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1 **[The R.M.C. 803 session was called to order at 0903, 23 March 2026.]**

2 MJ [LtCol SCHRAMA]: This commission is called to order.

3 Trial Counsel, can you please identify who is in attendance  
4 on behalf of the United States, both here in Courtroom No. 2 and at  
5 the Remote Hearing Room in Virginia?

6 MTC [MR. TRIVETT]: Yes, sir. Good morning.

7 Representing the United States today in the courtroom in  
8 Guantanamo is myself, Mr. Clay Trivett; Colonel Joshua Bearden;  
9 Ms. Nicole Tate; and Captain Allison Carr. Also present in the  
10 courtroom here in Guantanamo from the Federal Bureau of Investigation  
11 is Supervisory Intelligence Analyst Kimberly Waltz and Intelligence  
12 Analyst Christina Volker.

13 Representing the United States in the Remote Hearing  
14 Facility in Virginia is Mr. Jeff Groharing.

15 Your Honor, these proceedings are being transmitted via  
16 closed-circuit television to sites in the continental United States,  
17 pursuant to the commission's orders, at Fort Meade, Pentagon, Fort  
18 Devens, and Joint McGuire-Dix.

19 MJ [LtCol SCHRAMA]: Thank you, Mr. Trivett.

20 Mr. Sowards, can you please indicate for the record who is  
21 in attendance on behalf of Mr. Mohammad?

22 LDC [MR. SOWARDS]: **[Microphone button not pushed; no audio.]**  
23 Push to talk.

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1 Good morning, Your Honor. Happy to. Present with me, Gary  
2 Sowards, is Major Elspeth Theis, United States Air Force; Major  
3 Michael Leahy, United States Air Force; and Gabriela McQuade in her  
4 civilian capacity. I am also joined in the courtroom by Captain  
5 Ayana Anderson, United States Air Force; and Mr. Derek Poteet, who we  
6 at some point will be placing on the record.

7 MJ [LtCol SCHRAMA]: Thank you, Mr. Sowards.

8 LDC [MR. SOWARDS]: And I should clarify, no one presently in  
9 the Remote Hearing Facility.

10 MJ [LtCol SCHRAMA]: Appreciate it. Thank you.

11 LDC [MR. SOWARDS]: You're welcome, Your Honor.

12 MJ [LtCol SCHRAMA]: Mr. Engle, good morning. Could you  
13 please account for your team?

14 LDC [MR. ENGLE]: Yes. Good morning, Your Honor.

15 Counsel present on behalf of Mr. Bin'Attash this morning:  
16 To my right, Captain Marian Messing; Matthew Engle, myself,  
17 obviously; William Montross; Anisha Gupta; and behind me is  
18 Lieutenant Austin Ridgeway.

19 Up in the RHR, we have Mr. Edwin Perry and Ms. Tasnim  
20 Motala.

21 MJ [LtCol SCHRAMA]: Thank you, Mr. Engle.

22 I will note that Mr. Ali's case is currently stayed pending  
23 the government's appeal of AE 942SSSS, and his counsel's presence is

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1 governed by the commission's order in AE 980C.

2 Mr. Connell, good morning. Could you please account for  
3 your team?

4 LDC [MR. CONNELL]: Yes, Your Honor. Present on behalf of  
5 Mr. Al Baluchi are myself, James Connell; Alka Pradhan; Defne  
6 Ozgediz; and Lieutenant Matthew Burns.

7 MJ [LtCol SCHRAMA]: Thank you. On Saturday, 21 March, the  
8 commission was informed that learned counsel for Mr. Hawsawi will be  
9 absent today and tomorrow due to unexpected illness. In a few  
10 minutes, we will discuss the implications of that absence. For now,  
11 though, I will note that Mr. Hawsawi has other counsel present in the  
12 courtroom.

13 Would one of you please step forward and please account for  
14 your team?

15 ADC [MS. LACHELIER]: Good morning, Judge. Suzanne Lachelier  
16 on behalf of Mr. al Hawsawi. Next to me is Major Nichole Timmreck  
17 and Sean Gleason. We have nobody in the RHR.

18 MJ [LtCol SCHRAMA]: Thank you.

19 I remind everyone that we will occasionally hear the voices  
20 of interpreters over the speaker system. They are listening and  
21 translating but are not physically in the courtroom. Additionally,  
22 because we will be making use of these interpreters during our  
23 hearings, I ask that all courtroom participants make a conscious

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1 effort to speak slowly when addressing the commission or questioning  
2 a witness, especially when quoting from a published case or reading  
3 from a prepared text.

4 I will now advise the accused of their right to be present  
5 and their right to waive said presence. You each have the right to  
6 be present during all sessions of the commission. If you request to  
7 absent yourself from any session, such absence must be voluntary and  
8 of your own free will. Your voluntary absence from any session of  
9 the commission is an unequivocal waiver of the right to be present  
10 during that session.

11 Your absence from any session may negatively affect the  
12 presentation of the defense in your case. Your failure to meet with  
13 and cooperate with your defense counsel may also negatively affect  
14 the presentation of your case.

15 Under certain circumstances your attendance at a session can  
16 be compelled regardless of your desire not to be present. Regardless  
17 of your voluntary waiver to attend a particular session of the  
18 commission, you have the right at any time to decide to attend any  
19 subsequent session.

20 If you decide not to attend the morning session but wish to  
21 attend the afternoon session, you must notify the guard force of your  
22 desires.

23 Assuming there is enough time to arrange transportation, you

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1 will then be allowed to attend the afternoon session. You will be  
2 informed of the time and date of each commission session prior to the  
3 session to afford you the opportunity to decide whether you wish to  
4 attend that session.

5 Mr. Mohammad, do you understand what I have just explained  
6 to you?

7 ACC [MR. MOHAMMAD]: Yes.

8 MJ [LtCol SCHRAMA]: Thank you.

9 Mr. Bin'Attash, do you understand what I have explained to  
10 you?

11 ACC [MR. BIN'ATTASH]: Yes.

12 MJ [LtCol SCHRAMA]: Thank you.

13 Mr. Ali, do you understand what I have explained to you?

14 ACC [MR. AZIZ ALI]: Yes.

15 MJ [LtCol SCHRAMA]: Thank you.

16 And, Mr. Hawsawi, do you understand what I have explained to  
17 you?

18 ACC [MR. AL HAWSAWI]: Yes.

19 MJ [LtCol SCHRAMA]: Thank you.

20 I intend to generally start each court day at 0900 and end  
21 no later than 1700. It is also my intent to break for prayer and  
22 meals. It is my understanding that prayer times this week will occur  
23 at approximately 1310 and 1630. It is also my understanding that the

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1 main dining facility is open from 1100 to 1330 for lunch and from  
2 1700 to 1900 for dinner.

3 To accommodate both the prayer times and meal times this  
4 week, we will take a lunch recess from 1200 to 1330 and an evening  
5 recess no later than 1700.

6 I assume that adequately accommodates the prayer schedule  
7 for everyone?

8 ACC [MR. MOHAMMAD]: Yes.

9 MJ [LtCol SCHRAMA]: Thank you.

10 I understand there may be new counsel who have not yet  
11 entered an appearance. We will now take a few minutes for them to do  
12 so and to be sworn.

13 Mr. Trivett, does the prosecution have anyone who needs to  
14 enter an appearance?

15 MTC [MR. TRIVETT]: Not at this session, sir, although I -- I  
16 did notice that Ms. Katherine Eisenreich from the FBI Office of  
17 General Counsel is now in the Remote Hearing Room.

18 MJ [LtCol SCHRAMA]: Thank you.

19 Mr. Sowards, do any of your teams -- or team have counsel  
20 making their first appearance here today?

21 LDC [MR. SOWARDS]: We do, Your Honor. Mr. Derek Poteet, Your  
22 Honor.

23 MJ [LtCol SCHRAMA]: Okay. Mr. Poteet, could you please state

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1 your qualifications.

2 DC [MR. POTEET]: Good morning, Your Honor, Derek Poteet on  
3 behalf of Khalid Shaikh Mohammad. I am a member of the Virginia  
4 state bar, admitted to practice before the U.S. Court of Appeals for  
5 the Armed Forces, the United States District Court for the Eastern  
6 and Western District of Virginia, and admitted to the bar of the  
7 United States Supreme Court.

8 I have previously been certified and qualified in my  
9 military capacity. I've now retired from the Marine Corps and am  
10 appearing before you as a civilian attorney for Mr. Mohammad.

11 I've not acted in any manner that might tend to disqualify  
12 me in this matter and I understand that it's appropriate as civilian  
13 counsel to be sworn.

14 MJ [LtCol SCHRAMA]: Correct. And we'll do that now.  
15 Mr. Poteet, could you please raise your right hand.

16 **[Counsel was sworn.]**

17 MJ [LtCol SCHRAMA]: Thank you very much.

18 DC [MR. POTEET]: Thank you.

19 MJ [LtCol SCHRAMA]: Mr. Engle, do you have any counsel making  
20 their first appearance?

21 LDC [MR. ENGLE]: We do not, Your Honor.

22 MJ [LtCol SCHRAMA]: Thank you.

23 Mr. Connell, do you have any counsel making their first

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1 appearance?

2 LDC [MR. CONNELL]: No, sir.

3 MJ [LtCol SCHRAMA]: Thank you.

4 And Ms. Lachelier, do you have any counsel making their  
5 first appearance?

6 ADC [MS. LACHELIER]: No, Judge.

7 MJ [LtCol SCHRAMA]: Thank you.

8 This week the commission was intending to cover in Docket  
9 Order 988B:

10 To receive testimony in both open and closed sessions from  
11 Special Agent Gaudin as -- or excuse me, in regards to the motions to  
12 suppress the statements of the accused in AE 630, 631, and 632  
13 series;

14 Hear oral argument on AE 978 concerning access to these  
15 proceedings by nongovernmental organizations;

16 To discuss the list of outstanding motions provided by the  
17 parties in AE 988C;

18 Hear oral argument on the prosecution's motion for a trial  
19 scheduling order in AE 989;

20 And, if time allows, to receive ex parte presentations from  
21 the defense teams on their theories of the case.

22 Given the absence, however, of Mr. Ruiz, we need to discuss  
23 those plans.

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1 Prosecution, I'd like to start with you. Mr. Trivett, I do  
2 understand that Mr. Gaudin has some health concerns.

3 Do you anticipate needing to take frequent breaks to obtain  
4 his testimony, and is there any physical constraints he has in the  
5 duration of testimony that he can provide?

6 MTC [MR. TRIVETT]: Yes, sir. So to answer your first  
7 question, I am -- I instructed the witness that if for some reason he  
8 needs some additional health and comfort breaks, to communicate that  
9 to Your Honor during his testimony.

10 And -- I don't know that I understood the second question.

11 MJ [LtCol SCHRAMA]: Is there any limitations on the duration  
12 that he can go at any one time?

13 MTC [MR. TRIVETT]: No, sir. You know, he's down here, he's  
14 ready to go. He's 11 days out from having a cancer surgery. We're  
15 going to discuss that a little bit during his testimony. But he's  
16 ready to go, he's fully prepared, and he wants to get it done this  
17 week, certainly.

18 MJ [LtCol SCHRAMA]: Okay. Now with that, Mr. Trivett, how  
19 much time do you anticipate that it will take to complete your open  
20 hearing direct examination of Mr. Gaudin?

21 MTC [MR. TRIVETT]: Yes, sir. And just for the record, I have  
22 no planned closed hearing for any testimony, although I know the  
23 defense does. They've given 505(g) notice.

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1           Approximately two days. Maybe a little more. It's going to  
2 be very similar in length to the testimony from Special Agent  
3 McFadden that he provided virtually in one of Colonel McCall's last  
4 hearings.

5           MJ [LtCol SCHRAMA]: And Mr. Trivett, can you briefly proffer  
6 the testimony that you intend to cover with Mr. Gaudin specifically  
7 relevant to Mr. Hawsawi's motion to suppress?

8           MTC [MR. TRIVETT]: Yes, sir. We don't believe there's  
9 anything relevant in the direct examination to Mr. Hawsawi's motion  
10 to suppress. The testimony is going to involve the 46 hours over  
11 nine days that Special Agent Gaudin and his team spoke to Khallad  
12 Bin'Attash specifically in January of 2007, October of 2007, and  
13 February of 2008.

14           I do not have a single question that has Mr. Hawsawi's name  
15 in it. I don't anticipate any of his answers having any mention of  
16 Mr. Hawsawi either. But you never know exactly how those  
17 questions -- the answers are.

18           MJ [LtCol SCHRAMA]: Okay. So I was going to ask you similar  
19 questions in regards to -- to Mr. Ali and Mr. Mohammad's. Do you  
20 intend to elicit testimony in regards to those two individuals?

21           MTC [MR. TRIVETT]: Those names are referenced because they  
22 were identified during the interviews.

23           MJ [LtCol SCHRAMA]: Mr. Trivett, if the court does not finish

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1 the testimony of Mr. Gaudin this week, are there any hurdles in him  
2 testifying in a future scheduled hearing?

3 MTC [MR. TRIVETT]: Potentially. He's got -- and he's  
4 authorized me to say this. He's got four different types of cancer,  
5 three of which were certified as 9/11-related based on the time on  
6 the pile and assisting in the immediate aftermath of the attacks.  
7 He's awaiting further certification for the fourth one.

8 He has not yet had full results from the surgery that he had  
9 ten days ago, so there's always the possibility. And, right up until  
10 Friday, when he was getting preliminary results, we wanted -- we  
11 could have had to inform the commission that he needed some  
12 additional surgery to address something that they found in the  
13 exploratory surgery on the 10th.

14 So there is always that hurdle. There is always that  
15 concern with him. But that said, he's here, he's ready, he's  
16 available. And if he is any way physically able, I'm confident that  
17 he will make himself available to the commission for whatever  
18 examination is appropriate.

19 MJ [LtCol SCHRAMA]: Thank you.

20 Changing gears a little bit, Mr. Trivett, moving on to  
21 AE 978, do you -- how much time do you anticipate needing to present  
22 argument on behalf of the government on that motion?

23 MTC [MR. TRIVETT]: We intend to rest on brief, as we did the

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1 last time.

2 MJ [LtCol SCHRAMA]: And the same question but in regards to  
3 AE 989, the motion for scheduling trial order. How much time do you  
4 anticipate needing for argument on that?

5 MTC [MR. TRIVETT]: Right. I don't know. We wouldn't be  
6 prepared to do that one today, but I would imagine that would be  
7 under an hour.

8 MJ [LtCol SCHRAMA]: Okay. And then I do intend to discuss  
9 with the parties this week AE 988C, which I know the parties  
10 have -- have kind of submitted to me that -- their initial thoughts.

11 Is there anything else that you want to be heard on with  
12 that? And if so, how long do you anticipate that lasting?

13 MTC [MR. TRIVETT]: I think that would take no more than  
14 roughly the same amount of time for the trial scheduling order. And  
15 that's the one, sir, for -- on the outstanding motions to compel?

16 MJ [LtCol SCHRAMA]: Correct.

17 MTC [MR. TRIVETT]: Yes, sir. So no more than an hour.

18 MJ [LtCol SCHRAMA]: Okay. Thank you, Mr. Trivett.

19 Do you have anything else for me at this time?

20 MTC [MR. TRIVETT]: No, sir.

21 MJ [LtCol SCHRAMA]: Thank you.

22 First, I'd like to hear from Mr. Mohammad's defense team.

23 Mr. Sowards, I understand that Mr. Gaudin was not the FBI

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1 agent who conducted the interrogation of your client. Do you intend  
2 to cross-examine Mr. Gaudin? And if so, do you have an approx amount  
3 of time that you will need for cross-examination? Now, I will not  
4 hold you to this estimate, but the information will assist the court  
5 in planning for the week.

6 LDC [MR. SOWARDS]: May I have just a moment to consult with  
7 the counsel who is doing the heavy lifting?

8 MJ [LtCol SCHRAMA]: You may, Mr. Sowards. Thank you.

9 **[Counsel conferred.]**

10 LDC [MR. SOWARDS]: In total, Your Honor, we'd estimate a  
11 couple of hours, to include closed.

12 MJ [LtCol SCHRAMA]: Okay. Thank you. And that was going to  
13 be my subsequent -- so combined, a couple of hours for both open and  
14 closed?

15 LDC [MR. SOWARDS]: Correct, sir. And it's my understanding  
16 it's probably more on the closed end.

17 MJ [LtCol SCHRAMA]: Okay. And then, Mr. Sowards, regarding  
18 the NGO motion AE 978, do you intend to present argument? And if so,  
19 how long do you think you'll need?

20 LDC [MR. SOWARDS]: Thank you, Your Honor. Once again,  
21 consulting with the person who is responsible, probably about 20  
22 minutes of the argument we intend to present.

23 MJ [LtCol SCHRAMA]: Okay. And then same question in regards

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1 to the motion for a trial scheduling order, AE 989.

2 LDC [MR. SOWARDS]: One moment, sir. And I -- and I do intend  
3 to do some work myself. But let me just...

4 **[Counsel conferred.]**

5 LDC [MR. SOWARDS]: Estimate of no more than 20 to 30 minutes,  
6 Your Honor.

7 MJ [LtCol SCHRAMA]: And then I do plan, as I said to  
8 Mr. Trivett, on discussing the list of outstanding motions and the  
9 answers that parties provided in AE 988C.

10 Is there anything else that you wish to be heard on  
11 specifically on that? And if so, how long do you think you would  
12 need?

13 LDC [MR. SOWARDS]: Sure. Just one moment, Your Honor.

14 **[Counsel conferred.]**

15 LDC [MR. SOWARDS]: It is my understanding, Your Honor, you  
16 are -- you're interested in discussing the -- sort of the universe of  
17 the pending motions and what -- at what time we deal with them and in  
18 what order, that sort of question. Because I ----

19 MJ [LtCol SCHRAMA]: Correct.

20 LDC [MR. SOWARDS]: Yeah, yeah. As to that -- and I'm sorry,  
21 I was just confirming. I don't think that will take much of our  
22 time. We have the two that I recall that we had specific interest  
23 in.

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1           The government had previously suggested that those would  
2 probably -- they didn't know this at the time of your trial conduct  
3 order, but their position was that those would be appropriate motions  
4 to visit after they have made their -- attempted to carry their  
5 burden to your satisfaction and to see whether we then have an  
6 opportunity or necessity to respond.

7           MJ [LtCol SCHRAMA]: Okay. And we'll cover that. So ----

8           LDC [MR. SOWARDS]: Okay.

9           MJ [LtCol SCHRAMA]: ---- I think that answers my questions.  
10 Thank you, Mr. Sowards.

11          LDC [MR. SOWARDS]: You're welcome, sir.

12          MJ [LtCol SCHRAMA]: And then last question, Mr. Sowards,  
13 while we're here this week, if time allows, do you intend to present  
14 an ex parte defense theory of the case? And if so, approximately how  
15 much time would you need for that?

16          LDC [MR. SOWARDS]: Thank you, sir. We did not intend at this  
17 time to take you up on that offer, sir.

18          MJ [LtCol SCHRAMA]: Thank you.

19          LDC [MR. SOWARDS]: You're welcome. Thank you.

20          MJ [LtCol SCHRAMA]: Okay. Mr. Sowards, there anything else  
21 for me at this point?

22 **[Counsel conferred.]**

23          LDC [MR. SOWARDS]: Not at this time, sir. Thank you very

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1 much.

2 MJ [LtCol SCHRAMA]: Thank you.

3 Mr. Engle, I understand that Mr. Gaudin was the FBI agent  
4 who conducted the interrogation of your client. I would imagine that  
5 you intend to conduct cross-examination.

6 If so, approximately how much time do you think you'll need  
7 for both the open and closed cross-examinations?

8 LDC [MR. ENGLE]: Yes, Your Honor. So the answer is a little  
9 complicated, and let me explain.

10 We received your ruling yesterday in AE 990, which was our  
11 motion to compel discovery for use in cross-examination of Agent  
12 Gaudin related to his time in Location Number 3. Yesterday we  
13 received Your Honor's ruling essentially saying that that motion was  
14 premature and denying it without prejudice to raise it later on. And  
15 as I understand Your Honor's ruling -- and I promise I'm getting  
16 to -- to the answer to your question directly, I'm not just going on  
17 long tangents.

18 But as I understand Your Honor's ruling, you are essentially  
19 saying that you are going to have the government present its case,  
20 you are going to make that initial sort of assessment, and then we'll  
21 revisit the issue at that time, if necessary, about whether we're  
22 entitled to those materials for use both in terms of  
23 cross-examination, but also in our rebuttal case, which we would go

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1 into at that time.

2 In light of -- of that ruling, what I would say is  
3 that those materials and that subject matter is a great deal of our  
4 cross-examination. It's the heart of my cross-examination. And  
5 if -- it's always a little bit dangerous to read tea leaves, but  
6 that's what we're trying to do a little bit.

7 If the commission's intention is to hear the government's  
8 case in chief, to hear Agent Gaudin's direct testimony and then give  
9 us the opportunity to litigate the issues in AE 990, get the  
10 discovery that we need for cross-examination, and then call Agent  
11 Gaudin for cross-examination, then it would be my intention to  
12 cross-examine him once we have crossed those hurdles.

13 In other words, I would not intend to cross-examine him this  
14 week, because that's going to inform my entire cross. And what I  
15 don't want to do is a partial and ill-informed cross-examination of  
16 Agent Gaudin only to get materials later that I would need to do an  
17 effective cross-examination of Agent Gaudin.

18 So -- so if I'm understanding the court's order correctly,  
19 then we would not cross-examine Agent Gaudin this week. We would  
20 look to recall him and cross-examine him when we have had that  
21 opportunity to get those discovery materials that we need.

22 I would note that that's exactly the position that we're  
23 already in with respect to Agent McFadden, which was one of the other

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1 agents who was present for Mr. Bin'Attash's LHM interrogations. His  
2 direct testimony has already been heard by the commission, but we  
3 have not cross-examined him yet. So we're in a very similar posture  
4 when it comes to that.

5           So having said all of that, and I know -- I apologize if I'm  
6 getting ahead of the question that you asked me, but our view would  
7 be we are probably going to have the lengthiest cross of Agent  
8 Gaudin, eventually. I would estimate that it's going to take a full  
9 day between open and closed. We do have some closed but the majority  
10 will be in open, I think probably four to five hours in open and an  
11 hour or two in closed, would be my best guess.

12           But that if we're going to be doing that in the future, then  
13 there would be, in my view, no problem with having him give his  
14 direct when Mr. Ruiz is present on Wednesday and getting through that  
15 this week.

16           So I think I gave you a lot more information than what you  
17 actually asked me, but I hope that I answered your question in the  
18 course of that.

19           MJ [LtCol SCHRAMA]: You did. Thank you, Mr. Engle.

20           Mr. Engle, in regards to kind of moving forward to the rest  
21 of the events ----

22           LDC [MR. ENGLE]: Yes.

23           MJ [LtCol SCHRAMA]: ---- the motion on the NGO, the 978, do

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1 you anticipate presenting argument on that and how much time do you  
2 think you'll need?

3 LDC [MR. ENGLE]: I do not anticipate presenting argument on  
4 that, Your Honor.

5 MJ [LtCol SCHRAMA]: And the motion on the -- the government's  
6 motion for a trial scheduling order, AE 989, do you anticipate  
7 presenting argument? And if so, how long?

8 LDC [MR. ENGLE]: I do. And I would estimate -- again, a  
9 estimate -- 45 minutes or so, part of which, I think, would be in  
10 closed session.

11 MJ [LtCol SCHRAMA]: Okay. I'm not going to ask -- I've been  
12 asking counsel in regards to the -- kind of the list of outstanding  
13 motions in AE 988C.

14 Generally, I think what we're going to do at some point is I  
15 had -- want to go through the joint answers just to make sure as I am  
16 reading all of these things, making sure that I'm on the same page  
17 with counsel.

18 So I think generally I'm going to stop asking that question  
19 and just let you all know that we're going to go through that  
20 together in an open session.

21 LDC [MR. ENGLE]: Yes, Your Honor.

22 MJ [LtCol SCHRAMA]: Last question. Do you intend to present  
23 an ex parte defense theory of the case? And if so, approximately how

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1 long would you need to do so?

2 LDC [MR. ENGLE]: We do -- we have requested that, and we  
3 would like to do that, Your Honor. Yes, it is our intention to do  
4 that.

5 We -- the majority of that, again, would be in open session,  
6 and I think that -- well, obviously ex parte, but not classified. I  
7 would think we probably need four hours in open, and then we would  
8 need an hour or two in closed session on top of that, so the better  
9 part of a day, Your Honor.

10 MJ [LtCol SCHRAMA]: Okay. Mr. Engle, anything else for me?

11 LDC [MR. ENGLE]: I think we're good.

12 MJ [LtCol SCHRAMA]: Thank you.

13 LDC [MR. ENGLE]: Thank you, Your Honor.

14 MJ [LtCol SCHRAMA]: Okay. I'd like to hear from Mr. Ali's  
15 defense team.

16 Mr. Connell, I understand that Mr. Gaudin was not the FBI  
17 agent who conducted the interrogation of your client.

18 Do you intend to conduct a cross-examination of the witness?  
19 And if so, approximately how much time, both in open and closed  
20 session, do you think you would need?

21 Again, I'm not going to hold you to your estimate, but this  
22 information is just useful in informing the court as we plan for the  
23 week.

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1 LDC [MR. CONNELL]: Understood, sir. Under normal  
2 circumstances, we would take the position that cross-examination of  
3 Special Agent Gaudin would be prohibited under the stay.

4 In this situation because of the health issues the  
5 government has informed us about, there is something of a  
6 preservation of testimony issue or flavor to the examination of  
7 Special Agent Gaudin. And I know that the government has asked  
8 permission, and we have not objected, for that to be video-recorded,  
9 which I assume a question we'll take up at another time.

10 But in light of that and Special Agent Gaudin's importance  
11 to the overall 9/11 investigation and a number of issues that are  
12 additional to the LHM interview of Mr. Bin'Attash, if we are acting  
13 independently, meaning that if we are going first and the only people  
14 who are asking questions, we would expect one day of open  
15 cross-examination and between one and two hours of closed  
16 cross-examination.

17 The original idea was if we were following the Bin'Attash  
18 team, obviously we would not duplicate efforts that they had already  
19 made. If they had already covered a topic sufficiently we would not,  
20 and our time estimate would have been shorter. But if we are  
21 operating independently, that's our time estimate.

22 MJ [LtCol SCHRAMA]: All right. Thank you.

23 And, Mr. Connell, how much time do you anticipate needing

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1 for your motion regarding the NGO access, which is AE 978?

2 LDC [MR. CONNELL]: Having argued it once, Your Honor, it's  
3 only five more minutes.

4 MJ [LtCol SCHRAMA]: Okay. The same question in regards to  
5 the government's motion for a trial scheduling order?

6 LDC [MR. CONNELL]: 30 minutes, sir.

7 MJ [LtCol SCHRAMA]: And, Mr. Connell, do you intend to  
8 present an ex parte defense theory of the case to the court? And if  
9 so, approximately how long do you anticipate that taking?

10 LDC [MR. CONNELL]: We do, Your Honor, and we expect about  
11 three hours.

12 MJ [LtCol SCHRAMA]: Okay. Mr. Connell, anything else for me?

13 LDC [MR. CONNELL]: Two quick things, Your Honor: First, with  
14 respect to 988C, we're prepared to address the items on that list in  
15 whatever level of detail seems appropriate. In the conversation we  
16 can give detailed explanation of our positions or not depending on,  
17 you know, how that conversation goes.

18 I do have two housekeeping matters, which I can take up now  
19 or at a different time.

20 MJ [LtCol SCHRAMA]: Why don't we -- why don't you tee them up  
21 and then we can figure out whether we need to address it now or ----

22 LDC [MR. CONNELL]: Sure.

23 MJ [LtCol SCHRAMA]: ---- kind of after we get through this

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1 initial session.

2 LDC [MR. CONNELL]: Your Honor, you know, there's always a  
3 sort of a loss of muscle memory around -- around hearings and two  
4 issues have come up.

5 The one is I wanted to inquire of the court and make sure  
6 that the court still intends to abide by the rules which were laid  
7 out in AE 965 regarding access to the courtroom. We had requested  
8 access to the courtroom yesterday and instead met with -- we were  
9 required to meet with Mr. al Baluchi at the standard location.

10 AE 965 would provide that -- assuming that the guards can  
11 support, that the courtroom is available for joint or individual  
12 meetings on -- while the military judge is on island, which  
13 specifically includes the Sunday before hearing. So that's the first  
14 issue. I just want to make sure that AE 965 is still operative.

15 And the second issue, which I also put down to, you know,  
16 first day of hearings and that sort of thing, this morning we were  
17 not allowed in the courtroom between 0800 and 0840, and I think there  
18 was some confusion over the status of the courtroom during that time.

19 Obviously that's normally the time that people bring  
20 material into the courtroom. Sometimes, depending on the arrival  
21 time of the client, I meet with Mr. al Baluchi. You know, that's  
22 typically court time or time that we make use of the court. And I  
23 just wanted to clarify the status of that.

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1 I think it was probably a misunderstanding on somebody's  
2 part, but I request the military commission's guidance on the fact  
3 that, you know, we can come and go in the courtroom in service of  
4 legal business.

5 MJ [LtCol SCHRAMA]: Thank you, Mr. Connell, for bringing this  
6 to my attention, number one.

7 Number two, I believe when we were down here in December on  
8 the record I laid out, as the new presiding judge, kind of my  
9 expectations. And I do agree -- right? -- both the ability to have  
10 access to the courtroom and access to your client in non-court times  
11 when the guard force can accommodate.

12 So what we'll do is when we return to the session, I'll  
13 reiterate my instructions from December for the benefit of everyone.

14 What I would ask is that if there's still a problem, you  
15 work with Mr. Trivett to figure out the problem and if there's a  
16 solution. If there's not, please reraise it to my attention and then  
17 we can deal with it more directly.

18 But my hope is by reiterating later my expectations that  
19 I've previously laid out, I believe that will most likely solve  
20 whatever issues presented itself sufficiently.

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

22 MJ [LtCol SCHRAMA]: Anything else, Mr. Connell?

23 LDC [MR. CONNELL]: No. Thank you, sir.

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1 MJ [LtCol SCHRAMA]: Thank you.

2 Okay. I would like to hear from Mr. Hawsawi's defense team.

3 Good morning, ma'am.

4 ADC [MS. LACHELIER]: Good morning, Judge.

5 MJ [LtCol SCHRAMA]: I understand that Mr. Gaudin was not  
6 involved in the interrogation of your client. Given Mr. Ruiz's  
7 absence, would you like to be heard concerning whether the commission  
8 should proceed to take Mr. Gaudin's testimony?

9 ADC [MS. LACHELIER]: Yes, Judge.

10 We would object to proceeding with Mr. Gaudin's testimony in  
11 the absence of learned counsel. Even though Mr. Gaudin was not  
12 directly present at Mr. Al Hawsawi's LHM interrogation, Mr. Gaudin  
13 was around during the LHM interrogations.

14 The absence of learned counsel on the material -- on  
15 material testimony is unacceptable. Mr. Hawsawi is being asked to  
16 waive a right, essentially, of -- to his right to learned counsel  
17 because of the pressures of being here, because of the pressures that  
18 the government brought on by deciding to come here by delaying the  
19 case, delaying the case with -- I don't want to get into the details,  
20 Judge, but you're aware, delaying the case for the PTA litigation.  
21 We are here in part at this juncture, and with Mr. Gaudin in the  
22 advanced stages that he is, because of the government's delay. To  
23 ask to then put that pressure to put on Mr. Al Hawsawi to waive the

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1 right to learned counsel is inappropriate and unlawful.

2 Mr. Ruiz is the one who prepared Mr. Gaudin's  
3 cross-examination. He is prepared to cross-examine him on certain  
4 matters. And I would also emphasize to the judge that limiting the  
5 testimony -- given what the government says about Mr. Gaudin's  
6 prognosis, limiting the testimony to merely the LHM interrogation is  
7 inappropriate given that Mr. Gaudin's prognosis is poor, according to  
8 the government.

9 And that is because Mr. Gaudin was involved in certain  
10 aspects of the case, not just the LHM interrogation, and so  
11 examination of Mr. Gaudin on matters broader than simply the LHM  
12 are -- would be appropriate at this juncture. And, again, Mr. Ruiz  
13 is the one who prepared the examination of Mr. Gaudin. So...

14 MJ [LtCol SCHRAMA]: Okay. Ms. Lachelier, let me ask you  
15 this. If we were to begin the direct testimony of  
16 Mr. Gaudin -- obviously, there's counsel here representing the  
17 client -- Mr. Ruiz would be able to receive a full transcript of the  
18 direct examination. Why would he not be able to conduct, then, the  
19 cross-examination when he returns? And, obviously, the court would  
20 provide the amount of time that he would need to prepare that, but on  
21 a Wednesday, Thursday, Friday?

22 ADC [MS. LACHELIER]: I want to emphasize, Judge, a couple of  
23 things. We're only asking for two days. This is not like a huge

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1 extension of time. In any normal setting, this would not be an  
2 unusual request. It's unusual only because the government chose this  
3 venue and put us at this juncture.

4 So the question is difficult to answer because, essentially,  
5 you're saying it's not sufficient. It's sufficient for Mr. Ruiz to  
6 read a transcript to get the gist of the witness' demeanor, and  
7 that's just not how trials are conducted.

8 MJ [LtCol SCHRAMA]: I understand that ----

9 ADC [MS. LACHELIER]: That's foremost ----

10 MJ [LtCol SCHRAMA]: ---- to a certain degree -- right? -- but  
11 based on the time allotment indicated by the  
12 parties -- right? -- we're not going to get through it in three days.

13 So, again, my question is, we have counsel here. Can you  
14 not all determine the demeanor of the witness and convey that? I  
15 guess that's the trouble that I'm having trouble understanding.

16 ADC [MS. LACHELIER]: Well, what I was going to finish saying,  
17 also, Judge, is you're asking Mr. Ruiz to read two days' worth of  
18 testimony and transcript. I'm not going to -- he's willing to try to  
19 be here on Wednesday. He's still -- jury's out on that, no pun  
20 intended.

21 But he -- he is not -- I'm not saying that he's going to be  
22 capable by 10 o'clock at night, whenever the transcript shows up, to  
23 read two days' worth of transcripts. I think that's a lot to ask of

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1 somebody who's not well. So I caution on that.

2           Could we tell him the demeanor? Yes. But we're not learned  
3 counsel. We're not looking for the things that he would be looking  
4 for. We don't have his level of experience or knowledge about what  
5 might be important in the moment. I think it's critical -- it is  
6 critical that learned counsel be here to observe the witness in  
7 addition to prepare questions in light of what the witness says.

8           So it -- I think it -- I don't think it's semantics. And to  
9 start parsing the counsel -- right? -- because it's inconvenient is  
10 really placing an inordinate burden on the defense for -- for a  
11 catalyst of issues that the government caused that got us to this  
12 point.

13           We as -- and I'll emphasize also, Judge, and I don't think  
14 it needs to be said, but I'm going to say it, we were the -- one of  
15 the teams that was not in the position to say we should go forward.  
16 We want a stay. We would be on standby because we still have the  
17 appellate issue pending on the PTAs.

18           So, again, this is not of our doing except for Mr. Ruiz's  
19 illness, which is not of his doing. And what you're asking him to do  
20 is read transcripts late at night when he's not -- the nighttime is  
21 when his pneumonia is the worst -- and to read transcripts and try to  
22 catch up late at night.

23           Even if we were able to tell him, okay, this is what we

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1 perceived from the demeanor, you're asking him to glean from the  
2 record, late at night when he's not feeling well, and try and prepare  
3 an examination.

4 That's not just unfair to Mr. Ruiz. It's unfair to  
5 Mr. al Hawsawi, mostly, because that's his right and it's his learned  
6 counsel, and he needs his learned counsel to be 100 percent there.

7 MJ [LtCol SCHRAMA]: Okay. Another question. The witness for  
8 the government is primarily provided to support the government's  
9 burden as to another named accused other than your client. What  
10 should I make of that differentiation?

11 ADC [MS. LACHELIER]: Again, I'll -- and I know that the  
12 investigation part of the case is not on the record and in front of  
13 you, but I think there are aspects of the record of that  
14 investigation that are in front of you. Gaudin was present at  
15 certain parts of the investigation that are critical to  
16 Mr. al Hawsawi's case, particularly -- and the government's aware of  
17 this -- overseas investigation.

18 And those -- that matter would be a fair area of  
19 examination, again, given Mr. Gaudin's condition. And that is key  
20 to -- it is an -- a very important part of our case.

21 So even -- and I'm not conceding that just the LHM piece is  
22 still important to us because, again, Mr. Gaudin was present around  
23 the LHMs. What he observed, who was there, who saw what is important

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1 to every one of the defendants here.

2 So without conceding the LHM piece, there is this other  
3 investigative piece to the case that is important to the -- to  
4 Mr. al Hawsawi's defense. And that is an area that should be fair  
5 game in this examination of Mr. Gaudin given his prognosis.

6 MJ [LtCol SCHRAMA]: I certainly agree with you on the -- the  
7 breadth of that cross-examination. But, primarily, we're here today  
8 in regards to the LHM statements. So why can't we take up the LHM  
9 portion and then re-call the witness at an appropriate time for these  
10 other additional aspects that you've annotated.

11 ADC [MS. LACHELIER]: Well, it sounds like the -- the  
12 emergency is undoing itself, if that's the case, because the  
13 emergency of examining Mr. Gaudin this week, according to the  
14 government, is because of his prognosis.

15 But now, it's okay to put it off for a while and parse his  
16 testimony over a period of time, which is fine with us. But if  
17 that's the case, then what is the harm in delaying his testimony for  
18 two days so we can see if Mr. Ruiz can be present?

19 MJ [LtCol SCHRAMA]: I guess I'm not sure the emergency. The  
20 court's intention, via the order, the docketing order, was to take up  
21 the LHM statement this week. That's -- that is why we are here.

22 So I guess that's my question. Why -- why can't the court  
23 take up that portion of it, and then at a later point, if we don't

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1 get to everything that you're annotating, take up this other portion?

2 ADC [MS. LACHELIER]: Well, for one -- for practical reasons,  
3 for one. There are other matters that the court could take up until  
4 Mr. Ruiz is present that we wouldn't object to conducting without the  
5 presence of learned counsel. So that's -- just very practically  
6 speaking, Gaudin is one we object to. There are other matters we  
7 would not object to.

8 MJ [LtCol SCHRAMA]: Okay. So let's stop there because I'll  
9 piggyback now to go into to those, and then we'll come back.

10 ADC [MS. LACHELIER]: Okay.

11 MJ [LtCol SCHRAMA]: One of the things that was part of the  
12 docketing order was the commission taking up the motion for NGO  
13 access ----

14 ADC [MS. LACHELIER]: Right.

15 MJ [LtCol SCHRAMA]: ---- AE 978.

16 ADC [MS. LACHELIER]: And we have no objection to pursuing  
17 that -- that without the presence of learned counsel.

18 MJ [LtCol SCHRAMA]: Okay. And then with that, do you  
19 intend -- if Mr. Ruiz is not here, does somebody intend to make  
20 argument on that?

21 ADC [MS. LACHELIER]: No, we do not.

22 MJ [LtCol SCHRAMA]: Okay. Would Mr. Ruiz want argument on  
23 that when he returns later in the week?

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1 ADC [MS. LACHELIER]: No, he would not.

2 MJ [LtCol SCHRAMA]: Okay. And then what about the  
3 government's motion for a trial scheduling order, AE 989? Is that  
4 something that you all would be prepared on moving forward on without  
5 Mr. Ruiz?

6 ADC [MS. LACHELIER]: That was something Mr. Ruiz was going to  
7 handle.

8 MJ [LtCol SCHRAMA]: Okay. So would you be willing to move  
9 forward on it without him, and then he'd be given the opportunity to  
10 argue when he returned? Or are you arguing that he would also need  
11 to be present for ----

12 ADC [MS. LACHELIER]: He would need to be present for that  
13 one, yeah.

14 MJ [LtCol SCHRAMA]: Why is that?

15 ADC [MS. LACHELIER]: Because we don't know exactly what's  
16 going to be said necessarily about -- it sounds a little bit like  
17 a -- a back and -- it's going to be a lot of back and forth between  
18 the teams and the government about where the motions are. And that's  
19 a very much in-the-moment thing. And, again, it would require his  
20 reading the transcript to get caught up.

21 That one, I agree, is more clinical in reading the  
22 transcript. However, again, I emphasize the -- the demand to ask him  
23 to read transcripts late at night on Tuesday night before he comes

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1 back in when he is still trying to recuperate is excessive. He -- I  
2 think his hearing -- his hearing, the back and forth about the status  
3 of each motion, is important for him to be able to respond properly.

4 MJ [LtCol SCHRAMA]: Okay. And then if I wish to conduct a  
5 discussion on 988C, which is the list of outstanding motions that the  
6 parties had put together, is that something that you're able to do  
7 without Mr. Ruiz present?

8 ADC [MS. LACHELIER]: He was going to handle that too. So I  
9 would rather not -- it's best that we not do that one either.  
10 Because I -- what is -- what is pending and the status of various  
11 motions, I think, is ultimately a strategy decision about where we  
12 are with the case, and he needs to hear where -- the arguments of  
13 government counsel on that one.

14 MJ [LtCol SCHRAMA]: Okay. And then does your team intend  
15 this week, or in general, to present an ex parte defense theory of  
16 your case ----

17 ADC [MS. LACHELIER]: No, we do not.

18 MJ [LtCol SCHRAMA]: ---- and if so, how long would that take?

19 ADC [MS. LACHELIER]: We don't. We don't intend to produce  
20 it -- to conduct any ex parte ----

21 MJ [LtCol SCHRAMA]: Okay.

22 ADC [MS. LACHELIER]: ---- this week.

23 MJ [LtCol SCHRAMA]: So going back to Mr. Gaudin. If we begin

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1 direct examination of Mr. Gaudin on Wednesday -- right? -- and we  
2 only get through Friday the direct examination, then what?

3 ADC [MS. LACHELIER]: If we begin and we only get through  
4 Friday? He has ----

5 MJ [LtCol SCHRAMA]: Yeah. I mean, I think the government has  
6 proffered it's going to take approximately two to three days.

7 ADC [MS. LACHELIER]: If we begin on Wednesday, you're saying,  
8 Judge, right?

9 MJ [LtCol SCHRAMA]: Correct.

10 ADC [MS. LACHELIER]: It sounds like, regardless, we are going  
11 to need to call him back given Mr. Bin'Attash's counsel's position,  
12 right? Again, I don't think we're in a different place if we start  
13 Wednesday.

14 Am I understanding right?

15 **[Counsel conferred.]**

16 ADC [MS. LACHELIER]: Yeah, so I just ----

17 MJ [LtCol SCHRAMA]: I just want to caution you -- right? -- I  
18 think counsel has proffered a strategic decision they are making  
19 based on the court's decision to possibly -- right? -- reconsider a  
20 discovery motion.

21 So you're saying you're also basing your opinion on that  
22 caveat?

23 ADC [MS. LACHELIER]: Well, what I understood where it left

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1 us, and maybe I missed something -- I'm still looking at counsel to  
2 make sure I'm not misstating it -- where they intend to -- they  
3 expect they might need to call him back in light of the testimony  
4 that he gives on direct.

5 And if that's the case, then Mr. Gaudin is coming back no  
6 matter what. So I do not see how two days' delay this week changes  
7 the mix of we're not done with Mr. Gaudin this week.

8 MJ [LtCol SCHRAMA]: I just want to caution you, you're  
9 making -- you're making a lot of assumptions to come to that  
10 decision.

11 ADC [MS. LACHELIER]: That's the nature of this case, Judge.  
12 I'll give you over a decade on it, and there's a lot of assumptions  
13 that have to be made. So but just, yes, but that seems to be where  
14 the record is leading us.

15 MJ [LtCol SCHRAMA]: Okay. Ms. Lachelier, anything else from  
16 me that you want to bring up that we didn't otherwise discuss?

17 ADC [MS. LACHELIER]: I -- I think I've made the record on the  
18 waiver of learned counsel. And I just want to emphasize that  
19 it -- you need to find good cause. This would be a removal of  
20 learned counsel if you conduct proceedings that are material where  
21 we've said that learned counsel's presence is necessary because he's  
22 involved in the preparation and he would need to be here for strategy  
23 calls.

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1           Learned counsel holds the cards when it comes to strategy  
2 calls on this case. None of us here today, the counsel for  
3 Mr. Hawsawi, are competent to represent him in a capital proceeding  
4 alone without learned counsel present. And there's no good cause to  
5 remove learned counsel at this point. And two days is not a lot to  
6 ask, particularly given what's come out about the fact that  
7 Mr. Gaudin is likely going to have to be called back.

8           Thank you, Judge.

9           MJ [LtCol SCHRAMA]: Okay, thank you.

10          LDC [MR. ENGLE]: Your Honor, may I be heard again? This is  
11 Mr. Engle.

12          MJ [LtCol SCHRAMA]: Yeah, Mr. Engle, we're going to circle  
13 around to you. I'm going to go in kind of back in order just to kind  
14 of get everyone's thoughts on what we discussed primarily now,  
15 right? The court is figuring out the order of events and what to  
16 proceed on, if we decide to proceed, based on Mr. Ruiz's temporary  
17 unavailability.

18          So, Mr. Trivett, I'll ask you, do you have any thoughts on  
19 what I just discussed with counsel?

20          MTC [MR. TRIVETT]: So I wanted to call the commission's  
21 attention to how much time it takes any witness to prepare to testify  
22 here because of the broad nature of the litigation and it not always  
23 applying simply to suppression.

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1           We believe we have called, and we do have a burden of  
2 proving, by a preponderance of the evidence, that the statements that  
3 Mr. Bin'Attash made to Special Agent Gaudin were voluntary.

4           But I want to make sure that the commission understands the  
5 government's position on that because it did get raised by a couple  
6 of counsel. And understanding and respecting the commission's ruling  
7 on the bifurcated nature of the litigation and the burden shifting as  
8 far as meeting that preliminary burden, the government does still  
9 believe that if we met that burden, then the issue is over for  
10 voluntariness, notwithstanding the commission's ruling.

11           But that said, when we first started litigating this issue,  
12 there were, I think, 113 witnesses that had been requested from the  
13 defense counsel, 28 of which we believe was relevant to the  
14 suppression litigation. Those were the ones that we decided to say  
15 we are going to produce those.

16           And in producing those witnesses, there were both  
17 defense-requested witnesses and government-requested witnesses.  
18 Special Agent Gaudin is a government-requested witness. He is the  
19 last government witness on our burden for any of the suppression  
20 litigations for any of the teams.

21           So he's here. He is prepared. It takes hours and hours and  
22 hours for these witnesses to prepare. This would now be the third  
23 witness in a row that the government presented that the defense now

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1 have months to prepare a cross-examination for.

2           And while that's obviously -- there wouldn't be any counsel  
3 who wouldn't want three months to prepare for a cross-examination,  
4 I'm more concerned about the witnesses, how difficult it is for the  
5 witnesses.

6           Because they have to drop whatever they're doing -- and,  
7 again, Special Agent Gaudin is retired. Special Agent McFadden is  
8 still an employee of the Department of Defense. Supervisory  
9 Intelligence Analyst Kimberly Waltz, which is the other witness that  
10 this occurred to, is also someone who is our team case analyst.

11           So to have them start, which is fine -- and I do want  
12 Special Agent Gaudin's testimony this week from us for sure. But  
13 what I'm trying to communicate is that every team that's prepared to  
14 do so should be forced to cross-examine him today, this week, until  
15 Friday at 1700.

16           That's got to be our position. We have to get as far along  
17 as possible with that. It's not fair to ask him to re-prepare for  
18 his testimony three months from now or in May or whenever it is  
19 because it's very difficult. This is obviously -- it's a criminal  
20 case that happened 26 years ago almost -- or 25 years ago almost, and  
21 he's going to be testifying about something that occurred in 2007 and  
22 2008.

23           So that's our -- our position on that piece of it is that he

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1 should testify, that it's limited to suppression. It's our burden.  
2 It's our witness. We're going to call him strictly on those  
3 parameters, none of which should apply to Mr. Hawsawi.

4 At least in -- you know, and I -- I count Walter Ruiz as a  
5 colleague. He's a Navy guy. He's in our reserve unit. I wish him  
6 the best. I hope he's healthy. But nothing that I saw from that  
7 e-mail indicates that by Wednesday he's going to be ready. Right?  
8 He was just diagnosed with pneumonia a couple of days ago.

9 So to stop now and not allow for Special Agent Gaudin, who  
10 is fully prepared to testify for the next five days, on an issue  
11 that, quite frankly, as far as what we're eliciting, isn't in any  
12 relation to Mr. Hawsawi, we think would be patently unfair to the  
13 witness.

14 So that was the primary -- that was the primary issue that I  
15 wanted to stand and address with the commission.

16 MJ [LtCol SCHRAMA]: Okay. Thank you.

17 MTC [MR. TRIVETT]: Thank you.

18 MJ [LtCol SCHRAMA]: Mr. Sowards, do you have any response on  
19 the court's question of proceeding forward with Mr. Gaudin in  
20 Mr. Ruiz's temporary absence?

21 LDC [MR. SOWARDS]: Thank you, Your Honor. First let me say  
22 no one envies your current position here, and we appreciate your  
23 diligent, earnest efforts to sort this out. Because it is a -- a

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1 kind of a conundrum that often faces trial courts with the immovable  
2 object of the Sixth Amendment and Eighth Amendment right to competent  
3 counsel in a capital case, and the irresistible force of things that  
4 happen that prevent counsel from being there.

5 But I did want to say that -- a couple of things very  
6 quickly, and what's in -- with due respect for the delicate position  
7 that we're all in.

8 The first is that I had an inclination to actually note in a  
9 very respectful and delicate nonadversarial way, if that's possible,  
10 actually an objection to the conversation you had with Ms. Lachelier,  
11 not because she isn't, as we all know, a superb, very competent  
12 attorney, but that in terms of Sixth and Eighth Amendment law in this  
13 setting, my thought was -- and, again, it's not my case, so I was  
14 struggling with myself whether I should say anything at the time  
15 at -- or not at all.

16 But it struck me as an insoluble situation that the  
17 commission is called upon -- and I understand the good instincts upon  
18 which you proceeded -- but you were being called upon to talk about  
19 the Eighth Amendment and Sixth Amendment rights of Mr. Hawsawi in the  
20 absence of his capitally qualified counsel.

21 And Congress, when they reinstated the Military Commissions  
22 Act of 2009, one of the positive developments from the former version  
23 was to note the statutory -- which tracks the constitutional

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1 obligation to conduct all meaningful and significant proceedings in  
2 the presence of capitally qualified counsel on behalf of the  
3 defendant.

4           And there have been times in this lengthy proceeding when  
5 counsel and the commission have had to accommodate -- as you noted,  
6 they try to have different ways to accommodate the interests of both  
7 going forward in an efficient fashion but, at the same time, not  
8 losing sight of or inadvertently compromising the right of counsel in  
9 a capital proceeding.

10           And, usually, what happens -- and, again, this is not  
11 criticizing Your Honor. What I'm saying is we -- I understand this  
12 sort of no-win situation that we find ourselves in with this issue,  
13 especially with Mr. Gaudin's needs.

14           But, generally, what has happened is it has been a -- or it  
15 has always been an effort joined by the commission and the capitally  
16 qualified counsel to find a way out of the problem. One example is,  
17 of course, the loss of Mr. Herrington's assistance to Mr. Binalshibh  
18 and the way that worked out with sort of overlapping appointment of  
19 capitally qualified counsel while he eased out of the case.

20           This is a situation where we hear only from Mr. Ruiz's ably  
21 qualified co-counsel saying that a medical doctor has diagnosed a  
22 medical situation, which prevents him from being here under what  
23 Mr. Trivett acknowledges are very grim and foreboding circumstances.

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1           So we have two, you know, medical issues that are -- that  
2 are affecting this case, but one of them prevents the capitally  
3 qualified counsel from being here to represent his client on this  
4 very issue about whether he should be here to represent his client.

5           So that's the -- that's the first problem, that I think  
6 that -- and I would certainly say, as one who has relied on a very  
7 important issue on statements that Mr. Ruiz alone made on the record  
8 to vindicate the interests of all of the clients, and I refer to the  
9 question about the pretrial agreements and whether we had commenced  
10 performance.

11           I appreciate the participation of all capitally qualified  
12 counsel in this common defense of a case that the government made the  
13 decision, ironically enough, against Mr. Ruiz and Mr. al Hawsawi's  
14 wishes, to make this a joined effort and to keep us together lo these  
15 many years.

16           So I have a -- I think that there's a risk, a very great  
17 risk, that we are going forward with a structural error being built  
18 into this record from this point forward.

19           The second thing that I would ask the commission to keep in  
20 mind is that Mr. Trivett -- and I don't believe he intentionally  
21 overlooked this, but he was -- he got into the issue of the shifting  
22 burden regimen that Your Honor had, I believe, correctly imposed upon  
23 us because it's exactly what the law requires, when, as here, the

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1 government has conceded that the earlier statements that were  
2 extracted from the defendants were done so under coercion.

3           It then falls to the government to show that those -- that  
4 that coercion has been completely attenuated by the time they got the  
5 statements that they want to admit. And you have correctly said,  
6 fine, let me see if you, the government, can discharge your burden on  
7 that narrow, focused issue on attenuation.

8           And what Mr. Trivett said is, if we look as if we have  
9 discharged it at this stage, the game or the litigation is over,  
10 which, as you had already acknowledged, is not correct. But the  
11 issue that I think effects what we may be able to talk about later  
12 this week in terms of the pending motions to compel is that he  
13 reminds the commission, if you've had a chance to go back and read  
14 all of the records on this point up to now, that, initially, we had  
15 identified -- and I believe actually not only 116. I believe the  
16 number is more like 130, but I may have lost count at this  
17 point -- witnesses that are important to the issue of attenuation  
18 because, just as a -- a quick example, in the 629 series, which we'll  
19 be talking about, what we allege and -- and it has to do with  
20 classified information, so I won't go into detail, but it sets up  
21 exactly why there was not attenuation between what was going on in  
22 the black sites and what happened here in January of 2007.

23           And in between those -- those two points was the litigation

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1 of the government, which had initially tried to convince the  
2 commission that the FBI and the CIA were completely independent  
3 actors in what was going on.

4 And when that -- that theory, that narrative was so  
5 completely demolished, they actually filed 824 to try to get the  
6 commission to stop the defense from presenting more issue -- more  
7 evidence on that issue, and the commission denied it.

8 But what they said in terms of the witnesses -- and so these  
9 are a host of witnesses who go to issues that are still alive and  
10 active that we can show, if they somehow miraculously make a showing  
11 of some kind of attenuation, that we can rebut it. What they said to  
12 this commission was not give us six witnesses, and that will be  
13 enough for the commission to decide this case.

14 What they said was -- and this is in AE 630Y -- I'm  
15 sorry -- yeah, 630Y. What they said to the commission was give us  
16 those six witnesses, let us see if we have discharged our burden, and  
17 then the commission can decide who and how many of the additional  
18 witnesses the defense needs to rebut that. And that's exactly what  
19 you've set up.

20 And so I would just say that in case Mr. Trivett had  
21 inadvertently said something that I don't think is -- is correct in  
22 terms of how we got here and what your -- Your Honor's organization  
23 of this litigation and the trial conduct order has appropriately

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1 tracked, he's inadvertently said something contrary to that. I just  
2 wanted to correct him.

3 MJ [LtCol SCHRAMA]: Thank you, Mr. Sowards. And I think  
4 Mr. Trivett did qualify what he believed was the correct  
5 interpretation versus what the court's interpretation is.

6 LDC [MR. SOWARDS]: Right.

7 MJ [LtCol SCHRAMA]: I think he made the proper qualification  
8 in his statement.

9 To your first point, Mr. Sowards ----

10 LDC [MR. SOWARDS]: Yes, sir.

11 MJ [LtCol SCHRAMA]: And I appreciate you pointing out  
12 10 U.S.C. 949a, which is the statute that sets up the right of the  
13 accused to learned counsel in these commissions. Now, the statute  
14 does kind of qualify that to -- to the extent practicable. What do  
15 you make of that verbiage in light of this proceeding where the  
16 learned counsel is going to be given every opportunity to  
17 cross-examine the witness appropriate and thoroughly? What should  
18 the court make of that language?

19 LDC [MR. SOWARDS]: Yeah. Well, first, I think that  
20 Ms. Lachelier, for being capitally unqualified, did a very good job  
21 of explaining why those are two different things.

22 Coming in after -- and I know Mr. Trivett thinks there's an  
23 advantage to reading a cold transcript and coming back weeks or

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1 months later when all of the kind of dynamics of the courtroom have  
2 died down and dissipated and say, but you said this, and what about  
3 this?

4           People, when they're prepared for cross-examination, are  
5 ready for the questions they're going to ask someone. And if  
6 somebody deviates from prior inconsistent statements, we all know  
7 there's a certain dynamic and chemistry in the courtroom to confront  
8 the individual at that time.

9           And I -- and obviously with -- and I'm not speaking now  
10 specifically of Special Agent Gaudin. I don't cast any aspersions on  
11 him. I'm saying but what we have to be prepared for, what any  
12 attorney has to be prepared for, is the fact that people are going to  
13 start qualifying and modifying and trying to minimize statements and  
14 actions that they have done in their past that are perhaps, upon  
15 reflection, not things they want to endorse now.

16           And when you catch them in that, when you show to the trier  
17 of fact at that in the moment, it's much, much more powerful than  
18 coming back months later when, by the way, not only have we had the  
19 chance to review the transcript, but the prosecution has had the  
20 chance to review the transcript and say -- not -- again, nothing  
21 improper, but just to say, you know, they're probably going to be  
22 asking you about this. And I've got to say, it looks like a pretty  
23 inconsistent statement or fact with what you said before. Do you

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1 think there's any honest explanation for that apparent inconsistency?

2           And it allows the witness an opportunity to come up with an  
3 answer or to pose a response that is lost in the moment in, you know,  
4 what we sometimes refer to as the heat of battle.

5           But in terms of the actual language of the statute, to the  
6 extent practicable, I actually read as more an affirmation of the  
7 right to the assistance of qualified counsel. It doesn't mean if the  
8 prosecutor's in a good mood or the planes are running on time or  
9 someone, you know, wants to accord that right for a reason.

10           It is, can you, as a practicable matter, recognize and  
11 respect the right to capitally qualified counsel. This is a bedrock  
12 right that has been recognized by the United States Supreme Court  
13 since at least 1932 in the case of Powell v. Alabama. And  
14 particularly in pretrial settings they have said it's every bit as  
15 important as having the assistance of counsel at trial.

16           So imagine if we were at trial and counsel can't be here  
17 because of a diagnosed medical issue, would we say, let us postpone  
18 the proceedings for two days to see whether his doctor clears him for  
19 action.

20           And if need be, I would say if a doctor comes in and says,  
21 you know what, either this individual is too sick or he is too sick  
22 and he is too contagious to have him go back into that courtroom,  
23 and, as Ms. Lachelier said, to spend the hours that we all spend the

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1 night before getting ready. If that's the case, then that's all the  
2 more reason to say we are sorry, we are very sorry that we have an  
3 irreparable situation here that requires us to postpone the testimony  
4 of this witness. You know, and Godspeed in terms of being able to go  
5 forward.

6 But the "if practicable" language does not mean it -- I  
7 don't think anyway -- should be considered as an option and what it's  
8 enforcing on the military commissions is to do everything possible to  
9 ensure that that counsel is there.

10 And I think -- I don't think it means that if you do  
11 everything possible and you can't provide counsel at this time, you  
12 go forward anyway. I just don't think that's the case.

13 And I think in some ways it's -- it's -- and I don't mean  
14 this at all in a humorous fashion, it's if we couldn't have your  
15 presence here today. I know that you are assisted, as the military  
16 judges in this case have been, by an incredibly talented and  
17 knowledgeable staff of special attorneys and clerks and CISOs and  
18 folks who really know this stuff, but nobody would think for a  
19 nanosecond that someone should say, well, why don't you just for a  
20 day or two fill in for Judge Schrama. Because he is not only under  
21 the weather, he has been told by his doctor to confine to quarters.  
22 But we would really, you know, kind of like to accommodate people.  
23 Nobody would give that a passing thought.

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1           Because, you know, one time the -- read a story about the  
2 airline pilots who were on strike, and one of the airline pilots  
3 said, well, you know, the thing about a pilot of a plane, is it's  
4 sort of like a tennis racket. When you need one, nothing else will  
5 do.

6           And I guess we can say that about a whole host of things,  
7 but things like judges and at least in terms of the conception of a  
8 constitutional standard, a constitutional prerequisite, people who  
9 have qualified, officially qualified as learned counsel are not  
10 fungible in the sense that you can get someone else who may be  
11 whip-smart and probably has a lot of insights and can do a great job.

12           You cannot interchange them because that's the -- that's the  
13 easy reference that a reviewing court has to determine whether the  
14 presumption of appropriate counsel has been provided.

15           And that's what we're missing here.

16           MJ [LtCol SCHRAMA]: Well, Mr. Sowards, I appreciate your  
17 thoughts.

18           LDC [MR. SOWARDS]: Thank you.

19           MJ [LtCol SCHRAMA]. As to your first point, my last question  
20 is this ----

21           LDC [MR. SOWARDS]: Sure.

22           MJ [LtCol SCHRAMA]: You mentioned -- right? -- the ability of  
23 the defense counsel to be able to get up and kind of extemporaneously

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1 with the direct examination ask those questions. Here if I go in  
2 order -- right? -- and I provide you cross-examination and  
3 Mr. Connell a cross-examination, Mr. Ruiz may not cross-examine that  
4 same witness two days later anyway. Is he going to be any  
5 differently situated than if he didn't see a direct examination in  
6 regards to being able to do that extemporaneously with the direct?

7 LDC [MR. SOWARDS]: Well, I think -- yeah, I mean, I think  
8 any -- with respect to, I think, anyone who's done trial work knows  
9 that there is just a world of difference between being present and  
10 hearing it, ruminating about it later. If you do have a one- or  
11 two-day wait for your turn as you scribble all of your notes in  
12 court, the sort of energy that's generated, again, in the moment,  
13 looking across the -- across -- around the courtroom, watching the  
14 prosecution, getting different senses and different ideas about what  
15 you're going to do, that's a world of difference from picking up a  
16 cold record.

17 And I know -- let me tell you, one of the things I used to  
18 do as a -- as a young public defender is that I would take my brief  
19 and go across the hallway where the calendar department was and where  
20 we would hear motions, and two days before I would -- or a day before  
21 I would be called upon to do the argument, I would sit there with the  
22 information, because I knew that when I was in the courtroom there's  
23 a whole different feel about what you're thinking about the case and

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1 reacting to the information. So it's not -- it's not just a matter  
2 of, you know, I read this record, I read this cold record.

3 The other thing is we're talking about the shape and  
4 direction of the proceedings while they're going on. Mr. Ruiz has  
5 never been shy about objecting when somebody is asking questions  
6 about another detainee and the witness starts volunteering  
7 information about Mr. al Hawsawi.

8 And he says wait a minute. You know, your interrogation has  
9 nothing to do with him, you know, maybe the flip side of whether he's  
10 been mentioned or not.

11 When someone is not there to raise objections on behalf of  
12 his or her client, we may go down a road a very great distance that  
13 you're then going to want to ask Mr. Ruiz to come back and say, if I  
14 had been there, Your Honor, I would have objected to this because I  
15 know under certain principles of capital litigation this is not an  
16 appropriate area. Or I would have known that the answer to the  
17 court's question when you asked for an offer of proof or relevance  
18 that the issue may not be directly relevant to the voluntariness of  
19 the confession but it is directly relevant to an issue of mitigation.

20 And we have the 524 issue about this. We have access to  
21 witnesses and whether we were given a fair opportunity even to  
22 litigate this motion that is in play.

23 So there are a lot of -- a lot of dynamics. I mean, some

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1 people refer to it as three-dimensional chess, that sort of stuff,  
2 which is going on in the moment and is not going to be adequately  
3 repaired if somebody lets the witness and the prosecution go in an  
4 area they shouldn't be allowed to.

5 MJ [LtCol SCHRAMA]: Thank you, Mr. Sowards.

6 LDC [MR. SOWARDS]: Thank you very much, sir.

7 MJ [LtCol SCHRAMA]: Mr. Engle?

8 LDC [MR. ENGLE]: Yes, thank you, Your Honor. And I just have  
9 a few points to add. I certainly join the comments of Ms. Lachelier  
10 and Mr. Sowards, and I just want to add a couple of points.

11 We do join Mr. Hawsawi's objection to proceeding with  
12 testimony in the absence of learned counsel. And what I want to add  
13 to that is -- because I don't think this has been mentioned yet -- is  
14 that in -- we're all sort of talking about Agent Gaudin's testimony  
15 as relevant to my client's LHM interrogation. It certainly is  
16 relevant to that.

17 But to call your attention to your docket order, Your Honor,  
18 AE 988B, what that order says is that we would -- it is the intent  
19 of -- the commission's intent to make use of this hearing session to  
20 receive witness testimony from Special Agent Stephen Gaudin on any  
21 motion to which that testimony may be relevant, but especially in  
22 regards to the motions by Messrs. Mohammad, Bin'Attash, and Hawsawi  
23 to suppress their Federal Bureau of Investigation letterhead

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1 memoranda statements.

2           So, certainly, that is what I'm most interested in, is the  
3 motion to suppress my client's LHM statements, but the reality is  
4 that this witness is here to testify on a number of different issues  
5 that are relevant to all of the accused in this courtroom.

6           Special Agent Gaudin -- and this really, Your Honor, goes to  
7 the heart of the arguments that we raised in AE 990, which you ruled  
8 upon yesterday and said we could litigate down the road. He was  
9 present for the inception of the RDI Program. He helped pioneer the  
10 torture techniques that were later administered to all of our  
11 clients.

12           That is extremely relevant to not only our client's  
13 suppression issue but all of the suppression issues in this case and,  
14 frankly, a host of number -- number of other motions that have been  
15 or may be filed as we move forward related to the Government's  
16 egregious misconduct and torture in this case.

17           So this isn't a narrow witness. This is a broad witness who  
18 has incredibly important information to offer on a host of issues.

19           Another point I wanted to make, but Mr. Sowards beat me to  
20 it, is that you really can't separate the direct and the  
21 cross-examination. Reading a record does not enable Mr. Ruiz to make  
22 contemporaneous objections. When I'm sitting at counsel table, and  
23 I'm listening to the testimony of a witness, I'm thinking of

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1 objections that I need to make on behalf of Mr. Bin'Attash. I'm not  
2 thinking of objections that need to be made on behalf of anybody else  
3 in this courtroom because I don't represent them.

4 And Mr. Ruiz is -- and Mr. Hawsawi, really, is entitled to  
5 have that benefit of learned counsel to make objections if necessary  
6 and to participate, not only in cross but also in direct examination.

7 I think that Ms. Lachelier made very strong arguments about,  
8 you know, the government having chosen to bring us all to this,  
9 frankly, absurd place to hold this trial and the various  
10 complications that that causes, and it's obviously a big problem.

11 The government also chose to make this a joint trial. And  
12 we have moved to sever in the past, and we think that's a strategic  
13 error on the part of the government. And that if they really wanted  
14 these cases to progress, they would give us all separate trials  
15 because it would be more fair, and it would be more efficient.

16 But that's the decision that they've made. And on that  
17 point, they have made their bed, and they need to lie in it.

18 We're here, we're together, we're joined, and each of our  
19 clients is entitled to be represented by learned counsel to the  
20 extent practicable.

21 And I heard Your Honor ask Mr. Sowards about that language,  
22 and what I want to say about that is that it is clearly practicable  
23 to wait 48 hours to see if Mr. Ruiz's health situation has improved

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1 and if he is able to be here.

2 The last thing that I would like to say about this, Your  
3 Honor, is -- because I'm concerned, frankly, at the characterization  
4 when Ms. Lachelier was up here -- that we're sort of taking a gamble  
5 about the ability to re-call Special Agent Gaudin.

6 I need to know if we're going to be able to re-call Special  
7 Agent Gaudin. I have to make a decision about that, and I'm not  
8 looking to roll the dice, and I'm not waiving any opportunities that  
9 we have to re-call him. My understanding of the commission's order  
10 in AE 990B, I think -- no, D -- yeah, sorry, the ruling that came out  
11 last night.

12 MJ [LtCol SCHRAMA]: And I think, Mr. Engle, yes.  
13 You're -- there's a -- I think Ms. Lachelier conflated the -- will  
14 the court compel discovery in the future with the defense ability to  
15 re-call the witness.

16 LDC [MR. ENGLE]: Okay.

17 MJ [LtCol SCHRAMA]: So I think there are two separate issues  
18 that got conflated.

19 LDC [MR. ENGLE]: Okay.

20 MJ [LtCol SCHRAMA]: So if that helps assuage fears, I think  
21 that's the distinction that got commingled. There are two separate  
22 issues.

23 LDC [MR. ENGLE]: I appreciate that.

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1 MJ [LtCol SCHRAMA]: Yeah.

2 LDC [MR. ENGLE]: Thank you, Your Honor. So what I will say  
3 then ----

4 MJ [LtCol SCHRAMA]: The ability to re-call the witness versus  
5 the entitlement to discovery -- right? -- the discovery is an  
6 additional question that the court, based on its ruling, would have  
7 to revisit based on facts that are presented.

8 LDC [MR. ENGLE]: You ----

9 MJ [LtCol SCHRAMA]: That's different from the ability to  
10 re-call a witness later in the proceeding.

11 LDC [MR. ENGLE]: You haven't ruled on the discovery request,  
12 and I should not understand 990D to be you're going to get the  
13 materials.

14 MJ [LtCol SCHRAMA]: Correct.

15 LDC [MR. ENGLE]: I'm a hundred percent with you on that.

16 MJ [LtCol SCHRAMA]: And I think when it got brought up, those  
17 two things got conflated in that answer.

18 LDC [MR. ENGLE]: Okay.

19 MJ [LtCol SCHRAMA]: But they are two separate issues.

20 LDC [MR. ENGLE]: Okay. Well, then, in that case, you know,  
21 if, as I'm hearing, you know, we're going to be able to re-call Agent  
22 Gaudin after we've had an opportunity to litigate before Your Honor  
23 the discovery issues -- and it's not only 990, I would add, I think

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1 it was 987 -- 927 -- I apologize. I'm pretty bad at these numbers.  
2 But we have a related discovery issue that is still pending before  
3 Your Honor that I suspect is going to sort of shake out the same way,  
4 that you may say it's premature because we're not there yet. That's  
5 fine.

6 But if I know that we're going to have an opportunity to  
7 argue those, and we're going to be able -- an opportunity to re-call  
8 Special Agent Gaudin, then I think there's an elegant solution to the  
9 problem that faces the commission. And I think that elegant solution  
10 is that there's plenty that we can make use of today and tomorrow,  
11 plenty of things that we can accomplish, and we can call Agent  
12 Gaudin, you know -- hopefully Mr. Ruiz is back Wednesday. Of course,  
13 we don't know that for sure. But that seems to be a realistic  
14 possibility, and we can present his direct, and we can go forward  
15 from there. And we can probably get his direct done this week, I  
16 would think, which would put the commission in the position that you  
17 have articulated in AE 990D of having given the government its  
18 opportunity to present its case.

19 And I would just point out that Agent Gaudin and Agent  
20 McFadden and many of the other agents, they have testified repeatedly  
21 in the other commissions. They have come back time and time again.

22 This is not an unusual situation in -- frankly, in this  
23 commission or in other commissions. So there's really nothing

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1 unusual about any of this. We're just in a position where,  
2 unfortunately, I don't think that we can legally go forward with this  
3 witness testimony on all of these issues in the absence of learned  
4 counsel.

5 So we join Mr. Hawsawi's objection for that reason. Unless  
6 Your Honor has any questions.

7 MJ [LtCol SCHRAMA]: No questions. Thank you, Mr. Engle.

8 LDC [MR. ENGLE]: Thank you.

9 MJ [LtCol SCHRAMA]: Mr. Connell, would you like to be heard  
10 on this?

11 LDC [MR. CONNELL]: Yes, thank you, Your Honor, on two points.

12 The first of those is that I join my colleagues in asking  
13 this court not to set a precedent of parsing individual actions of  
14 the military commission as to whether the presence of learned counsel  
15 is practicable or not.

16 The -- in 1789, the Treaty of Paris ended the Revolutionary  
17 War and really established the United States as a player in the world  
18 scene recognized by other countries as independent.

19 The same year, in 1789, Congress established the right to be  
20 represented by -- in capital cases, by counsel learned in the law of  
21 capital cases. Literally, the right to the representation by learned  
22 counsel in capital cases is as old as the Republic.

23 The -- congress recognized that in, as the military

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1 commission referred to, 10 U.S.C. 949a(b)(2)(C)(ii), and used the  
2 language not to the extent practicable, but the language to the  
3 greatest extent practicable, counsel -- clients charged in a capital  
4 military commission have the right to be represented by additional  
5 counsel learned in the law of capital cases.

6 Now, we have been discussing that today as if that  
7 practicality determination is something that is made on an individual  
8 day-by-day basis.

9 But what the statute is referring to is the structure of  
10 appointment of counsel learned in the law of capital cases for people  
11 who are charged in capital offenses. And what makes that clear is  
12 the Secretary of Defense's implementation of that both in Rule for  
13 Military Commission 506(b), which talks about the appointment process  
14 for capital cases -- for capital attorneys in capital cases. But  
15 even more importantly, to this point Regulation for Trial by Military  
16 Commission 9-1.a.6., which does not contain the qualification "to the  
17 greatest extent practicable."

18 When the Secretary of Defense established the regulation for  
19 military commission, which they had specific direction by Congress to  
20 establish regulations for the appointment of -- of capital-qualified  
21 counsel in capital cases, the regulation for the Secretary of Defense  
22 did not include any qualifications. Instead, the Secretary of  
23 Defense said that if the convening authority elects to refer to a

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1 capital military commission, the counsel has the right to be  
2 represented by capital-qualified counsel.

3           Now, I think the other point that is -- has been missed in  
4 the discussion this morning is that the presence of capitally  
5 qualified counsel is, in fact, structural. It is not simply a right  
6 of the defendant, although it is a right of the defendant. It is  
7 also part of the structure that gives a judicial body dignity and  
8 legitimacy, the presence of an advocate representing the prosecution,  
9 the presence of a capitally qualified representative of the  
10 defendant, a neutral fact finder, and rules which allow an  
11 adversarial system to exist are what give a body, a judicial body,  
12 dignity and legitimacy.

13           And the presence of capitally qualified counsel on that is  
14 not just a convenience or a good idea, but it is built into the  
15 structure of how a capital trial works.

16           And it's not a question of interchangeability. It's not a  
17 question of ability. It is a question of structure.

18           I point specifically in this military commission to two  
19 things which I don't think have been covered in this discussion yet.  
20 The first is that I'm certain that the military commission, that Your  
21 Honor, as a judge relatively new to the case, has done a diligent  
22 study of transcripts.

23           And one of the things that you can't tell from that

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1 transcript is how often this space immediately behind me is filled  
2 with attorneys from the prosecution and the defense trying to work  
3 out problems about witness testimony, discussing government's  
4 invocation of national security privilege, discussing why the hockey  
5 light has just been activated or not, discussing how a question can  
6 be asked in a way that is consistent with the national security  
7 interests of the United States, discussing a wide variety of issues.

8           And what you can tell from the transcript, or what Mr. Ruiz  
9 reviewing it later could tell by the transcript, is sometimes you can  
10 tell that a conference has taken place because the military  
11 commission will say "I'll give you a few moments to discuss."

12           What you cannot tell is the intense work that is done in  
13 those conferences between the defense and the prosecution to resolve  
14 issues in a way that the testimony can go forward in a way most  
15 consistent with the interests of the parties.

16           The other point that I think has been missed in this  
17 discussion is the importance of the client. This is not a contest  
18 between lawyers. This is a contest between the majesty and might of  
19 the United States Government and four individual defendants who that  
20 United States Government is seeking to end their lives. And the  
21 discussion that takes place between client and counsel in that  
22 dynamic cannot be replicated by a transcript or any other mechanism  
23 other than their physical presence.

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1 I say these things as the only person, the only person who  
2 has been present for every single day of this military commission and  
3 also a person who has frequently been forced to avail themselves of  
4 the services of the Naval Station Guantanamo Bay Hospital.

5 On occasions this military commission has delayed the  
6 beginning -- most recently delayed the beginning of court so that I  
7 could get out of the hospital and drive to here. So the -- it -- we  
8 are in a situation. We are all human beings and we are in a  
9 situation where from time to time learned counsel, which are a single  
10 point of failure in this system, despite all of our efforts to get a  
11 second learned counsel appointed, but as a single point of failure,  
12 from time to time we are going to fail.

13 And setting a precedent that our individual responsibilities  
14 can be parsed out as to what questions we would ask a particular  
15 witness at a particular time is not consistent with the dignity of  
16 the court.

17 The second point that I rise to address is that although I  
18 acknowledge that this is a difficult question, we do object to any  
19 solution that would deny Mr. al Baluchi the right to examine Special  
20 Agent Gaudin.

21 It has come up that Special Agent Gaudin has been involved  
22 in a number of areas of investigation in the global war on terror  
23 other than the LHM interview of Mr. Bin'Attash and we intend to

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1 explore those areas as they are relevant to other motions.

2 A few motions that occurred to me that are relevant to  
3 Special Agent Gaudin's testimony are AE 524, AE 702, AE 827, AE 828,  
4 AE 866, AE 942MM, and most recently, of course, the continuation of  
5 AE 990.

6 There are a lot of things that we intend to ask and I do  
7 not -- and we do object to any solution that would deny us that  
8 possibility. That said, there have been various solutions thrown out  
9 and I'm sure that the court will weigh all of those appropriately.

10 Two more that I would like to mention is that over the years  
11 Mr. al Baluchi has repeatedly proposed the R.M.C. 702 deposition  
12 process as a possibility for obtaining testimony from some of these  
13 witnesses.

14 That was our solution to why we -- to COVID, for example,  
15 when we could not travel for quite a long time, about 18 months, to  
16 Guantanamo Bay and we have proposed that at various times and -- and  
17 could play a role here. I just mention it because I still consider  
18 it a good idea in many situations.

19 The other thing that I'd like to point out is that we're  
20 currently scheduled for four weeks in Guantanamo in May. I hope at  
21 some point this week we will address for our planning purposes what  
22 is intended to happen for four weeks. But this is not a situation  
23 where there is -- this week is the only possible week within a

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1 reasonable span of time for taking this testimony.

2           So I just mention those as points for the military  
3 commission's consideration.

4           MJ [LtCol SCHRAMA]: Okay. Mr. Connell, just as far as the  
5 portion of your point to dealing with the interest in your client  
6 taking the testimony of Mr. Gaudin, does that interest apply to this  
7 week, or are you saying just in general there's an interest in taking  
8 his testimony?

9           LDC [MR. CONNELL]: I'm saying that in general there's an  
10 interest in taking his testimony. We are fully prepared to proceed  
11 this week. I understand that the military commission has to balance  
12 the requirement of the presence of military -- of learned counsel  
13 with the medical issues of the parties, more than one party in this  
14 situation. And we -- we do hope to participate in the taking of  
15 testimony from Special Agent Gaudin this week.

16           MJ [LtCol SCHRAMA]: How do you balance your right of your  
17 client to be able to cross-examine this witness this week versus what  
18 you've articulated regarding the ability of Mr. Ruiz to be present?

19           LDC [MR. CONNELL]: I'm smiling because as an advocate it's  
20 usually not my responsibility to balance those duties, but I do  
21 understand the military commission's question.

22           The -- if one of those has to give, it is our interest in  
23 scheduling -- in examination this week. The right to learned counsel

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1 is important, not just for Mr. al Hawsawi, it's important for  
2 Mr. al Baluchi, it's important for the dignity and legitimacy of the  
3 military commission, and it's really not negotiable. And if other  
4 things have to bend, they have to bend.

5 MJ [LtCol SCHRAMA]: Thank you, Mr. Connell.

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

7 MJ [LtCol SCHRAMA]: Ms. Lachelier, before -- I'll give you  
8 the opportunity -- anything else to add based on everything else that  
9 has been articulated?

10 ADC [MS. LACHELIER]: Just two things particular to our case,  
11 Judge.

12 MJ [LtCol SCHRAMA]: Please.

13 ADC [MS. LACHELIER]: The learned counsel just demonstrated  
14 why they're learned counsel and I'm not.

15 I -- but I did want to point out, in addition to  
16 Mr. Bin'Attash we moved, and it's infamous in this court in our case,  
17 Mr. Hawsawi moved for severance for years. And the motion was  
18 pending for years and was denied. So, again, we are not the author  
19 of the condition in which we find ourselves at this point.

20 And, secondly, we also moved for a second learned counsel.  
21 And that was -- the government vociferously opposed that. The CA  
22 denied it. And we -- so I emphasize those two prior motions because  
23 now the burden is being placed on Mr. Hawsawi to waive -- to waive a

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1 statutory right, which counsel have very aptly articulated the  
2 breadth of, at a critical stage of proceedings for a delay of two  
3 days that we're asking for.

4           And to ask Mr. Hawsawi, given conditions that are completely  
5 the government's responsibility have put us here in the denial of the  
6 two motions that we made, we would not be here if we had not -- if we  
7 had been denied a second learned counsel. We would not be here if we  
8 had been severed. I -- and we're just asking for two days for  
9 counsel to recuperate rather than ask Mr. Hawsawi to waive a  
10 statutory right.

11           Thank you.

12           MJ [LtCol SCHRAMA]: Thank you.

13           DC [Maj LEAHY]: Your Honor, may I be heard briefly?

14           MJ [LtCol SCHRAMA]: You may.

15           DC [Maj LEAHY]: Your Honor, not my position to talk about  
16 death penalty and death-qualified counsel, but I am in a position to  
17 talk about this witness. So we did want to note a couple of things  
18 that have come up from the arguments we've heard so far.

19           First, with regard to Team WBA's motion to compel that we  
20 received a partial ruling on yesterday from Your Honor, we're all  
21 joined to that motion. So the decisions and the questions that Team  
22 WBA are going through right now, all of us are going through with  
23 regard to that motion and the information that was sought there

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1 because that information would be applicable and helpful to, I  
2 believe, all of us, but certainly to Mr. Mohammad.

3 And the second thing I wanted to note is we certainly agree  
4 with the comments Mr. Engle made and Mr. Connell made with regard to  
5 the breadth of Agent Gaudin's testimony. What we anticipate going  
6 into is likely the same types of things that they mentioned outside  
7 the bound of what the prosecution has indicated of just the LHM.

8 A lot of motions are at play here. You've heard many of  
9 them. I know Mr. Sowards mentioned AE 929. That's a motion to  
10 compel information that we believe Agent Gaudin would be able to give  
11 us, important information to support that motion.

12 The same could be said of 630TT, which is our motion to  
13 compel the extensive list of witnesses. We believe Agent Gaudin knew  
14 many of those people and could give significant information that  
15 might help Your Honor in determining whether those folks need to be  
16 compelled at some point.

17 So I rise just to say that those considerations also apply  
18 to Mr. Mohammad.

19 MJ [LtCol SCHRAMA]: Thank you.

20 DC [Maj LEAHY]: Thank you, Your Honor.

21 MJ [LtCol SCHRAMA]: Okay. Folks, we're going to take  
22 approximately a half-an-hour recess. That will give me the ability  
23 to think through this and properly craft a decision on the way

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1 forward. In addition to that, it will give everyone a comfort break.

2 Okay?

3 With that, we are in recess.

4 **[The R.M.C. 803 session recessed at 1042, 23 March 2026.]**

5 **[The R.M.C. 803 session was called to order at 1135, 23 March 2026.]**

6 MJ [LtCol SCHRAMA]: This commission is called to order.

7 All persons who were present when we recessed are again

8 present.

9 Counsel, we are going to proceed with oral argument on  
10 AE 978 when we return from our lunch break. Thereafter, we'll begin  
11 the government's open hearing direct examination of Special Agent  
12 Gaudin.

13 The commission has considered the position of all parties  
14 regarding how to proceed in light of the temporary absence of learned  
15 counsel for Mr. Hawsawi.

16 The government has proffered that Special Agent Gaudin is  
17 only expected to offer testimony relevant to AE 631, Mr. Bin'Attash's  
18 motion to suppress. Any mention of Mr. Mohammad or Mr. Ali in  
19 Special Agent Gaudin's testimony is expected to be ancillary, and he  
20 is not expected to offer any testimony relevant to AE 632,  
21 Mr. Hawsawi's motion to suppress statements.

22 The commission set this precedent of litigating the  
23 suppression motion separately when it proceeded to litigate Mr. Ali's

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1 motion to suppress in the AE 942 series separate from the motions  
2 filed by the other accused in this case. We will proceed in a like  
3 manner here.

4           Accordingly, the government will be permitted to offer  
5 Special Agent Gaudin's testimony on direct examination to the extent  
6 that it is relevant to Mr. Bin'Attash's motion to suppress his LHM  
7 statements. No defense team is required to question Special Agent  
8 Gaudin this week on AE 631 or any other matter, but they're permitted  
9 to do so if they choose.

10           With a proper showing, the defense teams may also re-call  
11 Special Agent Gaudin for testimony at a later session.

12           Counsel, with that, we're going to go ahead and break early  
13 for lunch. So we will come back together at 1630 to proceed  
14 on -- 1330 to proceed on argument on Mr. Connell's NGO motion.

15           Government, I'll ask that at the conclusion of that that you  
16 have your witness ready to proceed. Okay?

17           ADC [MS. LACHELIER]: Judge, you had mentioned the production  
18 of a transcript. Mr. Ruiz obviously will not be present, will not be  
19 able to be present. We've established that. You said that there  
20 would be a transcript produced. At the very least we want a  
21 transcript produced so that if -- he can attempt to read it. The  
22 issue that you may not be familiar with is that, when the transcript  
23 comes out, initially it's Top Secret. So it had to be read,

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1 reviewed, and declassified in time for him to read it on  
2 Wednesday -- by Wednesday.

3 And, again, I'm not -- he won't be able to go to the -- the  
4 alternative facility, or whatever you call it, the SCIF, to read it.  
5 So it's going to have to be produced and declassified so he can read  
6 it in time for Wednesday.

7 MJ [LtCol SCHRAMA]: Yes, Ms. Lachelier. Thank you.

8 So two things. Mr. Ruiz has the benefit of time here,  
9 whether he chooses to do the cross-examination this week or not. I  
10 am also tracking the issue of the transcript and getting it  
11 expediently processed for review.

12 During the lunch, I'm going to look into that to figure out  
13 how best, as the court, I can assist in directing that that occur.  
14 And when we get back, I'll have more guidance for the people that  
15 need to do that to do that expeditiously in conformity with the  
16 court's wishes.

17 ADC [MS. LACHELIER]: I guess I'll just point out, Judge, you  
18 said with the proper showing, the defense would be able to re-call  
19 Gaudin. And at the same time, you're saying Mr. Ruiz has the benefit  
20 of time because he will be able to examine Mr. Gaudin at a later  
21 date. And the two are incongruous. So if -- I would say dispense  
22 with the proper showing and make it a given that Mr. Gaudin is going  
23 to return for examination. The **[microphone button not pushed; no**

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1 **audio]** not have to make a proper showing given that you've already  
2 ruled that he can't be present, he won't be present for the  
3 examination of Mr. Gaudin.

4 MJ [LtCol SCHRAMA]: Ms. Lachelier, I will take your concerns  
5 under advisement and they are noted for the record. But as of right  
6 now, I have issued my ruling and that ruling stands.

7 Counsel, anything else to take up before lunch?

8 Mr. Sowards, go ahead, please.

9 LDC [MR. SOWARDS]: Thank you, sir.

10 Just because I'll be discussing this with Major Leahy over  
11 the break, both Mr. Engle and I had raised with you the reference in  
12 your order 988B to noting the relevance of 524 issues.

13 And I would just ask you to if -- either my understanding or  
14 you would clarify, are those still within the ambit of what is being  
15 allowed to question inspector -- I'm sorry, Special Agent Gaudin  
16 about?

17 MJ [LtCol SCHRAMA]: Yeah. Mr. Sowards, good question. So if  
18 you choose to cross-examine Mr. Gaudin today, I will allow you that  
19 full purview to go into issues outside of the direct examination. If  
20 you choose not to conduct your cross-examination,  
21 then -- right? -- there may be an opportunity later, with the proper  
22 showing, to re-call the witness to go into those issues. But if you  
23 wish to do it today, you are more than welcome to do that.

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1 LDC [MR. SOWARDS]: All right. Thank you, sir.

2 MJ [LtCol SCHRAMA]: Counsel, anything else?

3 Mr. Trivett?

4 MTC [MR. TRIVETT]: Briefly, sir. And this is really just a  
5 matter of making sure the record is clear.

6 The government's position in regard to Mr. Ali continuing  
7 any litigation was that he should be able to continue litigation not  
8 related to the suppression motion specifically. The judge ruled  
9 otherwise, but in doing so felt the filing of a notice of appeal was  
10 an event of jurisdictional significance.

11 And so to the extent that the commission is permitting  
12 Mr. Connell to go forward on either the NGO argument or any part of  
13 the examination of Special Agent Gaudin, we would like specific  
14 findings from the commission that it believes it has jurisdiction  
15 over those issues for him just to clarify Your Honor's earlier ruling  
16 on that issue in AE 980. It's really just a matter of protecting the  
17 record, sir.

18 MJ [LtCol SCHRAMA]: Anything else, Mr. Trivett?

19 MTC [MR. TRIVETT]: No, sir.

20 MJ [LtCol SCHRAMA]: Thank you.

21 MTC [MR. TRIVETT]: Thank you.

22 MJ [LtCol SCHRAMA]: Counsel, anything else?

23 Okay. Court's in recess.

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1 [The R.M.C. 803 session was recessed at 1143, 23 March 2026.]

2 [The R.M.C. 803 session was called to order at 1352, 23 March 2026.]

3 MJ [LtCol SCHRAMA]: This commission is called to order.

4 All persons who were present when we recessed are again  
5 present, with a few exceptions. I was given notice that, based on my  
6 ruling before lunch, Mr. Hawsawi's legal team has made the decision  
7 to voluntarily absent themselves from this proceeding.

8 There is a nonlegal representative sitting at the table.  
9 Mr. Farag, am I the -- are you the one that's sitting in at the table  
10 for Mr. Hawsawi's team?

11 [MR. FARAG]: Michael Farag. Yes, Your Honor.

12 MJ [LtCol SCHRAMA]: Okay. And is my summation correct?

13 [MR. FARAG]: Yes, Your Honor.

14 MJ [LtCol SCHRAMA]: Okay. Thank you.

15 LDC [MR. SOWARDS]: Excuse me, Your Honor. I'm sorry to  
16 interrupt. But on behalf of Mr. Mohammad, we would object to the  
17 commission eliciting a layperson's opinion as to whether your  
18 summation of the legal team's statement or intent is correct, for the  
19 record.

20 MJ [LtCol SCHRAMA]: Okay. Thank you, Mr. Sowards. Noted.

21 Before we get started, I wanted to clarify a couple of  
22 administrative issues. To the extent that the guard force can  
23 accommodate, I intend to continue the practice of allowing individual

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1 accused to take latrine breaks as necessary and/or to rest in the  
2 adjacent areas without the commission having to take a recess for the  
3 movement of the accused.

4 Unless counsel rise to tell me otherwise, I will assume that  
5 his client is departing voluntarily and therefore is waiving his  
6 presence.

7 I also intend to allow prosecution and defense team members  
8 to move around freely within and outside the courtroom and  
9 communicate with each other and the accused so long as doing so does  
10 not become disruptive to the proceedings. As I had noted in my first  
11 day in court, I understand that it is more efficient and productive  
12 for attorney-client meetings to take place here in Courtroom No. 2  
13 and/or the adjacent facilities during the times when Courtroom No. 2  
14 is not actively being used for commission hearings.

15 As was the practice under Judge McCall, it is my intent, and  
16 subject to the ability of the guard force to accommodate, for the  
17 accused and counsel to be permitted to stay in the courtroom for at  
18 least an hour after the commission concludes for the day and to be  
19 permitted to make use of the courtroom and/or of the adjacent  
20 facilities at times that this commission was not scheduled to be in  
21 session but is not.

22 Likewise, if it is at all possible for the guard force to  
23 accommodate, it is my preference that the defense teams and

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1 prosecution team be able to enter the courtroom at least an hour  
2 prior to the start of court to get set up and possibly meet with  
3 their clients.

4 As noted by Mr. Connell this morning, the commission has  
5 already issued a trial conduct order in this case, AE 965, that  
6 governs the use of Courtroom No. 2, its adjacent facilities, and the  
7 Remote Hearing Room during the weeks the military commission is  
8 scheduled to be onboard the U.S. Naval Station Guantanamo Bay, Cuba,  
9 for hearings. That TCO is still in effect, and I expect it to be  
10 adhered to.

11 Counsel, what I would ask is, now that I've renewed my  
12 expectations, if there's any additional conflicts with what I just  
13 announced, I ask that you coordinate with the government to see if  
14 there's an easy fix to navigate. If not, please bring it to my  
15 attention so that, if necessary, I can issue corrective procedures.

16 Any questions, Counsel, on my clarification?

17 MTC [MR. TRIVETT]: None from the government, sir.

18 MJ [LtCol SCHRAMA]: Defense Counsel, I see no questions, so I  
19 will assume that there's no ambiguity with what I've just said.

20 LDC [MR. CONNELL]: Sir, that's fine with us. But for going  
21 forward, do you -- when you ask a question like that, do you want a  
22 verbal answer or -- Judge McCall sort of was happy with the lack of  
23 response. But if you want verbal answers, we'll give you verbal

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1 answers.

2 MJ [LtCol SCHRAMA]: No, that's fine. I was just capturing it  
3 for the record, Mr. Connell. So that was a bit awkward on my part.  
4 But yeah, if there's no need -- if you don't have anything, I'll give  
5 a few moments' pause and then drive on.

6 Counsel, before lunch, I had indicated that this afternoon  
7 we would take up Appellate Exhibit 978, which was the motion dealing  
8 with NGO access.

9 Due to the fact that Mr. Hawsawi's legal team is not here,  
10 and that motion implicates them, the court is not going to take up  
11 that motion at this time.

12 Now, moving on to the testimony of Mr. Gaudin, Mr. Trivett,  
13 you had brought up, before we departed, the question of whether  
14 Mr. Ali's counsel can participate in light of this court's ruling in  
15 980C.

16 What is your position on whether or not they can participate  
17 in the cross-examination of Mr. Gaudin?

18 MTC [MR. TRIVETT]: One moment, Your Honor.

19 **[Counsel conferred.]**

20 MTC [MR. TRIVETT]: Sir, we would defer to the commission. We  
21 just note that in AE 980C, the commission cited that the filing of a  
22 notice of appeal is an event of jurisdictional significance. It  
23 confers jurisdiction on the appellate court and divests the trial

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1 court of its control over those aspects of the case involved in the  
2 appeal.

3 So we were just noting that for the record. We'll defer to  
4 you. It's your ruling. And so we just wanted to make sure that the  
5 record was clear that if they are permitted, that they are permitted  
6 and you believe that you have jurisdiction over the issues that  
7 they're litigating.

8 MJ [LtCol SCHRAMA]: Okay. Thank you.

9 Mr. Connell, what is your stance?

10 LDC [MR. CONNELL]: Sir, our position is that 980C was  
11 correctly reasoned. And if there were no health issues for Special  
12 Agent Gaudin, we would say that this testimony falls within the stay.  
13 And I think that's clear.

14 The reason why we're taking a different position in this  
15 situation is because of the difficulties that the military commission  
16 recently noted in the AE 990 series, that there are extraordinary  
17 circumstances around Special Agent Gaudin in some ways regarding the  
18 health concerns that the government has revealed to the military  
19 commission.

20 So we don't actually know -- I mean, no one knows the future  
21 in anything, but we certainly in this situation do not know whether  
22 Special Agent Gaudin will be available in the future or not, and so  
23 are taking a different position with respect to this matter asking as

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1 a matter of preservation of testimony that we be able to participate  
2 in the questioning.

3 MJ [LtCol SCHRAMA]: Okay. How does that fall under my order  
4 in the verbiage?

5 LDC [MR. CONNELL]: So I actually agree that the filing of a  
6 notice of interlocutory appeal is a jurisdictional question. I do  
7 note that the reasoning of the military commission was that there are  
8 certain matters -- in paragraph 7.b. of the ruling on page 10, there  
9 are certain matters that are carve-outs.

10 And that puts us in a little bit of an unusual  
11 jurisdictional position because if jurisdiction were fully 100  
12 percent transferred in the sense of this military commission no  
13 longer has authority to act, then these other matters like ex parte  
14 hearings, and we've even discussed the possibility of arguing the  
15 trial scheduling order, those -- those sorts of things, those  
16 carve-outs continue under -- under -- the reasoning of 980C continue  
17 under the jurisdiction of this court.

18 So this is not a jurisdictional question in the matter of  
19 not a statutory jurisdiction question, right? There are different  
20 types of jurisdiction.

21 If you were asked to prosecute -- or to preside over the  
22 prosecution of a U.S. citizen, for example, who are statutorily  
23 excluded from the jurisdiction of the military commission, you would

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1 have no power to do so whatsoever.

2 Here it's a question of jurisdiction is transferred to the  
3 CMCR where it currently rests. However, there are certain matters  
4 that this court can continue with, and we're really in the question  
5 of is this one of those matters?

6 It's not a matter that is explicitly covered by  
7 paragraph 7.b. but we are asking for a different treatment of this  
8 situation because if the military commission chooses to exclude us  
9 from this examination, we are concerned that this is not a witness  
10 who we are necessarily guaranteed to be able to examine in the  
11 future.

12 So in our view, we see this as a witness preservation issue.  
13 I know this is not technically a deposition but it is somewhat akin  
14 to that situation.

15 MJ [LtCol SCHRAMA]: So if this was a discovery issue, I think  
16 that falls under the gambit of what was discussed in the 980C ruling.

17 The other side of the coin is that when you articulated  
18 earlier today about the reasons of going into cross-examination, they  
19 touch upon areas that are of a contested matter ----

20 LDC [MR. CONNELL]: That is true.

21 MJ [LtCol SCHRAMA]: ---- which then would be prohibited for  
22 the court allowing Mr. Ali to continue on until there's resolution by  
23 the appellate court.

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1           Would you agree with that statement?

2           LDC [MR. CONNELL]: As a general matter, sir. But not being  
3 fully prepared to address this, since we have a little bit of time,  
4 could we be -- I be permitted to do some research on this question  
5 tonight and address it tomorrow morning? We won't be cross-examining  
6 today.

7           MJ [LtCol SCHRAMA]: That is correct. Yes, that's fine,  
8 Mr. Connell.

9           Is there anything else that you want to bring to my  
10 attention that I didn't ask or that you didn't otherwise discuss?

11          LDC [MR. CONNELL]: No. Thank you, sir.

12          MJ [LtCol SCHRAMA]: Okay. Thank you.

13          Mr. Trivett, I know you don't have an opinion per se, but  
14 based on what you've just heard I'm going to ask you to state an  
15 opinion. Which of these buckets does this fall in?

16          MTC [MR. TRIVETT]: The government took the position that he  
17 should be required to continue, so I believe it would fall within the  
18 bucket of allowing him any cross-examination he wants. His LHM  
19 suppression has been litigated and decided at this court. It's now  
20 on appeal at the CMCR. So we do not believe that any questions that  
21 he would be asking are relevant or even pertinent to an already  
22 decided issue before the commission. Now, that may change, obviously  
23 if the CMCR overturns Judge McCall's decision.

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1           So I believe the commission has jurisdiction to continue.  
2 It's simply in reading your ruling it was unclear to me as to whether  
3 or not the commission would have jurisdiction based on the ruling.

4           MJ [LtCol SCHRAMA]: Well, I'm not sure -- can you -- I'm not  
5 sure what -- what is the ambiguity in the ruling that you don't  
6 understand?

7           MTC [MR. TRIVETT]: Simply because the ruling said it's  
8 jurisdictional in nature. And if it's jurisdictional in nature, you  
9 don't have the power to permit any litigation on the issue going  
10 forward. Now, Mr. Ali took this position that he needed to stay the  
11 entirety of his case. We conceded that the evidence that would be  
12 presented in Mr. Ali's statements to the FBI were pertinent to all  
13 charges and specifications and then the court decided that the stay  
14 would be granted.

15           So that's sort of where we are in the state of the  
16 litigation. But consistent with our position before Your Honor  
17 ruled, we believe that it can go forward and should have been made to  
18 go forward on issues that are ----

19           MJ [LtCol SCHRAMA]: I understand, Mr. Trivett, but I  
20 ruled ----

21           MTC [MR. TRIVETT]: I understand.

22           MJ [LtCol SCHRAMA]: ---- so I disagreed with that position.  
23 I'm asking now based on my ruling -- right? -- does the

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1 cross-examination fall in that gambit of discovery, which I think is  
2 still allowed to take place, or do you think the cross-examination  
3 goes to contested issues pertaining to Mr. Ali, which the court does  
4 not have jurisdiction to hear?

5 MTC [MR. TRIVETT]: So Judge Cohen always believed that the  
6 examination of the witnesses had a discovery aspect to it. I would  
7 say it's both, though. It certainly would have evidence relating to  
8 contested matters before the commission unrelated to the suppression  
9 LHM.

10 So I think it's both. But I think the -- there is -- I  
11 think it's the law of the case that the commission has recognized  
12 there was a discovery component to the questioning of the witness.

13 MJ [LtCol SCHRAMA]: If the court ruled that I was going to  
14 allow cross-examination for discovery purposes because we have a  
15 witness here that I think we all agree, at least from what I've  
16 heard, is in some declining health, is the government in a position  
17 where they would object to the cross-examination for that purpose?

18 MTC [MR. TRIVETT]: For which purpose now, sir? Just ----

19 MJ [LtCol SCHRAMA]: For the purpose of discovery purposes.

20 MTC [MR. TRIVETT]: I don't think we're objecting to the  
21 purpose of either discovery or for the contested issue. I'm  
22 just ----

23 MJ [LtCol SCHRAMA]: I understand the contested issue,

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1 Mr. Trivett, but I've already ruled. We don't have jurisdiction over  
2 that.

3 MTC [MR. TRIVETT]: I see what you're saying, okay.

4 MJ [LtCol SCHRAMA]: So that's the concern, right? And I  
5 would otherwise prohibit the ability of Mr. Connell to cross-examine  
6 this witness. And we may have to then explore another means for the  
7 discovery, such as a deposition, in order to capture this testimony  
8 in a timely manner.

9 So my question specifically is -- right? -- if the court  
10 were to find that this is pertaining specifically to discovery and  
11 the unique circumstances of this witness, is that a circumstance that  
12 the government would be in opposition to?

13 MTC [MR. TRIVETT]: We won't oppose that, sir.

14 MJ [LtCol SCHRAMA]: Okay.

15 MTC [MR. TRIVETT]: We believe it's your interpretation of  
16 your order, so we wouldn't oppose that.

17 MJ [LtCol SCHRAMA]: Okay. Thank you.

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

19 MJ [LtCol SCHRAMA]: Mr. Connell, there was a further back and  
20 forth. Do you have any comments or concerns?

21 LDC [MR. CONNELL]: I don't, sir. I think the discovery  
22 position that you explored at the end of the colloquy with counsel is  
23 consistent with our position that our primary concern is about

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1 preservation of testimony that's -- I mentioned earlier that we  
2 thought that it would functionally operate somewhat like a  
3 deposition. So if -- if the military commission thinks that the  
4 cleanest resolution of this issue is to treat it as a discovery  
5 matter under paragraph 7.b. of your order, we would concur with that  
6 approach.

7 MJ [LtCol SCHRAMA]: Okay. Anything else, Mr. Connell?

8 LDC [MR. CONNELL]: No. Thank you, sir.

9 [MR. FARAG]: Excuse me, Your Honor. Just to -- for the  
10 record, I'm not a legal representative of Mr. Hawsawi. I'm just  
11 making that clear for the record. Thank you, Your Honor.

12 MJ [LtCol SCHRAMA]: Thank you, Mr. Farag.

13 Now, Counsel, I would like to get any possible objections  
14 before we move forward.

15 Before we broke I specifically ruled that I was going to  
16 allow today the government to begin their direct examination of  
17 Special Agent Gaudin, specifically related to the extent they were  
18 relevant to Mr. Bin'Attash's motion to suppress his LHM statements.

19 I also specifically ruled that no defense team is required  
20 to question Special Agent Gaudin this week on AE 631 or any other  
21 matter, although they are permitted to do so if they choose.

22 Now, Mr. Hawsawi's legal team has absented themselves  
23 voluntarily from this proceeding. Is there any objection to moving

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1 forward in their voluntary absence?

2 Mr. Trivett?

3 And when I say "move forward," just specifically to the  
4 issue of the testimony of Mr. Gaudin.

5 MTC [MR. TRIVETT]: No, sir.

6 MJ [LtCol SCHRAMA]: Okay. Mr. Sowards?

7 LDC [MR. SOWARDS]: We would, Your Honor.

8 MJ [LtCol SCHRAMA]: Okay. Why is that?

9 LDC [MR. SOWARDS]: Well, because the -- earlier to my  
10 comments about the total absence of counsel for Mr. Hawsawi, we now  
11 have that. And as one who expects to be a learned counsel for at  
12 least the foreseeable future, adopting Mr. Connell's opening  
13 **[microphone button not pushed; no audio]** when it was his turn to  
14 speak, I too would have objection to taking the precedent in this  
15 commission absent our seeking appellant review of it that the  
16 commission is prepared to proceed in the absence of appellate counsel  
17 at a critical stage of the proceedings is something we find  
18 objectionable.

19 And the practical impact of that, sir, is not -- this is not  
20 to somehow boycott your proceedings. We obviously respect and follow  
21 what you order, and, if appropriate, we'll seek appellate review or  
22 appropriate review at the appropriate time.

23 But the -- the difficulty is, as I'm seeing -- as I'm seeing

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1 this proceeding shape up -- am I still losing this or ----

2 **[Counsel conferred.]**

3 LDC [MR. SOWARDS]: Thank you, sir.

4 As we're -- as we're -- as I'm seeing this proceeding and  
5 the nature of it shape up today going forward, that as opposed to  
6 postponing things until Wednesday, what will happen in the next  
7 couple of days is we may or may not have Mr. Hawsawi's counsel  
8 completely out of attendance, and we'll have Mr. Bin'Attash's counsel  
9 facing the prospect of perhaps deferring their examination for the  
10 reasons they've expect -- they've anticipated and articulated.

11 So that will leave us, to a large extent, sort of -- I don't  
12 know what the metaphor is -- flying blind or moving across a  
13 minefield, not knowing what the significance of some of our questions  
14 and potential answers will be with respect not only to other -- other  
15 defendants in the case, but to Mr. Mohammad in particular.

16 Again, as I've mentioned, that there is a certain important  
17 tactical and strategic but also Sixth Amendment representational  
18 component to being part of a common defense and being educated by  
19 other counsel as to what they're not planning to do, but what starts  
20 emerging in the courtroom as they examine a witness and the answers  
21 they're getting.

22 And if we start asking questions largely uninformed by what  
23 they're developing for their purposes, it could inure to the

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1 detriment of Mr. Mohammad. And in a capital case, for different  
2 reasons, I would share the wisdom of Mr. Ruiz's approach to this and  
3 to say it's best not to do anything.

4 Because I'm relatively healthy and noncontagious, I can be  
5 here, and I can firsthand observe the -- observe the proceedings and  
6 make notes of not only the substance of the testimony but those  
7 elusive qualities we talked about earlier today in terms of the  
8 credibility and presentation of the individual for -- for further  
9 examination.

10 MJ [LtCol SCHRAMA]: Mr. Sowards, I appreciate your comments.

11 LDC [MR. SOWARDS]: Thank you, sir.

12 MJ [LtCol SCHRAMA]: I've already ruled on that.

13 LDC [MR. SOWARDS]: No, no. No, I understand.

14 MJ [LtCol SCHRAMA]: So I'm just asking now ----

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

16 MJ [LtCol SCHRAMA]: ---- that the entire legal defense team  
17 is absent, does that prejudice you at all in moving forward.

18 LDC [MR. SOWARDS]: I fear that it has the potential to -- to  
19 prejudice me and, more importantly, Mr. -- actually, Mr. Mohammad,  
20 and, for that reason, I would not be proceeding.

21 MJ [LtCol SCHRAMA]: How does that prejudice you?

22 LDC [MR. SOWARDS]: For the reasons I articulated, that I may  
23 be eliciting information, asking questions, getting answers, making

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1 tactical decisions, which if I had been informed of the -- of the  
2 full participation of all counsel -- because I'm not the one leading  
3 off -- and I should say Major Leahy is not the one leading off, and  
4 so we have an opportunity to assess what potential questions we -- we  
5 were going to ask in light of the information that's being developed.  
6 Yes, sir.

7 MJ [LtCol SCHRAMA]: Thank you.

8 LDC [MR. SOWARDS]: Yes. And, I'm sorry. Earlier I didn't  
9 mean to be -- relitigate. What I was explaining to you is there are  
10 opportunities I have which explain why -- why I'm still here and if  
11 we're going to certainly observe the proceedings.

12 MJ [LtCol SCHRAMA]: I appreciate it. Thank you, Mr. Sowards.

13 LDC [MR. SOWARDS]: Thank you, sir.

14 MJ [LtCol SCHRAMA]: Mr. Engle, I'll ask you the same  
15 question. I know you've indicated today that, kind of regardless of  
16 who is participating, you're most likely not going to partake in  
17 cross-examination today and wait until a later time to do so.

18 Does the voluntary participation, then, at all prejudice  
19 your ability to cross-examine this witness?

20 LDC [MR. ENGLE]: Yes. And we do -- we would object to going  
21 forward with the testimony of any witness, particularly this witness,  
22 in the absence of learned counsel. We've already made that  
23 objection, but now in the absence of any counsel for Mr. Hawsawi.

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1           And I anticipate that your next question is going to be:  
2 How is that going to prejudice you? And what I can tell you is that,  
3 over the course of decades of representing capital defendants, some  
4 in single-defendant cases, and some in multidefendant cases, this is  
5 a new one on me. I have never been in the position of potentially  
6 having to litigate a capital case in the presence of a capital  
7 co-defendant who is unrepresented. Not only unrepresented by learned  
8 counsel, which is problematic, but unrepresented by any counsel,  
9 including the statutorily mandatory military counsel that -- that  
10 needs to be here. I think it creates real complications in how we  
11 approach this case, what issues we raise, how they resolve them.

12           I will tell you -- and I -- and I think Mr. Connell raised  
13 this issue earlier -- there is often a great deal of collaboration  
14 that has to take place to figure out how we are going to resolve  
15 issues about questioning, about classification, about, you know, how  
16 we can resolve roadblocks that arise. And that requires us to put  
17 our heads together and come up with a solution that works for all of  
18 our clients.

19           And we simply can't do that without counsel for Mr. Ruiz  
20 present -- excuse me -- for Mr. Hawsawi present. I misspoke. There  
21 was another point that I wanted to make about that that is escaping  
22 me at the moment.

23           Oh, I know what it was.

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1 I wanted to say that, as I understood what happened this  
2 morning, Ms. Lachelier, counsel for Mr. Hawsawi, who was here, waived  
3 the presence of Mr. Ruiz with respect to 978, the motion that is  
4 pending, I think about the NGOs, if I'm not mistaken, but  
5 specifically asserted their right to have learned counsel present for  
6 the questioning of any witness.

7 And it appears to me that we're going to do exactly the  
8 reverse of that. We are going to punt on 978 despite the fact that,  
9 when Mr. Hawsawi was represented, they waived the presence of learned  
10 counsel for that issue but push forward with the testimony that could  
11 seriously impact his case in the absence of any counsel. And I'm not  
12 comfortable with that, and -- and I would -- I would ask the  
13 commission to reconsider that.

14 One other point that I would like to make, and this is  
15 specific to Mr. Bin'Attash, so I don't know if you want to hear this  
16 now or if you'd prefer to go through and hear everybody's point on  
17 that or ----

18 MJ [LtCol SCHRAMA]: Please proceed.

19 LDC [MR. ENGLE]: ---- that first. Okay.

20 The other point is that I felt like this morning when I  
21 spoke to Your Honor, I had a pretty clear sense of where we were.  
22 And my understanding of that was that we were going to allow the  
23 direct to proceed; that at some point in the future after sort of

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1 Phase 1 had been resolved by the commission, we would revisit -- or  
2 have an opportunity to revisit our pending discovery motions, both of  
3 them, the 990, which you ruled upon, and the other one whose number I  
4 can never remember, that you haven't yet ruled on that is pending.  
5 And then we would be able to re-call Special Agent Gaudin. Not that  
6 you were going to grant those motions, but you were going to hear  
7 those motions and we would have an opportunity to get that discovery,  
8 if you allowed us, and then to base our cross-examination on those  
9 documents.

10 And I no longer feel that sort of sense of comfort that I  
11 understand the lay of the land. Because to me, when I hear a court  
12 tell me I'm not required to do something, as Your Honor has said, I'm  
13 not required to question Special Agent Gaudin, that to me means I'm  
14 not waiving anything by not doing it. I'm not losing any  
15 opportunities by not doing it.

16 But then when I hear the court say, I'm going to require you  
17 to make a proper showing before you bring the witness back, that  
18 causes me some anxiety. And I think what is that proper showing?  
19 What am I going to have to make? Am I going to be able to satisfy  
20 that?

21 And that's where I am right now. And I know that  
22 Ms. Lachelier prior to the break had asked Your Honor to rescind that  
23 part of your ruling to say we don't need a proper showing. We're

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1 going to have the opportunity to re-call and cross-examine Special  
2 Agent Gaudin if we get there after phase one, full stop.

3 And I would reiterate that request. And if the commission  
4 is unwilling to do that, then I would ask you to rule that we have  
5 made a proper showing. Because the proper showing that I'm going to  
6 make is we have these outstanding discovery issues. They are going  
7 to inform my cross-examination.

8 I cannot complete writing my cross without knowing if I'm  
9 going to have those materials and then getting them and doing it.  
10 And it's putting me in the position where I'm either going to  
11 ineffectively bumble through a cross-examination in a state of  
12 relative ignorance about what the universe of information available  
13 to me is, or I'm going to stand pat and potentially be ineffective by  
14 waiving a right to cross-examine the agent in the future.

15 And I really feel that I'm between a rock and a hard place  
16 here, and I would ask Your Honor to take me out of that hard place.

17 MJ [LtCol SCHRAMA]: Mr. Engle, I -- the reason I placed a  
18 caveat on it had nothing to do with the reasons that you are  
19 articulating.

20 So for those purposes -- right? -- and especially in light  
21 of Mr. Ruiz being ill this week, I will direct that Mr. Gaudin be  
22 produced at a later time for defense counsel cross-examination, which  
23 I think would not only alleviate your concerns -- right? -- but the

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1 concerns that Ms. Lachelier had before her voluntary departure.

2 LDC [MR. ENGLE]: I feel a great deal of relief.

3 MJ [LtCol SCHRAMA]: Okay.

4 LDC [MR. ENGLE]: Thank you, Your Honor.

5 MJ [LtCol SCHRAMA]: Anything else, Mr. Engle?

6 LDC [MR. ENGLE]: Just the objection, which I've noted, about  
7 proceeding in the absence of counsel for Mr. Hawsawi. I don't have  
8 anything more to say about that, though.

9 MJ [LtCol SCHRAMA]: Okay. Thank you.

10 And, Mr. Connell, I'll ask you the same question. I'm going  
11 to take a moment in a second just to -- I would like to rule on your  
12 ability or not to cross-examine.

13 If I'm inclined not to go in that direction, then I would  
14 obviously give you the chance tonight to look at that and make a  
15 more kind of nuanced argument tomorrow with proper research. But if  
16 I look at everything and find that we can proceed, especially with  
17 the government having no concern, at least as part of a discovery  
18 proceeding, I will look at that.

19 So provided that you are allowed to cross-examine in this  
20 proceeding, are you -- do you have any objection to the  
21 absence -- the voluntary absence of counsel as far as the prejudice  
22 in your case?

23 LDC [MR. CONNELL]: So to be clear what our objection is, we

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1 do object to military commission proceeding in the absence of  
2 counsel. The authorities that I referred to earlier in 949a and in  
3 R.M.C. 506 and in the Regulation for Trial by Military Commission,  
4 don't just apply to the right to capitally qualified counsel. They  
5 generally provide for the right to counsel.

6 My -- my central concern that I articulated earlier is a  
7 structural one, that courts need adversarial proceedings. And  
8 the -- there are a number of times and I've raised a number of  
9 objections over the years to the places where adversarial proceedings  
10 have been eroded in this court by unilateral ex parte pleadings or  
11 arguments by the government and by interference with the defense  
12 right to investigate and proceeding without counsel for a present  
13 defendant who has not waived the right to presence on this occasion  
14 seems to be the next step down a structural slippery slope that  
15 really is undermining the adversarial nature of these proceedings.  
16 So that's my objection.

17 MJ [LtCol SCHRAMA]: Thank you, Mr. Connell.

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

19 MJ [LtCol SCHRAMA]: Okay. Counsel, we're going to take a  
20 20-minute recess. The court's in recess.

21 **[The R.M.C. 803 session recessed at 1426, 23 March 2026.]**

22 **[END OF PAGE]**

23

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1 [The R.M.C. 803 session was called to order at 1452, 23 March 2026.]

2 MJ [LtCol SCHRAMA]: This commission is called to order.

3 All parties that were previously present at the previous  
4 session are again present. Mr. Hawsawi's legal counsel are still  
5 voluntarily absent from the proceeding.

6 Counsel, consistent with my ruling before lunch, we are  
7 going to move forward with the testimony of Special Agent Gaudin,  
8 noting again that the testimony of Agent Gaudin -- excuse  
9 me -- pertains to the litigation of Mr. Bin'Attash's motion to  
10 suppress the LHM statement.

11 Now, I've given all defense counsel the ability to  
12 participate in cross-examination, if they choose to do so. And, with  
13 that, in response to Mr. Engle's question, I have directed that  
14 Mr. Gaudin will be produced at a later time for cross-examination on  
15 various issues.

16 Mr. Connell, I've also considered the issue of whether you  
17 shall be able to conduct cross-examination in light of this court's  
18 previous ruling. And I do find, in this specific situation, because  
19 of the unique facts, this seems to fall under the gambit of  
20 discovery. And, within that, and seeing no protestation by the  
21 government on that specific issue, I will allow you to cross-examine  
22 Mr. Gaudin at the appropriate time.

23 In addition, over lunch and on the break, I've had the

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1 opportunity to consult with the Office of Court Administration, and  
2 my intent is that the transcripts will be provided daily in an  
3 unclassified fashion and furnished to all parties by the conclusion  
4 of the day.

5 Now, as the Hawsawi legal team has voluntarily absented  
6 themselves, I do encourage them that they are welcome to return to  
7 the proceeding at any time.

8 Mr. Trivett, are you ready to call your witness?

9 MTC [MR. TRIVETT]: Yes, sir. We would just need a couple of  
10 minutes to set up.

11 MJ [LtCol SCHRAMA]: Okay. Is it appropriate to take a recess  
12 in place or do we need a longer recess to do so?

13 MTC [MR. TRIVETT]: If we could maybe have 15 minutes, sir, 10  
14 or 15 minutes.

15 MJ [LtCol SCHRAMA]: Okay. That's appropriate. We'll take a  
16 15-minute recess. When we return, we will call the witness and  
17 proceed.

18 LDC [MR. SOWARDS]: Your Honor.

19 MJ [LtCol SCHRAMA]: Yes.

20 LDC [MR. SOWARDS]: I'm sorry.

21 MJ [LtCol SCHRAMA]: I'm sorry, Mr. Sowards. Go ahead.

22 LDC [MR. SOWARDS]: One point of clarification, and I don't  
23 know if we will be allowed to relay this or not, but just for our

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1 purposes, the -- the transcript preparation that you mentioned in the  
2 unclassified form that would be made available, does that indicate,  
3 then, it would then be a redacted version?

4 **[The military judge conferred with courtroom personnel.]**

5 MJ [LtCol SCHRAMA]: I can get a further answer, Mr. Sowards.

6 LDC [MR. SOWARDS]: Okay. Great.

7 MJ [LtCol SCHRAMA]: It may be that if there's unclassified  
8 information in it, there may be redactions. But I'm not sure that I  
9 have a full sight view at the moment.

10 LDC [MR. SOWARDS]: Okay. Thank you, sir. I appreciate it.

11 MJ [LtCol SCHRAMA]: Thank you, Mr. Sowards.

12 Okay. It is 1456. So we will proceed at 1511.

13 **[The R.M.C. 803 session recessed at 1456, 23 March 2026.]**

14 **[The R.M.C. 803 session was called to order at 1514, 23 March 2026.]**

15 MJ [LtCol SCHRAMA]: This commission is called to order.

16 All parties previously present at the previous session are  
17 again present with the exception of Mr. Hawsawi's legal team, who are  
18 still voluntarily absent.

19 Mr. Trivett, are you prepared to proceed?

20 MTC [MR. TRIVETT]: Yes, sir. The United States calls Special  
21 Agent Stephen Gaudin to the stand.

22 MJ [LtCol SCHRAMA]: You may proceed.

23 MTC [MR. TRIVETT]: Special Agent Gaudin, please stand and

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1 raise your right hand so that I may administer the oath.

2 **SPECIAL AGENT STEPHEN GAUDIN, civilian, was called as a witness for**  
3 **the prosecution, was sworn, and testified as follows:**

4 MTC [MR. TRIVETT]: Please be seated.

5 **DIRECT EXAMINATION**

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

7 Q. For the record, please state your name, spelling your  
8 last.

9 A. Stephen Gaudin, G-A-U-D-I-N.

10 Q. Special Agent Gaudin, you are a retired FBI agent?

11 A. I am a retired FBI agent.

12 Q. And how long were you an FBI agent?

13 A. Almost 28 years.

14 Q. And we'll get into more detail later in your background,  
15 but did you have an opportunity to interview Mr. Bin'Attash both in  
16 2007 and 2008?

17 A. Yes, I did.

18 Q. And for 2007, did that first occur in January?

19 A. That's correct.

20 Q. And was that for a four-day period in the 24th and 27th of  
21 January?

22 A. Between the 24th and 27th, yes, sir, four days.

23 Q. Now, during that January interview, was there specifically

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1 a message that Mr. Bin'Attash asked you to convey to the judge during  
2 the interview?

3 A. Yes.

4 Q. What was it and how did he say it?

5 A. Okay. In that particular interview he asked me very  
6 clearly to take this to the judge, using his hands as air quotes, to  
7 which I asked him what are you doing, because I wanted to make sure I  
8 understood fully.

9 And he said, you know, use the tick marks, quote this, what  
10 I'm about to say.

11 Q. And what did he say?

12 A. And then he said, I want you to tell the judge that I am  
13 very proud for my part in the Planes Operation which resulted in the  
14 September 11th attacks and specifically for my part in the collection  
15 of information on United Airlines in Southeast Asia.

16 Q. Thank you. Now, how many days did you interview  
17 Mr. Bin'Attash in January?

18 A. In January for four days.

19 Q. Now, before you ever interviewed Mr. Bin'Attash, did you  
20 have reason to believe he may be involved in the East Africa embassy  
21 bombings in 1998?

22 A. Yes, I did.

23 Q. And how did you come to that belief?

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1           A. I was one of the case agents out of the FBI office in New  
2 York that was in -- was charged with investigating the bombings in  
3 Kenya and Tanzania in 1998. And as part of that, there was someone  
4 that I arrested and interviewed that indicated he was very -- well,  
5 number one, he admitted to his role in the attacks in Kenya and  
6 Tanzania, his involvement with al Qaeda, and specifically involved  
7 with the individuals in al Qaeda, to include Mr. Khallad Bin'Attash.

8           Q. Now, before you interviewed Mr. Bin'Attash in January of  
9 2007 did your investigative team have reason to believe he may be  
10 involved in the attack on the USS COLE in Yemen in October of 2000?

11          A. Yes. The FBI did have reason to believe that he was  
12 involved in that.

13          Q. And how was that?

14          A. Similar -- similar experience, not that I was part of that  
15 investigation initially, but the New York office, part of the Joint  
16 Terrorism Task Force, which I was on, was dispatched to Yemen when  
17 the USS COLE was attacked and they started to find information about  
18 who may be involved. And some of those agents called me because some  
19 specific information came out about a Khallad, which is a very kind  
20 of a unique name compared to Khalid. Khallad was a much more -- it's  
21 a very different name. It's not the difference between Jim and  
22 James. It would be the difference between Jim and Peter, basically,  
23 even though they sound very much the same.

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1           And because of that, they assumed that Khallad, that I found  
2 out about his involvement in the embassy bombings, might be the same  
3 Khallad involved in the COLE attack.

4           Q. Thank you.

5           A. And then also because I later worked in Yemen and found  
6 out more about the COLE operation.

7           Q. Before you interviewed Mr. Bin'Attash, did your  
8 investigative team have reason to believe he may be involved in the  
9 attacks on September 11, 2001, on the United States?

10          A. I did.

11          Q. And how was that?

12          A. Well, information -- a lot of information came out very  
13 publicly about who -- that al Qaeda took responsibility for the  
14 attack. My being in the New York office, I actually responded to the  
15 World Trade Center on September 11th, and I was part of the initial  
16 team that was investigating the September 11th attacks. And then I  
17 worked at headquarters in the Usama bin Laden unit, obviously  
18 continuing the investigation on the September 11th attacks. So that  
19 information about who started to become involved became more and more  
20 clear.

21           And, more specifically, there was a -- some sort of  
22 surveillance operation in another country that Mr. Khallad may have  
23 been in in some of those surveillance photos. And then some of that

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1 was also very public information at the -- in or around that time  
2 frame as well.

3 Q. Now, was Mr. Bin'Attash the first person you were  
4 intending to interview in January of 2007?

5 A. No, he was not.

6 Q. And who was the first person you were intending to  
7 interview?

8 A. Well, when I initially got put on this program, whatever  
9 we want to call it here, this task force, it was another detainee who  
10 later the people in charge of this thing said, no, you're not going  
11 to interview that person at all, but you'll interview Mr. Nashiri.

12 Q. Okay.

13 A. And so I began to concentrate on interviewing Mr. Nashiri.

14 Q. Now, what was your primary objective in speaking with  
15 Mr. Bin'Attash that first day?

16 A. My primary objective was to get to the truth, to find out  
17 what -- what he -- what he might have been involved in, would he be  
18 willing to speak to us voluntarily, of course, and whatever  
19 information I could find. I didn't go in with an agenda to try to,  
20 quote/unquote, get him on anything, but to find out what the truth  
21 was.

22 That's -- that's my job as an FBI agent, to collect the  
23 information, bring it to the prosecutors and to the court to see

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1 what's proven truthfully and what's not.

2 Q. And, in general, how would you characterize those first  
3 four days regarding the subject matter you hoped to discuss with him?

4 A. It was a very cordial interview, I'd have to be quite  
5 honest with you. There were times that I think that Mr. Khallad was  
6 quite -- I don't want to use the word "shocked," but very interested  
7 on how I could have known so much about terrorism and things like  
8 that. And it seemed odd to him that I had already -- I had this  
9 knowledge on al Qaeda and terrorism before meeting him.

10 Q. So did you go in with any prepared questions?

11 A. No. Like I said, we thought we were going to interview  
12 Mr. Nashiri first. And so I was more prepared to interview  
13 Mr. Nashiri and, quite frankly, hoping to get more information that I  
14 could use against -- that I could use in furtherance of the interview  
15 with Mr. Khallad, and didn't find out until that morning that, no,  
16 you're not interviewing Nashiri. Get in there. Grab that door, open  
17 it, and Mr. Khallad will be in there.

18 So I would have to say I was reluctant. All of it felt -- I  
19 don't know what the right word is. But I was quite aware of the task  
20 I had ahead of us.

21 Q. So what documents had you gathered to show him the January  
22 interviews?

23 A. Right. So in -- in -- my objective with Mr. Khallad was

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1 to show him, as quick as I could and in a very calm way, that his  
2 meeting me would be very, very different than anybody else from the  
3 U.S. that may have interviewed him prior to him seeing me.

4 And so I wanted to make sure, by the way I spoke, the way I  
5 acted, the customs, and things I brought into the room with me that  
6 would alert him to the fact that you -- you're in -- you know, you're  
7 in a different setting now than you may have ever been in before.

8 So we brought in -- I searched -- knowing that he was born  
9 in Saudi Arabia, so I searched for dates that came from Saudi Arabia  
10 instead of bringing him dates that may have come from California or  
11 somewhere else. I was trying to be as hospitable and, you know, in  
12 line with Arabic culture. Having lived overseas for a good number of  
13 years, I was trying to be as polite and customary as possible within  
14 the confines of being here.

15 Q. Now, you've mentioned a couple of times -- you've called  
16 him "Mr. Khallad." Is that what he asked you to call him?

17 A. Right. So when we first met him, obviously, I knew what  
18 his true name was. That was Walid Bin'Attash. But I also knew that  
19 he had a very famous kunya or sort of war name, nickname, whatever we  
20 want to call it in the courtroom here today, of Khallad, Khallad.  
21 It's K-H-A-L-L-A-D. But I also use knew him by other names that he  
22 used for my investigation in East Africa, or in working with the COLE  
23 team, a name of Tawfiq bin Rashid or Tawfiq Bin'Attash.

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1           So in my initial greeting with him I called him Tawfiq,  
2 again, as a way to let him know that, you know, I know an awful lot  
3 about you and that, you know -- and to be in a more congenial  
4 setting. And he was -- he kind of seemed taken back that I would  
5 call him Tawfiq and actually said, Why do you call me Tawfiq?  
6 Everybody calls me Khallad. And to which we had a little bit more of  
7 a conversation of, Oh, you've also used the name Tawfiq bin Rashid as  
8 well.

9           Q. All right. And we'll get into some more detail ----

10          A. Sure.

11          Q. ---- on that issue.

12                 So after the January 2007 set of interviews, did you return  
13 to Guantanamo in October of 2007 to interview Mr. Bin'Attash?

14          A. Right. So after the January  
15 interviews -- right? -- again, the next time I would have seen him  
16 would have been in October of 2007.

17          Q. Great. And how many days did you interview him in October  
18 of 2007?

19          A. In October, we interviewed him for three days.

20          Q. Now, regarding the subject matter of the interviews, in  
21 general how would you characterize the three days of interviews in  
22 October, and how were they different than the January interviews?

23          A. So in October, it was -- in some ways it was even more

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1 congenial than the first one because he was -- he seemed pretty happy  
2 to see us because, after January ended, he did say, you know, come  
3 back and see me anytime, basically. And he remembered specifically,  
4 Hey, the last time I saw you was your brother's birthday,  
5 January 27th, and he remembered that specifically. And he brought  
6 that up of his own volition.

7           And the difference between the two interviews were -- his  
8 January interview, we were trying to find out what -- you know,  
9 voluntarily whatever he would say to us. And the October interview  
10 was more to corroborate what he said by showing him a number of  
11 documents, photos, et cetera, if he would be willing to see them,  
12 sort of to put proof on what he said.

13           Q. And did you have a final set of interviews with  
14 Mr. Bin'Attash in February of 2008?

15           A. Yes, sir.

16           Q. And how many days did you interview Mr. Bin'Attash in  
17 February?

18           A. That one was technically two days. The first interview  
19 was more of a formality to set up the actual day of the interview.

20           Q. So how many days total from January to October to February  
21 of '08 ----

22           A. So ----

23           Q. ---- did you interview Mr. Bin'Attash?

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1           A. So it would have been four in January, three in -- October  
2 would be seven, and then technically two in February, so nine  
3 altogether.

4           Q. And do you know how many hours total that you spoke with  
5 him, not counting prayer breaks or lunch breaks?

6           A. Sure. So time where we actually were speaking was roughly  
7 between, like, 45 and 50 hours.

8           Q. All right. Now I want to go back to some of your  
9 background.

10          A. Sure.

11          Q. What's your educational background?

12          A. My education -- good question. How far back do you want  
13 to go, sir?

14                 No, so I'm a college graduate, graduated from a small school  
15 in Boston. So that's as high as I went in education for  
16 four -- four-year -- it took me five years to get a four-year degree.  
17 Sorry.

18          Q. So did you spend any time in the military?

19          A. I did. I was -- I was in ROTC when I was in the -- in  
20 college or for the latter part of my college years, and I was  
21 commissioned as second lieutenant upon graduating college. And then  
22 I went directly into the Army when I graduated college in 1986 for  
23 active duty.

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1 Q. And how long were you on active duty?

2 A. I was on active duty until the fall of 1991. So a little  
3 over five years.

4 Q. And what was your military occupational specialty?

5 A. Okay. I was -- initially, I was an infantry officer  
6 assigned to the 82nd Airborne Division at Fort Bragg, and -- and  
7 then -- do you want me to go further than that? Or I don't know if  
8 that ----

9 Q. Well, did you ever take Ranger training?

10 A. Yes. So as part of being an infantry officer, you're not  
11 forced to, but one of the things you're encouraged to do is to go to  
12 Ranger School. So after my initial infantry officer training course,  
13 I then attended and passed Ranger School. And that was right before  
14 I reported to Fort Bragg for my official assignment as a platoon  
15 leader -- infantry platoon leader in the 82nd Airborne Division.

16 Q. And did you ever take special forces training?

17 A. Much later in my time in the Army I did. I complete -- I  
18 mean, if you want to go into that in more details or -- now or...

19 Q. I'm about to ask you.

20 A. Okay. Sorry about that.

21 Q. So did you actually become special forces?

22 A. No.

23 Q. And why not?

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1           A. Somewhere along the lines, the Army was recalibrating its  
2 forces, and I was told that, hey, congratulations, you've done  
3 everything that you need to do as a lieutenant, and you're going to  
4 be promoted to captain. However, your promotion to captain is  
5 contingent upon you taking a branch transfer to a different MOS. And  
6 in this case it would have been military intelligence.

7           My brigade commander found out about that. And I wasn't the  
8 only one. There were a number of us in our brigade. He got us  
9 together, and he gave us an option saying, If you don't want to go  
10 down that path, I've arranged for you guys now as  
11 lieutenants -- which was early for us to do this -- you could attend  
12 the Special Forces Assessment and Selection course right there at  
13 Fort Bragg.

14           And if you successfully complete it, which you probably  
15 won't, in his words, then instead of being branch transferred to  
16 military intelligence you'd be a Special Forces officer. So I  
17 completed that course. By the grace of God, somehow I was selected.  
18 But I still had to go to the Military Intelligence Advanced Course in  
19 Arizona, which lasted about a year. But even traveling over there I  
20 had orders to come back to Fort Bragg to start Special Forces  
21 officer's training.

22           Q. All right. And at some point during those trainings, did  
23 you apply to be an FBI agent?

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1           A. Yes, sir. I had an executive officer who wanted to be an  
2 FBI agent. And he found about a recruiting day that was happening at  
3 Fort Bragg, and he made me go with him to the recruiting day because  
4 he didn't want to go by himself.

5           And I filled out some paperwork, and little by little I get  
6 a letter back saying come in for another phase of this process, and  
7 over time that process continued.

8           Q. All right. So when did you formally join the FBI?

9           A. So with about 80 percent of the Special Forces training  
10 course completed, I get a call from the FBI saying you need to be  
11 here Sunday. And that was in late October. And so I started -- I  
12 had very little time to make up my mind. I had about 48 hours to  
13 decide if I was going to stay in the Army. Pretty much at that point  
14 would have been a career decision for the rest of my career because I  
15 was coming up on six years in the Army, or start a new career with  
16 the FBI. And after a lot of wrestling with that decision, I chose to  
17 go with the FBI and literally I had no break in service. I went from  
18 Fort Bragg and drove right to Quantico, Virginia ----

19           Q. And how many ----

20           A. ---- to start the FBI Academy. Sorry.

21           Q. That's fine. How many years did you serve as an FBI  
22 agent?

23           A. Almost -- so from November -- November 3rd of 1991 to May

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1 of 2019. So roughly 27, 28 years.

2 Q. And what positions have you held in the FBI?

3 A. Whew. So I was a special agent. When you leave the FBI  
4 Academy, regardless of your background, you pass the special agent  
5 training course, you become a special agent. I started up in the  
6 Albany division in the Kingston RA or two-man office and covering  
7 five rural counties up there.

8 Then I moved -- I was an investigator in general crimes what  
9 you would typically think the FBI would do, everything from bank  
10 robberies to organized crime, kidnappings, I worked on serial murder  
11 case, things along those lines.

12 I was later moved to our -- the head of our field office in  
13 Albany for a couple of years doing the same job. And then late 1997,  
14 I was transferred from Albany to the New York office where I was put  
15 on the Joint Terrorism Task Force.

16 Q. All right. Did you spend ----

17 A. Let me know if you want to keep going.

18 Q. Well, did you spend any time as a LEGAT? And if so, can  
19 you explain to the commission what a LEGAT is?

20 A. Sure. Much later in my career -- so that first time I  
21 would have been a LEGAT -- I was LEGAT in three different places.  
22 The first time would have been a couple -- about a year or two after  
23 September 11th, I was the -- I opened the first legal attache office

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1 at the U.S. embassy in Sana'a, Yemen.

2           Legal attache, to put it in militaryese for most of the  
3 people in uniform here, would be similar to the defense attache at  
4 the embassy where I was the go-between or the liaison officer between  
5 the FBI, the U.S. embassy, and the host nation that we were in.

6           Q. Did you officially retire in 2019?

7           A. I did, after several more assignments. I mean,  
8 after -- after Yemen I was also the LEGAT in Vienna, Austria,  
9 covering five countries in Eastern Europe, and then LEGAT in the  
10 United Arab Emirates was my last assignment.

11           Q. So of all of your years in the FBI, how would you  
12 characterize your primary investigative focus?

13           A. Up until I transferred to -- the first few years was all  
14 general criminal work. And then on August 7, 1998, when al Qaeda  
15 attacked the U.S. embassies in Kenya and Tanzania, I never worked  
16 anything else but terrorism cases, for the most part, primarily  
17 al Qaeda cases.

18           As the LEGAT, I still -- I handled a couple other different  
19 things, more as to liaison with host nation. But my primary focus  
20 from '98 to 2019 was purely terrorism and mostly al Qaeda, almost all  
21 al Qaeda.

22           Q. All right. So in 1998 are you transferred to the New York  
23 office?

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1 A. Yes, sir.

2 Q. Do you remember approximately when?

3 A. It was late in -- might have been late in '97 when I  
4 officially transferred.

5 Q. And the New York office ----

6 A. And, again, was put on the Joint Terrorism Task Force.

7 Q. Sorry. I didn't mean to interrupt.

8 A. Yes, sorry.

9 Q. So is the New York office of the FBI, the one you were  
10 transferred to, is it in Manhattan?

11 A. Yes, sir.

12 Q. And where approximately in Manhattan?

13 A. I worked on the JTTF, which was -- so I mean -- the big  
14 difference between Albany and New York, Albany was probably the  
15 smallest FBI agency -- probably the smallest division of the FBI we  
16 had and now it was about 50 agents altogether.

17 Now I'm transferred to the New York office, which is by far  
18 the largest office of the FBI with over 1200 agents. And I was put  
19 on the Joint Terrorism Task Force at a building at 290 Broadway,  
20 which was next to -- where more people from the FBI in downtown New  
21 York worked in Manhattan which would have been 26 Federal Plaza. So  
22 this would be lower -- lower Broadway area, not very far from the  
23 World Trade Center. Also not far from City Hall, in that area.

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1 Q. I understand. All right. So to what squad were you  
2 assigned when you were assigned to the New York office?

3 A. When I first got on there I was put on the Joint Terrorism  
4 Task Force, and the particular squad I was put on was something that  
5 was called the Special Events Squad.

6 Q. All right. And were you also part of the SWAT team at  
7 that time?

8 A. I was. I was on the SWAT team in the Albany Division, so  
9 when I got to New York I did have to try out to make sure I knew what  
10 I was doing. But in retro -- you know, in some sort of analysis your  
11 SWAT duties continued when you got to the next field office because  
12 you had been trained but still you had to prove that you could make  
13 the team.

14 Q. Okay. So these proceedings are being simultaneously  
15 interpreted ----

16 A. Okay.

17 Q. ---- by someone who is somewhere else on the ELC.

18 A. All right.

19 Q. So if we can just slow down a little bit, give them an  
20 opportunity to do it.

21 A. Sure thing.

22 Q. Every once in a while, you might see a yellow light come  
23 on. I just saw it. I don't know if it comes up on the witness

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1 stand. So if I -- if I ever hold my hand up ----

2 A. Sure.

3 Q. ---- it just means that they've asked for you to ----

4 A. Where would the yellow light be, sir?

5 Q. You might not have it up there.

6 A. Okay.

7 Q. We have it, I think the judge has it.

8 A. So if I see your hand I'll ----

9 Q. Yeah, it just means to slow down. They're trying to catch  
10 up.

11 A. Sure thing.

12 Q. Okay. Great.

13 So when you were transferred to the New York office, what  
14 was your first assignment?

15 A. My first assignment on the JTTF was as part of the Special  
16 Events Squad. There was an event coming to New York, a sporting  
17 event coming to New York in the summer of 1998 called the Goodwill  
18 Games, and it was an international sporting event brought by Ted  
19 Turner -- the Ted Turner organization. And it had particular  
20 importance to the head of the -- the Counterterrorism and  
21 Counterintelligence Division of the New York office because it was  
22 the first major broadcasted international sports event since the 1996  
23 Olympics, so in the last two years, where there was -- obviously

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1 there was an attack and the -- on the U.S. Olympics in Atlanta, so  
2 there was some fear that someone could use this as a stage to -- for  
3 whatever agenda they might have because it was going to be broadcast  
4 all over the world.

5 Q. All right.

6 A. So I was put in charge of the logistical side of running  
7 security in coordination with all of the different police departments  
8 across both -- all of the boroughs of New York City plus all of the  
9 way out to Long Island. There were events all over that wide area.

10 Q. And did you plan for a follow-on assignment ----

11 A. Yes.

12 Q. ---- after the Goodwill Games?

13 A. It was a -- it was a -- it was a very logistical  
14 assignment. It was not an investigative assignment, sir. And so I  
15 wasn't keenly happy with doing the job. But because it had such  
16 importance for these -- my bosses in the New York office, they said,  
17 look, if you -- we understand what a slog this is going to be and it  
18 might not be technically up your alley, but if you do a good job,  
19 consider being -- you can be transferred to where you would like to  
20 go. And where would you like to go?

21 And I said I'd like to go work criminal cases, which is what  
22 my background was, and specifically I'd like to be on the Fugitive  
23 Squad in New York.

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1 Q. Now, did all of this change for you on 7 August 1998?

2 A. Yes, it did.

3 Q. And do you recall what you were doing on 7 August 1998?

4 A. I was on a well-deserved vacation from the end of the  
5 Goodwill Games where I had pretty much worked nonstop for months, and  
6 particularly during the duration of the games, I don't even know how  
7 many times I might have even gone home to go to sleep. So I was on  
8 vacation on the morning of the 7th.

9 Q. Now, did something happen on that day that would change  
10 the course of your career?

11 A. Yes, sir.

12 Q. What happened?

13 A. Our two embassies -- two U.S. embassies in East  
14 Africa -- Nairobi, Kenya, and Dar es Salaam, Tanzania -- were  
15 simultaneously bombed and the FBI needed to send people over there to  
16 help figure out who had -- who had done it.

17 Q. And what was your role supposed to be on that part of the  
18 investigation?

19 A. So when my pager went off, again, I was at a beach house  
20 and didn't have a -- there was no TV. There was no radio where I  
21 was. I didn't have a radio in my car. It was just get to New York  
22 office, get to the command post right away.

23 I thought there was some sort of remnant of something that

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1 happened with the Goodwill Games and I needed to get back and find  
2 out what had happened. So I raced up there, walked into the command  
3 post which I had run for the Goodwill Games, and I closed it down so  
4 it was silent before I left. And now it was a beehive of activity  
5 with, you know, as many people that are in this room right now all  
6 scurrying about, trying to figure out a way to get the FBI over to  
7 Kenya and Tanzania.

8 My bosses looked at me and said, Do you want to go to  
9 Nairobi or Dar es Salaam?

10 I immediately said Nairobi.

11 They said, Why did you pick that so fast?

12 I said, I don't know where Dar es Salaam is.

13 And they knew I had no background in terrorism at  
14 all -- terrorism investigations, but they said, look, you are the  
15 only -- you're the only member of the SWAT team in New York that's on  
16 the JTTF. So we need you to go, and your primary role, your main  
17 function will be to do everything you can to protect the on-scene  
18 commander and the other agents from New York that are going there.  
19 So my role was more protective than investigative. That's how it was  
20 explained to me that day.

21 Q. And who was -- who was the person you were responsible for  
22 protecting?

23 A. Pat D'Amuro was the on-scene commander for the New York

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1 personnel deploying to Kenya.

2 Q. Now, is it a -- a common practice of the FBI to name its  
3 major investigations?

4 A. Yeah. So if -- if you had a regular case -- I don't want  
5 to say "regular," but a standard case would have a file number, you  
6 know, that corresponds. For example, an 88 case was a bank robbery  
7 case, and then the next two letters would be New York, so an 88 New  
8 York meant a bank robbery in New York, and then a file -- a serial  
9 number.

10 Now, when cases became so large, they still had that file  
11 number, but they were also given -- I don't want to say a code name  
12 but a name to sort of highlight what it is. Like, for example, the  
13 attack on the first World Trade Center in 1993 became Tradebom. So  
14 the bombings in Kenya and Tanzania, once they became a New York case  
15 became KENBOM for the bombing in Kenya and TANBOM for the bombing in  
16 Tanzania, just shorten the -- shorten the verbiage of what the name  
17 of the case was.

18 Q. And was it a combined case or two separate cases?

19 A. It was a combined case, so it was called KENBOM/TANBOM.

20 Q. All right. Understanding that your role was to be a SWAT  
21 officer, did that role change for you at any point in time once you  
22 get to Kenya?

23 A. It certainly did, sir.

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1 Q. Now, did you become one of the case agents on the case  
2 eventually?

3 A. Yes. Much faster than I wanted to be.

4 Q. And without getting into every detail ----

5 A. Sure.

6 Q. ---- can you explain, in general, how the attack on the  
7 United States Embassy in Kenya occurred?

8 A. It was a -- a suicide bombing using an explosive-laden  
9 truck. There were two assailants in the truck in Nairobi. A similar  
10 type of bomb-laden vehicle at the U.S. Embassy in Dar es Salaam,  
11 Tanzania.

12 Q. And did the FBI investigation into the embassy bombings  
13 determine that al Qaeda was responsible for the attacks?

14 A. Yes, they did. And, in fact, I think it was the first  
15 time the FBI had ever responded to an overseas bombing where they  
16 actually arrested people overseas, brought them back for trial in the  
17 United States. To my memory, it was the first time that that had  
18 ever happened.

19 Q. Now, as an agent on the case, did you have the opportunity  
20 to interview any of the suspects in the bombings?

21 A. I did.

22 Q. And what was -- what -- what was the name of the person  
23 that you interviewed in regard to a potential suspect?

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1           A. Right. So the -- the person that I arrested and then was  
2 interviewing used two names. His -- he used the fake name initially  
3 of Khalid Saleh Salim bin Rashid and then ultimately told me that his  
4 true name was Muhammad Daoud Rashid al Owhali. So he first pretended  
5 to be a poor Kenya -- a poor boy from Yemen and then later advised us  
6 that he was a very wealthy man from Saudi Arabia and how and why he  
7 joined al Qaeda and what his role and what many other people's roles  
8 were in these dual bombings that -- that were led by bin Laden and  
9 al Qaeda.

10           Q. And can you explain how it came about that you found  
11 Mr. al Owhali?

12           A. Yes, sir. It's a bit of a story. But -- so you tell me  
13 how -- my being responsible for the on-scene commander's safety and  
14 security, I was very close in watching him while we were working.  
15 Now, you have to understand, normally, if we were to work overseas,  
16 we'd be working at our U.S. Embassy, which was blown up, so we didn't  
17 have that place -- that luxury to work.

18           So, initially, we worked at the lunchroom of a consulate of  
19 another country's embassy. And then, over time, we moved over  
20 working in the Criminal Investigation Department's office of the  
21 Kenyan police -- Kenya National Police.

22           So a little bit more formal, but still it wasn't  
23 really -- it wasn't our space. It was very ad hoc. So I did

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1 everything that I could to be as -- you know, within inches of  
2 Mr. D'Amuro the entire time. And one of the major things I saw, what  
3 he was doing, was information would come in, whether it would be from  
4 the Kenyan police or we had a tip line that was sent in, information  
5 would come in, basically, with leads.

6 Q. Just slow down.

7 A. Sure thing. Sorry.

8 Q. That's okay.

9 So information would come in with leads that ----

10 A. Right.

11 Q. ---- that would eventually get a lead that you were  
12 assigned to?

13 A. Yeah, so leads are tips, and some of the tips were  
14 extremely odd, but every tip or every lead had to be investigated  
15 out. And so Mr. D'Amuro was pairing up FBI investigators with Kenyan  
16 investigators to go follow up on a particular lead or tip.

17 Eventually, another lead came in and, quite frankly, there  
18 was nobody left to go out on those leads, but the person who took the  
19 lead convinced Mr. D'Amuro that that seemed a little bit more -- this  
20 seemed a little different than some of the -- than the majority of  
21 the other leads we had, and this one really needed to be followed  
22 up -- followed on as soon as possible.

23 Looking down the bench, so to speak, the bench was empty.

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1 And Mr. D'Amuro said, okay, put away your MP5 and get out your  
2 notebook. You're an FBI investigator before you're a SWAT team  
3 member. We need you to go find somebody.

4 And let me know how many more -- much more detail you'd like  
5 me to fill in.

6 Q. And so did you ultimately find Mr. al Owhali and have an  
7 opportunity to interview him?

8 A. Right. So the lead we got was to find someone whose name  
9 we did not know but who was in a particular area about an hour away  
10 from the embassy in a town of Eastleigh, Nairobi, which was a Somali  
11 refugee area that I did not know at the time, and we ultimately found  
12 this person that -- because he didn't fit in in this particular  
13 village, so to speak, because it was primarily all Somali refugees,  
14 and he was not a -- he was not Somali. So we did find him and  
15 brought him back to the U.S. Embassy where I thought I would be  
16 turning him over to other agents who would interview him.

17 Q. Now, how long did you interview Mr. al Owhali?

18 A. 14 days altogether.

19 Q. And how would you characterize those 14 days?

20 A. So there was almost like -- I would characterize them in  
21 two camps or two phases. The first ten days of the  
22 interviews -- and, again, when I say "ten days," we didn't interview  
23 him for all of those ten days. There was a ten-day period, and there

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1 were several -- several of those days there was no interviews with  
2 him at all, but during those first ten days, he feigned a story,  
3 basically. He provided a cover story of why he -- why he was in  
4 Nairobi, et cetera, et cetera, and his story fell apart rather  
5 quickly.

6 And, eventually, the last four days, when he realized that  
7 we knew a lot more about this and that his lies basically circled  
8 himself and he decided -- he decided that he wanted to cooperate and  
9 tell the truth, he had some demands on that. And so those last four  
10 days would be the times where he told the truth, so to speak.

11 Q. And can you explain what those demands were?

12 A. His first demand was he want -- he said he would tell me  
13 everything about his role in the bombing of the 1998 -- in the  
14 bombing of the embassy in Nairobi, the roles of others involved,  
15 bin Laden's role, and al Qaeda's role in this particular attack, but  
16 his demand was you must promise me that you take me to the United  
17 States to stand trial.

18 Q. And at that time when you were interviewing Mr. al Owhali,  
19 how much experience, if any, did you have in terrorism  
20 investigations?

21 A. He's the first -- first terrorist person I've ever met in  
22 my life.

23 Q. How much experience with al Qaeda?

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1           A. The first time I heard the word "al Qaeda" came from  
2 Mr. al Owhali's mouth to my ears.

3           Q. Now, during those 14 days, did Mr. al Owhali provide you  
4 information about any of the accused in this case?

5           A. He did.

6           Q. Who specifically?

7           A. In particular he told me about Khallad.

8           Q. Was that the only name that he used for him?

9           A. So during the first -- during the four days where he was  
10 telling us the details of his role and all these other people's role,  
11 he used the word "Khallad." In the first ten days when he described,  
12 like, his cover story of why he was in Kenya and how he got there, et  
13 cetera, he used a name of Tawfiq bin Rashid, his cousin, Tawfiq  
14 bin Rashid, and that they were going to go -- you know, they had some  
15 business that they were going to try to start in Kenya or in  
16 Pakistan, something to do with nuts and some other things. But it  
17 was all part of his cover story.

18           So there was a Tawfiq bin Rashid in the early parts of the  
19 interview and then Khallad in the part where he was being truthful  
20 about who did what for the attacks in Kenya and Tanzania.

21           Q. Okay. And that statement where he was being truthful,  
22 those last four days ----

23           A. Yes, sir.

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1 Q. ---- was that statement ultimately admitted against him in  
2 his own trial in the Southern District of New York?

3 A. Right. Those four days in entirety were admitted, and I  
4 testified in that trial to those four days.

5 Q. And were those ten days before that excluded from his  
6 trial?

7 A. They were excluded.

8 Q. So what if -- what, if any, role did he indicate  
9 Mr. Bin'Attash had in the embassy attacks as far as assisting him?

10 A. So there was a number of things he said that Khallad did,  
11 one of them being he basically assisted him in getting him to Nairobi  
12 and gave him some of his instructions. You know, when you get to  
13 Nairobi, someone's going to pick you up at the airport, et cetera, et  
14 cetera, and you'll get your final details on your mission there.

15 Before that -- so he helped him travel from -- at that point  
16 they would have been in Pakistan. They would have -- he would have  
17 helped him get from Pakistan to Nairobi. He had earlier met him also  
18 in Yemen as well. But during that time frame that we're talking  
19 specifically here, it was about getting him from Pakistan  
20 to -- ultimately to Nairobi where he would get more details.

21 So he didn't have all of the information on what his  
22 operation was. He knew he was on an operation but didn't know the  
23 details, which you normally wouldn't tell somebody in this case until

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1 you get to the -- your final spot.

2           Anyway, Khallad -- he had said also that Khallad was part of  
3 this martyrdom video that al Owhali was to make regarding, you know,  
4 what he was -- you know, that he was going to be a martyr in an  
5 operation. Again, there was a lot of -- a lot of wording in the  
6 title. It didn't say -- is this microphone still on? Sorry.

7           Q. That's okay.

8           A. Didn't say the words "al Qaeda," but it had -- it had,  
9 like, this long thing, the third martyr barracks of the Malik  
10 something Brigade of the Liberation Army of the Holy Lands, et  
11 cetera.

12           And al Owhali kept on -- well, the way he explained it to me  
13 was I had a hard time saying that because I hadn't really heard that  
14 term before and Khallad was helping him memorize that term and also  
15 helped him memorize very clearly his fraudulent Yemeni passport and  
16 the name of Khallad Saleh Salim bin Rashid and the way he would do  
17 that was, hey, don't try to think of this alternate identity of  
18 yours, just remember I'm your cousin, I'm Tawfiq bin Rashid, you're  
19 Khallad Salim Saleh bin Rashid, we are cousins, and that helped him  
20 with his cover story.

21           Q. Did Mr. al Owhali also identify other people associated  
22 with al Qaeda during his interview with you?

23           A. He did.

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1 Q. And what were those two individuals?

2 A. He identified photographs -- again, of a person named  
3 Azzam or Jihad -- his formal name of Jihad Ali, a Saudi citizen who  
4 was the suicide bomber in the truck in Nairobi, and also a man by the  
5 name of Bilal -- he called him Bilal al Makki, who we were told by  
6 the people who gave us the photos that his real name is Abdul Rahim  
7 al Nashiri and that Bilal and Azzam were cousins.

8 Q. And in your -- the four-day interview, did he admit his  
9 involvement in the attacks, Mr. al Owhali?

10 A. He did.

11 Q. And what did he say his specific involvement was in the  
12 actual attack?

13 A. Okay. So his specific role when they -- was to be inside  
14 the bomb-laden truck and he had two primary roles while in the truck.  
15 The truck was to be command detonated from inside the truck by the  
16 driver. It wasn't on a timer or something, but it was on a command  
17 detonation that was controlled from inside the driver's portion or  
18 the cab of the truck.

19 Mr. al Owhali's job was when they got as close to the  
20 embassy as they could, there was a drop bar that was manned by a  
21 local guard force. And that drop bar, if you will, would allow the  
22 vehicle to get another maybe 15 yards -- 10 or 15 yards closer to the  
23 skin of the embassy where the Marine security guards would have

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1 control of a gate. So he said to me we knew we weren't going to get  
2 past that gate but we just wanted to get past the drop bar.

3 So his primary role was to -- when they pulled up into that  
4 area, Mr. al Owhali was to jump out of the vehicle and attack the  
5 guard or demand -- attack the guard -- he had two homemade grenades  
6 and a pistol -- to order the guard to open the drop bar so Azzam  
7 could get the truck closer.

8 His backup job was if something happened to the command  
9 detonation, Mr. al Owhali had a set of keys that he would have to  
10 unlock the back of the -- the back of the truck where the explosives  
11 were hidden. He would open up that padlock, throw in one of the  
12 grenades and set off a -- a detonation of the attack that way instead  
13 of manually, a sympathetic reaction that would cause the bomb -- the  
14 bigger bomb to go off.

15 MTC [MR. TRIVETT]: All right. So I'm now showing the witness  
16 what has been marked as Appellate Exhibit 631IIIII, page 1 of 66.  
17 And, Your Honor, the rest of the direct examination will be in the  
18 Appellate Exhibit 631IIIII trigram and I'll just note the page of that  
19 each time for the record. This is page 1 of AE 631IIIII.

20 There are separate ones that we'll get to that are not  
21 within the 631 realm. But when I have Special Agent Gaudin use  
22 those, we'll note them separately for the record.

23 MJ [LtCol SCHRAMA]: Thank you, Mr. Trivett.

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1 MTC [MR. TRIVETT]: Thank you. All right. So we would ask  
2 for the feed from Table 1 and would note that all of these are Law  
3 Enforcement Sensitive, so they can't be displayed to the gallery.

4 Q. So, Special Agent Gaudin, can you see this document?

5 A. Yes, sir.

6 Q. And do you know what this document is?

7 A. I do.

8 Q. And what is this document?

9 A. This is the FD-302, or the document in which I would have  
10 recorded my interview with Muhammad al Owhali back in 1998 while we  
11 were still in Kenya and Tanzania.

12 Q. Okay. And so there's going to be ----

13 A. Again, this would be the four-day portion that was allowed  
14 into the trial.

15 Q. All right. So there's going to be seven separate pages  
16 within this 302.

17 A. Okay.

18 Q. We've pre-highlighted them.

19 A. Yes.

20 Q. If I can ask you just read the first highlight and then  
21 I'm going to have some follow-on questions for you.

22 A. Sure.

23 The following is a combined report of interviews with

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1 Muhammad Rashid Daoud al Owhali, also known as Khallad Saleh Salim  
2 bin Rashid, hereafter referred to as subject, a male citizen of  
3 Saudi Arabia born on January 18th, 1977, that were conducted over a  
4 four-day period between the 22nd to the 25th of August, 1998, at CID  
5 headquarters in Nairobi, Kenya.

6 Q. All right. Thank you. And I gave you some poor  
7 instructions. So from now on when I ask you the highlights just read  
8 them to yourself, everyone read them to themselves and just let me  
9 know when you're ready and then I'll ask you the question.

10 A. Sure. Sorry about that.

11 Q. I'll save you the time of reading them out loud.

12 A. My bad.

13 Q. All right. Thank you.

14 And there's a highlight on the bottom ----

15 A. Yes, sir.

16 Q. ---- of your name.

17 A. Yes, sir.

18 Q. I specifically want to ask you, what's next to that and  
19 whether or not that would follow you through the remainder of your  
20 career?

21 A. Right. So when you draft the document, you -- at the  
22 bottom there you have to write who the authors of the document were.  
23 And, again, you know, this was in the time, that I was in the FBI, we

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1 were very paper heavy. All of the documents were in paper. So you  
2 would have to initial that over that saying, okay, I'm authenticating  
3 that, yes, this is the final version of the form and I'm the person  
4 who wrote it.

5           So with my initials there you see the "S" and "G" and with  
6 the circle. And that's how I would label something that -- whether  
7 it was a piece of evidence or anything else, it was kind of like my  
8 own little way of saying this is -- I could identify that those are  
9 my initials as opposed to potentially somebody else with similar  
10 initials of "S" and "G."

11           Q. All right. Now back up to that first ----

12           A. Highlighted portion?

13           Q. The first highlighted portion.

14           A. Yes, sir.

15           Q. Now, I see there are two names. And just to clarify ----

16           A. Yep.

17           Q. ---- which one was the true name and which one was the  
18 kunya?

19           A. Al Owhali, the first of the names in this document, is his  
20 true name, and his kunya, or war name, would be Khalid Saleh Salem  
21 bin Rashid.

22           Q. And how did that second name, that war name, relate to  
23 your investigation of Mr. Bin'Attash?

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1           A. Right. So the -- at some point during the investigation  
2 of the USS COLE, a particular document was found, a Yemen ID card and  
3 an application thereof, or something along those lines. And then  
4 with -- what we -- came to be known as Mr. Khallad's photograph on  
5 that document, but the document was in the name, and all you'd have  
6 to do is substitute Khalid Salim, but it was Tawfiq bin Rashid. So  
7 it was a -- it was a very similar name for me.

8           And then there were other details once we -- you  
9 could -- started to compare those documents because, eventually, with  
10 our investigation, we found all of Mr. al Owhali's fraudulent  
11 documents in Yemen, and there were -- there were a lot of  
12 similarities between Mr. al Owhali's and this fraudulent document  
13 belonging to Mr. Khallad of Tawfiq bin Rashid. There was just ----

14           Q. Thank you.

15           A. ---- an incredible amount of similarities.

16           MTC [MR. TRIVETT]: I'm now showing the witness page 2 of 66  
17 of that same appellate exhibit.

18           Q. If you can read that to yourself, let me know when you've  
19 completed it.

20           **[The witness reviewed the evidence.]**

21           A. Yes, sir.

22           Q. What, if anything, else did Mr. al Owhali say in regard to  
23 his -- his perceived enemies?

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1           A. Yes, sir. So this was, you know, my recording of what  
2 Mr. al Owhali literally demanded, that he wanted it very clearly  
3 known that he wanted to be tried in the United States because the  
4 United States was his enemy, not Kenya. And a part in that was he  
5 had some disagreements with the cell leader on where they were  
6 supposed to put the bomb. Mr. al Owhali didn't like where they were  
7 putting it, but he ultimately followed their instructions anyway.  
8 But he -- he didn't want to kill the Kenyans. He didn't want to kill  
9 anyone but the Americans -- his primary role was to kill the  
10 Americans, the U.S. -- U.S. people there.

11           Q. Okay.

12           A. And so he wanted to explain in court in the United States  
13 that all of this that's happening, this -- this war, this attack even  
14 in Nairobi and Dar es Salaam was really the fault of the United  
15 States and that he wanted to explain why -- why he was -- became part  
16 of this, that, you know, he had a very comfortable life in  
17 Saudi Arabia, and what made him give all of that up to be involved to  
18 go live in a cave in Afghanistan, and, eventually, like I said, he  
19 was supposed to die in this attack. It's just by a matter of luck  
20 that he didn't -- he didn't die in the attack.

21           Q. And did he explain why he didn't die?

22           A. Yes, sir. Well, he -- number one, he woke up in the  
23 hospital and realized he wasn't dead, and he was almost shocked at

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1 that.

2 But what had -- what he explained was when they got to the  
3 embassy, there was almost a -- there was a bit of a traffic jam, so  
4 to speak, where, as they were trying to get close to that drop bar, a  
5 car was coming out of the embassy around about the same time. So  
6 there was almost like this -- you know, they needed -- someone needed  
7 to move so that someone could get closer.

8 Are we good?

9 Okay. And so when Mr. al Owhali jumps out of the car to go  
10 attack the guard with the grenades and the pistol and demand that he  
11 open the drop bar, which obviously got the guard's attention, and the  
12 guard's saying okay, okay, I'll do what you say. I'll do what you  
13 say. The guard started to back up, and he was about to press the  
14 counterbalance, you know, the real heavy part of the drop bar so that  
15 the drop bar would open.

16 And just as the guard got there, he realized he had enough  
17 distance to get away from Mr. al Owhali and he ran. So there  
18 was -- you know, in Mr. al Owhali's eyes, the way he explained it to  
19 me is, I couldn't open the bar from where I was, and Azzam needed to  
20 get the car closer. And it was almost like this Mexican standoff of,  
21 like, what are we going to do.

22 So Mr. al Owhali throws one of the grenades, and that causes  
23 a lot of confusion, just like basically a small bang in comparison to

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1 what was going to happen next. So as that happened, there was a bit  
2 of chaos, and he saw Mr. Azzam back up the truck.

3 Now, later on, he said what we had come to realize, Azzam  
4 was probably trying to turn the truck around, but at the time it  
5 looked to him that Mr. Azzam was pulling the truck away and  
6 potentially going back out to the main road and leaving, and  
7 Mr. al Owhali said to himself, he said, listen, in my religion,  
8 dying -- and I was fully prepared to die in this -- as a martyr in  
9 this operation in doing my work and basically completing my part of  
10 the operation. I did that. I don't know what Azzam's doing right  
11 now.

12 So for me to stay here and die was not only unnecessary, but  
13 it was actually un-Islamic because it would no longer be in  
14 completion -- I mean, it would no longer be within him conducting  
15 this operation. He already did everything he was supposed to do.

16 So to die by suicide instead of -- he wouldn't have been  
17 considered a martyr, he would have been suicidal. And that would  
18 have been against his religion to die that way.

19 So he ran. He ran not that far, but by that point,  
20 Mr. Azzam got the truck turned around, and what we could ascertain  
21 was because the explosives were in the back of the truck, and  
22 Mr. Azzam wanted to get the business end of the explosives pointed at  
23 the embassy instead of onto the Haile Selassie, the main road

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1 adjacent to the embassy. And Mr. al Owhali was far enough away so  
2 that when the explosion went off, he woke up in a hospital.

3 MTC [MR. TRIVETT]: All right. I'm now showing the witness  
4 what has been marked as page 3 of the same appellate exhibit.

5 Q. I'll just ask you to read both of these. They're fairly  
6 short. And then look up.

7 A. Up in the right-hand corner where it says -- where the  
8 page number -- it says page 4. I just want to make sure I'm reading  
9 the right page.

10 Q. No, that's the correct page. It's an appellate exhibit  
11 that ----

12 A. Okay. Sorry.

13 Q. ---- we're filing for our record.

14 A. Okay.

15 Q. So I'll control those pages.

16 A. Sure thing.

17 Q. Yep. Thank you, though.

18 **[The witness reviewed the evidence.]**

19 A. Yes, sir. I remember both of those.

20 Q. Great. So within the first highlight, did Mr. al Owhali  
21 explain to you bin Laden's role in the attacks?

22 A. About bin Laden's role in the attacks, or Mr. al Owhali's  
23 role in the attack?

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1 Q. Did Mr. al Owhali explain to you what role, if any,  
2 Mr. bin Laden had in regard to the attacks?

3 A. Sure. So al Owhali went to his initial training in these  
4 camps, and because he did good enough, sort of, let's just call it  
5 basic training for now, he was able to earn an audience with  
6 bin Laden. And the people who got selected to -- to do that were  
7 basically given a choice.

8 There's all different ways you can serve the jihad. You can  
9 go this way or that way. But if you really want, Mr. bin Laden has a  
10 special plan against the United States. And if you're -- we think  
11 you're good enough to go in that direction, if you so choose, and  
12 bin Laden's basically going to have like a little recruiting speech  
13 for that, which he attended, and he really liked what Mr. bin Laden  
14 had said and at that point volunteered with bin Laden, please give me  
15 a -- please give me a martyrdom mission for this cause.

16 And bin Laden told him -- yeah, something like that can  
17 happen for you later. Be a little patient. You'll need more  
18 training first, et cetera. But in -- and someday you'll receive such  
19 a mission.

20 Q. Down to that second highlight, he mentioned something  
21 about fighting in the C formation.

22 A. Yes, sir.

23 Q. Now, does this become significant in your interview with

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1 Mr. Bin'Attash?

2 A. It does.

3 Q. Can you explain what Mr. al Owhali stated about the battle  
4 of the C formation?

5 A. Right. And, again, these are Mr. al Owhali's words, the C  
6 formation. And sort of a simple way that I could describe it, is  
7 there was a time where Mr. al Owhali and others, part of  
8 the -- bin Laden's al Qaeda group, were helping the Taliban fight  
9 against the Northern Alliance.

10 And in this particular battle, the battle of the C  
11 formation, was not going very well for their group, the -- the people  
12 that they were helping and themselves.

13 And al Owhali sort of describes himself -- this is my word,  
14 not his -- he becomes the Audie Murphy of this particular battle  
15 where they would pin down -- the leader was trying to get someone to  
16 take an action because they were pinned down by this sort of a  
17 machine gun nest or something to that effect, and no one would  
18 volunteer to do it.

19 And then, finally, Mr. al Owhali said, I'll do it, and he  
20 basically saves the day. And it was so significant, again, because  
21 there was some -- it was such a significant battle that it was a  
22 battle that Mr. Bin'Attash's brother Muhannad was killed at. And  
23 during this battle, at some point in this battle, Mr. al Owhali

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1 carries Mr. Khallad off the battlefield to an aid station.

2 Q. Now, do you know that from Mr. al Owhali or from  
3 Mr. Bin'Attash?

4 A. Both. Well, first, obviously, from 1998 from  
5 Mr. al Owhali.

6 MTC [MR. TRIVETT]: Now showing the witness what has been  
7 marked as page 4 of that same appellate exhibit.

8 Q. This one's a little longer so let's just break it down.

9 A. Sure thing.

10 Q. Look at the first one, read it, and let me know when  
11 you're complete.

12 A. So just read the first highlighted portion then we'll talk  
13 about that?

14 Q. Yes, sir.

15 A. Yes, sir.

16 **[The witness reviewed the evidence.]**

17 A. Yes, sir. I read that first highlighted part.

18 Q. Thank you. So, again, the reference to Azzam, who was  
19 Azzam?

20 A. Azzam is the suicide bomber for the Nairobi bombing. Him  
21 and Mr. al Owhali were very close. And he was also Bilal's cousin.  
22 Mr. Nashiri's cousin.

23 ADC [MS. PRADHAN]: Sir, I apologize for the interruption.

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1 Mr. Trivett referred to this page as being marked page 4 but I think  
2 it was just a misstatement. But for the record this page is marked  
3 page 6.

4 MJ [LtCol SCHRAMA]: **[Microphone button not pushed]** marked  
5 page 6 at the top and I think the appellate number in the lower right  
6 is page 4 ----

7 ADC [MS. PRADHAN]: Sir, I believe -- I believe that  
8 Mr. Trivett is talking about a page that has a great deal of  
9 highlighting on it, that is the Bates No. BKG-00004662 which is  
10 marked as page 6. I just wanted to correct that on the record.

11 MTC [MR. TRIVETT]: Sir, can I have a second to consult with  
12 counsel and compare? We got a marked version of this later than we  
13 typically get. It was on us, not on the judiciary, and it might be  
14 that there's some confusion between what they have and what we have.  
15 I definitely have this as page 4. So if I can take a second to just  
16 consult.

17 MJ [LtCol SCHRAMA]: Please do, Mr. Trivett. I think I'm  
18 looking at what you are but please make sure all of that you have...

19 **[microphone button not pushed; no audio.]**

20 MTC [MR. TRIVETT]: Thank you.

21 **[Counsel conferred.]**

22 MTC [MR. TRIVETT]: All right. Thank you, Your Honor. I  
23 think we came to an understanding of what the confusion was. They

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1 don't have the marked version. But what I can say to the parties is  
2 that I'm just going in order. So this is page 4. Page 5 will be the  
3 next one in order. So the order is not changed. We just don't have  
4 the actual markings in the bottom right. We'll rectify that for  
5 tomorrow.

6 MJ [LtCol SCHRAMA]: Please do, Mr. Trivett.

7 And, Defense Counsel, if at any point there's any confusion,  
8 please let myself or Mr. Trivett know so that we can properly orient  
9 you so that we are all on the same page.

10 LDC [MR. ENGLE]: I would just like to note for the record,  
11 Your Honor, because this won't be reflected in the transcript, that  
12 when this issue arose, counsel met to discuss and compare exhibits  
13 and no one representing Mr. Hawsawi was able to participate in that.

14 MJ [LtCol SCHRAMA]: Thank you, Mr. Engle.

15 ADC [MS. PRADHAN]: And I have one additional note for the  
16 record, Your Honor, which is just that -- I mean, Mr. Trivett just  
17 said that they are going page by page, but -- which is true on the  
18 marked pages, on the pages that he has marked, but is actually not  
19 correct with regards to the original document, which he's skipping  
20 pages on. So that's where some of the confusion comes from.

21 MJ [LtCol SCHRAMA]: Are we able to navigate the exhibit in  
22 the current fashion or not?

23 ADC [MS. PRADHAN]: Yes, sir. I think -- I think we're able

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1 to navigate. But I just -- for the record, the document as it exists  
2 in the record multiple times, the full document, is not actually the  
3 document that is -- it has been altered a little bit in the version  
4 that Mr. Trivett is working from.

5 And so when he says we're going from page 4 to page 5, it's  
6 not actually page 4 to page 5 of the original document. It's page 4  
7 to page 6 of the original document.

8 MJ [LtCol SCHRAMA]: Okay. Thank you for that. That makes  
9 sense. Thank you for the clarification.

10 As I said, if there's a continued issue, please let us know  
11 and we'll make sure Mr. Trivett orients everybody.

12 MTC [MR. TRIVETT]: Yes, sir. Thank you.

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

14 Q. I believe the last question I had asked was who was Azzam?

15 A. Azzam is the person who was the suicide bomber in the  
16 attack on the U.S. embassy in Nairobi on August 7, 1998, with  
17 Mr. al Owhali and he is also the cousin of Bilal, who is also known  
18 as Abdul Rahim al Nashiri.

19 Q. And is that the individual you would interview after you  
20 interviewed Mr. Bin'Attash in January of 2007?

21 A. That's right. Mr. Nashiri we interviewed right after  
22 finishing the interview with Mr. Khallad in 2007.

23 Q. All right. And then finally that name at the end?

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1           A.   Khalid Saleh Salim bin Rashid, which was an alias, a Yemen  
2 passport and the alias that Mr. al Owhali used to get all the way to  
3 Nairobi at one point -- at his last point, actually, before he was  
4 arrested.

5           Q.   If you can read the longer highlighted paragraph there in  
6 the middle ----

7           A.   Sure.

8           Q.   ---- and let me know when you've completed your record.

9           MJ [LtCol SCHRAMA]: Mr. Trivett, while the witness is doing  
10 that also I don't know if it's useful to just refer to the Bates  
11 number.

12          MTC [MR. TRIVETT]: Yes, sir. That's fine.

13          MJ [LtCol SCHRAMA]: That should be the same so you can orient  
14 the witness to the page number and maybe possibly orient defense  
15 counsel to the Bates number ----

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

17          MJ [LtCol SCHRAMA]: ---- just to make sure they are on the  
18 same page as you.

19          MTC [MR. TRIVETT]: Happy to do so. So this document is  
20 MEA-BKG-00004662.

21          MJ [LtCol SCHRAMA]: Thank you.

22          A.   Yes, sir.

23          Q.   All right. Now, to your knowledge does this 302

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1 represent -- does this portion of the 302 represent the first time  
2 that Mr. al Owhali mentions an individual by the name of Khallad?

3 A. Looking at it here now, I believe it is.

4 Q. Again, can you provide any more detail that is in this 302  
5 regarding Khallad's role in regard to assisting Mr. al Owhali?

6 A. Yes. So in this highlighted portion, what Mr. al Owhali  
7 is instructed to do is to meet with Khallad in Karachi, and  
8 Mr. Khallad would fill in the -- would fill in Mr. al Owhali with the  
9 rest of the details regarding this martyrdom mission at a U.S.  
10 embassy in East Africa. He didn't get the final destination in this  
11 briefing, but Mr. Khallad would fill him in on that that he and Azzam  
12 would be in a -- would be in an explosive-laden truck, that they  
13 would be killed in the attack, and the claim of responsibility by  
14 filming this martyrdom video with the claimed responsibility that we  
15 had talked about earlier and that he also gave -- Khallad also gave  
16 Mr. al Owhali instructions on here's how -- you know, you're  
17 traveling to Nairobi, Kenya. And once you get there, you'll get your  
18 final instructions, and he helped them with, you know, this is the  
19 date you're leaving of the 31st of July, 1998.

20 Q. All right. And that last highlighted portion, please?

21 A. And then Mr. al Owhali departed Pakistan for Nairobi,  
22 Kenya.

23 Oh, I'm sorry, the last -- you want me to read the last part

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1 of ----

2 Q. That last highlighted portion at the very bottom of the  
3 page, please.

4 A. Yep.

5 **[The witness reviewed the evidence.]**

6 A. Yes, sir.

7 Q. Did Mr. al Owhali explain why he needed to reach back out  
8 to Khallad Bin'Attash ----

9 A. Yes, sir.

10 Q. ---- in his travels?

11 A. So Mr. al Owhali did not have a direct flight from  
12 Pakistan to Nairobi, it was -- I think it had at least three -- two  
13 to three stops before it got to Nairobi. One of those stops was in  
14 Muscat, Oman before it was scheduled to proceed to Abu Dhabi and then  
15 to Nairobi.

16 Apparent -- according to Mr. Al Owhali there was some sort  
17 of a layover there in Muscat that was longer than potentially  
18 anticipated. He took a rest and fell asleep and missed the  
19 connecting flight to Abu Dhabi and now he didn't know what to do.

20 So he contacted Khallad saying, Now what do I do?

21 And Khallad explained to him, Oh, now that you're not going  
22 to arrive on time, you're going to -- there's not going to be anybody  
23 there to pick you up because the plan was to pick you up in Nairobi

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1 and take you to this big meeting that they're -- that the cell is  
2 having in Mombasa and it would have been elements of both parts of  
3 the bombings of the two embassies, the Kenya portion and the Tanzania  
4 portion were all going to meet in the coastal town of Mombasa, Kenya  
5 and go over some of the details of the operation. And he goes  
6 but -- so there's not going to be anybody there to pick you up.

7           So when you get to Nairobi, go to the Ramada Hotel in  
8 Eastleigh -- or Nairobi. Just go to this specific hotel. So Khallad  
9 told him a specific hotel to go to and wait there, and someone will  
10 come and get you.

11           Q. And did that Ramada Hotel have any -- Ramadan [**sic**] Hotel  
12 have any significance into your investigation into the case?

13           A. Over the long -- I mean, at that -- yes, it did. Over the  
14 long term, it did.

15           Q. And had any of the suspects actually stayed at the ----

16           A. Right.

17           Q. ---- Ramada?

18           A. We -- again, the longer portion of the whole investigation  
19 into the bombings in Kenya and Tanzania, a lot of people arrested, a  
20 lot of people pled guilty. All of the subjects that were brought  
21 back to the U.S. were convicted, so we had a lot more information at  
22 the end.

23           What we found out was that, several years earlier, the

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1 people from al Qaeda that were tasked with doing the site survey or  
2 the surveillance of the U.S. Embassy in Nairobi stayed at that same  
3 hotel, did their work, and then went back to the Ramada Hotel in  
4 Eastleigh and developed the film, et cetera, that they took for that,  
5 basically, site survey, for lack of a better word. So it was a hotel  
6 that was known to them to use.

7 Q. So during the course of your entire interview, do you  
8 recall how many times Mr. al Owhali indicated that he had reached out  
9 to Mr. Bin'Attash?

10 A. So for sure that time, and the -- when he missed his  
11 flight and then again later after Mr. al Owhali -- well, and then  
12 there were a number of other phone calls from the residence, the safe  
13 house where they built the bomb, to a safe -- to basically -- to a  
14 phone number in Yemen right up until about a half hour before the  
15 bomb actually goes off on the 7th of August. So the week of  
16 August 7th, there's a series of phone calls to the same number that  
17 ends in 578 in -- in Yemen, in Sana'a, Yemen. So a bunch of calls  
18 there.

19 After Mr. al Owhali doesn't die, and he has no escape plan,  
20 really, because that's what was supposed to happen to him, he makes  
21 contact with that same 578 number and instructs the people there that  
22 he -- obviously, he needs help, and someone call Khallad and tell him  
23 I didn't die.

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1           So the 578 number was a gateway to reaching Mr. Khallad and  
2 others in al Qaeda in Afghanistan. So, again, if I didn't explain  
3 that, the calls would go from Nairobi to Sana'a, the 578 number, and  
4 then from -- the 578 number in Sana's would call the al Qaeda people  
5 in Afghanistan or in Pakistan, depending on who they were trying to  
6 reach. Those phone numbers, they would pass information back to the  
7 578 number in Sana'a, and that would get relayed to Mr. Owhali how  
8 they were going to try to come and help him. They sent him some  
9 money, et cetera, but we found him before that happened.

10           In fact, Mr. al Owhali said if you had -- if you had come a  
11 day later, you probably would have caught me and whoever they sent to  
12 get me out of here.

13           Q. Now, did you use all of this information in your interview  
14 with Mr. Bin'Attash in January of 2007?

15           A. I used as much of it as I could get in. Again, my goal  
16 when I first met Mr. Khallad was to differentiate myself from anybody  
17 that he might have been interviewed by before. And knowing that  
18 Mr. al Owhali expressed great concern for Mr. Khallad -- I mean,  
19 seemed to have some sort of admiration for Mr. Khallad, especially  
20 the part carrying him off of the battlefield, my idea was to show him  
21 that I knew that story and again differentiate myself from me or  
22 anybody else who may have interviewed him before me.

23           MTC [MR. TRIVETT]: I'm now showing the witness what has been

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1 marked as page 5 of the same appellate exhibit. That's at  
2 BKG-00004663.

3 Q. Just review that yellow highlighted section, and let me  
4 know when you've completed it.

5 A. I did read it. Yep.

6 **[The witness reviewed the evidence.]**

7 A. Done.

8 Q. All right. So the morning of 2 August '98, that predates  
9 the bombing?

10 A. It does.

11 So do you want me to explain what Mr. al Owhali is telling  
12 me, sir?

13 Q. Yes, please.

14 A. Yeah. So in this portion, what he's telling me -- and,  
15 again, it may seem germane here but was very big to our part of the  
16 investigation because -- and Mr. al Owhali's cover story, what he had  
17 said to us, was that when he got to Nairobi, this person Harun, was  
18 supposed to pick him up at the airport, did not show. And he didn't  
19 tell us why, and, obviously, he wasn't telling us why he was really  
20 there.

21 So when he left the airport and went to get a taxi, he  
22 didn't know where to go. And the taxi driver who picked him up,  
23 realizing that there would be a language barrier between -- for him

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1 because he spoke Arabic and Nairobi -- and Nairobi would generally  
2 speak Swahili or English, I'll take you to the Ramada Hotel or the  
3 Ramadan Hotel because I know there that they speak Arabic. So the  
4 taxi driver was selecting the hotel, not Mr. al Owhali.

5 As part of our investigation, while we were interviewing  
6 him, we were able to find his arrival card to Nairobi that you fill  
7 out at the airport long before you get to the taxi, before you -- as  
8 you're clearing customs, and Mr. al Owhali had already written on his  
9 arrival card where he was intending to stay, which was the same  
10 hotel. So we basically caught him in a lie, and that was the  
11 beginning of his story starting to unravel to us.

12 So in this particular section, again, the last four days  
13 where Mr. al Owhali was being cooperative ----

14 DC [Maj LEAHY]: Your Honor, at this point I'm going object to  
15 narrative.

16 MJ [LtCol SCHRAMA]: Mr. Trivett.

17 MTC [MR. TRIVETT]: Just providing content for the independent  
18 source in which Mr. Gaudin walks into the interviews in January 2007  
19 and questions Mr. Bin'Attash. Just giving the contextual background.  
20 These are all things that he would later then discuss specifically  
21 with Mr. Bin'Attash.

22 MJ [LtCol SCHRAMA]: At this point I'm going to overrule the  
23 objection.

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1           But, Mr. Trivett, I am going to ask that you direct the  
2 witness and not propose a subject that he then narrates on.

3           MTC [MR. TRIVETT]: Yes, sir. Happy to do it.

4           A. Okay. So on this portion here, Mr. Al Owhali is  
5 explaining that he followed Mr. ----

6           MJ [LtCol SCHRAMA]: Hold on, Mr. Gaudin.

7           WIT: Sorry about that.

8           MJ [LtCol SCHRAMA]: I'm going to have Mr. Trivett direct you.

9           WIT: Yes, sir.

10          MJ [LtCol SCHRAMA]: And then you can answer his question, and  
11 then you may testify.

12          WIT: Got you. Yes, sir.

13          Q. I think I've actually asked you the questions I wanted to  
14 on this document.

15          MTC [MR. TRIVETT]: So, Your Honor, I notice that  
16 it's -- we're about four minutes from prayer time. I don't know if  
17 it was your intention to have prayer time be the end of the day or if  
18 you intended to come back after prayer time.

19          MJ [LtCol SCHRAMA]: The intent is to have prayer time at the  
20 end of the day. So we'll go a little bit longer with this witness,  
21 and then we will recess for the evening and then reconvene tomorrow  
22 morning.

23          MTC [MR. TRIVETT]: Okay, Your Honor. And just for the

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1 court's awareness, I have about three more pages of the 302 that I  
2 want to ask him some questions about for East Africa, and then that  
3 would probably be the appropriate place to stop.

4 MJ [LtCol SCHRAMA]: That would be appropriate, Mr. Trivett.

5 MTC [MR. TRIVETT]: Thank you.

6 I'm now showing the witness what has been marked as  
7 Appellate Exhibit 631IIII, page 6 of 66. That's MEA-BKG-00004669.

8 Q. If you can read all three of those, please, Special Agent  
9 Gaudin, and let me know when you've completed it, sir.

10 **[The witness reviewed the evidence.]**

11 A. Yes, sir.

12 Q. All right. So that first highlight, what, if any,  
13 injuries did Mr. al Owhali present with when you interviewed him?

14 A. Mr. al -- Mr. Owhali had plain injuries to his forehead,  
15 to both wrists, and the biggest injury he had was in the very center  
16 of his back.

17 Q. All right. And that second highlight, I believe you  
18 indicated the 578 number, and you've already spoken about how that  
19 was used, there's a reference to a Hazzá.

20 A. Yes, sir.

21 Q. Did the FBI investigation reveal who Hazzá was?

22 A. Right. So, again, Hazzá, here spelled with two Zs -- it  
23 can also be called in Arabic al Hada or al Hazzá -- was a very good

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1 friend of Mr. al Owhali's. But also at that house -- the father of  
2 that house had a number of daughters that were married to al Qaeda  
3 personalities. And that -- at this particular house, the phone  
4 number at that house is where al Owhali called to get messages to  
5 both, hey, I need help, and please call Khallad for me.

6 Q. Thank you. And that third one specifically, did  
7 Mr. al Owhali indicate that he had received money? And who did he  
8 believe he received the money from?

9 A. He did. He asked Mr. al Owhali for the help and he sent  
10 him the thousand dollars to a -- basically a gold jewelry store  
11 called ShearGold not in -- we have that here but we also have that as  
12 evidentiary to back up what Mr. al Owhali told us that was used in  
13 court as well.

14 Q. Thank you.

15 A. So that did happen.

16 MTC [MR. TRIVETT]: All right. And I'm now showing the  
17 witness the final page of this al Owhali 302 that we've highlighted.  
18 It's at Appellate Exhibit 631IIII, page 7, at MEA-BKG-00004670.

19 Q. Can you just read the highlight? Let me know when you've  
20 completed.

21 **[The witness reviewed the evidence.]**

22 A. Yes, sir.

23 Q. All right. Did you specifically ask Mr. al Owhali to do

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1 physical identifications of the people that he referenced in these  
2 interviews?

3 A. Right. We at this particular time in the investigation we  
4 didn't have a lot of photographs. So during Mr. al Owhali's telling  
5 of his role in the attacks and his role in al Qaeda, as he would say  
6 names, I would write them down and then later at this portion I would  
7 say, okay, you talked about these people. Can you further describe  
8 them to me.

9 And in some cases he described them in very good detail.  
10 Other cases it was more general detail. So I would, like, stand up  
11 and say bigger than me or shorter than me? Fatter than me? Skinnier  
12 than me? Things like that.

13 And Mr. al Owhali would fill in the blanks. On some people,  
14 he filled them in more than he did on others, and he purposefully  
15 told me he was going to do that.

16 Q. And during that interview did you have a photo of  
17 Mr. Nashiri?

18 A. Not right at this point, I didn't.

19 Q. Did you ever get a photo of Mr. Nashiri?

20 A. I did.

21 Q. Did you ever get a photo of the individual identified as  
22 Azzam?

23 A. We did, at the same time I got those two photos.

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1 Q. During this interview did you have a photo of Mr. Walid  
2 Bin'Attash?

3 A. I did not.

4 MTC [MR. TRIVETT]: Thank you. I know that I said I was going  
5 in order, but I'm actually going to ask, we're going to go one ahead  
6 so we can just end at the appropriate time on the East Africa embassy  
7 interview.

8 So if we can go to page 9, which is two ahead, at  
9 MEA-LHM-00001022.

10 Q. Mr. Gaudin, do you recognize this photograph?

11 A. I do.

12 Q. What do you recognize this photograph as?

13 A. So in -- this is a photograph taken by a Kenyan news  
14 reporter who surreptitiously got himself into the Kenyan CID  
15 headquarters to take a picture of Mr. al Owhali after Mr. al Owhali  
16 had been identified in what we would use in the U.S. as a lineup. In  
17 Kenya they would call it an identification parade.

18 So this would have happened on August 20th. So this  
19 particular picture ended up being in the newspaper the very next  
20 morning saying that subject confesses to his role in the bombing.

21 Q. And does this photo have any significance in your later  
22 interview in January of 2007 with Mr. Bin'Attash?

23 A. Yes. It's one of the photos I showed Mr. Bin'Attash

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1 to -- again, showing him my bona fides that I had been working  
2 terrorism cases long before September 11th.

3 Q. And did you, in fact, return to the United States with  
4 Mr. al Owhali?

5 A. I did.

6 Q. And was he ultimately convicted for his role in these East  
7 Africa embassy bombings attacks?

8 A. On all counts he was convicted.

9 Q. And is the information that you learned about Khallad  
10 Bin'Attash the primary information you would later use to start your  
11 questioning of Mr. Bin'Attash in January of 2007?

12 A. Yes, it was, sir.

13 MTC [MR. TRIVETT]: That's the end of the East Africa embassy  
14 bombings portion, sir. I think it makes sense to stop here. I'll  
15 defer to the commission, but this seems like a natural stopping  
16 point.

17 MJ [LtCol SCHRAMA]: Well, Mr. Trivett, you know this direct  
18 better than I do, so I will take that recommendation.

19 Mr. Gaudin, we are going to stop your examination for today.

20 WIT: Yes, sir.

21 MJ [LtCol SCHRAMA]: I want to instruct you. You are still on  
22 the stand. So the duration that you are a witness, I'm going to  
23 instruct you not to discuss your testimony with anyone, to include

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1 counsel for both the government and defense.

2 WIT: Understood, sir.

3 MJ [LtCol SCHRAMA]: Do you understand my instruction?

4 WIT: Yes, I do.

5 MJ [LtCol SCHRAMA]: Okay.

6 Counsel, is there anything that we need to take up outside  
7 the presence of the witness before we adjourn for the evening?

8 MTC [MR. TRIVETT]: Not from the government, sir.

9 LDC [MR. CONNELL]: Your Honor, only that I'd note that  
10 typically we have some time at the end of the day, assuming the guard  
11 force can support that, I think prayer time and sometime after that.

12 So if that's -- as you indicated earlier, I'm only  
13 mentioning it because it's day one of the -- of the guard force  
14 seeing this process. So we expect to be in the courtroom for a  
15 while.

16 MJ [LtCol SCHRAMA]: Thank you, Mr. Connell.

17 Yes, so I know we're coming up to prayer time. And then  
18 after that point, if counsel would like to make use of the facilities  
19 here, that is my intent.

20 Okay. With that, we will recess for the evening and we'll  
21 return at 0900 tomorrow morning with Mr. Gaudin on the stand.

22 **[The witness was warned and withdrew from the courtroom.]**

23 MJ [LtCol SCHRAMA]: Court's in recess.

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1 [The R.M.C. 803 session recessed at 1634, 23 March 2026.]

2 [END OF PAGE]

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