1 **[The Military Commission was called to order at 1309,**
2 **19 February 2014.]**
3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when the
5 commission recessed. Defense Counsel, 184.
6 ADDC [CDR MIZER]: Thank you, Your Honor.
7 MJ [COL POHL]: Commander, just so I understand what the
8 issue before me is, the issue before me, as I see in your
9 brief, is the authority of the commission to subpoena a
10 person. It really doesn't make any difference who the person
11 is if the commission does not have subpoena power.
12 ADDC [CDR MIZER]: That's correct, Your Honor, and it is
13 our position that you do in fact have subpoena power.
14 MJ [COL POHL]: And based on what?
15 ADDC [CDR MIZER]: Well, Your Honor, it's specifically
16 the changes to -- from the UCMJ to MCA primarily. If you look
17 at the Daniels case which is cited in our pleadings, it is a
18 1984 case where the COMA noted a gap in court-martial process.
19 And in that case, the military judge ruled that he couldn't
20 subpoena a foreign national in, I believe it was Belgium or
21 Holland. And COMA ultimately notes that there is a gap in
22 court-martial, gap in court-martial process, service of
23 process.

1 And they specifically declined to import 28 U.S.C.
2 1783(a), they invite Congress, if you want to fill this gap we
3 are noting the gap is there but we are not going to -- we are
4 not going to find that that statute applies here. So what the
5 court ultimately did in that case was abate proceedings or
6 find abating proceedings was the appropriate remedy. It is
7 interesting that when the Rules For Military Commissions,
8 specifically 703e(2)(E)(ii) are promulgated, and again, Judge,
9 703, little e, 2, big E, little ii. That you see in there a
10 specific reference to 28 U.S.C. 1783(a). Now, when you sit
11 across the bay here in a traditional military courtroom you
12 will not find that provision. In fact, Daniels will tell you
13 that as a traditional military judge you don't have that
14 power.
15 What that statute authorizes you to do as a
16 military judge is to compel individuals who are in foreign
17 territory to appear here at Guantanamo Bay. So that is one
18 piece of it.
19 Another piece of it, Judge, is Article 46 has been
20 broadened in the Military Commissions Act with the second
21 provision of 949j(a)(2). Instead of run -- instead of your
22 subpoena power running anywhere to the United States or the
23 commonwealth or territories, the Military Commissions Act says

1 that your subpoena power shall run to any place where the
2 United States jurisdiction shall run. And so this is
3 undoubtedly an area where United States jurisdiction runs.
4 And so you see in two independent areas both in
5 the statute itself and the Secretary of Defense, excuse me,
6 through the Manual for Military Commissions providing you
7 authority that you don't have as a traditional military judge.
8 MJ [COL POHL]: You refer to Secretary of Defense and
9 the manual provisions. But what about the Regulation For
10 Trial By Military Commissions Rule?
11 ADDC [CDR MIZER]: Excellent point, Judge. I think
12 there are two things that I would say with respect to that. I
13 think that Your Honor is well aware of the number of CAF cases
14 where the CAF has outlined the hierarchy of authority
15 beginning with the Constitution, then moving down to the code,
16 then moving down to the manual, and all the way down at the
17 bottom where you have the nonbinding discussions sections that
18 are actually in the manual.
19 Rule for Trial by Military Commission 13-5 does
20 indeed say civilians may not be compelled by subpoena to leave
21 the United States and travel to a foreign country. I would
22 submit to the extent that complies with the statute and the
23 Rules For Military Commission that you follow both the statute

1 and the Rules For Military Commission primarily.
2 I think probably the more important point on that
3 is the drafters of the Rule for Trial by Regulation -- or
4 Trial by Military Commission, excuse me, cite United States v.
5 Bennett which is a court-martial case, Judge. It is not a
6 Military Commissions Act case, and the defense does not
7 quarrel with the basic proposition that a military judge, as I
8 said, sitting across the bay in the courtroom that's over
9 there to try service members under the UCMJ does not have that
10 power, Bennett stands for that.
11 It is simply error for the regulation to cite that
12 case for the proposition that this court does not have
13 subpoena power particularly when it conflicts with both the
14 statute in 949j and then also the express inclusion of 18
15 U.S.C. 1783.
16 MJ [COL POHL]: Now the government argues that 1783 does
17 not reach to compelling an individual to leave the United
18 States to go to a foreign country.
19 ADDC [CDR MIZER]: I think that's right, Your Honor. So
20 you would be left with the conclusion that both Congress and
21 the Secretary of Defense intended to give you power to compel
22 people in foreign countries to come to Guantanamo Bay, but did
23 not intentionally give you the power to compel United States

1 citizens to leave the United States to come to Guantanamo Bay.
2 MJ [COL POHL]: But isn't that what you are asking me to
3 do?
4 ADDC [CDR MIZER]: It is, Your Honor. I believe the
5 statute provides you that -- 949j itself provides you the
6 authority. I'm saying if they tried to plug a gap in military
7 practice with 1783, that COMA and the CAF have said it existed
8 in military practice for now 40 years, the Daniels case.
9 So military judges don't have that 1783 power to
10 compel foreigners to come before a court-martial. So say
11 Okinawa is the common example we see at the Navy Marine Corps
12 Court of Criminal Appeals. They do not have power to compel
13 foreigners to appear before court-martial so typically the
14 remedy is if a witness is in the states, you move for change
15 of venue which is entirely separate issue that is before Your
16 Honor.
17 MJ [COL POHL]: Just so I understand your authority for
18 me to issue a subpoena for an American -- let me use an
19 American citizen, although arguably it may be a resident of
20 the United States. Let's talk American citizen because that's
21 the case before me ----
22 ADDC [CDR MIZER]: Yes.
23 MJ [COL POHL]: ---- to compel his presence physically

1 here lies in 949j or 1783 or both?
2 ADDC [CDR MIZER]: Well, Your Honor, and that is not
3 entirely correct. It is also rule for court-martial
4 703e(2)(e)(ii), the corollary to the military commission rule,
5 the drafters actually remove language that is in the Manual
6 for Courts-Martial that bars compelling a witness to come
7 appear before Your Honor.
8 MJ [COL POHL]: Okay. But the rule itself, we can argue
9 about the hierarchy of authorities. We are talking about
10 compelling an individual to leave the United States. The rule
11 you are referring to talks about 1783, okay? So the ----
12 ADDC [CDR MIZER]: That's correct, Your Honor.
13 MJ [COL POHL]: Just so I understand ----
14 ADDC [CDR MIZER]: Yes.
15 MJ [COL POHL]: ---- earlier did you not tell me that
16 1783 would not -- and correct me if I'm wrong, would not
17 permit a subpoena for an American citizen to go to foreign
18 country.
19 ADDC [CDR MIZER]: It would compel subpoena of an
20 American civilian in foreign county to come to Guantanamo Bay.
21 That is what 1783 would apply.
22 MJ [COL POHL]: Okay, but that's not the issue before
23 me. The issue before me is an American citizen from the

1 United States compelled to come to Guantanamo Bay?
2 ADDC [CDR MIZER]: That's correct, Your Honor. The
3 issue with respect to this 949j gives you the authority. I
4 think you can also infer that authority from the omission or
5 the deletion from the discussion section of 703e(2)(E)(ii)
6 which, if you look at the Manual for Courts-Martial, says you
7 cannot compel a witness in the United States to leave the
8 United States and appear before a court-martial. That's gone
9 from the Manual for Military Commissions.
10 And you can say that's perhaps an accident. We
11 submit that that's by design when you lay out both the
12 inclusion of 1783, something that hasn't been in military
13 practice for 40 years since Daniels, and then also the
14 broadening of Article 46, which again says that subpoena power
15 shall run to the United States or the commonwealths. Here it
16 is to run to any place where the United States shall have
17 jurisdiction. That is clearly this court.
18 Judge, I think one of the things -- and this is
19 one of the areas where Congress actually tried to get this
20 right, in that there was a sense that these commissions were
21 going to be, at least for some period of time, held here at
22 Guantanamo Bay, and they wanted to give this court legitimate
23 subpoena power. Because I don't think that it is any mystery

1 that the government is going to be able to get all its
2 witnesses down here. There are going to be FBI agents that
3 are employees of the government and they will sit in the box.
4 If Your Honor doesn't have subpoena power where
5 the defense can get its witnesses here, it should be no
6 surprise not too many people wish to cooperate with the
7 defense in this case. And in federal district court, Judge, I
8 have litigated terrorism cases there, I can tell you subpoena
9 power is absolutely required. And Congress didn't mean to
10 make this process a one-sided affair, and I think that's
11 evident from the statute and also from the Manual for Military
12 Commissions that you have before you.
13 MJ [COL POHL]: If the issue -- if a court of competent
14 jurisdiction issues a subpoena that then is not complied with,
15 the U.S. Marshal Service enforces it generally?
16 ADDC [CDR MIZER]: Yes, Your Honor. Yes, Your Honor.
17 MJ [COL POHL]: Okay. So if witness X -- if I issue a
18 subpoena for witness X the U.S. Marshal Service would have to
19 enforce it, put them physically on a plane to leave the United
20 States?
21 ADDC [CDR MIZER]: I don't think you have marshals down
22 here, Your Honor.
23 MJ [COL POHL]: You ask me to issue an order. I'm

1 questioning how do I enforce it.
2 ADDC [CDR MIZER]: I think it is done through the local
3 marshals office. So in the case of this witness it would be
4 through the Eastern District of Virginia, I can give you those
5 marshals office.
6 MJ [COL POHL]: I don't need that much detail. What I'm
7 simply saying is you issue a subpoena to any witness.
8 ADDC [CDR MIZER]: Yes, Your Honor.
9 MJ [COL POHL]: This is not specific to Mr. Rodriguez.
10 Obviously this covers other witnesses. You also have this
11 issue I think on a venue issue later on.
12 But my question then is enforceability, is I issue
13 the subpoena, the Marshal Service must agree to enforce it if
14 the witness doesn't want to come, right?
15 ADDC [CDR MIZER]: Yes, Your Honor. They have the
16 option to move -- in this case they would go to the Eastern
17 District of Virginia and move to quash the subpoena there or
18 perhaps appear before Your Honor. I believe those would be
19 the two options.
20 MJ [COL POHL]: Who would appear before me?
21 ADDC [CDR MIZER]: The individual that has been
22 subpoenaed.
23 MJ [COL POHL]: But he is now here.

1 ADDC [CDR MIZER]: I agree, Your Honor. The more
2 realistic option is he will go to the courthouse in Alexandria
3 and move to quash the subpoena.
4 MJ [COL POHL]: Now, are there any other statutes that
5 may impact on compelling individuals to leave the United
6 States against their will?
7 ADDC [CDR MIZER]: I'm unaware of any, Your Honor. I
8 believe we have laid out the authorities that would impact
9 this commission. This is United States territory, these are
10 important commissions, and we believe that we should be
11 entitled to live witnesses here at this ----
12 MJ [COL POHL]: I understand. I understand all of the
13 desires of it. But Congress -- for whatever reason this is
14 not an Article III court set up here so ----
15 ADDC [CDR MIZER]: It is indeed -- Your Honor, I don't
16 know it's -- it's an out to say that it is simply an Article I
17 court. It is an Article I court.
18 MJ [COL POHL]: I'm not saying it is an out. I'm saying
19 there was discussions about another option of somehow
20 transforming this into and Article III procedure.
21 What I'm simply saying is this, is my authority to
22 issue subpoenas for a witness from the United States to
23 Guantanamo Bay lies in the MCA provision you have cited?

1 ADDC [CDR MIZER]: MCA provision, Your Honor, and then
2 the Manual for Military Commissions.
3 MJ [COL POHL]: But if it is not explicitly in the
4 statute by Congress, just for a matter authority here, I can
5 rely on the Secretary of Defense to say I can do this?
6 Because that's all the Manual for Military Commissions is, is
7 a decision by the Secretary of Defense.
8 ADDC [CDR MIZER]: Your Honor, the statute, I think, is
9 clear and doesn't require much interpretation, which is that
10 your subpoena power shall run to any place the United States
11 has jurisdiction thereof. That is different than Article 46,
12 which COMA has interpreted to only give courts-martial
13 jurisdiction inside the United States. And so I use the
14 example of Okinawa. You can't go get witnesses from the
15 United States, you can't compel them under Bennett and under
16 Article 46. This isn't Article 46, Judge. You already ruled
17 it is not Article 46. You ruled this is a hybrid and that's
18 with respect to Provision 1 under 949j.
19 We are now to 2. So with respect to 2 it is a
20 hybrid as well. Congress had the option of court-martial. In
21 fact, military commissions are still authorized under the
22 Uniform Code of Military Justice, no disputing that. They
23 could have sent these cases to a traditional court-martial

1 under Article 18, under Article 21.
2 They didn't do that. They chose option C, which
3 is to create this court, Judge, a hybrid court with -- and
4 giving you hybrid powers, powers that you don't have as a
5 traditional military judge. Excuse me.
6 MJ [COL POHL]: Okay.
7 ADDC [CDR MIZER]: Thank you, Your Honor.
8 MJ [COL POHL]: Trial Counsel.
9 TC [CDR LOCKHART]: Thank you, Your Honor. The defense
10 would have you believe that there's this writing into the
11 manual, writing into the rules that there is the authority to
12 issue a subpoena and compel a U.S. citizen to travel to
13 Guantanamo Bay for testimony.
14 And the defense points to the lack of certain
15 language that was in the Manual for Courts-Martial as evidence
16 towards this. And the defense would have you ignore words
17 that are clearly written in the Regulation for Trial By
18 Military Commission. And as the government cited in its brief
19 under Chapter 13, Section 4 and 5, it very clearly, expressly
20 discusses this very issue.
21 Defense claims that this is a one-sided rule
22 because the government is likely to be able to have lots of
23 government witnesses that will travel down here. It is

1 absolutely not a one-sided rule. It applies equally to both
2 sides, meaning what works for one works for the other.
3 And there is absolutely nothing that is at issue
4 on what can and cannot be done. It is very clear, it is
5 written out. A witness, if asked to testify, can voluntarily
6 come to GTMO, can voluntarily testify via VTC. If they choose
7 that they don't want to testify, we can issue a subpoena and
8 they can either choose to come to GTMO or they can choose to
9 go to a remote site and testify.
10 MJ [COL POHL]: Just to be clear, when you say issue a
11 subpoena, a subpoena to go from point a to point B would both
12 be within the United States, but not a subpoena to go from
13 Point A to GTMO; is that correct?
14 TC [CDR LOCKHART]: My understanding is the VTC location
15 would be located near where they resided.
16 MJ [COL POHL]: Again, you say there's power to subpoena
17 a witness to go from point a to point B as long as both of
18 those points are in the United States.
19 TC [CDR LOCKHART]: Well, it's a subpoena power -- it's
20 sort of two issues. It's subpoena power to testify and then
21 the implementation of that is they can choose to travel to
22 GTMO or they can testify from a location in the United States.
23 The subpoena doesn't say you are going to this location or

1 that location.
2 MJ [COL POHL]: Okay.
3 TC [CDR LOCKHART]: You can issue a subpoena ----
4 MJ [COL POHL]: Commander, I'm just trying to clarify
5 what the government's position ----
6 TC [CDR LOCKHART]: Sure.
7 MJ [COL POHL]: ---- is to me, if you issue a subpoena
8 that, if not complied with, you enforce.
9 TC [CDR LOCKHART]: Correct.
10 MJ [COL POHL]: Okay. Okay. If a subpoena is issued
11 for a person to go from point a to point B in the United
12 States, where point B -- A is their home, point B is the VTC
13 site or deposition site, you believe that's fully enforceable?
14 TC [CDR LOCKHART]: I think that is an issue for another
15 day, sir. That is not the issue of this motion. I will take
16 issue with the fact that if you look specifically at the
17 relief requested by the defense, which is all the government
18 has to go by, the relief requested by the defense is that they
19 issue a subpoena to Mr. Jose Rodriguez ordering him to testify
20 before this commission at a date to be determined by the
21 parties and the commission.
22 So I understand we got a little bit off topic here
23 by going down what can and cannot be done, but this motion

1 that's been filed by the defense has asked for a subpoena to
2 be issued for Mr. Rodriguez. I'm certainly happy to discuss
3 the other issues. But if the issue is what happens if a
4 subpoena is issued and a witness doesn't want to comply with
5 it, what do we do, that issue has not been fully briefed to
6 this commission, and we would say that is an issue to litigate
7 another day.
8 MJ [COL POHL]: The issue before me is not
9 Mr. Rodriguez. The issue before me, because it has come in
10 other motions also, is the threshold inquiry of the authority
11 of the commission to issue a subpoena for somebody to be
12 involuntarily brought from the United States to Guantanamo
13 Bay, before we get to Mr. Rodriguez or any of these other
14 cases ----
15 TC [CDR LOCKHART]: I agree with that, and that is why
16 we have been discussing this. But what happens if that person
17 doesn't comply ----
18 MJ [COL POHL]: No.
19 TC [CDR LOCKHART]: ---- is not before the court.
20 MJ [COL POHL]: No, no. What is before the commission
21 is the authority to issue a subpoena.
22 TC [CDR LOCKHART]: Yes, sir.
23 MJ [COL POHL]: If a subpoena can't be enforced, it is

1 not -- to me, you have no authority to issue it then, okay?
2 So my question is very simple, because you are the one who
3 brought up these alternative terms is ----
4 TC [CDR LOCKHART]: Brought up what, sir?
5 MJ [COL POHL]: You brought up these alternatives of
6 what you could do with witnesses to testify, and you said you
7 could subpoena them to go to a VTC site or to come to GTMO.
8 What I simply wanted to clarify is the
9 government's position is that I can issue an enforceable
10 subpoena to tell somebody to come to GTMO?
11 TC [CDR LOCKHART]: To GTMO, no, sir.
12 MJ [COL POHL]: Okay, that is all I asked.
13 TC [CDR LOCKHART]: I apologize for the confusion. I
14 didn't understand.
15 MJ [COL POHL]: But I can issue enforceable subpoenas to
16 go from point a to point B as long as both Point A and point B
17 are in the United States.
18 TC [CDR LOCKHART]: Yes, sir.
19 MJ [COL POHL]: Thank you. That was my only question.
20 TC [CDR LOCKHART]: I apologize for being dense on that
21 one, sir.
22 MJ [COL POHL]: No, that's okay.
23 TC [CDR LOCKHART]: So again, as the government has

1 stated, the issue before you today is simply that, and the
2 government would assert as consistent with the briefings that
3 we have provided for the court, that the language is clear, it
4 is contained within the Regulation for Trial By Military
5 Commission, there is nothing that contradicted that.
6 I understand the defense wants you to read into
7 some sort of intent that is not there because something was
8 lacking or something wasn't added, but there is nowhere else
9 where it states that that can be done. So the government
10 would urge that you deny the defense's motion, sir.
11 MJ [COL POHL]: Okay, thank you. Commander.
12 ADDC [CDR MIZER]: Your Honor, we certainly are asking
13 you to infer from the inclusion of the statute 1783 that you
14 have broader power, but we are not merely -- and the removal
15 from the discussion section of 703, which says that you don't
16 have power to compel United States citizens to come to this
17 court. We are certainly asking you to make inferences, that
18 is not it, Judge.
19 MJ [COL POHL]: Yes, but at the end of the day, I would
20 need affirmative authority -- you are talking about what
21 the -- 1783 you said doesn't apply to this case.
22 ADDC [CDR MIZER]: Yes, Your Honor.
23 MJ [COL POHL]: The lack of discussion so no longer

1 apply, the regulation that contradicts your position is
2 trumped by the statute.
3 ADDC [CDR MIZER]: That's right, Your Honor.
4 MJ [COL POHL]: At the end of the day I have to read the
5 statute as inferentially giving me enforceable subpoena power
6 over U.S. citizens to come to GTMO.
7 ADDC [CDR MIZER]: I don't think it is inferential,
8 Judge. The opportunity to obtain witnesses and evidence shall
9 be comparable to the opportunity to -- available to a criminal
10 defendant in a court of the United States under Article III of
11 the Constitution. And the second provision of that is process
12 issued in military commissions under this chapter to compel
13 witnesses to appear and testify and to compel other evidence
14 shall be similar to that which courts of the United States
15 have in criminal jurisdiction may lawfully issue, this is the
16 important part, shall run to any place where the United States
17 shall have jurisdiction.
18 Judge, there is no district court here, but if
19 there were, it would undeniably have the power to subpoena
20 witnesses to appear before this court. I think that is really
21 what makes this court unique and you cannot ignore, with
22 respect, Judge, the language that Congress has given you in
23 949 and then the trappings around it which are the inclusion

1 of 1783 and then also the drastic altering of the Rule For
2 Military Commission with respect to its manual for
3 court-martial counterpart.
4 And the fact that whomever drafted the trial
5 for -- the Regulation for Trial By Military Commission cites
6 Bennett, a court-martial case, and says that court-martial
7 precedent is somehow binding widely misses the mark because
8 Congress doesn't believe that. Congress drafted a different
9 statute, and the Manual for Military Commissions is otherwise
10 different, Judge, both in the inclusion of what Daniels said
11 was lacking with your power as a military judge, and then also
12 the removal of that language, Judge.
13 It's -- it is the statute which says that this
14 shall be -- that your subpoena power shall operate like an
15 Article III court and the altering of the manual that gives
16 you the authority. And that's the basis of our argument,
17 Judge.
18 MJ [COL POHL]: Yeah, and the answer to this question
19 may be self-evident, so current military practice, there is no
20 authority to subpoena, to force citizens of the United States
21 to leave the United States to go testify in a foreign country,
22 true?
23 ADDC [CDR MIZER]: Indeed, Your Honor, and that is why

1 the statute and the manual look nothing like the statute and
2 the manual that regulate that practice.
3 MJ [COL POHL]: Now, in an Article III there is no -- or
4 correct me if I'm wrong. Is there any type of Article III
5 analogous situation where an Article III court is sitting in a
6 foreign country that can ----
7 ADDC [CDR MIZER]: I'm unaware of any Article III court
8 sitting in a foreign country, Your Honor. I suppose the court
9 in Guam, which is a U.S. possession, would have the authority
10 to issue subpoenas to travel to Guam.
11 MJ [COL POHL]: But Guam is a territory of the United
12 States.
13 ADDC [CDR MIZER]: Captured at the same time as this
14 naval base in 1898 from the Spanish.
15 MJ [COL POHL]: We capture a lot of stuff.
16 ADDC [CDR MIZER]: Yes.
17 MJ [COL POHL]: Sometimes they capture and release,
18 sometimes they don't. We kept Guam as a territory.
19 Guantanamo Bay may be a lot of things but is it a recognized
20 territory of the United States?
21 ADDC [CDR MIZER]: Your Honor, I think that would be in
22 dispute after Boumediene.
23 MJ [COL POHL]: I understand what Boumediene said. But

1 what my question goes down to, if you don't -- unless you say
2 this is really a unique authority given to the commissions
3 here in Guantanamo Bay, okay, which is one of your
4 arguments ----
5 ADDC [CDR MIZER]: Yes, Your Honor.
6 MJ [COL POHL]: ---- the only other analogous argument
7 is Guantanamo Bay is more like Guam than Okinawa.
8 ADDC [CDR MIZER]: Well, it's -- the MCA applies to any
9 place where U.S. jurisdiction shall run. So unlike Article 46
10 which applies to the United States and its territories, Guam,
11 that's the distinction. There clearly is a widening of the
12 language in the MCA, I mean the language "any place shall have
13 jurisdiction thereof," and that's clearly Guantanamo Bay,
14 Judge.
15 And we have cited the references in the hearing
16 debates as they are trying to craft this unique system,
17 essentially reworking the UCMJ 1950 or the Elston Act in 1948,
18 I mean that is essentially what they are reworking here with
19 the MCA. And they broadened that language, Judge.
20 They have given you the power -- the section deals
21 with comparable to Article III courts, and we are asking for
22 the authority, comparable to an Article III court and to
23 simply ask the court to apply the language that's written in

1 the statute. Certainly we do make inferential arguments --
2 I'm sorry.
3 MJ [COL POHL]: Go ahead. They asked you to slow down a
4 little bit.
5 ADDC [CDR MIZER]: I have that problem with Spanish
6 interpreters as well, Judge. I will try to keep it in mind.
7 MJ [COL POHL]: Go ahead.
8 ADDC [CDR MIZER]: Simply put, Judge, the MCA was
9 modified to give this court greater powers than a military
10 judge would normally have. It was to make this court a hybrid
11 court more powerful and more akin to an Article III court
12 because Congress recognized the remoteness of this location.
13 At the same time it wanted to ensure fair proceedings.
14 And the statements that are emerging in the public
15 record that Mr. Rodriguez can provide from his book, if his
16 book is to be believed, directly impeach the government's
17 case. I mean it would appear to be ----
18 MJ [COL POHL]: Okay. We are now sliding off into the
19 other issue.
20 ADDC [CDR MIZER]: Yes, Your Honor.
21 MJ [COL POHL]: And the other issue is a motion to
22 compel type of issue.
23 ADDC [CDR MIZER]: Yes, Your Honor.

1 MJ [COL POHL]: Okay. The government is arguing that it
2 is not ripe because you have not asked for him to come
3 voluntarily.
4 ADDC [CDR MIZER]: Indeed, Your Honor, and ----
5 MJ [COL POHL]: Do you believe that's -- wouldn't that
6 be a factual predicate to any issuing of an involuntary
7 subpoena, assuming I have such authority?
8 ADDC [CDR MIZER]: Well, Your Honor, things don't work
9 here like they do in a traditional court-martial or an
10 Article III court. And what we are trying to do is, if you
11 will pardon the expression, is grease the skids a little bit.
12 I think we can come to an agreement as to whether
13 we are going to get into evidentiary motions in April or June,
14 and that's all that I meant when we put that language in the
15 motion. So that if Your Honor finds that he does have
16 subpoena power, we can agree as to when Mr. Rodriguez needs to
17 appear before this court because ----
18 MJ [COL POHL]: That, of course, will impact a number of
19 other ----
20 ADDC [CDR MIZER]: Yes, Your Honor.
21 MJ [COL POHL]: ---- witness production issues at least.
22 ADDC [CDR MIZER]: And that is simply what we are trying
23 to do. The answer to everything can't be it is moot. We are

1 trying to tee up these issues, we can set the daisy chains in
2 motion; because if he is not here when the evidentiary motion
3 comes, we will have to wait until another session.
4 MJ [COL POHL]: I understand the issue is not mootness
5 but ripeness.
6 ADDC [CDR MIZER]: Yes, sir, mootness is argued often.
7 Ripeness is argued the rest of the time, Judge.
8 MJ [COL POHL]: I got you. I got you. Thank you.
9 ADDC [CDR MIZER]: Thank you, Your Honor.
10 MJ [COL POHL]: Thank you.
11 Trial Counsel, anything further?
12 TC [CDR LOCKHART]: No, sir.
13 MJ [COL POHL]: Okay. Trial Counsel, 188. Before you
14 argue that ----
15 TC [CDR LOCKHART]: I'm sorry, sir?
16 MJ [COL POHL]: Okay. Defense, do you object to the
17 relief requested in this one?
18 DDC [Maj DANELS]: [Microphone button not pushed; no
19 audio].
20 TC [CDR LOCKHART]: You need to push the button.
21 DDC [Maj DANELS]: The rules make it clear any time a
22 judge grants a delay, it is an excludable delay.
23 MJ [COL POHL]: So unnecessary because you agree the

1 government's position it is excludable delay? Is that what I
2 understand.
3 DDC [Maj DANELS]: Correct, Your Honor.
4 MJ [COL POHL]: We are done.
5 TC [CDR LOCKHART]: There is no issue, sir.
6 MJ [COL POHL]: Okay.
7 TC [CDR LOCKHART]: Thank you, sir.
8 MJ [COL POHL]: 169. Thank you, Major Danels.
9 ADDC [CDR MIZER]: Judge, at bottom what the prosecution
10 asked you to do with respect to 169 is to repeat
11 Judge Allred's error at Hamdan's military commission. And you
12 need only look to the Hamdan II decision to see exactly how
13 this charge is going to play out on appeal, because the
14 parallels truly are striking.
15 Now, the government offers six reasons as to why
16 hazarding a vessel is in fact a law of armed conflict
17 violation. First, the prosecution says that the charges
18 dealing with the M/V Limburg deal with civilian property on
19 page 5 of its pleading. And whether or not the Limburg is
20 civilian property is very much at issue in AE 174, whether it
21 is a lawful target or legitimate civilian property.
22 But for purposes here, attacking civilian property
23 is a legitimate war crime. We are not conceding whether or

1 not the facts here will substantiate that charge. But what is
2 not a legitimate war crime or what is not a valid argument is
3 to say that attacking civilian objects is a war crime, that
4 therefore hazarding a vessel is also an independent war crime.
5 And that is essentially what the government argues on page 5
6 of its pleading.
7 MJ [COL POHL]: Is your basic argument the same one,
8 based on the one with al Bahlul?
9 ADDC [CDR MIZER]: Your Honor?
10 MJ [COL POHL]: The al Bahlul since-vacated decision
11 whether it violates the international law of war at the time.
12 ADDC [CDR MIZER]: Yes, Your Honor, or the Hamdan II
13 opinion, which certainly governs these proceedings, that was
14 rejected by the D.C. Circuit.
15 MJ [COL POHL]: Your basic premise, although they are
16 not using ex post facto because they didn't really reach the
17 constitutional argument, they reached a statutory argument,
18 but that it had to be recognized international law of war
19 violation at the passing of the statute in 2006, at least in
20 charge in conspiracy, at least the initial decision was it
21 wasn't and, therefore, was not cognizable by military
22 commission and perhaps material support for terrorism is going
23 down that same road or has gone down the same road. Is that

1 the essence of your argument?
2 ADDC [CDR MIZER]: That is the essence of the argument
3 in a nutshell, Judge, both material support for terrorism and
4 hazarding a vessel as war crimes have really no basis in
5 international law as law of war offenses.
6 And the prosecution tries to cobble together a
7 number of arguments. For instance, they argue Article 43 of
8 Additional Protocol 1 prohibits hijacking of civilian aircraft
9 as the basis for hazarding a civilian ship. And I mean that
10 is how tenuous the arguments are here, and it is why I
11 reference Hamdan, Judge. I stood in this exact same spot in
12 2008 and heard these same arguments about material support for
13 terrorism, and they are essentially being repeated here.
14 And Your Honor has at least now the benefit of
15 what the D.C. Circuit has found compelling with respect to
16 material support for terrorism. And really, if you wanted to
17 write your opinion, Judge, you could look to the majority
18 opinion in Hamdan II and you could simply remove material
19 support for terrorism every time it appears and insert
20 hazarding a vessel and you would have what I believe to be the
21 correct legal interpretation.
22 On page 1251 of Hamdan II, the court says that
23 material support for terrorism was not a recognized violation

1 of the international law of war as of 2001. Again, you can
2 replace that with hazarding a vessel. As we have noted, the
3 Geneva Conventions and the Hague Convention do not prohibit,
4 again, inserting hazarding a vessel.
5 The 1998 Rome Statute of the International
6 Criminal Court which catalogs an extensive list of
7 international war crimes makes no mention of, again, inserting
8 hazarding a vessel, nor does the statutes for the Criminal
9 Court of Yugoslavia, Rwanda or Sierra Leone. And then finally
10 the court concludes, nor have any international tribunals
11 exercising common law type power determined that, again,
12 inserting hazarding a vessel is an international law or war
13 crime.
14 And so this case is very similarly situated to the
15 issues in Hamdan. And the defense doesn't dispute there
16 actually are some real war crimes in the Military Commissions
17 Act, but there are also some crimes that are not international
18 law of war violations, and this is chief among them with
19 respect to Mr. Nashiri.
20 Judge, the government also mentions the convention
21 against suppression, SUD I believe is actually the acronym for
22 the treaty, dealing with maritime, maritime violence, in
23 essence. It is a treaty that requires individual states or

1 member states to codify and to punish as -- under domestic law
2 violations of that treaty, Judge. And the United States has
3 done that. It does have a federal statute which again is no
4 different that 2339(B) the material support for terrorism
5 statute. Again, the parallels are striking between the
6 commission of violence on the high seas, the federal statutory
7 provisions that govern that and the material support for
8 terrorism provisions.
9 The prosecution also resorts to 1864 -- at least
10 one 1864 military commission, this sort of American common law
11 of war argument that has been rejected by the D.C. Circuit
12 again in Hamdan II. With respect to those military
13 commissions on page 1252 of Hamdan II the government -- the
14 court cites three provisions as to why these cases that the
15 prosecution -- the government, excuse me, categorizes as the
16 American common law of war.
17 The third reason, and to quote the court and
18 perhaps most to the point, these cases do not establish that
19 material support for terrorism was a war crime recognized, and
20 then in italics, international law as of 1996 to 2001 when
21 Hamdan committed his conduct.
22 And this court has to conduct the same inquiry.
23 It is not whether a member of the insurgent State of Virginia,

1 as the case they cite referenced, established some offense
2 under the American common law of war. It is whether hazarding
3 a vessel was a crime under the international law of war as it
4 existed in 2000 and 2002.
5 And as the authorities that I just cited from the
6 D.C. Circuit conclude, there really simply is no basis for
7 this court to conclude that hazarding a vessel as charged
8 against Mr. Nashiri is, in fact, an actual war crime.
9 MJ [COL POHL]: Do you believe attacking civilian
10 objects is a war crime?
11 ADDC [CDR MIZER]: Yes, Your Honor.
12 MJ [COL POHL]: You may have a factual dispute whether
13 it was a civilian object or not. You indicated earlier that
14 you are not conceding, for sake of your argument, the Limburg
15 may or may not have been a civilian object, but for the sake
16 of my question ----
17 ADDC [CDR MIZER]: Yes, Your Honor.
18 MJ [COL POHL]: ---- sake of my question, what's the
19 difference between Charge IV and Charge IX?
20 ADDC [CDR MIZER]: Your Honor, may I take a look?
21 MJ [COL POHL]: Sure. I know it is charged in different
22 statutory provisions, but the first one, attacking civilian
23 objects, is intentionally attack the Limburg, a civilian oil

1 tanker, and the other, hijacking or hazarding a vessel
2 endangering safe navigation, they both -- and they both appear
3 to be -- although different wording, seems to be similar kinds
4 of offense.
5 ADDC [CDR MIZER]: I think the point there is, Judge, we
6 are not quarrelling with legitimate war crimes, attacking
7 civilians or attacking civilian objects. What the government
8 can't do is just cast the same conduct as a separate crime and
9 create a separate provision. And here critically the
10 government alleges that hazarding a vessel is also a capital
11 offense. And so they can't create a crime after the fact
12 under Hamdan II and ex post facto clause.
13 And then also create, as we have alleged in other
14 motions they also can't find that also happens to be a capital
15 offense. And that is really the crux of this motion, Judge.
16 MJ [COL POHL]: Of course, the capital enhancement, for
17 want of a better term, of hazarding or hijacking a vessel is
18 predicated on the loss of -- the death of any person in the
19 course of such. So it is not -- it is not hazarding the
20 vessel itself. It requires additional ----
21 ADDC [CDR MIZER]: It requires a homicide in addition,
22 Your Honor.
23 MJ [COL POHL]: Okay.

1 ADDC [CDR MIZER]: On page 1251, I think that that is
2 the key thing that this court needs to keep in mind as it
3 deliberates on this motion. Again most tellingly before this
4 case no person has ever been tried by an international war
5 crimes tribunal for hazarding a vessel. And, Your Honor, this
6 shouldn't be the first case for a war crime that doesn't
7 appear anywhere until the 2006 Military Commissions Act. This
8 shouldn't be the first case and Mr. Nashiri shouldn't be the
9 first person charged for something that clearly wasn't a
10 violation of the international law of armed conflict when
11 these acts were alleged to have occurred 2000 and 2002.
12 MJ [COL POHL]: If for some reason the D.C. Circuit in
13 al Bahlul rethinks its position and adopts the American common
14 law of war analysis, would that change your argument on this
15 particular ----
16 ADDC [CDR MIZER]: I don't think it would, Your Honor.
17 I don't think one case from 1864 and then radio silence from
18 1864 to 2006 would impact this decision whatsoever.
19 MJ [COL POHL]: Okay.
20 ADDC [CDR MIZER]: I mean, literally the government is
21 citing a case about stealing a steamboat and sinking it from
22 someone who appears to be in the Confederate Navy, and I just
23 don't know that that has any modern application. I mean, I'm

1 sure that the same is practiced in your court. Unless it is
2 Marbury v. Madison or Dred Scott, if someone is citing a case
3 from the 19th century, alarm bells should ----
4 MJ [COL POHL]: I don't have many Dred Scott cases, or
5 Marbury.
6 ADDC [CDR MIZER]: Those are probably the only 19th
7 century cases seen in courtrooms, military or civilian.
8 MJ [COL POHL]: Got it. Trial Counsel, Major Seamone?
9 ATC [MAJ SEAMONE]: Good afternoon to you, sir.
10 MJ [COL POHL]: Good afternoon. Go ahead.
11 ATC [MAJ SEAMONE]: Article 21 of the Uniform Code of
12 Military Justice grants military commissions jurisdiction to
13 try offenses that amount to violations of the law of war and
14 also offenders who commit those violations.
15 The offense of hazarding a vessel is based upon
16 norms that are firmly grounded in international law.
17 Foremost, there are some key principles, three of them to keep
18 in mind, which form the foundation for a number of
19 codifications in the Military Commissions Act.
20 The first would be the principle of protecting
21 civilians. Closely related to that is the principle of
22 distinguishing between civilian objects and legitimate
23 military objectives and distinguishing between combatants and

1 civilians. And finally there is the principle of military
2 necessity, which essentially holds that before using deadly
3 force in hostilities, there must be exigencies that require
4 such use.
5 MJ [COL POHL]: Isn't military necessity a law of war
6 principle?
7 ATC [MAJ SEAMONE]: It is.
8 MJ [COL POHL]: It has got to do -- if these were in
9 compliance with the law of war, why are we having this
10 discussion?
11 ATC [MAJ SEAMONE]: Well, these are when there is not
12 compliance there is a violation, and that's precisely why we
13 point to those.
14 MJ [COL POHL]: No, I mean, just so I understand your
15 argument, are you saying that the law of war principle of
16 necessity somehow would make an attack on a civilian object by
17 an unlawful belligerent somehow not a law of war violation?
18 ATC [MAJ SEAMONE]: No, Your Honor, but it's -- when you
19 take these principles and codify them, they are existing and
20 you codify them as offenses, they do have a bearing on the way
21 the matter is resolved.
22 MJ [COL POHL]: Okay. Go ahead.
23 ATC [MAJ SEAMONE]: So the defense has acknowledged that

1 attacking civilian objects is a legitimate offense. The
2 government's position as briefed is that hazarding a vessel
3 embraces that offense of attacking civilian objects.
4 MJ [COL POHL]: Haven't we already charged that, though?
5 ATC [MAJ SEAMONE]: We have.
6 MJ [COL POHL]: Should we charge it twice now?
7 ATC [MAJ SEAMONE]: It is a separate offense in the
8 sense it represents a more aggravated form of the offense and
9 is rightfully involving a more aggravated form of ----
10 MJ [COL POHL]: The civilian object is a boat, ship --
11 I'm not sure of the Navy term, but a boat.
12 ATC [MAJ SEAMONE]: Yes.
13 MJ [COL POHL]: And the hazarding is a hazarding of a
14 boat, so it is not the same thing?
15 ATC [MAJ SEAMONE]: You can have an attack on a civilian
16 object without endangering the safe navigation of that object,
17 without creating damage.
18 MJ [COL POHL]: I got you. But in this particular case,
19 the civilian object is the same in both specifications. It is
20 a boat.
21 ATC [MAJ SEAMONE]: The government believes that there
22 is a unique aspect of a vessel that is, that makes the offense
23 more egregious.

1 MJ [COL POHL]: Okay.
2 ATC [MAJ SEAMONE]: An example in the Uniform Code of
3 Military Justice that would be a good parallel would be an
4 assault perpetrated under Article 128 of the UCMJ versus
5 striking a superior officer, superior commissioned officer in
6 the performance of duties. You couldn't have that greater and
7 different offense of striking a superior commissioned officer
8 without having an underlying assault. And, in fact, in
9 Article 128 there is even an aggravating factor, which is an
10 assault on a commissioned officer.
11 But Congress has specified a different offense
12 that still requires an assault, but it is the nature of the
13 victim, in this case a superior commissioned officer who is
14 performing duties, that makes it worthy of a higher penalty
15 and different treatment as a separate offense, even though it
16 necessarily relies upon an assault.
17 And the position about the unique nature of a
18 vessel is that it is inherently mobile, and when a vessel is
19 harmed, you have more passengers who are in greater peril,
20 such as the possibility of being shipwrecked; they are harder
21 to get to.
22 In addition there is cargo on vessels that
23 couldn't be compared to a civilian object, like a truck with a

1 gas tank. In this case the charge relates to a vessel that's
2 holding over 300,000 barrels oil, crude oil. And certainly
3 when the safe navigation is endangered of a vessel of that
4 magnitude, it is not simply an attack on a civilian object, it
5 is something worse. And it's more than attack, in that harm
6 actually befalls upon the object.
7 Now, Your Honor, the defense has pointed to the
8 Hamdan II opinion and suggested just filling in the blanks and
9 replacing "hazarding a vessel" for "material support for
10 terrorism," and that is a totally different analysis.
11 Material support for terrorism is an inchoate type offense.
12 This offense of hazarding a vessel relates to a completed
13 hazarding, which in this case resulted in death.
14 MJ [COL POHL]: Is the essence of the government
15 argument that this is a recognized violation of the
16 international law of war?
17 ATC [MAJ SEAMONE]: That it is firmly grounded on norms
18 that are international law.
19 MJ [COL POHL]: You are not making the American common
20 law of war argument?
21 ATC [MAJ SEAMONE]: Well, the government did cite to --
22 it was more than one military commission that occurred
23 following the Civil War in relation to these offenses, but the

1 government cited that to show that there was a distinction.
2 The government noted that there is a long lineage dating back
3 to the first laws of the Navy in 1799, which recognized an
4 offense for United States military members of hazarding a
5 vessel to show that there is a sensitivity and history for a
6 power on the sea, a naval power to be particularly concerned
7 with this issue, like all navies sailing the seas.
8 MJ [COL POHL]: I understand the historical basis. I
9 want to understand the government's position. Based on
10 Hamdan II and al Bahlul, I'm going to call it al Bahlul I,
11 although technically I think it is vacated, your basic
12 position is that the approach of the D.C. Circuit on what
13 constitute a law of war violation must be grounded in
14 international law of war and not the American common law of
15 war. And again, that's not necessarily the position of the
16 government, but your position is that this offense meets that
17 standard.
18 ATC [MAJ SEAMONE]: It meets the firmly grounded
19 standard, yes. But on Hamdan page 1252 there is a comment
20 that U.S. Presidents may inform the content of international
21 law. So certainly this is something that could be looked at
22 and could actually have some bearing.
23 The reason why the military commissions in Hamdan

1 that occurred in the Civil War weren't valuable was because
2 when they looked for material support for terrorism, they
3 could only find military commissions dealing with aiding and
4 abetting and completed offenses. They couldn't find any
5 military commissions dealing with the offense of material
6 support.
7 In this case there are at least two, there was the
8 Thomas Hogg, Master Thomas Hogg and six Confederate sailors
9 who pretended to be passengers on a civilian ship ----
10 MJ [COL POHL]: The 1864 case that was so persuasive to
11 the Commander?
12 ATC [MAJ SEAMONE]: Actually the Hogg case was
13 different, that occurred in Grenada. The other case involved
14 sinking a steamboat.
15 MJ [COL POHL]: Go ahead.
16 ATC [MAJ SEAMONE]: The key point is even in military
17 commissions in the 1800s involving something you might
18 consider to be a noninternational armed conflict, these were
19 offenses, hazarding a vessel was tried as far back as then.
20 Importantly Hamdan also looked to see whether
21 material support for terrorism was the basis of a treaty and
22 could not find a treaty citing that. And this is where the
23 suppression of unlawful acts treaty is quite important. The

1 treaty, which is from 1988, was developed shortly after the
2 Achille Lauro incident, in fact, as the government's motion
3 notes other incidents where there were explosions on ships and
4 hazarding of ships.
5 And the concern in creating this treaty was that
6 the United Nations Law of the Sea Convention did not
7 appropriately codify concerns beyond piracy, and that there
8 was an international concern for acts against ships and in
9 maritime environments that were not for the purpose of
10 financial gain, but maybe political gain or related to
11 ideologies, and that is why this was created, Your Honor.
12 And if you were to align the text of the SUA
13 convention and look at some of the provisions of the offense
14 of hazarding a vessel, you would see some very striking
15 similarities. For example, the Military Commissions Act notes
16 intentionally seizes or exercises unlawful control over SUA
17 sites intentionally seized or exercises unlawful control over.
18 So there is direct parallel there.
19 In the Military Commissions Act there is mention
20 of endangering the safe navigation of a vessel. In SUA it
21 states endangers or is likely to endanger the safe navigation
22 of that ship. In the Military Commissions Act, it talks about
23 not being a legitimate military objective. In the SUA

1 convention, a ship is defined as one that is not a warship or
2 a naval or auxiliary or customs or police ship. So you have a
3 very, very clear similarity and identical nature of language
4 in some cases which reflects international norms here about
5 issues.
6 And it is not only something domestic either.
7 Some of the provisions of the SUA convention require that a
8 state that's party to the treaty -- and there were 156 of
9 these signatories. A state that is party to that treaty has
10 to prosecute the individuals or extradite, regardless of the
11 nationality of the vessel. So it is far more of an
12 international norm than something that is merely domestic.
13 MJ [COL POHL]: Has anybody been prosecuted through that
14 procedure?
15 ATC [MAJ SEAMONE]: Yes, there is a case, and I can
16 provide you with a citation. The Ninth circuit Court of
17 Appeals upheld a conviction for violation of this act dealing
18 with a Taiwanese vessel that was sailing. There was a problem
19 with one of the cooks who had an issue with corporal
20 punishment, so there was a murder. And then he forced someone
21 who did not have familiarity with sailing the vessel to be its
22 new captain, and the ship was endangered. And that was
23 prosecuted because that occurred near the district of Hawaii

1 so it was the District of Hawaii Court.
2 MJ [COL POHL]: Any international case, any
3 international forum where such an offense has been prosecuted?
4 ATC [MAJ SEAMONE]: The only other example I can provide
5 is a case in the United Kingdom where a British national
6 hacked into the United States Navy computer systems and
7 changed information, and it was found that that would sustain
8 a conviction. And I believe it was in the British courts in
9 the United Kingdom because of the fact that the Navy had lost
10 accountability based on the change of that computer
11 information.
12 MJ [COL POHL]: I got it.
13 ATC [MAJ SEAMONE]: Yes, Your Honor.
14 MJ [COL POHL]: Is there a similar kind of offense in
15 the International Criminal Court?
16 ATC [MAJ SEAMONE]: Not one that I can cite to you
17 readily, Your Honor. However, that's why the government drew
18 a parallel in the additional protocol involving hijacking of
19 an aircraft, because one of the key elements that makes that
20 offense a violation of the laws of war is because there is no
21 military necessity involved and it doesn't involve combatants.
22 That's something that is extremely analogous, Your
23 Honor, in the sense that by endangering the safety of a vessel

1 and seizing control over it when there is no legitimate
2 military objective, you essentially have the same type of
3 offense. The only difference is that the act is being
4 performed on a ship rather than in the air.
5 But the similarity of this is enough to again
6 point to these firmly grounded norms of international law
7 which reveal why this is an offense that is sustainable in a
8 military commission.
9 MJ [COL POHL]: Okay. Anything further?
10 ATC [MAJ SEAMONE]: One moment, Your Honor.
11 MJ [COL POHL]: Sure.
12 ATC [MAJ SEAMONE]: Thank you very much.
13 MJ [COL POHL]: You are welcome.
14 Commander, anything further?
15 ADDC [CDR MIZER]: I apologize. I don't have the Ninth
16 Circuit case in front of me. However, I can tell the court
17 the name of the case is Shi, S-H-I, that deals with the
18 federal statute.
19 MJ [COL POHL]: Major Seamone, you said that was not in
20 your brief, right?
21 ATC [MAJ SEAMONE]: No, Your Honor, it was in
22 response -- Your Honor, it was in response to your question.
23 MJ [COL POHL]: Provide me the cite, please.

1 ATC [MAJ SEAMONE]: Absolutely, Your Honor.
2 MJ [COL POHL]: Go ahead.
3 ADDC [CDR MIZER]: So the defense doesn't dispute that
4 there are a handful of cases, I think two or three you will be
5 able to find, that implement the SUA. That is a requirement,
6 that the signatories to treaty agree this will be penalized as
7 a matter of domestic law. We don't dispute that can be
8 evidence of international law.
9 But what we are dealing with here is a subset of
10 international law, the law of armed conflict, Judge, and what
11 you won find is any precedent -- and I won't belabor the point
12 or go through the authorities that they are looking to in
13 Hamdan II, the Geneva Conventions, the international
14 tribunals, or even a single international case where this has
15 been determined to have been a law of war armed conflict
16 violation.
17 MJ [COL POHL]: Well, just so I understand your point,
18 there is the law of war out there.
19 ADDC [CDR MIZER]: Yes, Your Honor.
20 MJ [COL POHL]: And there is law of war conflict.
21 ADDC [CDR MIZER]: Yes, Your Honor.
22 MJ [COL POHL]: Not the same thing.
23 ADDC [CDR MIZER]: There's international law.

1 MJ [COL POHL]: International law, better term.
2 ADDC [CDR MIZER]: Bigger subset of international law,
3 and a narrow part of international law is armed conflict.
4 MJ [COL POHL]: You read Hamdan II, al Bahlul I as
5 requiring that an offense occur prior to 2006 as a violation
6 of international law or the law of armed conflict?
7 ADDC [CDR MIZER]: The law of armed conflict, Your
8 Honor. You can go back to Quirin if you like, and even Quirin
9 talks about the law of armed conflict being a specialized
10 subset of international law. So the fact there is a
11 commercial maritime treaty out there that deals with the safe
12 navigation of vessels during peacetime, of no consequence to
13 this court, Your Honor, as we determine what violated the law
14 of armed conflict.
15 MJ [COL POHL]: That is how you read the D.C. Circuit's
16 opinions, it's talking about not international law, law of
17 armed conflict.
18 ADDC [CDR MIZER]: You can certainly look ----
19 MJ [COL POHL]: I'm just asking that question.
20 ADDC [CDR MIZER]: Yes, Your Honor, yes.
21 MJ [COL POHL]: Okay.
22 ADDC [CDR MIZER]: Yes.
23 MJ [COL POHL]: Okay.

1 ADDC [CDR MIZER]: That is how this court should apply
2 Hamdan. Particularly there is no international tribunals that
3 have found that this is an offense, Judge, and we would just
4 simply ask this court to dismiss it.
5 If the court doesn't, I think we have got issues
6 of unreasonable multiplication of charges and multiplicity,
7 but we will address that after we have Your Honor's ruling.
8 MJ [COL POHL]: Okay, thank you.
9 Mr. Seamone, anything further?
10 ATC [MAJ SEAMONE]: One more thing, if I may approach.
11 MJ [COL POHL]: Sure.
12 ATC [MAJ SEAMONE]: One of the points raised by the
13 defense in its motion was that it turned to one of the
14 commentators, the international law commentators that the
15 Hamdan court referred to when reaching its determination on
16 material support of terrorism, the authors of the book would
17 be Bianchi and Naqvi.
18 Bianchi and Naqvi had developed a listing of what
19 they believed to be, without a doubt, violations of the law of
20 war that were -- raised no issues and were firmly grounded and
21 they mentioned a number of those violations as not creating
22 any question. It included attacks on civilian objects, and
23 the range that they cited which is listed in the defense's

1 motion was the provisions of the Military Commissions Act,
2 10 United States Code 950t(1) through 950t(23). The
3 government would like to make special note of the fact that
4 950t(23) is hazarding a vessel. Something that was recognized
5 there.
6 The defense mentioned that there was no mention of
7 hazarding of a vessel and it was conspicuously absent. But
8 indeed the government's position is that if it is already
9 covered by the offense of attacking civilian objects at least
10 at its base, then it is present and accounted for. It was
11 also not recognized among those Military Commissions Act
12 provisions that the authors claimed were not well recognized
13 enough to be firmly grounded. So that is one other
14 constellation point that the government would ask that you
15 consider as you move forward, Your Honor.
16 Thank you very much.
17 MJ [COL POHL]: Thank you. 174?
18 ADDC [CDR MIZER]: Thank you, Your Honor. At its heart,
19 this is a case about the law of armed conflict. But if I
20 can -- if I could draw Your Honor's attention to an even more
21 narrow subset that is going to be very important to this case,
22 and that's the law of naval warfare.
23 As a point of clarification a submarine is a boat,

1 Judge, and a ship is a ship. But that's an important thing to
2 keep in mind and it will play itself out over the coming
3 months, because there are important distinctions that we
4 recognize in the United States Navy that may not be readily
5 apparent to a practitioner of the law of war who wears an Army
6 or Air Force uniform, for instance. International law does
7 not require enemy naval crews to wear uniforms. There is not
8 a provision. Whereas air crews and soldiers on the ground
9 specifically have to wear uniforms. There is no corollary in
10 the law of naval warfare.
11 Additionally there is a wide degree of treachery
12 permitted in land warfare -- excuse me, in naval warfare that
13 is not permitted. For instance, you can fly false flags so
14 long as they are lowered immediately before an assault in
15 naval warfare.
16 In Appellate Exhibit 168 the prosecution takes the
17 position -- and 168 you will recall, Your Honor, is the
18 defense motion to dismiss for lack of jurisdiction. This is a
19 French warship carrying Iranian oil where a Bulgarian crew
20 member is allegedly killed. When the defense moved to dismiss
21 it, the government cited 849a(7)(A), which provides for this
22 commission to exercise jurisdiction over attacks on the U.S.
23 or coalition partners.

1 It is in 168 that the government advances the
2 theory that in 2002 off the coast of Yemen, not only was the
3 United States engaged in armed conflict with al Qaeda, but so
4 was the nation of France. And so that really is the predicate
5 to this motion that the court must keep in mind as it's
6 resolving the motion. Certainly ----
7 MJ [COL POHL]: Is this jurisdictional issue or failure
8 to state an offense?
9 ADDC [CDR MIZER]: Failure to state an offense, Your
10 Honor, even assuming 168 raises the jurisdictional issue
11 separately, and we will address that I assume at some point in
12 the next week.
13 But this is a corollary, dovetails with the
14 prosecution's response to 168. Because when we say why is
15 this any affair of the United States that a Bulgarian national
16 was killed on a French ship off the coast of Yemen, the
17 prosecution's response is, well, didn't you know that France
18 was also in the war with al Qaeda off the coast of Yemen?
19 And so that's the predicate you have to have
20 before you get to this motion which is, all right, if France
21 was involved in this war off the coast of Yemen in 2002, then
22 there are certain things that can be attacked. Those would
23 include French warships could be attacked, and then also

1 specifically oil tankers. And that is the thrust of this
2 motion.
3 MJ [COL POHL]: Let me see -- okay. The one issue
4 sounds to me ----
5 ADDC [CDR MIZER]: May I grab some water, Judge.
6 MJ [COL POHL]: Sure.
7 ---- this is a factual issue. You say your
8 position is France must have been at war at the time?
9 ADDC [CDR MIZER]: That is not our position.
10 MJ [COL POHL]: Your position is they would have to be
11 to make this a legitimate offense?
12 ADDC [CDR MIZER]: Well, Your Honor, if France isn't at
13 war, there is no jurisdiction for Military Commissions Act.
14 The government can't have it both ways. So if France is not
15 at war and this is merely sporadic violence by al Qaeda
16 against a French ship where Bulgarian nationals are killed,
17 there is no jurisdiction.
18 MJ [COL POHL]: But the focus there is on the
19 jurisdiction of the target ----
20 ADDC [CDR MIZER]: Yes, Your Honor.
21 MJ [COL POHL]: ---- as opposed to jurisdiction of the
22 individual charged with attacking said target. Okay. Let's
23 assume, maybe I'm mixing up the two motions because you

1 mentioned other motions we are not at yet, but that's okay.
2 If you have a conflict between two nations, okay,
3 legitimate military targets of one nation can be attacked by
4 the other nation, assuming everybody complies with the law of
5 war. I'm trying to understand your argument. Would you say
6 this would be a legitimate military target if at war ----
7 ADDC [CDR MIZER]: Yes, Your Honor. So if al Qaeda is
8 at war with France ----
9 MJ [COL POHL]: ---- if al Qaeda is at war with France?
10 ADDC [CDR MIZER]: ---- then the Limburg is a lawful
11 target under the law of war.
12 MJ [COL POHL]: Okay. Does that make the al Qaeda -- if
13 it is a legitimate target attacked by an unlawful belligerent,
14 does it lose -- is it still a legitimate military target?
15 What you are saying there, what you are telling me is -- let's
16 go from -- let me do a different example.
17 You have got a recognized armed force in an
18 insurgency that is not a recognized armed force.
19 ADDC [CDR MIZER]: Yes.
20 MJ [COL POHL]: They both commit the same military
21 action. Okay, assuming it is against a military target, are
22 you saying that because it is a legitimate military target the
23 illegitimate force doesn't commit a law of war violation?

1 ADDC [CDR MIZER]: I think we are getting into
2 distinctions between NIAC and IAC that are going to play out
3 in this case, and the remedy for the unprivileged belligerent
4 in NIAC the government also asserted this conflict was would
5 be to try the individual under the domestic law as a criminal,
6 not under an international law regime as a war criminal.
7 And so I think there is an element of
8 belligerency -- privileged belligerency that is going to have
9 to be resolved in this case. There is going to have to be an
10 Article 5 hearing that potentially puts on a lawful combatant
11 theory before this commission.
12 Indeed, the Military Commissions Act incorporates
13 the Geneva provisions that Mr. Nashiri could avail himself of.
14 MJ [COL POHL]: So it is your position if an unlawful
15 combatant hits a legitimate military target, that is a crime
16 under domestic law not a law of armed conflict violation?
17 ADDC [CDR MIZER]: Yes, Your Honor, under NIAC. That is
18 what NIAC says should happen.
19 MJ [COL POHL]: I got it.
20 ADDC [CDR MIZER]: So if we're here at a law of war
21 court where Congress clearly provided the ability for a
22 criminal defendant to assert privileged belligerency is in the
23 statute, then oil tankers, again, placing Mr. Nashiri on par

1 with a state or al Qaeda on par with a state, you have the
2 ability to attack warships, you have the ability to attack oil
3 tankers, that is what is at the heart of this motion.
4 This isn't, as the prosecution suggests in its
5 papers and has just done, an attack on civilian objects. I
6 mean, I don't think they are actually going to assert that the
7 individuals who attacked the Limburg were hoping to attack
8 civilians. I think it will be abundantly clear that they were
9 targeting an oil tanker for purposes of disrupting the world
10 oil supply and specifically targeting France in this case.
11 MJ [COL POHL]: And so since -- and, again, I don't know
12 if this is an admission of proof or not. So you said this is
13 not targeting civilians, it is targeting a boat flagged by
14 France.
15 ADDC [CDR MIZER]: Yes, Your Honor.
16 MJ [COL POHL]: Therefore, that is not a civilian
17 object. What it is then?
18 ADDC [CDR MIZER]: Well, Your Honor, don't -- all I
19 said, Your Honor, was one of the charges is attacking
20 civilians. In its papers the prosecution talks about
21 attacking civilians. It certainly would be attacking civilian
22 objects if this is, in fact, a civilian object. And we would
23 quarrel that in an armed conflict, if such a thing exists, and

1 if that armed conflict is with France, none of which we
2 concede, that French oil tankers can be sunk when they are
3 carrying the quintessential element of modern warfare, oil,
4 Judge. I went to the Smithsonian ----
5 MJ [COL POHL]: Are you saying under your analysis -- I
6 know we got a lot of leaps until we get there.
7 ADDC [CDR MIZER]: Yes, Your Honor.
8 MJ [COL POHL]: If it's a legitimate target, no offense
9 was committed when allegedly attacked?
10 ADDC [CDR MIZER]: Combatant immunity, Judge. If a
11 tanker is sunk, it is no different than Admiral Nimitz in
12 World War II or any of his submarine commanders seeing a
13 Japanese oil tanker on the surface of the Pacific or Admiral
14 Doenitz with the German Navy sinking American tankers in the
15 Atlantic.
16 MJ [COL POHL]: So you are equating the belligerents in
17 this case protected by the law of war a legitimate military
18 target then?
19 ADDC [CDR MIZER]: Yes, Your Honor. Exactly right.
20 MJ [COL POHL]: Would they have to be lawful
21 belligerents first?
22 ADDC [CDR MIZER]: To be before this court, Your Honor,
23 I think there is some implication that what we are penalizing

1 here is conduct. We are not penalizing status. Certainly the
2 defense is going to have the ability, should it so choose, to
3 put on the defense, the affirmative defense of privileged
4 belligerency.
5 MJ [COL POHL]: I understand. I know we are not at that
6 point. I'm not obviously making any conclusions. I'm trying
7 to understand your argument here. You know, the specification
8 alleges Mr. Nashiri is an alien unprivileged enemy
9 belligerent.
10 ADDC [CDR MIZER]: Yes, Your Honor.
11 MJ [COL POHL]: If an individual is an alien
12 unprivileged enemy belligerent and he or she attacks a
13 legitimate military target, as you define it, are you telling
14 me that that's not a violation of anything?
15 ADDC [CDR MIZER]: I think that it could be pursued at a
16 domestic court, Your Honor. I believe he could be hauled
17 into -- because we are talking about NIAC, Judge, I believe,
18 and the prosecution repeatedly cites NIAC in it pleadings. So
19 you cannot -- if you wished to treat these men as -- in a NIAC
20 as criminals -- and that's what Additional Protocol 2 has as
21 its goal, it is written by states, and the goal is not to give
22 insurgent groups the protection of the law of war.
23 But that is not where we are, Judge. We are in

1 international law of war criminal tribunal, and I believe that
2 the provisions of IAC would apply to where these individuals,
3 if they can make the showing with a privileged belligerency,
4 that they will be able to assert combatant immunity.
5 MJ [COL POHL]: Yeah, okay. Just so I understand your
6 position, your position is it may be a crime, okay, but if it
7 is a legitimate military target, the status of the person
8 conducting the attack is irrelevant for the jurisdiction of
9 this court?
10 ADDC [CDR MIZER]: Yes, Your Honor.
11 MJ [COL POHL]: May have jurisdiction somewhere else if
12 he is not a -- if he is an alien unprivileged enemy
13 belligerent.
14 ADDC [CDR MIZER]: Yes, Your Honor. If the United
15 States Government wishes to treat him as common criminal they
16 can certainly do it under NIAC, but not here.
17 MJ [COL POHL]: Doesn't that not require then to take
18 evidence on A, the status of the individual, and B, the status
19 of the target?
20 ADDC [CDR MIZER]: I don't think so, Your Honor.
21 MJ [COL POHL]: I mean, your allegation is that it
22 doesn't state an offense.
23 ADDC [CDR MIZER]: Your Honor, I think the only facts

1 that are relevant here is whether Limburg was a tanker of a
2 belligerent at war, whether she was a tanker of -- whether a
3 civilian tanker at peace. I think those are really the only
4 facts that are relevant to this inquiry. Because if she is a
5 tanker at war, she may be sunk, Judge. And state practice
6 since World War II has demonstrated that, Judge. I have
7 stated ----
8 MJ [COL POHL]: But again, I'm coming back to you. I
9 understand what you are saying, I understand your position.
10 But what I don't understand is why that is not a factual issue
11 as opposed to failure to state an offense. Because they have
12 alleged under the Military Commissions Act, alleged status of
13 your client and on this particular one they didn't necessarily
14 allege the status of the Limburg, but they clearly -- but
15 aren't those fact dependent?
16 If Limburg was a civilian vessel, doesn't it make
17 a difference? If Limburg was a part of the French war effort,
18 doesn't it make a difference?
19 ADDC [CDR MIZER]: Your Honor, I don't think there is an
20 argument that the government can make that Limburg carrying
21 oil, the quintessential element of modern warfare, can ever be
22 a civilian vessel. You can have fishing trollers, cruise
23 liners, all of these other types of vessels have different

1 protections under the law of war.
2 But when we are dealing with oil tankers, the
3 defense's position is those are lawful targets, and state
4 practice since World War II has reflected that oil is the
5 quintessential element of war.
6 Judge, I mentioned I went to the Smithsonian last
7 week, and out there at Dulles is a huge poster, a World War II
8 poster, I was struck by it, it says "Oil is Ammunition" at the
9 bottom. It features Arnold -- there are two other versions of
10 it, you can find them online, one with Admiral King, and if
11 you like Eisenhower, there is one featuring Eisenhower as
12 well. Oil is ammunition, Judge. It is that simple, Judge,
13 that's the point of this motion at bottom.
14 At Admiral Doenitz' trial at Nuremberg for
15 unrestricted submarine warfare, he brought the affidavit of
16 Admiral Chester Nimitz who said we also engaged in submarine
17 warfare in the Pacific. We sent everything to the bottom.
18 That's state practice, Judge. That is simply broader than
19 simply oil tankers, it is recognized all the way up to today
20 in the Kosovo examples we cited to, Your Honor, where the U.S.
21 Air Force in that conflict blew up oil refineries. And in
22 those cases, civilians were actually killed. And no one is
23 going to suggest that the U.S. intentionally attacked civilian

1 property or targeted civilians in those operations.
2 And, in fact, what we cited to, Your Honor, was a
3 memorandum by the prosecutors at the ICTY because everyone
4 thought this was again victor's justice at the ICTY, that the
5 United States, which arguably did commit some war crimes, and
6 they cite a number of examples, at least questionable
7 examples, the bombing of a civilian passenger train, a convoy
8 of tractors, but none of the questionable examples that they
9 cite resolve -- or revolve around the issue of oil.
10 Judge, the San Remo manual, which is cited by both
11 the defense and the prosecution, allows the sinking of
12 merchant vessels when they are making a contribution to
13 military action; or military manuals and the commander's
14 guide, which is the source that Navy commanders rely upon in
15 Category 7, and this is from page 13 of the prosecution's
16 response, states that if the ship is integrated into the enemy
17 war-fighting, war-sustaining effort and compliance with the
18 rules of the 1936 London protocol would, under the
19 circumstances of the specific encounter, subject the surface
20 warship to imminent danger or would otherwise preclude mission
21 accomplishment.
22 So you have the authority with respect to military
23 commanders, and if the United States was actually involved in

1 a surface engagement, I don't think that the prosecution's
2 position in these pleadings would be the actual practice of
3 the United States if we were to, say, find an Argentinian oil
4 tanker, if we were engaged in naval combat, that we would stop
5 the vessel, that we would board the vessel in accordance with
6 the 1936 London protocols, allow the passengers to get off and
7 either seize or sink the vessel. That is not what happened in
8 World War II.
9 In fact, the Germans initially tried to do that,
10 then the British came out with something called Q ships, which
11 had panels that would fall off of the sides of the ships and
12 then there were guns inside. When the German U-boats would
13 surface, allow the passengers to get off, you might call that
14 treachery or perfidy, but the British Navy and British
15 Merchant Marine was arming its merchants and sinking
16 submarines when they tried to do that.
17 MJ [COL POHL]: I may be getting ahead of myself.
18 ADDC [CDR MIZER]: Yes, Judge.
19 MJ [COL POHL]: Let me get a clear example here. The
20 attack on the USS COLE itself ----
21 ADDC [CDR MIZER]: Yes, Your Honor.
22 MJ [COL POHL]: ---- wouldn't the same analysis apply?
23 ADDC [CDR MIZER]: Warships, Judge. So if these are

1 privileged belligerents, warships may be attacked.
2 MJ [COL POHL]: Unprivileged belligerents.
3 ADDC [CDR MIZER]: If unprivileged belligerents, Your
4 Honor ----
5 MJ [COL POHL]: Again I may be getting ahead of myself
6 so if I am we will get to that motion.
7 ADDC [CDR MIZER]: Yes, Your Honor. Our position would
8 be if we are dealing with unprivileged belligerents just by
9 the basis of NIAC, then they have to be taken into a domestic
10 court under NIAC.
11 MJ [COL POHL]: Domestic U.S. court?
12 ADDC [CDR MIZER]: Domestic U.S. court. If -- and the
13 concept behind Article 2 was -- excuse me, Additional
14 Protocol 2 was states didn't want to dignify these guerilla
15 groups with combatant immunity, so they were going to treat
16 them as merely criminals. If the government wishes to do
17 that, they can treat them as mere criminals, the forum to do
18 that is Article III court, not an international law court. So
19 here we have to be ----
20 MJ [COL POHL]: Is there any offense on this charge
21 sheet that should be that -- that passes that test as alleged?
22 ADDC [CDR MIZER]: Your Honor ----
23 MJ [COL POHL]: Perfidy?

1 ADDC [CDR MIZER]: ---- perfidy is a legitimate war
2 crime. And if the facts are borne out that demonstrate that
3 offense, there is no privilege -- there is no right of a
4 privileged or unprivileged belligerent to engage in perfidy.
5 That's the first one that comes to mind.
6 MJ [COL POHL]: Again, I know we are slightly off topic,
7 but again this permeates. Your position is an alien --
8 rephrase, an alien unprivileged belligerent who attacks a
9 legitimate military target is subject to criminal domestic law
10 prosecution only?
11 ADDC [CDR MIZER]: Yes, Your Honor.
12 MJ [COL POHL]: Okay. Now, when I say okay, I heard
13 what you said ----
14 ADDC [CDR MIZER]: I understand.
15 MJ [COL POHL]: ---- not necessarily I'm agreeing.
16 ADDC [CDR MIZER]: I understand. We are having a
17 discussion.
18 MJ [COL POHL]: Go ahead.
19 ADDC [CDR MIZER]: One of the things the prosecution
20 cites in its papers notes the fact that this is a civilian oil
21 tanker carrying Iranian oil on a Malaysian contract where a
22 Bulgarian national is ultimately killed in some causational
23 chain with respect to the explosion.

1 But international law states that this judgment is
2 a subjective one, so we don't hold the naval commander who
3 comes up with the periscope to somehow get the bill of lading
4 and determine whether or not -- exactly what the ship is or
5 where it is going before he is allowed to fire upon that ship.
6 An enemy flag in a state of hostilities is what is required
7 under those circumstances, and state practice has reflected
8 that. But specifically ----
9 MJ [COL POHL]: What flag was the Limburg flying?
10 ADDC [CDR MIZER]: The French flag, Your Honor.
11 MJ [COL POHL]: Okay.
12 ADDC [CDR MIZER]: She is either -- as I said before,
13 she is either a civilian ship belonging to France outside of
14 hostilities, in which this court has no jurisdiction, or she
15 is a co-belligerent of the United States in an international
16 armed conflict with al Qaeda, and she may be attacked.
17 It's -- that's the argument at bottom, Judge.
18 And the last point I wanted to make -- and we
19 cited the hostages trial. This gets to the
20 subjective/objective component of this. The case that we
21 cited dealt with a German commander who, after the fall of
22 Finland, began retreating across Finland back into Norway,
23 which was then held by the Third Reich, and the commander was

1 repeatedly blowing up civilian property in efforts to make
2 roadblocks, obstacles for the Soviet army he believed was
3 pursuing his unit.
4 As it turned out, the Soviets weren't chasing him
5 at all, so the question at that case was whether he was going
6 to be bound by the standard, the objective standard or
7 subjective standard. And the court in that case ultimately
8 held he would only be held by what he believed at that point.
9 So the naval crew that encounters the Limburg in
10 2002 sees a belligerent oil tanker carrying a French flag, and
11 they may take action based upon their knowledge at that point,
12 Judge.
13 MJ [COL POHL]: Thank you. Trial Counsel? Major
14 Seamone.
15 ATC [MAJ SEAMONE]: Your Honor, if I may answer your
16 prior question, I do have a citation for the Shi case.
17 MJ [COL POHL]: Please do.
18 ATC [MAJ SEAMONE]: 525 F.3d 709, 2008, from the Ninth
19 Circuit, Your Honor.
20 MJ [COL POHL]: Before you argue again, let's take a
21 15-minute recess.
22 **[The Military Commission recessed at 1435, 19 February 2014.]**
23 **[END OF PAGE]**