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1 [The Military Commission was called to order at 1316, 25 April  
2 2014.]

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

6 I understand both sides have a proposed order of  
7 march for this afternoon; is that correct?

8 TC [CDR LOCKHART]: Yes, sir.

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

10 MJ [COL POHL]: Okay. Commander. Whichever commander  
11 talks first.

12 DDC [CDR MIZER]: Ladies first.

13 TC [CDR LOCKHART]: I think we're going to start with 244,  
14 sir.

15 MJ [COL POHL]: Okay. Then?

16 TC [CDR LOCKHART]: I'm sorry. 244, then 245, then the  
17 witness production issue in 260, and then the sessions for 240  
18 and 242 that will be closed, sir.

19 MJ [COL POHL]: Okay. That's what both sides want to  
20 finish today with?

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

22 TC [CDR LOCKHART]: Yes, sir.

23 MJ [COL POHL]: Okay. Let's start with 244.

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1 Major Danels.

2 DDC [Maj DANELS]: Good afternoon.

3 MJ [COL POHL]: Good afternoon.

4 DDC [Maj DANELS]: In 244, Your Honor, the defense is  
5 requesting that the commission dismiss Charge II, Charge III,  
6 Specification 2, Charge V and Charge VI as unreasonable  
7 multiplications of Charge II and Charge IV, Specification 1 --  
8 I'm sorry, Charge I and Charge IV, Specification 1.

9 R.M.C. 307(c)(4) requires that each specification  
10 state one offense, and that one transaction should not be the  
11 basis for an unreasonable multiplication of charging. The  
12 defense believes that what's at play here and the analysis  
13 that's appropriate are articulated in U.S. v. Campbell;  
14 however, those factors are not exhaustive. The defense  
15 believes that the analysis of the charges in light of the  
16 Campbell factors reveal that the four additional charges don't  
17 allege separate criminal acts.

18 The accused in Charge I is charged with perfidy, and  
19 in Charge IV, Specification 1, terrorism. Those are two  
20 distinct theories of liability. Then as a pile-on, the  
21 government charged murder by perfidy, attempted murder by  
22 perfidy, caused injury by perfidy, and conspired to commit  
23 murder by perfidy. These pile-on of charges are a classic

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1 example of unreasonable multiplication of charges.

2 MJ [COL POHL]: If you have an underlying offense, say,  
3 larceny, and the government alleges it happened by a group, so  
4 charges a conspiracy to commit larceny, would that be an  
5 unreasonable multiplication of charges?

6 DDC [Maj DANELS]: I'm sorry, Your Honor. I don't  
7 understand your question.

8 MJ [COL POHL]: My question is this, because part of  
9 your -- okay. Let me phrase it a different way.

10 When you say one form of conduct can be the basis of  
11 only one offense, if that conduct commits, as alleged,  
12 multiple offenses, is the government stuck with just picking  
13 from one of the offenses?

14 Let me give you another example. For example,  
15 felony murder, can the government charge both felony murder  
16 and the underlying felony at least up through findings? Same  
17 act. Let's say it occurred in the course of a robbery.

18 DDC [Maj DANELS]: No, Your Honor. I guess I'm -- can  
19 you ----

20 MJ [COL POHL]: No, what I'm just simply saying is that --  
21 is it your position that when an accused commits an act, that  
22 the government must -- can only charge one offense from that  
23 act, even though it may implicate different statutory

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1 violations?

2 DDC [Maj DANELS]: The defense position is here that, as  
3 charged, the pile-on of the attempted murder, the causing  
4 serious bodily harm, the conspiracy and the murder by perfidy  
5 are pile-ons to the underlying -- when he's already charged  
6 with perfidy and terrorism for the underlying crime, those are  
7 just pile-on charges that aggravate criminality. It's  
8 redundant. It's unnecessarily redundant.

9 MJ [COL POHL]: Okay.

10 DDC [Maj DANELS]: And it's because all of the charges  
11 depend on Mr. Nashiri's alleged commission of one act of  
12 perfidy and/or terrorism.

13 And continuing with the analysis under Campbell, the  
14 four additional charges, as I said earlier, exaggerate  
15 criminality. They add nothing to the allegations of perfidy  
16 or terrorism other than to separately charge murder, attempted  
17 murder, conspiracy, and assault that resulted from the  
18 underlying perfidy and/or terrorism.

19 They also have a tendency to confuse the members  
20 with regard to criminality, because in ordinary civilian life,  
21 murder, assault, and conspiracy are serious crimes in and of  
22 themselves. However, in the context of war, these are not  
23 ordinarily criminal acts. I mean, by definition, in war you

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1 commit homicides against your opponent in the war. There's  
2 nothing inherently criminal about killing someone on the other  
3 side.

4 Furthermore, in this capital case, an unreasonable  
5 multiplication of charges is highly prejudicial and the  
6 redundancy of the charges pile-on, if you will, and skews  
7 things in favor of death and it makes the offenses look worse  
8 than they really are.

9 By charging one act which occurred in one place, in  
10 a single moment, as six different crimes, it demonstrates the  
11 fourth factor under Campbell, prosecutorial overreaching.  
12 Because they're doing nothing more than exaggerating the  
13 nature of the alleged crime, which is the very reason for the  
14 prohibition against redundant charging. And the government is  
15 essentially front-loading its sentencing case.

16 Your Honor, the defendant believes that the manner  
17 in which the prosecution has charged the case, the piling-on  
18 of Charges II, III, Charge -- Specification 2, Charge V and  
19 Charge VI exaggerates the case against Mr. Nashiri, and as  
20 such it violates the letter and spirit of R.M.C. 307(c)(4).  
21 Therefore, the defense respectfully requests that this  
22 commission dismiss those charges as unreasonably multiplying  
23 the charges and specifications set out in Charge I and

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1 Charge IV, Specification 1.

2 MJ [COL POHL]: Thank you.

3 Trial Counsel.

4 CP [BG MARTINS]: Good afternoon, Your Honor.

5 MJ [COL POHL]: Good afternoon.

6 CP [BG MARTINS]: May it please the commission. I'd like  
7 to spend a little bit of time on this motion because this  
8 motion actually goes to the charging function and  
9 prosecutorial discretion in that function. We've  
10 appropriately challenged and looked at a number of different  
11 aspects of the charge sheet, which is the right thing to be  
12 doing, scrutinizing it carefully.

13 But this particular challenge is based on a sense of  
14 overreach, of almost calculating, inflammatory treatment.  
15 This is coming out of 307 of the manual, where when we were  
16 talking about multiplicity, the notion was one of jeopardy, of  
17 putting somebody twice in danger, even if it was in the same  
18 trial, of -- that there's an unfairness there. The focus is  
19 on the unfairness of having the same crime be tried twice and  
20 putting that person in jeopardy.

21 Here again, this focuses on the charging decision  
22 and whether it was, as counsel was saying toward the  
23 conclusion of her argument, overreaching on its face,

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1 presumably, because there wasn't an allegation of intent to  
2 overreach, but sort of on its face it's too much. It's piling  
3 on.

4           Let me say up front, too, I want to underline and  
5 agree with completely a sentiment expressed by learned counsel  
6 yesterday and again today; that, you know, we're into these  
7 technical discussions of pleading, and we have to be there.  
8 We have to talk law. We have to get into technicalities. And  
9 when one does that, it can come across as perhaps a bit too  
10 callus with these facts. And I just want to say up front,  
11 every one of the humans alleged in this charge sheet is -- was  
12 a human, the suffering that is alleged to have come out of  
13 that is real, and we want to underline that, as we talk about  
14 it in technicalities, that we're mindful of the listening that  
15 some people may be doing to this discussion and don't get the  
16 wrong impression about it, also mindful that we're talking  
17 about allegations, and they're just allegations. Although  
18 real suffering came from the charged events, the accused is  
19 presumed innocent. The system requires us to prove that  
20 beyond a reasonable doubt.

21           So, you know, we've had a motion here now to look --  
22 this is also a -- although the requested relief is to look at  
23 a charge and say dismiss it because it is an unreasonable

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1 multiplication of charges with another, this form of requested  
2 relief is alleging something about the charge sheet as a  
3 whole, and so, as such, it's important to talk about the  
4 relationship amongst the charges, and the ultimate test under  
5 Rule 307 is of course, that a single transaction, a single  
6 criminal transaction, cannot be the basis for an unreasonable  
7 multiplication of charges.

8           So the test here is one of reasonableness. And the  
9 reason I'm going to belabor this discussion a bit, with your  
10 indulgence, is that I'd like to show the reasonableness of  
11 this charge sheet and why the way in which it's been alleged,  
12 the way in which these acts have been alleged is entirely  
13 reasonable. And fully putting an accused on notice in a  
14 plain, concise, but definite way, that captures the  
15 criminality and the specific acts and crimes that are alleged.

16           So in Appellate Exhibit 244, in the motion at hand,  
17 and we're going to have very similar arguments, of course,  
18 both sides on the 245, it's a multiplication of charges  
19 allegation on the charge sheet, is we have -- the COLE-related  
20 charges are being challenged as unreasonably multiplying a  
21 single transaction, and the request for relief is to dismiss  
22 the murder in violation of the law of war charge, the  
23 attempted murder in violation of the law of war charge,

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1 Spec 2, the one going to COLE, the conspiracy charge, which is  
2 conspiracy to commit terrorism and murder in violation of the  
3 law of war, the intentionally causing serious bodily injury  
4 charge, which is a COLE charge, dismiss those as unreasonable  
5 multiplication of charges of the transaction described by  
6 using perfidy, and terrorism Spec 1, which is the COLE charge.  
7 So looking at those now, and thinking now of the standard  
8 within military practice, the Quiroz case of 2001 cited by  
9 both parties in the brief.

10           If I could, you know, prosecutor -- with that solemn  
11 discretion given to it, the prosecutor by law, you know, sits  
12 down with a legal pad with a lot of evidence and figures out  
13 how to -- how do we capture this properly. And I'm going to  
14 walk through the charges and explain the reasonableness of  
15 this and incorporate these five Quiroz factors -- again, up  
16 front those factors are that the defense must have raised it.  
17 That's present -- a threshold factor to get to the remaining  
18 four steps in the analysis, but then also that the charge --  
19 is the charge aimed at distinctly separate criminal acts from  
20 the one it's said to be a multiplication of, does the number  
21 of charges misrepresent or exaggerate the criminality of the  
22 transaction, does the number -- third, does the number  
23 unfairly increase the punitive exposure, underline unfairly,

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1 and then is there evidence of prosecutorial overreaching.

2           So, you know, looking at the perfidy charge, you  
3 have an event that is charged as a perfidious act, and a  
4 perfidious attack in this port, and the gravamen of perfidy in  
5 the law of war -- this is one of the oldest offenses in the  
6 law of war. This inviting of an adversary to rely upon the  
7 law and rely upon your status, your protected status, under  
8 the law with the intent to take advantage of that. That's the  
9 heart of perfidy.

10           And we have elements of it in the manual that  
11 require a completion of that through something, a capture, a  
12 killing, as a result of that perfidy. And that is -- given  
13 that the counsel seems to acknowledge that some aspect of this  
14 transaction is not unreasonable to charge, at least in this  
15 motion, that the -- that is at the heart of a piece of the  
16 conduct here.

17           So, then, murder in violation of the law of war, and  
18 the commission has expressed some interest in this  
19 relationship of this charge, Charge II, with Charge I. Here  
20 the gravamen is intentionally killing. I mean, this is a --  
21 truly under the multiplicity test, it's not violating  
22 Blockburger or Teters. If you look at the elements -- I'm  
23 going back to multiplicity for a minute just to illustrate

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1 something. You're looking at different elements here.

2           If you have the classic Venn diagram of the  
3 Blockburger/Teters analysis, one element has to lie outside of  
4 that overlap on each offense, and you clearly have that in  
5 this case with perfidy. But now does it unreasonably multiply  
6 that perfidy charge? No. I mean, the most obvious Quiroz  
7 factor that's implicated here is is it aimed at distinctly  
8 separate criminal acts.

9           And acts in that analysis is not the narrow actus  
10 reus of some part of the offense. It's the crime. Is it  
11 aimed at a criminal problem that the authority that's making  
12 the law is seeking to get at? And the problem of perfidy, of  
13 using treachery or perfidy, the full name of the crime, is a  
14 different problem in crime than that of getting at those who  
15 set out to kill others intentionally, who are trying to kill  
16 others. There's different proof involved. There's a  
17 different crime.

18           And, you know, this notion of unreasonable  
19 multiplication at this very early point in the charge sheet,  
20 you can see, is not supposed to keep the lawmaker, the  
21 society, the legislature, the community of nations agreeing on  
22 a war crime to prevent it from proving the many different ways  
23 in which a transaction -- a number of different ways in which

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1 a transaction can be criminal. It's not intended -- the law  
2 is not intended to prevent that. And Quiroz itself is a great  
3 example.

4           You had one piece of property, C-4 explosive, in  
5 Quiroz. What were the charges there that were under analysis?  
6 Selling, receiving, possessing, and conspiring to do that of  
7 the explosives. Four different offenses, four different  
8 crimes, not an unreasonable multiplication, and that goes to a  
9 relatively small amount of C-4.

10           So let's move on. So that's the murder in violation  
11 of the law of war. Attempted murder in the violation of the  
12 law of war is getting at -- in this case it's not  
13 the SULLIVANS specification, it's the COLE specification.  
14 These are the people who didn't die. And, you know, here the  
15 intent is to look at -- well -- and there's a specific intent  
16 part of this to try to murder, but to -- and then falling  
17 short.

18           So those who were not killed are reflected, embraced  
19 by that, in a fair way, not an unfair way. Not in a way  
20 intended to inflame, not in a way that's irrelevant. We've  
21 had some examples of irrelevant things in the charge sheet.  
22 All of this is highly relevant and highly -- and important to  
23 distinguishing the accused's alleged conduct from others in a

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1 situation of hostilities, which is a -- an important aspect of  
2 this. We have group conduct here and there's a requirement to  
3 distinguish the criminality of the accused as opposed to those  
4 he is alleged to be complicit with and in a conspiracy with.

5           So now moving on to the next one, conspiracy,  
6 Charge V, the allegation is that this is an unreasonable  
7 multiplication of charges with the perfidy charge and the  
8 terrorism charge. This, now, is -- again, on the government's  
9 motion, our position is this is a completed conspiracy. This  
10 is the common plan to do terrorism -- to commit an act of  
11 terrorism and to perfidiously attack the USS COLE. This is  
12 something different in the sense that it's going to the  
13 agreement and the overt acts that define that criminal  
14 responsibility of someone who was nowhere near the actual  
15 explosion of the COLE, nowhere near the very mature but foiled  
16 attempt on THE SULLIVANS, the explosion that actually was  
17 successful on the Limburg. And it describes with  
18 particularity, but not overdoing it, it describes the common  
19 plan that is a clear basis for vicarious liability.

20           And the notion that the defense and the accused are  
21 not on notice of the connection of the accused, who in  
22 military pleading and military commissions pleading is charged  
23 as a perpetrator under the principles theory, to the notion

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1 that they're not on notice that that common allegations --  
2 those allegations in Charge V don't apply to link the accused  
3 to these actions, we've heard the word frivolous a couple of  
4 times, that's one of the more frivolous things I've heard.

5           The idea that a vicarious liability theory does not  
6 need to be spelled out in each specification is firmly rooted  
7 in our law. It goes back to Article 77 in case law,  
8 construing it, and then also incorporated into the Military  
9 Commissions Act with almost identical language. And we've had  
10 that discussion, of course, Your Honor, in the context of  
11 AE 048.

12           And then finally, intentionally causing serious  
13 bodily injury. Again, different gravamen. You know, this is  
14 setting out to intending to cause serious bodily injury,  
15 something different from intending to cause death. Because,  
16 of course, if you're seriously injured, the pain lasts longer.  
17 The suffering extends. And so the lawmaker, and this is  
18 international law and also Congress, is seeking to proscribe  
19 that aspect. And of course there's the need to prove the  
20 intent not just to kill, not just to go out and kill  
21 100 percent of those you're attacking but to leave some who  
22 aren't killed.

23           So to say that those are, with very different,

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1 distinct -- again remembering Quiroz -- acts and crimes are  
2 the same or unreasonably multiplying, using perfidy and  
3 terrorism -- of course, terrorism as has been discussed, I  
4 think adequately, the gravamen there to kill or cause serious  
5 bodily harm with an intent to influence, to cow the  
6 population, to affect the conduct of a government, that  
7 specific intent of terrorism, very important, and it -- you  
8 know, it's the substitution of violence for peaceful ways of  
9 changing the political order. Totally different crime and  
10 act, distinct -- clearly distinct from the others and not at  
11 all resulting in an unreasonable multiplication of charges.

12           The Rezaq case that we quote, Your Honor, I believe  
13 is an important one because it goes to this label that  
14 continues to come from the allegations relating to the charge  
15 sheet that it is unfairly prejudicial, or piling on, I think  
16 has been a term. And in Rezaq you have a discussion of the  
17 standard for surplusage, and it's not just what is surplus to  
18 a minimally adequate pleading, but it's surplusage subject to  
19 strike. You know, what is it that causes surplusage to be  
20 subject to striking on motion? And the court there -- and  
21 this is a D.C. Circuit case, so an important case for us. The  
22 standard is to be construed against striking surplusage, and  
23 that it must be clear that the allegations are not relevant to

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1 the charge and are inflammatory and prejudicial.

2           There's certainly a lot of violence, a lot of  
3 killing. You know, we have total of nine charges on the  
4 charge sheet. Seventeen deaths, a course of conduct that  
5 spans years, dozens of overt acts described with definiteness  
6 in the charge sheet, and yet really only nine charges. I  
7 would submit that this is actually a relatively concise  
8 account of the criminality that is at issue here. And that  
9 United States v. Rezaq charge -- or I believe language is  
10 really important in light of the allegations that this is  
11 piling on.

12           I noted amorphous in the various discussions of the  
13 charge sheet, vague, double-counting, stacking the deck, a  
14 product of fertile minds, unfair, and here, of course,  
15 unreasonable. And, you know, maybe there's a doctrine of  
16 unreasonable multiplication of pejorative epithets or  
17 something, but the basic principle of no matter how many times  
18 you say it doesn't make it true, I think applies here. This  
19 is a reasonable charge sheet that fairly, plainly, concisely,  
20 definitely explains the full nature, and all of the criminal  
21 acts that are at issue that were before the prosecution when  
22 the charge sheet was drafted. This case was actually referred  
23 on my first day as chief prosecutor. I didn't get a chance to

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1 review it, but I came to it and looked at it, and after seeing  
2 the clear outcome of analyzing it through and through, it's a  
3 reasonable set of charges, not an unreasonable multiplication  
4 of charges.

5 Subject to your questions, Your Honor.

6 MJ [COL POHL]: I have none. Thank you.

7 Major Danels, anything further?

8 DDC [Maj DANELS]: Your Honor, the defense's motion has  
9 nothing to do -- the basis of the motion has nothing to do  
10 with whether the defense is on notice as to what the  
11 government intends to prove, it has to do with stacking the  
12 deck in favor of death. It's the defense's position that as  
13 charged, the murder, attempted murder, conspiracy and the  
14 intent to cause serious bodily harm is an unreasonable  
15 multiplication of the charge of perfidy and terrorism, and as  
16 such, should be dismissed.

17 Thank you, Your Honor.

18 MJ [COL POHL]: Thank you. Anything further, Trial  
19 Counsel?

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

21 MJ [COL POHL]: Thank you.

22 245. Mr. Kammen.

23 LDC [MR. KAMMEN]: This is somewhat of the same argument,

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1 only applied to the unreasonable multiplication of charges  
2 involving the bombing of the Limburg. And taking the Quiroz  
3 case, one of the prohibitions, of course, is whether it  
4 unfairly impacts on the -- and this is a paraphrase, on the  
5 sentencing decision.

6 And this does. Now, let me say at the outset that  
7 at least under the law as it stands today, conspiracy is out.  
8 Because under Hamdan and Bahlul ----

9 CP [BG MARTINS]: Your Honor, I'm -- Counsel, what is the  
10 case you're referring to, and is it your brief?

11 LDC [MR. KAMMEN]: Hamdan and Bahlul, you're not familiar  
12 with those?

13 CP [BG MARTINS]: The case you named.

14 LDC [MR. KAMMEN]: Quiroz, the one you cited.

15 CP [BG MARTINS]: Oh, Quiroz. Okay.

16 MJ [COL POHL]: Okay. Same case, different pronunciation.

17 Go ahead, Mr. Kammen.

18 LDC [MR. KAMMEN]: So, you know, we'll put that to the  
19 side because -- you know, it's -- in many cases, you may  
20 charge murder, let's say, and conspiracy to commit murder,  
21 depending upon the circumstances. But here you take one  
22 situation, in this case the Limburg, and really by parsing it,  
23 you make, what is it, five crimes.

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1           You have -- and you have attacking civilians, and  
2 then you have attacking civilian objects, as though the harm  
3 of attacking the boat full of people is somehow different than  
4 attacking the people on the boat. I mean, it's word play.  
5 The harm is doing the attack. And presumably what -- and what  
6 makes this a death penalty case is because of the people who  
7 were killed. But what makes it more likely to impose death is  
8 the way in which they've multiplied the charges.

9           Terrorism, you know, is sort of, in the common sense  
10 of things, attacking civilians. Well, okay, now they use the  
11 terrorism -- and, of course, I don't want to revisit the  
12 arguments we had this morning, but at least in this charge  
13 they were capable of saying that the goal of all of this  
14 terrorism -- it had many goals. One to intimidate and coerce  
15 and retaliate against the United States government,  
16 intentionally kill and inflict great bodily harm on one or  
17 more protected people, civilians. And so, okay, that's fine.  
18 Well, then we have terrorism, we have attacking civilians, we  
19 have attacking civilian objects, but it is the same thing.

20           And so at the end of the day this hand-picked jury  
21 by the chief -- his boss, the convening authority, the person  
22 who decided this should be a death penalty case, will convict  
23 not on the three central charges, but on nine charges, and

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1 then the General will be saying, well, you've got to kill him,  
2 because look at all of these charges. That's unreasonable  
3 multiplication in the context of a capital case.

4           Now, this is not a drug case where, you know,  
5 buying, selling, conspiracy is fairly common stuff. And  
6 generally you buy, you sell, and you -- there's more than one  
7 person. So it is a different situation. Here it is  
8 functionally the same. You can parse it and make it  
9 different, but it's functionally the same with the same  
10 central harm.

11           The harm of the COLE was attacking the COLE and the  
12 sailors on it. The harm of the Limburg was attacking the  
13 Limburg and the people on it. Had the SULLIVANS attack gotten  
14 more than the 20 yards off the beach that it appears to have  
15 gotten, that might have been a harmful thing, too. But  
16 certainly that's a different situation.

17           And, again, I don't want to revisit the previous,  
18 but, you know, it's -- they say, well, there's different  
19 intent, intent to murder and intent to cause serious bodily  
20 injury. Well, if I have the intent to murder, I surely have  
21 subsumed within that the intent to cause serious bodily  
22 injury. So it is the kind of parsing that has no -- it might  
23 make a difference in legal world. I mean, lawyers, we can

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1 dance -- you know, on the heads of pins, but in the real  
2 world, there is no appreciable distinction, and that's the  
3 fundamental problem here is by using -- and I don't mean this  
4 pejoratively, creative drafting, they've taken nine charges --  
5 or three central charges, four if conspiracy happens to  
6 survive, and made it into nine or ten or whatever it is.

7           And on Quiroz that is the unreasonable  
8 multiplication because this is a death penalty case. And we  
9 have to be sensitive to that. In his -- the final thought,  
10 Your Honor, is in his example of, you know, buy, sell,  
11 conspire, the penalty is the same. In most situations you get  
12 convicted of buying, selling or conspiring an amount of drugs.  
13 Certainly in federal court, you know, the penalty is the same.  
14 They don't increase it because you bought it and sold it, if  
15 it's all part of the same series of transactions.

16           Here, of course, this is done with a view to ensure  
17 a death sentence. That's what this is all about. We can  
18 dress it up, but it -- that's what it's about, and it's  
19 improper and it's unconstitutional and it should -- they  
20 should be limited.

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

22                       Trial Counsel.

23           CP [BG MARTINS]: Briefly, Your Honor, because this is the

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1 same doctrine, and counsel and I agree on Quiroz being an  
2 important case for the analysis, but we are dealing here with  
3 a charge -- or a claim that we should dismiss terrorism --  
4 now, this is the Count 2 relating to the Limburg conspiracy,  
5 Charge V, attacking civilians, attacking civilian objects, all  
6 of those now as unreasonably multiplying that criminal  
7 transaction which was -- I guess they would like to keep  
8 hazarding a vessel or, you know, in this case, or not seeking  
9 to dismiss hazarding a vessel.

10           And here, now, it's important to look at this  
11 transaction that results in the attack on the Limburg, but  
12 I'll begin with the offense that is not seen as unreasonably  
13 multiplied, and that's hazarding a vessel.

14           Here the lawmaker, the authority is looking at --  
15 and this is the community of nations historically, with  
16 hazarding, with different types of seizing control of vessels.  
17 You know, there's a harm in attacking on an open sea where  
18 the -- those who aren't killed are then hard to rescue without  
19 provisions, wounded, in an open sea, more something that the  
20 legislature or the lawmaking body wants to criminalize. And  
21 then terrorism, if this is done again with that intent to cow  
22 the population, to hijack, if you will, the political system,  
23 the -- you know, a political intent behind terrorism, that's

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1 the gravamen, influence, cow the population.

2           Now, I'll come back to conspiracy, but attacking  
3 civilians and attacking civilian objects criminalize different  
4 things still. You're focusing on -- you're seeking to kill a  
5 type of protected person under the law of war. This is a  
6 noncombatant, somebody who is not in the conflict. And we  
7 are, as we have said repeatedly, in a state of armed conflict  
8 with al Qaeda and associated forces. So this is attacking  
9 now, setting out to kill, attack civilians, distinct from,  
10 again, in Charge VIII, attacking civilian objects. The  
11 destruction of property, though not as egregious under the  
12 law, this is not a capital offense, the destruction of  
13 property is an important crime to capture as well. To go back  
14 to Quiroz -- and then let me just come back to conspiracy.  
15 This is completed conspiracy.

16           Again, the government's position in Appellate  
17 Exhibit 048 is to take account of the Hamdan decision.  
18 Defense counsel, I think he summarized it as it's out. Well,  
19 it's a little bit quick on what Hamdan means. I confess to  
20 have spent a lot of time looking at it, and the instruction  
21 that's in the Bahlul case, Your Honor, in which the jury, the  
22 panel was instructed, it was unnecessary that Bahlul had -- to  
23 find him guilty of any of the object offenses, in order to

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1 find him guilty of conspiracy, the government would  
2 acknowledge that is out. Conspiracy as a separate and  
3 stand-alone offense, and as we've described in our motion on  
4 Appellate Exhibit 048, conspiracy, as a mode of liability, and  
5 as something that still belongs on the charge sheet as common  
6 allegations.

7           However, if given that the defense has claimed --  
8 again, I find it difficult to understand this, but claim that  
9 vicarious liability is not fully alleged or adequately alleged  
10 on the rest of the offenses, that conspiracy ought to remain  
11 on the charge sheet just as it -- and that that should be  
12 cured through instructions on findings that would cure the  
13 problem with the Bahlul instructions, and then on -- if there  
14 is a finding of guilt, appropriate instructions to take  
15 account of conspiracy not being a separate and stand-alone  
16 offense.

17           So that's, then, the reasonableness of the  
18 Limburg-related charges, but because of the conspiracy that's  
19 involved here, a course of conduct extending over a series of  
20 years dealing with dozens of alleged overt acts, but a common  
21 plan with many accomplices to do extraordinary acts of  
22 violence.

23           And defense counsel said this is not a drug case.

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1 Well, Quiroz wasn't a drug case either. It was a  
2 possession/sale/receipt conspiracy case having to do with  
3 explosives, and I would submit that the gravity of this case  
4 actually makes the importance of registering on the charge  
5 sheet the full criminality, not in an unfairly multiplying  
6 way, but the full criminality extremely, extremely important.

7           So we had a few other epithets. Word play,  
8 allegations of my boss getting this. Of course the convening  
9 authority isn't my superior, and in a sense that this is  
10 somehow unfair or directed toward inflaming or causing a  
11 certain inevitable outcome, and given that this is about the  
12 reasonableness of prosecutorial actions, I'll just register  
13 that we disagree with that just completely and utterly. Thank  
14 you.

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

16           LDC [MR. KAMMEN]: Very briefly.

17           I would be disappointed if General Martins didn't  
18 disagree. Let me just give an example, and this is the  
19 problem. Charge VIII, attacking civilians. You know, all of  
20 the precatory language and the context associated with  
21 hostility, attack civilian persons onboard MV Limburg, causing  
22 the death of one person, a fellow from Bulgaria.

23           Charge IX, hijacking or hazarding a vessel or

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1 aircraft. Basically alleging, in different language,  
2 virtually the same act resulting in the death of one  
3 crewmember. Same guy.

4 Now, you know, he says, well, hazarding a vessel is  
5 so serious because it's out on the high seas and all of that,  
6 and putting aside the arguments we heard in, I think it was,  
7 February or perhaps last year, that really the last time an  
8 American court had applied hazarding a vessel was during the  
9 Civil War. It was a vessel, I think, on the Ohio River.

10 Putting all of that to the side, fine.

11 How is that any different than attacking civilian  
12 objects? And if hazarding -- and if what makes it different  
13 is the causing the death, or death results, how is that any  
14 different than attacking civilians?

15 And so they take one aspect and ultimately you come  
16 up in this case with three charges, some overt acts in a  
17 conspiracy, if the conspiracy or, as he wants to do it, and  
18 this is under advisement, this sort of global language he  
19 wants to insert into the charge sheet, you know, and then you  
20 have the terrorism, again, taking essentially the same thing,  
21 causing the boat to be exploded resulting in the death of the  
22 same person, but then they add on this alleged intent --  
23 really double intent. First they allege the intent to kill

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1 one or more protected people, intentionally kill and inflict  
2 great bodily harm on one or more potential people, and then  
3 this other language about intending to affect the conduct of  
4 the United States.

5 All of this is the -- you know, the same thing. And  
6 with as much care -- and I'm meaning this in a complementary  
7 way. As bright as these guys are, they could sit down and  
8 draft a single count that would encompass the same gravamen of  
9 harm that would adequately describe what is at issue here,  
10 instead of making it into five counts, or if somehow the  
11 Bahlul -- when the D.C. Circuit rules, if Bahlul somehow  
12 changes, reinstating the conspiracy charge.

13 So, I mean, you know, we come down to the core  
14 issue -- I mean, he may not like it when we say that the  
15 practical effect of this is that it makes -- it stacks the  
16 deck, it stacks the scales in favor of a death sentence. But  
17 that's what will happen, and, you know, have no mistake about  
18 it. I can't read their minds, but whether that was their  
19 intent or not, that is the fact of how this will play out,  
20 because this is an unreasonable multiplication of charges.

21 MJ [COL POHL]: Thank you.

22 Anything further, Trial Counsel?

23 CP [BG MARTINS]: Briefly, Your Honor. Twelve-page charge

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1 sheet dealing with lots of acts. I believe it's a fair,  
2 concise, definite statement of all of the different ways in  
3 which these acts stretching across over a period of years were  
4 criminal. I think I'm up to 11 in the count of whether we  
5 have unreasonable multiple epithets, stack the scales was  
6 their -- but more importantly there was the discussion of a  
7 standard that I haven't seen anywhere in the law of the same  
8 central harm standard, the how is this any different standard.  
9 That's just not the law.

10           And the lawmaker, the legislature, has the  
11 prerogative, one would say even the responsibility, to define  
12 and proscribe the different ways in which conduct can be  
13 unlawful, and it is entirely reasonable for a prosecutorial  
14 authority to seek to provide that, that picture. Not that  
15 some lesser piece of that might not be adequate in some way to  
16 define or to proscribe a piece of the conduct, but to capture  
17 the full nature of it. Thank you.

18           MJ [COL POHL]: Thank you.

19           That brings us to 260A. Mr. Kammen, can I ask you a  
20 question on this?

21           LDC [MR. KAMMEN]: Yes.

22           MJ [COL POHL]: This is a defense motion to compel the  
23 production of a witness to support ----

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1 LDC [MR. KAMMEN]: Witnesses.

2 MJ [COL POHL]: Witnesses. I'm sorry. To support the  
3 production of a ----

4 LDC [MR. KAMMEN]: Jury consultant.

5 MJ [COL POHL]: ---- of a jury consultant. Shouldn't  
6 these at least be combined?

7 LDC [MR. KAMMEN]: Well, no, because ----

8 MJ [COL POHL]: What I'm saying is this: You have an  
9 underlying motion for a jury consultant.

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: Okay. And then you have an underlying  
12 motion for evidence on it?

13 LDC [MR. KAMMEN]: Well, yeah, because you can't hardly --  
14 given the way this has played out, at least in our view, we  
15 shouldn't have -- you shouldn't be deciding motion -- the  
16 underlying motion without hearing the evidence.

17 MJ [COL POHL]: Okay. Okay.

18 LDC [MR. KAMMEN]: I mean, that's -- it's ----

19 MJ [COL POHL]: I got it. I got your position. It's --  
20 okay. Okay.

21 LDC [MR. KAMMEN]: And given the fact -- you know, we'll  
22 get to the underlying piece of it next week, presumably, but  
23 this particular request has had a long history, and it's

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1 probably one of the things that's at the core of our  
2 frustration over your changed ruling in 114. And this is the  
3 place where the rubber meets the road in this environment,  
4 because the prosecution, for the obvious reasons, opposes this  
5 request. And so here we have the prosecution well into the  
6 defense tent trying to persuade Your Honor that we don't need  
7 resources.

8           The witnesses that we would like you to hear --  
9 and one of the witnesses the prosecution has kind of agreed  
10 to. They have said if you want to hear witnesses, they'll  
11 give us this one, and that is Mr. Jeffrey Frederick. And he,  
12 I believe, is available next week to testify by  
13 videoconference from his home in Charlottesville, Virginia.

14           The other witnesses that -- I will represent to the  
15 court that if we had any power, if we had the right to issue  
16 subpoenas, if this were similar to an Article III court in any  
17 meaningful sense, would all be willing to appear by  
18 videoconference or in person, are Mr. Gerald Zirkin, Mr. Kevin  
19 McNally, Mr. Morris Davis, and Mr. Richard Burr.

20           Dr. Frederick is a jury consultant who practices in  
21 Charlottesville, Virginia.

22           MJ [COL POHL]: Is Dr. Frederick at issue today?

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

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1 MJ [COL POHL]: I said, this is a motion to compel  
2 witnesses.

3 LDC [MR. KAMMEN]: Yes.

4 MJ [COL POHL]: And did you tell me that Dr. Frederick is  
5 slotted to testify next week by VTC?

6 LDC [MR. KAMMEN]: Well, no, the prosecution ----

7 MJ [COL POHL]: You say that if I grant him, he will  
8 testify. I thought that's what you told me.

9 LDC [MR. KAMMEN]: Yes. But they basically, as I  
10 understand their position, are going to say you shouldn't hear  
11 from him either.

12 MJ [COL POHL]: Okay. I'm sorry.

13 LDC [MR. KAMMEN]: But if you wanted to ----

14 MJ [COL POHL]: I misunderstood. If I want to hear from  
15 him, I can hear from him next week.

16 LDC [MR. KAMMEN]: If you are willing to entertain  
17 witnesses, they're nice enough to let us present him.

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

19 LDC [MR. KAMMEN]: But they want to persuade you you  
20 shouldn't hear any witnesses, as I understand their position.

21 MJ [COL POHL]: Let me ask you about Dr. Frederick.

22 LDC [MR. KAMMEN]: Okay.

23 MJ [COL POHL]: And this goes -- would he be the

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1 individual you'd want or is he just going to talk globally?

2 LDC [MR. KAMMEN]: He is not the individual we want.

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

4 LDC [MR. KAMMEN]: He is familiar with the individual we  
5 want. And his particular -- and each of these -- these were  
6 not just people we picked out of a hat, these are people that  
7 bring different knowledge to it. Dr. Frederick has been hired  
8 as or appointed by the courts -- in the last two, I  
9 understand, military death penalty cases that have been filed.  
10 He was appointed by the court, and we have a copy of that  
11 order, in Major Hasan's case. He was also appointed by the  
12 court in -- I want to say, Bozicevich, but I'm probably way  
13 mispronouncing that name.

14 MJ [COL POHL]: No. Close enough.

15 LDC [MR. KAMMEN]: And it is my understanding that he --  
16 that those are the last two military death penalty cases that  
17 perhaps were tried, but he is certainly extraordinarily  
18 familiar with the military system. And it is his -- his  
19 testimony or -- and what he will share in a nutshell, of  
20 course, is that especially in the military system where you  
21 have a very limited number of preemptory challenges, in the  
22 context of a death penalty case, it is extraordinarily  
23 important to have the resources of a jury consultant.

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1           And, in fact, in Major Hasan's case the judge in  
2 that case entered an order, and we can provide that to the  
3 commission, that Major Hasan's trial would have been -- would  
4 have been fundamentally unfair if she did not grant a jury  
5 consultant. And so I think that Dr. Frederick provides very  
6 important information.

7           Now, I mean -- I'm giving you a brief summary  
8 because ----

9           MJ [COL POHL]: I understand.

10          LDC [MR. KAMMEN]: ---- you know, I think the standard is  
11 to try and demonstrate relevance. I can give you more if you  
12 want. Not necessarily on the list, but the next is Morris  
13 Davis, who -- colonel, he is retired now, but Colonel Davis  
14 was, as you may know, the chief prosecutor here in Guantanamo  
15 in the early days. I think he left in 2007, but he certainly  
16 was a -- for many, many, many years a military prosecutor.  
17 Prosecuted, you know, serious military cases. Is obviously  
18 familiar with the military system of jury selection. He's  
19 also uniquely familiar with the logistics and the  
20 circumstances of a trial here in Guantanamo Bay. And he will  
21 testify, if permitted, about the extraordinary need for a jury  
22 consultant in a case involving -- in which the government  
23 seeks the death penalty in the location of Guantanamo Bay,

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1 under the structure of the military commission system.

2           So we certainly believe that he adds something  
3 different because of his experience not only as a  
4 prosecutor -- military prosecutor but the military prosecutor  
5 in Guantanamo Bay.

6           MJ [COL POHL]: What would he add? I mean, he's just an  
7 attorney -- does he have experience in capital cases in the  
8 military?

9           LDC [MR. KAMMEN]: I don't know if he prosecuted any  
10 capital cases in the military. He was certainly involved in  
11 the early days after 2006 when there were going to be  
12 discussions about capital cases in Guantanamo -- well, no, you  
13 asked what he adds. He adds the perspective of the  
14 prosecutor, and he understands the advantages that the  
15 prosecutor has in the military criminal justice jury selection  
16 piece of that and how those advantages are multiplied here in  
17 Guantanamo Bay.

18          MJ [COL POHL]: What does he have that's unique on that?

19          LDC [MR. KAMMEN]: He was a prosecutor.

20          MJ [COL POHL]: No, I'm just saying that. You're saying  
21 he's going to talk about the advantages that the military  
22 prosecutor has down here. I'm assuming that you were -- I'm  
23 not exactly sure what you were referring to factually, but

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1 it -- any facts that he has that is not -- that you don't  
2 already ----

3 LDC [MR. KAMMEN]: That Colonel Davis has?

4 MJ [COL POHL]: Yes. He was the prosecutor.

5 LDC [MR. KAMMEN]: He was the prosecutor in Guantanamo.

6 MJ [COL POHL]: You keep saying that. I'm just saying  
7 what is he going to tell me? How the referral process works?

8 LDC [MR. KAMMEN]: He's going to tell you about the  
9 advantages that the referral process and the jury selection  
10 process, the creation of the venire, give the prosecutor. And  
11 he's going to tell the record -- you know, and he's going to  
12 help us make the record for appellate review in the case, in  
13 the event this resource is denied, as to the advantage.

14 MJ [COL POHL]: Okay.

15 LDC [MR. KAMMEN]: Next is Mr. Kevin McNally. Mr. McNally  
16 is one of the several capital resource counsel. You know, we  
17 have been over this. The -- at least the statute provides  
18 that our access to resources should be similar to an  
19 Article III court. And I won't tell you that every death  
20 penalty case prosecuted in federal court there's been a  
21 granted request for a jury consultant.

22 But Mr. McNally, if he's permitted to testify, will  
23 tell you that in the vast, vast, vast majority of capital

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1 cases prosecuted in federal court, the district judge has  
2 ordered a jury -- has authorized a jury consultant. Probably  
3 of the approximately 300 death penalty trials tried in federal  
4 district court, probably in 250 of those the district court  
5 has ordered a jury consultant.

6           So the standard of care in an Article III court is  
7 to authorize a jury consultant. It is not mandatory, but the  
8 standard, and in most -- virtually -- in most, and essentially  
9 in all of the vast, vast majority of cases tried in federal  
10 court in the last ten years, there has been the -- the defense  
11 has had a jury consultant.

12           Our next witness would be Mr. Richard Burr, who was  
13 one of the lawyers for Timothy McVeigh. And Mr. Burr would  
14 testify about the need for a jury consultant in cases  
15 involving terrorism, in cases involving multiple deaths, in  
16 cases involving huge amounts of victim -- potential victim  
17 impact evidence and the need to address that. He will testify  
18 about the complexities that exist in this case and how this  
19 case is extraordinarily more complex and more difficult than  
20 Mr. McVeigh's case, partially because of the location,  
21 partially because of the cultural differences, partially  
22 because of the religious aspects of it, the terrorism aspect  
23 of it.

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1           The differences between Mr. Nashiri and all of the  
2 rest of us, you know, and the differences between Mr. Nashiri  
3 and probably the jurors. I kind of doubt we're going to have  
4 any Muslims on the jury, and certainly no one who's not an  
5 American citizen.

6           And so in that respect Mr. Burr will testify that --  
7 how much more difficult from his experience as an  
8 extraordinarily experienced capital defense lawyer this jury  
9 selection will be compared to the difficulties they had in the  
10 McVeigh case, and in the McVeigh case, obviously, it was --  
11 they ultimately got a jury, but it was ultimately very, very  
12 difficult. And, of course, in McVeigh they had a jury  
13 consultant.

14           And finally, Your Honor, we would call Mr. Gerald  
15 Zirkin, who was learned counsel in the United States v.  
16 Moussaoui. The difference between him and Mr. McVeigh, of  
17 course, is Moussaoui is a closer analogy to this case, but  
18 also he employed in that case the specific jury consultant we  
19 wish to employ in this case. And so he can not only testify  
20 about the differences between the two, but obviously as to her  
21 abilities, her competence, what she brings to the table to  
22 demonstrate to the commission that this is a resource and this  
23 is a particular individual that should be granted.

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1           So certainly we'd be happy to expound on if you have  
2 any questions about any of these folks, but we think  
3 collectively if -- if you're going to grant the resource, then  
4 obviously it's one thing. If you're not going to grant the  
5 resource, we think you should allow us to present the  
6 evidence. If you really don't know, we think you should allow  
7 us to present the evidence.

8           MJ [COL POHL]: Okay. Just for procedural posture because  
9 of what you raised before, and I know -- I know you believe  
10 114 gave you an unfettered right to submit ex parte without  
11 any reference for unusual circumstances. Personally, I have  
12 read the order. Also, I've read all of my responses back to  
13 you, and there's a reference to Garries as being unusual  
14 circumstances, which I found most of the time, but not this  
15 time, but let's move that aside.

16           You submitted the request to me. I returned it and  
17 said file it with the convening authority. I got the  
18 government input on it. So if we had gone through procedure  
19 number one by not getting government input, I could have  
20 decided it based on that and that alone, correct, if I  
21 accepted it ex parte?

22           LDC [MR. KAMMEN]: Right. But I think there was some  
23 other things in the ex parte submission that may not be part

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1 of this. I don't recall.

2 MJ [COL POHL]: Okay. Okay. But that's kind of  
3 where ----

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

5 MJ [COL POHL]: But I understand your last point, and this  
6 is a chicken and egg thing, I understand your point, because I  
7 wasn't going to have witnesses to decide it ex parte.

8 LDC [MR. KAMMEN]: Sure.

9 MJ [COL POHL]: Okay.

10 LDC [MR. KAMMEN]: Because this is an adversary situation  
11 and because the government is going to oppose it and ----

12 MJ [COL POHL]: Okay.

13 LDC [MR. KAMMEN]: ---- and the government, at least as I  
14 read their opposition, well, look, Kammen is an expert. I am.  
15 Kammen's good enough. He's got five lawyers. None of the  
16 others of whom I don't believe have tried a capital case, but  
17 we'll put that to the side.

18 You know, they basically say we got enough. I don't  
19 want to get into the merits, but it's easy for somebody who's  
20 not done a capital case to say they got plenty. These  
21 witnesses, who know the system and who I have been involved in  
22 it, can explain why just having lawyers isn't enough. And  
23 Colonel Davis, especially from his perspective as a

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1 prosecutor, as to why, from his perspective as a prosecutor,  
2 the defense in a capital case to be tried in Guantanamo Bay  
3 absolutely needs a jury consultant.

4 MJ [COL POHL]: Okay.

5 LDC [MR. KAMMEN]: So you know, that's where we are on.

6 MJ [COL POHL]: But if you believe you have fully  
7 articulated your position in 260, let me hear what the  
8 government has got to say -- okay. Let me hear what the  
9 government's got to say first, but ----

10 LDC [MR. KAMMEN]: And I'm only talking about witnesses  
11 now. I'm not addressing the merits of 260.

12 MJ [COL POHL]: Well, you said earlier that if I'm  
13 comfortable with making a decision on the merits in your  
14 favor, we don't need 260.

15 LDC [MR. KAMMEN]: Oh, sure.

16 MJ [COL POHL]: I got it.

17 LDC [MR. KAMMEN]: If you tell me, yeah, I don't need to  
18 hear any more because you're going to win, we're all tired, it  
19 will be one less thing to do on Monday.

20 MJ [COL POHL]: I don't usually do that, but I just wanted  
21 to see what your position is. Okay.

22 Trial Counsel. And I know going back and forth,  
23 contrary to what Mr. Kammen did, and I know you want to do,

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1 too, but I want to go back to 260 itself.

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

3 MJ [COL POHL]: The way I read the government opposition  
4 to 260 is some cases they get one, some cases they don't.  
5 It's basically a discretionary call by the judge based on the  
6 need articulated by the defense. Correct?

7 ATC [LT DAVIS]: Yes, Your Honor. With regard to ex parte  
8 submissions the government has ----

9 MJ [COL POHL]: Not the ex parte. No, no, no, no, no.  
10 I'm not talking about the ex parte submissions. This was  
11 submitted ex parte.

12 ATC [LT DAVIS]: Yes, sir.

13 MJ [COL POHL]: I returned it and said I want the  
14 government input on it. I now have the government input on  
15 it, on the underlying motion. As I understand from the  
16 government position, you cite a lot of cases where a  
17 consultant was not provided and it wasn't reversible error,  
18 and there were a lot of cases where the consultant was  
19 provided, true?

20 ATC [LT DAVIS]: Well, Your Honor ----

21 MJ [COL POHL]: I doubt there would be much appellate  
22 issue on it, if they were provided.

23 ATC [LT DAVIS]: Certainly. And we certainly -- the

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1 difficulty there was we wouldn't know what the circumstances  
2 were. Mr. Kammen referred to the Hasan case. No real  
3 surprise there because a jury consultant was awarded and he  
4 was proceeding pro se, and if you have counsel who ----

5 MJ [COL POHL]: Lieutenant -- Lieutenant -- Lieutenant,  
6 let me stop you there.

7 ATC [LT DAVIS]: Yes, sir.

8 MJ [COL POHL]: If you know as a fact that he got a jury  
9 consultant after he decided he would go pro se, you can say  
10 what you just said. Do you know that as a fact?

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

12 MJ [COL POHL]: Okay. Then, don't -- and I would say the  
13 sequencing may be a little different than that. The jury  
14 consultant may have been provided long before the decision to  
15 go pro se.

16 ATC [LT DAVIS]: Okay.

17 MJ [COL POHL]: Let's not -- I'm not sure that's a good  
18 analogy and, quite frankly, arguing by antidote is not  
19 necessarily useful either, but go ahead. And, again, I want  
20 to talk about the merits of itself before we get to the  
21 witness issue.

22 ATC [LT DAVIS]: You want to talk about the merits of 260?

23 MJ [COL POHL]: Yeah. I'm just saying is I've read your

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1 response. Normally, as provided by the defense, you wouldn't  
2 have gotten an opportunity, but I said basically I don't think  
3 this was an unusual circumstance that did not warrant a  
4 government response. I now have your response, which I would  
5 not have had initially. Okay?

6 And in your response, the way I read it, is that you  
7 cite a number of cases where a consultant was not  
8 provided ----

9 ATC [LT DAVIS]: Right.

10 MJ [COL POHL]: ---- and that was not reversible error.  
11 Okay?

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

13 MJ [COL POHL]: And there's some cases where -- were there  
14 any cases where one was not provided and it was reversible  
15 error?

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

17 MJ [COL POHL]: Okay. But you would agree with me that  
18 there are cases where it is provided, a jury consultant is  
19 provided?

20 ATC [LT DAVIS]: Absolutely, Your Honor.

21 MJ [COL POHL]: What's the standard for whether one is  
22 provided or not?

23 ATC [LT DAVIS]: Well, the standard, Your Honor, in

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1 whether an expert is required comes down to Bresnahan and  
2 Freeman. Really, one, why the expert is necessary; two, what  
3 the expert will do; and, three, why the defense cannot  
4 undertake the case without that expert, or why they can't  
5 gather that evidence on their own.

6 MJ [COL POHL]: And the government's position is the  
7 defense request fails on number three?

8 ATC [LT DAVIS]: Exactly.

9 MJ [COL POHL]: Okay.

10 ATC [LT DAVIS]: And Mr. Kammen hit the nail on the head.  
11 As Mr. Kammen stated, he has done over 400 felony trials, 100  
12 murder cases, 35 capital cases. We have Commander Mizer here  
13 as well who, according to the defense, has done terrorism  
14 cases, national security cases, murder cases. And we have  
15 Major Hurley as well, who is reputed to be one of the Army's  
16 top litigators.

17 This is a team, an experienced team, a savvy team, a  
18 team that has learned counsel, and I think that's why the  
19 government cited the case of Moore v. Johnson when they talk  
20 about the process of jury selection. What they say about jury  
21 selection is it's not a mysterious process where someone  
22 learned in the law, like Mr. Kammen, cannot do it without the  
23 assistance of outside counsel -- or without the assistance of

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1 an outside expert.

2           And those are the cases that have been cited. The  
3 defense has cited no case that stands for the proposition that  
4 it is required, and under the circumstances present here, the  
5 defense certainly has the resources to conduct voir dire in  
6 this case.

7           MJ [COL POHL]: Okay.

8           ATC [LT DAVIS]: As to the merits, Your Honor, if you take  
9 a look at the facts, and we're referring to that third factor,  
10 Bresnahan and Freeman, the question is, can it be done ----

11          MJ [COL POHL]: The case ----

12          ATC [LT DAVIS]: ---- by this team.

13          MJ [COL POHL]: In a death penalty case involving crimes  
14 that allegedly occurred 12 to 14 years ago in a country far  
15 away with a different cultural background of the accused and  
16 the members, you think that can be just handled in the normal  
17 preparation of voir dire by the normal experienced death  
18 penalty lawyer?

19          ATC [LT DAVIS]: Well, Your Honor, it's not my personal  
20 opinion. The government is here to present the law, as it  
21 sees it, as it has cited in its brief, and whether it's  
22 Moore v. Johnson, the quote which I just provided to you which  
23 is a capital case, or whether we're talking about the Ake

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1 case, which certainly goes to capital issues. The question is  
2 does the defense have the raw materials -- do they have the  
3 raw materials to put on a proper defense for the accused?

4 And in this case where the defense has a number of  
5 resources, not just the counsel that are sitting here at this  
6 table, the raw materials are in place. And the need for a  
7 jury consultant simply has not been met, and Your Honor should  
8 deny the motion, in accordance with the law and in accordance  
9 with the facts in this case.

10 MJ [COL POHL]: Okay. Do you want to be heard on the  
11 260A? I mean, it's a variation of the same theme, isn't it?

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

13 MJ [COL POHL]: That since they're qualified to do it on  
14 their own, they don't need these people to tell me why they're  
15 not qualified to do it on their own?

16 ATC [LT DAVIS]: Exactly. That would be the government's  
17 position that there is no witness that can come into this  
18 courtroom and tell you that the people sitting at this table  
19 over here are not lawyers.

20 MJ [COL POHL]: I'm not sure that's the issue, but if you  
21 want to articulate it that way, I guess that's your  
22 prerogative.

23 ATC [LT DAVIS]: Well, Your Honor, with the cases that the

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1 government has cited, lawyers are presumed to have the basic  
2 skills to communicate with a jury, to pick a jury, and that  
3 those especially learned in the law, this is not a mysterious  
4 process.

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

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

7 MJ [COL POHL]: Thank you.

8 Mr. Kammen, anything further?

9 LDC [MR. KAMMEN]: Again, I -- maybe I'm parsing it --  
10 because I'm really conscious of this issue and the way it  
11 plays out this unusual circumstance. I mean, I understand --  
12 and Lieutenant Davis is right. I presume that if you deny  
13 this request and Mr. Nashiri is convicted and receives a  
14 sentence of death, that of the host of issues that will exist,  
15 this will probably be reasonably far down on the list.

16 But part of the reason that sometimes I think cases  
17 are reversed is because the appellate courts don't really  
18 understand the magnitude of why this is important.

19 So, again, we think that you ought to hear the  
20 witnesses. I mean, if you sort of in your own mind say, well,  
21 I don't need to hear the witnesses because of the reasons you  
22 articulated: 14 years ago, cultural differences,  
23 Guantanamo Bay, all of the things we'll be discussing -- you

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1 know, I'll say two things and then if you have any questions.

2           The first, I have, if you want it, the order in  
3 Major Hasan's case. At that time, as you're absolutely  
4 correct, he was represented by lawyers. I don't know them,  
5 but I suspect that they were probably as good a military  
6 lawyers as there are. I mean, actually I have met them. I  
7 met them at a seminar last year. And they certainly seemed  
8 like extraordinarily good lawyers, and yet Judge Gross  
9 indicated that the defense has demonstrated that the denial of  
10 the jury consultant in that case would result in a  
11 fundamentally unfair trial. I don't know what kind of  
12 evidence they presented.

13           And secondly, the only thing -- and I think this was  
14 in the ex parte declaration. I believe the government has  
15 seen it. If not, I can provide it to them. But somewhere  
16 along the line I provided, I believe, either the convening  
17 authority or you, or both, my declaration, which, you know,  
18 I ----

19           MJ [COL POHL]: I think they saw it, because I think they  
20 objected to it in their pleading.

21           LDC [MR. KAMMEN]: Okay. And this is the fact, of all of  
22 the capital trials I've done, I've always had a jury  
23 consultant. That's really the standard of practice in federal

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1 court. It's actually been the standard of practice in state  
2 courts, really since the inception of the modern death  
3 penalty.

4 And so, yeah, am I good at jury selection? Yes.  
5 Can I do an adequate job in the case of this magnitude without  
6 one? No.

7 So, I mean, if -- you tell us what you want from  
8 here, and we'll do it.

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

10 Lieutenant, anything further?

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

12 MJ [COL POHL]: On this particular issue the defense had  
13 submitted an ex parte request, and normally if I had found  
14 unusual circumstances, I would decide it on an ex parte basis  
15 without governmental input. On this request I did not find  
16 the unusual circumstances warranted that, and I requested the  
17 government input, which I did receive.

18 Which to me, makes the issue defense has requested  
19 ability to present evidence on an issue which, quite frankly,  
20 I have already, after considering the government input, have  
21 decided to grant the defense request anyway; and, therefore,  
22 the motion for the requested relief under 260 is granted. The  
23 motion for the production of the witnesses of 260A is denied

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1 as moot. An order to that effect will be issued in due  
2 course.

3 That being said, we have a closed session to do. So  
4 once the courtroom is cleared of all uncleared people and the  
5 court reporter is set up, we will do that. The commission is  
6 in recess.

7 [The Military Commission recessed at 1436, 25 April 2014.]

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