1 **[The R.M.C. 803 session was called to order at 1417, 2 March**
2 **2015.]**
3 MJ [Col SPATH]: These commissions are called to order.
4 All of the parties present before the recess are again
5 present. Let's take up 319J. Here's kind of the plan. We're
6 going to go until 3:30. I don't know if we'll need another
7 break before then or not, get through as many of the motions
8 that are out there as we can. At 3:30 we'll break to get
9 ready for the 505 hearing. So wherever we're at, at 3:30
10 we'll stop.
11 So let's take up then 319J.
12 ADDC [LCDR POLLIO]: Good afternoon, sir.
13 MJ [Col SPATH]: Good afternoon.
14 ADDC [LCDR POLLIO]: In 319J the defense requests that
15 this commission continue the hearing with regards to the AE
16 166 statements, the hearsay statements specifically, until the
17 Court of Military Commission Review renders the final judgment
18 on the government's interlocutory appeal. The rule is very,
19 very clear, and the rule requires as broad a sweep as possible
20 that any hearing that impacts something before the commission
21 review cease. And that's necessary so that all parties know
22 what the full scope of the case will be.
23 So I'd like to start with the legal framework and

1 just discuss the rule itself. The rule is very clear. It
2 says that no session of the military commission may proceed
3 pending disposition by the Court of Military Commission Review
4 of the appeal, except that solely as to charges and
5 specifications not affected by the ruling or order. And this
6 is based on the federal rule, Federal Rule 8(a). It
7 contemplates that any litigation surrounding related offenses
8 will be halted.
9 And there's an exception in the military practice,
10 because in military practice we often see unrelated offenses
11 on one charge sheet. You may have a case where a sailor has
12 been accused of BAH fraud and assault, and that is not the
13 case here. All of the offenses that Mr. Nashiri is charged
14 with all relate to this overarching Boats Operation theory
15 that the government has put forward time and time again.
16 And so the standard before this court -- excuse me,
17 this commission, is not whether or not the evidence presented
18 has some independent relevance. The standard is whether or
19 not it is related solely as to charges and specifications that
20 are not up before the court of review. And when we look at
21 the factual issues in this case, we see that all of the AE 166
22 statements are, in fact, intertwined, they're all
23 interrelated, they all go to the Boats Operation and they're

1 all impacted by the pending appeal from the government.
2 The facts have dual use, they relate to a common
3 criminal enterprise, the mens rea, the aggravating factors.
4 The government has indicated that it intends to boot strap
5 this evidence to show this common enterprise of the Boats
6 Operation.
7 When we look at the government's response, it really
8 fully flushes out just how intertwined these issues are and
9 these statements are. They say over and over in their
10 response that, Your Honor, if you get overturned by the court
11 of review, we'll have already heard this evidence. You can
12 admit it for the Boats Operation, you can admit it for the
13 Motor Vessel Limburg. Which I find striking that the
14 government, in its own motion, admits that these statements
15 are, in fact, related, that they are intertwined, and that
16 they all relate to the Boats Operation. It's impossible to
17 separate the two.
18 And that's fully flushed out now, whereas in some
19 prior hearings before this court and prior pleadings perhaps
20 the government's intent and what they intended to use these
21 statements for was not fully flushed out or fully vetted. In
22 fact, in the 166 notice itself, the government merely provided
23 notice that it would be evidence of some fact. When we come

1 back and we look at 319 and their response to 319, the
2 government then comes forth and says, you know, this is all
3 related, it is all to the Boats Operation, but it also impacts
4 some of the charges that are not before the court of review,
5 so let's press ahead, all engines ahead. But that's not the
6 case, and that's not what the rule requires.
7 The government, throughout its response, says the
8 appropriate standard is whether or not there's some
9 independent relevance. But that is not the standard, and the
10 rule could not be more clear. The rule and the standard state
11 that you cannot proceed forward on any session except as to
12 which charges are solely unrelated to issues before the
13 appellate court.
14 And if you look at what the government actually just
15 argued in front of you, Your Honor, is that all of this fits
16 together; this all fits together under the boats theme. The
17 government's proposal of how they want to conduct the 166
18 hearing itself, they'd like to call Special Agent McFadden and
19 have him testify. Each and every statement he took. Those
20 statements, in part of them, are related to the Motor Vessel
21 Limburg. In fact, Mr. Hadi, one of the witnesses that they
22 provided notice of who special Agent McFadden was partaking in
23 that interview is solely related to the Limburg, nothing else.

1 All of this evidence is intertwined. It cannot be
2 taken apart. And when you look at the charges on the charge
3 sheet, they all do relate to each other. If we were in a
4 federal court they would be subject to joinder. And under
5 Federal Rule 8(a) it contemplates that when you seek an
6 interlocutory appeal, that has consequences. When you seek an
7 interlocutory appeal, you are stuck with those consequences.
8 The proceeding halts so that you know what the scope of the
9 playing field will be, rather than piecemeal litigation.
10 The defense needs to, you know, figure out what it's
11 going to allocate resources to, and that's what the rule is
12 set and designed to do is, so that you can halt the
13 proceeding, see what the scope of the litigation really will
14 be about. And when you look at the charges that are up before
15 the court of review, those are necessarily related to the
16 charges remaining, and they're specifically related to the
17 AE 166 statements which the government seeks to admit.
18 The rule has a clear meaning. It has a binding
19 consequence. It is not meant to be taken lightly to seek
20 interlocutory appeal, and the standard is not whether or not
21 there's some independent relevance. It's whether or not the
22 session is solely related to charges and specifications not
23 impacted by the appeal.

1 Here we have a common theme of liability, the Boats
2 Operation. The government has through its pleadings, time and
3 time again, through its 48 series pleadings, referenced
4 there's a Boats Operation, a common enterprise.
5 And so I guess to sum it up, Your Honor, we request
6 that these hearings related to statements themselves in AE 166
7 be continued until the Court of Military Commissions Review
8 renders a final judgment on the government's interlocutory
9 appeal. These statements are not related solely to charges
10 and specifications, they're not impacted by that appeal. And
11 as this past week has shown, there are plenty of other issues
12 that need to be litigated that have really nothing to do with
13 these charges that are up before the court.
14 You know, the government pointed out in its brief
15 that, you know, there are cases where a court-martial goes
16 forward, and then the example cited is that the court hears a
17 motion on a pretrial confinement issue when the interlocutory
18 appeal has to do with whether or not evidence should be
19 suppressed. Those are clearly unrelated, and that's not what
20 we have before you.
21 We have statements that are all related to a Boats
22 Operation. And the rule requires that this be continued until
23 the court renders final judgment at the interlocutory level so

1 that all parties know the full scope and the land ahead.
2 MJ [Col SPATH]: Thank you. Colonel Moscati?
3 DCP [COL MOSCATI]: Good afternoon, Your Honor.
4 Judge, this motion and our response is pretty simple
5 and straightforward. I want to make the point from the
6 outset, Judge, that you have already ruled on this in large
7 degree in your docketing order where in the footnote you
8 indicated you would not be hearing evidence pertaining to the
9 government's 166C notice. You said that was related to the
10 Limburg and we would not be taking it because of 908. So
11 we're only talking about 166, 166A, and 166B. That's
12 obviously a very important ruling on this motion, Judge.
13 In response to counsel's argument, if the government
14 had only charged the accused with conducting a Boats
15 Operation, then maybe that argument would be a little
16 stronger. But there are specific charges relating to the
17 bombing of the USS COLE, and 166, 166A, and 166B are the
18 statements that relate to the USS COLE. So we're already
19 excising out 166C, and the government agrees with that, Judge.
20 I do want to explain, Judge, in the government's
21 response 319O, we do indicate that there's what we call --
22 only with 166, 166A, and 166B, that when we conduct the
23 hearing relative to those, that those statements are probative

1 to the attack on the COLE, specifically probative to the
2 attack on the COLE, and we said generally probative of his
3 participation in the Boats Operation. And I want to explain
4 what we mean there a little more, Judge.
5 If you look at 803 on the admissibility of hearsay,
6 obviously the court has to go through the 803(b)
7 determinations. And when you're looking at 166, 166A, and B,
8 you're obviously going to consider the (b)(2) circumstances,
9 which I break them down into four, Judge. Taking into account
10 all of the circumstances surrounding the taking of the
11 statement, one; two, the degree to which the statement's
12 corroborated; three, the indicia of reliability within the
13 statement itself; and four, whether the declarant is
14 overborne. You're going to have to do that for all of the
15 statements, the whole universe of hearsay statements the
16 government's going to offer.
17 What you would not be doing in a hearing -- what you
18 would not be doing is, as it relates to the Limburg, because
19 the charges are dismissed, you would not be doing (b)(2)(A)
20 and (b)(2)(B), the materiality of the fact and whether it's
21 probative of that material fact. So there's no need to do
22 that while the Limburg statements are dismissed.
23 Should the Limburg statements be reinstated, you

1 would not have to conduct another evidentiary hearing related
2 to those first four indicia, what I'm calling the general
3 nature of (b)(2). If you do that in this hearing on only 166A
4 and Bravo, you would not have to do it again if Limburg gets
5 reinstated. As a matter of law, Judge -- and it's in our
6 footnote 2 of 3190 -- you would then just have to make a legal
7 determination, which may or may not include additional
8 briefing and argument, but wouldn't necessitate further
9 evidentiary hearings as they relate to the Boats Operation.
10 Hopefully that's more clear, Judge.
11 Again, 166C is not even being discussed here, as
12 you've already ruled. But with respect to 166, 166A and 166B,
13 you can do those, Judge, because they're not related to the
14 dismissed Limburg charges. Thank you.
15 MJ [Col SPATH]: Thank you. Defense?
16 ADDC [LCDR POLLIO]: Yes, Your Honor.
17 Sir, I'd just like to note that the government
18 argument shows, in fact, that these statements are related.
19 How else would Your Honor be able to then come back after a
20 hearing is conducted to the same statements that are related
21 to the Motor Vessel Limburg?
22 The rule is clear. It has a sweeping meaning, to be
23 sure, but the government knew the rule when they sought the

1 interlocutory appeal. With respect to the docketing order, in
2 fact, that's the very docketing order that the prosecution
3 seeks to set aside. And in all fairness to Your Honor, I
4 think that the government's intention to show how this is all
5 intertwined really got flushed out in their responses to this
6 motion. I don't think that that was evident per se in just
7 the general notice that, hey, these statements, they go to a
8 material fact.
9 With their responses, they show that these statements
10 are related to the Motor Vessel Limburg. And when you look at
11 the analysis under the UCMJ, which is the same rule that we
12 have here, it states that unrelated offenses are often tried,
13 and so that's why in court-martials you may move forward. We
14 simply don't have that here.
15 The Motor Vessel Limburg charges are part of the
16 Boats Operation, they are part of the remaining charges. And
17 the government's own argument that we're going to do a
18 hearing, that the statements relate to Motor Vessel Limburg,
19 but you can come back to that at another time, shows that
20 these statements are related to charges that are pending in
21 interlocutory appeal. And for that we ask that they -- that
22 this hearing on the 166 statements be continued until we have
23 final judgment on that interlocutory appeal. Thank you.

1 MJ [Col SPATH]: Colonel Moscati, any final comments?
2 DCP [COL MOSCATI]: Yes, Judge. In ruling on the motion
3 I'm sure the court will certainly cite 908(b)(4) and the
4 effect on the military commission. You would define, Judge,
5 the scope of the session, of that commission session, and
6 presumably you'd follow the rule. There would not be anything
7 admitted solely as to charge and specifications or -- I'm
8 sorry, the only thing that would be admitted is evidence that
9 is solely related to the existing charges not affected by the
10 order.
11 Again, Judge, if the accused had only been charged
12 with the Boats Operation, it would be a stronger argument for
13 the defense. He's charged specifically with bombing the COLE,
14 and 166, 166A, and 166B are only with respect to the COLE.
15 You've already ruled 166C would not be heard. Thank you.
16 MJ [Col SPATH]: All right. I've got 319F and G which are
17 interrelated. They do relate to the 166 series, so I will
18 turn it over to defense counsel. That's the motion to compel
19 discovery for 166 and then the motion to compel witnesses,
20 166.
21 DCP [COL MOSCATI]: 319F, Judge, there is a notice on
22 classified information there, and I don't -- you skipped 328?
23 MJ [Col SPATH]: We covered 328, I thought, with

1 Mr. Kammen's comments and you-all's comments. I don't know if
2 you want any additional comments on it, but I thought it was
3 argued. All right.
4 The 505 piece for 319 we'll deal with, but are there
5 any unclassified parts that we can deal with for 319?
6 ADDC [Maj JACKSON]: Your Honor, if I may?
7 MJ [Col SPATH]: You may.
8 ADDC [Maj JACKSON]: Just to talk about going forward with
9 the 505 piece for the 319 hearings on the motions to compel
10 witnesses and the motions to compel evidence. We've alluded
11 to it in previous argument today, but there is an outstanding
12 classification issue regarding 166 in general and the hearsay
13 statements that, before we can even get into the unclassified
14 portion of those arguments we would need to address, and
15 I ----
16 MJ [Col SPATH]: That makes sense, so we'll try to take
17 care of that this afternoon as well.
18 ADDC [Maj JACKSON]: Yes, sir.
19 MJ [Col SPATH]: All right. Thank you.
20 ADDC [Maj JACKSON]: And it's the defense's position that
21 this addresses 319F. And also, based on notice given by the
22 government to the defense, it encompasses 319G as well.
23 MJ [Col SPATH]: All right.

1 ADDC [Maj JACKSON]: Thank you.
2 MJ [Col SPATH]: Now we have 256D and 257D which are
3 motions to strike.
4 LDC [MR. KAMMEN]: 256 and 257 relate to notice of
5 aggravator that the government provided, and to set it in
6 context, the government provided the notice of aggravation as
7 it's required to do. Of course, because this is a death
8 penalty case, there is some responsibility on the part of the
9 government to have notice of aggravation, have some -- provide
10 some notice so the defendant knows what he or she is required
11 to disprove.
12 Recognizing that the Constitution may or may not
13 apply, at least in the government's view of this here in
14 Guantanamo, it is our view that the Eighth Amendment and the
15 Constitutional requirements of the Eighth Amendment apply,
16 because that is what is required under various treaties that
17 the United States has signed. So that if this is going to be
18 a death penalty case, it has to be a death penalty prosecution
19 by treaty that complies with the Eighth Amendment.
20 And basically what the government said is that, you
21 know, the attack on the COLE, one of the residual targets and
22 one of the things that made it aggravating was that it was
23 designed to terrorize the civilian population. The response,

1 of course, was to say what civilian population? Give us some
2 hint as to where in the world we were talking about. The
3 government basically said anybody in the world who may have
4 been terrorized is good enough. And the court said no, that's
5 not good enough, and ordered the government to file a bill of
6 particulars.
7 The bill of particulars, if it could have been
8 worse -- I mean, you know, I've alluded to this is sort of a
9 fantasy land. And the bill of particulars really takes us
10 there in many respects, because it really brings to light one
11 of the fundamental problems that really affects this
12 commission, and that is: Was the United States at war in
13 2000? Of course if the United States was at war in 2000, then
14 this case may properly be before a military commission. If it
15 was not at war, a conflict subject to the laws of war in 2000,
16 if we were not in such conflict, then we should be in federal
17 district court.
18 In response the government provided a bill of
19 particulars that said, "The civilian population, as we mean
20 it, means any nonmilitary legal resident of the United States
21 or any nonmilitary or legal resident of a coalition partner."
22 Now, I have spent I don't know how much time delving
23 into history in the year 2000 when the COLE was attacked and

1 am unable to find who the coalition -- what coalition the
2 government is talking about. We know there was a coalition
3 that was responsible and part of the first Gulf War, we know
4 that in the attack, when the United States went to war in
5 Afghanistan and then subsequently Iraq in 2002 and 2003, we
6 had the coalition of the willing.
7 In 2000 there was no coalition -- now, of course, and
8 the government hasn't told us who's a member of that
9 coalition. Was it France? Was it Bulgaria? Who was it?
10 And, you know, you can't just say somebody somewhere was
11 terrorized and that's good enough to kill him. It's got to be
12 specific.
13 And so what we have asked the commission to do is to
14 strike these two bills of particular and really continue to
15 strike the notice of aggravators. It's very similar to the
16 aggravators that the commission has previously stricken, which
17 the government now wants to, I guess, reargue later on today
18 or perhaps tomorrow. But it's -- the fundamental problem is
19 they are trying to make -- create a situation where there
20 is -- it is not possible to defend, and it's not -- going to
21 be impossible to defend because the facts don't warrant it.
22 It's impossible to defend because the facts are pled so
23 vaguely that they simply can't be met.

1 You know, I don't know if the government sustains
2 their proof, if they bring in, you know some guy who lived in
3 Keokuk, Iowa who said I read about the COLE and I was scared
4 to death. Well, you know, then do we get notice of him during
5 the trial? Do we get notice of him if we prove that, in fact,
6 he didn't know anything about the COLE until 2002? Does that
7 strike the aggravator? Or do they get to bring in a guy from
8 Buffalo or, you know, whoever our coalition partners are, who
9 says I was scared to death. Or do they just simply bring
10 in -- and this has happened in other circumstances, they bring
11 in some, quote, expert, closed quote, who will say, well, the
12 plan, you know, based on my research, was to terrorize the
13 civilian population of all of these countries, but we don't
14 really have to show any particular individual.
15 I mean, it is the classic vague pleading. And in
16 that circumstance it doesn't pass anything approaching the
17 kind of reliability that's necessary for a death penalty case.
18 You know, in other bombing cases you could say, okay, the
19 scope of the bomb was this apartment and the apartments on
20 each side, so you know there's a discrete group of people who
21 were potentially terrorized.
22 Here it's literally millions of people, but there's,
23 you know -- and there's no way to meet that. And, you know,

1 what -- again, I come back to the overarching thing: What
2 coalition? I don't know who's going to argue for the
3 government, but I would like somebody to tell us what
4 countries are part of this coalition in the year 2000, and
5 where does evidence of that coalition exist? How do we check
6 it out?
7 Now, if they're talking about the coalition of the
8 willing that existed in 2002 and those are the coalition
9 partners, then we're back to the issue this is governed by the
10 appeal because this is Limburg, and this would be touched on
11 by Limburg, and so we may be premature. But I think at a
12 minimum the commission has, you know, the authority to ask
13 whoever's going to argue this for the government what
14 coalition, who were the members, where do we find evidence of
15 that? Thank you.
16 MJ [Col SPATH]: Thank you.
17 ATC [LT MORRIS]: Good afternoon, Your Honor. At the
18 outset I think it's important to start by clarifying two
19 remarks that defense counsel stated, and the first is a
20 discussion that occurred last April in which the request for
21 this bill of particulars came about. And the second one is
22 how this actually plays out in the government's case which is
23 ahead of us.

1 Last April there was a defense motion to strike some
2 of the aggravating factors. There was a back-and-forth
3 between Judge Pohl and trial counsel and the concept of this
4 specific aggravating factor, R.M.C. 104(c)(11) was brought up.
5 And trial counsel discussed that or suggested that when
6 terrorism and the tactic of terrorism is used, that it very
7 clearly can't apply. What is that audience to the global
8 civilian population?
9 In response to that defense said that they were
10 confused. And the commission ordered the government, well,
11 let's just clarify that. So his characterization that it was
12 not good enough is not what the transcript shows. It was that
13 let's just get some precision on that. And if government, at
14 a potential sentencing phase, you want to apply that to the
15 global civilian population, just state that in a bill of
16 particulars. The government on its own narrowed that
17 definition. The government on its own pinpointed, focused the
18 definition of what civilian population is.
19 Second, the characterization that defense made that I
20 want to respond to is the government's burden of proof. That
21 he said, well, we have a kind of obligation to do certain
22 things. No, we have, beyond a reasonable doubt at the trial
23 to show -- and this is specific to Charge I and Charge II,

1 that the accused committed perfidious acts in the course of --
2 in the context of and associated with hostilities. There are
3 a number of elements we have to prove at the trial for perfidy
4 and for murder.
5 If the government does that, if the members find that
6 we meet each of those elements beyond a reasonable doubt, then
7 and only then do we move to a sentencing phase. And in that
8 sentencing phase, this is one of the aggravating factors that
9 we did put them on notice of, that beyond a reasonable doubt
10 we would have to show that if you have two different people
11 and one is -- and they both commit the same acts, the
12 underlying offense of perfidy and murder, that if you find,
13 Members, beyond a reasonable doubt, that they did it with the
14 intent to terrorize or intimidate the civilian population,
15 then that person would be more deserving of the death penalty
16 than otherwise.
17 And that needs to be said at the outset, because some
18 of their objections, especially in their underlying motion of
19 we don't understand, we'd be confused, we need to see it in
20 the context of where we'd be at that place in trial.
21 So we have a place in the trial where we've already
22 proven that hostilities took place. So you know there are
23 objections to hostilities. Well, would there be hostilities

1 at that time? Well, this bill of particulars wouldn't even
2 come into play, Your Honor, if we didn't prove that element of
3 the underlying offense. We must show that at the time of this
4 offense it happened in the context of and associated with
5 hostilities. Only after doing that do we get to, if under
6 Charge I and Charge II the specific aggravating factor.
7 Defense can continue to aver that they're confused,
8 that they don't understand it, and we would submit to Your
9 Honor what we're required to do in a bill of particulars --
10 what is the point of a bill of particulars? Is it to get the
11 defense to point where they look at Your Honor and say, okay,
12 I think I get it now, I have no confusion whatsoever? Is that
13 what the courts look for? Is it to say, what is the point of
14 a bill of particulars and then look at case law to say well,
15 what do they require of the government in putting forth the
16 bill of particulars?
17 And I would submit two things to Your Honor,
18 primarily the 2001 SDNY case, U.S. v. Tripp. And it says the
19 proper test of a bill of particulars is whether it is
20 necessary for the defense, not whether it would aid the
21 defense in their preparation. So even they're saying, even
22 if, arguably, you could say that pinpointing even more with a
23 more exactness would aid the defense, it's whether it's

1 necessary.
2 To our rules, Your Honor, I would submit that R.M.C.
3 906(b)(6) gives us our marching orders for the bill of
4 particulars. It's to inform the accused of the nature of the
5 charges with sufficient precision to enable the accused to
6 prepare for trial and to avoid the minimize -- to avoid or
7 minimize the danger of surprise at the time of trial.
8 So what Mr. Kammen is saying is that with the bill of
9 particulars, with the narrowing that the government did on its
10 own, that this is a nonmilitary legal resident of the
11 United States of America or its coalition partners, using
12 language that's specific to the statute itself. Mr. Kammen is
13 making the argument that at a sentencing phase they're going
14 to be surprised if the government comes up and presents
15 evidence that it involves our coalition partners or involves
16 the United States of America? That position is nonsensical.
17 They have in front of them a sufficient bill of
18 particulars to put them on notice and that would minimize the
19 danger of surprise at the time of trial. And I don't even
20 think that a defense counsel can get up here and say that
21 because we have not attached the phonebook for the coalition
22 partners and every single name of every single person that
23 they're not on sufficient notice.

1 This is terrorism, Your Honor. That is what the
2 aggravating factor is getting at. It is -- in and of itself
3 the tactic has an intended audience that is wide and far
4 reaching. It has a design in its tactic to have psychological
5 repercussions that are beyond, Your Honor, the immediate
6 target. It's not just about the attack of one target, it's
7 about something else. And that's why in a potential
8 sentencing case, that a person that would have that intent,
9 beyond just the underlying target, would be more deserving if
10 the government was able to show it beyond a reasonable doubt,
11 more deserving of the death penalty.
12 Subject to Your Honor's questions, the government's
13 position is that this bill of particulars is more than
14 sufficient.
15 MJ [Col SPATH]: All right. Thank you very much.
16 ATC [LT MORRIS]: Thank you.
17 MJ [Col SPATH]: Mr. Kammen, any additional comments?
18 LDC [MR. KAMMEN]: Very briefly. I'll say it again, what
19 coalition? You know, it's the easiest thing in the world.
20 It's just talk.
21 I asked the government to come up here and identify
22 what are the countries in the coalition, and what we got was
23 nothing. I was hoping you would ask him what are the

1 countries in the coalition so that he would have to answer.
2 But this is significant, because if the countries in
3 the -- let's assume -- let's just play let's pretend. Let's
4 assume that the evidence is that the goal of the attack on the
5 COLE had nothing to do with the United States, but had a lot
6 to do with Yemen and influencing the government of Yemen. If
7 Yemen's not a coalition partner, then that aggravator doesn't
8 exist.
9 If we're really going to focus on what was the effect
10 of the COLE on the United States globally as opposed to the
11 individuals who were clearly affected, then we have to look at
12 how much publicity was there? How was it regarded in the
13 United States? That makes the -- for example, the notion that
14 this was a peacetime attack extraordinarily more compelling
15 and opens up a range of evidence that might not otherwise be
16 available.
17 Again, if we know who the coalition partners are,
18 then we have some idea of what evidence the government has to
19 marshall, but they need to do it now. Because the whole point
20 of vague pleading -- and it's true -- it's especially true in
21 the death penalty context, is you can't allow the government
22 to simply wait till the trial and then they present something
23 and say, ah, you see we've proved it.

1 Because if we prove, for example, that one of the
2 reasons for the COLE attack -- I mean, let's play let's
3 pretend. Let's pretend that the government of Yemen or
4 certain factions in the government of Yemen were complicit in
5 the COLE attack, and so that the goal of the COLE attack was
6 not so much about sending a message to the United States or
7 some mythical coalition, it was rather to disrupt things in
8 the country of Yemen, well then the government comes in and
9 says oops, gosh, Yemen is part of the coalition, they can pick
10 and choose, and that's why we need to know now.
11 Now, you know, if they know who this mythical
12 coalition is, let them tell us. If there isn't one, let them
13 own it. But what we can't have is, you know, some vague
14 nonsense. I understand it tracks the statute, but the statute
15 applies to circumstances by and large that existed after 2001,
16 not in 2000. So that's why this bill of particulars and this
17 aggravator should be struck. And frankly, Your Honor, the
18 government's failure to come up here and identify who the
19 coalition is demonstrates that. Thank you.
20 MJ [Col SPATH]: Thank you.
21 Any final comments, Trial Counsel?
22 ATC [LT MORRIS]: No, Your Honor.
23 MJ [Col SPATH]: I think we can take 324, 325, and 326 and

1 then we'll stop, kind of pressing through the order until
2 tomorrow, except for the 505 hearing.
3 So Commander Mizer?
4 DDC [CDR MIZER]: Thank you, Judge, and good afternoon.
5 I provided four documents that I'd like to use -- or
6 provided the Bates numbers. These are documents that were
7 turned over to the defense in discovery, and I identified
8 those yesterday for the prosecution. And I'd like to use them
9 during this presentation and have them marked as the next
10 appellate exhibit in order with respect to 324, and then I'll
11 provide them to the court reporter after the end of the
12 presentation.
13 Judge, you know, quarreling about preadmission is not
14 something that I would do in a usual case, but I do want to
15 disabuse the court of the notion that these three motions are
16 similar to 207. 207 deals with the COLE, hallowed ground,
17 sovereign U.S. territory.
18 The three locations that are at issue in these
19 motions are sovereign Yemeni territory. And as Mr. Kammen
20 began our afternoon session, there was significant involvement
21 with the Yemeni authorities in this investigation. Indeed
22 most, if not all, of this evidence was gathered by the
23 Yemenis, not the FBI, and ultimately they're going to have FBI

1 agents come in and attempt to lay a foundation. I have no
2 idea how they're going to do that in any traditional legal
3 sense, but I think actually looking at the documents will give
4 you some idea of this.
5 And for the record, once this becomes an appellate
6 exhibit, I'm going to display the Bates number 38586, and,
7 Judge, if I could publish this to Your Honor and then to the
8 gallery.
9 MJ [Col SPATH]: I don't know if I can publish it to the
10 gallery. You can publish it to me.
11 DDC [CDR MIZER]: Very well, sir.
12 MJ [Col SPATH]: And I want you to do that. I want to
13 look at it. Let me just ask a couple questions ----
14 DDC [CDR MIZER]: Yes, Judge.
15 MJ [Col SPATH]: ---- so we're on the same page.
16 DDC [CDR MIZER]: And I can reduce it if you can identify
17 what the concern is, Judge.
18 MJ [Col SPATH]: Hang on. I've got lots of information.
19 Is it being published to the gallery or no? So it's not, it's
20 just you, just me. All right.
21 I just want to make sure where we're going with these
22 three motions. I know the trial counsel, the government, has
23 asked to preadmit a series of evidence from different sites in

1 Yemen.
2 DDC [CDR MIZER]: Right, Judge.
3 MJ [Col SPATH]: So far I've got it, I think.
4 Then the first part of your relief requested, that I
5 won't admit anything without the necessary and appropriate
6 foundation, I assure you that is accurate ----
7 DDC [CDR MIZER]: Yes, Judge.
8 MJ [Col SPATH]: ---- period. That I get, so, I mean,
9 we're focused on the second. My take is you want this to
10 occur in front of the members.
11 DDC [CDR MIZER]: That's exactly right, Judge. And
12 frankly, when the government is saying we need to save
13 resources and time by doing this, they're not saving any
14 resources or time because these four documents that I'd like
15 to at least show you, they're going to have to all be played
16 out.
17 And I, frankly, have never seen a situation where you
18 preadmit something even if it's possible. And I frankly,
19 again, don't know how it's possible when you consider these
20 documents. But then bring an FBI agent in, I presume just for
21 cross-examination on some of these very documents.
22 There is the 166 piece of this, too, in that we don't
23 know exactly who all is involved in these, and that's really,

1 I think, part of the frustrating aspect of this, is we're
2 putting the cart way before the horse. I mean, this isn't and
3 shouldn't be an FBI whitewash of what actually took place in
4 Yemeni, and that's what -- I mean, that's what it appears is
5 going to take place, or at least the government would like to
6 have take place.
7 MJ [Col SPATH]: I want you to go through these.
8 DDC [CDR MIZER]: Yes, Judge.
9 MJ [Col SPATH]: You were not here at one of the sessions
10 we had a conversation about preadmission while I've been on
11 the case. For some reason I thought it was 207, maybe there
12 was one after 207. But we had a discussion about
13 preadmission, and I'm confident it was Mr. Kammen on one side
14 and I think it was Mr. Sher or Colonel Moscati on the other,
15 maybe not. Maybe it was one of the lieutenants, sorry.
16 But we had a discussion about preadmission, I
17 remember, and it was the same thing, which is I only had
18 notice. And that's what I meant earlier when I said I hadn't
19 had notice of these three. At that point I had notice of
20 whatever it was, say 207, and it's not unusual to do
21 preadmission, and it's not unusual sometimes for that then to
22 be relitigated in front of the members.
23 DDC [CDR MIZER]: Yes, Judge.

1 MJ [Col SPATH]: What I want to talk to the government
2 about, probably a forewarning for the government, is just why
3 do this twice? Because it will be done twice based on what
4 the defense counsel is sharing with us, which I usually do
5 preadmission sessions when there's either no dispute, and a
6 side gets something, because we offer, you know, my glasses,
7 and the defense counsel says, No objection, it is Prosecution
8 Exhibit 1 or Commission Exhibit 1 or Defense Exhibit A.
9 DDC [CDR MIZER]: Yes, Judge.
10 MJ [Col SPATH]: And that doesn't sound like it's what's
11 going to happen with these three events, and I want to make
12 sure I understand the relief is you want this to play out
13 ultimately in front of the members so that you can impeach.
14 DDC [CDR MIZER]: Absolutely, Judge.
15 MJ [Col SPATH]: Now go through your documents, and I will
16 watch them as we go.
17 DDC [CDR MIZER]: Have you had time with the highlighted
18 paragraph there?
19 MJ [Col SPATH]: Yes.
20 DDC [CDR MIZER]: All right. There are three sections on
21 this document that I'd like to invite Your Honor's attention
22 to.
23 MJ [Col SPATH]: Okay. Okay.

1 DDC [CDR MIZER]: It's the first document and then ----
2 MJ [Col SPATH]: Would you put the first paragraph up for
3 just a moment?
4 DDC [CDR MIZER]: Aye, sir.
5 MJ [Col SPATH]: Okay.
6 DDC [CDR MIZER]: This is the next document, and for the
7 record it's Bates -- begins with Bates 52097.
8 MJ [Col SPATH]: Okay.
9 DDC [CDR MIZER]: Third document, Bates number 38578, and
10 this is more geared to the 166 issues, Judge.
11 ATC [Maj McMILLAN]: Your Honor, the government
12 respectfully requests a copy of what counsel is providing. We
13 were provided Bates numbers earlier this morning but I'm not
14 sure exactly what he's referring to, specifically, so I'd like
15 to be able to see that.
16 MJ [Col SPATH]: See the highlights, absolutely.
17 Actually, if you want to come up and see on the screen while
18 he's displaying them just so we can -- you can publish it to
19 them, just to them, all right. We're going to publish it to
20 you.
21 DDC [CDR MIZER]: Sorry, Judge, I thought that was
22 happening.
23 MJ [Col SPATH]: All right. We're going to publish it to

1 you on your screen.
2 DDC [CDR MIZER]: Sir, my colleagues across the aisle are
3 asking to go back.
4 MJ [Col SPATH]: I don't mind at all. I'll take the time
5 to look at them.
6 DDC [CDR MIZER]: So, again, displaying Bates
7 number 38586, first paragraph.
8 MJ [Col SPATH]: Yep. All right. Next.
9 DDC [CDR MIZER]: Second highlighted paragraph, for the
10 record.
11 MJ [Col SPATH]: And this is all for -- you're going to
12 mark in the next appellate exhibit in 324, correct?
13 DDC [CDR MIZER]: Yes, Judge, and give them to the court
14 reporter as soon as we're done.
15 MJ [Col SPATH]: All right. Next.
16 DDC [CDR MIZER]: Third paragraph on that same document.
17 **[Pause.]**
18 DDC [CDR MIZER]: I'll move on to the next one then,
19 Judge.
20 MJ [Col SPATH]: Thank you.
21 DDC [CDR MIZER]: And then the third that I have
22 displayed, which again we believe is sort of interwoven with
23 the 166 identities issue.

1 MJ [Col SPATH]: Bates number for this one, do you have?
2 DDC [CDR MIZER]: My apologies, Judge. It's 38578.
3 MJ [Col SPATH]: Thank you.
4 DDC [CDR MIZER]: And then the final are handwritten
5 notes. The document begins with 34775. Again, that relates
6 to 166 as well as this series of motions, Judge.
7 MJ [Col SPATH]: I understand.
8 DDC [CDR MIZER]: I mean, ultimately it's difficult for me
9 to imagine -- and I certainly don't have Mr. Kammen's or
10 Colonel Moscati's lengthy experience -- but a situation where
11 you have a second police department beat the officers that
12 they want to introduce to the crime scene, and have this much
13 involvement at a crime scene, and that the defense isn't
14 entitled to either identify or ultimately litigate that issue
15 before the members. And that's -- that's, I think, the point
16 in a nutshell, Judge.
17 If you look at AE 325 at page 18, the prosecution
18 cites the Lane case for the principle that only where the
19 accused provides evidence of tampering by the government
20 agent, employee, or official, must the government establish
21 acceptable precautions taken to maintain the evidence in its
22 original state. Again, I'm uncertain as to how they're going
23 to do that pretrial, but we certainly would require, should

1 the -- or would request, excuse me, Judge, that the defense,
2 if we're going to go through this, what we would submit is a
3 waste of this court's time and resources, then exactly outline
4 how it's going to be done again in front of the members.
5 Thanks, Judge.
6 MJ [Col SPATH]: All right. Thank you. All right.
7 Trial Counsel?
8 ATC [Maj McMILLAN]: Your Honor, I'll get to the point,
9 and that was your question that you asked before: Why go
10 through this twice, potentially? You know, we're seeking to
11 offer these numerous pieces of evidence, dozens and dozens of
12 witnesses that may be called to testify. The government's
13 going to have to lay a foundation, a chain of custody. The
14 government's going to have to authenticate each piece of
15 evidence. The government will be required to provide the
16 relevance for each item of evidence.
17 But to get to your point, why do it twice? And we
18 had mentioned this briefly in our filings at 324, 325, and
19 326. The determination for preadmissibility of evidence
20 protects the integrity of the proceedings. Members are
21 exposed only to admissible evidence. The defense benefits by
22 knowing in advance what evidence it must meet. Those are the
23 two big responses.

1 But a major response, you know, something that you
2 should take into consideration is if we were at trial and we
3 were going through the extensive, you know, chain of custody,
4 the extensive testimony that would be offered to show the
5 chain of custody, the authenticity of the evidence, to
6 authenticate that piece of evidence, to show the relevance of
7 that piece of evidence and to go through all of that testimony
8 could take days.
9 Some evidence, some items may only take a few hours.
10 Some items could take days, could take up lengthy proceedings,
11 and then ultimately at trial you could rule that that evidence
12 is not admissible. And then so in front of the members we
13 have gone through that entire process and they have now heard
14 testimony for potentially days, and ultimately you have
15 determined that that item of evidence is not admissible, and
16 you would then have to give an instruction to the members. So
17 that is a big concern for the government.
18 But also in that particular situation when you
19 determine that an item of evidence is not admissible, does not
20 meet that standard that is required under the law, well, then
21 the government could, because an item of evidence -- evidence
22 has been denied or the admissibility -- the government could
23 seek an interlocutory appeal on that, and we would be in a

1 position where we'd have to consider that, and that could
2 cause further delay to the proceedings. So for those
3 reasons -- for those reasons that would benefit the interests
4 of judicial economy in order to hold these pretrial hearings
5 on the admissibility of evidence. It's the same reason that
6 we offered in AE 207 and what we're trying to do with
7 admitting evidence.
8 The defense counsel brought up questions and offered
9 a couple of, you know, documents that they show may go to the
10 weight of the evidence, not necessarily the admissibility.
11 And you would determine the admissibility and the defense
12 would have that opportunity to present that evidence at trial
13 that could go to the weight. The defense is going to have an
14 opportunity to cross-examine witnesses. The defense is going
15 to have an opportunity to present evidence in its own right to
16 challenge the admissibility of evidence at the -- at these
17 pretrial hearings. So that goes to your ----
18 MJ [Col SPATH]: In front of the members, do we agree that
19 they can attack chain of custody, authenticity, where the item
20 came from, contamination of the item? I mean, anything that
21 goes to the weight the members should give it?
22 ATC [Maj McMILLAN]: Absolutely, Your Honor. Those are
23 areas where, even though you already ruled as the commission

1 that this item is admissible, the defense can challenge that
2 item of evidence, and it will go to the weight and how much
3 weight they will accord it.
4 MJ [Col SPATH]: So I just want to be clear that all of
5 the witnesses you call to go through this process, if the
6 trial counsel -- or if the defense counsel feels that they can
7 demonstrate that the evidence is unreliable, at least for
8 their theory of the case and their argument, they're going to
9 be able to call those witnesses and cross-examine them one by
10 one in front of the members?
11 ATC [Maj McMILLAN]: And, Your Honor, what we're asking
12 for is a chance to, you know, present this evidence pretrial,
13 outside the presence of the members.
14 MJ [Col SPATH]: Let's take, for example, the photographs
15 related to the truck. We've got a building opposite the
16 shoreline with a woodpile. This is just an example. I don't
17 think this is one they'll attack.
18 But if the defense is going to suggest, in their make
19 believe -- I think it was you said earlier pretend or whatever
20 the terminology was, let's pretend that some foreign
21 government faked that photo and they've got a lot of witnesses
22 in cross-examination about that, even if ultimately I say in
23 our session I'll let the photo in, we have enough evidence

1 that it is what it purports to be, I understand what it is,
2 and it's authentic, I do have to allow the defense to attack
3 all of that again in front of the members. We agree with
4 that?
5 ATC [Maj McMILLAN]: Yes, Your Honor.
6 MJ [Col SPATH]: Okay.
7 ATC [Maj McMILLAN]: I mean, any evidence that they're
8 going to present has to meet the same standards as far as
9 probative value.
10 MJ [Col SPATH]: They're going to attack your evidence.
11 They're going to do that in front of the members, even if I
12 rule it's admissible. We agree on that?
13 ATC [Maj McMILLAN]: Yes, Your Honor.
14 MJ [Col SPATH]: All right. I want to make sure, I think
15 that's what the defense is suggesting, they plan to attack a
16 significant amount of the evidence, so we're going to end up
17 doing it twice.
18 ATC [Maj McMILLAN]: Yes, Your Honor. And this commission
19 made that decision with AE 207, and we asked for that same
20 opportunity here with 324, 325, and 326. I will limit further
21 argument, it's all -- our supported case law is in the brief,
22 and with that, pending any other questions, Your Honor ----
23 MJ [Col SPATH]: No, I understand. Thank you.

1 ATC [Maj McMILLAN]: ---- that's all I have.
2 DDC [CDR MIZER]: Judge, just so I'm clear, I mean, the
3 reason that we couldn't display the documents is -- is it PII
4 that's on the documents?
5 MJ [Col SPATH]: The rules, as you know, for display back
6 to the members -- or to the audience, is the CSO has to have
7 the information for 24 hours.
8 DDC [CDR MIZER]: All right, sir. I apologize.
9 MJ [Col SPATH]: No, that's all right. It's the rules of
10 the court and ----
11 DDC [CDR MIZER]: So, Judge, just so we're clear, somewhat
12 along the same lines as Mr. Kammen before, I think that the
13 ruling has to say that we're going to get all effective
14 witnesses back here and that they're going to testify
15 consistent with how they testified in person, if they were
16 here in person before, VTC, if they were here VTC before.
17 And this is a significant chunk of the evidence,
18 Judge, that was tampered with by the Yemenis. I don't think
19 the government would be able to establish even admissibility
20 in a court-martial or a federal district court which may
21 ultimately be why we're at this forum, frankly after you look
22 at some of the discovery and the state of the evidence in the
23 case. And as long as we have ----

1 MJ [Col SPATH]: The one part of their argument, at least
2 for the preadmission -- we didn't have this with 207. The one
3 part of their argument that makes some sense is if I were to
4 exclude important pieces of it, they do have the ability to
5 have an appeal. And there is something to be said for doing
6 those appeals -- appeals before the members.
7 DDC [CDR MIZER]: Yes, Judge, but I just don't know if
8 that's a factor on whether you preadmit evidence. I don't
9 know that there's a case that would say that. Again, we are
10 in many respects building the train tracks as the train goes
11 down the tracks.
12 But here certainly you would have the ability to
13 instruct members, and you're certainly aware of hundreds of
14 appellate cases that have not been reversed on appeal because
15 a judge gave a proper limiting instruction. We have and will
16 hopefully have something that would resemble the blue ribbon
17 panel sitting in this box.
18 MJ [Col SPATH]: And you appear to be waiving at least
19 that part of your complaints ----
20 DDC [CDR MIZER]: Yes, Judge.
21 MJ [Col SPATH]: ---- by the way you want to go -- I mean,
22 by the discussion we're having, which is we'd rather do it in
23 front of the members.

1 DDC [CDR MIZER]: We want to do it once and in front of
2 members, and we'll make that determination. I don't think
3 that there's anything in there that would be prejudicial. I
4 think the most important thing, if -- that the members saw
5 should be excluded. I want to be precise that's what I'm
6 saying here. But we do want to be able to have the discussion
7 of what actually happened with the evidence before the FBI
8 comes in and tries to sell the story that they're going to
9 sell, and we shouldn't be pressing ahead at flank without
10 having kind of this foundational evidence, Judge.
11 MJ [Col SPATH]: Trial Counsel, any final comments?
12 CP [BG MARTINS]: Your Honor, counsel asked for some
13 authority. I was pulling up the case for cocounsel. Do you
14 mind if I go ahead and just cite it?
15 MJ [Col SPATH]: No, not at all.
16 CP [BG MARTINS]: It's United States v. Barletta 644 F.2d
17 50 at point cite 58, that's a First Circuit 1981 case, and
18 that's approvingly cited in United States v. Yakou, which is a
19 2005 D.C. Circuit case, and I can pull up the point cite and
20 get that to you.
21 MJ [Col SPATH]: I can find it.
22 CP [BG MARTINS]: That stands for the proposition that the
23 government's basis for seeking preadmission does -- can and

1 does rely upon its obligation to appeal if appropriate for the
2 interest of justice a denial of a piece of evidence.
3 MJ [Col SPATH]: All right. And for both sides, I think
4 you've picked up on this. I'm not worked up about one
5 counsel, one cause, without members here; a little more
6 nervous when we have court members and a little more
7 particular about it. But, truly, so long as we don't talk
8 over one another, it is far more important I get this stuff
9 right than we worry about who's talking. We just can't talk
10 over each other, so I don't mind at all.
11 Trial Counsel?
12 ATC [Maj McMILLAN]: Your Honor, I'd just conclude with
13 what we're asking for is to preadmit this evidence for the
14 government's case in chief. We understand that there may seem
15 to be some inefficiencies in the process, but we believe
16 ultimately in the end that it will reach a just and
17 appropriate result, and it will ultimately be an efficient
18 process or a more efficient process.
19 And number two, you know, what the defense chooses to
20 do with their case as far as rebutting or confronting the
21 government's evidence, that should not affect how the
22 government proceeds in its case in chief. Obviously that
23 could factor in with how we approach our case in chief, but

1 still nonetheless the defense will have that opportunity to
2 confront the evidence, present its evidence and ultimately
3 that will not change. Thank you, Your Honor.
4 MJ [Col SPATH]: The only -- I mean, there certainly has
5 been some indication -- hopefully it's been cleaned up based
6 on this morning -- of a desire of some people to see this case
7 move at a faster rate of speed than a slower rate of speed.
8 And the preadmission sessions are likely going to take some
9 time, and it's going to put trial further and further down the
10 road. I mean, that -- I think we all have to be cognizant of
11 that. These are going to take time, and it seems -- it just
12 pushes the trial piece of this down the road, if we're going
13 to end up doing it twice.
14 ATC [Maj McMILLAN]: Understood, Your Honor, and what
15 we're just asking for is the opportunity to have that process
16 put into place, Your Honor. Thank you.
17 I just have been handed the cite, Your Honor,
18 for ----
19 MJ [Col SPATH]: The Yakou case?
20 ATC [Maj McMILLAN]: Yes, sir, 428 F.3d, 241, 246 ----
21 MJ [Col SPATH]: Thank you.
22 ATC [Maj McMILLAN]: ---- D.C. Circuit 2005.
23 MJ [Col SPATH]: Commander Mizer?

1 DDC [CDR MIZER]: Judge, if I can just add one final
2 thought on this. I want to make sure when you're ruling on
3 this that we're clear. We had a situation last week where we
4 were calling witnesses that we felt were clearly adverse
5 witnesses, that if they're not going to be required to lay the
6 foundation in front of the members, that when we call them for
7 our case, that it's cross-ex, Judge. That's going to be our
8 concern, that we be allowed to treat that as hostile witnesses
9 and ask the leading questions.
10 MJ [Col SPATH]: I understand. I'll make sure I deal with
11 that in any ruling on this.
12 DDC [CDR MIZER]: Aye, sir.
13 MJ [Col SPATH]: All right. That's a good place for
14 today. I know we've got a couple 505 hearings we need to hold
15 this afternoon. My hope would be to have those so that then
16 we can figure out if we're going to have the 806 hearing and
17 try to do that tomorrow at the end of the day as well, so that
18 we do both of our closed sessions at the end.
19 And so for the public, the plan will be to start
20 tomorrow at 0900, our normal start time. We'll start at 0900,
21 and we'll pick up with the docketing order. When we recess
22 here in a moment I'll give everyone time to get the courtroom
23 set up so we can do our 505 hearings.

1 So let me check with the government. Anything else
2 for today's open sessio, Trial Counsel?
3 DCP [COL MOSCATI]: No, Your Honor.
4 MJ [Col SPATH]: Defense Counsel?
5 LDC [MR. KAMMEN]: No, sir.
6 MJ [Col SPATH]: All right. Then when the courtroom's
7 ready we'll start. It typically takes about a half hour, so
8 I'd count on a little bit of a recess, and we'll begin with
9 the 505 hearing. Thank you. I'll see you all in a little
10 while. I'll see everyone else tomorrow. Commission is in
11 recess.
12 **[The R.M.C. 803 session recessed at 1525, 2 March 2015.]**
13 **[END OF PAGE]**
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