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1 [The Military Commission was called to order at 1452,
2 19 February 2014.]

3 MJ [COL POHL]: Commission is called order. All parties
4 are again present that were present when the commission
5 recessed.

6 Major Seamone?

7 ATC [MAJ SEAMONE]: Your Honor, the government would
8 like to go back to the essential question here of whether the
9 charges related to the Limburg and the specifications related
10 to the M/V Limburg state an offense or whether they failed to
11 state an offense.

12 It is important to consider some of the facts that
13 are evident from some of the charges themselves, which is that
14 we are talking about a vessel that is registered in France but
15 it's owned by a civilian corporation. It's got a civilian
16 crew. It's been chartered to go and upload oil from Iran and
17 then Yemen on the way to a civilian corporation in Malaysia,
18 not engaging in any type of hostilities, not under any type of
19 escort, military escort, not carrying any types of munitions.

20 And a vessel that is a civilian small boat
21 approaches from the starboard side, comes alongside of the
22 Limburg, which is carrying over 300,000 barrels of oil, and
23 explodes a very large gaping hole in it. There are 90,000

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1 barrels of oil spilled into the Gulf of Aden, 12 members of
2 the civilian crew injured, one killed, a fire, engulfed in
3 flames.

4 MJ [COL POHL]: Major Seamone, you started this argument
5 by saying let's go back to the issue before me, failure to
6 state an offense. From that point forward you introduced all
7 sorts of facts. If what I'm talking about is failure to state
8 an offense, don't we look at the four corners of the
9 specification to see if it states an offense?

10 ATC [MAJ SEAMONE]: Offenses related to terrorism having
11 an essential element of protecting persons alleged in that
12 specification related to the Limburg. The offense involving
13 attacking civilians has a requirement and an essential element
14 that these civilians are not actively or directly engaged in
15 hostilities at the time they are attacked. The offenses
16 involving attacking a civilian object and also hazarding a
17 vessel require that it not be a legitimate military objective.

18 Those elements are what the defense is questioning
19 here, whether or not it is a legitimate objective, whether
20 these are civilians or they can be considered to be
21 combatants, et cetera. Those are factual determinations, and
22 they are elements that need to be proven to the panel beyond a
23 reasonable doubt.

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1 The government has complied with the provisions of
2 Rule For Military Commission 307(c)(3) which requires all
3 essential elements to be pleaded. The idea is that there is
4 sufficient notice to the accused to prevent three things from
5 happening, one, that he is aware of the elements of offense,
6 two, he can mount a defense to the charges, and three, that he
7 would not be called in to be held to the same offenses again
8 after trial on those charges.

9 If the notice is sufficient and the accused is
10 informed of those essential elements, then the government has
11 an opportunity and a right to present its evidence to a panel.
12 That's a fundamental point of Rule 917, which talks about the
13 fact that there can, in fact, be a motion for not guilty on a
14 charge based on failure of sufficient evidence. But the only
15 time that that is even possible is after both sides have
16 closed the evidence and the government has closed its case.
17 So that is a right that the Rules For Military Commissions
18 create, allowing sufficiently pleaded charges to move forward.

19 It is important that in meeting each of those
20 elements that talk about the status of the civilians not
21 engaging in hostilities, in talking about the status of the
22 object as not being a legitimate military objective. At its
23 core that is what pleads a law of war violation that is in

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1 sync with these firmly grounded law of war principles.

2 MJ [COL POHL]: I'm sorry, you are saying that the
3 civilians have to be nonbelligerents?

4 ATC [MAJ SEAMONE]: Your Honor, we are just saying the
5 way the statute is written ----

6 MJ [COL POHL]: Right.

7 ATC [MAJ SEAMONE]: ---- has -- for example, if you look
8 at the definition of a lawful military objective, there is
9 actually a rule that discusses that, or a provision. It
10 encapsulates the protected status of individuals and what
11 would make it a law of war offense that's -- so by stating
12 these offenses and pleading these elements, the government is
13 also at least meeting its requirement to put the accused on
14 notice that there is a law of war violation alleged.

15 With the defense talking about the court's need to
16 conduct a targeting analysis, to look at the nature of
17 indirect support, how substantial is an economic target, when
18 it becomes viable, to get into the subjective beliefs of an
19 attacker who has set out to explode a device alongside of an
20 oil tanker, all of those are heavily based on factual --
21 factual showings and the necessity to develop those facts at a
22 trial.

23 The defense cites a number of cases like Weaver

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1 and other cases that talk about dismissing indictments
2 pretrial. And what's very interesting about those cases is
3 they all talk about a fundamental rule that the government
4 usually and generally has a right to present its evidence.

5 It is only when there is a waiver by the
6 government, where the government is conceding that it can't
7 present any other facts than what it has, it is stipulating to
8 all of the facts involved, that is when the courts come in and
9 they start making determinations solely based on law and
10 removing charges. We haven't reached that stage. In fact,
11 the only thing that these proceedings have done is emphasize
12 that these are heavily factual situations that are rightfully
13 to be determined by the panel. These are also complete and
14 not inchoate offenses, and they fully state international law
15 of war violations.

16 Excuse me for one moment. Thank you, Your Honor.

17 MJ [COL POHL]: Thank you. Commander?

18 ADDC [CDR MIZER]: Your Honor, the defense has nothing
19 to add.

20 MJ [COL POHL]: Thank you. 172. Let me -- before I get
21 to 172, Commander, perhaps I just missed it because I've just
22 got the summaries here, I'm just looking at the charge sheet
23 and you focus your argument on this one to Specification 2 of

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1 Charge IV. But is there similar argument in Specification 1
2 of Charge IV that I'm overlooking? That deals with similar
3 conduct but involving the USS COLE. I mean, my basic question
4 is -- and again it may be that I just don't know whether I
5 overlooked it or it's not filed yet. I'm not encouraging
6 motions by the way.

7 ADDC [CDR MIZER]: I understand, Your Honor.

8 MJ [COL POHL]: I just didn't see it.

9 ADDC [CDR MIZER]: We haven't addressed that in the
10 motions, and we are not asking the court to consider it right
11 now. We are ostensibly focused on the Limburg at this point.

12 MJ [COL POHL]: If it was buried there, I want to get to
13 it. If it is not, fine.

14 ADDC [CDR MIZER]: Yes, sir.

15 MJ [COL POHL]: Let's go to 172.

16 LDC [MR. KAMMEN]: Excuse me, Your Honor. I was
17 intrigued this morning by the argument regarding unlawful --
18 or unlawful influence in the overlap regarding publicity and
19 the impact on member selection and the way in which this on
20 some level bears upon 172.

21 Let me start by acknowledging that at least what
22 exists in the statute I gather is identical to what exists in
23 courts-martial, that the convening authority in your typical

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1 court-martial would be the person who would select the
2 potential members for the court-martial.

3 And I also want to acknowledge properly, I guess,
4 that the military sees the panels of prospective jurors as in
5 the cases referred to as blue ribbon panels. Military
6 officers, the cases say, and this has certainly been my
7 experience, may be better educated, more worldly, more
8 experienced, have a greater volume of experiences than
9 certainly the typical person that we might see in a state
10 court or in a federal district court who is subpoenaed for
11 jury selection.

12 That said, and this raises many of the same issues
13 that we addressed and that the court has rejected in a
14 different context in AE 117 which challenged the neutrality of
15 the convening authority. And so we will incorporate some
16 references that we referred to in those, that motion.

17 And in that motion, in AE 117, one of the
18 challenges to the problem or the difference between your
19 typical court-martial and what exists here is that the
20 convening authority in a court-martial has as part of his
21 charge good order and discipline of his or her unit. And so
22 when a service member is court-martialed, one of the aspects
23 and one of the goals of a court-martial, besides determining

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1 guilt or innocence, is also good order and discipline.

2 One of the functions of the commander, his
3 command, is not charged with running criminal prosecutions.
4 He is a naval commander, an Air Force commander, an Army
5 commander charged with running a unit, a ship, a squadron,
6 what have you. And so his or her goal is to continue to have
7 military efficiency.

8 But that's not how this convening authority works.
9 This convening authority exists to organize these commissions.
10 That is his job. On a more micro -- macro level -- micro
11 level, on a case-by-case basis, he certainly determines
12 whether the cases should be referred. He determines whether
13 in the appropriate cases they should be referred as capital.

14 He has the obligation, I gather, at some level to
15 provide resources both for the prosecution and certainly for
16 the defense. All of our initial defense requests for
17 resources go to this convening authority. And so he's in a
18 different position than your typical military commander.

19 He also -- and this is true I presume in your
20 typical court-martial, since when one party is -- reaches a
21 plea agreement to testify against another, that plea agreement
22 must be approved by the convening authority. And at least
23 according to published reports we are reading the arraignment

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1 tomorrow, may well involve some sort of plea agreement that
2 involves some obligation on the part of that individual
3 perhaps to testify in future proceedings, maybe even future
4 proceedings in this case.

5 And if that's the truth, correct, then this
6 convening authority has decided that that witness is worthy of
7 belief to get whatever kind of plea agreement he may have
8 gotten to strengthen the case against Mr. Nashiri.

9 So he's not in your typical convening authority
10 posture. It is much more akin, and we have argued this
11 before, to the U.S. Attorney. And in our analysis, if the
12 convening authority is the U.S. Attorney, General Martins and
13 his staff in this case are the equivalent of Assistant
14 U.S. Attorneys, meaning no disrespect to General Martins as
15 the Chief Prosecutor, but I think in reality in the way it
16 functions, the convening authority is, in fact, the Chief
17 Prosecutor. Because if he doesn't refer the charges, General
18 Martins has got nothing to prosecute.

19 Now, that is really important, and we have seen
20 how this plays out in this case. And part of the reason we
21 have challenged and will continue to challenge the neutrality
22 of the convening authority is because he has demonstrated his
23 lack of neutrality.

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1 And it has been specifically important with
2 respect to the issue of jury selection. If you will recall
3 that one of the specific challenges we raised very early was
4 the fact that in his convening order the convening authority
5 attempted to set out with some precision exactly how jury
6 selection was to unfold.

7 He essentially tried to command you to have a jury
8 of 12 people with a certain number of alternates, and that
9 anybody who was not selected then would be returned. And
10 that, as we discussed in those arguments, was considerably at
11 variance from the military -- what would occur in a military
12 court-martial then, and I think still is at variance with what
13 occurs in a military court-martial. And you said well, I
14 don't care what he has done then, we will do it the way we are
15 supposed to.

16 MJ [COL POHL]: Well, to be fair, I don't believe -- I
17 don't know if I said "I don't care," but I believe that issue
18 to quote a word that I'm not sure the commander likes -- I'm
19 not sure that was ripe at the time, and we would address it at
20 the time.

21 LDC [MR. KAMMEN]: I think you said it was ripe, and it
22 would be your position you were not obligated to follow his
23 instructions.

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1 MJ [COL POHL]: Without making a final decision what we
2 will do.

3 LDC [MR. KAMMEN]: Right, but you did not regard his
4 instructions as binding.

5 MJ [COL POHL]: That's true.

6 LDC [MR. KAMMEN]: What is important and what is
7 significant is that he understands and understood when he
8 referred the charges how critical the venire was. And this
9 was really kind of touched on in the argument on, regarding,
10 you know, influence, because at the end of the day it is the
11 convening authority who picks the pool, and that is a
12 significant power.

13 MJ [COL POHL]: Mr. Kammen, let me just ask you a
14 question.

15 LDC [MR. KAMMEN]: Sure.

16 MJ [COL POHL]: You are correct that this models
17 military practice, okay. And although in your pleading you
18 seem to think that it is not consistent with the statute and
19 the Detainee Treatment Act.

20 LDC [MR. KAMMEN]: Yes. And we think that it is also
21 inconsistent with the requirements of the statute and U.S.
22 treaty obligations that these procedures have to comply with
23 the fundamental law of the United States under the Eighth

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1 Amendment, because it is a capital case.

2 MJ [COL POHL]: Isn't it at the end of the day, if it
3 complies with the MCA -- I'm not saying it does, if this
4 appears to be consistent with the congressional intent, the
5 only way it can be changed is through a higher authority?

6 LDC [MR. KAMMEN]: Well I disagree, Your Honor. I
7 disagree. When we ----

8 MJ [COL POHL]: A higher authority, a higher legal
9 authority. I don't mean -- that is what I meant, what I'm
10 saying is if the statute -- if the Military Commissions Act on
11 this provision, on this issue, okay, gives the convening
12 authority this authority to select the members, the only way I
13 can overturn that would be to rely on an authority that
14 supersedes the Military Commissions Act?

15 LDC [MR. KAMMEN]: Yes.

16 MJ [COL POHL]: Okay, that was my question. I mean
17 higher authority like a higher authority -- not a person, just
18 a higher legal authority.

19 LDC [MR. KAMMEN]: Yes.

20 MJ [COL POHL]: Go ahead.

21 LDC [MR. KAMMEN]: Certainly that is why we think the
22 treaty obligations of the United States that require
23 compliance with the Eighth Amendment, because this is a

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1 capital case, are important. The prosecution sort of argues
2 sometimes, well, the Constitution kind of applies, sometimes
3 it doesn't, don't know what they are going to say about the
4 Eighth Amendment. My guess is ultimately they will say, well,
5 an Eighth Amendment light kind of applies.

6 But the treaty obligations require that military
7 commissions comply with the Eighth Amendment, that, you know,
8 they not be cruel and unusual punishment.

9 MJ [COL POHL]: Wouldn't that also apply then to
10 military courts-martial?

11 LDC [MR. KAMMEN]: Yes -- well, no, because we know
12 under Loving that the Supreme court held that the military
13 court-martial statute does not comply with the Eighth
14 Amendment and would not pass muster in a civilian world. But
15 because of the need for good order and discipline and the
16 right of the President to prescribe rules for military
17 servicemembers there is that exception. I don't know that
18 that exception is going to ultimately survive, because that
19 was, you know, sometime ago, and the Eighth Amendment has
20 moved quite a bit further.

21 But there is that exception, but that doesn't
22 apply here, because nobody thinks that -- and I don't mean to
23 be facetious, that part of the job of the convening authority

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1 or the President is to provide good order and discipline for
2 al Qaeda. I mean, that's not what this is about, and so we
3 have a completely different situation here.

4 MJ [COL POHL]: Okay. If I assume you have identified a
5 wrong, what is a remedy?

6 LDC [MR. KAMMEN]: Well, the remedy, Your Honor, is
7 twofold. Certainly, you can take the draconian step of
8 abating the proceedings until Congress passes a -- changes it
9 to something that fits the statute, or I think you could say
10 that the -- either the court -- and this would be a relatively
11 easy thing to do. According to -- and again I don't want to
12 jump ahead to the prosecutor's argument, but General Martins
13 released a press statement on our arrival in which he talks
14 about how the convening authority would select from 200,000
15 officers who fit the grade in the four services. I assume
16 some database exists of those 200,000 officers.

17 So it would be relatively easy for this court to
18 issue an order for some number of those people randomly
19 selected to come to Guantanamo and be the venire, similar to
20 what a clerk does in the U.S. District court.

21 MJ [COL POHL]: Do I have that authority?

22 LDC [MR. KAMMEN]: I think you do if you find that the
23 convening authority is not the appropriate person to do it.

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1 Again, you could also abate the proceedings until Congress
2 passes a new proceeding. But you do -- if you find that the
3 convening authority lacks the neutrality to do this ----

4 MJ [COL POHL]: And then the normal remedy, if that's
5 your thing, is you would disqualify the convening authority in
6 selecting the members.

7 LDC [MR. KAMMEN]: Fine. And then the question is who
8 is left. And I believe that the party who is left, Your
9 Honor, is you. Because, you know, if you replace the
10 convening authority with, what, his law advisor? I mean, just
11 changing the identity doesn't change the problem. The
12 problem, Your Honor, is that the office ----

13 MJ [COL POHL]: But the power to select members applying
14 the criteria is reserved to the convening authority, not the
15 judge.

16 LDC [MR. KAMMEN]: Not if you find that that power is
17 not appropriate, given his lack of neutrality.

18 MJ [COL POHL]: Then what I'm saying is disqualifying
19 the convening authority from selecting the members does not
20 default to me selecting the members, because that is reserved
21 to the convening authority. Understand, there is a chain of
22 command at the convening authority, is that he has a boss ----

23 LDC [MR. KAMMEN]: Well I suppose if ----

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1 MJ [COL POHL]: ---- who supersedes him.

2 LDC [MR. KAMMEN]: I suppose if you said that the
3 Secretary of Defense then could do it.

4 MJ [COL POHL]: Well, I usually would say something to
5 the effect of he can't do it, go pick out somebody who can and
6 let them worry about it.

7 LDC [MR. KAMMEN]: Fine. That is an appropriate remedy
8 as well.

9 MJ [COL POHL]: I understand.

10 LDC [MR. KAMMEN]: It seems to us the far more -- the
11 thing that moves the thing along -- things along faster is you
12 take that upon yourself or deputize one of your clerks. I
13 mean, we have -- it is very much like a real court, an
14 Article III court, in the sense you have clerks, you have
15 staff, you are not without resources. If we know who this
16 pool of prospective jurors are, it is how many do we bring
17 here and you know ----

18 MJ [COL POHL]: No, Mr. Kammen, we kind of got a little
19 far afield here. It is not a matter of resources. It is a
20 matter of authority.

21 LDC [MR. KAMMEN]: Absolutely. But as you have
22 acknowledged and we have had this discussion in a number of
23 contexts, if this is one thing, it is, using your words, amply

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1 resourced. You know, they are spending five times to house
2 Mr. Nashiri here what it would cost to house him in the United
3 States. So the amount of money that is ----

4 MJ [COL POHL]: Again ----

5 LDC [MR. KAMMEN]: Let one other guy who should be gone
6 go, and you've got more than enough money to fund a clerk.

7 MJ [COL POHL]: But I just said it is not a resource
8 issue. It is an authority issue.

9 LDC [MR. KAMMEN]: Well ----

10 MJ [COL POHL]: That is where I'm coming from. But go
11 ahead with the basis of your argument.

12 LDC [MR. KAMMEN]: In any event, I think we really need
13 to look at the -- what we understand of the mechanics of this,
14 at least to the extent we have knowledge are, and then why
15 this is so threatening to us and why this really needs to be
16 addressed and, at least in our view, nipped in the bud.

17 Our understanding -- and this is -- there is
18 nothing in writing, don't know this, because we have not seen
19 any information about the specific members. I think maybe we
20 have been provided with something that may have their names,
21 but that was a time ago, and I am told that can change as --
22 you know, as these things extend on, so the people originally
23 selected as members in 2011, there may be a whole different

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1 cast that we'll actually see when we finally see members.

2 But in any event, one of the questions is will all
3 of those members be required to have TS/SCI clearances. If
4 that's true, I presume that that reduces by a significant
5 pool -- or a significant number the available number of
6 people, officers who can serve. It may reduce -- you know,
7 take out whole groups of disciplines that cannot serve because
8 they don't have the required clearance.

9 It may well mean that people with heavy experience
10 in intelligence and in the intelligence community will be
11 represented within the intelligence community within the four
12 armed services. It may well mean -- it almost certainly will
13 mean that everybody, because of their senior status, will have
14 been in the military in 2000, will have served at least one
15 and probably multiple tours in Iraq, Afghanistan and
16 elsewhere, fighting the war on -- international war on terror,
17 or whatever the current euphemism is, or the war in Iraq or
18 the war in Afghanistan.

19 And then we are told that the convening authority
20 uses age, education, training, experience, length of service
21 and judicial temperament in making his selection. Well, how
22 does he know? How does he know that Colonel Jones, who may
23 now be serving in Alaska -- and I'm just making up names. I

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1 don't want anyone to think I'm talking about a real Colonel
2 Jones who is really serving in Alaska -- has judicial
3 temperament?

4 Either he is making an arbitrary judgment based
5 upon something, or he's finding out who this person is. Now,
6 that's antithetical to a neutral selection of a venire.

7 MJ [COL POHL]: But all the things you just stated, the
8 military status, the potential clearance issue, the deployment
9 issue, the Article 25 criteria from the UCMJ, which are those
10 six things, all those would apply to whoever the convening
11 authority is, correct?

12 LDC [MR. KAMMEN]: Would apply to whoever the convening
13 authority is, sure.

14 MJ [COL POHL]: Yes.

15 LDC [MR. KAMMEN]: That is why we think ----

16 MJ [COL POHL]: The real question really is the
17 convening authority as opposed to a convening authority.

18 LDC [MR. KAMMEN]: At a minimum, it is this convening
19 authority. But, you know, who knows, because if the convening
20 authority -- if a new convening authority said I'm going to
21 pick, here is the pool. The pool is every officer above the
22 rank O6, I guess it is in the Army, Navy, Air Force and
23 Marines, they are all equally plausible in the pool.

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1 And I'm going to use this computer program, and
2 I'm going to select out 200 names, and this is how they are
3 going to be generated, okay? Then at least we know how they
4 are picked and we know that his or her biases, prejudices,
5 what have you, aren't at work.

6 What we know here is that no matter how much he
7 tries, he has decided this is a really good case -- or a
8 prosecutable case, and that it is a case that requires the
9 death sentence. He has also determined, we believe, that at
10 least one person, maybe more, should receive different
11 sentences and, at least in the person who we understand is
12 going to be arraigned tomorrow, not face death, not face the
13 death penalty, in order to -- if this is correct, to prosecute
14 Nashiri.

15 Now, that's hardly neutral. So when he goes
16 through and in this way selects Major -- Colonel Jones,
17 Lieutenant Colonel Smith, what have you, there is no
18 principled way he can have the necessary neutrality.

19 And this is what really concerns us, Your Honor,
20 is because what is occurring, at least according to what's
21 published here, is so at variance, not only from what would
22 occur in the civilian Article III world, but from what we
23 understand occurs in the world of a capital court-martial

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1 conducted in the United States.

2 MJ [COL POHL]: How is that variance?

3 LDC [MR. KAMMEN]: Well, in Major Hassan's
4 court-martial, Your Honor, it is my understanding that the
5 convening authority detailed approximately over 300 potential
6 jurors, anticipating that a number of them, any number of them
7 would properly -- because of the publicity, because of their
8 service, because of their service experiences, because of all
9 the typical things that come into play in a highly publicized
10 case, would be excused.

11 Now, obviously Major Hassan's case took some
12 rather peculiar turns, and I don't know how many ----

13 MJ [COL POHL]: How is that -- how is -- assuming that
14 is true, again I know it is just a proffer for the sake of
15 discussion -- how is that any different than what the
16 procedure has been laid out here?

17 LDC [MR. KAMMEN]: Because what we detailed here is 37
18 people, Your Honor.

19 MJ [COL POHL]: For now.

20 LDC [MR. KAMMEN]: Well, that is all we have to work
21 with.

22 MJ [COL POHL]: That's what we have for now.

23 LDC [MR. KAMMEN]: If we are provided with a list of 300

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1 names that is a different situation.

2 MJ [COL POHL]: Well, let me -- let me -- okay. I don't
3 know how many people the convening authority is going to
4 detail to this case, okay, as members. I know we've got 37
5 now. I got that. After voir dire -- after voir dire, say you
6 start with 37, we may have zero. So the raw numbers don't
7 tell me anything.

8 LDC [MR. KAMMEN]: But the raw numbers are critically
9 important because once you have people here, once you have
10 people only -- if you only start with 37, all of the
11 pressure -- there is going to be extraordinary pressure on you
12 to find a jury from those 37.

13 MJ [COL POHL]: Mr. Kammen, I understand that may be the
14 perception.

15 LDC [MR. KAMMEN]: Well ----

16 MJ [COL POHL]: I have had a number of cases where I
17 have gone through a number of members and we just keep
18 bringing them on. If they ----

19 LDC [MR. KAMMEN]: I don't doubt that, Your Honor,
20 but ----

21 MJ [COL POHL]: You may believe that, and I understand
22 that. I understand your position. If challenge for cause
23 should be granted, it will be granted. That is my job. And

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1 if that means we sit through 200 members until we get 12 or
2 whatever we're going to get, then we sit through 200 members.
3 That is the way the system works.

4 LDC [MR. KAMMEN]: I understand that's the way the
5 system ----

6 MJ [COL POHL]: I don't care. And I'll tell you this,
7 the fact it is here at Guantanamo Bay makes no difference in
8 the world to me. It is a matter of what is the appropriate
9 legal standard and what is met. If that means we spend weeks
10 or months doing member selection, so be it.

11 LDC [MR. KAMMEN]: I understand that, Your Honor. What
12 I'm concerned about is not we spend weeks or months doing
13 member selection, is that we are sitting there and we have
14 gone through 28 of the 37 and it looks like that unless things
15 improve, we are going to have to take six months off to get
16 another 37 here, because I don't know what the mechanics are.

17 MJ [COL POHL]: Neither do I.

18 LDC [MR. KAMMEN]: And that is something we should all
19 know. That isn't something we should have to speculate.

20 MJ [COL POHL]: Once we get to that point, we can
21 certainly have the government ask what is your plans for
22 members here. But to me -- I am going to tell you, you may
23 want that information, great. It makes no difference to me.

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1 If we have 37 people and that is all the government brings,
2 then 37 get challenged for cause and it's granted, then if it
3 takes them six months to get more, it is on them.

4 LDC [MR. KAMMEN]: Let me make sure when -- until my
5 heart starts beating again. When you talk "the government,"
6 you mean the big G or you mean the prosecution?

7 MJ [COL POHL]: Whoever is -- well, the convening
8 authority is going to nominate them or detail them. And they
9 can choose -- he can choose to detail the number he thinks is
10 appropriate.

11 LDC [MR. KAMMEN]: He has.

12 MJ [COL POHL]: 37 today. But we are not going to trial
13 tomorrow.

14 LDC [MR. KAMMEN]: That's true.

15 MJ [COL POHL]: How they want to choose them is up to
16 them. But I am going to tell you right now, Mr. Kammen, I
17 don't -- it makes no difference. If it is a legitimate
18 challenge for cause, I think it should be granted, it is going
19 to be granted. Then when we are done with challenge for
20 cause, done with peremptory challenge, we turn around and see
21 how many are left. If we've got a quorum, we go forward. If
22 we don't, they go get more.

23 LDC [MR. KAMMEN]: With respect -- I appreciate what you

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1 are saying. Part of our concern, and we understand this is a
2 function of the statute, we can't change this piece of it, is
3 that the military provides for far fewer peremptory challenges
4 than exist in any other jurisdiction. The military provides
5 for one peremptory challenge, and I know there is some
6 circumstances if you break quorum, I guess you get another
7 one, so maybe you get three or four.

8 But in a capital case, that is the lowest number
9 of -- in my belief, it is the lowest number of peremptory
10 challenges in ----

11 MJ [COL POHL]: Well, you can't get lower.

12 LDC [MR. KAMMEN]: You cannot -- well, you could have
13 none.

14 MJ [COL POHL]: Yeah, I guess.

15 LDC [MR. KAMMEN]: Challenges for cause -- and I don't
16 mean any disrespect to any member of the military, but that is
17 in many respects, depending upon the conditions of jury
18 selection, a very low bar. Let me give you an example that
19 came up in this morning's discussion regarding
20 Lieutenant Calley's case, because as a result of that
21 discussion, I went back and read the various opinions
22 concerning his case.

23 And, of course, in the court of Military Appeals

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1 that ultimately did the first affirmance, they sort of deal
2 with jury selection in about two paragraphs. It was fine.
3 All these officers said they were not influenced by the
4 publicity, end of discussion.

5 On his habeas at the District court, when the
6 District Judge explored that in more detail, he found that
7 many of the people should have been excused for cause despite
8 their assurances that they were not affected by the publicity.

9 That's the problem, Your Honor, depending on jury
10 selection conditions, you may not get to challenge for cause,
11 and it is unclear as we are here today precisely what the full
12 jury selection conditions will look like. Now, again in
13 Lieutenant Calley's case, and I think it is important because
14 when we look at the habeas opinion from the Fifth Circuit, and
15 that is 519 F.2d 184, the Fifth Circuit describes at some
16 length what the jury selection conditions in that case looked
17 like.

18 And of course there are two -- there are several
19 things that are really different about 1970, when
20 Lieutenant Calley was tried, and 2014 or '15, and that, of
21 course -- the main thing, of course, is the difference in the
22 media that is available. In 1970 the only forum there was
23 radio, there was television and newspapers and magazines, that

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1 was it. And the language always was that today's newspaper
2 article was tomorrow's repository in the bird cage or what you
3 took to put -- to line your trash can with. So it didn't last
4 as long. And those of us who are old enough to remember 1970
5 know that that was the case, that the effect of publicity was
6 considerably different.

7 Now, of course, something gets on the internet and
8 it is there forever. One of the things -- and, again, this is
9 anecdotal, but one of the things in the Camm case I recently
10 completed, we had a change of venue for about 300 -- for about
11 150 miles outside of the main media market where the crimes
12 had happened. And our feeling was that in the area north of
13 Indianapolis that penetration of the media after several years
14 would not have been as great.

15 Over half the jury panel had heard of the case.
16 Some had heard of the case and had extensive memories about
17 the facts of the case. And so the notion that something
18 exists, and, you know, the President says something today and
19 it is here today and gone tomorrow, that may have been true in
20 1970, but that is certainly not true today. And while again
21 we are not at the point of visiting the issues of pretrial
22 publicity, all of these things impact upon what the jury
23 selection condition should look like.

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1 So in Lieutenant Calley's case where they were
2 only pick -- because it wasn't a capital case, they were only
3 picking six members, the jury selection lasted, I believe,
4 nearly a week. It is unclear how many prospective jurors they
5 went through, but as the court described it, the appellate
6 court described it, beside the appellate court's -- besides
7 the judge's questioning, the individual lawyers, the
8 prosecutor and the defense lawyers had what the court
9 described as a virtually unlimited right to question the
10 prospective members.

11 Now, if that's the situation here, well, then we
12 may be in one situation, if because of the circumstances,
13 because of the small number, because of the -- you know, we
14 are here in Guantanamo, whatever. You know, if it is a more
15 truncated situation, then of course the lack of numbers at the
16 beginning becomes even more troubling.

17 MJ [COL POHL]: Those are a lot of assumptions,
18 Mr. Kammen ----

19 LDC [MR. KAMMEN]: Absolutely.

20 MJ [COL POHL]: ---- what may happen months from now.
21 Let's get back -- the issue is, is still back to the convening
22 authority is not neutral enough to select the members.

23 LDC [MR. KAMMEN]: Absolutely. If you look again at

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1 what we cited in 117, and really the U.S. Supreme Court case
2 of Massey v. Caperton Coal is really, really instructive. Of
3 course that was a case where there was a question of whether
4 or not by helping fund a judicial candidate's campaign for a
5 membership on the West Virginia Supreme court, one of the
6 litigants essentially could be perceived as having an
7 advantage. And the Supreme court said if the person -- if the
8 person in that case had contributed enough that the perception
9 would be that the judge couldn't be fair, the public
10 perception, then the judge had to be recused.

11 Well, by any standard of recusal, given the
12 convening authority's role in this case, he would -- could not
13 be perceived as being neutral. Again, he authorized the case,
14 he authorized the case as capital ----

15 MJ [COL POHL]: Well actually, didn't the previous
16 convening authority refer this case?

17 LDC [MR. KAMMEN]: Previous convening authority
18 authorized -- that's true. There has been a change in the
19 identity. This convening authority has -- I'm going to go out
20 on a limb because I think the only grants of resources from
21 the convening authority's office might have been from the
22 prior convening authority.

23 This convening authority, my memory is, has not

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1 granted a single defense request for resources in its
2 entirety. And, in fact, we will get into this in other
3 issues, has created a huge problem ----

4 MJ [COL POHL]: But you don't attach any significance to
5 the fact that the convening authority, the individual who
6 referred this case to trial as a capital case is no longer the
7 convening authority who will select members?

8 LDC [MR. KAMMEN]: Well, given the fact that the present
9 convening authority is also the, I think, counsel or deputy
10 counsel for the U.S. Navy, no. Given the subject matter of
11 this case, no, I really don't.

12 MJ [COL POHL]: Okay. I understand.

13 LDC [MR. KAMMEN]: But, again, you know, I don't want --
14 the problem, Your Honor, is that the structure of the military
15 commissions tries to glom on to a court system something that
16 was designed for a military unit that had different
17 obligations. A military unit's primary function is to fight,
18 move things, fly things, do the stuff the military properly
19 does. It is not to have trials.

20 This convening authority's function is to decide
21 who should be prosecuted, whether it should be prosecuted
22 criminally -- capitally or not, to fund or not the resources,
23 and presumably to provide at least structurally the best

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1 chance of the prosecution to prevail. Because in the end,
2 he's the person -- that office is who approves the charges.

3 And under the authorities -- you know, under the
4 authorities we cited in AE 017, and I will find them here just
5 so I don't -- in Schweiker v. McClure 456 U.S. 188, Concrete
6 Pipe & Products of California v. Construction Laborers,
7 508 U.S. 602, Tumey v. Ohio Officers, people who are acting in
8 a judicial or quasi-judicial capacity are disqualified by
9 their interest in the controversy to be decided. That is
10 clearly where the Office of the Convening Authority is.

11 So when it comes to the important and, in fact,
12 critical, critical obligation to assemble the pool of
13 prospective jurors, who does it and how it's done are critical
14 pieces, and they should not be done by somebody whose
15 neutrality can properly be questioned and, in fact, who
16 structurally in the context of this system is aligned quite
17 strongly with the prosecution. Thank you.

18 MJ [COL POHL]: Thank you, Mr. Kammen.

19 Trial Counsel? Lieutenant Davis.

20 ATC [LT DAVIS]: Thank you, Your Honor. I am going to
21 try to keep argument to the issue before the commission,
22 AE 172.

23 The analysis is fairly clear and fairly

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1 straightforward. We have a statute, the Military Commissions
2 Act, directly on point which states that the convening
3 authority shall detail the members and that the convening
4 authority shall detail the members who in his opinion are best
5 qualified by reason of age, education, training, experience,
6 length of service and judicial temperament. And the same
7 requirements are then mirrored in the Rules For Military
8 Commission 503(a)(1).

9 Now, this process and this procedure is identical
10 to that that is used in courts-martial. In the defense's
11 motion they allege there may be a due process problem with
12 that. But as the court in Loving, a capital case, found that
13 process and the role of the convening authority did not offend
14 anybody's notion of due process.

15 MJ [COL POHL]: How do you respond to the argument that
16 a military convening authority is inherently a different kind
17 of animal than a military commission convening authority?

18 ATC [LT DAVIS]: The convening authorities are very,
19 very similar. But to the defense's point that the convening
20 authority has -- in the military context has a good order and
21 discipline duty, that actually provides greater protection in
22 the military commissions context than it does in the military
23 justice system.

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1 Because a military convening authority does have
2 that good order and discipline mission, there is always the
3 inclination or the concern that that may bleed over to their
4 consideration or the members that they choose. Because this
5 convening authority doesn't have that concern or that issue
6 before him of good order and discipline, you don't have that
7 kind of spillover effect or that additional concern that that
8 particular -- that this convening authority has a special
9 interest in the outcome of the case.

10 Now, there's a couple of reasons why this -- the
11 structure as we have it here under the Military Commissions
12 Act has been upheld. Most importantly it's because regardless
13 of the pool that the convening authority puts together,
14 because of the -- because of the guarantee of the application
15 of Article 25, the Article 25 equivalent in military
16 commissions, as well as the use of peremptory and causal
17 challenges, that guarantees the fair and impartial jury, and
18 that's really the key aspect here.

19 It is misleading for the defense to say it is the
20 convening authority -- and this goes back to a little bit of
21 discussion we did have on the UCI motion -- it is misleading
22 to say the convening authority has the final say as to who is
23 going to sit in that box over there. The convening authority

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1 merely stocks the shelves, makes sure that basic standards are
2 met. It is up to the parties to walk the aisles, it is up to
3 the parties to read the labels, and it is going to be up to
4 the parties to determine the members that are actually going
5 to sit on this case.

6 So understanding that the true role of what the
7 convening authority is in the military commissions context,
8 what we really have here is just a rehashing of AE 117. It is
9 really old wine in new bottles.

10 MJ [COL POHL]: How does abating this convening
11 authority apply the judicial temperament standard?

12 ATC [LT DAVIS]: Your Honor, we are not privy to how
13 exactly this particular convening authority did that. You
14 know, we know that ----

15 MJ [COL POHL]: Is there some type of selection
16 documents that he was provided?

17 ATC [LT DAVIS]: I'm not 100 percent clear on that, Your
18 Honor. My understanding of the process that was used is that
19 the various -- the heads of the various branches were asked to
20 go to their personnel departments.

21 MJ [COL POHL]: I don't need to know how the eggs were
22 broken. I just need to know that in a normal court-martial
23 there is a memorandum signed by the convening authority of how

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1 members are to be nominated, and he gets a pool, and then from
2 this pool he may have an alpha roster in addition to it
3 because he is always told you can select anybody in this pool
4 or anybody else, and then it is all a paper trail of what to
5 apply, and goes on from there.

6 You don't know whether or not such a procedure was
7 done in this particular case of the current members?

8 ATC [LT DAVIS]: Of the current members, the selections
9 by the convening authority fully complied with the statute in
10 terms of ----

11 MJ [COL POHL]: My question is, is there any paper trail
12 of what the convening authority was told in terms of how the
13 members were nominated and how he was to select them?

14 ATC [LT DAVIS]: Your Honor, I don't have that with me
15 here at this moment. I would be happy to try and track that
16 down for you.

17 MJ [COL POHL]: I don't need to see it now. I'm just
18 saying you are telling me there is such a thing, you just
19 don't have it.

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

21 MJ [COL POHL]: That is my question, because routinely
22 that is something that is provided to the defense.

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

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1 MJ [COL POHL]: Go ahead.

2 ATC [LT DAVIS]: So, Your Honor, essentially
3 understanding what the role of the convening authority
4 actually is in military commissions, as I had begun to
5 indicate, we're really just rehashing what we had in 117,
6 which goes to the basic neutrality of the convening authority.

7 And as -- Your Honor, as your order indicated on
8 AE 117, that appellate courts have repeatedly affirmed the
9 role of the CA in the court-martial system generally. Then
10 Your Honor goes on to cite *Withrow v. Larkin* with the
11 proposition that government decision-makers are assumed to be
12 men of conscience and intellectual discipline, capable of
13 judging a particular controversy fairly on the basis of its
14 own circumstance.

15 We heard from defense before that you can kind of
16 do a swapping-out of offenses in terms of the material support
17 for terrorism and hazarding. Here you can really take your
18 order from 117, apply it in this case. Defense is raising
19 really the same issues. Their basic argument is the convening
20 authority is not neutral. There is no evidence to suggest
21 that the convening authority is not neutral.

22 The plain language of the statute says that it is
23 the convening authority that has the authority to detail the

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1 members in accordance with the factors that he is to consider.
2 That is the same type system that's used in the military that
3 has survived due process challenges. And frankly the defense
4 has not shown that there is any prejudice whatsoever from the
5 role of the convening authority in this system, in particular
6 because we will have a vigorous voir dire process that will be
7 able to ferret out any issues of bias that may exist. Can I
8 have a moment, Your Honor?

9 That's all I have, Your Honor.

10 MJ [COL POHL]: Mr. Kammen, anything further?

11 LDC [MR. KAMMEN]: Very briefly. Lieutenant Davis says,
12 well, he knows this complies and you asked the question well,
13 do some documents exist. And apparently they do, but only one
14 side gets them. Because we don't have them. Never seen them.
15 Didn't know until this moment such documents existed.

16 So transparency from the convening authority
17 apparently only goes to the prosecution, which is exactly the
18 point. He is not neutral. He is on their side. He wants
19 them to win. He gives them the resources. He gives them the
20 stuff. He gives them the information.

21 And if we don't file this motion, maybe we never
22 get this. We haven't gotten it yet, even after filing the
23 motion.

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1 MJ [COL POHL]: Mr. Kammen, I understand that, but if
2 you had asked for the referral documents, which is a standard
3 motion in military practice, on this court member selection,
4 they may have given it to you. The fact I mention it -- I
5 mean, you've got military counsel floating all over your
6 thing. They are not aware that there such documents.

7 LDC [MR. KAMMEN]: We have the referral binders.

8 MJ [COL POHL]: No, not referral binders. I'm talking
9 about the court member selection issue, how they were
10 nominated. I mean, I'm not saying the papers exist or don't
11 exist. I'm just saying it's standard practice ----

12 LDC [MR. KAMMEN]: Sure.

13 MJ [COL POHL]: ---- in military practice that such
14 documents will be used to assist the convening authority in
15 court member selection. The fact you didn't ask for them, I
16 somehow don't feel ----

17 LDC [MR. KAMMEN]: Fair enough.

18 MJ [COL POHL]: Again, I'm not saying they exist or
19 don't exist. I'm just saying ----

20 LDC [MR. KAMMEN]: Apparently they exist based on ----

21 MJ [COL POHL]: Again, based on that answer, perhaps
22 they do, perhaps they don't. What I'm saying is one reason we
23 have military counsel in these cases is hopefully to bring

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1 some insight on military practice.

2 LDC [MR. KAMMEN]: But here's -- here's what seems to be
3 at work, and this may be typical. We have to ask. They
4 don't. We have to ask the court. They don't. We can't call
5 up and say send us this stuff. We have to jump through these
6 hoops. Now, that's fine. You know, there's plenty more
7 motions coming.

8 But then on the one hand the prosecution says
9 let's get to it, and on the other hand then everything has to
10 be the subject of a motion. And this is going to be an
11 ongoing thing as we go through this week, is sort of the
12 scorched earth policy of the prosecution. But that's another
13 discussion.

14 The point, Your Honor, is this, as we sit here
15 today we know that the convening authority did something,
16 based upon one of the answers Lieutenant Davis gave. And
17 perhaps what the convening authority did is write to the four
18 service branches and say send me some people, which means he
19 delegated the authority to these other folks. Now, we don't
20 know what criteria they used. We don't know how that all
21 unfolded.

22 But the point is that the person who ultimately
23 gets those 37 people that we know exist whose -- those names

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1 on a piece of paper is a person who structurally is not
2 neutral, who structurally is not doing it in some kind of
3 random way, who structurally is not just sort of saying
4 everybody whose serial number ends in 5 gets put in the pool
5 or every seventh person or however an individual jury clerk
6 might do it, but is going through saying yes, no, yes, no.
7 And in this case, in this capital case, given the role, the
8 structural role of the convening authority, that taints this
9 process.

10 One of the realities here is we are all writing on
11 a clean slate. And you know, the government bets an awful lot
12 of resources and an awful lot of everyone's time in the hopes
13 that when this gets through this process and to the
14 D.C. Circuit that somebody will say this is appropriate.

15 In a capital case that is a pretty heavy hurdle to
16 climb. So I think if we are going to err here, we ought to
17 err on the side of caution, and err on the side of doing it
18 right, and err on the side of neutrality, and err on the side
19 of having something that at the end of this trial we can be
20 proud of, not at the end of some appeal. Thank you.

21 MJ [COL POHL]: Thank you, Mr. Kammen.

22 Anything further?

23 ATC [LT DAVIS]: Just briefly, Your Honor.

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1 MJ [COL POHL]: Go ahead.

2 ATC [LT DAVIS]: Just to clarify, Your Honor, with
3 regard to this documentation that in Your Honor's words may or
4 may not exist, the government does not currently have that
5 document in its possession. The government will take this as
6 a request from the defense to find whatever documents may
7 exist and will provide those to the defense.

8 MJ [COL POHL]: Understand, Lieutenant Davis, I wasn't
9 saying it was or wasn't. I'm saying if there is any
10 memorialization of the court member selection process it is
11 provided to defense. And this is an ongoing requirement.
12 They don't need to file a motion on it again. The fact they
13 didn't request it, we won't get into why they didn't. To me
14 that is standard practice for the government.

15 I'm telling you right now is any of those
16 documents about how members are nominated or any information
17 goes to the convening authority selection is to be provided to
18 the defense.

19 ATC [LT DAVIS]: Yes, sir. The government is happy to
20 do so.

21 MJ [COL POHL]: Good. Okay.

22 173, that will be the last one we do today.
23 Although there may be a lot of counsel who can argue different

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1 motions, different counsel argue them, remember there is still
2 only one judge. So go ahead.

3 ADDC [MAJ HURLEY]: Yes, Your Honor. Thank you. Good
4 afternoon.

5 MJ [COL POHL]: Good afternoon.

6 ADDC [MAJ HURLEY]: Sir, it is the position of the
7 defense Appellate Exhibit 173 seeks to have you declare that
8 10 U.S.C. 948i(B) is unconstitutional as applied to
9 Mr. al Nashiri in that he is entitled to the Sixth Amendment
10 guarantee of a jury trial.

11 Sir, in order to determine what rights --
12 constitutional rights are or are not extended to Mr. Nashiri,
13 we would look to Boumediene, and there the Supreme court
14 identified three factors relevant to determine the reach of
15 the Constitution. First, the citizenship and status of the
16 detainee, second, the nature of the sites of detention and
17 apprehension and third, the practical obstacles that may flow
18 from applying these constitutional rights to the detainee.

19 First, sir, let's talk about citizenship and
20 status. Obviously Mr. al Nashiri is not a citizen of the
21 United States. His status is in some question. In fact, that
22 will be a matter that has to be proven by the prosecution in
23 the course of this case, so there's -- because that, that

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1 status is in doubt, that provides no guidance for the court in
2 this matter.

3 The nature of the sites of detention and
4 apprehension, sir, obviously this is not a classified form so
5 we are just going to only talk about those things we know are
6 classified in this case. Mr. al Nashiri has been in the
7 custody, the sole custody of the United States for
8 approximately 11 years, he has been here on Guantanamo Bay for
9 more or less seven years. And that is in an uninterrupted --
10 the uninterrupted control of American forces.

11 And, sir, as we were talking earlier today, as you
12 and I and Lieutenant Davis were talking about unlawful
13 influence earlier today, there is the subject of time, how
14 long a time was back to 2002 and to, up to the decision of the
15 referral. And, sir, we would submit that, you know, if the
16 court is inclined to consider that a long time, a long
17 temporal break between the statements we discussed earlier,
18 then that logic must necessarily apply to this particular part
19 of our argument to declare this statute or portion of the
20 statute unconstitutional.

21 MJ [COL POHL]: If I declare this portion of the statute
22 unconstitutional, he can't be tried in Guantanamo Bay then,
23 correct?

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1 ADDC [MAJ HURLEY]: That's correct, yes, sir.

2 MJ [COL POHL]: And under the current framework, he
3 can't be tried in the United States either, correct?

4 ADDC [MAJ HURLEY]: Correct.

5 MJ [COL POHL]: So it would amount to he can't be tried
6 for anything.

7 ADDC [MAJ HURLEY]: Yes, sir.

8 MJ [COL POHL]: Doesn't mean he's going to be released,
9 but in essence that is the end result of your ----

10 ADDC [MAJ HURLEY]: No, sir. I'm not in the position to
11 ask for his release. That is not the subject of this motion.

12 MJ [COL POHL]: What I'm simply saying is there is no --
13 to get a jury trial you are going to have to have an
14 Article III court, correct?

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [COL POHL]: There is no Article III court with
17 jurisdiction over this case currently, right? They can change
18 by statute. I got that.

19 ADDC [MAJ HURLEY]: Correct.

20 MJ [COL POHL]: Regardless, if it's unconstitutional,
21 it's unconstitutional. The results are what the results are.
22 Understand I'm not backward planning, but you say his right to
23 a jury trial flows from the Boumediene language?

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [COL POHL]: And my question is have they extended
3 Boumediene to anything beyond habeas relief?

4 ADDC [MAJ HURLEY]: No, sir, they have not.

5 MJ [COL POHL]: Has any court extended Boumediene beyond
6 habeas relief?

7 ADDC [MAJ HURLEY]: No, sir, not to my knowledge.

8 MJ [COL POHL]: So why should I?

9 ADDC [MAJ HURLEY]: Sir, you should in this case because
10 of the important right of the accused to have a jury -- a
11 jury, civilian jury hear this particular action.

12 MJ [COL POHL]: Although not the forum, couldn't the
13 Supreme court indicate, as they have done in other detainee
14 cases, provided at least some thinking that the decision may
15 extend beyond what is before them? For example, in the
16 decision I believe -- it may have been Hamdan, I may be
17 misquoting it, there was concern by some of the members of the
18 court about conspiracy being a law of a war offense, wasn't
19 before them, they kind of put it out there, kind of dicta, it
20 came back, people have gone through it.

21 Since Boumediene was decided I believe in '06 --
22 is that correct?

23 ADDC [MAJ HURLEY]: '08 I think, sir.

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1 MJ [COL POHL]: '08. Okay. Whatever. They've taken no
2 other detainee cases. They've chosen to extend none of this
3 anywhere else. No other court has extended the Boumediene
4 reach beyond habeas.

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [COL POHL]: There is litigation what habeas means,
7 the reach of habeas. So they have not chosen to do this, why
8 should I?

9 ADDC [MAJ HURLEY]: Well, sir, I would say that in the
10 first analysis, the right to a jury trial is a very important
11 right, it is a foundational right of the constitutional
12 system. And that gets to the question should this particular
13 constitutional right extend to this particular accused, and it
14 is the position of the defense that it should.

15 MJ [COL POHL]: With that analysis, would not all
16 personal constitutional rights then belong to the accused?

17 ADDC [MAJ HURLEY]: Sir, we would have to go through
18 those rights as they come up in the course of litigation. I
19 can't tell you or ----

20 MJ [COL POHL]: I understand, it is somewhat of an
21 advisory opinion, but if your premise is this is an important
22 constitutional right, therefore it applies to the accused
23 based on the Boumediene language, unless there is some

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1 exception, let's say the Fourth Amendment because of where the
2 information came from, it may not make sense to apply that,
3 that would be kind of your overall rubric of analysis on which
4 personal constitutional rights the accused gets over and above
5 individual rights he may be given to by the statute itself.

6 ADDC [MAJ HURLEY]: Yes, sir.

7 MJ [COL POHL]: Is that accurate?

8 ADDC [MAJ HURLEY]: Yes, sir.

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

10 ADDC [MAJ HURLEY]: So, sir, perhaps this portion of the
11 argument gets a little bit at what the commission's concerns
12 are. Sir, we will distinguish between ex parte Quirin cited
13 by the government that they believe essentially stands for the
14 proposition we are out of luck on this particular matter to
15 say that Mr. al Nashiri has been in custody for such a long
16 period of time that -- that the amount of time that he has
17 been in custody, that that period of time that his necessary
18 familiarization with the American system and with the contact
19 with Americans held for the entire time in American captivity,
20 held since 2006 here on Guantanamo Bay, a territory of the
21 United States -- I know there was some discussion between you
22 and Commander Mizer. But that length of time itself we would
23 submit to you is a critical factor and distinguishes this

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1 particular case and the facts of this particular case from
2 ex parte Quirin.

3 Sir, we move on to the third prong in the
4 Boumediene analysis, and that is the practical obstacles that
5 would be faced by extending this particular right to the
6 accused. It is a practical and real difficulty to get down
7 here to Guantanamo Bay, and there is a lot of cost associated
8 with the detention of just the accused and just the court
9 personnel that are within your eyesight right now.

10 And, sir, we would submit to you that those
11 practical obstacles, that the cost is just a side. There is
12 not a practical prohibitive cost to dismiss these charges and
13 specifications and ask the Congress or whomever to come up
14 with a statutory -- I guess it would be Congress, not
15 whomever -- Congress to come up with a statutory framework to
16 try Mr. al Nashiri in an Article III court.

17 MJ [COL POHL]: You don't think it is impractical to
18 order -- I mean, how are you going to get these jurors here?
19 Not physically, that is not my question. My question is
20 American jurors get something in the mail to show up at the
21 courthouse, and they have to show up.

22 ADDC [MAJ HURLEY]: Yes, sir.

23 MJ [COL POHL]: We know many don't, but they have to.

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1 We are going to send out -- under your scenario we are going
2 to send out notices, by the way, get on this plane and go to
3 Cuba for six months, or is that kind of -- because you are
4 talking about a practical issue here and ----

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [COL POHL]: ---- practically the issue is trying
7 them here, so ----

8 ADDC [MAJ HURLEY]: Sorry, sir. Go ahead.

9 MJ [COL POHL]: So you don't think there is any
10 practical barriers that cannot be solved by appropriate
11 legislation of forcing members of the public to come to
12 Guantanamo to serve as jurors?

13 ADDC [MAJ HURLEY]: To execute their civic duty and to
14 serve as jurors. And, sir, I would suppose that is not
15 exactly what I'm asking for or what the defense is asking for
16 in this situation.

17 MJ [COL POHL]: But you are quoting the Boumediene
18 decision, and one of the things is the practicality of it.

19 ADDC [MAJ HURLEY]: Yes, sir.

20 MJ [COL POHL]: Now, if you say practicality is
21 determined by he's got this right and all Congress has got to
22 do is lift their prohibition and he can come and try in the
23 United States in the Southern District of New York, Eastern

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1 District of Virginia, wherever, therefore there really isn't a
2 practical problem.

3 But if you are trying him here, of, isn't that a
4 practical problem? It is a variation of the theme we
5 discussed earlier about subpoenaing people. At least they are
6 witnesses. You are going to force -- I know it is their civic
7 duty, but the ones that at least show up -- well, I don't want
8 to speak about American juries. But I'm saying isn't that a
9 practical consideration why that won't work?

10 ADDC [MAJ HURLEY]: Yes, sir, it is a practical
11 consideration of why that won't work. But that practical
12 consideration is going to apply to the members the convening
13 authority selects as well. As we just discussed, you and
14 Mr. Kammen and ----

15 MJ [COL POHL]: Really?

16 ADDC [MAJ HURLEY]: ---- Lieutenant Davis.

17 MJ [COL POHL]: Really?

18 ADDC [MAJ HURLEY]: Yes, sir. You get a letter in the
19 mail, go to GTMO or go to jail, as the song might go, right?

20 MJ [COL POHL]: I'm not sure the song goes that way but
21 I will tell you this, if they are military members ordered,
22 their place of duty is here in Guantanamo Bay to serve as
23 court members, that's an enforceable legal military order.

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [COL POHL]: But I'm just saying, so how is that
3 analogous to having John Q. Public come from Orlando, Florida,
4 get in a plane involuntarily and show up? Do we have that
5 kind of control over them?

6 ADDC [MAJ HURLEY]: Sir, if this portion of the -- or if
7 this statute is ruled unconstitutional by you, sir, in this
8 commission, then the Congress will be forced to come up with a
9 framework where that would be more likely.

10 MJ [COL POHL]: I got that. But you are going back to
11 the Boumediene exception of what rights apply or don't apply.
12 And so the issue is not whether he is tried in the United
13 States. That's not what you are asking me. You are asking if
14 he has a right to jury trial currently in Guantanamo Bay, and
15 there is a practical reason why that may be difficult.

16 ADDC [MAJ HURLEY]: Sir, I guess ----

17 MJ [COL POHL]: That is not what you are asking? Maybe
18 I'm misunderstanding.

19 As I understand your motion, your motion was
20 objecting to the lack of a jury trial ----

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: ---- in a civilian jury trial.

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [COL POHL]: So you are not saying -- excuse me, a
2 civilian jury, okay?

3 ADDC [MAJ HURLEY]: Uh-huh.

4 MJ [COL POHL]: Are you saying therefore it has to be an
5 Article III court?

6 ADDC [MAJ HURLEY]: Sir, what we are saying ----

7 MJ [COL POHL]: Or I thought your motion was only
8 focused on the jury.

9 ADDC [MAJ HURLEY]: And, sir, it is. That is why we are
10 not particular -- I'm somewhat confused about the court's line
11 of questioning. We are not particular about a location. If
12 the court wants to entertain the hypothetical where civilians
13 are being brought to Guantanamo Bay to serve as jurors, that's
14 fine. That wasn't the subject of -- or what the relief the
15 defense wanted.

16 MJ [COL POHL]: I think maybe we are talking across each
17 other, because you keep citing Boumediene for the proposition
18 of constitutional rights. Constitutional rights apply except
19 among other things where it may be impractical under the
20 circumstances.

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: I'm asking you how practical would it be
23 to bring civilian jurors to Guantanamo to hear this case,

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1 because you're focusing on civilian jurors in a military
2 commission.

3 ADDC [MAJ HURLEY]: Yes, sir.

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

5 ADDC [MAJ HURLEY]: You are right, sir. Absolutely it
6 is going to cost -- that will be of practical concern to
7 whomever is overseeing this commission. Agreed. Absolutely
8 agreed.

9 The point I was trying to make when I said the
10 convening authority is going to have the same problems if we
11 go forward as-is is that in the history of courts-martial
12 practice, that there have been times where members have gone
13 to the convening authority one way or the other to say I can't
14 do this, this job that you have given me, I can't because X --
15 whatever the reason is, personal injury, personal
16 circumstance -- pass back that issue to the convening
17 authority.

18 And I would submit to you that in a case like
19 this, of this magnitude where capital punishment is authorized
20 and the length of this trial may be of months and not the week
21 or so that is normally contained in a court-martial, you are
22 going to have that exact same problem.

23 MJ [COL POHL]: No, you are not. No, we don't need to

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1 belabor this issue. It is one thing to tell a civilian that
2 you have to get on a plane, if there is any authority for
3 this, and go to Place A.

4 It is much different to tell a military member,
5 ordering him or her to be at a certain place. He or she
6 responds, wait a minute, I have this conflict, I have this
7 conflict. The convening authority considers it and says,
8 okay, I understand, we are excusing you, or no, I'm not
9 excusing you, you are going to be there. And you have an
10 enforceable legal mechanism for them that you do not have for
11 civilians.

12 When you say it is the same thing, I quite frankly
13 have difficulty understanding why it is the same thing. But
14 we can move on.

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [COL POHL]: I got you.

17 ADDC [MAJ HURLEY]: Fine. I guess I have heard the
18 court say this a few times. I don't know. It is the position
19 of this particular defense counsel that I don't know the form
20 of conveyance that the juror would get to this court-martial
21 is of any moment. If a juror is called in Hughes County,
22 Oklahoma, in Holdenville, Oklahoma, where I'm from, gets in
23 their car and drive down to the county courthouse, they have

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1 to get where they are going.

2 MJ [COL POHL]: My point is it goes back to the subpoena
3 issue, is -- if I said there has to be a civilian jury, how
4 could I compel any member, civilian member to leave the United
5 States and come to Guantanamo Bay?

6 ADDC [MAJ HURLEY]: Well, if you declare the statute
7 unconstitutional, sir, I'm sure Congress will provide guidance
8 with respect to that weighty issue that you just described.

9 MJ [COL POHL]: Okay. And I understand that. I'm just
10 saying you talked about the exceptions to the constitutional
11 rights apply except where impracticable. I think that is
12 where that comes up. But go ahead.

13 ADDC [MAJ HURLEY]: Yes, sir. That pretty much
14 concludes my argument. I would conclude by saying again the
15 amount of time Mr. al Nashiri has been in custody
16 distinguishes it from the cases the government cited,
17 specifically Quirin and *Whelchel v. McDonald* and for the rest
18 of the argument, sir, we would just rest on our brief.

19 MJ [COL POHL]: Lieutenant Davis.

20 ATC [LT DAVIS]: Yes, Your Honor. Again this is a
21 fairly straightforward analysis. In fact, the court doesn't
22 even need to reach the question whether there is a right -- a
23 Sixth Amendment right to fair and impartial trial. That right

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1 is already guaranteed by the statute, by the MCA. In fact,
2 the accused in this case has every jury right that an accused
3 in a court-martial, an American servicemember, has.

4 And as courts have reviewed whether or not that
5 process and the right to impartial jury under the
6 court-martial system -- when they have reviewed that, they
7 found indeed that right to an impartial jury exists, that is,
8 as guaranteed by UCMJ, which is the same provision as in the
9 Military Commissions Act.

10 You have Article 25 in UCMJ that establishes the
11 criteria the convening authority should look to when
12 identifying jurors. Check, we've got the same one in the MCA.

13 Article 37 under the UCMJ prohibits the convening
14 authority from censuring or reprimanding. Check, we've got
15 the same rule under the MCA.

16 Article 41, UCMJ provides a process for conducting
17 voir dire, peremptory challenges, challenges for cause.
18 Check, Your Honor, we've got the same rules in the MCA.

19 Article 42, members under the UCMJ, they have to
20 take -- they have to take an oath, just as they will take an
21 oath when they come into this commission. In fact, the only
22 notable difference between MCA and UCMJ actually favors the
23 accused, because under the UCMJ only requires a unanimous

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1 finding of guilt to sentence somebody to get to a capital
2 sentence, whereas in the commission you actually need 12
3 members to get there. It would be a lower number under the
4 UCMJ.

5 Your Honor, member panels when properly
6 constituted have been consistently held by service courts to
7 provide a fair and impartial jury. Because of the striking
8 similarities between the two, the same result should apply
9 here because all of those rights to a fair and impartial jury
10 are already included under the MCA. There is no reason to get
11 to the constitutional question. This goes to the very
12 doctrine of constitutional avoidance. As we cited in our
13 brief ----

14 MJ [COL POHL]: Does an accused have a personal
15 constitutional right to Sixth Amendment trial by jury?

16 ATC [LT DAVIS]: Well, that was my next point, Your
17 Honor, which is to say first you apply constitutional
18 avoidance. When you have the rights under the MCA that
19 already provide that very same right that the accused is
20 looking for, you avoid that constitutional issue, you pass on
21 the constitutional issue.

22 MJ [COL POHL]: Assuming that there is a distinction
23 between a military members jury and a civilian jury, if you

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1 assume there is a distinction between the two, does the
2 accused have a personal constitutional right to a civilian
3 jury?

4 ATC [LT DAVIS]: No, Your Honor. And if Your Honor does
5 reach that constitutional question as to whether there is a
6 Sixth Amendment right, the course in ex parte Quirin gives a
7 clear answer that indeed before a military commission the
8 accused does not have a Sixth Amendment right.

9 MJ [COL POHL]: Okay.

10 ATC [LT DAVIS]: If Your Honor has no further questions,
11 I rest.

12 MJ [COL POHL]: Major Hurley, anything further?

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

14 MJ [COL POHL]: Okay. As discussed in the 802, the
15 schedule for tomorrow, because there is another case going on,
16 we will not have a session in this case tomorrow. We will
17 have a 505(h) closed hearing to discuss classified
18 information. My inclination is to have that at 1300 in this
19 courtroom. And then on Friday we will begin with -- we will
20 continue with the rest of the motions at 0900.

21 I indicated earlier I intend to go on Saturday and
22 Sunday. We will see how much progress we made, whether we
23 need to adjust that or not. My intent is to get through as

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1 much as we can this week, the week we've got left with us, but
2 if it looks like we are making good progress, I may give you a
3 day off.

4 LDC [MR. KAMMEN]: We are making very good progress.

5 MJ [COL POHL]: We will see where we are on Friday,
6 Mr. Kammen.

7 LDC [MR. KAMMEN]: No. Right, I understand.

8 MJ [COL POHL]: Okay. Commission is in recess.

9 [The Military Commission recessed at 1616, 19 February 2014.]

10 [END OF PAGE]

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