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1 [The R.M.C. 803 session was called to order at 1513,
2 15 May 2017.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties appear again to be present. By the way, if somebody
5 is absent who I don't notice, be sure to tell me; otherwise, I
6 assume everybody is still here.

7 Mr. Connell.

8 LDC [MR. CONNELL]: Thank you, sir. Two housekeeping
9 matters. The first one is I have provided to the parties
10 copies of slides which are marked 488H (AAA) and 502F (AAA).
11 I previously provided them to the court security officer who
12 very kindly, which I appreciate, notified me in advance that
13 they had been cleared, and I would request permission to enter
14 them into the record, display them on the screen and display
15 them to the gallery.

16 MJ [COL POHL]: Okay. Let me see them, please.

17 LDC [MR. CONNELL]: You are being handed two sets. They
18 are the same slides, they have just been marked for 488 and
19 502.

20 MJ [COL POHL]: One is 488H and the other is?

21 LDC [MR. CONNELL]: 502F.

22 MJ [COL POHL]: Go ahead.

23 LDC [MR. CONNELL]: Can I have the feed from table four,

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1 please?

2 The second housekeeping matter, as that is coming up,
3 the military commission ruled in 251M that these proceedings
4 should proceed during the appeal, notwithstanding our request
5 for a stay. I would simply note my objection, since this is
6 the appropriate time to note that.

7 MJ [COL POHL]: 251 being the commission's decision that
8 the ex post facto clause combined the statute of limitations
9 to the specifications -- non-capital specifications were
10 dismissed; the government chose to appeal that. Unless and
11 until somebody can show me how it impacts on a motion before
12 me, I don't intend to ----

13 LDC [MR. CONNELL]: We have already had one citation at
14 251J. I bet we will have a lot more when we get to 490, but
15 at the same time, I'm not arguing your ruling. I have read
16 your ruling, but I feel it's appropriate to note my objection
17 here.

18 MJ [COL POHL]: Not to the ruling, to continuing, though.

19 LDC [MR. CONNELL]: Correct.

20 MJ [COL POHL]: Got it.

21 LDC [MR. CONNELL]: I want to be clear that I speak today
22 only on behalf of Mr. al Baluchi. We have been very specific
23 in our pleadings as to which element of Mr. al Hawsawi's

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1 pleadings we joined. Other counsel may have different
2 opinions about what they agree with out of what I say and what
3 they disagree with, so I do want to be clear that I speak for
4 no one else.

5 The reason that this argument will be shorter than
6 the prior argument is because it is also a smaller argument.
7 It is smaller in a couple of ways. It is smaller first in
8 that in 488-5 you denied our request to continue the
9 litigation of this matter pending discovery, but said that we
10 could argue just the procedure today. As my closing remark, I
11 will propose what I think is the appropriate path forward.

12 But second, although ----

13 MJ [COL POHL]: Mr. Connell ----

14 LDC [MR. CONNELL]: Gosh, I'm off to a bad start then.
15 Sorry.

16 MJ [COL POHL]: Go ahead.

17 LDC [MR. CONNELL]: I am not even reading from anything.
18 The second issue is, although we agree with, in general with
19 the statements of Mr. al Hawsawi regarding the law of war, we
20 disagree in general regarding statutory construction. And
21 mostly the argument that I give to you today will be about
22 what is jurisdiction, especially personal jurisdiction and how
23 does it work under the Military Commission Act of 2009. It

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1 was different under the Military Commission Act of 2006 and it
2 was different from either of those under Article 21.

3 The first sort of controversy between the parties is
4 about the burden of proof. And the government claims in its
5 brief that the defendant bears the burden of persuasion on a
6 jurisdictional matter, which is clearly not true. In
7 jurisdictional matters, there is what is called a bursting
8 bubble presumption. That means the jurisdiction is presumed
9 in a very light fashion until it is challenged. We have
10 clearly challenged the jurisdiction both in the pleadings and
11 by evidence.

12 The Sassòli declaration that counsel for
13 Mr. al Hawsawi referred to is found in the record at 490A,
14 Attachment B, but this jurisdictional rule is hardly anything
15 novel. It's simply an application of the rule that
16 jurisdiction is always on the proponent. If you want to
17 invoke diversity jurisdiction in federal court you have to
18 plead it. In a military commission or court-martial, if you
19 want to invoke the jurisdiction of the court and it is
20 challenged, you have to prove it. That rule is set forward in
21 the military commission version at R.M.C. 905(c)(2)(B), which
22 seems pretty clear on the matter that in jurisdictional
23 matters that are interlocutory the government bears the burden

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1 of proof by a preponderance of evidence. That is separate
2 from the subject matter jurisdiction as construed for al
3 Nashiri, which we will talk about in a moment.

4 MJ [COL POHL]: Just so I am clear here, the subject
5 matter jurisdictional issue, it appears that one could read
6 Nashiri to say that it is not a subject matter jurisdictional
7 issue. But you see where ----

8 LDC [MR. CONNELL]: I see where they come together.

9 MJ [COL POHL]: So if it's not a jurisdictional issue, the
10 burden is on the movant, right?

11 LDC [MR. CONNELL]: So the -- on an interlocutory matter,
12 if there is no jurisdiction involved with some -- in general,
13 right. 251J was an exception, but in general the burden of
14 proof is on the movant. Some things are separate from that.
15 Personal -- jurisdiction, for example, is covered in the
16 military commissions rules. Rule 905 in the Rules for
17 Courts-Martial covers statute of limitations. There are a few
18 exceptions, that but in general it's on the movant.

19 So let's -- let me talk about -- let me just start
20 about the way jurisdiction worked under Article 21 and then we
21 will talk about how it works under the Military Commissions
22 Act, and then I want to answer your specific question about
23 how does the burden intersect with the two different types of

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1 jurisdiction.

2 Under Article 21, under the law of war, which

3 provided jurisdiction for military commissions under

4 Article 21, there were, in fact, four types of jurisdiction.

5 They are laid out in Winthrop, they were canvassed by the

6 Supreme Court in Hamdan. And those are personal jurisdiction,

7 that is jurisdiction over the person, jurisdiction over

8 combatants or belligerents. They were offense jurisdiction,

9 which sometimes now gets called subject matter jurisdiction.

10 I like the phrase jurisdiction over the offense better because

11 it's more clear about what we are actually talking about.

12 That's the phrase that the C.A.A.F. used in

13 United States v. Ali. And I think it captures also the

14 language that Winthrop uses, captures the fact that we are

15 looking at what offenses or crimes are triable by a military

16 commission. Temporal jurisdiction, which typically under the

17 law of war meant during hostilities and not before or after,

18 and geographical limitations, geographical jurisdiction, which

19 meant within the theater. That's the one that Hamdan sort of

20 footnotes and says there is some controversy about. And

21 certainly Congress did not introduce geographical jurisdiction

22 as a limitation in either of the two Military Commissions

23 Acts.

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1 But the first three existed at the law of war as it
2 existed in its pure state and it also exists in the Military
3 Commissions Act of 2009, just differently.

4 So what Congress did in the Military Commissions Act,
5 in both of them actually, was to rearrange those four types
6 of -- setting geographical aside, there's three types of
7 jurisdiction into three sections, 948d, 948a(7) and these are
8 the 2009, and 950p(c). In the jurisdiction in 948d, which is
9 what the Nashiri CMC decision describes as the jurisdiction
10 section within the Military Commissions Act, combines -- it
11 discusses both -- really all three types of jurisdiction. It
12 talks about jurisdiction over the person. "A military
13 commission under this chapter shall have jurisdiction to try
14 persons," it goes forward from there. It talks about temporal
15 jurisdiction. This Section 948d, abolishes temporal
16 jurisdiction as a limit in some ways and then reintroduces it
17 later in 948a(7) and 948p(c), and then it also talks about the
18 offense jurisdiction, offenses under this chapter, under
19 Articles 104 or 106 of the UCMJ or under the law of war.

20 It sets forth, then, three types of personal
21 jurisdiction. In 948a(7): direct hostilities, material
22 support for hostilities and part of al Qaeda. And there are
23 likewise three types of offenses. Offenses made, quote,

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1 punishable by the chapter in 948d, the UCMJ Articles 104 and
2 106, and the law of war.

3 The government essentially makes three arguments with
4 respect to our personal jurisdiction argument. Actually,
5 before I move to that, let me say what the -- Nashiri held,
6 and I am going to discuss it at more length later, but just to
7 answer your question about burden of proof, what Nashiri held
8 was that the nexus requirement of 950p(c) is an element of the
9 offense. Now, it would be fair to call that a jurisdictional
10 element. In some cases call that. Like if it is a gun case
11 that you are trying in federal court, there is a
12 jurisdictional element that the gun moved in interstate
13 commerce.

14 In the most famous commerce clause case, Lopez, the
15 issue was about whether domestic violence was involved, when
16 it did not have a jurisdictional element, satisfied the
17 commerce clause or not.

18 So in its subject matter or jurisdiction over the
19 offense incarnation, 950p(c) was held by the CMCR in Nashiri
20 to be a jurisdictional element. That is one that is proven by
21 the government at trial beyond a reasonable doubt. And what
22 the Nashiri court actually held was that the mistake of the
23 military commission below was that it tried to make the

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1 government prove hostilities as an element too early in the
2 process.

3 It did not, and I will talk about this more later,
4 insulate the government from any hostilities challenges,
5 personal jurisdiction or otherwise. It just said the place
6 for proving elements of the offense is at trial. The
7 government essentially makes three -- yes, sir.

8 MJ [COL POHL]: Let me, just to clarify that, and I may be
9 old school, some may call it -- so I am going to call it
10 subject matter jurisdiction.

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

12 MJ [COL POHL]: Do you read the Nashiri opinion to say,
13 whether you call it an element or subject matter, is it still
14 a matter for the members?

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: As I recall the judge in Nashiri, since
17 I -- anyway, I just was -- basically was a failure of proof,
18 said jurisdictional challenge has been raised. The
19 government, regardless of burden, presented no evidence;
20 therefore, they lose.

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

22 MJ [COL POHL]: The way I read the CMC decision is it's
23 not really jurisdictional, it's an element of the offense,

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1 therefore, they didn't have to prove it as an interlocutory
2 matter, they had to prove it at trial beyond a reasonable
3 doubt.

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

5 MJ [COL POHL]: Has anything changed that would not make
6 that part of this issue before me? Can I ----

7 LDC [MR. CONNELL]: That is why I acknowledge, we
8 acknowledge on brief in our pleading in 488 that the court at
9 the CMCR in Nashiri has held adverse to the defense on the
10 subject matter jurisdiction issue.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: That is completely separate, however,
13 from the personal jurisdiction issue which I want to talk
14 about.

15 MJ [COL POHL]: Okay, go ahead.

16 LDC [MR. CONNELL]: The government makes, on the personal
17 jurisdiction part, and so I keep trying -- I keep getting
18 ahead of myself, I'm sorry. I want to answer your questions
19 about burdens, once we properly conceptualize this as a
20 jurisdiction question, jurisdiction over individuals as
21 opposed to offenses, then it's completely obvious that
22 905(c)(B) [sic] comes into play, because whether we call it
23 jurisdictional element or subject matter jurisdiction pushed

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1 further into the case, or however you want to describe the
2 holding in Nashiri, personal jurisdiction is jurisdiction in
3 the sense in which it was -- it appeared -- it appears in
4 905(c)(2)(B). And that's completely familiar, I would
5 imagine, from courts-martial practice, because there is a
6 jurisdiction question in courts-martial practice.

7 And that question -- and this is a place where we
8 disagree with our learned colleagues, that question is a
9 statutory question. The question of whether Congress has
10 provided jurisdiction over a particular individual is always a
11 statutory question.

12 Now, whether Congress acted unconstitutionally in
13 providing that jurisdiction is a different question, and I
14 would suggest, one, that's not raised here, that's not
15 properly raised here, because personal jurisdiction is not a
16 constitutional question, it is a statutory question.

17 MJ [COL POHL]: When you say the constitutional question,
18 and I think it's filtered around here somewhere, that being
19 the equal protection argument?

20 LDC [MR. CONNELL]: No. It would really be the
21 Article III argument, did Congress exceed jurisdiction when it
22 gave this commission jurisdiction over people in the
23 defendant's situation.

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1 MJ [COL POHL]: Okay. In this category.

2 LDC [MR. CONNELL]: In this category.

3 MJ [COL POHL]: What we are talking about here is ----

4 LDC [MR. CONNELL]: Do they fit the category.

5 MJ [COL POHL]: ---- do they fit the category.

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

7 MJ [COL POHL]: In any other challenge to the category
8 itself, whether the Constitution, Article III, equal
9 protection, whatever you want to do, that's not the issue ripe
10 today.

11 LDC [MR. CONNELL]: Right. And that's not a
12 jurisdictional question.

13 MJ [COL POHL]: Right.

14 LDC [MR. CONNELL]: So if I were making an Article III
15 challenge, for example, saying that Congress exceeded its
16 bounds in defining the category, the burden of proof would be
17 on the movant. But in this situation it's does -- do the
18 defendants fall into the category established in 948a(7), A
19 through C, the personal jurisdiction section, that's the UEB
20 section, and so that is a statutory question, a strictly
21 jurisdictional question and one in which the government bears
22 the burden of proof once challenged.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: So the government's three arguments I
2 want to address are, first, that Congress has decided that
3 hostilities existed as a matter of law is their first
4 argument. The second argument is that 948a(7)(C) does not
5 include the word hostilities. And their third argument is
6 that Nashiri prohibits pretrial litigation of hostilities in
7 its entirety.

8 So let us look, which are the three arguments that
9 the government raises in its brief. The first of those comes
10 from AE 104 in Nashiri, which is not the Nashiri opinion which
11 led to the CMC decision, it was a different argument. And
12 the argument that the defendant raised in Nashiri was not that
13 the personal jurisdiction was lacking, but rather that the
14 convening authority convened this commission for offenses that
15 did not, as a matter of law, occur in the context of and were
16 not associated with hostilities.

17 In the argument that the defendant in Nashiri made
18 was that as a matter of law, because President Clinton had
19 stated that we were at peace in Yemen at the relevant time,
20 there was no possibility that the government could prove
21 personal jurisdiction and that it wasn't even really a
22 jurisdictional challenge, it was a challenge that the
23 convening authority had acted ultra vires, outside of its

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1 authority, in even referring the case at all.

2 So the defendant in that case was making a matter of
3 law challenge to hostilities, not a personal jurisdiction
4 challenge, and it should not come as a surprise then that the
5 judge in that case ruled about hostilities as a matter of law,
6 in Nashiri 104F. Now, both of these, because they are not in
7 our record in this case, I have attached them, albeit possibly
8 with incorrect margins with our brief in the case, but the
9 Nashiri 104F is the basis for the government's argument about
10 hostilities. And the court laid out under the particular
11 framework the ultra vires convening authority action that it
12 was dealing with what it viewed as questions of fact in that
13 context and what it viewed as questions of law in that
14 context.

15 Essentially the language about political question and
16 wide deference, all of that language was not meaning to moot
17 what Congress did in 104 -- excuse me, in 948a(7), instead it
18 was willing to say that Congress had the power to do that;
19 that in ruling that as a matter of law, hostilities could have
20 existed, it was essentially saying that Congress and the
21 convening authority were within their power to refer the
22 charges because it could make a determination about the
23 possibility of hostilities.

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1 Doing more than that, saying that as a matter of law
2 every case brought before the military commission is
3 necessarily within its personal jurisdiction because Congress
4 has determined hostilities as a matter of law would fly in the
5 face of what Congress actually did, which was to set out a UEB
6 definition that the government can attempt to satisfy in any
7 particular case. Congress has established a way that the
8 government can establish personal jurisdiction.

9 MJ [COL POHL]: Isn't the -- isn't this the issue that
10 started ten years ago in Khadr?

11 LDC [MR. CONNELL]: Yes. One might say that people have
12 been debating when did the war start for an awfully long time.

13 MJ [COL POHL]: The personal jurisdiction in the Khadr
14 case didn't establish and it went to CMCR and they said, no,
15 judge you can decide it, isn't that basically what your
16 position is here.

17 LDC [MR. CONNELL]: Yes, that's right.

18 MJ [COL POHL]: Isn't that basically what your position is
19 here?

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

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: In fact, we cite -- and, in fact,
23 let's do it right now. Can we have slide seven, please. So

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1 with apologies to the people in the gallery, because even when
2 I made the slide, I knew there was no way they were ever going
3 to read it. I'm sorry. I apologize. But I wanted to get
4 these paragraphs on here. And if you look at footnote eight
5 in the Nashiri decision where it says should appellee
6 challenge his status as an AUEB, it would be appropriate for
7 the military judge to hold an evidentiary hearing on this
8 issue. And what did they cite? Khadr. So it makes complete
9 sense to me that you could describe, this is the issue which
10 has been bubbling since Khadr and Khadr got it right on this
11 question.

12 So LN1, if we could travel back to slide four,
13 please. Thank you. So that brings us to the second argument
14 that the government makes. And before we examine the
15 statutory language, which is the source of all personal
16 jurisdiction, I do want to note that it is not clear from the
17 brief, and hopefully they will explain today, it's not clear
18 from the brief which of these Alpha, Bravo, Charlie prongs the
19 government is relying on.

20 At some points in the brief it appears that they are
21 relying only on subsection C about part of al Qaeda, and in
22 other places in the brief it appears that they would like to
23 take advantage of their full opportunity to litigate all three

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1 elements. But its completely clear that subsection A, the
2 direct participation in the hostilities, or as they say here,
3 engagement in hostilities, involves hostilities. It's equally
4 clear with subsection B, which is a material support claim,
5 material support of hostilities against the United States.
6 And then we come to subsection C, which is part of al Qaeda at
7 the time of the alleged offense under this chapter.

8 That is the whole personal jurisdiction section. And
9 I am going to talk about our interpretation of it textually in
10 a moment. So the subject matter jurisdiction or the
11 jurisdiction over the offense, as a general matter is found in
12 950p(c). This is what was being construed in Nashiri. But
13 there is a textual connection between the two, and -- which is
14 why it is our position that the, under subsection C alone,
15 948a(7)(C), the government does have to prove hostilities and
16 its nexus under p(c). So let me explain what I mean.

17 I began the discussion today with the language -- the
18 broader language in 948d. 948d establishes three kinds of
19 offense jurisdiction for a military commission. An offense
20 under this chapter, meaning appearing in 950t, UCMJ
21 jurisdiction under Articles 104 and 106, and the law of war.
22 Three different ways that the United States could bring an
23 offense in an MCA military commission. Only one of those,

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1 however, deals with an offense under this chapter. That is an
2 offense in 950t. And the language of 948a(7)(C) is at the
3 time of the alleged offense under this chapter.

4 Now, how do we know whether an offense is, quote,
5 under this chapter or not? There are two ways. First, is it
6 listed in 950t, one of the offenses listed by Congress in the
7 Military Commissions Act of 2009 or -- and, excuse me, and we
8 look at 950p(c). The common circumstances or, as is generally
9 referred to, nexus requirement, which tells us that an offense
10 specified by the subchapter is triable by military commission,
11 quote, under this chapter only if the offense is committed in
12 the context of and associated with hostilities.

13 Now, the government would say that this is just a
14 random occurrence of the use of the language under this
15 chapter. It doesn't actually tie 950p(c) back to 948a(7)(C).

16 There are three reasons why I think that it is clear
17 that this is not a random occurrence, that this was actually
18 what the statutory scheme, personal jurisdiction scheme
19 established by Congress.

20 The first is the word triable, found in green on this
21 slide. So there is an interesting textual distinction between
22 948d and 950p(c). 948d, which is, everyone agrees, including
23 the CMCR, is a jurisdictional section, uses the words

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1 punishable under this section whereas 950p(c), and which the
2 CMC R says -- is an elemental aspect, uses the word triable.
3 Now, doesn't that seem backwards? Right? Now, normally when
4 you talk about jurisdiction, when Congress talks about
5 jurisdiction, they use the word triable, that means capable of
6 being subject to trial in a jurisdiction, and they use the
7 word punishable when they are talking about defining a crime.

8 Well, if you read the statute the way I am proposing
9 it makes -- these two words make perfect sense because in
10 950 -- excuse me, in 948d, when Congress is talking about
11 offenses punishable under this chapter, it means those listed
12 in 950t, the punishment, the penal part of the code. Whereas
13 in 950p(c), when it is talking about the nexus requirement, it
14 uses the word triable, a jurisdiction word, because of
15 948p(c), the part of al Qaeda at the time of the alleged
16 offense under this chapter.

17 950p(c) ordinarily does work on the jurisdictional
18 element, subject to proof at trial by the government, proof
19 beyond a reasonable doubt. But under subsection C, the part
20 of al Qaeda element, it also does work as a jurisdictional
21 element incorporated into C.

22 Now, the second reason to prefer this interpretation
23 over the fact that Congress didn't mean what it says and it's

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1 just a random occurrence is the law of war origin of the
2 phrase part of al Qaeda. Congress did not choose the phrase
3 part of al Qaeda randomly. Instead, by the time of 2006 or
4 2009 it had been in the lexicon of the war on terror since at
5 least Hamdi v. Rumsfeld -- not Hamdan, but Hamdi v. Rumsfeld.
6 In Hamdi, in a plurality opinion written by Justice O'Connor
7 which has been treated as authoritative by the District of
8 Columbia Circuit, the plurality defined what is an enemy
9 combatant and they noted that the government has not been all
10 that clear or had not been all that clear about what was an
11 enemy combatant, but instead the plurality said we are going
12 to hold the government to the definition it gives us here,
13 which is a person who was an enemy combatant is a person who
14 was part of the Taliban or al Qaeda and who engaged in
15 hostilities against the United States.

16 Now, every D.C. Circuit opinion which has applied
17 this standard to people seeking release from Guantanamo have
18 all used that complete definition, that an enemy combatant is
19 both a person who is part of a prescribed organization and has
20 engaged in hostilities against the United States. Now, they
21 have not required that it be subsection A, direct hostilities
22 against the United States, they have extended it as far as
23 subsection B, material support for hostilities against the

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1 United States.

2 MJ [COL POHL]: So just -- again, I know it wasn't your
3 argument, when I heard the argument about participation.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Which appeared to be very limited.

6 LDC [MR. CONNELL]: That's 948a(7)(a).

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: Can we go back -- I'll show you real
9 quick. If we can go back to slide four, please. So
10 subsection A is the direct participation ----

11 MJ [COL POHL]: Right.

12 LDC [MR. CONNELL]: ---- and then subsection B is material
13 support basically.

14 MJ [COL POHL]: The point I am making, it is slightly
15 different. There's an argument that was made on whether it's
16 a NIAC or not, it was a participation -- and it wasn't the one
17 you made, but we are talking about for this the personal
18 jurisdiction issue we are using these definitions.

19 LDC [MR. CONNELL]: Yes, sir, the statutory definitions.

20 MJ [COL POHL]: Which appear to be a little broader than
21 the actual participation in a terrorist activity, for example.

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

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: And broader for targeting purposes
2 than operational law, for example. So Congress can choose to
3 define jurisdiction how it chooses to define it subject to
4 constitutional limits talked about elsewhere. But it does
5 matter. And one of the suggestions that I am making here is
6 that part of al Qaeda language was not random, it was --
7 that's especially true, and I wish I had a slide of it, and if
8 you compare this to the personal jurisdiction element under
9 the Military Commissions Act of 2006. In the Military
10 Commissions Act of 2006, there were two parts of personal
11 jurisdiction. The first one was a person who was engaged in
12 or materially supported hostilities against the United States,
13 including, for purposes of lawful or unlawful combatancy, a
14 part of al Qaeda or the Taliban. And then the second
15 subsection was a person who has been determined to be an
16 unlawful combatant by a CSRT.

17 What Congress essentially has done here in this
18 section was it removed the CSRT section because of Hamdan --
19 well, really one might say because of Boumediene by 2009, and
20 it unpacked what used to be subsection A into three component
21 parts: direct participation in hostilities, material support
22 for hostilities, and being part of al Qaeda.

23 So the third -- that actually brings me to the third

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1 reason why I think it's important to prefer this
2 interpretation of the connection of language to the
3 government's interpretation, which is that it avoids a fairly
4 serious ex post facto problem under the doctrine of
5 constitutional avoidance. Because of the difference between
6 the 2006 MCA and the 2009 MCA that we just discussed, there
7 was a jurisdictional defense, that is, lack of hostilities,
8 that was available in 2006 under Congress' definition of
9 personal jurisdiction that under the government's
10 interpretation would no longer be available under the 2009
11 Military Commissions Act, which means that under the classic
12 Calder v. Bull definition of ex post facto, they would be
13 removing a defense from the defendant, they would be
14 essentially relieving the government of a burden to prove some
15 inculpatory fact that typically cannot be done after the fact
16 of punishment.

17 So that brings us to -- and if we could go to slide
18 7, please, LN1, that brings us to what does it all mean in
19 Nashiri. And I won't belabor this because we went over it
20 before, but I do want to point out what incredible efforts the
21 CMCR went to in Nashiri to distinguish the personal
22 jurisdiction question from the question of jurisdiction over
23 the offense. It said in four different ways that the military

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1 judge didn't say it was personal jurisdiction, Nashiri didn't
2 assert there was no personal jurisdiction, and then saying
3 that again, and then noting that there was no challenge to his
4 personal jurisdiction.

5 And so to me it seems fairly clear, and the
6 government seems offended by the suggestion in its brief that
7 Nashiri established a distinction between personal
8 jurisdiction and subject matter jurisdiction for hostilities
9 purposes, but the court can read it as well as I can. And it
10 seems that we are in the area that is governed by footnote 8
11 instead of the area that is governed by the majority of the
12 Nashiri opinion about sufficient nexus in a subject matter
13 jurisdiction context.

14 So I just want to end by telling you what I suggest.
15 I know that we are in a bit of a strange procedural posture
16 here because we are only arguing procedure, as we requested,
17 and you granted in 488-5. The other point you made in 488-5
18 is that Mr. Hawsawi has the right to litigate the case as he
19 sees fit and including going forward on the substance
20 arguments about hostilities.

21 We heard a lot today about the intensity and
22 organization standards under Tadic, and I completely agree
23 with those. We, in fact, briefed them separately in 494. But

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1 it also seems like those are matters of fact. You know, what
2 the actual organization of al Qaeda was or what did -- the
3 intensity of its attacks were, whether we were going to count
4 Khobar Towers in the length and intensity, those kinds of
5 questions are questions which have to be resolved by some kind
6 of evidence.

7 So that's what we are really -- if you decide that we
8 are not prohibited from bringing this personal jurisdiction
9 challenge, then that's what we would like to do.

10 So here is what I propose.

11 MJ [COL POHL]: So your path forward is just addressing a
12 personal jurisdiction issue?

13 LDC [MR. CONNELL]: Yes, sir. We understand about subject
14 matter jurisdiction. For purposes of the record, we have
15 joined their argument, but unless -- Nashiri is in front of
16 the Supreme Court on cert. right now. Things could change
17 next week, we understand that. But under the law as it stands
18 right now, we don't feel we have a subject matter jurisdiction
19 argument.

20 But on personal jurisdiction, if you rule in favor of
21 the government that Nashiri prohibits litigation over personal
22 jurisdiction, then we are basically done. We have lost this
23 personal jurisdiction issue. We might have some other remedy,

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1 but as it is, mostly we are done.

2 But if you, on the other hand, you rule that Nashiri
3 does permit a pretrial challenge to personal jurisdiction, we
4 would ask you to set a briefing schedule. Two weeks would be
5 normal, but of course that's in your discretion. Set a
6 briefing schedule and let us brief the substance as well and
7 make our witness request to the government and essentially set
8 up for what we imagine would be a substantial evidentiary
9 hearing.

10 Reading the government's brief, it seems that they
11 contemplate something similar. I'm sure they won't endorse my
12 proposal, I am not attributing that to them, but there is an
13 awful lot of allegations contained in the government's brief
14 which would be susceptible to proof.

15 And I can't leave without mentioning that in fact the
16 position that we take today is the position that the
17 government took in 2013 in 119A when it construed an Article 5
18 challenge in 119 to in fact be a personal jurisdiction
19 challenge and said we intend to prove hostilities, we intend
20 to prove the personal participation of the defendants in the
21 hostilities.

22 So the position that we take today was their position
23 a few years ago, and the only thing that's changed is the

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1 Nashiri decision, which I think supports us rather than
2 hurting us.

3 MJ [COL POHL]: Thank you, Mr. Connell.

4 LDC [MR. CONNELL]: Thank you.

5 MJ [COL POHL]: Now, as I read the pleadings, the other
6 three defense teams have unjoined in this and wish to reserve
7 raising the issue on their behalf until discovery is
8 completed; is that correct?

9 LDC [MR. NEVIN]: That's correct, Your Honor. Thank you.

10 MJ [COL POHL]: Mr. Harrington, is that correct?

11 LDC [MR. HARRINGTON]: Judge, we applied for an extension
12 to unjoin, but we did not unjoin. But your ruling allowed us
13 to supplement this, obviously, with the proviso that whatever
14 you rule on this is binding on us later. That's all.

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

16 LDC [MS. BORMANN]: Judge, your understanding is correct.

17 MJ [COL POHL]: Okay. Trial Counsel.

18 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

19 MJ [COL POHL]: Good afternoon.

20 MTC [MR. TRIVETT]: In the Military Commission Act,
21 Congress gave this commission jurisdiction to try persons
22 subject to the chapter for any offense made punishable by the
23 chapter, whether the offense was committed before, on, or

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1 after September 11, 2001.

2 September 11, 2001, of course, was not a date picked
3 by Congress at random. On that date, 19 hijackers,
4 masquerading as civilians, hijacked four civilian airliners,
5 turned them into guided missiles and attacked the World Trade
6 Center, the Pentagon, and an additional plane was crashed,
7 killing all on board in Shanksville, Pennsylvania.

8 2,976 people were killed. All but approximately 55
9 of them were civilians. This was more people dead than at
10 Pearl Harbor when the Japanese attacked the United States on
11 December 7, 1941. These five accused in this courtroom are
12 the five people in United States custody we allege are the
13 most legally responsible for the attacks of September 11,
14 2001. They are charged as principals in the attack for
15 conspiring with, aiding, abetting, counseling, or commanding
16 the 19 hijackers on that day.

17 It is incorrect, as Mr. Hawsawi states in his motion,
18 that his offenses predated September 11, 2001. Many of his
19 overt acts and the overt acts of others may have predated the
20 attacks, but he is charged as a principal in the attacks
21 themselves, the attacks that occurred on September 11, 2001.
22 This was not an inchoate conspiracy, it was a completed and
23 deadly conspiracy. And although at trial the prosecution will

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1 show that the armed conflict with al Qaeda began as early as
2 1996 when Usama bin Ladin publicly declared war against the
3 United States, even had he not, even if there had been no
4 warning, no declarations of war, that the attacks of September
5 11, 2001, even if the first attack, would have been
6 hostilities in and of itself prosecuted -- prosecutable by
7 military commission as a violation of law of war.

8 Mr. Hawsawi's conduct as a principal in the attack,
9 along with all the other accused, clearly falls within the
10 jurisdiction of this commission that was given to you by
11 Congress in the 2009 Military Commissions Act.

12 Both Congress and the President determined that
13 hostilities existed before, on, or after September 11, 2001
14 with al Qaeda.

15 MJ [COL POHL]: Are you saying that the issue of
16 hostilities is a question of law that I should take judicial
17 notice of that the Congress and the President did and we are
18 done?

19 MTC [MR. TRIVETT]: I think you did that in the Nashiri
20 decision in 104F.

21 MJ [COL POHL]: Not talking about Nashiri case, let me
22 talk about this case. I mean, the allegation is is subject
23 matter and personal jurisdiction and they trigger the term of

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1 hostilities. You think there doesn't need to be evidence at
2 all taken for either type of jurisdiction?

3 MTC [MR. TRIVETT]: I believe that the evidence taken for
4 either type of jurisdiction after the CMC's decision in
5 Nashiri in the summer means that you have to allow the
6 prosecution to go through its evidence on the merits before
7 deciding.

8 MJ [COL POHL]: Well, Nashiri was focused on the fact that
9 an element included jurisdiction and there was a question of
10 whether that is subject matter jurisdiction or something else.
11 And they kind of concluded, the way I read it, basically they
12 said it was something else to go to the members as a question
13 of fact. That becomes an instructional issue as a matter of
14 law. How do you instruct on what hostilities are? Do you
15 think the same rationale applies to personal jurisdiction?

16 MTC [MR. TRIVETT]: I believe the timing of a personal
17 jurisdiction decision as it applies to hostilities only --
18 now, we are not talking about the accused alienage, we are not
19 talking about the other two pieces of the definition of what
20 an alien unlawful belligerent is, but at least in regard to
21 hostilities, then yes. I think you are foreclosed from
22 deciding the issue at least until we get an opportunity to
23 present all of our evidence up front in regard to hostilities.

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1 If they are challenging that they were a citizen of
2 the United States, we would have that burden, we would prove
3 that pretrial.

4 MJ [COL POHL]: Do you think -- when they say we are
5 challenging personal jurisdiction here ----

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

7 MJ [COL POHL]: ---- that moves the burden on you to prove
8 personal jurisdiction?

9 MTC [MR. TRIVETT]: Not in this instance, not after the
10 decision by Nashiri in the CMC. Their argument boils down to
11 this: I am not an AUEB, alien unlawful enemy belligerent
12 because hostilities did not exist as a matter of law;
13 therefore, I could not have been a belligerent. That's their
14 argument in a nutshell. That's both Mr. Hawsawi's argument
15 and Mr. Connell's argument.

16 Ultimately the CMC decided, the CMC in Nashiri
17 decided that, although couched incorrectly as a jurisdictional
18 challenge, that assuming arguendo, even if it were
19 jurisdiction, jurisdictional and it made no distinction
20 between subject matter jurisdiction and personal jurisdiction
21 in this part of its opinion, that if it went to jurisdiction,
22 because it is also an element of the offense, it needs to go
23 through the merits of the case and the government's evidence

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1 on the merits of the case before you are deciding it.

2 Now, ultimately if you still want to decide the issue
3 of personal jurisdiction, I believe you are foreclosed from
4 doing it before we finish our case-in-chief. That doesn't
5 mean you are foreclosed from doing it at all, but I think the
6 instruction of the CMC is clearly to allow us to present our
7 evidence because the existence of hostilities, whether it be
8 in a personal jurisdictional challenge or whether it be in a
9 subject matter jurisdiction challenge, is still a subject of
10 the offense. So whether they say I'm not a belligerent
11 because hostilities don't exist or whether they say the
12 offenses don't exist because the hostilities don't exist, we
13 still need to prove that the conduct was taken in the context
14 of and associated with hostilities. It is an element of every
15 one of the offenses.

16 Because it is an element ----

17 MJ [COL POHL]: It is an element of both, right?

18 MTC [MR. TRIVETT]: Oh, yes, sir, it is.

19 MJ [COL POHL]: Just to clarify a little point. The third
20 part of the jurisdictional -- personal jurisdiction talks
21 about the part of al Qaeda at the time of the alleged offense
22 in this chapter ----

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

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1 MJ [COL POHL]: ---- does that also require showing
2 hostilities?

3 MTC [MR. TRIVETT]: It does not. I think that's a matter
4 of law that ultimately the Congress and the President, in
5 passing the 2009 Military Commissions Act, ultimately made a
6 decision that we were in hostilities with al Qaeda. So
7 remember, the Military Commissions Act ----

8 MJ [COL POHL]: I get it.

9 MTC [MR. TRIVETT]: ---- was not written solely to be able
10 to prosecute al Qaeda. To the extent we have future conflicts
11 with other organizations where we have to establish that that
12 organization is engaged in hostilities with the United States,
13 then there is the hostilities prong. It could be that there
14 is some other AUMF or some other statute that's written that
15 also would give you the authority to decide as a matter of law
16 that those hostilities existed. But as of now, those are more
17 sort of naked proclamations. The one for al Qaeda
18 specifically, though, is a determination that we were engaged
19 in hostilities both before, on and after September 11, 2011
20 with al Qaeda.

21 MJ [COL POHL]: Major Wilkinson had a two-part attack on
22 the subject matter in the personal jurisdiction. Mr. Connell
23 took the position that subject matter jurisdiction rightly or

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1 wrongly has already been decided ----

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

3 MJ [COL POHL]: ---- in the Nashiri opinion. And it is --
4 your position is that because we are only talking about the
5 hostility element of 948a(7)(A) and (B), that that should
6 be -- one way forward is to wait until trial to see if you
7 prove the hostilities at that point ----

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

9 MJ [COL POHL]: ---- and then in the middle of trial the
10 judge would make an in personam jurisdiction ruling? Not that
11 that's unheard of. I want to know if that's correct.

12 MTC [MR. TRIVETT]: He certainly could at that point.

13 MJ [COL POHL]: You also recognize the language -- I know
14 I'm asking a question and I will give you a chance to
15 answer ----

16 MTC [MR. TRIVETT]: That's fine.

17 MJ [COL POHL]: ---- so I would apologize but you know
18 what that goes like. I just point out that it would appear
19 that the Nashiri opinion doesn't foreclose a pretrial
20 interlocutory matter on this, would you agree with that?

21 MTC [MR. TRIVETT]: No, sir. I think you are foreclosed
22 from it.

23 MJ [COL POHL]: Excuse me. You read Nashiri, particularly

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1 footnote eight, forecloses me from having a pretrial
2 evidentiary hearing on the personal jurisdiction issue?

3 MTC [MR. TRIVETT]: Only as it applies to the existence of
4 hostilities, yes, sir. The other, you are certainly not
5 foreclosed if they challenge the fact -- if Mr. Baluchi would
6 get up and say I am not subject to the jurisdiction of this
7 commission because I am a United States citizen. That gets
8 done pretrial. Because all of the other parts of the
9 definition of alien unlawful enemy belligerent are not
10 elements of the offenses. Right?

11 MJ [COL POHL]: What about the unprivileged part of it?

12 MTC [MR. TRIVETT]: What's that, sir?

13 MJ [COL POHL]: I'm saying he has to be an unprivileged
14 enemy belligerent, right?

15 MTC [MR. TRIVETT]: Correct.

16 MJ [COL POHL]: Does whether he is privileged or
17 unprivileged turn on hostilities or something else?

18 MTC [MR. TRIVETT]: No. It turns on status and his status
19 regarding what we are alleging.

20 MJ [COL POHL]: So what I am saying is to prove that, it's
21 not -- you are saying hostilities has got to be proven beyond
22 a reasonable doubt as an element.

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

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1 MJ [COL POHL]: That's the Nashiri, I'm calling it subject
2 matter jurisdiction thing. But what I am saying is the
3 personal jurisdiction has got four parts to it, one of which
4 is there a nonprivileged enemy belligerent, emphasis on
5 unprivileged. So where would we do that litigation?

6 MTC [MR. TRIVETT]: If he alleged he was a privileged
7 belligerent, privileged belligerency is a specific offense.

8 MJ [COL POHL]: Is the burden on them? This is where
9 Nashiri got off the rails, so let me try to bring it clear
10 here because it goes to burdens.

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

12 MJ [COL POHL]: The government makes a naked assertion he
13 is, for want of a better term, he is alien.

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

15 MJ [COL POHL]: And the defense says we challenge his
16 jurisdiction. Does that put a burden on you to disprove that
17 or to prove your element?

18 MTC [MR. TRIVETT]: Yes, sir. At trial.

19 MJ [COL POHL]: Wouldn't that cover every element of the
20 personal jurisdiction, even if it can be double tapped, for
21 want of a better term, on trial for another theory of subject
22 matter jurisdiction?

23 MTC [MR. TRIVETT]: I don't believe so, sir, because

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1 ultimately they are not elements of the offense. I believe,
2 and I don't believe that this piece was briefed, but whether
3 or not you are a privileged belligerent is actually a special
4 defense as I understand it. I don't know that it is
5 jurisdictional. We have alleged they are an AUEB as that is
6 defined, and it is specifically defined in three different
7 ways. You can either engage directly in hostilities against
8 the United States; you can purposefully and materially support
9 hostilities against the United States; or you can be part of
10 al Qaeda on the date of the alleged offense.

11 MJ [COL POHL]: Well, the whole definition says an
12 unprivileged belligerent is, paren, other than a privileged
13 belligerent, close paren, who engaged in these activities.

14 MTC [MR. TRIVETT]: And we don't have that issue before
15 us. We don't have an allegation right now of any of them
16 saying that they were actually privileged belligerents.

17 MJ [COL POHL]: So as I understand it, you believe that
18 the hostility issue is the only one before me. And since that
19 one can be done at trial, there is no need to address it now
20 and there is no challenge to the other three elements of
21 personal jurisdiction?

22 MTC [MR. TRIVETT]: Yes, sir. Yes, sir. That's our
23 position. So ultimately, jurisdictional challenges are always

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1 concerning to prosecutors. We want to make sure we get it
2 right. We want to make sure we understand whose burden it is.
3 We want to understand exactly what it is that they are
4 challenging. And so we have laid out three options. We have
5 argued in the alternative a lot more in this motion than we do
6 in others because we don't want to be in a situation where you
7 believed we had a burden, we didn't present any evidence, the
8 case is dismissed and then we are trying to appeal.

9 So ultimately I believe you are foreclosed from it.
10 Whether they characterize it as a challenge against personal
11 jurisdiction, whether they challenge it against subject matter
12 jurisdiction, I believe the CMC decision in Nashiri
13 forecloses you from deciding it before the end of our
14 case-in-chief. That's all ----

15 MJ [COL POHL]: And your plan B is?

16 MTC [MR. TRIVETT]: Our plan B is, to the extent you do
17 not believe that you are foreclosed from deciding the issue
18 pretrial, that you still make a determination and give wide
19 deference to Congress and to the President that hostilities
20 existed as of the date of the charged offenses. Ultimately we
21 would still prove that he is an alien and how he materially
22 supported or how he engaged.

23 MJ [COL POHL]: Okay.

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1 MTC [MR. TRIVETT]: And thirdly.

2 MJ [COL POHL]: You have a plan C?

3 MTC [MR. TRIVETT]: Yes. Plan C is that we have already
4 presented evidence in AE 119G that we believe ----

5 MJ [COL POHL]: Go ahead.

6 MTC [MR. TRIVETT]: In AE 119G that establishes
7 jurisdiction. And I won't get into all of the facts on that,
8 but we do believe we have made a record already to establish
9 this.

10 MJ [COL POHL]: Do you have a plan D?

11 MTC [MR. TRIVETT]: There is no -- to the extent ----

12 MJ [COL POHL]: I'm just asking. Mr. Connell proposed a
13 plan D which you have not hit yet.

14 MTC [MR. TRIVETT]: We would ask -- we would join in
15 Mr. Connell's request that if you believe a hearing, a further
16 hearing is necessary, that you schedule it in advance so that
17 we know that we have the burden and that we will go ahead and
18 we will present additional evidence other than that which is
19 already in 119G.

20 MJ [COL POHL]: Okay. Got it.

21 MTC [MR. TRIVETT]: But ultimately what we will say, at
22 least in regard to the plan C aspect, in the event that you
23 believe we have the burden right now and that we need to

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1 establish evidence right now, that ultimately jurisdiction,
2 certainly post 1987, in Solorio for courts-martial rests
3 solely on the status of the soldier or the sailor. Was he on
4 active duty at the time of the offenses? Was he on active
5 duty at the time of the trial? And it's a fairly simple,
6 straightforward process. We do not believe that it was any
7 more complicated what Congress was putting into place. We
8 believe it's strictly on status of AUEB.

9 MJ [COL POHL]: An activated reservist who leaves active
10 duty, there is still a procedure requiring in personam
11 jurisdiction for the full range of penalties, correct? I am
12 talking about courts-marshal now.

13 MTC [MR. TRIVETT]: This is near to my heart because I am
14 a reservist. Clearly I would have to be on active duty when I
15 committed the offense. And then if I left active duty, I
16 would need to be called back to active duty in order to be
17 prosecuted for my offenses as a reservist while on active
18 duty.

19 MJ [COL POHL]: Again, there are other requirements if
20 they want to impose deprivation of liberty and there's
21 elements of various approval levels. So what I am saying is
22 your basic principle is correct, but there is still
23 possibilities in personam jurisdiction attached, even in

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1 military cases, though not nearly what we used to have.
2 Solorio was subject matter, pre-Article 2 changes of the
3 recruiter misconduct, but we have digressed to 40 years ago.

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

5 MJ [COL POHL]: That's the problem with having an old
6 judge. But go ahead with what you were talking about.

7 MTC [MR. TRIVETT]: So ultimately it was not intended to
8 be a complicated legal question. Do we have the status we
9 need to go forward?

10 And ultimately, because Congress and the President
11 already made a determination, at least in regard to al Qaeda,
12 that we were engaged in hostilities against al Qaeda, if we
13 can show that they materially supported the attack for
14 al Qaeda or if we can show ultimately that they engaged in the
15 attack against al Qaeda [sic] or simply were just part of
16 al Qaeda, in theory we could present evidence not at all
17 related to the charges that they have been charged with, but
18 if we can show that they were part of al Qaeda in some other
19 way for some other purpose, as long as it was at the time of
20 the offenses, we would also establish jurisdiction. And in
21 general courts-martial, it is often just done with a service
22 contract. And if they challenge they weren't on activity
23 duty, prosecution, the trial counsel at the time would present

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1 the service contract and that might be all that's required.

2 MJ [COL POHL]: I got it.

3 MTC [MR. TRIVETT]: So what our position is, at least in
4 regard to Option C, if we are required to somehow prove and
5 have a record of their AUEB status right now, that what they
6 filed in D101 in 2009 is tantamount to an AUEB service
7 contract. They sua sponte pro se sent a letter to Colonel
8 Henley describing all of their involvement in the attacks
9 themselves. We believe that that in and of itself would
10 establish jurisdiction before this commission.

11 MJ [COL POHL]: Okay. Got it.

12 MTC [MR. TRIVETT]: Subject to your questions, sir.

13 MJ [COL POHL]: I'm done.

14 Major Wilkinson, anything further?

15 DC [MAJ WILKINSON]: Yes, sir.

16 MJ [COL POHL]: When Major Wilkinson, Mr. Connell, and
17 Mr. Trivett are done, we will recess for the day. That's not
18 an incentive for you to talk less, but if you want to you can.
19 Go ahead.

20 DC [MAJ WILKINSON]: All right. Now, first I want to say
21 that, I mean, on my initial argument I ended up not talking
22 about personal jurisdiction very much. What Mr. Connell said
23 about the interpretation of the jurisdiction section of the

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1 Military Commissions Act we agree with. I mean, that's very
2 similar to what we ourselves said in 502, basically that every
3 single section of that requires there to be hostilities for
4 there to be personal jurisdiction.

5 One thing I don't agree with is the notion that
6 personal jurisdiction is always statutory. Something like
7 that may be true in domestic law. But whenever you get the
8 customary international law of war involved, you are getting
9 an extra-factual question involved, because there is the
10 extra-factual question of how did states actually behave in
11 the relevant period, which is at least partly factual and can
12 be proved by different ways.

13 I note that Ex parte Quirin incidentally was partly a
14 jurisdictional issue because one thing they were asking is
15 under these constitutional limits on military commissions, can
16 you apply them to U.S. citizens. Their ultimate answer was
17 yes, you can, as long as those citizens are fighting with the
18 enemy belligerents or spying with them or what have you.
19 Which is a cautionary thing I put into one of the footnotes in
20 502, I will mention again. Any precedent that is set by this
21 case can ultimately be applied to U.S. citizens as well as to
22 aliens, because under Quirin the only difference between
23 trying citizens and not trying citizens before a commission is

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1 Congress amending the statute.

2 I will note that Mr. Connell was also correct, and I
3 think your questions brought it out, the Nashiri case didn't
4 make any decision on personal jurisdiction except to say it
5 hadn't been challenged. While I still say the Nashiri
6 decision was wrong, even if it was right, we win anyway,
7 because we still have the issue of personal jurisdiction, as
8 well as it being wrong and nonbinding because it didn't go
9 into constitutional issues.

10 It's important to reiterate not only the Nashiri
11 opinion, but also the government's briefs and the government's
12 arguments rest entirely on the four corners reading of the
13 statute. I don't believe they even mention the Constitution
14 in their briefs or in their arguments. It's a problem,
15 because if you view the jurisdiction of a commission that way,
16 it gives an underlying assumption that Congress can put any
17 crime or any person in front of a military commission and the
18 only issue to decide is did they intend to do so by their
19 language. I have already given the details of what is wrong
20 with that before. I won't repeat it all again here.

21 To end, but -- I mean, for both of those reasons
22 that's why you are not at all foreclosed from examining the
23 question of hostilities and jurisdiction now.

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1 If you -- the government talked a bit about the
2 question we had raised of actions predating any armed
3 conflict. From our point of view there was no armed conflict
4 even on 9/11, let alone before it. I know in
5 Hamdan v. Rumsfeld they discussed, at least the plurality
6 discussed the point that there might have been an armed
7 conflict starting on 9/11, in which case the timing of
8 people's actions are it is very important. And I will say if
9 you do that, if you look at the more specific actions that the
10 government relies on 119G for and that they set out in their
11 final response brief on 502, everything Mr. Hawsawi is
12 supposed to have done that actually supports or assists the
13 9/11 attacks happens before 9/11 itself. So if you were to
14 make such a finding that there were hostilities only starting
15 9/11, then the case against him would have to be dismissed
16 anyway.

17 From our point of view, there weren't hostilities,
18 even then. It looked more like what governments call
19 terrorism.

20 They said that they want an opportunity to
21 demonstrate hostilities if they have to. They have had an
22 opportunity so far. They have chosen not to do it, except
23 they have given us these 119G exhibits. But in the end, those

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1 are only exhibits about the facts of the 9/11 attacks, similar
2 to what we had already given you by citing to the
3 9/11 Commission Report. When it comes to facts about state
4 practice, preexisting state practice, the existing customary
5 law of war, they presented nothing. What we have presented on
6 that is uncontested.

7 Wide deference, as we said in the 502 response,
8 doesn't apply here under Lee v. Madigan because the term wide
9 deference came from 104F from Nashiri, which was citing to
10 with Al-Bihani v. Obama, which cited back to Ludecke v.
11 Watkins. But in Lee v. Madigan, the Supreme Court said when
12 it comes to this wide deference, when it comes to the issue of
13 war or peace, that doesn't apply in cases where you are
14 looking at the jurisdiction of a military court, especially in
15 a capital case. It applied to habeas cases involving security
16 detention, but that's a different story.

17 So you should not apply this wide deference here.
18 And, in fact, that's something I should also say, an
19 overarching thing. It's important in looking at all these
20 various civilian precedents that we cite and that we talk
21 about, not to normalize the use of military commissions,
22 because as I said at the beginning, a military commission,
23 when you put someone in front of that, you are taking away his

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1 right to trial by jury, you are taking away some mix of his
2 other constitutional rights; that under the Supreme Court
3 cases we talk about the most, Milligan and Madigan and Quirin
4 and so forth, that is not the normal situation, and it should
5 not receive deference or be treated as just a simple analogy
6 to the kinds of cases we normally do in civilian courts.

7 Pending your questions, sir, that's all I have.

8 MJ [COL POHL]: I have no more. Thank you.

9 DC [MAJ WILKINSON]: Sir.

10 MJ [COL POHL]: Mr. Connell.

11 LDC [MR. CONNELL]: Your Honor, I already addressed most
12 of the government's arguments so I won't repeat myself, but
13 there are two arguments I need to address. The first is the
14 government's characterization of Mr. al Baluchi's challenge as
15 hostilities could not exist as a matter of law. Nothing could
16 be further from the truth. Our position is that hostilities
17 are an intensely factual question and the government bears the
18 burden of proof to demonstrate them.

19 The second argument that I need to address is the
20 government's Solorio argument boils down to that Congress
21 thought that law of war jurisdiction was going to be simple.
22 I also have to strongly disagree with that for three reasons.
23 The first is that law of war jurisdiction under Article 21,

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1 the background against which Congress was acting, was anything
2 but simple. You probably -- if you took a survey, probably
3 every single person in this room who has read Milligan and
4 Quirin and Hamdan has a slightly different view of what
5 exactly military commissions jurisdiction was under
6 Article 21. They couldn't even get five justices to agree on
7 what Article 21 jurisdiction was. It was completely complex
8 and Congress knew it at the time.

9 The second is, the second problem with the
10 government's argument there is at the time that the
11 government, that the Congress was enacting 948a(7)(C) and (A)
12 and (B) for that matter in its current incarnation, only a
13 year before Boumediene had been decided, and so the floodgates
14 of Hamdi from seven years before, which had been shut by The
15 Detainee Treatment Act of 2005 and the Military Commissions
16 Act of 2006, the jurisdiction stripping sections were no
17 longer in effect. So Congress knew when it used the words
18 "part of al Qaeda" out of the Hamdi opinion, that it was
19 drawing on a rich and complex area of the law of war which
20 were just beginning to percolate in the D.C. district at the
21 time. And now by this time there are a dozen D.C. Circuit
22 opinions explaining what part of al Qaeda or the Taliban
23 means.

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1 And the third is that the Congress also had to
2 know -- whether they honored those concerns or not, they had
3 to know that there were Article 3 problems and ex post facto
4 problems. And the Article 2 issue that the military
5 commission raised is a perfect example. After the Article 2
6 UCMJ amendments went into effect, one of the challenges which
7 followed on was the retroactivity of the Article 2 amendments.
8 And in fact, the court of military appeals at the time found
9 that those Article 2 amendments were not retroactive as to
10 purely military offenses because -- because of the
11 ex post facto clause.

12 And I may have a case. No, I don't, but there is a
13 case, because I just read it, because I had to write the
14 appeal at the same time I was preparing for this, so I read
15 all those Article 2 cases. And retroactivity was a serious
16 issue with respect to retroactive extension of jurisdiction.

17 Thank you very much.

18 MJ [COL POHL]: Mr. Connell, I have a question for you.
19 You indicated, let me make sure, 950p(c) has to be read in
20 conjunction with 948a(7)(C) ----

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

22 MJ [COL POHL]: ---- and therefore hostilities is
23 required.

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1 LDC [MR. CONNELL]: Yes, sir. That's our position.

2 MJ [COL POHL]: Now, 950p(c) says an offense specified in
3 this chapter is triable by military commission in this chapter
4 only if the offense is committed in the context of and
5 associated with hostilities.

6 LDC [MR. CONNELL]: Yes, sir. That's where -- that's how
7 the linkage ----

8 MJ [COL POHL]: Then if you look at Nashiri, it talks
9 about punitive manner, in quotes, this exact provision ----

10 LDC [MR. CONNELL]: Yes.

11 MJ [COL POHL]: ---- for the proposition that this isn't
12 subject matter jurisdiction/element issue not a personal
13 jurisdiction issue or do you just say they are silent on it
14 and therefore I have to read it differently?

15 LDC [MR. CONNELL]: No. What I am, in fact, saying is
16 that provision, that common circumstances provision does
17 double work. For an offense which is listed in 950t, one of
18 the statutory offenses, an offense under this chapter, then it
19 becomes an element of the offense and has to be proven. If we
20 were doing an Article 104 UCMJ offense in this, that common
21 circumstances would not come into play because under
22 Article 104 and 106 of the UCMJ, we already have an inherent
23 element of enemy or an inherent element of war, and so those

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1 are not offenses triable under this chapter.

2 The phrase triable under this chapter was a term of
3 art that Congress used to describe jurisdiction in 948d, in
4 948a(7)(C) and in 948p(c). And so yes, I am saying that when
5 we are talking about proof of an element as we were in
6 Nashiri, like pretrial proof of an element, failure of proof
7 of a burden that the government has with respect to that
8 jurisdictional element, that's the work that 950p(c) is doing
9 in the trial context.

10 The government wants to read Nashiri as saying, well,
11 because that wasn't the proper procedure for -- in a
12 jurisdictional element, that is something they had to prove at
13 trial area, then that means that hostilities is forever
14 insulated from any pretrial litigation even when Congress has
15 provided to the contrary in 948a(7)(C).

16 So it's that use of the language under this chapter,
17 offense under this chapter. How do we find out what an
18 offense under this chapter is? We go to 950p(c). And so yes,
19 in the pretrial challenge to personal jurisdiction, there is a
20 pretrial proof aspect to it, just like there is under A and B.

21 MJ [COL POHL]: But what I am saying is, and just again it
22 may turn out to be not a big point. 950p(c) talks about --
23 and I know you don't like this term, an offense ----

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1 LDC [MR. CONNELL]: No, I like that term.

2 MJ [COL POHL]: I was going to say something else you
3 don't like. It sounds like they are talking about the
4 offense, they are talking about subject matter jurisdiction
5 back at the personal jurisdiction of 948a(7)(a), (b) and (c);
6 (a) and (b) included a hostilities component to it, which you
7 want me to read into, but (c) does not.

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: So reading these things together you are
10 saying they just forgot to put it in that one or they didn't
11 mean to put it in that one?

12 LDC [MR. CONNELL]: No, neither of those. They actually
13 did, they just didn't use the word hostilities, they used the
14 word offense under this chapter instead, and we have to go
15 elsewhere in the chapter to find out what offense under this
16 chapter means just like we have to go elsewhere in the chapter
17 to learn what lawful combatant means.

18 MJ [COL POHL]: I will give it one more try because I
19 think we are talking across each other. The definition of an
20 unlawful enemy belligerent has three possible definitions.

21 LDC [MR. CONNELL]: Yes, sir, two of which mentions
22 hostilities and one of which does not.

23 MJ [COL POHL]: My question is if Congress meant

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1 hostilities to include on the membership of al Qaeda ----

2 LDC [MR. CONNELL]: Why didn't they put it in there.

3 MJ [COL POHL]: ---- why didn't they put it in there when
4 you can read the clause that says they can put it in there.
5 One could read that that's talking about offenses, not
6 offenders.

7 LDC [MR. CONNELL]: Right, because the short answer to
8 what you are saying is Congress did, they just didn't use the
9 word hostilities in that exact, in (c). And the reason for
10 that, which I tried to explain, maybe not very successfully,
11 was that the difference between the 2006 MCA and the 2009 MCA
12 is they just unpacked what used to be (a). And what used to
13 be (a) was engaged in or materially supported hostilities,
14 including al Qaeda, or including al Qaeda on the element of
15 unlawful combatency, which is what it used to be called then.

16 So I am saying that in fact Congress did, by the use
17 of the phrase offense under this chapter, incorporate the
18 restriction in 950p(c) into 948a(7)(C).

19 Now, could they have been more clear? Sure. But
20 that's why I offered the three reasons to prefer our
21 interpretation. I think unlike (a) and (b), (c) does have an
22 area of ambiguity and that's why I wrote in the brief the
23 government's most substantial challenge was the question of

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1 why didn't they use the word hostilities. So I am not going
2 to repeat them, but the three reasons that I think that the
3 court should prefer our interpretation over theirs are ----

4 MJ [COL POHL]: You aren't going to repeat them.

5 LDC [MR. CONNELL]: I will just repeat them briefly, how
6 about that? The use of the phrase offense under this chapter,
7 the origin of the phrase part of al Qaeda from Hamdi, which in
8 every single case, Hamdi forward, has included hostilities as
9 an element. And the ex post facto problem of if you read it
10 without a hostilities element, then you have eliminated an
11 element from the -- which was required in 2006 creating an
12 ex post facto problem between the 2006 act and the 2009 act.

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

14 LDC [MR. CONNELL]: Thank you for the opportunity to
15 explain.

16 MJ [COL POHL]: Thank you.

17 Mr. Trivett, anything further?

18 MTC [MR. TRIVETT]: No, sir.

19 MJ [COL POHL]: The commission is in recess to 0900.

20 [The R.M.C. 803 session recessed at 1627, 15 May 2017.]

21 [END OF PAGE]

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