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1 [The R.M.C. 803 session was called to order at 0902,
2 7 December 2017.]

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

4 Trial Counsel, any changes since we last recessed?

5 CP [BG MARTINS]: No, Your Honor.

6 MJ [COL POHL]: Mr. Nevin?

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

8 MJ [COL POHL]: I will note that none of the accused are
9 currently present.

10 Ms. Bormann, any changes?

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

12 MJ [COL POHL]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: No changes, Judge.

14 MJ [COL POHL]: Mr. Connell?

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

16 Mr. al Baluchi are myself, James Connell; Lieutenant Colonel

17 Sterling Thomas; and Major Wareham. Ms. Pradhan remains

18 excused.

19 MJ [COL POHL]: Okay. Thank you.

20 And Mr. Ruiz?

21 LDC [MR. RUIZ]: No changes.

22 [END OF PAGE]

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1 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
2 was reminded of his oath, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Are you the same Major who testified yesterday in
6 these proceedings?

7 A. I am, sir.

8 Q. Again, I remind you that you are still under oath.

9 A. Yes, sir.

10 Q. Let's take Khalid Shaikh Mohammad first. What time
11 did you advise Mr. Mohammad of his right to attend today's
12 proceedings?

13 A. I met Mr. Mohammad this morning. I introduced
14 myself, advised him that he had a commission this morning. He
15 said he understood. I asked him if he would like to come to
16 the commission. He indicated he did not. So I then began
17 reading the English-only version at 7:08.

18 Q. All right. Did you have an interpreter translating
19 the English version?

20 A. There was an interpreter there with me for
21 Mr. Mohammad. Mr. Mohammad just simply asked that I read the
22 English version. He did not ask that it be interpreted.

23 Q. All right. Did you deviate from the use of this form

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1 in any way that you have done it 50 to 100 times before?

2 A. No, I did not.

3 Q. All right. I have in front of me 539G, consisting of
4 three pages. The second page has a signature presumably from
5 Mohammad. Is that his signature?

6 A. That is his signature. He signed that in my
7 presence, and then he handed it back to me, and then I signed.

8 Q. All right. Let's turn now to Bin'Attash. I see that
9 you advised him at 7:16 this morning and that he executed the
10 Arabic version of this document. Did you read both the
11 English and the Arabic version?

12 A. So I read the entire English version after he
13 indicated he did not want to come to the commission. He
14 followed along with the Arabic version, and then the
15 interpreter read the entire Arabic version, and Mr. Bin'Attash
16 signed the Arabic version signature form.

17 Q. Did you deviate from the use of this form in any way?

18 A. I did not.

19 Q. With respect to Ramzi Binalshibh, English or Arabic?

20 A. He simply asked that the English version be read
21 after he advised me that he did not want to attend the
22 commissions today.

23 Q. Did he sign the second page of this three-page

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1 document?

2 A. He did. After I read the entire English version, I
3 asked him if he had any questions; he said he did not. He
4 signed the second page of the English version statement of
5 understanding.

6 Q. With respect to Ali Abdul Aziz Ali, 539J, consisting
7 of three pages, English or Arabic?

8 A. Again, I only read the English version to him. He
9 indicated he did not need it translated. And after he
10 indicated he didn't want to come, I read both pages, and then
11 he signed the second page in my presence. After I asked him
12 if he had any questions, he said he did not have any
13 questions.

14 Q. And finally, 539K, consisting of three pages, Mustafa
15 al Hawsawi. English or Arabic?

16 A. Both. So Mr. Hawsawi asked that the document be read
17 to him in Arabic as well. So I handed him the Arabic version,
18 and he followed along as I read the English version. He
19 then -- I then had the translator or the interpreter read the
20 Arabic version to Mr. al Hawsawi, and he signed the Arabic
21 version in my presence, and then I signed it.

22 Q. All right. But there also appears to be a signature
23 on the English version as well. Is that his signature?

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1 A. Right. He signed that one after the Arabic version.
2 He asked for this one; I gave it to him. He signed that one,
3 so I went ahead and signed that one as well.

4 Q. With respect to all five of these men, do you believe
5 that they voluntarily waived their right to attend these
6 proceedings?

7 A. I do believe they voluntarily ----

8 Q. Any question in your mind about that?

9 A. There is no question in my mind.

10 TC [MR. SWANN]: Your Honor, I tender the witness.

11 MJ [COL POHL]: Any questions, Mr. Nevin?

12 LDC [MR. NEVIN]: No.

13 MJ [COL POHL]: Ms. Bormann?

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

15 MJ [COL POHL]: Mr. Harrington?

16 LDC [MR. HARRINGTON]: No question.

17 MJ [COL POHL]: Mr. Connell?

18 LDC [MR. CONNELL]: No questions, Your Honor. I continue
19 to object to anonymous testimony.

20 MJ [COL POHL]: Got it. Mr. Ruiz?

21 LDC [MR. RUIZ]: No questions.

22 MJ [COL POHL]: Thank you, Major.

23 WIT: Thanks, Judge.

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

2 MJ [COL POHL]: The commission finds that the detainees
3 have knowingly and voluntarily waived their rights to be
4 present today. And if I didn't put that on the record on the
5 previous times, I make a similar finding for the previous
6 times of an absence of any particular accused.

7 Mr. Ruiz, you've submitted a 505(h) -- or 505(g) notice.
8 Is that for cross-examination of the witnesses like the
9 previous one was?

10 LDC [MR. RUIZ]: Yes.

11 MJ [COL POHL]: Okay, here's the way that we're going to
12 do this, is we'll do the unclassified cross-examination of the
13 two witnesses first. Depending how long that takes, we may
14 begin with the testimony of your witness. In any event, we'll
15 take our lunch recess at 1200. At 1300, we will -- this is
16 because of logistics of switching around the court reporters.
17 At 1300, we'll conduct the 505(h) hearing and then we'll do
18 that part of it. If we need more open hearing, we will do
19 that; and if not, we will then do the 806 in the afternoon
20 today. So it's kind of just the general way ahead, and again,
21 a lot of it depends on how long the cross-examination takes,
22 okay?

23 That being said, who is the first witness?

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1 TC [MR. RYAN]: Agent Fitzgerald, Your Honor.

2 MJ [COL POHL]: Please recall Agent Fitzgerald.

3 LDC [MS. BORMANN]: Judge, so I don't have to interrupt
4 earlier or later, rather ----

5 MJ [COL POHL]: Sure.

6 LDC [MS. BORMANN]: ---- be asking that Mr. Perry, Major
7 Seeger, and Captain Brady are excused at various points during
8 the day. They have other projects to attend to.

9 MJ [COL POHL]: Sure. As I said yesterday, as long as the
10 learned counsel stays, if you wish to adjust the other
11 attorneys in and out, just go ahead and do it. You don't have
12 to ask permission.

13 LDC [MS. BORMANN]: All right. Thank you.

14 MJ [COL POHL]: As long as we are in the unclassified
15 setting.

16 LDC [MS. BORMANN]: Right, obviously.

17 MJ [COL POHL]: The rules are different if we are in a
18 classified setting.

19 LDC [MS. BORMANN]: Thank you.

20 [END OF PAGE]

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1 SPECIAL AGENT JAMES M. FITZGERALD, civilian, was called as a
2 witness for the prosecution, was reminded of his previous
3 oath, and testified as follows:

4 **CROSS-EXAMINATION**

5 Questions by the Learned Defense Counsel [MR. RUIZ]:

6 MJ [COL POHL]: Agent Fitzgerald, please take a seat
7 there. I remind you you are still under oath.

8 WIT: Yes, sir.

9 MJ [COL POHL]: You are the same Agent Fitzgerald who
10 testified a couple days ago.

11 WIT: Yes, Your Honor.

12 MJ [COL POHL]: Mr. Ruiz.

13 LDC [MR. RUIZ]: Judge, at the outset, I would like to
14 submit some exhibits to the commission. I have spoken to the
15 prosecution about the submission of these exhibits. They have
16 no objection. They have been premarked. They are 502BBB
17 (MAH), which is a September 9, 1998 series of 302s in the
18 interrogation of Mohammed Rashed Daoud Al-Owhali, who is one
19 of the accused in the embassy bombings. You heard some
20 testimony about him yesterday. The second exhibit is 502CCC
21 (MAH) and is an October 9, 1999 series of 302s as well for
22 Khalfan Khamis Mohamed, another one of the men who Agent
23 Perkins testified about yesterday in relation to the embassy

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1 bombings. 502EEE (MAH) is an August 31, 1998 series of 302s
2 from Mohammed Saddiq Odeh. And finally, 502DDD is a January
3 31, 2001 series of 302s from Fahd Mohammed Ahmed Al-Quso, who
4 is an individual that was questioned in relation to the
5 bombing of the USS COLE.

6 I'd like the commission to consider these.

7 MJ [COL POHL]: Okay.

8 LDC [MR. RUIZ]: May I approach?

9 MJ [COL POHL]: Sure.

10 Q. Good morning, Agent Fitzgerald.

11 A. Good morning.

12 Q. Agent Fitzgerald, you testified that in relation to
13 the 9/11 investigation, you were well aware of a large part of
14 the interrogation, correct?

15 A. I don't know if I testified specifically to that two
16 days ago, but I'm aware of -- that interrogation occurred.

17 Q. In terms of your involvement with the 9/11
18 investigation?

19 A. Yes.

20 Q. You're aware -- you are well aware of various aspects
21 of this investigation, correct?

22 A. Yes, I am.

23 Q. All right. In fact, you participated in many of the

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1 aspects of this investigation?

2 A. Of the 9/11 investigation by the FBI, yes.

3 Q. Correct. I think you testified that in 2001, you
4 became -- is when you first became involved in this
5 investigation, correct?

6 A. Yes.

7 Q. And thereafter, if I understood you correctly, the
8 primary focus of your involvement -- of your career has been
9 with this investigation, meaning the 9/11 investigation,
10 correct?

11 A. That's fair to say.

12 Q. Did I understand you correctly to say that -- so from
13 2001 to 2017 this has been your primary assignment?

14 A. There have been other assignments in between, as I
15 think I mentioned with Mr. Ryan before, from 2001 to 2006, I
16 was primarily focused on the prosecution of Zacarius
17 Moussaoui. After 2006, I worked other counterterrorism cases,
18 but in large part, much of my focus has been on 9/11.

19 Q. So in terms of Mr. Moussaoui's investigation, there
20 were aspects of that investigation that also were, at least
21 based on your investigation, connected to the 9/11
22 prosecution?

23 A. Yes.

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1 Q. All right. So you were, in fact, aware of those
2 aspects of this case?

3 A. I was aware of other aspects of the 9/11
4 investigation as performed by the FBI, yes.

5 Q. All right. In terms of your responsibilities on the
6 9/11 PENTTBOM team as you've discussed or -- actually, were
7 you actually a member of the PENTTBOM team?

8 A. Yes, I was.

9 Q. In terms of your specific duties and
10 responsibilities, did you have a specific assignment?

11 A. Initially, my assignment was regarding Flight 11 and
12 the hijackers surrounding Flight 11. After that, as the case
13 progressed, I took on more responsibility. But in general
14 terms, at least as I was initially assigned, it was to
15 Flight 11.

16 Q. Understand. And can you tell me a little bit about
17 what your chain of command was like?

18 A. I would have to answer regarding a specific time.
19 So, for instance, between, say, 2001-2006, my chain of command
20 was to a supervisory special agent from New York typically,
21 although there was some variation due to rotation of different
22 supervisors, and then from that New York supervisor to a New
23 York assistant special agent in charge.

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1 Q. And your specific title, I heard a number of
2 different titles that you may have in the course of an
3 investigation. Were you an agent, a supervisory agent?

4 A. I was an agent, not a supervisory agent.

5 Q. All right. And that's from, let's say, 2001 to 2006,
6 since that's kind of the time frame that you've identified,
7 right?

8 A. That's the time frame that I identified specifically
9 for the Moussaoui prosecution, yes.

10 Q. I understand. Very well.

11 In terms of Mr. al Hawsawi, when did you first become
12 aware that he was a person that you wanted to look more into,
13 a person of interest?

14 A. I would have to guess. I would say sometime in late
15 2001. That's speculation on my part. It would be about that
16 time. I don't know specifically when, but sometime in 2001.

17 Q. Towards the latter part of 2001, I take it?

18 A. I -- I don't know. I can think of some of the
19 evidence that I was learning about at that time concerning
20 Mr. al Hawsawi. So I would say maybe -- again, speculating,
21 approximately October-November 2001.

22 Q. Okay. All right. I take it that during the course
23 of the investigation, you have a way of maintaining a record

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1 of your investigation?

2 A. Yes.

3 Q. And what is that?

4 A. It's through the FBI case file system with a series
5 of FD-302s, which are investigative reports; and also a
6 document called an electronic communication, which has tended
7 to be more administrative, although has changed over time.

8 Q. So, for instance, if you became aware of a new person
9 of interest, such as Mr. al Hawsawi, you would have entered
10 that into some type of record-keeping program?

11 A. If you are asking would I personally or would that be
12 done in general terms, if you could clarify.

13 Q. Let's start with you personally, since you are on the
14 stand. Did you personally document when you first became
15 aware of Mr. al Hawsawi's existence as a person of interest?

16 A. I did not.

17 Q. All right. Do you know if anybody else did?

18 A. The documentation -- speaking for others and
19 hypothetically, the documentation would stand on its own. In
20 other words, if someone found a piece of evidence, an item of
21 interest that concerned Mr. al Hawsawi, that item would stand
22 on its own. So as to whether or not he would be -- someone
23 would write a special report saying, you know, we now

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1 designate Mr. al Hawsawi as a person of interest, that's not
2 something that I'm aware of. The evidence stands on its own.

3 Q. Well, let me ask you about sharing of information. I
4 understand this was the largest investigation, you would say,
5 in the history of the FBI?

6 A. Yes.

7 Q. All right. And every agent in the FBI was involved?

8 A. At some point, early on, I would speculate and say
9 yes.

10 Q. At least every agent in the New York Office?

11 A. Yes. Early on.

12 Q. All right. So how would you share information so
13 that you would know what the right hand is doing versus the
14 left hand?

15 A. The information would be available in the case file.
16 And then for the investigative team, specifically the PENTTBOM
17 team once that formed, there would be briefings or something
18 of that nature, like an oral briefing sometime in the morning,
19 but that was less formal.

20 Q. Now, I understand you may not remember the specific
21 entries and specific times, but it is fair to say that from
22 2001 to 2017 you recorded your investigative actions that
23 you've taken on this case?

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1 A. Yes.

2 Q. Meaning you've documented them?

3 A. Yes.

4 Q. And the reason you've done that is, number one, it's
5 been a very lengthy investigation, correct?

6 A. Yes.

7 Q. Memory erodes over time?

8 A. Yes, it does.

9 Q. And you want to have a clear record of what you did,
10 for instance, the latter part of 2001 when you're testifying
11 in 2017?

12 A. Yes.

13 Q. And, in fact, you have done that throughout the
14 course of this investigation?

15 A. Yes.

16 Q. Where are those documents maintained?

17 A. It would be in the FBI case file.

18 Q. All right. Did you have to code them with a specific
19 agent number so that somebody would be able to pull them based
20 on the ones that you prepared?

21 A. No.

22 Q. All right. Is there any identifying information in
23 those 302s that would indicate that Agent Fitzgerald had

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1 generated this 302?

2 A. My name would be at the bottom of the 302.

3 Q. All right. So let's go with the first time you
4 learned of Mr. al Hawsawi's involvement was the latter part of
5 2001 sometime. Not holding you to a specific timeline, but we
6 can at least agree that it was early on in the investigation
7 and not halfway through?

8 A. Yes.

9 Q. So early on in 2001, Mr. al Hawsawi's name pops up in
10 terms of a person of interest. What is the next action that
11 you recall you taking in relation to Mr. al Hawsawi?

12 A. Off the top of my head, I can't recall. As I
13 mentioned previously, my initial focus was on Flight 11 and
14 the hijackers. As far as Mr. al Hawsawi, I can't recall what
15 my next action would have been investigatively regarding him.

16 Q. Very good. Do you recall at what point you became
17 more involved in Mr. al Hawsawi's investigation or the portion
18 that related to him?

19 A. Probably after the prosecution of Zacarius Moussaoui.

20 Q. So post 2006?

21 A. Yes, although I was aware of circumstances concerning
22 Mr. al Hawsawi. And as I think back now, there was
23 information put out in the -- the Moussaoui case that related

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1 to Mr. al Hawsawi. I probably focused more on him after 2006.
2 So certainly knowledge of him and knowledge of the evidence
3 that concerns Mr. al Hawsawi. I believe I testified regarding
4 some phone numbers associated with Mr. al Hawsawi during the
5 Moussaoui trial, but I probably looked more closely at
6 Mr. al Hawsawi after 2006.

7 Q. So prior to 2006, he was not a focus of your
8 investigative efforts?

9 A. Not mine specifically, correct.

10 Q. Were you aware that he was being investigated by
11 other agents of the FBI?

12 A. Yes.

13 Q. Did you communicate with those agents?

14 A. Yes.

15 Q. Who were they?

16 A. Off the top of my head, Agent Perkins and
17 Special Agent Adam Drucker.

18 Q. Very well. In terms of Mr. al Hawsawi's capture, at
19 what point did you become aware that Mr. al Hawsawi had been
20 captured?

21 A. I would speculate to say sometime within a couple of
22 months after his capture. I don't think I knew
23 contemporaneous, but I have no specific recollection.

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1 Q. No specific recollection of the specific date?

2 A. Correct. I'm guessing sometime like -- as a
3 contrast, when Mr. Binalshibh was captured in 2002, I knew
4 almost right away. I don't recall when I learned when
5 Mr. al Hawsawi was captured.

6 Q. Was it -- I think you said it was maybe a few months
7 afterwards?

8 A. I'm speculating to say sometime within that time. I
9 don't recall exactly when I learned he was captured.

10 Q. So we can deal in larger numbers. So was it years?

11 A. No.

12 Q. Half a year?

13 A. Likely less.

14 Q. All right. Okay. So at least it wasn't the same
15 day, but at least we're not talking about a number of years?

16 A. Correct.

17 Q. All right. Who did you learn that from?

18 A. I don't recall.

19 Q. But you were aware that Mr. al Hawsawi had, in fact,
20 been rendered in Pakistan?

21 A. At some point, yes.

22 Q. All right. Do you remember the source of that
23 information?

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1 A. I do not.

2 Q. During the course of your investigation and your
3 involvement in the 9/11 investigation, have you had the
4 opportunity to work and share information with other agencies?

5 A. Yes, I have.

6 Q. What are some of those agencies?

7 A. I've shared information with Army CID; I've shared
8 information with NCIS, Naval Criminal Investigative Service;
9 I've shared information with the Central Intelligence Agency.
10 I have specific recollections -- I would speculate that some
11 of the information that I have written has been disseminated
12 to many more agencies, but specifically I recall those
13 agencies.

14 Q. So some of those agencies were intelligence agencies?

15 A. Yes.

16 Q. Such as the CIA?

17 A. Yes.

18 Q. And some were law enforcement agencies as well?

19 A. Yes.

20 Q. I understand. Was there a standard operating
21 procedure or memorandum that governed the interagency
22 cooperation of the FBI?

23 TC [MR. RYAN]: Objection, Your Honor. It's beyond the

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1 scope.

2 MJ [COL POHL]: Overruled. Go ahead.

3 A. Can you restate the question, Mr. Ruiz?

4 Q. Sure. Was there a governing document that set forth
5 the ground rules for how the FBI would share information with
6 other agencies or law enforcement or intelligence?

7 A. I'm not aware of such a document.

8 Q. All right. Were you aware of specific guidelines --
9 not necessarily a document, but did you have a specific
10 procedure that you would follow in doing that?

11 A. The procedure that I would follow at that time would
12 be to generate a cable with information that I considered
13 relevant to be passed on to another agency such as the CIA.

14 Q. Did you have access to the CIA's databases?

15 A. I did not.

16 Q. Did you ever look at CIA databases in the course of
17 your investigation?

18 A. I'm trying to recall now. At some point, I have
19 looked at a shared system, a shared -- it's a closed system
20 that is operated or owned by the CIA. But as far as CIA what
21 I will call investigative databases, I do not have access to
22 them.

23 So I have access to a CIA network -- or I should say

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1 had access to a closed CIA network where there was historical
2 information on there, but I have not had access to a CIA
3 formal active system of records.

4 Q. When you say it was a closed system, what does that
5 mean?

6 TC [MR. RYAN]: Objection, Your Honor. This is beyond the
7 scope of direct.

8 MJ [COL POHL]: Overruled.

9 LDC [MR. RUIZ]: Judge, may I respond to that, because I
10 suspect we are going to be getting the same objection a number
11 of times. I know you overruled it, but they have submitted
12 Mr. Hawsawi's interrogations to the court for consideration.
13 This is all going to go towards that testimony.

14 TC [MR. RYAN]: And, Your Honor, counsel is correct,
15 Judge. This will probably be objected to again. Let me point
16 out, sir, we called Agent Fitzgerald to testify primarily
17 regarding hijacker activity. No evidence was derived from him
18 regarding his LHM statement. Counsel made no move to request
19 Agent Fitzgerald as their witness.

20 LDC [MR. RUIZ]: Judge, Agent Fitzgerald was mentioned in
21 Agent Perkins' testimony. He was the second person in the
22 room with Mr. al Hawsawi when the interrogations took place,
23 and the statements, as I've indicated, are before you in terms

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1 of reliability assessment. This agent's actions on the
2 Pentagon bombing investigation are relevant.

3 TC [MR. RYAN]: Then he should have requested him as a
4 witness, sir.

5 MJ [COL POHL]: Although Agent Fitzgerald himself did not
6 testify about the interview of Mr. Hawsawi, Ms. Perkins did,
7 and Ms. Perkins indicated that he was there. And so therefore
8 it seems to me questions relating to that interview, whether
9 to Agent Fitzgerald or to Ms. Perkins, are within the scope of
10 the examination; therefore, the objection is overruled.

11 Go ahead, Mr. Ruiz.

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

13 Q. Trying to gain a little better understanding of the
14 access that you had, and you seem to draw a distinction
15 between a record-keeping investigative database and what you
16 call a closed system. I'm not familiar with those, so could
17 you please explain what you see as the fundamental difference?

18 A. Yes. I would -- estimating now circa 2007, I gained
19 access to a closed network operated or maintained by the CIA
20 which contained historical investigative information from the
21 FBI and from other agencies as they related to some of the
22 high-value detainees.

23 So to the best of my knowledge, the information

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1 maintained in this closed network was historical in nature,
2 although it could have, and I believe was, updated as new
3 information was added.

4 For instance, let's take Mr. al Hawsawi. In this
5 closed network, historical information was in this network as
6 it related to Mr. al Hawsawi. If new items were generated
7 regarding Mr. al Hawsawi, they may have been added. I don't
8 have specific knowledge of that.

9 I'm trying to differentiate that from other active
10 CIA systems of record where someone, for example, a CIA
11 employee, would come in and log on to a CIA system that has
12 information from all sorts of sources, all sorts of cases,
13 active, ongoing, and enables them to do their daily job. The
14 closed network that I'm speaking of is, to the best of my
15 knowledge, a closed network. It's not connected to the rest
16 of the CIA or, to my knowledge, any other agencies, and was
17 designed as a repository of investigative information as they
18 related to high-value detainees.

19 Q. I understand. So it was narrowly tailored to
20 information relevant to high-value detainees such as
21 Mr. al Hawsawi?

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

23 Q. All right. Can you tell us what timeline was covered

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1 within that database? So was this a repository of information
2 that began from the moment the planes struck the Towers and
3 led all the way up until the time before you stepped into the
4 interrogation of Mr. al Hawsawi? And can you tell us what the
5 time range or what the range of information was contained in
6 that database?

7 A. I am unaware of the time range. To the best of my
8 knowledge, any information in there was simply historical,
9 investigative information that was placed there concerning
10 those detainees. So how far back it went, I don't know.

11 Q. Do you recall if you were able to find any
12 documentation tracking back to 2003?

13 A. I would say yes, there is -- there would be
14 documentation certainly going back to 2003 in there.

15 Q. Beginning in 2003 towards 2006, would you say that
16 the database contained that range, that timeline?

17 A. Yes.

18 Q. Did the database contain any video information or
19 access to videos?

20 A. Not to my knowledge.

21 Q. Did you see any?

22 A. I don't recall seeing any. As I'm thinking now, I --
23 I don't recall seeing video.

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1 Q. All right. What about audio, audio files?

2 A. I do not recall audio files.

3 Q. Can you give us just a description of the types of
4 documents and reports that would have been contained in that
5 database?

6 A. There were what I would call historical FBI
7 documents, meaning anything gathered in the FBI's -- speaking
8 of Mr. al Hawsawi, anything gathered -- anything that was able
9 to be identified and gathered during the 9/11 investigation as
10 it related to Mr. al Hawsawi; FBI FD-302s, electronic
11 communications, things of that nature were scanned and placed
12 into that system.

13 There were also CIA documents on the system. There
14 were, to the best of my knowledge, other agency documents, INS
15 documents, customs documents that would have been gathered
16 during the course of the investigation into a person such as
17 Mr. al Hawsawi.

18 Q. Do I understand your testimony to be that you only
19 gained access to that website in 2007? Excuse me, not
20 website, to that closed system?

21 A. Yes, as near as I can approximate, 2007, that's
22 correct.

23 Q. All right. So you're not certain of the specific

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1 date?

2 A. It's -- I think it was created around that time, to
3 the best of my knowledge. Maybe it was created in 2006. To
4 the best of my knowledge, I had access to that circa 2007,
5 roughly.

6 Q. I understand. Prior to 2007, independent of the
7 system you've just described, did you have access to any other
8 CIA documents or information.

9 A. There were CIA documents there were uploaded at one
10 time into the FBI ACS system.

11 Q. Can you please indicate what that stands for?

12 A. I believe it's called Automated Case File.

13 Q. Thank you.

14 A. So there were CIA documents, some cables loaded into
15 the FBI automated case system, system of records. Those
16 documents would have to have been at a SECRET//NOFORN level or
17 below. That system could not -- it was not authorized to
18 contain anything above SECRET//NOFORN.

19 So there were CIA documents as well as other -- many
20 other agency documents in there. If they were submitted and
21 uploaded into the ACS system, they would be available through
22 ACS.

23 Q. During the course of your investigative efforts, did

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1 you have opportunity to review those types of documents?

2 A. Yes, I did.

3 Q. Did you have an opportunity to review those types of
4 documents as they related to Mr. al Hawsawi's investigation?

5 A. To the best of my recollection, I did not see any
6 documents as they related to Mr. al Hawsawi. Again, to
7 contrast, when Mr. Binalshibh was first captured, there were
8 documents that were uploaded into the FBI system of records,
9 ACS. At some point that stopped.

10 When Mr. al Hawsawi was captured, I do not believe
11 that those -- whatever cables that, as they related to
12 Mr. al Hawsawi -- to the best of my knowledge, I don't believe
13 that they were uploaded into ACS, because I'm of the
14 understanding that they were at a classification level higher
15 than SECRET//NOFORN. And I have no recollection of seeing any
16 CIA cables regarding Mr. al Hawsawi in ACS.

17 Q. At some point, you became aware Mr. al Hawsawi had
18 been captured?

19 A. Yes.

20 Q. You learned that he was being held?

21 A. Yes.

22 Q. Without telling me the specific location, did you
23 know that -- did you know the location where he was being

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1 held?

2 A. I did not.

3 Q. All right. Did you know by whom he was being held?

4 TC [MR. RYAN]: Objection, sir.

5 MJ [COL POHL]: Overruled. You may answer the question.

6 A. I knew in general terms that he had been captured in
7 Pakistan. I was unsure as to who was holding him or what the
8 circumstances of his detention were. At some point ----

9 TC [MR. RYAN]: Your Honor, at this time, I would ask the
10 commission to instruct the witness that if he feels an answer
11 is -- that is called for involves or contains classified
12 information, that he should make the commission aware of that.

13 MJ [COL POHL]: You know that limitation, don't you, Agent
14 Fitzgerald?

15 WIT: Yes, Your Honor. We're approaching that at this
16 time.

17 MJ [COL POHL]: This is not your first time testifying.
18 But -- we're in an open session here, but if you think you're
19 going to go into classified information, stop, and we'll
20 address it at that time.

21 WIT: Yes, Your Honor.

22 LDC [MR. RUIZ]: Just so everyone calms down a little bit,
23 I know we're anxious. I don't intend to ask about the

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1 specific countries ----

2 MJ [COL POHL]: I got it.

3 LDC [MR. RUIZ]: ---- or agencies or the identities, which
4 I know they're very worried about. I'm just asking if he
5 generally was aware of this ----

6 MJ [COL POHL]: I got it. Keep it general. Go ahead.

7 Q. So you knew he had been captured?

8 A. Yes.

9 Q. You knew he had been detained against his will?

10 A. Yes.

11 Q. So he was in custody?

12 A. Yes.

13 Q. And I think we were on the part where we were talking
14 about did you know by whom.

15 A. Yes.

16 Q. Did you know by whom?

17 A. At some point I became aware that U.S. authorities
18 were speaking with him, but I was unclear as to exactly who
19 was detaining him or what the circumstances of his detention
20 were.

21 Q. Did you at any point seek access to Mr. al Hawsawi?

22 A. I believe, in general terms, and I'm speaking now in
23 the context of being on the PENTTBOM team, that the team

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1 sought access to pass questions to Mr. al Hawsawi, but I don't
2 know that they were ever passed.

3 Q. Okay. Let me back that up a little bit. Do you know
4 if the FBI, your PENTTBOM team, sought physical access to
5 Mr. al Hawsawi; in other words, to see him in person?

6 A. That's not something that I was directly involved in.
7 When he was captured, I was working different matters. I know
8 we had an interest in him, but we did -- like I did not have
9 access to him, and to the best of my knowledge ----

10 Q. So you personally did not seek access to
11 Mr. al Hawsawi?

12 A. No, I did not.

13 Q. But you were aware that at least some elements of the
14 PENTTBOM team had sought access or at least had sought to pass
15 questions to the people who had Mr. al Hawsawi in custody,
16 correct?

17 A. Yes.

18 Q. Questions that were of importance to the FBI?

19 A. Yes.

20 Q. You personally did not pass any of those questions?

21 A. I did not.

22 Q. But because of your general involvement in the
23 investigation, you had knowledge that that, in fact, was

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1 something that was done?

2 A. I don't know if questions were passed. I know we had
3 an interest in trying to find out answers to certain
4 investigative questions that we had. But I don't know if
5 those questions were passed, and I don't know if answers were
6 forthcoming if they were passed.

7 Q. By that, do you mean that the questions that were
8 sent were actually used?

9 A. Yeah. I don't know if questions were sent. I don't
10 have specific knowledge of that. And if questions were sent,
11 I don't know if answers were received from them.

12 Q. All right. Okay. At this time when you learned that
13 Mr. al Hawsawi had been captured, it is fair to say that he
14 was a person of interest for the FBI?

15 A. Yes.

16 Q. And the FBI was participating in the law enforcement
17 investigation trying to determine who was responsible for the
18 attacks?

19 A. Yes.

20 Q. The FBI is, in fact, a law enforcement agency?

21 A. Yes, it is.

22 Q. And investigates violations of U.S. law?

23 A. Yes, it does.

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1 Q. For prosecution in domestic U.S. courts?

2 A. Or prosecution in any court that the Congress
3 identifies, yes.

4 Q. Federal courts?

5 A. Federal courts.

6 Q. At this time, and what I mean by that is 2003 or so,
7 the focus of the FBI's investigation was decidedly a law
8 enforcement investigation, correct?

9 A. I'm not sure what you mean by decidedly law
10 enforcement investigation. The FBI certainly was interested
11 in gathering as much evidence of -- any evidence related to
12 9/11. Certainly there is an intelligence component where,
13 anything that the FBI finds that might stop another attack,
14 any intelligence would be shared as well. So I think it's
15 fair to say the FBI would have a dual mission of trying to
16 gather evidence necessary for a prosecution, should one become
17 apparent, and also to gather any intelligence that could be
18 used to stop another attack.

19 Q. The primary mission of the FBI is law enforcement,
20 however, correct? You're not an intelligence agency.

21 A. Oh, the FBI is an intelligence agency; they
22 participate in the intelligence community. And certainly the
23 most important responsibility would be to stop another attack.

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1 Q. Are you familiar with the 28 CFR Chapter 1, 28 Code
2 of Federal Regulations, which sets forth the FBI's mission?

3 A. I have not read that.

4 Q. All right. Are you aware of a specific document that
5 delineates the FBI's primary function as an intelligence
6 agency?

7 A. No.

8 Q. All right. All right. You testified that you also
9 participated in the USS COLE investigation.

10 A. My testimony was that I supported investigators in
11 Yemen. I was not assigned as a case agent or as an
12 investigative agent in that case. My role, as I testified to
13 it, was as an agent going there to support the other
14 investigators there.

15 Q. The other investigators who were there were working
16 with local law enforcement agencies as well, correct?

17 A. Yes.

18 Q. And I think you testified that amongst the various
19 duties and responsibilities that the FBI team had was evidence
20 collection?

21 A. Yes.

22 Q. And general law enforcement investigation?

23 A. General law enforcement investigation as allowed and

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1 as available in Yemen, yes.

2 Q. Okay. If you identified one of the people
3 responsible for the USS COLE, and you, yourself, were not
4 personally threatened, were you authorized to use deadly
5 force?

6 A. I ----

7 MJ [COL POHL]: Rephrase that question, please.

8 LDC [MR. RUIZ]: Sure.

9 Q. Other than in a self-defense situation, were you
10 authorized to use deadly force?

11 A. It was only in self-defense. The FBI rule of
12 engagement was the same as it is domestically, to use force if
13 there's imminent danger of death or serious bodily injury and
14 only as a last resort.

15 Q. Did you have arrest powers?

16 A. I did not.

17 Q. Did other agents have arrest powers?

18 A. They did not.

19 Q. Did they have the ability to work with local law
20 enforcement to arrest individuals identified as being
21 connected to the USS COLE bombing?

22 A. I have no specific knowledge of anyone having arrest
23 powers derived from local law enforcement. Any local law

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1 enforcement took whatever investigative action they wanted to,
2 they were not directed by the FBI.

3 Q. The FBI, however, did have access to people who were
4 identified as suspects in connection with the USS COLE,
5 correct?

6 A. To the best of my knowledge, they had access, but it
7 was always with a Yemeni investigator.

8 Q. And, in fact, certain FBI agents did have an
9 opportunity to interrogate suspects connected with the
10 USS COLE bombing, correct?

11 A. To the best of my knowledge, based upon my presence
12 in Yemen at that time, there were interviews that were
13 conducted with Yemeni interrogators or Yemeni investigators.
14 I do not have any knowledge as to who led any sort of
15 interrogation or interview or whether or not FBI agents were
16 allowed to specifically direct them. That's outside my scope
17 of knowledge.

18 Q. Okay. Fast-forwarding to immediately -- immediately
19 before 2007, before you interrogated Mr. al Hawsawi ----

20 A. Yes.

21 Q. ---- when did you first learn that you would be
22 involved in his interrogation?

23 A. Sometime during the fall of 2006.

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1 Q. Do you recall how that came about?

2 A. I believe I received a call from one of my former New
3 York supervisors advising that they were getting agents
4 together to try to conduct interviews of high-value detainees
5 who either had been or were -- or about to be moved to
6 Guantanamo. I'm not exactly sure when that was, but it was
7 roughly in the fall of 2006.

8 Q. I notice you used the word interview. These were, in
9 fact, interrogations, no?

10 A. Yes.

11 Q. And you considered them to be interrogations?

12 A. Yes.

13 Q. At what point did you travel down to Guantanamo?

14 A. January 2007.

15 Q. Prior to you traveling down to Guantanamo, did you
16 make any efforts in preparation for the eventual
17 interrogation?

18 A. Yes.

19 Q. And what preparation did you take?

20 A. Gathering documents about -- mine specifically was
21 regarding Ali Abdul Aziz Ali, one of the other co-defendants.
22 I did not gather all of the documents related to
23 Mr. al Hawsawi. Special Agent Perkins at the time was

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1 gathering those documents.

2 Q. When you say you didn't gather all of them, does that
3 mean you gathered some of them?

4 A. What I recall is that I gathered the documents and
5 information related to Mr. Ali, and Special Agent Perkins
6 gathered the documents related to Mr. al Hawsawi. Now, at
7 some point, of course, I reviewed those documents so I would
8 be familiar with them, but to the best of my knowledge, I did
9 not gather the documents as they related to Mr. al Hawsawi's
10 interrogation.

11 MJ [COL POHL]: Agent Fitzgerald, just to clarify, were
12 you going down just to interview Mr. Hawsawi or also Mr. Ali?

13 WIT: Your Honor, my primary responsibility was with
14 Mr. Ali, but I assisted Special Agent Perkins with
15 Mr. al Hawsawi because there was much overlapping information.

16 MJ [COL POHL]: Okay. Got it.

17 Q. So you were assigned specific high-value detainees,
18 correct?

19 A. I was specifically assigned Mr. Ali.

20 Q. I understand. And when you say you gathered the
21 documents, what does that mean?

22 A. In the case of Mr. Ali, there were flight manifests,
23 telephone records, business records, documents gathered from

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1 searches, things of that nature that I wished to question
2 Mr. Ali about. Those are the documents that I'm referring to.

3 Q. What I mean is actually the location you gathered
4 them from; so, for example, did you go into a large room with
5 a bunch of boxes and just start grabbing stuff? Did you go
6 into a database? Did you go into an FBI -- and I'll break
7 that down.

8 That's kind of my initial question is: What do you
9 mean when you say you gathered these documents? Where did you
10 gather the documents from?

11 A. From the FBI case file system, which would be -- the
12 automated case file system, ACS, and then any -- related to
13 ACS there -- back at that time there were paper files. So you
14 would have a paper FD-302 as well as an electronic copy. Then
15 you would have an attached -- what the FBI calls a 1A envelope
16 or an FD-340 envelope; it's the same thing.

17 And in that, for instance, if an agent went --
18 I'll -- to try to give an example. If an agent went to
19 Emirates Airlines and obtained a passenger name record, in
20 general terms they would write an FD-302 saying I, James
21 Fitzgerald, collected the following flight manifest and
22 passenger name record from Emirates Airlines, and then I would
23 take that record, enclose it in a 1A, and put that with the

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1 FD-302 so it's memorialized and upload it into the case file
2 system.

3 I provided that example because in preparation for
4 Mr. Ali's interrogation, I would review the FD-302s, and then
5 I would go to the FBI paper file to get copies of that flight
6 manifest or copies of that passenger name record with the
7 intention of showing those things, in this case, to Mr. Ali,
8 to see what he had to say about them.

9 Q. And I understand you to have said that you reviewed
10 the documents that were gathered by Special Agent Perkins in
11 preparation for the interrogation of Mr. al Hawsawi?

12 A. Yes.

13 Q. Do you have specific knowledge as to where she
14 gathered these documents from?

15 A. Some of them, responding offhand, there were
16 documents from Standard Chartered Bank. I know those were a
17 large portion of the documents. Those documents were gained
18 through banks; specifically, of course, Standard Chartered
19 Bank, back circa -- to the best of my knowledge, circa 2002,
20 maybe a little bit later, but I think that's about ----

21 Q. Let me make my question a better question. Do you
22 know what database or what storage system she retrieved those
23 documents from?

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1 A. I don't.

2 Q. Very well.

3 Did you use any other document storage systems or
4 retrieval systems to access those documents? And by that I
5 mean things such as the closed system you've described from
6 the CIA, or did you stay entirely within the FBI's umbrella?

7 A. I stayed entirely within the FBI's umbrella. I'm
8 trying to think. I don't -- I don't know if I had access to
9 that closed system prior to the interrogation of Mr. Ali.
10 I -- I don't recall, but I know certainly the documents that I
11 had were from the FBI system.

12 Q. Were you aware that that access was impending; in
13 other words, that even though you may not have had access at
14 the time, that that access was coming?

15 A. I have no recollection of that. In the case of
16 Mr. Ali, I didn't need it. I -- there were documents gathered
17 during the investigation of Mr. Ali that I had identified, and
18 I had a good idea as to where they were and how to get them in
19 the FBI system.

20 Q. I understand. Did you have an opportunity, in
21 addition to reviewing the documents Agent Perkins intended to
22 use, to sit down with Agent Perkins and discuss the goals of
23 Mr. al Hawsawi's interrogation?

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1 A. Yes.

2 Q. Did you do that in the Washington, D.C. area before
3 travelling to Guantanamo?

4 A. I believe it was in Washington, D.C., but I do recall
5 having a conversation with Special Agent Perkins regarding how
6 we were going to attempt to interview or interrogate
7 Mr. al Hawsawi.

8 Q. Do you remember who else, if anybody else, was
9 involved in those discussions in terms of setting forth goals,
10 objectives of the interrogation?

11 A. I don't recall anyone else.

12 Q. Just Agent Perkins?

13 A. Just Agent Perkins.

14 Q. Prior to travelling to Guantanamo, did you meet with
15 any other law enforcement agencies or intelligence agencies to
16 set forth goals or objectives for the interrogation of
17 Mr. al Hawsawi or Mr. Ali, as you've indicated?

18 A. I don't, other than -- again, speaking in general
19 terms, because I do not have a specific recollection, other
20 than gathering the information related to Mr. Ali, in my case,
21 from FBI case files, I don't recall receiving specific
22 direction or instruction from anybody other than to identify
23 the relevant material and see if that could be -- if Mr. Ali

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1 would identify that or if it would be relevant towards his
2 interrogation.

3 So -- but I was not -- if I'm -- if I'm answering the
4 question that I think you're asking, I was not directed by my
5 supervisor to a specific end result. My supervisor looked at
6 me at that time as someone who was knowledgeable about Mr. Ali
7 and trusted that I would identify relevant material and
8 attempt to confront Mr. Ali regarding it.

9 Q. I wasn't so much asking about direction as I was
10 about participation or involvement, input into the objectives
11 or goals. Does that ----

12 A. Yeah. I don't recall other agencies or personnel
13 providing input as -- the goal to me was self-evident, so I
14 don't recall other agencies.

15 Q. We're still talking -- we're still talking about
16 before you traveled?

17 A. That's correct.

18 Q. Got you. All right.

19 What other types of background information did you
20 feel were important prior to interrogating a high-value
21 detainee such as Mr. al Hawsawi or, more specifically, as in
22 your case, Mr. Ali?

23 A. Anything that I could find in the FBI case file

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1 system, any FD-302s, any electronic communications. I mostly
2 concentrated on physical evidence: flight manifests, phone
3 records, bank documents, things that were tangible that a
4 person would have a tough time explaining away if confronted
5 with.

6 Q. Was it important to you to understand
7 Mr. al Hawsawi's or the high-value detainee's prior detention
8 history?

9 A. The problem was regarding the -- any sort of prior
10 detention, is between that time, between 2003 and 2006, to the
11 best of my knowledge, I had no information regarding Mr. Ali.
12 Like I don't recall reading information from other agencies
13 simply because it was not available.

14 Q. Sure. So my question was not so much did you have
15 access, it was: In preparing for an interrogation, does that
16 type of information matter to you, meaning what kind of
17 detention history the person has undergone, what kind of
18 treatment they may have received?

19 A. In this specific case, it did not matter to me.

20 Q. Very well. So you traveled down to Guantanamo ----

21 A. Yes.

22 Q. ---- in preparation for the interrogation of
23 Mr. al Hawsawi -- excuse me, Mr. Ali. At some point, you

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1 obviously also become involved in Mr. al Hawsawi's
2 interrogation. How did that come about?

3 A. I don't have a specific recollection in general
4 terms, because Mr. Ali and Mr. al Hawsawi were both around
5 each other at about the same time and were both facilitating
6 people we considered hijackers. There was overlap in
7 information. So I think, again, without having specific --
8 excuse me, specific recollection as to how it happened, I
9 think it was natural because of the overlap in information
10 between Mr. Ali and Mr. al Hawsawi that Special Agent Perkins
11 and I began to work together.

12 Q. So you saw them as being somewhat of a different
13 category, for lack of a better term, in terms of their
14 involvement. You said -- I think you used the word
15 facilitators.

16 A. At least in one specific context, yes.

17 Q. Okay. And it seemed reasonable to share information
18 and participate in both of those interrogations?

19 A. Not because they were, quote, facilitators, and not
20 to limit my explanation of their role as to a facilitator, but
21 simply because some of the information between Mr. Ali
22 overlapped with some of the information between
23 Mr. al Hawsawi.

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1 Q. Okay. Now, you're in Guantanamo prior to the
2 interrogation. What additional preparation do you undertake?

3 A. The preparation that I recall was specifically
4 talking with Special Agent Perkins over -- about the
5 information, how are we going to approach Mr. Ali or
6 Mr. al Hawsawi; presenting of the documents, presenting sort
7 of the fruits of the investigation about Mr. -- in this case
8 Mr. Ali or Mr. al Hawsawi to them, and then trying to confront
9 them and find out what they said.

10 But -- so other than gathering that information,
11 reading FD-302s, reading electronic communications, gathering
12 that information and talking it over with Special Agent
13 Perkins, to the best of my knowledge, that's all I can recall.

14 Q. Did you access the CIA's closed document system that
15 we discussed earlier in preparation for your interrogation of
16 Mr. al Hawsawi or Mr. Ali?

17 A. I did not.

18 Q. All right. At that point, were you aware that you
19 did, in fact, have access to that system?

20 A. I don't know if I had access to that system. I don't
21 know -- it's -- because those things happened around the same
22 time, I don't know when the system was actually functional.
23 At the time I was assigned to the New York Office, so I was

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1 going back and forth between New York and Washington, D.C. So
2 any -- there's a whole lot of travel around that time frame.

3 And to the best of my knowledge, I -- number one, I
4 didn't have access. I don't know when I first had access. It
5 would have had to have been sometime around January 2007. But
6 I have no recollection whatsoever of having any access to it
7 before then. I don't ----

8 Q. I understand.

9 A. I don't recall anticipating it.

10 Q. I understand. In terms of your specific access, are
11 you saying that you did not access it, or are you saying you
12 do not recall accessing it in preparation for the
13 interrogation?

14 A. I did not access it in preparation for the
15 interrogation of Mr. Ali or Mr. al Hawsawi. And I was trying
16 to answer your question as to whether or not I anticipated
17 access. I just have no recollection of that.

18 Q. I understand. Do you have -- well, backtrack here.
19 Do you know if Special Agent Perkins accessed the CIA's system
20 of records in preparation for Mr. al Hawsawi's interrogation?

21 A. I don't know.

22 Q. One of the purposes of the interrogation was to
23 develop evidence for a potential prosecution in military

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1 commission proceedings; isn't that correct?

2 A. That's fair to state, yes.

3 Q. All right. Did you receive any briefings prior to
4 the interrogation of Mr. al Hawsawi?

5 A. I think you'd have to be more specific.

6 Q. Sure.

7 A. There were lots of meetings around that time.

8 Q. All right. I'm specifically referencing meetings
9 focusing on the upcoming investigation of Mr. al Hawsawi. Did
10 you receive briefings from anyone on Mr. al Hawsawi's
11 background?

12 A. No.

13 Q. Did you receive briefings from anyone on the ground
14 rules for asking questions of Mr. al Hawsawi during your
15 interrogation?

16 A. We received a briefing on how to handle claims of
17 mistreatment, claims of torture. That's the briefing that I
18 recall. Like how -- if a detainee stated they were treated in
19 a certain way, we were briefed as to how that would be
20 memorialized.

21 Q. When you say treatment, you're referring to claims of
22 torture?

23 A. Yes.

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1 Q. And who provided that briefing?

2 A. To the best of my knowledge, it was an FBI person.

3 Q. When you say to the best of my knowledge, is there a
4 possibility that it could have been somebody posing as an FBI
5 agent?

6 A. No.

7 Q. No -- not possible?

8 A. When I say to the best of my knowledge, like in some
9 of these briefings, you know, you have a room full of people.
10 No, my knowledge is that my supervisor at the time was
11 briefing us, an FBI supervisor, who I had long-term knowledge
12 of was saying, hey, if you receive an allegation of
13 mistreatment, an allegation of torture, this is how you
14 memorialize it.

15 Q. Okay. Or not, correct?

16 A. I don't know what you mean.

17 Q. Sure. So you actually were prohibited from including
18 allegations of torture in the LHMs that you prepared; isn't
19 that correct?

20 A. I think it's more accurate to say that if someone
21 claimed that they were mistreated, that we would put it in a
22 separate document. So the answer is yes, it was not included
23 in the LHM that we prepared, but it was put in a separate

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1 document.

2 Q. Are you familiar with the January 10, 2007 CIA
3 grounds rule for FBI interrogations document?

4 A. I'm -- I suspect that I have read that, but it's been
5 quite some time.

6 Q. Okay. And do you remember that document indicating
7 that, "Allegations of misconduct will not" -- the "not" being
8 underlined -- "be included in the LHM"?

9 A. Again, as I've stated, I recall the directions to be,
10 if someone makes a claim of mistreatment or torture, it's to
11 be put in a separate document. So that is consistent with
12 that memo.

13 Q. In other words, the memorandum that would go to,
14 presumably, the outside world would not include such
15 information?

16 A. That would likely be the case, yes.

17 Q. You would have to prepare a ghost report that would
18 include such information relating to the torture and
19 mistreatment by the CIA?

20 TC [MR. RYAN]: Objection to the characterization, sir.

21 LDC [MR. RUIZ]: He can answer the question, Judge.

22 MJ [COL POHL]: Rephrase the question.

23 LDC [MR. RUIZ]: Sure.

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1 Q. You would have to provide a ghost report or a second
2 report, correct?

3 A. I would not consider it a ghost report because it
4 would be available. It's simply a separate report indicating
5 the claims of mistreatment by a detainee.

6 Q. How would someone know that the second report was
7 available if there was nothing to identify it in the first?

8 TC [MR. RYAN]: Objection, calls for speculation.

9 LDC [MR. RUIZ]: He said it would be available. I'm
10 asking what that availability would be.

11 MJ [COL POHL]: If you're asking about the distribution of
12 these reports, the objection is overruled. Simply, who sees
13 these reports?

14 WIT: Your Honor, it was a Top Secret document, so I don't
15 know how it was uploaded.

16 MJ [COL POHL]: Okay. That's the second report we're
17 talking about?

18 WIT: Correct.

19 MJ [COL POHL]: And the first report we're talking about?

20 WIT: The first report, at least initially they were Top
21 Secret as well. Some of the statements made by the detainees
22 were initially considered Top Secret. Since that time, many
23 of them have been declassified or reclassified at a lower

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1 level.

2 MJ [COL POHL]: Okay. So the distribution would be
3 limited by the classification?

4 WIT: Yes, Your Honor.

5 MJ [COL POHL]: So when you say available, it would be
6 available to people with the proper clearance and the need to
7 know?

8 WIT: Yes, that's correct.

9 MJ [COL POHL]: Mr. Ruiz.

10 LDC [MR. RUIZ]: Okay.

11 Q. The CIA's ground rules for your interrogations also
12 included the fact that you would have to use a CIA laptop,
13 correct?

14 A. That's correct.

15 Q. And you would have to type any notes into the CIA's
16 laptop?

17 A. Yes.

18 Q. And then they would be transmitted to the CIA for
19 their chop?

20 A. Yes.

21 Q. You would also have a CIA thumb drive for each HVD,
22 correct?

23 A. Now, when you say their chop, they did not have input

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1 into the -- like I wrote what I wrote, so they didn't modify
2 what I wrote, but they would -- if there was something that
3 they considered to be Top Secret, that was their chop. So I
4 just want to be clear, they did not and were not able to alter
5 the content of it, simply to comment on the classification of
6 it.

7 Q. They were able to set forth rules for what went into
8 or did not go into the document you prepared, correct?

9 A. Only as it related to treatment.

10 Q. Torture?

11 A. Yes.

12 Q. By the CIA?

13 A. Alleged torture, yes, by the CIA. Allegations of
14 mistreatment, that's correct.

15 Q. Your personal notes taken during the interrogation
16 also had to be submitted by -- to the CIA for their chop?

17 A. For their classification review, that's correct.

18 Q. So you, when you left that interrogation as an agent
19 of the FBI, were not allowed to hold on to your own notes?

20 A. I did not have my notes. I don't know if I -- it
21 was -- at that point, it was more of a handling issue. We
22 still had access to our notes. The issue became they're Top
23 Secret documents and how do we move them from Guantanamo up to

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1 Washington, D.C. So I could get access to my notes. It
2 wasn't something that the CIA seized and I had no access to,
3 but there was -- they were the mechanics of moving Top Secret
4 documents.

5 Q. So at the time that you interrogated Mr. al Hawsawi,
6 they were still operating under a presumptive classification
7 regime, correct?

8 A. To the best of my understanding, yes.

9 Q. Meaning everything that came out of Mr. al Hawsawi's
10 mouth was considered to be Top Secret?

11 A. Yes.

12 Q. So am I to understand that you had the opportunity to
13 interrogate him without having a Top Secret clearance?

14 A. No, I had a Top Secret clearance.

15 Q. And therefore, you would have had the ability to
16 transport that information?

17 A. As I mentioned, it was the mechanics of it. So in
18 order to move Top Secret information, travel with it on an
19 aircraft, requires obviously double-wrapping the information,
20 having it -- maintaining it in your own care and custody. So
21 it's not that I couldn't do it because I didn't have a Top
22 Secret clearance.

23 What I'm talking about is physically moving those

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1 documents in a secure fashion. I had access to my notes if I
2 needed access to my notes.

3 Q. There was specific guidance, was there not, that your
4 notes were to be pouched back to the CIA for classification
5 review?

6 A. Yes.

7 Q. So they had to be submitted to the CIA?

8 A. Yes, they had to be submitted to the CIA for
9 classification review.

10 Q. You were also prohibited from using any prior
11 statements of Mr. al Hawsawi or other high-value detainees
12 unless that was cleared by the agency in charge, which was the
13 CIA, or the prosecutor, who was available for your
14 consultation; isn't that correct?

15 A. Can you restate that, please?

16 Q. Sure. Why don't I just read you the paragraph and
17 you tell me if you recall this.

18 "No statement made by a detainee while a detainee was
19 in the custody of an intelligence agency or any evidence
20 obtained as a result of such statement will be used in an
21 interview unless approved in advance by the assigned
22 prosecutor and the appropriate intelligence agency."

23 A. Yes.

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1 Q. So you had to vet your questions not only through a
2 prosecutor, but also the CIA?

3 TC [MR. RYAN]: Objection, sir. Mischaracterization.

4 MJ [COL POHL]: Is it -- the objection is overruled.

5 Regardless how the question was phrased, do you
6 understand?

7 WIT: Yes, Your Honor. And to answer the question, I
8 asked any question that I needed to of Mr. Ali, and -- in the
9 case, when I was in the room with Mr. al Hawsawi.

10 MJ [COL POHL]: But as I understand what Mr. Ruiz is
11 asking you is you had to have permission to ask questions
12 based on prior statements of the detainees.

13 WIT: Yes.

14 MJ [COL POHL]: Okay.

15 WIT: As they were in CIA custody, yes.

16 MJ [COL POHL]: Okay.

17 Q. You had to have the CIA's permission?

18 A. Yes.

19 MJ [COL POHL]: Did you ever -- let's just cut to the
20 chase. Did you ever review statements made while in CIA
21 custody?

22 WIT: The only statements that I reviewed, Your Honor,
23 were the ones from Ramzi Binalshibh circa 2002 when they were

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1 uploaded into the FBI system of records, and before those
2 records -- before those cables began to be classified at a
3 higher level.

4 After that classification changed, in the case of
5 Mr. Ramzi Binalshibh, I did not review any of those CIA
6 cables.

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

8 Q. Well, all of the information you were going to
9 utilize in the interrogation was classified, correct?

10 A. No.

11 Q. Okay.

12 A. Most of it was unclassified.

13 Q. All right. Let me just focus on statements, okay?

14 A. Okay.

15 Q. Statements that Mr. al Hawsawi made during the course
16 of this interrogation were considered classified?

17 A. Statements made when?

18 Q. During the course of your interrogation ----

19 A. After classification ----

20 Q. ---- after coordination, you interrogated him?

21 A. ---- yes. So if Mr. al Hawsawi made a statement, it
22 was presumptively classified until a classification review
23 could determine whether or not it really was classified or

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1 not. It had to undergo some sort of review.

2 Q. I understand. I know you testified back in 2013, and
3 you admitted that Mr. al Hawsawi was not Mirandized?

4 A. That's correct.

5 Q. And the reason he was not Mirandized now we know is
6 because the CIA's ground rules prohibited that, correct?

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

8 MJ [COL POHL]: He can answer the question. Objection
9 overruled.

10 What was the reason why?

11 WIT: The admonitions that I was provided, Your Honor,
12 stated that the person speaking to us was voluntary, that the
13 person could stop at any time; however, based upon the Rules
14 of Military Commissions at that time, because that detainee
15 was not charged, they were not entitled to an attorney.

16 MJ [COL POHL]: And where did you get this direction from,
17 to use that admonishment in lieu of the normal Miranda
18 warnings?

19 WIT: From my FBI supervisor.

20 MJ [COL POHL]: Thank you.

21 Mr. Ruiz.

22 Q. So the January 2007 ground rules document, in fact,
23 says that the detainee will not be given Miranda rights,

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1 correct?

2 A. Yes.

3 Q. This is the same document that includes the other
4 ground rules in terms of how the CIA wants you to conduct your
5 interrogation?

6 A. I would not agree with that characterization. But in
7 general terms, yes.

8 Q. You would not agree that that information or that
9 direction is included in the same memorandum?

10 A. No, you said CIA direction. And the CIA did not
11 direct me when I interrogated Mr. Ali and when I participated
12 in the interrogation of Mr. al Hawsawi.

13 Q. So you voluntarily put that information on the CIA
14 laptop? That's what you thought was the best way to go about
15 doing the interrogation?

16 TC [MR. RYAN]: Objection, argumentative, Your Honor.

17 MJ [COL POHL]: Overruled. You may answer the question.

18 A. What I'm stating is that I was able to conduct
19 that -- the interrogation and ask the questions that I saw
20 fit, understanding that any allegations of mistreatment would
21 be memorialized on a separate document. And again, as you
22 mentioned, there were the admonitions regarding how -- in
23 other words, not Miranda, but the fact that a person could

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1 stop speaking at any time, that they could ----

2 Q. I'm sorry, you said that he could stop and speak to a
3 lawyer at any time?

4 A. No, that they could stop speaking to interrogators at
5 any time, that they were under no obligation to speak to us.
6 But I don't know that that was a CIA direction. This is where
7 I'm going. I don't know that that was a CIA direction or if
8 it was lawyers in general terms. I don't know if it was
9 Department of Justice or CIA or whatever, but other legal
10 advisors.

11 So what I'm saying is I don't know if that direction
12 was primarily or solely a CIA direction, but they may have
13 simply been passing on those admonitions from other people.

14 Q. Okay. You don't disagree with me that that direction
15 is included in the same memorandum that directs you to ask
16 permission before you ask certain questions?

17 A. You have to -- directs -- directs me to ask
18 permission to ask certain questions if they concerned, and
19 only if they concerned, prior statements made under CIA
20 custody, yes.

21 Q. And, in fact, during the interrogation you did not
22 ask any such questions?

23 A. That's correct.

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1 Q. And if you had, you had -- would have had to ask
2 permission?

3 A. If there were questions ----

4 Q. You would have had to ask permission ----

5 A. ---- they were derived from CIA interrogation. Or if
6 there was information derived from CIA interrogation, yes, we
7 would have had go to the CIA and say, can we use this. We --
8 I'm not aware of any of those -- of any information that we
9 used from CIA custody, and asked no permission for us to ask
10 any questions.

11 Q. Okay. Because I think, as you testified, previous
12 treatment was not important to you going into that
13 interrogation?

14 A. I would state that a different way. I was simply
15 concentrated on what we knew or what we believed that we knew
16 regarding Mr. Ali or Mr. al Hawsawi and presenting that
17 information to that individual to see what they knew about it.

18 Q. All right. If the detainee asked for a lawyer, you
19 were directed to tell the detainee that no attorney was
20 available for consultation, correct?

21 A. Yes.

22 Q. And that that was because they had not been charged?

23 A. Yes.

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1 Q. You, however, had access to an immediate consultation
2 to attorneys from OMC-P, the Department of Justice, the FBI,
3 and the NSLB?

4 A. Yes.

5 Q. All right. Immediate consultation.

6 A. I don't know that I had immediate consultation with
7 all of those individuals at all times, but I certainly had
8 access to FBI attorneys and OMC-P attorneys.

9 LDC [MR. RUIZ]: Well, this -- and I'm referring to --
10 because I haven't actually done this, Judge, I have been
11 referring to 502XX. When I refer to the CIA grounds rule
12 document, I'm referring to 502XX ----

13 MJ [COL POHL]: Thank you.

14 LDC [MR. RUIZ]: ---- and I have been referring to that
15 document throughout this examination. And it was submitted to
16 the court on the first day of the hearings.

17 MJ [COL POHL]: Okay.

18 Q. So in referencing 502XX, it is correct, Agent
19 Fitzgerald, that it says that prosecutors from the office of
20 OMC-P, the Department of Justice, the FBI, the NSLB will be
21 present in GTMO and available for immediate consultation,
22 legal assistance, and advice to interrogating agents.

23 A. Yes, I understand that. What I was saying was that

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1 my recollection is that I had immediate access to FBI
2 attorneys and OMC prosecutors. If that's what that memo says,
3 I'm sure that those persons were present. I was trying to
4 explain what my recollection was.

5 Q. Sure. Were any of these prosecutors the prosecutors
6 you had access to during the interrogation of Mr. al Hawsawi?

7 A. I believe Mr. Groharing was down there at that time
8 and also Mr. Trivett.

9 Q. All right. Did you have an opportunity to confer
10 with them prior to the interrogation of Mr. al Hawsawi?

11 A. Yes.

12 Q. And what was the nature of that interaction?

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

14 MJ [COL POHL]: Basis?

15 TC [MR. RYAN]: Beyond the scope and relevance, sir.

16 MJ [COL POHL]: What's the relevance of this?

17 LDC [MR. RUIZ]: Everything that he did in preparation for
18 this interrogation, Judge, is relevant: The briefings he got,
19 the information he was provided, the purpose of the
20 interrogation itself.

21 We've had one characterization of that interrogation
22 yesterday. I think it's important that we establish that this
23 was an interrogation with a view towards a prosecution.

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1 TC [MR. RYAN]: Excuse me, Your Honor. We -- the original
2 objection today was that this was beyond the scope of what
3 this agent testified to on direct. I understand there's
4 leeway that has been provided, but it went to specific issues
5 concerning CIA. We are far beyond that as well now. This is
6 not a motion to suppress.

7 MJ [COL POHL]: Well ----

8 LDC [MR. RUIZ]: Judge, we filed a motion to challenge the
9 existence of hostilities in this instance. We objected to the
10 relevance of the statements in this case because we were
11 narrowly drawing and tailoring this motion to the hostilities
12 aspect. As I've indicated, if we can establish
13 hostilities ----

14 MJ [COL POHL]: Well, wait a minute. Mr. Ruiz, is -- is
15 when we discussed this earlier and the government specifically
16 asked were you only challenging the hostility piece, wasn't
17 your response you were challenging everything?

18 LDC [MR. RUIZ]: Yes. But everything subsumes the
19 hostilities piece. So if they can't establish the
20 hostilities, they can't establish jurisdiction.

21 MJ [COL POHL]: Yeah, but that does not relieve them of
22 the burden to establish the other elements of personal
23 jurisdiction.

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1 LDC [MR. RUIZ]: Right. And they have chosen to submit to
2 you over 50 pages of statements from Mr. al Hawsawi. They
3 have chosen to submit that as reliable evidence and
4 information ----

5 MJ [COL POHL]: No, I got that part of it, but ----

6 LDC [MR. RUIZ]: ---- and there's a Sixth Amendment right
7 to test the basis of that information.

8 MJ [COL POHL]: I've got all that. I just want to make
9 sure that we're not shifting the ground rules here. Is that
10 they have to establish all of the elements of personal
11 jurisdiction because it was specifically asked, are you only
12 challenging the hostilities piece; and your response, your
13 team's response was, no, we're challenging the whole thing.
14 So when you say it doesn't go to hostilities and, therefore,
15 anything that doesn't go to hostilities is now irrelevant,
16 I -- I -- that's not ----

17 LDC [MR. RUIZ]: That's not exactly how it went, Judge.
18 The way it went was, we challenge -- if you look at the
19 original hostilities motion, that's what we key on, the
20 existence of hostilities.

21 MJ [COL POHL]: Are you stipulating to all other elements
22 of personal jurisdiction?

23 LDC [MR. RUIZ]: No. Let me explain how that came about.

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1 Prosecution stood up and said there are three prongs by which
2 we can establish personal jurisdiction. And we say, fine, if
3 they're going to pursue those three prongs, then obviously we
4 have to persist, but our key is on the hostilities issue.

5 The point I'm bringing it back to is, if there is
6 now, whether they brought it up or we brought it up, there's a
7 piece of evidence now that's before this commission,
8 supposedly introduced into evidence for your consideration on
9 this issue, I'm testing the grounds of that reliability of
10 that piece of information. This is the agent who was present
11 in the room ----

12 MJ [COL POHL]: No, I understand that.

13 LDC [MR. RUIZ]: ---- with a piece of paper ----

14 MJ [COL POHL]: No, I understand. I just want to make
15 sure that we're not -- I just want to make sure that the
16 challenge was to all elements of personal jurisdiction which
17 the government's rebutting. So any chance that this statement
18 goes to any element of personal jurisdiction, whether it's
19 hostilities or something else, then it seems to me it's fair
20 game for the government to argue its relevance to the personal
21 jurisdiction issue. Okay. Break.

22 Now, the issue we're back to is what briefings did he
23 receive prior to his interrogation.

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1 LDC [MR. RUIZ]: And he testified that there were a number
2 of people present.

3 MJ [COL POHL]: I got it. I got it.

4 LDC [MR. RUIZ]: This document that we were provided in
5 discovery on the eve of testimony reveals that prosecutors
6 were readily available. Presumably, the prosecution thinks
7 this is information we should have on the night before the
8 witness is testifying.

9 MJ [COL POHL]: No, no, don't ----

10 LDC [MR. RUIZ]: But, I mean ----

11 MJ [COL POHL]: I understand what you're saying.

12 Mr. Ryan, what is your basis of objection here if
13 we're just going to the circumstances around the taking of the
14 statement.

15 TC [MR. RYAN]: Irrelevant to the hostilities slash
16 personal jurisdiction motion in which suppression going to
17 other persons and other instructions has never been raised.

18 LDC [MR. RUIZ]: Well, that's not necessarily true, Judge.

19 TC [MR. RYAN]: Which all we've heard about ----

20 LDC [MR. RUIZ]: May I finish, Judge? May I finish?

21 MJ [COL POHL]: Both stop. I got it. Okay. You want to
22 discuss the circumstances around taking the statement. I'll
23 permit you to do that.

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1 LDC [MR. RUIZ]: Sure.

2 MJ [COL POHL]: But let's not keep repeating ourselves.

3 LDC [MR. RUIZ]: I didn't repeat my -- I was
4 specifically ----

5 MJ [COL POHL]: I know. I know. I hear you. Okay. The
6 objection is overruled. The objection is overruled. You may
7 ask your question.

8 LDC [MR. RUIZ]: Sure.

9 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

10 Q. So prosecutor Jeff Groharing and Clay Trivett were
11 available on the island during Mr. al Hawsawi's interrogation,
12 and you, in fact, conferred with them?

13 A. I know that Mr. Groharing was on island. I don't
14 recall if Mr. Trivett was. I recall Mr. Groharing being on
15 the island at that time. I know that I spoke with him at or
16 around that time. I recall very little of what we spoke
17 about. And as I stated before, the questions that I asked of
18 Mr. Ali or Mr. Hawsawi were of my own choosing.

19 Q. So this ground rules memorandum, 502XX, says that
20 agents should discuss their interview strategy with the
21 assigned DoD/DoJ prosecutors.

22 A. Yes.

23 Q. Did you do that with Mr. Groharing?

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1 A. I have no specific recollection of discussing an
2 interview strategy. At that time, then-Major Groharing, I
3 think, left the latitude to Special Agent Perkins and myself
4 as law enforcement professionals to approach this in the way
5 that we saw fit.

6 Q. You knew that Mr. Groharing, at that time Major
7 Groharing, was a prosecutor with the Office of Military
8 Commissions, correct ----

9 A. Yes.

10 Q. ---- prosecutor's office? And you did speak to him?

11 A. Yes.

12 Q. Prior to the interrogation of Mr. al Hawsawi?

13 A. Yes.

14 Q. You don't recall the specifics today?

15 A. That's correct.

16 Q. Did you memorialize that?

17 A. I did not.

18 Q. All right. Why not?

19 A. You're asking me to speculate why I didn't

20 memorialize something that I don't recall.

21 Q. Okay.

22 A. So I don't know how to answer that.

23 Q. Very well. In terms of the -- I know you've talked

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1 about you got to ask the questions you wanted and prepare the
2 documents and conduct the interrogation the way you wanted to.
3 Why didn't you prepare a 302 for Mr. al Hawsawi's
4 interrogation? Why did you create this LHM?

5 A. It was recognized at the outset that likely these
6 documents would be disseminated throughout the intelligence
7 community for their intelligence value, and it was also
8 recognized that they would likely be at a classification
9 higher than Unclassified.

10 At that specific time in the FBI system, FD-302s were
11 not classified, so it would be put into an electronic
12 communication or something else. So an LHM, a letterhead
13 memorandum, was chosen as a vehicle essentially out of
14 convenience. It was something that could be classified at a
15 Top Secret level, and it could be readily disseminated.

16 Q. Well, when you say it was chosen, it was chosen by
17 the CIA, correct?

18 A. I have no knowledge of that.

19 Q. All right. You interrogated Mr. al Hawsawi on four
20 different dates?

21 A. Yes, I believe that's correct. I don't have those
22 papers in front of me, but I will assume that you do, and that
23 sounds proper.

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1 Q. Early January 2007?

2 A. Yes.

3 Q. For approximately 24 to 28 hours?

4 A. Yes.

5 Q. Prior to the interrogation of Mr. al Hawsawi, did you
6 determine where he would be interrogated?

7 A. I don't know you what mean.

8 Q. Did you choose the location where you would be
9 interrogating him?

10 A. No.

11 Q. Somebody else chose that for you as well, correct?

12 A. Yes.

13 Q. The CIA?

14 A. I have no idea who chose it.

15 Q. All right, did you request to interrogate
16 Mr. al Hawsawi at Camp VII?

17 A. No.

18 Q. Did you request to interrogate him at Camp Echo II?

19 A. No.

20 Q. Do you know how that location was selected?

21 TC [MR. RYAN]: Objection, sir, relevance.

22 MJ [COL POHL]: Given what the answer is going to be, the
23 objection is overruled.

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1 A. I have no idea how it was chosen.

2 LDC [MR. RUIZ]: So, Judge, the place and manner in which
3 Mr. al Hawsawi was interrogated is extremely relevant,
4 particularly when you have an organization saying that they
5 are the clean team.

6 MJ [COL POHL]: You've lost me here. What are you arguing
7 about?

8 LDC [MR. RUIZ]: I'm not arguing about anything. I'm
9 asking.

10 MJ [COL POHL]: Asking what?

11 LDC [MR. RUIZ]: Who selected where Mr. al Hawsawi would
12 be interrogated.

13 MJ [COL POHL]: He says he doesn't know.

14 LDC [MR. RUIZ]: Okay. I'm probing that.

15 MJ [COL POHL]: But you're asking me something about this,
16 and I'm not quite sure ----

17 LDC [MR. RUIZ]: I'm not asking you anything, Judge.

18 MJ [COL POHL]: Well, that's good because I'm not going to
19 tell you anything. But I am going to tell you this: We're
20 going to take a 15-minute recess now.

21 Commission is recessed for 15 minutes.

22 [The R.M.C. 803 session recessed at 1027, 7 December 2017.]

23 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1044,
2 7 December 2017.]

3 [Special Agent James M. Fitzgerald resumed his seat on the
4 witness stand.]

5 MJ [COL POHL]: Commission is called to order. All
6 parties are again present. Agent Fitzgerald is still on the
7 stand.

8 Mr. Ruiz.

9 CROSS-EXAMINATION CONTINUED

10 Questions by the Learned Defense Counsel [MR. RUIZ]:

11 Q. Just a couple of quick questions, Agent Fitzgerald.
12 On the closed system that you described, do you recall what
13 the classification access requirement was for accessing that
14 closed system, the FBI's --

15 A. It was a Top Secret classification.

16 Q. Do you remember if there was a specific name of this
17 system?

18 TC [MR. RYAN]: Objection, sir.

19 MJ [COL POHL]: Overruled. You may answer the question.

20 A. I do remember if there was a name. I believe the
21 name is classified.

22 Q. I understand.

23 MJ [COL POHL]: Okay. That's what he just said.

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1 Q. But you know what that name was?

2 A. Yes, I do.

3 Q. Tacking back to the questions I asked you about
4 briefing, you said there were a lot of people at the briefing.
5 Do you know who the people at the briefing were? And I'm
6 referring to the briefing right prior to interrogating
7 Mr. al Hawsawi that we've discussed earlier today.

8 A. The briefing that I believe that you're referring to
9 is one where admonitions were discussed and the -- how we
10 would react to and how we would memorialize allegations of
11 mistreatment or torture, and at that meeting, agents from the
12 FBI were present. I remember there were a number of agents
13 who were going to interview a number of the different
14 high-value detainees at that time, so there was a lot of folks
15 there. I remember my FBI supervisor was there. I believe
16 there was an FBI attorney there as well. I can't remember
17 past that because the briefing that I'm thinking of, that I'm
18 recalling, it was my supervisor who was speaking regarding
19 this.

20 Q. To your knowledge, were there any non-FBI personnel
21 who attended that briefing?

22 A. There may have been. I don't recall.

23 Q. All right. So it wasn't just limited to FBI. If a

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1 CIA representative wanted to attend, they could?

2 A. It's possible, yes.

3 Q. All right. But the briefing you received was not, to
4 your knowledge, from a CIA intelligence officer?

5 A. The briefing that I'm thinking of specifically
6 regarding the admonitions was from my FBI supervisor.

7 Q. All right. And was that the only briefing you recall
8 that dealt with the interrogation of Mr. al Hawsawi?

9 A. There were other times during meetings where things
10 like admonitions were spoken of, but I ----

11 Q. Okay. We'll -- I'll get to kind of what happened in
12 between. Right now I'm just asking about prior to the
13 interrogation.

14 A. I recall that specific one. There certainly were
15 other meetings, but it's -- it's difficult for me to recall
16 exactly who was at what meeting when.

17 Q. I understand. Would you have documented meetings
18 such as the one where you -- where admonishments were
19 discussed, ground rules for interrogations were discussed?
20 Would you have documented that in some shape ----

21 A. I would not have in the normal course of business,
22 no.

23 Q. All right. So I understand that you recall this one

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1 meeting, but there were other series of meetings that also
2 took place before your interrogation of Mr. al Hawsawi?

3 A. There were other meetings, yes, around that time,
4 that's correct.

5 Q. All right. My question is: Do you recall if they
6 involved discussions about how to interrogate Mr. al Hawsawi?

7 A. No discussions involved how to interrogate
8 Mr. al Hawsawi, in the respect that I could ask any question
9 that I wanted to. My understanding was that people left it up
10 to me as a professional to ask appropriate questions based
11 upon the evidence that I had gathered, understanding, as you
12 have previously pointed out, that if I were going to rely on
13 any statements that came from the CIA between 2003 and 2006,
14 that would have required something different.

15 Q. And that would be statements made by Mr. al Hawsawi,
16 correct?

17 A. Yes, that's correct.

18 Q. Or any statements referencing specific torture that
19 Mr. al Hawsawi alleged?

20 A. As I understood the ground rules at that time, any
21 statements by any high-value detainees during that time, the
22 2003, roughly, to 2006 time frame, if I wanted to use any of
23 that material -- and I was not aware of the substance of that

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1 material -- if I were to use any of that material, that would
2 have required clearance from the CIA.

3 Q. Got it.

4 A. That notwithstanding, any plan that I had or that
5 Special Agent Perkins had for interrogation of either Mr. Ali
6 or Mr. al Hawsawi was, in large part, as I recall this, left
7 up to us to determine what we were going to ask based upon the
8 information that we had, with the understanding that we had
9 the -- enough law enforcement experience to do what was
10 reasonable, to ask what was reasonable.

11 Q. I understand that I asked you how to interrogate.
12 Did you attend any briefings where other subjects that related
13 to Mr. al Hawsawi were discussed, such as, for example,
14 medical -- current medical issues, current detention issues?
15 They may not have been directly related to how you conducted
16 the interrogation, but they would have been related to
17 Mr. al Hawsawi in some way, shape, or form. Do you understand
18 what I'm asking?

19 A. I believe so. If I understand what you're asking,
20 was I briefed on, like if Mr. al Hawsawi had a medical issue?
21 I don't recall that. I do recall there being Navy corpsman
22 readily available and on site when we interviewed or
23 interrogated Mr. al Hawsawi. I don't recall a specific

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1 briefing as to any medical issues regarding him.

2 Q. Were any attendance records or logs required at these
3 meetings?

4 A. In other words, like an FBI meeting like the one that
5 we were just discussing?

6 Q. Did you have to sign in and show that you had
7 attended?

8 A. No.

9 Q. All right. Okay. Moving forward. I had asked you
10 about the location; you said you didn't remember having chosen
11 the location. But you do remember where you interrogated
12 Mr. al Hawsawi, correct?

13 A. Yeah. I did not have any part in choosing the
14 location. I recall where it was.

15 Q. Very well. Do you know who?

16 A. Who chose it?

17 Q. Right.

18 A. I have no idea.

19 Q. Got it. All right. But you do know where you
20 interrogated him?

21 A. Yes.

22 Q. And that's what we normally refer to as Camp Echo II,
23 correct?

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1 A. That's correct.

2 Q. You have provided, I think in the past, somewhat of a
3 description of the place where Mr. al Hawsawi was
4 interrogated, correct?

5 A. I may have. If there's something specific that
6 you're referring to, if you could refresh my memory.

7 Q. Well, before I get to that specific room, do you know
8 how Mr. al Hawsawi was transported to the interrogation?

9 A. I know that I saw Navy personnel and ----

10 Q. Let me -- let me -- let me say this. I want to know
11 if you know the method. I understand some of these things may
12 be force protection or security issues, so I'm not asking you
13 necessarily to describe what you saw. I'm trying to ascertain
14 at this point if you know the method of transportation.

15 So did you know he was transported in a vehicle? Did
16 you know if he was transported -- did you have an opportunity
17 to see that? Do you see what I mean? And I'll come back to
18 one question at a time.

19 TC [MR. RYAN]: Objection on relevance grounds to this
20 line, Your Honor.

21 MJ [COL POH]: What's the relevance?

22 LDC [MR. RUIZ]: As I've said, Judge, everything leading
23 up to the interrogation of Mr. al Hawsawi will be important.

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1 And I can elaborate on that, but I'd like to do it outside the
2 presence of this witness, if possible.

3 MJ [COL POHL]: Objection is overruled. Go ahead.

4 LDC [MR. RUIZ]: All right.

5 A. I don't recall ever seeing Mr. al Hawsawi
6 transported. As a practical matter, I would assume he was
7 taken there by vehicle.

8 Q. Okay. Did you ever ----

9 A. I don't recall ever seeing him in a van, in a
10 vehicle. I don't recall seeing him transported.

11 Q. So you don't recall what type of vehicle, if any, he
12 was transported in?

13 A. I don't.

14 Q. All right. Do you know what -- and not tell me what
15 the measures were, but do you know if there were any specific
16 sensory deprivation methods used during that transportation?

17 A. I have no idea.

18 Q. You did not see the inside of whatever he was
19 transported in?

20 A. That's correct.

21 Q. You did not ask him about that when you first met
22 him?

23 A. I have no recollection of asking him how he was

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1 transported or under what conditions; that's correct.

2 Q. There was no record of that in your notes, correct?

3 A. Correct.

4 Q. And you have over -- I think it's over 120 pages of
5 handwritten notes?

6 A. There's a lot of notes, yes.

7 Q. All right. That memorialize all of the questions
8 that you indicated you asked Mr. al Hawsawi?

9 A. Yes, to the best of my ability.

10 Q. And how he was transported to the interrogations was
11 not a question you or anybody else asked?

12 A. That's correct.

13 Q. In other words, I'm referring not only to the method
14 of transportation, but also to how he was restrained or
15 otherwise prepared for that transportation, correct?

16 A. I have no idea; that's correct.

17 Q. You have no idea how that took place?

18 A. Correct.

19 Q. All right. Did you review Mr. al Hawsawi's
20 medical records prior to his interrogation?

21 A. I did not.

22 Q. Did Agent Perkins review Mr. al Hawsawi's
23 medical records prior to the interrogation?

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1 A. I have no knowledge if she did or did not.

2 Q. Now, I know you indicated you asked about his medical
3 condition. But other than asking about it, there was no other
4 information that you had regarding his medical condition,
5 correct?

6 A. At some point, I believe Mr. Hawsawi himself stated
7 that he had hepatitis, but I -- other than something like
8 that, I don't recall anything else about Mr. Hawsawi's health
9 condition.

10 Q. Excluding self-reports from Mr. al Hawsawi, in your
11 preparation for his interrogation, you did not review any
12 information regarding Mr. al Hawsawi's medical conditions,
13 correct?

14 A. I did not.

15 Q. To your knowledge, did Agent Perkins review any such
16 information?

17 A. To my knowledge, she did not.

18 Q. All right. In preparation for Mr. al Hawsawi's
19 interrogation, did you review any information that would have
20 informed you as to how Mr. -- strike that. Let me back this
21 up.

22 Did you review any information regarding how
23 Mr. al Hawsawi was previously detained, conditions of his

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1 detention?

2 A. I did not.

3 Q. Did you have any information regarding how he was
4 interrogated?

5 A. I did not.

6 Q. Did you have any information about where he was
7 interrogated?

8 A. I did not.

9 Q. Did you know what the cells looked like or -- that he
10 was constrained in previous to your interrogation?

11 TC [MR. RYAN]: Objection, asked and answered, Your Honor.

12 MJ [COL POHL]: Objection is overruled, but move on to
13 something else. He doesn't know. He keeps saying he doesn't
14 know, to rephrase the same question, but the answer is he
15 doesn't know. Go ahead.

16 Q. In regards to -- you have absolutely no knowledge of
17 how he was previously detained?

18 TC [MR. RYAN]: Objection, Your Honor, asked and answered.

19 MJ [COL POHL]: Sustained.

20 LDC [MR. RUIZ]: Okay.

21 Q. All right. So when you meet Mr. al Hawsawi, you have
22 a translator with you?

23 A. There was a translator available. There was not a

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1 translator in the room with us.

2 Q. You did not utilize a translator during the
3 interrogation of Mr. al Hawsawi, correct?

4 A. We did not need to; that's correct.

5 Q. Well, what I asked you was you did not use it,
6 correct?

7 A. We did not need one and we did not use one.

8 Q. Right. But there were translators that were readily
9 available?

10 A. Yes, there were.

11 Q. In fact, they were about 25 feet away, according to
12 your previous testimony?

13 A. That sounds about right.

14 Q. All right. And you determined that they were not
15 necessary because you made an assessment about
16 Mr. al Hawsawi's English language capability?

17 A. I think it's more accurate to say that both Special
18 Agent Perkins and I were able to communicate to and understand
19 Mr. al Hawsawi. So jointly, is my best description of how we
20 proceeded in that, was we both felt that we could communicate
21 effectively in both directions with Mr. al Hawsawi. We asked
22 a series of questions to try to determine his language
23 ability.

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1 Q. And as I think we have established before, you have
2 no professional expertise or advanced education in language
3 assessment, correct?

4 A. I do not.

5 Q. And, more importantly, at the time you did not have
6 that?

7 A. I did not.

8 Q. All right. Nor did you administer any instruments
9 that would have determined what Mr. al Hawsawi's language
10 ability were at the time, correct?

11 A. Other than asking questions to determine whether or
12 not he spoke English and what his experience was, we used no
13 other instruments.

14 Q. You didn't use any instruments to determine what his
15 comprehension of the English language is?

16 A. Other than being able to ask questions and get an
17 intelligent reply, no.

18 Q. Okay. On January 11, 2007, that was the first day
19 you interrogated Mr. al Hawsawi, correct?

20 A. I have not reviewed those notes recently, but that
21 sounds approximately correct.

22 Q. All right. You were present?

23 A. Yes.

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1 Q. Agent Perkins was present?

2 A. Yes.

3 Q. And also Special Agent Mason?

4 A. Yes.

5 Q. Both you and Special Agent Mason were taking notes,
6 correct?

7 A. Initially, yes. And then at some point, I was the
8 only one taking notes.

9 Q. One of the -- in regards to the initial recitation of
10 questions, one of the answers that Mr. al Hawsawi gave you
11 during that initial recitation was that he may recognize this
12 place, correct?

13 A. There may be a classification issue.

14 TC [MR. RYAN]: Sir ----

15 MJ [COL POHL]: Just a second.

16 LDC [MR. RUIZ]: These are unclassified notes, Judge. I'm
17 looking at an unclassified document, and it's from his
18 handwritten notes that says what I just said.

19 TC [MR. RYAN]: Subject of a 505(g) notice that's been
20 filed I believe by counsel, Judge, getting into locations.

21 LDC [MR. RUIZ]: This is an unclassified document with an
22 unclassified entry, Judge, and I just asked him if he wrote
23 the unclassified piece. The subject of that is the reason

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1 why. It has nothing to do with the agent's notes. Quite
2 frankly, he's called more attention to it now than if he had
3 just let me asked the unclassified ----

4 MJ [COL POHL]: Trial Counsel, is this calling for a
5 classified answer, I mean, the way the question was worded?

6 TC [MR. RYAN]: May I have the court's indulgence a
7 moment, Your Honor.

8 MJ [COL POHL]: Sure.

9 [Pause.]

10 TC [MR. RYAN]: Your Honor, there's a significant
11 question. It's my recommendation to the commission that it be
12 taken up during the (h) hearing.

13 LDC [MR. RUIZ]: Judge, this is an unclassified document
14 with an unclassified entry.

15 MJ [COL POHL]: Let me see the document.

16 LDC [MR. RUIZ]: I'll just have -- I'll give you my copy,
17 Judge.

18 MJ [COL POHL]: That's fine.

19 LDC [MR. RUIZ]: Just for the record, Judge, I've handed
20 you a copy of Special Agent Fitzgerald's handwritten notes
21 that were provided to us a couple of days ago.

22 MJ [COL POHL]: Just for the record, it's Bates stamped
23 MEA-LHM-00001299. Returning the document to Mr. Ruiz.

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1 LDC [MR. RUIZ]: Actually, Judge, if I also -- there are
2 two places where the same -- if we're discussing that, there's
3 a second place where he says he recognizes the surroundings
4 from the past.

5 MJ [COL POHL]: I got it. I got it.

6 LDC [MR. RUIZ]: I also intend to ----

7 MJ [COL POHL]: Trial Counsel, I'm going to need some
8 specificity here. And if you're invoking the
9 national security privilege and you want to do it in a closed
10 session, I understand that, but I'm somewhat at a loss of why
11 this is what it is. But, I mean, the way the system works, it
12 gives you the opportunity, but it's an unclassified note.

13 I understand there could be certain questions that
14 are classified that -- along this line, but that's -- this is
15 not one of them, I would not think. But, again, you're the
16 holder of the privilege, so tell me.

17 TC [MR. RYAN]: There has been an (h) filed on this
18 specific question, Judge -- or a (g) asking for an (h) on this
19 specific question. Your Honor is aware of parameters. It is
20 my suggestion that this be handled at the (h) hearing.

21 MJ [COL POHL]: Is this the new --

22 LDC [MR. RUIZ]: No, Judge. This is -- first, we received
23 two sets of notes.

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1 MJ [COL POHL]: I got it.

2 LDC [MR. RUIZ]: One set is classified, Judge. This is
3 the unclassified set of notes.

4 If -- what I -- the notice goes to follow-up
5 questions that I would ask in the closed session, but this is
6 an unclassified piece of information with unclassified entries
7 that they provided to us during the hearing this week.

8 MJ [COL POHL]: I got you.

9 Mr. Ryan?

10 TC [MR. RYAN]: You heard my objection, sir. I wish to go
11 no further.

12 MJ [COL POHL]: Just so I'm clear here, is -- are you
13 saying the question based on the unclassified notes calls for
14 a classified response?

15 TC [MR. RYAN]: A moment, sir.

16 LDC [MR. RUIZ]: Judge, if I may, the question asked, does
17 this say what it says ----

18 MJ [COL POHL]: I understand what you ----

19 LDC [MR. RUIZ]: ---- which is unclassified.

20 MJ [COL POHL]: I got it.

21 Mr. Ryan.

22 TC [MR. RYAN]: The words in the unclassified notes are
23 what they say. If it goes any further, it should be stopped.

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1 MJ [COL POHL]: Okay. Okay. Frame your question
2 precisely.

3 LDC [MR. RUIZ]: I will.

4 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

5 Q. Special Agent Fitzgerald, in your handwritten notes
6 of January 11, 2007, you indicate, quote, may recognize this
7 place. Correct?

8 A. Yes.

9 Q. There's also an entry in the January 2007 notes that
10 says, "Recognize surrounding from past."

11 A. Yes, it states that.

12 Q. The interrogation at this time was taking place in
13 Camp Echo II, correct?

14 A. Yes, it was.

15 Q. There was no audio taken of the interrogations of
16 Mr. al Hawsawi, correct?

17 A. No.

18 Q. There was no video that was taken. In other words,
19 his interrogations were not documented on video?

20 A. Correct.

21 Q. All right. There were no contemporaneously
22 transcribed notes that were prepared during his interrogation,
23 correct?

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1 A. Could you explain what you mean by that? Obviously,
2 there were my notes ----

3 Q. I mean, like a stenographer ----

4 A. No, there were not.

5 Q. ---- that would prepare a verbatim transcript of what
6 was being said by each person, kind of like what we have in
7 court.

8 A. No.

9 Q. And that applies to non -- I mean, that applies to
10 all of the four sessions, correct?

11 A. That's correct.

12 Q. Who made the determination not to videotape the
13 interrogation?

14 A. At that time it was FBI policy, in general terms, not
15 to videotape unless you had specific permission to do so.

16 Q. Now, to your knowledge, did the special agent in
17 charge have the discretion to videotape the interrogation if
18 they so desired?

19 A. I believe there was some discretion placed in the
20 hands of the SAC.

21 Q. Did you discuss with Special Agent Perkins how to
22 document the interrogation of Mr. al Hawsawi?

23 A. We discussed taking notes only.

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1 Q. Okay. Was the subject of video recording ever
2 brought up?

3 A. No.

4 Q. All right. Audio recording?

5 A. No.

6 Q. Verbatim transcript?

7 A. No.

8 Q. All right. Was that decision made before you went
9 into the interrogation room with Mr. al Hawsawi?

10 A. In general terms, during my FBI career up to that
11 time, I had not videotaped or audiotaped interviews or
12 interrogations, and it was not a practice to do so.

13 Q. Okay. Well, that's not my question.

14 A. I understand. But what I'm saying is that led to my
15 presence of mind at that time being that it was not a
16 generally accepted practice to do so.

17 Q. So your answer is -- was this a determination that
18 was made prior to the interrogation of Mr. al Hawsawi, yes or
19 no?

20 A. We did not seek to have it audiotaped or videotaped.

21 Q. Did you make that decision prior to beginning the
22 interrogation?

23 A. I don't know that it was a decision other than a

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1 continuation to practice as I had before.

2 Q. Very well. Prior to the interrogation, the first day
3 of the interrogation, had you ever heard Mr. al Hawsawi speak?

4 A. No.

5 Q. Had you ever heard him speak English?

6 A. No.

7 Q. Had you ever had a conversation with Mr. al Hawsawi
8 in the English language?

9 MJ [COL POHL]: Mr. Ruiz, you asked a -- he said have you
10 ever heard him speak, and the answer is no. Then you asked
11 him have you heard him speak in English. Well, if hadn't
12 heard him speak, he hadn't heard -- had a conversation with
13 him.

14 LDC [MR. RUIZ]: Well, I mean, he could have witnessed a
15 video, seen some clips of Mr. al Hawsawi.

16 MJ [COL POHL]: And heard -- didn't hear him speak but
17 heard him speak English. Didn't hear him speak but heard a
18 conversation.

19 LDC [MR. RUIZ]: Judge, here's what I got to tell you. We
20 saw an agent yesterday dance on the head of a pin needle ----

21 TC [MR. RYAN]: Objection, sir.

22 LDC [MR. RUIZ]: ---- on what a particular word meant.

23 Yes, I'm trying to make sure I pin down this witness as well

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1 as I can because words matter. I get it.

2 MJ [COL POHL]: You just keep repeating yourself. And
3 we're just wasting a lot of time. When you asked -- you asked
4 a question, did you ever hear him speak; and he said no. So
5 now move on to something else.

6 LDC [MR. RUIZ]: I understand. I understand. All right.

7 Q. Now, during the -- I'm going to ask to you about in
8 between interrogations, all right, from -- so one day to the
9 next. What did you do with the information you had gathered
10 from the day's interrogation? Did you type that in?

11 A. Yes.

12 Q. And did you type that into the CIA's computer?

13 A. It was a laptop owned by the CIA, correct.

14 Q. All right. And did you do that off your -- the
15 notes, the handwritten notes that you had utilized?

16 A. Yes.

17 Q. Did you have any meetings or briefings in regards to
18 the information that had been obtained during the day?

19 A. I have no recollection as to a specific meeting or
20 briefing regarding that information. My best recollection is
21 that when we finished, we went and got something to eat and
22 then started typing.

23 Q. Were you typing that by yourself or were there other

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1 agents who were providing input into what went into the
2 report?

3 A. No. So for -- in the case of Mr. Ali, I typed
4 Mr. Ali's report. In the case of Mr. al Hawsawi, Special
5 Agent Perkins typed that document. There may have been
6 conversation between myself and Special Agent Perkins, but
7 Special Agent Perkins had the notes that I had taken that day.

8 Q. So she used your notes?

9 A. Yes, she did.

10 Q. She didn't, to your knowledge, have any problems
11 reading your handwriting?

12 A. She may have. And if she did, I -- again, I would --
13 specific recollection, she may have asked me about something
14 and ----

15 Q. You would have provided input?

16 A. Yes.

17 Q. Did you have any input before the next day from any
18 other parties as to what kinds of questions you would ask of
19 Mr. al Hawsawi?

20 A. No.

21 Q. Did you have any meetings with prosecutors in the
22 days intervening each interrogation? Do you understand my
23 question?

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1 A. I do. There were prosecutors in the area, but I have
2 no recollection of discussing specific questions or an
3 interview or an interrogation strategy with them. We were --
4 had a certain series of documents, in general terms, that we
5 were presenting to the -- to Mr. al Hawsawi, and we were
6 continuing along that path.

7 Q. Okay. You're referring to the time frame during the
8 interrogations themselves?

9 A. That's correct.

10 Q. Gotcha. Did you have any role in the collection of
11 business records, international business records?

12 A. I did have some role in collecting some international
13 banking documents, business records, yes.

14 Q. And I know you discussed a number of business records
15 and generally the foundation for those records.

16 A. Yes.

17 Q. In regards to the records that were obtained from
18 international entities ----

19 A. Yes.

20 Q. ---- for instance, banks, those kinds of things, can
21 you tell me if you or other agents personally undertook those
22 efforts?

23 A. Yes. Some agents did, yes.

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1 Q. Did the agents themselves get the certifications, or
2 did you have to go through the respective governments?

3 TC [MR. RYAN]: Objection, relevance and beyond the scope.

4 MJ [COL POHL]: What's the relevance of all of this?

5 LDC [MR. RUIZ]: Judge, they raised the issue of business
6 records, the authenticity of business records. I'm asking --
7 and I didn't object to that for purposes of this hearing, but
8 I would like to know generally how they went about obtaining
9 the certifications of these business records. It's fair.
10 They testified under oath. I'm asking what ----

11 MJ [COL POHL]: And you didn't challenge it. Now, make it
12 quick.

13 LDC [MR. RUIZ]: That's my question.

14 MJ [COL POHL]: Okay. One question, one answer.

15 WIT: Can you restate that question, Mr. Ruiz?

16 MJ [COL POHL]: Objection overruled.

17 LDC [MR. RUIZ]: Can I ask the question again?

18 MJ [COL POHL]: Yeah.

19 LDC [MR. RUIZ]: Okay.

20 MJ [COL POHL]: One question, one answer. Go ahead.

21 LDC [MR. RUIZ]: Can it be can a long question?

22 MJ [COL POHL]: One question, one answer.

23 LDC [MR. RUIZ]: Got it.

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1 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

2 Q. So you did, in fact, have the opportunity to
3 participate in the collection of business records, or other
4 FBI agents did, in fact, participate in the collection of
5 business records.

6 My question is: Can you tell us with regards to
7 international business records, did the agents themselves
8 obtain the certifications or did you have to go through the
9 specific countries?

10 A. To the best of my recollection, specific countries.
11 And officers of those, for instance, banks or those
12 institutions, obtained those certifications and provided them
13 to us. That is my best recollection.

14 LDC [MR. RUIZ]: I just need a moment, Judge.

15 [Pause.]

16 Q. Agent Fitzgerald, during the first day of the
17 interrogation of Mr. al Hawsawi, you were joined by, I think
18 it was Special Agent Mason, correct?

19 A. Yes.

20 Q. He is -- was a member of what is referred to as CITF?

21 A. Yes, that's correct.

22 Q. And can you tell us again what CITF stands for?

23 A. That stands for Criminal Investigative Task Force.

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1 Q. He was one of the individuals who took notes on the
2 first day, correct?

3 A. Yes.

4 Q. And then at some point he stopped taking notes,
5 correct?

6 A. Yes.

7 Q. Do you recall why?

8 A. I don't recall the specific instance. But as a
9 general practice, only one person takes notes. So either
10 myself or Agent Perkins would have said to Special Agent
11 Mason, hey, only one of us needs to take notes. And again, I
12 don't recall specifically who said that or when either one of
13 us would have said it. But as a practice, we only take one
14 set of notes.

15 Q. Let me ask you a question. Why -- wouldn't it be
16 helpful to have another person in the room who could take
17 notes, and that way you could compare notes?

18 A. It's -- as a matter of practice, I find it to be
19 better to have one set of notes because it's more clear. So I
20 understand what you're saying, but practice in the FBI is to
21 take -- one person take notes, not multiple people, so that
22 there's no confusion.

23 Q. So less is better?

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1 A. No, one person taking notes is the practice. I'm not
2 saying less is better. I'm saying for the purposes of
3 clarity, one person taking notes is better.

4 Q. Now, Agent Mason was replaced after the first day,
5 correct?

6 A. You're using the term replaced. I know he wasn't
7 present after that, but I don't know why.

8 Q. Okay. He was no longer present in the interrogation
9 room after the first day, correct?

10 A. That's my recollection, yes.

11 Q. And he was -- let me not use the word replaced, but
12 another human being who was not Special Agent Mason, there was
13 a CITF agent came to the interrogation of Mr. al Hawsawi?

14 A. Yes. But to clarify my answer, what I was trying to
15 imply or to state was Special Agent Mason was not removed, to
16 my knowledge, for any wrongdoing. They just put another
17 person in there.

18 Q. I didn't say he was removed for any wrongdoing. I
19 just said he was replaced.

20 A. I understand. Sometimes the word replaced has a
21 different connotation, so I wanted to clarify that.

22 Q. And those little nuances matter in language, do they
23 not?

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1 A. Yes, they can.

2 Q. All right. And so you feel the need to clarify that
3 kind of stuff?

4 A. Yes.

5 Q. Even with an English speaker?

6 A. Yes.

7 Q. That is proficient in the English language?

8 A. Yes.

9 Q. Okay. Thank you for that.

10 So Agent McClain was, in fact, not present but was
11 present for the rest of the interviews, correct?

12 A. Yes.

13 LDC [MR. RUIZ]: That's all I have, Judge.

14 MJ [COL POHL]: Thank you. Any redirect?

15 TC [MR. RYAN]: I have no redirect. Thank you, sir.

16 MJ [COL POHL]: Okay. Mr. Ruiz, is Agent Fitzgerald
17 needed to come for the classified session?

18 LDC [MR. RUIZ]: Yes.

19 MJ [COL POHL]: Okay. Agent Fitzgerald, you're going to
20 be temporarily excused again. We're going to discuss some
21 classified information apparently and -- probably later on
22 today with you. So until that time, I remind you, don't
23 discuss your testimony or knowledge in this cases with anybody

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1 except the attorneys from either side or the accused, do you
2 understand that?

3 WIT: Yes, Your Honor.

4 MJ [COL POHL]: Thank you, Agent Fitzgerald. You are
5 excused.

6 [The witness was warned, temporarily excused, and withdrew
7 from the courtroom.]

8 MJ [COL POHL]: Is Agent Perkins ready?

9 TC [MR. RYAN]: I believe so, sir. She might be in the
10 trailer right outside.

11 MJ [COL POHL]: Mr. Ruiz, are you ready for Agent Perkins
12 or Ms. Perkins? Okay. Please call the witness.

13 TC [MR. RYAN]: I'll go find her, sir.

14 MJ [COL POHL]: Wait a minute. Stay right there,
15 Mr. Ryan.

16 Mr. Ruiz, just for planning purposes, how long do you
17 suspect your witness will take?

18 LDC [MR. RUIZ]: Judge, I expect it will be longer than
19 this witness.

20 MJ [COL POHL]: We got time.

21 LDC [MR. RUIZ]: I think they spent maybe six, seven hours
22 on her yesterday.

23 MJ [COL POHL]: I didn't ask you -- I did not ask you to

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1 compare and contrast; I'm simply asking how long.

2 LDC [MR. RUIZ]: It will be lengthier.

3 MJ [COL POHL]: Go ahead, Mr. Ryan.

4 Commission's going to be in recess until the witness shows
5 up.

6 [The R.M.C. 803 session recessed at 1125, 7 December 2017.]

7 [The R.M.C. 803 session was called to order at 1126,
8 7 December 2017.]

9 ABIGAIL PERKINS, civilian, was called as a witness for the
10 prosecution, was reminded of her oath, and testified as
11 follows:

12 **CROSS-EXAMINATION**

13 Questions by the Learned Defense Counsel [MR. RUIZ]:

14 MJ [COL POHL]: Commission is called to order. All
15 parties are again present.

16 Ms. Perkins has retaken the stand. I remind you,
17 ma'am, that you are under oath.

18 WIT: Yes, Your Honor.

19 MJ [COL POHL]: Thank you.

20 Mr. Ruiz.

21 Q. Good morning. Ms. Perkins ----

22 A. Yes.

23 Q. --- when you -- I'll start where kind of you started

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1 off. What is a behavioral analyst? What is that?

2 A. You're looking at behaviors to assess threats to
3 government facilities.

4 Q. Very well. And you also indicated that you had
5 obtained a law degree?

6 A. I -- yes.

7 Q. When did you obtain that law degree?

8 A. I graduated in 1992.

9 Q. Okay. That was prior to joining the FBI in 1995?

10 A. Correct.

11 Q. All right. When you joined the FBI in 1995, did you
12 go right into the counterterrorism unit?

13 A. So I would have started at the Academy. Upon
14 completion of the Academy, I would have been assigned to the
15 New York Office. There was a rotation in the New York Office
16 that you did prior to being assigned to a squad. After that
17 rotation, I would have been assigned to the IRA squad.

18 Q. Do you remember how long it was before you were
19 actually assigned to the IRA squad?

20 A. Probably -- I think we did a three-month rotation on
21 surveillance. I supported a criminal trial. It was probably
22 within the first six or seven months of reporting to the New
23 York Office, and that would have been at the end of October of

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1 '95.

2 Q. Now, I know you referenced your time at the Academy.
3 While at the Academy, did you get training with respect to
4 interrogation techniques?

5 A. We would have had training on
6 interview/interrogation, yes.

7 Q. And can you please describe for us what some of that
8 training would have involved.

9 A. At this point, 20 years later, I couldn't get --
10 wouldn't be able to get into the specifics of what they
11 trained back then. I mean, general interview/interrogation
12 training.

13 Q. Did you have an opportunity to practice, for example,
14 on mock suspects?

15 A. We did.

16 Q. All right. Did the FBI have a particular philosophy
17 as to how to interrogate suspects, for instance, rapport
18 based? Do you recall any of that?

19 A. It would be rapport based.

20 Q. All right. You did, in fact, receive training on
21 interrogation techniques?

22 A. I would have received interview/interrogation
23 training, yes.

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1 Q. Were you trained in the Reid method, that you recall?

2 A. At some point in my career, I can't remember exactly
3 the theory back then, but I did attend the Reid class at some
4 point in my career.

5 Q. From your perspective, what type of factors impact an
6 interrogation?

7 A. That's pretty broad.

8 Q. I don't want to put words in your mouth.

9 A. Like focus -- what's that?

10 Q. Well, let me -- if you want me to be more specific, I
11 can be.

12 A. That would be great.

13 Q. All right. Sure. Does the person's religious
14 background matter?

15 A. I mean, I think I would look at any part of the
16 background of an individual that I'm speaking to, right? What
17 they do for a living; anything I could know about them, I
18 would want to know about them.

19 Q. So in that regard, more information is better?

20 A. The more information I know about the individual,
21 yes, the better.

22 Q. And factors such as religion matter?

23 A. That would matter.

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1 Q. The race of the individual could matter?

2 A. May have cultural implications, yes.

3 Q. The gender could matter?

4 A. It could.

5 Q. Any knowledge that you can obtain about their
6 sociopolitical views could matter, correct?

7 A. Yes.

8 Q. If the person had been previously detained, their
9 detention history would matter?

10 A. Yes.

11 Q. If the person had been treated harshly while detained
12 or tortured, that would matter, correct?

13 A. It could matter.

14 Q. All right. In essence, everything that impacts the
15 person that you're going to interrogate is something that you
16 as an interrogator would want to know before you step into
17 that interrogation room, correct?

18 A. I would generally want to know that, yes.

19 Q. All right. Now, in 1998, as I understood your
20 timeline, you shifted gears from working with the IRA --
21 or not with the IRA, but investigating the IRA, to
22 investigating the embassy bombings that were attributed to
23 al Qaeda, correct?

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1 A. That's correct.

2 Q. And I think you indicated that you were previously in
3 the I-45 squad?

4 A. That's correct.

5 Q. And then you also referenced a second squad, which I
6 believe was I-49?

7 A. There was an I-49 squad. I was not part of that
8 squad.

9 Q. Okay. That's what I wanted to clarify. I know you
10 had referenced that.

11 But at least in 1998, the I-49 squad, to state that
12 one more time, was in charge of investigating bin Laden,
13 correct?

14 A. That's correct.

15 Q. So in 1998, even though you responded as an agent to
16 the embassy bombings, you were not officially on the I-49
17 bin Laden squad, correct?

18 A. Correct.

19 Q. And at that time I think your testimony was you had
20 never heard of al Qaeda?

21 A. I had not.

22 Q. And you had not heard of bin Laden?

23 A. I had not.

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1 Q. You did not know about a 1996 fatwa?

2 A. At that time?

3 Q. Yes.

4 A. '96?

5 Q. In '98 ----

6 A. In '98.

7 Q. ---- when you first responded to the embassy
8 bombings.

9 A. Right. I did not.

10 Q. Or the 1998 fatwa, you did not know about the
11 existence of that as well. And I'm ----

12 A. That I recall, yes.

13 Q. ---- referencing at the very inception of your
14 involvement.

15 A. Yes.

16 Q. I understand. I know later on through time, you get
17 additional information, but I'm focusing right now just on the
18 beginning of your involvement.

19 Had you ever in the course of your FBI career up to
20 that point investigated somebody from the Arabian Peninsula?

21 A. I don't have a specific recollection of having done
22 that.

23 Q. Very well. Had you investigated anyone that was

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1 Arabic?

2 A. It's been a long time. So there may have been
3 support that I provided to other squads during that timeframe.
4 It wouldn't have been my primary responsibility.

5 Q. I understand. Did you feel like you had a
6 familiarity with the culture?

7 A. Of?

8 Q. People from the Arabian Peninsula.

9 MJ [COL POHL]: We're talking about back 20 years ago?

10 LDC [MR. RUIZ]: In 1998, Judge, at the embassy bombing,
11 when she first responded.

12 MJ [COL POHL]: What is the relevance of that to her
13 interrogation of Mr. Hawsawi?

14 LDC [MR. RUIZ]: Well, the relevance of this piece is her
15 testimony in regards to her response to the 1998 embassy
16 bombings. The sum of the parts of what the agents
17 investigate -- experience then becomes -- is important. And
18 at what point she gains this information and this familiarity
19 is important as it relates to an investigation that happens
20 years down the road.

21 I mean, if -- if her testimony were that she had
22 interviewed dozens of people from the Arabian Peninsula, I'm
23 sure Mr. Ryan would have elicited that because they thought it

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1 was important.

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

3 A. Could you repeat the question?

4 Q. Sure. What was your familiarity with the culture?

5 A. So I can't -- I can't say that 19 years ago I could
6 specifically respond to you and say what that would have been.

7 Q. I mean, did you know much about it?

8 A. It wasn't part of my daily work. It could have been
9 part of what I did to assist other agents on other squads.
10 But a specific recollection for me sitting before you right
11 now, I couldn't say.

12 Q. All right. Now, you personally did not and do not
13 speak Arabic?

14 A. I do not.

15 Q. You did not understand Arabic?

16 A. In '98? No.

17 Q. You could not speak it, but you could understand it,
18 right?

19 A. I'm sorry. You will have to repeat that.

20 Q. There's a difference between speaking a language or
21 understanding it, and I'm now asking you if you understand
22 Arabic.

23 A. There may be words that I'm familiar with, but I do

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1 not speak it or generally understand it.

2 Q. In 2007, during the interrogations of Mr. al Hawsawi
3 in early January of 2007, did you have any particular
4 expertise in assessing language proficiency?

5 A. Other than asking what I would believe would be
6 questions to assess that, that would be the manner that I
7 would do it.

8 Q. You did not have an advanced degree in linguistics or
9 language-related issues?

10 A. I did not have an advanced degree in linguistics, no.

11 Q. When Mr. al Hawsawi was interrogated, you did not
12 administer any language comprehension examinations, correct?

13 A. Give him a test?

14 Q. Yes.

15 A. A language test? No, I did not.

16 Q. Because you would not be qualified to administer
17 that, correct?

18 A. I'm not sure what the qualifications are for such a
19 test.

20 Q. Got you. All right. Now, you testified that you
21 were part of the investigation in the embassy bombings,
22 correct?

23 A. Yes.

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1 Q. When you responded, you indicated that essentially,
2 the goal was the who, what, where, when, how. Right?

3 A. Correct.

4 Q. So you responded in a law enforcement capacity?

5 A. Yes.

6 Q. And your goal was to find out who was responsible?

7 A. One of the goals, yes.

8 Q. Okay. You wanted to find out who was criminally
9 responsible for those attacks, correct?

10 A. Who was responsible, period.

11 Q. All right. And at some point when suspects were
12 identified, they would be interrogated?

13 A. They would interviewed/interrogated. If you want to
14 call that interviewed, yes.

15 Q. All right. They were administered Miranda warnings
16 in some instances?

17 MJ [COL POHL]: Did you have any involvement in the
18 interrogations?

19 WIT: Yes, sir.

20 MJ [COL POHL]: Okay. Go ahead. You may answer the
21 question.

22 A. So there was a modified Miranda that had been -- I
23 guess Department of Justice had put together because we were

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1 overseas. So that would have been what -- it wouldn't have
2 been the regular Miranda, but there was a modified Miranda for
3 which these individuals were given.

4 Q. All right. So let me do that a little better. So
5 you actually in fact interrogated Khalfan Khamis Mohamed?

6 A. I interviewed him, yes.

7 Q. Correct. All right. And during the course of your
8 testimony the other day, you testified that you were kept
9 appraised of what other agents did, correct?

10 A. Yes.

11 Q. What do you mean by kept appraised?

12 A. So as one of the agents, you're -- every day you
13 would have a meeting at the end of the day to assess the
14 status of the investigation, information that was being
15 revealed, subjects that were being identified. So ongoing
16 throughout the course of that investigation, we would be being
17 updated on the state of the investigation.

18 Q. Another one of your goals when you responded was
19 evidence collection?

20 A. Correct.

21 Q. And that's evidence that would ultimately be used in
22 the prosecution of these men, correct?

23 A. Either in the prosecution or to help assist in

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1 furthering the investigation.

2 Q. But much of the evidence that was collected was
3 ultimately used in the prosecution of these men in the Embassy
4 Bombings trial, correct?

5 A. We did collect evidence and use them in the trial,
6 yes.

7 Q. In terms of Mr. Khalfan Khamis Mohamed, he received
8 three separate rights advisements from you, correct?

9 A. So he would have received one when he was -- when I
10 first interviewed him, received one en route back to the
11 United States, and I'm trying to recall if we had another
12 opportunity to speak to him. So I can't recall specifically,
13 but I know there were at least those two.

14 Q. So he received at least two; the first one being when
15 he was in the custody of South African authorities in Cape
16 Town, correct?

17 A. They would have given their own.

18 Q. All right. Are you saying you did not give him a
19 rights advisement?

20 A. They gave him a rights advisement. When I talked to
21 him, I gave him a rights advisement.

22 Q. Even though he was in their custody?

23 A. That's correct.

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1 Q. All right. And when you boarded the plane bound for
2 the United States, you gave him a different rights advisement,
3 correct?

4 A. That's correct.

5 Q. And that point, what was different about it?

6 A. He was in the custody of the United States at that
7 point.

8 Q. Well, I understand that, but what was different about
9 the rights advisement?

10 A. Oh, it was -- I believe the difference was in that
11 because he was not in the United States and an attorney was
12 available, it was the modified advice, initially. On the
13 plane, would have been the regular Miranda advice, he had the
14 right to an attorney.

15 Q. Right to an attorney, the full rights?

16 A. Yes.

17 Q. All right. And at that point, you were on a military
18 plane?

19 A. I'm not sure I can answer that.

20 Q. Okay.

21 MJ [COL POHL]: You were on a plane?

22 WIT: Yes, sir.

23 MJ [COL POHL]: Okay.

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1 Q. Bound for the United States?

2 A. Correct.

3 Q. In U.S. custody?

4 A. Yes.

5 Q. And he was in U.S. custody?

6 A. Yes.

7 Q. All right. Criminal warrants had been issued for his
8 arrest, correct?

9 A. Yes.

10 Q. And he was scheduled for prosecution in New York?

11 A. Meaning a trial date?

12 Q. No. He was to be prosecuted in New York?

13 A. That's correct.

14 Q. All right. In federal court?

15 A. Yes.

16 Q. You indicated that when you responded to the
17 bombings, your period on the ground was roughly 30 to 40 days
18 at a time?

19 A. Typically.

20 Q. All right.

21 Do you recall what the longest period may have been?
22 For example, were you there for six months at a time?

23 A. No.

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1 Q. Were you there for a year at a time?

2 A. No.

3 Q. All right. So it was more in the course of maybe a
4 couple of months at a time?

5 A. That's correct.

6 Q. Okay.

7 A. A month, month and a half, two months, possibly.

8 Q. Is it more accurate to say maybe you were TAD, on
9 temporary duty? Or was the term of art a deployment for you
10 all, for FBI?

11 A. I don't know that would matter either way, but it
12 would -- we were deployed and it was an on-temporary basis.

13 Q. All right. Fair enough. When you were investigating
14 the embassy bombings, who did you report to?

15 A. Like a supervisor?

16 Q. Meaning, did you report to the FBI?

17 A. I worked for the FBI, yes, so I would have ----

18 Q. Okay. Would you report to any other governments?

19 A. Report? Can you define that for me?

20 Q. Well, who was your chain of command?

21 A. It was an FBI chain of command.

22 Q. All right. Did anybody else have authority over how
23 you carried out your FBI duties? For instance -- let me ask

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1 you the question this way: If there were to be a lieutenant
2 colonel who gave you an order, say an Army lieutenant colonel,
3 would you have had to follow that as an FBI agent when you
4 were investigating the embassy? Was that a person in your
5 chain of command?

6 A. Had I had received such an order, I would likely go
7 to my chain of command to ensure that whatever was being asked
8 was being authorized as well by my chain.

9 Q. In other words, you weren't there with a military
10 unit, taking orders from military unit, correct?

11 A. I was not.

12 Q. All right. In terms of how you memorialized your
13 efforts during that investigation, did you use 302s?

14 A. Yes.

15 Q. All right. To your knowledge, did other agents who
16 were also working the investigation use 302s?

17 A. Yes.

18 Q. At some point in the investigation your role changed
19 from just an agent -- not just an agent, but from an agent to
20 a supervisory agent, correct?

21 A. Well, it would be a case agent, not a supervisory --
22 a supervisory would be a different position. But a case agent
23 would be in charge of the investigation, leading the

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1 investigation, assisting in that ----

2 Q. All right.

3 A. ---- along with others.

4 Q. So your status changed?

5 A. It did.

6 Q. And from what I heard you describe, it seemed like
7 you took on more supervisory duties.

8 A. Managing the case, not -- managing the case, I would
9 say your responsibilities are greater. I'm not -- I was not a
10 supervisor.

11 Q. I understand. So you took on more management
12 responsibilities?

13 A. Of the case, not of -- right. Not -- not an official
14 supervisory position. I had a supervisor that I reported to.
15 I was a case agent with others. We were responsible for the
16 management and direction of the case.

17 Q. When you mean the case, you mean the Embassy Bombings
18 case?

19 A. Yes.

20 Q. And there were other three -- three other
21 counterparts that basically had the same position you did?

22 A. There were two others in Tanzania and three in Kenya.

23 Q. All right. And it's fair to say that you

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1 communicated with them often to keep apprised of their
2 investigative efforts so you could cooperate ----

3 A. Yes.

4 Q. ---- and collaborate when necessary, correct?

5 A. Yes.

6 Q. It would have been important for you to have eyes and
7 ears, so to speak, on what other agents were doing in
8 different aspects of the investigation, but nevertheless, the
9 same investigation?

10 A. Yes.

11 Q. And to that extent, did you have the opportunity to
12 review their 302s?

13 A. I would.

14 Q. Okay. The reason you would have done that would be
15 because it would be a quick way to learn what other
16 investigative efforts were ongoing, correct?

17 A. Yes.

18 Q. Okay. Now, in this instance, the Embassy Bombing
19 case, there were, in addition to Khalfan Khamis Mohamed, there
20 were three other individuals who ultimately were tried in
21 federal court in New York, correct?

22 A. Yes.

23 Q. And that would have been Mohammed Saddiq Odeh?

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1 A. Odeh.

2 Q. Odeh. Thank you. Mohamed Rashed Daoud Al-Owhali?

3 A. Yes.

4 Q. And Walid al Hajj, correct?

5 A. Walid al Hajj, yes.

6 Q. And all of these men were identified in the course of
7 your investigation as having some varying degree of
8 responsibility for the embassy bombings?

9 A. Mine or others, yes.

10 Q. Right. All were extradited to the United States on
11 criminal warrants?

12 A. Walid was in the United States at the time.

13 Q. Okay.

14 A. The other three would have been maybe rendered or
15 extradited. I think rendered is maybe the term.

16 Q. Now, at least in Mr. Mohamed's -- Khalfan Khamis
17 Mohamed, there were actual criminal warrants issued, correct?

18 A. I'm sorry, could you repeat that?

19 Q. Sure. At least in Mr. Khalfan Khamis Mohamed's case,
20 there were criminal warrants issued for his arrest?

21 A. Correct.

22 Q. And you, in fact, discussed that with him when you
23 were -- when you first met him in Cape Town, South Africa,

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1 correct?

2 A. Yes.

3 Q. So what I was trying to ask is, for the remaining
4 accused, they were also -- there were also criminal warrants
5 that were issued for their arrest, correct?

6 A. Correct.

7 Q. And ultimately, whether they were rendered or
8 extradited, they were brought back to stand trial in the
9 United States.

10 A. Correct.

11 Q. In a federal court.

12 A. Yes.

13 Q. On criminal violations.

14 A. Yes.

15 Q. All right. In fact, you testified in 2001 in federal
16 court in the Embassy Bombings case?

17 A. Yes.

18 Q. And ultimately, all four of these men were convicted
19 in connection to their involvement to the Embassy Bombings
20 case?

21 A. Yes.

22 Q. With respect to Mr. Khalfan Khamis Mohamed, when you
23 advised him of his rights, you not only did that in English,

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1 but you also provided him a copy in the Swahili language,
2 correct?

3 A. I did.

4 Q. Why did you do that?

5 A. To make sure that he understood.

6 Q. You asked Mr. Mohamed whether he had ever signed --
7 whether he had ever sworn bayat, correct?

8 A. Yes.

9 Q. Why did you ask him that?

10 A. It would have defined his role in the group.

11 Q. How so?

12 A. The extent of his commitment that he had given to the
13 group.

14 Q. Can you -- if he had, in fact, sworn bayat, what
15 would that mean?

16 A. As -- my understanding is that by swearing bayat, you
17 are obligated in some respects to do what they tell you.
18 You -- you're defining your obligation to the group, but
19 you're also giving up even some authorities to maybe do other
20 things or refuse what's being asked of you.

21 Q. So you're becoming a full-fledged al Qaeda member?

22 A. I would say that's a -- yes.

23 Q. Now, Mr. Mohamed himself responded that he did not

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1 know the word bayat meant?

2 A. Yes.

3 Q. He never heard of it?

4 A. Yes.

5 Q. In fact, he didn't even really know of the name of an
6 organization by al Qaeda?

7 A. I think that's correct.

8 Q. He told you that he thought it was some kind of
9 formula or system?

10 A. I don't remember the specifics of what he said.

11 Q. I'll come back to that, I've got a -- but you did
12 testify in the Embassy Bombing case, correct?

13 A. I did.

14 Q. And if you had an opportunity to review the specific
15 portion of that transcript in relation to what his response
16 was to his knowledge of al Qaeda, would that refresh your
17 memory?

18 A. It would, if I spoke to it.

19 Q. So when I find it, I will bring it to your attention.

20 A. Okay.

21 Q. With respect to Mr. Mohammed Sadiq Odeh, 302s were
22 generated in regards to the interrogation of Mr. Odeh as well,
23 correct?

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1 A. Yes.

2 Q. Mr. Odeh -- Odeh was also Mirandized, correct?

3 A. I believe along the same, a modified Miranda.

4 Q. Let me ask you if any of this rings a bell. Mr. Odeh
5 was advised that if he chose to speak, anything he said could
6 be used against him in a U.S. court or elsewhere. Do you
7 recall that?

8 A. Yes.

9 Q. All right. He was further advised that in the United
10 States, he would have a right to talk to a lawyer?

11 A. Yes.

12 Q. To get advice before questioning?

13 A. Yes.

14 Q. And that he could have a lawyer present during any
15 questioning?

16 A. Yes.

17 Q. And that in the U.S., if he could not afford a
18 lawyer, one would be provided to him should he decide?

19 A. Yes.

20 Q. Do you recall that he was advised of that prior to
21 being transported to the United States?

22 A. I wasn't in the interview, but I know that modified
23 Miranda rights were provided to him.

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1 Q. All right. Were you aware -- do you recall that
2 those warnings were provided in both English and Arabic?

3 A. I don't have a specific recollection.

4 Q. Okay. Would it surprise you if he had been given an
5 Arabic version?

6 A. It wouldn't necessarily surprise me.

7 Q. In fact, you used the Swahili version because you
8 wanted to make sure Mr. Mohammed understood you, correct?

9 A. I used the Swahili version in mine, yes.

10 Q. In his 302, Mr. Odeh indicates that at the time of
11 his interrogation, he estimated al Qaeda's membership to be
12 roughly 150 members?

13 A. A specific recollection of what he told them, I don't
14 have a specific recollection of a specific number that he may
15 have indicated.

16 Q. What would have been your assessment of that number
17 at that time, 150 members? Does that comport with what your
18 understanding was of the al Qaeda organization in 1998?

19 A. In 1998?

20 Q. Yes.

21 A. I didn't have a -- when I first responded to the
22 attacks, I didn't have the background with regard to al Qaeda
23 or the size.

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1 Q. Okay. During the course of your investigation, did
2 your knowledge in regards to al Qaeda increase?

3 A. Yes.

4 Q. In fact, I think you testified that you had learned
5 about al Qaeda's organization and structure?

6 A. Yes.

7 Q. So looking back, when Mr. Odeh said -- assuming he
8 said this for purposes of the question -- there were 150
9 members, does that comport with the knowledge that you would
10 have gained during the course of your
11 interrogation/investigation?

12 A. I would have at some point read his -- the interview
13 results for sure, yes, and learned that. If you represent
14 that that's what he said, I would have learned that.

15 Q. No, I guess what I'm actually really trying to get at
16 is your knowledge of the size and membership of al Qaeda and
17 whether you agree or disagree that at that time there would
18 have been 150 members.

19 A. I don't know if -- I don't know that I would know
20 that it ----

21 Q. Well now ----

22 A. ---- the truthfulness of his statement.

23 MJ [COL POHL]: Ms. Perkins, I think we're talking across

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1 each other. Just -- don't worry about the statement.

2 Based on your experience and investigation, do you
3 have an idea of the size of al Qaeda's membership?

4 WIT: In '98, sir?

5 MJ [COL POHL]: Either '98 or up until 2001.

6 WIT: I guess I would say that there were a number of
7 cooperators that would have provided that sort of background
8 in terms of the structure, so it would be a fluctuating number
9 for me to sit here and say that that's consistent. I mean,
10 it's difficult for me to do. A lot of information would have
11 been provided during the course of the investigation to sort
12 of assess structure and size.

13 MJ [COL POHL]: Okay. Let me try it one more time, and
14 then we're going to break for lunch.

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

16 MJ [COL POHL]: Okay. Based on your experience, not on
17 this, okay, do you have an idea of the size of al Qaeda -- I'm
18 talking about then-Special Agent Perkins' idea of the size of
19 al Qaeda in '98 to 2001? Or was that figure never ----

20 WIT: I would say I wouldn't have a definitive number for
21 you, but probably an ever-changing number, and certainly
22 support growing for that subsequent to the East Africa attacks
23 leading up to the September 11 attacks, the number increasing,

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1 the support increasing for the size of the group.

2 MJ [COL POHL]: Okay. I'm going to try one more time.

3 But you don't have an exact -- you don't have an approximate
4 number or anything else?

5 WIT: I would be hard-pressed to give you a precise
6 number.

7 MJ [COL POHL]: Okay. Great. We'll leave it at that for
8 lunch and we'll recess until 1315. The commission is in
9 recess.

10 [The R.M.C. 803 session recessed at 1200, 7 December 2017.]

11 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1351,
2 7 December 2017.]

3 MJ [COL POHL]: Commission is called to order. Since we
4 recessed before lunch, any changes, General Martins?

5 CP [BG MARTINS]: No changes to counsel present, Your
6 Honor.

7 MJ [COL POHL]: Mr. Nevin?

8 LDC [MR. NEVIN]: Yes. Mr. Sowards is not present and
9 will be out for the rest of the afternoon.

10 MJ [COL POHL]: Ms. Bormann?

11 LDC [MS. BORMANN]: Captain Brady, Major Seeger, and
12 Mr. Perry are doing other matters, as I advised the court
13 earlier.

14 MJ [COL POHL]: Okay. Mr. Harrington?

15 LDC [MR. HARRINGTON]: No changes for us, Judge.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: Your Honor, James Connell and Alka
18 Pradhan on behalf of Mr. al Baluchi.

19 I don't know that anyone has notified the victim
20 family members or the media or the public that we are
21 proceeding. Well, I'll note for the record that there's
22 nobody in the gallery. They're the reason that this is a
23 public hearing, so ----

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1 TC [MR. RYAN]: We have notified the victim family
2 members, Your Honor.

3 LDC [MR. CONNELL]: Any observers?

4 MJ [COL POHL]: Just while we're on that topic, does --
5 I'm assuming the normal feed is going to the press area?

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

7 LDC [MR. CONNELL]: Since nobody else is talking, I'll
8 talk, which is that I note our objection on the First and
9 Sixth Amendment grounds to holding what is essentially a
10 closed hearing by logistically arranging things so that the
11 members of the nongovernmental observers and the victim family
12 members can't observe.

13 MJ [COL POHL]: Okay. Your objection is noted and
14 granted. We will wait until spectators return.

15 Commission is in recess.

16 [The R.M.C. 803 session recessed at 1354, 7 December 2017.]

17 [The R.M.C. 803 session was called to order at 1400,
18 7 December 2017.]

19 [Abigail Perkins, resumed her seat on the witness stand.]

20 MJ [COL POHL]: Commission is called to order. I will
21 just note for the record that some members of the public -- I
22 don't know what their categories are, because I quite frankly
23 think they all should be treated the same as far as a public

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1 trial -- have returned and are observing from the spectator
2 area.

3 Ms. Perkins is on the stand. And, Mr. Ruiz, your
4 questions.

5 **CROSS-EXAMINATION CONTINUED**

6 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

7 Q. Welcome back, Ms. Perkins. Earlier we were talking
8 about Khalfan Khamis Mohamed, which is one of the embassy
9 bombing suspects who was later convicted in New York. I asked
10 you the questions in regards to his knowledge of al Qaeda. Do
11 you recall that?

12 A. Yes.

13 Q. And I asked if you recalled that when you brought
14 that up, he didn't even know or didn't seem to have an
15 understanding of what al Qaeda was, correct?

16 A. Yes.

17 Q. And then I followed that up with saying that he
18 thought it was actually some kind of a formula or system?

19 A. Yes.

20 MJ [COL POHL]: Mr. Ruiz, what relevance is what this
21 person thought about al Qaeda in 1998 to the issue before me?

22 LDC [MR. RUIZ]: The issue of hostilities?

23 MJ [COL POHL]: Yeah. We're talking about this person.

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1 Okay. You said he wasn't a member of al Qaeda. After that,
2 aren't we done?

3 LDC [MR. RUIZ]: Right. I mean, in terms of what he
4 believed it was, I think it gives context to argument that
5 Major Wilkinson is going to make to the commission in regards
6 to what that means in the hostilities question. It's directly
7 relevant.

8 MJ [COL POHL]: No, but what I'm saying, again, he says, I
9 didn't know what al Qaeda is. Well, now we're done, right?

10 LDC [MR. RUIZ]: Well, but the agent asked a follow-up
11 question and his answer was, "I thought it was some kind of a
12 formula."

13 MJ [COL POHL]: Okay. So now we're done.

14 LDC [MR. RUIZ]: That's it.

15 MJ [COL POHL]: Okay. Move on.

16 LDC [MR. RUIZ]: But you see the relevance, right?

17 MJ [COL POHL]: I'll give it the weight I think it
18 deserves.

19 LDC [MR. RUIZ]: Okay.

20 Q. Agent Perkins, we also talked about an individual by
21 the name of Mohamed Rashed Daoud Al-Owhali, do you recall
22 that?

23 A. Yes.

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1 Q. He is also one of the four men who was implicated and
2 later convicted in the Embassy Bombings case; correct?

3 A. He was.

4 Q. Now, you did not personally interrogate Mr. Al-Owhali
5 but you were appraised of other agents' efforts in regards to
6 this investigation, correct?

7 A. I did not interview him, but yes, I was aware of the
8 results.

9 Q. I'm sorry?

10 A. I was aware of the results.

11 Q. And you reviewed the 302s that regarded those
12 investigative efforts, correct?

13 A. Along the way, yes.

14 Q. All right. And now, Mr. Daoud Al-Owhali, in fact,
15 received a full Miranda warnings and full Miranda rights,
16 correct?

17 A. I believe he also received the modified, initially.

18 Q. All right. Would reviewing the FBI 302 that was
19 prepared in this case refresh your recollection as to what
20 exactly Mr. Al-Owhali was read?

21 A. Yes.

22 LDC [MR. RUIZ]: Judge, I would like to present to the
23 witness ----

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1 MJ [COL POHL]: They're in the documents you already
2 submitted. I already have them before me. Whether this
3 witness recalls or not ----

4 LDC [MR. RUIZ]: Am I going to get to ask some questions
5 here?

6 MJ [COL POHL]: You've spent a lot of time asking
7 questions, and I've given you a lot of leeway. What I'm
8 saying is that we're not going to do this incessantly. Okay.

9 What's the relevance of a Miranda warning on this
10 suspect in 1998 ----

11 LDC [MR. RUIZ]: Judge ----

12 MJ [COL POHL]: ---- as opposed to a non-Miranda warning?

13 LDC [MR. RUIZ]: I've asked a portion or a fragment of the
14 time that the government spent on this witness.

15 MJ [COL POHL]: I'm not -- answer my question, don't
16 deflect to the government, how much time they spent. I'm
17 talking about this one. You have gone through each of these
18 witnesses. I'm asking you: What's the relevance of the
19 rights warnings of the witnesses in 1998 -- or the accused in
20 1998 to the issue before me today?

21 LDC [MR. RUIZ]: The existence of hostilities and whether
22 we approached this as a law enforcement effort or a military
23 operation? Really? It's directly relevant, Judge, that we

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1 investigated this as a law enforcement criminal action and
2 provided full Miranda warnings and rights to these men.

3 MJ [COL POHL]: Yeah, and what I'm simply saying is that
4 you've submitted the 502s on all four of these guys. Okay.
5 And all four of these guys, they explained what Miranda
6 warnings they got and didn't get. So I already got it ----

7 LDC [MR. RUIZ]: So because ----

8 MJ [COL POHL]: No. Let me finish. I'm just saying
9 you're simply repeating yourself with this witness. This
10 witness may or may not know but it doesn't make any difference
11 whether she knows or not. Now you're going to refresh her
12 memory with a document that I already have. My memory doesn't
13 need refreshing because I've already read it. And you already
14 got it before me.

15 LDC [MR. RUIZ]: So the prosecution has provided hundreds
16 of documents to you and then asked questions about them. You
17 already had the documents, so why even ask questions about
18 them? I didn't see you having that discussion with the
19 prosecution, Judge. Why are we having this discussion?

20 MJ [COL POHL]: Mr. Ruiz, we're not going to play this
21 game.

22 LDC [MR. RUIZ]: It's not a game. It's about fairness.

23 MJ [COL POHL]: I'm simply telling you this. You think

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1 it's being unfair, fine. You're entitled to your opinion, but
2 it's my courtroom.

3 LDC [MR. RUIZ]: Actually, it's the United States'
4 courtroom, Judge. It's the people's courtroom.

5 MJ [COL POHL]: If -- just listen carefully to what I'm
6 going to say. Is I establish the rules here. And you can
7 either choose to follow my rules, or you can stop your
8 cross-examination. That's going to be your choices. Do you
9 understand that?

10 LDC [MR. RUIZ]: I understand that your rule is if I've
11 submitted an exhibit, I'm not allowed to ask questions about
12 it.

13 MJ [COL POHL]: If that's what you understand it to be, I
14 cannot speak to how you understand it. I'm telling you is
15 when I tell you to stop that line of questioning because it is
16 asked and answered eight times or I already have the
17 information, I don't need it again, then you move on. That's
18 all I'm saying.

19 LDC [MR. RUIZ]: This is a separate defendant, Judge. And
20 with respect to the other questions, she said it was a
21 modified rights waiver. This is a full Miranda waiver that
22 was given to a person who was in custody of another
23 government. That's directly relevant to this issue.

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1 MJ [COL POHL]: Mr. Ruiz, you -- let me just make this --
2 understand something because I don't want either of us to get
3 upset, because I'm not going to get upset here. I'm just
4 going to tell you, is I'm going to rule and you're going to
5 accept the ruling. You don't have to agree with it, you have
6 to accept it, though. You have to accept it. And if you
7 choose not to accept my rulings, then I'm going to stop your
8 cross-examination. And I'm not going to listen to an argument
9 again and again after I've already ruled. That's what I'm
10 saying.

11 So I'm telling you right now is, is that any further
12 inquiry to this witness on what's already in those statements
13 that you submitted to me is not to be allowed and you are to
14 move on to another area.

15 LDC [MR. RUIZ]: So any inquiry regarding the 1998 embassy
16 bombings I can't make because, if that's referenced in the
17 302, I can't ask clarifying questions of this witness;
18 that's ----

19 MJ [COL POHL]: That's ----

20 LDC [MR. RUIZ]: ---- your ruling?

21 MJ [COL POHL]: See? This is the way it's going to work.
22 I told you, I've got those statements. Okay. This witness
23 took one of the statements but didn't take them all. Okay.

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1 We're now done here. I'm telling you what the rules
2 are. We're done with those -- if it's in those statements,
3 I've got it. If it's something else, you can ask. But if
4 it's in the statements, I got it. And just make it clear,
5 because -- that when I do this, when I say no more, I mean no
6 more. I don't mean no more and another response. You've got
7 my ruling. Move on.

8 LDC [MR. RUIZ]: I understand your ruling, Judge; however,
9 when I make an argument, you have to understand as well that
10 I'm not just making that argument to you. And I'm preserving
11 that record for other judges down the line. Right now, what I
12 see this is an infringement on the Sixth Amendment right to
13 cross-examination.

14 MJ [COL POHL]: You've made your objection. You have made
15 it again and again. And now -- now we're almost done here,
16 Mr. Ruiz. Is you're permitted to make a relevant record, as I
17 determine its relevance. That's the way it is. You're not
18 determining -- there's no rule that I'm aware of that an
19 attorney decides I want to make a record and that's free reign
20 to put whatever you want on the record, no matter how
21 irrelevant it may be to the presiding judge. So I don't buy
22 that argument.

23 You've made your objection. You're saying I'm

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1 violating your Sixth Amendment right. Got it. Okay.

2 LDC [MR. RUIZ]: Well, actually not my Sixth Amendment
3 right ----

4 MJ [COL POHL]: Well, your client's Sixth Amendment right.

5 LDC [MR. RUIZ]: ---- it's my client's Sixth Amendment
6 right. And it's cross ----

7 MJ [COL POHL]: I got it. I got it. But now let's be
8 clear. I've ruled on this. We're now done with this. Move
9 on to something else or sit down.

10 LDC [MR. RUIZ]: Very well.

11 **Questions by the Learned Defense Counsel [MR. RUIZ]:**

12 Q. You indicated that during the course of your
13 investigation with the embassy bombing, you also became aware
14 of the 1996 fatwa which you declared -- you referred to as a
15 declaration of war, correct?

16 A. Yes.

17 Q. And also a 1998 fatwa that you described as a
18 declaration of war?

19 A. Fatwa, yeah.

20 Q. Correct?

21 A. I described it as a fatwa, yes.

22 Q. Understood. Nevertheless, the four men who were
23 identified in the Embassy Bombings case were ultimately tried

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1 in a federal courtroom in New York, correct?

2 A. They were.

3 Q. And they were convicted of violations of federal
4 laws?

5 A. They were.

6 Q. Domestic laws?

7 A. Federal laws.

8 Q. During the course of your involvement with the 9/11
9 case, you have also had an opportunity to testify on a number
10 of other cases that relate to 9/11, correct? For example, you
11 testified in the grand jury proceedings of Zacarias Moussaoui
12 in 19 -- excuse me, in 2001, correct?

13 A. I did.

14 Q. And you also testified in the grand jury proceedings
15 of Zacarias Moussaoui in 2002, correct?

16 A. I recall one time. I don't know that -- if there
17 was -- I don't know -- I can't say that -- I recall a second
18 time. I know there was one time.

19 Q. And those were criminal proceedings, correct?

20 A. Grand jury proceedings, yes.

21 Q. All right. Ultimately, those were charges in federal
22 courts?

23 A. Yes.

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1 Q. And Mr. Moussaoui was tried and convicted in a
2 federal court?

3 A. He pled guilty.

4 Q. Okay. You also testified in a grand jury proceeding
5 in December of 2009 in regards to the 9/11 case, correct?

6 A. In what proceeding?

7 Q. Grand jury proceeding.

8 A. December of 2009 with regard to ----

9 Q. To this case, the 9/11 case.

10 A. In a grand jury? I don't recall that.

11 Q. Okay. I'll come back to that.

12 And finally, you testified in 2001 in the actual
13 Embassy Bombings case, correct?

14 A. I did.

15 Q. Now, you indicated when -- that when September 11
16 happened, essentially all of the resources of the FBI were
17 directed to this investigation, correct?

18 A. Yes.

19 Q. And that the focus of the investigation was to
20 determine the who, where, when, what, and why, correct?

21 A. Yes.

22 Q. And to use law enforcement methods, I think was the
23 language you used, to identify who was responsible and bring

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1 them to justice, correct?

2 A. Law enforcement methods were used.

3 Q. And some of the efforts that you recounted were crime
4 scene investigation?

5 A. Yes.

6 Q. Interviews with witnesses that may have had
7 information?

8 A. Yes.

9 Q. Review of relevant records, such as business records?

10 A. Yes.

11 Q. These were all the instrumentalities of the FBI as it
12 pursued a law enforcement investigation, correct?

13 A. Some of them.

14 Q. What were some of the other ones?

15 A. Your imagination could lead you in whatever
16 direction. I mean, there were lots of records. Maybe airline
17 records, post office records, banking records, passenger name
18 records, any record that would be relevant from any business,
19 any government entity, what have you.

20 Q. You indicated you were assigned the financial aspects
21 of -- to the financial aspects of the 9/11 investigation,
22 correct?

23 A. Yes.

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1 Q. And can you elaborate on that?

2 A. To pursue the financing surrounding the 9/11
3 operation. So any impact from anyone with regard to finances,
4 who did the financing, tracking banking transactions, bank
5 accounts, bank documents, bank transfers, bank wires, anything
6 like that that might help to identify who had provided the
7 money and who was involved.

8 Q. Very well. So that was the focus of -- the primary
9 focus of your investigative efforts?

10 A. I did many things. That was one of the many things
11 that I did.

12 Q. All right. Now, you indicated that Mr. al Hawsawi
13 was identified within the first month or two of your working
14 the case, correct?

15 A. That's my recollection, yes.

16 Q. I think you also testified that Boston was pretty
17 ready to indict Mr. al Hawsawi, correct?

18 A. I understood they were prepared to do so.

19 Q. So at least as -- very early on in the investigation,
20 you knew that somebody by the name of Mustafa al Hawsawi was a
21 person of interest ----

22 A. Yes.

23 Q. ---- in the investigation? What efforts did you make

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1 to attempt to apprehend him?

2 A. We would have immediately looked for any travel, any
3 use of a passport, try to identify any names or aliases he
4 might have used, checked records internationally, checked
5 incoming records, any cooperation from other countries. So we
6 would have pursued all avenues to attempt to locate him as a
7 person of interest.

8 Q. I think you indicated that documentary records were
9 collected prior to 2003, correct?

10 A. Yes.

11 Q. Did you share the fruits of those investigative
12 efforts with other United States agencies who were also
13 working the case?

14 A. The banking records themselves?

15 Q. We can start with the banking records, yes.

16 A. I don't recall sharing the banking records
17 themselves. We may have provided information to other
18 agencies. If you have a specific agency you're ----

19 Q. Just the fact that you had -- well, let's go back to
20 the identity and the fact that this was a person of interest,
21 right? You've identified a person by a specific name. Do you
22 shoot out that information to other agencies, say, hey, we've
23 identified this person as a person of interest; if you come

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1 across any information, this is somebody we're looking for.

2 Did you do that once he was identified?

3 A. So there probably would have been international, like
4 an INTERPOL sort of notice to attempt to track any information
5 we had known about his name and passport information to locate
6 him. So other agencies -- you know, we would have -- we would
7 have conducted checks and presumably would have told
8 immigration authorities the same; like INS stops and that sort
9 of thing, would be the normal course.

10 Q. What about agencies such as the CIA? Did you
11 coordinate with them and provide them information that you had
12 developed during the course of your investigation?

13 A. Yes, that would be shared.

14 Q. All right. What would have been the method of
15 sharing -- I know you said INTERPOL was one method. What
16 would have been your method of sharing information with the
17 Central Intelligence Agency?

18 A. Likely we would have -- and I forget the name of the
19 document that we share from us to them, but there's a
20 particular means to do that. There are people from the Agency
21 that would sit on our task forces as well as FBI personnel on
22 their -- in their space. So likely we would share it through
23 that method. But there would be a means to commune that

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1 directly to them.

2 Q. Do you remember if you specifically shared any such
3 information with the Central Intelligence Agency?

4 A. I would have shared information, the specifics of
5 which sitting here now I probably couldn't delineate for you.
6 But I'm certain that I shared information that I developed in
7 the investigation with them.

8 Q. Would that have been something you documented, for
9 instance, in a record of investigation, the fact that you
10 shared information with another agency?

11 A. It would be in a document that we would use to share
12 information to them.

13 Q. So since your involvement in this investigation which
14 began in 2001 and has extended through the course of many,
15 many years, what was the primary method by which you
16 documented your investigative efforts in the 9/11
17 investigation?

18 A. If I was conducting an interview of a witness, it
19 would be an FD-302. If I was conducting other investigative
20 efforts that I'm documenting sort of in summary style the
21 investigative efforts and what had been done, I might have
22 done so in an electronic communication.

23 Q. Would this all have gone into one specific folder or

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1 database that related to this investigation?

2 A. It would be sent to the file for the major case,
3 PENTTBOM.

4 Q. Understood. So there was one central file called
5 PENTTBOM?

6 A. Yes.

7 Q. Okay. When did you first learn that Mr. al Hawsawi
8 had been arrested, apprehended?

9 A. I would say it was likely shortly after he had been
10 located and arrested.

11 Q. Okay. Do you recall how you -- how you were notified
12 or how you learned that?

13 A. I don't specifically.

14 Q. Did you know where he was apprehended?

15 A. In the country, yes.

16 Q. All right. And I believe you indicated it was
17 Rawalpindi, Pakistan, correct?

18 A. Yes.

19 Q. Without saying who, did you know by whom he was
20 apprehended?

21 A. Specifically at that time, I can't say.

22 Q. All right. But since then, you learned by whom he
23 was apprehended, correct?

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1 MTC [MR. TRIVETT]: Objection, relevance.

2 MJ [COL POHL]: Overruled. You may answer the question,
3 assuming it doesn't implicate classified information.

4 Ms. Perkins, just so we're clear here, because this
5 came up with a prior testimony that -- you have a good idea
6 what's classified and what's not classified; and any question
7 that you think may call for a classified answer, don't
8 respond, so we can deal with it other ways. But I want to
9 make sure that just because we're here in an open session and
10 you get the question, that does not mean that that rule still
11 doesn't apply.

12 Okay. Ask the question again as you worded it.

13 Q. So I think that you've indicated at the time you
14 can't recall if you knew at the time, but at some point later
15 in time did you learn by whom Mr. al Hawsawi had been
16 apprehended?

17 A. I'm distinguishing in my mind between the CIA and in
18 collaboration with another government. So not having been
19 there at the time, whether it was the CIA alone or the CIA in
20 collaboration with Pakistani authorities.

21 Q. Understand. All right. But it was not the FBI?

22 A. I'm not aware of an FBI presence at his capture.

23 Q. Once you learned that Mr. al Hawsawi had been

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1 apprehended and was being held in custody, did you seek to
2 have access to him?

3 A. In person?

4 Q. Yes.

5 A. I would have expressed my interest in doing so to my
6 chain of command.

7 Q. Okay. Were you granted access to Mr. al Hawsawi in
8 person?

9 A. When he was first arrested?

10 Q. Yes.

11 A. I was not.

12 Q. What about between 2003 and 2006?

13 A. I was not.

14 Q. You were not granted ----

15 A. I was not granted access.

16 Q. In person?

17 A. In person.

18 Q. Did you have the opportunity to send information or
19 questions to the people who were holding Mr. al Hawsawi?

20 A. Yes.

21 Q. Did you do that?

22 A. There were so many subjects, so I'm going to say that
23 that -- I'm pretty sure that I did that with him, proffered

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1 questions.

2 Q. Sorry. Say that one more time.

3 A. Proffered questions.

4 Q. That you would ask somebody to ask him, correct?

5 A. Yes.

6 Q. Would you have documented those types of questions?

7 A. They would have been placed in a CIA cable that would
8 have gone to them documenting that request, yes.

9 Q. I understand. I understand there would have been a
10 CIA cable. Internally for the FBI, would you have documented
11 that either in a 302 or any other means of documentation?

12 A. I wouldn't have written a 302. What I would have
13 done, like I said -- maybe I'm getting the terminology
14 wrong -- teletype or a cable to the agency. So there was a
15 delineated process by which we shared information to them. I
16 would have used that process, not a 302.

17 Q. So would there have been a copy of that kept in the
18 PENTTBOM investigative file folder?

19 A. Yes.

20 Q. Did you ever have the opportunity to see
21 Mr. al Hawsawi, although not in person, by other means? For
22 instance, VTC or video? Did you ever have an opportunity to
23 witness his interrogations?

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1 A. No.

2 Q. And by that I was referring to the 2002 -- excuse me,
3 2003 to '6 timeframe.

4 A. I was not.

5 Q. Now, I know you said you sent proffered questions.
6 Did you receive back any information regarding what
7 information was being extracted from Mr. al Hawsawi during the
8 2003 to 2006 timeframe?

9 A. It's likely that I would have gotten a response.
10 Sitting here today, I cannot recollect for you that timeframe
11 and the back and forth. I would have been involved in the
12 investigation up until about 2003 and then departed back to
13 New York and took another position. So at that point in time,
14 I'm really away from the 9/11 investigation directly.

15 Q. Okay. Well, let me just ask you about that. So you
16 come back in 2003. Am I understanding correctly that from
17 2003 until some point in time you did not have involvement in
18 the 9/11 investigation?

19 A. So from 2003 -- the end of 2003, I returned to New
20 York where I would have continued fugitive efforts for the
21 East Africa bombings. That's the case squad I returned to.
22 In January of 2004, I took a promotion.

23 Q. So at that point, you were no longer working the 9/11

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1 PENTTBOM case?

2 A. That's right.

3 Q. I understand. You were focused on the
4 Embassy Bombings case?

5 A. For that period of time. I returned to New York
6 until the promotion. So if 9/11 information would have been
7 needed, certainly I was in a position to support that as well.

8 Q. I understand. So just to be very clear, did you ever
9 visit one of the black sites where Mr. al Hawsawi was held?

10 A. No.

11 Q. Did you ever witness any interrogations of
12 Mr. al Hawsawi between 2003 and 2006?

13 A. No.

14 Q. When did you become reengaged in the 9/11 PENTTBOM
15 investigation?

16 A. I returned to support the interviews sometime at the
17 end of 2006, I believe, in preparation for interviews.

18 Q. Do you know who had -- who had basically picked up
19 the responsibilities where you left off in terms of the
20 financial aspects of the PENTTBOM investigation? And by this,
21 I'm keying particularly on Mr. al Hawsawi. Do you know who
22 would have taken those responsibilities when you moved on to
23 your next position?

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1 A. So much of the financial investigation had been
2 completed at that point, leaving not very much left to really
3 seek. Certainly there were certifications of business records
4 that was conducted, I'm thinking, after the time that I left,
5 but I'm not certain how much effort or work was required to
6 continue the financial investigation aspects of -- with regard
7 to him.

8 Q. Well, let me ask you about the certification of
9 business records since you raised that. You did testify in
10 regards to certification of international business records,
11 correct?

12 A. I indicated they were certified records, yes.

13 Q. Correct. Am I correct to understand that those
14 certifications were obtained by the specific countries wherein
15 those documents were contained?

16 A. Do you have a specific country? There were lots of
17 countries involved that assisted us in the 9/11 investigation.

18 Q. I'm going to -- I was going to ask you about that.
19 But I guess what I'm trying to get at is, did you as an agent
20 walk those records into a record custodian or the
21 representatives of a different -- of the specific country do
22 that for you?

23 A. So there's a process by which we would do that. I

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1 think it was the MLAT process depending on the country,
2 whether we have a relationship with them or agreements with
3 them. We have people in countries that would service the
4 other end of a request from us from the domestic side to
5 achieve that certification with the country, and they would
6 follow that process with the country.

7 Q. I understand. So I know you testified that you had
8 traveled to the United Arab Emirates in 2002, correct?

9 A. Yes.

10 Q. And many of the documents you referred to were
11 obtained from businesses located in the United Arab Emirates,
12 correct?

13 A. A number of records were, yes.

14 Q. Would that have been the same process for obtaining
15 those records where the host country would have gotten the
16 certifications and provided them to the agents?

17 A. For banking, for -- for banking records or other
18 records, our records?

19 Q. Let's say banking records.

20 A. For banking records, we would have followed that
21 process.

22 Q. Phone records?

23 A. We would follow the same process for all of the

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1 records that I know of, to the extent that we had that
2 agreement or understanding with the country. There would be a
3 process in place, I guess is what I'm saying.

4 Q. Now, you indicated there were many countries that
5 were involved. And in the second page of the LHM that you
6 prepared, it indicates that when you met with Mr. al Hawsawi
7 the first time, he was told that you were specifically
8 responsible for gathering information about him. Do you
9 remember that?

10 A. I told him that, yes.

11 Q. All right. And you indicated as well that you had
12 spoken to a number of people, both in the United States as
13 well as in other countries?

14 A. That's right.

15 Q. Correct. So in addition to the United Arab Emirates,
16 can you tell us, without getting into any classified
17 locations, what, if any, other countries you followed up
18 investigative efforts in relation to Mr. al Hawsawi?

19 A. Saudi Arabia, likely Pakistan specific to him. There
20 would have been other countries related to the greater
21 investigation. But as I sit here in front of you, so -- those
22 are the countries that I would identify as -- that would be --
23 would have had information relevant to him.

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1 Q. And I take it that you would have documented any
2 efforts, such as the ones you've described -- you would have
3 documented that in an appropriate document for record-keeping
4 procedures?

5 A. Yes.

6 Q. All right. So even if you can't recall today, there
7 should be a record of your investigative efforts back when you
8 undertook those actions?

9 A. Yes.

10 Q. In regards to Mr. al Hawsawi's torture between 2003
11 and 2006, did you have any understanding or knowledge about
12 what he had endured through 2003 to 2006? Did you have any
13 knowledge of that?

14 A. I did not.

15 Q. All right. Did you ever become aware of how he was
16 treated, specifically -- and by that I'm referring tortured --
17 in 2003 to 2006?

18 A. I had no knowledge of his treatment.

19 Q. All right. And let me just -- let me just pinpoint
20 the time frame. So in 2007 prior to your interrogation, did
21 you still have no knowledge of any of his torture or
22 treatment?

23 A. I didn't know about his treatment.

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1 Q. Okay. To this day, do you know about his treatment?

2 A. I do not.

3 Q. All right. When did you learn that you would be
4 gaining access to Mustafa al Hawsawi?

5 A. I would say sometime prior to January 2007, in the --
6 probably that month or so before. I couldn't pinpoint a
7 specific date, but close in time to when -- to before the
8 interviews were conducted in January 2007.

9 Q. Do you recall how you learned that?

10 A. I was requested to be part of a team of individuals.
11 And at the time I'm not sure that access was available to us,
12 but certainly we were preparing for an opportunity to speak to
13 a number of detainees.

14 Q. So when you say we, were you specifically assigned to
15 Mr. al Hawsawi?

16 A. I was.

17 Q. All right. And was anybody else specifically
18 assigned to his interrogation team?

19 A. At that time it may have been James Fitzgerald,
20 Special Agent James Fitzgerald. I know my responsibility was
21 to be assigned to him.

22 Q. I understand. What did you do in preparation for
23 Mr. al Hawsawi's interrogation?

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1 A. I would have reviewed information that I had gathered
2 and others had gathered after the 9/11 attacks happened, the
3 business records, banking records, telephone records, again,
4 anything that would be associated to Mr. al Hawsawi so that I
5 could gather that information to show to him during the course
6 of the interview. I would have reviewed reports and reminded
7 myself. It had been some time since I had been involved in
8 the 9/11 case. I had been doing other things. So I would
9 have read and reviewed a lot of materials to try to get myself
10 back into knowing what I needed to know in order to conduct an
11 interview.

12 Q. So was this impending interrogation of Mr. al Hawsawi
13 your re-entry point, so to speak, into the 9/11 investigation?

14 A. It was sort of a discrete task. I had another job
15 that I was assigned to, but because of my background and
16 experience, I was requested as one of those individuals to
17 come back and conduct the interview.

18 Q. Do you know who requested that? Not necessarily you
19 specifically, but agents like you?

20 A. Who -- who ----

21 Q. You said you were requested, so I'm asking who
22 requested you?

23 A. Somebody from the FBI.

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1 Q. All right. Do you know if the request also came from
2 without -- from outside of the FBI? For example, someone
3 talks to the FBI and says, hey, we need you all to send agents
4 to interrogate high-value detainees in Guantanamo. Do you
5 know if there was any such external request to the FBI?

6 A. I wasn't part of discussions that would have been had
7 with my chain of command. They just told me -- or requested
8 that I come and join this team.

9 Q. Understood. The -- all of the efforts you described,
10 the records, cables, those kinds of things, were they all
11 contained in the PENTTBOM investigative folder that you
12 described earlier?

13 A. The banking records that I used, they were.

14 Q. Okay. Were there any other specific places where you
15 looked for information, background information on
16 Mr. al Hawsawi? By that I mean databases, cardboard boxes,
17 different places where you would have had information that was
18 stored in regards to Mr. al Hawsawi.

19 A. I would have accessed the PENTTBOM investigation in
20 that file. I would have had some exposure to Agency
21 reporting.

22 Q. By that you mean Central Intelligence Agency?

23 A. Central Intelligence Agency.

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1 Q. All right. Any other agencies?

2 A. I mean, to pick out ----

3 Q. Or departments, CITF, those kind of things?

4 A. I didn't review anything from CITF, that I recall.

5 Q. Okay. So when you say you would have had exposure,
6 does that mean that you had access to CIA databases?

7 A. I wouldn't have had access to their database. I
8 would have had access to what they gave me.

9 Q. Okay. Would you have had access to a
10 closed-system-type database, for lack of a better term?

11 A. I believe initially it was documents, like printed
12 documents.

13 Q. And what -- how would you describe those documents?
14 Were they cables? Were they memoranda? Was there a specific
15 term of art? I know like the FBI uses terms of art for
16 different records. Do you know if they had specific terms of
17 art for those records?

18 A. I would say they were -- I would describe them as
19 cables.

20 Q. Okay. Did those cables contain communications
21 between different people within the FBI in regards to
22 Mr. al Hawsawi's interrogations?

23 MJ [COL POHL]: I'm sorry, you said between different

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1 members of the FBI? Are we talking about FBI cables or CIA
2 cables?

3 LDC [MR. RUIZ]: CIA. I'm sorry. Thank you.

4 MJ [COL POHL]: Go ahead.

5 A. I'm sorry. Could you ask that again?

6 Q. Right. When you say cable, it kind of sounds to me
7 like you send a cable, you get a cable back, almost like
8 another word for e-mail. Is that what you're referencing to,
9 another word for e-mails?

10 A. It's not informal like that. It's formal. I mean,
11 it's to formally document a request out and a response back.

12 Q. Okay.

13 A. And this may have been -- the cables that I recall
14 would contain information maybe that had been obtained from
15 Mr. al Hawsawi or about him.

16 Q. Okay. Do you recall if any of those cables or any of
17 the records you reviewed from the Central Intelligence Agency
18 contained specific facts about the torture that he endured?

19 A. I didn't see any.

20 Q. All right.

21 MJ [COL POHL]: Ms. Perkins, you said that some of the
22 cables had things that Mr. Hawsawi had told the agency; is
23 that correct?

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1 WIT: As I recall, Your Honor.

2 MJ [COL POHL]: Okay. Do you have any idea under what
3 conditions that information had been gleaned from Mr. Hawsawi;
4 or you were just given a vanilla, Mr. Hawsawi said A, B, and
5 C?

6 WIT: That's how it came. No background.

7 MJ [COL POHL]: Okay. But did these cables go through the
8 period of '03 to '06? Did it predate -- well, they had to at
9 least pre-date your '07 interrogation because this was in
10 preparation for that, correct?

11 WIT: That's correct.

12 MJ [COL POHL]: Okay. So it was sometime before '07 and
13 after he got apprehended?

14 WIT: Yes.

15 MJ [COL POHL]: Okay. Thank you. Mr. Ruiz.

16 Q. Prior to the interrogation of Mr. al Hawsawi, did you
17 receive any briefings?

18 A. Prior to my interview of him?

19 Q. Yes.

20 A. Is that what you are asking?

21 Q. Yes.

22 A. Did I receive briefings?

23 Q. Were you briefed in regards to Mr. al Hawsawi

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1 or anything in relation to Mr. al Hawsawi's interrogation?

2 A. Certainly briefed about the process that was going to
3 happen.

4 Q. Okay. Where did that happen?

5 A. I'm trying to remember if it was at our headquarters
6 or at an off-site that we were located at. I believe it was
7 at an off-site.

8 Q. I understand. Do you recall who briefed you? I'm
9 not necessarily asking if you remember the name; but if you
10 do, that's great. Do you recall if they were an
11 FBI-affiliated officer or if they were a CIA officer? Do you
12 recall their affiliation, let's say?

13 A. As I recall, it was the Department of Justice.

14 Q. Okay. Do you recall who it was?

15 MTC [MR. TRIVETT]: Objection, relevance.

16 MJ [COL POHL]: Sustained. Move on.

17 Q. All right. Did you receive one briefing or multiple
18 briefings?

19 A. When I first came in, there was an initial briefing,
20 and I believe there were follow-up briefings.

21 Q. Prior to Mr. al Hawsawi's interrogation?

22 A. As I recall, yes.

23 Q. Were any of those briefings conducted by members of

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1 the Central Intelligence Agency?

2 A. Conducted by? I don't recall that being any CIA
3 briefings.

4 Q. When you say conducted by, it makes me think that
5 maybe you are drawing a distinction between conducting and
6 participating.

7 A. There may have been people in the room. But giving
8 the briefing to me, I do not recall an agency person providing
9 a briefing in that setting that you've described.

10 Q. But it's possible that there were representatives of
11 the agency in the briefing?

12 A. Could have been.

13 Q. You don't recall?

14 A. It could have been.

15 Q. All right. The -- what was the subject matter or the
16 goal of the briefing?

17 A. Initially, it was to identify to those individuals
18 conducting the interviews on how they were -- how we were to
19 proceed.

20 Q. Okay. And the individuals would have been the FBI
21 agents who would be participating in the interrogations of the
22 high-value detainees?

23 A. It would be the FBI agents conducting the interviews

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1 as well as the Criminal Investigative Task Force agent
2 personnel.

3 Q. Also referred to as CITF?

4 A. Yes.

5 Q. Were there OMC prosecutors present in those
6 briefings?

7 A. As I recall, yes.

8 Q. Do you recognize any of the prosecutors here today as
9 people who were present in those briefings?

10 A. Yes.

11 Q. Who was that?

12 A. Mr. Swann. I can't specifically recall Mr. Trivett,
13 but he could have been, or at least at a later time. But I do
14 recall Mr. Swann.

15 Q. Did Mr. Swann have an opportunity to present and
16 brief the people who were going to be doing the interrogating?

17 MTC [MR. TRIVETT]: Objection, relevance.

18 MJ [COL POHL]: Overruled.

19 A. The initial briefing was from Department of Justice,
20 and that's who I was taking the guidance from. I don't have a
21 specific recollection of getting a briefing where he's
22 conducting that briefing.

23 Q. Understood. Now, the manner of the interrogations

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1 was set forth in a January 10, 2007 memorandum that you and
2 other agents received, correct?

3 A. I'm sorry, could you repeat that again?

4 Q. Sure. The ground rules for the interrogation of
5 high-value detainees in Guantanamo by the FBI were set forth
6 in a January 10, 2007 FBI memorandum, correct?

7 A. Yes.

8 Q. In fact, January 10, 2007 is the day before the first
9 interrogation of Mr. al Hawsawi, correct?

10 A. That would be the day before we interviewed him
11 first, yes.

12 Q. All right. Did you have an opportunity to read and
13 review that memorandum before interrogating Mr. al Hawsawi?
14 Were you familiar with it?

15 A. It would have been part of the briefing. I'm not
16 sure that I had it in my hand to read it, given the date.

17 Q. All right. But it was before the day you
18 interrogated Mr. al Hawsawi?

19 A. The date on that EC is before the day I started the
20 interviews of him.

21 Q. Right. And that memorandum set forth some ground
22 rules for how you would treat classified information?

23 A. Yes.

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1 Q. So -- and yesterday you testified that if
2 Mr. al Hawsawi had complained about his treatment, you would
3 have documented that, correct?

4 A. That's correct.

5 Q. This memorandum also, however, indicates that
6 allegations of misconduct would not be included in the LHM;
7 isn't that right?

8 A. That's correct.

9 Q. And I think you also ----

10 MJ [COL POHL]: Mr. Ruiz. Mr. Ruiz, I'm sorry to
11 interrupt, but what is the exhibit number you're referring to?

12 LDC [MR. RUIZ]: It's 502XX.

13 MJ [COL POHL]: That's the stand-alone or attachment?

14 LDC [MR. RUIZ]: It's a stand-alone, Judge.

15 MJ [COL POHL]: Okay. Go ahead. Thank you.

16 LDC [MR. RUIZ]: Sure.

17 Q. I believe you testified that it was not your standard
18 practice to prepare LHMs under these circumstances, correct?
19 When you testified yesterday, you said you normally would not
20 have used an LHM.

21 A. In an interview of a subject, I would normally
22 document in an FD-302, yes.

23 Q. But because you were working with the CIA, that was

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1 the preferred method of documenting the interrogation of
2 Mr. al Hawsawi, correct?

3 A. Because I was working with DoD.

4 Q. Okay. Now, you were required to type notes of the
5 interrogation on a CIA laptop, correct?

6 A. Yes.

7 Q. And you also had a zip file or a zip drive for each
8 high-value detainee including Mr. al Hawsawi, right?

9 A. Yes.

10 Q. And once those notes were typed into the CIA's
11 laptop, they were sent to the CIA for their chop?

12 A. I believe for a classification review, yes.

13 Q. They went to the CIA?

14 A. Yes, for a classification review.

15 Q. Correct. The handwritten notes, same thing; once the
16 handwritten notes were taken, they were put in a pouch and
17 they were sent to the CIA for their chop?

18 A. For their classification review. I don't know what a
19 chop is, but ----

20 Q. Well, they had the opportunity to -- and the
21 authority to take information out of that, correct?

22 A. They had the authority to classify it, not to take it
23 out.

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1 Q. Okay. However, in this memorandum, they do tell you
2 what the ground rules are in terms of documenting any claims
3 of torture, correct?

4 A. The process to do that, yes.

5 Q. Right. In other words, not to include it in the LHM,
6 but to create a separate ghost report that would include that
7 information; although they don't use the word ghost, but it's
8 a separate report, correct?

9 A. There's no such thing as a ghost report, but it would
10 be a second report.

11 Q. It was a second report that would be disseminated
12 differently than the other LHM, correct?

13 A. I don't know about the dissemination part.
14 Disseminated -- I'm not sure of the distinction for
15 dissemination.

16 Q. Okay. So it was up to the CIA to determine what to
17 do with that second report?

18 A. No, to classify that report, is my understanding.

19 Q. Understood.

20 MJ [COL POHL]: Once it was classified, went through
21 classification review, was there documents returned to the
22 FBI, then?

23 WIT: So ----

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1 MJ [COL POHL]: Who maintained the -- who maintained the
2 LHM, for example? Is that your files?

3 WIT: I had that happen with a different subject. But
4 with regard to Mr. al Hawsawi, I did not have that issue. So
5 there was no separate document. So the process for him, there
6 was no process. If you're asking me to reflect on the other
7 detainee ----

8 MJ [COL POHL]: No, we're talking about Mr. Hawsawi. What
9 I'm saying is you generated these documents. You send them
10 over to the CIA, what Mr. Ruiz calls a chop, what you are
11 calling is a classification review. When that classification
12 review is done, are the documents returned to the FBI case
13 file, or does the CIA keep them?

14 WIT: So it didn't happen in his case, so ----

15 MJ [COL POHL]: What didn't happen? It didn't get sent to
16 the CIA?

17 WIT: There was not a second report given or written with
18 regard to any ----

19 MJ [COL POHL]: Ms. Perkins, you and I are talking across
20 each other again. So let me say -- okay.

21 The LHM was sent over to the CIA for classification
22 review, correct.

23 WIT: Yes.

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1 MJ [COL POHL]: Okay. When they got done with their
2 review, does that -- is that returned to the FBI case file, or
3 does the CIA keep it?

4 WIT: So with regard to the LHM, they classified it and
5 returned it to us with the classification markings on it.

6 MJ [COL POHL]: Okay.

7 WIT: But there was no second report in this case, so I
8 can't speak to that.

9 MJ [COL POHL]: Let me go back to -- the second report
10 that Mr. Ruiz is referring to about mistreatment, are you
11 saying that there was no reported mistreatment by
12 Mr. al Hawsawi during your interviews necessitating a second
13 report, or there was not that requirement at the time?

14 WIT: No. There was -- what you said first. There were
15 no documented reports of mistreatment provided to me by
16 Mr. al Hawsawi.

17 MJ [COL POHL]: Okay. Okay.

18 WIT: What you said at first was accurate, sir. I'm
19 sorry.

20 MJ [COL POHL]: No, you are very precise. You said there
21 were no documented reports, and that's ----

22 WIT: There were no ----

23 MJ [COL POHL]: No reports you are getting are from him?

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1 WIT: No reports are documented. There were no reports of
2 torture to me verbally, and there were none to write down to
3 document to be returned, yes, sir.

4 MJ [COL POHL]: Go ahead, Mr. Ruiz.

5 LDC [MR. RUIZ]: I'm glad you're feeling a little bit of
6 my pain, Judge. But very well. I think I understand.

7 Q. Now, there were specific guidelines as well, correct,
8 as to whether you could even ask questions about his previous
9 treatment, correct? That information was considered
10 classified?

11 A. That was considered classified.

12 Q. And the use of classified information in the
13 interrogation had to be approved both by a prosecutor and the
14 appropriate agency, correct?

15 A. The owning -- the owning agency, yes.

16 Q. The CIA?

17 A. It might be CIA. If it was CIA, they would own that
18 classification.

19 Q. So if you had wanted to ask Mr. al Hawsawi, what
20 happened to you when you were detained between 2003 and '6,
21 you would have had to have that vetted through a prosecutor
22 and through the appropriate intelligence agency?

23 A. I know with regard to documents, I did get

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1 pre-approval. Yes, I would say classified information that I
2 wanted to ask about would be approved through the owning
3 agency.

4 Q. Now, everything Mr. al Hawsawi said at that time was
5 presumptively classified, right?

6 A. I'm sorry.

7 Q. Everything Mr. al Hawsawi said was at that time
8 presumptively classified?

9 A. I think presumptively until it had classification
10 review, yes.

11 Q. Correct. You did not understand that Mr. al Hawsawi
12 was a qualified holder of a security clearance, correct? He
13 was not qualified to receive classified information.

14 MTC [MR. TRIVETT]: Objection, relevance.

15 LDC [MR. RUIZ]: I'm getting to it, Judge.

16 MJ [COL POHL]: How many more questions before you get to
17 it?

18 LDC [MR. RUIZ]: One.

19 MJ [COL POHL]: Okay. You can have one.

20 LDC [MR. RUIZ]: If we can agree he wasn't qualified, then
21 I'll go right to the question.

22 MJ [COL POHL]: Ms. Perkins, did -- to your knowledge, did
23 Mr. Hawsawi have a security clearance from the United

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1 States ----

2 WIT: No, sir.

3 MJ [COL POHL]: ---- government? I'm sorry?

4 WIT: No, sir.

5 MJ [COL POHL]: Okay.

6 LDC [MR. RUIZ]: Very well.

7 Q. You did testify yesterday that you did provide him
8 with a rights warning that was, in fact, classified?

9 A. I provided him admonishments.

10 Q. One of which was classified.

11 A. Oh. I don't I think testified to that. If I did,
12 yes, there was a -- there was a portion that would have been
13 classified, yes.

14 Q. So you provided -- and I think you used the word
15 admonishment, a classified admonishment, to Mr. Hawsawi even
16 though he was not qualified to receive classified information?

17 A. I verbally gave him an admonishment that was
18 classified.

19 Q. Yes. Who approved that?

20 A. I believe it would have been the Department of
21 Justice.

22 Q. Okay. Did you review any medical records for
23 Mr. al Hawsawi prior to your interrogation?

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1 A. I don't recall reviewing any medical records with
2 regard to him, no.

3 Q. Did you speak to any prosecutors to strategize as to
4 the goals of Mr. al Hawsawi's interrogation? And if the word
5 strategize bothers, then did you you speak to a prosecutor in
6 relation to the interrogation of Mr. al Hawsawi?

7 A. Yes.

8 Q. All right. I take it you had trouble with the
9 strategy piece of that question, the strategize?

10 A. Just trying to make sure I precisely answer your
11 questions. It's been a long time, so I'm trying to think
12 through a lot of years to get it right.

13 Q. Did you discuss with the prosecutor the goals and
14 objectives of your interrogation of Mr. al Hawsawi?

15 A. I would have -- that would have been a likely
16 discussion.

17 Q. Do you recall if the prosecutor suggested questions
18 that you should ask of Mr. al Hawsawi?

19 A. I don't recall specifically that.

20 Q. Was there any discussion about potential criminal
21 offenses that he could be charged with under the Military
22 Commissions Act with you and what the elements would be?

23 A. Trying to remember if I specifically reviewed any --

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1 any offenses at that time. I mean, I certainly would have
2 known the general offenses with regard to what I would discuss
3 with him. I can't recall specifically reviewing a military
4 commission statute or anything like that, but ----

5 Q. My question is: Did you -- do you remember
6 discussing potential offenses with the prosecution or members
7 of the prosecution, such as potential charges, elements, those
8 kinds of things?

9 A. I can't remember specific discussions with regard to
10 that. It would have been something I would have prepared
11 myself to know, but I can't remember a specific conversation
12 with a prosecutor with regard to that. Could it have
13 happened? Yes. But it's been a very long time to remember
14 those specific conversations during the course of the
15 preparation.

16 Q. Okay. I know you said you attended a briefing with
17 Mr. Swann. Do you recall having one-on-one discussions with
18 him prior to your interrogation of Mr. al Hawsawi?

19 A. I would have had one-on-one discussions with him.

20 Q. Did you select the place where Mr. al Hawsawi would
21 be interrogated?

22 A. I didn't select the interview place, no.

23 Q. Do you know who did?

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1 A. Not specifically.

2 Q. Mr. al Hawsawi was interrogated in what is referred
3 to as Camp Echo II, correct?

4 A. I believe that's correct.

5 Q. All right. Had you been to that camp prior to
6 Mr. al Hawsawi's interrogation?

7 A. I had not.

8 Q. On the first day of Mr. al Hawsawi's interrogation,
9 was Mr. al Hawsawi transported to the room prior to your
10 arrival or how -- how did that -- how did that work?

11 A. As I recall, he was in the room when I walked in the
12 door.

13 Q. All right.

14 A. Or we walked in the door.

15 Q. Did you have any opportunity to see how he had been
16 transported to the interrogation room?

17 A. I don't recall seeing him before walking in the door.

18 Q. Okay. So that is a no, you didn't know how he was
19 transported?

20 A. I don't recall seeing him before walking in the door
21 and seeing him in that room.

22 Q. Okay. Did you see any instrumentalities that could
23 have transported Mr. al Hawsawi to the interrogation room,

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1 such as vehicles?

2 A. Specific to him, I don't recall seeing -- I know
3 there were vehicles used to transport detainees.

4 Q. I understand. When you encountered Mr. al Hawsawi in
5 the interrogation room, he was shackled to the ground by the
6 ankle?

7 A. That's what I recall.

8 Q. Do you recall if he was sitting on a chair?

9 A. I recall he was sitting on a chair, yes.

10 Q. Okay. Do you recall if he was sitting on some
11 pillows?

12 A. I don't recall.

13 Q. All right. There were three people present in the
14 first day of the interrogation, yourself ----

15 A. Four including him.

16 Q. Thank you. In terms of investigative agents.

17 A. Yes, three.

18 Q. Special Agent Fitzgerald was there?

19 A. Yes.

20 Q. And then a representative of the CITF?

21 A. Yes.

22 Q. Correct? And who was that?

23 A. The first day was Elmer Mason.

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1 Q. There was no audio -- there was no videotaping of
2 Mr. al Hawsawi's interrogation, correct?

3 A. There was no videotape, no.

4 Q. Who made that decision?

5 A. People above my pay grade.

6 Q. I'm sorry, say that one more time.

7 A. Individuals above my pay grade or authority.

8 Q. All right. Within your organization, referring to
9 the FBI, or outside of the FBI?

10 A. I don't know who made that decision. Ultimately,
11 there was Department of Justice and other agencies involved in
12 that, I'm ----

13 Q. For your purposes, you knew that you were not to
14 videotape the interrogation?

15 A. Yes.

16 Q. Okay. And the same with respect to audiotaping the
17 interrogation?

18 A. Yes.

19 Q. Meaning somebody above your pay grade set forth those
20 ground rules?

21 A. Whoever decided the ground rules, yeah. It wasn't me
22 that necessarily decided that.

23 Q. All right. You just simply knew you were not to

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1 audio or videotape the interrogation?

2 A. Yes.

3 Q. To your knowledge, the interrogation room, however,
4 was monitored; wasn't that correct?

5 A. I understood there was a video feed.

6 Q. All right. Did you know where that video feed went
7 to?

8 A. To another room. Not specifically.

9 Q. Do you know who was present in the other room?

10 A. I know other FBI personnel were observing.

11 Q. Okay. Do you know if Mr. Swann or any other members
12 of the OMC-P prosecution team were observing?

13 A. I believe they were.

14 Q. And was Mr. Swann there?

15 A. Yes.

16 Q. Were there other members that you also recognized
17 that were there, by that I mean that are here in the
18 courtroom?

19 A. Beyond Mr. Swann, I don't have a specific
20 recollection at that time.

21 Q. Very well. Do you know if there was recording
22 capability in the room from where they were watching?

23 A. I don't know.

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1 Q. Is it fair to say that room was approximately 25 feet
2 from the interrogation room where you were interrogating
3 Mr. al Hawsawi?

4 A. I really didn't know where it was. I did not know
5 where it was.

6 Q. Okay. It is true that the use of video is, in fact,
7 permissible in FBI interrogations, correct?

8 A. To -- at that time it would have required permission.

9 Q. From the special agent in charge?

10 A. Yes.

11 Q. All right. And that was not your title, correct?

12 A. No.

13 Q. The first day of the interrogation, two people took
14 notes, both Agent Fitzgerald and Special Agent Mason?

15 A. Special Agent Mason took notes for just a short
16 period.

17 Q. All right.

18 A. But yes.

19 Q. Why was he required to stop?

20 A. Because it was our policy to take one set of notes
21 when you're conducting an interview.

22 Q. After the first day, Special Agent Mason was
23 replaced, correct?

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1 A. Yes.

2 Q. Do you know why?

3 A. I don't.

4 Q. All right. Did you ask for him to be replaced?

5 A. No.

6 Q. Did anybody above your pay grade ask for him to be
7 replaced?

8 A. I don't know.

9 Q. You did not use a translator during the interrogation
10 of Mr. al Hawsawi, correct?

11 A. I did not.

12 Q. And any rights advisements or admonishments -- I
13 think you said you used a modified admonishment or
14 advisement -- was not given to him in the Arabic language,
15 correct?

16 A. It was not.

17 Q. Either verbally or in a written form?

18 A. Correct.

19 Q. Why was that?

20 A. When I provided the admonishments to him, it was
21 really conversational. It wasn't as the normal Miranda, as
22 you might take a Miranda form and read it. So I didn't have
23 it -- an Arabic version or a translator in there translating

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1 simultaneous to my providing this to him in conversation.

2 Q. So you testified that when you interrogated
3 Mr. Mohamed back in 1998 or so, you did provide him an
4 advisement form in Swahili, correct.

5 A. 1999, yes.

6 MTC [MR. TRIVETT]: Objection, asked and answered.

7 MJ [COL POHL]: Overruled.

8 Q. And that was because you wanted to make sure that he
9 understood the rights?

10 A. I gave him both forms, yes, to review.

11 Q. Okay.

12 A. English and Swahili.

13 Q. In what language did you conduct his interrogation?

14 A. English.

15 MTC [MR. TRIVETT]: Objection, relevance.

16 MJ [COL POHL]: Overruled.

17 Q. So it is correct that the only record of this
18 interrogation that exists is the handwritten notes of
19 Special Agent Fitzgerald and about a page and a half of
20 Special Agent Mason's, correct?

21 A. Yes.

22 Q. Mr. al Hawsawi was not free to leave, correct?

23 A. That's correct.

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1 Q. He was in custody?

2 A. Yes.

3 Q. And shackled to the ground?

4 A. As I recall, he had at least one ankle hooked to a
5 chain on the floor.

6 Q. In terms of the -- I think you used the word
7 admonishment or modified waiver.

8 A. For? For Mr. al Hawsawi?

9 Q. Yes.

10 A. Yes. Admonishment.

11 Q. Correct. You had clear guidance, isn't that correct,
12 that the detainees were to be told that there was no
13 immediate -- there was no attorney available for immediate
14 consultation, correct?

15 A. To tell them that as part of the admonishment?

16 Q. No. If, for instance, the detainee asked for an
17 attorney, you were to respond that there was not one
18 immediately available?

19 A. If he asked for an attorney, I -- my understanding
20 was that because he had not been charged, he would not be
21 entitled to an attorney at that point in the commissions
22 process.

23 Q. Understood. But you did understand that the purpose

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1 of the interrogation was with a view to a prosecution,
2 correct? I mean, you knew that?

3 A. To get a statement from him to be used in the
4 military commissions process, yes.

5 Q. All right. And when you say military commissions
6 process, you knew that to be a criminal prosecution?

7 A. Military commissions process is what I understood.

8 Q. You understood that there was a prosecutor? I guess,
9 I mean, what I'm asking you is: You have a law degree, right?

10 A. I do.

11 Q. And you had it prior to joining the FBI?

12 A. I did.

13 Q. So when you were -- when you were conducting this
14 interrogation, you knew this was going to be used in a
15 criminal proceeding?

16 A. I knew it was going to be used in the military
17 commissions process.

18 Q. Okay.

19 A. So however you want to define that. For me, it was a
20 military commissions process, where there would be a tribunal
21 or a trial.

22 Q. Do you not recognize this as a criminal process? Why
23 are you looking ----

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1 A. I'm just making sure.

2 Q. Making sure?

3 A. I ----

4 LDC [MR. RUIZ]: Judge, I'm going to let the record
5 reflect that the witness looked to the prosecution and then
6 indicated that she was just making sure.

7 WIT: Making sure that there was not going to be an
8 objection prior to answering your question. But if you want
9 to repeat your question.

10 MJ [COL POHL]: They'll object when they feel they need to
11 object. You don't have to wait for that. Just go ahead and
12 answer.

13 WIT: Yes, sir.

14 MJ [COL POHL]: You understood the military commission
15 process to be a tribunal slash criminal process of some kind?

16 WIT: I knew it to be a tribunal commissions process. I
17 wasn't that familiar with military process to understand, is
18 that deemed a criminal process or something in military --
19 military process of some sort.

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

21 Q. Now, you testified yesterday that the LHM was not
22 completed in Guantanamo, correct?

23 A. Finalized, yes.

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1 Q. Excuse me?

2 A. Finalized, yes.

3 Q. Okay. And you indicated you were also interrogating
4 other detainees?

5 A. I did conduct other interviews while here.

6 Q. Okay. Those were high-value detainees?

7 A. They were.

8 Q. All right. After a day of interrogation, how would
9 you go about memorializing the information that you had
10 gathered? Let's say after the first day, what did you do?

11 A. So I would go to a different location and utilize a
12 computer provided to me to begin typing those notes.

13 Q. Okay. Would anybody else have input? Meaning the
14 agents who were in the interrogation, were they also assisting
15 you in generating that document?

16 A. Yes.

17 Q. Other than those agents, were any other individuals
18 involved in giving you input into what to put into that
19 computer?

20 A. No.

21 Q. Did you have any input from prosecutors?

22 A. No.

23 Q. Did you have any input from members of intelligence

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1 agencies?

2 A. No.

3 Q. All right. When you completed inputting that
4 information -- now, was this a stand-alone laptop?

5 A. Yes.

6 Q. So it wasn't hooked into a network?

7 A. Correct.

8 Q. All right. Where was that maintained? And I
9 don't -- don't give me the physical location, but it was
10 maintained within a building that was not in your control?

11 A. Yes.

12 Q. How was it stored?

13 MTC [MR. TRIVETT]: Objection, relevance.

14 MJ [COL POHL]: That's sustained.

15 When you got to the office, where was the computer?

16 WIT: I believe they were already out and available to us.

17 MJ [COL POHL]: Okay. When you left the office, what
18 happened to the computer? Did you just leave it there?

19 WIT: It would be sometimes 11:00, 12:00 at night. I'm
20 not certain I remember if -- we would have had to have made
21 sure they were secured in some way.

22 MJ [COL POHL]: You would hand it to somebody and they
23 would do that?

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1 WIT: There may have been somebody there that we would
2 have -- that would have taken control of those computers.

3 MJ [COL POHL]: In essence, it stayed in the office area
4 when you used it, when you weren't using it. Somebody
5 controlled it there?

6 WIT: Yes, sir.

7 MJ [COL POHL]: Got it. Thank you.

8 Go ahead, Mr. Ruiz.

9 Q. How was the access to the computer controlled? Would
10 you have to log in, for instance, handwritten record, or would
11 you just log in to the computer with a username and
12 identification?

13 MTC [MR. TRIVETT]: Same objection.

14 MJ [COL POHL]: Overruled.

15 You may answer the question.

16 A. I don't recall specifically.

17 Q. The process you just described, was that the process,
18 the same process for every day after Mr. al Hawsawi's
19 interrogation? So I know you started on the 11th, the 12th,
20 and 13th as well. The process you just described, is that the
21 same process you followed?

22 A. Yes.

23 Q. During any of the other specific dates I didn't

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1 cover, did you have any input from other agencies or
2 prosecutors into what went into the report?

3 A. No.

4 Q. Very well. And then I believe the third
5 interrogation was on the 16th, correct?

6 A. The third day of the -- would have been a continuous
7 interview in my mind, but yes, that would have been the last
8 day we talked.

9 Q. Very well. You indicated that -- well, actually, I
10 don't think you indicated. But in terms of the 9/11
11 operation, what would you say, based on your investigation,
12 was the date of inception? For example -- let me give you an
13 example.

14 Yesterday you testified that the embassy bombing took
15 place in 1998, but you discovered information that led the
16 investigators to believe that it was -- as early as 1993 there
17 was preparation for the operation. Do you recall that?

18 A. Yes.

19 Q. That's what I'm asking you in relation to this
20 operation. What would have been, based on your investigation,
21 the inception date on where that would have began, the 9/11
22 operation?

23 A. So as early as the investigation began on Usama bin

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1 Laden, arguably.

2 Q. Okay. And that would have been, in your mind?

3 A. The investigation, as I recall, began, I believe, in
4 1996.

5 Q. At what point in the timeline do you pinpoint as the
6 inception date of Mr. al Hawsawi's involvement?

7 A. Involvement with -- can you be specific? Involvement
8 with al Qaeda? Involvement with 9/11?

9 Q. 9/11.

10 A. I would say when he began supporting the media
11 committee for al Qaeda that supported al Qaeda and other
12 groups.

13 MJ [COL POHL]: When was that?

14 WIT: I believe that was May of 2000.

15 LDC [MR. RUIZ]: Okay. Give me a moment, Judge.

16 MJ [COL POHL]: Sure.

17 [Pause.]

18 Q. Agent Perkins, when you were logged into the CIA
19 databases that contained intelligence reports, do you recall
20 how you logged on?

21 A. So I said I didn't have access to CIA databases.

22 Q. You said CID?

23 A. CIA databases. I did not have access to their

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1 databases.

2 Q. Okay. The reason I asked that is because the January
3 10, 2007, indicates that you would be provided access to CIA
4 databases containing intelligence reports.

5 A. If you can show it to me, I'm happy to look at that.

6 Q. I'm sorry?

7 MJ [COL POHL]: The question really is, did you ever
8 access CIA databases?

9 WIT: So I wouldn't have been given direct access to CIA
10 databases. In my mind, it would be sitting at CIA and
11 accessing their databases. Information would be provided to
12 us in cables. So the idea of having access to a CIA database
13 to search their database as an FBI agent is not something that
14 I recall ever having had ----

15 LDC [MR. RUIZ]: May I refresh her recollection?

16 WIT: ---- getting access to their databases.

17 LDC [MR. RUIZ]: I can show her the document, Judge,
18 and ----

19 MJ [COL POHL]: But the document says they could do it,
20 right?

21 LDC [MR. RUIZ]: Yes.

22 MJ [COL POHL]: But she said she didn't do it.

23 LDC [MR. RUIZ]: Well, I think we're in -- we're kind of

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1 getting into the same distinction that maybe an earlier
2 witness drew between what a database is or whether you call it
3 a different system. And I really need to nail down on ----

4 MJ [COL POHL]: Talking about yesterday, when we were
5 talking about what did she rely upon; is that where we're
6 going to on this?

7 LDC [MR. RUIZ]: I just have that one pinpoint question
8 where I'm trying to determine if what she looked at is maybe
9 the same as what Agent Fitzgerald looked at.

10 MJ [COL POHL]: Are you talking about the closed system
11 now?

12 LDC [MR. RUIZ]: Yes, which he didn't see as a database.

13 MJ [COL POHL]: And you're characterizing that he
14 testified that he looked at it before the interrogation?

15 LDC [MR. RUIZ]: No, no. No, I'm just trying to ----

16 MJ [COL POHL]: Okay. Okay. Yeah, I just -- I understand
17 what you're saying is -- is you want to show it to her, but it
18 says it gives her access to a database. She says she never
19 reviewed the CIA database.

20 So did you review any CIA materials?

21 WIT: Materials, yes.

22 MJ [COL POHL]: Okay. And how did you access those
23 materials?

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1 WIT: As I recall, in preparation for the interview, I had
2 hard copy documents, hard copy printouts.

3 Q. Okay. Do you know where those hard copies came from?

4 A. My understanding, they were Agency records, CIA
5 records.

6 Q. Did somebody provide those to you based on a request
7 that you made?

8 A. I think they were there and available for me in
9 preparation. I don't recall specifically asking for them.

10 Q. Do you know who made them available?

11 A. I don't recall.

12 Q. You just kind of showed up and they were right there
13 for you?

14 A. There was information there. Like I said, I don't
15 recall specifically requesting that.

16 MJ [COL POHL]: Ms. Perkins, just so I'm clear here, is
17 Mr. Hawsawi is one of a number of HVDs being interviewed
18 around this time, correct?

19 WIT: Yes, sir.

20 MJ [COL POHL]: And the preparatory materials you're
21 talking about, I'm assuming each agent got one for each
22 detainee?

23 WIT: That could have been possible, yes.

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1 MJ [COL POHL]: Okay. When you say it's possible, this
2 may not be a fruitful area to go down then, but I'm saying is
3 but those preparatory materials, were they -- did you generate
4 them, or did the FBI said here's all the stuff we have on
5 Hawsawi, or a combination? Just how -- in response to
6 Mr. Ruiz's question, how did all this material get gathered in
7 order to prepare you for the interrogation?

8 WIT: So I -- as I recall, I would have gathered the FBI
9 material myself and the agency material, if -- like I said, I
10 have no specific recollection of asking for it or if when I
11 arrived to prepare for interviews there were agency cables
12 that they would have reported information that was available
13 to me, hard copy.

14 LDC [MR. RUIZ]: Okay.

15 Q. But you don't recall sitting at a computer searching
16 through folders or doing search queries or those kinds of
17 things to access those CIA records?

18 A. I specifically recall the hard copy. I don't
19 specifically recall otherwise. I just don't recall it.

20 Q. Now, I asked you if you specifically had been granted
21 access to Mr. al Hawsawi from 2003 to 2006, and you said no.
22 Are you aware if any other FBI agents were granted access to
23 Mr. al Hawsawi between 2003 and 2006?

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1 A. I was not aware of that.

2 Q. Do you recall the specific names of FBI agents who
3 were present at the briefing you described in regards to the
4 ground rules for interrogation of high-value detainees?

5 MTC [MR. TRIVETT]: Objection, relevance.

6 MJ [COL POHL]: Sustained.

7 LDC [MR. RUIZ]: I just need one more minute, Judge, to go
8 through my notes here.

9 MJ [COL POHL]: Sure. You have a lot of notes there,
10 Mr. Ruiz, so take your time.

11 LDC [MR. RUIZ]: Thank you.

12 [Pause.]

13 LDC [MR. RUIZ]: Just a minute, Judge.

14 [Pause.]

15 LDC [MR. RUIZ]: Judge, that's all I have.

16 MJ [COL POHL]: Thank you.

17 Any redirect, Mr. Trivett?

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

19 MJ [COL POHL]: Okay. Ms. Perkins, that will conclude
20 your testimony in open session, but you're going to be
21 recalled, probably tomorrow, for a closed, classified session.
22 So I remind you don't talk to anybody, except for the
23 attorneys for either side, or the accused. You are excused,

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1 thank you.

2 [The witness was warned, temporarily excused, and withdrew
3 from the courtroom.]

4 MJ [COL POHL]: Trial Counsel, do you have any other
5 witnesses to present?

6 MTC [MR. TRIVETT]: We do not, sir.

7 MJ [COL POHL]: Mr. Ruiz, is your witness prepared to
8 testify?

9 LDC [MR. RUIZ]: Yes.

10 MJ [COL POHL]: Okay. We'll recess for 15 minutes, and
11 then we'll call that witness. I'm looking. We'll see how
12 long he takes. But I think we can go at least until 1700 with
13 him, if he's that long -- and Mr. Ruiz indicated he is -- we
14 need to have a certain amount of time to break for the
15 classified session this afternoon, but it will not begin
16 before 1700. Commission is in recess for 15 minutes.

17 [The R.M.C. 803 session recessed at 1529, 7 December 2017.]

18 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1547,
2 7 December 2017.]

3 MJ [COL POHL]: Commission is called to order. Apparently
4 Mr. Ryan is absent. Anybody else, Trial Counsel?

5 CP [BG MARTINS]: Yes, Your Honor. Mr. Ryan and
6 Mr. Groharing are attending to case-related business. We
7 would request the commission's permission they come back when
8 they are done with that. Thank you.

9 MJ [COL POHL]: Sure. Fine. In fact, Mr. Groharing just
10 came back.

11 LDC [MR. NEVIN]: We're in the same posture. And I have a
12 question about 532 I'd like to ask you before we go on to the
13 next witness, please. The question is ----

14 MJ [COL POHL]: Hold that thought.

15 LDC [MR. NEVIN]: Oh, okay.

16 MJ [COL POHL]: Ms. Bormann, any changes?

17 LDC [MS. BORMANN]: Well, I'm now joined by Captain Brady,
18 who magically appeared.

19 MJ [COL POHL]: Well, that's good for Captain Brady.

20 LDC [MR. HARRINGTON]: Judge, Major Stuard is not here,
21 but he will be back.

22 MJ [COL POHL]: Mr. Connell?

23 LDC [MR. CONNELL]: No changes, sir.

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1 MJ [COL POHL]: Mr. Ruiz, your team here?

2 LDC [MR. RUIZ]: Yes, Judge.

3 MJ [COL POHL]: Mr. Nevin.

4 LDC [MR. NEVIN]: We have been waiting to hear some word
5 from Major Lebowitz about whether a witness will be available,
6 and, if so, who it is. Does the military commission take it
7 you have ordered or directed that he would provide us that
8 information by some point or will you provide ----

9 MJ [COL POHL]: Well, during the recess, I contacted my
10 staff and I had them -- directed them to send an e-mail to
11 Major Lebowitz as to who the witness is and what the witness
12 does, and that all of the defense counsel should be cc'd on
13 the same e-mail. So that's kind of where that's at. And I
14 think I get an idea for timing is another issue there.

15 LDC [MR. NEVIN]: All right. But there was no word
16 coming ----

17 MJ [COL POHL]: We had not heard -- I had not heard
18 anything.

19 LDC [MR. NEVIN]: Thank you, Your Honor.

20 MJ [COL POHL]: Go ahead. Mr. Harrington.

21 LDC [MR. HARRINGTON]: Judge, on that issue, I don't know
22 if we can get Major Lebowitz over here, but it might be
23 helpful if we had a few minutes to talk about tomorrow, what

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1 we're going to do. Especially because I want to talk about
2 our potential witness, too. So -- which we can't do without
3 him here, so ----

4 MJ [COL POHL]: Okay. Like I said, we got time. Time
5 going late, but we got time.

6 Mr. Connell.

7 LDC [MR. CONNELL]: Sir, since we have time, I just wanted
8 to say that, although this hearing is not about us,
9 we obviously have a right to examine this witness. I'm
10 prepared to do so today so Professor Watts doesn't have to
11 come back at some future time.

12 MJ [COL POHL]: I mean, I got a similar request from, I
13 believe, Mr. Nevin and Mr. Harrington and I denied that. Why
14 should I permit you to question this witness other than ----

15 LDC [MR. CONNELL]: Sir, Mr. Binalshibh and Mr. Mohammad
16 are not joined to the motion. This is my motion just as much
17 as it is Mr. Hawsawi's motion. There is evidence being culled
18 in it. If he needs to come back at a future time, that's
19 fine. I'm just advising the military commission, I have
20 questions. I am prepared to proceed today if the military
21 commission is inclined to let me do so today as opposed to
22 some future time. Because a witness in a hearing in which --
23 which affects the resolution of 502, we clearly have a right

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1 to question the witness.

2 MJ [COL POHL]: So I just want to make it clear here,
3 Mr. Connell, because one of the things I also want to talk
4 about is your 502 in a scheduling way-ahead thing. And again,
5 you're at a slightly -- you're at a different posture than the
6 other three, I've got that.

7 Is it your position then that you and Mr. Hawsawi are
8 using this witness in support of your argument.

9 LDC [MR. CONNELL]: Sir, I'm not 100 percent sure if the
10 witness -- so ----

11 MJ [COL POHL]: You're not quite sure of Mr. Hawsawi's --
12 I understand. He's speaking for himself. But, I mean, do
13 you -- I'm just -- is it the same issue?

14 LDC [MR. CONNELL]: Well, it's certainly the same issue.
15 It's not necessarily the same position.

16 MJ [COL POHL]: Okay.

17 LDC [MR. CONNELL]: I could be taking an adversarial
18 position on some points to Mr. al Hawsawi. But when one party
19 to litigation calls a witness, everyone gets -- all parties
20 including the prosecution get to examine him. So I'm not
21 promising that I have questions, but depending on what he
22 says, I may have questions. And what I'm advising you is I'm
23 prepared to question him today as opposed to some other day.

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1 He is not a joint witness of Mr. al Hawsawi and
2 Mr. al Baluchi; he is purely Mr. al Hawsawi's witness.

3 MJ [COL POHL]: Okay. Well, let's see what he says on
4 direct from Mr. Hawsawi, and then you tell me what you think
5 you need to ask. Because you would only ask him something
6 that wasn't asked by Mr. Hawsawi?

7 LDC [MR. CONNELL]: Right. I mean, I'm not ----

8 MJ [COL POHL]: Not going to repeat the direct testimony?
9 Because that never happens with another ----

10 LDC [MR. CONNELL]: I'm not requesting to repeat the
11 direct testimony.

12 MJ [COL POHL]: Okay. Let's let him do the direct for
13 Mr. Hawsawi, and then we'll see where we're at, okay?

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

15 MJ [COL POHL]: Go ahead and call the witness, please.

16 DC [MAJ WILKINSON]: Call Professor Watts.

17 MJ [COL POHL]: Just for planning purposes, we're going to
18 take this witness not later than 1700. We will stop at that
19 point. Please have him stand in front of the witness chair.

20 CP [BG MARTINS]: Please raise your right hand for the
21 oath.

22 [END OF PAGE]

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1 PROFESSOR SEAN WATTS, civilian, was called as a witness for
2 the defense, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the Chief Prosecutor [BG MARTINS]:

5 CP [BG MARTINS]: Please be seated.

6 Questions by the Defense Counsel [MAJ WILKINSON]:

7 Q. Good afternoon, Professor.

8 A. Good afternoon.

9 MJ [COL POHL]: Just so we get this down is I'm used to
10 swearing the witness, then having the witness identify himself
11 and the city and state of residence. So I'll do it this time,
12 but I expect the trial counsel to do it in the future.

13 What is your full name and your city and state of
14 residence?

15 WIT: My name is Sean Watts; I live in Bennington,
16 Nebraska.

17 MJ [COL POHL]: Thank you.

18 Questions by the Defense Counsel [MAJ WILKINSON]:

19 Q. Tell us about your educational background, Professor
20 Watts.

21 A. So I have a Bachelor of Arts from the University of
22 Colorado in international affairs. I have a law degree from
23 College of William and Mary Law School, and I have a legal

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1 masters from the United States Army Judge Advocate General
2 School.

3 Q. Tell us about your education on law of war topics.

4 A. I also began as an officer, Army officer. So I
5 started before I was a military lawyer as a -- an armor
6 officer. We received law of war training there. Then when I
7 transferred to the Judge Advocate General's Corps, I received
8 law of war training at the Officer Basic Course.

9 I was assigned to be an operational lawyer and
10 international lawyer at the 2nd Infantry Division in Korea --
11 that's my first legal assignment -- and was returned to the
12 JAG School for a two-week course in operational law. I would
13 say about half of that course was law of war.

14 Thereafter, I returned to the Judge Advocate
15 General's School for the legal masters program. When I was
16 identified as a future faculty member for my follow-on
17 assignment, I received significant law of war instruction
18 there as well. So in addition to the core curriculum that
19 each judge advocate going through the program has, I was
20 permitted to specialize in the law of war the second semester
21 of that legal masters program.

22 Q. So how long in your career, since when have you
23 specialized in this area?

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1 A. Well, so after the -- after completing the graduate
2 course, I joined the faculty of the Army JAG School. I was
3 assigned to the international law department. That was 2004.
4 I have specialized in the law of war since that time.

5 Q. And does that include in military assignments as well
6 as academic ones?

7 A. It does. I left active duty following my three-year
8 tour on the faculty. I remained in the reserves, and, in
9 fact, remained on the JAG School faculty as a reservist as
10 well. So I returned to the school periodically to teach a law
11 of war course and an operational law course, usually once per
12 year.

13 When I left active duty, I left to become a law
14 professor at Creighton University Law School. I continued
15 teaching the law of war there as a semester-long course,
16 actually called it The Law of Armed Conflict there. And all
17 of my research and writing since 2007 has focused on
18 international law and most especially the laws of war.

19 Q. What other professional activities do you have in
20 this area besides the academic ones you've talked about?

21 A. From two thousand -- I believe it's 2009 to 2012, I
22 was on a defense team at the International Criminal Tribunal
23 for Yugoslavia, former Yugoslavia. I was involved in the

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1 case, Gotovina, et al. I was assigned to the defense team of
2 General Mladen Markac. I was brought on the team to advise
3 and help litigate law of war matters in addition to command
4 responsibility matters.

5 Q. Have you done any advising to governments?

6 A. Yes, I have. I mean, most prominently, the United
7 States Government. I haven't advised governments directly, I
8 would say; however, some governments have brought me in to do
9 training for their own Armed Forces, so -- well, in 2005, in
10 Kabul, Afghanistan, I was assigned to give law of war
11 instruction and human rights law instruction to the Afghan
12 National Army and the Afghan Ministry of Defense there in
13 Kabul.

14 Q. Have you done any prominent activities with the
15 International Committee for the Red Cross?

16 A. Yes. Several. I have several projects with them.
17 Currently I'm on a reading committee for the redraft of the
18 commentaries to the 1949 Geneva Conventions. In 1958 through
19 1961, the International Committee of the Red Cross published a
20 series of four volumes of commentaries on the 1949 Geneva
21 Conventions. A few years ago they determined that they would
22 update and reissue those conventions. It's a quite large
23 project. I'm on a committee that reviews every single

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1 commentary that is written. In addition, I have submitted my
2 own three commentaries for inclusion in the new commentaries
3 as well. Those apply to the Third Geneva Convention on
4 prisoners of war.

5 In addition to that project, I have conducted
6 seminars for them on law of war training or, as they prefer to
7 call it, international humanitarian law. I have done this in
8 a number of university campuses in the United States,
9 including the University of Virginia, Brigham Young
10 University. I have also done this twice in Beijing, China,
11 for them as well.

12 Q. And your -- the commentaries you're talking about for
13 the ICRC ----

14 A. Yes.

15 Q. ---- do those draw on state practice and state
16 conduct and things of that nature?

17 A. Yes, quite heavily. In fact, most of the effort of
18 the commentaries is to layer a gloss of state practice over
19 the language of the convention itself. Those commentaries do
20 try to account for how states have implemented the
21 conventions, especially this updated version. There wasn't
22 much to work with in the original commentaries because they
23 were still quite new, the conventions were. But this updated

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1 effort is, I think, a much larger attempt to account for state
2 practice and the extent to which state practice has perhaps
3 even in some cases modified the plain meaning of the
4 convention.

5 Q. Tell us about your teaching in the area of the law of
6 war.

7 A. I have taught the law of war -- taught initially at
8 the Army JAG School, as I indicated. My teaching profile was
9 exclusively the Fourth Geneva Convention and war crimes
10 initially, but it grew to include other war crime subjects as
11 well. On top of that, every member of the department would
12 cover nearly the entire range of the curriculum in some of the
13 small group sessions as well.

14 In addition to teaching there at the school, we were
15 often sent to other government agencies to instruct on law of
16 war. Some of the departments we instructed included the
17 United States State Department, the Department of Justice, the
18 Central Intelligence Agency. We would travel frequently to
19 some of these other places to give law of war instruction.

20 Q. And have you taught seminars at other places?

21 A. Yes, I have, very frequently. Some of the law
22 schools where I have taught seminars and given talks include
23 Yale Law School, the University of Virginia Law School on at

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1 least five occasions, Duke University Law School, University
2 of Texas Law School on two occasions, Georgetown University
3 Law School, University of California Berkeley. Those are --
4 those are a few.

5 Q. On which school are you on the faculty now?

6 A. Creighton University Law School.

7 Q. And have you taught law of war topics there?

8 A. Yes, I have. I have for, I think, a total of five
9 semesters; I taught a course called The Law of Armed Conflict.
10 So this was to Juris Doctor candidates. It covered the entire
11 range of the law of war.

12 Q. Have you also taught anything on international
13 criminal law that would include war crimes?

14 A. Yes, I have. I've taught, I believe now, nine
15 iterations of international criminal law at Creighton
16 University Law School. This is both at our home campus in
17 Omaha, Nebraska, as well as a summer school that we have
18 offered now for six consecutive summers. We have partnered
19 with a German University, the University of Erlangen, to offer
20 a month-long international criminal law course. It's
21 headquartered in Nuremberg, Germany. We take the students up
22 to The Hague, Netherlands as well to tour the tribunals.

23 And we offer two courses, of course, on the law on

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1 the Holocaust and then a more traditional course on
2 international criminal law. I'm responsible for the latter,
3 which involves significant war crimes and law of war
4 instruction as well.

5 Q. Tell us about your publications in the area of the
6 law of war.

7 A. I have, I would say, in excess of 25 publications on
8 international law. The majority of these do focus on the law
9 of war, and the majority of them focus on the jus ad bella,
10 the prong of the law of war that is that prong of the law of
11 war that regulates the conduct of hostilities, in addition to
12 a wide range of subjects within the laws of war.

13 Q. Are any of your publications peer reviewed?

14 A. Yes, several are peer reviewed. The peer-reviewed
15 publications include the International Law Studies, which is a
16 publication that comes from the Naval War College. There's an
17 Oxford publication that is peer reviewed, the Journal of
18 Conflict and Security Law, that is a publication. I think
19 that came out last year. That is also a peer-reviewed
20 journal.

21 Q. And does peer review make a difference in your field
22 as far as the status of publications?

23 A. I would say in law it's a peculiar thing. For the

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1 longest time it was chiefly student-edited journals where law
2 professors placed their pieces. But increasingly, I think
3 we're making the conversion to appreciating the value of
4 peer-edited journals. I certainly have done that in my own
5 publication efforts. I have tried now to achieve a mix of
6 student-edited publications and peer-reviewed publications.
7 The latter, peer-reviewed publications, I have found provided
8 a higher quality of editing and substantive feedback.

9 Q. Have you received any awards for your publications?

10 A. Yes. Yes. I have received three writing awards.
11 The first was at the Judge Advocate General's School. The
12 article I wrote for the legal masters received the General
13 Prugh Award for Excellence in International Law Writing. Next
14 I received the Kevin Barry Award from the National Institute
15 of Military Justice; this was for an article on combatant
16 status. And then most recently, I received the Francis Lieber
17 Prize from the American Society of International Law for
18 excellence in law of war writing.

19 Q. Have you been involved in the writing of any law of
20 war manuals?

21 A. Yes. Yes, I have. So this was a substantial part of
22 the duties at the Judge Advocate General's School. The
23 international law department publishes two works, first a law

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1 of war deskbook used for instruction; secondly, an operational
2 law handbook which is used by judge advocates assigned to
3 operational billets, I believe, in each of the four services
4 and perhaps even elsewhere. More recently, I was involved --
5 or invited to participate in a project by the Nato Centre of
6 Excellence. The Cyber Defence Center of Excellence is located
7 in Tallinn, Estonia.

8 In 2008, we began a project to provide a manual on
9 how the laws of war, both the jus ad bellum regulating the
10 resort to armed force, and the jus in bello, resorting to the
11 conduct of hostilities, how these prongs of the laws of war
12 ought to operate in cyberspace. This is a three-year long
13 project. There were 18 members of what was called an
14 international group of experts. We produced the final product
15 in 2012, which was published by Cambridge University Press.

16 Q. Do you belong to any professional organizations in
17 this area?

18 A. Let's see. I'm a member of the Washington State Bar,
19 but that, of course, is not a law of war organization. I am a
20 member of the Institute of International Humanitarian Law in
21 San Remo, Italy. I was invited to join as a member of that
22 institute, I believe, in 2009, and I have been a member of
23 that organization ever since, yes.

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1 Q. And are you involved with the faculties of any other
2 universities, especially any military academies?

3 A. I was, as a reservist, a member of the department of
4 law at the United States Military Academy at West Point. I
5 provided instruction to summer students while I was assigned
6 there; that included constitutional law, military law, and
7 laws of war.

8 Q. Have you had any involvement with the U.S. Naval War
9 College?

10 A. Yes, I have. I am -- or was for three years -- it's
11 a rotating position -- a member of the board of advisors for
12 the International Law Studies series. I've been an invited
13 speaker there numerous times, both on panels at conferences
14 and to two smaller invitation-only workshops.

15 Q. Have you examined Attachment C to Appellate Exhibit
16 502Z?

17 A. Yes, I have.

18 Q. Is that your curriculum vitae?

19 A. Yes, it is.

20 Q. And is it accurate?

21 A. Yes, it is.

22 DC [MAJ WILKINSON]: The defense now requests Professor
23 Watts be recognized as an expert in the law of war.

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1 MJ [COL POHL]: Trial Counsel, do you wish to voir dire
2 the witness?

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

4 MJ [COL POHL]: Any challenge to that characterization?

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

6 MJ [COL POHL]: He's so accepted. Go ahead.

7 Q. Is the law of war a type of international law?

8 A. Yes, it is. It's known by various names. Some refer
9 to it as the law of armed conflict, some refer to it as the
10 law of war, some refer to it as international humanitarian
11 law; but it is a subtopic within public international law
12 generally.

13 Q. Are you familiar -- I mean, to your knowledge, does
14 there exist any separate United States law of war?

15 A. Like many of its international -- like many of its
16 legal -- international legal obligations, the United States
17 has implemented the laws of war in its own statutory regimes.
18 It is -- we are a dualist system that requires that additional
19 step. I suppose one could describe the extent to which we
20 have integrated the laws of war into our statutes as something
21 U.S. specific, but that's not usually termed its own body of
22 international law or its own body of the law of war, no.

23 Q. I mean, does any one country have the power to, by

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1 itself, change the law of war?

2 A. Not by itself, no. I mean ----

3 Q. Now, what does the term armed conflict mean in
4 international law?

5 A. It's a term that first appears in the 1949 Geneva
6 Conventions. There are two variants of armed conflict that
7 are described in those conventions. The first is
8 international armed conflict, which describes war or conflict
9 between two states or high-contracting parties to the Geneva
10 Conventions. The second variant of armed conflict recognized
11 in the 1949 Geneva Conventions is what the conventions term
12 conflict not of an international character. That term appears
13 in Common Article 3 of each of the four Geneva Conventions.

14 Q. And is that commonly called noninternational armed
15 conflict now?

16 A. Yes, sometimes it is.

17 Q. What is the principle of legality in the law of war?

18 A. It's not a principle peculiar to the law of war; but
19 within the law of war, it refers to a principle that requires
20 parties to apply existing law rather than laws that may be in
21 the future, or will be.

22 Q. So if you're analyzing a war crimes situation, you
23 have to use the law as it existed at the time of the crime,

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1 not what people come up with later on?

2 A. Yes. The concept of legality appears quite
3 frequently in international criminal law and in war crimes.
4 It was a focus of criticism, frankly, of the Nuremberg
5 Tribunals and the Far East Tribunal.

6 Q. Now, do the Geneva Conventions of 1949 or any other
7 treaties specifically define armed conflict? I mean, do they
8 provide some formula where you can just look at it and see
9 whether given fighting is armed conflict or not?

10 A. Well, there is one that goes to some greater length.
11 That is Additional Protocol II.

12 Q. We'll come back to that one in a little while.

13 A. Okay.

14 Q. But in order to classify a conflict as armed conflict
15 or not, do you have to look at customary international law?

16 A. You do. Because the 1949 Geneva Conventions do not
17 define armed conflict. There were proposals to do so. This
18 was not a point lost on states, that they had adopted a fairly
19 ambiguous term, particularly as it related to conflict not of
20 an international character described in Common Article 3.
21 Several states proposed to provide a definition or to clarify
22 what they meant by armed conflict, especially in the context
23 of noninternational armed conflict; and a working group was

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1 even formed to do that. Several states, including the United
2 States, proffered criteria, but they could come to no
3 agreement, and, therefore, the term was left undefined.

4 A second working group attempted, actually, and
5 abandoned the effort, and that sealed it. The states were
6 content to leave things with just the term armed conflict. I
7 suspect that ambiguity was probably key to the consensus of
8 all the states.

9 Q. To determine customary international law, do you have
10 to look at the behavior of governments?

11 A. The usual formula, the widely accepted formula for
12 customary international law, is general and consistent state
13 practice; not by one state but by the community of states;
14 hence the resort to general state practice. Then in addition
15 there's an element of opinio iuris, a Latin term which
16 describes a sense of legal obligations. That is not only are
17 states undertaking this general and consistent course of
18 practice; they're doing so because they feel legally obligated
19 to as a matter of international law.

20 Q. What's the relative importance of the pronouncements
21 or the words of governments versus their actions or their
22 deeds?

23 A. The latter is more persuasive. When accessible and

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1 when publicly available, scholars, academics, other states
2 even, prefer to examine the actual courses of conduct of
3 states. This can be difficult in conditions of armed conflict
4 where states often attempt to hide what they're doing or don't
5 make publicly available what they're doing. But as between
6 state pronouncements and actual state practices, the latter
7 are preferred.

8 Q. How important are the words and deeds of
9 intergovernmental bodies, such as the United Nations?

10 A. They're not authoritative. Only states can truly
11 make international law, and only what states do and in some
12 cases say is relevant for the identification of customary
13 international law. That said, many nongovernmental
14 organizations do offer opinions on the state of the law, do
15 attempt to advance the state of the law through dialogue.
16 Some of their products are persuasive.

17 The International Committee of the Red Cross have,
18 for decades, developed products which many lawyers consider
19 highly persuasive; some have lended them the status of
20 authoritative. That, in my opinion, is incorrect. They're
21 not authoritative.

22 Q. How about the role of international war crimes
23 tribunals? How important -- how important are those in

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1 determining customary international law?

2 A. They are relevant to the sources of international
3 law. Decisions by tribunals have been recognized as a source
4 of international law. For instance, in the statute of the
5 International Court of Justice, the decisions of tribunals are
6 a legitimate source of international law in that respect.

7 Q. Now, how about the statements and actions of private
8 armed groups?

9 A. They are not acceptable sources of international law.
10 They are not authoritative sources of international law any
11 more than a nongovernmental organization might be.

12 Recently, the United States expressed a very strong
13 opinion in this regard in its Law of War Manual. The United
14 States judged that the opinions of organized armed groups, for
15 instance, and whether they are involved in a state of armed
16 conflict, the Manual makes clear they are not competent
17 authorities. That's paragraph 3.4.1.2 of the Manual.

18 Q. Now, when it comes to the law of noninternational
19 armed conflict, when did that law really get started?

20 A. It really sees its birth in the 1949 Geneva
21 Conventions. There really was not a lot of multilateral
22 treaty-based law, certainly, that regulated noninternational
23 armed conflict prior to the 1949 Geneva Conventions. And even

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1 then, this was a modest effort of the 400 or more articles of
2 the 1949 Geneva Conventions. Only one in the original
3 conventions addresses noninternational armed conflict; that is
4 Common Article 3.

5 Q. So for the rest of my questions, given that, I'm
6 going to be talking about the period from 1949 to
7 September 11th, 2001.

8 A. Okay.

9 Q. So in your study of the law of -- the customary law
10 of noninternational armed conflicts during that period, are
11 there any overall patterns that you have seen in the way
12 governments behaved towards their conflicts with nonstate
13 armed groups?

14 A. The period that initially follows the 1949 Geneva
15 Conventions saw very little application of Common Article 3.
16 This was, I suspect, for a number of reasons. There was --
17 this generated frustration among some states. And as early as
18 1961, there were efforts by states to refine the standard of
19 applicability; that is, to fill out the meaning of that term,
20 armed conflict. Those efforts continued but saw very little
21 state interest, I would say, until the early 1970s. At that
22 time ----

23 Q. Sorry. In dealing with actual conflicts ----

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1 A. Yeah.

2 Q. ---- was there anything you would note about their
3 overall willingness or reluctance to refer to them or to treat
4 them as actual noninternational armed conflicts?

5 A. As a general matter, states were unwilling to regard
6 most situations of violence as rising to the level of armed
7 conflict.

8 Q. Tell us, then, a little about Additional Protocol II,
9 which is what I think you were coming to.

10 A. Sure. So after the efforts -- after various efforts
11 by nongovernmental organizations and even some states to
12 clarify the meaning of armed conflict, states convened a
13 diplomatic conference to update the Geneva Conventions more
14 generally. This is the diplomatic conference that runs from
15 1974 to 1977 and ultimately produces Additional Protocols I
16 and II to the Geneva Conventions of 1949.

17 Q. And what kind of conflicts does Additional
18 Protocol II apply to?

19 A. Additional Protocol II applies to all armed conflicts
20 not covered in Article 1 of Additional Protocol I. The
21 convention then elaborates further and describes conflicts
22 that involve a high-contracting party against an organized
23 armed group on the territory of a high-contracting party.

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1 The organized armed group must then satisfy three
2 conditions: A condition of territorial control; secondly, a
3 condition of carrying out sustained and concerted operations
4 against the government forces; and then finally, the organized
5 armed group must implement the protocol itself; that is
6 Protocol II.

7 It is an elaborate description of noninternational
8 armed conflict. I'm hesitant to say that Additional
9 Protocol II covers noninternational armed conflict because the
10 majority view is it actually only covers a subspecies or a
11 subgrouping of noninternational armed conflicts.

12 Q. So in other words, under other authorities you might
13 have a noninternational armed conflict that does not meet
14 those exacting criteria to fall under Additional Protocol II?

15 A. That is correct. The majority view is that there are
16 armed conflicts which satisfy the Common Article 3 and
17 customary standard for conflict not of an international
18 character, but there are also within that grouping conflicts
19 which also satisfy the Additional Protocol II criteria that I
20 enumerated a moment ago.

21 Q. Now does Additional Protocol II include any negative
22 language about what is not a conflict?

23 A. It does. Article 1, subparagraph 2, which

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1 immediately follows the criteria I described a moment ago,
2 excludes explicitly riots, isolated and sporadic acts of
3 violence, or other acts of a similar nature.

4 Q. And does that standard reflect customary
5 international law with respect to all noninternational armed
6 conflict?

7 A. Yes, it does. That language has been cited in
8 judicial opinions. In fact, it is reproduced verbatim by the
9 United States Law of War Manual, as well, in its 2015
10 publication.

11 Q. Does -- at the negotiations over Additional
12 Protocol II, did anyone suggest that in a contest like that,
13 where it's a government versus a nonstate armed group, that
14 the government should just have plenary power to say whether
15 it is or is not armed conflict?

16 A. That was a proposal made. During the diplomatic
17 negotiations that produced Additional Protocol II, Colombia
18 proposed that it ought to be the state that is fighting the
19 organized armed group who should make the determination
20 whether an AP II conflict is happening.

21 They proposed this in a working -- a plenary group,
22 rather, of deliberations. The states debated it briefly but
23 rejected it, and it did not appear in the final language of

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1 the treaty.

2 Q. So -- tell us about the role of international war
3 crimes tribunals in creating or setting forth customary
4 standards for determining what is an armed conflict.

5 A. Well, they have had a recognized role in clarifying
6 the law and, in some cases, I would say altering the law.
7 Some tribunals have perhaps put a finer point on some parts of
8 the law of war than some states might like, so there's often a
9 dialogue, I think, between these tribunals and the way they're
10 describing the law and how states perceive the law.

11 Q. What are the most prominent tribunals from the later
12 part of the 20th century?

13 A. Well, the most active and the most prolific has been
14 the International Criminal Tribunal for former Yugoslavia.
15 They share an appeals chamber with the Rwandan Tribunal, but
16 it is the Yugoslav situation and the Yugoslav work that has
17 been most prolific in its commentary on the laws of war.

18 Q. Has their work helped to solidify what the real
19 standards are for determining what's an armed conflict?

20 A. They have. If Additional Protocol II perhaps was too
21 precise or too demanding in its description, I think there is
22 more state sympathy for some of the clarifications that
23 developed in the work of the Yugoslav tribunal, yes.

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1 Q. Have states adopted or begun to teach standards that
2 come from the Yugoslav tribunal?

3 A. Yes, they have. The work of the tribunal has been
4 integrated into the work of many states' legal instruction.
5 It has also been integrated into the legal instructions they
6 issue to their Armed Forces.

7 Q. When you were teaching at the Army JAG School
8 graduate course, did you teach standards that came out of the
9 Yugoslav Tribunal to American judge advocates?

10 A. Yes, we did. We taught, for instance, work that came
11 from the Tadic case.

12 Q. Tell us about the standard of the Tadic case.

13 A. So there are a number of issues raised in the Tadic
14 case, but one of the more enduring observations that tribunal
15 made about the law was its description of standards and
16 classifications of conflicts. The Yugoslav situation produced
17 a complicated task for conflict classification, and one of the
18 court's earliest efforts was to develop a clearer framework
19 for distinguishing situations of riots and banditry and
20 isolated violence from situations that were truly
21 noninternational armed conflict.

22 Q. Do they mention the word terrorism at all?

23 A. I can't say with -- that I recall. I don't know

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1 if -- specifically if the Tadic situation -- decision uses the
2 term terrorism.

3 Q. And if you don't remember, you don't remember.

4 A. Yeah.

5 Q. But tell us what the test is or that is laid out in
6 Tadic for determining what is an armed conflict versus not an
7 armed conflict?

8 A. The Tadic tribunal identified two characteristics of
9 noninternational armed conflicts. First, they are violence
10 that rises to a requisite level of intensity. Later decisions
11 elaborated on what that intensity might involve or factors
12 that indicated there was sufficient intensity to the violence.

13 The second element of noninternational armed conflict
14 identified by the Tadic court is a requirement of organization
15 that applies to the nonstate actor involved in the violence.

16 Q. Is that then an objective test?

17 A. Yes, it is. It's an objective test; a de facto
18 standard, if you like.

19 Q. So it doesn't then depend on what the parties are
20 saying or what they think about it?

21 A. No. No decision from the Yugoslav tribunal that I'm
22 aware of resorts to the statements of the parties to
23 determine. They look to the conditions of the -- of violence

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1 themselves and to the characteristics of the organization
2 itself.

3 Q. By the end of the 20th century, would it be fair to
4 say that that standard was customary international law?

5 A. Yes. Yes, it would. By the end of the 20th century,
6 a number of states had incorporated that standard into their
7 legal manuals, and it was generally accepted as an accurate
8 description of the standard for noninternational armed
9 conflict.

10 Q. Now, I think you said there was some later cases that
11 helped to refine what goes into the intensity and organization
12 elements of the test.

13 A. They did, yes. A number of cases refined the Tadic
14 standard as they applied it to the facts of their own cases.

15 Q. Are there any especially good ones that summarize the
16 refinements?

17 A. By the late 1990s there were -- there was violence in
18 Kosovo that was addressed by the tribunal. It pitted Serbian
19 armed forces against irregular militia and organized armed
20 groups which had identified themselves as the Kosovo
21 Liberation Army. There were a number of cases that deal with
22 that situation that were called upon to apply the Tadic
23 standard. I'm thinking of the Limaj and the Haradinaj

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1 revisions specifically. Each of these offered some
2 refinements on the Tadic standard.

3 Q. Now, have you examined footnote 54 of the C.M.C.R.
4 case United States v. Hamdan?

5 A. Yes, I have.

6 Q. Does the standard in that footnote reflect customary
7 international law at the end of the 20th century?

8 A. Parts of it do. It tracks some of the language used
9 by the Tadic chamber and by other chambers of the Yugoslav
10 tribunal. There are references in that instruction to
11 intensity that I think do track some of the customary law
12 applicable to that period. However, there are other
13 provisions of the instruction that do not track customary
14 international law.

15 Q. Tell us more about those.

16 A. Well, to my recollection, the footnote reproduces an
17 instruction that refers to the statements of parties, the
18 statement of the organized armed group, or the statement of
19 the state, the country, if you will. Those are not part of
20 customary international law as I understand it.

21 MJ [COL POHL]: When you say it's not part of customary
22 international law, are you saying that the statements of the
23 parties have no relevance or just not a lot of relevance?

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1 WIT: They have no relevance to the legal standard. I'm
2 not aware of a tribunal or a treaty or a work that takes
3 account of how either party is labeling a conflict.

4 MJ [COL POHL]: Okay. So if you had one party declaring a
5 war on the United States, you wouldn't give that much credit?

6 WIT: No, I wouldn't.

7 MJ [COL POHL]: Okay. And similarly, if you had the
8 President of the United States refer to a certain action as
9 a -- as a criminal action as opposed to a law of war
10 violation, that would equally receive no weight?

11 WIT: Again, the labeling would not.

12 MJ [COL POHL]: Okay.

13 WIT: What the states -- what either party actually does
14 is highly relevant. How they carry themselves out on the
15 battlefield, what assets they choose to use on the battlefield
16 are extraordinarily relevant; however, the labels themselves
17 are not.

18 MJ [COL POHL]: Thank you. Go ahead.

19 Q. Now, what about the language in there that says that
20 the fact-finder can use anything else he considers relevant?

21 A. That's not part of the customary international law
22 standard for noninternational armed conflict. There is no
23 invitation for any party to add factors that it sees fit.

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1 Q. Now, in preparation for your testimony today ----

2 A. May I -- there's ----

3 Q. Yes, sir.

4 A. ---- just one further observation on the footnote.

5 It does not seem to give sufficient weight to the organization
6 of the nonstate actor as well. As I reviewed that footnote,
7 that element did seem to be missing from the instruction. It
8 gave me the impression that someone might read that
9 instruction and deduce that intensity alone would be enough to
10 satisfy the standard. It is missing the organization
11 requirement that is part of the customary standard.

12 MJ [COL POHL]: What do you believe the organization
13 requirement to be?

14 WIT: It's several-fold. There are a number of factors.
15 They look to the character of the nonstate organized armed
16 group. Some of the factors included are whether that
17 organization has a command hierarchy, whether it issues
18 instructions to its forces, whether it has tools for and means
19 to recruit members, whether it has a system to enforce
20 discipline within its organization, whether orders are given
21 within the organization, and whether those orders are followed
22 and carried out, whether there is an authority responsible for
23 the actions of that organization. Some cases have examined

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1 whether the organization is capable of issuing communiques in
2 a concerted fashion; speaking with one voice, if you will.

3 MJ [COL POHL]: Is the size of the organization a factor,
4 just the sheer number?

5 WIT: No, sir, not on the organizational side; however,
6 the number of participants that organization can bring to bear
7 on a situation of violence is relevant to intensity.

8 MJ [COL POHL]: Okay. Thank you. Go ahead.

9 Q. All right. And since the judge has asked about
10 the -- about the organization element, tell us about some of
11 the refinements on the intensity element.

12 A. Oh, sure. The -- some of the factors that indicate
13 that a situation of violence is sufficiently intense to
14 constitute a noninternational armed conflict are the, as I
15 mentioned a moment ago, the number of participants. The
16 number of casualties can be indicative of sufficient
17 intensity, the types of weapons that are used. The extent to
18 which violence causes displacement among a civilian population
19 has proved relevant. The duration during which hostilities
20 are carried out or violence is carried out, each of these
21 is ----

22 Q. And if you would, on this question of duration ----

23 A. Yes.

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1 Q. ---- does that mean how long the fighting is
2 happening, or does that mean how long people suffer from the
3 aftermath of the fighting?

4 A. It is usually focused on the exchanges between the
5 parties themselves, whether there are sustained -- that's a
6 term that's often used -- whether there are sustained
7 engagements or confrontations between parties to the conflict
8 or parties to the situation.

9 Q. But I mean, suppose you say one day you have an
10 ambush, some people are hurt, and someone spends a year dying
11 from his wounds. Are you looking at the day or are you
12 looking at the year?

13 A. Looking at the day. It's the violence itself that is
14 relevant.

15 Q. In preparing for this case, have you looked at some
16 examples where a conflict or a violence transitioned from
17 being not an armed conflict to being an armed conflict?

18 A. Yes, several.

19 Q. Tell us about one of those.

20 A. The earliest I've looked at in earnest is the
21 situation of violence in Northern Ireland. It begins in 1968,
22 and there is rioting and occasional violence in Northern
23 Ireland. The British Army responds by sending troops, at one

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1 point in the tens of thousands of troops, to quell this
2 violence.

3 By 1971, the violence evolves. It changes from
4 sporadic attacks on soft targets and civilians to an effort by
5 the Provisional Irish Republican Army, the PIRA, to attack the
6 security forces themselves, including the British Army.

7 In 1971, there are clashes between the PIRA and
8 British Armed Forces. By 1972, the frequency of these clashes
9 greatly increases. 1972, by one estimate, saw 6,000 shootings
10 and 1,000 bombings. There's a single day in July where there
11 are 22 bombings in Northern Ireland. The violence is
12 contained mostly to two cities, to Londonderry and to Belfast.
13 The British Army responds with widespread roundups and
14 security internments, so there are mass incarcerations
15 undertaken as a response by the British Army.

16 By the summer of 1972, the British Army mount a
17 six-month operation to regain control of territory. They --
18 this operation involves as many as 28,000 British Army troops.
19 And eventually they overcome the Provisional IRA in a tactical
20 sense.

21 After that, the PIRA seemed to have concluded that
22 they can't go toe-to-toe with the British Army and changed
23 tack. So from 1974 -- I'm sorry, 1973 to 1974, we see them

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1 revert to the tactics they were using in 1968 through 1971.
2 These are sporadic bombings against softer civilian-type
3 targets. They'll conduct shootings against British Army
4 soldiers, but these are usually off-duty or lone British Army
5 soldiers rather than attacks on formations of soldiers.

6 Q. Is it possible, then, that this conflict went from
7 being not an armed conflict, intensified for a while into
8 armed conflict, and then de-escalated into not an armed
9 conflict again?

10 A. Possible, but I'm not aware of a state that made that
11 legal conclusion. For instance, the United Kingdom throughout
12 the period, including the most intense period that I described
13 from 1971 to 1972, insisted that it was not a noninternational
14 armed conflict. They referred to the situation in Ireland as
15 The Troubles. They continue to do that to this day. As
16 recently as 2004, United Nations ----

17 Q. Sir, I don't want to get too far into the
18 21st Century.

19 A. Okay.

20 Q. All right. But do you know of some situations where
21 the government -- some government acknowledged that you had
22 moved from not an international or not an armed conflict into
23 being a noninternational armed conflict?

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1 A. Sure. So roughly contemporaneous to the Northern
2 Ireland situation, there were hostilities and violence in
3 Nigeria. Beginning in 1966, Nigeria suffered a number of coup
4 attempts. These attempts initially began with assassinations
5 of regional prime ministers. There was even a federal prime
6 minister killed in 1966, but these were sporadic acts of
7 violence.

8 However, by fall, there were attacks on government
9 forces. There were widespread attacks then on the civilian
10 population. Armed groups within Nigeria began attacking
11 civilians on the basis of their ethnicity. Some estimate as
12 many as -- civilian casualties are running to the thousands by
13 fall of 1966.

14 In 1967, several of these groups began to launch
15 independence movements; that is, it turned into an effort to
16 secure independence from the Federal Government of Nigeria.
17 So by March there were concerted efforts in this regard and
18 strong statements by these groups that they regarded
19 themselves as independent.

20 Beginning in June of 1967, then, there are sporadic
21 clashes between Federal Government troops and armed forces
22 associated with these separatist and rebel groups, so the
23 groups are now clashing with one another. In July, there are

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1 large-scale battalion-sized engagements between these forces.
2 By the end of July, there is as much as a 1,000-long front
3 that separates the groups in some instances.

4 Q. Can you tell us in this timeline you're giving about
5 when the Nigerian government started to recognize that it was
6 in what would be called a civil war or a noninternational
7 armed conflict?

8 A. The 6th of July, 1967, the Nigerian government
9 recognized civil war.

10 Q. And do you know if other governments did the same?

11 A. I'm not aware of other governments' opinions, no.

12 Q. Can you tell us about another situation that, you
13 know, again, with some recognition, moved from not an armed
14 conflict into being one?

15 LDC [MR. RUIZ]: Judge, I'm sorry to interrupt my -- our
16 own counsel, but may we have a five-minute break?

17 MJ [COL POHL]: Sure.

18 LDC [MR. RUIZ]: Thank you.

19 MJ [COL POHL]: While we're having that break, can we
20 bring this up to the case now?

21 DC [MAJ WILKINSON]: Um ----

22 MJ [COL POHL]: And I don't need to hear every example of
23 what doesn't apply.

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1 DC [MAJ WILKINSON]: I don't intend to go to every
2 example. In fact, I just really want to hear one more and
3 then move to ----

4 MJ [COL POHL]: It's always one more. But okay, but let's
5 try to get it ----

6 DC [MAJ WILKINSON]: Understood, sir.

7 MJ [COL POHL]: I understand what you're coming at and I
8 understand the parameters of it, but I really want to talk
9 about ----

10 DC [MAJ WILKINSON]: Understood. One more example, and
11 then the principles and our case.

12 MJ [COL POHL]: Okay. We'll be in recess for ten minutes.

13 LDC [MR. NEVIN]: Your Honor ----

14 MJ [COL POHL]: Commission is in recess.

15 [The R.M.C. 803 session recessed at 1639, 7 December 2017.]

16 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1648,
2 7 December 2017.]

3 [Professor Sean Watts resumed his seat on the witness stand.]

4 MJ [COL POHL]: Commission is called to order. Professor
5 Watts is still on the stand. All parties are again present.
6 I'm sorry.

7 CP [BG MARTINS]: Your Honor, Mr. Groharing is not
8 present.

9 MJ [COL POHL]: Not present. Okay.
10 Defense Counsel.

11 **DIRECT EXAMINATION CONTINUED**

12 **Questions by the Defense Counsel [MAJ WILKINSON]:**

13 Q. All right. We'll skip over most of the other
14 examples, but can you tell us a bit about that situation in
15 Kosovo in the late 1990s that you mentioned earlier on?

16 A. Yes. This was a situation addressed by the Yugoslav
17 tribunal. And as I mentioned previously, there was violence
18 between the Armed Forces of Serbia and the Kosovo Liberation
19 Army, as they called themselves. This was in the northern
20 territories of Kosovo. The court was called upon to analyze
21 whether the situation amounted to armed conflict and
22 specifically which dates it had matured into a
23 noninternational armed conflict.

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1 Q. Could you contrast what it was like at the time when
2 it wasn't an armed conflict and the time when it was? Because
3 that's what I'm getting at.

4 A. Sure. So there was an intermittent violence between
5 the Kosovo Liberation Army and Serbian police as early as
6 1997.

7 Q. When you say intermittent, be more specific about
8 that.

9 A. Sure. Weeks are elapsing between clashes in those
10 cases in some instances. The intensity picks up as 1997
11 progresses, and by the beginning of 1998, there are fairly
12 regular clashes between Kosovo Liberation Army elements and
13 the Serb police and Serb Armed Forces.

14 These clashes involve the use of mortars, in some
15 cases armored cars, in some cases even helicopters as well.
16 They are producing casualties in the dozens or so. But again,
17 they are intermittent in the sense that there are weeks in
18 some cases elapsing between each episode.

19 However, things change on the 22nd of April. The
20 court examines violence after the 22nd of April and determines
21 that this is the starting point of noninternational armed
22 conflict. What occasions this is a great reduction in the
23 periods between violence. Violence is nearly continuous from

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1 this period forward. There are breaks, but these are breaks
2 that involve matters of days rather than matters of weeks.

3 The intensity picks up as well. There are more
4 casualties produced in this period. The same sorts of armored
5 formations, helicopters, and mortars are used, machine guns
6 are used. And these involve clashes between the actual forces
7 rather than isolated strikes or even strikes against
8 civilians. They are true combat between forces.

9 Q. So in general, I just want to ask some general
10 questions about customary international law, as it had
11 developed at that point, and about conflict classification.

12 A. Okay.

13 Q. What is the importance of sustained versus sporadic
14 fighting in that period?

15 A. Well, it's captured by state understandings of the
16 term noninternational armed conflict by the late 1990s. There
17 are indications from states that do not regard isolated or
18 sporadic incidents as arising to the level of armed violence,
19 and we see the Kosovo tribunal putting that into practice in
20 its judgment in Limaj and Haradinaj.

21 Q. And what is the importance of clashes between
22 government and nongovernment forces; that is, those two
23 fighting each other?

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1 A. Well, they are an indication of a high degree of
2 violence. They tend to be more intense in some respects than
3 attacks against softer targets because they provoke responses.
4 They're also relevant because they provoke or speak to the
5 actual purpose of the jus in bello, to the laws of war. The
6 laws of war are designed to regulate combat between forces.
7 And so it's exactly that kind of activity to which these
8 regulations apply.

9 Q. So when you have just armed persons on one side
10 attacking unarmed civilians on the other side, how does that
11 relate to the standard?

12 A. Well, it is, in the context of an armed conflict, a
13 violation of the law of war to attack civilians, but ----

14 Q. But what I'm after is in determining whether you've
15 got an armed conflict in the first place.

16 A. Yeah. Not especially relevant. There are a number
17 of occasions of state practice that exclude those sorts of
18 attacks. This is the Irish situation I described previously
19 in some phases. This is the Nigerian situation I described
20 previously. This is also the Kosovo situation. In each
21 instance, either the state or the tribunal concerned did not
22 regard this as the kind of violence that amounted to armed
23 conflict.

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1 Q. Have you read about the violence between the United
2 States and al Qaeda as described in the 9/11 Commission
3 report?

4 A. I have read the report, yes.

5 Q. So focus on the period ending on September 11th
6 itself, including September 11th itself and before that. How
7 do these factors you're talking about apply to that violence
8 in that period?

9 A. Well, they are almost quintessentially sporadic.
10 They extend over a period, from my understanding, 1998 through
11 2001, as you asked me to focus. They are -- there are
12 occasions of violence; however, there are long periods that
13 don't involve violence between each of these episodes.

14 Secondly, there are not the clashes that we were
15 speaking of a moment ago. I'm not familiar with exchanges of
16 fire. I'm not familiar with operations that are typically
17 called combat in any of this period that you asked me to
18 consider.

19 Q. So when, at the earliest, focusing on intensity,
20 would you say the fighting between the United States and
21 al Qaeda might be an armed conflict?

22 A. October of 2001. I would say the introduction into
23 Afghanistan of large formations of United States Armed Forces,

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1 sustained bombing, clashes between those forces.

2 Q. And that's based on the intensity prong?

3 A. It is. Yes, it is not an evaluation of al Qaeda's
4 organization. I don't know enough about that organization to
5 evaluate them under the organization prong.

6 Q. And I understand in order to have a truly complete
7 definitive answer, it would have to meet both prongs and not
8 just one or the other.

9 A. It would, indeed.

10 Q. Are you familiar with the work of Marco Sassòli?

11 A. Yes. Yes, I've used it in my instruction.

12 Q. And can you just tell us about his stature in the
13 field of the law of war?

14 A. Oh, he's a renowned expert. There are few people in
15 the field that are as influential as Professor Sassòli.

16 Q. And when you say you've used his work, I mean, have
17 you used any texts of his or things like that in teaching?

18 A. Yes. In addition to his article, when I taught at
19 the Army JAG School, I used his two-volume casebook in my
20 semester-long Advanced Law of War elective.

21 Q. Are you familiar with the stature of Professor Leslie
22 Green back when he was alive?

23 A. Yes, the late Professor Green. Yes, I'm familiar

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1 with his stature.

2 Q. Tell us about that.

3 A. Also a giant in the field of the law of war, highly
4 regarded. I still use his work, The Contemporary Law of War,
5 today.

6 DC [MAJ WILKINSON]: No further questions.

7 MJ [COL POHL]: Mr. Connell, how long do you think you
8 would need?

9 LDC [MR. CONNELL]: 15 minutes.

10 MJ [COL POHL]: Okay. I'll hold you to that. Go ahead
11 and go ahead.

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

13 Q. Good afternoon, sir.

14 A. Good afternoon.

15 Q. My name is James Connell. I'm an attorney for Ammar
16 al Baluchi. I'd like to follow up on a couple of questions
17 that you were asked by counsel for Mr. Hawsawi.

18 In your testimony, you discussed the Law of War
19 Manual. What is the Law of War Manual?

20 A. This is a publication updated most recently in
21 December of 2016 from the United States Department of Defense
22 Office of General Counsel. It issues instructions to United
23 States forces on their law of war obligations.

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1 Q. What is its role in the collection of explanations of
2 the law of war within the United States?

3 A. That's a subject of some dispute. The manual
4 includes confusing disclaimers, frankly, in its beginning. It
5 disclaims being the view of any agency other than the
6 Department of Defense. It's my understanding that the
7 Department of Justice and the Department of State have not
8 endorsed the manual.

9 Q. Is it, in fact, the view -- the official view of the
10 Department of Defense?

11 A. I believe it to be that, yes.

12 Q. You testified on direct examination about -- during
13 the negotiations over Additional Protocol II, the position of
14 Colombia regarding the statements of leaders?

15 A. Yes.

16 Q. You testified on direct examination that a proposal
17 was put forth by Colombia to elevate the stature of statements
18 of leaders in the determination of armed conflict; is that
19 accurate to say?

20 A. Leaders of states. That Colombian proposal did not
21 speak to the leaders of organized armed groups, but did speak
22 to the leaders of parties to the protocol.

23 Q. Is there a consensus or majority view on the

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1 significance of the rejection of that amendment in the meaning
2 of Additional Protocol II?

3 A. There's broad consensus that the state itself cannot
4 make a conclusive determination as a matter of international
5 law whether it is or is not in noninternational armed
6 conflict. It is an objective analysis.

7 Q. You were asked on direct examination whether there
8 was any language about terrorism in the decision of Tadic
9 itself. Do you recall that question?

10 A. I do.

11 Q. Tadic itself, you told us, was not the end of the
12 development of the ICTY's jurisprudence on law of war, right?

13 A. Correct.

14 Q. And so are there -- there are later cases that give
15 us a refinement or an explanation of what Tadic meant; is that
16 fair to say?

17 A. It is.

18 Q. And do some of those cases speak to the status of
19 terrorism in armed conflict?

20 A. They do. They do. Several of them. I believe both
21 Limaj and Haradinaj incorporate statements that exclude acts
22 of terrorism from the definition of noninternational armed
23 conflict.

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1 Q. Okay.

2 A. There are also statements by states. The one that
3 stands out is a French statement made on their submission of
4 ratification of Additional Protocol I that explicitly mentions
5 terrorism as not included, both isolated terrorism and
6 concerted terrorism, in the French statement.

7 Q. I'd like to move forward to a question that the
8 military commission asked you about footnote 54 in the Hamdan
9 decision. The military commission asked you whether one party
10 declaring war was a relevant factor. Do you recall that
11 question?

12 A. I do.

13 Q. Okay. Is there a different answer for when the party
14 declaring war is a state actor versus a nonstate actor?

15 A. No, there is not.

16 Q. If one state declares war on another state, does a
17 state of armed conflict exist?

18 A. Yes, it does. This is an important difference
19 between the standard for international armed conflict on the
20 one hand and the standard for noninternational armed conflict
21 on another. Statements by states, declarations of war, are
22 conclusive as between states.

23 Q. All right. So, you know, there is a very ----

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1 A. May I correct this?

2 Q. Of course.

3 A. Statements as to the existence, that is, when a state
4 declares that it is at war, that is conclusive. If a state
5 declares that it is not at war but it is, in fact, carrying
6 out armed conflict against another state, then the fact of
7 hostilities is conclusive rather than the statement. Whereas,
8 a state may say it is in war, but a state may not conclusively
9 deny that it is not in war with another state.

10 Q. All right. And applying those two rules that you
11 just described to us, there is what is, in fact, for
12 state-to-state violence sometimes what is called -- strike
13 that. Withdrawn.

14 So when Japan attacked the United States at Pearl
15 Harbor, their attack was -- immediately preceded a declaration
16 of war by Japan; is that correct?

17 A. I'm unaware of the timing of a declaration.

18 Q. All right. I'll move on from there, then.

19 Can a nonstate actor declare war and have binding
20 effect under the law of armed conflict to create the existence
21 of armed conflict?

22 A. It cannot.

23 Q. And why not? Are there various nonstate actors that

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1 declare war on other states from time to time?

2 A. There are. There are several throughout history.

3 None has been accorded legal effect.

4 There are -- there are ridiculous declarations,
5 frankly, from some organizations. In the 1970s, the
6 Symbionese Liberation Army declared war on the United States,
7 I believe. The Japanese organization Aum Shinrikyo made
8 similar declarations. They were given no legal effect in
9 either case.

10 Q. And both of those organizations were otherwise
11 engaged in terrorist activity, correct?

12 A. That is my understanding, yes.

13 Q. Okay. Now, I'd like to move forward to Northern
14 Ireland. You described the sort of three phases of violence
15 between the Provisional IRA and the United Kingdom. During
16 that time, did the Provisional IRA declare itself to be at
17 war?

18 A. It did, yes.

19 Q. Did that have legal or binding effect?

20 A. It did not. There were also efforts by the Republic
21 of Ireland government and the United Nations to propose a
22 recognition of armed conflict, and none of those resolutions
23 carried, either.

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1 Q. Was that true -- was that state of affairs obtained
2 even though the Provisional IRA had actual troops in the field
3 against the U.K.?

4 A. That is my understanding, yes. The PIRA were still
5 deployed at the time they made those statements, yes.

6 Q. Okay. And you said that the U.K. had never
7 recognized itself -- recognized itself involved in a
8 noninternational armed conflict.

9 A. Correct.

10 Q. Did they, in fact, make a reservation or
11 understanding or declaration with respect to Additional
12 Protocol II about that fact?

13 A. My recollection on that is not perfect. I'm sorry.

14 Q. That's all right. Now, is it the fact that the
15 United Kingdom did not consider itself to be at war that's
16 determinative or the nonexistence of the NIAC, or is it the
17 objective factors of the facts on the ground?

18 A. It is the latter, the objective factors.

19 Q. Okay. Now, your second example that you gave was
20 Biafra. And what about the Biafra situation converted it to a
21 noninternational armed conflict?

22 A. What seems to have swayed the Nigerian government
23 itself were the clashes with their armed forces being carried

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1 out on a sustained and regular basis rather than being
2 sporadic clashes. There were direct confrontations between
3 Biafran forces and the Nigerian government.

4 At the time they recognized the civil war, Biafran
5 forces had managed to secure territory that had formerly been
6 held by the Federal Republic of Nigeria. They even carried
7 out operations within the capital of Nigeria itself. And I
8 suspect it was the scale and the prolonged nature of combat
9 between their forces that forced the Nigerian government to
10 concede that state.

11 Q. Now, is it the fact that the Nigerian government
12 recognized a civil war that created a state of
13 noninternational armed conflict, or was it the objective facts
14 on the ground?

15 A. The objective facts on the ground. The opinion of
16 the Nigerian government is no more persuasive than any other
17 state's opinion on the state of hostilities or the state of
18 violence there in Nigeria.

19 Q. All right. And under the international law of war,
20 what significance does the statement of the leaders of the
21 separatists and rebel groups in Nigeria have?

22 A. It has no significance. As the DoD Law of War Manual
23 says, they are not competent legal authority.

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1 LDC [MR. CONNELL]: Nine minutes, Your Honor. You owe me
2 six.

3 MJ [COL POHL]: You won't get it back.

4 Trial Counsel, do you wish to cross-examine? If so,
5 we're going to delay until tomorrow, but if not ----

6 MTC [MR. TRIVETT]: Yes, sir. We're going to
7 cross-examine.

8 MJ [COL POHL]: Okay. Before you leave, Professor, let me
9 have one question: Have you read the Military Commissions Act
10 and its definition of hostilities?

11 WIT: I have, yes.

12 MJ [COL POHL]: How do you -- and if this isn't in your
13 area, let me know, but Congress wrote the statute clearly to
14 cover, actually, this particular case. Do you believe they
15 wrote the statute when it defined hostilities to take this
16 case out of the jurisdiction of the enabling statute?

17 WIT: I'm not familiar enough with the legislative history
18 to know why they wrote it.

19 MJ [COL POHL]: Okay. But would that not be the effect of
20 if -- if you believe that, when it assigns hostilities, means
21 any conflict subject to the laws of war would only apply to
22 activity on or after 27 September 2001, then Congress wrote
23 that this statute intended not to apply to this case?

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1 WIT: That definition of hostilities strikes me, as an
2 international lawyer, as an incorporation of an international
3 legal standard. By referencing the laws of war, they
4 presumably meant the international laws of war and meant for
5 hostilities to refer to situations that the international laws
6 of war would similarly regard as armed conflict.

7 MJ [COL POHL]: I'm not going to let you off that easy.

8 But then you're saying that, because your view is the
9 armed conflict in the United States and al Qaeda began on
10 27 September, on or about, 2001, and, therefore, Congress
11 intended for this statute to incorporate international law,
12 which you say would preclude them from trying this particular
13 case.

14 WIT: Acts prior to it, correct. To save the statute's --
15 to apply the Charming Betsy canon, which instructs us to
16 interpret congressional acts consistently with international
17 law when we can, that is the best understanding, that they
18 meant to describe acts and activities that met the
19 international law of war standard.

20 MJ [COL POHL]: Okay. Thank you. We're going to recall
21 you again tomorrow for cross-examination. I'm not sure
22 exactly what time that will be because we have got one other
23 matter to take, but we'll let you know as quickly as we can.

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1 Thank you for your testimony. You are excused.

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

4 MJ [COL POHL]: We're about to recess, then we're going to
5 go into the 505(h) hearing, and then we're going to do the 806
6 hearing with Mr. Fitzgerald, both classified hearings, closed
7 to the public.

8 While we're in the recess, Trial Counsel, please ask
9 Major Lebowitz to stand by to be available for an 802 once
10 we're done with the 806.

11 Okay. Commission is in recess.

12 [The R.M.C. 803 session recessed at 1709, 7 December 2017.]

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