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1 [The R.M.C. 803 session was called to order at 0902,
2 3 November 2017.]

3 MJ [Col SPATH]: This commission is called back to order.
4 Let's see. Not all of the parties are present. All the
5 parties on the defense are present who were present the day
6 before. Lieutenant Piette is here and the accused is here.
7 On the government side, I see General Martins is not here, but
8 all the other parties are the same.

9 Mr. Miller, are you transmitting the proceedings?

10 TC [MR. MILLER]: Yes, they are, Your Honor. They are
11 being transmitted by closed-circuit television to the
12 locations authorized in your order. Brigadier General Martins
13 is attending to other case-related matters, and we would ask
14 permission of the court to proceed this morning without him.

15 MJ [Col SPATH]: Certainly. And so -- yep, I've already
16 noticed -- noticed that he is absent for this session. Thank
17 you.

18 What I don't know is if there are any attorneys at
19 the Mark Center who have chosen to at least attend that way,
20 although, again, they could attend in person like they've been
21 ordered. Do you -- Lieutenant Piette, do you know?

22 DDC [LT PIETTE]: Your Honor, I have no representations.

23 MJ [Col SPATH]: Okay. Trial Counsel, do you know? Do we

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1 have a video feed to the Mark Center? Do we have any idea?

2 MATC [COL WELLS]: Sir, we've been informed that no
3 counsel are present. I have not checked to see if we have a
4 video feed. Would you like for me to do that, sir?

5 MJ [Col SPATH]: Let's check. I think we do. I'm looking
6 back towards the tech room. I just want to make sure.

7 All right. There's an individual there at the Mark
8 Center, I think. Let me just check. I don't need your name,
9 but can you hear me?

10 [IT TECH]: Yes, sir. This is OMC IT. No one is here,
11 sir.

12 MJ [Col SPATH]: All right. I noticed I didn't recognize
13 you. You don't look like any of the three I was hoping to see
14 there. You haven't seen them?

15 [IT TECH]: No, sir. We went to the visitor control
16 center to verify and did a complete sweep of the building and
17 have not found them.

18 MJ [Col SPATH]: Okay. You can disconnect and you
19 certainly can use that room for anything else you need to use
20 that for today. Thank you so much.

21 DDC [LT PIETTE]: Your Honor ----

22 [IT TECH]: Thank you, sir.

23 MJ [Col SPATH]: Hold on one second. Give me one second.

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1 Lieutenant Piette.

2 DDC [LT PIETTE]: No, Your Honor. This isn't related to
3 that. We're just having some issues with static on the
4 headphones for the ----

5 MJ [Col SPATH]: Let me double check that, too. You can
6 disconnect. Thank you very much.

7 And then let me know if we resolve the issues with
8 the headphones here.

9 [The VTC terminated.]

10 DDC [LT PIETTE]: Yes, sir.

11 [Conferred with courtroom personnel.]

12 DDC [LT PIETTE]: Your Honor, the issue is resolved now.

13 MJ [Col SPATH]: Thanks. Thanks, Lieutenant Piette.

14 No issues have been brought to me, at least while
15 we're here this time, regarding the ability to meet with
16 Mr. al Nashiri. I don't need to know how long or anything
17 more than day before yesterday, on Wednesday, it appeared to
18 me you had an opportunity before and after to meet with your
19 client, Lieutenant Piette; is that accurate?

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

21 MJ [Col SPATH]: Day before that we were in session as
22 well and it seemed the same occurred, you had some
23 opportunity, I don't need the details, but you had the

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1 opportunity again either here or in another location to meet
2 with your client.

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

4 MJ [Col SPATH]: Have you requested to meet and had any
5 issues at least during this visit down here?

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

7 MJ [Col SPATH]: Okay. Have you been informed of any
8 effort to get you additional attorneys by the defense office?

9 DDC [LT PIETTE]: Not anything more than when this all
10 first started and General Baker said that we were in the
11 process of looking for a new learned counsel; I have not heard
12 anything since then.

13 MJ [Col SPATH]: Colonel Aaron is not here; I was going to
14 ask him. In a filing that went through one of the habeas
15 petitions, Colonel Aaron indicated he could have a learned
16 counsel in 30 days. It wasn't Colonel Aaron; it was a filing
17 made by Mr. Paradis. At some point I would like to talk to
18 Colonel Aaron about that, given the timing of things. We'll
19 work through that next week maybe. Thank you.

20 All right. Let's deal with the witness first because
21 he's here, then we can have another conversation, and then we
22 can figure out again where we are next week.

23 I know Special Agent Gaudin -- am I saying that

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1 right, Mr. Miller?

2 TC [MR. MILLER]: You are.

3 MJ [Col SPATH]: Is it Gaudin or Gaudin? Do you know?
4 Gaudin. I know Special Agent Gaudin is here. Let's get him
5 in here, get him under oath; and then if defense counsel has
6 any questions, we'll let him ask.

7 Come on in. If you would just stand here, Mr. Miller
8 is going to swear you in. Agent Gaudin, they told me that's
9 how I pronounce your name. Is -- okay. Good. Thanks.

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

12 **DIRECT EXAMINATION**

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

14 Q. Would you state your name for the record, please,
15 your position and your current ----

16 A. My name is Stephen Gaudin and I'm an FBI agent and
17 I'm assigned as the chief of our office at our U.S. embassy in
18 Abu Dhabi.

19 Q. And how long have you been with the FBI?

20 A. As of today, today is my 26th anniversary, so I've
21 been with the FBI 26 years today, effectively.

22 Q. Agent, I would like to first begin with reviewing
23 some of your background. You attended university; is that

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1 correct?

2 A. Yes, I did.

3 Q. And where did you go, when did you graduate, and what
4 was your major?

5 A. I graduated from Suffolk University in Boston, and I
6 had a degree in management and graduated, again, in 1986.

7 Q. You were a member of the ROTC?

8 A. I was.

9 Q. After you graduated from Suffolk, what was your next
10 employment?

11 MJ [Col SPATH]: Mr. Miller, I'm sorry, I hate to
12 interrupt. It's a defense witness; I'm going to turn it over
13 to the defense. We've gone through the preliminary questions.
14 I just want to see if the defense has any questions, and then
15 I will come to you to see if you have any.

16 TC [MR. MILLER]: All right.

17 MJ [Col SPATH]: Thank you, Mr. Miller, for the
18 preliminary questions.

19 Lieutenant Piette, do you have any questions for the
20 witness?

21 DDC [LT PIETTE]: Your Honor, as -- the defense position
22 is that we are participating due to the fact I am not
23 qualified learned counsel, and further reasons I ask to put on

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1 the record later when the witness is not present, we are not
2 participating, and, without waiving any rights of
3 Mr. al Nashiri, we are taking no position on this.

4 MJ [Col SPATH]: I understand. And an appellate court
5 will figure out if you've waived the rights on behalf of your
6 client or not.

7 Let me just ask this: How many cross-examinations do
8 you think you've done in the course of your career, as an
9 estimate?

10 DDC [LT PIETTE]: Several dozen, Your Honor, but none in a
11 capital case.

12 MJ [Col SPATH]: How many direct examinations?

13 DDC [LT PIETTE]: Probably roughly half that, but again,
14 none in a capital case.

15 MJ [Col SPATH]: Not my question yet. How many have you
16 done?

17 DDC [LT PIETTE]: Probably two dozen or so.

18 MJ [Col SPATH]: All right.

19 Mr. Miller, do you have any questions for the
20 witness?

21 TC [MR. MILLER]: I do, Your Honor.

22 MJ [Col SPATH]: You may proceed.

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

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1 Q. I got a little ahead of myself, so I'll -- you
2 indicated that, I think when we ----

3 DDC [LT PIETTE]: Excuse me. Your Honor, I object,
4 because this is the defense witness and we are not raising
5 this motion. We have not taken a position on this motion, so
6 we haven't raised the motion. We haven't called the witness.

7 MJ [Col SPATH]: You raised the motion and you requested
8 me to compel the witness here, for him from Abu Dhabi, which
9 for him is very gracious. And again, while rumor on the
10 street is that we never provide you witnesses and we never
11 provide you the opportunity to conduct any kind of
12 presentation of evidence, we've done that -- I've done it
13 regularly since I've been assigned to this case.

14 And here is yet another opportunity where you have a
15 witness here who has traveled. And what we're going to do
16 is -- because I have a motion pending before me still that I
17 haven't ruled on, I'm going to allow the government to go
18 through their questions. When they're done, I will again
19 allow you the opportunity to ask any questions if you choose
20 to.

21 And again, if there's waiver or something like that,
22 the appellate court will figure it out. If I'm wrong, I'm
23 confident the appellate court will figure it out. They tell,

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1 as I've said, me often.

2 DDC [LT PIETTE]: Yes, Your Honor. And I just want to
3 make it clear for the record that the defense did not call
4 this witness. It was the court called this witness which, as
5 far as I can tell, if the court -- if Your Honor is calling
6 the witness, then you should be the one asking questions first
7 and then giving the defense and government a chance to ask
8 questions because this is not us calling ----

9 MJ [Col SPATH]: Well, you've got a motion to compel. You
10 said, Make these witnesses available. I've made a witness
11 available. He's sitting right next to me.

12 DDC [LT PIETTE]: Yes, but that doesn't mean we have to
13 call him. We are not obligated to call a witness to the
14 stand, even if they are available. And we didn't call them;
15 we didn't take a position on that. I want it to be clear for
16 the record that the defense did not call the witness to the
17 stand.

18 MJ [Col SPATH]: I understand.

19 Trial Counsel, would you like to call the witness to
20 the stand?

21 TC [MR. MILLER]: I will. I will call Special Agent
22 Gaudin.

23 MJ [Col SPATH]: Thank you. We've already gone through --

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1 since he's here and for some judicial economy so he doesn't
2 have to travel back from Abu Dhabi, I'm going to allow you to
3 do that.

4 DDC [LT PIETTE]: Your Honor, I would object to that since
5 the government doesn't have a motion pending for requesting
6 this witness.

7 MJ [Col SPATH]: Defense Counsel, they get to put on
8 evidence if they choose to. In the motion initially they said
9 your witnesses were irrelevant. You made a motion for me to
10 compel them here. I've done that. They're here.

11 DDC [LT PIETTE]: I understand, Your Honor. But if there
12 were learned counsel here, qualified counsel, they would have
13 the opportunity to perhaps waive this motion, and even if the
14 witness was here, make a tactical decision to waive this
15 motion, because we haven't taken a position, we haven't waived
16 it, or requested it to be argued today as a -- and so ----

17 MJ [Col SPATH]: We're not going to argue the motion
18 today. As I continue to say, I appreciate learned counsel's
19 ability to be here. We can talk about it later. I'm likely
20 issuing some written rulings on it. You don't have a right to
21 learned counsel, in my opinion, at every aspect of every
22 proceeding, especially when it doesn't relate to capital
23 matters.

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1 And so your learned counsel has opted, in violation
2 now of multiple orders, not to be here. That's his choice.
3 He has voluntarily absented himself over and over after not
4 minding being here for significant periods of time at
5 significant government expense without an issue while raising
6 significant motions. He's made this choice.

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

8 MJ [Col SPATH]: Your defense team knew of his absence
9 October 16th. There are other military lawyers. There is
10 another one who is assigned to the case and cleared. Where is
11 he? I can't help how the defense organization is running
12 this. I'm trying to do the best I can.

13 We are going to move forward with this witness
14 testimony. At worst, we'll do it again some day; at best,
15 we're going to engage in a little judicial economy for a
16 witness who has gone out of their way to travel, at defense
17 request, for a motion to compel, that I granted.

18 DDC [LT PIETTE]: Yes, I understand, Your Honor,
19 but the ----

20 MJ [Col SPATH]: I think the record is clear. Thank you.

21 DDC [LT PIETTE]: ---- the learned counsel isn't here
22 so ----

23 MJ [Col SPATH]: That's pretty obvious.

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1 DDC [LT PIETTE]: Right. And he hasn't called the witness
2 to the stand.

3 MJ [Col SPATH]: No, he has not. Now the government has.
4 Thank you.

5 Mr. Miller.

6 STEPHEN GAUDIN, civilian, was called as a witness for the
7 prosecution, was reminded of his previous oath, and testified
8 as follows:

9 DIRECT EXAMINATION

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

11 Q. You're still under oath.

12 A. Yes, sir.

13 Q. I think we established that you had gone to Suffolk
14 University.

15 A. Yes, sir.

16 Q. And after that you joined the military?

17 A. Right. I was in ROTC in college, and effective on my
18 graduation I was commissioned as a second lieutenant in the
19 infantry and went to my Initial Officers Basic Course at Fort
20 Benning right after graduating.

21 Q. How long did you remain in the military?

22 A. I was in the Army for -- I was in active duty upon my
23 graduation and commissioning for about five and a half years.

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1 Q. When you left the military, what was your rank?

2 A. I left as a captain, O-2, newly promoted captain.

3 Q. After your military service, did you remain in the
4 reserves?

5 A. No, I did not, sir.

6 Q. Why was that?

7 A. At the time it was -- it was not permissible under
8 the rules of the FBI at that time, so I had to resign my
9 commission and have no participation in the reserves or even
10 the IIR [**sic**], Individual Ready Reserve.

11 Q. You went from the military to the FBI?

12 A. Directly.

13 Q. Did you attend any basic training with the FBI?

14 A. Yes, I did.

15 Q. And where was that?

16 A. At Quantico, Virginia, at the FBI Academy.

17 Q. What year did that occur?

18 A. That was 1991, started on November 3rd.

19 Q. After Quantico what was your first office, sir?

20 A. First assignment was to Albany Division where I
21 worked in what was called a two-man resident agency in
22 Kingston, New York.

23 MJ [Col SPATH]: If you would slow down a little bit for

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1 the interpreters, that would be helpful.

2 TC [MR. MILLER]: I will, Your Honor.

3 Q. What were your general duties at the resident agency?

4 A. In Kingston, my responsibilities was to work across
5 all FBI programs, from violent crime, some white-collar crime,
6 pretty much everything that came across our desk, as there
7 were only two of us assigned to cover three rural counties in
8 upstate New York. So it was everything from drug cases, I
9 worked on a serial murder case, but it also transcended into
10 simple background investigations and things like that. So it
11 was pretty much everything across the board.

12 Q. Did you have occasion to interrogate suspects?

13 A. I did.

14 Q. Did you have occasion to interrogate witnesses?

15 A. I did.

16 Q. Or interview witnesses?

17 A. Interview witnesses for sure.

18 Q. How long did you remain at the Kingston RA?

19 A. I was there for about three years, thereabouts, maybe
20 two and a half years. And then I moved up to our headquarter
21 city office which was Albany, and I was put on a violent crime
22 squad for the remainder of my time in Albany.

23 Q. And how long did you remain in Albany?

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1 A. Until 19 -- the summer of 1997, late summer of '97, I
2 was then transferred to our New York office, New York City
3 office.

4 Q. What were your assigned duties in New York?

5 A. I was immediately put on the Joint Terrorism Task
6 Force of the New York office of the FBI.

7 Q. What generally are the duties of the persons assigned
8 to the -- it's called the JTTF, correct?

9 A. Right, the Joint Terrorism Task Force.

10 Initially I was put on a squad that handled
11 protection matters and security matters for special events,
12 and in that time frame there was a significant sporting event
13 that occurred, the Turner Games, the Goodwill Games that was
14 run by the Turner organization; and it was the first sort of
15 big televised international sporting event since the summer
16 Olympics of 1996 where there was a bombing occurred. So my
17 role at the beginning of my time in New York City was to work
18 on that project to help with the safety and security of that
19 event.

20 Q. Did you have any collateral duties at that time?

21 A. I did.

22 Q. What was that?

23 A. I was also a member of our New York -- the SWAT team

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1 at our FBI office in New York.

2 Q. Is that why you were assigned to these Goodwill
3 Games?

4 A. That was one of the reasons, yes, sir.

5 Q. How long did you remain in the New York office?

6 A. I was there from summer of '97 to about two months
7 after September 11th. I think around November of 2001, I was
8 transferred to our -- to FBI headquarters.

9 Q. And what were your general duties there?

10 A. In 2001 I was put on the Usama bin Laden -- I'm
11 sorry, Usama bin Laden unit of the counterterrorism division.

12 Q. How long did you remain at headquarters?

13 A. I was there from roughly November 19 -- I'm sorry,
14 November 2001 to August of 2002 when I was transferred to
15 Sana'a, Yemen.

16 Q. What were your duties, responsibilities in Sana'a?

17 A. In Sana'a, Yemen, initially I was our
18 counterterrorism division representative to the U.S. embassy,
19 working closely with other members of the embassy and with the
20 local services of the Yemen government, and then that
21 transferred into actually being assigned to open up our first
22 FBI attaché office in Sana'a at the embassy.

23 Q. How long did you remain at the embassy in Sana'a?

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1 A. In that position I was there permanently -- or, you
2 know, full-time assignment from August of -- I'm sorry, yeah,
3 August of 2003 to roughly springtime of 2005, so about three
4 years. And then I went back other times for TDY to assist
5 with the office there.

6 Q. I'm unclear. Did you join -- did you go to Sana'a in
7 August of 2002 or 2003?

8 A. August of 2002 -- I'm sorry. That's correct, 2002.

9 Q. When you left Yemen, where did you go?

10 A. I went back to -- initially I went to a short-term
11 assignment at our Boston field office, and then I was recalled
12 to our FBI headquarters, counterterrorism division again.

13 Q. How long did you remain doing counterterrorism?

14 A. I was there from 2006 time frame to roughly 2009 I
15 think -- 2009 or 2010, where I was then assigned as our
16 attaché of the chief of our office in Vienna, Austria.

17 Q. How long did you remain in Vienna?

18 A. I was there roughly a year and a half, I want to say,
19 and my headquarters then reassigned me to my current position
20 as the head of the attaché office in Abu Dhabi, United Arab
21 Emirates.

22 Q. And is that where you remain?

23 A. I'm still there now, yes, sir, in that position ----

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1 Q. Your duties and responsibilities in Abu Dhabi?

2 A. Similar to other attaché positions I've had where you
3 are pretty much the liaison and point of contact between what
4 the FBI needs and what the host country needs, everything from
5 working cases, helping each other out in the various different
6 ways, capacity building, training, but also work. There are
7 things they may need things from our law enforcement; there
8 are things our law enforcement may need from them. So pretty
9 much a liaison person between the two countries.

10 Q. Do you have any other language skills other than
11 English?

12 A. Well, I'm from Boston, so some people would question
13 the English. But yes, in the summer of 2001 the FBI sent me
14 to a nine-week total immersion course in Arabic at Middlebury
15 College in Vermont.

16 Q. Have you used those language skills?

17 A. I have.

18 Q. How would you describe your Arabic abilities?

19 A. I would not put me in a total conversant category,
20 but enough that I can call people on the phone. I can arrange
21 a meeting. I could order off of a menu. I understand the
22 basics of Arabic, but I would not call myself fluent in
23 Arabic.

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1 Q. Would you ever conduct an in-depth interview in
2 Arabic by yourself?

3 A. By myself, no, I would not. I would not be at that
4 level.

5 Q. During your time assigned to the New York office, did
6 you have occasion to become involved in any significant
7 terrorism investigations?

8 A. Yes, I did.

9 Q. And what particular investigation?

10 A. In August of 1998, our two U.S. embassies in Nairobi,
11 Kenya, and Dar es Salaam, Tanzania, were attacked. The FBI
12 put together a team and I was put on that team to immediately
13 respond to those attacks.

14 Q. And if you could, just ----

15 MJ [Col SPATH]: Let me just jump in. No worries. You
16 talk fast.

17 WIT: Yes, sir.

18 MJ [Col SPATH]: Probably because you're from ----

19 WIT: Boston.

20 MJ [Col SPATH]: ---- New England. I'm from up there,
21 too. So if you can, try to slow down a little bit ----

22 WIT: Yes, sir.

23 MJ [Col SPATH]: ---- so the interpreters can keep up.

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1 WIT: Yes, sir. Yes, Your Honor.

2 MJ [Col SPATH]: Mr. Miller. Sorry.

3 Q. You indicated a team was sent there?

4 A. Yes, sir.

5 Q. You were a member of that team?

6 A. I was.

7 Q. Did you become what is known as a case agent in that
8 case?

9 A. Yes, I did.

10 Q. Could you describe for His Honor, please, what a case
11 agent is and what a case agent does?

12 A. Well, Your Honor, on any case someone has to be
13 assigned the lead or the point of contact to conduct the
14 investigation. This particular case was so large, you know,
15 two embassies attacked on the same day, 223 people killed,
16 thousands injured, we -- instead of having one case agent we
17 had what were called co-case agents, and I was one of four
18 co-case agents on the case.

19 And the responsibilities were everything from
20 investigating the crime, collecting evidence, interviewing
21 witnesses, and if we -- if we had subjects interviewing
22 subjects. And then everything from helping solve the case,
23 identifying the people who were involved, trying to find the

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1 people involved and bring them to court, which we did, and
2 then help prepare -- work with the U.S. Attorneys office in
3 the Southern District of New York to prepare the case and
4 ready it for trial. And, in my particular case, actually
5 testify in the trial.

6 Q. I want to ----

7 A. That's in a nutshell.

8 Q. I want to center on the Nairobi case.

9 A. Yes, sir.

10 Q. Just in a very compressed testimony, what occurred in
11 Nairobi?

12 A. In Nairobi the embassy was attacked by a truck bomb,
13 which we pretty quickly determined had two operatives in the
14 vehicle. It was a vehicle laden with, I think, up to at least
15 one ton or more of explosives. It went off at the back
16 entrance of the embassy where cars would sort of go into the
17 underground garage for the embassy. It was at that particular
18 gate where the bomb went off. Again, as I said earlier, it
19 caused a tremendous amount of damage, killed a lot -- you
20 know, hundreds of people, injured thousands, including 11
21 Americans who worked at the embassy.

22 And we -- within a few days of the attack we found
23 out that someone had actually survived. I don't want to skip

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1 too far forward. But my role became to help identify if there
2 was anybody that was involved in the attack, were they still
3 in Nairobi. And we actually found somebody who was.

4 Q. And who was that person?

5 A. His name is Mohamed Al-Owhali, was his true name. He
6 was -- I was part of a team that located him and arrested him
7 and brought him in for interview and -- within the first,
8 within the first week of our being there.

9 Q. How long after the event did you take him into ----

10 A. I think it was by August 12th, so within the first
11 five days of the attack.

12 Q. Did you have occasion to question him?

13 A. Yes, I did. Again, we -- one of the ways we came
14 upon him, there were various number of -- there was a tip line
15 open. We were working very closely with our Kenyan
16 counterparts. There were literally hundreds and hundreds of
17 tips.

18 The one tip that I was assigned to sort of run to
19 ground was there was a person hiding in a hotel about an hour
20 away from Nairobi who didn't fit into that particular
21 neighborhood. We went out, investigated, found him, and had
22 reason to bring him back for questioning. And then I
23 questioned him for the next 14 days in Nairobi.

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1 Q. Was he tortured in any way?

2 A. No, he was not.

3 Q. Was he willing to speak with you?

4 A. He was very willing. Yes, he was willing to speak to
5 us.

6 Q. And did he provide you with a statement as to what
7 occurred in Nairobi?

8 A. Yes, he did. He -- initially he provided some false
9 information, but then when presented with the number of facts,
10 he realized that we did know what he had been up to. And then
11 for a period of about four days, Your Honor, he just went into
12 particular detail about what his -- what his role was, not
13 only in this attack, but how he came to join al Qaeda, how he
14 had met with bin Laden on a number of occasions -- Usama bin
15 Laden, that is -- how he volunteered to be in a suicide attack
16 against the United States, and his direct role in the attack,
17 which was inside the bomb-laden vehicle, and who were the
18 other participants in this attack, the attack that was in
19 Nairobi.

20 He detailed, significantly, the training that he had
21 at the various camps in Afghanistan, the inner workings, in
22 some ways, of how al Qaeda operated, how particular attack
23 cells operated. And he detailed his time in places like Yemen

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1 and other places before he actually got to Nairobi to carry
2 out the attack.

3 And then what he did after he -- his thought was that
4 he was going to die in the attack; he did not, for a number of
5 reasons. Woke up in a hospital, didn't really have an escape
6 plan because he thought he was going to die. We found him
7 shortly thereafter.

8 Q. Let me stop you there.

9 A. Okay.

10 Q. Did he tell you what his role in the plot was?

11 A. He did.

12 Q. If you could, tell us what he told you about his role
13 in the plot, including any persons who helped him in that
14 plot.

15 A. Okay. In the particular plot, he was to be the
16 passenger in the bomb-laden vehicle. The vehicle was rigged
17 by an electronic detonation, that the driver would press the
18 actual button to cause the explosion.

19 Had that failed, he had a number of grenade devices
20 and a set of keys to open up the back of the truck, and so if
21 there was something wrong with the mechanical detonation, he
22 would throw the -- he would open up the back of the truck and
23 throw the -- you know, cause the bomb truck to go off by the

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1 grenades.

2 And his other primary job was to attack the guards at
3 the gate, to get them to open the drop bar so that the truck
4 could get another 15 or 10 meters closer to the side of the
5 embassy.

6 Q. Did he indicate whether or not he had any assistance
7 or any persons that assisted him in planning the bombing?

8 A. Well, for sure. He was -- he had detailed his time
9 in Afghanistan and how he was selected, how he was trained,
10 the others who participated, including -- he knew very well
11 the suicide bomber; he had trained with him; he had known him
12 very well; they were from the same country.

13 He was related to other -- he was a cousin of someone
14 else in al Qaeda, and that he was in Yemen with this person,
15 the bomber of the truck and the cousin, and that that cousin
16 had helped him, while he was in Yemen, arrange some -- helped
17 him with a place to stay and to meet his father, to say
18 goodbye to his father. And then also -- this person also
19 assisted him getting a passport. For some reason, he needed a
20 new passport and he got some assistance from this person to
21 obtain a Yemeni passport in a fraudulent name.

22 Q. Who was this person who assisted him?

23 A. He identified a person that he called Bilal to be the

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1 person that assisted him in that.

2 Q. And did he say specifically what Bilal did? If you
3 could, just as a listing, what did Bilal do for him?

4 A. He said he assisted him in obtaining this fraudulent
5 Yemeni passport that was ultimately the passport he used to
6 get to Kenya to carry out the attack.

7 Q. And there was also an indication, I think you said
8 that he was brought to see his father?

9 A. His father had visited him in Yemen at that time that
10 he was in Yemen.

11 Q. What was the purpose of that?

12 A. Again, Al-Owhali had agreed and knew that -- you
13 know, as being part of this attack he was going to die in the
14 attack, and he wanted to say goodbye to his father.

15 Q. Who arranged that meeting?

16 A. He had assistance in that meeting from Bilal.

17 Q. And was Bilal related in any way to the other suicide
18 bomber?

19 A. He was the cousin to the other person that was in the
20 suicide bomb truck that does die in the attack.

21 Q. And what was that suicide bomber's name?

22 A. He had a kunya, as they're called in al Qaeda, or an
23 alias name of Azzam and his true name was Jihad Ali from

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1 Saudi Arabia.

2 Q. Was this the first time you had ever heard of a
3 person named Bilal?

4 A. Yes, it was.

5 Q. Were you able later to find out what Bilal's true
6 name was?

7 A. Yes, I was.

8 Q. What was that?

9 A. Abdul Rahim al Nashiri.

10 Q. He talked to you about a person named Khallad.

11 A. Al-Owhali talked about Khallad in a number of ways
12 during this same interview. He did.

13 Q. And who was Khallad?

14 A. Khallad, again, was part and parcel of the
15 preplanning of the attack in Nairobi. He was a key member of
16 al Qaeda, according to Al-Owhali. He was one of his point
17 people who helped get him to Nairobi to carry out the attack.
18 He had filmed the martyrdom video of Al-Owhali, and he gave
19 him his instructions, his plane tickets, et cetera, and said,
20 This is where you're going and these are the people who will
21 meet you when you get on the ground.

22 MJ [Col SPATH]: Slow down a little bit.

23 WIT: Sorry.

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

2 A. These are the people who will meet you in Nairobi,
3 they will pick you up and they will take over from there.

4 And ultimately, when Al-Owhali didn't die, he was the
5 person that -- that would make a series of telephone calls to
6 a number in Yemen with messages of, Tell Khallad I didn't die
7 and I need help to get out of here. So Khallad was very much
8 involved in his -- was basically a point of contact for him
9 for everything he was doing.

10 Q. Was this the first time you had received information
11 about an individual named Khallad?

12 A. For sure.

13 Q. Did you show Al-Owhali a picture of al Nashiri?

14 A. Yes, I did.

15 Q. And did he identify al Nashiri as Bilal?

16 A. He did.

17 Q. Did he indicate how he was able to escape the suicide
18 attempt?

19 A. Yes, he did.

20 Q. And how did he -- was he able to do so?

21 A. Again, I probably wouldn't use the word "escape." I
22 think it was just a set of, you know, circumstances, where he
23 exits the truck at the appropriate point where the truck had

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1 pulled into the rear of the embassy. He gets out of the car
2 to assault one of the guards and demands that the guard open
3 the drop bar.

4 As the guard moves back to basically comply with
5 opening this drop bar, the guard then runs. And Al-Owhali is
6 standing out there in front of the truck close to the guard
7 tower -- or the guard shack, I should say, and he basically,
8 in his words, really didn't know what else to do at that
9 point, so he threw one of the grenades. That caused a bit of
10 a havoc.

11 And then the bomb truck -- the driver of the truck --
12 they obviously couldn't -- they weren't able to speak to each
13 other.

14 WIT: Can I use this sort of to demonstrate, Your Honor?

15 MJ [Col SPATH]: You can. You'll just capture it.

16 A. Basically the front of the bomb truck is pointing
17 towards the embassy. And the payload basically, the
18 explosives, were on the back pointing out towards the avenue.

19 And so the driver started to do some sort of a
20 three-point turn, which ultimately turned the truck around,
21 and so the explosives would be pointed at the back. Al-Owhali
22 was somewhat confused by that and he thought that the driver
23 of the truck may -- one of the things that may be on his mind

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1 is maybe he's going to leave because the plan wasn't exactly
2 going the way they envisioned it, that the truck would simply
3 pass by the gate and go forward ----

4 MJ [Col SPATH]: One second.

5 TC [MR. MILLER]: For the record ----

6 MJ [Col SPATH]: I'll do it. No, that was good. It was
7 easy. The witness used -- there was a tissue box on the
8 witness stand to indicate the truck pulling -- and if I say
9 anything wrong, correct me -- pulling up to the gate. The
10 front of the tissue box being the front of the truck, back of
11 the tissue box being the payload. And then normal three-point
12 turn where the truck turned itself around so that the payload
13 was towards the embassy.

14 WIT: That is what Al-Owhali told us, looked like he was
15 trying to do that, or maybe he was trying to leave.

16 MJ [Col SPATH]: And the front was facing away from the
17 embassy.

18 WIT: That's right.

19 MJ [Col SPATH]: And so -- anyway, that's what the tissue
20 box was used to demonstrate. Thank you. Was that accurate?

21 WIT: Yes, Your Honor.

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

23 Q. And he ran off?

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1 A. Well, so Al-Owhali was standing there in a bit of
2 confusion. This is, again, according to what he told me. And
3 he said that he was, you know, very committed to dying and
4 carrying out the assault. And religiously, the way he
5 explained it to me, was that that was acceptable in his
6 religion, to basically achieve martyrdom while carrying out an
7 attack.

8 But at that point he wasn't a hundred percent
9 positive if the attack was going to occur or not occur, and he
10 had what he described, in essence, a moment of clarity, that
11 to stay there and die at that point would not have been
12 martyrdom because he wasn't sure whether the attack was going
13 to happen or not; and then that would ultimately be suicide,
14 which is prohibited in his religion, according to what he told
15 me, and not martyrdom.

16 So he was prepared to be a martyr, but he wasn't
17 prepared to die by suicide; again, his terms. So he started
18 to back away and move away from sort of the center where he
19 was. But eventually the bomb did go off, and all he remembers
20 from there is waking up in the hospital.

21 Q. Nashiri's cousin, Jihad Ali, died in the bomb?

22 A. Yes, sir, he did.

23 Q. Now, jumping ahead now to 2000 October, the COLE

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1 bombing. Did you deploy to that bombing?

2 A. No, sir, I did not.

3 Q. And what was the reason for that?

4 A. Well, initially as -- when the attack on the naval
5 ship had happened, I was one of the logical people to be sent
6 for that, based on my current assignment, and the fact that
7 what -- Al-Owhali had provided us information not just about
8 the Nairobi attack and the Dar es Salaam attack, he had also
9 provided us information about future attacks based as it was
10 told to him.

11 And he had been told when he was in Yemen prior to
12 coming to Nairobi that al Qaeda was preparing to attack a U.S.
13 naval ship as it was refueling in the port of Aden. He didn't
14 have all those details, but that's what the al Qaeda members
15 had told him.

16 And so my familiarity with Al-Owhali was going to be
17 extended to the investigative team that was going to Yemen to
18 investigate the COLE. But at that same calendar time frame we
19 were just about ready to start the trial in Southern District
20 of New York for the embassy bombings, which started in January
21 of 2000. So the prosecutors met with seniors from the FBI and
22 said that I would need -- I was needed more to do the current
23 work of readying for trial and testifying in trial and that

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1 others -- I wouldn't be part of the team. So I did not go at
2 that time.

3 Q. Jumping ahead now to Yemen, August of 2002, where
4 were your offices located?

5 A. Again, I was assigned to the U.S. embassy in Sana'a.

6 Q. Did you have a working relationship with the Yemeni
7 law enforcement community?

8 A. Yes, I did.

9 Q. And what law -- essentially what were the law
10 enforcement agencies?

11 A. Primarily the law enforcement agency I worked with
12 was the Ministry of Interior's office, which basically ran
13 their police, and I also worked with the national security
14 office, the PSO.

15 Q. And did you have a good working relationship with
16 them?

17 A. It was Yemen, sir, so sometimes yes, sometimes not
18 exactly.

19 Q. Did you have occasion to go to the PSO headquarters?

20 A. Many times, Your Honor -- yes, sir, I did, many
21 times.

22 Q. Was that also located in Sana'a?

23 A. It was.

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1 Q. Did you have occasion to -- well, did they have a
2 holding facility within the headquarters?

3 A. Right. Their headquarters was a series of buildings
4 surrounded by a wall. It was more of a complex than a
5 high-rise like, you know, building. It was a number of
6 buildings surrounded by a security wall, like I said, like a
7 complex. And there were a number of office buildings -- you
8 know, offices, et cetera. But they did also have a --
9 basically holding cells, akin to what I would describe as if
10 you went to a sheriff's office where they have investigative
11 offices, administrative offices, but they would also have some
12 sort of a jail facility to hold people. So it would be
13 somewhat similar to that scenario.

14 Q. Is there anything shocking or inhumane about them?

15 A. From the cells I saw, sir, no, sir. Nothing that
16 shocking. Nothing that shocked me anyway.

17 Q. Were you in Yemen when the Limburg bombing occurred?

18 A. Yes, sir, I was.

19 Q. Did you provide any assistance in that case?

20 A. Yes, I did.

21 Q. And what was that?

22 A. Well, initially the attack had occurred where an oil
23 tanker was -- or some other type of ship related to the oil

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1 fields, oil work, was -- there was an explosion on the ship.
2 And there were some people that had logically assumed that
3 that might have been an attack, and there were other people
4 that thought that perhaps the explosion could have been
5 internal or some sort of accidental explosion.

6 So my job, through the embassy, was to help gather
7 the facts and determine was this an accident or was this an
8 attack.

9 Q. Did you arrange for some FBI personnel to visit the
10 Limburg?

11 A. I did. I immediately got on a phone with our FBI
12 headquarters and asked that a particular team be assembled who
13 had knowledge of explosives, obviously, and particularly
14 people who had worked on the USS COLE attack from October of
15 2000, as they would be qualified to ascertain whether this
16 type of explosion was purposeful or accidental.

17 Q. Do you remember any of the individuals who were
18 members of that team?

19 A. I remember at least one person, his name was Leo
20 West, and he was very much involved in the embassy bombings in
21 Kenya, and I trusted him very much. And I also knew he had
22 also been involved in the COLE investigation, so I thought we
23 couldn't have got anybody better than him to help make that

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1 determination.

2 Q. Did you receive any intelligence at this time
3 regarding the bombing?

4 Let me ask it a different way.

5 A. Okay.

6 Q. Are you familiar with a person named Darbi?

7 A. Yes, I was.

8 Q. Did you receive any information about any Darbi
9 debriefings during this time?

10 A. Yes, I did.

11 Q. And could you relate to the court, to His Honor,
12 please, what generally you were being told?

13 A. Sure. So Darbi, to my knowledge at the time --
14 again, this was late summer of 2002 -- was in custody in
15 Afghanistan and was being questioned by FBI agents there. The
16 FBI agents there knew that I was in Yemen and Darbi was
17 providing them with information on Yemen, so we started to
18 collaborate.

19 One of the main reasons I went to Yemen in August of
20 2002 was there was an attempt to attack and kill the U.S.
21 ambassador to Sana'a, and that plot was foiled. In large
22 part, the al Qaeda operatives who were planning that were, for
23 whatever reason, manipulating an AT-4 antitank round. It

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1 exploded. The front of the missile went through one of the --
2 one of the people handling it, and the back blast severely
3 wounded and -- another person that was in the room. That
4 person had -- you know, he didn't die right away. He walked
5 out of the safe house and into the street and collapsed there.

6 The -- basically the crime scene revealed a good
7 number of Yemen ID cards, basically national ID cards that are
8 required for people who live in Yemen. But it was very clear
9 that these ID cards, a lot of them were of the same person,
10 Your Honor, but with different names.

11 So one of the things I thought I could do was -- we
12 cropped out all the names, sent these photos to the agents
13 that were interviewing Darbi in Afghanistan to see what he --
14 if he knew any of these people. And, in fact, he did.

15 Q. Did Darbi provide information about Nashiri?

16 A. He provided a lot of information about Nashiri.

17 Q. And was that information provided to you?

18 A. Yes, it was. The sum and substance of what Darbi was
19 saying at the time, based on these photos that we sent up,
20 were that these people were part of Nashiri's cell operating
21 in Yemen for al Qaeda that were prepared to conduct or in the
22 process of conducting a number of attacks, both land-based
23 attacks and sea-based attacks.

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1 Q. Did you become aware that Nashiri was taken into
2 custody at some time?

3 A. I was.

4 Q. Did you ever review any statements that he might have
5 given upon his being taken into custody?

6 A. I wasn't in a position to do that. It wasn't my job,
7 and, no, sir, I didn't.

8 Q. Did you later assist the Yemenis in the trial of
9 Nashiri and the COLE co-conspirators?

10 A. Yes, sir. At some point, I don't remember exactly
11 when, but circa probably 2004 time frame or into 2005, the
12 Yemen government put on a trial for those they had in custody
13 for the criminal act of attacking the U.S. Navy ship, the
14 COLE, in Aden from October of 2000. There were a number of
15 people who stood trial in that, but they also tried
16 Mr. Nashiri in absentia.

17 Q. What were your -- just generally, if you could, what
18 were your duties and responsibilities in assisting?

19 A. Primarily to liaising with the prosecutors from
20 Yemen. There were lab reports, et cetera, and some other
21 documents that they needed from the FBI. But also, under
22 Yemeni law, the victims have a right to attend the trial. And
23 based on my position as the attaché there, I was, in essence,

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1 dubbed the representative of the families, so I actually had
2 an official role to actually be in the courtroom and was
3 recognized as such as by the judge.

4 Q. As part of your duties and responsibilities, did you
5 ever review any statements that Nashiri had given to law
6 enforcement authorities?

7 A. To law enforcement authorities?

8 Q. Or to anyone, actually.

9 A. No. There was no real need for me to ever read what
10 Nashiri may or may not have said to anybody.

11 Q. I want to jump ahead now to 2007. Did you have
12 occasion to interview Khallad and Nashiri?

13 A. Yes, I did.

14 Q. Let's start with, first, how did that come about?
15 How was it that you were asked to do that?

16 A. As it was told to me, the U.S. Government and
17 President Bush had moved a number of detainees from wherever
18 they may have been to Guantanamo Bay, and one of the purposes
19 of that move was so that they could be interviewed by the FBI
20 and others in an effort to put on -- in an effort to determine
21 if there were -- if there could be a criminal case built on
22 them, and for them to eventually to go to trial under those
23 circumstances.

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1 And the FBI leadership from counterterrorism chose me
2 to be part of that team that would come and try to interview
3 these people who were sent here, and I was put on the Khallad
4 team and the Nashiri team based on my prior experience from
5 the embassy bombings and my time in Yemen.

6 Q. Do you remember when these interviews were conducted?

7 A. Yes, sir.

8 Q. When was that, sir?

9 A. For me they started in January of 2007, where I
10 interviewed first Khallad for a number of days in January of
11 2007. Then I interviewed Nashiri for a few days after that.
12 And then there were -- throughout the rest of 2007, I had
13 another opportunity to interview Khallad for several days, and
14 then another time to interview Khallad in 2008. But that was
15 my -- that was the extent of my interviews with them.

16 Q. First off, where were the interviews conducted?

17 A. In Guantanamo, sir; at the base in Guantanamo.

18 Q. You indicated there were interview teams, correct?

19 A. Yes, sir.

20 Q. Who was on your team?

21 A. For the interview of Khallad, it was myself, Robert
22 McFadden, Andrew Emley, and we had an FBI linguist as well.

23 Q. And the purpose of the interview was what?

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1 A. Again, the purpose of the interview was to obtain a
2 voluntary statement that could be used in a criminal court, if
3 they chose to talk to us, as part of evidence against what
4 they were -- what they were thought to have been involved in,
5 their association with al Qaeda, and their -- whatever roles
6 they may have played in any attacks against the United States.

7 Q. Who did you interview first?

8 A. We interviewed Khallad first, sir.

9 Q. And did you have sort of an interview plan, just
10 procedurally how it was going to occur?

11 A. Yes, sir. I mean, I would stop short of, you know --
12 it wasn't a long list of questions or anything. It was more
13 of an approach of how would we -- how would we approach him,
14 try to gain his cooperation, tried to gain his -- whether he
15 would speak to us or not. That was pretty much the plan. The
16 plan was more -- the first day, to tell you the truth, we
17 didn't know whether he would speak or not speak to us.

18 Q. When you first met with him, did you read him --
19 Khallad, did you read him his rights?

20 A. The Department of Justice, Your Honor, provided us
21 with a -- with a form that we were to communicate with Khallad
22 that the -- our interview with him was -- in essence, Your
23 Honor, the way I would describe it is, You are in the driver's

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1 seat; you do not have to talk to us at all.

2 I identified myself as an FBI agent, and anything he
3 would say could and would be used against him in whatever
4 court proceedings that might follow.

5 But a large part of it was, You do not have to talk
6 to us at all. It's up to you entirely whether you want to
7 speak to us. And if you don't speak to us, no negative
8 inference could be derived from your not wanting to speak to
9 us.

10 That's, in general, was what the form had said. It's
11 part and parcel of the interview report attached to the
12 report, the exact document.

13 Q. And did he acknowledge those rights?

14 A. He did acknowledge the -- an understanding of what we
15 had said to him, and he chose to talk to us.

16 Q. How were those rights read to him? Was it in English
17 or was it in Arabic?

18 A. I would read it in English, and the linguist, the FBI
19 linguist that we had with us, who is a native Arabic speaker
20 and his full-time job is as a linguist/interpreter, both live
21 translation and documentary translation, would translate
22 everything we said into Arabic and then back to us from Arabic
23 into English, any of Khallad's responses.

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1 Q. Are McFadden and Emley Arabic speakers?

2 A. They both have a level of Arabic that's higher than
3 mine.

4 Q. At any time during your discussions with Khallad, did
5 it appear that he was having difficulty understanding the
6 questions being asked?

7 A. No, sir.

8 Q. Based on your Arabic skills, did you ever detect any
9 problems with communication?

10 A. No, sir. I had done other interviews that were under
11 the same circumstances of having to use a linguist, and I
12 would say our communication with Khallad was very complete,
13 without any misunderstandings or any problems with translation
14 at all.

15 Q. How was his physical condition when you met with him?

16 A. Khallad seemed very healthy. He was -- seemed well
17 taken care of. We asked if he felt okay and if he was fine,
18 if he had any problems, and he did not.

19 Q. Did he understand that he could stop the questioning
20 at any time?

21 A. I would say, Your Honor, based on my 26 years in the
22 FBI, I probably went overboard on that, higher than any
23 requirement that would have normally been needed, you know,

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1 appreciating the gravity of the situation.

2 Every time he needed to go to the bathroom and took a
3 break from the interview or he took a break for lunch, at
4 every reinitiation of the interview I would go into the
5 details of this, again, that he was in the driver seat and was
6 not required to talk to us, and that he would actually -- we
7 would elicit from him that, yes, he still agreed to speak to
8 us. And we did that at every occasion we restarted the
9 interview.

10 Q. Did he complain of any mistreatment at GTMO?

11 A. Not at GTMO, no, sir.

12 Q. Do you remember how many days you spoke with him?

13 A. For Khallad on the initial interview, I spoke to him
14 for about four days during the initial interview in late
15 January, I think the 27th through the 31st, thereabouts ----

16 Q. And ----

17 A. ---- of January.

18 Q. What did you discuss -- in general terms, very
19 general terms, what did you discuss with him?

20 A. Wow. We talked an awful lot during those interviews.
21 Some of those interviews lasted more than five or six hours.

22 Again, at Khallad's discretion he could turn off the interview
23 at any point, and he was the person who always decided, That's

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1 enough for today, we can -- I'll think about whether we'll
2 talk again tomorrow. And he always -- for those four days, he
3 volunteered to come back the next day.

4 In essence, with Khallad, it was really up to him.
5 And I basically said, We can start with pretty much when you
6 were born and you can fill in the rest of the blanks, all the
7 way up until the time you were captured.

8 And he decided to -- there were things that he would
9 talk about and there were things that he did not want to talk
10 about, and we stuck with the things that he wanted to talk
11 about.

12 Q. Was one of the things he was willing to talk about
13 the USS COLE bombing?

14 A. Yes, it was.

15 Q. And what did he tell you about the USS COLE bombing?

16 A. Well, so, per Khallad, Khallad's position in
17 al Qaeda, he was involved in multiple plots, and some of these
18 plots were at the same time. So while he was directly
19 involved in the planning of what eventually would be the
20 attack on the COLE, he called it the Boats Operation because
21 the plan was much bigger than just one -- the initial plan was
22 much bigger than just attacking one ship.

23 At that same time he was also involved in the -- part

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1 and parcel of what would be the embassy attacks, and then also
2 part and parcel of what he ultimately called the Planes
3 Operation, which was the September 11 attacks against the U.S.
4 as well. So he had his -- he had a detailed role and -- on
5 all of those -- on all of those accounts. And other things
6 that had happened as well, to include the destruction of the
7 Bamiyan Statues in Afghanistan.

8 Q. Did he talk about Nashiri at all? Nashiri?

9 A. He did.

10 Q. What did he tell you about Nashiri?

11 A. It would be easier for me to explain sort of how the
12 Boats Operation started, and that's how he would talk about
13 Nashiri. We didn't ask him, Tell me about Nashiri. I would
14 ask him, Well, tell me about the Boats Operation, for example.

15 And he started by saying the original attack plan for
16 the Boats Operation, per bin Laden and other in leadership,
17 was to attack a U.S. aircraft carrier, particularly a
18 nuclear-powered one, that bin Laden wanted mass devastation.

19 After researching some parts of that plan, they
20 decided that that was not feasible. And then they narrowed
21 the plan down from that, down to attacking four ports in
22 Aden -- I'm sorry, not in Aden -- in Yemen, along the
23 southeastern border. Ash Shihr, Mukalla, and Aden would be

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1 Khallad's portion to conduct the attacks, everything needed to
2 prepare and conduct those three attacks; and that Nashiri was
3 sort of like a co-person involved in the attacks. His job was
4 to attack a U.S. ship as it was in the port of Hudaydah, which
5 was on the Red Sea -- on the border of the Red Sea in Yemen.

6 MJ [Col SPATH]: Mr. Miller, you've got to stay near the
7 mic.

8 TC [MR. MILLER]: Oh, I'm sorry, Your Honor. I apologize.

9 Q. Were the questions regarding -- or your discussions
10 with him regarding the COLE, were they in any way inspired by
11 any statements that Nashiri had given to individuals while he
12 was in custody?

13 A. Not from me, sir, no.

14 Q. Did you review any of those statements prior to that?

15 A. No, sir, I did not.

16 Q. After you were done speaking with Khallad, with whom
17 did you next speak?

18 A. When Khallad decided that he was -- okay, he wanted
19 to take a break in our interviews, and he would let us know
20 sometime -- he didn't eliminate that we could ever talk to him
21 again. He said he would think about it over time. But
22 basically that this round of interviews he had -- you know, he
23 felt that he had talked enough and wanted to conclude the

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1 interviews for -- for at least a time. And then several days
2 later we started to interview Mr. Nashiri.

3 Q. And that was here at GTMO?

4 A. In the same -- I think even in the same room, yes,
5 sir.

6 Q. And could you describe that room?

7 A. It was a -- you know, white. There were plastic, or
8 what I would consider sort of outdoor patio furniture to sit
9 on. And the table was made out of the same type of outdoor
10 patio furniture. It was very secure. It was temperature
11 controlled. It was well lit, well ventilated, and it was here
12 on this base.

13 Q. How would you describe Nashiri's physical condition
14 when you met with him?

15 A. He seemed fine to me, sir. He didn't complain about
16 any treatment here at Guantanamo, and he seemed healthy to me.
17 He was very conversant with me. We followed the same
18 procedures on advising him that, again, his agreeing to speak
19 to me would be that he was in the driver seat, that he could
20 talk as much as he wanted or choose not to talk at all. No
21 negative inference could be taken if he chose not to talk to
22 us, and he voluntarily -- he agreed to voluntarily talk to us.

23 And under the same circumstances with Khallad, he

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1 chose when each interview would be over for the day. He took
2 breaks whenever he -- whenever he wanted, whenever he needed,
3 whether it be prayer breaks or meal breaks or bathroom breaks.
4 And then after several days of talking to him, he decided that
5 he was finished with talking to us, at his election.

6 Q. Did you read him the same rights form as you did
7 Khallad?

8 A. The exact same form, sir.

9 Q. And just for the record, what were those rights
10 again?

11 A. I'm sorry. I shouldn't say the same form, but it was
12 a similar form. Again, it's part and parcel of the statement
13 that we took from Nashiri attached to it in the FBI files.

14 Q. And what were those rights?

15 A. Again, we advised him that -- we identified who we
16 were; that I was with the FBI; that I was here to take -- to
17 attempt to take a statement from him if he agreed to speak
18 with us; that he did not have to talk to us if he didn't want
19 to; that no negative inference could be taken if he chose not
20 to talk to us; but if he did talk to us, he would be --
21 anything he did say could and would be used against him in
22 court proceedings -- criminal court proceedings in the future.

23 Q. Did he discuss with you the -- what I will call the

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1 Boats Operation and the bombing of the USS COLE?

2 A. He did.

3 Q. Did he discuss his own activities in al Qaeda?

4 A. He did.

5 Q. Were any of the questions that you asked him the
6 result of any prior statements he had given while in custody?

7 A. No, I didn't review any of his statements.

8 Q. Did you rely on the information that had been
9 provided that you have described thus far?

10 A. Again, I was familiar with Mr. Nashiri since August
11 of 1998 from Al-Owhali's identifying his photograph and what
12 Al-Owhali told me about him in 1998.

13 I also knew a bit about him from the COLE team that
14 was investigating the attack on the USS COLE. They came
15 across -- as part of their investigation, they came across a
16 number of identification cards and other documents that were
17 recovered at various crime scenes in the Aden area. And
18 because I was familiar with Mr. Nashiri from 1998, those case
19 agents would consult to me and say, hey, here's what we found
20 on Nashiri there. Again, whatever I knew about Nashiri was
21 associated with my time in the New York office of the FBI.

22 Q. How many -- how long do you think you spoke with
23 Nashiri?

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1 A. I think we spoke for three, maybe four days. But no
2 more than four. It may have only been three.

3 Q. And did you then reinterview Khallad?

4 A. Not right then, but I reinterviewed Khallad by
5 October of 2007.

6 Q. What caused you to reinterview him?

7 A. Khallad gave us a very long statement in our initial
8 interview, Your Honor, in two thousand -- in the January of
9 2007 time frame. And a lot of what he said was -- it was a
10 statement; it's words on a piece of paper. I wanted to go
11 back through FBI findings and try to see if there was anything
12 I could find and bring back to Khallad, have him review and
13 corroborate the testimony -- sorry, the statement he had given
14 to us in January of 2007.

15 So, for instance, if he said, While I was in this or
16 that country I stayed at this or that hotel, we went
17 through -- we spent an exhaustive search during the summer
18 of '07 going through various documents that been recovered in
19 Afghanistan or when Khallad was captured. I found a lot of
20 these documents, photographed them, put them into organized
21 binders, and would go over those things with Khallad in the
22 October interview, again, as part of an authentication process
23 to see if what he said to us in 2007 was accurate or how

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1 accurate was it or not accurate. And it was very accurate
2 based on our interviews in October of 2007.

3 Q. Did you have occasion to conduct an interview in
4 November of 2007?

5 A. Not of Khallad ----

6 Q. No ----

7 A. ---- but I did do another interview in November of
8 2007.

9 Q. And whom did you interview in November of 2007?

10 A. A person by the name of Jamal Al-Badawi.

11 Q. And how did you come to interview him?

12 A. The FBI leadership, senior leader from the FBI had
13 called me. And I had known from my work in the FBI that Jamal
14 Al-Badawi, who had already been tried and convicted for his
15 role in Yemen for his attack on the COLE, had escaped with
16 some 20-plus other folks from the PSO prison and that the
17 phone call that was given to me that he had been recaptured
18 and that the FBI was going to be given a chance to interview
19 him in Yemen. And I had a very short amount of time to get on
20 a plane and get to Sana'a.

21 Q. How short?

22 A. Same -- not far after that phone call, same day.

23 Q. And were there other persons that were going to

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1 assist you in this interview?

2 A. Yes. Because I had been working so closely, Your
3 Honor, with Bob McFadden and Andrew Emley. Bob McFadden, who
4 was still in the U.S. Government at the time, he was the
5 senior NCIS agent that was involved in the initial
6 investigation of the USS COLE, so he had a lot of information
7 about the attack, more than I did, about the COLE
8 investigation. We had worked well, he and Andrew and I,
9 during our interviews with Khallad, and I thought it would be
10 proper for us, so we had good team cohesion -- it would be
11 good to take that experience into the interview of Jamal
12 Al-Badawi.

13 Q. And had you received any instructions as to what the
14 purpose of the interview was to be?

15 A. Very clear instructions, sir.

16 Q. What were those instructions?

17 A. During the summer of 2007 there were a number of
18 attacks that had happened in Yemen that the al Qaeda group in
19 the Arabian Peninsula were responsible for, in large part, the
20 people that had escaped in 2006. And again, these were all
21 people that, per Darbi's identification and other reports,
22 were part of Nashiri's cell operating in Yemen, and that our
23 primary goal of interviewing Jamal Al-Badawi was to try to

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1 find out, Hey, where are these guys? How can we find them?
2 What trade craft might they be using? Anything we could do to
3 identify their locations, maybe if they're using cell phones
4 or e-mail addresses or anything like that, anything we can do
5 to find -- to locate them, Your Honor, with the mindset of
6 preventing future attacks and future loss of life. That was
7 our primary goal.

8 Badawi had already been interviewed as part of the
9 COLE investigation by the FBI, I think in early part of 2001,
10 when he was initially arrested. It could have been in late
11 2000, but I think it was in early 2001. So there was already
12 basically, if you will, a criminal statement already obtained,
13 a Mirandized statement obtained by him. So my goal was not to
14 go over that from the beginning. It was to find out, hey,
15 since you guys escaped from jail, where have you been? What
16 have you guys been doing? And what information -- if we could
17 get them to cooperate with us, how could we use that
18 information to protect -- to prevent further attacks and
19 future loss of life. That was my primary. I also had a
20 secondary objective as well.

21 Q. What was your secondary objective?

22 A. Jamal Al-Badawi was already indicted in the Southern
23 District of New York for his role in the participation of the

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1 attack of the COLE. So based on my FBI experience, my
2 secondary objective would be to see if we could get him to
3 potentially voluntarily agree to go to the U.S. to face those
4 charges, potentially plead guilty to those charges, and
5 cooperate with the U.S. Government about his participation and
6 that of others in the attack on the USS COLE.

7 Q. Was his 2001 statement taken prior to the arrest of
8 al Nashiri?

9 A. Yes, it was.

10 Q. Was the team informed of the purpose of the
11 interview?

12 A. Yes, we were.

13 Q. Were you able -- you or team members able to prepare
14 in any way for the interview?

15 A. We did not have much time to prepare. We were all
16 very familiar with who Jamal Al-Badawi was. We obviously knew
17 what was inside of the indictment against -- charging Badawi
18 for the crime in the U.S. -- Southern District of New York.

19 So we didn't -- in essence, A, we didn't have the
20 time; and B, we didn't really need a lot. And the questions
21 that we were going to be asking him were largely, in part,
22 about things that we didn't really know: Where were you?
23 What did you do? Where are these guys now? How can we find

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1 them?

2 Q. Did you travel as a team to Sana'a?

3 A. I don't remember if we all traveled together or not.
4 We may have traveled all at the same time or we might have
5 traveled on different planes. I don't remember. It was ten
6 years ago.

7 Q. When you arrived in Sana'a, were you met by anyone?

8 A. Yes, the assistant legal attaché, or basically the
9 deputy of the FBI office in Sana'a at the U.S. embassy in
10 Sana'a, named Carlos Fernandez.

11 Q. Prior to conducting the interview, did you as a team
12 agree as to who would be asking the questions, who would be
13 taking the notes?

14 A. Yes, we did.

15 Q. And what was the arrangement?

16 A. I was designated as the primary, the lead, basically,
17 on the interview, the person that would be asking the majority
18 of the questions, as I was the primary FBI agent on the team.
19 Being that the three of us had already worked together before,
20 I had taken all the notes on the other interviews of Khallad,
21 and we had just recently finished that interview. And so we
22 decided to share the burden a bit, that Andrew Emley would
23 take the notes for these interviews and he would prepare the

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1 actual typewritten report.

2 Q. Did you determine whether or not you were going to
3 use a native speaker to conduct the interview?

4 A. Yes. Like with the other interviews we did we knew,
5 despite the varying levels of Arabic that we may have had, it
6 would only be proper and more efficient if we had an actual
7 official Arabic linguist. And at the embassy there was a
8 Department of Defense contract linguist working for one of
9 the -- I believe the NCIS office or one of the DoD offices
10 that were assigned to the embassy.

11 So he was already there. Carlos was very familiar
12 with him. He was a professional linguist, if you will, and so
13 he was -- he was the one used for this interview.

14 Q. When did the sessions or the interview dates -- what
15 dates did they occur?

16 A. We interviewed him, Your Honor, ten separate times
17 between the 4th of November 2007, up until the 20th of
18 November. Not all consecutive days. I think the beginning of
19 it there were a number of consecutive days, and then there
20 were breaks in between of one or two or several days up until
21 the 20th, but a total of ten separate times in front of him to
22 speak with him.

23 Q. Was the ----

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1 MJ [Col SPATH]: Quick question: How long do you have
2 left, about?

3 TC [MR. MILLER]: Probably about a half hour.

4 MJ [Col SPATH]: We're going to take a short recess since
5 we're here in the morning. Let's take 15 and we'll come back.
6 Thanks. We're in recess.

7 [The R.M.C. 803 session recessed at 1012, 3 November 2017.]

8 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1041,
2 3 November 2017.]

3 MJ [Col SPATH]: The commission is called back to order.
4 All the same parties who were present before the recess are
5 again present. Special Agent Gaudin remains on the stand.
6 Just remember you're still under oath. You may proceed.

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

8 **DIRECT EXAMINATION CONTINUED**

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

10 Q. I think when we stopped you indicated the dates on
11 which you had conducted the interviews. Where were they
12 conducted?

13 A. Of Badawi?

14 Q. Yes. I'm sorry.

15 A. In Sana'a, Yemen, at the PSO headquarters.

16 Q. Can you describe the office in which, or the room in
17 which the interviews were conducted?

18 A. These interviews took place in what I could best
19 describe, Your Honor, as almost an anteroom or a sub room.
20 Basically it was, you know, a square room that was sort of in
21 the center of a number of other offices. It would be,
22 basically be like a waiting room if you were waiting to go
23 into another office. So it had, you know, couches and chairs

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1 and things like that, typical to a waiting room at a doctor's
2 office or something like that.

3 Q. And how was Badawi produced to you?

4 A. He was brought in to us by people from the PSO. He
5 was in clean clothes, in good spirits. He wasn't handcuffed
6 or shackled in any way. He was very, for lack of a better
7 word, as a normal condition as I could describe.

8 Q. Did you see any signs of physical abuse?

9 A. No, sir.

10 Q. Did he complain of any physical abuse?

11 A. He did not make any complaints about his treatment or
12 time with PSO or anything. And we asked him a lot of
13 questions, if he was feeling well, was he up to speaking to
14 us, things of that nature. He had no complaints and seemed in
15 good health, good spirits, and in control of all his
16 faculties.

17 Q. How would you describe his clothing? Was it clean?

18 A. Very clean.

19 Q. Did he wear the same clothes every day?

20 A. He did not.

21 Q. Do you know where he was -- you indicated there was a
22 number of interviews that were conducted over a two-week
23 period. Do you know where he was staying during this time?

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1 A. I don't know for sure. I assumed he was staying at
2 the PS0 facility, but I don't know for sure.

3 Q. Do you know whether or not he was being allowed to
4 visit any of his family?

5 A. He did say to us that, as part of his original terms
6 when he surrendered himself or turned himself in to the Yemen
7 government, he was allowed to, and was taken to his family's
8 home in the Aden area, so quite some distance from Sana'a. He
9 got to spend, if I remember right, at least one night with his
10 family, and then was brought back up to Sana'a. So he did
11 have time to visit with his family.

12 Q. How long did the sessions last?

13 A. The interviews, anywhere between two hours and five
14 or six hours. And again, they were controlled by Badawi's
15 interest in staying with us. And when he felt enough for that
16 particular session was done, he would call, say, okay, let's
17 start up again tomorrow.

18 Q. Who was present during the interviews?

19 A. Myself, Bob McFadden and Andrew Emley and the
20 translator that I mentioned were there for all the interviews,
21 as well as a lieutenant colonel from the PS0. And Carlos
22 Fernandez, who I had mentioned earlier, he was in and out of
23 the interviews at particular times. He wasn't there for every

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1 minute of every interview but was in and out based on other
2 duties he had to do to run the attaché office in Sana'a.

3 Q. How would you describe the PSO's role there?

4 A. Clearly he was in their custody. The officer was
5 familiar with the case, he had worked the COLE case from the
6 beginning, jointly with the FBI and other agencies. And he
7 was a participant in the interview from the standpoint that he
8 was always present. And he didn't ask any questions, to my
9 recollection, during the interviews when we were there.

10 Q. Was the interviewee, Mr. Badawi, given any
11 refreshments, tea, things of that nature?

12 A. Well, for sure. All kinds. I mean, tea, soda.
13 There were certain times that we just had some light snacks
14 and there were some other times we would actually have a full
15 meal.

16 Q. You indicated he was not restrained when he came to
17 the interviews. Was he restrained during the interviews?

18 A. The entire time that he was in my presence he wasn't
19 in any type of handcuffs or any type of physical restraint
20 whatsoever. He was free to get up and walk around. When he
21 went to the bathroom, he seemed to be able to do that on his
22 own. I don't recall anybody putting him into any restraints
23 or removing any restraints when he was in our presence or even

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1 outside our initial viewing of him.

2 Q. How would you describe his mood during the
3 interviews?

4 A. He was very conversant with us. Now, we didn't just
5 have periods where it was question, answer, question, answer,
6 real just back and forth sort of -- you know, did you do this,
7 yes or no, back and forth. We had open-ended conversations,
8 and a lot of conversations were general topics, and a lot of
9 the conversations we had with him had nothing to do with his
10 activities. They were what I would consider general life
11 questions, getting to know each other, basically.

12 Q. Do you consider that rapport building?

13 A. Yes, I would.

14 Q. What is the purpose of rapport building?

15 A. Again, you know, my goal in interviewing someone from
16 the FBI, my methodology would be to sort of put them at ease
17 and let them know you're a regular person, I'm a regular
18 person. For whatever reasons and circumstances put the two of
19 us together in this room, I have a job to do, which is to talk
20 to you, and you can decide whether or not you want to talk to
21 me.

22 So to give you an example of some things that we
23 talked about outside of the -- outside of specific topics but

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1 more sort of just general life questions, we found it
2 interesting that we were both born in 1963, and neither one of
3 us at the time had children. And we both sort of attributed
4 that to our chosen professions as -- of having been roadblocks
5 of our ability to do that.

6 So one of the reasons he had surrendered, he had felt
7 that he had given up an awful lot to be part of al Qaeda and
8 what they had asked him to do, and that he had chosen that
9 that was no longer something he wanted to be involved in, and
10 he sort of wanted to go back to -- not go back to, but
11 actually have, quote/unquote, a family life, get married, have
12 a child, that type of thing. And I was hoping at the time to
13 soon retire from the FBI to do the same.

14 Q. You indicated there was a translator that was used?

15 A. Yes, sir.

16 Q. Did -- based on what you could observe, did it appear
17 that Mr. Badawi or the translator were having any difficulties
18 communicating?

19 A. No, sir. We spent a good amount of time of making
20 sure there was no translation, very specific questions. Are
21 you sure you understand? And we found, again, based on our
22 combined experience of having been in these types of
23 interviews with Arabic speakers and a translator being needed,

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1 I would say that our interview was extremely clear, no
2 problems with communication on anyone's part.

3 Q. Based on your Arabic speaking skills, did you detect
4 any difficulty in them communicating?

5 A. Again, from my experience, no, I did not.

6 Q. And what was the protocol? How would you ask a
7 question and how would it get to him, and how would you get
8 the answer?

9 A. Again, we were all sitting in this room relatively
10 close to each other, sitting around basically, for lack of a
11 better word, a coffee table, so we were all within that close
12 quarters, if you will, around a, you know, standard-size
13 coffee table.

14 And I sat closest to Badawi; to my right was him.
15 The translator, I think, was off center of him but close
16 enough that you could hear each other even whispering. And I
17 would ask a question in English, the linguist would translate
18 it into Arabic and say it to Badawi in Arabic. Badawi would
19 respond in Arabic most of the time, if not all of the time in
20 Arabic, and then the translator would repeat what -- the
21 translation into English to the group.

22 Q. Who was taking the notes during the interview?

23 A. Andrew Emley was.

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1 Q. Did you read Mr. Badawi his rights?

2 A. We did. We used our standard FBI 395 form, which was
3 very specific. I actually put -- we had it in English and in
4 Arabic. I put the document in his hand with the Arabic
5 version. I then read it word for word in English, going at a
6 very standard speech rate so that, to make sure it was clearly
7 said. I would stop and pause to give the linguist time to
8 translate every sentence in Arabic. And Badawi agreed that he
9 understood everything back to the translator who relayed it
10 back to us.

11 He also said that he was familiar and had presented
12 with a form like this when he was originally interviewed by
13 the FBI back in 2001. He said he understood the substance of
14 the form and that it was up to him whether or not he would
15 speak to us, and he agreed to speak with us openly and
16 honestly.

17 Q. For the record, what rights did you inform him of?

18 A. His Miranda -- in this case we used the Miranda
19 Rights, which is the FBI form called the FD-395, and it's part
20 and parcel of his statement that he gave to us. It's attached
21 to his interview report.

22 Q. Was he advised of his rights to remain silent?

23 A. He was.

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1 Q. Did he -- was he advised that anything he said would
2 be -- could and would be used against him?

3 A. Yes, he was.

4 Q. Was he advised that he could stop the questioning at
5 any time?

6 A. He was.

7 Q. Were there any other rights that were ----

8 A. He was also advised that he had the right to have an
9 attorney before he chose to speak to us and that he could stop
10 the interview at any time he wanted to consult with an
11 attorney if he chose to do so.

12 Q. Did he waive those rights?

13 A. He did waive those rights.

14 Q. Did you advise him of those rights more than once?

15 A. We -- yes, we did. We advised him very specifically
16 on that first day, and similar to how -- other interviews I've
17 done in the past where you had multiple interviews with the
18 same person. Every time the interview would start, I would
19 actually take out the form and show it to him and say, Do you
20 remember what your rights are? Do you -- are you still
21 willing to continue to speak to us?

22 And he said, Yes, I remember what's in there, I know
23 what my rights are, and I agree to continue to talk to you.

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1 Q. If he had indicated at any point he wanted to stop
2 the questioning, would you have stopped?

3 A. Of course. I would have had to have stopped.

4 Q. Did he describe with you -- after you had read him
5 his rights, did he describe any agreement that he had reached
6 with the government of Yemen?

7 A. It wasn't right particularly at that moment, but he
8 did say -- you know, one thing in particular I will bring out,
9 he said he agreed to speak with us but he didn't want to sign
10 the document.

11 And then he went into -- you know, at some point he
12 went into a statement that part of his conditions of surrender
13 with the Yemen government was that he would not have to
14 provide any more statements to anybody, whether it be the
15 Yemeni government or the U.S. Government, but he agreed to
16 talk to us now. Even though he had negotiated these terms, he
17 still took some time to think about it and agreed to speak
18 with us.

19 Q. And what did you -- after he had waived his rights,
20 what did you and he discuss?

21 A. You know, we discussed a lot of things. Again, my
22 primary mission, if you will, was to obtain
23 information/intelligence to prevent further attacks and to try

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1 to find these people who had escaped with him. But we spoke
2 in very open terms of, Tell me everything about yourself from
3 when you were born until you -- pretty much how we got in this
4 room to talk to each other in 2007.

5 Q. Was your interest in his prior activities or his
6 current activities?

7 A. I was primarily focused on his current activities,
8 and then a sub-mission of could we get him to potentially
9 agree to turn himself in and, I mean, somehow be willing to go
10 to the United States to face the charges that were against
11 him. But primarily my main mission was to find out current
12 actionable information that we could use to prevent future
13 attacks.

14 Q. Did you speak with him -- or let me ask you this:
15 Was the topic of Nashiri -- did you talk about Nashiri during
16 the interview?

17 A. Not in so much, Your Honor, as did I ask him a
18 question about Nashiri. But as he described the activities of
19 things that he had done with his life, Nashiri came up as a
20 part of those conversations.

21 Q. Were there any questions that you asked him about
22 Nashiri that were inspired or the result of any statements
23 Nashiri had given earlier?

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1 A. No, sir, it was not.

2 Q. Did he talk to you about Khallad?

3 A. He definitely talked about Khallad as well.

4 Q. Did you receive any new information from him
5 regarding Nashiri?

6 A. Yes, I did.

7 Q. And what was that?

8 A. So again, Your Honor, our goal was not to trudge over
9 the past about what he had said in his prior statement about
10 his involvement in the USS COLE, which was obviously
11 substantial enough for him to be indicted, but as he talked
12 about the different parts of travel he had -- he had gone to
13 Bosnia, he had later gone to Afghanistan, et cetera -- he said
14 that when he had that he had -- this was -- again, this
15 portion that I am about to say now was not known to us,
16 meaning the FBI, regarding his role in the COLE.

17 He talked about that he had been actually involved in
18 it and he had not said this to anybody else before, any other
19 investigators before, that he had been involved in the COLE
20 planning as early as 1998. And that was new information to
21 us, so we obviously delved in a little deeper.

22 And I said, Well, what do you mean 1998?

23 He said, Well, when he, he was approached by Khallad,

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1 who he had already known from Afghanistan, he was approached
2 by Khallad in Sana'a to purchase -- to be part of this plot
3 that Khallad was working on to go to Aden and purchase a boat
4 and a motor and use that boat and motor -- Khallad wanted it
5 specifically purchased in Badawi's name -- use that boat and
6 motor with whoever you need to to start to basically surveil
7 and spot ships, particularly U.S. military ships that were
8 sailing, that were in the waters going from Aden up towards
9 Hudaydah, and that there were other people that were involved
10 in this, and this is where Nashiri would come up. Nashiri had
11 a group of people that was doing similar, but from the port of
12 Aden down to -- I'm sorry, from the port of Hudaydah down to
13 Aden.

14 So Badawi and his team, per Khallad's instructions,
15 would take care of things from up to Hudaydah, and Nashiri's
16 crew would take it from Hudaydah down, and that they were
17 comparing all these notes about dates, times, how long it
18 would take to get from Point A to Point B, that type of thing.

19 Q. This was all new information?

20 A. That was new to, for sure, the COLE investigative
21 team, which Carlos Fernandez had been a part of, Bob McFadden
22 had been very much a part of, and even the lieutenant colonel
23 from the PSO who had worked on the case said that was

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1 something we hadn't heard before. That is new information,
2 which is why we spent time off of our primary focus about
3 future attacks and asked normal follow-up questions to that --
4 that volunteered information.

5 Q. And did he refer to Nashiri as Nashiri?

6 A. He did not use the name Nashiri, no, sir.

7 Q. What name did he use?

8 A. He called him Bilal -- or a combination of Bilal,
9 Al-Harazi, or Bilal Al-Harazi.

10 Q. Did you have occasion to show him a photograph of
11 Nashiri?

12 A. We did.

13 Q. And when did you show him the photograph?

14 A. Again, at a certain point as he was talking about it,
15 we would show him other photos and say, Do you recognize any
16 of these people? And he picked out the photo of Nashiri,
17 saying, This is Bilal Al-Harazi.

18 Q. And you knew who Nashiri was, correct?

19 A. I certainly did. I had showed a photo of Nashiri to
20 Al-Owhali back in 1998, so I was very familiar with who
21 Nashiri was.

22 Q. And do you see Nashiri in the courtroom today?

23 A. Yes, I do.

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1 Q. Could you point him out please, for His Honor, and
2 describe what he is wearing?

3 A. He is the man sitting at the end of the first table.
4 He has the -- what I would call a gray jacket and has a -- I
5 can't tell if it's a shirt or a robe and -- that he's wearing.
6 He has headphones on. He is the furthest person on the right
7 of the table that I'm facing.

8 TC [MR. MILLER]: Your Honor, may the record reflect he's
9 identified the accused.

10 Q. Now, was a report prepared regarding this interview?

11 A. Yes, it was.

12 Q. And who prepared the report?

13 A. As Andrew Emley was the note-taker, he was
14 responsible for actually typewriting up the summary of the
15 report.

16 Q. Did you all discuss at the end of each day what had
17 occurred during the interviews?

18 A. Yes, we did. We would go over the significance, what
19 was said that day. You know, we did this sort of in a -- we
20 had worked together for over a year at that point on the other
21 interviews that we had conducted that I spoke of before, so we
22 had, we already had a good, I would say, team process. We
23 would do it over dinner or over lunch or whatever. How do you

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1 think we did? Did we miss anything here? Is there anything
2 we should go over tomorrow? That type of thing. So it was
3 almost like a little after-action review, and try to get ready
4 for the next day if Badawi would agree to interview us -- be
5 interviewed by us the next day.

6 Q. And did you have occasion to review Agent Emley's
7 final report?

8 A. Yes, I did.

9 Q. Was it accurate?

10 A. I would say it was accurate.

11 Q. Did it reflect the statements and the information
12 that had been given to you by Mr. Badawi?

13 A. Yes, it did.

14 TC [MR. MILLER]: Permission to approach.

15 MJ [Col SPATH]: You may. One second. I think it's
16 Appellate Exhibit 327G. Make sure you show the defense
17 counsel.

18 TC [MR. MILLER]: Your Honor, I believe I did provide it
19 to him at the break, but I'm going to show it to him again for
20 the record.

21 MJ [Col SPATH]: Thank you.

22 TC [MR. MILLER]: For the record, Your Honor, this was
23 originally attached to the motion itself. Permission to

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1 approach the witness?

2 MJ [Col SPATH]: You may.

3 Q. I'm going to show you what has been marked as
4 Appellate Exhibit ----

5 MJ [Col SPATH]: Just try to get near the microphone. You
6 guys can share.

7 Q. I'm going to show you what has been marked as
8 Appellate Exhibit 327G for identification. Do you recognize
9 that, sir?

10 A. I'm aging myself now, so ----

11 MJ [Col SPATH]: Just move that microphone back towards
12 you, please.

13 WIT: One moment.

14 MJ [Col SPATH]: No worry.

15 A. Yes, sir, this would be the report that Andrew typed
16 that we were all part of, reflecting the interview we did of
17 Jamal Al-Badawi in Sana'a between the 4th of November and 20th
18 of November 2007.

19 Q. And that is an exact duplicate of the original,
20 correct?

21 A. Barring out the parts that seem to be redacted, this
22 would be a copy of it. The original one would actually have
23 all of our initials over the top of our names that are at the

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1 bottom of the report, and a file number that appears to be
2 redacted here.

3 Q. We do not dispute the typewritten portions of it?

4 A. No, I did not.

5 Q. And approximately how long -- or the exhibit is how
6 many pages?

7 A. Let's see. According to this, it's -- yeah, it's 37
8 pages. And the original report would have the photographs
9 that we would have shown and a copy of the -- not a copy, but
10 the original advice-of-rights form that we would have used in
11 the interview as well.

12 Q. You had occasion to review that prior to coming in
13 the courtroom today; is that correct?

14 A. I did.

15 Q. And approximately -- of those 36 [sic] pages, how
16 many of those pages, how many pages deal with statements given
17 by Badawi regarding the accused, Mr. Nashiri?

18 A. From my review of the report, again, 37-some-odd
19 typed pages, there are only about three paragraphs that
20 concern the USS COLE. In fact, the way we modeled writing the
21 reports are based off of other reports we had written earlier
22 in the year where we actually sort of grouped it by topic, so
23 to speak.

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1 So there's a section in this 302 that deals with the
2 Boats Operation or the attack on the USS COLE. That itself is
3 only three paragraphs, and I believe Mr. Nashiri is referred
4 to in only -- only two times or three times in the entire
5 document.

6 Q. Again, none of these statements -- or none of the
7 information about Mr. Nashiri was gained as a result of any
8 prior statements Nashiri had made?

9 A. No, sir.

10 Q. You indicated that the last time you spoke with him
11 was November 20th, Badawi?

12 A. For Badawi? Yes, sir, November 20, 2007.

13 Q. Did you have any additional meetings that were
14 scheduled?

15 A. We had hoped to reinterview him again. You know, we
16 were going to take it as long as he was going to allow us to
17 continue to speak to him. We had hoped to interview him again
18 on the 26th of November, but we were told at that point he
19 decided he no longer agreed to speak to us, and so we were
20 finished. We never -- never got back in front of him again
21 after the 20th.

22 TC [MR. MILLER]: Your Honor, the government would move,
23 for purposes of this hearing, for the admission of AE 327G.

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1 MJ [Col SPATH]: It's attached to the motion and certainly
2 it's a part of the record.

3 Defense Counsel, recognizing your continuing
4 objection, any concern with me, as a part of this motion,
5 considering this document?

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

8 MJ [Col SPATH]: Understand.

9 TC [MR. MILLER]: And the government has no further
10 questions, Your Honor.

11 MJ [Col SPATH]: All right. If you would, retrieve the
12 exhibit from the witness, please. Thank you very much.

13 TC [MR. MILLER]: Nothing further. Thank you, Your Honor.

14 MJ [Col SPATH]: Defense Counsel, do you have any
15 questions?

16 DDC [LT PIETTE]: Your Honor, the defense is taking no
17 position on this motion.

18 MJ [Col SPATH]: I understand.

19 Needless to say, you probably have some idea that
20 this is reasonably unique right now as we work through some of
21 the issues with this hearing. So my guess, Special Agent
22 Gaudin, is you're going to be back to offer additional
23 testimony at some point in the future; what I don't know is

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1 when that's going to be.

2 So I'm just going to give you a very standard order;
3 you've probably heard it before. I don't want you to discuss
4 your testimony until this issue is resolved. But again, that
5 could be a fairly extended period of time. And I know that
6 your name has come up in connection with a couple of other
7 motions that have been filed in the case that we haven't dealt
8 with quite yet. So, like I said, it's probably more likely
9 than not you're going to get an opportunity to come back or
10 offer testimony by VTC.

11 I want to thank you for traveling here personally,
12 because I recognize where you came from. It's a long trip. I
13 appreciate anyone who travels down here in person to testify.
14 Thank you very much.

15 WIT: No problem, Your Honor. I understand the gravity
16 and the circumstance of the situation and would be willing to
17 come back whenever needed.

18 MJ [Col SPATH]: Much appreciated. You're excused.

19 WIT: Thank you.

20 [The witness was warned, excused and withdrew from the
21 courtroom.]

22 MJ [Col SPATH]: Just for the audience so they know, I
23 don't know if anyone has taken the time to go back and look

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1 what this relates to. It relates to Appellate Exhibit 327 and
2 a series of filings, which is a motion to suppress the
3 statements of Al-Badawi. And the motion to suppress was based
4 on both 10 U.S.C. 948r, which has to do with the military
5 commissions, obviously, and then the Fifth Amendment.

6 In any motion to suppress, of course, the government
7 has the burden. And so the government rightfully can put on
8 evidence. And so as the motion practice unfolded in the
9 series after the defense counsel filed their motion to compel
10 four witnesses, and the commission granted all four, the
11 government indicated in that response, 327D, that they would
12 call two of the witnesses, Special Agent Gaudin, who we just
13 heard from, and Special Agent McFadden, who we're likely going
14 to hear from next week either by VTC or in person.

15 The motion hasn't been withdrawn yet. Defense
16 Counsel, any chance -- anytime you want to file a filing and
17 withdraw the motion to suppress, you're welcome to do so.
18 While the motion is pending, we're going to continue on a
19 motion to suppress. Motions to suppress are common, almost
20 everyday occurrences in any court-martial I sit on. They're
21 very standard in our practice, and we expect any certified,
22 competent judge advocate to be able to handle those.

23 So again, we're going to continue to move through

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1 those things that do not relate. Now, I recognize some of the
2 testimony here related to Appellate Exhibit 166 and Appellate
3 Exhibit 319, those are somewhat different. 319, I believe,
4 was a motion to suppress; 166 is the hearsay issue. That is
5 more specialized, certainly for these commissions, and we're
6 going to resolve the learned counsel issue before we unpack
7 166 certainly. But I know both sides recognize that as I try
8 to navigate this.

9 I'm going to give both sides an opportunity to chat a
10 little bit. I've got a couple questions. I know the
11 prosecution recognizes -- or the government recognizes that
12 we're in -- it's not unique. We've certainly had lawyers
13 refuse to show up before or sit quietly in courtrooms, but we
14 are here doing it.

15 So I guess my first question to you all would be:
16 Where do you propose we go with relation to the three
17 attorneys who clearly aren't going to show up? I'm not going
18 to continue to issue orders; it's a waste of time. They've
19 violated a number of orders, and they're not going to show.

20 And so I guess I would ask: Government, I've already
21 indicated where I'm willing to go with Appellate Exhibit 207
22 and the continuing of the cross-examination -- or the
23 cross-examination of al Darbi next week, and that is my plan.

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1 My question to you all: one, do you disagree with that; and
2 then two, what do you propose I do with our three civilian
3 attorneys who have violated the orders and have not been
4 released from this case? Any input would be appreciated.

5 TC [MR. MILLER]: May we have a moment?

6 MJ [Col SPATH]: You may, absolutely.

7 [Pause.]

8 TC [MR. MILLER]: Your Honor, this may not be the answer
9 that the court would like, but we -- I think before we take a
10 position on this, we would like to discuss it with the chief
11 prosecutor.

12 MJ [Col SPATH]: No, that is all right. We have a filing
13 in that regard already. And in the -- I know in the filing
14 there was discussion about compelling their attendance, not
15 here but somewhere else, and then working through a contempt
16 proceeding. I'm not opposed to that or doing that. I'm
17 curious; so those are good discussions to have.

18 This afternoon we're likely to get, from an appellate
19 court with jurisdiction, after a habeas filing, hopefully a
20 decision regarding how they interpret contempt proceedings,
21 and that might drive kind of your position on this, I think.
22 So I recognize that.

23 A number of other habeas filings are out.

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1 Fascinatingly, they state that I've issued writs of attachment
2 and demanded their apprehension, which is reasonably
3 surprising to me. And I don't know how you can say that to a
4 court, because I haven't issued one. I haven't issued a
5 single writ of attachment for those three civilians, nor
6 confined them, nor ordered their confinement, nor indicated
7 they're confined. But they can file what they wish in the
8 habeas proceedings outside of here.

9 But the one that I am looking forward to this
10 afternoon is the ruling regarding the contempt proceedings,
11 and I think that will drive some of our discussion. We'll
12 either by filings or e-mail or on Monday have a conversation
13 about that, depending on what we hear this afternoon.

14 TC [MR. MILLER]: There are several moving parts that we
15 haven't been privy to, and that's many of the things that
16 General Martins is addressing so ----

17 MJ [Col SPATH]: I assumed. Thanks.

18 I know the defense counsel indicated he wanted to be
19 heard on some of the issues today, and I haven't given you the
20 opportunity yet, so the floor is yours.

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

22 I just wanted to make a record as to our position,
23 the defense's position, and why I am refusing to participate

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1 in the proceedings, because I really haven't had a chance to
2 put it on the record yet. I also want to clarify that I
3 misspoke earlier as to stating an objection when what I meant
4 to say or what I meant to do, and I tried to clarify, is that
5 I am just stating that I want it on the record that we did not
6 call that witness.

7 MJ [Col SPATH]: I understand. And if I misstate this,
8 tell me. Your position is you're going to do nothing until
9 learned counsel is with you?

10 DDC [LT PIETTE]: Correct.

11 MJ [Col SPATH]: And so you don't have a position, nor an
12 argument, nor a discussion.

13 DDC [LT PIETTE]: Right. Nor objections, either.

14 MJ [Col SPATH]: Nor objection. All right. I think
15 that's clear.

16 DDC [LT PIETTE]: Yes. And, Your Honor, if I could, just
17 for a few minutes, to clarify this position and why I'm taking
18 this position. Again, I'm refusing to participate in the
19 proceedings -- and this is not a trial strategy.

20 Three days ago you said on the record that this is a
21 situation created by General Baker. And although I believe it
22 was originally created by the government, not the prosecution,
23 but the government writ large and probably could have been

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1 dealt with with investigation, discovery and hearings, I do
2 agree to the extent that it was not caused by me and it was
3 certainly not caused by Mr. al Nashiri.

4 MJ [Col SPATH]: I agree with that part.

5 DDC [LT PIETTE]: Therefore, it can't be our trial
6 strategy. It's just something that's happened to us. We
7 don't have a choice. When I'm looking at Strickland and its
8 progeny, I see that as qualified lawyers making -- appear to
9 me at least to be bad decisions that they are qualified to
10 make. I am an unqualified lawyer with no choice.

11 MJ [Col SPATH]: You're not unqualified. You are both
12 certified, sworn, and competent to represent accused both here
13 at the commission -- now, I recognize the difference with a
14 capital case, but you are not unqualified.

15 DDC [LT PIETTE]: Yes.

16 MJ [Col SPATH]: I can't help that. That is -- I mean,
17 that is the oath of competency and all that you have got.

18 DDC [LT PIETTE]: What I mean, I should say, is I am not
19 qualified as learned counsel.

20 MJ [Col SPATH]: Correct. You are not a learned counsel.
21 I concur.

22 DDC [LT PIETTE]: I should say it's not about my
23 abilities; it's about Mr. al Nashiri's rights. And it's not a

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1 trial strategy to go forward with unqualified or
2 underqualified counsel. We have a term for that in the Navy,
3 what it actually would mean if we go forward without learned
4 counsel, and that's gundecking. I think in the Air Force you
5 guys call it a pencil whipping, but in the Navy we call it
6 gundecking.

7 And just in case people don't know what that term
8 means, it's when you sign off on something like, you know,
9 preflight maintenance or anything like that, sign off on a
10 dive rig or your jump gear, without having done the actual
11 checks, without having done the required checks that are
12 needed, it's a sort of fraud, and it's -- at least in the
13 Navy, and I'm sure in all the services, it is the cardinal
14 sin. You do not gundeck anything. And I think ----

15 MJ [Col SPATH]: So let me ask -- again, take this away
16 from the commissions and let's go to a court, particularly a
17 courts-martial or court-martial where you've practiced.

18 You do recognize the difficulty when I -- again,
19 lawyers can disagree with a ruling, I understand that. But
20 here we have an excusal of counsel for good cause shown on the
21 record, and I put quotes around that on purpose because,
22 again, on the record to who and when. So if a judge
23 interprets that as an ambiguous statute and rule, in any time

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1 I've ever had a proceeding, you know what happens. We comply
2 with the judge's order. We file an appeal. File a 62 appeal
3 over here, a writ over here, habeas down here.

4 But here we have people who are not complying with
5 orders and are stopping a six-year process. You know, what's
6 a judge to do?

7 DDC [LT PIETTE]: Yes. Your Honor, at the risk of -- I
8 don't want to, like I said, take a position, but I do
9 understand the difficulty that you are in, that the government
10 is in, that I'm in ----

11 MJ [Col SPATH]: And your client is in.

12 DDC [LT PIETTE]: Right, and I am in, yeah. And exactly,
13 Your Honor, I think the person that's in the most difficult
14 position is Mr. al Nashiri. As the one person who is left to
15 directly represent him, that's what I am going to do.

16 MJ [Col SPATH]: I understand. But according to General
17 Baker at the time, even if your client said -- I'm not
18 suggesting there was a conflict or any kind of intrusion,
19 because, again, I have access to the same information. And
20 again, the noise outside of this courtroom can ignore the
21 ruling, and they can ignore my common sense. That's fine.

22 But according to General Baker and his
23 interpretation, your client wants his lawyers. General Baker

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1 can excuse them for good cause shown, doesn't matter. And how
2 does that impact your client's due process rights? Because I
3 haven't seen Mr. al Nashiri ask me to get rid of his lawyers.
4 I've seen a defense lawyer step in and get rid of his lawyers.
5 How does that impact his due process rights, and whose
6 decision was it?

7 And again, I'm asking -- you're making a record.
8 Part of making a record is a good conversation with a trial
9 judge or, in this case, a commission, and I get to ask
10 questions. And I'm curious about that. Because his
11 interpretation of the statute would indicate, in the midst of
12 trial, after many more millions of dollars are handed out, he
13 could tell Mr. al Nashiri, sorry, you don't get your lawyer.
14 It's my decision, not yours. How do you resolve that?

15 DDC [LT PIETTE]: Well, that would be privileged, you
16 know, attorney-client communications, obviously. But that has
17 definitely been considered and dealt with.

18 But back to, you know, the issue of me. Regardless
19 of how this happened and what happened, I am left here. And,
20 Your Honor, I will not gundeck this case, and that's why ----

21 MJ [Col SPATH]: And I don't expect you to. That's why I
22 am letting you talk. But you have practiced pretrial motions
23 that don't relate to capital litigation. You are certified

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1 and qualified. And the statute says "learned counsel to the
2 extent practicable."

3 And so you're in a bind if I interpret that as
4 learned counsel right now is not practicable. You have to
5 make a choice of not gundecking, acting in accordance with
6 whatever bar you're licensed in and wherever you practice and
7 proceed, what to do.

8 DDC [LT PIETTE]: Yes. Your Honor, if I could just give a
9 hypothetical as to the situation that I'm in that I think you
10 somewhat described here. But imagine -- so I'm going to use
11 Navy analogies, but I think they're close enough and so I'm
12 going to involve planes here.

13 But let's say we have a young sailor who comes from a
14 helo squadron to an F-18 squadron. And just as he arrives,
15 this young petty officer, say he's a third-class petty
16 officer, E-4 shows up, and for whatever reason the crew chief,
17 other people have quit, but they're running sorties, they're
18 doing things; these F-18s have to get on the ground. So the
19 chief -- and I apologize to the chief's mess for using the
20 chief as an example here, but let's say the chief then orders
21 this young sailor, who's like, here, you take these cards and
22 go do the maintenance checks on that F-18.

23 He says, I've never done that before.

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1 He says, Well, you're coming from a helo squadron. I
2 know you've looked at helos before, I know you've done many
3 preflight maintenance checks. You can read, can't you? You
4 can look at an airplane, can't you? You can make checkmarks
5 in a box, can't you? I'm telling you you're qualified; go do
6 that.

7 I think every one of us here would hope that that
8 young sailor does not follow that and does not do that. And
9 even if nothing happened ----

10 MJ [Col SPATH]: Here is my hypothetical to you: Can't
11 that young sailor pack up the equipment and drive it out to
12 the aircraft and hand it to the qualified person who is
13 sitting at the plane to do the maintenance?

14 DDC [LT PIETTE]: Yes, he could.

15 MJ [Col SPATH]: Arguably, I'm just asking you to do what
16 you do in your day job in a noncapital-related issue like
17 motions to suppress, like the admission of real evidence,
18 which is the same no matter what the evidence is. It could be
19 parts of a skyscraper, parts of a Boeing 747, tissue paper,
20 urine, you name it, you've seen it.

21 It's a world of difference between me saying to you
22 capital-qualify a jury, Lieutenant Piette, good luck with
23 that. That would be asking you to fly the plane, maintain the

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1 plane.

2 I'm asking you -- and, by the way, your defense
3 community -- to do what you're qualified to do, in my opinion.
4 And I recognize you disagree with that given the severity of
5 the charges.

6 DDC [LT PIETTE]: Your Honor ----

7 MJ [Col SPATH]: But I will point out that at least the
8 habeas motion to tell me to stop, at least right now, a
9 federal judge has said I'm not stopping it yet.

10 DDC [LT PIETTE]: Right, Your Honor, and I understand
11 that.

12 MJ [Col SPATH]: But that's what I'm trying to get to. I
13 have indicated my willingness to follow orders and, I think,
14 demonstrated my hopeful ability to try to interpret the law.

15 Look, we're where we're at, and I appreciate your
16 hypothetical. And I can tell you I'm not going to have you
17 capital-qualify a jury, deal with 166, give a sentencing
18 argument or a findings argument in a capital case, unless
19 that's your team decision. We're in pretrial practice, and
20 I'm working on real evidence and things like that.

21 DDC [LT PIETTE]: Yes. Your Honor, and that's kind of my
22 point. I'm not qualified in death penalty litigation, but
23 what I do know, what I do understand is that -- in the words

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1 of Lester Freamon, all the pieces matter. Everything,
2 everything can be relevant to the sentence and everything, in
3 fact, is about the sentence. There is nothing that happens in
4 death-penalty litigation that isn't about the sentence.

5 You know, Mr. al Nashiri's life is on the line right
6 now with everything that happens and ----

7 MJ [Col SPATH]: Then where is the other military lawyer?
8 Where is Colonel Aaron, the acting chief on this case, getting
9 you an attorney down here, understanding that a federal judge
10 has said I'm not stopping it?

11 DDC [LT PIETTE]: Your Honor, to answer ----

12 MJ [Col SPATH]: Where is that?

13 DDC [LT PIETTE]: Before you had asked -- you're asking
14 the government and us what our way forward was. Again, that's
15 why I filed the motion to abate, which is the extent of what I
16 think I can do. I think the scope of my representation right
17 now is getting him qualified counsel and then moving forward
18 so ----

19 MJ [Col SPATH]: But the defense community for which you
20 work have an obligation.

21 DDC [LT PIETTE]: Yes, sir.

22 MJ [Col SPATH]: They've heard I'm moving forward with
23 pretrial issues not related to capital matters. I'm not

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1 asking you to maintain the plane, I'm just asking you to move
2 the parts out there onto the flight line, in my view. I'm not
3 asking you to do serious maintenance on the plane, I'm asking
4 you -- and again, it's not you necessarily, but you're here.

5 The defense community recognize -- this is, according
6 to them, nine years in the making, for me three and a half
7 years in the making, and the disorder being caused by the
8 violations of the orders requires something. Otherwise, this
9 could happen every day.

10 DDC [LT PIETTE]: Right. Your Honor, I ask -- that's why
11 essentially what I'm asking for you to do is to ground the
12 plane until I can run around and find somebody who's
13 qualified, trusting that as a certified and sworn officer of
14 this court that that is what I am doing.

15 MJ [Col SPATH]: I recognize that. But it's not just you.
16 It's the -- the chief defense counsel has responsibilities.

17 DDC [LT PIETTE]: Yes.

18 MJ [Col SPATH]: And they're abdicating it by what I can
19 see. General Baker recused himself. Fine. Colonel Aaron,
20 not here, although he was here the other day. And we have
21 another military lawyer who is cleared and ready to be here.
22 Where are they?

23 DDC [LT PIETTE]: Your Honor ----

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1 MJ [Col SPATH]: Why aren't they here?

2 DDC [LT PIETTE]: I have no representations on Colonel
3 Aaron. I am assuming he is continuing the work that Brigadier
4 General Baker stated he was doing of looking for a new learned
5 counsel.

6 As far as the other counsel, the other detailed
7 counsel that we have, they just haven't -- so with the other
8 ones, they're not cleared to be here.

9 MJ [Col SPATH]: One is.

10 DDC [LT PIETTE]: The one who is here and cleared, because
11 of where we are and because there's no learned counsel who is
12 able to advise and assist Mr. Nashiri at every stage, he has
13 not -- our new military counsel, who is also not learned
14 counsel, has not been able to meet and confer with the client
15 and be accepted by Mr. al Nashiri yet.

16 MJ [Col SPATH]: But why are -- you all do what you want.
17 A federal district judge has already stepped in and said I'm
18 not stopping it. Understanding the facts, and I have made
19 clear and I continue to make clear, I'm not going to fly the
20 plane without learned counsel, but we're going to move some
21 parts out to that plane.

22 And I think the law anticipates that and recognizes
23 that. Otherwise, it wouldn't say "to the extent practicable."

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1 Otherwise, what it would allow is learned counsel to quit at
2 any moment, at any time, anywhere, and stop a process where
3 you have lots of other interests.

4 Mr. al Nashiri's are the greatest interests -- there
5 is no doubt about it -- because he's the accused. But you
6 have other competing interests that are recognized, and you
7 know that, including -- well, they are victims of loss for
8 sure by the alleged acts of your client, but the victims
9 themselves of the act, they have an interest. The public has
10 an interest. And all of that is an interest in the efficient,
11 fair administration of justice, and trying to balance the
12 competing interests.

13 And so the government, I hope, would stand up if I
14 said we're going to seat a jury tomorrow, and say please don't
15 do that. That's reversible error on its face. But what I
16 have here is, again, a habeas filing, please stop. If the
17 judge had said stop, as I said the other day, I would have
18 stopped.

19 And the frustration I have is what the defense
20 community is doing, and not you -- and like I said, I
21 appreciate the filing that was filed. What the defense
22 community is doing is flagrantly violating orders and rulings
23 from a court. Imagine what would happen if -- let's say

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1 yesterday's hypothetical is different and the federal district
2 court judge told me to stop, and I said thanks for your input,
3 I disagree with your ruling, and I interpret it differently,
4 so I'm going to do it.

5 I know what would happen when my feet hit the soil of
6 the mainland. I'm confident that federal judge would have the
7 marshals there waiting for my arrival and be very unhappy with
8 my violation of the rules. And my bar would be really unhappy
9 with it, too, I would think. I would expect that.

10 And so what I'm encouraging -- I understand how you
11 interpret the learned counsel issue. Clearly we disagree.
12 And at this point a federal judge has told you they're not
13 stopping this. And I'm telling you we're not going to do the
14 significant maintenance on the plane yet or fly the plane.

15 But there's a reason that detailed military counsel
16 are the only ones who have to be present at a session --
17 typically with waiver from your client, I recognize. But
18 there's a reason detailed military counsel can be the only
19 ones present statutorily at a session; that's because they
20 presume you are competent to handle issues in a courtroom, and
21 then learned counsel is there to assist you with these capital
22 issues.

23 So I don't know what else to do. I am navigating

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1 what I believe is the best way I can navigate it. That's why
2 166, I'm not about to touch that before we get learned counsel
3 back here. But if we don't figure out what to do, your client
4 suffers from the fact that his learned counsel can go to the
5 chief defense counsel and quit, no matter how your client
6 feels about it, at any time in the process.

7 And again, we could be sitting in trial, and
8 according to General Baker's interpretation, that's what he
9 could do and stop this process cold. That -- again, maybe an
10 appellate court will agree with General Baker's interpretation
11 of the rules of excusal for defense counsel, but I have got
12 two rulings out there where I interpret that -- right? I
13 interpret that as ambiguous. To me it seems clearly
14 ambiguous. I wish it had been written better, but it wasn't.
15 That's not abnormal in court, right? We get a lot of that.

16 So I'm trying to navigate those two competing issues
17 right there, right, the ability of learned counsel to be
18 there, learned counsel just walking out the door and ignoring
19 every responsibility despite an order, and, frankly, a bar
20 rule that says if a tribunal orders you to be there, even if
21 good cause is shown on the record, you have to be there.

22 I mean, I'm doing what I can, Lieutenant Piette. And
23 I also -- again, I balance your client's interest

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1 significantly, which is why we're not doing some of the more
2 serious capital-related motions. But the other interest is
3 the prosecution multiple years into the process and a
4 significant amount of investment into the process with issues
5 that are something, again, you deal with or used to deal with
6 every day when you're doing courts-martial.

7 DDC [LT PIETTE]: Yes, Your Honor, I understand. And I'm
8 not taking a position on the excusal of counsel. That's out
9 of my hands right now. I'm just -- I'm not even trying to
10 change your mind. I'm just trying to make a record here.

11 MJ [Col SPATH]: I understand.

12 DDC [LT PIETTE]: I understand we're going to go forward.

13 MJ [Col SPATH]: Go forward on particular issues. That's
14 important. We're not just going to go forward to trial.
15 We're not just going to go forward into some of the more
16 unique and complex areas that face this commission.

17 So I want to make sure the record is clear, as it
18 apparently was in the federal habeas proceeding, go forward in
19 particular areas where you, I believe, are certified,
20 competent, and capable.

21 DDC [LT PIETTE]: Yes, Your Honor, I understand that. And
22 being ever mindful of the other interests and the -- you know,
23 the interests, including of the victims of my shipmates who

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1 were affected by this and their families, my duty is solely to
2 the interests of Mr. al Nashiri.

3 MJ [Col SPATH]: Absolutely.

4 DDC [LT PIETTE]: And I cannot -- and I understand that,
5 you know, there are certain things that could give me top
6 cover, but the way I see it, the rules, the ethics rules,
7 everything is designed to protect clients, not me, and that
8 includes Mr. al Nashiri.

9 And that is why, you know, I believe everything could
10 impact the sentence in ways that I don't fully understand, and
11 so I -- that is why -- you know, I want it clear for the
12 record that that is why I am not participating.

13 MJ [Col SPATH]: I understand.

14 DDC [LT PIETTE]: Thank you.

15 MJ [Col SPATH]: And I think you know this. It's -- it
16 may not appear this way on its face. I'm doing everything I
17 can to get Mr. al Nashiri's counsel here. I'm doing
18 everything I can for your client to be represented by a
19 learned counsel who's made an appearance in a case and has
20 invested a good deal of time and who has been paid a good deal
21 of money to do this; and I know you know that. The DoD
22 civilians are slightly different, but the learned counsel, I
23 am really trying to assist.

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1 DDC [LT PIETTE]: I understand, Your Honor.

2 TC [MR. MILLER]: While we still would like to speak, give
3 a position as what to do with the three attorneys who have
4 brazenly and willfully disregarded your order, we do concur
5 with the court's assessment that we can move forward on
6 noncapital matters, as Lieutenant Piette is certainly
7 qualified to do that.

8 I do want to talk a moment, however, Your Honor,
9 about this whole notion of this is not a strategy. I think
10 clearly, as evidenced by the events of this week, it is a
11 strategy. It is a scorched-earth strategy to obstruct the
12 proceedings by any means, however frivolous, however cynical.

13 This strategy is aimed at one thing and one thing
14 only, and that is blocking the cross-examination of al Darbi,
15 who the court knows, from listening to the testimony he
16 provided, devastating direct and corroborated evidence as to
17 the involvement of this defendant in the Boats Operations.
18 What they are seeking to do is to run out the clock.

19 Procedural history in this case shows that the
20 government moved, and was granted over defense objection,
21 permission to conduct the deposition of al Darbi, a
22 co-conspirator of the defendant. Even before the deposition
23 was started, though he had been ordered, defense counsel with

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1 General Baker's offering cover with his June 14th memo, began
2 an assault on the commissions process with disingenuous
3 assertions and positions regarding matters that are in
4 classified pleadings. I won't go into those. I will only
5 state that they are legally ----

6 MJ [Col SPATH]: Slow down a little bit. Slow down a
7 little bit.

8 TC [MR. MILLER]: I will only say that they were factually
9 and legally vacuous, and that the court, of course, eventually
10 rejected.

11 The deposition occurred in late July and early August
12 of this year, and al Darbi, as the government anticipated,
13 provided evidence of the defendant's involvement in al Qaeda
14 generally and the boats plot specifically. He recounted
15 admissions made by the accused regarding his participation and
16 oversight of the attempted bombing of THE SULLIVANS and the
17 bombing of the USS COLE, as well as the accused's plan to bomb
18 additional vessels in 2002.

19 Cross-examination was scheduled for September. This
20 allowed the defense 30 days -- 30 days -- to prepare its
21 cross-examination, an extraordinary amount of time, and time
22 that would have not been afforded had this occurred during the
23 course of the trial.

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1 Though armed with an immense amount of discovery and
2 the ability to soberly, without the pressures of trial,
3 prepare, the defense filed -- the defense filed a motion to
4 continue based on Mr. Kammen's need to drive his wife to
5 physical therapy. This was granted by the court, and
6 cross-examination was pushed to November.

7 Now, they still need, of course, to run out the
8 clock, having run out of these excuses, these connivances,
9 frivolous motions, with the knowing assistance of General
10 Baker. They then determined they would invoke the nuclear
11 option. They would simply refuse to play. They then colluded
12 and came forth with this contrived ethics opinion from a
13 professor who on record has been opposed to the military
14 commissions.

15 Notably -- notably -- they did not bring an opinion
16 from their own bars because their own bars' record is clear,
17 or their rules are clear, as the court has cited in its
18 various pleadings. The fact of the matter is that they're
19 supposed to be here. That's what lawyers do; they show up;
20 they argue their cases. That's how the system works.

21 General Baker, who has openly and publicly mocked the
22 commissions process, then conspired with the defense team and
23 offered this excusal memo ----

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1 [The security classification button was pushed in the
2 courtroom which caused the video feed to terminate at 1137,
3 3 November 2017.]

4 [The Military Commission resumed at 1138, 3 November 2017.]

5 MJ [Col SPATH]: All right. It appears there was just an
6 accidental press of a button with ----

7 TC [MR. MILLER]: Any third-year ----

8 [Conferred with courtroom personnel.]

9 MJ [Col SPATH]: Mr. Miller, we're just going to pause for
10 a second, let the buffer build so they can hear in back.
11 Don't lose your spot.

12 TC [MR. MILLER]: I won't.

13 MJ [Col SPATH]: I'm going to tell the public what
14 happened, and then we'll move from there.

15 [Pause.]

16 MJ [Col SPATH]: Okay. I know there's a 40-second delay,
17 so hopefully this will explain it to the audience watching.
18 On the off chance that classified information starts to be
19 discussed, I can authorize -- and I want to highlight the "I
20 can authorize" -- the feed to stop so that we don't disclose
21 classified information inadvertently, because if we disclose
22 classified information inadvertently, then I'm supposed to
23 stop. That would be my fault.

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1 Here somebody inadvertently hit one of the buttons
2 that would do that without me authorizing it. That shuts the
3 feed off. We then had to let the feed build.

4 So no classified evidence was being discussed. I
5 apologize, Mr. Miller, for the interruption. Let's all be
6 more careful. You may proceed.

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

8 ---- third-year law student knows you don't get to
9 shout privileges from the gallery and expect the court not to
10 make you take the witness stand so that the court can decide
11 what is privileged and what is not. But that's obstruction.
12 That's a scorched-earth theory at any cost.

13 These are just some of the highlights of what has
14 transpired, Your Honor. As the Supreme Court had noted -- has
15 noted, this is a strategy, not a particularly good one, but
16 one that the courts should not invade.

17 Lieutenant Piette, in furtherance of this delay, I
18 believe, has now advanced what we call the potted plant
19 defense: I'm here on the case, but I'm unable to do anything.
20 I have nothing to do. We're not going to have the other
21 lawyers who are assigned to the case come in and help either.
22 Again, further instructions [sic]. To them this is checkmate.
23 But it can't be, Your Honor. It is simply just another overt

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1 act in furtherance of their scorched-earth theory.

2 Your Honor, learned counsel has not been released by
3 the court or the accused. He has simply decided to not
4 participate and appear without the consent of the accused or
5 the court. The accused has learned counsel now. What we have
6 here is misconduct. What we have here is disobedience of a
7 lawful process by a learned counsel. He knows better.

8 In 37 years as a prosecutor, I have never witnessed
9 the level of contempt, disobedience and disrespect to a court
10 that I have seen when -- since I have been in this courtroom
11 during the last week. I have never seen anything like it. I
12 thought when I came to the military commissions, things would
13 be different, that things would be better. I haven't seen
14 that in the last week.

15 The 17 sailors and their families deserve justice.
16 The single Bulgarian sailor and his family deserve justice.
17 We cannot allow this misconduct, this strategy to disrupt
18 these proceedings.

19 Your Honor, I hope that we continue to move forward
20 during the next week, and that is the government's position in
21 this matter.

22 MJ [Col SPATH]: Lieutenant Piette -- am I saying your
23 last name correctly? Usually I just say defense counsel, but

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1 there's only one of you, so I'm trying to be ----

2 DDC [LT PIETTE]: Yes, sir. It's Lieutenant Piette.

3 MJ [Col SPATH]: Piette. Thank you.

4 DDC [LT PIETTE]: Yes, sir.

5 I'm really, unfortunately, not in a position to
6 respond to a lot of that. But I do want, for the record and
7 anyone reviewing the record, to take off the hats of cynicism
8 and look at this case, treating the defense as attorneys who
9 care about their client, who care about their jobs, who care
10 about justice, who aren't going to be willing to just give up
11 those things to simply avoid cross-examination of a witness
12 whom -- I don't know what direct the government was paying
13 attention to, but a direct that seriously undermined their
14 case and certainly established no elements that would prove
15 Mr. al Nashiri was guilty.

16 The timing of this is unfortunate. I can see how the
17 government would come to the position they came to. So what I
18 am asking -- the only reason I'm up here now is to ask the
19 courts, when they're looking at this on the record, to look
20 deeply and without the hats of cynicism and understand that
21 everybody here cares about justice and getting to the truth.
22 Thank you.

23 MJ [Col SPATH]: No, I appreciate that. I think fair,

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1 everybody here -- it's very difficult to envision how you
2 ignore court orders and abandon an order to be here to
3 represent a client in the face of bar rules that say the exact
4 opposite on their face, which again, I believe is why we so
5 far have the habeas ruling that we have and causing me not to
6 just drive into capital issues; but recognizing that at some
7 point the defense community is going to have to do something.

8 But what they have to do first is -- I haven't
9 released those counsel. And until a court tells me they're
10 released, we'll figure out where we're going to go.

11 I'm going to allow you all to talk amongst
12 yourselves. I recognize you filed a motion indicating what
13 you believe the way ahead was earlier, a filing. And so what
14 I would suggest is if there's no difference, just shoot a note
15 to the trial judiciary, to the admin that I have here, and let
16 me know that that is kind of the plan that you all envision.

17 Lieutenant Piette, I offer you -- you certainly -- I
18 know you don't want to file, or you're indicating you're not
19 going to file, but if you want to, you know you have that
20 opportunity. And so at any time over the weekend if you have
21 a different road ahead that you envision with regard to the
22 attorneys for where we're going next week -- it's a
23 deposition. I've said multiple times that doesn't make it

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1 admissible. Both sides know that. We've talked about it.
2 We're going to have Mr. al Darbi come in here, sit down. I'm
3 going to see if you have any questions, Defense Counsel. You
4 know I'm going to ask if you're affirmatively waiving your
5 right to cross. I know you're going to say you don't have a
6 position on it probably; I recognize that. But we're going to
7 go through that exercise.

8 Since that appears to be what's going to occur, at
9 least right now I'm not going to spend time on the classified
10 issues on Monday. Why tie up the record when we're not even
11 going to ask any questions? We'll have Mr. al Darbi come in,
12 and we will go from there. If he decides -- if the defense
13 decides they're going to ask questions, we'll break and deal
14 with any 505 matters. But if we're not going to deal with any
15 505 matters, we will move through Mr. al Darbi's cross, which
16 will be awfully quick.

17 Then we have Mr. McFadden. So like the last witness,
18 the witness that the government indicated they would likely
19 want some information from in the motion to suppress, along
20 with the defense counsel particularly and specifically
21 requesting them to be produced, and I know Mr. McFadden is
22 available and has been produced either by VTC or in person.

23 And then again, the 207 witnesses are the next order

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1 of business. If we can have them here next week or by VTC
2 next week, I think that's better where we're going to spend
3 our time next week since the cross-examination of Mr. al Darbi
4 appears, by choice, that it's going to be short.

5 I recognize what you've said, Defense Counsel, and I
6 know that you're suggesting it's not a strategy, but we're
7 where we're at.

8 Also next week and the third week we will be dealing
9 with the other counsel. Again, I'm waiting to see the habeas
10 ruling on the contempt issue. I believe I've interpreted to
11 the best I can, I believe, certainly correctly. I certainly
12 do my best in that regard, I hope. But since the ruling seems
13 to be coming this afternoon, that will be helpful, and that
14 will probably drive our discussion next week.

15 So my plan is Tuesday -- as I said, Monday was going
16 to be the classified issues. Tuesday, Mr. al Darbi in the
17 morning. If those questions are as quick as I anticipate,
18 we'll move on to the 207 witnesses and Mr. McFadden the rest
19 of Tuesday and on through the next week. And we'll deal with
20 the defense counsel who continue to voluntarily absent
21 themselves despite orders.

22 Again, I'm not going to waste time issuing any more
23 orders on it. I think that just demonstrates my inability to

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1 cause someone to follow my orders. So we'll just move forward
2 from there.

3 Anything else, Trial Counsel?

4 TC [MR. MILLER]: Nothing further from the government.

5 Thank you, Your Honor.

6 MJ [Col SPATH]: Thanks, Mr. Miller, I appreciate it.

7 Defense Counsel?

8 DDC [LT PIETTE]: Nothing further from defense, Your

9 Honor.

10 MJ [Col SPATH]: Thanks, Lieutenant Piette.

11 We're in recess.

12 [The R.M.C. 803 session recessed at 1150, 3 November 2017.]

13 [END OF PAGE]

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