

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 1322,  
2 05 November 2014.]

3 MJ [Col SPATH]: Commissions are called to order. All the  
4 parties who were here before the recess are again here in  
5 place.

6 Let me just ask regarding -- we were dealing with the  
7 Skype motions, and, Trial Counsel, you hadn't had a last  
8 chance to talk. Any final comments you want to make?

9 ATC [LT MORRIS]: The government does not. And I assume  
10 you are talking about all three, including 284Q, Your Honor?

11 MJ [Col SPATH]: You got it.

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

13 MJ [Col SPATH]: Did we have any discussions as to the  
14 conversation that occurred with Mr. al Nashiri, by any chance?  
15 Did we figure out who the person was or anything like that?

16 LDC [MR. KAMMEN]: [Microphone button not pushed; no  
17 audio]

18 MJ [Col SPATH]: Okay. Thank you. I'm kind of -- not  
19 kind of. Here's where I'm at. I went back and read Al Odah,  
20 and I spent a lot of time again going through the filings.  
21 And I agree, Government, if the issue is -- I believe the  
22 defense was given the opportunity fairly to demonstrate  
23 medical indifference, there were some witnesses who testified

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 and the witnesses said "medically helpful." I went and looked  
2 at the words again to make sure I was quoting them correctly,  
3 and I was.

4           The issue I have is, I have a desire to move this  
5 case forward in a way that makes sense. And the Skype issue  
6 and all of its iterations have been on the docket for a long  
7 time. We have put it off, and we have moved it, and we have  
8 put it off. I don't want to go through another briefing cycle  
9 where we talk about whether or not we are now going to deal  
10 with it under Turner and we are now going to deal wit under  
11 Hatim. It doesn't make any sense.

12           What makes sense is knowing where both sides are  
13 coming from. And some of it based on conversations in here  
14 and your answers to my questions, maybe the target has moved,  
15 but we all have a desire to move this forward. I know the  
16 people who have family members who have been involved and keep  
17 traveling down here don't want to come down and hear the same  
18 stuff discussed. It just -- it doesn't make sense.

19           The defense has the burden if what we are dealing  
20 with is whether or not a condition of confinement here is  
21 rationally related to that confinement. And I agree, some  
22 things are common sensical. If the defense was asking me to  
23 allow their client free rein on the base for periods of time,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 I don't need evidence. If the defense were asking me for  
2 unmonitored phone calls, frankly, I don't need evidence.

3 And this is not a suggestion I'm granting it. I  
4 think I made every bit of that clear. This is a suggestion  
5 that we tell the defense that they have the burden, and things  
6 have changed since al-Hadi [sic], a lot. We didn't have the  
7 2006 Military Commissions Act as amended by the 2009 changes,  
8 we didn't have the DoDI. And I don't know if we had a  
9 conversation or not, where it is indicated there was going to  
10 be these phone calls, I have an assertion from counsel.

11 But it appears to me there is a discussion out there  
12 about phone calls that somehow or another was communicated to  
13 a detainee. So either the process here has a problem, which I  
14 find -- I hope I find difficult to believe, because it looks  
15 very well run, or I should hear evidence to figure out what to  
16 do. And what I don't want to do is wait another month or two  
17 months, and that is not because I don't think we can wait  
18 another month before there is a phone call or not a phone  
19 call, but we all don't want to travel down here to keep  
20 talking about it and briefing it, we will spend another  
21 10 hours in briefing time for you guys. Why do that?

22 So is it Commander Cozad? Do I have his rank right?  
23 He's the commander; it's Admiral Cozad. I'm not necessarily

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 saying he has to come here. I'm not going to tell you who,  
2 Government, but I will tell you somebody needs to come and  
3 explain that has knowledge why there can be no delayed Skype  
4 or phone conversation put into place. Not why it can't be  
5 done mechanically, I mean why it is such with an HVD that that  
6 cannot happen. The bar isn't very high, but there should be  
7 some evidence presented.

8           The defense has the burden, so I want you all to work  
9 together to identify who is best suited. Maybe it is not the  
10 Admiral, maybe he doesn't really know that particular portion  
11 of the security setup here. I don't know. The defense needs  
12 to know who their options are, who knows why. And, again, not  
13 the "why," why we can't make a phone call, I think I'm being  
14 very clear; the "why" as to why it is not allowed, given that  
15 it is 2014, given where we are with technology, given where we  
16 are with security. And maybe the answer ultimately will be  
17 common sensical to me.

18           I also think we need to work to identify who the  
19 person is who shared that this was coming. The whole issue  
20 may be moot in a few weeks. And I think the defense has --  
21 again, they have the burden. If people are out talking about  
22 this process with a detainee, then they should come talk here  
23 and explain why they did it and if that process is coming or

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 not. And, frankly, maybe it will be moot and I won't have to  
2 rule on it, or maybe it will give me some illumination as to  
3 whether or not there is a rationally related purpose to the  
4 conditions of confinement.

5 Now, we can do that now -- not this moment I realize,  
6 but we are here and we are here today and tomorrow, frankly,  
7 we are here Friday. I don't know what schedules are, but we  
8 are here for today and tomorrow for sure. If you want to get  
9 that hearing knocked out, work with the defense. And if you  
10 don't, next time we come down, we will do an evidentiary  
11 hearing on this issue and we will resolve this issue rather  
12 than rebriefing. That is where we are with that one. I will  
13 let you work on the break tonight to talk about whether we can  
14 do it this time or not, but my goal is to move this forward in  
15 a way that makes sense.

16 This is the way that makes sense. Given where we are  
17 as I look through, you do have the affirmations. That may be  
18 the person, the unclassified one, maybe that's the person.  
19 Let me know if there is an issue with classified or  
20 unclassified. That may come up, obviously. Let me know, and  
21 we will have that portion of the hearing as well.

22 So we have moved a little bit on the 284 series, so  
23 now we have 286. Defense counsel? And I think it's 286B.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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

2 MJ [Col SPATH]: Which is your motion to withdraw the  
3 death penalty because there is no military necessity. You may  
4 proceed.

5 DDC [Maj DANELS]: Good afternoon, Your Honor. I'm about  
6 to say this one statement alone that will probably be the  
7 least controversial thing said in court today, because I think  
8 all parties can agree that military commissions are born of  
9 military necessity. And assuming without conceding that the  
10 charges are properly before this commission and this  
11 commission has jurisdiction to try this case, the punishment  
12 adjudged must also serve a military necessity. However, in  
13 light of the facts of Mr. al Nashiri's case, there is no  
14 military necessity served by sentencing him to death.

15 The federal courts and court-martial are specifically  
16 provided for in the Constitution; however, military  
17 commissions derive their power -- I'm sorry, their authority  
18 from Congress' power to define and punish under Article I,  
19 Section 8, Clause 10 of the Constitution. And arguably the  
20 President also has authority as Commander in Chief to convene  
21 military commissions.

22 As such, they are courts of limited jurisdiction.  
23 According to Lieber, the father of our first code of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 conduct of war, military necessity as understood by modern  
2 nations consists of the necessity of those measures which are  
3 indispensable for securing the ends of war and which are  
4 lawful according to the modern usage -- I'm sorry, the modern  
5 war and usages of war. Furthermore, military necessity cannot  
6 justify violations of other rules of international  
7 humanitarian law.

8 I would like to just put all of that in context with  
9 regard to Mr. al Nashiri's case. The offenses charged in this  
10 case occurred 13 and 14 years ago. Part of the conspiracy  
11 charge relates to the U.S. Embassy bombing in Kenya which  
12 occurred in 1998. Mr. al Nashiri was captured 12 years ago.

13 For the first part of his detention he was in CIA  
14 custody during which he, you know, was subjected to all manner  
15 of inhumane, un-American treatment. The President has  
16 acknowledged, as Major Hurley said earlier, that we've  
17 tortured some folks.

18 So that was 11 years ago that he -- I'm sorry. That  
19 was 12 years ago that he was captured. The charges were sworn  
20 in September of 2011, and he was arraigned in November of  
21 2011, 11 years after the commission of the charged offenses  
22 and nine years after he had been captured.

23 MJ [Col SPATH]: Let me just ask, the focus on the time,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 is there any authority that sets a time limit, like a statute  
2 of limitations? Maybe conspiracy is a different issue for  
3 other reasons as opposed to a statute of limitations. Maybe  
4 there are some issues with conspiracy. I think we will get  
5 guidance on that sooner or later from a District Court -- or  
6 Circuit Court, sorry.

7 But does the law of war prescribe a time period for  
8 crimes like murder and perfidy?

9 DDC [Maj DANELS]: No, Your Honor, there is not a time  
10 period for charging the offenses themselves. But when  
11 adjudging an appropriate sentence and determining whether or  
12 not it meets a military necessity, the delay in bringing the  
13 charges and the length of time that Mr. al Nashiri has been in  
14 U.S. custody without charges is a factor to be considered,  
15 whether or not there is a valid military necessity.

16 MJ [Col SPATH]: Well, is it or isn't it? It is  
17 definitely a factor to be considered in an extenuation and  
18 mitigation case. I don't think you will hear any -- that is  
19 probably the second least controversial statement we are going  
20 to have in the courtroom. I think there is no doubt that the  
21 time period goes to an extenuation and mitigation case, likely  
22 the conditions of confinement and the treatment go to an  
23 extenuation and mitigation case, probably not particularly

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 controversial there either.

2 I think my issue is where do you get authority for  
3 your statement that because 12 years has passed there is no  
4 military necessity to have the death penalty as an authorized  
5 punishment for a law of crime [sic] violation?

6 DDC [Maj DANELS]: Your Honor, the defense would say that,  
7 with regard to Winthrop's preconditions, if you look to the  
8 second precondition that states that it must have been  
9 committed within the period of the war, implicit in that is  
10 swiftness, that the military commission happens swiftly  
11 because it says that it has to be committed within the period  
12 of war.

13 There's nothing swift about charging him 14 years --  
14 I'm sorry, 11 years after the commission of the offense, nine  
15 years after he was captured, aware that there is this  
16 indictment in Federal District Court in New York where he is a  
17 named co-conspirator. So just by analogy, and just by  
18 implicit in the second precondition is that the military  
19 commission happen swiftly and that a punishment be adjudged  
20 swiftly.

21 MJ [Col SPATH]: But you have to balance that with the  
22 2006 Military Commissions Act as modified in 2009. I mean, I  
23 think my first question is: Isn't that statute binding on the

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 commission?

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

3 MJ [Col SPATH]: I mean, I think it is. We haven't had a  
4 decision -- we did back before we had the Military Commissions  
5 Act, right? We had Hamdan and we had lots of concerns with  
6 how the commission process was working. And that's, I think,  
7 maybe I'm wrong. Whoever is speaking over here will let me  
8 know. In large part that is because it is driven by the  
9 President and the Executive Branch with not a lot of  
10 involvement from Congress.

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

12 MJ [Col SPATH]: So Congress stepped in and fixed it by  
13 giving us the Military Commissions Act, which the President  
14 then signed. Both branches worked together ----

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

16 MJ [Col SPATH]: ---- to get us here. And so can a trial  
17 court declare the whole thing unconstitutional? Absolutely.  
18 Unless we already have case law above me that suggests the  
19 decision has been made.

20 So I'm trying to figure out, do those four  
21 preconditions that you are talking about from Quirin, do they  
22 apply here necessarily?

23 DDC [Maj DANELS]: We're specifically -- our motion is

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 specifically tied to the punishment, and so it is our position  
2 that these military -- these preconditions are born out of  
3 necessity. So if a military tribunal is convened out of  
4 military necessity, a punishment judged by that tribunal shall  
5 also be a punishment that meets military necessity.

6 MJ [Col SPATH]: And I think that's what I'm asking you  
7 is, where's your authority where you have connected all those  
8 pieces? Where's the authority for that? What legal  
9 authority -- I know you said Winthrop. I got the four or five  
10 preconditions, depending on whose brief I was kind of paying  
11 attention to. I got that.

12 But the Military Commissions Act says you can try  
13 these crimes in this commission, and that an authorized  
14 punishment is death.

15 DDC [Maj DANELS]: Yes, Your Honor. Death -- we are not  
16 saying that in an appropriate circumstance death wouldn't be a  
17 proper punishment. We are saying specific to Mr. al Nashiri's  
18 case that there is no death as a military necessity in his  
19 case.

20 MJ [Col SPATH]: But isn't that for the jury when they  
21 finally get here?

22 DDC [Maj DANELS]: Right, but we do it in courts-martial  
23 all the time, Your Honor. In the Colonel Murphy

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 court-martial, prior to the jury even getting to a finding on  
2 sentence, the military judge determined that the only  
3 authorized punishment allowed to be adjudged by that members  
4 panel was no punishment.

5 MJ [Col SPATH]: A popular decision in the JAG Corps, I  
6 can assure you.

7 DDC [Maj DANELS]: So it is not unheard of that military  
8 judges make decisions about ----

9 MJ [Col SPATH]: Absolutely not. I'm asking if this is  
10 the right vehicle to remove the option of the death penalty  
11 from the members is this military necessity argument, given  
12 the statutory framework we are working within, that's all.

13 Maybe -- I'm not ruling. I know you all know that.  
14 I'm not ruling. Maybe then conditions of confinement are such  
15 that pretrial confinement credit is such that death comes off  
16 the table. Maybe the conditions of interrogation were such --  
17 there's lots -- you are correct, there are lots of ways that  
18 at the trial level a judge could step in and alter what the  
19 maximum punishment would be. Maybe the government refuses to  
20 turn over information that is material and necessary for the  
21 defense in the interest of national security. And there is a  
22 host of options out there regarding stipulations and the like.  
23 We talked about them earlier today, got it.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           But I'm trying to figure out authority for this  
2 particular motion. Because you keep saying there's no  
3 military necessity in having death on the table at this point,  
4 but I have a statutory framework that tells me specifically  
5 that death is on the table at this point. And I'm just trying  
6 to figure out how -- where that authority comes from.

7           DDC [Maj DANELS]: Your Honor, the defense's position is  
8 that, in light of the facts and circumstances of  
9 Mr. al Nashiri's case specifically, because the members are  
10 going to be responsible for adjudging a punishment based on  
11 his facts and circumstances, and based on the facts and  
12 circumstances of his case, there is -- that you -- that we are  
13 asking you as a matter of law to determine that there is no  
14 military necessity in adjudging death and to withdraw death as  
15 an option for the members.

16          MJ [Col SPATH]: What facts do I rely on that 12 years is  
17 too long?

18          DDC [Maj DANELS]: That's not -- that's not the extent of  
19 the defense's ----

20          MJ [Col SPATH]: I understand. It was the condition of  
21 his involvement for the first number of years, conditions of  
22 confinement here, I mean, but what does that have to do with  
23 the military necessity piece?

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           The Military Commissions Act has said unprivileged  
2 enemy belligerents can be tried here and that these are the  
3 appropriate punishments that then could be adjudged. And so  
4 just for -- I guess I will let you answer that question.

5           What am I supposed to rely on then to just remove an  
6 authorized punishment under this particular motion? Again,  
7 there's lots of other motions coming, I realize that, but I'm  
8 talking about this one.

9           DDC [Maj DANELS]: Your Honor, the defense's position is  
10 that you look to the preconditions, the four conditions, and  
11 apply them to specifically the punishment phase of these  
12 proceedings.

13          MJ [Col SPATH]: Well, are we still within the period of  
14 the war? I've just listened to the news over and over telling  
15 me they don't need another authorization for the use of  
16 military force because we have one, telling me it hasn't  
17 expired.

18          DDC [Maj DANELS]: I mean, it is questionable. It is a  
19 question that the members will have to decide whether or not  
20 we were even at war ----

21          MJ [Col SPATH]: Correct. That's right.

22          DDC [Maj DANELS]: ---- in 2000 when the USS Cole was  
23 bombed. And as to the current state of this ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [Col SPATH]: Let's assume we were at war in 2000, then  
2 as we move into your mitigation case, are we still within the  
3 period of war?

4 DDC [Maj DANELS]: Assuming that the members determine  
5 that we were at war in 2000 ----

6 MJ [Col SPATH]: It is a great question, isn't it? Only  
7 try those violating ----

8 DDC [Maj DANELS]: I would be remiss without saying, Your  
9 Honor, that is a huge assuming, that the members determine we  
10 were at war in 2000.

11 MJ [Col SPATH]: I would not presuppose any of those  
12 issues. I don't know if that is a huge assumption or no  
13 assumption, I have no idea. And I'm not the fact-finder at  
14 this point.

15 So those four preconditions only try those violating  
16 the law of war, and I'm not sure those four preconditions  
17 apply here, but I assume we agree that one has been met, if  
18 the conduct occurred?

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

20 MJ [Col SPATH]: I mean, I got that it may or may not have  
21 been within the period of war. And then you can only try  
22 those violations appropriate for tribunals not legally tried  
23 in a court-martial. I think we all agree likely that one -- I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 saw it from your brief, you weren't arguing that one.

2           And then the location, I know there is some debate  
3 whether the location has to be within the theater or it can be  
4 outside of the theater. The government cited me a couple  
5 cases where there were trials outside the theater of war, one  
6 in the United States, one in the Philippines.

7           Do you think these preconditions apply given the 2006  
8 Military Commissions Act?

9           DDC [Maj DANELS]: It is the defense's position that the  
10 second precondition applies implicitly. By implication,  
11 within the time of war would mean swift. When these  
12 preconditions were created, when you think about the Quirin  
13 case, they came on -- they came into the U.S. on the 12th of  
14 July, and by the 8th of August they had been convicted and  
15 executed. That's swift justice. That is a part of fighting  
16 the war effort.

17           There's no military necessity. There is no war  
18 effort. This doesn't aid the United States in the war effort  
19 in their global war on terrorism. I mean, there is -- public  
20 safety is one of the justifications for the death penalty.  
21 There is no public safety concern here, Your Honor.

22           MJ [Col SPATH]: I would not -- I don't know, and I'm not  
23 going to presuppose. Here is what I will presuppose ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 DDC [Maj DANELS]: Can I explain why ----

2 MJ [Col SPATH]: Let me tell you, if the United States, in  
3 today's day and age and today's media environment, had  
4 captured -- not your client, just pick anybody -- had captured  
5 somebody and had a trial and executed them within a week, the  
6 outcry from the NGOs and everybody else would still be going  
7 on. Swift has got to be defined when we have to be  
8 accountable to the world for what we are doing. Swift has a  
9 different connotation than, hey, in the '40s we did it in a  
10 week. There is not a chance -- I agree with you, that is  
11 swift.

12 DDC [Maj DANELS]: That is why lots of legal scholars  
13 attack the way things have -- the way things were handled in  
14 the Quirin military commission.

15 MJ [Col SPATH]: So here we had to set up commissions.  
16 They were challenged. That didn't go very well for the  
17 government initially. We came back with the 2006 Military  
18 Commissions Act. It has then been altered a bit in the 2009  
19 modifications.

20 I mean, there is a lot of going on that slows the  
21 process, but I think much of that that's going on is to ensure  
22 that the process -- I won't say is fair, but I will say there  
23 is an effort to make it appear fair, or may be fair, actually,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 but that is certainly -- it seems to be helping.

2 I'm trying to figure out the timeline because the  
3 Military Commissions Act makes pretty clear there is no  
4 statute of limitations, so they take away the swiftness  
5 argument in the Act.

6 DDC [Maj DANELS]: Right. At the time Hamdan was charged  
7 in 2000 -- okay. He was charged a little earlier in 2002.  
8 Later that same year, Mr. Nashiri was in the custody of the  
9 United States.

10 There is nothing swift about him being detained in  
11 late 2002 and the Military Commissions Act coming along in  
12 2004 to try him for his alleged offenses, particularly when  
13 during his -- in the initial time of his custody, the  
14 government was aware of this pending indictment in the  
15 Southern District of New York. Swift would have been letting  
16 him go into the Southern District of New York and being tried  
17 there. He was within the custody of the United States.

18 The government just -- it just seems -- I'm looking  
19 for the right word, and I don't even know if there is a word  
20 that can really capture it. But the government shouldn't get  
21 the benefit of that type of delay. He was in their custody in  
22 2002. They waited until 2006 to even come up with a scheme  
23 under which they thought he could be tried. What military

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 necessity, what benefit to the war effort is there in that?

2 And the defense's position is there is none.

3           And I would like to, if Your Honor would allow me, to  
4 go into some of the justifications for the death penalty and  
5 how, in Mr. al Nashiri's case, it's clear that the death  
6 penalty serves no purpose with regard to those justifications  
7 and the first I mentioned briefly is public safety.

8           The President with the approval of Congress has  
9 authorized indefinite detention for prisoners at Guantanamo  
10 Bay. In light of that, even if Mr. al Nashiri is acquitted by  
11 this military commission, he can be detained indefinitely by  
12 the United States Government. Given that prospect of  
13 indefinite detention, he is not a danger to society. There is  
14 no public safety interest served by killing someone who is  
15 authorized to be detained indefinitely by the United States  
16 Government.

17           Deterrence. There is no general deterrence served  
18 here in executing Mr. al Nashiri. In fact, it would do  
19 nothing more than enrage the terrorists out there that mean to  
20 do us harm and, in fact, serve as justification today by ISIS  
21 for all manner of brutality that they exact. I mean, they are  
22 parading people around in orange jumpsuits. That is a direct  
23 response to the things being done here at Guantanamo Bay. So

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 there is no deterrence in executing Mr. al Nashiri, all it is  
2 going to do is enrage and give the terrorists justification  
3 for the brutality that they exact.

4           And another reason, Your Honor, is vengeance. When  
5 has the United States military ever been about vengeance?  
6 That is not what we are about. In fact, Lieber, in writing  
7 his code, points out that cruelty and revenge has no place in  
8 the concept of war. Indeed he insisted that soldiers pay heed  
9 to the effects their actions would have after the guns fall  
10 silent. And we are seeing that in the behavior of ISIS and  
11 other terrorist organizations out there, and it is also echoed  
12 in Justice Chase's dissenting opinion in Milligan where he  
13 says, "The laws which protect the liberties of the whole must  
14 not be violated or set aside in order to inflict, even upon  
15 the guilty, unauthorized, though merited, justice."

16           Vengeance is simply not what we stand for as the  
17 United States military. There is no military necessity in  
18 exacting vengeance for vengeance's sake and killing  
19 Mr. al Nashiri. It serves no benefit to the war effort at  
20 all. In fact, it hampers the war effort.

21           So it is the defense's position that, given the facts  
22 and circumstances of Mr. al Nashiri's case, and also to point  
23 out something that Your Honor said earlier about what was -- I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 can't remember the exact language used, but if we tried and  
2 executed someone within a week's time or a month's time, we'd  
3 be accountable to the world. We are accountable to the world  
4 in the manner in which we treated the detainees, not just  
5 Mr. al Nashiri, but my concern is Mr. al Nashiri, the  
6 detainees at Guantanamo Bay.

7           So the world is watching. They are watching and they  
8 are paying attention. Yeah, we tortured some guys. May just  
9 be a blip on the President's screen, but it has lasting  
10 effects and implications to the nations that we hold ourselves  
11 out to be an example to. And they are going to look to us  
12 when they are making determinations on how to treat our  
13 soldiers, sailors, marines and airmen if captured behind enemy  
14 lines.

15           So the justice that we exact inappropriately and  
16 unfairly can turn around and harm us in the long run; and  
17 therefore, in fighting the war effort, there is no military  
18 necessity in sentencing Mr. al Nashiri to death.

19           Absent further questions from Your Honor, the defense  
20 rests.

21           MJ [Col SPATH]: Thank you.

22           ATC [LT MORRIS]: Your Honor, the argument that defense  
23 counsel has given you is appropriate for sentencing. However,

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 for an interlocutory matter, nothing that defense counsel has  
2 given you has been founded in any legal basis, and perhaps  
3 that's all the government needs to say in its response.

4           The defense, however, has created some haze in using  
5 Winthrop-type language but completely misunderstanding or not  
6 correctly applying the substance of Winthrop. And so in an  
7 effort to try and clear some of that haze, I would like to  
8 briefly just go through what Winthrop, in fact, was saying;  
9 and then secondly, what relevance does Winthrop have for us  
10 today with statutory guidance.

11           Professor Winthrop is an authority on military  
12 commissions, was used for many years, and in his 1920 Military  
13 Law and Precedence, if you look on page 855 -- so here is a  
14 volume that is covering all of military law, and on page 855  
15 he discusses under the subheading, "The Constitution of  
16 Military Commissions," his very first sentence is as follows,  
17 "In the absence of any statute, by whom military commissions  
18 shall be constituted."

19           That is his first sentence in describing what is the  
20 jurisdictional parameters that commanders on the battlefield  
21 and that commanders in chief need to have in order to have a  
22 properly constituted military commission. So at the very  
23 beginning, he bows to the statute. He says only in the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 absence of a statute, here is the guidance for you. We have a  
2 statute. We have a statute born out of the Supreme Court's  
3 decision in Hamdan in 2005; Congress in 2006, and refined in  
4 2009, gave us that statute, and it's to be expected that he  
5 would bow to the statute.

6           You compare the fog of war, you compare the  
7 parameters and guidance needed there with the clear, concise,  
8 contemplated statute that is given methodically that provides  
9 guidance for what the jurisdiction is, and that's what we have  
10 here today.

11           So not only does defense misunderstand Winthrop,  
12 Winthrop himself saying bow to the statute, the statute trumps  
13 what I'm giving you under common law. But defense  
14 misunderstands the preconditions themselves. So even if, Your  
15 Honor, we were discussing this under a common-law basis, even  
16 if we were discussing his preconditions, defense's argument  
17 still falls flat.

18           They discuss Winthrop's first precondition, Your  
19 Honor, as the location of the military commission. That is  
20 clearly inaccurate. The Supreme Court in Hamdan in  
21 footnote 29 talks about that, the location of the military  
22 commission, as being what they describe as, quote, "an albeit  
23 not-often-complied-with, Winthrop's fifth precondition."

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           Now, Your Honor -- and I didn't hear defense counsel  
2 make any argument that somehow this military commission being  
3 here at Guantanamo Bay deprives it of its jurisdiction. They  
4 made that argument in its pleading and it sounds like they  
5 have either conceded that, but the statute gives clear  
6 guidance. The Rules for Military Commission, under 201.3,  
7 says the jurisdiction of this military commission will not be  
8 affected by where it is, where it takes place.

9           As Your Honor stated, the government did give you  
10 examples of that, specifically in the case of Ex parte Quirin  
11 1942, the well-known case of the eight Nazi saboteurs that  
12 were dropped off by submarine in Florida, far from the theater  
13 of war, but the military commission took place on the fifth  
14 floor of the Department of Justice in Washington, D.C., no  
15 problem, and scholars thereafter recognizing that that  
16 precondition was adjusted by Ex parte Quirin.

17           Defense counsel makes some argument as to the elapsed  
18 time, they don't give any clear -- or clarity, any further  
19 clarity than they did in their pleading on how that violates  
20 any legal basis. The Winthrop second condition is the offense  
21 would take place within the war. And as defense rightly said  
22 that the government bears the burden during the course of  
23 proving its charges that we would show that the conduct

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 occurred in the context of and in the course of hostilities.  
2 And that's a part of what the government must prove with each  
3 of these elements.

4           Importantly and tellingly and interesting to the  
5 government is if you look at how in their pleading defense  
6 counsel cites Hamdan, they entirely omit the most important  
7 language there when citing Winthrop. And that is in  
8 discussing the preconditions it says in Hamdan, parentheses,  
9 "In the absence of statutory guidance."

10           And I would like to think that defense counsel  
11 omitted that by accident, but specifically because that  
12 section, had they accurately quoted that section, is most  
13 damning to their argument because we do have a statute. We do  
14 have statutory guidance that is, at the very least,  
15 interesting to the government, and accurately, it's something  
16 that should be paid attention to.

17           Ultimately, at the end of the day, Your Honor, the  
18 statute gives guidance. Defense has given no legal basis for  
19 Your Honor to rule, and their requested relief should be  
20 denied. Thank you.

21           MJ [Col SPATH]: Thank you.

22           Defense Counsel.

23           DDC [Maj DANELS]: Your Honor, I think it might be a

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 fairly safe assumption that when William Winthrop penned the  
2 treatise and articulated that first precondition and created  
3 the parentheses, "except where otherwise authorized by  
4 statute," it presupposed that the statute already existed at  
5 the time of the commission of the offense and not that the  
6 statute would come four years after the enemy has been  
7 captured and six years after the commission of the offense  
8 that the statute purports to cover.

9 MJ [Col SPATH]: I don't know. I know that frequently the  
10 law of the military commissions that you are trying to use is  
11 being developed after the law -- after the war has started and  
12 frequently after whatever conduct is at issue has occurred.  
13 We don't often have standing tribunals ready to go for  
14 offenses that we just don't know what's going to happen in the  
15 future. I mean, Nuremburg is a fairly good example; as they  
16 tried to craft what they were going to do there, they couldn't  
17 start that process until they knew what had happened in  
18 Germany.

19 So I don't know. I mean, they started building the  
20 commission process not long after 9/11, and they ran into  
21 trouble with the commission process with Hamdan, and so they  
22 responded with the 2006 Military Commissions Act. And then  
23 they responded to more criticism with some refinements or

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 modifications, whatever we want to call it, in 2009.

2 DDC [Maj DANELS]: And then they stopped after they  
3 thought they got it exactly right so that they could get  
4 absolutely the convictions and the death sentences that they  
5 wanted. They perfected it. They had an opportunity to  
6 perfect the law, to fit specifically the offenses that they  
7 wanted to charge.

8 MJ [Col SPATH]: But the commissions don't apply to  
9 everything. The commissions don't apply to every act.  
10 They've made -- it appears to me that it is either acts that  
11 they've stated, I mean, they have jurisdiction over ----

12 DDC [Maj DANELS]: Acts they've defined.

13 MJ [Col SPATH]: ---- acts they've defined or things that  
14 violate what we normally expect to violate the law of war.  
15 And there's lots of law that is developed over what is a  
16 violation of the law of war, conspiracy being an interesting  
17 one right now. I think we are all going to be talking about  
18 that at some point in the future. We will get some guidance.

19 So I'm trying to sort out what to do. I have a  
20 statute that we have, that has been crafted and given to me by  
21 both -- by definition, by Congress and the President and that  
22 has made its way up into the Circuit Court a number of times  
23 now. The Circuit Court has not taken the opportunity to say

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the statute is unconstitutional. So where do I turn?

2 So that is why I'm asking: Do you have any authority  
3 that the time involved from capture to trial, that 14 years,  
4 is outside that statute of limitation envisioned by this  
5 statute?

6 And I'm not picking on you. I understand why the  
7 motions are being filed, I do. But there is no law that tells  
8 me I shouldn't allow this statute to be applied in the manner  
9 that it was passed by our elected officials and signed by our  
10 President.

11 DDC [Maj DANELS]: Again, we don't know whether the Eighth  
12 Amendment to the Constitution applies here, but ----

13 MJ [Col SPATH]: But we have agreed -- I mean, I heard the  
14 government agree today, I saw their heads nod and had  
15 agreement in the argument, that cruel and unusual punishment,  
16 the standard applies. We will have that same discussion with  
17 voluntariness of an alleged confession or statements made by  
18 some of the accused, whether or not the Fifth Amendment  
19 applies. Great question; we will figure it out, maybe.

20 Whether or not voluntariness of statements applies,  
21 the government is concurring in large part that these  
22 protections apply. That is why the commissions have been  
23 developed the way they have.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           And so whether or not capital punishment is cruel and  
2 unusual, again -- and this is not to make light of it, but  
3 that is for your elected officials to figure out. And our  
4 current Supreme Court has indicated that it's not, more than  
5 once.

6           DDC [Maj DANELS]: I wasn't suggesting the death penalty  
7 in and of itself. The death penalty as applied to Mr. Nashiri  
8 in this military commission.

9           MJ [Col SPATH]: I understand. And, again, there are  
10 going to be other motions as to whether or not there should be  
11 some relief in sentencing because of the treatment of your  
12 client, the conduct of government, big G. I get that.

13           But I'm just trying to figure out if the vehicle you  
14 are using right now offers you any of the relief you are  
15 requesting. That is what I'm trying to figure out.

16           DDC [Maj DANELS]: It's the defense's position that the  
17 second precondition -- implicit in that is that it just -- it  
18 can't be this many years after the fact and meet a military  
19 necessity.

20           MJ [Col SPATH]: I understand. Thank you.

21           Any final comments?

22           ATC [LT MORRIS]: Nothing based on that, Your Honor.

23           MJ [Col SPATH]: Okay. Thanks. Just give me a couple

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 minutes to move on to the next one.

2 ADDC [Capt JACKSON]: Your Honor, I know it is a little  
3 bit early, but can we take a brief restroom break?

4 MJ [Col SPATH]: We can. I don't think there is a problem  
5 at this point. Let's take 10 minutes. Thanks.

6 [The R.M.C. 803 session recessed at 1412, 5 November 2014.]

7 [END OF PAGE]

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**