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1 [The R.M.C. 803 session was called to order at 1043,  
2 18 October 2017.]

3 MJ [COL POHL]: The commission is called to order. Any  
4 changes?

5 CP [BG MARTINS]: None from the United States, Your Honor.

6 MJ [COL POHL]: Ms. Bormann?

7 LDC [MS. BORMANN]: Major Seeger is temporarily absent.

8 He will be here in a moment. But we have Captain Brady here  
9 as detailed military counsel, so it's fine. That's fine.

10 MJ [COL POHL]: He has returned. That's okay.

11 Okay. The commission is called to order.

12 Mr. Harrington, you just gave me the e-mail we talked  
13 about on the scheduling issue?

14 LDC [MR. HARRINGTON]: Yes, Judge.

15 MJ [COL POHL]: I'm going to take it a little out of order  
16 here. So, Mr. Connell, why don't you have a seat for a  
17 second.

18 And I am not sure we have discussed this on the  
19 record, so let's just go. I am going to mark this in the 478  
20 series because it deals with scheduling. It's 478M (RBS).

21 Okay. Go ahead, Mr. Harrington. I just wanted to put on the  
22 record, we discussed this in the 802 but we need to kind of  
23 flesh it out.

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1 LDC [MR. HARRINGTON]: Yes, Your Honor. I just found out  
2 that this e-mail which I sent yesterday didn't go to anybody  
3 it was addressed to. Something happened in my computer. But  
4 this is a copy of the e-mail I sent yesterday. The first page  
5 just notifies the court of what the case is and who the Judge  
6 is in Buffalo, and the second page is a notice that we  
7 received from that trial court of what he anticipates dates of  
8 trial are going to be starting after October 31. And  
9 obviously he anticipates it going into the first week in  
10 December. There are a number of down days in there. I have  
11 no idea what those are for, other than the fact that usually  
12 when he is on trial, he takes one day during the week to do  
13 the rest of his calendar rather than keep jurors  
14 inconvenienced, so ----

15 MJ [COL POHL]: Okay. Trial Counsel, do you wish to be  
16 heard on this?

17 Just for the record, I don't know if it was totally  
18 clear that Mr. Harrington has a case in Buffalo, New York,  
19 beginning on the 31st of October which may or may not impact  
20 on his ability to make it for the December -- scheduled  
21 December hearings.

22 Mr. Ryan.

23 TC [MR. RYAN]: Your Honor, there was a few options I

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1 believe that were discussed in terms of Your Honor reaching  
2 out to the judge. Are you still considering that as a  
3 possibility?

4 MJ [COL POHL]: Yes.

5 TC [MR. RYAN]: And secondly, Your Honor, I would note  
6 that if we are -- and I believe we are intending and scheduled  
7 to take up the hostilities motion in December. Mr. Binalshibh  
8 is not part of that motion; therefore, we could continue  
9 without the presence of Mr. Harrington.

10 MJ [COL POHL]: Okay.

11 TC [MR. RYAN]: Certainly as to that motion, sir.

12 MJ [COL POHL]: Mr. Harrington.

13 LDC [MR. HARRINGTON]: Judge, I'm not waiving my presence  
14 for the December hearing. And whether we are joined to that  
15 motion at this point or not, I don't think I see it ----

16 MJ [COL POHL]: Let me do this, and you know this court  
17 and this judge better than I do. It strikes to me that, at  
18 least in my experiences, trials can go faster or slower than  
19 anticipated.

20 LDC [MR. HARRINGTON]: Right.

21 MJ [COL POHL]: Would it be useful if I asked you to give  
22 me a status of this on the 21st of November? That would give  
23 me enough time to request a break for the week down here or

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1 should I ----

2 LDC [MR. HARRINGTON]: Judge, especially, as Mr. Ryan  
3 indicated, if there are witnesses coming, that complicates it  
4 is for everybody, but I think it's better to do it up front.

5 MJ [COL POHL]: Okay.

6 LDC [MR. HARRINGTON]: I am glad to grease the wheel for  
7 you and call him. You can call him. He is a very nice man.  
8 He will talk to you about it.

9 MJ [COL POHL]: He will even talk to me, okay.

10 LDC [MR. HARRINGTON]: Judge, he is my age, the same class  
11 as me, different school, and we have been on a parallel course  
12 for over 40 years.

13 MJ [COL POHL]: Okay. I am not sure I will either call  
14 him or write him. Is there any objection to either of those  
15 procedures by any party? And if I do call him, I will make a  
16 memorandum for the record of the contents of the call.

17 TC [MR. RYAN]: Not from the United States, sir.

18 MJ [COL POHL]: Any objection from any defense counsel?  
19 And I assume you don't, Mr. Harrington?

20 LDC [MR. HARRINGTON]: I don't.

21 MJ [COL POHL]: Would you just give him a heads up and  
22 tell him I intend to call him, the dates you are scheduled to  
23 be here, and that I will contact him, either call him or send

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1 him a letter? I will probably try do do it the more informal  
2 way first and then follow up with a letter if necessary. But,  
3 in essence, just tell him when you get back that I will be in  
4 contact with him about deconflicting the two trials.

5 TC [MR. RYAN]: Your Honor, if I could just quickly: One,  
6 I misspoke and called it hostilities when it is personal  
7 jurisdiction which Mr. Binalshibh is not part of.

8 MJ [COL POHL]: I got it.

9 TC [MR. RYAN]: Secondly, a pure suggestion on my part. I  
10 don't know that everyone else back on the mainland really  
11 understands what it takes to put this case on every time we  
12 come down here. My best guess for you is that a federal  
13 judge, once apprised of all of the moving parts that go into  
14 it and the cost and so on, will be somewhat sympathetic to  
15 Your Honor's plight.

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

17 Mr. Connell. Now, it's my understanding you were  
18 going to create a slide that was in your 502 slide deck.

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

20 MJ [COL POHL]: And during the break we had the OCA review  
21 that individual slide and said it was okay to publish it.

22 LDC [MR. CONNELL]: You know, I have made this beautiful  
23 artwork, it's marked as 510D. I think I will just go with it.

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1 MJ [COL POHL]: But that one wasn't reviewed.

2 LDC [MR. CONNELL]: It was reviewed.

3 MJ [COL POHL]: Is it identical to the one that was in the  
4 slide deck?

5 LDC [MR. CONNELL]: When I say reviewed -- it was more  
6 talent as an artist than the one in the slide deck.

7 MJ [COL POHL]: I am not commenting on your artistic  
8 talent. We asked for the things, you know, to be ahead of  
9 time, but it is not just a CIS0 review, it's the OCA review,  
10 okay? So if the same information is on an OCA-reviewed slide,  
11 let's use that one.

12 LDC [MR. CONNELL]: May I have a moment?

13 MJ [COL POHL]: Sure.

14 [Pause.]

15 MJ [COL POHL]: I think the folded one was the one that  
16 they reviewed. That's the one that you got back from my CIS0.

17 LDC [MR. CONNELL]: Yes, sir, but it doesn't have colors.  
18 It is only black and white.

19 MJ [COL POHL]: Okay. I will let you add color if you  
20 like.

21 LDC [MR. CONNELL]: I am just getting the right copy.

22 MJ [COL POHL]: Okay. We are also going to renumber to  
23 the 510 series?

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1 LDC [MR. CONNELL]: I'm sorry?

2 MJ [COL POHL]: I assume it has a 502.

3 LDC [MR. CONNELL]: The slide?

4 MJ [COL POHL]: Yes, we are.

5 LDC [MR. CONNELL]: I can pull it from the deck.

6 MJ [COL POHL]: Which is --

7 [Conferred with courtroom personnel.]

8 MJ [COL POHL]: It will be 510D.

9 LDC [MR. CONNELL]: Your Honor, with all that as preface,  
10 may I have the feed from Table 4, please?

11 Your Honor, this slide 510D has been reviewed --  
12 submitted to the CISO, the government has seen a copy of it.  
13 I will distribute a copy of it once I can make copies of this  
14 individual slide. May I request that this be displayed to the  
15 gallery?

16 MJ [COL POHL]: Sure, go ahead. Hold on a second,  
17 Mr. Connell.

18 [Conferred with courtroom personnel.]

19 MJ [COL POHL]: Go ahead.

20 LDC [MR. CONNELL]: Thank you, sir. AE 510 seeks  
21 discovery on the question -- on a historical event known as  
22 Operation Infinite Reach, which involved Tomahawk missile  
23 attacks on two locations, one in Afghanistan and one in Sudan,

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1 on 20 August of 1998.

2           Setting aside 510 for just one moment, in 502Y,  
3 Mr. al Baluchi went to extraordinary effort to lay out  
4 essentially the current version of our entire hostilities  
5 defense, something like 104 pages describing the historical  
6 events between the alleged organization of al Qaeda in 1988  
7 and the initiation of hostilities on 7 October 2001 in  
8 Operation Enduring Freedom.

9           I am not going to go through that either today or  
10 tomorrow, but a little bit of understanding of what the  
11 government's hostilities model is necessary in order to  
12 situate 510 as one of a series of motions to compel regarding  
13 hostilities. Hostilities, of course, is important in the  
14 determination of jurisdiction, as well as an element of  
15 defense that the government must prove beyond a reasonable  
16 doubt at trial.

17           The government's model, as laid out in their  
18 moving -- in their papers, as well as in the charge sheet, has  
19 essentially six elements to it. The first of those, in 1996,  
20 is Usama bin Laden's declaration of jihad against the  
21 crusaders. This is a document which lays out, in some detail,  
22 objections to American foreign policy; particularly, the  
23 occupation of the Arabian peninsula and the U.S. support for

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1 Israel.

2           There is one paragraph in that document, which  
3 involves a call for violence. The government's hostilities  
4 model treats this as the initiation of hostilities. In other  
5 words, grants this document written by Usama bin Laden the  
6 force of international law to bring the law of armed conflict  
7 into play, displacing ordinary criminal law and the law of  
8 human rights under international law.

9           Of course, at the time, hardly anyone paid any  
10 attention to this alleged world-shaking event. And then on  
11 February 23 of 1998, the second element of the government's  
12 hostilities model comes into play. Five individuals, one of  
13 whom was Usama bin Laden, issued a statement under the name  
14 The World Islamic Front. There are four organizations which  
15 are represented in The World Islamic Front, none of which is  
16 al Qaeda itself. No one claims to be speaking for al Qaeda,  
17 no one claims to be part of al Qaeda. Other organizations,  
18 like Egyptian Islamic Jihad, are specifically mentioned, but  
19 this is the second -- this also calls -- criticizes American  
20 foreign policy, especially occupation of the Arabian peninsula  
21 and support for Israel, and makes a call for violence against  
22 Americans in the United States.

23           And the next element of the government's model occurs

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1 on August 8 of 1998 when two embassies, American embassies in  
2 East Africa were simultaneously bombed, allegedly by people  
3 associated with al Qaeda, resulting in the deaths of a number  
4 of Americans and many more Africans.

5 Twelve days later, the United States takes the sole  
6 military action which occurs in the government's model, and  
7 that is Operation Infinite Reach. Operation Infinite Reach  
8 was addressed by the President, President Clinton at the time,  
9 and it resulted in an unknown amount of damage; it resulted --  
10 used an indeterminate number of cruise missiles or not  
11 publicly declassified number of cruise missiles; and resulted  
12 in not publicly released numbers of casualties or the  
13 affiliations of those casualties.

14 The government's model, Operation Infinite Reach, is  
15 the topic of AE 510. The government will no doubt be  
16 presenting evidence about it at trial, because it has to prove  
17 hostilities. Certainly it will be a subject of examination,  
18 both by the defense at trial and by the defense in the  
19 personal jurisdiction hearing.

20 Just to close out the model, on October 12 of 2000,  
21 individuals allegedly associated with al Qaeda attacked the  
22 USS COLE that resulted in the al Nashiri trial, among others,  
23 and on September 11 the attacks which are charged today.

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1           Not appearing on this model but of critical  
2 importance to the defense is the actual beginning of  
3 hostilities, which occurred on 7 October 2001 when Operation  
4 Enduring Freedom began in Afghanistan following an ultimatum  
5 issued by President Bush on 20 September of 2001. The Taliban  
6 did not comply with President Bush's ultimatum and President  
7 Bush carried through with his 20 September 2000 threat on 7  
8 October 2001.

9           Now, the only real question which is before the  
10 military commission in 510 is whether to grant the discovery  
11 regarding Operation Infinite Reach. It's clearly material to  
12 the preparation of the defense, and although we don't know  
13 what individual the government will use to prove Operation  
14 Infinite Reach, it's fair to anticipate that it will be using  
15 some level of information.

16           In our moving papers, we articulate five specific  
17 bases for materiality. The first is information surrounding  
18 Operation Infinite Reach to determine its purpose. This is a  
19 question which has been publicly and openly debated between  
20 members of the Clinton and Bush administrations. Was this  
21 single-day attack intended as a pin prick? Was it intended as  
22 an assassination? Was it intended as an opening campaign  
23 which was later aborted?

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1           Mr. Scheuer, head of the Usama bin Laden unit at the  
2 CIA, has described Operation Infinite Reach as the opening  
3 move in Richard Clarke's Delenda campaign, intended Delenda  
4 campaign, which is the subject of AE 514. Others have  
5 disputed that and said, as President Clinton said at the time,  
6 that it was intended to be a single attack, not part of a  
7 campaign.

8           One of the important questions about purpose is, did  
9 the strikes target al Qaeda as an organization, which is  
10 critical to the government's argument that a nonstate actor in  
11 1996 initiated a situation of armed conflict under  
12 international law with the United States as an organization  
13 and not as individuals, or did Operation Infinite Reach target  
14 Usama bin Laden as an individual as has been frequently  
15 suggested?

16           The other important purpose -- the other important  
17 issue out of purpose is the prestrike assessment of the  
18 affiliations of the individuals at the plant in Sudan and at  
19 the camp in Afghanistan. As I noted briefly before, the five  
20 people signed The World Islamic Front that the government  
21 charges in the charge sheet and relies on for the indication  
22 of the law of armed conflict, none of whom listed al Qaeda as  
23 an affiliation.

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1           The second basis for materiality of information  
2 surrounding Operation Infinite Reach is intensity. Now, there  
3 is a dispute among the parties about the appropriate standard  
4 for determining hostilities. But in this situation, as, in my  
5 view, in 502, it's not really -- it's a distinction without a  
6 difference. Because both the definition in Hamdan and the  
7 more widely accepted definition in Tadic, spelled T-A-D-I-C  
8 with a little accent over it, have intensity and duration of  
9 violence as an element of the determination. The critical  
10 difference between those two, and we will explore it in some  
11 depth tomorrow, is that Hamdan treats duration and intensity  
12 as one of a multifactor test and Tadic treats it as an  
13 absolute requirement.

14           But it is important to know -- it will be important  
15 for the prosecution to prove and for the defense to know how  
16 much ordinance reached its target, what was the duration of  
17 the bombing, how much damage, property damage was inflicted --  
18 which is a factor which is actually separately listed in the  
19 Hamdan instruction -- what casualties were inflicted -- which  
20 is a separate issue listed in the Hamdan instruction -- and  
21 what were the affiliations of those casualties? Were they  
22 al Qaeda? Were they someone else? Were they unaffiliated  
23 with any organization?

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1           The military commission may recall that the  
2 affiliation and the significance of the Sudan plant became a  
3 significant political issue in the late Clinton  
4 administration. And information in the public sphere was  
5 batted about by both supporters and opponents of President  
6 Clinton.

7           The third reason for materiality of discovery  
8 regarding Operation Infinite Reach is to support the defense  
9 argument which we intend to make comparing Operation Infinite  
10 Reach with other contemporary military activities. Within  
11 seven months of Operation Infinite Reach, the United States  
12 engaged in two other military activities. One was a four-day  
13 bombing campaign in Iraq and the other was a 78-day bombing  
14 campaign in Kosovo.

15           I am not the first person to compare Operation  
16 Enduring Freedom with those activities. In fact, in his  
17 speech on 20 September 2001, President Bush contrasted the  
18 forthcoming Operation Enduring Freedom -- which we fully  
19 acknowledge and endorse as initiating a state of hostilities  
20 under international law and domestic law as well, he  
21 contrasted Operation Enduring Freedom with three other  
22 military activities. One of those was Desert Storm, the  
23 liberation of Kuwait in 1991; one of those was the air war in

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1 Kosovo, the 78-day bombing campaign that I just mentioned; and  
2 the third was Operation Infinite Reach.

3 He deliberately contrasted the forthcoming state of  
4 hostilities with Operation Infinite Reach. That, we will  
5 intend to rely on that contrast and make that same contrast  
6 when we are arguing to the military commission in the personal  
7 jurisdiction hearing and to the members in the trial.

8 The fourth basis for materiality is a comparison  
9 between Operation Infinite Reach and Operation Infinite  
10 Resolve. Despite their close -- their names, which were close  
11 together, there is an extremely important difference between  
12 these two operations. Operation Infinite Reach went forward  
13 on 20 August 1998, whereas Operation Infinite Resolve  
14 represents the path not taken in hostilities against Al Qaeda,  
15 extensively examined by the 9/11 Military Commission -- excuse  
16 me, by the 9/11 Commission and extensively debated in the  
17 public sphere.

18 Infinite Resolve represents the armed conflict that  
19 wasn't against al Qaeda. It was a DoD plan for continuing --  
20 for hostilities against al Qaeda that for various reasons --  
21 and what those reasons were depends on who you ask, but for  
22 various reasons was never implemented.

23 And our position, what we will argue to the military

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1 commission in AE 502 and what we will argue to the members at  
2 trial, is that the Infinite Resolve might have -- probably  
3 would have represented hostilities, whereas the political  
4 decision not to implement Infinite Resolve supports our  
5 position that, because of intelligence limitations and  
6 failures, because of political will and because of other  
7 factors, the United States chose, deliberately chose not to  
8 enter a state of hostilities with al Qaeda between August 21  
9 of 1998 and 7 October 2001.

10           Especially important to that is the debate over the  
11 quality of intelligence. President Clinton and others have  
12 stated that the reason -- and Secretary Albright among the  
13 others, have stated that the reason why the United States did  
14 not act militarily, in other words, did not enter a state of  
15 armed conflict with the nonstate actor al Qaeda between 1998  
16 and 2001, has to do with the level of intelligence that they  
17 received from the CIA and others. That's a subject -- a  
18 matter of debate. But knowing the quality of intelligence  
19 that went into Operation Infinite Reach will make an extremely  
20 valuable argument to the defense in comparing the two.

21           Finally, Your Honor, the fifth basis for materiality  
22 for information surrounding Operation Infinite Reach is  
23 sometimes called the wag-the-dog model after a movie of the

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1 same name. The same week of President Clinton's attack on  
2 targets in Sudan and Afghanistan, he was scheduled to appear  
3 before the grand jury that was investigating the Monica  
4 Lewinsky scandal. Some people believe -- people more toward  
5 the conservative end of the spectrum often believe that this  
6 Operation Infinite Reach was not intended to be -- engage in  
7 any sort of hostilities, per se, but rather was intended to  
8 distract attention away from the forthcoming grand jury  
9 testimony, which is extraordinary for a President, in the  
10 Monica Lewinsky scandal.

11 The Department of State in fact in its reporting, its  
12 gathering of information to report back to Secretary Albright,  
13 in fact, reported world media, which was linking the two  
14 events, the two events being the attack on August 20 and the  
15 testimony before the grand jury. If that argument is  
16 supported by even some evidence within that the government  
17 would produce, it would be an important argument in favor of  
18 the lack of ongoing hostilities.

19 Your Honor, fundamentally, it takes more paperwork  
20 for me as an individual to travel here for a hearing than the  
21 government has produced regarding Operation Infinite Reach.

22 The military commission should issue an order to the  
23 government ordering it to produce information about Infinite

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1 Reach as requested in the series of discovery requests that we  
2 have made to the prosecution. On many occasions, we have  
3 pointed them to the exact collection in the Clinton library  
4 which we believe contains information. There can be no claim  
5 of overbreadth because, in the Clinton library example, the  
6 librarians have already collected that information in response  
7 to Freedom of Information Act requests and are slowly, slowly,  
8 slowly putting it through mandatory declassification review.

9 Thank you, sir.

10 MJ [COL POHL]: Thank you. Any other the defense counsel  
11 wish to be heard in this motion? Apparently not.

12 Trial Counsel?

13 MTC [MR. TRIVETT]: Good morning, Your Honor.

14 MJ [COL POHL]: Good morning.

15 MTC [MR. TRIVETT]: Mr. Connell certainly has the right to  
16 set forth a defense for his client, but he doesn't have the  
17 right to rewrite history. This motion, the next motion on  
18 Mr. Clarke, and the hostilities-related aspects of 502, all  
19 very closely intertwine, but it does go to show how important  
20 it is for the military judge to adopt the standard for  
21 hostilities that are set forth in the C.M.C.R. decision in  
22 United States v. Hamdan.

23 If that standard, which we believe is binding on this

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1 commission, is the standard under which the judge is going to  
2 make the determination in the jurisdictional hearing and  
3 ultimately the members are going to be instructed on for the  
4 trial, the why it may have happened isn't nearly as important  
5 to the standard as what actually did happen. And all along,  
6 the government has been proffering its theory of hostilities.  
7 And Mr. Connell had it pretty much right, but I did want to  
8 address certain things that we take issue with, lest you  
9 believe we don't take issue with them.

10           We do believe that the '96 document written by Usama  
11 bin Laden, who was the head of al Qaeda at the time he wrote  
12 it, is a declaration of war. We do believe the World Islamic  
13 Front, when he signed on, when Usama bin Laden signed on to it  
14 with other terrorist leaders, he was doing so as the head of  
15 al Qaeda. Evidence will establish that at trial and in the  
16 jurisdictional hearing. And it's also important that one of  
17 the other signatories for the Egyptian Islamic Jihad, Ayman al  
18awahiri, quickly joined forces with al Qaeda shortly after  
19 the '98 fatwa was issued and became part of al Qaeda and the  
20 number two in al Qaeda.

21           August 30, 1998, the U.S. embassies in Kenya,  
22 Tanzania, Africa, were attacked. Over 220 people were killed.  
23 That was the first in what is a series of ten separate attacks

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1 that al Qaeda had on the United States between 1996 and 2001  
2 following that declaration and following the '98 fatwa, which  
3 was pretty much a statement of intent to commit the  
4 quintessential war crime, which was essentially attacking  
5 civilians, namely United States civilians. But two embassies  
6 were attacked, four planes were hijacked, three buildings were  
7 attacked, and a U.S. warship was attacked. That's what  
8 actually happened. That's part of history and that can't be  
9 rewritten by any of the documents that Mr. Connell seeks  
10 today.

11 But I do want to point out to the judge that it's not  
12 as if he did not get any Infinite Reach documents. Between  
13 documents relating to Infinite Reach and documents relating to  
14 Infinite Resolve, he has 1,395 pages of them. It is true some  
15 of them were redacted. We went through and redacted them  
16 based on relevancy.

17 We are going back through them. We are seeking a  
18 broader declassification of those documents through the Joint  
19 Chiefs of Staff, but these are in some instances tremendously  
20 sensitive documents, even though they are 18 or 19 years old.  
21 So we are going through that process. We intend to make more  
22 available after that process. But I did want to bring to the  
23 judge's attention, it is not as though we don't concede that

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1 any of it is relevant, but we have to look at the eaches of  
2 what he is asking for.

3 One document he is asking for, Tomahawk failure  
4 rates. And it is an unclassified fact that at least over 80  
5 Tomahawks were fired into the Sudan and into Afghanistan on  
6 August, I believe 19, 1998. What percentage of those  
7 Tomahawks failed is irrelevant to the inquiry in the standard.  
8 Whether they were shot at a specific target is relevant and he  
9 has that in spades.

10 But when you are dealing with documents such as this  
11 that get into very detailed specific classified military  
12 aspects of its operational reviews, they have a hard time  
13 establishing how that -- establishing their burden on how that  
14 goes to the existence or nonexistence of hostilities. And so  
15 because this is classified and because it does have a higher  
16 standard before we just agree to disclose it, we have redacted  
17 in certain instances and we have withheld certain documents in  
18 their entirety if we believe that they were not relevant.

19 That said, from July of this year to the present, we  
20 have had teams at President Clinton's presidential library in  
21 Little Rock and in President Bush's presidential library in  
22 Texas, as well as the archives of the United States, looking  
23 for every single document that Mr. Connell has asked for. We

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1 don't necessarily intend to disclose every single document  
2 that he has asked for, but we are at least gathering them and  
3 we will go through our review process to make a determination  
4 under 701 and the standard for hostilities as to whether or  
5 not it's something that's discoverable. So we are in the  
6 process of doing that.

7 MJ [COL POHL]: When will that review be completed?

8 MTC [MR. TRIVETT]: The review at the libraries is done --  
9 is going to be done shortly. We then need to compile it,  
10 bring it back and put our team on it to do the final  
11 discoverability review. It's a two-part process.

12 This is a unique historical event. There is a lot of  
13 information in the Clinton presidential library, because  
14 obviously he was the President at the time. There is actually  
15 other relevant documents in the President Bush presidential  
16 library, not just relating to the first nine months he was in  
17 office up to September 11, but because the 9/11 Commission  
18 Report had a lot of information where the administration had  
19 to answer ----

20 MJ [COL POHL]: Do you anticipate at least giving some  
21 additional discovery on this issue to Mr. Connell?

22 MTC [MR. TRIVETT]: Yes, sir. There will be certain  
23 additional documents. And, quite frankly, in our review of

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1 these documents, which we think is broader than our regular  
2 affirmative discovery obligation, we found very inculpatory  
3 statements from presidents directly using the terms as "we are  
4 at war with al Qaeda," that will also be provided to them.

5           Mr. Ryan talked up to earlier in this week about some  
6 of the additional documents that are coming in relating to his  
7 argument on the trial scheduling order. This is some of that  
8 information that we envision coming. Whether it comes  
9 redacted, whether it comes without redactions, whether it  
10 comes with a 505 filing, we are not sure yet; we are still in  
11 the process of gathering it.

12           But again, we don't believe we had an obligation to  
13 look at every single document of every single government  
14 employee who may have had an opinion on whether or not when he  
15 was doing work, he believed we were under an armed conflict  
16 with al Qaeda. Because what happened matters. What happened  
17 matters. We will prove what happened. They have the  
18 information about what actually happened.

19           Other collateral issues surrounding that we don't  
20 believe are relevant and that's why we believe the standard is  
21 so important to be set so that we know, while we are reviewing  
22 this large volume of documents, what our obligations are in  
23 regard to that standard.

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1           Now, ultimately in the President Clinton library,  
2 there is 14,347 pages that we know the defense has already  
3 seen and that they have reviewed. Those are part of the  
4 archives. Because they are publicly available, we don't have  
5 a discovery obligation to turn them over. But we know the  
6 defense has been there. I know some of the documents they  
7 asked for are present within that 14,000.

8           There is an almost identical number in the President  
9 Bush library, 14,309 pages of open documents that were  
10 responsive in some way to the request that they also reviewed,  
11 that we have confirmed that they reviewed. So it's not as if  
12 we are being stingy with Infinite Reach and Infinite Resolve  
13 documents; it is we simply believe there is a standard that  
14 applies and that if these pages are not relevant to the  
15 standard, that they are not discoverable under 701.

16           I did want to point out, though, there was one part  
17 of our proffer of hostilities that Mr. Connell missed, and it  
18 is Operation Infinite Resolve. That was the military  
19 operation put into place after the strikes happened. It was  
20 what Infinite Reach eventually morphed into, where it's  
21 planning documents discussing every possible way we can kill  
22 or capture Usama bin Laden and remove the threat of his  
23 al Qaeda terrorist organization if we could.

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1           Mr. Connell seems to call that the path not taken.  
2 We would take great issue with that definition or that  
3 characterization. It was the military operation that was put  
4 into place and that nearly every entity of the United States  
5 Government was working to bring to conclusion the Usama bin  
6 Laden problem from 1998 to 2001.

7           While it is true and while we have conceded for the  
8 jurisdictional hearing that there was not a single weapons  
9 system fired between the Tomahawks in August of 1998 and the  
10 attacks of September 11, 2001, it wasn't for lack of effort,  
11 it wasn't for lack of planning, it wasn't for lack of  
12 political will. Everything historically that's been released  
13 about this in the public domain indicates the one issue was we  
14 did not have actionable intelligence to be able to know where  
15 he was going to be when we had an attempt to strike them. And  
16 ultimately it all came down to the fact that we did not yet  
17 have the Predator weapons system, we didn't have readily  
18 available ordinance at the ready. So the second we knew where  
19 he was, we would be able to shoot him.

20           Staff Statement 6, which was part of Mr. Connell's  
21 filing, and Staff Statement 8 in his filing as well from the  
22 9/11 Commission Report goes into great detail and, quite  
23 frankly, summarizes better than I could all of the information

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1 that we have already reviewed regarding Operation Infinite  
2 Reach.

3           So we would take -- we would take great issue with  
4 saying that's the path not taken. We will concede that we  
5 didn't actually get to fire a shot when we tried to, but the  
6 very fact that there was an entire military mission dedicated  
7 to this very issue from 1998 to 2001 inures to our benefit.  
8 It establishes the existence of hostilities, certainly a fact  
9 relevant to that. Again, he can make the defense he wants, he  
10 just is not allowed to rewrite history.

11           And again, we have heard this several times in this  
12 military commission, that the war didn't start until 7 October  
13 2001. And that ignores Supreme Court precedent that  
14 established that there is actually two different wars, right?  
15 On 7 October 2001, there is an international armed conflict  
16 under the Geneva Conventions that are engaged between United  
17 States and Afghanistan as a signatory to the Geneva  
18 Convention. That is true. That was the hostilities that  
19 began between the United States and the Taliban and  
20 Afghanistan. But clearly the standard that we are allowed to  
21 show has nothing to do with 7 October 2001. It's a standard  
22 that, if we can establish through the facts that can predate  
23 2001, as Congress gave you the authority to do and we have

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1 already done in cases in United States v. Hamdan,  
2 United States v. al Bahlul, it ultimately is what we are  
3 entitled to show under the law, under the law of armed  
4 conflict that we were engaged in protracted armed hostilities  
5 with a terrorist organization as early as 1996.  
6 International -- and our position has always been under  
7 international law, when you have international armed  
8 conflicts, a declaration of war is sufficient alone.

9           If we were to ultimately ----

10           MJ [COL POHL]: Hold on, Mr. Trivett.

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

12           MJ [COL POHL]: Go ahead.

13           MTC [MR. TRIVETT]: If we were to declare war on another  
14 country today, the law of war would apply from the second we  
15 declared war. And that's really what we are talking about.  
16 We are talking about when did the hostilities begin so we know  
17 when the law of war took over. And clearly our position has  
18 always been that we believe it began in 1996 with Usama bin  
19 Laden's declaration, because they were clearly making  
20 preparations, they were clearly ready to attack the embassies  
21 in 1998 and did shortly thereafter. They made it very clear  
22 what they intended to do and they did it, and our evidence is  
23 going to establish that.

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1           But ultimately we have also said that, certainly no  
2 later than 1998 when they actually strike our embassies and we  
3 actually fire Tomahawk missiles back at them, that is the  
4 latest possible date where the armed conflict began. And  
5 that's the position of the United States regarding the latest  
6 it began. We believe it began in '96 with the declaration, we  
7 believe that that's sufficient, but under the standard, an the  
8 very latest, it's August 1998, which would give us  
9 jurisdiction over all of the charged offenses in this case.

10          MJ [COL POHL]: You are kind of conflating two arguments  
11 here because you are really talking about your base 502  
12 argument.

13          MTC [MR. TRIVETT]: Yes, sir. And it's hard not to.

14          MJ [COL POHL]: That's a question about 502, and I'll wait  
15 until I get to 502. But I understand why it's difficult to  
16 make a clear distinction.

17          MTC [MR. TRIVETT]: We believe they are all intertwined  
18 and believe we have jurisdiction and continue all the way  
19 through the merits of this case based on that jurisdiction.  
20 Subject to your questions, sir.

21          MJ [COL POHL]: I have none.

22                 Mr. Connell. Just a second. Please go ahead.

23          LDC [MR. CONNELL]: Thank you, sir. I will begin where

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1 the government ended, which is with competing characterization  
2 of existing facts. The debate that we are having today is  
3 absolutely not the first time that this debate has taken  
4 place. The elements of this debate took place in the hours  
5 after the Tomahawk attack on 20 August 1998. Elements of this  
6 debate took place beginning on September 11 throughout  
7 congressional inquiries, the 9/11 Commission, books, movies,  
8 bars. I mean, these are questions which are constantly  
9 debated. There are multiple views of what happened, why it  
10 happened, when it happened, and what should have happened.

11           The government today, interestingly, took the  
12 position -- took the Clinton administration position of lack  
13 of actionable intelligence, which was actually one of the  
14 points that I made why we need to see the Infinite Reach  
15 discovery is so that we can compare the actionable -- the  
16 actionability, if that's a word, of the intelligence for  
17 Infinite Reach, which the government says did not result in a  
18 single shot being fired in Operation Infinite Resolve.

19           The government takes the position that it all came  
20 down to lack of Predator weapons. And there has been a great  
21 deal of discussion in the literature about whether the  
22 Predator was developed, whether -- Mr. Tenet, we expect to  
23 testify that he wanted to arm predators substantially prior to

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1 9/11. The Predator question is one which we will actually  
2 call witnesses on in the personal jurisdiction hearing. The  
3 significance of this ----

4 MJ [COL POHL]: Do the resources available -- this may be  
5 a 502 question, so if it is we can get to it there. But do  
6 the amount of resources available to execute an operation  
7 control on whether or not there is hostilities?

8 LDC [MR. CONNELL]: They don't control it by any means,  
9 but they do inform it. You know, for example, there have  
10 never been hostilities between -- or let's do it this way.  
11 Currently the United States is facing a question of what will  
12 happen with North Korea. And in the past, let us say 20  
13 years, there have not been hostilities between the United  
14 States and North Korea -- that's state-to-state action, so  
15 there is clearly a difference there -- but there have not been  
16 hostilities in the law of armed conflict system since between  
17 the United States and North Korea.

18 Now, is that because the North Koreans don't want  
19 there to be hostilities or is it because they have not yet  
20 tested a weapon capable of reaching the United States? I  
21 think different people would give you different answers to  
22 that. The final answer is that there has not been a conflict  
23 subject to the law of war between the United States and North

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1 Korea. But whether that's driven by political considerations,  
2 resource considerations, or both informs that answer, helps  
3 us -- if there were controversy about it, helps us find the  
4 answer to that question. But the way that you phrased the  
5 question is does it control the answer, and certainly not.

6           There is an enormous debate -- following up on your  
7 question, however, there is an enormous debate and has been an  
8 enormous debate -- I will actually play some clips tomorrow --  
9 about the question of whether it was a resource problem,  
10 whether it was a political will problem, whether it was an  
11 intentional choice as part of our overall diplomatic strategy.  
12 You know, there are lots of opinions.

13           And that's actually the fundamental point I want to  
14 make here, is that the government is entirely allowed to have  
15 its interpretation of history. It doesn't surprise me that  
16 they do. I am a little surprised by the Predator fact, but  
17 that's a different question. They are allowed to present  
18 their version of the events to the jury and to the military  
19 commission in a personal jurisdiction hearing. The difference  
20 between the government's position and our position, and the  
21 reason for this motion, is that the government has a  
22 mechanism, classified information, to withhold information  
23 from the defense that we need to present our version of

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1 events. We are both allowed to explain what happened, but the  
2 government gets to hold many of the cards, 70,000 according to  
3 their pleadings.

4 MJ [COL POHL]: When you say your version of events, and  
5 again this may be sliding into 502 ----

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

7 MJ [COL POHL]: ---- are we talking about -- and again,  
8 are we talking about your version of what happened or your  
9 version of what somebody thinks the significance of what  
10 happened?

11 LDC [MR. CONNELL]: Okay. Other than expert opinion --  
12 let's bracket expert opinion for a second.

13 MJ [COL POHL]: Okay.

14 LDC [MR. CONNELL]: I completely disagree with the -- with  
15 the prosecution -- with the characterization that whether any  
16 individual government employee thought they were engaged in an  
17 armed conflict, if they ever bothered to think about it, has  
18 really anything to do with the question. You know, I began  
19 this argument today with the question of we don't actually  
20 know what happened in this, in this attack. We don't know  
21 where in Afghanistan was targeted; we don't know what the  
22 casualties were, a listed Hamdan factor; what the property  
23 damage was, a listed Hamdan factor. I found it amusing that

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1 the government took the Tomahawk failure rate to pull out as  
2 an example of something outrageous that the defense wanted  
3 when, in fact, the Tomahawk failure rate was, in fact, one of  
4 the things that the government produced to us. It's  
5 Attachment L to AE 510.

6           And the reason why they produced the Tomahawk failure  
7 rate to us is that it is important to know what ordinance  
8 reached what target. And the -- because duration and  
9 intensity of violence is one of the factors for determining  
10 hostilities, whether that's under Hamdan or under Tadic.

11           The government made a remarkable argument, which is  
12 that today if the United States declared war on another  
13 country, then the law of armed conflict would apply. I could  
14 not agree more. State-to-state violence -- when Japan  
15 attacked the United States on December 7 of 1941, that  
16 initiated a state of armed conflict -- truly a state of war in  
17 the language of Article 3 of the Geneva Conventions -- because  
18 it is state-to-state violence. That is a completely different  
19 rule for violence by a nonstate actor, whether it be Egyptian  
20 Islamic Jihad or al Qaeda or the Basque Separatist Movement,  
21 ETA in Spain, or FARC in Columbia, or anyone else, a nonstate  
22 actor has completely different rules.

23           In fact, one of the shocking consequences of the

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1 government's argument is that they are assigning the sole  
2 writings of Usama bin Laden in 1996 the weight of a  
3 declaration of war by the United States Congress. The -- and  
4 it -- their position, I am not trying to argue, but I just  
5 want to show you how significant these interpretations of  
6 event mean, if that were true, if nonstate actor could simply  
7 declare war on a state and have that, their subsequent  
8 conflict be governed by the law of armed conflict. That means  
9 if al Qaeda were to have an insignia or to carry open arms  
10 openly or to have superior officers lead and agreed to abide  
11 by the law of war, then under the government's theory, it  
12 would have been a legitimate attack on the Pentagon, a  
13 military target, because what the government is saying is that  
14 a nonstate actor can place itself under Article 2 of the  
15 Geneva Conventions by its unilateral declaration.

16 MJ [COL POHL]: Are you saying it would be a legitimate  
17 military target without addressing the means they hit the  
18 target with?

19 LDC [MR. CONNELL]: Yes.

20 MJ [COL POHL]: You are just talking about the target?

21 LDC [MR. CONNELL]: Just the target. That's all I said is  
22 target.

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: Because one of the four things would  
2 be -- one of the four elements of combatency would be an  
3 agreement to abide by the laws of war. That's the fourth  
4 category that one has to do. So it would have to be by  
5 legitimate means.

6 MJ [COL POHL]: On the target itself.

7 LDC [MR. CONNELL]: Right. The target itself.

8 MJ [COL POHL]: Not necessarily the means and whether they  
9 hit the target ----

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: ---- which could violate the law of war  
12 and be a separate basis altogether.

13 LDC [MR. CONNELL]: Yes.

14 MJ [COL POHL]: Go ahead.

15 LDC [MR. CONNELL]: But the significance of that is what  
16 it would mean to allow nonstate actors, whether those be  
17 Timothy McVeigh or Usama Bin Laden or anyone else, to assign  
18 themselves the ability to declare war and to place themselves  
19 under the law of armed conflict.

20 Now, the government argues that it has produced 1,395  
21 pages of discovery. And the military commission knows, I am  
22 certain, because we attached every single page of it to AE  
23 502Y, that something like 98 percent of the information

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1 contained on those pages is redacted. In fact, when I -- one  
2 of the issues which came up in the literal filing of 510 and  
3 512 and 513 and 514 was, counsel, are you really telling me  
4 need to file all these redacted pages? We're going to spill  
5 all this black ink printing these pages out, because these  
6 pages are entirely redacted. Shouldn't you just leave them  
7 out of your filing? But I knew it would be important and so I  
8 pressed forward and we filed every single page. This is the  
9 BKG discovery in 502Y.

10           The last argument or the second to last argument that  
11 the government makes is that the defense has been reviewing  
12 documents. Nothing could be more true. I fully want to  
13 recognize the extraordinary efforts of a dozen or more people  
14 putting thousands of hours into this issue; many, many  
15 documents we have reviewed at the Clinton and Bush  
16 presidential libraries.

17           The government actually -- it's interesting to hear  
18 them make this argument because in their pleadings they said  
19 we, the government, don't have to review those unclassified  
20 documents because the defense has access to them. The fact  
21 that we have been diligent in pursuing unclassified sources of  
22 information doesn't excuse the government from the burden of  
23 diligence in reviewing the classified information.

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1           In fact, their argument that reviewing the  
2 information at presidential libraries is beyond the scope  
3 contradicts 701(e)(4), which imposes on the government the  
4 duty -- the discovery duty encompasses information that is  
5 known or reasonably should be known to any government official  
6 who participated in the investigation and prosecution of the  
7 case against the accused.

8           We are, in fact, on the defense, producing tens of  
9 thousands of pages from our review to the prosecution, have  
10 been doing so over the past few weeks, will file our notice  
11 of -- our second notice of discovery shortly. So this is a  
12 situation where we on the defense have exercised all of the  
13 diligence that we can and have run up against the  
14 classification of documents from 20 or more years ago. And it  
15 is now the government's turn to review that information and  
16 produce it to the defense.

17           MJ [COL POHL]: Is this issue ripe for decision now, given  
18 the fact the government says they are going to give you a lot  
19 of information from the libraries? I hear this all the time.  
20 I get a motion to compel and then I hear the government says,  
21 oh, we are going to give you some of what you are asking for  
22 and then we have ----

23           LDC [MR. CONNELL]: The answer to your ripeness question

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1 is yes for two reasons. The first is that our initial  
2 discovery request was in late 2014. I have heard for quite a  
3 long time about the -- and, in fact, you can read it in the  
4 conference in 510 about the review that's going on. And I  
5 know it's a lot of information, I know it takes a lot of time.  
6 But at that point, the government went radio silent. They  
7 said, we are working on it. They didn't send us any response  
8 to our series of requests. And we knew that the government --  
9 I mean, that the military commission had issued 502I requiring  
10 what, at that time, was a very quick turn on the personal  
11 jurisdiction litigation.

12           So when we initially tried to file these on 7 June  
13 2017, it was because we knew that the issue was forthcoming  
14 and that we needed to get it argued, we needed to compel the  
15 information.

16           You know, the government is in the position of  
17 arguing, at page 29 of 5020, that the military commission  
18 should push off the personal jurisdiction hearing, should  
19 delay it for some later date because the government has not  
20 yet been able to fulfill its responsibility for discovery.

21           On Monday, in 478, the military commission says -- I  
22 mean the government argues that not only should you push ahead  
23 with the personal jurisdiction motion, but you need to set a

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1 trial date because they have completed all their discovery  
2 responsibilities. These positions exist in serious tension  
3 and we recognize that tension and don't want it to be resolved  
4 at our expense.

5           The second reason why this motion is ripe is that the  
6 government has actually asked, in 5020 and elsewhere, for an  
7 order from the military commission. They have taken some  
8 strange, in my humble opinion, views of one phrase within the  
9 Hamdan instruction, saying that -- and I think what they mean,  
10 they haven't explicitly said this, but I think what they mean  
11 is that the fact that one of the many factors in Hamdan is a  
12 statement of the leaders is that they can exclude from their  
13 consideration anyone below cabinet level.

14           That's, in fact, not the way it works. I will  
15 discuss that in some more depth tomorrow. But I do want to  
16 finish with this point about the Hamdan instruction itself.  
17 And the reason why I say this is the government, I think,  
18 would profit from an order requiring the production of the  
19 information that we have requested. And this is not some  
20 fishing expedition, Your Honor. We have laid out in  
21 exceptional depth, much more than we are required to, our  
22 defense in how this information fits into it.

23           The government argued today that the Hamdan decision,

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1 the dicta footnote of a vacated opinion, is binding on the  
2 military commission. Those were its words today; those were  
3 its words in its brief. Now, our position on this is laid out  
4 in 20000, and where -- which the government exactly  
5 contradicts the argument that it made Monday, and in 200NN  
6 that the Mohammad opinion has, in their words, no persuasive  
7 value because it was vacated on other grounds. Now, the  
8 Hamdan opinion out of the C.M.C.R. was also vacated on other  
9 grounds, but they consider that to be not just persuasive but  
10 binding.

11 MJ [COL POHL]: Of course, you argued the other way, too.

12 LDC [MR. CONNELL]: No, I choose the middle ground, Your  
13 Honor. I don't argue the other way. You are mistaken. What  
14 we argue is that a vacated opinion can have persuasive value,  
15 and this is the D.C. Circuit rule. It's not that it's  
16 irrelevant and it's not that it's binding. It's that it can  
17 have persuasive value depending on the value of its reasoning.

18 And the Hamdan opinion does not have valuable  
19 reasoning, not simply because it was vacated, but because it  
20 has no reasoning at all. It simply has the line the trial  
21 court correctly instructed the court, and it doesn't explain  
22 why that's the truth.

23 MJ [COL POHL]: And I don't like to replot old ground, but

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1 since you have raised it I am going to. Hamdan was reversed  
2 on other grounds ----

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: ---- nothing to do with the instruction  
5 and nothing to do with the C.M.C.R. judges.

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

7 MJ [COL POHL]: al Bahlu -- or excuse me, for want of a  
8 better term, the KSM ex post facto decision that reversed the  
9 trial decision was decided by a court that later on the  
10 D.C. Circuit said should not have sat because one of the  
11 judges was disqualified.

12 LDC [MR. CONNELL]: Yes.

13 MJ [COL POHL]: Is that the same thing as being reversed  
14 on other grounds? It strikes to me if the court was, for want  
15 of a better term, improperly constituted because of an  
16 improperly sitting judge, that strikes to me is a different  
17 type of reversal that would give that opinion no weight  
18 whatsoever.

19 LDC [MR. CONNELL]: Okay.

20 MJ [COL POHL]: Do you see where I think it is a  
21 distinction of why it was reversed?

22 LDC [MR. CONNELL]: Yes. And I completely agree with you  
23 that a court which is improperly constituted is -- cannot

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1 issue a valid opinion. And I also completely agree with the  
2 result that the D.C. Circuit issued.

3 From the point of view, however, of what is the  
4 weight of the -- or what is the precedential value of the  
5 vacated opinion, however, the Hamdan opinion is just as  
6 vacated as the Mohammad opinion. Now, for different reasons,  
7 obviously. And what the D.C. Circuit law is -- and we cite  
8 this in 20000, we cite what the actual D.C. rules on this  
9 topic are, which is, you have a vacated opinion, it is not  
10 binding on anyone; it may be valuable, maybe those judges had  
11 a really good idea. Maybe like happened in the Mohammad case,  
12 it's a result of concession by both parties. Because a  
13 radical difference between the decision in Hamdan and its  
14 instruction and the decision in Mohammad and its issue is that  
15 in Mohammad both parties, the prosecution and the defense,  
16 took the same position, and all the military commission --  
17 Court of Military Commission Review did was to say yes, that's  
18 what the parties agreed.

19 Hamdan, on the other hand, the validity of the  
20 instruction was not even an issue on the appeal, it was just a  
21 kind of sidenote that the C.M.C.R. said and here is this  
22 Hamdan instruction. I excerpted in 502Y what the real -- and  
23 they didn't even quote the full instruction from the trial

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1 record. I included the trial record from Hamdan as part of  
2 502Y.

3 MJ [COL POHL]: I don't want to digress too much into the  
4 502 issue, but just ----

5 LDC [MR. CONNELL]: That's where it lives in the record is  
6 what I am saying. But the significance is that the Hamdan  
7 instruction is incredibly broad, it establishes a totality of  
8 the circumstances test. And for the relevant -- I will leave  
9 the rest of it for another day, but the relevant part of it  
10 here today is that the idea that the government could say that  
11 the Hamdan test excludes some factors and relieves it of a  
12 discovery burden is not consistent with either what the judge  
13 in Hamdan articulated on the record or the text of the  
14 argument itself.

15 The Hamdan instruction actually said, in addition to  
16 the totality of the circumstances test, that included any  
17 other facts and circumstances, that you, the members, consider  
18 relevant to the existence of armed conflict. The parties may  
19 argue the existence of other facts and circumstances from  
20 which you might reach your determination regarding this issue.  
21 The Hamdan instruction is a true totality of the circumstances  
22 test and produces no limit on the government's responsibility  
23 to produce discovery.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Thank you.

3 MJ [COL POHL]: Thank you. Mr. Trivett, anything further?

4 MTC [MR. TRIVETT]: Just briefly, sir. I wanted to touch  
5 on the binding nature of the Hamdan decision written by the  
6 C.M.C.R. on a case that was tried under the 2006 Military  
7 Commissions Act but wasn't decided until after the actual 2009  
8 Military Commissions Act was passed.

9 We keep hearing that this is characterized as dicta  
10 in a footnote. And I just wanted to point the military judge  
11 to the fact that it's actually included in a substantive  
12 section called Criminal Intent and Wrongfulness. And while  
13 the actual instruction is footnoted, it was in the Criminal  
14 Intent and Wrongfulness substantive part of the decision where  
15 he said that the military judge correctly instructed on armed  
16 conflict.

17 Much like the courts of criminal appeal in the Army  
18 and in the Navy and in the Air Force, the C.M.C.R. may only  
19 affirm such findings of guilty as it finds correct in law and  
20 fact and determines, on the basis of the entire record, should  
21 be approved. It is not dicta; it is part of their actual  
22 opinion. I do believe it is binding despite the fact that it  
23 was overturned on other grounds on this commission.

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1           We have scant case law to guide us because of the  
2 nature of this system, having undergone several iterations  
3 since 2003. I would think that the military judge would  
4 welcome when he actually has binding authority and rest on  
5 what the C.M.C.R. has determined is the correct definition of  
6 hostilities.

7           MJ [COL POHL]: Thank you.

8           That brings us to 514. Mr. Connell, just so I am  
9 clear on this, your pleading on this, I believe, is  
10 classified?

11          LDC [MR. CONNELL]: The initial pleading, yes.

12          MJ [COL POHL]: The initialing pleading is classified?

13          LDC [MR. CONNELL]: Yes. We covered this in the 505(h).  
14 I am not arguing any classified aspect of it. It was also  
15 true for 510, the original pleading was classified.

16          MJ [COL POHL]: Yes. But you have some slides here ----

17          LDC [MR. CONNELL]: Yes.

18          MJ [COL POHL]: ---- that you want to talk to that is just  
19 the unclassified portion?

20          LDC [MR. CONNELL]: Yes. And they have already been  
21 submitted to the CISO and reviewed by the OCA.

22          MJ [COL POHL]: I think they were sitting on my desk here,  
23 514E.

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1 LDC [MR. CONNELL]: Thank you, sir.

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

3 LDC [MR. CONNELL]: Your Honor -- have we passed out --  
4 with the court's indulgence.

5 MJ [COL POHL]: Sure.

6 [Pause.]

7 LDC [MR. CONNELL]: Sir, the slides contained in 514E have  
8 been submitted to the parties, submitted to the CIS0 approved  
9 by the OCAs. I would ask permission to display ----

10 MJ [COL POHL]: Let me make sure we all have the same copy  
11 because these are a little unusual format. The second page is  
12 just a blank box, I think it was going to be a video?

13 LDC [MR. CONNELL]: It is a video, yes, sir.

14 MJ [COL POHL]: And then slide 2, I see the title page  
15 is ----

16 LDC [MR. CONNELL]: Political/military responses to  
17 al Qaeda.

18 MJ [COL POHL]: No, but right after that I got another  
19 title page, AE 514.

20 LDC [MR. CONNELL]: May I hold what you are looking at,  
21 sir?

22 MJ [COL POHL]: Sure. I have a feeling when they were  
23 copied ----

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1 LDC [MR. RUIZ]: Your Honor, my apologies for  
2 interrupting. I am operating at less than a hundred percent  
3 here and I need to take a brief break, if that's okay.

4 MJ [COL POHL]: Sure. We will take a ten-minute comfort  
5 break.

6 LDC [MR. RUIZ]: Thank you.

7 MJ [COL POHL]: The commission is in recess.

8 [The R.M.C. 803 session recessed at 1152, 18 October 2017.]

9 [END OF PAGE]

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