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1 [The Military Commission was called to order at 1445, 22 April  
2 2014.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present that were present when commission  
5 recessed except for General Martins.

6 LDC [MR. KAMMEN]: Your Honor, before we proceed, we have  
7 been working with the security staff, and Dr. Crosby needs to  
8 meet with Mr. Nashiri about some things that will help  
9 expedite 205, but it would be helpful to the security people  
10 if we could adjourn around 4:00 to facilitate that meeting.

11 MJ [COL POHL]: Okay. That will work. Okay.

12 Commander, as I say many times, there's a lot of  
13 attorneys in this room, but there's only one judge.

14 TC [CDR LOCKHART]: Sir, I didn't say a word.

15 MJ [COL POHL]: I know. 209.

16 Major Danel's.

17 DDC [Maj DANELS]: Good morning, Your Honor.

18 MJ [COL POHL]: Good afternoon.

19 DDC [Maj DANELS]: Good afternoon. I will try to speak  
20 slowly so that the lights don't start flashing at me.

21 Your Honor, the defense in this motion asks that the  
22 commission strike the prosecution's notice of intent to seek  
23 the death penalty due to the convening authority's failure to

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1 refer the aggravating factors. Under R.M.C. 1004 and under  
2 the Constitution, a defendant convicted of murder -- it's just  
3 not enough that he be convicted of murder to authorize the  
4 death penalty. There has to be additional special factors  
5 that distinguish his crime from crimes committed by every  
6 other person convicted murder. And the MCA does not specify  
7 aggravating factors or anything else that narrows the class.  
8 In fact, the only limitation in the MCA is that for a crime to  
9 be death eligible is that a death results.

10           The statutory scheme created by the military  
11 commissions is -- does not include the statutory aggravators.  
12 Instead, the aggravators are created out of regulation. The  
13 Secretary of Defense has prescribed aggravators in the manual.  
14 Now, the defense in prior motions has disputed the authority  
15 of the Secretary of Defense's -- the authority of the  
16 Secretary of Defense to promulgate the aggravators in the  
17 manual. However, if we assume that the Secretary of Defense  
18 can legally prescribe death-eligible factors in place of  
19 Congress, those factors have to be referred by the convening  
20 authority.

21           Here there's no indication on the face of the  
22 document -- of the referral document that the convening  
23 authority considered or even determined what -- which of the

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1 aggravating factors applied in this specific case.

2 MJ [COL POHL]: Major Danels, is your argument that the  
3 statute has to list the aggravating factors ----

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

5 MJ [COL POHL]: ---- to make it death eligible?

6 DDC [Maj DANELS]: I guess it's in line with the lot of  
7 the argument that's going to happen in 210 and 211 as well;  
8 that the authority has been delegated to the Secretary of  
9 Defense and it's the defense's position that the Secretary of  
10 Defense -- that's not something that Congress can delegate to  
11 the Secretary of Defense because it is specifically a  
12 legislative function.

13 MJ [COL POHL]: Under Article 118 of the UCMJ, does  
14 Congress list the aggravating factors to make that a  
15 death-eligible offense?

16 DDC [Maj DANELS]: I'm sorry, Your Honor, say that one  
17 more time. Under Article ----

18 MJ [COL POHL]: Rephrase it. Article 118, (1) and (4),  
19 under the UCMJ are death-eligible defenses by statute?

20 DDC [Maj DANELS]: No, Your Honor. And the Supreme Court  
21 has identified that, but for the fact that the President is  
22 Commander in Chief and he ----

23 MJ [COL POHL]: Well, let me finish my -- well, you're

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1 talking about the delegation, I'm not at the delegation part  
2 yet. I'm simply at the statutory part of it. Those clauses  
3 of 118 carry a death penalty by statute, and Congress doesn't  
4 list the aggravating factors. As you correctly state, the  
5 President does.

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

7 MJ [COL POHL]: So is it your position under the MCA, the  
8 MCA must have the aggravating factors or ----

9 DDC [Maj DANELS]: Be delegated.

10 MJ [COL POHL]: ---- or Congress can delegate?

11 DDC [Maj DANELS]: To the President, but not the  
12 Secretary ----

13 MJ [COL POHL]: Just so I understand your argument. Your  
14 argument is they don't have to be embedded in the statute, but  
15 they must be properly delegated.

16 DDC [Maj DANELS]: Correct.

17 MJ [COL POHL]: Got it. Okay. Go ahead.

18 DDC [Maj DANELS]: And in this particular instance --  
19 the -- they were -- the authority was delegated to the  
20 Secretary of Defense, and then the convening authority was  
21 given pretrial advice by his legal advisor as far as the  
22 specific offenses and some aggravators that the prosecution  
23 intended to rely on during the course of trial in order for

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1 the accused to be death eligible.

2           However, there's no indication that the convening  
3 authority considered those factors or even -- there's no  
4 indication that he considered the factors because the referral  
5 document doesn't specify which factor he found -- I'm sorry.  
6 The convening -- the referral document does not show which  
7 factor he found relates to the offenses charged in this case.  
8 It doesn't show an aggravating factor, which is unlike a grand  
9 jury where the grand jury receives evidence, and then it  
10 considers the aggravating factors and it determines which  
11 aggravating factor applies. And in making that determination,  
12 it tells the defendant which aggravating factors applies and  
13 what evidence it found justifies the aggravating factor, and  
14 we don't have that here.

15           All we have is that this case is referred capital,  
16 nothing to suggest which of the aggravating factors apply at  
17 the case at instance. And because the convening authority  
18 didn't refer the aggravating factors, because those are  
19 elements of the offense, so the aggravating factor has to be  
20 found beyond a reasonable doubt by the jury, just as every  
21 other element of the offense, and should have been referred.  
22 However, that's lacking, and because that's lacking, the  
23 referral is defective.

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1           And the defense would ask that because the convening  
2 authority did not refer the aggravating factors, that the  
3 prosecution's list on its intent to seek the death penalty  
4 isn't properly before the commission and that it should be  
5 struck.

6           And I don't have anything further unless Your Honor  
7 has questions.

8           MJ [COL POHL]: Thank you, Major Daniels.

9           Trial Counsel?

10          ATC [LT MORRIS]: Good afternoon, Your Honor.

11          MJ [COL POHL]: Good afternoon. The established rules.

12          ATC [LT MORRIS]: The established rules and procedures to  
13 refer this case as a capital have been followed, and that is  
14 what is in front of Your Honor and what the defense is  
15 challenging in this motion. They were followed by trial  
16 counsel in its responsibilities, they were followed by the  
17 legal advisor, and they were followed by the convening  
18 authority who ultimately decided and explicitly stated that  
19 this case be referred capital.

20          Trial counsel's responsibilities are clear in  
21 R.M.C. 307(d), that if there are offenses which warrant or can  
22 be eligible for the death penalty, then the -- in a  
23 transmittal letter, the trial counsel will state which 1004(c)

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1 aggravating factors we intend to rely on. Trial counsel did  
2 that.

3           The other requirements of notice under 1004(b),  
4 trial counsel notified defense of the seven aggravating  
5 factors that we were going to rely on, and the rule says that  
6 this is to be done prearraignment. This was done in September  
7 of 2007. As Your Honor knows, arraignment was in November of  
8 2007, again, in accordance with the rule. The legal advisor  
9 in R.M.C. 406 needs to look at the evidence and look at the  
10 offenses under Bravo. There are five requirements of what the  
11 legal advisor is supposed to do.

12           The legal advisor did this, as well as incorporating  
13 the seven aggravating factors and making a determination that  
14 there was evidence for one or more of those aggravating  
15 factors, and put that information in front of the convening  
16 authority, and ultimately the convening authority took all of  
17 this information from the trial counsel, from the legal  
18 advisor, from submissions by defense, and made a determination  
19 that the evidence that was in front of the convening authority  
20 warranted referring this case capital. That is, the elements  
21 of the offense that's the aggravating, he made a determination  
22 in the totality of everything in front of him. And to quote,  
23 he said, "This case is referred capital."

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1           Now, what defense misapprehends is a constitutional  
2 distinction, Your Honor. They start with a 2002 Supreme Court  
3 case, Ring v. Arizona, which stands for the proposition that  
4 it is the jury, not the judge, which decides 1004 or which  
5 decides aggravating factors. Regardless of what we call them,  
6 as Scalia says in his concurrence, if they call them a part of  
7 the offense or if we call them sentencing factors, the  
8 important thing at the end of the day is that the jury decides  
9 these.

10           And so from the outset we should state the -- that  
11 the military commissions is spot on with this ruling, that it  
12 is the members who will decide the aggravating factors. That  
13 once they unanimously reach a verdict, then they need to find  
14 unanimously, beyond a reasonable doubt, at least one of the  
15 aggravating factors in order to move on to the stage where  
16 they'll weigh the aggravating evidence against the mitigating  
17 evidence. And as my colleague said in the last hearing, that  
18 this is in fact a heightened standard in comparison to  
19 Article III courts where they must find that it substantially  
20 outweighs and not just sufficiently in comparison.

21           So what the defense does is they take the Supreme  
22 Court ruling in Ring and then they take federal civilian  
23 practice, which is now to include at least one aggravating

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1 factor on a grand jury indictment pleading, and then form the  
2 analogy that somehow that needs to be done on a referral  
3 charge sheet, but what is missing -- defense hasn't give us a  
4 nexus between grand jury indictments and a referral charge  
5 sheet.

6 In fact, we know just the opposite to be true, Your  
7 Honor. We know that for servicemembers, the Fifth Amendment  
8 expressly excludes grand -- indictment by grand jury for  
9 servicemembers. We also know that by case law, ex parte  
10 Quirin, 1942, that an indictment clause of the grand jury is  
11 excluded by military commissions. So, you know, it  
12 unequivocally holds that the Fifth Amendment right to grand  
13 jury does not extend to military commissions.

14 State courts as well, where the Fifth Amendment  
15 indictment clause does not apply via the Fourteenth Amendment.  
16 So at the end of the day, no servicemember, no accused in a  
17 military commission, no defendant in a state court is going to  
18 be able to stand up and say I have a Fifth Amendment right to  
19 a grand jury. It does not exist. So constitutionally it's  
20 not there.

21 But what does exist is the protections we've just  
22 discussed. Under the rules that states establish, under the  
23 rules that courts-martial establish, and under military

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1 commissions, the rules that we've gone over that are a form to  
2 put evidence in front ----

3 LDC [MR. KAMMEN]: We're told that he's going too fast for  
4 the interpreters.

5 ATC [LT MORRIS]: Yes, sir.

6 MJ [COL POHL]: Please slow down.

7 ATC [LT MORRIS]: Yes, Your Honor.

8 What we do have, Your Honor, is rules and procedures  
9 in place to put evidence in front of the convening authority  
10 akin to a grand jury where you can evaluate that evidence  
11 using the standard of probable cause, where he can look at the  
12 aggravating factors, where he can weigh all of the  
13 circumstances and make a determination as to whether what is  
14 in front of him, both the offenses and the aggravating  
15 factors, whether that warrants referring the case capital.  
16 That happened in this case, and the convening authority made  
17 that decision.

18 Now, as I listened to defense's oral argument and as  
19 I read their pleading, I didn't see any legal authority for  
20 what they're proposing, whether that be in courts-martial or  
21 military commissions. They do cite some cases such as United  
22 States v. Brown, an Eleventh Circuit 2006 case. But again, if  
23 you read that case, it is firmly founded in the Fifth

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1 Amendment indictment clause. I mean, that's where they're  
2 pulling the necessity to include this aggravating factor on  
3 the charge sheet.

4           The government on the other hand has provided Your  
5 Honor with two cases, Turner and Akbar, that get at this  
6 issue, that talk about what is required in a courts-martial,  
7 what is required to be pleaded in Turner, whether the  
8 Article 32 officer needed to have a factual basis for the  
9 aggravating factors, and the court there said he did not. And  
10 in Akbar, then again examining what, if any, rule a grand jury  
11 indictment has in a military courts-martial and saying that it  
12 does not have any.

13           And I could give Your Honor a host of state cases  
14 post Ring that, again, do not have a requirement for these  
15 type of aggravating factors to be noticed or to be included on  
16 charge sheets, and so ----

17           MJ [COL POHL]: Does the government believe that the  
18 convening authority's referral adopted by reference the  
19 aggravating factors of the pretrial advisor?

20           ATC [LT MORRIS]: The convening authority explicitly  
21 stated that he referred the case capital. His obligation  
22 under the rules is to weigh all of the evidence, so yes, Your  
23 Honor.

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1           In conclusion, the applicable rules were followed.  
2 Rules that are not applicable to military commissions, the  
3 rules that are not necessary, were not followed, the convening  
4 authority explicitly and deliberately referred this case  
5 capital, and we urge you, Your Honor, to deny the defense  
6 motion.

7           Thank you.

8           MJ [COL POHL]: Thank you.

9           Major Daniels?

10          DDC [Maj DANELS]: Yes, sir.

11           As we pointed out in our pleading with regard to  
12 Ring, every federal court has held that an indictment charging  
13 a death-eligible offense under the federal Death Penalty Act  
14 must charge statutory aggravating factors, which in turn must  
15 be approved by the grand jury. And the convening authority in  
16 this particular instance, his function is to afford the  
17 accused the great protections of that -- of a preliminary  
18 inquiry, similar to that of a grand jury indictment, and to  
19 make a probable-cause determination that the offenses -- each  
20 element of the offense is supported by the evidence.

21           However, in this instance, by not referring the  
22 aggravators, the convening authority abdicated his  
23 responsibility to ensure that each element of the offense was

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1 in fact supported by probable cause.

2           We don't know which of the aggravating factors the  
3 convening authority determined were relevant. It just says  
4 that this case is referred capital. There isn't any  
5 indication as to which of the ones listed in the pretrial  
6 advice that the convening authority found existed or what  
7 evidence supported that finding, which is unlike a grand jury  
8 indictment. In a grand jury indictment, it would tell you  
9 which aggravating factor was found and what evidence the grand  
10 jury used to support the finding of that aggravating factor.

11           In the instance -- in this particular case, the  
12 convening authority hasn't done that. And when you have a new  
13 system like the one that we find ourselves in, this particular  
14 military commission, there's no presumption of irregularity.  
15 If the convening authority doesn't cross every T or dot every  
16 I, the system is flawed, and we have to come to Your Honor to  
17 ensure that those flaws are not allowed to pass -- or are not  
18 allowed to stand. I'm sorry.

19           And in this instance, the law is clear. The  
20 aggravators have to be referred because they are elements of  
21 the offense that must be found beyond a reasonable doubt by  
22 the jury. And because they were not referred, the referral is  
23 defective, and the government's notice, with the list of

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1 things that they intend to prove as aggravating factors,  
2 should be struck.

3 MJ [COL POHL]: Thank you.

4 Trial Counsel, anything further?

5 ATC [LT MORRIS]: Nothing further, Your Honor.

6 MJ [COL POHL]: 210.

7 DDC [Maj DANELS]: 210, Your Honor, gets into a little bit  
8 of what I started talking about when you asked the question  
9 about Article 118. The delegation authority of Congress in a  
10 capital sentence regime -- capital sentencing regime must, by  
11 statute, be regulated, instructed to genuinely narrow the  
12 class of people who are eligible for death and reasonably  
13 justify the imposition of a more severe punishment for a  
14 particular defendant compared to others found guilty of  
15 murder. And, again, like I mentioned earlier, the only  
16 limitation in the MCA is that death result.

17 Sorry. I will try to slow down.

18 And that is a clear example of an aggravating factor  
19 that lacks any narrowing function. Such a limitation does not  
20 allow a sentencer to distinguish between those who deserve the  
21 death penalty from those who don't. And if an aggravator --  
22 an aggravating factor applies to every defendant eligible for  
23 the death penalty, then it's constitutionally infirm.

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1 MJ [COL POHL]: I'm looking at your motion, and it seems  
2 to say -- you say relief requested in paragraph 2, to strike  
3 the death penalty in this case because Congress' failure to  
4 include statutory aggravators results in an indiscriminate  
5 capital sentencing scheme and violates the Eighth Amendment.  
6 Are you saying -- I'm again just reading what you write. Are  
7 you saying that Congress had to include the aggravating  
8 factors in the statute? I mean, that's what you are saying.  
9 Is that what you mean?

10 DDC [Maj DANELS]: I can answer the question this way,  
11 Your Honor: The fact that they weren't included in the  
12 statute, then they should have articulated the constraints for  
13 whoever they delegated the authority to promulgate the  
14 aggravating factors.

15 MJ [COL POHL]: Is there similar constraints in the UCMJ?

16 DDC [Maj DANELS]: No, Your Honor. The difference is in  
17 the UCMJ, the power is being delegated to the President, and  
18 the President has specific function as Commander in Chief, and  
19 his authority -- he already has independent authority over the  
20 military in his role as Commander in Chief. That doesn't  
21 exist in the case here where the power is being delegated to  
22 the Secretary of Defense. He doesn't have any uniquely  
23 independent role, exercise of authority, as the President

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1 does, as Commander in Chief over military members.

2 MJ [COL POHL]: Okay.

3 DDC [Maj DANELS]: In fact, this goes into what I was just  
4 about to discuss. The Supreme Court identified an identical  
5 constitutional infirmity in Loving; however, it survives  
6 because it found that the President's role as Commander in  
7 Chief -- his authority over servicemembers runs independent of  
8 the delegation by Congress, and that it's a shared  
9 responsibility between the legislative -- this delegation was  
10 a shared responsibility between the legislative and the  
11 executive branch. That is directly tied to the President's  
12 authority as Commander in Chief.

13 Here the MCA grants the Secretary of Defense  
14 authority to promulgate procedural rules and regulations. He,  
15 in turn, promulgated the Manual for Military Commissions, not  
16 the President. So the rules are not promulgated by the  
17 President, so that's the distinction between the Loving case  
18 and our case.

19 The Secretary of Defense doesn't have any  
20 authority -- in fact, there's no precedent for him to  
21 administer military commissions or any military court or to  
22 assume any sort of legislative function in promulgating a  
23 capital sentencing regime. So the distinction is between the

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1 President in Loving, being the person that Congress has  
2 delegated the authority to, and in this case, the -- it's  
3 delegated to the Secretary of Defense, who has no independent  
4 authority to oversee military commissions or military courts.

5           Also present in the Loving case is that it  
6 recognizes the President's authority over the defendant as a  
7 servicemember. Here, Mr. Nashiri is not a servicemember.  
8 Furthermore, the Secretary of Defense is conflicted from  
9 exercising this function. He is -- the CA is wholly  
10 subordinate to the Secretary of Defense, and, as such, the  
11 Secretary of Defense is sort of a superior convening authority  
12 for all military commissions.

13           The statute does not provide for a narrowing  
14 function as provided by Furman, and instead, it gives absolute  
15 discretion as to what conduct justifies death eligibility to  
16 the very official who is responsible for ensuring as many  
17 convictions as he can against Guantanamo Bay detainees.  
18 Because it does not narrow, it's indiscriminate, and it  
19 violates the Eighth Amendment, and 948d should be struck as  
20 unconstitutional.

21           MJ [COL POHL]: Thank you.

22           Trial Counsel.

23           ATC [MR. SHER]: Good afternoon, Your Honor.

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1 MJ [COL POHL]: Good afternoon.

2 ATC [MR. SHER]: Your Honor, Congress did include the  
3 aggravating factors in the statute. It's a process expressly  
4 approved by the Supreme Court in Lowenfield, and I'll quote  
5 the Supreme Court for a moment, Your Honor. The narrowing  
6 function required for a regime of capital punishment may be  
7 provided in either of these two ways: The legislator may  
8 narrow the definition of capital offenses so that the jury  
9 finding of guilt responds to this concern, or the legislator  
10 may broadly define capital offenses and provide for narrowing  
11 by jury findings.

12 Here, the Congress did the former. They built in --  
13 they built the aggravators into the definition of the crime  
14 itself. It's not just -- as we discussed in February, Your  
15 Honor, it's not just illegal killings like that defined in the  
16 UCMJ. It's the illegal killing of a person by an alien  
17 unprivileged belligerent through, for example, perfidious  
18 means, done in the context of hostilities. That is far more  
19 narrow than those homicides attributable by the federal  
20 government, subject to federal jurisdiction.

21 The defense in its motion on AE 210 got it right.  
22 It said the legislator must prescribe aggravating factors that  
23 must be found in addition to the taking of human life that

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1 distinguishes the accused's crimes from every other act of  
2 murder. That's what Congress did here. They -- it prescribed  
3 aggravating factors in the statute that makes the  
4 death-eligible offenses more than taking human life, and  
5 thereby distinguishing the accused's crime from every other  
6 act of murder because every other act of murder, Your Honor,  
7 need not occur in the context of hostility or at the hands of  
8 an alien unprivileged belligerent.

9           Your Honor, only a fraction of homicides subject to  
10 federal court jurisdiction are death eligible under the MCA.  
11 That's the proper way to narrow. Congress did so through the  
12 definition of its substantive offenses that appropriately  
13 winnowed the class of offenders to the most deserving of  
14 death. Again, it's a process expressly approved by the  
15 Supreme Court.

16           MJ [COL POHL]: You say the aggravating factors are  
17 embedded in the definitions by -- in the statute.

18           ATC [MR. SHER]: Yes, sir, embedded within the offense  
19 itself.

20           MJ [COL POHL]: Okay. So all those listed under 1004(c),  
21 Charlie, if I'm reading this correctly, you're telling me  
22 those are all embedded in the statute?

23           ATC [MR. SHER]: No, sir. That's another round of

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1 narrowing that the Secretary of Defense imposed on the  
2 government, and it's a gate that the government certainly has  
3 to go through.

4 MJ [COL POHL]: Because you're ----

5 ATC [MR. SHER]: But it's not part of the constitutional  
6 narrowing.

7 MJ [COL POHL]: I understand that. But you're saying that  
8 your defense -- your notice of the aggravating factors were  
9 the 1004(c), I assume, correct?

10 ATC [MR. SHER]: That's correct. That was our notice of  
11 the ----

12 MJ [COL POHL]: Aggravating factors.

13 ATC [MR. SHER]: ---- rule-based 1004 aggravators.

14 MJ [COL POHL]: So there was some narrowing -- again, I  
15 think constructs are -- or at least in my mind we're confusing  
16 a couple of different -- you have the narrowing part of it  
17 that you say is embedded in the statute.

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

19 MJ [COL POHL]: And then you have the aggravating factor  
20 part of it, which is a further narrowing, correct?

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

22 MJ [COL POHL]: Okay. By the Secretary of Defense.

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

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1 MJ [COL POHL]: If -- how do you respond to Major Danel's  
2 argument that the Secretary of Defense doesn't have that  
3 authority?

4 ATC [MR. SHER]: The government's response is that  
5 Congress -- Congress delegated that authority to him.  
6 Congress must legislate, and it did, but it also may delegate  
7 within proper limits, and it did, so long as it lays down an  
8 intelligible principle.

9 Well, in this instance Congress defined the offenses  
10 in the MCA. They chose which offenses are death eligible,  
11 they narrowed the class by doing so. They made it so that the  
12 facts on which capital punishment would be based are found by  
13 the members, not the judge, as required by the Supreme Court's  
14 jurisprudence. The Secretary didn't define the offense and  
15 choose what is death eligible. The Secretary promulgated  
16 rules, as Congress directed him to do.

17 And that -- as the defense pointed out, that really  
18 leads to the Loving analysis, Your Honor. The Supreme Court  
19 held that the Congress may delegate to the executive the  
20 authority to promulgate aggravators that genuinely narrow.  
21 Only in this instance -- in Loving -- let's talk about Loving  
22 for a minute. The accused was tried by a very broad murder  
23 statute.

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1           It had to be narrowed in the constitutional sense.  
2 There were no aggravators. It was the illegal killing of a  
3 human. That's not what -- that's not what's at issue here.  
4 Here, Congress built those into the statute, into the MCA by  
5 requiring the government to prove elements like -- or to prove  
6 things like in the context of hostilities and by an alien  
7 unprivileged enemy belligerent. That is Congress narrowing,  
8 and that is what the Supreme Court had in mind in Lowenfield.

9           Lowenfield talks about the fact that a sentencing  
10 jury is required to find the existence of an aggravating  
11 circumstance is in no part of the constitutionally required  
12 narrowing process where the narrowing functions also performed  
13 during the guilt phase. All that's requiring is that there be  
14 some narrowing, that the defense have some opportunity to  
15 present mitigation, that the members, the jury, have some  
16 opportunity to exercise discretion. Nothing more is required  
17 under the Constitution.

18           Now, the Secretary promulgated rules and put  
19 together a capital sentencing scheme, as directed by Congress,  
20 and that scheme imposes additional burdens that inure to the  
21 benefit of the defense, but they're not part of the  
22 constitutional narrowing process that must be undertaken.

23           What is more, Your Honor, there's nothing -- the

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1 defense alluded to Loving limiting Congress' delegation  
2 authority to the President. There's nothing in Loving that  
3 limits it to the President. There's nothing that suggests  
4 Congress can only delegate to the President some rule-making  
5 authority.

6           In fact, the Supreme Court in Loving explained that  
7 perhaps more explicit guidance would be necessary if  
8 delegating to a new entity, but it certainly did not limit it  
9 to the President alone. And moreover, Your Honor, the  
10 Secretary of Defense is not some new entity lacking in  
11 experience.

12           After the President, the Secretary of Defense is  
13 responsible for all -- is responsible for the Department of  
14 Defense. He is responsible for all matters relating to the  
15 Department of Defense. He is the principle assistant to the  
16 President in all matters related to the Department of Defense.  
17 He is responsible for causing an annual review of the manual  
18 for courts-martial and for recommending amendments to the  
19 manual. He has experience, to be sure, with promulgating  
20 rules.

21           And here he did so in a manner that is largely  
22 consistent with the process set forth in -- used in  
23 courts-martial, and the process that's entirely consistent

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1 with the Supreme Court's jurisprudence. His process -- his  
2 process requires notice to the accused before arraignment.  
3 His process again requires that the defense be allowed to  
4 present mitigation. His process requires that the members  
5 consider that mitigation. And his process requires that the  
6 members may not impose capital punishment unless they found  
7 unanimously that the aggravating circumstances substantially  
8 outweigh the mitigation.

9           So again, his process again comports with the  
10 Supreme Court's jurisprudence and there's nothing that stops  
11 Congress from delegating that authority to the Secretary of  
12 Defense.

13           May I have one moment, Your Honor?

14 MJ [COL POHL]: Sure.

15 ATC [MR. SHER]: Unless Your Honor has any more questions.

16 MJ [COL POHL]: I don't. Thank you.

17 ATC [MR. SHER]: Thank you.

18 MJ [COL POHL]: Anything further, Defense?

19 DDC [Maj DANELS]: The government cites to Lowenfield.  
20 However, Lowenfield is not a weighing state, and therefore it  
21 does not apply. And also it misquoted or misunderstood what I  
22 said earlier when I said that -- in discussing Lowenfield,  
23 that Congress had the authority to delegate to the executive.

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1 That's true, but not necessarily a cabinet member of the  
2 executive branch. The President, it stops at the President.  
3 And Loving recognized that it was allowed to delegate to the  
4 President in that instance because of the President's position  
5 as Commander in Chief.

6           And that the delegation was a shared power between  
7 the executive and the legislative in facilitating the  
8 President's functioning as Commander in Chief of military  
9 servicemembers and his responsibilities to oversee and  
10 promulgate rules according to military courts-martial.

11           The Secretary of Defense does not have such  
12 independent authority as the President. In fact, the  
13 Secretary of Defense's position didn't even exist when  
14 Congress was developing the Constitution and laying out the  
15 authorities and the powers of the Congress and the President.  
16 The Secretary of Defense's position came later, and surely  
17 Congress didn't intend to vest that type of power in the  
18 Secretary of Defense, that he can indiscriminately determine,  
19 absent the special relationship that exists between the  
20 President and servicemembers.

21           MJ [COL POHL]: You're saying that Congress didn't mean  
22 what they wrote? You're saying Congress didn't intend to vest  
23 this power in the Secretary of Defense? Isn't that what the

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1 statute says?

2 DDC [Maj DANELS]: It does.

3 MJ [COL POHL]: So didn't Congress mean to do that?  
4 Whether they could do it or not constitutionally is a  
5 different issue, but you just said that Congress didn't mean  
6 to do that, and I'm trying to figure out ----

7 DDC [Maj DANELS]: I'm sorry. I misspoke. It's not  
8 constitutional. It's unconstitutional for Congress to  
9 delegate that power without specifically enacting a law that  
10 prescribes the confines of the power that it's delegating.

11 Here there's no check on the Secretary's power or  
12 authority once it's been delegated by Congress because  
13 Congress hasn't articulated the constraints of that power and  
14 it can't delegate its lawmaking function absent such ----

15 MJ [COL POHL]: You believe there's no narrowing by the  
16 statute?

17 DDC [Maj DANELS]: No, Your Honor. And the reason why the  
18 defense doesn't believe there's a narrowing is because if you  
19 treated Guantanamo Bay as its own jurisdiction, the only  
20 people who can be tried by a military commission are  
21 unprivileged enemy combatants who committed crimes in the  
22 context of hostilities. That's not narrowing anything, that's  
23 the entire class of people who are tried before military

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1 commission at Guantanamo Bay.

2           So for every person who can be tried in this  
3 jurisdiction, those two criteria would exist. So there is no  
4 narrowing. And because there is no narrowing, the defense  
5 requests that you find that it violates the Eighth Amendment.

6           Thank you, Your Honor.

7           MJ [COL POHL]: Thank you.

8           Trial Counsel, anything further?

9           ATC [MR. SHER]: No, Your Honor.

10          MJ [COL POHL]: Okay. Thank you.

11           We may have already touched on this, but 211, which  
12 looks kind of similar to what we were just talking about.

13          DDC [Maj DANELS]: Yes, Your Honor. Like you said, we've  
14 already talked about it. Defense does not believe that  
15 Congress can legally and constitutional delegate this  
16 authority to the Secretary of Defense. The Congress'  
17 authority and job is to make the law. The policy judgments by  
18 definition for crimes and the imposition of the death penalty  
19 are at core one of Congress' nondelegatable legislative  
20 powers.

21           So like I said previously, if Congress wants to  
22 delegate its lawmaking authority, it must lay down by  
23 legislative act an intelligible principle to which the person

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1 or body authorized to act must conform, and it doesn't do that  
2 in this case.

3           The Secretary of Defense can act. He has total  
4 discretion. There's no check on what he promulgates once  
5 Congress has delegated the authority to him. And it violates  
6 the -- the delegation of this authority violates the  
7 separation of powers.

8           MJ [COL POHL]: Could the Secretary of Defense choose to  
9 make a death-eligible offense that is constitutionally  
10 prohibited? For example, rape of an adult woman? You say  
11 there's no check on them. Would that be a check on them?

12          DDC [Maj DANELS]: Well, that's not a charge that's  
13 triable ----

14          MJ [COL POHL]: I didn't say that. You were saying  
15 there's no check on him.

16          DDC [Maj DANELS]: In the context of military  
17 commissions ----

18          MJ [COL POHL]: Isn't he still restricted by the  
19 congressional limitations, if not a congressional limitation,  
20 a constitutional limitation of what's a death-eligible  
21 offense? Could he -- I mean, Congress -- Congress listed some  
22 death-eligible offenses, correct, but that's -- not all of  
23 these are death eligible.

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

2 MJ [COL POHL]: Okay. So -- but that's not a limitation  
3 of the Secretary of Defense?

4 DDC [Maj DANELS]: Can you ask the question one more time?

5 MJ [COL POHL]: Sure. You keep saying that the Secretary  
6 of Defense has unfettered discretion of what's death eligible,  
7 and my question to you is, he's limited by the statute, isn't  
8 he? Not every MCA violation is death eligible.

9 DDC [Maj DANELS]: Correct.

10 MJ [COL POHL]: So there's some limitation on what he can  
11 do.

12 DDC [Maj DANELS]: Correct.

13 MJ [COL POHL]: And similarly, if he picked an aggravating  
14 factor that was constitutionally infirm, even though not  
15 specifically in the statute, that would also limit his  
16 discretion, wouldn't it?

17 DDC [Maj DANELS]: Yes, Your Honor, if the determination  
18 is that the Constitution applies. But if the Constitution  
19 doesn't apply -- the defense thinks that the Constitution  
20 should apply.

21 MJ [COL POHL]: Well, for your argument you are saying  
22 these are constitutional questions. You are saying they're a  
23 constitutionally prohibited delegation. So what I'm saying

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1 is, you say there's no limit on what he can do, but isn't  
2 there a statutory and constitutional limit on what he can do?

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

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

5 DDC [Maj DANELS]: So in establishing the sentencing  
6 regime in the military commission, that is the core  
7 legislative function. And because the MCA lacks any  
8 intelligible principle for how to establish the sentencing  
9 regime and the Secretary of Defense lacks competence to  
10 structure a constitutionally adequate capital sentencing  
11 regime, the defense asks the commission to declare  
12 Section 48 -- 949d unconstitutional and strike the death  
13 penalty from this case.

14 MJ [COL POHL]: Thank you.

15 Trial Counsel, do you wish to be heard?

16 ATC [MR. SHER]: No, Your Honor, we rest on our previous  
17 argument and pleadings.

18 MJ [COL POHL]: Okay. Thank you.

19 212.

20 TC [CDR LOCKHART]: I think we were going to table that  
21 until tomorrow, sir. We had talked about that.

22 MJ [COL POHL]: Okay. 222.

23 Major Hurley.

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1 ADDC [MAJ HURLEY]: Colonel Pohl, sir, good afternoon.

2 MJ [COL POHL]: Good afternoon.

3 ADDC [MAJ HURLEY]: Sir, and I know you often orient  
4 yourself to the computer and to the pleadings, I assume, that  
5 are on your computer. Sir, if I could get you to take a look  
6 at page 2 of Attachment A to our original position Appellate  
7 Exhibit 222, that states more specifically the relief we  
8 request in paragraph 2 of our motion is ----

9 MJ [COL POHL]: I got it.

10 ADDC [MAJ HURLEY]: ---- is fairly broad. So when I talk  
11 about the relief that we request, I would refer you to page 2  
12 of our 2 October 2013 discovery request, specifically the  
13 second paragraph down. The paragraph begins with the word  
14 "Specifically."

15 MJ [COL POHL]: I'm sorry. On page 2?

16 ADDC [MAJ HURLEY]: Page 2, yes, sir, of Attachment A.  
17 So, sir, it's a seven-page motion with certificate of service.

18 MJ [COL POHL]: Okay. I got it.

19 ADDC [MAJ HURLEY]: It's probably about the tenth page.

20 So, sir, for everyone's benefit that doesn't have  
21 the pleading in front of them, specifically what we're looking  
22 for is with respect to a potential claim of reprisal, we're  
23 looking -- the defense is requesting that the government

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1 search its records for after-action reports, lessons learned,  
2 civilian casualty reports, other Department of Defense or  
3 similar agency briefs or memoranda, or any similar information  
4 resulting from -- and you can see there, coalition military,  
5 clandestine or covert operations. So, sir, that's what  
6 information the defense is seeking in support of its potential  
7 claim here for reprisal.

8 Now ----

9 MJ [COL POHL]: Start with your premise. What do you  
10 consider -- you say reprisal as a defense?

11 ADDC [MAJ HURLEY]: Yes, sir. Reprisal is the word we use  
12 both in our original discovery request and in our pleadings  
13 before this court, and that's not a word that we shrink from.

14 But to use the expression defense, specifically  
15 defense, is to obfuscate exactly what we found. The  
16 government has charged Mr. Nashiri specifically in  
17 Specification 2 of Charge IV with terrorism, and in terrorism,  
18 it is an act designed to affect the public policy of another  
19 government. With respect to the specification in this case,  
20 it's the government of the United States.

21 Now, with the defensive of reprisal or with the  
22 concept of reprisal, what a state entity would do is to effect  
23 the foreign policy of another state entity by a specific

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1 action that may be deemed to violate the law of war. And what  
2 we request and what we want out of this request and the relief  
3 that we seek from this -- pardon me, sir -- from the  
4 commission is information that may lead to either a specific  
5 defense of reprisal or a related concept or information that  
6 might defeat the government in its burden of proof beyond a  
7 reasonable doubt of the elements of Specification 2 of  
8 Charge IV.

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

10 ADDC [MAJ HURLEY]: Not only that ----

11 MJ [COL POHL]: You say a possible defense of reprisal.  
12 What do you mean by defense of reprisal?

13 ADDC [MAJ HURLEY]: Sir, the defense of reprisal is  
14 established -- or the government did a good job in their  
15 pleadings, sir, of what the defense of -- or what a defense of  
16 reprisal might be.

17 MJ [COL POHL]: I want to know you what think it is.

18 ADDC [MAJ HURLEY]: Yes, sir.

19 MJ [COL POHL]: I mean, it's your defense, not the  
20 government's defense.

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: I want to make sure. You agree with the  
23 government's definition?

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1           ADDC [MAJ HURLEY]: Yes, sir. Certainly it's a  
2 serviceable definition. And what we would -- I guess what the  
3 defense is seeking is information that would inform us as to  
4 whether or not there is a cognizable defense of reprisal, as  
5 we might put forward in this commission, or -- and this is  
6 just with respect to the guilt/innocence phase of the trial,  
7 or if there is information in there that we could find with  
8 respect to Mr. Nashiri's state of mind, perhaps, that would  
9 defeat an element that the government has to prove beyond a  
10 reasonable doubt.

11                   In addition to that, what we believe is the --  
12 pardon me, sir. I'm trying to slow down. I stammer ----

13           MJ [COL POHL]: Take your time.

14           ADDC [MAJ HURLEY]: ---- which is ironic.

15           MJ [COL POHL]: Take your time.

16           ADDC [MAJ HURLEY]: The information we seek would also be  
17 relevant, it is the position of the defense, in the  
18 presentencing proceeding, as to what, if anything, may have  
19 motivated -- now, once we are at the presentencing proceeding,  
20 obviously, there's been a finding by the commission of guilt  
21 on some or all of the charges, and what we would want to do  
22 with this information potentially is use it to explain these  
23 acts that the accused has now been convicted of to the

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1 members.

2                   And that -- and both of those, not only is Brady  
3 material, but also material that's relevant to an appropriate  
4 sentence from this commission.

5           MJ [COL POHL]: Now, the government in its response says  
6 that the defense of reprisal is only authorized -- is only  
7 applicable to authorized state actors.

8           ADDC [MAJ HURLEY]: Yes, sir. And, sir, we would  
9 generally agree -- generally agree with that definition.

10          MJ [COL POHL]: Okay.

11          ADDC [MAJ HURLEY]: But what we're seeking is a category  
12 of information that would better inform us as to whether or  
13 not -- obviously, based on those facts and based on what we  
14 understand of our -- of what we understand of Mr. Nashiri,  
15 that defense may not typically be appropriate for us. But if  
16 we get all of the information we seek, and it's the position  
17 of the defense that it isn't as vague or overbroad as the  
18 government would have you believe, if we get that information,  
19 then we can make specific decisions as to whether or not we're  
20 going to ask this court to perhaps take -- to perhaps craft a  
21 defense based on the evidence that we get that is appropriate  
22 for the facts of this particular case.

23          MJ [COL POHL]: Craft a defense? I'm not quite sure what

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1 you mean by that.

2 ADDC [MAJ HURLEY]: Your Honor, your instructions instruct  
3 on a defense of reprisal or a reprisal-related defense  
4 instruction that you would give the members based on the  
5 evidence that we can put forward during the ----

6 MJ [COL POHL]: I understand defenses, recognizable  
7 defenses that are raised are instructed upon. What I'm trying  
8 to get to here is you seem to agree with the government  
9 position that this is -- defense is applicable to authorize  
10 state actors.

11 Do you think there will be some evidence that your  
12 client's an authorized state actor?

13 ADDC [MAJ HURLEY]: Sir, we don't -- one, we don't know  
14 what the information is until we get it.

15 MJ [COL POHL]: Your information has nothing to do with  
16 him.

17 ADDC [MAJ HURLEY]: Yes, sir.

18 MJ [COL POHL]: Your information -- you're asking for  
19 information about civilian casualties -- third-party civilian  
20 casualties.

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: The global war on terror, or whatever we  
23 use this day on it, that's not the information that I'm asking

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1 about.

2 ADDC [MAJ HURLEY]: Yes, sir.

3 MJ [COL POHL]: You are saying that this may go to the  
4 defense of reprisal.

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [COL POHL]: The government alleges that that defense  
7 is only available to -- only applicable to authorized state  
8 actors, okay? Do you believe your client -- I thought you  
9 agreed with that.

10 ADDC [MAJ HURLEY]: Yes, sir, I do.

11 Sir, just one second.

12 MJ [COL POHL]: Sure. If that's true, would not a first  
13 step be that your client would have to be an authorized state  
14 actor?

15 ADDC [MAJ HURLEY]: Yes, sir, it is. And, sir, it's the  
16 position of the defense that we would reserve the right to  
17 assert that our client, Mr. Nashiri, was a state actor.

18 So first, we would reserve that right in attempting  
19 to get this information, and if the information ----

20 MJ [COL POHL]: Yeah, but you can't -- no, I understand  
21 that, and I'm not asking you to tell me your trial strategy,  
22 so make sure that's very clear. I'm not saying that.

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [COL POHL]: But you're asking for a certain amount of  
2 information ----

3 ADDC [MAJ HURLEY]: Yes, sir.

4 MJ [COL POHL]: ---- that is relevant to a defense that is  
5 available only to -- as you said, to state actors. But  
6 whether or not your client is a state actor is separate and  
7 apart from the discovery you're requesting, true?

8 ADDC [MAJ HURLEY]: Well, sir, it's related. That  
9 information, if we received it, that if he's a state actor,  
10 then ----

11 MJ [COL POHL]: How can that information -- that  
12 information doesn't make him a state actor is my point. He  
13 either is or isn't.

14 ADDC [MAJ HURLEY]: Right.

15 MJ [COL POHL]: Do you allege in your pleadings that your  
16 client is a state actor?

17 ADDC [MAJ HURLEY]: We don't, but we reserve the right.

18 MJ [COL POHL]: You reserve the right. But if you don't  
19 have that threshold or at least assertion, how do you -- but  
20 you say we're not going to say whether he's a state actor or  
21 not, but if he is, we're entitled to this information. And  
22 we're reserving the right to later on argue is a state actor.

23 When you request something based on status like

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1 that, wouldn't necessarily there be some proffer of why it's  
2 relevant to this case and your client?

3 ADDC [MAJ HURLEY]: Sir, would it be necessary? It's the  
4 position of the defense that it would not be necessary,  
5 because it's the information -- so it would be in the defense  
6 of the reprisal, this thing has occurred, that has come to  
7 Mr. Nashiri's attention or the attention of another. So this  
8 instance of civilian deaths. That information has occurred  
9 now. And it's -- to get to the defense of reprisal -- sorry  
10 for punching the microphone -- to get to the defense of  
11 reprisal, then that state actor bridge has to occur. This  
12 thing has happened, whether or not Nashiri was the state  
13 actor, and whether or not this instance in this case, the  
14 allegation regarding the Limburg, whether or not that was a  
15 reprisal, and whether or not he was authorized to be a state  
16 actor.

17 So it's first the information. That's what we've  
18 got to get. And then whether or not he was a state actor gets  
19 the bridge to the actual charged offense in this particular  
20 case.

21 MJ [COL POHL]: But isn't the standard for discovery  
22 material to the preparation of the defense?

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [COL POHL]: And would this information have been  
2 material to the preparation of the defense of a nonstate  
3 actor?

4 ADDC [MAJ HURLEY]: Yes, sir, we believe that it would,  
5 because it would potentially be material to his state of mind,  
6 that in -- if we're talking about a nonstate actor of  
7 Mr. Nashiri.

8 Sir, just one second.

9 MJ [COL POHL]: Got it.

10 ADDC [MAJ HURLEY]: Thanks.

11 So first, it's his -- if we're just talking about  
12 the defense, still haven't quite got to the mitigation part of  
13 it ----

14 MJ [COL POHL]: Okay.

15 ADDC [MAJ HURLEY]: ---- but if we're just talking about  
16 the defense of a nonstate actor, where we are, the defense  
17 would submit to you it's relevant to his state of mind.  
18 His -- that individual's state of mind and his ability to  
19 participate in what the government has alleged as a far-flung  
20 conspiracy.

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

22 ADDC [MAJ HURLEY]: Thank you, sir.

23 Now that we have had this discussion about the

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1 merits portion, I would like to reiterate it at least by the  
2 words with respect to the mitigation. This information, it's  
3 the position of the defense, these instances -- potential  
4 instances of civilian casualties on a battlefield, that would  
5 be very relevant information with respect to Mr. Nashiri's  
6 state of mind, why these alleged, and at this point, convicted  
7 offenses may have occurred, and perhaps be part of our  
8 extenuation and mitigation case.

9           So, sir, finally, there is much -- much was made by  
10 the government in its response as to the overbroad nature of  
11 this request. Well, first, sir, we would direct, again, the  
12 government to the specific information that we sought in our  
13 original discovery request. And second, sir, there is a  
14 finite time that we put not only in the discovery request, but  
15 also in our pleading, beginning whenever the hostilities  
16 commenced, and ending prior to -- immediately prior to the  
17 actual allegation of the Limburg bombing.

18           MJ [COL POHL]: To be relevant to your case, what do you  
19 want? I mean, your laundry list of things there, you have to  
20 show that your client knew about each one of these? Or just  
21 globally that a lot of civilians in Muslim countries may have  
22 been killed or injured during the course of hostilities.

23           ADDC [MAJ HURLEY]: Well, sir, what we ----

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1 MJ [COL POHL]: That's very specific stuff.

2 ADDC [MAJ HURLEY]: I'm sorry, sir, I didn't understand.

3 MJ [COL POHL]: You asked for very specific stuff.

4 ADDC [MAJ HURLEY]: Yes, sir, we did.

5 MJ [COL POHL]: But what I'm saying is the specificity  
6 required to establish your mitigation case.

7 ADDC [MAJ HURLEY]: Sir, I'm really lost as to the nature  
8 of your question.

9 MJ [COL POHL]: That's okay. That's fine. And tell me  
10 that when I do that, because I -- that happens.

11 What I'm saying is this. We asked for things like  
12 AARs and all sorts of specific information, okay?

13 ADDC [MAJ HURLEY]: Yes, sir.

14 MJ [COL POHL]: Okay. But your mitigation case, if I am  
15 understanding you, is basically a lot of innocent civilians  
16 have been killed by the global war on terror by the U.S. and  
17 its allies.

18 ADDC [MAJ HURLEY]: Yes, sir.

19 MJ [COL POHL]: Why do you need to drill down to that  
20 level? Your client doesn't know on this day so and so got  
21 killed, on this day five people got killed, on this day a  
22 drone attack did this.

23 ADDC [MAJ HURLEY]: Not in the way that it would be

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1 presented to him with these -- the Department of Defense  
2 disclosures. But he would be potentially aware of an  
3 individual instance this thing occurred -- and I'll just use  
4 made-up names, all right, sir -- on x date five civilians were  
5 killed in Greentown.

6 MJ [COL POHL]: I got it. But if it goes to his state of  
7 mind ----

8 ADDC [MAJ HURLEY]: Yes, sir.

9 MJ [COL POHL]: ---- isn't the issue as to what is in his  
10 state of mind at the time?

11 ADDC [MAJ HURLEY]: Yes, sir.

12 MJ [COL POHL]: Okay. And so therefore you already have  
13 that. Now, the fact there may be other instances out there  
14 that he didn't know about ----

15 ADDC [MAJ HURLEY]: Right.

16 MJ [COL POHL]: ---- how is that relevant to his state of  
17 mind, then?

18 ADDC [MAJ HURLEY]: But it's the information that exists  
19 is relevant to his state of mind. So if one instance did  
20 occur, if we can discover an instance that Mr. Nashiri was  
21 aware of, and again we're living in the world of  
22 presentencing, that Mr. Nashiri was aware of that perhaps  
23 motivated him as in this case a nonstate actor to commit these

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1 offenses, then that information that's been verified by the  
2 Department of Defense documents and data, that is a relevant  
3 bit of information.

4 MJ [COL POHL]: Would it have to be verified if it goes to  
5 his state of mind?

6 ADDC [MAJ HURLEY]: Well, that it occurred, that he was  
7 aware of it.

8 MJ [COL POHL]: No, the -- well, the documents themselves  
9 don't establish anything as to what Mr. Nashiri was aware of  
10 at the time.

11 ADDC [MAJ HURLEY]: Right.

12 MJ [COL POHL]: The documents themselves would only  
13 establish what happened.

14 ADDC [MAJ HURLEY]: Right.

15 MJ [COL POHL]: You're saying this is a state of mind  
16 mitigation position, and I'm not necessarily disagreeing with  
17 that, but it's state of mind of Mr. Nashiri, not all of the  
18 other activities that he was unaware of.

19 ADDC [MAJ HURLEY]: Right.

20 MJ [COL POHL]: So if he's unaware of a whole bunch of  
21 other activities, okay, giving you that information is not  
22 relevant to his state of mind, is it? Because his state of  
23 mind is from 10 years ago or 12 years ago.

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1           ADDC [MAJ HURLEY]: Right. Well, sir, we would have to  
2 establish -- if we wanted to introduce that information, we  
3 would obviously have to establish relevance for it.

4           MJ [COL POHL]: But how can you do that if he doesn't  
5 already know it? Don't you have the information from his  
6 state of mind?

7           ADDC [MAJ HURLEY]: Sir, what we wouldn't have is the  
8 allegation being borne out with proof. So let's say that --  
9 sir, you're an experienced military professional. You have  
10 been at this a long time on some high-profile cases. You've  
11 heard a lot of allegations that were bouncing around in the  
12 public sphere, with regard to, let's say, Abu Ghraib, that you  
13 know, because of your experience, didn't really happen.

14                       So what the information would do is, if it verifies,  
15 if it validates it, then that goes to the weight of the  
16 evidence, and the -- in this case, again, we're in the world  
17 in which this is a part of the extenuation mitigation case,  
18 where it validates that it happened, and it validates  
19 Mr. Nashiri's sense that it occurred. It wasn't that  
20 Mr. Nashiri latched on to one little, tiny thing. If this  
21 discovery is given to us, and if it is helpful to us to prove  
22 his state of mind and what went into his decision-making at  
23 the time and it's actual, actually verified information rather

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1 than data which may or may not be true that was just bouncing  
2 around in the -- in Mr. Nashiri's case, where he was living at  
3 the time ----

4 MJ [COL POHL]: Okay. I understand.

5 ADDC [MAJ HURLEY]: Sir, just one second.

6 MJ [COL POHL]: Sure.

7 ADDC [MAJ HURLEY]: Sir, that's it. Thank you.

8 MJ [COL POHL]: Thank you.

9 Trial Counsel? Major Seamone.

10 ATC [MAJ SEAMONE]: Good afternoon, Your Honor.

11 MJ [COL POHL]: Good afternoon.

12 ATC [MAJ SEAMONE]: Another opportunity to discuss  
13 international law as the last topic of the day, potentially.

14 Your Honor ----

15 MJ [COL POHL]: Depends how long you talk.

16 ATC [MAJ SEAMONE]: Your Honor, I don't intend to talk  
17 that long because your discussion with the defense counsel has  
18 highlighted some major points.

19 It's important to note, though, that there are other  
20 requirements besides simply state actor capacity that are also  
21 required to justify a reprisal under international law. So  
22 certainly, it's the government's position that the accused  
23 is -- cannot show that he was a state actor or acting in a

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1 representative capacity for a state actor. The ICRC study of  
2 customary international law actually talks about the  
3 requirement for the actor to be in the highest levels of  
4 government for a state. So it's the government's position  
5 that that could never be established, and that is a major  
6 reason why the requested information is not relevant or  
7 material to the preparation of the defense.

8           But some other elements of a lawful reprisal include  
9 identification of a serious breach of the law of war by the  
10 opposing or targeted state, and the defense has not identified  
11 or provided any information on a specific act. They talk in  
12 the most general terms about any act by U.S. or coalition  
13 forces that resulted in the loss of life. They mention  
14 property also, for any Muslim -- predominantly Muslim or  
15 Islamic nation or state, which does not identify a specific  
16 nation, doesn't identify a specific act, either. And without  
17 being able to identify a violation of the international law of  
18 war, there's no basis that would justify a response that  
19 involved a hostile act.

20           The purpose of reprisal is to encourage future  
21 compliance with the international law of war. So there are  
22 also requirements that there be use of hostilities only as a  
23 last resort, that there should be some type of attempt to make

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1 a claim that certain actions are unlawful, and, beyond that,  
2 to try to use diplomatic channels to resolve the issue before  
3 that final use of force, and then finally, that use of force  
4 that's part of a reprisal has to be proportional.

5           And the inability to identify a single incident or  
6 single location or the circumstances that would lead to the  
7 basis for a reprisal demonstrate that reprisal is entirely  
8 inapplicable here. Again, that's also a reason that overlaps  
9 with why this wouldn't go to the accused's state of mind at  
10 any presentencing hearings because the accused would have to  
11 be motivated by something he knew for it to be relevant there.  
12 And certainly Your Honor mentioned this point, that if he  
13 doesn't know about that, if he doesn't know about something  
14 that occurred, how could that be relevant to what went into  
15 his state of mind at the time.

16           And the government's position is that it wouldn't be  
17 and it couldn't be unless he knew about it, which ties into  
18 the Armstrong case. And the government cited Armstrong to  
19 emphasize the Supreme Court's opinion that when you're talking  
20 about discovery of something, whether it's impropriety in the  
21 way that prosecutors are prosecuting cases, or any matter, you  
22 should be able to cite the example. It shouldn't be the --  
23 they use inseparable task. It shouldn't be a strained,

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1 impossible task to just be able to say what you're interested  
2 in having with some level of specificity.

3           And because the defense has utterly failed to do  
4 that -- this is post hoc. It's after the fact trying to come  
5 up with a justification on something that there's absolutely  
6 no indication that it's relevant to the accused or his actions  
7 in attacking the Limburg. And for that reason, and the  
8 reasons that you've already discussed with the defense, the  
9 government asks that you deny the defense's motion.

10           MJ [COL POHL]: Do you think the concept of what the  
11 requested information has asked for could be material to the  
12 preparation of the defense mitigation case?

13           ATC [MAJ SEAMONE]: Simply by asking for after-action  
14 reports and other documents that would indicate that civilians  
15 might have been killed, the answer would be no, Your Honor.  
16 The way it's been stated, that does not talk about events or  
17 give any indication of a violation of the international law of  
18 war or something that was even unlawful.

19           Clearly, there would have to be more to show that  
20 there was even wrongfulness there, because if there was  
21 proportional use of force, if there was discrimination and  
22 still a civilian or property might have been harmed, we can't  
23 leap to the conclusion that there was wrongdoing. And the

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1 government had cited the case, and I don't want to  
2 mispronounce it, but I think it is pronounced as Ogu- -- I  
3 don't -- excuse me, I don't want to guess here -- Oguaju,  
4 maybe Oguaju? This is a case where obviously not involving  
5 hostilities, not involving the death of civilians, but the  
6 court in that case mentioned that a bare assertion of  
7 wrongdoing is never enough to overcome the presumption of  
8 legitimate governmental actions.

9           And in this case, simply saying that a civilian  
10 might have died or property might have been lost as a result  
11 of coalition or United States action does not get to the point  
12 of wrongfulness or anything that would lend itself to  
13 assisting the accused in a justification for attacking the  
14 Limburg.

15           So the short answer to the question is no, Your  
16 Honor, it would not, in the manner stated, assist. And the  
17 government offered the defense the opportunity to supplement  
18 the request, to provide more information that would make it  
19 relevant, that would be enough to demonstrate the necessity  
20 and materiality, and the defense declined to do that.

21           So at this point, based on what the defense offered  
22 in its initial request, and now here at this commission today,  
23 the answer would be no, and the government would say that it

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1 is proper to deny the request.

2 MJ [COL POHL]: Thank you.

3 ATC [MAJ SEAMONE]: Thank you, Your Honor.

4 MJ [COL POHL]: Major Hurley. Go ahead.

5 ADDC [MAJ HURLEY]: Thanks, sir.

6 Firstly, Judge, as you're well aware, I'm relatively  
7 new to this particular action. I have been given to  
8 understand that there was a request to depose President Saleh  
9 of Yemen, and that request was denied by this commission. And  
10 it's the position of the defense that that would have been an  
11 opportunity for us to determine what, if any, relationship  
12 Mr. Nashiri had with the state and whether or not he could  
13 make a cognizable claim as a state actor.

14 The second thing that I would want to talk about in  
15 response to what Major Seamone discussed with you at the tail  
16 end of his argument was Major Seamone's -- frankly, his  
17 confusion as to what would go into someone's mind or what  
18 would be appropriate extenuation mitigation evidence. If it's  
19 in his mind, if it can be alleged to be in his mind, then that  
20 is -- to have provided for him ----

21 LDC [MR. KAMMEN]: You need to slow down.

22 MJ [COL POHL]: Everybody has that problem, Major Hurley.  
23 Go ahead.

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1 ADDC [MAJ HURLEY]: Sir, if this were my only problem.

2 MJ [COL POHL]: Go ahead.

3 ADDC [MAJ HURLEY]: If it's in his mind, if that  
4 information is in his mind, then it is appropriate -- and was  
5 in his mind at the time of the events, his -- Mr. Nashiri's  
6 motivation, then it is appropriate for the commission, the  
7 members, to consider in determining an appropriate sentence.

8 It doesn't have to meet some arbitrarily defined,  
9 conveniently, of course, by the United States government, as  
10 to whether or not there's enough wrongfulness. Is it 51  
11 percent wrongful, or this much -- was this much livestock  
12 destroyed in this particular action that was attributed to the  
13 United States government? It's what goes into the accused's  
14 mind.

15 And so we're convinced that once we get this  
16 information, once it is discovered, this information to which  
17 we're entitled, and we go through it, if it is produced in  
18 this court, then obviously, it's subject to relevancy  
19 determinations and determinations with respect to its legal  
20 propriety.

21 Sir, that's it. Thanks.

22 MJ [COL POHL]: Okay. Thank you. Just -- Major Hurley,  
23 before you go, I do have one question for you.

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1           Just make -- just so I'm really clear what you're  
2 asking for ----

3           ADDC [MAJ HURLEY]: Yes, sir.

4           MJ [COL POHL]: ---- and in reading your discovery  
5 request, you're asking basically for loss of civilian life or  
6 property in various time frames -- the time frame discussed,  
7 and the locations discussed, without a determination of  
8 whether such loss of civilian life or property was wrongful or  
9 not; is that correct?

10          ADDC [MAJ HURLEY]: Yes, sir.

11          MJ [COL POHL]: Okay. So it doesn't make any difference  
12 whether it was, for example, a legitimate military target with  
13 collateral damage or knowledge of a military target, but may  
14 have violated some other rule?

15          ADDC [MAJ HURLEY]: Yes, sir.

16          MJ [COL POHL]: Just so I'm clear what you're asking for.

17          ADDC [MAJ HURLEY]: And, sir, I think an example may help.  
18 A lot of this information may come, as we understand, in the  
19 form of an investigation, and the conclusion of the  
20 investigation may be that it was an appropriate amount of  
21 collateral damage or a good shoot or whatever the expression  
22 is.

23                 That that is -- even if it includes that, it's the

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1 position of the defense, sir, that we're entitled to that  
2 information, if it fits the criteria that we established in  
3 our discovery request.

4 MJ [COL POHL]: Okay. Thank you.

5 Major Seamone, anything further?

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

7 MJ [COL POHL]: Commission is in recess until 0900 hours  
8 tomorrow.

9 [The Military Commission recessed at 1559, 22 April 2014.]

10 [END OF PAGE]

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