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1 [The R.M.C. 803 session was called to order at 0901, 27 March  
2 2019.]

3 MJ [Col PARRELLA]: Good morning. This commission is  
4 called to order.

5 Trial Counsel, if you could please identify who is  
6 here on behalf of the United States.

7 CP [BG MARTINS]: Your Honor, there are no changes to  
8 presence of counsel. I will note that the proceedings are  
9 being transmitted by closed-circuit television to locations in  
10 the continental United States pursuant to the commission's  
11 order.

12 MJ [Col PARRELLA]: Thank you.

13 Defense, are all the defense counsel who were present  
14 at the close of the previous session again present?

15 Mr. Nevin?

16 DDC [LtCol POTEET]: We are, Your Honor, for Mr. Mohammad.

17 MJ [Col PARRELLA]: Ms. Bormann?

18 LDC [MS. BORMANN]: Judge, we're all present.

19 MJ [Col PARRELLA]: Mr. Harrington?

20 LDC [MR. HARRINGTON]: We're here, Judge; same attorneys.

21 MJ [Col PARRELLA]: Mr. Connell?

22 LDC [MR. CONNELL]: Good morning, Your Honor.

23 MJ [Col PARRELLA]: Good morning.

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1 LDC [MR. CONNELL]: No changes.

2 MJ [Col PARRELLA]: And Mr. Ruiz?

3 LDC [MR. RUIZ]: Judge, same team, with the exception of  
4 Major Wilkinson is absent this morning.

5 MJ [Col PARRELLA]: Thank you.

6 I would note the following accused are been absent:  
7 Mr. Mohammad, Mr. Binalshibh, and Mr. al Hawsawi. The  
8 remaining accused are present.

9 Trial Counsel, do you have a witness to testify as to  
10 the absence -- absences I just noted?

11 CP [BG MARTINS]: We do, Your Honor.

12 Captain, could you please move to the witness box.  
13 Please remain standing. Raise your right hand for the oath.  
14 CAPTAIN, U.S. NAVY, was called as a witness for the  
15 prosecution, was sworn, and testified as follows:

16 **DIRECT EXAMINATION**

17 **Questions by the Chief Prosecutor [BG MARTINS]:**

18 Q. You are a captain in the United States Navy?

19 A. Yes, sir.

20 Q. And you are an assistant staff judge advocate here in  
21 the Joint Task Force Guantanamo?

22 A. Yes, sir.

23

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

2 Q. Captain, have you testified previously regarding the  
3 statement of understanding?

4 A. Yes, sir, I have.

5 Q. Let me do this in reverse order. I know you have in  
6 your possession what's been marked as Appellate Exhibit 622,  
7 consisting of three pages, and 622A and B, consisting of three  
8 pages, excuse me, each.

9 Let me do Ramzi Binalshibh first. That's 622A.

10 A. Yes, sir.

11 Q. Did you have occasion to meet with Mr. Binalshibh  
12 this morning?

13 A. I did.

14 Q. And did you advise Mr. Binalshibh of his right to  
15 attend today's proceeding?

16 A. Yes, sir, I did.

17 Q. What did he tell you that he wanted to do?

18 A. He did not want to attend proceedings today.

19 Q. Did he execute a waiver of his attendance?

20 A. Yes, he did, sir.

21 Q. And you have that in front of you?

22 A. I do.

23 Q. Did you read the document in English or in Arabic?

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1 A. I read it in English.

2 Q. Did he sign the English version of the document?

3 A. He signed the English version, yes, sir.

4 Q. And that's his signature on page 2?

5 A. Yes, it is.

6 Q. With respect to Mr. al Hawsawi, did you follow the  
7 same procedure?

8 A. I did.

9 Q. Did you read the document in English or in Arabic?

10 A. In English, sir.

11 Q. Did he say he understood the English version?

12 A. He did.

13 Q. And did he execute the English version of this  
14 document?

15 A. He did, sir, and as well as the Arabic version.

16 Q. And did you follow the procedure that's laid out on  
17 the documents?

18 A. Yes, sir.

19 Q. Now, with respect to Mr. Mohammad, it too is a  
20 three-page document?

21 A. Yes, sir.

22 Q. Did you follow the same procedure with him?

23 A. I did.

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1 Q. Did he indicate that he did not wish to attend  
2 today's proceedings?

3 A. He did.

4 Q. On that document, page 2, could you read that for the  
5 court, please.

6 A. With respect to his note that he wrote at the bottom  
7 of the document, sir?

8 Q. Yes, please.

9 A. Yes, sir.

10 He wrote, "I knew I have to be present the first  
11 session, but the rest of it is not compulsory to attend, and  
12 if government insist to bring female escort" -- looks like  
13 "given to me in each first session, then it is my decision to  
14 accept or refuse the other session."

15 Q. All right. Very well.

16 Again, back to did he understand that he could attend  
17 and that he voluntarily waived his right to attend?

18 A. He did, sir.

19 TC [MR. SWANN]: I have no further questions, Your Honor.

20 MJ [Col PARRELLA]: Do any defense counsel have questions  
21 for this witness?

22 That's a negative response.

23 Thank you, Captain. You are excused.

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1 [The witness was excused.]

2 MJ [Col PARRELLA]: The commission finds that  
3 Mr. Mohammad, Mr. Binalshibh, and Mr. Hawsawi have knowingly  
4 and voluntarily waived their right to be present at today's  
5 session.

6 So today's session is a result of a brief R.M.C. 802  
7 conference that we held at that conclusion of yesterday's  
8 session, which was a closed session held pursuant to  
9 R.M.C. 806.

10 During that 802 conference, Mr. Connell asked the  
11 commission to consider taking up the issue of whether the  
12 commission's ruling in 502BBBB with respect to the existence  
13 of personal jurisdiction should be applied to the other  
14 accused who were not the proponent of the initial motion that  
15 led to that ruling.

16 The government indicated that they were prepared to  
17 argue this should the commission deem it appropriate, although  
18 they didn't believe that oral argument was necessary.

19 After taking it under advisement, the commission  
20 decided to take this issue up in the open session and, as  
21 such, issued an amended docket order.

22 Do any counsel have any additions or corrections to  
23 the commission's summation of the R.M.C. 802 conference?

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1           That's a negative reply from all counsel.

2           CP [BG MARTINS]: No, Your Honor, from the government.

3           MJ [Co1 PARRELLA]: Thank you.

4           One other administrative note before we start. I  
5 have just been asked by the court administration to ask that  
6 you minimize the bending of your microphones to the extent  
7 that you can move the base of it. That would help us prevent  
8 damage to the microphones, themselves. If you can attempt to  
9 just move the base of it as opposed to just bending them,  
10 apparently that will help preserve the life of them.

11           Okay. With that ----

12           LDC [MR. CONNELL]: Sir, could I ask ----

13           MJ [Co1 PARRELLA]: Yes.

14           LDC [MR. CONNELL]: ---- a question about that just to  
15 make sure that I understand that?

16           Generally, the microphones, in my experience, don't  
17 get bent from side to side, they get bent up for me to stand  
18 and speak or down. Or should I just -- I'll just leave it  
19 alone.

20           MJ [Co1 PARRELLA]: Yes, I think they are designed -- I'm  
21 looking at my own -- in some respect to bend, but I would say  
22 that probably the side-to-side motion is more problematic.

23 But to the extent we can just avoid bending them altogether, I

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1 think it will help.

2 LDC [MR. CONNELL]: I will do my best, sir. Thank you.

3 MJ [Col PARRELLA]: All right. Thank you.

4 Okay. With that, Mr. Connell, would you like to  
5 present your argument?

6 LDC [MR. CONNELL]: Sir, my understanding is that we are  
7 before the military commission with respect to at least that  
8 portion of the government's argument in 502DDDD that the  
9 decision in AE 502BBBB, finding jurisdiction -- personal  
10 jurisdiction over Mr. al Hawsawi is res judicata with respect  
11 to Mr. al Baluchi and perhaps other defendants as well,  
12 although it is Mr. al Baluchi that's the subject of the  
13 briefing.

14 I'm prepared to address the other aspects of 502CCCC  
15 if the military commission directs, but I will focus my  
16 attention on that aspect unless the military commission  
17 directs otherwise.

18 The litigation in the 502 series writ large has been  
19 bifurcated in that at virtually every step since the filing of  
20 AE 488, the first of the jurisdiction -- at that time subject  
21 matter jurisdiction questions, the -- Mr. al Baluchi has taken  
22 a different position on most questions than Mr. al Hawsawi.  
23 The military commission repeatedly recognized that and

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1 directed Mr. al Baluchi to act in a different manner on a  
2 different schedule and with different issues than with  
3 Mr. al Hawsawi.

4 By the end of the litigation, Mr. -- in fact, by the  
5 middle of the litigation, Mr. al Hawsawi had been directed to  
6 proceed, and Mr. al Baluchi, although repeatedly indicated  
7 that he was ready to proceed, was directed first to wait, and  
8 finally his opinion was deferred -- his litigation was  
9 deferred.

10 That deferral continued even to AE -- BBBB itself,  
11 stating that although the military commission was resolving  
12 the personal jurisdiction issue with respect to  
13 Mr. al Hawsawi, in the same document the military commission  
14 indicated that Mr. al Baluchi's litigation remained deferred  
15 pending his filing of a motion to suppress.

16 Ultimately, what led to the filing of AE 502CCCC is  
17 that the suppression took place without the filing of a motion  
18 to suppress per se under Rule 304 and the -- in our opinion,  
19 it seemed ripe to at least begin the conversation about how we  
20 move forward on the personal jurisdiction question.

21 Now, let's look at all that in more detail. Before I  
22 do that, Your Honor, there have been substantial number of  
23 prior arguments with respect to 502, although not with respect

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1 to 502CCCC and DDDD. I stated each of those transcript  
2 citations in our proposed order of march -- on our updated  
3 order of march in the 619 series. I'm happy to repeat them at  
4 the -- per the court's direction at the beginning of my  
5 argument, or I can rest on the brief on that question.

6 MJ [Col PARRELLA]: You can rest on the brief. I did see  
7 all those citations.

8 LDC [MR. CONNELL]: Thank you.

9 Rule for Military Commission 812 regarding joint and  
10 common trials provides that in joint trials and in common  
11 trials, each accused shall be accorded the rights and  
12 privileges as if tried separately. This rule of the military  
13 commission reflects what the Supreme Court has described as  
14 the deep-rooted historic tradition that everyone should have  
15 their own day in court.

16 That quotation comes from Taylor v. Sturgell at  
17 553 U.S. 880, a 2008 case, but is reflected throughout 200  
18 years of jurisprudence over res judicata and its related  
19 doctrines. All that we ask is for our own day in court and to  
20 be treated as if tried separately.

21 The argument that I will be making this morning has  
22 both a legal component and a procedural component. I will  
23 begin with the legal component.

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1           The government's argument in AE 502DDDD is that the  
2 doctrine of res judicata, or a thing decided, applies in this  
3 situation. Res judicata is not simply the idea that someone  
4 has rendered the decision on a subject. If that were true,  
5 the development of the law throughout any particular trial,  
6 any particular jurisdiction, or throughout the nation would be  
7 impeded. Rather, res judicata has a specific and well-decided  
8 definition.

9           One of those -- and it's been repeated often -- comes  
10 from Allen v. McCurry at 449 U.S. 90, a 1980 case, which  
11 defines res judicata as, quote, a final judgment on the merits  
12 of an action precludes the parties or their privies from  
13 relitigating issues that were or could have been raised in  
14 that action.

15           Res judicata has developed over the years in modern  
16 jurisprudence; has two components. The first of those is  
17 claim preclusion, the idea that in a civil case, someone  
18 should have raised an issue earlier and that they didn't -- in  
19 an earlier case and that they didn't. This has no application  
20 whatsoever in a criminal case. It is only a rule of  
21 pleading -- or a rule with respect to civil pleadings.

22           The second aspect of res judicata is issue  
23 preclusion, also known as collateral estoppel. This issue

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1 does have an application in criminal cases but only in the  
2 manner of assertion by the defendant against the government.  
3 The most well known example of this being Ashe v. Swenson,  
4 397 U.S. 436, a 1970 case, in which the Supreme Court decided  
5 that collateral estoppel was an element of the double jeopardy  
6 protection, which, of course, the double jeopardy protection  
7 only runs in one direction in a criminal case.

8           Separate from that question, however, the application  
9 of res judicata as a doctrine requires -- has no application  
10 within the life of a single case, including when it is on  
11 appeal. Res judicata requires a final judgment, which is a  
12 term of art, meaning a judgment which has come to rest and has  
13 no longer been challenged. Res judicata has no application  
14 within a case because a judge has the authority to reconsider  
15 decisions, among other things.

16           Now, one of the things -- although the government  
17 repeatedly argues this as res judicata, on brief I considered  
18 the possibility that although they say res judicata, maybe  
19 they don't mean it. Maybe instead of a legal doctrine, they  
20 are just applying it like as an idea, like, hey, this has  
21 already been decided. And so I addressed that at some length  
22 in my brief, and that brings us to the more factually  
23 intensive part of the case.

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1           In summary -- and I am going to go in detail as well,  
2 but in summary, Mr. al Baluchi was precluded by the military  
3 commission from litigating personal jurisdiction in 2017.  
4 Everyone present in the courtroom at the time understood this.  
5 The government stated it repeated -- stated the distinction  
6 between Mr. al Baluchi's and Mr. al Hawsawi's claims  
7 repeatedly. The military commission promised that the  
8 decisions of Mr. al Hawsawi would not be held against the  
9 other defendants. And at this late date, the government now  
10 seeks a windfall in abrogation of both its prior positions,  
11 the prior positions of the parties of the defense and the  
12 prior positions of the military commission.

13           The most fundamental aspect of due process is notice  
14 and the opportunity to be heard. Mr. al Baluchi had notice  
15 but was repeatedly told that his litigation was being handled  
16 separately and did not have the opportunity to be heard.

17           As the Supreme Court explained in Blonder-Tongue Labs  
18 v. The University of Illinois Foundation at 402 U.S. 313, a  
19 1971 case, due process prohibits estopping a nonparty, despite  
20 one or -- despite one or more adjudications of the identical  
21 issue which stand squarely against their position. This is  
22 simply an application of the fundamental principle that  
23 everyone gets their day in court.

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1           Now, I -- there is an extremely long procedural  
2 history to this question. I am going to skip over parts that  
3 are not relevant to what we're talking about here today, but I  
4 don't want the military commission to think that I'm trying to  
5 mislead it about omitting part of the procedural history. I'm  
6 just going to focus, unless the military commission directs me  
7 otherwise, on the pieces relevant to what we are talking about  
8 today.

9           As part of litigation over the distinction between  
10 subject matter jurisdiction and personal jurisdiction,  
11 Mr. al Hawsawi filed AE 502. Mr. al Baluchi filed a separate  
12 petition in AE 502B, setting forth his own position,  
13 disagreeing with the position of Mr. al Hawsawi in some  
14 respects and agreeing with it in other respects.

15           The government response to both of those, which is  
16 found in AE 502C, was to argue that the government did not  
17 need to prove personal jurisdiction because the existence of  
18 hostilities was, I quote, a matter of law.

19           This question was argued before the military  
20 commission on 15 May 2017. My argument about the government's  
21 matter of law claim appears at 15707 to 15710 in the  
22 transcript.

23           The government at that time argued on 15 May 2017 at

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1 page 1000 -- excuse me, 15727 in the transcript that, quote, I  
2 think that's a matter of law; that ultimately the Congress and  
3 the President in passing the 2009 Military Commissions Act  
4 ultimately made the decision that we were in hostilities with  
5 al Qaeda.

6 In AE 502I, the military commission rejected that  
7 position. The military commission held that Mr. al Hawsawi  
8 and Mr. al Baluchi, which are called the affected accused,  
9 have, quote, raised a colorable issue, end quote, as to  
10 personal jurisdiction.

11 With respect to both defendants, it ordered a  
12 pretrial evidentiary hearing on the question of personal  
13 jurisdiction and held that the government bears the burden of  
14 proving any facts prerequisite to personal jurisdiction of the  
15 commission by a preponderance of the evidence.

16 MJ [Col PARRELLA]: Mr. Connell, in 502BBBB, the ruling  
17 breaks or separates personal jurisdiction into sort of two  
18 components: existence and nexus. Do you read 502I to suggest  
19 that the commission's ruling in that order -- that earlier  
20 order applied to both aspects or just the nexus component?

21 LDC [MR. CONNELL]: Both aspects, Your Honor. One of the  
22 ways that we know that is that that was the existence piece --  
23 I honestly believe -- and I think if I am reading the room

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1 correctly on this, I think that the nexus piece is not  
2 really -- the government is not really making an argument that  
3 there's res judicata with respect to the nexus piece.

4 MJ [Col PARRELLA]: Well, that was a question that I would  
5 have. That's my understanding of their position, but we ----

6 LDC [MR. CONNELL]: They can speak for themselves, of  
7 course.

8 So let me focus on the existence piece. It was the  
9 existence piece that was actually argued in -- on 15 May 2017  
10 that is what the military commission was deciding in AE 502I.  
11 So this is not a matter of, hey, somebody later thought  
12 there's an existence part and there's a nexus part, and there  
13 was another basket which was statements as well, eventually.

14 But it's not as if this issue had not occurred to  
15 anyone. And, in fact, the -- it was the government's primary  
16 position that they did not have to prove facts because at  
17 least the existence piece had already been decided by  
18 Congress, the -- or the President or some other public act,  
19 which we are going to talk about public acts in some detail,  
20 and I am going to talk about this particular part a lot more.

21 But with respect to AE 502I, yes, that is what the  
22 military commission was deciding because that's the  
23 controversy that the parties presented to the military

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1 commission. I just quoted the government's -- just -- you  
2 know, it went on for several pages, but the sort of pull quote  
3 from that at 15727, where they summarized the argument that --  
4 of their time, that's what in four pages I was responding to  
5 that particular argument about the relationship of  
6 10 U.S.C. 948a(7) to the existence of hostilities, right?

7           One of the things -- and there were other aspects of  
8 the existence of hostilities that were debated as well. I  
9 will give you an example, one that we lost. The 948a(7)(C),  
10 the part of al Qaeda, we made -- the defense made --  
11 Mr. al Baluchi made an argument that the existence of  
12 hostilities by reference to 950p(c), the element incorporated  
13 the existence of hostilities as an element into the part of  
14 al Qaeda, a(7)(C), prong of personal jurisdiction.

15           Now, the military commission decided against us on  
16 that question and decided that the existence of hostilities  
17 was not an aspect that the government had to prove with  
18 respect to the (C) prong, part of al Qaeda.

19           But the reason why I raised that is it demonstrates  
20 the sort of -- the fact that whether existence of hostilities  
21 was a matter of law or a matter of fact, as almost all  
22 jurisdictional facts are, was first -- was front in the  
23 military commission's mind at that time because in multiple

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1 different ways, that question was being argued by the parties.

2 Did I answer the question with respect to AE 502I,  
3 sir?

4 MJ [Col PARRELLA]: You did.

5 And perhaps you're going to get to this, but I'd like  
6 to hear what your take is. And then in light of 502BBBB, do  
7 you see that opinion, that subsequent ruling, as deciding that  
8 existence is established as a matter of law?

9 LDC [MR. CONNELL]: So I'll give the short answer: No, I  
10 do not see that. I will explain my interpretation of 502BBBB,  
11 but, if you don't mind, I'll do it in chronological order.

12 MJ [Col PARRELLA]: Absolutely.

13 LDC [MR. CONNELL]: The next thing that happened after  
14 AE 502I was an order for witness lists. At that time, the  
15 position of Mr. al Hawsawi diverged and the position of  
16 Mr. al Baluchi diverged, as it had already done, and this time  
17 in three core ways:

18 The first, a divergence in the approach to the  
19 evidentiary question. Mr. al Hawsawi requested one witness.  
20 At the time, we requested 133 witnesses.

21 The parties diverged in their approach to the use of  
22 the January 2007 statements by the government to prove  
23 personal jurisdiction. Mr. al Hawsawi elected not to

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1 challenge the statements at that time. Mr. al Baluchi, on the  
2 other hand, objected to the use of the statements under  
3 Military Commission Rule of Evidence 304.

4           And third, the parties diverged on the significance  
5 of a variety of legislative and executive acts, as to whether  
6 they were relevant or not. Mr. al Baluchi's fundamental  
7 approach was that there were a wide variety of acts of the  
8 United States Government. Sometimes those acts were -- were  
9 inaction with respect to military, choosing some other aspect  
10 of national power; but more importantly, acts/statements of  
11 President Clinton, statements of President Bush, the  
12 significance of the authorization for the use of military  
13 force. These public acts are the subject of the -- what  
14 Judge Pohl called the hostilities basket, the witnesses that  
15 Mr. al Baluchi sought to argue to establish the nonexistence  
16 of hostilities.

17           Mr. al Hawsawi, on the other hand, took the position  
18 essentially more like a 12(b)(6) in a federal court, that  
19 given the existence of all of these factors that the  
20 government has identified, it still doesn't rise to the level  
21 of a noninternational armed conflict and thus not a conflict  
22 subject to the laws of war as defined in the Military  
23 Commissions Act.

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1           So that distinction, later in 502BBBB, becomes quite  
2 important. But the earlier distinctions, the lack of  
3 challenge to the statement and the evidentiary approach, is  
4 what drove the military commission to separate because it was  
5 easier to deal with Mr. al Hawsawi's smaller challenge than it  
6 was logistically to deal with Mr. al Baluchi's larger  
7 challenge.

8           So at that time, the government agreed with respect  
9 to these witness lists to produce ten witnesses for  
10 Mr. al Baluchi, two of which overlapped with witnesses that  
11 the government intended to call, and refused 120 or so of  
12 Mr. al Baluchi's other witnesses.

13           And so this split continued in the argument before  
14 the military commission on 21 August of 2017 where the  
15 military commission took argument from Mr. al Hawsawi and told  
16 Mr. al Hawsawi that he was only speaking for himself and his  
17 client. That is at transcript 16062 -- 16062.

18           Then, further splitting the argument at transcript  
19 16065, the military commission told the government although  
20 this is one motion -- referring to AE 502, because it's so  
21 specific -- Trial Counsel, you'll get an opportunity to  
22 respond to Mr. al Hawsawi's position, and then you'll have an  
23 opportunity to respond to Mr. Ali's position.

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1           And the government did so.

2           If I can have the court's indulgence for just one  
3 moment.

4           And in responding to Mr. al Hawsawi's position, the  
5 government position at the time was Mr. al Baluchi's claim and  
6 Mr. al Hawsawi's claim are different not only procedurally but  
7 different in kind.

8           The government argued -- and I'm at page one  
9 thousand -- 16072. I want to first start a comparison between  
10 the two different motions because they're two different  
11 things. Mr. Connell's motion is more of a traditional  
12 personal jurisdiction challenge where he is challenging both  
13 the existence of hostilities as well as the fact that his  
14 client was an alien unlawful enemy belligerent in that he is  
15 arguing that he didn't support the hostilities against the  
16 United States, end quote.

17           In other words, the government was saying that  
18 Mr. al Baluchi -- in its estimation, Mr. al Baluchi was  
19 challenging both parts of what the military commission asked  
20 me about earlier, the existence part separately from the nexus  
21 part.

22           The government continued: Mr. al Hawsawi's motion is  
23 not truly a personal jurisdiction motion. It is a subject

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1 matter jurisdiction motion masquerading as a personal  
2 jurisdiction motion.

3           The government continued: It's only one witness that  
4 he's asked for -- meaning Mr. al Hawsawi -- Professor Watts is  
5 going to come and give what we believe to be an improper legal  
6 conclusion in his testimony that the United States can't be in  
7 hostilities with al Qaeda.

8           The reason why I quote this excerpt at some length is  
9 it is one of several places where the government, not -- not  
10 even just me or the military commission but the government  
11 took the position that these things are different from each  
12 other. Mr. al Hawsawi's challenge sounds more in -- in --  
13 subject matter jurisdiction sort of changed and is more of a  
14 sort of legal -- I described earlier as 12(b)(6) -- a more of  
15 a legal claim than a factual claim.

16           The -- in fact, at page 16075, the government argued  
17 that Mr. al Hawsawi's, and I quote here, challenge still  
18 doesn't seem to be a factual challenge. And at 16076, the  
19 government argued, quote, that's how I read their motion to  
20 be, as I see, as a legal motion. I don't see that as a  
21 factual motion.

22           Now, the government dealt with Mr. -- the military  
23 commission, rather, dealt with Mr. al Baluchi separately,

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1 starting at transcript page 16078, because -- as briefly came  
2 up yesterday, the problem was that we could not file our  
3 pleading, which ultimately became AE 502Y, because we had to  
4 submit it for classification review because it had kind of  
5 unusual, bizarre classification markings on it that the court  
6 information security officer at the time would not accept.

7 Later, a policy decision was made at some other part  
8 of the United States Government, rather than re-marking all  
9 the documents, that the -- that they would simply be accepted  
10 as they were. That argument begins at page 16078.

11 But at that time, Judge Pohl continued to separate  
12 the position of the parties, not just -- not just logistically  
13 but to make sure that he -- that everyone in the courtroom  
14 understood that he was talking about something different.

15 At transcript page 16083, addressing me in  
16 particular, "As I just told Mr. al Hawsawi's team, they don't  
17 speak for you." And then at page 16085, while Judge Pohl was  
18 trying to sort out the question of, well, what about the three  
19 defendants who are choosing not to contest personal  
20 jurisdiction at this time, Judge Pohl seemed to be -- like  
21 there was this -- in his colloquy with Mr. Nevin, there was  
22 a -- there was a description of Mr. al Hawsawi is over here,  
23 these three are over here, and Mr. al Baluchi seems to be in

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1 the middle.

2 But Judge Pohl said to me, three of these  
3 colleagues -- of your colleagues here are choosing to defer  
4 this issue. And I responded what, frankly, turns out to be  
5 prescient. I said, "At their own risk, sir. I choose not to  
6 take that risk."

7 I think that deserves unpacking, because at the time  
8 I was aware that the -- Mr. al Hawsawi's case seemed to be  
9 breaking off of Mr. al Baluchi's case on this personal  
10 jurisdiction, and even though early in 2017, I had said there  
11 are hostilities discovery motions pending; we're not ready.

12 Once the military commission issued AE 502I, I  
13 changed my position. I said we are ready. We will go.  
14 Please let us argue. Please let us present our witnesses.  
15 Because I was afraid that a ruling against Mr. al Hawsawi  
16 would later be taken to have preclusive effect against  
17 Mr. al Baluchi, so I did ----

18 MJ [Col PARRELLA]: Wasn't that sort of stated in the  
19 ruling in 502I, that the statement was "Any such motions must  
20 take into consideration any rulings issued by the commission  
21 with regard to AE 502 (Hawsawi)"?

22 LDC [MR. CONNELL]: Right. That statement was really at  
23 the time -- or I read it at the time to be first, a fair

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1 warning, and second, specifically a fair warning with respect  
2 to the three defendants who chose not to participate, because  
3 I chose to participate, having heeded that fair warning.

4           And so to me, it is somewhat ironic that now the  
5 government is claiming that Mr. al Baluchi's rights are  
6 controlled by litigation that he did not have the chance to  
7 participate in despite every effort to do so; and, in fact, at  
8 the time that I acknowledged that as a risk, made my strategic  
9 choices and articulated them to the military commission based  
10 on that risk that I worked so hard to avoid.

11           Now, in that same hearing, Judge Pohl offered me  
12 deferral until the hostilities motions -- discovery motions  
13 were decided, which they're still not decided, but that's a  
14 separate question. That's at page -- transcript page 16089,  
15 and he said that he did not want -- that the military  
16 commission did not want me -- to force me to go forward  
17 without the discovery that I thought that I was entitled to,  
18 or at least a ruling on the discovery that I thought I was  
19 entitled to.

20           He wasn't promising me everything I thought I needed,  
21 but I said that I was ready to go forward once the markings  
22 issue was resolved. And that's at transcript 16090. And when  
23 I go back and read it, Your Honor, it just leaps off the page

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1 that Judge Pohl was saying, look, you know, you can wait if  
2 you want to, I'm not trying to force you. And my palpable  
3 fear that the government would make the argument that it makes  
4 today and my willing to go forward without resolution of the  
5 hostilities discovery motions to avoid that risk just kind of  
6 leaps off the page at you.

7 And so the judge at the time, at page 16094, observed  
8 that the markings issue was in the al Baluchi case but was not  
9 in the Hawsawi case, and then the judge specifically addressed  
10 the argument that -- Judge Pohl specifically addressed the  
11 argument that the government makes today. And I'm going to  
12 read from transcript page 16096 and 97.

13 MJ [Col PARRELLA]: When you refer to the markings issue,  
14 you're referring to the 502Y issue?

15 LDC [MR. CONNELL]: Yes, sir, that's right. That markings  
16 issue affected 502Y, our sort of very large position on our  
17 theory of defense and motion -- and witnesses that we thought  
18 we should be able to call in the 502 litigation. It also  
19 affected the five hostilities discovery motions.

20 And the reason for this is, as one might expect,  
21 hostilities discovery motions were addressing largely matters  
22 from the 1990s and very early 2000s, which included perhaps  
23 markings that were not as scrupulous as they are now, as well

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1 as compartments which had been overtaken by events combined,  
2 disestablished, and were not familiar to the court information  
3 security officer.

4           So when we're talking about the markings issue -- and  
5 it actually comes up at some substantial length that I am  
6 skipping over in this transcript. When we are talking about  
7 the markings issue, specifically we are talking about the  
8 hostilities discovery motions from 609, et seq., and -- excuse  
9 me, 509, et seq., and 502Y, our position on hostilities.

10           Those were -- and this is a matter of record in the  
11 military commission; I documented it in the footnotes. We  
12 were trying to get those filed. They were not accepted for  
13 filing because of the unusual markings on the attachments,  
14 which we carried through, as we're required to do, to the main  
15 pleading. And we were directed to submit them for  
16 classification review.

17           The -- so after taking up that markings issue and  
18 observing that -- you know, that that was Mr. al Baluchi's  
19 problem, not Mr. al Hawsawi's problem, the military commission  
20 observed at page 16096, "With five accused, there is always  
21 going to come to the issue does it apply to all five or only  
22 one? These are personal jurisdiction issues, so whatever  
23 position that -- well" -- and then there is, you know, a

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1 break. "Well, Mr. Hawsawi has taken a position that's  
2 different from Mr. Connell's position, so I'm not imputing  
3 that to anybody else's position, if that's what you're asking  
4 me."

5 So even at that time, the military commission was  
6 well aware that there could come the day where if you went  
7 ahead and as a matter of judicial economy resolved  
8 Mr. al Hawsawi's personal jurisdiction challenge, that  
9 someone, say the government, might seek to assert it against  
10 Mr. al Baluchi. And at that time, he assured us that that was  
11 not the case.

12 Later he said -- and this is with respect to  
13 Mr. al Hawsawi is on one side, Mr. Mohammad and others were on  
14 the other side -- Judge Pohl said, "I think as of today's  
15 hearing, Mr. Connell is probably going to be more on your  
16 side" -- addressing Mr. Nevin on behalf of Mr. Mohammad --  
17 "than Mr. Hawsawi's side, but we'll see. And that's the way  
18 we are going forward on this procedurally." And what he meant  
19 was that it's going to take longer to resolve al Baluchi than  
20 it takes to resolve al Hawsawi. That turned out to be  
21 correct. That was the judge's -- the military commission's  
22 actual approach.

23 As we saw in the next hearing on 19 October 2017, at

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1 16917 in the transcript, the government separated the  
2 arguments of Mr. al Hawsawi from Mr. al Baluchi again, and the  
3 government again articulated a difference between the two  
4 arguments.

5           The government argued, and this is at page 16919,  
6 "I'm often confused about exactly what it is I have the burden  
7 of proving regarding personal jurisdiction over Mr. Hawsawi.  
8 I'm quite clear I understand what Mr. Connell wants me to  
9 prove. I still am unclear with what Mr. Hawsawi needs us to  
10 prove." And that is because -- end quote.

11           That is because of the strategic decision that  
12 Mr. al Hawsawi made -- took to this question of not addressing  
13 the public acts of the executive and the legislature, of not  
14 seeking to produce factual evidence about what happened  
15 between 1996 and 2001, but, instead, to take a sort of  
16 12(b)(6) type approach of, with no additional facts, just  
17 resting on the government's pleadings is, is that enough to  
18 demonstrate a noninternational armed conflict with the taking  
19 of no additional evidence.

20           And that's why the government continuously described  
21 Mr. al Hawsawi's motion as legal in nature rather than factual  
22 and not really a personal jurisdiction challenge but  
23 masquerading as a subject matter jurisdiction challenge.

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1 MJ [Col PARRELLA]: Mr. Connell, I understand that the  
2 argument advanced by Mr. Hawsawi at that prior session was  
3 different from perhaps the one you would make or would have  
4 made, and the government presented different evidence,  
5 obviously.

6 But in light of now having read 502BBBB and analyzing  
7 the -- or using the analysis the judge used in that ruling, do  
8 you think the outcome would have been any different with your  
9 presentation as opposed to what Mr. Hawsawi advanced? Because  
10 it doesn't appear to me that the judge necessarily took either  
11 party's position?

12 LDC [MR. CONNELL]: Absolutely it would have been  
13 different. And I am going to skip ahead to this, and then I'm  
14 going to come back just so you don't think -- because I want  
15 to answer your question, but I have no more to say about the  
16 lead-up to that. But the answer to that question is the --  
17 AE 502BBBB turns on essentially two factors.

18 One is Judge Pohl's rejection of the Tadic standard.  
19 He doesn't actually say in favor of the Hamdan standard, but  
20 that's what the parties were arguing and that's what I  
21 understood it to mean.

22 The second part is applying the text of the -- or at  
23 least his interpretation of the legislative history to the

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1 public acts of the executive and the legislature. And the  
2 public acts of the executive and the legislature are exactly  
3 what we seek to present evidence to the military commission  
4 on. I mean -- and so that's the answer.

5           The answer is that the public acts of the executive  
6 and legislature, which Judge Pohl largely but not completely  
7 chose to take judicial notice of, he did cite the testimony of  
8 the parties. And there was quite a bit of testimony from both  
9 sides about the factors that he eventually relied on, but the  
10 core of it is what we -- he called the effective  
11 determinations of the political branches. And that is what we  
12 seek to present evidence on in an evidentiary hearing. And  
13 I'm going to describe that in some more detail, if you don't  
14 mind, a little bit later in the argument.

15           MJ [Col PARRELLA]: Please continue.

16           LDC [MR. CONNELL]: So in the 19 October 2017 hearing,  
17 after the government recognized again what it saw as the  
18 difference between the parties, I argued the significance of  
19 the difference that just because you have one kind of hearing  
20 for Mr. al Hawsawi, Mr. al Baluchi is still in a different  
21 posture.

22           And that's at 16931, and this is me arguing. "The  
23 government made the point in the last hearing, correctly, I

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1 think, that Mr. al Hawsawi's personal jurisdiction is somewhat  
2 different than Mr. al Baluchi's. They made the same point  
3 again today."

4           And then on page 16932, "...even if you rule in favor  
5 of Mr. al Hawsawi's position for a fundamentally different  
6 type of hearing basically on paper...that doesn't necessarily  
7 mean that you should rule against Mr. al Baluchi because,  
8 under Rule for Military Commission 811, two parties can enter  
9 stipulations and that doesn't mean the other parties have to.  
10 There could be evidence that doesn't get taken with respect to  
11 Mr. al -- al Hawsawi or something else."

12           And that's what I am suggesting is exactly what  
13 ultimately happened, that there were evidence of the  
14 political acts -- the acts of the political branches, the  
15 legislature and the executive, that were not taken that we  
16 would have sought to have done.

17           So what Judge Pohl did -- after I argued at some  
18 length about the production of witnesses, at page 17016,  
19 Judge Pohl made a decision, and he said, "Just the way -- on  
20 the way ahead on 502, Mr. Ruiz, you'll get a decision  
21 relatively expeditiously on the witness request, hopefully  
22 with sufficient time to have the witnesses scheduled for  
23 December."

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1           Then he turned to me, "Mr. Connell, your issues are  
2 going to take a little longer. That probably doesn't surprise  
3 either of you."

4           Under that, in the order memorializing the argument  
5 on 19 October 2017, on 27 October 2017, Judge Pohl issued  
6 AE 502KK in which he made three decisions: First, he granted  
7 the witnesses of Mr. al Hawsawi -- or the witness of  
8 Mr. al Hawsawi; second, he granted the government's request  
9 for witnesses -- I'm not sure it needed it, but he did it  
10 anyway -- and third, deferred Mr. al Baluchi's request for  
11 witnesses.

12           And that was not -- that was pure -- that was for  
13 judicial economy. He said we're going to deal with  
14 Mr. al Baluchi later. And I was not, from that point, with  
15 one exception that we can talk about, involved in the  
16 litigation.

17           In December 2017, there was a four-day evidentiary  
18 hearing on evidence with respect to Mr. al Hawsawi. And at  
19 the end of that, Judge Pohl addressed our position on the 502.  
20 So we have had four days of hearing on Mr. al Hawsawi, and he  
21 says, all right, I just want for a moment to take up the  
22 situation with respect to Mr. al Baluchi. And that is at  
23 page 18226.

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1           And Judge Pohl turned to me and said, "I'm going to  
2 talk to Mr. Connell briefly about his 502." And he says,  
3 "Mr. Connell, where are we with your 502?"

4           And I said, well, there's some new discovery, but --  
5 and this is the quote -- "more importantly, we're waiting for  
6 your ruling on 502Y."

7           Judge Pohl asked me to refresh his recollection of  
8 what 502Y was, and I explained that it's our position on what  
9 witnesses we should be permitted to call in the 502 hearing.

10           And I went on to explain, "You told us at the last  
11 hearing that when you divided this between Mr. al Hawsawi and  
12 Mr. al Baluchi, that you intended to analyze what witnesses we  
13 would be permitted to call or would not be permitted to call.  
14 So that's where we are right now."

15           Then Judge Pohl went on to articulate what he saw as  
16 a -- a difference between the hostilities basket and the  
17 statements basket of witnesses.

18           The -- I volunteered to take what I called a hard  
19 look at our witness list, see what we could reduce it and see  
20 what we could resolve by stipulation.

21           That -- the Judge Pohl -- that is what I -- I'm  
22 sorry. Excuse me. Judge Pohl went on to say that in January  
23 of 2018, we would resolve the witness questions with the

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1 intention of calling witnesses in March. That's at page 18231  
2 and 32 and 37 of the record. And, surprisingly to me, he said  
3 we are going to address the statement basket of witnesses  
4 before we address the hostilities baskets of witnesses. And  
5 that was at 18232 to 33.

6 Moving forward -- so at this point, the -- Judge Pohl  
7 has already heard the evidence with respect to Mr. al Hawsawi,  
8 but he's still addressing, well, we need to take up  
9 Mr. al Baluchi's question, and here is my plan for doing so.  
10 We're going to argue the witnesses in January; in March, we're  
11 going to hear the witnesses. And I want to hear the  
12 statements witnesses in March, and then we're going to see  
13 where we are with respect to the hostilities witnesses.

14 On 11 January of 2018, we argued the revised witness  
15 list, which I cut substantially and proposed stipulations to  
16 the -- like not -- proposed stipulations to the government. I  
17 didn't just say, hey, I'll stipulate to things, like as the  
18 government practice. I actually drafted a stipulation,  
19 presented it to them, and I explained which witnesses in my  
20 mind this would obviate.

21 And -- but then on 18 January 2018, the judge issued  
22 AE 502QQQ. In that, he summarized the procedural posture of  
23 the case as follows: that he ordered an evidentiary hearing

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1 with respect to both Mr. al Hawsawi and Mr. al Baluchi; that  
2 he heard evidence and argument with respect to Mr. al Hawsawi;  
3 that he had previously deferred litigation with respect to  
4 Mr. al Baluchi, but that he was arguing for -- going forward  
5 that the whole AE 502 series was deferred with respect to  
6 Mr. al Baluchi until Mr. al Baluchi filed a motion to  
7 suppress.

8           Then a month or so later, on 26 February 2018, he  
9 issued AE 502BBBB. And in that order, itself, he refuted the  
10 government's argument that he saw it as controlling, because  
11 he recites the procedural history again. At the beginning, he  
12 explains that he had ordered an evidentiary hearing with  
13 respect to both defendants; that he had taken evidence and  
14 argument only with respect to Mr. al Hawsawi and had deferred  
15 Mr. al Baluchi's litigation.

16           In AE 502BBBB itself, Judge Pohl was very careful to  
17 confine his reasoning on every issue except one to  
18 Mr. al Hawsawi as opposed to Mr. al Hawsawi and  
19 Mr. al Baluchi. The -- with respect to his addressing of the  
20 Tadic standard, it was Mr. al Hawsawi. With respect to the  
21 public acts which the military commission either heard  
22 evidence of or took judicial notice of, it was confined to  
23 Mr. al Hawsawi.

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1           And then there was one exception to that rule where  
2 the judge combined -- excuse me, made clear that he was  
3 addressing only Mr. al Hawsawi. And in my view, that  
4 exception proves the rule of the rest of it, which is that  
5 when it came to the definition of what did "part of al Qaeda"  
6 mean, Judge Pohl said -- dropped a footnote, footnote 42,  
7 which said Mr. al Baluchi did participate in the briefing on  
8 the government's motion to adopt a standard of the definition  
9 of "part of al Qaeda."

10           Mr. al Baluchi addressed -- raised an issue which was  
11 that the ICRC's continuing combat function standard should  
12 govern in that situation. And because Mr. al Baluchi did  
13 participate in that, I'm going to go ahead and rule on his  
14 position. And then he did; he rejected our position, and we  
15 lost it.

16           But the fact that he chose the one element that we  
17 did participate in and did not construe anything with respect  
18 to the elements of the litigation that we did not participate  
19 in in my view demonstrates how careful he was in using a  
20 scalpel to distinguish between elements on which we had an  
21 opportunity to be heard and elements which we did not.

22           But most of all, at page 20 of AE 502BBBB,  
23 Judge Pohl, having just ruled with respect to Mr. al Hawsawi

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1 the last substantive piece in that motion -- excuse me, in  
2 that order states, "Per the commission's order in AE 502QQQ,  
3 further consideration of AE 502 and all motions in that series  
4 regarding Mr. Ali remains deferred unless and until the  
5 conditions specified in that order are fulfilled."

6 So Judge Pohl was making it clear, speaking in the  
7 record -- and I don't mean his private opinion, but his  
8 order -- that he did not concede -- see this order as  
9 resolving 502 with respect to Mr. al Baluchi because he was  
10 waiting for -- he deferred litigation with respect to  
11 Mr. al Baluchi and had done it months and months before, and  
12 that situation in his view had not changed.

13 Now, let me talk about 502BBBB itself. I skipped  
14 ahead earlier, gave an answer to your question, but I want to  
15 develop that at some length now.

16 You have my clear position that AE 502BBBB does not  
17 rule with respect to Mr. al Baluchi except on the part of  
18 al Qaeda question. But if it was a ruling against  
19 Mr. al Baluchi, what would I have done? I would have moved to  
20 reconsider on very good grounds. Because after the early 2018  
21 decision of -- in AE 502BBBB, which -- the first part of which  
22 was the legislative history demonstrates Congress's intent to  
23 allow this military commission to try to 9/11 case -- that's

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1 the first section of the hearing -- and then he moves on to  
2 the effective determinations of the political branches.

3           There were substantial law that came out after  
4 AE 502BBBB that completely undermines the military  
5 commission's ruling with respect to the first section of  
6 AE 502BBBB regarding the effect of that legislative history.  
7 And in Epic Systems Corporation v. Lewis at 138 Supreme Court  
8 1612, a May 21, 2018 case -- 2018 case, the Supreme Court held  
9 that legislative history is not the law and it is not  
10 appropriate as the starting point for analysis.

11           The Court of Appeals of the Armed Forces adopted this  
12 reasoning in United States v. Briggs at 2019 C.A.A.F. Lexis  
13 116, on February 22 of 2019 in which the CAAF discusses the  
14 impact of the rule that legislative history is not the law on  
15 one of its earlier decisions. It talks about the possibility  
16 of reconsidering that earlier decision based on  
17 Epic Systems Corporation, but says it hasn't been briefed and  
18 we are not going to do it.

19           So if this had ruled against Mr. al Baluchi, I would  
20 have come to court with -- armed with a change in the law  
21 subsequent to this to argue against it, but I didn't because I  
22 can't, because this ruling does not rule against us, except on  
23 the question of what does "part of al Qaeda" mean. And there

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1 is no new law on the continuous combat function piece so I  
2 don't have any basis for reconsideration.

3 But if it had ruled against Mr. al Baluchi, I would  
4 have sought reconsideration because the first third of the  
5 military commission's reasoning is at the least undermined and  
6 perhaps disallowed by the development around the importance of  
7 legislative history.

8 Now, I want to address the question which I feel  
9 lurking in -- in the questions so far, which is: How could  
10 Mr. al Baluchi win where Mr. al Hawsawi lost?

11 Now, one of the things we know about jurisdiction is  
12 that it is a factual inquiry. That's been decided by the  
13 Supreme Court. It's been decided by the military  
14 commission -- the military courts in numerous cases. Plus  
15 that's what AE 502I itself was, a decision that jurisdiction  
16 is a factual question. And AE 502I went on to hold that the  
17 burden of proof pretrial is by a preponderance of evidence on  
18 that question, and the government bears that burden.

19 So what -- in the first third of AE 502BBBB, the  
20 military commission held that the -- reasoning from the  
21 legislative history, that the legislative history means that  
22 the Tadic standard does not control -- does not provide the  
23 content to the question -- the phrase "laws of war."

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1           And moving on from there, as support for that  
2 position and application of that position, the military  
3 commission relied on the, quote, effective determinations of  
4 the political branches.

5           Now, with Tadic eliminated, that leaves Hamdan. When  
6 Mr. al Baluchi stood up to argue on 617 on Monday, one of the  
7 comments or questions that the military commission stated was  
8 talking about the Hamdan decision, I know that you think that  
9 a different standard should apply. And that's true. We've  
10 briefed that issue.

11           But in 617 and 620, as on many other occasions, we  
12 said, well, let's just go ahead and assume that Hamdan is the  
13 controlling standard. And if Hamdan is the controlling  
14 standard -- which we are willing to assume *arguendo* -- there  
15 are a lot of factors that go into the determination of  
16 hostilities, and all of them are factual.

17           I thought it was incredibly interesting, in an  
18 unclassified comment in yesterday's closed hearing that the  
19 government said that it had originally thought that Tadic was  
20 the appropriate standard when it was arguing Hamdan, and --  
21 but now it feels bound by a reversed decision from the CMC.

22           The -- but -- so let's just assume that Hamdan is the  
23 standard. Under that standard, seven enumerated factors plus

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1 a catchall factor, which is bounded really just by relevance,  
2 come into play. We would be presenting evidence in an  
3 evidentiary hearing on that wide variety of Hamdan factors.

4 And, in fact, it is not true that the military  
5 commission's question was purely legal in the sense of a  
6 hundred percent legal decision like might be made by the  
7 Supreme Court, because both the government and the military  
8 commission in its own questioning elicited evidence from the  
9 witnesses of the political acts of the -- excuse me, the acts  
10 of the political branches, the executive and the legislature.

11 In footnote 84 in our brief, I go through and lay out  
12 from the transcript each of the times where either the  
13 government or the military commission asked one of the  
14 witnesses about one of the acts of the political branches.  
15 And, in fact, the military commission in its ruling cited the  
16 testimony of Professor Watts at note 15 and cited the  
17 testimony of Special Agent Fitzgerald at Note 31.

18 Now, how do I feel confident that my interpretation  
19 that I'm presenting to the military commission today is the  
20 accurate one? First, one thing that we can be assured of is  
21 that Judge Pohl did not rule that hostilities exist as a  
22 matter of law.

23 How do we know that? First, he said nothing about

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1 overruling or reconsidering or changing AE 502I where he had  
2 previously rejected that position. But there is another way  
3 that we know it as well, which is that personal jurisdiction  
4 is not the only context in which hostility arises in the  
5 Military Commissions Act.

6           The same word "hostilities" appears in 948a(7)(A) and  
7 (B), the personal jurisdiction section, as well as in 950p(c),  
8 the common circumstances that the government has to prove  
9 beyond a reasonable doubt with respect to each of the  
10 elements.

11           Now, the difference between those two places,  
12 948a(7)(A) and (B) and 948p(c), is that the military  
13 commission's personal jurisdiction element also has that nexus  
14 element that you're talking about.

15           So in addition to proving, for at least (A) and (B),  
16 the existence of hostilities, the government also has to prove  
17 by a preponderance of evidence either what is technically  
18 known as direct participation in hostilities for (A), which  
19 the government does not seek to prove against Mr. al Baluchi,  
20 or material support for those hostilities, which the  
21 government does seek to prove against Mr. al Baluchi under  
22 (B). That's the nexus piece. And then there is a separate  
23 nexus piece under (c). But with respect to 950p(c), there is

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1 also both an existence and a nexus piece, because there have  
2 to -- hostilities have to exist and the crime has to have a  
3 connection to them.

4           The military commission, in defining and making a  
5 ruling about the hostilities of -- existence of hostilities  
6 could not take away from the fact-finder an element of the  
7 offense that they would have to prove. I mean, the most  
8 common example -- it seems pretty obvious but the most common  
9 example is United States v. Gaudin.

10           Gaudin was the case about whether a judge could take  
11 away from the jury the question of whether a statement was  
12 material for purposes of fraud. And whether things are  
13 material sounds like your classic legal determination, because  
14 judges, as we have seen this week already, routinely rule on  
15 whether evidence or questions or aspects of the case are  
16 relevant and material. But the Supreme Court held in Gaudin  
17 that because materiality was an element of the offense charged  
18 in that case, it could not be taken away from the jury.

19           The reasoning -- to me, what that says is that one  
20 thing that we know is that Judge Pohl was not ruling as a  
21 matter of law that hostilities existed, because that ruling  
22 would bind the members as well as the personal jurisdiction  
23 decision, meaning that he would be taking away from the panel

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1 an element that the government is required to prove beyond a  
2 reasonable doubt. That's not what he did. Both -- we know  
3 that both because it would have serious and unconstitutional  
4 impacts on the fact-finding process as well as the fact that  
5 he retreated in no way from the decision in 502I.

6 Now, I want to give you an example of why  
7 Mr. al Baluchi can win by the presentation of additional facts  
8 with respect to the public acts of the United States where  
9 Mr. al Hawsawi chose not to present evidence or contest them.

10 One of the factors that the military commission  
11 relied on in 502BBBB is the authorization for use by military  
12 force. And the military commission treated that, as the  
13 government had argued, that essentially that was a  
14 determination by Congress of the existence of hostilities.

15 While the passage of the AUMF is a -- is not  
16 contested in any way, what its meaning for hostilities is is  
17 hotly contested. So one of the -- and this is just one of  
18 many, many examples, and there's a 300-page brief in 502Y  
19 that -- that lays out this in much greater depth.

20 But, as an example, we would seek to present evidence  
21 and listed witnesses on this question -- would seek to present  
22 evidence of, well, what actually is the relationship between  
23 the AUMF and the -- and hostilities, because an authorization

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1 for use by military force, as opposed to a declaration of war,  
2 has a different effect.

3 A declaration of war is a speech act by Congress  
4 which says we are now at war, by definition, tautologically.  
5 In contrast, the authorization for use by military force is a  
6 delegation by Congress to the President for the President to  
7 use his or her discretion in whether to use force or not.

8 Part of the evidence that we would produce is about  
9 President Bush's public acts, his speeches, his papers, his  
10 instructions to the cabinet, and his actual actions; that for  
11 the next three weeks after the AUMF, President Bush chose not  
12 to use military force and chose to use -- to allow diplomacy  
13 an opportunity to work with respect to al Qaeda before he  
14 chose to use military force.

15 The significance of that is it is public acts of the  
16 United States, it is effective determination of the political  
17 branches, and it's evidence that the military commission could  
18 have heard -- could have heard argument from Mr. al Baluchi  
19 about that, and would change not the fact of the AUMF but the  
20 impact of the AUMF. In fact, it's our position that the  
21 existence of the AUMF in its context in September and October  
22 of 2001 is powerful evidence against the existence of  
23 hostilities; and we would present the evidence from which the

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1 military commission could draw that conclusion.

2 Now, on this -- in this part of the argument, there  
3 is one more way that the military commission can be  
4 100 percent sure that different parties can take different  
5 positions with respect to the effect of public acts in their  
6 context and reach different conclusions, and that is because  
7 in the Nashiri case, the positions of the parties here in this  
8 court are exactly reversed.

9 This same prosecution takes the position in  
10 United States v. al Nashiri, reflected in the decision of the  
11 District of Columbia Circuit, that -- that individual  
12 effective determinations of the political branches are not  
13 sufficient to meet the Hamdan standard and that it is more  
14 important to look at the context of those political decisions  
15 in support of their argument for the existence of hostilities.

16 I want to say that again because it sounds a little  
17 confusing. In Nashiri, the shoes are on exactly the other  
18 foot. The government takes the position that we take now, and  
19 Mr. al Nashiri takes the position that the government takes.

20 Why? Because the most important single effective  
21 determination of the political branch in the Nashiri case is  
22 the public speech of President Clinton in December of 2000  
23 that the United States was at peace in Yemen and thus,

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1 according to the al Nashiri team, not involved in hostilities.

2           So the -- I looked at the Nashiri case and quoted it  
3 in the brief, and the relevant Nashiri case in this is  
4 In re al Nashiri, 835 F.3d 110 at page 136, a D.C. Circuit  
5 decision from 2016.

6           The D.C. Circuit summarizes the government's position  
7 in that litigation as, I quote, "The existence of hostilities  
8 is established by looking not merely to the contemporary -- to  
9 the contemporaneous acts of the political branches, but to a  
10 totality of the circumstances, including al Qaeda's conduct."  
11 In other words, the exact position that Mr. al Baluchi seeks  
12 to advance is the government's position in al Nashiri, that  
13 effective determinations of the political branches is, in  
14 fact, broader.

15           Now, if that were not completely clear, the  
16 D.C. Circuit went on to draw an even sharper distinction  
17 between Mr. al Nashiri's view and the government's view in  
18 Nashiri. It said, I quote, at the same page, "al Nashiri and  
19 amici believed the judgments of the political branches at the  
20 time are what matters. The government takes a broader view."

21           That broader view is what we would seek to introduce  
22 in a hearing on this question, and it's the same broader view  
23 that the government advocates when its litigation advantage

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1 flows the other way.

2 In conclusion, Judge Pohl ruled on the evidence and  
3 the argument before him after excluding Mr. al Baluchi from  
4 that evidence and argument. As the government observed at  
5 transcript page 16076, Mr. al Hawsawi's challenge involved  
6 very few facts. Facts are important, especially in a factual  
7 determination such as jurisdiction.

8 It would be a violation of due process, not to  
9 mention just poor decision-making, to hold Mr. al Baluchi to  
10 the litigation strategy of someone else, including declining  
11 to address the actions of the political branches that the  
12 military commission considered important in AE 502BBBB because  
13 Mr. al Hawsawi chose a different approach.

14 Every person is entitled to their own day in court,  
15 and that's all we're asking for.

16 Thank you.

17 MJ [Col PARRELLA]: Thank you, Mr. Connell.

18 Mr. Nevin?

19 LDC [MR. NEVIN]: The same objection that I have  
20 articulated on previous days, Your Honor.

21 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

22 Ms. Bormann?

23 LDC [MS. BORMANN]: Judge, we have the same objection, but

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1 I would note that we have declined joinder on AE 502 on  
2 numerous occasions, and that is still the position. So I  
3 don't see that we have standing to argue.

4 MJ [Col PARRELLA]: Okay.

5 Mr. Harrington?

6 LDC [MR. HARRINGTON]: Judge, I don't rise to argue  
7 because we declined to join also, but I just wanted to advise  
8 the court that it's the intention of us to file a motion with  
9 respect to the 502 issues. And it's my understanding that if  
10 and when the conflict issue that Mr. Mohammad's team and  
11 Mr. Bin'Attash's team is resolved, that they also intend to do  
12 that.

13 I just wanted to make that clear to the court, and  
14 that obviously we don't accept that we are bound by res  
15 judicata or law of the case other than if the court would  
16 apply our arguments and use its own intellectual honesty to  
17 determine whether anything decided by Judge Pohl in the past  
18 may apply to us, depending on what the arguments we made. But  
19 we are reserving all of those arguments. That's all.

20 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

21 Mr. Ruiz?

22 LDC [MR. RUIZ]: We don't have anything, Judge. Thank  
23 you.

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1 MJ [Col PARRELLA]: Trial Counsel?

2 Actually, Trial Counsel, before you start, why don't  
3 we go ahead and take a ten-minute recess.

4 The commission is in recess.

5 [The R.M.C. 803 session recessed at 1017, 27 March 2019.]

6 [The R.M.C. 803 session was called to order at 1035, 27 March  
7 2019.]

8 MJ [Col PARRELLA]: The commission is called back to  
9 order. All parties present when the commission last recessed  
10 are again present.

11 Trial Counsel, you may present your argument.

12 MTC [MR. TRIVETT]: Thank you, Your Honor.

13 In my estimation, Mr. Connell is one of the brightest  
14 attorneys in this room, and his greatest skill is in  
15 convincing the commission that this is a difficult issue when  
16 it's a very simple one.

17 Mr. Connell complained that everyone is entitled to  
18 their day in court, and that is true. In the filing of 14  
19 different motions on the substantive issues surrounding the  
20 jurisdictional question, he got his day in court. He got two  
21 weeks' worth of his day in court, if you're counting the 14  
22 different motions.

23 And what he's really doing now, although this isn't

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1 his intent, the practical result would be a farce on the  
2 commission. It cannot be that the military judge makes a  
3 determination on the basis of jurisdiction from a legal  
4 standpoint that the United States was engaged in hostilities  
5 against al Qaeda on September 11th and from some indeterminate  
6 period before for one member of al Qaeda who is alleged to  
7 have committed the same offense as the other member and that  
8 somehow we would not be at war with al Qaeda for purposes of  
9 the other member.

10 To quote Judge Pohl in 502BBBB, "I have little  
11 difficulty finding it appropriate to defer to the effective  
12 determinations of the political branches that hostilities  
13 existed as of September 11th, 2001, and for at least some  
14 period before."

15 Now, let's unpack that a little bit. Determinations  
16 are legal determinations. We're talking about a statute.  
17 We're talking about a Military Commission Act that was passed  
18 in 2006 and then again in 2009 by two different Congresses  
19 with two different Presidents from two different political  
20 parties, all of whom made the same determination, which is  
21 their constitutional right to do under the Constitution, that  
22 we had been engaged in armed conflict with al Qaeda prior to  
23 September 11th.

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1           Mr. Connell conflates effective determinations of the  
2 political branches with this amorphous political acts  
3 standard. I don't know where he gets the political acts  
4 standard. That's not in the Hamdan instruction. The Hamdan  
5 instruction speaks specifically to statements of leaders.

6           And at some point -- and we've asked Judge Pohl to  
7 decide this, and it's never been decided legally -- is that  
8 has to have a limit as well; that the leaders have to be, in  
9 our position, the President of the United States and the  
10 Secretary of Defense, because they are the two responsible for  
11 the war-making of the United States. And that for leaders  
12 regarding al Qaeda, it's going to be Usama bin Laden,  
13 Ayman al-Zawahiri, and any of their other designated  
14 spokespersons -- and spokespersons of the President and  
15 Secretary of Defense as well.

16           But this political acts standard where he wants to  
17 now march, by my estimation, was 40 different witnesses to  
18 talk about their own perceptions as to whether or not we were  
19 in armed conflict is untethered to any legal standard, and  
20 that's why we opposed it.

21           The military judge in 502I understood the farce that  
22 would occur if these decisions were not made consistent for  
23 all parties. He made it very clear to all parties, and not

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1 just Mr. Hawsawi and not just Mr. Ali, that if they choose to  
2 defer litigation of the jurisdictional question, any  
3 subsequent motion would have to take into effect -- or into  
4 account any of his rulings on the jurisdictional question.

5 MJ [Col PARRELLA]: What about Mr. Connell's statement  
6 that he didn't choose to defer, that he attempted to actually  
7 argue?

8 MTC [MR. TRIVETT]: So two different issues, right? The  
9 first issue being there were certain substantive legal issues  
10 that needed to be decided before we ever actually got to the  
11 evidentiary hearing; and nothing prohibited Mr. Ali, who filed  
12 at least 14 motions to my counting, including three  
13 specifically on the issue of hostilities and who had the  
14 burden and how it should be proven. And that's at 488D, 502B,  
15 and 488F/AE 502D.

16 But nothing would have prevented any of the other  
17 counsel from joining in the substantive legal arguments had  
18 they chosen to do so, right? They might not have had a  
19 pending jurisdictional hearing yet. They may have wanted to  
20 defer the hearing. But all of the legal conclusions that had  
21 to happen prior to that hearing, they could have joined had  
22 they chosen to.

23 So Mr. Connell asked for -- after initially unjoining

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1 in 488, he specifically asked for the ability to join in on  
2 the substantive issues, and Judge Pohl makes a specific note  
3 of that in 502BBBB. He does that because I believe he fully  
4 intended the decision on the deference to Congress to apply to  
5 all five accused in this case.

6 One, it's the only logical thing to do. As long as  
7 they are all alleged to be part of the -- part of al Qaeda and  
8 all charged with the same offense, it can't be that we have an  
9 armed conflict with one of them and not the others. I believe  
10 he realized this in 502I.

11 I've never seen a ruling from Judge Pohl where he  
12 gave everybody a heads-up that we're going to be making  
13 certain decisions here as we go forward that we're going to  
14 have to logically and legally impact everyone. So join in if  
15 you want, but if not, you have to take into consideration what  
16 my prior rulings are. So that's the first issue.

17 The second issue is Mr. Connell chose to litigate in  
18 a certain way and to challenge things factually, and that's  
19 what the difference between Mr. Connell was and Mr. Ruiz was.  
20 Ruiz wanted to put witnesses on -- Mr. Ruiz wanted to put  
21 witnesses on, but that was specific to an issue of whether  
22 legal hostilities existed as a matter of law.

23 We opposed that witness. That witness was granted.

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1 We had an opportunity to cross-examine that witness. He  
2 testified at length. We then put on evidence of al Qaeda's  
3 hostilities towards the United States, starting in 1996 with  
4 the declaration of war, the '98 fatwa, the attack on the  
5 embassies in Kenya and Tanzania, the United States' response  
6 in firing 80 Tomahawk missiles into the Sudan and Afghanistan,  
7 the attack on the USS COLE, and the attack on September 11th.

8           So we did a full evidentiary presentation on the  
9 existence of hostilities between al Qaeda and the United  
10 States, but we did it kicking and screaming because we didn't  
11 think we had to do it.

12           Our first position, which was the position that  
13 ultimately Judge Pohl adopted, was that this is a simple  
14 jurisdictional question. You can determine it as a matter of  
15 law. Congress clearly gave jurisdiction over hostilities  
16 against al Qaeda. And we know that for a couple of reasons.  
17 We know it in the original jurisdictional section which says  
18 before, on or after September 11th, and we know it specific to  
19 the second -- or the third prong in how to prove jurisdiction.

20           And it's important to step back and understand that  
21 the Military Commission Act isn't only about al Qaeda. The  
22 Military Commission Act is for future generations in the event  
23 that we continue to have engagements with alien unlawful enemy

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1 belligerents. This is how we discipline them for the  
2 violations of the law of war, and it's not specific to  
3 al Qaeda.

4 So when you are doing that for someone who is not a  
5 member of al Qaeda, you have to establish that whatever act  
6 they took, whatever direct participation or material support  
7 for whatever you are charging them with, was done in the  
8 context of and associated with armed conflict -- or  
9 hostilities. You have to do that.

10 For al Qaeda, you don't. And that was very  
11 specifically done from Congress because they had already made  
12 the determination that we were in hostilities with al Qaeda  
13 before, on, and after September 11th.

14 So our position all along was, Judge, just decide  
15 this legally. Decide the issue of hostilities legally. The  
16 nexus to hostilities is a different issue, and I will accept  
17 the fact that it is a different issue. But the existence of  
18 hostilities now has been decided as a matter of law for  
19 everyone, including following briefings of Mr. Connell.

20 Now, during the evidentiary hearing that was held for  
21 Mr. Hawsawi, I just discussed all of the evidence that we --  
22 that we presented, and I discussed the evidence that Mr. Ruiz  
23 presented. Judge Pohl relied on exactly none of it in making

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1 that determination. He did not say: Based on the testimony  
2 and the findings of Special Agent Perkins and Special Agent  
3 Fitzgerald and Professor Watts, I find that hostilities  
4 existed. He simply deferred to the effective determinations  
5 of the political branches.

6 And it's not just the executive, and it's not just  
7 the legislature. Our very own superior court has made this  
8 determination in the al Bahlul case -- and I'm going to  
9 quote -- "After consideration of the record in this case, we  
10 conclude that hostilities rising to the level of armed  
11 conflict existed on or before February 1999, the beginning of  
12 the charged time frame." I'm sorry, that was the Hamdan case.

13 So we not only have two Presidents, we not only have  
14 two Congresses, we also have our superior court here making  
15 determinations in other cases. But again, it's the same armed  
16 conflict with the same enemy. It makes no sense that Congress  
17 would not intend to give the authority which it specifically  
18 stated in the Military Commission Act it was giving.

19 So we asked specifically up front for a  
20 determination. Judge Pohl required us to put on an  
21 evidentiary foundation and then didn't rely on any of it. Why  
22 he made that determination the way he did, only he knows, but  
23 ultimately, it's clear that he was making a legal and not a

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1 factual determination.

2           So I want to back up now to where we were at with 502  
3 when we filed the most recent, DDDD.

4           Now, Mr. Connell is going to get back up here, and he  
5 can correct me if I am wrong. And I went through as many of  
6 the filings as I could last night; obviously we weren't  
7 anticipating arguing this motion. I can find nowhere where he  
8 has made a motion to dismiss for lack of personal jurisdiction  
9 based on the fact that Mr. Ali did not materially support the  
10 9/11 attacks or that he was not a member of al Qaeda.

11           Now, he has said it in motions to unjoin Mr. Hawsawi.  
12 He has said it on the record. But as far as I'm aware, I  
13 couldn't find anywhere where he filed the motion specific to  
14 those two issues. And even in the most recent scheduling  
15 motion, what he did file said, "The personal jurisdiction  
16 of -- against Mr. Ali turns on whether al Qaeda and the United  
17 States were engaged in armed conflict during the relevant time  
18 frame." So even as recent as December, that's what he's  
19 saying his position is.

20           So the government's position, as set forth in DDDD,  
21 is he should be forced to file another jurisdictional motion  
22 specifically alleging what it is he is challenging before we  
23 are required to answer it.

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1           We are entitled to know exactly what is being  
2 challenged, and we only are required to prove that which is  
3 being challenged. Even if there's ten components of  
4 jurisdiction, he's only challenging two. We need not prove  
5 all ten; we need only prove those two. So we need to know  
6 clearly, and I think the commission is entitled to know what  
7 exactly is being challenged.

8           So there is some conflation of the Hamdan standard,  
9 and you have to understand what the government's position all  
10 along was. The government's position all along is just decide  
11 this as a matter of law. But having been present for when  
12 military judges decide to dismiss cases for lack of  
13 jurisdiction in the military commission context, we couldn't  
14 risk that being the entire position. Once it's raised in some  
15 way, especially in regard to Hawsawi when he raised it, if we  
16 were wrong, the consequences are severe.

17           So our second position was if you don't decide it as  
18 a matter of law, then decide it as a mixed question of law and  
19 fact applying the Hamdan standard. Now, the Hamdan standard  
20 is ultimately an instruction that goes to the members at the  
21 end of trial, and that's what we'll be arguing from.

22           We have not said and do not claim that Judge Pohl's  
23 ruling as a matter of law for purposes of jurisdiction is

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1 binding or required to be followed by the members of the  
2 panel. We fully understand and accept that we have  
3 beyond-a-reasonable-doubt requirement to prove hostilities in  
4 front of the members, but what we prove in front of the  
5 members and what we prove for purposes of jurisdiction --  
6 which would be a pretty simple straightforward issue -- are  
7 two different things. And one absolutely can be decided as a  
8 matter of law and was, in fact, decided as a matter of law as  
9 applies to all five individuals.

10           So then it comes to the question of timing. And if  
11 you read the In re al Nashiri case, which is one of the  
12 positions we took as well, we said if you can defer this  
13 completely, when it's an element of the offense that we have  
14 to prove that they are challenging, it is not fair to make the  
15 government show its proof early, try its case twice; and  
16 ultimately, any decision that you make on jurisdiction can  
17 come after we present all of our evidence. That was a  
18 position we also took.

19           The judge -- the military judge at that time did not  
20 follow it, but if we are considering rescheduling Mr. Ali's  
21 now, that is a case we would ask you to look at closely,  
22 because I want to quote Mr. Connell: "Since you can't take  
23 away from the fact-finder because it is an element of the

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1 offense which we concede, if they are challenging it up front  
2 from a jurisdictional standpoint, we believe we are entitled  
3 to prove it in court after the case-in-chief."

4           This is how it was done in the al Bahlul case.  
5 Judge Gregory in that case, in Appellate Exhibit 69, made a  
6 decision and listened very closely to whether or not the  
7 status at the time, which I believe was alien unlawful enemy  
8 belligerent, whether he constituted an alien unlawful enemy  
9 belligerent at the end of the case-in-chief. And he decided  
10 that he did, prior to the members being charged and ultimately  
11 finding Mr. al Bahlul guilty. That conviction was just  
12 recently upheld. That's how we would suggest it get done if  
13 we are, in fact, challenging what we believe is an element of  
14 the offenses.

15           So in regard to the nexus, our position is at this  
16 point in time, Mr. al Baluchi is free to argue that he's not a  
17 member of al Qaeda. He's free to argue that he didn't  
18 materially support the 9/11 attacks, and then it's just a  
19 question of the timing as to when that part of the  
20 jurisdictional hearing will happen. What he's no longer free  
21 to do is to say he's not an AUEB because we weren't at war  
22 with al Qaeda.

23           MJ [Col PARRELLA]: Do you also believe that the same, I

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1 would think, argument applies to the other three accused?

2 MTC [MR. TRIVETT]: Absolutely. And that's what the judge  
3 was doing in 502I.

4 They can challenge the nexus -- I think you defined  
5 it as the nexus and the existence issue. I've never heard it  
6 like that. I think that's a clean way to do it. They can  
7 challenge the nexus, but we're still talking about the timing,  
8 which is completely within your discretion, but they can't  
9 challenge the existence.

10 The existence has now been decided as a matter of law  
11 consistent with the judge's ruling in 502BBBB and consistent  
12 with Congress's determination, President's determination, the  
13 CMCR's determination, and every determination that's been made  
14 from any of the members who have listened to this question.

15 And that brings me to my second point. If -- and  
16 this ties in a little bit to the ICRC motion, but it was  
17 brought up by Mr. Connell. What happens when they call, if  
18 they are permitted to call, an expert on the law of war to say  
19 I don't think we were at war, or just any other government  
20 person who was working from 1998 to 2001 to give their own  
21 opinions?

22 If they are permitted to do that, which we are  
23 100 percent completely against because we think it invades the

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1 province of the jury, ultimately, this is a simple question.  
2 It's an application of law to fact that they do all day every  
3 day, and an expert witness would not assist the trier in fact.

4           But all that being said, we would reserve our right,  
5 if they are permitted to do that, to discuss the fact that two  
6 Congresses, two Presidents, and other courts have also made a  
7 determination separate, because it can't be that they're  
8 hearing from an individual who just used to work in the  
9 government and that they're completely blind to the fact that  
10 every major participant in our government has decided contrary  
11 to them.

12           Subject to your questions, sir.

13           MJ [Col PARRELLA]: I have no further questions. Thank  
14 you.

15           LDC [MR. CONNELL]: With your indulgence, Your Honor.

16           MJ [Col PARRELLA]: Mr. Connell.

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

18           Your Honor, the government began with -- by examining  
19 the same effective determinations, political branches -- of  
20 the political branches standard that I talked about, and it  
21 posed this question, somewhat indignantly: Where does a  
22 political act standard come from? It comes from the  
23 government's briefs in Nashiri.

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1           As the D.C. Circuit summarized, the government's view  
2 is that not merely contemporary acts of the political branches  
3 are relevant but a broader context is necessary. That  
4 approach was not thought up by me. The government got there  
5 far before I did. I simply looked at the government's  
6 positions, the military commission's positions, and  
7 synthesized them.

8           So related to that, near the end of its argument but  
9 the same point, the government says that it reserves the right  
10 to discuss the political acts. Yes, it has every right to  
11 discuss the political acts. It has every right to discuss the  
12 actions of the legislature and the executive and to explain,  
13 if it can, the inaction of the legislature and the executive  
14 with respect to al Qaeda between 1996 and 19 -- and 2001.

15           There are a wide variety of questions around that,  
16 and people have been discussing it, contemporaneously and  
17 later, for years. President Bush made a speech shortly after  
18 9/11 in which he committed to allow that -- the diplomatic  
19 process to work. President Bush did not decide to use  
20 military force until 7 October 2001. Those are actions,  
21 statements of political leaders.

22           But they require examination, they require context,  
23 which is the exact argument that the government makes in the

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1 D.C. Circuit in al Nashiri. And the government illustrated  
2 that extremely well by -- today. The government argued today  
3 that the statement of leaders are important, and for al Qaeda,  
4 that means Usama bin Laden and Zawahiri. Well, context is  
5 important to that because Zawahiri did not become a leader of  
6 al Qaeda until June of 2001 when his group, Egyptian Islamic  
7 Jihad, merged with al Qaeda. Prior to June of 2001, Zawahiri  
8 was not a leader of al Qaeda, he was a leader of Egyptian  
9 Islamic Jihad.

10 And so if you don't have any information about that,  
11 if you don't know, then any statement from any time from  
12 Zawahiri sounds like a statement of a leader. Any statement  
13 from any time from President Bush sounds like the statement of  
14 a leader. And it might be the statement of a leader, but it  
15 takes evidence and context and actual facts to sort those  
16 things out.

17 The government makes an argument which is not super  
18 clear but says that -- points out accurately that  
19 Mr. al Baluchi initially stated a separate position with  
20 respect to 488, and the rules of the military commission,  
21 which have changed repeatedly over time, on how a defendant  
22 states a separate position are extremely detailed and set a  
23 specific name.

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1 I have always argued repeatedly throughout this  
2 military commission that that name is misleading because  
3 especially the public often only has the name of a pleading.  
4 The government just called it a motion to unjoin, but it is  
5 actually a motion to decline joinder and state separate  
6 position, which is contained within the Rules of Court. And  
7 so with respect to 488 that the government just argued, that's  
8 what we did.

9 And, in fact, we made an argument that entirely  
10 subsumes the argument that the government just made about  
11 personal jurisdiction and the CMC decision in al Nashiri,  
12 because Mr. al Hawsawi initially in 488 brought a claim that  
13 the military commission lacked subject matter jurisdiction  
14 because hostilities had not existed between al Qaeda and the  
15 United States.

16 In my view, as I articulated in the 488 series, that  
17 position is mistaken because of the CMC decision in  
18 al Nashiri because the CMC decision in al Nashiri said that  
19 al Nashiri could not challenge subject matter jurisdiction on  
20 a pretrial, which is exactly the argument that the government  
21 just articulated, but in footnote 8 of that decision said that  
22 al Nashiri could challenge personal jurisdiction in an  
23 evidentiary hearing.

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1           That was part of the authority that Judge Pohl relied  
2 upon in AE 502I in rejecting the government's position that  
3 hostilities existed as a matter of law and that the defense  
4 could not bring a pretrial challenge to personal jurisdiction.

5           And the government just tried to conflate the 488 and  
6 502 decisions, cited three pleadings where, correctly,  
7 Mr. al Baluchi said that he wanted to be -- early in this  
8 litigation wanted to be part of the substantive hearing. And  
9 what actually happened, when you read the 488 pleadings and  
10 the early 502 pleadings, is that Mr. al Baluchi initially took  
11 the position that we should -- that this jurisdiction issue  
12 was premature, we should wait on the discovery, because in the  
13 discovery -- the government had promised that additional  
14 discovery was coming on hostilities.

15           The -- Mr. al Hawsawi filed a motion against  
16 Mr. al Baluchi's motion to defer consideration; and the  
17 government took a somewhat tepid position, and we lost. The  
18 military commission decided, nope, we're pushing ahead with  
19 this jurisdiction. And once the military commission decided  
20 that, Mr. al Baluchi did everything within his power to join  
21 this issue.

22           The -- he made clear again and again that on May 15th  
23 of -- 15 May 2017, that he was ready to go forward on

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1 21 August 2017. And it actually came to a head, and if I  
2 could ----

3 MJ [Col PARRELLA]: I believe it was my understanding,  
4 Mr. Connell -- and not having been there, perhaps you can  
5 correct me -- but that really where this came to a head was on  
6 the issue as to whether you got one attempt to suppress the  
7 statement or whether you got two attempts to suppress the  
8 statement. And ultimately, Judge Pohl ruled you only got one  
9 attempt; and based on that, that was the primary reason for  
10 deferring your evidentiary hearing, was to first take up the  
11 issue of the suppression. Is that incorrect?

12 LDC [MR. CONNELL]: Yes and no. It is correct as far as  
13 it goes, but as far as it goes is February of 2018.

14 So in all the elements before that, in May of 2017,  
15 in August of 2017, in October of 2017, in December of 2017,  
16 the issue was not is there -- is a motion to suppress required  
17 in advance of the personal jurisdiction hearing.

18 During that time, it was -- and I quoted some of that  
19 at length. The question was it's easier to resolve --  
20 Mr. al Hawsawi's challenge is smaller, it's easier to resolve,  
21 and yours is going to take a while, Mr. Connell, were the  
22 exact words of the military commission.

23 When we left court in December -- on December 8th of

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1 2017, the position of the military -- and let me just give you  
2 a transcript citation for that. The court's indulgence for  
3 just a moment. The transcript at page -- it's 8 December 2017  
4 at 18231 to 32, and then it comes up again at 18237.

5 At that time, the position -- and this is December of  
6 2017 -- the military commission's position was that in January  
7 of 2018, we're going to resolve the remaining witness  
8 questions and that we would begin presenting evidence in March  
9 of 2018. It was at that time, the military commission's  
10 position in December of 2017 -- which, don't forget, this is  
11 after the evidentiary hearing has taken place with respect to  
12 Mr. al Hawsawi. This is at the end of the December 2017  
13 hearing.

14 The military commission said, and said to me, we're  
15 going to take the statements basket before we take the  
16 hostilities basket. We're going to take the statements  
17 basket, and it's not 100 percent clear -- you can have your  
18 own opinion, but I read him to say that at the end of the  
19 statements basket, we're going to see where we are.

20 I'll be honest, at the time, I thought maybe that  
21 means Judge Pohl intends to grant my -- to sustain my  
22 objection to the statements, and, you know, we don't actually  
23 get to hostilities. But that was just tea-leaf reading. I

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1 mean, I didn't know.

2 But one thing that is completely clear and is  
3 completely clear from the transcript is at that time the  
4 separation had taken place, which took place beginning in  
5 August and was finalized in October of 2017, but at that time,  
6 the separation was over the large number of witnesses that we  
7 wanted versus the small number of witnesses required to  
8 resolve Mr. al Hawsawi's claim.

9 It was not until January of 2018 when we had our  
10 second argument on the witness list that the government really  
11 pressed its claim that there should be a -- that we should  
12 have to file a motion to suppress rather than rely on a  
13 Rule 304 objection to the witness; and it was not until  
14 18 January of 2018 that Judge Pohl issued AE 502QQQ, which  
15 deferred further litigation with respect to Mr. al Baluchi.

16 But even prior to that -- and the judge -- Judge Pohl  
17 made this clear in AE 502BBBB as well as other things that the  
18 deferral of Mr. al Baluchi's litigation was from October  
19 forward. We, with one exception that was made surely for  
20 the -- purely for the convenience of calling witnesses, were  
21 not allowed to participate, were not allowed to argue.

22 And the funny thing about this revisionist history  
23 that we're hearing from the government's side is everyone knew

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1 it. It is crystal clear from the transcript. It was crystal  
2 clear in the courtroom. And let me just give you an example  
3 of that. Who testified in early December of 2017? Special  
4 Agent Fitzgerald and Special Agent Perkins, the two  
5 witnesses -- two of the three witnesses, excuse me, who took  
6 the January 2007 statement from Mr. al Baluchi.

7 Now, I don't like to talk about myself too much, but  
8 one thing I'm not known for is my restraint in addressing the  
9 court. The -- can you imagine the situation where I would let  
10 the two witnesses who took the critical evidence from my  
11 client go uncross-examined? No. Everyone knew, because  
12 Judge Pohl had said it, that the two -- the two hearings were  
13 divided, that Mr. al Hawsawi was having his first and then  
14 later, Mr. al Baluchi.

15 MJ [Col PARRELLA]: I don't think there is any dispute  
16 here by any party that Mr. Ali has his opportunity to have an  
17 evidentiary hearing with respect to personal jurisdiction.  
18 The only issue is whether the existence piece is decided, that  
19 portion of it, as a matter of law; is that correct?

20 LDC [MR. CONNELL]: I'm delighted to adopt that  
21 construction. I mean, that's a -- that gets us part of the  
22 way. I mean, that's not -- I mean, the government -- right?  
23 -- the government's position in 502DDDD is this is resolved;

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1 you should not set an evidentiary hearing; you should not have  
2 a personal jurisdiction hearing for Mr. al Baluchi. So if  
3 that ----

4 MJ [Col PARRELLA]: I was just going to say, I think the  
5 government came up and said the opposite, that ----

6 LDC [MR. CONNELL]: They said the opposite, yes. It was  
7 not the first time that they take a different position in  
8 argument. And people can take different positions in argument  
9 than they do on the briefs, but, you know, at 8:00 this  
10 morning, that was not their position.

11 So accepting that as the construction for a moment,  
12 the -- let's talk about the government's authority for that.  
13 The government says -- read a quote from the CM -- the  
14 reversed CMCR Hamdan decision which said that, quote, after  
15 consideration of the record, end quote, the court found that  
16 the government had proved hostilities. That construction  
17 could not be more accurate, "after consideration of the  
18 record."

19 What the government is telling you is that  
20 Mr. al Baluchi, through no fault of his own and against his  
21 constant efforts, will not have the opportunity to make that  
22 record; that he should not be allowed to present evidence;  
23 should not be allowed to argue with respect to one of the most

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1 highly contested aspects of the case. And cites for that the  
2 CMC decision, which even in the sentence that the government  
3 read you, stresses the importance of the evidence "after  
4 consideration of the record." What we are asking for is to  
5 make that record.

6 Now, the government also argues -- and maybe it  
7 didn't -- maybe this -- maybe I misunderstood this, but the  
8 government also argues that Hamdan is only a jury instruction.  
9 That was not their position on Monday, where they took the  
10 position that the Hamdan instruction controlled for all  
11 purposes and, thus, should be applied to 617 and 620 to  
12 exclude discovery for the defendant.

13 The last and, I think, core of the government's  
14 argument is that -- and the use of the word "farce" recurred  
15 throughout the government's argument. And Judge Pohl  
16 thought -- this was the government's argument: Judge Pohl  
17 thought that there would be a farce if his opinion were not  
18 applied to all defendants.

19 AE 502BBBB excludes that construction because  
20 AE 502BBBB very specifically addresses parts with respect to  
21 Mr. al Hawsawi -- or, excuse me, Mr. al Baluchi and  
22 Mr. al Hawsawi, and then defers Mr. al Baluchi's litigation  
23 pending filing of a motion to suppress as outlined in AE

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1 502QQQ. If Judge Pohl thought it would be a farce to allow  
2 Mr. al Baluchi his own day in court, he would have ruled with  
3 respect to Mr. al Baluchi.

4 I don't have anything further, sir.

5 MJ [Col PARRELLA]: Thank you, Mr. Connell.

6 Anything else from any of the other defense counsel?

7 Negative response.

8 Trial Counsel, anything else?

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

10 MJ [Col PARRELLA]: I have none.

11 Okay. With that, any other issues that we need to  
12 address on the record before we recess?

13 Mr. Connell?

14 LDC [MR. CONNELL]: Sir, last year there was -- during the  
15 voir dire, there was significant discussion of your plans for  
16 summer of 2019. Are you in a position to advise the parties  
17 of your intentions?

18 MJ [Col PARRELLA]: I am not because it's not necessarily  
19 my intentions; it's what -- those who have authority to issue  
20 orders and, you know, relieve me from the case. So in other  
21 words, I guess the short answer is, I will remain on this case  
22 until I am otherwise instructed by an appropriate authority.

23 As to the voir dire question, let me give it some

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1 thought and determine whether it's appropriate to open that  
2 back up, if there's any need to.

3 LDC [MR. CONNELL]: All right, sir. And I didn't mean to  
4 imply that you were not in a chain of command and were not  
5 following orders. I didn't mean your personal intentions. I  
6 was trying to politely inquire if there was a status update  
7 that the parties should know about.

8 MJ [Col PARRELLA]: Yeah. Let me give it some thought,  
9 and we can maybe address that at the next session, assuming we  
10 are back on the record here tomorrow.

11 And I didn't take it in any sort of way to insinuate  
12 otherwise, Mr. Connell. I'm just simply pointing out that  
13 there are sort of two separate chains of command: There's the  
14 Marine Corps, which is my parent chain of command, and then  
15 there's also the Office of Military Commissions and the Chief  
16 Judge who decides when I am detailed and when I am undetailed.

17 All right. Anything else?

18 LDC [MR. CONNELL]: Sir, can we remain in the courtroom  
19 until 12:30?

20 MJ [Col PARRELLA]: You may. All right.

21 Commission is in recess.

22 [The R.M.C. 803 session recessed at 1115, 27 March 2019.]

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