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1 [The Military Commission was called to order at 1334,  
2 28 May 2014.]

3 MJ [COL POHL]: The commission is called to order. It  
4 appears all parties again are present that were present when  
5 the commission recessed.

6 Let's do 267B. Commander.

7 DDC [CDR MIZER]: Thank you, Your Honor, and good  
8 afternoon.

9 MJ [COL POHL]: Good afternoon.

10 DDC [CDR MIZER]: Judge, I think with respect to 267B, I  
11 would hope that the parties could agree that a fair tribunal  
12 is a basic guarantee of due process. In the pleadings, we  
13 dwelt on the Singer case which discusses how there is no  
14 general right to trial by a military judge alone, but  
15 acknowledges that there may be some case where passion,  
16 prejudice or public sentiment may work to deprive the accused  
17 of a fair trial.

18 And with this motion, and frankly with many motions  
19 in this case, Judge, I find myself asking if not this case,  
20 which case? And this is a case where we maintain that the  
21 passion, prejudice or public sentiment would prevent the  
22 accused from getting a fair trial by a members panel, or at  
23 least there is the potential that that's going to occur. And

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1 we would ask that the court allow him at the appropriate time  
2 at least the option to elect trial by military judge alone.

3 In fact, Judge, I think it would be difficult to  
4 imagine a case in the military context perhaps more  
5 prejudicial than this one. I can say that in our community,  
6 within the Navy, and certainly Naval officers of a certain age  
7 in the service, can probably pinpoint precisely where they  
8 were on the day that the COLE was attacked.

9 I mean, this is something that was important to our  
10 community. And given the range, as we addressed in the April  
11 session, the range of members that are going to be coming  
12 before this panel or going to be potentially seated here in  
13 the venire are going to be O-4s, O-5s, O-6s that were young  
14 officers just like I was in October of 2000, when, frankly, I  
15 was sitting in Newport instruction when someone came in and  
16 turned on the televisions and we watched what was happening in  
17 Yemen. And that's certainly something that was important to  
18 me and also important to, I think, generally the Navy as a  
19 whole, Judge. And those are going to be the members who are  
20 going to be seated in this panel.

21 We saw that, Judge, in Hamdan's case with the  
22 members that were detailed. And the prosecution is critical  
23 of us citing to Hamdan, but frankly, it's the only contested

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1 military commission that has occurred in 11 years and so it's  
2 the only representative sample that we have got. And the  
3 members that came down ----

4 MJ [COL POHL]: Wasn't al Bahlul a contested case?

5 DDC [CDR MIZER]: I don't believe that was a contested  
6 case at all, Judge. Dave Frakt sat on his hands during the  
7 panel.

8 MJ [COL POHL]: What I'm saying is it was a not guilty  
9 plea, but the way it was tried was not a fully --

10 DDC [CDR MIZER]: Indeed, Judge. The defendant boycotted  
11 the proceedings and the defense counsel did nothing during the  
12 entire case. On some level that's maybe a contested case, but  
13 without voir dire, I don't know who frankly sat on that panel.  
14 I think Hamdan qualifies as a contested case. I would  
15 disagree respectfully, Your Honor, that Bahlul does.

16 But that's what we have got. We have got one panel  
17 to judge by and the process fully fleshed out I think is  
18 illuminating. I think the individuals that came down, I think  
19 you heard some of those statements in the voir dire in that  
20 case. I mean, one was a classmate of Commander Lippold. And  
21 again, the COLE was on the charge sheet in the case. We have  
22 no reason to suspect that the Convening Authority is going to  
23 have any different process in this case.

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1 Another member, and it's on page 3 of our pleadings  
2 said, "I was flabbergasted and then I was saddened and then I  
3 said to myself, boy, you know, I sure hope that doesn't happen  
4 to me." And having stood watches in the Indian Ocean in that  
5 same time frame, 2000-2004, I think that that's probably, I  
6 would venture a guess to say, a universal sentiment, that we  
7 were all concerned about similar attacks and hoping that that  
8 doesn't happen to us.

9 I think that that's nothing but a candid admission  
10 by a member that you would expect from voir dire. And again  
11 that's going to be represented again, we believe, in the panel  
12 that is going to come before this commission in the future  
13 when the venire is ultimately settled.

14 Judge, we cited several examples in our pleadings  
15 from district courts which have overridden the waiver. You  
16 certainly have the right in district court to seek to have  
17 trial by judge alone and then with the concurrence of the  
18 U.S. Attorney, and ultimately the judge, you can elect that  
19 option. I certainly have done that in the Eastern District of  
20 Virginia. And that's simply what we are asking for here, is  
21 at least the ability to sit down and have a conversation with  
22 Mr. al Nashiri that doesn't include your choices are A or A.

23 After we take a look at the panel -- as the

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1 prosecution, I think, rightly points out, we don't know what  
2 the panel is going to look like. But after we look at the  
3 panel, we would at least like to explore that option because,  
4 frankly, Your Honor, trial by judge alone is appropriate, I  
5 think in certain cases, I think particularly a case that has  
6 and does evoke such passion, prejudice and public sentiment,  
7 particularly against this military or within the military  
8 community, and I would say more narrowly within the sea  
9 services.

10 Judge, I think it's important here to loiter, if I  
11 may, on Toth v. Quarles which is also cited in the papers.  
12 It's one of the series of the murdering spouses cases that I  
13 referenced before, although Toth himself was an ex-serviceman,  
14 a civilian, but not like the other murdering spouses cases  
15 which were, in fact, spouses who had killed their husbands.

16 And it's important because what Mr. Nashiri is going  
17 to get is not a jury, and military practitioners should know  
18 the importance of that. But the Supreme Court lays it out in  
19 Toth on page 17 that, "We find nothing in the history or  
20 constitutional treatment of military tribunals which entitles  
21 them to rank along with Article III courts as adjudicators of  
22 the guilt or innocence of people charged with offenses for  
23 which they can be deprived of their life, liberty or property.

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1 Unlike courts, it is the primary business of armies and navies  
2 to fight or be ready to fight wars when occasion should  
3 arise." And it goes on to say, "And conceding to the military  
4 personnel that high degree of honesty and sense of justice  
5 which nearly all of them undoubtedly have, it still remains  
6 true that military tribunals have not and probably never can  
7 be constituted in such a way that they can have the same kind  
8 of qualifications that the Constitution has deemed essential  
9 to the fair trial of civilians in federal courts." And the  
10 court, I would add here, is being critical of the pre-1968  
11 Uniform Code of Military Justice, not what is taking place  
12 here, which is very different from the Uniform Code of  
13 Military Justice.

14           And I won't get into all of the differences.  
15 Your Honor is well aware of our lengthy discussions on the  
16 disparity between this process and traditional either  
17 courts-martial or military commissions convened under the  
18 UCMJ. The court points out that, for instance, the  
19 Constitution does not provide life tenure for those performing  
20 judicial functions in military trials. They are appointed by  
21 military commanders and may be removed at will. Nor does the  
22 Constitution protect their salaries as it does the judicial  
23 salaries.

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1           And then the court turns -- and this is most  
2 important -- to the jury, and the distinction between a  
3 members panel and a jury, that there is a great difference  
4 between trial by jury and trial selected by members of the  
5 military forces. It is true that military personnel, because  
6 of their training and experience, may be especially competent  
7 to try soldiers for infractions of military rules. Such  
8 training is no doubt particularly important where an offense  
9 charged against a soldier is purely military, such as  
10 disobedience of an order, leaving post, et cetera.

11           But whether right or wrong, the premise underlying  
12 the constitutional method for determining guilt or innocence  
13 in federal courts is that laymen are better than specialists  
14 to perform this task. This idea is inherent in the  
15 institution of trial by jury, and it is those jurors, chosen  
16 from different walks of life, bring into the jury box a  
17 variety of different inferences, feelings, institutions and  
18 habits.

19           Such juries may reach completely different  
20 conclusions than would be reached by specialists in any single  
21 field, including specialists in the military field. And on  
22 many occasions fully known to the founders of this country,  
23 jurors, plain people, have manfully stood up in defense of

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1 liberty against the importunities of judges, and despite  
2 prevailing hysteria and prejudices -- and despite prevailing  
3 hysteria and prejudices, Judge.

4 MJ [COL POHL]: Isn't your argument then would be for a  
5 civilian?

6 DDC [CDR MIZER]: We made that argument, I think, Judge.

7 MJ [COL POHL]: You quote that case for the proposition  
8 that specialized knowledge of a military community is not  
9 as -- is not preferable to having a cross-section of the  
10 civilian community. Well, you are requesting now instead of a  
11 multiperson member of the military community, one person in  
12 the military community.

13 DDC [CDR MIZER]: Judge, we have a Hobson's choice, and I  
14 will leave it at that. I think we would choose neither of the  
15 above, frankly, but if our choice is between a military judge  
16 without tenure -- to discuss this, I mean they are talking  
17 about the flaws of the pre-1968 UCMJ, which again we won't get  
18 back into -- if our choice is between an untenured judge and a  
19 military panel that has had the experience, the important  
20 experience, the impactful experience, who has grown up as  
21 Naval officers in many cases with this looming large in their  
22 service career, that we would like the right to at least  
23 explore that option with Mr. Nashiri.

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1 MJ [COL POHL]: Would the election be made before voir  
2 dire then?

3 DDC [CDR MIZER]: Judge, I think it may be unusual, but  
4 given the circumstances of this case, that we should see what  
5 we get actually over in the box. And that's one of the things  
6 that the prosecution complains about, don't talk about Hamdan,  
7 let's wait and see what this panel looks like. And to the  
8 extent that that's an invitation, we would take them up on  
9 that invitation. We would like to take a look at the panel,  
10 see what we have and then make, again ----

11 MJ [COL POHL]: Is there any -- in places that permit a  
12 judge alone option, do any of them have that procedure, that  
13 election made after voir dire?

14 DDC [CDR MIZER]: Judge, I would have to look at the  
15 Federal Rules of Criminal Procedure. I believe that would be  
16 left to the discretion of the district court judge. I don't  
17 know.

18 MJ [COL POHL]: Okay.

19 DDC [CDR MIZER]: But if what we are really after here is  
20 justice, if what we are really after here is fairness, we  
21 would certainly ask that Mr. Nashiri be given the chance to  
22 choose between those options, because, and I will finish with  
23 Toth, where the court says there are dangers lurking in

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1 military trials which were sought to be avoided by the Bill of  
2 Rights and articles of our Constitution.

3 Free countries of the world have tried to restrict  
4 military tribunals to the narrowest jurisdiction deemed  
5 absolutely essential to maintaining discipline among troops in  
6 active service. And that's really where military jurisdiction  
7 has resided for the past 60 years.

8 One of the cases that we cited in the brief,  
9 Greenstreet, and then also the Lee case, which judge you may  
10 be familiar with, was the -- I believe it was the grandson of  
11 Robert E. Lee fighting over his house, and more importantly  
12 his flower garden and plantation, which you would know as  
13 Arlington National Cemetery. And in the decades following the  
14 Civil War they wanted their house back, in essence. And that  
15 case went all the way up to the Supreme Court. And as the  
16 Greenstreet case remarks, "It is an application of a firm  
17 judicial hand extended to exert a calming influence over the  
18 hysteria and oftentimes injustice prevailing in relations  
19 between the nation's government and the citizens of the  
20 defeated confederate states."

21 And in that case, the Supreme Court had to come in  
22 and say, look, despite Robert E. Lee's popular belief, at  
23 least in the 1880s, that he was a traitor, that he had

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1 betrayed his country, that he didn't -- that the government  
2 hadn't deprived him or hadn't deprived him of property without  
3 due process of law. And it is that firm judicial hand that is  
4 required oftentimes in times like this in that case to deal  
5 with the defeated confederate states and in this case to deal  
6 with alleged members of the defeated organization that is  
7 al Qaeda.

8           And, Judge, we believe that that option, the ability  
9 to rely upon that firm judicial hand is necessary if there is  
10 going to be justice at these commissions and not just victor's  
11 justice, Judge. Thank you.

12           MJ [COL POHL]: Thank you. Trial Counsel?

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

14           MJ [COL POHL]: Good afternoon.

15           ATC [LT MORRIS]: It is telling, if defense counsel is  
16 seeking justice at this commission, that their requested  
17 relief is contrary to the prevailing jurisprudence in capital  
18 cases. I don't need to point out to Your Honor that what they  
19 are requesting is contrary to what our statute explicitly  
20 states. It's unsupported by case law and, as I just stated,  
21 if you examine jurisprudence in capital cases, there is this  
22 prevailing thought, and we discussed this in Ring, we can  
23 discuss this in Singer, that juries, members, not the judge,

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1 is better entrusted with the decisions of life and death. And  
2 that is what Congress did in enacting the Military Commission  
3 Act. They placed this decision with the members.

4 So right from the outset, we have Congress having  
5 their finger on the pulse of jurisprudence in capital cases.  
6 The defense's relief is a fringe request. It is not  
7 consistent, and we will get into this, with what in fact, that  
8 jurisprudence is.

9 If you look at the statute, Your Honor, Rule 501  
10 states that in a capital military commission, a capital  
11 military commission shall consist of a military judge and at  
12 least 12 members. The word there is "shall." It's not  
13 optional.

14 So with a statute that's clear, that's explicit, for  
15 defense's request in attempting to, Your Honor, trailblaze  
16 contrary to this statute, to ignore this statute, it's  
17 problematic on two fronts. First, there is no deference being  
18 given to Congress, who is acting within their authority  
19 pursuant to the Constitution in enacting the Military  
20 Commission Act, no deference to the Secretary of Defense in  
21 promulgating the rules.

22 Secondly, it's problematic in a bigger sense -- and  
23 I am surprised that defense counsel doesn't share this

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1 concern -- is that it is attempting to introduce a  
2 jurisdictional defect into this commission, that -- Rules for  
3 Military Commission 201 gives five aspects that must vest in  
4 this military commission for jurisdiction to vest. Five  
5 things. And under 201(b)(2), it states that, "The military  
6 commission must be composed in accordance with these rules  
7 with respect to the number and qualifications of its  
8 personnel." And it says personnel there is the military judge  
9 and its members.

10           So by removing the members from this commission, you  
11 are in essence removing the jurisdiction for this commission  
12 to continue. And if you look at the discussion section in  
13 that rule, it raises that caution of doing that. It says that  
14 it takes away the power from the commission if you remove one  
15 of these five things. And we have quoted the 2005 case of  
16 U.S. v. Alexander that says that to remove a jurisdictional  
17 aspect from a case, you take away the power for the court to  
18 continue.

19           These cautions are there in the discussion section,  
20 the cautions are there in the case law and this is something  
21 that I am surprised that defense counsel isn't equally  
22 concerned with at the outset, to elect to proceed by judge  
23 alone that we would be robbing this commission of its validity

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1 to continue.

2 Now, defense counsel did cite two cases, they are  
3 correct. But to state that these cases give authority for the  
4 proposition that they are requesting is entirely incorrect.  
5 They cite a 1965 Supreme Court case of U.S. v. Singer. If you  
6 look at Singer, the holding in Singer is entirely opposite to  
7 what defense counsel is requesting today. In Singer, there  
8 are two things we need to state from the outset. One, this is  
9 a mail fraud case, this is not a capital case; and then two,  
10 this is examining constitutionality of a rule, Federal Rules  
11 of Criminal Procedure 23(a), which when the defense requests  
12 and the judge says yes and the prosecution says yes, then the  
13 defendant can proceed with a trial by judge alone. So Singer  
14 said that because he has got a Sixth Amendment right to a  
15 trial by jury, he believed he had the corresponding or the  
16 corollary right to a trial by judge alone, and the court, the  
17 Supreme Court emphatically said no, you do not have that  
18 right.

19 But in dicta, Your Honor, they say we need not  
20 decide here today whether there might be some circumstances  
21 where it would warrant a defendant without the waiver of the  
22 prosecution being able to proceed with a trial by judge alone.  
23 And they cite two cases, two cases from the 1970s that seem to

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1 pick up on this dicta. The first case, Braunstein and the  
2 second case Panteleakis. I mention these are from the '70s  
3 because, if you read the opinion, they pick up on this. In  
4 1974 Congress passed the Speedy Trial Act and so it made time  
5 considerations a major factor in judicial decision-making. So  
6 in Braunstein the court says, and I quote, "In a substantial  
7 sense, a trial by jury necessarily adversely affects the  
8 rights of other defendants and of the public to have other  
9 cases tried within the limits set by this Act."

10 So these words should be concerning to all because  
11 you have these courts in the '70s that are making judicial  
12 decisions based on trying to do things quick enough, trying to  
13 do things cheap enough, and these are things that the  
14 Braunstein court actually talks about. Most telling,  
15 Your Honor, is that the Braunstein court did not decide this  
16 on constitutional grounds. It very clearly says we need not  
17 decide this on constitutional grounds but instead on practical  
18 grounds.

19 If you read the Braunstein opinion, they say because  
20 this is a very complex case, because it would take too long to  
21 explain this to members, what we are going to do is we are  
22 going to give this to a judge alone. And this should be  
23 concerning to everyone, defense counsel and to Your Honor

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1 included, that to try to do something cheap enough, quick  
2 enough, that they went with a judge alone. And it certainly  
3 isn't what Congress did when they enacted the Military  
4 Commission Act. What Congress did when they embedded this  
5 protection in stating that because this is a death penalty  
6 case, you are going to get a members trial.

7           The second case that they cite is Panteleakis, and  
8 this is five defendants, a case also in the '70s, and there is  
9 no conspiracy charged here where the evidence for one  
10 defendant would cross over to the other defendants.

11           If you read the holding in that case, the judge very  
12 clearly held that because it would be too complicated for the  
13 members to compartmentalize the evidence, to -- in a sense  
14 they wouldn't be able to, with the time allotted to them, be  
15 able to figure out what evidence applied to what defendant, we  
16 are going to go ahead and go with a military -- or a trial by  
17 judge alone. And that's the whole impact of Panteleakis. And  
18 that's what the defense cites for this extraordinary relief in  
19 a capital case in wanting to proceed in trial by judge alone.  
20 And again in Panteleakis we had a fraud case. Braunstein was  
21 also a fraud case.

22           To close, and I think this is probably the most  
23 important, when we look at what Congress actually did, they

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1 have their finger, as I stated earlier, on the pulse of  
2 jurisprudence in capital cases. Their enacting the Military  
3 Commission Act is similar to it. In the last hearing we  
4 discussed at length the Ring v. Arizona case, and in there we  
5 saw the court state, and if I can read this, "The superiority  
6 of judicial fact-finding in capital cases is far from  
7 evident." I believe this is from Scalia's concurrence. So  
8 here we are saying we need to entrust these important  
9 decisions to a jury, not to a judge.

10           In the 1965 case that defense counsel cited, the  
11 Supreme Court said, "In light of the Constitution's emphasis  
12 on jury trials, we find it difficult to understand how the  
13 petitioner can submit the bold proposition that to compel a  
14 defendant in a criminal case to undergo a jury trial against  
15 his will is contrary to his right to a fair trial or to a due  
16 process."

17           So here is the Supreme Court saying that with this  
18 capital case, we entrust this to the members, to the jury, not  
19 to a judge. And when you look at a quick survey of the 34  
20 states that have the death penalty, upwards of 27 of them  
21 require the jury to make that final decision, and only one  
22 state, Montana, only one state has a capital scheme similar to  
23 what defense is requesting today.

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1           So you have the Supreme Court saying let's give it  
2 to the jury, you have an overwhelming amount of capital  
3 jurisprudence saying let's give it to the jury, and contrary  
4 to statute, without any case law, contrary to the  
5 jurisprudence which Congress codified in the Military  
6 Commission Act, defense is requesting relief.

7           When you actually look at not just the accused here  
8 today and the voir dire that is in front of us, and you look  
9 at the protections and provisions that are also embedded in  
10 the statute, you start to see why things like voir dire are  
11 important. You start to see why it was important in the cases  
12 that voir dire has been exercised.

13           There was a brief discussion at the beginning that  
14 only Hamdan and Bahlul resulted in panels being seated, but  
15 that's not true. And in Bahlul, if defense counsel sat on  
16 their hands during voir dire, well, I don't expect defense  
17 counsel during voir dire to do the same. I expect them to  
18 exercise peremptory challenges. I expect them to take  
19 advantage of the liberal challenges for cause that are also  
20 codified for the protection of the accused. And there are  
21 other cases in which this has been done in military  
22 commission, not just these two cases, Khadr, Noor Uthman,  
23 Qosi, all of these cases where you had panels being seated.

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1           And defense counsel's concern that in another case,  
2 in Hamdan, of somebody that may have known the commander of  
3 the COLE further magnifies the importance of voir dire to be  
4 able to question the members that are going to be here. And  
5 as Your Honor has said time and time again, we are not going  
6 to start this commission until we have 12 qualified members.  
7 And we partner with that. It is not the 12 most qualified  
8 members that come in the pool, it is 12 qualified members.  
9 And defense counsel, with a jury consultant, with all of the  
10 experience that they have, we feel confident that they will be  
11 able to effectively use the voir dire process, effectively use  
12 that protection to find those 12 qualified members.

13           So in conclusion, Your Honor, so as not to  
14 trailblaze away from our statute, so as not to potentially  
15 invalidate this commission from the outset, so as not to  
16 proceed without any legal authority, so as not to move away  
17 from the very heart of the jurisprudence in capital cases  
18 which Congress enacted in the Military Commission Act, we ask  
19 that Your Honor deny the defense's request for relief.

20           MJ [COL POHL]: Thank you.

21           DDC [CDR MIZER]: Thank you, Your Honor.

22           MJ [COL POHL]: Commander, anything further?

23           DDC [CDR MIZER]: Judge, I stopped counting how many times

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1 the prosecution used the word jury, and that was the entire  
2 point of me reading to you essentially half a page of Toth v.  
3 Quarles about the distinction between a members panel and a  
4 jury. I don't disagree with any of the states that the  
5 prosecution just rattled off. I don't even disagree with  
6 Justice Scalia on this point, that a jury may be better than a  
7 judge to adjudicate something as important as a capital case.  
8 And if we are going to get a jury down here, that will be  
9 great, we would love to have a jury. But we are not going to  
10 get a jury, Judge. We are going to get a venire of  
11 hand-picked military members, hand-picked by that entity  
12 possessing prosecutorial discretion that's going to sit in the  
13 box. And we think here that we should at least have the  
14 option of choosing between that venire and a military judge.  
15 Judge, I don't dispute that this isn't provided for  
16 in the UCMJ. I think my only response to that would be the  
17 death penalty hasn't been around, at least in its current  
18 form, in UCMJ since Matthews was decided in 1984, all that  
19 long. And really you could really probably count up the  
20 number of capital cases on maybe four hands. I guess my point  
21 there would be, I am not entirely certain that many aspects of  
22 the UCMJ aren't unconstitutional as they stand in 2014. It's  
23 simply that we try so few of these cases.

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1           And I think it's worth adding that if you think of  
2 the cases that have come out -- Gray, Loving, Curtis,  
3 Murphy -- I mean, you are not talking about successful  
4 prosecutions in any of those cases because they all get  
5 overturned on some procedural or constitutional basis.

6           And so I think to say look how great the UCMJ is, I  
7 think that there are flaws that remain unchallenged even  
8 within the Uniform Code itself.

9           MJ [COL POHL]: But did any of those cases turn on the  
10 requirement that you could not go judge alone?

11          DDC [CDR MIZER]: We haven't got there, Judge, is my  
12 point. And we haven't also gotten to the requirement that you  
13 can't plead guilty in a military commission. Fortunately,  
14 that's something ----

15          MJ [COL POHL]: No, I am talking about the military cases  
16 you cited.

17          DDC [CDR MIZER]: Yes, Judge.

18          MJ [COL POHL]: They all were members cases?

19          DDC [CDR MIZER]: I believe so, Judge.

20          MJ [COL POHL]: They were precluded from going judge alone  
21 in a capital case?

22          DDC [CDR MIZER]: Yes.

23          MJ [COL POHL]: Were any of them overturned or even that

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1 aspect substantially discussed on appeal?

2 DDC [CDR MIZER]: On that issue, I don't know, Judge. But  
3 I am certain I would -- I was reviewing the Witt pleadings  
4 last month, and the brief is 500 pages with 400 assignments of  
5 error. I don't know, Judge, but I would venture a guess that  
6 perhaps it was raised, but there are more fruitful errors in  
7 those cases that those cases were resolved upon, Judge.

8 I guess my point is the UCMJ itself isn't even the  
9 holy grail. We don't even know that parts of the UCMJ are not  
10 unconstitutional, and in some respects they have been  
11 determined to be unconstitutional. And then we have this  
12 system, which isn't the UCMJ, which departs from the UCMJ in  
13 significant aspects, which is completely untested. And we are  
14 preserving this challenge as well, Judge.

15 MJ [COL POHL]: Okay. I understand. Thank you.

16 Trial Counsel, anything further?

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

18 MJ [COL POHL]: Okay. Thank you. Let's do 270.

19 Good afternoon.

20 ADDC [Capt JACKSON]: Good afternoon, Your Honor.

21 Your Honor, the factual predicate that forms the  
22 basis for the motion under 270 goes along with Your Honor's  
23 ruling in 045H. Essentially in 045H this commission ordered

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1 that the prosecution should provide a notice any time it gave  
2 discovery after its September 2013 deadline. And in short,  
3 what we are going to talk about in this motion is evidence  
4 that's over a decade old, that has been in possession of the  
5 government, the big government, for the entire time, that has  
6 only recently become in the possession of the defense.

7           And, Your Honor, for purposes of argument, I  
8 understand that in the 045 series we have several arguments  
9 that relate to scheduling, and this is a more narrowly  
10 tailored argument geared specifically towards the government  
11 notices. And that may impact the scheduling arguments later  
12 on, but just understand that I am going to try to remain  
13 within that lane.

14           Essentially what the defense is requesting,  
15 Your Honor, is a finding that the government has been  
16 noncompliant in regards to your order of 045H; that the  
17 government be ordered to provide additional explanation as to  
18 this very delinquent discovery that was turned over after your  
19 September deadline; and that the military judge can fashion  
20 appropriate remedies that fall under the power of this  
21 commission in 701(1) and 701(3).

22           Now, essentially the spirit and intent of the  
23 court's order in 045H was to ensure that this process kept

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1 moving and to hold the government's feet to the fire in terms  
2 of their affirmative obligations in providing discovery to the  
3 defense. This court set a September 2013 deadline for any  
4 affirmative discovery turning-over and to provide an  
5 explanation when that didn't happen. And the government has  
6 been in compliance with the form but not the substance of what  
7 that order entailed.

8           If we want to talk specifically about the things  
9 that were turned over, we have documents that have been in the  
10 possession of the government since November of 2008. And to  
11 be certain, these aren't just any types of documents,  
12 Your Honor. We have got statements from the accused that have  
13 been in the possession of the government since November of  
14 2008. We have photographs of the crime scene that have been  
15 in the possession of the government for over a decade.

16       MJ [COL POHL]: What remedy do you want me to do, to give  
17 you? I read your brief. You know, do you want me to tell  
18 them to stop giving you discovery as they find it?

19       ADDC [Capt JACKSON]: No, Your Honor. We want a more  
20 detailed explanation as to why we are getting this discovery  
21 at the time that we are getting it and a finding ----

22       MJ [COL POHL]: And to what end? You get a detailed  
23 explanation?

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1           ADDC [Capt JACKSON]: Your Honor, as I said before, the  
2 ruling and the finding of this motion is going to touch the  
3 045 series of scheduling in probably a very significant way,  
4 that this entire process is hinging upon discovery, discovery,  
5 discovery. And to have a finding in this motion that the  
6 government has been noncompliant in their discovery  
7 obligations could impact those arguments later on.

8           MJ [COL POHL]: Okay.

9           ADDC [Capt JACKSON]: So essentially, Your Honor, like I  
10 was saying, we have documents, specifically 85 letters that  
11 were written by Mr. al Nashiri, that are essentially  
12 statements of the accused that have been in the possession of  
13 the government since November of 2008. And the government, in  
14 their response to 045, in their 045Z, say that this  
15 information has only recently come into the possession of the  
16 government; and I think we need to make note that coming into  
17 the possession of the government, they have a very crabbed  
18 view of who the government is in this case.

19                   The government does include the prosecution and any  
20 other governmental entities or branches that are closely  
21 aligned with the prosecution. Specifically, we have documents  
22 that have come from the FBI in this case and we have documents  
23 that have come from JTF-GTMO that they are saying are only

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1 recently coming into the possession of the government.

2           Now, the prosecution would argue that these entities  
3 are outside of their control, that it's not a part of the  
4 prosecution; but we know that that's not the standard that the  
5 prosecution has when seeking discovery affirmatively from  
6 outside sources. And if there is anything at the bare minimum  
7 that should be turned over in affirmative discovery, it's  
8 statements from our client that go towards his conditions of  
9 confinement, which are mitigating. And if you look at the  
10 *Kyles v. Whitley* case, then mitigating information is one of  
11 those things that they have an obligation to go out and seek  
12 that information so they can turn that over to us. And the  
13 fact that they want to now rest on their laurels and say, oh,  
14 but we didn't have it, five, ten, 13 years later is a poor  
15 view of discovery, Your Honor, to just keep it very mildly.

16           The entire premise of the defense being able to  
17 prepare for this capital case and the fact that such a  
18 lackadaisical view of providing discovery is being taken is a  
19 disservice to the work that we are doing here in this  
20 commission at every hearing and every proceeding; that such  
21 things, if they are going to just say that it's in the  
22 possession of the big government but not in the possession of  
23 the prosecution -- which actually, incidentally, Your Honor,

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1 they actually changed in their brief. It went from being in  
2 the possession of the government to being in the possession  
3 of -- not being in the possession of the prosecution.

4           So the questions that arise here are why are we  
5 getting this information from the FBI a decade later? Why are  
6 we just getting pictures of the crime scene a decade later?  
7 And when the government says that it's just come into their  
8 possession -- specifically, some of these photographs were  
9 taken by MA1 Crowe. And according to the discovery that the  
10 government has turned over to the defense, those photographs  
11 were provided to the FBI approximately three days after the  
12 incident occurred, and so that's 13 years ago, Your Honor.

13           And so the question is -- we are not trying to infer  
14 any malice on the prosecution right now, but the question is  
15 is it just that the government entities that they are  
16 requesting this information from are being nonresponsive,  
17 being uncooperative, that the prudential search requests that  
18 are being submitted for this information are being unanswered  
19 or are poorly worded where the information is not being  
20 relayed back to the prosecution so they are not giving it to  
21 us? Is there a reluctance for them to cooperate? And if so,  
22 that calls into question many of the documents that we have  
23 requested over time that are only recently coming into the

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1 possession of the government.

2 Now, if the prosecution would have had its way, we  
3 would have been in trial in February of 2013 without very  
4 essential statements from our client regarding his conditions  
5 of confinement right here at the Guantanamo facilities.

6 So, Your Honor, what the defense is asking in its  
7 relief is that you do find that the information provided in  
8 045S, 045U, 045Z, 045DD, 045GG, which are all of the  
9 corresponding notices of compliance for the government  
10 conforming with 045H, are actually not compliant; that they  
11 have complied in form but not substance; that they have  
12 provided us actually no concrete reason why this information  
13 is being provided at this very late hour.

14 And no, the defense is not arguing that we would  
15 rather not receive the discovery late than to receive it on  
16 time -- than receive it at all. The defense is arguing that  
17 in order for us to adequately prepare for our case, in order  
18 for this commission to adequately address the 045 series in  
19 terms of scheduling -- and we understand that there are other  
20 scheduling issues that are out there with regard to discovery,  
21 such as in 120, so this is aside from that, and we do  
22 understand that the commission has said that the trial  
23 deadline is a moving target, we understand that.

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1           But in order for us to adequately assess all of  
2 those moving parts and see where we are in the preparation of  
3 a death penalty case, next month we can't get more documents  
4 that are going to be, oh, by the way, this has been floating  
5 around in FBI cyberspace for the last decade and we are just  
6 getting around to giving you this.

7           So for that reason, Your Honor, we are asking that  
8 the remedies that the defense has articulated in our motion,  
9 be it finding that the government is noncompliant with the  
10 order that you gave in 045H, in having the government explain  
11 with more detail what function of the government was in  
12 possession of these documents and why we are just receiving  
13 them now, and to fashion any other appropriate remedy later on  
14 down the line, of course, depending on the updated trial  
15 schedule, as to how this information can be used, because we  
16 understand that the government's -- the judge's order was not  
17 just to check a box in 045H.

18           It was because this commission wanted to hold the  
19 government's feet to the fire in terms of their production of  
20 discovery, to take hold of the discovery process, which is in  
21 the power of this commission under 701(1) and 701(3) where you  
22 can order a scheduling for discovery and you can take  
23 appropriate remedies when you find that the government has not

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1 met those obligations. And for that, Your Honor, we ask that  
2 you grant the defense motion in 045H -- in 270.

3 MJ [COL POHL]: Thank you.

4 Trial Counsel.

5 ATC [Maj RUGE]: Good afternoon, sir.

6 MJ [COL POHL]: Good afternoon.

7 ATC [Maj RUGE]: Sir, just two quick points on this.

8 First, the government has complied with Rule 701 and with  
9 045H. As both the defense and the commission has noted, there  
10 is a continuing duty to disclose information and the  
11 government will continue to seek it out.

12 Second, there is really no connection, I think as  
13 the commission was touching upon, between the relief --  
14 between the individual discovery at issue here and the relief  
15 sought. I mean, the question, as you put it, to what end?

16 So starting with having complied, I mean, since the  
17 September of 2013 deadline, the government has continued to  
18 seek out and produce discoverable information to the defense.  
19 That is our obligation. We have said from the get-go that we  
20 are going to continue to look through that. There are  
21 millions upon millions of documents in many agencies of the  
22 United States Government that we are looking for. And the  
23 defense is absolutely correct. I mean, there are some that

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1 are, as the case law says, allied with the investigation where  
2 we have an increased duty to look through those files. And  
3 the FBI is certainly one of them. And we are looking through  
4 them and we are finding them.

5 I also want to focus on the actual 045 notices here  
6 for a moment, as we are talking about that because one of the  
7 things that the defense is doing is they are putting  
8 everything in the same basket. If you look at those 045H  
9 notices, you will see that there are a lot of reasons and  
10 different types of information that are being given and there  
11 are reasons that are being given to this date. Some of them,  
12 even though they are photographs of things we had for a long  
13 time, they are newer photographs that we have produced, lower  
14 resolution photographs, like the things from MA Crowe. It  
15 wasn't that those images hadn't been produced before, it was  
16 when we came into possession of better resolution photos, we  
17 produced those as well. Similar items, where we came across  
18 other translations or we made new translations or we made  
19 photographs of evidence that's been available for the  
20 defense's review and we produced those to the defense as well.

21 So all this information that's been provided after  
22 the September 30 date, there is, you know, a wide -- there's  
23 an array of it. It's because we keep on looking for it. And

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1 we not only keep on looking for it, but new stuff keeps  
2 getting produced.

3           And it's that lack of specificity in the defense  
4 motion that really goes to the second point. They are not  
5 pointing to a piece of evidence or a piece of discovery and  
6 saying, well, my getting it on this date has caused some  
7 prejudice that is identifiable that would be at the basis of a  
8 motion. They are trying to get this, as we say in our brief,  
9 this meta-relief, that you look at these as a whole and say  
10 everything that has been produced after is, on its face,  
11 insufficient and we are going to take -- we are going to get  
12 to that point right now and then, as defense counsel says,  
13 later on down the line maybe marry that up with some  
14 appropriate relief.

15           And that's not how a discovery motion works. How it  
16 works you have a particular issue, you allege some sort of  
17 prejudice that would warrant an appropriate relief, and unless  
18 you have done that, the commission is in no position to  
19 determine if that relief is appropriate or not.

20           Any questions from the court?

21           MJ [COL POHL]: No, thank you.

22           Defense, anything further?

23           ADDC [Capt JACKSON]: Briefly, Your Honor. Your Honor,

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1 the defense did say that this motion marries very closely to  
2 the 045 series in terms of scheduling. And in order to go  
3 into those scheduling discussions with a very open mind and a  
4 very concrete understanding of what is being provided, how  
5 late it is being provided, and what efforts the government is  
6 actually taking to provide that information to the defense, it  
7 is absolutely necessary to have a ruling, and this is not  
8 preliminary, this is not trying to put the cart before the  
9 horse.

10           Essentially, the government has information that  
11 is -- in their brief they are saying it was in the possession  
12 of other governmental entities that they had submitted PSRs to  
13 before, and in updating those PSRs, they are just getting this  
14 information. So this is not -- it is a motion related to  
15 discovery, but this is not a motion to compel. This is not a  
16 discovery motion. This is asking that the government go back  
17 and, with more specificity, explain themselves as to why this  
18 information is just -- and had they done that in some of these  
19 instances -- we are not asking for every single line item to  
20 say you have been noncompliant, but had they done that in some  
21 of these specific instances that have been mentioned in 045Z,  
22 they are correct, some of those things could have been  
23 rectified. But that's the problem with the government notices

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1 as they stand on their face right now. And in looking and  
2 saying, oh, this information just came into our possession and  
3 so we are turning it over to you now, that is a problem.

4 So the issue of specificity is one that the defense  
5 clearly articulated in our motion with saying that the  
6 justifications that the government has given thus far are so  
7 very watered down as to what the actual facts were and why  
8 they are just coming into the possession of this information  
9 that we are not able to actually address what needs to be  
10 addressed in the 045 series of scheduling and how this should  
11 be addressed by the commission in terms of an appropriate  
12 ruling as to whether or not they have complied with their  
13 discovery obligations.

14 Your Honor, we don't know how many times we have  
15 heard the government say that they have completed all of their  
16 affirmative discovery obligations in this case, and it is that  
17 type of misleading statement, when we are constantly getting  
18 things that it's not new information -- part of the  
19 government's argument is that the fact that the government  
20 came into possession and turned over more discovery should not  
21 be a surprise to the defense.

22 Well, that should not be a surprise to the defense.  
23 But what is shocking to the defense is that they are

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1 statements from our client regarding his conditions of  
2 confinement that have been in the possession of the government  
3 since 2008, conditions of confinement which have been the  
4 topic of numerous motions in this commission, that go  
5 specifically towards a lot of the mitigation motions and all  
6 the things that we have discussed in several other pleadings.

7           So, no, we should not be shocked -- I mean, we  
8 should not be surprised that they are continuing with their  
9 discovery obligations, but certain things being turned over at  
10 this point in this litigation process is shocking and must be  
11 addressed by this court. And the court does have the power to  
12 address these things because, in accordance with 701(1), the  
13 court did issue a deadline for the government to provide this  
14 information and to give some sort of justification. And in  
15 accordance with 701(3), the court has the ability to remedy  
16 that situation and -- if the government has become  
17 noncompliant.

18           And, Your Honor, it is still the defense's position  
19 that just saying that things have come into the possession of  
20 the government at this juncture is being less than candid with  
21 this tribunal. And less than candid is not going to get us  
22 anywhere in terms of progressing our 045 series, in addressing  
23 all the scheduling issues regarding discovery.

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1           That's why we are seeking this type of remedy,  
2 Your Honor, because in these things we can find that the  
3 government is noncompliant and that they have not provided an  
4 adequate justification or explanation as to why this  
5 information is so tardy and being turned over to the defense  
6 then that will be used in our scheduling discussions later on.

7           MJ [COL POHL]: Thank you.

8           ADDC [Capt JACKSON]: Thank you, Your Honor.

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

10          ATC [Maj RUGE]: Two very brief points, Your Honor. First  
11 of all, the defense has referenced to statements of the  
12 accused, but I think defense counsel has made it clear that we  
13 are not talking about Rule 301 stuff, they are talking about  
14 just things that have nothing to do with the offense, that  
15 apparently have to do with the conditions of confinement.  
16 Something which, as we know from many, many motions, they have  
17 had ample opportunity to describe, to discuss with their  
18 client, and there is no indication that there is anything in  
19 that material that is new, that hasn't, in fact, been pled to  
20 this commission.

21           And I think this also leads into the other point  
22 with regard to candor and what defense counsel was talking  
23 about when she first came up about the difference between -- I

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