[The R.M.C. 803 session was called to order at 1032, 30 April 2019.]

MJ [Col PARRELLA]: The commission is called to order.

Trial Counsel, are all of the government counsel who were present at the close of the previous session again present?

CP [BG MARTINS]: Yes, Your Honor. And in addition, Mr. Swann and Major Dykstra also have returned.

MJ [Col PARRELLA]: Thank you.

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

LDC [MR. NEVIN]: No, Your Honor. Ms. Radostitz has departed.

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

Ms. Bormann?

LDC [MS. BORMANN]: Yes, Judge.

MJ [Col PARRELLA]: Mr. Harrington?

LDC [MR. HARRINGTON]: Yes, Judge.

MJ [Col PARRELLA]: Mr. Connell?

LDC [MR. CONNELL]: Yes, Your Honor.

MJ [Col PARRELLA]: Mr. Ruiz?

LDC [MR. RUIZ]: Judge, with the exception of

Ms. Lachelier.

MJ [Col PARRELLA]: Thank you.

I will note that the following accused are absent: Mr. Bin'Attash and Mr. Hawsawi. The remaining accused are present.

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

CP [BG MARTINS]: Yes, Your Honor.

MJ [Col PARRELLA]: All right. Trial Counsel, please call your witness.

CP [BG MARTINS]: Captain, if you could please proceed to the witness stand and raise your right hand for the oath.

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

DIRECT EXAMINATION

Questions by the Chief Prosecutor [BG MARTINS]:

Q. You are a Navy captain?

A. Yes, sir.

Q. You are an Assistant Staff Judge Advocate for Joint Task Force-Guantanamo?

A. Yes, sir.

Questions by the Trial Counsel [MR. SWANN]:

Q. I apologize. Did you have occasion to advise the

accused of their right to attend today's proceeding this morning?

A. Yes, sir. For ----

Q. All right. Let's take Mr. Bin'Attash first.

A. Yes, sir, I did.

Q. What time did you meet Bin'Attash? What did he tell you?

A. I wrote it down on the form there, sir. I don't have it in front of me right now, but it's listed on the top when I started and then the signature block is when I completed the notification.

If I recall, it was roughly around 8 -- 0806 and probably ended ----

Q. I apologize. I probably should have given you these documents.

A. Thank you.

MJ [Col PARRELLA]: Okay. Trial counsel has handed the witness appellate exhibits.

WIT: Yes, sir.

TC [MR. SWANN]: Your Honor, those were Appellate Exhibits 626 and 626A.

MJ [Col PARRELLA]: Thank you.

TC [MR. SWANN]: Each consisting of three pages.

Q. With respect to Bin'Attash, what time was that?
A. I began at 0801 and concluded at 0806.
Q. All right. Did you use the form that you have in front of you to advise him of his rights?
A. I did.
Q. Did you do it in English or did you do it in Arabic?
A. I did it in English, sir.
Q. Did he indicate that he wished to attend today's proceedings?
A. He indicated he did not wish to attend today's proceedings.
Q. Did he sign the document?
A. He did, sir.
Q. Was the Arabic version -- did he sign the Arabic version or the English version?
A. He signed the Arabic version.
Q. With respect to Mustafa Ahmed Adam al Hawsawi, 626A, a three-page document, what time did you advise him of his rights?
A. I began at 0809, concluded at 0813.
Q. Did you do that in English or in Arabic?
A. Again, did it in English, sir.
Q. Did he understand his right not to attend this

morning's proceeding?

A. He did, sir.

Q. And did he indicate that he did not wish to attend, signing the Arabic version, I believe?

A. That's correct, sir. He indicated he did not wish to attend.

Q. All right.

TC [MR. SWANN]: I have no further questions. Thank you, sir.

MJ [Col PARRELLA]: Thank you.

Do any defense counsel have questions for this witness?

LDC [MS. BORMANN]: None, Judge.

LDC [MR. RUIZ]: May I confer?

MJ [Col PARRELLA]: You may.

[Pause.]

LDC [MR. RUIZ]: I think we got it correct, Judge, but I just want to indicate my copy says -- I only got two pages and the third page says WBA on it, so I currently don't have a copy -- well, I guess I do have a copy of what I think is Mr. al Hawsawi's signature. I don't have a translator here.

LDC [MS. BORMANN]: That's yours. You have mine.

LDC [MR. RUIZ]: I have the same exact thing.

[Counsel conferred.]

MJ [Col PARRELLA]: Mr. Ruiz or Ms. Bormann?

LDC [MS. BORMANN]: Judge, I believe there's some confusion about the actual copies that we received. I don't think I actually have a copy of my client's. I know he wasn't going to be here today because we had meetings scheduled this afternoon, so there's not a problem with it. And Mr. Swann has indicated to me that he will get me a proper copy.

MJ [Col PARRELLA]: Okay.

LDC [MR. RUIZ]: Same for Mr. al Hawsawi. He indicated he was not coming today. I just wanted to make sure we have the proper documentation.

MJ [Col PARRELLA]: Where are the originals, Trial Counsel?

WIT: Right here, sir [handed to military judge].

MJ [Col PARRELLA]: Okay. Counsel, I have here what's marked as Appellate Exhibits 626 and 626A, respectively. 626 is a three-page document purporting to be the waiver of rights for Mr. Bin'Attash; 626A, a three-page document purporting to be the waiver for Mr. Hawsawi. So if you would like to come up, I can certainly give you the originals and an opportunity to look at these.

[Pause.]

LDC [MR. RUIZ]: Thank you, Judge. That's correct.

MJ [Col PARRELLA]: Okay. And we will ensure that you have copies at the appropriate break.

Any other questions for this witness?

All right, Captain, you may step down.

[The witness was excused and withdrew from the courtroom.]

MJ [Col PARRELLA]: The commission finds that Mr. Bin'Attash and Mr. Hawsawi have knowingly and voluntarily waived their right to be present at today's session.

Now before we get into the -- back to 617 and 620, I want to take up a couple matters. The first is with respect to AE 530. On 28 April 2019, I issued an order in AE 530RRR indicating that the certification contained in AE 530QQQ is in compliance with the requirements set forth by the commission in AE 530LL and AE 530GGG. Accordingly, I authorized counsel for Mr. Hawsawi to return the laptop to Mr. Hawsawi after coordination with the Joint Detention Group.

Upon making inquiry with the Joint Detention Group, counsel for Mr. Hawsawi was informed that the computer would need to go through a separate certification process conducted by the convening authority's IT personnel. The government states that certification by the neutral convening authority's IT personnel was an established procedure prior to the seizure

of Mr. Hawsawi's laptop.

In response to the commission's inquiry, the government represented that the convening authority's IT personnel could conduct this certification on island and estimate that it would take three days. Mr. Hawsawi objects to any further delay in the return of the laptop and asks this commission to order its immediate release.

In the commission's prior ruling in AE 530LLL, dated 11 November 2018, I held, quote, The commission declines to direct any change in the ordinary practices of JTF-GTMO and/or the Office of the Convening Authority with regard to standard examinations of IT prior to its entering or re-entering the detention facility, unquote.

So consistent with my earlier ruling, I will not direct any change to the Joint Detention Group's standard policy for having the convening authority IT personnel examine laptops before they may enter the facility. I will, however, place reasonable limits on the time for said examinations. In light of the government's representation, I deem three days to be a reasonable period of time. As such, I'm directing the government to comply with this court's order in AE 530RRR by this Friday, 3 May 2019, or to show cause why they cannot comply.

Any questions with respect to the court's ruling in 530?

TC [MR. RYAN]: Not from the prosecution, Judge, other than to ask for leave to leave the courtroom to explain it to the relevant parties.

MJ [Col PARRELLA]: You may do so.

Mr. Ruiz?

LDC [MR. RUIZ]: May we have a moment, Judge?

MJ [Col PARRELLA]: You may.

[Pause.]

LDC [MR. RUIZ]: Judge, I think -- I think we have made our position very clear with the commission. I understand your ruling. The main thing I want to continue to emphasize is that Mr. al Hawsawi's computer has always been walled off in the sense that it has not gone through any government channels.

The convening authority, in and of itself, if they're going to conduct the normal examination that they did in the past, which is essentially to determine that the capabilities were turned off, fine; however, that should not mean that they can then feel free to share that information with any party that they choose to do so should anything come up, which we don't expect.

We just want to make sure that it's very clear that that remains a walled-off process. We will, of course, turn the laptop over as soon as possible when -- once we're told who we turn it over to, but that's the main concern. I want to make sure that's clear.

MJ [Col PARRELLA]: Okay. Thank you.

LDC [MR. RUIZ]: And I would also just -- I think it's obvious, but Ms. Lachelier has joined us, and so she's here for us as well.

MJ [Col PARRELLA]: Thank you.

Trial Counsel, any comment on -- if -- if no comment, then you're free to take care of that.

TC [MR. RYAN]: I have no comment, sir.

MJ [Col PARRELLA]: Thank you.

Okay. Additionally, we had a very brief R.M.C. 802 conference prior to our hearing pursuant to 505(h) this morning where I confirmed with the parties that they had received word from the commission that OMC has determined that changing the flight is not feasible, and as such we will depart as scheduled on Saturday.

In light of this, I also posed to the parties the option and asked them to discuss and come up with a position as to whether we should take up the remaining business, which

I anticipate will take about a day, either tomorrow or whether we should postpone that until Thursday.

In light of that second question, do the parties have a response for the commission at this time?

Trial Counsel?

CP [BG MARTINS]: Your Honor, the United States totally defers to the commission.

MJ [Col PARRELLA]: Okay.

Defense Counsel? Mr. Nevin?

LDC [MR. NEVIN]: Your Honor, I do not ask that you postpone things until Thursday. I appreciate the offer, but I don't make that request.

MJ [Col PARRELLA]: Okay.

Ms. Bormann?

LDC [MS. BORMANN]: We agree with Mr. Nevin.

MJ [Col PARRELLA]: Mr. Harrington?

LDC [MR. HARRINGTON]: Judge, could I just have a moment to speak to my client about it?

MJ [Col PARRELLA]: Certainly.

[Pause.]

LDC [MR. HARRINGTON]: Judge, we're going to ask that you do it on Thursday, and when you finish this, I need to bring an issue up to the attention of the court, which will explain

why that's my position.

MJ [Col PARRELLA]: Okay.

Mr. Connell?

LDC [MR. CONNELL]: Your Honor, I think we'll finish the open argument today, unless there's something new, and that just leaves the closed argument at whatever discretion the military commission chooses to exercise.

MJ [Col PARRELLA]: Okay.

Mr. Ruiz?

LDC [MR. RUIZ]: Judge, no preference.

MJ [Col PARRELLA]: All right. Then back to you, Mr. Harrington, if there's something further you wanted to bring to attention.

LDC [MR. HARRINGTON]: Judge, this is an issue that has come up, although it has a long history to it. The court is familiar, probably, with the 152 series, in which we have had many, many motions and arguments with respect to the treatment of my client while he's been at Camp VII, and at one point in time that resulted in an order from Judge Pohl to the camp.

Since January of this year, Mr. Binalshibh has encountered a new problem in the camp, which he encounters day and night, and it greatly affects his quality of life, his living, his ability to do anything, but most importantly, his

ability to sleep; and in the present circumstances, he's gone for three nights now without much sleep, if at all, which obviously not only affects him in his personal condition, but also affects his ability to participate in the court and to assist in his defense.

He has been -- complained about this to the JTF, to the medical staff, to the psychiatric staff. They have made different recommendations to him. He has followed the recommendations that they've made and the other medications and things that they have prescribed, and none of them has given him any relief. And he wants the court to be aware of this situation. And also we're asking the court's assistance in this, in either directing or requesting that the trial counsel in this become involved and allow us, his attorneys, to meet with the camp psychiatrist and the senior medical officer; and that's the reason that we want to have the proceedings done on Thursday rather than tomorrow, if they continue, because we want to try to accomplish that.

Our goal here is to try and get him relief from what he suffers from, and whoever is responsible for it is almost a secondary issue to us because what we need is the relief for him. And there's been a dispute between the prosecution and us as to who is responsible for this, who causes it or doesn't

cause it, and that is an issue that probably would require another hearing and a motion before the court.

But he needs immediate relief right now because this has persisted for the past three months, and it's different from the complaints that we made before in terms of the symptoms that he feels, but it is -- it is impossible for him to live and endure in these circumstances, and we're trying to get him whatever relief we can.

So we're asking the court to keep these -- his conditions in mind and also to request that the trial counsel and the SJA cooperate with us and get us the interviews that we need so that we can report to the court on Thursday, hopefully, about it, and try to get some relief from this situation, which will benefit not only Mr. Binalshibh, but his defense team and everybody else involved in this court, including Your Honor. So ----

MJ [Col PARRELLA]: Okay. So, Mr. Harrington, just so I understand, there's an addition to the request to go Thursday, which seems to be a relatively easy solution. In that interim period, what additional assistance are you seeking from the commission? You mentioned getting the trial counsel and the SJA to cooperate, but I'm not so sure I understand.

LDC [MR. HARRINGTON]: It's primarily, Judge, to get us --

so we can meet with the doctors, is what we need to do, and that's been resisted before for some reason, which I'm not sure of. Our goal here is to get relief for our client. It's not to get anybody in trouble or anything else at this point in time. It's to get ----

MJ [Col PARRELLA]: So is it to facilitate an interview between the defense counsel and doctors assisting Mr. Binalshibh with this issue?

LDC [MR. HARRINGTON]: Yes, Judge. We are hopeful that that may be of some assistance.

MJ [Col PARRELLA]: All right. Trial Counsel, what's the government's -- I mean, if you are -- this may be, I understand, an issue of first impression for you. But if it's not, what's the government's position with respect to assisting counsel with meeting with those individuals who are currently providing care to Mr. Binalshibh while we're down here?

MTC [MR. TRIVETT]: We'll certainly reach out to the Office of the Staff Judge Advocate to communicate to the current psychiatrist the defense's desire to meet. It will be up to the psychiatrist, but we'll certainly facilitate that request.

MJ [Col PARRELLA]: Okay. And, I mean, I would say that

it seems to be -- it shouldn't be a -- I'm very hopeful that they will agree to facilitate this, because it's quickly getting to the point where we're now talking about his voluntariness to appear at this hearing and that said individual will be here in open court testifying. So in the hopes of it not getting to that point, I hope that they will be willing to meet with counsel.

So number one, Mr. Harrington, I'm going to go ahead and grant your request to go Thursday. We have -- we have time this week, we're not getting off island either way, so to me that's an easy one. We'll go Thursday.

And in the meantime, Trial Counsel, if you can please talk to the Office of the Staff Judge Advocate and encourage them to facilitate some sort of meeting so we can resolve this as quickly and as efficiently as possible.

Does that resolve your issue for now, Mr. Harrington?

LDC [MR. HARRINGTON]: I hope so, Judge.

And I just -- my client wanted me to reiterate to the court that I only mentioned 152 just in terms of historical context.

MJ [Col PARRELLA]: I understand.

LDC [MR. HARRINGTON]: This is not a 152 motion or anything else like that. This is a new -- a new problem that

we're dealing with.

MJ [Col PARRELLA]: I understand. And it's probably a short fuse for you, but as soon as you can present the court with some sort of a written pleading on it, that would be fantastic.

LDC [MR. HARRINGTON]: All right.

MJ [Col PARRELLA]: Thank you.

Okay. With that, let's go ahead and pick back up with the 617/620 series.

Mr. Connell.

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

Your Honor, I have provided to the military commission, to the court information security officer, and to the court reporter, as well as to the parties, a set of slides which has been marked as AE 617I (AAA) and AE 620H (AAA). I have complied with all of the rules of court requirements for the submission of a display of slides. I would request permission to display the slides to the gallery.

MJ [Col PARRELLA]: All right. You may do so.

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

I would request the feed from Table 4.

MJ [Col PARRELLA]: Okay. It appears you have it.

LDC [MR. CONNELL]: Thank you.

Sir, as yesterday, I turn to the question of the five issues specified for briefing by the military commission. With respect to Mr. al Baluchi -- and in particular, this is a matter of incredible importance. It could be framed and I certainly think of it as the question of whether Mr. al Baluchi gets to present his defense or not. Because the questions that the military commission has posed go to the heart of the ability to present a defense, the requirement that the government prove every element of an offense beyond a reasonable doubt, and the fact that -- and the command of the Supreme Court that no device, by instruction or otherwise, be used to relieve the government of that burden, which in this situation is statutory as well as constitutional.

The question of the meaning and definition of hostilities has arisen in this military commission in three contexts: Personal jurisdiction, on which the military commission has already ruled; member instructions, which is raised here, although perhaps it seems a little premature. I understand why the military commission is framing it that way. And in seven pending motions to compel, some of which have been pending for 18 months or more, on the question of discovery for hostilities.

Before we move to the specified issues, I do want to

take a moment to talk about the four different ways in the Military Commissions Act context that the word "jurisdiction" is used. Because although I thought we had this sorted out in 502I, the -- some of the pleadings got a little loose in their use of the word "jurisdiction" again. In fact, the government at some points equivocates on what jurisdiction means, sort of moving back and forth between subject matter and personal jurisdiction.

So I want to just briefly separate those out, which is, I think, responsive to a direction of the military commission yesterday. Let's concentrate on exactly what we're talking about here, which is the contextual element.

The first way that the word "jurisdiction" is used in this context is personal jurisdiction out of 948c and 948a(7).

The -- Mr. Binalshibh made an argument yesterday, which the military commission has already rejected, which is that 948a(7)(C), the statutory inclusion of "member of al Qaeda" as a basis for personal jurisdiction is a finding of hostilities. I, in fact, advanced that argument in the 488 series because it is my belief that the -- statutorily, that the 748(a)(7)(C) **[sic]** does incorporate the hostilities from 950p(c).

The military commission disagreed with me and said

that the inquiry in 7(a)(C) -- sorry, a(7)(C) is, in fact, a separate inquiry. It is purely a membership-based inquiry. It does not incorporate hostilities.

So I just wanted to say that I think that that issue is already settled. I lost that issue. It was decided against me and we move on from there.

The second way in which "jurisdiction" is used -- no, I'm sorry. Not yet.

The second way in which "jurisdiction" is used is subject matter jurisdiction. And subject matter jurisdiction is the source of a lot of confusion, which was somewhat untangled in the decision of the CMCR in the Nashiri appeal on hostilities.

And as the military commission ruled in the 502 -- in 502I and in 488I, subject matter jurisdiction in this sense means ability -- the statutory power of the court to address a topic. And 948d gives the military commission subject matter jurisdiction over two types of offenses: One, those which are outlined in the Military Commissions Act; and two, those which are prosecuted under the law of war.

The -- that means that really for subject matter jurisdiction purposes the inquiry is, is the offense charged -- charged one that appears in the Military

Commissions Act or the law of war, not should it be. Right?

There's a descriptive aspect to subject matter jurisdiction as articulated by the CMCR rather than a normative aspect, which is going to come into play when we talk about Article III.

The third way that "jurisdiction" is sometimes used -- and with respect to that subject matter, I think that the government makes some confusions or some allusions, at least in its brief, on the way that subject matter jurisdiction is used.

But the third part is the contextual element. I say contextual element because it's identified in the statute as common circumstance. It is sometimes called jurisdictional element, based on federal court practice, but the CMCR uses the phrase "contextual element." So I'm adopting that phrase just because that's what the CMCR uses. I think it decreases some of the confusion around using, for example, jurisdictional element, which makes it sound like it has something to do with jurisdiction. And that's proof of being in the context of and associated with hostilities.

Now, what the CMCR explained in Bahlul and in the government interlocutory appeal in Nashiri is that that element does serve a jurisdictional function in that it ties

the offenses in the MCA to congressional authority under the Define and Punish Clause and under the war powers in the same way that a -- an element that a gun, for example, in a 922(g) -- that a gun moves in interstate commerce is tied to Congress' authority under the Commerce Clause. It is not itself jurisdictional to be proved prior to trial in the way that personal jurisdiction is, but it serves a function of tying the statutory authority to the congressional power to act.

The fourth way that "jurisdiction" gets thrown around is with respect to Congress' authority to establish offenses. Obviously, this does have a relationship to the congressional -- to the contextual element, but the -- it's really an Article III inquiry. Like in the second Bahlul decision, in the D.C. Circuit, that's what they were dealing with, what is Congress' authority to act, not what did Congress do. That last part of it is the normative and constitutional inquiry of jurisdiction rather than the statutory inquiry into jurisdiction. I know this all seems pretty pedantic. But like it is the source of much confusion on this topic, the way that people confuse Congress' authority to act with what they actually did in the statute or with the contextual element with what Congress' authority to act is.

So with that as a backdrop, let us move to the specific questions that the military commission has framed.

The first question that the military commission framed is whether the proof of existence of hostilities, as opposed to nexus to hostilities, is a component of the common substantive element established by 10 U.S.C. Section 950p(c).

And the military commission dropped a footnote, Footnote 18, and said, by nexus to, the commission means in the context of and associated with, as stated in 10 U.S.C. Section 950p(c).

So I want to start there because the CMCR uses the word "nexus" slightly differently, and in the brief we pointed out the elements of Bahlul where the CMCR uses the phrase "nexus" in pretty much the same way that the government did yesterday, which is that this whole element without -- not divided into its component parts, but the whole element is a nexus element. To me, that seems a little bit confusing as well, so I'm just going to call it all the contextual element so we don't get too tangled up in that.

Now, I fully agree with the military commission that the contextual element has within it components. The Supreme Court in Hamdan, which the Congress drew from in crafting the original 2006 MCA, and more to the point for this inquiry, in

the 2009 MCA, because that's when they actually put the contextual element in the statute as opposed to just in the M.M.C., the -- they talked about four different components that tie an offense to the law of war, but there are really only two that are important -- that are important to us here.

Because the military commission has divided this into existence and nexus, and the CMCR addresses more or less the same things except instead of existence, they talk about intensity, and instead of nexus, they talk about duration. Now, obviously, duration is not the only aspect of nexus, right? So there is a war right now, or there are armed hostilities -- there might be armed hostilities going on in Yemen right now, but that doesn't mean that they're also going on in Cuba.

But there's a fairly -- these -- if we look at these two dimensions, and I don't know if the commission is mathematically minded or not, but it seems to me that there's an easy sort of graphical framing of this.

Could I have access to the document camera, please?

So it would be fairly easy to imagine this as -- on an X and Y axis, where we put the duration on the X axis and we put the intensity on the Y axis. And to take us out of the al Qaeda context, I just want to talk about a different U.S.

conflict with a nonstate actor, and that would be General Pershing's 1916 Punitive Expedition against Pancho Villa.

And so just as an example of how one could look at this, there's some sort of initiating event. In the 1916 border war involving Pancho Villa, the initiating event would be that Pancho Villa, a renegade general in Mexico, crossed into the United States and attacked a U.S. Army outpost at Columbus, New Mexico. So that would be the initiating event which would start things.

The -- at some point after that, there is an increase in the amount of activity that seems war-like, right? So President Wilson orders General Pershing to put together the Punitive Expedition, the U.S. Army assembled artillery, the first use of trucks in armed conflict, and there was, in fact, even a couple of airplanes that were involved. One of the first uses -- U.S. -- the first U.S. use of -- of airplanes.

So sort of marshal -- the United States marshals its forces, and, at some point, it crosses over into Mexico. It's not involved in an interstate armed conflict with Mexico, but it's just with this renegade force, which happens to be in the territory of Mexico, and then there are a couple of sort of picket actions, and then, eventually, combat is joined.

The -- there are a series of battles between U.S.

forces and Pancho Villa. Then the United States captures a number of forces under Villa's command, the conflict ends, and they return to New Mexico with those people and try them in county court in New Mexico for the offense of murder for the attack.

So one can imagine -- and I'm making this line arbitrary -- but one can imagine that there is a time when the U.S. action and the -- and Villa's action combine to reach the level, the intensity on the Y axis, of interstate -- of armed conflict between organized groups, and then there's a time that it ends.

The reason why this is important -- and I'm skipping ahead here while I have this graph up -- is the end point of this is entirely a political question. The Supreme Court has held again and again that the end point of conflicts -- and the D.C. Circuit has supported this -- the end point of conflicts are to be decided by the political branches.

What the D.C. Circuit has told us, however, that the beginning point of nonstate armed conflicts are different; that they are determined objectively by the facts and circumstances, rather than by -- simply by an act of the political branches. Acts of the political branches are important. Woodrow Wilson's order to General Pershing is

important. General Pershing's order to his troops is important. The marshalling of forces is important, which is not a political act but a military act.

And so the question that will ultimately be examined by the members in this case is when does the activities of al Qaeda and the United States cross the line into interstate armed conflict or hostilities, and what is the relationship of that point to the actions of the defendants.

So could we have a screen capture of this chart, please?

And just for the record, do we have an AE number for it?

MJ [Col PARRELLA]: Yeah. It's going to be 620I or 617J.

LDC [MR. CONNELL]: Thank you.

So turning -- with this sort of model in mind -- if we could have access to Table 4 again, please.

Oh, you beat me to it. Thank you.

The CMCR has told us, has explained to us, how this process works in the Military Commissions Act. It has told us that there is a requirement of a nexus between the charged conduct and an armed conflict, and that's where I mentioned that the Bahlul decision uses "nexus," and we know that it has a jurisdictional function, which is why I started with

jurisdiction, and we also know that the -- this property sounds in the law of war. And the way that we know that it sounds in the law of war is that the Bahlul court explained to us the importance of this phrase, excluding "isolated and sporadic acts of violence not within the context of an armed conflict."

Now, that phrase comes from Additional Protocol II, which was cited extensively in Bahlul Footnote 66.

We also know that the -- that the Rome Statute, cited by the government, drew on that definition of Additional Protocol II to come up with the phrase "in the context of and associated with." The -- Congress didn't write on a clean slate when it came up with that phrase. That phrase comes directly from the Rome Statute. And I agree with the government that the United States participated extensively in the negotiation of the Rome Statute, although ultimately it did not sign it.

And we also know that this framework addresses both factors, and to what the CMCR calls intensity, and what the military commission is calling existence, and what the CMCR calls duration, which has at least some additional contextual elements.

Now, when -- in the 2016 CMCR decision, regardless of

whatever one considers to be the precedential value of this Bahlul decision -- and I'm going to address that in a moment -- addressed the same thing -- said the same thing again in the 2016 CMCR Nashiri decision.

And what -- so what does that mean? How does a jury analyze that? Well, the government has it right at its brief at AE 617E, pages 5 and 6, that it is a mixed question of fact and law, meaning that the duty of the members on this question is to be instructed on the law and to apply it to the facts.

And the -- that includes both the existence element or component of this offense, because the jury is going to be instructed -- and we're going to talk more about this -- on the element as a whole, and they have to decide all components of that element. It's fundamental that the government has to prove beyond a reasonable doubt all facts which are necessary to conviction. We learned that from Ring v. Arizona, as if we didn't know it from In re Winship and all sorts of other foundational constitutional decisions.

But the most persuasive advocate on this particular point about proof of existence as well as nexus is General Martins. In the United States v. Hamdan military commission, General Martins wrote in AE 190 of al Nashiri, which is contained in our record at AE 617F Attachment N, on

this exact point.

And he wrote -- oh, I put -- I will talk more about his, but this particular thing that I have on the slide is the military commission's decision based on the briefing from the government, and the military commission decided in Hamdan that the existence of a state of armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence upon the issue may be offered by either side, and the commission will instruct the members appropriately before they retire.

And then the military commission continued to talk about the government's position. The government urges the commission to treat this as a matter for the members to decide, and then a little bit further down after the government's promises, whether the accused's conduct occurred in the context of, and was associated with, an armed conflict is expressly or by necessary implication an element of each offense before the commission.

And the military commission held that the government was going to have to prove that at trial, and also importantly, the military commission held that it was also a defense; that the defense as part of the trial of the case will offer its evidence that there was no period of armed

conflict prior to September 11, 2001.

MJ [Col PARRELLA]: Mr. Connell, we have also heard from the trial counsel that the government was arguing Tadic, so things have changed and you're arguing precedential value of essentially another commission who was interpreting or providing their own interpretation. So this isn't an appellate cite.

So I guess there appears to the commission to be plenty of examples out there, whether it be United States v. New, whether it be the legality or the element of whether a controlled substance is on a schedule, where -- although there is the requirement that it be proven beyond a reasonable doubt, the judge may still decide as a matter of law, for example, the existence or the legality of the -- of the order. In the case of a violation of an unlawful general order, the legality question is decided by the judge.

So I understand all of this, and I understand and agree with the previous aspect where you talk about the connection and nexus, that that's an element, but the way the commission sees it, existence is a component of that, that is necessarily included. You have to have hostilities in order to show the nexus aspect.

The question I pose to you is: Why can the judge, in

light of these other things, these other cases such as United States v. New, not decide the question of the existence as a matter of law and still allow the members to apply that? And so looking at your chart, going back to 617J and 620I, what you've circled as the question of the "when" would still go to the members, perhaps, in some aspect, but perhaps the judge would -- could say -- and this ties into what the government is asking the court to do -- as a legislative fact that they've at least existed as of this date.

LDC [MR. CONNELL]: Are you -- is that it, sir?

MJ [Col PARRELLA]: I'm finished, yes. Thank you.

LDC [MR. CONNELL]: There are four components of the question that you just asked me.

The first component that you asked me was whether -- was about the precedential value of, for example, the reasoning of the military commission in Hamdan. I would suggest that it has substantial persuasive value for three reasons. The first is that the Hamdan court was addressing the very similar questions to those which are here, before the military commission here.

We all know that there's a dearth of military commission precedent out there, but this is on exactly the same question which is addressed here.

The second reason why I suggest that it has precedential value is that this is the exact reasoning. This decision that the court was addressing is the exact reasoning which the CMCR addressed on direct appeal.

The -- this is the decision which led to the instruction which the Hamdan court gave. The -- and which is entitled actually to substantial precedential value -- I'm taking -- I'm answering your question, so I'm going a little bit out of order than I otherwise would, but I'm going to, you know, leave some parts of that.

The third is that this -- the position of the government at that time in Hamdan, I don't know whether they argued Tadic or not, but as we have argued many times, and the government has argued, and some of the other parties have argued, the Hamdan decision actually is a form of the Tadic instruction, right? In the ICTY, there's no jury, right? There's no jury instructions in the ICTY. So what they have instead is principles of law that a three-judge panel articulates, and the ----

MJ [Col PARRELLA]: Well, when you say "some form," I mean, I guess they both relate to the law of war, but I don't see much more connection because one half of the Tadic instruction appears to be missing from the Hamdan instruction.

LDC [MR. CONNELL]: Actually, it's not. And if we'll look on the -- if you will just look at this slide for a second, this is the instruction as it was given. And I think what you mean by one half of the instruction is the organization prong.

MJ [Col PARRELLA]: Correct.

LDC [MR. CONNELL]: And it certainly does not get the attention that the intensity prong gets, but it certainly does appear in the instruction, and I've highlighted the -- you know, the -- what Tadic essentially looks at is was there protracted armed violence between governmental authorities and organized armed groups, and the organized armed groups does appear in the Hamdan instruction.

Now, it doesn't get as much attention as some other elements, but that probably has to do with what the evidence and arguments of the parties were.

One thing that we know and I agree, I did a lot of work trying -- we did a lot of work trying to track down what was the parties' actual position. But the one thing that we do know was that the judge in Hamdan rejected the defense instruction because he found it too long and complicated, and that's on the record.

And so we're left with either this Tadic-like instruction of the government was what was accepted, or the

judge drafted his own. You can't tell from the record exactly what happened. But I do not agree with the military commission that the organization aspect is missing from the Hamdan instruction.

Now, what does organization mean in this context is missing, because organized actually means structured like a military force with a chain of command and a duty of obedience. My cousin's hunting group is organized and armed, but that doesn't make it an organized armed group.

The organized armed group does have a further meaning, which could be elucidated by an additional instruction, but I do disagree that -- and I'm slowing down -- I do disagree that organization is missing entirely.

So let me -- I am returning to your -- the second part of your -- this is like an appellate argument where we have nested questions.

Returning to the second part of your argument, you asked about United States v. New.

Now, I will tell you that I was initially confused by United States v. New, because on its -- like when I first heard of its holding, that lawfulness of an order in a prosecution under Article 90 or 91 or 92 is an element -- is something for the judge to decide, I thought, gosh, how can

that square with United States v. Gaudin, which materiality is as legal a sounding determination as, you know, exists, and materiality is clearly a mixed question of fact and law for the jury in a civilian court or, for that matter, there's reference in New itself to 1001 prosecutions in courts-martial, I didn't know they did those but apparently they do, and maybe under assimilated crimes or something.

But the point is that New is 100 percent clear that lawfulness is not an element. The distinction between -- the core distinction we don't even have to look for, like larger philosophical distinctions. New distinguishes Gaudin because it says materiality was an element, and lawfulness is not an element. What New reasons is that essentially lawfulness is redundant with order, that lawfulness is inherent in order, and that the reason why the judge decides the element of lawfulness is because it's not an element. And this became even more clear when New, himself, as an individual, challenged his conviction on habeas.

And after the CAAF decision in New, he challenged it in -- he filed a habeas corpus in the district of D.C., and then the later decision is New v. Rumsfeld at 448 F.3d 403, where they made it even more clear.

So in New itself, at 55 M.J. 95, page 104, the CAAF

says, the question in the present case is not whether the military judge must instruct the court-martial panel on the elements of an offense. That question is resolved by Article 51(c). The question before us is a matter of statutory interpretation, whether in this case the issue of lawfulness was an element and therefore should have been submitted to the members under Article 51(c).

So then we move to New v. Rumsfeld, and New v. Rumsfeld reasons that for the Court of Appeals, the New case presented the inverse of Gaudin. Classification of the factor lawfulness as an element was unclear, but once the classification was made, the judge/jury allocation was indisputable.

So when the military commission -- in response to the military commission's request about New, the situation in New is the exact opposite of the one we have here. I will continue -- once we're done with this question, I will continue to talk about why existence is part of the contextual element as defined by Bahlul and Hamdan, but that answers the question.

Like, that doesn't answer the instruction question like part B of 1 ----

MJ [Col PARRELLA]: Yeah, I think when you get to that

point, what I'm interested in is I get that it's a component of it in the sense that it's a word that requires a definition. What I want to know is why -- why is it a standalone element as opposed to the relation and contextual aspect of it, the nexus. Why is the existence a standalone element, which is essentially what you're sort of advocating. I could not take it as a matter of law because it's a standalone element.

LDC [MR. CONNELL]: No, sir. That's not my position.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: My position is -- so the law does not require -- we often as lawyers shorthand proof of elements, proof of all elements. But what Ring teaches us is, in fact, it requires proof of all facts necessary to conviction or increased punishment. And so one can divide that into elements as you so wish.

When you go -- if you yourself as an individual were writing the elements of the offenses that we are dealing with here, you might cut them up differently -- I know that I would -- from the way that they're laid out in the Crimes and Elements section of the MMC.

If I were -- you know, sometimes they have four elements that look like three to me or three elements that

look like five. You might -- I as an individual certainly would probably define what the elements are differently, but none of that matters. It doesn't matter how elements are carved up out of a statute. What really matters is whether it's a fact necessary to conviction.

So the place where I'm pushing back against the military commission's characterization is as a standalone element, because -- I articulated this earlier and it continues to be my position now -- that, in fact, existence is a fact -- existence of hostilities or intensity of hostilities is a fact necessary to conviction that must be proven beyond a reasonable doubt. Does that make it a standalone element? That's really a question of how you like -- how finely you like to carve up your statutory elements.

The -- to me, I would characterize it as the way that the CMCR seemed to, which is that existence is a component of the contextual element, the contextual element being during and in relation -- not during and in relation. Gosh.

The -- it is instead in the context of and associated with a -- with hostilities. That's the way that the government puts it in its brief, right? The government reaches the same conclusion, that you cannot have -- in the context of and associated with hostilities without

hostilities, which is why the government considers it an element. I would call it a component of an element. One could call it, if you -- you know, if you slice and dice them a little narrower, you could call it a standalone element, but that's not my position. But if it were my position, it wouldn't change anything.

But let's -- but to some extent that's semantics. Let me answer the actual question you're trying to get to and then I'll go back to your other question.

The -- your question is why is it -- why is hostilities -- whether we call it a standalone element or not, why is hostilities something that independently must be proven as an element?

So I just talked about the Ring standard that really facts necessary to conviction or increased punishment is the standard, not proof of elements, although it's often used as shorthand. But we know quite a lot about this.

And LN1, can we go back a slide, please?

We know quite a lot of this from the way that the -- that one of the -- that the only contested trial that's ever occurred in a military commission on this topic occurred.

And so the -- I think it is important to realize that in this decision, the position of the parties was -- was quite

different than it is now. In Hamdan itself, the -- I'm talking about the military commission level now; we'll talk about the CMCR level in a moment -- but Hamdan argued that the existence or nonexistence of hostilities was a political question, and the government argued that its armed conflict was elemental; that armed conflict was an element which it had to prove, that it welcomed its burden to do so, and the military commission held that.

I think that's important because on almost everything we're going to say today, in Nashiri, the government took the opposite side and the government won. And while I think it is significant that the government took the opposite side, it's more significant that they won. It's more significant that they won in the military commission, that they won in the CMCR, and that they won in the D.C. Circuit, because those are the -- either persuasive when it comes to the military commission or controlling authorities for this -- for this court.

And what went on to happen in Hamdan is that Hamdan actually presented such a defense, that there were no hostilities prior to 9/11. Hamdan presented public documents, rules of engagement, law of war expert Geoff Corn. The government, on the other hand, fought for its side for the

existence of hostilities. It presented the al Qaeda plan. It called Evan Kohlmann as a witness, the exact same things that it has given notice that it plans to do here.

The judge, in fact, specifically ruled in the case that, quote, The members will be called upon to decide when and whether a period of armed conflict began. That's at AE 617F Attachment P, at page 3673 from the Hamdan transcript.

And that is the -- we were just talking about the circle on my graph. The -- that circle is when and whether hostilities began. It is -- it is at what point on the X and Y axis did the -- I'll informally use the word violence between the parties -- reach the level that went beyond isolated and sporadic conflict and reach the level of hostilities, of armed conflict between organized groups.

And the way that the judge put it there is pretty accurate, because did it ever cross that line, and when did it cross that line?

So let's come -- I take the military commission's point that that's persuasive authority the military commission can accept as persuasive or not persuasive, but the same is not completely true with respect to the CMCR. Because on appeal, the CMCR emphasized the reasoning of the plurality, the Hamdan plurality in the Supreme Court that, quote, Only

offenses -- excuse me, that only offenses, and this is the quote, committed within the period of the war can justify a conviction under the law of war.

And the CMCR -- I think this is important -- approved two separate instructions, actually. There were two separate instructions on paper when the judge gave them, but the -- the way the CMCR saw it, both the existence portion and the connection portion of the instructions were separately approved by the CMCR.

MJ [Col PARRELLA]: When you say "approved," is that dicta, or was that something that was directly discussed in -- directly discussed and appealed or at issue?

LDC [MR. CONNELL]: Elements of both. Like, I think a dicta characterization is fair, but it is equally true that it was not dicta in the sense of, hey, I'm just going to randomly comment on something. I completely agree and, in fact, briefed that the adequacy or appropriateness of the instruction was not at issue. It was not one of the issues which was either identified by one of the parties or added among the two issues that were added by the CMCR.

So I completely agree that in a -- there is a sense in which one could call them dicta because they were not -- the adequacy of that instruction was not a joined issue by the

parties.

At the same time, and especially the Bahlul decision did this in greater depth than the Hamdan decision did, but the Bahlul decision went to extraordinary length to explain the validity of the contextual element, its role in the law of war, its role in the MCA/M.M.C. that was in effect at the time, and why it was important.

So I -- in that sense, it is not dicta because it was very important to their holding that -- of the affirming the convictions that the government had sufficiently proven hostilities based on evidence that it had presented. The instruction was an element of that ruling.

So, you know, we don't have enough vocabulary to describe different types of dicta, but -- or maybe somebody does, but I don't -- so I -- that is what I will say. Rather than just, you know, using the word dicta or not dicta, I will say that there -- it was important to the ultimate conclusion of the court and that's typically not considered dicta; but on the other hand, it was not directly joined in issue by the parties, which typically is considered dicta.

Is that a reasonable answer?

MJ [Col PARRELLA]: It does. And I have another question for you that may overcome the need to answer any others that

may remain.

But one of your colleagues yesterday used the term "absurd result." So I guess at the essence of my questions pertaining to the existence and whether it's a matter of fact or law, as a commission avoid the absurdative result of a trial of five co-accused where you could have findings for one accused existence began in -- let's say on September 11th, another is maybe October, one might be, you know, 1998. So how do we -- that would seem to be an absurd result, that you have five accused, five separate findings as to the beginning of the existence for what is essentially one conspiracy. How do we avoid that result if this goes to the members?

LDC [MR. CONNELL]: All right. There are three important factors in answering that question.

The first one, I'll begin with the instruction itself. And I -- I -- well, I suggested the argument *ad absurdum* that was made yesterday about Santa Claus coming into play and all sorts of things really does not hue to the way that actual trials work because it ignores the role of the judge. And I'll give you the perfect example.

The argument that we make is that prior to October -- 7 October of 2001, the United States chose to use its diplomatic intelligence, economic, and criminal authority in

the fight against al Qaeda, and it did not choose to bring its military authority, those being the five dimensions of power projection -- did not choose to bring its military authority into effect until it began Operation Enduring Freedom.

The government argues on the other hand that the four soft power -- or softer elements of power projection are not mutually exclusive with the military, and thus, the use of other elements of power projection does nothing to prove whether military force was being used or not, right? That's their argument, that's our argument, and at some point you're going to decide that question.

You're going to say, all right, so the fact that the United States chose to use -- and many of our witnesses will testify to this. Let me proffer that. Richard Clarke will testify to this. George Tenet will testify that he thought the intelligence aspect of the United States was at war, and he couldn't get anybody else to listen to him, like nobody else would go to war.

The -- so at some point, you as judge, or whoever the judge is, is going to have to make a decision as to relevance, right? Does this -- is this more probative than -- is this probative of a fact in issue, and if it is, is it outweighed by its prejudice, right? Those are just standard rules that

place limits on things.

So if I brought a witness to talk about Santa Claus other than, you know, rolling your eyes at me, you would say that's irrelevant, and I'm not going to include it.

A similar relevance function is formed by ordinary elements of statutory construction with this instruction, for example. Yes, it says, and any other facts and circumstances that you consider relevant. That's a very standard way to address totality-of-the-circumstances tests. Take voluntariness for example, right? Classic totality of the circumstances, but that doesn't mean that Santa Claus becomes important to whether a statement is voluntary or not, because of the principle of *noscitur a sociis*. And *noscitur a sociis*, you are known by the company you keep, means that when you have a sort of catchall at the end of any legislative or instructional list of things -- *noscitur a sociis* means and other things basically like those things that we have already talked about. So we saw this in the Hamdan case itself where it was, in fact, the government tried to ask an intelligence analyst about a question that was far afield from the rules of engagement, and the judge ruled them in and said, you know, look, everybody gets to argue what they want to argue, but within the bounds of relevance.

So both the instruction and the presentation of the evidence as well as, for example, the materiality standard under R.M.C. 701 are governed by ordinary principles that keep us from reaching an absurd result.

That's the first answer.

The second answer is part of the issue that you raised is controlled by the statement that you said, it's a single conspiracy, right? Whether a conspiracy is singular or multiple is, in fact, a question for the members. And so some -- I don't know if anyone is going to put on a defense in this case that the -- that there were multiple conspiracies rather than singular conspiracies, but it is a very common defense in large conspiracy cases.

And so it is, in fact -- and it is a factual question, application of law to facts that the jury does, and the jury gets to decide whether it's a single -- singular conspiracy or not. And let me tell you, the jury very well could decide that, right? And again, I don't speak for anyone else, but a rational actor looking at this could easily conclude that Mr. Bin'Attash was included in the USS COLE conspiracy, but was not included in a 9/11 conspiracy.

The connection of Mr. Bin'Attash to this case and this charging document is minimal, at best. The -- and one

could easily decide -- and I'm just using him as an example -- a rational trier of fact could easily decide that he was engaged in some other hostilities, right? That there were hostilities between al Qaeda and the United States involved in the attack on the USS COLE that lasted a short period of time, and does not mean that there were hostilities lasting from 1996 or 1998 or 1988, as we heard yesterday, all the way to 2019. Right?

A rational person, say a person who is deployed on a destroyer in the year 2000 and did not consider themselves to be engaged in an armed conflict, could easily conclude, no, there are multiple conspiracies, and there are multiple periods of hostilities.

I will tell you that the many elements of the United States Government consider the hostilities on 20 August of 1998 during Operation Infinite Reach to have lasted one day. Yes, the United States was engaged in hostilities on that day, but not on the 21st and not on the 19th.

And so the reason why I say this is not an absurd result, because the jury is at liberty to, within the bounds of the law and, in fact, like intellectually, honestly could easily reach these conclusions that there were multiple conspiracies, that there were multiple periods of hostility,

and that different defendants were connected to different periods of that.

You know, if they were to conclude, for example, that there were -- contrary to the representations of President Clinton, that there were hostilities in Yemen in December of 2000, they might decide, well, but Mr. al Baluchi doesn't have anything to do with that, so, you know, his -- there's no connection between him and hostilities.

So the reason that I -- that I explain all of that is that you -- in order to -- your question rests on a premise of singular conspiracy, singular hostilities, that is the government's theory here and they're entitled to their theory. They can argue it, they can present it, they can write it in a charging document, they can argue it all day long to the members, but that doesn't mean that a member has to accept either of those premises and a defendant could certainly defend on those bases.

MJ [Col PARRELLA]: No. And I understand, and I appreciate your point and that's a very valid point, but I think it still is more closely tied to a differing result as to the connection. That's the whole aspect of you still have to show the connection. You have to show the nexus.

But if we operated under the premise, let's just say

assuming arguendo, that the government's theory is they're all members of al Qaeda and the question is, is when was the existence of hostilities between the United States and al Qaeda. It seems to the commission to be -- there could be an absurd result if you get five different answers on what is essentially a singular or should be a singular question, when was the existence of hostilities with al Qaeda.

LDC [MR. CONNELL]: All right. Let's look at that in two different ways.

The first is hostilities is not necessarily unitary. Right? There have been times when the United States has been engaged in hostilities that are different for different bodies. I'll give you a perfect example. The United States became engaged in hostilities with -- let's see, I need a nonstate actor.

In the -- in United States hostilities with -- in Hawaii, right, at the end of the 19th century, the different groups in Hawaii might have -- you know, the queen is trying to assert her sovereignty, there are other groups that are trying to assert their sovereignty, and became involved with different nonstate actors at different times.

The -- you know, that -- that principle itself comes into play here. One of the -- one of the factors that has

never -- hasn't really come up much yet, but there is an entire wing of what is now known as al Qaeda called Egyptian Islamic Jihad which does not merge with al Qaeda -- and Mr. Kohlmann is going to testify to this, the government witness -- does not merge with al Qaeda until the summer of 2001.

And so the idea that -- and so with respect to those people, for example, the United States -- and taking the government's unitary theory as true, hostilities do begin at different times. Hostilities with al Zawahiri occur -- don't occur until the summer of 2001 under the -- under the government's explanation, whereas hostilities with bin Laden as an individual begin 1996 or whatever time that they began. So, yes, it is definitely true that different elements of nonstate actors could have different elements of hostilities.

That's true even in interstate conflicts. The conflict between the United States and Japan actually began at a different time than the conflict between the United States and Germany, even though we think of them all as the axis powers, because before very long they were all part of the same coalition opposing the United States. But our hostilities, even on an interstate basis, began with them at a different time. So that's part one.

Part two is, different hostilities may be important with respect to different defendants. The -- what you are calling an absurd result isn't actually an absurd result, it's a precise result. And I'm not -- this is all accepting the premise that the -- that the jury is likely to make different decisions as to different defendants because they're more or less making a unitary decision, and your question here really goes to trying to justify the extension of the al Hawsawi personal jurisdiction question to the other defendants than like to have a unitary answer as a legal matter, as opposed to the application of law to the facts by the members, which it seems very unlikely to me that -- that -- that they're going to sort of parse that out separately, but they could. Because I don't know what defense -- defenses different defendants are going to advance. And I gave the example a moment ago of Mr. Bin'Attash, and Mr. Bin'Attash could easily make that argument.

The other factor is, we haven't -- you know, the government's principal argument for hostilities from the United States' point of view is Operation Infinite Reach and I was really astonished yesterday to hear the government say El-Shifa was Bin'Attash's factory. You know, in fact, one of the cases that -- the El-Shifa case that we cited here out of

the D.C. Circuit makes it pretty clear that it wasn't Bin'Attash's factory.

It's also true that all of the cruise missiles which are launched in -- in Afghanistan on 20 August of 1998 were not all aimed at al Qaeda properties. So it may be that even under their theory, the United States is engaged in hostilities with other non-al-Qaeda entities who are operating in Afghanistan.

The real point out of all of this is that this is not absurdity, this is reality. This is taking the sort of hypothetical that the government has and it can -- it can make -- reduce things to as simple as it wants, and if it considers that to be its best strategy for -- with the members, all power to them. They get to make their own strategic decisions. But it is not an absurd result for the members to look at the actual evidence of what actually happened and apply the law to that individually.

MJ [Col PARRELLA]: Okay. I understand your answer.

LDC [MR. CONNELL]: It -- well, then let me just say one more thing about it, then. Because the -- it is not that hostilities are different for each defendant, it is that there are different views of hostilities writ large, and then you come along and apply the connection of each individual

defendant to whatever you've decided the hostilities are.

So if by absurd result you mean that hostilities began at a different time for Mr. Mohammad than Mr. al Baluchi, which they might, if they joined -- like assuming that they're members of al Qaeda, if they joined it at a different time, right? Because this is membership-based hostilities.

MJ [Col PARRELLA]: And I'm not -- I don't think anybody's disputing that the question of the nexus, the connection, when they joined, is clearly a question for the members. It's a question of fact. This is the -- purely the aspect of the existence as to when did the existence begin between the state and the nonstate actor in this case.

LDC [MR. CONNELL]: The -- right. And there are multiple nonstate actors, right? We just covered that. Even under the government's theory, there are multiple nonstate actors.

MJ [Col PARRELLA]: Correct. And I do understand that argument.

LDC [MR. CONNELL]: Right. The -- what -- what other piece can I help with?

MJ [Col PARRELLA]: I think I understand your argument.

LDC [MR. CONNELL]: Okay.

MJ [Col PARRELLA]: So yeah, definitely. You've

definitely addressed the question that I have posed to you.

LDC [MR. CONNELL]: So let's go back to this instruction and your B question -- 1B question of whether the -- whether you are bound by this instruction.

And the short answer to that is yes, and the most persuasive advocate on that question is Mr. Trivett. On 18 October 2017 at pages 16862 to 63, Mr. Trivett argued, "This is not dicta. It is part of our actual opinion" -- referring to the instruction. "I do believe it is binding despite the fact that it was overturned on other grounds on this commission."

I would think that the military judge would welcome when he actually has binding authority.

On -- later on the same day -- no, excuse me, the next day, 19 October 2017, at 1 -- sorry, 16,917 in the record, Mr. Trivett argued that the proper standard is set forth by the CMCR in Hamdan.

And then just recently on 25 March 2019, at page 22,443 to 46 in the transcript, Mr. Trivett argued, "So, Your Honor, the controlling legal standard for determining hostilities is set forth by the United States Court of Military Commission Review in the case of United States v. Hamdan. It states," and then he read the instruction.

And then he said, "The members who have this legal instruction in front of them, and we have to be anchored to this legal instruction -- this legal instruction governs what's discoverable, what's not discoverable, what's admissible, what's not admissible, but we have an actual legal standard from an appellate court that is superior to this commission."

And I want to be clear that this actually wasn't always the case, and the D.C. Circuit rule on vacated opinions has always not been binding on this commission. It was only in the al Nashiri instruction -- decision at 191 F.Supp. 3d at 1323, note 21, that the CMCR first decided that the D.C. Circuit law was binding on this military commission.

And the D.C. ----

MJ [Col PARRELLA]: Let's just say that I accept your premise, it's binding. Let's just -- for the sake of argument and getting kind of to the point here, so what? Does that mean I'm bound to each and every word that's articulated in here? Or, like any other court-martial, can I as the trial judge still tinker with the specific wording to suit the facts and circumstances of this case?

LDC [MR. CONNELL]: Yes, certainly.

MJ [Col PARRELLA]: Okay. So I -- I get the premise that

your belief is it's binding, but I still have the ability to make it case-specific, which I think is essentially what the government is arguing as well.

LDC [MR. CONNELL]: Yes. You know, the devil is probably in the details.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: But -- the -- in fact, it's just like any other instruction, right? I mean -- and I've have said consistently -- like I leave it to you whether the government's position on this has been consistent, but mine has been, that the -- I've always thought this was persuasive, and then at some point the CMCR decided that the D.C. rule and not the other rule applies. And, yes, I think this is a valuable instruction. You know, I -- you gave the example yesterday. You asked one of my colleagues whether you could give a separate -- or you could instruct on the meaning of organization, for example.

And yes, I think you could probably -- a perfectly good way to do that would be to give an additional instruction, organization in this context means military-style organization with a chain of command and a duty of obedience, but that's all in the details. And, you know, when I said at the beginning, member instructions seem a little premature,

but at some point there's going to be an instruction conference where we sit -- you know, sit and sort of see what we can agree on and hash out wording and those sorts of things.

So yes.

MJ [Col PARRELLA]: Okay. And then I would take it that -- what's your position, if you could comment on the part that you have highlighted up here on this slide -- this is slide 5 -- sort of the catchall? Is that something that you deemed is -- the commission is required to include in its instruction?

LDC [MR. CONNELL]: Yes. And that's -- and the reason for that is the -- the one thing that does seem decided in this, right? There are some principles of this that are just accidents of wording and there are some principles that are decided.

And the thing that is decided is that this is a totality of the circumstances test. And this is what I have argued from 488 forward.

The difference between this and Tadic is that Tadic is a two-pronged test. You have to prove a certain level of intensity and you have to prove a certain level of organization. The difference between that test and this test

is not what factors get considered. It's whether it is a totality analysis where the members take a wide variety of factors and balance them, or whether it is a multiprong, have-to-check-these-boxes test.

And the one thing which is decided as a principle here, which I suggest is binding on the military commission, is a totality-of-the-circumstances test. That's really all that got decided here.

The CMCR made it perfectly clear -- and Bahlul footnote 66 is perfectly clear on this -- that it thought that it was applying Tadic, but the specific way in which it chose to do so was through a totality test rather than a two-prong test. And so that is the difference.

And the fact that other nonenumerated factors can be considered as long as they're bound by relevance, which is right here; other circumstances you consider relevant to the existence of the armed conflict, the -- the relevance, as long as they are anchored in relevance, which has -- you know, there's a screening function for that on the front end with what evidence that the military commission lets in -- as long as they're anchored by relevance, other factors can come into play. And that's what a totality-of-the-circumstances test is.

MJ [Col PARRELLA]: Okay.

LDC [MR. CONNELL]: All right. So let's move to your second question, which is whether the military judge may determine the existence and duration of hostilities for purposes of 10 U.S.C. 950p(c) as an instructional matter while reserving the question of nexus to the hostilities to the panel.

Now, the government essentially treats this as a form of judicial notice question. Because judicial notice is just a special form of instruction, and this is where the government cites, and the military commission mentioned earlier, three categories of places where something that smells like an element is treated as an instructional matter. One of those we already talked about. That's lawfulness of an order. And the answer to that question is that it's not actually an element, which is what New -- the actual holding of New and as recognized by the D.C. Circuit.

But the other two examples that the government gives -- and it was kind of surprising; they're reliance on that Chapman case because it falls squarely within this -- is that the other two examples are really linked to your legislative facts question, which is your question 4, because there are two forms of legislative facts that the -- typically

courts can take judicial notice of and those are geography and chemistry.

The -- all of the cases that the government cites are one of those two forms of legislative fact. Does this particular street fall within this particular venue. And that Chapman case that the government relied on is a perfect example. Its question is does Cartersville fall within the Northern District of Georgia. I come from a district where this happens -- where this is frequently -- or court where this is frequently debated because there's Alexandria -- in Virginia, states -- I mean, sorry, cities and counties are separate. Cities are not part of counties. It's the only state that's like that. And Alexandria, Virginia is in a different jurisdiction than the Alexandria portion of Fairfax County.

So when a witness testifies, well, I was in Alexandria at the time, it's a common defense tactic to say, well, it must have been in a different jurisdiction, or it could have been in a different jurisdiction because there's different Alexandrias.

And the way that that gets addressed is by court taking judicial notice that such and such street falls within the Alexandria portion of Fairfax County as opposed to the

city of Alexandria.

And all of the cases that the government cites fall within those two -- other than lawfulness of an order, which we already talked about, but fall into one of those two categories, geography or chemistry. And there's only one example that I could find of the extension of that very basic principle, which is you could flip open a science book or you could flip open a map and you could see where the street is or you could see that cocaine hydrochloride is a form of cocaine.

There's only one time when that sort of very basic principle has been tried to extend into something more complicated that really involves inferences, like what we're talking about here. And that's in the case of Yutes the -- where the government in a court-martial tried to extend that idea to a legislative finding that Congress had made in sort of the preamble of a statute. And it was at that point -- let me give you a citation. I'm sorry, Lutes, not Yutes. That's found at 72 M.J. 530, Air Force Court of Criminal Appeals 2013.

And what that court said was that that kind of legislative fact -- a legislative fact like Congress has found that illegal immigration presents a great threat to this nation, those kinds of inferential legislative facts are never

appropriate to instruct the members on because they are not core, indisputable facts that somebody just needs to look at a book -- to glance at a book to understand. They are, in fact, complicated legislative judgments that are not appropriate for instruction.

So that's the only case that I could find, that Lutes case, that addresses this issue that the military commission has raised about whether it could instruct on something as complicated as the existence of hostilities.

The -- one of the things that we know from Hamdan and Bahlul is that the hostilities determination requires the members to apply law to facts to evaluate this beyond a reasonable doubt, and that's a difference between cocaine hydrochloride, the geography and chemistry cases.

One of the examples I thought was -- involves really one of the most famous cases of all the time, sir, the case of Aaron Burr, sir, which is -- in which Aaron Burr, after his killing of Alexander Hamilton in a duel, raised an Army at Blennerhassett Island and was tried for treason by Thomas Jefferson.

And Thomas Jefferson -- the Administration claimed that he had levied war against the United States, and it was, in fact, Chief Justice Marshall, who was riding circuit at the

time who went to Richmond, Virginia and tried the case. And what he held was -- and this -- this -- and we don't know this just from, like, the trial record of Aaron Burr, we know it from Sparf and we know it from Gaudin. He held that the question of war is the classic application of law to facts that is within the core duty of the members to determine.

That -- in the beginning of the 18th century, it went on to the end of the 19th century in Sparf, and more recently in Gaudin, and that principle, which is about hostilities, really, has been passed down and endorsed by the Supreme Court on at least two different occasions.

So I suggest, sir, that the question -- the answer to your question two is controlled by Gaudin itself at 515 U.S. 506, a 1995 case, that it is the jury who must apply -- answer mixed questions of law and fact. It is the job of the jury to apply the law to the facts.

And I mentioned this earlier, but materiality, which was at issue in Gaudin, seems like, on its face, even much more of a question of law than hostilities does.

The -- I talked a little bit -- so we talked earlier about the military commission in Hamdan, but the military commission in al Nashiri demonstrates as well that on other occasions, at least, General Martins has persuasively

advocated and won for the idea that even the existence of hostilities, as opposed to some other component of the contextual element, is required to be proven to the jury.

So this comes from AE 104A in the Nashiri record, which is found in our record at AE 617 Attachment -- excuse me, 617F Attachment R, and the -- drawing the distinction that the military commission draws here, General Martins argued that under the statute and the case law, the duration and scope of the hostilities between the United States and al Qaeda is an objective factual element that the members must resolve at trial after receiving an instruction on the proper standard.

And so the way that the -- that Judge Pohl dealt with this question in al Nashiri, which was upheld by -- which is significant not only for itself, its own persuasive value, but it was upheld by the CMCR in the 2016 Nashiri decision and upheld -- which itself was upheld by the D.C. Circuit last year, is that he drew a core distinction between -- or the military commission drew a core distinction between how it was going to handle hostilities for personal jurisdiction purposes with how it was going to handle it for the -- with the members.

And in 104F in Nashiri, just like ultimately in this

case, the military commission held that the question of personal jurisdiction hostilities was controlled by political -- affected political decisions of the political branches, but that it was different for the members. So I've quoted here on this slide just the portion of AE 104F Nashiri that deals with the -- with the members.

And this comes -- I just want to stress this portion of this opinion comes after having decided that political determinations control for jurisdictional purposes. But for members of the jury, the military commission directly addressed the question that is before it today about the existence. And the military commission held that whether hostilities existed on the date is as much -- is as much a function of the nature of hostilities as any particularly legal significant act by the legislative or executive branches.

It goes on: Whether hostilities existed on the dates of the charged offenses necessarily is a fact-bound determination, and then it goes on to say that al Qaeda gets a vote.

It says: Whether al Qaeda considered itself to be at war with the United States on the date of the alleged law of war violations is a factor among many to be considered by the

trier of fact, and is as relevant as any judgments made or withheld by the President or Congress.

So for member purposes, the prior military commission -- in a pending military commission, not some long-ago, ten-years-ago military commission -- but in a pending military commission, held -- addressed both the totality of the circumstance element of the instruction that I talked to earlier, but also drew a core distinction between the political determinations, that is, judgments made or withheld by the President or Congress, and the many factors that the jury is -- or the members are going to have to address when it comes to determining existence rather than connection.

Now, that brings us to your third question.

MJ [Col PARRELLA]: Mr. Connell, since I've derailed your presentation several times, I will offer you the opportunity, if you want to just pick it up after lunch. That way -- we have been going for a while. I'm inclined to maybe take a recess if that's okay with you to bifurcate it.

LDC [MR. CONNELL]: Certainly, sir.

MJ [Col PARRELLA]: So what we can do is go ahead and take a recess at this point and there's no rush. So why don't we go ahead and do that. We'll reconvene here at 1345, finish up

your argument, and afford Mr. Hawsawi an opportunity to do so as well. All right.

Commission is in recess.

[The R.M.C. 803 session recessed at 1211, 30 April 2019.]

[The R.M.C. 803 session was called to order at 1354, 30 April 2019.]

MJ [Col PARRELLA]: Good afternoon. This commission is called back to order. All parties present when the commission last recessed are again present, subject to any exceptions noted by counsel.

And there being none, Mr. Connell, if you would like to continue.

LDC [MS. BORMANN]: Judge ----

LDC [MR. NEVIN]: Lieutenant Colonel Poteet has -- is working on other -- another project and will be back shortly.

MJ [Col PARRELLA]: Okay.

LDC [MS. BORMANN]: And Mr. Montross is -- will not be joining us this afternoon.

MJ [Col PARRELLA]: Thank you, Ms. Bormann.

LDC [MR. CONNELL]: Lieutenant Colonel Thomas is out of the courtroom and will be back in a while.

MJ [Col PARRELLA]: Thank you.

Okay. Mr. Connell, if you want to resume your

presentation.

LDC [MR. CONNELL]: Yes, sir.

Sir, when we broke, we were turning to the question -- the third question of four posed by the commission, whether the existence of hostilities for purposes of 10 U.S.C. Section 950p(c) in this case is to any extent a nonjusticiable political question.

The political question doctrine, principally under Baker v. Carr excludes value judgments in -- from the province of the judiciary or, in this case, the Article 1 judiciary. And it mostly comes up in courts-martial in the question of is the war justified. People who are charged with disobeying an order who want to put on a defense that they were justified in their failure to obey the order because the war itself was unjustified. There's quite a few cases that go in that line.

And I just want to sort of drop a footnote here to your question earlier about New, because New is quite interesting when viewed in a political question area, because -- or light, rather, because initially, I thought, well, how could a -- the lawfulness of an order not be a question of fact because if the order is shoot that man, whether that's a lawful order or not depends principally on who that man is, whether he is a civilian out -- or to combat

or whether he is an enemy soldier.

But once I read New that became clear, because New has as its underpinnings a political question justiciability issue. Because the challenge to the lawfulness of the order in New was not that the order was illegal or to commit an illegal act, but rather, the -- it was that the soldier in question had been deployed to Macedonia in conjunction with U.N. troops on a noncombatant peacekeeping mission, and the soldier wanted to advance the argument that deploying alongside U.N. troops was illegal, and therefore, any orders issued -- regulations issued pursuant to that were illegal, which is -- has as -- which is really just another way of coming to the "this was an illegal war, and I didn't want to participate in it" defense.

So I think that's interesting background to that case and sort of answers that question. Although really, as I mentioned earlier, because New decided that lawfulness is not an element, it's not really analogous to our situation here.

But with respect to political questions themselves, the larger doctrine, not generally as applied in courts-martial, which is always -- almost always about the lawfulness of the war -- but in the larger question, the D.C. Circuit handles more -- for obvious reason handles more

political question cases than any. And their most recent case is pretty instructive in the distinction between the value judgments that are involved in political questions and the policy questions, the application of law to facts that are involved in nonpolitical questions.

And in Al-Tamimi v. Adelson at 916 F.3d. 1, D.C. Circuit 2019 case, the D.C. Circuit distinguished between two different questions. The -- in the case, the plaintiffs had sued -- because political questions outside of the court-martial lawfulness of war context are almost always people suing to change a policy of the United States Government. The plaintiff was challenging the participation of certain U.S. actors in Israeli policy toward Palestine.

And the court said, look, really, there are two different questions here. One of them is a political question and one of them is not. The question of who should control Palestine is inherently a political question laden with value judgments and reserved for the political branches.

On the other hand, the question of are Israeli settlers committing genocide against Palestinians was not a political question, it was a justiciable question because it essentially involved the application of law to facts.

There's a standard under the foreign -- the Alien

Tort Statute as to what genocide is, there are facts which could be presented to the court, and there's an application of the law to the facts. And so even as heavily laden a political question as are Israeli settlers committing genocide against Palestinians, is not a nonjusticiable political question because it's not a value judgment, it's application of law to facts.

Now, this question is really foreclosed by Hamdan I, the Supreme Court decision has already essentially decided this question, and that becomes even more clear when you look at the procedural history of Hamdan I.

When the first military -- the pre-MCA, the military commission of Hamdan began in this court, the district -- Mr. Hamdan, during the selection phase, went to -- filed habeas in the D.C. District, and the district court rejected -- the government -- rejected a government claim that they made. The government claimed in the district court that there was military commission jurisdiction because the conflict that was going on was of the nature of a noninternational conflict, armed conflict with al Qaeda, as opposed to an international armed conflict with Afghanistan.

And the district court said no. The government does not get to decide the nature of the conflict. I'm objectively

looking at it, and I reject that claim.

That was exact -- that was, in fact, the claim that went up on review to the D.C. Circuit, and the D.C. Circuit said, no, the President gets to decide the nature of an armed conflict. In February of 2002, President Bush issued a fairly famous memorandum, a presidential memorandum of 13 February 2002, in which he characterized the nature of the conflict as noninternational, but also not -- not of an international character. If you may recall, President Bush took the position that the conflict was in a gap between -- essentially between Common Article II and Common Article III of the Geneva Conventions; that's how he characterized it, and that the D.C. Circuit ruled in favor of the government, reversing the district court on that basis of that characterization of the war. And it took the essentially political question, deference to the political branches or effective determinations of the political branches, however soft -- how much you want to soften the political question doctrine -- as conclusive.

In Hamdan -- and this is not the plurality of Hamdan, right? There's the Stevens plurality. This is the five-justice majority when Justice Kennedy joined the portion of the majority. The majority portion of Hamdan rejected that

and held that the explicit presidential finding on the nature of the conflict with al Qaeda was not controlling on the court.

Now, that is now the law. And it had five justices, but not only that, there's no question of being dicta, that was the actual holding of D.C. Circuit, which it was actually reversing.

The plurality, of course -- both pluralities went on to address a number of other issues about the nature of military commissions, but the question of whether the President's determination of the nature of a conflict, whether that was binding on the judiciary, as a political question or otherwise, was decided in Hamdan and decided in the negative.

Now, the plurality went further, the Stevens plurality. The Stevens plurality went further and said that the al Qaeda conflict began -- the conflict between the United States and al Qaeda began after the AUMF that the government was relying on to activate the war powers of Congress. That's, in fact, our position, right? Four justices -- now, I know that's not five, not the magic number five, but four justices in Hamdan took that position, whereas three justices in dissent took the position that it essentially was a political question.

The President and Congress -- the President in that situation got to -- the political branches, in any case, got to decide when -- the nature of conflicts. And so that the -- the dissent's position was, Justice Thomas's position, that the D.C. Circuit position should have prevailed. The D.C. Circuit position did not prevail initially with five justices and then more fleshed out in the plurality.

Now, this is not the first time this question has come before a military commission, and I have on the screen a couple of arguments which come from AE 104A, which was the government's pleading in al Nashiri. And it's found in our record at AE 617F Attachment O, and on this situation, I think that General Martins is the most persuasive advocate and lays out a number of arguments as to why the existence -- and we're specifically talking about existence, not connection -- but existence of hostilities is not a political question.

In this clip, the -- General Martins argued that the 2009 MCA and binding CMCR precedent established that the existence of hostilities is an objective question of fact for the members to decide.

So what binding precedent was the General referring to here? He was referring to Hamdan. Hamdan at 801 F. Supp. 1275, Note 45 converted the pluralities -- the Hamdan

plurality position into a holding of the CMCR in that it acknowledged and rejected Justice Thomas's position in dissent that there was a political question involved in the advent of hostilities, but said instead we're going to look at the evidence in the case.

So I suggest to whatever extent there's a question about the precedential value of the plurality, it has been converted to a holding in the CMCR.

Now, General Martins and I are not the only people to take this view of Hamdan and Bahlul, because the D.C. District addressed the same -- was looking at a political question in al Warafi, W-A-R-A-F-I, v. Obama.

And in al Warafi, the D.C. District Court relied on Bahlul as authority for the proposition that the executive recognizes that the existence of armed conflict cannot be taken for granted in detainee cases.

So the reading that the government had, and that I have of al Bahlul and Hamdan has also been at least strongly considered by other courts.

So let's look at Baker and the Baker v. Carr and the question of political questions in separation of powers. In AE 104A in Nashiri, the government -- and this is at page 14. The government argued that, in fact, in military commissions,

there is no separation of powers of concern -- separation of powers concern, and gave a specific statutory argument that I think really resolves this political question.

The government argued that Congress and the President in the 2009 MCA created military commissions to try violations of the law of war, and expressly made the nexus to hostilities an element of each offense.

In so doing, far from removing the determination of the existence of hostilities from the purview of the commission, Congress and the President actually empowered the members to decide whether the government has proven the hostilities element beyond a reasonable doubt in each case.

Now, this argument makes a great deal of sense, because in 2009 MCA, unlike the 2006 MCA, Congress specifically made a delegation of authority, in that even if it is a political -- was at some point a political question between Congress and the President, the two Congresses and the two Presidents that the government is fond of referring to actually delegated the authority in 950p(c) to the members to make the decision as to whether hostilities existed.

That approach was endorsed by the D.C. Circuit in El-Shifa Pharmaceutical Industries Company v. United States at 607 F.3d 836, a D.C. Circuit en banc case from 2010.

And in El-Shifa, which was actually the case about Operation Infinite Reach, the D.C. Circuit explained that when a statute or even an area of law contains within it a recognized role of the judiciary, that even otherwise political -- questions that would otherwise be political become justiciable.

And it distinguished the question in that case, whether the United States was justified in firing cruise missiles at a factory in Somalia, the -- Sudan, I'm sorry, Sudan -- distinguished that from the enemy combatant determinations that it makes at Guantanamo and said that there's a recognized judicial role there.

The same thing happened in the 2009 MCA. Recognizing the possibility of a political question, two Congresses -- one Congress and one President, because we're talking about the 2009 MCA, created a specific role for the members, and that is to determine the existence of hostilities as the government successfully argued in Nashiri and was upheld by both the CMCR and the D.C. Circuit.

The same point was made -- this exact same point was made again in the Guantanamo context in Hamdi v. Rumsfeld at 542 U.S. 507 2004, regarding the justicia- -- remember, Hamdi was the first case that went before the Supreme Court about

whether it was -- the judiciary had any role in assessing enemy combatants, so-called, who are being held here at Guantanamo and they rejected the idea that that was a political question and said it was justiciable, there was a role for the judiciary because there's a recognized role for judicial actors.

The other point that the government has made in Nashiri is the role of the international cases, Tadic, Haradinaj, Boskoski, et cetera, in the holdings of Hamdan and Bahlul.

So the government described that one of the reasons why the -- this was not a political question was because of the -- the reliance on international law, and that the government, in a brief signed by General Martins, wrote, "These international cases lend support to the CMCR's holdings in Hamdan and Bahlul that the existence of hostilities is not a political question in the context of a military trial, but a question of fact for the members to determine.

"In this case, the members will decide at trial, upon consideration of the totality of the circumstances, whether these offenses were committed in the context of and associated with hostilities between the United States and al Qaeda."

The government's brief persuasively makes the

point -- several points that are themes of my presentation today.

The close interaction between the Hamdan decision and the Tadic standard found in footnote 66 of al Bahlul, the fact that the existence of hostilities is a question of fact for the members to determine, and the totality of the circumstances approach taken by Hamdan.

Now, this same idea, lest you say, well, you know, that's just the government arguing in another case, this particular point went up on review through the CMCR and ultimately to the D.C. Circuit. The D.C. Circuit in their Nashiri decision -- not this most recent Nashiri decision, but the one before that -- decided -- held -- addressed two questions. One was the application of Councilman v. Schlesinger to military commissions, the other one was whether mandamus was appropriate because it was so clear that the existence of hostilities was a political question that it could just decide it.

And first, on the Councilman part, the D.C. Circuit held that Councilman did not -- that did apply, and Councilman abstention was appropriate exactly for the reason that Nashiri was going to be able to present his defense about the existence of hostilities at trial. That was the basis for

their Councilman holding, was that Mr. Nashiri had a -- an adequate place to present his argument about the existence of hostilities, and there's no connection question by this point in Nashiri, right? The connection decision -- part was decided by the CMCR; the existence part was decided by the D.C. Circuit. His -- that he was going to have a forum for his existence of hostilities defense, and that was going to be the trial.

The -- now, the second part of that -- that was the Councilman abstention part on habeas. The second remedy that al Nashiri sought was direct mandamus from the D.C. Circuit. And Nashiri's position in the D.C. Circuit was that existence of hostilities is a political question to be determined by contemporary political acts, and the government's position was, no, it's much broader than that, there's a totality of the circumstances approach.

And the D.C. Circuit described at 835 F.3d 136, that the government's argument is that, quote, The existence of hostilities is established by -- is established by looking not merely to the contemporary -- contemporaneous acts of the political branches, but to a totality of the circumstances.

The D.C. Circuit rejected Nashiri's position -- I -- I won't say that they fully embraced the government's position

either, but they at least rejected the political question argument of Nashiri on the basis that the end of hostilities question -- cases; that is, the protector and al Bihani principally, do not speak directly to when hostilities begin.

You will remember on my little graph that I tried to draw that I said that the end of hostilities may be a political question, but the D.C. Circuit has held that the beginning is not, and that's at 835 F.3d at 137, where they reject the argument of Nashiri, approved the argument of the government, that there is not a political question for when hostilities begin.

Now, let's move to the fourth question, which is about legislative fact. Now, I addressed this question to some extent and I won't repeat the things that I said earlier. But I do have a few other things that I want to say about judicial notice of legislative fact.

The first one is that M.C.R.E. 201(a) authorizes judicial notice of domestic and international law, and what that means is that, yes, there are elements that can be taken judicial notice of. Some facts relied by defendant say that the AUMF and some facts relied on by the prosecution say executive orders -- or they have a long list of things that -- in their brief -- are subject to judicial notice under

M.C.R.E. 201(a). No one has to call a witness to say that on such and such a date, Congress passed such and such law, or that on such and such a date, the President made a -- passed a law.

We may have to -- when we are talking about the speeches of President Bush, we may have to have some sort of a testimonial sponsor or something for those. But for law, for, like, legal issues, laws that are actually passed, which all you have to do is flip open the book and see what they say, then that's subject to judicial notice.

That's much different than legal conclusions and inferences from laws which either the government or the defense asks the members to -- to draw. That -- those inferences are much more like the type of legislative fact which is rejected in Lutes as something that should never be instructed to the members.

Now, it's not completely clear to me that M.C.R.E. 201 would allow judicial notice of legislative facts of that kind, certainly, but of any kind other than domestic law. But assuming that it does, there's no -- that hostilities -- the existence of hostilities is not that kind of legislative fact like chemistry or geography, which is instantly determinable.

In fact, hostilities is, as the government argues, a mixed question of law and fact -- sometimes it has argued fact, but it doesn't really matter -- but involves the application of law to those facts.

And I do want to -- yes, sir.

MJ [Col PARRELLA]: I'd just ask that we keep the sidebar discussion down, please.

LDC [MR. CONNELL]: So I do want to address the argument that the government made yesterday about, well, what if you, sir, were to instruct the jury, as a matter of adjudicative fact, that hostilities existed and let it go from there.

One point about that is the -- that would, in fact, have very little practical effect on the trial other than partially relieving the government of its burden of proof beyond a reasonable doubt. So let me break that into two parts.

With adjudicative facts -- and this is clear on -- in M.C.R.E. 201 -- they are subject to rebuttal. They are really a tool for shifting burden of proof that the party no longer has to -- on whose behalf judicial notice is taken no longer has to prove a certain fact.

Now, the government has said it wants to prove that fact anyway, right? It's given notice. It's calling Evan

Kohlmann; it's given notice of the al Qaeda plan; it's given notice of the Operation Infinite Reach. You know, the plan -- its way -- it has its theory of hostilities and it's going to prove it, and that's the way the trials are supposed to work.

The -- on the other hand, adjudicative facts are subject to rebuttal, that the -- that the -- if you take judicial notice of a fact that it's 88 degrees outside, and it really turns out to be 75 degrees outside, the defense is allowed to put on evidence that, no, actually it's not 88 degrees outside, it's 75 degrees outside.

And so in that situation, if you instruct on existence of hostilities as an adjudicated fact, the government still gets to put on all of its evidence of hostilities, and the defense still gets to put on all of its evidence of lack of hostilities.

The only thing that changes is that the military commission would be impermissibly reducing the burden of proof on the government because the burden of proof on the government requires that it prove every fact necessary to punishment beyond a reasonable doubt.

And I looked up -- I quoted Ring on that earlier, and I wanted to give you the citation, which is 536 U.S. 584, a 2002 case, Ring v. Arizona.

But what that means is that, like the cases where the Supreme Court has rejected instructional devices that reduce the burden on the government, for example, establishing a rebuttal presumption, judicial notice on this point would look an awful like a rebuttable presumption or creating presumptions like even ones that seem as innocuous as the defendant is presumed to intend the natural consequences of his or her acts. That's impermissible.

The -- because any device that reduces the burden of proof on the government shifts that burden in a way that is inconsistent with both the due process clause and the Military Commissions Act.

So the final point that I want to bring to you is that the first question that you asked about whether the existence of hostilities is -- as opposed to a connection or a nexus to hostilities is an element of the offense pretty much contains almost of the answers to all of your other questions within it. And we know the answer to that question because the CMCR held that the existence of hostilities is an element that must be proven.

And I cite -- I'm going to quote from Bahlul at 820 F. Supp. 2d at 1189, and in it the CMCR explained that the contextual element, quote, is central to determining whether

conduct is punishable by law of war tribunal. Consistent with treaty law, custom, and practice, the determination whether the hostilities in issue satisfied this element is objective in nature and generally relate to the intensity and duration of those hostilities. That is describing the existence of hostilities, not the connection of an individual defendant.

And what it makes clear is, that holding, like that core of the Bahlul decision, controls the answer to the first question, which cascades down to the rest of the questions.

And that's all I have, sir.

MJ [Col PARRELLA]: Okay. Thank you.

Ms. Bormann.

LDC [MS. BORMANN]: Thank you, Judge. I misspoke yesterday and I wanted to clarify. On this position, we adopt Mr. al Baluchi's argument. I had not been handling this particular issue, Mr. Perry had. He was not in court yesterday. I conferred with him yesterday. So we adopt the position of Mr. al Baluchi.

MJ [Col PARRELLA]: Okay. So just to clarify, you weren't disjoined, you were just adopting Mr. al Baluchi's position.

LDC [MS. BORMANN]: That's correct. I was confusing this with the personal jurisdiction issue.

MJ [Col PARRELLA]: I understand. Thank you.

Mr. Ruiz.

DC [MAJ WILKINSON]: Good afternoon, sir.

MJ [Col PARRELLA]: Good afternoon.

DC [MAJ WILKINSON]: Our position on these questions follows from two major sources of law, which are the U.S. Constitution itself and the law of war. Because in a military commission, in a law of war military commission, those two sources of law are supreme, and no statute can overrule either one. No case that's just interpreting a statute can overrule either one.

With respect to the Constitution, Article III says it plain and clear; the judicial power of the United States lies in the courts. It also says the trial of all crimes shall be by jury. There's no exception in there for aliens or something we're really angry about or any other such thing. And the Supreme Court's reaffirmed that in Ex parte Milligan, Hamdan v. Rumsfeld, no part of the judicial power of the U.S. lies in the military. There is an exception, of course, for these law of war military commissions and I think the constitutional principles are laid out very well in Ex parte Quirin, which of course we quote in the brief.

The first thing to note is it recognizes a constitutional limitation on military jurisdiction. The

question it's asking is whether those people could be constitutionally tried by a military commission, not just a matter of statute.

You'll notice in the introduction to the case that they also held a special term just to hear it, because they understood it implicated the separation of powers, which applies even in wartime, even in times of crisis.

You'll also notice that there was no deference to the government. The government's position was the President wants -- the Commander in Chief wants to try these enemy belligerents, it's wartime, let him do his job, courts stay out of it.

And the Supreme Court said, no, we're going to do our job, which is to make sure the separation of powers is honored, even in wartime.

They did conclude, and this is the fourth point out of Quirin -- they did end up concluding that that case fell inside the law of war so that it could be tried by a military commission; but they concluded so because they looked at law of war sources. They looked at treatises, even German treatises as well as French and English ones, to determine ultimately this falls in the law of war so it can be constitutionally tried in the military commission.

That, of course, is also why in cases like U.S. v. Hamdan if a commission convicts someone of a domestic crime such as material support to terrorism, you end up with the convictions vacated because you can't convict people of a non-war crime in a military commission.

And I will say that we disagreed very much with Mr. Trivett's idea that conspiracy is a war crime. It's, rather, a domestic law they've tried to import here in AE 490, which by the way has not been decided yet. We argued that at some length, as did Mr. al Baluchi.

And indeed, actually, Mr. Trivett made a point yesterday showing exactly the problem, or one of the problems, when you try to import a domestic law into a law of war commission because, as he pointed out, under the American law of conspiracy, you can be guilty of a conspiracy for an agreement you made long before any actual crime was committed, which means in this context, they want to use it to hold people liable for something -- or for agreements or things they're supposed to have done before any armed conflict may have begun.

But at least for the use in Bello, the rule under the law of war is there is no war crimes liability for anything you did before the armed conflict began. If there's a

mismatch between the two, that doesn't mean that a U.S. domestic law modifies the law of war; it means that any conspiracy they want to charge belongs in an Article III court, not a law of war commission.

But anyway, the main point is that in order to have jurisdiction constitutionally in a law of war military commission, everything you're dealing with has to lie inside the law of war, inside armed conflict.

So, that said, the law of war is, as we've shown, a type of international law and nothing else. Under The Paquete Habana, which is a case we cite in footnote 13, if you're dealing with customary international law, as you have to, there are two ways of getting at it.

One of those is to look at a bunch of state practice, see what governments were doing and saying over time and accepting as lawful, and we've given some examples of that in 502QQ in facts that were judicially noticed for purposes of 502 earlier on.

But you can also simply look to the opinions of experts, to people who have studied these things for years. And under The Paquete Habana, that is a perfectly good source for determining customary international law, which is why we attached to our brief the testimony of Professor Sean Watts,

an expert we called on the personal jurisdiction issue, as well as an affidavit that Mr. al Baluchi submitted in the 490 series, and an extract from a treatise that was from the year 2000 on these issues.

From Professor Watts' testimony, of course, we cite it much in the brief, and I hope that you will take the time to read it through because it lays out these very issues that we're talking about very nicely and in a pretty short space, but most importantly, he said, the principle of legality always applies in the law of war. Just as you can't change domestic laws retroactively under the ex post facto clause, you can't change the law of war retroactively under the principle of legality.

It's a type of international law, as I mentioned, and because of these things, the law of war that you have to apply is the law of war as it stood at the time of the alleged crimes on 9/11.

The threshold for armed conflict, when you reach the level of armed conflict, is something you have to look to the law of war for, and nothing else, and it's a matter of custom because the treaties, particularly Common Article 3 that covers noninternational armed conflicts, don't give you a precise test. That's why you have to look to customary

international law, which is something that he testified about.

Now, I'll say before going to the questions that even these principles might tell you something about the relevance of the discovery that you were looking at in 617 and 20, because, as Professor Watts noted on page 17,999 of his testimony, the International Committee for the Red Cross is a source of scholarship on the law of war, and one thing it does is analysis -- conflict classification analyses of what is or is not armed conflict, meaning the reports Mr. al Baluchi is after might be useful in determining customary international law in that era. Likewise, state actions, such as taking or not taking law of war detainees, might be useful to him in establishing that same thing. So much for that.

With respect to your first question about whether the panel has to determine the existence of hostilities, I don't need to say much because I noticed everybody who briefed it agreed that, yes, they do. That's a statutory requirement as found in the Nashiri case. And whether or not Congress had to make it a requirement for the panel, they did. That's how Nashiri read it, and that's all I have to say about that.

The next question was about whether you had to use the standard from the footnote in the vacated case U.S. v. Hamdan, and the answer to that is absolutely not.

Firstly, I'll point out that it isn't binding, as you were discussing with -- well, you've discussed several times over the last couple of days.

It's -- at the worst, it's pure dicta, but at best it's what Matter of Stegall referred to as a point of law that's merely assumed and not discussed. They cite to a Supreme Court case for that, I believe, and the point is if an appellate court just mentions it, but they don't say why, and there's no -- no sign that it was really litigated, then it hasn't gone through the kind of process that really generates a binding precedent. I mean, that goes back to the way our adversarial system is supposed to work.

As you know, it doesn't really rely on assuming that judges are wise and everything a judge pronounces will be right. It relies on the process, the process sometimes called adversarial testing, where you have two parties with a strong interest in litigating something. They brief it as best they can. A trial judge makes a decision. Someone thinks it's worth appealing, but they might have space limitations on appeal, they litigate it fully, and those judges then have all the best that the really motivated parties can do before they issue a pronouncement that is worth calling a precedent and that's going to be followed.

Now, Mr. Trivett told us that in the Hamdan case itself, I mean, the parties submitted briefs, the judge decided it over a weekend; no sign of any litigation after that. I looked at the record of trial myself. I didn't notice anybody objecting to or litigating further about whether that particular standard was wrong. And then on appeal, there's no discussion, no sign they appealed it, they just mentioned it.

MJ [Col PARRELLA]: So based on the argument of your predecessors, it appears, though, it may be in part the intent was to adopt some formulation of the Tadic standard, although it may not have been, depending on your perspective, executed well.

So I've read your brief. I understand your position that it's not the one the court should follow. But I want to know specifically, assuming that it is an attempt to put a Tadic standard in front of the members -- I just want to clarify, what exactly from your perspective is wrong? I think I read from your brief that there's two aspects. One would be the catchall, which is a standard that creates no standard at all ----

DC [MAJ WILKINSON]: And that's already been discussed, so I don't need to go over it again.

MJ [Col PARRELLA]: Okay. And I believe -- is the other one the aspect of the public statements of leaders associated?

DC [MAJ WILKINSON]: That's part of it, but there's something more overarching ----

MJ [Col PARRELLA]: Okay.

DC [MAJ WILKINSON]: ---- that I think is really important to point out. And that is, it doesn't tell the members, as a real element would, here is something the government has to prove; here is something that if you don't find it, he's not guilty.

It just says you should consider -- you should think about this, and if you consider that carefully and the art of giving orders, that even without that catchall provision, that really makes it a catchall. Imagine, say, you're in a premeditated murder prosecution, and instead of telling the members, you know, if the government can't prove he had the intent to kill, you can't convict him; you said, in deciding whether to convict him, you should think about whether he had the intent to kill. The unspoken last part of the sentence is, but you can still convict him if you want to, if you just don't like him.

And especially in a case like this, where there's been so much notoriety about it, leaving a panel that kind of

discretion to just see what they should think about, but then can do what they please, is nowhere near specific enough.

MJ [Col PARRELLA]: So using Mr. Connell's example or his dichotomy, you're advocating for the checklist vice the totality of circumstances.

DC [MAJ WILKINSON]: Yes, sir.

MJ [Col PARRELLA]: Okay.

DC [MAJ WILKINSON]: And it should be framed in the form of, these are things that the government has to prove, especially because, unlike the original tribunal -- and I think Mr. Connell made this point -- which was an all-judge tribunal where they're simultaneously determining the law and then deciding what applies to the facts, we have a bifurcated system, which is supposed to be the judge determining the law and laying it down to the panel, saying, panel, you don't determine law; you follow this law that I'm giving you, and this is what they must prove.

And here also I disagree very much with Mr. Trivett's idea that you should consider that a military panel has a unique ability to determine questions under the law of war. This could be someone who heard a lecture from his brigade judge advocate ten years earlier, or heard something from a sergeant five years ago or, for that matter, read things in

editorials or blog comments. Nothing in that background says that they are now entitled to make legal findings under the law of war. Even judge advocates, if they don't specialize in the area, cannot be guaranteed to have a working knowledge of conflict classification.

And so it's important that when the instructions are done, when they're finally done -- of course, we're not litigating the actual instructions today -- but they should be in the form of orders.

So, for example, you might have them say, you cannot convict unless the government proves the violence is not sporadic. You might go further and say, correctly, that if you have violence on one day, and then weeks or months passing until the next act of violence, then it is sporadic and you can't find armed conflict.

Whatever words and terms you may use, if you were going to follow the law of war as it stood on 9/11, as shown by all three of our attachments, in some form the instruction would have to say you cannot convict under these crimes unless the government proves the 9/11 attacks were not terrorism, which in point of fact is impossible, because they were, but that was a point we've made in other motions and we'll see if it comes up again in the future.

Let's see. This is especially important, as I think I mentioned in the brief, when you're dealing with capital litigation. Capital litigation does require under the Constitution -- Woodson v. North Carolina, adopted for the military in U.S. v. Curtis -- an extra degree of certainty before you impose that penalty, and that should include an extra degree of certainty that the law being applied is the correct one, and that the panel is using the correct standards, and is not simply being invited to do what they feel like doing. In fact, in a way, that converts -- that kind of should standard converts the element to a box-check, and the box is, do you want to be able to convict Khalid Shaikh Mohammad and these other men of the 9/11 attacks? Check the box for yes, and you're done. Not a good idea.

And I don't think I need to say other things regarding that particular Hamdan footnote instruction. I think that you have the strength of our case against it.

So your next question was, could you determine hostilities possibly as a matter of law, at least that's what I have heard you saying earlier today, then let the panel decide a nexus.

I should note that the existence of hostilities, as others have mentioned, is a mixed question of law and fact.

In fact, we argued that point in footnote 1 of AE 502, pointing particularly to the D.C. District case of Ali Jaber v. The United States, which has since been affirmed by the D.C. Circuit, although they didn't reach that particular point. But showing that when you had a question of customary international law, that -- and whether a given action violated it or fell inside it, that the standard itself was law, but whether these particular facts fell inside it, and by analogy is armed conflict, then that's the -- that's the factual part.

Everyone agrees that that is not the right standard, or that's how I read the briefs, in any case. But as you'll notice in our brief, we do go a little bit further, because we do say that under the Constitution, leaving the statute aside, that you do have a duty, and you should at some point make public findings of a kind that can be reviewed de novo on the question of hostilities as part of your inherent duty to look into your own jurisdiction.

MJ [Col PARRELLA]: Yeah, I recall reading that in your hybrid approach, and I guess my question for you is: Is that satisfied by the finding that I have already made in the 502 series for personal jurisdiction and finding that the existence of hostilities for personal jurisdiction?

DC [MAJ WILKINSON]: Well, that particular finding is the

one we're -- is part of what we're litigating in 625 as a bill of attainder violation on the theory of Congress makes you partly guilty of something like that, and takes away the rights you'd have in a civilian court by a direct finding aimed at you. You've got that violation, but this also touches the question of subject matter jurisdiction, which we litigated in 488, and we notice we litigated under both statutory and constitutional grounds. Judge Pohl's ruling on that addressed the statutory ones, and frankly, kind of blew past the constitutional ones. Whether we bring that up again remains to be seen.

But that is because we don't yet have any publicly readable, reviewable-by-a-court analysis in some context showing this is why, based on the facts of this case and the applicable law, there's supposed to be hostilities. Saying Congress did it for us doesn't satisfy the Constitution as we understand it and as we argued in the brief.

MJ [Col PARRELLA]: Okay. So what you're saying is that it should have been -- even though the commission has clearly made that decision, you're saying that that decision was insufficient because it wasn't the product of an evidentiary hearing, but rather a reliance upon political question non-justiciability?

DC [MAJ WILKINSON]: Well, in the particular case of 488, he relied just on the interpretation of the statute as read by the Nashiri court. In that case, we hadn't asked for an evidentiary hearing per se, although that's another problem with 502; that having had the evidentiary hearing, he then said, and now I'm going to say thanks for the evidence, but Congress decided it for you.

But it's true in both cases it's inadequate because neither one really looks at the constitutional requirement that should be examined by the court or by the commission, and should be laid out in a finding, properly litigated under the right standards, that can be reviewed de novo by a Superior Court.

Because in the cases such as Ex parte Quirin or Hamdan v. Rumsfeld and the rest, they always looked de novo. It was never in terms of deference to any other branch.

Which leads me right to the next question, actually.

MJ [Col PARRELLA]: Okay.

DC [MAJ WILKINSON]: Because you asked the question of whether hostilities is nonjusticiable, and the answer is not in this context; not in the context of criminal jurisdiction, especially not in the context of applying the death penalty to somebody without a trial by jury.

Now, the government pointed to the case of Baker v. Carr, which I saw Mr. Connell also discussed a little bit. And Baker v. Carr does have, you know, a long section on what is nonjusticiable, and it has a section on hostilities. But if you read that section on hostilities, it doesn't say hostilities are always nonjusticiable no matter what the context. In fact, the way they put it is, deference rests on reason, not habit. And then they go on to say, you know, whether we give deference depends on what it is, and the examples they give are out of what the Supreme Court elsewhere called the ability of the political branches to regulate society in response to a -- in response to a crisis. So they point to you might have a rent control program, for example, that says until the end of the current hostilities, you shall not raise rents in this city because we want to -- we want troops to be able to get apartments or whatever.

Something like that, you might have a need for uniformity. You know, if you had, say, a program to compensate people for war damage out of the public treasury, it might be good to have just one answer across the board, when did the war end? In cases like that, it makes sense to defer to the political branches to have, you know, something consistent across the board.

This isn't that kind of issue at all. Oh, I should say first that one issue where there is a lot of deference, although it's not an outright political question, is in security detention and things related to it. Those cases trace back to Ludecke v. Watkins saying, in this area, you know, yes, we will give a lot of deference to political branches, when does the war end, have we got one, whatever. Although they will still, as you have seen in some of the later Ludecke cases in the D.C. Circuit -- you know, they still let people try to argue questions about their status. So it's not perfect deference, but it's a lot of deference.

But in Lee v. Madigan, the Supreme Court was very clear on this point, when it comes to the ability of the military to try a capital case, Ludecke v. Watkins doesn't apply. Do not use Ludecke v. Watkins for military criminal jurisdiction.

Do not use Ludecke v. Watkins to justify giving the death penalty to somebody without a trial by jury. That's the point they were very clear on. We cited other cases also showing that when it comes to this kind of area, I mean, this goes back to Ex parte Milligan itself, that when it's using the military for that purpose, we do not need uniformity. When they talk about inconsistent verdicts in criminal cases

where everyone is supposed to get individual justice, everyone is supposed to be able to put his own case as best he can, it would be terrible to say, well, yes, but if that's the case, it might be inconsistent.

I mean, Mr. al Bahlul, as you know, put on no defense at all at his own trial, and unsurprisingly, the commission ended up finding hostilities enough to convict him.

It would be terrible to say that anyone else accused of the same conflict, we have to try to make sure we get the same outcome to avoid it being inconsistent. And it doesn't work that way. Everyone has to be able to defend himself to the best of his ability, and simply saying that some other branch of government decided that for you is flat wrong. It would be flat wrong on any element of a crime. It's especially bad on doing it on an issue that affects the separation of powers, and says that something that would normally go and usually did go to an Article III court is instead to be tried in front of a military.

And that's what I had to say about that question.

Oh, I did want to say one other thing, because this is another -- a reason this comes up, and it is a very hard issue to argue is precisely because this is a very notorious case and it draws a lot of anger, and you can see that in some

of the kinds of litigation that the government does. They will sometimes bring up again how large is the casualty bill, and, you know, how were these casualties inflicted.

Ex parte Milligan gave very important principles on that point. They were facing a very similar temptation at the end of the Civil War where the casualty bill was not 3,000, it was 600,000, and they had no sympathy with the southern cause. They described it as "the late wicked rebellion."

But they said, I'm quoting partly -- I mean, the principle was when people are angry about something, that's a time not to defer to the military. That's the time to watch more carefully to make sure the separation of powers isn't being violated.

They said when peace prevails, there is no difficulty preserving the safeguards of liberty; but if the passions of men are aroused, these safeguards need and should receive the watchful care of those entrusted with the guardianship of the Constitution and laws, which right now is you. And if there is a trial, if we get to one, the panel will be entrusted with that as well.

It's the opposite of deference, and it's the opposite of non-justiciability. It's saying not only don't defer, but watch them very carefully to make sure they're not stepping

too far.

The last question, then, is this business of whether hostilities could be noticed as a legislative fact. And the answer to that follows with what I just said. It can't do that. I think everybody cited In re Winship to the point that the government cannot ever be relieved of the burden of proving every element of a crime. And of course, we also have, in military practice, the rule -- and it applies under Common Article 3, and I think it's even in the statute -- that a big part of the judge's duty is to make sure nobody improperly influences the decision of the panel.

So you could not, in a murder case, say, the government has to prove that this man had the intent to kill, oh, and by the way, your brigade commander thinks he does, but you don't have to agree with him if you don't want to. Of course that wouldn't be allowed.

If you say, well, two Presidents and two Congresses think it was armed conflict, but you don't have to agree with them, you are doing very much the same thing. It's back to the box-check. Do you want to be able to convict these men? Check the box. And by the way, if you check the box yes, you can sleep through that part of the defense's case because your discretion is there. That's all the more reason not to give

them that.

So when you apply the Constitution and the law of war to these questions, the answers come out pretty clearly, and it does mean the defense is entitled to a certain amount of discovery, at least to meet things under the Tadic test. And the instructions, when they come, should be -- should clearly distinguish between the commission's duty to determine the law and limiting the panel, you know, with less discretion, to determining the facts under the right standard.

And in particular, it would force the government to prove that the 9/11 attacks were not terrorism, which they cannot do, and thereby show that this case is hopeless.

That's all I have, sir.

MJ [Col PARRELLA]: All right. Thank you, Major Wilkinson.

[Pause.]

MJ [Col PARRELLA]: Okay. At this juncture, what I would propose -- well, before I go there, is there any update, Mr. Harrington, with respect to your client's situation?

LDC [MR. HARRINGTON]: Yes, Judge. It looks like we're working out a meeting for tomorrow afternoon at 1:00, so ----

MJ [Col PARRELLA]: Okay. I'd just ask that you keep the commission informed. If you foresee this being something that

we will need to take up on Thursday, what I'm inclined to do is perhaps do an 802 conference tomorrow evening, but if you'd just let the commission know if you foresee that need.

LDC [MR. HARRINGTON]: Right. Will do. Thank you.

MJ [Col PARRELLA]: Okay. Other than that, what I'm inclined to do is we'll take up the 523/330, which I think is the only outstanding EE series, we'll do both the open and closed portion of that on Thursday.

Anything else further we need to take up at this juncture?

Mr. Connell?

LDC [MR. CONNELL]: There's nothing else, sir, but we're perfectly ready to go forward on 523, if you want to do the open today.

MJ [Col PARRELLA]: I think at this point in time, I -- what I would say is I would like to keep open the possibility of doing an open session anyway on Thursday, and I think, you know, it's clearly easy. We'll get that completed in one day, so I think it makes sense to keep that together. That way the commission can get out its closure orders before we commence.

So we'll start at 9:00 a.m. on Thursday. Okay. Commission is in recess.

[The R.M.C. 803 session recessed at 1455, 30 April 2019.]