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1 [The Military Commission was called to order at 1029, 25 April
2 2014.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present.

5 Mr. Kammen, I notice Mr. al Nashiri is not present.

6 LDC [MR. KAMMEN]: Yes, he voluntarily elected to leave.
7 He thought that perhaps the upcoming legal arguments he knew
8 well enough that he could go back to the camp.

9 MJ [COL POHL]: Okay. Did he wish to go back to the camp
10 or just to the holding cell?

11 LDC [MR. KAMMEN]: My understanding is he wanted to go
12 back to the camp.

13 MJ [COL POHL]: So he's voluntarily waiving his presence
14 for the morning session and the afternoon session?

15 LDC [MR. KAMMEN]: Yes, sir.

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

17 Now, Mr. Kammen, I think we left off yesterday with
18 what I'm calling the 246 series dealing with Aggravator
19 Number 1.

20 LDC [MR. KAMMEN]: Yes.

21 MJ [COL POHL]: And we discussed how it impacted on
22 Charge I.

23 LDC [MR. KAMMEN]: Right. And let me just -- I won't

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1 belabor the point other than with respect to the others. 247
2 is Charge II -- involves Charge II, which is murder in
3 violation of the law of war and deals with the people on the
4 COLE who lost their lives.

5 And, again, you have this, then, aggravator that's
6 not plead within the heart of the charge, and so you have that
7 issue. And then, of course, you have the issue of vagueness.
8 And while you could at least make a plausible argument that --
9 referring to the crew members onboard the COLE in Charge I
10 somehow cures the vagueness problem. I don't agree that it
11 does. There's nothing in Charge II that would cure the
12 vagueness problem.

13 With respect to motion 248, which deals with
14 Charge IV, both specifications. And one of the specifications
15 is -- involves the COLE, and this is the charge of terrorism,
16 and one of them involves the Limburg and, again, you have the
17 same problem. You know, the charge doesn't in and of itself
18 allege that one or more persons -- the language of the
19 aggravator, and it refers back to Charge II for a list of the
20 deceased, but wouldn't in any way put any reasonable person on
21 notice, again, as to who the other individuals who were at
22 risk would be.

23 There's just -- again, it would be as though the

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1 government filed a charge that on or about, you know,
2 June 5th, the defendant, you know, John Jones did something
3 that was dangerous that could have hurt somebody, and we'll
4 tell you who later on. And, of course, that's the heart of a
5 vague pleading. So you have two problems, as we said. It's
6 not in there as a -- to the extent it needs to be as plead
7 within the heart of the charge, and, secondly, it would be a
8 vague charge -- vague charge because there's just nothing to
9 put us on notice as to who specifically was put at risk.

10 Of course, the vice of vagueness, as we we've talked
11 about earlier, is that the government can sort of change its
12 theory to conform to -- you know, if say the husbanding
13 agent -- you know, or somebody on a ship or some Yemeni police
14 officer starts talking about how he could have been killed,
15 well, all of a sudden you should kill Mr. Nashiri because the
16 Yemeni police officer could have been killed. Well, there's
17 just nothing in here that provides that kind of notice. And,
18 you know, that's -- I mean, deals with Charges I and II -- or
19 charge -- or Specifications 1 and 2 ---- Charge IX -- I
20 apologize ----

21 MJ [COL POHL]: Take your time.

22 LDC [MR. KAMMEN]: ---- is, you know, hazarding a vessel,
23 and it says, you know, Mr. al Nashiri is -- all the precatory

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1 language and in the context of associated with hostilities
2 eventually did endanger the safe navigation of the Limburg.

3 And so there's nothing -- and it says and resulted
4 in the death of one crew member. Well, there's nothing in the
5 charge of hazarding a vessel that would put anybody on notice
6 that you have this aggravator contained within it, and there
7 would certainly be nothing that in the -- in any of these that
8 talks about the intent that's required.

9 And that becomes fairly important with respect to
10 some because -- some of the counts because the hazarding a
11 vessel is particularly important because, like -- and we've
12 argued this in other contexts, one of the defects of this
13 whole regime is, of course, everything that comes into -- that
14 could conceivably be tried in Guantanamo where there's a death
15 involved, the government at its election can request the death
16 penalty because, you know, many of these statutes, you know,
17 hazarding a vessel resulting in death -- you didn't have to
18 intend it, you didn't have to want it, you could have been
19 completely, you know, sort of an accident following the
20 hazarding act, and yet could you still face the death penalty.

21 Which really flies in the face -- and we have
22 discussed this in other contexts, under problems of Tison and
23 some of the other cases because, you know, under traditional

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1 American law, in order to face the death penalty, you had to
2 intend, and the government has to allege that the defendant
3 intended.

4 Now, again, I don't -- to people who may be
5 listening, certainly, the -- when you drive a boat full of
6 explosives up to another boat, there's probably -- this is a
7 pleading problem. So I'm not suggesting that, you know, in
8 real life that that might not be an issue.

9 But unfortunately, because this is a death penalty
10 case and because, again, as we said yesterday, under the death
11 penalty statutes when they stack the charges and stack the
12 aggravators, they stack the scales; especially in a weighing
13 state, this all becomes particularly important.

14 You know, that really completes the failure to
15 charge acts in aggravation, and then, you know, there's a
16 series of similar things that deal with duplicity, but
17 let's -- you know, I think that might want to be addressed
18 separately rather than ----

19 MJ [COL POHL]: Yes. We'll do that as a separate motion.

20 Okay.

21 Trial Counsel.

22 ATC [MR. SHER]: Good morning, Your Honor.

23 MJ [COL POHL]: I think we're talking about 247, 248, 249,

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1 and 250 all together.

2 ATC [MR. SHER]: Yes, sir.

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

4 ATC [MR. SHER]: The defense has raised really two
5 separate issues, though their pleadings certainly only relate
6 to one of them. The first question is whether the aggravators
7 were properly plead. The second deals with whether they are
8 vague.

9 With regard to the pleading requirements, the rules
10 are clear. The government complied with the rules. The
11 government properly plead the offenses. The government
12 properly plead the statutory aggravators that are embedded
13 within the definition of those offenses.

14 Again, as we discussed yesterday, the defense had
15 notice before arraignment, the convening authority had notice
16 before referral. And, again, the rules require that the
17 members are the appropriate fact-finders to determine whether
18 the existence of any aggravating factors exist, as the Supreme
19 Court required in Ring. There's nothing in Rule 307(c) that
20 requires the 1004 factors to be plead on the face of the
21 charge sheet, and to have required that would make 307(d) and
22 1004(b) superfluous.

23 With regard to the vagueness argument, Your Honor,

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1 the notice of the aggravating factors are not vague. The
2 defense knows exactly what it must prepare for. And in United
3 States v. Le, 327 F. Supp. 2d 601, the government noticed the
4 aggravator of grave risk of death to additional persons where
5 they -- where the government alleged that a defendant
6 brandished his weapon in a restaurant and fired, murdering
7 people, and the government alleged the aggravator that he
8 endangered other people in the restaurant because there was a
9 crowd. The government didn't identify all of the people in
10 the restaurant.

11 MJ [COL POHL]: But the government in that example did
12 identify it by a geographical location, correct? In the
13 restaurant.

14 ATC [MR. SHER]: The location of the offense was, sure.

15 MJ [COL POHL]: Yeah.

16 ATC [MR. SHER]: He shot at people and murdered people in
17 the restaurant.

18 MJ [COL POHL]: Okay. But I'm just saying is that when
19 you say endangered other people, in that case did the
20 government define other people as those in the restaurant, not
21 by name, but by location?

22 ATC [MR. SHER]: I don't believe that in the aggravator
23 that they identified the location. They identified the

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1 substantial endangerment of other people by virtue of somebody
2 firing a weapon.

3 MJ [COL POHL]: Okay. And then so there's no more
4 specificity as to the other people involved?

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

6 MJ [COL POHL]: Could it have been somebody walking
7 outside the restaurant and a bullet goes out the door? Would
8 that be also -- could the government have called in somebody
9 to say there was pedestrians outside and they were also
10 endangered?

11 ATC [MR. SHER]: Sure. Absolutely.

12 MJ [COL POHL]: Okay.

13 ATC [MR. SHER]: Bullets fly outside windows.

14 MJ [COL POHL]: No, I understand that.

15 ATC [MR. SHER]: And likewise, here, the ----

16 MJ [COL POHL]: My question really isn't that. My
17 question goes to: Do you see any requirement to identify the
18 universe of endangered people, or can it be -- I mean,
19 that's -- the vagueness argument here as Mr. Kammen has made
20 again and again is simply how do we know who was endangered
21 because there's no limiting or definitional discussion of who
22 we're talking about? We talked about earlier about the
23 sailors on the ship, in the first charge. On these other

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1 charges, there's no -- do we just infer -- for example, on the
2 Limburg, is it just the people on the Limburg? Is it
3 somebody -- were there other boats in region? I don't know.

4 I mean, do you understand what the ----

5 ATC [MR. SHER]: Your Honor, I understand your question.

6 MJ [COL POHL]: So go ahead. Is there any requirement to
7 limit that in any way?

8 ATC [MR. SHER]: Certainly the rules don't require the
9 government to provide anything more than it has. Of course,
10 the government is going to have to prove the aggravator that
11 it's relying on. It's going to have to prove to the members
12 that other people were substantially endangered by the acts of
13 the accused. And if the government can't prove that, the
14 members won't be able to find that aggravator.

15 MJ [COL POHL]: And it's ----

16 ATC [MR. SHER]: It's up to them as members.

17 MJ [COL POHL]: No, I understand that. But it's the
18 government's position that they have to provide evidence of
19 other people being endangered, but there's no requirement to,
20 with any specificity, prior to trial, to tell the defense who
21 the other people who were endangered, by category, location or
22 identification?

23 ATC [MR. SHER]: Your Honor, the government's position --

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1 and it's clear from the charge sheet that it did. When the
2 government talks about -- when the government charges the
3 accused with murdering 17 sailors onboard a ship and alleging
4 that fairly specific in detailed facts on the face of the
5 charge sheet ----

6 MJ [COL POHL]: So it's your ----

7 ATC [MR. SHER]: ---- the government alleged the statutory
8 aggravator both within it and within the notice.

9 MJ [COL POHL]: I understand. I'm not -- my only question
10 is, and it's -- it's the vagueness issue. The only question
11 is, does there need to be any specificity in your notice of
12 who's endangered? Now, some of these specifications arguably,
13 as we discussed yesterday, they may be -- there may be some
14 evidence of who, the universe we're talking about here, but in
15 other ones, for example, the Limburg offense, we just infer
16 the universe of the other people endangered are the sailors on
17 the Limburg or the -- the seamen on the Limburg? I mean, my
18 basic question is just ----

19 ATC [MR. SHER]: I understand.

20 MJ [COL POHL]: ---- does the government believe there's
21 any more specificity required as to who is endangered?

22 ATC [MR. SHER]: I understand. I have two answers.

23 First, the government's position -- I don't believe

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1 that there is something more required of the government at
2 this point. Having said that, a solution here, if Your Honor
3 finds that these 1004 factors are vague, the government can
4 clarify. The government can -- and the rules allow for that.
5 1004(b) allows the government to supplement its notice. And
6 if that's what the defense is requesting, and it's -- and
7 that's not what it requested in its motions.

8 MJ [COL POHL]: No, I understand.

9 ATC [MR. SHER]: If that's what the defense is requesting,
10 that's a solution.

11 MJ [COL POHL]: Okay.

12 ATC [MR. SHER]: They're sufficiently -- we are
13 sufficiently before trial still. There would be no prejudice
14 to the accused by disclosing or by providing that information.

15 MJ [COL POHL]: Okay. Anything further?

16 ATC [MR. SHER]: May I have one minute?

17 MJ [COL POHL]: Sure.

18 ATC [MR. SHER]: Your Honor, so from the charge sheet
19 itself and from the statutory aggravators and the 1004 factors
20 that the government plead, the defense certainly can
21 reasonably infer from that those people who were substantially
22 endangered, for instance. And the defense can make those
23 inferences based on the charge sheet, they can make it based

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1 on the discovery provided. And if the defense needs -- and,
2 again, if the defense is unclear, if the defense cannot --
3 believes it cannot reasonably infer who those people are that
4 were substantially endangered, it can ask. And if that's
5 where we are, the government will clarify.

6 MJ [COL POHL]: Okay.

7 ATC [MR. SHER]: Thank you.

8 MJ [COL POHL]: Anything further?

9 ATC [MR. SHER]: No. Thank you.

10 MJ [COL POHL]: Good.

11 Mr. Kammen.

12 LDC [MR. KAMMEN]: Just to be clear, I have three
13 responses. The first is that under Ring these aggravators
14 become elements, and as elements of the offenses the
15 aggravators must be alleged in the charge and the
16 specification, if the government intends to use them to make
17 that charge death eligible. R.M.C. 307(c)(3) is explicit,
18 quote, "that except for aggravating circumstances under
19 R.M.C. 1004(b)(2), facts that allege the maximum authorized
20 punishment must be alleged in order to permit the increased
21 punishment." Of course, that's different than the Manual for
22 Courts-Martial, so it's something that's clearly intentional.
23 And in our view, it's not properly alleged.

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1 Now, I heard the government say two things. The
2 first they said, well, gosh, if the defense thinks it's vague,
3 we can always replead. And essentially that's what we ask in
4 a motion to dismiss various aggravators, is essentially, you
5 know, that they replead. Nobody's saying they can't fix this,
6 but we are saying that they have to fix this, and they have to
7 fix it in a way that's constitutionally permissible.

8 Now, sort of in this next breath the prosecutor
9 says, oh, and if they really are unclear as to who we have in
10 mind, they can just ask. Well, essentially that's what a
11 motion to dismiss for vagueness or lack of precision, call it
12 what you will, is, is a request for something that is more
13 specific.

14 But I don't mean to -- this isn't -- and I don't
15 mean to -- this isn't meant condemnably. The problem in this
16 system is, you know, when you are talking about a death
17 penalty case, we don't do things by sort of informal
18 understanding. We could ask the prosecutor and say who do you
19 have in mind, and he may well say we have in mind, you know,
20 the crew of the COLE, and that's fair with respect to some of
21 the counts.

22 But then all of a sudden for litigation purposes,
23 something else appears more emotionally evocative, and you

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1 used the example of, well, if the door is open, and, you know,
2 a bullet flies out, and, you know, it threatens a woman and
3 her, you know, three children, you know, pushing the -- you
4 know, the pram down the street, well, the prosecutor might say
5 that's a little bit more evocative of the harm of this than,
6 you know ----

7 MJ [COL POHL]: But if they were -- if they were to --
8 and, again, this kind of slides to a bill of particulars type
9 of issue. If they were forced to name their universe of
10 endangered persons, would that not limit them?

11 LDC [MR. KAMMEN]: Sure, if they were forced to name the
12 universe of endangered persons. Now, it doesn't cure the ----

13 MJ [COL POHL]: That doesn't go back to your first
14 issue ----

15 LDC [MR. KAMMEN]: The first issue.

16 MJ [COL POHL]: ---- but your second issue is ----

17 LDC [MR. KAMMEN]: Absolutely. Absolutely. I mean, if
18 somewhere in something they said other people could have been
19 endangered, to wit, and -- absolutely that cures that piece of
20 it.

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

22 Mr. Sher, anything further.

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

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1 LDC [MR. KAMMEN]: Next we're to the ----

2 MJ [COL POHL]: 251.

3 LDC [MR. KAMMEN]: ---- duplicity issue.

4 In several of the charges -- you know, and, again,
5 the overarching problem is that by having nine or ten
6 different charges -- I mean, the heart of this case is two
7 events, the bombing of the USS COLE and the bombing or the
8 attack on the MV Limburg. It's two discrete events.

9 MJ [COL POHL]: Well, I would -- probably a third one
10 dealing with THE SULLIVANS.

11 LDC [MR. KAMMEN]: You're right. So three discrete
12 events.

13 MJ [COL POHL]: Go ahead.

14 LDC [MR. KAMMEN]: I apologize.

15 MJ [COL POHL]: No problem.

16 LDC [MR. KAMMEN]: And yet the prosecutors make it into
17 11, 12, whatever the final number is of charges by, you know,
18 taking one and then taking another, and then it's, you know --
19 it's attacking civilians, it's terrorism, it's murder, it's
20 perfidy. It's all of these different ways of stacking the
21 deck.

22 Then, of course, the aggravators, you know, they
23 have, for example -- and it's, again, the 1004(c)(1)

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1 aggravator, which makes death eligible any offense that puts
2 one or more persons other than the victim were endangered, but
3 then you also have 1004(c)(8) which makes death eligible any
4 offense which one or more protected persons were endangered.

5 So we have an aggravator that endangers persons and
6 an aggravator that endangers so called protected persons. Any
7 count that involves protected persons by definition involves
8 persons. If the attack on the Limburg or attacking civilians
9 is a protected person under the law of war, then those people
10 are people. And so by, you know, stacking the two, persons
11 and protected persons, they -- it's the epitome of
12 double-counting.

13 And, again, as I said yesterday -- and the problem
14 here is this is a weighing jurisdiction. And so when you
15 double-count, you know, at the end, depending on what the
16 verdict forms look like, if the verdict form lists all of the
17 aggravators and, you know, we, the jury, find aggravator --
18 you know, Count 1 or Charge I, you know, Aggravator 1 beyond a
19 reasonable doubt, Charge I, Aggravator 2, however it is -- you
20 have this list -- well, when you double-count, you increase
21 the list, and thereby in a weighing state stack the deck
22 because what will happen, and what will unquestionably happen,
23 is that the prosecutors will say, ladies and gentlemen of the

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1 jury, when you convicted Mr. Nashiri, you -- we asked you to
2 find all of these aggravators, and just the sheer number of
3 them, the sheer number of aggravators requires you to enter --
4 impose a sentence of death. And maybe if there were fewer
5 aggravators, maybe we could say that the mitigation outweighed
6 the aggravation. But here, given the number of aggravators,
7 there is no way.

8 And so, you know, they have this vice of
9 double-counting which, again, is prohibited under the cases
10 we've, you know, cited. And, you know, I mean, the case
11 that to my mind, you know, comes is *Stringer v. Black* that
12 where a single aggravator is counted twice, it
13 unconstitutionally skews the weighing of aggravating and
14 mitigating factors. And, you know, I mean, that's the heart
15 of -- that is not the heart of the argument, that's the heart
16 of the argument. It's very simple.

17 MJ [COL POHL]: Mr. Kammen, on that Aggravating Factor
18 Number 4, it's in the disjunctive? It says the victim was a
19 protected person or the offense was committed in such a way
20 that it endangered a protected person?

21 LDC [MR. KAMMEN]: Right, so you have that as well.

22 MJ [COL POHL]: But your double-counting is primarily on
23 the ----

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1 LDC [MR. KAMMEN]: Well, it's on both. I had forgotten,
2 you know, this, but my experience has been that when it really
3 comes down to aggravators, this is not something that gets --
4 I mean, the decision to impose the death penalty is an
5 individual juror's choice, and each juror is allowed to and
6 required to bring their individual decision-making process.
7 It's not a collective effort. It is an individual effort that
8 has a collective, potentially, result.

9 I don't know that jurors can or should make these
10 sort of nuanced distinctions between protected persons and
11 persons. If they find that individuals were at risk and that
12 that was sufficiently aggravating to make this, you know, sort
13 of weigh on the side of death, I don't know that they're going
14 to make that distinction. And that's the problem here is ----

15 MJ [COL POHL]: But wouldn't the burden be on the
16 government to prove beyond a reasonable doubt that the victim
17 was a protected person? I mean, you said it won't be just
18 simply a ----

19 LDC [MR. KAMMEN]: Well, yeah, but let's be honest. I
20 mean, to the extent that people -- you know, the protected
21 persons are civilians, I mean, how difficult is it to prove
22 that the people on the Limburg were protected people that --
23 you know, Captain, were you ----

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1 MJ [COL POHL]: But that's not the argument. The argument
2 before me deals with the duplicity of the two ----

3 LDC [MR. KAMMEN]: Right. Absolutely.

4 MJ [COL POHL]: ---- with the two aggravating factors.

5 I'm just saying that I think the second part would appear
6 to -- Aggravating Factor 4 is the crux of your argument. The
7 first part, the protected person part ----

8 LDC [MR. KAMMEN]: I mean ----

9 MJ [COL POHL]: Assuming the protected person is not the
10 same person -- well, the protected person is a victim, so it's
11 not a ----

12 LDC [MR. KAMMEN]: Right. It's always going to be the
13 same person. That's the problem.

14 MJ [COL POHL]: Okay.

15 LDC [MR. KAMMEN]: I mean, I suppose you could -- and this
16 may come back ----

17 MJ [COL POHL]: No, what I'm saying, though, is that
18 Aggravating Factors 1 and 4, the second half of 4 deals with
19 endangerment of people other than the victim.

20 LDC [MR. KAMMEN]: Right.

21 MJ [COL POHL]: Okay. But the first part of Aggravating
22 Factor 4 is the victim was a protected person. So for this
23 motion, you're focusing on the second half of aggravators for

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1 want of a better -- okay. Yes. Thank you.

2 LDC [MR. KAMMEN]: Yes.

3 MJ [COL POHL]: Thank you.

4 LDC [MR. KAMMEN]: And the other ones deal with that ----

5 MJ [COL POHL]: The other motions.

6 LDC [MR. KAMMEN]: ---- the other ones as well.

7 MJ [COL POHL]: Mr. Seamone.

8 ATC [MAJ SEAMONE]: Your Honor, good morning.

9 MJ [COL POHL]: Good morning.

10 ATC [MAJ SEAMONE]: It's important to think about this
11 term "duplicitous" and what it means when addressing the
12 defense's motion. And duplicity essentially means that you
13 have one of the factors necessarily subsuming the other, and
14 essentially that it's necessary to find one in order to find
15 the other. And hopefully, after this next few moments, it
16 will be clear that these are not duplicitous sentencing
17 factors, sentencing aggravators.

18 The defense wants to characterize protected persons
19 in terms of air quotes, but it's really a lot more than that.
20 The significance of a protected person by someone who's not
21 protected is directly linked to protections under the Geneva
22 Conventions.

23 MJ [COL POHL]: But can a protected person under

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1 Aggravating Factor 4 -- again, I'm talking about the second
2 half of Aggravating Factor 4, not the first part, just to make
3 it clear.

4 Can a protected person under Aggravating Factor 4,
5 the second half, not necessarily include a person under
6 Aggravating Factor 1?

7 You lean forward like you're going to tell me
8 something.

9 ATC [MAJ SEAMONE]: I'm leaning forward just to let you
10 know what's going on. I'm thinking of the fact that the
11 courts repeatedly say that you can have these factors which
12 have overlapping facts or the same evidence might actually
13 support two separate factors, but that alone doesn't mean that
14 they're duplicitous.

15 MJ [COL POHL]: But you can't double-count. You agree
16 with that?

17 ATC [MAJ SEAMONE]: Your Honor, in the government's
18 motion, there's an extensive discussion about the Jones case,
19 the Supreme Court finding that the articulation of the
20 double-counting theory alone doesn't automatically make
21 something duplicitous.

22 MJ [COL POHL]: No, I'm not saying it does, but there is
23 some limits on charging the same conduct multiple ways that

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1 runs a risk of double-counting.

2 ATC [MAJ SEAMONE]: And the double-counting is really tied
3 to when you have identical factors rather than something with
4 significant differences. The insertion of "protected" is so
5 substantially different than just a person that it's not
6 identical. They're not identical to one another. And the
7 government would respond that the case of United States v. bin
8 Laden really talks about nonidentical, but factors that have
9 some overlap to them.

10 So in answer to that question, Your Honor, the fact
11 of the protected person quality makes this so substantially
12 different that it is permissible. That is definitely the
13 government's position.

14 MJ [COL POHL]: No, but I think the question is, and I
15 know I'm going to analogize to something that's not directly
16 analogous, but it seems to fit is, is Aggravating Factor 4 or
17 1 basically just a lesser included factor to the second half
18 of Aggravating Factor 4? By that I mean is, other than the
19 protected persons status, it's identical, isn't it? I mean,
20 it's worded slightly differently, but at the end of the day
21 it's virtually identical, isn't it, except for adding that one
22 adjective, "protected"?

23 ATC [MAJ SEAMONE]: The government would say that's one

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1 potential reading, but the case law seems to support the fact
2 that you can still have a major difference because of the fact
3 that "protected" is included in this. And, again, there are a
4 couple of thoughts here. This really ties in to the notion of
5 what an aggravating factor is. And bin Laden is really
6 important here because they say it's not really about adding
7 up what these factors are there to do. You know, defense
8 counsel talked about an individual juror's determination based
9 on his or her own sense of having received the information and
10 then properly attaching weights and not getting confused.

11 It's also true that sentencing in a capital case is
12 about individualized sentencing. And the bin Laden court said
13 these factors are therein mitigating or aggravating. These
14 factors are there because they exist to show the members of a
15 jury or a panel a perspective that they wouldn't have by
16 considering the other factors.

17 So to the extent that there is a perspective that is
18 not present in the other, that allows the panel to have a more
19 rich understanding, make a determination of whatever weight
20 they want to assign if they even find that factor to be
21 present. Therefore, the more factors you have, the more
22 individualized it is. Rather than just having one and
23 comparing that to other situations, you are individualizing

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1 the process.

2 So in United States v. bin Laden, there were three
3 factors -- three aggravating factors that were complained
4 about. One of them was posing a grave risk of death to
5 additional persons. Another was multiple victims. And yet
6 another dealt with victim impact. And the defense in the bin
7 Laden case said, listen, you're not -- essentially, you're not
8 only double-counting, you're triple-counting because it all
9 deals with the same thing, an argument very much like
10 Mr. Kammen has raised. And, in fact, if you take a look at
11 this grave risk of death to additional persons, it's very
12 similar to substantial endangerment as the first one that
13 we're talking about now.

14 And what the bin Laden court said in taking a look
15 at those three factors in that case was that they were not
16 duplicitous, they did not essentially triple-count, and they
17 said you've got to think about the purpose of that grave risk
18 of death to additional persons.

19 The goal there is to get to the state of mind of the
20 defendant when committing the crimes. And what the bin Laden
21 court said was that if you have a defendant who has targeted
22 an individual, intending to harm that individual, and has
23 carefully planned the attack as not to harm additional

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1 persons, bystanders, that's an important difference in terms
2 of culpability from one who just abandons risk to others that
3 are not the intended targets, that would show a difference.
4 So that goes to state of mind of the defendant. That's that
5 unique perspective brought out by that factor, arguably here,
6 the same type of factor at play in that first factor of
7 substantial endangerment. But multiple victims was different
8 because the perspective of multiple victims in the bin Laden
9 case dealt with the sheer amount of destructiveness involved,
10 the magnitude of the offense, different from the state of
11 mind.

12 In this case, the protected persons piece is so
13 vitally important and provides a different perspective because
14 it's not talking about the state of mind of the accused. The
15 unique perspective that makes this not duplicitous and not
16 double-counting, even though the words might look the same, is
17 in fact that these are a class of people, whether it's the
18 wounded or the sick who can't participate in fighting or
19 medical personnel who are trying to help or religious
20 personnel who are actually giving spiritual services at the
21 time that they are harmed, that whole category of protected
22 persons deals with a special, unique vulnerability based on
23 either their infirmity or the nature of the duties they're

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1 performing. It has nothing to do with the accused's intent.

2 MJ [COL POHL]: Let me ask you this.

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

4 MJ [COL POHL]: Let's assume for the sake of this
5 discussion that you have a protected person named John Doe.

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

7 MJ [COL POHL]: And the government proves beyond a
8 reasonable doubt that John Doe is both a protected person, who
9 was endangered by the activities involved here -- okay?

10 Would endangering John Doe amount to evidence of
11 both Aggravating Factors 1 and 4 simultaneously?

12 ATC [MAJ SEAMONE]: It could possibly do that, yes, but
13 because of the different perspectives and the different
14 reasons for considering it, like I just described, Your Honor,
15 it would still not be double-counting or duplicitous.

16 MJ [COL POHL]: Okay. So -- and using my John Doe analogy
17 here, okay, if the members came back, and let's say these are
18 the only two factors there, the members came -- well, it
19 doesn't make any difference. The members came back and found
20 beyond a reasonable doubt that John Doe was evidence of
21 Aggravating Factor 1 and also evidence of Aggravating Factor
22 Number 4, that that is -- and they make that finding beyond a
23 reasonable doubt, and then when they do their weighing between

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1 the aggravating and mitigating part, they can weigh the John
2 Doe twice ----

3 ATC [MAJ SEAMONE]: Well, Your Honor ----

4 MJ [COL POHL]: ---- because it's two aggravating factors?

5 ATC [MAJ SEAMONE]: Your Honor, the great thing about what
6 you posed is that the Supreme Court in Jones told us how to
7 avoid the potential for the kind of ambiguity that would lead
8 to a result that would invalidate one of those factors because
9 of that ambiguity.

10 And what Jones tells us is two things, very
11 important things. The Supreme Court, first thing Jones tells
12 us is that the power of instructions here -- and I'm not just
13 saying instructions alone. We have heard much during the
14 course of these proceedings about instructions. It's not just
15 a bare analogy I'm making to instructions.

16 But the fact is if we look at Jones, they say when
17 it is clearly explained to the members of a jury that they are
18 not to just simply tally and add up but to give these factors
19 individual weight, that is something that goes against this
20 impermissible skewing factor, something that would lead to an
21 invalid ambiguous result.

22 MJ [COL POHL]: So the members are instructed to consider
23 Aggravating Factor 1 with John Jones individually and

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1 Aggravating Factor 4 with John Jones individually, but to
2 consider them as two aggravating factors, not one?

3 ATC [MAJ SEAMONE]: They're to consider them as different,
4 and the important ----

5 MJ [COL POHL]: How can they be -- if they're different,
6 you're saying consider them as two and not one?

7 ATC [MAJ SEAMONE]: And to essentially avoid
8 double-counting. And I say that because in Jones they said
9 instructions were one piece of it, but the other fact in that
10 case that made this skewing and ambiguity nonrealistic was
11 that in that case it was the prosecution actually highlighted
12 how those aggravating factors were different and went to the
13 differences, the different perspectives, so that would avoid
14 the confusion. And the -- you know, again, we do ----

15 MJ [COL POHL]: But in essence -- in essence, though,
16 is -- but it doesn't cause you pause that in essence under my
17 hypothetical Jones' death -- or, excuse me endangerment, is
18 counted twice. You keep saying it's different, and different
19 tells me you believe it can be considered from -- from your
20 view of the concept of perspective, is you consider Jones as a
21 victim under Aggravating Factor 1, an endangered victim, and
22 also separately, differently, under Aggravating Factor 4, and,
23 therefore, Jones can be considered under both of those

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1 aggravating factors even though it's the same person and even
2 though it's the same act of endangerment. Is that the
3 government's position?

4 ATC [MAJ SEAMONE]: No, Your Honor. Your Honor, the
5 government's position is that you can have overlap. And in
6 the Jones analogy you provided, there is overlap. There is
7 evidence that is indeed relevant, the same evidence --

8 MJ [COL POHL]: But overlap would imply that part of one
9 is not part of the other one, that there's a distinct part of
10 each of them. And by that I mean, if you have a sub -- you
11 have 1, 2 and 3, and 2, 3 and 4. 2 and 3 overlap, but there's
12 1 and 4 on the two different concepts. Okay.

13 My question here is if you prove Aggravating
14 Factor 4 for Jones, you necessarily have to necessarily have
15 proved Aggravating Factor 2 with Jones because the only thing
16 different is he's a protected person for one and just a person
17 for the other. True? False? Want to explain.

18 ATC [MAJ SEAMONE]: No, you don't have to because the way
19 you've described it is accurate, but in the law as you clearly
20 note, Your Honor, oftentimes appearances can be deceiving,
21 especially when you are talking about the construct that you
22 can in fact carve out -- and perhaps something to the nature
23 of this -- I'm just hypothesizing.

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1 If the panel were to receive an instructions -- and
2 it can be highlighted, of course, clearly they are going to
3 get the definition of protected person under
4 Section 950p(a)(2), because we do have one that defines the
5 universe of what a protected person is.

6 For example, in a terrorism charge the protected
7 person is actually an element. So they wouldn't only be
8 hearing about protected person during the sentencing phase,
9 they would have already have been oriented to the unique
10 differences of what a protected person is during the merits as
11 well, which would help enable them to have the tools to
12 discriminate and to not just merely to say, oh, substantial
13 endanger, substantial endanger, therefore we're going to give
14 it the same weight and double-count it again.

15 Rather than that, an instruction might go something
16 like this, which is to the extent that protected status is
17 something that highlights the vulnerability of that class of
18 persons, that is the weight to consider -- or that is the
19 evidence to consider separate and not again when you have
20 already considered the first factor.

21 So for highlighting the aspect of protected class,
22 however much of a weight they want to give it, whether that
23 could be just a little or it could give nothing, that, Your

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1 Honor, would be sufficient to show the members why it's not
2 necessarily a double-counting and why it's reasonable to
3 expect that, if correctly informed, they would not in fact
4 double-count.

5 So one final thought, and this is just something
6 worth highlighting. It's not necessarily the case that one
7 who is a victim as a protected person has to be the victim of
8 the underlying offense in this same way. The term victim is
9 defined quite broadly for the purposes of the military
10 commissions system. And just a point there would be -- and I
11 want to target the first prong that you spoke about, the
12 difference that the protected person is a victim. Those are
13 the only two requirements in the first prong of Section 8.

14 You could, for example, at sentencing have a victim
15 who was a witness -- let's say you had a first responder who
16 went to a burning oil tanker to try to conduct firefighting
17 activities. I'm not -- I'm just using a hypothetical. I'm
18 not tethering this to the Limburg, but using an analogy. That
19 medical person, while rendering aid, let's say that person
20 suffered smoke inhalation from the attack that had caused the
21 death. You could have different types of injury. You could
22 have a first responder, let's say, who suffered a
23 post-traumatic stress disorder as a result of having to

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1 witness the aftermath of a horrific murder in violation of the
2 law of war or whatever the merits, charges were that led it to
3 be death eligible. The victim who is a protected person might
4 not even had to have suffered any kind of physical injury at
5 all. It could be emotional harm when we look at the
6 definition of victim that is spelled out in the Rules for
7 Military Commission.

8 So the point is, you have the ability to distinguish
9 between a protected person who happens to be a victim and make
10 distinctions that would not, you know, generally apply to the
11 other situation, of prong one. It's just -- there's just a
12 lot of variance here. This is not simply just putting things
13 in boxes and looking at general overarching terms, because
14 there's enough granularity here that will be provided by the
15 facts and then the differences between the merits in
16 sentencing where the panel will be able to make these types of
17 determinations that allow the members to discern these
18 differences in perspective.

19 And that is what the government offers.

20 MJ [COL POHL]: Is Aggravating Factor 4 two aggravating
21 factors admitted under one?

22 ATC [MAJ SEAMONE]: Aggravating Factor 4, which would
23 be ----

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1 MJ [COL POHL]: I mean, it says the victim was a protected
2 person or -- and they go to the endangerment language. Isn't
3 that two completely separate aggravating factors, particularly
4 since the latter half refers to people other than victims?

5 ATC [MAJ SEAMONE]: I think the main point -- and it's
6 important to note that this comes first, this distinction
7 comes first. They're saying that for Aggravating
8 Factor 1 ----

9 MJ [COL POHL]: No, I'm not talking about that. I'm just
10 talking about 4 by itself. Just 4 by itself.

11 ATC [MAJ SEAMONE]: 4 by itself. Aggravating Factor 4,
12 I'm reading here, the accused procured another by means of
13 compulsion ----

14 MJ [COL POHL]: No, I'm reading it off your notice.

15 ATC [MAJ SEAMONE]: Oh, our notice. I apologize. Yes,
16 I'm sorry, Your Honor.

17 MJ [COL POHL]: I'm sorry. I just read what you guys give
18 me. It's AE 182.

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

20 MJ [COL POHL]: The numbers I have been referring to, I'm
21 referring to on your notice.

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

23 MJ [COL POHL]: It says the victim was a protected person

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1 or the offense was committed, and the rest of it is
2 endangering protected persons. Is that a duplicitous
3 aggravating factor alleging two separate factors in one ----

4 ATC [MAJ SEAMONE]: Again, I don't mean to harp on the
5 same thing, but when you consider the importance of a
6 protected person, what they're trying to get at is that
7 protected status is so vital, it should apply to both the
8 victims and people who are nonintended victims who are still
9 harmed. So not only -- the government would suggest that the
10 emphasis and the repeating of this part in terms of protected
11 persons just emphasizes how vital it is that protected persons
12 makes it entirely different from the first one. That's why
13 it's mentioned again, because it provides such a different
14 perspective, in fact.

15 That's the way to look at that, Your Honor.

16 MJ [COL POHL]: Okay.

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

18 MJ [COL POHL]: Thank you.

19 Mr. Kammen.

20 LDC [MR. KAMMEN]: It is a death argument that makes John
21 Jones into both the -- John Jones, the person, into John
22 Jones, the person, and John Jones, the protected person, and
23 somehow that's different.

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1 And I think you hit on the heart of it. If the
2 government wants to allege as an aggravator that certain
3 attacks targeted protected persons, fine, so be it. Putting
4 aside the -- you know, whether they need to say the protected
5 persons at issue were the crew of the MV Limburg or how you
6 get beyond that, you know, that's fine.

7 But when they say it targeted protected persons and
8 those same persons were put at risk in the same way from the
9 same explosion, then, you know, there's no reasonably
10 principled way to avoid saying this is double-counting. And
11 for all of the argument, I didn't hear any explanation for
12 how, in using your hypothetical, John Jones was -- it's not
13 double-counting. I mean, there was, well, you look at this
14 case and that case, but at the end of the day those are
15 different -- really, really different situations.

16 But there is another piece of this that troubled me
17 because it brings us back to, again, this sort of notion of
18 lack of provision, and I think we just saw the heart of what
19 we were afraid of when we talk about the vagueness, and we
20 haven't made this argument on this, but I think we see the
21 potential problem.

22 I mean what I'm about to say, you know, with the
23 greatest amount of respect. All of the survivors who are

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1 here, who are at Fort Meade, who are wherever, suffered huge
2 emotional damage. No question about that. Many of them and
3 many of the people would were on the COLE, maybe most of the
4 people who were on the COLE, the survivors who were not
5 wounded, perhaps suffer from PTSD. And so if we have this --
6 you know, and the notion of the first responders, people
7 from -- Yemenis who went to help on the COLE somehow become
8 victims or, you know, if the notion of victimhood increases
9 without adequate notice, and we have this -- you know, this
10 amorphous situation.

11 And the prosecutor's, you know, argument was
12 compelling. A first responder who suffers PTSD is a victim.
13 In one sense that's absolutely true. But, again, for death
14 penalty purposes, when there's no notice, you know -- and so
15 then the argument comes at the end when it's too late to deal
16 with it, that's exactly the vice here in the context of a
17 capital case, why all of this needs to be done with some
18 precision.

19 And all of what the prosecutor described would be
20 within the definition of victim under the Military Commissions
21 Act -- or under the rules because the rules define victim as a
22 person who suffered direct physical, emotional or pecuniary
23 loss or -- harm or loss as a result of the commission of an

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1 offense.

2 So it's -- the first responder, I assume,
3 potentially is a victim. The guy who was on the pier in Yemen
4 who perhaps saw the explosion, certainly people who were
5 profoundly affected by the explosion all fall within that
6 category.

7 And yet -- and that's the problem, of course, is
8 this moving target of victimhood increases. You know, given
9 the way that the government has elected to plead this stacks
10 the scales. I mean, there's just no other way to say it. You
11 can't fix it in the instructions. You can't fix it in the --
12 I mean, it will have that effect, and the law recognizes it
13 has that effect, and the law -- that's why in a system that's
14 protected by the Constitution of the United States, that's why
15 such things are prohibited.

16 I just want to touch on something that will probably
17 be coming up, but at least under the Rules for Military
18 Commission there really seems to be no definition of what a
19 protected person is. I presume that comes from international
20 law or the law of the rules of war, but, again, you know,
21 we're -- there's nothing in writing that I -- that we can find
22 just sort of here that tells us exactly what it is we're
23 talking about. So there may be that amorphous concept at work

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1 here as well, so ----

2 MJ [COL POHL]: Mr. Kammen, I don't mean to interrupt you,
3 but on Part IV, definition of construction in the Manual for
4 Military Commission, isn't there a definition of protected
5 person?

6 LDC [MR. KAMMEN]: Well, there could well be. Let me
7 look.

8 MJ [COL POHL]: I mean, you just may not have ----

9 LDC [MR. KAMMEN]: I mean ----

10 MJ [COL POHL]: We're doing a lot this week, and sometimes
11 I just -- it's on page IV-1, if that's easier to find.

12 LDC [MR. KAMMEN]: You know, you're absolutely correct.

13 MJ [COL POHL]: Okay.

14 LDC [MR. KAMMEN]: And -- perfect. Thank you.

15 MJ [COL POHL]: No, I ----

16 LDC [MR. KAMMEN]: And I stand corrected.

17 The -- I mean, that really doesn't change the heart
18 of our argument.

19 MJ [COL POHL]: I understand that. I understand that.

20 LDC [MR. KAMMEN]: The heart of our argument is any
21 person, I mean ----

22 MJ [COL POHL]: Any protected person is going to be a
23 person.

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1 LDC [MR. KAMMEN]: Is a person. Any civilian who's not
2 taking -- you know, unless somehow we have martians, and I
3 don't mean to belittle this, but any person is a protected --
4 any protected person is also a person.

5 MJ [COL POHL]: Understand. Thank you.

6 Mr. Seamone.

7 ATC [MAJ SEAMONE]: Your Honor, the government would
8 indeed request that the commission look at Jones -- the
9 Supreme Court's ruling in Jones v. United States and the
10 subsequent opinions. The government's cited those in its
11 motion, highlighting a trend, and the trend -- many of the
12 cases actually cite to this language from Jones, quote, "we
13 have never before held that aggravating factors could be
14 duplicative so as to render them constitutionally invalid, nor
15 have we passed on the double-counting theory."

16 So when the Supreme Court is addressing these
17 concerns and recognizing that while there could be things that
18 make an aggravating factor invalid, they're rejecting the
19 notion that duplicity is necessarily prohibited, that's an
20 important point. And, again, considering the perspectives --
21 perspective from bin Laden and other cases, this can be
22 adequately handled through both instructions as well as
23 distinctions made that highlight the difference in perspective

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1 to the members of the panel. And that would be consistent
2 with the Eighth Amendment, and it would meet the accused's
3 statutory protections against cruel and unusual punishment.

4 So thank you very much, Your Honor.

5 MJ [COL POHL]: Thank you.

6 And, Mr. Kammen, I believe it's the same argument
7 for 252 and 253. Okay. Why don't we start 254 and we
8 will break for lunch at 1200.

9 Major Daniels.

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

11 MJ [COL POHL]: Good morning.

12 DDC [Maj DANELS]: In 254, the defense is asking, Your
13 Honor, that you strike Aggravator Number 4, because it was not
14 alleged in the specification to Charge IX, hazarding a vessel.
15 And we had this discussion -- I can't remember whether it was
16 yesterday or the day before, Your Honor, with regard to the
17 requirement that aggravators be charged as an element of the
18 offense. It's required under Ring, and it's also required
19 under R.C.M. -- R.M.C. 307(c)(3) that it be charged in the
20 offense. And the defense's position is because it is not
21 charged as an element of the offense, it cannot stand and
22 should be struck as an aggravator for that offense.

23 MJ [COL POHL]: Does -- looking at 307(c)(3), do the

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1 aggravators increase the maximum punishment authorized?

2 DDC [Maj DANELS]: Can I just grab a copy of the charge
3 sheet and the manual, Your Honor?

4 MJ [COL POHL]: Sure.

5 DDC [Maj DANELS]: As it relates to Charge IX, hazarding a
6 vessel, because a death result -- based on the fact that a
7 death resulted, in the scheme that the defense is for now
8 forced to work within, no, it does not increase the maximum
9 sentence.

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

11 DDC [Maj DANELS]: However, Your Honor, under Ring, it's
12 required to be plead because aggravators are required to be
13 plead as an element of the offense. So the defense's position
14 is despite the fact that it does not increase the maximum
15 sentence, given the capital sentencing scheme that's currently
16 in place, it fails under Ring and, therefore, it should be
17 struck from Charge IX.

18 I have nothing further, Your Honor.

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

20 Trial Counsel.

21 ATC [MR. SHER]: Your Honor, as we discussed yesterday and
22 a little bit earlier today, the government did plead the
23 statutory aggravators. We're coming back to the statutory

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1 aggravators. That's what makes -- that's what narrows.

2 That's what makes these crimes more deserving of death.

3 On the charge sheet, again, the government alleged
4 that the accused is an alien unprivileged enemy belligerent.

5 Again, the government alleged that the accused illegally

6 killed in violation of the MCA, and, again, the government

7 alleged that the illegal killing occurred in the context of

8 hostilities. Those are the statutory aggravators.

9 Those are the aggravators on which the defense has
10 notice. It can prepare. And, of course, as we've discussed,
11 the defense also has notice by virtue of R.M.C. 1004(b) of the
12 1004 factors. Thank you.

13 MJ [COL POHL]: Thank you. Major Danels, anything
14 further?

15 DDC [Maj DANELS]: Yes, Your Honor. I would just like to
16 point to you, by way of contrast, the way that the government
17 has charged attacking civilians. Where it expressly ----

18 MJ [COL POHL]: Which charge and specification?

19 DDC [Maj DANELS]: I'm sorry, Your Honor. It's
20 Charge VII.

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

22 DDC [Maj DANELS]: It specifically alleges that it -- that
23 Mr. al Nashiri intended -- intentionally attacked civilian

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1 persons onboard the Limburg. And no mention is made of any
2 other person other than the victim and no allegation is made
3 as to the victim's status of the protected person in Charge X.
4 So there's nothing in Charge -- I'm sorry, Charge IX.

5 The aggravator -- the language of the aggravator,
6 "the life of one or more protected person other than the
7 victim was unlawfully or substantially endangered," is not
8 found anywhere in the charging of Charge IX, as required by
9 Ring. And because that aggravator is not alleged as an
10 element of the charged offense, it fails under Ring and,
11 therefore, should be struck from the charge.

12 MJ [COL POHL]: Understand. Thank you.

13 DDC [Maj DANELS]: Thank you, Your Honor.

14 MJ [COL POHL]: Trial Counsel, anything further?

15 ATC [MR. SHER]: Your Honor, it seems that we're back to
16 the vagueness argument, not the pleading argument, which is
17 the subject of the defense motions.

18 With regard to vagueness, the defense can and should
19 infer that by detonating explosives next to a civilian ship,
20 that civilians would thereafter be intimidated, that they're
21 no longer safe, for example, from traveling. And that's what
22 the aggravator is about. That's the point. That's what makes
23 the offense further aggravating and more deserving of death.

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1 So with regard to vagueness. The government contends it is
2 not vague.

3 Back to the pleading component of the defense
4 argument, the government's position is the same. It has
5 alleged all of the statutory aggravators embedded within the
6 definition of the offense, the government's alleged those
7 aggravators on the face of the charge sheet. The defense has
8 notice.

9 Ring is not about -- the Supreme Court's holding in
10 Ring is not about how to plead. It was about ensuring that
11 the members, the jurors there, the members here, are -- who
12 are the ultimate fact-finders, they are responsible for
13 finding facts that would expose the defendant to a death
14 sentence; not the judge alone, the members. That's what Ring
15 is about. Thank you.

16 MJ [COL POHL]: Thank you.

17 255. I think we just did 254. 255 looks a lot like
18 254, but -- Major Daniels.

19 DDC [Maj DANELS]: Your Honor, in 255, the defense is
20 asking that Aggravating Factor 4 be struck from Charge IV,
21 Specification 2, which is terrorism, as it relates to the
22 Limburg.

23 And, Your Honor, the argument is essentially the

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1 same as what was presented on 254. Because it is not charged
2 as an element of the offense, it fails under Ring, which
3 requires that aggravating factors be charged as elements of
4 the offense.

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

6 DDC [Maj DANELS]: Thank you, Your Honor.

7 MJ [COL POHL]: Trial Counsel, do you want to adopt your
8 same argument on 254 -- on 255 as in 254?

9 ATC [MR. SHER]: Yes, Your Honor. And I think we could do
10 that through 259, but ----

11 MJ [COL POHL]: Well, I'll let -- it's defense motions.
12 They can choose to proceed if they want to go through each,
13 because we're switching to a different aggravating factor.

14 ATC [MR. SHER]: Yes, sir.

15 MJ [COL POHL]: Okay. 256.

16 LDC [MR. KAMMEN]: In some respects the argument is the
17 same, so I won't belabor the point, but 256 through 259 deal
18 with Aggravator Number 5, which, if I can find it here, does
19 offer some unique variations on this because Aggravation
20 Number 5 deals with the alleged intent to intimidate or
21 terrorize the civilian population.

22 And if we look at Charge I as an example of the
23 series of problems, Charge I alleges one of the variations of

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1 the attack on the COLE and talks about the perfidy. There is
2 nothing in the body of Charge I -- or Charge II, which is
3 murder in violation of the law of war, basically same attack,
4 same circumstances. The only difference in practicality is
5 the title of the charge.

6 There would be nothing that would give us any clue
7 that the intent was to terrorize some civilian population.
8 You could reasonably look at either of these charges and say,
9 okay, the people who did this, you know, had the intent to
10 attack a warship, they had the intent to harm or kill the
11 people on the warship, but there's nothing that you could --
12 would give you any notice from the body of the charges about
13 an intent to terrorize the civilian population.

14 And I'm going to guess, but let me just make sure,
15 Charges VIII and IX, you know, really talk about hijacking or
16 hazarding a vessel, so I want to deal with those a little
17 separately.

18 MJ [COL POHL]: Is your basic argument on 256 the Ring
19 argument?

20 LDC [MR. KAMMEN]: Yes. But, I mean, there is -- the Ring
21 argument because, you know, the government can say, well,
22 okay, on some of these, it's sort of -- it's fairly understood
23 or it's fairly a part of it, but here, of course, there's

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1 nothing in this that alleges anything with respect to a
2 civilian population. It's not even close.

3 Now, I don't know that this is -- there's also a
4 vagueness -- and to the extent that an aggravator -- Ring
5 requires -- I think this is subsumed within this argument,
6 that Ring requires, to the extent an aggravator is an element,
7 the same bit of precision that you would plead a charge with.
8 And there's an allegation of an intent to terrorize a civilian
9 population.

10 I'm kind of curious what civilian population the
11 government has in mind. Do they have in mind the American
12 civilian population that was 7,000 miles away and perhaps had
13 one response to the bombing of the COLE, or the Yemeni
14 population that was across the harbor that may have had
15 another response, or perhaps some other population the
16 government has in mind?

17 So to the extent that Ring requires pleading with
18 precision, we don't have that here. And so, you know, that is
19 a huge issue that affects, really, all four of the counts.

20 Let me turn to Counts, again, VII -- excuse me, VIII
21 and IX. You know, it alleges an attack on a civilian entity
22 and civilian personnel, and so is that the civilian population
23 that is allegedly terrorized? Because then you have ----

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1 MJ [COL POHL]: Just so I'm tracking here, Mr. Kammen, I
2 know that the charges have been renumbered, and I have a
3 feeling that ----

4 LDC [MR. KAMMEN]: Okay. Go ahead.

5 MJ [COL POHL]: Okay. Which charges are you referring to
6 now?

7 LDC [MR. KAMMEN]: I am referring to VII ----

8 MJ [COL POHL]: And.

9 LDC [MR. KAMMEN]: ---- and IX.

10 MJ [COL POHL]: Okay. Fine. Thank you. Go ahead.

11 LDC [MR. KAMMEN]: You know, VII alleges an attack --
12 attacking civilians on the MV Limburg, and X is hazarding a
13 vessel.

14 MJ [COL POHL]: IX.

15 LDC [MR. KAMMEN]: Or, excuse me, IX is hazarding a
16 vessel. Well, again, there's nothing in those that would, in
17 our view, give any notice as an element -- as we read Ring,
18 that subsumed in there is an intent to terrorize a civilian
19 population, which is a somewhat different -- arguably a
20 somewhat different intent.

21 Now, the prosecutors are going to say, well, we have
22 properly pled it. We have jumped through all of the hoops,
23 we -- you know, you're misreading Ring. And for the purposes

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1 of this discussion, that becomes kind of a big so what,
2 because, again, what civilian population?

3 Because there is perhaps -- I mean, there's the
4 United States, there's Yemen. Sometimes in their
5 justification for making the attack on the Limburg have
6 jurisdiction in this commission, we've heard that this
7 affected world oil prices, it affected insurance rates, it
8 affected France, France as a coalition partner. You know, I
9 mean, the list of potential people population -- civilian
10 populations that were terrorized is, you know, given fertile
11 minds, almost unlimited.

12 And I don't mean to be flip when I say I could see
13 the prosecutors saying the entire world was terrorized because
14 this affected for a day the price of oil, and so it wasn't
15 just America or Yemen or France or wherever, or Malaysia or
16 Bulgaria. This was the entire world.

17 Well, again, that really does become pretty
18 important because if the targeted population is the United
19 States, then the focus is on what was the United States's not
20 just necessarily political reaction, but partly the political
21 reaction. Were people in the United States terrorized? Did
22 it have any impact? Was that really the intent? And,
23 certainly, did it have that effect?

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1 If it was about Yemen, then we are into, well, was
2 this part of the Civil War in Yemen? And if it's part of the
3 Civil War in Yemen, then why are we here in Guantanamo? If it
4 is about France, was there an intent to terrorize the French
5 population, or the Malaysian oil -- you know, I mean, again,
6 as we have heard countless times, this involves a French
7 tanker carrying Iranian oil to Malaysia and the person killed
8 was a Bulgarian.

9 Well, was this to terrorize the Bulgarian
10 population? So we're back to the vagueness argument both in
11 terms of -- to the extent it's an element and then on its face
12 because of the lack of precision.

13 MJ [COL POHL]: Thank you. Mr. Sher.

14 ATC [MR. SHER]: Your Honor, the defense is on notice of
15 the aggravators. This charge sheet has -- this charge sheet
16 has a lot of detail about the offenses, about the common
17 allegations relating to these offenses. At the end of the
18 day, the government will have to prove to the members all of
19 the facts that support each of the aggravators.

20 With regard to Mr. Kammen's discussion about who's
21 intimidated, perhaps everyone. That's the way this works.
22 Just because the accused's illegal acts are huge and far
23 reaching does not mean that the aggravator itself is vague.

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1 If al Qaeda can kill 17 sailors on a warship ----

2 MJ [COL POHL]: Let me ask you this: Mr. Kammen asked
3 what civilian population.

4 ATC [MR. SHER]: Any civilian population that might want
5 to travel, Your Honor. You can no longer get on a civilian
6 ship safely.

7 MJ [COL POHL]: Well, let me ask you this: Is the focus
8 of this on the civilian population or the intent of the
9 accused?

10 ATC [MR. SHER]: It's certainly the intent of the accused
11 to intimidate, but for who he intimidated ----

12 MJ [COL POHL]: If the government proves beyond a
13 reasonable doubt that the accused intended to intimidate the
14 civilian population wherever, is evidence that such
15 intimidation actually occurred probative on that issue?

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

17 MJ [COL POHL]: Sure.

18 ATC [MR. SHER]: Your Honor is right. It's his intent to
19 intimidate ----

20 MJ [COL POHL]: No, that was a question. I'm not taking a
21 position. So when you say I'm right ----

22 ATC [MR. SHER]: Okay.

23 MJ [COL POHL]: ---- you make it seem like I'm taking a

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1 position. I simply ask, is that probative on the issue.

2 That's all. So I mean, you can say whatever, but ----

3 ATC [MR. SHER]: Aggravators certainly.

4 MJ [COL POHL]: ---- just because I have a question
5 doesn't mean I'm taking a position on the subject. Go ahead.

6 ATC [MR. SHER]: The aggravator is certainly the accused's
7 intent. Whether it's probative who was intimidated, I think,
8 yes. It shows that -- how the intent was carried out.

9 And the intent, certainly at a minimum, is focused
10 on -- certainly is focused on the Western world, to be sure.
11 Certainly focused on the United States.

12 The allegations are that he attacked a civilian oil
13 tanker that had great -- with the purpose of intimidating
14 Americans, but who was intimidated ----

15 MJ [COL POHL]: Well, as charged, is the focus on who was
16 intimidated or is the focus on who the accused intended to
17 intimidate and, therefore, the ----

18 ATC [MR. SHER]: The charge itself relates to his
19 attacking civilians. But by virtue of attacking a civilian
20 oil tanker and having the intent to terrorize civilians ----

21 MJ [COL POHL]: That's somewhat of a circular argument.
22 You said by having the intent to attack civilians, he has an
23 intent to attack civilians. I'm simply saying is the focus is

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1 on -- I mean, the focus is on the intent of the
2 accused, right?

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

4 MJ [COL POHL]: Okay. Okay. Anything further?

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

6 MJ [COL POHL]: Mr. Kammen.

7 LDC [MR. KAMMEN]: I think I'm inclined to agree that at
8 least as it's plead, the focus is on the intent of the
9 accused. The intent of the accused as alleged is to terrorize
10 an undefined civilian population, and that's the problem. I
11 suppose, and I know in other arguments, the prosecution has
12 said that in some other context or -- that, you know, Usama
13 bin Laden had the intent to terrorize the Western Crusaders.
14 And I suppose if that's their position, that the intent was
15 to -- and what they're going to try and prove is that
16 something Usama bin Laden wrote was somehow applicable to
17 Nashiri and then went on to be applicable to whoever, and this
18 was all sort of -- you know, and that's it, well, that's fine.
19 It's just -- none of that is alleged. None of that is --
20 would be fairly subsumed within any of those four charges.
21 Now, it's kind of glommed on in a very vague way.

22 MJ [COL POHL]: But is it -- on that issue -- and I
23 understand your charging issue.

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1 LDC [MR. KAMMEN]: Sure.

2 MJ [COL POHL]: But I'm saying that issue is assuming this
3 is focused on the accused's intent, regardless of the source
4 thereof, the government would have to prove beyond a
5 reasonable doubt that the accused had that intent. And so
6 isn't the -- what you're discussing now how they can prove it
7 is not -- is a question of proof, not a question of charging?

8 LDC [MR. KAMMEN]: Well, I think it's a question ----

9 MJ [COL POHL]: Do they have to -- when they charge it --
10 is it your position that when they charge it -- let's assume
11 it was included. We'll go with the Ring issue. Let's put
12 that aside.

13 LDC [MR. KAMMEN]: Right.

14 MJ [COL POHL]: Is it your position that when they charge
15 the aggravating factor, they also have to charge facts within
16 the aggravating factor constituting how they would prove it?

17 LDC [MR. KAMMEN]: Well, they would have to put us on
18 notice if there was a specific civilian population they had in
19 mind. Because, again, what you don't want is -- and the whole
20 problem with vagueness is the prosecutor opens on one theory,
21 presents evidence on another, and closes on a third. And, you
22 know, then -- you know, the jury just sort of has this morass.

23 If the intent was to -- you know, Nashiri's specific

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1 intent was to harm the United States, so be it. But then, you
2 know, you have to ask yourself in the Limburg case, well, is
3 it -- you know, and, again, this may be a matter of countering
4 the aggravator, but does a guy who attacks -- assuming for the
5 sake of the discussion he has been convicted. Does a guy who
6 organizes an attack on a French ship carrying Iranian oil to
7 Malaysia, does that really evidence in some real world way an
8 intent to harm the United States?

9 And a jury may well say, huh-uh, no.

10 MJ [COL POHL]: So it's your position is that the term
11 civilian population has to be defined ----

12 LDC [MR. KAMMEN]: Yes.

13 MJ [COL POHL]: ---- in some ----

14 LDC [MR. KAMMEN]: I mean, what civilian population --
15 because you have -- I mean, you have multiple. You have --
16 and it really does make a difference. If the attack on the
17 Limburg was part of the Yemeni Civil War ----

18 MJ [COL POHL]: What if, just for the sake of this
19 discussion, they said the -- they proved the accused intended
20 to terrorize a civilian population. That's not sufficient? I
21 mean ----

22 LDC [MR. KAMMEN]: A civilian population.

23 MJ [COL POHL]: Or the civilian population.

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1 LDC [MR. KAMMEN]: The civilian population.

2 MJ [COL POHL]: Okay.

3 LDC [MR. KAMMEN]: I think not, because, again, what's --
4 what civilian -- you know, what ----

5 MJ [COL POHL]: Whether they're -- okay.

6 LDC [MR. KAMMEN]: You know, the civilian population of
7 France is a different concept than the civilian population of
8 South Africa. And, you know, you -- it would be like saying
9 on or about, you know, April 23rd, 2001, you know, Richard
10 Kammen intended to kill someone. I mean, you know, at some
11 point you have to have vague -- you have to have some
12 precision so that the defense knows what it can meet.

13 Now, you may -- they may -- if you uphold this,
14 then, of course, I think that -- and say, well, they don't
15 have to plead this with any precision, but then they're
16 prohibited, I think, from saying, well, what was the effect on
17 world -- in the United States or what was -- you know, then
18 they have to -- they can't get specific if they don't plead
19 specifics. If that makes ----

20 MJ [COL POHL]: But that comes back to the discussion I
21 had with trial counsel is, the focus is -- I think the plain
22 reading of it is the intent of the accused.

23 LDC [MR. KAMMEN]: Sure.

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1 MJ [COL POHL]: So whether or not it had this impact, I'm
2 not sure how probative that is.

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

4 MJ [COL POHL]: It might be -- it may -- I'm talking about
5 on findings. We're not worried about sentencing.

6 LDC [MR. KAMMEN]: I understand what you are saying.

7 MJ [COL POHL]: I mean, the accused intended to commit a
8 certain act of this type of thing with intent to intimidate.
9 Whether or not there is actual intimidation ----

10 LDC [MR. KAMMEN]: No, but it has to have -- I may say
11 this inelegantly. It has to have some sort of tendency -- it
12 has to be rational.

13 MJ [COL POHL]: I understand.

14 LDC [MR. KAMMEN]: I could say, boy, I want to make the
15 best argument in the world in front of Judge Pohl, but my real
16 intent is to convince the Governor of Indiana that he should
17 come out against Guantanamo.

18 Well, I mean, yeah, that can be what's going on in
19 my mind, but that's not necessarily rational.

20 MJ [COL POHL]: I'm with you. Okay. I understand. Okay.
21 Thank you.

22 Trial Counsel, last word, with the understanding
23 your last word is standing between us and lunch.

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1 ATC [MR. SHER]: I understand that, Your Honor. I just
2 want to draw Your Honor's attention to R.M.C. 1004(c)(11),
3 which is the language of the aggravator itself. It says that
4 the offense was committed with the intent to intimidate or
5 terrorize the civilian population.

6 It does not require that you -- that you define or
7 limit any more than that. It's the global civilian population
8 that ----

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

10 ATC [MR. SHER]: It's the civilian population. Any
11 civilian ----

12 MJ [COL POHL]: So ----

13 ATC [MR. SHER]: The civilian population. Civilians
14 travel, and now they may be intimidated.

15 MJ [COL POHL]: I know. I know. I know civilians travel.
16 I got it. Just so I understand your position, so it would be
17 the global civilian population?

18 ATC [MR. SHER]: It certainly can be. If the government
19 can prove that and if the members find that beyond a
20 reasonable doubt, it certainly can be.

21 MJ [COL POHL]: But that's how you're defining the term
22 civilian population? The civilian population is -- I assume
23 all nonmilitary people on the face of the earth?

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

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

3 ATC [MR. SHER]: Thank you.

4 MJ [COL POHL]: Commission is in recess until 1310.

5 [The Military Commission recessed at 1207, 25 April 2014.]

6 [END OF PAGE]

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