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1 [The R.M.C. 806 session was called to order at 1542,
2 1 November 2019.]

3 MJ [Col COHEN]: The commission is called to order. This
4 806 session is convened to take the classified testimony of
5 the Former Camp VII Commander.

6 General Martins, would you please account or someone
7 from your team please account for the members of the
8 prosecution and any others that are here with you.

9 CP [BG MARTINS]: Good afternoon, Your Honor.
10 Representing the United States at this R.M.C. 806 closed
11 session of the commission: Brigadier General Mark Martins,
12 Mr. Robert Swann, Mr. Edward Ryan, Mr. Clayton Trivett,
13 Ms. Nicole Tate, Major Christopher Dykstra. Securing the
14 entrances are Staff Sergeant Jeffery Furr and Mr. Rudolph
15 Gibbs. Also in the courtroom, Your Honor, Kimberly Waltz and
16 Nicole Taylor of the Federal Bureau of Investigation. All
17 personal have the requisite clearance.

18 MJ [Col COHEN]: All right. Thank you.

19 Mr. Sowards.

20 LDC [MR. SOWARDS]: Good afternoon, Your Honor.

21 MJ [Col COHEN]: Good afternoon.

22 LDC [MR. SOWARDS]: The following people I'm about to
23 mention, you'll be happy to know, have the requisite

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1 clearance.

2 MJ [Col COHEN]: Thank you.

3 LDC [MR. SOWARDS]: So I'll just get that out of the way.

4 That would be Mr. Nevin, Ms. Radostitz, Ms. LeBoeuf, and

5 myself, Gary Sowards.

6 MJ [Col COHEN]: All right. Thank you, sir.

7 Ms. Bormann.

8 LDC [MS. BORMANN]: Judge, it's just Mr. Montross and I

9 and we both have the appropriate clearances. Mr. [REDACTED] is

10 leaving.

11 MJ [Col COHEN]: All right. Thank you.

12 Mr. Harrington?

13 LDC [MR. HARRINGTON]: Judge, for Mr. Binalshibh: James

14 Harrington, Air Force Major Virginia Bare, and [REDACTED]

15 all of whom have appropriate clearances.

16 MJ [Col COHEN]: Thank you, sir.

17 Mr. Connell.

18 LDC [MR. CONNELL]: Your Honor, on behalf of

19 Mr. al Baluchi: Myself, [REDACTED]

20 Captain Mark Andreu of the United States Air Force and

21 Benjamin Farley.

22 MJ [Col COHEN]: Thank you, sir.

23 Mr. Ruiz.

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1 LDC [MR. RUIZ]: Judge, Mr. Sean Gleason, Mr. [REDACTED]
2 myself on behalf of Mr. al Hawsawi. We are expecting another
3 member of our team to rejoin us in a short while, Technical
4 Sergeant [REDACTED] We all have appropriate
5 clearances.

6 MJ [Col COHEN]: Okay. And when Sergeant [REDACTED] shows
7 up, I will -- we'll note that, but I -- I recognize that he
8 has a clearance.

9 Mr. Sowards.

10 LDC [MR. SOWARDS]: Yes, Your Honor. And we'd just
11 thought before Your Honor recalled the witness, this might be
12 a logical time to discuss the issue more fully that we raised
13 with you only because, depending on the court's resolution of
14 the more immediate question, we need to know whether we have
15 to ask what we want to ask in closed session or whether it
16 will require ----

17 MJ [Col COHEN]: I understand. Sir, I'll take that up in
18 just a moment. One issue from a previous closed session with
19 respect to the FBI attendees, I know, Mr. Connell, you had
20 raised an issue previously. Is that now moot or are we good
21 to go?

22 LDC [MR. CONNELL]: Yes, sir. I'm glad you mentioned
23 that. I was waiting my turn. The 615 request was mine. The

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1 government asked for an exception for this closed session and
2 I agreed.

3 MJ [Col COHEN]: Okay. Thank you. It was just -- it was
4 on my radar as well. All right. Thank you. Let's do that
5 before we call the witness.

6 Let's take up that issue with respect to the witness
7 and what could or could not be said in the open session. And
8 then I will keep the show rolling. Mr. Sowards or
9 Ms. Radostitz. Either one.

10 Mr. Sowards.

11 LDC [MR. SOWARDS]: Thank you, Your Honor.

12 MJ [Col COHEN]: You're welcome.

13 LDC [MR. SOWARDS]: I was just going to address this
14 because it has a broader implication than this one witness.

15 MJ [Col COHEN]: I understand. Absolutely.

16 LDC [MR. SOWARDS]: What we were raising, Your Honor, is
17 that we -- and we have said this before, sort of an ongoing
18 theme, but whether by design or effect, the government has
19 followed a pattern of selective invocation and use of the
20 classified information and the national security
21 privilege ----

22 TC [MR. RYAN]: Excuse me, sir.

23 MJ [Col COHEN]: One second. That's Sergeant  I

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1 recognize him. He has the requisite clearance.

2 Sir, you may continue.

3 LDC [MR. SOWARDS]: They've engaged in selective use of
4 these privileges from -- from our perspective to skew the
5 narrative that is going out to the public in -- in these
6 proceedings. And the problem is that as of -- well, not as of
7 today, but it's been threatened in the past but certainly an
8 example of it is today, is that this process, among other
9 things, aside from the question of changing rules, which I
10 briefly discussed with Your Honor, I think, during the
11 September proceedings when we were first confronted with this
12 brand-new set of -- we -- we regard it as a fairly brand-new
13 set of security guidance. I know Mr. Trivett had the -- took
14 the position that this was merely a restatement of -- of
15 existing -- existing guidance.

16 Nevertheless, its employment and its use as of today
17 is certainly beginning to abridge the -- the right to a public
18 trial, separate and distinct from the problem of giving us
19 adequate notice of the restrictions on our ability to
20 investigate an equally important presented defense.

21 But as to the public trial aspects of it, I know we
22 have -- have quoted to the court before, but we think in this
23 context it's important to recall both Chief

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1 Justice Rehnquist's observation in Wheat v. United States and
2 Justice Breyer's observation repeating that in
3 Indiana v. Edwards, that trials must not only be fair, they
4 must appear fair to all who observe them.

5 And part of that right of a fair trial and public
6 observation is to hold accountable the decision-maker in the
7 process based on the evidence presented. And while we have
8 obviously no -- no concerns or -- or trepidations about Your
9 Honor's impartiality and fairness and your wisdom in making
10 decisions, I think you understand that people observing this
11 may have a difference of opinion in terms of how they view a
12 decision made on evidence they can see versus information they
13 don't see ----

14 MJ [Col COHEN]: I understand.

15 LDC [MR. SOWARDS]: ---- no matter how they come down on
16 that. And what the government does is to create a certain
17 impression in open sessions and through their open disclosure
18 of information, and then they use the classification or
19 national security privilege whether intentionally or
20 unintentionally, the way it affects the proceedings is to
21 close off the defense's opportunity to correct the impression
22 they -- they've created. And in the case -- situations where
23 it's a misimpression, we're not able to correct that.

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1 And so we had two examples today of this process
2 with -- with the camp commander's testimony. The first
3 instance arose when he was asked whether he observed in the
4 detainees any outward manifestations of distress. And he
5 answered that he had not. And so we know the sort of
6 impression that the government is trying to create with Your
7 Honor in making a decision on the -- on the more narrow issue
8 of the ongoing effects of the black site treatment on the
9 ability to give a voluntary waiver during the letterhead
10 memorandum interrogations.

11 But what the public in being asked to decide whether
12 these proceedings appear fair, what they hear is that one
13 impression that the camp commander has created, that he feels
14 confident in saying that there was no distress exhibited by
15 the detainees. When Mr. Connell, I believe it was, attempted
16 to get into the area, and certainly Ms. Radostitz was going to
17 do so until the government objected in the context of the open
18 proceedings, attempted to query the witness about his
19 correctional experience, his background. The government
20 invoked not only the protections of the pseudonym for the
21 witness, but in our informal conversations, General Martins
22 explained that this also implicated broader classification
23 issues, classified information issues.

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1 And so the -- the effect of this was to preclude the
2 defense in a public forum and for the benefit of the public
3 observers to establish that, in fact, this particular witness
4 really lacked even though he had had some assignments in a
5 general administrative capacity with apparently some
6 correctional aspects of the facilities here in Guantanamo, he
7 actually lacked any sort of hands-on inmate population control
8 or assessment of individuals.

9 So that was closed off from the -- from the public
10 view -- from the public airing. And perhaps the government
11 can explain more to you what -- what their position is or
12 they -- they would prefer to, but what we were hearing was
13 that if -- essentially, if you tell the public that this
14 gentleman had another job at an earlier point in his life,
15 that somehow will vitiate the protection of the pseudonym
16 testimony, which we don't think is -- is really logical, but
17 certainly, the impact is to prevent us from having a full
18 airing of his -- his qualifications for an objective observer
19 to consider.

20 But equally troubling is that if we look at the
21 guidance we had been provided beforehand and specifically at
22 paragraph 62 on page 19.

23 MJ [Col COHEN]: Of 658A?

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1 LDC [MR. SOWARDS]: Yes, sir. I'm sorry.

2 MJ [Col COHEN]: That's all right.

3 LDC [MR. SOWARDS]: Right. The version that was prepared
4 15 September and filed 18 September.

5 MJ [Col COHEN]: Yes, sir.

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14 Mr. Connell and the prosecution for certain concerns they had
15 but was reported as a fait accompli to Ms. Radostitz before
16 she attended the interview with him, which we had no objection
17 with. We thought that's fine. If that facilitates the
18 proceedings and we can have him testify under the protection
19 of a pseudonym if he feels more comfortable doing that or the
20 prosecution thinks so, that's fine.

21 MJ [Col COHEN]: Okay.

22 LDC [MR. SOWARDS]: But I can say that I don't think
23 anyone, any reasonable individual, advised of that arrangement

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1 could reasonably foresee the far-reaching implications to the
2 extent you couldn't say to this witness, "You have testified
3 to making a certain judgment, an evaluation by the government
4 on direct testimony. I want to ask you a few questions to --
5 to test the basis of that and to have that fall into something
6 that is rendered off limits because we agreed to his
7 testifying under a pseudonym.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. SOWARDS]: The second instance of this selective
10 enforcement and invocation of the classification and security
11 privileges to control the narrative came in the form of the
12 direct testimony questioning of the camp commander with regard
13 to the Senate Select Committee's reference to the CIA
14 exercising operational control over Camp VII. And the
15 prosecution asked the witness whether he was aware of that
16 and, more importantly, whether that was accurate. And he said
17 no.

18 So the message that goes out to the world at large is
19 that a knowledgeable source is denying, refuting, a major
20 committee of the United States Senate and their conclusions
21 based on an extensive investigation and something like 6
22 million pages of documents and a 6,000-page record. This
23 witness is saying that is to be discredited.

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1 And when Mr. Connell just barely ventured into that
2 area -- and I know the commission knows exactly what happened
3 because you're actually the one who helped educate the
4 prosecution that there was a distinction in Mr. Connell's
5 questioning that didn't run afoul of the -- of the guidance
6 that they were -- they were citing. I believe it was
7 paragraph 68.

8 But the point was that they were so eager and so keen
9 on protecting the false impression, an impression they know to
10 be false, at least from the perspective of the Senate Select
11 Committee and the information we know about the CIA's
12 involvement in Camp VII, that they pounced on that question
13 and said it violates the security -- the classification
14 guidance, and we shouldn't -- we shouldn't be allowed to
15 correct or at least fairly refute and test the witness'
16 opinion.

17 But what's, you know, from our perspective or at least
18 from my perspective, even more frustrating and mystifying and
19 gives me cause for concern going forward, in addition to the
20 limitations, the unfair limitations of a fair trial, is if we
21 look at the -- the exact guidance that they gave us back in
22 September when I was complaining about, you know, getting
23 more changing -- ever-changing guidance about the question --

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1 if we look at page 20, paragraph 67, and it talks specifically
2 about the executive summary of the Senate Select Committee and
3 their finding as an unclassified fact that the CIA maintained
4 operational control over Camp VII. And so they say this is
5 unclassified. And then they warn us while that specific line
6 about the operational control is unclassified, any and all
7 follow-up questions regarding any specifics of said CIA
8 operational control is classified and must be presented in a
9 closed session.

10 Now, anyone, as I was, the product of admittedly
11 public schools, but taught to read the English language, would
12 assume that to come in and ask the witness the operational
13 control of the CIA, "Can you tell me if that's true or not,"
14 would be a follow-up question on the specifics of that. But
15 that's what they did. And they got that answer out, and then
16 they stopped Mr. Connell or anyone else from raising any
17 information that is going to undercut that misimpression.

18 So what we're -- what we're saying in broad and
19 general terms but also specifically with respect to the
20 questioning of -- of this witness is his prior corrections
21 experience. However we want to work it out. We don't have to
22 go into -- into time, place, date. But the simple question
23 of: Can a current -- or a first camp commander prior to

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1 working at your position as a camp commander of Camp VII, did
2 you have operational day-to-day corrections experience
3 including the evaluation of an inmate population for signs of
4 stress? And we don't believe that that raises any concern
5 or -- or appreciable realistic harm to the gentleman with
6 respect to the protection of his pseudonym and is directly
7 relevant to the public's assessment of ultimately the decision
8 Your Honor will make in this case.

9 MJ [Col COHEN]: All right. Thank you, sir. I -- I
10 definitely understand the issues. Thank you.

11 LDC [MR. SOWARDS]: Thank you, sir. I'm sorry, is this --
12 someone else's copy.

13 MJ [Col COHEN]: Ms. Bormann.

14 LDC [MR. SOWARDS]: Thank you, Your Honor.

15 MJ [Col COHEN]: Thank you, sir. Ms. Bormann?

16 LDC [MS. BORMANN]: I just have a little more to add on
17 the Protective Order #2 issue, which is the pseudonym issue,
18 because I was involved with the -- those discussions.

19 So the government's position when we were having this
20 conversation was that any question that tended to either show
21 or not show anything this man ever did in his past could
22 somehow disclose his identity. And it struck me, and I told
23 General Martins and the rest of the prosecution that were

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1 there, that that was bizarre because he's a man. He testified
2 here in open. [REDACTED] I mean, it -- assuming that
3 anybody in the audience knew who he was, I mean -- so -- but
4 the idea that we're going to use as an excuse to prevent the
5 undercutting of a government-introduced piece of evidence
6 something as bizarre as you can't even ask him what the
7 underpinnings were for his opinion smacks of complete
8 unfairness. And that's the only thing I had to add.

9 MJ [Col COHEN]: Thank you. I understand.

10 I think what I'm inclined to do is just to create a
11 record. Let's just go ahead and ask him those questions and I
12 can hear what the answers are and that puts me in a much
13 better position factually to -- to determine what -- what
14 impact or -- or potentially how I should rule on any issue.

15 Just to hear the -- just to hear the arguments at this
16 point without being able to weigh what the -- what the -- what
17 the value of the evidence would be in and of itself, and that
18 may be something I need to start doing on certain occasions
19 with respect to some of this evidence, which is -- it's not
20 ideal. But in many ways, I kind of see that the way it works
21 out in trial sometimes where I have to excuse a jury, then I
22 have to hear evidence. In this particular case I may have to
23 exclude the public. Which is why I kind of say we may bring

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1 the witness back on Monday to testify once I've heard what the
2 evidence is. It's not ideal and it's a lot more muscle
3 movement, but it's kind of the muscle movement that's
4 required, and so I think that that's where -- what I'm
5 inclined to do. I mean, I understand exactly what the defense
6 is saying is, is if he -- if he can make an assertion like
7 that, if I'm not then able to then ask questions as to --
8 because he did use the word a couple of times "based on my
9 experience." Well, if I'm not allowed to ask you what that
10 experience is, then, I mean, that's one of the things of
11 asking -- when someone offers an opinion, there is -- there is
12 a need to challenge that opinion. And so then the question
13 is, is finding that -- that -- that line between what should
14 be allowed to just be discussed in open forum when the issue
15 is raised in open forum as opposed to when an issue is raised
16 completely in a closed forum, which is like where we are now.

17 And so what I would ask the parties to do is just go
18 ahead and ask your questions that you would have asked in the
19 open session, point out these are the questions I wanted to
20 get to in the open session, and then I can issue a ruling
21 which -- to the government as to you can still assert your
22 privilege, but I'm telling you this was relevant or it's not
23 relevant, and if it is relevant, then there's a process I need

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1 to go through with the government as to how they address that
2 relevant information if they want to continue with a certain
3 national security privilege.

4 General Martins?

5 LDC [MR. RUIZ]: Judge, excuse me.

6 CP [BG MARTINS]: Your Honor, we don't ----

7 MJ [Col COHEN]: Go ahead, sir.

8 CP [BG MARTINS]: Go ahead.

9 MJ [Col COHEN]: Mr. Ruiz.

10 LDC [MR. RUIZ]: I apologize, Judge. I wasn't quick
11 enough on the standing up and -- before, but I did have some
12 matters I wanted to add on the defense side for the record.

13 MJ [Col COHEN]: That's fine. Let me get -- let me see
14 what he had to say and then -- because ----

15 CP [BG MARTINS]: Your Honor, I was just going to say we
16 don't object certainly to having the witness testify and you
17 eliciting the testimony, because it goes to the ground rules
18 and 568, which -- about which the commission has already
19 stated there's a need for some updates.

20 MJ [Col COHEN]: Yes, sir.

21 CP [BG MARTINS]: I wanted to address some of these points
22 that counsel had made with the ----

23 MJ [Col COHEN]: Okay.

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1 CP [BG MARTINS]: ---- intent of clarifying those rules.

2 MJ [Co1 COHEN]: Okay.

3 CP [BG MARTINS]: And I'm doing so with your indulgence as
4 not the trial counsel litigating this because it relates to
5 public trial and some of the things that I've argued.

6 MJ [Co1 COHEN]: Okay. Yes, sir. So I'll go ahead and
7 hear from the rest of defense and then I will let you address
8 those.

9 Mr. Ruiz.

10 LDC [MR. RUIZ]: So, Judge, the main issue I wanted to
11 articulate for the record is one that I articulated very
12 poorly earlier. But my main concern in this instance is
13 the -- the ever-shifting landscape of the -- of the
14 classification guidance and the way that it's deployed during
15 the examination of a witness.

16 And I have a number of transcript references that I'm
17 going to ask you to look at because I think they will
18 illustrate for you where we've had similar proceedings with
19 very different results in the way that we've proceeded, in the
20 way that the defense has been allowed to effectuate our
21 function and properly cross-examine the witnesses in open
22 court.

23 And I'll just give you the references now and just a

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1 brief synopsis. But there have been multiple instances in
2 this commission's history where we've had witnesses testify
3 under pseudonyms. And they have done so a number of times and
4 we have been allowed to ask questions that go to their
5 background, their qualifications, their credibility, to test
6 exactly the same kind of issues that I think were being tested
7 today.

8 Transcript pages 9106 will take you to the testimony
9 of a person who testified by the name of Staff Sergeant Jinx.
10 J-I-N-X. Page 9300 will take you to testimony where a Major
11 person testified under a pseudonym "Major." It was a current
12 camp commander at the time.

13 Page 9584 refers to a "Major Prior." That is the --
14 that's the -- that's the pseudonym they testified under.

15 MJ [Col COHEN]: Prior, you said?

16 LDC [MR. RUIZ]: Prior, P-R-I-O-R.

17 MJ [Col COHEN]: Thank you.

18 LDC [MR. RUIZ]: Page 13481 referred to the "Assistant
19 Watch Commander." These were the -- the pseudonyms they
20 testified under.

21 And what you'll see when you -- when you look at that,
22 is for instance in Staff Sergeant -- excuse me -- yep, Staff
23 Sergeant Jinx, Mr. Nevin conducted the initial examination on

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1 that particular witness and was able to ask questions about
2 the person's qualifications, their history, their background,
3 where their guard unit was from geographically in the
4 United States, what kind of training they had, what kind of
5 experience, all of these kinds of questions that go to the
6 qualifications, to the credibility of the witness to testify
7 on the -- on the issue before the commissions.

8 What I got back today, and I know this is something
9 the commission wasn't privy at the time, is that the position
10 the prosecution was taking was that because the person was
11 testifying under a pseudonym, no questions about the
12 credibility or the background, the history, the education,
13 those kinds of questions that go exactly to the heart of the
14 qualifications of that witness were allowed.

15 And the analysis that was being put forth by General
16 Martins was that because any of that information could
17 ultimately lead to an identification of that witness, that
18 would render the pseudonym process inoperable. Of course,
19 when I -- when I heard that, what I wanted to make sure
20 happened was that this was somehow captured on the record.
21 Knowing the history of the case, knowing the prior instances
22 where witnesses have testified under pseudonyms over defense
23 objection, and we were allowed to develop their background,

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1 their history, and those kinds of areas where today all of a
2 sudden seem to be off limits.

3 So that is -- that is my concern. It has been an
4 overriding concern in the great context just in terms of how
5 the rules can easily be manipulated in midstream. And as I've
6 said a number of times, Judge, it's very difficult to do
7 anything when the guidelines, the rules, change midstream or
8 in the middle of the game.

9 Certainly if you take it to a different forum, let's
10 say, for instance, say a sporting event. The seventh game of
11 the World Series recently happened, or you can allude that to
12 the Super Bowl. No team would really feel that they got a
13 fair shot if in the middle of that endeavor where there are
14 high stakes, not really nearly as high as we have in this
15 courtroom, one of the opposing sides could continue to
16 manipulate the rules, continue to change the way that -- I
17 don't like to use the word "game" even though I know that
18 Mr. Ryan used that word, but for purposes of the analogy,
19 continue to stretch the boundaries of guidance and limits in
20 midstream because it has a real direct impact not only on
21 the -- on the court itself. You saw the disruption it caused
22 today just in terms of the time and the expenditure and the
23 discussions and sidebars, engagements between the litigants

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1 and between the court and us as well. But also in the manner
2 we prepare and in the way that we approach examinations.

3 And for myself, the great concern that I have is that
4 because there is a very legitimate and very sincere desire
5 from the court and the litigants to preserve that classified
6 information, it's a real concern; none of us really want to
7 violate that. We don't want to be on that side of the aisle.
8 Because there is that real concern, sometimes there tends to
9 be an overcompensation. And the overcompensation comes in the
10 way of anytime that an issue arises in -- in -- and the
11 prosecution brings out their national security stick, the --
12 the natural tendency and reaction is let's not talk about this
13 right now. Let's do this in a closed session. I will submit
14 to you that nothing that I've said right now is a classified
15 matter.

16 The references I've given you are in open record, and
17 on the unclassified side. I could have made this entire
18 argument, I believe, in open session without having done
19 anything to implicate this person's identity. Yet General
20 Martins' position is that we need to do this in a closed
21 session because having this very argument could lead to a
22 revelation about what this man's true identity is.

23 And here's the argument -- and you can judge for

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1 yourself. Is there anything that I've said, anything I've
2 referenced, anything I've alluded to to put his identity at
3 risk? I would contend that it has not.

4 And my great consternation really is to have to do
5 this in a closed session. I understand why you do it. I
6 don't think there's a nefarious motive here, but I think it's
7 inappropriate. And I think that's my real concern, is that we
8 keep getting pushed into these closed sessions. And I
9 understand you said, well, we'll come back on the open record
10 and we'll do that and I believe that and I think it will
11 happen.

12 But how do I recreate this? Do I read it word for
13 word? I mean, do I do this -- do I do the same exact
14 argument? I guess I do. But there is something that is lost
15 in that from the first time it comes out.

16 And so I understand your job. I understand you have
17 to balance those equities and you most of the time have less
18 information than we do. I get that. What I can tell you is
19 that when I represent to the commission that I can make these
20 arguments in an open setting, I really, really believe that I
21 can. And the main concern that I have and the one I want to
22 leave the commission with is that let's not get pushed into
23 these closed sessions. Let's -- I've seen Mr. Sowards getting

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1 up consistently over time and making the same objection, and
2 it makes sense. Because what we keep saying to this
3 commission and what we've been saying and years and years and
4 years is please, give us -- give us the rules, tell us what
5 they are, and then we'll go -- we'll go do the -- you know,
6 what we need to do.

7 But the ever-shifting nuances and the prosecution's
8 position is that this is a nuance because that's what was
9 going on over here. That's part of what the discussion that
10 was going on over here between General Martins and myself,
11 that this nuance about the commander's pseudonym and how the
12 question that was asked by Mr. Connell is one that wasn't
13 anticipated.

14 I've given you five references to transcript testimony
15 of pseudonym witnesses where they testified about their
16 background, their qualifications, their assignments, where
17 their units were from. How is that unanticipated? I would
18 just submit it's -- it just -- it's not. And we can't
19 continue to litigate this way.

20 And so that's -- that's what I want to say, Judge.
21 Thank you.

22 MJ [Col COHEN]: Thank you, sir.

23 Mr. Connell?

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1 LDC [MR. CONNELL]: Sir, I wouldn't comment at all, but I
2 think that the record is a little unclear on a couple of
3 points, so I just want to give from my perspective which is
4 somewhat different from others.

5 First, I yield to no one in my objection to anonymous
6 witnesses. I have objected at every opportunity. Anonymous
7 witnesses are anathema to democracy, in my view, and worse
8 than that, they're anathema to the record because no one can
9 tell, no review in court or reviewing convening authority or
10 anyone else can tell anything about that person.

11 Second, we don't have here an anonymous witness,
12 right? We have a pseudonymous witness where the identity of
13 the witness is known to the parties in the court and known to
14 the record and this is -- this is the part that I have to --
15 that I think counsel may be misinformed on.

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1 [REDACTED] I chose not to
2 object. It was not the result of any agreement or anything
3 else. It was just one party, essentially the government,
4 moved, I think it's R.T.M.C. 13-6 is the relevant authority.
5 They moved for a pseudonym, no one objected, and so he
6 testifies under a pseudonym.

7 The other point that I want to make, and I was a
8 little more cryptic about this in open, was that my two
9 questions don't really implicate -- what happened actually
10 here was the government took a much broader argument about the
11 scope of classification and protection than my questions
12 called for, right? My first question was: "At some point you
13 were told you had been nominated for a new detention mission."
14 And what I meant was there was a new mission.

15 MJ [Col COHEN]: Right.

16 LDC [MR. CONNELL]: And the government took it to mean a
17 mission new to the witness after his prior detention missions.

18 MJ [Col COHEN]: Right.

19 LDC [MR. CONNELL]: And which I'm not even sure is
20 factually accurate, but I just reworded it. It was no big
21 deal. And then the question that I consulted about was: "At
22 an interagency meeting in August of 2006, you received more
23 information about the mission." And so since time seemed to

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1 be a factor, I just wanted to check on the August 2006 part.
2 And it was very quickly resolved that I could just say "at
3 some point after your nomination" and that's what I -- to me,
4 the important part of that question was the interagency part,
5 not the timing part of it, so that was easy.

6 But in the course of that, the government made some
7 very broad statements about how nothing outside the exact
8 temporal scope of the time that the person -- that the
9 witness, rather, started his duties at Camp VII or after that
10 time could be referred to, and that sort of started down a
11 slippery slope of, well, what about the situation where we
12 want to -- where counsel -- this is not me. I didn't want to
13 inquire about this, but other counsel wanted to inquire about
14 his lack of experience in corrections or detention matters,
15 which is the experience question the court referred to, and I
16 sort of walked away from it at that point because my issue was
17 resolved. But that's -- and that's how we find ourself in
18 this situation here.

19 So given the record issues there, I just wanted to
20 tell you what our -- what my view of it is, and I'll ----

21 MJ [Col COHEN]: Thank you, sir.

22 LDC [MR. CONNELL]: But to -- from -- from

23 Mr. al Baluchi's point of view, nothing is pending before the

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1 military commission. We do not have a claim before you or an
2 objection to be ruled on.

3 MJ [Col COHEN]: Okay. Thank you, sir.

4 General Martins? Mr. Harrington? Okay. Nothing.

5 Sir?

6 CP [BG MARTINS]: Your Honor, up front, bottom line, I
7 think the -- the key factor that can answer a number of the
8 concerns and that I think specifically goes to the -- the
9 citation of individuals who have testified under pseudonym
10 before is what makes this different is this individual is
11 known by various persons outside the courtroom. He's moved on
12 to a more prominent role than Sergeant Jinx, for instance, and
13 his -- both his prior experience and his experience after his
14 time as the first Camp VII commander can very readily be
15 linked up with his visage here in the court as well as with
16 the questions and the answers to undercut the pseudonym
17 protection that the commission granted on Monday when -- when
18 Mr. Trivett clarified the intention that he testify under
19 pseudonym.

20 So if I may, I'd like to just -- here's how we see the
21 procedural posture and the legal posture of this and the
22 authority for it and how it -- we believe it -- it is
23 distinguished from some of the troublesome scenarios that

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1 counsel raise.

2 So first, when the military judge permits a detention
3 camp witness to testify under pseudonym, the law of the
4 commission is that this is being done under the following
5 authorities. And these have been cited by military judges in
6 prior rulings that I'm going to refer to.

7 First of all, M.C.R.E. 611(d)(2), which authorizes the
8 military judge to allow a witness to be identified under
9 pseudonym during all commission sessions. There is an
10 R.T.M.C. 13-6 reference Mr. Connell referred to.
11 Interestingly, not one cited by the commission to date, but it
12 is additional authority in the R.T.M.C.

13 M.C.R.E. 104 cited by military commission judges which
14 states that the military judge shall determine preliminary
15 questions, including whether to protect the identity of a
16 witness. M.C.R.E. 505, which is the rule of privilege for
17 classified information, and I'm going to -- I'm going to come
18 back to that because we've -- we've heard of Protective
19 Order 2, which invoked nonclassified stuff, so I want to come
20 back to 505, because that is an authority here. M.C.R.E. 506
21 invoked by military commission judges in this case, which is
22 the rule of privilege for government information, sensitive
23 but unclassified information; Rules for Court Martial 701 and

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1 806, which authorize the military judge to protect
2 respectively information produced in discovery and information
3 that would otherwise be disclosed in a public proceeding of
4 the commission.

5 Protective Order #2 of 20 December 2012, and this is
6 contained in the record at Appellate Exhibit 14H which
7 protective order is supported by the in camera but not
8 ex parte declaration at Attachment B to that motion, Appellate
9 Exhibit 14, which was the government's motion for a protective
10 order regarding sensitive information. The -- the
11 Attachment B was the declaration of the then-SOUTHCOM
12 commander, General Fraser. And Protective Order #2 expressly
13 covers identifying information relating to DoD personnel at
14 paragraph 6 of that protective order.

15 And although not filed until well after Protective
16 Order 2 was issued, Appellate Exhibit 523K and the associated
17 ruling, 523L, which related to protection of camp medical
18 provider identities includes conclusions and findings by
19 Judge Parrella at the time that makes clear any information
20 that identifies current or former JTF medical provider
21 personnel and that associates that medical provider with a
22 detainee, a high-value detainee, is classified.

23 The other authorities that are cited in the materials

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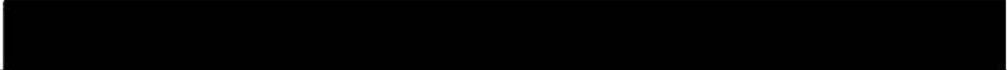
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1 pertaining to testimony under pseudonym in the record are
2 10 U.S.C. 130b. 10 U.S.C. Section 130b, which states that the
3 Secretary of Defense may authorize to be withheld from
4 disclosure to the public personally identifying information
5 regarding any DoD personnel pertaining to assignment with a
6 sensitive unit.

7 And this has been specifically invoked in the AE 014
8 series by the government that we're invoking that DoD
9 authority to make sensitive unit personnel identifying
10 information protected.

11 And then Regulation for Trial by Military Commission
12 19-4, which authorizes the military judge to issue protective
13 orders limiting the public disclosure of, quote, protected
14 information, end quote. The definition of which includes the
15 identifying information determined by DoD under 10 U.S.C. 130b
16 of AE 14B to be protected.

17 So this commission has enforced that framework in the
18 following: AE 256B of 10 March 2015, in which it ordered
19 protection of the true identity of an assistant staff judge
20 advocate. 

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1 And then Appellate Exhibit 523L, which I've mentioned
2 before at page 2 is then Judge Parrella on 2 April 2019
3 paraphrasing something that was in a declaration we provided
4 ex parte but it was part of the Protective Order 5 that he was
5 issuing stating that it had been represented to him by the
6 government that the association of a medical provider,
7 JTF-GTMO, with an HVD was classified.

8 Okay. So that every time an assistant staff judge
9 advocate testifies while identified only as such in these
10 proceedings and waivers by each, you know, absent accused of
11 the right to be present or introduced, that those are --
12 that's the framework that's getting relied upon every time,
13 and then Mr. Connell, you know, states his standing objection
14 to anonymous testimony and the commission overrules it.
15 That's the backdrop to a lot of that.

16 And then I would also reference the commission to
17 Exhibit 603C, which is the 9 November 2018 ruling in which the
18 commission overruled a defense objection to the government's
19 use of a pseudonym for the ASJA when testifying in pretrial
20 proceedings regarding the voluntariness of the absence of the
21 accused.

22 Our motion -- or our pleading with regard to that, our
23 response to that defense objection at Appellate Exhibit 603A

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1 (Gov) at page 16 states something very similar to what
2 Judge Parrella stated in 523L but -- but a little bit further,
3 which is the association of a JTF-GTMO person with an HVD is
4 classified. So that brings me to where we were as of Monday.

5 On Monday, we were operating under Appellate Exhibit
6 658A (Gov), the revised classification guidance. The 15
7 September 2019 memo. And Mr. Sowards, you know, points to
8 paragraph 62. I think it was Mr. Sowards pointed to it. That
9 is -- as of Monday, that had spoken of [REDACTED]
10 testifying in open session. [REDACTED]

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[REDACTED]

So innocent question, certainly asked in good faith. We don't doubt that it's relevant to the overall motion. We would submit it needs to be asked in a closed session. But it's appropriate for withholding from public disclosure. I can proffer to you he could have -- he would have answered -- he could have answered to the question, "What's your prior experience or is it true you're not -- you don't have experience in detention," [REDACTED]

If we're -- as a way ahead, the government would submit we don't object in open session to a question from

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1 Ms. Radostitz about whether he has experience as a detention
2 or corrections commander because our under -- we understand
3 the answer to that to be no. We don't have a problem with him
4 answering that in public and indicating that -- that lack of
5 experience and that would go to, we believe, to the concerns
6 about his expertise in evaluating distress, as I understood
7 the relevance of that testimony.

8 I don't -- we don't have a way ahead as to the -- the
9 second complaint of Mr. Sowards about the comment on the SSCI
10 report. I mean, that is -- he does disagree. His
11 disagreement with it is unclassified. You know, we -- there
12 was no intent to, you know, open the door to something in some
13 way that they couldn't respond. We just felt the responses
14 and the fuller testimony on that would occur in closed
15 session.

16 So those are our responses. We -- as soon as we
17 understood the lack of clear guidance in paragraph 62, Your
18 Honor, we sought something that would clarify it, and -- and,
19 you know, we have not been trying to shift any rules. We're
20 trying to obey the law and the rules of the court.

21 MJ [Col COHEN]: All right. Thank you, sir. I
22 understand.

23 Mr. Sowards?

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1 LDC [MR. CONNELL]: Your Honor? Before counsel starts, I
2 just want to note that it's after 1630. The witness has been
3 waiting around for probably a couple of hours now. I know
4 that I have about an hour of cross. It seems likely the
5 witness is going to come back. I don't know if it makes sense
6 to cut him loose. It's not my decision, but I just thought I
7 would put the idea out there.

8 MJ [Col COHEN]: I'm going to take a little bit of extra
9 testimony today.

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

11 MJ [Col COHEN]: All right. Not that it's not -- I got
12 it. I just want to take a little bit of testimony today.

13 LDC [MR. CONNELL]: Sure.

14 LDC [MR. SOWARDS]: And, Your Honor, I was going to try to
15 be brief. Anyway, I'll be even briefer and my apologies to
16 the witness, but I just wanted to respond to a couple of the
17 things about -- both Mr. Connell and General Martins said.
18 The first is, I don't know that anything I said was
19 inconsistent with what Mr. Connell said in that my
20 understanding was -- when I said agreement, I mean, I think
21 the absence of -- of objection to a proposal by the government
22 sort of sounds like agreement. But, you know, we don't need
23 to split hairs.

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1 What my position was, though, and it wasn't a matter
2 of the -- although you obviously ratified the agreement among
3 the parties, it wasn't like you had to make a hard decision
4 about him testifying under a pseudonym. Everybody agreed to
5 that. That was to make the process go -- go more quickly.

6 MJ [Col COHEN]: Yes, sir.

7 LDC [MR. SOWARDS]: And with due respect to -- to General
8 Martins, the litany of authorities that he has cited merely
9 give the -- the commission in the appropriate -- under the
10 appropriate circumstances the authority to allow a witness to
11 testify under a pseudonym. But all of the provisions that
12 General Martins alluded to refer exclusively to identity.
13 Shield the person's identity, mask their identity. It does
14 not say, "Go to absurd lengths to prevent some hypothetical
15 possible chimera possibility that somebody is going to put
16 together some shred of evidence and figure out who this person
17 is." I mean, I just don't think that is -- that is feasible.

18 But what it comes down to, what General Martins has
19 described under the rubric of -- of a synonym -- of a
20 pseudonym is that we have cyborg witnesses. And what he said
21 to us, again, in the sidebar and maybe that's, you know, a
22 reason why in addition to this whole argument being better
23 done in public, all of it was discussed on the side while we

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1 were trying to work this out and make things go faster to no
2 avail should also be public. But his position was that when
3 they -- when a witness invokes or is protected by a pseudonym,
4 as in this case, the camp commander, they -- they testify and
5 our cross-examination is limited to asking them questions
6 about their -- about them in their capacity as that witness,
7 as that -- as that identified person.

8 So he would say that we can only ask this gentleman
9 questions relating to his capacity as the original camp
10 commander. And what that means is any assertions that he
11 wants to make about anything, whether viewing people not in
12 distress can't be -- can't be challenged -- and this idea, I
13 mean, again, I appreciate the effort, I guess, but the adverse
14 party, particularly when it's the government, is not entitled
15 to broach a subject -- and I would say in this regard, even
16 though Mr. Connell and Ms. Radostitz examined the witness
17 about a lot of other issues that will be certainly germane to
18 Your Honor's determination about whether the change in
19 circumstances worked any magical dissipation of the -- of
20 the -- of the torture in the black sites, perhaps if you look
21 at this record, one of the most salient and significant and
22 substantive questions to this man was: Did these people look
23 like they were in distress when they got off the planes or at

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1 any time under your care? That is a very significant
2 question.

3 And to introduce that and then say, "I will not allow
4 you to explore what are clearly the foreseeable line of
5 questioning to test that opinion," is simply an abuse of this
6 sort of classification process. Or it should have been -- it
7 should have been -- the whole thing should have been moved to
8 closed session with an explanation, which I don't think would
9 have been convincing, about why that was necessary.

10 And the other point, that -- that we come to, and this
11 is, you know, again, a -- a reflection or an echo of what both
12 Mr. Ruiz said and the point that I first broached with the
13 commission back in September.

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19 So this information that Mr. Trivett was telling me, I
20 was falsely accusing the government of presenting to us for
21 the first time in September because this was merely a
22 codification or a clarification of rock-solid,
23 forever-existing guidance. We're now being told over a month

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1 later, six weeks later, is inoperative. And so yet again,
2 we're changing course.

3 I think the danger here that we're -- that we're
4 looking at, and maybe it behooves us to just compile all of
5 these at some more appropriate point, is we are reaching
6 critical mass in saying that if this is really what the
7 government's authority is, to control and shape and skew the
8 information, whatever it's motivated by, but if they can wield
9 this kind of power on these kinds of issues, then a fair
10 trial, consistent with any standard of due process, is simply
11 out of reach.

12 But at least for today, we should be able to ask these
13 questions in open session. Thank you.

14 MJ [Col COHEN]: Thank you, sir.

15 Mr. Ruiz?

16 LDC [MR. RUIZ]: Judge, just a couple of points. I think
17 it is clear, but I want to make sure, particularly because of
18 General Martins' emphasis on authority pertaining to the
19 pseudonym issue.

20 I think I heard Mr. Sowards say that those merely give
21 the court the authority to have a witness testify under
22 pseudonym. And I just wanted to make sure that I don't think
23 he meant to say that. But, you know, we stand with

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1 Mr. Connell and his various objections on the pseudonym issue.
2 And even though these authorities go to that effect, it is our
3 position that they should not be testifying under pseudonym.

4 Having that said, that is not the issue that brought
5 me to my feet in the first place before. It is not the issue
6 that brought me to my feet now.

7 I did talk to the camp commander before he testified.
8 I thought I would take the opportunity to do that in
9 contemplation of maybe future testimony. [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

I wasn't going

13 to be -- like saying, having a dog in the fight, I didn't
14 think it was for me to make an objection on this particular
15 issue at this particular time, so I was more than content to
16 not say anything about that.

17 My issue and my emphasis is on -- on the -- on the
18 scope of cross-examination of a witness who testifies under
19 pseudonym. And the manner in which the government, in my
20 view, arbitrarily expands or constricts the scope of what they
21 believe can or cannot be covered and the way which that
22 impacts the effectiveness of our preparation and the
23 effectiveness of the examination of a witness.

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1 That is -- that is the emphasis and that is the
2 concern that I have and one that I have voiced a number of
3 times before. So I wanted to just make sure that that was
4 known. That that is the impediment that I see as the -- to
5 effective representation in a capital trial.

6 I also will observe that I believe that it was, in
7 part, this very type of exercise of authority and discretion
8 that over the years was what informed Judge Pohl's decision to
9 ultimately suppress the statements that we are here litigating
10 today. It was recognition. It was many, many instances of
11 very similar arguments that had to do with how the information
12 constantly shifted beneath the defense's feet, how that
13 impacted our ability to prepare, and to carry out the defense
14 function.

15 And I will tell you that even between the time that we
16 had this extension of sidebar and now, the government's
17 position has changed. Because when we had that sidebar and I
18 was discussing the issue with General Martins, as Mr. Connell
19 observed, there were some very broad statements that were
20 made. And the -- the breadth of those statements were that
21 anything, anything that was said, in terms of background, was
22 off limits.

23 Now, General Martins has now taken a different

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1 position, which is that a particular question, which he put
2 forth to the commission in terms of asking if he is a
3 detention commander and if he's had that kind of experience,
4 becomes the appropriate question.

5 So then again, the -- the -- the breadth of -- of what
6 is permissible has changed on the fly. And the -- the main
7 point I'm making is that this national security privilege, the
8 manner in which it is exercised over and over and over in an
9 arbitrary fashion, from our perspective, is not consistent and
10 not compatible with a fair trial. And as I said, that is the
11 issue that brought me to my feet.

12 Thank you, Judge.

13 MJ [Col COHEN]: Thank you. Okay. I am ready to create
14 the record if you guys are.

15 TC [MR. RYAN]: One thing, if Your Honor please.

16 MJ [Col COHEN]: Mr. Ryan.

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2 MJ [Co1 COHEN]: Okay. Thank you.

3 LDC [MR. CONNELL]: Can I just look at it first?

4 MJ [Co1 COHEN]: You may. I think he has copies for
5 everyone, if they want them.

6 TC [MR. RYAN]: Sure. If I may, sir.

7 MJ [Co1 COHEN]: You may. Any counsel that wants a copy,
8 just see Mr. Ryan. Absolutely. Thank you, sir. I'll take a
9 look and then I'll have it marked and then I'll announce what
10 the marking is. All right. I'll hand these back to the court
11 reporters and they'll mark them. I'll let you know what the
12 numbers are.

13 Okay. Let's call the witness.

14 Sir, please take your seat. Thank you for your
15 patience.

16 [The witness resumed the witness stand.]

17 WIT: Thank you.

18 MJ [Co1 COHEN]: We are in a closed session. Not always,
19 but for the most part, you can answer freely. If you can't,
20 the government is supposed to stand up and let me know.

21 WIT: I understand, sir.

22 MJ [Co1 COHEN]: All right. Thank you. Mr. Swann, your
23 witness.

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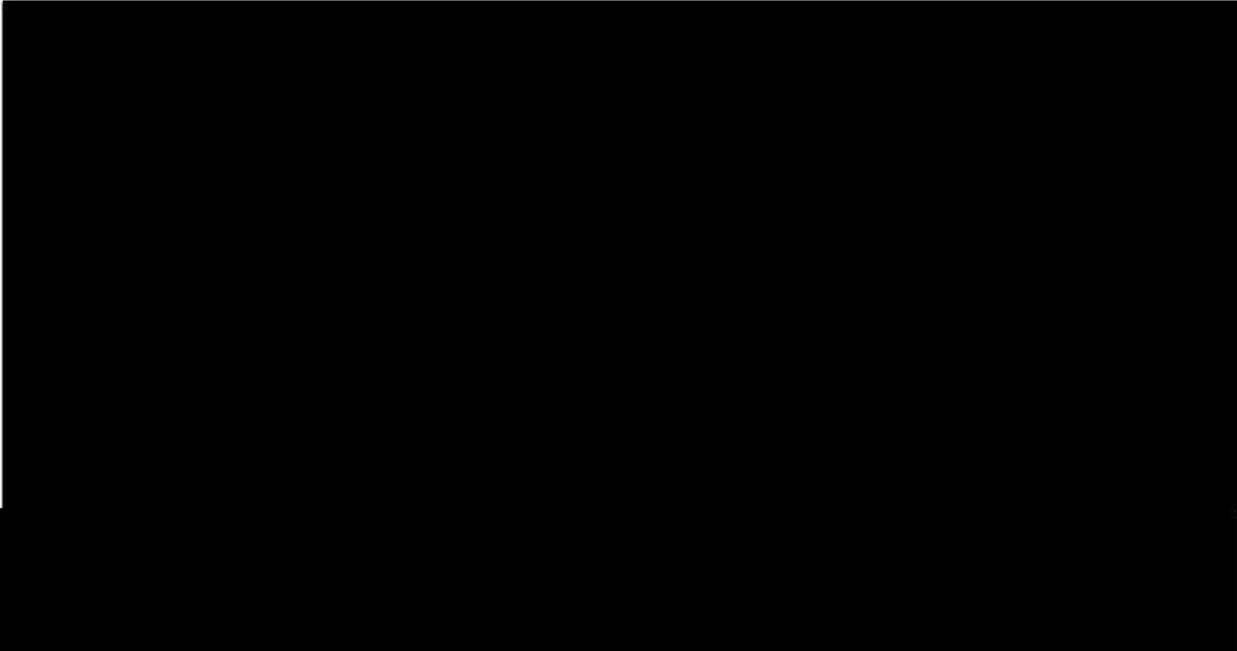
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1 DIRECT EXAMINATION CONTINUED

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

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13 A. That's correct.

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16 Q. And you came to Guantanamo in what -- at what time
17 period?

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19 [REDACTED] And it was around August, right after
20 August of 2006 where I learned I would become the next -- the
21 Camp VII commander, the Task Force Platinum commander.

22 Q. All right. Who picked you, again?

23 A. Admiral Harris.

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1 Q. You're not an MP?

2 A. No, sir.

3 Q. Why do you think Admiral Harris picked you as the
4 commander of Camp VII?

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11 Q. Let me take you back to the -- the arrival of the 14
12 detainees.

13 A. Okay.

14 Q. Were all of the guards at the airport that night under
15 your command?

16 A. Absolutely. Yes, sir.

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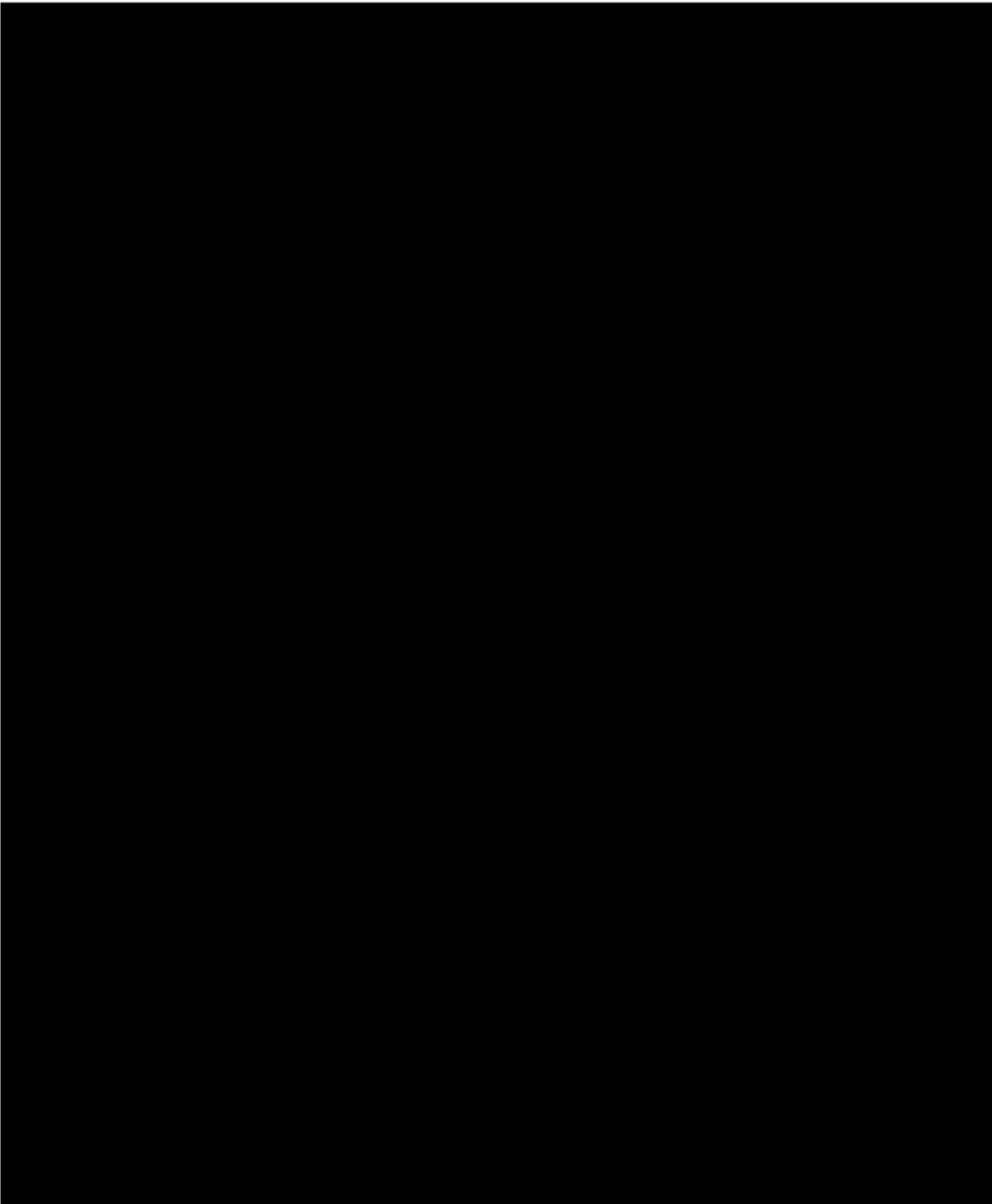
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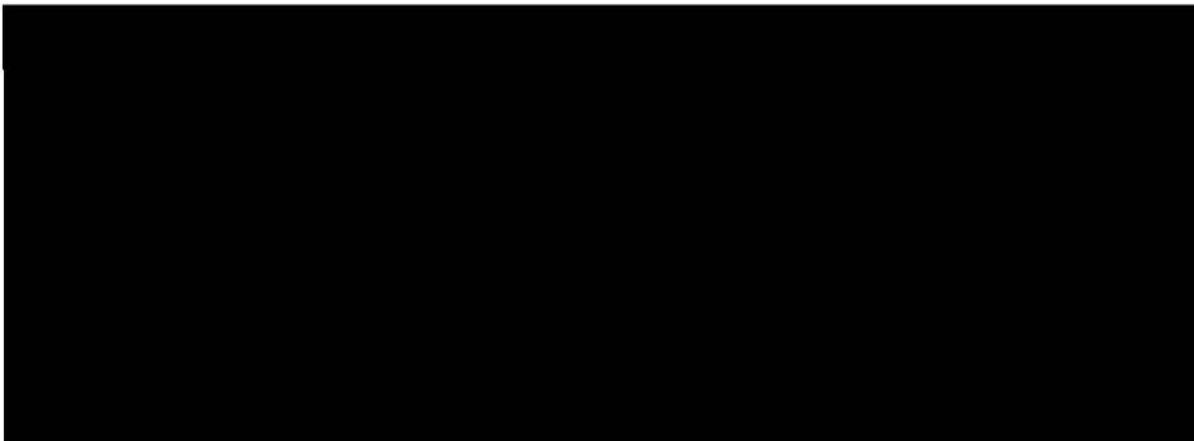


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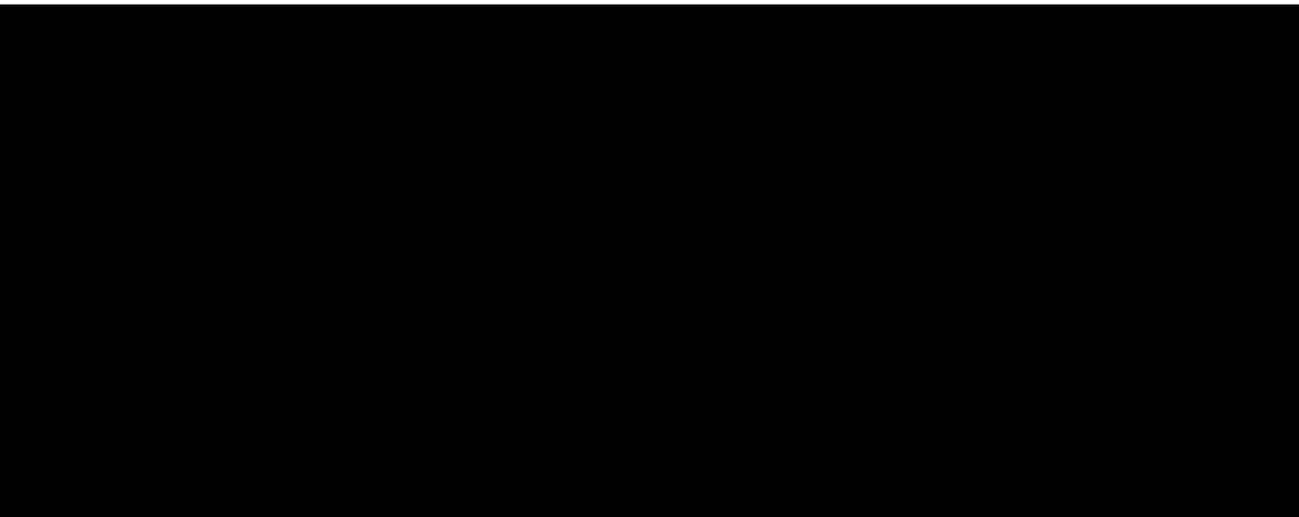
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8 Q. All right. So how -- at the airport again, how is it
9 that you got to Camp VII that night?

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18 Q. All right. Let's turn to the letterhead memorandums
19 that -- the law enforcement interviews.

20 A. Okay.

21 Q. We've heard testimony that you informed the detainees
22 of a meeting that the detainees could -- could say no, that
23 you would not bring them if that's what they said; am I

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1 correct?

2 A. That's correct. I invited them to come to the
3 meeting. And I won't say I personally singly invited every
4 one of them. It was myself or my guard force that -- that
5 invited each one of them to -- to participate.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 But I -- I asked quite a few of them, but other
13 detainees were asked by other officers in my organization.

14 Q. All right. Who selected the guard force that
15 accompanied the detainees to the interviews?

16 A. I did. [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED] Guard force escorts

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1 moved detainees.

2 Q. And what did you transport them in from -- from
3 Camp VII to Echo II?

4 A. Detainee movement vehicle.

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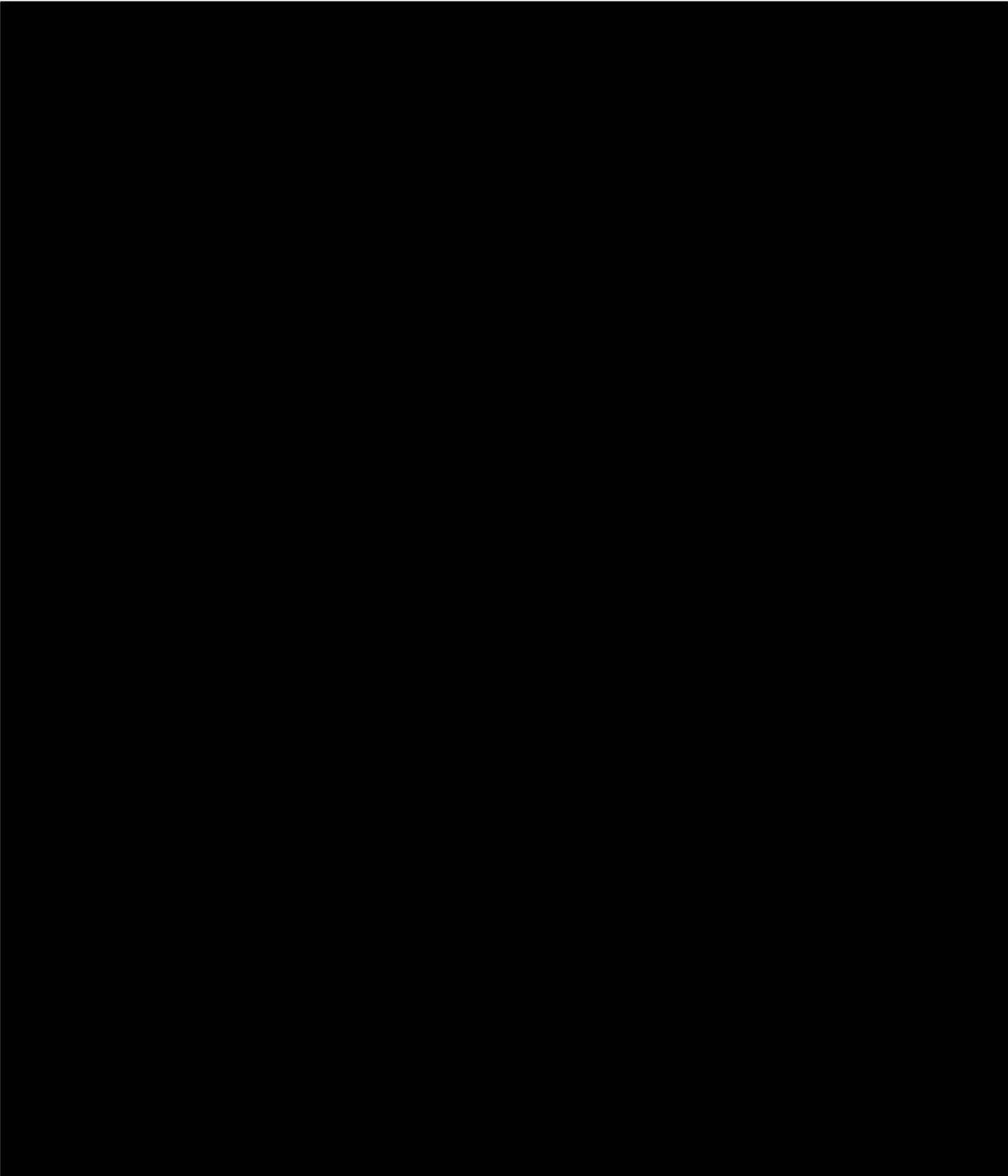
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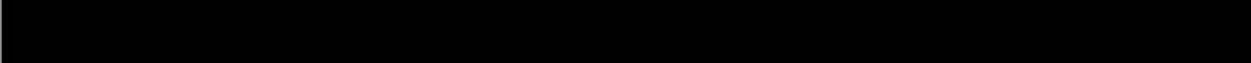
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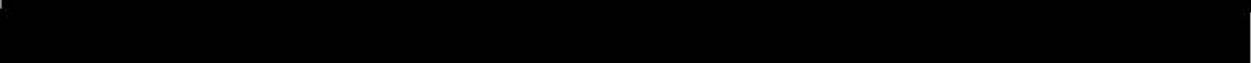
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1 Q. Now, what about your -- what about your guards? Did
2 they remain in the interview room when these interviews were
3 being conducted?

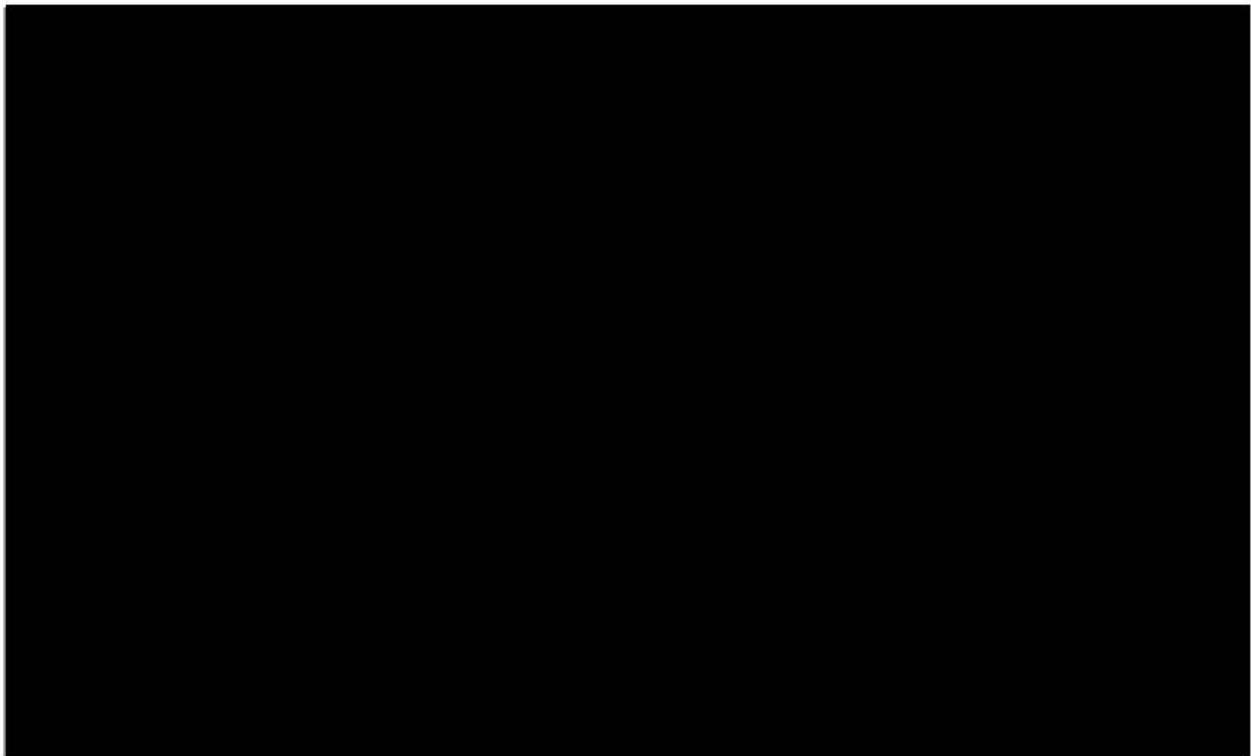
4 A. Not at all, no. They exited. 

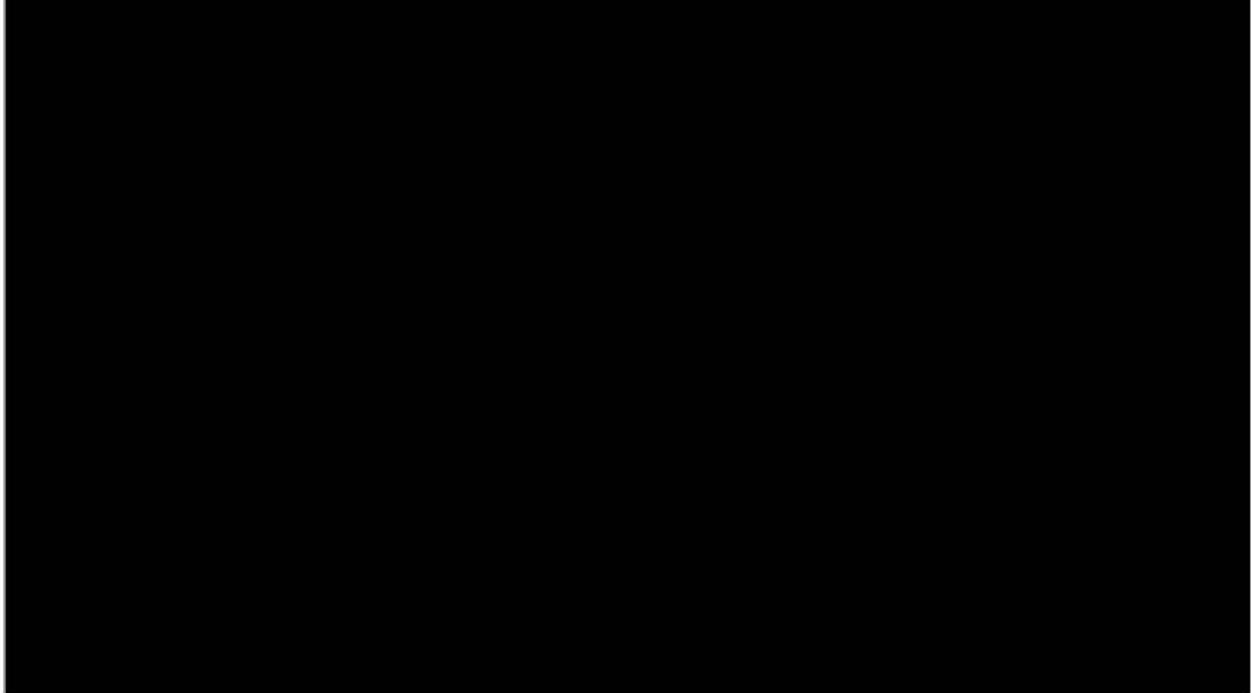
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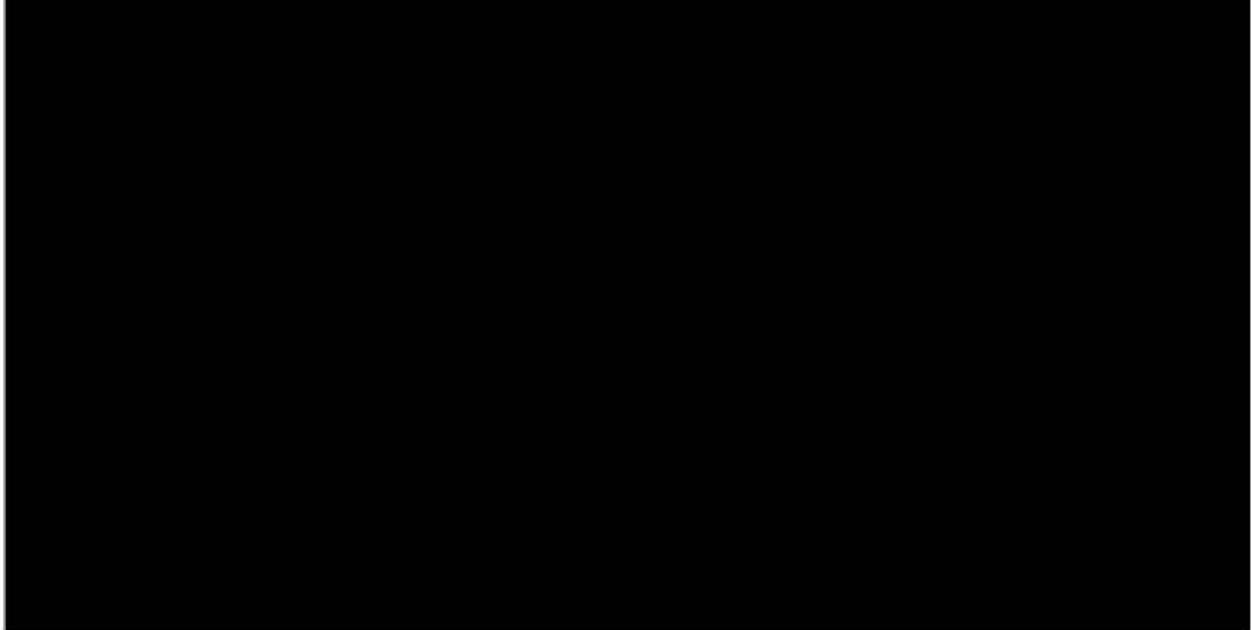
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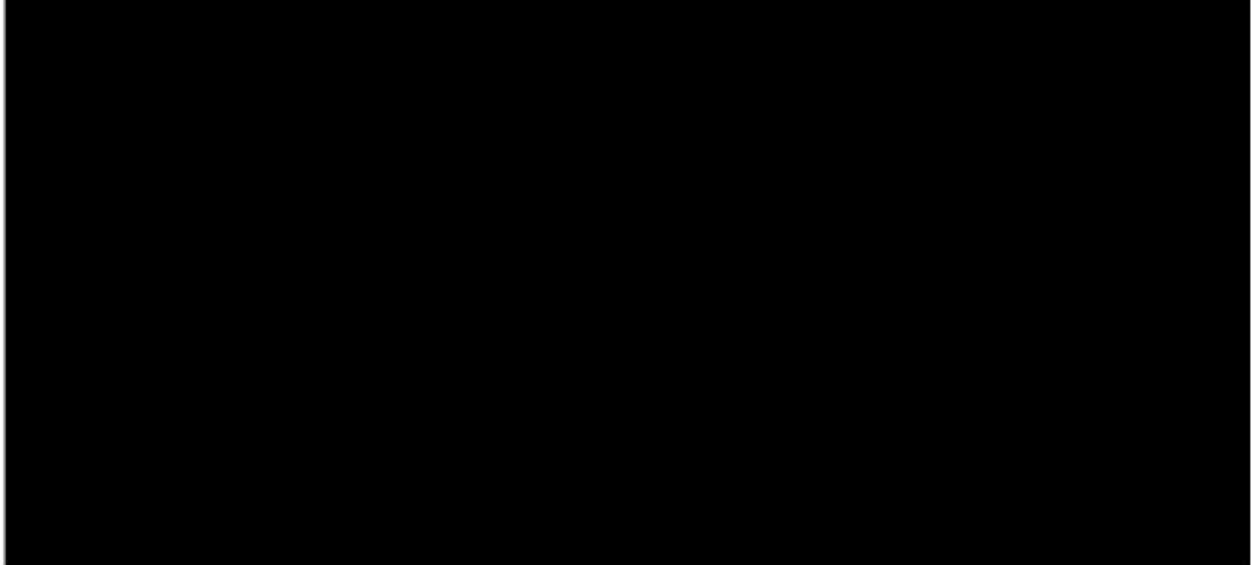
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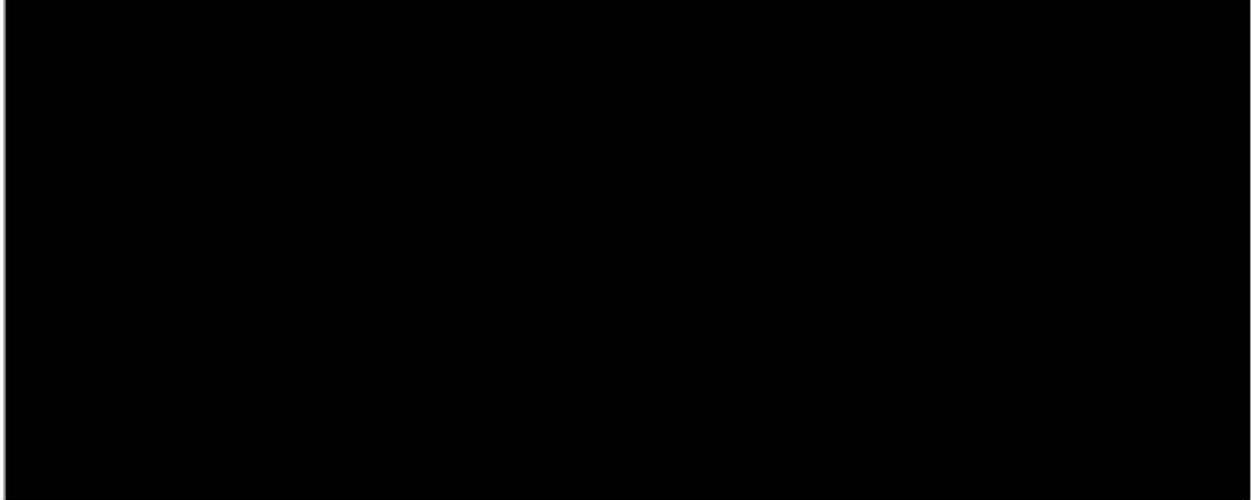
8 Q. All right. So again, a discovery question that was
9 asked by one of the teams, and we promised that we would do it
10 through your testimony.

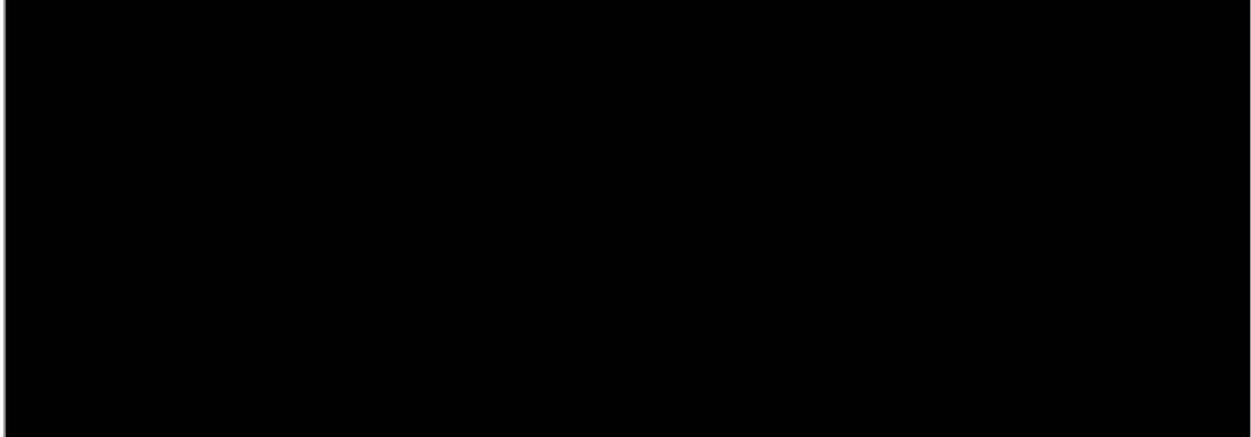
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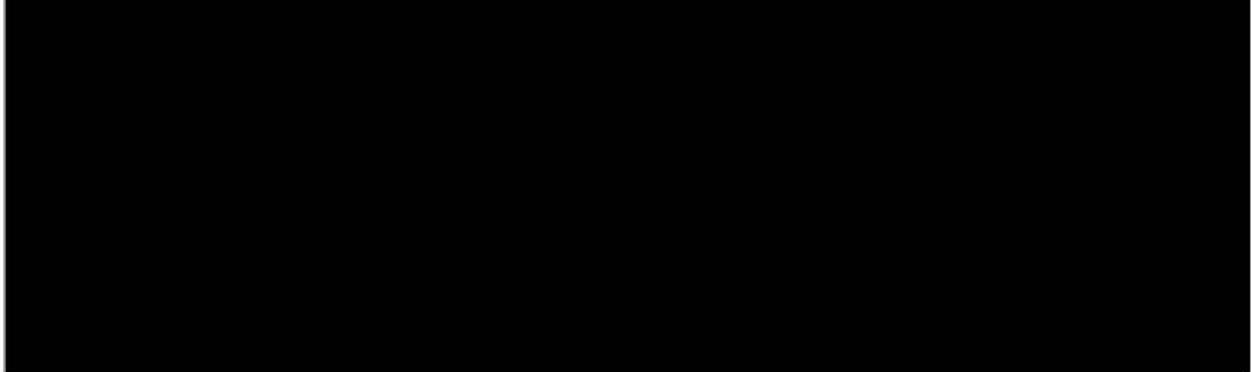
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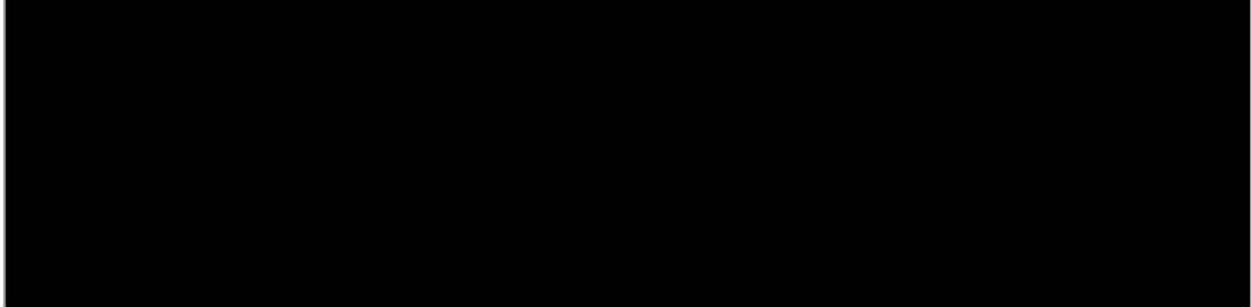
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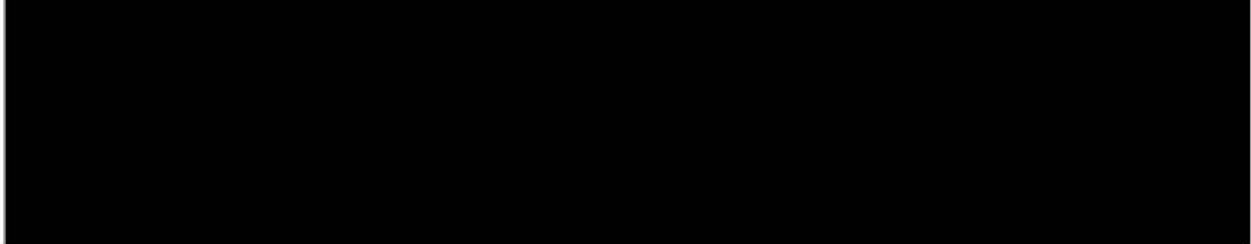
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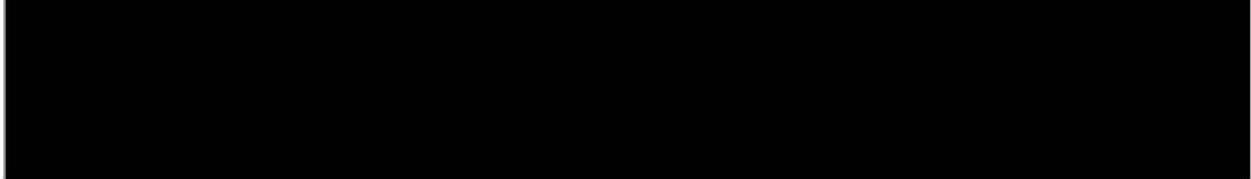
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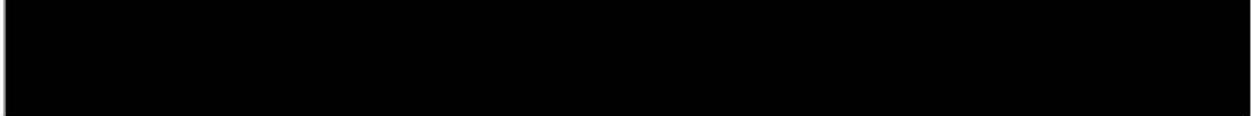
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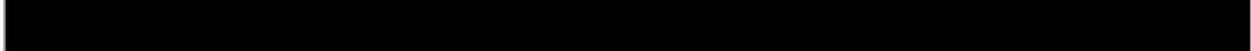
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23 Q. All right. Now, I'm sure Mr. Connell is going to show

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1 you some pictures of the interview room. 

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20 Q. We've heard a lot about, during the interviews, the
21 food that went in and out. Do you recall the -- any
22 cheeseburgers or pies or anything?

23 A. A lot of variety of the food that went in and out. We

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1 got to take a look at it before it was brought to the detainee
2 because this is the first time they were being exposed to food
3 that wasn't part of our standard SOP.

4 But, yes, McDonald's food, other -- other food, pizza,
5 things like that went in there. Tea. [REDACTED]

6 [REDACTED] so there were some things that the legal teams were
7 preparing as well. Mostly -- mostly tea for the -- for the
8 detainees, for the meetings.

9 Q. So how soon after the interviews were completed for
10 the day were the detainees then taken from Echo II back to
11 Camp VII?

12 A. Immediately afterward. After the interviews were
13 finished we would take the detainee back.

14 Q. What if they needed to pray because of the -- of the
15 time?

16 A. It was the detainee's call. If he asked to stay there
17 to finish prayer, to pray, we would allow that, absolutely.

18 Q. All right. Let me shift from the interviews now back
19 to Camp VII.

20 A. Okay.

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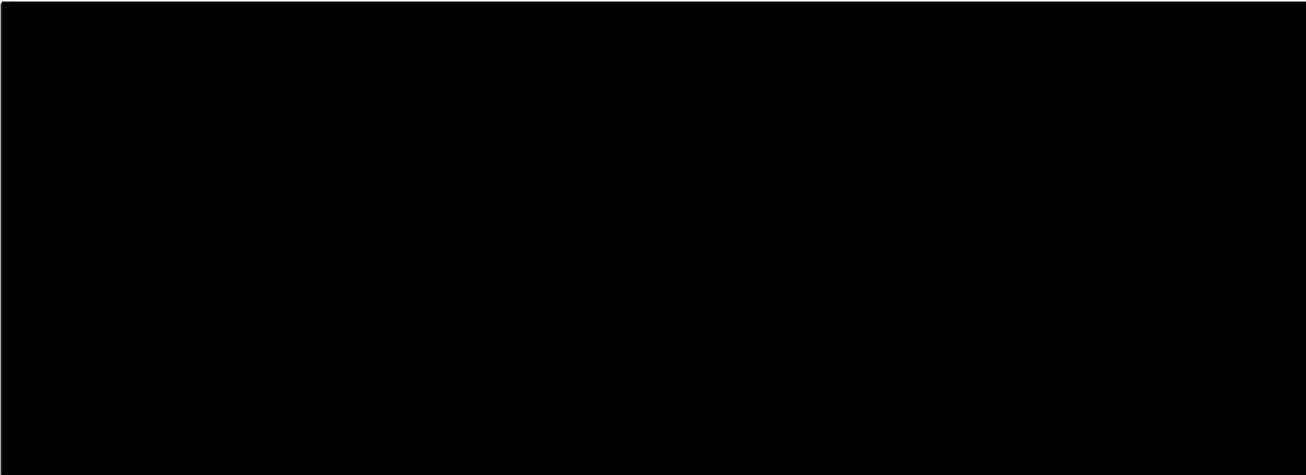
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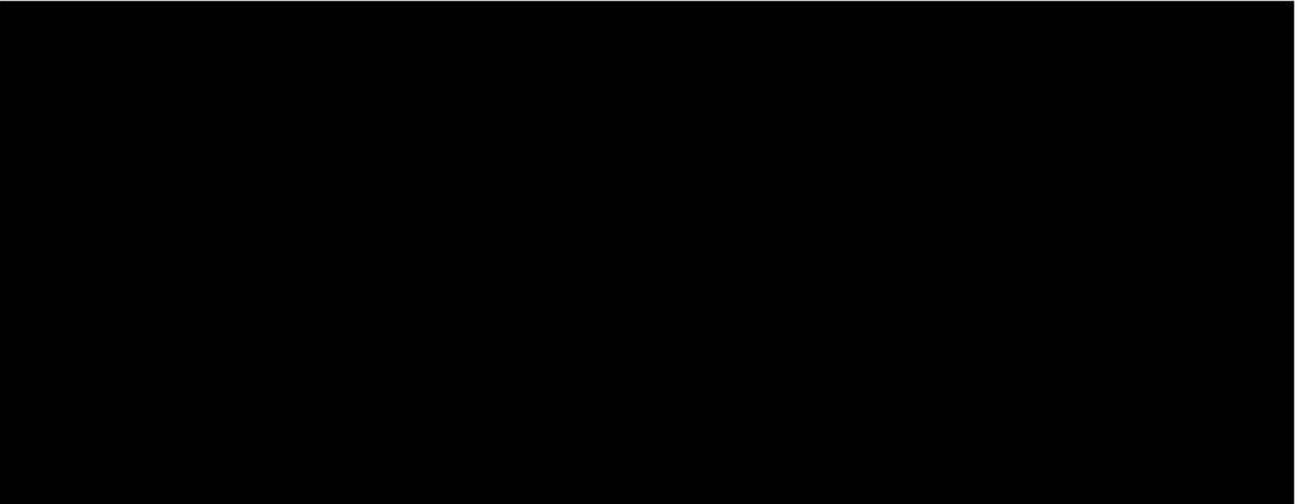
MJ [Co1 COHEN]: One second, sir. There's a knock, I believe.

CP [BG MARTINS]: Your Honor, we did want to allow one individual to leave the courtroom.

MJ [Co1 COHEN]: Okay.

CP [BG MARTINS]: Thank you for the court's indulgence.

MJ [Co1 COHEN]: You may. All right, Mr. Gibbs has left and Major Dykstra is on the door. All right. Thank you.



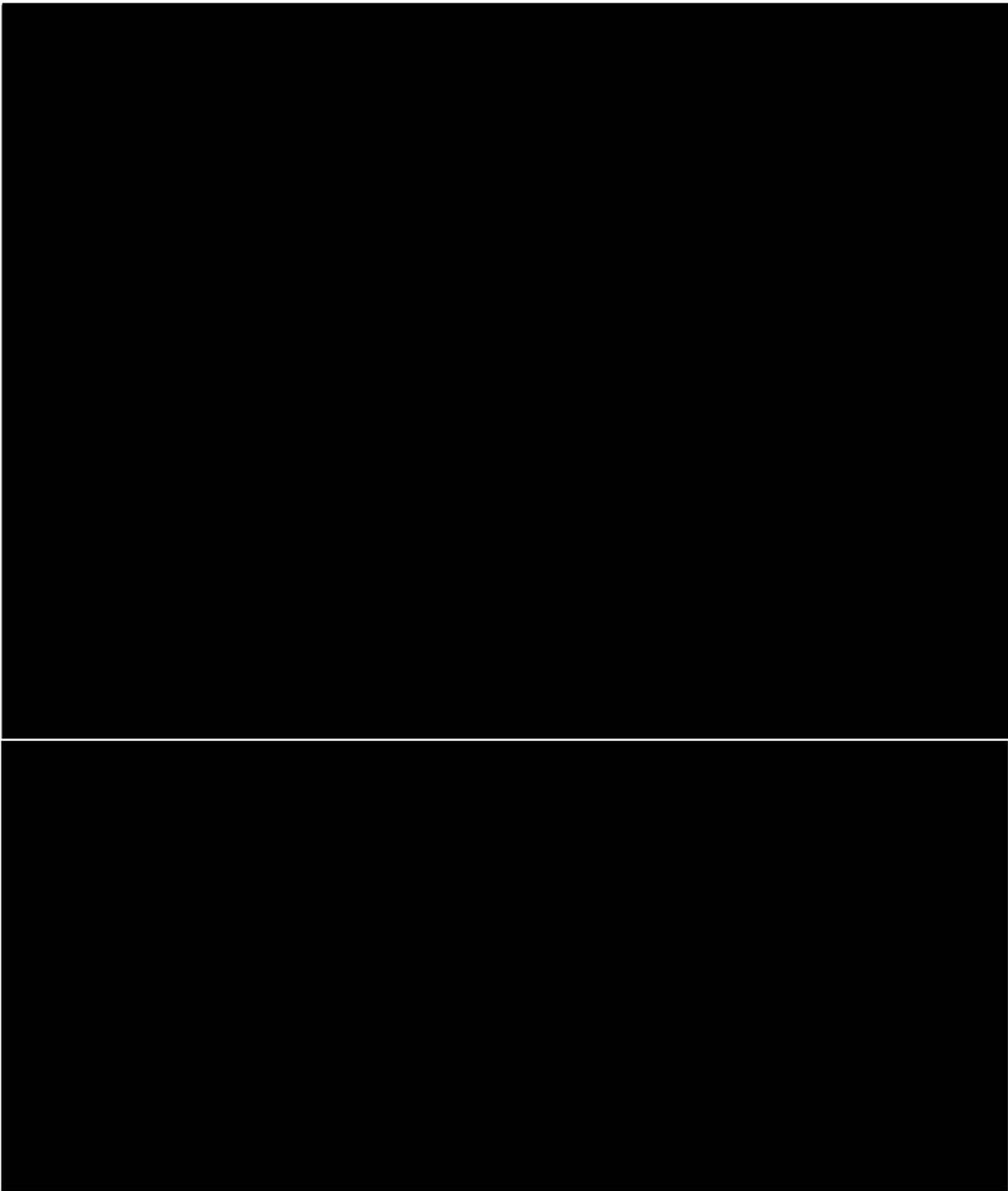
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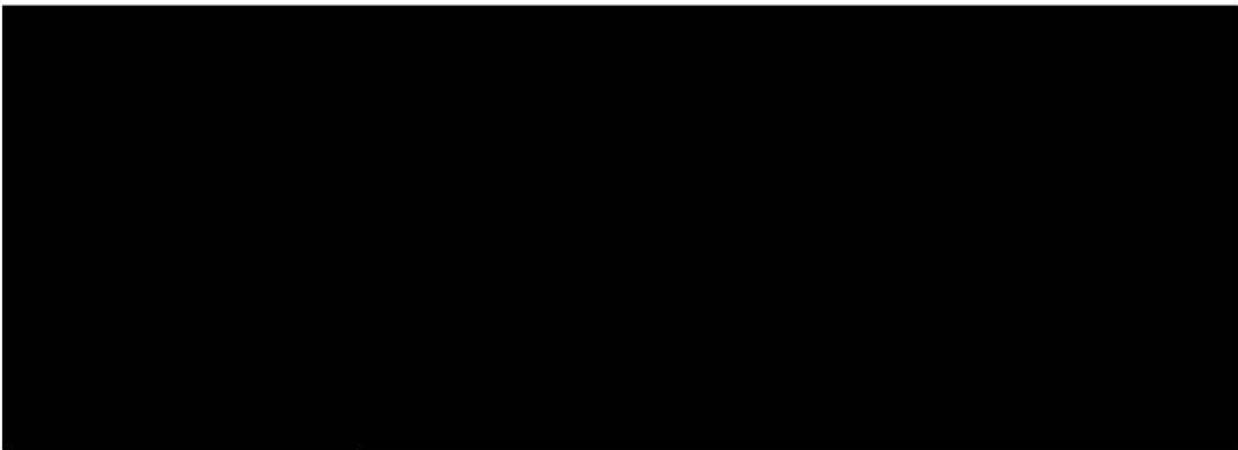
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8 MJ [Col COHEN]: One second. Mr. Gibbs is back. Major
9 Dykstra is returning to his location. Mr. Gibbs is remaining
10 at the door.

11 Sir, you may continue.

12 Q. All right. Generally, I'd like to talk about certain
13 things that are known as the ten-day and 30-day assessments.
14 Do you know what I'm talking about?

15 A. I do, yes, sir.

16 Q. The ten-day assessments, how long were they done for?

17 A. I can remember them starting not long after the
18 detainees got there. I think ten-day reports went on through
19 November, somewhere around November, the first couple months
20 there. And then we switched to 30-day reports.

21 Q. And the 30-day reports were essentially done through
22 the entire period that you were in command of Camp VII; is
23 that correct?

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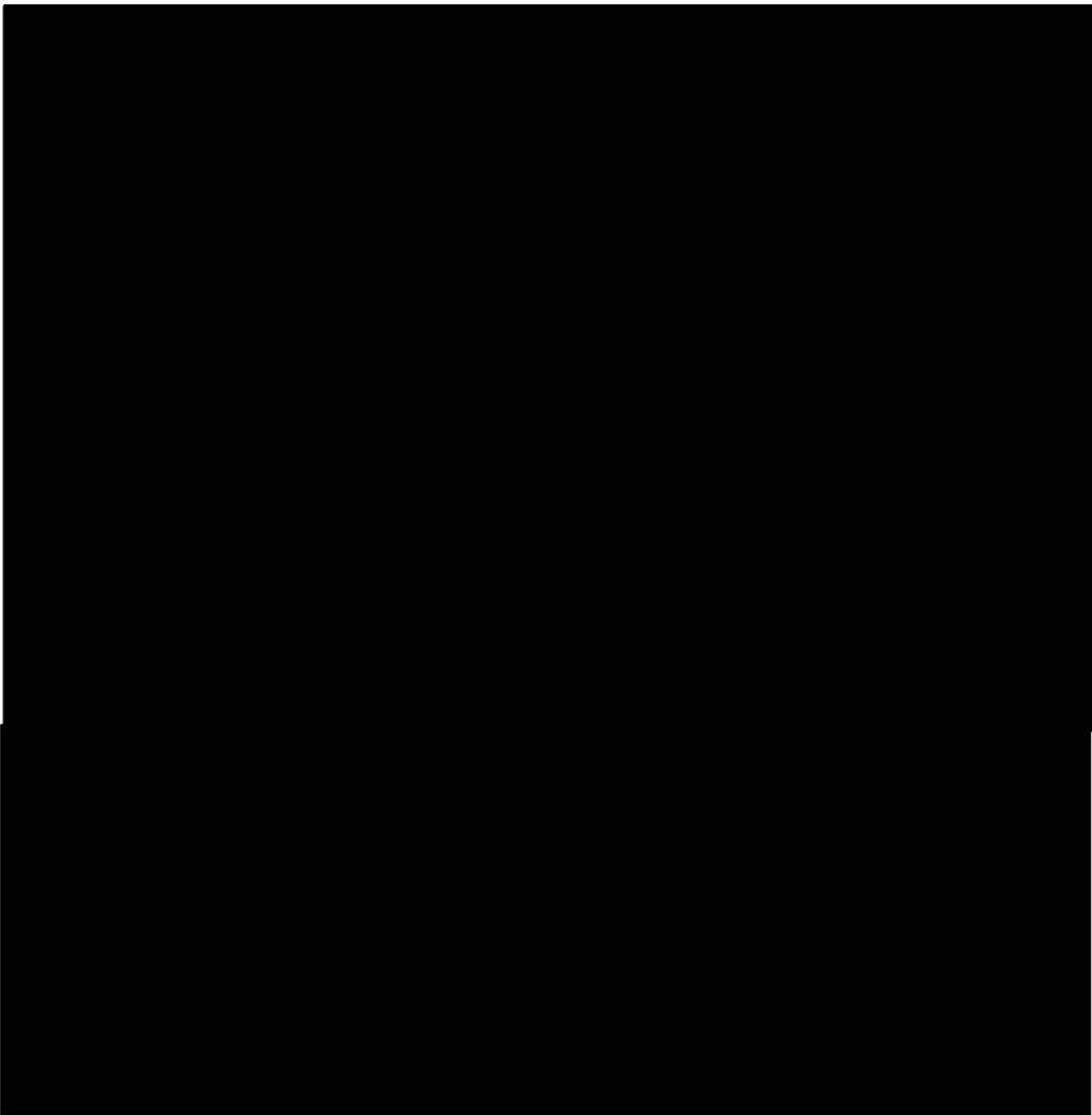
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1 A. I believe so, yes, sir.

2 Q. All right. What generally would be contained in these
3 ten and 30-day reports?

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4 Q. What about -- well, you indicated the ICRC visits, the
5 first visit was in October. The follow-on visit was in
6 December. Any other visits of the ICRC during that period of
7 time?

8 A. No other visits of the ICRC that -- that I remember
9 during that time period, no.

10 Q. And these visits would generally last, what, four to
11 five days? Six days? Is that correct?

12 A. That's correct.

13 Q. And every detainee that was held in Camp VII would be
14 afforded an opportunity to -- to go to these visits?

15 A. That's correct.

16 Q. So what would you tell the detainees regarding those
17 visits?

18 A. I think we were -- I gave them specific information
19 about the International Committee of the Red Cross on the
20 first visit. I remember that one was something that we --
21 we -- we tried to promote, if you will, because potentially
22 the ICRC had contact -- had had contact with their families,
23 and this was an opportunity to bring them up to date on what's

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1 going on back home, if you will.

2 The ICRC had books. They would -- they would provide
3 me books. So the detainees could ask about books that they
4 would -- they'd want. We would be able to do that. At the
5 first visit we would begin using the ICRC to help us populate
6 our library. But that -- that first exchange, I remember we
7 tried to encourage -- encourage them to -- to go to those and
8 let them know there's an opportunity there.

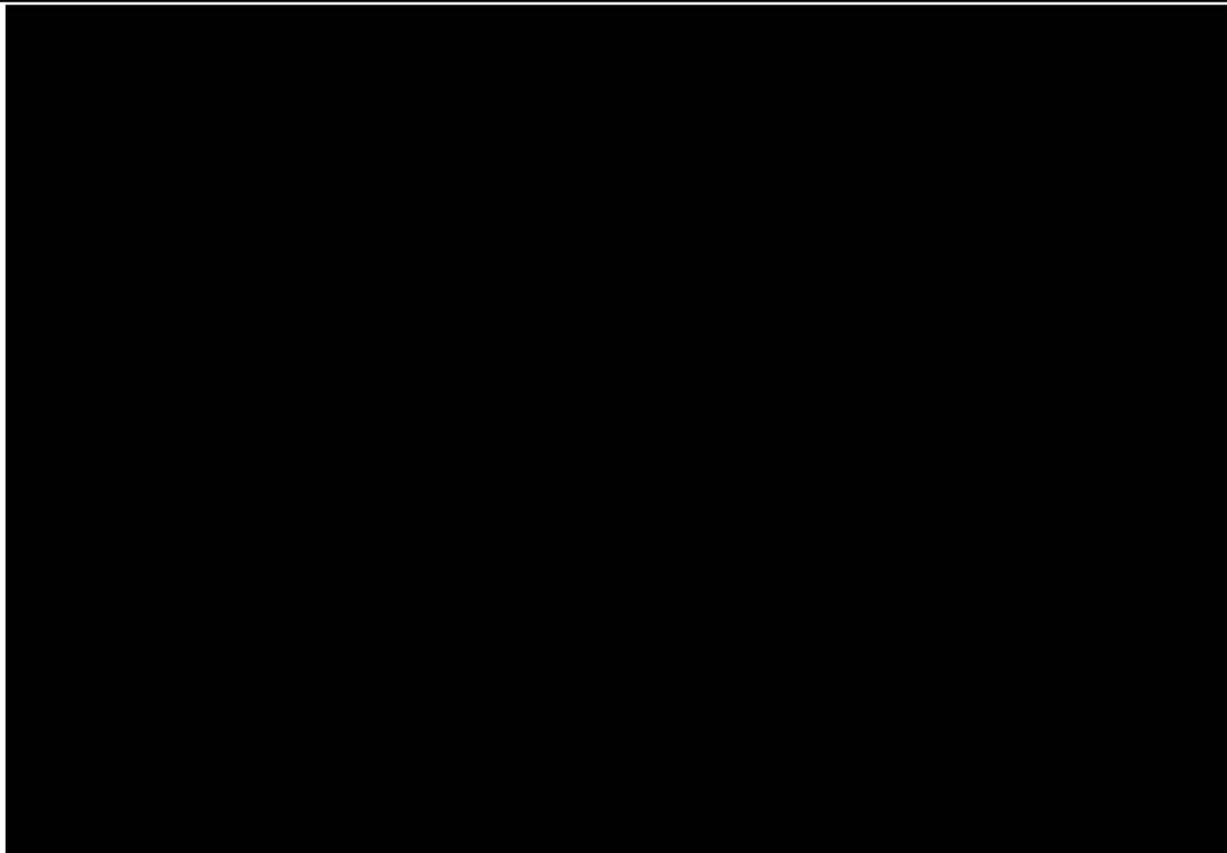
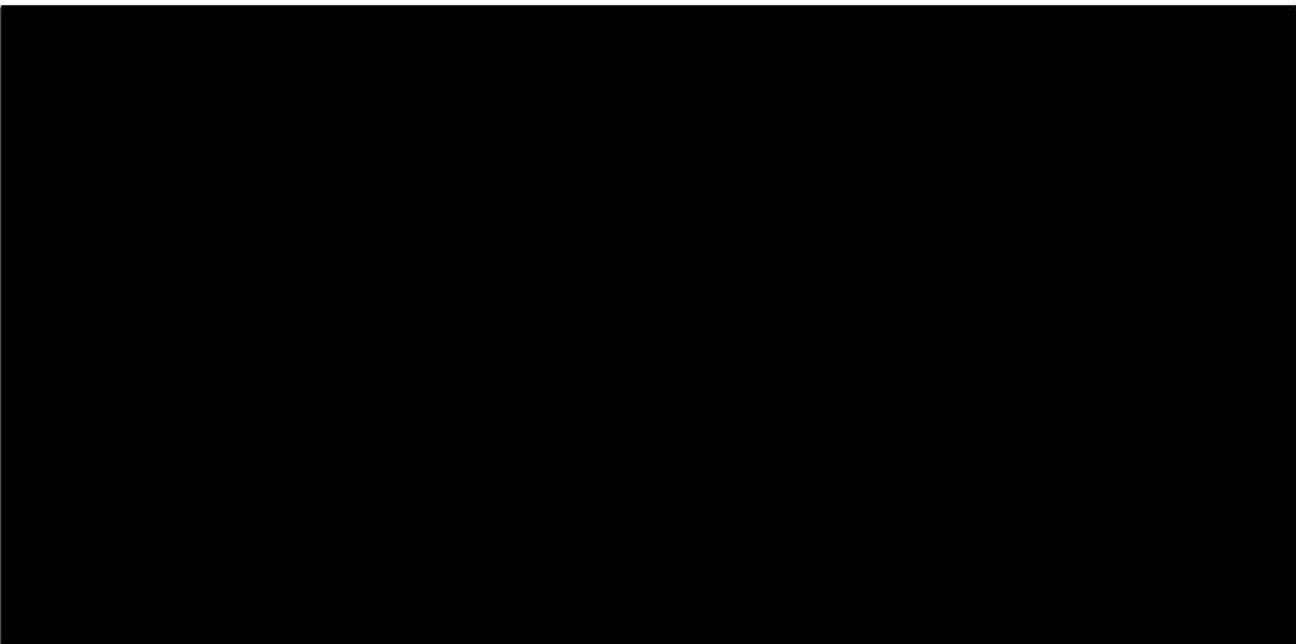
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Q. ---- throughout your entire period or even after that?

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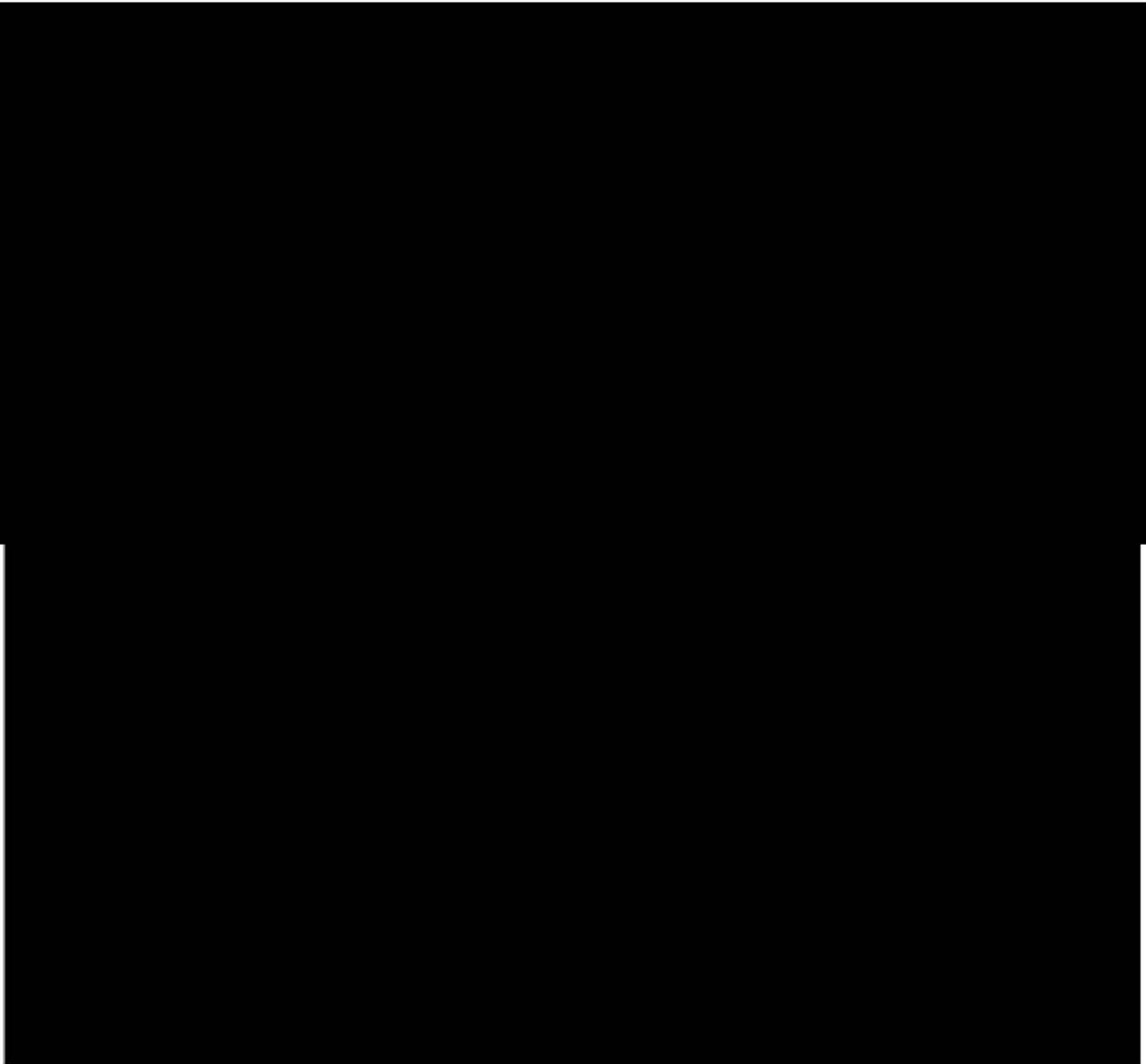
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Q. All right. Let me read you a few statements and tell me whether you agree or disagree with the statement.

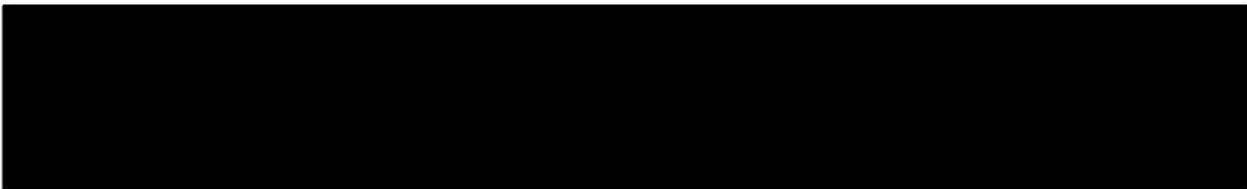
A. Okay.



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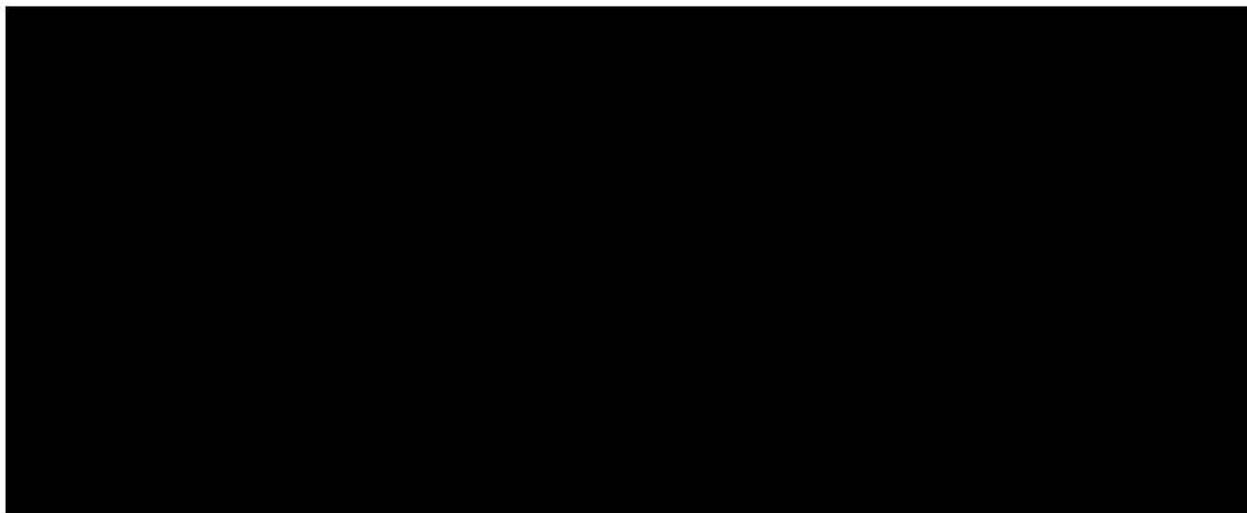
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4 A. Correct.

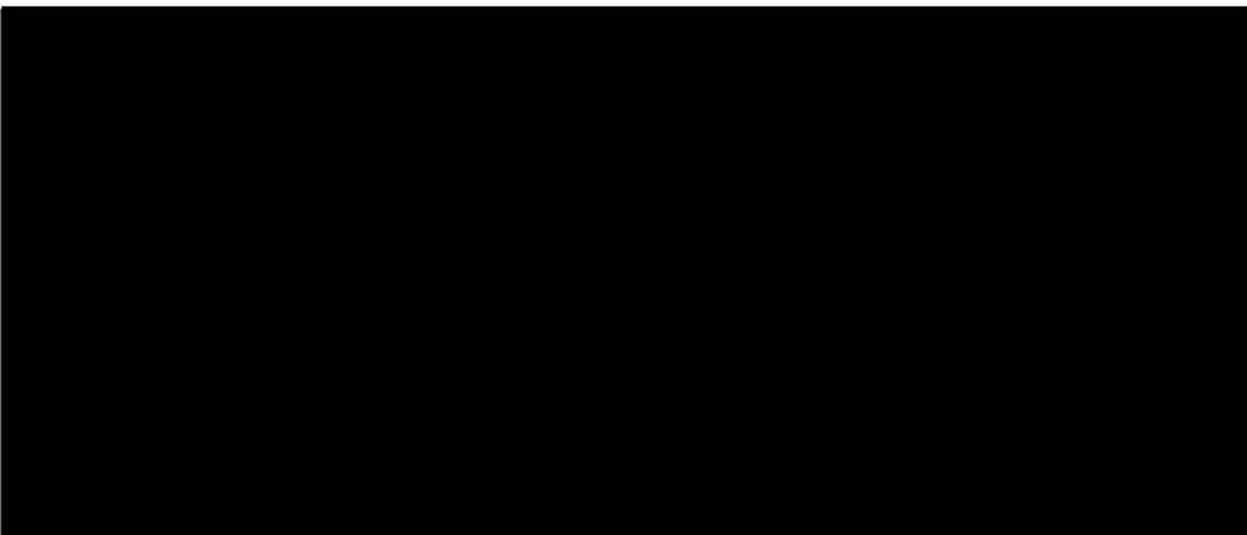
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13 Q. The DoD site commander, meaning you, was authorized to
14 deny access to any person who wanted to get into the facility.

15 A. Correct.

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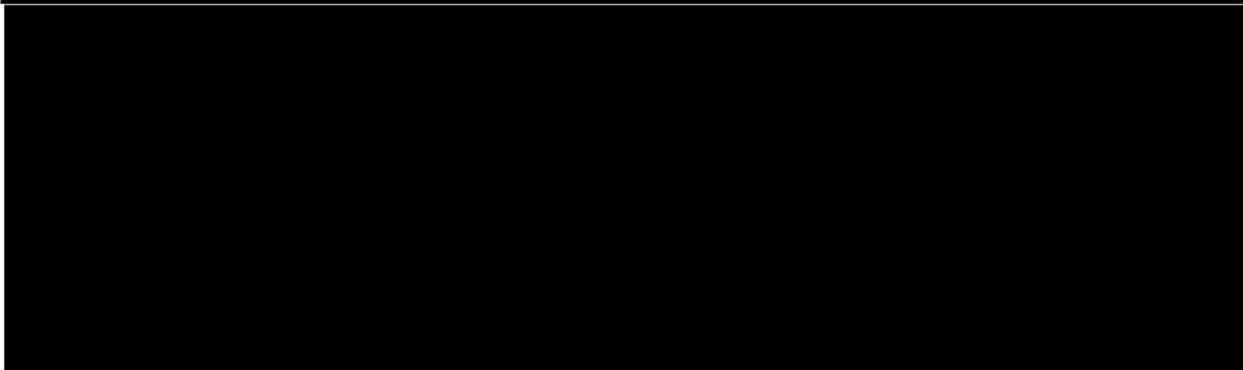
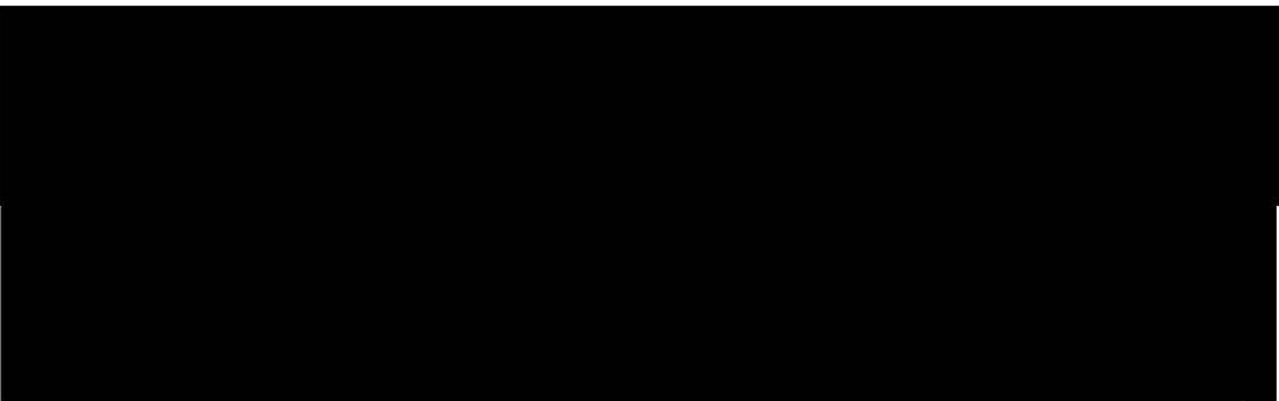
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13 MJ [Col COHEN]: One second. I need to have everyone just
14 check real quick and see -- I'm getting the alarm going off.
15 It's been a few days.

16 TC [MR. SWANN]: There's something over here. I heard it.

17 WIT: Thanks.

18 TC [MR. RYAN]: Sure.

19 MJ [Col COHEN]: Oh, yeah. There's two -- there's two
20 alarms. Yeah, there's the one there and there's the one here.
21 Mr. Swann, that may have been what you heard is one there.

22 TC [MR. SWANN]: I heard an alarm, so ----

23 MJ [Col COHEN]: All right. He may need to use the

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1 restroom, my court reporter.

2 LDC [MS. BORMANN]: Judge, I am going to need a comfort
3 break at some point in the next 15 or 20 minutes. So I just
4 wanted to give you a heads up.

5 MJ [Col COHEN]: All right. I'll tell you what, let's go
6 ahead and take a break right this second. And then everyone
7 just do a search, make sure there's no electronics in the
8 room.

9 All right. We're in recess.

10 [The R.M.C. 806 session recessed at 1713, 1 November 2019.]

11 [The R.M.C. 806 session was called to order at 1740,
12 1 November 2019.]

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

14 Mr. Harrington, looks like Major Bare is -- has
15 stepped out, which is fine.

16 LDC [MR. HARRINGTON]: That's correct, Judge.

17 MJ [Col COHEN]: All right. I think everyone else remains
18 the same. Please recall the witness.

19 [The witness resumed the witness stand.]

20 MJ [Col COHEN]: Sir, please take your seat. We'll
21 continue with your examination.

22 WIT: Okay.

23 MJ [Col COHEN]: Mr. Swann.

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1 **DIRECT EXAMINATION CONTINUED**

2 **Questions by the Trial Counsel [MR. SWANN]:**

3 Q. And before we broke I was asking you certain questions
4 about the operation of the camp. Let me read a statement and
5 you tell me whether it's a true statement or not.

6 A. Okay.



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17 LDC [MR. CONNELL]: Your Honor?

18 MJ [Col COHEN]: Counsel.

19 LDC [MR. CONNELL]: I object. This is just a strange way
20 to lead.

21 MJ [Col COHEN]: Yeah, Counsel, is -- where are we going
22 with the line of questioning? I guess ----

23 TC [MR. SWANN]: That's the last question in this line of

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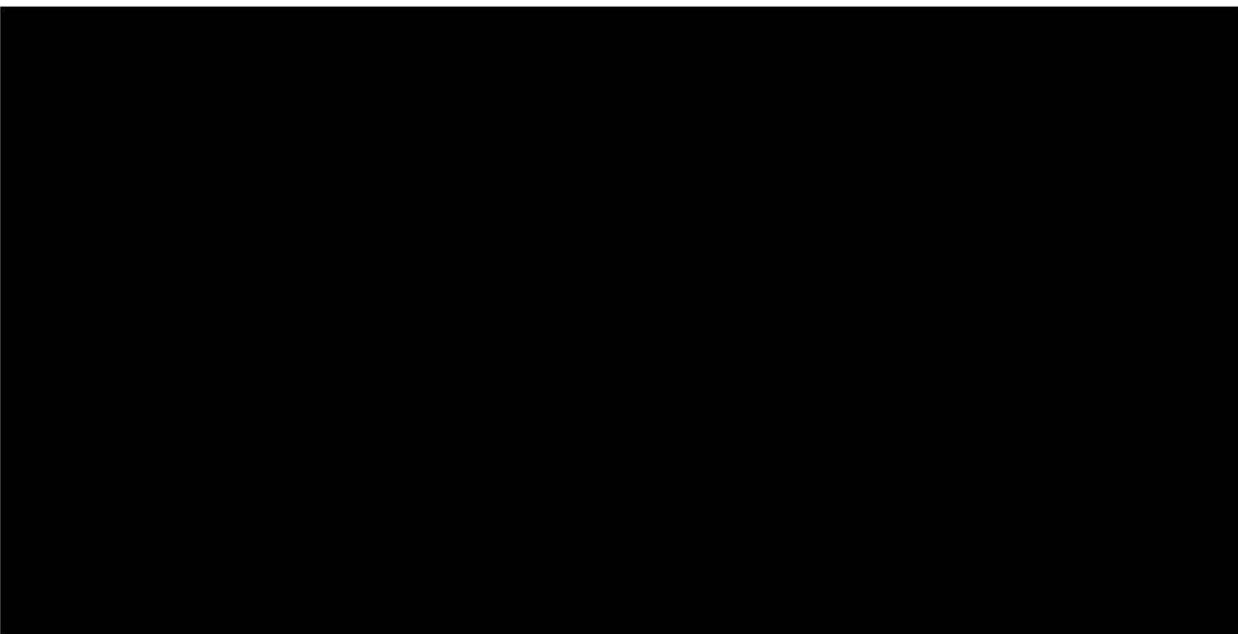
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1 questioning.

2 MJ [Col COHEN]: All right. I'm going to allow this one
3 so we can move on. You may answer.

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14 So I -- I do believe there's two separate missions
15 that went on there. I can't account for why that statement
16 was made. Again, OPCON is traditionally a military term used
17 by military -- in the military jargon to define a relationship
18 between forces and the -- and the -- and the commander of --
19 of those forces and how they interact and their
20 responsibilities. There's OPCON, there's ADCON, TACON. I'm
21 not going to go down those roads.

22 But OPCON, to me, as I've described, was OPCON over
23 forces, over forces that are accomplishing a mission, specific

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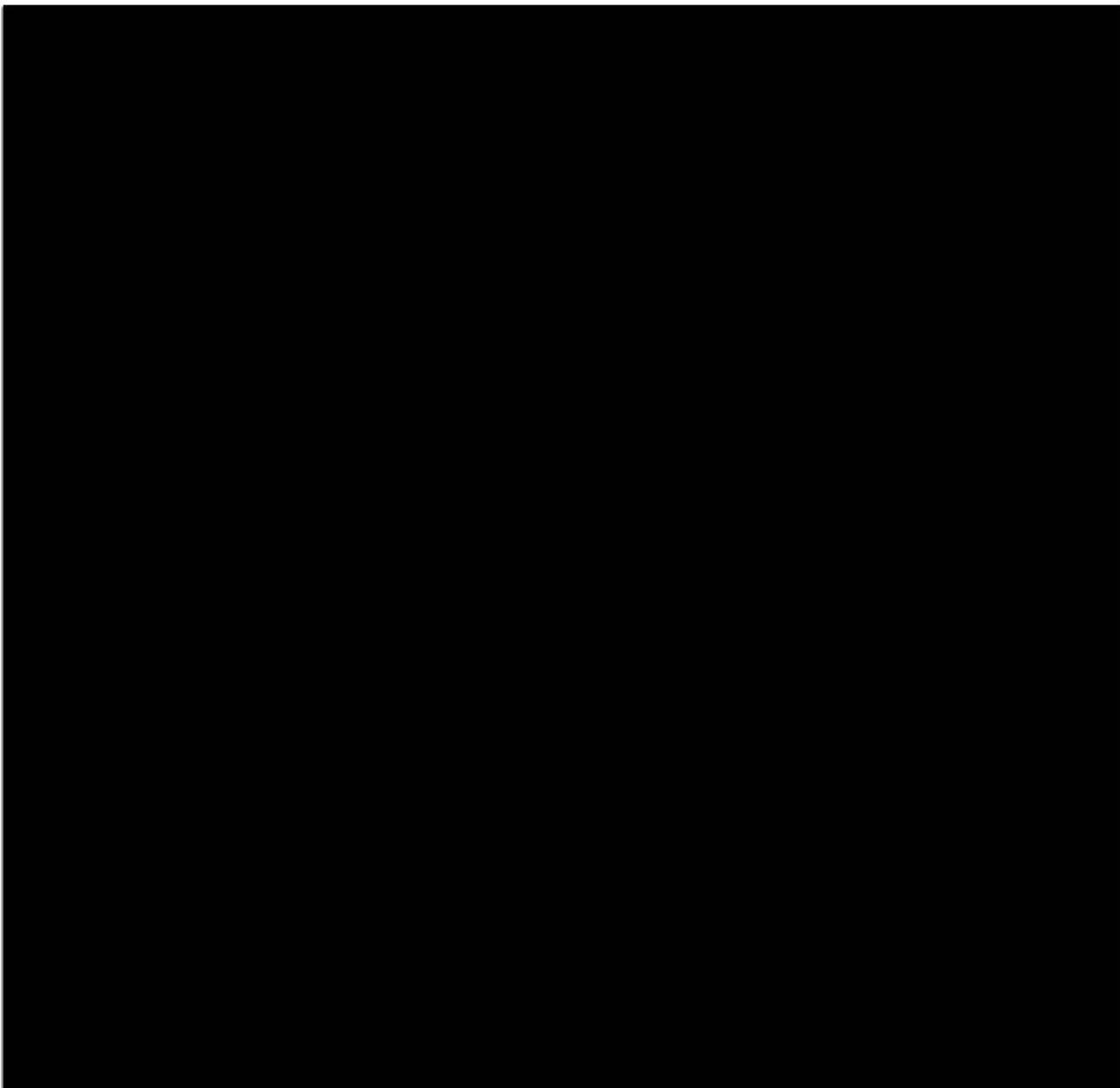
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1 mission. The detention mission was responsible for -- was the
2 responsibility of Task Force Platinum. The commander of Task
3 Force Platinum had OPCON over all those forces that conducted
4 the detention mission.

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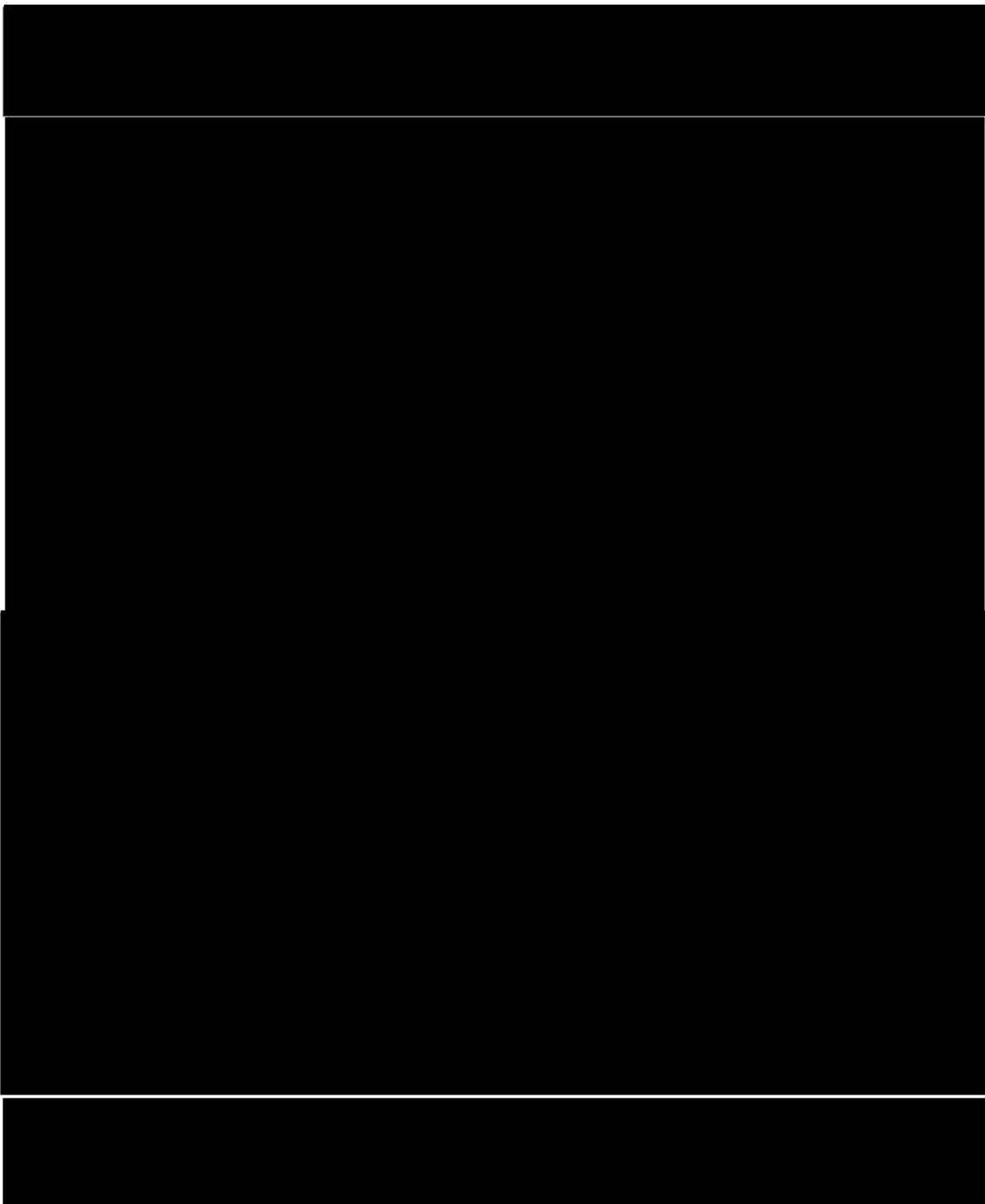
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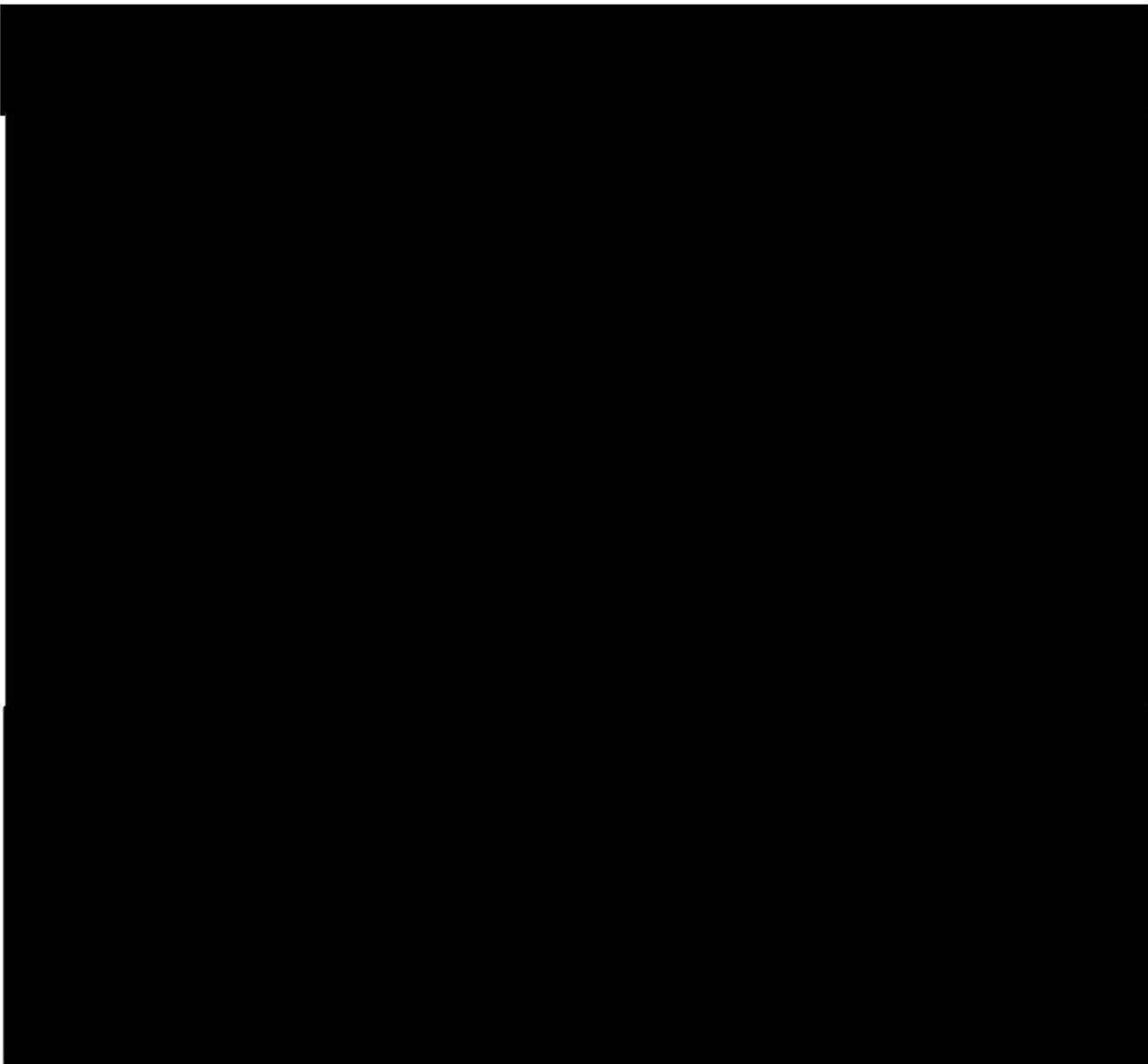
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19 Q. I believe you've indicated that everybody was wearing
20 a military uniform.

21 A. Correct.

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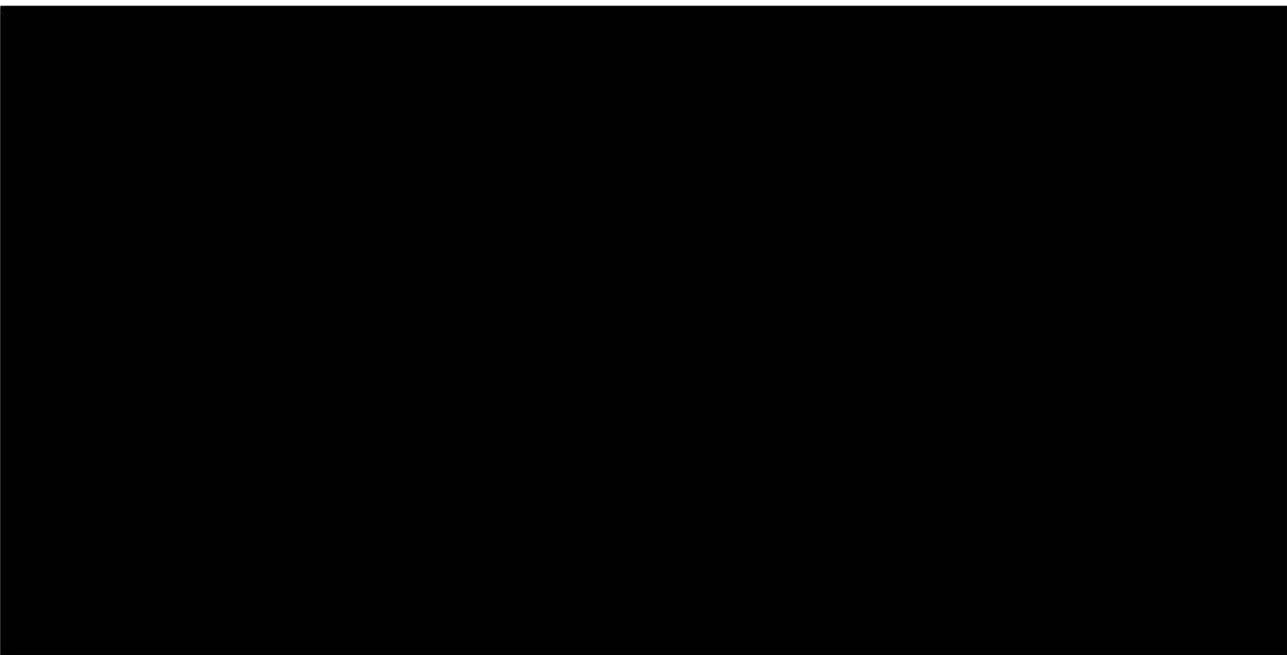
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11 Q. Did the ICRC have access to Camp VII during this
12 period of time?

13 A. They were allowed to visit. They were allowed to see
14 the facility, the conditions of detention there. They toured
15 -- not all of them were. OSD told us which ones would be
16 allowed to do that. And I personally rode there with them the
17 first time they went and went to visit. I rode in the back of
18 the vehicle with the lead delegate there.

19 We took him to Camp VII and gave him a tour with his
20 fellow members of the delegation on the first visit there. So
21 they -- we did want them to see Camp VII and -- and all its
22 operations. They did not meet with detainees there. They did
23 not talk with the detainees at Camp VII, but they saw all the

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1 places that the detainees had access to, recreation, medical,
2 things like that.

3 Q. There was some discussion in the open session about
4 ICRC postcards.

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11 we'd give them to the ICRC to carry it back to the
12 family members. If it was a letter, it would be mailed
13 through standard legal -- or standard mail. This was before
14 legal mail was being used, but regular mail.

15 Q. If you know -- I'm sorry. If you know, about what
16 period of time did they get to send the first ICRC cards out?

17 A. I don't recall. I don't recall if they were able to
18 do that for the first visit. I don't remember.

19 Q. Was it before the interviews that were conducted by
20 the law enforcement folks?

21 A. To me it seems logical, but I can't confirm that
22 with -- definitively. I can't confirm it.

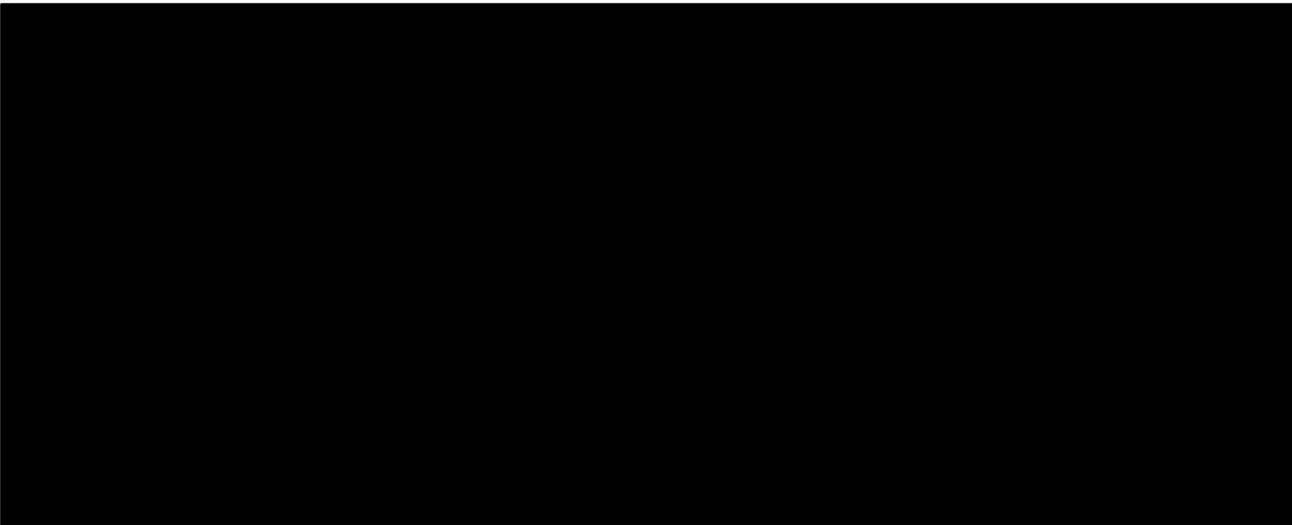
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9 Q. All right.

10 TC [MR. SWANN]: I have nothing further. Thank you.

11 WIT: Yes, sir. Thank you.

12 MJ [Col COHEN]: Mr. Connell?

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

14 MJ [Col COHEN]: Are you ready to proceed?

15 LDC [MR. SOWARDS]: Your Honor?

16 MJ [Col COHEN]: Yes, sir.

17 LDC [MR. SOWARDS]: I beg your pardon. In the flurry of

18 activity at the beginning I forgot that actually Ms. 

19 has joined us.

20 MJ [Col COHEN]: Okay. Thank you. I recognize her from

21 before and she has her requisite clearances. Thank you for

22 clarifying, sir.

23 LDC [MR. HARRINGTON]: Excuse me, Judge.

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1 MJ [Col COHEN]: Yes, sir.

2 LDC [MR. HARRINGTON]: Do you have any idea how long we're
3 going to go?

4 MJ [Col COHEN]: I want to get through at least his
5 cross-examination.

6 LDC [MR. CONNELL]: Did I do something wrong, Your Honor?

7 MJ [Col COHEN]: No, sir. No. I'm just trying to see if
8 we can get through most of this witness's testimony today.

9 LDC [MR. CONNELL]: Okay.

10 LDC [MR. SOWARDS]: Your Honor, I'm sorry. I did want you
11 to know -- I'm sure different teams have different situations,
12 but we have two paralegals who will be able to help us pack up
13 here when we get out and then stow things back in our
14 temporary office. I'm not sure if we get to move to our
15 regular office, but they are helping us kind of arrange our
16 makeshift temporary office. But we have a new group come --
17 or two paralegals coming in tomorrow and the two that are here
18 have the plane to catch. So any consideration you can give to
19 that process would be much appreciated.

20 LDC [MS. BORMANN]: Judge, we're in a similar situation.
21 Not so much that we have replacement paralegals, but we
22 don't -- but our paralegals have been here since 7:00 this
23 morning. I just spoke with them. They asked if they could

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1 leave. I told them yes because, I mean -- so we're going to
2 be asking permission to be able to leave the materials here
3 because we don't have any assistance over -- over the weekend.
4 We don't have any assistance. It's just Mr. Montross and I at
5 this point.

6 MJ [Col COHEN]: Okay. What's the schedule for next week?

7 MTC [MR. TRIVETT]: Sir, we have the testimony of Special
8 Agent Butsch either Monday or Tuesday. He's available. We
9 have two witnesses, Mr. Parker, Mr. Adams coming in on
10 Saturday. That testimony will be fairly short. And then we
11 have a potential argument on the 645 issues following that.
12 And I believe that's -- I'm sorry. What was the -- 642 and
13 645 or just 642?

14 LDC [MR. CONNELL]: Both.

15 MTC [MR. TRIVETT]: So 642 and 645 argument, which will be
16 in closed. And I think we're going to try to do the
17 Mr. Parker and Mr. Adams as a conceptual hearing as well under
18 the substituted evidentiary foundation ruling.

19 MJ [Col COHEN]: Okay.

20 MTC [MR. TRIVETT]: I'm sorry, sir. And the Admiral
21 Reismeier issue.

22 MJ [Col COHEN]: Yes. All right. When we say Parker and
23 Adams are fairly short, like what does that really mean? I'm

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1 just trying to keep us on somewhat of a schedule because we
2 won't be back until the middle of January.

3 MTC [MR. TRIVETT]: Yes, sir. Based on what we have to
4 do, I'm not concerned that we won't finish, if that's what the
5 judge is concerned with.

6 MJ [Col COHEN]: Okay. Mr. Connell, do you agree?

7 LDC [MR. CONNELL]: I do, sir.

8 MJ [Col COHEN]: Okay. Do the rest of the teams agree?

9 LDC [MR. CONNELL]: I can also answer your specific
10 question. Unless there's something very surprising, I would
11 expect that we would finish both Parker and Adams in one half
12 of a day.

13 MJ [Col COHEN]: Okay.

14 MTC [MR. TRIVETT]: Agreed.

15 MJ [Col COHEN]: All right. Okay. All right. Based on
16 what you guys are telling me, like I said, I -- as you see,
17 there's still a lot of things that we want to do and I don't
18 want to avoid the opportunity to let you guys be heard on
19 these issues and get these witnesses in, creating records ----

20 LDC [MR. CONNELL]: I understand, sir.

21 MJ [Col COHEN]: ---- for findings of fact. Yeah, I'm not
22 upset with anyone. It's just a matter of just trying to work
23 it in, unexpected delays, so just trying to ----

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

2 MJ [Col COHEN]: ---- to fit some testimony in. Okay.

3 Can the parties -- let me ask you this. 645 and 642, when --

4 can -- could we argue those earlier in the week, or is there a

5 particular witness that has to be called to address those?

6 LDC [MR. CONNELL]: So 642 can be argued at any time. 645

7 should come after Parker and Adams.

8 MJ [Col COHEN]: Okay. Government, do you agree?

9 MTC [MR. TRIVETT]: Yes, sir. And for planning purposes,

10 because Parker and Adams are going to be in closed, it might

11 just make sense to argue -- 645 is classified. 642 as well,

12 Mr. Connell?

13 LDC [MR. CONNELL]: 642 is wholly classified. That's the

14 one ----

15 MTC [MR. TRIVETT]: I'm conflating the two.

16 LDC [MR. CONNELL]: ---- that we said we didn't expect any

17 open argument on. There will be open argument on 645.

18 MJ [Col COHEN]: Okay.

19 LDC [MR. CONNELL]: 645A, right? 645 itself is not being

20 argued, but 645A has open argument. I can consult with

21 Mr. Trivett about this.

22 MJ [Col COHEN]: All right. Why don't you guys do.

23 Here's what I'd like to do. For planning purposes, it is with

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1 respect to both the public, the parties, and in particular,
2 your clients.

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

4 MJ [Co1 COHEN]: The more fidelity I can have on closed
5 versus open and those kinds of things. So we will start
6 Monday morning with a closed session. We'll continue this
7 testimony.

8 LDC [MR. CONNELL]: Okay.

9 MJ [Co1 COHEN]: If the parties are in agreement
10 following -- sir, I'll release you for the weekend here pretty
11 shortly.

12 WIT: Thank you, sir.

13 MJ [Co1 COHEN]: If Parker and Adams -- for example, I'm
14 just throwing this out there. I don't know how these
15 witnesses are going to play out, but, for example, if we
16 finish with this witness and -- in the closed session and then
17 it's possible to just go into another witness, that's --
18 that's closed, that would be my preference. I would need some
19 e-mail from the parties sometime over the weekend to let me
20 know whether or not that's what we want to do.

21 MTC [MR. TRIVETT]: Yes, sir. We would be amenable to
22 that, to having Mr. Parker and Mr. Adams after [REDACTED]

23 MJ [Co1 COHEN]: Okay.

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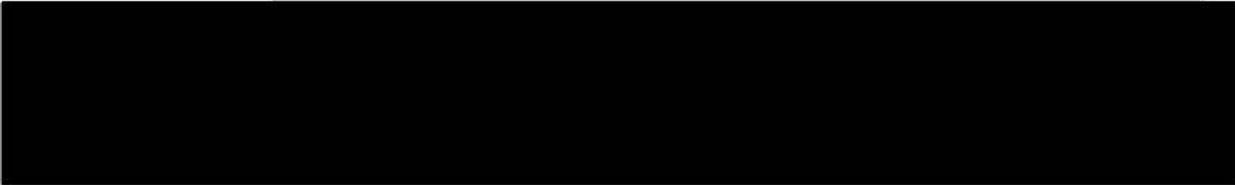
1 LDC [MR. CONNELL]: Yes, sir. My original proposal was to
2 have them on Monday, so ----

3 MJ [Co1 COHEN]: Okay. Perfect.

4 LDC [MR. CONNELL]: ---- I'm on board.

5 MJ [Co1 COHEN]: All right. That's what we'll do. So
6 Monday is just closed. We're going to get through all the
7 closed testimony. And then we will -- if -- that will give me
8 some time to make a record. I will issue any rulings with
9 respect to -- 

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13 LDC [MR. CONNELL]: Of course.

14 MJ [Co1 COHEN]: But we know that, sir, you are available,
15 is that correct ----

16 WIT: That's correct, sir.

17 MJ [Co1 COHEN]: ---- if I need to call you back? Okay.
18 Great. All right then. So if we need to have an open session
19 then starting Tuesday morning with him, we can, but at least
20 I'll be able to make some rulings Monday afternoon.

21 LDC [MR. CONNELL]: Right. Thank you.

22 MJ [Co1 COHEN]: Okay. Thanks, everyone. We'll be in
23 recess until Monday morning.

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1 [The R.M.C. 806 session recessed at 1750, 1 November 2019.]

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