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1 [The R.M.C. 803 session was called to order at 0901,
2 10 November 2017.]

3 MJ [Col SPATH]: This commission is called back to order.
4 All of the parties who were present at our last session are
5 again present except for General Martins who is absent on the
6 government side.

7 And then on the defense side, Mr. al Nashiri has
8 returned back to the courtroom today. He was absent the last
9 time as well.

10 Trial Counsel, are the recordings -- or is the -- are
11 the proceedings being transmitted?

12 TC [MR. MILLER]: They are, Your Honor. And we'd ask
13 permission of the court to proceed today without General
14 Martins.

15 MJ [Col SPATH]: Yes. No worries.

16 I think these have become reasonably standard
17 comments. The outside appointed learned counsel is not here,
18 despite, again, this hearing being scheduled for some months
19 previously. The two DoD civilians who are still detailed to
20 this case are not here. All three of them have voluntarily
21 absented themselves from each and every proceeding, despite
22 having notice of it.

23 Major Robinson is not here, despite being detailed to

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1 the case and cleared to assist. And I will go through some
2 updates I got from e-mail, but it appears to me there's a
3 second counsel who is also cleared to assist, Major Fewell,
4 and I don't see her as well.

5 Trial Counsel, has she been read into all the
6 programs?

7 MATC [COL WELLS]: Yes, sir. That's the information I
8 understand.

9 MJ [Col SPATH]: Lieutenant Piette, is she coming down
10 this weekend, do you know, on Saturday for the -- with the
11 contract flight?

12 DDC [LT PIETTE]: No, Your Honor.

13 MJ [Col SPATH]: Again, what we're engaged in is pretty
14 straightforward foundational law practice of real evidence and
15 the foundation for real evidence, which any attorney practices
16 in and is taught in. It's certainly not an area of something
17 you need learned counsel for. It is something that any
18 advocate, judge advocate, or anyone else competent to practice
19 law could handle, particularly the evidence that we're dealing
20 with. I've referred to it as the bread and butter of law
21 practice or the basic blocking and tackling of trial work, and
22 that's what it remains.

23 We're not dealing with matters that require capital

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1 qualification or any capital experience at all, nor, in my
2 view, does it require a capitally qualified attorney to
3 introduce another attorney to a client.

4 I continue to invite you to take advantage of the
5 opportunity to do so, and again, I'm happy to give you the
6 courtroom for two hours or so, if you need it. I offered that
7 the other day; I offer it again.

8 Mr. al Nashiri, I don't want to ask anything about
9 your conversations with your lawyer. I want to make that
10 clear. I'm not interested in that. I just want you to know
11 that you have another cleared lawyer here on the island to
12 assist Lieutenant Piette. And if you tell me you want time,
13 or you tell me you want the courtroom to meet with him, I'll
14 stop as well. So I want you to understand that.

15 I'm not -- I'm not going to do anything right now
16 until you tell me differently, but I just, I want you to
17 understand you have another lawyer here who could be in the
18 courtroom. And I am more than willing to take a break and
19 have you meet with that person either in the courtroom -- I'll
20 be here -- or out of the courtroom, or in the courtroom with
21 just Lieutenant Piette.

22 I made that offer to your defense counsel, and I just
23 want you to understand it. Do you understand?

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1 ACC [MR. AL NASHIRI]: [Microphone button not pushed; no
2 audio.]

3 MJ [Col SPATH]: No, no worries. Please.

4 [Accused conferred with counsel at table.]

5 MJ [Col SPATH]: Mr. al Nashiri, do you understand?

6 ACC [MR. AL NASHIRI]: [Speaking in English] Yes.

7 MJ [Col SPATH]: All right. And that's an affirmative.

8 Thank you.

9 All right. A few other administrative notes. It
10 appears today we're going to have two witnesses, one live and
11 one by VTC, with approximately seven exhibits. We were not in
12 court yesterday, again, giving defense counsel significant
13 time on island to continue to prepare for what is, as I've
14 said, the nuts and bolts of any trial practitioner, as we
15 weren't in session at all yesterday.

16 Regarding the two witnesses the commission's
17 requested, one witness is going to testify by VTC on Monday,
18 and it appears that one witness, not as willing to testify.
19 There was a subpoena, I believe, issued, and let me know if I
20 have any of this wrong -- it was through e-mail traffic I know
21 both sides were copied on -- and that witness indicated they
22 were going to attempt to get the subpoenaed quashed. And so
23 the question was could we delay the requirement to have that

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1 person here on Monday to -- I think the request was to
2 Wednesday. And our response was really any time next week
3 will satisfy us.

4 So alls I would ask is just keep us posted. If
5 there's no motion to quash the subpoena filed in any federal
6 court, I assume we're going to move forward on enforcing a
7 subpoena. What I don't want is just to push the timeline off
8 to the right of a threatened filing and nothing happens and
9 the witness simply avoids testifying in the face of a
10 subpoena. So just keep me posted if we get anything related
11 to that.

12 Additionally, I was asked, through my staff, if the
13 defense could meet with their client after our session today
14 for approximately an hour. And as I've done throughout, I
15 indicated I have no opinion on it. I certainly encourage the
16 staff here to assist with that. They seem to be doing that.
17 We've had a number of meetings in the courtroom throughout
18 this process.

19 So let me check, first, Lieutenant Piette, were you
20 able to meet with your client before starting today?

21 DDC [LT PIETTE]: Yes, Your Honor.

22 MJ [Col SPATH]: And has it been indicated to you that
23 post session you'll have an opportunity as well?

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1 DDC [LT PIETTE]: Yes, Your Honor.

2 MJ [Col SPATH]: Okay. So again it seems one of the
3 requested relief from the learned counsel was that he was
4 unable to meet with his client in a location different than in
5 the past, and seems the staff here continues to allow meetings
6 with the client at the request of defense counsel here in the
7 courtroom.

8 I realize I denied issuing an order that it had to
9 happen that way; that's because I didn't have to, because all
10 those meetings have been going on long before and continue to
11 go on. But that's where we're at.

12 But I appreciate, again, the people here working with
13 the defense to facilitate those meetings.

14 All right. Are we ready to call our first witness?

15 TC [MR. MILLER]: Your Honor ----

16 MJ [Col SPATH]: Colonel Wells, I assume you have an
17 update on one of the issues.

18 MATC [COL WELLS]: Yes, sir. Good morning.

19 MJ [Col SPATH]: Good morning.

20 MATC [COL WELLS]: Just to run down, we do have two
21 witnesses for today, sir; one witness will take the stand, the
22 other witness by VTC. And then on Monday we do have three
23 witnesses scheduled. We also have a witness on Tuesday. No

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1 witnesses on Wednesday. Thursday and Friday, depending on the
2 lineup and availability, we have seven witnesses.

3 MJ [Col SPATH]: Total?

4 MATC [COL WELLS]: Yes, sir.

5 MJ [Col SPATH]: Over the two days, okay.

6 MATC [COL WELLS]: And we'll update your staff if we have
7 any changes.

8 Regarding Professor Yaroshefsky on Monday, according
9 to your order of AE 389L, there was a motion to quash filed in
10 the Southern District of New York for the United States
11 District Court. It was not based on a subpoena that was
12 issued by the prosecutor's office, just purely Appellate
13 Exhibit 389L. The response is due by midnight Monday, and so
14 we're working towards that.

15 Two other matters I'd like to bring to the
16 commission's attention. The meeting space, an additional
17 meeting space at AV-34 has been prepared. The JTF command has
18 sent notices to the defense team, Lieutenant Piette and
19 Mr. Kammen and others, requesting an opportunity for them to
20 inspect and look. And I think three notices have been sent,
21 but I was not able to confirm whether or not there's any
22 response. So if the commission can assist in any way with
23 that, inquiring with the defense team on their intent, that

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1 would be helpful.

2 Another thing is the MRI that the defense requested.
3 It is on island. It has been set up since the latter part,
4 mid of September. We understand that it will be available
5 only until about the end of January. So if there's an
6 opportunity for the defense to execute their diagnostic
7 examination that they desire, that's the window of
8 opportunity.

9 And, of course, if there's -- needed to move that and
10 make that available at any other time, we need some input from
11 the defense so that we can go to the medical command and
12 discuss funding and availability and staffing and all of that.

13 MJ [Col SPATH]: And that MRI was in response to an order
14 from this court granting a defense motion in the
15 preparation -- it didn't have to do with medical care; it had
16 everything to do with the preparation of a mitigation case.
17 And so I'm glad it's on island.

18 MATC [COL WELLS]: Sir, that's all I have unless you have
19 any questions.

20 MJ [Col SPATH]: I don't.

21 MATC [COL WELLS]: All right, sir. Thank you.

22 MJ [Col SPATH]: Lieutenant Piette.

23 DDC [LT PIETTE]: Thank you, Your Honor. My impression

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1 was the MRI was taken care of, but I'll get with the
2 government after this and we'll make sure everything is
3 squared away.

4 MJ [Col SPATH]: Thank you.

5 DDC [LT PIETTE]: Let's see. And again, just to make a
6 record -- I think we're all kind of repeating ourselves
7 here -- but throughout today and the rest of the proceedings,
8 unless somehow the learned counsel shows up, because we don't
9 have learned counsel present or giving advice and representing
10 Mr. al Nashiri, at this time we are going to continue to not
11 take a position, or take the position that we're not taking a
12 position, depending on how you want to word it.

13 I am aware this is the nuts and bolts of criminal
14 defense or of litigation in general, but the fact is this is
15 the nuts and bolts of the government's case that they are
16 trying to use to convict and execute Mr. al Nashiri. We
17 absolutely need learned counsel for all stages; that's
18 including meetings with new counsel where we're trying to
19 develop trust.

20 As anybody who has tried a court-martial knows, it's
21 difficult, even among our fellow sailors and citizens, to
22 first meet a client when you're wearing the same uniform as
23 the prosecutors and the people who are accusing them of the

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1 crime. Here we have a government that's trying to kill
2 Mr. al Nashiri, and it's difficult enough, even in the best of
3 circumstances, here.

4 A learned counsel is absolutely necessary. Trust is
5 absolutely necessary in any case, especially those in which
6 the government is trying to kill him, and we need to gain that
7 trust to get any mitigation evidence. Every aspect of a
8 capital case relates to mitigation, especially the
9 attorney-client relationship. And I understand.

10 And as far as these proceedings, maybe I've only been
11 doing this for five years, but in my mind, what we're doing
12 now is definitely not a standard evidentiary proceeding. This
13 is not the normal course of business of any evidentiary
14 hearing I've ever seen.

15 I've never seen either side be able to lay foundation
16 outside the presence of members in a pretrial hearing and then
17 have the evidence conditionally admitted -- which I don't know
18 what that means. I don't know what the conditions are
19 because, the way I understand it, the conditions of something
20 being admitted is foundation being laid in front of members.
21 So, I mean, clearly maybe a learned counsel could shed some
22 light on this, but this isn't like anything I've ever seen.

23 So thank you, Your Honor.

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1 MJ [Col SPATH]: I agree it's like nothing I've ever seen,
2 but not about the preadmission of evidence. I see it every
3 week in court, and, frankly, you all do, too. It's allowed
4 for in the federal rules. It's allowed for in courts-martial.
5 It's allowed for in basically any state of practice. It's the
6 preadmission of evidence.

7 And what recent case law, trial judge got in trouble
8 for, was not allowing the attack in front of the members, even
9 though the evidence as admissible, because you can always
10 attack it and show the members what weight to give it. But it
11 is conditionally admitted. I'd look at the MREs and the FREs.
12 The government is going to have to demonstrate relevance. I'm
13 also cautiously going forward to give the defense a chance to
14 attack the evidence, during the preadmission session, as I
15 said I would do.

16 What the government is offering now is real evidence
17 from the COLE -- which I find it difficult anyone is going to
18 dispute an incident occurred on the COLE. It is not evidence
19 yet of a conspiracy, discussions, conversations. It's real
20 evidence, the process by which occurs every day in every
21 court.

22 I know learned counsel is not here. Lieutenant
23 Piette, I hope you're talking to him. Because, again, in the

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1 regular course of business, I don't know a tribunal or a court
2 that works where you issue an order and counsel just choose to
3 ignore it, and after nine years of building an attorney-client
4 relationship with their client, abandon their client for a
5 long-scheduled hearing; and then you're telling me that's the
6 person that's going to build the trust with the client?

7 It remains shocking and appalling that three lawyers,
8 in the face of orders, would absent themselves. I recognize I
9 haven't dealt with that yet. But we plan to. I plan to. But
10 we're all awaiting to figure out what the scope of the
11 authority is of the court.

12 Frankly, again, if a federal district court judge
13 tells me I have zero contempt authority and zero authority to
14 issue orders in my court that are going to be followed, we'll
15 probably pack up and go home. I mean, what do you do with
16 that? But what I will do is follow the orders. See, there is
17 the difference; that remains the difference of lawyers who
18 have Bar rules who frankly have abandoned their client here.

19 I am choosing very carefully what we move forward on.
20 I continue to do that. I still believe completely there's a
21 reason that it says "learned counsel to the extent
22 practicable," and I can't think of a situation more clearly
23 within that than a learned counsel who simply walks away, even

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1 MORGAN BODIE, civilian, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Would you state your name for the record, please.

6 A. Morgan Bodie.

7 Q. And how are you presently employed, sir?

8 A. I'm retired from the FBI. I'm presently a
9 stay-at-home dad for my one-and-a-half-year-old son.

10 TC [MR. MILLER]: Your Honor, I want to make sure that
11 Mr. Nashiri can see the witness.

12 MJ [Col SPATH]: Mr. al Nashiri, can you see?

13 ACC [MR. AL NASHIRI]: [Microphone button not pushed; no
14 audio.]

15 MJ [Col SPATH]: That's affirmative.

16 TC [MR. MILLER]: Thank you, Your Honor.

17 Q. I want to go into a little bit of your background,
18 sir. You attended college?

19 A. Yes, I did.

20 Q. And where did you attend college?

21 A. University of Maryland.

22 Q. And did you receive a degree from Maryland?

23 A. Yes, in architecture.

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1 Q. In what year?

2 A. 1984.

3 Q. And after college, how were you employed?

4 A. I was employed by the FBI.

5 Q. And what was your first job with the FBI?

6 A. My first job in the FBI was in the identification
7 division.

8 Q. And what did you do in the identification division?

9 A. Process fingerprint cards basically.

10 Q. And how long did you remain in that position?

11 A. Approximately five months.

12 Q. And where did you go from there?

13 A. From there I moved to another unit in the FBI called
14 the Bomb Data Center.

15 Q. And what were your duties, responsibilities?

16 A. I was a writer/editor.

17 Q. And you were a writer/editor in what sense?

18 A. Of publications and materials for bomb technicians.

19 Q. After that?

20 A. After that I worked in the explosives unit at FBI
21 headquarters.

22 Q. What was your position in the explosives unit?

23 A. I was a physical science technician.

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1 Q. Did you receive specialized training to do that?

2 A. Yes, I did.

3 Q. And what did you do in the explosives unit?

4 A. Handled evidence. We received evidence from police
5 departments and law enforcement agencies, and categorized and
6 examined the evidence and recorded what was being taken in.

7 Q. Now, these positions are not special agent positions,
8 were they?

9 A. That's correct, I was not at that time a special
10 agent.

11 Q. Did you later become a special agent?

12 A. Yes, I did, in 1987.

13 Q. You entered Quantico?

14 A. Yes, that's correct.

15 Q. So I take it you went to the special agents class?

16 A. Yes, I did.

17 Q. And did you receive any training in evidence
18 gathering and evidence collection during your new agents
19 training?

20 A. Yes, I did.

21 Q. Where was your first office?

22 A. Dallas Division.

23 Q. And your first assignment in the Dallas Division?

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1 A. It was in the violent crime squad.

2 Q. And how long did you remain in the violent crime
3 squad?

4 A. For the first time upon my entry there, approximately
5 a year, but off and on during my assignment to Dallas Division
6 I worked in violent crime squads.

7 Q. Did you remain your entire career in the Dallas
8 Division?

9 A. Yes.

10 Q. Did you have any collateral duties?

11 A. Yes, I was a special agent bomb technician.

12 Q. And could you explain what a special agent bomb
13 technician is?

14 A. A special agent bomb technician is an FBI special
15 agent that is trained as a bomb technician, the same as a
16 local bomb technician would be, a technician in a police
17 department or a fire department. You all get the same
18 training.

19 Q. And what training is that?

20 A. It's at the Hazardous Devices School in Huntsville,
21 Alabama, and it's approximately six weeks long.

22 Q. Were you ever an instructor in the area of bomb
23 collection, bomb evidence?

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1 A. Yes. Yes. One of our duties as special agent bomb
2 technicians is to provide instruction and training in the
3 collection of bombing crime scene evidence.

4 Q. Did you provide it for state and local police
5 officers?

6 A. Yes, I did.

7 Q. Did you provide it internationally?

8 A. Yes, I did.

9 Q. Did you work what I would call any major bomb scenes,
10 other than the COLE?

11 A. Yes, the Oklahoma City bombing in 1995.

12 Q. And what did you do in the Oklahoma City bombing?

13 A. For the first two days after the bombing, I was at
14 the scene, the Murrah Building, assisting in the collection of
15 evidence there. Then I was placed in charge of the Oklahoma
16 City morgue team that went through the bodies of each of the
17 victims looking for bomb parts and other evidence.

18 Q. I want to -- and how long did you remain in the
19 Dallas Division? When did you retire?

20 A. In 2014, January 2014.

21 Q. I want to direct your attention back to October of
22 2000. Do you remember where you were in the early part of
23 October?

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1 A. Yes. In October I was in Uzbekistan providing
2 training for the Uzbek government in bombing crime scene
3 investigation.

4 Q. And were there -- do you remember the -- were there
5 other instructors there with you?

6 A. Yes, there were.

7 Q. Do you remember who those were?

8 A. Paul Fennewald was one, Leo West, Ed Cronin, Bob
9 Holley, and there might have been one or two others. I don't
10 recall.

11 Q. Did you receive a notification that there had been a
12 bombing of the USS COLE in Aden Harbor, Yemen?

13 A. Yes, I did.

14 Q. When you received that information, what, if
15 anything, did you do?

16 A. I contacted our explosives unit at FBI headquarters.

17 Q. And what was your purpose in contacting them?

18 A. To see if they wanted to send those of us that are --
19 who were providing the training in Uzbekistan to Yemen to
20 participate in the crime scene investigation.

21 Q. What were you told?

22 A. I was told that they thought that was a good idea.

23 Q. And did you travel to Yemen?

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1 A. Yes, we did, almost immediately.

2 Q. And how did you travel there?

3 A. We traveled by commercial air transport to Ramstein
4 base in Germany, and then from there we were transported by
5 military air transport to Yemen.

6 Q. Do you remember arriving in Yemen?

7 A. Yes, I do.

8 Q. Did anything unusual occur when you landed?

9 A. Nothing out of the ordinary when we landed, no.

10 Q. Did you go -- where did you go from the airport?

11 A. To the hotel, the Moevenpick Hotel in Aden -- Aden.

12 Q. And when you arrived there, were there other law
13 enforcement personnel there?

14 A. Yes, there were.

15 Q. And what was your purpose? What did you understand
16 that your duties and responsibilities were going to be
17 regarding this particular investigation or case?

18 A. That we would spend time on the USS COLE collecting
19 evidence of the bombing.

20 Q. Did you have occasion to go out to the boat?

21 A. Yes, we went every day.

22 Q. And how did you get to the boat?

23 A. We were transported by van from the hotel to -- to

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1 the harbor, and in -- at the harbor we were transported by a
2 small boat to the fueling station where the COLE was docked.

3 Q. I want to ask you if you could, please, describe for
4 His Honor the first time you went to the boat, in what sort of
5 condition -- or ship, I should say ship -- what condition was
6 it in?

7 A. It was in disarray. There was clearly a large hole
8 in the side of the ship where the explosive had torn the steel
9 away, and water -- a lot of water had entered the ship. The
10 ship appeared to be at a noticeable tilt to one side, and
11 there was diesel fumes, a lot of diesel fumes and fuel that
12 was covering the decks. And I think lighting was being
13 provided by some temporary lighting that was strung up through
14 the inside of the ship.

15 Q. You said there was a diesel film. So the ship had
16 not been scrubbed, so to speak?

17 A. No, no, it had not been scrubbed.

18 Q. Were the sailors on the ship?

19 A. Yes, they were.

20 Q. What was the first action you took, or what were the
21 first duties that you undertook upon arrival on the ship?

22 A. The first duty was to establish a station, where we
23 were -- we were assigned to different parts of the ship to do

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1 different tasks. My task was to assist in guiding the salvage
2 team to cut metal components away to access bodies of the 17
3 sailors within the ship.

4 And the first thing we did was set up a station
5 within the galley where we would use that as -- as our
6 gathering point for equipment, a place where we could decide
7 what we wanted to do next. And we set up a decontamination
8 station basically that was metal pans with water and bleach so
9 that if we believed we were contaminated with bodily fluids
10 and that sort of thing, that we could get clean and not expose
11 others to those fluids, potentially hazardous fluids.

12 Q. Were there other persons -- you said you had a team
13 of cutters?

14 A. Yeah, salvage personnel that were assembled by the
15 Navy to come and actually physically remove metal components.
16 The decks and bulkheads within the ship in the area of the
17 explosion were destroyed and twisted, and we knew that there
18 were bodies within the twisted metal, and we needed to remove
19 the metal to recover the bodies.

20 Q. Did you use torches?

21 A. No. Because of the explosive hazard, we used die
22 grinders.

23 TC [MR. MILLER]: Your Honor, permission to publish to the

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1 witness Prosecution Exhibits 254, '55 -- 255, 256 and 258.

2 MJ [Col SPATH]: You may.

3 Q. I show you first Prosecution Exhibit 254 for
4 Identification. Do you recognize that, sir?

5 A. Yes, I definitely do, as a ----

6 Q. And what do you recognize that to be?

7 A. It's a photograph taken from within the galley
8 looking through a section of the bulkhead that the bulkhead
9 was between -- a bulkhead is the naval term for wall --
10 between the galley and the hallway where sailors would stand
11 and obtain their meals. And there were sailors standing in
12 the hallway waiting to go up to the kitchen, get their meal
13 and enter the galley.

14 When the explosion took place, a large section of the
15 deck outside this wall that we're looking at was torn away and
16 flipped up against the bulkhead, and bodies of several sailors
17 were trapped in that, in between the deck and the bulkhead.

18 This was one of the first large sections of bulkhead
19 we cut away to access the deceased. We had to cut large
20 serving tables away that were anchored to the floor; we had to
21 cut the legs off, remove those serving tables. They had milk
22 and other food items.

23 Then we had to take the die grinders and cut into

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1 this section of ----

2 Q. You can circle it.

3 A. ---- of the bulkhead, and this is the section that
4 was cut away, right here. We had to suspend that section of
5 bulkhead from the ceiling with rope and whatever straps we
6 could -- we could obtain so that once it was cut free, it
7 wouldn't just fall. We swung it away. And that's how the
8 bodies were accessed.

9 There was another section very close to this one that
10 we did exactly the same thing.

11 TC [MR. MILLER]: Your Honor, for the record, the record
12 should reflect that he has drawn a -- an outline around what
13 appears to be an opening in the bulkhead, the middle of the
14 photograph.

15 Q. Is that a fair and accurate depiction of the cutting
16 and the bulkhead as it appeared on the day that you worked on
17 it?

18 A. Yes, it definitely is.

19 TC [MR. MILLER]: Your Honor, I don't believe it's been
20 admitted before, so I'm going to move for the admission of
21 Prosecution Exhibit 254.

22 MJ [Col SPATH]: Defense Counsel?

23 DDC [LT PIETTE]: Your Honor, defense takes no position.

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1 MJ [Col SPATH]: All right. Again, I believe it is a
2 position, as I've said multiple times. I'm not going to move
3 it into evidence at this point, only because we need to have a
4 discussion ultimately under 403 about how many pictures we're
5 going to allow in and the like, but it has been moved for
6 admission. Thank you, Mr. Miller. You may proceed.

7 TC [MR. MILLER]: Thank you, sir.

8 255, please.

9 Q. I show you what has been marked as Prosecution -- I
10 show you Prosecution Exhibit 255. Do you recognize this
11 photograph, sir?

12 A. Yes, I do. This is the kitchen area, and this is
13 looking from the direction of the galley in the hallway
14 between the galley and the kitchen. Looking back towards the
15 kitchen, but to the left as you're looking in that picture, is
16 the hallway where several sailors were trapped. It is the
17 hallway that we could -- basically it's the area of the
18 hallway that we saw in the last photo through the bulkhead.

19 TC [MR. MILLER]: 256, please.

20 MJ [Col SPATH]: And 255 and 256 were both admitted ----

21 TC [MR. MILLER]: Yes.

22 MJ [Col SPATH]: ---- without objection at a prior
23 hearing.

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1 Q. 256, please, do you recognize that, sir?

2 A. The same area, just a different angle of photograph.
3 This, again, is the kitchen. What you're looking at to the
4 left of the photograph is the kitchen area with the serving
5 counter removed and moved back along the hallway.

6 Q. And this is the area in which you were working with
7 your crew -- crew?

8 A. Yes. This is where we spent a large amount of time.

9 Q. Lastly, 258, Do you recognize this, sir?

10 A. This is in the same location, again, from a different
11 angle. And this is the hallway -- the best photograph that
12 depicts what actually occurred in that area. The kitchen,
13 again, is to the right in the photograph.

14 We're looking straight down the hall, the deck that
15 was the hallway, and this edge right here is where the deck
16 was torn apart. It was separated. And you can see right
17 here, I believe that is the section that was attached but was
18 flipped forward against the bulkhead. You can see the
19 bulkhead. You can see a hatch right here [indicating], and
20 that would be an entry into the galley in front of the
21 bulkhead.

22 As you look past that point into that photograph, the
23 light-colored area in the back here is the hole that was torn

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1 in the side of the COLE. And what you're seeing, the
2 light-colored area in the back, is the water illuminated by
3 the sun outside.

4 Looking down from this area, it was a drop-off at
5 that point since the deck was torn upward. It was open to
6 the, I believe, engine room and mechanical room below. And
7 looking down you would see nothing but water. The water had
8 come in and filled up that entire area.

9 MJ [Col SPATH]: All right. Mr. Miller, let me -- and if
10 I state it wrong, let me know. Just so the record is clear,
11 what you drew the circles around ----

12 WIT: Okay.

13 MJ [Col SPATH]: ---- the first circle is on kind of the
14 copper-colored area, left side of the photo, a little over a
15 third of the way up the photograph.

16 WIT: Uh-huh.

17 MJ [Col SPATH]: And then left side of the photo about
18 two-thirds up there's another; it's a -- copper colored, but
19 it's slanted ----

20 WIT: Right.

21 MJ [Col SPATH]: ---- to the right of the photograph.

22 The third photograph is right on the left -- is
23 completely on the left side of the photograph. It's what

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1 appears to be a white -- you called it a bulkhead door, but
2 it's the white object on the far left of the photograph.

3 WIT: Correct.

4 MJ [Col SPATH]: And then the last circle, basically in
5 the middle of the photograph to the left, is the -- what looks
6 like a white area, but you described as the hole in the ship
7 from the explosion.

8 WIT: That's correct.

9 MJ [Col SPATH]: Okay.

10 WIT: Absolutely.

11 MJ [Col SPATH]: Thank you.

12 Trial Counsel.

13 TC [MR. MILLER]: Thank you, Your Honor. And I believe
14 258 had been previously admitted, also.

15 MJ [Col SPATH]: It has been.

16 **Questions by the Trial Counsel [MR. MILLER]:**

17 Q. Did you actually remove the bodies?

18 A. No, I did not physically remove the bodies. That was
19 handled by a team of individuals who had experience in body
20 recovery.

21 TC [MR. MILLER]: Permission to publish Prosecution
22 Exhibit 251, Your Honor?

23 MJ [Col SPATH]: You may.

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1 Q. Do you recognize this photograph, sir?

2 A. Yes, that's Agent O'Connor.

3 Q. And was his team responsible for anything regarding
4 the bodies?

5 A. Yes. He -- his team was in charge of removing the
6 bodies.

7 TC [MR. MILLER]: And I believe, again, 251 has already
8 been admitted, Your Honor.

9 MJ [Col SPATH]: It has.

10 Q. Subsequent to your work regarding the body recovery,
11 what other tasks did you undertake on the ship?

12 A. When we -- when we hit a point below decks that we
13 couldn't proceed or that we were waiting to move to another
14 location, the other bomb tech and I who were working in this
15 particular role would help out in other places, and that would
16 mean on deck, on the upper decks of the ship, helping to sift
17 through evidence or recover evidence or collect evidence and
18 bag evidence.

19 TC [MR. MILLER]: Permission to publish to the witness,
20 Your Honor, Prosecution Exhibits 29, 29A, 29B, and 29C.

21 MJ [Col SPATH]: You may.

22 TC [MR. MILLER]: And at this time we would ask
23 permission, Your Honor, to use the ELMO.

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1 MJ [Col SPATH]: You may.

2 Q. I think first for the record, we have placed before
3 you Prosecution Exhibit numbered 29, the actual bag of
4 evidence?

5 A. Yes, that's correct. That's right here.

6 Q. I'm going to ask you, however, to first look, if you
7 would, please, at Prosecution Exhibit 29A for Identification,
8 and ask you if generally you recognize the substance or the
9 matter contained in the photograph.

10 A. Yes, I do. And this is what I believed to be -- at
11 the time to be charred fragments of fiberglass.

12 Q. And was this the type of evidence that you were
13 gathering from the ship?

14 A. Yes, that's correct. That's one type of evidence
15 we -- we were aware that a boat, small boat, had pulled up to
16 the ship immediately prior to the explosion. And so it would
17 be logical for us to be alert for anything that would be a
18 part of that small boat.

19 Q. Are you familiar with the FBI Q tab system?

20 A. Yes, I am.

21 Q. Is there a Q tab on this particular photograph,
22 Prosecution Exhibit 29A?

23 A. Yes, there is, at the bottom on the ruler.

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1 Q. Excuse me?

2 A. There is at the bottom of the photograph on the
3 ruler.

4 Q. All right. If you could, please, read that into the
5 record, that number.

6 A. Q301.

7 Q. You have before you an evidence bag that's marked
8 Prosecution Exhibit 29; is that correct?

9 A. That's correct.

10 Q. Do you recognize that bag?

11 A. Yes, I do.

12 Q. And what do you recognize it to be?

13 A. An evidence bag containing a second evidence bag with
14 information written on the original evidence bag.

15 Q. I want you, if you could, please -- as to the top
16 bag, do you recognize the handwriting on that bag?

17 A. I don't recognize the handwriting on the outer bag.

18 Q. Okay.

19 A. But I do on the inner bag.

20 Q. All right. If you could, please, then tell us the
21 writing on the inner bag.

22 A. The inner bag contains handwriting that I believe to
23 be my own; it's very distinct. It contains information such

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1 as the case number, a brief description of the evidence, date
2 and time of recovery, location of recovery, my name, and my
3 signature.

4 Q. That inner bag would have been the bag you used on
5 the COLE; is that correct?

6 A. That's correct.

7 Q. Would that have been the bag in which you placed the
8 evidence back in October of 2000?

9 A. Yes, it would.

10 Q. So the inner bag was simply placed in the outer bag?

11 A. That's correct.

12 Q. All right. What is -- what -- if you could, for the
13 court, please, what was the description of the evidence that
14 you gave, the date and time of the recovery, the location of
15 the recovery, and by whom it was recovered?

16 A. Okay. The description of the evidence on this bag is
17 simply debris. The date and time of recovery is 10/22 of 2000
18 at 1600, which would be 4:00 p.m. Location of recovery,
19 Midship-Port. Recovered by SA, for Special Agent, Morgan
20 Bodie. And then chain of custody, received from USS COLE,
21 because it was collected directly from the USS COLE, from the
22 deck of the USS COLE, my signature, again the date,
23 10/22/2000, time 1600.

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1 Q. Does it have an MDK number on it?

2 A. Yes, it does, MDK-131.

3 Q. Is there a 1B number on it also?

4 A. Yes, there is. It's 1B819.

5 Q. Are you able to manipulate the bag such that you can
6 see the evidence, what's in there?

7 A. Yes, I can. I can see through the two bags and see
8 into the bag, and I can feel it very clearly and am extremely
9 certain that this is the same material that we're seeing in
10 the photograph.

11 Q. The photograph being Prosecution Exhibit 29A?

12 A. Yes.

13 Q. Now, is there a chain of custody receipt attached to
14 the -- to that exhibit or near that exhibit?

15 A. Yes, there is a section for chain of custody on the
16 bag itself and a sheet that we've referred to as a green sheet
17 that is attached to this folder here [indicating].

18 Q. Do you recognize your signature on it?

19 A. Yes, I definitely do.

20 Q. And is the first, second -- is it the top entry?

21 A. It is the first entry, yes. I was the original
22 person who collected the evidence.

23 Q. Are you able to associate that chain of custody

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1 receipt with the Prosecution Exhibit 29?

2 A. Yes, I can. It has the same item number, which is
3 MDK-131, has the same 1B number, which is 1B819. It has the
4 same date and time of collection and the same case number.

5 Q. I'm placing on the ELMO Prosecution Exhibit 29C. Is
6 that an exact duplicate of the first four entries on the chain
7 of custody form that you have just testified about?

8 A. Yes, it is.

9 Q. And for the record, that would be your signature at
10 the very top where it says ----

11 A. Absolutely, yes.

12 Q. Above "collected"?

13 A. That's correct.

14 Q. Lastly, I'm placing on the ELMO Prosecution
15 Exhibit 29B. Do you recognize that photograph?

16 A. Yes, I do.

17 Q. And what is it?

18 A. It's a photograph of the inner pouch that contains
19 the evidence.

20 Q. Fair and accurate depiction of it?

21 A. Yes, it's very clear.

22 TC [MR. MILLER]: Your Honor, we would move the admission
23 of 29A, 29B, and 29C at this time.

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1 MJ [Col SPATH]: Thank you.

2 TC [MR. MILLER]: And again, for the record, we're not
3 moving for the real evidence because we understand that's
4 going to be taken up at another time.

5 Permission to publish to the witness, Your Honor,
6 Prosecution Exhibits for Identification 117, 117A, 117B, and
7 117C.

8 MJ [Col SPATH]: You may proceed.

9 Q. For the record, Agent Bodie, has Prosecution
10 Exhibit 117 been placed in front of you?

11 A. Yes, it has.

12 Q. Before we talk about that exhibit, I'd ask you to
13 take a look at the photograph that's been placed on the ELMO,
14 Prosecution Exhibit 117A.

15 First off, as to that material that's contained in
16 the photograph, is that the type of material that you were
17 gathering on the USS COLE?

18 A. Yes, it is. It appeared to me to possibly be carpet
19 material or a textile-type material, and it is charred.

20 Q. And as in the other photograph, is there a Q tab
21 number on it?

22 A. Yes, there is.

23 Q. And what is that number, sir?

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1 A. It's Q533.

2 Q. I'd ask you, if you could, please, to look at the
3 exhibit -- excuse me -- Prosecution Exhibit 117. Do you see
4 that, sir?

5 A. Yes, I do.

6 Q. And do you recognize that?

7 A. I recognize the inner pouch, and I recognize the
8 numbers on the outer pouch.

9 Q. All right. Let's start with the inner pouch. What
10 is the inner pouch?

11 A. The inner pouch is the bag that I would have used to
12 collect this evidence. It, again, contains the information,
13 the case number, description of the evidence, date and time of
14 collection, location of recovery; and it has my name as
15 recovered by. Then it also has a section for chain of
16 custody, which contains my signature.

17 Q. And you recognize that both as your printing and as
18 your signature, handwriting?

19 A. Yes, I definitely do.

20 Q. If you could, please, for His Honor, read into the
21 record what the description of the evidence is, the date and
22 time of recovery, the location of the recovery, and by whom it
23 was recovered, sir.

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1 A. Okay. It -- description of the evidence is
2 miscellaneous debris. Date and time of recovery is
3 10/22/2000, 1105; that would be 11:05 a.m. Location of
4 recovery is Midship-Port, recovered by, my name, SA Morgan
5 Bodie.

6 Q. And chain of custody?

7 A. Chain of custody, received from USS COLE by, with my
8 signature. Date, again, 10/22/2000, time 11:05 a.m.

9 Q. Was there a GA number on that?

10 A. Yes, there is. It's GA109.

11 Q. I think there's a GA number next to it, also, is
12 there?

13 A. Yes, there is a GA108 that was scratched out.

14 Q. Is there a 1B number on it?

15 A. Yes, there is. It's 1B563.

16 Q. Now, this evidence bag that you have referred to with
17 your handwriting, is that the original bag you used in which
18 to catalog the evidence?

19 A. Yes, definitely.

20 Q. Are you able to see what's inside that evidence bag?

21 A. Yes, I can. And I can feel through the bags and feel
22 it pretty clearly.

23 Q. And does it appear to be the same evidence contained

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1 in Prosecution Exhibit 117A?

2 A. Yes, it does.

3 Q. Is there a Q number on that exhibit?

4 A. Yes, there is. It's Q533.

5 Q. And does that match the number in Prosecution
6 Exhibit -- the Q number in Prosecution Exhibit 117A?

7 A. Yes, it matches the photograph.

8 Q. Is there a chain of custody form ----

9 A. Yes, there is.

10 Q. ---- in front of you?

11 Do you recognize that, sir?

12 A. Yes, I do.

13 Q. Does it contain your signature?

14 A. It does.

15 Q. And does it indicate who collected that evidence?

16 A. Yes. It has my signature as the original collector
17 of the item.

18 Q. Are you able to associate this chain of custody -- or
19 that chain of custody form with the exhibit, Prosecution
20 Exhibit 117?

21 A. Yes. Yes, I can by the item number; again, it's
22 GA109, with the original number 108 crossed out, and with the
23 corresponding date of 10/22 of 2000, and 11:05 a.m.

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1 Q. I'm going to ask you: Does it have the same 1B
2 number, also?

3 A. I'm looking for the 1B number on the green sheet.
4 Yes, it's 1B563. And this is 1B563, so they both correspond.

5 Q. I would like to show you Prosecution Exhibit 117C for
6 Identification. Is that -- as to those first four entries,
7 signatures, are those -- is that a duplicate of the green
8 sheet attached to the exhibit?

9 A. Yes, it appears to be an exact duplicate.

10 Q. All right. And again, for the record, is that your
11 signature above the "reason"? It says "reason" and colon,
12 collected?

13 A. Yes, it's definitely my signature.

14 Q. I'm going to show you a photograph on the ELMO again,
15 Prosecution Exhibit 117B for Identification. Do you recognize
16 that, sir?

17 A. Yes, I do.

18 Q. What do you recognize that to be?

19 A. It's a photograph of the inner pouch in this exhibit
20 in which the evidence is contained.

21 Q. A fair and accurate depiction?

22 A. Yes, it is.

23 TC [MR. MILLER]: I want to go back just briefly to the

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1 last exhibit, if you could hand him that again, 29.

2 Q. Is there a Q tab number on that exhibit?

3 A. Yes, there is.

4 Q. What is that number?

5 A. Q301.

6 Q. That's off of Prosecution Exhibit 29, correct?

7 A. That's correct.

8 Q. I've placed on the ELM0 Prosecution Exhibit numbered

9 29A. Does it match the Q number on Prosecution Exhibit 29?

10 A. Yes, it does. Q301.

11 Q. Thank you.

12 TC [MR. MILLER]: Your Honor, the government would move at

13 this time for the admission of Prosecution Exhibits

14 numbered -- or Prosecution Exhibit 117A, 117B, and 117C.

15 MJ [Col SPATH]: I understand. Thank you.

16 Q. Did you remain on the ship the entire time?

17 A. Most of the time, but there were one, possibly two,

18 occasions where our services were requested at locations on

19 land to residential locations that we referred to as safe

20 houses. We believed them to be locations used by perpetrators

21 of the bombing.

22 Q. Did you have any occasion to later assist in the

23 investigation of the COLE?

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1 A. Yes. Yes.

2 Q. And briefly, if you could tell the court, what was it
3 that you did?

4 A. Are we talking about at Yemen or beyond?

5 Q. Beyond.

6 A. Beyond. The next task that I had related to the COLE
7 investigation was to return to the USS COLE when it had been
8 brought to dry dock in Pascagoula, Mississippi.

9 Q. And did you assist in the search of the ship then?

10 A. Yes. Yes. And at that point the ship had been
11 stabilized, it had been emptied out, so it -- if there was any
12 evidence left within the ship, it was much easier to access
13 with all the debris -- or most of the debris removed.

14 TC [MR. MILLER]: Your Honor, we'll pick up those matters
15 at a later time. I have no further questions of the witness.

16 MJ [Col SPATH]: Thank you.

17 Defense Counsel, any questions?

18 DDC [LT PIETTE]: Your Honor, the defense takes no
19 position.

20 MJ [Col SPATH]: Again, I believe it's a strategic
21 position from the defense and the defense community.

22 Mr. Bodie, I'm going to give you a standard order.
23 You've probably heard it. I don't want you to discuss your

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1 testimony with anyone until this issue is resolved; however,
2 in this case, that could be a while, as you probably
3 recognize. So just keep that in mind. Don't talk about your
4 testimony with anybody.

5 The another thing is, as I've said to all the
6 witnesses who travel here in person, I appreciate you coming
7 down here in person to provide testimony on this. I have a
8 feeling we'll see you again at some point. But your testimony
9 is appreciated. You're excused.

10 WIT: Thank you very much.

11 MJ [Col SPATH]: Thank you.

12 [The witness was warned, temporarily excused, and withdrew
13 from the courtroom.]

14 MJ [Col SPATH]: I know our next witness is by VTC; is
15 that correct?

16 TC [MR. MILLER]: Yes. Correct, Your Honor.

17 MJ [Col SPATH]: All right. And so how long a recess do
18 you believe you need? Just approximate.

19 TC [MR. MILLER]: Let's say 20 minutes, Your Honor.

20 MJ [Col SPATH]: All right. I'll see you at 1020. Let me
21 know if it's going to be longer through the bailiff. We're in
22 recess.

23 [The R.M.C. 803 session recessed at 0959, 10 November 2017.]

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1 [The R.M.C. 803 session was called to order at 1016,
2 10 November 2017.]

3 MJ [Col SPATH]: All right. These commissions are called
4 back to order. All the parties who were present at our last
5 session are again present.

6 Mr. Miller, call your next witness.

7 TC [MR. MILLER]: Your Honor, the government calls Special
8 Agent -- or former Special Agent Robert Mulry.

9 MJ [Col SPATH]: All right. And I know he's appearing by
10 VTC. You may swear him in.

11 TC [MR. MILLER]: Thank you.

12 ROBERT MULRY, civilian, was called as a witness for the
13 prosecution, was sworn, and testified as follows:

14 **DIRECT EXAMINATION**

15 Questions by the Trial Counsel [MR. MILLER]:

16 Q. State your name for the record, please.

17 A. Robert Mulry.

18 Q. And you were formerly employed by the Federal Bureau
19 of Investigation; is that correct?

20 A. That's correct.

21 Q. I'd like to review with you some of your background,
22 starting with your education. You attended college; is that
23 correct, sir?

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1 A. Yes, I did.

2 Q. And where did you first attend college?

3 A. Glassboro State College in Glassboro, New Jersey.

4 Q. And did you graduate from Glassboro?

5 A. I did.

6 Q. And do you -- what degree did you receive and when?

7 A. 1980, a bachelor's degree in criminal justice.

8 Q. Did you later attend college and obtain several other
9 degrees?

10 A. I did.

11 Q. All right. And could you relate those to the court,
12 please?

13 A. An associate's degree in nursing from Excelsior
14 College in Albany, New York; a bachelor's degree in nursing
15 from Rutgers University in New Brunswick, New -- or, yeah, in
16 New Jersey and a master's degree in nursing from Rutgers
17 University.

18 Q. And when did you receive your Bachelor of Science in
19 nursing from Rutgers?

20 A. I believe it was 1993.

21 Q. All right. And your master's?

22 A. I finished my master's in, I believe, 2008.

23 Q. Are you a diver, a scuba diver?

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1 A. Yes, I am.

2 Q. All right. And when did you begin or when did you
3 first start scuba diving?

4 A. I believe 1986 or 1987.

5 Q. And did you become proficient in it?

6 A. Yes.

7 Q. There are -- I understand there are certain
8 certifications that you can receive in the area of scuba
9 diving; is that correct?

10 A. That's correct.

11 Q. And have you received certain certifications?

12 A. I have.

13 Q. And what certifications have you received, sir?

14 A. I'm -- open-water diver, dive master, open-water
15 scuba instructor. I currently still teach scuba diving on a
16 recreational basis. I received my hard hat diving training at
17 the U.S. Navy Dive School in Panama City. That's about it.

18 Q. All right. After Glassboro, after you received your
19 degree from Glassboro State, did you enter the military?

20 A. I did.

21 Q. And which service, sir?

22 A. United States Marine Corps.

23 Q. And how long did you remain in the Marine Corps?

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1 A. I was on active duty for four years and then remained
2 in the reserves for several years after that.

3 Q. All right. And when you were in the Marine Corps,
4 what were your duties, what were your responsibilities?

5 A. Initially I was an armor officer in a tank battalion.
6 And after my first fleet tour, I transitioned over to military
7 police and stayed there until I got out.

8 Q. And what was your rank when you left active duty?

9 A. I was a captain.

10 Q. All right. And how long did you remain in the
11 reserves?

12 A. Until around 1990.

13 Q. At some point did you join the FBI?

14 A. I did.

15 Q. How soon after your military service did you join the
16 FBI?

17 A. Immediately after leaving active duty I entered the
18 FBI Academy.

19 Q. And I take it that's what we refer to as the course
20 at Quantico; is that correct, New Agent School?

21 A. That's correct.

22 Q. And did you receive training in the collection of
23 evidence while at Quantico?

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1 A. I did.

2 Q. After you finished your course at Quantico, what was
3 your first office, sir?

4 A. I was assigned to the Columbus, Ohio resident agency.

5 Q. And what duties and what responsibilities did you
6 have there?

7 A. I was assigned to a reactive crime squad which was
8 primarily bank robberies, fugitive matters, and property
9 crimes.

10 Q. So is it my understanding then that you would have
11 had the opportunity to conduct searches of a variety of crime
12 scenes?

13 A. That's correct.

14 Q. Did you have any what they call collateral duties
15 while at the Columbus office?

16 A. I was a SWAT team member.

17 Q. And how long did you remain in Columbus?

18 A. I left there in the very end of -- I believe
19 November-December 1989.

20 Q. And what was your next office, sir?

21 A. I went to New York City.

22 Q. And did you remain in the New York office until your
23 retirement?

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1 A. Yes, I did.

2 Q. When you arrived in New York, what was your first
3 squad?

4 A. I was on a surveillance squad.

5 Q. And from there?

6 A. From there I went to a technical squad.

7 Q. And if you could, go through, after the technical
8 squad.

9 A. That was a -- the specific squad that I was, that I
10 was on was affectionately known as the break-in squad. We did
11 covert entries into locations to implant video devices, audio,
12 microphones, that sort of thing.

13 Q. All pursuant to a court order, however, correct?

14 A. Of course.

15 Q. All right. And after your time in the tech squad?

16 A. After that I went to -- I moved to the Joint
17 Terrorism Task Force.

18 Q. What was -- how long were you on the Joint Terrorism
19 Task Force?

20 A. I think that was eight or nine years.

21 Q. And after that?

22 A. I retired in 2008.

23 Q. Did you have any collateral duties?

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1 A. I had -- actually I had a couple collateral duties.
2 I remained in the SWAT program until I retired, and was also
3 on the -- what was known as the New York office Scuba Team,
4 which later became part of the Evidence Response Team program
5 for the FBI, specifically the underwater -- underwater
6 recoveries, search and recoveries.

7 Q. And how did one qualify to be on the dive team and be
8 part of these underwater recoveries?

9 A. Well, there's a selection process, a training -- and
10 a training period, of course, for various things like, you
11 know, job-specific equipment, crime scene processing,
12 sketching, photographing, that sort of thing.

13 Q. And how long were you on the dive team?

14 A. From 1990, I believe, until probably 2007. Because I
15 retired in March of 2008.

16 Q. And did you work -- did you ever actually use these
17 skills in the recovery of evidence in an underwater setting?

18 A. Many times.

19 Q. Do you know an FBI agent by the name of Anthony
20 Duback?

21 A. I do.

22 Q. And how do you know him?

23 A. I failed to mention one of the other -- one of my

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1 other collateral duties was, I was the operational medical
2 coordinator for the New York office. So all operational
3 medical support, whether it be for the dive team or the SWAT
4 team, or teams deployed overseas, I would coordinate that
5 medical support as well as, of course, deploy myself to
6 provide that kind of support.

7 So Tony was one of my -- one of my medics. I had
8 also known Tony prior to him entering the FBI. He had done
9 some contract training for us on the dive team.

10 Q. I want to take you back to October of 2000. Did you
11 have occasion to travel to Aden, Yemen?

12 A. I did.

13 Q. And what caused you to go there?

14 A. I was a member of our Rapid Deployment Team in the
15 New York office, so we were deployed for the bombing of the
16 USS COLE.

17 Q. And again, for the record, if you could, what was the
18 Rapid Deployment Team, sir?

19 A. That was a -- it was a designated team for primarily
20 international, but could also be used for domestic acts of
21 terrorism where we needed to have a tailor-made deployment
22 team to be able to quickly deploy to investigate acts of
23 terrorism against the United States.

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1 Q. And what was your role on this deployment team?

2 A. I was -- my primary job was as the operational
3 medical coordinator. And so for that deployment I was -- I
4 was sent to coordinate medical care for our team, as well as
5 provide medical support and whatever other duties were
6 required of me while we were deployed.

7 Q. Were your diving or scuba skills also one of the
8 reasons you were sent to Yemen?

9 A. That's correct.

10 Q. Do you remember arriving in Yemen?

11 A. I do.

12 Q. Anything unusual happen, sir?

13 A. My first memory was the -- was the back gate of the
14 C-17 lowering down and seeing a -- what we all believed to be
15 a Yemeni soldier with an RPG pointing into the belly of the
16 aircraft. Sort of gave us a pause, but fortunately that
17 worked out well.

18 Q. How long did you remain on the plane or on the
19 tarmac?

20 A. We were there for quite some time. I don't recall
21 how long it was, but I suspect it was a matter of hours.

22 Q. And after -- obviously at some point you left the
23 airport, correct?

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1 A. That's correct.

2 Q. And where did you go?

3 A. We went to -- I believe the name of the hotel was the
4 Aden Hotel. It's a multi-story hotel, probably six or seven
5 or eight stories tall in downtown Aden.

6 Q. Were there other law enforcement personnel staying
7 there?

8 A. Yes, there were.

9 Q. At some point were you informed of what your duties
10 and what your responsibilities were going to be regarding this
11 particular case or this investigation?

12 A. Yes. We had -- because of the large contingent
13 there, we had decided to man a -- for lack of a better word, a
14 clinic to provide medical support for all of our personnel.
15 So we were going to split our medics, essentially working port
16 and starboard. So you would either go to the COLE, to the
17 crime scene to work there, or stay in the clinic for whatever
18 support we needed.

19 We were fortunate that we had a contract physician
20 and a couple of contract medics with us as well. So that it
21 really permitted me and the other bureau medics that were
22 there to primarily spend our time out at the crime scene.

23 Q. Do you remember when you first got to the crime

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1 scene?

2 A. Vaguely. A lot of chaos, a lot of commotion. I
3 remember the Marines from the FAST Company had established a
4 perimeter around the ship. There was a lot of Yemeni military
5 activity in the area as well.

6 Q. Did you assist in the search for the body recovery,
7 search for bodies?

8 A. I did.

9 Q. And what did you do?

10 A. It was primarily body recovery. Unfortunately, most
11 of the -- most of the casualties were trapped in the mangled
12 structure of the ship, so there were some civilian
13 contractors, U.S. civilian shipbuilding contractors that were
14 there that were actually doing the mechanical work of
15 accessing the bodies, and then we would remove the bodies out
16 of the area up on deck.

17 Q. Was there a search, an underwater search conducted?

18 A. There was.

19 Q. And are you familiar with how that came about?

20 A. I am.

21 Q. And how were you able -- were you part of the
22 formation of the, let's say, underwater team?

23 A. As we were en route to Yemen, the special agent in

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1 charge of our -- of our detachment, our team, Mr. John
2 O'Neill, had asked me to coordinate with the Navy regarding
3 any in-water and underwater recovery. He told me that there
4 was going to be a Navy dive team there and that the Navy was
5 going to do all the diving, but he wanted me to coordinate
6 with the Navy divers as far as any underwater recovery we
7 might do.

8 Q. And was a team set up?

9 A. There was an underwater salvage team. I believe it
10 was Mobile Underwater Salvage Team 2 that was -- I think some
11 of their team was already on site, and I think some of the
12 team was actually on the aircraft with us when we flew into
13 Aden.

14 Q. And other than yourself, were there any other members
15 of the New York dive team that were there?

16 A. Yes. There was another agent by the name of Brenda
17 Heck.

18 Q. And Mr. Duback, or Agent Duback also had certain
19 scuba skills; is that correct?

20 A. That's correct. He was a Navy diver. He was also an
21 independent duty corpsman. So Tony was actually there under
22 the auspices of being a medic. But certainly as a former Navy
23 diver, he was in a perfect position to help -- help us

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1 coordinate with the Navy divers on any in-water operations.

2 Q. How did the operation work? How did they get the
3 items from the bottom to the -- onto the ship or into the
4 possession of law enforcement?

5 A. It was -- we actually had to kind of figure out this
6 operation on the fly, because the underwater salvage team,
7 their primary responsibility was to reestablish watertight
8 integrity to the ship. So they were not there primarily to
9 recover evidence.

10 We -- they -- I believe that they did some of that as
11 well and while they were doing their shipboard operations.
12 But, as a for instance, I believe they recovered a couple of
13 bodies for us that were below the waterline and such. But we
14 actually had to enlist the help of a couple of Navy SEALs and
15 a couple of Navy EOD divers to actually do the diving for
16 us ----

17 Q. What area ----

18 A. ---- since we had no other divers available.

19 Q. Sorry.

20 A. That's okay.

21 Q. What area was searched?

22 A. The general area alongside of the blast damage to the
23 hull.

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1 Q. I'm going to show you ----

2 TC [MR. MILLER]: Permission to publish, Your Honor, to
3 the witness, Prosecution Exhibit 192.

4 MJ [Col SPATH]: You may.

5 Q. I'm showing you what has been previously admitted as
6 Prosecution Exhibit 192 and ask you if you recognize that,
7 sir.

8 A. I do.

9 Q. And what do you recognize that to be?

10 A. That looks like the hull of the USS COLE, the site of
11 the breech into the hull from the bomb.

12 Q. And can you, using -- I don't know if it works --
13 using your finger, draw the area that was searched by the dive
14 team?

15 A. Oh, it was actually larger than what's depicted on
16 the photograph. So that entire area of the -- [VTC
17 transmission interrupted.]

18 Q. Just stop for a second, sir.

19 A. Okay.

20 Q. Okay. There we go. Go ahead.

21 A. Okay. There we go. So that entire area of water
22 that you see alongside of the hull was included in the area
23 that was searched, but the search area actually expanded

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1 beyond those limits.

2 Q. How was the items -- I take it some -- there were
3 some items found; is that correct?

4 A. That's correct.

5 Q. And how were those items brought up and who was
6 involved in bringing those items up to the ship or to law
7 enforcement personnel on ship?

8 A. So the Navy divers, the SEALs and the EOD divers were
9 the divers that actually did the evidence recovery underwater
10 for us. I was coordinating with Mr. Duback.

11 Essentially I was up on deck and I would receive the
12 evidence from their dive boat, from their Zodiac inflatable,
13 and Tony was actually on the boat with them. So when they
14 would come up with some items, they would hand it to him, he
15 would take custody of it from them. And either when they were
16 out of air and they needed new dive tanks or there was a
17 sufficient quantity of evidence, they would come back
18 alongside; and the evidence, Tony would transfer the evidence
19 up to me.

20 Q. And what would ----

21 MJ [Col SPATH]: Mr. Miller ----

22 Q. ---- you then do with it, sir?

23 MJ [Col SPATH]: Mr. Miller, hang on one second. Can we

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1 get the witness back up on the screen?

2 TC [MR. MILLER]: Oh, I'm sorry.

3 MJ [Col SPATH]: That's okay.

4 TC [MR. MILLER]: That would serve us better.

5 MJ [Col SPATH]: That's okay. There we go.

6 TC [MR. MILLER]: Thank you.

7 Q. Once the evidence was brought up to you, I guess
8 pulled up to you, what would you then do with it, sir?

9 A. I believe we took all of the evidence up to the -- up
10 to the bow, the deck of the bow, where we had some space to
11 work, where we could spread everything out, of course, let
12 everything dry, and -- so that we could start to identify it.
13 And then I would turn the evidence over to the evidence
14 custodian who would then start to number and identify the
15 items.

16 Q. You did not mark the bags yourself; is that correct?

17 A. I -- no, I did not.

18 Q. Did any of these items go through -- this collection
19 of evidence go through the sifting process?

20 A. I don't remember specifically, but I'm sure they must
21 have. You know, the diving that these guys were doing, they
22 were essentially in black water. It was about 40 feet deep,
23 very turbulent water and, of course, it's in a harbor anyway,

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1 so they would be fortunate to be able to see their hand two or
2 three inches from -- from their eye.

3 So they were doing everything by feel, and if they
4 found something, they would scoop it up and put it into a bag
5 and bring it up. And of course it would come up with mud and
6 all kinds of other stuff with it, so we would need to clean it
7 off.

8 Q. Now, you indicated that it was a grid search,
9 correct?

10 A. Yes.

11 Q. What is a grid search, sir?

12 A. So in a grid search, it can be done a couple of ways,
13 but essentially you identify the perimeter of the area that
14 needs to be searched. And then you can subdivide that grid
15 into manageable pieces so that you can efficiently search one
16 grid at a time, and not only would you efficiently search the
17 grid, but you could identify what areas have been searched
18 from those areas that have not been searched. And searching
19 one grid at a time in a systematic basis assures that you're
20 going to not miss an area.

21 Q. Is it standard procedure for one of the persons -- or
22 one person to draw a picture of the grid or make a schematic
23 of it?

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1 A. Yes, it is.

2 TC [MR. MILLER]: Your Honor, permission to publish to the
3 witness Prosecution Exhibit 676, page 1 and 676, page 2.

4 MJ [Col SPATH]: You may. And they're both for
5 Identification.

6 TC [MR. MILLER]: Both for Identification. I'm sorry,
7 Your Honor.

8 MJ [Col SPATH]: That's all right.

9 Q. I'm showing you Prosecution Exhibit 676 for
10 Identification, page 1. Do you recognize that, sir?

11 A. I'm sorry, I don't -- I don't see it.

12 Okay, there we go.

13 That looks like the basic drawing that I did
14 depicting the search area on the COLE.

15 Q. And is that your signature in the bottom right-hand
16 corner?

17 A. It is. Yes, it is.

18 Q. And it has a date of 10/17/2000; is that correct?

19 A. Actually, 10/18.

20 Q. 10/18. Okay, I'm sorry. 10/18, all right.

21 And would that have been the date you drew this?

22 A. Yes, it would.

23 Q. And does that show the grid search that was conducted

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1 on the USS COLE?

2 A. Yes, that shows the -- that shows the perimeter of
3 the area being searched, correct.

4 Q. And if you could explain, there's a word, the word
5 "buoy" there. What would -- what is that significance?

6 A. So we would use a surface marker buoy to easily
7 identify the perimeter of our search area, for several
8 reasons. First of all, we had divers in the water. We
9 certainly didn't want anybody in a motorboat going through the
10 grid area and potentially striking one of our divers, but it
11 also gave us a surface visual reference to indicate the
12 boundaries of where we were working.

13 So we would -- we would take a surface marker buoy
14 with a line and a weighted anchor, and, as the drawing shows
15 here, we had buoys butted right up to the hull of the ship and
16 going out to the far corners of the search area.

17 Q. I'm showing you Prosecution Exhibit 676 for
18 Identification, page 2, and ask you if you recognize that,
19 sir.

20 A. Yes, that is a drawing of the grid pattern that we
21 did.

22 Q. And did you draw that?

23 A. I did.

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1 Q. Again, it contains your signature on the lower
2 left-hand side, correct?

3 A. That's correct.

4 Q. And is it dated?

5 A. Yes, it is. It looks like 10/19/2000.

6 Q. And then it says "Grid One set 10/18/00 USS COLE Aden
7 Yemen," correct?

8 A. That's correct.

9 Q. Would you have drawn this at the time or near the
10 time the search was conducted?

11 A. That's correct.

12 Q. It shows what appears to be almost a football-size or
13 a football-shaped rectangle, but then there's a series of
14 lines on the right side. It says cross lines every six feet
15 across entire grid. Could you describe what that means?

16 A. So essentially what we did is we made a rope grid
17 system that we then sank underwater to give our -- give our
18 divers a tactile guide to conduct their search. Without the
19 aid of metal detectors or more sophisticated search equipment,
20 we were really limited to a hand search.

21 So what we wanted to be able to do was reduce the
22 size of a pass, if you -- what we would refer to a pass, or if
23 you can imagine one circuit going from the edge of the hull

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1 out to the far edge of the search area. We needed to limit
2 the width of the search area to the arm span of the diver
3 since he was doing a search by hand.

4 And so in this way, what we did was we had parallel
5 lines approximately six feet apart, and along that -- along
6 those lengths at various intervals we had a shorter line that
7 essentially tied the search lines together so that the lines
8 would remain parallel and wouldn't flex in or out to change
9 the form of the search that they were doing.

10 Q. So this ----

11 A. I hope that's clear.

12 Q. Okay. For somebody who spends all their time on
13 land, so this is a grid that laid on top of the water,
14 correct?

15 A. This is multiple lengths of rope that we laid out on
16 dry land ----

17 Q. Okay.

18 A. ---- that were cut to length.

19 Q. Right.

20 A. And then at -- I don't recall what the intervals --
21 it says every six feet, so every six feet we took another
22 piece of line perpendicular to the search lines and tied them
23 off so that we could maintain that six-foot interval ----

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1 Q. Correct.

2 A. ---- in between the search lines so that we, as a for
3 instance, wouldn't create a large bow in the search area and
4 potentially miss an area.

5 Q. That's my question to you. I apologize for not being
6 clear. Is this grid -- did it sit on top of the water?

7 A. Oh, no, it did not. It sat on the bottom.

8 Q. Sat on the bottom.

9 A. That's correct.

10 Q. And it was anchored by buoys?

11 A. Correct, it was tied into the anchors that held the
12 buoys down.

13 Q. So it's underwater?

14 A. Correct, laying right on top of the bottom.

15 Q. When the diver would bring an item up, would he or
16 she identify from where on the grid the item had been taken or
17 found?

18 A. In an ideal world we would have had the diver
19 carrying a number of small marker buoys so that they could go
20 ahead and as soon as they found an item, deploy it to the
21 surface. We would photograph that and be able to show the
22 exact location where that item was located. Unfortunately, we
23 had none of that equipment to do this. So that was not done.

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1 They would bring the items up. They would turn them
2 over to Mr. Duback who was sitting in the Zodiac with them.
3 And I don't recall us having any other better way to identify
4 exactly where each piece came from.

5 Q. The cross lines every six feet, it indicates across
6 the entire grid. I take it you just drew these first four or
7 five lines, but these lines were actually all the way from one
8 end to the other; is that correct?

9 A. That's correct. So it went from end to end.

10 Q. All right. Would that have allowed the divers to
11 know where they had previously searched?

12 A. That's correct. So I believe we started -- as you're
13 looking at the sketch, we started on the right-hand and
14 started working our way towards the left, which if memory
15 serves me correctly, that would have been starting on the end
16 of the bow and working towards the stern of the ship.

17 Q. Again, for somebody from -- that lives on the land,
18 is that from the front to the back of the ship?

19 A. That's from the front to the back, yes, sir.

20 Q. All right.

21 TC [MR. MILLER]: 221 and 240. Permission to publish to
22 the witness, Your Honor, Prosecution Exhibits 221 and 240,
23 which I believe have been previously admitted.

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1 MJ [Col SPATH]: You may.

2 Q. Mr. Mulry, I'm placing on the ELMO in front of you so
3 you can see it, Prosecution Exhibit 221. Do you recognize
4 generally this sort of evidence?

5 A. I do.

6 Q. All right. And is that the sort of evidence that the
7 divers were bringing up?

8 A. That's correct.

9 Q. And I take it for purposes of identification, that's
10 the deck it's lying on?

11 A. Yes, it is.

12 Q. I'm showing you Prosecution Exhibit 240. Again, do
13 you recognize this evidence, generally?

14 A. Yes, I do.

15 Q. And is this the sort of evidence that the divers were
16 bringing up?

17 A. That's correct.

18 Q. And you indicated that some of this evidence was laid
19 out to dry?

20 A. Yes. You know, certainly with any kind of evidence,
21 before you seal it in an airtight container, you want to go
22 ahead and get it dry so that mold and rust and whatever else
23 doesn't alter the evidence substantially.

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1 Q. Did you actually seize evidence on the ship itself?

2 A. I believe I did, yes.

3 TC [MR. MILLER]: Prosecution Exhibit 96, please.

4 Q. While we're doing that, I failed to ask: After your
5 employment with the FBI, have you been employed continuously?

6 A. Yes, I have.

7 Q. As?

8 A. As a nurse practitioner.

9 TC [MR. MILLER]: Permission, Your Honor, to publish to
10 the witness Prosecution Exhibits for Identification 96, 96A,
11 96B, and 96C.

12 MJ [Col SPATH]: You may.

13 Q. I'm going to first place on the ELMO what has been
14 marked as Prosecution Exhibit numbered -- or, excuse me,
15 Prosecution Exhibit 96 for Identification. Do you recognize
16 this, sir?

17 A. It's a -- yes, generally -- a sealed bag with
18 evidence control labels on them.

19 Q. Do you -- are you able to -- here in the chain of
20 custody section, can you see that?

21 A. Yes, I can.

22 Q. Do you recognize that handwriting?

23 A. Yes, that is my signature and my handwriting.

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1 Q. I'll move it down a little bit here. Do you
2 recognize -- do you recognize that handwriting?

3 A. Yes, that's mine.

4 Q. All right. And were you using these sorts of bags on
5 the COLE?

6 A. Yes. Yes, we were.

7 Q. If you could in Prosecution 96, having identified
8 your handwriting, there's a section that says description of
9 the evidence, date and time of recovery, location of recovery,
10 and by whom it was recovered. Could you read that, please?

11 A. All right. The description of evidence says
12 audiotape and matting. Time of recovery is 10/17/2000 at
13 1130. And the location of recovery, 01 Level of the Port Side
14 Quarterdeck, and by -- by me, my name, in my handwriting.

15 Q. Is there a DK number on it?

16 A. Yes, there is.

17 Q. And what's the DK number?

18 A. DK01 -- looks like something is struck out. Looks
19 like 100 with initials and then 101.

20 Q. Is there a 1B number on this?

21 A. 1B13.

22 Q. And is there a Q tab number on it?

23 A. Q155.

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1 Q. I'm going to show you Prosecution Exhibit 96A for
2 Identification and ask you if generally you recognize this
3 type of evidence.

4 A. I do.

5 Q. All right. And was this the type of evidence that
6 was being seized on the COLE by you and others?

7 A. That's correct.

8 Q. There is a Q number on this, also; is that correct?
9 Do you see that?

10 A. Yes, I do. It's Q155.

11 Q. Does that match the number on Prosecution Exhibit
12 Number 96?

13 A. It does.

14 TC [MR. MILLER]: Would you open this.

15 For the record, Your Honor, we have opened
16 Prosecution Exhibit 96, pulling out the various containers
17 therein.

18 Q. Again, do you recall seizing this particular type of
19 evidence?

20 A. This -- this type of evidence, yes. This specific
21 evidence, no. But this type of evidence.

22 Q. I'm specifically interested in this, looks like this
23 audiotape -- do you see that -- or tape of some sort?

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1 A. Yes, sir.

2 Q. Do you recall that at all?

3 A. I actually do. I recall recovering some audiotape,
4 looked like the tape from inside of a cassette, an audio
5 cassette.

6 Q. I'm also going to show you the evidence contained in
7 the bag that you identified with your handwriting. See that,
8 sir? Can you see?

9 A. Yes, I do.

10 Q. Does it appear to be the same evidence contained in
11 Prosecution Exhibit 96A?

12 A. Yes, it does.

13 Q. I'm placing before you Prosecution Exhibit 96D for
14 Identification. Do you recognize your handwriting on that
15 form, sir?

16 A. I do.

17 Q. And where is your handwriting?

18 A. On the, on the top line under accepted by.

19 Q. And does that form contain an item or DK number on
20 there?

21 A. It does.

22 Q. And what is that number?

23 A. DK -- DK01-101.

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1 Q. And does that match the number contained in
2 Prosecution Exhibit numbered 96C?

3 A. Yes, it does.

4 Q. Excuse me. I should say Prosecution numbered 96.
5 Does it -- is that correct?

6 A. That's correct.

7 Q. I'm also going to place on the ELM0 Prosecution
8 Exhibit numbered 96C. Do you recognize that photograph?

9 A. I do.

10 Q. Is that a fair and accurate depiction of Prosecution
11 Exhibit numbered 96?

12 A. Yes, it is.

13 TC [MR. MILLER]: Your Honor, at this time we would move
14 for the admission of Prosecution Exhibits 90 -- one more.
15 Excuse me. No -- Prosecution Exhibits number 96A, 96C, and
16 96D.

17 MJ [Col SPATH]: I understand. Thank you. And just to
18 make sure, it was 96, was it A, B and C?

19 TC [MR. MILLER]: A, B and D.

20 MJ [Col SPATH]: A, B, and D. Let me just go look at my
21 binder here.

22 TC [MR. MILLER]: Let me make sure, Your Honor.

23 MJ [Col SPATH]: I know it was 96 as well, of course.

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1 TC [MR. MILLER]: Hold on.

2 MJ [Col SPATH]: 96A.

3 TC [MR. MILLER]: 96A, 96 ----

4 MJ [Col SPATH]: B.

5 TC [MR. MILLER]: No. 96A, 96C, and 96D.

6 MJ [Col SPATH]: There it is. Thank you. Not 96B at this
7 point. Thank you.

8 TC [MR. MILLER]: If I could have 97, please, as the next
9 one.

10 Permission to publish to the witness at this time,
11 Your Honor, Prosecution Exhibits 97, 97A, 97B, C, and D for
12 Identification.

13 MJ [Col SPATH]: You may.

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

15 Q. First I want to place in front of you Prosecution
16 Exhibit numbered 97 and ask you if you recognize just
17 generally that item.

18 A. I do.

19 Q. All right. And what do you recognize it to be?

20 A. It's an evidence tag similar to the previous one we
21 just looked at.

22 Q. And do you recognize the handwriting, sir?

23 A. Yes, sir, that is my handwriting.

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1 Q. And was this the type of evidence bag you were using
2 on the COLE?

3 A. That's correct.

4 Q. As to Prosecution Exhibit numbered 97, I want to ask
5 you, if you could, as to your handwriting, read for His Honor,
6 please, the description of the evidence, the date and time of
7 recovery, the location of the recovery, and by whom it was
8 recovered.

9 A. Okay. Description is matting, again. Date and time
10 of recovery 10/17/2000 at 1130. Sorry, I'm getting some --
11 oh, there we go. Location of recovery, 01 Level/Port
12 Quarterdeck.

13 Q. All right.

14 A. Recovered by me.

15 Q. Underneath it says chain of custody. Did you prepare
16 that chain of custody form?

17 A. Yes.

18 Q. All right. And if you could, read it into the
19 record, please.

20 A. Recovered from USS COLE by, with my signature, date
21 10/17/2000, time 11:30 a.m. Received from me and then -- and
22 then there's a following signature after that. I don't
23 recognize the signature though.

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1 Q. All right. Is there a 1B number on this particular
2 exhibit?

3 A. Yes, sir, it's 1B12.

4 Q. Is there a Q number on it?

5 A. Q156.

6 Q. And is there a DK number?

7 A. DK01-100, one-zero-zero.

8 Q. I show you a photograph, Prosecution Exhibit 97 --
9 97A for Identification. I'm going to first ask you: Is this
10 the sort of evidence that you were gathering on the COLE?

11 A. Yes, it is.

12 Q. All right. And the -- it has a Q number on a ruler
13 underneath it; is that correct?

14 A. That's correct, sir.

15 Q. And what is that number?

16 A. The number is Q156.

17 Q. And does that match the Q number on the bag?

18 A. Yes, it does.

19 Q. All right. And I think it's in two spots; is that
20 correct?

21 A. I believe so.

22 Q. All right.

23 TC [MR. MILLER]: Open it.

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1 For the record, we have opened Prosecution Exhibit
2 Number 97. We are removing the contents of it.

3 Q. Can you see that item?

4 A. I do.

5 Q. Is that, again, the type of evidence that you were
6 gathering that day or -- from the COLE?

7 A. Yes, it is. Yes, it is.

8 Q. And does the evidence that I have removed from the
9 bag appear to match the evidence contained in photograph
10 Prosecution Exhibit 97A?

11 A. Yes, it does.

12 TC [MR. MILLER]: Could I have the green sheet?

13 Q. I'm showing you a chain of custody form you're
14 familiar with; is that correct?

15 A. Yes, sir.

16 Q. And do you recognize your signature on that form?

17 A. I do.

18 Q. And is it the top entry?

19 A. That's correct.

20 Q. Where it says collected; is that correct?

21 A. Yes, sir.

22 Q. And it has a DK item number on the top; is that
23 correct?

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1 A. Yes, it does.

2 Q. And what is that number?

3 A. DK01-100.

4 Q. And does that match the DK number contained on
5 Prosecution Exhibit Number 97? Hold on, let me put it up
6 there.

7 A. Yes, it does.

8 Q. I'm showing you Prosecution Exhibit 97D. Is that an
9 exact duplicate of the form that I've just showed you?

10 A. Yes, it is.

11 Q. All right. And when I say of the form I just showed
12 you, 97D is an exact duplicate of the chain of custody form
13 associated with 97, correct?

14 A. Yes, sir.

15 Q. Lastly, I want to show you a photograph, Prosecution
16 Exhibit 97C for Identification. Do you recognize that, sir?

17 A. I do.

18 Q. Is that a fair and accurate depiction of Prosecution
19 Exhibit 97, the evidence bag containing the -- what you have
20 described as matting?

21 A. Yes, it is.

22 TC [MR. MILLER]: Move for the admission, Your Honor, of
23 97A, 97C, and 97D.

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1 MJ [Col SPATH]: I understand. Thank you.

2 TC [MR. MILLER]: Show me 134.

3 Permission to publish to the witness, Your Honor,
4 Prosecution Exhibit 134, 134A, B, C, and D for Identification.

5 MJ [Col SPATH]: You may.

6 Q. I'm placing on the ELM0 Prosecution Exhibit 1B -- no,
7 excuse me, Prosecution Exhibit 134 for Identification. Do you
8 recognize that, sir?

9 A. I do.

10 Q. What do you recognize it to be?

11 A. Again, evidence bag, evidence label with my
12 handwriting on it.

13 Q. Again, is that the type of bag that you were using on
14 the United States COLE back in ----

15 A. Yes, it ----

16 Q. ---- October of 2000?

17 A. Yes. Yes, it is.

18 Q. You've indicated it has your handwriting; is that
19 correct?

20 A. Yes, sir.

21 Q. Is there a Q tag on this bag?

22 A. There is.

23 Q. And does it have a Q number?

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1 A. It does.

2 Q. And what is that number?

3 A. The number is Q340.

4 Q. All right. And is there a DK number on it, also?

5 A. There is.

6 Q. And what is that number?

7 A. DK01-130.

8 Q. And does it have a 1B number?

9 A. It does.

10 Q. And what is that 1B number?

11 A. 1B627.

12 Q. And if you could read into evidence, again,
13 identified as your handwriting, the description of the
14 evidence, the date and time of the recovery, the location of
15 the recovery, and by whom it was recovered.

16 A. The description is two metal objects. Date and time
17 of recovery, 10/17/2000 at 1130. Location, the 01 Level/Port
18 Quarterdeck, recovered by me.

19 Q. Then it has a chain of custody section. If you
20 could, please, read that into the record.

21 A. Yes, sir. Received 10/17/2000 by me, my signature.
22 Date, again, 10/17/2000, 11:30 a.m.

23 Q. Do you recognize that? Is that your handwriting?

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1 A. It is.

2 Q. And on the by line, is that your signature?

3 A. Yes, sir.

4 Q. I place before you Prosecution Exhibit 134A for
5 Identification. Again, is that the sort of evidence that you
6 were gathering on the COLE?

7 A. Yes, it is.

8 Q. Does that particular photograph, Prosecution
9 Exhibit 134A for Identification, have a Q number?

10 A. Yes, sir, it does.

11 Q. And what is that number, sir?

12 A. Q340.

13 Q. And why would you have been gathering this sort of
14 evidence?

15 A. One of the first things that you look for in a crime
16 scene is something that doesn't belong there, so objects like
17 fabric matting, unusual metallic objects, audio tapes, things
18 of that like, shouldn't be on the exterior deck of a Navy
19 ship.

20 Q. For the record, I am placing on the ELM0 the evidence
21 bag, Prosecution Exhibit numbered -- Prosecution Exhibit,
22 excuse me, 134 for Identification. Do you see those two items
23 on the bottom, sir?

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1 A. Yes, I do. Yes, sir, I do.

2 Q. Do they appear to be the same items contained in the
3 photograph, Prosecution Exhibit numbered -- Prosecution
4 Exhibit 134A for Identification?

5 A. Yes, they do.

6 Q. And if I haven't asked you for the record, the Q
7 number on that photograph, Prosecution Exhibit 134A, is?

8 A. Q340.

9 Q. And does that match the Q number on Prosecution 134
10 for Identification?

11 A. Yes, sir, it does. Yes, sir, it does.

12 Q. I'm showing you a chain of custody form. Do you
13 recognize your signature on that, sir?

14 A. Yes, I do.

15 Q. And where is your signature on that form?

16 A. On the top line, right over top reason, which
17 indicates collected.

18 Q. And there is a 1B number on it; is that correct?

19 A. Yes, there is.

20 Q. And what is that number?

21 A. 1B627.

22 Q. And there's an item number, DK number?

23 A. DK01-130.

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1 Q. Does the 1B number on that chain of custody match the
2 number on the Government Exhibit 134?

3 A. Yes, it does.

4 Q. And does the DK number match also?

5 A. Yes, sir, it does.

6 Q. I'm placing on the ELM0 Prosecution Exhibit 134C for
7 Identification. Is that an exact duplicate of the chain of
8 custody form you have just described?

9 A. Yes, it is.

10 Q. And does it contain -- again, we recognize your
11 signature as the first entry?

12 A. Yes, sir.

13 Q. Lastly, I want to show you a photograph, Prosecution
14 Exhibit 134B for Identification. Do you recognize that
15 photograph, sir?

16 A. I do.

17 Q. And what do you recognize it to be a photograph of?

18 A. Of an evidence collection bag with evidence tag.

19 Q. All right. And is that a fair and accurate depiction
20 of Prosecution Exhibit 134?

21 A. Yes, it is.

22 TC [MR. MILLER]: Your Honor, at this time the prosecution
23 would move for the admission of Prosecution Exhibit 134A -- or

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1 would offer, excuse me, Prosecution Exhibit 134A, Prosecution
2 Exhibit 134B, and one -- and Prosecution 134C.

3 MJ [Col SPATH]: Thank you.

4 TC [MR. MILLER]: Permission to publish to the witness,
5 Your Honor, Prosecution Exhibit 135, 135A, B, C for
6 Identification.

7 MJ [Col SPATH]: You may. 134 please. 135, right?

8 TC [MR. MILLER]: Yes, it is 135, sir.

9 MJ [Col SPATH]: I just wanted to make sure.

10 **Questions by the Trial Counsel [MR. MILLER]:**

11 Q. I'm placing on the ELM0 Prosecution Exhibit 135. Do
12 you recognize this generally, sir?

13 A. I do.

14 Q. What do you recognize it to be?

15 A. As an evidence collection bag.

16 Q. And do you recognize the handwriting?

17 A. I do. It's mine.

18 Q. Was it the type of evidence bag that you were using
19 on the COLE back in October of 2000?

20 A. Yes, it is.

21 Q. Is that your handwriting, the description, the date
22 and time, the location of the recovery?

23 A. That's correct.

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1 Q. All right. Could you read into the record the
2 description of the evidence?

3 A. The description of the evidence is unknown objects.

4 Q. Date and time of your recovery?

5 A. Date and time is 10/17/2000 at 1130, location
6 01 Level/Port Side-Quarterdeck, and recovered by me.

7 Q. And is there a chain of custody?

8 A. There is. Received from USS COLE by, with my
9 signature. Date, 10/17/2000, 11:30 a.m.

10 Q. Is there a Q number on it?

11 A. Q number is Q343.

12 Q. Is there a DK number on it?

13 A. DK01-133.

14 Q. And is there a 1B number on it?

15 A. 1B629.

16 Q. I'm placing on the ELMO Prosecution Exhibit 135A for
17 Identification. Is this the type of evidence that you were
18 gathering on the COLE?

19 A. Yes, it is.

20 Q. And, again, why were you obtaining or seizing this
21 sort of evidence?

22 A. Because that should not have been where I found it.

23 Q. Meaning it was foreign to the COLE?

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1 A. Meaning it was foreign, it would not typically be
2 found on the weather deck of a Navy ship.

3 Q. And does it have a Q number on the ruler underneath
4 the various pieces of evidence?

5 A. Yes, it does. Q343.

6 TC [MR. MILLER]: Open it.

7 For the record, Your Honor, we have now -- I am
8 placing Prosecution Exhibit 135 on the ELM0, the evidence bag
9 itself.

10 Q. Can you see the various pieces of items in that bag?

11 A. Yes, I can.

12 Q. Do they appear to match the items contained in
13 Prosecution Exhibit 135A for Identification?

14 A. Yes, they do.

15 Q. Do the Q numbers also match? Oh, let me ----

16 A. Yes, they do.

17 Q. I'm showing you a chain of custody form. Do you
18 recognize your signature on that form?

19 A. I do.

20 Q. And where is your name contained on that form?

21 A. On the first line over "collected."

22 Q. All right. And on that chain of custody form, is
23 there a 1B number?

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1 A. There is.

2 Q. And what is the 1B number?

3 A. 1B629.

4 Q. Is there also an item number or DK number?

5 A. Yes, sir.

6 Q. And what is that, sir?

7 A. DK01-133.

8 Q. Does that match the 1B number on Prosecution

9 Exhibit 135?

10 A. Yes, it does.

11 Q. And does it match -- do the DK numbers also match?

12 A. Yes, they do.

13 Q. I'm showing you Prosecution Exhibit 134C, and does --

14 do the first four entries on -- excuse me, 135C. Excuse me,

15 135C.

16 Do the first four entries on 135C for Identification

17 match the first four entries on the chain of custody form,

18 which you have just identified?

19 A. Yes, they do.

20 TC [MR. MILLER]: Your Honor, at this time the prosecution

21 would offer into evidence Prosecution Exhibit 135A, 135B, and

22 135C.

23 MJ [Col SPATH]: Again, noted, and thank you.

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1 TC [MR. MILLER]: Permission to publish to the witness,
2 Your Honor, Prosecution Exhibits 136, 136A, 136B, 136C for
3 Identification.

4 MJ [Col SPATH]: You may.

5 Q. Sir, I have placed on the ELMO Prosecution
6 Exhibit 136 for Identification. Do you recognize that, sir?

7 A. Yes, I do.

8 Q. What do you recognize that to be?

9 A. An evidence collection bag.

10 Q. Do you recognize the handwriting on it?

11 A. Yes, sir, it is mine.

12 Q. Was it the type of evidence bag you were using when
13 you were gathering evidence on the COLE?

14 A. Yes, it is.

15 Q. Does it contain a description, other information on
16 that evidence bag?

17 A. Yes, it does.

18 Q. And again, that's in your handwriting?

19 A. It is.

20 Q. Could you read into the record the description of the
21 evidence?

22 A. Audiotape and unknown black object.

23 Q. All right. Date and time of recovery?

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1 A. Date of 10/17/2000, 1130. Location, 01 Level/Port
2 Side-Quarterdeck, recovered by me.

3 Q. And a chain of custody form, did you complete that?

4 A. I did.

5 Q. All right. And could you read that into the record,
6 please.

7 A. Received from USS COLE by my signature. Date,
8 10/17/2000, 11:30 a.m.

9 Q. And does it have a Q number on it?

10 A. It does.

11 Q. What is that number, sir?

12 A. Q349.

13 Q. Does it have a DK number on it, sir?

14 A. DK01 ----

15 Q. Can you see the rest of it, sir?

16 A. I'm sorry, it's moving. There we go. Okay.

17 DK01-139.

18 Q. And lastly, a 1B number, sir, does it have one?

19 A. Yes, sir, 1B634.

20 Q. Let's see if you can identify it. I'm placing on the
21 ELMO Prosecution Exhibit 135A -- 136A for Identification.

22 Again, was this the sort of evidence that you were seizing on
23 the USS COLE?

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1 A. Yes, it is.

2 Q. And why were you seizing this sort of evidence?

3 A. Because it was out of place.

4 Q. Does the evidence in Prosecution 136A have a Q number
5 attached or listed underneath it?

6 A. Yes, sir, it does.

7 Q. And what is that Q number?

8 A. Q349.

9 Q. And does that match the Q number on Prosecution
10 Exhibit 36 [sic]?

11 A. Yes.

12 Q. It does? All right.

13 A. It does.

14 TC [MR. MILLER]: Open it.

15 Q. I'm placing the evidence bag, Prosecution Exhibit 136
16 for Identification, on the ELM0. Can you see the item inside
17 that bag, sir?

18 A. I can.

19 Q. Does it appear to be the same item that's contained
20 in Prosecution Exhibit 136A for Identification?

21 A. Yes, they do.

22 Q. I'm placing on the ELM0 a chain of custody form. Do
23 you recognize that form, sir?

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1 A. I do.

2 Q. And do you see your signature on it?

3 A. I do.

4 Q. And where is your -- let me make it a little smaller.

5 Where is your signature?

6 A. At the top over collected.

7 Q. Does the form have a 1B number?

8 A. It does.

9 Q. What is that 1B number?

10 A. 1B634.

11 Q. And does it have a DK number?

12 A. It does.

13 Q. What is that number?

14 A. DK01-139.

15 Q. Does it match the 1B number contained on the evidence
16 bag itself?

17 A. Yes, it does.

18 Q. And does the DK number match the DK number on the
19 evidence bag, Prosecution Exhibit 136?

20 A. It does.

21 Q. I'm placing on the ELM0 Prosecution Exhibit 136C.

22 Are the first four entries on that exhibit, Prosecution

23 Exhibit 136C for Identification, identical to the chain of

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1 custody form that you have just identified?

2 A. Yes.

3 Q. I'm placing on the ELM0 Prosecution Exhibit 136B. Do
4 you recognize that photograph?

5 A. I do.

6 Q. And what do you recognize it to be a photograph of?

7 A. Of the evidence collection bag that we were
8 previously discussing.

9 Q. Prosecution Exhibit 136 for Identification, that bag?

10 A. Yes, sir.

11 Q. Fair and accurate depiction of it?

12 A. It is.

13 Q. Now, as to any of the exhibits that I've shown you,
14 do you have any reason to believe they have been altered or
15 changed in any way?

16 A. I do not.

17 Q. As to all the exhibits that we have discussed today
18 that you have identified, did you personally put all those
19 items in those bags and fill out the information on the bag
20 itself?

21 A. Yes, sir.

22 TC [MR. MILLER]: Lastly, Your Honor, the prosecution
23 would offer into evidence Prosecution Exhibit 136A, 136B, and

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1 136C.

2 MJ [Col SPATH]: Noted. Thank you.

3 TC [MR. MILLER]: No further questions. Thank you, Your
4 Honor.

5 MJ [Col SPATH]: Thank you.

6 Defense Counsel, questions?

7 DDC [LT PIETTE]: Your Honor, defense takes no position.

8 MJ [Col SPATH]: All right. I think we've probably
9 covered the ground. The commission finds there is a position
10 and a strategic decision from the defense and the defense
11 community.

12 Special Agent Mulry, I'm going to give you a standard
13 order. Don't discuss your testimony until we resolve this
14 issue at hand. I know it's a standard order. The unique
15 piece here is it's going to take a while for us to resolve
16 this obviously. So please keep my order in mind. Do you
17 understand?

18 WIT: Yes, sir, I do.

19 MJ [Col SPATH]: All right. I want to thank you for
20 taking the time to testify in this matter, and I'm sure we'll
21 see you at some point in the future as we move forward through
22 these issues. Thank you very much. They'll disconnect the
23 feed.

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1 WIT: Thank you, sir.

2 [The witness was warned, temporarily excused, and the VTC was
3 terminated.]

4 TC [MR. MILLER]: Nothing further for today, Your Honor,
5 from the government.

6 MJ [Col SPATH]: That's all for today. And so just update
7 us as we move forward about the witnesses on Monday.

8 TC [MR. MILLER]: Major Pierson has ----

9 ATC [Maj PIERSON]: Your Honor, prior to adjourning, could
10 we make a small record?

11 MJ [Col SPATH]: Please. Reasonably short?

12 ATC [Maj PIERSON]: Yes, Your Honor.

13 MJ [Col SPATH]: All right. I'm not limiting it; I just
14 wanted -- I want to know if I needed to take a break.

15 ATC [Maj PIERSON]: No, Your Honor, it will be short.

16 MJ [Col SPATH]: Okay.

17 ATC [Maj PIERSON]: Your Honor, the government just wanted
18 to take this opportunity to note the change in tactics from
19 attacking the military commission system by rogue counsel to
20 now what appears to be an unwilling witness.

21 The government previously made comments, Mr. Miller
22 did, about the actions of the rogue counsel before this
23 commission. But the government wanted to make clear that

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1 it -- its patience in not issuing a subpoena at this time
2 should not be viewed as a lack of belief in the government's
3 authority from Congress under 10 U.S.C. Section 949j and the
4 Secretary of Defense in R.M.C. 703 to lawfully issue subpoenas
5 in pursuant -- in pursuance of the commission's orders.

6 For as the Court of Appeals For the Armed Forces in
7 the United States v. Curtin noted, The trial counsel's
8 function in the context of the military justice system
9 parallels the functions of the clerk of court of a
10 United States District Court who issues subpoenas for that
11 court as a ministerial act.

12 The government finds it remarkable that a citizen of
13 New York, who has been on notice, since at least the 1870s,
14 that they may be compelled to provide information before a
15 military tribunal and who voluntarily allowed her purported
16 expert opinion to be injected into these proceedings would now
17 question that she was going to be required by the commission
18 to provide -- to attend a hearing of the commission and
19 provide further information on her opinion.

20 The government remains confident that the federal
21 courts reviewing these collateral attacks on the military
22 commissions system will reach the conclusion the Fourth
23 Circuit did in 2012, in Hennis v. Hemlick; that the principles

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1 of comity, respect for the expertise of military judges and
2 judicial economy, weigh against federal court intervention in
3 pending court-martial proceedings and in favor of requiring
4 exhaustion of all available remedies within the military
5 justice system before a federal court's collateral review.

6 The government remains confident that the federal
7 courts will equally find the commission should be afforded
8 such latitude. Thank you, Your Honor.

9 MJ [Col SPATH]: All right. And again, I have requested
10 the witness be made available. Certainly the timing of a
11 subpoena -- you all are welcome to start the subpoena process.

12 ATC [Maj PIERSON]: Your Honor, like the commission, we
13 appreciate the commission's patience. At this time the
14 government is similarly exercising patience in the hope for
15 resolution of these collateral attacks.

16 MJ [Col SPATH]: No, I understand. And certainly there's
17 a number of them kind of going on right now that hopefully
18 we'll get some resolution on as we move forward.

19 Defense Counsel, any additional comments?

20 DDC [LT PIETTE]: Yes, Your Honor. Again, very briefly.
21 Just going back to Your Honor continues to mention Major
22 Fewell, Major Robinson. And I just want to make it clear
23 there are four detailed military counsel on this case. Three

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1 of us are cleared. And, again, all of us have a lot of
2 experience. I consider all of us very good attorneys.
3 However, none of us are capital qualified.

4 And the only reason I'm here, and not anybody else,
5 is because I'm the only one who has an attorney-client
6 relationship that was formed when learned counsel was present
7 and giving advice and representation to ----

8 MJ [Col SPATH]: The only reason you're here is because
9 three counsel voluntarily abandoned their role and
10 responsibility to be here, frankly. And that is not at all --
11 you've got my empathy.

12 I just -- they've been ordered to be here. They have
13 an obligation to be here. They've been told to be here. And
14 the attorney-client relationship has not been severed with
15 Mr. al Nashiri, and there's been no request from him to do so;
16 and in relation to the learned counsel, not a surprise, given
17 a nine-year relationship.

18 So I recognize that you are currently the only one
19 here, but the reasons for it are important for the appellate
20 review. I'm certainly not standing in their way.

21 DDC [LT PIETTE]: Yes, Your Honor. And I actually don't
22 think your position and mine on that diverge very far.

23 MJ [Col SPATH]: I don't either.

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1 DDC [LT PIETTE]: So again, but if they were here, they
2 would be in the same position I am. None of us are qualified.
3 All of us would be similarly taking the nonposition on ----

4 MJ [Col SPATH]: Again, you are qualified and certified to
5 perform duties as trial and defense counsel, as you know, and
6 have performed those duties. You are not learned counsel.

7 And if you want my -- be very cautious, as I usually
8 am about what I say. But from a soapbox it's pretty
9 remarkable to me that when I preside over capital cases of
10 Airmen, and other judges who preside over capital cases for
11 Soldiers, Sailors and Marines, they don't get learned counsel.
12 There's no law for them to get learned counsel. And frankly,
13 there's been silence about it.

14 But we come here, learned counsel are provided at
15 great expense. Spend nine years, hundreds of hours at the
16 rate that you pay -- I'm not doing the math, hopefully other
17 people do -- investing a great deal of money, and then just
18 walk away.

19 So I recognize learned counsel are provided to
20 detainees, not active duty military. That's a choice Congress
21 makes, right? And I've said it before, I don't have to agree
22 with the law. I'm supposed to follow it, not interject what
23 my personal opinion is, and I haven't.

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1 But Congress did say "to the extent practicable" --
2 and I've mentioned, I'm going to make a good deal of findings
3 on this both on the record and in writing. But it is
4 important to recognize "to the extent practicable," one would
5 think it envisions a learned counsel who voluntarily abandons
6 his role and absents the premises, despite that investment of
7 time and effort in this case, it's disturbing.

8 But again, we're probably not that far off in many
9 areas.

10 DDC [LT PIETTE]: Yes, Your Honor. And as far as the
11 witnesses on Monday, or whenever in the week, the defense -- I
12 don't think we're particularly far off from the government
13 either, and we're not going to oppose any efforts to get them
14 to testify.

15 MJ [Col SPATH]: I certainly would like to follow up on
16 their opinions, so ----

17 DDC [LT PIETTE]: Yes, sir.

18 MJ [Col SPATH]: Thank you. I appreciate it. And one has
19 agreed to come in, I know, by VTC, and I appreciate that.

20 Again, as witnesses, the scheduling of the witnesses
21 occurs, let the defense counsel know the schedule. We have
22 taken a very small pool of witnesses on real evidence each
23 day, and we continue to give pretty significant breaks for

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1 counsel to prepare for, again, what are evidentiary
2 foundations of real evidence.

3 I appreciate both sides' efforts. I'll see you all
4 Monday morning at 0900. We're in recess.

5 [The R.M.C. 803 session recessed at 1137, 10 November 2017.]

6 [END OF PAGE]

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