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1 [The R.M.C. 803 session was called to order at 1054,  
2 16 May 2017.]

3 MJ [COL POHL]: The commission is called to order.  
4 Trial Counsel.

5 CP [BG MARTINS]: Good morning, Your Honor. And may the  
6 arguments of the United States assist the commission in  
7 addressing it. The commission should decline this invitation  
8 to declare three punitive provisions of the Military  
9 Commissions Act to be unconstitutional ex post facto laws, and  
10 it should do so because these provisions codify longstanding  
11 law of war offenses triable by military commission rather than  
12 define any kind of new unlawful conduct.

13 Close study of the statutory provisions and the  
14 language codifying these offenses reveals that none is the  
15 kind of so-called inchoate crime the D.C. Circuit found lacked  
16 sufficient pedigree either in the international law of war or  
17 the experience of our wars and our wartime tribunals.  
18 Instead, each provision requires that the government prove  
19 beyond a reasonable doubt that the accused personally and  
20 knowingly committed one or more overt acts in furtherance of  
21 the crime, which itself must be in furtherance of the hostile  
22 aims of the entity at war with the United States, as well as  
23 prove the other elements of the offense.

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1           This requirement that the overt act be personally and  
2 knowingly committed by the accused has been part of the  
3 experience of our wars and our wartime tribunals since at  
4 least as far back as 1863 when President Abraham Lincoln  
5 reviewed and disapproved on that basis the military  
6 commission's sentence of William Vittenhoff. The Vittenhoff  
7 case is the precedent cited by Colonel Winthrop when famously  
8 writing that military commission offenses must consist of  
9 overt acts, i.e., in unlawful commissions or actual attempts  
10 to commit and not intentions merely. And this was language  
11 approvingly quoted by seven of the eight justices in the  
12 United States Supreme Court that heard the Hamdan v. Rumsfeld  
13 case.

14           Extensive interbranch dialogue, beginning with the  
15 1862 statute delegating to President Lincoln the  
16 responsibility to review military commission sentences, the  
17 1916 statute, still on the books, preserving the body of  
18 common law of war that grew out of President Lincoln and  
19 successor presidents' review of commissions, and then two  
20 recent rounds of codification with Supreme Court review and  
21 supervision, all place, on firm footing, conspiracy,  
22 terrorism, hijacking, these three offenses before the Bar  
23 today to withstand ex post facto challenge.

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1 MJ [COL POHL]: Do you believe those three offenses  
2 violate the international law of war or just the American  
3 common law of war?

4 CP [BG MARTINS]: Your Honor, as we've ----

5 MJ [COL POHL]: And does it matter?

6 CP [BG MARTINS]: Your Honor, we have tried to use the  
7 analysis that has been validated by the en banc D.C. Circuit  
8 now in two different en banc appeals. So we are analyzing,  
9 looking at domestic statutes. That's what they did. They  
10 looked at the conspiracy to kill Americans abroad statute when  
11 they were looking at conspiracy in Bahlu. And we look at the  
12 air piracy statute and the terrorism that transcends national  
13 boundaries statute. So that analysis, we believe, helps  
14 establish the pedigree of these offenses.

15 MJ [COL POHL]: That is not my question. My question  
16 was -- the defense position is these are not recognized as  
17 international -- violations of international law. And I guess  
18 my first question is: Do you believe they are?

19 CP [BG MARTINS]: It depends on the offense. I mean, the  
20 conspiracy offense we have acknowledged. The United States  
21 position acknowledges that the more inchoate forms of  
22 conspiracy do not have firm international recognition as  
23 crimes. There are very strong antibodies to conspiracy as an

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1 inchoate offense. Terrorism and piracy, because these are not  
2 inchoate offenses -- counsel for the defense, you know,  
3 struggled to distinguish lots of mentions of terrorism and  
4 hijacking in the international realm. There aren't nearly as  
5 serious antibodies there. But the controlling analysis,  
6 Your Honor, we believe is looking at both international law  
7 and the experience of our wars and our wartime tribunals.  
8 That's the law of war prong of Article 21 of the UCMJ. So  
9 domestic statutes control this case; Justice Kennedy,  
10 Hamdan v. Rumsfeld.

11 MJ [COL POHL]: So if one were to conclude that you would  
12 have to rely on the American body of law for support for these  
13 provisions because there is not any international body of law  
14 to support them, that would ----

15 CP [BG MARTINS]: We believe there is sufficient pedigree  
16 in the U.S. common law of war. So for instance, each of these  
17 offenses, in addition to requiring an overt act by the accused  
18 himself, and not intentions merely, has long been triable, was  
19 triable before 2001, and each describes conduct that the  
20 accused well knew would subject them to trial and punishment  
21 if captured.

22 MJ [COL POHL]: If there was a preexisting federal  
23 statute, does that make it a law of war violation? I mean,

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1 you keep analogizing in your briefs ----

2 CP [BG MARTINS]: Well, the Hamdan court does it too.

3 MJ [COL POHL]: I am not saying they don't. I am not  
4 saying you are wrong; I am just curious.

5 CP [BG MARTINS]: And the reason they do it is they say  
6 type of forum in what charge is brought is not the kind of  
7 right the ex post facto law protects. That's not the fact  
8 that your conduct is criminalized elsewhere. If you look at  
9 the opinion for the court drafted by Judge Karen LeCraft  
10 Henderson, she says that, and she is actually agreeing with  
11 the government's position on that. She quotes our brief and  
12 she says we agree. That's the majority of our supervising  
13 court. So that's why they look to 2332b.

14 We believe you can do it with just the U.S. common  
15 law of war. This is another part of their analysis.  
16 Prominent national level military commission trials in our  
17 nation's history have resulted -- that in their day were  
18 subject to high-level executive branch or presidential review,  
19 resulted in punishment for the very offenses that are written  
20 down now and codified in sections 950t(29), conspiracy;  
21 950t(23), hijacking; and 950t(24), terrorism; and that are  
22 stated with great particularity in Charges I, VI and VII of  
23 the charge sheet that was referred to this commission with 167

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1 overt acts, more than 20 for each of these accused, personally  
2 knowingly committed in furtherance of the object crimes. This  
3 is the kind of thing that withstands ex post facto challenge  
4 under the analysis validated by the D.C. Circuit.

5           So, for example, in conspiracy, in addition to the  
6 1865 trial of those who assassinated President Lincoln for  
7 conspiracy -- I mean, that is what's on the charge sheet. In  
8 addition to that, high-level, prominent, national level  
9 military commission, the 1865 trial of William Murphy, the  
10 boat burner, was for, and I am quoting Winthrop now, this is  
11 why this is so powerful and important and withstands the  
12 concerns of the defense, is Winthrop himself in his digest is  
13 calling that case conspiracy of two or more to violate the  
14 laws of war.

15           And Justice Stevens, importantly, in his plurality  
16 opinion, claiming -- you know, deciding that the Hamdan  
17 version of conspiracy, which was more inchoate than we have  
18 here, Stephens disparages that comment in the digest because  
19 they didn't know where it pointed to. And this is this  
20 Thravalos article I stated to you, the Murphy precedent is  
21 very strong because it shows that it was Winthrop himself, not  
22 some lesser successor, Howland -- this is Stephens, this is  
23 Justice Stevens disparaging the statement; it wasn't Howland,

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1 it was Justice Stevens who he quotes throughout. So Murphy is  
2 a very strong precedent. And Justice Stevens says that is --  
3 that would be strong authority if we could find the case and,  
4 well, because of a scrivener's error in the old JAG records  
5 books, it's an extraordinary story, but it shows that the  
6 plurality opinion actually gives weight to something if they  
7 could find it. Well, it's actually been found. So Murphy is  
8 very strong authority.

9 MJ [COL POHL]: Let me ask you a question, and it is a  
10 little bit of a side issue, but it does raise something in my  
11 own mind. Nearly three years ago in 107A, the government  
12 moved to dismiss the conspiracy specification because you  
13 didn't want to run the potential, as I read your pleading, a  
14 potential risk of appellate issues. The 107 series was never  
15 litigated, since on 30 November, pursuant to defense request,  
16 it was withdrawn. But I am going back to the government's  
17 original position. Would it be fair to say you have rethought  
18 that since you originally filed the 107A?

19 CP [BG MARTINS]: I think everyone has rethought in light  
20 of the D.C. Circuit. You know, many, many separate opinions  
21 have been restated. Recall that our position was there that  
22 if the commission would keep all of the 167 overt acts on the  
23 charge sheet, and if the defense would agree that was an

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1 appropriate change to the charge sheet in the context of  
2 military commissions charging, which Quirin states don't have  
3 to be stated with the precision of a common law indictment,  
4 that we would not oppose the commission taking the standalone  
5 offense off. They didn't take us up on that, nor did the  
6 commission, and that was the only -- that was a very specific  
7 provision to try to cut through this, because this is a  
8 completed conspiracy. I mean, this is not subject to the  
9 infirmities that are imagined here.

10 MJ [COL POHL]: Okay. I don't want to get too far into  
11 this.

12 CP [BG MARTINS]: Our position certainly takes into  
13 account, Your Honor, the Bahlul cases.

14 MJ [COL POHL]: Okay. Understand. Go ahead.

15 CP [BG MARTINS]: So I could -- much more could be said  
16 about Murphy. Importantly, the Supreme Court approvingly  
17 quotes Murphy. And it has the case from Missouri where the  
18 Justice Miller writing circuit granted his habeas appeal on a  
19 Milligan holding that has since been overruled by Quirin.  
20 Okay. So you can't look at Murphy too much.

21 Murphy is very strong authority because it's  
22 conspiracy of two or more to violate the laws of war. It  
23 included multiple overt acts with Murphy in cahoots with a

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1 Colonel Tucker and a number of others who were burning  
2 steamboats, getting funding, getting instructions on how to go  
3 behind enemy lines, early echoing of overt acts that we have  
4 in our current charge sheet. But Murphy is very, very strong  
5 authority. I can't recommend it more.

6 Terrorism. Much more can be said about the offense  
7 of terrorism, but the 1942 trial of the saboteurs, as we  
8 described in our charge sheet, high-level executive branch  
9 review certainly of that military commission trial. It was,  
10 for the reasons we state in our brief, terrorism when these  
11 eight Nazi saboteurs, carrying over 100 pounds in separate  
12 blocks of TNT with blasting caps land, on the shores when the  
13 country is reeling from Pearl Harbor and very jittery, and  
14 their intent, as testimony in the saboteurs' trial  
15 established, was to cause terror and panic. That was  
16 terrorism.

17 Much more can be said about hijacking. But again, in  
18 the experience of our wars and our wartime tribunals, we  
19 recommend to the commission to really study the case of John  
20 Yates Beall -- and I understand that's the appropriate  
21 pronunciation of it, not Beall; even though it looks like  
22 Beall, it is Beall. Beall hijacks the Philo Parsons, an  
23 embarked passenger craft. Element for element that is a

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1 hijacking in everything but the modern term. And the law of  
2 war certainly can allow for different ingenious ways in which  
3 hijackers throughout the ages might do their deeds. Again,  
4 multiple overt acts on the record of trial. They used  
5 firearms and hatchets to overcome the crew, early evoking of  
6 overt acts on the current charge sheet.

7           They endangered its safe navigation, and they did it  
8 with the intent to further the Confederacy war aims while  
9 being unprivileged belligerents. So John Yates Beall, high  
10 level executive review, Lincoln himself reviewed that, and  
11 these are the kinds of ----

12           MJ [COL POHL]: Can you hear okay? Try to stand closer to  
13 the microphone and speak up a little louder, please. The rain  
14 is distracting.

15           CP [BG MARTINS]: These are the kinds of precedents that  
16 do give you the judicial pedigree that the D.C. Circuit found  
17 compelling. They gave lesser weight, importantly, to  
18 low-level field orders; high-level executive branch review  
19 they gave great weight to. So these three provisions of the  
20 Military Commissions Act, Your Honor, codify these crimes.  
21 They don't create them.

22           And in light of how the ex post facto clause is to be  
23 applied in a situation where the prior law is not statutory

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1 law, but is a body of common law of war, these codifications,  
2 because they don't have unpredictable breaks with the existing  
3 law, are permissible under the Constitution, as the document  
4 is interpreted by the Supreme Court in Calder v. Bull, in Ex  
5 parte Quirin, and then in Rogers v. Tennessee, which is very  
6 specifically on this point of when the prior law is common  
7 law.

8           The joint decision of Congress and the President to  
9 reaffirm military commissions power to try these offenses must  
10 not be set aside by a court or with respect this commission  
11 without a clear conviction that it is in violation of the  
12 Constitution. The commission is not going to gain that clear  
13 conviction, that sense of confidence, by reading the 2014  
14 Bahlul decision or the 2016 Bahlul en banc decision, because  
15 those decisions affirm the overt act rich charges against  
16 Bahlul. They also validate that analysis on how to determine  
17 pedigree that we have placed in our brief.

18           Nor is the commission going to gain that clear  
19 conviction that the three provisions are in violation of the  
20 Constitution by reading Hamdan v. Rumsfeld. It is a plurality  
21 opinion. It is only four justices that found even that  
22 provision, not triable by military commission. And the Hamdan  
23 provision was drafted in Military Commission Instruction

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1 Number 2 of that time, which required no overt act by the  
2 accused personally.

3           Also, the plain and unambiguous standard that counsel  
4 has been quoting has all been coming from that plurality  
5 opinion. That's not a majority of the court. A proper  
6 standard here is clear conviction that it's in violation of  
7 the Constitution. You have got two branches of government  
8 working together. Recall, as the commission well knows, the  
9 holding of Hamdan is that five justices now find that multiple  
10 variances with the courts-martial procedures violated  
11 Article 36's requirement that procedures be uniform insofar as  
12 practicable, and the Geneva Convention's Common Article 3  
13 requirement of a regularly constituted court.

14           Importantly, the court was focused upon and concerned  
15 about how those procedures, all of those variances,  
16 concentrated power in a fewer number or even one executive  
17 branch official. All of those changes that they are worried  
18 about and pointing to are concentrating power: Fewer jurors,  
19 fewer panel members, eliminating the position of the military  
20 judge. In some respects -- and this is how the Supreme Court  
21 got the record. There is not necessarily a record at trial  
22 level that establishes abuses of these things, but they are  
23 very worried about not having counsel present and sensed more

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1 of a not serious enough and careful enough effort to ensure  
2 that counsel -- the other side could be there to challenge  
3 this. So this concentration of power is what the court is  
4 worried about.

5 That then raises separation of powers concerns of the  
6 highest order, language of the court, five justices, and  
7 causes you to then fall into Youngstown Category III,  
8 President's power at the lowest ebb, different standard of  
9 review.

10 So we are not there. And in fact the overt act by  
11 the accused himself requirement tends to decrease those kinds  
12 of concerns, whereas not needing an overt act by the accused  
13 himself can aggravate the concerns about concentration of  
14 power because you don't have specific named overt acts that  
15 could be challenged by the defense, cited by the commission  
16 judge, looked at in review. That was President Lincoln's  
17 problem with Vittenhoff. There were disloyal statements.  
18 There are indications he is in cahoots with the Confederacy,  
19 but Lincoln says there are no overt acts in this record.

20 So having overt acts makes it more subject to review,  
21 it allows for a decrease of the concerns over concentration of  
22 power. So again, the commission is not going to find that  
23 clear confidence or the clear conviction that the provisions

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1 are in conflict with the constitution by looking at  
2 Hamdan v. Rumsfeld, which we agree is a very important case to  
3 read.

4 Subject to any questions.

5 MJ [COL POHL]: I have no further questions.

6 CP [BG MARTINS]: Thank you, Your Honor.

7 MJ [COL POHL]: Major Wilkinson.

8 DC [MAJ WILKINSON]: A few points, sir. Mr. Connell made  
9 the apt point -- well, he made the point that if you are just  
10 looking at the prior appeals relating to conspiracy, though  
11 mainly in context such as the application of the ex post facto  
12 clause and not some of the Constitutional jurisdictional  
13 arguments that we have made, you can find a lot of uncertainty  
14 there, and he said it should be approached with humility for  
15 that reason.

16 Do please remember, and we have said this in one of  
17 our reply briefs already, whenever you are trying a death  
18 penalty case, whether you are talking about the merits or  
19 about the sentencing, the modern reading of the Eighth  
20 Amendment is that you need extra certainty. If you want to  
21 know whether the modern reading of the Eighth Amendment should  
22 be applied here, do consider Congress has made a requirement  
23 of learned counsel. A learned counsel is simply an expert on

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1 the -- well, that's not all he is, but he is an expert on the  
2 modern reading of the Eighth Amendment.

3           It only makes sense to give us such experts if the  
4 thing which they are expert on is going to be used.

5 Letting -- normally that's in terms of you have a definite law  
6 and you require them to prove it with great certainty; that  
7 is, the law paints a target, they have to hit the target dead  
8 center. But if you allow the government to bring in laws of  
9 uncertain providence, it's like letting them shoot the wall  
10 first and paint the target around it. That's not the kind of  
11 certainty -- well, it's not allowed in any case, but  
12 especially not in a death case.

13           When the government is talking about a separate U.S.  
14 law of war, some of this comes out of a confusion on this term  
15 common law of war, which I believe you do see in  
16 Ex parte Quirin and some of the earlier cases.

17           I would like to remind you of something that came up  
18 yesterday in our 488 brief, and that is the 1952 case of  
19 U.S. v. Schultz. It's what's cited in 488 but it's 4 C.M.R.  
20 104, particularly around page 114, Court of Military Appeals  
21 1952. That contains a good discussion of the term common law  
22 of war and says quite clearly that is a type of international  
23 law, that it has its sources in its principles, uses of

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1 civilized nations.

2 MJ [COL POHL]: It is your position I should ignore any  
3 American common law of war, for want of a better term?

4 DC [MAJ WILKINSON]: There is no such separate body of  
5 law.

6 MJ [COL POHL]: Is there ----

7 DC [MAJ WILKINSON]: The United States, if its practices  
8 line up with a general practice among other nations.

9 MJ [COL POHL]: But let's say they don't.

10 DC [MAJ WILKINSON]: If they don't, then either you don't  
11 have a binding custom in that area or else the U.S. is out of  
12 step with it.

13 MJ [COL POHL]: Go ahead.

14 DC [MAJ WILKINSON]: Yes, sir. And I mean this notion of  
15 a separate American body. I don't see it, for example, in  
16 Field Manual 27-10 when they talk about the law of land  
17 warfare. They just talked about international treaties that  
18 we know. And in general, the law of war as we use it and  
19 advise commanders on it is not something you tease out between  
20 the lines of old precedents. It's something we set out  
21 plainly so that our soldiers and our officers can understand  
22 it.

23 Winthrop's treatise that they cite is very important,

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1 and on some points, as shown by the Hamdan plurality, it is  
2 still good law and important to look at. But do keep in mind,  
3 Winthrop was giving us the state of the art around 1920. When  
4 it came to conspiracy, the Nuremberg tribunal gave us the  
5 state of the art in 1946. And the 1946 UN resolution, 95(I),  
6 which was led by the U.S., it was a U.S. proposition, said,  
7 you know, we, the United Nations affirmed the principles of  
8 law being used at Nuremberg. So that's later, that's closer  
9 to now, and that is exactly how the Hamdan plurality saw it  
10 later and the way it still is.

11           The government also talks about needing a standard of  
12 a clear conviction of violation of the Constitution. That may  
13 be the way you apply the ex post facto clause to domestic law.  
14 But when you get to creating new law of war and potentially  
15 going outside the proper jurisdiction of military commissions,  
16 that is not at all the standard. And if you look at the kind  
17 of analysis done in Ex Parte Milligan and Ex parte Quirin,  
18 they didn't say either one we are going to give huge deference  
19 to whatever the political branches want to do, instead they  
20 examined carefully to see whether, does this lie inside the  
21 existing international law of war. If it is, it does, it's  
22 okay; if it doesn't, it's not.

23           And that's all I have, sir.

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1 MJ [COL POHL]: Thank you.

2 Mr. Connell.

3 LDC [MR. CONNELL]: The first point, Your Honor, at some  
4 point during the questioning there was a description of the  
5 defense position that these crimes do not satisfy the  
6 requirements of war crimes under the international law of war.  
7 That is certainly true, but I don't want to leave the false  
8 impression that we think even if there is an American common  
9 law of war that functions as a source of independent crimes,  
10 that these offenses don't satisfy that either.

11 I don't know what the law is of how we find out what  
12 the common law of war means. I know there is some kind of  
13 common law of war; I don't know how we find it out. Hopefully  
14 the Supreme Court will tell us, but right now we don't know.  
15 So our position is whether you look at American practice, the  
16 mixed jurisdiction tribunals under the Civil War, the World  
17 War II tribunals, or whether you look at the -- at some other  
18 source, all the sources converge around these three offenses.

19 The second point I want to make is with respect to  
20 the choativity of crimes. The government argues that  
21 conspiracy is not an inchoate offense because in this case the  
22 crime was completed and they are going to prove individual  
23 liability on the part of the defendants and that it is overt

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1 act rich. That description describes 99 percent of conspiracy  
2 prosecutions in the United States.

3 Conspiracy prosecutions generally, of course, are for  
4 murder or sometime the compound offenses, the RICO and CCEs  
5 that I mentioned in the first argument. But virtually every  
6 conspiracy charged is completed, because the drugs were sold,  
7 and is over -----

8 MJ [COL POHL]: Is the conspiracy charged as an agreement  
9 to sell drugs, when the drugs are completed, or agreement to  
10 sell drugs to John Jones on the 2nd of May with specificity of  
11 the exact offense?

12 LDC [MR. CONNELL]: Typically they are charged as a  
13 conspiracy to make as much money as possible by selling drugs  
14 with the following 200 overt acts ----

15 MJ [COL POHL]: Right.

16 LDC [MR. CONNELL]: ---- of they sold drugs on this  
17 occasion and that occasion and they had drugs and they got  
18 stopped.

19 MJ [COL POHL]: But the object of the conspiracy, for want  
20 of a better term, is a generic drug selling or robbery or  
21 murder as opposed to the other way, because I have seen it  
22 charged both ways, quite frankly.

23 LDC [MR. CONNELL]: Sure.

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1 MJ [COL POHL]: The other way is they charge conspiracy to  
2 complete the completed offense with great detail of what the  
3 completed offense is, which I think are two separate kinds of  
4 agreements. Are you saying the latter is not charged very  
5 often or ----

6 LDC [MR. CONNELL]: Sir, you are going to have to explain  
7 to me the difference ----

8 MJ [COL POHL]: Okay. The agreement to sell drugs is one  
9 kind of conspiracy with overt acts.

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: Agreement to sell drugs to a certain  
12 person on a certain day at a certain time with all the details  
13 in it, then the overt acts. Both of you have agreement, one  
14 is a generic agreement to sell drugs, one is a specific  
15 agreement to sell drugs to this person on this day.

16 LDC [MR. CONNELL]: Right. The critical commonality  
17 between them is that they are both an attempt ---- they are  
18 both conspiracy to violate 21 U.S.C. 846 to sell drugs. The  
19 object of the offense is what matters. Is the object of the  
20 offense a criminal act, and whether that is to sell drugs to a  
21 bunch of people or to sell drugs to one person, the criminal  
22 act is what makes it a conspiracy and makes the agreement  
23 illegal.

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1 MJ [COL POHL]: So the specificity in this conspiracy  
2 specification with an agreement to do specific things ----

3 LDC [MR. CONNELL]: Correct.

4 MJ [COL POHL]: ---- doesn't change it, doesn't change  
5 your analysis?

6 LDC [MR. CONNELL]: Right. And there are a couple of  
7 reasons why that is. If I can have access to the document  
8 camera, I am just going to show the text of the Manual for  
9 Military Commissions.

10 MJ [COL POHL]: Sure, go ahead.

11 LDC [MR. CONNELL]: May I have the feed from the document  
12 camera, please?

13 MJ [COL POHL]: You may.

14 LDC [MR. CONNELL]: So what matters, of course, is the  
15 statute, not the indictment or the charge sheet or whatever.  
16 And the statute, as implemented by the Secretary of Defense,  
17 has three elements: One, the agreement to commit one or more  
18 substantive offenses. Even the Secretary of Defense  
19 understands the difference between inchoate and substantive  
20 offenses as placed here. And then the object of that  
21 agreement, the common criminal purpose, the commission or  
22 intended commission of one or more substantive offenses  
23 triable by military commission.

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1           And then second, an intent, a knowledge requirement  
2 or an intent requirement, the accused knew the unlawful  
3 purpose and joined willfully.

4           And third, the accused knowingly committed an overt  
5 act to accomplish some objective or purpose of the agreement  
6 or enterprise.

7           The law of conspiracy is quite clear, and normally  
8 this operates to the disadvantage of the defense and to the  
9 benefit of the prosecution, that all the conspirators don't  
10 even have to know each other. As long as anyone, and in this  
11 situation the individual accused, does any kind of overt act  
12 that accomplishes some objective or purpose of the agreement  
13 or enterprise, it doesn't even have to be an illegal objective  
14 or purpose of the agreement or enterprise, part of the  
15 objective could be -- or one of the means and methods of the  
16 conspiracy could be buying Ziploc bags to sell the drugs in.  
17 And if the person's job is to go by the Ziploc bags, that in  
18 and of itself is not illegal, but if it is done with knowledge  
19 of the conspiracy, then it invokes liability.

20           The distinction that the government wants to -- or is  
21 drawing is the accused committing an individual, an overt act  
22 versus some person in support of the conspiracy. But that's  
23 not the critical distinction, to the extent that critical

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1 distinction exists at all. And I want to draw the military  
2 commission's -- you can cut the document feed -- attention to  
3 the Stevens plurality opinion in Hamdan, which is where this  
4 idea came from at page 604. And in that, Justice Stevens is  
5 explaining the Winthrop quote that the government relies on.

6           And it says that Winthrop explains that under the  
7 common law governing military commissions, it is not enough to  
8 intend to violate the law of war and commit overt acts in  
9 furtherance of that intention, unless the overt acts either  
10 are themselves offenses under the law of war or constitute  
11 steps sufficiently substantial to qualify as an attempt. This  
12 is the Hamdan hint that I was talking about.

13           It might be possible for Congress to construct a  
14 statute that would comply with the law of war in 2001, but  
15 they did not do so. They used a generic, slightly modified  
16 conspiracy statute.

17           Now, the third point that I want to make is with  
18 respect to the Murphy -- and I have learned something -- Beall  
19 cases that the government relies on, which are, in the way  
20 that the government relies on them, are not judicial cases at  
21 all. They are military commission cases from 150 years ago.  
22 The fact that that's their primary authority probably should  
23 give you some pause as to whether these crimes actually exist

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1 under any sort of version of the law of war, international or  
2 American.

3 But the Murphy case does far more work for the  
4 defense than the prosecution because it was reversed on the  
5 basis that it did not fall within military commission  
6 jurisdiction. And I think it's also important how the Supreme  
7 Court in Quirin described those cases. In Quirin, at page 31,  
8 the Quirin court describes both of those cases, describing  
9 Beall as his conviction by the commission was affirmed on the  
10 ground that he was both a spy and a guerrilla; and with  
11 respect to the Murphy case, he was convicted of coming within  
12 the lines and burning a United States steamboat and other  
13 property.

14 But the only distinction that the government makes  
15 about the Murphy case, which is, as I mentioned, extremely  
16 valuable as the only example of a retroactive extension of  
17 military commission jurisdiction, is this shocking and  
18 undefended statement. Quirin overruled Milligan. That would  
19 definitely come as news to the Quirin court, which cites  
20 Milligan a half dozen times, approvingly, and follows the same  
21 reasoning. It talks about that Milligan governs  
22 nonbelligerents and Quirin governs belligerents. Quirin is  
23 entirely consistent with Milligan. And the government's

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1 suggestion is the first that has been made that Quirin  
2 overrules Milligan, and that's its reason. That's why I don't  
3 pay attention to the fact that Murphy is powerful precedent  
4 for the lack of military commission's jurisdiction over Murphy  
5 because, without explanation, Quirin overruled Milligan. It's  
6 simply not correct.

7           So I understand ---- that's all I have. I understand  
8 that Ms. Pradhan would like to add a point with respect to the  
9 other offenses.

10           MJ [COL POHL]: Yes, I just want to clarify something you  
11 said. On the conspiracy specification, you indicated that the  
12 government, and if I quote you correctly, is bound by the  
13 elements as promulgated by the Secretary of Defense?

14           LDC [MR. CONNELL]: I don't know that I said that but I  
15 think that it is true.

16           MJ [COL POHL]: Okay. Because I want to come back to the  
17 hijacking one that you talked about earlier ----

18           LDC [MR. CONNELL]: Yes, sir.

19           MJ [COL POHL]: ---- that we referenced earlier that the  
20 death part is not a listed element ----

21           LDC [MR. CONNELL]: Correct.

22           MJ [COL POHL]: ---- but it's a charged element. It's in  
23 the specification.

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1 LDC [MR. CONNELL]: Yes. Correct.

2 MJ [COL POHL]: Okay. So ----

3 LDC [MR. CONNELL]: I am with you so far.

4 MJ [COL POHL]: My only question is that ----

5 LDC [MR. CONNELL]: The same applies to conspiracy as well  
6 for that matter.

7 MJ [COL POHL]: No, what I am saying is I just wanted to  
8 clarify what I thought you said is they are compelled to only  
9 follow the elements in the manual as promulgated by the  
10 Secretary of Defense ----

11 LDC [MR. CONNELL]: Well ----

12 MJ [COL POHL]: ---- and then they seem to be adding an  
13 element. If you buy that strict interpretation, then they are  
14 adding a death-eligible element, for want of a better term, to  
15 the hijacking specification.

16 LDC [MR. CONNELL]: I do agree with that characterization.  
17 What I was saying, however, is that when one is looking at --  
18 to determine what an offense is, one looks at the elements of  
19 the offense. So, for example, it's basic Blockburger  
20 analysis. If one is trying to determine if you are lesser  
21 included of one thing ----

22 MJ [COL POHL]: I just wanted to clarify that point. When  
23 you say elements of the offense, you can read it two ways,

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1 there is the text in the manual and there is the elements  
2 that's underneath it.

3 LDC [MR. CONNELL]: That's right.

4 MJ [COL POHL]: And quite frankly, in hijacking they don't  
5 match up.

6 LDC [MR. CONNELL]: I went back and checked after you  
7 asked that question. The same thing is true for conspiracy  
8 but not true for terrorism. Terrorism does have killing as a  
9 means of committing ----

10 MJ [COL POHL]: Again, it is not the issue directly before  
11 me, but I just wanted to address it.

12 LDC [MR. CONNELL]: Thank you, sir.

13 MJ [COL POHL]: Ms. Pradhan.

14 DC [MS. PRADHAN]: Just a couple of brief points,  
15 Your Honor. Your Honor, General Martins talked at length  
16 about Quirin and about the facts of Quirin and went through  
17 the acts committed that led to Quirin and said it was  
18 terrorism.

19 Now, Your Honor, that actually squares precisely with  
20 the characterization of it was terrorism in Motomura, in  
21 Buehler. It is that concept of terrorism. You don't see a  
22 charge ----

23 MJ [COL POHL]: What was Quirin charged with?

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1 DC [MS. PRADHAN]: Your Honor, I will go and get all of  
2 the charges from Quirin and I will bring it back to you.

3 MJ [COL POHL]: But you are basically saying he was  
4 charged with terrorist acts but not terrorism?

5 DC [MS. PRADHAN]: That's exactly right.

6 MJ [COL POHL]: That's okay. I don't need the charges.

7 DC [MS. PRADHAN]: I am happy to.

8 MJ [COL POHL]: No, I can find them myself.

9 DC [MS. PRADHAN]: My point is specifically that, that  
10 Quirin was charged with terrorist acts. Thank you. Quirin  
11 was charged with a violation of Article 81 of the Articles of  
12 War defining the offense of relieving or attempting to relieve  
13 or corresponding with or giving intelligence to the enemy,  
14 defining the violation of Article 82, the offense of spying,  
15 and conspiracy to commit the offenses alleged in Charges I, II  
16 and III; Charge I being a violation of the law of war.

17 We don't see terrorism in there. That is the  
18 characterization -- excuse me, the characterization of the  
19 government of what the acts of Quirin, the acts committed in  
20 Quirin actually were, which is exactly the same thing you see  
21 through these historical cases. You see the acts, the  
22 constituent acts being characterized or conceptualized as  
23 terrorism.

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1           Now, in these cases they didn't charge terrorism or  
2 hijacking. We don't see hijacking cases pertaining to the law  
3 of war. So we have to ask why does the government want to  
4 keep these charges. And it relates to the comment that  
5 Your Honor just made, which is that General Martins says  
6 that -- or said that the Military Commissions Act doesn't  
7 codify these crimes -- excuse me, doesn't create these crimes,  
8 it codifies these crimes. What the military commission does  
9 is codify death for specific charges that -- whose analogous  
10 charges, whose real charges under IHL do not carry that  
11 sentence. That is true for hijacking, that is true for  
12 terrorism, and that is true for conspiracy as well.

13           That's all I have except for questions.

14           MJ [COL POHL]: Thank you, ma'am. Any other defense  
15 counsel want to be heard based on the comments from General  
16 Martins?

17           LDC [MR. NEVIN]: No, thank you.

18           MJ [COL POHL]: General Martins, anything further?

19           CP [BG MARTINS]: Your Honor, only if it would assist the  
20 commission.

21           MJ [COL POHL]: I'm fine, thank you.

22           That brings us to 491, which is -- actually is a  
23 government motion dealing with admission of hijacker activity

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1 records in evidence.

2 LDC [MR. CONNELL]: For housekeeping, I just wanted to  
3 advise the military commission that Mr. al Baluchi will not be  
4 here for the afternoon session.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: And so I have discussed that with JTF  
7 and the question arose whether you would prefer if you just  
8 ask him is his waiver voluntary as opposed to having to go  
9 through advice by the SJA and testimony.

10 MJ [COL POHL]: I have no problem with that.

11 LDC [MR. CONNELL]: Thank you.

12 MJ [COL POHL]: Mr. Ali, Mr. Connell tells me that you  
13 wish to not attend the afternoon session; is that correct?

14 ACC [MR. AZIZ ALI]: Yes.

15 MJ [COL POHL]: Do you understand that if you choose to do  
16 that, that's your voluntary decision; is that what you are  
17 telling me?

18 ACC [MR. AZIZ ALI]: [Microphone button not pushed; no  
19 audio.]

20 MJ [COL POHL]: You said "nam"? Okay. I figured out what  
21 that is.

22 Okay. Do you have any questions about your ability  
23 to come back for our next session? Okay. Go ahead.

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1 LDC [MR. CONNELL]: He means he understood when he said  
2 yes.

3 MJ [COL POHL]: Yes, I got it.

4 TC [MR. RYAN]: Your Honor, this one will be short.

5 On 491, as we did in the case of the motion to admit  
6 the death certificates from several weeks ago, we are seeking  
7 to move to preadmit business records into evidence for  
8 purposes of trial, and this is by the authority of Rule of  
9 Military Commission 906(b)(11).

10 The records that are attached to the motion are  
11 duplicates of domestic records of businesses. Among those  
12 that are included are car rental agreements, calling card  
13 records, flight training records for flight academy, pay phone  
14 subscriber information and airline records.

15 I do need, Your Honor, to draw your attention at this  
16 point to two specific tabs containing records, those being  
17 number 5 and number 7. At this point, although they were  
18 filed as attachments or as tabs to the motion, Your Honor,  
19 with your permission, I seek to withdraw those two tabs at  
20 this time. We will address them at another time in another  
21 pleading.

22 MJ [COL POHL]: Okay. Your motion to do that is granted.  
23 But just for accountability purposes, just put it in writing

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1 so the record is complete.

2 TC [MR. RYAN]: Will do, sir.

3 MJ [COL POHL]: Okay. Go ahead.

4 TC [MR. RYAN]: The records at issue on their face and  
5 through a very cursory examination clearly bear the indicia by  
6 their appearance of being normal business-type records. In  
7 addition, the records are accompanied by certifications of a  
8 custodian or other qualified person stating that the record  
9 was made at or near the time of the occurrence of the matters  
10 set forth, by, or from information transmitted by a person  
11 with knowledge of those matters, and was kept in the course of  
12 regularly conducted activity, and was made by the regularly  
13 conducted activity as a regular practice. That is in fact  
14 quoting from Military Rule of Evidence 902.11.

15 This method of introducing business records is fairly  
16 basic and firmly rooted in established law. In military  
17 practice, in normal courts-martial, it is, as I said, Military  
18 Rule of Evidence 902.11. In federal practice, it is by  
19 authority of Federal Rule of Evidence also 902.11.

20 Because it would be admitted in a court-martial in  
21 that mechanism, Military Commission Rule of Evidence 803A  
22 allows for its admission in this military commission.

23 Subject to any questions, Your Honor, that's all I

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1 have to present.

2 MJ [COL POHL]: Thank you. Defense?

3 Mr. Ruiz.

4 LDC [MR. RUIZ]: Judge, our position, Mr. al Hawsawi's  
5 position on this particular motion by the prosecution, is one  
6 that looks to not only address this issue, but also anticipate  
7 what will be a number of motions I think that we will see  
8 seeking preadmissibility of evidence at this stage of the  
9 proceedings. Our position on that is that it is premature to  
10 engage in the preadmission of evidence at this stage of the  
11 proceedings.

12 What we have asked to suggest to the court, since you  
13 are, of course, involved in the method, order, and  
14 presentation of the proceedings, is that you hold this in  
15 abeyance, this particular type of motion, in abeyance, and  
16 that we seek a time where we can address all issues of  
17 preadmissibility of evidence. It would make a lot of sense to  
18 do that after the discovery process is complete. As you know,  
19 that has been a long and onerous process and it continues to  
20 this date. But at least from our analysis, in our estimation,  
21 it seems it would be the most efficient way to attack these  
22 issues.

23 The way that we envision looking at the admissibility

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1 of these types of records is one where we would have to look  
2 at each one of these documents and assess their underlying  
3 reliability, issues of admissibility, the persons who are  
4 proffered as the authenticators of the records.

5 We have an outstanding discovery request that we  
6 submitted to the prosecution for some of this information so  
7 that we can test the underlying reliability of the document,  
8 the people who are authenticating it, who are stating that it  
9 is what it appears to be, and that discovery request has yet  
10 to have been answered by the prosecution. The discovery  
11 request ----

12 MJ [COL POHL]: So what you are asking is you want to  
13 know, be able to contact the people who signed the  
14 authentication certificates and verify who they were?

15 LDC [MR. RUIZ]: Absolutely. And I submitted to you as  
16 Attachment B, it was submitted to the prosecution on March 9,  
17 2017. We certainly think it is part of the process for us to  
18 be able to ascertain who these people are. There are times,  
19 Judge, where these people who are proffered as the  
20 authenticators or the business record custodians are not in  
21 fact in that position. I'm not saying that's the case here,  
22 we simply have not had an opportunity to do that.

23 But that is where we are right now. The way that we

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1 envision this on Mr. al Hawsawi's team, Judge, is that we take  
2 every -- each document up, document by document, and then  
3 submit whatever objections that we have to those records, if  
4 we have objections to them. There may be records that we can  
5 just simply stipulate to, have no objection to. But at this  
6 stage of the proceedings, Judge, from our perspective we would  
7 like to avoid a situation where we are doing piecemeal  
8 litigation on issues of admissibility of different business  
9 records.

10           And as we go along, it makes a lot of sense, at least  
11 from our perspective, and we are asking the court to adopt  
12 this procedure, to put all of these types of motions and  
13 proffers in evidence for somewhere down the road, a more  
14 identifiable time when we have completed the discovery  
15 process, when we are closer to a defined trial date, where we  
16 can do this in a more orderly fashion and less piecemeal.

17           So at least at this stage that is our position on  
18 this motion, Judge. And if you care to get into the  
19 specificity of each of the documents, we are prepared to do  
20 that. We have done some of that in our brief as an  
21 alternative position, and the alternative that you want to  
22 proceed with each of these individual records. But as we have  
23 highlighted in our motion, we have already identified a number

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1 of issues that I think go to the heart of some of the records,  
2 but we do need to do a further due diligence with the  
3 assistance and compliance with the government in our discovery  
4 request. Thank you.

5 MJ [COL POHL]: Thank you.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Sir, if this was a motion in limine, I  
8 would probably have a very different position, but it's not.  
9 It's a motion to preadmit evidence. And so lacking any  
10 courts-martial experience, I have really two sources that I  
11 can go to to try to figure out what that means. The first one  
12 is the Rules for Military Commission, and the government has  
13 cited as its authority Rule for Military Commission  
14 901(b)(11), which simply says that a judge can make  
15 preliminary rulings on admissibility of evidence. It sounds  
16 like a motion in limine to me. And Rule for Military  
17 Commission 913C on the presentation of evidence, which says  
18 that the presentation of evidence takes place after the  
19 selection of the panel and the opening statements in what  
20 seems to me to be the ordinary course.

21 So turning to the military authorities, we did find  
22 two cases that referred to the preadmission of evidence,  
23 neither favorably. One said that -- one just made an offhand

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1 comment that it had happened, and the other said a denial of  
2 for a motion of preadmissibility was not an appealable matter  
3 interlocutorily for the government.

4           So I don't know what the government means by  
5 preadmit. I think what it means is start the trial today and  
6 introduce the first evidence today, I guess causing jeopardy  
7 to attach and future dismissals, if any, to be run afoul of  
8 statutory prohibition and double jeopardy. I mean I don't  
9 know why they want to do that and how they can do it. That's  
10 all I have to say on the comment. I just can't find any  
11 authority for what they are asking to do, and I don't  
12 understand how it may work.

13           MJ [COL POHL]: Okay.

14           LDC [MR. CONNELL]: You may explain it to me in a ruling,  
15 but the rules don't support it.

16           MJ [COL POHL]: Okay. Thank you.

17           Mr. Nevin.

18           LDC [MR. NEVIN]: I'll only just say that I hesitated to  
19 mention that part about jeopardy because I thought that you  
20 might permit this and there we would be, but I do think it  
21 clearly would have that effect. And there is that question  
22 about jeopardy under the rule as to when it attaches. And  
23 there are some exceptions to it and we can debate that, but I

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1 think that's one consideration.

2           And the second is if -- as a motion, thinking of it  
3 as a motion in limine, the government says here, we give you  
4 advance notice of our certificates under the business  
5 exception rule and you may do with that as you see fit, but,  
6 you know, we have presented it and that simplifies proof at  
7 trial and that makes sense, I understand. I think that's done  
8 all the time.

9           But to ask you to preadmit, I would assume that  
10 admission would occur in the context of a trial when we would  
11 have -- when we would know what evidence had been presented  
12 and we would know whether these records were even relevant  
13 under those circumstances, and we would know whether or not  
14 these records were perhaps cumulative or whether some other  
15 objection might apply, but we can't tell you -- we can't know  
16 that now. We can only know that in the context of the trial.  
17 So I join the objections as well, Your Honor.

18       MJ [COL POHL]: Okay. Mr. Harrington, do you have  
19 anything to add?

20       LDC [MR. HARRINGTON]: Just one other comment, Judge, that  
21 the way that this is being done now, these documents are filed  
22 as a motion. Once it clears whatever it clears with court  
23 security staff and it becomes a public record. So it means we

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1 will dribble on for the next several years with records and  
2 records and records, which allegedly will be admitted in  
3 trial, which become public records, which is certainly never a  
4 way I have seen a trial by a judge, where a judge may do  
5 preadmission in limine motions to facilitate the, you know,  
6 the trial, so it goes in an orderly way. But those documents  
7 are never released to the public until such time as they are  
8 admitted into evidence at the actual trial. And I think that  
9 it's a horrible risk to do it in the way that the government  
10 proposes to do it and I join in the other counsels'  
11 objections.

12 MJ [COL POHL]: Okay. Ms. Bormann?

13 LDC [MS. BORMANN]: This motion to preadmit made my head  
14 explode. I, for 20 years, taught trial advocacy to law  
15 students and to practicing lawyers before taking this  
16 position. So I'm just going to focus on the word admission.  
17 Admission happens during a proceeding, in this case a trial.  
18 It requires for pieces of evidence two primary laying of  
19 materials by its proponent. The first thing is foundation.  
20 In a case where a proponent is seeking a hearsay exception,  
21 that comes in two parts. The first is authentication. The  
22 question for the judge, and also to be weighed by the jury, is  
23 whether or not the document is what it purports. So is it

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1 actually a document in this case that was kept in the ordinary  
2 course of business?

3           The second foundational requirement that the judge  
4 would decide at a trial before a jury, and that the jury could  
5 weigh, is whether or not it is a recognized hearsay exception.  
6 Those are the two foundational requirements.

7           Obviously, there is one more requirement, and that is  
8 that the material sought to be introduced, admitted at trial,  
9 has to be relevant to the defendant. At this point, there has  
10 been no evidence that the purported hijacker records are  
11 relevant in any way, shape, or form, which is why they can't  
12 be admitted prior to the taking of testimony at a trial. So  
13 we strongly oppose this. We adopt the argument of  
14 Mr. Connell. We don't think it's appropriate at any time  
15 except in a basic motion in limine like you would normally  
16 have before a trial. Parties have objections. If we have an  
17 objection, if we have an exception, we still have to argue  
18 that, but they still have to lay the foundation and the  
19 relevance before the trier of fact. We object to this motion.

20           MJ [COL POHL]: Thank you. Mr. Ryan?

21           TC [MR. RYAN]: Nothing else, sir.

22           MJ [COL POHL]: Mr. Ryan, I have a question for you, sir,  
23 if I could.

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1 TC [MR. RYAN]: Yes, sir.

2 MJ [COL POHL]: As alluded to, the term preadmission is  
3 not unknown to the military practice. I am not saying it's  
4 favored, I am just saying it's not unknown. When you say  
5 preadmission, what do you mean? Do you mean conditional  
6 preadmission, that it meets the hearsay exception but it is  
7 still subject to certain trial level objections, for want of a  
8 better term?

9 TC [MR. RYAN]: Your Honor, that's probably the best  
10 solution that would take into account concerns.

11 MJ [COL POHL]: I am not asking for a solution, I am  
12 asking what are you asking me to do.

13 TC [MR. RYAN]: We are asking, consistent with military  
14 practice, as I understand it, that Your Honor rule on the  
15 basics of admission in terms of does it meet, in this case,  
16 the business records exception to the hearsay rule and that it  
17 would be admitted on that basis. And I think -- we do not  
18 contest that there could be objections down the road as to  
19 either relevance or something else that at that point could  
20 take it out. But consistent with the rules that require the  
21 prosecution to do everything we can to put together an orderly  
22 presentation of evidence, consistent with 906(B)(11) that says  
23 Your Honor can rule on issues of evidence in pretrial motions,

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1 that this aspect of it, that is the admissibility of a hearsay  
2 under the business records exception, is of, I think, value to  
3 all of the parties.

4 MJ [COL POHL]: So term -- when you say preadmit, really,  
5 if I understand you correctly, what you are asking me to do is  
6 not -- is simply to address whether or not it meets the  
7 business record exception?

8 TC [MR. RYAN]: That's correct, sir.

9 MJ [COL POHL]: But it's not being told -- let me ask you  
10 this. If we go through this whole drill and they are  
11 preadmitted, okay, how do the members know what they are?

12 TC [MR. RYAN]: We would expect that Your Honor would have  
13 an instruction to the jury, consistent with the rules in  
14 military commission's book as to I find this evidence to be  
15 for your consideration, specific wording being you can attach  
16 to it the weight that you see fit.

17 As far as when we are introducing it, I would elicit  
18 testimony either from the witness stand or by stipulation or  
19 something else that says the relevance of it is as follows.

20 MJ [COL POHL]: Got it. I understand your position.

21 TC [MR. RYAN]: Thank you, sir.

22 MJ [COL POHL]: Anything further? Okay.

23 One issue came up on 442. Mr. Ruiz, I believe you

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1 have a supplement pending?

2 LDC [MR. RUIZ]: Yes, sir, I believe we got the green  
3 light on that.

4 MJ [COL POHL]: Okay. Where does that put us on 442?

5 LDC [MR. RUIZ]: Judge, as soon as that's filed, I am  
6 ready to argue that. I mean, there is a portion of it that is  
7 classified.

8 MJ [COL POHL]: Doesn't the supplement permit the  
9 government to respond, though?

10 LDC [MR. RUIZ]: Sure, as I understand it.

11 MJ [COL POHL]: Let's see where they are at. File it, and  
12 if they are prepared we will go from there. Mr. Ryan, you are  
13 standing for some reason.

14 TC [MR. RYAN]: Yes, sir. It's not on 442, but I was  
15 informed that there was a problem with the power getting back  
16 to the court translators and it's about to shut off soon.  
17 They have been working on battery.

18 MJ [COL POHL]: When you say soon, do you have a time?

19 TC [MR. RYAN]: You know what I know, sir. Apparently  
20 what happened ----

21 MJ [COL POHL]: I want to do a little bit more and then we  
22 will take a lunch break. Is this going to be repairable?

23 [Conferred with courtroom personnel.]

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1 MJ [COL POHL]: Okay. So there is a current backup system  
2 working? When it runs out, let me know.

3 Okay. Let me jump to 497. Mr. Ruiz, I didn't mean  
4 to cut you off, but all I asked the government -- you filed  
5 your supplement, the government is prepared to argue; if not,  
6 they have time to respond. Okay?

7 LDC [MR. RUIZ]: It's the factual supplement on the  
8 records they provided to us. As we know from Mr. Swann, he  
9 spent a significant portion of his life reviewing those, and  
10 we will be prepared if he is.

11 MJ [COL POHL]: Is that an unclassified argument or just a  
12 classified?

13 LDC [MR. RUIZ]: It's unclassified, Judge.

14 MJ [COL POHL]: We will come back to it.

15 Let me ask about 497, which is the Durham  
16 investigation documents. Trial Counsel, what's the status of  
17 that? I'm just ----

18 CP [BG MARTINS]: Your Honor, we have reviewed it. We  
19 have reviewed the material and have requested substitutions  
20 and other relief with, looking at this very recently, well  
21 over 1500 pages of material that would be going to the defense  
22 if you were to approve the current form of our substitutions.

23 MJ [COL POHL]: Okay. And I have reviewed a lot of it

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1 already.

2 CP [BG MARTINS]: Right.

3 MJ [COL POHL]: Is there anything more for me to review?

4 CP [BG MARTINS]: We have given you -- we had, by  
5 September 30, gone through it all and had provided you the  
6 original transcripts and other materials and ----

7 MJ [COL POHL]: My only question is where we are at now is  
8 in the review process ----

9 CP [BG MARTINS]: Right.

10 MJ [COL POHL]: ---- but you have given me at least  
11 everything for the first cut ----

12 CP [BG MARTINS]: Right.

13 MJ [COL POHL]: And so ---- 497 covers a lot of  
14 things ----

15 CP [BG MARTINS]: Right. Right.

16 MJ [COL POHL]: ---- with the grand jury transcript, I  
17 have that. But addressing the issue, the answer is we are  
18 going to give it to them, the check is in the mail. It  
19 doesn't seem there is any reason to address 497 at this time.

20 CP [BG MARTINS]: Your Honor, we oppose the motion because  
21 we reviewed the material, we believe we have discharged our  
22 discovery obligation. We still have to get it to them ----

23 MJ [COL POHL]: That's my question.

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1 CP [BG MARTINS]: ---- we have looked at it all and we  
2 found the material that is discoverable and have submitted it  
3 to you.

4 MJ [COL POHL]: Okay. You have.

5 DC [MR. PERRY]: Your Honor, on 497 we would agree it's  
6 premature to argue at this time. We will await receipt of  
7 what's coming.

8 MJ [COL POHL]: I wanted to clarify that. I thought  
9 that's where it was at. I wanted to make sure one other thing  
10 to put on the record, 802, the status of 350. Mr. Connell, I  
11 believe you had something on that.

12 LDC [MR. CONNELL]: Yes, sir. The 350C and 0 are both  
13 pending completion of the RDI discovery process.

14 MJ [COL POHL]: Okay. Okay. I'm being told that the  
15 system is back up, so then that leaves 442, 494 and 501.

16 LDC [MS. BORMANN]: Judge, on 494, we are sort of in the  
17 same position as we are on 497. The government has answered  
18 and said that it's being subject to the review process under  
19 505. So we don't have the materials yet.

20 MJ [COL POHL]: Okay.

21 LDC [MS. BORMANN]: We can certainly, I guess, argue it,  
22 but it may be premature at this point.

23 MJ [COL POHL]: Okay. Trial Counsel, what's the status of

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1 494?

2 TC [MR. RYAN]: Could I have one moment with counsel,  
3 Your Honor?

4 MJ [COL POHL]: Sure.

5 [Pause.]

6 LDC [MR. RUIZ]: Judge, I will throw another one out  
7 there, which is 444. We filed a supplement on that. The same  
8 applies in terms of the response.

9 MJ [COL POHL]: Trial Counsel, just think about 442, 444,  
10 for the unclassified argument.

11 LDC [MR. RUIZ]: Judge, we could also argue the  
12 unclassified portion of 375, AE 375.

13 MJ [COL POHL]: I see we have a classified portion of  
14 that.

15 LDC [MR. RUIZ]: Right. We think it is fairly small and  
16 we would be okay at least proceeding with the unclassified  
17 argument, Judge.

18 MJ [COL POHL]: Okay. Mr. Ryan.

19 TC [MR. RYAN]: Your Honor, I have to review something.  
20 Maybe we could do it over the lunch break before I could  
21 answer that.

22 MJ [COL POHL]: Sure. Okay. So we will discuss 494 after  
23 the lunch break.

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1 ACC [MR. BIN'ATTASH]: I would like to inform the judge  
2 that I would like to go back to the camp after lunch.

3 MJ [COL POHL]: Okay. Mr. Bin'Attash, as I discussed with  
4 Mr. Hawsawi, you are choosing to voluntarily go back to the  
5 camp for the afternoon session?

6 ACC [MR. BIN'ATTASH]: Yes.

7 MJ [COL POHL]: That's your personal choice to do that?

8 ACC [MR. BIN'ATTASH]: Yes.

9 MJ [COL POHL]: No one is forcing you to do that?

10 ACC [MR. BIN'ATTASH]: Yes.

11 MJ [COL POHL]: Okay.

12 LDC [MR. RUIZ]: Just to be clear, Mr. Hawsawi is not here  
13 today. I believe you meant Mr. Ali.

14 MJ [COL POHL]: That's true. I meant Mr. Ali, what I told  
15 Mr. Ali earlier. You knew what I was talking about,  
16 Mr. Bin'Attash?

17 ACC [MR. BIN'ATTASH]: Thank you.

18 MJ [COL POHL]: That brings us to 501, Mr. Connell's  
19 motion for housing for the next five years. You can rest on  
20 your pleading, if you wish.

21 LDC [MR. CONNELL]: I just want to explain a little bit  
22 what I am talking about here.

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: Which is in March the government told  
2 you, sir, that your wish was their command, and if you just  
3 mentioned the problems around here in the context of a second  
4 courtroom, wheels would begin to turn and buildings would  
5 begin to be erected.

6 MJ [COL POHL]: I'm not quite sure that's what they said,  
7 but I -- I hope they did, but go ahead.

8 LDC [MR. CONNELL]: Exactly. But the military commission  
9 took some care in 485C to lay out the significant concerns  
10 around logistics and logistical planning in the military  
11 commissions. I completely get that, like so many problems, a  
12 controversy erupted, all housing was canceled on the island  
13 and then we objected and somebody went and fixed the problem.  
14 I get that. I understand why there was nothing further to do  
15 on 485. But it shows the way that we have dealt with these  
16 logistical problems and the way that the powers that be have  
17 dealt with these logistical problems on an ad hoc basis every  
18 time.

19 And so that's what the government's response is, we  
20 are not giving you what would ordinarily be available to  
21 people who spend a substantial amount of time on a military  
22 base because we want to deal with these problems ad hoc. All  
23 we are asking in this motion -- we are not asking for housing

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1 for the next five years. All we are asking for is the plans  
2 that the DoD regs requires military bases to maintain for  
3 housing.

4           And the reason why we are asking that is that we have  
5 a lot of relationships with the convening authority and  
6 other -- and General Baker and other resource providers. We  
7 understand that you, the military commission, don't control  
8 the plane or the houses or the courtroom or anything else, but  
9 there are people who do. And what we want to do is to line up  
10 the DoD reg which actually has very specific requirements for  
11 privacy and living amenities and space for people of different  
12 ranks and stations of life, versus what the Navy station's  
13 plan is, versus what the actual facts on the ground are.

14           In that way, instead of continuing to deal with these  
15 issues ad hoc, we could try to contribute to a planning  
16 process that would let this case move forward in a way that is  
17 convenient and possible for all involved. Thank you.

18           MJ [COL POHL]: I understand. Any other defense counsel  
19 want to be heard on this? Apparently not.

20           Trial Counsel's response?

21           MTC [MR. TRIVETT]: The prosecution rests on briefs, sir,  
22 subject to your questions.

23           MJ [COL POHL]: I have a question, Mr. Trivett. I'm just

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1 going to repeat what I said last time, so it's really more of  
2 an observation.

3 MTC [MR. TRIVETT]: Yes, sir.

4 MJ [COL POHL]: The only thing that's changed is that  
5 currently, as we have discussed last time, there are three  
6 active cases prior to findings; there are two pending  
7 sentencing hearings, and I don't know whether there is an  
8 intent to prefer additional cases or not.

9 In the last -- when we last met, I think we sent out  
10 a calendar for CY18 for this case. The judges in the other  
11 two cases did the other thing. I invite the government to  
12 look at that calendar, because those dates are set. But if  
13 you look at that calendar, there is only one courtroom.  
14 Something has got to give. I guess I don't have a question,  
15 just a comment on that part.

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: And I will tell you this, is this case  
18 will not be night court, okay? I just throw that out to you.  
19 Mr. Connell's plan, I understand what he is asking for, and it  
20 deals with a lot of factors in this case, but it's better to  
21 plan now -- for example, as I am saying, you have got a CY18  
22 schedule out there, that if you want these cases tried, it's  
23 going to be the responsibility of the government to provide an

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1 appropriate facility.

2           Now I am looking at you, Mr. Trivett, and I know I am  
3 not that powerful, I am not sure you are either, but I think  
4 it is important to put on the record that the Government, the  
5 big G, has decided to have these cases down here and,  
6 therefore, they must appropriately be resourced, including  
7 housing; but most significantly, an appropriate facility that  
8 permits the cases to be handled in an appropriate manner.

9           MTC [MR. TRIVETT]: Yes, sir.

10          MJ [COL POHL]: Do you have any questions of me?

11          MTC [MR. TRIVETT]: I do not, sir.

12          MJ [COL POHL]: Okay. So we are done. Thank you.

13                Okay. Is the government prepared to discuss 442, 444  
14 and 375? We can add them to the docket now.

15          LDC [MR. NEVIN]: Your Honor ----

16          MJ [COL POHL]: What we can do is -- let's do this? We  
17 have -- you have to do some background work on 394 anyway --  
18 excuse me, 494. We will go ahead and recess for lunch now to  
19 reconvene back at 1330 and then we will see where we are at on  
20 those. Mr. Nevin.

21          LDC [MR. NEVIN]: I was going to say that Mr. Mohammad  
22 would like to return to the camp for the afternoon as well.

23          MJ [COL POHL]: Okay.

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1 LDC [MR. NEVIN]: So I was going to ask you to do the  
2 colloquy with him while we were waiting to see what the  
3 government said.

4 MJ [COL POHL]: Okay. Then we don't have anybody left,  
5 from what I am counting. It just makes the prayer issue  
6 different is what I am saying.

7 LDC [MR. NEVIN]: No, no, that's correct.

8 MJ [COL POHL]: Mr. Mohammad, I understand you want to  
9 return to the camp for the afternoon session; is that correct?

10 ACC [MR. MOHAMMAD]: Yes.

11 MJ [COL POHL]: Are you voluntarily choosing to go back to  
12 the camp for the afternoon session and not to be here for what  
13 happens in the afternoon session?

14 ACC [MR. MOHAMMAD]: Yes.

15 MJ [COL POHL]: Do you have any questions about your  
16 rights to go back to the camp or to stay?

17 ACC [MR. MOHAMMAD]: No.

18 MJ [COL POHL]: Okay. I find that Mr. Mohammad and  
19 Mr. Bin'Attash and Mr. Ali have all voluntarily waived their  
20 presence to attend the afternoon session.

21 Given the parameters, we will still reconvene at 1330  
22 and at 1330 -- Mr. Nevin.

23 LDC [MR. NEVIN]: I am sorry to look like I am about to

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1 pounce, but can the court -- the military commission say  
2 anything about what we are going to do tomorrow?

3 MJ [COL POHL]: I think realistically, assuming we get --  
4 well, without the detainees, it makes it a little easier  
5 scheduling. Realistically I believe we can complete the open  
6 session today. Tomorrow would be the 505(h) session in the  
7 morning. And then we already have an 806 scheduled for and we  
8 would do that tomorrow also. Assuming that gets done, then  
9 Thursday would be open and then Friday would be Mr. Zubaydah.  
10 And that to me is what's on the calendar.

11 When we come back from lunch, if people have things  
12 to add, I always like to add stuff if we can, but I think  
13 that's kind of where we are right now. I don't know whether  
14 that means arrangements need to be made to visit the camp on  
15 Thursday. If not -- but again, talk among yourselves, but  
16 that seems to be the way ahead right now.

17 That being said, the commission is in recess.

18 [The R.M.C. 803 session recessed at 1213, 16 May 2017.]

19 [END OF PAGE]

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