[The R.M.C. 803 session was called to order at 1006, 28 January 2026.]

MJ [Lt Col BRAUN]: This hearing is called to order. Mr. Nurjaman is present.

Trial Counsel, it appears the same members that were present for yesterday's session are again present today. Is that accurate?

TC [Lt Col GOEWERT]: Yes, Your Honor. And for today's session the government will be utilizing the means authorized in AE 0012.023 (TJ).

MJ [Lt Col BRAUN]: Are we broadcasting via closed-circuit television to the United States in compliance with Appellate Exhibit 0007.006?

TC [Lt Col GOEWERT]: Yes, Your Honor. I apologize for not saying that earlier. We are broadcasting to the Pentagon and Fort Meade, and we've confirmed that those sites were up and available to the public should we wish to see that.

I'll also note today that we have a full gallery -- a full galley -- gallery of people who are observing this proceeding as well.

MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

Defense Counsel, it appears the entire team, the same people announced yesterday on the record, are present for the defense. Is that accurate?

LDC [MR. FANNIFF]: That is accurate, Your Honor.

MJ [Lt Col BRAUN]: Okay.

So, the commission granted oral argument in AE 0129, that series of filings. A portion of that argument was taken in a closed session. However, counsel had indicated that they desired to present some argument, or were able to present some argument in an open session. I'm going to take that up first this morning.

Defense Counsel, as you bear burden, I plan to open and close with you. Are you ready to proceed?

DDC [Capt HOPKINS]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Okay. Please do.

DDC [Capt HOPKINS]: Good morning, Your Honor.

MJ [Lt Col BRAUN]: Good morning.

DDC [Capt HOPKINS]: Yesterday at the end of my argument in closed session, I concluded by discussing the potential for the line of investigation that is the subject of this motion to unravel portions of the government's case. As that argument recognizes, we don't know exactly what a proper investigation of this matter will reveal, but that is always true at the start of any investigative effort.

Yet, the government, in its response to this motion, characterizes the defense request at issue here as being grounded in a, quote, speculative need to investigate, end quote.

That characterization strongly suggests that the government does not appreciate or understand the defense function. And so I want -- that's why I would like to take this opportunity in open session to emphasize that pursuing lines of investigation that may lead to exculpatory information is, in all instances, meaningfully helpful and material to defense preparation.

Whenever a line of investigation appears that reasonably may help to impeach government witnesses, it is not merely a good idea for the defense to pursue it, it is the defense's ethical obligation to do so. And you don't have to take my word for that. Standard 4-4.1(c) of the American Bar Association's Criminal Justice Standards for the Defense Function states, in relevant part, quote: Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, end quote.

Whatever the results of the defense's investigation into such matters the simple fact of running the issue to ground to the greatest extent possible is helpful and, as the ABA Standards confirm, necessary for proper defense preparation.

Sometimes defense investigation confirms certain facts alleged by the government. If that's the result, then that is also helpful because it informs the defense's theory of the case and our client's decision about how to plead to certain charges.

Other times running an issue to ground yields information that the defense can use to demonstrate the unreliability of government witness testimony or other potentially case dispositive exculpatory information.

Answering important and unanswered questions, though, is always helpful to the defense, whatever that answer turns out to be. This is reflected in an excellent summary of the defense function provided by Lieutenant Colonel Michael Schrama, the military judge in the adjacent commission of United States v. Mohammad, et al., when he was asked last month during voir dire about his prior duties as a defense counsel, part of his answer was, quote: My role as a defense counsel in preparing a case for trial or other resolution was to conduct an investigation that went above and beyond the government's criminal investigation. My first duty was to uncover the facts for myself. I never assumed their file told the full story, end quote.

This commission recognized the same basic principle in its ruling at AE 0090.004 when it stated that: Information is material and therefore discoverable when it impacts decisions that might affect how to pursue lines of investigation.

In the present motion we ask only for the commission to apply that same standard here, and the same standard does apply.

Yesterday the government argued that whenever they assert the national security privilege over a piece of information during

the 505 discovery process, then a balancing test should apply, they argued, to decide whether that information is discoverable. But the government also acknowledged that the D.C. Circuit has never applied such a balancing test. They also didn't cite any law from CAAF or any other court that might be binding or highly persuasive upon this commission to support the notion of such a balancing test. And, in fact, as the government acknowledges in its filing at AE 0116.002, the D.C. Circuit said in Yunis, a case that is frequently cited by this commission, that the analogous rules under CIPA, quote: Create no new right or limits on discovery of a specified area of classified information, end quote.

So the government's proposed balancing test would operate as a new limit on discovery, which is exactly what Yunis says the 505 substitution rules do not do.

So all that's left, in light of the plain materiality of the requested information, is the government's claim that it should nonetheless be withheld pursuant to M.C.R.E. 505(f)(3). The government claimed yesterday that this argument is consistent with its submission to the commission in AE 0116.002 regarding the effect of that rule.

Little could be further from the truth. And to demonstrate that, I'm just going to read some of the government's statements from their response in that motion series.

The government said, quote: The defense can request or obtain discovery materials based upon the defense's review of summaries produced under M.C.R.E. 505(f)(2) and the commission can reconsider its prior M.C.R.E. 505(f)(2) rulings sua sponte or in response to a defense motion to compel discovery if appropriate.

This is not just, you know, idle statements from the government. The government goes on to say that: The relief requested by the defense in that motion series is unnecessary because no rule, regulation, statute, or court precedent prevents the defense from receiving what it requests, the relief it requests in that motion.

The government goes on to more specifically address the exact scenario that we face here. The government says: M.C.R.E. 505(f)(3) does not bar the defense from requesting additional discovery, nor has the government argued otherwise. And I suppose at the time they filed this, that was true. And yesterday in closed session, they took a very different position.

Continuing the government's quote: Not only is the defense not barred from seeking additional discovery, the rules specifically allow for it. The defense is free to submit a discovery request in accordance with R.M.C. 701. Just like past discovery requests, the government can deny some or all of those requests. But if denied, the defense may file a motion to compel and then the commission

determines whether the defense has met its burden for the government to produce the requested information. As such, the defense unnecessarily seeks judicial intervention to a nonexistent problem.

Although -- continuing -- additional quote from the government: Although M.C.R.E. 505(f)(3) bars the accused from seeking reconsideration of a ruling under M.C.R.E. 505(f)(2), the commission can nevertheless sua sponte reconsider past rulings on substitutions and deletions. Indeed, the U.S. Court of Military Commissions Review in al Iraqi v. United States expressly held that just because 505(f)(3) prevents an accused from seeking reconsideration of certain rulings and orders on classified information, it does not necessarily preclude the military judge from reconsidering those decisions.

The government says, though, that the defense burden in requesting information pursuant to R.M.C. 701(c) is the usual and logical start to the discovery process. So that's where we are.

It's never my preference, Your Honor, to quote extensively from government filings but when the government is saying one thing publicly, putting information in open filings that suggest that it intends to conduct discovery fairly and in accordance with ordinary procedures in this case, and then in a closed session taking entirely contradictory positions, it's necessary simply to air it out so that the commission can have full and open, you know, briefing in

consideration of these issues.

The last thing I'd like to say, Your Honor, is that I do think there's a reason for the government's about-face on these issues, which is that in the government's capacity as sort of ordinary prosecutors, I believe that they understand the rules of materiality in the discovery process.

However, in this case, government counsel faced competing interests. And their obligation, it appears, very often is not only to the court and to the fairness of this process and to ensure that Mr. Nurjaman receives material information that he requests, but they have other voices in their ears.

So I would like to draw the commission's attention now to a filing -- a letter that's already in the record. This is Attachment C to the defense's motion at AE 0120.001. This is a 2019 letter from the Office of the Director of National Intelligence to the chief prosecutor for military commissions concerning this case.

A portion of that letter reads: As you and the prosecution team are aware, the intelligence community continues to have serious national security concerns with the use and potential disclosure of classified information in these cases. Accordingly, we expect that you will continue to work closely with the intelligence community to assess the risks to national security of any information that may be used in this case and to formulate prosecution strategies that will

best protect intelligence community equities.

It continues slightly later: Prosecutors have indicated that they can adequately protect the national security information involved in the prosecution of these detainees by making full use of Military Commission Rule of Evidence 505 and, if necessary, closure of the courtroom. We appreciate their commitment in this regard.

So in other words, Your Honor, what we have here is a situation where the government has competing interests, and we see that play out in how they address certain discovery matters. But what Yunis says is that the discovery rules are the discovery rules. And if something is helpful and the defense requests it, then the defense is entitled to receive it.

We are facing a roadblock for a necessary investigative matter, and that's what this motion concerns.

The government has, in its filing in the AE 0116 series, provided the roadmap for us to follow to overcome that roadblock. That is exactly what we're doing. The government has told you exactly what your authorities are to order discovery of that requested information.

And then when we get to a classified filing in a closed session, all of a sudden the narrative changes. And I believe we know why, Your Honor, because there are other voices in their ear. But those voices cannot be in your ear, Your Honor. Your obligation

is to ensure that discovery is conducted fairly in this case.

When the government asserts a national security privilege over information that is relevant and material -- and I should just say "material," Your Honor, because we frequently throw out the term "relevant" even though it does not appear in Rule for Military Commission 701(c). When it's material to defense preparation, then we are entitled to receive that information.

When the government asserts a national security privilege over that material information, that is supposed to come with consequences for the conduct of this case. We are not there yet.

What's required now is simply for Your Honor to apply normal discovery rules to this very normal discovery request that is only made abnormal by the, quote/unquote, intelligence community equities at play.

I respectfully submit that if this discovery request were about anything other than something that the intelligence community cared about, it would be the most obvious discovery request the government has received. We would receive the information and Your Honor would grant any motion to compel. It is only those equities that are throwing off this process. That is not what Yunis provides for. Thank you.

MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

Trial Counsel, response?

ATC [Maj MILTON]: Your Honor, if I may just have one moment?

MJ [Lt Col BRAUN]: You may have a moment.

[Counsel conferred.]

ATC [Maj MILTON]: Good morning, Your Honor.

MJ [Lt Col BRAUN]: Good morning.

ATC [Maj MILTON]: Your Honor, the commission's obligation in this case is to follow, per the statute, discovery of classified information in accordance with standards generally applicable to the discovery of or access to classified information in federal criminal cases. We're not asking you to treat this as ordinary discovery that you would have in an unclassified case in a normal courts-martial. That's not the standard here.

And the standard's not even that unique to the military courts-martial. The standard is what the federal courts do with classified information.

Classified discovery -- the defense posits that the classified discovery is being treated differently or special here in this commissions, but it's not just classified discovery. There is a whole host of evidentiary and discovery limitations that the defense may receive due to other privileges, such as spousal privilege, doctor/patient privilege, psycho privilege. Even the rape shield laws would reduce the amount of discovery or evidence that the defense could put on in their case.

Obviously, in all these privileges, the defense would like to have those avenues of discovery available to them, but there is a societal and judicial need for limitations on those avenues of investigations. Congress in this case has included classified information as one of those avenues that may place limitations on ordinary discovery that would not otherwise be subject to these privileges.

Your Honor, this -- I would like to talk to you about two sort of issues in the motions for today. One is which the defense alluded to earlier: What is necessary for effective cross-examination during testimony?

The information has been discovered to defense that provides them with what they need to probe into these issues related to bias. Defense argued that it's not enough to probe it with information, they should have a right to surprise the witness with additional information the witness may not expect them to have.

And, again, the defense talks about how we didn't cite to any CAAF cases. That's because CAAF is not appropriate here. We should be looking at federal cases. And while the D.C. Circuit or the Supreme Court obviously is binding on this commission, other federal district courts would be persuasive.

In Delaware v. Fensterer ----

MJ [Lt Col BRAUN]: But, Counsel ----

ATC [Maj MILTON]: Yes, sir.

MJ [Lt Col BRAUN]: ---- generally speaking, opinions regarding matters of military law authored by CAAF are incredibly helpful to the interpretation of the rules and procedures provided for in the Manual for Military Commissions, correct?

ATC [Maj MILTON]: They would be normally but for the statute specifically saying that this issue should be guided by federal criminal law standards for classified information. Therefore, CAAF ----

MJ [Lt Col BRAUN]: Isn't that language also in the Manual for Courts-Martial, in the same rule?

ATC [Maj MILTON]: I'm sorry, Your Honor. I don't have the Manual for Courts-Martial in front of me. And if there were CAAF cases dealing with 505 discoverability, then obviously the defense could present those, dealing with those in a different manner. However, with the guidance that we have from federal court on how to treat classified information, the government's position is that should be a slightly higher standard for persuasibility. Because, again, it's not binding any more than CAAF is binding on this commission. But it is something that when you're weighing factors about what is more persuasive, that should be in your consideration due to Congress' intent.

MJ [Lt Col BRAUN]: Okay.

ATC [Maj MILTON]: So in the Supreme Court case Delaware v. Fensterer 474 U.S. 15 at 20, the confrontation clause guarantees an opportunity for effective cross-examination. Not cross-examination that's effective in whatever way and to whatever extent the defense might wish.

Also a D.C. Circuit case from 1996, United States v. Graham, 83 F.3d 1466. Further analysis concerning the cumulative nature of the impeachment information, and cites to the limitations in Delaware v. Fensterer.

United States v. Mohamed, 2005, a Southern District of California opinion, 410 F. Supp. 2d 913, discusses discovery related to classified information of potential impeachment of a law enforcement officer, and goes on to state: Moreover, disclosure would compromise national and international intelligence sources without adding any appreciable benefit to the determination of truth, veracity or bias of this case at 918.

At this stage, the commission does not have everything the commission needs to make this determination concerning the appreciable benefit to the defense. Reconsideration is not appropriate.

The second issue is that this issue is not ripe for reassessment of materiality by the commission. The commission had all currently known information when it determined the information

could be substituted under M.C.R. 505(f) and R.M.C. 701(f)(4).

R.M.C. 701(f)(4) is a balancing test concerning substitutions of classified information. The rule goes on to say whether the evidence is cumulative of or is a distinct from other evidence available to the defense, relevancy and materiality of the evidence to the appropriation of the defense and the significance of the evidence in comparison with other evidence to which the defense has access.

The defense has provided no new information to change this analysis. The commission should not reconsider the materiality of the issue until you receive additional facts.

Defense argued that they need disclosure of this information now because there's no guarantee as to what the witness would say. What the witness says is the new information that will allow the commission to assess whether the information is material.

Valdez v. U.S., a D.C. Circuit case from 2024, 320 A.3d 339, exclusion of extrinsic evidence of a witness' bias. A witness testified to hearing incriminating statements from the defendant. The defense's theory was that the witness had fabricated his evidence to implicate the defendant because he was trying to take attention away from his other crimes he was accused of and curry favor from the government.

The defense was permitted to ask questions about these

crimes but was not allowed to bring intrinsic evidence from the alleged victim of those crimes.

The court held that this intrinsic evidence of the other witness would only be relevant and admissible when the witness denied the allegations and thwarted defense's attempt to cross-examine him.

The court was not persuaded that additional facts would give a significantly different impression of appellant's credibility at Valdez at 370.

Comparing that to this case, the judgment materiality of the defense's requested information, the commission should not make a determination on this issue until the witness has been given the opportunity to testify. If the witness provides information the defense seeks during cross-examination, then the information the defense seeks would become cumulative or irrelevant. If the witness denies the information, then the commission can determine whether information is material for extrinsic evidence or of bias or impeachment.

The commission will have the opportunity to properly assess materiality at that time when the necessary facts are developed.

The commission made the correct rulings in its meticulous review of this information, and on the discovery provided to the defense. If the commission is reconsidering its ruling, it should not do so at this time. The same information that was present when

the commission made its ruling is present today. The defense has what it needs to probe into this issue with the witness.

If there is a time to reconsider the commission's ruling, it is not today. It is only after additional information allows the commission to determine the materiality and cumulativeness of the information the defense is seeking. Until that time, this motion is not ripe.

The commission cannot decide this issue until it has the full picture. And then it can decide if any additional disclosure, substitution or other remedies are required. This issue simply is not ripe.

Thank you, Your Honor.

MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

Defense Counsel?

DDC [Capt HOPKINS]: What we just saw, Your Honor, was the government largely now resting its new submission to the commission on this issue on a ripeness argument that the government had the opportunity to make in its written response and did not do so; that the government had the opportunity to make yesterday in closed session and did not do so. And the defense response to that ripeness argument is going to be highly fact specific and require delving into classified information.

So our ability to do that is really, you know, contingent on

the commission's, you know, willingness to receive now, you know, additional response in a classified setting. I would respectfully submit, Your Honor, that the government forfeited its opportunity to make a ripeness argument on this matter.

We're not asking to go into closed session to make that fact-specific response. We're not asking for an additional opportunity to make that fact-specific response. If Your Honor is inclined to rule on a ripeness ground, then we would respectfully request that you first provide us an opportunity in a closed session of the court to make a fact-specific response to a fact-specific argument, or that you request additional written briefing on that subject, because the government had two opportunities.

And only after argument yesterday in closed session where the defense advanced its fact-specific need for this information, really in the same way that we did, you know, in written briefing but with, you know, the opportunity to, you know, potentially answer questions and respond to statements of the government, things of that matter, the type of airing out that's appropriate for oral argument. Only after that and the opportunity to come back in open session, which the defense, you know, used to discuss legal principles, did the government come back with a submission that requires consideration of the facts specific to this motion and timing pieces that can't be adequately discussed in an open session.

So we have been putted in that position by the government. You've been put in that position by the government. I respectfully submit that that argument was forfeited.

To the extent that I can address it here, I would simply say that Your Honor is, you know, aware of the timing elements that the government is referring to. The defense intends to do its job correctly at every stage of this case. The defense intends to investigate this case now. The defense certainly does not intend to wait to conduct investigations until government witnesses have testified.

The suggestion that we should do so on the basis of what sounded to me -- you know, again, this was not provided in written briefing, it was not provided yesterday -- but what sounded to me like a single, highly fact-specific district court decision from, you know, out of any circuit that had to do with this commission's jurisdiction, is inappropriate.

Investigation cannot wait until trial, particularly given, you know, the fact that the investigative effort that we're discussing here is unlikely to be as straightforward as a single phone call.

The last thing I would leave Your Honor with is that the, quote/unquote, balancing test, you know, referred to by the government in 701(f)(4) pertains to the commission's consideration of

whether alternatives to classified information are practicable for purposes of discovery, not the basic discoverability standard.

And, you know, Your Honor, I've -- the CAAF/D.C. Circuit discussion, you know, I've dropped footnotes, you know, in various motions and alluded in various defense discovery replies and things to the sort of, you know, tension that exists at all stages of this case between -- to what extent is kind of the governing discovery standard here, Stellato from CAAF versus Yunis from the D.C. Circuit. And that may well be an issue with certain types of discovery requests that the commission is going to have to work through at some point so that those issues are properly preserved for the parties, right? This is not one of those cases.

That's why, standing up here at oral argument, I'm more than comfortable asking Your Honor to simply go read Yunis and apply its classified standard here.

As Your Honor alluded to, you know, Yunis is -- or as -- was in the background of Your Honor's, you know, conversation with the government. Yunis does not interpret the exact language of R.M.C. 701, and the cases that do interpret the exact language of R.M.C. 701, or rules that are extremely close to it come from CAAF. We believe those are extremely persuasive, if not binding, on this commission. We believe they're the best source for the commission to look to for a lot of things.

For these purposes, Your Honor, this discovery request meets and exceeds the discoverability standard described in Yunis. It's as simple as that.

The government appears this morning to have backed away really from its argument that it doesn't and appears instead to have shifted to this ripeness argument that, again, if Your Honor is inclined to rule on that basis, I do ask for additional opportunity to respond. But more importantly, the government also seems to have backed away from its claim regarding its submission in AE 0116.002.

So to wrap up, I would simply ask Your Honor to again read their submission in AE 0116.002, to read Yunis and apply those very basic standards to this very simply request and discover this plainly discoverable material. Thank you.

MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

ATC [Maj MILTON]: Your Honor, may I briefly address not the argument but the defense's statement that the government's backed away from anything that was said in closed argument? Clearly that was in closed session. The government did not revoke anything or backed away from anything that was said in the closed session.

MJ [Lt Col BRAUN]: So, Counsel, the court understands and appreciates that argument of counsel is designed to assist the court in orienting the court -- the commission to counsel's position, their determination on controlling law, their interpretation of that law,

and the application of facts to that law. I don't believe any additional response is necessary. The court has the filings of the parties and the assistance of argument of counsel to ultimately rule on this matter. So I'm not inclined to entertain any additional argument at this time.

ATC [Maj MILTON]: Yes, sir. The government has no intent to provide additional argument, just the stating, since we are in open session, that we are not backing away from anything that we had said in the closed yesterday, contrary to the defense's position.

MJ [Lt Col BRAUN]: Okay. Understood, Trial Counsel.

With that, then, the commission would like to pivot to AE 0123, which the commission granted oral argument on. This is a defense motion for appropriate relief to ensure right to a randomly selected panel.

Defense, in your filing, you indicate that you bear burden as the movant and that the applicable burden is a preponderance of the evidence.

Is that still accurate, Defense Counsel?

DDC [LtCol STRICKER]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Okay. Trial Counsel, do you concur?

ATC [Capt JONES]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Okay. Very well.

As neither party has filed any notice pursuant to Military

Commission Rule of Evidence 505(g), I'm assuming that we aren't going to stray into any classified information in this particular argument. Is that accurate, Defense Counsel?

DDC [LtCol STRICKER]: Yes, sir.

MJ [Lt Col BRAUN]: Trial Counsel?

ATC [Capt JONES]: That's accurate, Your Honor.

MJ [Lt Col BRAUN]: Okay. Very well.

Defense Counsel, proceed when you're ready.

[Pause.]

DDC [LtCol STRICKER]: The defense is requesting that primary and alternate members be impaneled in random order consistent with Article 25(e)(4) of the Uniform Code of Military Justice, Rules for Courts-Martial 911, and Common Article 3 of the Geneva Conventions, and the Fifth Amendment.

I'd like to begin with a simple proposition. United States Government can do no more than is authorized by the United States Constitution.

Currently, Rule for Military Commissions 911 has no procedure for impanelment. We would advise the commission to not reach into the unknown depths of the law of war to try and construct a method for impanelment when one is already provided for.

MJ [Lt Col BRAUN]: Counsel, is the commission really delving into the depths of anything? If the commission were to apply the

process utilized by the Manual for Courts-Martial prior to the enactment of the -- what's commonly referred to as the 2019 changes to the Manual for Courts-Martial which introduced into the court-martial settings randomization of a panel.

If the court-martial goes back to the pre-version, the pre-2019 version of the Manual for Courts-Martial that -- there is a longstanding practice that was utilized by military judges at that time to seat a panel that didn't require randomization.

So is the commission really delving in very far to determine how to impanel when a process did, indeed, exist?

DDC [LtCol STRICKER]: Sir, the Military Commissions Act suggests and requires that you abide by general court-martial practice. And the current general court-martial practice for impanelment of members is defined under Article 25(e)(4) of the UCMJ requiring randomization.

MJ [Lt Col BRAUN]: Why should the commission apply changes to military practice that didn't exist at the time of the enactment of the Military Commissions Act?

DDC [LtCol STRICKER]: Again, sir, as I said, you should abide by current general court-martial practice.

MJ [Lt Col BRAUN]: What authority requires this commission to do that? I understand the argument you make in the filing, Common Article 3 and the Fifth Amendment and the defense's position that

those operate to require a randomization of the panel. That's defense's position.

But is there any binding precedent that supports this argument of defense?

DDC [LtCol STRICKER]: There is no binding precedent, sir. And that is due to the fact that the appellate case law history of federal military commissions is fairly limited.

There is much greater history, if one would look back to the late 19th and early 20th century, when state militias convened military commissions to suppress various labor movements in the past, but that is not binding on this commission here.

MJ [Lt Col BRAUN]: Okay.

DDC [LtCol STRICKER]: If I may, sir, the Fifth Amendment does apply to military commissions. The first of those cases that I mentioned is Ex parte Milligan, and is actually very favorable to Mr. Nurjaman in that its holding is that while federal district courts are open and functioning, military commissions are not appropriate.

The other case that the government may cite to is Ex parte Quirin. And I would like to distinguish the case of the trial and execution of the German saboteurs in World War II from the present military commission. That commission was convened under the then-existing provision in the Articles of War allowing the President

to convene military commissions.

This commission, obviously, has been authorized by the Military Commissions Act, not the current Article 21 of the Uniform Code of Military Justice which allows military commissions to try people.

Quirin also is distinguished from the sense in that United States was then considered to be engaged in an existential conflict against the axis powers, whereas Mr. Nurjaman is involved in a multi-decade-long trial that we do not see the end of. The requirements in Quirin for expeditiously trying the saboteurs at a military commission do not apply.

Another way to distinguish Quirin is simply the fact that it was a declared war between nation states, whereas here we find ourselves in an undefined armed conflict with alien enemy belligerents.

The Fifth Amendment due process provision requires randomly selected panels. Now, Congress recognized this more than 50 years ago when it passed the Jury Selection and Service Act requiring random selection of juries in federal district court. The act stated: It was the policy of the United States that all litigants in federal court entitled to trial by jury shall have the right to grant a petit jury selected at random from a cross-section of the community in the district or division wherein the court convenes.

This act codified previously recognized rights to trial by jury to ensure fair due process. The act states the requirements that adhere to the Sixth Amendment, an impartial jury chosen by random selection from a cross-section of the community.

Servicemembers brought to trial by courts-martial were not entitled to random selection until recently when Article 25(e)(4) required random impanelment. Quote: The convening authority still details a panel, but the random order of impanelment may change the final panel once quorum for the court-martial is reached.

Referring, again, to Common Article 3 of the Geneva Conventions, "Prohibition," it states: The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples, end quote.

To comply with this treaty obligation, the members, both primary and alternate, should be impaneled in a random order consistent with American criminal courts and courts-martial. Our servicemembers, held as POWs, would expect such a right. POWs that we held and were going to try by court-martial would be entitled to the same right of random impanelment.

If this military commission does not use random impanelment, the military commission appears to be some informal tribunal of

lesser form of due process.

And as I stated previously, the military commission should follow general courts-martial procedures which require random selection of panel members. This requested relief is not prohibited by the Military Commissions Act and is, in fact, consistent with general courts-martial procedure.

As I stated earlier, Rule for Military Commission 911 does not provide a method for impanelling members. It simply states, quote: The military judge shall announce the assembly of the military commission, end quote.

We are offering this method to assist the court in impanelling primary and alternate members through a simple practice which has been adapted by all of the uniformed services.

The defense is not asking for random panel members as the government claims. We are asking for the members, primary and alternate, to simply be impaneled in a random order.

Subject to your questions, sir. Thank you for your attention.

MJ [Lt Col BRAUN]: I have no additional questions. Thank you, Defense Counsel.

Trial Counsel, are you ready to present argument?

ATC [Capt JONES]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Proceed when ready.

ATC [Capt JONES]: Your Honor, the defense in its filings in the 123 series and in its arguments here today has presented a discrete issue for this court to decide. That is whether randomization is required for this commission. It is not.

No constitutional provision or subsequent congressional act undermines the Military Commissions Act's use of nonrandomized panels, which is based on over 200 years of military practice. Now, as Your Honor has pointed out, that is indeed a longstanding practice.

The Military Commissions Act of 2009 governs this commission and it does not support randomization, Your Honor. The structure and the history of this Act, combined with the subsequent legislative and administrative action taken when randomization was authorized in the courts-martial, assure that randomization is an idea foreign to the Military Commissions Act.

Speaking first to the structure piece, Your Honor. They're not expressly prohibited in the Military Commissions Act. The clear, several provisions within that Act make clear that randomization was not contemplated by Congress at the time of its enactment. Looking first to 948m(a) within the Military Commissions Act which provides that alternate members are to be obtained -- are to be appointed, rather, by the convening order in the order in which they are to replace a primary member. 948m(e) says the number of primary and

alternate members dip below quorum, the convening authority only has to appoint the minimum to get back to quorum.

This structure was similar to the then-in-place procedures for panel selection under the UCMJ. That we're talking about alternate members at all, Your Honor, shows that we are talking about a pre-randomization procedure.

The history of the Military Commissions Act also follows this up. The Military Commissions Act was modeled procedurally, with some deviations, from the general courts-martial that were in place at the time of its enactment in 2009.

At that time, the -- at the time of the MCA's passage, no court-martial had ever had a randomized panel. That procedure was not implemented until several years afterwards. In short, an unbroken run of over 200 years of military justice had used nonrandomized panels.

And subsequent congressional and executive action, Your Honor, bears this out. When Congress did authorize randomization for the UCMJ, it did so explicitly. It did so by amending Article 24(e) of the UCMJ by adding a whole new paragraph requiring a randomized selection of quality -- qualified personnel. And even then when it did amend that, it only did so and stated that the procedure of randomization only to be done to the maximum extent possible.

In response to this, after and subsequent to that

congressional action, the Executive Branch changed R.C.M. 911. Before that R.C.M. 911 mirrors the R.M.C. 911 that we have in this military commission. Pretty much says, Your Honor, as the judge in this commission would just simply announce the impanelment of members.

Making changes because of a congressional change, the Executive Branch had several provisions within the now current R.C.M. 911 to adopt for randomization and to account for that randomization.

Here with regards to the Military Commissions Act, no such legislative changes or executive action has accounted for any sort of procedural change that would allow for randomization.

Simply put, the Military Commissions Act does not allow for randomization, nor does any constitutional provision compel this commission to find otherwise.

The defense in their argument claims that several -- that certain constitutional provisions compel this commission to override the Military Commissions Act and order randomization. That argument fails, Your Honor, because the rights cited by the defense are, A, both inapplicable to this commission, and B, even if they were applicable to this commission, it would not compel the relief that the defense requests.

As the defense conceded, Your Honor, no case cites for the proposition the due process clause guarantees randomization in a

military commission.

Further, no case cites for the proposition the Fifth Amendment due process clause applies to this military commission. This commission should follow the lead of the D.C. Circuit in its en banc decision in al Hela v. Biden in avoiding the issue of Fifth Amendment due process.

Even assuming arguendo, the due process clause did apply to this commission, solely as a hypothetical, the relief the defense has requested is not compelled by the due process clause. No case the defense cited or otherwise has said the due process clause compels the randomization of a panel at courts-martial or a trial by jury as well.

The statute that the defense cites to with regards to randomization in jury trials begins quite clearly by saying that it is a policy of the United States to engage in randomization. And even then, that statute has an important caveat, Your Honor. It only applies to members subject -- to persons subject to trial by jury, which the accused in this military commission is not.

In the military courts where members have had nonrandomized panels for over 200 years, there has been no military court that found that lack of randomization compromised due process.

Now, Your Honor, the defense in its filings mixed and matched a little bit between the Fifth Amendment due process clause

and the Sixth Amendment right to a jury, using similar language and confusing the two.

The Sixth Amendment jury right, though, is not applicable to this commission. Ex parte Milligan, that the defense actually cited in their argument, quite clearly states that cases that are not subject to presentment in the Fifth Amendment are also not subject to the jury right in the Sixth Amendment, such as here.

Ex parte Quirin also stands for the proposition that the Sixth Amendment right to a jury does not apply to military commissions.

In Whelchel v. McDonald, 340 U.S. 122 at 127, the Supreme Court stated: The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by court-martial or military commissions.

Which makes sense, Your Honor. The jurisprudence of the Sixth Amendment simply would not be applicable to a military commission. It calls for a trial by a fair cross-section of community, something that simply is not applicable in the military setting such as here.

Your Honor, simply put, the defense is trying to cry foul to a procedure that has been deemed fundamentally fair for over 200 years for both servicemembers and military commissions. Congress and the Executive Branch has made a clear policy choice to not

incorporate randomization in the military commission proceedings. That choice is a difference and nothing about Congress' policy choice to move courts-martial to randomized undermines the fundamental fairness of over 200 years of selecting nonrandomized panels.

Pending any questions, Your Honor.

MJ [Lt Col BRAUN]: Counsel, I do have a point of clarification with your filing that I need you to address for me. Your filing in the facts section, paragraph 6.d. -- I'm sorry, 6.e., you talk about the 2023 NDA becoming law in which Congress required the implementation of randomization.

I believe randomization was introduced into the military justice system before that coming from the FY17 NDAA, Public Law 114-328 which would have been enacted in 2016. It did have a delayed effective date. That was further implemented by the President in Executive Order 13825.

In 2018, which contained an effective date of referral -- cases referred after 1 January 2019, on or after 1 January 2019 would then be subject to the changes to the Manual of Courts-Martial prescribed in that Executive Order.

I raise the issue because that would mean referral in this case would have happened after those changes would have been effective. I'm just wondering where the disconnect is between your assertion and what appears to be in the FY17 NDAA as I try to puzzle

through this, the issues as presented by each side.

ATC [Capt JONES]: Of course, Your Honor. And I don't have the language of that fiscal year 2017 NDAA in front of me. I apologize. But ultimately, Your Honor, the timing of that is irrelevant to the matters before this commission. The MCA was enacted in 2009. That random -- which embodied the procedures in place in 2009 of the general courts-martial system.

Subsequent changes to the courts-martial system after 2009 would have no bearing. And whether in 2019, or in 2023 when randomization occurred, it would have no bearing on the -- on this commission's findings in this -- with this discrete issue.

MJ [Lt Col BRAUN]: Okay. So you -- the court should disregard the argument, then, of counsel, of trial counsel, that even if the court were to apply the current state of the Manual for Courts-Martial, this case wouldn't apply based upon the date of those changes and the referral date in this particular commission.

I note -- I'll direct you to your filing, page 6, that argument begins. It's a rather short argument, but I think that would be inconsistent if these changes are indeed older than the 2023 NDAA, that -- that argument would fail. Yes?

ATC [Capt JONES]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Okay.

ATC [Capt JONES]: If hypothetical -- you know, again, I

apologize. I do not have the language from that fiscal year '17 NDAA in front of me, but if -- taking Your Honor at his word, yes, that argument would fail.

MJ [Lt Col BRAUN]: Okay. Those are all the questions I have for you, Trial Counsel. Anything further?

ATC [Capt JONES]: Thank you, Your Honor.

MJ [Lt Col BRAUN]: Defense Counsel, as you bear burden, I give you last word.

DDC [LtCol STRICKER]: Sir, the government cited to more than 200 years of tradition. Just because a tradition is old does not mean it's good or should be followed. I mean, I could give you numerous examples where the government enacted a policy that, as the decades passed, we have regretted.

I mean, the first one that comes to mind is the internment of Japanese-Americans during the Second World War. One man tried to resist that. He was detained. He took his case to court, and the Supreme Court of the United States said that this policy of interning American citizens without due process was good in the Korematsu case, but you would not find many people that would uphold that case today.

And I would like to also point out one thing, too. If appointing members to a courts-martial panel without randomization was so fair, why did they change it? And our servicemembers who do not have a Sixth Amendment right to trial by jury do have protections

from the Fifth Amendment due process clause.

And we're asking that you consider using the current randomization method that we use in general courts-martial to impanel our primary and alternate members. Now, the Military Commissions Act requires uniform procedures for how these commissions are conducted. In the MCA, which we've talked about a lot, it does not provide that.

The new War Department, the then-Department of Defense, issued our regulations which we follow for Rules for Military Commissions. They did not give you a method to impanel our members. We're suggesting one that is a right afforded to both our servicemembers and the citizens of the United States, or anyone appearing in front of, you know, district court. They get the right to have a random impanelment.

And I'd like to reiterate. In the government's response, we're not asking for a random pool of members. We're asking for members, primary and alternate, to be impaneled in a random order.

Now, you currently do not have a method. We are suggesting one to you.

Thank you, sir.

MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

[Pause.]

MJ [Lt Col BRAUN]: Counsel, we've been on record now for a little better than an hour. It's generally my practice to give the

parties a comfort recess at that point. I note we have one additional piece of oral argument that I'd like to get through, and I think we can get through before lunch.

So it would be my intent at least to place us in a -- is ten minutes sufficient, Trial Counsel?

TC [Lt Col GOEWERT]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Defense Counsel?

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

MJ [Lt Col BRAUN]: Okay. To place us in that 10-minute comfort recess, and if the parties could be ready to take up argument in AE 0124 following that recess, that would be most appreciated.

With that, this courts-martial -- or this commission, excuse me, is in a 10-minute recess.

[The R.M.C. 803 session recessed at 1107, 28 January 2026.]

[The R.M.C. 803 session was called to order at 1126, 28 January 2026.]

MJ [Lt Col BRAUN]: This military commission will again come to order.

All parties that were present when the commission last recessed are again present.

As I had mentioned prior to the recess, counsel **[sic]** granted oral argument on AE 0124.001. This is a defense motion to require unanimous jury verdict or, alternatively, a fixed panel size

and the concurrence of three-quarters of the members to convict.

Defense, in your filing you indicated that you bear burden as the movant and the applicable burden is a preponderance of the evidence. Is that still the case?

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

MJ [Lt Col BRAUN]: Trial Counsel, you concur?

ATC [Capt JONES]: Concur, Your Honor.

MJ [Lt Col BRAUN]: Okay. And as I have not seen a notice pursuant to Military Commission Rule of Evidence 505(g), I'm assuming we don't plan to get into any classified matters in this argument?

LDC [MR. FANNIFF]: No, Your Honor.

ATC [Capt JONES]: That's correct, Your Honor.

MJ [Lt Col BRAUN]: Okay. Very well.

Defense, are you prepared to proceed?

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

MJ [Lt Col BRAUN]: Please.

LDC [MR. FANNIFF]: Your Honor, as you are well aware, the Constitution of the United States is the bedrock of our nation, of our republic. The rules established under the Constitution apply. They apply in this commission. They apply in the actions of the United States Government. And I know it's fact specific on how they apply, but I contend, Your Honor, that the Sixth Amendment right to a unanimous verdict applies to Mr. Nurjaman. Both under the

Sixth Amendment, under the Fifth Amendment due process, and under the Fifth Amendment equal protection, under all of those aspects it applies to Mr. Nurjaman's case.

So, Your Honor, in 2020, United States Supreme Court decided the Ramos case and found that the Sixth Amendment required any jury to be unanimous in order to be impartial. This was applied to the states through that case, and ultimately the holding was unanimous is required for impartial.

Now, understanding that we are not in an Article III court here, Your Honor, nor are we in a state court, but that proposition, that impartiality requires a unanimous verdict does apply to this case.

Your Honor, as the government points out in their response, they rely on Ex parte Quirin. And you heard from Colonel Stricker already discussing how Ex parte Quirin can be distinguished from this case. But I'd like to point out some more ways in which Ex parte Quirin should be distinguished from this case. First and foremost, as Colonel Stricker said, World War II is the context of Ex parte Quirin.

It is a declared war. It is the greatest conflict to occur in human history. It was a declaration of -- with a well-defined enemy, Nazi Germany, Italy, and the empire of Japan. And it had a defined end state when that declaration of war was issued.

In the context of this case, we're dealing in a situation not with a declared war, but an authorization for the use of military force. That authorization for the use of military force was different than a war declaration. We have not a defined -- well-defined enemy under that authorization for the use of military force, we have an expansive definition. It's not clearly defined. We're fighting a war against an ideology under this authorization for the use of military force. There's no defined end state. It is, in fact, a forever war at this point.

The holdings that you have provided, Your Honor, in other motions say that this is still ongoing armed conflict. It started over 20 years ago. There's no defined battlefield that this conflict is occurring on. There is no defined -- as I said, a poorly defined enemy. We're fighting an ideology. And that is very different from the context of Ex parte Quirin and World War II.

I'd like to also point out how the trial in Ex parte Quirin occurred. The Nazi saboteurs were captured, sent to military commission, tried, and ultimately executed or their sentences were executed, vast majority of them being executed, within a matter of months.

This case, Mr. Nurjaman was arrested and came into United States custody in 2003, and has remained in United States custody since that time.

As was held in the Quirin court that military commissions -- one of the goals of military commissions, as they say, was to deter the enemy from some behavior. And in looking at how those Nazi saboteurs were quickly tried and their sentences were executed, that deterrence factor makes sense.

In this case, Mr. Nurjaman has been held in United States custody since 2003. He was not even charged in this case formally, the referral of charges, until 2021, almost 18 years after he was initially put into United States custody. These facts matter in how we should be applying these constitutional principles, Your Honor.

Another important distinction between this case and the case in Ex parte Quirin is, in fact, the treaties the United States has entered into post-World War II, the Geneva Conventions, establishing Common Article 3, those all occurred after the case in Quirin and that changed how we conduct these.

The tribunal that determined the guilt and the sentence for the members in Ex parte Quirin for those saboteurs would not be authorized today because of these treaties we've entered into. And, in fact, that's why, when the George W. Bush Administration chose to create commissions based on the Quirin commission, that they were struck down by the Hamdan case. Hamdan found that that was not appropriate under Common Article 3, that that was not sufficient due process.

Your Honor, there have been many cases I point out in my brief where the Sixth Amendment has been applied in military cases, aspects of the Sixth Amendment: United States v. Danylo, United States v. Bess, United States v. Fosler. They're all cases where aspects of the Sixth Amendment were applied to military courts-martial. And I would argue they show and demonstrate why the Sixth Amendment can be applied to this case.

There is a requirement in the military that the members be impartial. And the government and, quite frankly, CAAF, goes to great lengths to try to say that, well, it's only a requirement that the individuals be impartial, not that the verdict be impartial, which requires unanimity.

But to say that, Your Honor, is to say that these individual members -- or individual jurors in civilian courts don't have a requirement that they be impartial. It just matters that the verdict end up being impartial through unanimity. And that doesn't make sense, Your Honor.

Those individual members in practice, in civilian court, are required to be impartial just as military members in a military court-martial are required to be impartial. And that is why this Sixth Amendment right should apply to military cases and, more importantly, to this case with Mr. Nurjaman.

But it's not just the Sixth Amendment, Your Honor. Fifth

Amendment due process does apply, Your Honor. If you look at the language of the Fifth Amendment: No person shall be held nor deprived of life, liberty, or property without due process of law. It applies to this case.

The government in their last argument told you, avoid making that decision, just like they did in al Hela v. Biden. I would argue, Your Honor, that you cannot avoid making that decision. This issue is too important, and this issue requires you to apply due process to this case. And the due process that Mr. Nurjaman should be afforded is a unanimous verdict.

In looking at due process -- and, you know, the government, you know, points to Anderson, as I said they would in my initial filing. And they say Anderson held, under their due process analysis for military members, that there were other safeguards that made the process appropriate in due process without requiring unanimity.

I would argue that those safeguards for military members do not apply in the same way in this commission and do not have the same level of protection in this commission as they do in a military court-martial.

So looking at the two things that the Anderson court hung their hat on, Your Honor, it was voting by secret written ballot and de novo review at the initial level of appellate review.

Now, certainly those aspects were incorporated in the MCA,

and I'm not here to say they were not. My point, Your Honor, is they aren't -- do not provide Mr. Nurjaman with the same protections.

Now, one of the reasons the Anderson court says that that was okay is because -- yes, Your Honor?

MJ [Lt Col BRAUN]: Sorry. When you say "the same protection," do you mean the same protection as applied to a military member undergoing a court-martial or the same protection as a civilian in an Article III-style court? Which protection?

LDC [MR. FANNIFF]: Your Honor, I am referring to the same protection as a military member ----

MJ [Lt Col BRAUN]: Okay.

LDC [MR. FANNIFF]: ---- in a court-martial.

MJ [Lt Col BRAUN]: Okay. Continue on, please.

LDC [MR. FANNIFF]: Because that's how the Anderson court found that the process provided in courts-martial was significant -- was adequate due process. So the secret written ballot aspect, Your Honor -- in a typical court-martial, as you're well aware through your career, you have members that are all assigned to the same base, that are chosen by the convening authority to come together and ultimately constitute the panel.

And in those situations, there are relationships formed with other people around the base. And the concern of undue influence, due to rank and due to superiority in the organization, is much more

significant than what we have here.

A panel that we have here, while rank will still be a factor, you're -- the convening authority will be appointing people from different bases and different services. And, so, the protection that this applies in courts-martial is not the same in this case. The concern of undue influence is lessened in this case. And, therefore, I would argue that that does not militate the issue of a nonunanimous verdict as they discussed in Anderson and how that was sufficient due process.

The members in this case, the members that will be impaneled to determine Mr. Nurjaman's guilt and ultimately his sentence, are members that have been taught that Mr. Nurjaman is their enemy. Part of what they have to determine is whether he qualifies as an alien unprivileged enemy belligerent to even find him guilty of any of the offenses.

This is not the same as a military member that has a shared history of being in the service and deciding the guilt or innocence of a fellow military member.

MJ [Lt Col BRAUN]: Okay. Counsel, help me understand how, if that is the premise -- and we're talking for argument here, but if that is the premise, that all the panel members have been indoctrinated and trained to believe that fact, how would unanimity address that situation at all? What protection would unanimity

provide?

I appreciate the math portion. I'm just -- I'm not tracking how unanimity would really address that. That seems -- one, it seems something that voir dire is absolutely designed to protect an accused from both in the civilian system, the court-martial system, this system, right? Those are matters that voir dire is designed to uncover, those inflexible bias.

But I'm trying to understand the application of unanimity and how that would address that kind of -- if one were to assume that factual predicate.

LDC [MR. FANNIFF]: Well, Your Honor, I would say that our military members do their best to follow the instructions that you provide them. But with that indoctrination, the likelihood that one member might be able to, you know, for instance, follow your instructions and ignore that indoctrination means that if that one member decides that Mr. Nurjaman is not guilty, that should be enough to find him not guilty, Your Honor. And that should be enough to find that he -- it's a protection because we do have a panel of members that have been, you know, trained in a certain way. Typically what we've seen are individuals that are in career fields where they would be involved in the war on terror.

And so while I do agree that voir dire is an initial way to cull those individuals that have an explicit bias or even an implicit

bias that is obvious, I would argue that unanimity is an additional protection. Because if a panel of members who have all been trained to decide -- or trained that Mr. Nurjaman is their enemy, and one of them says, "Well, this doesn't meet the standard for me to find him guilty," I would argue that should be enough to find that he was not guilty, Your Honor.

MJ [Lt Col BRAUN]: Okay.

LDC [MR. FANNIFF]: So, Your Honor, in looking at, you know, this due process, you know, the other aspect that the Anderson court relied on was this de novo review.

In our military system, the de novo review is based on a robust case law that exists. Under this Military Commissions Act, we have no case law -- or I wouldn't say no case law, but very limited case law, Your Honor, on which to decide whether or not the factual predicates have been met under the de novo review process.

So it's not the same level of protection as a military member gets because there is this robust case law about these specific offenses under the UCMJ, where we have no case law right now of de novo review of a litigated trial in the military commissions system.

So I would say that is a limited -- and it drops that protection down significantly, which is why I believe that the protections that we need is a unanimous verdict from the members,

Your Honor.

Under the due process analysis under the Fifth Amendment, I would also argue there is an equal protection analysis that you must decide on, Your Honor. And if there's one aspect of equal protection that I would agree with the government on is that Mr. Nurjaman is not similarly situated to a military member. And just because he's in a military commission does not make him similarly situated to a military member.

There are a lot of reasons why I would argue he is not similarly situated to a military member, Your Honor. First and foremost, a military member would not be subjected to three years of torture at black sites. That's never happened to our military members by our government, and it never will.

A military member would not be held for almost 10 years in solitary confinement after being transferred here out of the black sites. That is treatment that Mr. Nurjaman was subjected to.

A military member has never been held without charge for 18 years. We would never allow that in the military justice system. That is exactly what happened to Mr. Nurjaman.

To say he is similarly situated to a military member is preposterous. He is not.

The reason we are here in this courtroom today, Your Honor, is because the administration under President George W. Bush did

everything they could to try to take the Constitution out of these proceedings from the get-go. They didn't want Mr. Nurjaman, or any other of the detainees, to touch U.S. soil because they were afraid if they did, that they could not keep the Constitution out of these proceedings. But the Constitution applies to these proceedings.

It is not citizens that have the right to due process. It is persons. It is the oppression of the government is why that was enacted in the Constitution. The oppression of the British, we said we can't have that. We can't have a government that could oppress people like that. And that's why the Bill of Rights was enacted. And that's why it applies to this case today, Your Honor.

And who -- so the question is if he's not similarly situated to a military member, who is Mr. Nurjaman similarly situated to? Is he similarly situated to a U.S. citizen on U.S. soil? No. I would agree with the government, he is not.

But he is similarly situated to individuals that are captured on foreign soil and brought back and tried in Article III courts. And thus the protections, the due process that he's entitled to, should be the same as those individuals. Individuals like Ramzi Yousef who was captured on foreign soil, brought back to the United States, tried in Article III courts.

Quite frankly, Your Honor, I can even go to a recent example. President Nicolás Maduro was recently captured on foreign

soil, brought back to the United States, and he's going to be tried in an Article III court.

And while Congress has passed a law that says Mr. Nurjaman cannot be brought back to the United States and be tried in an Article III court, that doesn't mean they can take away the constitutional rights that Mr. Nurjaman is entitled to. It doesn't mean they can take away the Constitution out of this process. It applies. And the Constitution clearly shows that due process, equal protection that Mr. Nurjaman is entitled to would be a unanimous verdict in this case.

What is the difference between Mr. Nurjaman and Nicolás Maduro or Ramzi Yousef? The difference is the CIA took him, held him in black sites, and tortured him. That's the difference.

Quite frankly, Your Honor, that's why we're here today. That's why we have to be in this court, in this military commission. Because they want -- they didn't want the malfeasance of the United States Government and the United States intelligence services aired in Article III courts. They didn't want it out in the public and they've done everything they can to hide their crimes by putting us into this forum. And even though we are in this forum, Your Honor, that does not mean that Mr. Nurjaman should not be granted the rights he's entitled to.

Your Honor, I have outlined why I believe the unanimous

verdict is required. If for some reason you do not agree with me on that, there is still a baseline that you are required to provide Mr. Nurjaman. And that baseline comes from the Hamdan case, the case that said that the military tribunals that the George W. Bush Administration tried to conduct provided insufficient due process to the detainees here at Guantanamo Bay.

And that is why the MCA had to be enacted.

If we look at the holding in Hamdan, the point that is -- they said in order to be a court under Common Article 3, the baseline -- the baseline is our military justice system. And that was not said that the military justice system as it currently exists. It just said the military justice system was the baseline. That was the minimum amount of due process. I would argue the minimum, not the appropriate level of due process. But to be at least considered a proper court under Common Article 3, the procedures under the UCMJ would apply.

In the 2017 NDAA, we had a sea change, as you have commented in the last argument, Your Honor, a sea change in how military courts-martial are conducted. And that change required for a general court-martial, at least eight members, for quorum. And it requires a three-quarters majority for conviction.

That change, as Your Honor pointed out during the last argument, occurred before referral of charges in this commission.

And I think that's highly relevant, Your Honor, in that if Mr. Nurjaman had been tried under the UCMJ, which was a possibility and authorized, he would have been entitled to those changes.

I would argue the holding in Hamdan says he should be entitled to those changes. He deserves at least that. Now, I obviously argue he deserves more than that, but at least that, Your Honor.

You know, as constituted under the MCA, this court, with two-thirds majority and with a minimum of five members and no set panel, falls well below the standards of what is required for our military members. There is no justification from the President or Congress as why it would be impracticable to provide Mr. Nurjaman with those same procedures. And those procedures were enacted to improve the courts-martial system, to improve the due process that our military members receive.

And if we allow the provisions of the MCA as they stand to control, Your Honor, we are stating that Mr. Nurjaman is somehow less -- deserves less due process than our military members.

The holding in Hamdan said at least he deserves the same process unless it's impracticable. There's no evidence provided by the government that says this is impracticable.

They don't provide you with any legislative history. They ----

MJ [Lt Col BRAUN]: Counsel ----

LDC [MR. FANNIFF]: Yes.

MJ [Lt Col BRAUN]: Counsel, I want to jump in there. The impracticality portion of your argument -- and you hit on this in your brief, too, and I had a question on this particular piece.

Is it trial counsel's duty to determine impracticality? Or is it Congress and subsequently the promulgation of the MMC? Should the impracticality be -- should it be decided by the Secretary of Defense through the MMC, or should it be done by Congress? Or is it Congress' -- or is it trial counsel's responsibility here in this court-martial?

LDC [MR. FANNIFF]: Your Honor, I would argue that it's Congress' responsibility and Congress has failed in that responsibility. By updating the UCMJ and providing additional due process to our military members and ignoring the MCA -- which is the only evidence you have, is they just ignored it. They didn't evaluate it. They didn't look at it and say ----

MJ [Lt Col BRAUN]: Well, Counsel, I think that could be argued both ways, though, right? I think the other side of that coin is Congress knew it had the authority to adjust Title 10 as it applies to the UCMJ, but then chose not to modify the provisions it had previously established in the Manual for -- in the Military Commissions Act, right? I think you could look at that both ways, in

fairness.

LDC [MR. FANNIFF]: Well, your Honor, I think you can. But I think you have to look at it in the way that I am describing because there is no legislative history that shows that they looked at it at all. There is nothing that says that they evaluated it in any way and considered it when they decided to update the UCMJ.

If the government could point to some legislative history or some other method that showed that Congress gave this a look and decided, well, no, it's impracticable, we don't have to do that, we don't have to meet the standards of the UCMJ, which is what Hamdan stood for, then I think it could be evaluated the other way, Your Honor.

The problem is we have no evidence, nothing presented in any way that shows that Congress considered it at all. And the government relying on the fact that, well, Congress didn't say anything, therefore, they considered it, I think is giving Congress way too much credit, Your Honor. Congress is very busy and probably the military commissions are not their number one priority.

MJ [Lt Col BRAUN]: But doesn't the -- isn't there deference ----

LDC [MR. FANNIFF]: Your Honor ----

MJ [Lt Col BRAUN]: ---- that this commission has to provide to Congress? It is occupying its space as the legislature in passing

the Military Commissions Act, and this is a trial-level court. So this court doesn't legislate. So I think precedent requires some level of deference to the congressional decisions being made, right?

LDC [MR. FANNIFF]: I understand that, Your Honor, and I don't disagree that some level of deference. The government argues for a level of deference that basically is unassailable, and that is not the case here. We cannot take a look at this and say that, oh, well, Congress didn't mention it, so, therefore, we're good. Because that's not the standard. That's not what this -- it's not the standards that our nation has been built upon, Your Honor.

Mr. Nurjaman deserves at least a due process of our military members. Congress cannot legislate the Constitution away.

And, Your Honor, finally, you know, the defense, in our filing, discussed equitable relief. If you do not find that you could rule on the law, which we argue you can, equitable relief is still available to you, Your Honor. And that equitable relief would be to set the panel size at eight members. Because if you set the panel size at eight members, you are in no way violating the Military Commissions Act, because the Military Commissions Act is silent on that subject. All it says is there must be more than five. I'm not a math major, but eight is greater than five.

All it says is two-thirds is required for a verdict. Well, if there is a set panel of eight members, Your Honor, the

number -- two-thirds of eight and three-quarters of eight in whole numbers is the same. So you're in no way violating the Military Commissions Act if you were to grant equitable relief in this case.

And the government says you can't do it because it violates the MCA, but they point to no provision of the MCA that says you can't do it.

Your Honor, as I've stated, I believe that a unanimous verdict is required in this case in order to provide Mr. Nurjaman with the rights he deserves because the behavior of our government should not dictate what rights Mr. Nurjaman is left with. The choices of our intelligence services to house him in black sites, torture him, to transfer him here with no charges, and leave him in solitary confinement should not dictate that he deserves less rights than if they hadn't done that.

And that's exactly what is said here. If we hold to what the MCA says and give him less rights, less rights than anyone, less rights than any individual subject to conviction under any jurisdiction in the United States, there is no other jurisdiction, including the military, that would allow a five-member panel and two-thirds to convict.

Your Honor, our choices, this black mark on our history, should not limit Mr. Nurjaman's rights.

Thank you, Your Honor.

MJ [Lt Col BRAUN]: Counsel, one question before you sit down.

LDC [MR. FANNIFF]: Yes.

MJ [Lt Col BRAUN]: When you say "unanimity," is the instruction to the panel that you must be unanimous in any finding or just a finding of guilty?

LDC [MR. FANNIFF]: A finding of guilty, Your Honor.

MJ [Lt Col BRAUN]: Okay. So only unanimity to convict. Anything less than unanimity is automatic acquittal?

LDC [MR. FANNIFF]: Yes, Your Honor. And I would say that I believe the three-quarters requirement for sentence, specifically the sentence that the government is likely seeking, would be sufficient protection, but for findings it is not.

MJ [Lt Col BRAUN]: Okay. Thank you, Defense Counsel.

Counsel, while I generally don't try to break up argument, I do note that we are coming up on the afternoon break to accommodate both the lunch hour and our afternoon prayer time.

So what I'm going to do -- understanding, Defense, you get last word, so you will have an opportunity to address -- I'm going to recess for lunch at this time. We will then continue after that recess with the continuation of today's matters.

So with that I'm going to place us in a recess until 1330.

[The R.M.C. 803 session recessed at 1203, 28 January 2026.]

[END OF PAGE]

[The R.M.C. 803 session was called to order at 1333, 28 January 2026.]

MJ [Lt Col BRAUN]: This military commission will come to order.

All parties that were present when the commission last recessed are again present.

When we recessed for lunch, we were in the middle of argument on AE 0124.

Trial Counsel, are you ready to present argument?

ATC [Capt JONES]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Please proceed.

ATC [Capt JONES]: Your Honor, the defense here makes two discrete asks in its motion series. The first for unanimous verdict. The second, a fixed panel size with three-quarters members to convict. Both definitively run afoul of the Military Commissions Act and the defense once again incorrectly calls into question procedures that are or have been fundamentally fair for over 200-plus years, including for the military's own members. Simply put, no text, constitutional or otherwise, contravenes the MCA procedures at issue and such procedures are fundamentally fair.

I'm going to first address, Your Honor, the defense's request for a unanimous verdict. And simply put, Your Honor, no provision compels this commission to adopt the unanimity rule. That

request for unanimity rule directly contradicts the MCA's voting procedure provision and no constitutional provision requires a change to those procedures. This provision of the MCA is constitutional.

The MCA specifically provides for the voting provisions in a noncapital commission be done by a vote to convict of two-thirds of primary members present. This provision comes from presumptively constitutional act of Congress. The MCA is a valid use of Congress' powers under the war powers clause, fine and punish power clause, necessary and proper clause, combined with the President's own inherent authority to create military commissions.

Additionally, no constitutional provision cited by the defense constrains Congress' authority here specifically as applies to members' voting procedures.

Now, Your Honor, there's a great deal of conversation about Ramos v. Louisiana and the Sixth Amendment in defense's argument and in their brief. And I want to talk a little bit about Ramos v. Louisiana and what it actually held.

Ramos v. Louisiana, just as general background, is a state criminal proceeding in the state of Louisiana that occurred, only Louisiana had then a nonunanimous jury verdict requirement. Simply put, someone could be convicted with 10 out of 12 jury members voting to convict.

What the court in that case held was not that a right to a

unanimous verdict stems from the impartiality provision of the Sixth Amendment but rather that it stems from the right to a jury trial under the Sixth Amendment. And this can be seen in Justice Gorsuch's decision. There it quite clearly states in multiple provisions that they are referring to the jury provision. In fact, the only time in Justice Gorsuch's opinion that impartiality is mentioned or the word "impartial" is mentioned is when it's a direct quotation from the Sixth Amendment itself.

Further, Justice Kavanaugh in his concurring opinion in Ramos v. Louisiana notes that unanimity and impartiality are two distinct, though complementary, concepts. Distinct concepts, Your Honor.

Now, why does it matter that the Sixth Amendment jury right provision provides unanimous verdict versus its impartiality provisions? Because the jury right does not extend to this commission. Thus, unanimous verdict requirement of the Sixth Amendment does not apply to this provision.

United States v. Anderson, which was the 2023 CAAF opinion that examined this question following Ramos in a similar setting for a military member before a court-martial reached the same conclusion and the same interpretation of Ramos' decision. There, as is here, it determined that the jury right, not the impartiality provision, was where the unanimous verdict requirement stemmed from.

In there, as in here, because there is not a Sixth Amendment right to a jury, therefore, the requirement of a unanimous verdict does not apply to courts-martial as is indeed the case here.

Now, Your Honor, the defense also cites the Fifth Amendment and due process clause as a reason to apply the -- this jury right, this right to a unanimous verdict to this case.

At the outset, the government does not concede that the Fifth Amendment applies to this commission. But, assuming arguendo that it does, the defense does not cite to any case that says the Fifth Amendment requires unanimous verdict. In fact, Your Honor, if you read the U.S. v. Anderson opinion, in its conversation about the Fifth Amendment due process clause, it cites to a D.C. Circuit case, Sanford v. United States.

Sanford, Your Honor, specifically states that the right to a jury, in both federal cases and in court-martial cases, is not found, is not contained within the due process clause. In essence, that right to a jury which creates the unanimous verdict is not present for military commissions under either the Sixth Amendment nor also the Fifth Amendment, Your Honor.

The defense also cites in their brief two cases with regards to due process, Weiss v. United States and Edwards v. Vannoy, for the proposition that unanimity is required for -- by due process. And neither stand for that proposition, Your Honor.

Edwards followed on the heels of Ramos. It was a habeas petition from a Louisiana prisoner who had previously been convicted under those nonunanimous provisions. And in that case the Supreme Court actually determined that unanimity was not a right that alters our understanding of the bedrock procedural elements essential to the fairness of a fair proceeding.

Also, Weiss, as the defense notes, notes that history is powerful in determining due process challenges in the context of military justice. It notes at 179: Indeed, historical maintenance suggests the absence of a fundamental fairness problem.

And, Your Honor, historical maintenance is exactly what we have here. For over 200 years, in courts-martial and within military commissions, there's not been a requirement for unanimous verdicts from panel members.

Moving on, Your Honor, to the Fifth Amendment's contention of -- under the Fifth Amendment equal protection clause. Again, the defense cites to no case that says equal protection clause -- equal protection clause requires unanimous verdicts or a case to apply strict -- or it has not cited to a case that applies strict scrutiny to the supposed rights at issue.

Strict scrutiny is required when either a fundamental right or protected class has been discriminated against. Here there is neither. There is no fundamental right being discriminated against

because the accused does not have a fundamental right to a jury under the Sixth Amendment which is, again, the source of the unanimous verdict requirement. Nor has he alleged that he's part of a protected class that it so requires. Thus, rational basis review applies, and easily this -- this easily exceeds rational basis review.

Now, Your Honor, I'm going to turn the commission's attention, if I may, to the alternative procedure that the defense suggested that we raise the floor of panel members required to serve on a panel from five to eight and also raise the floor of votes to convict from two-thirds to three-fourths.

Those procedures, again, specifically contradict the Military Commissions Act. The ----

MJ [Lt Col BRAUN]: How?

ATC [Capt JONES]: Yes, Your Honor. Thank you.

So I want to make very clear when I say, especially with the panel member requirement, that it's the mandate to go from five to eight that it requires, and not that eight members may sit at this commission. That very well might be the case. That is within the discretion of the convening authority, Your Honor.

Speaking, I'll take in turn both the panel member size and the voting conviction size.

If you look first at the panel member size to

10 U.S.C. 948m, that's the MCA provision that controls the size and the number of members on the panel. It states: A military commission under this chapter shall have at least five primary members and as many alternate members as the convening authority shall detail. It gives to the convening authority the discretion to provide members to this commission.

And it sets that floor at at least five members. It does not provide -- or raising of that floor would impede upon the convening authority's discretion under the statute.

Moving on to the number of votes required to convict, Your Honor, it states: No person may be convicted by a military commission under this chapter of any offense except as provided in Section 914i(b) -- this title which deals with capital commissions, which is not at issue here -- or the concurrence of two-thirds of the primary members present at the time the vote is taken.

It doesn't say at least two-thirds, Your Honor. It says concurrence of two-thirds of the primary members. That is the requirement, Your Honor.

And any attempt to alter the floor that Congress has set within the Military Commissions Act contravenes the Military Commissions Act, Your Honor.

MJ [Lt Col BRAUN]: Doesn't -- words matter. So "concurrence of two-thirds" -- I appreciate that "concurrence of two-thirds" and

"at least two-thirds" are functionally different words, right? Different phrases. But it operates of -- it operates as if it were concurrence of at least two-thirds, right? As a panel member -- as a panel is instructed on voting and findings, you know, at least two-thirds -- the instruction will read something to the effect of: At least two-thirds of you must agree upon a finding of guilty before the accused can be convicted. Because there are "X" number of you, that will mean at least "X" number of you must agree in a finding of guilty before the accused can be found guilty. If, after taking a vote, they find less than that, that does not result in a finding of guilty.

So I appreciate that you're drawing a distinction here. I'm just not sure I see the practical effect of that distinction.

ATC [Capt JONES]: Your Honor, a mandate that more than two-thirds required to vote would be going against that provision which is at least two-thirds. So if there's an implication to the panel that, hey, you need three-fourths in order to convict, that directly goes against that requirement. That two-thirds is the number to convict, not some other number.

Now, of course, the panel can reach their verdict by a greater number. I mean, they could be unanimous. They could be three-fourths. They could be -- I'm not going to try to do math, Your Honor. But the point stands that the implication that's more

than two-thirds would contravene that provision.

Now, Your Honor, in defense of this second alternative, the defense has cited to U.S. v. Hamdan and the Common Article 3, the concept that this court is not regularly constituted. It should be noted, Your Honor, that much has changed since Hamdan.

In Hamdan the court was analyzing a military commission established solely as the Hamdan court determined executive action. That is not the case here.

What we have here is a commission directly resulting from a dialogue between two political branches which was a direct response to the decisions of the judicial one. That determination and the deviations that followed forthwith with the MCA made by the two political branches is owed deference here, Your Honor.

Further, the MCA meets the very basic requirements set out in Common Article 3. As Justice Stevens in Hamdan noted, Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict. Its requirements are general ones crafted to accommodate a wide variety of legal systems.

The practice shows why this is obvious, Your Honor. Common Article 3 was designed to encompass the great variety of legal systems seen the world over. It is not designed to answer minute procedural details such as the one before this commission. It's a system designed to encompass common law systems, civil law systems,

even traditional legal systems, and international tribunals.

Just taking as an example, Your Honor, if the accused was before the International Criminal Court or the International Criminal Court for the Former Yugoslavia, the requirement for the fact-finder to find him guilty would be a bear majority, Your Honor, certainly not the two-thirds or the three-fourths -- the three-fourths he's asking for, and certainly not the two-thirds he's granted under the MCA.

Your Honor, because this commission as convened under the MCA is a regularly constituted court, there is no need to perfectly align the commission court-martial system. Political branches have made a policy determination to make the deviations between the court-martial and commission system. That choice is owed deference, and nothing cited by the defense undercuts that.

Ultimately, the defense is asking this commission to order procedures that directly contravene the MCA without any support from the Constitution or other provision. Provisions the defense are challenging is fundamentally fair. They have been for over 200 years, and nothing in the defense's argument changes that.

Thank you, Your Honor.

MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

Defense Counsel, rebuttal?

LDC [MR. FANNIFF]: Thank you, Your Honor. The government,

much like in their response, just sort of waves away the Fifth Amendment. Don't even consider it. It's not a factor.

The Fifth Amendment is a fundamental part of our Constitution. And while I don't disagree that it was the intent of the Bush Administration, by holding these proceedings here, by starting that process of transferring Mr. Nurjaman to this base, it was their intent to circumvent the Constitution. But that doesn't mean it was right. That doesn't mean it was possible. It just means they tried.

At the end of the day, the Constitution matters. It matters to our jurisprudence. It matters for our -- the legitimacy of these proceedings. To say that we can circumvent the Constitution by holding these proceedings outside of the United States, even though I'd argue that it is not held entirely outside of the United States and, in fact, we had an entire hearing that was conducted in the United States back in November, but to say that that somehow avoids the constitutional questions is un-American, quite frankly, Your Honor.

This is the actions of the United States Government that we are scrutinizing here, and the actions of the United States Government must comport with the Constitution.

Your Honor, to address somewhat the regular constituted court argument that the government just presented, regularly

constituted court has to mean something. The government kind of said, you know what, it's just because there's all these different judicial systems all over the world and that doesn't -- it doesn't mean anything. Well, it should mean something in the context of this case.

And it -- for this to be a regularly constituted court, we, at least, have to give the due process, under our Constitution, that everyone else gets. Because if we allow this two-thirds, we're allowing Mr. Nurjaman to be treated lesser than anyone else under American jurisdiction.

And to say that this can be a regularly constituted court, even if we do not hold ourselves to the standard of any other court in the United States, is unconscionable.

Your Honor, the government says much has changed since Hamdan. Well, Hamdan was dealing with this as a tribunal that's not okay. Well, it was dealing with it as a tribunal based off of what happened in Ex parte Quirin. So if things have changed so much since then, I would argue that that lessens the precedential value of Quirin, Your Honor.

Your Honor, the government, you know, tries to say that equitable relief wouldn't be appropriate because, you know, you can't mandate that it be eight members. But, again, there's no provision of the MCA that says anything like that. All it says, that there

must be at least five.

So you're in no way violating the MCA. And it's certainly possible if you were following the UCM -- or following the MCA procedures that you could end up with eight, and that would be fine. And there would be no issues in no way contradicting the MCA if you ended up with eight members randomly.

So why would it be a problem if we -- if you, as the judge, determined under your equitable powers that eight is the appropriate number? It wouldn't be. They can't point you to any law. They can't point you to any provision that says it's not -- must be five. It just has to be five or greater.

Your Honor, you know, we -- the Constitution, as I said, matters in all proceedings that are conducted by the United States Government. It cannot be waved away. It cannot be ignored.

And so the due process that is required in this case is -- cannot be limited because we're trying to avoid that Constitution. The due process that Mr. Nurjaman is authorized, and what is fair and just, would be a unanimous verdict.

Thank you, Your Honor.

MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

The commission granted oral argument in AE 0125.001. This is a defense motion to dismiss because the provisions of the Military Commissions Act governing personal jurisdiction are void for

vagueness.

Defense, what is the -- as you're the movant, what is the applicable burden -- who bears the burden in this? Let's start there.

DDC [Capt HOPKINS]: Yes, Your Honor. So to maintain jurisdiction over Mr. Nurjaman, the government bears the burden to demonstrate that. It is true that this is a constitutional challenge to the MCA and there are certainly citations that would suggest, you know, we bear the burden on those sorts of constitutional challenges. I believe that there's some entangled matters there, so we will take the position that the government bears the burden. I'm not suggesting to you that that's a straightforward decision on your part.

MJ [Lt Col BRAUN]: Okay.

Trial Counsel, I'm going to let you respond on the burden piece.

MDTC [LTC MILLER]: Yes, Your Honor. The government disagrees. The burden remains with defense.

Challenging the constitutionality of the statute does not amount to challenging the commission's power to adjudicate the case. And while their constitutional challenge involves part of the statute related to jurisdiction, that does not amount to challenging the commission's power to adjudicate.

The Court of Appeals for D.C. has rejected similar arguments, namely in U.S. -- excuse me -- al Bahlul v. U.S. where the defense made a similar argument where they made a constitutional challenge and then tried to wrap it in the jurisdiction. But the court found that constitutionality of a statute did not involve power to adjudicate. That has already been addressed in the defense's challenge to personal jurisdiction in that separate motion where the government met its burden.

Here they are challenging the constitutionality of the statute and as the moving party, the defense has the burden.

MJ [Lt Col BRAUN]: Okay. So, Defense, I see you standing there. What the commission is going to do, I'm going to allow the defense to open and close. You can address the jurisdictional piece. This is another matter that I think the commission is going to have to wade through in its ruling. So I'm going to let the parties walk through the burden piece as part of their argument.

It sounds like, Defense, you already anticipated doing that anyway. Trial Counsel, it appears the same. So I'll just allow you to address that during regular argument, but I'm going to format the argument, if you will, in a way that, Defense, you're going to open and close.

DDC [Capt HOPKINS]: Thank you, Your Honor. And I will just briefly respond on the Bahlul point.

MJ [Lt Col BRAUN]: Before we do that, just so that I'm being -- I'm fully understanding our situation, I did not receive a Military Commission Rule of Evidence 505(g) notice in this. Based upon the nature, I wouldn't expect we would get into any classified matters. Is that assumption correct?

DDC [Capt HOPKINS]: That is correct, Your Honor.

MJ [Lt Col BRAUN]: Okay. Trial Counsel, you concur?

MDTC [LTC MILLER]: Yes, Your Honor.

MJ [Lt Col BRAUN]: Thank you.

Defense Counsel, sorry about that. Please proceed.

DDC [Capt HOPKINS]: Yes, Your Honor. Just to briefly respond on the Bahlul point. There's an important distinction to be made there. So Mr. Bahlul came into his trial and boycotted it and didn't raise any motions. And then on appeal he raised, you know, various challenges to jurisdiction. Now on appeal, he's on the left side of the v., right? So he's now asking an appellate court to change something that already happened. So in that context, it would be kind of silly for him to say that the D.C. Circuit didn't have the power to hear the case because he's asking them to hear the case, right? So the context there for that jurisdictional piece that trial counsel was just describing is very different.

Here, we're at the trial level. Mr. Nurjaman has not been convicted and he's asserted, you know, through this motion and

various others, that it doesn't properly have jurisdiction over him. So we believe that that's a distinction with Mr. Bahlul's case that's extremely important because, again, in the context in which that jurisdictional question was decided for Mr. Bahlul, he had petitioned the D.C. Circuit to hear his case.

MJ [Lt Col BRAUN]: Okay.

DDC [Capt HOPKINS]: Moving to the substance, Your Honor, I'd like to start by noting that in Toth v. Quarles, the Supreme Court observed that there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.

For that reason, as the court further observed in Reid v. Covert: The necessary and proper clause cannot operate to extend military jurisdiction to any group of persons beyond the land and naval forces. It further observed that that's the case, because every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts and, more important, acts as a deprivation of the right to a jury trial and other treasured constitutional protections, end quote.

And that's exactly what we've been talking about for the last few hours, Your Honor.

So there's a lot that we ought to learn from those holdings. But for purposes of this motion, one takeaway suffices, and that's

that the laws that define the jurisdiction of this forum matter. They matter to the basic system of separation of powers enshrined in the Constitution and they matter to every person who the government might choose to label an enemy of our nation for whatever reason, whether 20 years ago, now, or sometime in the future.

And this is a settled question, Your Honor. The Supreme Court expressly held in Boumediene that men detained at Naval Station Guantanamo Bay who litigate in the United States courts can challenge under the Constitution -- you know, can litigate in favor of separation of powers principles. So this is not like the -- just the pure Fifth Amendment question. There's binding precedent on that question.

Those principles should guide the commission as it confronts the two central questions raised by the defense motion under consideration here.

The first question is whether the government is permitted to decide who may be charged in this forum on the basis of a vague statute. And the second question is whether the 2009 MCA, specifically the portion defining the scope of personal jurisdiction in this forum, is such a statute.

In its response the government primarily asks the commission to decide this motion on the basis of the first question. In other words, the government claims that Congress simply is free under the

Constitution to enact a vague statute that determines who may be tried here rather than in an Article III court.

The precedence of the Supreme Court that define the void for vagueness doctrine make clear that this position is wrong.

As Justice Gorsuch observed in his concurrence in Sessions v. Dimaya, vague laws invite arbitrary power, and that is why in our constitutional system courts must decline to give effect to laws that do not supply the judiciary with sufficiently clear standards for enforcement.

And as the court emphatically affirmed in that case, Sessions, and as well as in Johnson and in Davis, that essential principle enshrined in the void for vagueness doctrine is both a necessary component of due process and a necessary means of protecting our constitutional separation of powers.

When Congress declines to legislate clearly, then police officers, prosecutors, and also judges and juries are left to enforce the resulting law arbitrarily and inconsistently. In other words, they are empowered to make up what the law means rather than to faithfully carry out the will of the legislature, and the Constitution does not permit that result. Instead, the Constitution requires judges faced with a vague law to simply declare it null and void.

As the court's opinions in Hoffman Estates and in Sessions

v. Dimaya make clear, vagueness scrutiny is at its highest not only when we're talking about the elements of a criminal statute, but also when Congress is passing any type of law that imposes on an individual's rights and liberties.

The MCA's jurisdictional grant is such a law. The government has just stood up and told you that because Mr. Nurjaman is being tried here rather than in a court, he loses rights and liberties.

The MCA declares, in direct tension with Article III of the Constitution, that certain defendants can be tried in this separate and undoubtedly inferior forum. And though the government, in its response on this motion, sort of softly disputes the notion that this forum is inferior, that's plainly not the case.

To say nothing of, you know, many of the motions that we've put forward regarding inferior procedures in this forum, it's simply inherent to the nature of a military forum that when a defendant stands trial here instead of in an Article III court, they're exposed to dangers that our Constitution sought to avoid. Those dangers include trial before a judge and a members panel who wear military uniforms and whose independence from the prosecuting authority in this case can and should be reasonably questioned.

Military judges in this forum rely on the military authorities for future promotions and assignments. That is just a

far cry from the institutional independence and life tenure afforded to Article III judges.

Similarly, the members panel that will decide Mr. Nurjaman's guilt or innocence here will bear little, if any, resemblance to the civilian juries required by our Sixth Amendment.

Here the panel will consist of a nonrepresentative sample of American society. Each of its members will quite literally have been indoctrinated through military training toward a favorable and protective view of the U.S. Government and its military activities.

Each of its members will have volunteered for a profession in which we are expected on command to kill people who the President declares to be our nation's enemies. That can include foreign soldiers, alleged terrorists, or alleged drug smugglers operating watercraft on the open ocean.

In the case of this particular trial, which is being held, at least in part, on this offshore military base, the dangers of a fundamentally unfair proceeding are magnified even further. Here, because the government has off-shored Mr. Nurjaman and this courtroom, the government claims, as they just did, that basic constitutional protections, such as the due process and confrontation clauses, cannot be enforced.

Despite having sworn an oath to support and defend the Constitution, every military member who participates in this trial

from any vantage point, other than the defense table, is liable to claim that this case constitutes an exception to that oath.

So yes, the government's decision to charge Mr. Nurjaman here rather than in our nation's open and functioning Article III courts is a significant intrusion upon his rights and liberties, as well as our nation's basic constitutional structure.

So any statute that provides for that sort of intrusion has to be able to survive at least the same level of vagueness scrutiny that applies to statutes that burden speech rights as in the Supreme Court's decision in Hoffmann Estates or that subject noncitizens to potential deportation as in Sessions v. Dimaya. The question then turns to whether the MCA's personal jurisdiction provisions can survive such scrutiny.

To be clear, Your Honor, as we said in our motion, we think that there is an available construction of the MCA's core jurisdictional provisions that probably could survive such scrutiny.

In 2009, MCA says that a military commission may exercise personal jurisdiction over any noncitizen who engaged in or supported hostilities against the United States. And it defines hostilities as any conflict subject to the law of war. And there are sources that speak to the law of war itself that together have developed a definition of hostilities that the defense has previously argued, and we're not waiving or altering that argument. We've previously argued

that that was necessarily and textually incorporated into the MCA.

And we're not submitting that such a law would be unconstitutionally vague. However, the commission has held that the MCA does not incorporate those standards, or at least that it does not do so for purpose of assessing personal jurisdiction, and that subject matter jurisdiction is not enforceable by the commission pretrial. Or ascertainable, I should say, by the commission pretrial.

And in fairness to the commission, in that construction of the MCA, it is true that Congress has used the word "hostilities" in other statutes in what appears to be an extraordinarily and intentionally vague manner.

As we observed in our motion back in 2011, President Obama ordered a bombing campaign in Libya that lasted more than 100 days, and he claimed that it did not trigger the requirements of the war powers resolution respecting hostilities lasting more than 60 days. And his State Department's legal advisor, Mr. Harold Koh, argued to Congress that the war powers resolution's use of the term "hostilities" was, in fact, intentionally vague and designed to be fleshed out and defined by subsequent executive practice.

This is the type of flexible, unmoored definition of hostilities that the government has embraced so far in this case. According to the government, for our present purposes the existence

of hostilities, at least for personal jurisdiction purposes, is a political question to which courts are expected to answer by giving deference to the Executive Branch.

In other words, the government can charge any noncitizen here rather than in a court. If our nation's political leaders make the political and military decision to characterize that person's action as those of an enemy belligerent, a decision that, as we lay out in our motion, the government is making increasingly often and increasingly alarming, you know, in number and type of circumstances.

The commission in its ruling at AE 0081.032 embraced the government's view that the existence of hostilities is a political question. Such an invitation to the political branch is to make up the prerequisites for jurisdiction here is a textbook unconstitutional vagueness -- a textbook example, excuse me, of unconstitutional vagueness in a criminal statute.

By what possible legal standard are the events in the charge sheet, hostilities, while a bombing campaign in Libya is not? By what possible standard are drug cartels engaged in hostilities against the U.S. while our air strikes against alleged drug smugglers are not hostilities? And how is it that we are at war with al Qaeda but we're not at war with Russia even though we've provided billions of dollars and untold quantities of intelligence to Ukrainian forces?

There's nothing consistent or legally sound about our

government's characterizations of these various circumstances.

And the Constitution does not permit Congress to pass a statute that allows the rights of noncitizen criminal defendants, like Mr. Nurjaman, to turn on such arbitrary executive whims.

The existence of an incredibly broad, open-ended AUMF in the background of all of this simply does not solve the problem. That's the case for one because it's a category error to say that an AUMF can recognize or even independently create a state of hostilities, especially for purposes of a criminal statute like the MCA. And although it is true that habeas cases decided by the D.C. Circuit Court of Appeals and its subordinate district courts have used the terms "hostilities" and "part of al Qaeda" in decisions that decline to interfere with the continued detention of Guantanamo detainees, those decisions have to be understood in the context of the statute that they are interpreting.

The AUMF that the D.C. Circuit is interpreting in those cases does not use the word "hostilities." It does not refer to al Qaeda. It simply gives broad and indeed vague authority to the President to use military force and to decide who to use it against.

What's more of the text of the AUMF, unlike the MCA, makes no effort to acknowledge, incorporate or frankly show any amount of respect or deference to the requirements of the law of war. It's fundamentally intended to broadly activate the executive war powers

in a particular area.

Criminal statutes are fundamentally different. They ask the judiciary to preside over efforts by the government to hold defendants accountable for crimes. Criminal statutes, more than any other type of statute, and certainly more than an AUMF, requires strict construction.

The 2009 MCA does not say that anyone who may be detained pursuant to the 2001 AUMF may be tried in this forum, and if it did our challenge would look a little different. It would be more of a nondelegation-type challenge, but that's not the statute that we're confronted with.

So to reiterate, it's just a category error to claim that because the United States has decided to authorize military force indefinitely against an indeterminate number of people under domestic war power authorities that hostilities thereby exist indefinitely and in all places between the U.S. and those people in groups, especially for purposes of a criminal statute. A domestic law permission slip does not create a material state of affairs.

And the defense agrees that hostilities can exist when the President deploys the military into active combat without an AUMF pursuant to his inherent Article II authorities. And similarly, hostilities can fail to exist despite the existence of all sorts of domestic sources of authorization to use military force inherent or

otherwise.

And most important for current purposes, the government agrees with that last part as well. Or at least seems to by virtue of all its filings and submissions on this issue. Nowhere does the government take the position that an AUMF is necessary or even a sufficient condition to find that a defendant engaged in hostilities and can, therefore, be tried in this forum. By all accounts, the government's position is that the MCA allows the President to just characterize a noncitizen as an enemy belligerent and then send him to face trial in this forum.

As trial counsel argued in the 0081 series, this is at page 1474 of the unofficial transcript, the government's position is that it has the ability to use every lever of national power to defeat its opponents; and that it's not precluded from asserting that hostilities or a conflict exists just because it prefers to use one lever of national power or another.

Which brings me to my concluding point which is that perhaps the single-most informative aspect of the government's response to this motion is what it does not argue. It does not argue that if you interpreted the MCA strictly that it would apply in this case.

The government is wedded, in this case and in general, to a version of the MCA that is incredibly broad because it wants that power both in general and to prosecute Mr. Nurjaman. The first tool

available to courts to defeat vagueness in a statute, and thereby protect it against a constitutional challenge, is strict construction. And if the government believed that a strict construction of the MCA's jurisdictional provisions would still provide jurisdiction over Mr. Nurjaman, then it would have raised that argument somewhere in its response to this motion. It would have used the words "constitutional avoidance" somewhere in response to its motion, and it did not do so.

The government has not done so because on a strict construction of the term "hostilities," Mr. Nurjaman did not engage in or support hostilities, just like how on a strict construction of the phrase "part of al Qaeda" ----

MJ [Lt Col BRAUN]: Counsel, I need you to slow down a little bit.

DDC [Capt HOPKINS]: Yes, Your Honor. Sorry about that.

Just like how on a strict construction of the phrase "part of al Qaeda," Mr. Nurjaman simply was not in al Qaeda.

Strictly and properly construed, the MCA does not provide for personal jurisdiction over Mr. Nurjaman. We're here because "deferentially construed" in accordance with the ever-shifting political whims of the Executive Branch, the statute is unconstitutionally vague.

Pending any questions from Your Honor, that's my argument.

MJ [Lt Col BRAUN]: Sorry. I don't believe I have any questions for you at this time, Counsel. Thank you.

DDC [Capt HOPKINS]: Thank you, sir.

MJ [Lt Col BRAUN]: Trial Counsel?

MDTC [LTC MILLER]: Yes, Your Honor.

Your Honor, a unique issue with this motion is that the defense is asserting that it is making a constitutional vagueness challenge to the statute. But, as we see in their filings and as we've just heard, what they're actually challenging is the commission's construction of the statute. So I'm going to take both of those aspects. I'm going to start with how the void for vagueness doctrine would apply to the statute and then I'll move on to address the construction issue.

The defense's vagueness challenge to the statute suffers from a fatal flaw. And that is that the void for vagueness doctrine has not been applied to jurisdictional elements of a statute. Void for vagueness applies to penal statutes and, as the defense noted, some civil statutes that involve conduct and then penalties or other fines that come along with that conduct.

The MCA's jurisdictional scheme is not a penal statute. Black's Law dictionary defines a penal statute as one that defines a crime and then prescribes the corresponding fine, penalty, or punishment. The MCA's jurisdictional elements do not define crimes.

It does not make being alien a crime. It does not make being an unprivileged enemy belligerent a crime.

The eight charges against Mr. Nurjaman, those are the crimes. And they derive from the penal statutes within the MCA, and those penal statutes are not at issue in this motion.

This fatal flaw becomes more apparent when you actually try to apply the void for vagueness doctrine to personal jurisdiction. In Kolender v. Lawson, the Supreme Court outlined that the doctrine has two prongs, notice and structural. The notice prong requires that a statute define a criminal offense with sufficient definiteness that an ordinary person can understand what conduct is prohibited.

Personal jurisdiction does not define offenses. It does not prohibit conduct. It is not a penal statute, and it makes no sense to apply this vagueness doctrine to that.

The second prong is structural. And the same problem occurs if you try to apply it to personal jurisdiction. Structural analysis requires minimum guidelines to govern law enforcement.

The courts have found that a statute runs afoul of the void for vagueness doctrine when it fails to define a criminal offense in a manner that does not encourage arbitrary and discriminatory enforcement.

And, again, the personal jurisdiction elements of the MCA do not define any offenses, nor does the personal jurisdiction scheme

encourage arbitrary and discriminatory enforcement. For one, it doesn't govern law enforcement. The personal jurisdiction elements of the statute are not used by law enforcement or prosecutors to determine what conduct to investigate and charge someone with.

The aspects of the MCA that do govern law enforcement are the applicable criminal offenses, the basis of the charges against Mr. Nurjaman.

Personal jurisdiction does not involve law enforcement conduct. It involves what court has the power to adjudicate charges that are filed against a person in this commission, and applying void for vagueness doctrine does not make sense.

The defense has requested that the commission apply the void for vagueness doctrine to all laws, defying precedent for the void for vagueness doctrine.

And in their filings -- and they mentioned it again in oral argument -- one of the primary quotes they use is from U.S. v. Davis where Justice Gorsuch said: A vague law is no law at all.

In using this type of quote, the defense argues that void for vagueness applies to all laws. But if the defense had simply read the three sentences that come after that quote, they would see that Justice Gorsuch was talking about penal statutes. He says that laws cannot be vague because the legislature has the responsibility to define criminal behavior and the consequences of that behavior.

U.S. v. Davis is a case involving a statute that creates enhanced punishments for people who use a firearm when committing certain other federal offenses. And the entire case revolved around whether Congress had properly defined what those other offenses are so that law enforcement and prosecutors could not willy-nilly pull people into that higher penalty scheme. It had nothing to do with jurisdiction or what court had the power to adjudicate those claims.

Now, the defense wants the commission to bypass this fundamental question of whether the void for vagueness doctrine applies to jurisdiction, and instead wants the commission to skip over that and determine what level of scrutiny should be applied.

It wants the commission to ignore the clear law that void for vagueness only applies to penal statutes and those civil statutes involving conduct and penalties that come with it. It makes sense that they're trying to do this because they were unable to cite a single case in which void for vagueness doctrine was applied to a jurisdictional element of a statute.

The government hasn't been able to find one either. And that cannot be explained because the MCA has a unique jurisdictional scheme, because other jurisdictional schemes are similar.

10 U.S.C. 802a(10) involves the jurisdiction of military courts in a time of declared war or a contingency operation for persons serving with or accompanying an armed force in the field. In

some ways this jurisdictional scheme is broader than the MCA's because it includes a large group of potential people, aliens and citizens.

And that scheme does incorporate hostilities in some of its definitions, but it goes further to include military actions and contingency operations outside of declared wars.

In U.S. v. Ali in 2012, the Court of Appeals for the Armed Forces upheld the constitutionality of this personal jurisdiction scheme as it applied to Mr. Ali.

That case did not challenge subject-matter jurisdiction under vagueness standards, which makes sense because it doesn't apply to jurisdiction. It primarily challenged it under the Fifth and Sixth Amendment.

The defense in that case did argue that certain terms in the personal jurisdiction scheme were ambiguous, such as what it meant to be accompanying the force in the field. But the Court of Appeals for the Armed Forces found that no ambiguity existed because the court was able to understand the definitions of those terms and apply them to Mr. Ali's facts.

This is the case that comes closest to what the defense is attempting to do in this motion. And even then, it does not involve applying vagueness doctrine to personal jurisdiction.

So now I'll move on to the construction element. As

reiterated in their reply and during their argument today, the defense is challenging the commission's construction of personal jurisdiction rather than whether the term "hostilities" is vague unto itself in the statute.

And this is not really a challenge to the statute. It's a request for you to reconsider the personal jurisdiction ruling that has already been made.

They're primarily attacking, as they've said, the political question issue. And in the personal jurisdiction ruling, the commission followed precedent to determine that the existence of hostilities was a political question.

The commission found that Congress and the Executive had both agreed that hostilities exist between the United States and al Qaeda and that existence of hostilities has been recognized by numerous superior appellate courts.

Defense's main challenge to the political question issue appears to be that the construction of the courts would potentially allow personal jurisdiction over other people under the whim of the political elements, such as drug smugglers or others, but that's a red herring.

The defense is inviting the commission to entangle itself in abstract disagreements over political policy and executive decisions.

And as the D.C. Circuit has stated in Hight v.

the U.S. Department of Homeland Security: The ripeness doctrine is meant to prevent this very entanglement. Courts should reserve their judicial power for resolution of concrete and fully crystallized disputes. And the potential personal jurisdiction over drug runners or anyone else is not a concrete dispute for this commission in this case.

The commission's personal jurisdiction over Mr. Nurjaman is based on him being an AUEB under the definitions of the MCA that the commission was able to apply. And the commission found, after the government presented its evidence in that motion, that the government had met its burden, and that under the facts of this case, the commission had personal jurisdiction over him.

I'll now move on to the defense's arguments related in particular to the term "part of al Qaeda."

MJ [Lt Col BRAUN]: Before you do that, Counsel, you had cited to a case, Hight v. U.S. Department of Homeland Security. Do you have the citation to that?

MDTC [LTC MILLER]: I do, Your Honor. That would be 135 F.4th 996.

MJ [Lt Col BRAUN]: You said that was a D.C. Circuit case?

MDTC [LTC MILLER]: It is, Your Honor.

MJ [Lt Col BRAUN]: Okay. Thank you. You may move on.

MDTC [LTC MILLER]: Yes, sir.

For the term "part of al Qaeda," one of the defense claims is that the law of war prohibits jurisdiction over individuals based purely on their membership in a nonstate armed group, and that's simply not the status of the law. The defense relies on the ICRC interpretive guidance related to direct participation in hostilities. And this is unpersuasive for two reasons.

First, the ICRC guidance is not a definitive statement of the law. It is a recommendation. The ICRC explicitly states that their guidance is not a definition of the law. And this was emphasized by Justice Williams of the D.C. Circuit in his concurring opinion in al Bihani v. Obama, which is 590 F.3d 866.

Secondly, the defense is misinterpreting the ICRC guidance. The ICRC does not recommend that membership is insufficient for jurisdiction. Instead, it recommends that membership be equated to a continuous combat function. And superior U.S. courts have not applied that recommendation.

In a habeas case, al Adahi v. Obama, 613 F.3d 1108, the D.C. Circuit found that voluntary affiliation with al Qaeda was sufficient to render someone a part of al Qaeda. And although this was a habeas case, it deals with similar issues as jurisdiction. Is a person a member of a group that subjects them to U.S. authority, namely capture and detention. The law simply does not contain any prohibition on asserting jurisdiction under law of war based on a

group affiliation.

Now we move on to the defense's arguments related to bill of attainder. There's no precedent case showing that bill of attainder applies to the military commissions. Even if it does, the provision of personal jurisdiction is not a bill of attainder. Bills of attainder are prohibited because Congress may not subsume the judicial power. Congress cannot be judge and jury. It cannot punish individuals or groups without a judicial trial.

And this means that a statute violates bill of attainder if it applies with specificity and imposes a punishment. For specificity, the MCA clearly doesn't name Mr. Nurjaman in this personal jurisdiction language, nor does it make being a member of al Qaeda a crime within the personal jurisdiction statute.

Other criminal conduct is necessary to allow someone to be tried and convicted in the commissions.

And as far as punishment and imposing punishment, trial is the key element to this. It shows that Congress has not imposed a predetermined punishment for being a member of al Qaeda. Punishment is only possible if Mr. Nurjaman is found guilty within the procedures and safeguards of a trial. Congress is not the judge and jury. I'm talking to the judge right now, and the jury will be a panel, as it has been for any commission that has gone to trial.

Now, the defense made a lot of claims saying that the

jurisdiction of the military commissions of themselves -- you know, within itself is a form of penalty. And they've made this both related to the bill of attainder and also for their overall argument about the vagueness issue.

But the defense has made many arguments in the past, including previously today, about whether the commissions grant sufficient rights and protections. That is not the purpose of bill of attainder and it is not the purpose of the vagueness doctrine. And the commission should not allow the defense to use this motion to relitigate all those issues that they've litigated in the past.

Your Honor, the defense's arguments simply cannot overcome their fatal flaws. Void for vagueness does not apply to jurisdiction, and no court has done so. The defense has provided no case law to support this. The two prongs of the doctrine when you try to apply them make it clear that applying them to jurisdiction makes no sense. Their arguments surrounding "part of al Qaeda" face similar absence of supporting law.

And the defense's attempt to use this constitutional claim to attack the commission's personal jurisdiction ruling does not change the fact that under the clear language of the statute, applying the facts of this case and the evidence that the defense put forward in the personal jurisdiction motion, Mr. Nurjaman was rightly found to be an alien unprivileged enemy belligerent. And the

commission should deny this motion.

MJ [Lt Col BRAUN]: Thank you, Trial Counsel. No questions.

MDTC [LTC MILLER]: Yes, sir.

MJ [Lt Col BRAUN]: Defense Counsel, rebuttal argument?

DDC [Capt HOPKINS]: Yes, Your Honor.

All right. So the government -- so the government's main argument is that the void for vagueness doctrine does not apply to jurisdictional elements of a statute. And to advance that argument, they point primarily to the fact that in the Kolender case there's kind of a test that's set out for how to assess whether a criminal statute violates the void for vagueness doctrine. And I would agree with trial counsel that for a while after that Kolender case, many practitioners' -- particularly in lower courts -- assessment of the void for vagueness doctrine was, okay, this is a -- the thing about criminal statutes and it doesn't apply in other areas.

However, more recent case law from the Supreme Court has made clear that that's not what the doctrine is about and that that version of the doctrine was primarily derived from its due process origins, but that there's also, as I noted in my argument, a separation of powers prong of this doctrine to which the Supreme Court has increasingly been speaking, you know, in its more recent precedents.

So because I, you know, frankly, Your Honor, am a nerd, I

recently listened to the Supreme Court's oral argument in Sessions v. Dimaya. And the government representative in that argument, Mr. Kneedler, a longtime advocate for the United States, stood up and made an argument extremely similar to what Lieutenant Colonel Miller just said: Hey, this whole void for vagueness thing simply does not apply to the petitioner whose risk here is being deported. We're not talking about crimes, we're talking about immigration. That's a totally different thing. It's not a punishment, et cetera, et cetera.

And what the Supreme Court justices said in all their questions to him was, okay, but it's really important whether someone gets deported, right? And then that carried the day. And the opinion that they wrote said there are serious consequences to being deported and so the void for vagueness doctrine, both in its due process and its separation of powers elements, applies to this decision of whether the government can treat someone in that way.

And those same principles apply here. So, yes, absolutely. You know, the government is correct that I cannot point you to a case that says a statute defining the jurisdiction of a separate, inferior criminal forum is subject to void for vagueness scrutiny. That is true.

The main reason for that is that almost all of our criminal courts are bound by the Constitution and almost all of them that try

felonies are courts of general jurisdiction. So if you are tried by the United States, you're tried in a U.S. District Court. If you are tried by the State of Texas, you're tried in the State of Texas court that is bound by the Constitution and that is appropriate to the level of criminal penalty that you face there.

Our nation's history with establishing inferior criminal courts such as this one is lengthy temporally, but in terms of, you know, summarizing it, it's pretty short, right?

Ex parte Milligan, the Supreme Court said: Hey, you're off the battlefield. The courts are open. This whole premise is wrong and you cannot try someone, you know, in a military commission while the courts are open, and decided the question on that basis.

Ex parte Quirin has been discussed a lot in the other motions argued today and in various filings. But suffice it to say, you know, World War II, in the midst of a hot war, you know, between nation states, you know, that threatened their existence, the Supreme Court in a specific context signed off on a military commission where, you know, those defendants could make a lot of arguments, but they couldn't argue that they weren't belligerents. You know, that was not an option that was reasonably available to them. They could not argue that they were not engaged in a war, right? So it had no reason to come up.

And then similarly in Hamdan, the first time the government

tried this, the Supreme Court struck it down on the simplest, narrowest basis available to them, which was, you know, accepting arguendo that there is a conflict to which, you know, the government asserts here -- right? -- well, this just doesn't meet Common Article 3 standards. And to be clear, because this has come up in this motion and in others, four of the five justices who signed onto that opinion disparaged the idea that there could be conspiracy war crimes jurisdiction for pre-9/11, pre-Iraq -- excuse me, Afghanistan invasion conduct outside of a theater of war, right?

You know, and then you have -- then you have Hamdan and Bahlul. And Hamdan, his case was entirely thrown out, you know, on one ground. And then Bahlul sat here on his hands and because he waived everything, he created an appellate case that the government loves because it signed off on a -- you know, it's one of the only times they've been able to successfully maintain a conviction but it depends fundamentally on the fact that the guy didn't litigate anything in here and so he was extremely constrained in what he could litigate above, right?

And the judges who decided his case, you know, the two in the middle made very clear this applies to Bahlul and his litigation conduct and his specific activities, and we're not going to endorse anything broader.

So this idea that I can come in here with extensive history

of our nation's efforts to try people in inferior forums, you know, the vast majority of those efforts have been shot down, right? Rightly so. And the few that have not, you know, there's been a reason why this specific issue hasn't come up, Your Honor.

So what we're left with are constitutional principles. And, again, Boumediene said that when a noncitizen litigates in United States forums, they can raise separation of powers arguments, because that was one of the government's arguments in that case. Why are we listening to an individual who's not from here tell us about our own Constitution? And Justice Kennedy said, well, if the United States is a litigant, then we're going to talk about our Constitution.

And so when you go read Davis and Justice Gorsuch's concurrence in Davis, and when you go read Sessions v. Dimaya, it becomes clear that the void for vagueness doctrine as it currently exists is not a narrow due process protection. It is a statement about the relationship between Congress, the executive, and the courts.

And where the stakes are high, the Supreme Court requires Congress to write a law that prosecutors and law enforcement can fairly enforce and that judges can fairly interpret.

The stakes are undoubtedly high here. Again, you know, the government repeated its argument here today that because we've elsewhere litigated fairness issues, that is we're just relitigating

it here to say, oh, well, Mr. Nurjaman has been deprived of various rights. But it's not in question that Mr. Nurjaman is deprived of various rights.

Trial Counsel stood up today and said the rights of the Constitution do not apply here, right? We can convict Mr. Nurjaman by a lesser concurrence than any other forum in the United States. We can convict Mr. Nurjaman of a lifetime offense with five people, a thing that at this point in American history no other forum permits. And, actually, two-thirds of five or six people.

So the notion that it doesn't matter who gets to be tried here is belied by the words of trial counsel today. They're saying because we get to try you here, we get to treat you this way. And what the defense is saying is the executive can't just do that willy-nilly.

The government alludes to really the only other -- and this is true -- I mean, the only other sort of similar jurisdictional effort known to our system is those narrow instances where civilians can be tried under the Uniform Code of Military Justice. I will agree with the government that that is the closest analog to what we have here. Because Mr. Nurjaman, unlike any defendant in Quirin, didn't sign up, you know, for -- to be involved in a belligerent force, right? He was not engaged in what everybody would agree is a war.

And so, you know, the only similar situation where someone is not clearly a belligerent -- I would say not a belligerent, but I think everyone would have to agree not clearly a belligerent -- where we, nonetheless, allow military jurisdiction is those narrow instances where civilians can be tried. And we addressed this in our reply, Your Honor, but in the case -- the Ali case cited by the government.

CAAF made clear that every single aspect of the statute that permits that is narrowly construed. The predecessor to that statute, you know, resulted in a prosecution being thrown out -- the case is cited in our reply -- because the CMA, the predecessor to CAAF, held that it only applied to formally declared wars, and Vietnam was not such a formally declared war. It did that because it decided that strict construction of any sort of military jurisdiction statute was necessary.

And so then, yes, Congress went in later and added contingency operation, but it required prior notice from the Secretary of Defense about which operations qualified as contingency operations. And then it further requires a civilian serving in such a contingency operation, a fact about which they have prior notice -- right? -- it further required that for jurisdiction to attach, they had to be serving with the armed forces in the field.

CAAF did not find that "in the field" means whatever the

government says is in the field. You know, we use the phrase "in the field" all the time in the military. Probably the most common, you know, application these days is "I'm going to the field," which means I'm going on a training exercise for two or three days. And CAAF could have said, hey, the most natural reading of "in the field" is anything outside of, you know, a garrison environment, right?

But what CAAF said is, no, because jurisdiction in military forums is a big deal. "In the field" means in an area of actual fighting. That's what the Ali case says. So now we've got reference to a material state of affairs in the world. Not -- crucially, not whatever the government says the field is, right? The courts are going to look at facts on the ground and say, are these facts that justify military jurisdiction? They are not going to say, does the government say we get to charge this guy here?

Next argument the government raises is that, you know, we're actually asking the commission to reconsider its prior ruling. And I will certainly acknowledge that our motion contains plenty of criticism of the commission's prior ruling. Not running away from that at all.

It's not a request to reconsider, though, because yeah, it is conceptually possible that when Congress used the word "hostilities" in the MCA that it intended not to incorporate a law of war definition that could be strictly construed. It meant to be

incredibly vague. Like, that is conceptually possible. And to the extent that what Congress was doing and legally did was create a forum to which the executive can send people it doesn't like, then that's the statute that we're challenging as unlawfully vague.

I do want to pause for a moment to discuss, you know, the government's treatment of drug smugglers, et cetera, right? There probably was a time in American history where courts felt very comfortable saying: We're going to defer to the President on what hostilities is and we're going to do that because the Executive Branch takes the notion of hostilities extremely seriously.

To the extent that any of this political question, you know, line of cases from habeas case law and things like that depends on kind of the extension of, we'll say, you know, earned deference to the executive, current events and the government's kind of breezy assessment of those current events demonstrate that that type of deference is not appropriate here.

The government is using the phrase, you know, "terrorist," "enemy," "invader." They're using these phrases all the time to activate novel, unconstrained legal authorities to do things that the Constitution would not allow if they didn't use those words.

And what we present to you, Your Honor, is that the Constitution is not such a fickle, weak document or idea that the government gets to bypass it by using the language of wartime.

Nothing that trial counsel said in their argument suggested that the government believes anything other than that the MCA would allow them to charge someone they pick up off a drug boat in this forum because the government calls them an alien enemy belligerent.

And if the government's not even willing to say that, to present a theory of this statute -- right? -- that could capture Mr. Nurjaman but could not capture that person, that is a blaring signal to you and to anyone else who cares about the Constitution that something is wrong here, that this statute is not a lawful basis upon which to send people to an inferior criminal forum with inferior rights.

And, yes, because this is an inferior forum with inferior rights, we stand on our argument that in addition to being unconstitutionally vague, the final personal jurisdiction provision about al Qaeda membership is also a bill of attainder.

Again, the more straightforward and the more correct basis upon which to decide that is on the fact that the government has never claimed that Mr. Nurjaman was a member of al Qaeda. They claim that the phrase "part of al Qaeda" incorporates this, you know, broad test that is far from any notion of strict construction that doesn't require actual membership in the organization. So that's the, you know, more straightforward basis on which to decide the question.

But insofar as it could be construed strictly and

appropriately, then it would be picking out a certain group of people and saying you're being subjected to legislative punishment.

In the black letter statement of what a bill of attainder is from United States v. Brown, Supreme Court in 1965, is any legislative punishment of any form or severity of specifically designated persons or groups, and that portion of any severity -- "of any form or severity" is quite clearly intended to contemplate noncriminal punishments, right? The government can punish people in ways other than by convicting them of crimes. It can subject them to civil forfeiture. It can deport them. And yes, it can send them to face trial in an inferior criminal forum.

Any questions, Your Honor? Thank you, sir.

MJ [Lt Col BRAUN]: None. Thank you, Counsel.

Counsel, what I'd like to do at this time -- we've been on the record for a bit. I'm going to place us in a 15-minute comfort recess. During that time I'm going to have a brief R.M.C. 802 conference. I just need the lead counsel from each team just to talk about if there's anything additional that we can -- I believe there's one additional matter that the commission had originally docketed, but if there's anything additional, just to kind of try and get a way ahead, understanding where we are in the week.

At the end of that 15 minutes, then we'll come back on the record, address those matters at least that the commission notified

the parties it desired to address based upon the parties' joint filing.

I believe that will take us to where we need to be. Is there anything else we can take up before I place us in a 15-minute recess?

Trial Counsel?

TC [Lt Col GOEWERT]: No, Your Honor. Thank you.

MJ [Lt Col BRAUN]: Defense Counsel?

LDC [MR. FANNIFF]: No, Your Honor.

MJ [Lt Col BRAUN]: Very well. This commission is in a 15-minute recess.

[The R.M.C. 803 session recessed at 1452, 28 January 2026.]

[The R.M.C. 803 session was called to order at 1545, 28 January 2026.]

MJ [Lt Col BRAUN]: This military commission will come to order.

All parties that were present -- all parties that were present when the commission last recessed are again present.

During the recess I had a very brief R.M.C. 802 conference with the lead trial counsel and lead defense counsel. At that R.M.C. 802 conference I just let the counsel know that there was one matter still outstanding based upon the joint schedule provided by the parties to the commission that I was tracking. I also asked the

status as to another matter that doesn't have a complete briefing cycle yet, if the parties would be ready to address that this week. The answer to that was no.

No evidence was received, nor argument entertained during that -- nor ruling provided during that R.M.C. 802 conference.

Does either side wish to object to or supplement my summary?

Trial Counsel?

TC [Lt Col GOEWERT]: No, Your Honor.

MJ [Lt Col BRAUN]: Defense Counsel?

LDC [MR. FANNIFF]: No, Your Honor.

MJ [Lt Col BRAUN]: So during the last argument defense counsel had expressed an opinion on the record -- or at least what appeared might have been an opinion on the record that the military judge is subject to influence by the chain of command and, therefore, should be questioned.

First off, I want to state affirmatively on the record again, as I have previously, that I am aware of no matter that would stand for ground for challenge against me. I have provided the opportunity for the parties to question or challenge me. The defense indeed took advantage of that. Those questions are contained in the record at AE 0066.010 (NUR) dated 11 October 2023.

That was the first session where I appeared on the record in this commission. And both parties actually conducted voir dire of

the military judge and no challenges were expressed at the end of that session.

I also note that as a military judge I am protected by law in the exercise of my judicial duties. Look at 10 U.S.C. Section 948j, as well as 10 U.S.C. 826. All that being said, if either party becomes -- if the court becomes aware -- if the commission becomes aware of a matter that might be ground for challenge, I'm aware of my obligation to disclose that to the parties and would do so.

If at any point the parties have a need or a desire to question or challenge me, I just invite them to make that known to the commission so that I can take that up. I, you know, do believe that military justice proceedings and the commission proceedings need to be fair and impartial in fact, reality, and perception. So I believe that we have satisfied those obligations to date. I believe we continue to satisfy those obligations to date. But if a party has a concern, I just ask them to bring it to the attention of the commission so that we can address it.

That being said, are there any -- is there a desire to question or challenge me at this time?

Trial Counsel?

TC [Lt Col GOEWERT]: No, Your Honor.

MJ [Lt Col BRAUN]: Okay. Defense Counsel?

DDC [Capt HOPKINS]: No, Your Honor. And just for clarity for the record, you know, the reference was intended to essentially address the structure of this commission and was not specific to Your Honor and was not based on any basis to, you know, question the impartiality of this commission that would not equally apply to any possible military judge who could be detailed to this military commission.

MJ [Lt Col BRAUN]: Okay. And thank you, Defense Counsel. And I'm not trying to read into the argument of counsel very far. I just -- insomuch as somebody who is observing the proceeding may have heard that comment -- and I don't want people to have a misperception that something is wrong and we're not addressing it. So that's why I want -- I felt it important to address that matter on the record.

DDC [Capt HOPKINS]: Heard and understood, Your Honor. Thank you.

MJ [Lt Col BRAUN]: Okay. So the last matter that the commission would like to address is the continued representation of Mr. Nurjaman by Mr. James Hodes.

So Mr. Hodes' last appearance before this commission on behalf of Mr. Nurjaman was in October 2023, I believe. That's around -- a little better than 25 months ago.

Since that appearance, Mr. Nurjaman has voluntarily excused Mr. Hodes from participation in hearings on his behalf, with the

exception of the July 2024 hearing where he did not excuse Mr. Hodes.

On 23 September 2025, Mr. Hodes mentioned the commission -- or motioned the commission for permanent excusal as detailed defense counsel, citing his inability to communicate with Mr. Nurjaman or meaningfully participate in the military commission's proceedings.

Mr. Hodes is also unable to travel to Naval Station Guantanamo Bay or appear from the Remote Hearing Room. The defense reported in AE 0119.004 that Mr. Hodes is no longer a federal government employee.

Mr. Fanniff, I'm going to start with you. Is that fact, indeed, correct?

LDC [MR. FANNIFF]: Yes, Your Honor. Mr. Hodes did apply for and was accepted into the Deferred Resignation Program offered by this administration. And thus, his employment with the federal government and with MCDO specifically was terminated on 1 October of this past year.

MJ [Lt Col BRAUN]: Okay. So his last day would have been 30 September?

LDC [MR. FANNIFF]: That is correct, Your Honor.

MJ [Lt Col BRAUN]: Thank you.

Mr. Nurjaman, I know I advised you of your rights to counsel yesterday -- Monday -- yesterday. Do you have any questions about

your rights to counsel before I move forward?

ACC [MR. NURJAMAN]: There are none.

MJ [Lt Col BRAUN]: Okay. It's my understanding, at least up until now, that you have not agreed with the permanent excusal of Mr. Hodes as your detailed defense counsel. Is that understanding still correct?

ACC [MR. NURJAMAN]: Correct.

MJ [Lt Col BRAUN]: Okay. It would appear to me that the last time ----

[Pause.]

MJ [Lt Col BRAUN]: When was the last time -- and I'm not going to ask about any conversation you've had with Mr. Hodes. Okay? I don't want to know about the contents of any conversation you've had with him. But when was the last time you've been able to have contact with him, if you remember?

ACC [MR. NURJAMAN]: I don't remember, but it's been at least a year.

MJ [Lt Col BRAUN]: Okay. Okay. I think those were the factual questions that I wanted to ask. One, to get Mr. Nurjaman's position as to his desires regarding the continued representation of Mr. Hodes on the record, as well as be sure that I understand fully his current status as a federal employee.

So are there any other matters that the parties wish to

bring to the attention of the commission as it relates to the continued representation of the accused by Mr. Hodes?

Defense Counsel, I'll start with you.

[Counsel conferred.]

LDC [MR. FANNIFF]: Nothing in addition to the filings we've already presented, Your Honor.

MJ [Lt Col BRAUN]: And the commission will -- and has those filings and will fully consider them in acting upon Mr. Hodes' request.

Trial Counsel, anything further from the government?

TC [Lt Col GOEWERT]: No, Your Honor, except to point out that I believe that you ordered Mr. Hodes to provide you with a request for excusal, and he did not prepare one.

MJ [Lt Col BRAUN]: Okay. I believe that -- Defense Counsel?

LDC [MR. FANNIFF]: Yes, Your Honor. I believe there was a filing from Mr. Hodes that was the request for excusal. I don't know the AE number of that off the top of my head, Your Honor.

MJ [Lt Col BRAUN]: And I, unfortunately, do not have that AE number handy either. The commission will look through the filings that it has, though. I believe there is a request before the commission for his excusal. So that is what the commission plans to act upon, is that request. That's what's prompting this conversation and the -- the ascertainment of those additional facts that the

commission wanted to have prior to acting upon that request.

So the commission's satisfied with regard to that matter.

Are there any other matters, then, that we can take up at this time before I terminate this proceeding?

Trial Counsel?

TC [Lt Col GOEWERT]: No, Your Honor. Thank you.

MJ [Lt Col BRAUN]: Defense Counsel?

LDC [MR. FANNIFF]: Nothing further, Your Honor.

MJ [Lt Col BRAUN]: Very well. This session of the military commission is terminated.

[The R.M.C. 803 session recessed at 1557, 28 January 2026.]

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