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1 [The R.M.C. 803 session was called to order at 1304,
2 8 September 2016.]

3 MJ [Col SPATH]: This commission is called to order. All
4 of the parties who were present for this morning's session are
5 again present. Mr. Nashiri is not here. Mr. al Nashiri is
6 not here. I take it that -- did he communicate with you in
7 any way?

8 LDC [MR. KAMMEN]: Yes. We were told that he is not
9 coming.

10 MJ [Col SPATH]: All right. Let me check with the Trial
11 Counsel as well.

12 TC [MR. MILLER]: That is correct, Your Honor. I think
13 General Baker was also here this morning but I don't think
14 he's here this afternoon.

15 MJ [Col SPATH]: He's not a party of record for this
16 proceeding and I haven't accounted for him and I don't plan to
17 unless he makes an appearance for this particular case. Thank
18 you, though.

19 And you -- Lieutenant Cantil, were you going to say
20 something different? No. Cantil.

21 ATC [LT CANTIL]: Cantil, sir.

22 MJ [Col SPATH]: Cantil. I've said it right most of the
23 time.

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1 ATC [LT CANTIL]: Just one additional housekeeping matter.
2 I wanted to provide the court with an update on the security
3 clearance issues. If I may approach.

4 MJ [Col SPATH]: You may.

5 ATC [LT CANTIL]: Your Honor, the update is this, and I
6 think it may already be reflected in the record, but I just
7 want to make it abundantly clear, that on 6 September, the day
8 before the proceedings here started, the DoD favorably
9 adjudicated the TS/SCI eligibility for Ms. Eliades and they
10 are prepped to indoctrinate her into the relevant additional
11 programs. And as of yesterday, 7 September, OPM -- the update
12 is that OPM completed the SSCI background information for
13 Ms. Spears on 30 August of 2016 and that her TS/SCI clearance
14 is currently being adjudicated. So ----

15 MJ [Col SPATH]: All right, thank you.

16 ATC [LT CANTIL]: Thank you, Your Honor.

17 DDC [LCDR POLLIO]: Sir, just to be clear, that does not
18 impact or address the additional delay that will result and is
19 required for the SAP access and additional controlled program
20 measures for this particular case, and also does not impact
21 the underlying issues with request to the continuance
22 abatement.

23 MJ [Col SPATH]: I understand.

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1 Let's turn to 332AA. That is just a -- not just, but
2 it is a discovery motion as opposed to getting to the merits
3 of the unlawful influence filings. Let me just ask, as I look
4 at it, part of it is contingent on -- I'm reading 332AA and
5 I'm down in paragraph W. It indicates that the government,
6 for many of the requests, either has or is going to request
7 the information sought and then turn over discoverable
8 information if there is any.

9 And so part of it, of course, part of the discussion
10 just needs to be, is there more discovery forthcoming for 332
11 based on that?

12 ATC [LT MORRIS]: [Pointed to the podium.]

13 MJ [Col SPATH]: You may, please.

14 ATC [LT MORRIS]: Provide a quick background, Your
15 Honor -- good afternoon -- on the production of evidence for
16 332. In May when defense made their renewed allegation of
17 unlawful influence on 8 May, on 7 May they provided the
18 government a discovery request. And towards the end of that
19 month the government responded giving them an indication that
20 information, if in existence, would be provided to them.

21 The coordination that took place, you know, as you
22 know from reading the pleadings, was across multiple
23 organizations: It was the Office of the Convening Authority,

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1 it was OJAG Code 62, it involved multiple people. And as
2 information came in, we provided that to the defense. To your
3 question, Your Honor, in our 22 May response to the
4 allegations, the government took those allegations seriously
5 and investigated the claims fully. And in that attachment,
6 with over 117 pages to that motion, we attempted to provide
7 Your Honor and as well the defense more of a basis of, you
8 know, rather than just the sole source of the allegation being
9 yesterday's witness, Lieutenant Commander Gill, more of a
10 basis or an understanding of what was going on.

11 After we provided that on June 24th, Your Honor, in
12 Production 124, we provided the defense with an additional 205
13 pages. And then Production 126 was the final production on 24
14 August, and that was an additional 103 pages.

15 That addresses -- in their 7 May request, they had 19
16 specific items. We did indicate to them that we would be
17 broadly fencing off a few areas. And I will just share with
18 Your Honor, the government's concern was to obtain ex parte
19 information. And, you know, so we went about -- and that was
20 our initial concern.

21 MJ [Col SPATH]: You didn't want to give defense ex parte
22 submissions or information.

23 ATC [LT MORRIS]: That's right. So we communicated that

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1 to the convening authority, or not -- asked them not to send
2 us ex parte stuff or to find another way around it.

3 In addition, there was a notebook that the defense
4 had requested a notebook of one Captain Matt Rich and, you
5 know, the government is prepared to respond to that directly
6 as -- but those are ----

7 MJ [Col SPATH]: And you're not -- at least right now,
8 your plan was not to turn over the notebook.

9 ATC [LT MORRIS]: But without -- but what the government
10 did do was fully investigate whether there was anything to
11 turn over in that. And again, the concern there, the fencing
12 that the government was concerned with, was whether there was
13 ex parte material in that. I mean, this is a notebook that
14 was part of meetings that involved all convening authority
15 cases. And so what we, you know -- and we went about, and we
16 can get into the details of it, but specific ways of due
17 diligence and discharging our discovery obligations with that.

18 So to answer your question of the 19 categories, over
19 400 pages has been turned over. The government takes
20 seriously those obligations to discharge its duties. And
21 while most discovery is rooted, Your Honor, as, you know,
22 we've discussed in rules and cases and authority in this case,
23 the threshold for turning it over -- you know, for example,

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1 the June production, we just got it, we reviewed it, and then
2 turned it over in its entirety because really of the unique
3 nature of this type of allegation.

4 Subject to any more of your questions, Your Honor.

5 MJ [Col SPATH]: No, I think -- so I'm clear, and I think
6 it was a green notebook not turned over yet, don't believe
7 anything discoverable in it, and then it discusses other
8 cases. Understand. At least at this point, all known -- I
9 realize discovery is ongoing obligations and the like, but at
10 this point, all known information that the government believes
11 is discoverable related to this issue has been turned over to
12 the defense?

13 ATC [LT MORRIS]: Yes, Your Honor.

14 MJ [Col SPATH]: All right. That helps for right now. At
15 least it helps frame the discussion for this particular
16 exhibit, so thank you very much.

17 Obviously now just focusing in on 332AA.

18 DDC [LCDR POLLIO]: Yes, sir.

19 MJ [Col SPATH]: What additional discoverable information
20 are you seeking and why do you think you're entitled to it?

21 DDC [LCDR POLLIO]: Well, this is where it gets a little
22 tricky, sir.

23 In our request, we asked for e-mail traffic, reports,

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1 you know, Alpha through Sierra, and the government's initial
2 response was we're working on it, we'll get it to you.

3 They did provide, as Lieutenant Morris mentioned, two
4 subsequent discovery packages. It is unclear, though, if that
5 is, in fact, the entire universe of responsive discovery to
6 that. Lieutenant Morris today on the record said that was it,
7 but there hadn't been any writing saying this is it, this is
8 everything that -- these are all the e-mails, we haven't
9 withheld anything.

10 The other difficulty ----

11 MJ [Col SPATH]: He did indicate that there was some
12 fencing that went on and, Lieutenant Morris, I -- you've moved
13 to the front row and I keep looking for you one back.
14 Lieutenant Morris. Let me just ask you this: He did say
15 there was some fencing with regard to ensuring they didn't see
16 ex parte filings, which is a good thing to ensure.

17 Other than that, are you comfortable that you have
18 turned over everything that is responsive to the defense
19 request, except for what you've already told me you didn't
20 turn over, which is the notebook and then anything that was
21 kind of segregated out because it was ex parte?

22 ATC [LT MORRIS]: As I just stated, the government
23 discharged its discovery obligations. And in regards to the

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1 notebook, it wasn't that we just didn't turn it over. We had
2 asked that other individuals, specifically Captain Rich,
3 review it, and then we had gone about whether there would be
4 anything write to in that notebook through other interviews.
5 So the government, upon this allegation, went to the convening
6 authority's office and conducted a full investigation of this.
7 And so, you know, not just that we didn't turn over that
8 specific notebook, that we had a full investigation which
9 allowed us, with that specific item and the other items, to
10 fully discharge our discovery obligations.

11 MJ [Col SPATH]: All right. Thank you.

12 DDC [LCDR POLLI0]: And, Your Honor, while the defense
13 appreciates that, there are specific items requested that
14 either they -- the government has not received from a
15 different agency, perhaps they don't exist, but there's no way
16 for the defense to know that because there hasn't been a --
17 since the initial discovery request and government's reply
18 briefing, you know, the government just stated that the last
19 production was provided 24 August. There was never a
20 follow-up response to the discovery request.

21 And I'll just point out, for example, and this is --
22 I'm looking at, in Attachment B of the initial motion related
23 to the motion to compel discovery, which is AE 332AA,

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1 Attachment B, page 2, you know, line E, for example, the names
2 of the current legal advisors for the case and their current
3 office locations and rating and evaluation scheme. The
4 defense has not been provided with that information. And it
5 includes any person that has input to the legal advisor's
6 rating, evaluation system, regardless of whether or not that
7 person -- I mean, that is directly relevant to this case. The
8 defense has always maintained that from day one. That's just
9 one example of the line items.

10 So while I appreciate the defense is certainly
11 relieved to see some discovery and production come in, that
12 doesn't necessarily hit the mark on every specific line item.
13 And without going through every line item in that initial
14 request, I believe that, based on some of the testimony that
15 was elicited yesterday, the defense needs to revisit this
16 discovery request, because some of these items now have new
17 and additional relevance to them that we need to make clear of
18 why we need this information if it hasn't been provided.

19 So I would say at this time, Your Honor, we would say
20 that, rather than rule on this motion, we would ask for time
21 to supplement our request on the motion to compel additional
22 discovery, not only for the underlying initial request --
23 because some of these items have not been received, they

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1 remain relevant, and are now even more so relevant than
2 perhaps they were yesterday. So we just ask for the
3 opportunity to do that before this motion is ruled on.

4 MJ [Col SPATH]: That might well be a nice way to proceed
5 given that we're going to have some more discussion about 332
6 at some point in the future when we finish Mr. Gill's
7 testimony. So there has been an order in relation to 332
8 laying out a timeline to ensure we get the discovery done. We
9 get -- the discovery requests done, the response from the
10 government finalized and memorialized. I have said before I
11 do appreciate the efforts of the government to comply with
12 their discovery obligations, and as officers of the court,
13 when they tell me they do, I take that seriously. But I also
14 recognize some of the ground may change after a witness
15 testifies, so we can resolve this issue.

16 We all know allegations of unlawful influence and
17 dealing with unlawful influence is important. I know that's
18 why the government took the time they have to respond to and
19 look into this, and it's to prevent what is a danger to this
20 and the military system, particularly. So thank you.

21 We're going to come back to 332 to discuss kind of
22 our road forward. And before we move over to Appellate
23 Exhibit 351, I just wanted to say, regarding 332, based on the

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1 cross-examination of Mr. Gill, I'm going to go back and
2 reconsider my ruling in 332GG, and just go through those
3 witnesses. I may, in reconsidering, go back out to the
4 parties to request more detail as to why those witnesses are
5 or are not relevant. But it is -- in response to or based on
6 the cross-examination and some of the questions that were
7 asked of Mr. Gill has highlighted the need for me to re-look
8 at that ruling. And, again, you may see some traffic from the
9 judiciary to get some more detail regarding those witness, and
10 it's possible the government wants to call some of those
11 witnesses now that Mr. Gill has testified anyway.

12 So I just wanted you all to know that I'm going back
13 to look at 332GG. I think most of you had probably guessed
14 that, based on what happened.

15 And you will see that in an order of some sort. I
16 would recommend, Defense, if you want to refile your witness
17 request, here's the plan: Whether we get to it in October or
18 some date in between October and December, we'll talk
19 scheduling here in a moment -- towards the end. I shouldn't
20 say in a moment, that was inexact. I recommend that both
21 sides look at who they may believe are necessary witnesses for
22 that motion. Government, give the defense notice, of course,
23 of any witnesses you plan to call; and, Defense, you may want

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1 to refile your witness request listing what you expect their
2 testimony will be and how it relates to the unlawful influence
3 issue.

4 I will tell you this with regard to the unlawful
5 influence issue, and this is nowhere near a ruling, the
6 appearance of UI is significant, as should have been clear
7 from what happened in 332. We all know that. However, UI is
8 different than contemptible conduct or violation of a court
9 order. And I'm not saying that happened either, by the way;
10 not even close. I'm just saying there's different worlds out
11 there and I don't want the two to bleed over into each other.
12 There may be discussion of the contemptible conduct, I got
13 that, but ultimately we need to focus in on unlawful
14 influence, either actual, where somebody was unlawfully
15 influenced in the process, or the appearance of it, where
16 there is an appearance of an unlawful influence, as opposed to
17 the appearance of behavior that just should maybe not have
18 happened.

19 And so that's why you may want to re-look at your
20 witness list. And here -- I will give you an example, and we
21 probably can't discuss much of it now. My order, right, was
22 recommendations and decisions by the legal advisors in this
23 case and then there was a list of legal advisors. Separating

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1 out the convening authority right now, because the order with
2 regard to the convening authority was more directive. But
3 legal advisors, it was recommendations and decisions.

4 Currently I have this evidence before me that I have
5 yet to go search through and sort out its credibility. But if
6 at a meeting after I ruled that there would be an MRI where
7 Mr. Gill observed something which was basically Mr. Toole
8 going into an office where arguably there was going to be a
9 discussion, that does not lead to there was a recommendation
10 or a decision. I had already issued the order. It could well
11 lead to he went into a room, Mr. Toole, to discuss his
12 displeasure with my order and to share how unpleasant he
13 believed my ruling was. That's different than recommendations
14 and decisions.

15 And so it's a good lesson as I draft orders because I
16 need to be exceptionally clear, and I recognize that. Because
17 then there was the follow-on line about where legal advice
18 needed to come from. And we need to make absolutely clear, if
19 wasn't clear at the time, that it's clear as we move forward,
20 because it has led to some of this.

21 So inasmuch as any of that is my fault ultimately as
22 the signing authority and frankly the decision authority, as
23 the judge, I get that. But we need to get 332 focused in on

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1 unlawful influence, actual and the appearance of, and not a
2 widespread search of conduct that may or may not be well
3 thought out in an office. And I think everyone kind of
4 understands what I'm trying to say there. I hope you do,
5 but -- so that's where we are at right now.

6 Mr. Kammen.

7 LDC [MR. KAMMEN]: Again, just so I can understand the
8 rules, we appreciate that even if the government knows who the
9 witnesses are and they know what they're going to say, we --
10 you envision us having this hoop to jump through of ----

11 MJ [Col SPATH]: You don't.

12 LDC [MR. KAMMEN]: The rule does.

13 MJ [Col SPATH]: The government and the commission does.

14 LDC [MR. KAMMEN]: Your reading of the rule does.

15 MJ [Col SPATH]: I don't.

16 LDC [MR. KAMMEN]: In any event, our belief about what
17 witnesses will say is often at variance from their belief, and
18 all we can state is our belief based on the evidence we have
19 seen.

20 MJ [Col SPATH]: Yes.

21 LDC [MR. KAMMEN]: And if they say, well, no, the witness
22 isn't going to say that so then he's not relevant, then, you
23 know, I'm just trying to figure out the way forward here. I

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1 know we come to you, but I'm trying to figure out ----

2 MJ [Col SPATH]: It's really as simple as that. You tell
3 them why you believe the witness is relevant.

4 LDC [MR. KAMMEN]: Because they say so.

5 MJ [Col SPATH]: And you -- why you believe the witness is
6 relevant for your effort to demonstrate that there is some
7 evidence of UI.

8 LDC [MR. KAMMEN]: Okay.

9 MJ [Col SPATH]: If the government's response is as simple
10 as they're going to say something else, that's what witness
11 testimony is for.

12 LDC [MR. KAMMEN]: Okay.

13 MJ [Col SPATH]: Typically, right, to sort out --
14 witnesses always say something in between, frankly, what you
15 and you, you as a group, tell me what they're going to say.
16 Because when they get on the stand, they always vary slightly.
17 It's very difficult, you know, and you know, to tell me here's
18 what a witness is going to say when they testify.

19 But based on your investigation and the evidence that
20 you have and the e-mail traffic and all that, you can put
21 together a brief synopsis as required, not by me, but of our
22 rules, of their expected testimony. And we can then resolve
23 the issue. If they say no, you can come to me.

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1 LDC [MR. KAMMEN]: So if my brief synopsis was, for
2 example, that witness X is going to confess to unlawful
3 influence, attempting to assert unlawful influence, and the
4 government says no, he's not going to say any such thing, at
5 least that satisfies, in your mind, this obligation?

6 MJ [Col SPATH]: I certainly am not going to give you a
7 pre-ruling.

8 LDC [MR. KAMMEN]: No, no, I understand.

9 MJ [Col SPATH]: But I will say this: A hypothetical and
10 scenario like that, that would certainly cause me to look at
11 that witness testimony with some interest, because we're all
12 concerned with unlawful influence. And I mean, we all should
13 be, if we're not. And I know we are.

14 LDC [MR. KAMMEN]: Okay. Thank you.

15 MJ [Col SPATH]: Thank you, Mr. Kammen.

16 Government, if you have any comments on that, I'm
17 willing to ----

18 TC [MR. MILLER]: No. We'll try to work with defense
19 counsel.

20 MJ [Col SPATH]: Good. And so again, just let the defense
21 know what your plan is in relation to whenever we're going to
22 have the 332 hearing, who you're going to call, and it would
23 help if you would give an idea of realistically of who you

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1 think you might call.

2 Defense, you do have the burden in the UI, of course,
3 to raise some evidence. And it's always interesting to try to
4 sort out when you believe you've hit that mark. But let the
5 government know if there are witnesses you believe you need.
6 If the witness list has been pared down, fine; if it hasn't,
7 fine. Or even grown, fine. And we'll give some timelines for
8 that so we can move 332 forward to closure sooner than later.

9 Let's turn to 351. That's a defense motion to
10 dismiss Charge IV, Specification 2, an overt act in Charge V
11 and Charges VII through IX because of the Nabisco v. European
12 Community ruling.

13 Let me ask first, Mr. Kammen, do you have any
14 additional witnesses or evidence on this particular motion?

15 LDC [MR. KAMMEN]: No.

16 MJ [Col SPATH]: You may proceed with your argument. Or
17 let me just check with the government first.

18 Trial Counsel, do you anticipate any additional
19 witnesses or evidence for this motion?

20 TC [MR. MILLER]: We do not, Your Honor.

21 MJ [Col SPATH]: Thank you. You may proceed.

22 LDC [MR. KAMMEN]: Of course, the underlying issue is the
23 Limburg issues, which we all know too well involve a French

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1 ship carrying Iranian oil to Malaysia which was attacked in
2 Yemeni waters in which a Bulgarian was killed.

3 And in the previous litigation and certainly in the
4 pleadings, the government has not established any rational
5 connection to the United States of America. Now, they have
6 not indicated ----

7 MJ [Col SPATH]: That is the background, but that's not
8 the issue ----

9 LDC [MR. KAMMEN]: No, I ----

10 MJ [Col SPATH]: ---- now.

11 LDC [MR. KAMMEN]: Well, it is in part the issue because
12 this is extra -- it is to what extent the Military Commissions
13 Act applies extraterritorially. An extraterritorial
14 application, of course, is when there is no United States
15 interest involved. And so this is what is known as
16 extraterritorial cubed because it's everything that happened.
17 Nothing in this episode has anything to do with the United
18 States.

19 MJ [Col SPATH]: But let me just ask, because that -- I
20 dismissed in large part because, clearly, I agreed ultimately
21 with your argument on this.

22 LDC [MR. KAMMEN]: Right.

23 MJ [Col SPATH]: I know how you feel about the

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1 commission's review process and the court, but they clearly
2 disagreed with my ruling.

3 LDC [MR. KAMMEN]: No. They disagreed with your ruling
4 that the government was required to present evidence.

5 MJ [Col SPATH]: Correct.

6 LDC [MR. KAMMEN]: But their ruling was premised on --
7 under 950g ----

8 MJ [Col SPATH]: Yes.

9 LDC [MR. KAMMEN]: ---- under the hostilities element ----

10 MJ [Col SPATH]: Correct.

11 LDC [MR. KAMMEN]: ---- and had nothing to do with
12 extraterritoriality.

13 MJ [Col SPATH]: Correct. Okay.

14 LDC [MR. KAMMEN]: Okay.

15 MJ [Col SPATH]: I track with you so far on that. I just
16 want to make sure, one is -- and frankly, what they did was,
17 like the D.C. Circuit Court, they've kicked the ball down the
18 road as well. Although overturning me, they moved the ball
19 down the road in their ruling, as they can do, I guess.

20 So ----

21 LDC [MR. KAMMEN]: Well, absolutely. But they did not
22 deal with the extraterritorial impact of the statute.

23 MJ [Col SPATH]: Correct.

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1 LDC [MR. KAMMEN]: And essentially, they did not deal --
2 and while we don't think our motion raises jurisdictional
3 aspects at all, they did not deal with jurisdiction because
4 they just said it's -- you can't do -- you can't have this
5 factual thing at this point in time, the government doesn't
6 have to present it. It's an element, if you will, dealing
7 with hostilities.

8 And that's really important because that's what the
9 CMCR decided. And I don't know to what extent the government
10 still argues that somehow this is the same issue in different
11 clothing, but it is absolutely not the same issue.

12 Now, we start with the premise that there is a
13 presumption against extraterritorial application of United
14 States laws; and of course, the operating premise is that the
15 United States is not, cannot, and should not be the policeman
16 for the world. And additionally, we would argue that the
17 premise is that the military commissions, with all of its
18 issues, should not be the forum for the United States to be
19 the policeman for the world.

20 If the United States -- if the United States Congress
21 wanted the Chief Prosecutor to be the world's policeman, to be
22 able to prosecute Saudi Arabian citizens who may commit crimes
23 in Yemen against Yemenis, Congress would have said so as

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1 clearly as possible because of the huge international
2 implications of making this process in this location under
3 these circumstances the forum in which there was worldwide
4 authority to arrest and bring people here.

5 And that is hugely important. Because where the law
6 stands today, as a result of the D.C. Circuit and as a result
7 of the CMCR's combined decisions, is that once some poor soul
8 finds himself in Guantanamo, he can't litigate whether he's
9 properly here in front of some other independent or
10 nonmilitary organization for ten years or more, however long
11 it takes.

12 And so, you know, if in the future, you know, they
13 decide, okay, we're going to, you know, start bringing more
14 people back into this process, there is simply no barrier and
15 no way for them to attack it. And Congress would not have
16 wanted that massive delegation of power to somebody who's not
17 part of the Department of Justice, who's not an Article III
18 lifetime appointee, would not have wanted any of that without
19 the clearest, most direct say-so.

20 Now, as I said, there is this presumption against
21 extraterritoriality. And the government, under Morrison and
22 ARAMCO and -- bears the burden of demonstrating that the
23 presumption has been overcome. And a presumption must -- and

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1 so I hope it's clear, and I hope you're shaking your head yes
2 in agreement, because the presumption has to be overcome by
3 the proponent -- by the opponent of the presumption. A
4 defendant is proved to be -- presumed to be innocent; the
5 government has to prove his guilt beyond a reasonable doubt.
6 A regulation that's based on content, such as in Connelly v.
7 Colorado, the government has to prove that it is not an
8 infringement on the First Amendment.

9 And so there has to -- and so that's where we come to
10 Nabisco. Nabisco says there has to be a clear indication that
11 the law applies extraterritorially.

12 MJ [Col SPATH]: There has to be clearly expressed
13 congressional intent.

14 LDC [MR. KAMMEN]: Clearly expressed congressional intent,
15 absolutely.

16 Now, obviously there's no magic words. We agree that
17 there's no magic words. But it has to be in the law, the
18 clearly expressed congressional intent has to be in the law.
19 And if I may, does this document camera work?

20 MJ [Col SPATH]: I don't know. Let me.

21 LDC [MR. KAMMEN]: Can I use it?

22 MJ [Col SPATH]: That's a nod.

23 LDC [MR. KAMMEN]: I'm going to use the slide that was

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1 provided to me by the government that I gather has been
2 cleared.

3 MJ [Col SPATH]: Let me check.

4 TC [MR. MILLER]: Yes, it has.

5 MJ [Col SPATH]: Have the slides been cleared?

6 TC [MR. MILLER]: For the record, they have, Your Honor,
7 and I have provided copies to counsel.

8 LDC [MR. KAMMEN]: Do you want to see it?

9 MJ [Col SPATH]: Sure. Let me do this. First I'm going
10 to make sure -- I'm going to have the next appellate exhibit,
11 right? I believe it's 351C.

12 So the government's two-page document, that is 351C.
13 If you would provide the original to the court reporter, Trial
14 Counsel, that would be helpful.

15 TC [MR. MILLER]: I apologize.

16 MJ [Col SPATH]: No worries. Thank you.

17 And then, Mr. Kammen, you're going to show one of the
18 pages from 351C.

19 LDC [MR. KAMMEN]: Yes.

20 MJ [Col SPATH]: All right, you may display that. And
21 it's been cleared so we can display it completely.

22 LDC [MR. KAMMEN]: Now, the government's going to
23 argue ----

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1 MJ [Col SPATH]: This is page 2 of that exhibit. All
2 right. You may proceed.

3 LDC [MR. KAMMEN]: ---- that various words and phrases in
4 the statute somehow, when combined together, provide the --
5 what's the language? -- clear notice that the law applies
6 extraterritoriality. And we have to distinguish between
7 notice that it applies to extraterritorial crimes committed
8 against the United States and extraterritorial that have
9 nothing to do with the United States. And that is the huge
10 difference here.

11 All of this language, Geneva Conventions, coalition
12 partners, aliens, unprivileged enemy belligerents, clearly
13 apply to foreigners. But the military commission just applies
14 to court. That doesn't tell us anything. Law of war is --
15 defines the crimes. An American can commit a law of war
16 violation, that doesn't tell us anything about
17 extraterritorial effect.

18 International law of war, again, an American can do
19 that or it can be committed against Americans or American
20 interests. Enacted in response to the global war on terror,
21 which was, of course, 9/11, and in this case the COLE attack,
22 and those were committed against American interests. And in
23 those circumstances, under Nabisco, those are domestic,

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1 because crimes committed against Americans, even if it happens
2 overseas, essentially have -- become domestic.

3 And so the law clearly -- the Military Commissions
4 Act clearly was meant to not -- to allow the prosecution of
5 crimes committed against American interests. And the COLE is
6 the perfect example. This case is -- this case is the perfect
7 example. The COLE was an American warship in Yemeni harbors
8 attacked and, you know, the tragic -- Americans were killed.
9 We couldn't colorably argue that the military commissions
10 somehow wasn't meant to apply to that, assuming jurisdiction,
11 assuming the other arguments.

12 Similarly, elements of the 9/11 case occurred
13 overseas leading to the attack against the United States
14 interests. So you couldn't really claim in any rational basis
15 that it wasn't meant to apply to that. But here, coming back
16 to French ship, Yemeni waters, Iranian oil, Malaysia,
17 Bulgarian was killed, there is no United States connection.
18 And the whole point -- one of the points of Nabisco is that
19 the United States -- and the other cases, Aramco, Kiobel, all
20 of the other cases, is that the point was that the United
21 States wants to respect international relations.

22 And nothing could be more adverse to a respect for
23 international relations than Guantanamo and military

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1 commissions being the forum where any poor soul anywhere in
2 the world who happens to do something that the chief
3 prosecutor of the military commissions doesn't like can be
4 hauled in here to sit and fester for 10, 12 years while they
5 figure out whether he should have been here or not.

6 If that happened to an American, if some American
7 were snatched off the streets of Paris and taken to North
8 Korea, and North Korea said, well, we're going to chuck him
9 into our military commissions because we have this -- he
10 didn't do anything against North Korea, he did something we
11 don't like against Spain, but we're going to try him in North
12 Korea and we'll get around to it in, well, 10, 12 years, you
13 know what the response would be. We absolutely know what the
14 response would be.

15 And so the notion that Congress would have intended
16 that, that absolute intrusion on foreign affairs, is, frankly,
17 ludicrous.

18 Now, Morrison holds that legislative history cannot
19 overcome silence. We contend that you can take all of these
20 terms, but you might as well include the sun or Pluto or
21 anything else, because they're random words. And if you take
22 the -- the act and any fair reading of it, there is nothing in
23 this act that is vague.

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1 There is another premise, and this is important
2 because it really goes to the government's RICO argument.
3 There is one portion of the Military Commissions Act dealing
4 with cruel, inhumane, and degrading treatment that
5 specifically applies extraterritorially. It's kind of ironic
6 given what we know. Putting that to the side, we know that
7 Congress knew enough and was precise enough to say that this
8 one portion applies extraterritorially.

9 Now, the law is clear that when Congress says one
10 portion applies and is silent on the others, that the others
11 do not apply. Because then Congress had the pen. Congress
12 was doing the writing. And when Congress knew enough to say,
13 we want a prohibition against cruel, inhumane, and degrading
14 treatment to be prosecutable extraterritorially; so that if a
15 French citizen tortured a Yemeni in some way that constituted
16 a war crime, they could be brought here. Congress clearly
17 authorized that. But that's the only thing it authorized that
18 doesn't involve U.S. interests.

19 And that brings us to the RICO piece of it. And
20 while I'm tempted to use their other slide, I'll be a good guy
21 and let them use it. But when you look at RICO and the RICO
22 structure, RICO has, I don't know, countless predicate
23 offenses. And so in that sense, it is a very, very unique

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1 law. And so, you know, for -- distribution of pornography can
2 be a RICO predicate offense. Fraud can be a RICO predicate
3 offense. Murder can be a RICO predicate offense. Terrorism
4 can be RICO predicate offense. And it goes on and on. And
5 many of those, because of their nature, Congress said they
6 apply extraterritorially. The terrorism statute, which is
7 incorporated as a predicate offense into the RICO statute, for
8 example, has an -- by -- on its face has an extraterritorial
9 application.

10 So what Nabisco says and what Nabisco ratified was,
11 well, yeah, if these underlying statutes that are predicates
12 have extraterritorial application, we'll read that into RICO,
13 we'll just carry that into RICO. And that makes some sense.
14 But it's only those things that have extraterritorial
15 application that can be applied in RICO extraterritorially.

16 So, for example, and I'm just guessing because it's
17 been a while since I've read it, excuse me, the prohibition on
18 distribution of obscenity that is a RICO predicate offense
19 probably does not have -- and I'll assume for the sake of my
20 argument, it does not have extraterritorially application. So
21 I don't think the United States could bring a RICO case
22 against a French citizen who is distributing obscenity in
23 France that never came to the United States. But if that same

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1 French citizen committed an act of terrorism or two acts of
2 terrorism, then, of course, they could be prosecuted under the
3 RICO statute in the -- the same way. So it is a unique
4 statute, and the -- in which Congress again in the underlying
5 heart of it -- the heart of the RICO statute is the predicate
6 offenses, and extraterritorially effect.

7 As I said, when Congress speaks on one provision and
8 is silent on others, it is a given that Congress meant to be
9 silent, and that is Russello v. U.S., and Validus and Liu
10 Meng-Lin.

11 The other in place -- two other thoughts. The thrust
12 of all of this, of course, was in response to the 9/11 attack.
13 And all of this was premised on the desire and under the
14 absolutely necessary desire to protect the U.S.'s security.
15 This is about protection of Americans and American interests.
16 It is not about being the policeman for the world. And that
17 is the fact. And that has always been the problem with the
18 Limburg charges. It represents the height of overreaching in
19 this commission because, again, it has nothing to do with the
20 United States.

21 Now, in Kiobel, the judge -- the judges said, and it
22 makes some sense then and it makes sense now, no nation has
23 ever pretended or thought to be the policeman of the world.

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1 And when we know, as is set out in our pleadings, and which is
2 uncontested, that the countries with perhaps the two greatest
3 interests in this particular episode, France and Bulgaria,
4 have their own investigations about the Limburg case and have
5 specifically participated in resolutions in the appropriate
6 European forum condemning the United States from using this
7 case to seek the death penalty, we can't say that this doesn't
8 implicate international relations. It absolutely does.

9 Granting our motion doesn't end this case. It only
10 ends the Limburg charges; charges that were not filed in 2000
11 in the original iteration of this case; charges that should
12 never be part of this case; charges that Nabisco makes clear
13 are not properly in this commission. And because, under the
14 rubric of they failed to state a cause of action under this
15 commission, they need to be dismissed.

16 So subject to any questions you might have.

17 MJ [Col SPATH]: No. Thank you, Mr. Kammen.

18 Mr. Miller.

19 TC [MR. MILLER]: Thank you, Your Honor. Good afternoon.

20 MJ [Col SPATH]: Good afternoon.

21 TC [MR. MILLER]: The government concurs with Mr. Kammen's
22 statement that the Supreme Court has long held that there is a
23 presumption against extraterritorial application of U.S. law,

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1 but that's absent a clearly expressed congressional intent to
2 the contrary. If we can show that clearly expressed
3 congressional intent, then the law is given that
4 extraterritoriality application.

5 We disagree with his summary in his brief that
6 announced a new rule, a plain statement rule. I think that's
7 clear from just the language of Nabisco and Morrison itself.
8 From his remarks today, I think it's also clear that it is not
9 a U.S. interest rule or a U.S. connection rule. And what he
10 has done is he's jumped to the second step of the test that
11 was established in Nabisco, and I'm going to go through why I
12 don't think we get to that particular position in this case of
13 that test.

14 What the court did in Nabisco was simply summarize
15 and repeat prior precedent established in Morrison and Kiobel
16 and reinforced the notion, first, that there is a two-part
17 test in judging whether there is a statutory presumption and
18 whether that has been rebutted and whether the U.S. has
19 extraterritorial effect.

20 MJ [Col SPATH]: Let me just ask, for the two-part test
21 that we set out in RJR ----

22 TC [MR. MILLER]: Right.

23 MJ [Col SPATH]: ---- is it conjunctive or disjunctive,

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1 and/or?

2 TC [MR. MILLER]: I'm not sure. If we don't meet the
3 first part, then we go to the second part.

4 MJ [Col SPATH]: If you meet the first part?

5 TC [MR. MILLER]: The second part becomes irrelevant.
6 That was one of the points that I was going to make about this
7 particular test. The first part of the test, is there a clear
8 indication, all right, doesn't have to be a plain statement;
9 but is there a clear indication that the Congress wanted it to
10 have extraterritorial effect.

11 MJ [Col SPATH]: Clear, affirmative indication.

12 TC [MR. MILLER]: Indication, correct.

13 Now, if we don't show that, if the proponent does not
14 show that, then we then move the focus to the second part of
15 the test, which is focus, which is, I think, what counsel was
16 talking about. I think he was more moving past the first part
17 of the test into the second part of the test.

18 For the reasons I'm going to talk about in the next
19 couple of minutes, I think we don't get to the second part of
20 the test.

21 Now, the second critical holding in Nabisco is that
22 finding that there exists this indication, this clear
23 indication does not require an express statement of

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1 extraterritoriality. I think Mr. Kammen, excuse me, during
2 his remarks conceded that.

3 The court, looking to Morrison and Nabisco, stated,
4 and again I'm quoting, "Assuredly, context can be consulted as
5 well." Now, in applying these principles, the court then
6 looked at the substantive RICO statute, and we're talking
7 about the criminal aspects of it, which would be
8 Sections 162(a)-(d) [sic] of the racketeering statute. And in
9 it, the court found that it did, in fact, have
10 extraterritorial effect, even though that particular statute
11 did not have -- it did not have a clear statement that said,
12 we expect or we want this to have extraterritorial effect.

13 What the court did instead was look at the textual
14 clues in RICO, and I'm again quoting, "The most obvious
15 textual clue that RICO defines racketeering activity to
16 include a number of predicates that plainly apply to at least
17 some foreign conduct." The court then went on and stated,
18 "Short of an explicit declaration it is hard to imagine how
19 Congress could have ----"

20 MJ [Col SPATH]: Mr. Miller, if you would slow down just a
21 little ----

22 TC [MR. MILLER]: I'm sorry.

23 MJ [Col SPATH]: ---- it took me some getting used to when

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1 I first got here, just a little bit, that will help the
2 multiple court reporters.

3 TC [MR. MILLER]: There we go. All right.

4 MJ [Col SPATH]: Thank you.

5 TC [MR. MILLER]: "Short of an explicit declaration, it is
6 hard to imagine how Congress could have more clearly indicated
7 that it intended RICO to have some extraterritorial effect."
8 This unique structure makes RICO the rare statute that clearly
9 evidences an extraterritorial effect despite lacking an
10 express statement of extraterritoriality.

11 I think in this particular case what this court needs
12 to do in making its finding in this particular case is look at
13 the MCA applying those same principles to it. What are the
14 key contextual factors? What are the circumstances that make
15 it apply extraterritorially?

16 First, Your Honor, I think there's approximately ten
17 different things that may be important to the court in making
18 its decision. First is the reference -- the numerous
19 references in the MCA to the Geneva Convention, to terms like
20 coalition partners, to hostilities to aliens, to unprivileged
21 enemy belligerents. Each of these terms by themselves is a
22 clear indication that the MCA is intended for international
23 and, therefore, extraterritorial context; but taken together,

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1 I think it leads to the inescapable conclusion that Congress
2 had international goals in mind, and that the only logical way
3 to achieve these goals is if it had the extraterritorial
4 application.

5 Second, we can look to legislative history. I point
6 the court to the statements made by then-Senate Majority
7 Leader Bill Frist, who said, and I quote, "Today we address
8 our nation's security by debating one of the most serious and
9 most urgent security issues currently facing the nation: The
10 detainment, questioning, and prosecution of enemy combatants,
11 terrorists captured on the battlefield." Again, international
12 in its effect.

13 "When we capture terrorists on the battlefield, we
14 have the right to prosecute them for war crimes." Again, war
15 crimes is a term of art. I'm going to speak to that in just a
16 second, Your Honor. The statements referencing enemy
17 combatants, terrorists on the battlefield only makes sense, I
18 suggest, in the context of the extraterritorial application.
19 I think it is counter-intuitive Your Honor, to believe that
20 Congress intended to create a system of military commissions
21 and military commissions offenses that applied solely to war
22 crimes committed within the United States.

23 I mean, if you think about it, there's no point to

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1 having a military commission if you are going to only attack
2 those crimes that occur within our own borders, leaving
3 outside its reach all of those offenses committed in what is
4 now known as the global war on terrorism.

5 And Mr. Kammen talks about there being no interest.
6 The United States has a huge interest in the global war on
7 terror, no matter where it hits, because the nature of what we
8 are fighting now is also international in nature and its
9 attacks are international in nature. It doesn't just simply
10 attack the United States, it attacks various locations,
11 various countries, and that's how it draws its strength.

12 Third, the specific term, military commission,
13 invokes an extraterritorial application which began in the
14 Mexican-American Wars forward. When Congress employed the
15 words, Your Honor, military commission, these are words that
16 have a precise history. We assume that Congress understood,
17 and they signalled again by using the term military commission
18 and acting military commissions, they were looking to apply to
19 crimes that occurred overseas.

20 Fourth, and this is very important, the MCA
21 explicitly refers to and incorporates the law of war in
22 several locations in the text of the statute. Indeed, the
23 very purpose of it was to establish procedures governing the

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1 use of military commissions to try alien unprivileged enemy
2 belligerents for violations of the law of war and other
3 offenses triable by the military commission.

4 The MCA states that a military commission shall have
5 jurisdiction to try persons subject to this chapter for any
6 effectiveness, fitness, and efficiency, any effectiveness,
7 fitness, and efficiency made punishable by this chapter or the
8 law of war. Now, the Supreme Court has held that the term law
9 of war includes the international law of war. It is not
10 limited to the international law of war but it does include
11 it, and it's clear that Congress wanted the military
12 commissions to handle those offenses.

13 Sixth, Your Honor, Congress and the President have
14 used military tribunals since the beginning of the Republic,
15 and the Supreme Court has recognized that the trial and
16 punishment of enemy combatants for war crimes important to
17 incidents to the conduct of war.

18 Seventh, and a significant component of the war
19 powers granted by the Constitution, is the define-and-punish
20 clause. And this was specifically cited as the basis for
21 enacting the 2006 Military Commissions Acts, which ended up
22 becoming the Military Commissions Act of 2009 which we are now
23 addressing.

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1 Eighth, the Military Commissions Act states that its
2 explicit purpose is to establish procedures governing the use
3 of military commissions to try alien unprivileged enemy
4 belligerents for violations of the law of war and other
5 offenses triable by the military commission, and this grant of
6 jurisdiction contains no language that could logically be read
7 to infer a geographical limit of that same jurisdiction to the
8 sovereign territory of the United States.

9 It's actually very comparable, Your Honor, to the
10 RICO statute evaluated in Nabisco. And it is hard to imagine
11 how Congress could have made it clearer that the MCA has
12 extraterritorial effect absent adding the words this applies
13 abroad which we have noted was not required by either Nabisco
14 or Morrison.

15 And lastly, I think it's also important to look at
16 the context in which this particular law was enacted. It was
17 enacted first after years of wrestling with the courts,
18 wrestling with Congress, presidents going back and forth and
19 coming up with a system in which to prosecute alien
20 unprivileged enemy belligerents, persons caught on the
21 battlefield committing acts against the United States and
22 coalition partners, other persons throughout the world.

23 And lastly, we also know that it took place, the

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1 acts, during this ongoing war against the terrorists. So I
2 think if you add all of these different factors together, Your
3 Honor, looking at context -- and that's what Nabisco teaches
4 us. Nabisco doesn't say it has to have this U.S. connection
5 in the sense that it has to happen in the United States or
6 that the courts are going to decide what the U.S. interest is,
7 it simply says if you look at the context of the statute,
8 adding all of those factors together, if you come up with a
9 clear indication, which I think if you look at all of these
10 together in its totality, you look at these all together, that
11 it has extraterritorial effect.

12 Those would be my comments, Your Honor. I would rest
13 on our briefs, unless you have any additional questions that
14 you all might have.

15 MJ [Col SPATH]: I have one that may or may not have a lot
16 to do with the ruling on this ultimately, and it has nothing
17 to do with being overturned by the appellate court. As I
18 said, it happens; fortunately not frequently, or I wouldn't
19 have kept my job.

20 The history of commissions or some type of war court,
21 right, we have used them since the Mexican War forward in
22 arguably every conflict we have been engaged in some way and
23 we have done them within our borders and we have done them

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1 overseas. I think historically we can find examples of all of
2 those. I know we can. I've been doing a lot of reading
3 recently.

4 Have we used the commissions to prosecute a non-U.S.
5 person for extraterritorial violations of the law of war
6 against a non-U.S. person?

7 TC [MR. MILLER]: Well ----

8 MJ [Col SPATH]: And I don't know if that answer matters
9 to this assessment here. The -- what matters here is does
10 this statute apply extraterritorially. I -- that's clear.
11 It's just -- it's one of those and it's what led to kind of
12 the churn of the Limburg charges here, obviously, and my
13 misunderstanding, as the appellate court made clear, of the
14 question of fact for the members versus something that I
15 engaged in before the members had an opportunity to see it.

16 It was just a question that came to my -- General
17 Martins, I see you're ready to address that.

18 CP [BG MARTINS]: May I talk to counsel or ----

19 MJ [Col SPATH]: Either way. As long as we don't talk
20 over each other, General Martins, you're free to ----

21 CP [BG MARTINS]: Your Honor, we can go back and look, but
22 one that I believe fits the fact pattern you gave is

23 Eisentrager and others who were Germans who were seized in

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1 China following the end of World War II, and they were charged
2 with having -- after Germany had surrendered, continuing to
3 fight in China. And they were charged under the law of war
4 for violating Germany's cessation of hostilities and
5 continuing to fight.

6 They were doing things hostile to the United States,
7 but they were also waging war, which involved the killing of
8 civilians, the continuation of hostilities in the Pacific
9 theater. That seems to fit your fact pattern, but I -- I'm
10 sure we can look.

11 MJ [Col SPATH]: I appreciate that. It was ----

12 CP [BG MARTINS]: Yamashita was tried for having done more
13 than harm. This was another post World War II case tried by
14 military commission. You know, his war crimes included lots
15 of crimes against Manila civilians and Philippine civilians,
16 so it wasn't purely hostilities to the U.S. Does that fit
17 your fact pattern?

18 MJ [Col SPATH]: It does. It's an interesting question,
19 and it is what caused some of the churn in the original ruling
20 on the Limburg. The other part that, at least dealing with
21 part of whether or not it's extraterritorial in application,
22 is you look at the MCA, protected persons don't appear to be
23 limited to Americans. It seems to be any person entitled to

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1 protection under the Geneva Conventions. I mean, just as
2 another -- if we look at the language as we try to find that
3 clearly expressed intent.

4 But I don't think I have any other questions,
5 Mr. Miller.

6 TC [MR. MILLER]: And I would point the court -- I think
7 that's Section 950t, if I'm not correct. It does very broadly
8 says -- it says civilian populations and then says, who have
9 been subjected to crimes committed in violation of the law of
10 war. I think that in and of itself is a clear indication that
11 the jurisdiction that Congress was looking for is much more
12 expansive than that suggested by defense counsel.

13 MJ [Col SPATH]: All right. Thank you, Mr. Miller.

14 TC [MR. MILLER]: Thank you, Your Honor.

15 MJ [Col SPATH]: And welcome to this team.

16 Mr. Kammen, you get the last word.

17 LDC [MR. KAMMEN]: I may be wrong in my terminology. I'd
18 like to look at the case cited by General Martins, but I think
19 historically there has been a distinction between military
20 commissions that took place after the conclusion of
21 hostilities when there was no organized, domestic court system
22 at work versus this kind of commission.

23 And so I think at a minimum you're dealing with two

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1 different apples and oranges, and I'm just drawing a blank as
2 to the technical distinction. But I think Yamashita and the
3 case cited by General Martins fall into that first category
4 and they are different than the -- this kind of commission.

5 MJ [Col SPATH]: Let me ask this, because you and I had
6 finished the last discussion. If there's an area that I'm
7 struggling with as you look at this, if the statute has
8 extraterritorial application, you seem to have suggested this
9 second test because the COLE being the example. The statute,
10 as conceded at least in your argument, clearly covers the
11 COLE.

12 LDC [MR. KAMMEN]: Yes.

13 MJ [Col SPATH]: The COLE was extraterritorial.

14 LDC [MR. KAMMEN]: Absolutely extraterritorial.

15 Essentially, though, the COLE is the United States for these
16 purposes.

17 MJ [Col SPATH]: It -- yes, a flag -- a ship with the
18 American flag, but ----

19 LDC [MR. KAMMEN]: American sailors.

20 MJ [Col SPATH]: ---- but the attack was extraterritorial.
21 Once I get by whether or not the statute is extraterritorial,
22 you seem to have put forth kind of a two-part test of
23 extraterritorial where the victims or the interests are purely

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1 United States ----

2 LDC [MR. KAMMEN]: Absolutely.

3 MJ [Col SPATH]: ---- or a combination.

4 LDC [MR. KAMMEN]: That's always been the distinction.

5 MJ [Col SPATH]: Versus extraterritorial with limited
6 connection to U.S. interests.

7 LDC [MR. KAMMEN]: Well, no connection.

8 MJ [Col SPATH]: Interesting discussion based on the ----

9 LDC [MR. KAMMEN]: I mean, no, let's be -- there is
10 absolutely no connection. And essentially what in this
11 context the government wants to do, using the RICO analogy, is
12 prosecute -- let's say a guy in Marseille is running a fraud
13 ring and he commits multiple acts of fraud against French
14 citizens. Under their theory, the United States could
15 prosecute him for RICO because fraud is identified in the RICO
16 statute, even though it -- that piece may have no
17 extraterritorial effect. They take it far beyond what is
18 allowed.

19 And, you know, they -- the Supreme Court reached RICO
20 because the predicates, which are the heart of RICO,
21 specifically have extraterritorial effect, without any
22 question.

23 They're not picking a sentence here and a phrase here

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1 and, you know, two words from this sentence and five words
2 from this sentence and glomming it all together into some kind
3 of position of extraterritoriality. It's clear in the
4 predicates.

5 So it logically makes sense, if Congress wanted
6 predicates to be applied extraterritorially, then the RICO
7 enhancement, if you will, it makes sense that those would be
8 applied extraterritorially if that has an impact on the U.S.

9 The United States cannot prosecute French fraudsters
10 who commit fraud against French people that has no discernible
11 interest in the United States. It's not the policeman of the
12 financial world and it's not, with respect, the policeman of
13 the terrorist world. It's the policeman -- as Senator Frist
14 said, it is about protecting the interests of the United
15 States and the security of the United States.

16 Now, the prosecutor says, well, the United States has
17 an interest in combatting terrorism. Absolutely true. But in
18 his notion of the world, France doesn't. What he's
19 essentially saying is France has no interest in prosecuting
20 the people who bombed the Limburg, we're the only country that
21 has an interest in that. We, the superpower, are the only
22 ones who have an interest. France, they don't have an
23 interest. Bulgaria, they don't care about their citizens. We

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1 are the policeman for the world.

2 And I want to -- I apparently, and could very well
3 be, because I will confess to being tired, that I wasn't
4 clear. We are not suggesting that the only people who can be
5 prosecuted are people who commit crimes within the United
6 States. That's clearly not the case. And if I gave the
7 government that impression, I -- I am not being very
8 articulate. The law clearly is intended to have an
9 extraterritorial application against circumstances that impact
10 the United States, just as RICO does.

11 And that's the critical point here. The Supreme
12 Court looked to what's -- what are the international
13 implications of enforcing this and applying this, and they --
14 there are real, strong limits here. And if you look at the
15 alien statutes that are referred to in our brief, you look at
16 all of the economic and criminal litigation where the courts
17 have drawn very clear lines that we will -- you know, we are
18 not the policeman for the world.

19 Now, the United States has an interest in prosecuting
20 drugs. The United States has an interest in -- we've had a
21 war on -- global war on terror for 10, 12 years now? We've
22 had a global war on drugs since I was in law school. You
23 know, the -- and yet the cases are routine that there are many

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1 drug offenses that the U.S. seeks to prosecute, that because
2 they don't have a connection to the United States, they can't
3 be prosecuted, even though it's drugs.

4 And so you can sort of -- if you look at this and the
5 international -- and that's why we come back to the
6 international implications of all of this. This is a really,
7 really big deal, what the government's asking you to do, with
8 huge, I think, international consequences.

9 You know, the media's quit paying attention to this,
10 the U.S. media. But I will tell you, the media in the rest of
11 the world pays a lot of attention to this. And when you rule,
12 as the government asks you to, that General Martins now has
13 the authority to bring any poor soul from anywhere in the
14 world who commits anything that he alleges can be prosecuted
15 in Guantanamo, that poor soul can't get out until the trial is
16 over because that's the state of the law right now.

17 You don't get habeas corpus because they don't review
18 stuff. We can't challenge -- their theory is we can't
19 challenge subject matter jurisdiction. You know, there's no
20 effective challenges. And this is a big deal. This is a big,
21 big deal in the rest of the world, what they're asking you to
22 do. And it would seem to me, Your Honor, that if you do it,
23 you should only do it when it's -- when you're not hunting and

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1 pecking and taking a word here and a word there and a sentence
2 here and a sentence there and putting it all together in a
3 stew and saying, oh, that's what they must have meant.
4 Especially in light of Russello. Because Russello is very
5 clear. When they give extraterritorial effect on one piece
6 and are silent on the rest, they meant to be silent on the
7 rest.

8 Thank you.

9 MJ [Col SPATH]: We're getting close to 1430. There's
10 probably enough time to argue another motion. Let's clear a
11 few things while everybody's here.

12 One is a start time for tomorrow. Is 9 o'clock
13 sufficient? I have a nod from the defense. Trial Counsel, 9
14 o'clock works tomorrow?

15 TC [MR. MILLER]: Very well, Your Honor.

16 MJ [Col SPATH]: And so our next open hearing after we
17 ultimately close for the classified hearing will be at 0900
18 tomorrow. We'll pick up with 352 and then 335C and 355.

19 Trial Counsel.

20 ATC [LT JOLLY]: Sir, respectfully request to be heard
21 before we close.

22 MJ [Col SPATH]: Absolutely. Why don't you start since I
23 don't know what it's about.

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1 ATC [LT JOLLY]: Sir, it's regarding the closure.

2 Good afternoon, sir. Respectfully, and for the sake
3 of transparency and efficiency, we do not believe that we need
4 to have a closed session again on AE 333.

5 Specifically, sir, the defense here did not provide
6 the required particularized showing setting forth the --
7 specifically the classified information which the defendant
8 reasonably believes to be necessary to his defense under
9 Military Commission Rules of Evidence 505(g). The defense has
10 not done this. They have been on notice of this since March
11 of 2015 when we first had that closed session where the
12 government argued that the showing was insufficient.

13 And it's important to note, sir, that Commander Mizer
14 actually led the argument in that 505(h) session in March of
15 2015. And not only did we have argument then, sir, but within
16 that argument, and obviously I'm not going into any of the
17 facts or underlying information, but just focussing on the
18 legal argument presented during that session, Commander Mizer
19 addressed CIPA and how the procedures applied here are
20 extraordinary and completely different than his experience.
21 Because in his experience, the defense and government worked
22 together on the substitutions that would be used to be
23 presented to the members.

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1 But that's not what we're talking about, sir. We're
2 talking about discovery. And it's clear in the defense reply
3 to the government response that we do not need to have another
4 closed session. That was an unclassified reply, sir,
5 specifically focussing on the statutory framework of CIPA.

6 And so the question, sir, obviously since the purpose
7 of a 505(h) hearing is to determine the use and admissibility
8 of classified information, and you need to determine if that
9 information that the defense is seeking is relevant and
10 admissible, the question is relevant to what? So while this
11 motion was styled as a Brady violation, sir, it's truly a
12 challenge to the statutory framework of CIPA, so we would
13 oppose another closed session. Thank you, sir.

14 MJ [Col SPATH]: Defense Counsel.

15 DDC [LCDR POLLIO]: I'd just like to start off by noting
16 that it was, in fact, Commander Mizer who led the charge on
17 this particular motion because of his extensive background and
18 knowledge in national security matters. And while I do not
19 have that same background, I will attempt to address some of
20 the issues raised, understanding that it was the defense's
21 understanding that we were going to go into a closed session,
22 so I do not have all of AE 333 in front of me to argue. I
23 have reviewed some of the closed portion of that, and without

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1 going into anything that would be -- raise any security
2 concerns in this particular setting, that was not a robust
3 hearing because the defense did not go into each individual
4 piece of evidence, because at that point you had not been able
5 to read it and become familiar with it. And so it was decided
6 that a more robust setting might be appropriate.

7 The defense did file a 505 notice referencing the
8 underlying classified motion and particular attachments in
9 that, and the defense simply is asking for an opportunity to
10 be heard on that matter, particularly since it's the defense's
11 understanding that we will go into that, and we believe it is
12 quite necessary. And whether or not it's Brady material,
13 discoverable material, there is a necessary need for the
14 closed setting so that we can fully flesh all of those issues
15 out and then move from there.

16 MJ [Col SPATH]: Any final comments? Trial Counsel?

17 ATC [LT JOLLY]: No, sir. Thank you.

18 MJ [Col SPATH]: Thank you. All right. First let me deal
19 with that and then a couple of final comments before tomorrow,
20 since we know what time we're starting.

21 Transparency is important. With regard to 333, the
22 issue is I cut the defense off before they presented fully in
23 that hearing. And it was my own recognition that I am one

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1 person, and there was a lot of information that came to me in
2 333 and I wasn't prepared to digest responsibly what the
3 defense needed to put on or if they needed to put it on. And
4 so they stopped their presentation in large part due to that
5 pretty quick statement I made in that hearing. I remember it.
6 I didn't remember it earlier today as we talked about it at --
7 I remembered quite clearly, and then having an opportunity to
8 go back and look at some of it at the time.

9 The 505 hearing is simply the mechanism where the
10 parties can demonstrate why they might need a classified
11 session later without the public here to carry the day in
12 their motion. And so while I appreciate completely that
13 transparency is important, as is open sessions of court, there
14 are just sometimes that we have to have a discussion that
15 branches other than -- or people other than me, Congress and
16 the President, have put the system in place that I have to use
17 in order to have that discussion. And I have to at least
18 allow the defense to finish the discussion they were having on
19 Appellate Exhibit 333 before I shut it off, acknowledging I
20 hadn't read it all.

21 It was just -- it was too much material and we were
22 going through a lot of information in that prior hearing. And
23 we thought we would be here for two weeks back then and we had

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1 moved into a UI issue that consumed a significant amount of
2 our time since then.

3 So I need to have the 505 hearing. Your request not
4 to have the 505 hearing is denied. We'll do the 505 hearing
5 on the two issues I discussed earlier. One of them could be
6 reasonably or relatively short, and -- as we deal with
7 Appellate Exhibit 092. I don't know how long the other one
8 will be, which is why we're going to start them at 3:00. And
9 we'll either be done really quickly or we'll be done later in
10 the afternoon again. We'll get a feel for it when we get into
11 that hearing. The other piece we have to start talking about
12 soon, but not until our next session, is the road ahead with
13 our -- with 332.

14 Defense Counsel, you had mentioned a concern about
15 December. Can you give me some detail about that?

16 LDC [MR. KAMMEN]: I am advised, Your Honor, that the
17 government, big G, is forcing at least the Nashiri team to
18 relocate its offices in the Washington, D.C. area, and that
19 that relocation must occur beginning, I'm told, the first and
20 second weeks of December. And so we have been told that the
21 offices for at least the Nashiri team, and I'm not sure, it
22 may go beyond that, I mean, it's just going to be disrupted
23 beyond -- I'm told beyond imagination.

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1 Because apparently what's happening is -- as I
2 understand it from Brigadier General Baker, is that even as we
3 sit here today, it's unclear if -- where they're moving, where
4 the office is moving, and whether they'll have to move twice,
5 once in December, and then once in perhaps another year. So I
6 mean, we've just been told that sort of mechanically December
7 is going to be kind of a shambles.

8 MJ [Col SPATH]: Hopefully we can develop some more detail
9 on that.

10 LDC [MR. KAMMEN]: And I'm certain that if the commission
11 wants to hear from him, he will be happy to come tomorrow.
12 I'm just relating what ----

13 MJ [Col SPATH]: Understand. I appreciate that.

14 LDC [MR. KAMMEN]: ---- what he's related to me.

15 Another question. Is it possible to get heat in
16 here? Or less cold?

17 MJ [Col SPATH]: I don't know. I can -- that is one
18 talent I don't have.

19 LDC [MR. KAMMEN]: Or parkas?

20 MJ [Col SPATH]: But it is cool in here, I think in large
21 part because of the secured nature of it and the computers,
22 but I have no idea. I'll leave that to you all.

23 All right. We're going to start at 1500. Tomorrow I

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1 want to talk through scheduling. My worry is that 332, as I
2 look at the October date -- and what I don't want to do is
3 lose the ability to resolve 332 sooner than later, and I -- so
4 I have the commission calendar here so we can come to some
5 agreement.

6 Right now we have two weeks scheduled in 2016, and
7 then we start two-week sessions in 2017. I think it would be
8 helpful to utilize those two weeks in 2016, if not on the days
9 they're on, to resolve as many outstanding legal motions as we
10 can and to work towards the close of discovery, if at all
11 possible, and to finalize the security clearances, which seem
12 to have found some traction, and I appreciate that, so that we
13 can have those two get the SAP reading and all.

14 If we're going to have additional witnesses and a
15 discovery discussion and an opportunity to finalize 332, I
16 just want you to think about if it makes sense to keep the
17 week we have, move a week forward and have two weeks together,
18 and -- or move two weeks forward and have two weeks together,
19 because they're on the calendar, and not come down twice. Can
20 we file some motions? Can we get enough work so that we come
21 down for a block of time rather than two separate trips? We
22 do not have to answer it right now.

23 Also something we could have -- at some point maybe

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1 do in an 802, but since right now we're talking here about
2 these things, I'm talking to you. But there are weeks open on
3 the calendar. And so I don't want to discuss it today, I
4 wanted to just put it out there as there's an ability for us
5 to compress in some ways, because we'll travel down here only
6 once, but I want to make it an extended period of time so
7 we're working. We could still come twice, but the December
8 issue might cause some real problems. Or we can just simply
9 keep an eye on the October date.

10 My worry is, as we start exchanging witnesses and try
11 to get ready for a significant evidentiary hearing, I want to
12 get that done. The UI issue outstanding needs to be resolved,
13 as do the two abatement motions which I'm hoping to get you
14 guidance on sooner than later.

15 But we'll have full discussions tomorrow morning at
16 9:00.

17 LDC [MR. KAMMEN]: [Counsel away from podium; no audio.]

18 MJ [Col SPATH]: You may.

19 LDC [MR. KAMMEN]: May I please --

20 We keep hearing anecdotes. I mean, one of the -- you
21 talk about finalizing discovery, and one of the big issues, of
22 course, that remains undone is where we are on 120. I mean,
23 that is huge. And we've heard anecdotes that supposedly all

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1 that information will be coming -- I'm unclear if it's coming
2 to us or coming to you -- by the end of September. Now, if
3 it's coming to us, I will tell you that our time is after --
4 at the end -- in October is better spent reading that and
5 digesting that than it is litigating Commander Gill. I'll be
6 as blunt about that as possible.

7 If it's not coming to us, if it's just coming to you
8 and for your continued review and then it's going to be on
9 down the road before it comes to us, we'll do what we can.
10 But the other part of that is we are getting to the point
11 where the motions that will be prepared are really discovery
12 motions and we can't really begin to litigate material until
13 we have material. And so, you know -- and if the government
14 wants to answer now, that's fine; if they don't, if they need
15 to answer it in hiding, that's fine, but -- whatever they want
16 to do. But I mean, that's just -- we keep hearing these
17 rumors, but that -- that's all they are is rumors to us. So
18 thank you.

19 TC [MR. MILLER]: Your Honor, may I be heard?

20 MJ [Col SPATH]: You may. Please.

21 TC [MR. MILLER]: Two things. Did I understand counsel to
22 indicate that General Baker might be available tomorrow to
23 tell us about what the plans were for early December?

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1 LDC [MR. KAMMEN]: Yes.

2 MJ [Col SPATH]: Yes, I believe that to be accurate.

3 LDC [MR. KAMMEN]: Yes. I think he is, yeah.

4 TC [MR. MILLER]: And could we do that ----

5 LDC [MR. KAMMEN]: Sure.

6 TC [MR. MILLER]: ---- in the morning?

7 LDC [MR. KAMMEN]: I'll ask him.

8 TC [MR. MILLER]: If you would, I appreciate it.

9 LDC [MR. KAMMEN]: Yeah. Sure.

10 TC [MR. MILLER]: That way we may be able to better plan.

11 MJ [Col SPATH]: Yes, we can. Right now, as you mention,

12 we'll get to him.

13 TC [MR. MILLER]: The second matter, the discovery issue

14 that was raised by counsel, we would like to address, be

15 willing to address that tomorrow morning after we huddle, and

16 I think we'll have some answers for the court and for the

17 defense counsel as to where we stand with that.

18 MJ [Col SPATH]: That would be great. And part of that,

19 Mr. Miller, my introductory comments had to do with kind of in

20 the same vein of let's move along the security clearances, big

21 G, I recognize not within your control necessarily. Also

22 would be nice if the other classification authorities, after I

23 finish my reviews, it would be helpful if they put some

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1 effort, not that they're not, but quicker effort to getting
2 those reviews done. Because I have certainly spent the time
3 to keep up with your all's submissions to me and they're not
4 making their way quite yet over to the defense, I know.

5 TC [MR. MILLER]: Well, I can assure you, this has been a
6 new experience for me also, Your Honor, but we have been
7 working very diligently doing that. And General Martins has
8 been working tenaciously getting it done. But we'll be able
9 to give the court and defense counsel some answers in the
10 morning.

11 MJ [Col SPATH]: Perfect. That would be helpful. For
12 everybody in the audience, we're about to close the court.
13 We'll see you at 0900 tomorrow. For everybody here,
14 30 minutes from now, let's plan on that. It's a little bit
15 after 3:00 for our 505 hearing. Thank you, everybody, as
16 always, for your time and attention.

17 The commission is in recess.

18 [The R.M.C. 803 session recessed at 1438, 8 September 2016.]

19 [END OF PAGE]

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