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1 [The R.M.C. 803 session was called to order at 0908, 6 August  
2 2014.]

3 MJ [Col SPATH]: This commission is called to order. All  
4 parties present before the recess are again present.

5 TC [MR. SHER]: Right, sir.

6 MJ [Col SPATH]: And Mr. al Nashiri is not here, and we'll  
7 talk about that. Just give me a minute. Lieutenant Morris is  
8 not here, I see.

9 TC [MR. SHER]: Sir, it's being transmitted.

10 MJ [Col SPATH]: To the back CONUS, correct?

11 TC [MR. SHER]: Yes.

12 MJ [Col SPATH]: Mr. Kammen.

13 LDC [MR. KAMMEN]: Mr. al Nashiri is not present. He told  
14 us at the conclusion of the day yesterday it is voluntary on  
15 his part. He understood it was going to be a half-day --

16 Do you want me to start over?

17 MJ [Col SPATH]: Yes.

18 LDC [MR. KAMMEN]: We have no question that his  
19 nonappearance is a voluntary choice, and we have no question  
20 that he voluntarily signed the waiver.

21 MJ [Col SPATH]: Okay, thank you. I have Appellate  
22 Exhibit 313 up here which is a statement of understanding and  
23 right to be present, in which he appears to be waiving his

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1 presence here today.

2 Any comments from the trial counsel?

3 CP [BG MARTINS]: Your Honor, we -- the process that's  
4 been developed in the Appellate Exhibit 099 series, which I  
5 know Mr. Kammen has memory of from our lengthy litigation over  
6 it, we typically put on the testimony of the individual who  
7 received the waiver.

8 MJ [Col SPATH]: All right. I am ready for that if that  
9 person is here.

10 CAPTAIN G, U.S. Army, was called as a witness for the  
11 prosecution, was sworn and testified as follows:

12 DIRECT EXAMINATION

13 Questions by the Assistant Trial Counsel [LT Davis]:

14 Q. And you are Captain G?

15 A. Yes.

16 Q. And you are a Staff Judge Advocate at JTF-GTMO?

17 A. Yes.

18 Q. As part of your duties as Staff Judge Advocate, it's  
19 one of your duties to notify the accused of upcoming hearings?

20 A. Yes.

21 Q. And did you do that this morning?

22 A. Yes.

23 Q. And what did you tell the accused?

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1           A.    I told the accused that he had commissions this  
2 morning and then I asked him if he wished to attend.

3           Q.    And did he wish to attend this morning?

4           A.    No, he did not.

5           Q.    Okay.  And what procedure do you use to document his  
6 waiver of his presence?

7           A.    There is a two-page waiver form, and I review that  
8 first with Mr. -- with the accused.  I use an interpreter, and  
9 I read line by line the form, and the interpreter translates  
10 that form, and we go sentence by sentence.

11                    So, for example, I will read the first sentence, the  
12 translator will translate, we will take a pause.  And then I  
13 will read the next sentence, the translator again will  
14 translate, there will be another pause.  And between -- while  
15 the translator is translating, I actually look at Mr. Nash --  
16 or the accused to make sure, one, he is paying attention, and  
17 I can tell whether he is comprehending what is being said  
18 whether I need to speak more slowly, things of that nature.

19           Q.    And so on this particular occasion did he seem to be  
20 comprehending the rights that he was being advised of?

21           A.    Yes.

22           ATC [LT DAVIS]:  Okay.  Your Honor, may I approach the  
23 witness with what has been previously marked as Appellate

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1 Exhibit 313? Your Honor has a copy, defense has a copy.

2 MJ [Col SPATH]: All right.

3 WIT: Thank you.

4 Q. Is that the document that you used this morning when  
5 you met with Mr. al Nashiri?

6 A. Yes.

7 Q. How do you know that that's that document?

8 A. I notice the printing on the first page is my  
9 handwriting as well as my notation on the second page of  
10 "Captain G" as well as the accused's signature, that I  
11 witnessed myself, as well as the interpreter's signature,  
12 which I also witnessed.

13 Q. Okay. Now, the signature that is on the top of  
14 page 2, that is the accused's signature?

15 A. That is correct.

16 Q. And the one that is in the middle, that is the  
17 interpreter's signature?

18 A. That is correct.

19 Q. And did you actually witness the accused signing that  
20 document?

21 A. Yes.

22 Q. After he signed the document, did you ask him again  
23 whether he wished to voluntarily waive his presence?

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1 as smoothly as possible?

2 A. Yes, sir.

3 Q. And you have certainly gone out of your way on  
4 occasion consistent with your duties to accommodate our needs,  
5 and we appreciate that.

6 A. You are welcome.

7 Q. And we have tried to do the same and hopefully have.

8 A. Yes, sir.

9 Q. Yesterday during court you and I discussed the  
10 possibility that Abd al-Rahim would not come to court today;  
11 is that correct?

12 A. Yes, sir.

13 Q. And I told you we would have a decision for you after  
14 we met with him in the place behind the court?

15 CP [BG MARTINS]: Your Honor, objection, relevance. This  
16 is a waiver process that defense requests that prevents you  
17 from having to take an in-court waiver. And I'm not sure  
18 where counsel is going and if we are going to go -- we can  
19 bring the accused in. Neither of us wants to do that, but why  
20 are we having an extensive cross on this ----

21 LDC [MR. KAMMEN]: Because we ----

22 MJ [Col SPATH]: The -- hold on. I will get there. I am  
23 reading the 99 series right now. It's pretty lengthy. I will

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1 say this: It's a voluntary waiver, that seemed pretty clear  
2 from your representations, but there is a process in place.  
3 That seems pretty clear from the 099 series. Waste of time or  
4 not, this is my first time here, so I am learning as we go, so  
5 I appreciate everybody's patience.

6 Just a proffer of where we are going with her  
7 testimony.

8 LDC [MR. KAMMEN]: Just to make sure, because this is a  
9 trust-free zone and a trust-free courtroom, they apparently  
10 did not trust our representations about -- that the decision  
11 was made last night and that we had no question. So we want  
12 to flesh out so that they are satisfied that our  
13 representations earlier today were true.

14 And this -- you know, they can't have it both ways.  
15 They want to go through this pointless hearing. We stipulated  
16 it's a voluntary thing. This has not happened before in this  
17 case to my memory, but if they want to do it this way, that's  
18 fine. But at least the commission should know that when we  
19 make a representation, it's true, and I am just bringing out  
20 the fact that this was discussed last night as I represented,  
21 it was communicated to her as we represented, and that we are  
22 telling the truth.

23 MJ [Col SPATH]: Let me say this: I recognize -- I do not

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1 take this as a trust-free zone. I take you as an officer of  
2 the court, and you as well, both sides, absolutely like I  
3 would ----

4 LDC [MR. KAMMEN]: Yes, but they don't.

5 MJ [Col SPATH]: What I take they are doing is complying  
6 with an order that Judge Pohl has put in place, and so I would  
7 say this: I am more than amenable to relooking at 099 and we  
8 can make this voluntary waiver process very short based on  
9 representations from Mr. al Nashiri's counsel as an officer of  
10 the court and especially with a signed waiver. We can  
11 absolutely go back, look at the motion and modify it.

12 So I did not take it as they didn't trust your  
13 representations in this case.

14 LDC [MR. KAMMEN]: I understand you didn't. I know you  
15 didn't.

16 MJ [Col SPATH]: I understand what the purpose is, to show  
17 me that the representations were true, so I am going allow him  
18 to ask the questions in that vein, and then we will move on.

19 LDC [MR. KAMMEN]: Thank you.

20 MJ [Col SPATH]: General Martins, any other comments?

21 CP [BG MARTINS]: If I may just respond. Your Honor, this  
22 seems simple perhaps on first look and I think the 099  
23 litigation reveals going all the way back to -- with a

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1 19th Century case from the Supreme Court, that a capital  
2 defendant in custody's waiver is in the context of presumption  
3 against waiver. The authority in the D.C. Circuit, a 1963  
4 case, Cross, and then there is a 1986 case of Mitchell very  
5 clearly give preference for in-court waivers even in  
6 noncapital cases.

7           Mr. Kammen, trusting him or not is not the issue  
8 here, and I wouldn't say this is going to be Mr. Kammen, but  
9 the law books are filled with examples of after trial,  
10 presence or absence of the accused being an issue. This  
11 process not to have an in-court waiver is something the  
12 defense sought. Putting on the record the basics of that  
13 waiver with testimony is part of the process.

14           A lengthy cross-examination, we would want to visit  
15 whether we want to have a position allowing in-court waiver,  
16 because there is a lot of case law with appellate courts  
17 overturning, and I would remind the commission that the  
18 Hamdan v. Rumsfeld case for the plurality was all about -- or  
19 factually about presence of the accused.

20           So I certainly don't buy into the characterizations  
21 of defense counsel on this matter. It's an important matter.  
22 It doesn't have to take a lot of time, and what is very clear  
23 on the record now doesn't need to be lengthened by a

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1 cross-examination into matters, the relevance of which I know  
2 not. Thank you.

3 LDC [MR. KAMMEN]: He knows not because he wasn't paying  
4 any attention. But number one, we would have been done by now  
5 but for the interruptions.

6 MJ [Col SPATH]: I will allow in the vein that you are  
7 demonstrating the waiver was voluntary. It will make the  
8 record even more fleshed out, and we can discuss this in some  
9 detail at some point in the future. You may proceed.

10 **CROSS-EXAMINATION CONTINUED**

11 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

12 Q. Just a few more questions. You and I discussed the  
13 fact that after our meeting with Abd al-Rahim, that he wasn't  
14 going to come?

15 A. Yes, sir.

16 Q. And, in fact, I asked you if it was possible to  
17 execute the waiver early so you wouldn't disturb his sleep,  
18 and we had a brief conversation, and whatever you needed to  
19 do, you went ahead and did; is that correct?

20 A. I executed the waiver. You had asked me to do it  
21 actually later in the morning rather than earlier.

22 Q. Right. And so he wasn't woken up at whatever time?

23 A. Yes, sir.

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1 Q. And certainly -- I don't know, did you have any  
2 discussions with him on the way back?

3 A. I did not speak with the accused between yesterday  
4 and until I saw him this morning.

5 Q. Okay. So we told you he wasn't going to come, he  
6 told you he wasn't going to come, right?

7 A. This morning, yes, sir.

8 Q. Yeah. Okay.

9 LDC [MR. KAMMEN]: Thank you. I don't have anything else.

10 MJ [Col SPATH]: Any follow-up?

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

12 MJ [Col SPATH]: Thank you. Captain G, thank you for your  
13 testimony. You are excused. If you just want to hand that  
14 document back to the trial side, that will be great, or to the  
15 court reporter.

16 [The witness was excused and withdrew from the courtroom.]

17 MJ [Col SPATH]: It seems clear, based on conversations  
18 with defense counsel, along with Appellate Exhibit 313 and the  
19 testimony, that today's absence is completely voluntary on  
20 behalf of Mr. al Nashiri.

21 All right. Just as where we are heading, let me give  
22 you a few housekeeping matters and then we will move forward  
23 with our hearing today. We will start with the 287 through

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1 292 series, which will include some discussion I know about  
2 the videotape, and then 277, because we can take argument on  
3 that.

4 For Appellate Exhibit 279, the motion to compel the  
5 additional 175 hours, I am granting the 175 hours for  
6 Mr. Assed. I will follow up with a written order for the  
7 convening authority.

8 For Appellate Exhibit 284, I find the information the  
9 defense referenced in 284D relevant and material to the  
10 determination of the issue before the commission.

11 In Appellate Exhibit 284C, the motion to close the  
12 hearing in accordance with M.C.R.E. 505(h) and R.M.C. 806 is  
13 granted. A written order will follow. We will have that  
14 closed hearing to argue regarding the production of the  
15 witness at the end of our session today. So we will do a  
16 closed session at the end today.

17 With regard to the motion to recuse, I'm working  
18 through my written findings. As I mentioned, I was probably  
19 going to supplement the record, and I will with a written  
20 order or a written ruling, and I just wanted to highlight for  
21 the parties a portion of what will be included as I was  
22 writing it and we are working through it. I realize this will  
23 be in there. So to the best of my knowledge thus far,

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1 Commander Mizer has not filed anything in the Witt appeal.  
2 What I do know is I have not seen anything filed by him in the  
3 Witt appeal in any event.

4           So I am precluding the parties from filing anything  
5 from other judicial proceedings with this commission in the  
6 future. Certainly if there is an additional motion to recuse,  
7 I don't want attached to that a filing in another judicial  
8 proceeding that I have not seen. There is no reason for me to  
9 be provided filings in other courts when otherwise I wouldn't  
10 see them because I don't read them.

11           But I tell you this: If somebody else ends up filing  
12 with me or sending to me or giving me or transmitting to me or  
13 communicating to me the material that is communicated in the  
14 Witt appeal, I will bring it to the parties' attention  
15 immediately, but if I don't see it, it's difficult for me to  
16 have feelings on it, and what I don't want is it attached to a  
17 motion so I then have to read it.

18           I have no concern that those filings will affect my  
19 impartiality. I have made that completely clear. I have no  
20 concerns. But there is no reason for the parties to bring it  
21 to my attention when I would never otherwise see them because,  
22 again, my practice has been and will be not to read those  
23 things, not just in that appeal but frankly in any appeal,

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1 unless it's required. And I just wanted to highlight that.  
2 It will be in the written ruling when that is produced, and I  
3 hope to get that to you reasonably soon.

4 TC [MR. SHER]: Your Honor.

5 MJ [Col SPATH]: Yes.

6 TC [MR. SHER]: With regard to 284C, the government would  
7 request that we hold a bifurcated hearing so that the closed  
8 portion, if any, is narrowly tailored.

9 MJ [Col SPATH]: Yes. And we will do that, absolutely.  
10 We will take all the argument we can in the public forum, and  
11 then whatever portion needs to be closed, we will do that at  
12 the very end today. All right.

13 So that leaves us -- or it allows us to move to 287  
14 through 292. Defense Counsel?

15 ADDC [Capt JACKSON]: Your Honor, I believe there is an  
16 issue of the authentication of the video and it's the  
17 government's objection so I don't know if it makes more sense  
18 for them to lodge that first.

19 MJ [Col SPATH]: Let me ask that first. Before I hear the  
20 objection, let me get an idea of what the video is, just in  
21 general terms, and what the relevance is. I know the  
22 objection maybe isn't relevance, I just want an idea of where  
23 we are going.

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1 TC [MR. SHER]: It is. It is authentication and  
2 relevance.

3 ADDC [Capt JACKSON]: Good morning, Your Honor. Captain  
4 Jackson for the defense for 287 through 292.

5 The video that the defense wants to present in  
6 conjunction with the argument is basically the OSS depiction  
7 of the Campbell missile operation, and that is referenced in  
8 the defense brief. The video actually -- there is a footnote  
9 that includes a link to the video in the motion, so this is  
10 something that Your Honor could have considered in reviewing  
11 the motion and the things that were attached to it already.

12 Defense wants to be able to reference the video, and  
13 I think it would just be better for all parties involved if we  
14 have seen it contemporaneously with the argument.

15 MJ [Col SPATH]: About how long is the video?

16 ADDC [Capt JACKSON]: Twenty-seven minutes.

17 MJ [Col SPATH]: Thank you. Trial Counsel.

18 TC [MR. SHER]: Good morning, Your Honor.

19 MJ [Col SPATH]: Good morning.

20 TC [MR. SHER]: So the government objects to the defense  
21 playing the video both on the grounds that it lacks any  
22 probative value and also its questionable authenticity.

23 With regard to relevance, Your Honor, the

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1 government's position on these series of motions is that tu  
2 quoque is not a valid defense and showing a video simply has  
3 no relevance to that legal question of whether tu quoque is  
4 valid or recognized. But even if it were a valid defense, it  
5 still wouldn't be relevant. Tu quoque is an equitable theory,  
6 Your Honor, where one seeks to defend their actions, not be  
7 held accountable, because another person committed the same  
8 act. And in short it's -- it would be hypocritical to charge  
9 the offense.

10 Here the defense wants to show a video that doesn't  
11 show the U.S. Government doing anything other than testing and  
12 considering a plan that it never implemented or deployed. It  
13 merely considered it. So it typically has no relevance and,  
14 again, to use Mr. Kammen's language, it would really be a  
15 waste of time. The defense certainly can discuss the content  
16 that's outlined in their brief, but showing a video like that  
17 simply is just not relevant.

18 With regard to the authentication, Your Honor, the  
19 defense got this supposed government video from a website  
20 called *criticalpast.com*. By no means a government website of  
21 any kind. There is no indication the video is what it  
22 purports to be. It's not self-authenticating. We don't know  
23 if it's been modified or edited in any way.

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1           So we recognize this is a pretrial matter,  
2 Your Honor, but the commission still should fulfill its role  
3 as a gatekeeper of relevant evidence, just like it does with  
4 witnesses and other evidence.

5           MJ [Col SPATH]: I guess I was going to ask that under  
6 104A, the pretrial portion of this, if it is referenced in the  
7 defense motion, and I can do away with a good deal of the  
8 rules of evidence when I am dealing with pretrial issues ----

9           TC [MR. SHER]: Yes, sir.

10          MJ [Col SPATH]: I guess what's the harm. Yes, it is 23  
11 or 27 minutes -- and yes, in your view it's a waste of time  
12 but the question is if it is in the motion, I am probably  
13 going to go watch it anyway. I spent a lot of time in the  
14 motions reading the citations. I hope you all appreciate that  
15 because you cite all these things, so I take the time to go  
16 through all those things pretty closely anyway and so frankly  
17 it will probably save me 24 minutes when I go through the  
18 motion back in chambers or on the airplane or when I get home.

19          TC [MR. SHER]: Yes, sir. Twenty-seven minutes.

20          MJ [Col SPATH]: Twenty-seven minutes. So I guess I am  
21 just asking, given 104 and the fact it's a pretrial hearing,  
22 this is certainly not how I deal with evidence going before  
23 members, but just as we are dealing with it here, is there any

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1 harm to going through this process here?

2 TC [MR. SHER]: It is just significant again, Your Honor,  
3 again that it's just not relevant and it comes from whatever  
4 *criticalpast.com* is. And just because it is on the Internet  
5 doesn't make it true.

6 MJ [Col SPATH]: Thank you.

7 Defense Counsel, let me ask you a couple of  
8 questions.

9 ADDC [Capt JACKSON]: Yes, Your Honor.

10 MJ [Col SPATH]: Recognizing the issues -- I guess it's  
11 been referred to is a no-trust zone a couple of times -- I  
12 disagree with that, as I said, and I recognize both sides as  
13 officers of the court and I appreciate that -- I will give you  
14 the opportunity to play it or you can trust that I will watch  
15 it. Either way. I don't mind watching it in here, but I  
16 assure you it's why some of these motions are going to take me  
17 longer than I expected. It takes me a long time to go through  
18 the number of citations and the number of issues in there.  
19 But I am more than amenable to doing it here in the courtroom  
20 and watching it here.

21 ADDC [Capt JACKSON]: It is the defense preference that we  
22 watch it here in the courtroom, sir.

23 MJ [Col SPATH]: Let's do that before we hear the argument

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1 on the motion.

2 ADDC [Capt JACKSON]: Your Honor, there is a place -- we  
3 can do it either way, but there is a place in the argument  
4 where we were going to play it because it goes in with that  
5 portion of the argument.

6 MJ [Col SPATH]: I understand. Then I will allow you to  
7 argue the motion the way you need to and you may play it at  
8 the appropriate time. This is your series of motions. You  
9 may argue.

10 ADDC [Capt JACKSON]: Thank you, Your Honor. Your Honor,  
11 as we have already discussed, this is defense motions AE 287  
12 through 292, the defense motions to dismiss for tu quoque  
13 because the United States has engaged in the practice of using  
14 concealed boats in naval warfare.

15 Now, the Latin translation of tu quoque means "thou  
16 also" or "you also," and it's basically an argument of the  
17 hypocrisy of the United States in attempting to criminalize  
18 conduct that has been in practice not only throughout history  
19 and around the globe, but more importantly within our own  
20 domestic practice of naval warfare from the United States.

21 The tu quoque defense is raised in war crime  
22 international law type of tribunals usually where the  
23 defendant raises the mirror against the actions of the

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1 opposing party, basically in this case the United States  
2 Government.

3           There are two ways in which tu quoque has been seen  
4 applied throughout history. Now, the first is a safeguard  
5 against victor's justice, which the party with dirty hands  
6 shouldn't be the one pointing the fingers, and there are I  
7 don't know how many idioms that are out there, "the pot  
8 calling the kettle black" or "look who's talking," or "what is  
9 good for the goose," et cetera.

10           But the second and more important application of  
11 tu quoque that is more applicable in this case is where it's  
12 an argument that the actions of the prosecuting power, and in  
13 this case the United States Government, which is a world  
14 superpower, is compelling evidence that the underlying conduct  
15 they are attempting to criminalize is not a war crime that is  
16 firmly or -- that is firmly grounded in international law and  
17 more specifically not in domestic law, the domestic law of  
18 war.

19           So it is to this argument that the defense  
20 raises ----

21           MJ [Col SPATH]: I'm not cutting you off, I just wanted to  
22 recognize that Lieutenant Morris has now joined us. Good  
23 morning. You may proceed.

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

2           It is this latter argument that the crux of the  
3 defense's argument rests around, whereas this is an absolute  
4 bar to prosecution in this case, because the underlying  
5 conduct is actually not a war crime firmly grounded in  
6 international law. And what brings us to that -- that's why  
7 the defense alleges that this is an issue of subject matter  
8 jurisdiction, because we know that in order to have  
9 jurisdiction over the offenses charged in this case, they need  
10 to be war crimes that are firmly rooted in international law.

11           Now, the government made -- in their response they  
12 kept addressing the fact that the defense said these are  
13 arguably war crimes under the current regime, and the reason  
14 the defense said "arguably" is because perfidy by definition  
15 is a war crime. But what we need to do in the instances of  
16 perfidy is look to the actual underlying conduct that the  
17 prosecuting power is alleging is actually perfidious, and in  
18 this case, Your Honor, it's not.

19           So perfidy requires not just that the opponent be  
20 deceived, but that it's an unlawful deception, and so the crux  
21 of the defense's argument is that the practices that were  
22 engaged by -- that are alleged in this case and engaged by the  
23 United States Government show us that these types of

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1 deceptions, per se, are actually not unlawful deceptions, but  
2 more so they are practicable and allowable acceptable ruses of  
3 naval warfare.

4           So that raises the question: What exactly is an  
5 unlawful deception in this case? It is the defense's position  
6 that concealing hostile intent is not an unlawful deception.  
7 We have seen numerous examples of that throughout history and  
8 rulings of that specifically that's cited in the defense's  
9 brief were the OLC has said merely concealing one's hostile  
10 intent in wartime operations is not an unlawful deception.  
11 It's actually a practice of guerrilla warfare that we have  
12 seen all throughout history.

13           The failure to wear a uniform or wearing civilian  
14 clothes is not an unlawful deception, because, by definition,  
15 not wearing a uniform or just wearing civilian clothes is a  
16 status that makes you lose your protected status under the  
17 laws of war, but does not necessarily constitute a war crime.  
18 Under the rubric that the government would like us to accept  
19 in this case, wearing civilian clothes and becoming an  
20 unprivileged enemy belligerent is almost automatically making  
21 you a war criminal, which we know is not the case. Failure to  
22 bear arms openly is also not in and of itself an unlawful  
23 deception. So what we are seeing here is the constant

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1 conflating of the government of what causes one to lose their  
2 protected status under the laws of war and what actions are  
3 actually criminal conduct under the laws of war.

4           Now, there is a distinction of feigning of civilian  
5 status, and that was raised in both of our briefs. Courts  
6 have identified across history examples of when feigning  
7 civilian status actually differs from the lawful ruses of war.  
8 Such examples are in wearing a protected emblem, such as the  
9 Red Cross, or waiving a white flag or offers of truce, hiding  
10 in a crowd of civilians, which is distinctly different from  
11 anything that's been alleged in this case.

12           Now, examples of concealing your hostile intent have  
13 been, as I said, seen throughout history and around the globe,  
14 and even a few examples are very recent. Within just this  
15 year you have seen a skirmish between the Chinese Navy and the  
16 Vietnamese Navy where the Chinese used a concealed warship  
17 where it was basically retrofitted to look like a fishing  
18 vessel, but it was really a Coast Guard ship to engage in  
19 wartime operations.

20           So more directly on point is the practice of the  
21 United States Navy using concealed warships in naval  
22 operations and, Your Honor, that's where we come to the issue  
23 of the Campbell missile. Now the Campbell missile dates back

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1 to World War I, World War II timeframe, and it was basically a  
2 Q-Ship that was basically fitted to look like a merchant  
3 vessel, a Q-Ship; it was a merchant vessel retrofitted for  
4 combat operations is what it was. And the United States  
5 Government went through great lengths to put together this  
6 practice of how they could penetrate the enemy harbor without  
7 being detected.

8           Now, things that were taken into consideration when  
9 developing this operation was the fact that at a time of war  
10 the people of a country are at a heightened alert, but they  
11 are also in very need of certain supplies, like food: And  
12 because of that, the authorities are hard-pressed to keep  
13 fishing boats out of the harbor, and because of that the  
14 United States preyed on that weakness and decided to develop a  
15 system where supposed fishing boats are allowed into the  
16 harbor.

17           Now, as I said, it's the Campbell missile, but it's  
18 also called Operation Javaman, and this is the point where,  
19 Your Honor, we would like to play the video that the Office of  
20 Strategic Services put together to demonstrate the application  
21 of the Campbell missile and how specifically and how in detail  
22 our U.S. Government went to conceal the fact that we had  
23 wartime ships that were going into -- that were being

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1 disguised as merchant vessels. All right.

2 MJ [Col SPATH]: All right. Now I will see how technology  
3 works. The court reporters can publish that, if they can.

4 ADDC [Capt JACKSON]: Well, Your Honor, in this case what  
5 we are saying is that the conduct in and of itself is what  
6 they are alleging is making him an unprivileged belligerent,  
7 is the type of conduct. And we are saying that this type of  
8 conduct is not criminalized under the law of war and -- well,  
9 according to ----

10 MJ [Col SPATH]: My question though is: The United States  
11 no doubt engaged and engages in significant conduct when they  
12 are engaged in hostilities within the law of war. And so I am  
13 trying to figure out where your -- how your client is  
14 acting -- I think for this doctrine to work -- again, I am not  
15 conceding it applies. For the doctrine to work, they have to  
16 be acting in a comparable capacity. The United States engaged  
17 in X -- your client engaged in X, sorry, so how can we punish  
18 him? If your client is an unprivileged belligerent, how is he  
19 in the same position as the people engaged in this back in  
20 World War II?

21 ADDC [Capt JACKSON]: Well, Your Honor, if the government  
22 were to have it their way, and we were at war, then the COLE  
23 was a lawful war target, and our client was a soldier who was

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1 engaged in the practice of war.

2 MJ [Col SPATH]: That's my question to you is: In which  
3 armed force was your client a member according to your theory?  
4 I understand that you can wear civilian clothes occasionally,  
5 I understand you can mark yourself not as a noncombatant but a  
6 combatant in different ways. We have seen arm bands, we have  
7 seen many things.

8 I am curious what your client was a member of, a  
9 recognized -- a recognized armed force, and I'm just asking so  
10 it can help sort through this motion. But how is he, at least  
11 according to the government's theory, in the same place as the  
12 people here engaged in this behavior?

13 ADDC [Capt JACKSON]: And, Your Honor, it's the defense's  
14 position that if the United States is at war with al Qaeda,  
15 then Mr. al Nashiri is a combatant under that status.

16 MJ [Col SPATH]: And I assume that goes back -- I know  
17 earlier Mr. Kammen had asked of the voir dire process of me if  
18 when I was at the University of Charlottesville or the Army  
19 JAG School, what it looked like, and I indicated some surprise  
20 at the period of warfare that was described, so I assume it  
21 goes back to since 1996 ----

22 ADDC [Capt JACKSON]: The defense is not conceding that we  
23 believe we were at war at the time of the USS COLE. I am

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1 saying, Your Honor, for the purposes of this argument with the  
2 question you presented, if, based on the government's rubric  
3 we were at war at that time, we were at war with al Qaeda and  
4 Mr. al Nashiri would have been allowed to engage in warfare  
5 against lawful enemy targets.

6 MJ [Col SPATH]: I understand. Understand. Any other  
7 comments?

8 ADDC [Capt JACKSON]: Yes, Your Honor. I just wanted to  
9 make sure that we were -- so the video just demonstrated to  
10 what lengths the United States went in engaging in that type  
11 of -- those acceptable ruses of naval warfare, to the point  
12 where they had a dummy that was put at the hull of the ship  
13 for purposes none other than deception. But in this instance  
14 it was a lawful deception, which is no different and actually  
15 much, much worse than any conduct that's been alleged against  
16 Mr. al Nashiri with these charges.

17 So, Your Honor, if we want to go and actually look to  
18 the tu quoque defense historically, the one that the defense  
19 cited in our brief was the Nuremberg trial and it was the  
20 trial of Dönitz in that case, who was accused of unrestricted  
21 submarine warfare. Essentially there was a policy about  
22 rescuing the survivors of an enemy ship after it had been  
23 attacked and he refused, and so when he came to answer for

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1 those actions in Nuremberg, he looked to American practice and  
2 not in a way that says, oh, you did it too, because the  
3 government wants us to look at tu quoque as if it is a defense  
4 that says two wrongs make a right, and that's not actually  
5 what we are trying to show here.

6           In this instance we are saying, and as they did in  
7 that, in the Dönitz trial in Nuremberg, that looking to the  
8 practice will tell us what are war crimes that are firmly  
9 rooted in international law, and we all know that there is a  
10 question about what constitutes with what type of war crimes  
11 that make it triable under the Military Commissions Act and  
12 they look to U.S. practice. And now that we have the Bahlul  
13 decision, we understand that even in looking to the domestic  
14 laws of war that these types of deceptions or ruses of naval  
15 warfare were acceptable and are acceptable.

16           The government in its brief distinguished -- and I am  
17 sure I am going to butcher this name -- Kupreskic -- does that  
18 sound good enough, Your Honor?

19           MJ [Col SPATH]: I can find it, thank you. I have it.

20           ADDC [Capt JACKSON]: In saying that in that case ICTY  
21 completely rejected any type of defense of tu quoque, but if  
22 you actually look to the underlying conduct, and that's what  
23 we need to keep going back to here, Your Honor, is looking to

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1 the underlying conduct, because in that case it was -- it was  
2 the massacre of over 100 civilians in a case where the  
3 argument that was made was, well, there are all kinds of  
4 infighting going on in Bosnia at that time and so there had  
5 been other attacks on the Muslim religion, there had been  
6 other attacks, the Bosnian Croats they did this attack for the  
7 Kupreskic case and the difference there is the court said,  
8 hey, we are not going to look to this conduct and said, hey,  
9 just because you both did it that it's okay to go out and  
10 massacre hundreds of civilians based on their religious  
11 preference. And that's not what we are looking at here.

12 MJ [Col SPATH]: I think -- again, I'm catching up, I have  
13 a lot of reading to do, as I mentioned, but it seems that the  
14 court there rejected it more because it doesn't apply to  
15 individuals in criminal cases whereas the Dönitz case, it was  
16 accepted because it was more of a -- it was an allegation that  
17 each state had engaged in the conduct and each state had  
18 engaged in similar conduct and they said, well, if you do the  
19 conduct as a state you can't accuse another state of acting  
20 improperly when they do that. That's my reading of those two  
21 together so far.

22 ADDC [Capt JACKSON]: And several things about that,  
23 Your Honor. So if we are looking to the Kupreskic case, in

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1 that case the judges that were actually sitting to review what  
2 happened, none of them had -- I don't want to say -- none of  
3 them had a dog in that fight, none of them were actually the  
4 parties that were involved going on. And it distinguishes it  
5 from the Nuremberg trials because we all sent judges.

6 So we are looking at different state actors that were  
7 all involved in that conduct, and so that's different from  
8 looking at the individual conduct as opposed to when it's  
9 actually the prosecuting powers that are pointing the fingers  
10 at each other, because there were the individuals that were  
11 being held accountable in Nuremberg. Is that ----

12 MJ [Col SPATH]: It does, thank you.

13 ADDC [Capt JACKSON]: So we would say that, yes, tu quoque  
14 has been used in some instances in history, most specifically  
15 in the Dönitz trial in Nuremberg, which is actually quite  
16 different from the ruling that came out from the ICTY  
17 regarding the Kupreskic case. And so based on the doctrine of  
18 tu quoque, which we understand -- scratch that.

19 Based on the doctrine of tu quoque, Your Honor, we  
20 believe that this is an absolute bar to prosecution because  
21 the alleged underlying criminal misconduct is actually not a  
22 war crime that's firmly rooted in international law, nor is it  
23 a war crime rooted in domestic law because it's the actual

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1 practice of the United States, the prosecuting power in this  
2 case. And furthermore, it warrants an instruction to the  
3 members that this is a defense, and at the very least that the  
4 argument of tu quoque is mitigation in this capital case.

5 Subject to any other questions, Your Honor.

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

7 ADDC [Capt JACKSON]: Thank you.

8 TC [MR. SHER]: Good morning, Your Honor.

9 MJ [Col SPATH]: Good morning.

10 TC [MR. SHER]: First, to address Your Honor's question,  
11 the accused is not a member of any recognized force, and  
12 therefore he is an unprivileged enemy belligerent. He is not  
13 the same as United States sailors.

14 Putting legal status aside, Your Honor, the  
15 government alleges that the accused killed through perfidious  
16 means illegally, and in the movie the U.S. merely tested an  
17 operation that it never used.

18 The defense seeks to dismiss the charges on this  
19 theory of tu quoque, and in fact seek to have the accused  
20 escape liability on a theory or an allegation that the U.S.  
21 engaged in similar culpable conduct. But, again, the defense  
22 has presented no evidence, and it cannot, that the U.S.  
23 engaged in such conduct.

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1           The theory of tu quoque has been used -- has been  
2 used -- has been relied on in international tribunals and  
3 those tribunals have rejected the theory outright because  
4 one's moral culpability, Your Honor, is not contingent on the  
5 acts of another.

6           To be sure, as the ICTY stated in Prosecutor v.  
7 Kupreskic, "an accused does not exculpate himself from a crime  
8 by showing that another has committed a similar crime," and  
9 that's in paragraph 516 of the opinion, Your Honor.

10           Now, in an effort to give some life to the tu quoque  
11 concept, which is not a valid or recognized defense in any  
12 forum, the government will address the example identified by  
13 the defense, Operation Javaman or Campbell. It's the only  
14 example that the defense offered that has any connection to  
15 the United States.

16           It involved the U.S. as we just -- as the government  
17 just mentioned, it involved the U.S. considering plans to  
18 disguise missiles in the 1940s as part of its war effort. The  
19 plans were considered and tested, as the video showed, but the  
20 government never actually implemented the plan. In other  
21 words, the government never actually engaged in the conduct  
22 that the defense wants to rely on to take this unprecedented  
23 step of dismissing charges on an equitable theory. Indeed,

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1 even for the tu quoque proponents out there, Your Honor,  
2 Operation Javaman would not support the purported defense,  
3 because, as the defense concedes, it was a plan that was only  
4 considered.

5 Consistent with the findings of the ICTY, the  
6 commission should find that the tu quoque theory has been  
7 rejected and quite simply has no support in law: And as the  
8 ICTY explained in Kupreskic, the humanitarian law is instead  
9 the obligation to uphold the key tenets of the law regardless  
10 of the conduct of enemy combatants. That's important. The  
11 ICTY is correct to hold otherwise, and to allow tu quoque to  
12 become a valid or recognized defense would allow parties to  
13 escalate the destructive impact of war beyond that which is  
14 necessary, Your Honor. Then there would be no law of war  
15 where one side acts inconsistent with the law of war, anyone  
16 could just engage in any conduct at that point.

17 The defense looks to the Dönitz case, and in that  
18 case, Your Honor, in the Nuremberg trials, Dönitz did not  
19 assert a tu quoque defense. Dönitz argued that merchant  
20 vessels were armed and they were attacking German ships and  
21 because they were attacking, Dönitz ordered German subs to  
22 attack British merchant vessels. He considered them to be  
23 lawful targets at that point. He did not argue that he should

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1 be excused from being held accountable for his conduct because  
2 the British also engaged in similar conduct. That would have  
3 been tu quoque. He did not make that argument.

4 Your Honor, to the U.S. Government's credit, it did  
5 not and has not ever used or implemented Operation Javaman or  
6 anything like it, and in contrast, the accused did. He  
7 engaged in a perfidious attack, an attack that resulted in the  
8 death of 17 United States sailors, an attack that resulted in  
9 the injury of many more.

10 MJ [Col SPATH]: Thank you.

11 TC [MR. SHER]: Thank you.

12 MJ [Col SPATH]: Defense Counsel.

13 ADDC [Capt JACKSON]: Thank you, Your Honor. One  
14 housekeeping measure, Your Honor. We just wanted to mention  
15 that we did cut the feed based on sensitivity to the members  
16 of the audience for what is at the end of the video, but we  
17 still want Your Honor to view the video or at least the last  
18 seven minutes.

19 Your Honor, I want to start off with going back to  
20 the Javaman/Campbell -- slash, Campbell operation. And no,  
21 that operation never came to fruition, but I believe we can  
22 rest assured that if the United States thought they were  
23 committing a war crime, that they would not have been testing

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1 this concealed missile to engage in World War II. And looking  
2 further at that operation, the timing of the testing, by the  
3 time the missile was complete, World War II was over and there  
4 was no reason to use it.

5 Now, of course, that would be speculation as to how  
6 it would have been utilized, but I think the proof is in  
7 their -- how proud they were when they put together their OSS  
8 video demonstrating the lengths that they went through to  
9 conceal this missile. Giving no thought that concealing this  
10 hostile intent was in any way contrary to what was completely  
11 acceptable within international norms.

12 What the ICTY was saying in that holding in Kupreskic  
13 is that there are a certain amount, there is a standard of  
14 rules and we can't just let state parties do whatever they  
15 want and then point their fingers at each other. But  
16 ultimately it is that body of law that is established by the  
17 actors of the state party that forms our international norms  
18 and what is acceptable and that is actually what Dönitz  
19 argued. He didn't argue -- Admiral Dönitz didn't argue that,  
20 oh, but they did it too so I shouldn't be held accountable for  
21 it.

22 What he did argue was that if we look to the  
23 standards set by the superpower of the world, the United

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1 States, in the way that they conduct their naval operations,  
2 we can see that this is an acceptable practice and is actually  
3 forming and shaping the changes of naval warfare that were  
4 going around in that time. And that is more akin to the  
5 argument that we have here, is that in shaping what is  
6 acceptable -- and it's not saying two wrongs make a right and  
7 so that nobody gets in trouble. It's saying the United States  
8 has set the standard as to what is acceptable ruses of warfare  
9 here, not only in the international realm, but according to  
10 our own domestic law or domestic law of war.

11 And so in that case, Your Honor, it wasn't that there  
12 were similar acts that were committed by General Dönitz and  
13 Admiral Nimitz in that case where he was pointing the fingers,  
14 he was saying that this actually indicated a change in what  
15 was acceptable deceptions or ruses of naval warfare. And for  
16 that reason, Your Honor, we believe that the defense shall  
17 prevail on the argument of tu quoque not in that two wrongs  
18 make a right, but that this is an acceptable practice within  
19 the United States' standard of ruses of naval warfare.

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

21 TC [MR. SHER]: Nothing further, Your Honor.

22 MJ [Col SPATH]: We will take a short break. It is  
23 certainly easier today to take recesses. So let's go back on

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1 the record at 1035, and then we will just move forward with  
2 the last two. Thank you very much. The court is in recess --  
3 the commission is in recess.

4 [The R.M.C. 803 session recessed at 1023, 6 August 2014.]

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