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1 [The R.M.C. 803 session was called to order at 1334, 3 March
2 2015.]

3 MJ [Col SPATH]: These commissions are called to order.
4 All the parties who were present before the last recess are
5 again present.

6 So our last outstanding motion, at least for these
7 proceedings, is 248H. Trial Counsel, you may proceed.

8 CP [BG MARTINS]: Good afternoon, Your Honor. We
9 appreciate this opportunity to orally argue this motion for
10 reconsideration. We are in 248H, which is our motion that you
11 reconsider a paragraph of your order in 248G, that's the
12 paragraph 5 of that order.

13 Perhaps it is a matter of wording, perhaps it is
14 something more intentional, but our reading of that is that it
15 unjustifiably and without any identifiable lawful authority
16 operates to exclude highly relevant and probative evidence
17 that we believe is necessary to prove that the bombing of the
18 United States -- or USS COLE in the harbor of the city of Aden
19 was a terrorist attack on 12 October.

20 The paragraph of that order reads, Your Honor, "To be
21 clear, the Prosecution can consider only the U.S. Navy
22 crewmembers on board the USS COLE along with any
23 foreign-national individuals on board the COLE at the time of

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1 the attack to be the individuals whom the accused had a
2 'wanton disregard for human life' when attacking the USS COLE
3 and killing 17 United States Sailors." That's the text of
4 paragraph 5. Why don't we go ahead and pull it up, Appellate
5 Exhibit 248K, page 4, Staff Sergeant, if we could publish
6 this. The court security officer and the clerks all indicated
7 to me these were cleared. Counsel had no objection to using
8 these.

9 MJ [Col SPATH]: We can publish to the audience as well.

10 CP [BG MARTINS]: And I'm referring to this is an excerpt,
11 set of excerpts of key filing, Your Honor, to frankly keep the
12 paperwork down and use only those key excerpts. I'm in 248K,
13 but this is actually a paragraph from G, excerpted in there.
14 Can you please enlarge that Sergeant. So there's the
15 paragraph that we seek to reconsider. We are seeking
16 essentially reconsideration in part.

17 We are not opposing much of the other aspects of it,
18 sort of the reaffirmation of the relief that you gave back in
19 your original ruling on 248. And I will get -- I will point
20 that out a little bit more.

21 What I would like to first do is explain what we
22 respectfully maintain are the factual and legal errors that
23 resulted in this paragraph of the ruling.

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1 Second, I would like to describe how those errors
2 result in making the government unable to prove one of the
3 elements of Charge IV, Specification 1, the properly pleaded
4 charge of terrorism in connection with the bombing in Aden
5 Harbor while the USS COLE was refueling and receiving other
6 services.

7 And then third, I would like to take it out of the
8 abstract and show under this third point how live witnesses
9 giving testimony about Aden Harbor that morning as well as
10 probative and reliable hearsay statements of which we've put
11 the defense on notice as well as other evidence is, we
12 believe, arbitrarily excluded by this language and blocked
13 from the military commission panel, which of course is the
14 lawful factfinder on the question of guilt or innocence.

15 I will be referring at various points to different
16 exhibits that I have asked to be added to the appellate
17 record. And they have been marked J through Q. One of these
18 contains excerpts of law and reference materials. One
19 contains excerpts from filings, charge sheet pleadings,
20 transcripts. Five are separate productions of discovery the
21 defense long has had, clearly put them on notice specifically
22 demonstrate what will be the government's proof in this area.

23 And finally, there's a set of PowerPoint slides that

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1 I'm actually going to make my main presentation, and I do ask
2 that you consider all these things in the reconsideration. So
3 I'm asking you to see those as something to think about and
4 deliberate upon in the motion.

5 Sergeant, can you please bring up slide 1 from
6 Appellate Exhibit 248Q. Judge, we've come a long way from
7 using a pencil on an MRE cardboard box, but I still think the
8 simple slides are the best. That's the universe of
9 individuals that are described in the aggravating factor. We
10 are in the world of the aggravating factor under 1004(c)(1) --
11 1004(c). This is the first aggravating factor.

12 Next slide. Slide 2. The aggravating factor says it
13 has to be persons other than the victim. Next slide, please.
14 So it is that area in red that we are talking about, that is
15 as defined by 1004(c)(1), that is Rule For Military Commission
16 1004(c)(1). And that's because victims are a subset of that.
17 It is hard to envision a victim who is not unlawfully and
18 substantially endangered.

19 Slide 4, please. Now, what you did -- this is how I
20 envision what you did back in 248B, your ruling. You limited
21 that universe. You said I'm going to consider victims -- and
22 I know we all agree in the courtroom here we are going to be
23 talking fast and rapidly about victims and numbers and things,

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1 and I want to make very clear that can kind of sound a little
2 callus when you come into it. We all are very mindful that
3 each one of these individuals is a human.

4 But you limited that area to the 56 in the victim
5 category who on the COLE died or were injured. And then as I
6 understand it, Your Honor, graphically you said that that
7 portion in that vertical oval, that is the remaining personnel
8 on the COLE, that's the universe where we could consider for
9 the purposes of Aggravator 1 the persons other than the victim
10 who are substantially and unlawfully endangered.

11 Are you following me thus far?

12 MJ [Col SPATH]: I am.

13 CP [BG MARTINS]: Okay. So as I see it, that's kind of
14 what you did in 248B, was you told us we were limited.

15 With regard to Charge IV now -- but right now I'm
16 actually in the charge we were talking about when this first
17 came up, and this is important.

18 Slide. Because in the context where this first came
19 up in, when you described it in your ruling in 248B, counsel
20 and you -- and your predecessor, Judge Pohl, were talking
21 about treachery or perfidy. So at this point in the context,
22 it is key to look at the elements of perfidy because they
23 really define the context within which we believe you got to

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1 that point where you could limit the group that would be
2 identified as unlawfully and substantially endangered for the
3 purposes of Aggravator 1.

4 So the heart of perfidy is the accused is inviting
5 the confidence or belief of one or more persons that those
6 persons are entitled to or obliged to accord protection under
7 the law of war and then use that for an advantage to injure,
8 kill or capture. So there is this transaction where the
9 perfidious party is leveraging the law of war for an advantage
10 and then killing. And that is really a key piece of the
11 context.

12 Can you now go to the next slide. So what was
13 happening as we saw it, and this was back when you were --
14 when your predecessor was talking about 246 now. This is
15 Charge I and the whole aggravating factor discussion. Trial
16 Counsel Sher was agreeing with Judge Pohl that a fair reading
17 of Charge I and Aggravating Factor 1 limited the individuals
18 who are unlawfully and substantially endangered to those on
19 the COLE. And in the context of that perfidious element, this
20 makes a lot of sense. That context makes a lot of sense.

21 And if you eyeball the perfidy charge and the
22 language of it, reference after recounting the victims saying
23 all members of the COLE, the fact that a perfidious element --

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1 because the COLE and the sailors aboard it in the Aden Harbor,
2 which we will describe as a pretty populated place that
3 morning, those were the only ones who could be victim to a
4 perfidious attack in the sense of being the ones who were
5 invited, or whose confidence was invited, that that makes
6 sense. So this context is terrifically important to
7 understanding how we read your ruling and how we think your
8 ruling was to have been read.

9 Sergeant, can you please bring up 248K, page 21.
10 Judge, this is your original ruling on 20 October. And,
11 Sergeant, go ahead expand, enlarge the text above the footnote
12 for now. We will get to the footnote.

13 Your Honor, this is your ruling on Charge IV, and yet
14 you're talking about -- I'm going to go ahead and use this
15 indicator, "The prosecutor argued a fair reading of the
16 charge." "The charge." And I'm going to note the footnote
17 here, 5. You are saying a fair reading of the charge, and
18 citing to 3918 and '19, that very clearly is a portion of the
19 transcript -- I have read it 20 times. I think there is only
20 one way to read it. That is when they were taking up 246 and
21 only 246. That is all they did on 24 April.

22 And at this point -- so it's a discussion of perfidy.
23 I don't know if you formed an opinion on the factual aspects

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1 of this part of your ruling, but if you feel there's any need
2 to go -- not to go further, I can stop, I mean, if you concur
3 that was an error. But if not, I really would like to move
4 through the transcript and show you why we believe it can only
5 be seen as a discussion of perfidy.

6 Should I go through a couple pages?

7 MJ [Col SPATH]: Yes.

8 CP [BG MARTINS]: Pull out of that please, Sergeant. So
9 let's go to 3918 then, so 248K, page 32. So you are in 3918,
10 it says on Charge I -- this is the point cite you are giving.
11 Go to page -- the next page please, so it is 33. And this is
12 the second page you cite to, 3919, and there's the agreement
13 that is cited to.

14 There is nothing -- been nothing intervening the
15 discussion of Charge I to where you get to this agreement that
16 talks about any other charge, and this is the first charge in
17 that whole series of aggravators -- 246 is the first one that
18 we had. It was on 24 April and it was the first of a long
19 series.

20 Why don't you pull up K, page 19. This is just to
21 refresh you, Your Honor, on the way the docket was set up. K,
22 page 19. And just highlight the ones all on Aggravator 1.

23 So we are into AE 246 at this point, and we are

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1 talking about -- we haven't begun to talk about the others.
2 So that reference of yours in the ruling, we can only see as
3 being a misreference factually. If you come out, please, and
4 go to page 30 of K, the first place where we start up on 24
5 April is at page 3905. Now, I'm bracketing just to show you
6 again that we are very clearly in the discussion of the
7 perfidy charge, Charge I. It says, "Let's start with 246."
8 So that's the start. Mr. Kammen gets up and starts talking
9 about 246.

10 The next place it is very clearly anchored to
11 Charge I is to go to page 31, please. You can see -- go ahead
12 and highlight that -- you are now at page 3911 of the
13 transcript, still 24 April. This is the charge of perfidy.
14 Mr. Kammen is talking perfidy.

15 Now I'm going to go to places after your point cite
16 to show we are still on perfidy. Go to slide 34 of K.
17 Enlarge that, please Sergeant. "Let's stick with Charge I for
18 now," reminder from Colonel Pohl. You are still in perfidy.
19 This is all the perfidy charge. And go to the next one,
20 please, in K. I have snipped out in this one.

21 Now you are on 25 April. They did 246 on 24 April.
22 25 April you are now taking up that 246 series and saying,
23 hey, we discussed how it impacted Charge I yesterday or on the

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1 24th. And I can -- you know, again we can go through it.
2 But, Your Honor, again, I would ask you to read it. We've got
3 the hard copy here for you if you want to go through it and
4 get the context. It is very clear Mr. Sher and Judge Pohl are
5 talking Charge I in that context of perfidy that I gave you,
6 and believe that's really important to how you fairly read
7 what is embraced because they were talking Ring v. Arizona,
8 Apprendi v. New Jersey and thinking through what needs to be
9 in the pleading in the context of those important cases.

10 Okay. If you can go now back to the PowerPoint
11 slide, Staff Sergeant, slide 5. So that's where we were.

12 With that understanding, next slide. I want to now
13 move to -- next slide please, 7. Now I want to talk about the
14 terrorism charge, and I want to start with it by comparing it
15 to another charge on the charge sheet that you eventually
16 found was not multiplicitous. These were different offenses.
17 But importantly -- and, Sergeant, don't highlight any of this
18 here, I will just talk from this.

19 The first element in terrorism is an alternative
20 actus reus, intentionally kill or inflict great bodily harm,
21 or is engaged in an act that evinced a wanton disregard for
22 human life. Charge IV, Specification 1 of the charge sheet
23 here is the latter, and only the latter. And that's very

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1 important here. We are not setting out to prove the protected
2 persons definition with regard to any one. We are using the
3 engaged in an act that evinced a wanton disregard for human
4 life.

5 When you look at elements of murder in violation of
6 the law of war, you have intentional killing, and those are
7 not the same thing. Those are different. The one is not
8 lesser than the other. They are different -- different
9 standards. There's discussion over whether wanton disregard
10 for human life is actus reus, mens rea, or both. But it is
11 clearly an element, and it is a different element than
12 intentionally killing.

13 Next slide. And this reflects how they are
14 different, although there is an overlap in any -- often in a
15 particular set of facts, such that a set of actions that led
16 to an intentional killing could also show wanton disregard for
17 other human lives with regard to any one victim -- or, I'm
18 sorry, any one individual that is subject to that. It may be
19 impossible to prove that the accused evinced both because they
20 are kind of exclusive.

21 If you intentionally seek to kill somebody, how can
22 you be heedless of the consequences? And this is really
23 important to why what you've done in this terrorism charge

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1 leaves us without an ability to prove an element.

2 And I would like to just point out if you go to
3 slide -- I'm sorry, Appellate Exhibit 248K, page 17, this is
4 you in the multiplicity context, Your Honor. This is 233.
5 This is your ruling in 233. You recognized exactly what I
6 just said. Terrorism and murder in violation of the law of
7 war are different, and you point out -- we appreciated you're
8 pointing out the need to account for exigencies of proof on
9 this, but so they are not the same. So we submit there is
10 error in this ruling in not having recognized the difference
11 in the elements.

12 I would like to now, second, describe how these
13 errors that I have identified result in making the government
14 unable to prove Charge IV, Spec 1. If you go to slide 9 on
15 the PowerPoint in Q, Staff Sergeant. So we will do the same
16 kind of build now with terrorism. You have the aggravator,
17 slide 10, with the victims being a subset of that.

18 Slide 11. So the red is what 1001(c)(1) limits it to
19 those other than the victims, if it is going to be an
20 aggravator.

21 Slide 12, please. There's the overlay again that you
22 provided. This is now what causes the problem.

23 Next slide. Because of that exclusivity of those two

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1 elements, those circles don't cross. And if we are not able
2 to bring in proof -- and that is our reading of paragraph 5,
3 we cannot consider -- it seems to be a pretty sweeping bar to
4 even consider. We are thinking about offering proof, arguing,
5 seeking instructions. This is -- we are not even allowed to
6 consider persons outside of that vertical oval of the COLE
7 when we need somebody inside that other circle, or we need to
8 prove wanton disregard and doing it without reference to those
9 persons outside or in that larger circle on the right, we are
10 unable to do it.

11 So I would like to show how these, these matters play
12 out. Can you go to 248K, page 2, and just pull up terrorism
13 charge. This is Specification 1. This is the one relating to
14 COLE and show why this is a plain, concise, definite charge.
15 This is not hard to interpret.

16 We've heard discussions of how this fails to put the
17 defense on notice, things are missing. They are not. This is
18 a legally sufficient charge. It states an offense. It
19 follows the statutory elements. It pleads statutory
20 aggravators. A death resulted. That's why you have the
21 resulting in the deaths of 17 persons. This is a sufficient
22 charge.

23 I also want to point out some of the specifics there

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1 that have meaning and reasonably infer what we would intend to
2 prove and the aggravators we would intend to prove. So Abd
3 al Rahim al Nashiri is an alien unprivileged enemy
4 belligerent. That is not just boilerplate. He is not wearing
5 a uniform, and he is being pleaded as the perpetrator. He is
6 a principal being pleaded as the perpetrator. And that's the
7 way we plead in military justice.

8 If you could go to Appellate Exhibit 248J at 12. I'm
9 going to take a detour into the Manual for Courts-Martial on
10 how we plead principals who may be distant from the actual
11 scene of the attack. This is Rule 307. This is H in the
12 discussion. The last paragraph of that, if you can enlarge,
13 Sergeant.

14 Put together the way Mr. al Nashiri has pleaded in
15 that offense with this rule, and you are on notice, clearly,
16 that we could be using a vicarious theory of liability. That
17 is not hard to figure out. It is right there and it is a
18 standard practice in military pleading. You plead all
19 principals as if they are the perpetrator.

20 Can you please come back out and go to 248K, page 2.
21 This is again the terrorism charge. And blow that up, please.

22 Aden, Yemen, again not a casual detail. Aden is a
23 city of 700,000 people. In a specific date. You have the

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1 statutory language there, "Engage in an act that evinced a
2 wanton disregard for human life." So we only have the one
3 piece of that element there, Your Honor, that is not casual
4 language either. We have definitions for wanton disregard for
5 human life.

6 I would like to take a detour to 248K -- I'm sorry,
7 go to 248J at about 14. There's the explanation of it within
8 the context of 118, but we have a definition. This is also in
9 the Benchbook. Wanton relates to heedlessness of the probable
10 consequences, indifference. This is why we have the problem
11 with regard to the proof.

12 So that language is not without meaning, and it puts
13 the accused on notice that Aden, city, harbor -- this is not
14 the open sea -- blowing up a bomb alongside a ship there you
15 are fairly on notice we are going to be talking about wanton
16 disregard for human life.

17 And if you look here in the discussion proximity of
18 persons, very low, toward one another, this is -- language of
19 distance and proximity is critical. We have to be able to
20 talk about that to make sense of wanton disregard and to
21 convey it and to prove it.

22 Can you please come back out of that and go back to
23 page 2 of 248K. Because we are using a vicarious theory of

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1 liability and also have conspiracy on the charge sheet, the
2 multiple sworn and concrete allegations in that charge sheet
3 serve to put the accused on notice. And I would like to walk
4 through some of those that deal with wanton disregard for
5 human life and the fact that we have a populated harbor and
6 that the accused and his co-conspirators knew that and were
7 able to observe that over a period of many months.

8 If you go to 248K at 3, so this is the conspiracy
9 charge -- just, yeah, highlight that. Two of those
10 co-conspirators will come into clear focus later as I go
11 through some of what they have received in discovery. But
12 this is at multiple locations in and around Yemen. There is
13 an agreement, a conspiracy to carry out al Qaeda's self-named
14 Boats Operation in the Arabian peninsula. I would like to
15 point out some of the overt acts that fully talk about
16 proximity of population, populated area to the explosion.

17 Can you go to page 4, please, of 248K. Close
18 analysis of the charge sheet, Your Honor -- why don't you go
19 ahead below the co-conspirators, the last three paragraphs.
20 There are the object offenses. That's what they were focused
21 on doing: Terrorism. We are putting the accused on notice of
22 that. This is years old, before the attack happens, over a
23 series of years, and they focus upon Aden Harbor. They pick

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1 it out. They have to figure out how to obtain and store
2 explosives in this urban area.

3 Can you go to 4, please. 248K at 4. Is that 4? Go
4 to 5, please, I'm sorry, 248K at 5. These are just the
5 excerpts of the overt acts in the charge sheet. Highlight all
6 of that, enlarge all of that.

7 So you have extensive preparations in this urban
8 area, renting houses to store the boat. We would submit that
9 each of these is a particle pointing to this beehive of
10 activity in an urban area. Now we're not on the high seas.
11 This is not an attack on a warship on the high seas. And then
12 they have a rehearsal that goes wrong in the charge sheet.
13 The USS SULLIVANS is a refueling operation, and we allege that
14 in the surf of this urban port it gets foundered.

15 If you look at overt act, they have to collect the
16 materials up. If you look at Overt Act 11 and redo it, Overt
17 Act 15 as they are preparing attack in 2000. The charge sheet
18 alleges renting a house to conduct surveillance of Aden
19 Harbor -- this is an important, very specific item -- renting
20 another house from which to conduct surveillance of the
21 harbor, registering the boat. These are things happening in
22 this urban Port of Aden, and these put the accused and counsel
23 on notice.

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1 And, Your Honor, using the -- when you have clearly
2 established or put the accused and counsel on notice and the
3 court on notice of a co-conspirator theory of liability,
4 resorting to other counts of an indictment or other pieces of
5 the charge sheet is perfectly proper.

6 The third point of my overall argument, I would like
7 take it out of the abstract now and show in this third point
8 how highly critical evidence is then going to be excluded, we
9 would submit, and cut out of the proof, maybe even proof of --
10 maybe even out of the whole case, as part of the concern, if
11 the fact of consequences, that wanton disregard fact, you
12 could be cutting it out of the case.

13 Please show slide 14 -- I'm sorry, this is slide 14
14 of Q. I apologize, we are back to the general PowerPoint
15 slide show.

16 Your Honor, the discovery -- five productions of
17 discovery in the appellate exhibits, if you spend three hours
18 with them and you look at the descriptions in the different
19 statements you come up with a sketch like this. Now, we have
20 not included some of the sketches of three of the individuals
21 who made sketches, but they have Bates numbers. The defense
22 has them. We seek to bring forth testimony and other evidence
23 that this is what the harbor of Aden, urban harbor of Aden

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1 looked like at the time of the attack.

2 And what I would like to do is walk through what we
3 have real concern with on paragraph 5. You know, what can we
4 hope to admit? What can we argue relevance of here? If you
5 are saying we can't even consider individuals other than the
6 members of the crew of the COLE and others on board the
7 COLE -- to be fair, you did mention that. And there was one
8 individual, and we will talk about him.

9 So what I would like to do is start with the sailors
10 or with the personnel on board the USS COLE. Let's go to
11 Fireman Mooney, Fireman E3 Mooney. Go to 248L, page 19.
12 Mooney, and bring up that third paragraph.

13 So this is the 302 for Mooney. We would want to
14 bring him in. He would be subject to cross-examination. We
15 expect this is what he would testify to, and he is describing
16 being on watch with Hull Tech 3rd Class Toney. He is 11 feet
17 above the main deck, so he is at a position where he can see a
18 lot of things. He's got other ships, other vessels in the
19 harbor. I'm circling the two tankers portion. There is a
20 yellow ferry in front of the COLE. There is a garbage boat;
21 he describes what that is. And then he describes the attack
22 boat. He looks down, and it began to slow.

23 So can we offer that under your ruling? That is our

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1 question. Are we able to consider -- I mean, this is pretty
2 important. Are we going to get an objection that that is out
3 of bounds due to your ruling?

4 Can you pull out of that, please, Sergeant. Let's go
5 look at Lieutenant Woodfin. She is another one of the
6 individuals. Although we don't believe we are required to
7 announce our witness list right now, we are going to go ahead
8 and provide you essentially the case with which we would have
9 wanted to prove that element of the offense.

10 Can you go to 248L, page 11, and bring up the last
11 two paragraphs of this. So this is the supply officer on
12 board. And she is describing getting the husbanding agent,
13 this person they pay for the different services other than the
14 fuel. So she is looking for the husbanding agent. It talks
15 about the different services in the -- that is going to
16 involve people near the boat. And then she is noticing
17 individuals.

18 Can you pull out of that, please.

19 So when she is referring to these individuals around
20 the boat, again, can we offer that? It says we can't consider
21 it, commend the statement of Lieutenant Woodfin to Your Honor.

22 Lieutenant Commander Peterschmidt, he is the XO of
23 the vessel. Go to 248L, page 8, and go ahead and just last

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1 two paragraphs of that, please. You know, discussion of the
2 tugboats there, others in the harbor, evidencing that we have
3 a harbor with different vessels in it.

4 Okay. Those are -- so we are going to have testimony
5 from persons on board, and you have said we can consider them
6 with regard to the aggravator. But can I use the testimony
7 from them talking about those you say we can't consider, is
8 the basic point.

9 Can you pull out of that, please, and go back to Q,
10 slide 14. So I have done those three up on the left. I won't
11 do all the ones on the right. I will limit it to the four
12 that we've noticed the defense regarding the hearsay
13 statements. We believe we don't need all of them to show the
14 picture and to show the fact that there was a wanton disregard
15 for human life here, Your Honor, with regard to other than
16 just the sailors on the COLE.

17 If you go to the garbage removal worker, 248N,
18 page 6, Imad Ali Mohammed. I have not put the Bates number on
19 the slide, but it is in November. We got the whole list of
20 the Bates numbers, Your Honor. Go ahead, and third full
21 paragraph. I'm sorry, this is -- you pulled up -- I'm sorry.
22 Can you go 248N, page 6. I apologize.

23 Is that 248N, page 6? I apologize. This is actually

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1 one of the individuals on the Dolphin. So this is Moti. I
2 will come back to Imad. Moti is on the Dolphin. Go ahead and
3 do the first full paragraph and the second full paragraph, if
4 you would enlarge that, please. Okay. That's fine.

5 So he is getting the hoses ready, talking about his
6 work on the Dolphin. Sees a garbage boat out of the corner of
7 his eye. He is precluded from seeing a lot because he has got
8 this big warship in front of him that he is refueling, so some
9 of his vision is blocked. But he notices color on the garbage
10 boat. The firm Mansoub provided the garbage boats. He saw
11 that it went around to the bow of the ship. He describes
12 others who are on the Dolphin with him. He talks about
13 injuries to him and Haj, another one of his fellow workers on
14 the Dolphin.

15 How about this? I mean our question is, we
16 understand there may be a point under which relevance analysis
17 and, you know, a concern about cumulativeness or prejudice in
18 light of the fact that these are going to be hearsay. We
19 understand all of that, and what it seems to us in your ruling
20 we can't even go here. And that is of great concern to us.

21 Why don't we go to 248N, page 8 and 9. This is Imad
22 Ali Mohammed, this is the guy on one of the two garbage boats.
23 So go ahead and do -- just do the middle paragraphs of that,

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1 enlarge all the middle paragraphs. A little further down,
2 please. There you go.

3 So he is talking about being around the COLE. A lot
4 of detail in here. Bakathir, as we will get to, he is the
5 husbanding agent giving him instructions about where to go to
6 get the garbage. A lot of detail in there what he is doing
7 before the explosion.

8 Can you go to page 9. The very next page of this
9 302, then gets to what happens at the explosion. Just start
10 at the very top, please, and just go down to about halfway.

11 So he got -- he was injured. Again, totally off
12 limits? I mean, this seems to be wanton disregard for human
13 life, in proximity in a crowded harbor, not on the high seas
14 at all. This is a port that is servicing a ship.

15 Please go to another Dolphin worker, Da Eh, 248
16 November, page 13, Al-Da Eh. Yeah, middle paragraphs of that,
17 Sergeant. Here is an interesting thing, after the explosion,
18 so you have an attack where someone is taking advantage of
19 your adherence to the law of war, and people get trigger, get
20 jumpy, if you will. A little bit, maybe. This is some very
21 important detail on that. We have to litigate this as hearsay
22 statement.

23 But this is what makes this a war crime, is you can't

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1 restore the peace, you can't have any kind of sustainable
2 peace if un-uniformed people are coming up, tricking a
3 warship, and then there are all these civilians around with
4 this worship armed to the teeth, very important verisimilitude
5 and detail here that we are wondering in light of paragraph 5
6 of whether we can even consider.

7 Can you go back to 248N at page 17. This is the
8 husbanding agent, so this is one you said we can consider in
9 your ruling. You said we could talk about those on the COLE,
10 and you couldn't distinguish between a Yemeni on the COLE and
11 others. There is only one, this is Bakathir. He had come on
12 the COLE. He was working with the garbage workers and others.
13 Go ahead and highlight the middle paragraph.

14 So he is telling you where he was in the explosion.
15 He is somebody who knows the harbor and he is on the COLE. He
16 is a different kind of witness and detail. So when he sees a
17 boat, he knows a lot of boats. And he is trying to figure out
18 who is in that boat, that attack boat.

19 So we are not going to get this from Fireman Mooney.
20 We are not getting it from other people on watch because this
21 is somebody who knows what he is looking at. And you hear him
22 giving you some really important detail, reddish sleeveless
23 shirt. This goes again to urban harbor, a situation where

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1 services are being provided to a ship. It is not out on the
2 high seas.

3 Pull back to Q slide 14. So -- and, again, there are
4 those -- there are other statements of people on the Dolphin.
5 There are others nearby in another garbage boat. The waste
6 removal boat is coming back. Having already serviced the
7 waste, he is coming back to the ship when it explodes. You
8 see some of the other entities in this urban harbor.

9 Could you please go to slide 15? And, again, we are
10 not trying to introduce all of the different statements, but
11 there are a lot of people in that harbor who are in the
12 vicinity. So now there are also people whose testimony we
13 would like to introduce that provide more evidence that this
14 was wanton disregard, that this was an urban harbor with
15 population all around and that the accused knew it.

16 Can you bring up Appellate Exhibit N, 248N, at 21.
17 So this is Yahya Muhammad. He is part of the transaction to
18 rent a lookout in the Al-Tawahi neighborhood of Aden that can
19 very clearly see the part of the harbor where the COLE is. So
20 he is talking about -- why don't you bring up the first two
21 full paragraphs.

22 Important detail here about how the individual wanted
23 the second floor, and he sort of found that curious. It was a

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1 smaller apartment. This is a surveillance house and lookout
2 place that they would eventually want to, we seek to prove,
3 surveil the area and videotape it.

4 Can we bring that in? I mean, that -- okay, relevant
5 to the other aspects, the conspiracy and so forth. Are we
6 then going to be told we can't use it as to wanton disregard?
7 There is a real question of what we get to prove that element
8 up with. Pull out of that, please.

9 Go to N at 25. This is -- is this where we just
10 were, 25? Why don't you -- okay, yeah, the second two
11 paragraphs of this. This is Jbeir. This is another person
12 with a transaction relating to a lookout house in that same
13 general neighborhood. You have a discussion of liking the
14 second floor, and you see the -- one of the individuals there
15 is looking out the window toward the port. Can we use that as
16 to the element of the offense for wanton disregard?

17 And then go ahead and go to Oscar at 6, 2480 at 6, a
18 picture taken from one of the houses. That shows it. Again,
19 can we use that to prove a wanton disregard for human life if
20 only the COLE -- do I have to focus that picture down into
21 just the COLE? Because I don't want to be talking about or
22 considering the fact that there may be a population in the
23 area that goes to the -- whether the act of instant wanton

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1 disregard to blow up a bomb in that harbor.

2 There are other -- the two Badawi statements we are
3 seeking to introduce has discussion. I won't go into that,
4 but that's actually in your packet, the excerpt of the
5 videotaping operation and how they wanted to videotape this in
6 this urban harbor, and how other parts of the Badawi
7 statement -- how Badawi was aware this was not an attack on
8 the high seas.

9 So, Your Honor, in conclusion, we believe we have
10 identified a clear error in law which we think meets the
11 standard of reconsideration, and that we would respectfully
12 submit that the commission should reconsider and either strike
13 that paragraph, clarify in detail what it means for us. We
14 are not seeking to undo the limiting you have done on
15 Aggravator 1 throughout the charge sheet. And that is a
16 whole 'nother discussion we deliberated. You know, to what
17 extent we wanted to talk about that we did not seek
18 reconsideration of that, paragraph 5.

19 Subject to your questions, Your Honor, I will yield
20 the lectern.

21 MJ [Col SPATH]: Okay. Thank you, General Martins.

22 ADDC [MAJ HURLEY]: Sir, obviously I'm taking a second to
23 get organized.

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1 Sir, the defense would be remiss if it did not point
2 out how this is brought to the commission's attention, in that
3 there was a ruling from this commission and a reconsideration
4 motion was filed and now has been argued, and argued
5 extensively by General Martins. Much like it did -- much like
6 General Martins did ----

7 MJ [Col SPATH]: Move the mike up a little bit. There you
8 go.

9 ADDC [MAJ HURLEY]: Is that better?

10 MJ [Col SPATH]: That's better.

11 ADDC [MAJ HURLEY]: Again, my reception is less than it
12 normally is. I apologize. I have been told to speak up over
13 the last ten days.

14 MJ [Col SPATH]: Don't worry.

15 ADDC [MAJ HURLEY]: Trying as I might, this is the first
16 time in my life I have been told to speak louder.

17 And just like, sir, what happened on Friday, there
18 was a controversy and in swoops General Martins to the rescue
19 and ----

20 MJ [Col SPATH]: I mean, he can argue. That doesn't
21 matter. He gets to argue. I mean, we have had multiple
22 people argue different parts of motions. It doesn't make a
23 difference to me who argues it.

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1 ADDC [MAJ HURLEY]: Yes, sir. It was important from the
2 defense's perspective to point that out.

3 What is more important and more germane to the
4 question that you have to resolve before you this afternoon is
5 there are no new facts that have been cited by the government
6 in its argument. There is no -- most importantly, there is no
7 new law.

8 This commission, when it rendered its ruling a month
9 ago today, knew what it was doing when it did it. It made
10 certain decisions with respect to the facts and with respect
11 to the law. The legal framework and the factual framework has
12 not changed. What it made was a clearly supported rule --
13 ruling based on the evidence and the law that it had. And
14 that evidence and law, again, has not been altered at all. So
15 this motion for reconsideration that the government has
16 propounded should be dismissed, should fail because there's
17 nothing new for you to consider, sir.

18 Sir, as I was listening to General Martins' discourse
19 on this matter, it occurred to me that what General Martins
20 wants, and it occurred to other members of the defense team
21 that what General Martins wants is, he wants an advisory
22 opinion as to what evidence is going to be allowed before this
23 commission and what evidence won't. And, sir, if you think

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1 the trial is far off now, wait until unfortunately what we've
2 been given to understand, what you have been given to
3 understand as the way the government sees forward which is a
4 line-by-line, fact-by-fact permission -- series of permissions
5 coming from you in writing before it proceeds.

6 And the subtext to this motion for reconsideration
7 from the defense's perspective, sir, is clear. If you deny
8 the government's motion for reconsideration, sir, as you
9 should, then the government is going to take an interlocutory
10 appeal, and that's what we would submit to the commission is
11 the subtextual threat here.

12 We are going to go through the volumes of evidence
13 and -- the volumes of evidence necessary to prove my client
14 guilty of the charges and specifications that still remain
15 before this commission, we are going to go through that line
16 by line, and you are going to give them an advisory opinion.
17 You are going to tell them before one member ever sits, before
18 one question of voir dire, any prefatory instructions ever
19 issued from that bench, sir, you are going to tell them
20 exactly what evidence they have. And if they don't like the
21 framework you established, to borrow their expression from
22 another pleading, well, they are going to go to a higher court
23 and get you some guidance. Which is their right, and if

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1 that's the way they want to frame it, well, that's the way
2 they want the frame it.

3 MJ [Col SPATH]: I understand. And, again, a lot of
4 people like to go to another court and give me some guidance.
5 That's the unfortunate life at the trial level.

6 ADDC [MAJ HURLEY]: And, sir, I certainly understand that.
7 But that's from the defense's perspective what they want to do
8 with regard to this particular case. And, again, from the
9 defense's perspective there is a fundamental misunderstanding
10 of what the government wants to do in this case.

11 With regard to Charge IV and the first specification
12 under Charge IV, they had the opportunity to -- after the
13 words "to wit" and the grammatical mark, the colon, they had
14 the opportunity to fill in whatever they like. If they wanted
15 to talk about the individuals in this crowded harbor, to use
16 the expression of General Martins, they had that opportunity
17 to lay out with particularity what they wanted to fill out and
18 what they wanted to use to complete that specification. The
19 government chose to just talk about the COLE, and necessarily,
20 the sailors on that.

21 And this isn't about a confusion with regard to the
22 specification, with regard to the perfidy specification or
23 with regard to the other specifications. It is about the

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1 clear line that you drew as an experienced trial judge, you
2 wouldn't -- sir, I'm not familiar with the Air Force, but I
3 know that you would only become a commissions judge if you
4 were an experienced trial judge, experienced at the most basic
5 concept that trial judges and trial litigants have to deal
6 with, which is relevance and drawing a relevance line. What
7 falls in is relevant, what falls outside is relevant (sic).

8 Sir, it is your charge to make that determination,
9 whether it is now or whether it is when the members are
10 present, and the evidence is really coming into this
11 commission that that's going to decide the fate of
12 Mr. al Nashiri.

13 So, sir, it's the government's position in so doing
14 that you are presumed by the law to know the law and you
15 actually know the law and you made the right decision based on
16 the evidence that you had and the charge in front of you.

17 Sir, we are not asking you to stick by a decision not
18 irrespective of what you have heard and your review of the
19 record of this case as it goes forward. Sir, we are asking to
20 stick by a well-made and appropriate decision.

21 Sir, in summation, this motion for reconsideration
22 should be denied. It should be denied on the legal grounds
23 that the government has raised nothing new, whether it is no

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1 new facts or no new law, and it has not pointed to an error
2 that this commission has made. Even if this commission wishes
3 to reconsider and take on the government's challenge of
4 reconsidering this language, you should not go through those
5 facts that have been identified by the government and
6 specifically identify which facts are relevant which facts are
7 not, because the court, based on the specification charged,
8 based on the aggravators put forth by the government in the
9 bill of particulars, you made the right decision. The field
10 should be limited to those individuals aboard the USS COLE in
11 making the determination that you have to make today.

12 Sir, any questions?

13 MJ [Col SPATH]: No, thank you.

14 General Martins?

15 CP [BG MARTINS]: Very briefly, Your Honor. This
16 commission said in 247J -- we cite this in our brief -- that a
17 motion to reconsider could be granted after finding what
18 quote, "could be viewed as error and should be corrected," end
19 quote. Of course you have the authority to reconsider any
20 ruling under the rules.

21 And then we've cited to the D.C. Circuit 2000 opinion
22 of National Center for Manufacturing Sciences v. DoD. It is
23 not new facts or new law. Clear errors of law could compel a

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1 court, a judicious court, one that is seeking to get to the
2 right law based on the right facts to reconsider, not seeking
3 an advisory opinion where -- we are seeking action on
4 paragraph 5, very specifically, which does not mention
5 relevance, which seems to be the reason for the rationale of
6 defense counsel.

7 And then we won't seek to add language to Rule 307
8 and we've pleaded this in accordance with the rules. This is
9 a legally satisfactory specification, and it puts the accused
10 on clear notice of all of the elements and the statutory
11 aggravator, that death was caused. That is why there is the
12 reference to the victims that shouldn't be seen as exclusive
13 or exhaustive, and that seems to an aspect of interpretation
14 of the charge the defense is overlooking.

15 And, finally, we won't try to defend -- have to
16 defend or justify taking an appeal and using the people's
17 rights to appellate review if that is what we believe is
18 necessary.

19 Thank you, Your Honor.

20 MJ [Col SPATH]: Thank you. And I know I said this:
21 Taking an appeal certainly doesn't bother me. It is what they
22 are there for, General Martins.

23 Defense Counsel, any final comments?

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1 ADDC [MAJ HURLEY]: Yes, sir. One thing we would note is
2 that we could have gone through this process before, that this
3 was -- this process was available to the government before,
4 but it's only now that we have arrived at the eleventh hour
5 that we go through the process in this complete manner. So
6 again, it is the dilatory process by which they do this.

7 And it is -- when we talk about no new facts --
8 obviously General Martins touched on this -- all of these
9 facts, all of this information was available to the government
10 at the time of filing.

11 Thank you, sir.

12 MJ [Col SPATH]: All right. That takes us through every
13 motion along with some extra motions that we had briefed and
14 ready. I already talked to you this morning about what I hope
15 is the road ahead with some of the classified pieces and the
16 classified motions outstanding, along with some of the other
17 motions that I know are more pressing because of the time they
18 have been out there waiting for a ruling.

19 We have -- based on the information about the holiday
20 for April, we are making inquiries. The trial judiciary staff
21 is working to see if they can move the flight. I don't know
22 what success we will have, but we have asked if we can move it
23 to come down here on Monday and do the five days and then

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1 depart here on the following Sunday. So we will keep you
2 posted. I know you will see that as we move forward.

3 And as for departing off the island, the Office of
4 the Convening Authority asked -- I think all of you know
5 this -- about the potential of leaving on Thursday. I have no
6 updates. So I know you will all get updates as we move
7 forward whether or not that is something they can do or not.
8 I have no information. It won't be before then, I don't
9 think. I don't know if it will be then. It might not be
10 until the Saturday schedule. Stay in tune. All right.

11 Let me ask: Are there any other matters we can take
12 up, Mr. Kammen?

13 LDC [MR. KAMMEN]: I don't know where we can go with this.
14 We just wanted to alert the commission where we started.
15 There was the commission -- the issue about grooming
16 Mr. al Nashiri. And certainly it appeared that things had
17 been resolved, and I suppose on one level they have.

18 But the problem is, at least we understand that even
19 in the time we've been here, the ten days or so we have been
20 here, the policy has changed three times. And so what we are
21 concerned about is this completely fluid yes/no/yes but for
22 five minutes, no but for 10 minutes. So we just wanted to
23 alert the commission that, you know, we were really hopeful

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1 that this was no longer an issue, and I can't fathom why the
2 policy would repeatedly change, but it has.

3 And so we wanted to put that on the record because my
4 fear is that when we are here in April, it will not be such
5 benign issue if the policy continues to change according to
6 the whimsy. There is a whole lot of reasons we know about
7 that really can't be discussed here why things that happen
8 arbitrarily have a huge ripple effect.

9 And so I did want to alert the commission that we
10 may -- hopefully we won't, but we may have to come to you for
11 assistance with respect to that.

12 MJ [Col SPATH]: And that outstanding motion is just
13 deferred at the moment.

14 LDC [MR. KAMMEN]: It's just deferred. We wanted to give
15 you an update because we are troubled by, again, it just seems
16 to be a whimsical situation, and, you know, hopefully the fact
17 we've talked about it in court will smooth things out, but if
18 they don't, it could escalate into a more complicated issue.

19 MJ [Col SPATH]: Trial Counsel, any comments?

20 ATC [LT DAVIS]: Just on that issue, Your Honor, based on
21 the request from defense counsel, JTF has endeavored to amend
22 their standard operating procedure, that is -- has been
23 drafted, is going through revisions, and should be set in the

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1 near term. Once that is set, to the extent that there is any
2 variation, that that should take care of itself.

3 In the meantime, it has been guaranteed that the
4 accused at the defense's request will have access to grooming
5 materials, both before any session before this commission and
6 before his attorney-client meetings. The government believes
7 that is a satisfactory interim solution and with the
8 finalization of the SOP should take care of the problem for
9 good, Your Honor.

10 MJ [Col SPATH]: Well, hopefully that is the case. With
11 that, if you have issues initially, let's try to work together
12 if things are occurring, and then hopefully it can be
13 resolved. If not, I know we will deal with it in April.

14 For the hearings, similar to any accused who shows up
15 here, they are not shackled unless they need to be shackled,
16 and they are not typically in a prison uniform in front of
17 members or in front of the finder of fact for the motions,
18 unless they need to be. I would anticipate they would be able
19 to groom and look presentable at any session we have in court
20 without any issue. That would be no matter who the accused is
21 or what they are. But that is not a ruling, that's just I
22 think common sense as you deal with people coming to court.

23 ATC [LT DAVIS]: And the government completely concurs

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1 with that, Your Honor.

2 MJ [Col SPATH]: All right. I know you will work with the
3 defense. Mr. Kammen, if you have an issue, let the government
4 know and e-mail us too.

5 LDC [MR. KAMMEN]: Absolutely.

6 MJ [Col SPATH]: All right. Trial Counsel, I asked
7 defense if there were any other issues to take up. Let me ask
8 you if you have any issues we can take up during this session.

9 DCP [COL MOSCATI]: No, Your Honor.

10 MJ [Col SPATH]: We will keep you posted on flights this
11 week, and of course for the travel down here on the Easter
12 holiday. I thank you for bringing that to my attention.
13 Hopefully that is a good fix, give us five days like we are
14 supposed to have and avoid the holiday as well.

15 So I will see you all in a month. We are in recess.

16 [The R.M.C. 803 session recessed at 1443, 3 March 2015.]

17 [END OF PAGE]

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