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1 [The R.M.C. 803 session was called to order at 1208,
2 18 October 2017.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Thank you, sir. I would request the
8 feed from Table 4 and permission to publish the slides in AE
9 514, which are AE 514E, to the gallery.

10 MJ [COL POHL]: Go ahead. I'm sorry. Go ahead.

11 LDC [MR. CONNELL]: As the government observed, 509, 510,
12 512, 513, and 514 are all related to each other. They
13 essentially relate to five of the phases of the history
14 between the United States and al Qaeda, which are defined by
15 that historical model that I put up on the screen earlier.

16 There are a number of factors that are common to them
17 all, and I won't repeat them. But I do want to discuss the
18 significance of political/military plan Delenda, which is in
19 many ways a complement to the Operation Infinite Resolve that
20 the government just spoke about.

21 At the end of the Clinton administration and the
22 beginning of the Bush administration, there were two major
23 advocates of kinetic action against al Qaeda. One of those

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1 was George Clarke, excuse me, George Tenet, and the other one
2 was Richard Clarke. Tenet's views are the subject of AE 509,
3 which will be heard another day, but Clarke's views were
4 compiled in a document known as -- or perhaps even documents,
5 I don't know -- known as political/military plan Delenda. It
6 was important for two reasons. First, like Operation Infinite
7 Resolve, it represents the path not taken and the reasons why
8 that path was not taken; and second, it represents an
9 important historical commentary on the transition between the
10 Bush -- the Clinton and Bush presidencies. The delivery or
11 lack of delivery of Delenda to the incoming Bush
12 administration was a major subject of inquiry by the
13 9/11 Commission and has been extensively debated between
14 people of different political views.

15 To really set up the controversy, I think that it is
16 appropriate to hear from President Clinton himself. And Tech
17 Sergeant, if you wouldn't mind pressing play.

18 [AE 514 video played.]

19 LDC [MR. CONNELL]: Can we turn up the volume?

20 All right. Let's try that again.

21 [AE 514 video played.]

22 LDC [MR. CONNELL]: The comprehensive strategy that
23 President Clinton refers to there is political/military plan

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1 Delenda and Dick Clarke is Richard Clarke, National Military
2 Advisor.

3 The controversy is explained a little bit more in
4 detail by President Clinton also appearing in Fox News Sunday
5 on September 26, 2006. If you will push play, please.

6 [Video played.]

7 LDC [MR. CONNELL]: Thank you, we will stop there.

8 What we just saw encapsulates a wide number of
9 debates, factual debates, regarding U.S. policy toward
10 al Qaeda prior to 9/11 which will manifest in this trial as
11 the question of hostilities.

12 The plan -- the government took the position earlier
13 today that the failure to pursue a military response to
14 al Qaeda was a question of Predator development and actionable
15 intelligence. Certainly other members of the Clinton
16 administration have echoed the actionable intelligence claim,
17 although they don't support the Predator claim.

18 Another witness who is expected to testify in 502,
19 Mr. Scheuer, has talked about the plan that President Clinton
20 just described. And he says that Clarke's Delenda Est, or
21 Delenda, was a plan like the one Mr. Clinton described to
22 Chris Wallace that we just watched; it was meant to be a
23 comprehensive and ongoing campaign against al Qaeda until it

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1 was destroyed. In 1998, Delenda Est started and ended with
2 the August 20, 1998 cruise missile strikes on Afghanistan and
3 Sudan. Mr. Clinton did leave a plan for the Bush team, which
4 I never heard of or saw. It was mostly a version of Delenda
5 Est. The President Clinton statements and the rebuttal by the
6 head of the CIA bin Laden unit encompass many of the questions
7 around U.S. policy. Was there a plan? Was it part of the
8 government described Infinite Reach as morphing into Infinite
9 Resolve?

10 Mr. Scheuer describes Delenda as -- excuse me,
11 Infinite Reach being part of Delenda. Were these the same?
12 Were they different? Did it exist or did it not exist? So
13 let's look at a couple of other approaches to the same
14 problem.

15 President Clinton claimed in the clip that we just
16 watched with Fox News Sunday that he had authorized the
17 killing of bin Laden. It raises a question about the use of
18 assassination versus law of war targets. Mr. Scheuer says
19 that "President Clinton always refused to pull the trigger.
20 In addition, we were never authorized while I was chief of
21 operations to kill Usama bin Laden. In fact, Mr. Richard
22 Clarke definitely told us we had no authorization to kill bin
23 Laden."

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1 If that is true, Your Honor, then it's a persuasive
2 and important fact against hostilities because, of course, if
3 you are engaged in an armed conflict with the person, you
4 don't need any authorization to kill them. It's an act of
5 war, not an assassination.

6 Why they didn't shoot, of course, at least from
7 Mr. Tenet's viewpoint, is because one time they were afraid to
8 have shrapnel hit a mosque when they killed bin Laden which,
9 in a law-of-war framework, of course, would simply be
10 collateral damage rather than being controlled by political
11 considerations.

12 I would show you the video for this, Your Honor, but
13 as far as I can tell, it doesn't exist anymore; only
14 transcript exists.

15 Next slide, please. Thank you.

16 A person who -- Mr. Benjamin, a member of the Clinton
17 administration defending him, said -- gave the position that
18 the government gives today, which is the actionable
19 intelligence argument. Mr. Benjamin says we never got the
20 confirming intelligence, we never had enough information to do
21 this with confidence knowing that we would get the target.

22 Now, these controversies are important because either
23 the military commissions acting as finder of fact or the

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1 members of the panel acting as finders of fact are going to
2 want a persuasive explanation of what happened and why it
3 happened, especially since we are trying to explain the
4 existence of a negative, the existence of -- the nonexistence
5 of hostilities with al Qaeda.

6 In fact, both of these explanations are exculpatory
7 to us. There was lack of political will. If we didn't have
8 political will to enter into hostilities with al Qaeda or if
9 we didn't have the actionable intelligence to enter into
10 hostilities with al Qaeda, both of them are of assistance to
11 the defense and are exculpatory.

12 Next slide, please.

13 MJ [COL POHL]: Who is the decision-maker?

14 LDC [MR. CONNELL]: The President. The President is
15 always the decision-maker, sir.

16 MJ [COL POHL]: So I'm just saying is we have a lot of
17 opinions here. So the issue as to whether or not there is
18 hostilities is a -- at the end of the day, does it just come
19 down to the President's opinion?

20 LDC [MR. CONNELL]: No, sir. If we were in state-to-state
21 conflict, it would come down to Congress's opinion. In
22 state-to-state conflict, a declaration of war is a
23 constitutional act which itself establishes the applicability

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1 of the law of armed conflict that the government argued this
2 morning. Which itself establishes the application of the law
3 of armed conflict as the government argued this morning. With
4 respect to nonstate actors, it's a different situation here.
5 And I, in fact, disagree with the argument from the Nashiri
6 camp that President Clinton's address to the nation in
7 November of 2000 that the United States was at peace after the
8 USS COLE is dispositive. It is not dispositive because the
9 subjective views of any -- bracketing the constitutional
10 operation of the declaration of war, the subjective views of
11 leaders as to whether hostilities did or did not exist are
12 significant. They can inform an answer, but it's actually an
13 objective inquiry. The place ----

14 MJ [COL POHL]: But objective inquiry into the facts on
15 the ground? Objective inquiry of the facts on the ground as
16 they are interpreted by others?

17 LDC [MR. CONNELL]: No, sir. In fact, that's what I was
18 about to come to. That I disagree with your idea or your
19 suggestion -- and I know not to read too much into
20 questions -- I disagree with the suggestion that the people in
21 this debate are expressing opinions about hostilities. They
22 are not. No one before us has ever really addressed the
23 question of whether the law of armed -- setting aside the

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1 ICRC, the United States Government has never really addressed
2 the question of whether the law of armed conflict applies in
3 this situation pre-9/11 because it hasn't had to.

4 What these people are debating is what were the
5 facts. Is it a fact that the political people -- bodies
6 decided that actionable intelligence did not exist? Is it a
7 fact that a planned Delenda existed? Is it a fact that it did
8 not exist? Is it a fact that it was part of Operation
9 Infinite Reach? These are people who are not giving opinions
10 on the ultimate question of hostilities; frankly, they
11 probably couldn't care less. These are people who are
12 debating what the facts were. And that is why discovery is
13 important, because the government will have its view of what
14 the facts were and must produce discovery when relevant and
15 helpful, even if classified, to the defense so that we may
16 present our view of what the facts were.

17 MJ [COL POHL]: Okay.

18 LDC [MR. CONNELL]: The other significant issue that I
19 mentioned with respect to political/military plan Delenda, is
20 the extensive debate over whether the Bush administration
21 took -- had any proactive stance, hostilities or otherwise,
22 with respect to al Qaeda prior to September 11, 2001. The
23 main elements of that debate come down to did Richard Clarke

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1 present his plan Delenda at a meeting in January of 2001 and
2 was he ignored? When President Clinton says he was demoted,
3 yes, he was literally demoted; but the other question is, is
4 it true, as Secretary Rice said, that the United States was
5 engaged in active opposition to al Qaeda or was it something
6 that was not really on the issue -- on the radar of the Bush
7 administration, and that the -- one of the claims around plan
8 Delenda was that it was not a subject of the meeting of the
9 principles of the National Security Council what to do about
10 al Qaeda until September 4, 2001.

11 Now, that's the position that the 9/11 Commission
12 took, although it laid out other lower-level questions about
13 al Qaeda prior to September 4. But if Mr. Clarke is correct,
14 the Bush administration did not even take up the question of
15 Delenda until a week before the attacks on 9/11.

16 And that's my argument, Your Honor.

17 MJ [COL POHL]: Were there hostilities in August of '98
18 when they shot the cruise missiles into Afghanistan?

19 LDC [MR. CONNELL]: That is a question of debate. This is
20 a -- different people look at it differently. Some people say
21 use of kinetic activity means that, you know, military assets
22 under -- the question in Hamdan or the question in the
23 analysis in Tadic, different people have different views.

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1 Some people say it lacks sufficient duration and intensity.
2 But I want to give the members of the panel an answer to that
3 question. I see you smile when I don't answer you, but I want
4 to give an answer to that question ----

5 MJ [COL POHL]: Good, go ahead.

6 LDC [MR. CONNELL]: ---- I just don't have the information
7 I need to do it yet.

8 MJ [COL POHL]: I am just wondering if hostilities come
9 and go under your argument.

10 LDC [MR. CONNELL]: They could.

11 MJ [COL POHL]: And so if it requires duration, then a
12 one-time cruise missile assault wouldn't count, is that your
13 position?

14 LDC [MR. CONNELL]: It requires intensity under Tadic. It
15 does require duration under the government's Hamdan
16 instruction. But it doesn't say -- there is no bright-line
17 rule as to duration. Certainly if the members were called
18 upon to decide whether hostilities existed on 20 August 1998,
19 duration would be a factor, which is one of the reasons why,
20 when I was arguing 510, I said we need to know what was the
21 actual ordnance on target, what was the duration.

22 We call it a one-day -- we call it one day of
23 hostilities, it could have been six minutes of hostilities

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1 under the government's theory. So we don't actually know.
2 And that's why information like we seek in 510 is important,
3 because we have to answer the question of duration.

4 There has been a report that a night watchman was
5 killed at the factory in Sudan. Is that the only casualty?
6 If so, the fact that a noncombatant was killed probably argues
7 against the existence of hostilities. The fact that if, in
8 fact, 80 Tomahawk missiles landed at their targets, that much
9 ordnance on target argues in favor of hostilities. These are
10 questions which we will have to argue to you and the members
11 of the panel. All we are asking for is the information we
12 need to do that with.

13 MJ [COL POHL]: And we're kind of sliding into the 502
14 motion itself, but okay. Thank you.

15 LDC [MR. CONNELL]: They are all related, sir.

16 MJ [COL POHL]: I got it. I got it.

17 Any other defense counsel want to be heard in support of
18 this motion? Apparently not.

19 Trial Counsel?

20 MTC [MR. TRIVETT]: I wish I had played that video of
21 President Clinton for you. The Commander in Chief at the time
22 that the embassies were attacked; the Commander in Chief at
23 the time the '96 declaration of war was set forth; the

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1 Commander in Chief when the '98 fatwa took place; the
2 Commander in Chief when the USS COLE was struck. I believe
3 the quote was, "I tried to kill him after the USS COLE battle
4 plans were drawn, I just didn't have the basing rights I
5 needed in order to attack."

6 And at least for the last two and a half months he
7 was President, while of course the investigation into the USS
8 COLE attack was still very much in its infancy, the FBI and
9 CIA couldn't tell him specifically that al Qaeda was
10 responsible. Obviously we have evidence that will establish
11 that it was, that al Qaeda was, in fact, responsible.

12 But I just -- I don't accept from a legal perspective
13 any of Mr. Connell's argument. It almost boils down to,
14 because we didn't fight the war well we must not have been at
15 war. That was the most that I could get out of the argument.
16 There was clearly a military plan, but ultimately you heard it
17 from the Commander in Chief at the time. You heard what he
18 was doing, what he was trying to do, that there were battle
19 plans. All of this supports the United States position that
20 we were in armed conflict.

21 LDC [MR. RUIZ]: Judge, I am going to object. If we are
22 going to continue to argue the merits of 502, then at some
23 point we are going to ask to be heard on the merits of 502.

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1 This is a discovery issue.

2 MJ [COL POHL]: The objection is overruled. He is simply
3 putting it in context. I am only being -- I am only
4 considering the discovery aspect of this, but it is
5 intertwined with 502, so I don't see how he can totally
6 separate the two.

7 Go ahead, Mr. Trivett.

8 MTC [MR. TRIVETT]: So it may be that there were lots of
9 plans on the shelf. It may be that people looked at
10 Mr. Clarke's plan and said it wasn't good enough, it wasn't
11 aggressive enough.

12 In the end, it doesn't matter. The plans on the
13 shelf do not matter to the standard and, therefore, they are
14 not entitled to them on discovery. These are classified,
15 highly sensitive documents that sometimes involve executive
16 privilege. They certainly almost always involve deliberative
17 process privilege when they are trying to consider what it is
18 they are going to do against a group that had just killed 3200
19 people over the course of three years, the vast majority of
20 which were Americans.

21 There is a couple of things I want to make sure we
22 make clear as far as what our position is in regard to armed
23 conflict as it relates back to this discovery, but we can rely

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1 solely on the actions of al Qaeda to establish hostilities,
2 and none of the evidence that they are seeking undermine any
3 of our arguments. If there was some kind of evidence that
4 establishes that they weren't responsible for the East Africa
5 embassy bombings, yes, we have a discovery obligation for
6 that. We don't have a discovery obligation for what plans
7 were put on the shelf after 1998 that, for whatever reason the
8 Commander in Chief -- and he pretty much explained why he
9 couldn't execute those plans, how all of that information is
10 discoverable.

11 And quite frankly, I don't know that it ever ends.
12 It can't be that our discovery obligations are constrained to
13 the creativity of Mr. Connell, who we have all seen is
14 tremendously creative in his legal arguments and very
15 persuasive. But in the end, the legal standard is the legal
16 standard and evidence is either relevant to it or not. And
17 when it is classified, we have an obligation to turn it over
18 if it is relevant and helpful to a legally cognizable defense,
19 rebuttal of the prosecution's case in chief, or to sentencing.
20 That's our standard. And this information and all other
21 information like it, quite frankly, simply does not meet the
22 standard for discovery.

23 MJ [COL POHL]: Mr. Trivett, let me follow on something

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1 you just said and make sure I follow what you are saying. You
2 said it doesn't make any difference, and I'm paraphrasing,
3 what the U.S. response was.

4 MTC [MR. TRIVETT]: What I said was we can rely solely on
5 al Qaeda's acts and still establish hostilities. That was
6 what I meant to say.

7 MJ [COL POHL]: Yes, well, maybe I said it the other way
8 around, but let me just ask you this then: Then for
9 hostilities, it doesn't take two sides to agree to be engaged
10 in hostilities, one side is enough?

11 MTC [MR. TRIVETT]: Absolutely. There is no two to tango
12 requirement for hostilities.

13 MJ [COL POHL]: Okay.

14 MTC [MR. TRIVETT]: If we get completely obliterated by a
15 nuclear weapon and don't ever respond, that doesn't mean that
16 the law of war didn't apply and it didn't mean that we weren't
17 engaged in hostilities. One of the questions you asked
18 Mr. Connell is whether or not hostilities can come and go.
19 Our position is that they came in 1996 and they haven't left
20 today. I mean, that's our position.

21 But one attack alone, the 9/11 attack alone, which is
22 in our other papers, our moving papers, our pleadings, is --
23 we believe we could rest on the 9/11 attacks alone from

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1 al Qaeda.

2 MJ [COL POHL]: I don't want to drift too far from 502,
3 but I wanted to get a clarification of that particular remark.

4 MTC [MR. TRIVETT]: Yes, sir. Subject to your questions,
5 sir.

6 MJ [COL POHL]: I have none.

7 Mr. Connell.

8 LDC [MR. CONNELL]: I have gathered from the government's
9 responses that they don't agree with our defense. That has
10 been made clear. What their responses do not establish is
11 that either it is not a defense or that we are not entitled to
12 it, and the -- there are opposing views on the existence of
13 hostilities, especially sort of in the revisionist history
14 that the government uses. We will watch a clip tomorrow from
15 Secretary Albright about how important it is to remember
16 the -- how things looked different after 9/11 and before 9/11.

17 And the examples that the government just used, which
18 certainly it can use to you or to a panel, are susceptible to
19 different interpretations and argument. For example, the
20 government just relied on "I tried to kill him" from President
21 Clinton. That sounds an awful lot like an attempt to kill bin
22 Laden rather than a noninternational armed conflict with a
23 nonstate actor, defined however al Qaeda is going to be

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1 defined retroactively.

2 The fact that President Clinton couldn't obtain
3 basing rights in Uzbekistan, the government says, shows why
4 there were hostilities in some way. In fact, it shows the
5 reason why there were no hostilities, or one of them, or, if
6 believed, one of them. And the government describes this as a
7 defense position that we didn't fight the war well. In fact,
8 the defense position is we didn't fight the war because there
9 was no war. And when the panel reflects on -- you know, some
10 of them might have been in the military on September 10, 2001,
11 and I doubt many of them thought they were at war.

12 The government's argument is that the existence of
13 political/military plan Delenda and the existence, by
14 extension, of Operation Infinite Resolve war planning
15 establishes hostilities. That position is extraordinary. The
16 United States spent trillions of dollars establishing war
17 plans with the Soviet Union. The United States never entered
18 into a state of hostilities with the Soviet Union because
19 there was no armed conflict subject to the law of war.

20 The fact that the United States spent so much money
21 on it might demonstrate, probably in President Reagan's view,
22 is that the reason -- the existence of a military plan was the
23 reason why the United States never entered into armed conflict

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1 with the Soviet Union because, the one, in the thinking of the
2 time, the thinkability of nuclear war, the extent of planning
3 meant that created mutual destruction in one view, or
4 deterrence in another view, and to stop hostilities from
5 coming into existence.

6 No person who was analyzing the existence of
7 hostilities or lack thereof between the United States and the
8 Soviet Union in the 1980s would ever find it irrelevant that
9 the United States had vast military planning, nor would they
10 conclude that that military planning meant hostilities as
11 opposed to preventing hostilities.

12 Now, the government is exactly wrong on its
13 two-to-tango argument. In state-to-state conflict, there is a
14 one-shot rule. If North Korea fires one missile at the United
15 States, a state-to-state conflict comes into being. And
16 whether the United States ever responds or not is irrelevant
17 to the existence of armed conflict. If the United States ----

18 MJ [COL POHL]: If that first shot violates the law of
19 war, for example, just for the sake of a discussion, that the
20 first shot deliberately targets a hospital, is a nonmilitary
21 objective, so the first shot violates the law of war ----

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: ---- would that be cognizable as a

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1 chargeable offense in the law of war even though hostilities
2 began with that first shot? And again, we are talking about
3 under the rubric of the MCA, so I understand.

4 LDC [MR. CONNELL]: Okay. Under the state-to-state
5 violence, right -- which is what I was just talking about, and
6 I think you want the answer in nonstate actor, too, and I will
7 answer it, too -- but in state-to-state violence, it would not
8 be chargeable under the MCA because the North Korean who fired
9 the missile would be a combatant. They might be subject to
10 other law of war jurisdiction for attacking a hospital, for
11 example.

12 MJ [COL POHL]: That's where this analogy gets confusing.

13 LDC [MR. CONNELL]: But under the MCA, combatants are
14 excluded from the MCA. So state-to-state violence involves
15 combatants on both sides. The one-shot rule that applies in
16 state-to-state violence ----

17 MJ [COL POHL]: Would the one-shot rule apply to the NIAC?

18 LDC [MR. CONNELL]: No, the one-shot rule does not apply
19 to a NIAC. Let me give you an example. The perfect example
20 is the violence between the Irish Republican Army and the UK.
21 The Irish Republican Army named itself an Army to try to bring
22 itself, among other reasons, under the rubric of the law of
23 war. And from the IRA perspective -- and this goes to the

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1 statements of leaders question we are going to discuss
2 tomorrow -- but from the IRA perspective, they were engaged in
3 hostilities with the UK. But when the United Kingdom ratified
4 Additional Protocol 1, one of their reservations,
5 understandings, and declarations was we do not understand
6 Additional Protocol 1 to the Geneva Conventions, which
7 establishes additional nonstate actors as combatants, to apply
8 to the IRA. And that was not ten attacks. That was thousands
9 of attacks. Those were not attacks that -- battlefield. They
10 didn't comply with the law of war. Those were thousands of
11 civilian casualties in many cases.

12 So the -- in the question of whether a
13 noninternational armed conflict rises to the level of an armed
14 conflict or not, there is an objective analysis, but the most
15 important vote is the state. It is not like state-to-state
16 violence. Japan -- the United States was in an armed conflict
17 with Japan when it attacked Pearl Harbor, whether or not the
18 United States retaliated or not.

19 And here is the absolute, perfect example for you,
20 Your Honor. The Civil War. The first -- the opening shots in
21 the Civil War were fired not in April of 1861, they were fired
22 in December of 1860, not in the Lincoln administration but in
23 the Buchanan administration.

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1 In January of 1861, Buchanan sent a ship, The Star of
2 the West, to Charleston Harbor which the -- which South
3 Carolina fired upon. But at the time South Carolina was a
4 nonstate actor and, in modern terms, there was no conflict.
5 In the first inaugural address, President Lincoln described
6 South Carolina, and by then the Confederacy, not as a wartime
7 opponent but as a conspiracy of criminals.

8 The firing on Fort Sumter took place on April 12,
9 1861, where Confederate forces -- by that time because South
10 Carolina had formed the Confederacy -- and Confederate forces
11 fired on Fort Sumter. But the Civil War did not begin on
12 April 12, 1861, despite the first shot in December, additional
13 shots in January, additional shots on April 12. The Civil War
14 doesn't begin until April 19, which is when President Lincoln
15 imposes a blockade, which is under the law of armed conflict,
16 on the South. President Lincoln decided when the Civil War
17 changed from a conspiracy of criminals engaged in violence to
18 a conflict under the law of war.

19 MJ [COL POHL]: So bringing that ahead a hundred years,
20 150 years, this is back to what we discussed earlier, who
21 decides whether we are on a -- we are talking about a NIAC
22 here.

23 LDC [MR. CONNELL]: Right.

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1 MJ [COL POHL]: Who decides we are in a state of
2 hostilities?

3 LDC [MR. CONNELL]: In NIACs, and including the Civil War,
4 essentially all judgments about whether we are at -- involved
5 in a NIAC or not, they are almost retrospective. The only
6 reason why we are having this discussion today and why
7 President Clinton and others discussing this in 2006 didn't
8 really care, the only reason is because the Military
9 Commissions Act of 2009, which imposes hostilities as a basis
10 for personal jurisdiction, it's always a backward-looking
11 analysis.

12 At the time President Lincoln -- many of his cabinet
13 opposed his blockade for the exact reason that they did not
14 want to impose the law of armed conflict on the conflict with
15 the South. They thought that they should, you know,
16 essentially hang all the leaders of the South.

17 MJ [COL POHL]: Again, come back to the 20th century
18 here -- the 21st century ----

19 LDC [MR. CONNELL]: The 21st century, whatever you want.

20 MJ [COL POHL]: It's almost the 21st century. But your
21 discovery request, it is to know what the lay of the land, for
22 want of a better view, of the American leaders vis-a-vis the
23 hostilities.

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1 LDC [MR. CONNELL]: Yes, sir. The only thing I disagree
2 with is so much the word leaders, because it is not the
3 leaders that are so important, it is the United States as a
4 whole. You know, President Clinton -- or Vice President Gore
5 is a better example, I suppose. Vice President Gore doesn't
6 enter into a state of armed conflict, the United States enters
7 into a state of armed conflict. The same way that the actual
8 war fighters' actions may determine whether we are in a state
9 of armed conflict, especially in state-to-state conflict,
10 right, if the -- if Mexico -- if a battalion of soldiers in
11 Mexico invades the United States, even without the approval of
12 the President, there could be a state-to-state armed conflict.
13 So it's not -- like the whole leader's idea, while relevant,
14 is not -- hardly controls the situation.

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

16 LDC [MR. CONNELL]: The last thing I want to say, Your
17 Honor, is we actually drew this exact distinction using
18 evidence, sworn evidence, that is attached to AE 494D
19 Attachment I, in which Ambassador Pickering, who was engaged
20 at the time, explains that, in his view, the isolated use of
21 military force against bin Laden was a strategic move trying
22 to lead to a particular objective, neutralizing bin Laden and
23 al Qaeda. War, however, is a consistent series of military

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1 operations and attacks. The fact that military force against
2 bin Laden was authorized does not in itself support the
3 government's argument that we were engaged in an armed
4 conflict with al Qaeda. The significant part of that, Your
5 Honor, is not that an ambassador, a leader of the United
6 States holds that opinion, the significant part of that is
7 that is a legitimate view held by a number of people who know
8 that we should have the evidence to support and the ability to
9 argue to the military commission or the panel as the trier of
10 fact.

11 MJ [COL POHL]: Thank you.

12 LDC [MR. CONNELL]: Thank you.

13 MJ [COL POHL]: Mr. Trivett, anything further?

14 MTC [MR. TRIVETT]: I think I will save it for 502, sir.

15 MJ [COL POHL]: Okay. As discussed earlier, there are
16 some things we wanted to do this afternoon to explore the --
17 start out with Mr. Connell, the issues of the 502 and the 525
18 slides. And rather than coming back to do the 523, we will do
19 523 tomorrow also. And that will give counsel time to resolve
20 the legal -- the issue about the seizure of the legal
21 materials.

22 So the way forward will be tomorrow morning we will
23 do 502J, 523 and 525 in an open session; 114, 502J, 510, 514,

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1 523 and 525 in a closed session.

2 Mr. Harrington, did you need further argument -- you
3 wanted some argument on 152 in a closed session?

4 LDC [MR. HARRINGTON]: Yes, sir. Very brief.

5 MJ [COL POHL]: And then just to -- one other kind of
6 hanging thing out there. Mr. Connell, in 522K you indicated
7 517 would also be subject to a closed session. And again, I
8 could be wrong here, but my tracking shows we had that
9 argument on the 23rd of August, '17.

10 LDC [MR. CONNELL]: Sir, we never had that. You already
11 issued an order closing part of the session, and that argument
12 never came to pass.

13 MJ [COL POHL]: Okay. Then I must be -- so we will do 517
14 tomorrow?

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

16 MJ [COL POHL]: Excuse me -- yes, tomorrow we will do the
17 open session. The closed session will be 114, 502, 510, 514,
18 517, 523 and 525. Okay.

19 And that being said, we will recess until tomorrow at
20 0900. The commission is in recess.

21 [The R.M.C. 803 session recessed at 1247, 18 October 2017.]

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