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1 [The R.M.C. 803 session was called to order at 0952,
2 26 January 2015.]

3 MJ [CAPT WAITS]: This commission will come to order. Let
4 the record reflect that all parties present when the
5 commission recessed are once again present.

6 At this time the commission will summarize the
7 R.M.C. 802 conferences that have been held since our last
8 session. The first one was conducted on 19 November 2014. I
9 believe it was the day after our last session of this
10 commission. It related to the scheduling of future
11 proceedings on the issue of the defense's motion related to
12 in personam jurisdiction of the commission. The court has
13 previously ruled that there would be a hearing for
14 determination of that issue to be held as a result of the
15 scheduling order in July of this year, and the purpose of that
16 802 conference was to establish the litigation milestones in
17 order that that can be accomplished.

18 The parties were ordered to provide a joint proposed
19 litigation schedule, and that was provided to the commission
20 on 12 December, or prior to 12 December, and the litigation
21 schedule that has been promulgated will require that we hold a
22 motions session or a preliminary session the third week in
23 July of this year, I believe, at which there will be a hearing

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1 on motions related to this question of in personam
2 jurisdiction along with preadmission of evidence on the issue
3 of in personam jurisdiction, and the second week will be the
4 actual hearing on the issue of in personam jurisdiction. So
5 that was really the substance of that 802 conference.

6 Do counsel for either side have anything to add to
7 the commission's summary of that 802 conference?

8 TC [MR. CLAYTON]: Nothing from the government, Your
9 Honor.

10 DDC [LtCol JASPER]: Nothing from the defense, Your Honor.

11 MJ [CAPT WAITS]: Very well.

12 And the second of three 802 conferences that we've
13 had occurred yesterday with all parties present. It occurred
14 in the air terminal at -- in a conference room at Andrews Air
15 Force Base, since we had a delay in our departure. We took
16 advantage of that time, since everyone was present, to hold
17 our 802 conference there.

18 At that 802 conference, I informed counsel that I had
19 been informed of an equal opportunity complaint filed by one
20 or more of the female guards assigned to the Joint Task Force
21 here at Guantanamo Bay related to the court's interim order
22 regarding the accused not being touched by female guards in
23 relation to his movements to meetings with counsel and to

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1 sessions of this commission. I informed -- the commission was
2 in receipt of a request by the government for an R.M.C. 505(h)
3 hearing. I informed counsel that prior to that hearing, the
4 courtroom security officer would go over the parameters of
5 classified material and their classifications to hopefully
6 give everyone kind of a baseline going into that R.M.C. 505(h)
7 hearing.

8 I discussed with counsel the review of classified
9 material, classified discovery that the government had
10 provided to the commission for its review and subsequent
11 provision to the defense and the progress of that review. I
12 informed the defense that if they had any other motions
13 related to the issue of in personam jurisdiction, they needed
14 to be filed no later than next week so the commission could
15 move forward with its litigation schedule that I previously
16 discussed.

17 We discussed the order of events of the hearing of
18 motions for this week, and we discussed the scheduling of
19 another 802 conference this morning prior to coming on the
20 record, which I'll talk about next.

21 I ascertained from the defense whether they would
22 have any objections related to certain issues that the
23 government had given notice of, namely, witnesses testifying

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1 under pseudonyms related to the female guard issue, and also
2 whether they would be having any objections to a proffered
3 witness of the government testifying by -- remotely by video
4 teleconference on the motion related to the female guard issue
5 as well.

6 And finally, we discussed -- or the defense raised a
7 procedural issue, namely, the government's filing of what has
8 been marked as Appellate Exhibit 021S, which was a response to
9 a defense supplemental reply to a supplemental response that
10 the government filed on the female guard issue.

11 Do counsel for either side have anything to add to
12 the commission's summary of that 802 conference?

13 TC [MR. CLAYTON]: Nothing from the government, Your
14 Honor.

15 DDC [LtCol JASPER]: Yes, Your Honor. The defense
16 requests some additional voir dire on the E0 matter.

17 MJ [CAPT WAITS]: Okay. Let's do that after I summarize
18 the last 802 conference.

19 DDC [LtCol JASPER]: Thank you, sir.

20 MJ [CAPT WAITS]: Okay. So finally, the other -- the
21 final 802 conference that I just alluded to occurred here in
22 the chambers of this courtroom this morning around 0845 prior
23 to coming on the record, and it related to, again, the

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1 courtroom security officer providing counsel, after
2 consultation with relevant classification authorities, the --
3 I guess the best information that we have at this time about
4 the parameters of what information might be classified related
5 to issues pertaining to the motion related to the female
6 guards.

7 And we also discussed just the way ahead of an
8 R.M.C. 505(h) hearing which at this time we intend to conduct
9 this afternoon at 1430.

10 Do counsel for either side have anything to add to my
11 summary of that R.M.C. 802 conference?

12 TC [MR. CLAYTON]: No, Your Honor.

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

14 MJ [CAPT WAITS]: Very well. All right.

15 Before I open the floor for any voir dire related to
16 this E0 complaint, I will just say that -- I'll put a little
17 bit more information on the record about my -- the extent of
18 my knowledge. I was informed on Friday morning by the Chief
19 Judge of the Navy-Marine Corps Trial Judiciary, who is my Navy
20 boss, that this -- that she had gotten wind of this equal
21 opportunity complaint. I have not seen the complaint. My
22 understanding is that it was filed -- or at least it was
23 forwarded to SOUTHCOM. I don't know how many complainants

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1 there are. I don't know what administrative procedure was
2 used in the making of the complaint. And as far as the
3 substance of the complaint, all I know is that -- all I was
4 told was that it was related to the issue of female guards not
5 being able to have physical contact with the accused based on
6 the commission's temporary order. Okay.

7 So, Colonel Jasper, you -- I'll open the floor for
8 voir dire from both sides regarding the impartiality or the
9 ability of the military judge to hear this issue.

10 DDC [LtCol JASPER]: Thank you, sir. May I approach the
11 well?

12 MJ [CAPT WAITS]: You may.

13 DDC [LtCol JASPER]: Thank you. Good morning, Your Honor.
14 You just informed the parties, sir, that your boss, the Chief
15 Judge of the Navy ----

16 MJ [CAPT WAITS]: Navy-Marine Corps Trial Judiciary.

17 DDC [LtCol JASPER]: ---- informed you on Friday morning.

18 MJ [CAPT WAITS]: Correct.

19 DDC [LtCol JASPER]: If you know, who informed the Navy
20 Judge, your boss, of the complaint?

21 MJ [CAPT WAITS]: I believe -- and this is just my
22 recollection, is she may have first heard of it from the Chief
23 Judge of the Army because there was a similar complaint filed

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1 against Colonel Pohl, since he issued a similar order in the
2 9/11 case.

3 DDC [LtCol JASPER]: Thank you. Was it required that she
4 inform you of this complaint, Your Honor?

5 MJ [CAPT WAITS]: I'm not aware of any requirement for her
6 to inform me of such a complaint, but since I was the subject
7 of the complaint, I think it was a matter of professional
8 courtesy for her to have done so. And since she was -- or
9 since her office was the one who made me available for these
10 duties in the first instance, it's a matter within her
11 official interest, at least. And as I said, since I'm the
12 subject of the complaint, it only made sense for her to let me
13 know of the existence of the complaint.

14 DDC [LtCol JASPER]: Presumably, she was aware that you
15 were going to be litigating as a judge on a female guard
16 unwanted touching matter this week?

17 MJ [CAPT WAITS]: I think it's safe to assume that she
18 would know that.

19 DDC [LtCol JASPER]: Has an EO complaint ever been filed
20 against a military judge's ruling that you are aware of?

21 MJ [CAPT WAITS]: Against any military judge's ruling or
22 against my?

23 DDC [LtCol JASPER]: Against yours. I'll ask about that.

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1 MJ [CAPT WAITS]: Pardon me.

2 DDC [LtCol JASPER]: I'll ask about you first, sir.

3 MJ [CAPT WAITS]: No, I'm not aware of it. From my
4 perspective, such a complaint is not cognizable under any
5 administrative procedure that I'm aware of.

6 DDC [LtCol JASPER]: Have you ever heard of an E0
7 complaint against any military judge's ruling besides
8 yourself?

9 MJ [CAPT WAITS]: No.

10 DDC [LtCol JASPER]: So this is a unique situation?

11 MJ [CAPT WAITS]: In my experience, yes.

12 DDC [LtCol JASPER]: Do you know what the next step is
13 with handling the E0 complaint against your ruling?

14 MJ [CAPT WAITS]: I do not.

15 DDC [LtCol JASPER]: So we don't know how or when this
16 will be resolved, whether administratively or at the time of
17 any resolution?

18 MJ [CAPT WAITS]: I do not know that.

19 DDC [LtCol JASPER]: Will you ever be given the
20 opportunity to review the complaint, Your Honor?

21 MJ [CAPT WAITS]: I have no idea.

22 DDC [LtCol JASPER]: Do you believe that an unknown
23 complaint against you might influence your decision this week

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1 on this female guard motion?

2 MJ [CAPT WAITS]: I do not.

3 DDC [LtCol JASPER]: Your Honor, we'd like to reserve the
4 right for further voir dire based on any possible discovery we
5 may receive in this matter going forward.

6 MJ [CAPT WAITS]: That's a fair request, and that request
7 is granted.

8 DDC [LtCol JASPER]: Thank you. I have nothing further.
9 Thank you.

10 MJ [CAPT WAITS]: Thank you.

11 Mr. Clayton, does the government have any voir dire
12 on this issue?

13 TC [MR. CLAYTON]: Your Honor, only one question, if I may
14 approach the lectern. I believe each of counsel's questions
15 presumes that the commission is familiar with Rule 902, with
16 what might cause a judge to recuse. I assume the commission
17 is also familiar with that rule?

18 MJ [CAPT WAITS]: Absolutely. I'm getting ready to put
19 something on the record directly related to that rule.

20 TC [MR. CLAYTON]: With that, I'll take my seat then.

21 MJ [CAPT WAITS]: Very well. You can ask any questions
22 that you would like before I put on the record what I was
23 going to put on the record.

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1 TC [MR. CLAYTON]: I believe you are going to answer my
2 questions, Your Honor.

3 MJ [CAPT WAITS]: All right. The applicable rule just
4 alluded to by Mr. Clayton is Rule for Military Commission 902.
5 None of the specific grounds for disqualification which are
6 listed in Rule For Military Commission 902(b) are applicable
7 to this situation, and the issue that I have sua sponte put on
8 the record.

9 Therefore, the question falls squarely under
10 R.M.C. 902 subsection (a), which states that a military judge
11 shall disqualify himself in any proceeding in which that
12 military judge's impartiality might reasonably be questioned.
13 The discussion to that rule states that the military judge
14 should broadly construe grounds for challenge, but should not
15 step down from a case unnecessarily. The commission is
16 applying this rule only to this discrete issue of the motion
17 related to female guards, the cessation of physical contact of
18 the accused by female guards.

19 The commission finds that on this issue, the military
20 judge's impartiality is not subject to reasonable question. I
21 have not seen the complaint. All I have been told is that it
22 is an equal opportunity complaint related to the commission's
23 temporary order that women guards shall not have physical

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1 contact with the accused. And, again, that order only relates
2 to movements to and from meetings with attorneys and to and
3 from this courthouse.

4 This narrowly tailored order, again, is for the sole
5 purpose of maintaining the forward progression of this
6 commission related to this motion and other proceedings of
7 this commission.

8 This was a lawful judicial order by a qualified and
9 properly detailed military judge to this commission. It goes
10 without saying that rulings and orders of judges in the course
11 of litigation never makes everyone happy, be it parties,
12 victims, or other entities or persons collaterally affected by
13 rulings of judicial bodies. By its nature, the outcome of
14 litigation is that some people's positions are advanced and
15 others are not. In this instance, one or more women guards
16 assigned to the Joint Task Force apparently believe that their
17 interests have been harmed or set back in some way. This is
18 not a novel phenomenon for me or any other judge.

19 Furthermore, I am not aware of any administrative
20 equal opportunity grievance procedure that affords a person a
21 cognizable avenue to challenge a judicial ruling or order such
22 as this.

23 For these reasons, the filing of one or more equal

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1 opportunity complaints by female guards assigned to the JTF
2 will have no impact on any deliberations or further orders on
3 this or any other issue before this commission. On this
4 basis, I find that my impartiality cannot reasonably be
5 questioned, and I do not intend to recuse myself from hearing
6 this motion.

7 Do counsel for either side have any questions on my
8 ruling? No one has asked me to recuse myself, but I am just
9 stating for the record all of the reasons why I do not believe
10 it's ----

11
12 DDC [LtCol JASPER]: No additional questions, Your Honor.
13 Thank you.

14 MJ [CAPT WAITS]: Okay. Anything from the government?

15 TC [MR. CLAYTON]: One housekeeping matter, Your Honor.
16 I'd like to place on the record that these proceedings are
17 being transmitted stateside pursuant to the commission's
18 order.

19 MJ [CAPT WAITS]: Okay. Thank you.

20 So just for everyone's notice, the motions that will
21 be heard this morning are Appellate Exhibit 027, the defense
22 motion to dismiss co-conspirator liability, and Appellate
23 Exhibit 026, the defense motion to dismiss for lack of

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1 personal jurisdiction. This is the style of this motion,
2 anyway, because the Military Commissions Act violates the due
3 process clause, and particularly the equal protection part of
4 that clause.

5 Are both sides prepared to -- is there any evidence
6 on this motion, defense?

7 ADDC [Maj STIRK]: No, Your Honor.

8 MJ [CAPT WAITS]: Okay. And are both sides prepared then
9 to argue?

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

11 MJ [CAPT WAITS]: Okay. Bear with me for one moment while
12 I pull out that motion.

13 Who's going to be arguing for the defense?

14 ADDC [Maj STIRK]: I will, Your Honor.

15 MJ [CAPT WAITS]: Very well, Major Stirk, you may
16 approach. Who has the burden on the motion, and what is it?

17 ADDC [Maj STIRK]: Thank you, Your Honor. Good morning.
18 I believe the defense has the burden, and it's by a
19 preponderance of the evidence.

20 MJ [CAPT WAITS]: Very well. The court ----

21 ADDC [Maj STIRK]: And just to be clear, this is arguing
22 AE 027, the co-conspirator liability.

23 MJ [CAPT WAITS]: Yes.

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

2 Good morning, Your Honor, I just want to briefly
3 argue in favor of the defense motion to strike the
4 co-conspirator and common plan liability language from the
5 charge sheet. This is basically a companion motion to AE 019,
6 which was a defense motion to dismiss the common allegations
7 language. They kind of go together.

8 The Military Commissions Act Section 950q
9 specifically defines who may be found liable as a principal,
10 and as we noted in our brief on this issue, it specifically
11 does not include any language defining what a co-conspirator
12 or what a common plan liability is.

13 Now, the government has argued that that's by design,
14 and that because the language of the Military Commissions Act
15 tracks the definition of principal from federal criminal law,
16 that Congress must have known that at the time they passed the
17 Military Commissions Act, and must have intended to
18 incorporate federal court definitions and the interpretations
19 of co-conspirator liability.

20 And while this makes some intuitive sense, we believe
21 there's a big problem with that, and the problem is that the
22 American concept of co-conspirator liability, specifically but
23 not limited to Pinkerton-style liability, is an exceptionally

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1 broad definition of what counts as co-conspirator liability,
2 and that that American idea of co-conspirator and common plan
3 liability is not accepted as a part of the customary
4 international law of war. I believe that the government in
5 other cases has conceded that this Pinkerton-style liability
6 is not accepted in international law.

7 And now I'm going to concede that some flavor of
8 joint criminal enterprise liability is probably widely
9 accepted enough to be applied in the military commission, but
10 we believe that that theory of liability is going to be much
11 closer to aiding and abetting rather than this broad military
12 concept of co-conspirator liability.

13 Again, as we raised in our motion regarding the
14 common allegations, a theory of liability does not need to be
15 specified on a charge sheet. The government's response at
16 that time was basically, "Hey, we just want to make sure the
17 accused is on notice so that he has a fair shot," which is
18 great. But once again, the vehicle for placing him on notice,
19 as we noted in AE 019, is a bill of particulars or some other
20 kind of notice. Like they could just tell us, they could tell
21 the court that they're going to be pursuing that theory of
22 liability. So like the common allegations, this government
23 theory doesn't need to be in writing, sitting in front of the

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1 members for the entire trial.

2 MJ [CAPT WAITS]: Can I interrupt you there for a ----

3 ADDC [Maj STIRK]: Yes, sir.

4 MJ [CAPT WAITS]: ---- on that point for one second?

5 I haven't really received an argument from the
6 government as kind of a fallback argument or any concession
7 from the defense on a question that has occurred to me, and
8 that is the focus of your angst on the issue of the common
9 allegations seems to be that the members would be able to look
10 at those common allegations from the time they sit down in
11 their chairs and they're given the charge sheet throughout the
12 trial until the end of the trial, and they would be able to
13 contemplate the substance of those common allegations, and
14 that it prejudices the accused because it's a whole lot of
15 information that will not have been the subject of any proof
16 when they sit down over there. Correct?

17 ADDC [Maj STIRK]: That's correct, Your Honor. That's the
18 main concern.

19 MJ [CAPT WAITS]: Okay.

20 ADDC [Maj STIRK]: It's not questioning whether they
21 could ----

22 MJ [CAPT WAITS]: I haven't gotten to my question yet.

23 ADDC [Maj STIRK]: Sorry.

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1 MJ [CAPT WAITS]: Okay. That's just background.

2 So my question is -- if that's your concern, there's
3 going to be a charge sheet that's going to be included, you
4 know, in the allied papers of this commission. And, I mean,
5 now I'm looking way ahead, but the possibility of special
6 findings on -- and this all assumes that any kind of
7 conspiracy charges go forward. With that assumption, the
8 possibility that special findings might be made on those
9 common allegations because they can be viewed as overt acts,
10 is still a possibility.

11 So my question is: Would the defense concede that a
12 reasonable solution would be to not strike those common
13 allegations? You know, they're -- just make them part of the
14 record just as if the defense had received them as part of a
15 bill of particulars, but that based on the Rules For Trial By
16 Military Commissions that says that the flyer is supposed to
17 be a concise statement of the charges and specifications, that
18 they not be part of the flyer put in front of the members?

19 ADDC [Maj STIRK]: Absolutely, Your Honor. And I believe
20 that we noted that as a possibility in AE 019, if not in our
21 written brief, then in argument, because that's really
22 what ----

23 MJ [CAPT WAITS]: Okay. I don't recall that, so okay.

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1 ADDC [Maj STIRK]: Yes, sir. I believe that the
2 government's position was that because of this co-conspirator
3 language, that those were incorporated by reference into the
4 charges, and I think -- I think, to paraphrase their position,
5 that the overt acts are part of Charges II, III and IV, is how
6 they perceived them, which is why this motion is a companion,
7 essentially, to the common allegations.

8 Because if you agree with the defense that this
9 language doesn't need to be on the flyer or on whatever goes
10 to the members, then that, I think, supports our position that
11 neither do those overt acts and common allegations, that none
12 of that needs to be in front of the members. The members
13 should have Charges I through V and that's it, and not any
14 theory of liability and none of the overt acts.

15 MJ [CAPT WAITS]: Okay. You can proceed.

16 ADDC [Maj STIRK]: And I think that goes to kind of the
17 heart of this one, which is that this issue is potentially
18 more egregious because the language is particularly
19 prejudicial. The language on the charge sheet reads that,
20 "The accused is liable for the above alleged offenses as a
21 principal, a co-conspirator, and a participant in a common
22 plan." That's totally directive. That leaves no room for the
23 possibility that he's not -- that says he is liable, which we

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1 believe should be addressed later in trial as some kind of a
2 findings instruction.

3 MJ [CAPT WAITS]: So are you reading directly from the
4 common allegations on the charge sheet?

5 ADDC [Maj STIRK]: Yes, Your Honor. For Charges II, III
6 and IV.

7 MJ [CAPT WAITS]: Okay. Hold on for one second, then.

8 Okay. Go ahead.

9 ADDC [Maj STIRK]: So the accused certainly may be found
10 liable, but a statement to the members throughout the trial
11 that he is, is simply inappropriate. And we believe ----

12 MJ [CAPT WAITS]: I just got a copy of the charge sheet,
13 so can you refer me to the language that you are referring to?

14 ADDC [Maj STIRK]: Yes, sir, Your Honor. It's on the
15 Charges II, III and IV at the -- you know, at the bottom of
16 each of those charges: "The accused is liable for the above
17 alleged offense as a principal, a co-conspirator, and a
18 participant in a common plan as set forth in the section
19 entitled 'Common Allegations' which is hereby realleged and
20 incorporated by reference as if set forth fully herein." That
21 language appears on Charges II, III and IV.

22 MJ [CAPT WAITS]: Okay. Okay.

23 ADDC [Maj STIRK]: So our position is that this is really

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1 just a naked attempt to bring in a very broad American concept
2 of co-conspirator liability into this international law of war
3 tribunal, and there will be time to argue about what
4 instruction about co-conspirator liability should be and what
5 that theory might be and what's accepted under the
6 international law of war and is appropriate. Co-conspirator
7 and participant in a common plan simply aren't detailed enough
8 to be in front of the members for the entire presentation of
9 the government's case.

10 Any kind of joint criminal liability will require
11 precise definitions and instructions to the members. Just
12 putting that language on the charge sheet would allow the
13 members to formulate their own definition as the trial
14 proceeds, and that definition is almost certainly going to be
15 something very similar to a very broad American concept of
16 conspiracy that we are all familiar with from TV, from movies,
17 and frankly, from the ongoing terrorism trials in federal
18 court, in which dozens of al Qaeda members have been found
19 guilty under a conspiracy liability theory that absolutely
20 should not be in play in a military commission. That's been
21 argued about over and over, and the government's conceded that
22 this Pinkerton-style liability does not apply, that an
23 inchoate conspiracy theory of liability does not apply.

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1 MJ [CAPT WAITS]: Well, the government's position is that
2 this isn't inchoate conspiracy, that these are charged acts
3 and these are completed acts. So how does your argument hold
4 water if this is not -- if we're not talking about inchoate
5 conspiracy?

6 ADDC [Maj STIRK]: Our argument is that while Charges II,
7 III and IV are specific things that happened, acts that
8 happened, the accused is not charged with personally being
9 involved in those. He's charged as three things. He's
10 charged as a principal, as a co-conspirator, which under our
11 impression of what the government is going for with this
12 co-conspirator liability would be a very broad concept, where
13 he wouldn't have to have taken any direct steps. If you look
14 at the overt acts, there are very few overt acts that have
15 anything to do with actual Charges II, III and IV. They're
16 almost entirely about his participation as a member of the
17 Taliban or as allegedly a member of al Qaeda.

18 So that's why we think that this language shouldn't
19 be there for the members to see; that once the government has
20 introduced evidence of these overt acts, when we get to the
21 point of instructing the members, they can request that you
22 instruct them on a theory of liability based on some flavor of
23 joint criminal enterprise based on those overt acts. But just

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1 simply having co-conspirator and participant in a common plan
2 sitting in front of the members doesn't help them, and we
3 think it prejudices the accused. Because if you interpret
4 those words through the lens of an average American military
5 panel member, I mean, you're going to think of, you know, the
6 mob movies, you know, which you think of the RICO Act and
7 that's your definition of conspiracy and co-conspirator, which
8 is probably not going to be the legal definition that you will
9 eventually instruct them on, if appropriate.

10 So between this and the next motion regarding due
11 process that we'll argue, you know, we basically believe that
12 the government is trying to have their cake and eat it, too.
13 They're trying to take this very broad theory of liability and
14 combine it with a very friendly set of rules of evidence that
15 only apply in military commission. So what they're trying to
16 do -- what we believe they're trying to do is take a federal
17 court definition of conspiracy and co-conspirator liability,
18 but use that in a forum that allows hearsay evidence and other
19 types of evidence that would never get into that federal
20 forum.

21 So we believe that the co-conspirator and common plan
22 language should either be stricken from the charge sheet, or
23 at least should not be on the materials presented to the

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1 members. And that if a joint criminal enterprise theory of
2 liability is raised by the evidence, the government should
3 request a findings instruction, and we can argue about what
4 that instruction will be at the appropriate time.

5 Thank you, Your Honor. That's all I have.

6 MJ [CAPT WAITS]: Thank you, Major Stirk.

7 Trial Counsel, argument?

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

9 MJ [CAPT WAITS]: Good morning, Mr. Clayton.

10 TC [MR. CLAYTON]: Your Honor, I have to confess that the
11 argument I'm hearing now before the commission sounds
12 remarkably different in scope and style to the one that was
13 briefed before the commission. One that focused largely upon
14 the existence of co-conspirator liability has now morphed into
15 a rehash, as counsel has admitted, of AE 019, the motion to
16 strike the common allegations. Because we stand firmly in our
17 position on that motion as well as on this motion, we're
18 adequately prepared to argue each as we did once before.

19 I think, however, to properly address these issues,
20 we first have to address a few of what I'll call misstatements
21 or misrepresentations by the defense. The government is
22 unaware of any instance in which the United States Government
23 has taken the position that Pinkerton liability does not apply

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1 in commissions, and indeed, the defense cited no such
2 instance. And I think if we rehash our discussions from
3 November, what's going on here is a continued conflation of
4 the two concepts captured within the notion of conspiracy,
5 that of the agreement crime, and that of the vicarious
6 liability principle. And as this commission properly pointed
7 out, the government's position has been in this commission
8 with respect to the agreement crime, these are indeed
9 completely -- it is indeed a completed conspiracy. And that's
10 captured in Charge V. I don't believe Charge V is the subject
11 of this motion.

12 So to the extent the government has made any sort of
13 concession about the international law of war with respect to
14 the agreement crime, that's an entirely different conversation
15 than the conversation presently before the commission about
16 the vicarious liability principle. So the tendency to
17 conflate the two, I think, is the source of the confusion here
18 and what causes and underscores, again, the need to articulate
19 clearly and plainly in the charging instrument for the
20 defense, for the commission, for reviewing courts, as well as
21 for the jury, these two separate and distinct concepts to
22 allow the jury to have the tools necessary to consider each of
23 these concepts appropriately.

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1 The second fundamental disagreement we have with the
2 defense is the characterization of a charge sheet as being
3 directive and in an impermissible way. Think about the most
4 basic charge sheet you can imagine. Let's make it a murder
5 charge. The charge sheet says the defendant did commit
6 murder, and then the government's obliged to prove that.
7 There could be little language more directive than, "The
8 defendant did commit murder, to wit, by doing the following
9 things." Every charge sheet is directive. Every judge who's
10 ever impanelled a jury then instructs that jury as to how to
11 consider the allegations in that charge sheet, to consider
12 them as simply charges and to make the government meet its
13 burden.

14 There's an initial instruction that could accompany
15 the flyer -- which, Judge, I'd ask you to recall the record on
16 your own time of AE 019, where we did discuss the propriety of
17 these allegations on the flyer as well as our briefing, we
18 briefed this issue as well. They can be instructed throughout
19 the trial as to different matters and how to consider them,
20 and of course, finally, they can be instructed as to how to
21 assess each allegation.

22 And as the court has properly noted, in a special
23 findings form, which is likely going to be necessary in

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1 commissions, they will have before them the tools necessary to
2 make the findings as to those two distinct concepts, that of
3 the agreement crime in Charge V and that of the theory of
4 vicarious liability that permeate Charges II through IV. And
5 while there may be some substantial overlap in each of these,
6 it's important that we not conflate that, and given that
7 experienced trial -- excuse me, experienced defense counsel
8 standing before the commission has a tendency to conflate
9 those two concepts, one can only imagine a lay juror without
10 strong guidance in a charging instrument, without strong
11 guidance from the bench, might equally conflate those two
12 concepts.

13 MJ [CAPT WAITS]: Okay. I want to interrupt you and ask a
14 question. Am I hearing from you that you think that the
15 members should be somehow instructed at some time before
16 findings instructions on these various theories of liability?

17 TC [MR. CLAYTON]: Not on the theories of liability
18 themselves, Your Honor, because that would be an instruction
19 upon the law of the facts. And typically, I'm not aware of a
20 court that instructs the jury on how to apply the facts to the
21 law for its ultimate findings at the inception but rather
22 after the evidence.

23 But it is consistent practice for a jury to receive a

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1 charge sheet with all of these very directive allegations in
2 them and to be told that they are to consider those as merely
3 allegations and they are to hold the government to its burden
4 to prove each of those beyond a reasonable doubt and will be
5 instructed at the conclusion of the trial as to what the law
6 is. That said, if there is a need to understand how these
7 allegations interrelate to each of the charges, the jury will
8 be informed, and will allow them to then conceptualize, as
9 they hear a fact, how that allegation might relate to a charge
10 of murder, for example as we did in this case, as the
11 convening authority chose to do in this case, by incorporating
12 those facts by reference.

13 It's no different than in a murder charge, the
14 language that begins with, "To wit, by using a handgun, on
15 July 17th, and firing it with malice aforethought at the
16 victim, did kill." It's no different from that. It's the
17 further explanation as to how the defendant committed the
18 crime for which the legal theory of liability which will be
19 explained at the conclusion of the trial attaches. But
20 because these trials are so sprawling in scope and sprawling
21 in nature, given the facts -- and that's not a function of the
22 government's choice.

23 Recall, we only allege what we believe the facts to

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1 bear out with respect to the accused's conduct. The accused
2 is alleged to have committed ten years' worth of bad conduct,
3 spanning multiple continents. We simply try to capture it
4 accurately, place it accurately before the jury, give them the
5 tools necessary to properly assess this information and move
6 forward.

7 And as we discussed in the context of AE 109, the
8 deference given to these decisions on how to arm the jury with
9 the proper framework to assess and put the government to its
10 burden have a number of collateral benefits, as we discussed
11 in the context of the al Bahlul case and the entire ability to
12 prove or determine whether or not an inchoate conspiracy
13 versus a choate conspiracy is lawful rests upon the fact that
14 that jury and that discussion was only made possible because
15 that jury, unique to commissions, was able to assess and pass
16 verdict on each of those overt acts alleged in the conspiracy
17 count.

18 There's an adequate and accurate record of exactly
19 what the jury did by including those matters. And I submit to
20 the court that if the defense has, which I believe they have,
21 conceded that the facts will come before the jury, appears to
22 be conceding that there should be a special verdicts form
23 provided to the jury to find these facts, I don't understand,

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1 nor do I conceptualize, the added harm of the jury being armed
2 with these tools from the beginning. I know that in federal
3 practice, it's customary for a jury to hear the reading of an
4 indictment and in some instances hold the indictment
5 throughout the trial. As you recall from AE 019, we attached
6 multiple federal indictments that had very similar charging
7 language the jury would be armed with when conceptualizing
8 these particular facts, in the context of these kinds of
9 trials.

10 Now, Major Stirk has raised some question about
11 whether or not this is an American notion of liability versus
12 an international notion. And I think if we look back again to
13 that argument and to the brief filed in this case, every
14 manner of international tribunal has also found that this type
15 of liability exists. And I refer the court to the cases cited
16 in our brief including Tadic from the International Criminal
17 Tribunal for the Former Yugoslavia at paragraph 220, and I
18 quote, "Notion of common design as a form of accomplice
19 liability is firmly established in customary international law
20 and in addition is upheld, albeit implicitly, in the statute
21 of the International Tribunal." This is the same for the
22 International Criminal Tribunal for Rwanda, the same for the
23 International Criminal Court under the Rome Statute as cited

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1 in our brief, the same as the Special Court for Sierra Leone.
2 And conceptually, the attachment of co-conspirator liability
3 in the American version, which I'll discuss in a moment, is
4 even more imperative in the notion of international crimes
5 committed in the context of hostilities.

6 So let's first start back with the American notion of
7 co-conspirator liability, which as we know derives from the
8 Pinkerton case in 1942, a fairly well-settled proposition at
9 this point.

10 It's based upon agency principles, the idea that
11 those acting together are then liable for the acts of one
12 another, done to the mutual benefit of those persons. And I
13 direct the court to the Seventh Circuit's case, Manzella,
14 791 F.2d 1263 at 1267, talking about the liability principles.
15 The Supreme Court has also said, as far back as 1961 in
16 Callahan v. U.S., 364 U.S. 587, that group crime, conspiracy
17 type crimes, organized crime, is uniquely, uniquely dangerous
18 to society and to the public, because of the sheer volume and
19 mass of destruction and other detrimental conduct that can be
20 reaped. With this backdrop and these agency principles, the
21 law certainly in the United States adapted to develop what we
22 all know now to be Pinkerton liability, which in the
23 international community we know to be joint criminal

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1 enterprise.

2 Since this argument has morphed from a conceptual
3 argument about co-conspirator liability into one once again
4 about charging instruments and motions to strike, I would
5 remind the court that we also in the context of AE 109
6 attached multiple International Criminal Tribunal charging
7 instruments, which laid out in significantly greater detail
8 than in this charging instrument or the domestic instruments
9 the broad, common plan of each of those criminal
10 organizations, then articulating within that broad common plan
11 the specific facts or instances that give rise to the
12 liability for the defendant before them.

13 And as I alluded to before, that takes on a
14 significant and particularized importance in the context of
15 these types of trials. When you're talking broadly about
16 organized crime, there's a concept that someone who's in a
17 leadership position should not reap the benefits of the
18 leadership role of that organized criminal organization
19 without also being subject to its liability. In other words,
20 someone in a leadership position should not be allowed to have
21 the underlings take the fall, essentially.

22 In the context of an international terrorist
23 organization engaged in unprivileged belligerency in a war

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1 zone, this is even greater, of a greater heightened
2 sensibility where you have who is alleged to be a leader among
3 this international terrorist organization engaging in broad
4 scale, wide-sweeping international hostilities and criminal
5 acts, it would be somewhat unique to this courtroom if somehow
6 he were able to escape the liability for that particular act.
7 And joint criminal enterprise, under the international
8 customary law of war concept says no. Tadic himself is a
9 perfect example of this type of liability.

10 MJ [CAPT WAITS]: How is what you just described not
11 already covered by the theory of liability of command
12 responsibility?

13 TC [MR. CLAYTON]: I think they're duplicative because in
14 command responsibility one must also be a commander. There's
15 proof of command structure and there's proof of accountability
16 of those below, some sort of reporting requirements. There
17 are certain elements specific to command responsibility that
18 don't always match up necessarily one for one with
19 co-conspirator liability. One could be a part of a criminal
20 conspiracy and be a very high-ranking member but not squarely
21 have command responsibility.

22 That said, in the facts of this case, we believe that
23 both exist. But as the court well knows, we aren't obliged to

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1 elect at this stage.

2 MJ [CAPT WAITS]: So they are alternate theories of
3 liability?

4 TC [MR. CLAYTON]: They are, Your Honor.

5 MJ [CAPT WAITS]: And they're not completely -- they don't
6 completely intersect or overlap?

7 TC [MR. CLAYTON]: They do not, Your Honor.

8 MJ [CAPT WAITS]: Okay.

9 TC [MR. CLAYTON]: So again, not to digress too far from
10 what I believe the original motion read, but I think it's very
11 telling -- I think it's very telling that the original motion
12 has now become a second bite at the common allegations apple.
13 The reason that's telling is because there's simply no case in
14 any jurisdiction relevant to this commission that has held a
15 common -- that common plan liability doesn't exist. Most
16 notably, the D.C. Circuit, in interpreting this very statute,
17 in concurrence, Judge Rogers said, and I quote, "The
18 government could have pursued Bahlul under the Pinkerton
19 doctrine, under which he could have been found vicariously
20 liable for reasonably foreseeable substantive crimes committed
21 by his co-conspirator in furtherance of the conspiracy."

22 There was simply no suggestion -- there was no
23 question on oral argument and no suggestion by any of Judge

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1 Rogers' co-judges that that was anything but absolute fact.

2 So with that sort of underpinning misperception to
3 the defense's argument that somehow this theory of liability
4 is not the same under the MCA as our traditional notions, nor
5 is it the same as joint criminal enterprise, what we're left
6 discussing then, I believe, and I'll digress briefly, is
7 again, the motion to strike argument, which I'll revisit as I
8 have before.

9 Before getting to that argument, let me quickly
10 dispose of the other argument raised by the defense to make an
11 adequate record. The notion that the failure to specifically
12 articulate co-conspirator liability at Title 10,
13 Section 950q(1) as being clear intent by Congress to exclude
14 flies in the face of the highest court of the military, the
15 Court of Military Appeals, which said in Jefferson at 323
16 through 324, indeed, because federal criminal code Title 18
17 USC Section 2 and the Uniform Code contained almost the same
18 provisions for vicarious liability, it would be anomalous, and
19 I underscore that word, to conclude that only the former
20 suffice to impose vicarious liability on co-conspirators. To
21 read our statute, which tracks the language of the UCMJ's
22 Article 77 in a way inconsistent with the manner in which the
23 Court of Military Appeals has incorporated that statute would

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1 indeed be anomalous. So we think that can be quickly disposed
2 of as well.

3 And, Judge, that leads me, of course, to what I think
4 is the implicit admission by the direction this argument has
5 taken. While the court has set aside for the time being
6 arguments on Charge V, criminal conspiracy, and we talked
7 earlier about the conflation of the two concepts.

8 The court can recognize by this particular filing and
9 by this particular argument an implicit admission that the
10 presence of these allegations in the charge sheet are equally
11 merited by this theory of liability. Notice this was styled
12 as a motion to dismiss the theory of liability with a
13 secondary relief of striking the common allegations thereon.
14 I think that, given the style, it's very telling that the
15 government argued, I believe credibly, in AE 019 this
16 vicarious liability theory consistent with the way these
17 charges are alleged in international tribunals, consistent
18 with the way they're alleged in domestic tribunals, inform
19 that very debate; and the defense needs you to believe this
20 theory doesn't exist in order to strike these allegations.

21 As the court properly pointed out, the remedy of
22 strike is probably not the appropriate remedy here. If
23 anything, there's some question about the manner in which a

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1 jury is instructed on these allegations and the timing of
2 that. Striking, as we talked before, as Professor Wright has
3 said and as the D.C. Circuit has said in Rezaq is an
4 extraordinary remedy and only rarely exercised.

5 With that, I give the government's fallback argument
6 as well. Even if this were -- even if Charge V were to not
7 exist, the co-conspirator liability theory does carry the day
8 on the common allegations. And I cite three cases in our
9 brief. The cases are Budd out of the Sixth Circuit, Macey out
10 of the Seventh Circuit, Davis out of the Fifth Circuit, which
11 confirms the instruction on co-conspirator liability is
12 appropriate even if a conspiracy agreement charge is not made.
13 Even if Charge V were not a part of this charge sheet, which
14 it is, but were it not, the allegation should stand.

15 Judge, even further than that, the reasons we stated
16 in our argument on AE 109, even if co-conspirator liability
17 did not exist, these allegations meet elements of aiding and
18 abetting liability; as the court properly noted, command
19 responsibility liability, which is a part of this case, as
20 well as the hostilities element, which must be proven in each
21 of our cases for each of our counts.

22 So I think that the continued effort at chipping away
23 at these theories of law by proposing what seems, at first

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1 blush, to be somewhat preposterous readings of the statute and
2 the case law is indicative of how far removed from proper
3 relief this motion to strike truly is.

4 So with that in mind, I am subject to any questions,
5 and I would yield the floor to the defense.

6 MJ [CAPT WAITS]: Okay. Do you have -- can you cite the
7 commission any case law in which the criminal proscription
8 against conspiracy is compared to joint criminal enterprise
9 and that those two theories of liability are equated?

10 TC [MR. CLAYTON]: The entire Bahlu argument on
11 conspiracy is riddled with that sort of comparison and there
12 seems to be some consensus as we put in our briefs, that the
13 court's not presently considering that we believe six, if not
14 seven, of the judges in the D.C. Circuit would find that
15 choate conspiracy concurrent with the joint criminal
16 enterprise theory exists in the international community. So
17 we can discuss that at greater length, at the risk of going
18 deeply into those other issues, but I would point you to that
19 particular case.

20 MJ [CAPT WAITS]: No. That's a pretty timely case, so
21 that's all I need to hear. That's all.

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

23 MJ [CAPT WAITS]: Thank you.

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1 Major Stirk, rebuttal?

2 ADDC [Maj STIRK]: Thank you, Your Honor. I'll be brief.

3 On that last point, I think that what Trial Counsel's
4 answer was was that, no, there is no case law that exists that
5 compares directly and has ruled yet on whether American-style
6 conspiracy, Pinkerton liability, for example, lines up with
7 what is internationally recognized as joint criminal
8 enterprise.

9 MJ [CAPT WAITS]: Are you saying that because al Bahlul's
10 en banc hearing was under a plain error review standard?

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

12 MJ [CAPT WAITS]: Is that why you're making that
13 assertion?

14 ADDC [Maj STIRK]: Yes, Your Honor, and that they didn't
15 agree on what's what.

16 MJ [CAPT WAITS]: So you think reasonable minds could
17 still differ on that issue?

18 ADDC [Maj STIRK]: Absolutely, Your Honor.

19 MJ [CAPT WAITS]: Under a different standard of review?

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

21 MJ [CAPT WAITS]: Under a higher standard?

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

23 MJ [CAPT WAITS]: Okay.

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1 ADDC [Maj STIRK]: And I think that that's borne out today
2 by having two lawyers talking right past each other about what
3 this theory of liability is and what we're even talking about.
4 We're not asking for a second bite at AE 019. This motion
5 goes along with AE 019. I mean, they're somewhat, you know,
6 companions. It's not a second bite.

7 This theory of liability that none of us can agree on
8 what the definition of what it is shouldn't be in front of the
9 members until at least you've decided what the theory of
10 liability is. Simply saying co-conspirator and common plan,
11 that's not a definition. That doesn't mean anything. It can
12 mean a very narrow aiding and abetting theory of liability --
13 which we believe is what it should be, and that's what's
14 accepted under the international law of war -- or it could be
15 a much broader Pinkerton style of liability which I would
16 assume is what the government believes is accepted and should
17 be instructed.

18 But that's not what those words mean, and we haven't
19 briefed that issue. That should come up in findings. It
20 shouldn't be on the charge sheet as a theory because it's
21 simply not detailed enough. It's not a definition of
22 anything. Those words don't mean -- they could mean anything.

23 MJ [CAPT WAITS]: Well, I mean, aren't there a lot of

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1 charging instruments and a lot of charges that can be brought
2 in criminal cases where terms of art, you know, legalese, is
3 used, and juries don't know what the technical legal
4 definition of that term is until they get to instructions and
5 making their findings?

6 I mean, the example that jumps out at me from my
7 court-martial practice is under Article 120 of the UCMJ, you
8 know, the current version of it, only requires that the
9 government allege a sexual act or a sexual contact, and those
10 terms are very specific. The definitions of those terms are
11 very specific, and they're not -- you know, a person, a
12 layperson reading those terms might not even come close to
13 what the -- you know, their impression of what that means
14 might not even come close to and probably doesn't even come
15 close to the legal definition of those terms that they receive
16 before they begin their deliberations.

17 So that's just one example. Because I'm so inundated
18 with that area of the law right now, that comes to my mind
19 that, you know, just because something -- just because there's
20 no definition provided in the charging instrument, is it
21 really as big a problem as the defense is making it out to be?

22 ADDC [Maj STIRK]: I believe so, Your Honor, and the
23 reason why is when you look at the difficulty of Article 120

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1 cases -- and in those situations, you're stuck with the
2 elements as they're defined in the UCMJ. So you eventually
3 get to instructions on what the acts are, what the elements
4 are, and what the definition is.

5 But here, "co-conspirator" is not found in the
6 Military Commissions Act. "Common plan liability" is not
7 found in the Military Commissions Act. So there is no
8 agreed-upon definition of what those words mean, even if they
9 were, you know, as legalese.

10 At best, you know, you would have to decide what they
11 mean in your commission, what you think the law is, before
12 they could be instructed to the members. And here, we're not
13 at that point, and we shouldn't be at that point until the
14 evidence is raised during the presentation of evidence, and
15 then the government requests an instruction based on what the
16 evidence that actually comes into trial is, not what they have
17 alleged the evidence will be in the 63 overt acts.

18 That's why these go together. That goes back to
19 their saying, "That's our evidence." Well, that evidence
20 isn't before the members. It's not before the commission yet.
21 Those are simply assertions of what they're going to show.
22 That's their opening statement. Here's what you will --
23 here's the evidence we're going to show you.

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1 MJ [CAPT WAITS]: But, I mean, that's what, you know, Mr.
2 Clayton's argument was. Well, that's what an allegation is,
3 that's what a charge sheet is, that's what an indictment is.
4 It's what the -- you know, the prosecutorial authority is
5 saying, the government is saying happened. And they
6 understand -- I mean, members, when they sit down, they
7 understand, well, this is all -- you know, they're going to be
8 given an instruction that these are just allegations.

9 So how is this allegation -- why are you asking the
10 commission to distinguish this allegation from any other
11 allegation that the government makes in a charging instrument
12 and give it some kind of special treatment just because it may
13 be hard for someone to understand?

14 ADDC [Maj STIRK]: Well, I think that's -- because what's
15 difficult to understand is why. The charges, Charges I
16 through V and their specifications are the charges. These
17 again are things going back to AE 019. The 63 overt acts are
18 the evidence they intend to show, either the co-conspirator,
19 the common plan theory, or conspiracy theory for Charge V.
20 That's evidence. That doesn't need to be on the charge sheet.
21 Those aren't allegations. That Usama bin Laden issued his
22 declaration of war against the United States in 1996 isn't a
23 charge against the accused. That's a piece of evidence that

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1 the government intends to put in to show that there was a
2 conflict. That doesn't need to be in the charge. I mean,
3 that's the evidence that supports a charge if, you know, it
4 comes in as evidence.

5 MJ [CAPT WAITS]: I mean, I'm starting to agree with the
6 government that you're -- that the arguments you're making are
7 dealing a whole lot more with the common allegation motion
8 than they are with the issue of the viability of
9 co-conspirator liability in this commission. So I'd like for
10 you to move over to that, which was really the substance of
11 this motion, rather than what the members are going to read
12 when they sit down here in this court-martial.

13 ADDC [Maj STIRK]: Absolutely, Your Honor. And going back
14 to the co-conspirator, again, as I mentioned in my opening
15 arguments, we concede that some version of vicarious liability
16 is probably going to be instructed to the members. Our
17 concern, and the reason for this motion, is that what is
18 charged on the charge sheet is not a definition of what that
19 vicarious liability instruction will be, and that it's not
20 appropriate either to have it on the charge sheet.

21 It doesn't need to be there, nor is it appropriate
22 for the members to see it in the very simple form as it exists
23 on the charge sheet now; that it should be a detailed

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1 instruction when you have evaluated the government's assertion
2 of what vicarious liability is, and the defense's, you know,
3 opposition to that, one would assume, and then you will craft
4 an instruction of what you believe the appropriate theory of
5 liability should be. And that's why we want it stricken from
6 the charge sheet. It doesn't need to be there at this point.

7 Thank you, Your Honor. That's all I have.

8 MJ [CAPT WAITS]: Okay. Well, before you sit down, there
9 is one argument the government's raised that -- you addressed
10 it very briefly, but to the commission it seems pretty
11 persuasive; and that is that the language of Article 77(1) of
12 the UCMJ tracks the language involved here in this commission
13 as far as principal liability or a co-conspirator theory of
14 liability.

15 And the government's argument is that if you take
16 your argument to its logical conclusion, that every time that
17 Congress has amended the UCMJ, that their decision to
18 specifically exclude language related to co-conspirator
19 liability was an expression of their intent to nullify the
20 Pinkerton doctrine. And I mean, to me, that's, you know, the
21 same Congress that has repeatedly reauthorized the UCMJ, or,
22 you know, the Rules for Courts-Martial, that same Congress is
23 the one who passed the Military Commissions Act.

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1 And why, if the same entity is passing a law that
2 reads the same, why -- and it's been interpreted in a certain
3 way for decades, why should the commission suddenly assume
4 that those same presumptions that have existed for decades
5 don't apply to the same language of a statute that's been
6 extrapolated over here to a commission?

7 ADDC [Maj STIRK]: Absolutely, Your Honor. I believe the
8 answer to that can be found both in the conspiracy charge and
9 in the difference between American common law and the
10 recognized international law of war. The reason why it
11 wouldn't apply in the UCMJ context is that everyone in --
12 under American common law understands the Pinkerton doctrine
13 is our version of vicarious liability. As the government
14 said, that's well settled. There's no dispute about that.
15 The UCMJ covers servicemembers of the United States. It's
16 under our federal law.

17 The Military Commissions Act is implementing an
18 international law of war tribunal. These are the
19 international laws of war, which is what the whole fight about
20 conspiracy is, is that American common law would suggest that
21 conspiracy is a viable war crime. That is not in any way
22 accepted under the international law of war.

23 The same issue here, the American concept of

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1 vicarious liability, clearly would include a Pinkerton-style
2 liability. The international law of war on vicarious
3 liability does not. It absolutely does not go as far as
4 Pinkerton, and the government cites various tribunals where
5 they have applied a version of a joint criminal enterprise
6 liability, but there's no universal agreement on what that is.
7 That's something that you will need -- we, the defense,
8 believe that you will have to decide applies here.

9 Congress, simply by tracking the language of the
10 UCMJ, can't bring Pinkerton liability to the international law
11 of war. It doesn't work that way. The vicarious liability in
12 this court has to be one that is recognized under the
13 international law of war, not simply the domestic American
14 law.

15 MJ [CAPT WAITS]: Well, there's a difference between what
16 they can't do and what they may have intended to do. And if
17 they were using the same language, and that language has a
18 history, doesn't it seem like they would have gone out of
19 their way to make sure, by adding additional language when
20 they used the same language for military commissions, to
21 legislate differences; namely, that, oh, by the way, since
22 this is an international type of tribunal that we're talking
23 about, a commissions setting, everything -- the history of

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1 Pinkerton liability or co-conspirator liability that you see
2 in American case law doesn't apply?

3 They didn't do that. They just apparently moved it
4 over, lock, stock and barrel. And if it was important to make
5 that distinction, as important as you're saying it is, it
6 seems like they would have done that.

7 ADDC [Maj STIRK]: Well, one would have hoped they would
8 have done that, but that's what the entire D.C. Circuit
9 argument multiple times has been, is whether conspiracy can be
10 an international war crime. Congress at the same time that
11 they passed this version of principal liability passed
12 conspiracy as a war crime, assuming -- or we don't know --
13 saying that it's an international war crime, and well, now
14 that's been called into great question whether the conspiracy
15 charge that Congress enacted in the Military Commissions Act
16 is a viable international war crime.

17 This is the same thing. This is the same issue here.
18 They probably did intend to include some, you know, American
19 style of Pinkerton liability, but that's not the international
20 law of war. And that's why we're raising this issue here and
21 believe that, you know, that they -- you know, that it's not a
22 viable theory in an international law of war tribunal.

23 MJ [CAPT WAITS]: Very well.

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

2 MJ [CAPT WAITS]: Thank you very much.

3 All right. Now, we will move on to the defense
4 motion to -- it's styled -- it's Appellate Exhibit 026. It's
5 styled as Defense Motion to Dismiss for Lack of Personal
6 Jurisdiction because the Military Commissions Act Violates the
7 Due Process Clause. Then the relief sought specifically
8 focuses the commission on the equal protection component of
9 the due process clause.

10 Who has the burden on this motion, and what is that
11 burden, and who will be arguing?

12 ADDC [Maj STIRK]: This is Major Stirk. I'll be arguing.
13 May I approach the lectern?

14 MJ [CAPT WAITS]: Yes, you may.

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

16 When we filed this motion, we did file it as a
17 challenge to jurisdiction. I agree with the government's
18 response to that, that I believe the defense has the burden,
19 and it's by a preponderance of the evidence. We are
20 challenging the constitutionality of an element of
21 jurisdiction, not whether the government has met that element
22 of jurisdiction, which I believe would be a jurisdictional
23 challenge. Here we're making a constitutional challenge to

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1 whether the government should be required to prove that
2 element or not.

3 MJ [CAPT WAITS]: So you agree that you have the burden?

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

5 MJ [CAPT WAITS]: And that the burden is by a
6 preponderance of the evidence?

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

8 MJ [CAPT WAITS]: Very well. I'll hear from you.

9 ADDC [Maj STIRK]: Your Honor, the 2009 Military
10 Commissions Act conditions the personal jurisdiction of a
11 military commission on the nationality of the accused. It
12 literally creates a segregated criminal justice system for
13 noncitizens. Now this commission is being asked to embrace
14 this segregation of the justice system for what we believe is
15 the first time in U.S. history.

16 Going back to World War II, the Supreme Court in
17 *Ex parte Quirin* held that American citizens are subject to the
18 jurisdiction of law and war military commissions to the same
19 extent as aliens. Going back even further, more than a
20 century ago, the Supreme Court in Wong Wing v. United States
21 directly confronted a congressional attempt to segregate the
22 criminal justice system, and in that decision clearly held
23 that the Fifth Amendment did not allow the government to

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1 discriminate on any basis when it challenges something as
2 fundamental as equal justice under the law.

3 Now, in the government's response, they give pretty
4 short shrift to Wong Wing, but the court there clearly held
5 that the Fifth Amendment applies to any prosecution of an
6 individual who is brought into the jurisdiction of the United
7 States. This is a United States war tribunal. He is within
8 the jurisdiction of the United States. The Fifth Amendment
9 should apply.

10 MJ [CAPT WAITS]: Okay. So I guess that's a point of -- I
11 would like clarification. I'd like both parties to address
12 the issue.

13 You're interpreting "within the jurisdiction" as
14 within the jurisdiction of this commission, not within the
15 contiguous 48 states or Hawaii or Alaska type of physical -- I
16 don't want to -- I don't know if you want to call it presence
17 jurisdiction?

18 ADDC [Maj STIRK]: Yes, Your Honor. That's correct.

19 MJ [CAPT WAITS]: So you're -- I'm going to assume that
20 you're probably interpreting that more broadly than the
21 government might?

22 ADDC [Maj STIRK]: I would assume so, Your Honor.

23 MJ [CAPT WAITS]: Okay.

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1 ADDC [Maj STIRK]: And yes, we are assuming that because
2 he's held by the United States military, I mean, he is in a
3 trial conducted by the United States, he is within our
4 jurisdiction.

5 MJ [CAPT WAITS]: So the fact that we're -- that he's
6 being held in Guantanamo Bay, Cuba, and that's where we're
7 holding this hearing, as far as the defense is concerned is
8 not a relevant factor on this question?

9 ADDC [Maj STIRK]: We do not believe that it is. We don't
10 believe that it should matter.

11 MJ [CAPT WAITS]: Very well.

12 ADDC [Maj STIRK]: So in the government's response, they
13 go on to argue that if, you know, the Fifth Amendment applies
14 and if there is due process required, that the procedural
15 protections within the Military Commissions Act satisfy those
16 due process requirements, and they cite back to Hamdan from
17 the Court of Military Commissions review.

18 And they're essentially arguing that a separate but
19 equal system of criminal justice is constitutionally sound.
20 However, our contention is that there's really nothing equal
21 about this system at all. The rules of evidence in this
22 military commission allow hearsay that would never see the
23 inside of a federal courtroom, and that's for good reason. I

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1 mean, the rules against hearsay are well-settled in the United
2 States, and this system was specifically designed to
3 circumvent those well settled rules regarding the
4 admissibility of hearsay.

5 Furthermore, the statutory lack of Miranda rights and
6 Miranda advisement within the Military Commissions Act guts
7 the accused's rights against self-incrimination. And that is
8 by design, that is within the law, and that creates this
9 separate system designed, obviously, to make a difficult
10 conviction easier for the government to obtain. And they talk
11 about lots of good reasons for that, well, it's war, and, you
12 know, these are hearsay statements from investigators from
13 around the world, they should come in if you decide that they
14 pass muster. But that is a separate system, but that's
15 specifically what the Supreme Court said you can't do in
16 Wong Wing.

17 Undoubtedly, Congress does enjoy wide latitude when
18 legislating in areas of immigration and about political
19 privileges. An individual's citizenship in those situations
20 is not only relevant but is very often the subject of whatever
21 regulation Congress is passing. Equal justice under the law,
22 however, is not a political privilege and should be subject to
23 the strictest scrutiny. Regardless of whether strict scrutiny

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1 applies -- and the government in their response, you know,
2 states that we have got the wrong test, that it's not strict
3 scrutiny, it should be a rational basis test; and we believe
4 that's incorrect. We believe that the cases that they cite
5 deal with the many states usurping Congress' authority when
6 passing legislation based on citizenship. And under those
7 cases it's strict scrutiny. When Congress does it for
8 Congress' right -- I mean, their lawful place to regulate
9 immigration and citizenship issues, that Congress gets a
10 rational basis review.

11 But our position is that's not what we have here.
12 They're not doing this to regulate immigration. They're not
13 doing it for any of the various reasons Congress should be
14 concerned about a person's citizenship. They did it
15 specifically by design to create this separate system. And
16 the only way they could get this separate system to pass
17 muster politically was to declare that only noncitizens would
18 ever be subject to it, and they were very clear about that
19 point. Congress was explicit that if two individuals were
20 arrested at the same time for committing the same offense, no
21 other distinction between them, the one with the U.S. passport
22 would be sent to a federal court, and the one without one
23 would be sent to Guantanamo for this specifically designed

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1 system that takes away rights they would enjoy in federal
2 court.

3 At this point, it's not even clear to us where you
4 would take a U.S. citizen for a law of war tribunal that
5 doesn't even exist. Thus far, American citizens have only
6 been tried for various kinds of conspiracy and providing
7 material support for terrorism, which are viable federal
8 crimes. So functionally, the only people who will face a law
9 of war commission are alien noncitizens.

10 We believe that in designing that system, Congress
11 unconstitutionally overstepped its bounds and is in violation
12 of the due process clause, and we'd point back again to
13 Wong Wing, which is directly on this issue and is still good
14 law. They can't do that. That is a violation of Fifth
15 Amendment due process.

16 That's all I have, Your Honor.

17 MJ [CAPT WAITS]: Thank you, Major Stirk.

18 Trial Counsel, Mr. Clayton?

19 TC [MR. CLAYTON]: Your Honor, as we noted in our brief,
20 no court, to consider this issue, has decided in favor with
21 the defendant's position in this particular case. And I think
22 that's telling, and I think that's telling because it reveals
23 the two fundamental flaws the defendant's argument is premised

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1 upon: First being an argument to suggest that historically
2 the United States has never successfully delineated between
3 aliens and citizens, or more specifically in this instance,
4 alien foes or enemy belligerents and citizens; that being the
5 first flaw. The second being, as counsel alluded to, the
6 strict scrutiny test being the test for when Congress acts in
7 this area. And I think that's probably the proper portion for
8 us to begin talking about the Fifth Amendment application and
9 the issues you raised with defense counsel.

10 But if the court would indulge me, I'd begin first
11 with the historical discussion that we believe permeates this
12 entire argument. The defense states, as I mentioned before,
13 and I quote here, "Congress has never legislated a separate
14 system of military tribunals for aliens alone." That's at
15 page 3 of our motion. That's just factually inaccurate, and
16 in our brief we pointed out the historical precedence for
17 doing that. But before we get to the precedence, let's talk a
18 little bit about the background and the jurisprudence that
19 stands behind that.

20 The Supreme Court has said, and I note most directly;
21 the *Harisiades v. Shaughnessy* case, 342 U.S. 580, which says,
22 "War is the most usual occasion to treat aliens differently.
23 Historically, there's been a longstanding assumption that in

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1 times of armed conflict, enemy aliens of necessity are subject
2 to different regimes." U.S.C.M.C.R. in Hamdan, echoing the
3 Supreme Court in Eisentrager, said that the framers never
4 supposed that the nation's obligation to its foes could be put
5 on parity with those of its defenders. That's at page 23 of
6 the U.S.C.M.C.R. opinion.

7 And Eisentrager goes even further, and this is the
8 Supreme Court speaking at page 769, "Our law does not abolish
9 inherent distinctions recognized throughout the civilized
10 world between citizens and aliens, nor between aliens of
11 friendly and of enemy allegiance." It is the latter that
12 we're talking about today.

13 The Supreme Court has on more than one occasion
14 endorsed the notion that those who are enemies, those who are
15 aliens and enemies combined in particular can be treated and
16 have a different set of rights and obligations than those who
17 are citizens, those who are residents, and even in some
18 instances, those who are friendly aliens during a time of war.

19 Indeed, it's been the longstanding military practice
20 to hold laws differently for those enemy belligerents. It
21 dates all the way back to the Second Continental Congress. As
22 Winthrop tells us at 831 of Military Law and Precedence, the
23 Second Continental Congress reserved military tribunal for the

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1 crime of spying to, and I quote, "all persons not citizens or
2 owing allegiance to the United States of America." From the
3 very early, early inception of our constitutional republic,
4 this is a time-honored and historical distinction. Now, one
5 that's not to be abused, mind you, and I'll discuss that in a
6 few moments.

7 The Supreme Court in 1928 in the case of
8 J.W. Hampton, Jr. & Co., 276 U.S. 394, goes further to say we
9 should look particularly at what Winthrop says about the
10 Second Continental Congress because the practice of the early
11 Congress informs the construction to be given to the
12 Constitution's provisions.

13 The defense has cited Ex parte Quirin. I believe
14 they have cited it incorrectly, because Ex parte Quirin also
15 echoes the government's position on this issue. The defense
16 says that because Ex parte Quirin held or stated that citizens
17 could be subject to tribunal similarly to noncitizens, that
18 that means they must -- must, must by necessity of equal
19 protection, both be subject to the same tribunal. Conversely,
20 if you look at page 41, Quirin says that the early spying
21 legislation that made alien but not citizen spies subject to
22 the jurisdiction of a military tribunal for spying must be
23 regarded as the contemporary construction of the Constitution.

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1 By saying that citizens could also be a part of a
2 military trial does not foreclose, certainly not historically,
3 the ability of Congress to enact legislation that
4 distinguishes between the two and, as has been the case with
5 spying from the inception, in the early days of our country,
6 relegate enemy aliens to a special court for those types of
7 offenses.

8 And this is important because, as we talk about
9 history, one might be inclined to say that that's a moment
10 that has passed, that our jurisprudence has moved beyond that,
11 or maybe even our Congress' culture has moved beyond that.
12 There are modern examples of very similar types of
13 distinctions done for practical and necessary reasons and done
14 effectively. I note, for example, that the Foreign
15 Intelligence Surveillance Act, as noted in our brief, is --
16 draws sharp, sharp distinctions between aliens and foreign --
17 foreign surveillance versus domestic surveillance. And the
18 Supreme Court has endorsed that in U.S. v. U.S. District
19 Court, Eastern District of Michigan, 407 U.S. 297.

20 In assessing why those differences are necessary, and
21 this will go to our rational basis test that we will discuss
22 in a few moments, the court points out the practical
23 difficulties of gathering surveillance or intelligence from a

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1 foreign entity, that that intelligence in a foreign nation,
2 sometimes in hostile environments, sometimes in warlike
3 conditions, the practical considerations there weigh upon the
4 Fourth Amendment differently from domestic surveillance,
5 domestic evidence gathering.

6 I think that's poignant -- that modern example is
7 poignant here because that's what we're dealing with in this
8 instance, a need to gather evidence, a need to ferret out
9 crimes, a need to capture individuals, a need to be able to
10 put on for a factfinder fair, probative evidence that a judge,
11 a professional jurist, has examined and found to be both
12 probative, relevant, and meeting the rules that are obliged --
13 they're obliged -- the government is obliged to find. That's
14 what this is about.

15 This is not an effort to single out aliens as being
16 subject to a harsher penalty. It's about accounting for these
17 very practical difficulties and differences as in a FISA
18 context, and as we have in historic context in the past, of
19 creating a system that still allows for a due process and a
20 moment of justice that the practical difficulties of
21 committing your crime in a war zone should not be a means by
22 which you can shield yourself from justice or responsibility.

23 That's what the purpose of this tribunal is. And we

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1 can talk more about rational basis, I suggest that that more
2 than meets the test. The defense makes the sweeping
3 proposition about history by saying the constitutional and
4 historical uniqueness of the MCA cannot be overstated, page 4.

5 I think I've just shown you that it can be
6 overstated. Indeed, the defense's argument overstates the
7 uniqueness and historical anomaly as they would have us
8 believe. It is indeed neither historically unique or an
9 anomaly, and I think it's this type of argument that it
10 reflects upon, and it pervades the rest of the argument that
11 the defense puts forth in this particular issue, which is why
12 I thought it was important to sort of lay the historical
13 background and perspective prior to going into the
14 constitutional analysis under the equal protection clause.

15 I think a good segue into that particular analysis of
16 the proper test for these types of distinctions comes from the
17 Second Circuit in examining the FISA statute where they say,
18 "nothing prevents Congress from adopting standards and
19 procedures that are more beneficial to United States citizens
20 and resident aliens than to nonresident aliens so long as the
21 differences are reasonable. And that's U.S. v. Duggan, 743
22 F.2d 59 at pages 75 and 76. And this, Your Honor, leads to
23 the second fundamental flaw.

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1 I may have misunderstood Major Stirk, but I believed
2 him to have stated in his argument that he believes the strict
3 scrutiny test is reserved to those states that are attempting
4 to restrict rights in violation of equal protection and the
5 Congress -- the test for Congress is rational basis, yet in
6 this unique or anomalous instance, he would advocate strict
7 scrutiny. I may have misunderstood the argument, but I
8 believe that is what it was. If that, indeed, were the
9 argument, I think that is an even weaker argument than that
10 put forward in the brief. Because if you're conceding that
11 the test for Congress, as you must, because it is, is a
12 rational basis test, and for the number of reasons we have
13 already discussed and will discuss in a moment, this
14 particular statute more than meets that test.

15 Prior to getting to that, to address the commission's
16 question about the Fifth Amendment and the scope of its
17 application, I think for the purposes of this argument that
18 the government will assume *arguendo* that the equal protection
19 provisions of the due process clause apply in this instance.
20 The court need not reach that question in order to decide in
21 favor of the government because, as I've argued here today,
22 the rational basis test is the test, and this statute more
23 than meets that test. So we reserve that argument but argue

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1 from that position arguing that it applies in this particular
2 instance.

3 As is helpful to me in both the historical
4 perspective as well as the constitutional application of the
5 test, I want to start with some jurisprudential backdrop. It
6 is and has long been the case, as noted in Mathews v. Diaz 426
7 U.S. 67, the Supreme Court gets great deference to the
8 political bodies in wartime. I quote the court, "Any policy
9 towards aliens is vitally and intricately interwoven with
10 contemporaneous policies with regard to the conduct of foreign
11 relations, the war power. Such matters are also exclusively
12 entrusted to the political branches of government as to be
13 largely immune from judicial inquiry or interference."

14 This again is not to the direction of the rational
15 basis test rather than a strict scrutiny test. And as we
16 discussed a moment ago in Eisentrager, the Supreme Court noted
17 the inherent need to distinguish between the citizens and
18 aliens, and more specifically aliens of enemy allegiance.

19 It's against this sort of jurisprudential background
20 that each court to have considered this issue prior to the
21 commission has held that the rational basis test is the
22 appropriate test. This is the critical inquiry on this issue
23 because, as the court could gather from the defense argument,

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1 the only -- only possibility that argument has of succeeding
2 is the application of the strict scrutiny test, which is
3 simply not the test. We note the U.S.C.M.C.R. in Hamdan
4 specifically redirected the strict scrutiny test. In Nashiri,
5 the commission applied the test at AE 046B. In the Mohammad
6 commission, the commission applied the rational basis test in
7 AE 106C. This is notable as well because that decision came
8 March 7 of 2014, which is after the Hamdan II decision vacated
9 the other parts of the U.S.C.M.C.R.'s opinion; and the Hamdan
10 commission found, and properly so, that no superior court to
11 the U.S.C.M.C.R. had addressed that question as to what the
12 proper test was, so that still remains the law of this
13 commission, governing this commission, and has some
14 precedential value. And at a minimum, the Hamdan -- excuse
15 me, the Mohammad commission would have some persuasive value,
16 I would assume for this commission.

17 MJ [CAPT WAITS]: Do the orders or the rulings in Nashiri
18 and KSM, do they specifically mention rational basis, or do
19 they just defer to the C.M.C.R.'s last word on this issue?

20 TC [MR. CLAYTON]: They're much more the latter than the
21 former, but one can't read the order deferring to the C.M.C.R.
22 position without assuming that the C.M.C.R. applied the proper
23 test.

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1 MJ [CAPT WAITS]: Does the ruling -- does it refer to --
2 does the ruling specifically refer to a rational basis?

3 TC [MR. CLAYTON]: It does not explicitly use the
4 "rational basis" term. It says that the Hamdan case on this
5 point remains controlling. I think the most notable opinion
6 there would be the Hamdan opinion because it came after -- the
7 Hamdan II opinion came after the court vacated the other two
8 portions of the U.S.C.M.C.R. opinion. I don't know the way
9 one could read the Mohammad commission order or the even the
10 Nashiri commission's order without presuming that they too
11 believed that the rational basis test, which was strictly --
12 which was applied, and conversely, strict scrutiny
13 specifically rejected by the U.S.C.M.C.R. I don't know how
14 one could read those orders without presuming that the court
15 adopts that as its position as well, although not articulated
16 explicitly.

17 And even outside of the realm of these commissions
18 cases, Judge, to the extent there's again this lingering
19 concern that somehow the MCA is unique and anomalous among
20 other laws, there are the cases we cite in our other brief of
21 instances in which statutes draw sharp distinctions between
22 aliens. I note the Ferreira case, 275 F.3d at 1025 through
23 26, also applying the rational basis test to the Hostage

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1 Taking Act, which is a federal act that singles out certain
2 types of punishments for aliens versus citizens, and also in
3 the Narenji, which is a D.C. Circuit case, 617 F.2d 745.
4 Again, each case to address these types of issues is addressed
5 so, on the terms of rational basis.

6 With the sort of one removal of the Nashiri and
7 Mohammad commission orders, as the commission properly points
8 out, no case -- which is telling, no case has addressed this
9 specific issue by a strict scrutiny standard. That alone
10 could be dispositive for the issue. But for the sake of
11 continuing to make a sound record on this issue and to be sure
12 that I'm answering any lingering questions the commission may
13 have, I'd like to now address the rational basis test briefly.

14 As the commission is aware, it's a two-pronged test,
15 the first being what -- the commission must determine what, if
16 any, legitimate government purpose Congress could have been
17 pursuing by entering this piece of legislation.

18 And I digress for one moment. The "could have been
19 pursuing" does not require Congress to articulate specifically
20 in the legislation exactly what it is pursuing. We are left
21 to discuss, and even at some level hypothesize, as to what the
22 rational or, excuse me, legitimate purpose could have been.
23 Here I don't believe we have to hypothesize or guess far

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1 because the legitimate government purpose behind ensuring the
2 security of our nation by providing a forum to adequately and
3 fully adjudicate matters and hold those accountable who seek
4 to terrorize the United States and kill United States military
5 personnel is beyond legitimate, and certainly one that if we
6 were to comb the legislative record, would be -- would be
7 significantly pointed to.

8 The second prong of the test is that the rational
9 basis must -- the rational basis is there must be a rational
10 basis to believe that the hypothesized purpose of the
11 legislation would be achieved by the legislation. As we
12 talked about in the FISA context, creating a separate system
13 with separate statutory procedures and intricate safeguards to
14 assure due process is clearly yet another arrow in the quiver
15 of the warfighting effort of the United States.

16 One would find a difficult time persuading any
17 rational person that creating a system that allows us to hold
18 individuals like the accused accountable for his conduct over
19 the period of a decade which resulted in so much death and
20 carnage would not be rationally related to the effort to
21 protect the United States citizens in the realm of national
22 security.

23 And like FISA, as we discussed previously, the unique

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1 characteristics of conduct of crimes being committed amidst
2 hostilities, being committed in foreign countries, sometimes
3 foreign countries governed by hostile governments -- I'd note
4 Afghanistan in 1996 forward to 2001, for example -- should not
5 be sufficient and enable these types of defendants to mask or
6 shield themselves from liability. And it's that particular
7 goal that Congress is pursuing in enacting this legislation,
8 so on a rational basis, it in fact would be difficult to
9 persuade any rational thinker that this was not designed with
10 that goal in mind -- was an acceptable one.

11 With that, I would like to discuss just briefly a
12 number of guarantees that this commission is well aware of,
13 but are worth mentioning, given the defense's characterization
14 of these proceeding as somehow being so devoid of due process
15 as to be something similar to the system in Wong Wing.

16 As the commission is well aware, our most fundamental
17 notions of due process are enjoyed by this accused. Even in
18 this distinct system, we must prove beyond a reasonable doubt
19 his guilt, as we discussed in the context of the last
20 argument. That's in Section 9491(1) through (4). He has a
21 right to qualified military counsel, as we see here today,
22 very capable and able counsel.

23 He has a right to -- against self-incrimination in

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1 948r. That's not the strict application of the prophylactic
2 Miranda provisions the Supreme Court has created, but a due
3 process right nonetheless. I don't think the distinction
4 between those makes the system we have before us today so
5 devoid of due process as to be something akin to what happened
6 in Wong Wing, which we'll discuss in a few moments.

7 Remember, the Miranda right itself, even for
8 citizens, is not absolute. I note for the court, the
9 Howes v. Fields opinion from the Supreme Court in 2012
10 discusses whether or not a prisoner, someone who is in custody
11 for some period of time who then volunteers to speak with law
12 enforcement agents about a crime that occurred out of custody
13 is required to be Mirandized after he has been in custody for
14 a period of time. The Supreme Court said no.

15 While so grand sweeping hyperbole might lead one to
16 believe that these distinctions are so great as to be devoid
17 of due process, the statute and the law, when examined
18 closely, is anything but that. Again, protection against the
19 use of statements derived or obtained through torture or cruel
20 or inhumane treatment for both the defendant and others, the
21 right to exculpatory evidence, the right to an impartial
22 decision-maker, which we have seen exercised in this very
23 courtroom today as counsel for the defense, the able counsel,

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1 voir dired the judge on his ability to be impartial in light
2 of a particular complaint, the protection against double
3 jeopardy and ex post facto laws which is an issue we will
4 litigate in this commission and, of course, the right to
5 appeal to a federal civilian court.

6 The remaining issue that the defense is pointing to,
7 to suggest that this system is somehow lesser, is the
8 strengthened viability of what I will call a residual hearsay
9 exception over an objection based on confrontation as to
10 whether or not testimonial hearsay can come before this court,
11 as it could have in any court in America prior to 2004. I
12 don't know that on that sole basis one can come to the
13 conclusion this court begins to approach the system in
14 Wong Wing, which was described by the Supreme Court as a
15 nonjudicial system in which an administrative board sentenced
16 Chinese immigrants -- unlawful Chinese immigrants to hard
17 labor based upon some sort of administrative hearing without
18 any of the trappings that we just described that are
19 fundamental due process, which are statutorily guaranteed in
20 this process.

21 So even when excepting the rational basis test on its
22 face which favors the United States, if there are any
23 lingering concerns or lingering doubts about whether or not

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1 this system indeed protects the defense -- or, excuse me, the
2 accused, I think those are satisfied by the statute.

3 I think it's also important, although not raised in
4 oral argument, to note the briefing on this issue in which the
5 defense not only asks the commission to disregard all
6 historical practice, but also to disregard all precedent on
7 this issue before the commission today.

8 It is not the case that this commission writes upon a
9 clean slate on this issue. Many have gone before. I note for
10 the commission Judge Henderson's concurrence in Bahlul at
11 767 F.3d at 33 in which Judge Henderson cited a number of
12 cases addressing the equal protection argument and the
13 rational basis test over and over again.

14 The defense seizes upon a comment in oral argument by
15 the government, by General De Pue, noting that these were
16 decided in the context of civil habeas litigation to suggest
17 that they have no precedential value at all. Judge, I think
18 that just misunderstands what precedent is. As the court is
19 well aware, there's both binding and persuasive precedent.

20 At a minimum, we should conclude and can conclude
21 that federal courts interpreting the same statute, albeit in a
22 civil habeas context, would certainly remain as persuasive
23 precedent to this commission, just the same as coequal

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1 commissions in the Nashiri case and the Mohammad case are
2 valid and important persuasive precedent, but that we're not
3 left with just persuasive precedent in this particular case.

4 As I suggested before, there are portions of the
5 Hamdan opinion as noted in the Mohammad order that we have
6 discussed that remain in effect, and that is the court
7 superior to this one. One might argue that that has a binding
8 value on this court to apply that rational basis test and, in
9 the context of the same statute as decided there, to find that
10 there is no equal protection violation, even assuming arguendo
11 that those tests apply.

12 It is in the face of this long history and in the
13 face of this particular type of precedent that the defense has
14 asked you to simply go out on a limb and be the first court to
15 disagree with all of that.

16 Judge, I suggest that even if you were to go out on
17 that limb and be the first court and decide, you need to look
18 at this as if it were a clean slate. The application of the
19 tests, when looking at the reasons why this statute might have
20 been instituted, combined with the fundamental due process
21 guarantees specifically outlined in the statute, which you
22 yourself will be in charge of policing, show that this statute
23 does not run afoul of the equal protection portions of the due

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1 process clause, even if applied to this accused, in this
2 courtroom, in this location.

3 With that, Your Honor, I am open to questions.

4 MJ [CAPT WAITS]: I don't think I have any questions.

5 Thank you, Mr. Clayton.

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

7 J [CAPT WAITS]: Major Stirk, rebuttal argument?

8 ADDC [Maj STIRK]: Thank you, Your Honor. Yes, just
9 briefly.

10 I just want to touch on a few points. The prosecutor
11 talked about this long history going back to the spying cases
12 and statutes from the founding of the republic, and I just
13 want to point out that that's an anachronism. That was a case
14 in which spying could only at the time be committed by a
15 noncitizen. If you were a citizen and you were spying, that
16 was treason and you were a traitor. They were different
17 crimes. It wasn't a separate system of justice that was
18 created then, and so it doesn't go back to the founding.

19 I also want to note that they talked a bit about
20 Eisentrager, which was a case about German citizens after --
21 during World War II who were captured in China committing
22 violations of the laws of war. They were brought back to
23 American-occupied Germany and tried in the law of war military

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1 commission there. And the Supreme Court simply said no, they
2 don't have habeas rights for that, that was a lawfully
3 constituted military commission in occupied Germany. It just
4 doesn't apply to this case.

5 And I want to touch back on Wong Wing, which does.
6 It directly addresses the issue.

7 MJ [CAPT WAITS]: Well, go back to Eisentrager. Why does
8 it not address this?

9 ADDC [Maj STIRK]: At the time, they were ----

10 MJ [CAPT WAITS]: Yes, but at the time, if they said what
11 you just said they said, then it was a declaration that that
12 was a lawful tribunal before which aliens could be -- criminal
13 actions could be brought against them. And it was something
14 probably pretty similar to what we have here, if not less than
15 what we have here, in terms of the rights that were guaranteed
16 to those people. I'm just guessing. I haven't gone to look
17 at that statute.

18 ADDC [Maj STIRK]: And the reason I bring it up is because
19 there's nothing about those military tribunals that suggested
20 that American citizens who had committed violations of the
21 laws of war couldn't be tried by them. It wasn't a system
22 only designed to try alien noncitizens. Taking from that
23 anything, I don't think it applies in this situation where

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1 we're arguing that conditioning jurisdiction on alienage is a
2 violation of due process.

3 The government spent some time talking about why this
4 is -- if under a rational basis evaluation that this would be
5 okay, and they say that the legitimate purpose is to provide a
6 forum for this kind of tribunal. Well, as we're all aware,
7 there already is a viable forum. It's the Southern District
8 of New York, for one, federal court. They could take the case
9 there. So to suggest that that's a legitimate reason or a
10 legitimate purpose sort of misses the point, especially when
11 tied with the question of how rational that decision was.

12 And as we're all familiar with how this process came
13 about, that decision was not rational. It was a hysterical
14 response to the idea of trying these al Qaeda super-soldiers
15 in the Southern District of New York and closing down the
16 island of Manhattan and how dangerous that would be. That's
17 why Congress created this system here. It wasn't a rational
18 decision at all.

19 And then briefly going back to the question of is
20 there any precedential value in the Court of Military
21 Commission's review of the Hamdan case.

22 MJ [CAPT WAITS]: I was hoping you were going to get to
23 that.

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1 ADDC [Maj STIRK]: Obviously, I think you're going to
2 guess that I'm going to suggest there is not much precedential
3 value, if any, left. The case was overturned. It was not
4 overturned on this issue. However, since the two commission
5 cases have ruled and relied on that case, the en banc panel,
6 the en banc decision of the D.C. Circuit returned the question
7 to the panel of the D.C. Circuit because the en banc decision
8 didn't ask them to brief this very issue. So they sent it
9 back to the three-judge panel and told them, look at this
10 exact issue. So there's very little doubt that the
11 D.C. Circuit doesn't think much of the Hamdan decision or they
12 wouldn't have sent it back.

13 MJ [CAPT WAITS]: But if it's not an issue before them,
14 obviously they're not going to consider it, so what else are
15 they going to do besides send it back? That doesn't really
16 speak to the merits of the appellant's claim. It only speaks
17 to the fact that this is an issue before an appellate court,
18 and it either has to be addressed en banc or back to the
19 panel. So it hasn't been addressed; address it. It didn't --
20 I mean, from my reading, it didn't indicate one way or the
21 other whether the en banc panel was favorably or unfavorably
22 disposed toward an equal protection argument.

23 ADDC [Maj STIRK]: Our position would be that if they

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1 weren't interested, they could have just said, well, the
2 decision is overturned, we don't care about the due process
3 issue. They cared enough to have it briefed and argued. So
4 to us, to the defense, that suggests that relying on Hamdan is
5 misplaced reliance or, if anything ----

6 MJ [CAPT WAITS]: All because of al Bahlul's en banc panel
7 remanding it to the panel?

8 ADDC [Maj STIRK]: Yes, Your Honor. We believe the
9 decision does not -- is not directly precedential, that you're
10 not bound by it. It could certainly be something persuasive.

11 MJ [CAPT WAITS]: If only -- that's my immediate superior
12 court that we're talking about here?

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

14 MJ [CAPT WAITS]: So it's the closest level -- next level
15 of court to this commission.

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

17 MJ [CAPT WAITS]: And it's the only statement that we have
18 on this issue, and it wasn't reversed on that issue. So how
19 can I -- I'm bound to follow the precedent of my superior
20 courts, unless they have been overturned, and it hasn't.

21 ADDC [Maj STIRK]: I think we just respectfully disagree
22 and I think the Trial Counsel's statement that -- I think
23 somewhat admits that, well, no one particularly thinks that

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1 that case is going to stand for long, that it was reversed,
2 and all indications are that a lot of questions have been
3 raised about the decision on the due process part. And it was
4 a decision that was reversed.

5 MJ [CAPT WAITS]: On other grounds. I'm a trial -- this
6 is a trial court. It's a commission. I'm bound to follow the
7 precedent. I don't anticipate what's going to happen next.
8 That's part of the reason why some motions in this case have
9 not been heard yet, is because of what's going on in
10 al Bahlul.

11 ADDC [Maj STIRK]: Understood, Your Honor.

12 MJ [CAPT WAITS]: Okay? So I believe this commission as
13 well as some of the other pending commissions are hoping that
14 they get direction on that soon, but nobody's making a ruling
15 based on what they think any appellate court is going to do.
16 And you're kind of -- you're arguing that there's people up
17 there that just don't like this, it's going to be overturned.
18 That's not my standard.

19 My standard -- my duty is to follow case precedents,
20 particularly of my immediate superior court, which is --
21 there's really nothing more persuasive than that, so ----

22 ADDC [Maj STIRK]: Fair enough, Your Honor. We again just
23 respectfully disagree. We believe it's been overturned and

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1 should not bind your decision.

2 MJ [CAPT WAITS]: Very well.

3 ADDC [Maj STIRK]: And I believe that's all I have, Your
4 Honor. Thank you.

5 MJ [CAPT WAITS]: Thank you, Major Stirk.

6 Okay. So that concludes the two motions that we
7 discussed in our 802 conference that we would hear, that the
8 commission would hear this morning.

9 And as I alluded to also in our 802 conference, there
10 are a couple of issues related to our 505(h) hearing that have
11 been noticed by the government that the defense has either, in
12 pleadings or in the 802 conference, indicated that they will
13 have objections to. And since those are not subject to any
14 kind of closure under 505, and we have a strong preference for
15 everything being conducted in a public proceeding that can, I
16 want to go back to those issues, and I'm looking for them
17 right now.

18 And I guess before I do that, I want to specifically
19 talk about the one -- what the defense characterized as a
20 housekeeping issue on the government's styled reply to the
21 defense's supplemental reply to the government's supplemental
22 response -- it sounds like who's on first, I know, but we all
23 know what we're talking about, and that is Appellate

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1 Exhibit 021. It has been received as Appellate Exhibit 021S,
2 was it?

3 ADDC [Maj STIRK]: That's correct, Your Honor.

4 MJ [CAPT WAITS]: The commission has decided that it will
5 not -- you know, under the local court rules, under the
6 commission's rules, that it would be improper for the
7 commission to accept that. Obviously, the government is free
8 to argue every word of that rejected pleading in a few
9 moments, if you'd like.

10 But in fastidious adherence to the local rules and to
11 avoid a slippery slope of not following the prescribed
12 pleadings cycle, the court -- the commission is going to -- is
13 not going to accept that pleading. I don't know logistically
14 how we go about removing it, but we will address that with the
15 commission staff. And that's not to say that you did anything
16 wrong. I understand why you did what you did, but that's the
17 commission's position on it.

18 TC [MR. CLAYTON]: Your Honor, in order to educate
19 ourselves, could you tell us which rule the commission is
20 relying upon for that particular ruling just so that we make
21 sure we inform ourselves with the rule and file properly the
22 next time?

23 MJ [CAPT WAITS]: You know, without pulling it up, it's

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1 you file a motion, I think you have 14 days to respond, and

2 then the opposing party has seven days to file a reply.

3 That's my recollection.

4 TC [MR. CLAYTON]: Okay. So the basic motion cycle rule
5 is what ----

6 MJ [CAPT WAITS]: Yeah, the basic motion cycle rule.

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

8 MJ [CAPT WAITS]: That's all I'm referring to. And I
9 know -- I mean, the confusion in this instance is the defense.
10 I know when you conferenced your request to file your
11 supplemental motion, the defense stated that they objected,
12 but then they did not file a response. Okay. So you filed
13 your supplemental response to the defense's motion, and at
14 that point, once the defense actually saw what was in your
15 supplemental response, decided to file a reply. So it's a
16 little unusual. This would probably only come up in the
17 context of the court -- the commission granting one party or
18 the other the opportunity to supplement their sum filing.

19 So it's an unusual instance. I understand the
20 government's desire to get something in writing before the
21 commission based on things that have not been addressed in
22 pleadings, but that's why we have the rules regarding
23 pleadings; otherwise, we could go back and forth all day.

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1 So that's the only reason I'm rejecting it, is based
2 on the local rules. Again, I don't -- I don't think it would
3 have prejudiced the accused in this case because you're going
4 to probably argue everything in there orally anyway. So it's
5 more about keeping an orderly progression of the filing of
6 pleadings in the case. Okay?

7 So the first issue that I have that came up, I
8 believe this is in the defense's reply, which would probably
9 be what, 021R?

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

11 MJ [CAPT WAITS]: Appellate Exhibit 021R, and that
12 objection is to the -- to a witness testifying by remote
13 means, namely video teleconference.

14 So I will hear your -- if you would like to put that
15 on the record now.

16 DDC [LtCol JASPER]: Yes, sir. May I approach the
17 lectern? Thank you.

18 ATC [MAJ LONG]: Your Honor, I apologize for the
19 government. Before that progresses, the government is
20 requesting a short comfort break. And I apologize.

21 MJ [CAPT WAITS]: Okay. Ten minutes?

22 ATC [MAJ LONG]: That would be fine, Your Honor.

23 MJ [CAPT WAITS]: Well, we'll make it about 12 minutes.

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1 We're getting close, I think, to the next prayer time. I
2 think it's around 1215. So if we're going to do that ----

3 DDC [LtCol JASPER]: 1215, Your Honor, that's correct.

4 MJ [CAPT WAITS]: If we're going to do that, then we need
5 to try to dispose of this motion, these issues, relatively
6 rapidly. So I'm going to say -- let's just take about a
7 seven-minute recess, okay?

8 ATC [MAJ LONG]: Yes, Your Honor.

9 MJ [CAPT WAITS]: So the commission is in recess until
10 1150.

11 [The R.M.C. 803 session recessed at 1143, 26 January 2015.]

12 [The R.M.C. 803 session was called to order at 1159,
13 26 January 2015.]

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 All right. So, Colonel Jasper, I think you were the
18 one who was about to stand. The issue is you putting on the
19 record your objections to the remote testimony of a witness in
20 the -- on this female guard issue motion.

21 DDC [LtCol JASPER]: Yes, sir. Thank you. Yes, sir.

22 Back in November, specifically November 14th, we gave
23 notice to the government that we wanted to produce the

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1 previous OIC who was in charge of the female guard force. At
2 that time she was here at Guantanamo Bay, and we knew that
3 potentially she would be revolving into a different position
4 in mid December.

5 We gave that notice for her to testify in person, and
6 our objection is simply that video teleconference or
7 telephonic communications are not an adequate substitute in
8 this matter, when we have given that far of notice. We have
9 interviewed her and we let her know she is going to be a
10 witness for either the defense; if not us, the prosecution
11 made us aware that she was a witness for them. She is simply
12 on leave in Hawaii.

13 We just feel as if, given the notice, the gravity of
14 the case, the significance of the issue, the fact that she
15 knew back on November 17th, as well as us, that we would be
16 proceeding this week starting today, January 26th, 2015, that
17 there just isn't -- it's not sufficient that she is not here
18 in person, but rather on approved leave. That's our position
19 on the matter, Your Honor.

20 MJ [CAPT WAITS]: Very well.

21 DDC [LtCol JASPER]: Thank you.

22 MJ [CAPT WAITS]: Trial Counsel, your response?

23 ATC [MAJ LONG]: Your Honor. May it please the court,

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1 Lieutenant Colonel Long for the government. I would just
2 start out by noting, Your Honor, just based on what the judge
3 had said specific to the government's reply to the reply
4 rejecting that filing, there were three particular matters
5 that the government raised. We're only going to, at this
6 time, address the VTC issue. The government would, however,
7 reserve the right for oral argument based on defense
8 objections to the other two items that were raised in our
9 pleading.

10 MJ [CAPT WAITS]: What were those other two items again?

11 ATC [MAJ LONG]: There was the former commander's
12 declaration as hearsay, and there was also the issue of the
13 relevance of the letter, the KSM letter.

14 So both objections will be forthcoming -- the
15 government would presume would be forthcoming during later
16 argument, and the government will be prepared to cite our
17 arguments and our response to those objections at that time,
18 unless the court would wish -- I could go through all three of
19 those now.

20 DDC [LtCol JASPER]: We don't think it's ripe yet, sir.
21 We haven't objected formally. We would like to make those
22 objections when we get to the female guard motion.

23 MJ [CAPT WAITS]: Okay. I want those to be -- I want them

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1 to be raised, assuming that we -- and this is a -- this is a
2 complete assumption right now. If we have a bifurcated
3 hearing on that, closed and open, I want you to raise it
4 during the -- obviously the unclass, the open portion of that
5 hearing.

6 DDC [LtCol JASPER]: We'll comply with that. Thank you,
7 sir.

8 MJ [CAPT WAITS]: All right. Yeah. So go ahead and limit
9 it to the VTC testimony issue, then.

10 ATC [MAJ LONG]: Yes, Your Honor. The government invites
11 the court to look at the Military Commission Rule of Evidence
12 104, something just so fundamental, the government risks
13 instructing the court on the law simply to put it on the
14 record. But in the preliminary questions, there's various
15 different items that the rule considers, to include
16 availability of a witness to testify, either at the site of
17 trial or a remote site; and that is to be determined by the
18 military judge. I only highlight that section of the rule
19 because that's followed by the following sentence, which says,
20 "In making these determinations, the military judge is not
21 bound by the rules of evidence" ----

22 MJ [CAPT WAITS]: Tell me the rule again.

23 ATC [MAJ LONG]: Yes, Your Honor, it's Rule 104(a). I

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1 have it as page 3-2 in my Rules.

2 MJ [CAPT WAITS]: Okay.

3 ATC [MAJ LONG]: So in looking at that provision,
4 specifically that the court is not bound by the rules of
5 evidence, with the exception of privileges and those rules
6 with respect to privileges, we then look elsewhere as to where
7 the rules may provide guidance.

8 Before I do that, I would note, although it's not
9 something that the defense raised previous to the government's
10 standing, that in the preliminary hearing context that the
11 Supreme Court has held that there is not a right to
12 confrontation. The confrontation right is reserved as a trial
13 right, and for that decision, I cite to Barber v. Page,
14 390 U.S. 719.

15 So in moving on from Rule 104 in the Military
16 Commissions Rules of Evidence, we look to Rule for Military
17 Commission 703(c)(3), and I have that on page 2-52 at the
18 bottom, that in this instance where the government has
19 requested video or remote teleconference testimony, the
20 defense has objected; that is the court who balances probative
21 factors, and I read, "including but not limited to the need of
22 either party for personal appearance of the witness, the
23 remote and unique situation of the forum, and the logistical

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1 difficulties in obtaining the presence of the witness."

2 As the defense counsel has already mentioned, at the
3 time in the first week of December, when the witness was made
4 available and elected to be interviewed by the defense, prior
5 to that, the government had provided to the defense the
6 declaration of this witness to have that in preparation for
7 that interview. That interview was conducted, and at that
8 time the government informed the defense that the testimony at
9 the January hearing of this witness would be by some remote
10 means, as the witness would be on family vacation. So the
11 defense then was put on notice the first week of December.

12 The fact that this is a preliminary hearing where the
13 rules of evidence -- for instance, hearsay and other rules,
14 with the exception of privilege -- do not apply: The fact
15 that there is no constitutional right of confrontation at a
16 preliminary hearing, the fact that the touching -- however
17 significant, and however important to the government, the fact
18 that the touching by female guards of the accused in certain
19 instances is a collateral matter not bearing on the event, the
20 ultimate guilt or innocence of the accused on the underlying
21 charges, the fact that as all parties experienced and
22 witnessed, by a three-hour delay of our plane's arrival
23 yesterday, the location -- the remote location of the forum

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1 and the logistical challenges in providing witnesses in
2 person.

3 In addition, Your Honor, and I would add to the
4 probative factors one more, if I may, and that is the service
5 of this soldier. The soldiers and guards here at
6 Guantanamo Bay, Cuba, are in a deployed status. Those of us
7 in the military know if we are to take advantage of the
8 morale, welfare and recreation facilities and resources
9 provided to us by the Department of Defense, particularly at
10 popular destinations for vacations, those plans must be made
11 well in advance. That is why the first week of December, as I
12 informed the defense, we already knew that a vacation -- a
13 family vacation of this deployed soldier had already been made
14 well in advance by the family.

15 MJ [CAPT WAITS]: Let's take a step back. The 703(c)(3)
16 that you just cited ----

17 ATC [MAJ LONG]: Yes, Your Honor.

18 MJ [CAPT WAITS]: ---- doesn't that apply -- that applies
19 only to trials, doesn't it? It doesn't apply to -- again,
20 going back to your first argument, it doesn't apply to
21 interlocutory and -- interlocutory questions on collateral
22 issues.

23 ATC [MAJ LONG]: Correct, Your Honor.

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1 MJ [CAPT WAITS]: So, I mean, I don't even know why we
2 need to -- why the commission needs to rely on that.

3 ATC [MAJ LONG]: We rest on the fact that as a collateral
4 and interlocutory ----

5 MJ [CAPT WAITS]: Right.

6 ATC [MAJ LONG]: ---- and preliminary matter, even this --
7 the secondary motion or the secondary issue addressed in
8 the -- and rejected pleading, which was the declaration of
9 this particular witness, could be considered by this
10 commission without the testimony, live testimony, in person or
11 remote. And there has been no evidence, no showing by the
12 defense, of need in this particular context, Your Honor.

13 MJ [CAPT WAITS]: Thank you.

14 ATC [MAJ LONG]: Thank you, Your Honor. The government
15 has nothing further.

16 MJ [CAPT WAITS]: Thank you.

17 ATC [MAJ LONG]: And we respectfully request that the
18 commission grant the request for VTC testimony.

19 MJ [CAPT WAITS]: All right. The defense's objection --
20 for the reasons just stated by the government, the defense's
21 objection is overruled. The commission will allow the witness
22 to testify by remote means, video teleconference. Since this
23 is a collateral issue, albeit an important issue, it does not

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1 go to the ultimate issue of guilt or innocence, the rules of
2 evidence don't apply. Confrontation doesn't apply. For those
3 reasons, the commission will receive the testimony remotely,
4 either in an open session of court or -- and that includes a
5 505 hearing, if that's necessary also.

6 All right. So all the other issues that you have,
7 you're going to wait and raise at the argument on the motion?

8 DDC [LtCol JASPER]: That's our preference, yes, sir.

9 MJ [CAPT WAITS]: Very well. That's fine. All right,
10 then. We discussed 1430 as being the time for holding the 505
11 hearing. Is that still going to be adequate, or do we need to
12 push it back any further?

13 TC [MR. CLAYTON]: Your Honor, we've received guidance
14 from the court security officer. We have to now begin
15 investigating and implementing. I believe on its face 1430 is
16 still adequate. We would ask that, if necessary, if something
17 comes between the parties, that we be allowed to contact your
18 clerk and readdress, if necessary.

19 MJ [CAPT WAITS]: That will be fine. Do you think 1430 is
20 adequate for the defense?

21 DDC [LtCol JASPER]: Yes, sir.

22 MJ [CAPT WAITS]: All right. Then the commission will be
23 in recess until 1430. That will be a closed session of the

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1 commission under Military Commission Rule of Evidence 505(h),
2 so there will not be access by spectators for this afternoon's
3 hearing.

4 All right. Any other issues from counsel for either
5 side before the court recesses -- before the commission
6 recesses?

7 DDC [LtCol JASPER]: Nothing from the defense, Your Honor.

8 TC [MR. CLAYTON]: Nothing from the government, Your
9 Honor.

10 MJ [CAPT WAITS]: Very well. This commission is in recess
11 until 1430.

12 [The R.M.C. 803 session recessed at 1212, 26 January 2015.]

13 [END OF PAGE]

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