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1 [The R.M.C. 803 session was called to order at 0914,
2 17 November 2014.]

3 MJ [CAPT WAITS]: The commission will come to order. All
4 parties present when the commission recessed are once again
5 present.

6 At this time the commission will advise the accused
7 of his right to be present and to waive his right to his
8 presence here in the commission, so I am addressing Mr. Hadi
9 directly at this time.

10 Mr. Hadi, you have the right to be present during all
11 sessions of this commission. If you request to be absent from
12 any session of this commission, such absence must be voluntary
13 and of your own free will.

14 Your voluntary absence from any session of this
15 commission is an unequivocal waiver of the right to be present
16 during that session. Your absence from any session may
17 negatively affect the presentation of the defense in your
18 case. Your failure to meet with and cooperate with your
19 defense counsel may also negatively affect the presentation of
20 your case.

21 Under certain circumstances your attendance at a
22 session can be compelled regardless of your personal desire
23 not to be present. Regardless of your voluntary waiver to

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1 attend a particular session of the commission, you have the
2 right at any time to decide to attend any subsequent session.

3 If you decide not to attend a morning session, for
4 example, but wish to attend an afternoon session of the same
5 day, you must notify the guard force of your desires to attend
6 the later session. Assuming there is enough time to arrange
7 transportation, you will then be allowed to attend the later
8 session.

9 You will be informed of the time and date of each
10 commission session prior to the session to afford you the
11 opportunity to decide whether you wish to attend that session.

12 Do you understand what the commission has just
13 explained to you?

14 ACC [MR. HADI]: Yes.

15 MJ [CAPT WAITS]: Very well. At this time, the commission
16 will summarize a Rule for Court-Martial 802 conference that
17 was held yesterday up on the hill, AV34, with all counsel of
18 record present.

19 During that 802 conference, the commission discussed
20 the scheduling of this week's proceedings. The first
21 administrative issue was the schedule of prayers and at what
22 points the commission would recess in order for Mr. Hadi to be
23 able to exercise that.

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1 The second thing was the commission, having put out a
2 docketing order for this week's proceedings, threw out to the
3 parties the question of whether there were any issues related
4 to that schedule, particularly based on a motion that the
5 defense filed on Friday to compel discovery related to a
6 motion that the defense filed related to female guards and
7 their interactions with the accused.

8 At that point I heard from the defense. And
9 Lieutenant Colonel Jasper was concerned about the schedule as
10 promulgated and wished to have that, the motion related to
11 ceasing physical contact with female guards and the accused,
12 pushed to the later stages of this week's proceedings. The
13 commission was amenable to that and changed the order of
14 hearing motions this week. The defense motion to compel
15 discovery related to this issue was Appellate Exhibit 021E.

16 After that I heard from the government. Mr. Clayton
17 requested clarification on, I guess, the differentiation
18 between law motions and what the court -- what the commission
19 has deemed evidentiary motions. And in particular, his
20 concern was that the government be afforded the opportunity to
21 establish in personam jurisdiction of the commission, which
22 would be an evidentiary-heavy proposition for the government.
23 His concerns were, I think, allayed when the commission made

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1 clear to him that that issue is ripe at any time and the
2 government will not be considered to have waived it any time
3 before the trial of this case.

4 Then we went on to discuss the court's issuance --
5 the commission's issuance of R.M.C. 804 warnings. Initially
6 the commission was reluctant to do that before it became an
7 issue. However, after hearing from the parties, the
8 commission decided to go ahead and issue R.M.C. 804 warnings
9 this morning, and obviously the commission has already done
10 that.

11 Mr. Clayton also informed the commission that,
12 contrary to an earlier protective -- or an order of the court
13 related to closed-circuit television or projection of these
14 proceedings, the site here at Naval Station Guantanamo Bay at
15 Bulkeley Hall was not operational. He brought that to the
16 commission's attention since it would be -- since it is
17 contrary to the commission's prior order. However, the
18 commission finds that really of not any significant moment
19 given all of the other closed-circuit television projections
20 of these proceedings, not to mention the fact that there is a
21 gallery here in the courtroom and several other closed circuit
22 sites. Accordingly, the commission finds that this is clearly
23 a public proceeding within the meaning of Rule for Military

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1 Commission 806 despite the fact that the Bulkeley Hall site is
2 not operational.

3 Finally, the commission notified the government with
4 the defense there, obviously, that today, after our in-court
5 proceedings, the commission would like to hold a brief Rule
6 for Military Commission 802 conference ex parte with the
7 government to ask a couple of questions related to classified
8 discovery that the government has made available to the
9 commission for further promulgation to the defense based on
10 summaries and redactions of some information. So that session
11 will be held in my chambers here in this building after
12 proceedings of the court -- of the commission today.

13 So at this time I would ask counsel for both sides
14 whether they have anything to add or modify based on the
15 commission's summary of that R.M.C. 802 conference.
16 Mr. Clayton?

17 TC [MR. CLAYTON]: Your Honor, only one thing. Pursuant
18 to the court's order to do so, we note for the record that the
19 proceedings are being transmitted CONUS pursuant to the other
20 CCTV orders.

21 MJ [CAPT WAITS]: They are, and that's Fort Meade and --

22 TC [MR. CLAYTON]: Fort Devens.

23 MJ [CAPT WAITS]: Very well. Anything from the defense?

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1 DDC [LtCol JASPER]: No, Your Honor.

2 MJ [CAPT WAITS]: Thank you, Mr. Jasper. I'm sorry,
3 Lieutenant Colonel Jasper.

4 All right. Then are there any other issues that need
5 to be addressed prior to going right into the motions in this
6 case from either side?

7 TC [MR. CLAYTON]: None from the government, Your Honor.

8 DDC [LtCol JASPER]: None from the defense, Your Honor.

9 MJ [CAPT WAITS]: All right. Then based on the court's
10 docketing order and our 802 conference of yesterday, the first
11 motion that the commission will hear today is Appellate
12 Exhibit 020, the defense motion to dismiss for lack of subject
13 matter jurisdiction and to compel a status determination
14 pursuant to Article 5 of the Geneva Conventions.

15 So, Lieutenant Colonel Jasper, who has the burden on
16 the motion and what is it?

17 DDC [LtCol JASPER]: Your Honor, the defense has the
18 burden on the motion and the moving party is the defense.
19 However, we believe in this case the burden is on the
20 government to establish jurisdiction in the proper status of
21 Mr. Hadi al-Iraqi that he is, in fact, an alien unprivileged
22 enemy belligerent.

23 MJ [CAPT WAITS]: Mr. Clayton, do you have anything on

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1 that?

2 TC [MR. CLAYTON]: To the extent we will be examining at
3 some point in the future jurisdiction of the accused, we do
4 bear that burden. To the extent defense has requested the
5 relief specifically of an Article 5 hearing, we believe they
6 would bear the burden of proof that that relief is merited.

7 MJ [CAPT WAITS]: Colonel Jasper?

8 DDC [LtCol JASPER]: Your Honor, the defense is ready to
9 proceed. We do contend the burden is still on the government
10 to prove proper jurisdiction in this case. We don't believe
11 they have done so with the 2009 combatant status review
12 tribunal that was conducted. I am going to argue that, Your
13 Honor, and we don't have a preference whether we go first or
14 if the government goes first.

15 MJ [CAPT WAITS]: I am going to assign -- based on the
16 specific relief requested by the defense, that an Article 5
17 tribunal be the mode of establishing jurisdiction in this
18 case, I'm going to assign the burden to the defense. While I
19 do concur with your position that it is ultimately the
20 government's responsibility or the government's burden to
21 prove that the commission has in personam jurisdiction and
22 subject matter jurisdiction over this case, and that as part
23 of the government's allegations that they will ultimately have

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1 to prove those things beyond a reasonable doubt at the trial.

2 Based on the specific relief that the defense has
3 requested of an Article 5 tribunal, I believe that the correct
4 assignment of the burden in this case at this time for that
5 issue is upon the defense. So I will hear from the defense
6 first. And is there any evidence on the motion?

7 DDC [LtCol JASPER]: No evidence on the motion, Your
8 Honor, and we are ready to proceed.

9 MJ [CAPT WAITS]: You may argue.

10 DDC [LtCol JASPER]: May it please the court, good
11 morning, Your Honor.

12 MJ [CAPT WAITS]: Good morning.

13 DDC [LtCol JASPER]: Again, I am Lieutenant Colonel Jasper
14 and I represent Mr. Hadi al-Iraqi. Again, we contend, Your
15 Honor, that the burden ultimately is upon the government to
16 establish the true status of Mr. Hadi al-Iraqi by a
17 preponderance of the evidence. And specifically the relief
18 sought in this case from the defense is dismissal of all
19 charges and we are specifically requesting an Article 5
20 hearing before a competent tribunal in accordance with
21 Article 5 of the Geneva Conventions relative to the treatment
22 of prisoners of war.

23 Mr. Hadi al-Iraqi at this time asserts there is a

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1 question as to his true status that this tribunal should have
2 occurred before the preferral of charges in this case from the
3 prosecutors and also the referral of charges by the convening
4 authority, Your Honor.

5 MJ [CAPT WAITS]: Okay. Colonel Jasper, I am getting a
6 signal from court reporters and interpreters that I need you
7 to speak a little bit slower.

8 DDC [LtCol JASPER]: Yes, sir, I apologize. I understand
9 this needs to be translated and I will do everything in my
10 power to speak more clearly.

11 MJ [CAPT WAITS]: Believe me, I have had to adjust in the
12 same way, so if you could just slow down a little bit. Thank
13 you.

14 DDC [LtCol JASPER]: Thank you, Your Honor.

15 The facts in this case, Your Honor, at issue is Hadi
16 al-Iraqi was captured in Turkey in 2006. He was released to
17 the U.S. Government, specifically to Guantanamo, in April of
18 2007. We know that the military commissions' jurisdiction is
19 status based, and under the Military Commission Act they do
20 not have the ability or the authority to try any offense
21 unless it is committed by an alien unprivileged enemy
22 belligerent, and that's clearly, plainly stated in the rules
23 of military commission Rule 202, which is authorized under

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1 47(A) of Title 10 of the U.S. Code.

2 Now, Article 5 of the Geneva Conventions, Your Honor,
3 creates the presumption that any captive is considered a
4 prisoner of war or an EPW, enemy prisoner of war, not an alien
5 unprivileged enemy belligerent as stated in the Military
6 Commissions Act of 2009.

7 Now, under Article 4 of the Geneva Conventions,
8 prisoners of war are persons that fall under any of the
9 enumerated categories after falling into the hands of the
10 enemy. The enemy from Mr. Hadi al-Iraqi's perspective in this
11 particular case is the U.S. Government.

12 Now, Article 4 of the Geneva Conventions relative to
13 the prisoner of war enumerates eight specific categories, and
14 I will mention a few, Your Honor, that the defense contends
15 need to be fleshed out throughout a competent tribunal to see
16 if he falls into one of these categories. Because if he does
17 fall under one of the enumerated categories under one of the
18 Geneva Conventions Article 4, he should be repatriated to his
19 country when hostilities are over.

20 Some of those enumerated categories are when someone
21 is considered a member of the armed forces of a party to the
22 conflict, as well as members of a militia group, someone that
23 is considered a member of a volunteer corps or a militia,

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1 including those organized resistance movements, that would be
2 under four different elements: One, that of being commanded
3 by a person responsible for his subordinates; a second prong
4 of that particular category is having a fixed distinctive
5 insignia recognizable from a distance; third, someone who is
6 carrying arms openly; and fourth, someone that is conducting
7 their operations in accordance with the levels of the
8 customary international law, the customs of war.

9 Another category that's important in this case, we
10 believe, that needs to be completely shown from the government
11 by a preponderance of evidence is that he is not someone
12 that's in a regular armed forces who professed allegiance to a
13 government or an authority recognized by the detaining power.

14 The fourth would be persons who accompany the armed
15 forces without actually being members thereof, such as
16 civilian members of the militia, aircraft crew, or war
17 correspondents or supply contractors.

18 Another category to be considered is whether Mr. Hadi
19 al-Iraqi is an inhabitant of a nonoccupied territory who, on
20 the approach of the enemy, spontaneously takes up arms, he
21 resisted the invading forces. These are just some of the
22 categories that Mr. Hadi al-Iraqi may fall into; and if so,
23 Your Honor, the court would not have jurisdiction because he

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1 would be considered an enemy prisoner of war.

2 This tribunal, Article 5 tribunal, Your Honor, is
3 something that would consist of normally three officers, one
4 of a field grade level, where the government would be in a
5 position to argue his case through a recorder and Mr. Hadi
6 al-Iraqi would have the opportunity to defend as well in this
7 tribunal.

8 This tribunal did not occur, Your Honor. In fact, on
9 February 3 of 2009, he was given what's called a competent
10 status review tribunal -- a combatant status review tribunal,
11 and they determined, the U.S. Government, on that day that he
12 was an enemy combatant, not an unprivileged enemy combatant,
13 not an alien unprivileged enemy combatant, but rather an enemy
14 combatant. That really militates that he is considered right
15 now a prisoner of war, not someone subject to the jurisdiction
16 of your commission, Your Honor.

17 Now, there is plenty of legal significance and
18 precedence on this particular issue. There have been several
19 military cases before the commission, U.S. v. Khadr, to
20 mention one, U.S. v. Hamdan, which is a Supreme Court case.
21 In those cases the judges dismissed the cases because
22 jurisdiction had not been established. Specifically on June 5
23 of 2007, the Hamdan and Khadr cases had all charges against

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1 them dismissed. The judges presiding over those military
2 commissions ruled that the Military Commissions Act did not
3 give them the jurisdiction to try Hamdan or Khadr because it
4 only authorized the trial of unlawful enemy combatants.
5 Hamdan and Khadr's case, just like Hadi al-Iraqi's case,
6 usual, had a combatant status review tribunal and they both
7 confirmed them as well as enemy combatants.

8 Now, the government concedes, Your Honor -- the
9 government concedes that the Military Commission Act of 2009
10 permits a military commission to be considered a competent
11 tribunal. In essence, Your Honor, you, Your Honor, could
12 serve as someone, as a competent tribunal to determine the
13 true status and jurisdiction of Hadi al-Iraqi.

14 We contend, Your Honor, as the defense, that that's
15 insufficient, that the Geneva Conventions as articulated in
16 Article 5 should trump what's been legislated from a U.S.
17 Congress as the Military Commissions Act of 2009. And that,
18 for the record, is an objection. We believe the
19 alternative ----

20 MJ [CAPT WAITS]: Do you not believe that Congress
21 considered the fact that the United States was a party to the
22 Geneva Conventions when it made that legislation?

23 DDC [LtCol JASPER]: The United States was a party to the

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1 Geneva Conventions and a signatory, yes, Your Honor, I do
2 believe ----

3 MJ [CAPT WAITS]: Don't you believe Congress took that
4 into consideration when they promulgated the MCA?

5 DDC [LtCol JASPER]: It's very likely, yes, sir.

6 MJ [CAPT WAITS]: Okay.

7 DDC [LtCol JASPER]: The bottom line, sir, is that at this
8 point, Hadi al-Iraqi cannot be tried by this commission
9 because his legal status remains in doubt until he is provided
10 a competent tribunal consisting of three officers determined
11 -- to have determined his true status of either an
12 unprivileged or privileged enemy combatant or yourself as a
13 competent tribunal as recognized by Congress in the Military
14 Commissions Act.

15 There is also domestic authority that parallels
16 Article 4 procedures, Your Honor, of the Geneva Conventions.
17 The Army regulation of 190-8 and the OPNAV instruction and
18 there is Air Force instruction and a Marine Corps order that
19 also specifically provide for a tribunal, a competent tribunal
20 that consists of three officers, one being a field grade
21 officer, and it's exactly in keeping with Article 4 and
22 specifically mentioned in the Military Commission Act.

23 Congress has demonstrated its intent time and time

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1 again in the Military Commission Act to comply with the Geneva
2 Conventions by defining what is a privileged belligerent as
3 one belonging to one of the eight enumerated categories, and I
4 listed a few under Article 4. The Military Commission Act
5 defines someone as an unprivileged enemy belligerent as
6 someone other than a privileged belligerent. Therefore, our
7 contention, Your Honor, is that Congress has explicitly
8 endorsed the Geneva Conventions into the United States law.

9 Accordingly, establishing jurisdiction of Mr. Hadi
10 al-Iraqi requires a two-step process. First, adherence and
11 compliance with Article 5 of the Geneva Conventions; and
12 second, following the procedures set forth by our own DoD
13 service regulations, only if Mr. Hadi al-Iraqi falls into one
14 of those enumerated categories of Article 4, if he does not
15 fall into one of those can he be tried at this military
16 commission. And therefore, Your Honor, all charges and
17 specifications at this point should be dismissed until he is
18 afforded the opportunity to be heard at his Article 5 tribunal
19 or some other competent tribunal recognized by U.S. law.

20 Subject to your questions, Your Honor, those are the
21 issues in this case.

22 MJ [CAPT WAITS]: Thank you, Colonel Jasper. I don't have
23 any other questions right now.

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1 DDC [LtCol JASPER]: Thank you.

2 MJ [CAPT WAITS]: Thank you.

3 Mr. Clayton?

4 TC [MR. CLAYTON]: Good morning, Your Honor.

5 MJ [CAPT WAITS]: Good morning.

6 TC [MR. CLAYTON]: Your Honor, the United States takes no
7 issue with Colonel Jasper's recitation of what the
8 requirements of Article 4 and Article 5 are of the Geneva
9 Conventions. I think he is being accurate. However, there is
10 a fundamental flaw in Colonel Jasper's argument. It's
11 premised on a false basis. It's premised on a notion at
12 page 3 of their pleading that Mr. Hadi's capture was in the
13 context of an international armed conflict between signatories
14 to the GPW (the United States and Afghanistan.) It is simply
15 not the case. The Supreme Court has disagreed, Congress
16 disagrees, the executive branch disagrees.

17 In fact, there is no authority, no authority the
18 defense can cite to that believes it's otherwise. So without
19 that foundation, the entire premise of the argument falls.
20 And it's explicitly, explicitly overruled in Hamdan I, 548
21 U.S. 57. As that court found, the United States is engaged in
22 an armed conflict not of an international character. The
23 consequence of that is that this is a Common Article 3

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1 conflict, a NIAC. It is not an Article 4 or Article 5
2 conflict. Article 3 and Article 5 are mutually exclusive of
3 each other. Article 3 is referred to as a mini-convention.
4 There are certain rights and certain procedures that attach in
5 the Article 3 context and there are different rights and may
6 be greater procedures that attached in the Article 5 context.
7 But it is not the case per the conventions themselves or for
8 any governing authority that one can import an Article 5
9 procedure into an Article 3 NIAC.

10 MJ [CAPT WAITS]: Article 3 -- what is that last word you
11 are saying?

12 TC [MR. CLAYTON]: NIAC, non-international armed conflict,
13 Your Honor.

14 MJ [CAPT WAITS]: Thank you.

15 TC [MR. CLAYTON]: I think this is notable because
16 particularly in this day and age there are very few, very few
17 issues upon which all three coordinate branches of government
18 agree. This is one of those.

19 There are also many issues related to the Geneva
20 Conventions about which the United States and other
21 signatories disagree. For example, we have not signed on to
22 Protocol 2.

23 Even with those disagreements that exist in other

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1 contexts, there is no disagreement in this context. The
2 exclusion of Common Article 5, by virtue of this being an
3 Article 3 NIAC, is customary state practice with the United
4 States, it's consistent with the practice of our allies. As
5 we noted in our briefing, there is authority from Great
6 Britain following the same principles. It's consistent with
7 the official commentaries to the Geneva Conventions. It's
8 consistent with Protocol 2 itself, a protocol we have not
9 signed on to. And it's consistent with all ILOW scholars as
10 we have cited in our brief view on the issue.

11 So per the court's instruction, which I think is
12 sound, if we divide this issue into the two separate
13 questions, the one of jurisdiction over Mr. Hadi for a
14 commission and the question of whether or not Mr. Hadi is
15 entitled to an Article 5 hearing, the failure of which should
16 result in the dismissal of charges upon which the defense's
17 bears the burden, I think there is little doubt that he is not
18 entitled to an Article 5 hearing, and the court under no
19 authority should dismiss the charges on that basis.

20 Turning now to the issue of jurisdiction, the
21 question that we agree is the government's burden to bear once
22 that question is fully raised and fully litigated, I note that
23 in the defense brief they argue that this tribunal is not they

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1 argue that this tribunal is not competent to itself determine
2 whether or not it holds jurisdiction over Mr. Hadi. The
3 defense also cites to the trial court decisions in Hamdan and
4 Khadr. Notably they fail to bring to the court's attention
5 the U.S.C.M.C.R. opinion in Khadr, which we do cite in our
6 brief. The U.S.C.M.C.R. came back, and I will give you the
7 cite, that's 717 F.Supp. 2nd 1215 at 1232 and 1235. The
8 U.S.C.M.C.R. came back and determined two things: One, the
9 trial court is a competent tribunal to determine its own
10 jurisdiction over the defendant; and two, chastised the trial
11 court for not giving the government the opportunity to present
12 the evidence to prove its jurisdiction over the defendant.

13 And so as to that second issue, the matter of
14 evidence, we will at the proper time, as we explain in our
15 brief, present and carry that burden. And we think that this
16 actually is going to be an important moment in this case,
17 because as this court has time and again said to us, we want
18 this case to be about the issues of this case. I think that
19 that begins with the personal jurisdiction hearing.

20 At that hearing, among many other things, we will
21 establish something I believe I heard Colonel Jasper concede.
22 I believe Colonel Jasper said that Mr. Hadi's enemy is the
23 United States. That's a pretty strong step in the direction

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1 of proving personal jurisdiction in and of itself. Secondly,
2 we will prove that Mr. Hadi was, in fact, a high-ranking
3 member of the al Qaeda group, which is specifically named in
4 the jurisdictional language of our statute, Title 10 U.S.C.
5 948d and prior to that 948c which deals directly in personam
6 jurisdiction.

7 We will present some fairly strong evidence to
8 include a propaganda video entitled Harb Wa Salib, which is
9 made from a battle scene and contains footage of a young
10 19-year-old army private dying on the battlefield. You will
11 have the chance to see in that video that it begins with the
12 opening of an al Qaeda flag. In the middle of the video,
13 there is a banner that reads emir of the front, in other
14 words, the leader of the front, Abd al Hadi al-Iraqi. You'll
15 also learn that Abd al Hadi al-Iraqi explained to FBI agents
16 the portions of the video where he provided the voiceover and
17 the purpose behind creating the propaganda of the video to
18 continue the cause.

19 Similarly there was some discussion of Mr. Hadi being
20 captured in Turkey by Turkish authorities. Again, the
21 evidence at the jurisdictional hearing will give more insight
22 as to the situation that was occurring at this time.

23 Saeed al-Masri, another significant al Qaeda leader

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1 who got the video describing al-Hadi as a hero to al Qaeda's
2 cause and explaining that al-Hadi was traveling to Turkey on
3 his way to continue to fight the Americans in Iraq, something
4 he wanted to do since long before, but only had been granted
5 permission by the leader, Sheik Bin Laden, recently.

6 I think it's a long way of saying the question of
7 whether or not this court will exercise in personam
8 jurisdiction over the defendant is not a close one. We will
9 be able to prove amply that he is a member and a senior leader
10 in al Qaeda. The more interesting question I think for this
11 commission will be the substantive liability or the vicarious
12 substantive liability for the acts of his subordinates and
13 other insurgents. So if we're really focusing on what this
14 commission is about, it is vicarious liability for his
15 coinsurgents and subordinates which we will discuss at greater
16 length with respect to the common allegations, which I think
17 is a great way of emphasizing for the court and for the
18 defense why that style of pleading is so critical to make
19 clear what the issues are in this case for this particular
20 prosecution.

21 But as this court has said, it will give us our day
22 to prove those matters and we will do so, I believe, amply and
23 in abundance. We will prove jurisdiction over the defendant.

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1 Until then, as the Khadr case has said at the U.S.C.M.C.R.
2 level whether this court exercises prima facie jurisdiction
3 over the defendant.

4 With that, there is simply no basis, no authority, no
5 reason that this court should be persuaded to dismiss the
6 charges presently before the defendant prior to hearing and
7 ruling upon in personam jurisdiction and improper hearing.

8 And, Your Honor, I am open for more questions; but if
9 there are none, I am prepared to pass the argument.

10 MJ [CAPT WAITS]: I do want to ask one question that was
11 raised in Colonel Jasper's argument. And it is -- the
12 government cites it in its response, that is, the CSRT.

13 TC [MR. CLAYTON]: Yes, Your Honor.

14 MJ [CAPT WAITS]: Explain to me what the government
15 believes is the relevance for purposes of this commission of a
16 CSRT that only determined that the accused was an enemy
17 combatant.

18 TC [MR. CLAYTON]: For the purposes of this commission,
19 the statute fairly clearly articulates what you must find to
20 exercise in personam jurisdiction and ultimately jurisdiction
21 over the case entirely. We believe the CSRT, while maybe not
22 dispositive of that issue, is certainly something that can
23 inform that issue. The findings of that CSRT are something

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1 that the court can consider among the other pieces of evidence
2 we will present.

3 The other reliance on the CSRT is for an important
4 point, to demonstrate that Mr. Hadi has received at each stage
5 the process to which he was due in an Article 3 NIAC. He has
6 received a CSRT. There was a ruling on his CSRT, a finding as
7 the Supreme Court said in Boumediene v. Bush that he was
8 entitled to the U.S. District Court for writ of habeas corpus,
9 which he has. There are, as this commission is well aware, a
10 number of prereferral processes to which a defendant or an
11 accused in a military commission is entitled. He has received
12 all of those. So it would not be the government's position --
13 we do not argue that the CSRT alone is sufficient to establish
14 jurisdiction in this case. However, we do believe it is and
15 can be a part of that analysis.

16 MJ [CAPT WAITS]: So it's some evidence toward the
17 government's burden?

18 TC [MR. CLAYTON]: Yes, Your Honor.

19 MJ [CAPT WAITS]: I understand. Okay. I don't have any
20 other questions then.

21 TC [MR. CLAYTON]: Thank you, Your Honor.

22 MJ [CAPT WAITS]: Colonel Jasper, last word?

23 DDC [LtCol JASPER]: Your Honor, I would just like to make

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1 note, with respect to the CSRT, and it has been presented
2 before you, it was a one-page cover sheet that just said
3 essentially that Mr. Hadi al-Iraqi was deemed to be an enemy
4 combatant. We don't know anything about that CSRT that was
5 conducted. It hasn't been provided to the defense and surely
6 hasn't been provided to you, Your Honor.

7 We don't know if there were hearsay statements that
8 were used to prove that he was -- what his status was, which
9 was an enemy combatant, which the defense contends connotes
10 lawful, not unlawful. Nothing says that he was unlawful. We
11 don't know what that CSRT consisted of, we don't know what
12 evidence was put on because none of that was brought to you;
13 and therefore, we believe it is completely insufficient and
14 would like to note that for the record. Thank you.

15 MJ [CAPT WAITS]: Okay. Was that a specific -- a
16 specifically requested item of discovery by the defense?

17 DDC [LtCol JASPER]: It absolutely was, yes, Your Honor.

18 MJ [CAPT WAITS]: Mr. Clayton, is that something that the
19 government intends to provide to the defense at some point?

20 TC [MR. CLAYTON]: Yes, Your Honor. I can consult. We
21 may have provided it with the recent round of classified
22 discovery, but it is classified, so it would had to have
23 waited until the execution of the MOU. So it was then either

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1 in the last round or a very near-to-come round.

2 MJ [CAPT WAITS]: All right. Colonel Jasper, thank you.

3 DDC [LtCol JASPER]: Thank you.

4 MJ [CAPT WAITS]: You may. I need a moment also, so
5 stand by.

6 [Pause in proceedings.]

7 MJ [CAPT WAITS]: Anything else?

8 DDC [LtCol JASPER]: No.

9 MJ [CAPT WAITS]: Very well. All right. Then the next
10 motion for consideration on the court's -- on the commission's
11 docketing order is the defense motion to strike common
12 allegations alleged by the government on the charge sheet in
13 this case.

14 Colonel Jasper, who has the burden on this motion and
15 what is that? Major Stirk, I guess you are going to be
16 addressing this motion?

17 ADDC [Maj STIRK]: Yes. Thank you, Your Honor.
18 Major Stirk for the defense. We believe the defense has the
19 burden.

20 MJ [CAPT WAITS]: Very well. By a preponderance of the
21 evidence?

22 ADDC [Maj STIRK]: Yes, Your Honor.

23 MJ [CAPT WAITS]: All right. I will hear argument from

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1 the defense at this time.

2 ADDC [Maj STIRK]: Thank you, Your Honor.

3 As you are well aware, at trial the government will
4 have the burden of proving the elements of conspiracy and
5 common plan liability beyond a reasonable doubt. They do that
6 by putting in evidence and then arguing to the members that
7 the evidence that they put in proves the necessary elements.

8 What they are trying to do by incorporating the 63
9 common allegations into Charges II, III, IV and V is take a
10 shortcut. The common allegations are a roadmap, a cheat
11 sheet, if you will, that amounts to a written summation of the
12 government's case that, if left on the charge sheet and in
13 front of the members, will allow them to see the government's
14 entire case in black and white from the very first moment of
15 trial.

16 It will act as a checklist for the members to cross
17 off throughout the trial as the government presents its case.
18 That is extremely prejudicial to the accused and is nowhere
19 provided for in the Military Commissions Act. The common
20 allegations should be stricken from the charge sheet and not
21 provided to the members at trial.

22 In their response, the government says all of this is
23 necessary to provide notice to the accused of the charges

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1 against him. But the actual charges and specifications are
2 clear and there is, in fact, a method provided for in the
3 Military Commissions Act to provide such notice and
4 clarification, and it is called a bill of particulars.

5 R.M.C. 906(b)(2) provides that the purposes of a bill
6 of particulars is to inform the accused of the nature of the
7 charge with sufficient precision to enable the accused to
8 prepare for trial to avoid or minimize the danger of surprise
9 at the time of trial. It further goes on to state that a bill
10 of particulars need not be sworn because it is not part of the
11 specification.

12 What the government has done in their charging is
13 essentially littered the charge sheet with what amounts to a
14 bill of particulars regarding their theory of conspiracy and
15 common plan liability.

16 The charges and specifications on their own are
17 perfectly clear. The common allegations are not necessary to
18 explain the essential facts of any of the charges or
19 specifications. What they are basically is the evidence the
20 government will introduce to meet the elements of the
21 offenses. The members will be instructed what the elements
22 are, what the burden is, and then it is up to the government
23 to argue that the evidence that they would put in for those

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1 common allegations meets the burden of proving those elements.
2 There is no reason or authority to have all of that evidence
3 listed on the charge sheet for them. It's inflammatory and
4 unduly prejudices the accused.

5 Furthermore, as we state in our motion, there is no
6 authority under the MCA to use common allegations on the
7 charge sheet. The government cites numerous international
8 bodies and federal case law where common allegations are
9 common and asks this commission to ignore the one commission
10 case to actually address this issue square on. And while we
11 agree there are procedural differences between the other
12 commission case to deal with this and ours, I believe it's
13 instructive.

14 Simply put, there is no actual authority cited by the
15 government. They are relying on the fact that the MCA doesn't
16 specifically prohibit them from using common allegations, but
17 that's just not how the law works. Absent ----

18 MJ [CAPT WAITS]: What is the other commissions case that
19 you are talking about, and what is the -- I guess the status
20 of that ruling?

21 ADDC [Maj STIRK]: Yes, Your Honor.

22 MJ [CAPT WAITS]: What is the ruling and what is the
23 status of it?

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1 ADDC [Maj STIRK]: In the 9/11 commissions case, the
2 initial charge, there is the charge of conspiracy, which has
3 160 something common allegations, I believe, approximately.
4 In that case, which has been going on for quite some time, as
5 you are, I am sure, well aware, for a while conspiracy was
6 ruled not to be a war crime and the government intended to
7 have it dismissed, and then they changed their mind, and now
8 it's sort of hanging in limbo.

9 The defense asked for the common allegations to be
10 stricken after the government asked to make a minor change to
11 the charge sheet having the common allegations refer to all of
12 the other offenses. In that charge sheet, they are not
13 incorporated by reference into charges as they are in our
14 cases in Charges II, III and IV, so that's the difference. In
15 this case, they learned from their mistake last time and put
16 them on all the charges. We don't think that that's allowed
17 either, but that's the difference between the two.

18 So the ruling in the 9/11 case is if there is no
19 conspiracy, there is no common allegations and that they
20 wouldn't go on the flimsy anyway.

21 MJ [CAPT WAITS]: They wouldn't go on the what, I'm sorry?

22 ADDC [Maj STIRK]: The flimsy, to go to members.

23 MJ [CAPT WAITS]: The flyer?

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1 ADDC [Maj STIRK]: Yes, sir.

2 MJ [CAPT WAITS]: That's an Army term, too. We call it a
3 cleansed charge sheet in the Navy, but I understand the
4 document that you are referring to. Go ahead.

5 ADDC [Maj STIRK]: A cleansed charge sheet is certainly
6 more descriptive of what it actually is.

7 So again, they rely on an absence of any prohibition,
8 much as they did in the reasoning in the argument for the MOUs
9 as part of the protective order in this case where they cited
10 to you a lot of case law in federal courts in CIPA cases where
11 judges have issued MOUs, but they never cited to you any
12 authority that if you actually had to or even could, they just
13 said, well, everybody else does it, so why not?

14 And that's essentially what they are doing here with
15 their argument for these common allegations. Fine. They are
16 common in Article III federal courts and they are common in
17 other international bodies, but they are not common, and the
18 government concedes as much, that they are not common in
19 military courts, which is what this court is based on.

20 MJ [CAPT WAITS]: Well, I have a question. In the Rule
21 307(c)(3), my question, you may not know the answer to this
22 off the top of your head, but the very last sentence in
23 307(c)(3) says no particular format is required. Is that in

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1 the M.C.M., Rules for Courts-Martial? Is there an equivalent
2 to that statement, no particular format is required, or is
3 this unique to the MCA?

4 ADDC [Maj STIRK]: I don't know the answer to that, Your
5 Honor. I can get back to you on that.

6 MJ [CAPT WAITS]: Maybe somebody can look at that while
7 the government is arguing. I'm curious.

8 ADDC [Maj STIRK]: Yes, Your Honor.

9 MJ [CAPT WAITS]: I didn't look, and I just thought ----

10 ADDC [Maj STIRK]: We will get you an answer, Your Honor.

11 MJ [CAPT WAITS]: Okay.

12 ADDC [Maj STIRK]: The only reason that the common
13 allegations are on the charge sheet is so the members see the
14 government's narrative they plan to introduce before the first
15 words of an opening statement and so the members will have the
16 government's version sitting in front of them for the entire
17 trial and while they deliberate.

18 MJ [CAPT WAITS]: Major Stirk, I need you to slow down a
19 little bit also. Sorry.

20 ADDC [Maj STIRK]: Yes, Your Honor, sorry.

21 In the government's response, they place a great deal
22 of reliance on United States v. Rezaq, a D.C. Circuit case
23 that declined to strike language as surplusage.

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1 Sorry, Your Honor, I am getting the slowdown look
2 again.

3 MJ [CAPT WAITS]: I am, too. I thought you slowed down
4 pretty well, but go ahead. Maybe it's a remnant of the --
5 there we go.

6 ADDC [Maj STIRK]: And while D.C. Circuit precedent is
7 generally binding on these military commissions, the court in
8 that case was dealing with charging practice again in an
9 Article III court, not a commissions case, not a court
10 martial. And since these commissions are modeled after United
11 States courts-martial, this court should not place a great
12 deal of reliance on what federal courts consider surplusage
13 and are willing to strike.

14 They go on -- the government goes on in their
15 response in this case to say that it's necessary because this
16 is a complicated case. They claim that this is an
17 international conspiracy and a common plan theory of
18 liability. But, in fact, it's not complicated. It's
19 conspiracy. They know the elements of conspiracy. The
20 members will be instructed on what the elements of conspiracy
21 are, what kinds of evidence they can consider to meet the
22 burden that the government has. It's pretty straightforward.

23 And frankly, by putting these common allegations on

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1 the charge sheet, they have taken away the need for Mr. Hadi
2 al-Iraqi to request a bill of particulars, because that's
3 essentially what they have put on the charge sheet. But they
4 don't belong there and they don't belong in front of the
5 members from the start of trial.

6 They are clearly not necessary to enhance the maximum
7 authorized punishment in this case, which is already life, and
8 they don't explain the essential facts of the offense. They
9 explain the government's theory of liability. As we note in
10 our brief, that doesn't need to be on the charge sheet, it
11 shouldn't be on the charge sheet. That's for them to argue,
12 why this accused is guilty of the charges the government
13 alleges that he is guilty of. That's their theory.

14 What these common allegations are are pieces of
15 evidence that the government intends to prove beyond a
16 reasonable doubt at trial. There is a difference. And
17 because of that difference, leaving the allegations in front
18 of the members and on the charge sheet unduly prejudices the
19 accused; and therefore, they should be stricken from the
20 charge sheet.

21 Thank you, Your Honor.

22 MJ [CAPT WAITS]: Thank you. Mr. Clayton, just bear with
23 me for one moment.

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1 TC [MR. CLAYTON]: Yes, Your Honor.

2 MJ [CAPT WAITS]: All right, Mr. Clayton, I will hear from
3 you.

4 TC [MR. CLAYTON]: Your Honor, in both the briefing and
5 the oral presentation today, the defense makes much of the
6 notion that this form of pleading is not typical of
7 courts-martial practice. We agree. This is not a typical
8 courts-martial. This is not a typical assault case that one
9 might find off post.

10 This is a decade-long criminal conspiracy involving
11 an international criminal terrorist organization, conduct that
12 spans transnationally, involves many, many actors and, maybe
13 most fundamentally, attempts to adjudicate matters under the
14 law of war.

15 So when this commission is looking for guidance as to
16 how it should make rulings in this particular arena of
17 charging and in other of these types of matters, your paradigm
18 is not the typical court-martial, your peers are not the
19 typical courts-martial judges in this instance. Your paradigm
20 and your peers are other similarly situated tribunals,
21 international tribunals exercising and adjudicating matters
22 under the law of war, domestic tribunals, domestic courts
23 adjudicating major national security matters.

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1 The court raised a very interesting question of
2 Major Stirk, whether or not Rules for Courts-Martial 307(c)(3)
3 also contains no particular format language. It does. But I
4 believe there is one other overriding piece of that rule that
5 distinguishes this particular case. If you look to the
6 appendix of the Manual for Courts-Martial at 21-22, you will
7 see guidance that says, "For courts-martial, when looking to
8 violations of the law of war, where possible, you shall
9 charge -- you should charge a violation of the UCMJ instead.
10 That's not what we have been instructed to do here by
11 the Hamdan II court. We have been instructed to look to
12 international precedent. So again, even consistent with the
13 rules for courts-martial, these cases are different and they
14 have to be charged differently.

15 The rules bear that out. As the court pointed out,
16 no particular format is required. However, the charge sheet
17 does honor the charge -- the form of charge and specification.
18 I can assure you that it is not customary practice in
19 Article III courts to lump similar counts under one charge and
20 give them separate headings and specifications. That was a
21 learning curve for me. Our practice would be to allege each
22 individual count separately, let it stand on its own, maybe in
23 chronological order in the indictment, but never lump them

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1 together as one category of charge as was done in this case.

2 And as I noted before, there are many, many other
3 cues in the law and in the pleading specifications of the
4 Manual for Courts-Martial -- excuse me, the Manual for
5 Military Commissions that recognizes there has to be a
6 flexibility in pleading these large, complex cases that are
7 under the laws of war rather than your traditional UCMJ
8 regulations.

9 I note, for example, 307(c)(2) specifically directs
10 us to the laws of war as a manner of charging. And it's
11 almost as if the drafters of the manual were prescient,
12 because in Hamdan II, as we just described at 696 F.3d at
13 1248, we are specifically directed to look to the
14 international law of war for guidance under the MCA. We are
15 then directed by the al Bahlul en banc opinion at Lexis cite
16 to pages 55 through 60 to look to domestic wartime precedence
17 for guidance in matters of -- in addition to the
18 international law of war matters when charging under the MCA.
19 And again, the Rules for Courts-Martial also support what we
20 are positioning for the court here today. At 307(c) in the
21 Rules for Courts-Martial, it says the charging practice is
22 intended to be entirely consistent with Federal Rule of
23 Criminal Procedure 7. That's at the Appendix XXI at page A21

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1 through 22 again.

2 So by my tally, there are at least three different
3 sources of pleadings and peers and paradigms for you to look
4 to: International tribunals, domestic wartime precedent, and
5 finally Rule 7 pleadings in Article III cases of similar
6 national security type cases and the complex nature of those.

7 So the rules themselves combined with the case law
8 specifically directs us to use a very functional approach to
9 pleading these cases. And this charging instrument in this
10 case, the one referred by the convening authority in his power
11 to do so, follows precisely that guidance by those tribunals
12 and those bodies of law who are again your peers in this
13 measure, in this endeavor.

14 And as Major Stirk noted, we have provided for you
15 roughly 670 pages of examples of how these matters are pled,
16 these complex cases are pled, and there are a number of
17 reasons why that's done. We will get into those in a few
18 moments. But I note, for example, that of the four
19 International Criminal Tribunals for the Former Yugoslavia
20 cases that we have attached, you will see that while there is
21 robust pleading of the criminal enterprise, we mirror that
22 pleading to some degree, but in honor of the traditional
23 courts-martial practice, this charge sheet is much more

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1 judicious. There you have paragraphs of prose, limitless
2 prose also in some instances describing the nature of the
3 case. Here you have very succinct allegations specifically
4 alleging facts which underpin the elements of proof that the
5 government will have to prove beyond a reasonable doubt.

6 Contrary to Major Stirk's argument, the government
7 will still be obliged to prove each of these allegations
8 beyond a reasonable doubt. The mere fact that they are on a
9 charging instrument doesn't change that in any manner.

10 Indeed, I presume the court will instruct the members of that
11 fact.

12 So given the precedent that's available to you here,
13 including the national security cases that we have cited, the
14 seven cases there we have cited, I think you can see that this
15 case is important, as well as the Al Darbi case, and those are
16 the cases the military commission most likely looked at.

17 Those are the only two referrals that have taken place since
18 the Hamdan II decision came out. Each of those are structured
19 identically. Each of those track the style of pleading from
20 those various sources, those co-equivalent tribunals to this
21 tribunal and do so in a manner that we believe best places the
22 tribunal on a footing to defend itself on review.

23 MJ [CAPT WAITS]: You said Al Darbi and what was the other

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1 one?

2 TC [MR. CLAYTON]: Al Darbi and this case, Your Honor, the
3 only two that have been referred following Hamdan II. And Al
4 Darbi was accepted as a guilty plea. The 9/11 case and COLE
5 case -- which I won't digress too deeply into the issue, but I
6 know the court asked about this, the 9/11 case -- and the
7 charge sheet in that particular case is really an ill fit for
8 this discussion because in that case the charges, the overt
9 acts were alleged beneath a single conspiracy count. The
10 government's position in that case was to concede conspiracy
11 while maintaining the overt acts on the charge sheet and to
12 ask the court to rewrite the charge sheet in a small -- in
13 fact to incorporate those overt acts into the existing
14 substantive charges.

15 So procedurally there was a lot more intrusion upon
16 the charging -- the power of charging by the court there than
17 we are asking here. And when we talk about the law of
18 surplusage, I think you will see that here, when the entity
19 entrusted with referring charges makes a decision, the narrow
20 window with which a court can then second-guess or reform that
21 charge sheet is simply not available in this instance.

22 So with that very brief overview, let me give you an
23 outline of what I would like to discuss now in a little more

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1 detail. First, I want to go into the structure of this charge
2 sheet in some detail to explain to the commission why it is
3 structured -- why the convening authority chose to structure
4 it this way, how it works, how each of the allegations work
5 with one another.

6 Then I think that leads us to a discussion of the
7 somewhat extraordinary relief the defense has requested in
8 this instance and the law of surplusage. We will then apply
9 that law to this particular case. And then, if I take the
10 defenses's argument to be an indication of what their true
11 concern is, we will talk a little bit about the practice of
12 pleading vicarious liability overtly rather than impliedly in
13 a charging instrument. Finally, we will conclude with the
14 benefits to the defendant, the commission, the panel and
15 reviewing courts of a charge sheet drafted in this manner,
16 sworn in this manner and referred in this manner versus
17 others.

18 So we will start with this particular charge sheet.
19 As the commission is well aware, conspiracy is essentially two
20 concepts with the same title. Concept one is the agreement
21 crime itself. Concept two is conspiracy as a theory of
22 vicarious liability. In a given charge, in a given series of
23 crimes, one might have both concepts, one might have one

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1 concept and not the other.

2 I think an easy example that we can all sort of wrap
3 our heads around is a criminal drug conspiracy. If there were
4 a criminal drug conspiracy involving, let's say, 100 members,
5 and the particular member before the court is the head of that
6 conspiracy and the investigation into that conspiracy included
7 multiple purchases of narcotics from the head of the
8 conspiracy's underlings, including recorded phone calls that
9 violate the prohibition against use of interstate telephone
10 lines in furtherance of a crime, it may even include some
11 shootings, the way in which that particular case could be
12 charged is really one of three. In the first instance, it
13 could be charged as simply the agreement crime, the conspiracy
14 crime itself, with each of these instances throughout listed
15 as overt acts in furtherance of the conspiracy, one of which
16 must be proven, many of the others going to the other elements
17 of the conspiracy itself.

18 Another way in which the case could be tried is that
19 some of those individual distributions of narcotics or
20 individual illegal uses of the telephone lines or even in some
21 instances use of firearms can be charged substantively with no
22 conspiracy charge and simply at that point rely upon a theory
23 of vicarious liability to attach criminal liability to the

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1 head of the conspiracy for those acts. Because, as we well
2 know in drug conspiracies, guys at the top rarely get their
3 hands dirty with the action on the ground, so their liability
4 attaches vicariously.

5 The third way is some combination of the two, a
6 conspiracy charge with each of these instances listed as overt
7 acts in furtherance of the conspiracy, underpinning elements
8 of the conspiracy, and there may be certain of those overt
9 acts for strategic reasons that the charging body plucks out
10 and charges substantively and attempts to assert vicarious
11 liability over those substantive acts.

12 There is no body of authority that I am aware of that
13 requires the charging entity to select which of those overt
14 acts it choose to charge substantively, which of those
15 underlying pieces of evidence it chooses to charge as overt
16 acts, and which of those pieces of evidence it wishes to leave
17 out of the charging instrument, or whether it has to charge
18 any of them substantively at all that's all within the purview
19 of the entity charged with making these prosecutions.

20 In federal court, it's the executive branch. Here
21 it's the convening authority. He is entrusted in Rule 601
22 with that power, and there is a deference throughout the case
23 law to that decision. So long as the decision is not made for

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1 an improper purpose, which it is certainly not based upon the
2 briefing you have seen today, deference is given -- high
3 deference is given in those particular instances.

4 This case is charged consistent with the third type
5 of case we have just described. There is a conspiracy. There
6 are any number of overt acts that have been alleged to show
7 the continuing nature of the conspiracy, to meet the elements
8 of conspiracy, to give the outline of the purpose, the manner
9 and means of the conspiracy, and to give form and function as
10 to what the government has to ultimately prove.

11 Major Stirk's suggestion that the charge sheet
12 renders it unnecessary to file for a bill of particulars
13 should be a good thing, I would think. A bill of particulars
14 is requested when there is not enough information for a
15 defendant to proceed. The fact that he believes he does not
16 need to file one in this instance tells me that the charge
17 sheet has been successful in making notice.

18 So this charge sheet tracks exactly that third
19 example. It also tracks very closely with the manner in which
20 these other tribunals we have discussed charge their cases,
21 while at the same time doing something important to military
22 commissions and important to courts-martial, and that is to be
23 plain, concise and definite.

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1 The conspiracy count alone could have contained these
2 overt acts beneath its header, but because of reasons I will
3 talk about in a moment, the decision -- the convening
4 authority's decision to place the defendant on full notice of
5 the intent to use these allegations to prove his vicarious
6 liability, the more plain, concise and definite way of
7 pleading that is to pull those overt acts out from under the
8 conspiracy count, place them in the front of the charging
9 instrument, and properly incorporate them by reference into
10 each count rather than repeating them five times -- four times
11 over. That's less concise, decidedly, than doing it once and
12 incorporating by reference.

13 That decision, because it's not an improper one, is
14 within the purview of the convening authority to make, and
15 there is very, very limited -- very limited aperture for the
16 court to be able to invade into that purview.

17 And that's where we get into the second part of the
18 discussion, the law of surplusage. I think it's fair to say
19 that surplusage has been described as an extraordinary
20 measure. The D.C. Circuit cites Professor Charles Alan Wright
21 as saying a motion to strike surplusage should be granted only
22 if it is clear that the allegations are not relevant to the
23 charge and then goes on to say this is a rather exacting

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1 standard and only rarely has surplusage been ordered stricken.

2 Professor Wright knows of what he speaks. I can tell
3 you that not only is the Federal Practice and Procedure book
4 renowned as being the guidebook on these matters, having gone
5 to law school with Professor Wright as a professor, I can
6 assure you he begins most of his lessons with an anecdote
7 about the time he argued that particular issue before the
8 Supreme Court. So it is not surprising that the D.C. Circuit
9 and many other circuits cite to Professor Wright on this
10 matter and take a very strong stand -- again, the controlling
11 circuit case for us is the D.C. Circuit case, United States v.
12 Rezaq, 134 F.3d 1121, at 1134 the court says the standard has
13 been strictly construed against striking surplusage from the
14 charging instrument.

15 That is embodied in guiding and binding precedent
16 this deference principle that we are discussing, that when a
17 properly empowered body charged with charging an accused with
18 a crime makes a decision, it makes a decision on proper bases,
19 not improper bases, the court should wade very carefully -- be
20 very careful of wading into the particular purview of that
21 particular body.

22 Major Stirk is correct, we do make much of that
23 precedent because it is controlling, but we don't live by that

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1 precedent alone. Let's look to precedent around the country.
2 The Sixth Circuit in United States v. Thomas at 875 F. 2nd at
3 559, 563, says, "If the language in the indictment is
4 information which the government hopes to properly prove at
5 trial," and I stress, "it cannot be considered surplusage no
6 matter how prejudicial it may be, provided it is legally
7 relevant." All of this information is relevant to the
8 conspiracy charge and ultimately to the vicarious liability
9 principles they talked about.

10 Major Stirk conceded these are matters we want to
11 prove in evidence at trial. I think with that concession,
12 looking at what the Sixth Circuit has said here, the law of
13 surplusage says to the court you simply don't wade in and
14 excise these things out. That's not for the court to
15 determine whether these matters are relevant to the ultimate
16 proof and the elements the government must prove at trial.
17 Fourth Circuit, United States v. Williams at 445 F.3d 724 at
18 733, "Only strike as surplusage if it is clear, clear that the
19 allegations are not relevant to the charge and are
20 inflammatory and prejudicial." Not that they are excess, not
21 that they are not necessary, that they are not relevant to the
22 charge. The Third Circuit similarly,
23 United States v. Hedgepeth, 434 F.3d 609 at 612, "Information

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1 that is prejudicial yet relevant to the indictment must be
2 included for any future conviction to stand and information
3 that is irrelevant need not be struck if there is no evidence
4 that the defendant was prejudiced by its inclusion."

5 The law of surplusage embodies this spirit of limited
6 judicial intrusion into the charging exercise. We think that
7 the best example of this very limited, very marginal instance
8 of intrusion into the exercise of charging is illustrated best
9 by the Rezaq case, by which Major Stirk discussed. The facts
10 of that case are very telling.

11 The Rezaq arises out of an incident which you may
12 remember in 1985 when a terrorist hijacked an Air Egypt
13 airline and forced it to land in Malta, landed on the tarmac,
14 took each of the passengers disburse on the plane hostage,
15 gathered the Americans and the Israeli nationals to the front
16 of the plane, began making demands, threatened to kill one
17 hostage every 15 minutes if his demands weren't met. He did
18 it. He shot three Americans, two Israelis, killing three
19 people. He shot them in the head -- excuse me, killing two
20 people. He shot them in the head. As he shot each person in
21 the head, he dropped them on to the tarmac. Fortunately some
22 survived.

23 He was charged with one count of aircraft piracy. He

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1 was not charged with shootings, he was not charged with
2 murders. He was charged with one count of aircraft piracy.
3 The charge sheet in that case alleged the details that I just
4 described to you of these shootings of the American and
5 Israeli passengers. The District Court and ultimately the
6 Circuit Court that controls us found because those shootings,
7 because those murders went to the elements of force or
8 intimidation to control the aircraft, they are properly
9 included in the charging instrument and properly pled.

10 Your Honor, I can think of very few, very few
11 allegations more inflammatory than the ones I just described.
12 I think that's demonstrative of how high the bar is for the
13 defense to succeed on these matters.

14 The allegations in this case I think are even closer
15 to the elements as described in our brief, because each of our
16 allegations proves multiple elements, underpins multiple
17 elements the government will put on evidence and attempt to
18 persuade the jury beyond a reasonable doubt is true.

19 I think the law of surplusage is best summarized as
20 this: In the world of charging, there is essentially a
21 continuum. On the one end there is what is minimally
22 necessary to state an offense such as you don't suffer a
23 dismissal for failure to state a defense. On the very far end

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1 there is this impermissible surplusage where facts or
2 allegations are in the charging instrument that have no
3 relevance to the elements or the offense at hand.

4 And what's between is good practice. It's practice
5 entrusted to the individuals or the entities making the
6 charging decision to put forth in their best strategic
7 interests the way in which a case should be presented to a
8 panel of members. I think that we quite clearly fall in this
9 instance -- the convening authority's charge sheet in this
10 instance quite clearly falls within that bandwidth of good
11 practice.

12 With that, let's apply the law of surplusage briefly
13 to the charges in this case. At a minimum, at a very minimum,
14 the defense would have to concede that the overt acts are
15 relevant to the conspiracy charge itself. The nature and
16 number and type of overt acts that the United States alleges
17 and the convening authority referred in this case, I am aware
18 of no authority that entitles a defendant to persuade a court
19 to decide which of these overt acts is enough to prove the
20 element. Which will the defense and maybe the court will find
21 to be sufficient to persuade the jury as to a particular
22 relevance? I am aware of no authority for that proposition.

23 And in the spirit of tracking very, very closely with

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1 these international tribunals and domestic national security
2 cases which are your peers, you will note in the allegations
3 concerning the conspiracy there is a manner and means phrase
4 that describes both the objects of the conspiracy and then the
5 purpose of the conspiracy being to rid the Arabian peninsula,
6 Afghanistan and Iraq of Americans and their allies. That
7 tracks very closely with Karadzic indictment at Attachment F,
8 which says their objective was the permanent removal of
9 Bosnian Muslims, Bosnian Croats from Bosnia Serb-claimed
10 territory in Bosnia-Herzegovina though the crimes charged in
11 this indictment.

12 Similarly in the Virginia Jihad attachment,
13 Attachment I, India, the ways, manner, and means says the
14 purposes of the conspiracy were to prepare for engaging in
15 violent jihad on behalf of Muslims in Kashmir, Chechnya, and
16 other countries and other territories, against countries,
17 governments, military forces and peoples the defendant and
18 co-conspirators believe to be enemies of Islam. This charging
19 instrument down to that level of detail is precise,
20 well-considered, and tracks with these standards that are your
21 standards to judge against.

22 As we talked about the elements of conspiracy before,
23 each of these overt acts within Charge V, as you have seen

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1 through our briefing, proves one and in many instances
2 multiple, multiple elements of conspiracy. For example, we
3 have to prove the beginning of the conspiracy. We have to
4 prove the conclusion of the conspiracy. We have to prove who
5 was a party to the conspiracy. What exactly did they agree
6 to? At what point did the defendant agree to this conspiracy?
7 These overt acts articulate that for the accused to know what
8 he must defend against and ultimately for the panel members to
9 know whether or not we have met our burden.

10 Another interesting element particular to military
11 commissions as law of war prosecutions is found at 10 U.S.C.
12 950p(c), which requires that each crime -- as an element of
13 each crime, the government must prove that the conduct took
14 place in the context of and was associated with hostilities.
15 As the commission may be aware, this is a hotly contested
16 issue, somewhat intertwined with the current interlocutory
17 appeal going on with the al Nashiri case. The existence of
18 hostilities is identified by a number of cases. The most
19 notable case is the ICTY case of Tadic, which asks us to look
20 at factors such as the length, duration and intensity of the
21 hostilities as well as the protracted armed violence.

22 We have to assure, we have to assure the members that
23 this is indeed protracted armed violence, not sporadic

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1 instances of violence. These overt acts do that. We also
2 have to give to the jurors some ability to identify the number
3 of people killed in determining whether or not ongoing
4 hostilities occurred, the amount of property damage,
5 statements of leaders. This charge sheet, again tracking very
6 closely with these international law standards, alleges
7 statements of al Qaeda leadership about the purpose of their
8 unlawful agreement. And it's not merely academic in this case
9 because the allegations also tell you that this accused was
10 tasked with distributing that propaganda to existing and
11 future members to further indoctrinate them into this
12 conspiracy.

13 Each of these overt acts is purpose driven. There
14 are none, simply none that are listed in this case that are
15 throwaways and don't have a purpose or place as to the
16 elements of proof in this trial that we will have to prove
17 beyond a reasonable doubt, and I think our brief does a better
18 job of articulating that than I can do here at the podium.

19 MJ [CAPT WAITS]: Okay. Mr. Clayton, I am getting signals
20 from court personnel that they would like to have a recess
21 ----

22 TC [MR. CLAYTON]: Okay.

23 MJ [CAPT WAITS]: ---- the people up here at the front row

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1 of the bench. So if this is a logical breaking point, I would
2 like to break now.

3 TC [MR. CLAYTON]: Your Honor, I can pick back up here, no
4 problem.

5 MJ [CAPT WAITS]: Is that okay?

6 TC [MR. CLAYTON]: Yes, Your Honor.

7 MJ [CAPT WAITS]: Then we will take a ten-minute recess
8 until -- I have 10:32. We will just say 10:45. That's about
9 a 12-minute recess. So the commission is in recess until
10 10:45.

11 [The R.M.C. 803 session recessed at 1039, 17 November 2014.]

12 [The R.M.C. 803 session was called to order at 1055,
13 17 November 2014.]

14 MJ [CAPT WAITS]: The commission will come to order. Let
15 the record reflect that all parties who were present when the
16 commission recessed are once again present.

17 Mr. Clayton, I am sorry we had to interrupt you, but
18 you may continue at this time.

19 TC [MR. CLAYTON]: Thank you, Your Honor. I'm sure
20 everyone was growing weary of me at that point anyway.

21 I would like to correct one citation I made from my
22 memory which was slightly incorrect. I discussed the
23 court-martial rule and the appendix, I described it as the

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1 appendix suggesting that when someone subject to UCMJ commits
2 a violation of the law of war, they should be charged under
3 the UCMJ rather than the law of war.

4 My assertion was correct. My citation was incorrect.
5 It's actually in the discussion. It's Rule 307(c). In fact,
6 it says ordinarily persons subject to the code should be
7 charged with a specific violation of the code rather than a
8 violation of the law of war. So again, another reason why it
9 would not be typical courts-martial practice to charge
10 violations of the law of war in the way which we were obliged
11 to charge in these particular commissions, another manner in
12 which courts-martial is really not the paradigm for what
13 Your Honor is engaged in today.

14 If I may pick back up where I left off, we had talked
15 about the necessity of the overt acts in proving the elements
16 underpinning conspiracy. We are talking exclusively about
17 Charge V at this point. The defense made some sort of
18 argument to suggest that they should be entitled to a
19 conspiracy charge with fewer overt acts with less -- with
20 fewer allegations, less verbiage.

21 Your Honor, I am aware of no body of law that
22 entitles the defendant to that, to strike relevant allegations
23 and overt acts from a conspiracy, nor am I entitled -- nor am

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1 I aware of any case and the defense has cited none in which a
2 court has stricken a number of overt acts from a conspiracy on
3 the basis that it simply believed that's enough, you can prove
4 it without those. I am unaware of that.

5 And the law of surplusage as we now know it I think
6 would quite squarely disavow that practice, because it is the
7 practice to honor the charging function so long as it is
8 within relevant allegations, which it is in this case. I
9 think that the Rezaq case is another great example of this. I
10 presume that the defendant in Rezaq, had he failed to exclude
11 each of those shootings and murders, would have been very
12 happy if a judge dwindled the allegations to simply one
13 shooting, and maybe one that was nonfatal. That would have
14 been a win for him. The law of surplusage doesn't provide for
15 that. It does not give a right to the defendant or frankly
16 even to the court to decide which allegations it believes
17 should be enough to convince the jury.

18 I make two other notes along those lines. In the
19 brief that the defense filed in addition to their oral
20 argument, there was some passing mention of the fact that many
21 of the overt acts may not themselves be crimes. I think it's
22 fairly well settled in all fora that that's not required, that
23 an overt act be a crime. The Choate case which we cite in our

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1 brief is directly on point, and the Manual for Military
2 Commissions at part 4, paragraph 29(c)(4) specifically says
3 the same.

4 MJ [CAPT WAITS]: That's well settled.

5 TC [MR. CLAYTON]: Similarly, Your Honor, there was some
6 notion in the briefing that by alleging within the conspiracy
7 multiple acts that could be objects of the offense or multiple
8 acts which within themselves could be crimes might raise a
9 duplicity issue. I think that's equally well settled.

10 I cite the United States Supreme Court in Braverman,
11 saying it's not an issue. Moreover, the Rules for Military
12 Commissions in 906(b)(5) discussion says that it's not
13 duplicitous when you allege a continuing offense involving
14 several separate overt acts, so I think those objections are
15 unfounded.

16 With that, I think we can conclude that were this
17 case simply Charge V alone, conspiracy, and included each of
18 these overt acts under that charge, we wouldn't be here
19 arguing today. There would be no basis for the motion.

20 I think it should be equally true that by taking that
21 particular set of overt acts, which is entitled to be in the
22 charge sheet, pulling them out, placing them in the front of
23 the charge sheet and incorporating them by reference, to

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1 object and to strike on that basis would be the height of rote
2 formalism, which the rules strictly assume.

3 We are here for functional, practical, pragmatic
4 pleading consistent with the laws of war, consistent with
5 those tribunals that are coequals to the one we are before
6 today. That's what this charge sheet does.

7 So I think it's fair to say, and if I understand the
8 defense's argument correctly, the real objection is to the
9 practice of pleading and incorporating by reference those
10 overt acts and allegations into the substantive offenses
11 themselves, II through IV, thereby placing the defendant on
12 notice of the intent to pursue theories of vicarious
13 liability. So I would like to address that now, Your Honor,
14 if I may.

15 MJ [CAPT WAITS]: You may.

16 TC [MR. CLAYTON]: The defense has repeatedly stated, and
17 I think accurately so, that it's not required. That's
18 absolutely true. But it's also not prohibited, and for a
19 number of reasons we believe it is sound practice. I think as
20 the defense would concede, there is a dearth of cases to
21 suggest that one cannot charge or articulate vicarious
22 liability principles in a charge sheet. However, this issue
23 gets litigated in the reverse.

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1 There is a mountain of precedent in which defendants
2 have claimed they weren't properly on notice of this issue and
3 attempted to overcome the attachment of that vicarious
4 liability theory for failure to be on notice. Now, they
5 routinely lose those under domestic precedent. I think the
6 issue is a little less clear under international precedent.
7 The reason I say that is the Kvocka case, which is
8 Attachment B to our pleading, which says the failure to plead
9 these theories of vicarious liability, or in that case joint
10 criminal enterprise, prevents the accused from properly
11 mounting a defense and constitutes a defect in the indictment.

12 Now, I'm not suggesting -- I'm not suggesting that we
13 are obliged in the commissions to do this. What I am
14 suggesting is that in the wake of Hamdan II and in the wake of
15 the ever-shifting jurisprudence governing military
16 commissions, knowing that that law is out there, the safer,
17 the better practice is to articulate it in the charge sheet,
18 notice the defendant properly.

19 And, again, this discussion is not academic in the
20 world of commissions. I call the commission's attention to
21 the unauthorized transcript at pages 2096 and 2097 of the
22 Nashiri case in which the defense team there makes this very
23 argument, that Mr. al Nashiri was not on notice of the

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1 government's intent to pursue the aiding and abetting theory,
2 and as such they should not be allowed to do so.

3 Again, I believe, and I believe the court would find
4 similarly, that that's not a barrier to pursuing those
5 theories, but on balance it seems like the better practice is
6 to put him on notice adequately, particularly whereas here
7 putting him on notice with these common allegations and these
8 overt acts does not add a single new allegation or a single
9 new charge to the charging instrument that doesn't already
10 exist by virtue of Charge V, conspiracy. So the prejudice, if
11 any, is not impermissible prejudice, and indeed I think is
12 probably the safer and better practice in this particular
13 instance and is the practice in each of those tribunals we
14 discussed before.

15 Similarly, each of these allegations and overt acts
16 underpins necessary elements of these theories of liability in
17 the same way it does so for Charge V, conspiracy. More simply
18 put, co-conspirator liability requires proof of the conspiracy
19 itself. These are elements the court will instruct the panel
20 that we have to prove.

21 So even if the charge of conspiracy weren't on the
22 charge sheet, we would still be obliged to meet each of those
23 elements. We would then be obliged to prove beyond a

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1 reasonable doubt that the actor who committed the particular
2 act indeed violated the law by committing that act; that that
3 act was committed by someone who is a co-conspirator of the
4 accused; that act was within the scope of the accused's
5 agreement with that co-conspirator, was done in furtherance of
6 that conspiracy, and was reasonably foreseeable to the
7 defendant.

8 What better way to articulate those elements than to
9 describe to the defendant what we will prove to show the jury
10 what is reasonably foreseeable to you, what was the agreement
11 we are going to prove you were engaged in; therefore, you can
12 mount a proper defense as to what exactly we are doing.

13 On balance, while a bill of particulars serves
14 certain functions, a bill of particulars does not meet the
15 charging requirements if, in fact, a reviewing court some day
16 were to determine we needed to put these allegations into a
17 charging instrument to place him on notice consistent with
18 that ICTY case. A bill of particulars does not do that. A
19 charging instrument, however, does do that, and that is
20 essentially what we are advocating for here, is making it so
21 that this case, as we all I believe would agree, is tried once
22 and not again.

23 So on balance, we think the best measure and the

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1 convening authority in his exercise of discretion thinks the
2 best measure and the sound practice is to do this. So let's
3 talk a little bit more about why that's sound practice.

4 I think charging instruments essentially have three
5 purposes. The first is to accurately and adequately reflect a
6 finding of probable cause by whichever entity is obliged to do
7 so, and that's the convening authority in this instance.

8 The second function is to notice the accused, which
9 we have discussed at length here.

10 The third function, I believe, is to guide the panel
11 such that they make the decisions based upon proper facts
12 applied to the elements and not improper facts. I think this
13 is particularly true when you have the heady notions of
14 vicarious liability to include command responsibility, a
15 notion that, while may be familiar with the military members,
16 may not be familiar to them in terms of a criminal liability
17 mode.

18 So that there is no confusion among the jurors as to
19 what allegations they can find to ultimately meet the
20 elements, we have articulated them. For example, we don't
21 want a juror basing a command responsibility liability or a
22 co-conspirator liability theory on something that does not
23 support the charge. For example, if they found that because

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1 Mr. Hadi exercises some sort of beliefs similar to someone
2 else, therefore he is liable for these particular charges,
3 that would not be the basis for liability under a
4 co-conspirator liability theory or command responsibility.
5 However, the allegations we have put into the charge sheet
6 would direct the jury to what they must consider, and they
7 still have to find it beyond a reasonable doubt.

8 Major Stirk referred to it as a checklist. I think
9 that's true. I think what I am told by military practitioners
10 is that military members, each being college educated, each
11 being very sophisticated, each being very intelligent, will
12 view that checklist as a measuring stick for the government.
13 They are going to hold us to that. I suspect that by putting
14 in our charge sheet, it elevates it in their mind and raises
15 the bar for them such that they have to find it and they have
16 to prove it, which leads to, I think, the second issue that is
17 of most benefit to the accused, this commission and the panel.

18 Something new to me and unique to military practice
19 is findings by substitutions and exceptions. That's a
20 fantastic practice in this endeavor, and I will tell you why.
21 When I issue an indictment with a conspiracy charge and
22 substantive offenses, but for special verdict forms in federal
23 court, the response you get back is a guilty or not guilty on

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1 the count. You don't get a window into what exactly the panel
2 members found to arrive at that guilty or not guilty.

3 Here, because the panel members will be required to
4 find these allegations beyond a reasonable doubt by
5 substitutions and exceptions, we will know exactly which
6 allegations they found beyond a reasonable doubt so that we
7 can assure ourselves, so the defendant can assure himself, so
8 a reviewing court can assure itself that the finding and the
9 holding and the verdict was on a proper basis and not on an
10 improper basis.

11 And I think that that is particularly important in
12 what we do here today. As I said, jurisprudence in
13 commissions is one that is ever-evolving. I know for example
14 in the al Bahlul en banc argument there was considerable
15 discussion about whether or not the individual panel members
16 found al Bahlul guilty of the substantive offense of terrorism
17 by virtue of vicarious theory of liability.

18 That discussion involved the findings by
19 substitutions, exceptions and deletions from the charging
20 instrument. Had that charging instrument not been present,
21 that wouldn't have been available. That level of review would
22 not have been available to the court. It's instructive, it's
23 informative, it takes what's, in my world, a simple black box

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1 of yes or no and gives insight into the jury.

2 And as I have always said in this practice, educating
3 the jury as to the law, educating them as to what they must
4 find, educating them as to what standard they must apply is
5 always preferable. It's cliché, but there is no due process
6 right to confusion of the jury.

7 So to the extent we are trying to make sure that the
8 jury has a better understanding and a better feel for what
9 they must do in this particular case, and a way in which they
10 can make their findings definitive on appeal, we think that we
11 have eliminated a good dose of that confusion and made the
12 case sustainable for the long haul.

13 I would like to wrap up with this. I think lack of
14 familiarity should never be a barrier to sound practice. It's
15 not surprising to me that seasoned military practitioners,
16 such as Major Stirk and Colonel Jasper, are unfamiliar with
17 this style of charging. I too, as I said before, am
18 unfamiliar with the form of charge and specification. I have
19 learned the value of it, as I have learned the value of the
20 jury finding by exceptions and substitutions.

21 And just a little anecdote, when I was much younger I
22 worked briefly for the ICTY, and there I learned a number of
23 things that we would never do in our practice, but once I

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1 learned more about the function and the reason and the
2 purpose, it made sense. For example, one of the projects I
3 worked on was putting together a written summation for a
4 two-year-long trial. So as opposed to simply making your
5 summary argument to the factfinder, you not only make your
6 summary argument to that factfinder, you also submit to them
7 essentially a brief outlining the facts from the transcript.

8 At first I thought that shouldn't be done. How can
9 that be? But as was explained to me, given the complexity of
10 the trial, given the length of time of the trial, given the
11 large nature, given the number of witnesses, the number of
12 victims, the discrete and individualized roles each defendant
13 plays in this particular case, again an important fact for the
14 accused is making sure which roles he is responsible for
15 versus others in our charging instrument.

16 Even things as simple as the language barrier in the
17 ICTY led me to understand that stepping outside of my comfort
18 practice zone is important. And where you see a form and you
19 see a function and the rules allow you the ability to embrace
20 that function to make the practice better, we should do so.
21 We shouldn't reject it out of mere suspicion of that which we
22 have not seen before.

23 And for all of those reasons, I think this is good

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1 practice. I think the convening authority referred a charge
2 sheet that's within the realm of the rules, defensible on
3 appeal in many particular ways, and at a very minimum, at a
4 very minimum does not rise to the extraordinarily high level
5 of the relief requested here of having this court invade into
6 the province of the convening authority and begin changing the
7 charge sheet.

8 Your Honor, if you have questions, I am prepared to
9 answer. Otherwise, I pass the argument.

10 MJ [CAPT WAITS]: Okay, I do. I want to ask one question
11 related to kind of the end of your argument.

12 TC [MR. CLAYTON]: Yes, sir.

13 MJ [CAPT WAITS]: The government has incorporated by
14 reference the common allegations into all of these charges and
15 specifications?

16 TC [MR. CLAYTON]: No, Your Honor, not Charge I.

17 MJ [CAPT WAITS]: Okay. So the ones that you do ask for
18 it to be incorporated, you are asking for all of the common
19 allegations to be incorporated, correct?

20 TC [MR. CLAYTON]: In Charge V we only request the overt
21 acts themselves, not the prefatory vicarious liability
22 language in Charges III through IV. We include the overt acts
23 and the prefatory vicarious liability language.

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1 MJ [CAPT WAITS]: Okay. I think that answers my question
2 then.

3 And then in page 29 of your pleading, the second full
4 paragraph, you say it would be appropriate for the military
5 judge to instruct the members during preliminary instructions
6 under R.M.C. 913(a) regarding common allegations contained in
7 the flier and in the charges which constitute the elements of
8 the offenses which must be proven beyond a reasonable doubt.

9 Can you explain that a little bit further?

10 TC [MR. CLAYTON]: Yes, Your Honor. I think the intent is
11 to -- as a first course, to let the court or commission know
12 there is an opportunity, should the need arise, to instruct
13 the members as to how to handle these allegations. At its
14 most basic ----

15 MJ [CAPT WAITS]: As to what, I'm sorry?

16 TC [MR. CLAYTON]: As to how to consider and handle these
17 allegations. At its most basic level, that would be the
18 instruction, identify them as merely allegations that must be
19 proven, allegations that speak to the theories of liability
20 alleged in the charge sheet, that they are not to be treated
21 any differently from any other allegation in the charge sheet.
22 They still have to be considered and weighed based upon the
23 evidence.

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1 I think there could be a much more sophisticated jury
2 instruction on that front. But as we are just speaking here
3 today off the cuff, those are at a minimum the kinds of things
4 we would include in that initial instruction.

5 MJ [CAPT WAITS]: In other words, the basic instruction
6 that these are allegations.

7 TC [MR. CLAYTON]: Correct.

8 MJ [CAPT WAITS]: This is not evidence.

9 TC [MR. CLAYTON]: Correct. Correct.

10 MJ [CAPT WAITS]: Okay. Thank you, Mr. Clayton.

11 TC [MR. CLAYTON]: Thank you, Your Honor.

12 MJ [CAPT WAITS]: Major Stirk, rebuttal?

13 ADDC [Maj STIRK]: Thank you, Your Honor.

14 I want to pick up where Mr. Clayton left off about
15 lack of familiarity, because perhaps the government is
16 unfamiliar with court-martial practice where we have a way for
17 a jury or a panel of members to issue their findings,
18 including various exceptions and substitutions, and it's
19 called a findings worksheet. And that's a document that goes
20 back with the members and is argued about between the trial
21 counsel and defense counsel. Defense counsel gets a say in
22 what's on that findings worksheet.

23 What the government is attempting to do here

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1 apparently is craft the findings worksheet for the members
2 ahead of time so they have it in front of them the entire
3 trial, and that's simply not fair. I mean, that's not done in
4 courts-martial at all.

5 They will be looking at this government-written
6 narrative for the entire trial. And then the government wants
7 them to have the ability to find by exceptions and
8 substitutions that these allegations -- which they just
9 conceded are not evidence, they are allegations. If they are
10 allegations, the government has to prove every single one of
11 them beyond a reasonable doubt. That's 63 elements that they
12 have added to Charges II through V. So if that's the case,
13 then by all means. But if it's not, then the members
14 shouldn't see them.

15 If they are allegations, they have to be proven and
16 they can be on the charge sheet. If they are not, if they are
17 just a guide for the members to direct them through the course
18 of the presentation of evidence, then that's not appropriate.
19 They shouldn't be on the charge sheet.

20 I just want to touch on a couple of quick points,
21 Your Honor. And if you would like supplemental briefing on
22 the Rules for Courts-Martial, we looked up during the break
23 Rule 307, and the version that I have is different than the

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1 one that Mr. Clayton read, and it speaks of charging under the
2 law of war under Rule 307(c)(2)(D), "Charges under the law of
3 war. In the case of a person subject to trial by general
4 court-martial for violations of the law of war (see
5 Article 18), the charge should be violation of the law of
6 war," semicolon, go on to describe the offense.

7 And in the discussion to Rule 307, it goes on at
8 great length about specifying exactly how to charge an
9 offense. I didn't pull this up myself during the break, so I
10 don't know which year it is, but if you would like us to brief
11 on it, we would be glad to.

12 Again, the government went on ----

13 MJ [CAPT WAITS]: Major Stirk, I want to take a step back.
14 You are talking about a findings worksheet?

15 ADDC [Maj STIRK]: Yes, sir.

16 MJ [CAPT WAITS]: Well, let's just say for argument sake
17 that the court granted your motion and all that the members
18 had in front of them was the bare bones specification under
19 each charge -- well, first of all let me clarify.

20 Is your argument, the government seem to say that
21 they believe the defense has to concede to if conspiracy is a
22 viable charge in this commission, that it's within the
23 government's purview to allege all of these common allegations

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1 as overt acts?

2 ADDC [Maj STIRK]: I believe that's incorrect. We don't
3 concede that.

4 MJ [CAPT WAITS]: Okay. You would concede that the
5 government has to allege overt acts?

6 ADDC [Maj STIRK]: And they have -- yes, sir, and in the
7 charge they allege terrorism, commit murder. They allege
8 specific acts in the actual charge, and our position is that
9 these overt acts are pieces of evidence that would show the
10 acts that are already in the charge.

11 MJ [CAPT WAITS]: Okay. Well, let's move on to how -- I
12 mean, how would exceptions and substitutions -- if the only
13 allegations the members had in front of them were the bare
14 bones allegations, what would there be to except and
15 substitute? I mean, there is not a whole lot to work with
16 there.

17 ADDC [Maj STIRK]: Well, correct, Your Honor. But in a
18 findings worksheet we would provide them, you know, with the
19 elements. They would have to tell us which piece of evidence
20 that the government submitted and that the government directed
21 to them in argument that they should consider for all of the
22 various elements of each offense, which one did they find was
23 proven beyond a reasonable doubt and that meets that element.

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1 In the government's response brief, they talk about
2 the number of overt acts that might be required to show that a
3 person was a participant in a conspiracy or somebody was a
4 participant as a co-conspirator form of liability, and they
5 don't get to -- they don't have an answer for how many actual
6 acts are required.

7 MJ [CAPT WAITS]: That's because I don't think there is an
8 answer.

9 ADDC [Maj STIRK]: That's fair enough, sir. But if they
10 are charged on the charge sheet, our position is they have to
11 prove all of those.

12 MJ [CAPT WAITS]: Well, they don't. I think technically
13 they only have to prove one overt act per conspiracy, right?

14 ADDC [Maj STIRK]: And that was the convening authority's
15 decision, to charge 63 overt acts.

16 MJ [CAPT WAITS]: But they only have to prove one.

17 ADDC [Maj STIRK]: Correct. But they would only have to
18 prove one if they alleged one. They alleged 63. Our position
19 is they have to prove all of those if they are in the charge
20 sheet in front of the members the whole time.

21 MJ [CAPT WAITS]: I think they have to have probable cause
22 for charging them. I don't think they have to prove every one
23 of them because I think they only have to prove one overt act.

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1 ADDC [Maj STIRK]: That's why it's our position that it
2 shouldn't be in front of the members the whole time for them
3 to read this. When you read the common allegations, I mean,
4 it's a story. It's written as a closing argument for why
5 there is conspiracy liability, and that's not appropriate.

6 I mean, that obviously prejudices the accused. The
7 members are sitting there the entire time with the
8 government's seven-page story of how the conspiracy started,
9 how the accused got involved, what he did as part of the
10 conspiracy, and how the conspiracy ended. That's their job to
11 present that evidence during trial, not in a piece of paper on
12 day one that the members have to sit there and read the whole
13 time.

14 I mean, they are obviously going to read that
15 narrative. You are going to instruct them to read the charges
16 in front of them. They are going to read the whole thing and
17 say I have got the whole story now. And then if the
18 government doesn't actually have to put on evidence for each
19 of those overt acts and they can just say, well, I only found
20 one act for the conspiracy and that's enough, how does that
21 not prejudice the accused? They have had this whole story,
22 and the government doesn't actually have to prove the story,
23 they only have to prove -- let's call it nine out of 63 to

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1 meet their burden? That truly prejudices the accused in our
2 opinion.

3 MJ [CAPT WAITS]: Okay.

4 ADDC [Maj STIRK]: I believe -- therefore, Your Honor, we
5 believe they should be stricken from the charge sheet and at
6 the very least should not go to the members.

7 Thank you, sir.

8 MJ [CAPT WAITS]: Very well. All right. Based on our 802
9 yesterday and the fact that the commission did say that we
10 would not begin the argument or presentation of evidence on
11 the motion for appropriate relief related to ceasing physical
12 contact with female guards until no earlier than tomorrow, the
13 only motion remaining before the court is the motion to compel
14 discovery.

15 We said we were going to take a recess at 1130.
16 Since we have one more motion to hear, I suppose it would be
17 prudent to go ahead and take the lunch recess now, and to
18 accommodate the prayer schedule, we will still be in recess
19 until 1300. I believe that was the time that I directed
20 yesterday, 1300.

21 Is that satisfactory to counsel for both sides?

22 DDC [LtCol JASPER]: From the defense, yes, sir.

23 TC [MR. CLAYTON]: Yes for the government, Your Honor.

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1 MJ [CAPT WAITS]: All right. Then we will come back at
2 1300 and hear that last motion for today, and then, Colonel
3 Jasper, I need to hear from you on the status of your review
4 of the discovery you were provided yesterday and the way ahead
5 on that last motion.

6 DDC [LtCol JASPER]: You want to hear from me now, sir?

7 MJ [CAPT WAITS]: No, we will do that on the record after
8 we hear the last motion for today.

9 DDC [LtCol JASPER]: Thank you.

10 MJ [CAPT WAITS]: And then that will inform our way ahead,
11 either what time to start, whether to start, et cetera.

12 DDC [LtCol JASPER]: Understood, yes, sir.

13 MJ [CAPT WAITS]: All right. Then this commission is in
14 recess for lunch until 1300.

15 [The R.M.C. 803 session recessed at 1125, 17 November 2014.]

16 [END OF PAGE]

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