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1 [The Military Commission was called to order at 0902, 27 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, and Mr. al Nashiri is also currently
6 present.

7 Commander.

8 TC [CDR LOCKHART]: I'd just like to place on the record
9 that these proceedings are being transmitted CONUS.

10 MJ [COL POHL]: Okay. Just so we understand the way
11 ahead, is we're just going to pick up the motions where we
12 left off, and then we will have the witness -- I believe,
13 1100 hours is what I was told.

14 TC [CDR LOCKHART]: Yes, sir.

15 MJ [COL POHL]: Yeah. Okay.

16 Anything to discuss before we go to 261? Apparently
17 not.

18 LDC [MR. KAMMEN]: No.

19 MJ [COL POHL]: Okay. 261.

20 CP [BG MARTINS]: Your Honor, I'm sorry, I do have one
21 thing. I believe we all ----

22 MJ [COL POHL]: Okay.

23 CP [BG MARTINS]: I believe we all received defense

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1 counsel's e-mail last night describing what he would prefer to
2 do with regard to 120, and I would just like to submit
3 respectfully that the government's position is we would not
4 oppose a couple of extra days, as he requested, to respond,
5 given that we filed it while we were in proceedings.

6 Correspondingly, we do believe that the judge should
7 consider the ex parte presentation; that is, I believe it was
8 given the docket entry number of 120F and 120G, but that it
9 should consider that on the authority of the statutory
10 provision that both sides can make ex parte presentations in
11 this area. And that if we are going to, as defense counsel
12 mentioned, you know, get to this meaningfully in the next time
13 we come here, believe that's the appropriate way to proceed
14 within the context of discovery and moving this forward.

15 Again, in the spirit and letter of your bench order
16 from February where you wanted us to really, you know, join
17 the issues, see what this discovery dispute is about in
18 detail, you asked the government at that time to respond with,
19 you know, a point-by-point to the 75 items in the defense
20 August request, and then you issued your order in which it
21 became clear that that didn't quite join the issues in a
22 satisfactory way, and you carved out the new ten-category
23 approach.

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1 So we seek to be responsive, to comply with that
2 order as much as we can consistent with our view of the
3 classified information, national security information
4 privilege in this case.

5 So just a request to have that May session really,
6 you know, get to and start joining the issues and not have us
7 talking past one another. So we do not oppose the couple of
8 extra days on the reply, although I would ask that we actually
9 set that date and then try to get to a full consideration,
10 given -- in light of the standard that's required, there's no
11 real way to join the issues if Your Honor is not considering
12 that material. Thank you.

13 MJ [COL POHL]: Good. Thank you.

14 LDC [MR. KAMMEN]: Let me respond to that before we
15 address 261. I'm given to understand that, besides the
16 classified filing that was served upon the defense, the
17 government has filed some form of ex parte proceeding.

18 Where we believe the situation is, is we believe
19 your order was clear. The April 14th order was very clear.
20 The government is ordered to produce ten categories of
21 information because the defense needed it, and so that's the
22 finding. What the government now wants is, hey, whoa, wait a
23 second, we really don't want to do that. And so they're

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1 asking you to essentially revisit all of this.

2 As I'm understanding where the prosecution is, we're
3 really restarting, in their view -- they would prefer that we
4 essentially restart, in their view, this whole 505 process.
5 And one of the things, of course, that happened at the very
6 beginning is we submitted a rather lengthy guess at that time
7 as to what our defenses would be so that you could analyze the
8 summaries in conjunction with that.

9 We think we're well past all of that. I mean, we
10 think that the heart of the issue is, is there grounds, new
11 facts, new law to reconsider your order, which is quite clear
12 on its face. We think there is not. And so we think that the
13 heart of the argument in May should focus on that, and that
14 wouldn't require consideration of either the classified filing
15 that's been served on the defense or whatever they filed
16 ex parte, and it wouldn't require us to file anything
17 ex parte.

18 If we're revisiting everything, and so we have to
19 file some form of updated ex parte situation -- and I think as
20 an excess of caution we'll probably file something with
21 respect to the classified, but ask -- you know, we haven't
22 really thought that through. You know, that's one situation.

23 Now, the other thing that occurs to me is that

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1 the -- I mean, the original argument, when we finally got
2 around to arguing AE 120, that was in closed session. And I
3 think the parties agreed, as I recall, the 505(h) discussion
4 that it was just -- didn't make any sense to try and parse the
5 issues that finely. I'm not sure that's not this situation,
6 especially if we're going beyond is this a proper motion to
7 reconsider. I mean, if we're getting into the merits of their
8 classified filing or, you know, what -- the way forward and,
9 you know, what they proposed, if we're getting into the merits
10 of that, we're probably dealing with a proceeding that may
11 well have to be in large measure or entirely closed.

12 You know, we can -- I know we're -- this isn't the
13 time to address scheduling issues. That's probably going to
14 come at the end of the day, but I mean one thing to consider,
15 if we're going to have a closed hearing, you know, that's
16 going to last a day or two, it's all going to be completely
17 closed, does that really have to occur here as opposed to some
18 CONUS location that's, you know, a little easier to get to. I
19 don't know if that's doable or not. But it does -- you know,
20 coming ----

21 MJ [COL POHL]: Yeah. The difficulty with that proposal,
22 Mr. Kammen, is you're only -- the closure under 806 has got to
23 be narrowly drawn as possible, and although this may all

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1 require a closure under 806 until -- but there's clearly stuff
2 that can be argued in open session because the original
3 pleading is unclassified. So I just don't think that ----

4 LDC [MR. KAMMEN]: Okay.

5 MJ [COL POHL]: I understand your point.

6 LDC [MR. KAMMEN]: No, if that's where it ends up, that's
7 where it ends up.

8 MJ [COL POHL]: But I understand your point. I don't know
9 if ----

10 LDC [MR. KAMMEN]: I kind of hate to have everyone come
11 down here for an hour of open argument and two days of
12 closed ----

13 MJ [COL POHL]: No, understand.

14 LDC [MR. KAMMEN]: ---- and that strikes -- but in any
15 event -- and the other thing I would just throw out is this --
16 and, again, we can address it more towards the end of the
17 day -- right now because of the Memorial Day -- and, frankly,
18 you rescheduled it due to our request, so I'm not complaining.
19 Believe me.

20 MJ [COL POHL]: You're commenting?

21 LDC [MR. KAMMEN]: Huh?

22 MJ [COL POHL]: You are commenting?

23 LDC [MR. KAMMEN]: No, I'm just throwing out a suggestion

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1 that may or may not prove to be warranted.

2 MJ [COL POHL]: Okay.

3 LDC [MR. KAMMEN]: Because I think we're departing on the
4 actual Memorial Day or maybe it's that Tuesday. I don't
5 remember the schedule. I think we're departing Andrews on
6 Tuesday, then you scheduled hearings Wednesday, Thursday and
7 Friday, the following Monday or Tuesday, I'm really wondering
8 whether or not there -- if we're really focusing on this
9 motion to reconsider, and that's going to be the heart of it,
10 I'm really wondering whether we'll need the following Monday
11 and Tuesday. That's all I'm ----

12 MJ [COL POHL]: Well, it's easier to take days off than to
13 add days.

14 LDC [MR. KAMMEN]: Fair enough.

15 MJ [COL POHL]: If as time moves on it looks like that's
16 all that's going to be around, we can address schedule at that
17 time. There will be a docketing order that will come out, and
18 we'll see -- quite frankly, I'm not sure what's out there in
19 terms of being briefed which would be fully briefed by that
20 time.

21 LDC [MR. KAMMEN]: Yeah, I mean, given ----

22 MJ [COL POHL]: Given the number we did this time, I'm not
23 sure what's left. So if we need to address it, we certainly

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1 can. Just to your point, -- two points, one is ----

2 LDC [MR. KAMMEN]: Yeah.

3 MJ [COL POHL]: ---- just to your point, two points, one
4 is -- you're going to be given an option to reply.

5 LDC [MR. KAMMEN]: Right.

6 MJ [COL POHL]: I would take that option to fully reply.

7 LDC [MR. KAMMEN]: Sure.

8 MJ [COL POHL]: Secondly, as you indicated, because we
9 have been down here, you would like some extra time for this.
10 The normal two weeks from the day it's filed is the day the
11 reply is due.

12 LDC [MR. KAMMEN]: If we could do it ----

13 MJ [COL POHL]: Since we're back tomorrow, I will give you
14 until 14 May to reply.

15 LDC [MR. KAMMEN]: Okay. Fine.

16 MJ [COL POHL]: That means the government's response is
17 due 21 -- to respond, the government's response is due 21 May.

18 CP [BG MARTINS]: Yes, Your Honor.

19 LDC [MR. KAMMEN]: That's fine.

20 MJ [COL POHL]: Okay.

21 LDC [MR. KAMMEN]: Turning now to 261, and the genesis of
22 this request, Your Honor, is really founded in two or three
23 concepts. The first concept, of course, is the method by

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1 which the convening authority somehow selected the 37 people
2 that have at present been detailed to the -- be members. And
3 one of the things -- and we have been provided with some of
4 the underlying information concerning how they were --
5 apparently the procedure was in some way, -- and we don't know
6 what communications were sent. The convening authority sent
7 requests to at least four of the five services, Army, Navy,
8 Marines and Air Force, requesting candidates. We don't have
9 any idea whether a request was sent to the Coast Guard, or if
10 not, why not.

11 MJ [COL POHL]: Well, just on that point, isn't the Coast
12 Guard not part of the Department of Defense?

13 LDC [MR. KAMMEN]: I understand they are in time of war,
14 Your Honor, and that's what I'm told by the military people.

15 MJ [COL POHL]: Trial Counsel, is your opinion the Coast
16 Guard is part of the Department of Defense?

17 I'll tell you what, I'll let them kind of think
18 about that, because it's really a side issue. But go ahead.

19 LDC [MR. KAMMEN]: It's ----

20 MJ [COL POHL]: It's part of the issue, but the question
21 is does the pool include the Coast Guard or not, but your
22 basic argument would be the same, whether the Coast Guard is
23 or not.

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1 LDC [MR. KAMMEN]: But in any event, somehow some culling
2 of officers occurred among the four services. They were
3 presented to the convening authority, and then somehow the
4 convening authority went through and picked Colonel Jones of
5 the Marines Corps -- and I'm just making up names -- and not
6 Colonel Smith of the Marines Corps, and picked, you know,
7 Colonel -- Major McGillicuddy of the Air Force, and not
8 Major ----

9 MJ [COL POHL]: Somebody else.

10 LDC [MR. KAMMEN]: Yeah. Whoever. And, again, there's --
11 we really can't -- there's no way of really understanding how
12 that worked.

13 MJ [COL POHL]: Were you provided with the memo that went
14 from the convening authority to the services asking for
15 nominations?

16 LDC [MR. KAMMEN]: I don't believe so, no. No.

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

18 LDC [MR. KAMMEN]: And so one of the things we -- it
19 occurred to us in -- again, you know -- you know, in an
20 Article III court or really in any other court, jurisdiction
21 is a random process. The creation of the venire is a random
22 process.

23 MJ [COL POHL]: In Article III courts?

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1 LDC [MR. KAMMEN]: Well, in state courts or virtually any
2 other court other than military courts.

3 MJ [COL POHL]: Other than military courts. Got it.

4 LDC [MR. KAMMEN]: Absolutely. It's one thing when the
5 commander is working through a command, and so presumably the
6 commander knows the people within his command. Here, of
7 course, the convening authority can't really know the people
8 in all of these -- spread out all over the world.

9 And so it occurred to us that in any sort of
10 rational system, there would be a random selection within this
11 pool of assembled people. And so what we asked for was
12 essentially demographic information, how many -- what's the
13 total pool of officers in the Army, Navy, Air Force, Marines
14 to include, because we understand they're included in this
15 process, warrant officers. And just to get a sense of whether
16 the demograph -- whether the panel we ultimately will have
17 matches in any meaningful way the demographics of this total
18 force.

19 Now, because we have no power, we sent this request
20 to the prosecution and asked that it be forwarded to the
21 Department of Defense. Again, under normal circumstances we
22 would have simply sent a subpoena to the Department of Defense
23 requesting this information, and they could have objected or

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1 not as they thought appropriate. The prosecution objected,
2 and when we asked them who from the Department of Defense --
3 you know, who the point of contact was, at least it appeared
4 that they didn't bother to refer it to the Department of
5 Defense because in their view of things they're the
6 gatekeeper, and if they conclude this wouldn't be relevant,
7 they don't have any need to send it on.

8 So be that as it may, the information we wanted, the
9 demographic information, is -- you know, is described in the
10 motion. Now, in fairness, the prosecution said -- and as part
11 of the record, there is some demographic information that the
12 military does publish, but the military doesn't really get
13 drilled down to the kind of detail that we need to make to see
14 whether what we're getting is any kind of statistically
15 relevant cross-section. Let's say, for example, 25 percent of
16 the officers who are available to serve on a military
17 commission of total officers are African-American and yet the
18 jury pool we end up getting has -- is 5 percent
19 African-American. Again, you would have this statistical
20 anomaly where you would be saying this is not a representative
21 sample. So essentially the convening authority is in this
22 more less-nuanced selection process, excluding, you know,
23 demographic groups.

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1 One of the other things that's also important, Your
2 Honor -- and, again, I don't know the numbers -- is are there
3 Muslim officers who would be eligible to serve. And, again,
4 if there are not, well, then there are not, and of course,
5 that raises other issues. But if there are but none of them
6 somehow make it into the pool, if there's a statistically
7 representative sample but none of them make it into the pool
8 because the convening authority is picking -- you know, sort
9 of handpicking people, you know, again, we just don't know.

10 MJ [COL POHL]: Would you want the convening authority,
11 then, to -- if assuming -- let's assume he had all of this
12 demographic data, race, religion, gender, then you then take
13 the rough -- or the numbers of percentages of those various
14 people and then specifically include those from various
15 categories?

16 LDC [MR. KAMMEN]: Well, I think in a perfect world what
17 you would say, of course, is you've got all of the officers in
18 several services. And of course, again, we can't fathom how
19 anybody who could really believe you're going to get a jury
20 from 37 people unless the thing is wildly skewed.

21 But putting that to the side, putting our suspicions
22 to the side, the appropriate way is you do a random -- you
23 take the whole officer pool of the four or five services and

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1 you do a random selection the way it would happen in any other
2 court in America.

3 So if you need 100 people, you throw them all in,
4 and -- you know, where it's statistically important is that
5 the big pool include as many people as possible. That's why
6 in a federal court they include, you know, voter registration,
7 phone lists, and various things from a wide geographic area
8 that encompasses the district in an attempt to obtain as
9 representative a sample in the big pool as possible. There
10 may be some statistical anomalies in the actual selection.

11 And of course if in a district, let's say, the
12 Southern District of New York where the potential jury pool
13 may be in the hundreds of thousands, if not millions, the jury
14 wheel, if you will, and you only pick 100 jurors, you may have
15 some statistical anomalies, but they shouldn't be huge. And
16 if the jury wheel is -- includes everybody, then the
17 statistical anomalies are acceptable.

18 But, of course, here where there's this handpicking
19 from the jury -- you know, the big group, then the chances of
20 it being skewed in some way are extraordinary. So in a
21 perfect world, you get the big pool, he picks 100 names
22 randomly, you know, those are the people who ----

23 MJ [COL POHL]: But given that there is no random

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1 selection in this process, or courts-martial for that matter,
2 how is the convening authority able to meet your demographic
3 goal without, -- for example, gender and race and religion
4 will be on the ORBs of most officers -- sometimes not
5 religion, but obviously gender and race are -- where he would
6 have to look and say, well, now, I have got -- you are
7 supposed to cull through and say I'm now going to include
8 certain people with certain qualifications -- or certain
9 characteristics?

10 LDC [MR. KAMMEN]: Well, I suspect he's doing that anyway.
11 I just suspect the characteristics he's using are picking the
12 jurors that are to his liking as opposed to trying to find
13 some neutral way of doing it. I mean, he's ----

14 MJ [COL POHL]: Well, okay, if you want to impugn bad
15 faith on him, Mr. Kammen, that's fine. What I'm saying is
16 you're asking for information for us to solve a certain
17 problem.

18 LDC [MR. KAMMEN]: Right.

19 MJ [COL POHL]: And I'm just simply saying is -- in your
20 relief, eventual relief, would be I want to know how he picked
21 them and whether he considered these various factors. And my
22 question simply was should he therefore then specifically
23 include people with various factors?

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1 LDC [MR. KAMMEN]: Yes.

2 MJ [COL POHL]: Okay.

3 LDC [MR. KAMMEN]: Yes. I mean, if it comes down to that,
4 yes.

5 Now, the other piece of this that we asked for which
6 is not known and which is not in the -- in any way in the
7 demographic area is, of course, the number of people in this
8 pool of officers who have TS or TS/SCI clearances. Because
9 despite the prosecution's suggestion that none of the evidence
10 in in trial will be classified, which -- at least the
11 convening authority's clearly limited the pool of people he
12 selected to people with TS/SCI clearances, and that, of
13 course, may further skew the list of people in the available
14 pool. Because if you're excluding, for example, the general,
15 who for whatever reason doesn't have a TS/SCI clearance, or
16 the lieutenant who doesn't have a TS/SCI clearance, you know,
17 then -- who knows what you have got.

18 That's certainly not part of the rules. The rules
19 don't appear to require him to truncate the pool in that way,
20 but it appears he's done that because of his understanding of
21 the probability that classified evidence would be presented.

22 MJ [COL POHL]: Let's -- on that issue -- there is a
23 distinct possibility that classified evidence will be

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1 presented.

2 LDC [MR. KAMMEN]: I think there's a certainty classified
3 evidence will be presented.

4 MJ [COL POHL]: I was going to be generous, but okay.

5 LDC [MR. KAMMEN]: No, I mean ----

6 MJ [COL POHL]: So let's assume there is, then a member is
7 sitting there without a clearance altogether.

8 LDC [MR. KAMMEN]: Or if a member is selected who doesn't
9 have a clearance, getting cleared. Somebody's -- you know,
10 somebody's in the pool and, you know, Major -- again, in
11 positing some form of randomness, if Major Jones from the
12 Marines is selected and he or she does not have a clearance
13 and they're -- and you know they're going to be coming down
14 here sometime next year, get them cleared.

15 MJ [COL POHL]: But, in essence, you end up with the same
16 result, the only people who sit are the people who are
17 eligible for TS clearances. It's just -- what I'm saying is
18 let's say Major Jones doesn't have one. They do the
19 background check and says, no, you're not getting one. Well,
20 he's now eliminated.

21 LDC [MR. KAMMEN]: That's true. But I can't hardly
22 imagine that, you know, Major -- any military couldn't get a
23 TS/SCI clearance.

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1 MJ [COL POHL]: I'm not sure ----

2 LDC [MR. KAMMEN]: And also, you know, we have to
3 recognize, and this -- and Mr. Nashiri doesn't have a
4 clearance. So, you know, if he gets to be in his trial, then
5 you know, I assume, given the location and given the -- you
6 know, the circumstances, I don't know that the world comes to
7 an end if a military officer who doesn't have a clearance ends
8 up sitting on this jury.

9 You know, so what -- and I recognize given the delay
10 that is going to be occasioned as a result of the prosecutor's
11 motion to reconsider, the panel we have in front of us may
12 well change. But the panel we have in front of us is unique,
13 again, to my eye, because if you include all of the officers
14 and sort of this judicial temperament and all of this, it
15 would appear that nobody above the rank of O6 has the
16 sufficient judicial temperament. No generals, no admirals
17 have sufficient expertise, service, judicial temperament to
18 serve as jurors or nobody below the rank of, I believe,
19 captain, or O4 I guess it is, has sufficient experience,
20 temperament, what have you. So, again, there seems to be this
21 arbitrary picking of people in the middle, and exclusion of
22 all warrant officers.

23 So, I mean, the problem, Your Honor -- and I

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1 understand that they've adopted the military model, but
2 they've adopted the military model to an unrealistic situation
3 because once the convening authority has no knowledge about
4 the people, there's no reason not to have something that's
5 random or at least some -- try to achieve some demographic
6 information.

7 Now, here's our bottom-line concern. And, I mean,
8 this is going to come up in any number of different contexts,
9 and it's -- you know, in this context, good faith and bad
10 faith or good faith or call it what you will is often in the
11 eye of the beholder. I accept that. But how does the
12 convening authority pick Major Jones rather than Major Smith
13 if they're both, say, Air Force officers and both good
14 candidates according to their command? And our concern is
15 that the convening authority is calling people up and saying,
16 what can you tell me about Major Jones? What can you tell me
17 about Major Smith? And that strikes us as -- on any number of
18 levels to be hugely inappropriate.

19 You know, a public official can believe he's acting
20 in all good faith, but as we've argued in different contexts,
21 of course, the human nature is -- I mean, he is the guy who
22 approved the charges. He is the guy who says this ought to be
23 a death penalty case.

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1 And so, you know, it doesn't -- and we've seen in
2 the civilian context case after case after case where when
3 jurors weren't randomly selected, it ended up being a jury
4 wildly skewed in favor of the prosecution, because the people
5 who are selecting the juries in the civilian world tend to be
6 pro-prosecution. Here, of course, the chief -- what we call
7 the chief prosecutor, the guy who filed the charges, is the
8 guy picking the jurors. And so that's our ultimate concern.

9 But in order to -- I mean, this is just the first
10 step. What we'd like is the demographic information. Let's
11 see how close this is. You know, and then we can see where
12 we're at and if other relief is appropriate. But that's the
13 reason we sought this. And, again, we have to come through
14 this because we don't have the authority to issue subpoenas
15 duces tecum, we don't have any power to assemble information.
16 And so that's the reason we have to jump through all of these
17 hoops to come to this point.

18 MJ [COL POHL]: Thank you.

19 Trial Counsel.

20 ATC [LT DAVIS]: Good morning, Your Honor.

21 MJ [COL POHL]: Good morning.

22 ATC [LT DAVIS]: At the outset, Your Honor, I just want to
23 go ahead and clarify the state of discovery on this issue.

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1 Last time we were before you, the court ordered the government
2 to provide certain information to the defense, including the
3 information that the convening authority relied on in
4 selecting the members or all of the associated documents with
5 that, and the government has complied with that order.

6 MJ [COL POHL]: Did the government provide the memo that
7 went from the convening authority requesting nominations?

8 ATC [LT DAVIS]: Yes, Your Honor. So just to be clear,
9 for the record, the government provided, yes, that memo,
10 number one, the submissions that came back to the convening
11 authority from each branch of the Armed Forces, the Officer
12 Record Briefs of every officer that was recommended by each
13 military branch, the memo from the convening authority's legal
14 advisor to the convening authority, and the actual document
15 that the convening authority used when selecting the members.
16 All of that information, Your Honor, has been provided. The
17 defense has it. To the extent that there's a suggestion that
18 they're missing some of those documents, that's simply not the
19 case.

20 MJ [COL POHL]: Okay. But the -- that's somewhat of a
21 side issue right now. The issue is this demographic data.
22 Does it exist?

23 ATC [LT DAVIS]: Well, Your Honor, in the government's

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1 response the government went ahead, did some of the work on
2 this, Googled demographic information for the Department of
3 Defense, a report pops up, something that the defense
4 certainly could have done on its own. And if you take a look
5 at this report, it does break down the demographic information
6 for the Department of Defense.

7 Going to Mr. Kammen's example, he wants to know
8 whether, you know, there's a certain minority group within the
9 military or a racial group and whether the submissions that
10 came in are consistent with that. Well, the information in
11 those reports, in these DoD reports, shows what the racial
12 breakdown for all officers in the Army is, for all officers in
13 the Air Force, for all officers in the Marines Corps, and all
14 officers in the Navy. So to that specific example, they have
15 that information.

16 MJ [COL POHL]: Just a point, is the Coast Guard part of
17 the Department of Defense, currently?

18 ATC [LT DAVIS]: Under Title 10, Your Honor, when we are
19 talking about the definition of the Armed Forces, the Coast
20 Guard is included in that.

21 Now, to the point that the Coast Guard should have
22 been included or representatives should have been submitted to
23 the convening authority for his consideration, the convening

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1 authority is aware that the Coast Guard -- is aware that the
2 Coast Guard would be eligible. When you see the legal
3 advisor's advice, he has advised in accordance with the
4 statute, Section 948i, that all active duty commissioned
5 officers in the Armed Forces are available.

6 So the convening authority, while not having those
7 officers -- or not having those submissions is aware that if
8 he determines that the group of officers that he currently has
9 is insufficient and doesn't meet the statutory guidelines,
10 that he could reach back and include Coast Guard officers in
11 his consideration.

12 MJ [COL POHL]: Okay.

13 ATC [LT DAVIS]: Now, but to the larger point, Your Honor,
14 with regard to this demographic information, it's based on a
15 false premise. It's based on the false premise that the
16 statute or the law requires that there be a representative
17 cross-section of the military community serving on this panel,
18 and that simply runs contrary to the law on the subject.

19 Speaking specifically when we're talking about
20 courts-martial, it's never been held that a jury of peers or a
21 representative cross-section of the community is required.
22 What is required is what the statute says, which is that the
23 convening authority shall select those members which in his

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1 opinion and based on age, education, training, experience,
2 length of service, and judicial temperament -- those are the
3 relevant factors, and those are the factors that the convening
4 authority considered. To gather this other demographic
5 information is simply irrelevant, because those are not the
6 factors upon which the members for a military panel are
7 selected.

8 Now, in some ways the defense seems to be suggesting
9 that we should add factors to that when we're talking about
10 the demographic information, but then when this issue of a
11 TS/SCI clearance comes up, they want to subtract
12 considerations from the convening authority.

13 And just to be clear, when we're talking about this
14 TS/SCI issue, based on the documentation that was provided to
15 the defense, upon review, if you take a look at those officers
16 that were selected, not all of them have a TS/SCI clearance.
17 Juror Number 6, Juror Number 4, Juror Number 10, three of the
18 12 members of the primary members do not have a TS/SCI
19 clearance, and as well as a representative on the ----

20 MJ [COL POHL]: Is it the government's view that they all
21 have to have one to hear classified evidence?

22 ATC [LT DAVIS]: To hear classified evidence?

23 MJ [COL POHL]: Uh-huh.

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1 ATC [LT DAVIS]: I guess it would depend on what level of
2 classified evidence that you're talking about. As Your Honor
3 is aware ----

4 MJ [COL POHL]: Well, let's not quibble on that. What I'm
5 simply saying is this: If they don't have a TS/SCI and
6 they're selected as a member and TS/SCI comes out, can they
7 still sit?

8 ATC [LT DAVIS]: Well, Your Honor, it would be the
9 convening -- if they are selected and they don't have that
10 clearance, the idea would be that they would obtain that
11 clearance before the commission begins.

12 MJ [COL POHL]: And that can be done in a period of time
13 that's currently allocated between completion of voir dire and
14 the start of the trial?

15 ATC [LT DAVIS]: Well, Your Honor, those that are actually
16 sent down here to be part of the larger jury pool, there would
17 be more lead time for those that are selected, and certainly
18 sufficient time to get those clearances done.

19 MJ [COL POHL]: Okay.

20 ATC [LT DAVIS]: Can I have a moment, Your Honor?

21 MJ [COL POHL]: Sure.

22 ATC [LT DAVIS]: Again, Your Honor, just on this kind of
23 the first issue that came up, where I guess the first issue is

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1 the discovery, but beyond that, the convening authority is
2 well aware, has been advised in the legal advisor's advice to
3 him that all members of the Armed Forces, Army, Navy, Air
4 Force, Marines and Coast Guard, that have been brought on to
5 active duty, all 200,000 of that personnel are eligible to
6 serve. The convening authority has gone through, has
7 evaluated the officers that were recommended to him based on
8 the statutory factors, age, education, training, experience,
9 length of service and judicial temperament, and has selected
10 the officers that he feels are best equipped to meet the needs
11 to serve on this commission.

12 If the convening authority felt that that pool was
13 lacking in any way, certainly had the ability to go ahead and
14 reach back and bring forth more members. But the convening
15 authority has complied with the statute, it is not required
16 whatsoever that we have a representative cross-section. The
17 important part is that these are going to be the best
18 qualified people for the job, and those are the people that
19 have been selected.

20 MJ [COL POHL]: Thank you.

21 Mr. Kammen.

22 LDC [MR. KAMMEN]: I'm given to understand that apparently
23 nobody in the Coast Guard could possibly be qualified because

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1 they didn't even get an invitation, which strikes us as
2 skewing the -- I mean, under what circumstance does the
3 convening authority say, well, I'm just going to eliminate
4 this one particular service?

5 MJ [COL POHL]: Mr. Kammen, let me make sure what you
6 want. The government says you have the -- in their brief it
7 says the -- I guess the big-picture breakdown.

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

9 MJ [COL POHL]: Do you want breakdown by rank ----

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: ---- of each -- by rank of every service,
12 race, gender and religion?

13 LDC [MR. KAMMEN]: Yes.

14 MJ [COL POHL]: Okay. But in your normal jury pool in
15 the -- your federal court, it's not broken down by profession.
16 It's broken down by everybody.

17 LDC [MR. KAMMEN]: Absolutely. But in the normal
18 situation in federal court, you have a completely random
19 selection.

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

21 LDC [MR. KAMMEN]: So if we're not going to have a random
22 selection, we at least want to know how lack of random it is,
23 because, again -- and let's just take generals. I am hard

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1 pressed to imagine that there is no general in the Army, Navy,
2 Air Force, Marines, or Coast Guard, or 07, who by whatever the
3 criteria is qualified. That just is implausible to me, which
4 strikes me as saying that the convening authority, for some
5 other reason, has decided to exclude people above a certain
6 rank or below a certain rank.

7 Well, you know, again, the more you get away from
8 random -- you know, this isn't a court-martial. And I
9 understand we use -- the prosecution wants to use the
10 court-martial rules, but the interests served in a
11 court-martial are different than the interests served in this.
12 You know, I won't belabor the point, but the commander in a
13 court-martial who is picking from the 82nd Airborne, if that's
14 the relevant convening authority, has some idea of who these
15 people are.

16 It is not plausible to me that this convening
17 authority, or his legal advisor, have any idea who these
18 people are, or if they do and if it's a situation where the
19 legal advisor says, well, you know, Major Smith's a buddy of
20 mine, so let's put him in, you know, that's one of the
21 concerns. But, yeah, we would like to know so we know where
22 we are. Now, again, we recognize that there is this
23 procedure, but we want to know how far away from random we're

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1 really getting.

2 And, frankly, I recognize that in the end nothing
3 may change, but in the end this will all be reviewed by some
4 court that may have different notions of how this proceeding
5 should unfold. I mean, we're all -- they have decided they
6 wanted to make up this system.

7 MJ [COL POHL]: Well, now, you keep saying they, like the
8 prosecution.

9 LDC [MR. KAMMEN]: Oh, no, it's not. It's ----

10 MJ [COL POHL]: Congress. Congress passed the law ----

11 LDC [MR. KAMMEN]: Right.

12 MJ [COL POHL]: ---- and said this way, so ----

13 LDC [MR. KAMMEN]: Congress. Okay. Let me make ----

14 MJ [COL POHL]: Signed by the President of the United
15 States. They're the ones that put this system in place, not
16 the people sitting over there.

17 LDC [MR. KAMMEN]: Right. That's what I meant. Congress
18 and the President decided they wanted to make up a system. So
19 far everything that has come out of this system that has been
20 reviewed by civilian courts, the civilian courts have pretty
21 much consistently said they got it wrong, Congress and the
22 President got it wrong.

23 And so when this process is reviewed by a civilian

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1 court, that civilian court may say this is so skewed from what
2 randomness should be in a capital case of this magnitude that
3 it simply cannot stand. They may not. We don't know. But
4 the starting point, of course, is to let us have the
5 information.

6 Additionally, now that we know it, that the
7 convening authority sort of made the judgment Coast Guard
8 people need not apply, that strikes us as sort of invalidating
9 this whole pool, but that may be the subject of some other
10 litigation.

11 Finally, Your Honor, I may well -- I probably am
12 wrong. If Lieutenant Davis tells me that we have the
13 submission from the convening authority to the services, it's
14 been a while since I've looked at it ----

15 MJ [COL POHL]: Okay.

16 LDC [MR. KAMMEN]: ---- we may well have it. What we
17 don't have is whatever the services sent out to whoever to
18 assemble this. You know, so what we don't know is how let's
19 say, the 50 names, 60 names, 100 names submitted by the Army
20 were assembled. And that may well be particularly important
21 in a situation like this.

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

23 LDC [MR. KAMMEN]: Thank you.

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

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

3 MJ [COL POHL]: On Mr. Kammen's last point, I'm assuming
4 this was a request, one from the convening authority to the
5 service?

6 ATC [LT DAVIS]: That's correct, Your Honor.

7 MJ [COL POHL]: Is there paperwork on what the services
8 did to get the nominations?

9 ATC [LT DAVIS]: No, Your Honor, we don't have that.

10 MJ [COL POHL]: That's not my question. I didn't ask
11 whether you had it. I'm saying is I tell you this -- you may
12 not know whether they did it or not, but if it exists, find
13 the paper trail from the convening authority to the services,
14 to the services to the -- whoever made the decision. It may
15 have just gone to the G-1 saying here's what you did, but at
16 least my experience in the military, there's going to be a
17 paper trail all the way down. I doubt very much that the
18 Chief of Staff of the Army sat down with an alpha roster
19 picking names to nominate. So just -- do you understand what
20 I'm asking?

21 ATC [LT DAVIS]: Actually, I do.

22 MJ [COL POHL]: Actually, I'm not asking. I'm telling.

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

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1 MJ [COL POHL]: And then provide that to the defense.

2 ATC [LT DAVIS]: Yes, sir.

3 MJ [COL POHL]: That brings us to 262.

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

5 MJ [COL POHL]: Good morning, Major Danels.

6 DDC [Maj DANELS]: In this motion, the defense is
7 requesting that the commission compel the appointment of
8 Mr. Lessemun as a part-time investigator for the Nashiri
9 defense team, and specifically as an investigator with an
10 expertise in capital defense investigations.

11 Your Honor, it's important to point out that in
12 amending the MCA and working on the 2009 version of the Act,
13 Congress' intent was to provide adequate defense resources.
14 The conference committee report specifically noted concerns
15 over the fact that the commission suffered from systemic
16 under-resourcing of defense needs ----

17 MJ [COL POHL]: Major Danels, slow down, please.

18 DDC [Maj DANELS]: I'm sorry.

19 MJ [COL POHL]: Go ahead.

20 DDC [Maj DANELS]: The conference committee report noted
21 that the commission systemic -- had systemic issues with
22 relation to funding defense resources in capital cases.

23 To be fair, it didn't just find that that problem

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1 existed in capital cases, it existed in all cases brought
2 before a commission. And the Secretary of Defense was
3 strongly encouraged to take the steps necessary to ensure that
4 the defense was adequately resourced in capital cases.

5 So the defense submitted our request to the
6 convening authority for an expert for capital defense
7 investigations. In denying the request, the convening
8 authority points out that the defense has two other
9 investigators assigned to the team provided by the Office of
10 the Chief Defense Counsel, and he also pointed out that he had
11 provided us eight additional investigators. And, Your Honor,
12 that's simply not the case.

13 The persons highlighted in the convening authority's
14 denial are our mitigation specialist and assistant mitigation
15 specialist, neither of which have capital defense fact
16 investigation experience. And then they point out a myriad of
17 other resources that have nothing to do with capital defense
18 fact investigations. They highlighted our DIVOs whose duties
19 have nothing to do with investigations at all.

20 So I'd like to talk a little bit about the
21 individual that we're requesting and why he is distinguished
22 from the other assets that are assigned to the defense team.

23 Mr. Lessemun has 46 years of investigative

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1 experience. Fourteen years of that, he conducted capital
2 defense investigations. During the time of that, he worked on
3 16 capital investigations. He's worked -- he worked for the
4 Office of the Chief Defense Counsel for almost four years,
5 retiring in November of 2013. He was hired in February of
6 2010 and he worked as the primary -- many times, the only
7 investigator on the al Nashiri defense team.

8 He has the greatest institutional knowledge of the
9 underlying facts with regard to the charges in this case. He
10 has experience conducting international investigations. He's
11 the primary point of contact for our Yemeni investigator. He
12 has culled through thousands of pages of discovery. He's
13 interviewed witnesses, developed leads, gathered evidence, and
14 cultivated relationships with contacts who have information
15 related to the facts at issue in this case.

16 MJ [COL POHL]: Does he have a current clearance?

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

18 MJ [COL POHL]: Even though he retired?

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

20 MJ [COL POHL]: He didn't get read off when he retired?

21 DDC [Maj DANELS]: Not -- to my knowledge, he has not been
22 read out of any of the programs.

23 MJ [COL POHL]: I'm just saying is, is that if you get

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1 this guy and he doesn't have a clearance, then the next thing
2 I'm going to say is we need to delay this case because he
3 doesn't have a clearance. I'm just -- I'm not saying whether
4 you will get it or not. I'm not saying whether you will get
5 the delay or not. I'm just simply saying I want to know the
6 lay of the land. You said he's retired.

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

8 MJ [COL POHL]: And that change in status, would it be
9 fair to say you don't know whether he has a current clearance
10 or not?

11 DDC [Maj DANELS]: I have spoken to Mr. Lessemun about
12 having been read out of programs and things like that, and to
13 my knowledge, he has not been read out of any of the programs.

14 MJ [COL POHL]: Okay.

15 DDC [Maj DANELS]: Mr. Lessemun has traveled to the UAE
16 and Yemen as part of the investigation for this case.

17 The two investigators that the defense currently has
18 assigned to the team, while very experienced, one has only
19 been on the team for approximately a year, the other has been
20 on the team since May of 2013, and neither has any experience
21 working on a case from the defense perspective, let alone
22 capital defense experience.

23 Furthermore, while there may have been some period

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1 of overlap between Mr. Lessemun and those two investigators,
2 six and seven months respectively, by the prosecution's own
3 admission there are vast numbers of pages of discovery, over
4 200,000 pages of discovery. So, frankly, the six-month
5 overlap between Mr. Lessemun and the other investigators on
6 the case, part of that time required those investigators to
7 come up to speed as to what the evidence is in the case. So
8 it wasn't a full six months of overlap as far as what
9 investigative steps have been taken so far and what
10 investigative steps continue to need to be taken because they
11 had thousands -- hundreds of thousands of pages of discovery
12 to go through before they could even have an intelligent
13 conversation with Mr. Lessemun regarding those things.

14 And it's also, I think, important, Your Honor, to
15 highlight the fact that the defense is requesting to have two
16 full-time investigators, and a part-time capital defense
17 investigator. And on the other side the government has had
18 agents from the FBI, the NYPD, NCIS, Air Force OSI, with
19 assistance from the Yemeni Ministry of Interior, Political
20 Security Organization, and local police assist in this
21 investigation. So four U.S. government agencies, three Yemeni
22 agencies, with over 130 agents conducting an investigation
23 over the course of ten years is what is on the government's

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1 side in terms of investigative assets. The defense is merely
2 asking for a part-time capital defense investigator to help us
3 continue to go through the discovery that's continuing to be
4 submitted to the defense and help us in the adequate
5 representation of Mr. al Nashiri.

6 And the defense would ask that the commission
7 inquire with the government how many investigative assets are
8 currently assigned to assist in this particular case. We know
9 that there's at least one employee of the FBI who has been
10 sitting in on this week's session and who sat in on previous
11 sessions, but the defense has no idea how many investigative
12 assets are continuing to be employed on this case on the
13 government's side.

14 And we believe that allowing us to have Mr. Lessemun
15 on a part-time basis -- I'm sorry, denying us Mr. Lessemun on
16 a part-time basis would result in a fundamentally unfair
17 trial, and therefore the defense asking that our request be
18 granted.

19 MJ [COL POHL]: Thank you.

20 Trial Counsel.

21 ATC [LT MORRIS]: Good morning, Your Honor.

22 MJ [COL POHL]: Good morning.

23 ATC [LT MORRIS]: The government contends that the defense

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1 has not made a sufficient notice of showing of necessity such
2 that Mr. Lessemun should now be approved as an expert
3 consultant. U.S. v. Gonzalez as well as Bresnahan all give us
4 a three-prong test for when an expert consultant should be
5 approved, and it's the defense that must show why the expert
6 is needed, what the expert is going to do, and then why the
7 current defense team can't do it themselves. So basically it
8 is, why do you need him, what is he going to do, and why can't
9 you do it yourself?

10 And when we look at defense's response in their
11 motion, when we listen to their oral arguments, while we hear
12 he has capital experience, we don't actually hear what it is
13 that he's going to do with that capital experience that's
14 specific to him. It doesn't tell us why he's the only one
15 that can have a relationship with this Yemeni investigator.
16 It doesn't tell us why someone else can't pick up where he
17 left off. And as defense just said, we know that, in fact,
18 happened, that Mr. Lessemun -- he's a contractor. He's a
19 resource that was allocated to defense by the Government, by,
20 big G, Government, giving the chief defense counsel six fact
21 investigators.

22 The contract says that when one of those
23 investigators retires or leaves, then another contract

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1 investigator is hired and the chief defense counsel will then,
2 as he sees fit, make a replacement.

3 So primarily, Your Honor, this is a resource
4 allocation issue. The chief defense counsel has resources.
5 He has a mechanism to replace those resources, and not one but
6 two fact investigators one year ago were provided to this
7 defense team. The defense may not like the two fact
8 investigators as much as they might like Mr. Lessemun, but
9 that, again, is not the issue. That's not the standard that's
10 before Your Honor. You know, we cited United States v.
11 McAllister, a 2001 C.A.A.F. case and it said the defense is
12 not entitled to an expert of their own choosing, but to
13 competent assistance.

14 And so that's what we look at, do they have
15 competent assistance, and defense said here today that these
16 two fact investigators have considerable experience. It's not
17 that they don't have capital experience. The defense has the
18 burden of showing what is it that this capital experience will
19 do in this case. They haven't articulated that. And as
20 stewards of the taxpayers' money, we have to at least hold
21 them to the standard that's put in front of them for expert
22 witnesses. And as defense talked about, they don't just have
23 these two fact investigators that, yes, had months of

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1 turnover -- but, again, overlap or months of turnover is not
2 the burden that they have -- it is not necessary. It's,
3 again, why is Mr. Lessemun necessary.

4 And yes, on top of the fact investigators, they had
5 this overlap available to them. They had this -- these months
6 of helping use those resources effectively, if they did. But
7 not only did they have those two fact investigators, they
8 had -- as the convening authority pointed out in his denial,
9 they have been funded eight expert consultants, seven that
10 currently work for the defense team. Two of those, as they
11 stated, were mitigation experts, one that was brought on to
12 the defense team pre-referral. And then the defense came back
13 and said, well, we need more hours, and the convening
14 authority granted them more hours.

15 So when you look at the capital nature of this and
16 you start to look at the experts or the resources that were
17 funded to the defense, we start to say, okay, what were those
18 resources that were given to them specific for the capital
19 nature of this. And we see seven expert consultants that were
20 given in an investigative capacity, some that the defense
21 articulated, well, we need this expert because he speaks
22 Arabic, because he's Muslim, because he can have contacts in
23 Yemen. And they articulated that, and they were funded, they

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1 were granted.

2 But in this case all we're simply asking is what is
3 it specifically that Mr. Lessemun is going to be doing? What
4 is he -- what is it that he's going to be doing that these
5 other fact investigators cannot do? So that makes seven
6 expert consultants, six defense counsel, two full-time
7 investigators. And simply put, defense has not made a
8 plausible showing that Mr. Lessemun is necessary.

9 MJ [COL POHL]: Thank you.

10 ATC [LT MORRIS]: May I have just a moment, Your Honor?

11 MJ [COL POHL]: Sure.

12 ATC [LT MORRIS]: I would like to, with your indulgence,
13 touch on two issues or points that defense counsel made.

14 The somehow painting and comparing the resources
15 that the government has to what defense has is simply not an
16 appropriate comparison to make. The government has different
17 responsibilities. The government has a burden to prove this
18 case beyond a reasonable doubt, and it's not a tit-for-tat
19 comparison. This has been briefed in front of Your Honor and
20 in prior requests that the defense has made and in prior
21 arguments that the defense has made in trying to make a
22 tit-for-tat comparison. We've provided you in prior briefs
23 with the Cronin case that says this is, in fact, not an

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1 appropriate comparison to be making.

2 The issue or the concern that Your Honor raised on
3 the clearance certainly is one that needs to be addressed.
4 The government knows that when you lose your ability to --
5 your need to know classified information, then you're read off
6 a program. And so during this overlap when Mr. Lessemun has
7 retired, the government contends that by logic, he would lose
8 his ability -- or his need to know classified information.

9 So it's obscure to us why he would still be read on
10 the program, but that's something that could be followed up on
11 and be supplemented to, but certainly raises an additional
12 concern.

13 Subject to any questions, Your Honor.

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

15 ATC [LT MORRIS]: Thank you.

16 MJ [COL POHL]: Major Danel's.

17 DDC [Maj DANELS]: I just want to clarify a few things,
18 Your Honor. The six fact investigators were assigned to the
19 Office of the Chief Defense Counsel as a whole, not the
20 al Nashiri defense team. So just in case there was any sort
21 of misunderstanding about the fact that those six fact
22 investigators were not assigned to the Nashiri team
23 specifically. We had one of those six, who was Mr. Lessemun.

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1 MJ [COL POHL]: You currently have two fact investigators?

2 DDC [Maj DANELS]: Yes, Your Honor, and ----

3 MJ [COL POHL]: And you have how many mitigation
4 specialists?

5 DDC [Maj DANELS]: A mitigation specialist and an
6 assistant mitigation specialist.

7 MJ [COL POHL]: And they also do investigations of ----

8 DDC [Maj DANELS]: They don't do the type of investigation
9 that ----

10 MJ [COL POHL]: I didn't say that. I said, but they also
11 do investigations related to mitigation?

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

13 MJ [COL POHL]: Okay. Now, what does Mr. Lessemun add to
14 the two fact investigators you already have?

15 DDC [Maj DANELS]: He has ----

16 MJ [COL POHL]: What can he do that they can't do?

17 DDC [Maj DANELS]: Well, first of all, he has four years
18 of institutional knowledge that they just don't have. And
19 given that the government is moving -- wants to move this to
20 trial, there's no way for them to catch up in the time left,
21 with the four years that he had before -- well, actually, the
22 three years that they had -- he had before they got there.

23 There are hundreds of thousands of pages of

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1 discovery. They have to read that discovery, wrap their minds
2 around that evidence before they can have intelligent
3 conversations with Mr. Lessemun about what he has done before
4 they got there. And we like our investigators just fine. The
5 two that are assigned to the team, we like them just fine. It
6 doesn't have anything to do with not liking them. They just
7 don't have the knowledge that Mr. Lessemun has.

8 Furthermore, one of the investigators is an SRA
9 asset who is a retired Army CID investigator, the other is an
10 active duty Air Force OSI investigator, both with experience
11 working on cases and investigations from the government
12 perspective. This is the first time either of those
13 individuals have ever worked on a defense investigation. So
14 Mr. Lessemun has not only -- sorry. Mr. Lessemun has not only
15 capital defense investigation experience, he has defense
16 investigation experience, which neither of the two
17 investigators currently assigned to our team have.

18 And the government, Your Honor, isn't the only party
19 in this case with an obligation. The defense has an
20 obligation in this capital case to conduct a thorough
21 investigation with regard to the guilt and innocence phase of
22 this trial, in addition to its obligation for mitigation. And
23 to point out the fact that we have seven other assets assigned

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1 for investigative functions, that is just misleading.

2 Furthermore, some of the people have limited number
3 of hours of those eight, and the work that they are allowed to
4 do has been specifically dictated to us by the convening
5 authority. So even if the defense wanted to use those other
6 assets to make -- to take up the slack, we're not allowed to,
7 because the hours simply don't exist, and we have been told in
8 some regards how those people are allowed to work for us,
9 and ----

10 MJ [COL POHL]: No, wait a minute, wait a minute. You put
11 a request for expert assistance to the convening authority and
12 to me. You have a rationale for that expert assistance. If
13 granted, it is to perform the expert assistance that you
14 requested. I mean, you can't sit there and say, I want -- now
15 you're saying this is a limitation that the convening
16 authority put on this person?

17 DDC [Maj DANELS]: Yes, Your Honor, in the case of
18 Mr. Assed it has been dictated to the defense how the hours
19 allocated to Mr. Assed were to be used, and conducting a
20 criminal defense -- capital defense investigation was not a
21 part of ----

22 MJ [COL POHL]: What was Mr. Assed's expertise for which
23 he was originally appointed?

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1 DDC [Maj DANELS]: He was appointed to assist in
2 conducting investigations and consult with -- on how to
3 conduct investigations in Yemen and Saudi Arabia.

4 MJ [COL POHL]: All right.

5 DDC [Maj DANELS]: Because there's specific requirements,
6 cultural requirements and cultural things that have to be
7 taken into consideration when you're conducting investigations
8 in those countries, he was brought on to consult with -- so
9 that we shape our investigations within the cultural
10 constraints of those two countries. Mr. Barman, yes, he was
11 brought on as an investigator, but specifically to assist in
12 the investigation in Yemen where the defense isn't able to get
13 to.

14 Mr. Lessemun dictates -- has in the past dictated to
15 Mr. Barman what investigative things that he should be doing
16 in Yemen. So Mr. Lessemun, his -- it's not just his
17 experience and the fact that he has been with us for four
18 years, he leads -- or has led the defense investigation for
19 four years. His knowledge and experience informs the
20 defense's investigation.

21 And if Your Honor approves him to continue assisting
22 the defense on a part-time basis, with that approval comes the
23 requisite need to know. And, quite frankly, the defense

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1 doesn't even believe that much of the discovery is
2 unclassified. So it's the defense's position that even if he
3 no longer has the clearance, the clearance wouldn't be
4 absolutely critical for him to assist us in conducting a
5 capital defense investigation.

6 MJ [COL POHL]: So you're telling me that if Mr. Lessemun
7 is appointed as part of the defense team and does not have a
8 current clearance, that presents no difficulty for him to just
9 pick up where he left off, and he can perform the duties that
10 you're requesting, and he's able to do that even though the
11 people he is allegedly assisting will be discussing classified
12 information? Can he do his job without a clearance, as you've
13 described his job?

14 DDC [Maj DANELS]: Yes, Your Honor, because much of the
15 evidence provided in this case isn't classified.

16 MJ [COL POHL]: I know that, but you're saying he directed
17 the investigation for the other people, okay, assisted them.
18 You said dictated. I would say probably directed. He says,
19 okay, go look at this in Yemen, or to your other
20 investigators, what about this, what about that.

21 Now, if he doesn't have a clearance, can he do that
22 intelligently with them, or he says I only can talk about
23 unclassified stuff? Is that your -- so the clearance is a

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1 nonissue to you.

2 DDC [Maj DANELS]: Correct.

3 MJ [COL POHL]: You are saying he can do his job without a
4 clearance even though he has been telling people who have
5 classified information -- who may have classified leads, he
6 can't even discuss them with them, but he can still do his
7 job? That's what you are telling me?

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

9 MJ [COL POHL]: Okay.

10 DDC [Maj DANELS]: But it's the defense's position that
11 should he be approved to work on the defense team, there would
12 be the requisite need to know for him to have a clearance. So
13 I really think that the clearance discussion is subterfuge, it
14 has nothing to do with the underlying request for
15 Mr. Lessemun.

16 MJ [COL POHL]: Yeah, but when you request assets, you
17 should know whether or not he has a clearance.

18 DDC [Maj DANELS]: Correct.

19 MJ [COL POHL]: I mean, it's not -- this should not be a
20 mystery one way or the other. I'm not saying it's
21 dispositive, because it probably -- fairly well probably
22 isn't. But when the question is, we want to pick this case
23 up -- we want him to pick up right where he left off -- that's

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1 part of your request -- you should know whether or not that
2 would mean he will have to be read back on or not and how long
3 you anticipate that to take.

4 DDC [Maj DANELS]: Correct, Your Honor, which is why I
5 inquired with Mr. Lessemun with regard to the status of his
6 clearance. And furthermore, SRA is continuing to seek out
7 Mr. Lessemun for themselves in relation to part-time work,
8 which is probably why, because they have been in discussions
9 with him continuing for SRA in a part-time capacity.

10 So to the defense's knowledge, Mr. Lessemun still
11 has the clearances necessary to assist in this capital case.

12 MJ [COL POHL]: You know, didn't you have a DS0 assigned
13 to your team? Don't you have a DS0?

14 DDC [Maj DANELS]: We have had a DS0 approved. That
15 person has not been employed as of yet with the team.

16 MJ [COL POHL]: Okay.

17 DDC [Maj DANELS]: He or she has been appointed by the
18 convening authority pursuant to your order, but we do not have
19 a DS0 currently assigned to our team.

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

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

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

23 ATC [LT MORRIS]: Your Honor, we submit the convening

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1 authority's initial decision that the defense has not made the
2 showing necessary, and we urge you to adopt that in your
3 ruling.

4 MJ [COL POHL]: 263.

5 DDC [CDR MIZER]: Good morning, Your Honor.

6 MJ [COL POHL]: Good morning.

7 DDC [CDR MIZER]: Looking at 263, Judge, and listening to
8 the arguments this week, there's going to be significant
9 litigation over the 66 declarants and the 72 hearsay
10 statements, and so the defense -- and I've discussed this with
11 the prosecution -- would propose that we table these series of
12 motions until the inevitable evidentiary hearing in this case.

13 We're seeking to have the same witnesses produced in
14 this series of motions that are certainly going to have to
15 testify when we litigate the unavailability and reliability of
16 those ----

17 MJ [COL POHL]: Okay.

18 DDC [CDR MIZER]: ---- statements. So we propose ----

19 MJ [COL POHL]: So basically just for accounting purposes,
20 treat 263 as withdrawn at this time, with leave -- because if
21 it comes to something else, we'll do another number on it.

22 DDC [CDR MIZER]: Well, Your Honor, is it possible to just
23 simply pass the motion ----

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1 MJ [COL POHL]: Okay.

2 DDC [CDR MIZER]: ---- leave it unresolved at this point?

3 And I would assume at some point when we get to evidentiary
4 motions, we'll want to reassert the same motion.

5 MJ [COL POHL]: Sure.

6 DDC [CDR MIZER]: Thank you, Judge.

7 MJ [COL POHL]: Trial Counsel, do you have any opposition
8 to that proposed procedure?

9 TC [CDR LOCKHART]: No, sir. The government also agrees
10 that the style of the way that this motion was written, it's
11 more appropriate to challenge the type of information that the
12 defense is seeking when the witnesses testify in the eventual
13 evidentiary hearing for the foundation for the hearsay
14 statements.

15 I will just say, and I know this was provided in our
16 briefs, the government does reassert that all impeachment
17 evidence that they've had documentary-wise in the possession,
18 custody and control of the government has been provided. So
19 the only issue left is the cross on the witnesses, sir.

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

21 264. Just for kind of the way ahead, my intent is
22 we'll probably go until about 10:45, take a break and then
23 we'll -- because -- and then assuming the witness is available

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1 at 1100, we'll pick up with the witness, and then wherever
2 we're at once the witness gets done, we'll pick up where we
3 left off.

4 DDC [CDR MIZER]: Yes, Your Honor. I think that we can
5 meet those milestones, Judge.

6 With respect to 264, I believe it's closely enough
7 related to AE 046, which you will recall, Your Honor, is an
8 equal protection challenge under the Fourteenth Amendment, the
9 equal protection clause of that amendment. This merely
10 reiterates a similar argument under the Fifth Amendment due
11 process clause.

12 MJ [COL POHL]: What was the other Appellate Exhibit
13 number, please?

14 DDC [CDR MIZER]: AE 046, Judge.

15 MJ [COL POHL]: Go ahead.

16 DDC [CDR MIZER]: So I don't know that I really want to
17 belabor the points there. We're just trying to make sure that
18 we cover both the Fourth and -- excuse me, the Fifth and
19 Fourteenth Amendment. So with that, Judge, I would propose
20 that I just move on to 265.

21 MJ [COL POHL]: All right. You just want to rely on your
22 brief, basically, on 264?

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

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1 MJ [COL POHL]: Trial Counsel.

2 CP [BG MARTINS]: Your Honor, I can make equally brief
3 comments on our position on 264, and I think we can get to
4 265.

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

6 CP [BG MARTINS]: Concur on the basic procedural posture.
7 This is a claim that if the due process -- or the equal
8 protection component of the Fifth Amendment is violative -- or
9 is related to the alienage distinction, that's what 046 was.
10 This is now a claim that the -- the alienage distinction in
11 the Military Commissions Act violates the due process piece of
12 the Fifth Amendment.

13 And we just rest on the Fritz case that we've cited
14 in our brief, which holds -- 1981 Supreme Court case, which
15 clearly holds that if a federal statute is valid under the
16 equal protection component under the Fourth Amendment -- I'm
17 sorry, it's valid under the due process clause and the judge's
18 holding -- the military commission's holding in 046, which
19 relied on Bahlul and Hamdan, which are not overruled as to the
20 equal protection component should be the ruling here. Thank
21 you.

22 MJ [COL POHL]: Okay. Commander, are you going to do 265?

23 DDC [CDR MIZER]: Thank you, Your Honor. Judge, when the

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1 Supreme Court reinstated the American death penalty in
2 Gregg v. Georgia, it did so with the understanding that the
3 states, a few states in particular, Texas and Georgia, had
4 redrafted their laws to ensure that capital punishment was no
5 longer going to be imposed on either an arbitrary or
6 discriminatory basis. And so we focused a lot both in this
7 session and the prior session about how the aggravating
8 factors work and do they, in fact, oppose -- impose the death
9 penalty in an arbitrary, or to use the words in one of the
10 cases, a wanton or freakish fashion.

11 This deals with the discriminatory basis, Judge.
12 The MCA discriminates on the basis of alienage both on its
13 face and in its application. It is only going to apply to
14 individuals who are not nationals of the United States. With
15 respect to application, I think there are a couple of examples
16 that may be -- analogies that may be helpful to the court.

17 In the wake of the Civil War, the Fifteenth
18 Amendment to the Constitution was ratified to where minorities
19 would for the first time have the explicit right to vote. And
20 what you had from 1866, essentially until the 1964 Civil
21 Rights Act, was chipping away at that right through facially
22 neutral restrictions, you could argue, such as poll taxes,
23 such as reading tests. Certainly anyone could vote so long as

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1 they could pass the reading test. And the courts ultimately
2 found that those types of restrictions worked a discriminatory
3 effect and struck them down.

4 In the criminal context, very recently, particularly
5 in the past seven years, the Supreme Court has had to address
6 the discriminatory application of the so-called crack powder
7 disparity in federal district courts. Until 2007, crack
8 cocaine was punished at 100 times the rate of powder cocaine.
9 And a chemist would tell you that there's no distinction
10 whatsoever between crack cocaine and powder cocaine, it's
11 simply the folks that are using it. It was largely minorities
12 were using crack cocaine, and the majority at that point were
13 large consumers of powder cocaine.

14 That, both with the Fair Sentencing Act of 2009, has
15 now reduced that disparity from 100 to 1 to where it rests
16 today at 18 to 1 in federal courts, and so crack users for the
17 same substance are being punished at only 18 times the rate of
18 those who use powder cocaine. So it's that sort of
19 discriminatory application that works also here with the
20 military commission.

21 MJ [COL POHL]: Well, is this really as applied? On the
22 face of the statute it says aliens.

23 DDC [CDR MIZER]: Indeed, Judge. And so that's why I

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1 prefaced my remarks by saying it is both on the face of the
2 statute, and if you wish to ignore the face of the statute, it
3 is in its application, because the only individuals that are
4 going to sit in the defendants' chairs in these cases are
5 foreign nationals we would also argue that it discriminates
6 against Muslims by its operation.

7 Now, that's not exactly stated, but there's no
8 chance that there's going to be a Catholic or a Christian at
9 the other end of this table just by the basis of the way that
10 this statute is drafted both with alienage. We've already
11 discussed the jurisdictional predictions mentioning that it
12 gives this court jurisdiction to try members of al Qaeda. So
13 the way that the MCA all works together also creates an
14 at-applied challenge that is broader than just alienage, I
15 think is the point that I would like to make there, Judge.

16 MJ [COL POHL]: Okay.

17 DDC [CDR MIZER]: We cited Eddings v. Ohio [sic], which --
18 excuse me -- states that the court has insisted, quote,
19 "capital punishment be imposed fairly and with reasonable
20 consistency or not at all." And that's what we're seeking,
21 Judge, is a consistent and equal application of capital
22 punishment in this case.

23 On its face as you pointed out, the statute

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1 discriminates against alien enemy unprivileged belligerents,
2 whereas here enemy unprivileged belligerents are afforded
3 Article III courts in the United States. Your Honor is
4 undoubtedly aware of John Walker Lindh who was tried in the
5 Eastern District of Virginia by Judge Ellis; Jose Padilla,
6 both Americans. And I am certain that if Adam the American
7 Gadahn, an alleged member of al Qaeda from California, is
8 apprehended, he is pending indictment for treason in
9 California, and I can assure you that on the face of this
10 statute that he will never face a military commission. And so
11 we're not discriminating against the enemy, it's just
12 foreigners that are being discriminated against on the basis
13 of this statute.

14 Judge, the Quirin case has been cited many times
15 throughout these proceedings, and for all of its faults, you
16 can say that it would at least pass Eighth Amendment muster
17 under the argument that we raise here. Because Hans Herbert
18 Haupt, a 23-year-old then American citizen, and then George
19 Dasch, both Americans, were tried in that summary proceeding,
20 executed -- and, excuse me, executed in Washington, D.C.'s
21 electric chair, and then put in the Blue Plains Potter's Field
22 together, Judge. No discrimination whatsoever between
23 citizens and noncitizens. What was relevant there was that

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1 they were part of an enemy force.

2 MJ [COL POHL]: Let me ask you this: Does your
3 argument -- is it unique to a death penalty case or just would
4 not it apply to anybody brought before a military commission
5 under the current statute?

6 DDC [CDR MIZER]: This argument, Judge, is an Eighth
7 Amendment argument and, therefore, applicable to the death
8 penalty. And that's where Hamdan and Bahlul missed the point.

9 Hamdan obviously wasn't a death penalty case. I
10 think important to the C.M.C.R.'s analysis there was the fact,
11 and they noted it expressly, that Mr. Hamdan was already home
12 by the time that that court had reached its decision on equal
13 protection. This isn't the Fourteenth Amendment equal
14 protection issue that was addressed there. It's not the Fifth
15 Amendment due process claim that we just briefly discussed.
16 This is dealing with the Eighth Amendment's requirement that
17 the death penalty not be arbitrarily imposed or
18 discriminatorily imposed.

19 And on its face, Judge, here you are dealing with a
20 statute that discriminates against aliens on its face and we
21 believe also against Muslims in its application.

22 Thank you, Your Honor.

23 ATC [MAJ SEAMONE]: Good morning, Your Honor.

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1 MJ [COL POHL]: Good morning, Major Seamone.

2 ATC [MAJ SEAMONE]: Quite an important distinction, Eighth
3 Amendment versus Fifth Amendment equal protection component of
4 the Fifth Amendment due process piece. It is important,
5 though, to consider that Congress, when you're talking when
6 important federal interests, and oftentimes competing federal
7 interests, it's a little bit -- well, not a little bit, it's
8 quite different from the Fourteenth Amendment analysis,
9 because you have these competing federal interests. And the
10 standard for viewing those -- and it's important to recall
11 this -- is rational basis.

12 And the government's legitimate objectives,
13 important objectives that it needs to meet and in this case
14 and important to consider Hamdan and Bahlul and the point that
15 on considering the safeguards in this system and comparing the
16 rights accorded to servicemembers at court-martial or federal
17 defendants at a criminal court, there is a sufficient, you
18 know, level of safeguard present to ensure that the accused's
19 trial is fair enough.

20 MJ [COL POHL]: Is that the issue before me? Is the issue
21 before me whether or not there is sufficient safeguards in the
22 procedure, or is the issue before me is this is a
23 discriminatory application only to aliens in violation of the

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1 Eighth Amendment? So if you have the fairest system in the
2 world, but if it violated the Eighth Amendment, does it make
3 any difference?

4 ATC [MAJ SEAMONE]: If it violates the Eighth Amendment,
5 that's definitely a concern. It's important they're kind of
6 tethered to one another, because if you consider, for example,
7 the define and punish clause, if -- Congress is permitted to
8 punish offenses against the law of nations, under that clause,
9 right, and it's allowed to punish to the extent that those
10 offenses exist, if you -- by that reading.

11 So for serious violations of the law of war, the
12 death penalty has been available for grave breaches under the
13 law of nations, and, therefore, Congress if Congress is able
14 to hold a commission -- to hold individuals accountable for
15 violations against the law of war, then it naturally flows
16 from that. That's where that piece comes in, that the
17 punishment that is authorized under the law of war is also
18 available and lawful, and it can include death. And that's
19 why there's no violation of the Eighth Amendment.

20 But this invidious discrimination piece is something
21 that the government believes is quite necessary to address.
22 And in looking at the safeguards, it's a very poignant point
23 made by opposing counsel to talk about crack cocaine and

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1 sentencing disparities and concerns over that. One of the
2 main issues that's related to that -- and if the government
3 may also tie into the same example the defense presented, one
4 of those concerns is mandatory minimum penalties, this notion
5 that you've got to go to jail for a certain amount of time.
6 Treatment might help, there might be extenuating or mitigating
7 circumstances, but you're statutorily locked into a certain
8 amount of confinement.

9 The sentencing commission recently came out with a
10 report -- 2011, but it's still recent -- of over 194 offenses
11 in the United States Code in a federal criminal court
12 applicable to citizens and nationals of the United States have
13 mandatory minimum penalties regardless of the amount of
14 mitigation that might be presented. And when you get into a
15 situation where the offenses are more egregious, especially
16 akin to the ones that the accused is charged with, that
17 mandatory minimum is life confinement or death. You've got
18 those pivot points.

19 For example, aircraft piracy ----

20 MJ [COL POHL]: Major Seamone, I got that. But, again, we
21 are not talking about that, are we?

22 ATC [MAJ SEAMONE]: We are.

23 MJ [COL POHL]: Well, let me put it this way: You are.

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1 ATC [MAJ SEAMONE]: Yes, sir.

2 MJ [COL POHL]: I'm just saying is you're talking about
3 mandatory minimum, and I heard the commander's cocaine
4 discussion, and that was kind of more of the as-applied. But
5 let's just talk about the facial challenge here.

6 On its face the MCA's limited to aliens, correct?

7 ATC [MAJ SEAMONE]: The ability to prosecute for a
8 violation of the law of war in this forum is limited to
9 aliens, but it's the ----

10 MJ [COL POHL]: That could have just been a yes, but
11 that's okay.

12 ATC [MAJ SEAMONE]: It's the offense that leads to the
13 possibility of a certain punishment being available.

14 MJ [COL POHL]: Okay. So focus your argument on what I
15 think the issue is, is the fact that it excludes U.S. citizens
16 and only has aliens, you don't believe that violates the
17 Eighth Amendment as articulated by the defense in their
18 pleading?

19 ATC [MAJ SEAMONE]: That's absolutely true. And may I say
20 just one more piece, though? I will bring it back around.

21 The accused under Rule for Military Commission 1002
22 has the opportunity to have no punishment at all adjudged,
23 even though -- and even if the panel should find that he

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1 committed all of the offenses charged, and even if the panel
2 should find that there is evidence of aggravating factors,
3 that if they got to the point where death would potentially be
4 authorized, they could still decide to give him absolutely no
5 punishment.

6 MJ [COL POHL]: And that somehow would ameliorate the
7 Eighth Amendment argument that he's talking about?

8 ATC [MAJ SEAMONE]: The point is, Your Honor, if you took
9 a similarly situated United States citizen charged with the
10 same offenses, that citizen would be looking at a mandatory
11 minimum sentence of life no matter what type of mitigation
12 or ----

13 MJ [COL POHL]: If you had a statutory scheme that
14 violated the Eighth Amendment by discriminatory application or
15 on its face, does the fact that there are other
16 constitutionally permissible schemes means the first one is
17 okay, then? Does that -- I don't see how that's relevant. If
18 the scheme stands -- doesn't it stand or fall on its own, not
19 on the fact that what could happen in other statutory schemes?

20 ATC [MAJ SEAMONE]: If there's invidious discrimination.
21 But, Your Honor, the government would also ask that you take
22 into consideration the offense in the United States Code,
23 which applies to United States nationals, the War Crimes Act,

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1 and this would be 18 United States Code 2441. It's the War
2 Crimes Act of 1996. It says, if a person committing a war
3 crime is a member of the Armed Forces of the United States or
4 a national of the United States, if they violate the
5 international law of war in a way where they commit a grave
6 breach of the Geneva Conventions, whether or not that crime
7 occurs inside the United States or outside of the United
8 States, if that offense results in death, they are eligible
9 for death. It is something that targeted only United States
10 citizens and nationals, and it was ten years before the 2006
11 Military Commissions Act.

12 So, Your Honor, for the defense to say that United
13 States citizens somehow benefit or the accused is the only
14 person who would face the possibility of death for these
15 violations, that's not true. There was more of an interest in
16 bringing United States citizens to justice where they could
17 face death for these violations of the international law of
18 war, more interest in that before. It took ten years before
19 there was interest in addressing the concern over aliens.

20 So that's definitely worth considering, Your Honor.
21 The Uniform Code of Military Justice, you know, we talk a lot
22 about offenses and offenders and Article 21, but we also have
23 provisions which permit a general court-martial to try a

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1 servicemember for violations of the international law of war
2 and several provisions that authorize death for those
3 violations.

4 It's in Rule for Court-Martial 1004(c)(10), talking
5 about if you are guilty of a law of war violation for which
6 death is authorized, then death could be the sentence. And
7 then you have other provisions that the government cited in
8 other hearings on these related issues which subject a U.S.
9 servicemember to death for violations of the law of war.

10 So it's not just an alien. It is a forum in which
11 the central concern is these egregious violations, these grave
12 violations of the international law of war, servicemembers are
13 held accountable, U.S. citizens are held accountable in
14 federal court, and the accused, you know, because of these
15 compelling -- you know, these important interests, these
16 interests to ensure security to -- you know, you have
17 offenders who commit offenses in other countries, part of
18 organizations with very few contacts with the United States,
19 to suggest that they must be brought back and tried alongside
20 of civilians, those are precisely the reasons why Hamdan and
21 Bahlul found a legitimate reason that with the safeguards and
22 protections available, there's no violation, that it's all
23 right.

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1 It's not -- and here it's not a violation to make an
2 individual who is rightfully on trial for these offenses
3 accountable under the international law of war which
4 contemplates, if we think about the Second World War, we are
5 talking about an international armed conflict between
6 different countries. And so this contemplation of an enemy
7 being not a citizen and needing to be held accountable just
8 the same because it affects the conduct of war at large and
9 that necessary deterrent that there is, in fact,
10 accountability for the most egregious types of offenses.

11 If I could have one moment, Your Honor.

12 MJ [COL POHL]: Sure.

13 ATC [MAJ SEAMONE]: Thank you very much.

14 DDC [CDR MIZER]: Judge, the issue here isn't that
15 Americans are also subject to capital punishment, it's that a
16 single group has been singled out for a separate judicial
17 punishment -- or a separate judicial system, and as we've
18 litigated before and I won't rehash here, has a very different
19 capital sentencing scheme.

20 MJ [COL POHL]: What is the test to be applied here? The
21 government in its pleadings says it's a rational basis test.

22 DDC [CDR MIZER]: Yes, Your Honor, I believe that's
23 borrowed from equal protection analysis.

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1 MJ [COL POHL]: Would you say that's the test?

2 DDC [CDR MIZER]: No, Your Honor, I would not. I would
3 ask for a finding that this is not on its -- or, excuse me, is
4 on its face discriminatory and invalid. That simple. I don't
5 think ----

6 MJ [COL POHL]: No, but what I'm saying, when you say
7 invalid, don't I have to have some type of constitutional test
8 to apply ----

9 DDC [CDR MIZER]: Judge, I think that it is ----

10 MJ [COL POHL]: ---- compelling state interests, you know,
11 whatever strict scrutiny, racial basis? Don't I ----

12 DDC [CDR MIZER]: Judge, those are all equal protection
13 standards and I think inapplicable for an Eighth Amendment
14 analysis.

15 So we would just invite this court's attention to
16 Gregg v. Georgia and the Eighth Amendment jurisprudence that
17 has come up in the course of this litigation that if you find
18 that the death penalty here is arbitrarily imposed, which is
19 the basis of all of the aggravating factor cases, or if you
20 believe that it is discriminatorily imposed, that the capital
21 sentencing scheme here is invalid. That simple, Judge.

22 MJ [COL POHL]: I'm with you.

23 DDC [CDR MIZER]: And that's ultimately what undid the

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1 death penalty in Georgia and Texas at the beginning of this,
2 when the court looked at that in the early '70s, was that it
3 was being applied both in an arbitrary fashion and in a
4 discriminatory fashion. And when those states went back and
5 rewrote their code -- and that's Gregg v. Georgia. So we
6 would just invite this court's attention to those cases.

7 In the end, Judge, separate but equal isn't an
8 acceptable way to run our schools, and it's not American
9 justice, either. That's the issue here. You can't create a
10 justice system, and if this were to happen in the United
11 States where you would pick out, say, a racial minority and
12 say we've created a separate justice system for this racial
13 minority, it may look the same in that there's a judge and
14 something that looks like a jury over there, but it's separate
15 but equal, that's not going to be an acceptable argument in
16 court. And that's essentially what you have before you.
17 They've created a justice system that discriminates on its
18 face against foreign nationals and that doesn't pass muster
19 under the Eighth Amendment.

20 MJ [COL POHL]: Thank you.

21 Trial Counsel, anything further?

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

23 MJ [COL POHL]: Okay. The commission will be in recess,

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1 but Commander Lockhart is standing.

2 TC [CDR LOCKHART]: Yes, sir. The government would just
3 ask that AE 205N be resolved prior to the witness being
4 called.

5 MJ [COL POHL]: Yeah. There's two things, housekeeping
6 things. 205 is a request that the witness be -- testify under
7 a pseudonym.

8 LDC [MR. KAMMEN]: May I [Microphone button not pushed; no
9 audio].

10 MJ [COL POHL]: Sure.

11 LDC [MR. KAMMEN]: Our understanding is this particular
12 witness is no longer assigned here. If that is the case, then
13 there is no reason for him to testify under a pseudonym. If
14 his further duties will not bring him back here, there's no
15 reason for him to testify under a pseudonym.

16 MJ [COL POHL]: Okay. Trial Counsel, do you want to
17 respond?

18 TC [CDR LOCKHART]: Yes, sir. The issues are still the
19 same regardless of whether he's still assigned here or not.
20 It has to do with the danger of his name being provided to
21 either the accused or the general public. The harms and the
22 potential dangers are still the same. His current duty
23 assignment is of no means.

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1 MJ [COL POHL]: He's active duty?

2 TC [CDR LOCKHART]: He is, sir.

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

4 LDC [MR. KAMMEN]: This is exactly the concern we have.

5 It's arguable, I suppose, that people who are here and who are
6 having contact with people here may feel the need for some
7 protection, but if we're going to have a trial where every
8 witness says, well, I don't want my name out there, then you
9 know, we're way down the road to essentially the -- exactly
10 the form of secret trials that we fear.

11 You know, there's going to be lots and lots people
12 who are going to be requested to testify. Maybe we'll even be
13 allowed to call some of them. And, you know, we can't be in a
14 position where somebody in Iowa or Washington or whatever
15 says, oh, yeah, but I don't want anyone to know my name for no
16 particular reason.

17 If this fellow is not -- is no longer assigned here,
18 the truth of the matter is, he's at no risk -- I don't think
19 he's at risk if he is assigned here. But if he's not assigned
20 here -- I don't want to belabor the point, but it's not like
21 Mr. Nashiri is allowed to contact the outside world. So there
22 is just no logical reason for -- to keep his name secret and
23 to keep his identity secret.

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1 And if we can apply it to an Army officer who is not
2 applied here, then we're going to end up applying it to FBI
3 agents who may have worked on this case 15 years ago. I mean,
4 it's never going to end. So we're going to end up with
5 everybody here testifying under a pseudonym.

6 TC [CDR LOCKHART]: Sir, if I may, briefly?

7 MJ [COL POHL]: Sure.

8 TC [CDR LOCKHART]: Several things. First of all, this is
9 an interlocutory matter. This is not trial. And I understand
10 Mr. Kammen's reference to trial, that this is different.
11 What's key here is that what he's testifying about are his
12 duties in the same manner that the senior medical officer did.
13 He's not testifying about something not involving the accused
14 or the HVDs in general, and that's where the need to protect
15 his name comes in. And, again, it is an interlocutory matter.

16 As you stated earlier, several days ago, I believe,
17 it's a case-by-case analysis and the same -- the same reasons
18 applying to the senior medical officer still exist. He had,
19 you know, interaction with these individuals, and as Your
20 Honor -- as Your Honor has the government's brief.

21 Thank you, sir.

22 LDC [MR. KAMMEN]: I'm assuming the factual allegations
23 that they filed -- I didn't read their brief closely, it was

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1 served on us last evening -- is pretty much the same as in the
2 others, that, you know, some other person other than
3 Mr. Nashiri made some threat against some person other than
4 this guy, and, you know, there's -- you know, sort of
5 implication.

6 Again, there's been no threats directed at this
7 individual, who is no longer here. And so if the case-by-case
8 analysis is to mean anything, then it's got to mean that
9 people who are not here, you know, are -- have no real need to
10 testify in secret.

11 So, I mean, that's where we're at. I mean, you
12 know, this is where the rubber meets the road, because they
13 can say it's an interlocutory matter, but how is that really
14 any different? It's either an open proceeding like that
15 begins to resemble something that's real, or we just sort of
16 have this secret sham, let's keep all of the stuff secret
17 proceedings.

18 MJ [COL POHL]: Commander.

19 TC [CDR LOCKHART]: Yes, sir.

20 MJ [COL POHL]: When we discussed the protective order
21 dealing with camp personnel, the articulated concern was based
22 on their contact with the detainees.

23 TC [CDR LOCKHART]: Yes, sir.

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1 MJ [COL POHL]: Okay. This person no longer has contact
2 with the detainees?

3 TC [CDR LOCKHART]: That's correct, but the ----

4 MJ [COL POHL]: So anybody -- so I'm just saying is where
5 does your line now be drawn here?

6 TC [CDR LOCKHART]: It's the connection with the -- in
7 conjunction with his official duties. His connection with the
8 detainees, that they may somehow have some sort of retribution
9 or retaliation. Whether or not they're there now or two years
10 from now or whenever, those potential dangers are articulable
11 dangers are still present.

12 MJ [COL POHL]: Let me ask you this: I got the line about
13 the current people interacting with the detainees. I got that
14 line. But now you go to the line is that he interacted with
15 detainees in the past and therefore may be subject to a threat
16 in the future.

17 TC [CDR LOCKHART]: For his testimony today. His
18 testimony today, it is him testifying as to everything that
19 occurred during the official performance of his duties.

20 MJ [COL POHL]: So if a witness comes in and testifies on
21 another matter dealing with detainees, all those witnesses who
22 have ever testified, anything to deal with detainees, can
23 testify under a pseudonym because of a suspected potential

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1 harm?

2 TC [CDR LOCKHART]: Absolutely not, sir. And as noted in
3 the government's brief, there's an identifiable class of
4 individuals that have close connection and duties. And as you
5 notice, there's a comparison to the guard force with these
6 specific medical personnel, and that's the identifiable group
7 of persons whose identities the government is seeking -- well,
8 for today the government is seeking to not publicly release.

9 And, again, it may be a case by -- well, it is a
10 case-by-case basis analysis. For this particular individual,
11 the threats that have been made in his class of workforce, the
12 doctors, it is real. It's not everybody. And it certainly
13 isn't the FBI agent who is going to be testifying at trial,
14 whenever we go to trial. This is a very small subset of
15 individuals with articulable potential dangers.

16 MJ [COL POHL]: Thank you.

17 Mr. Kammen, do you have something new?

18 LDC [MR. KAMMEN]: Only this, Your Honor, in, I want to
19 say, *Basciano v. The United States*, the defendant was a
20 mobster who as part of his mob duties allegedly killed and was
21 on -- facing trial for killing other mobsters and for making
22 threats to the prosecutor who was appearing in -- who was
23 prosecuting him and the judge in front of whom he at one time

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1 appeared. Witnesses there didn't testify in secret.

2 Here the threats that the government identifies are
3 not made by this accused against -- they're made by
4 unidentified -- unidentified other people against other
5 unidentified other people having nothing to do with this case.
6 And the accused is held in a way, way more secure situation
7 than anybody in federal court. People here have no contact
8 with the outside world, period, no new paragraph. And so, you
9 know, they're drawing this imaginary threat where none in
10 reality exists. And it certainly doesn't exist against him.
11 He's gone.

12 MJ [COL POHL]: Last word, Commander.

13 TC [CDR LOCKHART]: Yes, sir. Just to clarify, his real
14 name is actually on the record. It's been provided to Your
15 Honor. It's just requested that it not be released. And this
16 is an active duty military officer, and he could be reassigned
17 here in the future.

18 MJ [COL POHL]: Let me think about it. We'll be in recess
19 for 15 minutes, and I'll give you my decision when I get back.

20 When the witness does testify, after he is sworn in,
21 whoever is doing the swearing in, remind him that this is an
22 unclassified setting and he's not to discuss any classified
23 material, and if he's not sure, the default is don't say it.

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1 Okay.

2 The commission is in recess for 15 minutes.

3 [The Military Commission recessed at 1057, 27 April 2014.]

4 [END OF PAGE]

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