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Proceedings recorded by mechanical stenography, transcript
produced by computer

1 THE COURT: Good morning. My understanding is
2 that you have a video to show and then after that we
3 will -- I will hear your arguments on the role in the
4 offense objection and I'll rule on that.

5 The two other issues, that is whether there
6 should be a downward departure because the criminal
7 history category VI overstates the criminal history and
8 likelihood to recidivate and whether there should be a
9 downward departure because of the length and harshness of
10 the conditions of confinement, I think you can just, as
11 far as I'm concerned, address those in your statement on
12 sentencing. Is that agreeable to everyone? Then I'll
13 effectively rule on them when I impose sentence.

14 MR. RISLEY: Your Honor, theoretically that
15 sounds good, but we actually had decided we would -- that
16 Ms. Baltes will be giving the closing statements and I was
17 going to address that particular argument, so we would
18 have to rearrange some things. If it's permissible to do
19 it in the main body, we would prefer doing that. But if
20 the Court really wants to do that, we'll adjust.

21 THE COURT: I don't care if you each do part of
22 the presentation. I just would prefer to do it this way.
23 Do you have any objection to that?

24 MR. LUSTBERG: No objection to that. The only
25 thing, the only minor modification I would request is that

1 the video actually fits in more with our final
2 presentation. If we could do it as part of that, it's
3 not --

4 THE COURT: That's fine. Fair enough. All
5 right. Then let's begin by discussing the objection, your
6 second objection, which is to page 16, paragraph 58,
7 concerning role in the offense.

8 MR. LUSTBERG: Thank you, Judge. Obviously the
9 issue of role in the offense is one that this Court
10 confronts, I would assume, fairly regularly. It's a
11 sentencing guidelines issue that arises in many cases in
12 which there are multiple participants for which there are,
13 for example, conspiracies. This of course is just such a
14 case.

15 And the Court is well aware of the guideline,
16 Section 3B1.2, which allows the Court to adjust the
17 offense level down by two, three or four points, two for
18 minor participant, four for minimal participant and three
19 for something in between. We recognize that with respect
20 to this issue that we bear the burden of persuasion.

21 Of course the Court is also aware of the case
22 law that holds that this is a determination that's based
23 on the totality of the circumstances and in particular on
24 the defendant's position within the conspiracy, his
25 knowledge or understanding of the scope and structure of

1 the enterprise and the activities of others and his
2 relationship with the principal members of the conspiracy.

3 Here there really are three different ways to
4 look at it. We propose two and the Government proposes a
5 third. And I think based upon Mr. Risley's submission,
6 the Government's submission, again we sort of are at a
7 point where this is largely a matter of legal
8 interpretation.

9 There are, we submit, two different ways of
10 looking at this, either of which would result in an
11 appropriate consideration of Mr. al-Marri as a minor or
12 minimal participant. First: If we look at al-Qaeda as a
13 whole. And second: If we look simply at the conspiracy
14 that's set forth in detail in the factual basis that's
15 appended to the plea agreement here. Under either of
16 these, we respectfully submit, Mr. al-Marri is
17 appropriately characterized as one with a mitigating role.

18 The Government's position, which I will address
19 in a little more detail in a minute or two, is that
20 actually you just look to his own participation and since
21 essentially that because he agreed then he could not
22 possibly have had a mitigating role because the issue is
23 his agreement. For reasons I'll discuss in a moment, I
24 think respectfully that analysis is incorrect and
25 inconsistent with, in particular, the law of the Seventh

1 Circuit.

2 The question before the Court is whether
3 Mr. al-Marri is substantially less culpable than other
4 participants in either of the two conspiracies. With
5 respect to al-Qaeda, that could not be clearer. To say
6 he's anywhere in the hierarchy would be an extraordinary
7 overstatement.

8 We know a lot about the structure of al-Qaeda
9 and these arguments are set forth in detail in our brief,
10 but let's be clear. Mr. al-Marri in the overall structure
11 of al-Qaeda was a sleeper agent who was entrusted with
12 almost no information, who was not given any particular
13 mission, who was consistently accepting directions from
14 others and he did not even know, as the evidence shows --
15 actually there's a lack of evidence that he knew anything
16 about 9-11 before it took place even though he was already
17 in touch with the relevant people then. It makes really
18 clear what his overall role was in al-Qaeda, but let's be
19 more specific in terms of what his role was in the
20 conspiracy that is this case.

21 The people that he dealt with were Khalid Sheikh
22 Mohammed who was the chief of external operations for
23 al-Qaeda and the architect of 9-11 and Mustafa al-Hawsawi
24 who was the financier of those attacks. To say that --
25 and those are the people whose names are actually in the

1 factual basis in this case. Those are people who are
2 actually part of, according to the Government and
3 according to what Mr. al-Marri has admitted, who were part
4 of the same conspiracy that is at issue here.

5 When the Court thinks about this and looks at
6 the question of role, necessarily it's a comparative
7 analysis and the relevant comparison is between
8 Mr. al-Marri on the one hand and those individuals on the
9 other. Of course it's patently obvious Mr. al-Marri
10 played a role nothing like either of those two people. He
11 attended training camps. He offered his services.

12 THE COURT: I want to stop you there for a
13 moment. I'm looking at the appendix to the pre-sentence
14 report. It's page 30 of my copy where it sets out your
15 position concerning this objection and it says: "The
16 defendant traveled to Pakistan to gain military training
17 to defend his country, a pilgrimage that was motivated by
18 beliefs about religious duties", etcetera, "not the desire
19 to join any terrorist operation." That's not in the
20 record to my knowledge.

21 MR. LUSTBERG: No, nor is it relevant to this
22 position and that's not -- we're not backing away -- I
23 think for purposes of this analysis, Your Honor, the Court
24 should completely credit every single aspect of the plea
25 agreement as it's written and as Mr. al-Marri admitted to

1 it in the course of his colloquy with the Court. To the
2 extent there is anything additional -- in other words, let
3 me put it to you this way. Just based upon those things,
4 Mr. al-Marri's role is simply substantially less than that
5 of KSM and al-Hawsawi. Those are the other two
6 co-conspirators. And in any conspiracy when the Court
7 evaluates relative roles, that's what it looks to.

8 THE COURT: Let me ask you a question. In the
9 Government's submission they cite to a Seventh Circuit
10 case, U.S. vs. McKee, and that was a case -- let me get to
11 that. The description at the beginning of that case:
12 "McKee was part of a conspiracy to smuggle ecstasy from
13 the Netherlands to Chicago. His co-conspirators,
14 MacIntosh and MacNac, lived in the Netherlands and
15 arranged for couriers to deliver ecstasy to Chicago. His
16 role was to provide housing, transportation", etcetera,
17 "while they were in Chicago."

18 In that case the Court says: "As McKee sees
19 things, he was entitled to the reduction because", quote,
20 "all of the other participants were higher up the food
21 chain than he was." End quote.

22 But then it says: "However, where each person
23 was an essential component in the conspiracy, the fact
24 that other members of the conspiracy were more involved
25 does not entitle a defendant to a reduction in the offense

1 level." The Court found McKee was an average participant
2 because of his role in making the arrangements. Could you
3 comment on that case in relation to this issue?

4 MR. LUSTBERG: Certainly, Your Honor. The
5 question is one of context and there's also some question,
6 I think, as to whether cases like McKee survive the
7 decision of the Seventh Circuit earlier this year in
8 United States vs. Hill which both parties cite to the
9 Court.

10 In Hill, the defendant pleaded guilty to -- or I
11 can't remember whether it was a trial or guilty plea, but,
12 in any event, was convicted of being a felon in possession
13 of a firearm, a very discrete offense. Certainly one
14 could argue that he was essential to that offense, but the
15 facts of the case were that it was part of a much broader
16 gun running or gun smuggling type of operation. That's
17 the case here. And the Court found, the Court ruled, that
18 a role adjustment was appropriate.

19 The Court will have to of course determine --
20 and I'll address in a moment the question of whether --
21 the question that's raised by McKee as to whether
22 Mr. al-Marri was essential. But the question is essential
23 to what. Was he essential to the operations of al-Qaeda?
24 Clearly not. Was he essential to the conspiracy that's at
25 issue here? It's hard to argue that he was when he was

1 not entrusted with any mission, when he was not directed
2 to do anything, but, more to the point, when he was the
3 person who was the object of those directions. He was not
4 giving orders. He was receiving them. He was not coming
5 up with the mission. He was going to do whatever he was
6 going to do when he was ordered to do that.

7 And along those lines, it's relevant to consider
8 what actually occurred, which is to say that he was not
9 able to engage in the communications that he was told to
10 do. In fact, the entire thing basically went awry. He
11 was, as it turns out, relatively unskilled in the computer
12 work that he was entrusted to do as we see from the way he
13 used the anonymizer program.

14 And the issue of whether one is essential
15 necessarily turns under all these cases on the question of
16 what the scope of his knowledge was. That's really what
17 McKee, if you look at it, and a whole line of cases turn
18 on, which is you can't be essential unless you know that
19 what you're doing is -- where it fits into the overall
20 scheme of things.

21 THE COURT: One of the fascinating things about
22 this case that for whatever reason neither side focuses
23 on, I'm looking at -- excuse me just a moment.
24 Paragraph 36 of the pre-sentence report makes reference to
25 the fact that he made a trip here actually the year before

1 in 2000 and it doesn't provide -- what I see in here
2 doesn't provide much information. I don't know how long
3 he was in the country. I don't know whether he came with
4 his family or not. I'm guessing that maybe he didn't.
5 But it indicates that once he arrived here he established
6 a fictitious business, AAA Carpet, using a false name and
7 a stolen security card and obtained a number of credit
8 cards. I think that was over in Macomb if I'm not
9 mistaken. I'm just curious about how that fits into all
10 this.

11 MR. LUSTBERG: I think what we've been told is
12 that the Government does not take the position that it
13 fits in with it at all. There's no evidence that that
14 episode in 2000 had anything whatsoever to do with what
15 happened in 2001 to which Mr. al-Marri --

16 THE COURT: So he just came over here in 2000
17 for the purpose of setting up a phony carpet cleaning
18 business?

19 MR. LUSTBERG: As the Court may recall, that was
20 the subject of the charges that this Court dealt with --

21 THE COURT: I understand that, but I'm just
22 saying the fact that those charges were dismissed with
23 prejudice doesn't mean that it has to be totally ignored.

24 MR. LUSTBERG: No, and it shouldn't be ignored
25 by the Court to the extent that it bears at all upon the

1 facts of this case, but neither side, particularly the
2 Government who bears the burden with respect to that, has
3 adduced any evidence that it has anything whatsoever to do
4 with this case.

5 Our theory all along has been that because he
6 had come to the United States in 2000 he was a good
7 candidate, and I think this was some of what was in the
8 factual basis, that essentially al-Qaeda saw him as a
9 person who could come into the United States, had done so
10 recently, so they would exploit that.

11 THE COURT: One of the things I found
12 interesting about that, I believe it's set out in here,
13 was that when he came here in 2000 he came here on a Saudi
14 Arabian passport and that he gave false information on the
15 visa application.

16 MR. LUSTBERG: There's no question and those are
17 matters that the Court can consider, but they are not
18 relevant to the conspiracy here. They may be relevant to
19 the Court's ultimate sentencing in this matter, but they
20 are not relevant to the question of role in the offense.

21 THE COURT: Go ahead.

22 MR. LUSTBERG: Let me explain. Our view all
23 along, and I think this is confirmed by the factual basis
24 in this case, is that al-Qaeda saw Mr. al-Marri, having
25 done that, as a good candidate to be the sleeper agent

1 that they recruited him to be, but there's no evidence
2 that he did those things at that time in order to qualify
3 for that. There's been no proof of that. In our
4 discussion with the Government, I think they concede there
5 is no proof of that. The inference that we have always
6 drawn from it is that that made him someone that al-Qaeda
7 could take advantage of for that purpose.

8 But it's important to note that even after that,
9 he's provided with no information. He's completely
10 directed by others. He doesn't even do that which he's
11 supposed to be doing. And for those reasons when one does
12 a straightforward analysis under Section 3B1.2, there's
13 just no question but that his role is less than the
14 average participant. The average participant in this
15 offense is at a much higher level than him. That's what
16 distinguishes this case from cases like McKee or any case.

17 THE COURT: You would say in order to have a
18 conspiracy you have to have an agreement between two or
19 more persons and in this case the persons that the
20 Government is asserting that he conspired with were Khalid
21 Sheikh Mohammed and al-Hawsawi?

22 MR. LUSTBERG: Correct. Those are the people
23 according to the guilty plea that Mr. al-Marri has entered
24 into, according to the facts that have been adduced by the
25 Government, and I don't believe there are any other facts.

1 And that really fundamentally is where we part
2 company with the Government because the Government says
3 there's this agreement between Mr. al-Marri and these
4 other people and of course he's essential to that
5 agreement. That certainly is true. But if that were to
6 disqualify somebody for a role in the offense adjustment,
7 then there would never, ever be, ever, a role in the
8 offense adjustment in a conspiracy because in order to be
9 convicted of a conspiracy you have to have entered into an
10 agreement and conspiracies, far from being the type of
11 situation where role in the offense adjustments don't
12 occur, are exactly where they do. What Courts do under
13 those circumstances is take a look at the entire scope,
14 the entire context, which respectfully, we submit here,
15 really is all of al-Qaeda and saying where did
16 Mr. al-Marri fit into this.

17 This case, Your Honor, has always been about
18 al-Qaeda and about Mr. al-Marri's association with
19 al-Qaeda. It is al-Qaeda that he's alleged and admitted
20 to providing material support to, to conspire to provide
21 material support to. And under Hill, the Court should
22 look at that entire context the same as the Seventh
23 Circuit did in that case and slot Mr. al-Marri into where
24 he belongs in that organization.

25 And I don't think that there's -- I don't think

1 there's a reasonable position that could be taken that in
2 the structure of al-Qaeda that Mr. al-Marri is anything
3 other than the most minimal participant, somebody who did
4 not even know what al-Qaeda -- the most horrible thing
5 that al-Qaeda was going to do and did do until after it
6 had occurred, somebody who was completely -- was one of
7 literally thousands of people who went to these camps and
8 who was recruited into that mission, somebody who came to
9 the United States without specific directions and was only
10 told to communicate with people so he could receive them
11 and be told what to do. The notion that he's essential in
12 a situation in which nothing happened is counterintuitive.

13 But beyond that, it's simply wrong as a matter
14 of law to remove him from that context in making this role
15 in the offense determination. That's really what Hill
16 says. Hill bases it on amendments to the sentencing
17 guidelines that make that perfectly clear. And the
18 Government's position that this is just his offense and
19 that he, therefore, is an average participant in this
20 offense is contrary to the law the way the Seventh Circuit
21 has pronounced it.

22 So it's for that reason and based upon a fair
23 view of all of the facts of this case that Mr. al-Marri is
24 appropriately viewed as having a mitigating role and,
25 respectfully, when you look at him within the context of

1 al-Qaeda as a whole, a truly minimal role. There's no
2 real other way to view these facts. I will be happy to
3 respond to whatever arguments Mr. Risley makes.

4 THE COURT: Thank you. I may have some other
5 questions. What's the Government's response?

6 MS. BALTES: Your Honor, if the Government had
7 charged Mr. al-Marri in an over-arching al-Qaeda
8 conspiracy and charged his coming into the United States
9 and all of the conduct associated with that as one of the
10 overt acts in the conspiracy, it's possible that he would
11 be eligible for a minor role in this case, but that's not
12 what the Government charged here. The Government did not
13 charge him as part of an over-arching conspiracy, charging
14 everything that al-Qaeda has done in the United States or
15 abroad.

16 The defendant committed all of the conduct in
17 this case. He did take direction from KSM, but he was the
18 one who prepared himself to be an ideal candidate for
19 al-Qaeda to send to the United States. He attended
20 multiple training camps, received multiple training in
21 military type training, poisons research, how to conceal
22 his communication. These are all actions that the
23 defendant himself undertook.

24 In addition, the 2000 trip, the Government's
25 theory on the case is that it probably was a test run. It

1 was an example that he could take to al-Qaeda leadership
2 to show he had the ability to come into the United States.

3 THE COURT: But you have not -- I mean, that may
4 be a reasonable inference, but as I understand it you
5 clearly have not presented any evidence into the record,
6 direct evidence into the record.

7 MS. BALTES: And that's absolutely correct.
8 This is a plea situation. The defendant pled guilty to
9 the relevant facts supporting the material support charge.
10 Mr. Lustberg provided his theory to the Court. The
11 Government's theory is somewhat consistent with that.
12 Yes, that's probably what the 2000 trip was for, but
13 that's just one part of what the defendant himself did to
14 prepare himself for the mission for al-Qaeda. He learned
15 about communications code. He did. He went and met with
16 KSM. He kept in contact with KSM and he took direction
17 from KSM. But absent his specific conduct in this case
18 and action that he took, there would never have been a
19 conspiracy to charge the defendant with. He was --

20 THE COURT: But that logic concerns me a little
21 bit because let's take, for example, the situation that I
22 get in this court quite commonly, the large drug
23 conspiracy. We've got people at the top, middle, then
24 you've got the person down at the bottom who has the task
25 of driving the semi full of cocaine from point A to

1 point B. That person doesn't know about the ultimate
2 plans of the conspiracy, is not an equity -- doesn't have
3 an equity interest in it, and yet you could make the same
4 argument that that person was essential to the conspiracy
5 because unless they can move the cocaine from point A to
6 point B they don't have an operation. Isn't that correct?

7 MS. BALTES: That's absolutely correct.

8 THE COURT: That person typically gets a
9 reduction for role in the offense.

10 MS. BALTES: Absolutely, and the Government
11 doesn't disagree with that proposition at all, but what
12 the defendant has been charged with is coming to the
13 United States and being a sleeper agent to wait for
14 further instructions from al-Qaeda to assist al-Qaeda in
15 some operation in the United States. That's what he was
16 charged with. Yes, there are other people that directed
17 him, but in any conspiracy involving al-Qaeda that's
18 always going to be the case. There is the leadership of
19 al-Qaeda that includes Bin Laden who issues his fatwas and
20 then there are the people like KSM who were the
21 operational planners who directed.

22 All the operations are very compartmentalized
23 and not everyone in al-Qaeda knows about other operations,
24 which is consistent with the Government's theory and the
25 fact that there is no evidence to suggest that the

1 defendant knew about the 9-11 attacks. Various 9-11
2 hijackers didn't even know what their role was going to
3 be until the morning of the attacks, but still they were
4 an essential part of the conspiracy and probably would not
5 have been given a minor role had they been captured before
6 they committed those acts on September 11.

7 But the defendant committed significant acts as
8 part of this conspiracy and if KSM was charged in this
9 conspiracy clearly he would be eligible for a leadership
10 role. But the defendant shouldn't get the benefit of
11 getting a downward role for his role in the offense when
12 he's the one that committed all of the acts for the
13 conduct that he was charged with. Certainly, again, if
14 this was an over-arching conspiracy, it would be more
15 appropriate because Mr. al-Marri's conduct would be
16 relative to other people's conduct within al-Qaeda.

17 THE COURT: The indictment itself charges him
18 with providing material support to al-Qaeda.

19 MS. BALTES: That's absolutely correct. And if
20 the Sentencing Commission thought that every time someone
21 only provided material support that they would
22 automatically be -- a role adjustment would be
23 appropriate, certainly that might be in the sentencing
24 guidelines, but it's not. The material support charge
25 covers a wide range of conduct.

1 THE COURT: Well, they like to leave a few
2 things for us bunch of trial lawyers to figure out.

3 MS. BALTES: Agreed. Agreed. But the material
4 support was essential to al-Qaeda's further missions in
5 the United States and the defendant's actions certainly
6 support that he was a vigorous participant and the only
7 participant in this particular conspiracy even though he
8 took his direction from al-Qaeda or from KSM which is not
9 unlike any other al-Qaeda operation.

10 THE COURT: All right. Thank you.

11 MR. LUSTBERG: Thank you, Your Honor. Briefly,
12 I would again commend to the Court's attention the Hill
13 case and on page 578 of the Seventh Circuit's opinion in
14 that case the Court addresses exactly this situation.

15 Ms. Baltes started her remarks by saying what we
16 charged here was not an over-arching conspiracy, but a
17 limited one. And what Hill makes absolutely clear is the
18 fact that that was charged or even the fact that that was
19 the basis of the conviction is fundamentally
20 non-dispositive of the role in the offense issue. In
21 particular, what the Court says is it was precisely the
22 District Court's rationale that the Court reversed there
23 because Hill was charged with, convicted of and sentenced
24 for only his own possession of the firearms and not the
25 burglary or sale of those firearms, that's the bigger

1 scheme, that the Court could not credit him for his lesser
2 role in the broader scheme to obtain and distribute the
3 firearms. And this is precisely the view that the
4 Sentencing Commission has rejected. That is, there was a
5 split in the circuits on this very question. Where
6 somebody was essential to their little conspiracy or their
7 smaller crime, the question was can you consider the
8 over-arching, uncharged, unconvicted conduct in
9 determining role in the offense and the Seventh Circuit
10 has said in no uncertain terms you can and you must.

11 So what this Court has to do is to determine was
12 Mr. al-Marri an essential participant in al-Qaeda. The
13 fact that he -- the fact that he committed many acts, the
14 acts that Ms. Baltes talks about, really distinguishes,
15 and when you look at those acts, distinguishes him from
16 the usual case where somebody is deemed to be essential.

17 I was a public defender for a while and we did a
18 lot of bank robbery cases and the issue would arise, for
19 example, with respect to the lookout who, by the way,
20 sometimes would get a downward role adjustment, but that
21 person was arguably essential.

22 The question here is what did Mr. Al-Marri do
23 that was essential. It would be one thing if we were
24 talking about 9-11 hijackers and you could say this is
25 the thing that they did or this is the thing that they

1 were going to do. But there is no evidence of the thing
2 that Mr. al-Marri did or the thing that Mr. al-Marri was
3 going to do. That's what makes this case unique. You
4 can't really assess his role as being anything more than
5 minor or minimal because there has never been a particular
6 theory or evidence as to what it was he was going to do
7 and there certainly is no evidence as to anything that he
8 did do.

9 Now the Government says, well, you know, that's
10 because he got caught. And that may be. But now we're
11 talking about a role adjustment. And so with respect to
12 that role adjustment, one has to look at what he actually
13 was going to do and what he actually did. And viewed in
14 the larger context that this Court is required to look at
15 under Hill and under the sentencing guidelines, there
16 really is no other conclusion other than it warrants a
17 mitigating role.

18 Ms. Baltes' final remark was that this was his
19 conspiracy. He was the only participant in it. Obviously
20 as a matter of law that doesn't stand up. In order to
21 conspire, you have to conspire with someone else. And
22 under the terms of this plea agreement, under the factual
23 basis that the parties worked out and that Mr. al-Marri
24 set forth at the time of his guilty plea, he conspired
25 with these two other people and the Court has to evaluate

1 his role vis-a-vis those two other people.

2 For sure, the fact that they might deserve
3 upward role adjustments may mean that he doesn't get one,
4 but you have to look at the whole context here under the
5 law of this circuit. And I think once the Court does
6 that -- it's not that the Sentencing Commission should
7 have done anything special on this issue with respect to
8 material support. I can see a material support case where
9 a person could get an aggravated role adjustment, one
10 where someone could get no role adjustment. In a case
11 like this, when you look at the facts of the case as they
12 are agreed upon by the parties and set forth in the plea
13 agreement, a downward role adjustment is appropriate and
14 fair and an accurate way of evaluating the acts that he
15 actually did and the agreement he actually entered into in
16 the broader context.

17 THE COURT: What is the language on page 578
18 that you were referring to?

19 MR. LUSTBERG: Okay. So on 578 there's citation
20 to a case called Perez and that language is right below
21 that or near that which says that --

22 THE COURT: Hold on a minute. I don't see that.

23 MR. LUSTBERG: Well, I'm working off of a
24 Lexis --

25 THE COURT: There's language I see that says:

1 "Determination of a defendant's role in the offense is to
2 be made on the basis of all conduct within the scope of
3 1B1.3 and not solely on the basis of elements and acts
4 cited in the count of conviction." Is that the kind of
5 wording you're talking about?

6 MR. LUSTBERG: The paragraph I'm reading from,
7 Your Honor -- and I apologize. We're working off of
8 different versions of this case in the sense you're
9 looking at it in the book and I'm looking at it in a Lexis
10 print-out. The paragraph begins with the phrase -- I
11 believe that paragraph starts on 577 and goes over onto
12 578. It starts: "In view of the amended commentary." So
13 it's that paragraph and it's further down that paragraph
14 that the language I read to the Court -- that's where the
15 language appears that I read to the Court.

16 THE COURT: All right. I have that. Thank you.
17 Let me take a moment and read this again. Well, the
18 resolution of this I think is a pretty close question, but
19 I'm going to grant the objection.

20 Looking first at the wording of the indictment
21 itself, as I said a few minutes ago, the charge is that
22 the defendant knowingly conspired with others unindicted
23 to provide material support and resources, namely
24 personnel, to a foreign terrorist organization, namely
25 al-Qaeda. Now the personnel that's referenced in the

1 indictment, as I understand it, is the defendant himself.

2 In terms of characterizing his involvement here,
3 I agree with the Government in many respects. I mean,
4 this was -- it's not, for example, a good comparison to
5 compare this person with a person driving the cocaine from
6 point A to point B. Here we have someone who, if you
7 would, trained for the role that he was to play by going
8 through the military training in camps, training on not
9 just the use of weapons and poisons but also the use of
10 codes. In fact, when he came to this country he had codes
11 that he was supposed to use to carry out his assignment.
12 Whether or not he knew exactly what he was going to do
13 after he got here, we don't know. There's nothing in the
14 record to suggest that he specifically knew. And it would
15 be unlikely, I would think, that he did know because to
16 the extent to which he's fairly characterized as a sleeper
17 agent, that is the nature of that type of operation as I
18 understand it. Everything is done on a need-to-know
19 basis. So, for example, if someone is arrested, then they
20 are not capable of giving up, if you would, what was
21 supposed to happen.

22 But it is clear to me that based not just on the
23 indictment but on the statement of facts that the people
24 that he's effectively charged with conspiring with were
25 the two that we've already referred to. Those people

1 certainly were much higher up the al-Qaeda chain than he
2 was. And I'm not minimizing in any way what he could have
3 done while he was here. I'm simply saying in the context
4 of the sentencing guidelines, my understanding of them and
5 the application of the case law, that it's appropriate to
6 say that in relation to them his involvement was
7 substantially less and so for that reason I'm going to
8 give him a two-level downward adjustment as a minor
9 participant.

10 Because of all -- everything that was involved
11 in preparing him to come here and everything that was
12 expected of him, while we don't know the details, but he
13 was certainly sent here as an agent, as a representative
14 of al-Qaeda, I think it would be inappropriate to say that
15 his role was minimal. But comparatively speaking, it was,
16 I believe, minor for purposes of the guidelines, so that
17 adjustment will be made.

18 And the effect of that -- excuse me just a
19 moment. That would change paragraph 56 -- I'm sorry. I
20 apologize. Paragraph 58, which is the adjustment for role
21 in the offense, that would change from zero to a minus 2,
22 which would change the total offense level from a 37 to a
23 35. That would change the guidelines. The range would
24 now be 292 to 365, which is still very substantially above
25 the limit of 180 months, the 15-year limit of the statute.

1 Now concerning these other matters, as I said, I
2 would prefer to deal with the other two by simply having
3 you address them in your final statement. If you want to
4 bifurcate that in some way, that's fine. And then because
5 I'm doing it that way, the Government gives its statement,
6 defense gives its, if you want to go back and forth after
7 that, I'll certainly allow some of that. What I would
8 like to start with then is the Government's statement
9 regarding sentence.

10 MR. RISLEY: Your Honor, we're going to take you
11 up on your offer about bifurcating.

12 THE COURT: That's fine.

13 MR. RISLEY: What I'll do, if it please the
14 Court, is to address the issue of whether the criminal
15 history category of VI, which is automatic under the
16 sentencing guidelines for an offense in which the
17 defendant qualifies for the terrorism enhancement and it's
18 been stipulated by the defense that the defendant does,
19 and of course it's a separate question even though he
20 qualifies for that does it overstate the criminal history.
21 So what I'm going to do is first of all address the
22 theoretical point. What is the criminal history category
23 supposed to -- what is the purpose of it and how does that
24 relate to this case and then turn to the practical
25 defendant specific issues.

1 First of all, the sentencing guidelines
2 expressly state a purpose and then they implicitly have a
3 purpose for the sentencing guidelines. The expressly
4 stated purpose is that the criminal history category
5 represents the Sentencing Commission's best judgment of
6 factors that would predict -- predictive factors about the
7 chances of recidivism. How likely is it that the
8 defendant would go back and do the same -- commit the same
9 or similar offense or pose a danger to the community? So
10 that's a predictive element to it.

11 There's another implicit element to this, a
12 vector that intersects in the ultimate criminal history
13 category, and that is the degree of risk that would be
14 associated if the defendant does recidivate. And that's
15 illustrated in such things as the career offender
16 provisions where a defendant all of a sudden because of
17 certain particular types of offenses jumps to the head of
18 the class so to speak and becomes a criminal history
19 category VI.

20 And so there's two elements. One is predictive
21 and the other one is consequence, degree, the extent of
22 the damage if the defendant did become a recidivist. All
23 of that amounts to classic risk assessment factors.

24 Now turning to the practical as it relates --
25 well, before we leave the theoretical, Section 4A1.3 of

1 the sentencing guidelines talks about the standard for
2 downward departure and it begins: "If reliable
3 information indicates that the defendant's criminal
4 history category substantially overrepresents the
5 seriousness of the defendant's criminal history or the
6 likelihood that he will commit other crimes, a downward
7 departure may be warranted."

8 That's the standard that we're talking about.
9 The two operative words there which in the Government's
10 view are virtually dispositive, the first is the word
11 "reliable" information and the second is the word
12 "substantially" overrepresents. It's not enough just to
13 overrepresent. It has to substantially overrepresent it.
14 Otherwise deference is given to the Sentencing
15 Commission's formulation. And that conclusion has to be
16 based on reliable information.

17 So now let's turn to this particular defendant
18 and the information before the Court about him. Speaking
19 broadly, the gist of the defendant's argument, position is
20 that because there are people who have observed that he --
21 okay, I don't mean to be flippant about this, but
22 basically that he's a nice guy, that because of that he's
23 not likely to be a terrorist or return to any sort of
24 terrorist activity, including lending material support to
25 terrorism.

1 Your Honor, even if -- okay. They've talked to
2 the defendant. There are people in the Brig that have
3 talked to the defendant. There are people in the prison
4 system who have talked to the defendant. And the evidence
5 is, and the Government does not controvert it, that the
6 defendant has on many occasions showed all sorts of signs
7 of being an affable guy, sometimes humorous guy. We don't
8 contest the assertion that he's a family oriented man, any
9 of those sorts of things. To then reach the conclusion
10 that based upon that, even if you accept all that picture
11 as being true, that the defendant does not pose a risk of
12 recidivism is an irrational jump in logic.

13 To use an extreme example, and it's not
14 completely apt here, but Ted Bundy was by all accounts an
15 extremely charming, likable guy, if it wasn't for that
16 serial killer part of him.

17 The criminologists, when they try to predict
18 future behavior, don't look to whether the defendant has
19 personality characteristics like, you know, family
20 oriented, although that's a factor, whether they're a nice
21 guy but for their criminal activity, but it's particularly
22 true with terrorism. There is a growing body of well
23 publicized and well recognized research about the
24 psychological profile of a terrorist and the bottom line
25 of all that and I cite as one example, probably the most

1 notable example, a book by Mark Sageman written in 2004
2 called Understanding Terrorist Networks and works that he
3 cited in that, Mark Sageman being a forensic psychiatrist
4 with a background in the CIA. He was a CIA officer who
5 worked in Afghanistan while he was a CIA officer. But it
6 took an empirical look at a large body of terrorists and
7 what is the psychological profile. Basically the bottom
8 line is it debunked all the usual assumptions about the
9 psychological makeup of a terrorist and ends up with the
10 picture that the defendant's attorneys paint of the
11 defendant is entirely consistent with, not inconsistent
12 with, being a terrorist. Now I'm not saying the reverse
13 is true, that because the defendant has this he's more
14 likely to be a terrorist. My point is there is nothing
15 inconsistent about that picture and being a terrorist,
16 much less someone who would lend material support to
17 terrorism, one step essentially removed.

18 Let's look at what we do know about the
19 defendant on the other side. Now we heard from the view
20 of Dr. Serratt yesterday. Now, okay, she didn't make the
21 best witness that this Court has ever seen or that we've
22 ever seen. Nevertheless, I think that it's fair to say
23 that when the Court considers what she reported that the
24 defendant said to her on certain subjects, it's credible,
25 believable. And the important part of her testimony is

1 not the opinion she expressed at the end because, as I
2 indicated to the Court, there's no scientific basis for a
3 professional opinion as to a defendant's potential to be a
4 danger.

5 THE COURT: I've heard testimony of that type
6 several times in certain contexts of other cases.

7 MR. RISLEY: And it's an imperfect science.

8 THE COURT: I agree with that.

9 MR. RISLEY: And I do not want to overstate
10 that. It is what it is. I think the Court understands
11 what I mean when I say you take those qualifying factors
12 into the weight to be given to it. That was not -- it may
13 have been the last thing she said in her testimony on
14 direct examination, but it's not the most important thing.

15 Let's go back to the really critical things and
16 that were the statements that she reported that the
17 defendant made to her about his attitude towards the
18 infidels, which would be everybody except Muslims, and
19 they need to be -- need to get rid of them. Now she said
20 that she didn't remember the exact words he used, but the
21 gist of it was they needed to be killed. That was the
22 context. That was what he was saying. He made -- now
23 then you look at the statement that he made about the
24 Shi'a. What about if you get rid of anybody else and you
25 only have Muslims himself left? What then? Well, then we

1 have to, you know, kill the Shi'a.

2 Those things, Your Honor, are really powerful
3 key indicators of a person who has bought into and still
4 adheres to the terrorist -- the legitimizing ideology of
5 al-Qaeda and similar terrorist organizations. I say that
6 because it is so aberrational even among Muslims holding
7 extremist views that it stands out. It just screams to
8 someone who has that understanding, that perspective, that
9 this man has a world view, an ideology that is entirely
10 consistent with being a terrorist and inconsistent with
11 any other course in his life.

12 And just to illustrate that -- I mean, the
13 infidel part is obvious, but let's focus in on the remark
14 about Shi'a, okay? Now there is a well known, well
15 publicized, historical conflict between the Suni and the
16 Shi'a. The question isn't, however, whether there's a
17 religious or cultural conflict between them, but whether
18 as a matter of religious principle is it permissible to
19 target the Shi'a to be killed simply because of their
20 religion -- not because of their politics or anything
21 else, but simply because of their religion. And the
22 ideology of al-Qaeda is that the Shi'a are apostates.
23 They're not true Muslims. They are apostates. They then
24 bootstrap from that to a proposition because they are
25 apostates, they assert the dubious proposition that the

1 punishment for apostasy in Islam is death and, therefore,
2 they are legitimately executed as apostates. Now that
3 ignores the fact that this doctrine of death for apostasy
4 is rooted in historical roots in Islamic law to a period
5 of time in which apostasy from Islam is the functional
6 equivalent of treason and punishable as such.

7 There are other instances, there's at least one
8 with the Prophet Muhammad, that are entirely inconsistent
9 with that view that that's a general principle, that it
10 applies in all contexts. It's been an item of some
11 controversy because al-Qaeda and similar organizations
12 have asserted this idea that the Shi'a are targetable as
13 Shi'a, as apostates, and they can be executed basically on
14 sight, if anything worse than infidels, and that was very
15 notable in the al-Qaeda insurrection in Iraq where the
16 Shi'a were targeted as Shi'a.

17 Now I will contrast that, just to show you how
18 aberrational that thinking is within Islam itself, with
19 the Amman Message. Now there isn't a lot known about the
20 Amman Message in the United States, but there is within
21 Islam. In the principle of Islamic law, one of the bases
22 for determining -- making legal rulings is to determine
23 whether a proposition is -- whether there's consensus, the
24 Islamic term is ijma, on that subject. And if there is,
25 then it's regarded as a principle of law, of just -- if

1 there's unanimity, then it's accepted as law. And there's
2 a principle -- there is a set of principles that the Amman
3 Declaration set forth about which there is today not only
4 ijma within a particular school of thought, therefore main
5 schools of Suni thought, but also all of several other
6 schools, Shi'a and others, such that within those schools
7 there is consensus. It makes it kind of a super
8 consensus, super Islamic law today. And those
9 propositions are these, that there is the conclusion --
10 and I have -- what I will do is give the Court, if I may
11 approach the bench, Government Exhibit 7 which is a copy
12 of the published Amman Declaration.

13 As you can see, there are different bodies of
14 scholars, hundreds of scholars from all across the
15 spectrum of Islam, that agree, proposition one, they
16 specifically recognize the validity of all eight Mathhabs,
17 which are legal schools, of Suni, Shi'a and other
18 traditional Islamic schools, including Sufism, and even
19 true -- it says true Salifi thought. So that is in terms
20 of defining who is a Muslim, Shi'a are defined as being
21 Muslim.

22 Number two: Based upon this definition, they
23 forbid takfir, which is declarations of apostasy between
24 Muslims.

25 Those two principles constitute incontrovertibly

1 not just the mainstream, but unanimity within the Muslim
2 community. So for al-Qaeda to take the position, and its
3 affiliates, that Shi'a are targetable as Shi'a and can be
4 killed is an extremist position that is just beyond the
5 pale even within extremism and that is a view that was
6 expressed apparently rather nonchalantly by the defendant
7 to Major Sirratt.

8 Now that is an indication that, nice guy,
9 affable guy, sense of humor, family man, all those sorts
10 of things, that he has a mind set such that future acts of
11 violence against the United States and others are likely,
12 that their view is morally justified. And if the burden
13 is to show by reliable evidence that there's a substantial
14 reason to believe otherwise, well, the Government doesn't
15 see that.

16 THE COURT: Thank you. Do you have a separate
17 response concerning the belief that there should be a
18 reflection in the sentence for conditions of confinement?

19 MS. BALTES: Yes. Do you want me to discuss it
20 or is the defense --

21 THE COURT: No. I would prefer you to finish
22 and then I'll hear everything they have to say.

23 MS. BALTES: Would you like me to discuss that
24 first and then go into the 3553 factors?

25 THE COURT: Any way you want to do it is fine.

1 MS. BALTES: Then I'll discuss it as I discuss
2 the factors then.

3 THE COURT: That's fine.

4 MS. BALTES: Your Honor, I know the Court is
5 obviously well aware of the guideline range, but in
6 discussing the 3553 factors obviously one of the critical
7 factors is what the applicable guideline range is and
8 based on the departures that the Court has already ruled
9 on the guideline range would be 292 to 365 months, which
10 obviously is far in excess of the statutory maximum in
11 this case of 180 months. The Government does assert that
12 the appropriate guideline range then is 180 months and it
13 should be nothing less and there should be no additional
14 departures in this case.

15 The nature and the circumstances of the offense
16 I think probably provide the Court with extremely
17 significant factors in determining whether or not
18 180 months is appropriate.

19 As the Court is well aware and has been
20 discussed in the filings by the defense and the
21 Government, this is a case involving the defendant's
22 participation with al-Qaeda. As the stipulated facts in
23 the plea agreement and the plea colloquy clearly state,
24 the defendant did a lot of preparation for his mission to
25 the United States. He trained at various times in

1 al-Qaeda training camps where he learned about the use of
2 weapons, he learned to communicate through codes so he
3 would not be detected by law enforcement, he learned about
4 poisons research, all in preparation for his mission to
5 the United States. He was directed by Khalid Sheikh
6 Mohammed to enter the United States on September 10, 2001.
7 Khalid Sheikh Mohammed is the principal architect of the
8 9-11 attacks and he was the external operations chief and
9 the defendant admitted in his plea colloquy that he knew
10 that that was KSM's role within al-Qaeda.

11 The defendant was well aware of al-Qaeda's
12 violent philosophy against the United States. He agreed
13 in the plea agreement that he was aware of the 1996 fatwa
14 issued by Osama Bin Laden and of the 1988 fatwa issued by
15 al-Qaeda.

16 I think it's helpful to point out -- it's
17 possible that people do not even remember or people
18 haven't read what the fatwas say, but it's clear that
19 violence against the United States was the number one goal
20 of al-Qaeda.

21 In the 1996 fatwa, Bin Laden specifically stated
22 that: "Terrorizing you while you are carrying arms on our
23 land is a legitimate and morally demanded duty. It is a
24 legitimate right well known to all humans and creatures."
25 He further provided: "Death is truth and ultimate destiny

1 and life will end anyway. Without shedding blood, no
2 degradation and branding can be removed from the forehead.
3 These youths know that. If one is not to be killed, one
4 will die anyway and the most honorable death is to be
5 killed in the way of Allah. They are even more determined
6 after the martyrdom of the four heroes who bombed the
7 Americans in Riyadh. My Muslim brothers of the world,
8 your brothers in Palestine and in the land of the two holy
9 places are calling upon your help in asking you to take
10 part in fighting against the enemy, your enemy and their
11 enemy, the Americans and the Israelis."

12 The defendant specifically applied to Bradley
13 University in the summer, in the mid-summer of 2001, so
14 that he could obtain a student visa and enter the United
15 States. There was no true purpose for him coming here to
16 obtain an education. He had already obtained a bachelor's
17 degree from the same university in 1991. He applied for a
18 second bachelor's degree specifically for the purpose so
19 he could obtain a student visa. It was a late admission
20 to Bradley University. As soon as he was admitted, he was
21 only interested in obtaining his visa. And even though he
22 was in such a rush to gain admission to Bradley
23 University, he waited several weeks before coming to the
24 United States and actually showed up several weeks late
25 for class. This is all evidence that supports the

1 Government's theory this was the only true purpose for him
2 coming to the United States. It was as an agent of
3 al-Qaeda, not to come to school.

4 Before he came to the United States, he again
5 met with Khalid Sheikh Mohammed to receive additional
6 instructions and he met with Mustafa al-Hawsawi in Dubai
7 where he received money and a laptop computer.

8 Once the defendant entered the United States, he
9 went to Bradley University and he attempted to enroll in
10 6 credits even though he was supposed to enroll in
11 12 credits as an international student. The university
12 let him enroll in 9 credits.

13 Ten days later he traveled outside of Peoria to
14 another university in the area and set up five e-mail
15 accounts under different names and sent an e-mail --
16 created an e-mail for Khalid Sheikh Mohammed in which he
17 told him, "I had to enroll in 9 credits," and provided his
18 cell phone number in a previously determined code so that
19 Khalid Sheikh Mohammed would be able to contact him.

20 This is despite the fact that on September 21
21 when he did this he was well aware of what al-Qaeda had
22 done to the United States on September 11 and that 2,973
23 people had been murdered by al-Qaeda. He never disavowed
24 al-Qaeda at this point and he continued to communicate or
25 attempt to communicate with al-Qaeda to await his further

1 mission.

2 The fact that he was arrested in December of
3 2001 and has been charged with material support and not
4 with any other plot is something that the Court should
5 also consider. He did not have an opportunity to
6 potentially carry out some other terrorist acts in the
7 United States, perhaps not because he didn't want to but
8 because he was arrested in 2001.

9 During this time also instead of spending his
10 time going to class, he conducted research on his
11 computer. Now the defendant admitted this in his
12 stipulated facts and plea colloquy. He admitted doing
13 research into various cyanides and poisons. When the
14 Court directly asked him whether this is the type of
15 research that he had learned in training camps, the
16 defendant admitted that this was the type.

17 Whether or not this was going to be part of some
18 additional plot by al-Qaeda, certainly the Government
19 cannot assert at this point, but it is inescapable that he
20 came to the United States upon the direction of al-Qaeda.
21 He clearly understood that al-Qaeda's mission against the
22 United States was violent and he committed -- he continued
23 to attempt to contact al-Qaeda and maintain his status as
24 a sleeper agent and conduct the research that was
25 consistent with his training. He was employing the

1 training that he had received on numerous attendance at
2 training camps both in getting into the United States and
3 once he was in the United States to avoid detection.

4 Now the history and characteristics of the
5 defendant are also important to note here. The defense, I
6 know, plans on putting forth a video that shows that he is
7 certainly someone that loves his family and that has a
8 family that loves him. There's no dispute that the
9 defendant probably does love his family, but I think it's
10 also important for the Court to note that as part of his
11 coming to the United States and part of what made him an
12 ideal sleeper agent was that he was able to come with his
13 family. He brought his wife and his children to the
14 United States on his mission for al-Qaeda. So he might be
15 a loving family man, but he also brought his family to
16 participate in what he was doing and to provide him cover
17 so that he would be unlikely to be detected by law
18 enforcement.

19 The defendant's history and characteristics
20 certainly indicate that he had other opportunities. He
21 came to the United States. He obtained a bachelor's
22 degree in 1991. He was provided all sorts of
23 opportunities both educationally and professionally. He
24 was employed as a banker in Qatar. He certainly had a lot
25 going for him and would not -- I'm sure the Court has

1 sentenced individuals where they are pushed into a
2 criminal life because of circumstances, maybe
3 socioeconomic factors, but that's certainly not the type
4 of defendant the Court would sentence today. He is
5 someone that specifically chose to join al-Qaeda and to
6 join their philosophy of militant extremist religion and
7 come to the United States to pursue some type of violent
8 act.

9 The fourth factor that the Court considers in
10 sentencing is that the sentence imposed reflect the
11 seriousness of the offense. There is a wide-ranging
12 conduct that certainly Courts would see in material
13 support cases. Material support cases could run the gamut
14 of someone that provided less support to a designated
15 terrorist organization than what the defendant did here.
16 The defendant pled guilty to providing material support to
17 al-Qaeda and I think it's important to put in context the
18 timing of this. This was in 2001, obviously when the
19 nation experienced the terrorist attacks of September 11.

20 Again, the Government is certainly not asserting
21 that there's any evidence that the defendant was aware of
22 those attacks, but al-Qaeda was extremely active during
23 2001 in its attacks on the United States and he was sent
24 here as someone who could help in the post 9-11
25 environment.

1 I mean, there's a reason why KSM told the
2 defendant that he had to get here on September 10.
3 Clearly once September 11 happened, al-Qaeda leadership
4 knew that it would be very difficult to enter the country
5 and that law enforcement would be on the alert for anyone
6 they thought would be suspicious.

7 And what the defendant did, he attended multiple
8 training camps. He conspired with the senior leadership
9 of al-Qaeda. Al-Qaeda is a very highly compartmentalized
10 organization. Not all the operators knew of the different
11 tasks. But this defendant was not some low level lackey.
12 Low level lackeys would not have had access to al-Qaeda's
13 senior leadership and they certainly would not have been
14 entrusted with an operation to come into the United States
15 post 9-11. He must have had some role in al-Qaeda and
16 they trusted him, whether it was based on his training,
17 his ability to enter the United States which he had
18 demonstrated in 2000, but that is a very serious offense.
19 There is no way to minimize the potential for what could
20 have happened had he not been arrested in 2001 and,
21 therefore, the seriousness of this offense should not be
22 understated by the Court.

23 Now I'm sure the defense will argue and have
24 argued in their papers that the fact that he has been
25 confined since 2001 should be a factor to reduce his

1 sentence because he's been already punished based on the
2 seriousness of his offense. There is no doubt that the
3 conditions of confinement that the defendant endured
4 during his time in the Brig were different than most other
5 inmates in the United States. The Government does not
6 dispute any of the facts that were put forth yesterday in
7 the testimony of Mr. Seymour or Mr. Pucciarelli. The DIA
8 interrogations of the defendant that lasted until
9 approximately October of 2004 certainly provided harsher
10 conditions for Mr. al-Marri than someone that would have
11 been in a state custody or Bureau of Prisons custody. He
12 wasn't provided with a mattress. He was in a cell by
13 himself. He was in solitary confinement. He was
14 interrogated.

15 And at this point I would like to draw the
16 Court's attention to one of the defense exhibits,
17 Exhibit 2, that the Government provided which is a summary
18 of the interrogations. "Al-Marri was interrogated" --

19 THE COURT: I'm sorry. Is it your exhibit?

20 MS. BALTES: It's Defendant's Exhibit 2.

21 THE COURT: All right. I've got it.

22 MS. BALTES: "Al-Marri was interrogated on
23 37 days from September 2003 through July 2004. With the
24 exception of two conversations which occurred in his cell,
25 all the interrogations were video recorded in an

1 interrogation room. Some of the sessions were
2 extraordinarily brief, lasting just minutes, and other
3 sessions lasted for hours. Retained recordings have
4 session lengths varying from 38 minutes to just under
5 9 hours. During the almost 9-hour session there was a
6 2 1/2 hour break and another short break. During the long
7 sessions al-Marri was offered and took meals and prayer
8 breaks. There was a session at least one a month
9 typically with sessions on consecutive days, but there was
10 never more than five consecutive days of interrogation.
11 There was a 10-day period where there were nine
12 interrogation sessions. With the exception of the use of
13 the duct tape described in a separate memorandum, the
14 interrogators followed interrogation procedures consistent
15 with the Army Field Manual. No enhanced or extraordinary
16 interrogation techniques were employed. There was no use
17 of sleep deprivation or stress positions. Interrogation
18 sessions were conducted in a humane fashion."

19 In addition, Exhibit 4, Defendant's Exhibit 4,
20 discusses information that was contained in a 2008 DIA
21 Joint General Counsel-Inspector General Report regarding
22 destruction of tapes that the defense has alluded to.
23 Obviously the defense argument is that because there was
24 destruction of tapes, there must be some bad faith purpose
25 and there must have been other abusive techniques that

1 were concealed because things were destroyed, but that
2 simply is not the case.

3 Evidence in the case showed that: "After the
4 interrogation of al-Marri concluded, the interrogation
5 team destroyed what they believed to be all the recordings
6 of the interrogation sessions. The interrogation team and
7 manager for the interrogation regarded the recordings as
8 working materials similar to handwritten notes,
9 destruction of which they believed was required when no
10 longer needed for intelligence purposes. This belief was
11 consistent with then DIA and DoD issuances concerning
12 information security. During the course of the
13 interrogations the interrogation team chief asked about
14 disposition instructions for the al-Marri recordings and a
15 DIA attorney advised that there was no specific
16 instructions regarding retention or disposition of the
17 al-Marri recordings. When the recordings were destroyed,
18 there was no court order or executive agency preservation
19 order requiring their retention."

20 While the defense might have a different
21 interpretation of why, the Government certainly thinks
22 it's important that the Court consider that this was an
23 Inspector General Report that was issued that clearly
24 discussed why the recordings were destroyed and that there
25 was no bad faith and there was no purpose. If there was

1 some bad faith or intent on the Government to destroy,
2 certainly everything would have been destroyed and the
3 videotape which the Government provided a summary of to
4 the defense in which the defendant's face was duct taped
5 certainly would have been among the tapes that would have
6 been destroyed and that's not the case.

7 On Defense Exhibit 8, information contained in
8 the document on October 21, 2003, the Government provided
9 information regarding one of the interrogation sessions.
10 Essentially this is -- I think this is important for the
11 Court to consider as well because there was a lot of
12 testimony yesterday about the different treatment between
13 the different enemy combatants that were at the Brig and
14 the treatment that the defendant endured when he was
15 undergoing DIA interrogation and when he was under Brig
16 control.

17 But the report on the 21st of September 2003
18 certainly indicates that he was provided socks. He
19 demanded socks, clock, dental floss and Q-tips. He had
20 received socks due to feeling chilly and to minimize the
21 bruising caused from the ankle shackles.

22 THE COURT: Well, my understanding from my
23 reading of all those documents is that there were times
24 that he was given things, say, for example, socks or a
25 clock or the Quran, and then other times that those were

1 taken away. The fact that he was provided socks on a
2 particular date doesn't mean he always had them.

3 MS. BALTES: And the Government certainly is not
4 asserting that, but I think it's important based on the
5 evidence that the defense put forth yesterday that -- I'm
6 sure there were times during the interrogations where
7 things were taken away and there was evidence that the
8 Quran was taken away and this was all part of DIA's plan
9 in interrogating the defendant, but this was not inhumane
10 treatment. It was pursuant to the standard Army Field
11 Manual. And although the defendant might have been
12 uncomfortable, he was never tortured. No enhanced
13 interrogation techniques were used.

14 And the Government certainly doesn't condone
15 what happened or -- I mean, this is a criminal prosecution
16 of the defendant and the conditions of his confinement
17 were certainly different than any other criminal
18 defendant, but it's very important to put in context about
19 why that happened.

20 In 2001 the defendant was arrested three months
21 after the September 11 terrorist attacks. He was
22 initially arrested because the Government found evidence
23 that he had been in contact with Mustafa al-Hawsawi or
24 attempted to contact Mustafa al-Hawsawi. At that point
25 during the several months after the 9-11 terrorist

1 attacks, the FBI had identified Mustafa al-Hawsawi as one
2 of the persons who had assisted the 9-11 hijackers with
3 money and with western style clothing so that they could
4 enter the United States undetected and be available on
5 September 11 for terrorist attacks.

6 Additionally, the Government at that point knew
7 that the defendant had been in touch with Khalid Sheikh
8 Mohammed. Again, the Government was aware that Khalid
9 Sheikh Mohammed had been involved in planning the 9-11
10 attacks.

11 So while the DIA interrogations of the defendant
12 certainly would not be standard in any criminal case, it's
13 very important to put these in context in the post 9-11
14 environment. It was DIA's job to assess the threats that
15 the defendant might pose against the United States and
16 that's why he was declared an enemy combatant in 2003,
17 when the United States learned of information that they
18 believed at that point needed to be -- that he was a
19 member of al-Qaeda and that's why he was declared an enemy
20 combatant.

21 So the interrogations of the defendant are
22 definitely unique to a criminal case and are not something
23 that Courts have seen very frequently. However, the post
24 9-11 environment was a very different time in the United
25 States and the Government's belief at that time that he

1 was communicating with people that had planned the 9-11
2 attacks was very, very significant and that's why he was
3 treated the way he was.

4 Now it's interesting to note obviously that
5 that's not -- it wasn't an incorrect conclusion. I mean,
6 the defendant was in contact with Khalid Sheikh Mohammed
7 and he was in contact with Mustafa al-Hawsawi. Obviously
8 there is no evidence to suggest that he was part of the
9 9-11 attacks. But after 9-11 the Government was extremely
10 concerned about what additional attacks could be happening
11 and the fact that a sleeper cell agent had managed to come
12 into the country on September 10 and was positioned to
13 work for al-Qaeda was very threatening and still should be
14 threatening. Al-Qaeda still harbors the same violent
15 philosophies against the United States that they did in
16 2001.

17 So for these reasons, although the conditions of
18 confinement were certainly not what a criminal defendant
19 would see and the defendant was not charged, he did not
20 have access to his attorneys for the first couple of
21 years, the Government took all of that into account in the
22 determining the plea agreement in this case. There were
23 two charges that the defendant was charged with. Had he
24 gone to trial, clearly there would have been -- there's
25 litigation risk for both sides. But if convicted at

1 trial, the defendant would have had a much greater
2 exposure than the plea agreement that he pled to today.

3 THE COURT: Well, I would like to ask you about
4 that because I'm not sure I understand why that's so. He
5 was convicted -- or he was charged in Count 1 with
6 conspiracy. Count 2 was the substantive count of
7 providing material support, correct?

8 MS. BALTES: Yes.

9 THE COURT: But it's exactly the same conduct,
10 correct?

11 MS. BALTES: That's true.

12 THE COURT: And I don't recall in over 27 years
13 on the bench ever imposing a consecutive sentence on a
14 person for two different counts involving the same
15 conduct. Am I missing something?

16 MS. BALTES: Certainly --

17 THE COURT: If that's the point you were making,
18 that he was theoretically exposed to 30 years rather than
19 just 15, I don't think I've ever done that in 27 years.

20 MS. BALTES: There certainly is nothing in the
21 guidelines that prohibits a judge from imposing a
22 consecutive sentence. And given the conduct of this
23 defendant, certainly if he had gone to trial the
24 Government would have asserted that that would have been
25 appropriate. But it is. It's a theoretical risk and

1 there are lots of litigation risks about going to trial.
2 The fact is the defendant did plead guilty in this case.

3 But the Government certainly was aware of the
4 prior conditions of confinement that the defendant endured
5 in negotiating this plea agreement and that's the point
6 the Government would like to take into account today, that
7 those were already taken into account, so an additional
8 departure is something the Government objects to based on
9 the prior conditions of confinement.

10 THE COURT: So you're saying to me you took it
11 into account by agreeing to drop Count 2? Is that
12 correct?

13 MS. BALTES: That's correct.

14 THE COURT: Anything else or is that it?

15 MS. BALTES: Well, certainly a sentence range
16 could be different if someone goes to trial or if someone
17 pleads guilty. I mean, I think that --

18 THE COURT: But not in these circumstances
19 arguably because the guidelines come in twice greater than
20 the statutory maximum. I don't recall ever having a
21 situation like that before.

22 MS. BALTES: Certainly the situation is unique
23 before the Court for many respects, but --

24 THE COURT: I am a little curious about what he
25 was charged with because it seems kind of ironic to me

1 that he's facing a 15-year maximum sentence for this
2 conduct and on a typical Friday I am routinely sentencing
3 many young adults to 20, 30 years, 40 years on drug
4 charges. It seems like the statutory maximum in this case
5 is ridiculously low.

6 MS. BALTES: Well --

7 THE COURT: Is that factored into your decision?

8 MS. BALTES: I do and I think the Government
9 would agree that the statutory maximum of 15 years for
10 conduct that supports the material support charge in this
11 case is ridiculously low, which is why the Government
12 highlights the fact that the guideline range absent the
13 statutory maximum started at 360 months to life and even
14 with the role adjustment that the Court granted this
15 morning it's still 292 months to 365. Obviously all those
16 are factors that the Court will take into consideration
17 when sentencing this individual, but 180 months, yes, for
18 the conduct that this defendant pled guilty to and
19 admitted in his colloquy does seem low, which is why if
20 the Court was to grant some type of downward departure
21 less than 180 months it would obviously reduce that and
22 not reflect the seriousness of the offense for which he
23 was charged.

24 And in the sentencing papers the Government
25 filed, obviously the Court is aware of the Government's

1 argument with respect to the credit for time served issue.

2 THE COURT: Well, I would like you to address
3 that briefly.

4 MS. BALTES: The Government's position is that
5 under the statute the authority rests with BOP to
6 determine the credit for time served for an individual.

7 THE COURT: And I don't think the defense
8 challenges that. As I understand it, it's very clear that
9 once he's sentenced here, goes into the Bureau of Prisons,
10 the Bureau of Prisons is not, not going to give him any
11 credit for time served when he was being held as a
12 material witness up until the time that he was indicted in
13 the Southern District of New York. It's my understanding
14 that they would give him credit for the period of time
15 that he was under that first indictment up through -- up
16 to the date that he was designated an enemy combatant in
17 this court and then he would not be credited for the
18 period of time that he was held in the Brig from '03 to
19 '09.

20 MS. BALTES: That's my understanding. The
21 Bureau of Prisons typically does not award credit for time
22 served for time spent as a material witness. That's
23 pursuant to their internal guidelines. It doesn't qualify
24 under 18 U.S.C. 3585(b) as something that qualifies for
25 credit for time served.

1 THE COURT: Do you agree with my understanding
2 that he would be given credit for the time that he was
3 under charge with the first indictment?

4 MS. BALTES: Yes. Yes. BOP's interpretation
5 and certainly the Government's interpretation of 3585(b)
6 is consistent. Because he was charged in a federal
7 criminal case, that qualifies under the statute for credit
8 for time served. I'm not sure how the computation works
9 out, but that time would be.

10 THE COURT: Go ahead.

11 MS. BALTES: Now the time that he was in
12 military detention, however, also does not qualify as
13 3585(b) credit for time served. The reasons for that the
14 Government laid out in the sentencing memorandum, but I
15 think it's important to note that the same reasons why it
16 doesn't qualify for credit for time served are perfect
17 factors for the Court to consider in whether to grant a
18 downward departure based on conditions of confinement.

19 I mean, essentially it's -- the defense
20 obviously would like the defendant to receive credit for
21 the time that he served in the Brig and if it's not a
22 credit for time served sentence, then they are proposing
23 it as a downward departure based on his conditions of
24 confinement. And the reasons -- the reasons why it's not
25 appropriate under 3585(b) are that it's not -- obviously

1 it doesn't satisfy the statutory requirement that it was a
2 criminal sentence. He was never charged with anything and
3 so it doesn't qualify under 3585(b).

4 THE COURT: But the reason that he was being
5 held there as an enemy combatant is for the most part the
6 very same conduct that he's charged with in this
7 indictment. Isn't that correct?

8 MS. BALTES: To a point. When he was declared
9 an enemy combatant in 2003, it was based on the AUMF,
10 Authorization For Use of Military Force, and that
11 authorized the executive branch to declare someone an
12 enemy combatant because they're a member of al-Qaeda. Now
13 the information that was contained in what's been called
14 the Rapp Declaration, which I'm sure Your Honor is aware,
15 certainly contained a lot of the facts. They're similar
16 to the conduct that he pled guilty to in the criminal
17 case. But that doesn't mean that that was required under
18 the AUMF. It was simply to determine whether someone was
19 a member of al-Qaeda.

20 And I want to provide the Court with a little
21 bit of an analogy because this is certainly a complicated
22 area I admit. But if someone is designated as an enemy
23 combatant and designated in military custody, it's because
24 they are going to be taken off the battlefield and away so
25 they cannot cause any harm to forces. If you had a

1 situation in World War II where an enemy -- or where a
2 German soldier was captured, they would be put into
3 military detention because they are a member of the enemy
4 forces, but that person might not be charged with a war
5 violation or a criminal violation simply because they are
6 a member of the enemy forces. However, if while that
7 person was in military custody there was evidence to
8 suggest that they had committed some type of war crime --
9 and during World War II that certainly was possible.
10 Maybe they were involved in concentration camps. Maybe
11 they were part of the Nazi SS forces. Clearly that
12 evidence would have supported charging them with a war
13 crime. But it can be different.

14 Now it's much more complicated in the time that
15 we're dealing with now because we're talking about
16 al-Qaeda. Al-Qaeda members are not uniformed forces.
17 They are not part of a nation's army. So it's different.
18 When al-Qaeda declared war on the United States, as
19 evidenced by the '96 and the '98 fatwa, this was a holy
20 war. It was in Bin Laden's statement. All Muslim
21 brothers have to fight the infidel and eradicate the
22 infidel from the Holy Land and from Mecca. And clearly
23 al-Qaeda brought that fight to the United States in
24 September of 2001, even earlier by the bombing of the
25 USS Cole in 2000 and the East African bombings in 1998.

1 So the United States had the authority to detain
2 somebody as an enemy combatant simply because they're a
3 member of al-Qaeda. The fact that the same facts support
4 that he was a member of al-Qaeda that supports the
5 criminal case though do not mean that he should get credit
6 for the time he served. He was a member of al-Qaeda.
7 That's why he was detained as an enemy combatant.

8 In addition to him being a member of al-Qaeda,
9 he also provided material support. He came here as a
10 sleeper agent to the United States on September 10, 2001.
11 That's the criminal conduct he's charged with in this
12 case. And there is a difference. And I understand that
13 it's not a difference that's easily understandable as it
14 would be in 1946 post-war Germany, but the reasons for him
15 being designated as an enemy combatant in 2003 were
16 because he was a member of al-Qaeda. And the evidence
17 that he was a member of al-Qaeda certainly was much of the
18 same evidence that he admitted to in 2009 in his plea
19 agreement.

20 Part of reason for that is because if you're a
21 member of an enemy force, typically you wear a uniform so
22 it's very easy to identify someone as a member of an enemy
23 force, but that's not how al-Qaeda operated and he didn't
24 come into the United States wearing a uniform. He came in
25 with his family on September 10, 2001.

1 For those reasons, Your Honor, it's not --
2 that's why it doesn't support the 3585(b) factors for time
3 served and because of that the Government asserts that the
4 Court should take that into serious consideration in
5 determining whether or not it's appropriate then to grant
6 the defendant credit or a downward departure based on his
7 conditions of confinement at the Brig.

8 The fifth factor under 3553 that the Court
9 should consider is obviously the need for adequate
10 deterrence and protection of the public. The terrorist
11 cases are tricky because, as Mr. Risley already discussed,
12 the terrorism enhancement applies in this case, the
13 defendant stipulated that it applies, and so it adds a
14 12-level upward adjustment to the base offense level, but
15 it also does move the criminal history category to VI.

16 And as Mr. Risley already discussed, the reason
17 for that is because the Sentencing Commission in their
18 research in support of putting the terrorism enhancement
19 in the guidelines acknowledged that there is a high
20 likelihood of recidivism and lack of rehabilitation for
21 people that are engaged in terrorist acts. It's because
22 they -- people that are members of al-Qaeda and engage in
23 terrorist acts have bought into a philosophy, a violent
24 philosophy, where they believe that their faith justifies
25 their committing terrorist acts.

1 The defendant clearly in 2001, he bought into
2 that philosophy. It doesn't appear from the record that
3 there's been any disavowal of al-Qaeda by the defendant
4 apart from -- and we obviously heard a lot of evidence
5 yesterday about his ability to develop meaningful
6 relationships with his attorneys who are Americans and
7 with the Brig staff who are uniformed personnel in the
8 military and that might seem inconsistent to an observer
9 that someone that could maintain those relationships,
10 especially with Americans, could still harbor the same
11 al-Qaeda philosophy, but the discussions with
12 Major Sirratt as indicated in her notes that the
13 Government submitted yesterday reveal that the defendant
14 still harbors the same philosophy as al-Qaeda with respect
15 to infidels. The fact that he has carved out an exception
16 for the people at the Brig who treated him well and for
17 his American attorneys doesn't mean that he doesn't still
18 harbor the same views that he did in 2001 when he came
19 into the United States on behalf of al-Qaeda and there's
20 no -- there is a letter, I believe, from the defendant's
21 attorney which was based on conversations that Mr. Berman
22 had with al-Marri prior to 2006 when Mr. Berman left for
23 Israel and Mr. Berman talks in there about how they had
24 heated exchanges about the Middle East and that the
25 defendant had never met someone who was Jewish before and

1 they were able to discuss these topics and Mr. Berman's
2 characterization is based on those conversations and that
3 he saw this transformation in the defendant and based on
4 that he believes that the defendant wouldn't pose a
5 threat. But interestingly in there, Mr. Berman notes
6 that -- he acknowledges that it might be that the
7 defendant never posed a threat. I think that the letter
8 states: "It's my sense that he would not perform those
9 acts today. This is not a man filled with rage,
10 notwithstanding the manner in which he was treated over
11 the past years. He is a man" -- I'm sorry. "For those
12 reasons, regardless of the acts, if any, he may have been
13 prepared to engage in when he arrived in the United
14 States, it is my sense that he would not perform those
15 acts today."

16 I think it's important to put in context that
17 the defendant -- the letters in support of his supposed
18 rehabilitation, this dramatic transformation, don't really
19 talk about a transformation from what. It doesn't appear
20 that there is an acknowledgment that the defendant in 2001
21 was capable of anything violent. But the facts that he
22 pled to, the logical inference from those facts is that he
23 was here on behalf of al-Qaeda and, as Your Honor noted
24 yesterday, it's inconceivable to believe he was not going
25 to be asked by al-Qaeda to do something that was going to

1 result in some type of violent act against the United
2 States.

3 And so all of these views have to be put in
4 context. At the same time Mr. Berman was having these
5 conversations with Mr. al-Marri, these heated exchanges
6 which lead him to believe that he's not going to pose a
7 threat, the defendant was having discussions with Major
8 Sirratt which I think show a different side. Maybe he
9 felt more comfortable with her expressing certain views,
10 but he expressed the views that all infidels -- I don't
11 know the exact language, but certainly the impression
12 Major Sirratt was left with was that he harbored the same
13 philosophy that al-Qaeda had. And this is in 2007.

14 So I'm not sure what the dramatic transformation
15 has been other than the defendant has been able to develop
16 meaningful relationships and so those people are certainly
17 carved out in his exception of what an infidel is, but I
18 don't think that that should provide comfort to the Court
19 in determining whether or not he's going to pose a threat
20 to the community or to the public once he is released from
21 the sentence.

22 The last factor that the Court considers is the
23 need to avoid unwarranted sentencing disparities. There
24 is obviously a wide range of conduct that forms the basis
25 for a material support charge, so this is obviously why

1 it's so important that the Court considers many factors in
2 determining the sentence.

3 I'm not sure it's helpful to look at every
4 single material support case. I mean, certainly the
5 sentences have ranged from 5 years to 15 years because
6 that's the statutory maximum. I know the defense has
7 pointed out several cases that they think are illustrative
8 of what the conduct is in this case and what the sentence
9 should be.

10 Specifically there were two Military Commission
11 cases, the Hamdan case and the Hicks case that the defense
12 cites as examples of why the defendant's sentence here
13 should be much less than 15 years. In addition, the
14 Warsame case was cited by the defense, a recent sentence
15 of 92 months.

16 There's obviously distinguishing features in all
17 these cases, but in the Warsame case one of the
18 significant factors in the sentence of 92 months was that
19 the defendant in that case cooperated and that is a huge
20 factor that is not present here.

21 The other two cases, David Hicks and Hamdan --
22 in the Hamdan case, at the sentencing and throughout
23 actually the litigation Hamdan expressed great remorse for
24 what he had done and expressed a disavowal of what he
25 believed he was asked to do by al-Qaeda and that he would

1 have ever done anything violent. That has never been seen
2 by the defendant in this case.

3 In addition, the Military Commission cases are
4 not bound by sentencing guidelines. The sentences are
5 handed down by the members who are similar to a jury in a
6 federal jury trial. So there's a lot of factors that
7 obviously went into that decision, but I don't think
8 that's particularly helpful.

9 But if one wanted to look at the other Military
10 Commission cases where material support was charged, the
11 case of Bahlul would be an example that the Government
12 would point to. In that case Bahlul was charged with
13 material support and conspiracy. It's not cited in the
14 defendant's papers. They cite to --

15 THE COURT: How do you spell the name?

16 MS. BALTES: B-A-H-L-U-L. Now Bahlul was
17 charged with material support and he was -- actually the
18 conduct supporting that charge was that he created the
19 propaganda video for the USS Cole. It was produced after
20 the USS Cole bombing and it was distributed by al-Qaeda in
21 propaganda for that act against the United States. In
22 addition, his role was as some type of personal secretary
23 to Bin Laden. Now in that case the defendant was
24 sentenced to life in prison.

25 So there's a huge range of sentences and conduct

1 that have been charged in material support cases which is
2 why this factor is probably one of the less significant
3 factors that the Court should look at and the other
4 factors I think paint a much better picture of who the
5 defendant is and what the purpose of the 3553 factors are
6 for the Court in fashioning a sentence, which the
7 Government obviously asserts is a 15-year sentence.

8 And with that, Your Honor, I will stop there and
9 if I may have a few minutes in rebuttal based on the
10 defense case.

11 THE COURT: Thank you. We're going to be taking
12 a break in a couple of minutes. Before that I had two
13 things I wanted to mention to defense counsel for
14 clarification.

15 One is because there's a reference to this in
16 the pre-sentence report, but there are no additional
17 details. And you don't have to give me additional
18 details, but if you're willing to I might find them
19 enlightening. Let me find the reference. Hold on.

20 Paragraph 105 of the pre-sentence report, this
21 is under the section concerning financial condition,
22 ability to pay, in effect ability to pay a fine. It says:
23 "The defendant reported no assets. He advised he
24 currently owes \$1.5 million to Islamic Bank, Doha, Qatar
25 for a business loan." And you can think about this over

1 the break. But I'm very curious about that. Most people
2 don't borrow \$1.5 million. I don't know when that
3 occurred, what happened.

4 The other thing is in a number of the -- I think
5 almost always when Mr. al-Marri wrote a letter to someone,
6 the letter would begin by him saying, "Peace be upon those
7 that follow the guidance." I would like to know what that
8 means. We'll be in recess for 15 minutes.

9 (Recess taken)

10 MR. SMITH: Your Honor, before we start back in,
11 just a housekeeping matter to take care of. Yesterday
12 there were a number of documents that were shown to the
13 Court as well as some photographs and videos. We have
14 marked as Hearing Group Exhibit A the documents that were
15 shown yesterday and also we have made a video, and I will
16 give a copy to the Government of the video showing -- the
17 DVD that has the videos and photographs. I understand
18 from the Government as far as the video, they wish that to
19 be kept under seal.

20 THE COURT: How can I keep it under seal if it's
21 admitted into evidence?

22 MS. BALTES: The Government's concern with the
23 exhibits yesterday were that there was no redaction in the
24 written material of some of the active duty military
25 personnel, so we would request that to the extent that the

1 exhibits have those names either we be provided an
2 opportunity to redact them or they be kept under seal.
3 The issue with the video is that it does show the full
4 faces of active duty personnel which is something the
5 Government is concerned about considering a lot of those
6 people serve overseas. So if the Court cannot seal that
7 video, then we would like to be able to work with the
8 defense to provide a copy.

9 THE COURT: I would hope that the parties could
10 confer on that, try to come up with something that
11 addresses the Government's legitimate interest and at the
12 same time recognizes that normally once an exhibit is
13 admitted into evidence, it becomes part of the -- becomes
14 accessible by the public.

15 MR. SMITH: Certainly we can redact the
16 documents to remove any names. That's not any problem.
17 As far as -- I don't know technically how we redact faces,
18 but -- we can do it? Okay, we can do it.

19 MS. BALTES: I think it takes a little bit of
20 time though, so --

21 THE COURT: I'm certainly willing to seal it
22 until that's done, but with the understanding that
23 following the sentencing that that would have the highest
24 priority so that whether it's a member of the public
25 generally or the news media, whoever can have access to

1 it.

2 MR. SAVAGE: We will redact names and we will
3 redact faces of military members.

4 THE COURT: Have you conferred so that you are
5 on the same page as to which names need to be redacted
6 from where?

7 MS. BALTES: We have had discussions about that
8 before, but I will make sure that --

9 THE COURT: I do think we need to be very exact
10 about that. Does that implicate -- is that solely focused
11 on what was presented yesterday or is it -- are there
12 other exhibits in the ones that I received prior to trial
13 that need further redaction?

14 MS. BALTES: The two exhibits that also included
15 that information were the ones that the Government
16 requested be sealed yesterday and certainly we can work on
17 redacting copies of those so that those can be made public
18 as well.

19 THE COURT: Very good. All right. Thank you.
20 So with that caveat then, as I understand it, all of the
21 exhibits that were admitted yesterday -- all of the
22 exhibits that were presented yesterday are admitted.

23 MR. LUSTBERG: Thank you, Your Honor. If it
24 please the Court, I will first address the departure
25 issues that we raised. I know the Court is going to

1 consider these all together, but it will just help us to
2 keep it straight if I can do it that way and then move on
3 to 3553(a) factors and at that point, actually given that
4 the second factor is the history and characteristics of
5 the defendant, that's when we will show the videotape to
6 the Court that we wanted to.

7 THE COURT: Fair enough.

8 MR. LUSTBERG: Let me start with the downward
9 departure that we requested based upon Section 4A1.3(b).
10 Mr. Risley addressed that issue with Your Honor first, so
11 I'll address it first as well.

12 Section 4A1.3(b) is a particular departure under
13 the guidelines that is permitted when a defendant's
14 criminal history category under the guidelines
15 substantially overstates (a) his criminal history and/or
16 (b) the likelihood that he will commit another crime.

17 THE COURT: Is it "and/or" or both?

18 MR. LUSTBERG: Well, you know what? As soon as
19 I said that, I realized you would ask me that question and
20 I'm going to get the exact language so we don't have to
21 speculate about that. That's the language directly from
22 the guidelines and it says: "If reliable information" --
23 I'm sorry. This is upward departure.

24 THE COURT: I've got it. It's "or".

25 MR. LUSTBERG: Yes, it's "or." "If it

1 overrepresents the seriousness of the defendant's criminal
2 history or the likelihood that he will commit."

3 The way the cases address this is to boil it
4 down to initially a fairly simple inquiry which is is this
5 defendant in this case the usual criminal history category
6 VI defendant. Respectfully, Mr. al-Marri is not. As the
7 Court is aware, he scores out before the terrorism
8 enhancement as a criminal history category II and even
9 that is based upon an 18-year old DWI conviction and the
10 fact that he eventually, because he had left the country,
11 pleaded guilty to that offense in October 17 of 2001 when
12 he returned and he was sentenced on November 29, 2001, a
13 couple of weeks before he was taken into custody, and so
14 his arrest on these charges constituted sort of a
15 violation of that probation and that is what increased him
16 from criminal history category I where he normally would
17 have been for a DWI to criminal history category II. So
18 clearly a person with that criminal record is not
19 typically a category VI, is not usually a category VI
20 offender.

21 Here obviously that's not what we're talking
22 about. What we're talking about is the terrorism
23 enhancement and, as the Court is well aware, the terrorism
24 enhancement increases a defendant's offense level by 12
25 and also automatically increases his criminal history

1 category to VI based upon two things, the dangerousness of
2 the offense and the likelihood of recidivism. But as the
3 Government has repeatedly said today, the terrorism
4 enhancement applies to a large, broad range of offenses
5 and it's because it applies to such a broad range of
6 offenses that Courts have in fact -- and we provided the
7 authorities to Your Honor in our sentencing memo --
8 departed downward, in fact departed downward as far as
9 criminal history category I even when that enhancement
10 applies and especially in situations where it overstates
11 the likelihood of recidivism.

12 As Your Honor knows, it is the defense's very
13 strongly held view that Mr. al-Marri's likelihood of
14 recidivism is overstated by criminal history category VI
15 and by the Government's presentation here today.

16 Mr. al-Marri will not recidivate for a number of reasons.
17 I would like to take those in order because they are all
18 the reasons that this Court ought to consider in deciding
19 whether criminal history category VI is in fact
20 appropriate.

21 First, he has been very significantly punished
22 and, therefore, very significantly deterred by the type of
23 punishment that has been inflicted upon him and that he
24 understands would be inflicted upon a person who does --
25 who would commit the kind of offense that he has committed

1 in the past. But we as a practical matter, Your Honor,
2 really do believe that this is a defendant who has
3 changed. And with all due respect to Dr. Surratt, her
4 testimony in that regard is entirely unconvincing. It
5 completely ignores the evidence. Not that, as Ms. Baltes
6 says, Mr. al-Marri has carved out a number of Americans
7 who he likes, but the fact that -- and you will hear this
8 from his own mouth shortly and much more. And that's why,
9 Judge, it's a good idea for you to take this all as a
10 whole and not rule on these applications one at a time.

11 Mr. al-Marri's affection for people at the Brig
12 and for his attorneys is not limited to them. He
13 understands that those are Americans and he has a greater
14 understanding of this country and of the good here that is
15 represented by particularly Mr. and Mrs. Savage who have
16 spent an extraordinary amount of time, energy, personal
17 resources to stand by Mr. al-Marri's side for what is now
18 years under what has at times been extremely emotionally
19 draining and difficult circumstances. And Mr. al-Marri
20 doesn't say so, therefore, he would never do anything to
21 hurt the Savages. What he says is that he understands now
22 what Americans are about, that the Savages are the kinds
23 of Americans that are out there all around this country
24 and the kind of people who he would never hurt. And so he
25 has a different view, not just of them and not just of the

1 uniformed staff at the Brig that treated him with decency,
2 but of all of us as a result of that. That is the fact.

3 Now Major Sirratt says that she had
4 conversations with Mr. al-Marri where he said something
5 along the lines of the Jews are infidels and they should
6 be killed. Your Honor, you have Government Exhibit 6 and
7 I would challenge the Court to go through Government
8 Exhibit 6 and find any statement that says anything like
9 that.

10 THE COURT: I did that yesterday.

11 MR. LUSTBERG: It's not there. It's not there,
12 as she herself admitted, but let's talk about what is
13 there. There is for sure a discussion that we went over
14 on cross-examination of Major Sirratt on June 25, 2007 in
15 which Mr. al-Marri discusses the fact that he and his
16 brother, who was at the time detained at Guantanamo, would
17 not be released until the war was over and that the war
18 would not be over until there were no longer infidels on
19 Palestine soil or words to that effect.

20 Your Honor, if you read that particular
21 discussion on that day it's abundantly clear exactly what
22 was going on and what was going on was that Mr. al-Marri
23 was having a discussion about politics. He was having a
24 discussion about what was likely to happen. He had at no
25 point said, "I will be involved in killing people," or

1 even that they should be killed. He was saying that he
2 would remain in custody or his brother would remain in
3 custody for the length of the war and that that war would
4 go on for a very long time. At no point in that
5 discussion does he say that that was his position. Now
6 Dr. Sirratt says that's what he said and the Court will
7 have to evaluate of course her credibility in light of the
8 fact that she was taking notes about things far beyond the
9 medical services that she says she was tasked to provide.
10 One would think if he said something like that, it would
11 appear in the notes and it doesn't. Instead what appears
12 is really a relatively -- I mean, obviously these are
13 serious matters, but it's an abstract general discussion
14 of these issues.

15 You will hear with your own ears and not too
16 long from now what Mr. al-Marri himself has to say about
17 his view of these things and you will see it is not in the
18 least consistent with Dr. Sirratt, who in any event has
19 had no contact with him over the last -- really any
20 significant contact since 2007, which is now two years
21 ago.

22 Likewise Your Honor can examine her report,
23 form 600 or whatever it is, about the issue of Suni and
24 Shiites. And, again, it's the report dated July 12, 2007.
25 Again, it is an abstract discussion of these issues. They

1 are discussing those types of matters. There is no point
2 at which Mr. al-Marri evidences any commitment to
3 undertake any violent act or even any sympathy with those
4 violent acts. They are discussing the difference between
5 Sunis and Shiites. And when you read that paragraph,
6 that's exactly what it talks about.

7 To rely upon that to say that those two
8 discussions in the context of a man who has been so
9 severely punished and, therefore, so severely specifically
10 deterred, in the context of a man who has become -- it's
11 not just as Mr. Risley says that he's a good guy.
12 Respectfully, that has not been our position. It is not
13 our position he is unlikely to recidivate because he's a
14 good guy with a good sense of humor. That really does
15 demean the argument that we're making.

16 The argument that we're making is unbelievably
17 real and is revealed by the evidence of record and by the
18 way that Mr. al-Marri interacted with everybody from the
19 commander on down at the Brig and has continued to this
20 day at places, at Pekin and with all of us, and we're not
21 really allowed to testify, but it does speak of a
22 remarkable transformation and Mr. Berman's letter does
23 bear powerful witness to that transformation, a
24 transformation of a man who came here, has pleaded guilty
25 to coming here to do bad things and now will not do bad

1 things to the United States, does not believe in doing
2 that and stands for peace and love. And you're going to
3 hear that for yourself.

4 Mr. al-Marri will not commit another offense and
5 putting him in criminal history category VI completely
6 overstates his likelihood of recidivism. Certainly the
7 Government has not come forward with any evidence that is
8 the least bit persuasive on the fact that that's the kind
9 of thing that he's likely to do. He should be treated as
10 a criminal history category I or criminal history
11 category II if you want to use the one that would
12 otherwise be --

13 THE COURT: So there shouldn't be any reflection
14 in his criminal history category for his conduct in this
15 case? Is that what you're saying?

16 MR. LUSTBERG: Well, typically --

17 THE COURT: Answer that question.

18 MR. LUSTBERG: You're correct, Judge. That is
19 our position and that is the position that is consistent
20 with what has happened in other cases with the terrorism
21 enhancement that we cited to the Court in our papers. I
22 did not see anything -- I haven't seen any case law that
23 has addressed it to the contrary. We did cite cases to
24 Your Honor where people in criminal history category VI
25 were reduced to criminal history category I

1 notwithstanding the terrorism enhancement and it is our
2 position that's what ought to happen here.

3 At the end of the day one could -- that matters
4 a great deal because that would bring his offense -- if he
5 were criminal history category II, for example -- well, it
6 would still be at a level that would be slightly above the
7 180 months, but much closer.

8 However, there's an extent to which all that is
9 quite academic because Your Honor's starting point is not
10 the guideline range that you arrived at. Your Honor's
11 starting point is 180 months. The Government did not
12 address this point at all, but we did in our papers, which
13 is this.

14 Under Section 5G -- I think it's 1.1 of the
15 guidelines. Under Section 5G1.1(a) of the guidelines, it
16 states as follows: "Where the statutorily authorized
17 maximum sentence is less than the minimum of the
18 applicable guideline range, the statutorily authorized
19 maximum sentence shall be the guideline sentence."

20 That is, therefore, the starting point for Your
21 Honor's 3553 -- for any departure analysis, although this
22 obviously is a departure so it wouldn't be the starting
23 point for this last one, but for any departure for
24 conditions and also for any 3553(a) analysis.

25 The Government has not pointed to any authority

1 and there isn't any that stands for the proposition that
2 where the sentencing guideline range is above that, that
3 that should be the starting point from which Your Honor
4 works or even that it should carry any weight and they
5 give it a great deal of weight in the way the Courts have
6 sentenced. That is to say the Court should not consider
7 the fact that the guidelines have arrived at a range
8 higher than 180 months in deciding whether and how far to
9 vary from the guideline range if that's what the Court
10 chooses to do.

11 THE COURT: Are you saying I shouldn't consider
12 that?

13 MR. LUSTBERG: You should not consider that.

14 THE COURT: Where does it say that in there?
15 All it says is that effectively or as a practical matter
16 in that situation the guideline range becomes 180 because
17 that is the statutory maximum.

18 MR. LUSTBERG: Right. And then under 3553 one
19 of the factors the Court is supposed to consider is the
20 guideline sentence and what the Sentencing Commission has
21 said is under those unique circumstances -- and the Court
22 pointed out it doesn't happen very often. I mean,
23 typically the statutory maximum and the guidelines tend to
24 be in closer proximity to one another and usually in fact,
25 I'm sure in the vast majority of Your Honor's sentences,

1 the guideline range is beneath the statutory maximum and
2 so you don't encounter that issue. But the Sentencing
3 Commission has told you how to treat that in those rare
4 circumstances where you do.

5 THE COURT: No doubt the guideline range becomes
6 180 months.

7 MR. LUSTBERG: Pardon me?

8 THE COURT: The guideline range is 180.

9 MR. LUSTBERG: Correct. No question. So that's
10 the point from which you start. And --

11 THE COURT: No doubt about that.

12 MR. LUSTBERG: And it's also the guideline, it
13 is the wisdom of the Sentencing Commission, that is
14 supposed to be weighed under 3553(a). That's one of the
15 3553(a) factors.

16 THE COURT: Well, let me just interrupt. I
17 don't want to spend a lot of time on this.

18 MR. LUSTBERG: I'm not going to.

19 THE COURT: Because obviously if the statutory
20 maximum is 180, to say that the guideline range remains
21 above that is ridiculous.

22 MR. LUSTBERG: Correct. Right. But the
23 Government spent a great deal of time in their
24 presentation -- the only reason I'm addressing this -- and
25 in our brief it's a footnote around page 100. The

1 Government spent a great deal of time arguing that because
2 the sentencing guideline range would otherwise have been
3 much higher, that somehow that should, I guess, argue
4 against or be considered by the Court in arguing against a
5 variance. I think legally that's incorrect and that's the
6 position I'm taking here and I think that 5G speaks to
7 that.

8 THE COURT: All right. You've made your point.

9 MR. LUSTBERG: I want to now address the
10 conditions of Mr. al-Marri's detention. That has
11 obviously been the focus of this hearing in many ways from
12 its outset and continues to be an extremely important
13 issue and I want to first deal with a couple of the points
14 that the Government made.

15 First, I appreciate Ms. Baltes' concession that
16 the conditions under which Mr. al-Marri was detained were,
17 to use her terms, different from any other criminal
18 defendant. She's obviously correct about that. However,
19 she says a few things that are disturbing.

20 First of all, she says that it shouldn't matter
21 because -- or not that it shouldn't matter, but it should
22 matter less because of the offense that he committed. To
23 be sure, Your Honor, when you ultimately arrive at a
24 sentence in this matter, you're going to consider all of
25 the 3553(a) factors and the first one is the nature and

1 circumstances of the offense, so we're not arguing that
2 that shouldn't be considered. But the notion that that
3 offense because of what it was justifies those conditions
4 of confinement or more to the point that that offense
5 because of what it was serves to undermine an argument
6 that those conditions of confinement ought not be
7 considered by the Court in deciding whether to vary from
8 the guidelines is wrong and disturbing. If the Court
9 finds that those conditions are different from any other
10 criminal defendant, then under the case law that we have
11 cited to the Court your Honor has the discretion to depart
12 downward from the guidelines on that basis and certainly
13 you have the discretion under 3553(a) to consider that as
14 one of the circumstances of the offense in deciding what
15 the ultimate sentence ought to be.

16 So whether you do it by way of departure or
17 variance always is a little bit of angel stands on the
18 head of a pin. It matters little. The point is that the
19 fact that Mr. al-Marri was held under those conditions for
20 as long as he was -- and I'm going to talk about them in a
21 moment -- ought not be in any way mitigated because of
22 what this offense was. That's just unfair and it's wrong.

23 Beyond that, the notion that somehow that was
24 already taken into account in the plea agreement that we
25 reached is an extraordinary contention. I don't know all

1 of the details as to why the Government chose to enter
2 into the plea agreement it did. There were obviously a
3 lot of discussions back and forth, including discussions
4 that are not relevant to the Court as to what we thought
5 the likelihood was of Mr. al-Marri getting credit for time
6 served from the Bureau of Prisons. I will say that the
7 assessment of what that likelihood was is different -- was
8 different then than it is now, but in any event the point
9 is this.

10 The plea agreement was, as Ms. Baltus says, a
11 plea agreement that was reached in order for the parties
12 to do what they always do in reaching plea agreements,
13 which was to moderate each side's litigation risk. That's
14 correct. It is not and was not by its terms an effort to
15 take into account the conditions under which Mr. al-Marri
16 was held. And you know that because from day one and as
17 part of the plea agreement we have been telling Your Honor
18 and telling the Government that that was going to be an
19 issue that we were going to raise at sentencing and that
20 that should be relevant to the sentence that the Court
21 reaches. That's beyond what the plea agreement did.
22 There's just no question that that was the intent of the
23 parties and it was not the intent of the parties to in any
24 way say that because this was a good deal in some sense
25 that, therefore, Mr. al-Marri's -- the conditions under

1 which he was held should somehow be less significant in
2 the Court's analysis.

3 Really it is not disputed and it is indisputable
4 that unusually harsh conditions of pre-trial confinement
5 are a mitigating circumstance that may warrant a downward
6 departure. That is the law. It's the law of this
7 circuit. It's the law of the land. And in this case
8 there really is no question but that those conditions
9 existed. I want to talk about a few of those conditions.

10 First, for six years Mr. al-Marri was in
11 indefinite detention. No matter how good things were at
12 the Brig -- and they did improve. There's no question
13 about that. Until February of this year, he was not
14 charged. There was no process. There was no end in
15 sight. I was asked by a newspaper reporter recently,
16 "Does Mr. al-Marri feel like there's now light at the end
17 of the tunnel?" One of the great things about our
18 criminal justice system is there is light at the end of
19 the tunnel. Sometimes that light is a long way off, but
20 at least there's a tunnel that you can look through. At
21 the time that he was in the Brig there was no tunnel, let
22 alone light at the end of it. It was just going to go on
23 and on and on and he had no idea when it would ever end or
24 whether it would ever end. For all that time, from
25 June 23, 2003 until October 14, 2004, he didn't see any

1 lawyers, anybody from the ICRC, nobody outside of his
2 interrogators and Brig staff.

3 But be that as it may, the point of it is he
4 didn't have any sense that it would ever come to an end
5 and that is one of the most brutal things that I can
6 imagine somebody going through, the notion that you're
7 there and there's no end in sight. You can't even mark
8 off the days and say, "It's one fewer day before I get
9 out." Because you don't know that it will ever end and
10 there's no process to determine whether it will ever end.

11 That has devastating psychological consequences.
12 It has -- as the expert testimony or the expert literature
13 that we have cited to Your Honor in our brief indicates,
14 it leads to pervasive hopelessness, deep despair, so much
15 so that there really are very serious constitutional
16 questions that the Supreme Court discusses in the Zadvydas
17 case and really that were only avoided in this case
18 because Mr. al-Marri's case then in the Supreme Court was
19 mooted by the indictment here.

20 But this case is even a little different than
21 that. This case is even a little different from the case
22 where somebody faces indefinite detention. This was a
23 case in which Mr. al-Marri was before Your Honor in this
24 court facing criminal charges after he had been facing the
25 same criminal charges that were in the Southern District

1 of New York where we argued there was no venue, which is
2 why it ended up before this Court.

3 Your Honor probably remembers that day in June
4 of 2003. It was about a week or ten days before we were
5 to have a suppression hearing in the case and I think
6 about a month before the trial that the Court scheduled
7 and Mr. Smith was here and the Government came over and
8 showed Your Honor the order from the President declaring
9 Mr. al-Marri an enemy combatant.

10 Up until that time Mr. al-Marri did have an end
11 in sight. Your Honor had carefully at his arraignment
12 laid out for him what the maximum penalties he faced were.
13 Your Honor had apprised him, as all good district court
14 judges do, of what his rights were. He knew those rights
15 and he knew what he faced. And suddenly beginning in June
16 of 2003, he didn't. Suddenly he was in, as some people
17 have described it, a legal black hole where there was not
18 only no end in sight, but not even a process to determine
19 that end.

20 This is much worse than a sentence of life
21 imprisonment, what he was going through at that time, in
22 some ways because it was indeterminate and there was no
23 sense as to what would happen to him, as to what would
24 even become of him. So that when his interrogators would
25 tell him, "We can make you disappear so that nobody will

1 ever know", that was credible. That was credible. It was
2 frightening. It was unbelievably scary. It's almost
3 really an unimaginable situation, respectfully, in this
4 system of laws that we have that somebody can be held
5 without any charges, without any sense that definition
6 will ever take place and for six years -- not a year, not
7 those 16 months, but for six years, from June of 2003
8 until Mr. al-Marri was indicted and this matter returned
9 to this court in February, actually into March of this
10 year, that was his situation.

11 Respectfully, Judge, it's unique, it's
12 extraordinary, it's unusually harsh, whatever words the
13 Court chooses to use. It's an unbelievable situation that
14 was not otherwise taken into account by the sentencing
15 guidelines and it certainly warrants a downward departure.
16 So indefinite detention is the first thing I wanted to
17 bring to Court's attention.

18 Second, to this very day, to this day and from
19 the time of his original arrest on a material witness
20 charge in December of 2001, so now almost eight years
21 later, Mr. al-Marri's confinement has been unique and
22 characterized by one extraordinary factor and that is
23 complete isolation. He has -- for an enormously long time
24 he had no contact with anybody, but he has never been in
25 population. He has never had any interaction with other

1 inmates or prisoners as they're called at the Brig.

2 THE COURT: Some of that I assume arguably could
3 be for his own protection.

4 MR. LUSTBERG: Could be. But if he were asked,
5 Judge, he would desperately crave the companionship of
6 somebody, somebody to talk to. And the effects of that
7 isolation are set forth in detail in the reports that we
8 have provided to Your Honor from Dr. Grassien.

9 Initially Dr. Grassien's reports were relatively
10 academic in the sense that he was really reviewing for
11 this Court, actually for a different Court at the time,
12 the literature on isolation, but ultimately, you know, he
13 himself interviewed earlier this year Mr. al-Marri and his
14 certifications stand for the proposition that
15 Mr. al-Marri's symptoms, his hypervigilance, his paranoia,
16 his anxiety, his jumpiness, are all things that are
17 consistent with isolation.

18 To be sure -- and we don't really disagree with
19 Major Surratt's view that Mr. al-Marri is a strong and
20 resilient person. He's honestly one of the strongest,
21 most resilient people I've ever met. But the notion that
22 one could go through eight years with the limited social
23 interaction, so incredibly few conversations, the months
24 where people were only allowed, as Your Honor has seen
25 from the record, to say "noted" to him and nothing else,

1 the months where his only conversations were with
2 interrogators, the times even thereafter his interactions
3 were limited to attorneys or the ICRC or fleeting
4 conversations with people at the Brig, that is
5 extraordinary.

6 And it's extraordinary, Judge, not only for the
7 time at the Brig but also in the Peoria County jail and we
8 submitted materials to Your Honor on that, at the MCC in
9 New York where I first met him, and he was there too under
10 23 hours a day lockdown and the other hour, which didn't
11 occur every day, he was allowed rec in a steel cage, again
12 with nobody else. It's exceptional. It's extraordinary.
13 It's unusually harsh. It warrants a downward departure.

14 We have provided evidence to the Court about
15 what that was like and what the psychological consequences
16 are. It's the sort of thing that, working from the
17 statutory maximum and from the guidelines, the sentencing
18 guidelines, that should be considered in imposing a just
19 sentence.

20 The Court, I think, got a particularly good look
21 at what it was like from some of the video that Your Honor
22 had the opportunity to see yesterday and that was made
23 available to us because video was kept on a 24-hour a day,
24 7-day a week basis at the Brig. Let's just point out a
25 few features of that.

1 Not only was there no human contact except for
2 interrogation, which I'll talk about later, and with
3 relatively few conversations with captors for a long time,
4 but the lack of interaction was heightened by the way
5 Mr. al-Marri was treated. Your Honor saw him. The only
6 time he was allowed to move about, it was with goggles and
7 earmuffs. It's one thing to have somebody move about a
8 facility in shackles and handcuffs. That's -- it's true.
9 That's routine in Bureau of Prisons facilities and in, I
10 think, most correctional facilities. But to blindfold and
11 earmuff somebody every time they move around to avoid even
12 the opportunity to view another person, the opportunity to
13 hear another person, is an extraordinary and extremely
14 harsh thing to do and just really goes to the very essence
15 of what it is to be treated as a human being. Human
16 beings are social. I think Dr. Surratt said that. And
17 the notion of treating somebody as if it doesn't matter,
18 as if that is something other than -- and I heard the
19 Government say that Mr. al-Marri was not tortured. That,
20 to me, is torture, to keep somebody from having even the
21 most rudimentary human interaction that goes along with
22 seeing other people and hearing other people.

23 Your Honor also saw the extraordinary sensory
24 deprivation that Mr. al-Marri experienced in his cell for
25 months and months and months at the Brig. We sat and

1 watched for something like three minutes or so
2 Mr. al-Marri uncomfortably shifting his position on his
3 metal bed where there was no mattress. There was nothing
4 there. I think in that case he was able to put toilet
5 paper underneath his head at some point to try to use it
6 as a pillow, but that was the closest thing to soft in
7 that room. It was a cold, hard, metallic, cement
8 existence. And that existence is one that is, again,
9 almost inconceivable. You know, we wake up in our beds
10 and those beds have a softness to them and that helps us
11 get through the night and it does help us get through the
12 day because we can touch and feel things that give when we
13 touch and feel them. Mr. al-Marri didn't have that for
14 months and months at a time.

15 I was thinking about that 3-minute video and I
16 was thinking to myself that meant that 3 minutes was
17 repeated 20 times in that hour and that 3 minutes was
18 repeated another 24 times in that day and it was day after
19 day and week after week and month after month. That is
20 exceptional, it's extraordinary, it's brutal, and it's the
21 kind of thing that ought to be recognized in a sentence
22 that promotes respect for the law.

23 The result of all this of course, Your Honor, is
24 predictable. It has devastating effects on a person's
25 mental health. It creates obsessiveness, a situation

1 where people would, for example, think that noxious odors
2 are being introduced into their cell when they're not or
3 when you become obsessively preoccupied with sounds, for
4 example the sound of a fan or the slamming of a door.

5 As one Court said in one of the cases that we
6 cited to Your Honor, that sort of isolation, that sort of
7 sensory deprivation is worse than a lashing by a cat of
8 nine tails. It's truly horrible punishment and most
9 respectfully, Your Honor, it deserves some credit.

10 So I've talked about the indefiniteness. I've
11 talked about the isolation. I want to talk, third, about
12 the interrogation. Your Honor has learned a lot about
13 that interrogation and, candidly, the Court knows probably
14 more about it than we on the defense side do because you
15 were actually able to view the one video which we weren't,
16 although we got a summary, and you were able to see the
17 longer memos which we do trust are adequately captured in
18 the summaries that Your Honor required.

19 That interrogation the Government describes
20 today as consistent with the Army Field Manual other than
21 the one interrogation in which Mr. al-Marri was gagged,
22 his mouth stuffed with -- I believe it was towels and duct
23 tape -- but that's not correct. The methods of
24 interrogation that were used on Mr. al-Marri are methods
25 that have been repudiated correctly by the Government

1 today and that are inappropriate for a society of laws.

2 What we know is that, among other things,
3 Mr. al-Marri was told that if he did not answer the
4 questions of the interrogators and did not cooperate with
5 them that his family would be rounded up, that they would
6 be tortured in cells next to him where he could hear them.
7 He was shown pictures of them to drive this point home.
8 Mr. al-Marri -- that doesn't necessarily appear in each of
9 the summaries, but Mr. al-Marri wrote about that at the
10 time and related it and it's consistent as we know with
11 evidence of what the Government has done in other cases to
12 lend credibility to it.

13 It's almost impossible to imagine somebody going
14 through that. It's almost impossible to imagine the type
15 of -- being interrogated in the way that Mr. al-Marri was
16 with those kinds of threats, not only to him but to his
17 family, that he would disappear, that his wife would be
18 raped, this sort of thing that we've put in our papers.

19 I understand that the Government thinks that may
20 not be violative of the U.S. Army Field Manual.
21 Respectfully, it's violative of basic human rights, human
22 decency, and it goes to the conditions under which he was
23 confined which he had to endure and which simply ought to
24 in a good system of justice play a role in the additional
25 punishment that was meted out. Why? Because Your Honor

1 will have a sense of what the punishment ought to be for
2 Mr. al-Marri's case and some of that punishment has
3 already been visited upon him.

4 And I want to take a quick detour here to
5 address a point that Your Honor raised with Ms. Baltes in
6 your colloquy with her this morning and that was whether
7 he was really being held for the same thing as what he's
8 charged with here.

9 I understand Ms. Baltes' position, which is he
10 could have been held in a military situation on the
11 battlefield and so forth and never charged and, therefore,
12 there would never be credit for anything. But here
13 there's just no question but that the facts under which he
14 was being held -- and it's not simply association with
15 al-Qaeda because the Rapp Declaration, Your Honor, didn't
16 come out of no where. The Government didn't submit that
17 Rapp Declaration out of the goodness of their hearts.
18 They submitted that Rapp Declaration because Mr. al-Marri,
19 as Your Honor will recall because the matter was
20 originally before you, challenged his confinement by
21 filing a petition for a writ of habeas corpus and in
22 response to that petition the Government justified his
23 continued detention with that declaration and other
24 material and that declaration and that other material is
25 absolutely on all fours with the charges in this case.

1 If you compare the Rapp Declaration with the
2 stipulation of facts in our plea agreement, the basis
3 is -- the overlap is extreme. There is discussion of
4 Mr. al-Marri's participation in the training camps.
5 There's discussion of him having met Khalid Sheikh
6 Mohammed and agreeing to assist al-Qaeda. There's
7 discussion of the fact that he received money from
8 al-Hawsawi to buy, for example, a laptop computer.
9 There's discussion of the communications with Khalid
10 Sheikh Mohammed and the codes. There's discussion of his
11 failed communications with others. There's discussion of
12 his use of computers to research cyanide.

13 The guts of this case -- not only the guts, but
14 the details of this case are identical to the reasons he
15 was being held. The notion that that should factor in not
16 one single bit to punishment in this case because it was a
17 different sort of detention is an extraordinary one.

18 And that, Your Honor, is a different argument.
19 Let me be clear of what I'm not saying because you pointed
20 out that we agree about credit for time served. We'll
21 litigate that issue if we have to with the Bureau of
22 Prisons. That is to say we're going to request that the
23 Bureau of Prisons -- the Bureau of Prisons said they're
24 not going to give credit for time served. If we have to
25 challenge that determination we will. We think that there

1 is a good argument under 3585. The Bureau of Prisons
2 disagrees. That's for another Court at another time.
3 Probably not Your Honor because if I understand the law
4 correctly, if we do something it would be filed in
5 whatever district he's being held.

6 But we don't need to look forward to that. This
7 is not a -- this is not for this Court to decide, as Your
8 Honor has pointed out, the 3585 area. What Your Honor is
9 deciding is the issue of whether it's appropriate to
10 depart downward based upon conditions that Mr. al-Marri
11 suffered during the time he was an enemy combatant and
12 during the time that he was held for precisely the same
13 reasons as underlie this very case.

14 I began to talk -- let me say something else
15 before I move on from the interrogations because the
16 interrogation issue overlaps some of the other
17 deprivations that Mr. al-Marri suffered because, as Your
18 Honor knows, part of interrogation method was to keep him
19 in an uncomfortable, to make it euphemistic, setting and,
20 for example, to deprive him of his Quran when that would
21 advance the interrogation process. One can have one's own
22 views about whether that's appropriate to use religion in
23 that way. Whether it's appropriate or not, it's
24 extraordinary. It's harsh. The Court ought to consider
25 it in determining whether to depart downward.

1 But the sensory deprivations go beyond that of
2 course. In addition to the cell that Your Honor saw
3 Mr. al-Marri attempting to get comfortable on top of the
4 bed, underneath the bed, crawling around the floor, that
5 cell, as Your Honor knows, had no sunlight. The windows
6 were blacked out and there was a magnet even over the
7 little window that looked out into the hallway or
8 corridor.

9 As I mentioned, there was nothing soft in there,
10 not even eventually when he gets -- if I can approach to
11 show the Court -- the suicide blanket, which is
12 Defendant's Exhibit 1. This blanket just doesn't cover a
13 person. It's harsh. It's thin. It is not soft. It does
14 not give the tactile sensation that human beings need in
15 order to survive day to day. We brought it to the Court
16 so Your Honor could have a sense of that.

17 Your Honor heard about the grating noise of the
18 fan, about the fact that for months Mr. al-Marri can't see
19 without glasses, was not provided with glasses so he could
20 not even experience the harsh environment that was around
21 him. He was deprived of basic hygiene items such as a
22 toothbrush, dental floss, tooth paste, soap. At times he
23 was deprived of socks or footwear, clean clothes. And
24 throughout he had absolutely no privacy. Now many inmates
25 don't have privacy. Privacy is something that goes away

1 when you're in prison. But Mr. al-Marri was under 24 hour
2 surveillance 7 days a week even when he engaged in the
3 most personal private bodily functions.

4 All of this, as we pointed out in our papers,
5 Your Honor, is contrary to Bureau of Prisons standards, to
6 ACE standards and really the standards of human rights and
7 human decency and they ought to be considered by Your
8 Honor in determining whether Mr. al-Marri's sentence
9 should be decreased because of the punishment he has
10 already endured.

11 Now I just want to add one thing because Your
12 Honor specifically pointed us to this late yesterday
13 afternoon and that is you asked about the conditions
14 elsewhere. We have provided literature to the Court --
15 that is other than in the Brig because the Court is
16 correct that Mr. al-Marri was at the Brig for obviously a
17 long period, from June 23, 2003 until March of this year,
18 almost six years, but since then he has been at Pekin and
19 the situation there is not like that for sure, but it
20 remains a situation where he's isolated, has no contact
21 with people. It remains in that way different from what
22 other prisoners experience because the SHU where he's held
23 is typically reserved for people who have committed some
24 institutional infraction, who are there because they're in
25 administrative segregation. That obviously is not the

1 case. He's there forever.

2 We obviously take issue with the Government's
3 position that Mr. al-Marri's indefinite detention was
4 justified by the laws of war and was constitutional. At
5 the very least, I think anybody would have to concede that
6 that issue was a cutting edge legal one. In fact, as Your
7 Honor well knows, it was one as to which the Supreme Court
8 had granted certiorari and was going to consider in this
9 very case before the matter became mooted. We believe of
10 course that we have the better of the argument, that
11 Congress did not in fact authorize that detention under
12 the AUMF, that it was inappropriate to exercise domestic
13 military jurisdiction when the civil courts of our nation
14 were operating and that the President or the executive
15 does not have inherent authority to seize and detain
16 people who are arrested here in the United States.

17 But those issues are not issues for Your Honor
18 now and they were mooted, but we just want to make sure
19 that we don't concede what the Government's position is,
20 that somehow his detention was lawful.

21 That said, it's not the lawfulness or
22 unlawfulness that's really before Your Honor. What's
23 before Your Honor is the experience of it and we hope that
24 by virtue of the presentation that we've made that we've
25 given the Court some insight into what that experience

1 was, how intimidating and scary and brutal and difficult
2 it was for anybody, even somebody like Mr. al-Marri who is
3 in fact strong and resilient.

4 I want to go back to something that I failed to
5 mention before with respect to Mr. al-Marri's likelihood
6 of recidivism and this is something that not much has been
7 made of here, but really should.

8 Exhibit 78 to our sentencing memo --
9 unfortunately the hard copy that we provided, it got left
10 out of, but it's in the one that was filed publicly. Let
11 me just grab it. It's the document whereby the Government
12 ultimately vacated the special administrative measures as
13 to Mr. al-Marri and it did that based upon a finding that
14 Mr. al-Marri was no longer a danger to communicate with
15 al-Qaeda or others. And I would commend that document to
16 Your Honor so you can take a look at it because it bears
17 directly on the issue of recidivism as was raised by Major
18 Sirratt, goes to his future dangerousness.

19 This is July 7 of this year and it says: "After
20 further analysis" - it's a memo to Mr. al-Marri from the
21 warden at Pekin. It says: "After further analysis of
22 your communications, conduct and guilty plea, the
23 Counterterrorism Section of the National Security Division
24 believes there is no longer a substantial risk that your
25 communication or contacts with persons could result in

1 death or serious bodily injury to persons or substantial
2 damage to property that will entail the risk of death or
3 serious bodily injury to persons. The U.S. Attorney's for
4 the Central District of Illinois and the Federal Bureau of
5 Investigations concur in this request. Therefore, your
6 SAM", standing for Special Administration Measure -- "is
7 hereby vacated."

8 That's significant because Your Honor has seen
9 what the SAMs were and what they meant and among the
10 things they meant were it created extreme difficulty for
11 Mr. al-Marri in terms of getting materials to read, in
12 terms of correspondence, so forth.

13 And I want to turn to that because we've talked
14 about sensory deprivation. One of the things that strikes
15 you when you look at that video of Mr. al-Marri on that
16 hard, metal bed is that he has nothing to do. Obviously
17 there's no television there, but there's no books, nothing
18 to read, nothing to write with, there's no Quran. For
19 months and months he's deprived of those sorts of things
20 that will keep a person from literally going crazy from
21 boredom and inability to keep themselves occupied. I
22 think what it would be like to go through a day like that,
23 let alone day after day, week after week and month after
24 week and year after year.

25 And year after year as well, Mr. al-Marri is

1 deprived of contact with his family. You know, family
2 contact is something that's part of the usual prisoner or
3 inmate's life. They can call. They can write. They can
4 receive visitors. For years Mr. al-Marri couldn't call.
5 For years the only writing -- he couldn't write or receive
6 letters and when he did they were delayed by months or
7 even up to a year we heard yesterday. He still to this
8 day has never received a visit from a family member. It's
9 almost extraordinary to think about, that that's the kind
10 of thing that we would do to somebody, but that's what has
11 been done to him and that remains the case to this day.

12 Now this day he does have calls. Now he has --
13 I think it's going to be fewer, but he now gets periodic
14 calls with his family. He does have the opportunity now
15 to receive letters, although they remain delayed because
16 they have to be reviewed if they are in Arabic and Your
17 Honor sees what happens when they do get reviewed in terms
18 of the types of redactions that take place.

19 The family contact is also part of what it is to
20 be human and you're going to see in a moment what
21 Mr. al-Marri's family is composed of and you'll have an
22 opportunity to see what it is he has missed as a result of
23 all that.

24 But these are the extraordinary -- and I agree
25 with Ms. Baltes -- the conditions of his confinement that

1 are different from other criminal defendants. And as Your
2 Honor ponders the quantum of punishment that Mr. al-Marri
3 ought to receive, I would request on his behalf that you
4 reduce that punishment to account for the punishment he
5 has already received and that's punishment that is
6 exceptional and warrants treatment that is nuanced and
7 based upon his particular case.

8 Now when I say "based upon his particular case",
9 in no way -- and when we turn to the 3553(a) factors, of
10 course we're going to address this. In no way does that
11 mean to undermine the seriousness of his crime. He
12 recognizes it. We recognize it. He's facing a lot of
13 time as a result of that.

14 And let me just detour to address a point that
15 Your Honor made that I completely understand, which is
16 Your Honor said each week you sentence people to very long
17 sentences on drug offenses in what seems like less serious
18 crimes in some ways. You know, that's Congress' will
19 unfortunately. The sentences for drug offenses are very
20 long. I often have wished they weren't. But you should
21 know that in this case, you know, the available sentence
22 before the Patriot Act, which was passed in the fall of
23 2001, for material support was 10 years. Congress, in
24 light of what occurred here, extended the maximum to
25 15 years for that. The fact that it's a serious offense

1 certainly should weigh in the analysis, but the amount of
2 punishment that one receives should be proportionate and
3 should be proportionate in the sense not only to other
4 cases, which we're going to talk about later, not only to
5 the extent that uniformity is promoted by the sentencing
6 guidelines, but it should account for the punishment that
7 one has already experienced as a result of the very same
8 acts for which he stands before the Court for sentencing.

9 Judge, if it's okay with Your Honor, we would
10 like now, Mr. Savage will present to Your Honor a video
11 tape that goes to actually the second 3553(a) factor,
12 which is the history and characteristics of the defendant.
13 Then I'll come back and I'll address each of the other
14 3553(a) factors and then we'll be finished.

15 THE COURT: All right. Thank you. Mr. Savage?

16 MR. SAVAGE: May it please the Court. Good
17 morning, Judge. Judge, a couple of matters. You had
18 asked earlier about the report of his financial condition.
19 Mr. al-Marri is going to make a statement to the Court and
20 I would urge the Court to question him about that if you
21 would like. As I understand it, that is a family
22 business. He was in the auto parts business in Doha.
23 Following his detention here, that business went down the
24 drain. And the amount of money is not U.S. currency
25 but Riyal.

1 THE COURT: What's the difference?

2 MR. SAVAGE: It's about half. Is that right?
3 3.6 to the dollar.

4 THE COURT: Thank you.

5 MR. SAVAGE: One other thing, Judge, before I go
6 into the video. One of the contractors -- and those
7 contractors are unnamed, so I want to be careful what I'm
8 saying here. But there was one who participated in the
9 events of March 11, 2004 that Your Honor had an
10 opportunity to see the video and to read the summary that
11 testified this year before Congress, the Senate Judiciary
12 Committee in May of this year, where -- he, who is now no
13 longer a government employee -- condemned the enhanced
14 interrogation techniques, those techniques which were used
15 on March 11 against Mr. al-Marri, stating that they were
16 worthless and groundless, they were morally in opposition
17 to what America stands for. That was the day that
18 Mr. al-Marri was not water boarded, but the effect of the
19 interrogation techniques were the same. That is he was
20 gagged in his mouth and he was taped three different
21 occasions, one up to 15 minutes long, to give the same
22 sense of deprivation of air that is the same thing that
23 the water board does.

24 In addition to that, the United States Attorney
25 this summer released many documents about the CIA

1 techniques and other techniques that are used, condemning
2 the very same techniques that were used against
3 Mr. al-Marri on many occasions during those interviews:
4 The threats of physical abuse against him, the actual
5 physical abuse against him, the threats against his
6 family, the sexual acts he was threatened with and his
7 family was threatened with, the fact that he was told that
8 he would be released and the government would report that
9 he had escaped. Certainly that does say that he was
10 tortured at that time.

11 Your Honor, I came into the case when Mr. Berman
12 called me in June of 2004 when the Supreme Court
13 determined that people who were in the status that
14 Mr. al-Marri was being held in were entitled to counsel.
15 At that time we went through a pretty intense background
16 investigation that led to a top secret security clearance
17 and we were permitted to see Mr. al-Marri in October of
18 that year. Some nine months later my wife, Cheryl, who is
19 not a lawyer but works in our office, also went through a
20 background check and she as well was given permission to
21 see Mr. al-Marri. We have maintained his primary contact
22 with the outside world for several years and our
23 observations of him, our in-depth conversations, which
24 actually were a thousand hours, there was a great
25 dichotomy between the allegations charged against him and

1 our impressions of him at that time. We thought it was
2 incumbent upon us to look into this a little bit further
3 and in doing that we traveled to the Middle East
4 approximately a year ago to look into whether or not he
5 had been truthful with us, what his family was like, what
6 his religious beliefs were like, what his business
7 reputation was, and I would like to present to you a very
8 short summary of that trip.

9 (Video played)

10 Ali is one of a family of 12 children. His
11 father, as you know, is recently deceased. His mother is
12 alive. Cheryl had an opportunity to speak with his
13 mother. Because of the culture there, I was prohibited
14 from speaking to any of the women who were post-puberty.
15 His brother Naji, who is pictured on the screen now, and
16 his brother Mohammed are both older than him. Mohammed
17 was trained as a civil engineer at the University of
18 Texas. Naji attended Bradley University in the early
19 eighties. Both of them work in the oil and gas industry
20 in Saudi Arabia.

21 When Ali left home, he left several family
22 members, all very close family members. The gentleman on
23 the top right is his cousin. His brother is next to him.
24 Another brother is next to him. Another brother. The
25 young man on the left with his hand on his head is his

1 eldest son. In front of him are other brothers, one
2 cousin and his baby child who was six months of age when
3 he was originally detained. The young man on the right is
4 a nephew.

5 Abdalhadi, Naji, Mohammed and his cousins all
6 have since his arrival in Pekin been able to speak to him,
7 so he has maintained since his arrival communication by
8 telephone with his brothers and as well with his wife. He
9 was not able to do that at all until the first call in
10 2007. He had another call in the Brig in -- excuse me,
11 2008, and then he had another second call in 2009.

12 We have a video of his family that was taken at
13 the same residence. This is his brother Mohammed's
14 residence in Saudi Arabia. The audio is not on. This is
15 when I was speaking to his older brother, Mohammed.
16 Mohammed represents himself as a spokesman for the family.
17 Well, let's pass on.

18 THE COURT: While they're doing that, just a
19 question. There has been a reference, there was
20 yesterday, to a brother that was being held in Guantanamo.
21 Is that -- what is his status?

22 MR. SAVAGE: His brother Jarrallah, who was
23 detained on the same day, December 12 of 2001, in
24 Pakistan, he was taken from Pakistan and he was placed in
25 American custody. He was then taken to another air base

1 in Afghanistan and then to Guantanamo. One day in the
2 summer of July of 2008 when he went to bed, he was a
3 terrorist. When he woke up, he went home. No explanation
4 given. He is now living in Doha. He's not under any
5 restrictions in the country of Doha. There was no request
6 by the American government to limit his restrictions. His
7 passport was returned to him by December, I believe, of
8 last year. So in theory he could go any place, do
9 anything he wants. But he's engaged in a business now in
10 Doha and is leading a life of a law abiding citizen, never
11 tried.

12 THE COURT: Are you ready to proceed now? Let's
13 try it.

14 (Video played)

15 MR. SAVAGE: You will notice that you don't see
16 any of his sisters. The men are basically segregated from
17 the women, particularly when guests are around. They are
18 all very, what I would say, conservative in their
19 political beliefs. They are all very religious. They are
20 all well thought of in their community. There has been
21 some family taint because of the arrest of their younger
22 brothers, but they are still engaged in business and hold
23 very responsible positions in the community.

24 Ali was a good parent as reported by the family.
25 This is his younger son. The pictures that you saw there

1 are actually outside in the desert in a family home there
2 similar to what you would think of in the states as being
3 a summer home. We might choose to be around a lake or
4 water, but they choose to be in the desert.

5 Judge, after several years at the Brig and at
6 the urging of the Brig staff, Ali was allowed to receive a
7 video from his family and I believe this was in late 2007.
8 It took some time to go through the clearance, but he was
9 eventually allowed to see this and we'll show an example
10 of that, please.

11 (Video played)

12 These are his daughters doing their homework and
13 singing songs. This is showing now their achievements in
14 school. Of course they don't study all the time. A kiss
15 from his daughter.

16 Judge, when we were there we wanted to explore
17 the community. We wanted to see the business world in
18 which he worked. We wanted to know what his reputation
19 was. And I must say that we spoke to Sunis and Shi'a.
20 The idea that he would harm somebody who was Shi'a is
21 contrary to the evidence that we discovered there. He
22 worked side by side with them. Let's show the video about
23 his employment.

24 (Video played)

25 MR. SAVAGE: We knew that his brothers had been

1 schooled in America and we were curious as to why that
2 was. We wanted to know what type -- what role religion
3 played in Ali's life. Your Honor, you will be able to
4 hear directly from Mr. al-Marri about his religious
5 beliefs and how they apply to this situation.

6 When he arrived here, he has been described as a
7 sleeper agent, a fair description but belies the
8 appearance that he had upon his arrival. Can we put up
9 the photograph? That's a picture that was taken of him in
10 2001 shortly after his arrival. His wife of course is not
11 in the photograph, although she was in America, because of
12 the cultural attitude towards photographers and one of his
13 daughters is missing from that photograph. No one in his
14 family, the children or his wife, could speak any English.
15 Mr. al-Marri's English at that time was not what it is
16 today. Of course he has been speaking exclusively English
17 since December of 2001.

18 But it was apparent upon his arrival where he
19 had come from and he immediately after his arrival came
20 under the scrutiny of the FBI through reports of citizens
21 that saw him, heard his language and were concerned about
22 him. He was not unknown when he arrived. I believe the
23 taxicab that drove him from Chicago to Peoria first
24 reported him and others at Bradley University reported him
25 as being a suspicious person, all because of how he looked

1 and how he spoke.

2 Over the years that he has been incarcerated,
3 his family has changed. His oldest son, Abdulhadi, was
4 10 years of age in 2001. He was 8. I'm sorry. He was
5 8 years of age in 2001 and there's a picture of him today
6 or last year. His daughters, who are twins, Maryam and
7 Hajar, were 7 years of age. They are now post-puberty, so
8 we don't have photographs of how they look today. This is
9 Khaola. She was 3 years of age at the time. This is how
10 she looked when we were in his country last year.
11 Abdulrahman was an infant, has never spoken to his father,
12 and a photograph of him today or last year. Again, his
13 wife is not in those photographs because of their cultural
14 beliefs. When she came to America, the wife was wearing
15 traditional clothing. And as you might know, the women at
16 least cover themselves completely. They wear a head cover
17 all the time and that's how she was dressed when they
18 arrived in Chicago in September of 2000. Thank you, Your
19 Honor.

20 THE COURT: Thank you. I think this would be a
21 good time to break for lunch. I would like to start again
22 at 1:15. Do you have some additional arguments to make?

23 MR. LUSTBERG: Yes, Your Honor. It will not be
24 long.

25 (Noon Recess)

1 THE COURT: Mr. Lustberg?

2 MR. LUSTBERG: Thank you so much, Your Honor.

3 And let me just start by saying thank you very much for
4 the really extraordinary amount of time you have allocated
5 to this. It's obviously a very emotional, difficult and
6 intense matter for all of us and I really would commend
7 the Court for the way it's been handled.

8 All that remains for us is to essentially apply
9 all of what you heard to the statutory factors that this
10 Court must consider under 18 U.S.C. 3553(a), so to provide
11 whatever assistance we can as to an appropriate sentence
12 in this case I'll do that relatively quickly because I
13 don't want to repeat all of what I said before.

14 The first factor -- and I should say Ms. Baltes
15 of course accurately summarized what those factors are.
16 The first factor is of course the nature and circumstances
17 of the offense. Let me be as clear as I can be. Nothing
18 that we have said now, nothing that we will ever say and
19 I'm sure nothing Mr. Al-Marri will say should be thought
20 of as undermining in any way the recognition that this is
21 an extremely serious offense. Each and every one of
22 Mr. al-Marri's actions from attending camps to agreeing to
23 serve, to coming here and doing what he did are things
24 that must give rise to concern and that do deserve
25 punishment. The only question for the Court is what the

1 quantum of that punishment should be.

2 In assessing the nature and circumstances of the
3 offense, I would just add that one of the factors, as
4 agreed, that the Court looks at is what harm was caused.
5 And thank God, no harm was caused in a sense.

6 Mr. al-Marri's actions, whatever they would have been, and
7 of course they remain uncertain, never resulted in any
8 violent act or any other harm to American citizens or
9 property. And that is a good thing. We absolutely
10 acknowledge that. So I want to start with that and the
11 Court will weigh that appropriately, as it should, and
12 will impose a harm punishment even if that punishment is
13 no more than that which Mr. al-Marri has already served.

14 The second factor of course is the history and
15 characteristics of the defendant. Your Honor has come to
16 learn a lot about Mr. al-Marri through the course of these
17 proceedings, through the course of other proceedings, and
18 as a result of all that you have read. And we have put a
19 lot in front of you to read we understand. You have seen
20 and heard about his positive attributes as a father and
21 his religious devotion, his employment and his
22 intelligence.

23 You've also gotten a window from some of the
24 testimony that you've heard and some of what you've seen
25 into his humanity, his resilience, as Major Sirratt said,

1 his strength, his sense of humor and his generosity in
2 ways that were of course quite small because there wasn't
3 much he could do for people at the Brig, but those who
4 have come to know him even in passing, the marshals who
5 have transported him back and forth, those personnel at
6 Pekin. We have had a lot of contact with all those people
7 and the response we get is the same. I guess to use
8 Mr. Riskey's point, he's kind of a nice guy. You sort of
9 saw that on the tape when, even shackled and blindfolded
10 and earmuffed, he has a big, warm smile for, you know, the
11 guard who is taking him back into custody after he has had
12 his dental work done. It doesn't -- it's a small thing,
13 but what it shows is fundamentally Mr. al-Marri's humanity
14 and it's that humanity that really is the reason I think
15 why this group of attorneys who are here today have stood
16 by him for so many years.

17 I have been involved with Mr. al-Marri since
18 2002. And like Mr. Berman who wrote to the Court, we have
19 come to know him under what was truly the worst of
20 circumstances. What we have come to know is a man who
21 loves people and who can be loved, who cares about people
22 and who accepts caring from people, who learns, who has a
23 mind that really is a sponge. He's open minded. And not
24 only in terms of learning about his own faith, but who
25 will listen to people about their own beliefs. Who has

1 taken away from all of it a love of, a caring for and a
2 knowledge about this great country of ours that, believe
3 it or not, even with what he's going through, means that,
4 in our view, he will never reoffend. Those are the
5 history and characteristics of this extraordinary person
6 in many ways.

7 The third factor that the Court must consider is
8 just punishment and respect for the law. I just want to
9 spend a minute if I can on that, Your Honor, because I've
10 been to a lot of sentencings under 3553(a) and typically
11 that factor of just punishment which appears in
12 3553(a)(2)(A), and which also mentions reflecting the
13 seriousness of the offense, which we have completely
14 acknowledged, but the question of just punishment is one
15 that typically Courts use to impose more rather than less
16 punishment.

17 In this unique situation, just punishment and
18 respect for the law requires respectfully that this Court
19 take into account what Mr. Al-Marri has been through and
20 the punishment he has already endured. The indefinite
21 detention, the isolation, the sensory deprivation, the
22 interrogations all make what he has experienced something
23 that must be recognized.

24 When I talk to people, regular Americans -- my
25 father is a truck driver -- and I tell them that there's a

1 chance that this man will be sentenced and what he's gone
2 through would not be recognized by the Court, those people
3 are astounded. And I'm not saying of course that's what's
4 going to happen. But what I guess I'm saying is in order
5 to foster a respect for this country and the law that
6 really is what this country is all about, this Court
7 should not ignore what Mr. al-Marri has gone through,
8 particularly when some of that is policy that has been
9 repudiated by our Government.

10 I do have to address deterrence of course and,
11 as always, there are two forms of deterrence. There's
12 general deterrence and specific deterrence. Anybody who
13 knows what Mr. al-Marri has gone through in this case,
14 it's gotten a great deal of public attention, would of
15 course be deterred from engaging in acts such as those
16 that he engaged in. It may be difficult to deter
17 terrorism, as some say, but anybody who knows what he has
18 been through, the punishment he has endured, the
19 proceeding that he faces today will certainly think twice.

20 And that's really what the Court has to think
21 about. You want to send a message, but that message has
22 been sent out and sent out more poignantly than ever when
23 you look at these videos of what this man has been
24 through. Removed from his family for eight long years,
25 isolated and abused. Personally that sort of treatment

1 will certainly deter. This is a serious crime and it has
2 been treated seriously. There is plenty of deterrence
3 here.

4 With respect to specific deterrence and
5 protection of the public, I think we have made our
6 arguments with respect to Mr. al-Marri and his likelihood
7 of recidivism. As I mentioned earlier this morning,
8 there's no question that at least to a certain extent --
9 even the Government in its own documents with respect to
10 vacating the SAMs has some level of agreement with that.
11 But one thing he also know that hasn't yet been
12 mentioned --

13 THE COURT: Well, I want to stop you a moment
14 because I read that document that you mentioned and as I
15 understand the document all it says is as of this date --

16 MR. LUSTBERG: July.

17 THE COURT: -- we don't believe that that
18 problem exists while you're -- he's in custody while this
19 is being written.

20 MR. LUSTBERG: Right.

21 THE COURT: Of allowing him to communicate. I
22 don't see how you get from that to we believe you're not
23 going to go out and commit a terrorist act in the future.

24 MR. LUSTBERG: Of course the SAMs had been in
25 place all along while he was in custody.

1 THE COURT: I understand.

2 MR. LUSTBERG: So the question is could he be
3 trusted. There certainly came a time when -- partly, I
4 think -- and, you know, I was part of the discussions
5 about that. The sense was, look, we were now in 2009.
6 His contacts with al-Qaeda happened back in 2001.

7 THE COURT: They were all stale.

8 MR. LUSTBERG: They were all stale. So really
9 the likelihood of his communicating with al-Qaeda had
10 dissipated, but for the same reason -- after all, his
11 crime was all about communicating. The likelihood of his
12 reassociating with al-Qaeda likewise has dissipated over
13 time. So I think it's at least relevant. For sure, it's
14 not a direct reflection of anybody saying he's not a risk,
15 but certainly there was a recognition that he was no
16 longer any kind of risk of committing those sorts of
17 offenses at that time so the SAMs were not necessary. I
18 don't think there is any evidence, in fact I know there's
19 none, that since the SAMs have been vacated there has been
20 any conduct that would cause anybody to second guess that
21 decision.

22 But beyond that, one thing we haven't really
23 talked about -- and the Court will recall this because we
24 had a discussion about it at the time of the guilty plea.
25 As Your Honor may recall, one of the conditions of the

1 guilty plea is that at the conclusion of whatever sentence
2 the Court imposes, Mr. Al-Marri is to be deported. He's
3 not permitted to defend against deportation proceedings.
4 He has agreed to it. He will be removed from American
5 soil. Now I mean obviously these offenses are
6 international in nature and doesn't preclude somebody from
7 doing something wrong, but it certainly lessens the
8 likelihood that he will do anything, that he will -- that
9 he can do anything here for sure. And the chances of him
10 ever coming back here, if ever he would do that -- it's
11 hard to imagine he would after what's has been through --
12 but the chances that he would be allowed back are none.

13 So in terms of reoffending at least in the way
14 that he offended this time, the probabilities are just
15 exceptionally low and that is built into the plea
16 agreement between the parties and I think bears
17 mentioning.

18 But more than that -- and I think one can
19 understand it when we see the video from this morning --
20 he wants to go home. He wants to go home to those
21 children and that family. He wants to -- it's going to be
22 a difficult transition, but he wants to become part of
23 their lives again. It's completely understandable.
24 That's the person he wants to become. It's the person he
25 was and he wants to return to it.

1 But even more so, this is a defendant who simply
2 has learned his lesson. But more than that, he has
3 learned about this country. He has learned about the
4 country from Andy and Cheryl Savage, from Mark Berman. He
5 has learned about this country from Brig staff, from the
6 incredibly gracious people at Pekin, from the marshals
7 that transport him back and forth to court. He knows that
8 this is a place that will punish him harshly, but one
9 that's also full of good and generous people who do not
10 deserve what al-Qaeda intended. He feels -- and he will
11 express this to you -- at the core of his being that
12 violence is not what should happen. He is not a danger
13 anymore.

14 The final factor that we have to address under
15 3553 is sentencing disparity. I do think, Your Honor,
16 that it is appropriate to look to the Military Commission
17 cases and I say that with some authority because if you
18 read the Court's decision in Warsame, which I'm sure Your
19 Honor has, you can see that the Court there in evaluating
20 18 U.S.C. 3553(a)(6) looked to the Military Commission
21 cases. So that while of course it's true what Ms. Baltes
22 says that each case is different and can be distinguished,
23 it's also the case that it's not inappropriate to look at
24 Military Commission cases even though sentencing
25 guidelines don't apply in those cases. The Court did it

1 in Warsame and the Court should do it here.

2 Obviously if you look at Hicks and look at the
3 facts of Hicks which we set forth in our brief, there's a
4 tremendous amount of overlap. The difference is that
5 Mr. Hicks actually did fight against this country and he
6 got 7 years, most of which was suspended, and after
7 9 months he went home.

8 Mr. Hamdan, who was the actual driver for Osama
9 Bin Laden and also transported weapons in that car, got
10 66 months. He was given 61 months of credit for his time
11 at Guantanamo.

12 But leave aside these specific cases on the
13 grounds that they are distinguishable. We have provided
14 Your Honor with data that cuts across the various cases
15 under this particular statute, 18 U.S.C. 2339(b), and what
16 you can see is that the average sentence for somebody who
17 goes to trial -- actually I think it's for all defendants,
18 108 defendants -- was approximately 10 years, between
19 118 months to 122 depending on how many counts there were.
20 For people who actually pleaded guilty like Mr. al-Marri
21 has, the average sentence is between 102 and 107 months.
22 For actual conspiracy, as opposed to the substantive
23 count, which obviously Mr. al-Marri pled guilty to
24 conspiracy to provide material support, and with people
25 who pleaded guilty the average sentence is 82, 83 months.

1 This is the sort of data that under the current sentencing
2 regime the Court should consider respectfully. We would
3 ask that you do that.

4 In Warsame, Ms. Baltus says that the difference
5 there was that he cooperated. Actually I didn't note that
6 in the opinion, but I do note that the Government in that
7 case did ask for a sentence beneath the guideline range
8 and asked for a sentence of 150 months. But in light of
9 the particular -- particularly in light of the conditions
10 of his confinement, the Court there departed downward to a
11 sentence of 92 months and in doing so compared his case to
12 the Lackawanna 6 where the sentences were between 84 and
13 120 months and that's where there actually was evidence of
14 a plot. And in Warsame, by the way, there was no specific
15 violence, as I understand the facts, but it was a
16 situation where the defendant actually did act as a
17 security guard and actually did deliver funds here in the
18 United States.

19 I should finally note in that regard that there
20 has been a lot of mention throughout this case of the
21 other ECs. The one thing I would point out with respect
22 to Mr. Padilla, as the Court knows, the Court -- the Court
23 in the Padilla case did depart downward to take account of
24 Mr. Padilla's custody at the very same Brig, just a cell
25 or two away from Mr. al-Marri. That's relevant only

1 because the Government argues here that one's time spent
2 as an enemy combatant ought not necessarily be considered
3 in assessing a sentence for the criminal offense, but it
4 certainly was there and in that case Mr. Padilla got a
5 substantial downward departure.

6 But beyond that, the Court will recall that he
7 was not in custody at the Brig as long as -- not nearly as
8 long as Mr. al-Marri has been or was and his conditions,
9 as we saw repeatedly, were not nearly as stringent as were
10 Mr. al-Marri's.

11 For all of these reasons, the 180 months sought
12 by the Government is respectfully just too long. Your
13 Honor, this Court sentences defendants all the time and
14 all the time defense attorneys get up and ask the Court to
15 temper justice with mercy or, in the more mundane terms
16 that we all live with today, to balance all the factors of
17 18 U.S.C. 3553(a). Not nearly as eloquent as saying
18 balance justice with mercy, but that's how we talk now.

19 This case has always been extremely difficult,
20 challenging. It's always presented amazingly
21 sophisticated, difficult legal issues. When I talk about
22 it to people, I say it's a case where actually you can
23 argue and cite Marbury vs. Madison and mean it. It just
24 has had those kinds of fundamental issues.

25 And I was thinking even yesterday when Your

1 Honor was just ruling on the one guidelines adjustment,
2 once again we were right on a blank slate. It seems like
3 that's been the journey that all of us have been through
4 here. Today the Court is again facing this challenge of
5 what to do with this extraordinary case, a case in which a
6 person was treated, as Ms. Baltus says, unlike other
7 prisoners and how you weigh that against a crime that is
8 so undoubtedly serious.

9 What's great about this country is really put at
10 issue in this case. On the one hand we want to protect
11 ourselves from harm and the Government's -- it's the
12 Government's job to do that and they have done it
13 vigorously.

14 On the other hand, the way this Court sentences
15 Mr. al-Marri will send out more than a message about that
16 harm. It will send out a message about forgiveness. It
17 will send out a message that we do believe, as we do in
18 this country, that people can change. It will send out a
19 message that we as a country when we make mistakes and
20 treat people poorly, we'll accept responsibility for that.
21 It will send out a message that acknowledges the humanity
22 of even people who break our laws, people who, even though
23 they violated a statute, even though they put us in danger
24 even, have feelings, who shouldn't be detained in a cell
25 that's all metal and cement, people who, notwithstanding

1 what they've been through, have real humor and real
2 humanity.

3 Your Honor, as you go about imposing sentence on
4 this defendant we would ask that you consider all of that,
5 all of those values that make us great, and that the Court
6 depart very significantly downward from the 180 months
7 that the guidelines provide for and let Mr. al-Marri go
8 home. Thank you.

9 THE COURT: So you're asking for a time served
10 sentence?

11 MR. LUSTBERG: Judge, that's the request.

12 THE COURT: Okay. Thank you. What's your
13 reply?

14 MS. BALTES: Your Honor, there are just a few
15 points I would like to respond to and I will try to be
16 brief.

17 The Court asked about Mr. al-Marri's brother,
18 Jarrallah al-Marri. Contrary to what Mr. Savage told the
19 Court, the defendant was released from Gitmo and he was
20 released to Qatar and not supposed to travel, him telling
21 Qatar authorities that's what he was going to do. In
22 fact, he went to the United Kingdom twice and once
23 actually was able to enter the country and the other time
24 he was deported and sent back to Qatar. He was arrested
25 or captured in 2001 in Pakistan after fleeing from

1 Afghanistan and held as an EC in Guantanamo Bay until
2 recently in 2008.

3 One thing that I think is important to make
4 very, very clear in this case, the defense has asserted
5 that the interrogation of the defendant involved using
6 enhanced interrogation techniques and that's a very
7 serious charge that the Government does not want to go
8 unanswered in this case.

9 The Inspector General report from the Defense
10 Intelligence Agency, a summary provided to the defense,
11 specifically talks about the types of interrogations that
12 were used on the defendant and certainly the defense may
13 not agree with that, but that report was thoroughly
14 investigated, the interrogations of the defendant, and
15 provided that report to Congress, and I think it's
16 important for the Court to consider the source and the
17 amount of time that went into producing that document that
18 clearly stated that that was absolutely not the case. The
19 defendant was never in CIA custody and the various
20 exhibits that the defense put forth to the Court regarding
21 the Inspector General report from the CIA discussing
22 abusive techniques and enhanced interrogation techniques
23 are completely irrelevant in this case.

24 With respect to the overrepresentation of the
25 criminal history, the defense characterizes that the

1 defendant has already been significantly punished and,
2 therefore, has been significantly deterred and that his
3 confinement has transformed him into a person who embraces
4 Americans. I would like to point out to the Court that
5 this supposedly has happened during the years that he has
6 been confined, but this is not the first time that he had
7 an opportunity to live among Americans and to experience
8 the way of life here. The defendant in fact came here in
9 the late eighties to attend Bradley University and
10 received a bachelor's degree.

11 THE COURT: 1983 actually.

12 MS. BALTES: And he was here until, I believe,
13 1990 or '91. He certainly had an opportunity to get to
14 know Americans and to understand the lifestyle, almost as
15 much time as he was detained since 2001. And yet after
16 that, that's when he subscribed to al-Qaeda's philosophy.
17 That's when he went to the training camps and it's after
18 that that he came to the United States in 2001. So his
19 exposure to Americans during the last couple of years is
20 certainly not the first opportunity for him to understand
21 what the lifestyle and the culture of the United States is
22 about and to embrace it, but he rejected that back in 2001
23 and it certainly should be a factor for the Court to
24 consider whether he will reject that when he's released
25 from custody in this case.

1 In addition, the defense has stated that there
2 were numerous things that the defendant claims were said
3 to him by interrogators. With all due respect, I think
4 what he has told his attorneys is not supported in the
5 record. It's not supported by the interrogation reports.
6 Certainly it's possible that not everything was written
7 down, but, again, it should be something for the Court to
8 consider.

9 THE COURT: Well, there was at least one -- I
10 think more than one reference to him being told that if he
11 didn't cooperate, they could not guarantee the safety of
12 his family and I believe he was shown pictures of his
13 family.

14 MS. BALTES: He was shown pictures of his family
15 and there was one reference in the reports which was
16 turned over to the defense in which the interrogator said,
17 "You will be kept safe, but yet in Saudi Arabia your
18 family could be rounded up." Certainly I'm not putting
19 forth that assertion in any way to minimize that that was
20 told to him, but the statements that have been made and
21 the statements that appear in the defendant's sentencing
22 certainly are much more detailed and much more dramatic
23 than that account and, again, should be something for the
24 Court to consider in light of the fact that the defendant
25 has lied throughout. He obviously lied to get into the

1 United States. He has pled guilty to being a sleeper
2 agent. We certainly heard testimony of his narcissistic
3 nature, his manipulative nature. We heard testimony from
4 the Brig staff yesterday that he would routinely make
5 things up to cause problems at the Brig. So, again, an
6 additional factor for the Court to consider, the source of
7 those statements.

8 In addition, again the conditions of
9 confinement, the defense relies on two declarations that
10 were provided by Dr. Grassien, the first one that was
11 provided based on the underlying abuse allegation in which
12 Dr. Grassien had not met with the defendant and then the
13 second one that was created for purposes of this
14 sentencing after the defendant met with Dr. Grassien
15 several weeks ago, I believe, October 9 of 2009.

16 Just to point out -- and this is also in the
17 Government's submission earlier this week with respect to
18 the Government's response in the underlying habeas
19 petition about conditions of confinement. But
20 Dr. Grassien's declaration and his 5-hour discussion with
21 the defendant, the conclusions that he came to about the
22 effects of isolation were based on research that he
23 conducted for a paper that was published in 1983. That
24 paper has been severely criticized by others who have
25 conducted research into supermax facilities as lacking any

1 empirical research. Again, the Government thinks it's
2 important for the Court to take into consideration all
3 those.

4 It's interesting to note, too, that rather than
5 bringing Dr. Grassien to testify here in court where he
6 would be subject to cross-examination on his views, the
7 defense chose to submit a declaration to the Court
8 instead.

9 I believe Your Honor correctly noted that the
10 issue with the Government's withdrawing the SAMs really
11 has no bearing on the Government's request for a lengthy
12 sentence in this case. The SAMs were specifically
13 withdrawn because the defendant has been detained since
14 2001 and, therefore, his ability to communicate and to
15 provide information that the Government would consider of
16 intelligence value to al-Qaeda has been greatly diminished
17 or at this point non-existent. That certainly has no
18 bearing on the defendant's ability to reconnect with
19 al-Qaeda once he is released from prison and, therefore,
20 just the fact the SAMs have been withdrawn in this case
21 should have no bearing on the likelihood that he will pose
22 a threat in the future.

23 The video that the defense showed this morning
24 shows Mr. al-Marri's family and they obviously greatly
25 miss him. That's part of what the Court has to consider

1 under the 3553 factors, the defendant's history, and
2 obviously his history includes his family. Again, what
3 the Court should keep in mind is that the defendant
4 contemplated absence from his family. He attended various
5 training camps where he was gone for months at a time away
6 from his family, likely with no contact. And when he
7 attended those training camps, he specifically provided
8 information so that al-Qaeda could contact his family in
9 the event he was murdered. Clearly the defendant at that
10 time contemplated not being there to provide for his
11 family. And although maybe he would not have intended
12 that had been the case, he certainly contemplated that.
13 And while it's extremely unfortunate his family has
14 suffered because of his absence, that absence is due to
15 the conduct that the defendant chose in his life. He
16 chose a path that led him down supporting al-Qaeda and
17 supporting a violent mission against the United States.

18 One last comment, Your Honor, with respect to
19 some of the issues in disparity in sentencing. I've
20 already commented on the Military Commission cases and
21 that I think the guidelines are not applicable in that
22 situation.

23 But, in addition, the defense points out the
24 Padilla case and in that case they correctly note that the
25 District Court judge did provide a downward departure for

1 the conditions of confinement of 42 months and the
2 Government objected to that and that case is currently up
3 on appeal. So of course everything should be considered a
4 factor by this Court in determining the appropriate
5 sentence, but Mr. Padilla was facing 30 years and the
6 ultimate sentence that was handed down by the District
7 Court judge was still in excess of the 15-year sentence
8 that the Government seeks in this case.

9 The Government respectfully requests that the
10 Court deny a downward departure for conditions of
11 confinement and deny the downward departure also for
12 overrepresentation of criminal history.

13 With respect to the criminal history, the
14 terrorism enhancement was stipulated by the parties in
15 this case. That is pursuant to the plea agreement. The
16 application of the terrorism enhancement is a two-fold
17 process. One: It involves the increase of 12 levels for
18 the base offense level. Two: It increases the
19 defendant's criminal history to a criminal history
20 category VI. There was nothing in the plea agreement
21 where the defense was allowed to just pick and choose
22 which part of the terrorism enhancement be applied and I
23 think that's very important to note. There's a reason why
24 the criminal history category is VI and Mr. Lustberg has
25 discussed that. I won't belabor the point. I think the

1 Court is well aware of that. But that was stipulated to
2 in the plea agreement. And even though it's now being
3 brought as a request for downward departure for
4 overrepresentation of the criminal history, it essentially
5 guts the effect and application of the terrorism
6 enhancement which is what the parties agreed to in this
7 case.

8 Your Honor, the Government respectfully requests
9 that the defendant be sentenced to 180 months in this
10 case. The Government believes that that will send a
11 message regarding people that come to the United States to
12 commit terrorist acts. Terrorism is a horrific crime that
13 literally rips at the fabric of our society. The
14 defendant came here ostensibly to enjoy and take advantage
15 of the educational opportunities that this country affords
16 to students and international students all over the world.
17 It's ironic that this case does turn on values that we
18 hold so dear when the reason why the defendant came here
19 was because he believed in al-Qaeda's mission of hatred of
20 Americans and all things American and the Government
21 respectfully requests that you sentence him to 180 months.

22 THE COURT: All right. Thank you.

23 MR. LUSTBERG: Thank you, Your Honor. Of
24 course, Your Honor, you have Dr. Grassien's materials.
25 There's a 2006 article. The purpose of submitting it was

1 to show the effects that Mr. al-Marri's isolated existence
2 have had psychologically. Actually, you know, we have --
3 I don't think there's a loss of disagreement as to what
4 those effects are. In fact, even Major Sirratt talked
5 about them to a certain extent. That was the reason why
6 we didn't feel like we had to call Dr. Grassien. But in
7 any event, just so you understand, it's not correct that
8 it's based on a 1982 article. There's more recent
9 materials and the Court has it and you can weigh that
10 accordingly.

11 Second, with respect to the downward departure
12 based upon the criminal history category VI
13 overrepresenting criminal history, there was not anything
14 in the plea agreement that prevented us from making that
15 motion. We made that motion. It's been made in other
16 cases. It's not an effort to pick and choose or to in any
17 way repudiate our stipulation. People stipulate to things
18 all the time and then ask for appropriate downward
19 departures that are specifically provided for in the
20 sentencing guidelines. That's all we're doing and the
21 Court has a right to hear those arguments and we have made
22 them.

23 Third, the notion -- and Your Honor correctly
24 pointed this out -- that there were threats to
25 Mr. al-Marri's family is backed up by the materials the

1 Government has turned over. It's not that something was
2 going to happen to them in Saudi Arabia. This is
3 Exhibit 13. It says -- Defendant's Exhibit 13. "Towards
4 the end of the session, the interrogator developed and
5 drove a strategy to shake Mr. al-Marri. The interrogator
6 told Mr. al-Marri that he had a job to do and if he would
7 not cooperate he would have to have the Saudi and Qatari
8 authorities round up his family." This was not some
9 passive thing.

10 He would then -- he then proceeded to mention
11 all of Mr. al-Marri's siblings and some of their spouses.
12 "The interrogator then said he would be back tomorrow for
13 his answer. When he came back, Mr. al-Marri did not speak
14 to him or did not want to cooperate. The interrogator
15 asked Mr. al-Marri if he had made a decision regarding
16 cooperation, was he ready to talk or allow his family in
17 Saudi Arabia and Qatar to suffer the consequences of his
18 refusal."

19 This was not subtle. This was not something may
20 happen. This was a direct threat. And the Court is
21 correct that pictures of Mr. al-Marri's family were used
22 to interrogate him. It's also the case that this is one
23 of the very same techniques that has been criticized and
24 repudiated by the administration and that's something that
25 the Court ought to the consider in deciding whether

1 Mr. al-Marri deserves any credit for the conditions that
2 he endured.

3 Finally, Judge, again I want to be clear. It is
4 the case that Mr. al-Marri committed a serious offense.
5 We don't in any way walk away from that. It is also the
6 case that he was here in the United States before doing
7 that. But whatever the impulses were that led him to do
8 what he did in 2001 are the very impulses that we have to
9 deal with now.

10 So the fact that he had the opportunities to do
11 things differently before he turned in a wrong direction
12 at that time certainly should be considered, but it's what
13 he has learned since then that matters. If he had been a
14 perfect -- and he wasn't. I mean, he had some DWIs and so
15 forth, but his behavior before 2001 is not the issue. The
16 issue is what has he done since this time. The Court has
17 heard a great deal about it and I'm not going to repeat
18 it, but for all the reasons I've set forth earlier I think
19 the Court can take comfort -- and you're going to hear
20 from Mr. al-Marri himself -- that he is not a man who will
21 reoffend and that he has come to a completely different
22 view of this country.

23 However, I think the best way for Your Honor to
24 understand that is to hear from Mr. al-Marri himself, so
25 if you would I think this might be the appropriate time

1 for that.

2 THE COURT: All right. Mr. al-Marri, if there's
3 anything you wish to say before I impose sentence, now
4 would be the time to do it.

5 MR. AL-MARRI: Your Honor, would you allow me to
6 have my Quran?

7 THE COURT: What?

8 MR. AL-MARRI: My Quran.

9 THE COURT: Sure.

10 MR. AL-MARRI: Before I start, I would like to
11 thank the Judge and this Court for giving us enough time
12 for my lawyers to present my case. And then you must
13 understand that this statement is my writing. I have
14 announced to my lawyer to not even correct the grammar
15 problems. This is my writing.

16 And I would like to address first something you
17 had mentioned at an earlier time, that what does that
18 mean, also as in this statement, the first paragraph and
19 the last paragraph. Those are a traditional Islamic
20 opening and ending salutation. It is in all letters, all
21 writings, all -- it is not specific for this case or for
22 this issue. It is just a matter of traditional Islamic
23 writing.

24 THE COURT: I assume the guidance is a reference
25 to the Quran? Is that correct?

1 MR. AL-MARRI: Guidance as guidance. You
2 believe it is the Bible. I believe it's the Quran.
3 Whatever is guiding you.

4 THE COURT: Okay.

5 MR. AL-MARRI: In the name of Allah, all praise
6 to Allah and peace and prayer of Allah be upon his last
7 messenger Mohammed, the messenger of mercy.

8 Judge Mihm, peace be upon who follow the
9 guidance. I would like to start by saying that I've been
10 waiting for this day for the last 2,880 days or the last
11 8 years.

12 Judge Mihm, I am glad I have no blood on my hand
13 and my assistance did not cause any bloodshed or lead to
14 that either, nor would I have ever agreed to that and I
15 will never agree to that in the future, but I am sorry for
16 providing assistance for those who would do this country
17 harm.

18 Judge Mihm, all of my captors know that I speak
19 my mind, be it in politics, religion or personal issues,
20 and you have heard some of the American people who were
21 responsible for detaining me that I was never violent or
22 expressed a desire to harm them or any American people,
23 with the exception of course of Dr. Serratt, which I
24 believe my lawyer has showed that she was inconsistent.
25 But for the record, I did not say what she has said I

1 said.

2 Judge Mihm, my religious beliefs refined after
3 or through my years of thoughtful prayers and study during
4 my incarceration I realize prohibit me from engaging in
5 violence towards any man. I forcefully reject any sort of
6 violence for religious, political or other reasons. I say
7 this to the Court and I also state this to the
8 representatives of my country who are present with us
9 today. I know that the news people are here so -- I'm
10 sorry. I know that the news people are here, so I know my
11 word will be received by those with whom I associated with
12 in 2001. You have my word.

13 I had to make my position clear when I spoke to
14 Mr. Risley and the FBI before entering my guilty plea. At
15 that time I was not under threat or abuse and I spoke the
16 truth about my activities. As my lawyer was present at
17 that time, Mr. Risley said, "Thank you for talking to us
18 and being truthful with us."

19 You have seen pictures of my kids when I left
20 them 8 years ago and their recent pictures. Missing all
21 of those years, missing hearing the first words of my
22 youngest child -- missing hearing the first words of my
23 youngest child, missing the crying of not wanting to go to
24 school, missing solving their problems with kids in the
25 school or in the neighborhood, missing their smile and

1 laughter, of buying them toys or new things, missing --
2 missing not being there to take care, protect and provide
3 as fathers do, missing all of that and all of the
4 father/kid activities is more than enough punishment.

5 My 80-years old mother, 5 kids, wife,
6 7 brothers, 4 sisters, more than 70 nephews and nieces and
7 about 12 grandchildren from my nephews and nieces are
8 being punished too of no fault of theirs, rather mine. I
9 have said more about it because it has been 8 years since
10 I have seen or have been away from them.

11 Even though I am a changed person from the 2001
12 al-Marri, I hope you would look with an eye of mercy on me
13 today. But if not, Judge Mihm, have mercy on the 80-years
14 old -- have mercy on the 80-years old who tells me her
15 wish is to see me before she passes away. I have already
16 lost my father during my incarceration. It will be
17 unimaginable to lose both of my parents without being
18 there for them or saying goodbye.

19 Judge Mihm, have mercy on the child -- on the
20 wife who chose to wait for her 8 years imprisoned husband
21 rather than going on with her life even after I asked her
22 to do, but refused and chose to wait.

23 Judge Mihm, have mercy on the suckling infants
24 who have never -- Judge Mihm, have mercy on the suckling
25 infants who have never seen me. They only know me by

1 name.

2 Judge Mihm, have mercy on my American family
3 here, my brother and sister Andy and Cheryl Savage, who
4 cried yesterday when -- or day before yesterday when they
5 read this letter, which was one of the hardest things
6 because I am causing pain and hurt to my family whom I
7 would give my life for, but it is out of my hand to
8 alleviate their pain. Judge Mihm, I am helpless to
9 alleviate their pain, but you are not. Judge Mihm, have
10 mercy on all of them by sending me home to my Arabian
11 family accompanied by my American family by giving me a
12 time served sentence.

13 Before I finish my statement, I would like to
14 give all praise and thanks to my Lord Allah, lord of all
15 lords, for the support he gave me and is still giving and
16 I hope will continue. I would like to thank my government
17 who stood by me and my family during this ordeal. And I
18 would like to thank all of the American people who dealt
19 with me humanely and kindly during my incarceration. And,
20 Judge Mihm, as Allah and this Court are my witness, I
21 forgive all who harmed and caused me pain.

22 And I would like to thank -- I would like to
23 thank my legal team, Larry, Mark, John, Lee and Andy, and
24 the behind the scenes heroes, Jenny, Eileen, Alex, Bobby
25 and Heather, who I believe have done an excellent job.

1 And remember what I said in our first meeting.
2 My opinion of you will not be affected by the ruling of
3 the Court as it is not in your hands as long as you
4 prepare well for the case and it is beyond any doubt that
5 you have done that with an utmost excellence.

6 Last, but not least, I would like to thank my
7 American family. It is an honor to call them my brother
8 and sister, Andy and Cheryl Savage, who are also part of
9 my legal team. You have changed my perception of the
10 American people's generosity, kindness and their culture
11 fundamentally, to the better of course. I will never do
12 anything to harm the American people. And I will still
13 name my future son and daughter after you as I promised
14 before if Allah blesses me with more children. I pray to
15 Allah to assist me in showing you how much I appreciate
16 your help and show you my appreciation and not repay you
17 because I do not believe it is possible to repay you
18 monetary or otherwise for what you have done for me. It
19 is trying to reach the stars with -- or it is like trying
20 to reach the stars with my hands. However, I will pray
21 and always will to the one who can. May Allah reward you
22 as best as he rewards any of his servants and make you, I
23 and our loved ones to follow the right path that will lead
24 us all to an eternity of life together in paradise in the
25 afterlife. Amen.

1 I would like to remind myself first, then my
2 loved ones, that if today's judgment is favorable, it is
3 from the generosity of all generous, all merciful Allah,
4 then the fairness of Judge Mihm and the excellence of my
5 legal team lead by Mr. Andy Savage and Mr. Larry Lustberg,
6 and if not it is due to my sins. I advise myself and my
7 loved ones to accept Allah's judgment and be patient. As
8 Allah has said in the Quran, it may be that you dislike a
9 thing which is good for you and that you like a thing
10 which is bad for you. Allah knows, but you do not know.

11 Finally, glorified is your Lord, the Lord of
12 honor and power. He is free from what they attribute unto
13 him. And peace be on the messengers. All praise and
14 thanks are to Allah, lord of the mankind and all that
15 exist. Chapter 37:180, 182. Thank you very much, Your
16 Honor.

17 THE COURT: Thank you. I'm going to take about
18 a ten minute recess and then I'll come back and impose
19 sentence.

20 (Recess taken)

21 THE COURT: My comments will be rather lengthy,
22 so it's fine with me, Mr. al-Marri, if you just remain
23 seated.

24 MR. AL-MARRI: Thank you.

25 THE COURT: First of all, the Court adopts the

1 factual findings and guideline application as contained in
2 the pre-sentence report except for the one change that I
3 made and that has been reduced to writing.

4 You have had quite an odyssey. I'm not quite
5 sure where that odyssey began or when in relation to this
6 case. I don't know, for example, where and when and under
7 what circumstances you became radicalized in your
8 religious beliefs to the extent that you believed, I'm
9 sure sincerely, that it was the right thing for you to do
10 to go to the training camps and get your training and do
11 all of those other things that we'll be talking about.

12 There's no doubt that you were not only trained
13 in the camps, but in military matters, weapons, the use of
14 poisons, codes for communicating. It's also clear from
15 your stipulation that you were a courier on at least one
16 occasion, as I recall, from al-Hawsawi to Khalid Sheikh
17 Mohammed carrying electronic equipment.

18 It's also clear to me that your trip to the
19 United States in 2000 is not just some aberrant event that
20 comes out of no where and goes back into no where. That
21 makes no sense. Although I don't know exactly what that
22 was, I do believe in some way it's related. And I think
23 it's worthy of note that when you came here in 2000 that
24 you used, I believe, a Saudi passport and gave some false
25 information for your visa application and when you came

1 here you set up a fictitious company, AAA Carpet.

2 So I don't know. I would be -- I would like to
3 know. I won't know. But I would be curious to know how
4 you became radicalized and when because when I look at
5 your family on this screen, it's a beautiful family. It's
6 a wonderful family. Not just your children, but your
7 brothers. That's a family that anybody, whether you live
8 in that country or here, would justifiably be very proud
9 of.

10 It's also clear that you, after you came back in
11 '91, got married, you went to work and developed some very
12 good -- a very good work record, had responsible positions
13 there. People have commented on that. You were a
14 respected person.

15 Again, putting all of that in context, the
16 family, the respect in the community, the job, all of
17 that, I don't understand how we get from that picture to
18 training in an al-Qaeda camp in Pakistan, but we know it
19 happened.

20 I might point out parenthetically right now by
21 the way that you're absolutely right about your lawyers.
22 One of the things that's clear in this case is that the
23 lawyers on both sides have been superlative and your
24 lawyers for a long time, as long as I've been involved in
25 this case and before that, have been aggressively

1 representing you in every court in the land up to and
2 including the Supreme Court. They are very decent people.
3 They are good lawyers. They are very honorable officers
4 of the Court and you could not do better. I could say the
5 same thing about the Government attorneys.

6 Anyway, so we know you came here in 2000 and
7 then you went back and then certain events happened in
8 2001. I believe you were a courier in that year and at
9 some point the decision was made for you to come here.
10 That was, as I understand it, an agreement that you made
11 with Khalid Sheikh Mohammed that you were to come here and
12 be a sleeper agent, but you were carefully admonished to
13 be here by the 10th of September. And we all know what
14 happened on September 11. Someone cited the number
15 earlier. I don't know, I don't recall the exact number,
16 but it's just under 3,000 people were murdered that day by
17 the planes that flew into the World Trade Center and the
18 Defense Department.

19 You said in your statement -- and, again, I have
20 great respect for what you said in your statement. I had
21 the sense that you were being sincere. But one of the
22 things you said was, "Nor have I ever agreed to do harm."
23 With all due respect, I don't agree with that. It's hard
24 to know the extent to which you had specific ideas about
25 what you might ultimately be doing here in the United

1 States as a sleeper agent when you finally did get that
2 e-mail or that phone call about this is what there is to
3 be done, but it's also clear in my mind that as of
4 September 11 you had to know what was going to be expected
5 of you.

6 And I've thought a lot about this case and
7 struggled with the idea of what the just sentence would
8 be. One of the things that popped into my mind when I was
9 thinking about this was, you know, I recall where I was
10 when I first heard about the planes going into the World
11 Trade Center. I was right out here in the parking lot
12 coming to work after a meeting at a hospital. I think
13 every American knows where they were that day. Your
14 lawyers know where they were that day. You were somewhere
15 that day and you were here and so you heard of these same
16 things that all of us heard and after that you made a
17 conscious, deliberate decision to continue. You could
18 have stopped at that point, may not have been easy but you
19 could have stopped, but you didn't.

20 And by the way, I want to mention another thing
21 about your family. And I am absolutely convinced you have
22 the greatest love for your family. But with all due
23 respect, I have to ask what kind of man comes to this
24 country as a sleeper agent for al-Qaeda, knowing what
25 al-Qaeda does and learning on September 11 what it had

1 done, what sort of man brings his family to this place, a
2 family, a young family, small children, where apparently
3 they don't speak the language. I don't understand that,
4 sir. I don't understand how you made that choice to do
5 that because then it was not just your commitment to
6 jihad. It was committing all of those that you loved and
7 I find that troubling.

8 So I think that 9-11 was the defining moment for
9 you, at least in terms of how I view this case, in terms
10 of the seriousness of the conduct and other things. I
11 think 9-11 -- not what happened in the training camps, not
12 what happened when you were acting as a courier, not when
13 you came over here for some nefarious reason in 2000.
14 9-11 was the defining moment for you because that's when
15 you decided to remain part of a conspiracy when you could
16 only expect that you were going to be asked to either
17 directly or indirectly harm American citizens.

18 So talking about the criminal history
19 category VI, I recognize that I have the discretion to
20 depart downward from level VI to a lower level. I choose
21 in the exercise of discretion not to because I do not
22 believe that a level VI substantially overstates the
23 seriousness of your history or, for that matter, the
24 likelihood of recidivism. And I'll talk about that later.
25 I'm not going to repeat all of the things that I've

1 already said. All of those are part of the explanation
2 for why I feel that this category VI is appropriate.

3 The training, I might point out, the training
4 that you received was all very consistent with your
5 mission here, at least it would have to have been
6 explained to you that way I think, and that was to inflict
7 damage on the United States. I would be the first one to
8 say that I am not in any way well read concerning the
9 dynamics of al-Qaeda, but I think I could reasonably
10 assume that not everyone who trains in training camps or
11 did at that time develops the personal relationship that
12 you did with Khalid Sheikh Mohammed and al-Hawsawi. And
13 of course at that time you knew about the embassy bombings
14 in East Africa. You knew about the USS Cole.

15 I do also think it's worthy of note that --
16 there have been different interpretations placed on this
17 concerning what was found on your computer. Concerning
18 the cyanide poison, that does not exist in isolation on
19 your computer. It exists beside or on the same computer
20 with information about waterways and I believe dams and
21 tunnels, things like that. I don't believe it would be an
22 unreasonable inference to conclude that that research was
23 at least the beginning attempt to develop information upon
24 which later decisions could be made concerning possible --
25 the use of some sort of weapon of mass destruction. Any

1 suggestion that you developed this cyanide information for
2 a cousin at home, in the context of this case I don't
3 believe that has any merit.

4 So all of this means in my mind that this was
5 extremely serious conduct and in that sense I do not
6 believe that -- I don't believe that your criminal
7 history VI is substantially overstated.

8 Concerning the likelihood for you to recidivate,
9 that's a difficult analysis. At the end of the day, in
10 spite of what you've said here today, and I believe that
11 you've spoken sincerely and from your heart, I believe
12 that the risk of recidivism is very high. I heard what
13 you said in your statement. I don't really see that as a
14 repudiation of al-Qaeda. I think it can be fairly
15 characterized as you giving your word to me that you would
16 not go back to being involved with that organization, but
17 I don't hear it as a repudiation of al-Qaeda or a
18 disavowal for others of jihad. And whatever your sentence
19 ends up being here today, I believe that when you do go
20 home, and you will, I believe that there is a very strong
21 risk that you will renew old acquaintances and
22 associations in spite of the wonderful family that you
23 have.

24 Counsel has argued that significant punishment
25 in this case, and it was significant, that is deterrence.

1 I certainly agree with him that that can be. I don't
2 believe in your case that ultimately it will prove to be
3 so.

4 We've heard here today that you have changed,
5 that -- I mean, it's clear, not only from what you've
6 written but your relationship during your court
7 appearances and otherwise, it's clear that you have
8 developed a good friendship and affection for the people
9 on your defense team. And that's no surprise because
10 they're very nice people and they've gone way beyond what
11 one would expect a lawyer to feel obligated to do to plead
12 your case from Peoria all the way to Washington.

13 Your attorneys argue of course it's more than
14 that, that you have now seen the light because of your
15 exposure with those good people. But what troubles me
16 about that is that that argument, I won't say
17 conveniently, but it avoids the reality that you didn't
18 drop here in Peoria out of a helicopter on September 10.
19 You had been in this country for eight years, from 1983 to
20 1991. And I forget now the exact number of schools you
21 attended. I think Southern Illinois, maybe a university
22 in Macomb, Knox College.

23 THE DEFENDANT: Canton, Spoon River College.

24 THE COURT: Okay. And then Bradley University.

25 I can only assume, I think very strongly assume, that you

1 met an awful lot of nice Americans during that time, a lot
2 of college professors, fellow students, people that you
3 may have lived around. And I'm so certain of that
4 because, first of all, these university environments that
5 I'm talking about, including Peoria, contrary to some
6 belief that someone like you would simply be profiled and
7 treated differently, in my experience that's not true,
8 especially in university settings. People go out of their
9 way to encourage folks coming from another place. I know
10 that Bradley is like that. Bradley has always been that
11 way and I'm sure there were professors that went out of
12 their way to help you. But the point I'm making is why
13 did you need this epiphany from the friends you've gained
14 on your defense team now or over the course of their
15 assistance? You spent eight years here. You knew who we
16 were as a people.

17 Other judges -- it's been noted there have been
18 other judges who departed downward from category VI to
19 something lower. I think one even was to a level I. I
20 respect their decisions. I assume they made those
21 decisions based on the facts in their case and their
22 conscience in terms of what they felt, the right thing
23 that he or she felt was called for under their
24 circumstances. But I don't believe there's anything in
25 any of those findings that would compel me to come to the

1 same conclusion, so I reject the idea of a reduction in
2 your criminal history category.

3 Concerning your confinement, I don't know if
4 this case is unique. There may be other cases that I'm
5 unaware of that would make it less than unique. But it
6 may be that the early part of your confinement from when
7 you were a material witness and held in isolation and,
8 more severely, when you were held as an enemy combatant in
9 South Carolina, that that -- there may be another case
10 where that type of treatment while in confinement existed.
11 I'm not aware of it. I think this case is at least highly
12 unusual.

13 There can't be any doubt that the treatment you
14 received at the Brig from the time you arrived there until
15 late 2004 when you were allowed to have lawyers for the
16 first time was very severe and we've heard all the reasons
17 why that characterization is correct. I think the bottom
18 line on most of it, the bottom line on the most serious
19 part of it is the intense and ongoing isolation.
20 Definitely severe.

21 And I do know that there were some things said
22 to you about your family. And whether it was what is
23 reported by the government agents or whether it was
24 reported by you, in my personal belief as a judge in a
25 civilian court, those totally are unacceptable.

1 Threatening someone's family for what they've done, that's
2 not who we are. Whether these methods of interrogation
3 are fairly characterized as enhanced interrogation or
4 something else frankly is irrelevant to me. There's no
5 doubt that it was very severe.

6 Certainly things got a lot better later on. It
7 sounds like by the time you left the Brig you had a lot
8 more going for you than almost anybody else in the prison
9 system in a lot of ways. Not everybody. Certainly your
10 isolation from your family and things like that remained
11 as a problem.

12 It's not certainly part of the explanation that,
13 well, this post 9-11 world. It's true that immediately
14 following that not only was there great mourning over the
15 people who died, but certainly great fear and continuing
16 concerns that there would be other things that would
17 happen. But in the context of a civil court, which is
18 where this case ends, not a military tribunal, in the
19 context of this court that period of time, especially from
20 the time your arrived at the Brig in '03 until late in
21 '04, was very severe.

22 The Government has suggested in some ways that
23 this has already been taken into account in the plea
24 agreement. I'm sorry. I still don't understand that. As
25 I said earlier today, there were two counts. The

1 Government has agreed to drop one count. If they hadn't
2 and you had gone to trial on both counts and been
3 convicted, I don't believe there is any way as a matter of
4 conscience I could have sentenced you to a consecutive
5 sentence under those circumstances. And I'll talk more
6 about that in just a minute.

7 Excuse me just a moment. I did want to comment
8 about one statement Mr. Savage made about being people
9 being suspicious of you because of how you looked or
10 dressed. With all due respect, I don't believe that was
11 true here in Peoria. I could be wrong. But I've lived
12 here for 40 years and there's a very large, for example,
13 Lebanese community here, I think a pretty large
14 Palestinian community here. People in this area are very
15 used to having folks from the Middle East living here and
16 working here. Then of course we've got Bradley University
17 which has done a great deal to foster acceptance of people
18 from diverse backgrounds. And frankly, the same thing I
19 think could be said for Caterpillar because of its status
20 in the world and the fact that we have people coming in
21 and out of here all the time to work. I don't believe
22 that, based on my experience in this community, that that
23 happened.

24 Now there were some specific things that
25 happened. Candidly, taking a taxi cab from O'Hare Airport

1 to Peoria is unusual. You may not have made other
2 arrangements to do that, but that would be highly unusual.
3 You had an incident in an electronic store that was
4 reported to the FBI, but that happened, I believe, because
5 of the fact that you paid, if I understand it correctly,
6 with a credit card and yet claimed to have no credit
7 history and some of the information you put on the
8 agreement or the contract that you signed was different
9 from some other information that you had provided. In the
10 post 9-11 world, I can see how that would be suspicious.
11 And then when you were arrested by the police on the old
12 warrant and you, as I understand it, ultimately posted
13 bond on that, I believe that you paid the bond out of a
14 large amount of cash that was in a briefcase, which would
15 also be suspicious.

16 I want to talk very briefly about the 3553
17 factors. Concerning the guidelines themselves, it's
18 certainly correct that the guideline that applies here is
19 the 180 because that's the statutory maximum. I do think
20 it's interesting to note that the guidelines, which
21 consider a number of different factors in determining
22 where the guideline range should be, consisting not only
23 of the relevant conduct in the offense but also all of the
24 background information, that in this situation, based on
25 the change that I made, was 292 to 360, which in fact was

1 substantially more than the 180.

2 The nature and circumstances of the offense.
3 I'm not going to go through all of those. If anyone who
4 is interested in this wishes to spend the time, the
5 factual basis, a very detailed factual basis, is set out
6 in the plea agreement. That document is available for
7 anyone to copy and take with them.

8 I do believe that at the time that you came to
9 this country you had decided to commit yourself to be a
10 sleeper agent for al-Qaeda and I can only assume that that
11 would mean anything that that involved, including, as I
12 understand it, the ultimate honor of death by martyrdom.

13 After 9-11 you opened up the e-mail accounts.
14 You enrolled at Bradley University, although I think it's
15 painfully clear that that was really only done as a cover.
16 From what it says in the pre-sentence report, you attended
17 virtually no classes, or very few classes I should say,
18 and you were failing on whatever subjects you were taking
19 there at the time that you were arrested.

20 I do not believe that you were a lackey.
21 Someone used that word today. I don't believe that. I
22 believe that would be not only an insult to your
23 intelligence -- and I believe you're a very intelligent
24 person -- but I also think it would be an insult to the
25 commitment you made to al-Qaeda before you came here. And

1 I'll say it for the last time. In terms of the nature and
2 circumstances, all of this in my view became much worse
3 effective 9-11.

4 Your personal characteristics. There has been a
5 lot of discussion about that. We know that you came from
6 a very respected family, one of several brothers, very
7 respected. You do have another brother who at least for a
8 period of time was considered an enemy combatant himself.
9 There's no doubt that you have a very highly respected
10 family and your own children and wife are very good
11 people. And I guess that says something about you, too,
12 or you wouldn't have them.

13 We know you came here, spent eight years here,
14 ultimately got your bachelor's degree and went back.
15 Responsible jobs after you went back. As I said, the
16 pre-sentence report ends without any real addressing of
17 when and where you became radicalized, but it's clear that
18 you did.

19 I want to skip over reflects the seriousness of
20 the offense, promotes respect for law. I'll come back to
21 that.

22 In terms of an adequate deterrence to others, I
23 don't really think that's a particularly active factor in
24 this case. I think just about any sentence the Court
25 would impose would properly address that. It's suggested

1 here that the general deterrence is the fact that you were
2 removed from your family for eight years, put in Brig
3 isolation. I'm not sure how effective that is as general
4 deterrence. I'm guessing that people, other people who
5 become committed to al-Qaeda or some other terrorist
6 organization, may often believe that they won't be caught
7 or, if they are caught, that it doesn't matter.

8 To protect the public from further crimes by
9 you. Your lawyers have repeatedly, consistently,
10 aggressively and with great emotion argued that your
11 chance of committing a new crime, new harm to the United
12 States is extremely low. With all due respect, I don't
13 accept that. I believe that the risk of your
14 reassociating with those who brought you here to begin
15 with, I believe that's high. I believe that based on
16 everything I've read and heard that you do not truly
17 regret what you did and I believe you would do it again
18 after you go home. Whether that is coming back here or
19 doing something else somewhere else remains to be seen.

20 In terms of desperate sentences, there's been a
21 reference to some of those and I'm not going to dwell on
22 them overly much, but I did want to touch on a couple
23 of them. Bear with me just a moment.

24 Yaser Hamdi, as I understand it, ultimately his
25 civil case was dismissed. It was recorded that he was

1 released and returned to Saudi Arabia. No reasoning.
2 There's a suggestion in the Government's argument that it
3 was because of his great remorse. I don't know exactly
4 what that means.

5 David Hicks was an Australian citizen trained in
6 al-Qaeda camps. He was captured on the battlefield in
7 Afghanistan after affiliating with the Taliban unit. He
8 was detained at Guantanamo from January of '02 to March of
9 '07. He ended up pleading guilty in front of a Military
10 Commission to one count of material support, which is the
11 same type of thing you pled guilty to. He was sentenced
12 to seven years, but as I understand it only nine months of
13 that was served and the rest of it was suspended. The
14 reasoning for that is not available and he returned to
15 Australia 60 days after sentencing.

16 Jose Padilla was one of the other people held
17 there at that time. He was an American citizen trained in
18 al-Qaeda camps, sought to provide support to al-Qaeda. He
19 was arrested as a material witness in May of 2000 for
20 suspicion of plotting a dirty bomb attack. He was
21 declared an enemy combatant, transferred to the Brig in
22 June of 2002, which is before you got there. He was held
23 there until November of '05 when he was transferred to a
24 Miami jail, charged with a conspiracy to murder, kidnap,
25 maim and a conspiracy to provide material support to

1 terrorism. As I understand it, he received 208 months on
2 Count 1, 60 months on Count 2 and 180 months on Count 3 to
3 run concurrently and, as I understand it, that case is on
4 appeal.

5 Warsame, Mohamed Warsame, has been referred to.
6 He was a Canadian citizen, attended two al-Qaeda camps,
7 including lectures by Osama Bin Laden, received funds to
8 return to Toronto. He solicited an equivalent amount of
9 funds to send back to Pakistan. He entered the U.S. as a
10 resident alien in August of 2001, maintained
11 communications with al-Qaeda associates. He was held in
12 Minnesota corrections for 5.5 years prior to trial and he
13 pled guilty to the same exact count that you did. In that
14 case the judge imposed a sentence of 92 months with full
15 credit for 68 months spent in pre-trial detention and that
16 credit was given, the explanation was, because his
17 confinement was significantly more onerous than the
18 conditions faced by the ordinary pre-trial detainee and
19 found the terrorism enhancement overstated his criminal
20 history category and there was never any link to any
21 specific terrorist plan or plot.

22 I could go on, but I think that each of these
23 cases is instructive. As I said earlier, every one of
24 those judges had to make their own decisions based on
25 their assessment of the facts and the various sentencing

1 factors.

2 Lastly, I want to talk about the sentence should
3 reflect the seriousness of the offense, promote respect
4 for law, provide just punishment. Mr. Lustberg is
5 correct. Usually this part about just punishment, that's
6 usually, when it is invoked in any detailed way, it's
7 invoked because of a judge's belief that there is a call
8 for a very serious sentence.

9 I take very seriously this mandate of providing
10 a just punishment. That in effect is a very personal
11 decision. It's my decision and the weight of that
12 decision remains with me after you leave, just as it does
13 almost every Friday when I sentence other people. I see
14 this as a terribly serious responsibility. There may be
15 some appeals that are filed yet that are still allowed by
16 the plea agreement, but in all other respects this case
17 ends here in this courtroom today, which I would point out
18 is a civilian court.

19 You were held from December 12 of 2001 to today,
20 in my opinion, substantially for the same conduct that was
21 charged in the indictment. And as a matter of conscience
22 for me and I think as a proper reflection of the facts and
23 the law, I think a just sentence must reflect that
24 71 months that you were held. I say 71 months. As I
25 understand it -- and I didn't bring that sheet out with

1 me. But as I understand it, there's 71 months that you
2 have been held -- am I correct, Mary? Is it 71 months?
3 71 months that you have been held that the Bureau of
4 Prisons is not going to give you credit for because it was
5 a period of time when you were a material witness or a
6 period of time from the day that you left here in June of
7 2003 until the day you were indicted earlier this year. I
8 believe that in order for this sentence to reflect respect
9 for law and be a just punishment that I should reduce your
10 sentence by that 71 months.

11 The remainder -- there is other time for which
12 you will be given credit by the Bureau of Prisons and I'm
13 not going to reduce the sentence in that respect. I will
14 leave them to do their duty under the law. I have no
15 reason to doubt that they will not do their duty. And we
16 did check with them and they seemed very clear about the
17 exact amounts that you will receive or not receive.

18 The last thing that I need to discuss is the
19 conditions of confinement. I've already indicated that
20 some of them were, if not unique, highly unusual.
21 Especially the period of time from June of '03 until the
22 late fall of '04 was extremely severe in terms of
23 isolation and other things and I do believe that some
24 adjustment for that is appropriate. But I will tell you
25 that it's not going to be dramatic and the reason that it

1 isn't is because I have to weigh against that the other
2 factors that I've talked about with some serious focus on
3 the fact that I believe that you still present a very
4 dangerous risk of future harm. So I am going to be making
5 an adjustment on your sentence of an additional 9 months.

6 If my math is correct, what that means then is
7 that I'm going to be imposing a sentence of 100 months.
8 There are some other periods of time that will come off of
9 that, but -- there is nothing that has inevitably drawn me
10 to these exact numbers. In spite of everything, there is
11 a certain amount of arbitrariness involved.

12 I think most judges, certainly the judges that
13 I've known over the years, make every effort to give the
14 sentence that they believe is correct. At the end of the
15 day I think we are defined as a people by how we deal with
16 difficult and unpopular legal issues and that's especially
17 true in this context. There is a war on terror. It
18 exists. It existed -- I guess it didn't get the full
19 attention of the American public until 9-11, but we know
20 that it's ongoing both here and in other places and there
21 are many, many Americans in harm's way as I speak and that
22 creates a very complicated situation for this type of
23 case. But I can only say as long as cases like this are
24 processed in the civilian courts, the types of
25 considerations that we've been struggling with here the

1 last two days, those struggles will continue because there
2 are very few bright line answers involved.

3 I recall a couple of years ago I had the great
4 honor of going to China for the State Department to talk
5 to a number of different universities and law schools over
6 there about the American legal system and the Chinese
7 students were extremely active in their questioning and
8 although they were respectful, they didn't take any of my
9 comments at face value so we talked a lot about the Bill
10 of Rights and other things. And of course I was hit with
11 a lot of the things that were going on at that time about
12 the Patriot Act and this and that, cases like yours,
13 whatever, and they demanded explanations for a lot of that
14 and I told them I thought candidly that I couldn't give
15 them all the answers at that time. I said we are
16 struggling with these things and we will continue to
17 struggle with them and it may take years before we've
18 settled on the answers that we feel comfortable with as a
19 people, but I said I am certain of the fact that that will
20 happen because the commitment to the rule of law in this
21 country is not dead. It's not represented by one side or
22 the other. It's not only represented by defense lawyers.
23 It's every bit as much embodied by the prosecutors. In
24 any event, I am now ready to impose sentence.

25 Pursuant to the Sentencing Reform Act of 1984,

1 the defendant is hereby committed to the custody of the
2 Bureau of Prisons for a period of 100 months. And that
3 sentence reflects a reduction by the Court of 71 months,
4 which is my understanding of the period of time when you
5 were in custody beginning on December 12 of 2001 until the
6 time that you were -- I'm sorry -- the time that's not
7 going to be given credit by the Bureau of Prisons. So
8 it's the time that you were a material witness. It's the
9 time that you were in the Brig in South Carolina. It also
10 reflects a reduction of 9 months for the harsh conditions
11 of confinement for part of the period of time that you
12 were being held and most specifically the first part of
13 the time that you were being held as an enemy combatant.

14 The Court finds that you do not have the ability
15 to pay a fine and no fine is imposed.

16 Following your release from custody you shall
17 serve a 3-year term of supervised release. Within 72
18 hours of your release from custody you shall report in
19 person to the probation office in the district to which
20 you are released.

21 The Court finds that you do not present the
22 likelihood of future substance abuse and waives the
23 mandatory drug testing requirement.

24 While on supervision you shall not commit
25 another federal, state or local crime.

1 You shall not possess a controlled substance.

2 You shall cooperate in the collection of DNA as
3 directed by the probation office or the Bureau of Prisons.

4 In addition to the standard conditions of
5 supervision, you shall comply with the following special
6 conditions.

7 Number one: You shall not reenter the United
8 States illegally during the time of supervision.

9 Number two: If for any reason you are released
10 in this country during the time of your supervision, you
11 must immediately report to the U.S. Probation Office in
12 this building or if released by immigration officials
13 somewhere else or if you return to the United States for
14 any reason you will immediately report to the nearest
15 federal probation office.

16 Number three: You shall not own, purchase or
17 possess a firearm, ammunition or other dangerous weapon.

18 A special assessment of \$100 is imposed and
19 payable immediately.

20 Does the defense have any recommendations for me
21 to make to the Bureau of Prisons?

22 MR. LUSTBERG: Your Honor, we have been in touch
23 with the Bureau of Prisons and we believe they are going
24 through a pretty careful deliberative process with respect
25 to that and so we will -- in fact, I wouldn't be surprised

1 if decisions have already been made, so we will refrain
2 from requesting them of the Court.

3 THE COURT: Does the Government have a motion to
4 make regarding Count 2?

5 MS. BALTES: Yes, Your Honor. The Government
6 moves to dismiss Count 2 of the indictment.

7 THE COURT: That motion is granted. Count 2 is
8 dismissed with prejudice.

9 Now at the time of your plea agreement, you told
10 me that because of the terms of your plea agreement in
11 some respects, not all, you were giving up the right to
12 file an appeal following your sentence. Nonetheless, to
13 the extent to which you feel you have any appeal rights
14 that survive that waiver and it is your wish to appeal, I
15 instruct you that any notice of appeal must be filed with
16 the Clerk of the Court within ten days of today's date.
17 As your -- your attorneys standing beside you have an
18 absolute responsibility to file that notice for you if
19 that is your wish. Do you understand?

20 MR. AL-MARRI: Yes.

21 THE COURT: All right. Good luck.

22 MR. LUSTBERG: Your Honor, just one matter. We
23 have been asked to withdraw the exhibit that is the
24 blanket as the Court doesn't have any particular place to
25 put it, so we'll take that back.

1 THE COURT: Do you have any objection to that?

2 MS. BALTES: No. I believe the Brig wants it
3 back.

4 THE COURT: Okay. That's granted.

5

6 * * * EXCERPT CONCLUDED * * *

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10 **REPORTER'S CERTIFICATE**

11 I, Karen S. Hanna, certify that the foregoing
12 transcript constitutes a true and accurate transcript of
13 the original shorthand notes of the proceedings had at the
14 time and place aforesaid before the HONORABLE MICHAEL M.
15 MIHM, U.S. District Judge.

16

s/Karen S. Hanna

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Karen S. Hanna, C.S.R.
License #084-001760

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