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1 [The R.M.C. 803 session was called to order at 0903,
2 8 December 2017.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, any changes since we last recessed?

5 CP [BG MARTINS]: Good morning, Your Honor. Mr. Groharing
6 is not present for the United States; all other counsel are
7 the same.

8 MJ [COL POHL]: Okay. Mr. Nevin?

9 LDC [MR. NEVIN]: Your Honor, the same except Mr. Sowards
10 is back and Ms. Radostitz is with us.

11 MJ [COL POHL]: Thank you.

12 Ms. Bormann?

13 LDC [MS. BORMANN]: Judge, we're the same.

14 MJ [COL POHL]: Mr. Harrington?

15 LDC [MR. HARRINGTON]: We're the same also, Judge.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: James Connell, Alka Pradhan, Major
18 Jason Wareham of the United States Marine Corps on behalf of
19 Mr. al Baluchi. Colonel Thomas remains excused.

20 MJ [COL POHL]: Mr. Ruiz?

21 LDC [MR. RUIZ]: Judge, we have the same representatives
22 for Mr. al Hasawi. I will ask the court, however, for leave
23 of court for Mr. Gleason to come in and out. He has to

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1 complete a number of tasks for us.

2 MJ [COL POHL]: Okay. Permission granted.

3 And I will note that none of the five accused are
4 currently present. Mr. Swann.

5 MAJOR, U.S. Army, was called as a witness for the prosecution,
6 was reminded of his previous oath, and testified as follows:

7 **DIRECT EXAMINATION**

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

9 Q. Are you the same Major that's testified at least a
10 couple of times this week?

11 A. I am.

12 Q. All right. Again, I remind you that you are under
13 oath.

14 A. I understand.

15 Q. I have in front of me what's been marked as Appellate
16 Exhibits 539L through P, each consisting of three pages.

17 Let's take 539L first.

18 Khalid Shaikh Mohammad. Did you advise him of his
19 right to attend this morning's proceeding?

20 A. I did. I met with Mr. Mohammad this morning. I
21 introduced myself. I advised him that he had a military
22 commission this morning. He said that he understood. I asked
23 him if he would be coming. He indicated he did not want to

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1 come.

2 So I then read the statement of understanding to him.

3 Q. All right. This is both in Arabic and in English.

4 Did you read the English version to him?

5 A. I asked him if he wanted it read in English and then
6 translated. He said no need to translate it, you can just
7 read it in English. So I began reading the entire document at
8 6:22 this morning.

9 Q. All right. You did it the same way you did it every
10 time?

11 A. That's correct.

12 Q. Did he sign the second page of 539L?

13 A. He did sign the second page, and he gave it to me. I
14 signed it and dated it.

15 Q. All right. Let's talk about Khallad Bin'Attash,
16 539M. In Arabic or in English?

17 A. So again, I met with Mr. Bin'Attash, introduced
18 myself, advised him he had a military commission, asked him if
19 he wanted to come to the military commission. He indicated he
20 did not want to come.

21 I handed him the Arabic version because he normally
22 follows along, so he followed along as he read the entire
23 English version, and then the translator read the Arabic

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1 version to him.

2 Q. All right. Is that his signature that appears on the
3 Arabic version?

4 A. That's correct. He completed the Arabic version,
5 signed and dated the Arabic version, and then I signed and
6 dated the Arabic version.

7 Q. Ramzi Binalshibh, 539N. English or in Arabic?

8 A. Again, I introduced myself, asked -- advised him that
9 he had a military commission this morning. He said he
10 understood, indicated he did not want to come. I asked him if
11 he just wanted me to read the English version because that's
12 normally what he wants. He said that's fine. So I read the
13 entire English version to him, and then he signed it, and then
14 he actually put the date underneath the date line, and then I
15 signed and dated it as well.

16 Q. 5390, Ali Abdul Aziz Ali.

17 A. So on Mr. Ali, again I introduced myself to him this
18 morning, advised him that he had a military commission, asked
19 him if he would be coming to the military commission. He said
20 he did not want to attend.

21 I simply read the English version to him and asked
22 him if he had any questions. He indicated he did not. And
23 then he signed and dated the second page of the English

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1 version.

2 Q. Finally, Mustafa Ahmed Adam al Hawsawi, 539P,
3 consisting of three pages. What time did you advise him?

4 A. Correct. So again, when I met with Mr. al Hawsawi, I
5 advised him that he had a military commission this morning,
6 asked him if he would be attending. He indicated he did want
7 to come. I read the entire English version to him as he
8 followed along and filled out the Arabic version. And then
9 after I completed the English version, I had the translator
10 read the Arabic version to Mr. al Hawsawi. He signed and
11 dated that in my presence, and then I signed and dated it as
12 well.

13 Q. All right. That was done at 6:17 this morning?

14 A. I began the reading at 6:17, and after the translator
15 read the Arabic version, I signed it at 6:21.

16 Q. All right. Any question in your mind that all five
17 of these men waived their right to attend today's proceeding?

18 A. No question in my mind.

19 TC [MR. SWANN]: All right. Your Honor, I have nothing
20 further.

21 MJ [COL POHL]: Mr. Nevin, any questions?

22 LDC [MR. NEVIN]: No, thank you, Your Honor.

23 MJ [COL POHL]: Ms. Bormann?

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1 LDC [MS. BORMANN]: No, thank you, Judge.

2 MJ [COL POHL]: Mr. Harrington?

3 LDC [MR. HARRINGTON]: No questions.

4 MJ [COL POHL]: Mr. Connell?

5 LDC [MR. CONNELL]: Your Honor, I have no questions. I
6 object to anonymous testimony.

7 MJ [COL POHL]: Got it. Objection overruled.

8 Mr. Ruiz?

9 LDC [MR. RUIZ]: No questions.

10 MJ [COL POHL]: Okay. Thank you. Thank you for your
11 testimony.

12 [The witness withdrew from the courtroom.]

13 MJ [COL POHL]: The proposed way ahead today is that --
14 we're going to take a recess and then switch out to the
15 special trial counsel and take the 532 VTC. Then we will call
16 Professor Watts -- we'll switch out prosecutors again and
17 bring back the regular prosecution team, we will call
18 Professor Watts for the cross-examination.

19 Then we will have a closed, classified session under
20 806 to do the cross-examination, classified cross-examination
21 of Ms. Perkins. When that is concluded, then any classified
22 argument will follow that on 502. When that is done, we will
23 have an open session with a 502 open argument. When that is

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1 completed, we will then see where we are at with two issues:
2 One is the 532 issue, kind of the way ahead, and the other is,
3 Mr. Connell, I kind of want to get an update of where we're at
4 with your 502 motion.

5 Okay. So that's kind of the plan for today. Okay.
6 Any questions?

7 TC [MR. SWANN]: Could I ask you make a determination
8 regarding their waiver this morning, sir?

9 MJ [COL POHL]: Oh, yeah. I'm sorry. I find the waiver
10 was knowing and voluntary from each of the accused. Thank
11 you, Mr. Swann.

12 MTC [MR. TRIVETT]: Sir, one more housekeeping note for
13 the witness for Ms. Perkins.

14 MJ [COL POHL]: Uh-huh.

15 MTC [MR. TRIVETT]: In the 806, do you envision that
16 happening before or after the lunch break?

17 MJ [COL POHL]: Well, that depends on how long the VTC
18 takes and also depends on how long your cross-examination
19 takes. So what I'm saying is I don't like dead time, if
20 that's what you're asking.

21 So you will have an idea of how close we are to the
22 lunch break when you guys come back for the -- Professor
23 Watts' cross, so she should be available as soon as that is

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1 done.

2 MTC [MR. TRIVETT]: Understood. Thank you, sir.

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

4 [The R.M.C. 803 session recessed at 0911, 8 December 2017.]

5 [The R.M.C. 803 session was called to order at 0917,

6 8 December 2017.]

7 MJ [COL POHL]: The commission is called to order. The
8 same defense counsel are present when the commission recessed.

9 And Major Lebowitz is here representing the United States.

10 We're here to discuss AE 532.

11 Mr. Nevin, during the recess you indicated -- and I
12 told you we'd put it on the record -- that you had an exhibit
13 that you wanted me to consider?

14 LDC [MR. NEVIN]: Yes, sir.

15 MJ [COL POHL]: That's 532CC (KSM).

16 LDC [MR. NEVIN]: Yes, sir.

17 MJ [COL POHL]: Did you intend to display this?

18 LDC [MR. NEVIN]: No.

19 MJ [COL POHL]: Okay. Okay.

20 LDC [MR. NEVIN]: I figured I just didn't have enough time
21 to put it through your process ----

22 MJ [COL POHL]: Okay. Yeah. Okay.

23 LDC [MR. NEVIN]: ---- so we'll just be discussing it with

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1 the witness.

2 MJ [COL POHL]: Everybody will have it in front of them,
3 so it will work out fine.

4 I'm not really quite sure who called this particular
5 witness, so the proponent of the witness; but given the nature
6 of the witness, I'm going to -- I am going to treat this as a
7 government witness. And, therefore, Major Lebowitz, you may
8 do your -- the direct examination if you want to. If you
9 don't, then I'll just simply turn it over to the defense
10 counsel, but ----

11 STC [MAJ LEBOWITZ]: Your Honor, may I -- before we begin
12 with the witness, just there are -- I just wanted to put on
13 the record the updates that we discussed in the 802 ----

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

15 STC [MAJ LEBOWITZ]: ---- yesterday evening. As this
16 commission knows, of the three affected defense teams,
17 Mr. Binalshibh's counsel are the only ones to have submitted
18 supplemental information to WHS, and WHS again described it as
19 wholly mitigating.

20 So the new information that we discussed is that WHS
21 informed counsel yesterday that the CAF rendered a favorable
22 determination for each of Mr. Binalshibh's attorneys. So for
23 them, the government's position is that this matter is

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1 resolved.

2 So again, in the 802 I requested that we take a break
3 from this litigation and the witness and put the issue back in
4 the administrative process, but we're prepared to go forward
5 with the witness.

6 MJ [COL POHL]: Okay. As -- if you want to treat that as
7 a request in the 802 to continue the hearing and not take this
8 witness, that request was denied then and it's denied now. Go
9 ahead.

10 STC [MAJ LEBOWITZ]: Thank you, sir.

11 Your Honor, the government calls Mr. Daniel Purtill.

12 MJ [COL POHL]: Okay. And he will appear by VTC, correct?

13 STC [MAJ LEBOWITZ]: Yes, Your Honor.

14 MJ [COL POHL]: Okay.

15 STC [MAJ LEBOWITZ]: Actually, Your Honor, just one quick
16 housekeeping again is, I believe Mr. Purtill's counsel is in
17 the room, and I just want to request if his counsel can stay
18 in the room with him, without speaking.

19 MJ [COL POHL]: Any objection?

20 LDC [MR. NEVIN]: No, Your Honor.

21 MJ [COL POHL]: Okay. He may remain in a nonspeaking
22 role.

23 STC [MAJ LEBOWITZ]: Good morning, sir. Can you please

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1 stand up and raise your right hand.

2 MR. DANIEL PURTILL, civilian, was called as a witness for the
3 prosecution, was sworn, and testified as follows:

4 DIRECT EXAMINATION

5 Questions by the Special Trial Counsel [MAJ LEBOWITZ]:

6 Q. Okay. Please be seated. Sir, can you please --

7 STC [MAJ LEBOWITZ]: Are you ready, Your Honor?

8 MJ [COL POHL]: No, just a second. Okay. Go ahead.

9 STC [MAJ LEBOWITZ]: Thank you, sir.

10 Q. Sir, please state your name for the record.

11 A. Daniel Edward Purtill. It's spelled P-U-R-T-I-L-L.

12 Q. What is your title, your current title?

13 A. I am Deputy Director of the Department of Defense

14 Consolidated Adjudications Facility.

15 Q. What is your duty location?

16 A. I am at Fort Meade, Maryland.

17 Q. Is that where you are speaking to us right now from?

18 A. That's correct.

19 Q. What are your responsibilities in your position as

20 deputy director of the DoD CAF?

21 A. So my primary responsibility is to assist the

22 director in leading the DoD CAF in the execution of its

23 personnel security adjudications mission. I have

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1 responsibility for strategic planning, policy interpretation,
2 operations, customer service, and support functions.

3 Q. How long have you worked at the CAF?

4 A. I have been a member of the CAF since its standup in
5 August of 2013 -- or 2012. Apologies.

6 Q. And what were your previous positions at the CAF?

7 A. So previously I was the division chief for the WHS
8 Division, Washington Headquarters Services Division. Prior to
9 that, I was acting director upon the standup of the CAF.

10 Q. Can you please finally briefly kind of explain your
11 prior experience, if any, in personnel security matters
12 employment?

13 A. Certainly. Yes. I began work as a personnel
14 security specialist assessing security clearance background
15 cases in -- it was February of 2003. And I have worked in the
16 same line of business since as an active adjudicator until
17 becoming director of the Washington Headquarters Services CAF
18 prior to CAF consolidation in approximately 2012,
19 January-February timeframe.

20 Q. Thank you. I'm going to shift gears and ask some
21 questions. Are you familiar with the issue posed to this
22 court?

23 A. I am.

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1 Q. Have you had a chance to review the declarations of
2 Mr. Greg Williams that were submitted in this case on this
3 issue?

4 A. I have.

5 Q. Do the declarations accurately describe the CAF's
6 policies and procedures?

7 A. They do.

8 Q. Did you find anything inaccurate?

9 A. I did not.

10 Q. Will you be able to discuss the individual facts
11 regarding the counsel referenced in the declaration, their
12 dispositions and things like that?

13 A. I will not for a couple of reasons. One is that
14 according to the Privacy Act, I'm not permitted to discuss
15 those kind of -- that kind of information about any individual
16 under CAF jurisdiction as part of the personnel security
17 process. Further, the process itself, while it's ongoing, is
18 it could take multiple directions, and any discussion of
19 what's going on or what is being done by our adjudicative
20 staff would be inherently unreliable.

21 Q. For your testimony today, will you be able to focus
22 on the CAF processes pertaining to the scenario at issue
23 without getting into their specific facts?

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1 A. Yes.

2 Q. So we can tailor it, is my question.

3 A. Yes. Absolutely.

4 Q. Okay. I want to start off with just the governing
5 documents regarding the CAF and the scenario. Is there a
6 policy or procedure governing the CAF processes that apply to
7 this issue?

8 A. So the procedure that is probably primary for the DoD
9 CAF is the Department of Defense Manual 5200.02, which is
10 entitled -- let me just make sure I've got it exactly right --
11 "Procedures for the DoD Personnel Security Program." This is
12 really the DoD implementation of Executive Order 10 -- hang
13 on -- Executive Order 12968.

14 Q. And what about -- excuse me. I'm losing my voice.
15 What about the SF 86, does that have any bearing on
16 this process?

17 A. The SF 86, Standard Form 86, is present in basically
18 every case that is under CAF jurisdiction. It's a
19 questionnaire for national security positions, which is kind
20 of the initial attempt to gather information regarding an
21 individual as we begin to assess their eligibility for access
22 to classified information.

23 I think of most relevance to my mind is the release

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1 forms that go along with that that are a required part of the
2 Standard Form 86 which authorizes the cognizant authority, in
3 this case the Department of Defense, to actually assess a
4 person's background.

5 Q. So it's essentially consent; is that correct?

6 A. That's correct.

7 Q. Now, I want to walk -- if you don't mind walking us
8 through the process of this scenario from the CAF perspective
9 step by step. So I'm going to ask you some questions, and the
10 questions are going to begin for the process when the CAF
11 first gets involved.

12 So in a situation like this, when does or did the CAF
13 come into play?

14 A. So the CAF's role in this part of the process begins
15 upon the referral of information to the CAF by a security
16 office.

17 Q. And when this referral happens, is the individual
18 typically notified?

19 A. I'm not really part of the initial, the referral
20 process. I think that may vary among security offices, but I
21 do not believe there's any requirement for notice to the
22 individual.

23 Q. So you say referral. What is referred?

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1 A. So what is referred to the CAF is information that
2 may have relevance to the personnel security process,
3 specifically information that may need to be considered in
4 light of the 13 federal adjudicative guidelines which are the
5 basis for our determinations.

6 Q. And so once the referral is made, when does an
7 adjudicator become involved?

8 A. So upon referral of information -- usually the same
9 day, maybe, you know, the next day -- the information is
10 assigned to an adjudicator through our case management system,
11 which is really just a workflow database. So it is then
12 assigned to an adjudicator right away upon receipt. The
13 adjudicator then will give an initial assessment of that
14 information, again, usually within a day or two of the
15 assignment to the adjudicator.

16 Q. And can you elaborate on what's the assessment?

17 A. So the initial assessment really just consists of
18 what is the relevance to the personnel security program, which
19 of the guidelines, if any, does the information relate to, and
20 the adjudicator's initial determination on what the first
21 actions should be regarding the referral.

22 Q. Sir, what does the adjudicator actually review?

23 A. So the adjudicator would review, in the situation

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1 we're discussing now, the referral; obviously, whatever is
2 sent to the CAF, which could obviously be quite varied. They
3 would also assess all other available, reliable documentation,
4 so since we are talking about someone who has consented to and
5 is part of the continuous evaluation process of the personnel
6 security process, we would have the initial background
7 investigation that had been conducted, typically by the Office
8 of Personnel Management.

9 So they would assess that information at a minimum
10 along with the referral in order to get a good picture of who
11 the person is, what are the circumstances of their life, and
12 as is spelled out in the 5200.02 manual, in order to make a
13 whole-person assessment of the information.

14 So it's -- our adjudicators, they're very clear that
15 they do not look at any one piece of information in isolation.
16 We do look at everything that's available to us, which for
17 someone who has been around for a very long time, there may be
18 multiple previous background investigations that had been
19 conducted.

20 And we'll look at the totality of the information we
21 have in order to make a good judgment regarding their
22 continued reliability and trustworthiness.

23 Q. Is there a timeline for the adjudicator to conduct

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1 this review?

2 A. So the -- really, the only timeline that's in statute
3 is under the Intelligence Reform Terrorism Prevention Act
4 which requires that 90 percent of adjudications be completed
5 within 20 days or less. That is the only statutory
6 requirement that's placed upon the adjudicator. We do expect
7 our adjudicators to move cases along at an expeditious pace,
8 and I believe we have set a 15-day timeline for them to take
9 their initial action.

10 Q. During -- excuse me. During this adjudication phase,
11 sir, is this considered an adverse security action?

12 A. No. From the CAF's perspective, there has been no
13 adverse action at this point. We are, again, just kind of
14 conducting our initial assessment, and as far as we're
15 concerned, there's been no adverse action.

16 Q. At what points in the process would you consider an
17 adverse security action to have been taken?

18 A. So as I stated earlier, the process can go multiple
19 directions, but if it were to go the direction where the CAF
20 has determined that we don't believe the person continues to
21 meet the requirements for eligibility and access to classified
22 information, we would issue a letter of intent with a detailed
23 statement of reasons, or SOR as we call it. And at that

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1 point, that's where we consider due process to have begun. So
2 I would -- in my opinion, that's where the first adverse
3 action would be taken; and that is a tentative action at that
4 point.

5 Q. What is the purpose of JPAS?

6 A. So JPAS is the system of record for final security
7 clearance eligibility determinations. It's actually divided
8 into two sides. The side that I'm most familiar with is where
9 I'll speak to, the JAMS, Joint Adjudication Management System,
10 where -- that is where we record our final eligibility
11 determinations.

12 Q. Now, during the adjudications stage, sir, what is --
13 excuse me -- what is the impact on the individual's security
14 clearance?

15 A. So during the initial phases, there is no impact to
16 the individual's security clearance. It remains intact.

17 Q. During the adjudication phase, is the CAF open to,
18 say, accepting supplemental information?

19 A. Absolutely. It's one of the things you will find
20 about the CAF, is that we are always interested in additional
21 information; it only gives us the opportunity to make a
22 better, more informed decision.

23 Q. And what is the process for people to submit -- how

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1 do they submit it to you?

2 A. Typically, the -- any information is submitted
3 through the individual's supporting security office, and they
4 submit that through -- in an electronic means to the CAF.

5 Q. Okay. So we discussed the adjudication -- the
6 adjudication stage, is what I'm calling it.

7 A. Uh-huh.

8 Q. Is that accurate, kind of to say the adjudication
9 stage, an accurate kind of layman's term?

10 A. I would say it's -- I would maybe say the initial
11 adjudication stage, because adjudication can be ongoing at
12 multiple points.

13 Q. Okay. So after this stage, and you kind of touched
14 on it, but what is -- what is the next stage in the process?

15 A. So the adjudicator, as I said, will receive the
16 referral, ensure that they have all available information for
17 their review, then they conduct that initial review. At that
18 point, they can make several different decisions.

19 They could decide that the information is not of a
20 concern, or it is clearly mitigated and favorably adjudicate
21 that referral; in which case, they would recertify the
22 person's security clearance eligibility in JPAS. They could
23 favorably adjudicate the information with conditions which

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1 would be communicated to the individual through their security
2 office. For instance, say -- we might say, you know, we are
3 going to recertify your security clearance eligibility, but
4 you must within the next 60 days have refresher security
5 training, something like that. And then we'd expect
6 confirmation that that had been done.

7 We could at that point decide that we need to gather
8 additional information, and we could go out and request that
9 directly from the individual via written interrogatories. We
10 could request that the Office of Personnel Management, who is
11 our investigative service provider, go out and gather
12 additional information for us if it's something that we feel
13 like we can't get from the individual. Or we could initiate
14 due process, as I said, with that statement of reasons as the
15 attachment to the letter of intent that would be sent to the
16 individual.

17 Q. When is notification to an individual required?

18 A. So notification to the individual is required at the
19 issuance of that letter of intent with the statement of
20 reasons. That is actually addressed to the individual. It is
21 delivered through the security office, but it is -- basically
22 it's a notice to them of the CAF's tentative determination or
23 intent to take an adverse action at that point, and providing

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1 them the opportunity to respond to that, to rebut our
2 concerns, provide additional mitigating information, and it
3 provides them instructions on how to do that.

4 Q. What happens if there's no letter of intent required;
5 it's essentially a favorable determination? What happens
6 then?

7 A. At that point, it's simply an update to the JPAS
8 system indicating the favorable determination, which there is
9 notification given to the security manager at that point.
10 They receive a notification from the system. But I do not
11 believe there's any direct notification to the individual
12 typically.

13 Q. Thank you, sir.

14 STC [MAJ LEBOWITZ]: No further questions, Your Honor.

15 LDC [MR. NEVIN]: Shall I go forward, Your Honor?

16 MJ [COL POHL]: Go ahead, Mr. Nevin.

17 **CROSS-EXAMINATION**

18 **Questions by the Learned Defense Counsel [MR. NEVIN]:**

19 Q. Mr. Purtill, David Nevin, I'm one of the attorneys
20 representing Khalid Shaikh Mohammad, and I'm going to have
21 some questions for you now. Are you able to hear me okay?

22 A. Yes, no trouble.

23 Q. Great, thanks. So let's -- before we begin, though,

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1 I wanted to direct your attention to a PowerPoint presentation
2 that you prepared that is available on the Internet and we
3 were able to download it this morning and take a look at it.
4 It's dated May 18, 2016. For our purposes here at the
5 military commissions, it's been marked as Appellate Exhibit
6 532CC, double Charlie, (KSM).

7 Are you familiar with that document? Do you know
8 what I'm talking about?

9 A. I don't know specifically, no. I'd have to look at
10 it. We do quite a few briefings.

11 Q. Yeah. We have a mechanism here where we could
12 push -- there's one page of this that I think is relevant to
13 the questions I want to ask you ----

14 LDC [MR. NEVIN]: ---- that we could push this to him so
15 that he can see it?

16 MJ [COL POHL]: Yeah, go ahead.

17 LDC [MR. NEVIN]: Is that something we could do now?

18 MJ [COL POHL]: Sure. What page?

19 LDC [MR. NEVIN]: 14.

20 MJ [COL POHL]: Sure. Go ahead.

21 LDC [MR. NEVIN]: Okay. What do I -- do I put this on the
22 ELMO?

23 MJ [COL POHL]: You're asking the wrong guy.

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1 [Mr. Nevin conferred with courtroom personnel.]

2 MJ [COL POHL]: Could the right guy assist Mr. Nevin,
3 because he's trying to adjust ----

4 LDC [MR. NEVIN]: I deny that I'm not the right guy, Your
5 Honor.

6 MJ [COL POHL]: Okay.

7 Q. So are you able to see that now, Mr. Purtill?

8 A. Yes.

9 Q. Okay, great. So first of all, thanks for getting
10 together with us on short notice. I recognize you may not
11 have had a choice in the matter, but it's appreciated
12 nonetheless.

13 So I heard you say that since August of 2012 when the
14 DoD CAF was stood up that you have been -- you've been with
15 that organization. And you referred to consolidation. It's
16 correct, isn't it, that there were a number of adjudication
17 facilities around the military services that were all brought
18 into one place and now called the Department of Defense
19 Consolidated Adjudication Facilities, correct?

20 A. That is correct. There were ten adjudications
21 facilities prior to consolidation. The consolidation which
22 resulted in the creation of the DoD CAF consolidated seven of
23 those entities. So the DoD currently has four adjudications

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1 facilities.

2 Q. Okay. Does the CAF that you're a part of deal with
3 adjudications of contractors, of government contractors, as
4 opposed to military servicemembers?

5 A. We adjudicate contractors, part of the National
6 Industrial Security program, military members, and civilians.

7 Q. Okay. And, sir, my name again -- I don't know if you
8 caught it when I said it -- is David Nevin, N-E-V-I-N. I'm
9 one of the people that's involved in this. Is my -- is my
10 security clearance being considered by your organization at
11 this time?

12 A. I don't really know for sure. We have about, at any
13 given time, 75 to 80,000 cases in process, and we receive
14 about three-quarters of a million every year. So I believe
15 that we have jurisdiction over your security clearance
16 eligibility, but I don't know if there's -- if it's being
17 actively worked at this time.

18 Q. I see. So when you said before that you were
19 familiar with this situation, could you say what it is you
20 have seen that relates to this, not with respect to general
21 procedures at the CAF, but rather with respect to this precise
22 situation?

23 STC [MAJ LEBOWITZ]: Your Honor ----

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1 MJ [COL POHL]: Just a second.

2 A. Sure, there was ----

3 LDC [MR. NEVIN]: Hold on just a second.

4 STC [MAJ LEBOWITZ]: Your Honor ----

5 MJ [COL POHL]: Sure.

6 STC [MAJ LEBOWITZ]: ---- just I have some concerns,
7 object to this, so the question regarding his specific
8 circumstances. Mr. Nevin, as learned counsel, receives
9 payment from a contracting company, but he's not employed by
10 the contracting company.

11 MJ [COL POHL]: Are you presenting me evidence?

12 STC [MAJ LEBOWITZ]: No, Your Honor. I'm just, I guess --
13 the witness has already stated that he can't talk about
14 specific individuals.

15 MJ [COL POHL]: I got it. I got it. I got it. If that's
16 some type of an objection, it's overruled.

17 LDC [MR. NEVIN]: Okay.

18 MJ [COL POHL]: Go ahead, Mr. Nevin.

19 Q. So the question was: What have you learned about
20 this specific situation? I understand you can't talk about
21 specific facts, but with that in mind, what is your
22 understanding of what's happening right now with respect to my
23 security clearance and that of Lieutenant Colonel Derek Poteet

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1 and Mr. Gary D. Sowards?

2 A. So again, I don't -- I don't personally track any
3 individual case that's in our adjudicative process. I am
4 aware that there were -- there was an information referral on
5 several individuals and that they are in various stages of the
6 adjudicative process. So I don't know specifically what the
7 state of any particular case is at this time.

8 Q. Okay. You indicated that the reason that you are
9 limited in discussing facts is, first, because of the Privacy
10 Act, but you also said something about the inherent
11 unreliability of something, and I just missed that. Could
12 you -- do you know what I'm referring to, and could you say
13 that again, please?

14 A. Sure. I think I probably didn't state it very
15 clearly the first time. As we were discussing a few moments
16 ago, there are multiple options that are open to adjudicators
17 as part of the process, and as they look at each case on its
18 individual merits and consider the whole person, there are
19 multiple paths that the adjudicative process could take. So
20 to speculate on what might or might happen is -- again, it
21 is -- it's going to be inaccurate more often than not because
22 there are too many variables at play.

23 Q. All right. Thank you. Now, do you have -- I have

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1 hope that I have caused to be presented to you page 14 in the
2 lower right-hand corner of Appellate Exhibit 532CC. Do you
3 see that?

4 A. I do.

5 Q. Okay. And this says "General Example of Current
6 Process" at the top of it. Is this a document or a slide that
7 you prepared, sir?

8 A. It was prepared by the DoD CAF. I did not personally
9 prepare it, but ----

10 Q. Okay. And does it accurately represent in general
11 terms -- I know it says General Example. Does it represent a
12 general overview of how the process works?

13 A. Yes.

14 Q. Okay. So I see that the -- in the upper left-hand
15 corner is where it looks like it begins, right, Investigation
16 requested via JPAS e-QIP?

17 A. That's correct.

18 Q. Okay, and is it your understanding that that has
19 occurred in the case of me, Mr. Sowards, and Lieutenant
20 Colonel Poteet?

21 A. Yes. As a general rule, everyone who is submitted
22 for eligibility for access to classified information must
23 complete the forms; in this case it's talking about the

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1 electronic version of the SF 86, the e-QIP ----

2 Q. Right.

3 A. ---- and they are -- they complete that and that is
4 sent off to OPM.

5 Q. Okay. But here we're not talking about an initial
6 investigation or a re-investigation, we are talking about a
7 referral from a security office, I think is the way you put it
8 on -- during direct examination, right?

9 A. That's correct.

10 Q. Okay. So your organization has received a referral
11 from the local security office here, whether it's Office of
12 Military Commissions or whatever, but from the place where we
13 work here, that -- a referral has come to you, correct?

14 A. Correct.

15 Q. Okay. And so that puts us at the next phase, which
16 is the icon of a man sitting at a desk with a phone, and it
17 says, "OPM conducts investigation." That is something that
18 has occurred at this point, correct?

19 A. Let me ask a clarifying question, if I may.

20 Q. Sure.

21 A. So are we talking about the referral example,
22 specifically? Because this general example is basically the
23 initial or the periodic reinvestigation that's walking through

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1 these steps.

2 Q. Yes, we are talking about the referral situation.

3 A. So in a referral situation, this chart is not
4 helpful, I don't think. This is really talking to that
5 initial or that periodic reinvestigation ----

6 Q. Okay.

7 A. ---- that is done. For a referral, there is not
8 necessarily a step where OPM conducts the investigation. If
9 we go back to my previous answer, one of the options available
10 to an adjudicator is that they could request OPM to go gather
11 additional information, but that is not an automatic or even a
12 typical step, necessarily, in the case of a referral.

13 Q. Okay. So is this overview that we have on the
14 screen, is there a place where it does describe the process,
15 just that we have a different entry point to it?

16 A. Bear with me a moment.

17 Q. Sure.

18 A. So if we're speaking very generally, while the
19 terminology is not accurate, I think you could say that at the
20 lower right-hand corner, where it says "DoD CAF adjudicator
21 reviews investigation" ----

22 Q. Yes, sir.

23 A. ---- would be the correct insertion point; however,

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1 in the case of a referral, there's typically no investigation.
2 I would change that word to information, and then I think we
3 are basically accurate at a macro level.

4 Q. Okay. Because your point is there hasn't been an
5 investigation, quote/unquote, at this point; there's only been
6 information?

7 A. That's correct. That's typical.

8 Q. Okay. So we could begin down there in the lower
9 right-hand corner, and let me ask you: I take it you have not
10 looked at the referral in our particular case; is that
11 correct?

12 A. That's correct.

13 Q. Okay. So let me ask you: Within DoD CAF, does the
14 term "willful dissemination of classified information in an
15 unclassified setting," does that have a meaning, the term
16 willful, to you?

17 A. It's hard to state as a generality. I suppose it
18 potentially could.

19 Q. Yeah.

20 A. Again, the adjudicative process requires that
21 consideration of the whole person, not a single data point.

22 Q. Right. But you see -- I take it DoD CAF sees a
23 difference between an accidental dissemination of classified

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1 information and a willful one, correct?

2 A. Yes, the federal adjudicative guidelines do
3 distinguish that.

4 Q. Right. And a willful and -- does willful mean the
5 same thing as intentional, basically, that you purposely
6 released classified information?

7 A. I don't know. I think there could be multiple
8 meanings there, but in general, I think I don't have a problem
9 with that.

10 Q. Okay. So when a -- you said there's not been an
11 investigation -- I'm talking about the lower right-hand corner
12 again -- not yet an investigation; there's just been
13 information?

14 A. Uh-huh.

15 Q. What's your understanding of what would come to the
16 DoD CAF at that point? Would there be -- whether you --
17 whatever you call it, would there be witness statements?
18 Would there be a general description of the situation? What
19 would the DoD CAF receive in that situation?

20 A. It could be a great variety of things. All of those
21 are possibilities, but we get just about -- you name it, and
22 we get that kind of information referred to us.

23 Q. Okay. So then from there, the adjudicator has to

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1 make his or her own decision about -- about what to do going
2 forward, correct?

3 A. That's correct, but it's not done in isolation.

4 Q. No, I didn't mean to suggest it was. But my -- but I
5 see what you're saying. There is a process that is then
6 followed by the adjudicator to arrive at a correct decision
7 about what to do about the security clearance, correct?

8 A. That's correct.

9 Q. Okay. And that would -- that process would
10 involve -- it could involve acquisition of additional
11 information; you spoke previously of receiving information
12 from the subject of the investigation; presumably information
13 could be acquired from sources other than the subject of the
14 investigation. I assume information might come from a number
15 of places, correct?

16 A. That's correct. But again, I just wanted to clarify,
17 there's typically not an investigation involved at this point
18 of the process.

19 Q. Okay. So the adjudicator then makes a decision --
20 and I thought I heard you say within 20 days or maybe 15, one
21 of those may have been aspirational, but there is an initial
22 determination that is made by the adjudicator about the
23 situation, correct?

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1 A. They do make their initial determination within 15
2 days, is our internal suspense that we impose upon our
3 employees ----

4 Q. Okay.

5 A. ---- about what the next step should be.

6 Q. Right. And then from there, the process goes forward
7 to final determination, correct?

8 A. Well, there are some intervening steps in there; but
9 eventually, yes, we would get to a final determination.

10 Q. Okay. And those intervening steps are that, at some
11 point, a final decision is -- when a final decision is to be
12 made, if it's favorable, the adjudicator simply announces the
13 final determination that a favorable result was reached. But
14 if it's unfavorable, then that triggers the right to due
15 process, correct?

16 A. That's correct.

17 Q. All right. And that unfavorable determination would
18 be accompanied by the LOI, the letter of intent, as well as a
19 statement of reasons; those would be given to the person with
20 the security clearance and the person would be invited to
21 respond to that, correct?

22 A. That's correct.

23 Q. Okay. But that's all something that will happen in

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1 the future in our cases, correct?

2 A. Well, I wouldn't say it will happen; it's a
3 possibility.

4 Q. Okay. And the -- yes, correct. Because as I said
5 before, the adjudicator might reach a favorable decision as
6 well, right?

7 A. Yes.

8 Q. Right. But in any event, that hasn't happened yet,
9 correct?

10 A. That is correct.

11 Q. Okay. So the ----

12 A. If I could clarify for one second. That is correct
13 as far as my current understanding is regarding everyone's
14 cases; but again, they are in various stages of the
15 adjudicative process, so I do not know the final disposition
16 of all of them. I know they are being actively worked by our
17 adjudicators.

18 Q. So the process that follows the initial
19 determination, if we look just to the left of that lower
20 right-hand corner, there's a yellow arrow that goes to the
21 left, and it points to -- I don't know what that shape is
22 called, but a blue box that says determination in it, right?

23 A. Yes.

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1 Q. Okay. And from that determination, that's where you
2 either get a favorable result, an unfavorable result -- which
3 is due process, the red line in the middle -- or the
4 adjudicator requesting additional information, which is the
5 yellow arrows that go downward and to the left, correct?

6 A. Yes, that's correct.

7 Q. Okay. So you basically have three options then that
8 are open to the adjudicator at the present time, correct?

9 A. Speaking generally, that's correct. There are some
10 details within those that would kind of branch off a little
11 bit, but in general, yes.

12 Q. So I'll represent to you that Mr. Williams,
13 Mr. Gregory A. Williams, who was referred to previously,
14 executed a declaration on 4 December of 2017, and it has been
15 marked in our case as 530 -- Appellate Exhibit 532AA. I don't
16 suppose you would have that in front of you?

17 A. I do, actually.

18 Q. Oh, good.

19 A. Supplemental Declaration of Gregory A. Williams; is
20 that correct?

21 Q. That's the one. Yes, sir.

22 A. Yes.

23 Q. So in paragraph 3, he basically says, look, three

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1 things can happen from here and then he lists those three
2 options. Did you see that?

3 A. I do.

4 Q. Yeah. And that's what you were just referring to
5 just now, correct?

6 A. Yes. I think this tracks with the chart that you are
7 displaying very accurately.

8 Q. Okay. So what is the -- under ordinary
9 circumstances, what is the general timeframe for arriving at
10 that blue box that says determination question mark, which has
11 three -- three exit doors from it? How long does it take to
12 get there?

13 A. So in the case of a referral as we're discussing now,
14 that can vary quite widely. They are, frankly, the more
15 complicated cases that we work, which is why we have, as I
16 stated earlier under the Intelligence Reform Terrorism
17 Prevention Act, where we are mandated to complete 90 percent
18 of our adjudications within 20 days, this kind of information,
19 these information referrals, are why it's not at 100 percent.
20 That's why that 10 percent is excluded from that timeline,
21 because these are complex and they do require typically a
22 little more time to work through and ----

23 MJ [COL POHL]: Mr. Purtill? Mr. Purtill?

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1 WIT: Yes.

2 MJ [COL POHL]: This is Colonel Pohl, I'm the judge here.
3 I just got a question.

4 WIT: Of course.

5 MJ [COL POHL]: Let's talk about this particular case. Is
6 this case a relatively straightforward one that can be
7 resolved within the 20-day time limit?

8 WIT: Are we talking the specifics of the ----

9 MJ [COL POHL]: Yeah. I don't need to go to the specifics
10 of the case. I'm just saying, you talk about a complex
11 counterterrorism case. What we have here is one classified
12 document submitted over an unclassified system, and the
13 question is, is how long would it take to adjudicate, to get
14 out of the blue box? Would that be within the 20 days?

15 WIT: I -- unfortunately, I can't answer that with any
16 accuracy.

17 MJ [COL POHL]: Why not?

18 WIT: Again, I don't know the full details of the cases,
19 the whole-person concept that has to be considered, or what
20 information is or is not available at this time.

21 MJ [COL POHL]: Do you know when you received this
22 referral?

23 WIT: I would have to double-check, but I should -- I

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1 don't have it in front of me, but yes, I'm aware of when it
2 came in.

3 MJ [COL POHL]: And how long ago was that?

4 WIT: I want to say I think it was about -- I think
5 approximately three weeks, but I could be off on that a little
6 bit.

7 MJ [COL POHL]: Okay. So we're past the 20 days already,
8 correct?

9 WIT: I believe so. Again, I don't know the exact
10 date ----

11 MJ [COL POHL]: I mean ----

12 WIT: ---- off the top of my head.

13 MJ [COL POHL]: ---- you know, Mr. Purtill, I understand
14 that you're in a complicated business, but what's frustrating
15 is sometimes is that we need a decision. You say you have a
16 20-day standard. This seems to me, and I'm not in your
17 business, a relatively straightforward case, but you can't
18 give me a timeline of when a decision will be made; is that
19 accurate?

20 WIT: That's accurate.

21 MJ [COL POHL]: So are we talking days, weeks, months,
22 years?

23 WIT: Again, I don't feel comfortable speculating on a

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1 timeframe, sir.

2 MJ [COL POHL]: Go ahead, Mr. Nevin.

3 **Questions by the Learned Defense Counsel [MR. NEVIN]:**

4 Q. Sir, does -- and let me just represent to you that a
5 pleading was filed in this case. It's AE 532, Appellate
6 Exhibit 532, which says that the Washington Headquarters
7 Service director of security referred the case we're here
8 talking to you about to the DoD CAF on 25 October of 2017.

9 I take it you haven't looked at it, but I just
10 thought I would say that to see if in some way that refreshed
11 your recollection or makes any difference.

12 A. Not particularly, but I have no reason to ----

13 Q. Okay.

14 A. ---- say that that's inaccurate. That sounds fine.

15 Q. Okay. So did I understand you correctly, then, in
16 the normal circumstance, the first time that notification to
17 the individual whose security clearance is being considered
18 would occur would be when we get down here to this red arrow
19 that says due process in it?

20 A. It could also occur with the yellow arrow there,
21 where we may send interrogatories for the individual to
22 complete.

23 Q. I got it. I understand. Thank you.

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1 And the -- I notice -- I just call your attention to
2 the thumbs-up icon that's -- that is in the middle of those
3 green arrows, sort of at the top of that box down at the
4 bottom, and it says, "Favorable Determination Updated in CATS,
5 JPAS, Favorable Secret or TS/SCI." That's what happens if
6 there's been a favorable -- if your process at the DoD CAF has
7 come to a favorable conclusion, then you could do updates in
8 CATS and JPAS, correct?

9 A. That is correct.

10 Q. Okay. And so just so we're clear on where we stand
11 or rather on the meaning of the acronyms, what are CATS and
12 JPAS?

13 A. Sure. So JPAS we've talked about I think a bit in
14 some detail. It's the Joint Personnel Adjudication System.
15 That is the system of record for final determinations
16 regarding security clearance eligibilities.

17 CATS stands for the Case Adjudication Tracking
18 System ----

19 Q. Hmm.

20 A. ---- which is a system that handles our internal
21 workflows here at the CAF.

22 Q. Okay. That's your internal database that you use to
23 track a case?

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1 A. Yes. Basically, yes.

2 Q. Okay. So the -- this updating of CATS and JPAS for
3 the persons I referred to previously as to whom this case is
4 still pending, that has not occurred yet, there's not been
5 that kind of an update in JPAS or in CATS, correct?

6 A. Again, I don't have specifics on the status of each
7 case. I know they're each in a different part of the
8 adjudicative process. So it's certainly possible that some
9 may have been completed at this point. I just don't have that
10 direct knowledge.

11 Q. Okay. But if they weren't completed, then that
12 updating would not have occurred, and there would still be
13 some sort of a reference to derogatory or adverse information
14 in CATS and JPAS, correct?

15 A. I'm not sure I completely understand the question.

16 Q. Well, let me just tell you that again -- maybe we can
17 probably push this to you, but I will tell you that a pleading
18 was filed by the government in this case on 27 October of
19 2017. Again, it's Appellate Exhibit 532. I referred to it
20 before.

21 I'll just represent to you that paragraph (e), like
22 echo, it says that "On 26 October of 2017, classified adverse
23 incident reports were entered into the Joint Personnel

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1 Adjudication System (JPAS)." So you wouldn't have any -- I
2 take it you would not have any reason to disagree with that
3 assertion?

4 A. No, I don't have -- again, I'm not directly involved
5 in the adjudication of these cases, but I don't have any
6 reason to disagree with that statement.

7 Q. Just two more issues to address, and then I will --
8 I'll let you go, and I appreciate your bearing with me here.

9 First, I will tell you that I have been told that I
10 have a periodic reinvestigation pending, and that that has --
11 it's in some process of awaiting a determination. That
12 process, the PR, periodic reinvestigation, process, that's
13 separate from -- at least in its initiation, that's separate
14 from the process you and I have been talking about so far,
15 correct?

16 A. That is correct.

17 Q. Okay. And the periodic reinvestigation comes up
18 every -- I think it's five years because my clearance is a
19 TS -- a TS clearance, so there's a reinvestigation every five
20 years as a routine matter, correct?

21 A. That's correct.

22 Q. Okay. And this however, the adverse incident that we
23 are referring to here is separate from that reinvestigation,

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1 right?

2 A. That is correct. Although again, you know, when the
3 adjudicator receives information, they try to look at
4 everything wholistically to assess the whole-person concept.
5 So the periodic reinvestigation you're referring to was
6 triggered as a routine matter ----

7 Q. Yes.

8 A. ---- that we all undergo and not -- not triggered by
9 the information referral that we were talking about before.

10 Q. Uh-huh. Does the information referral have an impact
11 on the PR?

12 A. That, I really couldn't speak to. That's -- we don't
13 conduct investigations here at the CAF. We receive them ----

14 Q. Uh-huh.

15 A. ---- for our adjudicative determinations, but we
16 don't actually conduct the investigations.

17 Q. But could the information referral have an impact on
18 the outcome of a PR? In other words, I guess what I'm getting
19 at is: There's not some -- you just said you look at the
20 thing wholistically, so when the PR is being considered, the
21 CAF will consider the information referral at that time,
22 correct?

23 A. That's correct.

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1 Q. Okay. And so finally, the last thing I wanted to ask
2 you about is -- or maybe not the last thing. Thank you. All
3 right. Great minds think alike.

4 So the last thing I wanted to ask is that my
5 understanding is that, as I stand here, I still have a TS
6 clearance, and I am cleared for secure compartmented
7 information, SCI, and that I also have been read on to one or
8 more special access programs, SAP access, as well.

9 So your -- the DoD CAF, generally speaking, is
10 considering sort of base-level eligibility for
11 national security information; is that correct?

12 A. That's correct.

13 Q. And the SCI and the SAP access are layered on top of
14 that basic eligibility; would that be, generally speaking,
15 correct?

16 A. I suppose that's -- I suppose that's accurate, but
17 that's not a CAF determination at that point.

18 Q. Right. So that was really what I was getting at.
19 Both the SCI and the SAP eligibility issues are taken up by
20 other entities, for want of a better way to put it, correct or
21 not?

22 A. I would use the term SCI and SAP access issues are
23 taken up by others. CAF handles eligibility, and other

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1 offices handle access to actual classified information.

2 Q. Okay. I guess the -- sort of the simple way of
3 stating it is that SAP access and SCI access are controlled by
4 some other process than the one you and I have been discussing
5 so far, correct?

6 A. That's the security management function more, and it
7 really is a factor speaking generally of do they have the
8 eligibility granted by the CAF, and do they also have the need
9 to know.

10 Q. Okay.

11 A. And we certainly here at the CAF have no insight into
12 need to know.

13 Q. And so, Mr. Purtill, again referring to AE 530 --
14 Appellate Exhibit 532, I will just represent to you that at
15 paragraph (d) of that document, it states that -- "That same
16 day," referring to 25 October of 2017, "Washington
17 Headquarters Service notified the National Programs
18 Special Management Staff (NPSMS) of the actions taken in this
19 matter." And the NPSMS is the office -- it states, "The NPSMS
20 is the office responsible for administering the special access
21 program for the Office of Military Commissions." Does that
22 sound right to you?

23 A. I really don't have expertise. I have no reason to

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1 think it's wrong, but -- okay.

2 Q. Okay. Yeah, and I didn't mean to ask whether -- I
3 didn't mean to ask you to agree that they had notified or not,
4 but NPSMS is somebody different from you, correct?

5 A. That's correct.

6 Q. Okay. And then finally -- and I really mean finally
7 this time -- paragraph (b) of Appellate Exhibit 532 states
8 that, "On 24 October 2017, after reviewing" various
9 information, "the Washington Headquarters Services, Office of
10 Special Security concluded that the defense teams" -- to
11 include the three persons I mentioned to you before, myself
12 and two others -- "appear to have willfully submitted
13 classified information on an unclassified network." That's
14 what I was referring to before when I used the term willful.
15 I mean, that's why I was referring to it.

16 So does the fact that there's an allegation of
17 willful misbehavior, for want of a better way of putting it,
18 does that complicate at all or cause any heightened attention,
19 anything like that, from your organization?

20 A. No, I don't think that complicates or creates any
21 heightened attention. We treat all information of this nature
22 basically the same. It's fairly routine for us. We get
23 about -- it varies a little bit from year to year, but we get

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1 about 50,000 of these referred to us every year. So it's
2 not -- not anything that we could consider unusual.

3 Q. Do you have an obligation to share information with
4 law enforcement under any circumstances?

5 A. No, we are not obligated to do so under any
6 circumstances.

7 Q. I'll represent to you that 5200.0 ----

8 MJ [COL POHL]: 2.

9 Q. ---- 2, thank you, contains an indication that the
10 DoD CAF is obligated to share information with law
11 enforcement. I think the language is something like as
12 appropriate.

13 A. Yeah, you're correct. I apologize. I think I kind
14 of misspoke. I would have to look at the language again to
15 answer that specifically, but I think that is -- if I recall
16 correctly, I think that's referring to counterintelligence
17 issues, things of that nature, foreign connections; and I
18 thought we were still focused on the kind of exigent example.

19 Q. Yeah. Okay. Fair enough. Thank you.

20 LDC [MR. NEVIN]: That's all the questions I have. Should
21 I leave this here or ----

22 MJ [COL POHL]: Yeah. Yeah. I'm going to use it, too, so
23 go ahead.

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1 Ms. Bormann, do you have any questions?

2 **Questions by the Learned Defense Counsel [MS. BORMANN]:**

3 Q. Good morning, Mr. Purtill. Can you see me and hear
4 me?

5 A. Good morning.

6 Q. My name is Cheryl Bormann ----

7 A. I got you now.

8 Q. My name is Cheryl Bormann, I represent Walid
9 Bin'Attash. Good morning to you.

10 A. Good morning.

11 Q. I, like Mr. Nevin, Major Poteet -- I'm sorry,
12 Lieutenant Colonel Poteet, I don't want to demote him, and
13 Mr. Sowards, along with a couple of my team members, are part
14 of this situation. And so I just have a few questions that
15 are about the procedure.

16 You testified earlier that the relevant rules and
17 regulations include DoD Manual Rule 5200.02, right?

18 A. Correct.

19 Q. Okay. Do you have that in front of you?

20 A. I do.

21 Q. Good. I have a copy that's dated April 3rd of 2017.
22 Do you have that same one?

23 A. Yes.

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1 Q. Great. Can you please turn to page 56. That would
2 be Section 9.

3 LDC [MS. BORMANN]: Judge, do you have that ----

4 A. Okay.

5 LDC [MS. BORMANN]: ---- in front of you? It's
6 attached ----

7 MJ [COL POHL]: Got it. I got it.

8 LDC [MS. BORMANN]: Okay. Great.

9 Q. The title of that section is Personnel Security
10 Actions, right?

11 A. Yes.

12 Q. And that section generally is the description of what
13 you've just testified, the procedure that we are going through
14 right now?

15 A. Yeah, I believe that's correct.

16 Q. Yeah. And, in fact, the Section 9.2, the second
17 section of that says -- the title of that section is, "Referral
18 [sic] of Derogatory Information for Action," right?

19 A. Yes.

20 Q. And so when Mr. Nevin said to you that there was a
21 referral that contained -- to DoD CAF that contained
22 information that said whomever referred it believed that it
23 appeared that certain defense counsel willfully disseminated

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1 classified information on an unclassified system, that would
2 be considered derogatory information under Section 9.2?

3 A. I believe that's correct, yeah.

4 Q. Okay. And so as we stand right now against the
5 people here where there is a process pending -- let's call it
6 that for now -- there has -- there's derogatory information
7 that's been accepted by DoD CAF, and then that's been assigned
8 to an adjudicator, right?

9 A. Yes. I'm not sure that I would use the word
10 accepted, but it's been received ----

11 Q. Received.

12 A. ---- at the CAF. There's not kind of an active ----

13 Q. Right.

14 A. ---- yes or no, we're going to accept or decline the
15 information.

16 Q. Right. They've received it.

17 A. Yes.

18 Q. So it's in the sort of they're-considering-
19 whatever-information-they-have position right now, right? The
20 adjudicator ----

21 A. I'm not sure ----

22 Q. ---- is considering and reviewing whatever
23 information they have; that's where we are right now.

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1 A. That's correct.

2 Q. Okay. So I want to talk a little bit about how that
3 works, if you don't mind. Now, typically after a referral of
4 derogatory information, the target or the person from -- whose
5 clearance is being adjudicated -- and I'm going to just for
6 purposes of clarity call that person a target for now, so that
7 we understand what we're talking about -- the target, that
8 person doesn't normally know about a referral. They don't get
9 advised or notified typically when a referral is made, right?

10 A. I don't believe there's any requirement to do so, but
11 that's a security management function. I don't really -- I
12 can't really answer with any authority.

13 Q. Okay. And so the information that arrives at an
14 adjudicator's desk would include the referral itself, right?

15 A. Uh-huh.

16 Q. And then I think you said that they would look at the
17 whole picture of the individual, right?

18 A. Yeah. We would look at all available, relevant,
19 reliable information.

20 Q. Great. So the available, relevant, reliable
21 information would, of course, include the SF 86, the form
22 which is filled out by every person who applies for a
23 clearance, right?

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1 A. Right.

2 Q. In my case, I applied for it electronically, that's
3 called an e-QIP, E-Q-I-P?

4 A. Correct.

5 Q. All right. So they go back and they review -- or
6 they can go back and review all of the information on an
7 individual submitted initially?

8 A. Yes.

9 Q. Okay. And then they can review other information
10 that they consider pertinent to a decision, right?

11 A. Yeah. Whatever is available, relevant, and reliable.

12 Q. Sure. So they could review anything that the
13 adjudicator would consider relevant, available, or reliable --
14 and reliable?

15 A. Yeah. And as a matter of fact, they're obligated to
16 do so. It's not that they can; that's their job.

17 Q. Right. Now, if they still have questions after
18 reviewing all of that, there are other options available to an
19 adjudicator, right?

20 A. Yes.

21 Q. Okay. So they can actually request any other
22 material that he or she, the adjudicator -- I don't want to be
23 gender-specific here -- might -- they can request information

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1 they think might be relevant, useful, and reliable, right?

2 A. Yes.

3 Q. Okay. And they can do that by requesting an
4 interrogatory from the target?

5 A. Yes.

6 Q. Okay. They could also go back to the person who made
7 the initial referral, like the local security officer?

8 A. Yes.

9 Q. They could talk to -- they could refer an
10 investigation or questions to be answered to OPM?

11 A. Yes.

12 Q. And, of course, they could ask questions of anybody
13 else they thought were relevant, reliable, and in some other
14 way useful?

15 A. I'm not quite sure I understand that.

16 Q. Well ----

17 A. I'm not sure what you have in mind for that category.

18 Q. Okay. What I was referring to is if a factual
19 scenario arose where a person appeared to have relevant,
20 reliable information, an adjudicator could figure out a way to
21 reach out to that individual, whether it's through an OPM
22 investigator or somebody else, to gather that information?

23 A. Sure. I think I understand now. That would -- that

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1 would be done through OPM.

2 Q. Okay. Great.

3 A. Yes.

4 Q. Now, it's only after all of that information is
5 gathered that an adjudicator would reach a decision ----

6 A. Yes ----

7 Q. ---- of all of the relevant, reliable ----

8 A. ---- generally correct.

9 Q. Relevant, reliable -- I didn't mean to talk over you.
10 But I just want to make it clear, I'm talking about relevant,
11 reliable, useful information.

12 A. Yes. And available, obviously.

13 Q. And available, obviously. I mean, if somebody has
14 passed away and they can't be interviewed, obviously that
15 would not be available.

16 A. Correct. We would not wait for that kind of
17 information because you would never receive it.

18 Q. Right. Exactly. If the determination is that it's
19 unfavorable, after all of that, and during the gathering of
20 the information we just talked about it becomes clear that the
21 target has committed a criminal act ----

22 A. Uh-huh.

23 Q. ---- like let's say, you were, for instance -- let's

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1 go back -- investigating Private First Class Manning's
2 clearance and you came upon this big piece of information, DoD
3 CAF would certainly report that to law enforcement, wouldn't
4 they?

5 A. No. I think the requirement -- and again, I would
6 have to look at the specific requirement within the 5200. I
7 believe that refers to counterintelligence and foreign
8 intelligence entity involvement is where the requirement for
9 that referral is.

10 Q. Okay. Can you turn to page 57 of DoD Manual 5200.02,
11 the one we were discussing earlier?

12 A. Sure.

13 Q. So if you look at Section 9.4.a, subsection (2), that
14 applies -- it says, "Adjudication facility officials should
15 confirm with the reporting organization to ensure derogatory
16 information has been reported to CI or law enforcement
17 authorities as appropriate."

18 Can you tell me what CI is?

19 A. Counterintelligence.

20 Q. Okay. In the other -- the other is law enforcement.

21 And so what information does 9.4 apply? What -- what
22 are we talking about here? I mean, I guess I could read it
23 for you.

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1 MJ [COL POHL]: Mr. Purtill, let me see if I understand
2 this right. The question that was being asked was CAF
3 reporting to law enforcement. This provision appears to be --
4 say that CAF must ensure -- confirm the reporting organization
5 reports to law enforcement. Is that the distinction we're
6 talking about here?

7 WIT: I'm sorry, sir. Was that a question for me or for
8 counsel?

9 MJ [COL POHL]: Yes, yes. No. What I'm asking you is is
10 the question that Ms. Bormann asked you whether CAF had a
11 responsibility to report to law enforcement, and you said in
12 the counterterrorism area, where you had a requirement, but
13 not a requirement in other areas.

14 This provision says CAF must confirm the reporting
15 organization reported to law enforcement/CI as appropriate.
16 So it could be read to say that CAF doesn't do the reporting,
17 all CAF does is go to the reporting organization to confirm
18 they did that. Is that how you understand the process?

19 WIT: Yes. And I would say to confirm that if they did or
20 did not, and that -- as appropriate, I think is where -- from
21 my understanding of this language is that we're basically just
22 confirming what their decision was.

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

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1 LDC [MS. BORMANN]: Thank you for your answer, and thank
2 you for clarifying so many things for us. I am finished
3 asking this gentleman questions.

4 MJ [COL POHL]: Thank you.

5 LDC [MS. BORMANN]: Have a good day.

6 MJ [COL POHL]: I'm not sure any other counsel has a dog
7 in this current fight, although Mr. Harrington may still.

8 LDC [MR. HARRINGTON]: Judge.

9 MJ [COL POHL]: Do you have any questions?

10 LDC [MR. HARRINGTON]: Ms. Wichner is going to ask a
11 couple of questions.

12 MJ [COL POHL]: Okay.

13 **Questions by the Defense Counsel [MS. WICHNER]:**

14 Q. Good morning, Mr. Purtill. Can you hear me okay?

15 A. Good morning.

16 Q. My name is Alaina Wichner, I represent Ramzi
17 Binalshibh in this matter. Myself and three other counsel on
18 our team were involved in this incident, and I have some -- a
19 few follow-up questions for you regarding the process as well.

20 First off, we were informed that's an attorney for
21 you in the background. Can you identify him for us, please.

22 A. Yes, this is James Clark. He is Senior Counsel with
23 the Office of General Counsel in support of Washington

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1 Headquarters Services, and Pentagon Force Protection Agency.

2 He has -- he is the lead counsel in support of the CAF.

3 Q. Okay.

4 WIT: Anything else?

5 [MR. CLARK]: That's all correct, thank you.

6 Q. Thank you. And can you or he or anyone else expedite
7 adjudications in this process for the commissions or for
8 anyone else when you receive a request like that?

9 STC [MAJ LEBOWITZ]: Objection, Your Honor, asked and
10 answered before, but we're starting to get into essentially an
11 adverse litigation process of asking the security function to
12 do something in the process -- in the context of litigation.
13 I believe this goes straight to Egan where counsel is asking
14 essentially, this commission, although she is asking the
15 witness, it's in the process of litigation to get directly
16 involved in the security function.

17 MJ [COL POHL]: I think she was asking whether there's a
18 way to expedite the decision.

19 STC [MAJ LEBOWITZ]: I would ask if the question is
20 reframed so it's not specific to individuals. Just the
21 general question, is there an expedite process, would be a
22 legitimate question.

23 MJ [COL POHL]: I'm not sure this is different than the

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1 question she asked, but rephrase your question as a generic
2 question about priority of work is really what we're talking
3 about here. Go ahead.

4 DC [MS. WICHNER]: Yes, Your Honor. You are correct, and
5 that's exactly what -- and actually for us we're not asking
6 for anything further because we have been told our situation
7 is resolved, which I do have some follow-on questions too, but
8 I'm not asking for expedition of our situation in my
9 understanding ----

10 MJ [COL POHL]: Okay.

11 DC [MS. WICHNER]: ---- but it is a general question.

12 Q. Generally when it involves anyone or any
13 adjudication, is there a process by which anyone, whether that
14 be you, your counsel, anyone else, can request expedited
15 adjudication, because of any particular circumstance that is
16 given to you?

17 A. So generally speaking, yes. Our stakeholders can
18 request expedited processing on part of the CAF. I was a
19 little concerned that -- I think that the language that was
20 used earlier was could we get to an expedited decision. And
21 we always like to be very clear: When someone does request
22 that the CAF expedite their process, that doesn't mean
23 something will be, you know, completed in x number of days.

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1 What it means is that we will continue to keep the
2 adjudication as part of the discussion at the top of the
3 adjudicator's work queue, so that every time that there is an
4 action to be taken, that's basically the first thing that
5 they're supposed to be doing. But it does mean -- you know,
6 it doesn't change any of the rest of the process where we may
7 be requesting additional information, things of that nature,
8 which have -- just obviously have their own timeframes that
9 are built into them that are not controlled by the CAF.

10 So yes, security management officials can request
11 that individual cases be expedited through the adjudicative
12 process.

13 Q. Thank you. Now, in our situation -- I am speaking
14 just to the four counsel on -- that represent Mr. Binalshibh
15 that were involved in this matter -- we know a classified
16 incident report was made from WHS, I guess, or to DoD CAF, to
17 the extent I understand all of this process. I have a
18 question about that.

19 Are classified incident reports processed differently
20 than an unclassified incident report?

21 A. From a macro level, not really. You know, they do
22 not -- they're not placed into our CATS system, for instance,
23 because that is an unclassified system. They are -- they stay

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1 on the classified network, so there are some kind of
2 administrative differences. But as far as actual process, no,
3 there's really no difference at a macro level.

4 Q. And the administrative differences, can you tell us
5 what those are?

6 A. So again, the primary is that CATS is an unclassified
7 system, so the classified information would not be placed in
8 that system, which is where typically most of our information
9 would reside. You know, we try to keep everything in the one
10 place. It's the ease of the adjudication, the adjudicator
11 doesn't have to look in multiple places. That's why we try to
12 keep it all in the CATS system. But in this case, we wouldn't
13 be able to, so it would reside on SIPR or JWICS.

14 Q. And by the nature of it being a classified incident
15 report, does that increase processing times or is there no
16 difference in processing times?

17 A. That in and of itself does not; but again, every case
18 is different. Even if you have the exact same information
19 that was referred, your background may be different than one
20 of your colleagues' backgrounds, which could certainly in and
21 of itself create different processing timelines. So no, not
22 necessarily. I wouldn't say as a matter of course that the
23 fact that it's classified necessarily extends timelines.

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1 Q. And do you happen to know, if it is a classified
2 report, does that indicate to an adjudicator any increased
3 concerns because it is a classified report? Is there any --
4 does it feel like there's any increased like prejudice because
5 it's a classified report, or is it just handled just the same
6 as an unclassified incident report would be handled?

7 A. The fact that it's classified is not -- it's not
8 prejudicial to our process at all.

9 Q. Now, again, as to the four -- and I'm speaking just
10 to the four attorneys or counsel for Mr. Binalshibh that were
11 involved in this. We have been informed that, and I'm
12 quoting, "A favorable adjudication has been made and that JPAS
13 no longer reflects pending referral." But as to this
14 classified incident report, what happens to that? Where does
15 that go?

16 A. So the classified incident report would still
17 presumably be resident at whoever made the referral; but as
18 far as the CAF is concerned, it would be simply archived as a
19 historic document at that point. Again, it would not be
20 placed into our CATS system, anything of that nature.

21 Q. Would it -- and you spoke a lot about the
22 whole-person concept. Would that classified incident report
23 ever be available or considered in another totality of

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1 continued reliability assessment?

2 A. So again, at every assessment point from the CAF's
3 perspective, we look at everything from somebody's background.
4 Now, you know, it's the kind of thing to see the history and
5 what do you look like now and in light of your history. We're
6 trying not to just look at, you know, again, single data
7 points. We want to understand -- get as fulsome a picture of,
8 you know, who you are or who the individual is in order to
9 make that kind of trustworthiness, reliability determination.
10 So yes, we would look at whatever ----

11 Q. So ---- sorry.

12 A. ---- is available to us.

13 Q. So say, for example, there are then four classified
14 incident reports, classified or unclassified incident reports,
15 all of which favorable adjudications have been made.

16 A. Uh-huh.

17 Q. Those four reports would still be considered, though,
18 you know, in the totality of circumstances of that person,
19 even -- even though favorable determinations had been made?

20 A. Again, we look at all available information. We
21 would go back all the way, you know, back to people who may
22 have had their first background investigation conducted in the
23 1960s. We will again review that today in order to get that

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1 complete picture of who they are at this time.

2 Q. In the case of counsel for Mr. Binalshibh, again we
3 did submit additional matters, and we were told that the
4 matters were, quote, wholly mitigating. What does wholly
5 mitigating mean?

6 A. I'm not sure. Was that an assertion made by the WHS
7 security ----

8 Q. Yes.

9 A. ---- office? I'm not sure ----

10 Q. Well ----

11 A. Okay.

12 Q. Yes. When we submitted -- yeah, that's a fair
13 distinction. So when we submitted it to -- for consideration,
14 the supplemental information, we were told that they were
15 of -- so WHS OSS stated that the supplemental information
16 wholly mitigates the four counsel for Mr. Binalshibh's team
17 involved in this matter.

18 What would that mean to your adjudicator then in
19 reviewing that opinion, if reviewed -- so that's -- I guess,
20 my first question is, is that reviewed; and secondly, what
21 would that mean to the adjudicator, wholly mitigates?

22 A. So yes, it would be reviewed. Whatever is submitted
23 to us is reviewed. As to what wholly mitigates would mean to

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1 us, it probably would have very little influence because it's
2 an assessment that the adjudicator is tasked with making. And
3 whether that's submitted through, you know, the Office of
4 Special Security or an individual themselves, it would not
5 really be relevant to our deliberation, that kind of, I would
6 say, subjective statement. The adjudicator would make their
7 own determination.

8 Q. So that's helpful then to me. But this next question
9 I have then is, so when we were notified that DoD CAF has,
10 quote, favorably adjudicated our referral, what does that mean
11 then, favorably adjudicated? What determination has the DoD
12 CAF adjudicator come to, if they have favorably adjudicated
13 it?

14 A. So again, speaking generally, because I'm not -- I
15 just don't have the details of any individual's case, but a
16 favorable adjudication means that we've considered whatever
17 information was given to us, whether that be the initial
18 background investigation, whether it be the information
19 referrals, in this case, and we've determined that the person
20 is or should remain eligible for access to classified
21 information, and that we have updated the appropriate systems,
22 JPAS, to reflect that recertification of the clearance
23 eligibility.

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1 Q. So that adjudication then sounds to me as if it's in
2 that moment -- say, for example -- like in our case, say you
3 had two more classified incident reports that came along. Is
4 it possible that, in reviewing the first one -- and so let's
5 say the second one was favorably adjudicated just the same --
6 let's say it's the same allegation three times. The third
7 time over, is it possible an adjudicator would look back at
8 those first two and say, well, we have three now, and even
9 though number one and number two, we decided the person could
10 still have access to classified information; but now we're
11 looking at number three, and now maybe where there's smoke,
12 there's fire? At this point, we are concerned, and we are
13 going to suspend access and then follow the other processes
14 that are outlined in this slide here, whatever?

15 Is that possible? That goes back to my question of
16 what a favorable determination really means.

17 A. So certainly anything's possible. Part of the
18 adjudicative process, and it's spelled out in the adjudicative
19 guidelines, is that the nature, the recency, and the frequency
20 of the conduct are things that are all considered during the
21 adjudicative process. So that would be true of any
22 potentially derogatory information.

23 If you're talking about trying to understand what a

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1 favorable determination means, there's also covered, and it is
2 part of the consent form that is completed by every individual
3 who is considered for security clearance, is that they would
4 be subject to continuing evaluation. So the consideration of
5 someone's eligibility, whether that be yours or mine or anyone
6 else who is cleared for access to classified information, is
7 never complete.

8 All of us are subject to continuous evaluation, and
9 so if something were to occur in our lives that might be
10 relevant to the adjudicative guidelines, there's a requirement
11 to self-report that information. If someone else becomes
12 aware of such information, they're required to report that
13 about us. And we do have, again, as we've discussed before,
14 the regular and routine periodic reinvestigations.

15 So the favorable determination is a final
16 determination, but the vetting process is never complete as
17 long as you remain in a position requiring access to
18 classified information. That's true for every individual.

19 Q. So it's fair to say a favorable determination, we
20 can't then assume we were then, in essence, determined to be
21 innocent of the allegation. It just means based off of what
22 they're looking at at the moment, they decided we can still
23 access classified information?

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1 A. Guilt or innocence is outside the realm of the CAF's
2 responsibility. That is not what we do.

3 DC [MS. WICHNER]: May I have a moment, Your Honor?

4 MJ [COL POHL]: Sure. Mr. Purtill, this is Colonel Pohl
5 again, I got a question for you, on that blue box where it
6 says determination.

7 WIT: Yes, sir.

8 MJ [COL POHL]: Is there a name for that decision point?

9 WIT: No. Not particularly, sir. We would just use that
10 kind of -- that determination, which in and of itself is not a
11 perfect term because it's really determining what is the next
12 step.

13 MJ [COL POHL]: Yeah.

14 WIT: So if we go the upper route, we determine we are
15 done and it's favorable. We go to the middle route to the
16 red, we make that tentative determination to initiate due
17 process. Or we determine, no, we need to go get more
18 information. So not really.

19 MJ [COL POHL]: No, so what I was asking earlier about
20 your 20 days ----

21 WIT: Yes, sir.

22 MJ [COL POHL]: ---- is that -- is that up to that point?

23 WIT: I'm not sure I really understand that, but let me --

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1 so it is ----

2 MJ [COL POHL]: What I'm saying ----

3 WIT: ---- it's a closure of the case, whatever that may
4 be.

5 MJ [COL POHL]: Okay. So ----

6 WIT: That's for 90 percent of our workload, not 100.

7 MJ [COL POHL]: I got it. You're very clear that it's not
8 100 percent. I understand that.

9 WIT: Yes, sir.

10 MJ [COL POHL]: But I'm just saying is that -- just so I
11 use -- you may see some things from me here, so I want to make
12 sure that I use the right terms.

13 From the lower right-hand -- the little man looking
14 at the book, okay, from that date to the final determination
15 is the 20-day standard, 90 percent of the time; is that
16 correct? In the scenario we're talking about today where
17 we're talking about ----

18 WIT: Sir, I'm not quite ----

19 MJ [COL POHL]: ---- an individual incident as opposed to
20 a more macro.

21 WIT: I got you. I understand. I understand. So it is
22 basically from receipt at the CAF ----

23 MJ [COL POHL]: Okay.

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1 WIT: ---- that's when our clock begins that 20 days.

2 MJ [COL POHL]: Okay.

3 WIT: So whatever point in the process that is.

4 MJ [COL POHL]: Okay. And again, I want to make sure I
5 use the proper term. So it's from the receipt by the CAF
6 until the final determination?

7 WIT: Correct.

8 MJ [COL POHL]: Would that be the proper terms, and
9 although 90 percent -- and I know not 100 percent -- that's
10 the 20-day limit?

11 WIT: Yes, sir.

12 MJ [COL POHL]: That's the 20-day goal, for want of a
13 better term?

14 WIT: Right.

15 MJ [COL POHL]: Correct? Okay. So in this particular
16 scenario, that would be from the little man down to the worst
17 case scenario, the thumbs down right after the no?

18 WIT: Yes, sir. But again, that would probably, if we got
19 to the no, it's probably going to exceed that 20 days. By
20 that 90 ----

21 MJ [COL POHL]: I'm just saying, looking at the chart, if
22 you go from the little man to the blue thing -- I know this
23 sounds --

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1 WIT: I'm tracking.

2 MJ [COL POHL]: It sounds like I'm following a Monopoly
3 board, but I deal with what I got. We take a yellow arrow
4 from the little man to the blue figure?

5 WIT: Yes.

6 MJ [COL POHL]: And it goes up on the green road to the
7 green thumbs up, that's -- that's reasonable to do it within
8 20 days?

9 WIT: Yes, sir.

10 MJ [COL POHL]: If it goes down the red road, because then
11 we've got statements of reason, things like that, that's
12 obviously going to take longer?

13 WIT: Yes.

14 MJ [COL POHL]: And if we go down the yellow road,
15 similarly, that requires more information so that may take
16 longer?

17 WIT: Yes.

18 MJ [COL POHL]: So really the green path is realistically
19 in 20 days, but the other two -- I don't know, just I have
20 dealt with government bureaucracies for a long time. I'm a
21 member of government bureaucracy; I don't mean to besmirch
22 that.

23 So the bottom two would usually take a little longer

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1 just because of the way the process works, you are asking for
2 information or you have to give some due process to the
3 individual. Would that be accurate?

4 WIT: Yes, sir.

5 MJ [COL POHL]: Okay. So I got it. Thank you.

6 Ms. Wichner.

7 DC [MS. WICHNER]: Thank you, Your Honor.

8 **Questions by the Defense Counsel [MS. WICHNER]:**

9 Q. Back to my quest to understand what a favorable
10 adjudication actually means now, so does that indicate whether
11 or not the adjudicator determined whether the target did
12 something wrong or not?

13 A. No, that's not what we're doing.

14 DC [MS. WICHNER]: Thank you, sir. I don't have any
15 further questions.

16 MJ [COL POHL]: Okay. Any further questions? Apparently
17 not.

18 Major Lebowitz, anything further from you?

19 STC [MAJ LEBOWITZ]: I just have one question, Your Honor.

20 MJ [COL POHL]: You really need one question?

21 STC [MAJ LEBOWITZ]: No, I don't, Your Honor. No
22 questions, Your Honor.

23 MJ [COL POHL]: I didn't think you did. Okay. Thank you.

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1 Mr. Purtill, I want to thank you for your testimony.

2 You are excused.

3 WIT: Thank you, sir.

4 [The witness was excused and the VTC was terminated.]

5 MJ [COL POHL]: Okay. Mr. Nevin, you wish to be kind of
6 heard from the way ahead? I'm not sure if this resolved
7 everything, resolved anything.

8 [Military judge conferred with courtroom personnel.]

9 LDC [MR. NEVIN]: The clerk of the court asked me for a
10 one-sided copy of 532CC ----

11 MJ [COL POHL]: Okay. You're going to switch that out.
12 Okay.

13 LDC [MR. NEVIN]: ---- at the -- I'm going to provide
14 that.

15 MJ [COL POHL]: Sure. Go ahead. Thank you. Let me start
16 with some stuff because I think there's some clarity here.

17 The way I understand part of the process is that --
18 and I'm referring now to Mr. Nevin's team and Ms. Bormann's
19 team, that you have the option to submit additional matters.
20 You don't have to, obviously, if you don't want to.

21 But given the paths on the road, my question to you
22 is, do you intend -- because I'm about to tell the government
23 something about timing, so I need to know whether either of

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1 you intend to submit matters, and, if so, when. Mr. Nevin?

2 LDC [MR. NEVIN]: That is -- and I'll tell you there are
3 three of us ----

4 MJ [COL POHL]: Uh-huh.

5 LDC [MR. NEVIN]: ---- who are at issue in this, and each
6 of us have appeared in front of you, and I think it's possible
7 we will have different opinions about what ought to happen
8 next because each of us has an individual stake in this. And
9 so the short answer is: I'm not sure ----

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: ---- yet. And if the -- we'll come to a
12 decision as quick as we can, but this is -- this is
13 complicated for some of the reasons that I laid out for you
14 when I argued before.

15 MJ [COL POHL]: No, I understand that, Mr. Nevin. And the
16 reason I ask this is because -- because of your concern, and
17 justifiably so, of this kind of thing hanging over everybody's
18 head.

19 LDC [MR. NEVIN]: Yeah.

20 MJ [COL POHL]: But if part of the process would include
21 your input, I want to make sure that you have the opportunity
22 to do that. But if the answer is we're not going to submit
23 anything, then there's no need for the process to wait for

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1 submissions that are never coming. That's kind of what I'm
2 asking.

3 LDC [MR. NEVIN]: Right. And if we could have ----

4 MJ [COL POHL]: I'm not -- okay.

5 LDC [MR. NEVIN]: ---- some amount of time to make a
6 decision about that.

7 MJ [COL POHL]: I will. Okay. I'm going to go to some
8 suspenses in a minute, but okay, thank you. I just want to --
9 Ms. Bormann, same question. I get the same answer?

10 LDC [MS. BORMANN]: Not exactly the same answer.

11 MJ [COL POHL]: Okay.

12 LDC [MS. BORMANN]: With respect to the four affected
13 parties on our team, we already submitted matters through the
14 chief security officer of OSS who referred the charges.

15 MJ [COL POHL]: Was that similar to what you filed in
16 court?

17 LDC [MS. BORMANN]: No. It was specific about what
18 occurred.

19 MJ [COL POHL]: Okay. So you've already submitted the
20 matters you intend to submit?

21 LDC [MS. BORMANN]: Yeah. We didn't do it through us, we
22 did it through the person who made the mistake.

23 MJ [COL POHL]: Okay.

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1 LDC [MS. BORMANN]: And after that person identified that
2 person to the chief of OSS, the matter was still referred. So
3 we're in a slightly, I think, more difficult situation. We
4 will -- we -- we've talked about this. I mean, we're going to
5 submit the same material we already did. I'm hoping maybe
6 somebody will actually consider it this time.

7 MJ [COL POHL]: Okay.

8 LDC [MS. BORMANN]: But I can't ----

9 MJ [COL POHL]: Okay.

10 LDC [MS. BORMANN]: ---- tell you that they will.

11 MJ [COL POHL]: And understand, make it clear, I'm not
12 asking whether -- or not requiring submissions, things of
13 that, I'm just trying to work out a timeline here.

14 LDC [MS. BORMANN]: Well, they do require submissions. So
15 I kept waiting. You know, frankly, I got the notice in
16 October, you know, two weeks after we thought this thing was
17 done because explanations had been given, I get a notice that
18 there's been a determination -- a conclusion that there's been
19 a willful dissemination.

20 MJ [COL POHL]: Uh-huh.

21 LDC [MS. BORMANN]: And I keep waiting for somebody to
22 contact me.

23 MJ [COL POHL]: Okay. I got it.

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1 LDC [MS. BORMANN]: And nobody ever -- nobody has ever
2 contacted any of the four people at our table.

3 MJ [COL POHL]: Yeah. But if you look at the process,
4 that's not necessarily ----

5 LDC [MS. BORMANN]: Well ----

6 MJ [COL POHL]: It might happen, it might not happen. If
7 you go down the red road, they'll contact you; if you go down
8 the yellow road, they may contact you; if you go down the
9 green road, you -- you go wherever. I got it.

10 LDC [MS. BORMANN]: I'm trying not to laugh because it's
11 actually not very funny.

12 MJ [COL POHL]: No, it's not funny. But that's the
13 vehicle I have.

14 LDC [MS. BORMANN]: Yeah. So we will continue to
15 submit ----

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: ---- what -- the accidental nature of
18 this in hopes that, you know, somebody will actually pay
19 attention.

20 MJ [COL POHL]: Okay. Okay. Here's what we're going to
21 do is: This issue needs to be resolved. It appears from the
22 way the process is explained is this is not a -- this can be
23 done not in terms of years, months, but a matter of days. So,

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1 Defense, if you wish to submit additional matters, you will
2 notify me that you are -- not what the matters are, that you
3 intend to submit matters. And the matters must be submitted
4 not later than next Friday.

5 And I would like an affirmative statement one way or
6 the other. We are submitting matters, we have done it on this
7 day; or we're not going to submit matters, just so I know
8 where it is. I'm talking about a week from today. So today
9 is the 8th, so that is the 15th. And so they'd be submitted
10 by the 15th and there's notice to me. Okay.

11 LDC [MR. NEVIN]: Okay. And, Your Honor, that refers to
12 the DoD CAF ----

13 MJ [COL POHL]: Right.

14 LDC [MR. NEVIN]: ---- as opposed to whoever is dealing
15 with the SAP and ----

16 MJ [COL POHL]: Yeah. Yeah. I mean, I'm going to give --
17 we got to get to the -- we have to resolve DoD CAF. The SAP
18 and the other issue are separate. I want to put that to the
19 side for now, okay? Okay.

20 LDC [MR. NEVIN]: Okay.

21 MJ [COL POHL]: Because I don't -- we're at the
22 adjudicative stage of the CAF, is where we're at right now, so
23 that's what I'm addressing.

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1 LDC [MR. NEVIN]: No, I think we're at a -- I think we're
2 in an adjudicative phase at the NPSMS as well. But I just
3 wanted to clarify what you are saying.

4 MJ [COL POHL]: Okay. I got it. But I'm talking about
5 that.

6 STC [MAJ LEBOWITZ]: Just one clarification, Your Honor.

7 MJ [COL POHL]: Yes, sir.

8 STC [MAJ LEBOWITZ]: For these submissions or potential
9 submissions, I believe the witness stated that the proper way
10 is to go through the local security office, as
11 Mr. Binalshibh's team did. I just want to confirm that ----

12 MJ [COL POHL]: What I'm -- well, I'm not in the Western
13 Union business, so I don't know how the mail flows. Major
14 Lebowitz, you are to ensure that what they submit goes to the
15 right person, which the way I gather is the adjudicator at
16 CAF. If that has to go through OSS, whatever it is. But I
17 don't want it sitting on 18 people's inboxes over Christmas
18 because it's not their job to move it. Do you understand?

19 STC [MAJ LEBOWITZ]: Yes, Your Honor. And just for
20 another clarification, paragraph (f) of the original notice
21 does address NPSMS, where it says that they have taken -- they
22 have not taken any action to suspend counsel's ----

23 MJ [COL POHL]: Let's -- I got it. But let's deal with

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1 the issues I like dealing with. And that's the CAF part.

2 Okay?

3 Then on the 22nd of December, I want a declaration
4 from a knowledgeable person in the CAF process of when a
5 decision will be made in these cases. And the term that
6 Mr. Purtill used was final determination. At that point, it
7 will be almost two months since they've had it. Now, I'm not
8 saying they've made it, I want a status of when it's -- if
9 it's been made; and the second thing, if not, when it will be
10 made, okay?

11 I'll issue an order in writing to assist you, Major
12 Lebowitz, because I also will -- they talk about requesting,
13 they don't like ordering. So I'll probably order an
14 expeditious review because that apparently is a process.

15 And I'll give you a written order to this effect. I
16 know you don't own the CAF. But until this is resolved,
17 there's not much we can do in this case. I'm being told that
18 it can be done within 20 days. That's what they're telling
19 me. So it seems to me two more weeks is plenty of time to at
20 least get close to the end of it, okay?

21 Any questions?

22 LDC [MR. NEVIN]: Just to clarify ----

23 MJ [COL POHL]: I'm not going to -- I'm go going to send a

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1 written order on that one. On this one, I'm not, because --
2 just I'm telling you guys now, this is the requirement if you
3 want to do it. If you don't, that's fine. But I don't want
4 to delay the process getting all of the order numbers done.

5 Go ahead, Mr. Nevin.

6 LDC [MR. NEVIN]: Just so we're clear, by next Friday, we
7 would do -- we would just notify you whether we are going to
8 submit, or we would also submit?

9 MJ [COL POHL]: You will submit it by Friday.

10 LDC [MR. NEVIN]: All right. So we submit and then notify
11 you.

12 MJ [COL POHL]: Whether you chose to submit or not to
13 submit and when you actually submitted it to them.

14 LDC [MR. NEVIN]: Right. And then that notification to
15 you would be ex parte and under seal?

16 MJ [COL POHL]: Well, it doesn't really say much, but if
17 you ----

18 LDC [MR. NEVIN]: Just ----

19 MJ [COL POHL]: It will -- right now, it could be ex parte
20 in the sense that it just goes to special trial counsel.

21 LDC [MR. NEVIN]: Uh-huh.

22 MJ [COL POHL]: Whether it needs to be under seal or not,
23 I'm not -- we're going to have to address all of that in this

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1 case down the road. Since we're doing that currently, let's
2 just keep it all the same methodology. Although I'm putting
3 out some orders in this case that are not going to be ex parte
4 under seal, but that's my decision.

5 LDC [MR. NEVIN]: Right.

6 MJ [COL POHL]: I think we're -- but I'll get --
7 allow this whole thing will be removed from under seal
8 eventually, once we figure out where we're at on this thing.

9 LDC [MR. NEVIN]: We'd have an opportunity to be heard on
10 that?

11 MJ [COL POHL]: Oh, absolutely. Absolutely. I mean, we
12 started down that road, and it's easier to stay on that
13 road -- I know I'm dealing a lot with roads today -- but stay
14 on that road until we can resolve it, and then we can figure
15 out where we're going.

16 LDC [MR. NEVIN]: And then the last question: We have
17 been litigating this issue during this session, but only this
18 issue.

19 MJ [COL POHL]: Right.

20 LDC [MR. NEVIN]: Our view is that we're laboring under a
21 conflict, which I think is confirmed by this gentleman's
22 testimony. But we will not -- I take it we are essentially in
23 abatement with respect to Mr. Mohammad pending resolution of

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1 the process you've just described.

2 MJ [COL POHL]: I don't like using the term abatement
3 until I have to abate something. At this point there's
4 nothing abated.

5 LDC [MR. NEVIN]: Can we go with defer? I mean ----

6 MJ [COL POHL]: What I'm saying is this, Mr. Nevin. You
7 guys can choose to do what you want to do during this period
8 of time. If -- my question is that's why I want to see if --
9 whether or not we can hold the January hearings because this
10 issue has been resolved or not.

11 LDC [MR. NEVIN]: Yes, sir.

12 MJ [COL POHL]: That's kind of the -- that's my, for want
13 of a better term, my continuance or, slash, abatement target.

14 LDC [MR. NEVIN]: Yes, sir.

15 MJ [COL POHL]: The only other thing we're going to
16 address here is the 502 that deals with Mr. Hawsawi, and
17 touching on the 502 with Mr. Connell. We go beyond that to
18 anything else, we'll make a decision about whether or not we
19 can do that in light of 532, okay? So that's ----

20 LDC [MR. NEVIN]: Yeah. And I will say, you know, Major
21 Lebowitz referred in a pleading to all of the motions that we
22 had filed since the notice had gone out implying that we
23 weren't pulling our punches and we weren't ----

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1 MJ [COL POHL]: Mr. Nevin, this exact same issue came up
2 in the 292 series.

3 LDC [MR. NEVIN]: Right.

4 MJ [COL POHL]: And I take no -- I add no weight of
5 whether or not you choose to continue to file motions or not
6 as far as your substantive argument and whether or not you had
7 a conflict.

8 LDC [MR. NEVIN]: We let some deadlines run yesterday, if
9 I'm not mistaken, for responses because we don't want to be in
10 that box.

11 MJ [COL POHL]: Yeah, well, I know he said that.

12 LDC [MR. NEVIN]: All right.

13 MJ [COL POHL]: I don't give that any -- you can choose to
14 respond to things you choose to respond to. That's up to you.

15 LDC [MR. NEVIN]: Thank you.

16 MJ [COL POHL]: But I don't take continual pleadings from
17 counsel while this is pending as somehow any evidence that
18 there is no real conflict and they really are pulling their
19 punches. To me, it's evidence of nothing.

20 LDC [MR. NEVIN]: All right.

21 MJ [COL POHL]: Except you doing your job, quite frankly,
22 as you see fit.

23 LDC [MR. NEVIN]: Yeah, but that's really the point ----

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1 MJ [COL POHL]: Yeah. I got it. I got it.

2 LDC [MR. NEVIN]: ---- anyway.

3 MJ [COL POHL]: Major Lebowitz?

4 STC [MAJ LEBOWITZ]: May I approach the podium, Your
5 Honor?

6 MJ [COL POHL]: Sure.

7 STC [MAJ LEBOWITZ]: Your Honor, I'll obviously follow
8 whatever order the commission directs. Saying that, I just
9 want to put on the record serious reservations about the order
10 to the security function. I believe that this court has
11 now -- and I understand where you're coming from and where you
12 got this from, Your Honor -- but we're now in a situation
13 where this court -- and I have another thing I want to bring
14 up after this that goes with this part.

15 But the court is now essentially in Egan territory.
16 It's ----

17 MJ [COL POHL]: No, I'm not. No, I'm not. I'm simply
18 saying -- your own witness said you could expedite this
19 process. Your own witness says it takes 20 days to resolve
20 this thing. I'm just telling you tell me how long it takes to
21 do it. I'm not telling them what to do. I'm not telling them
22 that they have to do -- give them a clearance or not give them
23 a clearance. I'm not telling them they have to adjudicate it

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1 a certain way or not. I'm just telling you about the process.

2 He said the process is supposed to take 20 days; it's
3 now taken six weeks. He said you can expedite the process.
4 I'm asking him to expedite the process. How is that getting
5 into Egan territory? I'm not going into the substance of what
6 they're doing. They do what they do. All I'm asking for is a
7 decision. Is that unreasonable?

8 STC [MAJ LEBOWITZ]: I guess my main point of what I
9 wanted to make, Your Honor, is the commission -- you stated
10 that this is the exact same scenario as 292.

11 MJ [COL POHL]: I don't believe I said that, but go ahead.
12 First of all, if I did say that, I misspoke. It's not. But
13 go ahead. Others have said that, but I don't believe I did.

14 STC [MAJ LEBOWITZ]: I believe ----

15 MJ [COL POHL]: Go ahead. What's your point?

16 STC [MAJ LEBOWITZ]: ---- we're far afield from the
17 conflict motions that the defense had filed, and I just
18 don't -- I guess the question is: Where is the conflict?
19 There's no -- he said -- the witness said there's no
20 investigation; that the process -- the administrative process,
21 time aside, is working, so ----

22 MJ [COL POHL]: You know, I hear you saying that, but I --
23 and I don't want to make light of it, but if they go down the

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1 red road or the yellow road, there's clearly an investigative
2 part of that, isn't there?

3 STC [MAJ LEBOWITZ]: But, Your Honor, that's the key word.
4 That's "if." That's hypothetical. It's speculation.

5 MJ [COL POHL]: All I'm asking -- yeah, all I'm asking
6 them is decide which road they're going down.

7 STC [MAJ LEBOWITZ]: I guess perhaps ----

8 MJ [COL POHL]: I mean, let's back up here, okay? I
9 understand your concerns there, Major Lebowitz, and I
10 certainly don't want to get into telling people how to do
11 their classification jobs, because you're absolutely right,
12 that is -- I have no authority to do that, and I'm not doing
13 that. Okay.

14 But let's review the bidding here, okay? As I did
15 the other day with Mr. Nevin when he was blaming the
16 government for everything, and I said, well, this -- the
17 triggering event was from the defense, okay, which is true.
18 Okay. But the second triggering event was a decision by the
19 government to refer this to the CAF.

20 We've had a lot of spills in this scenario, some by
21 the government, some by the defense. Okay. This was treated
22 by like one of those spills. There was no referral to CAF.
23 People's computers were wiped. Hard drives may have been

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1 destroyed. You know, and that's what happened.

2 But on this particular one, instead of treating it
3 that way, the United States Government chose to elevate it to
4 the CAF level, okay, which makes it different. And once you
5 made that decision, all they are asking for is let us know
6 what this decision is by the CAF of the route that the
7 government chose to pursue. Go ahead.

8 STC [MAJ LEBOWITZ]: I guess the one clarification I just
9 want to make, and then I'll sit back down, Your Honor.

10 MJ [COL POHL]: Okay.

11 STC [MAJ LEBOWITZ]: Is because Mr. Nevin came up after
12 you had said what you were going to put in writing and asked
13 you if this is -- threw out the words abatement and then
14 defer, and the conversation moved to pulling punches, and I
15 get that.

16 I just -- I guess based on your response to my
17 questions just now, I would request that this commission just
18 set aside the 532 issue, allow this case to proceed as normal,
19 obviously, and then we'll see where we're at when we've --
20 when, you know, your declarations and process unfolds,
21 but ----

22 MJ [COL POHL]: Okay. Just to be clear, because
23 apparently, I wasn't as clear as I thought I was, to either

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1 you or to Mr. Nevin, is -- is today is Friday. Okay. This is
2 the last week of this week's sessions. Okay. The rest of the
3 business this week deals with 502 issues; it's got nothing to
4 do with this issue or with these counsel, okay. I know you
5 may or may not be aware of that. Okay.

6 We have hearings scheduled for January. I will see
7 what the lay of the land is between now and January based on
8 what I get from whether -- what the defense decides to submit
9 and, more importantly, what I get from the United States
10 Government on or about 22 December as to the status of the
11 investigation. Then I will determine whether or not we can
12 have hearings in January, and whether or not we can -- what
13 those hearings would cover.

14 But I'm not -- right now, if you're saying am I
15 granting any type of abatement or continuance, the answer is
16 no, because there's nothing, quite frankly, to abate at this
17 point. But we'll see how it plays out, okay?

18 STC [MAJ LEBOWITZ]: Yes, Your Honor.

19 MJ [COL POHL]: Okay. Commission is in recess, and then
20 we will reconvene to have Professor Watts back on the stand
21 for cross-examination, switching to the regular prosecution
22 team. The commission is in recess for 15 minutes.

23 [The R.M.C. 803 session recessed at 1111, 8 December 2017.]

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1 [The R.M.C. 803 session was called to order at 1131,
2 8 December 2017.]

3 MJ [COL POHL]: Commission is called to order. All
4 defense counsel are present that were present when the
5 commission recessed. The regular prosecution team has
6 replaced the special trial counsel.

7 General Martins, any changes since we last met?

8 CP [BG MARTINS]: Your Honor, Mr. Groharing is back, so we
9 have all seven trial counsel.

10 MJ [COL POHL]: Okay. Please recall Professor Watts.
11 [Sean Watts resumed his seat on the witness stand.]

12 MJ [COL POHL]: Please have a seat, Professor. I'll
13 remind you, you are still under oath.

14 WIT: Thank you.

15 MJ [COL POHL]: Okay. Mr. Trivett.

16 **CROSS-EXAMINATION**

17 **Questions by the Managing Trial Counsel [MR. TRIVETT]:**

18 Q. "Indeed, the attacks of September 11th, 2001, that
19 launched the U.S. global war on terrorism, had they taken
20 place in an unequivocally international armed conflict, would
21 unquestionably have constituted prohibited law of war
22 perfidy." Do you recognize that statement?

23 A. Sounds a little like my writing.

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1 Q. In fact, in 2013, you wrote an article called "Law of
2 War Perfidy," correct?

3 A. [Nods.] Yes.

4 MJ [COL POHL]: Can you ----

5 WIT: Sorry. I forgot.

6 MJ [COL POHL]: Okay.

7 Q. So you would agree that the conduct of the
8 September 11th attacks, specifically with hijackers
9 masquerading as civilians on civilian airliners, if it were in
10 the context of an international armed conflict, would, no
11 doubt, constitute perfidy?

12 A. Yes. It would meet the elements if it were in the
13 context of an international armed conflict. My reluctance or
14 the qualification for that statement is to address some
15 ambiguity about whether perfidy is an offense in
16 noninternational armed conflicts. There is a debate about
17 that. I would say that is an unsettled question. However,
18 perfidy is perfectly settled as a violation of the laws of war
19 in international armed conflict.

20 Q. Would you agree that the grave breaches -- that
21 perfidy is one of the grave breaches of the Geneva
22 Conventions?

23 A. It is not of the 1949 Geneva Conventions, no, sir.

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1 Q. Okay. So then where -- the 1949 Geneva Conventions
2 specify in Article 50 what the specific grave breaches are,
3 correct?

4 A. It depends on the convention, sir. Each of the four
5 Geneva Conventions has its own article; the number differs
6 depending which convention you're citing to.

7 Q. So this would be GC(III), correct?

8 A. GC(III) is, I believe, in -- let's see, the -- it's a
9 higher number than that. I think it's 129 and 130 address the
10 grave breaches regime.

11 Q. So where in the law of war does it say that perfidy
12 is only limited to international armed conflicts?

13 DC [MAJ WILKINSON]: Could I have an objection here for
14 relevance? There's no charge of perfidy in this case, and I
15 don't see what it has to do with this case, or with the
16 existence of noninternational armed conflict.

17 MJ [COL POHL]: Objection overruled. You may answer the
18 question.

19 WIT: Sir, could you repeat the question?

20 Q. Where under either customary international law or
21 conventional international law of war does it state that
22 perfidy is limited to only international armed conflicts?

23 A. No provision says that it is limited to international

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1 armed conflicts, but that's not how international law
2 typically works. It's -- I'm not aware of a provision that
3 says something is not a violation in a certain type of armed
4 conflict.

5 The law of war tends to be more prohibitive in
6 nature. We would imply something isn't a violation of the law
7 of war from its -- from the absence of a prohibition rather
8 than from some affirmative provision saying this is -- by the
9 way, this is not a violation in this type of armed conflict.
10 It's just not a method of regulation states have used.

11 Q. Okay. So in the Geneva Conventions, the grave
12 breaches ----

13 A. Yes.

14 Q. ---- are only listed in the context of an
15 international armed conflict, correct?

16 A. They are. That is the correct view, in my opinion.
17 There are -- there are law of war -- I don't know what to call
18 them -- sources, I suppose, who believe that the grave
19 breaches regime extends beyond international armed conflict.
20 That is not the correct interpretation to my view.

21 Q. Okay. So in your view, you believe that the grave
22 breaches are limited to just international armed conflicts?

23 A. That is my understanding of the 1949 Geneva

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1 Conventions, yes.

2 Q. Okay. The appellate chamber in Tadic disagrees with
3 you, correct?

4 A. They do, yes, sir.

5 Q. And Tadic is what you are saying is customary
6 international law in regard to the definition of an armed
7 conflict?

8 A. There has been far greater acceptance of the appeal
9 chamber's descriptions of noninternational armed conflict than
10 there have been of their overturning the trial chamber's
11 decision that grave breaches are not part of noninternational
12 armed conflict. So that aspect of the Tadic decision -- Tadic
13 said a lot of things about a lot of parts of the laws of war.
14 Their pronouncements on conflict definition and how to
15 identify a noninternational armed conflict are far more widely
16 accepted than what they said about the availability of grave
17 breaches in noninternational armed conflict.

18 Q. So you would agree then that the Tadic decision
19 *in toto* has not risen to the level of customary international
20 law such that it would bind all of the other nations?

21 A. I agree. That would be sloppy to say that the entire
22 decision, every word of it, is customary international law.

23 Q. I want to transition for a second. You would agree

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1 that the principle purpose of the law of war is to limit the
2 effects of armed conflict on humanity, correct?

3 A. That is a purpose, certainly not the only purpose.

4 Q. All right. Would you agree that there's two
5 principal pillars of the law of war; first one being military
6 necessity, second one being humanity?

7 A. Those are. And the law of war reflects a balance
8 between those often competing concerns, yes, sir.

9 Q. And the necessity pillar seeks the prompt submission
10 of the enemy?

11 A. Yes, sir.

12 Q. And the humanity pillar seeks to protect persons and
13 objects who fall under the submission of the enemy?

14 A. And even those that don't.

15 Q. Can you elaborate on that?

16 A. Well, so a person not -- need not be submitted to an
17 enemy to fall within the ambit of protection offered by the
18 law of war. Even civilians who aren't under enemy control can
19 benefit from the protections offered by the laws of war.

20 Q. Because protection of civilians is the entire purpose
21 of the law of war, at least especially as it applies to the
22 Geneva Conventions, correct?

23 A. No, sir. Because prisoners of war are not civilians,

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1 but they are protected by the Geneva Conventions, so ----

2 Q. I was talking about GC(III) specifically -- GC(IV).

3 A. GC(IV).

4 Q. I'm sorry. I apologize.

5 A. That is not correct, either. GC(IV) -- there's a
6 common misconception about it. It is not for the protection
7 of civilians generally; in fact, there's only a single part of
8 it that protects civilians generally, that is Part 2. The
9 vast majority of the protections of the Fourth Convention
10 inure to a very specific and specifically enumerated class of
11 civilians. They are the so-called protected persons described
12 in Article 4.

13 Q. And protected persons is also defined in the Military
14 Commission Act, is it not?

15 A. It's been a very long time. I have read the Military
16 Commissions Act, but I'm not aware that it defines protected
17 persons, I'm sorry.

18 Q. So to the extent the Military Commission Act does
19 define protected persons, and civilians are one of those
20 protected persons, the Military Commission Act makes it clear
21 that it's civilians not taking part in active hostilities that
22 are protected persons, correct?

23 A. I'm sorry. I'm not familiar enough with the Military

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1 Commissions Act definition of protected persons to answer
2 that.

3 Q. All right. So you would agree that the two pillars
4 were necessity and humanity?

5 A. Yes, sir.

6 Q. Okay. And there's actually four principles of
7 international law that I believe you wrote about, which
8 includes those, but also includes distinction and
9 proportionality?

10 A. Yes.

11 Q. So that the four principles of international law
12 according to your writings, are necessity, humanity,
13 distinction, and proportionality.

14 A. Principles of the law of war rather than principles
15 of international law generally, but, yes.

16 Q. Great. Can you please he explain the principles
17 behind distinction and proportionality?

18 A. Distinction is about making a fundamental -- I'm
19 trying not to use the word distinction. It recognizes a
20 difference between civilian persons and persons who are either
21 combatants or are taking a direct part in hostilities. The
22 principle generally instructs armed forces to limit their
23 attacks and efforts to combatants and civilians who take

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1 direct part in hostility and to insulate civilians as best
2 they can from the effects of hostilities.

3 Q. Why does it do that?

4 A. I suppose there are a number of reasons. The first
5 is, I've always thought that an important part of the law of
6 war is to retain something of the human character of the
7 people who take part in warfare. That is, if warfare did not
8 require such a distinction, it would be enormously difficult
9 to ask persons to take part in warfare and then return to
10 normal life if they weren't continuing to observe some very
11 fundamental aspects of humanity. I suspect that's part of
12 what's at the root of the rule of distinction.

13 Q. And explain proportionality, please.

14 A. Proportionality is a principle that operates in the
15 context of attacks. When an attack is anticipated to involve
16 damage to civilian property or to civilian persons, the
17 principle of proportionality instructs forces to weigh the
18 anticipated collateral damage against the anticipated military
19 advantage of the attack. The anticipated collateral damage
20 cannot be excessive in relation to the anticipated military
21 advantage.

22 Q. Should the United States choose a missile strike
23 against Usama bin Laden specifically in 1998 and he was in a

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1 stadium full of people, would the United States be governed by
2 the law of war and would that have violated the principle of
3 proportionality?

4 A. The first question to ask is whether the law of war
5 has been activated, whether it is a context to which the law
6 of war applies. The methodology we taught at the Army JAG
7 School was always, before one answers a law of war question or
8 reaches into the law of war and grabs an attractive rule or
9 principle, is to ask: Do I have the right conflict, and I do
10 have the right person?

11 So I would have to understand the nature, the context
12 of hostilities or violence before I reached in and grabbed a
13 law of war principle such as proportionality.

14 Q. Okay. Say there was no armed conflict at all ----

15 A. Okay.

16 Q. ---- but the United States felt like they wanted to
17 target Usama bin Laden anyway.

18 A. Okay.

19 Q. Is the United States bound by the law of war in
20 choosing how it targets him? Can they shoot at him in a
21 stadium full of people?

22 A. Only to the extent -- again, they're only limited to
23 the extent there's an ongoing armed conflict.

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1 Q. So the United States military is free to act with
2 impunity if it -- if it so chose in targeting Usama bin Laden?

3 A. Oh, no, not at all. No. I mean, there are domestic
4 law regimes that apply, depending where the attack was
5 geographically and who was involved; international human
6 rights obligations might apply as well. So no, impunity is
7 incorrect.

8 Q. Okay. Who would prosecute the military members who
9 ordered that strike if it was done by the Commander in Chief
10 ordering it?

11 A. If the Commander in Chief were to order a strike
12 against Usama bin Laden, who is in a stadium filled with
13 civilians, who would prosecute the Commander in Chief?

14 Q. Or whomever violated the law of war. What would the
15 enforcement mechanism be in that scenario if that law of war
16 did not apply?

17 A. Most likely, it would be some domestic regime, some
18 domestic municipal law or regime. There are a number of
19 jurisdictional theories that could attach. There's the theory
20 of nationality, that is the nationality of the person could
21 give rise to one or another state asserting jurisdiction.

22 The location of the offense, so the geography of the
23 attack could give rise to one or more territorial states

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1 asserting their domestic legal jurisdiction.

2 The nationalities of the victims could give rise to
3 an international legal claim of jurisdiction as well. And
4 finally -- well, no, that's it.

5 Q. Okay. Could they just come into the United States
6 and arrest them, arrest the Commander in Chief?

7 MJ [COL POHL]: Mr. Trivett, I'm not sure that's relevant
8 to anything.

9 MTC [MR. TRIVETT]: That's fine, sir. I'll continue.

10 MJ [COL POHL]: Move on to something else.

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

12 Q. So you would agree if it were anything, the conflict
13 between the United States and al Qaeda would be a Common
14 Article 3 noninternational armed conflict as opposed to an
15 international armed conflict, correct?

16 A. From the rough period of October 2001 forward, yes,
17 sir.

18 Q. Okay.

19 MJ [COL POHL]: Prior to that -- you talk about categories
20 here. What category would be -- let's take it from '96 to
21 October of 2001. What would the category -- how would you
22 categorize the relationship -- and I know that's probably the
23 improper word -- between the United States and al Qaeda?

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1 WIT: There is no relationship under the laws of war for
2 that situation. They are adversaries. There's terrorism
3 happening. There are law enforcement operations, I suppose,
4 happening there.

5 MJ [COL POHL]: So you see it as -- again, this is the
6 wrong term, but it would be a -- United States versus al Qaeda
7 would be criminally -- primarily a criminal approach to it; it
8 would be a law enforcement approach?

9 WIT: That approach would be available to the United
10 States in that situation, yes, sir.

11 MJ [COL POHL]: Okay. Got it. Go ahead.

12 Q. And a law enforcement approach is available at any
13 time, right, including during the armed conflict if it so
14 chooses?

15 A. Yes, sir, that is correct.

16 Q. And in fact it was FBI agents who captured the Nazi
17 saboteurs on the beaches of Long Island and Florida, correct?

18 A. Actually, they didn't. There's some dispute there.
19 Two tried to turn themselves in and were at first were
20 rebuffed, I believe. Someone didn't believe them when they
21 said they were here to attack American manufacturing. There
22 was a Coast Guardsman, I believe, who was patrolling the beach
23 who saw something not right on the beach. I think he reported

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1 something.

2 And then later, I think finally, the two saboteurs
3 who had turned and turned themselves in and turned in their
4 co-saboteurs eventually convinced some law enforcement
5 authority to accept them.

6 I understand the misconception. I think J. Edgar
7 Hoover took a lot of credit for capturing those guys, but I
8 don't think that was actually the case.

9 MJ [COL POHL]: I think we can move on to something else
10 from the ----

11 Q. Common Article 3 ----

12 WIT: Sorry.

13 MJ [COL POHL]: That's okay. The question was asked.

14 Q. Common Article 3 prohibits violence to life and
15 person, correct?

16 A. Yes, sir, it does.

17 Q. Murder of all kinds?

18 A. Yes, sir.

19 Q. The taking of hostages?

20 A. Yes, sir.

21 Q. The United States was a high-contracting party to the
22 Geneva Conventions of 12 August 1949, correct?

23 A. Yes, sir. Still are.

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1 Q. 195 state parties, give or take?

2 A. Give or take, yes, sir.

3 Q. And Afghanistan was also a high-contracting party;
4 isn't that correct?

5 A. Yes, sir. I think they acceded in 1959.

6 Q. All right, and al Qaeda was not a high-contracting
7 party. You would agree with that?

8 A. Correct, nor could they be.

9 Q. And they never could be because they're not a power,
10 correct?

11 A. They're not a state.

12 Q. They're not a state and they're not affiliated with a
13 state?

14 A. I don't know the extent to which they had an
15 affiliation with any state but they are not recognized as a
16 sovereignty that can ratify international legal instruments.

17 Q. Now, you've written a paper arguing for the
18 separation of combatant immunity from prisoner of war status.
19 Do you recall writing that paper?

20 A. Yes. Yes, I do.

21 Q. Okay. And do you agree with that statement as we sit
22 here today?

23 A. I think a correct understanding of the law of war

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1 does separate the two, yes.

2 Q. But that's typically not how it's been treated,
3 correct?

4 A. I am perhaps a minority view there.

5 Q. Okay. So -- and you would agree with the concept
6 that combatant immunity is the most valuable part of prisoner
7 of war status that someone can have.

8 A. It is very valuable, yes. It is ----

9 Q. That means -- I'm sorry. Go ahead.

10 A. The point I'm trying to make, however, in
11 distinguishing between prison of war status and combatant
12 immunity is that I don't think they are inextricably linked;
13 they're not coextensive with one another. There are persons
14 who are prisoners of war under the Geneva Conventions who, in
15 fact, would not enjoy combatant immunity. That's the point I
16 was making.

17 Q. Are those persons sometimes referred to you as
18 extra-conventional persons?

19 A. No, sir. That's a different concept. Yes. That --
20 that article was about the Fourth Geneva Convention.

21 Q. So one of the principal reasons you argue that a
22 state may find that someone's not a prisoner of war is because
23 of the combatant immunity and not wanting to grant that

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1 combatant immunity, correct?

2 A. I think to the extent a state is stingy or reluctant
3 to confer POW status or recognize that status, they may have
4 concerns about combatant immunity. And so that's, again, part
5 of the thrust of the article, is to say we could have a more
6 faithful application of the Geneva Conventions and prisoner of
7 war status if we were to recognize that combatant immunity is
8 not necessarily part of prisoner of war status.

9 Q. And so prisoner of war status, then, requires to
10 either be a state actor or affiliated with a state actor and
11 then to follow the criteria, correct?

12 A. The levee en masse category, so this is Geneva
13 Convention (III), Article 4(A)(6), I believe, describes the
14 levee en masse. A levee en masse need not be affiliated with
15 a state; however, that is -- that is temporally limited. As
16 soon as they have the opportunity to, and intend to be
17 prisoners of war upon capture, they must find their way to a
18 state and belong to a state.

19 Q. So an al Qaeda member once proven to be an al Qaeda
20 member, could not be a prisoner of war under the third Geneva
21 Convention; you would agree with that?

22 A. That's difficult to evaluate. If they did not have
23 affiliation with a state, and were not a levee en masse, there

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1 are few categories of prisoner of war enumerated that they
2 could satisfy.

3 Q. Now, you wrote an article in response to the
4 combatant status review tribunals defending the decision to
5 render both the Taliban and al Qaeda not prisoners of war,
6 correct?

7 A. Yes, sir, I did.

8 Q. Okay. And as you stand here today, you agree with
9 everything you wrote in that article?

10 A. I -- I co-authored that article, just law professors
11 are touchy about that kind of thing. I co-authored that
12 article, and yes, I believe that article is correct.

13 Q. Okay. So then if there's a jurisdictional
14 requirement that an alien unlawful enemy belligerent has to be
15 someone other than a privileged belligerent, an al Qaeda
16 member wouldn't constitute a privileged belligerent, and would
17 therefore fall under the AUEB definition; you would agree?

18 A. The AUEB status is not one I'm familiar with from
19 international law. My first encounter with it was reading the
20 Military Commissions Acts.

21 Q. Are you familiar with it from reading the acts?

22 A. Vaguely, I -- vaguely. Yes.

23 Q. Did you review the jurisdiction of the commission

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1 before testifying today?

2 A. I -- again, I have read the Military Commissions Act
3 of 2009, but don't recall all of its details.

4 Q. That's fine. Would you agree that the
5 September 11th, 2001 attacks constituted violence to life and
6 person? The attacks themselves. I'm not talking about the
7 status of the combatants, the attacks themselves?

8 A. In a plain meaning of that phrase, yes, sir.

9 Q. Okay. That would be prohibited as murder of all
10 kinds.

11 A. You mean for the purpose of Common Article 3?

12 Q. Correct.

13 A. Again, before I answered whether there was a
14 substantive violation of Common Article 3, I would have to
15 understand if the context involved had managed to trigger the
16 application of Common Article 3.

17 Q. Okay.

18 A. Again, if we were talking ----

19 Q. I think I can help you with that. So hold on one
20 moment.

21 A. Okay.

22 MTC [MR. TRIVETT]: I'm now showing the witness what has
23 been previously marked as AE 502SS (Gov) Attachment TTT. It's

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1 specifically a clip of the North Tower strikes, 36 seconds,
2 sir. I'd like to play it for the witness.

3 MJ [COL POHL]: For what purpose?

4 MTC [MR. TRIVETT]: The testimony yesterday was clear that
5 he believed that the -- that the hostilities were not of a
6 sufficient intensity, and I wanted to ask him specific
7 questions about that. And it was just raised in the question
8 in the context as to whether or not the September 11th attacks
9 would constitute violence to life and person and murder of all
10 kinds.

11 MJ [COL POHL]: Go ahead.

12 MTC [MR. TRIVETT]: Thank you, sir. I need the feed from
13 table ----

14 [Video played.]

15 MJ [COL POHL]: Mr. Trivett, that's not the clip that you
16 referred to.

17 MTC [MR. TRIVETT]: I know, sir. The wrong thing got
18 pulled up. I apologize.

19 MJ [COL POHL]: I think he's probably aware of it. I
20 think you can ask him without the visual aid.

21 Q. Did you watch the testimony yesterday?

22 A. No.

23 Q. You haven't watched any of the testimony so far

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1 today -- so far this week?

2 A. No, sir.

3 Q. Okay. And you've seen --

4 MJ [COL POHL]: Professor Watts, let me ask you a
5 question: Have you seen the video in the last 16 years of the
6 strikes on 9/11 ----

7 WIT: Yes, I have.

8 MJ [COL POHL]: ---- the planes going in there? Okay.

9 Q. So that ----

10 MJ [COL POHL]: Mr. Trivett, let me ask you a question.

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

12 MJ [COL POHL]: How much longer do you think you're going
13 to go?

14 MTC [MR. TRIVETT]: Several hours, sir.

15 MJ [COL POHL]: Excuse me?

16 MTC [MR. TRIVETT]: Several hours.

17 MJ [COL POHL]: Okay. We're going to do a recess for
18 lunch. Then at 1315 -- several hours?

19 MTC [MR. TRIVETT]: At the most, sir.

20 MJ [COL POHL]: We'll reconvene at 1315. And while we're
21 over lunch, see if you can cut it down to much less than
22 several hours.

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

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1 MJ [COL POHL]: Okay. Commission is in recess.

2 [The R.M.C. 803 session recessed at 1158, 8 December 2017.]

3 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1318,
2 8 December 2017.]

3 MJ [COL POHL]: The commission is called to order. Any
4 changes since we recessed, General Martins?

5 CP [BG MARTINS]: No, Your Honor.

6 MJ [COL POHL]: Mr. Nevin?

7 LDC [MR. NEVIN]: No, Your Honor.

8 MJ [COL POHL]: Ms. Bormann?

9 LDC [MS. BORMANN]: No changes, Judge.

10 LDC [MR. NEVIN]: I'm sorry. Ms. Leboeuf and Mr. Sowards
11 are not with us this afternoon. I apologize.

12 MJ [COL POHL]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: No changes, Judge.

14 MJ [COL POHL]: Mr. Connell?

15 LDC [MR. CONNELL]: No changes, sir.

16 MJ [COL POHL]: Mr. Ruiz?

17 LDC [MR. RUIZ]: No changes.

18 MJ [COL POHL]: Okay. Please recall the witness.

19 Mr. Trivett, I'll give you some leeway, but let's
20 focus on the issue before me, please.

21 MTC [MR. TRIVETT]: I understand, sir.

22 [Sean Watts resumed his seat on the witness stand.]

23 MJ [COL POHL]: Professor Watts, please have a seat. I

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1 remind you, you are still under oath.

2 WIT: Yes, thank you.

3 MJ [COL POHL]: Mr. Trivett.

4 MTC [MR. TRIVETT]: Thank you, sir.

5 **CROSS-EXAMINATION CONTINUED**

6 **Questions by the Managing Trial Counsel [MR. TRIVETT]:**

7 Q. Professor, you mentioned that there were slight
8 modifications made to that armed conflict definition in
9 subsequent Yugoslavia tribunal cases?

10 A. Yes. Modifications to the initial Tadic standard,
11 yes.

12 Q. And can you explain what those were.

13 A. The earliest decisions merely referred to a
14 protracted armed conflict. What later decisions, such as
15 Boskoski, the Limaj and Haradinaj decisions, did was to flush
16 out factors that would merely indicate that either intensity
17 was present or organization had been satisfied. So the
18 elements that I recounted yesterday were developed chiefly in
19 later decisions.

20 Q. So are either of those later decisions now part of
21 the customary international law of war?

22 A. Yes. I think in significant part, they are.

23 Q. So if they are part of the customary international

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1 laws of war, is Tadic no longer part of it?

2 A. No. To the extent Tadic is offering a more ambiguous
3 or less precise standard, I don't think those later decisions
4 displaced it or eclipsed it, no, sir.

5 Q. But it was modified to the specific requirements of
6 the law that they were dealing with and the war they were
7 dealing with?

8 A. I think so, yes, sir.

9 Q. And the wars in Yugoslavia were very hard to
10 characterize, correct?

11 A. They were complex.

12 Q. They were complex. There were some aspects that were
13 international armed conflict, some aspects that were not
14 international armed conflict, sometimes it looked as if it was
15 blending?

16 A. Yes. And some aspects that were not armed conflict
17 at all.

18 Q. And Mr. Tadic himself questioned the jurisdiction of
19 the tribunal based on the fact he was being prosecuted for
20 grave breaches and what he thought constituted a
21 noninternational armed conflict; isn't that correct?

22 A. That is one of many challenges he made to the
23 jurisdiction of the tribunal, yes, sir.

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1 Q. And ultimately, the appellate chamber in Tadic said
2 that the Security Council of the United Nations -- and they
3 were the ones who wrote the statute, correct?

4 A. Yes, Security Council Resolution 827.

5 Q. And the Security Council is the one who listed the
6 offenses that were chargeable ICTY.

7 A. I know there is a separate statute of the
8 International Criminal Tribunal for Former Yugoslavia. I'm
9 not certain that the Council itself wrote that statute. I
10 think they wrote a resolution that authorized the creation of
11 their tribunal, and they may have approved the statute of
12 court.

13 Q. The Tadic court ultimately decided, though, that the
14 Security Council wasn't concerned about the difference between
15 international armed conflict and noninternational armed
16 conflict when it came to charging the offenses, that the
17 offenses were meant to cover anyone who was conducting
18 violations of the law of war in Yugoslavia; isn't that
19 correct?

20 A. No, sir. I think that goes too far. I don't think
21 the Security Council said they did not care about delineations
22 between noninternational armed conflict and international
23 armed conflict. I'm not aware of a statement to that effect.

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1 Q. Just for purposes of what offenses can be charged
2 against individuals?

3 A. The statute refers to grave breaches and I believe
4 the statute, Article 3, also refers to violations of customs
5 of the laws, and the laws of war. And that, I think, the
6 Tadic tribunal took as the Security Council's instructions on
7 the substantive body of law they were to draw offenses from.

8 Q. And before of the ICTY tribunal, there hadn't been an
9 International Criminal Tribunal since Nuremberg and Tokyo,
10 correct?

11 A. I think that is correct, yes, sir.

12 Q. And before the Tadic tribunal, there had never been
13 an individual charged with the grave breaches in any of the
14 international military tribunals for conduct committed in a
15 noninternational armed conflict?

16 A. I believe that is correct as well, although recall
17 that grave breaches can be charged in domestic courts as well.
18 But I think you asked about international tribunals ----

19 Q. Right.

20 A. ---- and no, sir.

21 Q. As a violation of the law of war?

22 A. Yes, sir.

23 Q. So Tadic was breaking new ground in that respect?

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1 A. They were breaking new ground in the application of
2 that law to facts, yes, sir.

3 Q. Okay. And I believe you testified yesterday that you
4 believed that one of the main criticisms of the tribunals at
5 Nuremberg and in Tokyo was that there were certain retroactive
6 aspects of it?

7 A. Yes, sir. That is a critique of the ----

8 Q. Okay.

9 A. ---- of both the Far East tribunal and the Nuremberg
10 tribunal.

11 Q. But the Nuremberg tribunal was also lauded and
12 Nuremberg principles were adopted for international tribunals
13 going forward that are still bound -- well, that are still in
14 play today at both ICTY and ICTR?

15 A. They are today. The Nuremberg principles are held in
16 somewhat high regard, yes, sir.

17 Q. So the law of war is always evolving, correct?

18 A. It does evolve, yes, sir.

19 Q. And you would agree that the principles of The Hague
20 Convention in 1899 and the principles of the Geneva Convention
21 in 1949 in some ways didn't anticipate all of the types of
22 modern warfare that we're dealing with in the modern world.
23 Would you agree with that?

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1 A. I would agree with that, yes, sir.

2 Q. And one of the specifics -- specific ways that I
3 believe you've been writing about is in the cyber warfare
4 context?

5 A. Yes, I have written about that.

6 Q. Okay. And there's generally consensus that an armed
7 conflict can exist with a cyber attack. You would agree with
8 that?

9 A. If the standards are satisfied for either
10 international or noninternational armed conflict, yes, I
11 believe there are cyber means by which those standards could
12 be satisfied.

13 Q. All right. Please give an example of a type of cyber
14 attack that would rise to the level of armed conflict to which
15 the law of war would apply.

16 A. Where a state -- to use its organs to launch a cyber
17 operation against another state that produced destructive
18 effects against -- particularly against persons, a state of
19 international armed conflict could be said to exist between
20 those two states.

21 Q. Okay. Change the hypothetical briefly, and it's not
22 state to state, but it's a terrorist organization
23 cyber-attacking the United States.

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1 A. Okay.

2 Q. Would it still rise to the level of armed conflict?

3 A. I can imagine a scenario where it would satisfy the
4 criteria, yes.

5 Q. Can you describe such a scenario?

6 A. Well, so if we had a sufficiently organized group, a
7 group that met the organization criteria we spoke about
8 yesterday, and that group were to engage in a protracted,
9 sustained, concerted set of attacks that met the intensity
10 elements we described yesterday, and if there were an
11 exchange, particularly between that group and the state on the
12 other side of that situation, yes, that could amount to
13 noninternational armed conflict.

14 Q. Okay. And that could be without a single kinetic
15 attack?

16 A. There is dispute on that point. I contributed to a
17 manual which split on that issue. We could not achieve
18 consensus in the group of international experts whether cyber
19 events or cyber operations that produced only nonkinetic
20 effects. The example we hung up on were mere deletions of
21 data. That frankly split the group. It was not clear to
22 everyone. We could not agree on a single conclusion there.

23 Q. But you personally believed that there are types of

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1 scenarios from a cyber attack standpoint that would constitute
2 armed conflict in a noninternational armed conflict realm?

3 A. Yes, sir. I think that could happen.

4 Q. Okay. And that's due to the evolving nature of the
5 weapons that are being used in modern warfare?

6 A. Yes. One of the chief guiding principles of my work
7 in cyber warfare is that the law of war is largely ambivalent
8 as to the weapon. Weapons have changed. It's not even a
9 20th -- or 21st or 20th century phenomenon to see new weapons
10 show up on the battlefield, but the principles of the law of
11 war are broad enough to regulate even weapons that didn't
12 exist at the time the principles came into being.

13 Q. Or even groups not envisioned at the time The Hague
14 Conventions were written?

15 A. Certainly, there are groups not in existence at the
16 time of the 1899 and 1907 Hague regulations that are
17 regulated.

18 Q. I want to talk specifically about your review of the
19 armed conflict between the United States and al Qaeda from
20 1996 to 2001.

21 A. Okay.

22 Q. I believe you testified and were asked a direct
23 question as to whether or not you reviewed the 9/11 Commission

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1 report and the facts that were set forth therein?

2 A. I have read the 9/11 Commission report.

3 Q. And was that the extent of your review of the actual
4 facts on the ground with the armed conflict between the United
5 States and al Qaeda?

6 A. That is the primary source. I've read other sources,
7 you know, in the years since that event, different recountings
8 of it, different analyses of it. But the 9/11 Commission
9 report is probably the primary source of my understanding of
10 what was going on ----

11 Q. All right.

12 A. ---- in that period.

13 Q. And are you aware that Usama bin Laden declared war
14 on America in 1996?

15 A. I'm aware of that, yes, the fatwa he issued.

16 Q. And are you aware that in that declaration of war he
17 gave three specific reasons that he believed it was legitimate
18 to attack the United States?

19 A. Yes. I do vaguely recall enumerated reasons. And
20 not just the United States, either, right?

21 Q. Also Israel?

22 A. I think he mentioned Jews.

23 Q. Correct.

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1 A. Yes.

2 Q. So the United States' presence in Saudi Arabia was
3 one of those, correct, following the Gulf War?

4 A. I'm sorry, I don't recall that one specifically.

5 Q. That's fine. But you do recall the United States'
6 support for Israel?

7 A. I do, yes. Yes, I recall.

8 Q. And then specifically also the United States support
9 for Middle Eastern regimes, do you recall that?

10 A. May I go back? I remember Jewish persons being
11 mentioned. I'm sorry that I don't remember the State of
12 Israel being mentioned.

13 Q. Okay. And there's actually a specific convention on
14 initiation of hostilities, correct?

15 A. Yes. One of the old Hague Conventions addresses the
16 opening of hostilities.

17 Q. And what does that convention demand?

18 A. I don't recall specifically off the top of my head.
19 It refers to war, which is a somewhat outdated term now; but
20 I'm sorry, I can't quote the thing to you.

21 Q. I just wanted to read your Article 1 and ask you
22 questions about it. "The contracting powers recognize that
23 hostilities between themselves must not commence without

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1 previous and explicit warning in the form either of a reasoned
2 declaration of war or of an ultimatum with conditional
3 declaration of war."

4 A. Okay.

5 Q. So that was international conventional law regarding
6 the initiation of hostilities, correct?

7 A. For the parties to that convention, yes, sir.

8 Q. And that's state to state?

9 A. Yes, because the passage you read refers to "among
10 themselves," and that could only mean the high-contracting
11 parties to The Hague Convention.

12 Q. And what would you say the principles of the law of
13 war -- what principles of the law of war is that concerned
14 about? Why must a declaration of war occur first?

15 A. We've left, first, the prong of the law of war that
16 regulates the conduct of hostilities and we've now, with this
17 convention, to my mind, taken ourselves to the prong of the
18 law of war that regulates the resort to the use of force.

19 Q. That would be jus ad bellum?

20 A. Correct. Yeah. I can't say I can identify that
21 passage with that particular principle of the jus ad bellum.

22 Q. You would agree in a state-to-state conflict that the
23 law of war applies immediately upon that declaration?

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1 A. The Geneva Conventions certainly do. They explicitly
2 refer to situations of declared war.

3 Q. So would it be a violation of that Hague Convention
4 to -- for one state to attack another state without first
5 declaring war?

6 A. That's unclear now. That statement -- or rather,
7 that convention has fallen into disuse. It is rare now for
8 states to observe the formalities of The Hague Convention.
9 There's a concept of desuetude in international law that
10 refers to a formerly active rule or norm through disuse no
11 longer constituting a norm.

12 Now, the states concerned may not have gone through
13 the formalities of withdrawing from the convention, but
14 international lawyers look to their practice sometimes, and
15 conclude that states, through ignoring it, frankly, no longer
16 regard it a binding provision of international law.

17 Q. The principles of international law are supposed to
18 govern the necessity of the attack as well as protect
19 civilians who may either be subject to attack or fall within
20 the power of the other side in the conflict, correct?

21 A. The principles of the law of war do address those
22 concerns.

23 Q. And it's those principles that trigger immediately

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1 upon the declaration in order to protect the principles that
2 the law of war is designed to protect?

3 A. In international armed conflict, a declaration of war
4 would bring into play the principles between those two states
5 and their conduct of hostilities, yes, sir.

6 Q. So if a state were to declare war and then wait
7 several years before attacking, the first attack would clearly
8 still fall under the law of war, correct?

9 A. Yes, sir. There are numerous instances -- and the
10 historical term that is used is phony wars -- where states
11 have declared hostilities or declared war between one another
12 but had not yet fully mobilized their forces, didn't see that
13 it was either in a strategic, operational, or tactical sense a
14 right time to attack and then do so much later.

15 Q. All right. So now let me bring it to 1998.

16 A. Yes, sir.

17 Q. So 1998, are you aware that Usama bin Laden and other
18 terrorist leaders issued a fatwa?

19 A. A second fatwa?

20 Q. A second fatwa.

21 A. I was not aware of that.

22 Q. Okay. To the extent this -- to the extent a fatwa
23 was issued that specifically declared -- strike that. To the

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1 extent a fatwa was issued that specifically said that American
2 civilians were legitimate targets in the war that they
3 declared in 1996, you would agree that that's an intention to
4 commit what would be a war crime in a state-to-state conflict.
5 If a state declared war and said we are going to specifically
6 target your civilians, you would agree that that shows intent
7 to commit war crimes?

8 A. There's a theory of liability in war crimes that
9 would attach there to statements that could be understood as
10 an incitement to commit war crimes. These can be captured
11 under the theory of co-perpetration, or complicity in some
12 cases, or ordering is probably the most direct theory of
13 liability that would reach that sort of statement. And if
14 that were, in fact -- if then, in fact, civilians were
15 attacked in the context of an international armed conflict,
16 the person who gave the order to make those attacks on
17 civilians may be guilty of a war crime, yes.

18 Q. And you're aware of the two embassies that were
19 attacked in August of 1998, correct?

20 A. Yes, Nairobi and Dar es Salaam.

21 Q. And you would agree embassies are the sovereign
22 property of the United States no matter where they're found?

23 A. There's some confusion on that. They are protected

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1 as diplomatic embassies; they are generally inviolable. I'm
2 not convinced that they become the territory of the sending
3 state; I think they remain the sovereign territory of the
4 receiving state. But yes, they have a special protected
5 status.

6 Q. Have you ever seen the video of the aftermath of the
7 Kenyan bombing?

8 A. I have not seen video. I have only seen still
9 photos.

10 Q. Have you ever seen the video of the Tanzanian
11 bombing?

12 A. Only still photos. I have not seen video, no, sir.

13 Q. So -- and you're aware that 220 people were killed
14 during that -- those attacks?

15 A. Yes. I am aware that's the casualties, yes, sir.

16 Q. Okay. What, if any, laws of war would be violated in
17 a recognized, noninternational armed conflict if someone drove
18 a truck bomb concealing the bomb into an embassy?

19 A. In a recognized noninternational armed conflict, an
20 attack on an embassy that killed civilians would violate a
21 prohibition on killing civilians who are not taking direct
22 part in hostilities.

23 Q. Would you agree that, under the law of targeting,

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1 that the embassies would not be a legitimate military target?

2 A. That's an unsettled question. I'm aware of persons
3 who hold the opinion that embassies, being property of --
4 particularly of an enemy state, are lawful objectives. That
5 is not my view, however.

6 Q. So your view is that it's not a lawful objective to
7 target an embassy?

8 A. My view would simply apply the same test we use for
9 all military objects in targeting law; and that is to ask
10 whether by its nature, location, purpose, or use the asset in
11 question is making an effective contribution to enemy action
12 and whether its destruction, partial or total neutralization,
13 offers a distinct military advantage.

14 Q. Were you aware that 10,000 pounds of TNT were used,
15 combined, in those two bombs?

16 A. No, sir, I was not.

17 Q. And the United States responded to those attacks,
18 correct?

19 A. Yes, sir, it did.

20 Q. So on 20 August 1998, the United States targets two
21 different places, one in the Sudan, one in Afghanistan, both
22 of which the United States believed were associated with the
23 Usama bin Laden group, true?

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1 A. Tarnak Farms and the Al-Shifa pharmaceutical plant,
2 yes, sir.

3 Q. And over 80 Tomahawk missiles were launched?

4 A. I did not know that many were launched.

5 Q. Okay. Does that -- you would agree that Tomahawk
6 missiles are very expensive?

7 A. I assume so.

8 Q. And that they're part of the national assets of the
9 United States?

10 A. Yes, we have them.

11 Q. And that they have tremendous destructive power?

12 A. Yes, they do.

13 Q. And that 80 of them being rained on two separate
14 places that are not very large in geographic scope would be an
15 intense experience for anyone who was there?

16 A. In the common meaning of the term, it would be
17 intense; perhaps not in the -- as a term of art.

18 Q. And I believe you testified that the United Nations
19 has a role in the development of international law?

20 A. It does. It facilitates the development of
21 international law. As an entity itself, a U.N. organ does not
22 create international law, it does so through the member
23 states.

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1 Q. The United Nations was the vessel by which the ICTY
2 was ultimately authorized to prosecute war crimes, correct?

3 A. That's a good word, yes, I think a vessel by which
4 states' consent or lack thereof is expressed.

5 Q. The United Nations recognizes two distinct times
6 where armed force is authorized, correct?

7 A. The United Nations Charter provisions on jus ad
8 bellum do envision the lawful use of force between states in
9 two circumstances, yes.

10 Q. And Article 51 specifically recognizes the right to
11 collective and self-defense in the event of an armed attack?

12 A. Yes, the inherent right of self-defense.

13 Q. So on September the 12th, 2001, isn't it true that
14 the United Nations unanimously condemned the attacks of
15 September 11th, 2001?

16 A. I know it addressed. I'm not certain about the word
17 "condemned," but I know it did address the attacks directly.

18 Q. And it specifically cited to the language in
19 Article 51 for inherent or collective right to self-defense
20 against an armed attack, correct?

21 A. I cannot say with 100 percent certainty that
22 Article 51 was cited in that particular resolution. I'm
23 sorry.

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1 Q. That's fine. If you don't know, you don't know.

2 A. Yeah.

3 Q. So ultimately, had the United Nations cited to the
4 collective and individual right to inherent self-defense ----

5 A. Yes.

6 Q. ---- they would have recognized that it was an armed
7 attack that occurred the day before, correct?

8 A. Armed attack is the threshold for states to resort to
9 self-defense, correct. An armed attack must have taken place.

10 Q. Okay. And, in fact, the Clinton Administration also
11 invoked Article 51 when we -- when the United States attacked
12 the Al-Shifa pharmaceutical company and the al Farouq training
13 camps in Afghanistan; isn't that correct?

14 A. I'm not specifically aware of any direct citation of
15 Article 51. I'm sorry.

16 Q. But under Article 51, in order to invoke it, there
17 has to be a belief that you suffered from an armed attack and
18 you were defending yourself against it, correct?

19 A. That seems likely, yes.

20 Q. Are you familiar with the attack on the USS COLE?

21 A. Yes.

22 Q. Okay. And that happened roughly 13 months after the
23 attacks on the -- I'm sorry, strike that -- approximately two

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1 years after the strikes on the embassies?

2 A. My understanding is that it happened in the year
3 2000.

4 Q. Okay. And are you familiar with the scenario by
5 which the USS COLE was attacked?

6 A. Somewhat, yes.

7 Q. And would you agree that the bomber of the USS COLE
8 disguised himself as a civilian on a garbage barge floating up
9 to service the USS COLE?

10 A. I was aware that identity was disguised; it did not
11 make plain their intention to attack the ship. I did not know
12 it was a garbage barge.

13 Q. And you agree that there's a tremendous tactical
14 advantage by pretending to be a civilian in the -- during war?

15 A. In some scenarios, yes, it can be.

16 Q. Because the enemy doesn't know you're coming?

17 A. Yes. It can cause a defender to make assumptions and
18 forebear in attacking when otherwise they would not.

19 Q. And you threaten other civilians around you as well
20 when you do that, when you pretend to be a civilian, but
21 you're a combatant, correct?

22 A. That is some of the logic behind the prohibition on
23 perfidy, that other civilians are placed at greater danger

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1 when a person feigns civilian status because it conditions
2 defenders to view civilians skeptically.

3 Q. And perfidy is all based on honor and chivalry from
4 the past armed conflicts, wouldn't you agree?

5 A. I wrote a whole article taking issue with that. I
6 think perfidy has become much more refined and reduced greatly
7 to a legal formula, but I would agree with the idea that
8 perfidy has its roots in traditions of chivalry and honor,
9 yes, sir.

10 Q. The USS COLE attack killed 17 sailors and injured up
11 to 39 more, correct?

12 A. I was aware of the former figure but not the latter
13 figure.

14 Q. Have you ever seen the destruction -- and have you
15 ever seen pictures of the destruction of the USS COLE?

16 A. Yes, sir, I have.

17 Q. Would you agree that that was sufficient to
18 constitute an armed attack?

19 A. More of debate there. The chief difficulty saying
20 that that is a consensus view of international law is that
21 there is an International Court of Justice decision that
22 indicates that only states can carry out armed attacks under
23 the United Nations Charter, that nonstate actors cannot. They

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1 don't have legal competence to violate the United Nations
2 Charter or to satisfy conditions that give rise to other
3 states' rights to self-defense under international law. It is
4 disputed, frankly.

5 The -- now that we go to this example, one of the
6 chief responses to that argument, however, is the United
7 Nations Security Council resolution that suggested the United
8 States may be justified and resort to self-defense in response
9 to an attack by a nonstate actor. So I think the best
10 characterization of that is it is unsettled.

11 We have the ICJ, an eminent source of international
12 law concluding only nonstate actors can engage in armed
13 attacks for purposes of the United Nations Charter; however, I
14 concede there is significant state practice that suggests
15 otherwise.

16 Q. The United States did it after the embassy attacks?

17 A. Did what, sir?

18 Q. Invoked Article 51 and informed the Security Council.

19 A. I'm not aware of that, sir.

20 MJ [COL POHL]: Professor, let me ask you a question.

21 WIT: Yes, sir.

22 MJ [COL POHL]: And going back to the COLE example. And
23 we're talking about armed attacks and armed conflict which are

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1 not synonymous, correct.

2 WIT: Not at all. Separate prongs of the law of war.

3 MJ [COL POHL]: Okay. Did I understand you to say that,
4 in the COLE example -- and operate -- for the purposes of this
5 question, let's assume that al Qaeda was behind it, okay?

6 WIT: Okay.

7 MJ [COL POHL]: Okay. Did I hear you to say that under
8 Article 51, self-defense from the United Nations, that the
9 United States would have that right to respond to that attack?

10 WIT: That is the -- certainly the view of the United
11 States, that even if violence is traceable or attributable
12 only to a nonstate actor, that we can't attribute it through a
13 state responsibility to any state. The United States'
14 position is that the right -- the inherent right to
15 self-defense is activated in those circumstances; however,
16 that is not a universal view.

17 MJ [COL POHL]: Okay. I understand that. There don't
18 seem to be too many universal views, to tell you the truth,
19 but that's okay.

20 But you have that incident, and then you have -- if
21 you take the view of the United States that they have the
22 right to self-defense, does that make that then an armed
23 conflict?

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1 WIT: It has no bearing on the determination whether there
2 is a jus in bello armed conflict. It is an entirely separate
3 determination.

4 MJ [COL POHL]: Separate analysis altogether.

5 WIT: Entirely. One of the cardinal errors of the law of
6 war analysis is to blend the jus ad bellum with the jus in
7 bello to borrow terms of art from one and to apply them to the
8 other. There law review shelves are rife with dabblers in the
9 law of war who do this all the time. It is a cardinal error.

10 MJ [COL POHL]: Okay. So from the perspective -- if you
11 take the United States' view, they had the right to respond
12 violently against al Qaeda, but that would not necessarily
13 make it into an armed conflict justifying the hostilities that
14 we're discussing today?

15 WIT: Yes, sir. The invocation of the right of
16 self-defense would be a defense to allegations that the United
17 Nations Charter prohibition on use of force in Article 2 sub 4
18 have been violated. It would speak in no way to whether there
19 was a state of armed conflict or that in its choice of
20 responses or in its conduct of the actual hostilities there
21 had been a violation of the jus in bello.

22 MJ [COL POHL]: So -- and again I think from what you
23 testified to yesterday is the violent interaction between the

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1 two entities requires more than -- you said more than
2 sporadic, I believe was the term used when you -- I think the
3 IRA example was a little bit every now and then wasn't enough,
4 but then it got to be every day and it was enough, and then it
5 went back the other way.

6 WIT: It was never enough in the view of the United
7 Kingdom.

8 MJ [COL POHL]: Okay, and that may be for political
9 reasons and also to other reasons.

10 WIT: Yes, sir.

11 MJ [COL POHL]: Isn't there an element of this that if you
12 recognize the other entity, it may in some ways give them
13 support to their cause or whatever it would be?

14 WIT: There's long been concern about committing
15 noninternational armed conflicts to international law. States
16 have feared that legal status might be gained by a group or
17 that they might gain some sense of legitimacy. The final
18 passage of Common Article 3 speaks directly to this and denies
19 that, says that no legal status is gained by the virtue of the
20 operation of Common Article 3.

21 Commentary to Common Article 3 makes clear that
22 states never would have ratified Common Article 3 without that
23 clarification.

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1 MJ [COL POHL]: And nevertheless, since that time -- and
2 perhaps the United Kingdom can't speak for them, there may
3 have been a concern about the status by treating it -- instead
4 of criminals, we're going to treat them this way, and then you
5 can run into those problems.

6 But let's go back to -- because we have talked about
7 a lot of historical, what we have here today.

8 WIT: Yes, sir.

9 MJ [COL POHL]: Between '96 and '01, and I talked to you a
10 little bit about this yesterday, you've got at least four
11 incidents of violent interaction between the United States and
12 al Qaeda: Embassy bombing, which would actually be two;
13 you've got the reaction to the embassy bombing; you've got the
14 COLE; and then you've got 9/11.

15 WIT: Yes, sir.

16 MJ [COL POHL]: Okay. Okay. But that was not of
17 sufficient duration or -- not to rise to an armed conflict.
18 What part of that was -- there just wasn't enough activity
19 between the two parties, was that -- for want of a better
20 term, I know that's not precise.

21 WIT: That is one of the concerns, yes, that they are
22 almost by definition sporadic and isolated events.

23 MJ [COL POHL]: Okay. But does sporadic and isolated

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1 events only refer to violent interactions? For example, if
2 al Qaeda was spending a lot of time planning and preparing and
3 training for attacks, but the attacks themselves were few and
4 far between, would that change the analysis at all; or do we
5 have to wait until they actually come to fruition to a violent
6 attack? Do you understand my question?

7 WIT: I do, sir, yes. Although military-like activity
8 could happen in the intervening periods, it is the violence
9 that must be protracted. It is the violence that must be
10 sustained. It is the violent acts that may not be isolated;
11 otherwise, they are excluded by operation of the law.

12 MJ [COL POHL]: Okay. Thank you. Mr. Trivett.

13 MTC [MR. TRIVETT]: Thank you, sir.

14 Q. So you would agree that the attacks on the embassy
15 were perfidious in their conduct?

16 A. Not as a legal term of art. I would not conclude
17 that either embassy bombing was an act of perfidy under the
18 laws of war; no, sir, I would not.

19 Q. If the United States attacked another country's
20 embassy in the same manner, would that be perfidious?

21 A. Well, okay. We don't want to make that jump I was
22 referring to earlier between the jus in bello -- perfidy is
23 typically a term that comes from the jus in bello and conduct

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1 of hostilities. Perfidy is more of a slogan in jus ad bellum
2 discussions. I think the term was used to describe the
3 Japanese attack on Pearl Harbor, but it's -- perfidy is not a
4 term of art of the jus ad bellum, no, sir.

5 Q. So when you were considering the state of conflict
6 between 1996 and 2001, you were considering the embassy
7 attacks, correct?

8 A. Yes.

9 Q. All right. That's in Nairobi and that's in Tanzania?

10 A. Yes, sir.

11 Q. Okay. And that's over 220 people killed, correct?

12 A. Yes, sir.

13 Q. You were counting the USS COLE attack?

14 A. Yes, sir.

15 Q. Okay. 17 dead, 39 injured?

16 A. Yes, sir.

17 Q. Okay. And you were counting the 9/11 attacks, but
18 were you counting that as one attack?

19 A. No, sir.

20 Q. Okay. So you would agree that there were four
21 separate attacks on the planes in order to hijack them, kill
22 the pilots, and take the planes over, correct?

23 A. Those -- yes, those could be discrete events.

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1 Q. And then there were three specific targets that were
2 hit as well, correct, World Trade Center 1, World Trade
3 Center 2, and the Pentagon?

4 A. Yes, sir.

5 Q. So then there's a total of ten attacks that occur in
6 a period of two years, from August 7, 1998, until
7 September 11th, 2001, correct?

8 A. Yes, sir. That math ----

9 Q. And over 3,200 people are killed?

10 A. Yes, sir.

11 Q. Thousands more injured?

12 A. Yes, sir.

13 Q. And even today, people are dying of sicknesses that
14 they got at the World Trade Center as the buildings collapsed,
15 correct?

16 A. I'm not aware of that fact, I'm sorry.

17 Q. What's not sufficient about that under the law of war
18 in your view?

19 A. It's the intervening periods between the events,
20 however one counts them. Whether one counts them as four
21 events or as ten events, it's the lapses of time. It's my
22 understanding that there was not a military response from the
23 United States to the COLE as there was to the embassy

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1 bombings.

2 The lapses, these are not lapses of days and weeks
3 that we sometimes have seen in the close cases of
4 noninternational armed conflict. These are lapses of months
5 and even years between violent events.

6 Q. So have you ever heard the term that 90 percent of
7 war is boredom?

8 A. Some things to that effect, yes, sir.

9 Q. And you're a former armor officer?

10 A. Yes, sir, I am.

11 Q. In that, did you involve driving tanks?

12 A. They usually didn't let me drive. I was the
13 commander.

14 Q. You were the commander of the tank?

15 A. They wouldn't trust me to. The most commonly uttered
16 phrase on my tank was, "Sir, don't touch that."

17 Q. And you would -- you would agree that the four
18 civilian airliners were used in a way that was equivalent to
19 using a guided missile, correct?

20 A. In a sense, yes, sir.

21 Q. All right. They were able to fly it right into the
22 target they wanted to fly it into?

23 A. Yes, sir.

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1 Q. Tremendously destructive?

2 A. Yes, sir.

3 Q. Much like our Tomahawks?

4 A. Yes, sir.

5 Q. I believe you said you didn't know all that much
6 about al Qaeda's structure, at least enough to decide whether
7 or not the organizational prong would be fulfilled?

8 A. I have read so many conflicting things, I have never
9 felt I know who to believe or not believe about their internal
10 structure.

11 Q. Okay. What's the legal principle behind the
12 requirement for organization? The law of war principle, I
13 apologize.

14 A. I can't say that it traces to the four principles.
15 Which, while we're making the record clear, I regard the
16 principles as principles of targeting. Not every law of war
17 provision can be traced back to one of those four principles.
18 They are more directly applicable to rules of targeting, using
19 lethal force on the battlefield. There are all sorts of rules
20 that don't find their way back to those principles; they're
21 just stand-alone treaty principles or customs.

22 Q. So the law of targeting, generally known as Hague?

23 A. The Hague tradition.

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1 Q. The Hague tradition.

2 A. Yes, sir.

3 Q. And the Hague was based on the Lieber Code, correct?

4 A. Many provisions of The Hague Conventions and many
5 rules we find in the Hague tradition of the jus in bello are
6 traceable to the Lieber Code, yes, sir.

7 Q. And so the Lieber Code was written by Francis Lieber
8 during the Civil War?

9 A. Yes, sir, it was.

10 Q. Okay. It was used and adopted by President Lincoln
11 in the Civil War between the North and the South?

12 A. Yes, it was.

13 Q. And that was the first time that the laws of war had
14 really been written down or codified; wouldn't you agree with
15 that?

16 A. That's -- there's a contest in the law of war who can
17 find the earliest descriptions of the laws of war. There are
18 much earlier descriptions of the law of war than the Lieber
19 Code.

20 Q. But it's safe to say that the United States has
21 always played an important part in the development of
22 international law?

23 A. We have. We have been active in the development of

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1 the laws of war in particular.

2 Q. Wouldn't you say that no country spends more time
3 ensuring that their conduct is consistent with the law of war
4 than the United States?

5 A. The United States invests heavily in ensuring its
6 forces comply with the laws of armed conflict, yes, sir.

7 Q. So -- and I believe you said state practices are the
8 most important aspect of determining customary international
9 law.

10 A. State practice, to me, is more important than state
11 statements, but I would say state practice and opinio juris
12 are of equal weight, importance.

13 Q. Okay. Now, are opinio juris also another word for
14 some of the case law that develops?

15 A. No, opinio juris a word that captures the idea that
16 the state is doing something not as a matter of policy or
17 prerogative but rather is doing a thing because it feels
18 legally obligated to do that thing.

19 Q. How do you ever know that?

20 A. It's difficult to tell sometimes. It is, I think,
21 the most difficult analysis of customary international law
22 discernment. It's a step, frankly, that I think sloppy
23 lawyers just overlook.

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1 Q. All right. So getting back to the organizational
2 prong of al Qaeda ----

3 A. Okay.

4 Q. ---- are you -- as a military officer, you take an
5 oath of office, correct?

6 A. Yes, sir.

7 Q. And you swear to follow the orders of your superiors?

8 A. I swear to uphold and defend the Constitution of the
9 United States against all enemies, foreign and domestic.

10 Q. And that's an aspect of showing organization,
11 correct, in that you're going to be commanded by a chain of
12 command?

13 A. Yes, that I answer to a responsible authority.

14 Q. And ultimately, are you aware of the concept of
15 bay'ah within al Qaeda?

16 A. Bay'ah?

17 Q. Bay'ah.

18 A. Oh, the Arab term.

19 Q. Correct.

20 A. This is an oath of fealty.

21 Q. Correct. So similar to what the United States does,
22 a member of al Qaeda may or -- though he's not required to,
23 issue a bay'ah to Usama bin Laden or someone else who he puts

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1 in charge of him. Would that be an indicator of organization
2 within a military structure?

3 A. I think I resist the parallels between our oath and
4 theirs as an officer. I won't go on record saying that;
5 however, oaths can be an indication of the presence of
6 organization.

7 Q. Okay. And are you aware that al Qaeda had a specific
8 military commander?

9 A. Yes, I've seen that designation.

10 Q. Okay. Are you aware of the 9/11 Shura Council in
11 general?

12 A. No, sir, I'm not.

13 Q. Okay. So you understand Usama bin Laden was the head
14 of the organization?

15 A. I understand that, yes, sir.

16 Q. Ayman al-Zawahiri was second in command?

17 A. Yes, sir.

18 Q. And then were you aware that they set up various
19 different committees, meaning there was a military committee,
20 religious committee, a media committee, finance committee?
21 Are you aware of that?

22 A. I'm aware of specialization within the organization.
23 I wasn't aware of all of the committees you just enumerated.

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1 Q. That would be indicative of organization as well?

2 A. Subdivisions and assignments of authority to
3 different groups are an indication of organization, yes, sir.

4 Q. And you're aware al Qaeda had specific military
5 training camps?

6 A. Yes, I am aware.

7 Q. They would undergo basic training?

8 A. I don't know that that's a parallel, but I know they
9 had training camps and that personnel undertook training at
10 those camps that was military in nature.

11 MTC [MR. TRIVETT]: The court's indulgence, sir. I'd like
12 to show the witness what has been marked as Appellate
13 Exhibit 502SS (Gov); it's Attachment LLL. It's a short clip
14 of al Qaeda training camp activity.

15 MJ [COL POHL]: For what purpose?

16 MTC [MR. TRIVETT]: To show organization, sir, in the
17 second prong of the requirement for hostilities.

18 MJ [COL POHL]: Did he just say he knew they had training
19 camps? Do we have to watch them train to know they have
20 training camps?

21 MTC [MR. TRIVETT]: It's a short clip, sir. It's 30
22 seconds. I don't know that we need to.

23 MJ [COL POHL]: Then don't. Move on to something else.

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1 MTC [MR. TRIVETT]: Very well.

2 Q. Are you aware of what the term crew-served weapon is?

3 A. Yes, sir.

4 Q. And what would a crew -- in your mind, what would a
5 crew-served weapon be?

6 A. It's a weapon that is used by more than one person to
7 put it into operation.

8 Q. Okay. So if the airliners were used as guided
9 missiles, would that be at least analogous to a crew-served
10 weapon?

11 A. I'm not familiar with anyone equating those two, but
12 to the extent it takes more than one person, in a literal
13 sense, it would be a crew-served weapon.

14 Q. Okay. You would concede that ----

15 A. There ----

16 Q. ---- al Qaeda certainly thought they were in an armed
17 conflict with the United States, correct?

18 A. They may have had that subjective belief.

19 Q. Right. And that they carried out attacks consistent
20 with their declaration of war and their targeting of civilians
21 specifically after the fact, correct?

22 A. They committed attacks after the initial fatwa. They
23 did, yes.

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1 Q. I'm just going to ask you a couple of hypotheticals
2 that are based on the 9/11 attacks with slight changes to the
3 actors.

4 A. Okay.

5 Q. So country X declares war on the United States.

6 A. Okay.

7 Q. And then commits the same exact attack
8 on September -- as was done on September 11th. You would
9 agree that that would constitute an armed conflict.

10 A. That would be an international armed conflict from
11 the point of declaration of war forward.

12 Q. Change the hypothetical slightly.

13 A. Okay.

14 Q. Country X does not declare war on the United States,
15 commits the same offenses as was done on September 11th. Law
16 of armed conflict apply?

17 A. There would be an international armed conflict
18 between those two states.

19 Q. What is that based on?

20 A. That's based on my understanding of the Common
21 Article 2 standard for international armed conflict, the
22 threshold.

23 MJ [COL POHL]: Would the attack violate the laws of war?

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1 I guess this goes back to the Pearl Harbor situation. Let's
2 assume ----

3 WIT: Okay.

4 MJ [COL POHL]: ---- they deliberately targeted protected
5 people or places ----

6 WIT: Okay.

7 MJ [COL POHL]: ---- just for sake of discussion.

8 And does -- if there's no declaration of war at this
9 point or anything else, state to state ----

10 WIT: Okay.

11 MJ [COL POHL]: ---- attacking protected people and
12 places, deliberately, not accidentally.

13 WIT: Okay.

14 MJ [COL POHL]: Does that violate the law of war, or does
15 the first shot not violate the law of war? Do you understand
16 my question?

17 WIT: I understand your question.

18 MJ [COL POHL]: Okay.

19 WIT: In international armed conflict, were the opening
20 salvo to be an attack on civilians, that would constitute a
21 violation of the laws of war, most especially the principle of
22 distinction, discrimination ----

23 MJ [COL POHL]: Thank you.

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1 WIT: ---- in international armed conflict.

2 MJ [COL POHL]: Okay.

3 MTC [MR. TRIVETT]: Thank you, sir.

4 Q. So in violating the law of war, it would also
5 constitute and establish the existence of an armed conflict
6 between the two nations?

7 A. Yes. It would serve both the purpose of amounting to
8 a violation of the jus in bello of international armed
9 conflict, and it would be an act sufficient to invoke the
10 operation of the law of war applicable to international armed
11 conflict.

12 Q. And I believe when you teach the young JAGs at the
13 international -- or at the Army JAG School, that you say that
14 the threshold has always been known to be low.

15 A. It has. In international armed conflict, it is an
16 extraordinarily low level of violence. That precise threshold
17 is difficult to pin down. The ICJ has referred to mere
18 frontier incidents, sporadic exchanges of fire between states,
19 maybe no one is killed. There are purists and, I believe, the
20 ICRC's position is that any shot fired, any resort to armed
21 force between states initiates international armed conflict.

22 State practice doesn't seem to hew to that view. For
23 instance, in a recent launch of cruise missiles against Syria,

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1 the question was raised, well, are we at war with Syria now.
2 This is, I believe, a couple of months ago we launched maybe
3 59 or 60 cruise missiles. And I think the majority view would
4 have been, well, yes, of course we are. That's not a mere
5 frontier incident. But there were respected law of war
6 experts who said don't be so sure the threshold is as low as
7 you think. And, you know, if you examine U.S. conduct after
8 that, we sure weren't acting like we were at war with Syria.

9 Q. Not yet, at least.

10 A. Right. Yeah, the -- you know, the Syrian nationals
11 in the United States weren't treated as protected persons
12 under the Fourth Geneva Convention. There are just a number
13 of steps of the Geneva Conventions that should have gone into
14 operation that weren't going into operation after that event,
15 so yeah.

16 Q. Do you believe the United States, though, had to
17 target appropriately, or could it just indiscriminately target
18 civilians when it did that?

19 A. Well, as a matter of United States policy, the law of
20 war extends to all of our operations no matter how
21 characterized. So if you're asking about could a U.S.
22 commander launch an indiscriminate attack without consequence,
23 no, I don't think that's the case.

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1 Now, would international law have anything to say
2 about this? I think the majority view still is that that
3 initial salvo we were talking a moment ago with the judge is
4 subject to the laws of war in international armed conflict.

5 Q. Okay. At least within the Tadic decision, I believe
6 that the distinction between interstate wars and civil wars
7 was really losing its value as far as human beings were
8 concerned, correct?

9 A. I don't think the -- international armed
10 conflict/noninternational armed conflict distinction has
11 really ever had any value to persons. You know, the logic of
12 nearly all of the rules of international armed conflict
13 extends to noninternational armed conflict.

14 It's a fair question to say, well, why different
15 rules for these different conflicts. And far more persons in
16 the 20th century died in noninternational armed conflicts than
17 died in international armed conflicts, which is a staggering
18 number when you think of how many died in international armed
19 conflict.

20 But the error in that observation, saying that they
21 are equated, is using logic to discern the law of war. I'm
22 really fond of Holmes' comment, the life of law has not been
23 logic, it's been experience. To me, the life of the law of

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1 war has not been logic, it has been sovereignty. Just how
2 much are states willing to concede and to commit to this
3 international legal system.

4 For the reasons the judge mentioned earlier, they
5 have been extraordinarily reluctant to commit noninternational
6 armed conflicts to international law. They have simply
7 preferred to retain discretion in how these armed conflict are
8 conducted, and they have been extraordinarily reluctant to
9 submit to the post hoc judgment of international tribunals and
10 lawyers and the conduct of these most usually internal
11 conflicts, conflicts that are most usually confined to their
12 own borders.

13 So, you know, if we were to simply use logic to
14 discern which rules from international armed conflict ought to
15 apply to noninternational armed conflict, I think we would see
16 extraordinary parity. But that's just not the experience of
17 the law.

18 Q. But that is where the Tadic decision sought to go,
19 correct?

20 A. I don't think Judge Cassese, who wrote the appeals
21 chamber decision, thought he could eliminate the -- I'll use
22 the shorthand, IAC/NIAC distinction. I don't think he was
23 that bold, no.

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1 Q. In the end, the Tadic court said, we're not applying
2 conventional law of war, meaning the Geneva Convention
3 specifically, The Hague Convention specifically, we are
4 applying customary international law as set forth by the
5 Security Council of the United Nations?

6 A. I understand custom to be a source of some of the
7 analysis of the Tadic opinion; however, I do think that the
8 Geneva Conventions were in play as well in that decision.

9 Q. Okay. Just a few more scenarios so I can understand
10 your position.

11 A. Yes, sir.

12 Q. Same -- the South secedes from the North and does the
13 same exact attack as was done on September 11th.

14 A. So a group of southern United States' states
15 secede ----

16 Q. Yep.

17 A. ---- and replicate the attacks of 9/11 against
18 northern states?

19 Q. Are those attacks subject to the law of war?

20 A. There's not an international armed conflict. There's
21 not a noninternational armed conflict, no. That is a -- an
22 isolated incident.

23 Q. So they get one free shot under the law of war, at

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1 least?

2 A. Not at all, no. It's not free.

3 Q. They can only be prosecuted domestically?

4 A. They can be prosecuted domestically.

5 Q. What if they were so strong that our domestic law
6 enforcement wasn't capable of bringing them to justice but our
7 military was?

8 MJ [COL POHL]: Mr. Trivett, that -- the ability or
9 inability realistically to prosecute -- you've gone down this
10 road before. Quite frankly, I don't think is the issue here.
11 The question is what are they subject to. You know, whether
12 or not you can actually prosecute them or not; but if you
13 couldn't prosecute them domestically criminally, that does not
14 necessarily confer jurisdiction to some other people who
15 could.

16 So the question really is, is that under that
17 scenario, it's not a violation of the law of war?

18 WIT: It is not a violation of the laws of war applicable
19 to noninternational armed conflict because there is not a
20 noninternational armed conflict yet.

21 MJ [COL POHL]: Okay. So a noninternational armed
22 conflict, just to go back to the Pearl Harbor thing, and I --
23 quite frankly we're going down to all of these old analogies,

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1 I'm not sure how helpful they are, but whatever ----

2 WIT: I agree.

3 MJ [COL POHL]: Yeah. We agree on that.

4 But if the same thing was done by a -- by a nonstate
5 actor, then it would not be an armed conflict for purposes of
6 our discussion?

7 WIT: It would also be isolated.

8 MJ [COL POHL]: Okay.

9 WIT: An isolated event excluded by the text of some law
10 of war treaties.

11 MJ [COL POHL]: I think I got that, Mr. Trivett.

12 MTC [MR. TRIVETT]: Yes, sir, that's fine.

13 MJ [COL POHL]: Let's move on to something else.

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

15 Q. Who decides? Who decides when it hits the threshold?

16 A. It depends on the context. So if it is a tribunal,
17 of course, it's the tribunal itself that decides. So in the
18 case of the Yugoslav tribunal we had, as we mentioned earlier,
19 states that entrusted and created a tribunal and had delegated
20 power to decide in that case what was armed conflict and
21 whether war crimes were conducted, whether crimes against
22 humanity were conducted or genocide, even.

23 You know, when a state is issuing instructions to its

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1 armed forces for purposes of what those armed forces do, the
2 state decides. Now, if a state makes a reckless or erroneous
3 characterization of armed conflict and instructs its forces
4 consistently with that erroneous or careless characterization,
5 it's taking enormous risk. It's putting its soldiers at risk.
6 It's putting its -- it is perhaps going to be subject to
7 international litigation, to the extent it's consented to the
8 jurisdiction of something like the International Court of
9 Justice.

10 MTC [MR. TRIVETT]: One moment, please.

11 Q. So you would agree that the Supreme Court in
12 Hamdan v. Rumsfeld recognized the conflict between the United
13 States and al Qaeda as a noninternational armed conflict under
14 Common Article 3, correct?

15 DC [MAJ WILKINSON]: Objection to this. He has been
16 called as an expert on international law, not on American
17 constitutional law.

18 MJ [COL POHL]: Objection is overruled. You may answer
19 the question.

20 A. I'm aware of that aspect of the ruling.

21 Q. Okay. So the Supreme Court clearly believed that
22 there was an armed conflict between al Qaeda and the United
23 States?

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1 A. They concluded that there was, yes.

2 Q. And they gave great deference to the Executive's
3 decision regarding the existence of that armed conflict,
4 correct?

5 A. That was part of the debate, I believe, in the
6 decision. Some justices wrote separately and regarded the
7 Executive's determination -- I'm thinking of Justice Thomas,
8 who said the Executive Branch determination was conclusive.
9 Other justices -- I don't think any other justice joined him
10 in that argument. So I'm sorry, I'm just not clear
11 whether ----

12 Q. That's fine.

13 A. ---- the entire court or the plurality of the
14 court ----

15 Q. I understand.

16 A. ---- judged this to be a matter of -- on which
17 deference was owed.

18 Q. Isn't it true that the United States has always gone
19 beyond customary international law in prosecuting our own
20 domestic law of war offenses?

21 A. No, I don't think so, if I understand the question
22 correctly.

23 Q. Okay.

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1 A. Gone beyond the customary laws of war. If by that
2 you mean have also looked to treaties, I suspect that, yes,
3 that is correct.

4 Q. Let me ask the question a different way.

5 A. Thank you.

6 Q. I might have articulated a poor question. So you
7 would agree that conspiracy isn't -- conspiracy as we know it
8 as a substantive offense is not -- not risen to the level of
9 customary international law to the extent that that's accepted
10 by the majority of the nations in the world, correct?

11 A. I think that is correct. We are -- a majority of
12 states do not feature that in their domestic systems, and the
13 majority do not regard it to be part of international law
14 either.

15 Q. The United States always has, correct?

16 A. I don't know whether we always have.

17 Q. If the Nazi saboteurs were prosecuted under a
18 conspiracy charge, that would seem to indicate to you that the
19 United States has expanded beyond traditional international
20 law of war in its own domestic law of war?

21 A. There's much about the Quirin decision that goes
22 beyond the laws of war, yes. It is in many senses incorrect
23 in its understanding of the international laws of war, yes.

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1 Q. And the Lincoln saboteur cases as well charged
2 conspiracy?

3 A. I'm sorry, I'm not familiar with those cases.

4 Q. Are you familiar with the recent decision in the case
5 of Bahlul v. United States in the D.C. Circuit Court of
6 Appeals?

7 A. I've read news reports and I believe I read the
8 D.C. -- that was an en banc decision that overturned a
9 three-panel decision, is that correct, a three-judge panel?
10 Was there an en banc and a three-judge panel?

11 Q. That's correct. You are referencing the right case.
12 Are you familiar with that case?

13 A. Thanks. Yes, I've read those decisions some time
14 ago.

15 Q. You would agree that the D.C. Circuit Court is the
16 ultimate appellate jurisdiction over the military commissions
17 system, absent the Supreme Court, of course.

18 A. I was going to say, yeah, the Supreme Court of the
19 United States, of course, is in there.

20 Q. And are you aware that they found the concept
21 remarkable that international law would in any way confine
22 Congress or the President in asserting its constitutional
23 authorities, whether it's under the War Powers Act or

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1 Article I, Section 8, where it gives Congress the authority to
2 define the offenses against the law of nations?

3 A. I'm sorry. I lost the angle of that question.

4 Q. It was a very bad question.

5 Are you aware of the holding that said that
6 international law does not in any way limit the President or
7 Congress in their war power and war-making authorities?

8 A. It has been a while since I read the decisions.
9 That -- what you've just described, I recall. I thought,
10 however, that was part of the three-judge panel's decision,
11 and that the en banc decision in al Bahlul abandoned that
12 position. I can't say with perfect certainty, however.

13 Q. And I think the military judge asked you a question
14 about the jurisdictional prongs of the Military Commissions
15 Act.

16 MTC [MR. TRIVETT]: And if I can just get one second, I'd
17 like to put just those up on the ELMO. They're the three
18 jurisdictional standards of the Military Commissions Act, sir.

19 MJ [COL POHL]: Go ahead.

20 LDC [MR. CONNELL]: Sir, I want to go on record as saying
21 absolutely Mr. Trivett should be able to show the law on the
22 ELMO.

23 MJ [COL POHL]: Thank you, Mr. Connell. As long as he

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1 doesn't ask me how to work the ELMO, we're all good.

2 [Pause.]

3 MTC [MR. TRIVETT]: I can't seem to find it, so I'll ask
4 you questions about it.

5 WIT: Yes, sir.

6 Q. So there's three prongs to the jurisdiction to
7 establish an alien unlawful enemy belligerent. The first one
8 is participating in actual attacks?

9 MTC [MR. TRIVETT]: Thank you.

10 MJ [COL POHL]: Apparently everybody wants you to put it
11 on the ELMO, Mr. Trivett.

12 WIT: I think the general edged him out. I think he got
13 in there first.

14 MJ [COL POHL]: Okay.

15 MTC [MR. TRIVETT]: Can we get the feed, please, from the
16 ELMO?

17 [Military judge conferred with courtroom personnel.]

18 MJ [COL POHL]: Professor, is that on your screen?

19 WIT: Yes, sir.

20 MJ [COL POHL]: I'm not saying it's in a readable fashion.

21 WIT: Okay.

22 MJ [COL POHL]: It's an important question.

23 WIT: It is on my screen. Yes, sir. Actually, I have

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1 some glasses over there.

2 MJ [COL POHL]: Okay. Sure. Yeah. Go and get them.

3 WIT: Thank you.

4 MTC [MR. TRIVETT]: Sir, can we actually take a ten-minute
5 comfort break?

6 MJ [COL POHL]: We'll take a ten-minute comfort and
7 technology break.

8 MTC [MR. TRIVETT]: Thank you, sir.

9 MJ [COL POHL]: Try to have a version that's easier to
10 read. Okay. Commission is in recess for ten minutes.

11 [The R.M.C. 803 session recessed at 1425, 8 December 2017.]

12 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1436,
2 8 December 2017.]

3 [Sean Watts, resumed his seat on the witness stand.]

4 MJ [COL POHL]: Commission is called to order. All
5 parties are again present, including Mr. Connell.

6 Mr. Trivett.

7 MTC [MR. TRIVETT]: Thank you, sir. I'd ask that the feed
8 from the ELMO be brought up. This time, hopefully it's
9 legible.

10 Questions by the Managing Trial Counsel [MR. TRIVETT]:

11 Q. Are you able to see that, Professor?

12 A. Yes, sir, I am.

13 [Military judge conferred with courtroom personnel.]

14 Q. So 10 U.S.C. 948a is the Military Commission Act
15 definitions that are applicable to the statute. Do you
16 understand that to be the case?

17 A. Now that you've told me that, yes.

18 Q. "Congress has determined that unprivileged enemy
19 belligerent means an individual other than a privileged
20 belligerent who has either, (A), engaged in hostilities
21 against the United States or its coalition partners; (B), has
22 purposefully and materially supported hostilities against the
23 United States or its coalition partners; or (C), was a part of

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1 al Qaeda at the time of the alleged offense under this
2 chapter."

3 I wanted to focus on (C) for a second. You would
4 agree that Congress intended to indicate an existence of
5 hostilities between the United States and al Qaeda within this
6 definition, do you not?

7 DC [MAJ WILKINSON]: Objection. It's nothing to do with
8 his expertise.

9 MJ [COL POHL]: I'm not sure -- rephrase the question.
10 I'm not sure I understood it. Please.

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

12 Q. So by defining an individual as a part of al Qaeda at
13 the time of the alleged offense under the Military Commission
14 Act, Congress was implicitly finding that there was an armed
15 conflict with the United States and al Qaeda?

16 DC [MAJ WILKINSON]: Same objection. It's nothing to do
17 with his expertise and the law of war.

18 MJ [COL POHL]: The objection is overruled. He can answer
19 if he feels he's competent to answer it. If you don't, don't.

20 A. You're asking me to read -- just to be clear, to read
21 the chapeau provision of (7) as well as the subparagraph of
22 (C), and determine whether Congress from those two provisions
23 intended a reader to infer that there were hostilities?

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1 Q. Correct.

2 A. The term belligerent is suggestive of that, but I
3 can't say conclusively just from those two phrases. The other
4 difficulty is, for a law of war person like me to read this,
5 unprivileged enemy belligerent is just an unfamiliar term.
6 It's not a term of the international laws of war. I do see
7 hostilities in subparagraph (A), an explicit reference to
8 hostilities there.

9 Q. Let me call your attention to 10 U.S.C. 948d. It
10 states, "A military commission under this chapter shall have
11 jurisdiction to try persons subject to this chapter for any
12 offense made punishable by this chapter. Sections 904 and 906
13 of this title" ----

14 MJ [COL POHL]: I think he can read it, Mr. Trivett. Just
15 ask your question.

16 Q. So at some point Congress confers jurisdiction,
17 whether such offense is committed on, before, or after
18 September 11th, 2001. Do you see that line?

19 A. Yes, sir. I see the line that says "on or before, on
20 or after September 11th, 2001," yes.

21 Q. So you would agree that Congress clearly was
22 envisioning jurisdiction over the September 11th attacks and
23 those before, provided we could establish that hostilities

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1 existed before that?

2 A. I really dislike doing legal analysis from the hip
3 like this and then not slowing down and thinking about a thing
4 and researching it.

5 MJ [COL POHL]: If you're not comfortable answering that
6 particular question, just don't answer it. I understand where
7 you are at.

8 WIT: Yeah, I just ----

9 MTC [MR. TRIVETT]: Okay.

10 MJ [COL POHL]: I wish more lawyers took that attitude.

11 WIT: I do, too. I do, too.

12 MJ [COL POHL]: No, I understand. Go ahead.

13 Q. September 11th, 2001 wasn't a date obviously that
14 they just picked out of the blue, right?

15 A. Of course not.

16 Q. It was clearly referencing the attacks that occurred
17 on that day?

18 A. In that statute, yes, sir.

19 Q. Okay. Are you familiar with the Latin term *reductio*
20 *ad absurdum* that was used in the Tadic decision?

21 A. I'm familiar with the term. I don't recall it
22 appearing in Tadic, but it may very well have. Sure.

23 Q. So ultimately, when an argument is reduced to its

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1 logical conclusion ----

2 A. Yes.

3 Q. ---- it's absurd.

4 A. Yes.

5 Q. So clearly, Congress intended for jurisdiction over
6 these attacks, whether or not they were authorized to do it is
7 a different question, correct?

8 A. I can't say -- you know, I am one of these who is --
9 as statutory interpretation goes, I am skeptical of collective
10 intents on the parts of legislative bodies of congresspersons
11 who vote for things in their individual capacity and do so for
12 as many reasons as there may be congresspersons. I prefer
13 that we just start with language when I interpret statutes and
14 actually prefer not to go to individual intents of
15 legislators, it is such an elusive and slippery thing. I'm
16 not trying to resist the question here.

17 Q. That's fine. I appreciate your effort to answer it.

18 So -- and you've not reviewed the legislative history
19 of the 2006 Military Commissions Act?

20 A. No, sir, I'm sorry, I have not.

21 Q. 2009 Military Commissions Act?

22 A. No, sir, I have not.

23 Q. I believe in answering a question from the judge

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1 yesterday you referenced the Charming Betsy decision?

2 A. Yes, sir.

3 Q. Okay. Charming Betsy stands for the premise that we
4 interpret acts of Congress to be consistent with international
5 law to the extent it's possible?

6 A. When there are competing interpretations of a
7 statute, a court ought to go with the statute that more
8 clearly aligns with understandings of international law than
9 the competing version which would run contrary to
10 international law.

11 Q. Unless it was clear that Congress didn't intend to be
12 bound by customary international law?

13 A. If -- if it is impossible to reconcile Congress'
14 plain language with international law, well, then, we'll have
15 to take the later-in-time rule, I suppose.

16 Q. And are you familiar with the international law case
17 of the S.S. Lotus?

18 A. Yes, I am.

19 Q. It's one of the more famous international law cases?

20 A. Yes, France versus Turkey.

21 Q. So that scenario there was a collision at sea in the
22 high seas between a Turkish vessel and a French vessel?

23 A. Was it on the high seas or was it in territorial

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1 water? I don't recall.

2 Q. Okay. In any event, Turkey decides to bring the
3 Frenchmen back to prosecute them under their laws?

4 A. Yes. Yes, I recall that.

5 Q. And there was no convention at the time that dealt
6 with who would have jurisdiction over them?

7 A. There was a relative blank slate, yes.

8 Q. And so it's commonly -- the S.S. Lotus is commonly
9 understood to say unless there is a rule contrary in
10 international law, that states are free to exercise the
11 jurisdiction as they wish?

12 A. That's a fair characterization of Lotus.

13 Q. Thank you.

14 MTC [MR. TRIVETT]: No further questions.

15 MJ [COL POHL]: Thank you. Major Wilkinson, any redirect?

16 DC [MAJ WILKINSON]: Yes, sir. One moment, please, sir.

17 MJ [COL POHL]: Sure.

18 **REDIRECT EXAMINATION**

19 **Questions by the Defense Counsel [MAJ WILKINSON]:**

20 Q. I believe you answered some questions about a U.N.
21 resolution right after the September 11th attacks?

22 A. Yes, I did.

23 Q. Did that -- do you remember if that resolution

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1 mentioned terrorism at all?

2 A. I don't recall the word specifically. It's been too
3 long since I read the resolution.

4 DC [MAJ WILKINSON]: No further questions.

5 MJ [COL POHL]: Thank you. Mr. Connell, do you have any
6 further questions?

7 LDC [MR. CONNELL]: No, sir, thank you.

8 MJ [COL POHL]: Mr. Trivett, do you have any questions
9 based on that one?

10 MTC [MR. TRIVETT]: No, sir.

11 MJ [COL POHL]: Professor Watts, I want to thank you for
12 your testimony. You are excused.

13 WIT: Thank you, sir.

14 MJ [COL POHL]: Don't forget your glasses.

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

16 LDC [MR. RUIZ]: Judge, may I ask that Lieutenant
17 Commander Furry be excused?

18 MJ [COL POHL]: Sure.

19 So the way ahead is the only other evidence currently
20 scheduled to be taken on the 502 series is the 806 classified
21 information from Ms. Perkins. Then we discussed about going
22 forward to the 502 argument, but, Mr. Ruiz, you had indicated
23 earlier that there may be some outstanding discovery you

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1 wished to explore. So is -- I'm just curious ----

2 LDC [MR. RUIZ]: Sorry, Judge, I was -- I was distracted
3 for a minute.

4 MJ [COL POHL]: Yeah. What I'm saying is next on the
5 docket would be a classified session with Ms. Perkins. Then
6 initially, if we're done with all of the evidence on your
7 motion, at that time I would also hear your classified
8 argument, and then we would come back into open session to
9 hear the open portion of your argument on 502.

10 But earlier in the week, you indicated that there
11 still may be some discovery issues out there that you wanted
12 to address. So the question is, is 502, once we get done with
13 Ms. Perkins, ripe for argument for you?

14 LDC [MR. RUIZ]: May I confer for a minute?

15 MJ [COL POHL]: Sure.

16 [Pause.]

17 LDC [MR. RUIZ]: Judge, we will be prepared to proceed
18 with argument; however, we will still pursue discovery, not
19 necessarily as it relates to 502, but I think we've raised
20 some issues that affect that.

21 I would also tell you that I do not expect that we
22 will have any closed session closing argument. Unless
23 something dramatic happens in the closing session, we do not

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1 expect that there will be a closed session closing argument on
2 502.

3 MJ [COL POHL]: Okay. Then my suggestion is given that,
4 that we -- can we proceed with the open argument now and then
5 do the closed session at the end? I'm just doing logistics
6 now. That would mean we only switch out court reporters one
7 time.

8 LDC [MR. RUIZ]: Yes.

9 MJ [COL POHL]: Okay. So that's what we'll do. We'll do
10 the argument on 502 (MAH). But before we do that, I'm going
11 to talk to Mr. Connell briefly about his 502. After that, we
12 will then conduct the classified 806 session for 502, and that
13 will seem to conclude the business for this week.

14 Mr. Connell, where are we with your 502?

15 LDC [MR. CONNELL]: Two places, sir. The first is that
16 the government has provided additional discovery since this
17 issue first came up that has identified some additional
18 witnesses; but more importantly, we're waiting for your ruling
19 on 502Y.

20 MJ [COL POHL]: Refresh my memory of what 502Y is.

21 LDC [MR. CONNELL]: Well, it's our position on what
22 witnesses we should be permitted to call in the 502 hearing.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: You told us at the last hearing that
2 when you divided this between Mr. al Hawsawi and
3 Mr. al Baluchi, that you intended to analyze what witnesses we
4 would be permitted to call or would not be permitted to call,
5 so that's where we are right now.

6 MJ [COL POHL]: Okay. Just so I'm clear -- and that's why
7 I wanted to kind of refresh both my memory and where we're at
8 in this.

9 LDC [MR. CONNELL]: Sure.

10 MJ [COL POHL]: You have two baskets of witnesses?

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

12 MJ [COL POHL]: Hostilities witnesses and statement
13 witnesses?

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

15 MJ [COL POHL]: Okay. And I think you broke them up in
16 your 502J exhibit.

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

18 MJ [COL POHL]: Okay. Okay. Let me ask the government a
19 question. Trial Counsel, on Appellate Exhibit 5020, the
20 government provided a chart of 132 requested witnesses, one of
21 whom was Professor Watts. So I'm assuming that's OBE for you?

22 LDC [MR. CONNELL]: That was a request by Mr. al Hawsawi,
23 not for us.

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1 MJ [COL POHL]: Okay. But the other 131 are yours,
2 basically?

3 LDC [MR. CONNELL]: Yes, sir. The government provided
4 additional discovery after filing 5020. In 502Y, we withdrew
5 six of those witnesses and designated eight other witnesses
6 out of the new discovery. So the government's 5020 chart is
7 not quite up to the minute.

8 MJ [COL POHL]: Well, that was kind of going to be my
9 question, is -- Trial Counsel, we started out with a 5020.
10 You indicated, I believe, about ten witnesses you didn't
11 object to.

12 MTC [MR. TRIVETT]: Correct.

13 MJ [COL POHL]: And then he, Mr. Connell, modified his
14 list. And did you file a response to that list about
15 objections or nonobjections to the modified list?

16 LDC [MR. CONNELL]: Sir, they did not because it was a
17 reply in which we were -- in which we made the modification,
18 so they did not. But procedurally, they would ordinarily not
19 file ----

20 MJ [COL POHL]: Yeah, I understand that. But I'm now --
21 when people agree on something, I try to agree with them, too.
22 And that's why I'm trying to see who you agree on.

23 First of all, is there any change in the government's

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1 position on witness production, either for or against, that's
2 in 3020 [sic].

3 MTC [MR. TRIVETT]: No change, sir. But I would ask leave
4 of court to go back and see what the additional witnesses that
5 Mr. Connell ----

6 MJ [COL POHL]: I'm about to get to that. Okay. What was
7 the pleading number of that, Mr. Connell?

8 LDC [MR. CONNELL]: Y, sir, 502Y.

9 MJ [COL POHL]: By next Friday ----

10 LDC [MR. CONNELL]: Sir, before you say that, may I? I
11 have something to say on that topic.

12 MJ [COL POHL]: Sure.

13 LDC [MR. CONNELL]: Since that time, the government has
14 provided substantial additional discovery -- since the filing
15 of 502Y, has provided additional discovery. There are two --
16 I know that you're about to issue a briefing order -- or give
17 a briefing suspense. So what I wanted to say is I would like
18 the opportunity to modify our 502Y before the government gives
19 us its final position.

20 There are two reasons for that. The first is the
21 additional witnesses that the government has identified, new
22 discovery since 502Y ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. CONNELL]: ---- and the second one is that this
2 hearing itself has substantially increased the arguments in
3 favor of some of both baskets of witnesses. I was -- I'll
4 just give you a perfect example.

5 One of the government's objections to one of
6 Mr. al Hawsawi's exhibits, the declaration of Mr. Sassòli, was
7 that they had not had an opportunity to cross-examine him,
8 where, in fact, Mr. Sassòli is one of our requested witnesses.
9 So I think there were a number of things that were revealed in
10 both the classified and unclassified hearings that strengthen
11 our position beyond where we were in 502Y.

12 So if you are issuing briefing orders, I'm
13 volunteering to do more work and that we would be happy
14 to ----

15 MJ [COL POHL]: Okay.

16 LDC [MR. CONNELL]: ---- review our list.

17 MJ [COL POHL]: That's kind of why ---- that's why I'm
18 having this discussion to just kind of see where we're at ----

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

20 MJ [COL POHL]: ---- because I don't want to make it --
21 okay. Here's what we'll do. Okay, you want to file, in
22 essence, a supplement based on what you've heard today?

23 LDC [MR. CONNELL]: Yes, sir. And it's not impossible,

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1 given some of the facts that have emerged, that there are some
2 witnesses we no longer need because we -- the fact has already
3 been established.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: So the ground has shifted under us,
6 and I would like to revise our position.

7 MJ [COL POHL]: Okay. How long do you need?

8 LDC [MR. CONNELL]: The ordinary two weeks we could do.

9 MJ [COL POHL]: Okay. Understand, just so everybody is
10 not surprised with this, is that assuming the government is
11 funded after the 22nd of December -- and I have no control
12 over that ----

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

14 MJ [COL POHL]: ---- that I generally extend deadlines
15 around the holidays, just for both sides. So you got your two
16 weeks, but that takes us to 22 December ----

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

18 MJ [COL POHL]: ---- but, Trial Counsel, you will be
19 given -- I'll tell anybody -- any reply or something like that
20 is, quite frankly, if you ask, you will be given extra time
21 over the holidays and -- to file it.

22 And then I think what's going to happen then where
23 we'll be at is that in January, assuming we resolve an

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1 outstanding issue, is in January we'll be at the point where
2 we will say A, B, and C will be produced, and then we'll call
3 the witnesses in March.

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

5 MJ [COL POHL]: My intent also, though, as I've said
6 earlier, Mr. Connell, is I'm going to address the -- I'm
7 calling it a suppression statement -- motion, you're calling
8 it an objection motion, whichever we're talking about, of the
9 statement before we're going to get to anything in the
10 hostility motion.

11 LDC [MR. CONNELL]: Sir, we're standing by for
12 instructions. We understand.

13 MJ [COL POHL]: Okay. So I would anticipate that would
14 probably be done in March, and then we'll see where we get --
15 see where we're at after that.

16 LDC [MR. CONNELL]: My only question is to make sure I
17 understand what that is. That ----

18 MJ [COL POHL]: The hostilities basket, for want of a
19 better ----

20 LDC [MR. CONNELL]: The hostilities basket.

21 MJ [COL POHL]: You have two baskets.

22 LDC [MR. CONNELL]: Hostilities basket first or statement
23 basket first?

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1 MJ [COL POHL]: Okay. Statement basket first.

2 LDC [MR. CONNELL]: Yes, sir. Understood.

3 MJ [COL POHL]: And then we'll go on from there. Also,
4 when you file your response, I would like you to explicitly --
5 when the government objects to a witness, a lot of these,
6 they've offered to stipulate.

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

8 MJ [COL POHL]: Okay. And so I would like you to address
9 why that won't work. I understand you don't have to, but I'm
10 just saying is you have got a lot of witnesses here that are
11 just -- your base of knowledge is something they've written
12 somewhere else.

13 LDC [MR. CONNELL]: Right. Right.

14 MJ [COL POHL]: So whether you have to actually call them
15 or not or just submit the written materials ----

16 LDC [MR. CONNELL]: I ----

17 MJ [COL POHL]: That doesn't quite cover the stipulation
18 that I had talked about before, but some of these are
19 stipulation, but other things are you have a lot of -- I
20 didn't talk -- I'm going to pick a name ----

21 LDC [MR. CONNELL]: Yes, sir. There are lots of people
22 who wouldn't talk to us.

23 MJ [COL POHL]: Did you talk to Colin Powell?

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1 LDC [MR. CONNELL]: No, sir.

2 MJ [COL POHL]: Okay. But your proffer is based on
3 writing statements he's made?

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

5 MJ [COL POHL]: So consider that form of introducing the
6 evidence rather than trying to produce all of these witnesses.

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

8 MJ [COL POHL]: I'm not saying you have to, but I'm just
9 saying is, particularly on those kind of witnesses ----

10 LDC [MR. CONNELL]: We'll take a hard look at that.

11 MJ [COL POHL]: Good. Okay. That's where we are at with
12 the 502.

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

14 LDC [MR. RUIZ]: Judge, may I make one request?

15 MJ [COL POHL]: Sure.

16 LDC [MR. RUIZ]: When we filed our witness response to the
17 government's witnesses, we submitted a -- in one of those,
18 there's an attachment in there that's ex parte, it was in 502N
19 (MAH), and it is Attachment B. I would ask you to just make a
20 note that that is still in play, even though we're done with
21 our portion up front. And it still does impact issues that
22 are particular to our case, and I would ask you to consider
23 that in your analysis.

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1 MJ [COL POHL]: Please give me the cite again.

2 LDC [MR. RUIZ]: It's 502N (MAH) ex parte Attachment B.

3 MJ [COL POHL]: Attachment B. Do you have a date on this?

4 LDC [MR. RUIZ]: Correct. Attachment B to the pleading is
5 ex parte, it was filed ex parte.

6 MJ [COL POHL]: Okay. But I'm saying, you do have the
7 date on it?

8 LDC [MR. RUIZ]: Yes, my apologies. It was filed 30 June
9 2017.

10 MJ [COL POHL]: Just sometimes it's easier for me to find
11 it by the date. Okay. I'll consider it. Thank you. Okay.

12 CP [BG MARTINS]: Your Honor, I have one other
13 housekeeping matter.

14 MJ [COL POHL]: Sure. Go ahead.

15 CP [BG MARTINS]: Though it's a scheduling matter, it goes
16 to aspects of our request for trial scheduling and so forth.
17 But there's a conflict that I know the commission has
18 previously taken note of in January on the 15 to 19 ----

19 MJ [COL POHL]: It will be resolved next week.

20 CP [BG MARTINS]: Thank you, Your Honor.

21 MJ [COL POHL]: Okay. Ready to go on the argument of 502.

22 DC [MAJ WILKINSON]: Sir, we understand the government has
23 the burden of proof. Should they not go first?

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1 MJ [COL POHL]: I'm waiting for somebody to stand up.
2 Trial Counsel?

3 I know there's -- there perhaps is a difference of
4 opinion of who has the burden on this, but for the sake of
5 this discussion, let's just assume the government has the
6 burden of proving personal jurisdiction by a preponderance of
7 the evidence.

8 Do you need some time Mr. Trivett?

9 MTC [MR. TRIVETT]: How much time are we talking, sir?

10 MJ [COL POHL]: Not a lot. Ten minutes?

11 MTC [MR. TRIVETT]: Ten minutes would be great.

12 MJ [COL POHL]: Okay. I'll give you ten minutes.

13 Commission is recessed for ten minutes.

14 [The R.M.C. 803 session recessed at 1500, 8 December 2017.]

15 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1510,
2 8 December 2017.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present. Mr. Connell, you appear to have a
5 query.

6 LDC [MR. CONNELL]: Sir, I do. There was just one gap in
7 the path forward that we identified earlier, which was you are
8 expecting the government to present its evidence with respect
9 to Mr. al Baluchi in January or in March?

10 MJ [COL POHL]: In Jan -- excuse me, in March.

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

12 MJ [COL POHL]: Yeah. As I understand it, that's a little
13 bit of a moving target. So I think we can address it. I
14 don't -- either just decide on the pleadings. I don't think
15 with the briefing cycle is, it would be sufficient to make the
16 proper arrangements. I'm looking to shoot to get done with
17 any type of presentation on it and then make a decision
18 shortly after the January hearings and that way we can arrange
19 them for March.

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

21 MJ [COL POHL]: Just as an aside when you are mentioning
22 that, please indicate if your witnesses are going to be live
23 versus VTC.

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

2 MJ [COL POHL]: I'm sure they're all going to be -- again,
3 I don't know what category they're in.

4 LDC [MR. CONNELL]: That's right, sir. There are some
5 witnesses that, for reasons of their employment, will require
6 subpoenas, like physical pieces of paper, subpoenas, not
7 please join us at the military commission.

8 MJ [COL POHL]: An invitation doesn't work.

9 LDC [MR. CONNELL]: Some people will not accept a gracious
10 invitation, and I've had those conversations with them and
11 their lawyers.

12 MJ [COL POHL]: Once I order the production of it, if they
13 needed an additional subpoena to that, the order -- that's not
14 sufficient, then of course, the government will issue a
15 subpoena.

16 LDC [MR. CONNELL]: Very good, sir. That's all I wanted
17 to know. Thank you.

18 MJ [COL POHL]: Go ahead. Mr. Trivett.

19 MTC [MR. TRIVETT]: "I didn't want the operation to fail,"
20 those were Mr. Hawsawi's words to Special Agent Perkins when
21 she asked him specifically after he knew that the attacks on
22 September 11th were about to occur, why he didn't inform any
23 of the authorities. He then admits to going to Afghanistan,

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1 meeting with Usama bin Laden and congratulating him on the
2 success of the attacks.

3 Our standard to establish jurisdiction over
4 Mr. al Hawsawi is set forth in 10 U.S.C. 948a in the
5 definition of an unprivileged enemy belligerent by a
6 preponderance of the evidence. Although this was only a
7 sliver of the evidence that we have against Mr. Hawsawi, we
8 believe that just the evidence we presented establishes beyond
9 a reasonable doubt that he aided, abetted, counseled, or
10 commanded the September 11th attacks.

11 I ask the feed get pulled up, please, from the ELMO.
12 Same document.

13 MJ [COL POHL]: Go ahead. You may publish it.

14 MTC [MR. TRIVETT]: When we responded to the defense
15 motion, we said that we would be proving both prongs (B) and
16 (C) of 948a, subsection (7), that he has purposefully and
17 materially supported hostilities against the United States or
18 its coalition partners, and that he was part of al Qaeda at
19 the time of the alleged offense under this chapter.

20 We also stated to the military judge before the
21 jurisdictional hearing that the evidence would prove both. We
22 could have just relied on (C), but ultimately the evidence of
23 (C) also proved (B). So we believed it was inextricably

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1 linked. We believe it would be inextricably linked from
2 Mr. Ali and from whomever may challenge jurisdiction.

3 I want to first address Professor Watts's testimony.
4 He's obviously a very well-read man. I didn't challenge that
5 he was a law of war expert. But ultimately, he doesn't get to
6 decide. There's so much ambiguity in the law of war that it
7 cannot be that one professor's opinion that differs from two
8 different Presidents and two different Congresses of different
9 party affiliation when they've decided otherwise, which they
10 clearly have.

11 I appreciate the leeway that the military judge gave
12 me in the cross-examination of Professor Watts because I was
13 trying to prove three different theories of why this
14 constituted hostilities. The first being that it's just an
15 ordinary Article 3 noninternational armed conflict, and has
16 been since at least 1998, when the embassies were attacked and
17 220 people were killed. That was our first theory, because
18 that's consistent with all of the principles of international
19 law that are set forth.

20 I would ask the military judge to look at the Tadic
21 decision specifically and the principles behind the change to
22 hold individuals responsible for grave breaches of the Geneva
23 Conventions, even if ultimately it was in a noninternational

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1 armed conflict context.

2 The second theme was that it's a natural evolution of
3 the law of war. The law of war is always evolving, whether it
4 be cyber attacks or whether it be an armed group that the
5 founders of The Hague Convention and the parties to the Geneva
6 Convention had no way to anticipate that there would ever be a
7 transnational terrorist organization who had the ability to
8 hijack airliners which could act as guided missiles and fly
9 them into civilian targets.

10 So it was a natural evolution of international law
11 that the United States would ultimately hold al Qaeda
12 responsible under the law of war. When they declared war on
13 the United States, they declared their intention to
14 intentionally target civilians in that war, and then they
15 systematically executed their declarations: 220 people were
16 killed in the East Africa embassy bombings, 17 sailors were
17 killed in the USS COLE attack, 2,976 people were killed in the
18 World Trade Center, all in the period of just over two years
19 with ten separate attacks.

20 Professor Watts admitted there is no magic number,
21 and when I asked who decided, he said that's a good question.
22 And ultimately, tribunals can decide it in a retroactive
23 manner, but that's looking back at it from a different

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1 perspective.

2 Congress looked back at it from a different
3 perspective. President Bush, President Obama, and now
4 President Trump have all authorized military commissions for
5 offenses that occurred before, on, or after
6 September 11th, 2001, which as the military judges has found
7 in other cases is an implicit recognition by Congress and by
8 the Commander in Chief that a state of armed conflict existed
9 between al Qaeda and the United States prior to
10 September 11th, 2001.

11 Professor Watts agreed that the attacks, if carried
12 out by a nation state were both perfidious in their nature and
13 also violative of the intentional targeting of civilians. He
14 acknowledged it's a very low threshold traditionally in
15 international armed conflicts. He acknowledged the importance
16 of a declaration of war in regard to state conflicts.

17 And furthermore, he acknowledged the S.S. Lotus case,
18 standing for the proposition that unless there is a specific
19 prohibition against doing something under international law,
20 that countries were free to exercise the jurisdiction as they
21 saw fit. That's what Congress did in 2006. That's what
22 Congress did in 2009. And they specifically conferred
23 jurisdiction over this case and anyone we can show materially

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1 supported the attacks of September 11th, 2001.

2 So my third theory that I was trying to get out
3 through the evidence from Professor Watts is, even if it isn't
4 customary international law to hold someone responsible who's
5 not a nation state for acts that they took that he
6 characterized as sporadic, and even if it isn't a natural
7 evolution of the law of war to do so, that it doesn't matter
8 because Congress has Article I Section 8 authority to define
9 the law of nations. They exercised that authority. The
10 President has war powers to discipline those who in their war
11 efforts against the United States choose to violate the law of
12 war. He has exercised that power.

13 I would call the judge's attention to the recent case
14 in the D.C. Circuit of al Bahlul where they talk about how it
15 cannot possibly be that international law constrains the
16 President and Congress in its constitutional authority to wage
17 war.

18 So those were our three theories with Professor
19 Watts. We believe hostilities exist under Article 3. We
20 believe he gave enough concessions to -- without admitting
21 that specifically, to make it the obvious conclusion; that an
22 attack is an attack is an attack. And that the law of war
23 doesn't apply to our conduct, or if it does apply to our

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1 conduct in our targeting, why should it not apply to
2 al Qaeda's after they declare war and when they systematically
3 begin executing that war?

4 In the end, we've proven hostilities. We'll have
5 more evidence at trial, but we believe that we've hit the
6 standard of beyond a reasonable doubt for hostilities as well.
7 And it doesn't matter. Because ultimately prong three of 948a
8 gives jurisdiction over unprivileged enemy belligerents, other
9 than a privileged belligerent, which Professor Watts did
10 testify to could not be someone who was not affiliated with a
11 state, such as someone from al Qaeda, if that person was a
12 part of al Qaeda at the time of the alleged offense under the
13 chapter.

14 I think the military judge had identified this issue
15 early on in the process and asked if we had still intended to
16 prove hostilities and whether we had to under prong (C).
17 Under prong (C) we don't; we just need to show he was al Qaeda
18 at the time of September 11th. That's another implicit
19 recognition that Congress and the President, whether it be
20 President Bush in 2006 or President Obama in 2009, both
21 recognized a state of hostilities between the United States
22 and al Qaeda prior to September 11th, 2001.

23 I would also call the attention of the military judge

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1 to the case of Bensayah v. Obama, which is a D.C. Circuit
2 Court case. There's a tremendous amount of case law that's
3 been developed in the habeas context as to what constitutes
4 part of al Qaeda. And there's lots of talk in those
5 discussions about the duck test, meaning if it walks like a
6 duck, if it quacks like a duck, it is a duck. And there's no
7 formalized consideration that the judges are bound by in
8 making that determination.

9 Ultimately, while a Shura Council member may be a
10 definitive -- may cause a definitive determination as part of
11 al Qaeda, it was not required. Mr. Hawsawi specifically told
12 Agent Perkins that he didn't work for Usama bin Laden in his
13 mind, he worked for God; and if that Usama bin Laden would
14 die, he would simply go and work for the next mujahideen to
15 fight the war. I would ask that the judge take consideration
16 of that for the part of al Qaeda aspect of jurisdiction
17 because we believe the evidence is overwhelming that
18 Mr. Hawsawi was a part of al Qaeda on September 11th, 2001,
19 and the preceding events to which he has alleged to have
20 committed those overt acts.

21 I want to get a little bit into Hawsawi --
22 Mr. Hawsawi specifically now. There was an overwhelming
23 amount of documentary evidence from Standard Chartered Bank

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1 that indicates that he assisted Fayez al Banihammad in opening
2 a bank account, in sending money to him, in receiving money
3 back from him, and making sure that money got back into
4 al Qaeda coffers after the September 11th attack. In the very
5 last exhibit Special Agent Perkins circled every one of the 19
6 hijackers that he assisted. It was seven, to my recollection,
7 including one from every single flight.

8 We are required to prove it purposefully and
9 materially and we did. And I believe his statements describe
10 that specifically. Mr. Hawsawi had a tremendous grasp of
11 al Qaeda doctrine when asked about it by Ms. Perkins. He
12 understood the three purposes of the '96 declaration of war.
13 He understood that America was the real enemy and that its
14 support of Israel and its support of Middle Eastern regimes is
15 the main reason why, in his words, the attacks had to happen
16 to send a message.

17 I would ask the military judge to review the entire
18 LHM. Not only does it ooze voluntariness based on the length
19 of it, the records that are attached to it, the corroboration
20 of the statements to the records; but it shows a man who is
21 every bit a part of al Qaeda and every bit intent on helping
22 the brothers conduct operations against America in any way
23 possible.

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1 Of those 17 -- of those seven hijackers that he
2 assisted, at least two of them were pilots. Marwan al Shehhi
3 sent back approximately \$5,000; he was the hijacker pilot on
4 United Airlines Flight 175. Mohamed Atta was the ringleader
5 of the whole operation in the United States, American Airlines
6 Flight 11 hijacker pilot, sent various monies to include a
7 \$5,000 amount, I think a \$2,860 amount as well as other --
8 other banking information so Mr. Hawsawi could take the money
9 and use it for further purposes that al Qaeda saw fit.

10 The evidence of Mr. Hawsawi also establishes that as
11 soon as he knew what the exact date was of the attacks, he
12 emptied out the bank account, taking thousands and thousands
13 of dollars, leaving only approximately \$50, and he got out
14 of Dodge. He flew from the UAE to Pakistan as quick as he
15 could. He saw the attacks unfold from a hotel in Karachi, and
16 then he got out of Dodge again, and he went to Quetta,
17 Pakistan, where he made his way back to Kandahar and back to
18 the people who ordered the attacks of September 11th, 2001.

19 The evidence is overwhelming of this. We ask that
20 you find jurisdiction over Mr. al Hawsawi as both someone who
21 materially supported the attacks of September 11th and someone
22 who was a part of al Qaeda.

23 And I'll leave you with what we left at the end of

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1 Ms. Perkins's testimony: All you need to really look at is
2 him walking down the hill after September 11th greeting Usama
3 bin Laden warmly to understand that he was a part of al Qaeda.

4 Subject to your questions, sir.

5 MJ [COL POHL]: I have none. Thank you.

6 DC [MAJ WILKINSON]: Good afternoon, sir.

7 MJ [COL POHL]: Good afternoon.

8 DC [MAJ WILKINSON]: As in May, so today, the question
9 before you is not whether Mr. al Hawsawi can be prosecuted for
10 his alleged role in the 9/11 attacks; it's whether he can be
11 prosecuted in a military tribunal without trial by jury.

12 You know the structure of the statute. Before we
13 talk about hostilities, I'll talk about this business of being
14 part of al Qaeda. The government has not, in fact, produced
15 any proof, and they do have to prove it, that Mr. al Hawsawi
16 is part of al Qaeda.

17 When you're reviewing the documents later, one of
18 those documents is the CSRT transcript of the statements of
19 Mr. al Hawsawi. Though we don't say it's perfectly reliable
20 or admissible -- we may be dealing with it later -- it's the
21 one thing they have that is a transcript, a verbatim
22 transcript. It actually shows you the words of
23 Mr. al Hawsawi. In fact, we've received a recording of it;

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1 but we saw no reason to introduce that recording, and, you
2 know, so that we can verify, whatever else may have come
3 behind it, that the words written on the paper are the words
4 he spoke.

5 On pages 21 and 22 of that CSRT statement -- CSRT
6 statement, that is the one place where someone from the
7 government directly asks him, "Are you a member of al Qaeda?"
8 Mr. al Hawsawi answers, "No."

9 Page 22, they ask him, "Did you ever take an oath to
10 be a jihadist?" The answer is no. And the significance of
11 that, I will explain in a little while.

12 They've also introduced this FBI paraphrased
13 statement. Unlike the CSRT statement, it's not a verbatim
14 transcript. It's not backed up by any recording. Indeed, as
15 you've heard, the agents prevented more than one person from
16 taking notes. So we have to guess what was really asked, what
17 was really answered. We don't know, for example, if they were
18 asking open-ended questions and he gave them narratives, or if
19 they were asking leading questions to which he agreed or
20 disagreed, which is an extra problem because he was being
21 interrogated not in his native language. So my point of that
22 is if there's any reading on this question that relies on a
23 subtle interpretation of the FBI statement, please keep in

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1 mind, it's less reliable by nature.

2 That said, it does address the question of whether he
3 was part of al Qaeda, whether he worked for Usama bin Laden.
4 And while they don't reveal a straightforward question like
5 the CSRT, they do reveal they asked him something like that,
6 and again he said no. He said that he did not work for Usama
7 bin Laden, only that he worked for God.

8 I will mention a minor point that came up in
9 testimony, and it's on page 5 of the LHM that I know you will
10 be reviewing later. Mr. Hawsawi does mention a point of
11 theology on which he disagrees with Usama bin Laden. It has
12 to do with the Al-Aqsa Mosque in Jerusalem, which my
13 understanding from the statement, Sheikh Usama says that this
14 is a holy place, no one but Muslims is allowed to be around
15 it. Mr. al Hawsawi takes the view there's nothing wrong with
16 Jews, Christians, and Muslims all worshipping around there, as
17 long as there's no fighting going on around it. Not an
18 important thing but a hint there is some difference between
19 him and al Qaeda.

20 They also introduced the Islamic response to the nine
21 charges that we litigated about in 511. They haven't proven
22 that Mr. al Hawsawi actually wrote any part of it or that he
23 signed it. They have given you a typed version in English

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1 with his name typed on it. They haven't introduced evidence
2 that any of the accused had access to a typewriter or printer
3 to generate that document. How his name got on it, we don't
4 know.

5 You've decided not to suppress it; of course, that
6 means that -- that doesn't mean you've decided to believe it.

7 Note also that that response doesn't mention
8 al Qaeda, doesn't say anything about al Qaeda, doesn't
9 identify anyone as a member of al Qaeda, doesn't describe
10 individually what any person did. It uses the pronoun "we,"
11 and if I were to say that we defeated the Germans in five
12 years and haven't tried Mr. al Hawsawi in 15, the use of "we"
13 tells you nothing about my role individually or what I'm a
14 member of.

15 Now, the FBI and CSRT statements do say that
16 Mr. al Hawsawi played a role in the 9/11 attacks, that he
17 trained in an al Qaeda camp, and that he associated with
18 al Qaeda members; but thanks to the 302 statements that we
19 have put in and that you will be reviewing, as I'll show on
20 some specific pages, it shows that none of those factors makes
21 a person a member or a part of al Qaeda.

22 Special Agent Perkins told you about her
23 interrogation of Mohammed Saddiq Odeh, and his 302 is exhibit

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1 502EEE, which I'm sure you will be looking at later on.

2 Now, Odeh, unlike the others that we've introduced,
3 he really did join al Qaeda, but notice the details.

4 He was training at one of their camps, it says on
5 page three, and he trained there for two months, and he was
6 invited to join al Qaeda. But he didn't join at that time.
7 He wanted to think about it. In fact, he spent more than a
8 year thinking about it before he finally joined in 19 -- over
9 a year later, anyway. And he said that at that point he did
10 swear bayat to both Usama bin Laden and to al Qaeda itself.

11 So an al Qaeda training camp is not like a U.S. Army
12 training camp. Going to the camp doesn't mean you've joined
13 the organization. They're just there training Islamic
14 fighters there, and that's all that was.

15 Also on page 5 of his statement, he says that when he
16 joined al Qaeda, he did have to take an oath. Separate from
17 what he said about bayat, he had to take an oath swearing he
18 would help all Muslims everywhere.

19 On page 17 he goes further, and he says that in
20 addition to actual members of al Qaeda, there are also friends
21 of al Qaeda. I suppose that might analogize to fellow
22 travelers as opposed to people who are part of the Communist
23 Party. These are people who agree with al Qaeda's point of

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1 view that al Qaeda might work with, but they weren't members
2 and not subject to its instructions. On 17 it says they would
3 work with these friends on operation.

4 So that tells you several things, just that one
5 alone: Firstly, working on an al Qaeda operation doesn't make
6 you part of al Qaeda. Training in an al Qaeda training camp
7 does not make you a part of al Qaeda. If you did join
8 al Qaeda, if you became a part of it, you knew you were a
9 member. You had to go through at least a ceremony swearing an
10 oath. You couldn't just drift into al Qaeda without realizing
11 it.

12 Take that in mind in light of Mr. al Hawsawi's
13 testimony at the CSRT that he wasn't a member of al Qaeda and
14 that he hadn't taken an oath as a jihadist.

15 There's also a 302 from Fahd Al-Quso. That one is
16 502DDD, and he played a minor role assisting in the COLE
17 bombing. He admitted that he agreed to videotape the attack
18 on page 2. And he also trained with al Qaeda in Afghanistan,
19 stayed in an al Qaeda guesthouse, and -- where the emir was
20 associated with Usama bin Laden, but he didn't join them. He
21 said that Sheikh Usama did not ask him for bayat but that he
22 would pick out some people who were training and ask them for
23 it if they had the qualities that they needed.

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1 He made a statement somewhat analogous to
2 Mr. al Hawsawi's. He said he was not a member of any
3 organization, but he considered the scholars of Islam to be
4 his emirs, that is, his princes. And that's on page -- yeah,
5 page 7 is where he said that.

6 Page 10 is where he said he didn't belong to any
7 organization. He considered that he did have a duty as a
8 Muslim to protect Muslims everywhere, but he didn't join any
9 organization.

10 Special Agent Perkins also told you about the
11 survivor of the Nairobi embassy bombing, and this was Mohammed
12 Al-Owhali, this was the one who was actually in the explosive
13 truck and then as the truck pulled up, he got out to throw
14 some small homemade bombs and decided not to get back in.
15 That's on pages 11 and 12 of his 302. Like the others, he
16 trained in Afghanistan.

17 On page 3 it says that he trained at several bin
18 Laden al Qaeda camps in Afghanistan.

19 On page 4, it says he met Sheikh Usama several times
20 while he did so, but he refused to swear bayat and refused to
21 join al Qaeda because he wanted the option to either -- this
22 was on page 16 of his 302 -- that he wanted the option to
23 either take assignments or not take them. He didn't want to

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1 have to do what they said.

2 So he knew that they would sometimes assign people to
3 logistical roles. He didn't want to be assigned to roles like
4 that. Yet, even though he's not a member, he did play a key
5 role in the bombing. He was in the actual truck. He was part
6 of the actual attack.

7 MJ [COL POHL]: Does that make him part of al Qaeda?

8 DC [MAJ WILKINSON]: No, sir. Sorry, sir. I didn't hear
9 you.

10 MJ [COL POHL]: No, I'm saying is if he participated --
11 I'm talking about the East African bombing.

12 DC [MAJ WILKINSON]: Yes, sir.

13 MJ [COL POHL]: If he participated in an al Qaeda attack,
14 does that make him part of al Qaeda or ----

15 DC [MAJ WILKINSON]: No, sir.

16 MJ [COL POHL]: Okay. Do you have to have the card? I
17 mean, how do you -- because the statute uses the term "part."
18 It does not -- did not say member, it does not say sworn
19 bayat. So how do you define -- and again, I'm afraid it's not
20 the clearestly written -- the most clearly written element of
21 the statute, but how do you define when one would become a
22 part of the organization?

23 DC [MAJ WILKINSON]: Well, sir, first, I will point out

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1 that in English, the word part is a synonym for the word
2 member, which is why, for example, body parts are sometimes
3 referred to as members. It is the same thing. If you said
4 somebody works as a secretary for the Free Masonic library,
5 but doesn't join the Masons, is he part of the Masons? Of
6 course not. He's doing work for them.

7 If a contractor works for the Office of the Military
8 Commissions or even the defense office, that person isn't part
9 of the Department of Defense, doesn't participate in our
10 retirement or other programs, is simply paid to do work for
11 it.

12 So doing work -- I mean, somebody who sweeps up at
13 the Kingdom Hall for Jehovah's Witnesses would never be called
14 a part of Jehovah's Witnesses unless he actually became a
15 member of the church.

16 MJ [COL POHL]: But would they be a part of the
17 organization? What I'm saying is you seem to be
18 distinguishing between somebody who -- who, in the religious
19 context, is an adherent to the tenet of that religion. But
20 let's move it to something else. If an individual works in
21 the organization, whether they're a contractor or something
22 else, would he be considered a part of the organization even
23 though he's not a full-fledged member of the organization?

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1 DC [MAJ WILKINSON]: No, sir.

2 MJ [COL POHL]: Okay. So the -- so the custodian who
3 cleans out the halls of the Pentagon is not part of the
4 Department of Defense?

5 DC [MAJ WILKINSON]: I mean, assuming he's a contractor as
6 opposed to a soldier.

7 MJ [COL POHL]: Yeah. Yeah, I understand. I'm assuming
8 he's a contractor, but he's not -- he's paid by the Department
9 of Defense and he does the work that they ask you to do, in
10 your definition of part, he would not be a part of the
11 Department of Defense.

12 DC [MAJ WILKINSON]: Yes, sir.

13 MJ [COL POHL]: I got it.

14 DC [MAJ WILKINSON]: And the closest analogy I mentioned
15 was with the Communist Party and fellow travelers, they were
16 very distinct about members are part of the party; fellow
17 travelers agree with it.

18 She also talked about the interview of this fellow
19 KKM, Khalfan Khamis Mohamed, who supported the embassy bombing
20 in Dar es Salaam. He also didn't join al Qaeda. In fact, he
21 didn't know who al Qaeda was. He admired Usama bin Laden, he
22 was not a member of al Qaeda. Per page 9, that's where he
23 says he had never heard of al Qaeda, he didn't know what it

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1 was. He also didn't know what bayat was, which may make sense
2 because he was a speaker of Swahili rather than Arabic.

3 Page 26, he didn't even know if Sheikh Usama issued fatwas.

4 Now, he did say on page 25 that, in a spiritual
5 sense, he considered himself part of Sheikh Usama's group, but
6 he thought of himself that way subjectively because he agreed
7 with Sheikh Usama's idea -- or shared his feelings, rather;
8 but not because he ever joined or was part of it. He did
9 associate with them. He knew members of the group. That's on
10 page 25. But it means again, you can take part in their
11 operations, associate with them, agree with them, not be part
12 of them.

13 So the simple fact that a person works with al Qaeda
14 does not tell you he's a part of al Qaeda. The fact that he
15 trains in one of their camps or associates with them doesn't
16 tell you that. You need some kind of evidence he actually
17 joined them. That is what the government does not have.
18 Instead, what the government has is statements of Mr. Hawsawi,
19 particularly the verbatim transcript and the CSRT statement,
20 where he says just the opposite, he didn't join them.

21 That said, let's talk about armed conflict. The
22 statute says that hostilities means any conflict governed by
23 the laws of war, as you discussed it with Professor Watts

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1 yesterday. It tells you right there that the standard for
2 hostilities has to be a law of war standard because the
3 standards -- the statute says that.

4 Furthermore, the law of war is a type of
5 international law. That's in our briefs, I won't go over it
6 indefinitely. It's recognized in Ex parte Quirin, the DoD law
7 of war program, the DoD Law of War Manual. Professor Watts
8 told you the same.

9 As you know, the Geneva Conventions and other
10 treaties don't define armed conflict in precise terms with
11 numbers so you have to look to custom in order to determine
12 whether you're dealing with an armed conflict or not. The
13 Tadic standard which we have been talking about had become
14 customary international law by the end of the 20th century, as
15 he told you.

16 I will add, the government suggested that perhaps you
17 could make some retroactive changes to the law of war and
18 start applying it in contrast -- contrary to the standard that
19 had been established as of 9/11. Professor Watts reminded
20 you -- we've also noted in briefs -- part of the law of war is
21 the principle of legality. Under the principle of legality,
22 you do not change the law of war *ex post facto*. Although
23 sometimes it might be a hard thing to divine just what the law

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1 of war was at a given point in the past, but you don't just
2 outright change it. And by the end of the 20th century before
3 9/11, the Tadic standard was the customary standard.

4 Now, I notice in their argument, the government -- in
5 their oral argument, the government did not discuss the
6 standard that they had been pushing in their briefs, which is
7 the standard from United States v. Hamdan. Although they
8 haven't discussed it, we've attacked it before. I want to add
9 a couple of things I didn't say before about it. That is,
10 since that standard is not part of the law of war, as
11 Professor Watts told you, that means that standard is not --
12 is contradictory to the statute in addition to its other
13 problems.

14 The statute says hostilities are an action governed
15 by the law of war. That means the law of war must provide the
16 standard. This Hamdan footnote standard contradicts the law
17 of war and, therefore, also contradicts the statute.

18 In addition, as we've discussed before, because it
19 uses permissive and broad language, it says you should
20 consider this or you should consider that and you should
21 consider anything else that you consider relevant, it really
22 writes the hostilities requirement out of the statute
23 completely. Because -- I mean, imagine that someone has been

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1 convicted under that, an appellate court is trying to say this
2 looks like a ridiculous situation, it doesn't look like armed
3 conflict; did they apply the standard right. Well, the
4 standard just said they should consider whatever they want to
5 consider, *ipso facto* they did it, it becomes unreviewable.

6 MJ [COL POHL]: Let me ask you the question that I asked
7 Professor Watts.

8 DC [MAJ WILKINSON]: Yes, sir.

9 MJ [COL POHL]: Is the defense argument seems to rely on
10 the wording of the statute requiring hostilities be in
11 violation of the law of war.

12 DC [MAJ WILKINSON]: That's part of our argument, yes,
13 sir. But I have additional argument that goes beyond the
14 statute.

15 MJ [COL POHL]: I'm sure you do, but let me just talk
16 about this part of it.

17 DC [MAJ WILKINSON]: Yes, sir.

18 MJ [COL POHL]: If you take Professor Watts' position,
19 which I asked him, and he was up front, that the armed
20 conflict which would trigger the law of war -- and again, the
21 term hostilities and armed conflict seem to be used
22 interchangeably here -- triggering that would not have not
23 occurred until the American invasion of Afghanistan sometime

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1 in October of '01; so, therefore, it does not apply to 9/11 or
2 anything that predates October 2001.

3 So you would end up with the situation, the logical
4 end is that Congress wrote this statute intending not to cover
5 anything that predated October 2001, true?

6 DC [MAJ WILKINSON]: No, sir, that is not so. And this is
7 actually -- it's a point I wanted to get to because ----

8 MJ [COL POHL]: Okay.

9 DC [MAJ WILKINSON]: ---- I noticed you asked something
10 similar back in May also. And it's a good point that needs to
11 be cleared up.

12 You were asking whether Congress intended to have the
13 statute cover the 9/11 case, and my answer is in two parts on
14 this. Firstly, it's Black Letter Law on statutory
15 construction that, when the language of the statute is clear,
16 you don't even look for the intent. You don't have to go
17 through the rules of interpretation to try to discover intent,
18 because if the statute plainly says the standard is a law of
19 war standard, that's what you apply.

20 MJ [COL POHL]: The statute plainly says it covers
21 offenses that occur before and after and on
22 September 11th, 2001. What about that plain language?

23 DC [MAJ WILKINSON]: That plain language doesn't say that

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1 any specific thing is hostilities. It simply says if you have
2 hostilities in any of those time periods, they can be covered.
3 But it does not make a finding or in any way state ----

4 MJ [COL POHL]: But the logical -- and again, I don't want
5 to beat this to death because I think we have discussed it
6 before.

7 DC [MAJ WILKINSON]: Sure.

8 MJ [COL POHL]: But the logical -- you're saying the --
9 look at the statute, don't look for intent, and it's got to be
10 covered by law of war -- armed conflict, in violation of the
11 law of war, and that doesn't start until October of '01.

12 DC [MAJ WILKINSON]: But the statute doesn't talk about
13 the October, but yes.

14 MJ [COL POHL]: I know, but that's your basic position.
15 It's sometime after September 11th.

16 DC [MAJ WILKINSON]: Yes, sir.

17 MJ [COL POHL]: But in other plain language, the statute
18 says it covers on, after, and before September 11th, 2001,
19 so ----

20 DC [MAJ WILKINSON]: That part -- whereas the first part
21 says this is what hostilities are, and hostilities being the
22 thing that's mentioned in the jurisdictional parts of the
23 statute.

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1 MJ [COL POHL]: Uh-huh.

2 DC [MAJ WILKINSON]: The other part about saying basically
3 at any time, you know, if you have hostilities, then it can be
4 tried by a commission. That simply -- that would require
5 interpretation and very stretchy interpretation to say that it
6 includes an implicit finding that some specific attack was
7 hostilities.

8 And I think an issue here also is with this word
9 "intent" because there's an analogy to something you see a lot
10 in criminal law. In actions that are taken, whether it's
11 writing a statute or some criminal actions, you can have both
12 an intent and a motive. The intent is the immediate intent,
13 which is to put these words on the paper, what are these words
14 intended to mean?

15 A motive, I've called it before a wished-for outcome,
16 which is the final effect that the people passing the statute
17 are hoping it would have.

18 Now, it may well be that members of Congress passing
19 this were under a mistaken impression that the 9/11 attacks
20 would fall under the laws of war, and that if they just passed
21 a statute that says you can try war crimes within a military
22 commission, that that would be enough to bring in the 9/11
23 attacks. Any members who did think that were quite mistaken.

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1 Remember, please, that instead of saying that issue
2 is foreclosed, they put in another section which is plain,
3 which says that the commission is competent to determine its
4 own jurisdiction. So what they did not say is we want you to
5 take that off the table and treat this statute as foreclosing
6 the issue of jurisdiction on anything to do with 9/11. What
7 they said is, we want you, the commission, to make that
8 determination and do some legal analysis, which is exactly
9 what we're asking you to do.

10 I would point out an additional problem that if you
11 started treating the statute as a specific finding that a
12 certain set of people fall within military commission
13 jurisdictions, it starts to look like a bill of attainder, a
14 statute saying punish these specific people, which is not
15 something Congress may properly do.

16 I should also add, as I said, that the statute alone
17 isn't the entire limit on jurisdiction that can be exercised
18 by military commissions. This is a law of war military
19 commission; it's not a court. It only has the power to
20 enforce the law of war, not any kind of domestic law. That's
21 the description of law of war commissions in the plurality of
22 Hamdan v. Rumsfeld, that the third type, meaning law of war
23 military commissions, has been described as different from the

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1 other two: Its jurisdiction is limited to offenses cognizable
2 during time of war, but its role is primarily a fact-finding
3 one to determine whether the defendant has violated the law of
4 war.

5 This also fits Ex parte Quirin where the Supreme
6 Court didn't just say Congress wants it, you can put these
7 spies in front of a commission. They looked at international
8 law and even cited international treatises to figure out
9 whether spies and saboteurs would fit inside the law of war so
10 that you could then put them in front of a commission.

11 Congress can't change that. Congress cannot start
12 authorizing military commissions to try people for actions
13 that fall outside the law of war, outside of armed conflict.
14 Because if Congress tries to do that, Congress would be giving
15 part of the judicial power of the United States to a military
16 commission.

17 Ex parte Milligan and Hamdan v. Rumsfeld quotes it,
18 tells us that the Constitution confers no part of the judicial
19 power of the United States on military commissions in
20 particular. Instead, Article III of the Constitution says the
21 judicial power lies in the courts, the Supreme Court and the
22 subordinate courts that are created by Congress. It also
23 requires in those courts trials should be by jury, which is

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1 something you don't get in a military commission.

2 Congress and the President do indeed have the power
3 to wage war and, you know, to declare it and so forth; but
4 what Congress and the President do not have the power to do,
5 even if it were clear that they wanted to do it, which is not
6 clear from the language of this statute, to take judicial
7 power of the United States from the Article III courts and
8 give it to military commissions beyond the exceptions that are
9 established.

10 I also want to raise something because it's come up
11 implicitly in the cross-examination of Professor Watts, and
12 you raised it sua sponte in 488I, and that is the case of
13 United States v. Yunis, which talked about this later in time
14 business, that if Congress passes a statute later than a rule
15 of customary international law, Congress can overrule it.

16 The terms of that case tell us that it applies only
17 to Article III courts. What the Yunis court says is our duty,
18 the duty of an Article III court, is to enforce the
19 Constitution, laws, and treaties of the United States, not to
20 conform the law of the land to norms of customary
21 international law. Quite true, I'm sure as far as it goes,
22 but it's talking about the judicial power described in
23 Article III, Section 2 of the Constitution as applied in the

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1 domestic courts of the United States.

2 It goes further. Yunis cites Committee of U.S.
3 Citizens Living in Nicaragua v. Reagan to say that within the
4 domestic legal realm, an inconsistent statute simply modifies
5 or supercedes customary international law. And again, for the
6 domestic realm, for domestic law in a domestic court, that
7 would be -- that's the law. If Mr. Hawsawi were being
8 prosecuted for some terrorism-related offense in a district
9 court, these objections I'm making would not apply. But
10 that's not what's going on.

11 This commission is not a court. It doesn't exist to
12 enforce the law of the land. It doesn't exercise the judicial
13 power of the United States. It exists as a very limited
14 exception to the Article III right of trial by jury. It
15 exists to enforce the law of war.

16 I also remind you from our briefs, the Supreme Court
17 case of Lee v. Madigan advises that when you're interpreting
18 an ambiguous statute that gives criminal jurisdiction to a
19 military tribunal, then it should be read in favor of civilian
20 jurisdiction.

21 So the right standard is a law of war standard. The
22 Tadic standard is the standard as further refined in Haradinaj
23 and other cases; and remember, under that standard, you have

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1 to have both sufficient organization and sufficient intensity.
2 And since the government has the burden of proof here, that
3 means if they're going to prove it at all, they have got to
4 prove both parts of that standard.

5 Furthermore, that fits one of the historical examples
6 we give. Aum Shinrikyo had very large and very complete
7 organizations set up like a shadow government. If they had
8 chosen to fight in a different way, they might have created an
9 armed conflict. But they chose to do attacks analogous to
10 9/11 attacks, a few people on public transportation, so it
11 wasn't that way.

12 But to determine where the threshold lies, you have
13 to look at custom and what governments actually did in the
14 years preceding 9/11. As Professor Watts mentioned, the
15 relevant period is really 1949 to 2001, since the law of
16 noninternational armed conflicts didn't really get started
17 until the 1949 conventions.

18 The general rule in that period, as Professor Watts
19 told you, is government hated to admit they were in an armed
20 conflict with any nonstate group. They were very reluctant to
21 say so. Their customary behavior was to deny that it was
22 armed conflict, treat it as a civic disturbance or terrorism
23 or crime. They certainly did not treat sporadic attacks as

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1 armed conflict, and they didn't treat terrorism as armed
2 conflict.

3 In fact, one example -- two examples that he talked
4 about, one was in Kenya where even when the fighting was very
5 bloody, when there were weeks separating the attacks, they
6 wouldn't treat it as an armed conflict. When it starts to be
7 continuous, they do. That was also the same in the Kosovo
8 situation analyzed in the Limaj and Haradinaj cases when the
9 attacks, even very bloody ones, were separated by weeks, it
10 was sporadic. When the fighting began to be continuous, then
11 it could be treated as an armed conflict.

12 Also, if you reread the Tadic standard, as I'm sure
13 you will, one thing Professor Watts forgot, it does say
14 explicitly that in a noninternational armed conflict, that
15 this standard, this two-part standard is to be used for the
16 purpose of distinguishing an armed conflict from banditry,
17 unorganized and short-lived insurrections, or terrorist
18 activities, which are not subject to international
19 humanitarian law. That is the law of war.

20 And that fits in with the statements of France and
21 Great Britain that we have put in 502QQ, that they did not
22 understand armed conflict to include acts of terrorism,
23 whether singly or even combined. It also fits a statement

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1 we've given you from the United States Ambassador At Large for
2 Counterterrorism in the late '80s to the effect that terrorism
3 should be dealt with in a rule of law kind of way.

4 When it comes to the organizational prong, Professor
5 Watts was reluctant to testify because what he has seen is all
6 over the map. What you have seen here is certainly not
7 running all one way.

8 You have a statement by Mr. Mohammad suggesting that
9 al Qaeda was not terribly organized at all, at least not below
10 the level of the Shura Council, that there was some dispute
11 among the members as to whether it should be, but it wasn't.

12 Agent Perkins told you about two committees that were
13 part of it, the religious committee and the military
14 committee. They did say they had training camps, and having
15 training camps is something that favors the organization
16 prong. But I notice, while they talked about training people
17 in cutting throats, they didn't have the infrastructure to
18 train people for flying when they were doing hijacking, and
19 they had to send them to commercial flight schools for that
20 reason.

21 They had no real means of concluding war and peace.
22 There is no evidence at all of a disciplinary structure, of
23 any ability to enforce orders within al Qaeda or to impose

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1 punishments on people who don't obey.

2 The government did give you a couple of statements
3 taking responsibility for the bombings in Africa, and these
4 statements refer to an army to liberate the Holy Places and to
5 companies and battalions within this army. But beyond this
6 statement, there's no indication that these companies and
7 battalions exist.

8 In fact, if you look at page 6 of the 302 from
9 Mohamed Al-Owhali, he says that, shortly before he took part
10 in the attack, he was asked to make a video in which he said
11 he was part of one of these companies and battalions of this
12 army, all of which he had never heard of before and, as far as
13 he knew, it didn't exist. So it's important not to take
14 simply statements from them as determining what kind of --
15 what level of organization they really had.

16 When it comes -- and that also fits with the
17 affidavit from Professor Sassòli that we have provided that
18 Mr. al Baluchi's team acquired earlier in the year. And he
19 reaches the conclusion that transnational armed groups like
20 al Qaeda hardly ever meet the organization criterion, and that
21 al Qaeda didn't.

22 When it comes to intensity, remember again the
23 examples Professor Watts gave. When you had sporadic attacks

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1 separated by weeks or months, neither governments nor
2 tribunals would treat that as an armed conflict. This matches
3 up with the treatise of Professor Green that we've also given
4 you the relevant page from, which comes from the year 2000, it
5 was the cutting edge law of war right before 9/11. And it
6 says that "sporadic attacks treated as terrorism are not armed
7 conflict."

8 When the fighting gets to be continuous, often with
9 territory taken, and with clashes between the nonstate group
10 and the state actors, then you might. You might, that is,
11 have an armed conflict. Remember, he told -- as Professor
12 Watts described it, the most important factors were the
13 protracted fighting and these clashes, where it's not just the
14 nonstate group attacking a bunch of civilians, but actual
15 fighting between the two.

16 And he also -- in addition to telling you they're
17 important as legal criteria, he also gave you the kind of
18 underlying reasoning behind it, because when you have fighting
19 of that kind, you get the kinds of things that the law of war
20 is really meant to regulate.

21 For example, if the two sides are fighting each other
22 continuously, you might get prisoners. The law of war
23 regulates how you treat them. If the two sides are fighting

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1 each other and fighting continually, then you might -- you
2 need a truce to get the wounded; you might need protected
3 hospital vehicles that are able to evacuate the wounded. The
4 sort of thing that the law of war regulates. And if they take
5 territory, you might have captured territory with civilians in
6 it; the law of war regulates how the occupying party shall
7 treat them.

8 With respect to terrorist attacks where -- you know,
9 and immediate, short-lived attacks like the ones we have been
10 talking about here, there is no need for the law of war to
11 regulate them at all because there is already a full body of
12 domestic criminal law that regulates these things.

13 I mean, as we discussed over in 490, the United
14 States had air piracy and terrorism and murder and other
15 statutes on the book -- on the books a long time before these
16 attacks. And indeed, when they chose to prosecute Zacarias
17 Moussaoui for his alleged conspiring related to the 9/11
18 attacks, there was no need to come up with new statutes, new
19 bodies of law or any other such thing. The statutes were
20 right there, he could be prosecuted for it.

21 But regardless of why governments behave that way,
22 and regardless of, you know, the underlying logic, protracted
23 fighting and clashes are the most important parts of

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1 intensity. It's exactly what you didn't have. Each embassy
2 bombing was over in a moment. The COLE bombing was over in a
3 moment. There was no fighting of the kind that the law of war
4 is meant to regulate.

5 Also in examining intensity, as I mentioned, things
6 considered as terrorism do not count as armed conflict. If
7 you look at the African embassy bombings, they were carried
8 out by one or two men apiece. They simply drove up in truck
9 bomb, blew it up outside a government building. It's homemade
10 from commercial explosives. In fact, page 18 of the
11 Khaled [sic] Khamis Mohamed statement, the 302 said they used
12 fertilizer as well as TNT. That's not armed conflict, that's
13 terrorism.

14 The COLE bombing was two men in a boat with a bomb.
15 I believe on cross-examination they mentioned it was -- it
16 looked like a -- I forget what kind of boat it was, for
17 garbage or -- yeah, for garbage. Sneaked up with it, let off
18 a bomb. It's conceptually very similar to a truck bombing.
19 That's terrorism.

20 The 9/11 attacks are carried out by only 19 persons
21 using handheld weapons, like knives and pepper spray. I mean,
22 a can of mace is not a weapon of war, it's terrorism. Even
23 the fighting on that was all over in two hours from the

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1 timeline they gave you, where the first hijacking begins after
2 8:00 a.m. and the last plane crashes a little after 10:00.

3 If you look at the motives described by the FBI
4 witnesses also, they talked about the purpose of all of this
5 was to try to modify U.S. policy. If you look at the U.S.
6 terrorism statute, 18 U.S.C. 2331, it's defined as violent
7 acts to, amongst other things, influence the policy of a
8 government by intimidation or coercion or to affect the
9 conduct of a government by mass destruction, assassination, or
10 kidnapping. That's what terrorism is. That is the perfect
11 description of these actions.

12 As we pointed out in AE 490, there was no established
13 war crime to cover this sort of thing, which is why Congress
14 got a little innovative with that. But we're litigating that
15 separately in 490.

16 There were a large number of casualties on 9/11,
17 that's true; but casualties alone do not an armed conflict
18 make. If you consider, say, a truck bomber like Timothy
19 McVeigh, if he had pulled up next to a hydroelectric dam
20 instead of a federal building and had managed to rupture the
21 dam so the flood killed 5- or 10,000 people, there would be a
22 huge casualty bill, but it would still very obviously be an
23 act of terrorism, not an armed conflict.

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1 The U.S. Government overall and overwhelmingly
2 treated these acts as acts of terrorism up to 9/11 and even
3 after so. For example, even when it's overseas, they send the
4 FBI to investigate it.

5 If you look at 28 Code of Federal Regulations,
6 Subpart P, Section 0.85, it describes the mission of the FBI.
7 What does the FBI investigate? It investigates violations of
8 the laws, including the criminal drug laws of the United
9 States, and terrorism, but it doesn't say anything about war
10 crimes. There's no indication that FBI agents are even
11 trained on the law of war, or, you know, have it as a mission
12 to look for that.

13 I will also point out that with these witnesses that
14 they questioned overseas, they did give them Miranda rights
15 warnings as you would do in a domestic criminal case. Al-Quso
16 on page one got a full Miranda warning. Mohamed Al-Owhali on
17 page one got a full Miranda warning. The other two, Khalfan
18 Khamis Mohamed and Odeh on page one and two of KKM's and
19 page one of Odeh's got what the agent called modified Miranda
20 warnings, but the only modification that I saw is they were
21 told, "you will have a right to an attorney when you get to
22 the United States. We don't have one for you here." But it
23 was still being treated as criminal investigation for

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1 terrorism, which makes perfect sense.

2 That's also why, as we've noted in the judicial
3 notice facts, the Embassy Bombing prospects were prosecuted in
4 federal court. They prosecuted Zacarias Moussaoui in civilian
5 federal court, and they even listed Mr. al Moussaoui as an
6 alleged co-conspirator.

7 In between the two rounds of this military
8 commissions litigation, after it was dropped under the Obama
9 Administration and before it was reinstated, they got an
10 indictment in the Southern District of New York for these
11 accused for the 9/11 attacks. Then I understand there was
12 political infighting in the government that prevented that
13 from going forward.

14 In fact, the terrorists -- I'm not going to say that.

15 So I've said it already, sporadic attacks that are
16 regarded as acts of terrorism are not armed conflict. That's
17 Professor Green. That's Professor Watts. It's
18 Professor Sassòli. It's the ICTY in Tadic. It's the
19 reservations of France and Great Britain. It's the law. It's
20 the answer. There was no armed conflict between the United
21 States and al Qaeda before or on 9/11.

22 So they can't prove membership in al Qaeda. They
23 didn't prove part of al Qaeda, which is the same thing. And

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1 they can't prove hostilities. That forecloses every part of
2 the definition of alien unprivileged enemy belligerents, and
3 it forecloses every part of personal jurisdiction.

4 I should also add that -- one more thing about the
5 third element. Under the personal jurisdiction part of the
6 statute, the first two subjects -- the first two parts
7 explicitly require hostilities. The third subpart does
8 implicitly require it, as we have argued previously, and so
9 has Mr. al Baluchi.

10 You will notice that it applies at the time of every
11 offense under this chapter, but every offense under this
12 chapter requires hostilities. And as the language you've
13 looked at before in that -- yeah, it's 10 U.S.C. 930p [sic]
14 subsection (c), "An offense specified in this subchapter" --
15 the ones referred to in the other part -- "is triable by
16 military commission only if the offense is committed in the
17 context of and associated with hostilities." So if there's no
18 hostilities, then there is no offense under this chapter.

19 Also secondly, if you interpret the statute
20 differently, if you say that it doesn't require hostilities,
21 then you reach an absurd interpretation that a person could be
22 put in front of a military commission for war crimes with no
23 armed conflict.

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1 MJ [COL POHL]: Okay. We're in recess. We'll be
2 recessing the commission, and this will be the last open
3 session. Before we complete our work this week, we're going
4 to have a closed session to discuss classified information
5 under Rule for Military Commission 806.

6 Commission will be in recess for approximately 15
7 minutes.

8 [The R.M.C. 803 session recessed at 1615, 8 December 2017.]

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