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1 [The R.M.C. 803 session was called to order at 1357, 5 August
2 2014.]

3 MJ [Col SPATH]: The commission will come to order. All
4 parties present before the recess are again present.

5 I did not finish the written ruling for Appellate
6 Exhibit 277, the 505 piece; however, I have come to a ruling,
7 so we will get the written ruling into the record as the
8 appropriate appellate exhibit, but in short, I don't see a
9 reason to close the hearing for the piece of information that
10 we discussed during the classified portion yesterday.

11 I can rule on Appellate Exhibit 277, the defense
12 motion and the government motion, without having that piece of
13 information before me. I do not believe it's relevant nor
14 material to the motion. I realize that issue may come up
15 again in other places in the trial, but to deal with that
16 motion, I do not need a closed hearing, so we will not
17 reference that classified discussion that we had yesterday.
18 Again, written ruling to follow. I almost got there, but not
19 quite and I want to go through it one more time.

20 We are prepared now for 283, Appellate Exhibit 283.
21 I believe this will be the government first.

22 ATC [LT DAVIS]: Afternoon, Your Honor.

23 MJ [Col SPATH]: Good afternoon.

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1 ATC [LT DAVIS]: Your Honor, in AE 283 the government
2 simply requests that the commission set a hearing to determine
3 the admissibility of 93 photographs and three videos which
4 pertain to -- photographs and videos that were taken around
5 the site of the bombing of the USS COLE in Aden Harbor.

6 Contrary to the defense's arguments, such a hearing
7 to preadmit the evidence is not unusual and it's not unfair.
8 It's clearly called for in the rules. First, when we talk
9 about M.C.R.E. 104, those preliminary questions of
10 admissibility are yours, Your Honor. They are not for a jury
11 to determine, so it's certainly appropriate to hold a pretrial
12 motion outside the presence of the members to consider that.
13 Additionally, when you look at Rule for Military Commission
14 906(b)(11), it talks about an appropriate pretrial motion is
15 one to preadmit evidence. So what this is really getting at,
16 Your Honor, is this is not unusual. This is par for the
17 course.

18 A discussion to 906(b)(11) talks about some of the
19 reasons behind why we might do that, why we might have these
20 preadmission hearings outside the hearing of the members, and
21 one is to make sure that inadmissible evidence doesn't come
22 before the members so that we can sort all those things out
23 before members come in. And second, so that the parties can

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1 actually plan and practically predict what evidence it is that
2 the parties are going to have to confront. It's regularly
3 allowed in federal courts, regularly allowed -- I imagine
4 Your Honor has presided over many such hearings in your
5 career.

6 But the gist of the defense's argument, as I
7 understand it, is that the government has not presented
8 evidence that this type of hearing is required or that it's in
9 the interests of justice, and it's important for Your Honor to
10 consider whether we construe the interests of justice very
11 narrowly and only apply that in terms of the rights of the
12 accused or whether we expand that definition to talk about
13 interests of justice in terms of the process and the parties.
14 But either way, Your Honor, the interests of justice weigh
15 heavily in favor of holding such a motion, holding such a
16 motion and such a hearing.

17 One, the interests of justice, as I have already
18 indicated and as Rule 906(b)(11), the discussion talks about,
19 it is in the interests of the accused not to have inadmissible
20 evidence, perhaps cumulative evidence, evidence that might
21 violate 403, for a host of reasons. We don't want to have
22 evidence going before the members that is not eventually going
23 to come in as evidence in the case, and, again, just the

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1 predictability aspect of it so that the parties can plan.
2 That is clearly in the interests of justice with respect to
3 the accused.

4 But the government urges the commission to adopt a
5 broader definition of the interests of justice, one, the
6 efficiency of the process. What we are talking about in this
7 case is a tremendous volume of evidence such that the parties
8 can hash out those disagreements, that we're not
9 inconveniencing the members with objection after objection.
10 Your Honor knows how difficult that can be in the military
11 context, especially when we have a 39(a) session; members have
12 to depart, come back in. And when we are talking about the
13 true volume of evidence that we are going to have in this
14 case, it makes sense to deal with it and it serves the
15 interests of justice to do it ahead of time.

16 Additionally, interests of justice with regard to
17 Your Honor. There may be difficult evidentiary questions that
18 have to be answered, so rather than doing that in the context
19 of a trial, when you have members waiting, having the lead
20 time, the ability to actually thoughtfully consider is an
21 advantage and does serve the interests of justice.

22 And finally, Your Honor, there is frankly no
23 prejudice whatsoever to the accused from a preadmission

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1 hearing. Again, this is something, admissibility, the basic
2 determination is for Your Honor. It is not for the members to
3 determine. But that being said, the government will still
4 have to present some evidence to the members to demonstrate
5 that the evidence at least is what it purports to be, and the
6 defense will have every opportunity to challenge that
7 evidence, to call witnesses, whether it's chain of custody or
8 authenticity, relevance, however they want to challenge it.
9 By having this preadmission hearing in no way hampers their
10 ability to do that. So for those reasons, Your Honor, it does
11 indeed serve the interests of justice.

12 MJ [Col SPATH]: Preadmission hearings are pretty
13 standard. A lot of times when I'm dealing with preadmission
14 issues, both sides have either typically agreed, so it's a
15 pretty easy process, and I don't see that here just based
16 on -- and that's not a critique. I just don't expect a lot
17 agreement on what's admissible and not admissible.

18 So I usually see it when both sides have come to some
19 agreement on what's admissible or not admissible or there is
20 some particularly upsetting evidence for one side or the
21 other, and so we have to go through the 403 balancing test and
22 we have to figure out how many images are coming in or how
23 much victim impact evidence is coming in or things like that.

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1 So I'm not surprised or really opposed to the concept
2 of this. It's just that you can see the defense can attack
3 the evidence, even if it is admissible, and we go through the
4 preadmission hearing and I determine it is admissible, the
5 defense, if they want to, have the ability and the capability
6 to attack that evidence in front of the members in every way
7 that is appropriate.

8 ATC [LT DAVIS]: Yes, Your Honor, I agree.

9 MJ [Col SPATH]: And no issues with that?

10 ATC [LT DAVIS]: No, absolutely not.

11 MJ [Col SPATH]: I guess my question would be, just for
12 judicial economy, we may be doing this twice if the defense
13 wants to do that with each piece of admissible evidence, so I
14 don't know how economical this may or may not be. What it
15 will do, I think, though, is sculpt the case for both sides so
16 that they know what is admissible and what is not admissible
17 as we head into trial. I mean, I understand that and that
18 certainly helps with questioning the court members, opening
19 statement and the like.

20 ATC [LT DAVIS]: Yes, Your Honor. If I could just address
21 a few of your comments. You indicated you have these types of
22 hearings when the parties are in agreement. And as the
23 government has argued, it may be even more beneficial to have

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1 it in a situation where the parties actually are in
2 disagreement so that we can go ahead and hash those out.

3 With regard to the question of judicial economy, if
4 we do determine the admissibility while the defense has the
5 ability to challenge those pieces of evidence, they are
6 certainly not required to ----

7 MJ [Col SPATH]: You have to slow down. It's probably my
8 fault.

9 ATC [LT DAVIS]: It is the government's position that it
10 would indeed streamline the evidence at trial. The government
11 does not anticipate, and the defense certainly may disagree,
12 that the defense will challenge each and every piece of
13 evidence at trial. It will most likely be at least a subset
14 of that, if not a drastic subset of that.

15 And by streamlining it -- this is another advantage
16 and another reason why it serves the interests of justice, is
17 when we streamline the presentation, the less time that the
18 members are being bombarded by witness after witness and piece
19 of evidence after piece of evidence, I think the members will
20 be better able to focus on the evidence, understand the
21 evidence, and we lose any potential that there might be any
22 kind of confusion. So a lot of benefits here, Your Honor, to
23 holding such a hearing.

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1 And as a related matter, with regard to the timing of
2 such a hearing, what the government proposed in its motion is
3 that if we are to have such a hearing, that Your Honor give
4 the parties 45 days notice, because that would give the
5 government the opportunity to line up the necessary witnesses
6 and to make any logistical arrangements that need to be made.

7 In the defense response, their response was they
8 required at least 120 days -- four months -- from the time
9 that the commission would set the time of the hearing. And
10 from the government's position that is simply unnecessary,
11 it's unreasonable. Forty-five days is more than enough time.

12 And it's important to point out, Your Honor, that
13 it's not 45 days from when Your Honor sets the hearing, and
14 it's not even 45 days from right now as we sit here in court,
15 and it's not even 45 days from when the motion was filed
16 necessarily identifying the witnesses. The truth of the
17 matter, with regard to the evidence that's the subject of this
18 motion, the defense has had these photographs since 2012,
19 videos since mid 2013.

20 They know what the evidence is. They know who the
21 witnesses will be. They have had the opportunity over the
22 past however many years to interview the witnesses if they
23 thought that was going to be necessary. So the 45-day

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1 timeframe that the government has laid out is more than enough
2 time to give the parties notice and to go ahead and carry out
3 that hearing.

4 Thank you, Your Honor.

5 MJ [Col SPATH]: Thank you.

6 Hopefully I can focus this in. Preliminary
7 admissibility hearings, pretty standard. Agreed?

8 ADDC [MAJ HURLEY]: Yes, sir.

9 MJ [Col SPATH]: So in here there is a comment that the
10 defense opposes finding any evidence admissible or exhibit
11 admissible without the appropriate foundation. Agreed?

12 ADDC [MAJ HURLEY]: The defense, specifically myself, read
13 this motion initially as saying will you -- as a first offer
14 to negotiate, will you agree to stipulate to these 93
15 photographs and three videos. And what we were attempting to
16 make clear in our response is that we don't, is that one way
17 or the other, the appropriate foundation is going to have to
18 be made.

19 MJ [Col SPATH]: I understand, and I believe that's what I
20 heard from the government. They understand if you are going
21 to require them, as you have every right to do, to lay the
22 appropriate foundation, they have to get there.

23 So I guess my question is: Are you opposed to the

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1 concept of a preliminary admissibility hearing for evidence
2 the government intends to use in their case-in-chief?

3 ADDC [MAJ HURLEY]: As a general matter, no. In fact, I
4 anticipate that the defense will want to have evidentiary
5 hearings of that sort. Not only do I anticipate it, sir, I am
6 confident that that's going to occur.

7 I think in this particular instance we have to --
8 there is a lot of balancing that the commission is going to
9 have to do, and in this instance is, if you will pardon the
10 expression, the game worth the candle. And the defense
11 contends that with respect to Appellate Exhibit 283 it isn't.

12 MJ [Col SPATH]: Why not?

13 ADDC [MAJ HURLEY]: It's not because the nature -- first
14 off, the nature of the evidence and what would necessarily be
15 required. If we were to wait until the actual trial itself,
16 it is establishing a foundation for photographs and videos and
17 perhaps I misremember Imwinkelried, but that is one of the
18 shortest foundations known.

19 It's a fairly succinct process, so it's not going to
20 require -- these aren't business records or whatever that
21 require a longer foundation to be laid; it's fairly succinct.

22 MJ [Col SPATH]: It is, and I haven't looked at the
23 underlying photos or the video, so I should be careful

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1 presuming anything, I have learned here.

2 But I guess my question would be if it is of the
3 incident with the COLE that you all are -- along with the
4 foundational objections, have objections that it is cumulative
5 or does not survive the 403 balancing test, again, I'm getting
6 ahead of myself with what we will be dealing with in an
7 evidentiary hearing, but those hearings could take longer.
8 Not the photo itself; is this an accurate, fair depiction at
9 the time, easy.

10 ADDC [MAJ HURLEY]: Yes, sir.

11 MJ [Col SPATH]: But the follow-on ruling of how much is
12 appropriate and not appropriate, that can take a lot of time
13 for a trial judge, and I assume it would take as much time
14 here as a commission.

15 ADDC [MAJ HURLEY]: Recognizing that tension, sir, the
16 defense contends that even if -- and I am not in a position to
17 say yes, of course, we will make a 403 objection and a
18 cumulative objection, which I guess essentially is the same
19 thing. But we believe that you will be disposed -- or
20 whomever is acting as military judge in the commission, if you
21 wait until the actual trial to commence, you will still be in
22 a position to rule -- make whatever rulings are appropriate on
23 the evidence that the government seeks to admit, that this

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1 process that we are going to go through isn't unduly lengthy.

2 MJ [Col SPATH]: They have asked -- I think they have
3 asked for two days in their motion request, to set aside two
4 days to go through this, indicating that at least the
5 government believes this may be lengthy. I don't know what
6 foundational hurdles they anticipate, but maybe they
7 anticipate quite a few.

8 ADDC [MAJ HURLEY]: And, sir, perhaps they do. I was ----

9 MJ [Col SPATH]: I guess my question -- it seems that you
10 all -- it seems you all are in large part in agreement, not on
11 what's admissible and not on when we might try this or any of
12 that, but just in kind of the standard rules of evidence,
13 likely we are going to have evidentiary hearings and the
14 government has just said can we have one on this.

15 And so where is the harm or what is the reason for
16 not -- not scheduling it today and not ----

17 ADDC [MAJ HURLEY]: Right.

18 MJ [Col SPATH]: ---- but with an eye towards trial saying
19 well, we will do that of course because we would do that in
20 almost any case.

21 ADDC [MAJ HURLEY]: Where is the harm? Well, sir, the
22 first element of harm that we would talk about with respect to
23 these witnesses and this evidence would be if -- let's go

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1 through the hypothetical in which we have this hearing. There
2 will no doubt -- among those witnesses, they will have some
3 information that at least the trial defense team considers
4 important to adduce in front of the members to help them put
5 that evidence or their testimony at large into a larger
6 context.

7 MJ [Col SPATH]: Absolutely.

8 ADDC [MAJ HURLEY]: So those individuals, all eight or
9 some number of those eight will have to return for trial to
10 testify during the defense case-in-chief. And we believe for
11 those individuals that just amounts to an unnecessary waste of
12 time.

13 And that skips over another important idea, is the
14 government wants to bring all these witnesses to testify right
15 from there. Well, if they are allowed to do that, then the
16 question becomes if we have to put these witnesses down as
17 defense witnesses, will they be brought back, or will they
18 testify via video teleconference with all of the problems
19 attendant with that idea, which is a course of action that the
20 government has at its disposal. And that's practically the
21 first concern, is that those individuals will be brought back,
22 upsetting their lives. Well, that's a cost of doing business
23 for you as a witness.

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1 But the period of -- what we will get from them we
2 can get when the trial commences and not necessarily bifurcate
3 their testimony from an instance at time one and then at time,
4 you know, plus eight or nine months or even longer than that.
5 And at that point what we remember and know they would have
6 said at time one, and I guess this is true generally, but true
7 again here, they may forget, but that individual may not be
8 available for us at some later date. Again, a risk attendant
9 in trials generally, but it's again attendant here.

10 MJ [Col SPATH]: I am trying to just focus though --
11 because the other piece of that, as the government points out,
12 doesn't it help to know what's admissible prior to moving on
13 to the more substantive stages of the trial and what's
14 inadmissible? Just as a general sense I would think that
15 would be of assistance to you on the defense and to the
16 government as well.

17 ADDC [MAJ HURLEY]: Yes, sir, but -- do I agree with that
18 concept generally? Absolutely. Is it reasonably prudent for
19 all members of the defense team to anticipate that the
20 government will be able to successfully admit photographs of
21 the USS COLE and videos taken? You know, in that sense, we
22 can sort of get there from here with what the government has
23 warned us we need to have the evidentiary parameters set, and

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1 I absolutely would agree with that and with the multiple
2 hearsay statements and whether or not those are going to be
3 admissible.

4 MJ [Col SPATH]: That's a much different issue.

5 ADDC [MAJ HURLEY]: Much different issue.

6 The admissibility of Mr. al Nashiri's statements
7 prior to trial, all of those statements, much different, and
8 they are all important issues, but I think the court's, I
9 would say, much more central or important in terms of the
10 strategy that we would need to employ as defense counsel.

11 MJ [Col SPATH]: I would think the latter two that you
12 mentioned would take us a significant period of time to work
13 through in an evidentiary hearing, the hearsay issues and then
14 any statements made by your client. Those typically take
15 longer, again, in any setting, I would guess here even more.

16 ADDC [MAJ HURLEY]: Yes, sir. And with respect to the
17 members, we are confident, given the nature of this evidence
18 that we are talking about in Appellate Exhibit 283, that, you
19 know, Armed Forces officers typically from the rank of O-3 to
20 O-6 are going to be able to listen and implement any -- let me
21 finish this thought and then I will look at the note that was
22 just handed me. And you know where I am going with this, sir.
23 They are going to be able to implement any limiting

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1 instruction you give them with respect to any evidence that
2 they have a chance to see but is ultimately ruled to be
3 inadmissible to this commission.

4 Sir, can I have a second to look at this?

5 MJ [Col SPATH]: Absolutely.

6 ADDC [MAJ HURLEY]: Sir, again I just want to touch on
7 this or make sure that this point is specifically clear, that
8 as you are looking at this and crafting an appropriate order,
9 if you decide a pretrial hearing is appropriate, that the
10 interests of justice require -- and I took that from the rule,
11 that wasn't some invention of my mind.

12 If you believe that the interests of justice require
13 it, then what we would look for from the defense is to ensure
14 that we are -- one, we would ask that they be actually called
15 during the trial itself, but two, if you believe this to be
16 appropriate, that these witnesses are likewise called live
17 here rather than going through the video process, because that
18 is an alternative that the government has in this particular
19 case.

20 Now, with respect to these particular witnesses, and
21 witnesses generally, sir, when you call as a representative of
22 the Nashiri defense team, as a representative of someone who
23 is alleged to be a terrorist, that doesn't get a lot of phone

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1 calls returned. And the reason for asking for a delay, and a
2 120-day delay is -- the government asks for 45 days, and we
3 were able -- we understand that that's 45 days or at a point
4 determined in the future.

5 There is some difficulty associated with getting
6 people to talk to you when you tell them you represent someone
7 who is alleged to be a terrorist, and that's reflected in the
8 number that we gave you, 120 days, is that sometimes it takes
9 more time and, given the volume of material that we have to go
10 through in order to prepare to cross-examine these witnesses,
11 even for in the hypothetical scenario, if we are in a pretrial
12 admissibility hearing, we would be able to synthesize all the
13 information together, and longer would be better, and we would
14 request 120 days.

15 We were serious when we wrote that, but if you just
16 keep that concept in mind of the time that it would take to
17 work within, and I am sure the government is going to help us
18 with respect to these witnesses. I don't mean to impugn their
19 good offices, but that has a tendency to take longer than it
20 would in other matters that you may have run into in the past.

21 Sir, finally, generally speaking the government --
22 this is on the order itself and you entering an order with
23 respect to the forced protection measures and the handling of

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1 these documents, sir. The defense contends that's generally
2 unnecessary. We are going to handle this information as we
3 are required to by the protective order, and a special order
4 is not required for this particular matter or these particular
5 matters. And it is certainly not required until, you know,
6 the evidence is in evidence and it's necessarily in your
7 custody and control, because right now it's just discovery
8 that's been shared between the parties. That's not required
9 certainly until that point.

10 Sir, I am just going to go over my notes real quick.

11 Sir, as we said, in conclusion, we recognize that the
12 commission has the right and the authority to order these
13 pretrial hearings, but with respect to Appellate Exhibit 283,
14 that it is not appropriate and that these matters are best to
15 be taken up during the actual trial itself.

16 Thank you, sir.

17 MJ [Col SPATH]: Thanks.

18 ATC [LT DAVIS]: Your Honor, just on the last point with
19 regard to the sealing order, in the government's invocation of
20 the government information privilege, the government did
21 invoke the government information privilege. I believe the
22 protection of this information, although unclassified, served
23 the public interest. I just invite the court's attention to

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1 Military Commission Rule of Evidence 506(g), disclosure of
2 government information.

3 Under (g), it says, "If the government agrees to
4 disclose government information to the defense subsequent to a
5 claim of privilege under this rule, the military judge, at the
6 request of the government, shall enter an appropriate
7 protective order" ----

8 MJ [Col SPATH]: Slow down. You're good.

9 ATC [LT DAVIS]: Thank you, Your Honor. Again, just to be
10 clear for the record, under 506(g) Military Commission Rule of
11 Evidence, after the government has invoked the privilege and
12 has disclosed the material to the defense, which occurred in
13 this case, it's incumbent upon the commission to enter a
14 protective order using the operative word "shall" in 506(g).
15 And I invite the court's attention to that particular
16 provision and ask you that you approve the sealing order as
17 proposed by the government.

18 MJ [Col SPATH]: I am looking at 506. I may hear from the
19 defense again. I don't know if they are going to have
20 additional comments.

21 I guess my question on that is the time to deal with
22 that order isn't now because we haven't -- the evidence hasn't
23 been offered yet. All we are talking about now is scheduling

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1 a hearing to deal with these photographs and the videos. And
2 so I think what the defense was saying is it's preliminary to
3 deal with an order now to seal them. I haven't even looked at
4 them. I just want to make sure I have the timing aspect down.
5 Just looking through the rule it seems that I do. Is that
6 accurate?

7 ATC [LT DAVIS]: It is, Your Honor. As part of the
8 requested order, and I think this is what the defense was
9 getting at, but we just want to remind everybody to be as
10 careful as possible when you have sensitive government
11 information that, even though it has not been admitted into
12 evidence, that the defense should take proper care in handling
13 that information to ensure that disclosure of that information
14 does not occur.

15 MJ [Col SPATH]: All right. Thank you.

16 ATC [LT DAVIS]: Thank you.

17 MJ [Col SPATH]: Any final comments, Defense Counsel?

18 ADDC [MAJ HURLEY]: Yes, sir, and I say briefly, but I may
19 have to take license with that.

20 I am not sure of the applicability, or the defense
21 isn't sure of the applicability of 506(g) in the sense I don't
22 know what information the government has agreed to disclose.
23 According to the government in their first argument, we have

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1 had this for a year or two, so I'm not sure that we have asked
2 for something they have agreed to disclose, and perhaps I have
3 just misapprehended, but at the end of the day, sir, we are
4 going to treat the evidence that we get in accordance with its
5 classification markings. And obviously if it is sensitive
6 information, we are military professionals and officers of
7 this court, we will treat it appropriately and continue to do
8 that or continue to handle it in that way throughout the
9 pendency of these proceedings.

10 MJ [Col SPATH]: Thank you. All right. Now we are going
11 to turn to 285. I believe we were going to do Appellate
12 Exhibit 285 and 306 together. I see head nods. That's good.
13 And so I will take arguments on those. Just give me a moment
14 to retrieve some documents.

15 All right, defense counsel.

16 DDC [Maj DANELS]: Good afternoon, Your Honor. This is a
17 matter the defense would like to provide the commission with
18 the Zivotofsky case, Zivotofsky v. Kerry. It's a case that we
19 didn't cite to in our brief but is relevant to the argument in
20 these motions.

21 MJ [Col SPATH]: Do you have a cite for that case?

22 DDC [Maj DANELS]: I do, Your Honor. 725 F.3d 197 and 406
23 U.S.App.D.C. 324. It's a 30-page document. A copy has been

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1 previously provided to the prosecution.

2 MJ [Col SPATH]: Thank you, and you may -- just give me
3 one second.

4 I have answered my question. It is marked as
5 Appellate Exhibit 285C. All right. You may proceed.

6 DDC [Maj DANELS]: Thank you, Your Honor. In AE 285 and
7 AE 2 -- I'm sorry, 306, the defense asks that this commission
8 dismiss all charges as well as the death penalty because the
9 Military Commission Act as applied to Mr. al Nashiri violates
10 the Yemen Friendship Agreement.

11 Under the terms of that agreement, which was entered
12 into by the President of the United States in 1946, Yemen
13 nationals in U.S. custody, such as Mr. al Nashiri, are to be
14 afforded the full protection of U.S. law. Because this
15 agreement arises out of the President's power to recognize
16 nations, it is the exclusive purview of the Executive branch,
17 and so such agreements are self-executing, meaning that they
18 do not require the ratification of Congress and they cannot
19 subsequently be negated or usurped through legislation of
20 Congress after the fact.

21 So in talking about the President's exclusive
22 authority with regard to friendship agreements and the
23 recognition of nations, he has the exclusive authority to

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1 extend diplomatic -- I'm sorry, diplomatic recognition to a
2 nation and to make binding agreements incident to that
3 recognition.

4 By "exclusive" what it means is that the Congress
5 cannot negate the terms of such an agreement through
6 legislation, like the Military Commissions Act. It doesn't
7 require Congress' ratification. It cannot be reviewed by the
8 courts, and indeed the Supreme Court has declined invitations
9 to question the President's use of his recognition power.
10 Again, it cannot be varied or overcome by later inconsistent
11 legislation, and the agreements entered into via the terms of
12 the friendship agreement are the law of the United States of
13 America.

14 And, again, this agreement was entered into in 1946
15 and reaffirmed in 2004, and it provides the relevant article,
16 Article 3 of the agreement provides the following, and I will
17 read slowly because sometimes I get in the habit of speaking
18 too quickly when I read.

19 "Subjects of His Majesty, The King of Yemen, and the
20 United States of America, and nationals of the United States
21 of America and the Kingdom of Yemen shall receive, shall be
22 received and treated in accordance with the requirements and
23 practices of generally recognized international law. In

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1 respect of their persons, possessions and rights, such
2 subjects or nationals shall enjoy the fullest protection of
3 the laws and authorities of the country and shall not be
4 treated in any manner less favorable than the national, the
5 nationals of any third country. Subjects of His Majesty and
6 the United States of America and nationals of the United
7 States of America and the Kingdom of Yemen shall be subjected
8 to the local laws and regulations and shall enjoy the rights
9 and privileges accorded in this article."

10 Again, the defense's position is that this treaty is
11 the law of the land under the supremacy clause of the United
12 States Constitution; therefore, it has the full effect of law
13 in the United States of America.

14 You know, there was some disagreement with regard to
15 whether or not Guantanamo Bay is in the United States of
16 America, and the government cites to Boumediene in its brief
17 stating that essentially it stands for the proposition that
18 Guantanamo Bay is under the sovereign of Cuba. However, they
19 left off an important part of the rest of that particular
20 portion of the Boumediene opinion, and it reads that, "Under
21 the terms of the lease between the United States and Cuba,
22 Cuba shall retain ultimate sovereignty over the territory
23 while the United States exercises complete jurisdiction and

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1 control."

2 Further down it says, "Under the terms of the 1934
3 treaty, however, Cuba effectively has no rights as a sovereign
4 until the parties agree to the modification of the 1903 lease
5 agreement or the United States abandons the base." Neither of
6 those instances have occurred. Therefore, the United States
7 has de facto sovereignty over GTMO and plenary control over
8 the entirety of the installation, and the goings-on on
9 Guantanamo Bay are not subject to questioning by Cuba. They
10 have no ability to question or dictate anything that occurs on
11 Guantanamo Bay.

12 With that being the case, Guantanamo, for purposes of
13 the Yemeni Friendship Agreement, is the United States of
14 America, and as such the provisions of Article 3 of the Yemeni
15 Friendship Agreement should be adhered to. And because it
16 arises out of the President's power as the executive, it's the
17 law and it cannot be questioned. Congress cannot question it.
18 The court cannot question it. It is the law.

19 And what the Congress has attempted by the passage of
20 the Military Commissions Act is an attempt to usurp the
21 President's power under the Yemeni Friendship Agreement
22 through legislation. And the court has made it clear on
23 several occasions that that cannot be allowed. And the case

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1 that I provided, Your Honor, is a case that stands yet again
2 for the proposition that the President's power in that arena
3 is absolute, cannot be questioned by the court, the power in
4 that regard cannot be legislated away by the Congress.

5 And one of the first things that the defense would
6 like to point out with regard to one of the various ways that
7 the Military Commission Act violates the Yemeni Friendship
8 Agreement is that because this commission did not exist at the
9 time of any of the alleged misconduct in this case, it
10 violates the ex post facto clause of the constitution.

11 And the recent case in Bahlul, which Your Honor has
12 said that he would allow the government to submit, stands for
13 the proposition that the ex post facto clause applies at
14 Guantanamo Bay. Five of the seven justices sitting on the
15 en banc court agreed that the ex post facto clause applied to
16 Guantanamo Bay pursuant to Boumediene.

17 The defense -- another area in which the defense
18 believes that Mr. al Nashiri is not being provided all of the
19 rights that an American would be provided is the fact that
20 hearsay is facially allowed in a military commission. There
21 has been some discussion about the government's AE 166. You
22 know, they have put us on notice that they intend to try to
23 get some hearsay in. That would not be allowed in any court

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1 in America, no Article III court, no military court-martial.

2 Also the manner in which the jury is selected, the
3 way that the convening authority has hand-picked the members
4 who will come down to be voir dired and sit on the panel is
5 not consistent with the fullest protections of the law that a
6 U.S. citizen would get in an Article III court.

7 MJ [Col SPATH]: Unless they were a military member.

8 DDC [Maj DANELS]: Right, but, Your Honor, that wouldn't
9 be an Article III court.

10 MJ [Col SPATH]: They are U.S. citizens.

11 DDC [Maj DANELS]: I agree. However, the military has the
12 good order and discipline aspect of things, and the courts
13 have recognized that because of the unique circumstance of the
14 military as it relates to good order and discipline,
15 essentially they are allowed to -- things that would otherwise
16 be unconstitutional are allowed in the military because of
17 good order and discipline.

18 MJ [Col SPATH]: And the courts, to be fair, we don't have
19 the robust case law at the commissions yet, but they have
20 recognized the commissions as well. That's how we go to the
21 D.C. Circuit. The D.C. Circuit hasn't said you all have to
22 disband, you have no reason to be there. They haven't said
23 that's unconstitutional in the general sense.

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1 DDC [Maj DANELS]: Correct.

2 MJ [Col SPATH]: I recognize they have had some issues
3 with some of the procedures. But again, the case law is not
4 as robust for the commissions, but there is some recognition
5 that this process can exist.

6 DDC [Maj DANELS]: Absolutely, Your Honor, the process can
7 exist. But we are speaking specifically with regard to the
8 process being applied to Mr. al Nashiri and the fact that he
9 enjoys the benefits as a citizen of Yemeni -- I'm sorry, as a
10 citizen of Yemen, which the government has conceded he is a
11 dual citizen of both Yemen and Saudi Arabia, because he enjoys
12 the privileges of that friendship agreement as applied to --
13 the MCA as applied to Mr. al Nashiri violates that agreement.
14 So yes, they are allowed to exist.

15 MJ [Col SPATH]: I'm just trying -- again, I am just
16 reading the motions and doing the research. I'm just trying
17 to figure it out at the moment.

18 Does the friendship agreement -- I realize it
19 provides the fullest protection of the laws, that that's the
20 plain language, and we have certainly discussed that here, the
21 importance of language, but if -- and status probably matters
22 too. But was the President attempting to suggest that they
23 have some kind of immunity from things that our country sets

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1 up, like commissions, when he signed the friendship agreement?

2 I'm just trying to figure out what the purpose behind
3 the friendship agreement is and if it has anything to do with
4 this process, or if this process gives him the fullest
5 protection of our current state of the law?

6 DDC [Maj DANELS]: The defense's interpretation of the
7 friendship agreement is that Mr. al Nashiri, in being tried
8 for his alleged participation in the commission of these acts,
9 can be treated no differently than a United States citizen who
10 is accused of the exact same charges, and the MCA specifically
11 does not apply to U.S. citizens. So in that regard it's one
12 of the arguments that we make.

13 I mean, just facially there is a great difference
14 between the fact that he is being tried by the Military
15 Commission Act and it wouldn't even apply to a United States
16 citizen. They aren't charged under the MCA.

17 Additionally, when it comes to 1001(g), which makes
18 him ineligible for pretrial confinement credit, that is in
19 violation of the ex post facto clause because it didn't
20 exist -- it's not in the 2007 manual. It wasn't added until
21 2012. Mr. al Nashiri was charged -- has been charged since
22 2008. There was a period of time when the charges were
23 dismissed and he was recharged. But that provision of the MCA

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1 didn't even exist at the time of the commission of these
2 crimes or the original charging in 2008. So because of that
3 it's a violation of the ex post facto clause, which Bahlul
4 makes clear, ex post facto applies to Guantanamo.

5 I have already talked about the fact that the MCA
6 doesn't apply to U.S. citizens and it's the defense's position
7 that it systematically discriminates against noncitizens in so
8 much as it only applies to noncitizens, and it imposes death
9 through a use of procedures that don't apply to U.S. citizens,
10 which is in violation of the Fifth Amendment to the U.S.
11 Constitution.

12 You know, Boumediene specifically with whether or not
13 habeas corpus relief applied to Guantanamo Bay, but in
14 discussion of whether habeas applied it talked about in
15 determining which constitutional provisions applied -- let me
16 find it in the opinion so that I get the language exactly
17 right.

18 "The determination of what particular provision of
19 the constitution is applicable, generally speaking, in all
20 cases involves an inquiry into the situation of the territory
21 and its relation to the U.S." The defense has already stated
22 that for all intents and purposes Guantanamo is the United
23 States of America. Cuba is sort of the figurehead sovereign.

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1 And in determining what provisions apply, you look to
2 how impracticable or anomalous applying the provisions would
3 be to the military mission at Guantanamo Bay. And the defense
4 believes that the government hasn't provided anything,
5 certainly not in their response, with regard to what about
6 applying certain constitutional provisions or even the Yemeni
7 Friendship Agreement that would affect the Guantanamo mission.

8 You know, the court talks about costs. The costs are
9 already accounted for. There may be some incidental or
10 incremental costs in addition to the costs already
11 contemplated, but cost is not one of the factors that weigh in
12 favor of not applying, certainly the Yemeni Friendship
13 Agreement and certain other of the constitutional provisions
14 that the defense has requested information are wondered
15 whether or not they apply, and I believe that with regard to
16 the Sixth Amendment of the Constitution, that is still pending
17 before this commission.

18 MJ [Col SPATH]: I don't think it's in the agreement. I
19 am just -- again, it's good to ask questions and get some
20 input.

21 Do you think the Yemeni Friendship Agreement applies
22 to, by its terms, or is meant to apply to an unprivileged
23 enemy belligerent? I mean, I think that's a fair question

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1 under the current state of the law. It is certainly the
2 government's theory in this case that that is your client's
3 status. And so as the President signs that friendship
4 agreement, is it meant to apply to that category of people?

5 DDC [Maj DANELS]: Based on the fact that the agreement
6 was reaffirmed in 2004 with the addition of the commerce
7 aspect of the agreement, if the President at the time wanted
8 to limit aspects of the agreement to a certain category of
9 people, he had the opportunity at the time to alter the
10 language of the original agreement.

11 MJ [Col SPATH]: But if he thought this commission was
12 acting in violation of the agreement, couldn't he step in and
13 dismiss these charges?

14 DDC [Maj DANELS]: He could, but one of the things of note
15 in the Zivot- -- I'm just going to refer to it as the Z case
16 that I have provided you. One of the things with regard to
17 that case is that President Bush, recognizing that the
18 passport law that he signed, he signed it into law despite the
19 fact that he recognized that it impermissibly interferes with
20 the President's constitutional authority to conduct the
21 nation's foreign affairs.

22 So he is -- I mean, clearly a different President,
23 but here we have a President who recognizes that the very law

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1 that he is signing into law unconstitutionally infringes upon
2 his executive power as it relates to the conduct of foreign
3 nations. So following, you know, the logic of your question,
4 President Bush would have just not signed it into law because
5 it was unconstitutional -- that provision was unconstitutional
6 at the time of the signing.

7 So if the President, contemplating limiting the
8 Yemeni -- the terms of the friendship agreement to any class
9 of people, he could have done it at the time that the
10 agreement was essentially reaffirmed in 2004, and he didn't do
11 that.

12 And just quickly, to draw your attention, it's a
13 separate issue because it had to do with the President's
14 exclusive power to pardon, but it's also illustrative of the
15 point that Congress cannot legislate away the power of the
16 President in things that he controls as the exclusive organ of
17 the federal government. And in the Klein case it had to do
18 with the President's pardon power. President Lincoln had
19 signed into law -- essentially had made a proclamation that
20 anybody who had supported or fought on behalf of the
21 Confederate Army would be pardoned, all they had to do was
22 swear an oath of allegiance to the United States.

23 Well, those who fought for or supported the

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1 Confederacy had their property seized, so they could go into
2 these common courts -- common claims courts, courts of claims,
3 and assert their right to have the value of that property --
4 the proceeds for the sale of that property given to their
5 estate.

6 And so essentially Congress didn't like the fact that
7 people who they felt were traitors could get the benefit of
8 the value of their property, and so they passed the law
9 getting rid of those courts and also eliminating the Supreme
10 Court's power to review such decisions. And because it had to
11 do with the executive -- the power that was exclusive to the
12 President, the Court found that that was unconstitutional,
13 that Congress did not have that authority. So it's not just
14 the power to recognize nations. It's any power of the
15 President that is the exclusive purview of the Executive
16 branch, Congress cannot usurp, the court cannot question.

17 And with regard to the death penalty aspect, I am
18 just going to call the court's attention to the various ways
19 we feel that the death penalty specifically violates the
20 Yemeni Friendship Agreement, and these arguments have been the
21 source of motions. So I am not going to get into full
22 argument, I just want to highlight the manner in which we
23 think it offends the agreement.

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1 And one has to do with the charge of perfidy and
2 hazarding a vessel. There is no element to either of those
3 crimes that the killing be intentional, so it is -- imposition
4 of the death penalty for those strict liability offenses is in
5 violation of the Eighth Amendment to the Constitution.

6 The defense has argued that the MCA and Rule 1004 do
7 not genuinely narrow, as required under Lowenfield v. Phelps,
8 instead they work together to broaden the category of
9 people -- I'm sorry, the category of offenses virtually make
10 any offense where a homicide results death eligible, which is
11 also impermissible under the Eighth Amendment.

12 And I'm sorry, Your Honor, I wanted to let you know
13 that the previous argument about the -- about hazarding a
14 vessel and perfidy not having the element of intentional
15 killing was the subject of AE 176. The fact that the MCA and
16 1004 don't genuinely narrow was the subject of AE 180.

17 The defense also believes that on its face, the
18 absence of a grand jury is a facial violation of the Eighth
19 Amendment. That was the subject of AE 183.

20 Section 148(d) of the Military Commission Act
21 discriminates facially and invidiously in the application of
22 the death penalty insofar as it only applies to noncitizens,
23 and that was the subject of AE 264.

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1 I'm not going to reargue all of the positions of
2 those motions. I just direct Your Honor to those motions.
3 And absent questions from the commission ----

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

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

6 ATC [LT DAVIS]: Your Honor, there was a lot of discussion
7 about whether or not the Yemeni Friendship Agreement applies.
8 And with the court's indulgence I will actually save that part
9 of my argument more until the end. And if we can kind of play
10 on a field where the Yemeni Friendship Agreement does apply,
11 because it is the government's position that even if the
12 Yemeni Friendship Agreement does apply, the fullest
13 protections of that agreement have been and will continue to
14 be afforded to the accused.

15 The defense discussed the contents of the Yemeni
16 Friendship Agreement, but I think it boils down to two main
17 points, first, that the accused should be treated in
18 accordance with the requirements and practices recognized by
19 international law, and two, that the accused shall enjoy the
20 fullest protections of the laws of that country.

21 Well, Your Honor, in this particular scenario, that
22 country in question is the United States. The law of the
23 United States, as passed by Congress, is the Military

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1 Commissions Act, and the accused has all of the rights under
2 that law, so he does have the fullest extent, has the fullest
3 rights under U.S. law for unlawful enemy belligerents,
4 unlawful enemy belligerents who have violated the law of war.

5 What the defense argument seems to move into is
6 perhaps he does have the protections of the MCA, but there are
7 rights beyond that, that perhaps a regular citizen would have.
8 And what that boils down to, Your Honor, is an equal
9 protection argument, that somehow citizens of the United
10 States are afforded greater rights than the accused. This is
11 really just a repackaged version of AE 046 when the defense
12 did challenge whether or not there was a violation of the
13 Equal Protection Clause. That's been ruled on by this
14 commission as Your Honor may be aware, AE 046B.

15 In AE 046B the commission found that analyzing the
16 comparative rights and protections afforded by the MCA in
17 comparison to the UCMJ and criminal defendants in domestic
18 federal district courts, the court was satisfied that the
19 equal protection element of the due process clause had been
20 met in this case.

21 That was not just this court's opinion. The court
22 cited to Hamdan and the U.S. CMR decision of 2011. So not
23 only has this issue been resolved by this court, it's been

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1 resolved by our supervisory court. This argument that somehow
2 the accused is on separate footing or is put in a worse place
3 and therefore violative of the Yemen Friendship Agreement,
4 based on the law of the case, the law of the land or the law
5 of this commission, that that certainly is not the case.

6 And it's not really surprising that our supervisory
7 court and this court would find that, indeed, there is parity
8 essentially when we are talking about the UCMJ compared to
9 commissions, or when we are talking about U.S. federal courts
10 and commissions. Because when you take a look at the rights
11 under the MCA, there is a lot of talk about how unique this
12 system is. But I have certainly practiced a fair amount in
13 courts-martial throughout the United States, and this
14 courtroom sure looks a lot like those courtrooms, the rights
15 the accused have look a lot like those rights.

16 The right to be present during this trial is an
17 absolute right he has before this commission; the right to
18 counsel; including learned counsel, as we have discussed the
19 robust resources that the defense has; his presumption of
20 innocence, these are all examples of the rights that are
21 afforded to any citizen in the United States; that his guilt
22 needs to be proven beyond a reasonable doubt; his right
23 against self-incrimination; that he can present evidence, call

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1 witnesses and cross-examine, cross-examine available
2 witnesses; and that he can appeal to the federal court and all
3 the way up to the Supreme Court.

4 That is why the court in Hamdan found that indeed
5 those that come before a commission such as this are on equal
6 footing, and therefore even if the Yemen Friendship Agreement
7 applies, indeed the accused has the fullest protections of the
8 law of this country, either under the MCA or under any other
9 standard.

10 Certainly, if the defense believes that those rights
11 have -- or that his rights under the MCA have fallen short of
12 that, it's another right that the accused has, which is to
13 challenge those rules. And the defense certainly has done so
14 throughout this case. I am sure they will continue to do so
15 in the future. But virtually every issue that the defense has
16 brought up has already been determined by this commission to
17 be in full compliance with the law.

18 And speaking specifically about some of the examples
19 that were brought up both during oral argument as well as in
20 the defense motion, there is an argument that the procedures
21 by which the jury is selected, the impartiality of the
22 convening authority, that that somehow is violative of the
23 rights of the accused. That was the source of the

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1 commission's order at 117C.

2 The defense in its motion talks about the issues that
3 they feel that they have with regard to the production of
4 witnesses and that that somehow falls short of the rights that
5 should be accorded. That was addressed and ruled on and
6 denied by the court at 114C.

7 Frankly, Your Honor, virtually all of the issues
8 raised by the defense have been addressed by this commission.
9 This is simply a second bite at the apple, if you will, with
10 the defense and this motion.

11 As I indicated at the beginning, Your Honor, two
12 parts to this Yemen Friendship Agreement. One, that there is
13 the fullest protections of the law; two, that it's essentially
14 in compliance with procedures and requirements under
15 international law.

16 Similarly, the procedures and practices of the MCA
17 are in full accordance with international law. I invite the
18 court's attention to the Hamdan I case. I am talking about
19 what are those requirements under international law. And the
20 requirements under international law, Common Article 3, is
21 that you have a regularly constituted court, but that there
22 should be a great deal of flexibility with regard to having a
23 regularly constituted court. Two things, though, in

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1 particular stood out to that court: One, that the accused
2 should be present; and two, that the accused should be privy
3 to the evidence against him. Both of those are rock solid
4 tenets of the MCA. And with that in mind it does indeed
5 satisfy the international law standard with regard to the
6 Yemen Friendship Agreement.

7 AE 306, really the argument is no different. The
8 equal protection status and the fact that the accused in this
9 forum are on equal footing with their civilian counterparts
10 certainly exists with regard to the death penalty as well.
11 The defense brought up I think probably four separate areas
12 and indicated that they had already been addressed, perhaps
13 that there had already been oral argument. But it's more than
14 that. They have been addressed and they have been ruled on
15 and those motions have been denied. AE 176C denied the
16 defense motion.

17 Tison v. Arizona is a case representative of what the
18 standard would be in U.S. federal court, a case where it was
19 found that death penalty was appropriate in a case where there
20 was reckless disregard. So the charge that the government has
21 pled as a capital charge in this case of hazarding, that a
22 death, that death could result or that death could be a
23 sentence for that was absolutely appropriate.

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1 180C, the commission found that the narrowing process
2 set up by the MCA was fully in compliance with the
3 Constitution. Grand jury issues, equal protection issues, as
4 I have indicated, these have already been addressed by the
5 commission in motions raised by the defense and denied by the
6 commission.

7 As I indicated at the beginning, Your Honor, there is
8 this question of whether the Yemen Friendship Agreement
9 applies. It is not a necessary inquiry for this commission to
10 undertake because as I have gone through here, because even if
11 it does apply, the two standards have been met, fullest
12 protections of the law are present under the MCA, equal
13 protection is satisfied, and two, under international law.

14 Where the government does disagree, however, with the
15 defense as far as whether the Yemen Friendship Agreement
16 applies, it is not a question of whether it is a self --
17 whether the Yemen Friendship Agreement is a self-executing
18 treaty. If you look at McKesson Corporation v. Iran,
19 539 F.3d 485, this is a D.C. Circuit case cited by the
20 defense. However, cited somewhat incompletely.

21 The defense cited to McKesson Corporation for the
22 proposition that treaties can be self-executing. But the
23 McKesson court went on. The McKesson court went on to say

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1 even when treaties are self-executing, the background
2 presumption, the presumption is that international agreements,
3 even those which directly benefit private persons, generally
4 do not create private rights or create private -- or provide
5 for private cause of action.

6 Essentially, Your Honor, what that is indicating is
7 we are talking about treaties. Treaties are between
8 countries. So unless it is explicitly made in that treaty
9 that individuals are to have rights, any violation of that is
10 an issue between countries, it's not one that provides rights
11 to the individual, an individual like the accused in this
12 case. So because that does not provide that private cause of
13 action, it is the government position that the Yemen
14 Friendship Agreement does not apply.

15 Again, it's not necessary for Your Honor to undertake
16 that analysis, but we offer that for the court's consideration
17 and we ask you to deny the defense motion.

18 MJ [Col SPATH]: Thanks.

19 Defense Counsel, any final comments or any additional
20 comments?

21 DDC [Maj DANELS]: The defense does not argue that the MCA
22 does not provide some protections. Our position is that it
23 does not provide the fullest protections of U.S. law, and the

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1 agreement is pretty explicit in that it applies to Yemeni
2 nationals in the custody of the United States and that they
3 are to enjoy the full protections of U.S. law. And you don't
4 even have to look to international law in this regard because
5 the U.S. law is the Yemeni Friendship Agreement.

6 No Article III court would allow 66 plus hearsay
7 statements in without a right to confrontation against an
8 accused in any case, let alone a death penalty case.

9 The ability to call witnesses. Judge Pohl ruled that
10 he didn't have subpoena power here. No accused in an
11 Article III court in the United States of America would not be
12 allowed to subpoena witnesses in presenting a defense. And
13 quite honestly, I don't know whether Ghailani or Moussaoui
14 were Yemenis. I believe Moussaoui was Saudi, Ghailani was
15 Sudanese. I am not sure. However, they were taken to -- they
16 were taken to an Article III court.

17 In the Article III court they had rights that
18 Mr. al Nashiri does not enjoy in this commission. And with
19 regard to Judge Pohl previously ruling on some of the
20 underlying arguments in this motion, in the defense's opinion
21 there were reasons to question the impartiality of Judge Pohl.
22 It's not a secret that we had our concerns about his ability
23 to be impartial in this military commission and we challenged

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1 him on several occasions with regard to our concerns about his
2 impartiality.

3 He was called out of retired -- he was recalled from
4 retirement by the convening authority to be the Chief Judge in
5 the military commission. He detailed himself to this case and
6 the 9/11 case. He served on a one-year contract that was
7 renewed or not, presumably at the pleasure of the convening
8 authority.

9 MJ [Col SPATH]: Agreed. I mean, I am through that part
10 of the record. I saw the challenges.

11 Here is a question in that regard. This motion is
12 separate from that. For the motions that he decided I think
13 the only avenue you have is reconsideration for new facts or
14 new law or -- I am not inviting motion practice, but, I mean,
15 if you have a belief that it was decided by somebody who
16 should have recused himself earlier in the process, I am
17 confident you all will find motions there to have me go back
18 there and look at those rulings.

19 I'm trying to figure out how it is going to help me
20 here with this particular motion. I understand Judge Pohl has
21 ruled on things that are in a similar universe. They are not
22 the same. This is a different argument, and I am taking it in
23 as it relates to the Yemeni Friendship Agreement. So if I get

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1 replaced, you will have challenged both judges so far to
2 recuse themselves. I think it's the nature of doing business
3 on the commissions, truly.

4 But I haven't looked at Judge Pohl's qualifications
5 or, frankly, many of his rulings. I am working through them
6 now, so ----

7 DDC [Maj DANELS]: The defense doesn't have anything,
8 subject to questions from the commissions.

9 MJ [Col SPATH]: Thank you.

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

11 MJ [Col SPATH]: Any final comments?

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

13 MJ [Col SPATH]: Thank you. I know we are supposed to
14 turn to 295. We can. We can even break in the middle if it
15 goes a long time on one side before we start the next series.
16 So let's at least start with 295.

17 You have a busy day today.

18 ADDC [MAJ HURLEY]: Yes, sir. Good afternoon, sir. The
19 defense asks in Appellate Exhibit 295 that you, as the
20 military judge, dismiss all charges and specifications with
21 respect to Mr. al Nashiri, my client, because the Military
22 Commissions Act of 2009 is unconstitutional, specifically
23 because it is designed to discriminate against a specific

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1 religion, that is the Muslim religion.

2 And you will see initially, sir, that there is this
3 dispute among the parties as to who bears the burden. The
4 defense contends this is a jurisdictional challenge and the
5 government bears the burden. The government sees it another
6 way, calling it a facial challenge to the statute. Either
7 way, the defense contends that it prevails with respect to
8 this particular motion regardless of who bears the burden.

9 Turning to the specific -- the meat, if you will,
10 sir, of the appellate exhibit, the Military Commissions Act is
11 unconstitutional, specifically the First Amendment where the
12 free exercise clause, that is to say Congress shall make no
13 law infringing on religious liberty is impinged because of --
14 you know, facially, sir, that this ----

15 MJ [Col SPATH]: Let me ask, with regard to that it's
16 unconstitutional, here is where I find it difficult for me at
17 this point to deal with a broad statement like that, because
18 it seems like we have dealt with -- again, we don't have as
19 much -- we don't have a robust series of cases in the sense
20 this hasn't been in existence for 100 years, but we do have a
21 significant series of cases, and that hasn't occurred -- we
22 have not had a court, including the Supreme Court, say,
23 unconstitutional, you are done.

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1 So how can I step in and say, as a process it's
2 completely unconstitutional at this point?

3 ADDC [MAJ HURLEY]: Sir, you can step in and say that
4 because the defense would submit to you that -- you are right,
5 Your Honor, that there is no question this is a big ask ----

6 MJ [Col SPATH]: I don't mind the big ask.

7 ADDC [MAJ HURLEY]: ---- rule in my favor on minor
8 evidentiary issue.

9 MJ [Col SPATH]: I don't mind that. I mind if it has been
10 dealt with before and the superior courts already said you are
11 able to hold commissions, it is difficult for me then to say
12 forget that. Not because -- well, I don't particularly have
13 an opinion at this point, but my job is to follow the law no
14 matter how I might feel about any particular law.

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [Col SPATH]: To call it unconstitutional in that broad
17 stroke, it appears to me that courts superior to me have made
18 clear this can exist.

19 ADDC [MAJ HURLEY]: Yes, sir, or you are right, those
20 superior courts have made clear and should have made clear to
21 everyone who has read those opinions that the concept of
22 military commissions is grounded in American law.

23 MJ [Col SPATH]: Yes.

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1 ADDC [MAJ HURLEY]: Except that idea, that is, we agree
2 with that. The defense contends in Appellate Exhibit 295 that
3 the Military Commissions Act, that specific act in
4 implementing this idea ----

5 MJ [Col SPATH]: As applied here to your client?

6 ADDC [MAJ HURLEY]: Right. That in that limited sense
7 it's unconstitutional. Specifically when we were talking
8 about the facial challenge, it would be the jurisdictional
9 element which says in its last jurisdictional element, a
10 member of al Qaeda, members of the al Qaeda are exclusively
11 members of the Muslim religion and that that is -- that
12 illustrates -- not only does that particular portion of the
13 legislation inside its text, but that portion of it considered
14 with the robust legislative history -- to borrow the word
15 "robust" from the commission, the robust legislative history
16 indicates that this is designed, this Military Commissions Act
17 is specifically designed to address and to contemplate trying
18 Muslims, specifically Muslim men inside these -- inside this
19 commission, inside this ----

20 MJ [Col SPATH]: I am reading -- I am looking at your
21 motion and reading the statements and then yes, looking at how
22 you bring someone before the commission, yes, a member of
23 al Qaeda is one of the requirements.

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [Col SPATH]: And you say, and I don't think the
3 government would oppose that, that the religious background of
4 that person is going to be of a Muslim faith.

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [Col SPATH]: But are they targeting Muslims as a
7 general class or are they targeting a particular category
8 within that? Is it a member of a terrorist organization as
9 opposed to their religious nature?

10 ADDC [MAJ HURLEY]: Sir, you know, I don't know that one
11 can separate out -- I mean, it's hard to separate those two
12 particular things out, that this individual is a -- practices
13 the Islamic religion.

14 MJ [Col SPATH]: As I read the statements by the
15 politicians, and this is not a quality comment on their
16 statements. It isn't. It is just as I read them, they seem
17 pretty careful to say -- they don't say Muslims et al. They
18 seem pretty careful to say terrorists or alleged terrorists --
19 they don't say alleged, but I would, or an allegiance to
20 radical Islam, as opposed to the more general statement that
21 you seem to be making, that it is targeted at a category of
22 all Muslim men.

23 ADDC [MAJ HURLEY]: Yes, sir. I mean, you are right to

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1 say that it's not broadly aimed at Muslims in general. They
2 will say Islamic extremism, Islamic extremists. I am just
3 picking these out. But it is born of an animus towards the
4 practice of that particular religion or towards a viewpoint of
5 that particular religion and that's where ----

6 MJ [Col SPATH]: And I don't know, or is it born of a
7 perceived ability to respond to attacks by unlawful
8 belligerents who happen to be, at least defined by the act,
9 members of al Qaeda?

10 ADDC [MAJ HURLEY]: Well, sir, the defense would submit
11 that based on those statements in the legislative history,
12 it's born of the latter. It's born -- we have to target
13 specifically Muslims, not individuals who also just so happen
14 to be Muslim. As those members of Congress were enacting this
15 legislation, they had in their mind we are targeting Muslims
16 who also engage in these other behaviors. Islamic extremism,
17 that this is, in their mind, the first part of it. And
18 because the first issue for those members of Congress, because
19 of the plain language of the text itself, that's why we
20 believe this violates the admonishment in the First Amendment,
21 that Congress shall make no laws with respect to the exercise
22 of freedom of religion.

23 Sir, we talked about the specific animus that we have

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1 been bandying about, what those particular Congressmen said.
2 Specifically we would want you to look also -- and this is on
3 page 4, the top of page 4, that Representative Simmons said we
4 are not at war with you, we are at war with those who swore
5 allegiance to radical Islam.

6 MJ [Col SPATH]: Slow down for just a second. Okay.

7 ADDC [MAJ HURLEY]: Those statements that you read are a
8 sore temptation to speed up when you should not.

9 And it's illustrative of the government's intent to
10 only bring Muslim men before this commission, how it's handled
11 other cases. And we cited some of those cases in our motion,
12 specifically the case of Victor Bout who couldn't have been
13 working more closely, if you will believe the allegations and
14 ultimately convictions against him, he was working with
15 al Qaeda, but he, a Russian national, not on its face adherent
16 of the Muslim religion, that individual went through an
17 Article III court.

18 Sir, I will give it a shot. Piratheepan Nadarajah,
19 the same thing, that that individual, and I will just call him
20 "that individual" for the purposes of this particular
21 argument, Mr. Nadarajah is an adherent not of the Muslim
22 religion but of the Shinto religion, but as you can see from
23 our belief, engaged in acts that one would normally consider

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1 unlawful belligerent acts, if you were to believe strictly the
2 allegations against him, but not adherence to the Muslim
3 faith, thus, not brought here.

4 The other issue that we would point to, generally
5 speaking, is the facility and the practice of this commission.
6 Now, the facility and the practice of this commission in this
7 institution generally is to revolve -- revolves itself around
8 the Muslim religion. I have been to three detainment cells to
9 meet with my client. In each one of those cells, the
10 direction towards Mecca is put indelibly in that cell. I have
11 been to a lot of other jails, more than I would like to admit,
12 especially in front of my mother, and I can tell you that
13 that's never happened before. Not only that, but there are
14 certain -- a couple of those cells that I can remember, one
15 specifically had prayer times posted on the wall, the five
16 times of prayer in the Muslim faith.

17 And this commission over the course of the Muslim
18 holy month of Ramadan did not meet, in deference ----

19 MJ [Col SPATH]: Is that more of -- is that more of the
20 people who own this process being deferential and trying to
21 afford people dignity and respect while at the same time
22 trying to enforce the laws of a country that has a right to
23 enforce laws that they have passed? I guess I would say ----

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1 ADDC [MAJ HURLEY]: In answer ----

2 MJ [Col SPATH]: I do not know what the internment camps
3 were like in World War II, but I would guess that our country
4 was not as deferential in those camps. And in that case they
5 rounded up citizens based -- not that they were radicalized
6 from a country, not that they had engaged in acts -- alleged
7 acts of terror. They just rounded up a class of citizens and
8 put them in a camp.

9 ADDC [MAJ HURLEY]: Sir, you are talking about the
10 Japanese internment camps.

11 MJ [Col SPATH]: I am. No doubt if the United States
12 responded by rounding up everybody of that faith, putting them
13 in camps, then set up commissions to try them because they
14 were Muslim, that motion seems easier to start to deal with
15 and understand.

16 Whereas here we have people who, at least according
17 to the government, were captured away from our home soil, in
18 another country, engaging in acts of alleged terrorism or acts
19 against our country or our national interests. And so I'm
20 trying to see where the targeting a population -- again, a
21 broad population versus targeting a very narrow class of
22 defined population, those who engaged in belligerent acts
23 against our country unlawfully, and in this case members of a

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1 particular terrorist organization.

2 ADDC [MAJ HURLEY]: And that framework -- the defense
3 would contend, sir, that that framework has captured -- that
4 net, if I can use that analogy, has only captured Muslim men.
5 That's exclusively who is here.

6 And I was pointing to those practices of the
7 commission, not that I want them to stop, but that they exist
8 because the only people here are Muslims. That's it. And
9 when an individual is reduced to the control of the United
10 States one way or the other, when that individual is of Muslim
11 descent and is alleged to have participated in some
12 hostilities, that's when the hew and cry goes up, "Get you to
13 Guantanamo Bay."

14 Other instances in which terror-like activities have
15 been alleged, those individuals have gone naturally through
16 the Article III courts. And the statements of the legislators
17 with respect to the Military Commissions Act, they provide
18 that it's an animus towards this particular religion, and it's
19 an animus that should, that this court should recognize and
20 that this court should find that the Military Commissions Act
21 is unconstitutional.

22 Again, sir, the government's response seems to
23 suggest this idea that, well, other -- you know, the Shinto

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1 religion for those soldiers from Japan or Odinism for those
2 individuals tried by other military commissions, this is
3 separate and apart from that because this institution was
4 designed to net Muslim men, and the proof is who is here and
5 the proof is the reactions of the political leadership of the
6 United States when someone comes into American custody.

7 So, sir, again, that's what we ask, for you to
8 dismiss all charges and specifications.

9 MJ [Col SPATH]: Thank you.

10 And you are equally as busy today.

11 ATC [LT DAVIS]: Your Honor, the Military Commissions Act
12 does not criminalize religion. It criminalizes actions, it
13 criminalizes violations of the law of war by unprivileged
14 enemy belligerence.

15 While this issue is fairly easily dealt with, a
16 couple of questions that we need to answer. The first
17 question we need to answer is whether or not the statute is
18 facially neutral or not, in determining a question of whether
19 the free exercise clause has been violated, but is the statute
20 facially neutral. The statute is facially neutral. If you
21 page through the statute, the statute, any of the rules,
22 anything associated with commissions, you will not find the
23 word "Muslim" and you will not find the word "Islam." So as a

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1 preliminary matter, answering that first question of facial
2 neutrality, that is really without question.

3 The second question that you need to answer is is the
4 basis for the law, is it to restrict religion? And as I began
5 my argument, it's not. It is not to affect how Muslims pray
6 or practice their religion, it is simply to punish and hold
7 accountable those who violate the law of war. That is the
8 goal, that is the purpose. It has nothing to do with
9 restricting religion.

10 One very, very important point, Your Honor, there
11 seems to be some confusion about how the statute actually
12 reads. If we are talking about right at the top, 949a of the
13 statute, the definition of an unprivileged enemy belligerent,
14 and this is what establishes personal jurisdiction. It is the
15 defense's position -- there seems to be a little bit of
16 confusion, that there is a requirement or that the Military
17 Commissions Act only applies to al Qaeda members.

18 MJ [Col SPATH]: I didn't mean to imply that. There are
19 four or five.

20 ATC [LT DAVIS]: To be specific, Your Honor, there are
21 three, and there is an important word incorporated there, and
22 that is the word ----

23 MJ [Col SPATH]: "Or."

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1 ATC [LT DAVIS]: ---- "or," exactly. So before we have
2 Alpha, Bravo, Charlie, before Charlie "or" was a part of
3 al Qaeda.

4 What that indicates, Your Honor, is that if a person
5 is an unprivileged enemy belligerent or is a person that is
6 part of a group with which we are engaged in hostilities, the
7 Military Commissions Act applies to them just as it does to an
8 al Qaeda member.

9 Now, currently we are only in hostilities with al
10 Qaeda, but one can certainly envision a time when we may be in
11 hostilities with other groups. The Military Commissions Act
12 in that respect could apply over time to any group, be they
13 Muslim, be they Jewish, be they Buddhist, frankly. It is
14 broadly applicable. It is generally applicable. The
15 motivation behind it, again, was to punish, hold accountable
16 those who sought to violate the law of war.

17 MJ [Col SPATH]: I am not stealing any thunder from the
18 defense, I don't think. So their suggestion of course to
19 start was that it is facially -- I should strike it. But the
20 next one down of course is as applied.

21 So I guess my question to you would be: As we apply
22 the statute and decide -- as a country, we don't decide. Our
23 policy-makers decide -- who is going to go to an Article III

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1 court and who is going to come here to Guantanamo, is it being
2 applied in such a way that it is targeting Muslim men -- using
3 their motion as the starting point -- for selective
4 prosecution?

5 ATC [LT DAVIS]: Yes, Your Honor. First to address the --
6 one of the bases for that argument is the legislative history,
7 as the defense refers to it, refers to it as a robust
8 legislative history, when in fact what the defense has
9 provided are merely five statements by, out of 535 members of
10 Congress; hardly representative.

11 What would actually be representative is if there was
12 some language in the statute, as you saw in kind of the
13 preeminent case in this case, the Lakumi case. There actually
14 was language ----

15 MJ [Col SPATH]: Slow down. Good.

16 ATC [LT DAVIS]: So in that case, Your Honor, there was
17 explicit language that was part of the law that actually
18 pointed out that it was directed toward a particular religion,
19 and that's hardly legislative history, that's what the real
20 motivation was. Picking and choosing five statements from
21 Congress, from people of Congress doesn't really get to that.

22 Beyond that, Your Honor, just because the only cases
23 that have been tried -- I mean, it goes to this issue of who

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1 we are currently in hostilities with. That is a necessary
2 element. Currently we are in hostilities with al Qaeda, and
3 that does bring a disproportionate number, but it is not
4 exclusive of that, and one can certainly imagine a situation
5 where people of other faiths could be brought before this
6 commission, thus the -- thus the statute could be applied
7 across the board. It's generally applicable.

8 And that's really what this court needs to take a
9 look at is, is it facially neutral? Is it generally
10 applicable? And I think it's fairly clear, Your Honor, that
11 that's the case here.

12 MJ [Col SPATH]: Thank you.

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

14 ADDC [MAJ HURLEY]: I do have some more remarks. And we
15 would agree with the government that the Lakumi case, which we
16 have cited in our brief, 508 U.S. 520, is an important case
17 because the Supreme Court went through this two-pronged
18 analysis to determine whether or not it was facially
19 appropriate. And the court looked past just the face of the
20 law itself because they -- in the words of the court, that
21 animus can be masked as well as explicit in the language of
22 the law. And in this instance, as we have said before, yes,
23 we can imagine there may be some circumstances under which

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1 other members, adherents to other beliefs may ultimately be
2 tried here in Guantanamo Bay, but the proof is in the pudding.
3 They are here, exclusively Muslim men are here and have been
4 ultimately captured and brought to Guantanamo Bay for trial.

5 And those statements, we would call that a robust
6 legislative history, that you have public statements from --
7 you are right, it's five out of 535, and that doesn't add up
8 to much if you are counting noses in terms of a percentage,
9 but it is nonetheless significant, a significant sense of the
10 motivating factor, the animus behind that particular
11 congressional action.

12 And we would submit to you, sir, that the logic in
13 Lakumi and the Supreme Court's action in Lakumi striking down
14 that ordinance should guide you in this particular case, and
15 you should determine that the Military Commissions Act of
16 2009 -- and that should determine this act is
17 unconstitutional. Thank you, sir.

18 ATC [LT DAVIS]: Nothing further, Your Honor.

19 MJ [Col SPATH]: All right. I think we are at a good
20 point for an afternoon break. We have gone for a while.
21 Let's come back on at 10 till the hour, and then we will kind
22 of figure out where we are going to go from there.

23 The commission is in recess.

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1 [The R.M.C. 803 session recessed at 1537, 5 August 2014.]

2 [The R.M.C. 803 session was called to order at 1605, 5 August
3 2014.]

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

6 Thanks for a pretty timely effort here as we have
7 gone through the two days. We will be here part of a third, I
8 realize. So the plan, I think we will take up the statute of
9 limitations arguments, which is 296 through 301, Appellate
10 Exhibits 296 through 301, and then we will break.

11 Tomorrow we will come in to deal with 287, Appellate
12 Exhibits 287 through 292, and I know that there is a video
13 that the defense wants to show as part of the evidence
14 regarding those motions. I know there are some issues getting
15 that video played right now.

16 And then, Mr. Taylor and I were talking. Mr. Taylor
17 just let me know that likely the government is going to object
18 to me even considering the video. Probably I will have to
19 either know what's on the video or see the video to determine
20 if I am going to consider the video, but we will cross that
21 bridge tomorrow. Hopefully everything will work tomorrow for
22 audiovisual. So let me know how it goes over the evening
23 recess.

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1 So who has the statute of limitations argument?
2 Defense Counsel?

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

4 The defense in 296, 297, 298, 299, 300 and 301 asks
5 that the commission dismiss those charges because the statute
6 of limitation has run with regard to those charges.

7 It's defense's position that the statute of
8 limitation in place at the time of the commission of the acts
9 alleged in those charges and specifications was Article 43 of
10 the Uniform Code of Military Justice, and that has a statute
11 of limitation of five years.

12 And the reason why defense believes that it's Article
13 43 of the Uniform Code of Military Justice was because it was
14 the only statute of limitation applicable to crimes tried by a
15 military commission at the time of the alleged misconduct.
16 And pursuant to Section 821 of Title 10, it was the only
17 existing federal statute authorized to try -- that was the
18 only federal statute authorized to try violations of the law
19 of war.

20 With regard to an attempt to revive a statute of
21 limitation after the fact, the defense's position is that is
22 in violation of the ex post facto clause of the Constitution,
23 which, as I said in my earlier argument, the Bahlul court made

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1 pretty clear that ex post facto applies to Guantanamo Bay.

2 And with regard to applying the rules for the Uniform
3 Code of Military Justice to a military commission, Hamdan I,
4 the 2006 decision, states that rules applied to military
5 commissions must be the same as those applied to
6 courts-martial unless such uniformity proves impracticable.
7 And in the instant case the government has made no showing
8 that the uniformity with the R.C.M.s is impracticable in this
9 military commission.

10 The government makes the argument that Article 43 is
11 not -- I'm sorry, Article 47 is not of its own force binding
12 on a military commission. However, given the fact that
13 Article 43 was the only statute of limitation in place at the
14 time of the alleged misconduct, it's the status of the law at
15 the time that's binding. It just so happens to be that it's
16 Article 47 where the source of law is coming from.

17 And absent further questions from the commission, the
18 defense rests.

19 MJ [Col SPATH]: Thank you.

20 ATC [MR. CLAYTON]: Your Honor, the determinative fact for
21 this issue is fairly straightforward. These charges are
22 expressly alleged as violations of the laws of war under the
23 MCA which is Chapter 47(a) rather than crimes under the UCMJ,

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1 which is Chapter 47.

2 As such, per the statute itself, there is no statute
3 of limitations that applies, and for any number of reasons
4 that we will explain as we go further through the argument,
5 that's consistent with international norms in place prior to
6 this particular crime as far back at least as the crimes
7 charged at Nuremberg.

8 The central premise here is that the statute of
9 limitations for one body of law does not, except for limited
10 circumstances, dictate a statute of limitations of another
11 body of law, and this is simply not one of those limited
12 circumstances.

13 At the risk of being somewhat repetitive to the
14 court, I ask the court again to look to the first principle of
15 statutory construction, the plain language of each of these
16 statutes. Looking first to the UCMJ -- excuse me, looking
17 first to the MCA Section 948b(c) -- that's Bravo, Charlie --
18 the MCA specifically states the UCMJ does not apply to trial
19 by military commissions unless specifically provided herein.
20 So again a plain language reading tells you that the source of
21 authority is not the UCMJ. Even if we take the defense's
22 argument and look to the provisions of the UCMJ to determine
23 whether or not they are authoritative, the plain language of

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1 those statutes is equally unresponsive of their arguments.

2 At Article 21, an article cited by the defense, the
3 UCMJ states, "Provisions of this chapter in relevant part do
4 not provide military commissions of concurrent jurisdiction
5 over offenses arising under the laws of war." As I stated
6 very early in the argument, that's exactly what we are talking
7 about here, offenses under the laws of war articulated as
8 such, charged as such under a very specific statute.

9 Further, Article 43(b) cited by the defense states,
10 in a much more broad sense, when talking about statutes of
11 limitations, that one could not be liable to be tried by a
12 court-martial if the offense was committed out of time --

13 LDC [MR. KAMMEN]: Apparently, there is a problem with the
14 translation. It's not coming through.

15 MJ [Col SPATH]: Pause for a moment. Apparently the
16 translation is not coming through.

17 LDC [MR. KAMMEN]: We're good.

18 MJ [Col SPATH]: Okay.

19 ATC [MR. CLAYTON]: I will only backtrack a bit,
20 Your Honor. At Article 43(b) the statutes of limitations
21 provision of the UCMJ specifically states that one cannot be
22 liable to be tried by court-martial if the offense was
23 committed out of time.

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1 By analogy the same would not apply to Title 18 if a
2 soldier with were to commit a crime that was triable under
3 both statutes. For example, in my district if a soldier
4 committed a crime for which the UCMJ statute of limitations
5 says he is not able to be tried by court-martial, it would not
6 preclude me as a civilian prosecutor from trying him in a
7 federal court of jurisdiction, of concurrent jurisdiction for
8 the Title 18 crime whose statute of limitations may not have
9 run. Maybe not a perfect analogy, but that's what we have
10 here, and I think the McElhaney case cited in our brief bears
11 that out as well.

12 As we begin to look at the defense's ex post facto
13 claims, I think those are equally without support. As
14 described in some detail in our brief, the existence of no
15 statute of limitations for matters of violations of law of war
16 is a customary norm dating back to at least Control Council
17 Law Number 10, Article 2, Section 5 that was in a place at
18 Nuremberg in the 1940s, certainly well before this crime in
19 2000, even if you began with the conspiracy charge in 1996.

20 That maxim of international law, that maxim is
21 carried forward even to today because it is present, for
22 example, in the Rome statute at Article 29 of that particular
23 statute governing international law today, and there are very

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1 practical reasons for that being the case. As the Supreme
2 Court recognized in Yamashita at 327 U.S. 1, pages 11 through
3 12, in particular the practical administration of military
4 justice would fail if authority ended at the cessation of
5 hostilities.

6 In other words, given the nature of crimes that are
7 violations of the law of war, the magnitude of those crimes
8 and sometimes the far-reaching effects, and sometimes the
9 difficulty with which a prosecuting body -- the difficulty
10 they face trying to gather together the evidence or marshal
11 together these charges, it is international and customary to
12 expect that those types of crimes would not be subject to the
13 types of statutes of limitations we might be accustomed to in
14 other places. So for those reasons the ex post facto
15 challenge simply fails.

16 This type of issue doesn't reach any of the
17 traditional Calder v. Bull factors that we see from that old
18 case, nor any of the other ails that the ex post facto cause
19 would seek to remedy.

20 For those reasons, Your Honor, we think this simply
21 is a series of motions without merit.

22 MJ [Col SPATH]: Thank you. Defense counsel.

23 DDC [Maj DANELS]: Your Honor, in response to government

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1 counsel, it's important to point out that Mr. al Nashiri has
2 been in U.S. custody since 2002. At the time, he is an
3 unindicted co-conspirator in the Southern District of New
4 York. If they wanted to name him in the indictment, they knew
5 at the time that that indictment was -- that that indictment
6 became effective, they knew where he was. There was no
7 question as to where he was.

8 So trying him six years after he came into U.S.
9 custody, the U.S. made a choice here, and they don't get the
10 benefit of not trying him sooner by relying on the provisions
11 of the MCA, which, as far as defense is concerned, are
12 violative of the ex post facto clause because they are trying
13 to revive a statute of limitations that has run. They have
14 had the opportunity to try him since 2008, and they chose --
15 I'm sorry, 2002, and they chose not to.

16 The statute of limitations in place at the time of
17 the alleged conduct, as well as at the time of capture, was
18 the statute of limitations in place under Article 43 of the
19 Uniform Code of Military Justice. And if you don't want to
20 look to the Uniform Code of Military Justice for instruction,
21 the general federal statute of limitation in place at the
22 time, I believe it's Title 18 U.S. 3282, that also has a
23 five-year statute of limitation. So you don't even have to

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1 look to international law for guidance with regard to the
2 statute of limitations. The U.S. law is pretty clear under
3 Title 10, Article 43 of the Uniform Code of Military Justice
4 as well as Title 18, Section 3282, the statute of limitation
5 is five years, and an attempt to revive is a violation of
6 ex post facto.

7 Nothing further, Your Honor.

8 MJ [Col SPATH]: Thank you. Any final comments?

9 ATC [MR. CLAYTON]: Two. Maybe I shouldn't chase these
10 arguments, but I will address them briefly.

11 The issue counsel raised about Mr. al Nashiri being
12 an unindicted co-conspirator in New York is not an issue of
13 statute of limitations. It might be an issue of speedy trial
14 possibly, but by indicting someone for sure, and in this case
15 unindicted, it would be different. It would toll the statute
16 and that's not the issue.

17 And one correction, Title 18, Section 3282(b) which
18 is a conspiracy to kill Americans abroad has no statute of
19 limitations where death results, which is obviously the case
20 here. So I think even in that construct we are not talking
21 about an ex post facto. Even if you grant the arguments in
22 the best possible light, that's simply not the case in this
23 instance.

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1 MJ [Col SPATH]: I will work and see if I can get you a
2 ruling on 284 through the evening recess. I will get that to
3 you tomorrow.

4 So we know the outstanding motions then that we
5 have -- or motion series we have left, 287 through 292.

6 Then as I mentioned, at some point after we close
7 tomorrow I want to get together with the parties in an 802,
8 either later tomorrow or before we leave, and just talk
9 scheduling in a little bit more of a relaxed environment and
10 try to kind of work through where we are going to go over the
11 next few months.

12 Is there anything else we can take up today before I
13 recess the commissions?

14 Trial team?

15 TC [MR. SHER]: No, Your Honor.

16 MJ [Col SPATH]: Defense?

17 LDC [MR. KAMMEN]: No, sir.

18 MJ [Col SPATH]: Thank you again for your courtesy and
19 your timeliness. I appreciate it.

20 The commissions are in recess.

21 [The R.M.C. 803 session recessed at 1620, 5 August 2014.]

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