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1 [The R.M.C. 803 session was called to order at 1332,
2 15 May 2017.]

3 MJ [COL POHL]: The commission is called to order.
4 Trial Counsel, any change?

5 CP [BG MARTINS]: No, Your Honor.

6 MJ [COL POHL]: Defense, the only change I see is that
7 Mr. Hawsawi is absent; is that correct?

8 LDC [MR. RUIZ]: Correct, sir.

9 MJ [COL POHL]: Any other changes, Mr. Nevin?

10 LDC [MR. NEVIN]: No, Your Honor.

11 MJ [COL POHL]: Ms. Bormann?

12 LDC [MS. BORMANN]: No, Judge.

13 MJ [COL POHL]: Mr. Harrington?

14 LDC [MR. HARRINGTON]: No changes, Judge.

15 MJ [COL POHL]: Mr. Connell?

16 LDC [MR. CONNELL]: No, sir.

17 MJ [COL POHL]: And Mr. Ruiz, where is Mr. Hawsawi?

18 LDC [MR. RUIZ]: I'm not actually sure exactly where he
19 is, but he should be on the way back to the camp.

20 MJ [COL POHL]: Has he chosen to voluntarily return to the
21 camp and not be here this afternoon?

22 LDC [MR. RUIZ]: Yes.

23 MJ [COL POHL]: Has he signed the waiver?

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1 LDC [MR. RUIZ]: Yes.

2 MJ [COL POHL]: Would it be fair to say, Mr. Ruiz, that
3 you had him sign the paper?

4 LDC [MR. RUIZ]: No, Judge. He was advised by the Staff
5 Judge Advocate.

6 MJ [COL POHL]: Okay, then we will go through the normal
7 drill.

8 Mr. Swann?

9 CAPTAIN, U.S. ARMY, was called as a witness for the
10 prosecution, was sworn and testified as follows:

11 DIRECT EXAMINATION

12 Questions by the Trial Counsel [MR. SWANN]:

13 Q. All right. Captain, you are the liaison between the
14 camp and the commission; is that correct?

15 A. That is correct.

16 Q. All right. Did you have occasion to advise
17 Mr. Hawsawi of his right to attend this afternoon's
18 proceeding?

19 A. I did.

20 Q. And did he execute a waiver of his attendance?

21 A. He did.

22 Q. All right. I believe that's been marked as Appellate
23 Exhibit 507, okay? Did you do it the same way that you have

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1 done it every time in the past?

2 A. Yes, sir.

3 Q. Did you do it in English? Did you do it in Arabic?

4 A. I read it in English and had it read to him in
5 Arabic. He also had the Arabic version and had that as I was
6 reading it in English.

7 Q. Did he execute the waiver in English or in Arabic?

8 A. Mr. Hawsawi signed the Arabic version as well as the
9 English version of the form.

10 Q. Do you believe he understood his right to attend this
11 afternoon's proceeding?

12 A. I do.

13 Q. Did he approach you about not wanting to attend this
14 afternoon's proceedings?

15 A. It was brought to my attention that he wished to
16 waive, and I also spoke to Mr. Ruiz about it as well.

17 TC [MR. SWANN]: A copy of this document has been handed
18 to the defense. I have nothing further, Your Honor.

19 MJ [COL POHL]: Mr. Ruiz, any questions?

20 LDC [MR. RUIZ]: No questions. Thank you.

21 MJ [COL POHL]: Okay. Addressing the issue raised by 506
22 and 506A, I want to begin by noting that the 506A was filed on
23 10 May 2017. As everyone is perhaps painfully aware of, there

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1 is a normal briefing cycle that would take three weeks.
2 Although not raised by either party, the commission did decide
3 to address this issue before the normal briefing cycle has
4 been completed and the government has an opportunity to
5 respond in writing as well as orally. Given the nature of the
6 issue, the commission will address it without following the
7 normal briefing procedures. But I just want to be clear that
8 this is an exceptional case and normal procedure will be
9 followed for other motions filed by either side, particularly
10 if there is an objection by the nonfiling side that did not
11 have an opportunity to respond.

12 That being said, considering the defense motion to
13 abate, the commission finds that Dr. Semmerling was hired as a
14 mitigation specialist of the defense team representing Mr.
15 Mr. Bin'Attash. At some point in time, Dr. Semmerling's
16 employment by defense was terminated. The date of termination
17 is found in an ex parte filing in the AE 380 series. On 21
18 April 2017, Dr. Semmerling filed a civil complaint against,
19 inter alia, the current members of the defense team, including
20 Ms. Bormann, Mr. Perry, and Major Seeger. In his complaint,
21 Dr. Semmerling alleged defamation of character, violation of
22 Title VII of the Civil Rights Act of 1964, and intentional
23 infliction of emotional distress.

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1 The defense filed an ex parte motion with the
2 commission, AE 506, as well as AE 506A, a motion filed with
3 all parties. Upon defense request, the commission conducted
4 an ex parte closed session with the members of
5 Mr. Bin'Attash's team and Mr. Bin'Attash being present on 15
6 May 2017.

7 The most closely analogous case the commission could
8 find is U.S. v. Hurt at the 543 Fed Reporter -- Fed 2d 162, a
9 1976 case from D.C. Circuit Court of Appeals. In the case,
10 Hurt's appellate counsel filed an ineffective assistance of
11 counsel complaint against Hurt's trial defense counsel.
12 Hurt's trial defense counsel filed a civil claim for libel
13 against the appellate defense counsel. The appellate defense
14 counsel moved to withdraw during the pendency of the civil
15 suit because in his view pursuing the ineffective assistance
16 claim would exacerbate the alleged tortious conducts.
17 Reversing the trial court's decision ----

18 ACC [MR. BIN'ATTASH]: **[Speaking in English]** Slow down,
19 please. Slow down, please.

20 MJ [COL POHL]: Okay. Reversing the trial court's
21 decision to deny the motion to withdraw, the Circuit Court
22 said that, under the circumstances of the case, the appellate
23 counsel was operating in a conflict of interest that justified

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1 his withdrawal.

2 Now, the facts in this case are distinguishable from
3 Hurt. In Hurt the alleged tort went to the exact conduct of
4 the appellate attorney's representation. In this case the
5 alleged tort is unconnected to the continued representation of
6 Mr. Bin'Attash. In Hurt, if the appellate defense counsel
7 pursued zealous representation of Hurt, he would arguably
8 exacerbate the alleged tort. In this case there is zero
9 impediment to zealous representation of Mr. Bin'Attash as a
10 result of the civil suit.

11 The commission also reviewed a number of other
12 reported cases and, in summary, the commission found that most
13 of them involved actions by defendants against their lawyer
14 and in most of them the court found no error to keep the
15 lawyer on the case.

16 In this case the lawsuit was not filed by the
17 accused, but by a fired former mitigation specialist who was
18 discharged from the defense team. Based on the record before
19 me, including the ex parte pleading and the ex parte
20 presentation, and without disclosing the details of the
21 ex parte submissions, the commission finds no current actual
22 or apparent conflict of interest exists; that any future
23 conflict of interest is highly speculative and that anything

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1 is possible to develop in the course of civil litigation.

2 Accordingly, the defense motion to abate is denied.
3 The defense motion for the appointment of an independent
4 counsel is denied. And the motion to withdraw, which the
5 commission believes was made in light of the previous denials,
6 is also denied.

7 Again, the commission is deciding this issue on the
8 current state of the record. If additional relevant facts
9 come to light, the defense is free to supplement its motion
10 and request reconsideration.

11 Any question about the court's ruling?

12 LDC [MS. BORMANN]: Judge, I have a motion.

13 MJ [COL POHL]: Another one? Okay.

14 LDC [MS. BORMANN]: I have advised the court that --
15 excuse me. I am going to get a glass of water. I'm suffering
16 from a cold that ----

17 MJ [COL POHL]: Take your time.

18 LDC [MS. BORMANN]: I advised the court of the conflict
19 that burdens me and my co-counsel, so at this point I am
20 moving to withdraw. You have the basis for it in the earlier
21 ex parte position. The lawsuit puts at issue my profession,
22 my pecuniary interest, and sets up a conflict with
23 Mr. Bin'Attash. I am moving to withdraw.

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1 MJ [COL POHL]: Okay. As I just stated, your motion to
2 withdraw is denied.

3 That brings us to ----

4 DC [MR. PERRY]: Your Honor, I believe in order to perfect
5 this record we all need to enter our separate basis to
6 withdraw.

7 MJ [COL POHL]: Is there anything in addition to what
8 Ms. Bormann said or you just want to say you want to withdraw,
9 too?

10 DC [MR. PERRY]: Your Honor, just with respect to my
11 situation, I would just put forward that in addition to what
12 Ms. Bormann said earlier, both in the open and in the closed
13 session, based on my reading and also my consultation with the
14 ethics committees of the Bars of Maryland and D.C., I am
15 required to file a motion to withdraw at this time as well,
16 and ----

17 MJ [COL POHL]: Okay. Mr. Perry, your motion is also
18 denied. I will tell you, quite frankly, just in the three
19 hours that we have looked into this issue, is I don't see how
20 this rises to a conflict that necessitates withdrawal. Your
21 team provided me no legal authority on this issue; all you did
22 was cite representation of counsel.

23 Okay. So be that as it may, although I am ruling

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1 from the bench here because I have to, I understand your
2 motion, your motion to withdraw based on your own Bar
3 Association rules, whatever. And of course none of that has
4 been presented to me, it's just what you are saying you talked
5 to somebody on the phone or whatever. But based on what I
6 have reviewed and what we have as the state of the record,
7 your motion to withdraw is also denied.

8 DC [MR. PERRY]: Your Honor, with respect to your question
9 about no conflict being presented ----

10 MJ [COL POHL]: That wasn't a question. That was a
11 finding.

12 DC [MR. PERRY]: Okay. My response to that, just for --
13 again, for perfecting my part of this, because we are four
14 separate entities with respect to our licensing and
15 professional livelihoods. The conflict, as I see it, is our
16 inability to engage in any discussion with Mr. Bin'Attash
17 about the complaint. That's real and actual conflict now,
18 not -- as opposed to speculative, and that's why under the 1.7
19 version that Maryland and D.C. have, without our ability to
20 get written, informed consent from Mr. Bin'Attash to continue
21 in this representation, we are forced to withdraw.

22 MJ [COL POHL]: You are forced to request to withdraw.

23 DC [MR. PERRY]: Correct.

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1 MJ [COL POHL]: And that request is denied.

2 DC [MR. PERRY]: Thank you, Your Honor.

3 MJ [COL POHL]: Okay.

4 ADC [Capt BRADY]: Good afternoon, Your Honor.

5 MJ [COL POHL]: Good afternoon.

6 ADC [Capt BRADY]: Your Honor, similar to Mr. Perry and
7 Ms. Bormann, I have contacted my -- the Florida Bar regarding
8 this. They have an ethics hotline. They don't issue binding,
9 ethical decisions, but will give you an ethics attorney that
10 will give you advice. Upon calling them and explaining the
11 situation, detailing some of the facts that were presented in
12 the ex parte conference, they advised me to move to withdraw
13 because there was a conflict. And given the fact that I
14 cannot consult with Mr. Bin'Attash to get the informed consent
15 to get around the conflict, Judge, I am going to have to move
16 to withdraw.

17 MJ [COL POHL]: Your request to withdraw is denied. Major
18 Seeger, I am going to hear from you?

19 DDC [MAJ SEEGER]: Very briefly, Your Honor. Like
20 Ms. Bormann and Mr. Perry and Captain Brady, I would also
21 request to withdraw for basically the same reasons.

22 MJ [COL POHL]: Have you talked to your Bar Association?

23 DDC [MAJ SEEGER]: I have not, Your Honor.

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1 MJ [COL POHL]: What bar member are you of?

2 DDC [MAJ SEEGER]: I am a member of the California Bar,
3 whose Rules of Professional Responsibility, as I think you may
4 know, are cast in slightly different form than in many other
5 states.

6 MJ [COL POHL]: Okay. Your request to withdraw, Major
7 Seeger, is denied.

8 DDC [MAJ SEEGER]: Thank you, Your Honor.

9 MJ [COL POHL]: That brings us to the issue I referenced
10 earlier and this was generated in the government response to
11 488E and 502C. And again, this may be a unique issue because
12 of the way those two conflate, but I am going to take this a
13 little bit out of order because I am just trying to consider,
14 Trial Counsel, do you mean to state that you and the defense
15 share concerns on the record about how we are doing these
16 motions to unjoin? And I just kind of want to clear this up
17 so we can go forward with the same understanding.

18 MTC [MR. TRIVETT]: Yes, sir. The main concern, and our
19 understanding of how the practice was from 2012 until very
20 recently, was simply that the defense would file a supplement
21 to a motion. And to the extent they did file that supplement,
22 they could unjoin certain parts of the record that they wanted
23 to, whatever the motion was from the defense counsel, and then

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1 restate some additional argument on their own.

2 That allowed for us, especially if we knew a
3 supplement was coming, to be able to do a consolidated
4 response, which was helpful to us because oftentimes these --
5 the legal arguments are related but not exactly the same. And
6 I think that's what we ran into with 488 and 502. So that's
7 why I put that footnote in, just to let the judiciary know
8 that based on, I believe it was Mr. Connell's comments last
9 time, is that we are struggling sometimes to know what we need
10 to respond to. If there is a motion for leave to unjoin
11 something but then they put additional language in, is it a
12 separate motion or the same?

13 MJ [COL POHL]: You are referring to the change of
14 September 2016 to the rules or is it something I said in
15 court?

16 MTC [MR. TRIVETT]: I believe it was a change to the
17 rules. Now, this mostly impacted the defense because they
18 were often the ones -- I would defer to them.

19 LDC [MR. CONNELL]: It's the 1 March 2017 change. It was
20 not published as part of the rules in general, it was a
21 separate circulated change.

22 MJ [COL POHL]: And how did that change 3.5.1?

23 LDC [MR. CONNELL]: Sir, it changed the process from a

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1 motion for leave to file supplement, which it had two
2 important effects. One, it changed the motion for leave to
3 file a supplement to ----

4 MJ [COL POHL]: Notice.

5 LDC [MR. CONNELL]: ---- a notice of declination of
6 joinder, which confuses a lot of people. But since it was you
7 are no longer joining a motion, the automatic reset of the
8 government's time to respond no longer comes into play. So
9 they are now in the situation of they may have to file a
10 response to the original motion and then separately file a
11 motion, a response to the notice of declination of joinder,
12 even though ----

13 MJ [COL POHL]: Okay. I am looking at the rule in 1
14 September.

15 LDC [MR. CONNELL]: Yes, sir. And that was postdated six
16 months later on March 1.

17 MJ [COL POHL]: Again, to me, we all just need to know the
18 procedure here so there is no confusion.

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

20 MJ [COL POHL]: The 1 September rule says on the
21 declination, it says within seven days after a filing of a
22 motion you have automatic joinder and it only applies to this
23 case. So automatic joinder, you must file a declination to

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1 join within seven days.

2 LDC [MR. CONNELL]: Yes, that's fine.

3 MJ [COL POHL]: Then if you wish to file a notice of
4 declination in a motion to consider other arguments or other
5 relief, that's also in the seven-day timeframe.

6 LDC [MR. CONNELL]: Yes, or request an extension. But
7 yes, Your Honor.

8 MJ [COL POHL]: That's a basic thing, okay. And then if
9 you want to file an extension to that, then that's a normal
10 motion to file out of time.

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: From the government's perspective, you
13 have the defense motion on day one. You get two weeks to
14 respond. If they file in seven days, they get another two
15 weeks; is that the understanding?

16 LDC [MR. CONNELL]: That's the way it used to be and
17 that's the way we would agree it should be, so they can file a
18 consolidated response.

19 MJ [COL POHL]: Two weeks. The end of the two weeks for
20 the second motion would be three weeks after the first motion.
21 So if you wanted to file a consolidated response you could
22 file a motion for leave, file out of time for motion one to
23 consolidate for two? Are you with me on that?

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1 MTC [MR. TRIVETT]: If that's what is currently required.
2 We didn't have the requirement, Your Honor, for the supplement
3 is what I am saying.

4 MJ [COL POHL]: No. My point being is you have -- the
5 defense motion two filed within seven days. Let's assume,
6 okay, that gives you two weeks to respond to two. You have
7 also got two weeks to respond to one, but you have one week
8 less. Let's assume it comes on the last day, correct?

9 MTC [MR. TRIVETT]: Correct.

10 MJ [COL POHL]: You can live anyway, as long as it is
11 clear -- let me rephrase that. I can live, as long as it is
12 clear to my staff as to how we are doing it. Your position is
13 if you have that situation, the government to file a
14 consolidated response to both motions would have to file it
15 within two weeks of motion number one?

16 LDC [MR. CONNELL]: That's the way it is now, but that's
17 not the way that I think the parties believe it should be.

18 LDC [MR. RUIZ]: Judge, when we are talking parties, we
19 want to make sure we are only speaking for each co-counsel.

20 LDC [MR. CONNELL]: I apologize.

21 MJ [COL POHL]: I know.

22 LDC [MR. CONNELL]: Speaking only for myself. The rule
23 which was in place for the first five years where a joinder

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1 reset the time to respond is the appropriate rule.

2 MJ [COL POHL]: I assume that joinder comes in with -- you
3 said a motion to, as we call it, to unjoin part of it would
4 reset the clock?

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

6 MJ [COL POHL]: Okay. And if that didn't come within the
7 two weeks, then the government -- and again most of these are
8 defense motions -- the government would be in a position to
9 have to respond twice, assuming you got the motion granted?

10 LDC [MR. CONNELL]: Right. We would have to in that
11 situation -- that would be an unusual situation because we
12 would have to ask to file out of time, not just an extension
13 of time but to file out of time, which happens rarely.

14 MJ [COL POHL]: Basically the rule in September is the one
15 you like and whatever I did in March has confused people?

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

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

18 MJ [COL POHL]: Let me take a look at the other one. One
19 minute. Thank you. Anything else anybody else wants to be
20 heard on this? Mr. Ruiz?

21 LDC [MR. RUIZ]: Judge, I just want to make sure I heard
22 you correctly, because you said as long as it is filed within
23 the two weeks of the response, but then there was a discussion

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1 about seven days to submit a declination.

2 MJ [COL POHL]: Well, I am looking at the rule of
3 September that everybody seems to want me to go back to.
4 Motion is filed. In this case, quite frankly to save paper,
5 we make it an automatic joinder rule. You have seven days to
6 unjoin. If you unjoin -- just a strict unjoin, seven days,
7 you are done. If it is a declination of joinder and motion to
8 consider other arguments for other relief, that must be within
9 the seven days also.

10 LDC [MR. RUIZ]: Correct.

11 MJ [COL POHL]: And then what Mr. Connell is interpreting
12 that rule, and the government is, if such a motion is filed,
13 the government reply period is reset another two weeks after
14 the declination of joinder and motion to consider other
15 arguments or other relief.

16 LDC [MR. RUIZ]: After the seven days.

17 MJ [COL POHL]: Yes. I am saying motion's filed on day
18 one. Okay. And there is a motion of declination and
19 submission of other arguments. Simply declining joinder
20 doesn't reset the clock. If there are other arguments, that
21 would reset the clock for a response two weeks after that. So
22 there would be no need for the government to file an extension
23 of time on motion number one to file a consolidated response.

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1 LDC [MR. RUIZ]: I understand.

2 MJ [COL POHL]: I understood what everybody said. I will
3 take a look at the new rule, talk it over with my staff. This
4 is good for everybody to be clear on because --

5 LDC [MR. RUIZ]: I think it's clear, Judge.

6 MJ [COL POHL]: One moment, please.

7 That brings us to 488/502.

8 Major Wilkinson, I want you to hold it right there
9 for a second.

10 Mr. Connell, I believe there has been a little issue
11 with your filing on this. You filed a reply. It got returned
12 for being no room for the markings. You filed it again and it
13 got returned for lack of a conference.

14 LDC [MR. CONNELL]: We have now submitted it with
15 conference.

16 MJ [COL POHL]: Okay. Are you prepared ----

17 LDC [MR. CONNELL]: And ----

18 MJ [COL POHL]: I just want to make sure that everybody
19 has had an opportunity ----

20 LDC [MR. CONNELL]: It was served at noon on Friday. I
21 believe that they have a copy, and there is no reason why they
22 shouldn't, and we are prepared to go forward.

23 MJ [COL POHL]: Trial Counsel, are you prepared to go

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1 forward with this?

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

3 MJ [COL POHL]: Even though technically it has not been
4 accepted until today. Go ahead.

5 DC [MAJ WILKINSON]: You are treating 488 and 502 as one
6 thing?

7 MJ [COL POHL]: No, I am treating it as two things.
8 Although they both deal with many hostilities, one deals with
9 personal jurisdiction and one deals with subject matter
10 jurisdiction?

11 DC [MAJ WILKINSON]: That's correct.

12 MJ [COL POHL]: So the legal significance is correct.

13 DC [MAJ WILKINSON]: It's okay for me to argue them both
14 at once?

15 MJ [COL POHL]: Yes. Yes. Just don't confuse me by
16 conflating them when we get to the legal argument because the
17 requirements for personal jurisdiction aren't the same as
18 subject matter jurisdiction.

19 DC [MAJ WILKINSON]: Understood, sir.

20 MJ [COL POHL]: Go ahead.

21 DC [MAJ WILKINSON]: If the government wants to try Mr. Al
22 Hawsawi or anyone else for the 9/11 attacks, they are in the
23 wrong court, wrong kind of court and they are using the wrong

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1 body of law. This is true under the U.S. Constitution,
2 combined with the international law of war. That's what this
3 motion is about. That's all this motion is about. I believe
4 in one of their responses, the government talks about a one
5 free shot rule as if we are saying you can't be prosecuted for
6 your first attack. That's not the issue. The issue is where
7 the issue is under what law.

8 Is it important? Yes, it matters a very great deal
9 because this is not just a matter of the location where
10 something is tried. This is a matter of separation of powers
11 and the Constitution. It's a matter of the right to trial by
12 jury. It's a matter of other constitutional rights that apply
13 at trial.

14 As you know from Ex parte Milligan, the Constitution
15 does not give any part of the judicial power to the executive
16 or to the military. And as the court, the Supreme Court said
17 in Ex parte Milligan, the importance of that question cannot
18 be overstated. It involves the very framework of the
19 government and the fundamental principles of American liberty.
20 And, of course, it's very -- it is set out right there in
21 Article III of the Constitution. Not only is that where,
22 where the judicial power is located, but it says unequivocally
23 the trial of all crimes, except impeachment, shall be by jury.

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1 As -- in addition, in a military commission, you do
2 not have a trial by jury. That just isn't what it is. As you
3 yourself noted in 251J, the application of other parts of the
4 Constitution, other constitutional rights in the military
5 commission is an uncertain matter at best, something that we
6 often litigate about here, but it isn't nice and clear which
7 constitutional rights the accused in a commission actually
8 have.

9 We know under the Act, for an example, that it at
10 least gives the Secretary of Defense the option of canceling
11 the requirement of Miranda warnings with a right to counsel
12 before taking a custodial statement that can be used against
13 the accused.

14 So this is -- and there is a long discussion of
15 Milligan -- I won't quote from it at length -- to the effect
16 that when you take judicial power and give it to the military,
17 it is not an everyday occurrence, it is tightly constrained by
18 the Constitution. And the courts have always jealously
19 guarded the borders of those two realms to make sure that the
20 military is not overstepping its bounds.

21 That said, that by itself should be enough to put pay
22 to the government's idea that instead of deciding this issue,
23 that you should punt it off to the panel. It being a serious

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1 matter of the Constitution, separation of powers, rights like
2 the right to trial by jury, it ought to be decided in public.
3 It ought to be decided in public by a judge who is learned in
4 constitutional law for a case like this, preferably in the law
5 of war.

6 The reasoning ought to be explained, it ought to be
7 explained in writing, where everyone -- everyone in the public
8 is interested and also the appellate courts can see why you
9 ruled the way that you do. And so that when the appellate
10 courts look at it, they can give a decision on an issue that
11 fundamental -- a proper de novo review, at least of the legal
12 issues, with proper deference for any factual issues that you
13 may have to determine.

14 If you were to do it the government's way, if you
15 said this is an issue that goes to the panel, it means you
16 would have a group of military officers going off into a
17 private room, jury consultation room, making a secret decision
18 about whether they have jurisdiction to try this criminal
19 case.

20 MJ [COL POHL]: When you say jurisdiction, what kind of
21 jurisdiction are you talking about?

22 DC [MAJ WILKINSON]: Subject matter and ----

23 MJ [COL POHL]: Okay ----

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1 DC [MAJ WILKINSON]: Understood, sir.

2 MJ [COL POHL]: So you are talking about subject matter
3 jurisdiction?

4 DC [MAJ WILKINSON]: Yes, sir. Although I believe the
5 argument applies to personal as well.

6 MJ [COL POHL]: But you are talking about subject matter
7 jurisdiction?

8 DC [MAJ WILKINSON]: Yes, sir.

9 MJ [COL POHL]: So what is the infirmity on subject matter
10 jurisdiction, that it should be an interlocutory matter for a
11 judge as opposed to a finding by a panel?

12 DC [MAJ WILKINSON]: I'm sorry, you said infirmity?

13 MJ [COL POHL]: Yes. What's wrong with that?

14 DC [MAJ WILKINSON]: One thing that's wrong with it, as I
15 am mentioning, is the fact that the decision is made when it's
16 in a commission like this by a group of military officers, not
17 even judge advocates; it's made in private, they don't explain
18 their reasoning to anyone, though just give a thumbs up or
19 they give a thumbs down.

20 MJ [COL POHL]: But isn't it an element of the offense?

21 DC [MAJ WILKINSON]: The government has acknowledged it as
22 an element of the offense.

23 MJ [COL POHL]: I didn't ask whether the government did.

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1 Are you acknowledging as an element of the offense?

2 DC [MAJ WILKINSON]: Yes, it is an element of the offense
3 but, it is also an absolute jurisdictional requirement. And a
4 jurisdictional requirement like this should not be decided in
5 secret where the appellate courts say we give them deference,
6 we assume they follow the law; rather, it ought to be reviewed
7 in detail.

8 MJ [COL POHL]: Didn't the Nashiri case say it is an
9 element for the fact finder?

10 DC [MAJ WILKINSON]: It does say that.

11 MJ [COL POHL]: Are you saying that was incorrectly
12 decided?

13 DC [MAJ WILKINSON]: I'm saying they didn't even consider
14 the constitutional arguments that I am making now.

15 MJ [COL POHL]: What you are saying is it was improperly
16 decided then?

17 DC [MAJ WILKINSON]: Yes, sir, that's correct.

18 MJ [COL POHL]: If I follow Nashiri as written, don't you
19 lose?

20 DC [MAJ WILKINSON]: Nashiri as written doesn't address
21 the arguments that I have made or the ones I am about to make
22 either.

23 MJ [COL POHL]: But didn't Nashiri say that the

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1 hostilities as subject matter jurisdiction is an element to be
2 proven and it goes to the fact-finder for proof beyond a
3 reasonable doubt? Do judges normally, normally issue
4 interlocutory rulings about elements?

5 DC [MAJ WILKINSON]: No, sir, they do not. This is not,
6 however, a normal kind of case or a normal kind of issue.

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

8 DC [MAJ WILKINSON]: Yes, sir. Anyway, but as I said,
9 that is not something for a panel to take, to decide in
10 secret, and for the appellate courts simply to defer to.

11 As you notice, for example, in Milligan itself, it
12 was a commander who decided on his own that he had
13 jurisdiction to try a criminal case in a military commission.
14 And the Supreme Court, instead of saying well, we are going to
15 defer to that, they gave a very searching examination and
16 ultimately found that he did not. And the later cases that we
17 have cited likewise show the same thing. When there is an
18 issue of the proper jurisdiction of military tribunals, they
19 do not simply defer to a finding of any set of military
20 personnel, they examine it carefully to see if it fits under
21 the law.

22 MJ [COL POHL]: They are not going to defer to the finding
23 of a judge either?

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1 DC [MAJ WILKINSON]: What's that?

2 MJ [COL POHL]: They are not going to defer to the
3 findings of a judge, are they?

4 DC [MAJ WILKINSON]: No, sir.

5 MJ [COL POHL]: You are referring to matters strictly of
6 law.

7 DC [MAJ WILKINSON]: It is strictly of law and fact.

8 MJ [COL POHL]: When you say law and fact, we have an
9 evidentiary hearing before the trial to see whether or not
10 this element is met?

11 DC [MAJ WILKINSON]: Well, sir, since you did not allow us
12 the ex parte testimony we asked for on the subject, we have
13 put facts in front of you.

14 MJ [COL POHL]: No, no, no, no. Don't -- I am asking a
15 different question.

16 DC [MAJ WILKINSON]: Yes, sir.

17 MJ [COL POHL]: What I am saying is if the lay of the land
18 changes, I always can reconsider. I'm simply saying ----

19 DC [MAJ WILKINSON]: Yes, sir.

20 MJ [COL POHL]: I'm simply saying is this an evidentiary
21 hearing that I would have to address an interlocutory matter
22 by preponderance of the evidence, whether or not there is
23 subject matter jurisdiction or whether or not there is

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1 existence or nonexistence of hostilities?

2 DC [MAJ WILKINSON]: You could have one. However, we
3 believe we have put enough facts in front of you to decide it
4 on the record that you have now.

5 MJ [COL POHL]: So as a matter of law there is no -- you
6 say as a matter of law there was no hostilities, then?

7 DC [MAJ WILKINSON]: We are saying as a mixed matter of
8 law and fact. We are saying that -- I mean, you have to look
9 at some facts. We have put some facts in front of you for
10 judicial notice, both out of the 9/11 Commission Report and
11 out of historical sources that we looked up, and the
12 government has likewise put some facts in front of you, using
13 exhibits from an earlier appellate exhibit, although I think
14 on the things that matter it is mostly the same picture as the
15 9/11 Commission Report.

16 So if you use these things through judicial notice
17 for facts, you have your facts. If you believe that you need
18 more facts and we should have -- and also in addition there
19 have been expert affidavits, one in particular that team al
20 Baluchi has filed, that also can be used for factual
21 determinations.

22 If you believe you need more facts than what's in
23 front of you in the record, you are certainly free to have an

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1 evidentiary hearing and get some testimony and to search into
2 whatever needs to be searched into. But you do have facts in
3 front of you from which you could make factual findings.

4 MJ [COL POHL]: Okay. If I have this hearing ahead of
5 time, we will just take what we got and I find by the
6 preponderance of the evidence that there is subject matter
7 jurisdiction, it's still a members question, isn't it?

8 DC [MAJ WILKINSON]: Yes, sir.

9 MJ [COL POHL]: And so doesn't the real issue come down as
10 to how this element is defined? Isn't that the real legal
11 issue here is how you define this element?

12 DC [MAJ WILKINSON]: No, sir. Because the real legal
13 issue, what makes it an element, is the way Congress set it
14 out in the Military Commissions Act. The jurisdictional issue
15 we have raised would be there even if Congress had not
16 mentioned hostilities. This is something underlying. To ever
17 have a law of war military commission you must meet these
18 jurisdictional requirements. And so definition is important,
19 for sure.

20 MJ [COL POHL]: Is it the defense theory -- you have lost
21 me a little bit there so I want to understand.

22 DC [MAJ WILKINSON]: Yes, sir.

23 MJ [COL POHL]: And when I ask questions, believe it or

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1 not, they are sincere.

2 DC [MAJ WILKINSON]: I understand, sir.

3 MJ [COL POHL]: They are not tricks, although some people
4 think I ask a lot of trick -- okay. So in your pleading, you
5 have all these historical examples.

6 DC [MAJ WILKINSON]: Yes, sir.

7 MJ [COL POHL]: Okay. And so is it your position, not the
8 government first shot theory, it is that there were no
9 hostilities or that these kind of hostilities are not handled
10 in a military commission?

11 DC [MAJ WILKINSON]: Using the definition of hostilities
12 in the Act, which is action subject to the law of war, we are
13 saying there were no hostilities. If you use it in its common
14 language sense, just things that are hostile, then they are
15 hostilities that do not lead to a law of war violation that
16 could be tried in a law of war military commission.

17 MJ [COL POHL]: So you define hostilities as law of war
18 hostilities?

19 DC [MAJ WILKINSON]: Yes, sir.

20 MJ [COL POHL]: Not the fact there may have been
21 hostilities -- excuse me, some hostile action, let me put it
22 that way, to change the verbiage a little, that predates the
23 9/11.

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1 DC [MAJ WILKINSON]: Yes, sir. That's why we use the term
2 armed conflict. In international law, armed conflict is more
3 used to describe something to which the law of war describes.
4 In this particular act, they use the word hostilities.

5 MJ [COL POHL]: Do you believe the law of war does not
6 apply in this case?

7 DC [MAJ WILKINSON]: That is correct, sir. And if it
8 doesn't, then a law of war commission can't try it.

9 MJ [COL POHL]: I got the therefore. It's the predicate I
10 am talking about.

11 DC [MAJ WILKINSON]: Yes, sir.

12 MJ [COL POHL]: So -- and the reason it doesn't apply is
13 these are nonstate actors?

14 DC [MAJ WILKINSON]: Not just that they are not state
15 actors. If they were state actors it would be easy. You
16 would have an international armed conflict no matter how small
17 the actual violence may have been. But to determine a
18 non-international armed conflict, which is the only kind that
19 it could be, you have to look at the organization of the
20 parties, the intensity of the conflict. And what we say is
21 when you look at the organization of al Qaeda and the
22 intensity and non-protractedness of its conflict with the
23 United States, that those do not rise above the threshold

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1 established by international law to be an armed conflict.

2 MJ [COL POHL]: When you say the use of fancier word than
3 I am going to use, the length of the conflict hasn't been that
4 long?

5 DC [MAJ WILKINSON]: It's protracted because -- I mean,
6 the length of it, counting 9/11, beginning to the end of it,
7 if I remember that it's four years that it expands, but I was
8 using protracted to mean not sporadic. Because what the
9 authorities say is that sporadic attacks are not counted as
10 armed conflicts.

11 In this case, you had about one attack per year,
12 which from our point of view is very much sporadic as compared
13 to the other conflicts we mentioned to you.

14 MJ [COL POHL]: What time frame are you looking?

15 DC [MAJ WILKINSON]: I am looking at from the embassy
16 bombings in '98 through the 9/11 attacks in 2001.

17 MJ [COL POHL]: Okay.

18 DC [MAJ WILKINSON]: Yes, sir.

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

20 DC [MAJ WILKINSON]: Yes, sir. With respect to the
21 constitutional requirements, and again this is a thing where
22 if you have got it, I am happy to move forward. There is an
23 exception to the general rule that you try crimes by jury, and

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1 that's when you have an actual law of war issue that can be
2 tried in a law of war military commission. We get that from
3 the language in Ex parte Quirin in which they were -- and they
4 were examining the question whether they could try a group of
5 combatants under the law of war. But they didn't just say
6 Congress allowed it and therefore we can do it. They said
7 that Congress had provided, so far as it may constitutionally
8 do so, that military tribunals have jurisdiction to try
9 offenders or offenses against a law of war in appropriate
10 cases.

11 They also said that Congress had exercised its
12 authority to define and punish offenses against the law of war
13 within constitutional limitations by sanctioning the
14 jurisdiction of military commissions to try people for
15 offenses according to the rules and precepts of the law of
16 nations, more particularly the law of war. They also
17 recognized the law of war explicitly as being a part of
18 international law.

19 So if you want to deprive somebody of the right to
20 trial by jury, and of any other rights that may possibly be
21 taken away in a military commission, and you want to do it by
22 means of law of war military commission, you have to have an
23 armed conflict. It has to be some conflict to which the law

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1 of war applies; because otherwise, you want to try someone for
2 a civilian crime, whichever it may be, you take them to an
3 Article III court, as for example the government did with
4 Zacharias Moussaoui in connection with the 9/11 attacks.

5 Also, I will add in Hamdan v. Rumsfeld they mentioned
6 that the language in Quirin, at least the plurality did, was
7 the high water mark of authority for military commissions. So
8 it was more a ceiling than a floor.

9 Quirin didn't talk about the issue of whether you had
10 an armed conflict, because then there was an international
11 armed conflict, it was pretty obvious. Both the majority and
12 plurality in Hamdan did have to talk somewhat about the issue.
13 The majority pointed out that even Quirin didn't view the
14 authorization for military commissions in the old Article 15
15 or the later one as a sweeping mandate to invoke commissions
16 whenever the President thinks they are necessary, but that
17 they simply preserved the power under the Constitution and the
18 common law of war that he already had.

19 I should add we have cited to you, because I think
20 there has been a little disagreement about the meaning of this
21 term, common law of war. We did cite you a case in 488,
22 United States v. Schultz, which was from the Court of Military
23 Appeals in about 1952, which it goes on at some length, we

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1 quoted just a little, that the common law of war is simply a
2 synonym for customary international law as we call it, and
3 that those two things acting together are what limit the
4 jurisdiction of military commissions.

5 So bottom line from us is if the law of war doesn't
6 apply to the conflict, then military commissions -- law of war
7 of military commissions can't try it. Similarly, if there is
8 no -- if the law of war doesn't apply, nobody in it is a
9 belligerent, Your Honor, privileged or unprivileged, and
10 therefore he can't be tried.

11 Now, you have mentioned already this decision in al
12 Nashiri, which the government relies on at length in their
13 replies. And I should say some few things about that. The
14 first thing, the Nashiri case didn't consider any of the
15 arguments that I just made. Nashiri examined jurisdiction,
16 subject matter jurisdiction entirely as a matter of pure
17 statutory construction. And even on that they just looked at
18 the four corners of the act. They simply said that the
19 section that requires hostilities, that is an action to which
20 the law of war applies, was not written in the section that is
21 labeled jurisdiction, therefore, they don't consider it
22 jurisdictional.

23 But as you know, I mean, as we all learned first year

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1 law school, a precedent that doesn't turn on the same point
2 that's being raised later isn't a controlling precedent, and
3 it doesn't talk to our law of war or constitutional issues.

4 They decided a statutory issue; we come back with a
5 constitutional one. And for that matter, even on the one
6 issue that they did look at, which was just the statutory
7 issue, they only looked at the statute in isolation. They
8 didn't look at either international or constitutional
9 limitations on what a war court can do. That's important
10 because, as you know, in interpreting statutes, there is
11 plenty of Supreme Court case law that says you should
12 interpret a statute not to conflict with the constitution and
13 not to conflict with international law, even customary
14 international law.

15 What's even more is, as we cited in our last 502
16 response, there is cases of Coleman v. Tennessee and
17 Lee v. Madigan, and those set out a rule of construction that
18 you should read statutes against granting military
19 jurisdiction in criminal cases, particularly capital cases,
20 and that no such intention should be ascribed to Congress in
21 the absence of clear and direct language to that effect.

22 And furthermore, in Lee v. Madigan they said we will
23 attribute to Congress a purpose to guard zealously against the

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1 dilution of the liberties of the citizen that would result if
2 the jurisdiction of military tribunals were enlarged at the
3 expense of civil courts. That again is Madigan we cited in
4 502E at some length.

5 I should also add the use of the word citizen is of
6 interest there because we know ----

7 MJ [COL POHL]: Just so I am clear here, you are sliding
8 into the personal jurisdiction part here, right?

9 DC [MAJ WILKINSON]: Actually, that particular argument
10 applies to both parts.

11 MJ [COL POHL]: Let me ask you this. Did the Nashiri
12 court find the nexus with hostilities a jurisdictional
13 requirement?

14 DC [MAJ WILKINSON]: No, sir. And in fact even that use
15 of the term nexus is far from what we are talking about here.
16 Because you normally see nexus used in interstate commerce
17 cases where the Supreme Court requires only a very small
18 connection between interstate commerce and the thing being
19 regulated, to say if there is a nexus that's enough. I mean,
20 that's Filburn through Ollie's Barbecue, just about anything
21 can be made to fall under it. But we are saying there isn't
22 enough for there to be some kind of connection with
23 hostilities, however small, but that you actually have to have

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1 and be charging a war crime committed during hostilities. So
2 a nexus is not enough for that.

3 MJ [COL POHL]: So when they say subject matter
4 jurisdiction is not implicated, they are basically wrong?

5 DC [MAJ WILKINSON]: Yes, sir.

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

7 DC [MAJ WILKINSON]: Yes, sir. And in addition, you know,
8 to using those canons, both trying not to have a conflict with
9 international or constitutional law, and with the
10 Lee v. Madigan canon that you read statutes against giving
11 jurisdiction to military tribunals, it fits Congress' own
12 language when they said the things we have put in here have
13 been, have traditionally been triable at military commission.
14 I mean, it looks as if they are not trying to expand the law
15 of war or military commission jurisdiction; they are trying to
16 stay inside traditional lines.

17 And we have also given you a little bit of the
18 legislative history in the last footnote of 488, looking at
19 some statements from the committees and from the chairman, I
20 believe of the Armed Services Committee, to the effect that
21 what they really wanted to do was to keep this inside the way
22 they read Hamdan v. Rumsfeld and Common Article III.

23 MJ [COL POHL]: You don't think when they drafted the MCA,

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1 they didn't have this exact case in mind?

2 DC [MAJ WILKINSON]: I think they may have ----

3 MJ [COL POHL]: You are saying they tried to, but they
4 didn't succeed, is that kind of -- I am trying to understand
5 your argument here.

6 DC [MAJ WILKINSON]: Understood, sir. Well when I talked
7 about the intent of Congress, I mean ultimately what did they
8 intend for the words in the statute to mean? And my
9 understanding is their intent was for the statute to mean we
10 are going to follow international law, Hamdan v. Rumsfeld,
11 stay inside Common Article III. They may have wished that the
12 result of doing this would be trial and conviction for this
13 particular case.

14 In fact, as we will be arguing in 490, they seem to
15 have written at least one crime specifically to apply
16 ex post facto to this case. But if they intended to stay
17 inside constitutional and international law and doing that
18 forbids a trial of this case, then carrying out their intent
19 doesn't carry out their individual wishes.

20 MJ [COL POHL]: So they drafted a statute intending not to
21 cover this case, is that what you -- I don't quite understand
22 this part of the argument. Again, I understand, they write
23 these statutes and sometimes they do do a better job than

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1 other times, and that's not controlling. You are arguing
2 congressional intent here ----

3 DC [MAJ WILKINSON]: Sure.

4 MJ [COL POHL]: ---- and I am trying to figure out whether
5 they intended to have this case tried. And then you said,
6 well, they intended to apply -- as a matter of legislative
7 history, apply a body of law that would make the trial of this
8 case impossible under the statute they just wrote.

9 DC [MAJ WILKINSON]: Sure. I don't think that they
10 reasoned it out that far, I mean, but they knew after
11 Hamdan v. Rumsfeld had come out that just doing a bare bones
12 Yamashita type tribunal is not going to work now. And they
13 knew part of the problem -- the President had been doing it
14 just under his own authority. So they said, well -- and that
15 Hamdan v. Rumsfeld had complained you are not complying with
16 Common Article III with this.

17 They said we want to do this lawfully. We want to
18 still have military commissions, but we want to comply with
19 Common Article III, Hamdan v. Rumsfeld, and we are going to
20 write the statute intending for it to comply with that. They
21 probably did not realize that an implication of this intent
22 was that you would end up with the most famous case that they
23 were looking at not being triable, but regardless of what

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1 their wish was for the ultimate outcome, as -- you know, the
2 wish, what people wish legislation to come out to do often
3 doesn't look like what the legislation actually does. You can
4 think of famous cases from recent history for that.

5 But when you as a judge are interpreting the
6 legislation, you look at what did they intend the words to
7 mean, what legal effect did they intend them to have, not what
8 factual outcome they were hoping to reach.

9 MJ [COL POHL]: So I should ignore the legislative history
10 that cuts against your argument?

11 DC [MAJ WILKINSON]: No, sir. The legislative history
12 cuts in favor of our argument.

13 MJ [COL POHL]: Okay.

14 DC [MAJ WILKINSON]: Because the legislative history isn't
15 going to talk that we are going to get Khalid Shaikh Mohammad
16 hanged, it is we are going to stay inside Common Article III.
17 And Common Article III does require an armed conflict, which
18 is what we are saying did not exist in order to operate.

19 MJ [COL POHL]: Okay, got it.

20 DC [MAJ WILKINSON]: And as -- another thing that the
21 government cited is an order, which I believe went out over
22 your signature in the Nashiri case about four years ago. And
23 in that case it says that the Military Commissions Act of 2009

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1 actually decided the issue of hostilities, and it says so on
2 the grounds that since it looks at -- it says that crimes
3 might be committed before, on, or after September 11, it took
4 it as implicit that they thought some hostilities were going
5 on at that time. But that's a very broad reading of the
6 statutory language.

7 And as I mentioned in the briefs and just now,
8 Supreme Court case law says you don't read statutory language
9 broadly to give jurisdiction to military commissions, and you
10 do read it to avoid constitutional and international law
11 issues, or at least conflicts with those things. But this has
12 very serious issues under those bodies of law if you read it
13 too broadly.

14 So what I have been describing all this time so far
15 is the basic constitutional framework. To have subject matter
16 jurisdiction in a military commission, you have to have an
17 armed conflict, an action to which the law of war applies.
18 And to determine what that is, you have to look at the law of
19 war itself. The law of war is part of international war. Ex
20 parte Quirin says that explicitly, and the DoD recognizes it
21 also in some of its directives that we have cited to you in
22 the briefs.

23 The conflict between the United States and al Qaeda

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1 in the period we are talking about is not an international
2 armed conflict, obviously, because al Qaeda is not a country.
3 Hamdan pointed that out. You know, it's not a signatory to
4 the treaties, it's not a nation. The question then becomes
5 are we dealing with a non-international armed conflict. There
6 isn't any single source -- I mean, unlike some cases where
7 jurisdiction is at issue, it's very easy. If you -- say you
8 had a lawsuit based on federal question jurisdiction, you can
9 just read the well-pleaded complaint, see if it is pleaded a
10 federal cause of action. In some cases jurisdiction is
11 trickier.

12 In this case, it's much more so, because there is no
13 single piece of paper you can look at to answer the question
14 have you got a non-international armed conflict. There is no
15 single individual that has the power to declare it, so -- and
16 then that's what it becomes. To figure out whether you have
17 got a non-international armed conflict, you have to use the
18 customary international law of war. That's based on the
19 practice of states and that's why I say it's a factual matter,
20 because the practice of states, the actual deeds that they
21 did, is a matter of fact.

22 In the Nashiri case they complained there were no
23 facts on the record. Here there are some facts. In our case,

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1 we asked you to take judicial notice of some facts. I believe
2 we cited one case to the effect that jurisdiction is often an
3 appropriate issue for judicial notice. We simply used our
4 library cards, we got some examples and set them out for you
5 with our sources.

6 The examples we gave are a specific state practice.
7 And they show the general pattern, and the pattern is when
8 states before 9/11 were facing a small private armed group,
9 their normal rule was to say this is not armed conflict, we
10 are not bound by the law of war, this is just a civil
11 emergency or commonly this is just terrorism. We handle it
12 under our domestic laws and not under the law of war. And
13 when they prosecuted people in these groups, they did so under
14 civilian statutes.

15 Team al Baluchi ----

16 MJ [COL POHL]: Were the civilian trials like trials of
17 their own citizens or were there special rules the civilian
18 trials had?

19 DC [MAJ WILKINSON]: It varied from place to place, but in
20 some cases they certainly did because of the emergencies that
21 they saw. They would set up special courts or special
22 procedures. For example ----

23 MJ [COL POHL]: But they didn't -- they didn't -- it

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1 wasn't the same trial you would get back for an ordinary
2 citizen, they changed the rules depending upon whether there
3 was an exigency or whatever.

4 DC [MAJ WILKINSON]: Well, it varied. For example, one
5 example we used was United States trying Zacharias Moussaoui
6 for the 9/11 attacks or for the conspiracy to commit those
7 acts. He got an Article III court, the same kind of trial a
8 U.S. citizen would get. But on the other hand, with Great
9 Britain in the 1970s, they set up their Diplock courts for the
10 Irish Republican Army. They were still staffed by civilian
11 magistrates and they tried them under civilian law rather than
12 the law of war, but they certainly had streamlined procedures.
13 And, for example, they relied much more heavily on the
14 testimony of individual informers than you would have in a
15 regular full civil rights case.

16 In fact, there was a case in the European Court of
17 Human Rights in the late '70s called the Republic of Ireland
18 v. The United Kingdom in which they went at some length into
19 the procedures Great Britain was using in the earlier '70s,
20 including those Diplock courts, and found they didn't properly
21 meet the standards of human rights law. But the law of war
22 didn't enter into any of that because no one said that they
23 had to treat their opponents there as the other side of an

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1 armed conflict, non-international or otherwise, and the law of
2 war isn't what they were using.

3 And it's also true, especially if you go back further
4 into the colonial period, that the countries had and
5 considered themselves to have a lot more freedom to act as
6 they wished to act when they were not dealing with an armed
7 conflict. And one example we gave is the response in Kenya to
8 the Mau Mau Rebellion. Because as we showed you, British
9 military manuals of the era said, you know, in a military
10 operation you cannot do collective punishment on anybody. But
11 when villages in Kenya did not cooperate or did not turn over
12 their local Mau Mau members, they did do collective
13 punishments because, since they consider it just civil unrest
14 and not an armed conflict, they had a freer hand under their
15 domestic law than they would have under the Geneva Conventions
16 or the law of war.

17 So those are the kinds of state examples we give you
18 to show you that when the rubber hit the road, when it was a
19 decision, are we dealing with an enemy in law to try under the
20 law of war or are we dealing with a terrorist to be tried in a
21 civilian court, whether a streamlined one with fewer
22 protections or whether the same one that you get in a time of
23 lesser crime, it was the latter that they always went with.

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1 They thought of them as civilians.

2 We cited you also a couple of articles which show you
3 that the examples that we set forth in detail were the rule,
4 not the exception. In fact, armed groups often complained
5 that even if they swore that they wanted to abide by the law
6 of war and be taken seriously as the opponents in an armed
7 conflict, that governments always said no, you are a bunch of
8 terrorists, we are going to treat you like the criminals that
9 you are.

10 Mr. al Baluchi's team, to their great credit, has
11 acquired an affidavit from one of the top law of war experts
12 in the world. And he has not only talked about the general
13 rule, but applied it to the specific case. And looking at --
14 you know, he says in there that this was the common behavior
15 of states. I think he also gives the example of Spain dealing
16 with Basque separatists as another country that did not think
17 of them as the other side of an armed conflict or apply the
18 law of war, they thought of them as just civilian terrorists
19 of one kind or another and treated them accordingly.

20 He also looked at the facts of our specific case and
21 said, based on state practice from before 9/11, this attack
22 and al Qaeda's conflict with the U.S. would not be considered
23 armed conflict. As you know from The Paquette Habana, which

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1 has been cited in later cases, the Supreme Court says one way
2 that you can look at state practice is by looking at the
3 opinions of scholars like Professor Sassòli's, provided that
4 they are trying to give you what the law really says, what the
5 state practice really points to, rather than just their own
6 aspirations as to what they think the law should be, and
7 that's precisely what they did. I mean, that's precisely what
8 he provided.

9 We also gave you some state actions related to the
10 United States. We do not take the position that any country,
11 including the U.S., by itself can change or determine the
12 customary international law of war. It would not be
13 international if that were the case. But U.S. actions before
14 and after 9/11, to especially before, lined up with the
15 general rule and are themselves an example of the sort of
16 thing we were talking about.

17 We gave you, for example, the statement of the U.S.
18 ambassador-at-large for counterterrorism who was saying back
19 in the early '90s, yes, treat terrorism as the crime that it
20 is. Treat terrorists as criminals under criminal laws such as
21 homicide and what have you.

22 We pointed out with respect to the embassy bombings,
23 the U.S. was taking people to regular Article III civilian

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1 courts just like the ones we would use for our own citizens
2 before 9/11 and, in Mr. Moussaoui's cases, even afterwards.
3 We pointed you to some pronouncements from the governments of
4 France and Great Britain when they issued their reservations
5 to Additional Protocol I. They said it's fine, we agree that
6 all of this is what we must do in an armed conflict, but we do
7 not understand that armed conflict includes acts of terrorism,
8 the things that governments call terrorism, whether it's a
9 single act or whether it's a collected group of acts; it
10 doesn't apply.

11 We also have given you an extract from Professor
12 Green's treatise on the law of armed conflict from the year
13 2000, which I would like for a source, because it's a
14 treatment from right before 9/11 happened, and he said exactly
15 the same thing. Armed conflict doesn't include terrorism.

16 We have also given you opinions of jurists in actual
17 war crimes cases, particularly from the Yugoslav and Rwanda
18 tribunals, talking about what the standards properly were, as
19 well as the Nuremberg tribunal, and these being not just a few
20 judges giving their individual opinions, but these were bodies
21 set up by larger international bodies to say we want you to
22 apply the law of war here.

23 In the case of the Nuremberg tribunal, we mentioned,

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1 I believe, in one of our later footnotes in 502E, that the
2 year after it was decided, the United Nations issued a General
3 Assembly proclamation, on the motion of the United States, by
4 the way, saying that we affirm the principles of the law of
5 war that were set out at Nuremberg. In other words, according
6 to the international community the year after the first
7 tribunal, that was the state of the art, which included, as we
8 have mentioned in our briefs, the holding that in order to
9 violate the law of war, your actions have to happen during the
10 armed conflict, which is why, for the actual war crimes
11 charges, they always cut off actions before September 1st of
12 1939, which is when they said the war began.

13 So these things that we have been giving you, that
14 Mr. al Baluchi also gave you, are the things that we say are
15 used to determine customary law.

16 When you put them together and you look at the
17 findings in the Yugoslav tribunal, you get a standard test
18 that's been used in a lot of the war crimes tribunals that
19 were setting before 9/11 and also after it. True. When you
20 have non-international armed conflict that's internal or
21 mixed, they say that you use the -- you use the criteria of
22 organization of the parties, intensity of the conflict, and
23 specifically you use it for the purpose of distinguishing the

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1 armed conflict from terrorist activities, which are not
2 subject to the law of war.

3 MJ [COL POHL]: Is that a definitional issue? What I am
4 saying is you are saying it distinguishes armed conflict from
5 terrorist activities.

6 DC [MAJ WILKINSON]: Yes, sir.

7 MJ [COL POHL]: If a bomb is placed in a building and
8 blows it up, whether it is for terror or not, would it still
9 be part of armed conflict?

10 DC [MAJ WILKINSON]: It would depend on the organization
11 of the party that planted the bomb.

12 MJ [COL POHL]: Assuming you had that requirement. You
13 keep saying terrorism ----

14 DC [MAJ WILKINSON]: Yes.

15 MJ [COL POHL]: ---- is somehow -- if the same activity is
16 done in an armed conflict, it's subject to law of war; but if
17 it is terrorism, it isn't.

18 DC [MAJ WILKINSON]: Exactly. Absolutely, sir.

19 MJ [COL POHL]: Okay. I am not looking at the -- at who
20 is doing it, I am looking at what is done. So if a bomb is
21 placed just to blow up people, not cause terror, that could be
22 an armed conflict; but if it is intended to cause terror it is
23 not armed conflict.

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1 DC [MAJ WILKINSON]: No, sir, I better clarify that
2 because we do have a charge in this case that's called
3 terrorism, but that's not what I am referring to here.

4 MJ [COL POHL]: That's not what I am talking about here.
5 I am not talking about ----

6 DC [MAJ WILKINSON]: Understood. To determine whether, I
7 mean, a single act only telling you there was a bomb planted
8 and some people were killed or whatever is not enough to tell
9 you whether that is part of an armed conflict or not. To find
10 out whether it's an armed conflict, you have to know who
11 planted it. You have to know the organization of the group
12 that planted it. And you also have to know, at that point in
13 time, the overall intensity of the conflict that group has
14 with whichever party it is that it is planting the bomb
15 against.

16 So in some of the examples that Professor Sassòli's
17 pointed to that's in the Haradinaj that's from the Yugoslavia
18 tribunal, they talk about situations that are armed conflicts
19 and you might have 50,000 troops invading a territory using
20 artillery to shell civil villages, conquering a large swath of
21 territory, organizing the ways armies are organized, using
22 battalions, et cetera, you get an armed conflict.

23 MJ [COL POHL]: That's state on state.

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1 DC [MAJ WILKINSON]: Actually in the Yugoslav tribunal it
2 often wasn't because that was for the situation where what
3 used to be the country of Yugoslavia broke up. So some of the
4 parties there were not yet recognized as governments, but the
5 things they did looked an awful lot like a government waging
6 war, and indeed that is traditionally the sort of thing that
7 would be used to create a non-international armed conflict.

8 If you look at Additional Protocol II in fact, that
9 has a slightly higher standard that you need for the Tadic
10 test we have been talking about and says in order that -- in
11 order to really make it a non-international armed conflict,
12 your nonstate actor has to control territory and be behaving
13 as de facto government or something similar to that, I don't
14 remember the exact words. You don't need that to meet the
15 Tadic test, the control of territory, although it helps very
16 much, especially in determining organization. But in order to
17 get over the threshold to meet that test, you have to have
18 enough organization and an intense enough conflict.

19 MJ [COL POHL]: And you are saying al Qaeda lacks both of
20 those?

21 DC [MAJ WILKINSON]: That is correct, sir. And I do so
22 partly through comparison and -- al Qaeda on 9/11, that is.
23 After 9/11, I have done no analysis.

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1 MJ [COL POHL]: I got it, I got it.

2 DC [MAJ WILKINSON]: But I do that ----

3 MJ [COL POHL]: Predating 9/11 you say there wasn't
4 sufficient continual conflict and there wasn't sufficient
5 organization of al Qaeda to rise to this level to make it an
6 international armed conflict.

7 DC [MAJ WILKINSON]: Yes, sir.

8 MJ [COL POHL]: International armed conflict. Okay, I got
9 it.

10 DC [MAJ WILKINSON]: In addition, if you look at the case,
11 it takes all of the earlier ICTY cases and it distills from
12 them, you know, what you mean by what do you mean by intensity
13 of the conflict. And you look at the standards Professor
14 Sassòli's talks about. One thing, for example, you look at
15 the type of weapons and other military equipment being used.
16 In the case of al Qaeda versus the U.S., that's either bombs
17 placed in civilian vehicles or it's hijacking planes, which is
18 something that would normally be thought of by governments in
19 the 20th century as more like terrorism than armed conflict.
20 You look at the number and caliber of munitions fired in those
21 particular occasions there were no munitions per se fired
22 because those were not the kinds of weapons being used. You
23 look at the number of persons and type of forces partaking in

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1 the fighting. Even on 9/11, the largest of the operations,
2 that's either 19 persons directly involved in the fighting on
3 the al Qaeda side or 35 if you count everybody involved in the
4 operation.

5 MJ [COL POHL]: Is that when you look at the size of the
6 organization, by just those who are involved in a particular
7 operation, or the overall size of the operation including
8 perhaps training facilities and other activities that's not
9 done in the operations?

10 DC [MAJ WILKINSON]: According to the case and in
11 Professor Sassòli's affidavit, it pertains to partaking in the
12 fighting. So that suggests to me it doesn't include the
13 entire group that would include all of their support staff not
14 involved in the operations.

15 MJ [COL POHL]: So if you had a small group, a platoon
16 size going out and doing something, that's not -- you look at
17 the platoon size, not the army to which it belongs?

18 DC [MAJ WILKINSON]: Well, that depends on -- when you say
19 is the only fighting that happens the fighting done by that
20 platoon.

21 MJ [COL POHL]: You seem to be saying the only fighting
22 that matters is what happened on 9/11.

23 DC [MAJ WILKINSON]: If you are trying to count the whole

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1 conflict, you can count the earlier truck bombs at embassies.

2 MJ [COL POHL]: I am asking how you count, not how I
3 count.

4 DC [MAJ WILKINSON]: Understood. I count partaking in the
5 fighting as partaking in the fighting. However, even if you
6 do consider the whole organization, then you can compare it
7 with the other groups that we talked about, because, for
8 example, with the Irish Republican Army, it may be only a
9 couple of fellows would be involved in a given assassination
10 or planting a given car bomb, but the whole organization
11 fluctuated between 1 and 800 members. And the overall action
12 of the United Kingdom was never to recognize that as an armed
13 conflict in the period that we are talking about, which means
14 that whether they were thinking in terms of just how many
15 attacked or the whole organization, it didn't get treated that
16 way. So if you go by just actual state action, we are covered
17 either way.

18 You also look at the number of casualties. This is
19 the one place where the al Qaeda attacks, you know, are larger
20 and do have some standing. The total casualties from the
21 al Qaeda attacks on the U.S. run to about 14,000, if you count
22 wounded as well as killed. That is also roughly the total
23 number of casualties in the Mau Mau Rebellion. Now on these

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1 other factors I am talking about, the Mau Mau Rebellion was
2 much more war like, because the attacks happened more often,
3 they happened with more military type weapons and the unit was
4 organized more like an army taking part in the fighting.

5 You look at the extent of material destruction in the
6 al Qaeda attacks, it's a few buildings plus damage to a ship
7 as compared to armed conflicts where you have whole regions
8 devastated, whole towns placed under fire and so forth.

9 They also look at involvement of the UN Security
10 Council, and -- whereas in Yugoslavia you might actually have
11 peacekeeping forces sent out in order to try to stop the
12 fighting. In this particular case, well, they had no chance
13 for that because each of the attacks, these being very
14 sporadic, was over very quickly. And in fact, after the 9/11
15 attacks, what the security council did was to pass a
16 resolution saying we condemn terrorism. We want all countries
17 to pass and enforce domestic laws against terrorism. They did
18 not say, you know, that we are thinking of this as an armed
19 conflict or offering to send peacekeepers or anything of that
20 nature.

21 They also talk about the number of civilians fleeing
22 combat zones. In each of these cases, the attacks didn't last
23 long enough to create a combat zone from which the civilians

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1 could flee, at least not like in Yugoslavia. So in intensity,
2 most of those factors point very much in the direction of
3 attacks, what governments always call terrorism and not what
4 they ever recognized as armed conflict before 9/11.

5 With organization, Professor Sassòli also talks about
6 that. He also says in practice before 9/11, transactional
7 armed groups like al Qaeda almost never meet the criteria.
8 That's his paragraph 24 I believe. And furthermore, in
9 organization, we gave you a statement from Mr. Mohammad
10 showing that al Qaeda, with its few hundred members, that's
11 from the 9/11 Commission Report, was not organized below the
12 level of its Shura Council, which was an advisory council
13 Usama bin Ladin had. He said there was some about the
14 jihadists not much organized below that level.

15 If you compare them to the other groups we have given
16 you examples of, you will see that puts them way below some of
17 them and comparable with others, because with respect to the
18 IRA, for example, I have given you an attachment with their
19 organizational chart with their different directives,
20 different staff sections, as well as their cellular structure
21 and command structure. More like an army than al Qaeda. Red
22 Brigades, not as complicated as the IRA but similar. Aum
23 Shinrikyo which we gave you was a much larger organization

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1 anyway, and it was set up like a shadow government with its
2 different departments and ministries. In fact, that was in
3 their minds, apparently, to ultimately replace the government
4 of Japan.

5 And these groups did not control territory. The Mau
6 Mau Rebellion sometimes controlled a little bit; but in
7 general, like them, it controlled no territory. Most
8 importantly, in comparison with the groups that made the
9 listing that met the standard as set forth in Haradinaj, they
10 didn't act like an army.

11 MJ [COL POHL]: In those examples, was the law of war
12 commission an option they just chose not to pursue?

13 DC [MAJ WILKINSON]: In the options that met the standard,
14 the ICTY tried them as war crimes. The examples listed
15 Haradinaj intensity was enough because that's exactly ----

16 MJ [COL POHL]: Part of this was a political choice not to
17 recognize. It's much easier politically to call people
18 terrorists than call them an organized force that gives them
19 quasi POW status, for want of a better term.

20 DC [MAJ WILKINSON]: You can certainly argue that was a
21 motivation of governments. But regardless of what their
22 secret motivation was -- and I mean since governments are
23 large entities, different people in them have different

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1 motivations, I'm looking to in the end what did governments
2 actually do.

3 MJ [COL POHL]: Okay.

4 DC [MAJ WILKINSON]: And what they did consistently is
5 when -- unless the group was way up above the threshold, I
6 mean if it was a small armed group attacking them even
7 constantly over many years, their answer was terrorism, not
8 armed conflict.

9 Now, I have talked about the standard using the Tadic
10 standard. The government does propose an alternative standard
11 which they take out of a footnote in another commission in
12 U.S. v. Hamdan. That case was overturned on other grounds.
13 That footnote was not really part of its holding, which means
14 it's not a precedent anyway, but that is not a lawful
15 standard. The standard says, for example, you should consider
16 the length, duration and intensity of hostilities instead of
17 saying that is the standard as you must. But even worst, it
18 tells the person making the determination you can consider any
19 other facts or circumstances that you consider relevant to
20 determine the existence of armed conflict and the parties may
21 argue the existence of other facts and circumstances.

22 So it's telling them to make up the law as they go
23 along and to allow the lawyers to come forward.

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1 MJ [COL POHL]: Is your concern with the word should
2 instead of being the word you must?

3 DC [MAJ WILKINSON]: That is part of my concern, yes, sir.

4 MJ [COL POHL]: In the bottom part, the catch all?

5 DC [MAJ WILKINSON]: Yes.

6 MJ [COL POHL]: How about the in-between part?

7 DC [MAJ WILKINSON]: In the in-between part, there are
8 some other sections that are problems that I will admit that I
9 didn't write down here, but for example, they say what if the
10 parties made declarations. You look at the declarations of
11 their leaders. That, as we showed in 502E, is something
12 governments never paid attention to when they were making
13 decisions like this. Neither did the courts. They looked at
14 the facts on the ground.

15 MJ [COL POHL]: You don't think it's a factor what the
16 leaders of our government and perhaps Al Qaeda said?

17 DC [MAJ WILKINSON]: No, sir.

18 MJ [COL POHL]: It's not relevant at all?

19 DC [MAJ WILKINSON]: No, sir. As far as turning that into
20 an armed conflict.

21 MJ [COL POHL]: Somebody says I am going to fight you,
22 doesn't that -- isn't that some evidence of an intent to
23 engage in a conflict?

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1 DC [MAJ WILKINSON]: Yes, some kind of conflict.

2 MJ [COL POHL]: Somebody else saying this is times of
3 peace and somebody else said it's not part of an armed
4 conflict; I mean, it cuts both ways.

5 DC [MAJ WILKINSON]: What's that?

6 MJ [COL POHL]: It could cut both ways. But you are
7 saying it doesn't count.

8 DC [MAJ WILKINSON]: In the end, as we put it in the last
9 brief, it's deeds rather than words that really determine it.
10 That's the standard the ICTY used.

11 Now, the United States' words in some cases, as with
12 Ambassador Bremer's words, were indications of their policy
13 and they actually acted according to that policy, but words
14 alone don't do it. And we gave you several examples in 502E
15 where you had groups within the United States and they issued
16 often very grandiose declarations of war, as with the
17 Symbionese Liberation Army with its declaration of war and the
18 Weather Underground with its declaration of a state of war.
19 But the -- and I mean, in the FALN, in their communications
20 they had, many of them were always referring to any one of
21 them who was in prison as prisoners of war and wishing the
22 release of prisoners of war.

23 MJ [COL POHL]: My only point is you are saying it's not

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1 even -- it's not admissible or just it's a question of weight?

2 DC [MAJ WILKINSON]: It's a question of weight, and the
3 weight is almost nil.

4 MJ [COL POHL]: Okay.

5 DC [MAJ WILKINSON]: The words go one way, the deeds go
6 the other way, go with the deeds; the words and deeds line up,
7 it's another story.

8 So the answer is the test that was actually being
9 used, which I have already talked about.

10 So as I mentioned before, the U.S. before 9/11, to
11 some extent after it, was following along with this general
12 pattern, even in its conflict with al Qaeda. After the
13 embassy bombings, it was taking people to civilian courts.
14 After 9/11 it took one man to civilian court anyway. But that
15 leaves the question of what happened. Why on earth is it that
16 the government, having followed along with what everybody else
17 was doing and creating that custom to treat the small armed
18 groups as criminals and as terrorists and not to treat them as
19 opponents in an armed conflict, why would they reverse course
20 now?

21 And that -- I think the answer is an obvious one,
22 though not a pleasant one. It's the government made a
23 decision after 9/11 that it was going to take the most

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1 knowledgeable people it could capture, it was going to
2 disappear them into black sites, it was going to cut legal
3 corners, frankly going to torture them for information.

4 If you do that to someone and then try to bring them
5 to a civilian prosecution with the full set of legal rights,
6 that's poison to your prosecution. Your prosecution is gone.
7 Because under the rule of law they can either cut corners and
8 break the law or they can follow the law and get a lawful
9 conviction and punishment, but they can't do both.

10 So because they want to do both, they had to find a
11 way to try to take away these men's full set of trial rights
12 in order to try to get their punishment after their torture.
13 And the answer to that was to say, well, now let's start
14 refashioning what we think an armed conflict is so we can put
15 them into military commissions. They tried, of course, first
16 some very bare bones commissions that did not pass muster in
17 Hamdan v. Rumsfeld. This one, more rights are on the table,
18 but still a few key ones they have tried to take away. You
19 can't do that.

20 The last thing I do want to say, I mean pending any
21 questions from you, sir, is we do ask that you give this issue
22 some early attention. We cited you some Supreme Court case
23 law to the effect that jurisdiction is a threshold matter and

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1 that that rule can't change.

2 Also, that tribunals of limited jurisdiction, as with
3 federal district courts, have an ongoing duty always to look
4 into their own jurisdiction, and then if convinced they don't
5 have it, the proper thing is to dismiss it.

6 So I'm glad to finally be able to bring this issue
7 before you today. I do ask that you give it your attention as
8 soon as it is practicable.

9 MJ [COL POHL]: I have no further questions. Thank you.

10 DC [MAJ WILKINSON]: Yes, sir.

11 MJ [COL POHL]: Mr. Connell.

12 LDC [MR. CONNELL]: Yes, sir. Could we have our comfort
13 break before we argue?

14 MJ [COL POHL]: Are you going to argue as long as he did?

15 LDC [MR. CONNELL]: No, not as long.

16 MJ [COL POHL]: The commission will be in recess for 15
17 minutes. We will reconvene at 1510. The commission is in
18 recess.

19 [The R.M.C. 803 session recessed at 1454, 15 May 2017.]

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