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1 [The R.M.C. 803 session was called to order at 1230,
2 7 November 2017.]

3 MJ [Col SPATH]: This commission is called to order. All
4 the parties who were present from this morning's session are
5 again present.

6 Mr. McFadden is on the video screen, so we'll start
7 with him in just a moment, and then we'll deal with any
8 administrative issues after he testifies. This is still
9 witnesses for the 327 filings which have to do with a motion
10 to suppress. The government has the burden for that. The
11 defense did request four witnesses; the government concurred
12 with two of them. We've already heard from one. This is the
13 second one that the government concurred with.

14 So let me just ask, Trial Counsel, do you have
15 questions for this witness?

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

17 MJ [Col SPATH]: All right. Then if you would, call the
18 witness, swear the witness in, and we will begin.

19 TC [MR. MILLER]: Mr. McFadden, can you hear me?

20 WIT: Yes.

21 TC [MR. MILLER]: Could you stand, please, and raise your
22 right hand.

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1 MR. ROBERT McFADDEN, civilian, was called as a witness for
2 the prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

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

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

6 A. Robert McFadden.

7 Q. And your occupation, sir?

8 A. I'm a consultant with Deloitte Consulting.

9 MJ [Col SPATH]: Mr. McFadden, Judge Spath, here. Take a
10 seat for me. You can sit down, please. I don't remember if
11 it was a court reporter or an interpreter, but somebody has
12 seen you testify previously and they indicated that you talk
13 fast occasionally. That's okay; I'm from the Northeast; I
14 have the same problem.

15 So as best you can, just remember we are -- we do
16 interpret as you talk, so try to slow down a little bit for
17 us. Okay?

18 WIT: Yes, sir.

19 MJ [Col SPATH]: All right. Thanks.

20 Mr. Miller.

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

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

23 Q. Mr. McFadden, I want to start with some background

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1 about you. Did you attend university?

2 A. Yes, I did.

3 Q. All right. And I'm going to ask you, if you could,
4 maybe pull the microphone a little closer to you.

5 A. How's that?

6 Q. That's much better. Again, you attended university?

7 A. Yes, sir.

8 Q. And where did you go?

9 A. West Chester University and University of Maryland.

10 Q. And did you receive a degree?

11 A. Yes, I did.

12 Q. And what was that degree?

13 A. A bachelor's in government and political science.

14 Q. When did you graduate?

15 A. That was in December of 1986.

16 Q. Do you have any prior military service, sir?

17 A. Yes, I do.

18 Q. And when did that occur?

19 A. I was in the United States Air Force from 1978 to
20 sometime in the late 1980s, I think it was 1988, and then
21 recalled to active duty for Desert Storm and Desert Shield
22 with the Air Force.

23 Q. After your active military service, did you have

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1 occasion to become involved or employed in the law enforcement
2 capacity?

3 A. Yes, sir.

4 Q. And when did that occur?

5 A. That was in summer of 1991.

6 Q. And what -- I'm sorry.

7 A. Excuse me.

8 Q. And what law enforcement agency did you join?

9 A. That was as a special agent with the Naval
10 Investigative Service, and later the name changed, of the
11 organization, to Naval Criminal Investigative Service.

12 Q. And what are the general duties and responsibilities
13 of a special agent with the NIS or the NCIS?

14 A. Worldwide jurisdiction for the Department of the
15 Navy, both military and civilian, for felony crimes,
16 white-collar crimes, and foreign counterintelligence.

17 Q. When you joined the NIS, did you receive any training
18 before you were allowed to assume those duties?

19 A. Yes, sir.

20 Q. Could you describe briefly for His Honor what the
21 training was?

22 A. Yes. The training starts at the Federal Law
23 Enforcement Training Academy in Glynco, Georgia with a basic

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1 felony criminal investigative course. And then for my
2 particular organization there are a number of months of add-on
3 courses that have to do with, in detail, crime scene
4 processing, interview and interrogation and other specialized
5 training.

6 Q. Could you relate what kind of training you received
7 regarding interviews and interrogations?

8 A. As part of the basic criminal investigative course
9 there is a section that involves interview of subjects,
10 interrogation of subjects and witnesses and potential sources.
11 And then we -- my prior organization had more extensive
12 intermediate and advanced training in interview and
13 interrogation. And at the time it was called the Reid
14 technique. But then I had other, both in academic and
15 on-the-job training for interview and interrogation.

16 Q. After you received the basic training at FLETC, or
17 Glynco, what was your first assignment?

18 A. I was assigned to the former Philadelphia Naval
19 Shipyard, Philadelphia, PA.

20 Q. And what did you do there?

21 A. I was assigned to the felony criminal squad and
22 conducting felony criminal investigations, covering the
23 spectrum of homicide, drug conspiracies, aggravated assault,

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1 theft; and then during that assignment, shifted over to the
2 foreign counterintelligence squad.

3 Q. I take it during that time you had occasion to
4 conduct interviews and interrogations?

5 A. Yes, sir, extensively.

6 Q. After your time in Philadelphia, where did you next
7 go?

8 A. My next assignment was to the NCIS office in Manama,
9 Bahrain.

10 Q. And how long did you remain in Bahrain?

11 A. Approximately three years.

12 Q. And from there?

13 A. To the U.S. consulate, at our NCIS office in the U.S.
14 consulate in Dubai, United Arab Emirates.

15 Q. And when you were in Dubai and in Bahrain, what were
16 your duties? What were your responsibilities?

17 A. I was in a foreign counterintelligence position, and
18 so it largely involved both state and nonstate actors in
19 counterintelligence issues and as well as terrorism; although,
20 in a relatively small office, I and colleagues, even though we
21 may have been acting in a foreign counterintelligence
22 capacity, often helped for felony criminal investigations.

23 Q. Where did you go after Dubai?

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1 A. Had a very, very brief assignment as the special
2 agent afloat for an amphibious readiness group, marine
3 expeditionary unit, but then that assignment was curtailed and
4 I was sent to Yemen where I spent, off and on, approximately
5 the next two years.

6 Q. And do you remember the time frame in which you spent
7 that time in Yemen?

8 A. Yes, sir. That was from October of 2000 until in
9 2002, and then sometimes periodic and frequent trips back in
10 the period after that as well.

11 Q. What did you do while you were in Yemen generally, if
12 you could relate that, please?

13 A. From the period of 2000?

14 Q. To 2002, yes, sir.

15 A. I was part of the investigative element in response
16 to the attack on the USS COLE, and then later was named the
17 co-case agent with my partner from the FBI for that
18 investigation, as well as other issues related to al Qaeda in
19 the Arabian region.

20 Q. Who was that other co-case agent in Yemen?

21 A. That was Special Agent Ali Soufan.

22 Q. After your time in Yemen, where did you next go?

23 A. To headquarters, the Washington Navy Yard, NCIS

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1 headquarters in Washington, D.C.

2 Q. And what did you do there?

3 A. I was the division chief -- excuse me, division chief
4 for the newly formed counterterrorism directorate.

5 Q. And how long did you remain there?

6 A. Roughly two years, prior to my next assignment.

7 Q. And what was your next assignment?

8 A. As the Assistant Special Agent in Charge for
9 Counterterrorism in the Southwest Field Office in San Diego,
10 California.

11 Q. How long did you remain in San Diego?

12 A. Roughly a year and a half.

13 Q. And from there where did you go?

14 A. Then I accepted an assignment to the former
15 counterintelligence field activity in Washington, D.C.

16 Q. Your next assignment after that?

17 A. Then returned to NCIS where I was the senior
18 representative to the Deputy Undersecretary of the Navy in the
19 Pentagon.

20 Q. And how long did you hold that position?

21 A. I was there for over two years.

22 Q. Where did you go from there?

23 A. And then my -- prior to my final assignment before

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1 retiring I was a deputy assistant director for national
2 security in counterintelligence operations at NCIS
3 headquarters. And then my position prior to retirement in
4 August of 2011, I was a special agent in charge of the global
5 support field office.

6 Q. And I think you indicated you retired in 2011?

7 A. Yes, sir.

8 Q. And did you -- were you employed subsequent to your
9 retirement?

10 A. Yes.

11 Q. And what was your first job after you retired?

12 A. I accepted a position with The Soufan Group, first in
13 Doha, Qatar and then in Manhattan, New York, a little over
14 four years.

15 Q. Is that the same Ali Soufan who was the case agent
16 back in Yemen?

17 A. Yes, sir.

18 Q. And what did you do for them?

19 A. I was the -- initially the executive director for the
20 training academy in Doha as well as handling business
21 development issues for their -- the hub in the Middle East for
22 The Soufan Group.

23 Q. And after The Soufan Group, did you take on any other

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1 employment?

2 A. Yes, sir, with Deloitte Consulting in Rosslyn,
3 Virginia.

4 Q. Do you have any language skills? And when I say
5 language skills, other than English.

6 A. Yes. I've been formally trained in Arabic and Arabic
7 dialects.

8 Q. And how would you describe your level of competency
9 in speaking Arabic?

10 A. At this time?

11 Q. No. Let's say back in 2002 to 2007.

12 A. Conversational Arabic, both in a more formal setting
13 as well as in a more idiomatic or colloquial, so carry on
14 conversations, whether it was in Bahrain or UAE or Yemen,
15 Jordan or other Arabic-speaking countries.

16 Q. So you did use your skills in your duties in your
17 various Middle Eastern assignments; is that correct?

18 A. Yes, sir. The training was invaluable.

19 Q. And what kind of training was it that they gave you?

20 A. Well, I first studied Arabic, modern standard Arabic,
21 at the Defense Language Institute, and then had follow-on
22 training in North African dialects at Brigham Young
23 University. But like most with learning languages, you really

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1 start to capture an ability to speak a language when you're in
2 country.

3 Q. Sort of an immersion?

4 A. Exactly.

5 Q. I want to go back to October of 2000. Do you
6 remember -- do you recall how you received notice that there
7 had been an attack on the USS COLE?

8 A. Yes, sir.

9 Q. And how -- what was the notice that you received?

10 A. As I mentioned, I was on what turned out to be a very
11 short-time assignment working with marine units in the workups
12 for the -- what's called ARG/MEU, the amphibious readiness
13 group. And it was very early in the morning West Coast time,
14 because that's where the training grounds were in California,
15 San Jose, California.

16 One of my closest friends and a colleague from NCIS
17 who was at the -- still in his assignment to the office in the
18 Dubai consulate called me, told me to turn on the TV
19 immediately. And I saw, as soon as I turned on the TV, there
20 was breaking news from Aden, Yemen -- which I knew very well
21 from many, many trips there previously in my assignments in
22 NCIS -- breaking news that a U.S. destroyer, U.S. naval
23 destroyer had experienced some kind of an explosion.

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1 Q. And once you became aware of that attack, what did
2 you next do or what happened next as far as your
3 responsibilities are concerned?

4 A. Well, I received some calls from our headquarters,
5 essentially placing me on a standby notice, to potentially
6 meet up with the vanguard of NCIS special agents coming from
7 Bahrain, and then FBI special agents on the way there. So the
8 first day, though, it was just a matter of head back to the
9 training with the Marine Corps units and stand by for orders.

10 Q. And did you receive orders?

11 A. I did the next day, yes, sir, to pack up for maybe
12 roughly seven to ten days' worth of gear and get the first
13 available commercial flights over to Aden, Yemen.

14 Q. And did you do that?

15 A. Yes, sir.

16 Q. And did you go directly to Aden?

17 A. It was really kind of a circuitous route with the
18 flights, first up to Los Angeles, then over to Europe, where I
19 had a brief layover. And then I had a layover in Abu Dhabi as
20 well. And actually on my way there I received an
21 investigative lead to carry out with my colleague in the Dubai
22 office from the investigative team in Yemen. And then caught
23 a -- the next available Yemenia Air flight to Aden, Yemen. I

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1 arrived roughly 3:00 in the morning on the 17th of October
2 2000.

3 Q. Were you met by any persons?

4 A. Yes, sir, I was.

5 Q. By whom were you met?

6 A. It was the NCIS senior on the ground, Special Agent
7 Michael Dorsey, and as well as a colleague from the Middle
8 East field office, Special Agent Larry Mullins.

9 Q. Did you go to the hotel where the law enforcement
10 community had gathered?

11 A. Yes, sir, we went directly there.

12 Q. And did you meet with any persons there?

13 A. Yes, I met with the entire investigative team of NCIS
14 and FBI, and some other federal agencies that were in place.
15 And even though it was very early in the morning, we went
16 right to a preoperational investigative brief with, among
17 others, John O'Neill, who was the senior on the ground, late
18 great American from the FBI, New York JTTF; and then others,
19 some leadership elements from the FBI who I knew from
20 previously -- previous work in terrorism cases when I was in
21 Philadelphia.

22 Q. Did they indicate to you what your duties, what your
23 responsibilities would be?

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1 A. Yes. I was directed to co-lead the on-scene
2 investigation for one of the crime scene sites that had been
3 identified by that morning.

4 Q. And how long did you remain there investigating the
5 COLE bombing, I will call it?

6 A. In totality?

7 Q. In totality.

8 A. In totality, it was well over two years.

9 Q. And did you have occasion to conduct interviews of
10 various individuals?

11 A. Yes, sir.

12 Q. I want to jump ahead to 2007. Do you recall being
13 asked to conduct an interview of an individual known as
14 Khallad?

15 A. Yes, sir.

16 Q. And at that time were you supposed to interview any
17 other persons?

18 A. Yes, sir, as part of the working in the -- that part
19 of the high-value detainee program.

20 Q. And who was the other individual you were to
21 interview?

22 A. Abdul Rahim Hussein Muhammad Abdah Nashir al Safani.

23 Q. How is it that you were chosen to conduct the

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1 interviews of al Nashiri and Khallad?

2 A. I would characterize it as because I had been working
3 as the co-case agent for the USS COLE investigation, and so
4 working extensively with issues that related to al Qaeda;
5 there was an inextricable link from East Africa to the
6 USS COLE, to 9/11, and then other events after that. So I
7 was, I would say conservatively, intimately familiar with both
8 of those individuals.

9 Q. Had you met any of those -- either of those
10 individuals previously?

11 A. No, sir.

12 Q. You had not interviewed either of them previously?

13 A. That's correct, I had not.

14 Q. And who were the other members of the team that were
15 going to conduct these interviews?

16 A. For Khallad, also known as his given name Walid
17 bin'Attash; myself; Special Agent Stephen Gaudin of the FBI;
18 and Special Agent Andrew Emley of NCIS.

19 Q. And where were these interviews conducted?

20 A. They were conducted at the Naval Station Guantanamo
21 Bay.

22 Q. And what was the purpose of these interviews?

23 A. The purpose of the interviews were to -- from the

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1 establishment of this phase of the high-value detainee
2 program, to go in with -- and it's not my term, but commonly
3 in the media the so-called white team, to conduct law
4 enforcement as well as informational interviews of these
5 individuals in preparation for eventual trial.

6 Q. Did you use a translator to conduct these interviews?

7 A. Yes, we did.

8 Q. So you did not -- let me ask you this: The other
9 team members, both Emley and Gaudin, do they speak Arabic?

10 A. They both had training in Arabic, yes, sir.

11 Q. But you used a translator as opposed to trying to
12 conduct it yourselves in Arabic?

13 A. Exactly, at least for myself in conducting the more
14 important, the critical interviews like these, very important
15 to have a native speaker in the room.

16 Q. And do you remember whom you interviewed first,
17 Khallad or Nashiri?

18 A. Yes, sir. It was Khallad.

19 Q. And do you remember when these interviews occurred,
20 date-wise?

21 A. Not exactly, but I believe it was in the -- if not
22 the late part of 2006, the early part of 2007. And I would
23 say more toward the early part of 2007.

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1 Q. And did these take place over hours, days? How long
2 did you interview Khallad?

3 A. It was over, at least modestly, a handful of days.
4 I'd say four, possibly five. And because the interviews were
5 voluntary as far as start/end time, it was a number of hours
6 for each session.

7 Q. I want to start first with your interview of Khallad.
8 How would you describe his physical appearance when you met
9 with him?

10 A. Khallad seemed to be in good physical shape, and in
11 talking with him, he confirmed that as well, that he was
12 experiencing no medical issues. He was mentally alert and
13 lucid in conversation.

14 Q. Did you advise him of his rights?

15 A. It was not so much the right to an attorney
16 advisement and the right to remain silent or Miranda, as we
17 know it, but it was more of a -- and this was crafted by, you
18 know, the leaders in military commission, I'm sure in
19 consulting with the Department of Justice, where essentially
20 we were saying we're there to talk with him, it was voluntary,
21 he could end it at any time, and the information could be of
22 potential use against him. But essentially we were there for
23 him, and he had the levers of control on ending at any time.

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1 Q. Was he informed -- just to be clear, was he informed
2 that he could end these interviews at any time?

3 A. Yes, sir. And, in fact, at the start of the day and
4 before we would begin after each break, every time.

5 Q. Was he shackled in any way while you were speaking
6 with him?

7 A. There was a restraint system within the special part
8 of the camp where we conducted the interviews where there was
9 at least one restraint around an ankle in the room, but I
10 believe that's the only part that was restrained. In this
11 case his prosthetic device actually had a shackle around it.

12 Q. Khallad has one leg; is that correct? The other one
13 he lost in some sort of battle?

14 A. Yes, sir.

15 Q. Did he complain that he had received or had been
16 tortured in any way while at Guantanamo?

17 A. We -- there was a good amount of conversation -- oh,
18 while he was in Guantanamo?

19 Q. Yes.

20 A. No, sir. Never heard -- I do not recall anything
21 that had to do with ill treatment while he was in Guantanamo.

22 Q. What sort of room was the interview conducted in?

23 A. It was a prefabricated trailer-like room that had a

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1 bunk area that was separate from where we conducted the
2 interview area, with bathroom facilities, air conditioning,
3 and plastic chairs, kind of like lawn chairs.

4 Q. Was he given access to the bathroom?

5 A. Yes, sir, if he needed it.

6 Q. Were there any refreshments or tea, things of that
7 nature, served during the course of these interviews?

8 A. We brought refreshments, refreshments with us for the
9 interviews, but it was within the contours of the rules of the
10 camp.

11 Q. Do you remember generally the topics you discussed
12 with him?

13 A. Yes, sir.

14 Q. All right. And could you give us an overview of what
15 those topics were?

16 A. Yes. He, Khallad, provided us a really quite
17 detailed chronology of his involvement with al Qaeda
18 activities from roughly the period of 1998 up until his
19 capture. He was really quite detailed in particular about his
20 role as being essentially Khalid Shaikh Mohammad's right-hand
21 man out of Pakistan in doing, for example, the casing
22 operations in Southeast Asia. And so we talked about that at
23 length, as long as he was willing to talk about that, as well

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1 as other personalities within the al Qaeda structure -- excuse
2 me -- al Qaeda structure.

3 Q. Did he discuss -- okay?

4 A. Thank you.

5 Q. All right. Did he discuss with you the bombing of
6 the USS COLE?

7 A. Yes, he did.

8 Q. And did he discuss with you an individual named
9 Nashiri?

10 A. He did.

11 Q. And what did he say about the COLE, and specifically
12 what did he say about Nashiri's role in it?

13 A. He -- I remember almost like it was yesterday,
14 because it was some new information, at least for me in my
15 involvement with the investigation with al Qaeda, in how it
16 was essentially, as Khallad characterized it, a joint
17 operation, where they were both charged with al Qaeda
18 leadership, along with another individual in Yemen named Hadi
19 Dilqum to essentially gather tons of high explosives in
20 preparation for what he referred to as the Ships Operation.

21 Q. What did he say Nashiri's role was in it?

22 A. Like Khallad's role, was to gather, help gather and
23 store high explosives in preparation for what was to be

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1 actually a four-pronged attack initially, and also put
2 together other things that would be important for logistics,
3 safe houses, for example, vehicles, documents, and those sort
4 of things.

5 And then he provided new details as well, according
6 to how he portrayed it, that he was arrested in a case of
7 mistaken identity by Yemen authorities, that -- this is
8 Khallad.

9 Q. And what impact did that have on his operations?

10 A. Well, after he was released from Yemen custody, word
11 was sent from al Qaeda central in Afghanistan for Khallad to
12 return immediately to country without any questions asked,
13 paraphrasing from what he told us.

14 And so essentially, again the way he portrayed it, it
15 was sort of a handoff to Abd Rahim Nashiri as the leader of
16 what they were calling the Ships Operation.

17 Q. Now, you indicated that this was new information to
18 you; is that correct?

19 A. That's correct.

20 Q. Were any of the questions that were put to Khallad
21 based on any statements that Nashiri had previously given to
22 law enforcement authorities?

23 A. No, sir, not from my perspective.

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1 Q. Now, you indicated you spoke with him for a number of
2 days; is that correct?

3 A. Yes.

4 Q. Subsequent to your discussions with Khallad, did you
5 then interview Nashiri?

6 A. Yes, sir, we did.

7 Q. And did this interview take place in the same room?

8 A. It took place, if not in the same room, the same
9 facility, because there were multiple interview rooms within
10 that facility; but similar, identical, you know, as far as the
11 physical setting.

12 Q. Let me ask you first about his physical well-being.
13 How did he appear to you, Nashiri, physically when you
14 conducted your interviews?

15 A. During all the interviews we conducted with
16 Mr. Nashiri, he was in good physical shape. He was in good
17 mental order, all his faculties there, though he did complain
18 occasionally on and off about some back pain, if I recall. So
19 at that time, at least for my modus operandi in training, we
20 take a good amount of time to make sure the individual is okay
21 physically to continue. So he at no time indicated he was in
22 too ill or poor health to continue, but he did have occasional
23 complaints of back pain.

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1 Q. Did he complain of any torture, that he had been
2 tortured in any way since he had arrived in Guantanamo?

3 A. I hesitate in answering that. If I can, let's say,
4 draw a line for when he arrived with the other high-value
5 detainees in Guantanamo, when President Bush started to
6 establish the program, he made no complaints about treatment
7 from that time in Guantanamo.

8 Q. Let me break that down. He arrived -- did he
9 indicate to you when he had arrived in Guantanamo?

10 A. I don't recall if he provided that to us, but we knew
11 when they arrived.

12 Q. Did he say, from the time that he arrived in
13 Guantanamo until the time you talked to him, that he had been
14 mistreated in any way?

15 A. No, I don't recall any complaints about mistreatment
16 during that period, correct.

17 Q. Was he restrained in any way while you questioned
18 him?

19 A. In that Guantanamo setting, in that camp, as I
20 recall, there was at least one, one restraint on a leg only.

21 Q. The same -- the same as happened with Khallad?

22 A. Yes, sir, exactly.

23 Q. Was there a bathroom facility where the interview was

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1 conducted?

2 A. Yes.

3 Q. Was he allowed access to it?

4 A. He was allowed access if he needed to, yes, sir.

5 Q. Were there refreshments provided during the
6 interviews?

7 A. Like with Khallad, we, my colleagues, brought tea and
8 some other light refreshments, again according to the rules of
9 the camp.

10 Q. And was he advised of -- given advice of rights?

11 A. Yes, sir, the same sort of rights advisement that the
12 teams were provided in that setting. Yes, sir.

13 Q. Was he aware that he could end the interview at any
14 time?

15 A. To the best of my knowledge, ability, absolutely,
16 because again, our procedures were for every time we would
17 start at the beginning of the day and after every break, we
18 re-reviewed those rights advisements and made sure the
19 individual understood.

20 Q. And so the record is clear, both as to Khallad and
21 Nashiri, how did you advise those -- both these individuals of
22 their rights?

23 A. We would procedurally read the rights form in

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1 English, and then it was translated almost simultaneously into
2 Arabic for them, and then dialogue to make sure that they
3 understood and acknowledge their rights as they were read to
4 them.

5 Q. And did the interpreter/translator indicate that he
6 gave a positive, that he understood his rights?

7 A. Yes.

8 Q. Did you observe -- and I'm just asking about
9 observation. Did you see anything that would have led you to
10 believe that either Mr. Nashiri or Khallad did not understand
11 what was being said to them?

12 A. Not in any way.

13 Q. And based on your Middle Eastern or your Arabic
14 skills, was there anything that you heard that would indicate
15 to you that there was a difficulty in the translation process?

16 A. No, sir. And combined with the confidence that both
17 Special Agent Emley and Special Agent Gaudin had with Arabic,
18 that we were in really good shape there.

19 Q. And your purpose in interviewing Nashiri, was it the
20 same as your purpose in interviewing Khallad?

21 A. Yes, sir.

22 Q. And what was that purpose again?

23 A. It was to -- always in Guantanamo for information or

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1 intelligence purposes, but as well as potential for trial
2 preparation.

3 Q. And after advising him of his rights, did you have
4 occasion to discuss the USS COLE bombing with him?

5 A. Yes, sir.

6 Q. Were there any other topics that you discussed with
7 him?

8 A. Yes. We went into kind of a chronology of
9 Mr. Nashiri's life, you know, from his growing up in
10 Saudi Arabia. And I was interested in -- because
11 professionally and empirically this is important. I was very
12 interested to find out why they fight, what it is about them
13 that motivates them to violent extremism and the actions that
14 they took. So that was a real good conversation in that
15 regard.

16 Q. And what did he tell you?

17 A. He said -- and just summing up for a sense of
18 purpose -- or time here, that he was angry with the ruling
19 regime in Saudi Arabia and what he referred to as one of the
20 apostate ruling families in the Gulf. But there was a boiling
21 sense, a growing sense of frustration that the lack of
22 opportunities, the un-Islamic ways of the Saud family were
23 enabled by the United States.

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1 So then that really kind of provided details in what
2 motivated him, you know, why it wasn't just the focus on the
3 ruling regimes and why it was against the United States. So
4 he filled in a lot of blanks there.

5 Q. Did he discuss his time in al Qaeda?

6 A. To an extent.

7 Q. Now, were the questions that were put to him in any
8 way based on prior interviews that had been conducted of
9 Mr. Nashiri?

10 A. No, sir. The only thing I was aware of, again
11 because of my role as the co-case agent for the COLE -- I was
12 following the intelligence product reporting coming out of
13 places we don't know, we didn't know at the time. But even
14 though it was sourced, in the sense that it's not revealing
15 who the source was, I was following the reporting about the
16 COLE, ties to East Africa, 9/11, al Qaeda.

17 But for your question, though, for any interviews, I
18 wasn't aware of any results of interviews prior to my speaking
19 with Mr. Nashiri.

20 Q. How many days, do you think, or how long do you think
21 you spoke with him?

22 A. I would estimate three, maybe four days before he
23 called a time-out.

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1 Q. He called a time-out?

2 A. Yes, sir.

3 Q. What do you mean he called a time-out?

4 A. Well, as part -- a big part of our rights advisement,
5 again emphasizing they can end it at any time. So after
6 three, maybe four days he said, again to the best I can
7 remember, he was fatigued and really had nothing more to say
8 to us.

9 Q. And you honored that statement by him, correct?

10 A. Yes, sir.

11 Q. Did you then reinterview Khallad?

12 A. Yes.

13 Q. And what was the topics that were covered during
14 those interviews?

15 A. There was a pause in our interviews with Khallad, and
16 I cannot recall the reason, but it had to have been a week to
17 a few weeks, because I headed back up to Washington and then
18 was asked to return to Guantanamo. The best I can remember
19 were follow-up questions on some pending items where there may
20 have been a little bit of ambiguity.

21 Q. Again, were any of the questions inspired by
22 statements Nashiri had given upon his arrest or being taken
23 into custody?

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1 A. Neither Khallad nor Nashiri, because again, I wasn't
2 aware of any -- any statements that were taken.

3 Q. I want to jump ahead to November of 2007. Did you
4 have occasion to be involved in the interviewing of an
5 individual named Badawi?

6 A. Yes, sir.

7 Q. And how did you come to be involved in that
8 particular interview process?

9 A. I was working with colleagues, like Special Agent
10 Gaudin, Special Agent Emley, with the high-value detainee
11 program in the Washington, D.C. area. And it was a late
12 Saturday afternoon, and I received a call from the leadership
13 element of the HVD notifying us that Jamal Al-Badawi had been
14 recaptured, which we knew about, but there was word that he
15 was actually in either house arrest or actually free.

16 So I was told -- I hope this isn't too much more
17 detail than you had asked -- but I was told that the
18 United States Government démarche the government of Yemen
19 demanding action to Jamal Al-Badawi. So we received a tap on
20 the shoulder to go interview Jamal Al-Badawi.

21 Q. How much time transpired between the time that you
22 were told that he had been captured and he was to be
23 interviewed and did you meet with him?

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1 A. I -- we immediately turned around from beginning that
2 Saturday, early evening, were on a flight by Sunday afternoon
3 out of Dulles and in Yemen within the next few days. And so
4 as soon as the hosts were ready for us, we were interviewing
5 Jamal Al-Badawi in much less than a week later.

6 Q. When you say we, who is we, sir?

7 A. Excuse me. That was again Special Agent Stephen
8 Gaudin, FBI; NCIS Special Agent Andrew Emley; as well as now
9 retired FBI Special Agent Carlos Fernandez.

10 Q. Now, when you arrived -- prior to your conducting an
11 interview, had you received any instructions as to what the
12 purpose of the interview was to be?

13 A. Yes, sir.

14 Q. And what were those instructions?

15 A. From what I recall, the number one priority was
16 information from Jamal Al-Badawi about those that had escaped
17 from the Yemen security service prison in 2006. And there
18 were some notable al Qaeda figures that went back to close
19 associates of Usama bin Laden in Afghanistan. So that was
20 number one, was the intelligence ----

21 Q. Let me stop you so we have some context. You said
22 escape and some he escaped with. Could you give His Honor
23 context, just a little of the background of Mr. Badawi?

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1 A. Yes, Jamal Al-Badawi was one of the key local
2 trusted, as they used the term, bothers for the al Qaeda cell
3 of the Ships Operation. So Jamal Al-Badawi had a key role in
4 logistics, moving network work, like moving people, selecting
5 people, trusted confidence that he knew from al Qaeda,
6 al Qaeda associates.

7 And al Qaeda's modus operandi at the time, they may
8 send some leaders for the operation from Afghanistan
9 downrange, but then they would link up with a trusted person
10 who knew the local landscape, and that was Jamal Al-Badawi,
11 who was from that area of Aden, Al Burayqah area of Aden,
12 Yemen.

13 So Jamal Al-Badawi, after his capture and going
14 through Yemen criminal justice system, as well as being
15 indicted in the Southern District in New York in the U.S., he
16 was initially sentenced to death by the Yemen government, and
17 then that sentence was later commuted. And subsequently he
18 escaped from prison the first time from their security service
19 prison in 2003, recaptured ----

20 Q. That's a prison in Yemen, correct?

21 A. Yes, sir. This prison I referred to in 2003 was in
22 Aden, Yemen. Then when he was recaptured and injured while he
23 was recaptured, he was sent to their security service

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1 headquarters prison in Sana'a, Yemen where he escaped in 2006.

2 Q. So this capture of which you're speaking now is his
3 second escape, correct?

4 A. Correct, sir.

5 Q. So again, the purpose of your interview was to what?

6 A. He -- since -- during his time in prison,
7 particularly in Sana'a, as well as those he escaped with, were
8 key al Qaeda members and al Qaeda associates. So that was
9 task number one, from what I recall back at our respective
10 headquarters, for information about those. Nasir Al-Washishi,
11 for example, he later on became the head of what was called al
12 Qaeda in the Arabian Peninsula, and still called that.

13 Another individual, for example, named Qasim Al-Rimi,
14 Abdallah Al-Rimi, that were involved with both al Qaeda, and
15 Abdallah was involved with the COLE.

16 So getting information about these individuals, their
17 whereabouts, their network, their communications nodes, and
18 disrupting terrorism plots were important.

19 We also had tasking as well from headquarters back
20 home about certain teaching institutions in Yemen that were
21 known to espouse violent extremism, and also about some other
22 personalities involved.

23 Q. Were you interested at all in getting a statement

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1 with him regarding his prior involvement in the USS COLE
2 bombing?

3 A. Generally, no.

4 Q. So you were looking more forward than backward?

5 A. Exactly, with one exception. There was -- there
6 were -- one of the ambiguities I mentioned that we had tasking
7 on was a few items that did pertain to Walid bin'Attash, or
8 Khallad.

9 Q. Now, did you all come to some sort of -- when I say
10 you all, the team, yourself, Agent Gaudin and Agent Emley, did
11 you reach some sort of agreement as to an interview protocol?

12 A. Yes.

13 Q. And what was that?

14 A. In an interview generally, at least among federal law
15 enforcement, usually there's a lead interviewer. But then the
16 others that are part of the team, knowing the case so well,
17 fill in gaps and seams in the interview process, and then one
18 would usually take notes.

19 But other than that, though -- because we had worked
20 with each other so extensively prior, we had a good feel
21 about, you know, doing a three-man weave, if you will, as to
22 following certain lines of questioning.

23 Q. Was there a decision made as to whom would take

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1 notes?

2 A. There was, but I can't recall the details as to who
3 had that role or if we alternated.

4 Q. Did you write the final report?

5 A. I did not write the final report.

6 Q. Have you reviewed the final report?

7 A. Yes, I did.

8 Q. Now, I want to talk about the interview atmospherics
9 for a second. Where was the interview of Badawi conducted?

10 A. It was conducted in one of the anterooms in the
11 Political Security Organization headquarters in Sana'a, Yemen.

12 Q. And could you describe the office in which it was
13 conducted?

14 A. Yes, sir. This office was -- it's a little bit
15 larger than the previous -- the offices I had spent many, many
16 hours in the years before conducting interviews. It had ample
17 room for a chair and desk, chairs for us, chairs for Jamal
18 Al-Badawi. And it was comfortable. It was relatively clean
19 by local standards.

20 Q. And how many days or how many times did you interview
21 Mr. Badawi?

22 A. We had the opportunity to interview him, I would
23 estimate, maybe five times over the course of the next two

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1 weeks, five times each week over the course of the next two
2 weeks, roughly.

3 Q. Approximately ten times?

4 A. I would say around ten times, yes, sir.

5 Q. And how would you describe him health-wise when you
6 first -- physically, when you first met with him?

7 A. Jamal seemed to be fit, good spirits. He had clean
8 clothes in every session, coherent, lucid, and in relatively
9 good spirits, I would say.

10 Q. You indicated that his clothes were clean. Did he
11 wear the same clothes every day?

12 A. I don't think so, because knowing the way the system
13 works, the local family members provide clothing. So I don't
14 think it was the same thing every day.

15 Q. Do you know where he was staying in between your
16 interview sessions?

17 A. While ----

18 Q. I'm sorry.

19 A. While we -- that's okay.

20 While we had access to Jamal Al-Badawi, my
21 understanding was that he was remaining in Yemen custody as
22 part of the broader quid pro quo of his being there with us.

23 Q. Did he complain at all about his surroundings or

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1 where he was being kept?

2 A. He did not complain to us.

3 Q. When you met with him, did you give him an advice of
4 rights in any way?

5 A. Yes, sir.

6 Q. And what was told to him?

7 A. This was the -- I believe, the FD-395 provided to us
8 that was in Arabic and English, and it was a full rights
9 advisement and, according to our procedures, read in English
10 by one of us, usually Special Agent Gaudin, and then
11 translated verbatim in Arabic to Jamal, and then his
12 acknowledgment of the rights advisement back to us translated
13 from Arabic.

14 Q. Let me back up ----

15 A. Acknowledgment. Yes, sir.

16 Q. You again used -- as you had with Nashiri and
17 Khallad, you used an interpreter?

18 A. Yes.

19 Q. At any time during the interviews, did it ever
20 appear, at least visually, that they were having any
21 difficulty communicating?

22 A. Not at all.

23 Q. And again, based on your Arabic training and

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1 abilities, at any time did you detect that they were having
2 difficulty communicating?

3 A. No, I did not.

4 Q. So how was the interview, or at least the
5 questioning, conducted?

6 A. It was conducted in a conversational tone. It is my
7 custom to start out in a very general and broad sense and then
8 work to more specific questions and answers.

9 Q. Was the question given to the translator who then
10 gave it to Badawi who then gave the answer? Is that how it
11 worked?

12 A. Exactly, yes, sir.

13 Q. Could you describe that, please?

14 A. Procedurally, yes. We would ask the question, then
15 our professional interpreter, language specialist, would then
16 recite the question verbatim in Arabic to Jamal, wait for the
17 answer, and where we needed that assistance, translated back
18 into English for us.

19 Q. During these sessions were tea -- during these
20 sessions, excuse me, tea, refreshments, bathroom breaks, were
21 those all available to him?

22 A. All available to him, yes, sir.

23 Q. Time for prayer?

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1 A. Time for prayer, yes, indeed.

2 Q. Was he restrained in any way during the interviews?

3 A. He, to the best of my recollection, was not
4 restrained coming into the interview; definitely not during
5 the interview or when he concluded the interview at the end of
6 the session.

7 Q. And was there any other persons, other than you,
8 Emley, Gaudin, and the translator in the room during the
9 questioning?

10 A. Yes, sir. Most of the time two, but always at least
11 one of our counterparts from the security service.

12 Q. That would be what we call the PSO?

13 A. Yes, sir, Political Security Organization.

14 Q. Were they involved, actively involved in it, or were
15 they serving in a more passive role?

16 A. During these sessions with Jamal, definitely in a
17 more passive role. In fact, I'd be hard pressed to even
18 recall any questions and answers by our counterparts, whom I
19 had personally worked with extensively prior to that.

20 Q. How would you describe the interaction between
21 Mr. Badawi and the PSO officer that was present?

22 A. It was polite. It was cordial. Nothing remarkable
23 at all.

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1 Q. After you advised him of his rights, was he willing
2 to speak with you?

3 A. Yes, he was.

4 Q. And again ----

5 A. Waived the rights.

6 Q. Again, as you had with the other individuals, could
7 you describe generally the topics that you covered?

8 A. Yeah. The topics we covered, as I said, as much
9 detail as possible about those he was in the Yemen security
10 prison with, the escape, how they escaped, who gave them
11 shelter and sanctuary, their communications methodology, and
12 trying to drill down on more details about those very
13 important nodes of conversation and communication.

14 There was the part I mentioned about clearing up some
15 still fuzziness about issues that pertain specifically to
16 Khallad, and then other general and various issues related to
17 counterterrorism, antiterrorism matters.

18 Q. Did he at any point -- or at any point during the
19 discussion, was the topic of Nashiri brought up?

20 A. It did come up in the course of conversation, yes,
21 sir.

22 Q. And how did it come up?

23 A. When Jamal, during a really very important part of

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1 our interview sessions with him, provided new information, new
2 to me as the case agent, about the chronology and who was
3 involved in the early stage of what became the Ships
4 Operation. So he had mentioned that Bilal, as he called him
5 or Bilal Al-Harazi, he had met him as early as 1998 or '99,
6 where Jamal was working in Sana'a at the time.

7 Q. And if you could, give us some specifics as to what
8 he said.

9 A. There was initially tasking specifically or directly
10 from Khallad, Walid bin'Attash, and funding to buy an outboard
11 motor and boat. But then later on there was involvement with
12 Mr. Nashiri's element that was working out of Al Hudaydah,
13 Yemen, where -- and again, this was new and really quite
14 useful information about a rudimentary but effective seaborne
15 surveillance operation -- where individuals that Jamal knew
16 from Aden, Yemen, were conducting timing of ships, gray-hulled
17 ships, transiting from Aden up to the north and the Red Sea to
18 Hudaydah. And then he mentioned Bilal Al-Harazi's crew in
19 Hudaydah were doing the same thing. So they would compare
20 timing on ship routes, transit times.

21 Q. This was all new information to you?

22 A. It was to me, yes, sir.

23 Q. Again, was any of the questioning of Badawi inspired

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1 by any previous statements that -- or any statements that
2 Nashiri had given at the time of his arrest or when he was
3 taken into custody?

4 A. No, sir. In fact, it wasn't even a part of our
5 tasking really over there with Jamal Al-Badawi.

6 Q. Did you have occasion to show Mr. Badawi any
7 photographs?

8 A. Yes, sir.

9 Q. Did you specifically show him a photograph of
10 Mr. Nashiri?

11 A. Yes, we did.

12 Q. And was he able to identify him?

13 A. He did.

14 Q. And you were also familiar with Mr. Nashiri, correct?

15 A. Yes, sir.

16 Q. You had met him by that time?

17 A. I had met him by that time, yes, sir.

18 Q. Now, I specifically asked you whether or not you had
19 reviewed the report that had been prepared regarding this
20 interview, correct?

21 A. Correct.

22 Q. And did it accurately contain -- did it accurately
23 reflect what was told to you by Badawi during those

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1 interviews?

2 A. It did.

3 Q. Would you have made any -- were there any changes
4 that you would have made to it?

5 A. Not after, especially with the amount of time that --
6 you know, since that interview. No, I wouldn't see any need
7 or see fit to make any changes.

8 TC [MR. MILLER]: I have nothing further, Your Honor.
9 Thank you.

10 MJ [Col SPATH]: All right. Thank you.

11 Defense Counsel, any questions?

12 DDC [LT PIETTE]: Your Honor, unfortunately, because I am
13 not qualified as learned counsel and no learned counsel is
14 present and this is a capital proceeding, I cannot participate
15 in this proceeding.

16 MJ [Col SPATH]: All right. I appreciate that. You are
17 choosing not to participate, as I have said multiple times. I
18 recognize your feeling about that, but many cases with learned
19 counsel go on without a learned counsel at different points,
20 and it's even allowed for in these proceedings.

21 So again, I recognize your position, but you're
22 waiving your right, at least on this issue, to cross-examine
23 Mr. McFadden.

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1 Mr. McFadden, I've given this order a couple times.
2 I'm going to give you the same order. You've probably heard
3 it before. Until we resolve the particular motion we're
4 dealing with, which is a motion to suppress the statements of
5 Mr. Al-Badawi, I'm going to order you not to discuss your
6 testimony with anybody else. Again, in this case it's a
7 little unique in that I think that's going to take a little
8 bit longer than a few days. So just keep that in mind as we
9 move forward. Okay?

10 WIT: Yes, sir.

11 MJ [Col SPATH]: All right. I appreciate you taking the
12 time to testify. I have a feeling you'll have an opportunity
13 to do that again in the future. But thank you very much.

14 WIT: Thank you, Your Honor.

15 MJ [Col SPATH]: All right. And you can disconnect -- or
16 they'll disconnect for you there. Thank you.

17 WIT: Thank you.

18 **[The witness was warned, temporarily excused, and the VTC was**
19 **terminated.]**

20 MJ [Col SPATH]: All right. With regard to Appellate
21 Exhibit 327C, there were two additional witnesses the defense
22 requested. I ordered them produced at defense request. The
23 government indicated they likely weren't going to call those

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1 two witnesses when they were responding and filing in the 327
2 series. So let me just check with the defense counsel.

3 Defense Counsel, in 327C you listed four witnesses,
4 two that we've heard from and two that the government had
5 denied and I ordered made available. Are you going to call
6 either of them?

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

8 MJ [Col SPATH]: Okay.

9 Trial Counsel, recognizing you have the burden in a
10 motion to suppress, do you plan on calling either of those
11 witnesses?

12 TC [MR. MILLER]: No, Your Honor.

13 MJ [Col SPATH]: All right. I don't know if they are
14 available or have traveled anywhere. To the extent they are
15 waiting to testify, please let them know this afternoon they
16 are released.

17 TC [MR. MILLER]: Thank you, Your Honor. That was going
18 to be my question. Thank you, sir.

19 MJ [Col SPATH]: Let me summarize a few things. One, we
20 had a very brief 802 session after the deposition. In fact,
21 we did it in the courtroom with everybody, all the parties
22 present, and Mr. al Nashiri. It was only about one issue, and
23 that is whether Mr. McFadden was going to testify in person or

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1 by VTC. And trial counsel let me know he would be testifying
2 by VTC. That was the extent of the 802. And again, it
3 happened right after the deposition.

4 Trial Counsel, want to add anything to my summary of
5 the 802?

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

7 MJ [Col SPATH]: Defense Counsel?

8 DDC [LT PIETTE]: Defense concurs. Nothing to add.

9 MJ [Col SPATH]: In relation to the deposition, it is
10 closed. I recognize that, so to the extent any comments were
11 made there, I will just say that the same issue that we've
12 seen certainly here in public settings occurred, and that is
13 defense counsel did not ask any questions, despite the witness
14 being available for cross-examination.

15 In my role as deposition officer I commented on the
16 amount of time that the defense has had to prepare for
17 cross-examination, well over three months after a direct
18 examination, which is pretty unique in and of itself. That's
19 a long time to prepare a cross.

20 And then counsel for the government made some
21 comments. Defense counsel made some comments as well, just
22 about the fact that they weren't going to conduct any based on
23 the absent, willfully, appointed learned counsel.

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1 Trial Counsel, do you want to add anything to the
2 public record outside of the deposition about the deposition?

3 TC [MR. MILLER]: Briefly, Your Honor. I think I would
4 like to take this opportunity to publicly say what we said
5 during the deposition. It is brief.

6 But again, during the deposition of Mr. al Darbi from
7 the 1st of August to the 4th of August of this year,
8 Lieutenant Piette appeared on behalf of the accused, along
9 with Mr. Kammen and Ms. Eliades. Lieutenant Piette spoke on
10 the record to make objections and other assertions on behalf
11 of the accused, and by the prosecution count, Lieutenant
12 Piette made 89 objections; Mr. Kammen made 66 objections;
13 Ms. Eliades, 54 objections.

14 At the close of the last session on November 3rd,
15 2017, just a couple days ago, Lieutenant Piette stated, "I
16 don't know what direct --" speaking of the examination of
17 Mr. al Darbi "-- the government was paying attention to, but a
18 direct that seriously undermined their case and certainly
19 established no elements that would prove Mr. al Nashiri was
20 guilty."

21 As I stated during the deposition, this statement
22 shows a knowledge of the testimony and a resulting confidence
23 to publicly make an evaluation and judgment regarding the

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1 testimony and the value thereof.

2 Thank you for that opportunity, Your Honor.

3 MJ [Col SPATH]: You're welcome.

4 Defense Counsel, do you want to add anything to the
5 public record regarding the deposition?

6 DDC [LT PIETTE]: Yes, Your Honor. I mean, obviously I'm
7 just going to reiterate my position for the most part, that
8 this is a capital case. The government -- that deposition was
9 probably one of the government's only live eyewitnesses to
10 many of these events, and everything in a capital case relates
11 to the capital issues, especially such a critical witness that
12 the government described as being devastating to the defense,
13 meaning that they believe that his testimony was directly
14 relevant to the possible conviction and what they're
15 ultimately seeking, the execution of Mr. al Nashiri.

16 So as far as my ability to participate, the
17 difference is last time learned counsel was present; they were
18 here. And there was certainly no strategy in just spotting
19 objections and making them, when you can waive those
20 objections later in a deposition setting.

21 So here it's entirely different. There was no
22 learned counsel present. There is no learned counsel present.
23 I'm not in a position to take a position as to why that is,

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1 other than that it was not a choice of Mr. al Nashiri and is
2 not a strategy. And we hope that any objective observer who's
3 looking at this case, who doesn't have an agenda one way or
4 the other, can see that when the time is right.

5 Thank you, Your Honor.

6 MJ [Col SPATH]: I don't have a lot to add to that. I
7 think I've made clear, and again, I'll make findings.
8 Mr. Kammen's absence is by choice and voluntary, despite being
9 ordered to be here on multiple occasions, despite having been
10 involved in Mr. al Nashiri's defense for over six years,
11 despite being paid on the hour by the hour throughout the
12 process and investing hundreds of hours, thousands of hours.
13 I can't envision a tribunal that would simply release a person
14 like that without a showing on the record of a pretty
15 significant conflict.

16 I will tell you the reason I'm holding off on
17 findings is, to the extent things could be declassified, I'm
18 trying to get that done because it would be nice that my
19 findings were something that could be public; and if those two
20 witnesses become available, hypotheticals that I can ask them
21 or the government or the defense, about what they made their
22 assertions based on.

23 Another frustration is -- and we've talked about it

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1 before -- in an effort to be reasonable I postponed the
2 September session at Mr. Kammen's request so that he could,
3 frankly, tend to an issue that was not particularly serious.
4 It was so he was in a position to provide transportation to
5 his wife who had a knee operation.

6 And I did that fully believing, of course, by
7 November we would have the opportunity to go through this
8 cross-examination of a witness we've held subject to recall
9 for months and months to be available for cross-examination.
10 Frankly, I can't think of a counsel who would rather -- what
11 better position to be in than to wait all those months to do a
12 cross-examination? So often they happen immediately upon the
13 end of the direct examination.

14 Again, as I work through findings, I am likely to
15 make findings that this is a strategy decision. It is evident
16 by the lack of counsel coming into the courtroom. It's
17 evident by the continued recalcitrance of learned counsel and
18 two DoD civilians who are being paid completely by the
19 U.S. Government and were hired and then appointed to represent
20 Mr. al Nashiri.

21 I, too, can't imagine. I've never seen anything like
22 it. But we're where we're at, and I'll continue to try to
23 make the best calls I can, frankly, as I think I've made

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1 clear.

2 I take it that our next order of business is
3 tomorrow, 207, Appellate Exhibit 207, and I think it is, I
4 think -- Colonel Wells, you said three witnesses tomorrow is
5 the goal? Do I have that right, or was it two tomorrow? I
6 just put my notes in the other room. I don't remember if it
7 was two or three.

8 MATC [COL WELLS]: Your Honor, this is developing. I
9 think our objective, depending on what the defense would like
10 to do with the witnesses, we'd like to get as many witnesses
11 in as possible that are available, and then see if we could
12 fly them out on Thursday, if possible. So tonight I would
13 like to give Mr. Potter an update, and also the defense.

14 MJ [Col SPATH]: That works. Thank you. Just keep us
15 posted.

16 I didn't ask before the open session this morning or
17 now if we transmitted these proceedings in accordance with the
18 order already in place from the commission. Are they being
19 transmitted?

20 TC [MR. MILLER]: They are, Your Honor.

21 MJ [Col SPATH]: All right. Thank you, Mr. Miller. If I
22 forget to ask, don't hesitate to catch me. But we've got it
23 covered, so.

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1 All right. Then absent a change in the update, let's
2 count on being here at 9:00 tomorrow for Appellate Exhibit 207
3 witnesses. If you would, give me an update how we're doing
4 with the production of the other two witnesses, too, as that
5 becomes available. I'll see both sides at 0900 tomorrow for
6 Appellate Exhibit 207.

7 Mr. Miller.

8 TC [MR. MILLER]: Your Honor, if I may make a short report
9 to the court. The prosecution has been informed that Major
10 Kenitra Fewell -- am I saying it right? -- Fewell, has now
11 received a TS/SCI clearance and has been read on to four of
12 five tickets, with arrangements being made to have her read on
13 to the fifth ticket imminently, that which is -- of course,
14 that's the last security-related requirement to have her --
15 give her the ability to have contact with Mr. al Nashiri.

16 But I want to again be clear, the prosecution has no
17 influence over the investigation and clearance process.

18 MJ [Col SPATH]: No, I recognize you don't have influence
19 over it. But again, in your normal roles as representing the
20 government, sometimes calls from you mean a lot more than
21 calls from somebody else. But I under -- I am not suggesting
22 for a moment we do anything inappropriate. I'm just trying
23 to ----

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1 TC [MR. MILLER]: I understand. I just, because of the
2 timing, you know.

3 MJ [Col SPATH]: It was probably just because of the
4 timing I asked. It is Major Fewell, and I appreciate that.

5 TC [MR. MILLER]: Fewell. And I meant no disrespect.

6 MJ [Col SPATH]: No worries. Okay.

7 Defense Counsel, anything else?

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

9 TC [MR. MILLER]: Nothing further from the government.
10 Thank you.

11 MJ [Col SPATH]: See you all tomorrow for Appellate
12 Exhibit 207. We are in recess.

13 [The R.M.C. 803 session recessed at 1336, 7 November 2017.]

14 [END OF PAGE]

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