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1 [The Military Commission was called to order at 0904,
2 21 February 2014.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties again appear to be present that were present when the
5 commission recessed.

6 Trial Counsel, any changes?

7 TC [CDR LOCKHART]: No, sir. If we could just -- I'm
8 sorry. Just place that these proceedings are being
9 transmitted to CONUS.

10 MJ [COL POHL]: Thank you. Defense, any changes?

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

12 MJ [COL POHL]: Okay, just some housekeeping things.
13 Yesterday afternoon, I conducted a hearing pursuant to
14 Military Commission Rule of Evidence 505(h). That's a
15 procedure to decide whether or not there's a need to close the
16 proceedings to discuss classified evidence.

17 After hearing from the parties, I've determined
18 that such a closed hearing under Rule For Military Commissions
19 806 will be necessary. There will be an order with the
20 required findings put out today, and tomorrow at 0900 we will
21 conduct such a session. That will be the only business
22 conducted tomorrow.

23 Earlier, I believe, on Wednesday the issue came up

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1 about litigating 205, and there was a dispute about whether it
2 had been fully briefed or not.

3 LDC [MR. KAMMEN]: Yes, that was discussed Wednesday.

4 MJ [COL POHL]: Okay. Now, I've reviewed the pleadings,
5 and what we have in this case is the initial pleading -- and
6 this is why I'm looking at it, and let me know if there's a
7 disagreement.

8 The initial pleading by the defense was fully
9 briefed, and the government response eventually generated a
10 motion to compel witnesses from the defense. And we have --
11 and the government response also requested a motion to compel
12 some mental health records. But be that all as it may, the
13 outstanding issue in these pleadings is the defense motion to
14 compel three witnesses on it. That's kind of where I see
15 where we're at. True?

16 LDC [MR. KAMMEN]: Exactly.

17 MJ [COL POHL]: Okay. Now, Trial Counsel, you
18 indicated -- do you agree that's where we're at right now?

19 TC [CDR LOCKHART]: Yes, sir.

20 MJ [COL POHL]: Okay. And the other day, Wednesday, I
21 believe you said you wanted sufficient time to respond to the
22 most recent motion to compel.

23 TC [CDR LOCKHART]: That's correct, sir.

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1 MJ [COL POHL]: And when will your due date for that be?

2 TC [CDR LOCKHART]: It's Monday, sir.

3 MJ [COL POHL]: Then it seems to me is, assuming there's
4 no -- and again this is a little confusing because we've got
5 responses and replies because the issues kind of morphed a
6 little bit. But would it be fair to say, Commander, after
7 Monday you would be prepared to argue 205?

8 TC [CDR LOCKHART]: Yes, sir.

9 MJ [COL POHL]: So we can put it on the docket for
10 Tuesday.

11 TC [CDR LOCKHART]: That works, sir.

12 MJ [COL POHL]: Okay.

13 LDC [MR. KAMMEN]: Just in case, fine.

14 MJ [COL POHL]: I'm sorry?

15 LDC [MR. KAMMEN]: I'm not sure it picked up the first
16 "fine," so ----

17 MJ [COL POHL]: Okay. That brings us back to the
18 current docket and order which I have the next being 167.

19 ADDC [CDR MIZER]: Good morning, Your Honor.

20 MJ [COL POHL]: Good morning.

21 ADDC [CDR MIZER]: The Constitution says that no bill of
22 attainder or ex post facto law shall be passed. Both
23 Hamdan II and the Department of Justice's pleadings in Bahlul

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1 state that the ex post facto clause is applicable here.

2 The Supreme Court has called its decision in
3 Calder v. Bull, "The authoritative account of the scope of the
4 ex post facto clause." Hamdan II dealt with the first
5 category set out in Calder v. Bull and this motion deals with
6 the fourth which is, "Every law that alters the legal rules of
7 evidence and receives less or different testimony" ----

8 I'm getting the break light here, Judge, so ----

9 Then the law required at the time of the
10 commission of the offense in order to convict the offender.
11 The most recent case that really deals with this category in
12 depth is Carmell v. Texas. And that case involved the sexual
13 abuse of a minor and whether or not it involved a Texas
14 statute. And during some period of the sexual abuse, Texas
15 changed its law. And so the old law in Texas had stated that
16 the minor victim could testify if that testimony was
17 accompanied by a corroborating witness. And so by the time
18 Mr. Carmell was brought to trial, the laws changed and the
19 victim testified without the corroborating witness. And so
20 that was the issue presented before the Supreme Court in
21 Carmell, whether or not that was an ex post facto law.

22 The Supreme Court reversed several of the
23 convictions, not all of the convictions because some of them

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1 were not affected by the change in Texas' statute. On
2 page 530, the court says that requiring only the victim's
3 testimony to convict rather than the victim's testimony plus
4 other corroborating evidence is surely less testimony required
5 to convict in any straightforward sense of the words.

6 Judge, the Military Commissions Act doesn't
7 eliminate corroboration, it eliminates the witnesses entirely
8 with respect to hearsay. There isn't a military court or a
9 federal court or a state court that would allow the government
10 in what has been done, AE 166. And there's a later motion,
11 Judge.

12 So ultimately what the government has given notice
13 to the defense is that they intend to introduce 72 hearsay
14 statements by 66 declarants, some of whom are dead. And we
15 believe ----

16 MJ [COL POHL]: I understand they intend to attempt to
17 introduce them.

18 ADDC [CDR MIZER]: They have given us notice, Judge, and
19 we have no reason to believe they're not going to follow
20 through on that notice.

21 MJ [COL POHL]: No, I understand that. But I'm saying
22 there's still a, there's still admissibility issue even though
23 they're hearsay.

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1 ADDC [CDR MIZER]: Indeed, Judge. And here I don't
2 really intend to -- I need to speak to the hearsay provisions.
3 We're really addressing the ex post facto, and hearsay
4 provision probably provides the court with the clearest
5 example of why this is an ex post facto law.

6 I understand we have to get through
7 confrontational issues before the court and we still have to
8 address the evidentiary provisions themselves, because
9 certainly the defense believes many of these statements are
10 unreliable in the way they were obtained, even under the rules
11 for the Manual for Military Commissions.

12 But regardless of all of that, they constitute an
13 ex post facto law in violation of the clause or the fourth
14 provision of Calder v. Bull. You can't change the rules of
15 evidence after the fact and make it easier to convict someone,
16 and that's precisely what the MCA does.

17 Now ----

18 MJ [COL POHL]: The default becomes the Military Rules
19 of Evidence?

20 ADDC [CDR MIZER]: Yes, Your Honor. They were in place
21 in 2002 and, so we're asking the court to simply apply the
22 Manual for Military Commissions as it -- excuse me, the Manual
23 for Courts-Martial as it existed in 2002. We think that

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1 that's the cleanest way to avoid ex post facto issues in this
2 case, require the government to apply that manual.

3 As I alluded to the other day -- excuse me, Your
4 Honor -- the Manual for Military Commissions is not the only
5 set of military commissions currently authorized in federal
6 statute. The UCMJ continues to allow military commissions to
7 proceed and is evidenced in some of the later motions we're
8 going to talk about today. It allows a general court-martial
9 to hear violations of the law of war. So there's nothing
10 untoward or unpracticed about using the MCM for these
11 proceedings.

12 MJ [COL POHL]: But if you incorporated the Military
13 Rules of Evidence, you would be incorporating the statutory
14 interpretation of said rules which would in essence be
15 incorporating personal rights, personal constitutional rights,
16 correct?

17 ADDC [CDR MIZER]: In many respects, Your Honor ----

18 MJ [COL POHL]: For example, the confrontation clause
19 issue?

20 ADDC [CDR MIZER]: Yes, Your Honor. I think the thing
21 to keep in mind with the code is when the code was passed in
22 1950, that there was still a debate as to whether or not the
23 Constitution applied to uniformed service members. If you

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1 read the Supreme Court precedent, even into the 1980s, they're
2 still flirting with these decisions in cases like Weiss and
3 Salerno and ultimately I think it is generally accepted now
4 that constitutional provisions apply to uniformed service
5 members.

6 MJ [COL POHL]: Except where impracticable; some don't.

7 ADDC [CDR MIZER]: Yes, Your Honor.

8 MJ [COL POHL]: Grand jury indictment, for example.

9 ADDC [CDR MIZER]: Indeed. But a grand jury indictment,
10 Your Honor, is expressly excluded from the Constitution. So
11 "In cases of land and naval forces," is the language from the
12 Constitution. And so that's why we don't have that right with
13 respect to uniformed service members.

14 The code, the history of the code and the
15 evolution of the Constitution with respect to service members
16 is important because the framers of the code, so
17 Professor Morgan, the individuals that drafted the code, the
18 Elston Act of 1948 and then the code -- excuse me, eventually
19 in 1950, knew the questionability of the Constitution was
20 there, so they gave in the code essentially all of the rights
21 that are present. So discovery rights in Article 46, cruel
22 and unusual punishment protections in Article 58.

23 So you really have a framework in the code, a

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1 statutory code that -- and all of this is a long answer,
2 Judge, to saying I don't know that the court really needs to
3 get into granting constitutional rights. I believe that you
4 have the statutory rights there. Certainly the defense
5 believes that the constitutional rights are applicable here
6 after Boumediene, but I don't know that the court really needs
7 to get into that.

8 I think that the Manual for Courts-Martial
9 provides the framework, provides the evidentiary foundations
10 and that this court can have essentially a general
11 court-martial as has been authorized for law of war offenses
12 since 1950.

13 MJ [COL POHL]: But in essence, just so we get kind of
14 back on track, if the MCA violates the ex post facto clause,
15 whatever practical effect applying another set of rules is
16 really somewhat irrelevant to the issue before me.

17 ADDC [CDR MIZER]: Yes, Your Honor. The ---

18 MJ [COL POHL]: I mean, what I am saying is, if these
19 rules -- the ex post facto thing prohibits the new rules of
20 evidence and the default rules or some other rules that have
21 other effects, that really doesn't make any difference. That
22 doesn't save the ex post facto violation.

23 ADDC [CDR MIZER]: That's right, Your Honor. You're

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1 required to put -- what Hamdan II says is you're required to
2 apply the statute in place at the time. Now, the D.C. Circuit
3 there was dealing with Article 21, here we're dealing with a
4 different category of ex post facto violations. As I said,
5 this is the fourth category. Hamdan II dealt with the first.
6 The violation is there, Judge. We believe it's plain under
7 Carmell, and that this court has to apply the evidentiary
8 scheme according to ----

9 MJ [COL POHL]: To be accurate, did Hamdan II really get
10 to the ex post facto clause?

11 ADDC [CDR MIZER]: Your Honor ----

12 MJ [COL POHL]: They danced around it, but I'm not
13 sure ----

14 ADDC [CDR MIZER]: They absolutely do. And with respect
15 to the D.C. Circuit, I think their analysis is too cute by
16 half. They ignore the MCA and apply Article 21 to avoid the
17 ex post facto clause. But if the ex post facto clause isn't
18 applied there, they have simply no authority to disobey the
19 MCA. So I've read Judge Cavanaugh's footnote in that case
20 saying this is constitutional avoidance, I don't know that
21 there's any other way to read that case than they're applying
22 the ex post facto clause. Otherwise, they have no reason to
23 choose between the two statutes.

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1 MJ [COL POHL]: Looking at Hamdan II, you're saying
2 Congress didn't mean what this said in essence.

3 ADDC [CDR MIZER]: Yes, Judge.

4 MJ [COL POHL]: Therefore, they don't get to the
5 ex post facto issue.

6 ADDC [CDR MIZER]: Right, Judge.

7 MJ [COL POHL]: Which strikes to me ----

8 ADDC [CDR MIZER]: It's a bizarre analysis. And the
9 defense position is there's no way to read it except to say
10 they applied ex post facto analysis. Hopefully that will be
11 cleared up in the Bahlul appeal which is currently pending.
12 That really isn't that important given that the government has
13 conceded in the Bahlul appeal that the ex post facto clause
14 applies here.

15 So it's left to you, Judge, given that concession,
16 and we believe the binding precedent in Hamdan II.

17 MJ [COL POHL]: How do you respond to the government
18 argument where it is distinguishing between the two types of
19 rules of evidence?

20 ADDC [CDR MIZER]: Yes, Your Honor. The government does
21 rely on an 1884 Supreme Court case and an 1898 Supreme Court
22 case which are both dealt with in Carmell. They
23 essentially -- the government's brief could be cut and pasted

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1 from the State of Texas' argument in Carmell. The Supreme
2 Court distinguishes both of those cases.

3 And I think Thompson v. Missouri is a clear
4 example, that's the second case that they cite. Between the
5 first and second convictions in that case, the State of
6 Missouri passed a law that required a handwriting expert --
7 or, excuse me, permitted a handwriting expert. And so the
8 court was able to, in the second case, have the testimony to
9 compare letters between the defendant and I believe it was his
10 wife in that case. And so that's the type of procedural rule
11 that doesn't lessen the burden of proof in a case, I mean,
12 because a handwriting expert could be used by both sides.

13 The distinction here is by allowing hearsay, you
14 really have lowered the burden of proof, because in a federal
15 court or a court-martial, it certainly wouldn't be sufficient
16 proof if the government could come in and lay down 72
17 statements by 66 declarants, and give the instruction that
18 those were probative of what they claim to be.

19 MJ [COL POHL]: Well, there certainly is hearsay
20 exceptions in both Article III courts and courts-martial where
21 the declarant doesn't testify.

22 ADDC [CDR MIZER]: Indeed, Your Honor. I don't think
23 that any of those exceptions are going to apply to any of

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1 those statements.

2 MJ [COL POHL]: No, but my question, what it really gets
3 down to is, is are you equating the form of proof, which is
4 what we're talking about here -- rephrase that, the form of
5 the evidence, lowering the government's burden?

6 ADDC [CDR MIZER]: Your Honor, it really is any -- I
7 think Carmell on page 541 answers that, and it's that we think
8 there's no good reason to draw a line between laws that lower
9 the burden of proof and laws that reduce the quantum of
10 evidence necessary to meet that burden. The two types of laws
11 are indistinguishable in all meaningful ways relevant to
12 concerns of the ex post facto clause.

13 And so, Judge, it's making it easier to convict.
14 I mean, that's Carmell distilled to its essence. We believe
15 that that violates the ex post facto clause in this case.

16 Judge, if a court were confronted with a rule that
17 simply said that the charge sheet in this case were evidence
18 and the fact that the individual had been charged and the
19 members could consider the charge sheet as evidence of guilt,
20 I don't think that this would be an arguable point at all.

21 And I don't know that there's much difference
22 between a charge sheet, a mere allegation and a written
23 statement of someone who's never going to be present in court

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1 that occurred a decade ago and can simply be put in front of
2 the members as another written allegation in the same way that
3 there's a charge sheet.

4 MJ [COL POHL]: Even though the proponent, because this,
5 again, applies to both sides, would have to show reliability
6 of said statement.

7 ADDC [CDR MIZER]: Yes, Your Honor.

8 MJ [COL POHL]: I mean, isn't this -- is this similar to
9 the pre-Crawford decisions?

10 ADDC [CDR MIZER]: Yes, sir, going back to Ohio v.
11 Roberts. That's essentially what the court is pitching and
12 the ----

13 MJ [COL POHL]: I'm not pitching anything.

14 ADDC [CDR MIZER]: No, I know you're not. I said the
15 government.

16 MJ [COL POHL]: I thought you said the court.

17 But up until Crawford, would you see much
18 distinguishing between the Ohio v. Roberts analysis and the
19 hearsay rules for the commissions? Some type of residual
20 hearsay analysis?

21 ADDC [CDR MIZER]: I would have to take a look at that
22 issue in some depth. Off the cuff, I would have to say I
23 don't think so. I think what the court has done here is --

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1 excuse me, what the court -- what the Congress has done here
2 is codify the Ohio v. Roberts, the infirmed standard of
3 Ohio v. Roberts. But again I'd have to take a look at it to
4 see if there's any meaningful distinction between Ohio v.
5 Roberts and the MCA.

6 Judge, the prosecution also tries simply an end
7 run around the ex post facto clause arguing that military
8 commissions have admitted hearsay. And that statement is
9 literally true, but what is misleading about it is that they
10 cite Quirin and Yamashita for that proposition on page 12 of
11 their pleading.

12 Now, the judicial review of both Quirin and
13 Yamashita was truncated. The central issue before both of
14 those courts was essentially the President's power to convene
15 those courts, and they didn't weigh in on the evidentiary
16 practices that took place. And I think the dissent in
17 Yamashita is somewhat famous now for the trial abuses that
18 actually took place in Yamashita. The majority simply said we
19 have no power to review any of that. It didn't sanction the
20 use of hearsay in those courts. And those provisions we now
21 know from Boumediene and Hamdi that the President has absolute
22 discretion with respect to military commissions or those
23 holdings or the central holdings of both of those cases are no

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1 longer valid.

2 But specifically, page 23 of Yamashita actually
3 says, "Commissions' rulings on evidence and on the mode of
4 conducting these proceedings against petitioner are not
5 reviewable by the courts but only by the reviewing military
6 authorities." Again, that was not the standard. That was the
7 standard in the 1940s, not the legal standard now, Judge.

8 And so you don't have judicial precedent for
9 what's going to take place in this commission where a court
10 has reviewed these types of procedures, certainly not at the
11 Supreme Court, and put its stamp of approval on it.

12 So we're creating rules from scratch, Judge, and
13 we're going to sail a capital case through a system that's
14 been created from scratch, and I don't think that that's a way
15 to run the railroad, pardon the expression, Judge. What we
16 should do is go back to proven procedures that have been in
17 place since 1950, apply those here and really produce a
18 product that I think everyone can be proud of.

19 MJ [COL POHL]: Okay. Reading your brief, I'm trying to
20 figure out what point in time should, which rule should apply
21 at what point in time? I mean, you refer -- and this comes
22 back to my previous question. You refer to the 2002 version
23 of the Military Rules of Evidence.

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1 ADDC [CDR MIZER]: Yes, Judge.

2 MJ [COL POHL]: Which predates Crawford.

3 ADDC [CDR MIZER]: Yes, Your Honor.

4 MJ [COL POHL]: So do I start there and then how they've
5 been interpreted since then and then apply today's rules? Or
6 do I take the rules as they were back then and apply them at
7 the time?

8 ADDC [CDR MIZER]: I think what you would do, Judge, is
9 you would apply them in concert with Crawford. I mean,
10 Crawford says that it's a fundamental constitutional right,
11 the right of confrontation. And so you can apply the rules
12 with the caption on Crawford. And so I think it's 807, the
13 residual hearsay rule has changed ----

14 MJ [COL POHL]: What of -- you're talking about hearsay,
15 but there's all sorts of rules here.

16 ADDC [CDR MIZER]: Yes, Your Honor.

17 MJ [COL POHL]: What if the rules of 2002 were to the
18 detriment of the accused? Do I apply those? You seem to want
19 to have it both ways. You want to have the rules in place
20 that favor the accused, any evolution of those rules that
21 favor the accused, but none -- no evolution -- and I just want
22 to understand -- no evolution of the rules that disfavor the
23 accused. Why wouldn't applying Crawford run the same

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1 ex post facto concern you have, and I understand it's not the
2 statute, but do you understand what I am saying?

3 ADDC [CDR MIZER]: Yes, Judge, and I think the answer is
4 simply that the ex post facto clause bars the use of
5 provisions that disadvantage the accused after the fact.

6 MJ [COL POHL]: Okay.

7 ADDC [CDR MIZER]: So what we're looking for is simply
8 the application of the Manual for Courts-Martial. I've keyed
9 a lot on hearsay. It would take me I think a year of
10 litigation, if you want, to go through the entire manual and
11 go provision by provision. I think the ----

12 MJ [COL POHL]: No, I don't want that. I do understand
13 the ex post facto clause ----

14 ADDC [CDR MIZER]: Yes, Judge.

15 MJ [COL POHL]: ---- is designed to protect the rights
16 of the accused. So I didn't mean to imply it's somehow
17 something else.

18 ADDC [CDR MIZER]: Yes, Judge. Thank you.

19 MJ [COL POHL]: Trial counsel? General Martins.

20 CP [BG MARTINS]: Good morning, Your Honor.

21 MJ [COL POHL]: Good morning.

22 CP [BG MARTINS]: Section 949a of the Military
23 Commissions Act of 2009 is not an ex post facto law because it

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1 does not alter the legal rules of evidence and receive less or
2 different testimony than was required at the time of the
3 commission of the offense in order to convict the offender.
4 That is the Calder v. Bull fourth category. I appreciate
5 counsel narrowing some of the issues here. We're in the same
6 Calder V. Bull category. It is authoritative. And as the
7 court's jurisprudence makes clear, we're to look to those
8 enumerated categories and their and historical definition as
9 the meaning of the ex post facto clause both for states and
10 federal governments in the Constitution.

11 He has also helped narrow an issue we are not
12 arguing, that the ex post facto clause, which operates on the
13 power of the Congress, doesn't apply. We believe this does
14 operate on Congress and it also ----

15 MJ [COL POHL]: Just so I'm clear, is that -- because
16 there's been a little discussion on this, but the government's
17 position is -- is that ex post facto is a limitation on
18 Congress and, therefore, would apply to this case.

19 CP [BG MARTINS]: Yes.

20 MJ [COL POHL]: Okay, got it. Go ahead.

21 CP [BG MARTINS]: So we are talking about whether this
22 is an ex post facto law. That formulation from Calder v. Bull
23 is important because it asks you to look to what was required

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1 at the time of the commission of the offense, what was
2 required by the law at the time of the commission of the
3 offense.

4 And with respect, the defense analysis of this
5 skips lightly over what that law was and advances this theory
6 that the Manual for Courts-Martial and the rules of evidence
7 applying to general courts, which as counsel correctly
8 mentions, have authority to try the law of war offenses, are
9 what the law was in 2002 or at the time of the offense.

10 Your Honor, the court has actually looked very
11 closely at what the law was, and it was Article 36 of the
12 UCMJ, not analyzed much in Hamdan II. As counsel correctly
13 notes, they were looking at Article 21 and the
14 offender/offenses provision of Article 21.

15 But Hamdan I actually talks quite a bit about
16 Article 36 because, if you recall, they're considering the
17 practicability determination of the President. Was there such
18 a practicability determination in the departures from
19 courts-martial that Military Commission Order No. 1 of 2002
20 effected? And it went to a jurisdictional issue for them.
21 They actually found the commission lacked the authority to
22 proceed because those departures were not justified by
23 practical need.

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1 You cannot make sense of either the plurality
2 opinion portions by Justice Stevens and the portions of the
3 Hamdan opinion that are a majority five justice opinion by
4 Justice Stevens or the concurrence of Justice Kennedy that's
5 operative in this. You can't make sense of their discussion
6 of Article 36 if you think that the rule at the time as they
7 see it was that there could be no departures from
8 courts-martial.

9 And what I'm saying is, it was built into
10 Article 36, into the Manual for Courts-Martial all throughout
11 the '90s, long predating any of the conduct in question. It
12 was built in there that the President could depart based on
13 practical need.

14 And, Your Honor, while you're going to the manual,
15 let me ask you to turn to the preamble of the manual at some
16 point and see that that's part of the executive order that the
17 President was authorized to give under Article 36, which
18 states in Article 36A that the President shall prescribe rules
19 which, insofar as practicable, will be the rules in federal
20 district courts. And then 36B says that the procedures in
21 courts-martial and commissions shall be uniform insofar as
22 practicable. So you have this practical need determination
23 built into the law back in the time of the offense.

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1 So coming back to *Calder v. Bull*, you have to look
2 at 949a, say is this an ex post facto law and is this altering
3 the legal rules of evidence and receiving less or different
4 testimony than was required at the time of the commission of
5 the offense in order to convict the offender? And with
6 respect, we just don't see it. The law has not changed in
7 that respect.

8 Congress had stated that rules of evidence
9 departing from courts-martial were available to the President
10 based on practical need. Now, that's not open season, and the
11 court spends a lot of time on this in *Hamdan I*. That doesn't
12 mean every departure is justified. In fact, that decision
13 stands for the kinds of departures that are not justified, and
14 I'll get to what they say about hearsay in a moment.

15 But the President in the Manual for Military
16 Commissions going all the way back close to 1950 puts in the
17 preamble, part 1 of the Manual for Courts-Martial, that
18 subject to any applicable international rule or to regulations
19 made by the President, military commissions shall be guided by
20 the rules of this manual. That's part of the rules prescribed
21 by the President, too.

22 MJ [COL POHL]: Would that give him authority to
23 prescribe rules that would violate the ex post facto clause?

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1 CP [BG MARTINS]: There are limits based on the
2 Calder v. Bull category. I also appreciate counsel raising
3 Carmell because that's a very relevant case, that's a great
4 case. It highlights the distinction between those that are
5 permissible and a government changing the rules in violation
6 of the ex post facto and those types of changes that are
7 acceptable, and that no defendant can have a vested right or
8 expect a vested right in every procedure that may be in force
9 at the time in a particular forum when he commits the crime.

10 And that distinction, as Your Honor and counsel
11 were speaking a bit of Carmell, is one between sufficiency of
12 evidence rules and rules of admissibility. And Carmell is a
13 good case because it shows that the corroboration rule in that
14 case, which was the law changed from one in which a sexual
15 assault victim over the age of 14 whose statement would need
16 to be corroborated, it changed to eliminate the corroboration
17 of a sexual assault victim over the age of 14, over the age of
18 14 because they had a youthful victim exception to the general
19 rule that sexual assault victims' statements needed to be
20 corroborated or there needed to be some outcry
21 contemporaneous, close contemporaneous to the offense.

22 And very importantly the Texas statute in question
23 changed it from no conviction can be supported unless you have

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1 a corroboration to conviction may be supportable if you don't
2 have corroboration. That is a Calder v. Bull fourth category
3 case. It's very much like the case that Calder v. Bull cites
4 for its fourth category. That is very much like the 17th
5 century British case of Fenwick in which parliament, after
6 Fenwick does his crimes or his conduct, changes the treason
7 law from two witnesses required for treason to one. That's a
8 sufficiency of evidence to convict law to be contrasted with
9 an admissibility rule that increases the pool of evidence.

10 And that's what we have here, both in the hearsay
11 rules and in the corroboration rule, he points to the fact
12 that the Military Commission Rules of Evidence lack the 304(g)
13 corroboration requirement that we have in courts-martial.
14 That's not a sufficiency of evidence rule, that's about
15 whether or not the confession comes in. It's not one that
16 goes to the supportability of conviction. And the Carmell
17 court is very clear on this. Carmell preserves this important
18 distinction. That goes back then to what the President can
19 do.

20 So we have a rule in 949a, Your Honor, that
21 doesn't change the burden of proof. It remains beyond a
22 reasonable doubt. That is even-handed on its face. Defense
23 can bring in evidence of this kind as well. And if you bring

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1 that back now to the President's ability to change the rules
2 and look at Hamdan I, which spends a lot of time on the law
3 that existed relevant to procedures at the time of the conduct
4 in question, and you see some very important things.

5 And I would refer Your Honor to the concurrence of
6 Justice Kennedy, because he spends the most time on this and
7 gives the most content to it. He looks at three types of
8 things that are offensive about the rules for evidence and
9 hearsay in military commissions under Military Commission
10 Order No. 1. And the three things are that those rules would
11 allow for unsworn, unsigned statements. He says -- and other
12 types of statements that are unreliable. He also points to
13 coercion, coerced statements. They would have allowed for
14 coerced statements to come in.

15 And then, very importantly, and this links to a
16 lot of his analysis of the structural defects of that process,
17 he says there's no judge, and the presiding officer under that
18 system could have been overruled by the members of the
19 commission on whether to admit or consider something that they
20 thought was probative and reliable, and he thought not. And
21 this is pivotal to Justice Kennedy, who is the fifth vote on
22 this, and he's giving content to this discussion on hearsay.

23 So there are rules that are beyond the pale that

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1 would actually exceed the authority, but if linked to
2 practical need -- and what does 949a say? Practical need.
3 It's the same standard that was there in Article 36, the
4 unique circumstances of operations during hostilities. That's
5 what it asks the judge to consider in this very specific
6 process where there's notice given, adversarial process,
7 you're the one who's going to decide whether it's admitted.

8 You're a judge. To Justice Kennedy, that's very
9 important. You're presiding over it and you're applying rules
10 to ensure that it's reliable. You have to find that it's
11 reliable after looking at all of the circumstances. You've
12 got to find that it's probative. You've got to take into
13 consideration whether the will of the declarant was overborne,
14 and other indicia of reliability.

15 And then you have to make sure it's in the
16 interest of justice. But you're also considering those
17 practical need factors that Article 36 back in 1950 and now
18 competent authority giving more specificity to it, which by
19 the way was called for by the Supreme Court in Hamdan I. They
20 wanted more information about the practical need.

21 So 949a, Your Honor, with respect, is not a
22 violation of the Calder v. Bull fourth category and no accused
23 in the 1990s could have had a vested right in a rule such as

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1 the defense asks you to import ----

2 MJ [COL POHL]: You lost me a little bit there on that
3 one. You said no accused has a vested right.

4 CP [BG MARTINS]: In the rule, specific rule that the
5 defense says you should apply now.

6 MJ [COL POHL]: But as we discussed earlier, we're
7 talking about Congress' power or the ex post facto provision.
8 So if Congress violated the ex post facto rule, does it make
9 any difference whether or not the accused had some vested
10 right?

11 CP [BG MARTINS]: I'm using the formulation that the
12 court often uses in ex post facto analyses, Your Honor,
13 because ex post facto is, of course, grounded in the principle
14 of legality of notice. You know, the idea is the government,
15 is the government doing a bait-and-switch, right?

16 And so sometimes the courts look to the rules that
17 were in effect at the time of the commission of the alleged
18 offense, and they say what -- what does the accused have a
19 vested right in staying the same? And they sometimes talk
20 about it that way, that he has a vested right, that the
21 offense not change -- or the four Calder v. Bull categories
22 don't ----

23 MJ [COL POHL]: No, I understand that, and I didn't mean

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1 to -- I understand that this is an accused-centric rule, for
2 want of a better term, is that he can be better off, but he
3 can't be worse off.

4 CP [BG MARTINS]: Right. Although I would raise in that
5 formulation, the court has definitely gone away from this idea
6 that you sort of consider the distinction between substance
7 and procedure. And I think the commander made some reference
8 to this formulation, anything which makes the accused worse
9 off is ex post facto, I would certainly oppose that
10 formulation. That's not the law. The law is, in this fourth
11 category, sufficiency rules, which clearly Carmell was. And
12 the court spends a lot of time on that.

13 MJ [COL POHL]: But the question I asked him, and I'll
14 ask you, too: If we went to the 2002 rules of evidence on the
15 hearsay issue, would we use an Ohio v. Roberts analysis or
16 Crawford analysis?

17 CP [BG MARTINS]: At the first level, if you do that,
18 Your Honor, you're taking a law that is sound law that does
19 not violate ex post facto in which Congress is using its
20 authority appropriately here.

21 MJ [COL POHL]: I got it. You don't agree with the
22 premise of the question, I've got that.

23 CP [BG MARTINS]: I do oppose the premise.

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1 MJ [COL POHL]: I got it.

2 CP [BG MARTINS]: I think your question points out the
3 practical difficulty of this and the reason why courts don't
4 seek to freeze in time every rule and every aspect of a
5 particular preferred forum -- I guess there's a preference for
6 a general court-martial here that is going to redound to the
7 benefit of the accused. That is just not the law. Congress
8 is using ex post facto -- or the courts view the ex post facto
9 doctrine and the Stogner case which they cite in their reply
10 says this as well. Justice Breyer is noting ex post facto is
11 one of these separation of powers policing rules.

12 It ensures Congress' power is in check. And
13 that's the standard. It's not go in and try to freeze in time
14 every aspect. You've got to look at the categories, and is it
15 manifestly unjust and oppressive. It goes to notions of
16 notice.

17 So could someone, and Your Honor I ask you when
18 you're looking at this Hamdan I opinion and the places cited
19 by the defense and you're looking at the analysis of hearsay
20 by the majority in the context of Article 36 and practical
21 need, ask whether someone situated in the 1990s should feel
22 he's not on notice that he could be tried by a court with
23 procedures different from courts-martial if practical need is

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1 demonstrated.

2 And now we can go to the hearsay notice just
3 briefly since the defense raised it. We're not talking about
4 a piece of hearsay, testimonial hearsay in the abstract there.
5 The process requires you in the traditions of the adversarial
6 system to look at the details.

7 We're talking about a statement -- let's use the
8 hypothetical that we give you there. We haven't yet litigated
9 anything like this, but the hypothetical is a statement made
10 not long after the alleged offense that doesn't make a
11 conclusory statement of guilt or an opinion of guilt of
12 someone, which is offense to the court in Yamashita.

13 They leased some property to somebody who looked
14 like the accused, described the accused in detail, pick him
15 out in a photo book, describe details of the doors of the
16 place, of the carpeting in the place, the boat that was
17 present, go into great detail.

18 And then there's a whole web of additional
19 evidence that corroborates it, a lease document that
20 corroborates what he says, pictures of the boat, pictures of
21 the ----

22 MJ [COL POHL]: Now you're getting into the exact
23 procedure.

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1 CP [BG MARTINS]: But, Your Honor, I think this is
2 important because the question is is this unjust and
3 oppressive? Is there some unfairness that comes from the
4 practical need determination?

5 And the court in Hamdan I says that practical need
6 is pivotal ----

7 MJ [COL POHL]: But would I not then have to then apply
8 that analysis to each and every rule?

9 CP [BG MARTINS]: And that's the requirement of 949a,
10 Your Honor, and that's what we say is sound and that it's not
11 unjust and oppressive at all. We do not have a law here that
12 is an ex post facto law, the law present in this particular
13 motion.

14 But this court should look to that rule, should
15 apply the practical need determination that Congress has
16 rightfully made in a situation of unprivileged belligerency,
17 people who do not advertise themselves as being in conflict.
18 They're operating beyond international borders, and that can
19 raise practical difficulties that are cognizable and
20 appropriate. They do not settle the question.

21 You settle the question, Your Honor, with respect,
22 based on a hearing and a careful analysis of each particular
23 piece, and you say is this probative, is this reliable, does

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1 it have indicia of reliability, is it in the interest of
2 justice and is there any indication that the will of the
3 declarant is overborne?

4 So with respect, Your Honor, we believe that this
5 is not an ex post facto law. Thank you.

6 MJ [COL POHL]: Thank you. Commander.

7 Commander, just so I clarify something, looking at
8 your pleading ----

9 ADDC [CDR MIZER]: Yes, Judge.

10 MJ [COL POHL]: One moment. I'm sorry, go ahead.

11 ADDC [CDR MIZER]: Thank you, Your Honor. Okay. We
12 don't quarrel with the President's ability to make rules and
13 distinctions. The issue before Hamdan I, the issue before
14 Hamdan I was whether or not he had done so. And the ultimate
15 answer was that he had not, which was then sent back to
16 Congress. So even as late as 2006, 949a did not exist.

17 So I mean that's really what is at the heart of
18 this, is can you come in after the fact and create evidentiary
19 rules that lower the sufficiency of evidence? And that's
20 precisely what most notably the hearsay provisions do in this
21 case.

22 Judge, with respect to the retroactive application
23 of Crawford, I don't have Teague v. Lane in front of me here

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1 but I would submit to the court this would be the same thing
2 if a case were still on appellate review. This is still an
3 active case. You don't have to get into the analysis of
4 Teague v. Lane as whether the Supreme Court has announced a
5 new rule or retroactive or not. As I stand here, I believe
6 that Crawford -- I won't comment on the Teague v. Lane
7 retroactivity of Crawford because it's irrelevant, Judge.

8 MJ [COL POHL]: Yeah, quite frankly that's a little -- I
9 know I raised it, but it's a little bit off topic.

10 ADDC [CDR MIZER]: Indeed, Judge.

11 MJ [COL POHL]: If we're going to apply -- if the
12 ex post facto, if your requested relief is granted, we could
13 leave for another day as to exactly those kind of issues.

14 ADDC [CDR MIZER]: Yes, Your Honor, we would appreciate
15 an opportunity to brief the retroactivity of Crawford, if that
16 is in play.

17 Finally, Your Honor, General Martins discusses a
18 vested right, someone situated in the 1990s, and that the
19 ex post facto clause is rooted in notice. And that is partly
20 true. But Carmell on page 533 says it is more than just
21 notice. They say, "There is plainly a fundamental fairness
22 interest, even apart from any claim of reliance or notice, in
23 having the government abide by the rules of law it establishes

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1 to govern the circumstances under which it can deprive a
2 person of his or her liberty or life." And that's really what
3 this motion is about at bottom, Judge. Thank you.

4 MJ [COL POHL]: Thank you.

5 Anything further?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: Thank you. 177, also an ex post facto.

8 ADDC [CDR MIZER]: Yes, Your Honor.

9 And so here, Judge, we're dealing with the third
10 Calder category with respect to 177. And that category is
11 "Every law that changes the punishment and inflicts a greater
12 punishment than the law annexed to the crime when committed."

13 Now, the Military Commissions Act authorizes the
14 death penalty for a number of offenses for which it was not
15 authorized under the 2002 Manual for Courts-Martial. The
16 prosecution argues that the manual did authorize and refers to
17 general law of war provisions in Article 18, and then also
18 R.M.C. 201f(1)(B)(ii).

19 Article 18, though, Judge, if you take a look at
20 it, authorizes the death penalty for those subject to the code
21 when it is specifically authorized. The quote in the next
22 sentence in Article 18 says that general courts-martial also
23 have jurisdiction to try any person who by the law of war is

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1 subject to trial by a military tribunal and may adjudge any
2 punishment authorized by a law of war.

3 If you go and look at the discussion of RCM 201,
4 it references Article 68 of the Fourth Geneva Convention.
5 Article 68, which is cited in the prosecution's pleadings,
6 deals with the question of when an occupying power may impose
7 death. And so we're talking about in essence martial law
8 military commissions, which I think have been discussed at
9 length in both Hamdan I and to some extent in Hamdan II.

10 They include, Article 68 cites specifically,
11 espionage, serious acts of sabotage or intentional offenses
12 causing the death of one person if authorized under the law of
13 the occupied territory.

14 The MCM does not provide the authority for death
15 as default, and that's essentially what the prosecution's
16 argument is in this case.

17 MJ [COL POHL]: Are there any offenses in this case that
18 would, consistent with your argument, still authorize a
19 capital punishment?

20 ADDC [CDR MIZER]: If you're looking for pure
21 premeditation, offenses as currently drafted, the elements
22 set forth ----

23 MJ [COL POHL]: Only what we have.

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1 ADDC [CDR MIZER]: I understand. The short answer is,
2 Judge, no. Simply because what has happened here is that
3 Congress has codified lesser mens rea than was in place in the
4 2002 Manual for Courts-Martial. And although there is ----

5 MJ [COL POHL]: Would that same argument apply to any
6 federal statutes in an Article III court?

7 ADDC [CDR MIZER]: I'm not sure I understand your
8 question, Judge.

9 MJ [COL POHL]: What I am saying is you keep referring
10 to the 118 provisions that talks about unpremeditated murder.

11 ADDC [CDR MIZER]: Yes, Your Honor.

12 MJ [COL POHL]: Okay. And my question is -- and it is
13 your position that unpremeditated murder can never be a
14 capital offense under the UCMJ?

15 ADDC [CDR MIZER]: No, Judge, that's not our position.
16 And I think if you look, our position is simply that the
17 Manual for Military Commissions as it existed in -- excuse me,
18 the Manual for Courts-Martial as it existed in 2002 is cabined
19 by the court's Eighth Amendment jurisprudence. So you have
20 both of these prongs, ex post facto and Eighth Amendment
21 operating here. This is the ex post facto portion of that
22 argument, Judge.

23 And so we would submit that the power to impose

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1 the death penalty is cabined by the Eighth Amendment
2 jurisprudence in a military court, and specifically Loving v.
3 United States, which was cited in our pleading. And there's
4 many Loving cases so I want to be specific for the record,
5 it's 517 U.S. 748. That case, as I'm sure Your Honor knows,
6 has been going on your entire career in the Army.

7 But specifically in Loving, the court says,
8 "Article 118(4) by its terms permits death to be imposed for
9 felony murder even if the accused had no intent to kill and
10 even if he did not do the killing himself. The Eighth
11 Amendment does not permit the death penalty to be imposed in
12 those circumstance."

13 So they strike down the UCMJ or find that the UCMJ
14 Article 118 is unconstitutional for purposes of the Eighth
15 Amendment. They say that it's saved by the RCM 1004 factors
16 that we'll talk about in other motions with Your Honor.

17 So the answer to Your Honor's question is there
18 are a narrow category of unpremeditated murder offenses where
19 capital punishment can be imposed, and those are set forth
20 with glancing distinction in Loving, intent to kill, and even
21 if he did not do the killing himself.

22 So we're looking for, as we'll argue in the Eighth
23 Amendment portion of this motion later, substantial

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1 involvement in the crime. And so the death penalty may be
2 imposed ----

3 MJ [COL POHL]: That's the Ring analysis?

4 ADDC [CDR MIZER]: I don't know that it's as much Ring,
5 Your Honor, as it is Enmund, Tison, Kennedy, a series of death
6 cases most recently, Kennedy was '08 and I think Graham v.
7 Florida was 2010. I'm not sure about the year on Graham,
8 Judge.

9 MJ [COL POHL]: But you say there is a narrow category
10 of unpremeditated murder that would authorize the death
11 penalty given other involvement in the enterprise by the
12 accused?

13 ADDC [CDR MIZER]: Yes, Your Honor. And that's the
14 point of this motion, is that simply those two narrow
15 categories, premeditation and a very narrow category of felony
16 murder, if you will, is all that was authorized for capital
17 punishment in the year 2002 when some of these offenses are
18 alleged to have occurred.

19 And that simply the MCA as it's drafted -- and I
20 think the most offensive is probably hazarding a vessel,
21 although the perfidy, the elements of perfidy are no less
22 offensive to the Eighth Amendment in that they don't require
23 an intent element at all. With respect to hazarding a vessel,

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1 it's hazarding a vessel and a homicide results. The argument
2 by the defense is the Eighth Amendment simply does not allow
3 an accused to be put to death on what is, in essence, a strict
4 liability standard.

5 What we're looking for here, Judge, is two things:
6 First, the mens rea of premeditated felony murder, which is
7 intent to kill or killed himself; and then additionally, that
8 death would have been authorized for the elements as set forth
9 in these charges, perfidy, murder in violation of the law of
10 war, terrorism, attacking civilians and then also hazarding a
11 vessel. We're looking for the court, again, to apply the law
12 as it existed in the year 2002. Thank you, Judge.

13 MJ [COL POHL]: Thank you. Trial Counsel? Major
14 Seamone.

15 ATC [MAJ SEAMONE]: Good morning, Your Honor.

16 MJ [COL POHL]: Good morning.

17 ATC [MAJ SEAMONE]: At core, although a number of issues
18 have been discussed over the last few moments, the key
19 question here is whether there's an ex post facto violation.

20 And if essentially in 2002 punishment by death was
21 available for the defense that the defense has challenged, if
22 it was available then and it's available now and there has
23 been no increase in punishment because death is still

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1 available and it was before, then there's no ex post facto
2 violation. That's essentially the question posed.

3 And the answer to that question is that in 2002,
4 even before that in 1998, if you look at the Manual for
5 Courts-Martial, it's very clear that death was authorized
6 specifically for the types of offenses alleged here. And
7 that's because these offenses -- and this is important -- are
8 intentional in nature and they result in the death of one or
9 more people.

10 Each of the offenses challenged, whether it's the
11 terrorism charge, perfidy, whether it's attacking civilians or
12 whether it's murder in violation of the law of war, all of
13 these allege an intentional act that results in the death --
14 resulted in the death of one or more persons.

15 MJ [COL POHL]: Does the act have to be intentional or
16 the death have to be intentional?

17 ATC [MAJ SEAMONE]: Well, under international law,
18 Article 68 does talk about an intentional act that results in
19 death. It does not require even the intent to kill, it just
20 requires an intentional act that has the result of death. So
21 under international law principles, that's what the standard
22 would be.

23 But going back, it's important to consider why

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1 death would have been available under the various rules. And
2 what is important here is that when it comes to law of war
3 offenses, the rules of courts-martial and Article 18
4 collectively incorporate the sentencing range from the law of
5 war. That's what they serve to do. And one of the clearest
6 places to see that is in Rule For Court-Martial 1004(c)(10)
7 which says only in the case of a violation of the law of war,
8 death would be authorized if the offense is punishable by
9 death under the law of war.

10 So that's important because when we consider the
11 Loving opinion, which is important to this case, Loving was
12 not a case that addressed a law of war violation. So when the
13 Supreme Court talked about Article 118(1), Article 118(4), the
14 murder charge under the Uniform Code of Military Justice, it
15 did have a comment there about limitations on non-law of war
16 offense that would be either requiring premeditation or
17 certain articulated felony murders.

18 But in no way did Loving limit the types of
19 offenses that are permissible where the death penalty would be
20 permissible. In Loving the Supreme Court mentioned the
21 espionage offense under Article 106a under the Uniform Code of
22 Military Justice.

23 The Supreme Court recognized that death was

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1 available for espionage. And clearly, Your Honor, espionage
2 doesn't require the intent to harm anyone physically, the
3 intent to kill, and it doesn't even require a person to die
4 for death to be permissible, so there's ----

5 MJ [COL POHL]: Are you familiar with any espionage case
6 that a death sentence was actually adjudged?

7 ATC [MAJ SEAMONE]: Well, Your Honor, I am familiar with
8 the court's recognition that it's been a longstanding rule
9 that espionage is -- death penalty is appropriate for
10 espionage under the law of war.

11 MJ [COL POHL]: What I am saying is over time there has
12 been -- rape of a child was a death penalty offense. And then
13 when the person got death and went to the Supreme Court and
14 they said no, we don't think so.

15 So what I am saying is the fact they recognize
16 that it's listed as an authorized punishment but has never
17 gone through any traditional judicial type of review, that
18 that is an authorized punishment for espionage?

19 ATC [MAJ SEAMONE]: Your Honor, what the important
20 distinction is, especially if you take rape of a child as an
21 example, is the nexus in a law of war violation raises
22 national security concerns.

23 And the court did talk about, especially in the

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1 context of the President's responsibilities in that area and
2 the joint responsibility of Congress under the various
3 articles of raising and supporting armies, et cetera, that
4 there are specific war powers that address crimes like
5 espionage that take them into a different realm.

6 So even though death is not a sentence that is
7 handed out regularly for these offenses that I could find and
8 be able to cite now, the carved-out exception related to these
9 law of war firmly grounded principles is something worthy of
10 mentioning.

11 But, Your Honor, importantly to come back, rule
12 1004(c)(10) existed at the time the Supreme Court considered
13 the Loving facts and looked at the constitutionality of that
14 rule. And in (c)(10), in Subsection (c)(10), that provision
15 about the law of war violation meriting the death penalty for
16 an offense under the laws of war was still there when the
17 Supreme Court turned to Rule 1004 and found it to be
18 permissible. So that's also another point that would suggest
19 that it's simply not a limitation to law of war offenses to
20 cite a rule applying to non-law of war offenses.

21 Going back to the law of war authorizing death for
22 these offenses, while defense counsel mentioned Article 68 of
23 the fourth Geneva Conventions as being somewhat limited, it's

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1 important to recognize the way that we determine what
2 international law is, and that is a hierarchy of sources to
3 turn to, and certainly whether we look to Article 38 of the
4 ICJ statute or Hamdan v. Rumsfeld or al Bahlul in terms of the
5 sources of hierarchy, it is vital to consider the first prong,
6 which would be treaties and conventional law; and then after
7 that a second prong, a different source which would be
8 customary international law, and there are others. And the
9 government has focused on those first two categories to
10 emphasize what the law of war is for these offenses
11 specifically.

12 And so if we started with the third
13 Geneva Conventions, Article 100, that just talked about giving
14 notice for the types of offenses that the occupying power
15 considers eligible for death. The ICRC commentary to
16 Article 100 talks about the fact that there was going to be no
17 abolition of the death penalty and not even narrowing it down
18 to specific offenses.

19 And then the next treaty provision that
20 constitutes the corpus of treaty and conventional law on the
21 law of war is Article 68. And it mentions espionage and it
22 mentions sabotage of military installations and it mentions
23 intentional acts that result in the death of one or more

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1 persons as constituting those serious types of law of war
2 offenses that warrant the death penalty.

3 And then after that you see Additional Protocol 1,
4 Additional Protocol 2, they don't do anything to negate that
5 standard. They just talk about further limitations. They
6 talk about not executing -- excuse me, not imposing the death
7 penalty upon women who are pregnant and upon mothers with
8 young or dependent children or upon juveniles. But there's no
9 further limitation and nothing to contradict that rule.

10 And customary international law, looking beyond
11 treaty and conventional law, if you look to customary
12 international law, it's the concept of a general and
13 consistent practice combined with a sense of legal obligation
14 to follow that norm, the term being opinio juris.

15 In looking at customary international law, the
16 government talked about precedents from America, the American
17 Revolution all the way through in terms of military
18 commissions and the types of offenses that were punishable by
19 death, and certainly asks the court to consider World War II
20 precedents as particularly instructive because there were so
21 many cases tried. And it wasn't only the United States, it
22 was allies who had the same provisions that the government
23 cited, and then the international criminal tribunals of the

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1 Far East and Tokyo and in Europe and Nuremberg.

2 And what arises from that is the consensus that
3 the punishment of death was available for serious law of war
4 violations. The defense says any type of law of war violation
5 would merit death. Certainly there were committees of the
6 United Nations that looked at practices and came to that
7 conclusion. But beyond that, commentators such as the recent
8 analysis in 2005 of customary international law of war
9 concluded it is serious violations of the law of war that are
10 punishable by death. Also the United Kingdom's Ministry of
11 Defense Manual talking about violations of the law of war that
12 would be egregious would be warranting the death penalty.

13 So, Your Honor, to sum it up, the ex post facto
14 clause is concerned with an increase in the quantum of
15 punishment, right? In cases like Peugh, which the defense
16 cited, talk about an increase in a sentencing range and a
17 danger that a greater punishment would be authorized and given
18 and handed down.

19 And in the Peugh case there was an example of an
20 offense that had formerly been punishable in a range of 30 to
21 37 months confinement. And because of a change in the federal
22 sentencing guidelines, the same offense would be punishable by
23 up to over 80 months confinement because of one of those

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1 sentencing enhancements for a loss of over \$2.5 million
2 resulting from the crime.

3 And so the court was looking at a situation where
4 there was clearly a difference in the punishment and a higher
5 range that was possible, and in that case the argument was
6 that because the federal sentencing guidelines weren't
7 mandatory and were only advisory, there could still be judges
8 who depart from them and give a lesser sentence than the new
9 maximum range or the new range under the guidelines.

10 And the court, the Supreme Court in addressing
11 that said that for various reasons, because judges were forced
12 to come up with a sentencing range under the guidelines first
13 and then justify whether they wanted to depart from those
14 guidelines, that essentially cabined the discretion of the
15 judges and channeled them into the new range, which was
16 higher.

17 In this case the range under international law,
18 which would have been incorporated into the manual in 2002, in
19 1998, and even today, the range would include death for these
20 intentional offenses that resulted in the death of one or more
21 persons. And under the Military Commissions Act, it's the
22 same result, that death would be available for these
23 particularly egregious offenses. That is why the government

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1 requests that you deny the defense's motion.

2 MJ [COL POHL]: Thank you.

3 ATC [MAJ SEAMONE]: Would you excuse me for one moment,
4 Your Honor?

5 MJ [COL POHL]: Sure.

6 ATC [MAJ SEAMONE]: Thank you very much.

7 MJ [COL POHL]: Commander, anything further?

8 ADDC [CDR MIZER]: Your Honor, I think the important
9 thing to keep in mind as you consider this motion and also the
10 government's law of war arguments, are provisions in the
11 language of Article 18 that provide a general court-martial
12 with law of war jurisdiction, and they speak of express
13 authorization for the death penalty.

14 And, Judge, as the government looks at the law of
15 war, essentially death is a default position. It's available
16 for virtually every offense but certainly for an undefined
17 category that they call serious offense. And so all the
18 government need do in a case is label a war crime a serious
19 offense and they may circumvent the ex post facto clause.

20 Judge, when we were here Wednesday, I argued to
21 Your Honor that there is an example. There is not an example
22 of hazarding a vessel as a war crime anywhere. That case has
23 not occurred in international law, much less a case of that

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1 nonexistent, as we've submitted before, war crime being
2 subjected to the death penalty.

3 What this court should require of the government
4 is show us a perfidy case where the death penalty has been
5 imposed and to run through each of these offenses. Because if
6 they can, if there is an express authorization as required by
7 Article 18, then we've got an ex post facto problem, Judge.

8 MJ [COL POHL]: Are you saying that there needs to be a
9 first case before you can have a second case?

10 ADDC [CDR MIZER]: Well, Your Honor, there needs to be
11 some authority that these, in the case of hazarding a vessel,
12 are in fact a crime, much less a capital crime. So there
13 needs to be some consensus in the international community.

14 Certainly there is a first case somewhere, Judge.
15 Nuremberg was the first case of waging aggressive war. I
16 mean, major war crimes, millions of people killed. And if
17 that's what the government means by serious war crime, then I
18 don't know that the defense has a dispute with that.

19 But when we're talking about perfidy, hazarding a
20 vessel involving the Limburg, we would submit that they can't
21 impose or seek the death penalty without some guidance. And
22 notably, international law didn't stop in 1949. And still in
23 the years since 1949, in the treaties and international law

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1 authority cited by the prosecution, we don't have a single
2 case for some of these offenses at all, much less a capital
3 case.

4 Judge, the standard, and I mentioned Enmund,
5 Tison, and Graham earlier -- and this is Graham's 2010 summary
6 of the law, it's, "Defendants who do not kill, intend to kill,
7 or foresee that life will be taken are categorically less
8 deserving of the most serious forms of punishment, which are
9 murder."

10 MJ [COL POHL]: What was the last?

11 ADDC [CDR MIZER]: It's, "or foresee that life will be
12 taken are categorically less deserving of the most serious
13 forms of punishment, which are murder."

14 MJ [COL POHL]: Again, we're dealing with allegations.
15 You don't think that last provision applies to this case as
16 charged?

17 ADDC [CDR MIZER]: Potentially, Judge, but it's going to
18 involve substantial involvement of the offenses, not just
19 rented an apartment, not just bought a boat, but it is going
20 to involve substantial involvement. And I'll argue the facts
21 of the Tison case a little later this morning that will
22 illuminate this.

23 MJ [COL POHL]: I'll reserve it to then. The question

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1 becomes then is it a factual issue or is it ----

2 ADDC [CDR MIZER]: Yes, Your Honor.

3 MJ [COL POHL]: Okay, I'm with you. Go ahead.

4 Major Seamone, anything further?

5 ATC [MAJ SEAMONE]: No, Your Honor. Thank you.

6 MJ [COL POHL]: Okay. Let's go ahead and take a
7 15-minute break, and we'll reconvene at 1030. Commission is
8 in recess.

9 [The Military Commission recessed at 1018, 21 February 2014.]

10 [END OF PAGE]

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