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1 [The R.M.C. 803 session was called to order at 0902,
2 23 September 2019.]

3 MJ [Col COHEN]: The military commission is called to
4 order.

5 Good morning, everyone. We are convening this week
6 to take additional witness testimony on various motions.

7 General Martins, good morning. Is there anyone that
8 you need anyone to account for this week that has been added
9 to your team?

10 CP [BG MARTINS]: Good morning, Your Honor. Counsel
11 representing the United States remain the same as on Friday
12 evening as when we were last in public session.

13 MJ [Col COHEN]: Thank you, sir. I appreciate it.

14 Mr. Sowards, good morning.

15 LDC [MR. SOWARDS]: Good morning, Your Honor. How are
16 you?

17 MJ [Col COHEN]: Doing well, thank you.

18 I recognize that Mr. Mohammad is here and it looks
19 like all of your team members are here as well.

20 LDC [MR. SOWARDS]: That is correct, Your Honor. And
21 also, if I may just, with leave of the court, Ms. Radostitz
22 may need to to attend to some matters related to future
23 hearings.

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1 MJ [Col COHEN]: Absolutely. Not a problem. Thank you
2 very much.

3 Ms. Bormann, good morning.

4 LDC [MS. BORMANN]: How are you this morning?

5 MJ [Col COHEN]: Doing well. How about yourself?

6 LDC [MS. BORMANN]: I'm good. With us today for the first
7 time is Captain Peer. He needs to put his appearance in the
8 record.

9 MJ [Col COHEN]: Excellent. I'll take care of that
10 momentarily.

11 LDC [MS. BORMANN]: Captain Simon [sic] is obviously gone.
12 And Mr. Perry is doing other commission work.

13 MJ [Col COHEN]: Okay. And I recognize that
14 Mr. Bin'Attash is here. All right, thank you.

15 Mr. Harrington, good morning. How are you?

16 LDC [MR. HARRINGTON]: Good morning, Judge. I'm fine.

17 Judge, our team has changed. Wyatt Feeler is now
18 here.

19 MJ [Col COHEN]: Okay.

20 LDC [MR. HARRINGTON]: And Donna Cline will not be here
21 for the rest of the week. Otherwise we're the same. And
22 Mr. Binalshibh is here.

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

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1 Mr. Connell, good morning.

2 LDC [MR. CONNELL]: Good morning, sir. All counsel are
3 present.

4 MJ [Col COHEN]: Okay. And I recognize that Mr. Ali is
5 presently not here. So thank you.

6 Mr. Ruiz, good morning.

7 LDC [MR. RUIZ]: Judge.

8 MJ [Col COHEN]: How about your team?

9 LDC [MR. RUIZ]: Ms. Lachelier is absent and otherwise
10 we're the same.

11 MJ [Col COHEN]: And I recognize that Mr. Hawsawi is not
12 here. All right. Thank you.

13 Trial Counsel, is there a witness to testify with
14 respect to Mr. Ali and Mr. al Hawsawi?

15 I recognize the major is the major who testified last
16 week. Remind you you are still under oath.

17 WIT: Yes, sir.

18 MJ [Col COHEN]: Thank you.

19 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
20 was reminded of her oath, and testified as follows:

21 **DIRECT EXAMINATION**

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

23 Q. Ma'am, do you have what's been marked as Appellate

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1 Exhibit 660AA and BB in front of you?

2 A. Yes, sir.

3 Q. All right. Let's take Mr. Ali first. Did you have
4 occasion to advise Mr. Ali of his right to attend today's
5 proceeding?

6 A. I did.

7 Q. What time did you do that?

8 A. This morning at 0610.

9 Q. Did he indicate that he wished to or not come today?

10 A. He did not want to attend today.

11 Q. All right. Did you use the Arabic or the English
12 version?

13 A. English.

14 Q. Is that his signature on page 2 of the document?

15 A. Yes, sir.

16 Q. All right. With respect to Mr. Hawsawi, did you do
17 the same?

18 A. I did.

19 Q. What time?

20 A. 0638 this morning.

21 Q. Did he indicate that he wished to attend?

22 A. He indicated he did not wish to attend.

23 Q. Is his signature on the second page of the document?

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1 A. Yes, sir.

2 Q. And do you believe they voluntarily waived their
3 right to attend today's proceedings?

4 A. I do.

5 TC [MR. SWANN]: No further questions, Judge.

6 MJ [Col COHEN]: Thank you, Mr. Swann.

7 Mr. Connell, I'm looking at what has been marked as
8 Appellate Exhibit 660AA, which purports to be a statement
9 signed by your client, Mr. Ali, waiving his right, at least
10 presently, to be here for today's proceedings. Have you had
11 an opportunity to review this, and do you have any questions
12 of the witness?

13 LDC [MR. CONNELL]: Sir, I've had the opportunity to
14 review AE 660AA, and I have no questions.

15 MJ [Col COHEN]: All right. Thank you, sir. And I'll
16 note your -- I'll note the standing objection with respect to
17 identity.

18 Mr. Ruiz, the same questions with respect to what has
19 been marked as Appellate Exhibit 660BB.

20 LDC [MR. RUIZ]: I've reviewed it. I have no questions.

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

22 Handing these to the court reporter.

23 We'll temporarily excuse you. Thank you very much.

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1 WIT: Thank you, sir.

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

3 MJ [Col COHEN]: Based on the documentation and the
4 testimony presented, I find that Mr. Ali and Mr. Hawsawi have
5 knowingly and intelligently waived their right to be present
6 at today's proceedings and are, therefore, voluntarily absent.

7 Are there any matters we need to take up before we
8 call Special Agent McClain?

9 Oh, sorry. That's right. The new captain needs to
10 make his presence.

11 Captain, please come forward and announce your
12 qualifications and by whom you are detailed.

13 DDC [Capt PEER]: Good morning, Your Honor.

14 MJ [Col COHEN]: Good morning.

15 DDC [Capt PEER]: I'm Captain Jay Peer. I have been
16 detailed to this military commission by the Chief Defense
17 Counsel in accordance with R.M.C. 503. I'm qualified under
18 R.M.C. 502. I have been previously sworn as trial defense
19 counsel for trials by court-martial. I have not acted in any
20 manner that might tend to disqualify me in this proceeding.
21 And the document detailing me as defense counsel is included
22 in an attachment to AE 00400.

23 MJ [Col COHEN]: All right. Thank you. I appreciate it.

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1 Mr. Connell.

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

3 MJ [Col COHEN]: Oh, excuse me. Mr. Harrington. Sorry
4 about that.

5 LDC [MR. HARRINGTON]: Judge, I have been advising you
6 about this potential motion. We're going to file that this
7 morning.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. HARRINGTON]: Mr. Trivett and I have been working
10 on it, including trying to work out a stipulation for a
11 witness here.

12 MJ [Col COHEN]: Okay.

13 LDC [MR. HARRINGTON]: But there's one issue that we have
14 been attempting since I -- we arrived, for me to interview the
15 senior medical officer and the psychiatrist. They have agreed
16 to the interview ----

17 MJ [Col COHEN]: Excellent.

18 LDC [MR. HARRINGTON]: ---- but it keeps getting put off
19 until like now Wednesday this week.

20 MJ [Col COHEN]: Okay.

21 LDC [MR. HARRINGTON]: What I'm asking the court is if you
22 would suggest Mr. Trivett to make another inquiry if they
23 could do it today to change their schedule. Somehow or

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1 another, when a request comes from someone wearing a black
2 robe as opposed to a defense lawyer, things magically happen.
3 It would be helpful to us in terms of this motion. That's all
4 I ask.

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

6 Mr. Trivett, rather than just unilaterally doing so,
7 is there any chance that they could adjust a schedule so that
8 perhaps if it's something I need to address this week, I
9 could, earlier as opposed to later?

10 MTC [MR. TRIVETT]: Sir, Mr. Harrington just approached me
11 this morning on it. I will certainly communicate it back to
12 the JTF and find out their availability. We don't oppose
13 the -- I know that they have agreed to meet, so it's just a
14 matter of scheduling, and I will communicate to them that it's
15 more of an urgent matter than it had been, and hopefully they
16 will be able to do it today or tomorrow.

17 MJ [Col COHEN]: Perfect. Thank you. Let me know if they
18 can't.

19 Mr. Connell. Third time's a charm.

20 LDC [MR. CONNELL]: Just a couple of housekeeping matters,
21 Your Honor.

22 Of course, we have the VTC testimony of Special
23 Agent McClain this morning, and I'd like to talk to you about

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1 the sort of proposed order of march for the rest of the week
2 that I've socialized with the government.

3 MJ [Col COHEN]: Perfect.

4 LDC [MR. CONNELL]: The next two witnesses are Judge
5 Bernard Delury and D.J. Fife. The order of witnesses is --
6 remains Special Agent McClain, Judge Bernard Delury,
7 D.J. Fife, and then possibly the Camp VII commander, although
8 there's a late-breaking issue with that.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. CONNELL]: The -- the classification guidance
11 around the matters to be discussed with Judge Delury and
12 Mr. Fife have fluctuated wildly in the last 72 hours.

13 MJ [Col COHEN]: Okay.

14 LDC [MR. CONNELL]: So we have filed AE 628XX and will
15 momentarily be filing AE 628EEE, which are 505(g) notices.
16 And we would request a 505(h) hearing this afternoon after we
17 have already closed the courtroom for the closed portion of
18 Special Agent McClain's testimony ----

19 MJ [Col COHEN]: Okay.

20 LDC [MR. CONNELL]: ---- basically just to get -- so all
21 the parties know the final answer on exactly what can be used
22 in what kind of proceeding.

23 MJ [Col COHEN]: Okay.

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1 LDC [MR. CONNELL]: The second matter is -- and for
2 your -- just to close the loop on that, it seems to me that
3 that would be efficient because we could have all open
4 proceedings with respect to Special Agent McClain and then all
5 closed proceedings with respect to Special Agent McClain. The
6 courtroom is already clear, and we could do the 505(h) at that
7 time.

8 Unless there is some out-of-left-field thing that I
9 don't expect, I don't anticipate asking for redirect in an
10 open session on Special Agent McClain.

11 MJ [Col COHEN]: Okay.

12 LDC [MR. CONNELL]: Our goal, in consultation with
13 Mr. Groharing, is get him done today and on his way.

14 MJ [Col COHEN]: Excellent.

15 LDC [MR. CONNELL]: The second thing is, Your Honor, the
16 government and I have been having conversations about what
17 witnesses we will try to bring for the -- or they will try to
18 bring for the October-November hearing.

19 It would be valuable to us collectively for our
20 planning purposes to know if whether we should be planning on
21 Admiral Reismeier to be testifying or not. So if the military
22 commission decides that, either on motion or sua sponte, it's
23 going to ask Admiral Reismeier to testify, it would help us to

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1 know sooner rather than later so that we can plan accordingly.

2 MJ [Col COHEN]: All right.

3 LDC [MR. CONNELL]: And then the last item -- and this is
4 as much just kind of a heads-up as anyone else -- as anything
5 else, is the -- following the witnesses, there are a couple of
6 items still left on the proposed order of march relating to
7 scheduling and witnesses; the scheduling being the 653 series,
8 and the witness question being the 628B series.

9 MJ [Col COHEN]: Correct.

10 LDC [MR. CONNELL]: We will be prepared to address sort of
11 the medium term of what we think should happen, including some
12 proposals for depositions and our scheduling -- and our
13 position on scheduling of the interpreter deposition, which
14 you've asked us about.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. CONNELL]: The real heads-up there is I also
17 think now that we've had a couple of witnesses' worth of
18 testimony and have sort of stress tested the current discovery
19 posture, it would -- if we could just take 538 and 561 and
20 have some additional argument with respect to those, I think
21 they would give us a good vehicle for talking about what's
22 working in discovery and what's not working, and what
23 differences remain between the parties.

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1 MJ [Col COHEN]: Okay.

2 LDC [MR. CONNELL]: Thank you.

3 MJ [Col COHEN]: So just a couple of questions.

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

5 MJ [Col COHEN]: If I've said it once, I know I've said it
6 at least five or six times, if not more. I haven't put any
7 time limits or anything on any testimony, but with respect to
8 these witnesses this week, is there a general ballpark ----

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

10 MJ [Col COHEN]: ---- comparative to -- compared to last
11 week? It sounds like McClain, you all anticipate, will get
12 done at least before the end of the day today.

13 What about the rest of the witnesses? Are these
14 substantially long witnesses? If they are, that's fine.

15 LDC [MR. CONNELL]: No, sir. These are much more along
16 the lines of Special Agent Perkins rather than Special
17 Agent Fitzgerald, if that helps.

18 MJ [Col COHEN]: Yeah, that does. So about a half to
19 three-quarters of a day per witness?

20 LDC [MR. CONNELL]: That's right. That's right, sir.
21 Half to three-quarters of a day per.

22 I've thrown out there the idea that we do one per
23 day, since we have to have open and closed with respect to

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1 each of the four witnesses, rather than having to open, close,
2 and open again. And there's sort of a soft agreement that
3 that makes sense, but we can also see how things go today and
4 plan accordingly.

5 MJ [Col COHEN]: Okay. Thank you. I appreciate the
6 heads-up on that.

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

8 MJ [Col COHEN]: All right.

9 LDC [MR. CONNELL]: Was there any other question?

10 MJ [Col COHEN]: No. No, that gives me an idea. With
11 respect to some of the other things you mentioned, it kind of
12 helps me start planning as well.

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

14 MJ [Col COHEN]: All right. Mr. Trivett, I will -- do you
15 wish to address specifically an issue, or?

16 MTC [MR. TRIVETT]: Yes, sir, just that 655, which we had
17 mentioned, I believe, in the first week, the motion to compel
18 a mental health examination also be addressed at some point
19 this week.

20 MJ [Col COHEN]: Okay. Thank you. All right. Thank you.
21 Ms. Bormann.

22 LDC [MS. BORMANN]: I have some late-breaking news on the
23 motion to compel, the discovery related to the convening

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1 authority ----

2 MJ [Col COHEN]: Okay.

3 LDC [MS. BORMANN]: ---- conflict.

4 We received an e-mail late last night from
5 Mr. Trivett indicating that they were unable to comply by
6 Friday, which was the date you gave them for in camera ----

7 MJ [Col COHEN]: Okay.

8 LDC [MS. BORMANN]: ---- tendering of the documents
9 involved because there's some logistical issues, bottom line.

10 MJ [Col COHEN]: Okay.

11 LDC [MS. BORMANN]: I have not had an opportunity to
12 respond. Obviously, we would like it done sooner than later,
13 but, you know, we understand that there are sometimes issues
14 that you cannot control, and so we will have no formal
15 objection.

16 MJ [Col COHEN]: All right. Thank you. Appreciate that.

17 Mr. Sowards.

18 LDC [MR. SOWARDS]: Yes, Your Honor. Just a moment.
19 Ms. Radostitz wanted to bring to your attention something
20 about the 505 this afternoon.

21 MJ [Col COHEN]: Okay, excellent. Ma'am.

22 ADC [MS. RADOSTITZ]: Thank you, Your Honor. We have been
23 working on preparing a 505 notice for the argument 639/652,

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1 the scheduling thing. And after hearing Mr. Connell mention
2 that he wanted to handle that, his 505 notices in a hearing
3 this afternoon, I will leave and get those prepared and filed
4 so we can also address them this afternoon if the court
5 wishes.

6 MJ [Col COHEN]: Okay. All right. Thank you. All right.
7 Trial counsel and whoever wants to address this issue
8 is fine: With respect to a 505(h) hearing this afternoon,
9 does that also make the most sense to the government?

10 General Martins.

11 CP [BG MARTINS]: Yes, Your Honor.

12 MJ [Col COHEN]: All right. Thanks, then. We'll plan on
13 doing so.

14 Once again, thank you to all parties. The update
15 this morning indicates to me that -- that there's still
16 communication occurring between -- between the sides, which is
17 important, and -- for narrowing issues, et cetera. Once
18 again, the professionalism that's been exhibited over the last
19 two weeks continues to be appreciated by the commission and --
20 and lauded.

21 So, like I said -- so we got a way ahead. I think
22 now we'll -- do we need to take a break to put up the VTC or
23 can we just call the witness? This will be my first VTC

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1 testimony.

2 General Martins.

3 CP [BG MARTINS]: We should be ready, Your Honor.

4 MJ [Col COHEN]: Okay. Then let's call Special
5 Agent McClain via VTC.

6 CP [BG MARTINS]: Please bring up the feed from the VTC
7 distant station. Please remain standing and raise your right
8 hand for the oath.

9 **STEPHEN McCLAIN, civilian, was called as a witness for the**
10 **defense, was sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the Chief Prosecutor [BG MARTINS]:**

13 Q. Please state your full name and spell it for the
14 record.

15 A. Stephen McClain. S-T-E-P-H-E-N, M-C-C-L-A-I-N.

16 Q. What is your current occupation?

17 A. Sir, I'm a special agent with the agency, within D.C.
18 where I provide secure -- on a security detail for a cabinet
19 member.

20 Q. Special Agent McClain, what is your state of
21 residence?

22 A. I live in Maryland, sir.

23 CP [BG MARTINS]: Thank you.

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1 MJ [Col COHEN]: Mr. Connell, your witness.

2 **Questions by the Learned Defense Counsel [MR. CONNELL]:**

3 Q. Good morning, Special Agent.

4 A. Good morning, sir. How are you?

5 Q. Good. Thank you so much for taking the time to be
6 with us today.

7 I'd like to begin by just laying out some sort of
8 ground rules that we can all live with. Some of them the
9 judge has told us, some of them the government and I have
10 worked out, and I'd like to bring you into that conversation.
11 Do you understand?

12 A. Absolutely.

13 Q. Okay. So before each set of questions that I ask,
14 I'll explain what the topic area of the questions is. Does
15 that make sense?

16 A. Yes.

17 Q. And the questions that I ask will relate to that
18 topic, in case you need orientation, until I announce that
19 we're moving to a new topic.

20 A. Okay.

21 Q. The -- some of the questions that I'll ask are --
22 might sound a little strange, but are specifically designed to
23 avoid eliciting classified information. Does that make sense?

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1 A. Yes.

2 Q. And so sometimes, for example, I might ask if you
3 know a certain thing, and in that case, that's a yes-or-no
4 question designed to find out whether we need to follow up in
5 a closed session. I'm not asking you for information about
6 the certain thing. Do you understand?

7 A. Understood.

8 Q. Okay. And the government has invoked national
9 security privilege over some information. Are you aware of
10 that?

11 A. Yes.

12 Q. And if I correctly understand that, you have at least
13 in your general area a copy of the classification guidance?

14 A. No, sir. There's not any material in here.

15 Q. Oh. Okay. All right. My mistake.

16 The -- we have -- I'll represent to you then that
17 over the past two weeks, we've discussed at some length what
18 areas the government has invoked national security privilege
19 over, and on occasion I may ask you -- we've agreed on a
20 convention that I may ask you questions about, which is, if I
21 ask you a certain question, is it correct that you could not
22 answer because the government has invoked national security
23 privilege. Does that make sense?

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1 A. Yes.

2 Q. Okay. Furthermore, the military judge has ruled that
3 everyone in the courtroom, which by extension includes you,
4 has the right to raise the issue of classified information.
5 And so if I ask you a question that you think calls for
6 classified information, you can just bring that to the judge's
7 attention. We'll discuss it, and then the judge will tell you
8 how to proceed. Does that make sense?

9 A. Yes, sir.

10 Q. And you and I had the opportunity to meet in advance
11 of your testimony; is that right?

12 A. That's correct.

13 Q. And we went over the general topic areas of the
14 testimony?

15 A. Yes, we did.

16 Q. And I think it was the understanding of both the
17 government and myself that you would have access to your prior
18 declaration; but if you don't have access to your prior
19 declaration and you need to refer to it, just let me know, and
20 we'll work out a way to do that.

21 TC [MR. GROHARING]: Judge?

22 MJ [Col COHEN]: Just one second.

23 Mr. Groharing.

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1 A. Right. At this time ----

2 TC [MR. GROHARING]: It's my understanding that the
3 materials are available, and that they're waiting on approval
4 from the military judge to allow the materials to be present
5 with Special Agent McClain while he testifies.

6 MJ [Col COHEN]: Sounds like that's what the parties want.

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

8 MJ [Col COHEN]: I approve that.

9 Q. Were you able -- I don't know what you can hear
10 exactly, Special Agent. Did you -- were you able to follow
11 that?

12 A. Yes, sir.

13 Q. Okay. So I think they may be bringing you a copy of
14 your prior declaration and -- somebody may be bringing you a
15 copy of your prior declaration and the security classification
16 guidance document.

17 A. Yes, sir.

18 Q. Okay. Great. Sir, the first topic that I'd like to
19 ask you about is your background, specifically with respect to
20 OSI and CITF.

21 A. Okay.

22 Q. The -- in August 2007, you retired from the Air Force
23 after 22 years of active duty; is that right, sir?

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1 A. That is correct.

2 Q. And at the time of your retirement, you were a
3 special agent with Air Force Office of Special Investigations;
4 is that right?

5 A. Yes, sir. That is correct.

6 Q. And what was your rank at the time of retirement?

7 A. I was a master sergeant.

8 Q. Could you explain to us how OSI is structured a
9 little bit? Is it purely a military, is it purely a civilian,
10 or is it a mixed organization?

11 A. No, OSI is a mixed organization. There's civilians
12 and military members as well.

13 Q. Okay. And the -- with respect to the military
14 members, it is purely officers, purely enlisted, or mixed?

15 A. They're mixed.

16 Q. And what is the meaning of the title "special agent"
17 within OSI?

18 A. That means that we are an agency that's been granted
19 the opportunity to investigate crimes.

20 Q. Is every person in OSI a special agent?

21 A. Yes. As far as my knowledge, they are.

22 Q. Okay.

23 A. No, they're not. Because we have administrative

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1 people who are not agents.

2 Q. Yes, sir. And what were your duties as an OSI
3 special agent?

4 A. I would investigate various crimes, whether or not it
5 was base-level crimes of people possibly doing drugs or if it
6 had something to do with pornography; just whatever criminal
7 element that came up, I was allowed to investigate it.

8 Q. Sure. And in the course of your duties in criminal
9 investigation in a military context, were you familiar with
10 Article 31 of the UCMJ?

11 A. Can you state what Article 31 is?

12 Q. Yes. The requirement of warnings.

13 A. Yes.

14 Q. Yes. And would it be fair to say that, in your time
15 in criminal investigation, you gave Article 31 warnings on
16 many occasions?

17 A. Absolutely.

18 Q. Okay. And at some point, you were assigned to the
19 Criminal Investigative Task Force; is that right?

20 A. That's correct.

21 Q. Called CITF?

22 A. Yes.

23 Q. Yeah. And what is the mission of CITF?

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1 A. At the time, CITF was basically a joint organization
2 that was put together to investigate crimes that happened
3 somewhere around 9/11.

4 Q. And you mentioned "at the time." What time period
5 are you referring to?

6 A. When the time that I was there from a military
7 capacity until the time I retired and I was a civilian.

8 Q. Okay. If you would do me a favor, sir, and if you'd
9 just take those two documents and then just flip them
10 upside-down so they don't show up on the camera
11 accidentally ----

12 A. Absolutely.

13 Q. ---- and when we need to, you can review them.

14 A. Okay.

15 Q. Around what time period were you in a military
16 capacity with CITF?

17 A. From August 2006 to -- estimated -- August 2007, I
18 was in a military capacity at CITF.

19 Q. And then in August 2007, you retired from the
20 Air Force and took a civilian position with CITF; is that
21 right?

22 A. Correct.

23 Q. How is CITF structured?

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1 A. CITF was a multiagency organization. It was
2 basically set up like a joint task force. We had members from
3 OSI, CID, NCIS, U.S. Marshals that composed CITF at that time.

4 Q. Okay. You mentioned CID. What is CID?

5 A. Criminal Investigation Division of the Army.

6 Q. And you mentioned NCIS. What is NCIS?

7 A. Naval Criminal Investigative Service.

8 Q. Okay. And by comparison to OSI, CID is composed
9 exclusively of military members; is that right?

10 A. Yes.

11 Q. And NCIS is composed exclusively of civilian members?

12 A. Well, let me retract that. Because CID also employs
13 civilian agents, because after I retired, I was a CID agent,
14 but I was civilian as well.

15 Q. I see. That was something of a special capacity
16 within CID; is that fair to say?

17 A. Yes.

18 Q. And with respect to NCIS, their special agents are
19 civilians; is that right?

20 A. Yes.

21 Q. The -- now, was CITF broken into units?

22 A. Yes.

23 Q. So what was CITF-G, for example?

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1 A. That would be CITF-GTMO.

2 Q. And what was the role or responsibilities of
3 CITF-GTMO?

4 A. CITF-G, they had several people that were assigned on
5 island, and they had investigative responsibilities while they
6 were in GTMO.

7 Q. And I know some of this might precede your time, but
8 they were sort of the original mission of CITF and it grew
9 over time; would that be fair to say?

10 A. I would say that, yes.

11 Q. What was CITF-A?

12 A. CITF-A would signify CITF-Afghanistan.

13 Q. And CITF-HQ?

14 A. Headquarters.

15 Q. And CITF-P?

16 A. CITF-P?

17 Q. Yeah, Papa.

18 A. I'm not aware of CITF-P.

19 Q. Oh, okay. Maybe -- maybe I have the language wrong.

20 A. But I would assume CITF-P would be the prosecution
21 team at CITF. That's the only thing that it could be.

22 Q. Okay.

23 A. Which means they were lawyers.

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1 Q. I see. The -- when did you leave CITF?

2 A. January three years ago.

3 Q. Okay. Now moving to a new topic, I'd like to ask you
4 about the High-Value Detainee Prosecution Task Force.

5 A. Okay.

6 Q. When did you become assigned to the High-Value
7 Detainee Prosecution Task Force?

8 A. Sometime shortly after August of 2007. I know it
9 happened after I had retired and became a civilian with CITF.

10 Q. Okay. I'm going to move before that just a little
11 bit. The position, when you were assigned to CITF in
12 August 2006 ----

13 A. Uh-huh.

14 Q. ---- that was a prestigious position; is that fair to
15 say? Competitive to obtain, maybe I should say?

16 A. Yes.

17 Q. Okay. And how -- how did you -- how were you placed
18 in that position?

19 A. I was selected to go there when I was being
20 reassigned from my assignment from Kadena Air Force Base back
21 to stateside.

22 Q. All right. When you were in CITF in August of
23 2000 -- or starting in August of 2006, but before you had been

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1 assigned to the HVD Prosecution Task Force, what was your
2 assignment, your initial assignment?

3 A. My initial assignment when I was originally assigned
4 to CITF, I worked on the Bodyguard Team there at -- that was
5 underneath CITF.

6 Q. Right. And just so it's clear, by Bodyguard Team,
7 you mean CITF agents who were investigating alleged
8 bodyguards, for example, of Usama bin Laden. You don't mean
9 that you worked as a bodyguard?

10 A. That's correct.

11 Q. And at that time, who was your supervisor?

12 A. At that time, it was a Laura DeJong.

13 Q. At some point, were -- did the opportunity come open
14 to be involved in interviews of the so-called high-value
15 detainees?

16 A. Yes. Sometime afterward, that's correct.

17 Q. And how did you find out about that opportunity?

18 A. Again, it was a selection process, and they wanted
19 their top performers to be a part of this team.

20 Q. And was there a nomination process?

21 A. Yes. We were nominated by her supervisor, and at
22 that time it was Laura DeJong.

23 Q. Okay. And to whom were you nominated? Who made the

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1 decisions as to who got to be involved in this effort?

2 A. Above her. I have no idea.

3 Q. Okay. When she made -- so let me orient you. It
4 might help you out a little bit.

5 The services or the agencies, I will say, essentially
6 nominated their best to the CIA; is that right?

7 A. I wouldn't say that. They were -- we were nominated
8 to be a part of this additional force. I don't know if it was
9 CIA, so I can't say that.

10 Q. So, sir, do you remember a few weeks ago sitting in
11 my office and us discussing this topic?

12 A. Absolutely. We were nominated to be part of the
13 team. Who was behind the teams, I don't know who was behind
14 the teams. I just know that I was nominated to be a part of
15 this team ----

16 Q. Okay.

17 A. ---- the HVD team.

18 Q. And do you recall telling me that each agency
19 nominated its best to the CIA and the CIA selected who could
20 be involved?

21 A. I don't recall saying CIA, sir. I remember telling
22 you that we were selected based on our supervisor's
23 recommendation to be a part of the HVD team.

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1 Q. Okay. And to whom -- if it wasn't you who told me
2 that, who -- to whom did the nominations go?

3 A. Again, that is above me, sir. As I said before, we
4 were selected to be a part of this team, and then once we were
5 part of the team, that was basically it. I don't know who the
6 major players are. I can assume.

7 Q. Okay. The -- since the last time we met or the time
8 before that, when you met with Lieutenant Colonel Thomas, did
9 somebody tell you that you shouldn't acknowledge that it was
10 the CIA who made the decision about who ----

11 A. Absolutely not.

12 Q. No. No. That didn't happen?

13 A. Absolutely not.

14 Q. Okay. Was there something that changed your views?

15 A. No. Because, like I said before, I don't recall --
16 ever recall saying to you the CIA. I told you I was selected
17 to be part of the HVD team.

18 Q. I'll move on. What was the -- so where did CITF fit
19 into the interrogation team? Why was CITF involved in the
20 interrogations?

21 A. We were brought to the table because other agencies
22 were brought to the table, like the FBI; and CITF had the DoD
23 nexus, and the detainees were on DoD installations.

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1 Q. And who decided which -- how the teams would be
2 composed?

3 A. My supervisor, Laura DeJong, had involvement with
4 that.

5 Q. Okay.

6 A. But it was basically you go here, you go there.

7 Q. Okay. Do you recall telling me a couple of weeks ago
8 that it was the CIA who decided what investigators would go
9 with what detainee?

10 A. No. That was -- that was not said, that the CIA did
11 that. I said that decision was made beyond me.

12 Q. On your team, what agency had the lead role?

13 A. The FBI.

14 Q. And it's fair to say you had a collegial working
15 relationship with the FBI?

16 A. Absolutely. We had a good working relationship.

17 Q. And is it fair to say you had a collegial working
18 relationship with the CIA at that time?

19 A. Again, I worked with the FBI. Those were my
20 partners. That's who I knew.

21 Q. Okay.

22 A. If there was someone there from CIA, I didn't know
23 that they were. I was familiar with who I was working with,

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1 and that was the FBI.

2 Q. I'd like to move on to a new topic now.

3 A. Absolutely.

4 Q. The -- when were -- when approximately were you
5 notified that you were selected to be part of the
6 interrogation team for Ammar al Baluchi?

7 A. Around this same time that I mentioned to you
8 earlier. It was sometime after I retired in 2007, in August,
9 so it was sometime after that I was selected to be part of the
10 HVD team.

11 Q. So, sir, let me refresh your recollection in that
12 the -- the interrogation of Mr. al Baluchi that we're talking
13 about occurred in January 2007. So maybe you have your years
14 wrong?

15 A. I'm thinking 2007, but I could be wrong. It's been a
16 long time.

17 Q. Sure. Would it sound right that you might have been
18 selected for -- to participate in that interrogation in
19 approximately September 2006 for a January 2007 interrogation?

20 A. It's possible, yes.

21 Q. Okay. And at that time when you were -- received
22 information that you were going to be involved, the -- your --
23 the other people on your team preparing for the interrogation

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1 were Special Agent Fitzpatrick and Special Agent Perkins; is
2 that right? Excuse me, Fitzgerald and Special Agent Perkins?

3 A. That's correct.

4 Q. Okay. And at some point you were given access to a
5 closed network containing information about Mr. al Baluchi and
6 others; is that right?

7 A. Not before the interview. I was not given any
8 information.

9 Q. Does the -- does the phrase "bucket" sound familiar?

10 A. "Bucket"? Yeah, that sounds familiar.

11 Q. Okay. And in this nomenclature, a bucket was sets of
12 information about different detainees; is that right?

13 A. Correct.

14 Q. Okay. That was maintained on a closed network?

15 A. Correct.

16 Q. And you requested access to information from the
17 bucket about Mr. al Baluchi?

18 A. Not until after the interview. We had no access to
19 any information -- or excuse me. I had no access to any
20 information until the interview took place.

21 Q. Okay. So when was that access granted?

22 A. After the initial interview. So whatever the date is
23 for that interview, we weren't allowed to have any additional

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1 information until after that interview took place.

2 Q. Okay. And when you say "we," you mean you?

3 A. Correct. We as in CITF.

4 Q. Okay. We as in CITF. Got it.

5 So when you reviewed -- so at some point, after --
6 and I'll represent to you that the interrogation of
7 Mr. al Baluchi was in the second half of January 2007. Does
8 that sound right?

9 A. Okay. Okay.

10 Q. Okay. And so at some point after that you were given
11 access to the buckets, or at least Mr. al Baluchi's bucket?

12 A. I was given access to information, yeah. I can't say
13 it was a bucket, but I was given access to review information.

14 Q. Okay.

15 A. Basically that information is what we had talked
16 about during the interview.

17 Q. And how did -- how did that work? Was there a closed
18 network that you were granted permissions to access?

19 A. Yes.

20 Q. And you -- that -- you went to a location in Virginia
21 to access that information?

22 A. Yes.

23 Q. And among others, the Office of the Chief Prosecutor

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1 is collocated at that location?

2 A. Yes.

3 Q. If I were to ask you the specific location, you could
4 not answer because of invocation of national security
5 privilege; is that fair to say?

6 A. That's fair.

7 Q. The -- so when you accessed the bucket, the closed
8 network, the -- were you given access to any bucket other than
9 Mr. al Baluchi?

10 A. All the buckets were on a need to know. So since I
11 was in the interview for Mr. al Baluchi, I was also on an
12 interview for Mr. al Hawsawi.

13 Q. And so you had a need to know for both of those two
14 individuals?

15 A. That is correct.

16 Q. The -- did you, in fact, review the bucket for
17 Mr. al Baluchi?

18 A. Yes.

19 Q. Approximately how much time did you spend reviewing
20 that bucket?

21 A. As in hours or ----

22 Q. Well, I -- you could just give us an estimate. Is it
23 a matter of hours? Is it a matter of days? Is it matter a

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1 months?

2 A. I would say a matter of months.

3 Q. Okay.

4 A. But again, I did not have access to any information
5 prior to the interview.

6 Q. I understand, sir. I'm not trying to imply
7 otherwise. I am trying to find -- so during that period of
8 time where you had access to that bucket, was your primary
9 workplace at that location in Virginia?

10 A. No, I actually had two work locations. I worked out
11 of that location, and I also worked out of Fort Belvoir.

12 Q. Which is where CITF headquarters is?

13 A. Yes.

14 Q. The -- and it was over those months that, when your
15 job duties called for it, you would access information in the
16 buckets, correct?

17 A. Yes.

18 Q. And can you in a general way describe for us the
19 contents of Mr. al Baluchi's buckets? Bucket, excuse me,
20 singular.

21 A. General information that I learned about after the
22 interview that -- with the documents that was presented to
23 Mr. al Baluchi during the interview.

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1 Q. Okay. So the -- let me just -- the bucket
2 contained -- you're saying that it contained FBI information?

3 A. Yes.

4 Q. It contained CIA cables?

5 A. Yes.

6 Q. What other sorts of information did it contain?

7 A. Those are the two that I'm really familiar with, sir.
8 I don't know of any other information that would be inside of
9 there.

10 Q. Okay. And estimate for us, if you will, how many
11 documents were contained within the bucket.

12 A. There was a lot of documents. Probably thousands of
13 documents in there.

14 Q. Okay. Did you review, either superficially or in
15 depth, most of those documents over the course of these
16 months?

17 A. I would say a large majority of them, yes; but to
18 place my eyes on every single document and know what was on
19 every single document is really not realistic because there
20 was just too many.

21 Q. Sure. How did you organize the -- that's an awful
22 lot of documents. How did you organize the results of your
23 review?

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1 A. How did I organize them?

2 Q. Okay. You organized -- you took the individual
3 documents and put them into folders; is that what you mean?

4 A. No. Just opened up the document and looked at it and
5 then moved to the next document.

6 Q. Okay. Did you take notes?

7 A. No, sir.

8 Q. Okay. Did you type up a separate sort of narrative
9 document on Word?

10 A. No, sir, I did not.

11 Q. Okay. So you relied on your memory to -- for
12 thousands of documents?

13 A. Absolutely.

14 Q. Sir, I'd like to move on to the next topic. And the
15 next topic is what meetings or briefings took place in advance
16 of the January 2007 interrogations, okay?

17 A. I recall ----

18 Q. Sorry. Do you understand the topic is the first
19 question.

20 A. Yes. Yes.

21 Q. Would it be fair to say that there were meetings to
22 discuss what interview approach would be taken?

23 A. There was a meeting to discuss that, and as well as

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1 to make sure that we did not have any information prior to the
2 interview.

3 Q. Okay. Let's discuss the first one. Was that one
4 meeting with two purposes or two separate meetings?

5 A. I think it was the same meeting.

6 Q. Okay. Could you tell us -- do you have a sense of
7 like when that meeting might have been? Before or after
8 Thanksgiving? Before or after Christmas? In 2006 versus
9 2007?

10 A. Sir, I'm horrible with dates.

11 Q. Okay. No problem.

12 A. It's been a long time.

13 Q. Yes, sir. Who -- who attended that meeting?

14 A. There were members -- all the members from CITF were
15 there, those individuals who were assigned to the detainee to
16 be a part of the team, along with our counterparts, who was
17 the Bureau, and then select attorneys, I believe.

18 Q. Right. So like CIA attorneys?

19 A. I have no idea if they were CIA attorneys.

20 Q. Where did the meeting take place?

21 A. At a location in Virginia.

22 Q. And if I were to ask you the specific location in
23 Virginia, you could not answer because of national security

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1 privilege; is that fair to say?

2 A. I would say that. But I also don't even remember the
3 exact location where it was at.

4 Q. Okay. And what was the -- who led the meeting? Was
5 it led by the attorneys? Was it led by the investigators?

6 A. No. You know, basically it was a meet-and-greet
7 because that was the first opportunity that the team members
8 had a chance to meet each other, and we were going to be
9 working with each other for a long time. So it was an
10 opportunity for all of the agents to meet their counterparts
11 because, like I said before, we were going to start working
12 with each other?

13 Q. And when you say "to make sure that we didn't have
14 any information," what did you mean?

15 A. That we didn't have any information concerning the
16 detainees prior to them being transferred to Guantanamo Bay.

17 Q. How did -- how -- how did they accomplish that goal
18 at the meeting?

19 A. They asked us specifically what information did we
20 know about a particular individual.

21 Q. Okay. Like person by person they asked you?

22 A. Yes.

23 Q. Okay. And what was Special Agent Fitzgerald's

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1 answer?

2 A. I don't recall, to be honest with you, what his
3 answer was.

4 Q. Okay.

5 A. I know what my answer was, so -- I can't recall at
6 this time. But, like I said, it's been several years; I
7 cannot honestly recall what his answer was.

8 Q. Do you recall what Special Agent Perkins' answer was?

9 A. No.

10 Q. And what was your answer?

11 A. That I had no knowledge of who I was going to be
12 working with.

13 Q. Right. Because you had not been involved in the
14 investigation of 9/11 prior to this.

15 A. That is correct.

16 Q. Your only involvement to sort of the counterterrorism
17 side of things had been with the -- a short time with the
18 Bodyguard Unit.

19 A. Yes.

20 Q. And prior to that at OSI, you had been investigating
21 sort of garden-variety criminal behavior that occurred in
22 connection with Air Force bases, right?

23 A. And deployment stuff, yes.

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1 Q. And deployments, yes. Okay.

2 At that meeting, was there any discussion of ground
3 rules for the interviews?

4 A. No, I can't recall any particular ground rules.

5 Q. Okay. Was there any discussion of whether the -- you
6 should give Miranda warnings?

7 A. Yes, I saw a version of that.

8 Q. All right. And they gave you specific instructions
9 on what sort of advisement to give?

10 A. Yes.

11 Q. All right. Did anybody during that meeting push back
12 against that or say, I think that we should give -- we should
13 advise of the right to remain silent and the right to counsel?

14 A. No, sir ----

15 Q. And ----

16 A. ---- I don't recall that occurring.

17 Q. Sorry. I didn't mean to cut you off.

18 A. I don't recall that specific line being questioned at
19 all.

20 Q. Okay. And did any of the military members push back
21 saying, "Look, I'm subject to Article 31. Regardless of who
22 the suspect is, I have a duty"?

23 A. No, sir.

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1 Q. And am I correct that later in the interrogation of
2 Mr. al Baluchi, you did not, in fact, provide Article 31
3 warnings?

4 A. Not Article 31 word for word, but we did tell
5 Mr. al Baluchi that his voluntariness to talk to us is up to
6 him and he can end the interview at any particular time.

7 Q. Thank you. I'd like to move on now to a new topic.

8 A. Absolutely.

9 Q. Which is your involvement as evidence custodian of
10 what I'm going to call certain evidence. Do you understand
11 what I'm referring to, sir?

12 A. Absolutely.

13 Q. Okay. And as -- for a period of time, you were the
14 evidence custodian for certain evidence?

15 A. For a period of time, yes.

16 Q. And what was that period of time?

17 A. Umm.

18 Q. Sir, might it help refresh your recollection if you
19 reviewed your prior declaration on this topic?

20 A. Absolutely. May I turn it over?

21 Q. Yes, you can turn it over. And if you want to take a
22 moment and look through it. Neither of those ----

23 A. Unfortunately, they didn't bring the declaration in.

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1 Q. Okay.

2 A. But I'm familiar with what you're talking about. I
3 did the evidence custodian from the time of the date on that
4 declaration up until I left approximately three years ago.

5 MJ [Col COHEN]: Counsel, do you have the date that you
6 could just provide him?

7 LDC [MR. CONNELL]: I do.

8 Q. Sir, and I might reorient you. The date on the
9 declaration is 10 June 2015.

10 A. Okay.

11 Q. And ----

12 A. I did that all the way up until the time I departed
13 CITF. So to be fair, I probably started doing it shortly
14 before that declaration in 2015.

15 Q. Okay. So at the time you executed this declaration,
16 you had not been evidence custodian for the certain evidence
17 for very long; is that right?

18 A. That is accurate.

19 Q. Okay. A matter of days?

20 A. I wouldn't say days. Maybe a month or so.

21 Q. Okay. Who was the evidence custodian before you?

22 A. If I'm not mistaken, I took the program over from an
23 Agent Graziano.

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1 Q. Very good. And as evidence custodian, it was your
2 duty to maintain a chain of custody of certain evidence?

3 A. That's correct.

4 Q. And in criminal investigations, what's the
5 significance of a chain of custody?

6 A. To make sure that there's no questions about how the
7 documents or how the evidence was handled.

8 Q. Does CITF have a particular form or format that it
9 uses to document chain of custody?

10 A. Yes, sir.

11 Q. And is that a DA Form 4137?

12 A. That is correct.

13 Q. I'm going to ask you some -- some specific items. If
14 you need me, for example, to read you a portion of the
15 declaration, that ----

16 A. Uh-huh.

17 Q. ---- to refresh your recollection, you can just say
18 so. Okay, sir?

19 A. Absolutely.

20 Q. In 2009, Special Agent Anthony Graziano and Special
21 Agent Murat, M-U-R-A-T, Ocolan, O-C-O-L-A-N, took possession
22 of certain evidence from Guantanamo. Do you recall that?

23 A. Yes.

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1 Q. And at that time when they took possession of it,
2 they generated a form DA 4137?

3 A. Correct.

4 Q. And how are those form DA 4137s ordinarily
5 maintained?

6 A. They're maintained by CITF in a secure room. So
7 wherever the evidence is, those logs for handling that
8 information are in that same room.

9 Q. Okay. And when you say "log," you mean log of
10 chain -- of the chain of custody, transfer of the evidence
11 from one person to another for an investigative purpose?

12 A. Correct.

13 Q. The -- do you know where -- if the prosecution were
14 to go look for that DA 4137 for the evidence that Special
15 Agents Graziano and Ocolan took possession of in 2009, do you
16 know where they should go look?

17 A. Yes.

18 Q. And where is that?

19 A. In a location in Virginia.

20 Q. Skipping over the -- where that location in Virginia
21 is -- well, let me ask you a different question.

22 Do you know where that 4137 is now?

23 A. There are a lot of 4137s, and yes, I do know where

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1 they're at.

2 Q. Okay. And so that -- that large bulk of 4137s would
3 include a 4137 for the certain evidence that Special
4 Agent Graziano and Ocolan took custody of in 2009; is that
5 correct?

6 A. Yes.

7 Q. All right. On 8 January 2013, you personally went to
8 the FBI Headquarters; is that right?

9 A. Yes.

10 Q. To take possession of that certain evidence?

11 A. Yes.

12 Q. And you transported it back to the location, which is
13 collocated with the Office of the Chief Prosecutor?

14 A. That's correct.

15 Q. When you took custody of that certain evidence, did
16 it come with chain of custody documentation?

17 A. Yes.

18 Q. Did it come with the DA-4137, with an FBI green
19 sheet, or both?

20 A. No. The FBI did not use a 4137. I don't recall the
21 particular form they used, but we accounted for it by whatever
22 form they used, and we had -- if I'm not mistaken, we attached
23 our form with it.

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1 Q. And do you know where that documentation is now?

2 A. Yes. In the same location.

3 Q. Sir, in July of 2012, you traveled to Guantanamo; is
4 that right?

5 A. Yes.

6 Q. To take possession of certain evidence?

7 A. Correct.

8 Q. With the intention of transporting it back to the
9 location of Virginia which is collocated with the Office of
10 the Chief Prosecutor; is that right?

11 A. Yes, sir.

12 Q. And when you took -- and you, in fact, did so. You
13 took possession of the certain evidence?

14 A. Correct. There was two of us.

15 Q. Okay. Who was with you?

16 A. Honestly, I would have to look at the 4137 to see.
17 We've had a lot of personnel changes at CITF, so whoever was
18 available to go with me at the time I went. I don't have a
19 name right off the top of my head.

20 Q. Okay. When you took possession of that evidence, did
21 it come with chain of custody documentation or did you create
22 the chain of custody -- the 4137?

23 A. We created it.

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1 Q. And do you know where that documentation is?

2 A. Yes, sir. It's in the same location that we spoke of
3 previously.

4 Q. Okay. At some point after that, after July of 2012,
5 a process developed of regular transport of evidence from
6 Guantanamo by CITF agents; is that fair to say?

7 A. That's fair.

8 Q. And when -- do you know when that process began? How
9 about in relationship to the two sort of major transports of
10 evidence that you were involved with, was it after that or
11 before that?

12 A. Repeat that for me one more time because you lost me
13 on the time frame. I'm just horrible with dates.

14 Q. No problem, sir. I'm not asking you for a specific
15 date. I'm really just asking you sequence.

16 A. Okay.

17 Q. So for your orientation, I'll tell you that
18 July 2012, you've testified you traveled to Guantanamo to take
19 possession of evidence.

20 A. Correct.

21 Q. And January 2013, you went to the FBI to take
22 possession of evidence.

23 A. Correct.

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1 Q. Okay. Was it after that or before that that the
2 regular process of transportation by CITF agents began?

3 A. Afterwards.

4 Q. Okay. And how often did that transportation take
5 place, every month? Every six months? Every year?

6 A. No. It would be like once a quarter at a minimum.

7 Q. Okay. And as part of that process, the CITF agents
8 control -- assumed control of the evidence; is that fair to
9 say?

10 A. Absolutely.

11 Q. And when they assumed control of it, they create a
12 4137?

13 A. Yes, sir.

14 Q. In the same way that you did when you took control?

15 A. Yes, sir.

16 Q. And if I asked you who had custody of the evidence
17 before the CITF agents, am I correct that you could not answer
18 because of invocation of the national security privilege?

19 A. That is true.

20 Q. And if I were to ask you the agency affiliation of
21 the persons with custody of the evidence before the CITF
22 agents, you could not answer because of national security
23 privilege?

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1 A. That's accurate as well, sir.

2 LDC [MR. CONNELL]: All right. Sir, that's all my
3 unclassified questions.

4 TC [MR. GROHARING]: Your Honor, I believe he could answer
5 the question, but it would need to be in a closed session, of
6 that last point, though.

7 MJ [Col COHEN]: Okay. All right. Well, we will -- we
8 will allow him to ask the question in the closed session,
9 then. All right.

10 Agent McClain ----

11 WIT: Yes, sir.

12 MJ [Col COHEN]: ---- it is 1000 here just for a time hack
13 for you. In fact, my watch is probably a little bit faster
14 than that one. I'm hacking at 1002. We're going to take a
15 recess until 1017, based on that time hack; at which point if
16 there's any cross-examination, we'll do it at that time.

17 All right. We're in recess.

18 [The R.M.C. 803 session recessed at 1001, 23 September 2019.]

19 [The R.M.C. 803 session was called to order at 1018,

20 23 September 2019.]

21 MJ [Col COHEN]: The military commission is called to
22 order. The parties are present.

23 Mr. Groharing, your witness.

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1 TC [MR. GROHARING]: Okay.

2 **CROSS-EXAMINATION**

3 **Questions by the Trial Counsel [MR. GROHARING]:**

4 Q. All right. Good morning, Special Agent McClain. Can
5 you hear me?

6 A. Good morning, sir. Yes, I can.

7 Q. Special Agent McClain, in your career as a federal
8 agent, have you ever conducted a telephonic interview?

9 A. Yes, sir, I have.

10 Q. If you were conducting an investigation that involved
11 information classified at the TOP SECRET//SCI level that
12 involved current and former covert CIA officers, what would
13 you do to attempt to interview relevant witnesses?

14 A. Well, first, that wouldn't take place over the
15 telephone, but if I did need to interview someone, I would
16 make sure that I would use the chain of command to make sure
17 that everyone knew what was going on. So I wouldn't want to
18 do that blindly without any other individuals knowing what was
19 occurring.

20 Q. And as an agent, would you be comfortable having the
21 CIA Office of General Counsel contact a covert CIA officer and
22 letting them know that you wanted to interview them regarding
23 the investigation?

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1 A. Yes, sir, that would be correct.

2 Q. So, Special Agent McClain, you agreed to meet with
3 the defense prior to your testimony; is that correct?

4 A. Yes, sir, I did.

5 Q. And you actually met with them on a couple of
6 occasions?

7 A. On two occasions.

8 Q. And we met; you and I met prior to your testimony
9 here today as well. Do you recall that?

10 A. Yes, sir, we did. Yes, sir.

11 Q. And at that time do you recall indicating to me that
12 you were planning on meeting the defense?

13 A. Yes, sir.

14 Q. Did I do anything or say anything to suggest to you
15 that you should not meet with the defense?

16 A. Absolutely not.

17 Q. Did anyone else do anything or say anything to
18 suggest you should not meet with the defense?

19 A. Absolutely not. There was no hidden secrets. I told
20 the prosecution both times that I had a meeting to go see the
21 defense.

22 Q. And we spoke after your interview with the defense as
23 well, right?

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1 A. Correct.

2 Q. Did I do anything or say anything to suggest that
3 your testimony should be anything other than the truth, to the
4 best of your ability?

5 A. Absolutely not.

6 Q. Is it fair to say that the purpose of your interview
7 with Mr. Ali was to obtain a useable law enforcement
8 statement, completely detached from any statement that he made
9 in CIA custody or any evidence that could have been derived
10 from any statement that he made?

11 A. Yes, very accurate.

12 Q. And in your case, you were wholly unaware of anything
13 that Mr. Ali had ever said while detained by the CIA; is that
14 correct?

15 A. That's accurate. That is accurate. I had no idea of
16 anything prior to the interview.

17 Q. Do you have any recollection of anyone, Special
18 Agent Fitzgerald, Special Agent Perkins, or anyone else,
19 discussing statements that Mr. Ali had made while in CIA
20 custody prior to your interview?

21 A. Absolutely not.

22 Q. And do you recall specifically being -- excuse me.
23 Strike that.

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1 Do you recall specifically being directed not to
2 consider any statements made by Mr. Ali while he was detained
3 by the CIA?

4 A. Yes, sir.

5 Q. And not to mention to Mr. Ali that you were aware of
6 any statement that he might have made to the CIA?

7 A. Absolutely. That's correct.

8 Q. During your direct exam you talked about the fact
9 that you had advised -- or the agents -- Special
10 Agent Fitzgerald had advised Mr. Ali that it was up to him to
11 voluntarily participate in the interview. Do you recall that?

12 A. Absolutely.

13 Q. What did any of the agents actually do or say to
14 Mr. Ali in that regard during the interviews?

15 A. Well, when we were talking to Mr. Ali, we told him
16 his voluntariness to talk to us was exactly that -- was
17 exactly that; at any time that he wanted to terminate the
18 interview, he could. If he chose not to meet with us on
19 subsequent days, that was up to him. And anytime that he
20 needed any type of break, whether it was a prayer break or
21 anything else, just let us know, and we would accommodate
22 everything.

23 Q. And you have no recollection whatsoever of any CIA

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1 involvement in your selection to participate in this
2 interview, do you?

3 A. I have no idea how the teams were formed, who made
4 the final selections of where we went. I was just a top
5 performer, and I was selected to be a part of the process.

6 Q. Fair to say that you had to have a certain security
7 clearance to participate?

8 A. Yes, sir.

9 Q. Do you agree with me that that was the role that the
10 CIA played in the interviews, ensuring that individuals had an
11 appropriate clearance in order to participate?

12 A. I would say so, yes.

13 Q. And they played no substantive role as far as what
14 questions to ask Mr. Ali or anything like that?

15 A. Correct.

16 Q. Do you agree with me that the interview was documents
17 based?

18 A. Yes.

19 Q. What do you mean by "documents based"?

20 A. There was documents that was presented to Mr. Ali
21 during our interview, and he was asked whether or not he
22 recognized those documents or not. So all of the documents
23 that were made available during the interview ----

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1 LDC [MR. CONNELL]: Your Honor.

2 MJ [Col COHEN]: Yes. One second.

3 Counsel.

4 LDC [MR. CONNELL]: Objection as to scope of direct.

5 Obviously, counsel can make this his own witness, but I just
6 wanted to observe that that was what was happening.

7 MJ [Col COHEN]: I understand. I will -- for judicial
8 economy purposes, I will allow it. It was asked as an open
9 question as opposed to a leading question.

10 Major Groharing -- once again, Special
11 Agent Fitzgerald throughout -- Major Groharing -- I'm sorry,
12 Mr. Groharing. If you wish to exceed the scope of direct, you
13 may do so. Just please ask open-ended questions. All right.

14 Sir, do you recall the question?

15 WIT: Yes, sir.

16 MJ [Col COHEN]: Go ahead and provide your answer.

17 A. The interview was driven by the documents which were
18 made available, so Mr. Ali had an opportunity to look over
19 several documents and determine whether he recognized those
20 documents or not.

21 Q. Was he ever directed to write anything on a
22 particular document?

23 A. If it was anything like his signature or if he knew

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1 what the document was, he was asked to write his name on it, I
2 believe, and date it, if I'm not mistaken.

3 Q. Okay. How did you introduce yourself to Mr. Ali?

4 A. We introduced ourselves by true name and
5 organization.

6 Q. And throughout the course of the interview, how did
7 Mr. Ali refer to you?

8 A. I -- I don't recall him ever referring to me at any
9 particular time.

10 Q. Do you recall him ever referring to Special
11 Agent Fitzgerald or Special Agent Perkins?

12 A. Because they were the lead agents and they were
13 driving most of the conversations, I recall that. But nothing
14 directly towards me that I can recall because I was in there
15 assisting them.

16 Q. And did he refer to them as Special Agent Fitzgerald
17 or by their first names?

18 A. I honestly don't recall.

19 Q. Is it fair to say that, over the course of the
20 interviews, you spent more than 20 hours with Mr. Ali?

21 A. Hmm.

22 Q. Does that sound about right?

23 A. Somewhere around there. We had a couple of

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1 subsequent days of interviews.

2 Q. Okay. And how would you describe the rapport between
3 the agents and Mr. Ali throughout the course of the
4 interviews?

5 A. I believe it was a very good rapport. Before we even
6 talked anything substantive, we would always take a moment and
7 talk about sports and other things that he may have wanted to
8 talk about before we started the interview discussion.

9 Q. Do you recall any particular sports that Mr. Ali
10 discussed with you?

11 A. Yeah. He liked soccer and football.

12 Q. When we met, you described Mr. Ali as personable
13 throughout the course of the interview.

14 A. Absolutely.

15 Q. Why did you use that description of Mr. Ali?

16 A. Because he was very relaxed and open to any type of
17 discussion that we wanted to talk to him about. He wasn't
18 closed off to anything.

19 Q. How would you describe Mr. Ali's ability to speak
20 English?

21 A. Absolutely well. As a matter of fact, I even
22 commented on how well he spoke English.

23 Q. Did you have any difficulty communicating with

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1 Mr. Ali over the 30 hours that you spoke with him?

2 A. None at all.

3 Q. Did you ever feel the need to use an interpreter?

4 A. No. But we also told him every day, if there was
5 something that he needed an interpreter for, if anything that
6 he needed anything to be clarified, one would be provided for
7 him.

8 Q. Throughout the course of the interviews, did it ever
9 appear that he could not understand questions that were being
10 asked of him?

11 A. Not at all.

12 Q. Did you take any breaks during the interviews?

13 A. Oh, we took plenty of breaks.

14 Q. Did Mr. Ali ever ask for breaks?

15 A. Yes, he did. He asked for prayer breaks, if I'm not
16 mistaken, on a couple of occasions; and then like bathroom
17 breaks and whatnot. And we also did the routine food breaks
18 to give everyone a break.

19 Q. Is it fair to say that the agents and Mr. Ali worked
20 together to figure out when to take breaks throughout the
21 course of the interviews?

22 A. Absolutely. A lot of that was driven by him, because
23 if he needed to do something before our scheduled time frame,

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1 so to speak, then that was up to him to let us know when he
2 needed a break.

3 Q. Was Mr. Ali ever advised of his right to end the
4 interviews at any time?

5 A. Absolutely.

6 Q. Was Mr. Ali provided with food and beverages
7 throughout the course of the interviews?

8 A. Yes.

9 Q. Do you recall whether or not he ever asked to be
10 provided with particular food or beverages?

11 A. Yes. On a couple of occasion, I believe he asked for
12 some halal meals, if I'm not mistaken.

13 Q. Was he -- was he appreciative of the food or
14 beverages that were provided to him during the interviews?

15 A. Absolutely.

16 Q. Do you recall anyone ever raising their voice
17 throughout the course of the interviews?

18 A. Never happened.

19 Q. Did anyone ever threaten Mr. Ali?

20 A. Never.

21 Q. Did Mr. Ali ever appear disoriented or confused
22 during the interviews?

23 A. No, sir, he didn't.

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- 1 Q. Did he appear depressed?
- 2 A. Not at all.
- 3 Q. Anxious?
- 4 A. Not at all.
- 5 Q. Did he ever appear scared?
- 6 A. Never.
- 7 Q. Did he ever appear indifferent?
- 8 A. No, not at all.
- 9 Q. Did he ever have difficulty concentrating?
- 10 A. No, sir, he didn't.
- 11 Q. Did he ever seem distracted?
- 12 A. No, not at all.
- 13 Q. Did he show any signs of disassociating?
- 14 A. No.
- 15 Q. Any signs of hallucinating?
- 16 A. No, sir.
- 17 Q. Did he say anything that was irrational?
- 18 A. Irrational?
- 19 Q. Irrational.
- 20 A. No. No, sir, he didn't.
- 21 Q. Was he able to provide accurate details?
- 22 A. Yes, sir.
- 23 Q. Throughout the entire interview, did you see any

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1 physical signs that caused you concerns about Mr. Ali's
2 ability to participate in a voluntary interview?

3 A. No, sir, I did not.

4 Q. Based on what you observed over the course of the
5 interviews, do you believe the interviews were voluntary?

6 A. Oh, absolutely.

7 Q. Why do you say that?

8 A. Because we would tell him in the beginning, after we
9 did our true name introduction, anytime that he wanted to
10 terminate the interviews, it was up to him, number one. And
11 if he chose not to come back and talk to us at the conclusion
12 of that day, that he never had to come back the subsequent
13 day.

14 TC [MR. GROHARING]: Thank you, Special Agent McClain.
15 That's all I have.

16 WIT: Thank you, sir.

17 MJ [Col COHEN]: Thank you, Mr. Groharing.

18 Mr. Connell, redirect? Or cross, depending on which
19 area you're going into.

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

21 **REDIRECT EXAMINATION**

22 **Questions by the Learned Defense Counsel [MR. CONNELL]:**

23 Q. Special Agent, you just testified that on at least

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1 one occasion, you've conducted a telephonic interview?

2 A. I would have -- not for CITF, but in my OSI capacity,
3 yes.

4 Q. Okay. And what were the circumstances? Why would
5 you do that?

6 A. Because a person was not particularly available at
7 the time for a face-to-face interview.

8 Q. Okay. If you had done -- could have done a
9 face-to-face interview, would you have preferred that?

10 A. Yes. It's the preferred method.

11 Q. It's general law enforcement practice to conduct
12 face-to-face interviews when possible; would you agree with
13 that?

14 A. That's the preferred way, yes.

15 Q. And why is that? Why is that better?

16 A. Well, when you have a face-to-face interview with
17 someone, you can read their body language, and you can tell
18 whether or not they really want to cooperate with you or if
19 they're just doing it because they have to.

20 Q. Is it also easier to build rapport over -- while
21 you're face to face?

22 A. Rapport is another good one, yes.

23 Q. And is it easier to demonstrate your own sincerity

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1 and credibility face to face so they can read your body
2 language?

3 A. Absolutely.

4 Q. Is it also easier for people to see your credentials
5 in person?

6 A. Yes, sir, it is.

7 Q. You were asked on cross-examination about how you
8 would conduct an interview involving classified information.
9 Can you agree with that? Do you recall?

10 A. Uh-huh. Yes. I indicated that wouldn't happen over
11 the telephone.

12 Q. Right. Sure. Unless it was a STE or STU phone, you
13 wouldn't do that, right?

14 A. Correct.

15 Q. And do you ever use those STE or STU phones, those
16 classified phones?

17 A. I have.

18 Q. Is the sound quality as good as a regular line?

19 A. The newer ones, the sound quality is much better.

20 Q. Where can we get one of those?

21 A. Oh ----

22 Q. Just joking, sir.

23 The -- you talked about initial contact to a witness

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1 that you wanted to talk to that had information that might be
2 classified. Would you -- so you've, during your whole career,
3 been on the law enforcement side; that's right? You've never
4 been a defense investigator?

5 A. No, sir, I haven't.

6 Q. Right. Would you be comfortable letting a defense
7 investigator go and talk to the witness on your behalf?

8 A. If that was the only option, I think I would have to
9 go with it. But again, as I stated before, face to face would
10 definitely be the preferred way to go.

11 Q. All right. And why wouldn't you want somebody on
12 your sort of -- your opponent or your person on the other
13 side, why wouldn't you want the defense investigator to go
14 talk to them for you?

15 A. Why not -- why I would not the defense to go talk to
16 them for me?

17 Q. Yeah.

18 A. Again, like I said before, it's always better for the
19 face-to-face, get to know people.

20 Q. Sure. And it's better face to face for you, right?

21 A. Right.

22 Q. Somebody with your interests, you have certain
23 questions that you generally would like to ask, right?

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1 A. Correct.

2 Q. You have your personal credibility and credentials,
3 correct?

4 A. Right.

5 Q. And you have your lifetime of experience in building
6 rapport with people you're talking to, right?

7 A. Right.

8 Q. And you have the best -- best knowledge of the topic
9 of your investigation, right?

10 A. Yes.

11 Q. A defense interpret -- investigator wouldn't have any
12 of that, would they?

13 A. I'm not tracking on what they would have access to or
14 not.

15 Q. Right.

16 A. I don't know.

17 Q. There's no reason why a defense investigator would
18 know what -- about your thought processes or preparation,
19 right?

20 A. That's accurate.

21 Q. Okay. Unless you briefed them about it?

22 A. Yeah.

23 Q. Have you ever done that? Have you ever had a defense

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1 investigator go out and check with the witness to see whether
2 they'll talk to you?

3 A. Not that I can recall right now, no.

4 Q. Right. So if you want to talk to a witness, you find
5 out where they are, go into the field and talk to them, right?

6 A. That's true.

7 Q. Or if there's some special situation, like they're
8 represented by counsel, you might reach out to them
9 directly -- or reach out to their lawyer and say, "Hey, will
10 that person come and meet with me"?

11 A. That is accurate.

12 Q. Have you ever conducted an investigation involving
13 classified information other than this one?

14 A. Not that I can recall right offhand, sir.

15 Q. Okay. If you had to interview a witness who had
16 classified information, you've already told us that wouldn't
17 be over the telephone, but, in fact, it would need to be in a
18 space appropriate to the level of classified information,
19 correct?

20 A. That's accurate, yes.

21 Q. And one of the reasons why you might want to talk to
22 the witness is to assure them that it could be conducted in a
23 space appropriate to the classified information, right?

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1 A. Yes, sir.

2 Q. Because, otherwise, they may think, "Who is this
3 person coming to talk to me? I can't talk to them classified
4 while sitting in my living room"?

5 A. Accurate.

6 Q. Moving on to the next topic, the -- you testified on
7 cross-examination that the -- I didn't get it down exactly,
8 but counsel read you a sentence about the purpose of your
9 interview was to -- with Mr. al Baluchi was to get a voluntary
10 statement wholly untainted by exposure to CIA information. Do
11 you recall that?

12 A. Yes, sir.

13 Q. And is that -- that might not be exactly the wording,
14 but that's more or less what you were asked and agreed to; is
15 that right?

16 A. I agree to that.

17 Q. Okay. And you also said that one of the ways that
18 you accomplished that purpose was to be wholly unaware of CIA
19 information, correct?

20 A. Correct.

21 Q. Okay. Now, why would you want to be wholly unaware
22 of CIA information in order to take an untainted statement?

23 A. Because when that information that they allegedly

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1 admitted to earlier was possibly while they were with someone
2 else.

3 Q. Right. And so you wouldn't want knowing that
4 information to influence you, right?

5 A. Correct.

6 Q. Right. And just so -- maybe that question was a
7 little vague, but just so I can put a fine point on it: You
8 didn't want to be exposed to any of the CIA equity information
9 because you didn't want it to influence you when you were
10 interrogating Mr. al Baluchi; is that right?

11 A. I was selected to be a part of the team because I was
12 considered clean and I had no prior knowledge of what happened
13 to him in the past.

14 Q. Okay. So if I could just put that back to you.

15 One of the reasons that you were selected in the
16 first place was that you had no personal knowledge of what had
17 happened to Mr. al Baluchi in the past?

18 A. That's true.

19 Q. You didn't know how he was treated, good, bad or
20 indifferent?

21 A. That is very true.

22 Q. You didn't know what he had said?

23 A. Correct.

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1 Q. You didn't know what questions he had been asked by
2 the CIA?

3 A. Correct.

4 Q. You didn't know what answers he had given to the CIA?

5 A. Correct. I had zero prior knowledge.

6 Q. And you didn't know what answers he had given to the
7 CIA that had been distributed through elements of the
8 intelligence community?

9 A. That's very accurate.

10 Q. How did you know that that was one of the reasons you
11 were chosen?

12 A. Because they -- they being CITF, our supervisors,
13 asked us did we know anything about the individuals that we
14 were getting ready to be a part of the team.

15 Q. Okay. So in your, at that time, 21 years of
16 investigative experience, is it your experience that
17 investigators build on information over time? They start
18 sometimes with just, you know, a crime has been committed, and
19 then they build on that information over time?

20 A. That's accurate.

21 Q. And during that time, there's information flow from
22 different sources?

23 A. Uh-huh.

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1 Q. I'm sorry. You'll have to say yes or no.

2 A. Yes.

3 Q. And information -- it works in a sort of iterative
4 process, where the -- a person -- as an investigator, you
5 gather information, you refine your hypotheses, and then you
6 seek additional information based on that, correct?

7 A. That is correct.

8 Q. And the information which enters that iterative
9 process might come from witness interviews you did; it might
10 come from witness interviews that one of your colleagues did;
11 it might come from statements of the suspect; it might come
12 from documents. Different places, is that fair to say?

13 A. Yes, sir. That's fair.

14 Q. Okay. And so when they -- when you were selected for
15 the purpose of making sure that you were wholly unaware of
16 information which had been sourced from CIA, is it fair to say
17 that the goal of that process was to make sure that no CIA
18 information had entered your decision-making process over --
19 over the investigative period?

20 A. I think it's fair to say that no information in its
21 totality was given to me so I could have a fresh start.

22 Q. Right.

23 A. Regardless of where it came from.

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1 Q. Right. And so the reason why a fresh start -- the
2 reason why they selected you -- so I completely understand
3 your answer. I completely accept it. But my question is
4 about -- is following up on your statement about why they
5 selected you.

6 A. Uh-huh.

7 Q. It's not merely that you had a fresh start. It's
8 that the people who selected you wanted you to have a fresh
9 start; is that fair to say?

10 A. Well, I was selected because I was a top performer,
11 and they wanted top performers on the selected teams, that's
12 number one. And then two, I had no knowledge of your client,
13 Mr. Ali.

14 Q. Okay. Now, you testified on cross-examination that
15 you were directed not to consider prior CIA statements. Do
16 you recall that?

17 A. Yes, sir.

18 Q. Who directed you not to consider prior CIA
19 statements?

20 A. Again, we had a team of lawyers. I don't know who
21 the lawyers worked for or what organization they were a part
22 of, but we had a -- a lawyer team that, if any questions came
23 up, we could ask the questions.

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1 Q. I understand about questions, but you actually
2 testified that someone directed -- and that was a quote --
3 directed you not to consider CIA statements. What was the
4 source of that direction?

5 A. It came from the lawyer team that we had.

6 Q. What did they say to you, as best you can recall?

7 A. Just like you said, we cannot know or have any
8 knowledge of any prior statements or anything concerning your
9 client. And that was their last opportunity to make sure that
10 all the individuals who were selected for the teams were
11 absolutely clean, as I mentioned before, and had no knowledge
12 of anything.

13 Q. Right. And when you say "clean," you mean had no
14 knowledge of prior CIA statements that Mr. al Baluchi might
15 have made.

16 A. Yes. So it was basically a two-step process. Our
17 leadership made sure that we didn't have any knowledge. And
18 then, as I just mentioned, the legal team who was also
19 established made sure we didn't have any knowledge.

20 Q. And what steps did the legal team take to make sure
21 that none of the interrogators had any knowledge about
22 Mr. al Baluchi's prior CIA statements?

23 A. It was basically an honor basis. So they would ask

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1 you, do you know anything about a select individual, and we
2 would have to be honest and tell them yes or no.

3 Q. And if someone -- did you see anyone say yes?

4 A. No, I did not.

5 Q. Okay. Did you see everyone say no, I don't know
6 anything about any of those individuals?

7 A. I know for a fact that all of the C -- CITF
8 individuals did not know anything about any of those
9 individuals.

10 Q. Okay. Were you there ----

11 A. And we all made that a fact ----

12 Q. I'm sorry. Go ahead.

13 A. And we all made a fact of that to be known.

14 Q. And was that conversation with the lawyers, did that
15 take place at that meeting that you described on direct
16 examination?

17 A. Yes, sir.

18 Q. And in the course of that meeting, both the CITF
19 partners and the FBI partners to the interrogation teams were
20 present; is that right?

21 A. Yes, sir.

22 Q. Was this an out-loud sort of thing? Did the lawyers
23 ask out loud, do you have any access to prior CIA statements

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1 of such-and-such person?

2 A. Yes, sir.

3 Q. And did they ask that of everyone in the room?

4 A. Yes, sir, they did.

5 Q. Okay. And did anyone from your FBI partners say,
6 yes, I have had access to CIA information about them -- about
7 that person before?

8 A. No, I don't recall that ever being said.

9 Q. All right. So everyone said, "No, I didn't have any
10 access"?

11 A. To the best of my knowledge, yes.

12 Q. All right. Now, you testified on direct -- excuse
13 me, on cross-examination that you were directed not to mention
14 to Mr. Ali that you were aware of prior statements. Do you
15 recall that testimony?

16 A. Yes, sir.

17 Q. And who directed you that?

18 A. Again, that came from the lawyer team that was there
19 as advisors to us.

20 Q. In that same meeting?

21 A. In that same meeting.

22 Q. And what was the purpose of that?

23 A. What was the purpose of them?

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1 Q. No, no. Sorry. What was the purpose of that
2 direction not to mention prior CIA statements to
3 Mr. al Baluchi?

4 A. Again, to make sure that everyone understood that
5 they absolutely had to be clean prior to going into that room.

6 Q. And by "clean," you -- just to be a hundred percent
7 sure, you mean had no knowledge of prior CIA statements by
8 that individual detainee?

9 A. Yes, sir.

10 Q. How long, and you can say days, weeks, months,
11 minutes, however is comfortable to you ---- I get the date
12 thing, I'm not pressing you for dates. I'm just trying to get
13 a sense of like how much time we're talking about here.

14 About how long did you have to work with your FBI
15 partners in advance of traveling to Guantanamo for the
16 interrogations?

17 A. Less than a week. Maybe two days.

18 Q. Okay. How much time -- and again, minutes, days,
19 weeks, months -- passed between the time when you found out
20 that you would be assigned to this mission and the time when
21 you first met your FBI partners and had a couple of days to
22 meet with them?

23 A. Maybe a week.

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1 Q. Okay. So -- and how much time after you met with
2 your partners -- let me just say it this way.

3 So a couple of days after you met Special
4 Agent Fitzgerald and Special Agent Perkins, then you traveled
5 to Guantanamo; is that fair to say?

6 A. Shortly after that, yes.

7 Q. So you probably -- how long in advance of the
8 interrogations did you travel to Guantanamo? How long were
9 you on Guantanamo?

10 A. How long was I?

11 Q. On Guantanamo.

12 A. I think we were there for -- if I'm not mistaken, we
13 were there for a week.

14 Q. Just a week?

15 A. When we traveled to Guantanamo?

16 Q. Yes, sir.

17 A. Yeah. If I'm not mistaken, we were there for a week,
18 maybe a little bit longer.

19 Q. Okay. And you told us on direct examination you were
20 involved in two interrogations, one for Mr. al Hawsawi and one
21 for Mr. al Baluchi; is that right?

22 A. Yes.

23 Q. The interrogation for Mr. al Hawsawi was

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1 substantially before, a couple of weeks before the
2 interrogation of Mr. al Baluchi. Does that sound familiar?

3 A. Yeah. Like I said, that happened a long time ago. I
4 recall a week, I could have been there a little bit longer;
5 but that was 13 years ago plus. It could have been two weeks.
6 I just recall it being right around a week. But, yes, I was
7 on both interviews.

8 Q. Okay. While you were on Guantanamo, did you have
9 access to your e-mail account?

10 A. I don't believe I did.

11 Q. Okay. How did you communicate with your -- with
12 other people about this mission?

13 A. The people who I needed to communicate with were
14 there. They being -- the Bureau was there at the time, my
15 supervisor was there. So everyone who I needed was right
16 there at the same time.

17 Q. Okay. And so at any time while you were on
18 Guantanamo, did you take any notes?

19 A. No, sir, I did not.

20 Q. Did you write any documents?

21 A. Never.

22 Q. And did you author any e-mails?

23 A. No, sir. There was only one person that took

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1 notes ----

2 Q. Was there any form of communication other than verbal
3 that I've forgotten about that you might have said?

4 A. No, sir. There was only one person that took notes
5 and that was Agent Perkins.

6 Q. Oh, maybe -- let me be clear. I'm sure that's a poor
7 question then.

8 I'm not talking about in the interrogation of
9 Mr. al Baluchi, I'm talking about during the entire time that
10 you were on Guantanamo.

11 A. Okay.

12 Q. Okay. With that framing, during the entire time that
13 you were on Guantanamo, did you take any notes?

14 A. I may have taken some notes for someone who may have
15 been a bodyguard at that time. I don't know if that was
16 before or after the interview. I don't recall. I may have
17 taken some notes doing a non-HVD interview.

18 Q. Okay. Let's set that aside as well.

19 How about of meetings, strategy, discussions, review
20 of documents, anything like that?

21 A. No, sir, none of that took place.

22 Q. Okay. As a CITF agent, how do you document your
23 investigative activity? On a Form 40?

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1 A. Yes.

2 Q. Did you prepare any Form 40s while you were at
3 Guantanamo?

4 A. I possibly did a Form 40 for a non-HVD interview. If
5 I was the lead agent -- like I said before, I worked for the
6 bodyguard personnel element. So that I do recall a couple of
7 individuals that I talked to that I possibly had done a
8 Form 40 because I was the lead agent on those individuals.

9 Q. Okay. And who were those individuals?

10 A. Oh, I have ----

11 TC [MR. GROHARING]: Objection, relevance.

12 A. ---- no recollection of who those individuals are.

13 MJ [Col COHEN]: Counsel?

14 LDC [MR. CONNELL]: I'm moving on anyway.

15 MJ [Col COHEN]: All right. I'll sustain it then.

16 LDC [MR. CONNELL]: Well, let's do it this way, just so I
17 don't -- I mean, because it is relevant, but why don't I
18 withdraw the question.

19 MJ [Col COHEN]: Okay.

20 Q. The -- so when you prepared a Form 40, who did you
21 send it to?

22 TC [MR. GROHARING]: Objection, relevance.

23 MJ [Col COHEN]: Counsel.

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1 LDC [MR. CONNELL]: Can we mute my microphone to the
2 witness?

3 MJ [Col COHEN]: If we can. Is there a way to do that?

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

5 MJ [Col COHEN]: All right. Let's mute counsel's mic to
6 the witness.

7 LDC [MR. CONNELL]: Can you hear me, Special Agent?

8 No. Okay.

9 This question goes to exploring the credibility of
10 having no communications whatsoever while on Guantanamo. The
11 government adopted this person as their witness for a period
12 of direct, which brings them under the -- both R.M.C. 914 with
13 respect to that element as well as the military commissions
14 order in 502ZZZ.

15 So my question is not to find at the chain of
16 command. My question is to find out through what mechanism he
17 transmitted that, like e-mail, teletype, cable, something
18 else, I don't know. That's where this is going.

19 MJ [Col COHEN]: Okay. For people not related to the
20 case?

21 LDC [MR. CONNELL]: Yes, sir. He may say, I handed it to
22 the person next to me, in which case the end of -- line of
23 questioning ends. I'm just trying to find out what mechanism

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1 he used to do that.

2 MJ [Col COHEN]: Okay. I will allow that question because
3 he said that he didn't have e-mail previously.

4 LDC [MR. CONNELL]: Right. That's exactly right, sir.

5 MJ [Col COHEN]: Okay. All right. I will allow that one
6 question.

7 LDC [MR. CONNELL]: May I ask ----

8 MJ [Col COHEN]: You may. You have ----

9 LDC [MR. CONNELL]: The follow-up question, would that
10 be -- the actual pending question is to whom did you send it,
11 and the follow-up question would be what mechanism did you use
12 to send it. So that's where it's going.

13 MJ [Col COHEN]: Okay.

14 LDC [MR. CONNELL]: All right, thank you. If I may have
15 access to the microphone?

16 MJ [Col COHEN]: You may.

17 **REDIRECT EXAMINATION CONTINUED**

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

19 Q. Can you hear me, Special Agent?

20 A. Yes, I can hear you.

21 Q. The pending question is: To whom did you send that
22 Form 40?

23 A. It went to the CITF leadership for review.

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1 Q. And CITF's leadership in Fort Belvoir?

2 A. Yes, sir.

3 Q. And what mechanism did you use to send it to
4 Fort Belvoir?

5 A. I would write it at Belvoir.

6 Q. So -- I see. So you didn't write it until you got
7 back off of Guantanamo?

8 A. Right. Right.

9 Q. Okay. Once you got off of Guantanamo, where was your
10 duty station? Where did you work out of?

11 A. I split my time. I split the day between
12 Fort Belvoir ----

13 Q. Okay.

14 A. ---- and the offsite location in Virginia.

15 Q. When you say "the offsite location in Virginia," you
16 mean the same Virginia that -- the same location that you were
17 referring to earlier?

18 A. Yes, sir.

19 Q. Okay. And you testified earlier about your use to
20 the buckets -- or your use of the bucket of Mr. al Baluchi.
21 Was your request for access to that bucket before or after you
22 got back from Guantanamo?

23 TC [MR. GROHARING]: Objection, asked and answered.

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1 MJ [Col COHEN]: It's a different question. He did
2 testify as to when he got access, but not when he requested
3 the access. I will allow the question. That was not
4 specifically asked or answered.

5 You may answer the question. The question is: When
6 did you actually request access? Not when you were granted
7 access.

8 WIT: It wasn't until I returned from GTMO.

9 Q. Okay. And what was the purpose of your request for
10 access?

11 A. So I could build knowledge on what I was dealing
12 with.

13 Q. Okay. Did you expect to interrogate Mr. al Baluchi
14 again?

15 A. No, sir. No. I just wanted to gain as much
16 information and be intelligent on the subject as I possibly
17 could.

18 Q. Did you have other investigative duties that were
19 related to Mr. al Baluchi?

20 A. Other investigative duties? No, sir.

21 Q. Okay. So what was the purpose of gaining knowledge
22 about Mr. al Baluchi at that point?

23 A. Because after we did the interview, again, I wanted

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1 to be intelligent on what took place in the interview and
2 Mr. al Baluchi. And the only way that I could be intelligent
3 on what occurred was to read.

4 Q. Okay. And for what purpose did you want that
5 knowledge?

6 A. Well, one purpose was if I ever had the opportunity
7 to go back and interview him again.

8 Q. Okay. Was there another purpose?

9 A. No.

10 LDC [MR. CONNELL]: Okay. Nothing further, Your Honor.
11 Thank you.

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

13 Mr. Sowards is speaking with Mr. Connell.

14 LDC [MR. CONNELL]: Thank you.

15 MJ [Col COHEN]: All right. Mr. Groharing.

16 TC [MR. GROHARING]: Very briefly, Your Honor.

17 MJ [Col COHEN]: You may.

18 **RE-CROSS-EXAMINATION**

19 **Questions by the Trial Counsel [MR. GROHARING]:**

20 Q. Special Agent McClain, is it fair to say that Special
21 Agent Fitzgerald and Special Agent Perkins were very
22 knowledgeable of the September 11th investigation leading up
23 to the interviews of Mr. Ali?

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1 A. That's very accurate. That's the reason why they
2 were the lead agents asking the questions.

3 Q. Fair to say that that investigation was very large as
4 well?

5 A. Yes, sir.

6 Q. It's been described as the largest investigation in
7 FBI history. Have you heard that?

8 A. I haven't heard that, but I can imagine that it has
9 been.

10 Q. And fair to say that it would have been very
11 difficult for you to conduct an interview of Mr. Ali with
12 approximately one week to digest the investigation and
13 understand -- and develop a plan with regard to how you would
14 question Mr. Ali?

15 A. Extremely difficult, yes.

16 Q. Do you feel like you would have been able to do that
17 by yourself?

18 A. No, sir.

19 Q. And I believe when we spoke, you said -- you
20 described yourself as a -- to some degree a bystander for the
21 interview? Do you recall using that term?

22 A. Absolutely. Bystander or assistant agent because I
23 had no knowledge of anything.

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1 Q. And is it also true that you had no role in dealing
2 with threat information involving Mr. Ali that could prevent
3 another 9/11 attack before the interview?

4 A. That's accurate.

5 TC [MR. GROHARING]: That's all I have, Your Honor.

6 MJ [Col COHEN]: All right. Thank you. Any further
7 questions? I think rather than call it redirect/recross.

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

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

10 LDC [MR. CONNELL]: I do have questions for closed.

11 MJ [Col COHEN]: I understand. Yeah. I was talking about
12 an open session.

13 All right. Is the government also ready to go into a
14 secure session?

15 TC [MR. GROHARING]: Yes, Your Honor.

16 MJ [Col COHEN]: Okay. Then for the public, before we go
17 into the closed session -- Agent McClain, I'll go ahead and
18 excuse you for this moment. Stand by. We'll notify you when
19 we're ready for closed session testimony.

20 WIT: Yes, sir.

21 MJ [Col COHEN]: But you are temporarily excused. Please
22 do not discuss your testimony with anyone other than the
23 prosecution or the defense during this time.

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1 WIT: Yes, sir.

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

3 All right. For planning purposes, just to determine
4 what will be open and closed today, obviously we'll take
5 closed session testimony. Do the parties have an idea of how
6 long that will take? And if we have some idea of how long it
7 will take, I can decide whether or not there will be any
8 additional open session testimony later today, or whether we
9 just take the testimony and then reconvene tomorrow. Or not
10 even testimony, but argument on like a 655 or any of those
11 types of things.

12 LDC [MR. CONNELL]: Sir, I have maximum 30 minutes of
13 closed examination.

14 MJ [Col COHEN]: Okay. And what is the government
15 estimating?

16 TC [MR. GROHARING]: Much less than that, Your Honor.

17 MJ [Col COHEN]: Okay. All right, then. I'll tell you
18 what, then. Let's take -- we'll take approximately 30 minutes
19 because I need to get the stenographers down here for the
20 closed session testimony. And we'll escort everyone out of
21 the courtroom who doesn't have a clearance. And then at the
22 end of that we also have the 505(h) that has to be taken up.

23 Is this how we should kind of expect things to go the

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1 rest of the week?

2 LDC [MR. CONNELL]: Sir, a couple of the witnesses will be
3 somewhat longer.

4 MJ [Col COHEN]: Okay.

5 LDC [MR. CONNELL]: Nothing approaching a full day.

6 MJ [Col COHEN]: Okay. Is there any way we could take,
7 for example, tomorrow morning -- let's say I just go ahead
8 today and say, hey, we're just going to be in the closed
9 session. We'll do just the 505(h) and then we will cut for
10 the day, that -- just to make things easier. And that way the
11 public knows when to report back.

12 Is there any chance we can do closed session before
13 we do open session tomorrow?

14 LDC [MR. CONNELL]: May I have a moment?

15 MJ [Col COHEN]: You may.

16 LDC [MR. CONNELL]: Sir, the short answer is yes.

17 MJ [Col COHEN]: Okay.

18 LDC [MR. CONNELL]: The long answer is: The complexity
19 comes because sometimes the government advises us as to
20 something which is different what we expected. For example,
21 with this witness, something that I thought was subject to a
22 claim of national security privilege, I had two questions. I
23 thought they were both subject to national security privilege,

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1 and the government advised that I could ask one of them in
2 closed session.

3 MJ [Col COHEN]: I understand.

4 LDC [MR. CONNELL]: That's why it's generally better --
5 and it sometimes happens the other way. I think it is
6 unclassified and the government says no, that needs to be in
7 closed session. So it's generally better to do open than
8 closed, but there is no specific reason at this time why we
9 could not do closed then open.

10 MJ [Col COHEN]: Okay. An alternative would be -- how
11 much discussion -- how many of these witnesses are on island?
12 Let me ask that question.

13 LDC [MR. CONNELL]: Sure. After this, all three are on
14 island.

15 MJ [Col COHEN]: Okay. That gives me significantly more
16 flexibility than having someone hang out at wherever they're
17 testifying from ----

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

19 MJ [Col COHEN]: ---- at this point. That's what we'll do
20 then.

21 We'll just go into closed session this afternoon,
22 we'll call it at whatever time we get done, and then the
23 parties potentially have that opportunity; I'll hear from

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1 Mr. Harrington here just momentarily. And then barring him
2 from reconvincing me on that general thought process, then we
3 will tomorrow start with open session, then do -- if at all
4 possible, I'd like to go ---- since they're on island is I may
5 just take a break and then hear any discussion that we can
6 have on any arguments on any of those motions that we talked
7 in an open session ----

8 LDC [MR. CONNELL]: Tomorrow?

9 MJ [Col COHEN]: Tomorrow.

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

11 MJ [Col COHEN]: And then go ahead and conclude the day
12 then with closed session testimony, or start the next day,
13 Wednesday, with closed session testimony since people are on
14 the island.

15 LDC [MR. CONNELL]: Yes, sir. We'll be able to proceed in
16 that fashion.

17 MJ [Col COHEN]: Okay. Mr. Harrington, assuming you don't
18 tell me that we can't do it that way ----

19 LDC [MR. HARRINGTON]: Judge, I think it will work.

20 Mr. Trivett has advised me that the SMO and the psych will be
21 available at 1230 today.

22 MJ [Col COHEN]: Okay.

23 LDC [MR. HARRINGTON]: And we'll do the interview here.

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1 MJ [Col COHEN]: Oh, perfect.

2 LDC [MR. HARRINGTON]: And what I would like, if the court
3 can let my client remain so I can consult with him during --
4 he's not going to be part of the interview, but he's -- I want
5 him here so I can consult with him during the interview. And
6 so if we could start the closed session after we finish that,
7 then that would be fine.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. HARRINGTON]: I anticipate it will probably take
10 at the most a half an hour for these interviews.

11 MJ [Col COHEN]: Okay. Yeah, not a problem then. That
12 will give us time to set up and then the moment you have --
13 you have the discussion that you need to have with your
14 client, just let me know. We can be flexible. And then we'll
15 start the closed session testimony -- we'll start the closed
16 session testimony at 1145. Will that work? Oh. You mean a
17 half hour for -- okay. So you want to start later in the day.

18 LDC [MR. HARRINGTON]: That's right, yeah.

19 MJ [Col COHEN]: Okay. Government, is there any reason we
20 can't start around 1300 or 1330?

21 TC [MR. GROHARING]: No, Your Honor.

22 MJ [Col COHEN]: Mr. Connell. It was your witness, so I
23 want to make sure that you're okay with that.

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1 LDC [MR. CONNELL]: That's fine with me, sir.

2 MJ [Col COHEN]: Okay. Tell you what, just to be safe,
3 let's just tell him 1400 closed session testimony and
4 immediately followed by a 505(h). And that way, if there's
5 any notices that have come through, that gives me some time to
6 download those and see what those actually say as well.

7 LDC [MR. HARRINGTON]: And, Judge, can our clients remain
8 in the courtroom, then, until that's over?

9 MJ [Col COHEN]: Yeah, that will be fine. All right,
10 1400. Thank you.

11 [The R.M.C. 803 session recessed at 1109, 23 September 2019.]

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