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1 [The Military Commission was called to order at 0911,
2 24 February 2014.]

3 MJ [COL POHL]: Commission is called to order. I
4 believe all parties are present that were present when the
5 commission recessed from our last session on Friday; is that
6 correct, Commander?

7 TC [CDR LOCKHART]: Yes, sir.

8 MJ [COL POHL]: And is that correct, Mr. Kammen? A
9 technical issue that's come up. Apparently there's been an
10 issue with the prosecution's mic staying hot even when you
11 think it's not hot.

12 TC [CDR LOCKHART]: I verified with the technical person
13 and they say that it's not.

14 MJ [COL POHL]: Just in an abundance of caution, assume
15 it is and limit conversations to nonclassified matters.

16 TC [CDR LOCKHART]: Yes, sir.

17 MJ [COL POHL]: Not limit all conversations, but that's
18 up to you. Okay.

19 TC [CDR LOCKHART]: Yes, sir. And if we could also just
20 place on the record that these proceedings are being
21 transmitted to CONUS.

22 MJ [COL POHL]: Okay. Let's do 168. Are you prepared
23 for that, Commander?

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1 ADDC [CDR MIZER]: Sorry?

2 MJ [COL POHL]: What I want to do is try to get to the
3 legal -- clean up the legal motions first, as I -- just kind
4 of give you a way ahead that would be, as I see, 168, 187,
5 which I think are the two that I have that are kind of left.

6 ADDC [CDR MIZER]: Yes, Your Honor.

7 MJ [COL POHL]: And from there we'll slide to 205,
8 motion to compel.

9 ADDC [CDR MIZER]: Yes, Your Honor.

10 MJ [COL POHL]: And ----

11 TC [CDR LOCKHART]: Your Honor?

12 MJ [COL POHL]: Ma'am.

13 TC [CDR LOCKHART]: We're -- sorry.

14 MJ [COL POHL]: Go ahead.

15 TC [CDR LOCKHART]: The government is filing its
16 response at the lunch break. Could we do that 205 this
17 afternoon, sir?

18 MJ [COL POHL]: Sure. And then classified portion of
19 181.

20 LDC [MR. KAMMEN]: And if I may, we'll have to look at
21 their response.

22 MJ [COL POHL]: Sure.

23 LDC [MR. KAMMEN]: If the response is the same as it was

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1 14 days ago, then we're certainly prepared to proceed; if it's
2 somehow different, then we'll see.

3 MJ [COL POHL]: But just for this morning, then it will
4 be -- just so everybody's on notice be 168, 181, 187. And the
5 181 will be the unclassified portion of it. I've issued an
6 order that you should be getting that we'll do a closed
7 session on the classified portion of.

8 LDC [MR. KAMMEN]: Do you want to do that before 187?

9 MJ [COL POHL]: We can do them in any order. Doesn't
10 really make much difference. And 048G?

11 ADDC [CDR MIZER]: Your Honor, I spoke with General
12 Martins last Friday, and I believe that the parties are
13 content to rest on the pleadings with respect to 048G.

14 MJ [COL POHL]: Rest on the pleadings. Okay. And then
15 after we get done -- so that gives those three legal motions.

16 TC [CDR LOCKHART]: Your Honor, there's one more legal
17 motion, AE 200.

18 ADDC [CDR MIZER]: And, Your Honor, with respect to
19 AE 200, the defense would simply invite this court's attention
20 to the argument that we had last week with respect to 185.
21 It's essentially the same argument that international law
22 doesn't authorize the imposition of the death penalty.

23 MJ [COL POHL]: You want to rest on that argument for

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1 this? You don't want additional argument on 200?

2 ADDC [CDR MIZER]: Yes, Your Honor, the defense is
3 content with that.

4 MJ [COL POHL]: Trial Counsel, defense is content with
5 not submitting further oral argument. Are you also content
6 without further oral argument?

7 TC [CDR LOCKHART]: If I could have a moment to discuss
8 it with the team at one of the breaks, sir.

9 MJ [COL POHL]: Okay. And that was similar to your
10 argument on -- I'm sorry 185?

11 ADDC [CDR MIZER]: 185, Judge. 185 is just through the
12 prism of the Eighth Amendment, 200 is purely that of
13 international law. So 185 encompasses both arguments.

14 MJ [COL POHL]: Just to clean up some other things. I
15 sent an order, a -- I believe I actually even signed it before
16 it was even discussed in court the other day on 185 and 190.
17 There's no -- there's an ex parte submission. I already
18 sent -- I had already drafted an order and sent it back to
19 the defense, just to let you know that check is in the mail if
20 you've not already got it. Commander?

21 TC [CDR LOCKHART]: No. I'm sorry, I thought you wanted
22 to discuss the ----

23 MJ [COL POHL]: No. Okay.

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1 LDC [MR. KAMMEN]: There's also 171.

2 MJ [COL POHL]: Yeah, I -- okay. Yeah, I hadn't
3 forgotten that, Mr. Kammen. We can do 168, 181, 187 and then
4 the next set would include 171, 199, and I think all that's
5 left after those two would be 0450 and 202 which are both
6 scheduling issues, which I want to do last.

7 TC [CDR LOCKHART]: And then we had asked that 207 be
8 grouped into that scheduling and not to argue the underlying
9 merits. I think both sides rested on their pleadings but to
10 talk scheduling on that in case Your Honor does order a
11 hearing week. That's all, sir.

12 MJ [COL POHL]: Hold on a second. We can talk about 207
13 when we get to it. We'll do that one -- that one before we do
14 the other scheduling stuff. Okay. Okay.

15 That brings us to -- and I believe that's all
16 that's currently before us. And understand 205, the motion to
17 compel, will be not earlier than this afternoon.

18 TC [CDR LOCKHART]: Yes, sir.

19 MJ [COL POHL]: Can you give me a sneak preview of your
20 response?

21 TC [CDR LOCKHART]: It's very similar, and just so I can
22 address, because I know Mr. Kammen made a comment on that. I
23 was waiting to try and get some additional discovery to the

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1 defense.

2 MJ [COL POHL]: Okay.

3 TC [CDR LOCKHART]: So it's -- I have to review it one
4 last time, and it will be filed, sir.

5 MJ [COL POHL]: Okay. That brings us to 168, defense
6 motion to dismiss Charges IX through XI for lack of
7 jurisdiction under international law.

8 Commander.

9 ADDC [CDR MIZER]: Thank you, Your Honor. And I'll
10 endeavor to go slowly. I've had some complaints about the
11 speed with which I apparently talk.

12 Simply put, international law does not afford this
13 commission jurisdiction over the charges related to the
14 Limburg. I won't rehash the arguments that we've already had
15 before Your Honor about Hamdan II, the application of Article
16 21 and the incorporation of the international law of war into
17 both this court's substantive offenses and then also the
18 jurisdiction. In this case, the Military Commissions Act
19 compels the same result.

20 Judge, Section 948a(7)(A) gives this commission
21 jurisdiction over unprivileged enemy belligerents who have,
22 one, engaged in hostilities against the United States or its
23 coalition partners. And if you take a look at the statute,

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1 948a, Subsection 3, the term "coalition partner" with respect
2 to hostilities engaged in by the United States means any state
3 or armed force directly engaged, along with the United States,
4 in such hostilities or providing direct operational support to
5 the United States in connection with hostilities.

6 Judge, the charges related to the Limburg happened
7 in Yemeni waters. They involved a French oil tanker carrying
8 Iranian oil on a Malaysian contract where a Bulgarian national
9 was indirectly killed. I think it's telling that the NCIS
10 agents that were dispatched to the Limburg were sent there to
11 conduct, not a full criminal investigation, but merely one
12 with respect to causation. And they were pointedly told by
13 the French investigators on the scene that the Limburg was
14 sovereign French soil and that they had no jurisdiction there.

15 I do not think that the United States, until the
16 enactment of the Military Commissions Act, believed that it
17 had jurisdiction over the Limburg. They certainly didn't act
18 like the United States had jurisdiction over the Limburg.
19 Yemen certainly has, France has declined to do anything about
20 it, as has, to my knowledge, Bulgaria.

21 The U.S. in its pleadings here, the prosecution
22 asserts jurisdiction under the international legal principle,
23 the protective principle. But the statement on foreign

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1 relations says that for a state to assert jurisdiction under
2 that principle, it must have an effect on state security or
3 the functioning of the government. And this oil tanker,
4 thousands of miles away from the United States, simply had no
5 impact under the protective principle.

6 MJ [COL POHL]: Do you believe it meets the -- and,
7 again, this may be an issue of proof, but given the
8 government's position, do you believe the Limburg would meet
9 the definition of coalition partners under the -- under the
10 Act? Understanding that's not dispositive, but I'm just ----

11 ADDC [CDR MIZER]: Yes, Your Honor, and I do not believe
12 that it would. And we talked a little bit about last week the
13 NIAC that the prosecution has asserted that we are in, so to
14 put that in common parlance, a civil war; that the United
15 States is engaged in 2002 in a civil war with Yemen.

16 And that raises all sorts of questions, which side
17 is the United States on, more importantly which side was
18 Saleh's government, the deposed leader of Yemen, which side
19 was he fighting on. And then there's simply no indication
20 that the French were involved in that noninternational armed
21 conflict off the coast of Yemen in 2002.

22 I don't believe that the French believe that they
23 were in an armed conflict off the coast of Yemen in 2002, and,

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1 I think Your Honor will recall that's the same period of time
2 where the United States Congress was serving "freedom fries"
3 in the cafeteria was some indication of France's belief and
4 the United States' belief, frankly, that we were somehow
5 coalition partners in some global war on terror.

6 MJ [COL POHL]: Is that an issue of proof?

7 ADDC [CDR MIZER]: Well, it could be, Your Honor, and if
8 Your Honor's decision is in this case to hold an evidentiary
9 hearing, I think that that may be a very legitimate decision
10 to have, and we could have an evidentiary hearing with respect
11 to the Limburg the next session or the session after that.

12 MJ [COL POHL]: Well, let's -- let's make sure we
13 understand the bidding here. I as a general proposition don't
14 direct counsel to file any type of motions. You file what you
15 do. If this is an issue of proof, and therefore it's an
16 element, you know, you can choose the way forward as you deem
17 fit.

18 ADDC [CDR MIZER]: Yes, Your Honor.

19 MJ [COL POHL]: Because even if there was no motion, it
20 would still have to be presented to the fact-finder as an
21 element, right?

22 ADDC [CDR MIZER]: Well, Your Honor ----

23 MJ [COL POHL]: But what I'm simply saying, if you wish

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1 to make it a motion, which would basically be a jurisdictional
2 motion and you can handle it as an interlocutory matter,
3 that's also an option. But again, that would be a decision of
4 the parties, not a decision of the judge.

5 ADDC [CDR MIZER]: Yes, Your Honor. And should Your
6 Honor determine that this is a matter of fact, that would be
7 our intent, is that it not go to the members, that this be
8 addressed beforehand.

9 We believe that the evidence as it stands suggests
10 that there's no jurisdiction, just based upon the facts that
11 are before the court and that the government doesn't dispute,
12 French oil tanker, Iranian oil, Malaysian contract, Bulgarian
13 national.

14 If I could just invite the court's attention to
15 Judge Torruella's dissenting opinion in Cardales-Luna that
16 which is -- which is cited in the pleadings, that Congress
17 doesn't have the authority to punish dog fighting by
18 Indonesians on Java. And that is essentially what Your Honor
19 is being asked to do here, to punish conduct in the
20 territorial waters of Yemen as if the United States has some
21 sort of universal jurisdiction.

22 Now, the prosecution, to its credit, doesn't
23 assert universal jurisdiction in this case. They assert

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1 merely the protective principle. And these facts do not
2 satisfy the rigid requirements of the protective principle.

3 Justice Breyer's opinion when he was a circuit
4 judge in *Hernando Robinson*, which is also cited in the
5 pleadings, is instructive. The opinion states that the
6 protective principle permits a nation to assert jurisdiction
7 over a person whose conduct outside the nation's territory
8 threatens the nation's security or could potentially interfere
9 with the operation of its government functions. And it goes
10 on to say, moreover, any assertion of jurisdiction under the
11 protective principle must be reasonable.

12 Simply put, Your Honor, the assertion of the
13 jurisdiction under the protective principle is not reasonable,
14 it's an expansive interpretation of the protective principle
15 that would essentially swallow universal jurisdiction in this
16 case.

17 It's important to note that in that case, *Hernando*
18 *Robinson*, the United States intercepted a Panamanian ship
19 500 miles off the coast of North Carolina, and Justice Breyer
20 notes that that ship could have been going anywhere and that
21 the assertion of the protective principle would have been
22 problematic in that case. Only because Panama, the flag
23 state, authorized the United States to board the vessel and

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1 cede jurisdiction did the United States have jurisdiction in
2 this case. There's no similar conduct with the flag state in
3 this case.

4 Judge, this case and the chief charges in this
5 case are about American sailors on an American warship, and
6 that's what this case should be about. It shouldn't be about
7 the French, Bulgarians or Yemenis.

8 If Your Honor has no questions, that concludes my
9 argument.

10 MJ [COL POHL]: Thank you. Trial Counsel? General
11 Martins.

12 CP [BG MARTINS]: Good morning, Your Honor.

13 MJ [COL POHL]: Good morning.

14 CP [BG MARTINS]: May it please the commission, defense,
15 with respect, misconstrues the government's position. This
16 commission has jurisdiction over Charges VII through IX. And
17 just to be clear, I think the initial pleading had it listed
18 as IX through XI. The referred charges renumbered the
19 charges. So we're talking about VII through IX, attacking
20 civilians, attacking civilian objects, and hazarding a vessel
21 involving the Limburg. And I take it from counsel's brief
22 that they're not -- there's another Limburg-related charge,
23 Spec 2 of the terrorism charge, I take it they're challenging

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1 jurisdiction of in other motions.

2 This challenge, and the -- with the way the
3 defense described it is telling, is supposedly one of
4 jurisdiction, depriving the commission of jurisdiction by
5 operation of international law. Our position is look to the
6 statute first and foremost, and you've got a clear grant of
7 jurisdiction based on historical law of armed conflict bases
8 to try unprivileged enemy belligerents who are noncitizens for
9 the offenses that are punishable by a military commission.

10 And then there are some definitions. Notably,
11 counsel omitted one of the important bases in the description
12 of unprivileged belligerent. The very subparagraph he cited,
13 section 948a(7), there's an "or" at the end of bravo, if
14 you're looking at the statute, Your Honor. So the term
15 unprivileged enemy belligerent means an individual who has
16 engaged in hostilities against the United States or coalition
17 partners. And then there's another one for purposefully
18 materially supporting hostilities. And then, or was a part of
19 al Qaeda at the time of the alleged offense under this
20 chapter. So there is a description of coalition partner, and
21 I'll get into that in a moment.

22 But being part of al Qaeda matters. Certainly
23 something we have to establish concerns about expansiveness

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1 and overbreadth and these kinds of things. I mean, these
2 are things we have to establish. And the government sees the
3 procedural posture of this, Your Honor, as a jurisdictional
4 challenge which gives us the obligation to establish by a
5 preponderance that the commission does have jurisdiction, but
6 that at this point the commission is to look at the facts in a
7 light favorable to the government, as we haven't yet had an
8 opportunity to put on the case and the full proof, so to look
9 at the charges and determine if the commission has
10 jurisdiction.

11 And we would say looking at that statute, Your
12 Honor, you've got three law of war offenses that are
13 punishable by the commission, attacking civilians, attacking
14 civilian objects, and hazarding a vessel. We've had some
15 other litigation over hazarding a vessel.

16 We maintain with regard to a choate attack that
17 really happened that involved a cell -- a group of cells of al
18 Qaeda that were the same cells that -- and we have to
19 accomplish this, of course, that -- by facts, that carried out
20 an attempt, a very advanced attempt on THE SULLIVANS and a
21 successful attack on the USS COLE, and then this other attack
22 in the very same general waters, these maritime lanes of
23 southwest Asia and the ports in those -- in that area with an

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1 intent -- and we have to of course establish this -- to
2 disrupt the U.S. and world economies and to have effect on our
3 economy with 90,000 barrels of oil being dumped into the
4 ocean. We haven't specifically alleged it, but we will put on
5 proof of the price of oil rising for all countries
6 significantly because of insurance rates going up, the
7 disruption.

8 So these effects are real because they're carried
9 out by the same cells that are doing a common plan which is
10 the government's -- a governmental theory of liability. This
11 is very much something that our law of war tribunals can hail
12 an individual into court to be punished for.

13 MJ [COL POHL]: Is the status of the Limburg as a
14 coalition partner an element of the offense?

15 CP [BG MARTINS]: Your Honor, I wouldn't put it as an
16 element of the offense. Jurisdictional in the sense that we
17 have -- we are alleging that a part of al Qaeda and, in fact,
18 the accused was participating centrally in a course of conduct
19 in a series of attacks that shared a methodology, the means of
20 doing it, the boats, large boats, small boats, suicide
21 attackers, a whole methodology that was directed at targets.

22 The leader of the entire al Qaeda was saying, in
23 the case of the Limburg, in claiming responsibility for it

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1 after the attack, directed at the community of crusaders, the
2 crusader community, and that we were regarded as the leaders
3 of that.

4 MJ [COL POHL]: How does the -- you know, I'm looking at
5 the statute. I'm looking at your charge sheet. What is the
6 legal significance about a coalition partner as opposed to a
7 noncoalition partner?

8 CP [BG MARTINS]: Let me first -- the counsel muddied
9 the waters a bit with France's view of this and so forth. In
10 late 2002 France was fighting -- fighting, and they understood
11 it. There were French ----

12 MJ [COL POHL]: No, I understand that but ----

13 CP [BG MARTINS]: They were fighting along with the U.S.
14 against al Qaeda.

15 MJ [COL POHL]: ---- but -- well, what I'm saying is
16 does -- do you read the statute as requiring an attack on a
17 coalition partner ----

18 CP [BG MARTINS]: No, I mean, I don't. I regard the --
19 that's prong alpha, (7)(a), relates to has engaged in
20 hostilities against the United States or coalition partners or
21 was part of al Qaeda.

22 MJ [COL POHL]: Your specification specifically calls it
23 a civilian object.

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1 CP [BG MARTINS]: It is. And that ----

2 MJ [COL POHL]: Does this -- would a civilian object
3 belonging to a French company, I assume, would that constitute
4 a coalition partner object? Or is your position, you're not
5 even implicating that, you're going to the (7)(C)?

6 CP [BG MARTINS]: No, Your Honor. Our position is that
7 this -- this is indeed -- fits within the meaning of
8 "coalition partner" with regard to subparagraph 3. I mean, we
9 do think it fits within the definition.

10 France had forces in November fighting alongside
11 the United States with regard to al Qaeda. As the Iraq
12 conflict came into view in early 2003, certainly public
13 statements and other things were disassociating themselves
14 from that. But in Afghanistan, French forces have been there
15 since November of 2001. And again, we can establish this,
16 they fought at Tora Bora, they were fighting throughout 2002.

17 To say they are not a -- that France is not a
18 coalition partner, they invoked -- NATO partners invoked
19 Article 5 of NATO, the NATO treaty, so this is a bit of
20 revisionist history counsel seeks to want us to ----

21 MJ [COL POHL]: Let me return you to the charge sheet
22 then. In the -- there was a question I asked the commander, I
23 asked you earlier. I want to go -- you've alleged this as an

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1 attack by an unprivileged enemy belligerent against a civilian
2 object.

3 CP [BG MARTINS]: Right.

4 MJ [COL POHL]: Okay. Are you then, therefore,
5 asserting jurisdiction for those offenses ----

6 CP [BG MARTINS]: Yeah.

7 MJ [COL POHL]: ---- under (7)(C) and therefore the
8 coalition partner -- it's not alleged it's a coalition
9 partner.

10 CP [BG MARTINS]: Yes, Your Honor. Coalition partner in
11 sub 3, if I can direct you to 948a(3), coalition partner with
12 respect to hostilities engaged in by the United States means
13 any state or armed force. So France is the coalition partner.

14 MJ [COL POHL]: Not the ----

15 CP [BG MARTINS]: This is a French flagged vessel. The
16 part that it's not part of its armed forces doesn't make it
17 any less a -- France any less a coalition partner.

18 MJ [COL POHL]: No, I'm with you on that. My question
19 is in -- and it dealt with whether this is an element or not.
20 Clearly the way you've alleged it makes the status of the
21 accused under (7)(C), which I'm assuming is the -- one of the
22 government's positions for jurisdiction ----

23 CP [BG MARTINS]: Right.

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1 MJ [COL POHL]: ---- makes that an element that the --
2 that the -- you would have to prove beyond a reasonable doubt.

3 CP [BG MARTINS]: Yes. And we see that as going to the
4 panel members to determine hostilities, to determine that this
5 is an armed conflict against the United States.

6 MJ [COL POHL]: Okay. And all that stuff. But the ----

7 CP [BG MARTINS]: Your Honor, if I could pause there for
8 a moment.

9 MJ [COL POHL]: Sure.

10 CP [BG MARTINS]: Because this comes up throughout a lot
11 of aspects of what we're arguing these days, and that is we
12 must be given the opportunity -- those are relevant elements,
13 these are things we have to establish, and there's going to be
14 a need to put on proof of hostilities and of the armed
15 conflict against the United States. And there are going to
16 be, you know, examples of that where it establishes that we
17 regarded it, that al Qaeda regarded this as an armed conflict
18 that are relevant, not dispositive to the hostilities
19 determination.

20 And I mention that, of course, because of course
21 that's not sufficient to establishing a violation of the law
22 of war. And members would need to be instructed of that,
23 right, not to decide that just because we're in hostilities

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1 that the individual is violating the crime. That's something
2 that's got to be in a compilation of all the elements and has
3 the government proved it up.

4 I mention it because if you parse this all out and
5 look at each one and go prejudicial, probative, hey, that goes
6 to the final determination, it's very important we're not,
7 certainly not saying engaging in hostilities per se is
8 unlawful. If that were the -- if that were the case, all of
9 us military personnel in the room would be in trouble.

10 We're talking about violations of the law of war
11 in a context of hostilities. I'm sorry, sir, I just wanted to
12 mention that.

13 MJ [COL POHL]: No, I understand that. But my question
14 really is, is that goes back to the coalition partner issue.
15 It is not alleged that -- in the specification.

16 CP [BG MARTINS]: The specification that we believe is
17 a -- by saying alien unprivileged enemy belligerent subject to
18 trial by military commission, (7) incorporates by reference
19 those three. We believe we've satisfied those ----

20 MJ [COL POHL]: Okay.

21 CP [BG MARTINS]: We believe that we've given the
22 elements to put the accused on notice of what we're -- why he
23 falls within this statute.

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1 MJ [COL POHL]: So I back up. Then you said by --
2 inferentially the way you've alleged it is that would make
3 7(A) an element? That the fact finder would have to find
4 beyond a reasonable -- you've already indicated that
5 (7)(c) ----

6 CP [BG MARTINS]: Yeah, we have to establish as an
7 element that someone subject to the Chapter 47A has done the
8 elements of the crime as laid out in the manual. So, yes,
9 it's an element in the Winship sense of elements, or the key
10 aspects of the charge have to be proven beyond a reasonable
11 doubt, yeah.

12 MJ [COL POHL]: Just so I'm getting it, you've charged
13 him as an alien unprivileged enemy belligerent, and
14 subparagraph 7 defines that three separate ways. And
15 instructions go to members, to the fact-finder based on
16 evidence produced.

17 CP [BG MARTINS]: Right.

18 MJ [COL POHL]: Okay. And assuming there's some
19 evidence of -- and the standard, of course, is some evidence.
20 So that would mean that if the government were proving -- were
21 relying on all three theories and there was some evidence of
22 all three theories, that the members would then be instructed
23 that that's a -- those are elements, disjunctive elements

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1 actually.

2 CP [BG MARTINS]: Disjunctive. Right. If you find
3 beyond a reasonable doubt under any of those that this
4 individual was an alien unprivileged enemy belligerent, yes.

5 MJ [COL POHL]: Again I'll go back to the Commander's --
6 I understand the gist of his argument deals with the coalition
7 partner component. And if that is a sub-element to
8 jurisdiction ----

9 CP [BG MARTINS]: To their credit, I think they only
10 raised that -- they really focus in on the coalition partner
11 and sort of the French government's disapproval of the way in
12 which we were construing this, the conflict or the opposition
13 with al Qaeda as a conflict.

14 They raise that in their reply. Their challenge
15 is, I believe, one cognizable as a jurisdictional challenge to
16 the United States' jurisdiction to proscribe, Your Honor, and,
17 you know, from the -- they cite to the restatement of the
18 foreign relations law of the United States the three types of
19 jurisdiction, being jurisdiction to proscribe, jurisdiction to
20 adjudicate, and jurisdiction to enforce.

21 And they're basically saying Congress has no
22 authority to make punishable by this -- under this law
23 something that happened, as the Commander summarizes, in a

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1 Yemeni port with a Malaysian destination and contract,
2 non-American crew, and Iranian oil in the cargo hold. Of
3 course, left out of that is stuff, is material that's very
4 much in our pleadings, which is these are the same cells
5 carrying out a series of tightly connected attacks.

6 MJ [COL POHL]: Is the jurisdiction, then ----

7 CP [BG MARTINS]: ---- that are the enemy, I'm sorry.

8 MJ [COL POHL]: If you have, for want of a better term,
9 (7)(C) jurisdiction ----

10 CP [BG MARTINS]: Right.

11 MJ [COL POHL]: Okay. Does -- and assuming the
12 activity -- okay. Forget -- does the status of the object of
13 the offense make any difference? What I'm saying is whether
14 it's a coalition partner or a noncoalition partner, does the
15 M.C.A. give jurisdiction if all you have is (7)(A) -- excuse
16 me, (7)(C) jurisdiction?

17 CP [BG MARTINS]: Charlie. I mean, what I don't want to
18 imply is that you don't have to have hostilities. That's
19 described in (7)(A). But you're also required to have
20 hostilities in other parts of the statute if you know what
21 I'm -- that hostilities goes to whether or not you're
22 determining the individual to be an unprivileged enemy
23 belligerent.

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1 So, yes, if you have Charlie alone -- it's in the
2 disjunctive, Congress is clearly putting that in the -- but if
3 you have someone that you establish as part of al Qaeda that
4 is carrying out this attack, Congress' intent evinced through
5 this statute, which is in the aftermath of the authorization
6 to use military force, where Congress is making clear its
7 desire that the armed forces be involved in going after those
8 who committed those attacks.

9 So, yes, if you have part of al Qaeda and you've
10 established the individual as an unprivileged belligerent and
11 now, Your Honor, you go back to the base jurisdictional
12 provision which is 948d, you have an unprivileged enemy
13 belligerent and you have the individual charge for any offense
14 made punishable under this chapter, you have jurisdiction.

15 MJ [COL POHL]: Okay. So whether or not the Limburg or
16 France was a coalition partner, although it's in the
17 disjunctive, if it is in the disjunctive, therefore the
18 government's position is that even if there's a failure of
19 proof of a coalition partner whether it's ----

20 CP [BG MARTINS]: Right.

21 MJ [COL POHL]: --- freedom fries or whatever ----

22 CP [BG MARTINS]: Right.

23 MJ [COL POHL]: ---- the jurisdiction goes there.

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1 So if this was a tanker or it was a boat -- excuse
2 me, a ship owned by a noncoalition partner, and I don't want
3 to pick a country because I'm not sure how you're defining the
4 term "coalition partner," but be that as it may, as long as
5 he's a member of al Qaeda and it can be shown in the context
6 of hostilities, jurisdiction lies.

7 CP [BG MARTINS]: And you have an offense that is a law
8 of war conflict offense, yes.

9 And, Your Honor, to put this into context, because
10 essentially what's occurred is there's a challenge under
11 peacetime international law principles of jurisdiction and the
12 cases cited by the defense, and some that we offer you as a
13 more complete picture of that, to explain the protective
14 principle and the bounds of it are -- is off topic because
15 armed conflict matters as a legal matter.

16 And we're in an armed conflict here raising the
17 spectre of expansiveness. This attack really happened,
18 really -- we allege it really blew a hole in a big tanker,
19 affected the U.S. and world economies, and it was part of a
20 plan, common plan, by the group that is in armed conflict with
21 us, and that's got -- again, got to be established by fact.

22 So we're not within the define and punish power.
23 These are cases of what's the U.S.'s authority under just the

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1 define and punish power. And we're anchoring this in more
2 than the define and punish power. These are war powers in
3 Article I, and that those are allowing Congress to legislate
4 in this area.

5 And the protective principles really -- by analogy
6 our brief begins with the statute, begins and ends with the
7 statute and two branches of government very clearly saying
8 we're in an armed conflict with al Qaeda. It's really
9 resulting in attacks. These aren't just criminalizing a
10 meeting in a cafe in Yemen. This is a blowing-up of a ship.
11 And it's not abstract, and it's conduct that Congress can
12 legislate on and can call people into court to answer for.

13 If you do look to the protective principle at all,
14 Your Honor, we would ask you to do so by analogy because even
15 under the protective principle there's the case of Yousef.
16 This is an individual who's charged with 19 counts on his
17 indictment involving a plot in part, not only to do the 1993
18 World Trade Center bombing but also to hijack or blow up bombs
19 on civilian airliners in Asia. And Count XIX -- you know, you
20 could caricature it and make it into a cartoon of no
21 connection to the United States, it was a Philippine airline
22 heading to Japan, no U.S. nationals injured, certainly didn't
23 occur in the territory of the U.S., so you kind of have the

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1 same posture.

2 The court says -- and this is now, again, merely
3 under the protective principle and define and punish, Congress
4 has the authority to hail that individual into court and try
5 him for a U.S. offense because of the connections to that
6 larger plot that clearly was impacting United States.

7 And I invite you to that analysis, but again, as
8 a -- as an analogy because this case is about the law of armed
9 conflict which really does matter when properly invoked and
10 when the government establishes with evidence the effects on
11 the United States and the fact that it was part of that armed
12 conflict.

13 Subject to your questions, Your Honor.

14 MJ [COL POHL]: No, I have no further questions. Thank
15 you.

16 Commander.

17 ADDC [CDR MIZER]: Your Honor, the gist -- it was
18 suggested that the gist of the defense's argument is --
19 revolves around the preponderance. And, in fact, if you read
20 the prosecution's pleadings, I mean, that's what they advance
21 as affording this court jurisdiction. What you won't find in
22 the pleadings is any reference to 948a(7)(C), which is why at
23 best I omitted it from the argument as suggested because it

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1 wasn't addressed in any of the pleadings.

2 I also didn't address it in the pleadings because
3 I think there are serious legal issues raised by mere
4 membership in al Qaeda in affording this court jurisdiction.
5 And that begins with a long line of cases going all the way
6 back to 1961 with Scales, you'll recall that is mere
7 membership in the Communist party, something that was
8 terrifying to the American public, certainly in 1961.
9 Brandenburg v. Ohio involves the Klan, I believe that's 1972.
10 And then more recently Humanitarian Law Project v. Holder,
11 which says mere membership in a designated terrorist
12 organization isn't sufficient.

13 MJ [COL POHL]: Sufficient for what?

14 ADDC [CDR MIZER]: For prosecution, Judge. There's
15 something else that has to accompany the membership, some
16 action.

17 MJ [COL POHL]: But are they -- I mean, is -- okay.
18 Membership plus action would require -- could lead a
19 jurisdiction, you're saying?

20 ADDC [CDR MIZER]: Indeed, Your Honor. And here the
21 statute on its face says "mere membership," and that's our
22 quarrel, is that this court doesn't get jurisdiction by mere
23 membership in al Qaeda, and that's ----

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1 MJ [COL POHL]: Is any of these offenses dealing with
2 the Limburg mere membership offenses or membership plus
3 action?

4 ADDC [CDR MIZER]: Your Honor, it would be in these
5 cases membership versus -- in addition to action. But what is
6 being asserted on the statute in (7)(C) is part of al Qaeda at
7 the time of the alleged offense. And so we're talking about
8 mere membership, which is why it hasn't been addressed.

9 And so if Your Honor holds that mere membership is
10 sufficient to assert jurisdiction, then the defense is going
11 to require an additional motion or will file an additional
12 motion as to why that's insufficient. I don't think that that
13 issue -- I say all of this to say that I don't think that
14 issue was presented in the pleadings by either side. The
15 pleadings focus on the protective principle, and that that
16 separate, independent issue probably needs to be addressed if
17 the -- if Your Honor ----

18 MJ [COL POHL]: Just to be clear ----

19 ADDC [CDR MIZER]: Yes, Your Honor.

20 MJ [COL POHL]: ---- and again, I may -- in the course
21 of argument sometimes we get off track and -- so get me back
22 on track if I'm wrong here. I thought a lot of your argument
23 dealt with the fact that France wasn't technically a coalition

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1 partner.

2 ADDC [CDR MIZER]: Indeed, Your Honor, and it deals with
3 that because that was the prosecution's response. That's what
4 I'm trying to ----

5 MJ [COL POHL]: And what they're saying is they have
6 jurisdiction on (7)(A), which is the coalition partner issue.

7 LDC [CDR MIZER]: Yes, Your Honor.

8 MJ [COL POHL]: And I'm not going to get to Bravo
9 because that presents other issues, but essentially they're
10 saying (7)(C) ----

11 ADDC [CDR MIZER]: Yes, Your Honor.

12 MJ [COL POHL]: ---- is -- it's in the disjunctive, so
13 they say all three, they may say two of the three, but they're
14 certainly saying (7)(C).

15 ADDC [CDR MIZER]: Yes, Your Honor.

16 MJ [COL POHL]: And your position is that's
17 insufficient.

18 ADDC [CDR MIZER]: That it is insufficient merely to be
19 a member of al Qaeda. And there's a long line of cases that,
20 the most recent being ----

21 MJ [COL POHL]: But can't Article I courts limit the
22 jurisdiction by categories of the accused?

23 ADDC [CDR MIZER]: I'm not sure I understand Your

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1 Honor's question.

2 MJ [COL POHL]: Personal jurisdiction. Personal
3 jurisdiction. That's what we're talking about here.

4 ADDC [CDR MIZER]: Yes, Your Honor.

5 MJ [COL POHL]: Can an Article I court limit personal
6 jurisdiction of that court to certain accused? Now ----

7 ADDC [CDR MIZER]: Well, Congress limits ----

8 MJ [COL POHL]: Congress. Yeah, I understand.

9 ADDC [CDR MIZER]: ---- limits jurisdiction.

10 MJ [COL POHL]: I understand that. What I'm saying is
11 Congress limits, and let me just analogize this, limits the
12 Uniform Code of Military Justice to active duty servicemembers
13 only.

14 ADDC [CDR MIZER]: Yes, sir.

15 MJ [COL POHL]: Rephrase that. To servicemembers.
16 There's a reserved component jurisdiction. If you're
17 civilian, you're not subject to it. So that statute limits
18 the pool of -- I'm not sure they would want to be this -- but
19 of eligible accused to servicemembers.

20 ADDC [CDR MIZER]: Yes, Your Honor.

21 MJ [COL POHL]: Okay. That does not mean that by being
22 a servicemember you are therefore -- you are therefore --
23 that's an offense in and of itself. Is this categorization,

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1 assuming that -- again, there may be elements of proof of it,
2 saying that the only people we're going have jurisdiction of
3 are alien unprivileged enemy belligerents is a limit of the
4 personal jurisdiction of the commission, not necessarily an
5 offense in and of itself?

6 ADDC [CDR MIZER]: I think that that's correct, Your
7 Honor. If I understand Your Honor's question is that there
8 are only so many -- there's a narrow category of individuals
9 that are subject to this commission's jurisdiction, so alien
10 enemy unprivileged belligerents.

11 And we would submit that (7)(C) is insufficient
12 just on its face, that there has to be some additional conduct
13 coupled with mere membership for this court to have
14 jurisdiction.

15 MJ [COL POHL]: But don't they do that in every
16 specification?

17 ADDC [CDR MIZER]: Yes, Your Honor, they do. And I
18 think that this is something, as I suggested before, that
19 we're going to have to take a look at and potentially brief,
20 but (7)(C) hasn't been squarely presented before this
21 commission.

22 What is addressed in our motion and the
23 government's response is protective principle and historical

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1 cases dealing with allied nations in World War II.

2 MJ [COL POHL]: I'm not a big fan of piecemeal
3 litigation ----

4 ADDC [CDR MIZER]: Yes, Your Honor.

5 MJ [COL POHL]: ---- if it can be avoided. So what
6 you're tell me is you want to supplement your pleading in
7 light of the government's argument?

8 ADDC [CDR MIZER]: Yes, Your Honor.

9 MJ [COL POHL]: Okay.

10 ADDC [CDR MIZER]: With respect to the French fighting
11 in Afghanistan, Judge, that is quite literally true, that they
12 were fighting in Afghanistan. But there's simply no evidence
13 and we don't believe there would be any evidence that France
14 believed that it was also in combat operations off the coast
15 of Yemen in 2002.

16 And really part of the problem here, Judge, is
17 with respect to 168 and 169. I mean, last week we were
18 arguing whether or not this was a military target by virtue of
19 France being in the coalition, and the central argument there
20 was these are civilians unrelated to hostilities whatsoever.
21 And for purposes of 168, now France is involved in an armed
22 conflict, and therefore the United States has jurisdiction
23 over the Limburg because of that.

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1 Judge, I think it may be that an evidentiary
2 hearing is necessary on this motion. I mean, the prosecution
3 is suggesting that there are effects on the U.S. economy, and
4 I think to the extent that 90,000 barrels of oil impacted the
5 U.S. economy in 2002 may be a matter of fact. I mean, I would
6 suggest the U.S. consumes 20 million barrels of oil a day, and
7 it may be difficult to discern exactly what that, pardon the
8 expression, drop in the bucket actually -- that impact
9 actually had on the U.S. economy.

10 Judge, I would close with the reference to Yousef,
11 which there were -- it was overseas. I think the thing that
12 is certainly referenced in the prosecution's pleadings is that
13 they were U.S. aircraft. And so the fact that it was in the
14 Philippines en route to Japan was irrelevant because they were
15 U.S. aircraft, and the defense would never suggest that the
16 United States could not assert jurisdiction over U.S.
17 aircraft, U.S. individuals, but certainly not French ships,
18 Bulgarian nationals or Iranian oil, Judge.

19 MJ [COL POHL]: Okay. Commander, before you run off,
20 let me just see where we're at posture-wise.

21 ADDC [CDR MIZER]: I apologize, Judge.

22 MJ [COL POHL]: No, that's okay. A lot of people like
23 to leave quickly.

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1 You brief a certain issue here, government
2 responded to the issue before me.

3 ADDC [CDR MIZER]: Yes, Your Honor.

4 MJ [COL POHL]: I certainly can rule on the issue before
5 me.

6 ADDC [CDR MIZER]: Yes, Your Honor.

7 MJ [COL POHL]: But again, are you asking me to wait
8 until you file your supplemental?

9 ADDC [CDR MIZER]: Well, Your Honor, I think we would be
10 happy with a decision that says France is not a coalition
11 partner and therefore ----

12 MJ [COL POHL]: That's a fact, though. That's a fact.

13 ADDC [CDR MIZER]: Yes, Your Honor, it is.

14 MJ [COL POHL]: Or not a fact, whatever it is. I mean,
15 I only can judge from -- without an evidentiary hearing from
16 the four corners of the pleadings.

17 ADDC [CDR MIZER]: Yes, Your Honor. So if you wanted to
18 narrow it that the protective principle of international law
19 did not -- does not afford the United States jurisdiction, and
20 therefore the government must come up with some alternative,
21 I've heard today that that alternative is (7)(C), and the
22 defense can respond to that accordingly.

23 MJ [COL POHL]: Okay. But the issue before me as you

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1 understand it is, as a matter of law, (7)(A) jurisdiction?

2 ADDC [CDR MIZER]: It's (7)(A) jurisdiction, yes, Your
3 Honor. And I think we would have to take a look and see if
4 (7)(A) -- excuse me, (7) -- I think -- yes, Your Honor. The
5 issue before you is (7)(A). And I think we'd have to take a
6 look at whether (7)(C) al Qaeda comports with the
7 First Amendment jurisprudence that I've already talked briefly
8 about.

9 But then also international law, Judge, and that's
10 the thing we have to keep mind because Hamdan says that
11 Article 21 and the international law of war would govern here.
12 And if that is inconsistent, the international principles of
13 jurisdiction are inconsistent with (7)(C), we're going to have
14 to have the opportunity to research that, Judge, and present
15 it to Your Honor.

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

17 Trial Counsel, anything further?

18 CP [BG MARTINS]: Your Honor, briefly, just because we
19 can maybe then get whatever further litigation on this, get a
20 structure for it and we can provide you our position. We
21 don't object to defense supplementing on this matter if it
22 helps the court, and we would like the opportunity, though, to
23 reply to their supplement.

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1 MJ [COL POHL]: You would be, it's just -- what they're
2 telling me is before me is a little different than what you're
3 telling me is before me. And they're saying it's (7)(A)
4 before me, for want of a better term. If you think it's a
5 bigger issue than that and if you want to -- if you want to
6 fully brief this on that issue and then do it all at one time,
7 certainly it doesn't -- we're going to get there anyway, so
8 I'm not sure it makes much difference to decide the narrow
9 issue now, but I certainly can. Go ahead.

10 CP [BG MARTINS]: Your Honor, just to correct things
11 here a bit, it's been actually better briefed than counsel
12 might have suggested. If you look at our -- their motion
13 cites to -- he says it doesn't mention the protective
14 principle. On page 7 of their amended brief -- because
15 initially we had the brief with some materials they thought
16 were classified in it, but the 18 September version, page 7
17 they cite to -- they describe jurisdiction under customary
18 international law principles may be prosecuted in the United
19 States courts as offenses against the law of nations, that
20 define and punish quotation from the Constitution, and then
21 restatement 3rd, Foreign Relations Law, Sections 401 to 416.
22 That is the laydown of the different five bases of
23 jurisdiction to prescribe. I mean, that's their cite, not

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1 ours, and it clearly invokes the jurisdiction to prescribe
2 under international law. We responded to that, and again
3 they're claiming that this (7)(C) is new.

4 If I can quote from our own brief, "The exercise
5 of jurisdiction" -- this is page 3 of our brief, "The exercise
6 of jurisdiction by the United States for the accused alleged
7 offense against the M/V Limburg is lawful under any relevant
8 standard. As someone who chose to join al Qaeda and engage in
9 hostilities against the United States, the accused should
10 reasonably anticipate being held in a court in this country."

11 So we have been from the beginning talking about
12 it as part of the jurisdictional basis, and this discussion of
13 us punishing mere membership is muddying the water. That's
14 the definition of unprivileged belligerent. There's still a
15 requirement in the base statute, Your Honor, for jurisdiction
16 to establish unprivileged belligerency, and then they did
17 something, did an offense punishable under the chapter.

18 So we would certainly oppose the notion that this
19 is an attempt to punish mere membership and take exception to
20 the analogies to violations of freedom of association and
21 other things that punish mere membership. We take extreme
22 exception to that. Thank you.

23 MJ [COL POHL]: Thank you. I'm going to look at 168 as

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1 the issue that's been briefed in front of me. Defense, if you
2 wish to file -- don't make it a supplemental pleading, make it
3 a new pleading. We can merge them later on. I'm going to --
4 I'm saying this for numbering purposes, even though I
5 understand it's going to be part and parcel of 168. Once we
6 start calling things supplement, we end up getting some
7 time -- so you'll file any additional pleadings on this issue
8 not later than 7 March. Trial Counsel, you'll have your
9 normal two weeks to respond, seven days after that for a reply
10 brief.

11 So that's -- I will look at this and then make a
12 decision on whether or not I want to -- given the current
13 posture of it, whether I wish to decide 168 on what I've got
14 in front of me or whether I want to hear the other part of it
15 too. But let me review the pleadings and the arguments.
16 Okay.

17 ADDC [CDR MIZER]: Yes, Your Honor. Thank you.

18 MJ [COL POHL]: That brings us to -- let's do the
19 unclassified part of 181. Mr. Kammen.

20 LDC [MR. KAMMEN]: Your Honor, 181 is a defense motion
21 to dismiss the capital referral because the defense is
22 prohibited from discussing with Mr. Nashiri important critical
23 information relevant to both his defenses to the charges and,

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1 should he be convicted, to mitigation.

2 The starting principle, of course, is that in a
3 capital case the accused -- like any criminal case it is the
4 accused's right to make certain decisions. And in a capital
5 case, like any criminal case, the lawyers under relevant state
6 ethical rules of professional responsibility and under
7 relevant military rules of professional responsibility have an
8 obligation to consult with the accused prior to trial, but
9 that, as we all know, there are many decisions in the
10 continuum that are the province of the accused. It is his
11 case, not ours. And that is essentially true, Your Honor,
12 where his life and his freedom hang in the balance.

13 The sort of seminal case on all of this, Your
14 Honor, is Gardner v. Florida in which a death penalty was set
15 aside because the trier of fact, in that case the judge in
16 Florida, had a secret presentence report in that case that, at
17 least, neither the accused and I believe neither the accused
18 nor his counsel had seen.

19 Here, of course, we go far beyond something as
20 relatively trivial as a presentence report to whole classes of
21 evidence that, because of the rather baroque and frankly, how
22 can I say this, improper classification decisions and the
23 peculiarities of litigation in a military commission, we're

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1 simply prohibited from discussing with our client.

2 All of this as it presently exists really make it
3 impossible for us as defense lawyers to provide anything
4 approaching effective assistance of counsel. I mean, this is
5 a structural impediment that is -- renders us ineffective.

6 I think that is the way the litigation has
7 unfolded. This is done specifically to hobble defense
8 preparation as opposed to anything else, but it puts us
9 ultimately, if the court sustains the government's position,
10 in a professionally complicated position that at least in my
11 view will require every member of the defense team to consult
12 with their individual state bar authorities, maybe hire
13 individual ethics counsel for an individual opinion. For the
14 military people, they may have to consult with their military
15 counterparts really to determine what their ethical obligation
16 is.

17 MJ [COL POHL]: Mr. Kammen, if you feel the need to do
18 that, why haven't you already done it?

19 LDC [MR. KAMMEN]: Because, quite candidly, Your Honor,
20 when I did consult with ethics counsel, their advice was get
21 a -- before they could make any decision, their advice was,
22 well, at least take it to the judge. If the judge actually
23 sustains this position, which, frankly, Your Honor, I will

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1 tell you they were absolutely aghast at ----

2 MJ [COL POHL]: The position that an accused has no
3 unfettered right to classified evidence, that position?

4 LDC [MR. KAMMEN]: Well, that the way that the -- this
5 is being structured is to keep from the accused in a capital
6 case the ability to discuss in a meaningful way preparation of
7 his defense. So, you know, you can say it's -- well, does the
8 accused have a right to unclassified information -- classified
9 information. The answer to that is obviously no. Of course
10 there's always the question of whether the information is
11 properly classified, but that's neither here nor there.

12 But in the event the commission says I'm not going
13 to dismiss the capital referral, that this case can go ahead,
14 that's when it becomes far, far more complicated.

15 MJ [COL POHL]: Is there any limitations that weren't --
16 that are not also the same type of limitations with uncleared
17 accused in a federal death penalty case?

18 LDC [MR. KAMMEN]: This has never come up in a
19 federal -- the closest that it's come up in is Moussaoui, Your
20 Honor. As we already pointed out in our brief, what occurs
21 here is considerably different than what occurs in CIPA
22 litigation in Article III courts.

23 In CIPA litigation in Article III courts, only

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1 cleared counsel can see the classified evidence, and what is
2 produced is an unclassified summary which then goes to
3 unclassified counsel, if that's the case, or the accused. It is
4 extraordinarily rare that there would be critical information
5 that would be completely withheld in all manner from the
6 accused. The accused might get the summaries. The accused
7 might get an abridged version. What the accused -- what makes
8 this different is the accused does not get secrecy. And
9 that's what makes this really, really different, is ----

10 MJ [COL POHL]: No, but just so I'm clear on your
11 position is, is that you're saying that in federal court the
12 accused have access to the unclassified summaries of the
13 classified evidence?

14 LDC [MR. KAMMEN]: Yes.

15 MJ [COL POHL]: Okay. My question then is: But he
16 doesn't have access to the classified documents themselves?

17 LDC [MR. KAMMEN]: Yes, but here he doesn't have access
18 to anything.

19 MJ [COL POHL]: To the unclassified discovery?

20 LDC [MR. KAMMEN]: Well, he has access to the
21 unclassified discovery, but the unclassified discovery
22 excludes these significant pieces of evidence. And that is
23 the difference. It's not a situation where the unclassified

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1 discovery is adequate. The unclassified discovery excludes
2 all of this.

3 MJ [COL POHL]: So this is a -- really what you're
4 saying, the breadth of the classified information is so large
5 in this particular case that the fact he can see the
6 unclassified discovery really doesn't mean much?

7 LDC [MR. KAMMEN]: At this juncture, that's absolutely
8 correct.

9 MJ [COL POHL]: Okay.

10 LDC [MR. KAMMEN]: Especially on the penalty phase side
11 of things.

12 MJ [COL POHL]: Okay.

13 LDC [MR. KAMMEN]: Now, in -- you know, Padilla v.
14 Kentucky, the U.S. Supreme Court held that -- and recognized
15 that the obligation to consult, you know, is critical to the
16 decision-making process. And, of course, you look at the
17 ethics rules and -- and I don't want to overstate this. The
18 ethics rules are in conflict. It is not a simple question.
19 Because there may be times where under limited circumstances a
20 court can properly enter an order prohibiting counsel from
21 discussing something with their client for a period of time.
22 And that's why it's -- this is no simple situation.

23 And, again, I don't -- you know, the argument is

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1 somewhat truncated because we're dealing here in the
2 unclassified environment, but in their request for the death
3 penalty one of the things we discussed the other day is the
4 allegation in sort of the -- we'll call them nonstatutory, you
5 may call them facts -- is that based upon statements to other
6 individuals, and I'm paraphrasing, and law enforcement, the
7 accused demonstrates a lack of remorse.

8 Now, again, just speaking hypothetically, we would
9 be obligated to discuss with Mr. Nashiri any statements upon
10 which that allegation is based, and should we decline to do so
11 for any reason, that would be a violation of the
12 Sixth Amendment.

13 Now, I just want to touch on this, and we'll come
14 back because there's another piece of this that really has us
15 confused because it does seem to us, Your Honor, that if this
16 material is classified and then it's classified and it -- you
17 know, it's classified not only during the pretrial phase of
18 this but during the trial as well.

19 And our initial pleading, while it focused on the
20 pretrial, we did point out that at least under the
21 government's theory Mr. Nashiri would have to be excluded from
22 the trial as well. The government says, no, no, no, that's
23 not the case. Now, how they plan to at the time of trial get

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1 around this classification and maybe it somehow becomes
2 unclassified at the time of trial, and that raises a whole
3 host of additional issues ----

4 MJ [COL POHL]: Let's take the government at their word
5 for now on that issue, Mr. Kammen.

6 LDC [MR. KAMMEN]: I understand, but -- and let me
7 just -- and I'll answer your question, but let me just say
8 this. We're troubled by that, because what it looks like then
9 is gamesmanship. We'll hobble the defense's preparation, and
10 then when we get to trial somehow we'll fix this problem. And
11 that's -- that's the situation. But now let me ----

12 MJ [COL POHL]: No, I understand, but the government's
13 position apparently is, is that at trial the accused will be
14 able to hear all evidence against him, including classified
15 information. And the question you're asking me -- or the
16 issue appears to be, well, we need to know that before trial.

17 LDC [MR. KAMMEN]: Sure.

18 MJ [COL POHL]: Is that where you're at? Okay.

19 LDC [MR. KAMMEN]: Well, it's not we need to know it.
20 We know it. We need to discuss it with him. It is his case.
21 It is his defense. It is his right to make certain choices,
22 not ours.

23 What happens, Your Honor, if, you know, in the

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1 middle of the trial the government presents some evidence that
2 Mr. Nashiri is hearing for the first time and he pulls on our
3 sleeve and says that's not true or that requires additional
4 investigation, you need to find this witness, you need to do
5 this, you need to do that, are we really going to recess the
6 trial for two weeks, two months, while we go then for the
7 first time, do this investigation? Is that the kind of fair,
8 transparent thing we're really -- is that what we're really
9 about here?

10 You know, the other piece of that is this. I
11 mean, in large measure AE 120, for the people who hear it, the
12 filing is unclassified, so you can get a sense -- people can
13 get a sense of what it is. And if we offer evidence
14 concerning things that are presently classified -- I mean, the
15 government has conceded in that -- we've had this discussion
16 in numerous settings -- well, I don't know if the government's
17 conceded, but the commission has certainly said, well, the
18 right to present mitigation evidence is quite expansive and
19 includes the right to try to persuade the members in an
20 exercise of grace and mercy to exercise clemency, which
21 clearly gets into in many respects conditions of confinement,
22 what's been going on with Mr. Nashiri in the 13 or 14 or
23 15 years, however many years it will be, since his arrest,

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1 that sort of thing.

2 Now, assume for the sake of this discussion that
3 we then want to address -- introduce classified evidence, does
4 the government's declassification also extend to the defense
5 case, or is Mr. Nashiri then excluded from his own penalty
6 phase and is the public excluded from hearing the defense's --
7 a portion of the defense's portion of the penalty phase?

8 And think of the consequences of that. You know,
9 supposing my cynicism is unjustified and that the members do
10 return a sentence other than death, the public will -- how can
11 the public have any confidence in that decision when they
12 didn't see the penalty phase?

13 MJ [COL POHL]: Well, they wouldn't have -- under your
14 hypothetical, if it's classified information, they wouldn't
15 see the classified information.

16 LDC [MR. KAMMEN]: Exactly. That's the problem.

17 MJ [COL POHL]: So your position is not just for your
18 accused, is, is that -- is that all classified information
19 should be ----

20 LDC [MR. KAMMEN]: No. My position is that I don't see
21 how the government can have it both ways. If they're going to
22 declassify their evidence but not ours, that just seems to run
23 in the face of ----

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1 MJ [COL POHL]: Mr. Kammen, I'm not sure that's their
2 position. Maybe it might be, but let's wait to hear.

3 LDC [MR. KAMMEN]: That's what they wrote in their
4 brief. All I got -- you may have information I don't have.

5 MJ [COL POHL]: No, I just read what's in the brief.
6 And I'm not sure they're -- I'm not sure it's a matter of
7 declassification, but it might be. Let's wait to hear what
8 they've got to say. Go ahead.

9 LDC [MR. KAMMEN]: Now, again, let's take this in just a
10 gang case, plain old typical federal court drug conspiracy
11 where there's murders involved and the government seeks the
12 death penalty. And assume that there was evidence, say
13 coconspirator testimony in this gang case and the defense
14 lawyer says I read this, and in some ways it validates what my
15 client says, in some ways it undermines it, in some ways it's
16 contradictory, but I'm not going to even discuss it with him.
17 I'm not going to talk to him. I'm not going to bother.

18 Or there was information about the gang's
19 activities or mitigation evidence that, if it were true, might
20 take us in one direction for a penalty phase, if it were
21 false, might take us in another, but only the accused could
22 really advise. And the lawyer just said, nah, to heck with
23 it, not going to bother. I'm not going to talk to him.

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1 Any conviction that generated from that proceeding
2 when it was reviewed for ineffective assistance of counsel on
3 habeas, as all of this ultimately will be some day, would be
4 held to be an absolute violation of the defendant's right to
5 counsel under the Sixth Amendment and under Strickland. It is
6 well -- it is not even arguable that the refusal to consult
7 with the client is within the minimum bounds of professional
8 responsibility, and it would almost certainly be adjudged to
9 be prejudicial. I mean, that's how serious the position we
10 are put in is.

11 Now, you talked about federal court and CIPA. And
12 the most typical exclusions in the very limited circumstance
13 where some small amount of information might be withheld from
14 a defendant is when it was information he or she didn't have
15 and had never been exposed to.

16 Not this case, making it up -- I want to be very
17 clear -- if there were, for example, nuclear secrets that
18 the -- that somehow were germane to a case, that the accused
19 had never had, never seen, never knew anything about, that
20 might be a reason to keep that from him or ----

21 MJ [COL POHL]: But how would you know that unless you
22 asked him? Under your nuclear -- I mean, under your
23 position ----

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

2 MJ [COL POHL]: ---- then the lawyer's making a decision
3 as to what class of information -- classified information that
4 the accused doesn't need to see.

5 LDC [MR. KAMMEN]: There are plenty of -- no, it's not
6 about needing to see, it's about whether or not he ever had
7 access to it in the first place.

8 So let's assume, for example, in a particular case
9 the evidence was unquestioned that the accused had never had
10 access to these nuclear secrets but somehow they were germane.
11 That's the kind of thing, you know, where you might say did
12 you ever have access in some general sense without ever
13 getting into the specifics. That's certainly not this case.
14 And that's what makes this different. This is -- and I won't
15 go beyond this, this is not material to which the accused was
16 never exposed. On the contrary.

17 You know, we'll discuss this more in private, but,
18 you know, when the executive -- I mean, the executive -- these
19 things are all about choices. The executive has chosen to
20 classify for its purposes a broad swath of information. We,
21 you know, disagree with the notion that you don't have the
22 right to visit it, but that's your position. And so this --
23 the executive has for these purposes unilaterally done this

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1 and imposed that on us.

2 But there's a -- that's a choice that has
3 consequences. That is a choice that has consequences, and the
4 consequence here, Your Honor, is that they can't have it both
5 ways. They can't say, okay, you can't be constitutionally
6 adequate, you can't be constitutionally prepared, you can't
7 provide effective assistance of counsel, but we still want to
8 kill Nashiri.

9 I mean, you know, they -- they make this choice,
10 but ultimately, Your Honor, the choice is yours. Because if
11 you conclude, as you must, that this is so devastating to
12 preparation, then your obligation, your choice -- really the
13 government put you in this position -- is to withdraw the
14 referral and make this a noncapital case. I mean, that's the
15 choice they have made, and that brings you to this crossroads
16 where at the end, in our view, it is your responsibility to be
17 the bulwark that protects his rights.

18 Because if he does not have effective lawyers, if
19 all he has is folks in uniforms and suits sitting there, you
20 know, this is just Potemkin village, this is just a facade
21 without any real meaning. And frankly, Your Honor, as we'll
22 discuss in the closed session at greater length, that's what
23 the government seems to want and that is not certainly

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1 appropriate and adequate.

2 I would have greater argument, but in light of the
3 court's ruling, we'll defer that to the classified section. I
4 will say for the record that Mr. Nashiri absolutely objects to
5 being excluded from any discussion about things that
6 absolutely bear on the quality of his trial, his
7 representation, his freedom, his life. We understand you've
8 ruled, but we just want to make it clear that ----

9 MJ [COL POHL]: Sure.

10 LDC [MR. KAMMEN]: ---- he absolutely persists in his
11 objections.

12 MJ [COL POHL]: Thank you. What we'll do is we'll take
13 the 15-minute recess, then I'll hear from the government on
14 this issue. Commission is in recess.

15 [The Military Commission recessed at 1033, 24 February 2014.]

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