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1 [The Military Commission was called to order at 1459, 24 April
2 2014.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present with the absence
5 of General Martins, and the accused remains absent.

6 Mr. Kammen, you're standing. Okay. Sorry. I
7 thought you were ----

8 LDC [MR. KAMMEN]: Only to stretch, Your Honor.

9 MJ [COL POHL]: Okay.

10 Did we want to -- we discussed this yesterday about
11 the 228, 229, 230, and it strikes to me that was -- we'd want
12 to wait until we get done with the doctor tomorrow.

13 LDC [MR. KAMMEN]: If I may, Your Honor.

14 MJ [COL POHL]: Sure.

15 LDC [MR. KAMMEN]: 228 is probably something that can
16 wait. 229 addresses the production and training of health
17 professionals treating Mr. al Nashiri. This -- you know,
18 basically we want to know what their training is and ----

19 MJ [COL POHL]: Mr. Kammen, do you want to do 229 now?

20 LDC [MR. KAMMEN]: Yeah, if we could.

21 MJ [COL POHL]: Go ahead. I just wanted to make clear
22 where we're at.

23 LDC [MR. KAMMEN]: And let me, sort of in the interest of

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1 practicality, modify the request, because the request talks
2 about the various people performing medical and health
3 functions from -- what have you, from 5 October to the
4 present. If you were to grant that, that's realistically not
5 practical in terms of where it would most likely come into
6 play, which is during the examination of this doctor tomorrow.

7 But it does occur to me that you could order, and I
8 think the government could easily obtain, that information
9 from the people who are presently treating Mr. al Nashiri.
10 And so in the interest of really practicality we would ask
11 that the commission entertain a modified request to order
12 production of training and certifications of the health
13 professionals currently treating Mr. al Nashiri.

14 I'm given to understand that there are more than
15 one, less than five. I don't know if those are psychiatrists
16 or sort of ancillary individuals, but it does seem to me that
17 given the small number, that would be something that the
18 government could easily obtain and may well be germane to the
19 examination tomorrow, given what we -- based on the
20 unclassified medical records, it appears that Mr. al Nashiri
21 does not meet very routinely with the person who's going to
22 testify tomorrow but does meet every week or two with somebody
23 who we don't know, who is unidentified, but is a psychiatrist.

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1 And so if the person who's going to testify tomorrow says,
2 well, he's reviewed those records and Nashiri is getting
3 adequate care, of course, one of the things would be, well,
4 who are these people whose records he's reviewing? So I think
5 that that would be germane to this issue.

6 MJ [COL POHL]: Okay. Trial Counsel, do you want to be
7 heard on 229?

8 ATC [LT DAVIS]: Your Honor, I think it's important to
9 just kind of take a step back and take stock of where we are
10 with regard to all of this medical information. First, that
11 the defense has been provided with all of Mr. Nashiri's
12 medical and psychological records dating back to 2006.

13 As we heard from Dr. Crosby, the defense expert has
14 had access to examine, perhaps come to some conclusions with
15 regard to Mr. Nashiri. And then in addition to 205I, Your
16 Honor has ordered the production of someone who is
17 knowledgeable, which the senior medical officer over at
18 JTF-GTMO.

19 So in the context of AE 205, I mean, the issue
20 before the commission is the adequacy of the accused's current
21 medical care, and that information is already in the defense
22 possession. It's clear from the records, should be clear from
23 the interactions that they've had with Dr. Crosby, that this

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1 kind of overly broad request will not serve that end in any
2 special way.

3 So when we're talking specifically about these
4 training documents, the training documents themselves are not
5 relevant. What is relevant is the actual treatment that
6 Mr. Nashiri is receiving. The motion, of course, being that
7 the treatment itself is inadequate.

8 So you can have the most qualified person, if
9 they're giving inadequate treatment, the qualifications are
10 really irrelevant. Or you can have the least qualified person
11 and they manage to give excellent care.

12 MJ [COL POHL]: You don't see a -- any connection between
13 the quality of treatment and the qualifications of the
14 treater?

15 ATC [LT DAVIS]: Yeah, I think ----

16 MJ [COL POHL]: So when you walk into the doctor's office,
17 it doesn't bother you that you're going to be seen by a
18 physician assistant as opposed to a medical doctor even though
19 you may get the same treatment?

20 ATC [LT DAVIS]: Well, and this kind of gets back to the
21 fact that the senior medical officer is approved to come and
22 testify.

23 MJ [COL POHL]: Okay.

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1 ATC [LT DAVIS]: And the information that I can proffer
2 that he will provide at a minimum is that he is a
3 board-certified physician. He's the one that treats
4 Mr. Nashiri. The psychiatrist is a board-certified
5 psychiatrist, who treats. So because we do have this
6 testimony that's going to be brought before the commission,
7 the defense will have an opportunity to ask what the training
8 levels are for the people that most directly treat the
9 accused.

10 MJ [COL POHL]: So what you're basically saying is the
11 defense is going to get this through the witness tomorrow.

12 ATC [LT DAVIS]: Yes, sir.

13 MJ [COL POHL]: And we should just wait to hear what the
14 witness has to say to see whether or not we should address
15 this issue.

16 ATC [LT DAVIS]: Okay.

17 MJ [COL POHL]: I said okay, meaning I understand your
18 position.

19 ATC [LT DAVIS]: I'm sorry, Your Honor, I did forget to
20 mention one point. The government has also provided the
21 defense with the curriculum vitae of the witness that's going
22 to be testifying, the senior medical officer, so the defense
23 already does have that information.

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1 MJ [COL POHL]: Well, of course, they're asking for the
2 other qualifications of other doctors, too. You understand
3 that?

4 ATC [LT DAVIS]: Yes, Your Honor.

5 MJ [COL POHL]: But in your view as you stand here at
6 1505, you believe the witness tomorrow will be able to testify
7 as to the qualifications of the current treating medical
8 personnel -- the current medical personnel treating
9 Mr. Nashiri?

10 ATC [LT DAVIS]: Yes, sir.

11 MJ [COL POHL]: Okay. Got it.

12 LDC [MR. KAMMEN]: I don't doubt anything that was said,
13 but sort of the watchword of "trust but verify" seems
14 appropriate here, but ----

15 MJ [COL POHL]: Mr. Kammen, it seems tomorrow morning we
16 will have your answer, one way or the other, and then if it --
17 if the answers satisfy your request under 229, we're done. If
18 it's not, I will certainly give you another opportunity to
19 argue the inadequacy of what you have been provided.

20 LDC [MR. KAMMEN]: Okay. It just seems to me if this is
21 readily available, if he could -- if these folks must have
22 CVs, if he can bring them, that way we know. I don't doubt
23 he's going to tell us that these are the most wonderful

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1 doctors that ever lived. And, you know ----

2 MJ [COL POHL]: Okay.

3 LDC [MR. KAMMEN]: And I mean it's pretty clear.

4 MJ [COL POHL]: Yeah.

5 LDC [MR. KAMMEN]: You understand the issue.

6 MJ [COL POHL]: Exactly. I got a question for you. Do
7 you have anything further?

8 LDC [MR. KAMMEN]: No, not ----

9 MJ [COL POHL]: Okay. Because you raised an issue that --
10 Lieutenant, just to make -- sometimes these things evolve in
11 my mind.

12 ATC [LT DAVIS]: Yes, sir.

13 MJ [COL POHL]: What I'm hearing you tell me is you have
14 no objection to giving the information to the defense, it's
15 just the information is going to be given through the form of
16 a witness rather than a hard-copy CV?

17 ATC [LT DAVIS]: Yes, Your Honor. At 1500 today certainly
18 the government's not going to be able to turn that around ----

19 MJ [COL POHL]: Okay.

20 ATC [LT DAVIS]: ---- in that amount of time, so we will
21 have the witness here tomorrow ----

22 MJ [COL POHL]: Okay.

23 ATC [LT DAVIS]: ---- who should be able to provide

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1 information.

2 MJ [COL POHL]: Okay. Okay. Just so I understand the
3 government's position is, you're not really objecting to the
4 motion, it's just the form of the reply?

5 ATC [LT DAVIS]: No, Your Honor, the first argument was --
6 could I have a moment, Your Honor?

7 MJ [COL POHL]: Sure.

8 ATC [LT DAVIS]: Just to be clear, Your Honor, the
9 government does object, first of all, on relevance grounds;
10 and, second, that we're not even sure that we have the
11 authority to provide that information. So at this juncture,
12 you know, we can inquire to see whether we can provide that,
13 but we're not -- I'm not able to give you a firm answer on
14 that.

15 MJ [COL POHL]: Do you have some type of rule that you
16 think -- I'm not saying it is or isn't. Do you have some type
17 of rule that would prohibit this?

18 ATC [LT DAVIS]: Yes, Your Honor. This would go to the
19 identifying information of personnel involved in the
20 treatment.

21 MJ [COL POHL]: Okay. If that's your -- so are you
22 withdrawing your proffer you made earlier that the witness
23 tomorrow can give the qualifications without names to the

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1 doctors treating him? Is that what you are telling me? It
2 would be much easier if we had a consistent position.

3 ATC [LT DAVIS]: Yes, Your Honor. The doctor can provide
4 the general qualifications. He might not say that this person
5 attended X university, but will be able to provide the general
6 qualifications that don't kind of step over the line of
7 providing specifically identifying information.

8 MJ [COL POHL]: Okay. What we'll do is this. We'll see
9 how this develops tomorrow, and if it's satisfactory to the
10 defense, we're done; if it's not and there's more that you
11 want, we'll revisit it and see where we're at. Thank you.

12 ATC [LT DAVIS]: Yes, Your Honor.

13 LDC [MR. KAMMEN]: And with respect to 230, again, this is
14 something that should be rather easy for the government to
15 produce, and that is we want to know essentially what the
16 current health care -- JTF healthcare policy is for access
17 for -- access of high-value detainees to medical care and, of
18 course, what changes have been made over the course of the --
19 since 2006 to the present, if any.

20 Because obviously one of the issues that has been
21 raised, while it was raised in one unique context is that
22 there are inappropriate interventions by the camp command.
23 You know, there's not an appropriate separation between the

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1 camp command and the medical personnel. And, of course, one
2 way we would know about that is whether or not the medical
3 personnel are subject to ever-changing regulations or if the
4 HVDs are subject to ever-changing regulations that emanate
5 from the camp command, which of course does bear on the
6 adequacy of the medical care.

7 MJ [COL POHL]: Now, the government responds is that
8 you're asking for all of the HVDs ----

9 LDC [MR. KAMMEN]: Well, I assume that this -- I'm sorry.

10 MJ [COL POHL]: No, I'm just reading their response. It
11 appears to say it only should address to the medical care
12 provided to your client.

13 LDC [MR. KAMMEN]: Well, if they have -- I assume if their
14 position is they have a written policy, you know, since 2006
15 that applies only to Mr. Nashiri and that would not apply to
16 any other HVDs and that every HVD has some unique situation,
17 then okay, so be it.

18 MJ [COL POHL]: But I think what they're saying is that
19 the only thing that's relevant is -- and understand this is
20 what they're saying ----

21 LDC [MR. KAMMEN]: I understand.

22 MJ [COL POHL]: ---- is how Mr. Nashiri is receiving
23 medical care and you know how Mr. Nashiri is receiving medical

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1 care.

2 LDC [MR. KAMMEN]: Well, that's true. We know what the
3 records reflect. What we don't know is to what extent his
4 medical care is limited by some overarching policy that may be
5 imposed on the physicians.

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: And, of course, that would go to the
8 adequacy of the medical care. If, for example, there's a JTF
9 position that, you know, HVDs can only see a psychiatrist once
10 a week, by rule, that would be -- you know, we know he's
11 seeing somebody, let's say, once a week, but we don't know
12 what the reason for that is because there is some rule
13 prohibiting more frequent. And I don't know that to be the
14 case, and I just use that as an example. And this seems like
15 something relatively easy to ----

16 MJ [COL POHL]: Now, your motion asks for any changes in
17 JTF-GTMO policies, guidance, procedures and/or practice.

18 LDC [MR. KAMMEN]: Right, I mean ----

19 MJ [COL POHL]: Access to -- are you really asking for any
20 changes or the current SOP?

21 LDC [MR. KAMMEN]: Well, certainly ----

22 MJ [COL POHL]: I mean, when you say any changes, changes
23 from when?

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1 LDC [MR. KAMMEN]: 2006 -- during the time he has been
2 here.

3 MJ [COL POHL]: Okay.

4 LDC [MR. KAMMEN]: I mean, because if it's become sort of
5 increasingly restrictive, that would be important to know; if
6 it's changed for the better ----

7 MJ [COL POHL]: Yeah.

8 LDC [MR. KAMMEN]: ---- if it's become less restrictive.
9 But let's say, for example, one of the things that's there in
10 2006 is a directive not to go into certain areas. That may no
11 longer exist, but has become institutionalized simply because
12 of the absence in the medical records. So all of that would
13 be germane.

14 MJ [COL POHL]: Okay.

15 ATC [LT DAVIS]: Your Honor, the government objects to the
16 defense request on several grounds.

17 First, relevance, if we are talking about this time
18 frame. Again, the issue before the commission is what care is
19 he currently receiving and whether that is inadequate.
20 Whether there was a policy in 2006, '7, '8, '9, '10, on and
21 on, is irrelevant, or whether that -- whether there has been a
22 change in that policy.

23 MJ [COL POHL]: Are you saying the current -- and I am

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1 using the term, a medical SOP, is the only one that really is
2 relevant to this motion?

3 ATC [LT DAVIS]: Yes, Your Honor, and when we have the
4 witness come in, he will be able to testify to ----

5 MJ [COL POHL]: Is there a current written medical SOP?

6 ATC [LT DAVIS]: I don't know that there is a broad one.
7 I know that there are policies in place, whether they are
8 written or not. But as the senior medical officer, the
9 witness will be aware of what those policies are.

10 MJ [COL POHL]: We'll ask the witness whether there's a
11 written one or not and he will give us that answer?

12 ATC [LT DAVIS]: Yes, sir.

13 MJ [COL POHL]: If he says yes, do you oppose giving the
14 defense a copy of it?

15 ATC [LT DAVIS]: Well, within certain limitations. If
16 there are things that go to the witness protection ----

17 MJ [COL POHL]: I understand that you got to look at it
18 first ----

19 ATC [LT DAVIS]: Yes, sir.

20 MJ [COL POHL]: ---- but as a general concept, assuming
21 there is no other bar, giving the defense a copy of the
22 current medical SOP, you don't object to that?

23 ATC [LT DAVIS]: Well, no, Your Honor.

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1 MJ [COL POHL]: Assuming it exists and assuming it can be
2 put in a form that's -- that should be releasable to the
3 defense.

4 ATC [LT DAVIS]: Right ----

5 MJ [COL POHL]: And necessarily maybe even in the
6 protective order. So I got it.

7 ATC [LT DAVIS]: Additionally, Your Honor, the government
8 does object on relevance grounds. Again, what the policy may
9 be is not relevant necessarily to what the treatment is.
10 There's a disconnect there.

11 MJ [COL POHL]: But you say necessarily.

12 ATC [LT DAVIS]: Yes, Your Honor.

13 MJ [COL POHL]: But with the -- with the changeover in
14 medical personnel, if you are a new doctor there, don't you
15 think there's a likelihood that he would look at current
16 policies in place?

17 ATC [LT DAVIS]: Yes, Your Honor, but the guiding factor
18 that we have here is what was actually applied on the ground,
19 how has this person been treated, regardless of what
20 instructions may be out there ----

21 MJ [COL POHL]: Okay.

22 ATC [LT DAVIS]: ---- it's really the issue before the
23 commission.

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1 MJ [COL POHL]: Okay. I understand your position. Thank
2 you.

3 ATC [LT DAVIS]: Thank you.

4 LDC [MR. KAMMEN]: I gather that what the prosecution
5 believes is the circumstance where military doctors come in
6 and are provided with a military SOP regarding how they should
7 treat people and disregard it, none of us here think that
8 that's the case. And so I ----

9 MJ [COL POHL]: Of course, actually, I think their
10 argument and their motion is actually contrary to that in the
11 sense that they've told you how everybody has been treated.

12 LDC [MR. KAMMEN]: And so the -- and so the question ----

13 MJ [COL POHL]: The actual treatment you have -- the
14 question is the actual treatment you have is consistent with
15 the SOP.

16 LDC [MR. KAMMEN]: Well, that's right. And if it's not --
17 let's say the SOP calls for three times weekly psychiatric
18 visits and he's only getting one, that would be significant to
19 know.

20 MJ [COL POHL]: Got it. Okay.

21 LDC [MR. KAMMEN]: So you can know the treatment, you can
22 know the SOPs, and then you can say, okay, this complies.

23 Now, the SOPs, as Dr. Crosby testified based on her

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1 knowledge, are inadequate. But you can't have it both ways.
2 You can't say, well, we don't necessarily follow the SOPs, you
3 know, if they're inadequate, but we, you know -- so I mean,
4 the starting point is what are they.

5 MJ [COL POHL]: Got it. Thank you.

6 Anything further, Lieutenant?

7 ATC [LT DAVIS]: No, Your Honor.

8 MJ [COL POHL]: Okay. On 229 and 230, let's hear what the
9 witness has got to say and then, if necessary, we'll come back
10 to them.

11 That brings us down to 237, although that looks --
12 is that embedded in 236?

13 Major Hurley, since you are standing, I'm assuming
14 this is yours?

15 ADDC [MAJ HURLEY]: Yes, sir, this is my motion to argue.

16 There are arguments that I've -- the defense has
17 already made that we need not make again, but the relief
18 requested in 237 does get at what -- we want the -- we want
19 the information that we want here, but it also gets at a
20 larger idea that we would want to discuss with the commission.

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

22 ADDC [MAJ HURLEY]: Sir, again, and we touched on this
23 dichotomy before. We want what we want in the motion that's

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1 the matter before you.

2 Going back to the more global discussion that we had
3 before, sir, do you recall that discussion?

4 MJ [COL POHL]: I do. It wasn't that long ago.

5 ADDC [MAJ HURLEY]: Sir, with respect to that, another
6 component to this -- and it's -- we get at it with some of the
7 individual things that we want, the relief that we request in
8 the motion. This case -- obviously, I haven't been
9 participating in it this whole time. This case has been
10 ongoing for years and months. During that period of time,
11 from the time it was referred and the accused was arraigned,
12 until 18 July 2013, we had access to those programs, the JWICS
13 and SIPRNet. While we are in the midst of a referred case,
14 trial dates have been established and we are moving forward,
15 sometimes more quickly, sometimes more slowly, to trial, our
16 access to these -- access to these platforms is shut off.

17 And what we would want is, with respect to these
18 individual items, some understanding of how that occurred.
19 Secretary Hagel doesn't show up in his office in the morning,
20 I'm fairly confident, sit down at a computer and start banging
21 out a memo, that this is -- even the -- even if that were
22 true, which I am convinced it is not true, he indicates in the
23 text of the document that this order that he's signing is in

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1 response to concerns that were expressed to him from the
2 Office of the Director of National Intelligence.

3 What the defense seeks is some greater understanding
4 as to why this thing happened, what contacts existed prior to
5 and during the development of this memorandum, in order to
6 better inform what administrative remedies we will seek going
7 forward.

8 So it's the contact between OMC personnel and DoD
9 personnel regarding -- and other DoD personnel regarding OMC's
10 access to JWICS.

11 Sir, you were going to say something.

12 MJ [COL POHL]: Yeah. In your brief on page 2 you have a
13 footnote that says, "by having unrestricted access to JWICS,
14 the defense team was able to obtain underlying documents that
15 were substantially different from the summaries that had been
16 provided by the government in discovery."

17 ADDC [MAJ HURLEY]: Yes, sir. That's similar to what
18 Mr. Sher directed your attention to in AE 236.

19 MJ [COL POHL]: So there's a procedure in place for what
20 information you are to be provided.

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: You may disagree with it, you may say the
23 summaries are inadequate, but apparently it's your position

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1 that you don't have to follow it?

2 ADDC [MAJ HURLEY]: No, sir.

3 MJ [COL POHL]: I mean, let me just make -- see if I
4 understand the question. And, again, I don't know which
5 summary you are talking about here or not. There's a
6 procedure in place under CIPA and has been implemented
7 here ----

8 ADDC [MAJ HURLEY]: Yes, sir.

9 MJ [COL POHL]: ---- of when you are provided classified
10 information and what you're entitled to have. And what you're
11 telling me is by having this access, you can end run around
12 that procedure. If that's true, isn't that what you're doing?

13 ADDC [MAJ HURLEY]: Sir, that's not what we're seeking
14 relief from this court to do in the future; that we're not
15 seeking the opportunity to do an end run ----

16 MJ [COL POHL]: But you've gone -- you've made the
17 argument twice now that at a certain point in time you had
18 access to this.

19 ADDC [MAJ HURLEY]: Yes.

20 MJ [COL POHL]: And one of your examples of why you need
21 to have access to this is that you don't have to follow the
22 rules on the disclosure of classified documents. That's one
23 of your justifications for this.

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [COL POHL]: Again, I'm not asking you agree with the
3 rule or disagree with the rule. I'm not asking you to say the
4 summaries are inadequate and we can show you why it's
5 inadequate. I have heard all of those arguments. I've got
6 all of those arguments. I've got that. That's fine.

7 But what I'm saying is -- what you're saying is we
8 need access to the JWICS account in order for us to get more
9 than the summary that is specifically authorized by the
10 commission. Correct?

11 ADDC [MAJ HURLEY]: Sir, just one second. Sir, Mr. Kammen
12 indicated to me that there are matters that occurred prior to
13 my participating in the representation of Mr. Nashiri, factual
14 matters that he may be able to describe; otherwise, it would
15 be me just listening to Mr. Kammen and repeating them.

16 MJ [COL POHL]: No, I understand that. I'm just reading
17 your motion.

18 ADDC [MAJ HURLEY]: Yes, sir.

19 MJ [COL POHL]: You're standing here defending a motion,
20 and it's not -- I'm not -- I'm not asking you for the reason
21 why. And I'm not sure I really -- that's not the issue before
22 me. My issue before me is in the motion you are arguing.

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [COL POHL]: There is an allegation we -- here's an
2 example of how we use this process. Right?

3 ADDC [MAJ HURLEY]: How JWICS was used, yes, sir.

4 MJ [COL POHL]: Yeah. And I mean, you put it in there.
5 I'm not reading from your motion.

6 ADDC [MAJ HURLEY]: Yes, sir.

7 MJ [COL POHL]: You have no explanation for that?

8 ADDC [MAJ HURLEY]: Oh, no, sir, I have an explanation for
9 that. It happened. I'm saying it occurred. I'm saying it's
10 an indicator of the capability that JWICS did provide for us.
11 Now, going forward, we recognize that we are subject to these
12 orders, and that we cannot violate them, wherever they are.
13 We get that. That's just an indicator of what the access
14 provided when we did have access to JWICS and SIPRNet.

15 MJ [COL POHL]: Yeah. And my argument -- or my question
16 to you is basically what you're saying here is that we --
17 we had access to information that by rule we were not properly
18 given and that's why we need access to JWICS.

19 LDC [MR. KAMMEN]: Your Honor ----

20 ADDC [MAJ HURLEY]: That's not -- sir, that's not what
21 we're saying.

22 MJ [COL POHL]: Mr. Kammen, I'm going to let you ----

23 LDC [MR. KAMMEN]: It's not correct.

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1 MJ [COL POHL]: I'm just reading what the motion said.
2 That's all.

3 LDC [MR. KAMMEN]: But ----

4 MJ [COL POHL]: Okay. I'm going to give you an
5 opportunity to respond to this issue. No, go ahead. Go
6 ahead. Let's talk about ----

7 LDC [MR. KAMMEN]: Prior to the time [Microphone button
8 not pushed; no audio] was filed -- prior to [Microphone button
9 not pushed; no audio].

10 MJ [COL POHL]: Okay.

11 LDC [MR. KAMMEN]: Between 2008 and 2011 the defense had
12 access to JWICS, and as part of their routine duties was
13 looking for evidence. At no time did they -- did the people
14 who accessed that violate anything, work around any rules.
15 Everything they did was perfectly proper at the time they did
16 it. And I just wanted to make that ----

17 MJ [COL POHL]: Okay. Thank you, Mr. Kammen. And I would
18 just say in -- you know, if it had been more precision in the
19 footnote of dates, that might have been helpful.

20 LDC [MR. KAMMEN]: Right.

21 MJ [COL POHL]: Okay. So I understand that, and I'm
22 not ----

23 LDC [MR. KAMMEN]: I just wanted to make it clear that

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1 nothing has ever happened that was, again, outside the purview
2 of the rules as they existed at that time.

3 MJ [COL POHL]: But understand this: As your motion is
4 styled ----

5 LDC [MR. KAMMEN]: Sure.

6 MJ [COL POHL]: ---- is I'm not disputing that at the time
7 maybe nothing wrong happened. Okay. Okay?

8 LDC [MR. KAMMEN]: Okay.

9 MJ [COL POHL]: But I'm saying your motion is styled as
10 one of the rationales for unrestricted access to JWICS is
11 exactly this. So why is it even in there? And that's a
12 rhetorical question. But you see what I'm saying?

13 I mean, you're saying unrestricted access gave the
14 defense team this ability, which is a rationale of why you
15 want unrestricted access to JWICS now.

16 LDC [MR. KAMMEN]: My goal in interrupting was not to take
17 the argument away from Mr. Hurley. But let me just say that,
18 again, the owners of this -- of the information is -- you
19 know, may have different entry levels, and so if, for whatever
20 reason, there was an appropriate entry level, irrespective of
21 summaries, that's still a sort of information which we are
22 charged with looking for within the rules.

23 MJ [COL POHL]: Okay. I understand your position and it's

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1 a footnote and we don't need to beat it to death. Thank you
2 for that clarification.

3 Major Hurley. Move on from that point.

4 ADDC [MAJ HURLEY]: Sir, I would just say -- just
5 reiterate that essentially the argument that I'm here to talk
6 about with 237, which is if we want to talk about the global
7 prospect, then it's our access to this information has changed
8 while we are preparing for this trial. So what we would seek
9 from the government is -- and we understand that it's the
10 Secretary's prerogative, but what we're seeking from the
11 government is the relief in paragraph 2 that will at least
12 better inform us as to how this occurred.

13 MJ [COL POHL]: Well, if you believe it's the Secretary's
14 prerogative ----

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [COL POHL]: ---- why do you need to know that
17 information?

18 ADDC [MAJ HURLEY]: Well, it's just ----

19 MJ [COL POHL]: Because you can walk back up here in
20 another motion and say it was arbitrary and capricious or the
21 wrong reason ----

22 ADDC [MAJ HURLEY]: Yes, sir, or we'll ----

23 MJ [COL POHL]: I understand that you can't do that, but

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1 don't tell me that it's the Secretary's prerogative when you
2 want to know the reasons why he exercised it, like once you
3 know the reasons, whatever they are, that's the end of the
4 discussion. That's not the end of the discussion.

5 ADDC [MAJ HURLEY]: Well, no, sir, it won't be the end of
6 the discussion ----

7 MJ [COL POHL]: Okay.

8 ADDC [MAJ HURLEY]: ---- if for no other reason, we'll go
9 back to the Secretary in whatever way we can and ask him to
10 reconsider this decision, which we understand is probably not
11 going to happen. But that is one alternative. And another
12 alternative -- and I'm practicing talking slowly -- may be to
13 seek relief from this court.

14 MJ [COL POHL]: Okay. Major Hurley, I'm going to give you
15 a tip. When Mr. Nashiri is not here, there's no interpreter.
16 You don't necessarily have to slow down, except the court
17 reporters will probably want you to be slow.

18 ADDC [MAJ HURLEY]: Sir, you have to train to standard, as
19 they say.

20 Sir, nothing further.

21 MJ [COL POHL]: Thank you.

22 Trial Counsel? Mr. Sher.

23 ATC [MR. SHER]: Your Honor, what we know is what the

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1 Secretary put on the face of his memo. He's concerned about
2 uncontrolled access to classified information. The policy was
3 designed to make access to classified information conform to
4 long policy, and minimize risk to unauthorized access. That's
5 why he did it. It's right there on the -- it's right there on
6 his two-page memo. There's no prejudice to the defense here.
7 They get the same discovery they would otherwise get. There's
8 a process for it. The process is in the statute. It's in the
9 rules. It's clear. It's worked for more than two years.
10 That's what's available.

11 MJ [COL POHL]: Thank you.

12 ATC [MR. SHER]: Thank you.

13 MJ [COL POHL]: Major Hurley, any last words? Because I
14 take it when we go to 238, we're going to ----

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [COL POHL]: This is another variation of the same
17 theme.

18 ADDC [MAJ HURLEY]: Yes, sir, it is. And I think we've
19 got to the point where we can -- where we can rely on the
20 pleadings with respect to both 238 and 239.

21 MJ [COL POHL]: Okay.

22 ADDC [MAJ HURLEY]: Unless, Your Honor, you want to talk
23 about whether it's the specific relief that we are requesting

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1 in the motion or how that may impact more globally.

2 MJ [COL POHL]: Let me just look real quick at 238 and
3 239. Okay. I got it. Do you want to rely on just your
4 briefs for those two?

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [COL POHL]: Trial Counsel, do you want to be heard?

7 ATC [MR. SHER]: Nothing further.

8 MJ [COL POHL]: Okay. 238 and 239 are then submitted.

9 240 and 242 we will do tomorrow afternoon as
10 previously discussed.

11 241.

12 DDC [CDR MIZER]: Thank you, Your Honor. You said 241?

13 MJ [COL POHL]: 241.

14 DDC [CDR MIZER]: Thank you, sir.

15 Judge, this is one area where the discussion has to
16 begin, importantly, with the statute that is applicable. And
17 I don't think that we can reassert enough that the Hamdan II
18 decision remains valid, and that decision says that it's
19 Article 21 which governs the offenders and offenses, if you
20 look at the language of Article 21. It's international law.
21 You look to international law norms to determine offenders or
22 offenses that can be tried at military commissions,
23 courts-martial, and provost courts, Judge.

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1 And as the D.C. Circuit said in Hamdan, you look to
2 international law because Congress, in the applicable statute,
3 Article 21, expressly incorporated international law into that
4 statute. Now, the Hamdan II case deals with offenses under
5 international law, but really this motion, 168, and then also
6 241, deal with the offenders' portion of that applicable
7 statute.

8 Simply, Judge, as we have laid out in the pleadings,
9 international law does not permit the United States the
10 authority to punish acts against French ships, Iranian oil,
11 Bulgarian nationals, or Malaysian contracts, or financial
12 instruments, and that's what is at issue in the attack on the
13 MV Limburg.

14 Now, Judge, we're back here because the government
15 raised this MCA argument. The original briefing in this case
16 was focused on the first two prongs of 949a, it was focused
17 on (7)(A) and (B), and then this third basis, al Qaeda, was
18 asserted, Judge, the fact that an individual merely by being a
19 member of al Qaeda can be brought before this military
20 commission. And there's simply no authority under
21 international law to bring someone before a nation's courts
22 simply for membership in some organization.

23 There are multiple bases for jurisdiction, and the

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1 original pleadings discuss the protective principle, which
2 Your Honor will note from the pleadings allows the United
3 States to hail individuals before her courts if they have
4 committed conduct that threatens the United States --
5 specifically the functioning of our government or the security
6 of the United States. And there's simply no evidence that the
7 attack on that French ship where there's -- there's simply no
8 nexus to the United States whatsoever the attack on that ship
9 threatened the functioning of our government or the security
10 of the United States.

11 MJ [COL POHL]: Is that an issue of proof?

12 DDC [CDR MIZER]: Well, Your Honor, we submit ----

13 MJ [COL POHL]: In essence, your argument is a -- the
14 government talks about membership in al Qaeda ----

15 DDC [CDR MIZER]: Yes, Judge.

16 MJ [COL POHL]: ---- which sounds to me is an in personam
17 jurisdiction argument, and you appear to be making more of a
18 subject matter jurisdiction argument.

19 DDC [CDR MIZER]: Your Honor, and I think part of the
20 confusion is that international law doesn't have the neat
21 analog to personal jurisdiction and subject matters
22 jurisdiction. It really is -- and you can read essentially
23 that phrase in the RESTATEMENT (THIRD). They're going to

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1 say -- it's not a neat fit. We're really talking about the
2 ability of our Congress to prescribe conduct. That's what
3 we're really talking about.

4 And unless you can hit one of those wickets, one of
5 those bases to prescribe conduct, you don't get to regulate --
6 and I think it was Judge Tourruella's concurring opinion in
7 the original pleadings, you don't -- the U.S. Congress doesn't
8 get to regulate dogfighting in Jakarta by Indonesians. They
9 simply don't have the ----

10 MJ [COL POHL]: So it kind of works -- in military
11 practice actually, we always talk about the two, but really,
12 what you are saying here is this starts with an overarching
13 principle of what I would call subject matter jurisdiction,
14 and then if you want to narrow down, if you want to narrow
15 down in personam jurisdiction, that's a different step, or a
16 different analysis.

17 DDC [CDR MIZER]: Yes, Judge, and either way, whether you
18 are talking about Article 21 -- which expressly incorporates
19 international law. So the MCA doesn't even enter into this
20 discussion under Hamdan II. It frankly doesn't. There's no
21 way to distinguish Hamdan II from the facts of this case. The
22 governing statute that regulates both the offenses and the
23 offenders here under Hamdan II is Article 21 UCMJ. But even

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1 if you want to entertain this ex post facto statute; that is,
2 the Military Commissions Act, Congress does not have the
3 authority to prescribe the conduct 949a(7)(C), just mere
4 membership in al Qaeda. What they can do is what they did in
5 Alpha and Bravo and regular conduct by al Qaeda related to
6 hostilities against the United States or its coalition
7 partners. We don't dispute that. Because it's conduct
8 against the United States, which would certainly affect a
9 military conduct, which would certainly affect the security of
10 the United States or the operation of its government, and
11 that's simply not at issue with respect to the Limburg.

12 Notably, we're not making this challenge with
13 respect to the USS COLE. Clearly, the government has the
14 right and responsibility to protect its sailors and its ships,
15 but not the right and responsibility to protect Bulgarians
16 sailing on French ships, Judge. And that's really the legal
17 issue that is here.

18 You talk about a matter of proof, Judge, and that's
19 important, because the government has the burden on this
20 motion. They have the burden to show some evidence that this
21 satisfies jurisdiction under the correct legal regime, and
22 they simply haven't done it. I mean, first they came before
23 the court and said that this is part of some French war --

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1 they're asserting sort of a French alliance and they're
2 vindicating French interests in this case. And they offer no
3 proof of that. No proof that France believes it's at war.
4 And again, it's their burden. I mean, this is a pretrial
5 motion. We're alleging that the record and what we have
6 before us is absolutely silent on there being a coalition with
7 France in some boundless war off the coast of Yemen in 2002.
8 It's just not there.

9 And even if you were to assert that this somehow
10 affects the United States interests, which was the second
11 argument advanced at oral argument last time when they talked
12 about how this somehow impacted the price of oil and then when
13 we got back to Washington and actually looked at the price of
14 oil, it actually fell after the attack on the Limburg. So
15 they're really grasping at straws here to find some
16 jurisdictional basis to lump in this attack on French
17 sovereign territory before this American military commission,
18 Judge. And it's just not there. It's not there in
19 international law. And I think the important case that's
20 cited in our reply is that of United States v.
21 Bellaizac-Hurtado. It's an Eleventh Circuit case from 2013.
22 And specifically, Judge Barkett's concurring opinion in that
23 case.

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1 But what was at issue in Bellaizac-Hurtado was
2 Panamanian drug dealers were in Panamanian waters and they
3 were essentially chased down -- they fled their boat and they
4 ditched it in the Panamanian jungle and were found a couple of
5 days later. They were eventually extradited to the United
6 States and raised the exact same claim that we're raising
7 here, which is why do you have jurisdiction over Panamanian
8 drug traffickers in Panamanian waters found in a Panamanian
9 jungle. And the Eleventh Circuit says that you simply don't,
10 Judge. And if you think about it, you've got a ----

11 MJ [COL POHL]: Was that an international law decision or
12 the lack of extraterritoriality of the offense that was
13 charged?

14 DDC [CDR MIZER]: Well, it incorporates international law,
15 and what we're talking about is the define and punish clause
16 which is Clause 10 of Section 8 of Article I of the
17 Constitution.

18 MJ [COL POHL]: The statute as drafted in that case, in
19 your view, on its face, touched this conduct.

20 DDC [CDR MIZER]: In the Eleventh Circuit's view.

21 MJ [COL POHL]: Touched this conduct. Yeah. No, I'm
22 saying the Eleventh Circuit said that the statute covers this
23 conduct, but the statute exceeded the congressional ----

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1 DDC [CDR MIZER]: The power given to it by Congress,
2 Judge.

3 MJ [COL POHL]: Okay.

4 DDC [CDR MIZER]: Because international law simply doesn't
5 afford Congress the ability to prescribe these offenses under
6 the define and punish clause. They can't just do whatever
7 they want. Congress cannot pass laws that exceed -- they
8 cannot pass laws, excuse me, describing international norms
9 and principles that don't exist, I guess is the most simple
10 way to put this.

11 And what was asserted in that case, and what has
12 been asserted in our drug trafficking cases, is the protective
13 principle; that you're somehow protecting your populace from
14 cocaine. And some circuits, I think reasonably, have asserted
15 that the United States consumes 90% of the world's cocaine
16 and, therefore, there is at least an arguable rationale, but
17 you don't have that in this case, Judge.

18 You don't have this conduct being targeted at the
19 United States. You don't have it impacting the United States.
20 This is a problem for France. It's a problem for Bulgaria.
21 This case should be about American sailors, American ships,
22 and let those nations police conduct against their nationals
23 and their property, Judge.

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1 MJ [COL POHL]: Now, we're not dealing with a state actor
2 here when we're talking about al Qaeda. Is it your position
3 that assuming that there was a -- and the term has been
4 floated around, so I'm not saying this is particularly
5 precise. Assuming there was a conflict between the United
6 States and al Qaeda ----

7 DDC [CDR MIZER]: Yes, Judge.

8 MJ [COL POHL]: -- okay, would the United States'
9 jurisdiction to try any law of war violations by al Qaeda then
10 be limited only to when they attacked American targets, even
11 though they may have attacked other nations' targets in
12 furtherance of the same goals that the United States was
13 opposing?

14 DDC [CDR MIZER]: Your Honor, I would think there would
15 have to be the same factual predicate for that laid out and
16 there hasn't even been the bare minimum of a factual predicate
17 laid out here. And I think there are equally likely scenarios
18 here that this was targeted at the Yemeni government, at the
19 finances of the Yemeni government, and this has nothing to do
20 even with France or Bulgaria; that this may be part of a civil
21 war that is simmering in Yemen and has been simmering since
22 the early 1990s between the north and the south.

23 The simple point here is that it's not our

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1 obligation when we say, hey, what's the basis for jurisdiction
2 here to offer that evidence? And the time for them to do that
3 is now, Judge, and they simply haven't done it.

4 I would submit -- really the answer to the
5 question -- Your Honor's question is no. I mean, I don't
6 believe that we could, say, haul a defendant, say, for the
7 Spanish train bombings which have been attributed to al Qaeda
8 or the British London bus bombings. No, I don't think that if
9 we somehow came into contact with one of those individuals we
10 would fly them to Guantanamo Bay and try them for conduct on
11 English buses in London or other cities within the United
12 Kingdom. No, Judge, I don't. I don't believe the protective
13 principle of international law affords us any basis to do
14 that, and I think the *Bellaizac* case lays that out pretty
15 forcefully with conduct -- with Panamanians.

16 Now, the case law is clear that if you catch
17 stateless vessels on the high seas dealing with narcotics, you
18 can seize them if they're in U.S. territorial waters. And
19 that relates to the Justice Breyer's opinion that we also
20 cited in the papers dealing -- discussing catching drug
21 traffickers 500 miles off of our shore, with drugs that may be
22 bound for Africa, they may be bound for Europe, and that we
23 don't have the ability to prescribe that specific conduct,

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1 Judge. And that's really what this issue is about. We have
2 nothing to do. We have no authority, really, under
3 international law, our Constitution or the controlling
4 statute, which is Article 21, to prescribe this conduct in
5 this case, and we would ask the judge -- the commission,
6 excuse me, to dismiss those charges related to the Limburg.

7 MJ [COL POHL]: Thank you.

8 Trial Counsel.

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

10 MJ [COL POHL]: Good afternoon.

11 ATC [MAJ SEAMONE]: During the course of this response
12 there may be mention of some different principles of
13 international law, but I want to focus on the precious
14 principle, which is -- at the time of this commission is
15 precious, our time together. So the government would like to
16 limit its discussion and not retread the extensive and quite
17 informative arguments that occurred on the transcript pages
18 3074 to 3089.

19 During the course of your discussions with the chief
20 prosecutor during the time, several points were made that it
21 really is not necessary to continually repeat here. Suffice
22 it to say since the defense has raised it once again, with
23 regard to subsection (7)(C), which deals with membership in

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1 al Qaeda at the time of the offenses, you know, it's
2 important, if we look at Rules for Military Commission 202 and
3 Rule 203, it talks about persons subject to the jurisdiction
4 of the military commissions, then it talks about jurisdiction
5 over the offense.

6 So, Your Honor, when you talk about in personam
7 jurisdiction, that's exactly what it isn't. As the discussion
8 before highlighted, the accused was put on notice of that
9 personal jurisdiction component with the allegation that he
10 was an unprivileged enemy belligerent in the actual text of
11 the charge. And because it's in the charge itself on the
12 charge sheet, then, therefore, it goes to the panel, and the
13 conclusion was that it would be in the disjunctive in terms of
14 the panel members having the option to hear about the
15 different ways that personal jurisdiction would vest.

16 But the clear point here is membership in al Qaeda
17 alone, that is not what the accused is being prosecuted for.
18 It's for violating the international law of war while a member
19 of al Qaeda and engaging in hostilities and in the
20 context ----

21 MJ [COL POHL]: Does there have to be a nexus between the
22 offense and the prosecuting country?

23 ATC [MAJ SEAMONE]: Your Honor, this is important also.

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1 International law of war governs this, and we talk about lex
2 specialis and that just basically means when the international
3 law of war is clear on this issue, then you turn to
4 international law.

5 In terms of jurisdiction and prosecution,
6 international law, you know, the names of an enemy may in fact
7 change over time, but the law regarding the ability to hold
8 the enemy accountable for violations of the international law
9 of war remains the same.

10 So under these components, as long as you have an
11 enemy who is engaged in the context of hostilities with the
12 United States in this case, and violates the international law
13 of war during the course of that period of hostilities, then
14 you have jurisdiction.

15 Now, it is worthwhile to look to the protective
16 principle by analogy, because it helps to show the nexus and
17 that there isn't really an issue with a nexus, that there is
18 in fact a nexus here. And that's what I'd like to move on to
19 next, Your Honor. At the most general level, when we talk
20 about the protective principle -- you know, the defense talks
21 about a lot of drug smuggling cases. You heard one with
22 Bellaizac-Hurtado. There's another one, Robinson, which talks
23 about the offense occurred in Robinson, in that example 500

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1 miles off the coast of North Carolina with a Panamanian ship
2 and 20 tons of marijuana. How does that affect the United
3 States' interests?

4 The operative facts in this case don't deal with
5 nonviolent offenses. They deal with explosions. They deal
6 with a tremendous amount of destruction. They deal with
7 death. So it's a little bit -- well, not a little bit --
8 quite different, and that's a context that needs to be
9 appreciated.

10 There are a number of ways that a nexus can be
11 demonstrated. At the most general level, there has to be some
12 kind of important governmental interest, governmental
13 operations affected or -- and an effect that is intended or
14 actually occurs in the state based on the offense that occurs
15 outside of the nation, a security interest of the state.
16 These are terms that come up quite often, as applied to the
17 waters of Yemen where the bombing of MV Limburg occurred. At
18 the most general level there are interests because of the very
19 nature of the activities going on there. In 2002 at the time
20 of this attack, a quarter of the United States's oil imports
21 came from shipping from the Middle East.

22 MJ [COL POHL]: Are you telling me this is the -- that
23 there needs to be evidence of the nexus or do I -- I mean, I

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1 don't see any evidentiary hearing here.

2 ATC [MAJ SEAMONE]: Well, Your Honor, the defense has been
3 talking about the absence of any connection to the United
4 States. It's pretty clear that it's evident that shipping and
5 oil tankers implicate shipping interests. This is just a bit
6 more clarification, but geography -- you know, geography
7 itself is helpful here.

8 MJ [COL POHL]: No, I'm back -- the defense has
9 challenged -- made a jurisdictional challenge, okay?

10 If you say as a matter of law there's jurisdiction
11 and you decide it on the pleadings and the argument -- and I'm
12 with you on that, I mean, as a procedure. But if you say it's
13 based on the status of oil shipping or other evidence or what
14 happened in 2002 as far as how much oil came to the United
15 States, that's evidence. And you're not in a position --
16 you're not testifying.

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

18 MJ [COL POHL]: So I'm saying if your argument is that
19 this is dependent upon this evidentiary predicate, where is
20 that?

21 ATC [MAJ SEAMONE]: Well, Your Honor, a couple of points.
22 One would be -- and this was discussed earlier as well as in
23 the discussions on Appellate Exhibit 168, which was basically

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1 that there would be an offer of evidence to the panel in the
2 context of hostilities, and also because it's on the charge
3 sheet to consider this type of evidence.

4 So, for example, the commission entertained the
5 proffer from the government then about the effect on oil
6 prices. That's something the defense mentioned in their
7 motion. That's certainly something that the government would
8 like to respond further to, since it's factual and the court
9 had considered that, and that was part of the earlier
10 discussion.

11 The issues the defense raises about the absence of
12 evidence, if we're talking about the protective principle by
13 analogy and how it shows that the exercise of jurisdiction by
14 a military commission is valid and lawful under the
15 circumstances, to the extent that that is important for the
16 Court's consideration in that analogy, the government would
17 like the ability to respond here. So we'd like to offer just
18 a few points that aren't really technical or
19 hyper-complicated, and some of them, quite evident, simply
20 based on facts that are readily available that will help the
21 commission decide.

22 MJ [COL POHL]: So let me see if I got this correct. You
23 want to give me facts to consider on this motion?

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1 ATC [MAJ SEAMONE]: Well, Your Honor, if you believe it
2 would be helpful to know what the nexus is, since the defense
3 has raised the question and stated there's no nexus at all,
4 then the government can give you that information.

5 MJ [COL POHL]: It doesn't work that way. I don't tell
6 you what I think I need for the government to prevail or for
7 the defense to prevail. You got their motion. You're arguing
8 the government's position on it. You take whatever -- you
9 present whatever you want to present. I mean, as far as I am
10 seeing right now, the government's presentation is that this
11 is a legal issue and can be decided on the briefs and the
12 argument. Got it. But I'm not going to tell you what I think
13 you or the defense or anybody should do.

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

16 MJ [COL POHL]: Sure.

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

18 Well, Your Honor, the government will contain its
19 comments at this point to some of the responses that have
20 already been made, as you mentioned, Your Honor, in the
21 motions to highlight how -- highlight the fact that there is
22 evidence of a nexus that would -- without the need to go
23 further into an offer of evidence at this point on the fact.

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1 So one of the things mentioned, though, was that,
2 you know, the defense has cited a few random dates after the
3 Limburg bombing to say that there was no impact on the
4 financial markets. The government stands fast in its earlier
5 commentary that in fact there would be such evidence
6 presented, and it would be up to the panel members, after
7 hearing that evidence, to determine whether or not it was
8 supported. But the government stands by its assertion that it
9 would in fact demonstrate both an effect on the oil prices as
10 well as insurance rates, which implicated a financial
11 interest.

12 In addition, there's an aspect of the protective
13 principle that relates to the effects principle. And if you
14 look at comment f of Section 402 of the RESTATEMENT (THIRD),
15 it talks about a special application of the protective
16 principle existing where you can have an offender outside of
17 the nation engaging in conduct with the intent to create
18 effects within that nation, and that that could be sufficient
19 to exercise jurisdiction over the individual and bring them
20 into a court.

21 The government had presented information to the
22 effect that al Qaeda leadership talked about the Limburg
23 bombing as representing an attack on Western Crusaders, not

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1 simply just a French vessel. Beyond that, the principle of
2 effects, and also as it's incorporated into the protective
3 principle, is furthermore clear simply looking on the date of
4 the charged offense.

5 October 6th, 2002, marked the one-year anniversary
6 of the United States' commencement of operations, and
7 Operation Enduring Freedom. On October 7th of 2001, 31 sites
8 were bombed by B-1 and B-52 bombers by the United States Air
9 Force and that's what commenced these events. And clearly in
10 celebrating that anniversary, with the message of an attack
11 where U.S. interests are present, not just by virtue of
12 shipping, but in addition we know from the other charges that
13 U.S. security interests are implicated in those Yemeni waters
14 because you had United States destroyers going into those
15 waters on such a regular basis that the accused and his cell
16 were able to plan an attack on refuelling United States
17 destroyers.

18 So the presence of the United States conducting
19 activities and security operations in that area was clear, and
20 here you have an attack in that area commemorating the
21 anniversary of U.S. involvement in Afghanistan, which is
22 telling of the intent to have a negative effect, and really to
23 affect policy.

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1 The Yousef case talked about the application of the
2 protective principle. Normally is based on the desire to have
3 political motivations and to effect foreign policy, especially
4 when you have explosions like bombings of planes, which was
5 the example in that case. Here, bombings of oil tankers,
6 bombings of vessels, bombings of vehicles that would have an
7 effect on free transit in the area, would cause a disruption
8 in transit back and forth to the United States and would
9 certainly have the potential to increase costs of insurance
10 and the cost to support the diversion.

11 Beyond this, one of the important points about the
12 Yousef case, and something that the defense mentions, the
13 defense tries to say that the Yousef case, when it talks about
14 the application of the protective principle, is merely dicta.
15 They suggest that the case was resolved because the court was
16 able to decide the issue on a treaty, a convention that
17 existed at the time. However, when addressing Count No. 19,
18 which dealt with that Philippine aircraft with no United
19 States citizens harmed, but the court still found that there
20 was a sufficient nexus for the United States to exercise
21 jurisdiction, the basis of that rested in the protective
22 principle.

23 And the government would just like to address

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1 that -- the court -- the commission's attention to the fact
2 that the heading of that section, it was broken out into an
3 entirely different heading just like the heading dealing with
4 the convention at issue, and addressed not in a footnote or a
5 throwaway sentence but as a basis of that -- the Second
6 Circuit's decision. That's important because the Second
7 Circuit talked about modus operandi. The notice -- if you
8 look at the similarities between the attack involving the
9 Philippine aircraft, and then the later attack on the United
10 States aircraft, the similarities are striking and they are
11 evident of a common scheme and a shared intent in perpetrating
12 both of the types of acts, even though the one involving the
13 Philippine airline didn't have any U.S. citizens and did not
14 occur in the United States. And that is perhaps one of the
15 most telling considerations here.

16 In total, the evidence of a modus operandi and a
17 link between the attempt on THE SULLIVANS, the successful
18 attack on COLE, and the attack on Limburg is quite clear. You
19 have many hallmarks of a common scheme or plan. Small boats
20 pulling alongside larger vessels manned by two suicide
21 bombers, detonating explosives, blowing holes in the hulls,
22 targeting the hulls of these vessels, larger vessels, in the
23 waters surrounding the same country with tribal loyalty to

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1 bin Laden, the bin Laden family and al Qaeda, and in a
2 concentrated region where ships must pass when headed to and
3 from the west to the Persian Gulf.

4 So quite clearly, there is ample basis to see that
5 these are components of an overarching plan to send a message
6 to Western crusaders, in their words, the leader of which
7 would be the United States, to encourage prompt departure from
8 the Middle East, and noninterference with Middle East
9 economies and policy.

10 The defense also makes an argument that the
11 commission should not give credit to the Limburg attack
12 because it happened after the fact. It happened after the
13 fact of the attempt on THE SULLIVANS and the successful attack
14 of the COLE.

15 The government would suggest that there's an
16 analogy, another helpful analogy to be made here. Certainly,
17 this is not a 404(b) type situation at all, because all of
18 these offenses are charged, but many appellate courts,
19 including the D.C. Circuit, have found that subsequent acts
20 are admissible for purposes of 404(b) for the purpose of
21 showing a common scheme or plan, and that -- that is useful.
22 And they talk about the fact that mere chronology doesn't make
23 something irrelevant and, in fact, chronology, if something

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1 happens afterwards, it can be just as relevant. So there's no
2 distinction between whether the act occurred before or after,
3 if it's part of that grand scheme. And there could be minor
4 differences, but there needs to be enough to see that those
5 different components are steps towards the same overarching
6 objective, which again was clearly described in both accounts
7 of al Qaeda's reaction to this, their taking responsibility
8 for it, and their targeting of U.S. interests.

9 So for these various reasons, Your Honor, the
10 government believes that to the extent that a nexus would need
11 to be demonstrated external to principles of international law
12 of war, there certainly is a nexus here. And even though it
13 may have occurred 7,000 miles away from United States shores,
14 U.S. financial, U.S. security, U.S. governmental operations,
15 and in fact interests within the United States were all
16 affected and were directly related to the bombing of the
17 Limburg.

18 Subject to your questions, Your Honor.

19 MJ [COL POHL]: Thank you, Major Seamone. I have no
20 questions.

21 ATC [MAJ SEAMONE]: Thank you, sir.

22 MJ [COL POHL]: Commander.

23 DDC [CDR MIZER]: Judge, this is a jurisdictional issue

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1 that is before Your Honor. And I think perhaps the best
2 analogy is the lawfulness of orders for military
3 practitioners. The New case, which dealt with berets, the
4 wearing of berets, and when you litigate those cases, the
5 lawfulness of order cases, the judge makes the determination
6 about the lawfulness of the order. You don't submit that to
7 the members and then quarrel over whether that order was
8 lawful. And more to the point, the same is true, whether it's
9 jurisdiction under Article 2. I mean, the Ali case, which was
10 out of the C.A.A.F. a couple of years ago, deciding the novel
11 issue with the amendment to Article 2 giving military courts
12 jurisdiction over civilians for the first time since the
13 murdering spouses cases were decided in the '50s.

14 That jurisdictional question was answered by a
15 judge. The parties didn't get to go before the members and
16 say, I think we have got jurisdiction. What do you guys
17 think? It's a question for the judge. This a jurisdictional
18 question for you to decide, Judge. And they've had the
19 opportunity to bring in evidence ----

20 MJ [COL POHL]: Now, let me make sure I understand your
21 point. In this forum, is the jurisdictional prerequisite the
22 accused being an alien unprivileged combatant also a question
23 that should be submitted to the fact-finder to find beyond a

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1 reasonable doubt?

2 DDC [CDR MIZER]: That he is, Your Honor ----

3 MJ [COL POHL]: An unprivileged enemy belligerent.

4 DDC [CDR MIZER]: I believe that is a jurisdictional
5 question that Your Honor would have to decide.

6 MJ [COL POHL]: Aren't some jurisdictional questions
7 subject to a preponderance standard by a judge in the beyond a
8 reasonable doubt standard?

9 DDC [CDR MIZER]: Indeed. I think the military case law,
10 if you would look at -- again, the Khadr case would suggest
11 exactly that with respect to that jurisdictional question, the
12 judge must find by the preponderance of the evidence, the
13 equivalent of an Article 5 tribunal, if you will. But, yes,
14 that was an element of the offense, that the members
15 ultimately had to find beyond a reasonable doubt.

16 MJ [COL POHL]: And I know your -- you quibbled with me
17 when I used these terms earlier, but just so I'm clear.

18 DDC [CDR MIZER]: Yes, Your Honor.

19 MJ [COL POHL]: That struck me as the in personam
20 jurisdiction element which would go to the members ----

21 DDC [CDR MIZER]: Yes, Your Honor.

22 MJ [COL POHL]: ---- as well as the judge, if raised. I
23 mean, it doesn't have to be raised. That's an interlocutory

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1 matter.

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

3 MJ [COL POHL]: But on what we're calling -- I'm calling
4 subject matter jurisdiction, that's analogous to your New
5 example of simply an interlocutory ----

6 DDC [CDR MIZER]: Yes.

7 MJ [COL POHL]: ---- exclusively interlocutory question by
8 a judge.

9 DDC [CDR MIZER]: Yes, Your Honor. And I think part of
10 the problem, respectfully, is if you look at the restatement,
11 it says that there aren't neat corollaries for these
12 principles under international law. It's in the initial
13 notes. I mean, right up front in RESTATEMENT (THIRD) dealing
14 with states' authority to prescribe. And so I think that's
15 somewhat of the problem here.

16 But I think that you would have to conclude -- let
17 me say it this way: I think that this commission does not
18 have jurisdiction to charge or to try all unprivileged
19 belligerents. I think this there has to be -- I mean,
20 incorporated in that is the word "enemy." So getting back to
21 the statutory provision at issue here, it -- provision at
22 issue here, they're engaged in hostilities against the United
23 States or its coalition partners. That's really what has to

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1 be determined.

2 And so with respect to this statute, what we're
3 asking Your Honor to make is a determination that this
4 individual with respect to the Limburg offenses, the
5 allegations simply don't involve conduct against the United
6 States or its coalition partners and, therefore, should be
7 dismissed.

8 MJ [COL POHL]: So your position is that he must fall
9 under (7)(A) or (B)?

10 DDC [CDR MIZER]: Yes, Judge. I mean, first Article ----

11 MJ [COL POHL]: And Charlie.

12 DDC [CDR MIZER]: ---- Charlie doesn't exist, Judge, I
13 think is our first point. Because the MCA doesn't exist for
14 purposes of this commission. In Hamdan II, there is no
15 reasonable way to quarrel with Hamdan II on this precise
16 point. They say it's Article 21 expressly incorporating
17 international law that describes the offenses and the
18 offenders that must be tried by this commission. That's
19 Hamdan II.

20 Even if you look at the Military Commissions Act,
21 Charlie, our argument is that international law doesn't afford
22 this commission the -- or, excuse me, doesn't afford Congress
23 the power to pass that law. They simply don't have the

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1 ability to regulate all conduct by al Qaeda anywhere in the
2 world, Judge.

3 So if al Qaeda commits a clear war crime, let's say,
4 murdering chaplains or medical personnel and they do it in a
5 closet in the Himalayas, no, judge, I don't believe that this
6 commission has jurisdiction. And more importantly, Congress
7 doesn't have the power to criminalize that conduct. And
8 that's what we're really dealing with here.

9 MJ [COL POHL]: But at the end of the day, Congress said
10 they had that power.

11 DDC [CDR MIZER]: Just like they did material support for
12 terrorism, Judge, is my response to that.

13 MJ [COL POHL]: I know. I was about to go over that.

14 DDC [CDR MIZER]: I'm sorry.

15 MJ [COL POHL]: Just like they said in Al Buhl and Hamdan.
16 So it's not a -- just so it's clear, the statute says it has
17 that power, but the Court's interpretation of the statute in
18 Hamdan in particular, but the first al Bahlul which is
19 similar, but ----

20 DDC [CDR MIZER]: Yes, Your Honor.

21 MJ [COL POHL]: ---- says that, no, Congress didn't have
22 that power. Didn't -- so that's where we're at here.

23 DDC [CDR MIZER]: Yes, Your Honor.

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1 MJ [COL POHL]: The statute is not unclear, is what I'm
2 kind of saying.

3 DDC [CDR MIZER]: Oh, absolutely. The statute purports to
4 assert jurisdiction over all members of al Qaeda regardless of
5 what they're doing and where they're doing. Or let me
6 constrain that a little bit.

7 I mean, it demands war crimes by al Qaeda.

8 MJ [COL POHL]: Yeah.

9 DDC [CDR MIZER]: But it doesn't have a nexus to the
10 United States. So any war crime committed by al Qaeda
11 anywhere is triable by this military commission. And simply,
12 international law or our Constitution doesn't allow that to
13 happen.

14 And so ultimately, Judge, this is going to be a
15 jurisdictional question that you're going to decide. Because
16 I have no idea what this trial looks like. I don't know what
17 my defense is if this is really something that goes to the
18 members. I mean, is this trial about -- are we going to have
19 oil experts in here arguing over this nexus requirement? Are
20 we going to have instructions to the jury ----

21 MJ [COL POHL]: You know, it strikes to me, when I
22 mentioned that to you earlier, the -- again, the personal
23 jurisdiction aspect of it ----

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1 DDC [CDR MIZER]: Yes, Judge.

2 MJ [COL POHL]: ---- would appear to maybe go to both the
3 judge and at members. No decision because that's not the
4 issue before me.

5 DDC [CDR MIZER]: Understood, Judge.

6 MJ [COL POHL]: And whether or not this goes before the
7 members or not does not -- normal jurisdictional challenge can
8 be made -- if it can be made in both places, can be made in
9 both places.

10 DDC [CDR MIZER]: Yes, Your Honor.

11 MJ [COL POHL]: I mean, you challenge personal
12 jurisdiction with me and if you don't prevail by the
13 preponderance of evidence, you can challenge it with the
14 members.

15 DDC [CDR MIZER]: Yes, Your Honor.

16 MJ [COL POHL]: So I'm not sure it makes too much
17 difference whether or not for this discussion it's a members
18 question or not, because it's clearly, squarely before a judge
19 question.

20 DDC [CDR MIZER]: Yes, Your Honor, here it's a judge
21 question. And we would submit that the government had the
22 opportunity to have an evidentiary hearing. They could have
23 requested it, they could have brought the oil experts in here

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1 to say, look, there is actually some nexus. There is no
2 evidence to us, to the defense, that such a nexus exists. And
3 more importantly, there's no evidence before Your Honor.

4 And so the appropriate course of action in this case
5 when there's no evidence of nexus, when you -- when the
6 binding statute under Article 21 says that you incorporate
7 international law, and international law does not provide a
8 basis for jurisdiction over those crimes, is to dismiss.

9 Judge, two other brief points, if I may. The
10 government raises the Yousef case. And I don't know that we
11 have a great quarrel with the Yousef case or the effects
12 principle cited in the restatement. The conduct outside of a
13 nation targeted at that nation or inside that nation can be
14 regulated.

15 And ultimately, that's what was at issue in Yousef.
16 Yousef and Khalid Shaikh Mohammad were preparing a bomb plot
17 on U.S. airlines. They happened to use a Philippine airline
18 as a test run, but those are the key facts, that it was
19 targeted at U.S. airliners and U.S. interests. And here you
20 simply have no indication that attacking the French oil tanker
21 was part of a test run, or intended to have any effects in the
22 United States. You have an isolated incident of violence off
23 the coast of Yemen, literally halfway around the world. And

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1 Your Honor cannot accept what is, in essence, a butterfly
2 flaps its wings argument by the prosecution.

3 Judge, if you have no other questions, I have
4 nothing else.

5 MJ [COL POHL]: No. Thank you.

6 DDC [CDR MIZER]: Thank you.

7 MJ [COL POHL]: Major Seamone, anything further?

8 ATC [MAJ SEAMONE]: Your Honor, the government would
9 highly recommend the court consider the prior discussion in
10 the record on pages 3074 through 3089. Thank you, Your Honor.

11 MJ [COL POHL]: Is that I believe on 168?

12 ATC [MAJ SEAMONE]: It is, Your Honor. Thank you.

13 MJ [COL POHL]: Okay. Let's do 244 and 245.

14 TC [CDR LOCKHART]: Sir, we asked the defense if they
15 objected to moving that for not today. They had no
16 objections. I understand that it's your call, but we would
17 prefer not to, sir.

18 MJ [COL POHL]: Well, if those are the only two we had, I
19 might be concerned, but on my list, it's not close to the only
20 two we have.

21 246 through -- well, let's start with 246 and we'll
22 move on. Mr. Kammen.

23 LDC [MR. KAMMEN]: Let me start by making two points. The

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1 first is that because this is a death-penalty case, all of the
2 problems in the pleadings are more critical than they might be
3 in a noncapital case because the number of counts, the way the
4 counts are structured, the number of aggravators, the way the
5 aggravators are plead, all bear upon stacking -- what the
6 government clearly is trying to do is what the U.S. Supreme
7 Court calls putting its thumb on the scales of death, only
8 they're not putting its thumb on the scales of death, they're
9 literally putting their whole hand and arm on the scales of
10 death.

11 The other piece of this, Your Honor, that is clear
12 is that when the people who were creating essentially this
13 untried system, you know, they tried to do kind of a cut and
14 paste on, well, we have got military law, we have got medical
15 law, we'll take sort of -- we'll do sort of a cut and paste,
16 and then we'll, you know, send it all down to Guantanamo Bay
17 and open up this factory.

18 And those two things come together to create a
19 charge sheet that is sort of amazing for the way in which it
20 takes liberties with what would be appropriate. And so when
21 we have all of these charges to duplicity, multiplicity, the
22 aggravators and all of that, I mean, it has to be seen in a
23 bigger picture. And one of the concerns I have, and this is

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1 the reason I'm addressing this, is that because of the
2 military commission rule that says you can only raise one
3 issue per motion, you know, we have these separate and
4 discrete charges, but there hasn't been any real focus on the
5 overarching problem, which is that the level of pleading by, I
6 assume, the convening authority, whoever wrote this, is so at
7 variance from what would be accepted in a death-penalty case
8 in a more traditional jurisdiction, and so that's really
9 what's at issue here.

10 And one of the -- you know, in 246, for example,
11 really you see sort of the same errors over and over again.
12 So, you know, we're -- I'm not going to give the same argument
13 three times because it's essentially the same situation. But
14 if I may count, 246 deals with our request to strike
15 Aggravator 1, which is -- let me get the language. Is
16 precisely -- that the life of one or more persons other than
17 the victim was unlawfully and substantially endangered.

18 Okay. Now, this is a charge of perfidy. Digressing
19 just for a minute, because if you look at Charge I and you
20 look at Charge II, other than the title, they're virtually the
21 same thing. One is -- you know, Mr. -- essentially committed
22 this crime of perfidy and people were killed is Charge I, and
23 Charge II it's a murder in violation of the law of war by

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1 using perfidy, and people get killed. In any meaningful
2 respect, that is virtually the same -- that is the same
3 charge.

4 Now, again, this is only parenthetical, when you look
5 at Charge I -- and let me say, I don't mean to minimize the
6 seriousness of the loss of life and injury. I don't want
7 anyone to think that we're not sensitive to that. But
8 Charge I refers to the killing of 17 sailors of the United
9 States, and then refers us to Charge II to find out who those
10 people are, and injuring one or more persons, all crewmembers
11 aboard the USS COLE, and then directs people to some other
12 location.

13 If -- well, not if, because under the way this is
14 likely to unfold, it's hard to see -- well, in the event
15 Mr. Nashiri is convicted. And we get to a sentencing phase,
16 the jury -- the government wants the jury to be instructed
17 that they may impose death if the life of one or more persons
18 other than the victim was unlawfully and substantially
19 endangered.

20 Well, problem number one with this, and this is kind
21 of the heart of it, under Ring, the elements -- the
22 aggravators essentially become elements, and under Ring, the
23 elements have to be specifically plead. Now, who is the one

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1 or more person other than the victims who was unlawfully and
2 substantially endangered? It's certainly not the deceased.
3 It is certainly not -- well, I don't know. Is it the injured
4 crewmen? Is it the people who were on the COLE who did not
5 receive physical injuries? Is it the person in a boat near
6 the COLE? Is it -- who is it?

7 I mean, essentially, if you had a charge that said
8 on or about, you know, June the 30th Sam Jones hurt a person,
9 you wouldn't have a valid charge because you wouldn't have any
10 kind of specificity. And so here what the government will be
11 allowed to argue is, Ladies and Gentlemen of the Jury, you
12 have convicted the defendant of playing some role in attacking
13 the COLE -- or causing perfidy -- you know, perfidy, and this
14 treachery, and we know about the loss of life, and so we have
15 proven one or more people were endangered.

16 So the victim status is this kind of vague,
17 amorphous thing without any real proof.

18 MJ [COL POHL]: But if they convict him as charged ----

19 LDC [MR. KAMMEN]: I'm sorry?

20 MJ [COL POHL]: Okay. If they convict him as charged, you
21 say they won't know who the one or more persons are going to
22 be ----

23 LDC [MR. KAMMEN]: Well, no. Well, the life of one or

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1 more -- you know, the jury is -- would be free to simply
2 speculate. They can say -- I mean, essentially they can say,
3 okay, the people who were injured were substantially and
4 unlawfully endangered so, therefore, we get to kill him, even
5 though that's sort of the underlying thing.

6 The whole point of aggravators is to take a crime
7 and to separate two crimes where one is worse than the other,
8 and that's the whole point of the aggravators.

9 MJ [COL POHL]: Well, if you had an aggravator of multiple
10 homicides, multiple murders ----

11 LDC [MR. KAMMEN]: Sure.

12 MJ [COL POHL]: ---- okay, and you had charges of multiple
13 murders, would that be -- assuming the statutory scheme set,
14 an aggravating factor is more than one murder at the time, and
15 you charged three murders, wouldn't you have that issue you
16 just talked about? It's not a new offense. It's embedded in
17 the original offenses.

18 LDC [MR. KAMMEN]: If you had a statutory scheme that
19 said -- or that says one or more murders committed in the
20 course of a single event, there would be some -- probably some
21 constitutional issues with that. But putting that to the
22 side ----

23 MJ [COL POHL]: Yeah.

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1 LDC [MR. KAMMEN]: ---- and the defendant was charged with
2 murdering John Jones, Bill Smith, Fred Davis, then at least we
3 know who the victims are.

4 Now, there's nothing in this that limits the
5 government to the people charged as victims, survivors on the
6 COLE. The government would be free to argue, and I expect
7 probably will argue, it just doesn't affect the people on the
8 COLE, it affected people out in the harbor. It affected
9 people across the way. Who knows how this -- you know, had
10 the engine blown up and things happened worse, you know --
11 it's the butterfly effect at large. So there's simply
12 nothing -- I mean, it's impermissibly vague.

13 Additionally, the charge of perfidy -- remember,
14 this is a charge of perfidy. There's nothing about perfidy
15 that necessarily impacts victims, as we allege, you know, one
16 or more unnamed victims. And so it all invites this rampant
17 speculation and gives the government the opportunity to sort
18 of weave and move the target as the evidence prevails without
19 adequate notice to the defense. So for all this sort of
20 morass of inelegant pleading, which, again, makes it almost
21 mandatory for a finding that this aggravator exists, so, you
22 know, again, this -- you have this same thing over and over
23 and over again.

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1 Sure, is the government -- could the government
2 argue, yeah, we know who the victims are, but could the
3 government argue, you know, depending on the evidence, well,
4 yeah, the husbanding agent who was on the boat, he could have
5 been injured. You know, there's -- it just never ends given
6 the lack of notice and the lack of precision.

7 MJ [COL POHL]: So is this -- as I understand it,
8 Mr. Kammen, it's kind of a two-part argument. First of all,
9 the aggravating factors should have been alleged in the
10 specifications themselves?

11 LDC [MR. KAMMEN]: Yes.

12 MJ [COL POHL]: The second thing is, if they are perhaps
13 imprecise terms, void for vagueness anyway, and you're not on
14 notice of what you are to defend against?

15 LDC [MR. KAMMEN]: Yes. I mean, if it were part of --
16 it's not alleged. You're absolutely correct. And it's not --
17 so they're sort of glomming it on under this notion of an
18 aggravating factor, but the way it's glommed on is so vague
19 that even if the government is somehow correct, well, yeah,
20 they can do it as an aggravator, they don't have to do it
21 within the specification, it's still unlawfully vague.

22 And so for that reason, you know, this needs to be
23 struck from the -- you know, essentially, it needs -- and what

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1 happens, again, in other circumstances. I mean, it's not
2 unusual that, you know, there's counts that are vague, counts
3 that are duplicitous, counts that are multiplicitous. It's
4 unusual that you have them all combined in one charge sheet --
5 or one indictment, but that's a different issue. What would
6 typically happen is the prosecutor would -- the court would
7 dismiss and the prosecutor would go refile and file, you know,
8 an adequate indictment, superseding indictment in federal
9 court, superseding information in state court.

10 So this isn't, like, not fixable, but it is
11 important that it be fixed. Because again, the way it stands
12 now with all the duplicity and multiplicity, and I recognize
13 that that's not precisely what we're arguing, but all of these
14 various issues that we're raising kind of over and over again
15 have this charge sheet that, you know, is -- horribly stacks
16 the deck in favor of death where, you know, again, you convict
17 on Count 2, you almost -- you certainly have to convict on
18 Count 1. And then in final -- in opening statement in the
19 penalty phase or at some point in the penalty phase, it's
20 going to be, look, you haven't convicted him of just one
21 death-worthy offense, you've convicted him of two. Therefore,
22 that makes it far more necessary for you to kill him. Oh, and
23 by the way, all of these people could have been hurt, not the

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1 victims on the COLE, but the others, you know, whoever could
2 have been hurt.

3 So it's far more reason to kill him. And it's all
4 about stacking the deck in favor of death. That's what this
5 is all about and that's -- it's improper pleading. It also
6 doesn't follow Ring and Apprendi. Ring in the sense that now
7 it's got to be alleged as part of the specification.

8 So for those reasons, Your Honor, and while the
9 arguments on the others may be much, much shorter, we think
10 that Aggravator 1 should be struck from Charge I of the charge
11 sheet.

12 MJ [COL POHL]: Okay. Mr. Kammen, I'm flexible both ways
13 on this, so just let me know what you want to do. Is this --
14 and if you want to be heard on each one, you certainly will be
15 able to, but is this the same argument on all of the
16 Aggravator 1s as it relates to the other charges?

17 LDC [MR. KAMMEN]: It's essentially the same, yes. The
18 only difference, and let me just look ----

19 MJ [COL POHL]: Well, let's do it this way, Mr. Kammen,
20 just to be fair to the government. I'll let them reply to
21 what you have got. If you wish to have additional argument on
22 any particular one -- or I'm going to let you ----

23 LDC [MR. KAMMEN]: One that jumps out at me, again, Your

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1 Honor, is -- I mean, charge -- is Specification 2, the
2 murder -- I mean, that's going to be the same -- the same
3 thing. So I -- there's no need to ----

4 MJ [COL POHL]: Okay.

5 LDC [MR. KAMMEN]: ---- to redo that. The terrorism
6 charge, but let me look at that.

7 MJ [COL POHL]: Yeah, you don't have to decide now. If
8 you want, if it's the exact same argument, and you can make
9 it ----

10 LDC [MR. KAMMEN]: I'm not going to make ----

11 MJ [COL POHL]: ---- seven times or whatever it is.

12 LDC [MR. KAMMEN]: No, not going to do that.

13 MJ [COL POHL]: But you will have that option. Okay.

14 Trial Counsel. Mr. Sher.

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

16 MJ [COL POHL]: Good afternoon.

17 ATC [MR. SHER]: A couple of points. First, the
18 government complied with the plain language of R.M.C. 307(c).
19 As we've discussed several times starting in February and
20 through these hearings, the charge sheet incorporates
21 statutory aggravators that make these offenses death eligible
22 and that narrow the class of the death eligible -- of the
23 accused that are potentially subject to capital punishment.

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1 Each charge alleges that the accused is an alien
2 unprivileged enemy belligerent and that the accused illegally
3 killed in violation of an offense defined in the MCA, and the
4 illegal killing occurred in the context of hostilities.
5 That's what narrows. As constitutionally required, that's
6 what makes the offenses worse than just a general murder under
7 a broad murder statute like that in the UCMJ.

8 So the statutory aggravators that Congress built
9 into the definition are alleged. Separately, the Rules for
10 Military Commission require the government to provide both the
11 convening authority and the defense with notice of the 1004
12 factors. So R.M.C. 307(d) requires the government to provide
13 the convening authority with notice, which it did. The
14 government did. So the CA has the -- the convening authority,
15 the entity responsible for referring the case, had notice of
16 the 1004 factors the government intend to rely on before
17 referring.

18 Likewise, Rule 1004(b) requires the government to
19 provide the defense with notice of the 1004 factors, thereby
20 placing the defense in the position where it knows what it's
21 going to have to defend against, and it allows the defense to
22 understand the possible judgment if the accused is at some
23 point convicted unanimously beyond a reasonable doubt by the

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1 members, which is the part that satisfies Ring, Your Honor.
2 It's not going to be the military judge that makes findings of
3 fact that support -- that makes any findings of fact that
4 would support a death-eligible component of this case. The
5 members are going to make all of the findings of fact that
6 would make any of the offenses or the accused death eligible.

7 So between the charge sheet and the separate notice
8 requirements of 307(d) and 1004(b), both the convening
9 authority and the defense have notice of all facts that expose
10 the accused to a possible death sentence.

11 And, again, the members ultimately are going to make
12 all of the findings of fact that, again, expose the accused to
13 a possible death sentence as required by the Supreme Court's
14 holding in Ring.

15 If we were to interpret Rule 307(c) as the defense
16 suggests, it effectively would render other parts of the rules
17 ineffective, or inoperable. There would be no reason to
18 require the separate notice -- to require separate notice to
19 the convening authority or the defense if the government also
20 had to allege the 1004 factors on the face of the charge
21 sheet. So there would be no point to 307(d), which is not in
22 the Rules for Courts-Martial. It's in addition to the Rules
23 for Military Commission. There would be no point in making

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1 that addition, because the 1004 factors would be on the face
2 of the charge sheet. Likewise, there would be no point in the
3 government separately providing notice to the defense under
4 1004.

5 What's important is that the defense is noticed, the
6 convening authority had notice, this all happened before the
7 arraignment, the members are responsible for making all of the
8 findings of fact, and for that reason, Your Honor should deny
9 the defense motion.

10 MJ [COL POHL]: How do you respond to the vagueness
11 argument?

12 ATC [MR. SHER]: The government contends that it's not
13 vague. It says on Charge I, the government alleged all of the
14 elements of a perfidious attack including the statutory
15 aggravators like in the context of and associated with
16 hostilities, the government alleged the accused killed 17
17 sailors, and that the accused injured one or more persons, all
18 crewmembers onboard USS COLE, see Appendix B for the list of
19 injured.

20 MJ [COL POHL]: And so, therefore, the government, when it
21 says the endangered individuals, are whom?

22 ATC [MR. SHER]: The endangered individuals, Your Honor,
23 are the sailors that were onboard USS COLE on the day it was

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1 attacked.

2 MJ [COL POHL]: Does that include ----

3 ATC [MR. SHER]: Surely, there's not -- there cannot ----

4 MJ [COL POHL]: No, what I'm saying is -- so it's all
5 sailors, injured and uninjured, that were on the COLE is
6 your ----

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

8 MJ [COL POHL]: And you believe that's fairly in the --
9 well, it's not in the specification and it's certainly not in
10 the aggravating factor, but that's a fair inference when you
11 read them together?

12 ATC [MR. SHER]: I'm sorry?

13 MJ [COL POHL]: Excuse me. I'm sorry. You believe it's a
14 fair inference and this is the government theory is that when
15 you read the charge together with the aggravating factor, that
16 the individuals being endangered are clearly only the members
17 of the people on the ship at the time and does not include
18 anybody else?

19 ATC [MR. SHER]: I think that's correct. I think that's a
20 fair reading of the charge.

21 MJ [COL POHL]: Okay. That's -- okay. That's the
22 government's reading. I got it. Anything further?

23 ATC [MR. SHER]: May I have one minute, Your Honor?

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1 MJ [COL POHL]: Sure.

2 ATC [MR. SHER]: No, thank you, Your Honor.

3 MJ [COL POHL]: Mr. Kammen.

4 LDC [MR. KAMMEN]: The government confuses form and
5 substance. I don't dispute that they checked the box. I
6 mean, they sent this to the convening authority. They
7 certainly gave notice. That's the form of all of this. The
8 substance of it is the problem. And I don't doubt that if you
9 follow the law as set out in Ring, that that perhaps creates
10 some conflicts in the statute. But that's what happens when,
11 you know, you willy-nilly try to create a new legal system by
12 cutting and pasting things from more entrenched systems. I
13 mean, that's -- you know, that's what happens. They could
14 have avoided all of this -- you know, if there was
15 jurisdiction in court-martial, everyone would know the rules;
16 if there's jurisdiction in federal court, everyone would know
17 the rules. But they made the decision to make it up as they
18 go along.

19 MJ [COL POHL]: In the Manual for Courts-Martial the
20 comparable provision specifically says, does it not, that the
21 aggravating factors don't have to be in the specification?

22 LDC [MR. KAMMEN]: Well, and that may well not be
23 constitutional ----

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1 MJ [COL POHL]: Okay.

2 LDC [MR. KAMMEN]: ---- under Ring.

3 MJ [COL POHL]: Yeah. I understand what you are saying.
4 Earlier, you seemed to -- now, there's different wording in
5 the two, between the two ----

6 LDC [MR. KAMMEN]: Right.

7 MJ [COL POHL]: ---- rules.

8 LDC [MR. KAMMEN]: Right.

9 MJ [COL POHL]: The effect is basically the same.

10 LDC [MR. KAMMEN]: And, again, I mean, court-martial --
11 and I don't want to get too far off. Court-martial death
12 penalty law is kind of thin on the ground, number one. And
13 number two, an awful lot of the sort of deviations of
14 courts-martial law from more traditional death penalty law are
15 rooted in the President's need and the need of court-martials
16 for good order and discipline. So, you know, that's somewhat
17 different.

18 Now, you know, if you look at the problem -- and
19 just take Charge IV -- well, let me digress back before I kind
20 of move on.

21 MJ [COL POHL]: Let's stick with the Charge I for now,
22 please.

23 LDC [MR. KAMMEN]: You know, and so the government says,

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1 well, oh, and by the way, it's the members making the
2 decision. And really that's a piece of the problem. I mean,
3 that's why the pleading and all of this is so important. This
4 is a weighing jurisdiction. Do the aggravators in light of
5 the charges outweigh whatever the proffered mitigation is?
6 And so when the government sort of piles these things up in an
7 unfair way, it invites the argument, look, the defense offered
8 15 areas of mitigation, but we have got, you know, all of
9 these people who were potentially hurt in all of these
10 different ways, and you've convicted him of all of these
11 different charges. So clearly the aggravation outweighs the
12 mitigation.

13 And so when they sort of stack stuff on top of
14 stuff, stack aggravator on top of vague charge, on top of
15 bad -- another bad aggravator and so it all cascades into a --
16 you know, an unconstitutional stacking of the system in favor
17 of death. And, you know, that was part -- I mean, this is an
18 argument that we had in February, but essentially when the
19 government was saying -- when you said, well, I may strike
20 some of the aggravators on 1001, but they might be activating
21 facts.

22 The problem with aggravating facts other than that's
23 a concept that doesn't exist in death penalty law, of course,

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1 is the same thing. It stacks the deck in favor of death. It
2 becomes the -- gets piled on and to make it into a -- a
3 death-penalty case.

4 So, you know, if you sort of look ahead to what
5 we're going to be, you know, looking at the jurors are all
6 military. You know, it's the analogies -- and you will be
7 hearing this a lot as we discuss jury selection. If the
8 defendant as occasionally happens, were charged with killing
9 a -- if a defendant in a -- who is a -- incarcerated in a
10 federal prison were charged with killing a prison guard, and
11 the prosecutor contrived to the have the jury made up of
12 prison guards. Well, here we have the defendant charged with
13 killing American military where the jury is all made up of
14 American military.

15 So, you know, that's one of the real sort of
16 overarching problems we'll have to deal with. But then you
17 add onto that this -- you know, sort of the varying issues
18 we've been raising and you have a system where, you know,
19 using Justice Blackmun's terms, you have this machinery death
20 which is in full throttle. And that's why all of this -- you
21 know, this seems innocuous and seems hypertechnical, and I'm
22 sure to an observer, it is. But from the perspective of
23 death-penalty law, in having something that begins to even

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1 feel like a fair system, these are critical, critical
2 decisions.

3 So that's where I would end on Charge I, and I don't
4 know if the government wants to ----

5 MJ [COL POHL]: Well, let me -- anything further, Trial
6 Counsel, on Charge I? Apparently so.

7 ATC [MR. SHER]: Nothing other than the fact that we're
8 straying pretty far afield from what the motion is about, and
9 if Mr. Kammen wants to -- or if the defense wants to file
10 motions challenging various aspects of the capital sentencing
11 scheme, the defense can do so. But we're talking about
12 whether -- we're talking about the pleading requirements.
13 We're talking about Rule 307. That's what the defense motion
14 is.

15 MJ [COL POHL]: I got it. Thank you.

16 ATC [MR. SHER]: Thank you.

17 MJ [COL POHL]: Okay. Mr. Kammen, we're going to -- about
18 to recess, but let me know ----

19 LDC [MR. KAMMEN]: I'm happy to recess. I don't know if
20 anyone else is ----

21 MJ [COL POHL]: Okay.

22 LDC [MR. KAMMEN]: I don't know anyone else thinks it's
23 brutally cold in here, but also there's some other matters.

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1 So recessing now would really be convenient.

2 MJ [COL POHL]: Okay. And what we'll do is tomorrow, you
3 don't need to tell me today, just let me know what you want to
4 do on the similar motions dealing with aggravating factor
5 number one. Like I said, you have the option to argue them
6 each time or pick and choose. That will be your option on
7 that, okay?

8 The commission is in recess until 0900.

9 [The Military Commission recessed at 1654, 24 April 2014.]

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