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1 [The R.M.C. 803 session was called to order at 0901,
2 24 September 2019.]

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

5 Trial Counsel, are all of the government counsel who
6 were present at the close of the previous session again
7 present?

8 CP [BG MARTINS]: Yes, Your Honor. Mr. Swann has rejoined
9 us.

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

11 CP [BG MARTINS]: Your Honor, correction. Mr. Groharing
12 is out on commission business.

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

14 CP [BG MARTINS]: And he will not be back the remainder of
15 the week.

16 MJ [Col COHEN]: All right. Thank you, sir. I appreciate
17 that update.

18 Recognize that none of the accused are here this
19 morning. We'll take that up momentarily.

20 Mr. Sowards, it looks like your team is the same as
21 the last time we previously recessed.

22 LDC [MR. SOWARDS]: That is correct, Your Honor. And
23 Ms. Radostitz might be needing to leave the courtroom.

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

2 Ms. Bormann, it looks like it's just the two of you
3 this morning.

4 LDC [MS. BORMANN]: Captain Peer and I are here, yes.

5 MJ [Col COHEN]: All right. Thank you, ma'am.

6 Mr. Harrington, your team looks the same as it was
7 yesterday afternoon.

8 LDC [MR. HARRINGTON]: We are the same, Judge.

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

10 Mr. Connell, no military counsel this morning?

11 LDC [MR. CONNELL]: Your Honor, Ms. Pradhan and I are
12 present. Captain Andreu is working on other military
13 commissions business.

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

15 And, Mr. Ruiz, it looks like you have a -- your team
16 is a little bit smaller this morning as well.

17 LDC [MR. RUIZ]: Yes, there is some attrition here, Judge.
18 Lieutenant Colonel Williams will be working on other business
19 today.

20 MJ [Col COHEN]: Not a problem.

21 LDC [MR. RUIZ]: Thank you.

22 MJ [Col COHEN]: Thank you very much.

23 All right. Is there a witness with respect to the

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1 absence? Mr. Swann.

2 I recognize the Major who has previously testified
3 over the last couple of weeks. I remind her that she's still
4 under oath.

5 Mr. Swann, your witness.

6 WIT: Thank you.

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

9 **DIRECT EXAMINATION**

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

11 Q. Major, did you have occasion to advise each of the
12 detainees of their right to attend today's proceeding?

13 A. Yes, sir.

14 Q. Take Khalid Shaikh Mohammad first. What time did you
15 do that?

16 A. 0614.

17 Q. Did he indicate that he wished to attend or not
18 attend?

19 A. Not attend.

20 Q. Did you do it the same way you've done it every other
21 time that you've advised these men of their rights?

22 A. Yes, sir.

23 Q. Using the form?

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1 A. Yes, sir.

2 Q. Did he execute the English version of the form at
3 page 2 of Appellate Exhibit 660CC?

4 A. Yes, sir.

5 Q. With respect to Bin'Attash, I have 660DD, three-page
6 document, both English and Arabic version. Did he execute the
7 Arabic or English version?

8 A. The Arabic version.

9 Q. Did he indicate that he wished to attend or not
10 attend?

11 A. Not attend.

12 Q. With respect to Ramzi Binalshibh, 660EE, is that his
13 signature that appears on the second page of this document?

14 A. Yes, sir.

15 Q. With respect to Ali Abdul Aziz Ali, a two-page
16 document, 660FF, is that his signature that appears on this
17 document?

18 A. Yes, sir.

19 Q. And finally, with respect to Mustafa Ahmed Adam
20 al Hawsawi, 660GG, is that his signature that appears on this
21 document?

22 A. Yes, sir.

23 Q. Do you have any question about these men deciding not

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1 to attend today?

2 A. I do not.

3 Q. And was that decision voluntary on their part?

4 A. Yes, sir.

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

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

7 Mr. Sowards, I have what has been marked as AE 660CC,
8 which appears to be a statement signed by Mr. Mohammad
9 indicating his desire not to attend today. Have you had the
10 opportunity to view this document, and do you have any
11 questions?

12 LDC [MR. SOWARDS]: I have, Your Honor, had an opportunity
13 to review a statement dated 24/9/19, 0614, and I have no
14 questions.

15 MJ [Col COHEN]: All right. Thank you, sir. Note the
16 standing objection with respect to identity.

17 Ms. Bormann, I have a three-page document marked
18 AE 660DD, which purports to be a statement by Mr. Bin'Attash.
19 Do you have any questions of the witness, and have you had the
20 opportunity to see the document?

21 LDC [MS. BORMANN]: Your Honor, I've read the document,
22 and I have no questions.

23 MJ [Col COHEN]: Thank you, ma'am.

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1 Mr. Harrington, I have before me what's been marked
2 as AE 660EE, which is a statement from Mr. Binalshibh. It is
3 a two-page document. Have you had the opportunity to review
4 it, and do you have any questions of the witness?

5 LDC [MR. HARRINGTON]: I have reviewed it, Judge. I have
6 no questions.

7 MJ [Col COHEN]: Thank you, Mr. Harrington.

8 Mr. Connell, AE 660FF purports to be a statement
9 signed by Mr. Ali this morning. Have you had the opportunity
10 to review it and do you have any questions of the witness?

11 LDC [MR. CONNELL]: Sir, I have reviewed AE 660FF, and I
12 have no questions.

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

14 Mr. Ruiz, finally, I have AE 660GG, which purports to
15 be a statement signed by Mr. al Hawsawi. Have you had the
16 opportunity to see the document, and do you have any
17 questions?

18 LDC [MR. RUIZ]: Judge, I've seen the document, and I have
19 no questions. Thank you.

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

21 Major, you will be excused until the next time we
22 need to call you.

23 WIT: All right. Thank you.

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

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

3 MJ [Col COHEN]: Handing the exhibits to the court
4 reporter.

5 I find that Mr. Mohammad, Mr. Bin'Attash,
6 Mr. Binalshibh, Mr. Ali, and Mr. al Hawsawi have knowingly and
7 voluntarily waived their right to be here today.

8 Yesterday evening following the closed 505 -- excuse
9 me -- the closed 505(h) session, and the R.M.C. 806 closed
10 classified testimony, I held a conference with trial and
11 defense counsel in accordance with R.M.C. 802. The accused
12 were absent.

13 During that conference, we discussed 802 conferences
14 in general, and scheduling issues for the remainder of the
15 session.

16 I stated that although I will not make substantive
17 decisions or issue rulings during an 802 conference, I will
18 share my thoughts on logistical or procedural issues and
19 encourage counsel to share theirs so that we can make the most
20 efficient use of everyone's time.

21 I informed the parties that I was working on many of
22 the pending issues and that I am willing to issue written
23 rulings while we are in session to the extent that I can. I

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1 also noted that I am willing to grant oral rulings on the
2 record when appropriate on administrative matters, such as
3 requests for extension of time in order to avoid needless
4 written pleadings and starting a briefing cycle on a matter
5 that is really not contested and would just benefit the
6 parties.

7 I emphasized that when I asked counsel for an
8 estimate as to the anticipated length of witness testimony,
9 I'm not seeking to limit them in any way, I'm just trying to
10 make the best use of our limited time in session at GTM0; and
11 that my general practice is, if they estimate 30 minute, I
12 usually add a few minutes to that; but I usually try to base
13 recesses, lunch breaks, the close -- the end of day sessions,
14 et cetera, based on those estimates.

15 I also indicated that I'm willing to make use of the
16 space in the D.C. area for classified sessions and depositions
17 when appropriate, and I emphasized I'm amenable to ex parte
18 presentations from all parties in those situations where
19 ex parte sessions are authorized.

20 Several of the counsel informed the commission of
21 issues they believe need to be addressed, specifically a
22 series of motions and rulings, many of which that came up
23 were, for example, possibly AE 651, the XYM evidence which has

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1 been briefed in 538, 561, 600, 601, 641. We talked about
2 AE 650, and the need for a ruling on that. We talked in
3 general about the 573 series.

4 Reference was made to 286 and 286AA, as well as AE
5 490 and AE 655. No rulings, no substantive arguments, just a
6 general discussion of how those rulings and those matters
7 could potentially impact future witnesses to be called,
8 discovery, et cetera, all of which culminate in a -- in our
9 ability to move the case forward.

10 I indicated to the parties that in particular with
11 AE 650 that I was more than happy to -- not more than happy,
12 but I would definitely be issuing a ruling in short order on
13 AE 650 so that the parties could have that, and then that
14 would provide a framework for moving forward with respect to
15 substituted evidentiary foundations as well as protective
16 orders, which both which were addressed in those.

17 I also indicated generally to the parties that
18 because we would anticipate significant need for testimony by
19 witnesses over the next few sessions and probably into the
20 early majority of next year, that to the extent that I could,
21 I would take the written briefs by the parties, which are
22 always exceptionally done by the defense and the prosecution,
23 and may just certify specific questions that I have and then

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1 allow them to address those in writing as opposed to having
2 oral argument, when that makes sense; but that I was not going
3 to do away entirely with that.

4 Mr. Connell discussed generally what he referred to
5 as Gordian knots, which is reference to a number of the
6 pending issues in the AEs that I have addressed before the
7 commission, which are intertwined and which are impacting that
8 scheduling as we discussed and that it was my -- that I had
9 the ability in many instances to cut those knots and to allow
10 for more free flow of information and decisions moving
11 forward.

12 Ms. Radostitz indicated she would like to present
13 some oral argument on pending discovery issues in AE 655.

14 Mr. Harrington has filed an AE 152 with -- an AE 152
15 series asking for some emergency relief with respect to his
16 client, Mr. Binalshibh. That is being worked, and to the
17 extent that we can, we'll try to have some oral argument at
18 some point this week as he works through some evidentiary
19 issues with the prosecution at this point.

20 In terms of scheduling for the remainder of this
21 week, the parties agreed we would proceed with the open
22 testimony of witnesses today and tomorrow, followed by open
23 oral argument or discussion as time permits to be followed by

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1 a closed session for classified testimony at the end of each
2 day so that we could maximize the amount of time that the
3 public has to view what's going on in the courtroom, and then
4 at the end of the closed session testimony, we would be able
5 to recess for the end of the day.

6 Thursday and Friday this week will depend on how much
7 open oral argument we're able to fit on Tuesday and Wednesday
8 and on some pending discovery from the government, which is
9 currently impacting to some extent the potential testimony of
10 the former camp commander. I'll work with the parties to
11 address those issues as it becomes available.

12 Counsel, that's a -- oh, and then we also talked
13 about the fact that Mr. Connell had some thoughts with respect
14 to witnesses that he had proposed to the government with
15 respect to the October-November session, the January session,
16 and the February session, as well as some potential dates for
17 the deposition of the interpreter which I ordered. I think I
18 ordered that in August. I could be wrong.

19 And -- but that he still needed to discuss that,
20 also, or conference that within the defense community as well
21 as getting final decisions by the government as to what
22 witnesses would be produced. And to the extent that there are
23 witnesses on his list that he believes are relevant and

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1 necessary witnesses with respect to motions, that it may
2 require some rulings by the commission on AE 628B, which the
3 commission is willing to do, is to actually hear specific
4 argument on many of those witnesses and issue those rulings.

5 That is my summary of -- it was probably about a
6 45-minute just 802 to just kind of figure out planning. In
7 many ways, this will be our last time before October to have
8 that kind of discussion, perhaps, and so we discussed many
9 issues. No decisions were made.

10 But I will now give the parties an opportunity to
11 supplement my summary with anything that they believe is --
12 that they would like to put on the record.

13 Trial Counsel.

14 CP [BG MARTINS]: Your Honor, Mr. Trivett reminds me that
15 you asked that we make an oral motion to seek partial relief
16 from the requirement to provide you in camera by Friday some
17 discovery materials. Although the majority of it will be
18 provided, we did seek a leave of the commission to file a few
19 additional pieces later.

20 MJ [Col COHEN]: General Martins, that is correct. Thank
21 you. That's why I let you guys supplement. That is -- of all
22 of the many things, you're right. Sir, do you have a date
23 that you're requesting or is it just an open ended?

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1 CP [BG MARTINS]: We'll certainly provide it as soon as we
2 get it.

3 MJ [Col COHEN]: Okay.

4 CP [BG MARTINS]: But we would ask interim suspense of
5 another week.

6 MJ [Col COHEN]: Sure. Let's extend it by a week. I
7 think I initially put 27 September as the date. You may have
8 until -- I believe that would be 4 October, or thereabout, the
9 following Friday.

10 If you need additional time, let Ms. Bormann know.
11 She referenced this yesterday. And then if there's any
12 objection to additional time, I'll take that up and issue a
13 ruling. But as long as she indicates momentarily that she
14 still is in agreement that additional time is okay, then I
15 will just grant that here on the record.

16 CP [BG MARTINS]: Thank you, Your Honor.

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

18 CP [BG MARTINS]: No additional remarks relating to the
19 802.

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

21 Ms. Bormann, if you'd just confirm that is still your
22 position from -- that you referenced yesterday?

23 LDC [MS. BORMANN]: We advised Mr. Trivett that, although

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1 time is of the essence, we understand there are logistical
2 problems, and we had no objection to a short time extension.

3 MJ [Col COHEN]: Okay. Thank you, ma'am.

4 LDC [MS. BORMANN]: You're welcome.

5 MJ [Col COHEN]: Are there any other objections to
6 granting the motion?

7 That's a negative response from the remaining defense
8 counsel.

9 That motion is granted.

10 All right. Mr. Connell.

11 LDC [MR. CONNELL]: Sir, with respect to the 802, the one
12 other -- you covered this generally, but to be a little bit
13 more specific, the military commission said that it would give
14 me 20 minutes to place my views on path forward on witnesses
15 and -- which is 628B, and discovery, which is 538 and 561, on
16 the record.

17 The government asked for another opportunity to
18 address my concerns, and we told the military commission that
19 we would meet afterward, which we did for a substantial period
20 of time.

21 The military commission gave the government until
22 10 October to produce whatever additional material it intends
23 to produce and requested a status from Mr. al Baluchi on

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1 Friday, 11 October.

2 MJ [Col COHEN]: That is correct. Thank you, sir. That
3 is exactly one of the other things we talked about, and so --
4 like I said, this is why I asked for the comments just to
5 remind me of the things that we need to talk about.

6 All right. Once again, procedural in nature, but
7 yes, we'll take up -- that was one of the oral discussions
8 that will take place this morning, as well as any argument on
9 655 we'll take up sometime this morning.

10 All right. Mr. Sowards, would you like to add
11 anything to my summary?

12 LDC [MR. SOWARDS]: Yes, Your Honor, just to keep the
13 numbers straight and for ----

14 MJ [Col COHEN]: Please.

15 LDC [MR. SOWARDS]: ---- the benefit of your staff. And I
16 may have misheard, you may have misspoke, I'm not sure which,
17 but Ms. Radostitz wanted to address 653 ----

18 MJ [Col COHEN]: That is correct.

19 LDC [MR. SOWARDS]: ---- and not 639.

20 MJ [Col COHEN]: You are correct. Thank you, sir.

21 Ms. Bormann, is there anything else you would like to
22 add?

23 LDC [MS. BORMANN]: No, Judge.

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1 MJ [Col COHEN]: All right. Mr. Harrington, anything that
2 you would like to add, in particular with -- even with the
3 152?

4 LDC [MR. HARRINGTON]: Not at this time, Judge.

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

6 Mr. Ruiz, anything you would like to add.

7 LDC [MR. RUIZ]: No, thank you.

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

9 Okay. Are the parties ready to call the witness?

10 Trial Counsel, you may proceed.

11 ADC [MS. PRADHAN]: Sir?

12 MJ [Col COHEN]: Yes, Ms. Pradhan.

13 ADC [MS. PRADHAN]: I apologize. May I address a brief
14 housekeeping matter before we call the witness?

15 MJ [Col COHEN]: Sure. Absolutely.

16 Sir, give me one moment, and I'll hear what the
17 housekeeping matter is.

18 ADC [MS. PRADHAN]: Thank you for the opportunity, sir.

19 MJ [Col COHEN]: Yes, ma'am.

20 ADC [MS. PRADHAN]: Just briefly with regards to our
21 notice of exhibits, our very hard-working paralegals have been
22 working with the trial judiciary for about two days now ----

23 MJ [Col COHEN]: Okay.

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1 ADC [MS. PRADHAN]: ---- to file our notice of exhibits
2 for the next couple of witnesses. I believe that we were
3 successful last night in filing AE 628BBB, the SIPR
4 version ----

5 MJ [Col COHEN]: Okay.

6 ADC [MS. PRADHAN]: ---- and so the military commission
7 should have that.

8 But in part because of what I explained to Your Honor
9 in the 505(h) hearing, and I won't go into anything classified
10 here, but because of the fluctuation of the classification of
11 some of the documents, we have not been able to insert the
12 unclassified versions in the filing.

13 MJ [Col COHEN]: Okay.

14 ADC [MS. PRADHAN]: And so the solution -- so the first
15 issue is that we are working on filing the NIPR version ----

16 MJ [Col COHEN]: Okay.

17 ADC [MS. PRADHAN]: ---- of 628BBB at the moment.

18 And the second thing is that the solution that we
19 arrived at with the trial judiciary last night is that I would
20 take pen and ink to the list of exhibits and notate which ones
21 are now unclassified.

22 MJ [Col COHEN]: Okay.

23 ADC [MS. PRADHAN]: The unclassified versions are the ones

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1 that I'm going to be referring to with Judge DeLury and we
2 have a binder for Judge DeLury with the unclassified versions,
3 and some of the secret documents that we'll refer to in the
4 closed session.

5 MJ [Col COHEN]: Okay.

6 ADC [MS. PRADHAN]: Would it be all right for us to place
7 that binder up there now or would you prefer we do that
8 before ----

9 MJ [Col COHEN]: Trial Counsel, any objections, just going
10 ahead and prepositioning the binder?

11 TC [MR. RYAN]: No, sir.

12 MJ [Col COHEN]: Yes, ma'am, that would be great.

13 ADC [MS. PRADHAN]: Thank you, sir.

14 MJ [Col COHEN]: I'll give you a moment to do so and then
15 we'll call the witness.

16 General Martins, just give me just one second.

17 Sir, I think we are ready now. Thank you for your
18 indulgence.

19 CP [BG MARTINS]: Thank you, Your Honor.

20 Sergeant, please inform the witness to come into the
21 courtroom.

22 Could you please move to the witness stand, remain
23 standing, and raise your right hand for the oath.

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1 BERNARD E. DeLURY, JR., civilian, was called as a witness for
2 the prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the Chief Prosecutor [BG MARTINS]:

5 Q. Would you please state your full name and spell it
6 for the record.

7 A. Bernard Edward DeLury, Jr. B-E-R-N-A-R-D,
8 E-D-W-A-R-D, D-E-L-U-R-Y.

9 Q. Sir, what is your state of residence?

10 A. New Jersey.

11 Q. And what is your current occupation?

12 A. Superior Court judge.

13 CP [BG MARTINS]: Thank you, sir.

14 TC [MR. RYAN]: Your Honor, may I proceed, sir?

15 MJ [Col COHEN]: You may.

16 Questions by the Trial Counsel [MR. RYAN]:

17 Q. Mr. DeLury, you just identified yourself as a
18 Superior Court judge.

19 A. Yes, sir.

20 Q. First important question: Have you successfully been
21 able to stop sweating from your walk over here?

22 A. I was, thank you.

23 Q. Okay. Thank you. So may I take it from your current

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1 role as a Superior Court judge that you are an attorney by
2 profession?

3 A. I am.

4 Q. And if you would, for those of us who may not know,
5 what is a Superior Court judge? And I assume it's in the
6 state of New Jersey.

7 A. The Superior Court is the court of general
8 jurisdiction for the State of New Jersey. It has statewide
9 jurisdiction divided into 15 separate vicinages in three
10 different divisions: The Law, Chancery, and Appellate
11 Division. I sit in the law division, which is a trial court,
12 assigned primarily to hear criminal cases.

13 Q. All right. And we'll come back to your work on the
14 Superior Court, but for right now, would you please recount
15 for us your education post-high school.

16 A. I attended St. Charles Borromeo Seminary in
17 Philadelphia and studied there for four years. And when I
18 obtained my bachelor's degree, I was sent to Rome to continue
19 my studies. I spent less than a year in Rome, returned to the
20 United States.

21 I worked for a while in the food and beverage
22 industry and then went to law school. And attended law school
23 in Rutgers-Camden from 1983 to 1986.

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1 Q. And did you, in fact, receive a J.D. degree from
2 Rutgers?

3 A. I did.

4 Q. And you mentioned some time in Rome. What was your
5 role there? What was your education there?

6 A. I was studying for the Catholic priesthood, and my
7 bishop sent me to Rome to complete my studies. And while in
8 Rome I had a change of vocation and returned to the United
9 States.

10 Q. Okay. And at some point, did you become part of the
11 United States military?

12 A. I did. In 1985, I made application to the Navy
13 JAG Corps. Was accepted into the student program, was
14 commissioned an ensign in 1986, and began officer training and
15 judge advocate training after that.

16 Q. Prior to even law school, had you attempted to enter
17 the military at any time or considered it?

18 A. I considered it. And when I returned from Rome, I
19 thought about it. I made application, and went to a
20 recruiting station and talked to a recruiting officer. And
21 they were looking for submariners and aviators, and with the
22 philosophy degree and not a lot of math, those things were
23 really not on the table for me.

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1 Q. That wasn't you?

2 A. It wasn't me, no.

3 Q. All right. Now, when you entered the Navy, was it
4 only for the purpose of the JAG Corps, if I'm ----

5 A. It was. Yes, it was.

6 Q. And could you recount for us or trace for us your
7 training as a Navy JAG.

8 A. Well, I went to officer training, OIS as it was
9 called then, in Newport, Rhode Island, knife and fork school.
10 After I did that, I waited for my bar results and was working
11 as an intern at a naval legal service office. And when bar
12 results came in, I was then sent to Newport to do my judge
13 advocate training.

14 And when I completed that, we did our brief
15 orientation tour, lawyer at sea tour, which was not terribly
16 long -- it was about 30 days -- and then I was assigned to a
17 legal service office. My first billet was as a defense
18 counsel.

19 Q. What is a lawyer at sea, even if it was a short
20 period?

21 A. Teach you which end of the ship to salute and which
22 end goes forward, and to orient those who had no sea service
23 and no experience with the sea service as to what it was like

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1 to be at sea.

2 Q. So is it correct that you were not sort of actively
3 practicing law during that period of time?

4 A. No. No. Standing watches and just following along
5 with somebody who knew what he was doing.

6 Q. Good for you.

7 Now, you mentioned legal services and then your first
8 stint within legal services. Am I saying this correctly?

9 A. Yes, uh-huh.

10 Q. And I believe you said you were a criminal defense
11 attorney; is that correct?

12 A. Correct.

13 Q. Is that a normal progression within the JAG Corps?

14 A. Usually. In my day -- I don't know what's happening
15 now, but in my day, you would generally get assigned to a
16 legal service office or if -- a large staff, as the most
17 junior legal person on a staff, and you'd be assigned to
18 represent sailors and marines who were charged under the
19 Uniform Code of Military Justice, typical first job. Another
20 typical first job might be in legal assistance providing
21 personal representation for servicemembers and their
22 dependents in things like landlord/tenant and wills and powers
23 of attorney.

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1 Q. In your time as a criminal defense attorney within
2 the Navy, first of all, did you receive training for that
3 role?

4 A. I did.

5 Q. And where was that?

6 A. At Newport.

7 Q. It was all part of your Newport training?

8 A. It was. And then you would shadow a more experienced
9 judge advocate at the beginning. And then when they had
10 confidence that you were able to do it on your own, you'd do
11 it on your own.

12 Q. All right. And during the course of your time as a
13 criminal defense attorney in the Navy, I take it you had
14 clients?

15 A. I did, uh-huh.

16 Q. Those would be what?

17 A. Servicemembers, Navy and Marine Corps. Almost
18 entirely enlisted. I might have had one officer client, but
19 enlisted members, tending to be junior enlisted as well.

20 Q. And would those be persons who were charged with
21 crimes?

22 A. Military offenses, common law crimes under the
23 Uniform Code of Military Justice, yes.

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1 Q. For how long a period were you a criminal defense
2 attorney?

3 A. I'd say approximately 18 months.

4 Q. In the course of that time, if you have a general
5 idea, how many clients did you actually serve, about?

6 A. Dozens.

7 Q. In the course of your time as a criminal defense
8 attorney, did you at times engage in -- I guess I'll call it
9 guilty pleas?

10 A. Yes.

11 Q. And is that what it's called in the Navy as well?

12 A. Yes. Entering a guilty plea, yeah.

13 Q. And in those situations, am I correct, as the
14 attorney for the servicemember, you would have been with them
15 in the courtroom when they entered a guilty plea?

16 A. In the courtroom, meeting them usually in the office
17 if they were at their liberty, or in the brig if they were
18 not, and prepare for the case to proceed.

19 Q. At some point, did you also engage in the practice of
20 law in the Navy as a prosecutor?

21 A. I did.

22 Q. And did that follow your time as a criminal defense
23 attorney?

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1 A. It did, for about six months or so. At the time the
2 Naval Legal Service Command had a unified legal service
3 office, prosecutors on one side of the building, defense
4 counsel on the other side, a single command structure, though,
5 over both, and then I was essentially moved across the hall to
6 the prosecution side of the building and acted as a trial
7 counsel there.

8 Q. And in your role as trial counsel or as a prosecutor
9 in the Navy, did you also engage in the -- in practice of
10 criminal law, which involved guilty pleas?

11 A. It did, yes.

12 Q. As a criminal defense attorney -- let me back up for
13 a minute.

14 Describe the process by which you would have gotten
15 to the point that someone was entering a guilty plea. What
16 did you do along the way?

17 A. As a defense counsel?

18 Q. Yes, sir.

19 A. We would be assigned the case by the senior defense
20 counsel. A file would be opened. You'd review the discovery
21 and the materials that were in the file. You'd review the
22 charging document, the charge sheet. And you'd make an
23 arrangement to meet your client.

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1 You'd meet your client, you'd interview them, explore
2 potential defenses, explore the possibility of resolving by
3 way of a guilty plea, enter into discussions with the
4 prosecutor, the trial counsel, as to whether or not a plea
5 agreement could be reached, if one was on offer, and what the
6 defense was willing to plead to.

7 If it was not going to be a guilty plea, you'd
8 consider how you were going to contest it. You'd decide which
9 forum you'd want to try it in, whether you'd do it military
10 judge alone or judge and members. Occasionally, you'd look at
11 a case and decide you'd want to go with what they'd call
12 members for sentencing. You'd enter a guilty plea before the
13 military judge, but then would put your case on in sentencing
14 before members.

15 So any variety of that would be part of the
16 preparation. Interviewing witnesses as well.

17 Q. In the process of entering a guilty plea, did you as
18 the criminal defense attorney have to go through a process of
19 making sure your client understood what he was doing and what
20 he was giving up?

21 A. When I was practicing military law, entering a guilty
22 plea was a rather rigorous exercise. You'd have to make sure
23 that the client understood what was going to be occurring when

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1 we went before the military judge to enter the plea, and that
2 the providence inquiry or the Care inquiry would be very
3 extensive.

4 And it could -- it wouldn't be a relatively quick
5 affair; it could take upwards of a half an hour or more in
6 order to make a record that would satisfy the law and the
7 military judge as to the voluntariness of the plea and the
8 providence of it, and that the accused understood that he was
9 pleading guilty because he was, in fact, guilty.

10 Q. During the course of a guilty plea where you were
11 acting as the criminal defense attorney, are you standing next
12 to the person as they enter their plea?

13 A. Yes.

14 Q. And is it incumbent upon you or is it asked of you
15 whether you believe your client understands the rights he's
16 giving up?

17 A. It would be part of the colloquy, but the colloquy
18 was very accused oriented. The military judge would carefully
19 examine the accused to ensure that the accused understood what
20 was going on.

21 Q. Were there ever times during a guilty plea colloquy
22 in which you would have to take a moment to confer with your
23 client?

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1 A. Yes. And sometimes the military judge would not be
2 satisfied with the answer that -- perhaps there was a lack of
3 understanding. Occasionally, he would ask for a break.
4 Sometimes the plea would not be accepted.

5 Q. Understood. All right. Thank you, sir.

6 Let me -- have you -- in the course of your career in
7 the Navy as an attorney, did you ever have the opportunity to
8 serve as a judge?

9 A. I did.

10 Q. Tell me about that.

11 A. This is when I was a Reservist, so I did four years
12 or so of active duty. I came off active duty and affiliated
13 with the Selective Reserve, and at some point in my career, I
14 made application to become a military judge. I was selected
15 through a board process, which I believe is -- it runs in
16 tandem or it might run at the same time as the selection of
17 active duty military judges.

18 I was selected by that board process and then was
19 sent to the Army JAG School to do military judge training at
20 Charlottesville. I believe that was in 2004.

21 Q. And for how long did you serve as a military judge?

22 A. I served as a military judge -- I'm going to say
23 about five or six years.

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1 Q. Okay.

2 A. I was ultimately assigned to the Navy-Marine Corps
3 Court of Criminal Appeals as a Reserve appellate judge, and at
4 the end of that I was the commanding officer of the appellate
5 military judges in the Reserve for that -- for that court.

6 Q. During your entire time as a military judge, is it
7 correct that you were only in the appellate level?

8 A. It was. Traditionally, you'd be sent to the trial
9 judiciary first, needs of the service. I was anticipating the
10 trial judiciary. By '05, I had been selected as a civilian
11 judge, so I thought it would have been working in tandem, as
12 it were, doing the same thing as a trial judge.

13 Q. And just staying in your active duty period for
14 another moment, did you ever have occasion to occupy the role
15 of staff judge advocate?

16 A. I did. Towards the end of my active duty, there was
17 an opening at Naval Station Philadelphia, which was the -- the
18 base where the NLSO was, the Naval Legal Service Office, and
19 the incumbent had retired or transferred, and I volunteered
20 for that.

21 Q. Recount for us, if you would, in the -- in your
22 active duty time the places, the bases you were assigned to.

23 A. Newport for training, Norfolk for lawyer at sea, and

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1 then Philadelphia for the balance.

2 Q. Those three?

3 A. Yes, sir.

4 Q. All right. I think you said before that you left
5 active duty after four years; is that correct?

6 A. That's correct.

7 Q. And you entered the Reserves?

8 A. Yes.

9 Q. And tell us how that worked. For the Navy, what was
10 that?

11 A. You -- when I came in, it was an eight-year contract
12 that you signed, and you'd finish off the balance as a
13 Reservist. If you did not want to affiliate with the Reserves
14 on a more active basis, you just stayed in the Reserves until
15 your contract expired.

16 I elected to affiliate with the Selective Reserve and
17 was assigned as a lieutenant to a unit. I think my first
18 assignment was to also a Legal Service Office supporting unit
19 that would support one of the Legal Service Offices. I
20 believe it was the one in Staten Island, that no longer exists
21 either.

22 Q. For how long a period did you remain a Reservist?

23 A. I retired in April 1, 2011. I've transferred to the

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1 Retired Reserves, so I guess I'm still a Reservist, but
2 retired.

3 Q. Understood. Upon leaving active duty, sir, tell us
4 what employment, if any, you took up.

5 A. When I left active duty, my wife and I had settled in
6 southern New Jersey, and so I looked for work around there. I
7 had applied to prosecutors' offices, the public defender, the
8 county council, some law firms. The casino industry was very
9 big in southern New Jersey, and each of it -- each property
10 had its own law department, so I sent resumés to those.

11 And then I was hired by a company that was then known
12 as Bally Manufacturing, which was a gaming device
13 manufacturing company out of Chicago, a publicly traded
14 New York Stock Exchange company, which had offices in Atlantic
15 City. I was hired as staff counsel there in 1990.

16 Q. And for how long did you remain with that company?

17 A. I stayed with -- Bally Entertainment went through a
18 series of mergers and acquisitions, was purchased by Hilton
19 Gaming, and then, in turn, spun out into something known as
20 Park Place Entertainment, which then merged with something
21 known as Grand Casinos, and ultimately purchased Caesars. And
22 for -- through those several transactions, I stayed with the
23 company and advanced and was with them until 2005, 15 years.

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1 Q. And could you just give us an idea of what titles you
2 held within that corporation?

3 A. Started as staff counsel, became assistant vice
4 president legal affairs for Atlantic City. I became vice
5 president and general counsel for the eastern division of the
6 company. And then my last position was executive vice
7 president, secretary, and general counsel.

8 Q. And I'm sorry, sir, you concluded your work with that
9 company when, what year?

10 A. In 2004, Harrah's made a tender for Caesars. We
11 spent a year completing that transaction, and the transaction
12 closed in June of 2005.

13 Q. And in or around 2005, did you begin a new career?

14 A. I did. I knew that I was not going to be staying
15 with the surviving company after the merger, and I was looking
16 at what I was going to do next with my career.

17 I was asked by our local state senator if I had an
18 interest in the bench. At this point, I had already been
19 selected as a military judge. He -- our senator was a former
20 Marine, and we were friendly, and asked me if I was
21 interested. I said, yes, I was, and made the application
22 process that -- to be a judge in New Jersey, one is appointed
23 by the governor and confirmed by the senate, similar to the

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1 federal system, and you serve after a term of seven years for
2 reappointment, and then it's life.

3 Q. And did you, in fact, receive an appointment by the
4 governor ----

5 A. I did.

6 Q. ---- or nomination, I guess?

7 A. Yes. Nominated by the governor, appointed by the
8 governor, yes.

9 Q. And at some point, were you confirmed by the state
10 senate?

11 A. I was. I was confirmed right around the time that
12 the transaction with Harrah's closed. I can't be certain of
13 the exact date.

14 Q. That's all right.

15 A. And I took three months before I took the bench
16 because I was wrapping up some of the transaction. And before
17 one commits to serving as a judge, you should have your legal
18 business wrapped up, so I was spending three months or so to
19 wrap it up. I took the bench in October of '05.

20 Q. So have you been a judge since 2005?

21 A. Yes.

22 Q. And always in the same -- on the same court, in the
23 same area?

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1 A. Always in the Superior Court, always in the law
2 division, assigned to the criminal part.

3 Q. So you've been a criminal judge all that time?

4 A. I have.

5 Q. And what -- do you serve more than one county?

6 A. I do. I came on as a trial court judge, judge of the
7 Superior Court for Atlantic and Cape May County, primarily
8 serving in Atlantic County. And then in 2015, I was named the
9 presiding judge of our vicinage for the criminal part, so I'm
10 responsible for the criminal courts in Atlantic and Cape May
11 counties.

12 Q. Sir, as part -- in your work as a Superior Court
13 judge for New Jersey assigned to the criminal law area, how
14 much do you deal with negotiated guilty pleas?

15 A. Every day.

16 Q. Can you give us an estimate about how many in a year
17 you handle?

18 A. Judges in our vicinage handle approximately 5- to 600
19 dispositions a year. So a disposition could be a guilty plea,
20 it could be a trial, it could be a diversion through pretrial
21 intervention or drug court or something like that. So about
22 700; and of those, the majority are guilty pleas.

23 Q. So fair to say hundreds per year?

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1 A. Hundreds, yes.

2 Q. Now, in -- am I correct that in New Jersey, the
3 effect of a guilty plea is that you -- a client -- or I'm
4 sorry, an accused or a defendant gives up various
5 constitutional rights?

6 A. The colloquy with a criminal defendant is not -- it's
7 not the same as a colloquy that one would have with an accused
8 in the military court, although it hits all of the same
9 topics: An understanding of the -- what is occurring in the
10 courtroom, an acknowledgement that they would be waiving
11 certain constitutional rights by entering a guilty plea, and
12 then a factual basis upon which the court can enter a finding
13 of guilt.

14 Q. Now, you told us before about when you were handling
15 guilty pleas as a defense attorney, a criminal defense
16 attorney in the military. Now handling them as a judge,
17 you're in a different position vis-a-vis the client or the
18 defendant; am I correct?

19 A. Correct.

20 Q. And is it incumbent upon you, the judge, to make
21 certain findings?

22 A. It is.

23 Q. And do those concern, among other things, that the

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1 accused or defendant understands what he's doing?

2 A. The first series of questions are, first, assure
3 myself that I'm talking to the person named in the indictment.

4 Q. That would help.

5 A. So the defendant identifies himself. I ask him if
6 he's taken anything that would prevent him from understanding
7 what's going on. Sometimes a defendant is on medication, so I
8 explore that with him. And if it would appear it would not
9 allow him to understand the proceedings, we would adjourn, of
10 course.

11 I would then ask him how old he is; the extent of his
12 education; whether he reads, writes, understands the English
13 language or the language in which he is conversing with the
14 court through an interpreter; whether or not he's had the
15 advice of counsel and the opportunity to consult with counsel;
16 whether he is satisfied with that counsel's advice.

17 And having satisfied myself of those and several
18 other questions, tending to the nature of the plea itself,
19 indictments might have 25 or 30 counts in it, and this
20 defendant may be only entering into a plea on one or two
21 counts. So sentencing exposure changes depending on the
22 nature of the plea. I'll discuss that with him.

23 And as I become satisfied with that part of the

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1 colloquy, then I go into an explanation of the three chief
2 constitutional rights that he's waiving in order to enter a
3 plea: Right to remain silent; right to confront the evidence
4 against him, chief amongst them; right to put on his own case
5 at trial.

6 And if I'm satisfied with that, then we turn to the
7 indictment. And I go through, similar to what would happen in
8 a military guilty plea, count by count, element by element,
9 explore potentials for defenses, if that is raised by the
10 defendant. "I was only defending myself, that's why I did it,
11 Judge." Okay. Well, let's talk about that. And once
12 satisfied that the plea is being entered knowingly,
13 intelligently, and voluntarily, I enter a series of findings
14 based on that.

15 Q. Is it typical that you don't know this person prior
16 to the guilty plea?

17 A. Know them personally like I know a friend?

18 Q. Right.

19 A. The answer to that would be no. I would recuse
20 myself if I happened to know -- and it does happen. It's a
21 relatively small town where we live, and you will see or know
22 people, so I would recuse myself.

23 I know defendants, though, by name and reputation.

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1 We have repeat offenders that cycle through the court system.
2 And after going on 15 years now, I have seen defendants
3 several times.

4 Q. Judge DeLury, when you're making this determination
5 you've told us about regarding -- at the conclusion of a
6 guilty plea, is it correct that your assessment and your
7 determination is based just on what's happening in that
8 courtroom?

9 A. Almost entirely. There may have been a mental health
10 evaluation. If the defendant presents at a certain point
11 before the plea is entered with concerns regarding his mental
12 health, I would order an evaluation. So that might inform
13 what I'm doing at the course of taking a plea. But generally,
14 it's what I hear and see in court while I'm hearing and seeing
15 it.

16 Q. Do you at times have to handle situations where
17 there's a language barrier between yourself and the defendant
18 or accused?

19 A. Frequently.

20 Q. And is there translators assigned or available?

21 A. There are. Court appointed and certified translators
22 are assigned to the courtrooms.

23 Q. Are there times that you have -- that you have had

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1 concerns of a knowing and voluntary waiver by an accused?

2 A. Yeah. I have rejected pleas. I take it, you know,
3 seriously that someone is giving up their constitutional
4 rights, albeit for what they believe to be a favorable outcome
5 by a negotiation. But even if it is favorable, if I'm not
6 satisfied on those three general areas, I talked about I would
7 reject a plea. We don't have Alford pleas in New Jersey. One
8 must, in fact, be guilty and admit one's guilt before a plea
9 can be accepted.

10 Q. We have been talking about guilty pleas. Let me ask
11 you this: In the course of your work as a judge now, are you
12 faced at times where other similar -- or other situations in
13 which you also are called upon to make determinations as to a
14 person giving up rights?

15 A. Certainly. I have a motion calendar like every other
16 judge and statements might be moved to be suppressed, so I
17 have to make determinations of the voluntariness of the
18 defendant's statement and whether it was obtained properly by
19 law enforcement.

20 I conduct a fact-finding hearing, take evidence and
21 testimony and make a determination based on that, and
22 sometimes the defendant testifies at such a hearing; sometimes
23 not. I make similar determinations when evidence is to be

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1 suppressed, nontestimonial evidence, so physical evidence,
2 whether by consent or by an unwarranted search; sometimes by a
3 warranted search.

4 Q. Sir, I'd like to now turn the page and move into
5 another area, and I'd like to raise to you the subject of the
6 Combatant Status Review Tribunal. Are you aware of that?

7 A. I am.

8 Q. Could you please explain to us what it was? Well,
9 first of all, did you have participation in such things ----

10 A. I did.

11 Q. ---- in such tribunals?

12 A. I was a tribunal member in 2004 here in Guantanamo,
13 and assigned as the judge advocate member of several tribunals
14 here. And then I was also on CSRTs in 2007 as a tribunal
15 president and also as the judge advocate member.

16 Q. And if you would, now, sir, give us an explanation of
17 what the CSRT process was back at that time, for what purpose
18 and so on.

19 A. It was to determine the enemy combatant status of
20 those detained here at Guantanamo. And if the determination
21 was that they were an enemy combatant, then further
22 proceedings would be had to determine their continued
23 detention.

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1 After the CSRT process there was something known as
2 the ARB. I think it was the Administrative Review Board
3 process that met on a yearly basis after the initial
4 determination was made. If determination was made by the
5 tribunal that the person -- the detainee was not an enemy
6 combatant, as that term was defined in the instruction, then
7 arrangements would be made to release him through the
8 Department of State.

9 Q. I think you told us you had two different stints on
10 the CSRT?

11 A. Yes.

12 Q. The first one being in 2004?

13 A. Yes.

14 Q. Approximately, if you can, how many different review
15 tribunals did you sit on back in '04?

16 A. Two or three dozen.

17 Q. And I believe you said you were the JAG member. What
18 does that mean?

19 A. The way the instruction was written -- and I can't
20 quote the title of the instruction exactly without reference
21 to it, but I believe it was -- at that point, it would have
22 been an instruction from 2004 where it provided for three
23 military -- impartial, uninvolved military officers,

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1 uninvolvement with the apprehension or detention of the detainee,
2 to be assigned to hear the cases I just described. One of
3 them had to be a judge advocate member; one, the president,
4 had to be O-6 or above; and then another military officer.

5 Q. Very good. So that was the '04 stint. How about
6 '07? Did something change?

7 A. '07, I believe the instruction had been modified, and
8 I don't remember why or how or what particular parts, but the
9 basic framework was the same. The -- there were three members
10 on the tribunal: A president, O-6 and above; a judge advocate
11 member; and another military officer, who were not involved in
12 the apprehension, detention of the detainee, to make the same
13 fact-based determination, in a nonadversarial setting of the
14 detainee status as an enemy combatant.

15 Q. All right. And did your role on the '07 CSRT panel
16 change from '04?

17 A. Yes. I was appointed the president. I was -- in
18 '04, I was an O-6 select; I was not yet promoted to O-6. And
19 in '07, I was a Navy captain and, of course, a judge advocate.
20 So I was the judge advocate member as well as the president.

21 Q. All right. I'm going to focus on the '07 stint.
22 First of all, where did the tribunals take place? Where did
23 your hearings take place?

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1 A. In Camp D.

2 Q. That's here on Guantanamo?

3 A. Yes, sir.

4 Q. Could you describe the room for us?

5 A. Yes. It was in a -- a trailer-like structure,
6 prefab-type building. It was a hearing room, set up similar
7 to a courtroom, but not with all of the trappings. Instead of
8 a bench, there was a conference table, a long conference table
9 with three chairs behind it, the president in the middle, the
10 two other members on either side of the president.

11 The room, I would say, was a third of the size of
12 this room and not even as wide. On the right-hand side facing
13 the wall was a table perpendicular to the members' table where
14 the recorder and the reporter sat. In the center of the room,
15 there were three chairs, a chair for the detainee, a chair for
16 the personal representative, a chair for the linguist. And my
17 recollection is that there was a gallery behind glass on
18 the -- as you faced out on the left-hand side of the room.

19 Q. And as to the bench -- as to the table where you and
20 the other two members of the tribunal sat, was this simply a
21 table, or was it a raised bench like a judge would sit at?

22 A. Similar to counsel's table. A wooden table, black
23 formica top.

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1 Q. Okay. When you were sitting at that table and a
2 hearing was actually going on, about how far were you located
3 from the detainees over whom you were presiding at that time?

4 A. Closer than we are right now. I would say
5 approximately seven feet or so.

6 Q. Okay. Could you tell us, who would be in the room
7 during the course of the hearing?

8 A. It depended at what point in the hearing you were at.
9 It began with just the tribunal members, everyone but the
10 detainee in the hearing room, where some preliminary
11 jurisdictional procedural matters were taken up, oaths were
12 administered to some of the participants at that point. And
13 in that, it would be the tribunal members, the personal
14 representative; the linguist, if there was one; the recorder;
15 the reporter. There may have been MPs in the room. I don't
16 have a clear recollection of that, though.

17 Q. Okay. During the period of the hearing in which the
18 detainee was in the room, let's stand that for a moment.
19 First of all, were the persons in the room generally
20 servicemembers, other than the detainee?

21 A. The ones in the hearing room were entirely
22 servicemembers, to my recollection.

23 Q. And were they in uniform?

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1 A. They were.

2 Q. Describe which uniform are we talking.

3 A. I think we were in BDUs. We would not have been in
4 service uniforms. Might have been what we would call khakis
5 in -- you know, in a working uniform. But my recollection is
6 everyone was in BDUs for the hearing.

7 Q. For those of us who do not always speak military
8 acronyms, what does BDU stand for?

9 A. Battle dress utilities, the camouflage-type of
10 clothing that you see around the base.

11 Q. Okay. Were the -- during the period of the hearing
12 in which the detainee was in the room, was he restrained?

13 A. My recollection is that the detainees were restrained
14 to the floor by ankle restraints.

15 Q. Yes, sir.

16 A. And I do have a recollection of the detainees
17 handling papers while -- during the hearing, so their hands
18 may not have been restrained, although I can't be certain.

19 Q. Okay. And I'd like to talk to you for a minute or
20 two about the persons and the various roles they occupied in
21 the room. Starting with you, sir, you were what role?

22 A. President and judge advocate member.

23 Q. And is that the only judge advocate on the panel?

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1 A. I was the only judge advocate on the panel, although
2 one of the panelists was an attorney. In civilian life, he
3 was not a judge advocate.

4 Q. And there would be one more as well?

5 A. There was another -- three panelists, so myself and
6 two O-5s, a Marine Corps O-5, and an Air Force O-5. I believe
7 the Marine Corps O-5 had some sort of intelligence MOS,
8 although I'm not a hundred percent certain. And the Air Force
9 officer was a nonpilot, I know that. He was some kind of
10 other MOS in the Air Force.

11 Q. Okay. So all officers on the panel?

12 A. Yes, sir.

13 Q. I believe you mentioned before something called a
14 recorder?

15 A. The recorder was the military officer putting the
16 case for the government, as it were, would present the
17 unclassified summary to the tribunal; would call witnesses, if
18 there were any to be brought in order to establish the
19 detainee's status as an enemy combatant.

20 The instruction, as I recall, had a preference that
21 the -- that officer be a judge advocate, although my
22 recollection is none of the recorders that appeared with us
23 were judge advocates, but I'm not certain.

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1 Q. And how about a personal representative, what was
2 that?

3 A. The PR, or the personal representative, was again an
4 American military officer assigned to assist the detainee
5 through the process -- the instruction, I believe, required
6 that he not be a judge advocate -- and that he would assist
7 the detainee, deliver the unclassified materials to the
8 detainee for his review, obtain detainee witness requests, try
9 to assemble other evidence and materials that the detainee
10 wanted to have presented at the tribunal.

11 Q. And as the president, was it your job to essentially
12 preside over the whole matter?

13 A. Preside over, conduct the hearing, follow the
14 instruction, and, at the end, deliberate to reach a
15 conclusion.

16 Q. Okay. Was -- I think you mentioned this before, but
17 was this adversarial in nature, as you would call that?

18 A. It was not adversarial. It's not -- it was not a
19 court proceeding. It was not to determine the guilt or
20 innocence of an accused; it was an administrative fact-finding
21 undertaking.

22 Q. Did you see yourself as occupying any sort of a
23 prosecutorial role?

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1 A. I did not.

2 Q. Did you see yourself as occupying any sort of an
3 intelligence role?

4 A. I did not.

5 Q. Did you see yourself as occupying any sort of a law
6 enforcement role?

7 A. I'm not a law enforcement officer, then or now.

8 Q. Were all of your interactions with the detainees over
9 whom you presided in that courtroom -- or in that hearing
10 room?

11 A. They were.

12 Q. Did you have any additional meetings with them that
13 were not on the record or even on a record?

14 A. I met with the detainees only the one time, and that
15 was during the tribunal hearing in open session.

16 Q. Any -- and was there any situation in which you would
17 have had correspondence with them or anything like that, any
18 other type of communications outside that room?

19 A. There would have been correspondence as such,
20 submissions from the PR in advance of the hearing. I don't --
21 there might have actually been one, not from the detainee but
22 from a PR after a hearing, where there was a question from the
23 PR about the questioning that was done by one of the tribunal

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1 members in one of the hearings. But no direct contact with
2 the detainee himself.

3 Submissions would be given to the tribunal through
4 the PR for consideration; for example, a request for the
5 presence of witness or documents.

6 Q. Is it correct to -- well, first of all, let me ask it
7 this way: Did the personal representative typically, if you
8 know, have contact with the detainee prior to the hearing?

9 A. I -- to my knowledge, they had frequent contact with
10 the detainee in preparation for the tribunal hearing. They
11 would keep minutes of it, note what they had done, and it
12 would become part of the record, I believe.

13 Q. Very good. Sir, what -- approximately -- strike
14 that.

15 The period of time in which you conducted hearings in
16 the '07 time period, about how long was that?

17 A. I received a phone call from the CSRT staff in
18 Washington in the fall of '06, asking whether or not I would
19 be interested in returning to Guantanamo to serve on CSRTs,
20 and I said yes. And the orders were then issued to me to
21 report in December.

22 I reported stateside in December, brief meeting in
23 Washington with CSRT staff to let me know, you know, what I'd

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1 be doing and where I was going. And then jumped off from JAX,
2 I think, Jacksonville, and came down here on the island end of
3 December, beginning of January.

4 Q. Of -- of January '07 ----

5 A. '06-'07, early '07, say January '07. And I was here
6 until April of '07 when they were concluded. And I had a
7 couple of trips to Washington to review some of the records
8 that we had created, sign off on something. But I was done,
9 for all intents and purposes, by the beginning of April of
10 '07.

11 Q. Understood. When you -- during the '07 stint, you
12 had already been on the state court bench; am I correct?

13 A. Yes. I had been a judge for about a -- state judge
14 for about a year and a half and had been a military judge
15 since sometime in '04.

16 Q. Very good. Judge DeLury, during the time period of
17 early '07, were you aware of any activity by the FBI and other
18 law enforcement officers in relation to the persons who would
19 be the subject of your tribunals?

20 A. I was not.

21 Q. To the best of your knowledge, have you ever read any
22 of the reports that may have come out of any such meetings?

23 A. I have not until this day, I believe. Any of the

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1 materials I've reviewed, which were provided to me, were those
2 that were created at the time of the CSRTs.

3 Q. Good. We're going to come to that now.

4 The CSRT process as it occurred in the hearing -- I
5 think you've testified it was recorded; am I right?

6 A. It was.

7 Q. How was it recorded?

8 A. I have impression of a large recording device, two
9 and a half foot by one and a half foot, sitting on the
10 recorder or reporter's table; whether it was digital or
11 cassette, I couldn't tell you. But there was a recording
12 device. I have a recollection of microphones like this
13 being at members' table as well as at the recorder's table.
14 There might have been a free-standing mic as well near the
15 detainee.

16 Q. Was a transcript created?

17 A. It was.

18 Q. And was at some point that transcript subject to a
19 review process by someone in the room or a certification
20 process, something like that?

21 A. Generally -- well, after we completed the tribunal in
22 open session and then there was a closed session where the
23 detainee was not present where classified information was

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1 provided, when that was all done and the documents had been
2 assembled and the tribunal deliberated after materials had
3 been submitted -- we would deliberate in private, not on the
4 record -- and we'd reach a conclusion. I believe in the seven
5 that we handled, they were all unanimous conclusions, there
6 was no dissenting, 3-0.

7 And then one of us would prepare the report, assemble
8 the documents, and review a transcript. The reporter who was
9 assigned, his first task would be to listen to the recording
10 and transcribe a document in draft. And then I took it upon
11 myself to review each of them, sometimes listening to the
12 tape-recording itself if I wasn't confident that what was
13 typed was what I thought I had heard, to ensure the accuracy
14 of the transcript. And when that was completed, I signed it,
15 certifying it, that it was an accurate and complete record.

16 Q. Okay. In preparation of your testimony today, did
17 you have occasion to review transcripts of CSRT hearings over
18 which you presided?

19 A. I did, the materials that you had provided to me.

20 Q. And, sir, tell me -- first of all, in general, over
21 the months in '07 that you were conducting these hearings,
22 about how many detainees were you responsible for?

23 A. I was assigned seven of the 14 detainees that were

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1 called the HVD, or high-value detainees, and I was assigned
2 seven.

3 Q. So half?

4 A. Yes.

5 Q. There was another panel?

6 A. There was. There was another CSRT. We were CSRT 38,
7 if memory serves. The other one might have been 37 or 39, I
8 don't know.

9 Q. Understood.

10 A. And that was presided over by an Air Force colonel on
11 his panel -- on that panel.

12 Q. Among the seven that you were responsible for, did
13 they include Khalid Shaikh Mohammad?

14 A. Yes.

15 Q. Did they include Ali Aziz Ali, otherwise known as
16 Ammar al Baluchi?

17 A. Yes.

18 Q. Did they include Khallad Bin'Attash?

19 A. Yes.

20 Q. Did they include Mustafa al Hawsawi?

21 A. Yes.

22 Q. Did they include Ramzi Binalshibh?

23 A. Yes. Although his -- he did not attend the tribunal,

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1 as I recall. It was conducted in his absence.

2 TC [MR. RYAN]: Your Honor, the -- just to highlight where
3 I intend to go now, we have provided a notice of exhibits, and
4 the transcripts about which Judge DeLury was just making
5 reference appear in the pleading that is titled -- and I think
6 it's the longest title we've had yet --
7 628WW/629F/630J/631H/632N. It is titled "Government
8 Consolidated Notice of Exhibits."

9 And specifically, the matters we'll be going into are
10 found at Attachments B, C, D, E; Bravo, Charlie, Delta, Echo,
11 and Foxtrot.

12 MJ [Col COHEN]: Thank you, Mr. Ryan.

13 TC [MR. RYAN]: Yes, sir.

14 Q. Judge DeLury, you have had a chance to review that
15 binder?

16 A. I have.

17 Q. And am I correct that what is contained in there is
18 what I just referred to as the government's exhibits?

19 A. I'll take your word for it, but, yes, it's the binder
20 you gave me.

21 Q. Well, let me ask you this: Are they the transcripts
22 that you recognize?

23 A. They are, yes.

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1 Q. Are they the transcripts over which you -- I'm sorry,
2 transcripts of hearings over which you presided?

3 A. They are.

4 Q. The transcripts -- have you reviewed these
5 transcripts over the last couple of days?

6 A. I did, starting on Sunday.

7 Q. And do they fairly and accurately capture the
8 proceedings over which you presided?

9 A. They do.

10 Q. Do they appear to be the same transcripts that you
11 reviewed and certified some time ago?

12 A. They ----

13 Q. And please note any changes you saw.

14 A. They appear to be. There were no additions, although
15 the -- they do appear to have been redacted, at least in some
16 places.

17 Q. Very good.

18 As far as the information that is contained -- and
19 that, by the way, is unclassified; am I correct?

20 A. The binder I have here says UNCLASSIFIED, yes, sir.

21 Q. As far as matters that are contained in that
22 unclass -- those unclassified transcripts, are they fair and
23 accurate?

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1 A. They are.

2 Q. All right. And was there a record of the tribunal
3 hearings that included more than just the transcript of the
4 hearing itself?

5 A. Yes. There was a -- after we completed deliberations
6 and assembled the materials, a transmittal was completed by
7 me, as the tribunal president, forwarding to the convening
8 authority the transcript, unredacted, at least when it left my
9 signature; the -- several exhibits, the unclassified and
10 classified summary of exhibits; and other materials that were
11 pertinent to the proceeding.

12 Q. Okay. The items in the binder before you, the
13 government's notice of exhibits, do not contain, am I correct,
14 all of the matters that would have been in the CSRT package?

15 A. They do not.

16 Q. Judge, I want to ---- Judge DeLury, I want to sort of
17 define the playing field for you now, if I could.

18 A. Sure.

19 Q. I'm going to ----

20 MJ [Col COHEN]: Mr. Ryan, the court reporters have asked
21 me to remind you not to stray too far from the mic. They
22 can't pick you up. Thank you.

23 TC [MR. RYAN]: Will do so, sir. Thank you.

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1 Q. Judge DeLury, I'm going to ask you questions about
2 the CSRT process, to include the transcript of the hearings
3 and certain exhibits that we attached -- two of the
4 transcripts within that binder and within the government's
5 consolidated notice.

6 I want to ----

7 LDC [MR. RUIZ]: Judge, may I be heard?

8 MJ [Col COHEN]: Mr. Ruiz.

9 LDC [MR. RUIZ]: Judge, with respect to Tab Number 11 --
10 or Tab B, Hawsawi Number 11 in the exhibit Mr. Ryan just
11 referenced, I object on the basis of relevance ----

12 MJ [Col COHEN]: Okay.

13 LDC [MR. RUIZ]: ---- for 401, 402, and 403, at this time.

14 MJ [Col COHEN]: Okay. Thank you for noting the
15 objection.

16 TC [MR. RYAN]: May I continue, sir?

17 MJ [Col COHEN]: You may.

18 Q. I want to be clear, sir, that I am not going into
19 areas of the findings of the tribunal or the deliberations of
20 the tribunal. We understand each other?

21 A. Yes, sir.

22 Q. What I am seeking evidence from you is concerning
23 statements made by the various detainees as well as their

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1 demeanor as it may or may not reflect on their abilities to
2 act voluntarily. Do you understand me?

3 A. I understand, sir.

4 Q. All right. If I ask a question at some point that
5 seems to make you think I'm going into areas of deliberation
6 or findings or determination, I am not, and you cannot answer
7 in that term.

8 A. I understand, sir.

9 TC [MR. RYAN]: Your Honor, the -- what I would like to do
10 now is cover the attachments within the government's
11 consolidated notice of exhibits, which is a little bit -- I'd
12 like to cover them in the chronological order in which the
13 various hearings occurred, which is a little bit different
14 than the A, B, C, D sequence.

15 MJ [Col COHEN]: That will be fine.

16 TC [MR. RYAN]: But, of course, I'll note each time we're
17 moving, what attachment we should be on, and I'll also draw
18 the commission's and the parties' and the witness' attention
19 to page numbers to the very best extent I can.

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

21 TC [MR. RYAN]: Also, Your Honor, we have prepared certain
22 pages to be published or displayed in a public setting. It's
23 certainly not every page, but I will, with the court's

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1 permission, with the commission's permission, I will call for
2 Master Sergeant Horn to display those pages.

3 MJ [Col COHEN]: That would be fine.

4 **DIRECT EXAMINATION CONTINUED**

5 **Questions by the Trial Counsel [MR. RYAN]:**

6 Q. Judge DeLury, if you would, could you please turn to
7 Attachment C.

8 A. The binder that was here on the witness stand?

9 Q. No, sir. The binder that was provided to you by the
10 United States, by the prosecution.

11 A. Thank you. Yes, sir. I'm sorry, which ----

12 MJ [Col COHEN]: I'm sure the other one -- the defense
13 will be using the other binder.

14 WIT: Thank you, sir.

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

16 Q. Attachment C.

17 A. C, Charlie?

18 Q. C, as in Charlie, yes. Thank you.

19 A. Yes, sir.

20 TC [MR. RYAN]: And first, I'll ask if -- can I ask for
21 the feed from Table 3, please, Your Honor?

22 MJ [Col COHEN]: You may.

23 TC [MR. RYAN]: And I will ask that we display the first

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1 page. Thank you, Master Sergeant Horn.

2 Q. First of all, sir, do you recognize the page that's
3 in front of you?

4 A. I do.

5 Q. And have you reviewed it before?

6 A. I have.

7 Q. And is it part of one of the transcripts that you
8 ultimately had certified some time ago?

9 A. It is.

10 MJ [Col COHEN]: Sir, did you want this published to the
11 gallery or just counsel?

12 TC [MR. RYAN]: Yes, sir. I'm sorry. I would like to
13 have it published ----

14 MJ [Col COHEN]: It may be.

15 TC [MR. RYAN]: ---- to the gallery. That's correct.

16 MJ [Col COHEN]: Thank you.

17 LDC [MR. SOWARDS]: Excuse me, Your Honor.

18 MJ [Col COHEN]: Mr. Sowards.

19 LDC [MR. SOWARDS]: Yes, sir. On behalf of Mr. Mohammad,
20 we would also object at this time to the relevance of this.

21 MJ [Col COHEN]: Understand. Thank you.

22 LDC [MR. SOWARDS]: And also in the absence of any ruling
23 by the military commission as to its voluntariness.

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1 MJ [Col COHEN]: Okay. Thank you.

2 LDC [MR. RUIZ]: Your Honor.

3 MJ [Col COHEN]: Mr. Ruiz.

4 LDC [MR. RUIZ]: I know you've noted my objection;
5 however, I see where this is going. I ask the court for
6 additional argument on this particular objection when you deem
7 appropriate.

8 MJ [Col COHEN]: Okay. Yeah, consistent with the
9 guidelines that I gave, which was that I would -- I would note
10 objections and that no evidence will be considered against a
11 particular party until you have a final ruling.

12 TC [MR. RYAN]: May I, sir?

13 LDC [MR. RUIZ]: Yes, sir. I would, just when the time
14 comes and Mr. Ryan intends to discuss Mr. al Hawsawi's
15 portion, I would like to be heard, please.

16 MJ [Col COHEN]: Okay. Mr. Ryan.

17 TC [MR. RYAN]: Yes, sir. I will do that. All right.

18 **DIRECT EXAMINATION CONTINUED**

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

20 Q. Judge DeLury, are we on the page?

21 A. I am. It's 067 in the Bates stamp at the bottom?

22 Q. Yes. I'll refer -- I'll orient everyone. At the
23 bottom, Judge, just to make sure -- Judge DeLury, just to make

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1 sure you're with me, there is page 1 of 26. Do you see that?

2 A. Yes, sir.

3 Q. And then there is a Bates stamp number that ends
4 after many zeros in 67, and then dash 10024?

5 A. I see it.

6 Q. All right. Sir, first of all, at the top of the
7 page, do you see where it is highlighted and it says
8 "ISN 10024"?

9 A. I do.

10 Q. Who is ISN 10024?

11 A. Khalid Shaikh Mohammad.

12 Q. And if you notice, there is also the date a little
13 bit further down where the recorder is speaking, it says,
14 "This tribunal is being conducted at 1328, March 10, 2007,
15 onboard U.S. Naval Base Guantanamo Bay, Cuba."

16 Do you see that, sir?

17 A. I do.

18 Q. Is that, in fact, the date that this occurred?

19 A. It was.

20 Q. And is that, in fact, the location where it occurred?

21 A. It was.

22 Q. And then just below that, it says, "Captain" -- then
23 in parenthesis, redacted -- "United States Navy, President."

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1 Who is that?

2 A. Me.

3 Q. And when you reviewed and certified this transcript,
4 was your -- did your name actually appear? It was not
5 redacted?

6 A. It did. My full name was printed in the transcript.

7 Q. Very good.

8 I'm going to ask for the witness and the parties to
9 turn to the next page which I am not seeking to display to the
10 gallery, and it will say page 2 of 26.

11 Judge DeLury, are you there?

12 A. I am.

13 MJ [Col COHEN]: No longer published to the gallery.

14 TC [MR. RYAN]: Yeah, this one is not, sir. As we move
15 forward, Judge ----

16 MJ [Col COHEN]: There we go. All right.

17 TC [MR. RYAN]: ---- Master Sergeant Cohen [sic] will just
18 keep up with me.

19 MJ [Col COHEN]: All right, that's okay.

20 TC [MR. RYAN]: I don't mind if we stand the last page up
21 to the commission.

22 MJ [Col COHEN]: All right. We're good. It should be
23 just witnesses and party -- parties.

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1 TC [MR. RYAN]: Very good, sir.

2 Q. During the course of your -- the hearing, did you at
3 some point come to a point where you discussed with the
4 detainee his English capability?

5 A. I did.

6 Q. And I will go further down, and does it appear on
7 this page?

8 A. It does, about halfway down the page.

9 Q. Could you read your interaction for us with the
10 detainee?

11 A. "President: Before we begin, Khalid Shaikh Mohammad,
12 I understand you speak and understand English; is that
13 correct?

14 "Detainee" -- and then a note in brackets, "Detainee
15 nods his head in affirmative.

16 "President: All right. Are you comfortable in
17 continuing in English or would you like everything translated
18 in Arabic?

19 "Detainee: Everything in English. But if I have a
20 problem, the linguist will help me."

21 Q. And could you read the next line, please?

22 A. Yes.

23 "President: We will proceed in English. If you

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1 indicate to me that you would like something translated, we
2 will go ahead and do that. All right?"

3 Q. During this point in time, sir, were you watching and
4 speaking directly to the accused?

5 A. Looking him right in the face and speaking to him,
6 yes.

7 Q. All right. And were you -- did you make an
8 assessment as to his ability to understand you?

9 A. He appeared to be understanding our exchange and
10 appeared to me to respond responsively, appropriately.

11 Q. Very good. I'll ask you to turn to the next page,
12 please.

13 TC [MR. RYAN]: Your Honor, could I have the court's
14 indulgence one moment?

15 MJ [Col COHEN]: You may.

16 [Counsel conferred.]

17 TC [MR. RYAN]: Thank you, Your Honor.

18 Q. Judge DeLury, on this page, do you see about halfway
19 down where it says "Explanation of Proceedings"?

20 A. I do.

21 Q. And at this point, are you -- did you engage in
22 another discussion with the detainee?

23 A. I did. I explained the proceedings, how they would

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1 be conducted, and what his rights and abilities would be at
2 that portion of the hearing that he attended.

3 Q. All right. Would you read that for -- strike that.

4 This particular portion of the proceedings, was this
5 done in every case?

6 A. It was.

7 Q. And was this a significant part of the proceedings?

8 A. It was.

9 Q. Is this where you first explain what is happening to
10 the detainee?

11 A. It would not be the first time it would have been
12 explained to him, but it was the first time I was explaining
13 it to him on the record, yes.

14 Q. Understood. Could you read for us, please, your
15 statements there under "Explanation of Proceedings"?

16 A. Beginning right under that?

17 Q. Right under "Explanation," yes, sir.

18 A. "President: Khalid Shaikh Mohammad, you are hereby
19 advised that the following applies during this hearing:

20 "President: You may be present at all open sessions
21 of the tribunal; however, if you become disorderly, you will
22 be removed from the hearing, and the tribunal will continue to
23 hear evidence in your absence.

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1 "President: You may not be compelled to testify at
2 this tribunal; however, you may testify if you wish to do so.
3 Your testimony can be under oath or unsworn.

4 "President: You may have the assistance of a
5 personal representative at the hearing. Your assigned
6 personal representative is present.

7 "President: You may present evidence to this
8 tribunal, including the testimony of witnesses who are
9 reasonably available and whose testimony is relevant to this
10 hearing. You may question witnesses testifying at the
11 tribunal."

12 Q. I'll stop you there for one moment, sir.

13 TC [MR. RYAN]: I'll ask everyone to turn to page 4 of 26,
14 CSRT number, after many zeros, ending in 70. And I'll ask
15 Master Sergeant Horn to please display this photograph -- this
16 page. I think we are.

17 MJ [Col COHEN]: You may publish. Do you want this to the
18 gallery or do you want this ----

19 TC [MR. RYAN]: Yes, sir. I'm sorry, I do.

20 MJ [Col COHEN]: Okay.

21 TC [MR. RYAN]: I'll ask that specifically going forward,
22 Your Honor.

23 MJ [Col COHEN]: Please do.

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1 Q. Sir, if you would, please continue reading.

2 A. "President: You may examine documents or statements
3 offered into evidence other than classified information;
4 however, certain documents may be partially masked for
5 security reasons.

6 "President: Khalid Shaikh Mohammad, do you
7 understand this process?

8 "Detainee: Yes. If I have question, can I ask you?

9 "President: Yes, you may.

10 "Detainee: About the testimony which I ask about the
11 witnesses?

12 "President: Yes. I'm going to address the witnesses
13 shortly. So if you will bear with us, I'll take that up in a
14 few moments.

15 "Detainee: Okay.

16 "President: Do you have any questions concerning the
17 tribunal process?

18 "Detainee: Okay by me."

19 Q. During the course of the period that you were reading
20 this and the detainee was answering, did you again have the
21 ability to observe him?

22 A. I did.

23 Q. And were you satisfied that his answers were accurate

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1 and honestly stated?

2 A. I was -- I was assured that he understood what I was
3 saying. I would have stopped if I had a question that he
4 wasn't.

5 Q. I'd like to turn your attention down to the bottom of
6 this same page where it says "Recorder," the last entry, and
7 I'll read that: "I am handing the tribunal what has
8 previously been marked as Exhibit R-1, the unclassified
9 summary of the evidence that relates to this detainee's status
10 as an enemy combatant."

11 What is an unclassified summary, sir, as it -- as it
12 existed in these proceedings?

13 A. The unclassified summary was a summary of the
14 intelligence and materials that were gathered by the recorder
15 in order to establish sufficient facts to -- for the tribunal
16 to consider whether or not the detainee was an enemy
17 combatant.

18 Q. And were these unclassified summaries presented in
19 every case?

20 A. They were.

21 Q. All right. And in this case, once -- well, first of
22 all, was the unclassified summary actually presented in open
23 court, in open session?

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1 A. It was.

2 Q. And in this case, it went on for several pages; am I
3 correct?

4 A. That's correct.

5 Q. I would like to now turn your attention to page 8 of
6 26, and the Bates number ends, after many zeros, with
7 74-10024.

8 A. I have it.

9 Q. You there? At the top, could you read the first
10 entry from president as well as the detainee's answer.

11 A. "President: Khalid Shaikh Mohammad, you may now make
12 an oral statement to the tribunal, and you have the assistance
13 of your personal representative in doing so. Do you wish to
14 make an oral statement to this tribunal?

15 "Detainee: He will start, the personal
16 representative. PR will read, then later I will comment."

17 Q. Was this done -- was this opportunity granted in
18 every situation?

19 A. It was.

20 Q. And referring you down to the bottom of the page, did
21 the detainee or his personal representative make a response?

22 A. Yes.

23 Q. And I'll just refer to it.

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1 "President: You may proceed, PR."

2 And the personal representative states, "The detainee
3 responds to the unclassified summary of evidence with the
4 following key points."

5 And on the last paragraph on that page, the second
6 sentence, it reads, "For example, paragraph 3-a is only
7 information from news or a historical account of events on
8 11 September 2001, and note, with no specific linkage being
9 made in this paragraph to me or the definition of enemy
10 combatant."

11 Did you see that, sir?

12 A. I do.

13 TC [MR. RYAN]: This page, Your Honor, I'd ask to display
14 to the gallery; that is -- it is now page 9 of 26.

15 MJ [Col COHEN]: You may do so.

16 Q. About a little bit further down, sir, under "Personal
17 Representative," the second sentence, "I never stated to the
18 AL Jazeera reporter that I was the head of the al Qaeda
19 military committee." Then also, "Subparagraph 3-s is false.
20 I did not receive any from -- funds from Kuwait."

21 Then the next section that says "Personal
22 Representative." Point number three, "There is an unfair
23 stacking of evidence in the way the summary of evidence is

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1 structured. In other words, there are several sub-paragraphs
2 under parent paragraph 3 which should be combined into one
3 subparagraph to avoid creating the false perception that there
4 are more allegations or statements against me specifically
5 than there actually are."

6 Who is the personal representative speaking on behalf
7 of at this point?

8 A. The detainee.

9 Q. And in making such observations or objections, what
10 is -- what are they commenting about?

11 A. The unclassified summary of the evidence.

12 Q. I will ask you, sir, now, to go to page 17 of 26.

13 TC [MR. RYAN]: And I'll again ask that it be published
14 for the gallery, Your Honor. At the bottom, it would read
15 under the Bates stamp number, many zeros, 83-10024.

16 MJ [Col COHEN]: You may.

17 TC [MR. RYAN]: Thank you, sir.

18 Q. Now, Judge DeLury, notwithstanding the objections or
19 comments that we were just looking at several pages back, did
20 the detainee Shaikh Mohammad then go on to make an affirmative
21 statement regarding himself?

22 A. He did.

23 Q. If you would, looking at the highlighted portion

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1 where it says, "representative," could you please read that.

2 A. "Personal Representative: Mr. President, the
3 detainee has asked me to read his final statement to the
4 tribunal with the understanding he may interject or add
5 statements if he needs to to correct what I say. According to
6 the detainee" -- continue?

7 Q. Yes, sir.

8 A. "I hereby admit and affirm without duress to the
9 following: One" ----

10 Q. Would you read number one, please.

11 A. "I swore Bay'aat, that is allegiance, to Shaikh Usama
12 bin Laden, to conduct jihad of self and money and also
13 Hijarah, that is expatriation to any location in the world
14 where jihad is required."

15 Q. And now, sir, I'll ask you to jump down to the
16 highlighted portion at paragraph 4.

17 A. Yes.

18 Q. Would you read that, please?

19 A. "Personal Representative" -- continuing -- "4. I was
20 the operational director for Shaikh Usama bin Laden, where the
21 organizing, planning, follow-up, and execution of the 9/11
22 operation under the military commander, Sheikh Abu Hafs al
23 Masri Subhi Abu Sittah."

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1 Q. The detainee's statement goes on for several pages as
2 well, does it not?

3 A. It does.

4 Q. We won't go through those. I will ask you to turn to
5 page 20 of 26 of this CSRT transcript.

6 TC [MR. RYAN]: And I will ask Master Sergeant Horn to
7 publish this, and that it be displayed for the gallery. The
8 Bates number ends in 86-10024.

9 MJ [Col COHEN]: You may.

10 Q. At the top, sir, where it is highlighted, I'll be --
11 I will read: "Sir, that concludes the written portion of the
12 detainee's final statement, and as he has -- and as he has
13 alluded to earlier, he has some additional comments he would
14 like to make."

15 Statement by the president: "All right. Before you
16 proceed, Khalid Shaikh Mohammad, the statement that was just
17 read by the personal representative, were those your words?"

18 Then jumping down to the next highlighted area,
19 "Personal Representative: Also, hereby admit and affirm
20 without duress that I was a responsible participant, principal
21 planner, trainer, financier."

22 And then jumping down two, to where it reads,
23 "President: I understand. I want to be clear, though, is

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1 that you were the author of that document.

2 "Detainee: That's right.

3 "President: That it is true?" Question mark.

4 "Detainee: That's true."

5 Was that your exchange with the detainee?

6 A. It was.

7 Q. Were you observing him during this time?

8 A. I was.

9 Q. Were you satisfied that he understood what you were
10 asking him?

11 A. I was.

12 Q. And I'm coming to the conclusion of this particular
13 attachment, in this transcript.

14 Throughout the course of these proceedings, sir, did
15 you at any point observe anything that caused you concern
16 about -- concern for the physical and/or mental well-being of
17 that particular detainee?

18 A. Nothing. He appeared to be alert and interacting
19 with the tribunal.

20 Q. Very good.

21 TC [MR. RYAN]: Your Honor, I'm going to turn to the next
22 attachment. Do you wish now to be the morning break?

23 MJ [Col COHEN]: Yeah, I think we've been going for about

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1 an hour and a half. Let's go ahead and take a 15 minute
2 recess ----

3 LDC [MR. RUIZ]: Judge, we can't hear you in your
4 microphone.

5 MJ [Col COHEN]: Is my -- there we go.

6 Yes, let's go ahead and take a 15-minute recess.
7 We've been going for about an hour and a half.

8 [The R.M.C. 803 session recessed at 1031, 24 September 2019.]

9 [The R.M.C. 803 session was called to order at 1046,
10 24 September 2019.]

11 MJ [Col COHEN]: The commission is called to order. The
12 parties are present. The witness remains on the stand.

13 Mr. Ryan. Or Mr. Ruiz.

14 LDC [MR. RUIZ]: Yes, Judge, I believe Mr. Ryan was
15 intending to get into ----

16 MJ [Col COHEN]: We're at that point, now. Got it.

17 LDC [MR. RUIZ]: So he ceded the lectern to me, at least
18 for the moment, so that I may make this objection on the
19 record.

20 MJ [Col COHEN]: Okay.

21 LDC [MR. RUIZ]: Judge, I'm well aware of the procedural
22 posture that you have set forth; however, since this seems to
23 be the first instance where actual evidence and testimony is

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1 going to come in, which pertains specifically to
2 Mr. al Hawsawi, and there's some documentary evidence, I think
3 it is important for purposes of the record to articulate my
4 objections to this process and the procedure.

5 MJ [Col COHEN]: Okay.

6 LDC [MR. RUIZ]: I know there was reference to
7 Mr. al Hawsawi during the testimony of both Agent Perkins as
8 well as Agent Fitzgerald; however, I felt that that was in the
9 context ----

10 MJ [Col COHEN]: And Agent McClain.

11 LDC [MR. RUIZ]: Yes. However, I felt that was in the
12 context of Mr. Ali's greater issue, so I didn't feel the need
13 to object to that. It was contextual; it wasn't focused on
14 Mr. al Hawsawi.

15 MJ [Col COHEN]: Okay.

16 LDC [MR. RUIZ]: However, my concern at this point is that
17 there is going to be specific testimony that focuses on
18 Mr. al Hawsawi rights advisements or procedures that he was
19 subjected to on an issue that is not existent before this
20 commission.

21 As the commission is well aware, that motion to
22 suppress on Mr. al Hawsawi's behalf has now been submitted to
23 the commission. And therefore, our position is that it is not

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1 a legal issue that is before the court.

2 While I am mindful that you have articulated your
3 belief that 611 -- Rule 611 gives you the authority to control
4 the mode and the presentation of the evidence, and I believe
5 that is an accurate statement, I do not believe that 611,
6 however, gives the authority to make an issue that is not
7 otherwise before the commission, an issue in and of itself.

8 If -- if that -- Mr. Hawsawi's motion had been, in
9 fact, filed and the issue placed before the commission, then
10 certainly, I think that the commission could utilize Rule 611
11 to control the mode and the order of presentation of evidence.
12 But what we have here is a situation which for a number of
13 reasons which the commission is aware, and we've provided
14 detailed information to the commission about that process and
15 the impediments that we face; we've not yet filed that motion
16 to suppress, and therefore, it does not yet exist.

17 So my objection is based on 401, 402, and 403,
18 Military Commission Rules of Evidence, as a relevance,
19 probative objection, as well as prejudicial, given the fact
20 that there is really no legal issue before this commission.

21 And to do that, I just want to illustrate, also, I
22 think it's the Fifth, Sixth, and Eighth Amendment issue for us
23 as well, particularly when it comes to the individualized

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1 justice aspect that we have discussed before this commission
2 in terms of giving Mr. al Hawsawi that individualized justice.

3 And the way I would ask the commission to think
4 through that process is, if for one moment you just eliminated
5 all of the other counsel on this side of the courtroom, and it
6 was only Mr. al Hawsawi's counsel and Mr. al Hawsawi before
7 this commission, in essence, the procedure that took place
8 would be one where the government gets up and introduces
9 evidence on an issue that's not been raised.

10 That -- the reason it seems to not be so foreign is
11 because there are other issues that have been raised in terms
12 of motions to suppress, at least by three other teams, and
13 this witness is relevant to those particular issues. However,
14 in essence of what really is happening in terms of
15 Mr. al Hawsawi -- or is about to happen in terms of
16 Mr. al Hawsawi's case is we're going to be taking testimony on
17 an issue that's not yet before the commission. It doesn't yet
18 exist and, Judge, may not exist. We are still in the process
19 of determining when and if to file a motion to suppress.

20 So for all of those reasons, we object to a procedure
21 whereby a witness testifies on a legal issue that is not
22 before this commission at this time.

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

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1 LDC [MR. RUIZ]: Thank you.

2 MJ [Col COHEN]: I appreciate it.

3 Mr. Ryan.

4 TC [MR. RYAN]: May I proceed, sir?

5 MJ [Col COHEN]: Just momentarily. I need to -- I want to
6 address the comments of counsel, but you may stand there.

7 TC [MR. RYAN]: Yes, sir.

8 MJ [Col COHEN]: I understand Mr. al Hawsawi -- Mr. Ruiz's
9 position. The court issued -- at least two different judges
10 have issued dates to file a motion to suppress with respect to
11 voluntariness. The MAH team specifically asked for extensions
12 to do so; those were granted to some extent. And then a final
13 deadline to file those -- the motion to suppress was -- was
14 provided to the team.

15 The team -- the commission at that time indicated
16 that -- that that deadline was final to the extent that
17 these -- as evidence was about to be presented, that the
18 parties should go ahead and file that with respect to the
19 limited issue of voluntariness, as the defense's only burden
20 with respect to that would indicate that we challenge the
21 voluntariness, at which point the burden shifts to the
22 prosecution. And the prosecution must prove by a
23 preponderance of the evidence that that issue was raised.

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1 Notwithstanding the orders that those motions be
2 filed or that at least notice to the court be formally filed
3 that they do challenge the voluntariness, certain parties did
4 not make those motions.

5 The court in a significant footnote within the ruling
6 on the -- on the issue of these motions to suppress for
7 voluntariness indicated that although the motions to suppress
8 under the rules could be filed at any time up to the entry of
9 pleas, that there were other rules, for example, R.M.C. 108,
10 Rules of Court, et cetera, that does allow some leeway.

11 And so although the court -- the commission may not
12 be able to treat a failure to file the motion prior to the
13 entry of pleas as a waiver of that right, it disagreed with
14 the position that the commission could not order that those --
15 that those motions be filed at sometime prior to that.

16 Also indicated that essentially to -- to do otherwise
17 would require the commission to simply require the entry of
18 pleas. And then if a party refused to enter a plea, then the
19 rules are very clear that an entry -- that a plea of not
20 guilty should be entered if a party is unwilling to enter a
21 formal plea.

22 The commission's intent was to never go that route.
23 It was asking for the parties to work within the system that

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1 exists. And while the court understands Mr. al Hawsawi -- or
2 Mr. Ruiz's position on behalf of his client, Mr. al Hawsawi, I
3 also -- the court -- the commission has also found that, under
4 M.C.R.E. 611, that the court does have leeway with respect to
5 the presentation of evidence, and particularly in the interest
6 of judicial economy.

7 And if the witness is solely being called, and it
8 would appear that he would be, to state that the various
9 accused had a -- had the ability to speak English, they
10 understood themselves, and that they could make their own
11 decisions, that -- and no decision would be made that the
12 witness could not be recalled at a later date should a
13 particular party want to challenge anything about that
14 testimony, but they may also elect not to ever challenge those
15 specific -- those specific grounds, that the probative value
16 of the evidence would not -- would substantially outweigh any
17 prejudicial effect to the accused, given the fact that no
18 evidence consistent with the court's ruling would be
19 considered against an accused until a formal ruling on an
20 issue had been -- had been made, and that the ability of the
21 government to -- just as a matter of judicial economy to
22 present evidence that might be relevant to more than one
23 accused on a very limited nature made sense in the sense that

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1 it may preclude the need to ever -- to call back a witness, or
2 we may need to call back the witness but on a very limited
3 issue.

4 So, therefore, the parties have been allowed to
5 continue to file motions to compel witnesses, to recall
6 witnesses. And, in fact, as we have seen exhibited here in
7 the proceedings over the last three weeks, the government has
8 acknowledged that certain witnesses will necessarily be
9 recalled, specifically with respect to Mr. Hawsawi in this
10 case and any future motion to suppress when that is filed.

11 So while recognizing this and recognizing the needs
12 of individual justice, all of which the court is aware of and
13 significantly takes into consideration each and every time,
14 taking five minutes of testimony now potentially as opposed to
15 potentially calling a witness down several thousand miles to
16 testify for five or ten minutes about a particular issue seems
17 to be in the interest of justice and judicial economy under
18 M.C.R.E. 611, and I will allow him to go ahead and testify at
19 this time.

20 TC [MR. RYAN]: Very good, sir.

21 LDC [MR. RUIZ]: Judge, may I have a couple of comments
22 based on some of the comments that you've made?

23 MJ [Col COHEN]: You may.

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1 LDC [MR. SOWARDS]: Excuse me, Your Honor. Before
2 Mr. Ruiz begins, just wondering, for the witness' comfort and
3 convenience, whether he would prefer to ----

4 MJ [Col COHEN]: Sir, if you would like to step down, you
5 may.

6 WIT: Thank you, Judge. I'm fine. Thank you, Counsel.

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

8 LDC [MR. RUIZ]: Thank you, Judge.

9 I understand and respect your ruling. I will share
10 with you that because, as I said, this is the first instance
11 where we have what I think is a significant testimonial
12 evidence or evidentiary issue comes up, I want to make sure I
13 preserve this appropriately.

14 As one of my very experienced colleagues in
15 post-conviction work has properly observed, many clients have
16 died not because counsel -- because of what counsel did, but
17 because of what they failed to do in terms of getting on their
18 feet and making proper objections for the record. So while I
19 understand that we've had this discussion a number of times, I
20 do think it is important to make sure the appellate record in
21 this instance is very clear.

22 My intention moving forward, Judge, would be not to
23 elaborate on the objection, but simply to refer back to it.

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1 So this is why this one is a little bit more comprehensive.

2 MJ [Col COHEN]: Absolutely. I don't -- and, Mr. Ruiz,
3 like I said, I -- no offense taken. I understand exactly why
4 you're doing what you're doing. I understand that I also have
5 to then address the issue. You're being very professional in
6 the way that you're doing it. And if there ever is an
7 appellate record and someone can -- and they can find
8 prejudice in the way that this -- that this goes forward
9 moving forward, then I understand the -- the potential
10 consequences of that.

11 At this particular time, given my intent to allow for
12 the recalling of witnesses and all of those kinds of things,
13 in weighing those balances, I've ruled the way I've ruled.

14 LDC [MR. RUIZ]: I will tell you on the onset that I had
15 spoken to Mr. Ryan before coming up and making my objection,
16 and he indicated it is not their intent to have the judge come
17 back to testify.

18 MJ [Col COHEN]: That may be their intent ----

19 LDC [MR. RUIZ]: Understood.

20 MJ [Col COHEN]: ---- but that's why you guys get to make
21 motions to compel.

22 LDC [MR. RUIZ]: Understood. So as it was with Perkins
23 and Agent Fitzgerald, they've agreed to bring them back. I

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1 just wanted to make the commission aware that, at least on my
2 discussions, that's not the intent with respect to this
3 witness.

4 MJ [Col COHEN]: No, absolutely. And that's one of the
5 reasons -- that's one of the factors that I'm taking into
6 consideration in this, is that you may ultimately decide you
7 do not wish to have the witness come back; to be determined.

8 LDC [MR. RUIZ]: Sure.

9 MJ [Col COHEN]: But I do not prejudge any motion to
10 compel a witness at this point.

11 LDC [MR. RUIZ]: Understood.

12 So, Judge, with respect to your comment about moving
13 to extend the timeline with respect to the motion to suppress,
14 I want to move back, a little bit back in terms of the
15 procedural history again for the record.

16 As I think you are well aware now, the motion to
17 suppress issue arose out of the 524 series, which was
18 essentially and initially a challenge to the investigative
19 function and the adequacy of the defense's ability to
20 investigate properly, access to witnesses, and to carry on the
21 functions that are necessary in capital litigation.

22 As you know, Judge Pohl, after reviewing the
23 litigation, issued the remedy, which was, in fact, to suppress

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1 the LHM statements obtained by the FBI for all purposes; which
2 was subsequently reconsidered by Judge Parrella and ultimately
3 deferred; which has brought us to the motion to suppress issue
4 that is now before the commission in the greater context of
5 that litigation.

6 What I want to indicate for the record is that in
7 AE 632 (MAH), that was our response to AE 524RRR. 524RRR was
8 a ruling regarding the scheduling of motions to suppress the
9 FBI statements. In that motion, Judge Parrella for the first
10 time mandated or required us to submit a request for extension
11 of time to the motions to suppress that Judge Parrella had, in
12 fact, ordered or put in play before the commission.

13 And it is significant that in AE 632 (MAH), we titled
14 that reply as Mr. al Hawsawi's motion in response to AE
15 524RRR, ruling regarding scheduling the filing of motion to
16 suppress the FBI statements.

17 The reason we ----

18 TC [MR. RYAN]: Your Honor, excuse me. I object to this
19 as it's beyond the scope of a simple objection to a witness'
20 testimony, and the witness is in the room.

21 MJ [Col COHEN]: All right.

22 LDC [MR. RUIZ]: Judge, as I said, this is the first time
23 this issue has come up. I think it is significant in terms of

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1 what our position is for, not just this witness, but perhaps
2 for other witnesses going forward.

3 MJ [Col COHEN]: Right.

4 LDC [MR. RUIZ]: So I simply would just like the
5 opportunity do that at this time and, as I said, refer back to
6 it at a later time.

7 MJ [Col COHEN]: Yeah, I -- I'm very familiar with
8 procedural history and how we got here; and the record is very
9 replete with that. What my reference was is that there was a
10 motion filed by you asking for an extension of time to file
11 your motion to compel witnesses and any motion to suppress
12 that you were going to file. I granted your request with
13 respect to witnesses and gave you a date to -- an extended
14 date and said with respect to the motion to suppress it was
15 due on the 6th of September.

16 LDC [MR. RUIZ]: I'm not challenging that, Judge.
17 However, somebody reviewing this record, which is now close to
18 25,030 pages, it may get lost in that record. And as I
19 indicated, it is my job as an advocate to make sure that the
20 record accurately reflects the procedural history.

21 No disrespect, Judge. I know that you are well aware
22 of the procedural history. I'm speaking to you, of course,
23 but I'm also speaking to whomever may be looking at this

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1 record years from now, and looking at this process and this
2 procedure, will have the opportunity to have this all in one
3 place, which will make that review significantly easier. So
4 that's also a part of the advocacy and the importance of doing
5 that.

6 I think I can do it in two minutes or less.

7 MJ [Col COHEN]: All right. I'll give you two minutes.

8 LDC [MR. RUIZ]: So in essence, in that particular motion,
9 632 (MAH), we specifically titled that as a response to the
10 judge's ruling. The reason we did that is because we wanted
11 to communicate to the commission that we were not asking to
12 file an extension of time on a motion to suppress that we were
13 not prepared to file.

14 And, of course, your recitation of the procedural
15 history after that is accurate. But it has never been our
16 intention on behalf of Mr. al Hawsawi to put a motion to
17 suppress at issue on his behalf because it's not in his best
18 interests at this time.

19 The scheduling order you have issued itself contains
20 discovery dates that postdate these procedures themselves.
21 And as we have seen from these procedures themselves, evidence
22 and discovery has been coming through during the ongoing
23 process. Mr. Connell argued the 914 issue which was 502ZZZ of

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1 evidence that Agent Fitzgerald, in terms of his e-mails, his
2 writings, those kinds of things that have now come into the
3 record as well. So all of those issues are issues why we have
4 not filed Mr. al Hawsawi's motion to suppress.

5 And while I understand your point about 611 being --
6 it gives you the authority and the ability to control the mode
7 and presentation of evidence, with all due respect, Judge,
8 what it does not do, I think, for any commission or any judge
9 is the ability to make an issue that doesn't exist, in fact,
10 an issue. And that is what is, in fact, happening in this
11 particular case.

12 With that, we object to any additional testimony or
13 evidence as it pertains to this issue, Your Honor. I
14 understand that this may be a five-minute witness in this
15 particular instance, but the procedure itself is one that will
16 continue to lend itself to violations of Mr. al Hawsawi's
17 rights as we move forward.

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

19 LDC [MR. RUIZ]: Thank you.

20 MJ [Col COHEN]: Just adding that the trial scheduling
21 order that was referenced also indicates that at the
22 conclusion of all evidence, the parties will have 75 days to
23 file final briefings with respect to motions to suppress.

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1 TC [MR. RYAN]: May I proceed, sir?

2 MJ [Col COHEN]: You may.

3 Thank you for your time, sir.

4 WIT: Of course, Judge.

5 **DIRECT EXAMINATION CONTINUED**

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

7 Q. Judge DeLury, when we broke, I had suggested that it
8 was time to move to Attachment D in the government's
9 consolidated notice of exhibits and would be Attachment D in
10 your binder as well. Tell me if you get there.

11 A. Yes, sir, I have it.

12 Q. And the page I draw your attention to is the first
13 page of that attachment, 1 of 10, Bates stamps ending in 9 --
14 093-10014.

15 TC [MR. RYAN]: Your Honor, I ask for permission to
16 published this to the gallery.

17 MJ [Col COHEN]: You may.

18 Q. Judge DeLury, up ----

19 TC [MR. RYAN]: I'm sorry, can I have the ----

20 MJ [Col COHEN]: Yeah. It's just going to take a minute
21 for it to click on.

22 TC [MR. RYAN]: All right. I think we're there.

23 Q. Judge DeLury, directing your attention to the very

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1 top right-hand portion of the page. It says, after the
2 introductory words, "Tribunal Hearing for ISN 10014." Do you
3 see that, sir?

4 A. I do.

5 Q. And who is 10014?

6 A. Walid Bin'Attash.

7 Q. And the date that's listed below in the highlighted
8 area, it says, "This tribunal is being conducted at one of
9 two -- at one one two local. Date is 12 March 2007 onboard
10 U.S. Naval Base Guantanamo Bay, Cuba."

11 Was that the date that this hearing took place?

12 A. It was.

13 Q. Now, I'm -- we're not going to go into this
14 transcript in detail, sir, but I want to ask you a couple of
15 general questions.

16 First of all, throughout the course of it, were you
17 satisfied that the accused, Walid Bin'Attash, understood the
18 proceedings that were going on?

19 A. I was.

20 LDC [MS. BORMANN]: Judge, I have an objection ----

21 MJ [Col COHEN]: Yes.

22 LDC [MS. BORMANN]: ---- at this point. Unlike

23 Mr. al Hawsawi, we did file a motion to extend the deadline,

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1 and after directing the commission's attention to it, it was
2 granted in part. Our date on our motion to suppress is later
3 on after the hearings because of some specific factors that
4 played into our preparation, and I am unprepared to
5 cross-examine this witness ----

6 MJ [Col COHEN]: Okay.

7 LDC [MS. BORMANN]: ---- during this commission.

8 MJ [Col COHEN]: All right. Thank you, ma'am. I will --
9 if you need to cross-examine -- you are correct. I did
10 grant -- I did grant you the extension. If the witness needs
11 to be recalled for cross-examination, I will allow it.

12 LDC [MS. BORMANN]: Thank you.

13 **DIRECT EXAMINATION CONTINUED**

14 **Questions by the Trial Counsel [MR. RYAN]:**

15 Q. The accused was present in your hearing room; am I
16 correct?

17 A. He was.

18 Q. Were you able to engage with him in the way you
19 described you had done so with Khalid Shaikh Mohammad?

20 A. Yes, sir.

21 Q. Were you able to observe him as well?

22 A. I was.

23 Q. Were you satisfied that any answers he gave during

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1 the course of the hearing were voluntary in nature?

2 A. Yes, sir. They appeared to be.

3 Q. And throughout the course of the proceedings, did you
4 observe anything that caused concern on your part for the
5 accused's physical or mental or emotional well-being or
6 condition?

7 A. Nothing at all. Again, he appeared alert and
8 oriented and responsive to the tribunal.

9 Q. Very good.

10 Sir, if you could, I will direct everyone to
11 Attachment B, as in Bravo, and I'll ask that the first page of
12 that attachment be looked at. It's page 1 of 29, and I will
13 ask Master Sergeant Horn to publish that for the gallery.

14 MJ [Col COHEN]: You may.

15 TC [MR. RYAN]: Thank you, sir.

16 Q. Judge DeLury, again up at the top right-hand corner,
17 it says "ISN 10011." Who is 10011?

18 A. Mustafa Ahmed Adam al Hawsawi.

19 Q. And was he present as well in your room?

20 A. He was.

21 Q. And the date that is listed shows 21 March 2007
22 onboard U.S. Naval Base Guantanamo Bay, Cuba. Was that, in
23 fact, the day that this hearing took place?

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1 A. It was.

2 Q. And going further down, I did not ask this as to the
3 last one, but I'll ask it again as to this one: Were you, in
4 fact, the president of this tribunal?

5 A. I was.

6 Q. So under the redaction, would that have been your
7 name?

8 A. It was.

9 Q. And was that true for the prior one as well?

10 A. Yes.

11 Q. That is speaking about Mr. Bin'Attash.

12 A. Yes.

13 Q. In the course of your hearings -- in the course of
14 this hearing with this particular detainee, were you again
15 able to observe the accused in the course of the hearing?

16 A. I was.

17 Q. Were you able to engage with him?

18 A. I was, through -- in this case, through a translator,
19 it would appear.

20 Q. Were you -- thank you for reminding me of that.

21 As to this particular instance where there was a
22 translator being used, were you able to assess whether, in
23 fact, the accused seemed to be understanding what was going

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1 on?

2 A. He appeared to be. He was interacting with the
3 translator, with the linguist.

4 Q. Understanding that it was through a translator, were
5 you satisfied that the accused Hawsawi, the detainee Hawsawi,
6 understood the proceedings to your satisfaction?

7 A. I was.

8 Q. Were you satisfied that answers he was giving were
9 done so voluntarily?

10 A. They appeared to be.

11 Q. And again, in -- in this case, were answers coming
12 through the translator as well?

13 A. They were, and in my experience in dealing with
14 translation in court, I think I can tell when it's not being
15 effective, and it appeared to be effective.

16 Q. Okay. Were you able to observe anything at any point
17 during these proceedings that caused you to be concerned about
18 the physical, mental or emotional condition of this particular
19 detainee?

20 A. The detainee, again, appeared to be alert and
21 appropriate in interacting with the tribunal.

22 Q. I will now direct your attention, sir, to
23 Attachment E, as in Echo, and I will identify that the page --

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1 the first page of the attachment reads at the top "Detainee
2 Election Form," Bates number being, many zeros, 1041. Let me
3 know if you're there, Judge -- Judge DeLury.

4 A. Yes, I have it.

5 TC [MR. RYAN]: And I'll ask for the feed, and I'll ask
6 for Master Sergeant Horn to be able to publish this for the
7 purposes of the gallery.

8 MJ [Col COHEN]: You may.

9 Q. Sir, what is this form?

10 A. Something called a Detainee Election Form. It was
11 part of the CSRT process, a document that would -- was created
12 to assist the PR interacting with the detainee to explain the
13 process, to obtain the detainee's requests and understanding
14 of the process.

15 Q. We have not looked at one of these forms previously.
16 Was this part of the -- what I've called the CSRT package?

17 A. It was.

18 Q. And who is the detainee -- where it says at the top
19 in the left-hand corner "ISN Number 18," who is that?

20 A. Aziz Ali, we referred to as al Baluchi, number 18.

21 Q. Now, at the bottom right-hand portion that is
22 highlighted, you will see where it says, Exhibit D-a. What is
23 that referring to?

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1 A. Detainee's Exhibit a. First in order, I would take
2 it.

3 Q. And how did you differentiate between detainee
4 exhibits versus other exhibits?

5 A. R for recorder, D for detainee.

6 Q. And this is 1 -- according to the bottom right-hand
7 corner, page 1 of 2; am I correct?

8 A. Yes, sir.

9 Q. I will now direct your attention, sir, a few pages
10 back, Bates stamp number 1043.

11 A. Yes.

12 Q. This is not for display to the gallery.
13 Do you recognize this document?

14 A. I do.

15 Q. Was it part of the CSRT package as well?

16 A. It was.

17 Q. At the top, it reads, "ISN 18, Oral Statement for
18 Rebuttal of the Summary of Evidence for Combatant Status
19 Review Tribunal Dated 8 February 07, taken on or about
20 30 February" -- I'm sorry, "30 March 2007 by PR #3."

21 First of all, as to the date, 30 March 2007, is that
22 familiar to you?

23 A. I believe it was the date of the -- that detainee's

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1 detention hearing.

2 TC [MR. RYAN]: Court's indulgence, sir?

3 MJ [Col COHEN]: You may.

4 Q. I'll represent to you, sir, and we will come to it,
5 that the actual transcript reflects that it occurred on
6 30 March 2007.

7 A. My recollection, having reviewed these just a day or
8 so ago.

9 Q. Now, back on this page, the Bates stamp number 1043,
10 the oral statement, on the top where it says, dated
11 8 February 2007, does that mean anything to you? Do you
12 understand that at all?

13 A. I take it to mean that was the date of the
14 unclassified summary, although I can't be sure what it
15 references.

16 Q. This document indicates it's page 1 of 3, so it's a
17 three-page document?

18 A. It is.

19 Q. And what is it, in general terms?

20 A. A response or rebuttal or explanation to the
21 unclassified summary of the evidence.

22 Q. And were all the detainees given the ability to
23 present such statements?

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1 A. Yes.

2 Q. Is it correct to -- did all of them do so?

3 A. I believe all of them did. I don't believe alshibh
4 did. I believe all of them in some form or fashion, either
5 orally or provided an exhibit with their points that they
6 wanted raised.

7 Q. It was not -- was it required that they present
8 anything?

9 A. It was required that they present nothing.

10 Q. And when, in fact, something was presented on their
11 behalf, a statement of their own, is that -- would that be
12 reflected in the transcript as well?

13 A. It would be.

14 Q. I'll ask you to jump ahead two pages, Bates stamp
15 number ending in 1045, and ask that it be published.

16 TC [MR. RYAN]: And I ask Master Sergeant Horn to publish
17 it for the gallery, sir.

18 MJ [Col COHEN]: Let me get there first, Counsel.

19 TC [MR. RYAN]: Yes, sir. It's the page ending in 1 --
20 I'm sorry ----

21 MJ [Col COHEN]: I have it.

22 TC [MR. RYAN]: ---- Bates stamp number 1045.

23 MJ [Col COHEN]: It's the -- a last page with a signature

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1 block?

2 TC [MR. RYAN]: Page 3 of 3 from D-b.

3 MJ [Col COHEN]: Okay. You may publish.

4 A. I have it, sir.

5 Q. Okay.

6 A. Oh, I'm sorry.

7 MJ [Col COHEN]: That's all right. That particular TV
8 comes on a little bit slower.

9 All right, Counsel.

10 TC [MR. RYAN]: Thank you.

11 Q. Sir, this, as we just noted, is page 3 of 3. Is it
12 correct to say that the statement went on for two-plus pages?

13 A. Correct.

14 Q. This page concludes the statement; am I correct?

15 A. It does.

16 Q. Could you read for us the two paragraphs at the top
17 as well as the third sentence?

18 A. Beginning "The low concentration"?

19 Q. Yes, sir.

20 A. "The low concentration of cyanide in my possession is
21 used in clothing factories to bleach, decolor, tint, and
22 perfume clothes. It is not associated with threatening United
23 States national security at all. Mr. President and board

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1 members, I do not belong to al Qaeda, the Taliban, or
2 associated organizations. I do not have any ID card showing
3 that I am a member. I have never received any military
4 training in Afghanistan. I refuse to be called or classified
5 as an enemy combatant. I affirm these are my words and the
6 truth as I know it."

7 MJ [Col COHEN]: All right. One second. Counsel?

8 LDC [MR. CONNELL]: Sir, we have an issue of classified
9 information. May we discuss with the government?

10 MJ [Col COHEN]: You may. Is this something you need to
11 do while Mr. Ryan is conducting it, or do you need to take a
12 break?

13 LDC [MR. CONNELL]: I think we can -- there might be a
14 short answer or there might be a long answer; so why don't we
15 find out which one it is.

16 MJ [Col COHEN]: Okay.

17 TC [MR. RYAN]: Will do, sir.

18 MJ [Col COHEN]: Sir, just give us a moment. We're --
19 this is our process for working the classified.

20 WIT: I'm at your disposal, Judge.

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

22 [Counsel conferred.]

23 MJ [Col COHEN]: Mr. Connell.

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1 LDC [MR. CONNELL]: Sir, might I suggest you cut the feed
2 to the gallery while we sort this out?

3 MJ [Col COHEN]: Please cut the feed to the gallery.
4 [Counsel conferred.]

5 ADC [MS. PRADHAN]: Your Honor?

6 MJ [Col COHEN]: Ms. Pradhan.

7 ADC [MS. PRADHAN]: I'll wait for counsel.

8 MJ [Col COHEN]: Okay.

9 ADC [MS. PRADHAN]: At this point we'd like to object
10 because the government has -- our understanding is that the
11 government has invoked national security privilege and refused
12 to turn over evidence with regards to one of the items that
13 was on that display, that page of that display.

14 MJ [Col COHEN]: Okay.

15 ADC [MS. PRADHAN]: We would ask that that not be
16 published to the gallery.

17 MJ [Col COHEN]: This document? Okay. We won't publish
18 it to the gallery.

19 TC [MR. RYAN]: Pardon me, sir?

20 MJ [Col COHEN]: We won't publish it to the gallery then.
21 And if it's something else I need to have up in argument with
22 you guys, I can -- we can take that up later or ----

23 TC [MR. RYAN]: That's fine, sir. I'll refer to the

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1 document with the witness, have him looking at it. I won't
2 ask -- or if Your Honor wishes, it can be stopped from being
3 published outside.

4 MJ [Col COHEN]: Okay. Is that acceptable? We can still
5 take the testimony?

6 TC [MR. RYAN]: Oh, sure. I'll move off of that right
7 now.

8 MJ [Col COHEN]: Okay. It looks like the witness still
9 has it, as do the parties. You may continue, Mr. Ryan.

10 TC [MR. RYAN]: Thank you.

11 **DIRECT EXAMINATION CONTINUED**

12 **Questions by the Trial Counsel [MR. RYAN]:**

13 Q. Sir, where did I stop you? Where were you stopped
14 when you were reading?

15 A. I continued reading until "I know it," ending with a
16 quote mark, and that's where I stopped.

17 Q. I'd like to direct your attention down to the last
18 words above the signature line.

19 A. Yes.

20 Q. They state what?

21 A. "I affirm"?

22 Q. Yes, sir.

23 A. "I affirm these are my words and the truth as I know

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1 it," end quote.

2 Q. Very good. And where there is the signature line,
3 something appears there; am I correct?

4 A. Correct.

5 Q. In your review of these documents and in your
6 presiding over this, does that purported signature look
7 familiar to you?

8 A. It does.

9 Q. Did you see it before?

10 A. I saw it in several places, in drafts and other
11 documents in this case regarding Mr. al Baluchi.

12 Q. Very good.

13 Drawing your attention down to the bottom of the page
14 where it says Exhibit D-b. You gave us a brief description a
15 minute ago of Detainee-exhibit, correct?

16 A. Yes, sir.

17 Q. D-b, as you're looking at it right now, is this what
18 you recall being presented to the CSRT?

19 A. Yes.

20 Q. As it's -- as it's demonstrated right now on those
21 three pages.

22 A. It is.

23 Q. All right. The reason I'm saying this to you, sir,

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1 is just keep a mental note of D-b because I want to come back
2 to that at another moment.

3 A. Okay.

4 Q. And I'll ask you to turn to the next page, which ends
5 in Bates number 1046. And what is this, sir?

6 A. It is a -- purports to be ----

7 TC [MR. RYAN]: By the way, Your Honor, this is not for
8 publication outside the courtroom.

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

10 A. It's entitled "Final Oral Statement for Combatant
11 Status Review Tribunal taken on 30 March 2007 by PR#3, with
12 respect to ISN 18."

13 Q. And is that, in fact, another statement in the course
14 of this particular CSRT?

15 A. It was.

16 Q. In regard to detainee al Baluchi?

17 A. It was.

18 Q. And was it received as part of the CSRT's work?

19 A. As a D-c, Delta, Charlie.

20 Q. And again, sir, I'll ask you to just sort of make a
21 mental note of D-c because we will come back to it.

22 A. Okay.

23 Q. And I'll ask you to turn to the next page.

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1 TC [MR. RYAN]: And Judge, unless there's an objection, I
2 ask that this one be published for the purposes of the
3 gallery.

4 MJ [Col COHEN]: Is there any objection?

5 ADC [MS. PRADHAN]: Court's indulgence, sir?

6 MJ [Col COHEN]: You may. Sergeant, give me one second.

7 TC [MR. RYAN]: And sir, for better identification, ending
8 in Bates 1047.

9 MJ [Col COHEN]: Thank you.

10 ADC [MS. PRADHAN]: No objection, sir.

11 MJ [Col COHEN]: It may be published.

12 WIT: 47?

13 TC [MR. RYAN]: Ending in Bates number 1047, it's page 2
14 of 2 of D-c.

15 WIT: Thank you, sir.

16 TC [MR. RYAN]: We're just waiting for it to appear on the
17 screen.

18 WIT: Yes, sir.

19 MJ [Col COHEN]: Counsel, you may proceed.

20 TC [MR. RYAN]: Thank you, sir.

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

22 Q. Again, sir, looking at the line for the signature,
23 does a purported signature appear?

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1 A. It does.

2 Q. Does it appear to you to be identical to that which
3 we just looked at in D-b?

4 A. It does.

5 Q. And is the date 30 March 2007, is that consistent
6 with the prior D exhibit as well as the commission's -- the
7 tribunal's hearing?

8 A. It was.

9 Q. I would now ask, sir, that you turn several pages
10 back, and this ----

11 MJ [Col COHEN]: Publish.

12 Q. ---- is for publication to the gallery.
13 Bates stamp ending in number 1053.

14 A. Yes, sir.

15 Q. Are you there?

16 A. I am.

17 Q. This should look familiar to you. Is it, in fact, a
18 face page for the transcript of the CSRT hearing?

19 A. It was -- it is.

20 Q. And I'll direct your attention once again to the top
21 right-hand corner, that's highlighted, ISN 10018. Who is
22 10018?

23 A. al Baluchi.

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1 Q. And again, it lists the date as 30 March 2007. This
2 is what I represented to you before. Does that, in fact,
3 appear there?

4 A. Yes.

5 Q. And where it says "Captain" and then in
6 parenthesis -- redacted -- "United States Navy," comma,
7 "President," who is that?

8 A. That was me.

9 Q. And in the transcript that you certified, did your
10 name, in fact, appear there?

11 A. It did.

12 Q. I'll ask you to turn to the next page.

13 TC [MR. RYAN]: And this is also for publication to the
14 gallery, Your Honor.

15 MJ [Col COHEN]: Okay.

16 Q. And it ends in Bates number 1054. Are you there,
17 Judge DeLury?

18 A. I am.

19 Q. The first highlighted area, could you read for us
20 what you said, please?

21 A. "President: Before we proceed, Ammar al Baluchi, I
22 understand that you speak and understand the English language.
23 Is that correct?"

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1 Q. The first thing I'd like to ask you about is, and you
2 made mention of it before, you had the name as Ammar
3 al Baluchi; am I correct?

4 A. Yes.

5 Q. Was that ever objected to?

6 A. No.

7 Q. Was it ever clarified in any way?

8 A. Not that I recall.

9 Q. Now, continuing on from there, would you please
10 continue reading until it finishes with the detainee saying,
11 "I willl."

12 A. "Detainee: Yes, that is correct.

13 "President: We have present a translator who can
14 assist you. If you don't understand any of the proceedings
15 going on, we will pause to get a translation for you. Do you
16 understand?

17 "Detainee: Sure.

18 "President: If at any time you don't understand what
19 is happening, please indicate that to me or the translator and
20 we will provide a translation.

21 "Detainee: I willl."

22 Q. During this exchange and other exchanges in the --
23 exchanges in the course of the hearing, were you able to make

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1 an assessment as to his ability to understand English?

2 A. I was.

3 Q. Were you satisfied as to his ability to understand
4 and speak English?

5 A. He appeared to understand and be conversant in
6 English.

7 Q. All right. This is listed as page 2 of 37. I'll ask
8 you now to go to page 4 of 37. This is not for publication.
9 It ends in Bates stamp number 1056. Are you there, Judge,
10 Judge DeLury?

11 A. 1056.

12 Q. And reading page 4 of 37 of the transcript.

13 A. Okay. What's on my screen is different than ----

14 Q. No, sir. I'm asking you to stay on your ----

15 A. Oh, I'm sorry. I will. All right. Yes, I have
16 1056, yes.

17 Q. Okay. About halfway down the page, it says,
18 "Personal Representative: Sir, I'm handing the tribunal
19 Exhibit D-a labeled the Detainee Election Form." Do you see
20 that?

21 A. I do.

22 Q. And then a little bit further, it says, "The tribunal
23 has received Exhibit D-a indicating that the detainee wishes

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1 to participate in the tribunal and wants the assistance of the
2 personal representative."

3 Does this refer back to the Detainee Election Form
4 that we talked about at the very beginning of this tab?

5 A. It does.

6 Q. And was it, in fact, received?

7 A. It was.

8 Q. I'll ask you now to turn -- or I'll identify for
9 everyone the next page will be 14 of 37 of the transcript.
10 And that ends in Bates number 1066.

11 TC [MR. RYAN]: I will ask for the commission's permission
12 to publish for purposes of the gallery.

13 MJ [Col COHEN]: You may.

14 Q. We'll just wait for the screen, sir.

15 A. Yes, sir.

16 Q. All right. Are you there, Judge, Judge DeLury?

17 A. I am.

18 Q. At the very top where it says, "President: Okay.
19 Let me just explain one more thing, all right? And then
20 please translate."

21 My question to you now, sir, is: Why did we go
22 through the translation process at this point?

23 A. I was trying to make sure that I was clear to the

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1 detainee about my decisions with respect to witnesses and how
2 they would be produced or not produced and substitutions for
3 testimony that would be available, and I wanted to make sure
4 that there was absolute clarity because I was making a
5 determination or ruling.

6 Q. Did you consider this an especially significant
7 portion of the hearing?

8 A. It was important to the detainee that he have
9 witnesses produced, and there had been decisions made about
10 it, and I wanted him to understand what was happening now at
11 the hearing with respect to his request.

12 Q. Describe for us, sir, if you would in general terms,
13 just the back-and-forth discussion as to witnesses and what
14 ultimately was decided.

15 A. It was a request through the detainee through the
16 personal representative to produce several witnesses who were
17 also detainees at Guantanamo. I had made a ruling, as I
18 recall, that they would be relevant to a certain respect.

19 There had been a determination by the security folks
20 at Guantanamo that it would not be secure to have the detainee
21 in the room with the witness testifying, so I determined then
22 that they were not reasonably available under the instruction,
23 and explored ways, both with the PR informally and the

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1 recorder and CSRT staff, to see what other alternatives might
2 be available. Stipulations of expected testimony are
3 something that is familiar to court-martial practice, and I
4 suggested that might be one way to do it.

5 Q. After the discussion, did you -- did there come to a
6 conclusion as to this issue?

7 A. There was. And I believe the PR in his discussions
8 with the detainee came up with questions that I suggested
9 might be answered, and that if the detainee -- the witness
10 detainee chose not to provide answers, well, then, the inquiry
11 would end. But if the detainee witness was willing to
12 cooperate and provide answers, then the questions would be
13 propounded to him, and he would provide answers.

14 Q. And regardless of the PR's work, is it correct to say
15 that you and the detainee engaged in a back-and-forth
16 directly?

17 A. We did.

18 Q. If you see the next -- or the -- what would be the
19 second highlighted portion of this page, detainee says, "I
20 accept it." Could you then read what your response was?

21 A. "President: All right. We will proceed in that
22 fashion. And for the benefit of the record, I find that the
23 detainee has knowingly, intelligently, and voluntarily decided

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1 to withdraw this request for production of witnesses or
2 witness statements and to accept the statement contained in
3 Exhibits D-h and D-i in their place."

4 Q. What was your finding based upon?

5 A. Based on my interaction with the detainee, based on
6 my observations of him and his demeanor, and his responses.

7 Q. Very good.

8 Sir, I'll now direct you to go to page 18 of 37 in
9 the transcript, ending in Bates stamp number 1070.

10 TC [MR. RYAN]: And I'll ask Master Sergeant Horn to
11 publish for the gallery.

12 MJ [Col COHEN]: You may.

13 Q. Are you there, sir?

14 A. I am.

15 Q. I will direct your attention to midway down where it
16 says "President" and the first word is "And." Would you
17 please read the exchange that goes on there to the -- to the
18 bottom of the page.

19 A. "President: And that was the contents of
20 Exhibit D-b?

21 "Personal Representative: That's correct, sir.

22 "President: All right. Ammar al Baluchi, was that
23 the statement that you wanted the personal representative to

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1 read for you?

2 "Detainee: Exactly.

3 "President: Were those your words?

4 "Detainee: Yes, sir.

5 "President: Are you under any force or pressure to
6 give a statement here today?

7 "Detainee: No.

8 "President: And that statement was given of your own
9 free will?

10 "Detainee: Exactly."

11 Q. You can stop there, sir. During this period of time,
12 as you're engaging with him, again, are you able to assess to
13 your satisfaction his ability to answer you -- your questions?

14 A. He appeared to be alert and engaged with the process.

15 Q. Did you accept his assurance?

16 A. I did.

17 Q. Based on you what observed?

18 A. Based on his demeanor and his responses to me, yes.

19 Q. I'll ask you to turn to the next page, please, ending
20 in Bates stamp number 1071, page 19 of 37 of the transcript.

21 TC [MR. RYAN]: I will ask that Master Sergeant Horn
22 publish it for the gallery.

23 MJ [Col COHEN]: You may.

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1 Q. Are you there, sir?

2 A. I am.

3 Q. If you see the highlighted portion, it reads, "Do the
4 members have any questions for the detainee?"

5 "The Members: Yes, sir. Yes, sir.

6 "President: All right. Please proceed."

7 Here's what I want to get at at this: Was this a
8 common scenario? Was this a common occurrence in your
9 tribunal hearings?

10 A. Yes. I mean, there was a provision in the process to
11 permit questions by the members and the president, if there
12 were any.

13 Q. Did they always do it?

14 A. Not always, no. Sometimes yes, sometimes no.

15 Q. All right. Upon -- at this moment when the panel
16 members are given the opportunity to ask questions, what have
17 they had the benefit of in terms of information?

18 A. Well, they've had the benefit of the proceeding on
19 this particular detainee, and I note that this may have been
20 the last CSRT that this tribunal conducted, so they would have
21 had the benefit of the other tribunals that they had presided
22 over with me.

23 Q. Were they also -- did they also have the benefit of

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1 the unclassified summary that you described before?

2 A. Yes.

3 Q. And as we were just talking about statements from the
4 detainee, would the other panel members have had the benefit
5 of any statements given by the detainee?

6 A. They would have had anything that had been marked and
7 been provided to us by either the detainee or the PR at that
8 time. We sometimes reflected in the record, although I can't
9 recall here, we'd indicate the panel paused to examine the
10 exhibits.

11 Q. All right. Now, in this particular instance, as to
12 this detainee on this day, could you describe the
13 question-and-answer process that went on, just in terms of the
14 tenor and so forth?

15 A. Straightforward, businesslike, in my experience of
16 what fact-finders do when they're trying to accumulate facts
17 in order to make decisions.

18 Q. Okay. In this particular instance in this
19 transcript, is it correct to say that the questioning -- the
20 questioning by the panel members goes on for several pages?

21 A. It does.

22 Q. Was that somewhat longer than other instances?

23 A. It was.

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1 Q. I would like to ask you to turn to page 27 of 37 in
2 the transcript, Bates stamp number ending in 1079?

3 TC [MR. RYAN]: And I'll ask Master Sergeant Horn to
4 publish this page for the gallery.

5 ADC [MS. PRADHAN]: Your Honor, objection.

6 MJ [Col COHEN]: Ms. Pradhan.

7 ADC [MS. PRADHAN]: Same objection as before. This should
8 not be published to the gallery for the same reason.

9 MJ [Col COHEN]: Okay. Hold off for now.

10 Mr. Ryan.

11 TC [MR. RYAN]: May I have a moment, sir?

12 MJ [Col COHEN]: You may.

13 [Counsel conferred.]

14 TC [MR. RYAN]: Your Honor, I'll withdraw the request to
15 publish for the gallery. By agreement, I'll read a portion of
16 it out loud? Or I'll have the witness do so.

17 MJ [Col COHEN]: That will be fine. And then I don't have
18 any problem with the parties executing the production of the
19 documents to the -- to the thing, but just before you hit
20 forward, let me indicate that I -- that I allow it to be
21 published.

22 TC [MR. RYAN]: Will do, sir.

23 MJ [Col COHEN]: All right. Thank you. The court

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1 reporters asked that. They said either we can take the delay
2 or I can allow it to stay on, but just not forwarding it until
3 I give the affirmative. All right. Thank you.

4 TC [MR. RYAN]: Got it, sir. May I proceed?

5 MJ [Col COHEN]: You may.

6 Q. Judge, Mr. Witness, are these -- is this page
7 containing questions from among the questions asked by the
8 panel on that day?

9 A. It does. I don't know which member it was. I know
10 it wasn't me.

11 Q. That's okay.

12 I'd like to direct your attention down to the
13 portion, you may have it highlighted on your screen, it starts
14 with "In reference to Isam Mansour."

15 A. I see it.

16 Q. Would you please read that exchange for us.

17 A. "Member: In reference to Isam Mansour.

18 "Detainee: Yes.

19 "Member: Using your P.O. box, are you him, Isam
20 Mansour?

21 "Detainee: No.

22 "Member: Do you know of him?

23 "Detainee: Isam Mansour? No, I don't know this

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1 name."

2 Q. And that's -- I'll stop you there. During this
3 particular exchange as to this particular subject, let me just
4 focus you on that. Did you notice any change in the
5 detainee's demeanor at all in answering these questions?

6 A. I don't have any recollection of anything other than
7 the exchange happening. I don't ----

8 Q. Is it correct that nowhere in the transcript is
9 there -- does it appear to be any sort of a break in the
10 proceedings and regard to this area?

11 A. Twelve and a half years later, I can't remember every
12 moment of every hearing, but it is -- I would recall if
13 something other than what we're doing right now happened, a
14 give and take, back and forth, creating a record.

15 Q. Fully understand. Is it correct, though, that
16 there's no notation in the transcript to indicate ----

17 A. There is none.

18 Q. Through the course of the pages of questions by the
19 panel members, as you sit here now, did you note -- did you
20 recall any time that the detainee's demeanor changed
21 significantly?

22 A. None.

23 Q. Did you -- did you note any sort of inconsistency

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1 emerge in his story?

2 A. Not particularly. I mean, it was a general denial.
3 Whether we parsed particular statements he made in
4 deliberations, I understand we're not to go into it, I
5 probably couldn't remember it as I sit here now. But nothing
6 dramatic, nothing out of the ordinary occurred during the
7 exchange.

8 Q. All right. I'd like to direct your attention now to
9 Attachment F.

10 A. Yes, sir.

11 Q. And I will direct your attention to the first page of
12 the attachment, which is attachment 1 of -- it says
13 Exhibit D-b, page 1 of 3, Bates stamps number ending in 0529.
14 Do you see that?

15 A. I do.

16 Q. Take a look at this document, please. And I'll just
17 read the very top of it, "ISN 18 Oral Statement for Rebuttal
18 of the Summary of Evidence for Combatant Status Review
19 Tribunal dated 8 February 07 taken on or about
20 20 February 2007 by PR #3."

21 First of all, I asked you before to just keep in mind
22 the D-b that we had discussed in the course of Attachment E,
23 correct?

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1 A. Yes, sir.

2 Q. Have you had occasion to look at this document in
3 front of you now, compared to the earlier version?

4 A. I did.

5 Q. And can you give us a description of what you found
6 in doing that comparison?

7 A. Yeah. The D-b, which is dated 20 February, appears
8 to have pen and ink edits on it and with initial marks or ----

9 Q. I'm sorry, Judge. Let me hold -- let me stop you
10 there.

11 TC [MR. RYAN]: Your Honor, for this document, I ask for
12 the feed, and I ask for it to be published to the gallery.

13 MJ [Col COHEN]: Any objection?

14 ADC [MS. PRADHAN]: No, sir.

15 MJ [Col COHEN]: It may be.

16 TC [MR. RYAN]: Wait one second, please, sir.

17 WIT: Yes.

18 TC [MR. RYAN]: Okay. It's there.

19 Q. Judge -- I'm sorry, Mr. Witness, if you would,
20 please, tell us -- I stopped you in the middle of your
21 explanation.

22 A. Sure. D-b, dated 20 February 2007, appears to have
23 editorial -- not editorial -- edits and strikeouts and

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1 additions that some of which were in the D-b dated
2 30 March 2007. For example, some of them were just removing
3 articles or changing word from "company" to "business." And
4 others, paragraph N and O, Q, appear to have been rewritten or
5 edited more completely other than just making a typographical
6 or a style change.

7 Q. I'll direct your attention up to the top heading area
8 where it says "dated 8 February 07, taken on or about 20
9 February 2007."

10 20 February 2007 was not the date of this CSRT; am I
11 correct?

12 A. No, several weeks before.

13 Q. Do you recall if ever there had been an earlier date
14 actually scheduled for this CSRT?

15 A. I don't recall that. I would imagine the date is the
16 date that the PR met with the detainee and crafted this
17 document, but that's my understanding.

18 Q. Going down to -- directing your attention down to the
19 highlighted area, where there is handwritten words put in, do
20 those words appear in the version later accepted by the CSRT?

21 A. They do.

22 Q. And do they appear in handwritten form or do they
23 appear in typewritten form?

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1 A. They were typed in.

2 Q. And next to the handwritten portion on the document
3 ending in Bates stamp 0529, am I correct, sir, there appears
4 to be what looks like a signature or initials?

5 A. Yes.

6 Q. Does that look familiar to you?

7 A. It looks like the same mark that was used to -- in
8 the signature line on the exhibits admitted at the tribunal
9 hearing.

10 Q. Turning to the next page -- and I'll ask that it be
11 published for the gallery -- ending in Bates stamp number
12 0530, Exhibit D-b, page 2 of 3.

13 MJ [Col COHEN]: Any objection to this page?

14 ADC [MS. PRADHAN]: Not page 2, sir.

15 MJ [Col COHEN]: All right. It may be produced.

16 A. Yes, sir.

17 Q. And are there more handwritten edits on this page as
18 well?

19 A. There are.

20 Q. They are highlighted?

21 A. They are.

22 Q. Are there other places where there appears to be a
23 signature as well?

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1 A. Yes, one that I can see at the bottom.

2 Q. And does that look familiar to you as well?

3 A. It looks similar to the same one from the signature
4 blocks on the ones admitted into the tribunal.

5 Q. I will direct your attention to the next page, and
6 I'll state right up front, this final page is not for
7 publication to the gallery. It ends in Bates stamp number
8 0531, page 3 of 3 of Exhibit D-b.

9 Tell me if you're there, sir.

10 A. I am.

11 Q. More handwriting on this page, to your ----

12 A. There is.

13 Q. And do you see an area next to the signature line?

14 A. I see a mark in the signature line, and I see similar
15 marks elsewhere on the document.

16 Q. And the similar marks you're talking about also
17 appear to be the same signature?

18 MJ [Col COHEN]: You may publish -- oh, never mind. I
19 just wanted to make sure it's not going to the gallery. It's
20 not. Thank you.

21 WIT: I'm sorry, sir?

22 Q. Did you hear my question, sir?

23 A. I did not.

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1 Q. On this page, why don't you count them for us. How
2 many places do you see what you've described before as what
3 appears to be a signature?

4 A. Appears to be five, including the one in the
5 signature line.

6 Q. Sir, as to this document, which we've been looking
7 at, D-b, does it appear to you to be a draft of what was
8 ultimately received?

9 A. It does.

10 Q. Is it -- whether or not all of the handwritten
11 additions appear in the final, does it appear to you to be
12 consistent in terms of the information contained?

13 A. I didn't do a -- I reviewed -- I read both documents
14 and compared them to the best my ability, but the one without
15 the edits is the one that was submitted at the tribunal.

16 Q. Is there anything that you can see that's markedly
17 different about this one versus the one we looked at in
18 Attachment E?

19 A. Not markedly. As I said, there were some removals or
20 changes of words, but ----

21 Q. Very good.

22 A. ---- it's essentially the same thing.

23 Q. All right. I'll direct your attention now, sir, to

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1 the next page ending in Bates stamp number 0532.

2 TC [MR. RYAN]: Ask that it be published for purposes of
3 the gallery.

4 MJ [Col COHEN]: Any objection?

5 ADC [MS. PRADHAN]: No objection, sir.

6 MJ [Col COHEN]: It may.

7 Q. Are you there, sir?

8 A. I am, sir.

9 Q. Looking up at the top of the page, it reads, "ISN 18,
10 Final Oral Statement for Combatant Status Review Tribunal
11 Taken on or about 20 February 2007."

12 A. Yes, sir.

13 Q. Within the body, do you see more places where
14 handwritten notations were put in?

15 A. In the last paragraph on that page.

16 Q. And where this one is listed as Exhibit D-c in the
17 bottom right-hand corner, correct?

18 A. Yes, sir.

19 Q. Were you able to compare this D-c from Attachment F
20 with the earlier one we looked at in Attachment E?

21 A. I was.

22 Q. And do they appear to you to be, for the most part,
23 consistent?

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1 A. For the most part consistent. Again, there was
2 removals and changes that were made, and they appear to have
3 been made in D-c.

4 Q. Very good.

5 I'll ask you to turn to the next page ending in Bates
6 stamp number 0533.

7 TC [MR. RYAN]: And I'll ask Master Sergeant Horn to
8 publish, unless there's an objection.

9 MJ [Col COHEN]: Is there an objection?

10 ADC [MS. PRADHAN]: No objection, sir.

11 MJ [Col COHEN]: You may.

12 Q. Are you there, sir?

13 A. I am.

14 Q. And does the signature appear on this page as well?

15 A. It does.

16 Q. Does it seem to you to be the same one?

17 A. Appears similar, yes. The same.

18 Q. Sir, is it -- how would you assess the length of this
19 particular CSRT as to Mr. -- who you knew him as

20 Mr. al Baluchi compared to others you sat on?

21 A. A little bit longer, but not markedly so. They
22 took -- we were on the record somewhere between an hour and a
23 half and two hours or so on most of them in open session.

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1 Q. In the pages we've discussed today, by my count, I
2 see two statements from the accused; is that correct?

3 A. Yes, sir.

4 Q. I saw statements regarding witnesses that were
5 permitted to be presented; is that correct?

6 A. Yes, sir.

7 Q. More than one.

8 A. Yes, sir.

9 Q. Did they include co-accused or co-detainees?

10 A. Co-detainees at the time, yes.

11 Q. Throughout the proceedings, as it related to this
12 particular detainee, did you notice anything that caused you
13 concern as to his physical, emotional, or mental condition?

14 A. None.

15 Q. Judge DeLury, I -- the parties, specifically the
16 accused Aziz Ali, has presented to this commission a statement
17 that during early 2007, he was suffering from something
18 called, quote, learned helplessness, end quote.

19 Are you familiar with that term at all?

20 A. I ----

21 ADC [MS. PRADHAN]: Objection, Your Honor. This calls for
22 an expert opinion.

23 MJ [Col COHEN]: I think -- I will allow the question.

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1 How far I let you get down here, I will ----

2 TC [MR. RYAN]: Yes, sir.

3 MJ [Col COHEN]: ---- I will note the objection. So,
4 Counsel, I think the question was is does he know what learned
5 helplessness is; is that correct?

6 TC [MR. RYAN]: That is correct.

7 MJ [Col COHEN]: Sir, what was your response?

8 WIT: It's a term that I'm not familiar with. It was
9 mentioned to me in preparation and it was the first I had
10 heard of it.

11 Q. And I'm not going to try and turn you into a
12 psychologist at this late point, but let me ask you this
13 question, sir: Did you at any point in this particular
14 tribunal hearing preside over a man that you in any way
15 considered helpless?

16 A. He did not appear to be helpless. Obviously, he's a
17 detainee and his liberty is restricted, as many people who
18 appear in front of me are with their liberty restricted; but
19 he appeared to be, again, alert, oriented, cooperative with
20 the process.

21 TC [MR. RYAN]: May I have a moment, Your Honor?

22 MJ [Col COHEN]: You may.

23 TC [MR. RYAN]: Judge DeLury, thank you for your time,

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1 sir.

2 Your Honor, that's all I have.

3 WIT: Thank you Mr. Ryan.

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

5 For scheduling purposes, Ms. Pradhan, how long do you
6 anticipate that your inquiry will be? And I'm just looking
7 for the ballpark.

8 ADC [MS. PRADHAN]: Your Honor, I would estimate about an
9 hour and a half to two hours.

10 MJ [Col COHEN]: Okay. Then I tell you what, sir. We're
11 going to go ahead and take a lunch at this point, and we will
12 reconvene at 1330 hours, and we'll continue with open session
13 testimony.

14 If we cannot take up any of the motions today, we'll
15 push those to tomorrow, and then we'll go into -- and
16 definitely take the closed session testimony this afternoon.
17 All right.

18 All right. We're in recess until 1330.

19 Please do not discuss your testimony during the
20 break.

21 [END OF PAGE]

22

23

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1 WIT: Of course, Judge.

2 [The R.M.C. 803 session recessed at 1156, 24 September 2019.]

3 [The R.M.C. 803 session was called to order at 1331,
4 24 September 2019.]

5 MJ [Col COHEN]: The commission is called to order. The
6 parties are present. The accused are still absent.

7 Ms. Pradhan, are you ready -- you are ready.

8 Excellent. Please ----

9 ADC [MS. PRADHAN]: Yes, sir.

10 MJ [Col COHEN]: Someone please retrieve the witness.

11 [The witness resumed the stand.]

12 MJ [Col COHEN]: Your Honor, if you would please take the
13 stand. I remind you, you are still under oath.

14 WIT: Yes, sir.

15 MJ [Col COHEN]: I recognize you to be the same witness
16 who testified earlier this morning.

17 Ma'am, your witness.

18 ADC [MS. PRADHAN]: Thank you, sir.

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

20 **CROSS-EXAMINATION**

21 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

22 Q. Good afternoon.

23 A. Good afternoon.

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1 Q. Before we go into the meat of the cross-examination,
2 I'd like to take a couple of minutes and explain the
3 guidelines around examination, if you don't mind.

4 A. Yes, of course.

5 Q. So my examination is divided into sections, roughly
6 chronologically; but I will signal topics before changing
7 topics just to orient you to the questions that I'm about to
8 ask, if that makes sense.

9 A. Yes, ma'am.

10 Q. Great. If anything is unclear at all regarding the
11 context or the time period that we're talking about, please
12 just let me know and I'll be happy to clarify.

13 A. I will.

14 Q. All right. I may ask you questions at certain times
15 about whether you know certain facts or are aware of certain
16 facts. Do you understand?

17 A. Yes.

18 Q. And can we agree that these are yes-or-no questions;
19 and if I need any further information, that I'll ask you
20 follow-up questions?

21 A. Certainly.

22 Q. Thank you. You have a binder in front of you, sir,
23 that has, I think, your name on it, the DeLury Binder ----

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1 A. Yes, the white one?

2 Q. ---- and it has -- yes, sir. It has certain relevant
3 documents that I'll ask you to take a look at as we go through
4 this.

5 A. Okay.

6 Q. Some of them are just to refresh your memory, and
7 some of them we'll actually be reading from and talking about
8 the substance of them. Some of those documents are marked
9 SECRET, and those documents we will not be discussing the
10 substance of in this session, but we may -- I may ask you to
11 refer to a document that is marked SECRET in certain context
12 without discussing the classified information therein. Most
13 of those documents are marked UNCLASSIFIED.

14 Regarding classified information, the goal in this
15 session is, of course, to ask only unclassified questions and
16 elicit only unclassified answers. Do you understand?

17 A. Yes, ma'am.

18 Q. And so if at any point you feel that one of my
19 questions might require the use of classified information,
20 please just let the military commission know, we'll have a
21 discussion about it, and the military judge will give you
22 further instruction.

23 A. Understood.

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1 Q. Thank you. Additionally, the government has -- as
2 you probably gathered from some of my objections, the
3 government has invoked national security privilege over
4 certain topics. And are you familiar with the topics over
5 which the government has invoked national security privilege?

6 A. I am not.

7 Q. Okay. In -- I'll represent to you that, in those
8 cases, on those topics, we have agreed on a convention whereby
9 I may ask you that -- quote -- you know, if I were to ask you
10 the certain information, you would not be able to answer me
11 due to the government's invocation of national security
12 privilege. Do you understand that convention?

13 A. I understand the convention. I'm not quite sure how
14 it would work, but I'll wait and see.

15 Q. I understand. And because you may not be familiar
16 with those topics, what I'll do, if it comes up, is I'll pause
17 and I'll ask you to pause before answering so that the
18 government can object.

19 A. I understand.

20 Q. Thank you. There may additionally be other questions
21 that I am not quite sure whether the answer is classified or
22 not, and I'll ask you to pause before answering those as well,
23 just so that the government has an opportunity to object.

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1 A. Yes, ma'am.

2 Q. We do our best to make the lives of the court
3 reporters and the interpreters as easy as possible and by not
4 speaking too quickly. Do you understand? I am usually the
5 most guilty of violating this stricture myself, but I believe
6 that I get a signal if either one of us speaks too fast. And
7 can we agree that if I get that signal, that I'll just let you
8 know?

9 A. I'll keep it in mind. Thank you.

10 Q. Thank you.

11 I want to tell you quickly before -- again, before we
12 proceed, about one particular exhibit that is in our notice of
13 exhibits. It is not contained in your binder because this is
14 a little bit atypical.

15 Sir, you gave an oral history interview in 2015 to
16 the Atlantic County Veterans History Project. Do you recall
17 that?

18 A. I do.

19 Q. Okay. During the interview, which is about 45 -- 48
20 minutes long, you talked a little bit about your education,
21 your military background, and about your involvement with the
22 early CSRTs, the Combatant Status Review Tribunals here at
23 Guantanamo, and also with your involvement with the high-value

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1 detainee CSRTs. Do you recall that?

2 A. I did. I do.

3 ADC [MS. PRADHAN]: Now, the government has actually
4 produced that interview to us in digital format. It is fully
5 unclassified, and it is contained in the record, Your Honor,
6 at AE 628BBB, which is the defense notice of exhibits. It's
7 Attachment UU. And I believe that we submitted a CD with that
8 audio on it.

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

10 Q. At certain points, Judge DeLury, I'm going to
11 represent to you that you made certain statements in that
12 interview, and I may ask you to confirm or expand upon them or
13 clarify them. Do you understand that?

14 A. I do.

15 Q. Now, for the sake of time management, I will not play
16 the audio each time I quote from that interview; but it's your
17 interview, sir, and if at any point you'd like me to play the
18 audio, we have the time stamps, and we'd be happy to play that
19 audio just to refresh your memory.

20 A. Thank you.

21 Q. Sir, when did you -- when did you find out that you
22 would be testifying this week?

23 A. Six to eight weeks ago, I think.

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1 Q. Okay. So roughly during -- maybe during the summer,
2 maybe July?

3 A. Yes. Uh-huh.

4 Q. Okay. And how long have you spent preparing for this
5 testimony?

6 A. I'm sorry?

7 Q. How long have you spent preparing for your testimony,
8 sir?

9 A. Since I got here on Saturday, I came to the office
10 and reviewed the binder that was given to me. Several hours.

11 Q. Okay. So at no point before that did you spend any
12 time preparing or reviewing documents for this testimony?

13 A. I did not.

14 Q. Okay. Had you met with any members of the
15 prosecution prior to coming down to Guantanamo to prepare for
16 this testimony?

17 A. I have met with members of the prosecution but not --
18 when I learned I was coming to testify. I believe I was
19 interviewed in 2011.

20 Q. Yes, sir.

21 A. That's what I remember. I mean, sometime -- it was
22 in the past. Most recently, the only preparation I've done is
23 since I've been here on the island.

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1 Q. Okay. And so since you were notified that you would
2 be testifying this week, you didn't meet with any member of
3 the prosecution until coming down on Saturday?

4 A. Until I got here, that's correct.

5 Q. I understand.

6 And in preparing, you said you'd spent a number of
7 hours?

8 A. Yes.

9 Q. Do you think you could quantify that for me?

10 A. Sure. Let me think.

11 Sunday, I probably spent about three to four hours,
12 better part of the afternoon. And yesterday, when I was
13 waiting to testify, I reviewed the binder again, and some
14 other materials were shared with me that might come up during
15 your examination, and I reviewed those. So, again, maybe
16 another two hours.

17 Q. Okay. So between five and ten hours, can we say?

18 A. Approximately.

19 Q. Okay. And you mentioned that, on direct examination,
20 that you had reviewed the transcripts of your previous -- of
21 the high-value detainee CSRTs; is that correct?

22 A. That's correct. The ones that were provided in this
23 blue binder.

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1 Q. Okay. And those are the verbatim transcripts?

2 A. Yes.

3 Q. Did you review any -- you mentioned other documents
4 that you may have reviewed yesterday?

5 A. Yes.

6 Q. Would those be documents described by you in your
7 direct examination contained in this, quote, CSRT package?

8 A. Yes.

9 Q. And those would be documents including, say, the
10 Detainee Election Form and other relevant documents that were
11 in that package that was forwarded by you to the convening
12 authority?

13 A. Yes.

14 Q. Thank you, sir.

15 Now, you denied my request to meet with you prior to
16 your testimony today; is that correct?

17 A. Yes.

18 Q. And can you tell me why that was?

19 A. I chose to be questioned here rather than at some
20 other forum.

21 Q. I understand.

22 Sir, I'd like to turn to the -- sort of first topic
23 I'd like to talk about is a little bit about your background

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1 and your JAG experience.

2 A. Yes, ma'am.

3 Q. I understand you graduated with a J.D. from
4 Rutgers-Camden; is that correct?

5 A. I did.

6 Q. Now, sir, you graduated with a J.D. in international
7 law honors; is that correct?

8 A. I did.

9 Q. And what does that mean, to graduate with
10 international law honors?

11 A. You take a series of classes that are international
12 in nature, so international organizations, the United Nations,
13 international trade, and contracting. You have to score a
14 particular level of grade, and if you take the requisite
15 number of classes and get the appropriate grade, then you
16 graduate with that certificate.

17 Q. And as part of that, did you study international
18 humanitarian law or the laws of war at all?

19 A. We did, I mean, mostly as it touched upon the United
20 Nations Charter and certain other convention -- international
21 conventions.

22 Q. Okay. After you were accepted to the JAG Corps, sir,
23 you went to the Naval Justice School; is that correct?

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1 A. I did.

2 Q. And could you -- and that was for a shorter period of
3 time; is that right?

4 A. It was however long the course is. I have a
5 recollection of it being around three months.

6 Q. Around three months?

7 A. Yeah.

8 Q. And what topics would you have covered in Naval
9 Justice School?

10 A. Military justice, administrative law and procedures,
11 legal assistance. I don't remember there being a course in
12 I-law, or international law, but there may have been a module
13 for that.

14 Q. In your oral history interview, sir, you stated that,
15 quote, The bread and butter of the JAG Corps is military
16 justice. Do you recall saying that?

17 A. I do.

18 Q. Okay. You also described military justice as, quote,
19 Applying the fairness of the military justice system, assuring
20 that fair trials are had, providing personal representation
21 for individuals accused, representing the government in
22 prosecutions, presiding as a military judge, and all of the
23 facets just like any other court would have.

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1 Do you recall saying that?

2 A. I do.

3 Q. Okay. You also stated that you practiced operational
4 law.

5 A. I did.

6 Q. And that was described by you, sir, as providing
7 advice to commanders in the field or at headquarters on the
8 rules of engagement, the law of war, and the proper exercise
9 of military power. Do you recall that?

10 A. I do recall that.

11 Q. I'd like to ask you a few questions about the
12 operational law side, if I may.

13 A. Sure.

14 Q. Is it fair to say that in order to issue advice about
15 operational law, you had to have some background in the laws
16 of war?

17 A. It's fair to say.

18 Q. And where would you have gained that background, sir?

19 A. I gained it OJT. I was assigned to Code 10, the
20 Reserve component of that, which is the International
21 Operational Law Section of the Navy JAG. I was always a
22 Reservist in that capacity, and I have served in a unit that
23 supported Code 10. So duties as assigned, usually by -- I was

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1 not the CO of that unit, so whoever was the CO would have
2 given me tasks. It consisted of research and writing projects
3 for the most part.

4 Q. Okay. Research and writing projects for whom, sir?

5 A. I'm sorry. I'm having a hard time hearing you, Miss.

6 Q. Oh, I'm so sorry.

7 A. That's okay.

8 Q. For whom would you be doing research and writing
9 projects, sir?

10 A. For Code 10.

11 Q. Okay. Did you ever provide advice or were you ever
12 involved in situations involving non-state actors?

13 A. I was not.

14 Q. Okay. Now, in terms of your legal practice as a JAG,
15 you testified a little bit about how you began your practice
16 as defense counsel for about 18 months, did you say?

17 A. Approximately, yes.

18 Q. You also described that in your oral history
19 interview as being, quote, like a public defender; is that
20 accurate?

21 A. Yes. Yes.

22 Q. Okay. You described your duties as defense counsel
23 in Legal Command a little bit with Mr. Ryan. Is it fair to

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1 say that you had a duty to investigate your clients' cases as
2 defense counsel?

3 A. Yes.

4 Q. And what would that investigation entail, sir?

5 A. First would be speaking to one's client, and then
6 interviewing or attempting to interview witnesses. We had
7 limited access to investigation support, but if investigation
8 were needed, then to do that. The complexity of the cases was
9 not very high.

10 Q. I understand.

11 In terms of interviewing witnesses or attempting to
12 interview witnesses, how would you go about doing that, sir,
13 just in the case of ----

14 A. I would approach the trial counsel usually,
15 especially if it was a government witness or anticipated to be
16 a government witness, an NIS -- NCIS agent or some other law
17 enforcement type. I would approach and ask for an opportunity
18 to speak, and sometimes it would be accommodated, sometimes it
19 would not. Interviewing usually family members or those that
20 the accused would want me to speak to ----

21 Q. Uh-huh.

22 A. ---- about his future.

23 Q. Would you approach trial counsel if you wanted to

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1 investigate -- excuse me, if you wanted to interview defense
2 witnesses?

3 A. No. No.

4 Q. Okay. And why would that be, sir?

5 A. Presumably because I would have access to them.

6 Q. I understand. You said you handled a fair number of
7 guilty pleas; is that correct?

8 A. That is correct.

9 Q. And that entailed discussions with clients at length,
10 making sure they understood everything, as you said?

11 A. Yes, ma'am.

12 Q. Would those conversations -- would they have been
13 privileged, sir?

14 A. They were privileged, yes.

15 Q. They would have attached -- the attorney-client
16 privilege would have attached to those conversations?

17 A. Yes.

18 Q. I understand. Now, sir, you handled military crimes
19 in addition to common law crimes; is that correct?

20 A. Yes.

21 Q. How can you tell -- how do you know what a military
22 crime is? To what do you refer to ascertain whether something
23 is a military crime?

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1 A. That -- if you -- the commission of which by a
2 civilian ordinarily would not be an offense.

3 Q. I see.

4 A. So someone can be disrespectful to a Navy captain,
5 and if he's not in the military, it's not a crime.

6 Q. I see. Do you have any other examples of military
7 crimes?

8 A. Unauthorized absence, dereliction of duty. There are
9 certain misbehavior offenses in combat or time of war,
10 particularly military offenses. Striking of -- some of them
11 are a combination. When you strike someone, that's an
12 offense; but if you strike somebody who's in a particular rank
13 or grade, that makes it a different kind of offense.

14 Q. And those sorts of military crimes are handled in
15 military tribunals or military courts, right?

16 A. They are, yes.

17 Q. I see. And in your -- in your oral history
18 interview, you describe military crimes as, quote, crimes that
19 be -- can be committed by people in the military. Do you
20 recall that?

21 A. I do.

22 Q. Sir, you also talked a little bit about -- in your
23 oral history interview, about how Article 32 of the UCMJ

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1 provides for investigation of an offense alleged when an
2 officer is appointed to inquire into what an accused allegedly
3 has done and takes testimony.

4 And you described -- you described this as, quote,
5 similar to a grand jury; is that right?

6 A. Yes.

7 Q. Okay. You also stated that, unlike a grand jury, the
8 defendant is presented with appointed counsel for free, with
9 military counsel and civilian counsel, if they want to hire
10 one. Do you recall that?

11 A. I do.

12 Q. Okay. You stated that the accused has, quote, rights
13 of confrontation and cross-examination. So the Article 32
14 officer, the presiding officer, looks at the evidence in front
15 of him, looks at the charge sheet -- you're accused of assault
16 was the example that you gave -- calling the guy who was
17 assaulted, calling the doctor who treated him, calling the
18 officers who arrested him. Do you recall saying that?

19 A. I do.

20 Q. Is that an accurate summary of the Article 32
21 procedure sitting here now?

22 A. Probably not as perfect as it could be; but in
23 speaking with a layperson, who just wanted a little

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1 background, yes.

2 Q. That's a rough ----

3 A. It's a rough outline or sketch of what a 32 does.

4 Q. Thank you, sir. And again, you've practiced as both
5 defense and prosecution; that's correct?

6 A. I did.

7 Q. And you discussed with Mr. Ryan the invocation in
8 military justice about the sort of what you called the chief
9 constitutional rights to ensure that defendants are familiar
10 with; is that -- do you recall that?

11 A. Yes.

12 Q. Okay. And those rights included the right to remain
13 silent, the right to confront evidence, the right to put on a
14 case at trial, and be represented by counsel, right?

15 A. Yes.

16 Q. Okay. You said it was important to ensure -- I think
17 you stated this several times, sir, on direct -- that the
18 defendant understood exactly what he was doing, correct?

19 A. Yes.

20 Q. Okay. And that's particularly true, sir, if the
21 defendant is making a guilty plea because he's giving up
22 constitutional rights to do so as you described?

23 A. Yes, ma'am.

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1 Q. Okay. Would you agree that the application of those
2 rights and safeguards reflects, as you put it, the fairness of
3 the military justice system?

4 A. Yes.

5 Q. Okay. Were you ever trained, sir, in the standard
6 for torture and cruel, inhuman, and degrading treatment?

7 A. I was not.

8 TC [MR. RYAN]: Objection, Your Honor. This is beyond the
9 scope of direct, beyond the scope of AE 628.

10 MJ [Col COHEN]: Counsel, response?

11 ADC [MS. PRADHAN]: Your Honor, the application -- the
12 standard for torture and cruel, inhuman, and degrading
13 treatment is contained in the laws of war and the Geneva
14 Conventions. I'm simply asking Judge DeLury about his
15 background and training in the laws of war broadly before his
16 appointment as presiding officer of the Combatant Status
17 Review Tribunals.

18 MJ [Col COHEN]: Okay. I will allow you some general
19 background in what his training was prior to presiding. I
20 understand that line of questioning.

21 All right. I'll overrule it with respect to that
22 specific line of questioning.

23 ADC [MS. PRADHAN]: Thank you, sir. I won't go very far

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1 down this road.

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

3 A. I have no formal training in the subject.

4 Q. Did you have any informal training, sir?

5 A. I have read Common Article 3. I would have read
6 cases, media, it's just -- nothing, nothing in formal
7 training, that -- self-taught type of training, just general
8 reading.

9 Q. Okay. And what sort of cases? Do you recall any of
10 the sort of cases you might have read?

11 A. Over the years, or in -- before I went to Guantanamo?

12 Q. Let's say before you came to Guantanamo Bay, sir, for
13 the early CSRTs.

14 A. I can't pull anything specific.

15 Q. Okay. Now, you testified, I believe, that you left
16 active duty after four years; is that correct?

17 A. Yes, ma'am.

18 Q. And you entered the Reserves?

19 A. I did.

20 Q. Okay. In your oral history interview, sir, you
21 stated that you affiliated with the Reserves around the same
22 time as you took your position at Bally's, I believe it was,
23 yes?

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1 A. That's correct.

2 Q. And you stated that, quote, In the Reserves, we had
3 justices of state supreme courts, captains of industry, major
4 political figures in the Reserve JAG Corps, like Lindsey
5 Graham. I assume you're referring to Senator Lindsey Graham?

6 A. I was.

7 Q. What is your relationship with Senator Graham, sir?

8 A. None to speak of. I've met him a couple of times.

9 Q. Okay. Senator Graham was allowed to observe
10 Mr. Mohammad's CSRT; is that correct?

11 A. Yes.

12 Q. Okay. And we'll come back to the actual CSRTs
13 shortly.

14 A. Sure.

15 Q. Did your experience in the Reserves include
16 interactions with senior government personnel from any
17 intelligence agencies?

18 A. Never.

19 Q. Okay. But you did interact with senior DoD officials
20 during your time in the Reserves; would that be fair to say?

21 A. Yes. I mean, I can't think of anyone specifically
22 that would be, quote, senior, I -- I didn't count the
23 Secretary of Defense among, you know, acquaintances. I met

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1 Mr. England once or twice, but ----

2 Q. Do you recall when you might have met Mr. England?

3 A. Would have been here in Guantanamo, I think, when he
4 made the visit to -- with the congressional delegation.

5 Q. And you remained in the Reserves from 1990 until
6 about 2011; is that correct?

7 A. April 1st, 2011, yes.

8 Q. So 21 years, sir?

9 A. 21 years in the Reserve, four in active, yeah.

10 Q. Okay. And you were assigned to the Legal Service
11 Reserve Command, at which point you actually received a
12 promotion to lieutenant commander; is that correct?

13 A. I don't really remember when I got O-4, but it would
14 have been sometime when I was working for the LS0.

15 Q. Okay. And you continued doing what you had been
16 doing prior to joining the Reserves, which would have included
17 advice on operational law issues; is that correct?

18 A. It depends on the unit that I was -- I was in several
19 units. I was in an LS0, Legal Service Office, which mostly
20 provided personal representation. We did assistance for
21 servicemembers and their dependents. Then I was in the
22 Admiralty unit, so maritime issues. Then I was in the Code 10
23 unit, which was the one we discussed earlier. And then after

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1 Code 10, I think that might have been when I applied for
2 military judge and was accepted.

3 Q. I see. Do you recall at this point in time during
4 the -- roughly beginning in 2 -- excuse me, beginning in the
5 1990s, what sort of operational law issues you would have been
6 advising on?

7 A. I don't recall any, and I -- to be clear, I didn't
8 advise combatant commanders directly. I was doing, as I was
9 instructed and requested to do, research. I'm sure if I was
10 given enough time and -- I don't have any papers, I didn't
11 keep anything -- but there might be someone somewhere in a
12 filing cabinet that kept a few of the things I wrote. But I
13 can't tell you as I sit here today what they were.

14 Q. Do you know where those documents would be kept, sir?

15 A. I have no idea even if they exist. We were still in
16 paper then before digits.

17 Q. I understand some of those difficulties. Do you have
18 any idea where that research would have been sent to?

19 A. We -- like I said, Code 10 -- and Code 10 worked, I
20 think, out of the Pentagon. I was only there a couple of
21 times. We were drilling offsite, and we'd receive our
22 assignment, and we'd do our research and our writing.

23 Q. Okay.

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1 A. They were all -- I will say this: They were all
2 unclass, so the work that we were given to do, because we were
3 doing it usually in the location where nothing could be
4 secure.

5 Q. Okay. When did you first become aware, sir, that the
6 United States was at war with al Qaeda?

7 A. I would imagine it was right after 9/11.

8 Q. Okay. So at no point before 9/11 did anyone perhaps
9 in the Reserves or anyone else say to you, "Hey, we're at war
10 with al Qaeda"?

11 TC [MR. RYAN]: Objection, Your Honor. Beyond the scope
12 of direct, beyond the scope of AE 628.

13 MJ [Col COHEN]: Counsel?

14 ADC [MS. PRADHAN]: Your Honor, the government has called
15 this witness as part of their hostilities argument against
16 Mr. al Baluchi, and part of that inquiry relies on whether or
17 not we were at war. I understand that this question has been
18 decided by the military commission, but it is still the
19 foundational question upon which the other elements of -- of
20 the Military Commissions Act have to be ascertained by the
21 military commission.

22 And so Judge DeLury's -- Judge DeLury's impression
23 about whether or not we were at war with al Qaeda prior to

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1 September 11th has a bearing not only on that question, but
2 also on the -- also on his appointment as presiding officer of
3 these tribunals, and his attitude towards these tribunals.

4 MJ [Col COHEN]: Counsel?

5 TC [MR. RYAN]: Your Honor, the witness was called for the
6 specific purpose -- and I was very clear in my direct -- as to
7 his observations of the accused. He was not called in regard
8 to a hostilities question, nor has he ever been requested as a
9 witness to the hostilities question.

10 ADC [MS. PRADHAN]: Your Honor, if I may?

11 MJ [Col COHEN]: You may.

12 ADC [MS. PRADHAN]: Judge DeLury's impression of whether
13 or not we were at war with al Qaeda pre-9/11 certainly has an
14 impact on his conduct of the CSRTs for the high-value
15 detainees who were named by President Bush as having
16 perpetrated September 11th in 2006, prior to any legal or
17 administrative tribunal.

18 MJ [Col COHEN]: Well, I tell you what, Counsel. I'll
19 allow you to -- I'm not really sure I catch the relevance of
20 what his opinion was prior to September 11th, 2001, but if you
21 want to talk about what his opinion of the accused while -- or
22 after -- once he was the President of the CSRT, I'll allow
23 that line of questioning.

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1 ADC [MS. PRADHAN]: Okay, sir. And we'll get to that very
2 shortly.

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

4 ADC [MS. PRADHAN]: I'll move on.

5 **CROSS-EXAMINATION CONTINUED**

6 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

7 Q. Sir, I'd like to -- I'd like to actually move to
8 September 11th now. When September 11th occurred in 2001,
9 what were your immediate next steps?

10 A. I was at work already in Atlantic City. I was aware
11 of it, watching it on TV like everyone else. And I reached
12 out for my boss. I spoke to our security and surveillance
13 people to be aware of whatever was going on on our properties.
14 Just a sense of being alert and aware, I guess.

15 Q. So did you at any point contact any of your
16 colleagues in the Reserves to ask what was being done in terms
17 of mobilization?

18 A. Not that day, no.

19 Q. Okay. When would you have done that, if you did?

20 A. In the intervening months, volunteers were assembling
21 and people were offering to assist. I'm sure I mentioned to
22 one of my supervisor -- superiors that, if anything was
23 necessary, I'd be happy to volunteer.

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1 Q. Okay. Sir, I can refresh your memory just a little
2 bit. In your oral history interview around -- excuse me.

3 In your oral history interview, you said that you
4 helped, quote, helped people get mobilized and, quote, picked
5 up some clearances on the higher side of the intelligence we
6 were getting. Do you recall that?

7 A. I do.

8 Q. Okay. Do you recall around when you would have
9 received these security clearances?

10 A. I think my first clearance was while I was on active
11 duty. I was cleared at TS because I was a communications
12 COMSEC protection guy, and you needed a TS for that. And then
13 when I came into the Reserves, when you went to the Code 10
14 unit, you had to be cleared to TS.

15 The mobilization I may have been referring to was
16 going to places like Fort Dix and helping people with their
17 powers of attorney and wills and helping them get ready to
18 ship out, if they were leaving.

19 Q. Okay. Did you receive any additional clearances
20 after September 11th, if you recall?

21 A. I don't believe I received them after September 11th.
22 I believe I had them beforehand, which might have facilitated
23 my selection for the CSRT, because they were looking for

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1 TS//SCI.

2 Q. Okay. So you obtained the TS//SCI security
3 clearance, or you had a TS//SCI?

4 A. I filled out the forms and that was the clearance
5 that was granted to me, yeah.

6 Q. Okay. Without naming any special access programs or
7 compartments, were you read into any additional compartments?

8 A. Yes.

9 Q. Okay. What was the -- so the purpose of your
10 security clearance, sir, if you received it
11 pre-September 11th, would have been to facilitate your duties?

12 A. To the extent that you got called on active duty or
13 were asked to do something that was more sensitive than the
14 usual projects that were assigned to us.

15 Q. Okay. With your clearance level, sir,
16 post-September 11th, did you receive or have access to
17 intelligence from DoD operations in Afghanistan?

18 TC [MR. RYAN]: Objection, sir. Beyond the scope.

19 MJ [Col COHEN]: Counsel?

20 ADC [MS. PRADHAN]: Sir, this goes to what Judge DeLury
21 may or may not have known about the five defendants prior to
22 serving as their CSRT tribunal judge.

23 MJ [Col COHEN]: Okay. I will -- I will allow the line of

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1 questioning.

2 ADC [MS. PRADHAN]: I can ----

3 MJ [Col COHEN]: I will overrule it. I just want to make
4 sure we don't get too far down into -- like I said, I know you
5 specifically avoided programs, those kinds of things, and so I
6 just want to make sure that we steer clear of those at this
7 point.

8 ADC [MS. PRADHAN]: Yes, sir. And that's my only -- I
9 have basically three questions, and we're not going to go --
10 it's -- it's -- they're yes-or-no questions. We're not going
11 into anything.

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

13 Q. Sir?

14 A. I had no access to any secure -- classified
15 information prior to coming down here to Guantanamo.

16 Q. Okay. And so you would not have had any, say, access
17 to intelligence from the Central Intelligence Agency
18 post-September 11th?

19 A. None.

20 Q. Okay. Until you arrived down here at Guantanamo?

21 A. Whatever was given to me in the classified summary is
22 what I received.

23 Q. Okay. And we can discuss that in a little further

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1 detail in a minute.

2 A. Okay.

3 Q. Moving, sir, to the early Combatant Status Review
4 Tribunals, this was in 2004; is that correct?

5 A. Yes, ma'am.

6 Q. Okay. At some point, you were asked to join those
7 tribunals. Do you recall exactly when you were asked to join?

8 A. I'm going to say in the late summer, early fall of
9 2004.

10 Q. And do you recall why you were asked to join the
11 tribunals?

12 A. It was a demand signal from Navy JAG to provide judge
13 advocate members. I think they just needed help. They needed
14 hands to do it. Being in the JAG Corps Reserve, I was on the
15 message traffic. I mean, I don't remember how I saw it or
16 whether I got a call from someone. It might have been the
17 admiral I was working for at the time might have given me a
18 call to say, "They're looking for volunteers. Are you
19 interested?"

20 Q. That would have been Rear Admiral Kantrowitz; is that
21 correct?

22 A. Yes.

23 Q. So you don't recall, sir, whether you received a

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1 request or whether you might have volunteered?

2 A. I don't, as we sit here. I mean, it would have been
3 not uncommon for me to mention something like that to the
4 admiral, and then him -- for him to say, "Sure, if you're
5 interested, we'll put your name in."

6 Q. Okay. Now, you made sort of a lengthy summarization
7 of what the purpose of the early CSRTs were meant to do in
8 your oral history interview. And what you said was, quote, We
9 were making a battlefield determination off the battlefield,
10 that happens all the time. Forces gather people up on the
11 field. Everyone is shooting at you. People detain them.
12 People become combat d'hors, removed from combat, and then you
13 make a battlefield determination: fighter, civilian, aid to a
14 fighter, innocent, one of my people out of uniform, whatever.
15 You make that determination really quick because things are
16 happening fast.

17 Do you recall that statement, sir?

18 A. I do recall it.

19 Q. So I'd just like to parse that statement just a
20 little bit.

21 A. Sure.

22 Q. You said, quote, That happens all the time.

23 Sir, was it considered normal at that time for

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1 detainees to be gathered from the battlefield and flown around
2 the world before making a status determination?

3 TC [MR. RYAN]: Objection, sir. Relevance, beyond the
4 scope.

5 MJ [Col COHEN]: Counsel?

6 ADC [MS. PRADHAN]: Sir, this goes to -- Judge DeLury was
7 called to oversee Combatant Status Review Tribunals that
8 occurred more than two years after detainees were taken from a
9 battlefield and flown all the way around the world to a
10 distinctly non-battlefield. So that in and of itself was
11 atypical; it was a very atypical beginning to the CSRTs.

12 So I just represent to you that this question just
13 goes to whether or not these were properly constituted
14 tribunals.

15 TC [MR. RYAN]: May I respond, sir?

16 MJ [Col COHEN]: You may.

17 TC [MR. RYAN]: This is not in any way related to the
18 behavior, answers, capabilities of Mr. Ali at the time of the
19 CSRT over which this witness presided. The issues that
20 counsel is raising now go to many other possible motions, but
21 not the one before this commission.

22 MJ [Col COHEN]: Okay. Counsel, help me just understand.
23 So I just take -- I always go back to relevance. What facts

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1 of consequence are we trying to make more or less likely as a
2 result of this? In other words, do I have authority to rule
3 on the issue of whether the CSRTs should have ever been done,
4 or what am I -- where are you going with this?

5 ADC [MS. PRADHAN]: May I have a brief moment, sir?

6 MJ [Col COHEN]: You may.

7 ADC [MS. PRADHAN]: Thank you.

8 [Counsel conferred.]

9 ADC [MS. PRADHAN]: Sir, Mr. Connell reminds me that there
10 are -- first of all, as I indicated, the fact that detainees
11 were taken off a battlefield and there was a significant
12 period of time before these tribunals took place goes to the
13 issue of prompt presentation, which is directly relevant to
14 628.

15 But the reason -- these witnesses are being called
16 not only for 628, but also for issues related to 524 and also
17 issues related to 502. And so the question of how these
18 tribunals were constituted ----

19 MJ [Col COHEN]: Right. No, I understand that. So I
20 discussed this with the government earlier last week, which is
21 that I will -- you know, with 104, I'm going to have the mode
22 of testimony. And then also the scope, I'm willing to give
23 some leeway, as I indicated, as we have done that.

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1 I'm just trying to understand, with respect to this
2 particular line of questioning, what exactly it goes to so I
3 can kind of understand. Because I'm not sure -- how would I
4 rule on whether a CSRT was properly constituted? In other
5 words, how is that going to come before me?

6 ADC [MS. PRADHAN]: Well, if the issue, sir -- taking just
7 prompt presentation. I mean, if -- the fact that there was no
8 prompt presentation had an impact on what for -- I'll speak
9 just for Mr. al Baluchi -- had an impact on what
10 Mr. al Baluchi said before that tribunal.

11 MJ [Col COHEN]: I understand. So it seems like the
12 question then would be is, so how -- isn't it a fact that
13 these CSRTs were -- occurred, you know, more than two years
14 after these individuals were taken off the battlefield.

15 ADC [MS. PRADHAN]: I'll take the suggestion, Your Honor.
16 I'm happy to.

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

18 **CROSS-EXAMINATION CONTINUED**

19 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

20 Q. Sir, as the military commission suggested, isn't it
21 true that these particular tribunals in 2004, specifically
22 with regards to 2004 tribunals, occurred more than two years
23 after many of the detainees here at Guantanamo were taken off

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1 a battlefield?

2 A. I have no specific knowledge about it, but it -- that
3 would be my understanding based on what's released publicly.

4 Q. Okay. And in 2004, are you aware, sir, of what the
5 detainee population here was?

6 A. I don't know the exact number. I know it was perhaps
7 in the hundreds.

8 Q. Yes, sir. I'll represent to you that *The New York*
9 *Times* has reported that the detainee population here was about
10 595 in mid-June 2004.

11 Now, you testified that -- on direct that you
12 conducted dozens of CSRT tribunals; is that correct?

13 A. Two or three dozen, as I recall, yeah.

14 Q. Okay.

15 A. So maybe 24 to 30, I believe.

16 Q. Okay. I just wanted to clarify that because in your
17 previous interview, you had stated hundreds, but I assume that
18 you refreshed your memory?

19 A. If I said that, it was a slip of the tongue. I -- I
20 might have been referring to the hundreds that were conducted
21 by the CSRTs that were established. I wasn't the only one.
22 To my memory, there were five CSRTs running in 2004.

23 Q. I see. So ----

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1 A. There may have been -- they certainly did, in combo,
2 hundreds.

3 Q. I understand, sir. Thank you. You stated that there
4 were three tribunal members for each panel?

5 A. That's correct.

6 Q. And roughly five tribunals, you've stated, yes?

7 A. In 2004, yes.

8 Q. Okay. And you were the judge advocate member; is
9 that correct?

10 A. Yes.

11 Q. What was your specific role as the judge advocate
12 member of the tribunal?

13 A. I think to assist the president on any evidentiary
14 issues, lawyer-type issues. I don't know why the instruction
15 was written that way. I certainly wasn't consulted about the
16 instruction. But it was my sense that they wanted a JAG on it
17 for some kind of legal expertise -- small E -- to help the
18 tribunal.

19 Q. Okay. And the decisions were made by simple majority
20 vote or ----

21 A. The decisions were by majority, either 3-0, and if it
22 was 2-1, then either way, however the decision went, then
23 there would be a dissenting report, if desired.

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1 Q. Okay. What was the evidence you received to consider
2 in those early CSRTs, sir?

3 TC [MR. RYAN]: Objection, sir. Relevance.

4 MJ [Col COHEN]: Counsel?

5 ADC [MS. PRADHAN]: Strike that, Your Honor. I'll move
6 on.

7 MJ [Col COHEN]: All right. Thank you. Sustained then.

8 Q. In 2004, sir, did you -- were you aware that black
9 sites existed at Guantanamo Bay?

10 TC [MR. RYAN]: Objection, relevance.

11 MJ [Col COHEN]: Counsel?

12 ADC [MS. PRADHAN]: Sir, it's well known that all of the
13 high-value detainees were held at black sites at certain
14 points during their detention prior to being brought to
15 Guantanamo Bay. I'm simply trying to ascertain whether
16 Judge DeLury had any knowledge of the CIA hosting black sites
17 here at Guantanamo Bay, which is an unclassified fact.

18 MJ [Col COHEN]: Okay. I can -- I can see some relevance
19 to how that could be -- how that could be argued. I'll allow
20 that question. Overruled.

21 ADC [MS. PRADHAN]: Thank you, sir.

22 A. I had no knowledge of it until a few days ago.

23 Q. Okay. Thank you. When did you first hear that

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1 detainees were held overseas by the CIA?

2 A. I don't remember. I don't know. I would have read
3 it in the paper, I'm sure.

4 Q. So if you read it in the paper, sir, you might have
5 been aware by around 2005-2006; is that correct? That's when
6 the first stories came out.

7 A. Perhaps. I don't know.

8 Q. Sir, I'd like to move to the 2007 CSRTs, if I may.

9 A. Yes.

10 Q. Now, you discuss in your oral history interview, and
11 you discussed a little bit with Mr. Ryan this morning, about
12 when you were notified that you were being asked to conduct
13 the CSRTs for the high-value detainees. Do you recall that?

14 A. I do.

15 Q. Okay. Could you give me a time frame for when you
16 received that call?

17 A. Sure. It was approximately the summer -- late
18 summer, early fall, again, of '06, and I received a call from
19 the -- I believe he was the director of the CSRTs at the time,
20 although he may have still been the deputy director, or one of
21 his aides, Mr. Sweigart, and asked if I, you know, was
22 interested in taking a set of orders and to coming down to
23 Guantanamo to work on CSRTs.

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1 Q. Okay. And, Mr. Sweigart, you're referring to Gary
2 Sweigart; is that correct?

3 A. I don't remember his first name. I only ever called
4 him captain or mister.

5 Q. Okay.

6 A. Might have been Frank.

7 Q. Frank Sweigart?

8 A. Might have been.

9 Q. I may be wrong, sir. I can -- we can check that,
10 that's fine. Now, you have previously said that the -- I
11 guess it was Mr. Sweigart said that he had read some of your
12 records when he called you. Do you recall that?

13 A. Yeah. He had been the deputy in '04, which is how I
14 got to know who he was. So I presumed that he knew of my work
15 in '04 and thought I could do the job.

16 Q. Did he say anything specifically about your 2004
17 records and whether they impacted why he was calling you?

18 A. He didn't.

19 Q. Okay. He also told you that he couldn't give you any
20 more details over a nonsecure line; is that correct?

21 A. That's correct.

22 Q. All right. When did you come to Washington for the
23 briefing that you described for Mr. Ryan?

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1 A. Not long after that. I can't tell you the exact
2 date.

3 Q. Okay. I think -- you may have represented actually
4 that the briefing was in December 2006. Do you recall that?

5 A. Okay. I mean, that's -- I don't have a firm date in
6 mind, but ----

7 Q. Roughly ----

8 A. ---- sounds right, yes.

9 Q. ---- late 2006?

10 A. Yes.

11 Q. Do you recall where that briefing was?

12 A. Crystal City, I think.

13 Q. Okay. Do you recall who gave you that briefing?

14 A. Mr. Sweigart, I think. He had a deputy, I can't
15 remember whether she was still in uniform or had transitioned
16 to civilian. She had been an O-6 on one of the 2004 detention
17 hearings, president of one of the tribunals, and I think she
18 continued working for CSRT Directorate. May have been her,
19 too.

20 And the briefing was, I believe, unclass at the time.
21 We were not in a secure facility; we were in their office.

22 Q. Okay. What was the -- sir, if the briefing was
23 unclassified, what was the reason that he couldn't give you

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1 more details over an unsecure line?

2 A. I don't know.

3 Q. Was anyone else in the room for the briefing?

4 A. Other than those two, I don't remember.

5 Q. Okay.

6 A. I don't think so. But it would have been somebody
7 from the CSRT folks.

8 Q. So as you recall, there were maybe two or three
9 people, no more than that?

10 A. Yes.

11 Q. Okay. And what information did they give you in the
12 briefing, sir?

13 A. Referred me to the term of "high-value detainee"
14 which was something I had heard for the first time then.
15 There was -- I recall a document that was from the Office of
16 the Director of National Intelligence. I called that a white
17 paper. I don't remember if it was signed or not. It didn't
18 have any security marks on it, as I recall.

19 And it described the high-value detainee program that
20 Director of National Intelligence described; however he or she
21 thought was however the program worked. And then had fact
22 sheets, I'll use that term. They weren't called that, but on
23 each of the high-value detainees, mentioned by name,

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1 nationality, aliases, other names, language, and then a
2 paragraph or two about the conduct that they were engaged in
3 against the United States.

4 Q. I see. So I'm going to ask you a few follow-up
5 questions based on that information, sir.

6 A. Yes.

7 Q. You said that was an ODNI white paper?

8 A. Yes. I call it that because I don't know of anything
9 else to call it, but I believe it was entitled "High-Value
10 Detainee Program." I haven't seen it in some time, but ----

11 Q. Sure. Do you recall roughly how long the paper
12 itself was, without the additional sheets?

13 A. Oh, it would have been 14 sheets for the 14 HVDs, and
14 seven, eight, nine pages. It could be read in a quick
15 sitting. I remember just reading it while I was there.

16 Q. Uh-huh.

17 A. I was given reason to believe that it was publicly
18 available at the time, but I can't be a hundred percent
19 certain of it. Again, it was not marked and it wasn't shown
20 to me in a classified way.

21 Q. Okay. Could you summarize what information was
22 contained in those seven or eight, nine pages ----

23 A. I can't.

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1 Q. ---- about the program?

2 TC [MR. RYAN]: Objection, relevance, Your Honor.

3 MJ [Col COHEN]: Counsel.

4 ADC [MS. PRADHAN]: Your Honor, this goes to what
5 information Judge DeLury was given about the incommunicado
6 detention of Mr. al Baluchi and the other defendants
7 immediately prior to his sitting as president of their CSRT
8 tribunals. It goes to voluntariness. It goes to the evidence
9 presented to the tribunal. It goes to multiple factors,
10 frankly, sir.

11 MJ [Col COHEN]: Okay. Counsel?

12 TC [MR. RYAN]: I submit it does not go to voluntariness,
13 because voluntariness, as testified to by the witness, was
14 determined in the courtroom based on his behavior and his
15 answers.

16 MJ [Col COHEN]: Okay. I will allow it under 608 theory
17 with respect to prior knowledge of the witness about these
18 individuals before he started making assessments. So I'll
19 overrule it.

20 ADC [MS. PRADHAN]: Thank you, sir.

21 A. As I sit here today, Counsel, I can't give you a
22 description of what was in the document beyond how I just
23 briefly outlined it. I don't remember any of the

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1 specifics ----

2 Q. Okay.

3 A. ---- in any of the pages.

4 Q. Do you recall if it talked about the CIA's
5 administration of this program?

6 A. I don't remember.

7 Q. Okay. Do you recall at all if it talked about any of
8 the secret prisons, the black sites?

9 A. I don't remember.

10 Q. Okay. Sir, the -- and your testimony is that it had
11 no security markings on it at the time that you saw it; is
12 that correct?

13 A. That's correct.

14 Q. Okay. The fact sheets that were attached, you said
15 there were 14 of them, one for each high-value detainee; is
16 that correct?

17 A. As I recall, yes.

18 Q. And about how long would those fact sheets have been?

19 A. One 8 1/2x11 page each, a couple of paragraphs, fewer
20 than 300 words, maybe. It was not overly long.

21 Q. Did those fact sheets contain photographs?

22 A. No.

23 Q. Okay. Were there any footnotes to those fact sheets,

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1 do you recall?

2 A. I don't remember.

3 Q. Do you recall if there was any sourcing for the
4 information in those fact sheets?

5 A. I don't remember.

6 Q. Okay. Now, you said that the term "high-value
7 detainee," the HVD term, was explained to you during that
8 briefing; is that correct?

9 A. Yes.

10 Q. Do you recall what they said to you about why that
11 designation was given?

12 A. No.

13 Q. Did you understand from the briefing that the
14 designation was given by the Central Intelligence Agency?

15 A. I didn't understand that.

16 Q. Okay. Did you ask, sir, or were you told why the
17 detainees had not been given a status determination prior to
18 when you were briefed in December 2006?

19 A. I did not ask that.

20 Q. Okay. Was there any reason given sort of by the
21 person briefing you?

22 A. The best of my recollection, it was that they had now
23 become available to the CSRT process, and do you want to act

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1 as a tribunal member?

2 Q. Okay. Was it explained to you why they had been
3 unavailable prior to that point?

4 A. It had not.

5 Q. By that point, sir, this would have been late 2006,
6 correct?

7 A. Yeah. Uh-huh.

8 Q. So President Bush's speech discussing the transfer of
9 the high-value detainees to Guantanamo Bay would have been
10 September 6th, 2006. Do you recall that?

11 A. Say that date again.

12 Q. President Bush's speech regarding the transfer of the
13 high-value detainees to Guantanamo Bay would have been on
14 September 6th, 2006. Do you recall that?

15 A. I -- yes, I remember it. I don't remember the date
16 of it, though.

17 Q. And many people remember the speech itself?

18 A. Yeah, I don't -- I don't remember even watching it or
19 listening it to. I was aware of it.

20 Q. Sure. And were you aware that in that speech
21 President Bush talked about the transfer of these particular
22 high-value detainees to be prosecuted at Guantanamo Bay?

23 A. Yes.

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1 Q. Okay. At the time of your briefing, specifically,
2 sir, were you told at that time which detainees you would be
3 evaluating at their CSRTs?

4 A. I was not.

5 Q. Okay. You -- did you understand at that time where
6 each detainee had been captured?

7 A. No.

8 Q. Would that information have been on the fact sheets?

9 A. If it was, I don't remember it. And to the extent I
10 learned it, I learned it probably in connection with the
11 CSRTs.

12 Q. Okay. Do you recall whether you were told at all
13 whether or not the -- these 14 detainees were captured on a
14 battlefield or off of a battlefield?

15 A. I wasn't -- I don't remember being told that
16 distinction one way or the other.

17 Q. Okay. Were you briefed at all on the conditions of
18 confinement that they had been held in prior to being brought
19 to Guantanamo Bay?

20 A. I was not.

21 Q. Okay. Did you understand that they had been detained
22 incommunicado?

23 A. I don't think I had any understanding about that

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1 issue, no.

2 Q. Okay. Did you have any knowledge of whose custody
3 they had been in prior to coming to Guantanamo Bay?

4 A. No.

5 Q. Okay. So in -- just to -- just to make sure that I
6 understand your testimony, sir, it's your testimony that
7 during this briefing at the end of 2006, you were briefed by a
8 Mr. Sweigart or his deputy, about the high-value detainees.

9 Did they mention the Central Intelligence Agency at
10 any point?

11 A. Not that I recall, Counsel. And to -- if I may, the
12 briefing was largely logistical.

13 Q. I see.

14 A. You know, how to get yourself -- get going, get some
15 orders, get ready to go. And they were trying to assemble
16 others to do it as well, so it was mostly "Are you on board,"
17 and if yes, "start getting your bag packed."

18 Q. Okay. So it is your testimony that at that time, at
19 the time of that briefing, you may or may not have known that
20 these detainees had been held by the CIA?

21 A. I don't remember being told they were held by anyone,
22 CIA included, at this briefing; that they were now in
23 Guantanamo or would be in Guantanamo, and the CSRTs, they are

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1 now being made available for the CSRTs. I don't know, as I
2 sit here today, that I was told by whom they were held.

3 Q. Okay. Did you ask when they had been captured?

4 A. I did not.

5 Q. No one told you when they had been captured?

6 A. I don't recall being told that.

7 Q. Okay. Sir, at the time of your briefing, in addition
8 to the ODNI paper that you mentioned and the fact sheets, were
9 you given any other documentary or other information at all to
10 review?

11 A. I think I received the newer copy of the CSRT order,
12 instruction, which would have been, I think, a July '06
13 document. I might have been given a copy of that just, you
14 know, to prepare and read, I think, was slightly different,
15 or -- than the '04 version of the order. So I think I did
16 receive that.

17 Q. And you said the date on that would have been
18 July 2006?

19 A. I don't want to guess, but I think -- I think so.

20 Q. Okay. And you said that it was slightly different
21 from the previous order. Do you recall how it was different?

22 A. Other than the date, I can't tell you what the line
23 items were that -- if anything. There was an outline of

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1 procedure which I spent most of my time paying attention to,
2 since that was going to be what I would be chiefly responsible
3 for; and then reading the standard of -- trying to understand
4 the standard of proof, which was preponderance; and what the
5 ultimate question we were to reach. So that was -- those were
6 the things I remember looking at.

7 Q. Okay. Sir, did you ever -- were you ever briefed on
8 the pending re-interviewing of the detainees by the Federal
9 Bureau of Investigation?

10 A. Never.

11 Q. Okay. Now, you -- you've stated before that you were
12 told during your briefing, and you stated this in your oral
13 history interview, that during your briefing you were told
14 that the men were, quote, Potentially to be charged with war
15 criminality under the MCA of 2006. Do you recall that?

16 A. I do.

17 Q. So that was something that you were told during ----

18 A. Must have done.

19 Q. Okay. So you would have been aware at that point
20 that their CSRT could potentially have an effect on their
21 legal cases; is that correct?

22 A. Yes.

23 Q. Okay. Did you ever ask, sir, why the detainees were

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1 not being tried in federal court?

2 A. I did not.

3 Q. Okay. So I just want to make sure I understand the
4 timeline, if I may, sir.

5 A. Okay.

6 Q. The -- you received a call in sometime late 2006, you
7 arrived in Washington for a briefing in December 2006, and
8 then you stated to Mr. Ryan that you arrived in Guantanamo Bay
9 in January 2007; is that correct?

10 A. That's correct.

11 Q. Okay. And you stayed here in Guantanamo for about
12 four months, I think you said, until about April?

13 A. Approximately, yes.

14 Q. When did you receive further documents that were
15 relevant to the upcoming CSRTs?

16 A. I don't understand the question.

17 Q. Sure. We're going to look at in a couple of minutes
18 the summary of evidence, for example, that you talked about a
19 little bit with Mr. Ryan. When would you have received that,
20 sir?

21 A. I would have received it at the CSRT. I might have
22 seen the unclassified summary before we went in. I don't
23 remember, to tell you the truth, as I sit here today, of doing

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1 a lot of paperwork and what I saw and what I didn't see. I
2 was dealing with -- some of the detainees had witness and
3 document requests, I know I was working on that. So I
4 probably would have read the unclassified summary to --
5 because the detainee would have been referring to it in order
6 to address witness and document requests.

7 So it would have -- I would have read the
8 unclassified summary prior to the CSRT.

9 Q. Yes, sir. And we'll look specifically at that
10 document in one minute.

11 ADC [MS. PRADHAN]: Your Honor, may I have a moment?

12 MJ [Col COHEN]: You may.

13 ADC [MS. PRADHAN]: Thank you.

14 [Counsel conferred.]

15 Q. Sir, I have a document here that is entitled "Summary
16 of the High-Value Terrorist Detainee Program" that has a
17 header from the Office of the Director of National
18 Intelligence. It has no classification markings on it. Do
19 you think -- does this sound familiar as the document that you
20 were talking about?

21 A. It does. I'd have to see it to know, but that's what
22 it sounds like.

23 ADC [MS. PRADHAN]: Your Honor, may I approach?

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1 MJ [Col COHEN]: You may. Is this already in the record?

2 ADC [MS. PRADHAN]: This is not in the record, and so we
3 would ----

4 MJ [Col COHEN]: Okay. I'll make it an appellate exhibit.

5 ADC [MS. PRADHAN]: Thank you, sir.

6 MJ [Col COHEN]: You may approach the witness, though.

7 WIT: Thank you.

8 MJ [Col COHEN]: Trial Counsel, have you had the
9 opportunity to see this document?

10 TC [MR. RYAN]: I have not, sir.

11 MJ [Col COHEN]: Okay. After showing it to the witness,
12 if you would please show it to counsel. And then, Trial
13 Counsel, if you could let me know what the classification
14 status of this will be at this point in time.

15 TC [MR. RYAN]: Yes, sir.

16 MJ [Col COHEN]: Thank you.

17 [Counsel conferred.]

18 MJ [Col COHEN]: That will be AE 628KKK is what I believe
19 we're at, and then (AAA), with respect to reference on that.

20 ADC [MS. PRADHAN]: Thank you, sir.

21 MJ [Col COHEN]: And how many pages is that document?

22 ADC [MS. PRADHAN]: That document is five pages, sir.

23 MJ [Col COHEN]: Five pages. Thank you.

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1 Counsel, with respect to classification, where are we
2 at on this document?

3 TC [MR. RYAN]: Based on our quick review and based on
4 representations of counsel, Your Honor, we believe it to be
5 unclassified.

6 MJ [Col COHEN]: Thank you. All right. You may use the
7 document in open court then.

8 ADC [MS. PRADHAN]: Thank you, sir. May I have access to
9 the document camera?

10 MJ [Col COHEN]: You may. Would you like it published to
11 the gallery?

12 ADC [MS. PRADHAN]: I would, sir, please.

13 MJ [Col COHEN]: You may.

14 **CROSS-EXAMINATION CONTINUED**

15 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

16 Q. Judge DeLury, is this the document that you received
17 in your briefing in December 2006?

18 A. Yes. Without the sheets attached with -- as I
19 recall, were summary sheets for each of the detainees.

20 Q. And do you see the -- this paragraph here with the
21 header, "A Program with Safeguards and Oversight"?

22 A. Yes.

23 Q. And that states, "In March 2002, the CIA and our

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1 coalition partners captured Abu Zubaydah"; is that correct?

2 A. I see that.

3 Q. And it continues on to discuss about Abu Zubaydah's
4 interrogations. Do you see that?

5 A. I do.

6 Q. It goes on to make links between Abu Zubaydah's
7 interrogation and the interrogation and -- the capture --
8 excuse me, the interrogation of Khalid Shaikh Mohammad; is
9 that correct?

10 TC [MR. RYAN]: Objection to this line, Your Honor. Far
11 afield and irrelevant.

12 MJ [Col COHEN]: Counsel?

13 ADC [MS. PRADHAN]: Your Honor, this goes to
14 Judge DeLury's understanding of the program and the coercion
15 inflicted on these particular men, these particular five
16 defendants, prior to his sitting and presiding over their
17 CSRTs.

18 MJ [Col COHEN]: Okay.

19 ADC [MS. PRADHAN]: And the voluntariness of their
20 statements, so ----

21 MJ [Col COHEN]: The voluntariness of their statements to
22 the CSRT or the voluntariness of the statements to the FBI?

23 ADC [MS. PRADHAN]: Specifically, sir, it goes to his

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1 understanding of -- it goes to your evaluation of his
2 understanding of their voluntariness. The conditions in
3 which ----

4 MJ [Col COHEN]: Which statements, though? That's what
5 I'm asking.

6 ADC [MS. PRADHAN]: All of their statements, sir, to
7 the ----

8 MJ [Col COHEN]: Okay.

9 ADC [MS. PRADHAN]: ---- to the FBI and to the CSRT.

10 MJ [Col COHEN]: Okay.

11 LDC [MR. RUIZ]: Judge?

12 MJ [Col COHEN]: Mr. Ruiz.

13 LDC [MR. RUIZ]: To the extent that is couched in terms of
14 the collective, Mr. al Hawsawi has no such issue before this
15 commission.

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

17 Mr. Ryan, you've heard her response.

18 TC [MR. RYAN]: Yes, sir. Judge DeLury was called to
19 testify as to his observations in the course of the CSRT in
20 regard to the individuals. At no point did we question him or
21 put in issue any of his prior knowledge as to their behavior,
22 nor has there been any evidence or testimony from him that
23 whatever he knew beforehand had any effect on his observations

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1 and determinations as to voluntariness.

2 MJ [Col COHEN]: Okay.

3 ADC [MS. PRADHAN]: Your Honor, if I may respond?

4 MJ [Col COHEN]: You may.

5 ADC [MS. PRADHAN]: Judge DeLury has both testified here
6 on direct and has stated previously that he judged the
7 demeanor of Mr. al Baluchi and his answers to be businesslike,
8 to be perfectly -- you know, to be noncoerced. He has spoken
9 previously to the prosecutors about examining the body
10 language of these detainees. And so what Judge DeLury may
11 have known about their conditions of confinement and the
12 system of coercion placed upon them prior may very well have
13 had an impact on that determination.

14 MJ [Col COHEN]: Okay. I tell you what, I will allow
15 questions of the witness with respect to what he was aware of
16 with respect to the client and whether or not he considered
17 those -- those factors in determining that he believed he had
18 a voluntary statement at the time or that he had a coherent
19 individual, because that would go to potentially the weight of
20 that testimony.

21 To the extent that you can tighten your questions up
22 a little bit to get to that -- those specific issues, you are
23 free to do so.

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1 ADC [MS. PRADHAN]: Yes, sir. If I understand you
2 correctly, then, I'd like to -- I'd like to ask questions
3 specifically about Judge DeLury's knowledge of the --
4 specifically of the techniques used on these men prior to
5 their ----

6 MJ [Col COHEN]: Well, I think the predicate question is
7 what -- first of all, either you believe he did or did not
8 know something. So you can either lead him, or you can ask
9 the -- the initial predicate question is what did you know,
10 and that should scope the -- the follow-on questions.

11 ADC [MS. PRADHAN]: Okay.

12 MJ [Col COHEN]: So you're -- you don't have to ask
13 leading questions. It's completely up to you. But let's
14 start off with what does he know -- I think that's the
15 predicate -- as opposed to just asking questions he doesn't
16 know anything about.

17 ADC [MS. PRADHAN]: Sure, sir.

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

19 **CROSS-EXAMINATION CONTINUED**

20 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

21 Q. Judge DeLury, you had a chance to briefly review this
22 document; is that correct?

23 A. I looked at the five pages and that's nothing more,

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1 Counsel.

2 Q. I understand.

3 Now, I represent to you that this document contains
4 information about the interrogation program. It states -- and
5 I'll use the document camera for your review.

6 Do you see here where it states -- the paragraph
7 starting "Multiple safeguards"?

8 A. I see it.

9 Q. Okay. It says, "Multiple safeguards have been built
10 into the program to ensure its professionalism," and it talks
11 then about the specific CIA officers who would have
12 participated. And there's a bullet point below about
13 interrogation sessions in which the procedures, the enhanced
14 interrogation techniques were authorized, must be observed,
15 et cetera, the safeguards that were implemented by the CIA.

16 Do you see that?

17 A. I didn't see "enhanced interrogations techniques,"
18 but ----

19 Q. No, I apologize. That phrase is not there. It says
20 "one of these lawful procedures."

21 A. I see that, yes.

22 Q. Okay. Now, sir, on the next page, there is a heading
23 called "Proven Effectiveness." Do you see that?

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1 A. I do.

2 Q. Okay. And underneath that -- we won't spend too much
3 time here, but underneath that "Proven Effectiveness" heading,
4 there are examples given -- would you agree -- of where those
5 procedures may have been, according to the -- to whoever
6 prepared this document -- may have been effective. Do you see
7 that?

8 A. I do.

9 Q. Now, on the next page, in particular pages 4 and 5,
10 sir, I want to call your attention to bullets 1 through 4.
11 And it talks about the 2003 Karachi plot. Do you see that?

12 A. I see it.

13 Q. It talks about number 4 is the Heathrow Airport plot.
14 Do you see that?

15 A. I do.

16 Q. Okay. Sir, do you recall reading in the unclassified
17 summary that we'll talk about in a minute, the unclassified
18 summary that was given to you by the FBI, anything about the
19 Karachi plot or the Heathrow Airport plot?

20 A. I don't recall as I sit here. If I looked at it, it
21 might refresh my recollection.

22 Q. Of course. And we can get there in a moment.

23 Sir, you testified just now that you received fact

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1 sheets with ----

2 MJ [Col COHEN]: Counsel, I just want to make sure.

3 Was -- had you seen that document you just saw before?

4 WIT: I haven't seen the entirety of it. That looks like
5 what I had seen at the end of 2006.

6 MJ [Col COHEN]: Okay. Thank you. I just needed to
7 tie ---- I was hoping someone would tie that together for me.
8 Thanks.

9 ADC [MS. PRADHAN]: I appreciate it, Your Honor. I
10 apologize, I thought I had asked that question, but I may not
11 have done so clearly.

12 MJ [Col COHEN]: I just wanted to make sure. Thank you.

13 Q. Sir, you testified that there were fact sheets
14 attached to this; is that correct?

15 A. It appeared that there -- it was part of it. I don't
16 know if it was, in fact, part of the five pages, but I did see
17 what we're calling fact sheets, yes.

18 ADC [MS. PRADHAN]: Okay. May I have a moment, sir?

19 MJ [Col COHEN]: You may.

20 [Counsel conferred.]

21 ADC [MS. PRADHAN]: Sir, I'm afraid I have to amend the
22 page number I gave you before. It's 19 pages.

23 MJ [Col COHEN]: Okay. For KKK?

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1 ADC [MS. PRADHAN]: Yes. May I approach the witness, sir?

2 I have the 14 additional fact sheets.

3 MJ [Col COHEN]: You may. Trial Counsel, it looks like I
4 just saw you look at them; is that correct?

5 TC [MR. RYAN]: That is correct, Your Honor. Based on a
6 very fast review and based on representations of counsel, they
7 appear to be unclassified.

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

9 WIT: Thank you.

10 These look like the sheets that I had seen earlier.
11 I haven't read them, though, but they do appear to be the
12 same.

13 **CROSS-EXAMINATION CONTINUED**

14 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

15 Q. All right. Now, sir, you've had an opportunity to
16 look at these 14 sheets just now?

17 A. I did.

18 Q. At least, a cursory review?

19 A. They looked like the format I remember, with the
20 heading and the items that I had described and then the
21 paragraphs beneath it.

22 Q. So you believe that these -- these would have been
23 the fact sheets that came with that DNI paper; is that

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1 correct?

2 A. I -- yes. I mean, I can't tell you with a hundred
3 percent certainty because I haven't seen it in some years, but
4 it does look like it.

5 Q. Okay. And, sir, one of these fact sheets that you
6 just reviewed, in fact, the first one on here, was for Ali
7 Abdul Aziz Ali; is that correct?

8 A. Yes.

9 Q. Okay. And it's approximately one page long; is that
10 correct?

11 A. Yes.

12 Q. And it contains background on Mr. al Baluchi?

13 A. I can read it thoroughly if you'd like me to, and
14 then you can ask me about the particulars, but I will take
15 your word for it.

16 Q. Yes, sir. Let me give you a minute to review this,
17 in particular.

18 A. Sure.

19 ADC [MS. PRADHAN]: May I approach?

20 MJ [Col COHEN]: You may.

21 WIT: Thank you.

22 Ready, Counsel.

23 Q. Sir, you've had an opportunity to review this

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1 particular document?

2 A. I've read it.

3 Q. Okay. And this provides a brief biography of
4 Mr. al Baluchi; is that correct?

5 A. Yes.

6 Q. And it has bullet points on it describing the
7 allegations against Mr. al Baluchi; is that correct?

8 A. It does.

9 Q. In fact, they're not framed as allegations at all.
10 They are framed as factual statements in the bullet points
11 about what the drafter of this document believed
12 Mr. al Baluchi to be involved in; is that correct?

13 A. It would appear to be.

14 Q. Okay. Sir, in reviewing this document, did you see
15 references to the shoe bombers?

16 A. I did.

17 Q. In reviewing this document, did you see references to
18 a detainee named -- a current detainee named Majid Khan?

19 A. It did.

20 Q. In reviewing this document, sir, did you see
21 references to Karachi attacks?

22 A. I saw that.

23 Q. Okay. Is it fair to say, sir, that the memorandum

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1 that was attached to this was explaining how this information
2 was obtained?

3 A. I don't know if I can make that conclusion without
4 reading the whole thing, but ----

5 Q. I'll ask it a different way, sir. In this document
6 you received during your briefing -- which is a "Summary of
7 the High-Value Terrorist Detainee Program," that's the title
8 of it -- it provides headers discussing the evolution of the
9 program. Do you recall that?

10 A. I do.

11 Q. And it discusses the safe -- the safeguards that the
12 Central Intelligence Agency says it put in place during the
13 program. Do you recall that?

14 A. I saw that, yes.

15 Q. And it discusses the -- it discusses the substance of
16 the interrogations of a number of detainees, including these
17 five defendants. Do you recall that?

18 A. Yes.

19 Q. Okay. And then attached to that document, then, are
20 these 14 profiles. Can we agree?

21 A. Yes.

22 Q. Okay. Is it -- would it be a fair conclusion that
23 the cover document is describing the program in which that

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1 information was obtained?

2 A. I don't know that the information obtained --
3 contained in each of those 14 summaries were as a result of
4 the program described in the first five pages.

5 Q. Okay. Well ----

6 A. Certainly, one could infer that they were discussing
7 the program and then attached a fact sheet to it that; perhaps
8 it came from that program, and perhaps not.

9 Q. Okay. Can we agree, sir, that if this is the
10 document as you've identified it that you received in
11 December 2006, that at least you would have had an overview of
12 the CIA detention program?

13 A. I had an overview of the program as described in that
14 document, yes.

15 Q. And you would have had knowledge that these five men,
16 in particular Mr. al Baluchi, since we're talking about
17 Mr. al Baluchi, had been held in CIA detention; and you would
18 have had that knowledge by about December 2006?

19 A. If that was to be believed, yes. I mean, that would
20 have been my understanding at the time.

21 Q. Okay. And you would have had some understanding of
22 the topics on which Mr. al Baluchi was interrogated while in
23 CIA detention pursuant to that fact sheet?

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1 A. It would be a fair inference.

2 Q. Okay. Thank you, sir. When did you learn that you
3 would be assigned to meet those specific seven detainees whom
4 you -- whom you talked about with Mr. Ryan?

5 A. It was here in Guantanamo.

6 Q. It was after you arrived in January?

7 A. Yes, ma'am.

8 Q. Okay. But you didn't receive an appointment letter
9 until the 22nd of February; is that correct?

10 A. Yes. There was -- there was at least two convening
11 orders that I remember that my name was on. I think one was
12 superceded by another, because I think one of the members was
13 no longer available and they had to substitute a member.

14 Q. Uh-huh.

15 A. I don't know when those orders were signed. I think
16 it was 21 or 22 February, but we were going to be detailed.
17 The formality of the convening order probably did not happen
18 until later in February.

19 Q. I see. And yes, I can refresh your memory, sir.

20 A. Sure.

21 Q. There was, in fact, an assignment of seven ISNs to
22 your board on the 21st of February, I'll represent to you.

23 A. Okay.

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1 Q. So -- but you knew about your assignment to those
2 seven detainees prior to that; is that what you recall?

3 A. No. I don't think I knew who -- which of the
4 detainees we were going to assign to each. I think CSRT
5 staff, however they did it, came up with a list of numbers,
6 ISNs, and divided them between the two CSRTs. One would think
7 seven and seven would be the way to do it, and I think that's
8 how it happened.

9 Q. Sir, just going back for a second, when you left your
10 briefing in December 2006, did you leave with those documents
11 in hand?

12 A. I don't recall taking them with me. I do remember
13 having the instruction ----

14 Q. Uh-huh.

15 A. ---- because I can remember reading it, I remember
16 reading it on the plane and -- but I don't remember taking a
17 copy of that or having it after the discussion.

18 ADC [MS. PRADHAN]: Okay. Sir, this might be a good time
19 to take a -- an afternoon break, if you're so inclined. I'm
20 happy to push forward.

21 MJ [Col COHEN]: How much longer do you have?

22 ADC [MS. PRADHAN]: I have probably an hour.

23 MJ [Col COHEN]: Okay. A lot longer than the hour and a

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1 half you told me, but that's all right.

2 ADC [MS. PRADHAN]: I'm sorry about that, sir. It turns
3 out I'm worse at estimating than Mr. Connell.

4 MJ [Col COHEN]: Okay. Yeah. Let's go ahead and take a
5 15-minute recess.

6 [The R.M.C. 803 session recessed at 1451, 24 September 2019.]

7 [The R.M.C. 803 session was called to order at 1507,
8 24 September 2019.]

9 MJ [Col COHEN]: The military commission is called to
10 order.

11 The parties are present. The witness remains on the
12 stand.

13 Ms. Pradhan, your witness.

14 ADC [MS. PRADHAN]: Thank you, sir.

15 **CROSS-EXAMINATION CONTINUED**

16 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

17 Q. Judge DeLury, before we left off, I had just asked
18 you a series of questions about the ODNI memo and the 14 fact
19 sheets that were attached to that. Do you recall that?

20 A. Yes.

21 Q. I have two more questions for you just on that before
22 we turn to your preparation for the CSRTs.

23 A. Okay.

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1 Q. The two questions are these: You testified just now
2 that you -- that the fact sheet for Mr. al Baluchi contains
3 information about the shoe bombers and about his alleged
4 associations with Majid Khan; is that correct?

5 A. Yes.

6 Q. Okay. To the best your knowledge, would the other
7 members of the tribunal with which you sat, the other two
8 members, would they have had access to this same memorandum?

9 A. I don't know.

10 Q. Okay. Would you assume that to be the case?

11 A. I have no basis to infer or assume from that.

12 Q. Thank you, sir. The next topic, sir, is your
13 preparation for the Combatant Status Review Tribunal. And I
14 use the term "your preparation" broadly because, to be
15 perfectly honest, I'm not exactly sure which of the documents
16 that we're going to look at you have seen previously or
17 whether you prepared them or someone else prepared them.

18 A. And are you speaking about my preparation for
19 testimony here today or my preparation in conducting them?

20 Q. No, sir. I apologize if that was unclear. I'm
21 talking about the preparation before that was done by
22 yourself, the tribunal members, and the personal
23 representative prior to Mr. al Baluchi's CSRT.

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1 A. I'm clear. Thank you.

2 Q. Of course. Sir, I'd like you to turn, if you don't
3 mind, in your binder to AE 628BBB Attachment 00.

4 A. One more time.

5 Q. Sure. It's Attachment 0 in -- excuse me,
6 Attachment 00 in the binder that you have in front of you.

7 A. With the green tab and it says "Events Log" at the
8 top?

9 Q. Yes, sir. That's the one. My tabs are red ----

10 A. Okay.

11 Q. ---- but, yes, you are correct. That's the document.

12 A. All right.

13 Q. Sir, have you seen this document before?

14 A. Yes.

15 Q. Did you maintain this events log?

16 A. I did not.

17 Q. Do you know who did?

18 A. I presume the PR, but I can't be certain. I don't
19 remember his or her handwriting.

20 Q. Do you recall when you would have seen this before?

21 A. I believe I saw it for the first time in preparation
22 for my testimony here.

23 Q. I see.

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1 Sir, I'm going to ask you about a couple of the
2 entries here, understanding that you, yourself, didn't log
3 these.

4 A. Okay.

5 Q. But I'm going to ask you about your recollection of
6 some of these events, if you don't mind.

7 A. Okay.

8 Q. If you look at the entry for 19 March 2007, that's on
9 the page marked MEA-CSRT-567. Do you see that, sir?

10 A. What was the date reference, again? I'm sorry.

11 Q. The date reference is 19 March 07.

12 A. I see something that says "Update on witnesses. See
13 attached e-mail."

14 Q. Yes, sir.

15 A. Okay. Yes, I see it.

16 Q. All right. Do you know what that update would have
17 been?

18 A. I -- I don't. I know that I had been in
19 communication with the PR about witness determinations by the
20 tribunal, and it may have been that, although I can't be
21 certain.

22 Q. Okay. It says, "See attached e-mail." Do you have
23 any idea what that e-mail might have referred to?

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1 A. Might have been an e-mail from me to the PR saying,
2 you know, what we were going to do with witnesses. I can only
3 speculate. I don't know.

4 Q. Sure. Sir, would you mind looking at the very bottom
5 of that same page, the last entry.

6 A. Yes.

7 Q. It seems to say either 23 or 28 March. I would
8 assume 23, given the progression there, but I'm not quite
9 sure.

10 A. I see it.

11 Q. Would you mind reading that entry, sir?

12 A. Date appears to be 28 March 07. "Update to unclass
13 sum. See e-mail attached - re: EC definition - PR informed."

14 Q. Now, do you know what "EC" would have meant in that
15 context?

16 A. I don't. I would presume enemy combatant, but I
17 don't know.

18 Q. Would you mind turning in that same binder to
19 Attachment LL. For the record, sir, that's 628BBB
20 Attachment L [sic].

21 A. Dated 28 March 2007?

22 Q. Yes, sir.

23 A. Okay. I have it.

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1 Q. And that's MEA-CSRT-488, correct?

2 A. Yes, ma'am.

3 Q. Okay. Do you see paragraph 2 there?

4 A. I do.

5 Q. And that paragraph provides a definition for enemy
6 combatant; is that correct?

7 A. It does.

8 Q. Okay. Would you mind reading that definition, sir.

9 A. "2. An enemy combatant has been defined as, 'an
10 individual who was part of or supporting Taliban or al Qaeda
11 forces, or associated forces that are engaged in hostilities
12 against the United States or its coalition partners. This
13 includes any person who committed a belligerent act or has
14 directly supported hostilities in aid of enemy armed forces.'"

15 Q. Now, sir, this was the standard for determination
16 that you and the other panel members would have applied to
17 Mr. al Baluchi's CSRT; would that be a fair assessment?

18 A. Yes, ma'am.

19 Q. Okay. Now, that paragraph is part of what looks to
20 be a memo. Do you see who is in the "to" line at the top
21 there, sir?

22 A. Personal representative.

23 Q. Okay, and who was in the "from" line?

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1 A. OIC, officer in charge, I believe, the CSRT.

2 Q. And that's dated the 28th of March 07, right?

3 A. Yes.

4 Q. Okay. So that would seem to fit with the entry in
5 the events log; is that correct?

6 A. It does.

7 Q. And you testified on direct examination, and we know
8 from the documents, that Mr. al Baluchi's CSRT was held on the
9 30th of March 2007. Do you recall that?

10 A. That's my recollection, yes.

11 Q. Do you know if this was the first time that the
12 personal representative received a definition of the term
13 "enemy combatant"?

14 A. I don't know.

15 Q. Okay. But this would have been sent from the CSRT to
16 the personal representative; is that ----

17 A. It was not sent by me. OIC I take to mean the staff
18 officer who was responsible for the office, as it were, you
19 know, the staff support for CSRT. It wasn't me. I believe it
20 was a Navy captain.

21 Q. Do you know who would have instructed him to send it
22 to the personal representative?

23 A. No.

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1 Q. Do you know when you would have received this
2 definition of enemy combatant?

3 A. I don't remember. It's marked R-1, but I don't know
4 if this is the R-1 that we received at the CSRT, as I sit here
5 today. I'd have to see it in context. But I for sure got
6 whatever was finally marked as R-1 at the CSRT. This was
7 directed to the PR. There might have been separate documents.
8 I don't know. I just don't know as I sit here.

9 Q. Okay. If you wouldn't mind turning back to the
10 events log that was, again, Attachment 00.

11 A. Yes.

12 Q. There's an entry on the 29th of March 2007. Do you
13 see that, sir? It's on the second page, MEA-CSRT-568.

14 A. The entry on 29 March CSRT scheduled for 30 March, or
15 it's some other entry?

16 Q. It's -- excuse me, sir. It's the second entry on
17 page 568 dated 29 March.

18 A. I see it.

19 Q. Okay. And that entry says, "CSRT scheduled for
20 30 March." That's how it begins, right, sir?

21 A. Yes.

22 Q. Okay. It says, "PR to meet with detainee in AM to
23 review final statements and advise that only on-island witness

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1 statements will be presented. Off-island witnesses are still
2 being worked, per board president. Plan is to reconvene to
3 hear off-island witness testimony prior to or on 7 April 07."

4 Now, this is the day before Mr. al Baluchi's CSRT; is
5 this correct?

6 A. That's correct.

7 Q. And do you recall the circumstances around the
8 determination regarding on-island witnesses versus off-island
9 witnesses?

10 A. I remember that there was a request for witnesses,
11 and I had made determinations that the witnesses requested
12 would be relevant, somewhat, to certain aspects of the
13 presentation by the detainee. The on-island witnesses were
14 detainees, and security people on the island determined that
15 it would not be secure to have the detainees together in the
16 room at the same time. So I adjudged that they were not
17 reasonably available, and we had -- I suggested propounding
18 interrogatories, for lack of a better term, coming up with
19 questions and putting them to the detainee to see if they
20 would be willing to respond; and if they were, we'd receive
21 them as a substitute for testimony.

22 Some of the off-island witnesses were people that the
23 detainee had mentioned he had worked with in his job in -- I

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1 think it was Dubai, and that they might have been in Canada or
2 elsewhere, and he gave three names.

3 Q. Uh-huh.

4 A. I don't remember them now, but I read them a couple
5 of days ago. This is -- as I came here this week, I didn't
6 remember any of this, but I -- as I read it, it refreshed my
7 recollection.

8 And they were -- whoever was looking for them,
9 whether it was the FBI or was it Department of State or
10 however the CSRT staff had gone about trying to locate
11 witnesses, they were not successful in identifying or locating
12 them by the time the CSRT had been scheduled.

13 Q. Okay. And we'll look a little more closely at your
14 determination regarding witness relevancy in a moment.

15 But do you happen to know, sir, the -- the
16 significance of the 7th April date? Why there would be -- why
17 there would be a plan to reconvene to hear off-island witness
18 testimony prior to or on 7 April?

19 A. I don't know why I would pick that date except that
20 every time you adjourn, you should have a date, I think.

21 Q. Maybe just setting a marker?

22 A. Might have been just setting a deadline to get things
23 done.

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1 Q. Okay. And then further on that same page, sir,
2 page 568, you see the 30 March entry?

3 A. I do.

4 Q. The first 30 March -- excuse me, the only 30 March
5 entry. And it says, "Conducted Tribunal." Do you see that?

6 A. I do.

7 Q. And then on 31 March, immediately under that, it
8 says, "Closed tribunal" after -- well, it's "Closed tribunal.
9 Detainee elected not to call witness." Do you see that, sir?

10 A. I do.

11 Q. Okay. Sir, when were you given a copy of
12 Mr. al Baluchi's detainee notification form saying that he was
13 willing to participate in the CSRT?

14 A. I don't remember exactly. I know I would have seen
15 it the morning of the CSRT.

16 Q. Okay.

17 A. And I believe I was informed that he elected to
18 participate. I can't remember if I saw the form, though.

19 Q. Okay. But you would have -- you did receive his
20 witness requests prior?

21 A. I did, yes.

22 Q. Okay. But not necessarily -- you don't recall
23 receiving the detainee notification?

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1 A. That form as such, I don't recall receiving it. I
2 know that he was going to participate, and he wanted evidence
3 and witnesses.

4 Q. Okay. And again, at some point, you received the
5 investigative summary from the FBI with supporting documents.
6 You recall that?

7 A. Yes.

8 Q. Okay. Do you remember when that would have been?

9 A. I don't.

10 Q. Okay. Would you mind turning, sir, to 628BBB
11 Attachment KK, in your binder. This document has a
12 SECRET//NOFORN header, and so we won't be discussing any of
13 the classified information, but there are four lines portion
14 marked UNCLASSIFIED. Do you see that?

15 A. I want to make sure I'm looking at the right document
16 here.

17 Q. Of course, sir.

18 A. QQ, and the Bates stamp is ending 544?

19 Q. No, sir. I apologize if I misspoke. It's KK?

20 A. Oh, I'm sorry.

21 Q. And the Bates stamp ends in 487.

22 A. I don't think you misspoke. It is probably just my
23 ears. Okay. I have KK here, and it's Bates stamp 487?

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1 Q. That's right, sir.

2 A. Okay. I have it.

3 Q. Do you see the four lines in the middle of that page
4 that are portion marked UNCLASSIFIED?

5 A. I do.

6 Q. Okay. The first of those lines says, "Unclassified
7 Summary"; is that correct?

8 A. It does.

9 Q. The second of those states, "FBI Redaction Memo."

10 A. Yes.

11 Q. The third says, "FBI Investigative Summary"; is that
12 correct?

13 A. Yes.

14 Q. And the fourth says, "FBI FD-302." Do you see that?

15 A. Yes.

16 Q. Okay. Are these documents that you would have --
17 broadly speaking, are these documents that you would have seen
18 as part of Mr. al Baluchi's CSRT?

19 A. Yes.

20 Q. Okay. Do you recall having seen this particular
21 document before?

22 A. I don't -- I don't recall it particularly, no.

23 ADC [MS. PRADHAN]: Okay. May I have a moment to confer

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1 with counsel, sir?

2 MJ [Col COHEN]: You may.

3 ADC [MS. PRADHAN]: Thanks.

4 [Counsel conferred.]

5 ADC [MS. PRADHAN]: Sir, I've just conferred with counsel
6 for the government, and he's confirmed for me that I can ask
7 this next question.

8 MJ [Col COHEN]: Okay.

9 Q. Sir, on that particular document, do you see that the
10 title is "CSRT Recorder Exhibit List"?

11 A. I do.

12 Q. Okay. So those are the exhibits that would have been
13 submitted by the CSRT recorder for consideration by the
14 tribunal?

15 A. Yes, ma'am.

16 Q. Okay. And so those documents, again, would have been
17 the unclassified summary, the FBI redaction memo, the FBI
18 investigative summary, and the FBI FD-302; is that correct?

19 A. Yes.

20 Q. You see a redaction in the middle of that page, sir?

21 A. Yes, there were other documents.

22 Q. And we can talk about those documents in closed
23 session. Do you know, sitting here at this moment, what would

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1 be under that redaction without telling me what those are?

2 A. I cannot.

3 Q. Okay. Sir, would you mind moving to Attachment AA in
4 your binder. That's 628BBB Attachment AA.

5 MJ [Col COHEN]: Counsel, what's the Bates number?

6 ADC [MS. PRADHAN]: The Bates number is MEA-CSRT-414, sir.

7 MJ [Col COHEN]: Thank you.

8 A. Dated 29 June 07?

9 Q. Yes, that's right.

10 A. I see it, yes.

11 Q. Okay. Have you seen this document before, sir?

12 A. For the first time a few days ago.

13 Q. For the first time, you said?

14 A. Yes.

15 Q. Okay. Now, this is a -- this is a document that is
16 classified -- excuse me, this page of it is classified at the
17 SECRET//NOFORN level. Do you mind moving to the next page of
18 it, however. That's Bates number ending in 415, that is
19 marked UNCLASSIFIED.

20 A. I see it.

21 Q. Okay. Have you seen this document before?

22 A. For the first time a few days ago when I got on
23 island.

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1 Q. I see. This document is entitled "Legal Sufficiency
2 Review of Combatant Status Review Tribunal"; is that correct?

3 A. It is.

4 Q. And that's specifically for detainee ISN 10018; is
5 that correct?

6 A. Yes, ma'am.

7 Q. And 10018 is Mr. al Baluchi. Do you recall that?

8 A. That's correct.

9 Q. Okay. At paragraph 2 of that document -- it's the
10 same page, sir.

11 A. Paragraph c.2?

12 Q. Yes, paragraph c.2. It says, "In addition to the
13 information redacted from Exhibits R-3 and R-4, exhibits R-6
14 and R-7 also contain redactions. There is no certification
15 concerning these redactions in the Tribunal's report."

16 Do you see that?

17 A. Yes.

18 Q. Okay. Now, on the CSRT recorder exhibit list that we
19 just looked at, did you see documents marked -- did you see
20 documents for R-6 and R-7? That was at KK.

21 A. I don't see them listed on KK.

22 Q. Okay. Would it be fair to presume that those are the
23 documents underneath that redaction?

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1 A. Be a fair assumption.

2 Q. And you -- your testimony is that you do not recall
3 what is underneath that redaction; is that correct?

4 A. I do not.

5 Q. If you did know what was underneath the redaction, if
6 I were to ask you what those documents were, would you be able
7 to answer pursuant to the government's invocation of national
8 security privilege?

9 TC [MR. RYAN]: Objection, Your Honor. The witness has
10 stated he does not know.

11 A. I can't answer your question. I don't know how to
12 answer it.

13 TC [MR. RYAN]: Withdraw the objection.

14 MJ [Col COHEN]: All right.

15 Q. Sir, do you mind turning to Attachment II. That's
16 628BBB Attachment II. The Bates number ends in 439.

17 A. I have it.

18 Q. Okay. Now, sir, the title of this document is
19 "Unclassified Summary of Basis for Tribunal Decision"; is that
20 correct?

21 A. It is.

22 Q. Are you familiar with this document, sir?

23 A. I am.

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1 Q. Did you draft this document?

2 A. I believe I did, subject to the following: The
3 tribunal members, we divvied up work amongst ourselves, so
4 there may have been one of the members writing certain
5 sections, maybe the synopsis. And I see that there was some
6 determination about witnesses and evidence; I likely would
7 have taken that part. But then I would have reviewed the
8 whole thing, and it would have been my signature at the bottom
9 of it.

10 Q. And you said in direct testimony that you took it
11 upon yourself to review each decision before it was conveyed
12 to the convening authority; is that correct, sir?

13 A. That's correct.

14 Q. And that is on the last page, which ends in Bates
15 number 447 ----

16 A. Yes.

17 Q. ---- there's a signature line that ends, "CAPT JAGC
18 USN, Tribunal President." Who was that, sir?

19 A. That was me.

20 Q. And that would be your signature underneath that
21 redaction?

22 A. Yes.

23 Q. Okay. Now, this document -- you're welcome to take a

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1 moment to refresh your memory, if you would like to. This
2 document provides the unclassified reasons that the tribunal,
3 including you, arrived at your determination that
4 Mr. al Baluchi was an enemy combatant; is that correct?

5 A. Yes.

6 Q. If you'll turn, sir, to page 7 of that unclassified
7 summary, that's the page ending in Bates number 445.

8 A. Yes.

9 Q. The very last paragraph on that page, beginning with
10 letter A, it states, essentially, that you didn't actually
11 find the FBI investigative summary was persuasive, right? In
12 fact, you stated that, "It provides a detailed outline of what
13 the tribunal can expect to see, but that it provides
14 conclusory statements with limited supporting unclassified
15 evidence"; is that correct, sir?

16 A. I ----

17 TC [MR. RYAN]: Objection, Your Honor. Beyond the scope
18 of direct, beyond the scope of AE 628.

19 MJ [Col COHEN]: Counsel?

20 ADC [MS. PRADHAN]: Your Honor, we're trying to determine
21 exactly what information -- whether coerced information was
22 used in the documents that were provided to the CSRT tribunal
23 members before their questioning of Mr. al Baluchi.

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1 Judge DeLury has already testified that the
2 questioning of Mr. al Baluchi was much longer than the
3 questioning of other detainees. And once we go into the
4 closed session as well, the specific questions that were asked
5 become very important, considering the comparison between the
6 FBI investigative summary and the fact sheet that was provided
7 based on CIA reporting.

8 TC [MR. RYAN]: It was specifically excluded from direct
9 testimony regarding the inner workings of the tribunal, their
10 determinations, and their findings. We focused on the
11 behavior of the accused.

12 MJ [Col COHEN]: I understand. To the extent that it
13 exceeds the scope of direct examination, is that your only
14 basis?

15 TC [MR. RYAN]: Relevance.

16 MJ [Col COHEN]: Okay. And your relevance would then
17 be -- because I can always just allow you to, for judicial
18 economy purposes, to ask the questions if you were calling him
19 on direct, so ----

20 ADC [MS. PRADHAN]: Yes, sir.

21 MJ [Col COHEN]: There haven't been -- to be honest, there
22 haven't been that many leading questions to begin with, so
23 it's primarily been a direct examination anyway.

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1 But with respect to this particular area, it sounds
2 to me like you're asking what evidence he considered; is
3 that ----

4 ADC [MS. PRADHAN]: Yes, Your Honor. On a macro level, it
5 is the integration of the FBI's evidence with the CIA's
6 evidence, and how both of those were used by the tribunal
7 members, whether wittingly or unwittingly, to make a
8 determination about Mr. al Baluchi's enemy combatant status;
9 and the way in which -- and Mr. Ryan did cover this in direct
10 examination -- the manner of the questioning that would have
11 had an impact on voluntariness during that CSRT session.

12 MJ [Col COHEN]: Okay. So let's break this down a couple
13 of ways.

14 ADC [MS. PRADHAN]: Sure.

15 MJ [Col COHEN]: With respect to his enemy combatant
16 status, that seems to be more of a hostilities -- hostilities
17 question.

18 ADC [MS. PRADHAN]: Yes, sir.

19 MJ [Col COHEN]: As opposed to otherwise -- and to the
20 same thing I told Mr. Connell earlier, I understand, and there
21 may be necessity to re -- to recall a witness if I reconsider
22 the existing rulings, but the law of the case at this point,
23 based on the rulings of the previous judge is that hostilities

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1 is a settled issue.

2 Mr. Connell.

3 [Counsel conferred.]

4 LDC [MR. CONNELL]: Your Honor, can I address just
5 something very specific that's separate from that? I'm not --
6 this is something that the government and I had discussed over
7 the break that Ms. Pradhan wasn't privy to.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. CONNELL]: It is -- when we have a classified
10 answer to an objection, I was proposing to the government that
11 we might tender -- we might write on a document and tender it
12 to the military commission so that we don't have to go into
13 closed and then go into open and make a big mess.

14 This might be one of those occasions, if I could just
15 have a moment.

16 MJ [Col COHEN]: I'll give you a moment to see if counsel
17 wants to work something in that manner.

18 ADC [MS. PRADHAN]: Your Honor, I -- I can wait until
19 they're done, or I can -- I have one comment.

20 MJ [Col COHEN]: Yeah, go ahead.

21 ADC [MS. PRADHAN]: All right. I know that the existence
22 of hostilities is the settled law of the case, but the two
23 open questions are actually Mr. al Baluchi's association with

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1 al Qaeda and his direct participation in those hostilities,
2 both of which were addressed -- are addressed in some detail
3 in both the FBI investigative summary and this document that
4 was compiled -- seems to have been compiled, at least was
5 offered by the DNI to Judge DeLury, on which he was -- he was
6 questioned at some length during his CSRT. So those are open
7 questions for this military commission.

8 MJ [Col COHEN]: Right, whether he was a member of
9 al Qaeda, I understand that. I guess what I'm getting at
10 is -- and I referenced this a little bit last week with
11 witnesses as well as the documents themselves are already in
12 evidence. Like I have a copy of 628BBB right here in front of
13 me.

14 ADC [MS. PRADHAN]: Uh-huh.

15 MJ [Col COHEN]: So to the extent that the questions can
16 be is this what you reviewed, or is this what you did, or if
17 you need to confirm specific facts that are in there because
18 they're pertinent to a particular issue.

19 But I would advise both trial counsel and defense
20 counsel to the extent that we don't just need witnesses to
21 read from documents -- or if there is, then have a very
22 specific purpose as to why that needs to be read. That will
23 be very helpful to the commission. Because I'm going to have

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1 read all these thousands of pages anyway, and it is in the
2 record.

3 ADC [MS. PRADHAN]: Save you some time, sir.

4 MJ [Col COHEN]: It won't save me any time. It's my
5 obligation to read everything that you guys file.

6 ADC [MS. PRADHAN]: Yes, sir. I understand -- I
7 understand your guidance. And I will try to limit my
8 questions to where Judge DeLury can add context to the
9 documents.

10 MJ [Col COHEN]: Thank you. Please do. Thank you.

11 [Counsel conferred.]

12 MJ [Col COHEN]: Yeah, I guess the more articulate way of
13 saying that for the parties is: The document says what the
14 document says. But a question such as did you actually use
15 this document during questioning of a witness or did you --
16 you know, or if so, how did you use this document during the
17 questioning of a witness, those are things that aren't -- you
18 can't just discern by looking at a document.

19 But as far as the recitation of the parties of just
20 the contents of the documents themselves, the documents are
21 the best evidence ----

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col COHEN]: ---- of what's in the document.

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1 ADC [MS. PRADHAN]: Yes, sir. I guess my -- if I may,
2 just ----

3 MJ [Col COHEN]: You may.

4 ADC [MS. PRADHAN]: ---- to clarify. My previous
5 question, I asked Judge DeLury to ask -- to read from a
6 paragraph in Attachment II, which ends in Bates number 445,
7 discussing his conclusion that the investigative summary
8 provided conclusory statements.

9 My next question to follow that were I had a series
10 of questions regarding that particular investigative summary.

11 MJ [Col COHEN]: Okay.

12 ADC [MS. PRADHAN]: So if that's -- that's where I was
13 going with that, with how the tribunal handled that particular
14 investigative summary in its role as a fact-finding body.

15 MJ [Col COHEN]: Okay. Tying it to the issue of his
16 affiliation with al Qaeda?

17 ADC [MS. PRADHAN]: Yes, sir.

18 MJ [Col COHEN]: Okay. As long as you tie it to that, to
19 that issue of hostilities.

20 ADC [MS. PRADHAN]: Of hostilities, but also the manner in
21 which the evidence was procured and whether there was any -- I
22 can tell you what my next questions are, sir, if that would be
23 helpful.

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1 MJ [Col COHEN]: Sure.

2 ADC [MS. PRADHAN]: Sure.

3 MJ [Col COHEN]: While they're looking at something, so
4 we'll have a colloquy here.

5 ADC [MS. PRADHAN]: The next set of questions was alluding
6 to Judge DeLury's statement that -- on direct that this
7 tribunal was a fact-finding hearing. And having come to the
8 conclusion or having determined that that particular
9 investigative summary contained conclusory statements, my next
10 set of questions were about what this particular fact-finding
11 body did with those conclusory statements, whether there were
12 any questions about the information underlying those
13 conclusory statements. Because part of what we're talking
14 about here is, as Mr. Ryan said, AE 628, and how this
15 information all came together.

16 MJ [Col COHEN]: Okay. I understand that line.

17 ADC [MS. PRADHAN]: Thank you, sir.

18 MJ [Col COHEN]: And that's more in line with what I was
19 talking about as well, more of -- not what the document says,
20 but things that need to be clarified about the document
21 itself.

22 ADC [MS. PRADHAN]: I understand, sir.

23 MJ [Col COHEN]: Or how it was used, et cetera.

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1 ADC [MS. PRADHAN]: I think I understand, sir ----

2 MJ [Col COHEN]: Thank you.

3 ADC [MS. PRADHAN]: ---- so I'll try to move forward in
4 that way. All right.

5 **CROSS-EXAMINATION CONTINUED**

6 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

7 Q. Judge DeLury ----

8 TC [MR. RYAN]: May I have one more moment, Your Honor?

9 MJ [Col COHEN]: You may.

10 Just a few moments. I'm sure you don't have this
11 many counsel in your courtrooms typically, to begin with.

12 WIT: No, and I wouldn't anticipate questions from quite
13 so many either, but.

14 MJ [Col COHEN]: Yeah. But there are many moving pieces.
15 We find that it's just necessary to do this. So if you'll
16 bear with us just for a moment.

17 WIT: Judge, it's my pleasure.

18 MJ [Col COHEN]: All right. Thank you. We've made a few
19 modifications just to accommodate the fact that we have five
20 cases going on at the same time.

21 WIT: It's a big job.

22 LDC [MR. CONNELL]: Sir, for your information ----

23 MJ [Col COHEN]: Mr. Connell.

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1 LDC [MR. CONNELL]: ---- I wrote out on a document some
2 information which I think would assist the military commission
3 assessing the relevance here. I presented that to Mr. Ryan,
4 who is writing, essentially, the government's response to
5 that.

6 MJ [Col COHEN]: Okay.

7 LDC [MR. CONNELL]: And so the idea would be we would
8 tender those both to the military commission for your
9 consideration.

10 MJ [Col COHEN]: That would be great. Thank you. We'll
11 mark this document as AE 628, I believe we're at LLL. And I
12 anticipate that we'll work -- wait on the classification --
13 official classification later, but initially, it will be
14 classified at the TS//SCI level until a proper classification
15 can be given.

16 LDC [MS. BORMANN]: Judge, I hate to throw a monkey wrench
17 in, but can copies be made for the parties?

18 MJ [Col COHEN]: Yeah. I will -- yeah, let me figure out
19 how I do that; but if nothing else, during the next recess, I
20 have no objection to counsel at least coming up and seeing
21 what the exhibit is. Absolutely.

22 LDC [MR. CONNELL]: You said LLL, sir?

23 MJ [Col COHEN]: LLL, please.

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1 LDC [MR. CONNELL]: Your Honor, Mr. Ryan advises that he
2 believes that his response is not classified, so I'll just
3 pass out LLL.

4 MJ [Col COHEN]: Okay. Great. Thank you. I will take
5 LLL. This is helpful. I just want to confirm, blue ink
6 belongs to the defense?

7 LDC [MR. CONNELL]: I'm sorry, Your Honor. Both colors of
8 ink -- I'm the sort of person who picks up different colors of
9 pen.

10 MJ [Col COHEN]: Okay.

11 LDC [MR. CONNELL]: That document, LLL, is entirely the
12 defense. I believe the government will make its response
13 orally.

14 MJ [Col COHEN]: Okay. That is fine.

15 Mr. Ryan.

16 TC [MR. RYAN]: Yes, sir. Your Honor ----

17 LDC [MR. SOWARDS]: Excuse me, Your Honor. I'm sorry.

18 MJ [Col COHEN]: Mr. Sowards?

19 LDC [MR. SOWARDS]: I beg your pardon. I know that
20 Mr. Ryan is going to be amazingly erudite, convincing. But I
21 just wondered for context if we may be able to see
22 Mr. Connell's comments first. Would that be a trouble?

23 MJ [Col COHEN]: No, I can do that.

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

2 MJ [Col COHEN]: Mr. Connell, would you please, or
3 Ms. Pradhan. Thank you.

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

5 MJ [Col COHEN]: Mr. Ryan, give me a moment.

6 [Counsel conferred.]

7 MJ [Col COHEN]: All right. Learned counsel had the
8 opportunity to review AE 628LLL.

9 Mr. Ryan.

10 TC [MR. RYAN]: Yes, Your Honor. Although I have not
11 heard it mentioned in the course of the examination or
12 responses to objections, it struck me that it might be helpful
13 for the commission, in ruling upon the government's
14 objections, to know that the prosecution asserts now that it
15 will not introduce Mr. Ali's CSRT transcript or statements
16 made therein in its case in chief against him, thereby
17 removing the issue of the derivative evidence rule from the
18 matters of admission of statements by an accused.

19 MJ [Col COHEN]: Okay.

20 TC [MR. RYAN]: We submit further that that makes any link
21 between the RDI program and the CSRT process irrelevant. And,
22 Your Honor, let me just point out that I state that only as to
23 the CSRT transcript involving the accused Ali.

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1 ADC [MS. PRADHAN]: Your Honor, if I may respond?

2 MJ [Col COHEN]: Yes, ma'am.

3 ADC [MS. PRADHAN]: Your Honor, involuntary statements
4 can't be used at all, not just in the case in chief; so that
5 limitation placed by Mr. Ryan is not sufficient, in our view.

6 The inquiry, however, the examination of
7 Mr. al Baluchi's CSRT transcripts is still relevant to the
8 matters that we're looking at that are directly before the
9 military commission; namely, the issues in 628 of the
10 collaboration among government agencies on the direct -- the
11 derivation of the evidence against him, and the issues -- the
12 still-pending issues in 502 and 524.

13 MJ [Col COHEN]: Mr. Ryan?

14 TC [MR. RYAN]: Once derivative evidence as a means of
15 suppression is off the table, we are left with the issue of
16 voluntariness. The voluntariness aspect of Judge DeLury's
17 testimony was brought in for the specific purpose of examining
18 his statements that occurred at the -- in the same time frame
19 as the FBI statements, and specifically because the defense
20 Mr. al Baluchi, Mr. Ali has raised as a reason for suppression
21 that he was operating under a learned helplessness standard.

22 Therefore, sir, any reasons for Judge DeLury or any
23 possible background they may have had in asking the questions,

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1 if such questions were asked based on those matters, do not
2 matter as far as what his responses are and his statements
3 given, which is why we put this testimony before the
4 commission.

5 ADC [MS. PRADHAN]: Sir?

6 MJ [Col COHEN]: Yes, ma'am.

7 ADC [MS. PRADHAN]: The substance of the CSRT transcript
8 goes -- includes the -- I would -- strike that.

9 What I would say, sir, is that the substantive topics
10 addressed in the CSRT transcript, the manner in which they
11 were addressed, the conditions under which Mr. al Baluchi was
12 questioned by the panel, to include his preparation for the
13 CSRT, all go to voluntariness, which Judge DeLury has
14 testified about, and which I will be asking him further
15 questions about based on his testimony.

16 MJ [Col COHEN]: What I'm not real sure anymore is is what
17 we are -- voluntariness of what? What statements? I mean, if
18 we're not offering the CSRTs, I'm trying to figure out ----

19 TC [MR. RYAN]: Yes, sir. The statements made by the
20 accused in the CSRT are contrary to the state -- to the
21 position of the defense that at the time, that is in early
22 2007, this man, as a result of what he went through in RDI,
23 was not in a position to refuse to answer questions from the

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1 FBI because he was under this learned helplessness standard.

2 MJ [Col COHEN]: Okay.

3 TC [MR. RYAN]: At the time that this was happening, we
4 are presenting the CSRT statements in which -- statements in
5 which he presented a very strong, emphatic defense,
6 exculpating himself, and even in answers to panel members.
7 That is where we are, sir, demonstrating the voluntariness of
8 his statements, not only before the CSRT but before the FBI as
9 well.

10 MJ [Col COHEN]: I understand. I -- okay. I get it. At
11 least I understand what you're -- how -- what your -- how your
12 statements can be understood together. All right.

13 ADC [MS. PRADHAN]: May I respond briefly to that, sir?

14 MJ [Col COHEN]: You may.

15 ADC [MS. PRADHAN]: All right. Our position is that
16 the -- and I'll -- I'm happy to just tell you this.
17 Mr. al Baluchi's statements to the CSRT represented a
18 fundamental break from the manner in which he was interrogated
19 and the -- you know, some of the substance on which he was
20 interrogated and the conditions under which he was
21 interrogated by the FBI and the CIA, and that he viewed this
22 fundamentally as the first legal proceeding he had ever had
23 since being held incommunicado by the CIA.

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1 MJ [Col COHEN]: Okay. So I guess where I'm going is --
2 all right. The two sides can argue the same facts in a
3 different way. What I'm really interested in here is we still
4 haven't gotten to the point of how -- of how -- how the
5 questioning was different, how -- you know, what -- all of
6 those kinds of things, and we're three and a half hours
7 into -- into his testimony.

8 ADC [MS. PRADHAN]: Yes, sir. I'm trying to get there,
9 sir.

10 MJ [Col COHEN]: So, I mean, what you're saying is
11 evidence -- I can see how those -- those might align a little
12 bit.

13 ADC [MS. PRADHAN]: Yes, sir.

14 MJ [Col COHEN]: But how long is it going to take to get
15 there?

16 ADC [MS. PRADHAN]: Not too long, sir.

17 MJ [Col COHEN]: Counsel, "not too long" is one thing. I
18 mean, what you're saying is very specific issues ----

19 ADC [MS. PRADHAN]: Yes, sir. If you'll allow me to ----

20 MJ [Col COHEN]: ---- which can be used during
21 cross-examination.

22 ADC [MS. PRADHAN]: Yes, sir.

23 MJ [Col COHEN]: So in other words, you can lead your

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1 witness exactly where you need him to be ----

2 ADC [MS. PRADHAN]: Yes.

3 MJ [Col COHEN]: ---- using the documentation that you
4 have in front of you.

5 ADC [MS. PRADHAN]: If you'll give me one minute, sir, I
6 can give you a better estimate.

7 MJ [Col COHEN]: Okay. I mean, at the end of the day, you
8 have specific facts that you want to bring to me. My question
9 is: When are you going to use those facts in a
10 cross-examination of the witness to get him to confirm that
11 those facts are, indeed, the facts?

12 ADC [MS. PRADHAN]: Yes, sir. All right.

13 Your Honor, I have a couple of questions specifically
14 about the personal representative, and then I'd like to ask
15 Judge DeLury about his decision to -- his determination
16 regarding witnesses and evidence that Mr. al Baluchi requested
17 for the CSRT.

18 MJ [Col COHEN]: Okay. And what do you want to know? I
19 mean, where are we going with the personal representative?

20 ADC [MS. PRADHAN]: With the personal representative, I'd
21 like to know exactly why the personal representative -- the
22 instruction was that the personal representative specifically
23 not be an attorney. Why Mr. al Baluchi didn't ----

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1 MJ [Col COHEN]: Okay. Fair enough. All right. And then
2 what about his -- his decision on the witnesses? Where does
3 that lead us?

4 ADC [MS. PRADHAN]: Whether Mr. al Baluchi had access to
5 the witnesses and evidence that he needed to present the case
6 that he wanted before the CSRT before this determination.

7 MJ [Col COHEN]: Okay.

8 ADC [MS. PRADHAN]: And the impact of the lack of that
9 evidence on the tribunal's determination.

10 TC [MR. RYAN]: To which I object, sir ----

11 MJ [Col COHEN]: Mr. Ryan.

12 TC [MR. RYAN]: ---- because that goes to the inner
13 determination of the tribunal which we specifically excluded
14 from testimony.

15 MJ [Col COHEN]: Okay. Does the defense believe that
16 the -- that the CSRT's findings are binding on this commission
17 in any way?

18 ADC [MS. PRADHAN]: No, sir. But it was the beginning of,
19 and it -- certainly as Judge DeLury testified, certainly had
20 an impact on the legal proceedings that followed.

21 MJ [Col COHEN]: All right. Let's get to the personal
22 representative question, and then I'll hear a specific
23 question with respect to the others, and we'll see how far we

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1 go down that road.

2 ADC [MS. PRADHAN]: Okay, sir.

3 **CROSS-EXAMINATION CONTINUED**

4 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

5 Q. Judge DeLury?

6 A. Yes, ma'am.

7 Q. You said it on direct, sir, that the personal
8 representative was not an attorney, and, in fact, you stated
9 that the instruction required that he not be a JAG; is that
10 correct?

11 A. That's my recollection of what the instruction said,
12 yes.

13 Q. Do you know the reason for that?

14 A. I have no idea.

15 Q. Did you at any point consider that perhaps an
16 attorney should be provided for these detainees?

17 A. It wasn't my role to do that. It was an instruction
18 under which I was operating. I could speculate as to policy
19 reasons why, but it wasn't my decision, and it was a format
20 and a structure that I was bound to, and we were going to
21 follow it.

22 Q. I see.

23 Did you question any of the format or instructions,

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1 sir, at all?

2 A. I did not.

3 ADC [MS. PRADHAN]: Okay. Your Honor, I'll move to
4 witnesses now.

5 MJ [Col COHEN]: Okay.

6 Q. And, Judge DeLury, you recall your determination
7 regarding the relevance of witnesses and evidence?

8 A. I have a general recollection of what I did 12 and a
9 half years ago.

10 Q. I can point you, sir, to Attachment RR ----

11 A. Thank you.

12 Q. ---- in your binder, which is your witness and
13 relevancy determination.

14 A. I see it.

15 Q. And this is ending in Bates number 570, for the
16 military commission. That's AE 628BBB Attachment RR.

17 A. I have it.

18 Q. Okay. Now, with regard to the witnesses -- excuse
19 me, Judge DeLury.

20 Have you seen this document before?

21 A. I did. I saw it when I authored it and signed it,
22 and hadn't seen it again until just a few days ago.

23 Q. Okay. But you recall authoring this document?

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1 A. Yes, I do.

2 Q. Okay. And I'll represent to you that by the 21st of
3 February, Mr. al Baluchi had made a request for certain
4 witnesses. And you recall that, correct?

5 A. Yes.

6 Q. And he had requested Mr. Mohammad, Mr. Binalshibh,
7 Mr. Paracha, and five contacts or coworkers from the United
8 Arab Emirates, including a gentleman named Ammar al Tesqui.
9 Do you recall that?

10 A. That's my recollection, yes.

11 Q. Okay, he also asked additional evidence that would
12 show that his work visa had been cancelled by the Emirati
13 government. Do you recall that, sir?

14 A. I do.

15 Q. Okay. And with regards to the evidence he requested,
16 you found, and it's on that first page at 570, that, quote,
17 Whether the detainee's entry or employment visa in Dubai was
18 revoked for work-related reasons is not -- excuse me -- is not
19 relevant to his capture and combat status; is that not
20 correct, sir?

21 TC [MR. RYAN]: I object, sir, to these questions as to
22 the inner determination of Judge DeLury.

23 ADC [MS. PRADHAN]: This goes to the final determination

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1 of Judge DeLury, sir, and I'm about to flip to that document.

2 MJ [Col COHEN]: Okay. I guess the question I've got here
3 is: Is that on the document itself, or were you asking for
4 his deliberative process?

5 ADC [MS. PRADHAN]: Yes, sir.

6 MJ [Col COHEN]: You're asking for his deliberative
7 process?

8 ADC [MS. PRADHAN]: I'm asking for the deliberative
9 process, but it's contained -- the evidence regarding
10 Mr. al Baluchi's exit from Dubai is contained in several
11 documents. And so there is this determination that the
12 evidence that Mr. al Baluchi specifically required was not
13 relevant, but then there is -- there are also documents
14 talking about how witnesses discuss Mr. al Baluchi's exit from
15 Dubai, and that was taken into account by the CSRT tribunal.

16 MJ [Col COHEN]: Okay. Well, then, we're not going to go
17 into the deliberations of the board.

18 ADC [MS. PRADHAN]: Okay, sir. I understand.

19 **CROSS-EXAMINATION CONTINUED**

20 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

21 Q. We can -- as part of the -- I'll move on, sir, but I
22 have a question about the request for witnesses, if you ----

23 A. Yes, ma'am.

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1 Q. As part of your -- this determination, and as part
2 of -- as -- as part of the reasoning that you testified was
3 that the off-island witnesses were not immediately available;
4 is that correct?

5 A. They had not been located. That's correct.

6 Q. Okay. But you did ask Mr. al Baluchi to submit
7 expected witness statements; is that correct?

8 A. A proffer of expected testimony, yes.

9 Q. Okay. And those expected witness statements are
10 contained in the record at 628BBB Attachment Q -- QQ, excuse
11 me. Do you see those, sir?

12 A. Yes.

13 Q. I'll flip to those as well.

14 A. As well as a roommate.

15 Q. All right. Now, looking at these two expected
16 witness statements ending in Bates numbers 544 and 545, there
17 are a number of spelling and other errors; would you agree,
18 sir?

19 A. I don't see any spelling errors or typos that jump
20 out at me. I mean, I read it and understood it.

21 Q. In the heading, sir, do you see that certain words
22 are capitalized, certain words are not capitalized? On the
23 second document ----

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1 A. I noticed that "allies" is capitalized, which ----

2 Q. Okay. In the second document, the word "roomate" is
3 misspelled. They're minor errors. Do you see those?

4 A. I'll take your word for it. Oh, yes, "roomate" on
5 the first line is -- needs another M. Okay.

6 Q. Do you know who drafted those expected witness
7 statements?

8 A. I presume it was the PR, because I don't think that
9 the detainees had access to word processing equipment, but I
10 don't know.

11 Q. Yes, sir. And these are -- these are short, not very
12 detailed statements; is that correct, sir?

13 A. Correct.

14 Q. Okay. In -- is the submission of expected witness
15 statements, was that your idea, sir, or that ----

16 A. I suggested it as an alternative that the PR and the
17 detainee might want to use if the off-island witnesses could
18 not be located.

19 Q. Okay. And during the CSRT itself, there was some
20 discussion about the expected witness statements; is that
21 correct, sir?

22 A. I remember that, yes.

23 Q. Okay. And whether or not Mr. al Baluchi was going to

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1 use them or not; is that -- do you recall that?

2 A. Yes.

3 Q. Okay. Now, you -- on direct, you read the paragraph
4 in which you found that Mr. al Baluchi knowingly waived his
5 right to witnesses; is that correct?

6 A. I made that finding, yes.

7 Q. Okay. I'd like to look a little bit at the
8 conversation that occurred before that.

9 A. Sure.

10 Q. And that is found -- in the government's submission,
11 that's AE -- it's also in your -- in that same binder, sir.

12 A. Okay.

13 Q. We've included that in that same binder for your
14 convenience. That's AE 628WW Attachment E, at the Bates
15 number ending in 1062.

16 A. I'm there.

17 Q. Okay. And this -- on this page begins a -- what
18 looks to be a colloquy. And if you want to take a minute to
19 review the next couple of pages, it -- it's a sort of a
20 lengthy colloquy between you, the president, and
21 Mr. al Baluchi; is that correct?

22 A. Yes.

23 Q. There's a conversation about whether Mr. al Baluchi

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1 is going to withdraw his request for witnesses and submit the
2 expected statements instead; is that correct?

3 A. Yes.

4 Q. And during that translation -- excuse me, during that
5 conversation, do you see where Mr. al Baluchi needed to use
6 the translator several times to ask questions? And I'm
7 referring specifically to page -- the page ending in 1065. Do
8 you see that, sir?

9 A. I do.

10 Q. And on the page right after that, the page ending in
11 1066, the page, part of which you read with Mr. Ryan, he asked
12 through the translator: "What is the difference if they" --
13 the witnesses -- "came themselves and give you this exact
14 statement and now you have this statement?"

15 Is that what you see there, sir?

16 A. I do.

17 Q. And your response was, quote, If they were provided a
18 statement, we would treat it the same way. We would give it
19 the weight that we deem appropriate in view of all the other
20 evidence. Do you see that, sir?

21 A. I do.

22 Q. Sir, you also stated just above that on the same
23 page, that, quote, If they were here physically, you could ask

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1 them questions. We could ask them questions. You can't do
2 that with a statement. Do you see that, sir?

3 A. I do.

4 Q. Okay. Sir, isn't there a fairly large difference
5 between Mr. al Baluchi presenting a short drafted statement of
6 what he thinks witnesses would say and having live witnesses
7 whose testimony you could test with questions?

8 TC [MR. RYAN]: Objection, Your Honor.

9 MJ [Col COHEN]: Basis?

10 TC [MR. RYAN]: A qualitative challenge to the way
11 Judge DeLury operated the CSRT is not relevant and is beyond
12 the scope of voluntariness. Again, the CSRT's results are not
13 binding on this commission, will not be introduced by the
14 government in its case in chief.

15 ADC [MS. PRADHAN]: Sir?

16 MJ [Col COHEN]: Counsel.

17 ADC [MS. PRADHAN]: The determination that Mr. al Baluchi
18 was an enemy combatant rested in part on his, quote, hasty
19 departure from Dubai, which he attempted to explain both
20 through these witnesses and through the submission of
21 evidence, which was not allowed to him.

22 MJ [Col COHEN]: Okay. So where will you be going with
23 this particular issue if the finding is not binding on me?

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1 I'm not saying it isn't, I'm just -- you need to help me
2 understand. I'm not tracking.

3 ADC [MS. PRADHAN]: Yes, sir. The ----

4 MJ [Col COHEN]: I mean, even if I -- for example, if I
5 disagree with the way that the witness did the process,
6 what -- what would I do with that?

7 ADC [MS. PRADHAN]: Well, the government had Judge DeLury
8 read part of this statement for -- as evidence of his
9 voluntariness in participating in this CSRT. And what this
10 actually -- actually, give me one second to confer, sir.

11 [Counsel conferred.]

12 ADC [MS. PRADHAN]: Court's indulgence for one more
13 minute.

14 MJ [Col COHEN]: Okay.

15 ADC [MS. PRADHAN]: I have three more questions for open
16 session, sir.

17 MJ [Col COHEN]: Okay. But help me understand what ----

18 ADC [MS. PRADHAN]: I'm withdrawing the previous question,
19 Your Honor.

20 MJ [Col COHEN]: Okay. All right.

21 ADC [MS. PRADHAN]: I should have said that. I apologize.

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

23 ADC [MS. PRADHAN]: All right.

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1 CROSS-EXAMINATION CONTINUED

2 Questions by the Assistant Defense Counsel [MS. PRADHAN]:

3 Q. Sir, the last document I'd like you to take a look
4 at, Judge DeLury, is AE 628BBB Attachment I -- II, that's
5 Bates number ending in 447.

6 A. 447?

7 Q. Yes, sir.

8 A. I'm there.

9 Q. Okay. Got there ahead of me, sir.

10 LDC [MR. RUIZ]: Judge, can we get the cite one more time?
11 We didn't get all of it.

12 MJ [Col COHEN]: Yeah. That will be fine. Please
13 reannounce.

14 ADC [MS. PRADHAN]: Of course. It's AE 628BBB
15 Attachment II.

16 MJ [Col COHEN]: Bates number ending in?

17 ADC [MS. PRADHAN]: Bates -- the Bates number -- the
18 specific page number I'm directing Judge DeLury to is -- ends
19 in 447.

20 MJ [Col COHEN]: Thank you.

21 Q. And that's page 9 of the tribunal's unclassified
22 summary of the basis for your decision. Do you recognize this
23 document, sir?

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1 A. I recognize the document, yes.

2 Q. Now, at page 9, you stated that no medical or
3 psychological evaluation was necessary of Mr. al Baluchi. Do
4 you see that, sir?

5 A. I do.

6 Q. And that's at part a. up at the top?

7 A. Yes.

8 Q. Now, you also stated on direct, sir, that you did not
9 observe anything that raised concerns regarding
10 Mr. al Baluchi's medical or psychological state; is that
11 correct, sir?

12 A. That's correct.

13 Q. Okay. As a fact-finder, sir, had you reviewed
14 Mr. al Baluchi's medical and psychological records in the
15 months preceding the CSRT?

16 A. I don't recall reviewing them, no.

17 Q. Okay. Did you -- were you ever provided with his
18 medical records?

19 A. Not that I can recall.

20 ADC [MS. PRADHAN]: Okay. Sir, that's all I have for
21 direct.

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

23 Any redirect?

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1 ADC [MS. PRADHAN]: Thank you.

2 TC [MR. RYAN]: No, sir. Thank you.

3 MJ [Col COHEN]: All right. Mr. Sowards.

4 LDC [MR. SOWARDS]: Would you like me to start now, Your
5 Honor?

6 MJ [Col COHEN]: Would you like to question the witness?

7 LDC [MR. SOWARDS]: Yes, I would, sir.

8 MJ [Col COHEN]: Okay.

9 LDC [MR. SOWARDS]: I don't know what your timing is,
10 though.

11 MJ [Col COHEN]: No. Like I said, yeah, let's go ahead
12 and do the unclass now. Absolutely. Sorry, sir. It was the
13 first time in the last two weeks another counsel has asked a
14 question, so yeah, absolutely. That was the way the process
15 was supposed to work.

16 LDC [MR. SOWARDS]: No. Perfectly fine, Your Honor. As
17 you know from 650, I always work the late show.

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

19 **CROSS-EXAMINATION**

20 **Questions by the Learned Defense Counsel [MR. SOWARDS]:**

21 Q. Good afternoon, Judge DeLury.

22 A. Good afternoon, sir.

23 Q. Sir, I just have two ground rules. I know everybody

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1 has been talking about ground rules. My only ground rule is
2 that if I say "Judge" or "Your Honor" and I'm looking this
3 way, you answer. And if I say "Judge" or "Your Honor" and I'm
4 looking at Judge Cohen, he will take it. So otherwise.

5 MJ [Col COHEN]: That's fair. We can make that work.

6 Q. And then there will be no squabbling.

7 A. Okay.

8 Q. So let me just start, sir. You mentioned that with
9 respect to your background, if I understood it correctly, you
10 sort of said in passing that you were a philosophy major
11 undergraduate?

12 A. I was.

13 Q. Okay. And then went on to law school and that's
14 where you had some international law studies?

15 A. Yes, sir.

16 Q. Okay. And other than those two areas of study, do I
17 take it you have had no training in the areas of mental health
18 or diagnosis of mental conditions?

19 A. None, sir.

20 Q. Okay. And Mr. Ryan had established -- he said he
21 wasn't going to make you a psychologist, but you have no sort
22 of background in that area or professional ----

23 A. I have none, sir. I'm familiar with reading

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1 psychiatric reports in connection with my employment, but I am
2 not a psychiatrist, psychologist, or treatment provider.

3 Q. Okay. Good.

4 And when you say "reading psychological reports,"
5 does that come up occasionally in your judicial officer
6 duties, that you have to refer somebody out or get a report
7 back?

8 A. Yes, sir.

9 Q. Okay. And then if I could ask you to return to the
10 area of questioning that Mr. Ryan asked you about your
11 experience with advice on -- in taking guilty pleas and
12 observing defendants in that.

13 A. Yes, sir.

14 Q. And if I had it correctly, you have actually been an
15 active civilian judge in a civilian court in New Jersey for
16 approximately 15 years?

17 A. I'm starting my fifteenth year next month.

18 Q. Very good. So now you have the lifetime tenure?

19 A. I obtained that after seven years, yes.

20 Q. Very good. And in the -- in advising defendants of
21 their rights with respect to guilty pleas, you were mentioning
22 that you -- one of the rights you give them is the right to
23 remain silent?

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1 A. Yes.

2 Q. Okay. And when you give -- when you explained that,
3 you used the term "right to remain silent"?

4 A. I say, "You have the right to remain silent, that is
5 to say nothing at all, about the charges against you."

6 Q. Okay. And that you -- do you also tell them -- and
7 it may be different in different jurisdictions -- that if they
8 exercise their right to silence, no adverse inference can be
9 drawn?

10 A. Certainly no adverse inference in front of me as the
11 presiding judge, and the jury would be instructed about that,
12 if they were going to be the fact-finder in a contested case.

13 Q. Okay. And so when you're telling them -- when
14 they're giving up all of their trial rights, you are -- you're
15 explaining to them that they don't have to do anything. They
16 can -- they can sit there, stand there, whatever, have the
17 government prove its case?

18 A. Yes, sir.

19 Q. And if they exercise the right to remain silent, they
20 won't be penalized for that?

21 A. That's correct.

22 Q. Okay. And then you also tell them affirmatively they
23 have a right to testify and to present a defense?

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1 A. I do.

2 Q. And then also in your practice, sir, your
3 jurisdiction, do you explain to them explicitly that they have
4 a right to compel witnesses to be brought in their behalf?

5 A. I do.

6 Q. Okay. And then in terms of the standards you apply
7 with respect to that, in your training as a judicial officer
8 or otherwise, you are guided by the holdings such as
9 Johnson v. Zerbst, that the waiver must be an express and
10 knowing one?

11 A. Our rules particularly require that it has to be
12 under oath, in open court, and that the court has to propound
13 the questions to the defendant personally, and be personally
14 assured of the understanding of the defendant, and his waiver
15 of rights.

16 Q. Okay. And when you explore that with the defendant,
17 you are -- you are intending or questioning to make sure that
18 you understand from the defendant that he is expressly,
19 explicitly, without reservation waiving those rights?

20 A. That's correct, sir.

21 Q. Okay. And the rights that he is giving up or the
22 waiver that he is making is knowing and intelligent?

23 A. Yes.

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1 Q. Okay. And sort of the -- by the way, let me just
2 step aside here and say I know I'm asking you some fairly
3 obvious questions, and I know from your experience as a judge
4 that you know that lawyers sometimes ask very obvious, if not
5 dumb, questions, but actually for a very good reason; and then
6 other times they ask dumb questions just because they're dumb
7 questions.

8 A. I learn something every day, sir.

9 Q. Okay. So what I'm doing -- as you know, for purposes
10 of making a record, I want to establish we have a clear
11 understanding of your practice, sir.

12 A. Thank you, sir.

13 Q. Okay. And I'll move along as quickly as I can in
14 that regard.

15 But the purpose of establishing that the -- that
16 particularly a lay defendant is making a knowing and
17 intelligent waiver is the obvious principle that people can't
18 be waiving things -- a right that they don't know they have?

19 A. Yes.

20 Q. Okay. And so you make effort to make sure they know
21 what they have before you then take the waiver from them?

22 A. Yes.

23 Q. Okay. And then with respect to police interrogation,

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1 again, in your practice, you want to make sure when a police
2 officer comes into your court and the prosecutor -- by the
3 way, in New Jersey, is it State's counsel, Commonwealth
4 counsel?

5 A. Prosecutor on the county level, Attorney General on
6 the state level.

7 Q. So when the prosecutor calls a police officer, one of
8 the things you're listening for is whether the police officer,
9 before obtaining an incriminating statement, has elicited
10 information to ensure that he or she has advised the
11 individual, the suspect, of his or her right to remain silent?

12 A. It would be a preliminary determination for the court
13 to make, if the statement were being either challenged by the
14 defense. And then there would be a fact-based hearing with
15 testimony, and the court has to determine beyond a reasonable
16 doubt that the waiver was knowing, intelligent, and voluntary,
17 taking into consideration the actions of police.

18 If the statement were not moved for suppression or
19 contested by the defense, the court is still obliged to
20 determine its admissibility when the state proffers it outside
21 the presence of the jury for similar bases, but I'm not
22 testing it with testimony at that point necessarily.

23 Q. Okay. So you would -- you would even have a sua

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1 sponte duty before it slips in?

2 A. We call it a 104. And if the state's going to use
3 the accused's statement against him in its case in chief, they
4 play it for me first; it's almost always recorded now. Or if
5 it is a spontaneous statement made and remembered by the
6 officer and testifying as to the statements of the accused,
7 then I'd have to make the similar determination.

8 Q. Okay. And how long, sir, in New Jersey, anyway, has
9 it been recorded, has the practice been to record it?

10 A. The rule was amended ----

11 TC [MR. RYAN]: Objection, Your Honor. Relevance grounds.

12 MJ [Col COHEN]: Counsel?

13 LDC [MR. SOWARDS]: I'm just trying to get an idea of the
14 background of his practice. He was called by Mr. Ryan to
15 testify.

16 MJ [Col COHEN]: I'll allow you a little leeway.

17 LDC [MR. SOWARDS]: Okay.

18 MJ [Col COHEN]: We've spent a large portion of the day
19 talking about guilty pleas at various levels and experience as
20 a judge and how you assess the credibility of witnesses,
21 et cetera.

22 LDC [MR. SOWARDS]: And just for the record, Your Honor,
23 as I say, I'm sort of at a disadvantage of batting clean-up,

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1 but this is going to elicit his professional experience and, I
2 think, his high standards in assisting in addressing some of
3 the issues that Mr. Ryan left unaddressed in terms of exactly
4 those ----

5 MJ [Col COHEN]: I understand.

6 LDC [MR. SOWARDS]: ---- questions about assessing
7 reliability and voluntariness and someone's willing
8 participation.

9 MJ [Col COHEN]: I understand. The prosecution
10 specifically asked the witness questions to -- to add
11 credibility to his determination that the person was capable
12 of understanding English, that he was knowingly making
13 statements, those kinds of things. To the extent that you
14 wish to then challenge that with those same types of
15 credentials, seems to be fair game.

16 LDC [MR. SOWARDS]: Okay. And so the record is clear, I'm
17 not challenging Judge DeLury's credentials.

18 MJ [Col COHEN]: No, I understand.

19 LDC [MR. SOWARDS]: I'm going to be relying on them ----

20 MJ [Col COHEN]: I understand.

21 LDC [MR. SOWARDS]: ---- I think is how this will turn out.

22 [END OF PAGE]

23

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CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. SOWARDS]:

Q. Sir, just out of background curiosity, how long you have been recording those?

A. The requirement to record the statement of a suspect by rule? I'm going to say it's within the last ten years that the rule was put in place; and if it is not recorded, or if notes are not preserved, there's certain adverse inferences that the defense can request to be given to the jury in determining if I admit the statement. It can be admitted even if it's not been recorded if the standard is met.

Q. Okay, sir. And may I ask another maybe obvious question: Do you know the purpose for that rule, that requirement?

A. It makes it clear that what was said was said; but even then, sometimes recordings aren't perfect, and there's always a question as to what was said. That's why the jury gets it.

Q. Okay. And so then returning to the example, you said there were two situations, either your sua sponte duty when it hasn't been challenged, and then you actually have a hearing with witnesses when the statement has been challenged. In the latter situation where the statement has been challenged and

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1 they call an officer to testify, is it the case that one of
2 the things -- one of the essential things you're waiting to
3 hear is that the officer advised the defendant of his or her
4 right to remain silent before they began the interrogation?

5 A. The advisement of the so-called Miranda rights, and
6 the timing of which is an important consideration for the
7 court.

8 Q. Okay. And then you mentioned Miranda v. Arizona, so
9 just to move this along, that would also include, you would be
10 listening for the officer to explain to you that he or she
11 also explicitly advised the defendant of the right to counsel,
12 correct?

13 A. Yes.

14 Q. And also the right to have counsel present before any
15 questioning began?

16 A. Yes.

17 Q. And if at any time they asked for counsel, the
18 questioning would stop and they would arrange to have counsel
19 present before they resume the questioning?

20 A. Yes.

21 Q. And another important aspect of that is that the --
22 anything the defendant said can and could be used against him
23 or her?

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1 A. Yes.

2 Q. And all of that would have to be given to the -- to
3 the defendant and testified to so that you knew that they had
4 actually reasonably heard and understood it before making a
5 waiver of those rights?

6 A. Yes.

7 Q. Okay. And the purpose of the Miranda waiver is, in
8 part, is to convey these rights to sort of normal, average
9 individuals in language that he or she should be able to
10 understand.

11 A. Ideally, yes.

12 Q. And is it also, from your experience, either --
13 something we probably both learned in law school or since
14 then -- your understanding that the Miranda warnings are
15 required in part to ensure that the person in custody who's
16 being questioned has not been coerced into making
17 self-incriminating comments?

18 MJ [Col COHEN]: Wait one second. Mr. Ryan.

19 TC [MR. RYAN]: Objection. Relevance grounds, Your Honor.

20 MJ [Col COHEN]: Okay. Do you intend to potentially use
21 any of the CSRT statements such as the ones you read into the
22 record today against the accused at trial.

23 TC [MR. RYAN]: No, sir. As stated, we will -- the

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1 prosecution ----

2 MJ [Col COHEN]: This is Khalid Shaikh Mohammad.

3 TC [MR. RYAN]: My apologies, sir. We intend to introduce
4 the CSRT transcript regarding Mr. Mohammad against him, yes,
5 sir.

6 MJ [Col COHEN]: Okay. Then this goes to totality of the
7 circumstances. You may continue. Overruled.

8 LDC [MR. SOWARDS]: Thank you.

9 Q. Do you recall the question, sir?

10 A. Would you repeat it, please, or have it read back?

11 Q. I'll try to. That the Miranda warnings, what have
12 come to be known to be as the Miranda warnings, were mandated
13 by the United States Supreme Court in part as a method of
14 ensuring that the person who is being questioned in custody
15 has not been coerced into making self-incriminating
16 statements.

17 A. Yes.

18 Q. Okay. And it's also adopted as a means of
19 eliminating the sometimes confusing and complex litigation
20 that surrounds factual questions of voluntariness of
21 statements; is that correct?

22 A. Yes.

23 Q. Okay. And would it be accurate to say that

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1 essentially, in cases where the state -- as you mentioned, the
2 second category of cases where the state is carrying the
3 burden to establish the voluntariness of a statement to
4 police, it has become the gold standard for deciding whether
5 the procedures have obtained a voluntary statement?

6 A. It's fair to say.

7 Q. Okay. And if in the -- normally in your courtroom,
8 sir, or the procedures you're familiar with -- you're familiar
9 with, if at any time the person says to the police, "I would
10 like to have an attorney," the police are obligated to cease
11 the interrogation and obtain one?

12 A. That's usually the best practice and the way forward.
13 Sometimes that is a contested point in a hearing when --
14 whether or not there has been an invocation of the right or an
15 attempt to exercise it, and then that is sometimes litigated.
16 But you're correct, that is what should happen.

17 Q. Okay. And a shorthand way of describing the rest of
18 that scenario, if you find from the evidence that there was an
19 invocation of right to counsel and the police did not respect
20 it, that ends the inquiry, the statement is inadmissible?

21 A. If I find it to be an invocation of that right, that
22 would be the correct. Certainly anything that followed would
23 not come in.

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1 Q. And these rights and warnings then also have taken
2 on, would it be fair to say, greater significance in sort of
3 forming the -- one of the cornerstones of due process in the
4 American system of justice?

5 A. Yes.

6 Q. Okay. And that is, in fact, part of what makes our
7 system the envy of the rest of the civilized world?

8 A. That's a fair statement.

9 Q. Okay. And endorsing those things in the way you've
10 talked about, particularly volunteering the obligation of a
11 sua sponte duty, I take it that when you undertake these
12 inquiries, you do so in a very conscientious manner?

13 A. I try to.

14 Q. Okay. And would it be fair to say that, in
15 discharging that obligation, you have in mind both the
16 fairness of the proceedings as well as the integrity of your
17 court into which this evidence may be introduced?

18 A. That's fair.

19 Q. Okay. So I'd like to ask you, sir, to consider,
20 then, a couple of hypotheticals just to see how the -- your
21 application of the -- these warnings and the evidence that you
22 receive would play out.

23 And I want you to assume that a case unfolds, and

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1 let's say, uncharacteristically, both the defense and the
2 prosecution are in agreement that when the -- when the
3 defendant asked for counsel, the police refuse to give him an
4 attorney and also refuse to advise him of his right to remain
5 silent, and then proceeded to interrogate him and obtain
6 incriminating information.

7 Just looking at those facts, would it be your opinion
8 that that was a voluntary statement that may be admitted
9 pursuant to Miranda?

10 TC [MR. RYAN]: Objection, Your Honor. Calls for
11 speculation, relevance. Counsel is talking about a system of
12 justice that is different than we are over in this ----

13 MJ [Col COHEN]: Counsel -- Counsel, I'll allow you to --
14 I -- no problem on the question, but his legal conclusions as
15 to whether something was voluntary or involuntary is really my
16 role.

17 LDC [MR. SOWARDS]: Is what? I'm sorry.

18 MJ [Col COHEN]: He may be a judge, too, but really,
19 whether or not something is voluntary or involuntary is a
20 question before me ----

21 LDC [MR. SOWARDS]: No, no, I ----

22 MJ [Col COHEN]: ---- not for Judge DeLury.

23 LDC [MR. SOWARDS]: Yeah, I'm -- well, first of all, he's

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1 a judge.

2 MJ [Col COHEN]: No, I -- that's what I said. I said we
3 may both be judges, but ultimately that question in this case
4 is before me, and I will have to answer that question, so ----

5 LDC [MR. SOWARDS]: And -- well, and so the record ----

6 MJ [Col COHEN]: ---- whether he would agree or disagree
7 with me, I'm not -- move on to the next question. If you want
8 to talk about facts and whether someone was advised of their
9 rights and those kinds of things, but asking him to draw legal
10 conclusions with respect to hypotheticals on the very issue
11 that I have to rule, I'm very aware of what the law is, and I
12 could answer that question for you -- for you now under
13 different jurisdictions and under different law.

14 So you -- let's move on.

15 LDC [MR. SOWARDS]: I'm sorry. Have we decided that
16 Miranda and the Fifth Amendment do not apply in Guantanamo?

17 MJ [Col COHEN]: I have not ruled anything. Those are the
18 questions before me. He -- I can tell you what happens for
19 sure in New Jersey. They do. Whether they apply here or not
20 is a question still to be determined.

21 LDC [MR. SOWARDS]: Okay. And what we're also talking
22 about, Your Honor -- and either that or I can move to strike
23 all the -- all of his -- [thunder] the gods are angry.

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1 I can move to strike his testimony on direct
2 examination that went into exactly all of these issues of
3 voluntariness, how he observes the person before him, the
4 factors he takes into consideration in making sure they're --
5 all of those things go to his expertise in applying facts to
6 law and deciding whether something passes constitutional
7 muster.

8 MJ [Col COHEN]: If you want to go into facts that he
9 considered in determining someone was voluntary or facts that
10 he's aware of, but asking him to make a ruling, which is
11 essentially what that question calls for, as to whether a
12 statement is voluntary or involuntary, I will not allow that;
13 nor would I allow an expert witness to come in. I mean,
14 essentially, you qualified him as an expert without asking for
15 him to be -- to be recognized as an expert in the law and then
16 asking for legal conclusions. No, we're not going to do that.

17 **CROSS-EXAMINATION CONTINUED**

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

19 Q. Okay. Then let me ask you, Your Honor -- Your
20 Honor -- if the police were to testify that they had not told
21 the individual that he had the right to remain silent and, in
22 fact, they refused also to advise him that he could have an
23 attorney; and that in response to his request to have an

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1 attorney, they told him he could not, would that, in your
2 understanding, factually meet all of the components of the
3 standard Miranda waiver?

4 TC [MR. RYAN]: Same objection, sir.

5 MJ [Col COHEN]: Counsel, what's -- are you asking what
6 are the components of Miranda?

7 LDC [MR. SOWARDS]: Sure, whether those would be missing
8 from what he understands is the Miranda waiver he's usually
9 looking for in his court.

10 MJ [Col COHEN]: Okay. I think we've already covered
11 what's covered by Miranda, correct?

12 LDC [MR. SOWARDS]: We have done that.

13 MJ [Col COHEN]: Okay.

14 LDC [MR. SOWARDS]: I'm asking him whether the police --
15 as a factual matter, the police application of it in this
16 fashion would satisfy those components.

17 MJ [Col COHEN]: Okay. And how will that assist me? What
18 are you going to argue from that?

19 LDC [MR. SOWARDS]: The -- I believe the judge was asked
20 with respect to the CSRT whether Mr. Mohammad was freely and
21 voluntarily making statements.

22 MJ [Col COHEN]: Right. So everything that -- so what
23 transpired in there and whether or not he was advised of his

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1 Miranda rights, all of those kinds of things, those seem all
2 fair game, and I will allow you to ask all of the questions
3 you want about that.

4 LDC [MR. SOWARDS]: Well, let me -- maybe I can go at it
5 this way.

6 MJ [Col COHEN]: But the calls for legal conclusions as to
7 whether something was in violation of the law and those types
8 of things, those are not questions for this witness.

9 LDC [MR. SOWARDS]: Excuse me.

10 Yeah, sure.

11 **CROSS-EXAMINATION CONTINUED**

12 **Questions by the Learned Defense Counsel [MR. SOWARDS]:**

13 Q. Judge DeLury, in your practice -- in your court, sir,
14 have you had occasion to consider the voluntariness and
15 admissibility of a statement -- of a statement made by a
16 defendant after he has given an earlier coerced or
17 un-Mirandized statement, and the issue before you is whether
18 the second statement is free of the taint of the earlier
19 coerced statement?

20 A. I've had such cases.

21 Q. Okay. And in resolving those issues, do you -- do
22 you frequently find it helpful that, in making your
23 determination as to the voluntariness of the subsequent

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1 statement, to know the facts and circumstances of the earlier
2 statement?

3 A. It would be very important to my consideration as to
4 what happened in the first attempt to obtain a custodial
5 statement from the defendant and a subsequent one and whether
6 or not it was attenuated, yes.

7 Q. Okay. And so we know that sometimes there are what
8 might be called violations of the Miranda warning that are of
9 a hyper-technical nature, that the officer may inadvertently
10 transpose words or leave something out. I assume you've had
11 that that people have raised?

12 A. Our standard to apply is totality of circumstances,
13 and in order to determine whether or not there was compliance
14 with the Fifth Amendment protections and Miranda.

15 Q. Okay. And with respect to the totality of the
16 circumstances, when you look at the earlier statement, would
17 one of the factors in your consideration be how egregious the
18 Miranda violation was by the interrogating officers?

19 TC [MR. RYAN]: Objection, Your Honor. Relevance grounds.

20 MJ [Col COHEN]: Response?

21 LDC [MR. SOWARDS]: That's exactly what he's being -- was
22 being asked to do in the CSRT. He was being asked to consider
23 the voluntariness -- which I believe that the prosecution is

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1 going to be offering this -- the voluntariness of
2 Mr. Mohammad's subsequent statement in the CSRT after he had
3 given a number of coerced, and in our position, statements
4 violative of Miranda on several occasions.

5 MJ [Col COHEN]: Okay. Counsel, I will allow you -- I
6 will overrule and allow to you ask the question, I -- on those
7 grounds. I could see where you're going with that. I'll
8 allow that question.

9 Q. Do you have the question in mind, sir? And it's okay
10 if you don't, I can try ----

11 A. Please repeat it, if you would.

12 Q. Sure, sure. I was just asking that when you -- or
13 one of the fact -- among the factors that you consider under
14 the totality of the circumstances in looking at the
15 voluntariness of a subsequent statement, do those
16 circumstances include how egregious the officers may have been
17 in violating Miranda on the earlier occasion?

18 A. It would be a factor I'd want to know in order to
19 make a determination.

20 Q. Okay. So if they were sort of more overbearing,
21 telling -- yeah, referring to the defendant in pejorative
22 language, telling him he had no right to an attorney, all of
23 that sort of stuff, that -- would that be a factor that you

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1 would -- you would consider in determining whether that
2 initial taint has affected the later statement?

3 A. I would.

4 Q. Okay. Now, I understand that because your bench is
5 in an American court, this may -- these hypotheticals may be a
6 little different or improbable for you, but let me ask you to
7 the extent that you can help us out.

8 First of all, have you ever had a defendant appear
9 before you who had been in the custody of police officers
10 continuously for approximately four and a half years, during
11 which they physically and psychologically tortured him?

12 TC [MR. RYAN]: Objection, Your Honor. Relevance grounds.

13 MJ [Col COHEN]: I'll overrule. I know where -- with
14 respect to whether or not he believes that the statement was
15 voluntary to the CSRT, you are allowed to ask that question.
16 Overruled.

17 A. I have no such experience of that in my practice in
18 New Jersey.

19 Q. Okay. And in terms of assessing the voluntariness of
20 any statements made at any time, including before you in your
21 courtroom, would it affect your assessment of that
22 voluntariness to know that the police officers who have
23 brought the individual into court had been torturing him?

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1 A. I'd certainly want to know it.

2 Q. And would we -- would I assume that, at least
3 initially or presumptively, that would have a negative effect
4 on your assessment of whether he was voluntarily making
5 statements before you?

6 A. I can't say that without knowing every fact and
7 circumstance. It's certainly not a good fact.

8 Q. Okay. And additional facts or circumstances you
9 would want to know in that regard, what would those include?

10 A. I'd want to know the length of time attenuating
11 between the alleged maltreatment and the statements sought for
12 admission. I'd want to know what the police were doing, what
13 they were thinking, what the defendant was doing at the time.
14 I -- I can't imagine everything that might go into such an
15 inquiry, but ----

16 Q. Sure. And also fair to say that being a judge in an
17 American court, you probably can't imagine being in that
18 situation to begin with, having a tortured defendant before
19 you?

20 A. It hasn't happened in front of me.

21 Q. Excellent. You're lucky.

22 And let me ask -- just consider this hypothetical:
23 That if the defense, with the concurrence of the prosecution,

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1 pursuant to their duty of full disclosure, informed you that
2 the person appearing before you had, while in custody of the
3 police, been stripped naked, hung from the ceiling of his
4 cell, and deprived ----

5 TC [MR. RYAN]: Objection, sir.

6 Q. ---- of sleep for approximately ----

7 MJ [Col COHEN]: I'll allow the question.

8 TC [MR. RYAN]: Objection to the hypothetical, sir.

9 MJ [Col COHEN]: All right. I'll tell you what, Counsel,
10 rather than a hypothetical, why don't we just go to whether or
11 not he knew the facts and circumstances surrounding
12 Mr. Mohammad at the time that he made his decision that it was
13 voluntary.

14 LDC [MR. SOWARDS]: Okay. I can start there, Your Honor.

15 MJ [Col COHEN]: Yeah. The objection was the
16 hypothetical. I -- I don't think we need to go to the
17 hypothetical. I think you probably have a good-faith basis
18 for asking whether he knew specific facts about your client at
19 the time that he was making his voluntariness determination.

20 LDC [MR. SOWARDS]: Sure. And I would just say for the
21 record, generally, hypotheticals are admissible if they are
22 either based on record evidence to date ----

23 MJ [Col COHEN]: Yeah.

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1 LDC [MR. SOWARDS]: ---- or that which counsel has a good
2 faith belief.

3 MJ [Col COHEN]: It would be much more helpful to me.

4 LDC [MR. SOWARDS]: Okay.

5 MJ [Col COHEN]: Because hypotheticals require the finder
6 of fact to assume that all of the information within the
7 hypothetical is true in order to accept the answer. Whereas,
8 if you can just specifically relate it to your client, then
9 we're no longer in a hypothetical area, right? I don't have
10 to make multiple findings. I can just accept the response to
11 the question.

12 LDC [MR. SOWARDS]: All right. Sure.

13 **CROSS-EXAMINATION CONTINUED**

14 **Questions by the Learned Defense Counsel [MR. SOWARDS]:**

15 Q. So let me try it this way.

16 If at the time Mr. Mohammad appeared before you, you
17 had been informed that he had been in continuous government
18 custody for approximately four years, during that time, in
19 order to coerce him into making statements which were the --
20 the substance of which were going to be repeated in the CSRT
21 tribunal before you, he had been held by government officials
22 who had stripped him naked and had hanged him from the ceiling
23 of his cell for approximately a week and 12 hours ----

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1 MJ [Col COHEN]: Mr. Ryan.

2 TC [MR. RYAN]: Your Honor, I enter -- I raise an
3 objection. This is similar to what you've already ruled upon;
4 that is, where counsel is asking the witness to give a legal
5 conclusion that is ultimately yours to make.

6 MJ [Col COHEN]: I have to get to the question first. And
7 if you're just asking if that may have impacted his decision
8 with respect to his decision or with respect to voluntariness
9 in his earlier testimony, I will allow that question.

10 LDC [MR. SOWARDS]: Thank you, Your Honor. Appreciate it.
11 Thank you for the guidance.

12 Q. I don't know where -- if you're with me where I left
13 off ----

14 A. I am.

15 Q. ---- let me do this again. So at the CSRT tribunal,
16 you as the president are informed that Mr. Mohammad, appearing
17 before you, had been at that point held in continuous
18 government custody for approximately four years; during that
19 time, the government officials had, among other things,
20 stripped him naked and hung him from the ceiling of his cell,
21 leaving him to be in his own defecation and urine; they had
22 deprived him of sleep over seven -- over the seven days and 12
23 hours; that he was also anally raped by his jailers; that his

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1 jailers subjected him to 183 mock executions, meaning
2 procedures which put him in imminent fear and the belief that
3 he was about to die; that the police had kidnapped and abused
4 his children and threatened to kill him -- kill the children
5 if Mr. Mohammad did not confess.

6 If you had been provided with that information from a
7 reliable government source, would you as a judge have concerns
8 about the voluntariness of Mr. Mohammad's statements, either
9 initially to government officials who inflicted this torture
10 upon him or subsequent to the statement that was being
11 introduced before you?

12 A. I would certainly take it into consideration.

13 Q. Okay. And would it be a neutral factor or would it
14 cause you concern?

15 A. It would be causing me concern.

16 Q. Okay. And again, in your career as a judge and a
17 lawyer, have you ever encountered government acknowledgement
18 of similar conduct with respect to a defendant?

19 A. I have no such experience.

20 Q. Okay. And then if at the Combatant Status Review
21 Board they -- the government acknowledged that degree of
22 torture, at least that degree of torture, and then you -- then
23 you learned, at no time after Mr. Mohammad made his -- his

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1 initially coerced statements during that torture period, had
2 the government officials given him any Miranda warning, they
3 had not told him that he had a right to remain silent or right
4 to counsel; and, in fact, in response to his request for
5 counsel, they told him he did not have a right to counsel, and
6 proceeded to extract -- to obtain statements from him which
7 tracked the substance of the statements he had given during
8 the act of torture, would that have been a factor causing you
9 concern about the voluntariness of statements being introduced
10 at the tribunal?

11 A. I don't know how to answer that. I know that the
12 Miranda warnings, as such, were not required to be given by me
13 in questioning him. I was advised that Article 31(b), for
14 example, did not apply in the CSRTs. So I don't know what the
15 so-called Miranda rights or the absence thereof would have
16 meant to my determination in the totality of circumstances.

17 Q. And would it be your testimony that, if freed of the
18 Miranda warnings, you would have no concern about torture
19 affecting the voluntariness of a defendant's statement?

20 A. If I knew about it, it would have some bearing upon
21 my determination, yes.

22 Q. Okay. And if you knew about the torture and then you
23 also knew about the failure to tell the individual that,

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1 having confessed under torture, he now was in a situation
2 where he didn't have to make any statements and that he had
3 the right to counsel -- he wasn't advised of the right to
4 counsel, would those subsequent statements to you as a judge
5 have any indicia of voluntariness or reliability?

6 A. It would depend.

7 Q. On what?

8 A. On the total circumstances and everything else, what
9 I observed in here.

10 Q. What would be -- can you give me a circumstance?

11 A. Sure. The circumstance of how he was speaking to me
12 in my presence and providing information. And his demeanor
13 and his attention and his alertness at the time would be
14 important.

15 Q. Let me ask, when you -- and I'll return to that in
16 just a moment. At the CSRT, you explained -- you testified
17 that you explained certain rights and abilities to the
18 defendants who -- or the detainees who appeared before you.

19 A. Yes, sir.

20 Q. Okay. And you said they had the right to be present
21 as long as they didn't disrupt the proceedings?

22 A. Yes.

23 Q. Okay. You said -- you said they had the right not to

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1 be compelled to testify?

2 A. Yes.

3 Q. Okay. And why were you telling them that?

4 A. It was the process, advising them of what they could
5 expect from the CSRT ----

6 Q. Okay.

7 A. ---- and the purpose of it.

8 Q. And when you testified earlier this morning, you
9 didn't say anything about they had a right to remain silent.
10 You didn't use that word; is that correct?

11 A. I didn't use that phrase. I told them they couldn't
12 be compelled to answer questions. I don't have the transcript
13 right now in front of me, but whatever I said to them is how I
14 phrased it, yes.

15 Q. And you said they had a right to a personal
16 representative?

17 A. Yes, sir.

18 Q. Not a -- but no mention of a right to an attorney?

19 A. That's correct.

20 Q. And no mention of a right, if they -- if they decided
21 not to testify, no protection against adverse inferences being
22 drawn from their failure to testify; is that correct?

23 A. They were not -- the detainees were not informed of

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1 that.

2 Q. And no -- no advice to them that anything they said
3 in the CSRT could or would be used against them?

4 A. That's correct.

5 Q. Okay. So in large measure, your advice to the
6 detainees at the CSRT did not have many of the components of a
7 Miranda waiver, as you understand it, in your judicial duties
8 in New Jersey?

9 A. It is not the same thing.

10 Q. Okay. Now, when you were talking about
11 Mr. Mohammad's presentation, you testified with Mr. Ryan that
12 you did not see anything that concerned you about his mental
13 well-being?

14 A. That's correct.

15 Q. Okay. And what, if anything, were you looking for
16 that would raise a concern about his mental well-being?

17 A. Lack of attention, wandering attention, not being
18 responsive where a response was looked for: "Do you
19 understand this, Mr. Mohammad? Yes or no." and if he hadn't
20 responded or responded inappropriately with a nonresponsive
21 answer. Things like that.

22 Q. And that went along with your testimony earlier today
23 that his English seemed to be serviceable and very good?

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1 A. It appeared to be.

2 Q. Okay. And we've established, I believe, that we --
3 that you have no clinical training or skills; is that correct?

4 A. None.

5 Q. Okay. And it's not your testimony that just being
6 able to eyeball somebody in front of you in court would enable
7 you to diagnose any underlying mental or psychological
8 disorders; is that correct?

9 A. I would take a layman's approach to a person's
10 conduct and behavior as to whether or not he was
11 understanding, cooperating, capable of responding.

12 Q. Okay. So in other words, if someone were floridly
13 psychotic, you might notice that there was a problem; but if
14 they had subtle or internal disabilities, you wouldn't be
15 picking those up?

16 A. Under my New Jersey experience, we have a standard
17 set of questions that are right in the criminal code to ask
18 about orientation to time and place and understanding what's
19 going on. And if those questions were not answered to my
20 satisfaction, then I would refer the defendant for evaluation
21 as to competence. Things like: What day is it? What is my
22 job? What is your counsel's job? Things like that.

23 Q. Okay. And did you ask those questions of

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1 Mr. Mohammad?

2 A. I didn't feel the need to do so.

3 Q. So that's a no, you didn't ask?

4 A. I did not. No, I did not.

5 Q. And when you talk about the questions that -- whether
6 somebody's oriented to time and place, if you notice it, is
7 that going to assess their mental competency?

8 A. No. It's a threshold in order to seek expert advice
9 as to the present competence of the defendant to assist in his
10 own defense.

11 Q. Okay. And have you ever had occasion to refer
12 someone for a competency evaluation?

13 A. Yes.

14 Q. And have you had occasions where counsel has asked
15 you to refer someone for a competency evaluation?

16 A. Yes.

17 Q. And what I mean by that are situations where the
18 attorney asks you, rather than you initiating it.

19 A. Both. Yeah.

20 Q. Okay. And in the situations where the attorneys have
21 asked you to initiate competency evaluations, have you had
22 occasions where the person has been found to be mentally
23 incompetent?

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1 A. Yes.

2 Q. So those would be situations where they were mentally
3 incompetent despite your having noticed it in court and raised
4 the inquiry?

5 A. Yes.

6 Q. Okay. That's good. It wasn't a trick question. I
7 was just ----

8 A. I was trying to understand it, that's all.

9 Q. Yeah. I was following the combination.

10 And if you had -- well, let me ask: If you had known
11 about the type of torture and mistreatment that I had
12 described with regard to Mr. Mohammad and you had been
13 informed that he was removed from what's called the government
14 black sites approximately six months before appearing in your
15 tribunal, would you have found that information to be relevant
16 to concerns about his mental status?

17 A. I don't know. I might have.

18 Q. Okay. So if someone had told you about all of that
19 torture, you would have maybe not, maybe yes?

20 A. I don't -- I don't know how to answer it, sir, unless
21 I experienced it, the behavior in front of me, to make me be
22 concerned.

23 Q. Okay. Well, in fact, Mr. Mohammad did try to tell

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1 you about the extent of that torture, didn't he?

2 A. He did, yes.

3 LDC [MR. SOWARDS]: Okay. And we have a classified and an
4 unclassified version, Your Honor. I'd like to use the
5 document camera, if I may?

6 MJ [Col COHEN]: You may. For the unclassified version?

7 LDC [MR. SOWARDS]: This is from the government's
8 attachment.

9 MJ [Col COHEN]: It's unclass?

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

11 MJ [Col COHEN]: Okay. Just make sure counsel knows what
12 you're referring to.

13 LDC [MR. SOWARDS]: Sure. One moment.

14 [Counsel conferred.]

15 MJ [Col COHEN]: Mr. Sowards.

16 LDC [MR. SOWARDS]: Your Honor.

17 MJ [Col COHEN]: Is that in an existing attachment, or do
18 I need to give it an exhibit number?

19 LDC [MR. SOWARDS]: No, no, this is in the attachment.
20 It's page 14 of 26 and 15 of 26. I believe that's
21 Attachment C.

22 MJ [Col COHEN]: Okay. Just one second. I want to make
23 sure I know which exhibit it goes to. One second.

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1 [Counsel conferred.]

2 MJ [Col COHEN]: Counsel, is this Attachment C of the
3 joint 628WW/629F/630J/631H/632N (Gov)?

4 LDC [MR. SOWARDS]: Yes. That's my understanding, Your
5 Honor.

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

7 LDC [MR. SOWARDS]: And we will be also discussing page 24
8 of 26 of that.

9 MJ [Col COHEN]: All right. Thank you. You may use the
10 document.

11 LDC [MR. SOWARDS]: Thank you.

12 MJ [Col COHEN]: Would you like this published to the
13 gallery?

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

15 **CROSS-EXAMINATION CONTINUED**

16 **Questions by the Learned Defense Counsel [MR. SOWARDS]:**

17 Q. Are you there, sir?

18 A. What page -- this is the CSRT transcript for
19 Mr. Mohammad?

20 Q. That is correct, sir.

21 A. And what page?

22 Q. It's page 24 of 26 ----

23 A. Okay.

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1 Q. ---- Attachment C. It is -- and the Bates number
2 down at the bottom, if you can read it, is MEA-CSRT with more
3 zeros than I can count, and then ending at 90.

4 A. I have it.

5 Q. Okay. And do you see that on the -- in your copy of
6 it ----

7 A. This is not ----

8 Q. About a third of the way down the page, it says
9 "PRESIDENT," who I believe is you. I have it highlighted on
10 the screen if that helps.

11 A. My 24 of 26 is not the same pages that you've
12 highlighted on the screen. The one that's ----

13 MJ [Col COHEN]: Are you on page 24?

14 LDC [MR. SOWARDS]: I beg your pardon. I meant 14 of 26.

15 WIT: Oh, I'm sorry.

16 LDC [MR. SOWARDS]: No, my fault. My fault. 24 of 26
17 will be coming up.

18 WIT: 14 of 26. Yes, I see it.

19 Q. Okay. And then you -- said that you wanted to take
20 up a few things that had come up based on your review of the
21 materials. And then you refer specifically to Attachment D-d
22 appears to be a written statement regarding certain treatment
23 that Mr. Mohammad claims to have received at the hands of

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1 agents of the United States Government.

2 Do you see that?

3 A. I do.

4 Q. Okay. And do you recall making that statement to
5 Mr. Mohammad?

6 A. I do.

7 Q. And then you asked him if that was right, and he said
8 yes.

9 A. Yes.

10 Q. And then the next highlighted portion, again with
11 your office, PRESIDENT, you say, "Now, I haven't seen any
12 statements in evidence," et cetera. But then you ask him,
13 "Were any statements that you made as a result of any of the
14 treatment that you received during that time frame from 2003
15 to 2006? Did you make those statements because of the
16 treatment you received from these people?" Do you recall
17 that?

18 A. I do.

19 Q. Okay. And that's a question you asked him?

20 A. I did.

21 Q. And then he said, "Statements for whom?" And you
22 answered, "To any of these interrogators?"

23 A. Yes.

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1 Q. And then Mr. Mohammad explained to you, "CIA peoples.
2 Yes. At the beginning when they transferred me" -- redacted.

3 A. I see that.

4 Q. Okay. And do you know from your familiarity with the
5 CSRT transcript, that the redacted -- the word "REDACTED"
6 appears to be just a short phrase at the end of the sentence,
7 but, in fact, that contains a lot more information than that?

8 A. I haven't seen the classified version of the
9 transcript since I left Guantanamo in 2007. I have a
10 recollection of it being longer than just a few inches on a
11 line.

12 Q. Okay. So he -- I'm sorry.

13 A. No, that was my answer.

14 Q. Okay. So he was telling you that statements that he
15 made to CIA peoples were the result of the treatment that he
16 had complained about?

17 A. That's what he said, yes.

18 Q. And then you said that you were trying to get -- what
19 you were trying to get to is whether any of the statements he
20 made, was it because of this treatment, to use your word, "You
21 claim torture. Do you think any -- did you make any
22 statements because of that?"

23 A. Yes.

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1 Q. And then the translator indicated the need to clarify
2 or make some clarification; is that correct?

3 A. Yes.

4 Q. And then you asked the -- you asked the translator to
5 translate that, the response into English?

6 A. It's Arabic.

7 Q. Not -- not from his Arabic, but from your English
8 into his Arabic?

9 A. That's what I was asking the translator to do, was
10 translate what I said so that Mr. Mohammad would understand it
11 clearly.

12 Q. Okay. And then after receiving that translation in
13 Arabic, Mr. Mohammad responded to you in English?

14 A. He did.

15 Q. And according to the transcript, he said, "I, ah,
16 cannot remember now, and then" -- redacted. "I'm senior man.
17 Many people they know me which I don't know them. I ask him
18 even if he knew George Bush. He said, yes, I do. He don't
19 know -- you that not means it's false" -- redacted. "I said
20 yes or not. This I said."

21 And then you gamely responded, "Alright, I
22 understand."

23 A. It seems incongruent based on what has been redacted,

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1 but that's what I said.

2 Q. Okay. When you say "incongruent," you were smiling?

3 A. Yeah. Obviously, I'm understanding what does not
4 appear to be a very understandable few words.

5 Q. Okay.

6 MJ [Col COHEN]: Counsel, do you intend to bring this up
7 during the classified portion as well so he can clarify that?

8 LDC [MR. SOWARDS]: We may do that, Your Honor.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. SOWARDS]: And certainly if he wishes, we can do
11 that.

12 MJ [Col COHEN]: Yes, sir. If you would like the
13 opportunity to see the unclassified portion, that may be
14 available during the classified session.

15 WIT: That would be helpful.

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

17 Q. And then he describes -- his next statement to you is
18 that he is "saying for you to be careful with people," and
19 then in the highlighted portion he says, "but there are many
20 Detainees which you receive classified against them maybe,
21 maybe not take away from me for many Detainees false
22 witnesses. This only advice."

23 Then you ask him, "So you are aware that other..."

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1 And he said, "Yes."

2 And then you say -- or ask, "People made false
3 statement as a result of this?" And you're referring to
4 his -- the treatment that he has described?

5 A. Yes.

6 Q. Okay. And Mr. Mohammad responded, "I did also."

7 And then you responded, "Uh-huh."

8 A. Yes.

9 Q. And although we're lawyers and judges, we sometimes
10 say "uh-huh" rather than yes or no. That was an affirmative
11 uh-huh, you were following, tracking what he was saying?

12 A. Yes.

13 Q. Okay. And then if I may ask you, sir, to turn to
14 page 24 of 26 of that attachment. And if you can see it on
15 the screen, we also have highlighted a portion about
16 three-quarters or more down the page. This was Mr. Mohammad
17 saying to you, "They kill wife of Dr. Ayman Zawahiri and his
18 two daughters and his son and in one bombardment. They
19 receive a report that is his house be. He had not been there.
20 They killed them. They arrested my kids intentionally. They
21 are kids. They been arrested for four months they had been
22 abused."

23 A. I see it.

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1 Q. Okay. Do you recall him saying that to you?

2 A. As I read it and remember it, yes.

3 Q. So after he had said that he had made false
4 statements as a result of what the CIA peoples had done to
5 him, is it your testimony, sir, that you felt no -- no
6 compulsion to examine him to see whether he was suffering any
7 of the continuing effects of coercion in testifying or making
8 his statement at the CSRT?

9 A. I did not.

10 Q. And let me ask: At the time that Mr. Mohammad made
11 these statements to you -- and we are talking about back in
12 2007 ----

13 A. Yes.

14 Q. ---- before a number of revelations were made by the
15 government, would it have been your frame of mind that you had
16 any skepticism about the truthfulness of what he was saying?

17 A. I was receiving evidence and information. I hadn't
18 concluded anything yet whether to be skeptical or not with
19 respect to his testimony or the other evidence that I had
20 received. I was trying to keep an open mind as everything
21 came in.

22 Q. Okay. And did you at some point ask for his
23 allegations -- in fact, I'll represent to you you did, didn't

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1 you, asked for his allegations to be investigated?

2 A. I did.

3 Q. Okay. And there was a reference to -- I believe it's
4 part of the form of your report following the CSRT entitled
5 "Compliance with the Detainee Treatment Act of 2005"?

6 A. Yes, sir.

7 Q. And do you recall that being attached as Enclosure 6
8 to the CSRT report for Mr. Mohammad?

9 A. I have not seen it recently, but I accept your
10 representation.

11 Q. Okay. And do you recall that you made a
12 recommendation for investigation of the detainee's allegations
13 of torture?

14 A. I did.

15 Q. And did you receive any response or follow-up to that
16 recommendation?

17 A. I did not.

18 Q. And did you -- so I take it, then, that necessarily
19 means that you did not wait for any investigation of his
20 allegations before doing a final report or recommendation
21 based on his statements to you?

22 A. I completed the report, included the information
23 about his treatment, and indicated or asked that it be

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1 investigated. I was not in a position to investigate it
2 myself.

3 Q. I understand. And my question was, just so the
4 record's clear, that you didn't wait to see whether anyone
5 investigated or provided you with the results of their
6 investigation before you made your final report for the CSRT?

7 A. You're correct, sir.

8 Q. And your final report for the CSRT was based in part
9 on statements that Mr. Mohammad made after telling you that
10 the CIA peoples had done this to him?

11 A. It was.

12 Q. Correct?

13 A. Yes.

14 Q. Yes. Okay.

15 Now, if -- and I'm just asking in terms of your
16 methodology for assessing the voluntariness of statements. If
17 the government had provided you or if we can provide you with
18 the results of the investigation into Mr. Mohammad's claims of
19 torture, to include his children, would that be a factor that
20 you would find relevant to your determination of whether his
21 statements at the CSRT were voluntary?

22 A. If the information was available to me at the time, I
23 would have taken it into consideration.

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1 Q. Okay. And in particular, would you have wanted to
2 know whether the government still had custody of
3 Mr. Mohammad's children?

4 A. I don't know.

5 Q. Okay. Well, let me ask: In your -- your judicial
6 experience, have you had situations where victims of domestic
7 violence come into your courtroom and they want to drop the
8 charges?

9 A. Yes.

10 Q. Okay. And is one of your concerns whether they're
11 doing this totally voluntarily or whether the person who has
12 abused them is forcing them to do it?

13 A. It isn't always my call. The prosecutor has a role
14 to play in it, too. And very infrequently am I called in to
15 assess that in the criminal part. If the state can't go
16 forward on its charges, they tell me they can't go forward on
17 their charges, and the charges are dismissed.

18 Q. Okay. So -- but in terms of protecting either the
19 victims or the integrity of your court, do you ever have
20 occasion to ask the prosecutor to make sure that the
21 complaining witness is doing this totally freely and
22 voluntarily or whether she's being coerced by the abuser into
23 doing it?

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1 TC [MR. RYAN]: Objection, Your Honor, on relevance
2 grounds.

3 MJ [Col COHEN]: Counsel, I understand generally the
4 hypothetical. Can you rephrase it more specifically with
5 respect to K -- Mr. Mohammad and his children?

6 LDC [MR. SOWARDS]: Sure.

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

8 LDC [MR. SOWARDS]: Sure.

9 Q. Judge, would you have wanted to know whether the
10 government had informed -- or whether Mr. Mohammad knew
11 whether his children were in a safe place in 2007 or whether
12 the government was still holding them and threatening to kill
13 them?

14 TC [MR. RYAN]: Your Honor, I object on the grounds that
15 counsel does not have a good-faith basis to suggest that
16 children were being held in 2007.

17 MJ [Col COHEN]: Counsel?

18 LDC [MR. SOWARDS]: Well, I -- perhaps Mr. Ryan would like
19 to tell me how long they were held; and we're talking about
20 two sets. The other point is Mr. Mohammad was held
21 incommunicado since March of 2003, as Mr. Ryan well knows, was
22 denied access to counsel, and was denied any contact with his
23 family. All he knows is they said either you talk or

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1 we'll ----

2 MJ [Col COHEN]: I'll allow the question to be asked, and
3 the sense is whether the witness would have wanted to know --
4 would the fact that Mr. Mohammad may have believed at the time
5 that his children may have been held would have been something
6 he would have wanted to consider in determining whether or not
7 it was voluntary.

8 Q. Did you hear that question?

9 A. The answer is yes.

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

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

12 LDC [MR. SOWARDS]: I thought I'd eliminate the middleman.

13 MJ [Col COHEN]: I don't mind doing -- I'm not trying to
14 help either side, but sometimes I get an objection that -- but
15 I understand where you're going with it.

16 LDC [MR. SOWARDS]: Okay.

17 Q. And you testified in response to Mr. Ryan's question
18 that you were unfamiliar with the term "learned helplessness"?

19 A. That's correct.

20 Q. Okay. And then Mr. Ryan's questioning further
21 suggested that what that would mean would be whether you saw
22 someone that you thought looked helpless; is that correct?

23 A. Yes.

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1 Q. Okay. And in the colloquial sense, helpless means
2 somebody who might be unable to move or unable to feed or
3 clothe themselves; is that correct?

4 A. That would be one factor.

5 Q. Okay. And are you familiar with the term "learned
6 helplessness" that describes somebody who is outwardly able to
7 function, but has their sense of agency overborne by an
8 abuser?

9 A. I'm not familiar with that concept or the learning
10 behind it.

11 Q. Okay. So -- and then I take it, if a person would
12 appear in your courtroom who had been the victim of learned
13 helplessness, you would not know what the clinical
14 presentation of that condition would look like; is that
15 correct?

16 A. I would be advised by counsel, I'm sure.

17 Q. And if someone appeared before you who had a personal
18 representative rather than counsel, you wouldn't be advised by
19 counsel, would you?

20 A. I guess if the personal representative knew something
21 about it, he might tell me about it. But I wasn't advised of
22 anything along those lines.

23 Q. Okay. And as far as you know, no one in this

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1 tribunal that -- of which you were president had any clinical
2 skills to make this evaluation?

3 A. To my knowledge, no.

4 Q. Okay. And I believe you testified in response to
5 Mr. Ali's counsel that you had no information about the
6 detainees' psychological records; is that correct?

7 A. I had no information about it.

8 Q. Okay. And that would include Mr. Mohammad?

9 A. Yes, sir.

10 Q. During the course of your international studies or at
11 any time to the present have you gained any familiarity with
12 the Istanbul Protocol for evaluating victims of torture?

13 TC [MR. RYAN]: Objection, Judge. Relevance.

14 MJ [Col COHEN]: Counsel?

15 LDC [MR. SOWARDS]: Yeah, well, he -- the government has
16 introduced the judge's testimony as evidence of the person
17 appearing before him, appeared to be behaving in a voluntary
18 nature. His lack of familiarity, with due respect, sir, with
19 the United Nations definitive document on assessing
20 individuals who are victims of torture and may continue to
21 operate under the influence of their torturers is significant
22 to the limitation of his knowledge and the basis for his
23 opinion.

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1 MJ [Col COHEN]: Okay. So you just want to know whether
2 or not he was aware of that at the time that he made his
3 determination that someone was -- was acting voluntarily?

4 LDC [MR. SOWARDS]: Well, I can limit it to that. I was
5 trying to give him the benefit of the doubt. Maybe he has
6 read something similarly, and he says, "As I think back on it,
7 my familiarity with the Istanbul Protocol tells me that he was
8 fit as a fiddle." But however you want to limit it is fine.

9 MJ [Col COHEN]: Okay.

10 LDC [MR. SOWARDS]: I can do that. At the time,
11 Judge ----

12 MJ [Col COHEN]: Okay. I will allow that question.

13 A. I'm not aware of that document.

14 Q. Okay. Even to today?

15 A. Yes.

16 Q. And you otherwise have no other training in
17 recognizing the clinical presentation of torture survivors?

18 A. I have no training or experience.

19 Q. Okay. And I take it you have also no training in
20 recognizing the sequelae of traumatic stress resulting from
21 torture?

22 A. No training.

23 Q. Okay. And when you say individuals are attentive in

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1 a courtroom setting, do you have any training that allows you
2 to distinguish between attentiveness and hypervigilance?

3 A. I do not.

4 Q. And if someone is calm and reserved, do you have any
5 training that would enable you to distinguish between that and
6 constricted emotional affect?

7 A. No.

8 Q. Okay. So fair to say that when Mr. Mohammad was
9 appearing before you, you had no training or other basis to
10 rule out any of the ongoing effects -- psychological effects
11 of his torture?

12 A. I had no such training.

13 LDC [MR. SOWARDS]: Okay. May I have just a moment, Your
14 Honor?

15 MJ [Col COHEN]: You may.

16 LDC [MR. SOWARDS]: Thank you.

17 [Counsel conferred.]

18 LDC [MR. SOWARDS]: You'll be happy to know, Your Honor, I
19 have nothing further at this time.

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

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

22 WIT: Thank you, Counsel.

23 MJ [Col COHEN]: Mr. Ryan, is there any redirect?

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1 TC [MR. RYAN]: No, sir.

2 MJ [Col COHEN]: Any recross based on Mr. Mohammad's
3 cross?

4 ADC [MS. PRADHAN]: Sir, not based on Mr. Mohammad's
5 cross, but -- I think I may be wrong about this, based on what
6 Mr. Sowards said, but I think I have a way that we may be able
7 to avoid a closed session, if I may have a moment to speak to
8 Mr. Ryan?

9 MJ [Col COHEN]: You may.

10 Sir, do you need a break?

11 WIT: I'm fine, Judge. Thank you.

12 MJ [Col COHEN]: Okay.

13 [Counsel conferred.]

14 ADC [MS. PRADHAN]: Sir, if you'll allow me, I think, two,
15 perhaps three more questions, I think we can avoid a closed
16 session.

17 MJ [Col COHEN]: Okay.

18 ADC [MS. PRADHAN]: All right.

19 **RECROSS-EXAMINATION**

20 **Questions by the Assistant Defense Counsel [MS. PRADHAN]:**

21 Q. Judge DeLury, we're nearing the end, sir.

22 A. Take your time.

23 Q. You recall speaking to Mr. Ryan about the questions

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1 posed by the panel members to Mr. al Baluchi. Do you recall
2 that?

3 A. I do recall that.

4 Q. Okay. I represent to you, and you may recall that a
5 number of those questions had to do with the topics of Majid
6 Khan and the shoe bombers. Do you recall that?

7 A. I do recall that.

8 Q. Do you know how the panel members knew to ask about
9 those topics?

10 A. I don't.

11 ADC [MS. PRADHAN]: That's all I have, sir.

12 MJ [Col COHEN]: Okay. Thank you.

13 ADC [MS. PRADHAN]: Thank you.

14 MJ [Col COHEN]: Counsel, I do have one thing. The
15 witness was under the impression that he might be able to look
16 at the redacted portions of that particular document. We may
17 not need to go into a closed session to do that.

18 Does someone have the redacted portions that he can
19 review and see if there's any unclassified information that he
20 believes he needs to provide the commission with respect to
21 those documents?

22 TC [MR. RYAN]: I believe, Your Honor, the question was
23 about him viewing a classified, unredacted version of the

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1 transcript ----

2 MJ [Col COHEN]: That is correct.

3 TC [MR. RYAN]: ---- of Mr. Mohammad's CSRT. I do not
4 have that in the courtroom with me right now.

5 MJ [Col COHEN]: Okay.

6 TC [MR. RYAN]: And it was not the prosecution's question.
7 I believe it came from ----

8 MJ [Col COHEN]: No, it was. I just didn't know if
9 someone happened to have the document.

10 Mr. Sowards, do you have the unredacted document?

11 LDC [MR. SOWARDS]: We may. If I may have a moment?

12 MJ [Col COHEN]: You may. You don't have to read it into
13 the record, but he can review the classified portion and see
14 if there's anything that he would like to say about that.

15 LDC [MR. SOWARDS]: [Microphone button not pushed; no
16 audio].

17 MJ [Col COHEN]: Please.

18 [Counsel conferred.]

19 LDC [MR. SOWARDS]: May we approach, Your Honor?

20 MJ [Col COHEN]: You may. You may approach the witness.
21 Turn off the mics momentarily.

22 WIT: Do I turn it off?

23 MJ [Col COHEN]: Turn off the witness mic, please. Thank

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1 you.

2 [Counsel conferred with the witness.]

3 MJ [Col COHEN]: Yes. The mics are back on. All right.

4 Thank you.

5 Mr. Sowards, could I mark that exhibit?

6 LDC [MR. SOWARDS]: You may have this.

7 MJ [Col COHEN]: Thank you. I'll take it and then I'll
8 put it into the record tomorrow what the exhibit is with the
9 court reporters. Thank you.

10 LDC [MR. SOWARDS]: And I believe Judge DeLury's response,
11 and correct me, sir, if I'm wrong, is that now having had a
12 chance to see the less-redacted document, it doesn't change
13 his answers.

14 MJ [Col COHEN]: Okay.

15 WIT: That's correct, sir.

16 MJ [Col COHEN]: All right. Thank you, sir. I just
17 didn't want to send you off and not give you the opportunity
18 to close the loop on that.

19 WIT: Thank you, Judge.

20 MJ [Col COHEN]: Absolutely. I'll hand this back to the
21 court reporter. Thank you, Counsel, for the way you handled
22 that.

23 All right. Then there are no further questions for

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1 this witness, then?

2 TC [MR. RYAN]: No, sir.

3 MJ [Col COHEN]: Affirmative response from Mr. Connell and
4 Mr. Sowards. Okay.

5 Any other counsel? Negative response from any
6 counsel.

7 Subject to recall? Yes.

8 Sir, whether or not you will ever be called back is a
9 determination that maybe need -- need made a later date.
10 You're not stuck on the island. You may go about your
11 judicial duties back in New Jersey. In the meantime, please
12 do not discuss your testimony here with anyone other than the
13 prosecution or the defense while the case is ongoing.

14 WIT: Aye, sir.

15 MJ [Col COHEN]: All right. Thank you. And if you are --
16 if we do need to bring you back, you will be -- you will be
17 notified accordingly.

18 WIT: Yes, sir.

19 MJ [Col COHEN]: All right. Mr. Ryan?

20 TC [MR. RYAN]: Your Honor, I just wanted to clarify that
21 last instruction to the witness. For Your Honor's
22 understanding, and seeking Your Honor's agreement, any desire
23 or request for the witness to be recalled will be subject to

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1 discussion with Your Honor.

2 MJ [Col COHEN]: Absolutely. Yeah, I have not ruled, like
3 I said, whether Ms. Bormann, for example -- I know she
4 indicated whether she ultimately needs the witness or not will
5 be determined. It's preliminarily, but to the extent that I
6 didn't want to permanently excuse him and then a motion to
7 compel would be filed, and he would be like honestly, I
8 thought you said I was permanently excused.

9 TC [MR. RYAN]: Understood. And I just want to leave open
10 the possibility that, in the event Your Honor determines
11 further testimony is required, the possibility exists that he
12 could provide it by video linkup.

13 MJ [Col COHEN]: Yes. I'm open to all kinds of
14 suggestions to include, I mentioned to the parties,
15 depositions, et cetera. So we'll ----

16 TC [MR. RYAN]: Thank you.

17 MJ [Col COHEN]: All right. Absolutely.

18 Your Honor, thank you very much for your testimony
19 today. Same instructions apply. You are excused for now,
20 sir. Thank you very much.

21 WIT: Thank you very much, Judge.

22 [The witness was warned, excused, and withdrew from the
23 courtroom.]

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1 MJ [Col COHEN]: All right. Counsel, just brief
2 scheduling matter. No need for an 802. I still note we're
3 going to have Mr. Fife testifying tomorrow, I think is the
4 anticipation of the parties. Yes, as a prosecution witness.

5 Who will be conducting the examination on behalf of
6 the prosecution?

7 TC [MR. RYAN]: I will, sir.

8 MJ [Col COHEN]: And do you know how long your direct
9 examination will be?

10 TC [MR. RYAN]: I anticipate, Judge, attempting to be done
11 in about one hour to, at most, I would imagine no more than
12 one hour and one half.

13 MJ [Col COHEN]: Okay. Ballpark then, I will go with --
14 like I said, I don't disagree with you, I'll go with two for
15 planning purposes. So from approximately 9:00 to 11:00
16 tomorrow, in there.

17 Cross-examination? How many counsel intend to
18 cross-examine Mr. Fife tomorrow? Is it just Mr. Connell's
19 team? It may be, given the nature of the evidence.

20 Okay. It appears it's just you, Mr. Connell. Your
21 team, anyway.

22 LDC [MR. CONNELL]: Sir, I will -- just for the --
23 everybody knows, something that I just learned today that I

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1 didn't know before is that the government's going to be
2 covering fingerprints with respect to all the defendants. So
3 I just thought everybody should know before they make the
4 decision.

5 MJ [Col COHEN]: Okay. Then we'll see how this goes. Got
6 it. Okay. We'll see how all that plays out.

7 And, like I said, the same instruction with respect
8 to this witness as the other. If he initially presents
9 evidence, then the defense then gets the opportunity to hear
10 what that evidence is. It doesn't mean that it's admissible.
11 If you file an objection, it doesn't mean I will consider it
12 until I have ruled on an objection. And it also does not
13 presume that the witness cannot be brought back to ask
14 additional questions.

15 And I also will continue to recognize Mr. Ruiz's
16 position that he provided earlier today. All right.

17 Just as a matter of judicial economy, in the event
18 that someone elects not to bring the witness back, we'll at
19 least hear initially the direct examination, and then we'll
20 determine from that point who is prepared to cross-examine.
21 If you aren't, then we'll follow the typical process of how
22 you would request a witness to be called for cross-examination
23 purposes. All right.

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1 Mr. Connell, if you all go, what's the ballpark for
2 you all?

3 LDC [MR. CONNELL]: Sir, I'm scared now.

4 MJ [Col COHEN]: All right. As you notice, I already
5 added 30 minutes to the government, just to be safe.

6 LDC [MR. CONNELL]: Yes, sir. And to be fair, when I tell
7 members of my team how long it should take them to do
8 something, they always double it and add an hour. So -- but
9 it will be several hours of cross-examination, I can tell you
10 that.

11 MJ [Col COHEN]: Okay. Then I tell you what, we're going
12 to just go ahead and push oral argument into the morning
13 session. We'll go from -- no longer than 9:00 to 12:00 on
14 Thursday to address some of these issues in oral argument.
15 That way we're not under a time crunch. Like I said, we got
16 time this week, and I'll go ahead and say we'll do an oral
17 argument from 9:00 to 12:00 on Thursday.

18 So tomorrow will be the witness, both open and closed
19 session. When we're done with the closed session, we're done
20 for the day. And we'll come back at 0900 on Thursday.

21 LDC [MR. CONNELL]: Very good, sir, thank you.

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

23 Thank you, everyone. We're in recess for the

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1 evening.

2 [The R.M.C. 803 session recessed at 1724, 24 September 2019.]

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