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1 [The Military Commission was called to order at 1302,  
2 21 February 2014.]

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

6 Mr. Kammen.

7 LDC [MR. KAMMEN]: Your Honor, very briefly when we  
8 broke for lunch we were discussing the lack of narrowing  
9 provided by the aggravators listed in 1004, and it was our  
10 position, of course, that that provided no real narrowing in  
11 the context of anything that would be prosecuted in a military  
12 commission.

13 If we add to that, Your Honor, and it's a little  
14 unclear how the relationship works between the aggravation  
15 specifically set out in 1004 and the section in 1002 that  
16 refers to evidence of aggravation. If that is also what I'll  
17 call rule-bound aggravation in addition to 1004, then, if you  
18 will, the argument is absolutely complete that there is no  
19 plausible crime prosecutable in military commission where  
20 death results ----

21 MJ [COL POHL]: Okay, Mr. Kammen, I've got their AE 182  
22 which is their notice of aggravating factors.

23 LDC [MR. KAMMEN]: So do I. Thank you.

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1 MJ [COL POHL]: And I see the 1004(c) and then the next  
2 paragraph talks about additional aggravating factors pursuant  
3 to R.M.C. 1001(b)(2).

4 LDC [MR. KAMMEN]: Yes.

5 MJ [COL POHL]: That's what you're referring to?

6 LDC [MR. KAMMEN]: Yes. And what we've done and we're  
7 going to address this in large measure in the discussions of  
8 AE 191 through, I think it's 196 or 197. We address those.  
9 But what the 1001 refers to evidence and aggravation, and it's  
10 not specifically related to capital crimes. It would ----

11 MJ [COL POHL]: Let me ask you this, just so -- even  
12 though they called them aggravating factors in their notice,  
13 okay, let me ask you this. Assuming that it is evidence of  
14 aggravation, not aggravating factors -- are you with me on  
15 this?

16 LDC [MR. KAMMEN]: Yes.

17 MJ [COL POHL]: Okay. Would you have any problem  
18 with ----

19 LDC [MR. KAMMEN]: Yes, in the context of a death  
20 penalty case, because the whole point of death penalty law is  
21 to provide the jury with guided discretion so that the jury, a  
22 properly instructed jury, can make a -- the individual members  
23 of the properly instructed jury can make a unique personal

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1 moral judgment on the crimes that are before them and whether  
2 or not the individual should be put to death for those crimes.

3           And so you can't just call it evidence in  
4 aggravation and just sort of throw it out there, because in a  
5 weighing jurisdiction -- and military commissions are a  
6 weighing jurisdiction -- anything that goes on the scales  
7 is -- becomes aggravating factors.

8           MJ [COL POHL]: If the defense puts in mitigation, okay,  
9 which let's say for the sake of this discussion is -- I've  
10 used this term before, is somewhat in the eye of the beholder,  
11 the defense.

12           LDC [MR. KAMMEN]: Yes.

13           MJ [COL POHL]: Okay. The government is only permitted  
14 to put in evidence of aggravating factors and not necessarily  
15 rebuttal evidence to the defense mitigation?

16           LDC [MR. KAMMEN]: Well, certainly if they have evidence  
17 that defense mitigation is untrue. And, you know, and we'll  
18 get into this in some of the discussions regarding ----

19           MJ [COL POHL]: That's one form of rebuttal, rebutting a  
20 statement of fact. What I am simply saying is that -- you  
21 know, as I'm sure you know, is that mitigation is a very  
22 broad, broad category that could bring in all sorts of things.

23           LDC [MR. KAMMEN]: Right.

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1 MJ [COL POHL]: And so as a starting point, moving aside  
2 the issue about rebutting statements of fact, is the  
3 government limited in its aggravation case, whether in case in  
4 chief or rebuttal, to proving up, if not already proven, I  
5 mean, the aggravating factors?

6 LDC [MR. KAMMEN]: Certainly in their case in chief  
7 they're limited to properly alleged, pled aggravating factors.

8 MJ [COL POHL]: I know we're getting ahead of ourselves  
9 because we're not at this point. But just so I understand  
10 your position, for example, if a victim wished to be heard on  
11 sentencing, that would not be permitted under your view of the  
12 law?

13 LDC [MR. KAMMEN]: No, that would be permitted because  
14 under Payne v. Tennessee and under the Rules of Military  
15 Commissions, victim impact evidence, if properly limited, is  
16 clearly admissible.

17 MJ [COL POHL]: Okay, but that would not necessarily  
18 have to be tied into a specific aggravating factor.

19 LDC [MR. KAMMEN]: Well, the victim impact is  
20 traditionally listed as an aggravating factor. In the federal  
21 system, for example, it is a specific aggravating factor. And  
22 that seems to be a portion of what exists in the 1001 ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. KAMMEN]: ---- iteration.

2 MJ [COL POHL]: We've gotten a little bit far a field.

3 LDC [MR. KAMMEN]: That is part of the equation.

4 MJ [COL POHL]: I'm just trying to figure because victim  
5 impact is not a listed aggravating factor under 1004 of the  
6 notice you've given.

7 LDC [MR. KAMMEN]: Correct.

8 MJ [COL POHL]: You're right under Payne they talk about  
9 how it can come in. But it is a traditional matter in  
10 aggravation in a sentencing case.

11 LDC [MR. KAMMEN]: Yes.

12 MJ [COL POHL]: So that type of traditional aggravation,  
13 not amounting to an aggravating factor, you would say  
14 without -- may be admissible on their case in chief,  
15 sentencing case in chief.

16 LDC [MR. KAMMEN]: Yes, and, in fact, I would anticipate  
17 that that will be in large measure what their case in chief in  
18 aggravation consists of.

19 MJ [COL POHL]: Okay.

20 LDC [MR. KAMMEN]: Now, again, that raises a whole host  
21 of subsidiary issues we don't need to address here.

22 MJ [COL POHL]: Okay, got it.

23 LDC [MR. KAMMEN]: But that is certainly traditional

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1 aggravation. And that raises the point because, again, in the  
2 federal statute you have aggravation, and one of the  
3 aggravators -- and it's somewhere in there, I don't recall the  
4 exact section -- deals with victim impact.

5           And then the federal case law specifically allows  
6 what are called nonstatutory aggravators, case-specific  
7 aggravators that can be generated, you know, based upon the  
8 evidence and the law but really only exist because they happen  
9 to strike the U.S. attorney who drafts the case as aggravating  
10 circumstances. And if they're supported in the evidence, then  
11 the jury decides and -- but everybody knows going in what it  
12 is.

13           Now, that seems to be the foundation -- 1001 seems  
14 to be the foundation for those kinds of, I'll call them,  
15 non-written aggravators that the prosecution has alleged in  
16 this case. We think that in this case there's no basis for  
17 many of them if they're proper under 1002 and those  
18 discussions we'll be having in a little bit.

19           But the bottom line, Your Honor, is that  
20 especially if you add in 1001, excuse me, to the 1004  
21 aggravators, there is no conceivable situation resulting in  
22 death that would be where the individual would be prosecuted  
23 in a military commission which would not be eligible for the

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1 death penalty.

2                   And that's the fundamental flaw here. Not  
3 everybody who comes into a particular jurisdiction under a  
4 constitutional statute can face death, especially where the  
5 statutes really are as broad as the military commission  
6 statutes are. Thank you.

7           MJ [COL POHL]: Thank you, Mr. Kammen.

8           LDC [MR. KAMMEN]: And let me return these. Once I get  
9 over there ----

10          MJ [COL POHL]: Thank you, Mr. Kammen.

11                   Just for the record, the audiovisual aid was  
12 182A -- I'm sorry, 180B.

13                   Mr. Sher.

14          ATC [MR. SHER]: Your Honor, the scheme here actually  
15 provides more narrowing than Article III courts because it  
16 does it twice, does it once during the guilt phase and then it  
17 narrows again during the sentencing phase, and that's what the  
18 R.M.C. 1004 factors are. They're part of the  
19 death-eligibility process.

20                   The members don't consider the 1001(b)  
21 circumstances until after they convict beyond a reasonable  
22 doubt of a death-eligible offense based on the narrow statutes  
23 that Congress gave us, and then also find beyond a reasonable

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1 doubt at least one of the 1004 aggravating factors. So both  
2 of those together narrow twice to something less than, to a  
3 smaller subset of those triable by the federal government in  
4 some capital crime, whether it's a war crime or other.

5 MJ [COL POHL]: Does it cause you pause at all,  
6 Mr. Kammen's comment, that every MCA homicide-related offense  
7 is death-eligible?

8 ATC [MR. SHER]: It does not, Your Honor, because the  
9 idea here is that the legislature -- and for us it's the  
10 Congress, is the only relevant legislative body for our  
11 courts, right, must narrow the class of defendants to ----

12 MJ [COL POHL]: Slow down, please.

13 ATC [MR. SHER]: I apologize. They narrow the class of  
14 defendants that the federal government can try capitally and  
15 that the federal jury or the federal -- or the members can  
16 sentence to death.

17 MJ [COL POHL]: Is the narrowing of the accused, the  
18 type of narrowing that the Supreme Court talks about in  
19 capital litigation, is it unique? Because I'm not aware of  
20 any type of narrowing of accused in most other capital  
21 schemes.

22 ATC [MR. SHER]: That's correct, sir. It's the  
23 narrowing of the offense. And here it's not just murder, it's

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1 perfidious conduct in violation of the law of war that results  
2 in a murder. That's far more narrow than other capital  
3 defendants that can be tried by the federal government.

4 MJ [COL POHL]: Talking about the narrowing of the  
5 offense as opposed to the narrowing of the potential  
6 offenders?

7 ATC [MR. SHER]: That's correct. There's a broad  
8 offense of murder, killing human beings, and then there is a  
9 narrow offense, a much smaller subset, that is killing a human  
10 being through perfidious means in violation of the law of war.

11 MJ [COL POHL]: In your example, Congress not  
12 legislating for non-law of war homicides conducted the  
13 narrowing at that stage?

14 I mean, the remark I heard earlier was  
15 Mr. Kammen's argument that in most jurisdictions you have a  
16 range of homicides, and then they take that range of homicides  
17 and they narrow it down to capital-eligible homicides. In  
18 this scenario there is no noncapital homicide.

19 ATC [MR. SHER]: Well, there is because you can't start  
20 from the very narrow group that Congress already narrowed and  
21 defined through its legislative action.

22 MJ [COL POHL]: No, what I am saying -- but are you  
23 saying there is a non-death-eligible homicide under the MCA?

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1 ATC [MR. SHER]: No, I am saying there is a noncapital  
2 death homicide triable in a federal court.

3 MJ [COL POHL]: Okay.

4 ATC [MR. SHER]: And Congress narrowed that through the  
5 MCA as its prerogative.

6 MJ [COL POHL]: So using Mr. Kammen's broad base of his  
7 pyramid, you would include in that pyramid any other federal  
8 statute authorizing prosecution for a homicide, and therefore  
9 you would include Article III and Article I courts the UCMJ,  
10 and this is just -- the subsets of that whole -- the base of  
11 the pyramid includes that whole subset.

12 ATC [MR. SHER]: That's correct. Mr. Kammen is starting  
13 at almost the apex of that pyramid, and the base of the  
14 pyramid is the federal government's jurisdiction to capitally  
15 try the accused, whether it's first degree, second degree, or  
16 felony murder. Here they narrowed it and they moved up into  
17 closer to the apex of the pyramid, into something less than  
18 murders. It's those that murder in violation of the law of  
19 war. And that added element is important.

20 That operates a lot like the federal death penalty  
21 act by bringing in that specific killing that relates to a  
22 specific offense. It's not just -- it's not just a  
23 second-degree murder. It is a murder that takes place in the

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1 context of hostilities, it's one that violates the law of war.

2           That's what Lowenfield allowed, that's what the  
3 Supreme Court got to, Your Honor. It found that it is the  
4 legislature's prerogative to narrow through defining offenses.  
5 And then when the jury makes its findings during the guilt  
6 phase, it is finding a more narrow set of offenses that are  
7 capital-eligible.

8           In this case with the MCA, there is a second level  
9 of narrowing, because not only did Congress narrow, but then  
10 the Executive narrowed on top of that. So not only do the  
11 members have to narrow at the guilt phase with its findings,  
12 but it must do so again when they start considering the  
13 1004(c) factors.

14           And that's before they can even consider whether  
15 to sentence the accused to death, and that's part of the  
16 balancing that takes place after the death eligibility phase.  
17 That's what's called the selection phase in courts, civilian  
18 courts. The eligibility phase here is their findings of the  
19 guilt phase based on the narrow statute Congress gave us, and  
20 added to that are their findings during the R.M.C. 1004  
21 factors.

22           Only after all of that beyond a reasonable doubt,  
23 unanimous members, do they even turn to aggravating

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1 circumstances under 1001 and mitigation, and they balance it  
2 and they balance all of it, and they come up with their  
3 sentence.

4 MJ [COL POHL]: I may be getting ahead of myself, but  
5 since it's in the same piece of paper, in your notice, AE 182,  
6 you have additional aggravating factors pursuant to R.M.C.  
7 1001(b)(2). Now, just -- and I know this is coming up later  
8 on, but I just want to make sure I understand the lay of the  
9 land here. Do you see this as aggravating evidence or  
10 aggravating factors?

11 ATC [MR. SHER]: It is aggravating evidence, Your Honor.

12 MJ [COL POHL]: So the word "factor" was improperly put  
13 in there?

14 ATC [MR. SHER]: That's correct.

15 MJ [COL POHL]: Okay. Go ahead.

16 ATC [MR. SHER]: Thank you.

17 MJ [COL POHL]: Mr. Kammen.

18 LDC [MR. KAMMEN]: I think this may be the first time  
19 anyone has ever suggested that the jurisdiction of the  
20 military commission is coextensive of that with an Article III  
21 court or courts-martial, which is apparently what the  
22 government's current position is.

23 Sort of all -- we have all federal murders which

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1 is not how I understood their argument before. It was like  
2 all murders wherever they were committed, but now it's all  
3 federal murders. And that the narrowing somehow is those  
4 unlucky souls who find themselves in a military commission,  
5 then they may have done things for which they couldn't face  
6 death in federal court, couldn't face death in a military  
7 court-martial, but face death because they happen to be in a  
8 military commission ----

9 MJ [COL POHL]: Well ----

10 LDC [MR. KAMMEN]: ---- the epitome of the randomness  
11 that violates the ----

12 MJ [COL POHL]: I understand your point, but I'm just  
13 trying to -- if this was tried in an Article III court, you're  
14 saying that they wouldn't be death-eligible?

15 LDC [MR. KAMMEN]: Oh, I'm not saying that at all. I'm  
16 saying that some of these offenses might not be  
17 death-eligible, the aggravators would be different.

18 MJ [COL POHL]: I understand, but -- okay, just to  
19 understand what you are saying, because I know there's been --  
20 Moussaoui, for example, was a death case and evolved into a  
21 non-death case. You have to charge under a different statute,  
22 I got that.

23 LDC [MR. KAMMEN]: Moussaoui didn't evolve into a death

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1 case, it was a case where he didn't receive a death sentence  
2 from the jury.

3 MJ [COL POHL]: I understand how it ended. I'm just  
4 saying so -- I'm just trying to understand your point that  
5 offense, these offenses, particular offenses if tried in  
6 another particular jurisdiction, in Article III courts or  
7 military courts-martial, would not be death-eligible?

8 LDC [MR. KAMMEN]: I don't know, because again, I  
9 haven't really taken a look for this argument at the specific  
10 mens rea that is alleged. But again one of the defects in the  
11 military commissions, of course, is the lack of mens rea that  
12 is necessary that might apply in an Article III court or in a  
13 court-martial. Commander Mizer addressed that at some length.

14 MJ [COL POHL]: Okay.

15 LDC [MR. KAMMEN]: And so part of the problem, of  
16 course, is every death, every situation, crime, if you will,  
17 that involves a death that is in a military commission,  
18 because of the lack of mens rea that's required because of the  
19 broad definition, because of the broad scope of the  
20 aggravators, all will face the possibility of death. The  
21 prosecutor as a matter of grace may choose not to pursue  
22 death, but they are all death-eligible.

23 But that's certainly different than what exists in

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1 court-martial or what exists in an Article III court or in any  
2 other jurisdiction. And I think that's the fundamental -- you  
3 know, what the prosecutor does in order to obtain some  
4 pretense of narrowing is arbitrarily lump this into a rubric  
5 of all federally prosecutable murders that has never before  
6 been thought to be overlapping, coextensive, or what have you.

7           There certainly may be the occasional murder  
8 prosecuted in a court-martial that can also be prosecuted in  
9 an Article III court, but that is certainly not the majority.  
10 There certainly may be some offenses here that could have been  
11 prosecuted in a court-martial or could have been prosecuted,  
12 if alleged properly, in an Article III court.

13           But there's certainly -- nobody has ever thought  
14 to lump them all together and then say that military  
15 commissions, because they have this unique set of accused,  
16 somehow are narrowing. The narrowing occurs because of -- not  
17 the narrowing, but the selection process here has nothing to  
18 do with the crime, it has to do with the identities of the  
19 accused.

20           I mean, only certain people can end up in a  
21 military commission. Citizens can't end up in a military  
22 commission under the present ----

23           MJ [COL POHL]: Would that be an improper -- well, we've

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1 had this discussion, I think. The narrowing by the accused's  
2 status is not -- clearly they've narrowed the death-eligible  
3 individual ----

4 LDC [MR. KAMMEN]: They haven't narrowed the death  
5 eligible, they've simply narrowed the number of people who can  
6 be tried before a military commission, and they've done it --  
7 well ----

8 MJ [COL POHL]: Even if they expanded that, would it  
9 make any difference to your argument?

10 LDC [MR. KAMMEN]: No. It would -- no.

11 MJ [COL POHL]: Because we're talking about narrowing  
12 the offender, but really -- again, this is somewhat unique,  
13 but really your argument, if I understand it, is the narrowing  
14 of the offense.

15 LDC [MR. KAMMEN]: You have to have a principled Eighth  
16 Amendment-compliant capital punishment scheme. Not everybody  
17 who appears in a particular jurisdiction can face death.

18 As I said, essentially what the government posits  
19 is a scheme wherein a state said, okay, our narrowing is we're  
20 Indiana, and we only will try to put to death people who  
21 commit any kind of homicide, intentional, unintentional,  
22 accidental, whatever, in Indiana. People in Illinois, we're  
23 not interested in. People in Michigan, we're not interested

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1 in. It's only Indiana. Well, that's not an Eighth  
2 Amendment-compliant scheme and nobody has ever thought it is.

3 In fact, that was the ultimate problem in, you  
4 know, Gregg and in the seminal death penalty cases where some  
5 states basically, you know, in what existed for a long time  
6 was essentially, you know, the up or down, you could get death  
7 for any murder kind of situation. And that was struck down in  
8 Gregg for a whole host of reasons.

9 But what came back was essentially this  
10 pyramid-driven scheme that had to make a principled  
11 distinction or principled attempt to isolate the worst of the  
12 worst in that jurisdiction. And states could and  
13 jurisdictions can achieve it in different ways, but they have  
14 to try and achieve it. And they haven't tried to achieve it  
15 in this jurisdiction, in military commissions.

16 MJ [COL POHL]: Thank you, Mr. Kammen.

17 LDC [MR. KAMMEN]: Thank you.

18 MJ [COL POHL]: Mr. Sher, anything further?

19 ATC [MR. SHER]: No, thank you.

20 MJ [COL POHL]: 181.

21 TC [CDR LOCKHART]: Sir, I think we've actually tabled  
22 that. We need to have an additional 505(h) on that.

23 MJ [COL POHL]: Okay. Let me ask you a question because

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1 I'm trying to figure if there's a dispute here. And I don't  
2 want to get ahead of myself, but unless I'm confused with  
3 another motion, as I understand it, the issue is whether the  
4 accused will be granted access to classified evidence  
5 presented to the commission on the case in chief?

6 TC [CDR LOCKHART]: Correct, sir.

7 LDC [MR. KAMMEN]: That is not the issue ----

8 MJ [COL POHL]: Okay. What I am saying is I think  
9 that's -- I thought we've settled that issue, but that's okay.  
10 Okay, we'll go through the process and we'll come back to this  
11 next time. Got it.

12 183. Major Danels.

13 DDC [Maj DANELS]F: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon.

15 DDC [Maj DANELS]: Mr. Kammen said it best earlier in  
16 assessing whether or not the process is violative of the  
17 Eighth Amendment, the question is that the defense focuses on  
18 is how do we get to execution? Was the process -- did the  
19 process meet the standard of the law?

20 And here, absent a grand jury indictment, the  
21 defense believes that -- well, is requesting that Your Honor  
22 find that Section 948d of the Military Commission Act, find  
23 that it's lacking and violative of the Eighth Amendment and

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1 dismiss the capital referral in this case.

2           So as it stands, Your Honor, we're in the middle  
3 of a capital prosecution, initiated by nothing more than  
4 summary swearing of charges and the discretionary decision by  
5 a single DoD civil servant that Mr. Nashiri should be put to  
6 death. And frankly, Your Honor, the defense believes that  
7 death requires more, and by more, we mean more process.

8           The grand jury is the only protection against  
9 vindictive and politically motivated prosecutions, and the  
10 Supreme Court in its jurisprudence has determined that death  
11 cases require a heightened standard of reliability throughout  
12 all phases of the proceeding because death in its finality is  
13 different.

14           So in cases where the defendant's life is at  
15 stake, unreliable convictions are intolerable. And the check  
16 on the convening authority's decision to swear the charges  
17 that he swore to this commission and recommend death as the  
18 appropriate punishment, there's no check in the current system  
19 to that decision. And it's the defense's position that lack  
20 of a grand jury determination in a capital prosecution  
21 undermines the reliability and regularity of the proceeding  
22 and falls well below the standard, the heightened reliability  
23 standard of the Eighth Amendment.

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1           Even in a general court-martial a defendant has a  
2 right to an Article 32 investigation. And that's not ----

3           MJ [COL POHL]: But that's not a grand jury.

4           DDC [Maj DANELS]: I agree, Your Honor, but I'm just  
5 saying even there, where they don't even have to be a  
6 death-penalty court-martial, every general court-martial gets  
7 an Article 32 investigation, which entails the prosecution  
8 putting forth evidence to substantiate the charges. The  
9 defendant gets to present any sort of evidence that he wants  
10 to as it relates to guilt or in mitigation prior to the  
11 charges actually being sworn and going forward.

12          MJ [COL POHL]: Actually, just so -- the correct  
13 language here, charges are sworn at the preferral stage. So  
14 there are only preferred sworn charges. You go to the  
15 Article 32 and then the, and you're correct, the defense can  
16 put on mitigation if they want to and they can challenge the,  
17 cross-examine witnesses, the current Article 32 procedure  
18 which apparently is undergoing legislative changes, but I  
19 won't get into that.

20           And then it gets done, and then the 32 officer  
21 makes a recommendation to the convening authority, right?  
22 That's the process?

23          DDC [Maj DANELS]: Yes. But there is a thorough

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1 investigation of the alleged offenses and an opportunity for  
2 exploration of those charges. It's not just that the  
3 convening authority determines these are the appropriate  
4 charges and unchecked those charges go forward to  
5 court-martial.

6 MJ [COL POHL]: Are you equating a 32 investigation with  
7 a grand jury investigation?

8 DDC [Maj DANELS]: I do not, Your Honor.

9 MJ [COL POHL]: Okay. Your argument started out by  
10 saying no grand jury, therefore no proper referral, what it  
11 amounts to?

12 DDC [Maj DANELS]: Yes, Your Honor.

13 MJ [COL POHL]: A grand jury is a one-sided secret  
14 proceeding controlled by the prosecutor, and the failure to  
15 have that check invalidates the statutory scheme set up by  
16 Congress?

17 DDC [Maj DANELS]: In this military commission where the  
18 government is seeking to kill Mr. Nashiri.

19 MJ [COL POHL]: Is there a distinction, then, between --  
20 is it because it's a death case that he is entitled to a grand  
21 jury indictment whereas a nondeath, he wouldn't?

22 DDC [Maj DANELS]: That is the defense's position in  
23 this case that, because it is a death penalty case and the

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1 heightened level of reliability that's required in such cases,  
2 that absent a grand jury indictment, it just doesn't meet the  
3 level required by the Eighth Amendment.

4 MJ [COL POHL]: Okay.

5 DDC [Maj DANELS]: So like I said earlier, in a military  
6 court-martial, the person would get an Article 32  
7 investigation. Here exists no preliminary type investigation,  
8 Article 32 or grand jury or otherwise, where a determination  
9 is made as to what charges should go forward and a  
10 recommendation as to the disposition.

11 So in answering the defense's position that, in  
12 answering the question, how do we get to execution, the  
13 defense answers that question by saying that a process that  
14 lacks grand jury indictment or at a minimum of some form of  
15 preliminary investigation, such a process is constitutionally  
16 infirm and violative of the Eighth Amendment.

17 And in that the defense requests that you find  
18 that Section 948d of the MCA, to the extent that it authorizes  
19 the military commission to render a death sentence absent a  
20 grand jury indictment, that you find that violates the Eighth  
21 Amendment and dismiss the capital referral in this case.

22 MJ [COL POHL]: Thank you. Lieutenant Davis.

23 ATC [LT DAVIS]: Your Honor, the defense argument fails

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1 to recognize that there is a Supreme Court case directly on  
2 point. In Ex parte Quirin, the Supreme Court held that  
3 neither the Fifth nor Sixth Amendment, including the right to  
4 presentment before a grand jury, are applicable before a  
5 military tribunal, a case right on point ignored by the  
6 defense.

7 Now, perhaps the defense realize that problem, and  
8 admittedly Quirin addresses the Fifth and Sixth Amendment, so  
9 the defense has brought their challenge under the Eighth  
10 Amendment. But simply in a logical construction to suggest  
11 that amendments adopted on the same day, that there is a grand  
12 jury requirement in the Eighth Amendment that is not included  
13 in the Fifth Amendment that specifically addresses the right  
14 to a grand jury.

15 Now, such an argument as the defense makes would  
16 suggest that an accused before this commission, capital or  
17 not, has a right greater than American service members do.  
18 And that was really the crux, one of the main points in  
19 Quirin, is that that is not an acceptable situation.

20 And it's important to note that while the defense  
21 brings this claim under the Eighth Amendment, that no military  
22 case has ever found that there is that requirement, an Eighth  
23 Amendment requirement for a grand jury indictment, regardless

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1 of whether it's a capital case or a noncapital case.

2 Now, further the defense brings up this concept  
3 of an Article 32, suggesting that that presents at least some  
4 answer for why the absence of a grand jury in a military is  
5 not as significant in terms of the Eighth Amendment. As Your  
6 Honor correctly pointed out, when we're talking about an  
7 Article 32, while it does provide some protections, in the end  
8 all that is being made is a recommendation to the convening  
9 authority. There is nothing about an Article 32 that provides  
10 a check on what it is that the convening authority will  
11 ultimately decide to do.

12 It is just a recommendation. In the military  
13 context, the convening authority, generally a non-lawyer, is  
14 then going to go ahead and make a decision as to whether to go  
15 ahead and refer a case -- refer a case, refer certain charges  
16 and decide the forum for those charges.

17 The defense couldn't -- I didn't quite follow the  
18 argument, but seemed to be asserting that this grand jury  
19 protection is the one protection that is necessary to prevent  
20 an accused from moving through this process towards a sentence  
21 of death. But indeed under the MCA even though there is no  
22 grand jury, there are several procedural safeguards that more  
23 than meet a standard of prohibiting cruel and unusual

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1 punishment.

2                   One, he has a right to a fair and impartial jury;  
3 two, will not face a death sentence unless there is a guilty  
4 finding beyond a reasonable doubt by a unanimous jury of at  
5 least 12 members, that those members will then have to  
6 unanimously find an aggravating factor, that those members  
7 will then have to consider mitigating factors, that those  
8 members will then have to weigh the aggravating factors and  
9 the mitigating factors and make a finding that the aggravating  
10 factors must substantially outweigh the mitigating factors.  
11 And that's actually a heightened standard from what you find  
12 in Article III courts. In Article III courts the standard is  
13 that the aggravating factors must only sufficiently outweigh.  
14 So we have an even higher standard under the MCA.

15                   But in short, Your Honor, despite tangents about  
16 Article 32s, about the right that may or may not exist in the  
17 military, the plain and simple truth is that we have a Supreme  
18 Court case directly on point. Quirin stands for the  
19 proposition that a grand jury is not required, whether it's  
20 the Fifth Amendment or the Eighth Amendment, it's illogical to  
21 read that right into the Eighth Amendment, and the defense  
22 motion should be denied.

23                   MJ [COL POHL]: Thank you. Major Danel, anything

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1 further?

2 DDC [Maj DANELS]: Nothing further, Your Honor.

3 MJ [COL POHL]: Thank you. 185. Commander Mizer.

4 ADDC [CDR MIZER]: Thank you, Your Honor, and good  
5 afternoon.

6 MJ [COL POHL]: Good afternoon.

7 ADDC [CDR MIZER]: Judge, this motion addresses how the  
8 death penalty is no longer civilized or how it is cruel and  
9 unusual under international law in violation of the Eighth  
10 Amendment.

11 It is not unusual at the outset for courts to look  
12 to international law in assessing whether or not a particular  
13 practice violates the Eighth Amendment. I discussed this  
14 morning the Enmund case, there is reference to international  
15 law there. In Roper v. Simmons, 2005, the Supreme Court noted  
16 that the U.S. was the only nation that was still killing  
17 juveniles, and so the international practice plays a role in  
18 the Eighth Amendment determination there. And then Atkins v.  
19 Virginia in 2002. It noted that the court noted that the  
20 world's -- or the world community's disapproval of killing  
21 mentally retarded people before the Supreme Court said that  
22 that practice violated the Eighth Amendment.

23 MJ [COL POHL]: Let me make sure I understand your point

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1 here.

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

3 MJ [COL POHL]: Is that capital punishment per se  
4 violates international law and, therefore, is not an  
5 authorized punishment in U.S. courts?

6 ADDC [CDR MIZER]: Your Honor, we're limiting our  
7 argument to the punishment for war crimes. And so ----

8 MJ [COL POHL]: Okay.

9 ADDC [CDR MIZER]: ---- we need not go as broadly as  
10 some defendants in federal court have. We're just suggesting  
11 that it's no longer authorized for war crimes, which are the  
12 crimes that are before this court.

13 And that's important because Article 21 and  
14 Hamdan II direct this court to incorporate international  
15 norms. This is an international law of war court, but as I  
16 suggested this morning, it is also cabined by constitutional  
17 limitations. So here a major restriction that we've been  
18 discussing today is the Eighth Amendment.

19 I think it's important that the United States is  
20 the only western nation that retains the death penalty. I  
21 think that the court should consider that as it considers  
22 whether or not the death penalty is authorized for war crimes,  
23 it's the only nation that authorizes them even for a broader

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1 section of crimes, returning to Your Honor's previous  
2 question.

3           Importantly, all of the major international  
4 criminal tribunals of the modern era -- so here we're talking  
5 about Yugoslavia, Rwanda, Sierra Leone and Lebanon, none of  
6 them authorize the death penalty for the imposition of war  
7 crimes. I think an important point there, Judge, is some of  
8 the domestic statutes for each of those nations still did  
9 authorize capital punishment even though the international  
10 tribunals applying the law of war to those noninternational  
11 armed conflicts did not authorize ----

12           MJ [COL POHL]: But the -- you say even though some of  
13 those states authorize the death penalty domestically, but  
14 those states were not the ones running the international  
15 tribunals.

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

17           MJ [COL POHL]: I mean, otherwise we wouldn't need the  
18 international tribunals theoretically. They fill a vacuum  
19 where a decision has been made that the domestic state is  
20 either a party to the offense or won't do what the  
21 international community thinks they should do.

22           So what I am saying is, in essence, those  
23 tribunals were set up by an international community who

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1 decided they don't want to make -- to do the death penalty,  
2 correct?

3 ADDC [CDR MIZER]: What I think ---

4 MJ [COL POHL]: And primarily all western European?

5 ADDC [CDR MIZER]: They were, Your Honor, and I think  
6 it's more than just a decision that they didn't seek the death  
7 penalty. I think there's an application of international law.

8 And this gets back to one of the points I made  
9 earlier this morning, which is the prosecution cites to state  
10 practice and treaty practice from the '40s, and the way that  
11 they flip the argument on its head in essence is to say there  
12 is no modern prohibition against capital punishment. And  
13 really what you should be looking here for in the Eighth  
14 Amendment context is a modern acceptance of this practice.  
15 And you certainly aren't going to find it in any international  
16 tribunal of the modern era.

17 The last execution of a war criminal that the  
18 defense is aware of is that of Eichmann in 1962 by the State  
19 of Israel, which has also for that matter, as a domestic  
20 policy, abandoned the death penalty.

21 I think it's worth noting as well, Judge, with  
22 respect to U.S. practice, as we now wind down more than a  
23 decade of armed conflict, the way that the United States has

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1 treated U.S. servicemen who have or could have been prosecuted  
2 for war crimes, and here I'm referring to Hutchins, Vela,  
3 Behenna and then there was some discussion of Calley two days  
4 ago as well, suggests that capital punishment is not the  
5 traditional punishment for those war crimes as either.

6 I think it's worth noting, and perhaps Your Honor  
7 is aware of this, that first Lieutenant Behenna, the Army  
8 Clemency and Parole Board just granted parole in that case  
9 after just five years. It gives some idea, at least with  
10 respect to some U.S. domestic practice, the value the United  
11 States places on these type of clear war crimes. First  
12 Lieutenant Behenna executed without any dispute a captured  
13 insurgent and went through trial. It wasn't referred  
14 capitally and he is now out after five years.

15 And so both U.S. practice and international legal  
16 practice suggests that capital punishment is no longer  
17 authorized for military commissions under international law,  
18 which is one of the governing bodies of law that binds Your  
19 Honor.

20 If there are no further questions, Judge?

21 MJ [COL POHL]: Thank you. No questions.

22 Trial Counsel? Major Seamone.

23 ATC [MAJ SEAMONE]: Your Honor, good afternoon to you.

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1 MJ [COL POHL]: Good afternoon.

2 ATC [MAJ SEAMONE]: We find the opportunity again to  
3 revisit international law and the international law of war  
4 particularly and what it authorizes and authorization of the  
5 death penalty for international law of war violations. I'm  
6 going to try to limit commentary because this has been  
7 addressed before.

8 But it's important to recognize that treaties are  
9 the primary source listed among all of the different sources  
10 to consult for good reason, because they emphasize this notion  
11 of state consent and the states and treaties are manifesting  
12 their consent to a written document much like a contract that  
13 spells out what they have agreed to.

14 And we have a body of treaty and conventional law  
15 directly addressing the international law of war, and it is  
16 clear that there is no prohibition on the death penalty for  
17 law of war offenses in any of those key treaty and  
18 conventional provisions.

19 MJ [COL POHL]: Is there recognition of the death  
20 penalty as a -- as a possible sentence for ----

21 ATC [MAJ SEAMONE]: Certainly, there is.

22 MJ [COL POHL]: ---- for law of war violations?

23 ATC [MAJ SEAMONE]: We can look to Article 100 of the

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1 Third Geneva Conventions which talk about the occupying force  
2 needs to provide notice of the offenses that it will punish  
3 with the maximum penalty of death. So that is clearly  
4 recognizing that death is authorized as long as that notice is  
5 provided. And importantly Article 68 of the Fourth  
6 Geneva Conventions which we discussed earlier describes  
7 specific offenses, specific types of offenses, serious  
8 violations of the law of war that death is appropriate for,  
9 many of which have been charged here.

10           And the commentaries, the ICRC commentaries that  
11 go along with those provisions are fundamental to consider  
12 because the question of abolishing the death penalty came up  
13 again and again while countries were deciding how to draft and  
14 come up with a final version of these very treaties.

15           And the key answer was, and I think this is an  
16 appropriate characterization, that hostilities and war is also  
17 different. It's different in the sense that while some states  
18 might not on their own seek to impose the death penalty, the  
19 fact that a war is occurring is something that creates a  
20 different context, the types of offenses that occur are  
21 entirely different, more egregious.

22           As the court in Curtis commented, the death  
23 penalty is particularly an appropriate penalty for law of war

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1 violations, and there's a reflection of that in that states  
2 did not want to limit offenses to specific types or abolish  
3 the death penalty when given the opportunity. So that's why  
4 we can look at this body of treaty and conventional law and  
5 say that it certainly permits the death penalty.

6           And again, Additional Protocols 1, Additional  
7 Protocols 2, very important. This is not in the '40s, this is  
8 now after Vietnam, 1977, and we look in A.P. 1 and A.P. 2,  
9 there is no abolition of the death penalty, there is  
10 recognition the death penalty is still valid and only slight  
11 limitations based on the nature of the offender: Is it a  
12 pregnant mother? Is it a juvenile? Is it a mother who has  
13 young or dependent infants? Those are the kinds of  
14 limitations which certainly recognizes that when you don't  
15 have those factors in play, death would be authorized as long  
16 as it's in conformance with the other treaty provisions.

17           And customary international law as well. The way  
18 it's determined is by looking at that, again that opinio  
19 juris, the sense of an intent to be bound to a norm.

20           MJ [COL POHL]: How do you respond to the defense  
21 argument that the international courts of recent years have  
22 specifically not authorized the death penalty in their cases?

23           ATC [MAJ SEAMONE]: Your Honor had touched upon some of

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1 that. It's -- what are these courts? They're addressing  
2 regional conflicts. They're not states. It's the United  
3 Nations setting them up for the limited purpose of addressing  
4 those conflicts, and the rules that they're establishing are  
5 limited solely to those areas.

6           So to say that the tribunal dealing with Rwanda  
7 has any bearing on what occurs in the Middle East, for  
8 example, states are not saying that they have an intent to be  
9 bound to the parties or the situations evolved in that  
10 conflict.

11           Most notably the defense talks about the Rome  
12 statute and the creation of the International Criminal Court.  
13 That's very important. Certainly that is a forum that does  
14 not impose death. But more important than that, it's also a  
15 court of last resort. It's a court that takes cases when  
16 states are either unable to or unwilling to assert  
17 jurisdiction on their own.

18           And this is where, and I hope I get the word  
19 right, travaux preparatoires, essentially the legislative  
20 history of the development of the Rome statute ----

21           MJ [COL POHL]: I saw that word in your brief and I had  
22 no idea what it meant. So thanks for explaining it.

23           ATC [MAJ SEAMONE]: Yes, Your Honor. And it is even

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1 more important that it does mean legislative history because  
2 you had Mr. Conso from Italy describing some provisions, some  
3 key points.

4 One point is that the decision not to put death on  
5 the table as a viable punishment has no bearing on states,  
6 punishments that they would use for those offenses.

7 MJ [COL POHL]: Is that relevant for discussion because  
8 the defense is not saying states because we have -- I think  
9 Mr. Kammen said 36, 34 states, the federal government, the  
10 military have authorized the death penalty. I don't believe  
11 that's their argument.

12 Their argument is international law, that  
13 customary -- the current customary international law does not  
14 authorize the death penalty and that's the law that we should  
15 follow in this case, looking at the Hamdan and I'd say the  
16 al Bahlul I case, talking about international law. So the  
17 fact that states authorize death penalty, I don't think  
18 there's any dispute about that.

19 They just say it's not persuasive because their  
20 argument is predicated on international law. If I am  
21 misstating your argument there, Commander, I'm sure you'll  
22 correct me.

23 ATC [MAJ SEAMONE]: Your Honor, Mr. Conso made one other

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1 point when he made that first point, and I think his second  
2 point is even more appropriate to the issue you just raised.

3 He said that the Rome statute and its limitation  
4 on not imposing death as a punishment has no -- in no way  
5 should be considered as part of a norm against capital  
6 punishment. So they specifically disclaim their decision to  
7 take capital punishment off the table as something that would  
8 show a customary international law norm that the death penalty  
9 is abolished or prohibited.

10 I think, Your Honor, there is a reason why they  
11 wouldn't do that, because they don't recognize the customary  
12 international law of abolition of the death penalty. Instead  
13 they recognize that it is still a viable penalty, and  
14 certainly the government would submit that war and hostilities  
15 are different in the sense that it is even more appropriate in  
16 these situations.

17 And that is also -- you know, over 1600 death  
18 sentences issued during World War II and in the aftermath of  
19 World War II by tribunals dealing with war crimes. And when  
20 you have countries coming together and independently and  
21 collectively supporting this as a viable and necessary and  
22 lawful punishment in many instances, that's worthy to note.  
23 And nothing has been done to change or take that off the table

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1 since that period.

2                   And this is why you will see, even in 2004 and  
3 2005, the ICRC committee that reviewed customary international  
4 law of war concluded that death was available as a punishment  
5 for serious law of war violations, and the U.K. manual which  
6 the government cited before authorized it as well.

7                   So the government would certainly emphasize that  
8 war and hostilities are different, and particularly in  
9 accordance with customary international law, in accordance  
10 with treaty and conventional law, it is a viable punishment  
11 for these types of egregious offenses.

12                   Excuse me for one moment, please.

13                   MJ [COL POHL]: Sure.

14                   ATC [MAJ SEAMONE]: Thank you so much.

15                   MJ [COL POHL]: Thank you. Commander, anything further?

16                   ADDC [CDR MIZER]: Thank you, Your Honor. Just two  
17 quick points.

18                   The prosecution helps make our point here about  
19 the evolving nature of international law when they reference  
20 Additional Protocol 1. And what they suggest is its  
21 limitation of capital punishment to pregnant mothers and  
22 juveniles. And if you read out that argument, I suppose that  
23 execution for everything else, is what they're suggesting,

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1 would be permissible, which includes mentally retarded people,  
2 Judge.

3           And in 2002, our Supreme Court interpreting  
4 international precedent said the world consensus had moved  
5 past 1977.

6           MJ [COL POHL]: Now you're talking about a domestic  
7 decision by the Supreme Court about executing mentally  
8 retarded people.

9           ADDC [CDR MIZER]: I am, Judge. But what I'm referring  
10 to is that decision's reliance on the international  
11 community's consensus, that the law of nations or that  
12 international communities don't execute mentally retarded  
13 people, Judge.

14           MJ [COL POHL]: And so they rely on international norms,  
15 for want of a better term, as they interpret it to arrive at  
16 their conclusion on a domestic law.

17           ADDC [CDR MIZER]: Among other things, Judge, yes.

18           MJ [COL POHL]: I got it, okay. But I'm trying to get  
19 the leap here, is your basic argument is that international  
20 law controls this issue, not domestic law.

21           ADDC [CDR MIZER]: That's correct, Your Honor.

22           MJ [COL POHL]: Okay. And just as the Supreme Court  
23 sometimes looks at international law to interpret domestic

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1 law, in this particular context I should look at international  
2 law to determine, to glean the determination of Congress'  
3 definition, for want of a better term, of international law as  
4 it applies to the death penalty?

5 ADDC [CDR MIZER]: Yes, Your Honor. In fact, Hamdan II  
6 requires it. You're to apply Article 21 and the law of war as  
7 it existed -- or, excuse me, the law of war as it exists.  
8 That's the guidance from Hamdan II.

9 MJ [COL POHL]: Okay. And so the government argument  
10 that there is no international law explicit prohibition of the  
11 death penalty you find unpersuasive.

12 ADDC [CDR MIZER]: Yes, Your Honor. What we should be  
13 looking for is permission for the law of war.

14 MJ [COL POHL]: But wouldn't -- let me just ask. The  
15 status quo at one point in time, I don't know whether you want  
16 to start at the Nuremberg trials or wherever, death was an  
17 authorized and actually carried out sentence for law of war  
18 violations, true?

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

20 MJ [COL POHL]: Okay. And so over time, and it maybe  
21 has not been implemented, not been authorized, but you say the  
22 failure to validate it again means that it's changed from an  
23 accepted practice to an unaccepted practice, so the status quo

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1 changed by inaction to prohibiting capital punishment for law  
2 of war violations.

3 ADDC [CDR MIZER]: Yes, sir. State practice -- state  
4 practice reflects that capital punishment is not authorized  
5 for law of war violations. If this were a military commission  
6 in any other western nation, capital punishment would not be  
7 on the table here for these war crimes. Capital punishment is  
8 simply not authorized, as I said earlier ----

9 MJ [COL POHL]: But that would apply to domestic courts,  
10 also.

11 ADDC [CDR MIZER]: Indeed, Your Honor. But state  
12 practice on the domestic front informs international practice,  
13 and the last execution for war crimes that we can find is  
14 1962, Judge. That can't be ignored by this court. That's the  
15 last execution for a war crime, that of Eichmann in Israel.  
16 And we believe that that suggests that -- that, among other  
17 things, suggests that capital punishment is no longer  
18 authorized for war crimes.

19 MJ [COL POHL]: Thank you. I understand your position.

20 ADDC [CDR MIZER]: Thank you, Judge.

21 MJ [COL POHL]: Anything further, Major Seamone?

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

23 MJ [COL POHL]: 191, although I'm not sure ----

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1 LDC [MR. KAMMEN]: Take a brief recess?

2 MJ [COL POHL]: Yeah, we'll take a short break. I just  
3 want to -- just a quick question.

4 LDC [MR. KAMMEN]: Sure.

5 MJ [COL POHL]: Because this goes from 191 all the way  
6 down to 192, 193, 194, 195, 196.

7 LDC [MR. KAMMEN]: Correct.

8 MJ [COL POHL]: As fashioned, the request was to strike  
9 additional aggravating factors.

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: Okay. And I see your motion, I see the  
12 government's response. And then I thought I heard that these  
13 really aren't aggravating factors, they're aggravating  
14 evidence.

15 LDC [MR. KAMMEN]: Well, that's one thing we need to  
16 address.

17 MJ [COL POHL]: Okay. And so while we have a break,  
18 perhaps we could clarify the position of the parties, because  
19 there's a world of difference between those two nouns. And  
20 I'm not quite sure -- I see what your brief is, and I  
21 understand why your brief is there since 182 called them  
22 factors. I see the government's response and they call them  
23 factors, too. And then I heard what the government said

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1 earlier, they were not factors, they're aggravating evidence.  
2 Perhaps I'm just confused.

3 LDC [MR. KAMMEN]: No, they said it, and frankly, I've  
4 been over there -- I don't know what the right word is, but  
5 there is no concept in death penalty law of aggravating  
6 evidence unrelated to an aggravating factor.

7 MJ [COL POHL]: Okay. And I know you wanted to take a  
8 break, but let me ----

9 LDC [MR. KAMMEN]: One of our team members would like to  
10 take a break.

11 MJ [COL POHL]: Okay. We'll go ahead and take a break  
12 for 15 minutes and then we'll come back. Commission is in  
13 recess.

14 [The Military Commission recessed at 1404, 21 February 2014.]

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