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1 [The court-martial was called to order at 1453, 1 July 2013.]

2 MJ: Court is called to order. Let the record reflect--
3 well, Major Fein, go through to see who is here and the witness
4 is on the witness stand.

5 This is a closed session.

6 TC[MAJ FEIN]: Yes, ma'am. This session is classified at
7 the SECRET/NOFORN level. All parties when the Court last
8 recessed are again present. Sergeant Coates, the Court's
9 paralegal is present. The members of the prosecution team,
10 including the security experts and members of the defense team,
11 including the security experts are in the gallery along with
12 security, Your Honor. Prior to the start of this session, the
13 Court Security Officer completed his checklist and that will be
14 filed in the post trial allied papers.

15 MJ: All right. Before we begin, and I'll announce this
16 again in the open session, the Court has completed its review
17 and I haven't formally authenticated it yet, but I completed the
18 review of the session of the closed transcript--the closed
19 hearing with Special Agent Shaver on the 26th of June 2013. So
20 I am handing it back to the court reporter. That session is
21 ready to go to the next phase, the classification review of the
22 expedited transcript.

23 Any other issues with that?

24 TC[MAJ FEIN]: No, ma'am.

1 MJ: Okay.

2 CDC[MR. COOMBS]: No, ma'am.

3 MJ: Is there anything else we need to address before we
4 proceed?

5 TC[MAJ FEIN]: No, ma'am.

6 CDC[MR. COOMBS]: No, ma'am.

7 MJ: All right. Major Fein?

8 **DANNY LEWIS, civilian, seated at the witness stand, was reminded**
9 **of his previous oath, and testified as follows:**

10 **REDIRECT EXAMINATION**

11 **Questions by the trial counsel[MAJ FEIN]:**

12 Q. Sir, earlier you testified about five CI functions.
13 I'd like you now to focus on two of the functions; first,
14 investigations. What are examples of investigations?

15 A. CI investigations?

16 Q. Yes.

17 A. They go--run the range of everything from allegations
18 of espionage down to failed polygraphs, classified information
19 being mishandled, other types of reports of activity of people
20 who have a security clearance that are still being looked at
21 from a security standpoint, as well.

22 Q. And sir, over your career how have you been involved
23 in counterintelligence investigations?

1 A. When I was in the 527th, that is where we basically
2 handled everything that come into the office. So it was--if it
3 was a report of someone who had made a suspicious activity
4 report we would follow up on that and conduct that investigative
5 activity. We did all of the background investigations of all of
6 the military folks who were in the military community where I
7 was responsible for. We did all of their background
8 investigations. At that time the Defense Security Service--the
9 Defense Investigative Service, basically, had the military did
10 all of the background investigations overseas. From there and
11 that was just a lot of interviews of everyday CI activities.
12 After that when I got to we specialized in the significant
13 espionage investigations that the Army determined were based on
14 the allegation or the reporting--most likely, espionage was
15 happening and we had to resolve that.

16 Q. And sir, how did the exchange of money for government
17 information play a role in these investigations?

18 A. Money is one of the two things that we look for the
19 most. Normally, most foreign intelligence organizations pay for
20 classified information. So if an individual that--there is an
21 allegation that he or she is committing espionage or has
22 committed espionage, we would spend a lot of our time focused on
23 the background of the finances of that individual looking for
24 those unexplained affluence, the anomalies that fit on the

1 financial side to possibly prove that someone had been involved
2 in espionage.

3 Q. And sir, could you explain, please for the Court,
4 specifically what it was that you investigate in terms of money
5 changing hands?

6 A. I am not sure I understand the question.

7 Q. Yes, sir. You just testified in general how money
8 plays a role. And, what was your role? What were you using or
9 how did money come up in your purview as an investigator?

10 A. As far as conducting analysis of financial records,
11 both credit card records, bank records, anything that had to do
12 with the individual; all of those were laid out and we conducted
13 a financial analysis. What was the normal pattern of spending
14 for an individual and his or her family; and then we would look
15 for the patterns that did not fit the normal that we had
16 determined based on that individual.

17 Q. So in your time, sir, at the 527th and then as a
18 military and civilian member of (b) (1) how often did the exchange
19 of money come up in these types of cases?

20 A. Just about always. 95 percent of the time, I would
21 say.

22 Q. And sir, what type of foreign intelligence services
23 were involved with these types of investigations?

1 A. The ones that I had experience with, my experience was

2 (b) (1) (B) [REDACTED]
3 [REDACTED] so I'll
4 throw all those in. But, all [REDACTED].

5 Q. And sir, what was the classification of the different
6 types of government information that exchanged hands for money?

7 A. Top Secret, Secret, Confidential, Unclass sometimes as
8 well.

9 Q. What position--sir, in that position you held up until
10 last month, what was your role regarding investigations?

11 A. Visibility over all of the investigations that were
12 being conducted in every entity with DoD with the military
13 services, the Defense Agencies, and the (b) (1) (B) with those cases
14 that involved DoD. My role was to make sure I would review
15 those and see how they were going and as things became
16 significant there, something where there was going to be an
17 arrest, there was a media exposure, (b) (1) (B) [REDACTED]
18 (b) (1) (B) [REDACTED], or overseas. Those are the things
19 that I would review and ensure that we made part of the monthly
20 briefing up to the USDI.

21 Q. Sir, what do you mean by visibility--that you had
22 visibility of?

23 A. Well, all of the DoD entities reported in to my
24 office. So part of the monthly briefing was to ensure--review

1 those activities. What was happening in any of these--these are
2 a month to month snapshots in ongoing investigations and ongoing
3 operations.

4 Q. Sir, was it a regulatory requirement for all of these
5 counterintelligence entities to report to your shop?

6 A. Yes.

7 Q. What requirement did that come from?

8 A. It's the DoD Instruction 5240.2. It's the CI
9 activities and it lays out in detail the types of investigations
10 that were reported.

11 Q. And sir, why was it your responsibility to oversee
12 this?

13 A. I was responsible for ensuring that the Under
14 Secretary of Defense for Intelligence and the Deputy
15 Undersecretary had visibility on the things that were issues
16 within their counterparts--service secretaries. If something
17 had to go to Congress--if there was an issue overseas. My
18 responsibility was to make sure that as the Under Secretary of
19 Defense for Intelligence, he had equal knowledge of those
20 issues.

21 Q. And sir, over how many significant investigations do
22 you estimate that you have had personal visibility while at DIA?

23 A. (b) (1) (B)

1 Q. (b) (1) (B)

2

3 A.

4 Q. Sir, how did your experience in your previous job at
5 DIA differ from your previous roles as a CI Agent?

6 A. As a CI Agent I was more focused specifically on Army
7 equities. So my visibility was what was happening within the
8 Army with the specific investigations that I was the case agent
9 on or were assisting other case agents on.

10 Q. Sir, now I'd like to focus your attention on the fifth
11 CI function you mentioned which is operations. What are
12 examples of CI operations?

13 A. Offensive CI Operations

14

15 Q. And sir,

16 A.

17 (b) (1) (B)

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1 (b) (1) (B)

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3 Q. And sir, what do you mean by

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5 A. Those are all--those are

(b) (1) (B)

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16 Q. Sir,

(b) (1) (B)

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19 A. It depends on the requirement.

(b) (1) (B)

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23 Q. Sir, is it accurate to say that

(b) (1) (B)

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1 A. It is focused on [REDACTED]

(b) (1) (B)

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3 Q. Sir, what is the purpose of counterintelligence
4 operations?

5 A. The [REDACTED]

(b) (1) (B)

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1 (b) (1) (B)

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5 Q. What is someone

6 (b) (1) (B)

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8 A.

9 Q. Are you

10 A. I am.

11 Q. Have you (b) (1) (B)

12 A. I have.

13 Q. Was that your primary----

14 A. In----

15 Q. I am sorry. Go ahead, sir.

16 A. ----in the investigative side of being

17 (b) (1) (B)

18

19

20 Q. Sure, sir. And what was your primary specialty?

21 A. Counterespionage investigations.

22 Q. So not necessarily

23 A.

24 (b) (1) (B)

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(b) (1) (B)

Q. Sir, does your work involve using the same skills

(b) (1) (B)

A. Yes.

Q. Why?

A. From the investigative side we use

(b) (1) (B)

Q. Sir, earlier you mentioned that you've helped (b) (1) (B)

Could you briefly explain for the Court
what (b) (1) (B)

1 A.

(b) (1) (B)

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9 Q.

10 A.

11 Q.

12 A. In an investigation, that is one of the elements of
13 espionage. It's providing defense information to a foreign
14 national. So we're--from the investigative side that is what we
15 need to know. We need to know what was compromised by that
16 person who committed espionage so we can go back and determine
17 what is the damage; what is the long-term damage to DoD. So
18 that is what we are trying to focus in, is what did you provide.

19 (b) (1) (B)

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1 Q. [REDACTED]

2 (b) (1) (B) [REDACTED]

3 [REDACTED]

4 A. Yes.

5 Q. And sir, what did you mean just now--earlier when you

6 said, [REDACTED]

(b) (1) (B) [REDACTED]

7 What do you mean by that?

8 A. [REDACTED]

(b) (1) (B) [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 (b) (1) (B)

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3
4 Q. And sir, have you worked directly with case officers?

5 A. All of the time. Yes.

6 Q. And could you explain for the Court how you directly
7 work with case officers?

8 A. From the standpoint of when I was in the Army, as I
9 stated before, we were in the same group. If the (b) (1) (B)

10 (b) (1) (B)

11 actually created an organization
12 which would support that where you have the case officer and the
13 investigators (b) (1) (B)

14 In my role as the Chief of the
15 Counterespionage Division, as individual operations were
16 identified to be briefed to the Under Secretary of Defense, it
17 was almost monthly I would reach out to the field, to the case
18 officers through the Headquarters if I had specific questions or
19 I needed information to round out my briefing to the USDI.
20 Everything doesn't always make it into the report. If it is
21 significant enough for the USDI it was significant enough for me
22 to reach out and make sure I had the nuance there that was
23 really significant.

24 Q. Sir, how many years have you had direct oversight of
offensive counterintelligence operations?

1 A. Almost 7 years. Well, until this past May. Not
2 anymore.

3 Q. Sir, over the course of your career how many offensive
4 CI operations have you been involved with or had visibility
5 over?

6 A. [REDACTED]

7 (b) (1) (B)

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9
10 Q. Sir, what do you mean by--very briefly, what do you

11 mean by [REDACTED]

12 (b) (1) (B)

13 A. [REDACTED]

14 (b) (1) (B)

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21 Q. And sir, did you have a requirement to report those
22 types of operations higher?

23 A. If--yes. If it was--why it was failed was deemed to
24 be significant by the executor of that operation, [REDACTED]

(b) (1) (B)

Q. Sir, when you said "we" what is your role in the "we" for your organization?

A. My role was to ensure that the (b) (1) (B)

So as the DOD entity sitting atop all of those stove pipes, it was my responsibility to make that (b) (1) (B)

Q. Sir, now I would like to focus your attention on the foreign intelligence services that you've been briefly speaking about and your knowledge about them. What kind of information is generally sought by foreign adversaries through their intelligence services?

1 A. [REDACTED]

(b) (1) (B)

2

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4 Q. Is it limited just to classified information, sir?

5 A. Mostly. If it is unclass, they normally--there is a
6 lot of other types of ways that a foreign entity will collect
7 information. But there are times--if it's an FOUO document
8 something specific that is handled compartmentalized or it just
9 hasn't made it to the media, it can be unclassified. Yes.

10 Q. And sir, in your experience, how do foreign
11 intelligence services attempt to acquire U.S. Government
12 information?

13 A. They look for people within the government who would
14 be willing to compromise that information to them.

15 Q. [REDACTED]

16 (b) (1) (B)

17 A. [REDACTED]

18 Q. [REDACTED]

19

20 A. [REDACTED]

21

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1 Q. Is (b) (1) the only one you can think of off hand, sir?

2 A. (b) (1) (B)

(b) (1) (B)

4 Q.

(b) (1) (B)

8 A. Yes.

9 Q. And what about classified, sir?

10 A. Yes.

11 Q. How do you know that?

12 A. That is one of the primary things we get

(b) (1) (B)

18 Q.

20 A.

22 Q. Who is "they"?

23 A. The foreign intelligence service.

(b) (1) (B)

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[REDACTED]

(b) (1) (B)

Q.

[REDACTED]

A. I am not sure I understand that question.

Q. Yes, sir. I'll move on, sir. Sir, how many quarters-
-you mentioned earlier that you provide a report to Congress on
these types of operations?

A. Yes.

Q. How often did you provide that report?

A. Every quarter since December of 2006. So that is
about 27 quarterly reports that I was responsible for getting to
Congress on time and accurate.

Q. Sir, what was your actual role in those reports?

A. The actual military executors of the operations report
that information--reported that information into my office and I
was the one that would sign off on that, that the information in
there is accurate and it fits what we've seen as we see all of
the operational activity that was ongoing.

Q. Sir, throughout all the training you received or
given, what was taught about the role of money in
counterintelligence investigations

(b) (1) (B)

[REDACTED]

1 A. In the training as a case office, it is something that
2 we strive to do. That is where you know historically people who
3 have been charged and convicted of espionage got a lot of money
4 for that.

(b) (1) (B)



And in an

investigation, that is big. That is one of the things that we
can actually see over time as someone starts getting more money
into their accounts than they should be earning through all the
ways that we do that, that is what keeps us moving and that
actually allows us to get additional investigative authorities
along the way because it is actually considered a pretty
significant thing when there is unexplained money in someone's
banking account and there is a serious allegation of espionage
against that individual, as well.

Q. And sir, in those cases that money does exchange
hands, what factors determine the value of the information to
those foreign entities or foreign intelligence services?

A. Historically, it is mostly classification has the
biggest impact. Obviously someone providing Top Secret

1 information, which is something the U.S. Government would really

(b) (1) (B)

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6 Q.

7 (b) (1) (B)

8 A.

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12 Q.

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14 A. Yes.

15 Q. Could you explain, sir?

16 A.

(b) (1) (B)

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1 (b) (1) (B)

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4 Q. How do you know that, sir?

5 A.

6 (b) (1) (B)

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10 Q. Sir, the office that you were in or you were the----

11 A. That I was in charge of before I left for my new job.

12 Q. Yes, sir. Sir, do foreign intelligence services pay
13 for unclassified information?

14 A. They do.

15 Q. And how do you know that?

16 A. I had a couple of cases,

17

18

19 (b) (1) (B)

20 Q. And sir,


21

22

23 A.

24

(b) (1) (B)



Q. Sir, is there a open and free market to sell and buy U.S. Government information?

A. No.

Q. Is there like an Amazon or Wal-Mart to sell government information?

A. No.

Q. Sir, to the best of your knowledge and experience is there an illegal buyer's market that foreign intelligence services use to buy government information?

A. I would say that is the methodology most professional intelligence organizations--they are looking to stealing it, and they are trying to get from someone who is inside and can get their hands on it.

1 Q. (b) (1) (B)

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4 A.

5 Q.

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7 A.

8 Q.

9 A.

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13 Q.

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15 ADC[MAJ HURLEY]: Objection, Your Honor.

16 MJ: Yes?

17 ADC[MAJ HURLEY]: Hearsay. He is not qualified as an

18 expert yet, ma'am.

19 MJ: Overruled. Go ahead. He is developing a foundation;

20 that is what I am considering it for at this point. Go ahead.

21 ADC[MAJ HURLEY]: Yes, ma'am.

22 [Examination of the witness continued.]

23 Q. Sir, I will ask the question again. In general, based

24 (b) (1) (B)

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(b) (1) (B)

A.

(b) (1) (B)

Q. sir. And sir, with , was that with

(b) (1) (B)

A. Yes.

Q. And sir, what factors go into you assessing the cost of the information that

(b) (1) (B)

(b) (1) (B)

A. I am not sure I understand the question.

Q. Sir, what factors are you considering when assessing the

(b) (1) (B)

A. (b) (1) (B)

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Q.

A.

(b) (1) (B)

1 Q. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 A. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 Q. So, sir, speaking of
(b) (1) (B)

12 [REDACTED]

13 [REDACTED]

(b) (1) (B)

14 A. [REDACTED]

15 [REDACTED]

16 Q. [REDACTED]

17 [REDACTED]

18 A. [REDACTED]

19 Q. [REDACTED]

20 A. [REDACTED]

21 Q. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 Q. [REDACTED]
(b) (1) (B)

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9 Q. Sir, does that include--you used the term "tippy-top
10 secret" information or is----

11 A. That was probably a bad word.

12 Q. Yes, sir. So--well, not a bad word, sir but----

13 A. Top Secret.

14 Q. ----does that include Top Secret or is that for Secret
15 and below?

16 A. (b) (1) (B) [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Q. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 A. [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 (b) (1) (B)

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8 Q.

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11 A.

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13 Q. Sir, why does the United States Government keep
14 sensitive unclassified and classified information outside of the
15 hands of foreign intelligence services?

16 A. We have a whole classification system that we try to
17 use to protect our information from getting into the wrong
18 hands.

19 Q. And, what entity--when you said "we" what entity owns
20 that type of information?

21 A. The U.S. Government.

22 Q. I am sorry. Is that your answer, or were you asking a
23 question?

24 A. The U.S. Government.

1 Q. Okay, sir.

2 A. That was phrase as--my apologies.

3 Q. No. I am sorry, sir. Sir, do you consider yourself
4 an expert in valuing what foreign intelligence services pay for
5 types of U.S. Government information?

6 A. Based on the visibility that I have (b) (1) (B)

7 (b) (1) (B) I would say yes.

8 Q. (b) (1) (B)

9 A.

10 Q.

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12 A.

13 (b) (1) (B)

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TC[MAJ FEIN]: Your Honor, at this time the United States

23 offers Mr. Lewis as an expert in counterintelligence and the

1 value of government information to foreign intelligence
2 services.

3 ADC[MAJ HURLEY]: Ma'am the defense objects; inadequate
4 foundation.

5 MJ: Hold on, just a minute. In valuing?

6 TC[MAJ FEIN]: Ma'am, in the value of U.S. Government
7 information to foreign intelligence services. Just to note,
8 ma'am, not in classified information. It is government, U.S.
9 Government information.

10 MJ: All right. Defense, do you want to continue to voir
11 dire this witness? I am going to defer a ruling at this time,
12 pending your voir dire.

13 ADC[MAJ HURLEY]: Yes, ma'am. We would like to continue
14 voir dire of this witness.

15 MJ: All right. Do you object to both an expert in
16 counterintelligence; do you object to that one?

17 ADC[MAJ HURLEY]: Yes, ma'am.

18 MJ: All right.

19 MJ: I'll let you voir dire, but what is the inadequate
20 foundation?

21 ADC[MAJ HURLEY]: Ma'am, what I would say is I would just
22 offer--do an offer of proof real quick with respect to that.

23 MJ: Yes. That is fine.

1 ADC[MAJ HURLEY]: All right, ma'am. With regard to his
2 expertise in counterintelligence, generally, the defense would
3 object to Mr. Lewis' testimony as either being the product of
4 hearsay; things he has read, he is just coming in and dumping in
5 front of this Court that he is not going to offer an opinion on,
6 he is just going to say, "Here is the information that I have
7 read."

8 MJ: Well, this is a foundation for that expertise. What
9 he is going to testify before the Court as a fact finder has not
10 come out yet.

11 ADC[MAJ HURLEY]: Yes, ma'am.

12 MJ: So, we are looking right now--do you object to his
13 expertise as--in counterintelligence?

14 ADC[MAJ HURLEY]: Ma'am, I guess, what I would like to do
15 is to do is the voir dire first--our voir dire for valuation and
16 then after that is over, we will----

17 MJ: All right, just recognize there is two distinct things
18 here; counterintelligence and evaluation

19 ADC[MAJ HURLEY]: Absolutely, ma'am. Absolutely, we
20 understand that distinction.

21 MJ: Okay.

22

RECROSS-EXAMINATION

Questions by the assistant defense counsel [MAJ HURLEY]:

Q. Good afternoon, again, Mr. Lewis.

A. Good afternoon.

Q. Now we are going to talk about your knowledge of offensive counterintelligence operations, actual operations. Do you understand?

A. I understand.

Q. Everything you know about offensive, actual offensive counterintelligence operations, you know because you've either read it or have been told it. Is that correct?

A. No.

Q. Well what do you know about offensive counterintelligence that you have not been read--or haven't been told?

A. When I was in the Army, as an investigator we (b) (1) (B)

(b) (1) (B)

Q. My mistake then, Mr. Lewis. At that point, I guess you were reading information about offensive counterintelligence operations, is that correct?

1 A. No. I am being told by the (b) (1) (B) who is
2 running the operation the things that is happening in his
3 investigation.

4 Q. Okay. So let me restate my question then, Mr. Lewis.

5 A. Okay.

6 Q. And we will just go--what we'll do is we will break
7 out your experience in two phases.

8 A. Okay.

9 Q. If that's all right.

10 A. Okay.

11 Q. First the investigatory phase?

12 A. Okay.

13 Q. And then the oversight phase?

14 A. Okay.

15 Q. In the investigatory phase----

16 A. Mm-hmm[indicating an affirmative response].

17 Q. ----everything you knew about actual offensive
18 counterintelligence operations, you knew either because you had
19 been told--you knew those things because you had been told those
20 things, is that correct?

21 A. Yes.

22 Q. Or you----

23 A. Well--go ahead.

24 Q. Let me restate my question.

1 A. All right.

2 Q. Everything you knew, and this is the investigatory
3 phase of your career----

4 A. Okay.

5 Q. ----everything that you knew, you knew because you had
6 been told. Is that correct?

7 A. No. I don't agree with that. Experience comes from
8 all different types of activities that you are witnessing going
9 on. If you are sitting there and you are dealing with the

10 (b) (1) (B)
11 people
12 that know everything that is going on. So I don't understand.

13 Q. But he told you the information.

14 A. I am not the (b) (1) (B)

15 MJ: Major Hurley, I am going to stop just for a minute
16 here. He has testified on the direct examination from the
17 government that he was involved with investigations; he was
18 planning on-- (b) (1) (B)

19 (b) (1) (B) . I am getting--you are pinning
20 him down to something that he is trying to not respond that way.

21 ADC[MAJ HURLEY]: Sure.

22 MJ: Let him respond and don't put him in a box he doesn't
23 want to be in.

24 ADC[MAJ HURLEY]: I won't, Your Honor.

1 MJ: All right.

2 [Examination of the witness continued.]

3 Q. Mr. Lewis, were you ever (b) (1) (B)

4 A. I was never

5 Q. Were you ever an offensive counterintelligence

6 (b) (1) (B)

7 A. No;

8 Q. I apologize, sir.

9 A. No, I think we--I have clearly--I've never even
10 intimated that I was (b) (1) (B)

11 Q. So your actual knowledge of these things comes from
12 what you've been told?

13 A. I wouldn't characterize it that way. I've experienced
14 it. If you are sitting there in the middle of the operation and
15 you are getting ready--

16 (b) (1) (B)

17

18

19

20 That was not my role.

21 Q. Right. And you were not (b) (1) (B)

22 A. I was not.

23 Q. Thanks, Mr. Lewis. Let's try this with respect to
24 your experience in oversight.

1 A. Okay.

2 Q. Everything that you learned in the oversight phase in
3 your career about actual offensive counterintelligence
4 operations, you learned from what you've read in those files.
5 Is that correct?

6 A. I would say mostly; mostly. Because there were--I did
7 interact with the military executors of that operation if there
8 were things that were deemed critical that I wanted to ensure
9 the USDI was aware; there would be that direct contact. But you
10 are right. What allowed me to be in that position is the
11 experience I had that would be able to identify what was going
12 to be significant in that operation. But again, no, I did not
13 run the operation.

14 Q. Right. So let's go with, let's focus on that phase
15 some more.

16 A. Okay.

17 Q. The oversight phase.

18 A. Okay.

19 Q. You would--you said there were (b) (1) (B)

20 [REDACTED] ?

21 A. Yeah. I would--yes.

22 Q. Is that an accurate estimate?

23 A. (b) (1) (B)

24 [REDACTED]

1 Q. Somewhere in that range?

2 A. [REDACTED]

3 (b) (1) (B)

4 Q. Good. So you--in order to understand what was going
5 on----

6 A. Yes.

7 Q. ----you read the agent reports about any particular
8 investigation?

9 A. If it was an operation that I was going to brief. I
10 didn't read (b) (1) (B). If an operation is
11 going (b) (1) (B) I had a pretty good idea of what was
12 happening in that. If it was something that was new, maybe not
13 much--as much knowledge of that.

14 Q. So of those significant cases, what you would review
15 was a report from the agent?

16 A. The reporting from the field, yes.

17 Q. You didn't [REDACTED]

18 (b) (1) (B)

19 A. Nope.

20 Q. You didn't

21 A. Nope.

22 Q. You didn't

23 A. Not per--not per--no.

24 Q. You----

1 A. Not--you mean

2 Q. Right.

3 A. No. Those don't exist.

4 Q. In your investigatory experience you've

(b) (1) (B)

6 A. Absolutely.

7 Q. But you never (b) (1) (B)

8 A. You mean from the----

9 Q.

(b) (1) (B)

11 A. You mean in a--you talking about from the operations
12 standpoint?

13 Q. Right.

14 A. Yeah. (b) (1) (B)

16 Q. Now, with respect to the information that you have
17 been told about--and this is--we are still in the oversight
18 phase of your career.

19 A. Okay.

20 Q. You

(b) (1) (B)

23 A. No.

1 Q. You would only talk to that individual to further
2 develop your understanding for your briefing responsibilities?

3 A. Right. But the case officer wasn't responsible for
4 that either, okay. In that case, the case officer is responsible
5 for--the U.S. part of this----

6 Q. Right.

7 A. ----is responsible for trying to guide so we can learn
8 as much of that possible. [REDACTED]

(b) (1) (B)

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13

14 Q. Right.

15 A. ----where we understand, where we know what is going
16 on in [REDACTED]

(b) (1) (B)

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20 [REDACTED] We verify that at

21 every stage of the game. That is the [REDACTED]

22

23 true.

1 Q. Sure. So just to make sure I understand, you never
2 pushed that--the individual whose report you are reading----

3 A. Right.

4 Q. ----you

5 A. What

6 Q. That is what you would do?

7 A. No, no, no. No, no, no.

8 Q. You wouldn't do that either?

9 A. What I am saying is no--none of us did that.

10 Q. Right. You certainly didn't say, (b) (1) (B)

11 A. No.

12 Q. Or,

13 A. No. Absolutely not.

14 Q. And you never independently verified the truth of the
15 facts that you were being told in these reports?

16 A. Well that is the foundation of the whole security
17 system is trust.

18 Q. Sure.

19 A. So if an

(b) (1) (B)

20

21

22 Q. So that----

23 A. That is a written report that is signed by a special
24 agent. To me that means that is true. If a case officer is a

1 credentialed CI Agent and they are putting that name to that, I
2 take that as a true statement until I've seen otherwise.

3 Q. So again, just for my understanding----

4 A. Okay.

5 Q. You never independently verified the facts in the
6 reports that you've read?

7 A. I would have no (b) (1) (B) reason to do that.

8 Q. So, no?

9 A. No. Trust.

10 Q. Let's talk about your preparation for this case. In
11 January of 2013----

12 A. Um-hmm [indicating an affirmative response].

13 Q. ----you tasked a--one second, sir. I just want to
14 make sure that I get this name right.

15 MJ: Is it in January of 2013?

16 ADC[MAJ HURLEY]: Yes, ma'am. I am more into--down in my
17 notes.

18 [Recross-Examination of the witness continued.]

19 Q. In January of 2013 you tasked is
20 that correct?

21 A. I----

22 Q. You asked her to do something?

23 A. ----I asked her to do something.

24 Q. You asked her to pull an EEI?

1 A. I asked her to produce a report for me, yes.

2 MJ: What is an EEI?

3 WIT: Ma'am, the information [REDACTED]

4 (b) (1) (B) [REDACTED]

5 [REDACTED], that is compiled and we refer to that as Essential
6 Elements of Information and we publish a report on that.

7 MJ: Proceed.

8 Q. And that report is published quarterly?

9 A. It is published quarterly.

10 Q. But you--but what you didn't--you did not ask for one
11 of the quarterly reports, did you?

12 A. I did not.

13 Q. You asked for a snapshot of EEI information, is that
14 right?

15 A. I did.

16 Q. That snapshot was associated with the years 2008 and
17 2009?

18 A. Yeah.

19 Q. What were you were looking was--for a representative
20 sample?

21 A. I was. The EEI lists get voluminous over time. I see
22 them, I sign them out, I know what is there. To familiarize
23 myself, I wanted a report going back a few years to show me what
24 the foreign adversaries were looking for. And, it was a sample

1 that (b) (1) (B) took over a couple of years to create one report
2 for me.

3 Q. And you did that to prepare for your role as a witness
4 in this case?

5 A. I was going to testify about EEI. I wanted to feel
6 comfortable that yeah, I could say, "Yes, I am responsible for
7 it," but I also reviewed some of it so I wouldn't look like a
8 goof ball.

9 Q. Did you independently verify the information that
10 (b) (1) (B) gave you?

11 A. I have no reason to do that. She is responsible for
12 preparing an EEI report and is a contributor to a report that I
13 send to Congress every quarter. I am pretty certain she gave me
14 what was out of the database. And, some of it I know to be
15 true. Even the stuff that is on the list, I would have known
16 that that was an EEI without the report.

17 Q. Now, that wasn't the only data-call that you did
18 internal to your office, was it?

19 A. It is not.

20 Q. You asked (b) (1) (B) did I get his name----

21 A. That's (b) (1) (B) I can't account for the first
22 name.

23 Q. So we will just call him (b) (1) (B)

24 A. We will call him (b) (1) (B)

1 Q. ----from here on out. You asked (b) (1) (B) to pull
2 some date for you?

3 A. I did.

4 Q. And that was according to what you told me today about
5 4 or 6 weeks ago?

6 A. I think we--we said it was right before we had met in
7 the----

8 Q. With (b) (1) (B)

9 A. ----office with there in wherever that was.

10 Q. In May of 2013?

11 A. Right when I had just changed jobs. Yes.

12 Q. And, you pulled this document to inform your
13 testimony?

14 A. I did.

15 Q. As to specific countries?

16 A. Actually, what I asked for was a listing of over the
17 past years the most successful (b) (1) (B)

18 (b) (1) (B), and subsequent to that I realized, for me,
19 I only had one end of the spectrum. "Give me some of the ones
20 that were the least successful (b) (1) (B)." So,
21 yes, there is three pages there.

22 Q. Now when you say, "Least successful,"

23 (b) (1) (B)

24 A. Yes.

1 Q. But it was the (b) (1) (B) ?

2 A. Yeah. Generally in

3 (b) (1) (B)

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22 Q. Right.

23 A. But in failing (b) (1) (B)

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1 (b) (1) (B)

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6 Q. Mr. Lewis, just so that I am sure--I am clear, you
7 never asked in this data-call with (b) (1) (B) you never asked
8 for representatives--a representative sampling of failed
9 counterintelligence?

10 A. I did not. I wanted to (b) (1) (B)

11 Q. (b) (1) (B)

12
13 A. Yeah, that is what I asked.

14 Q. Now, let's talk about your preparation to testify with
15 the government. This isn't the first time--today is not the
16 first day you met with Major Fein?

17 A. No.

18 Q. Today is not the first day you met with Captain von
19 Elten either?

20 A. No.

21 Q. How many times prior to today would you estimate that
22 you have met with them?

23 A. Prior to today, Major [sic] von Elten, once last week.
24 I spent time with him last week, one day. The good Major--yeah-

1 -Major Fein, met last week a couple of times. I met him once at
2 MDW. And I don't remember meeting him before that. And I can't
3 remember who I had met with before I met Major Fein. There was
4 one other lawyer that I met with once or twice.

5 Q. Right. What is the first--do you remember the first
6 day that they handed you one of the documents relevant to this
7 particular case; and the question is do you remember that day?

8 A. I would say it would have been last Tuesday or
9 Wednesday. But, it was actually a database, it wasn't a
10 document at first.

11 Q. The first thing they showed you was something on a
12 computer?

13 A. Yeah. I reviewed a--the----

14 Q. Portion

15 A. ----the State--the State Department--I don't know the
16 exact name of that.

17 Q. Right. So they showed you something on a computer
18 first?

19 A. I had an opportunity to do some keyword searches of
20 that database.

21 Q. Do you recall what keywords you used?

22 A. I do.

23 Q. What were they?

1 A. I used [REDACTED]

(b) (1) (B)

2 [REDACTED]

3 [REDACTED]

4 Q. What is the next thing you can remember looking at?

5 A. I may not get it in the exact order but----

6 Q. That's fine.

7 A. ----over the course of last Tuesday and Wednesday, I

8 was introduced to (b) (1) (B) CIDNE-I, CIDNE-A and the list of

9 people from over the--I can't remember the name but it had all

10 of (b) (1) (B) I can't remember the

11 exact name of that. I'm sorry, but--

12 Q. So by percentage, how much of your preparation have

13 you done in the last 5 days as a witness?

14 A. 60 percent. 70 percent. That'd be a toughy. I

15 don't--I've thought about it since I've known I was going to be

16 called to testify. So that is--in my mind, I prepped a lot.

17 Q. Just imagining what was going to happen?

18 A. Just thinking what it--you know--what it would be?

19 What it would it entail?

20 Q. Now along with the other preparation you talked about,

21 you told me today that you have reviewed about 40 records from

22 the CIDNE-I database?

23 A. Yeah.

1 Q. And that is--maybe a quarter of those records had
2 information that was, in your mind, responsive to something?

3 A. When I looked at that, yes.

4 Q. And you reviewed about 40 records from the CIDNE-A
5 database?

6 A. I think a little less but yeah, around 36-40,
7 something like that.

8 Q. Maybe about a quarter of those, again, had information
9 that was----

10 A. I think for A, it was closer to a third.

11 Q. All right.

12 A. Of the few that I reviewed.

13 Q. And you reviewed about 10 to 12 (b) (1) (B) I am sorry,

14 (b) (1) (B) the (b) (1) (B) 10 to
15 12 sound about right?

16 A. No more than that.

17 Q. Now, you had testified that you had used the data pull
18 from (b) (1) (B) that you've used the----

19 A. Okay.

20 Q. ----or that you have looked at that document?

21 A. Okay.

22 Q. And you've looked at the document from the data pull
23 from (b) (1) (B)

24 A. I have looked at those. Yes.

1 Q. Both of those documents?

2 A. Yeah. I asked for them so I could look at them.

3 Q. And you've used those to prepare?

4 A. I have.

5 Q. Did you ever--to prepare, did you ever go back and
6 when you were still in the oversight role, did you ever go back
7 to the offensive counterintelligence operations that [REDACTED]

8 (b) (1) (B) [REDACTED]

9 A. No.

10 Q. Just (b) (1) (B) [REDACTED] and just--just--okay. Mr. Lewis,
11 were you going to say something?

12 A. Yeah. I want to say, I mean, I am aware of offensive
13 operations [REDACTED]

14 (b) (1) (B) [REDACTED]

15 [REDACTED] but when I used the stuff that [REDACTED] gave me,

16 okay, as those types of things that are going on that are
17 consistent across EEI and a lot of those I could have told you.

18 But I like to have it--I like to see it. I want to believe it.

19 I want to touch it. So this is a representative of what we are

20 (b) (1) (B) [REDACTED] For

21 [REDACTED] I want to know what was the [REDACTED]

22 [REDACTED]. So I acquainted myself with

23 that. I could have speak--I could speak it just off-the-cuff

24 and give you things that I have learned through my experience

1 through the years but I wanted to see it. I wanted to verify
2 that what I was going to say is accurate.

3 Q. All right. So let's talk about the off-the-cuff, the
4 potential off-the-cuff testimony. Now, can you testify that

5 (b) (1) (B)

6
7 A. Yeah.

8 TC[MAJ FEIN]: Your Honor, objection. This goes to
9 actually after--if the witness is qualified as an expert it goes
10 to the actual substance of his expert testimony. Not whether he
11 is qualified, Your Honor.

12 MJ: Well, this where--this is what he is going to be
13 qualified--I assume based on what I am hearing then is the
14 witness going to go back and compare the old records for things
15 that these countries (b) (1) (B) and look at what is in the
16 charged documents and make some sort of evaluation?

17 TC[MAJ FEIN]: Well, the witness will make an evaluation
18 then, Your Honor, based off of the stipulation--his review of
19 the stipulation of expected testimony of certain witnesses as if
20 he was sitting in the courtroom and by looking at certain
21 documents; yes. But, that is his ultimate opinion. We are not
22 at that stage yet to elicit that opinion.

1 MJ: Well, I understand that but the foundation is we've
2 got to establish a foundation that this witness can make that
3 opinion.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: And I believe that this is where you are going with
6 this, right Major Hurley?

7 ADC[MAJ HURLEY]: Yes, ma'am.

8 MJ: I am going to overrule that for now.

9 Go ahead.

10 TC[MAJ FEIN]: Yes, Your Honor.

11 Q. And you can do that from memory? The question was can
12 you testify that (b) (1) (B)

13 information from the CIDNE-I database prior to 1 June 2010?

14 A. I wouldn't call that memory. I would call it
15 experience.

16 Q. All right. So you can do that from experience?

17 A. I mean, when you--I read, I brief, I remember things
18 but specific EEI, there is just too many to remember. But I
19 know what (b) (1) (B)

20 I know that
21 as a CI professional and having visibility over those things.

22 Q. Right. Mr. Lewis, but I am asking you can you sort
23 your memory to say I am going to ignore everything that happened

1 after 1 June 2010? I am going to ignore it and I am only going
2 to consider information from 31 May 2010 back in time?

3 A. Can I do that?

4 Q. Can you do it?

5 [Pause.]

6 A. I suppose I could.

7 Q. You suppose so?

8 A. I suppose so. I would have to think what specific
9 operations, (b) (1) (B) , that I may think of and where
10 were those; where were those in the timeline.

11 Q. Do you recall our meeting earlier today, Mr. Lewis?

12 A. I do.

13 Q. Do you recall that part of our meeting where I handed
14 you a document and I asked you to pretend that this document was
15 a qualifying record from the CIDNE-I database?

16 A. I do recall that.

17 Q. Do you recall telling me what--just do you recall is
18 the question I am asking. Do you recall telling me what you
19 would say if your opinion was elicited as to whether
20 would be interested in that information?

21 A. I remember our conver--I remember what I said to you.

22 Q. Right. And what you----

23 A. I mean, that was a big question and I don't know if
24 that fits what you are asking.

1 Q. Sure. It does----

2 A. Okay.

3 Q. ----as a matter of fact. And you said, "My response
4 to that question will be this appears to be in the A-E-I or EEI.
5 So it would be something (b) (1) (B) was interested in?"

6 A. That is probably close to what I said. I probably
7 wouldn't have said it that way.

8 Q. But the close----

9 A. I probably would have based--I would have put
10 experience in there I am sure since I am using my----

11 Q. Right.

12 A. ----experience and my knowledge of (b) (1) (B) would do
13 in----

14 Q. Right.

15 A. ----the operations that we do specifically to
16 determine that information----

17 Q. Sure.

18 A. ----and I would apply that to information that I saw
19 in this fictitious thing that you told me to look at.

20 Q. Right. But you also said you had mentioned as you
21 were going through this----

22 A. Right.

23 Q. ----the EEI. That you would----

24 A. Okay. Okay.

1 Q. ----consider your experience and the EEI. Do you
2 recall that?

3 A. That is the--that is--yes.

(b) (1) (B)

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(b) (1) (B)

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8 Q. When it comes to

9

10 A. Mm-hmm[indicating an affirmative response].

11 Q.

12 (b) (1) (B)

13 A. Mm-hmm[indicating an affirmative response].

14 Q. (b) (1) (B)

15 A.

16 Q. Sorry.

17 A. (b) (1) (B)

18 Q. Yeah.

19 A. No, that is okay. The numbers get in my head too.

20 Q. Right. Me too.

21 A. I think the

22 (b) (1) (B)

23

24 Q. Right.

1 A. That is what I said I would say.

2 Q. That is what you've seen in the past,

3 (b) (1) (B)

4 A. That is what we've seen in the

5 (b) (1) (B) yes. And are over----

6 Q. Mr. Lewis, just one second.

7 [Pause]

8 Q. Mr. Lewis, prior to your experience here as a witness-

9 ---

10 A. Mm-hmm[indicating an affirmative response].

11 Q. ----have you ever taken a classified document and put
12 a value to it?

13 A. No.

14 ADC[MAJ HURLEY]: Thanks. Nothing further, ma'am.

15 MJ: Redirect on foundation?

16 TC[MAJ FEIN]: Yes, Your Honor. One moment, please?

17 [The trial counsel conferred.]

18 TC[MAJ FEIN]: I am sorry, Your Honor.

19 [END OF PAGE]

REDIRECT EXAMINATION

Questions by the trial counsel[MAJ FEIN]:

Q. Mr. Lewis, a few questions in different areas. First, regarding that snapshot that you've testified now about that produced for you----

A. Mm-hmm[indicating an affirmative response].


Q. ----Could you explain, please, in just very general terms, what that was?

A. The EEI are the individual themes, items, topics that we learn about (b) (1) (B)

Q. Sir, is it a list?

A. (b) (1) (B)

1 (b) (1) (B)



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14 Q. Sir, so at the beginning you talked about the
15 information,

16 (b) (1) (B)



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18 A.

19 Q. Okay, sir. How does your office receive this
20 information?

21 A. That contact report is sent electronically to my
22 office--my former office.

23 Q. That you were responsible for?

24 A. Yes.

1 Q. Did it have a section or subsection within your
2 overall office that handled these types of reports?

3 A. Yes. [REDACTED]

4 (b) (1) (B) [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] Okay? [REDACTED]

9 Q. Sir, what was [REDACTED] job for
10 you? What was (b) (1) primary responsibility and secondary?

11 A. She is responsible [REDACTED] but because of the way the
12 office is, (b) (1) (B) [REDACTED] if you will. She is
13 responsible--she has other responsibilities other than the

14 (b) (1) (B) [REDACTED]

15 Q. What do you mean by her thing is, sir?

16 A. Her responsibilities.

17 Q. Sir, was she responsible in your office to track this
18 information?

19 A. Yeah. She had two----

20 Q. What----

21 A. ----two responsibilities: [REDACTED]

22 (b) (1) (B) [REDACTED]

23 [REDACTED]

1 Q. Sir, how did she populate this database you've
2 referenced?

3 A. [REDACTED]

4 [REDACTED]

5 Q. [REDACTED]

6 A. [REDACTED]

(b) (1) (B)

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q. Okay, sir. So, what did [REDACTED] do when she
15 received these reports?

16 A. The EEI reports? That what you are----

17 Q. I am talking about the [REDACTED]

18 A. [REDACTED]

19 (b) (1) (B)

20 [REDACTED]

21 [REDACTED]

22 Q. And sir, have you ever required [REDACTED] to pull
23 EEIs before for you?

24 A. All the time.

1 Q. Can you explain for the Court, briefly, when in your
2 normal practice as the chief of the counterespionage section you
3 would have (b) (1) (B) pull these reports?

4 A. She is the one that prepares the quarterly report that
5 goes out to all the DoD customers. She prepares that report
6 based on all the data in our complete database.

7 Q. And just focused on EEIs?

8 A. That is one of her responsibilities, yes.

9 Q. And sir, when you--what were the criteria you gave her
10 when she pulled the EEI list that you have referenced?

11 A. Give me a representative sample from a couple of
12 years; go back to '08, '09, '10. I told her a window. I didn't
13 tell her (b) (1) (B) She decided--she went to
14 all the different reports in that timeframe. She extracted
15 several of the EEI from some of the countries on there and
16 compiled a list for me.

17 Q. And, is that the list you relied upon that Major
18 Hurley--you just testified with Major Hurley?

19 A. Yes.

20 Q. Sir, what about the--could you explain for the Court
21 briefly what it is, the list you referred to that
22 pulled for you.

23 A. In my thinking, I know (b) (1) (B)
24 (b) (1) (B) I

1 wanted to know because of the EEI, the [REDACTED]

2 [REDACTED]

3 [REDACTED] in information, [REDACTED]

(b) (1) (B)

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 Q. And sir, what database did that data pull come from?

16 A. That is the same database that houses [REDACTED]

(b) (1) (B)

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 Q. And sir, have you ever asked [REDACTED] before to [REDACTED]

23 pull data for you from the database?

1 A. He pulls--he is responsible for the--for giving me the
2 report that goes to Congress every quarter from (b) (1) (B)

3 Q. Does that report that goes to Congress every quarter,
4 that you were responsible for, include data pulls?

5 A. Yes, it does.

6 Q. What type of information is included that get gets
7 pulled?

8 A. The military services report in their reporting for
9 that quarterly report. We compile that with the information
10 that is already (b) (1) (B) We will ensure (b) (1) (B)

11 (b) (1) (B) That is really where Congress
12 likes to focus, is (b) (1) (B)

13
14 Q. And sir, is your briefing of that report relied upon
15 by our U.S. Government officials?

16 A. It is. Yes. It is----

17 Q. Who specifically relies--has relied upon your
18 expertise of using these reports?

19 A. The accuracy of that report is the USDI that actually
20 stands in front of Congress four times a year with that report
21 and briefs them.

22 Q. Sir, are you part of the DIA--well, are you aware if

23 (b) (1) (B)

24

1 A. (b) (1) (B)

2 Q. You were, sir?

3 A. I've heard about it. I mean, I don't--I couldn't tell
4 you----

5 Q. Were you part of that (b) (1) (B)

6 A. No. No.

7 Q. So sir, did you have any direct involvement in this
8 case before you were identified as a witness?

9 A. No.

10 Q. Or, specifically identified as an expert witness?

11 A. No.

12 Q. And sir, in your experience, have you ever seen a

13 (b) (1) (B)

14

15 A. As it pertains to:

16 (b) (1) (B)

17 Q. Yes, sir.

18 A. Yes. I've seen that

19 (b) (1) (B)

20 TC[MAJ FEIN]: Thank you, sir.

21 No further questions, Your Honor.

22 MJ: Any further re-cross?

23 ADC[MAJ HURLEY]: No, ma'am.

24 (b) (1) (B)

EXAMINATION BY THE COURT-MARTIAL

Questions by the Military Judge:

Q. Mr. Lewis, I have a few questions.

A. Yes, Your Honor.

Q. You talked about this EEI.

A. Yes, ma'am.

Q. Am I understanding your testimony correctly to be that when (b) (1) (B) when the reports come back to you----

A. Mm-hmm[indicating an affirmative response].

Q. ----these people in your office who run these databases (b) (1) (B)

A. Yes, ma'am.

Q. And so they would add in some field that said, (b) (1) (B) how does that work?

A. No, ma'am. In the way the report is written (b) (1) (B)

1 (b) (1) (B)

2
3
4
5
6
7 Q. Maybe I am still not understanding. I thought I heard
8 you testify that the

9 (b) (1) (B)

10 A. Yes, ma'am. Each individual operation, they will come
11 back and we will learn what,

12 (b) (1) (B)

13
14
15
16
17
18
19
20 Q. Now would you be able to tell from looking back, based
21 on your experience, from looking back into these

22 (b) (1) (B)

1 A. We would take that as, if they are [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Q. [REDACTED]

19 [REDACTED]

20 A. Okay.

21 Q. If all of your (b) (1) (B) [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 A. Mm-hmm[indicating an affirmative response].

1 Q. If there is nothing in the database that addresses,
2 for example, information regarding a United Nations food
3 program, just to throw something out there.

4 A. Okay.

5 Q. Do you believe you are in some kind of a position to
6 evaluate what the [REDACTED]

7 [REDACTED] (b) (1) (B)

8 A. [REDACTED]

9 [REDACTED] no, ma'am. I don't
10 think I could do that. We're--I can base it on what we know
11 they (b) (1) (B) [REDACTED] and the
12 result of that.

13 Q. Okay.

14 A. (b) (1) (B) [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 Q. Okay. You testified earlier that 95 percent of

19 (b) (1) (B) [REDACTED]

20 [REDACTED] The espionage cases, the
21 person has been paid. Have you been involved in any
22 investigations where the person is--has basically released
23 classified information or any espionage cases where the end goal

1 was not to be paid more like you were talking about (b) (1) (B) in
2 the philosophical?

3 A. Me, as a case agent, I never had a case against (b) (1) (B).

4 In my oversight roles, there were several cases against (b) (1) (B)
5 that we were monitoring where we know that even as of late as
6 last year, (b) (1) (B)

7 (b) (1) (B)
8
9
10 No.

11 MJ: Any follow up questions based on that?

12 ADC[MAJ HURLEY]: Not from the defense, ma'am.

13 TC[MAJ FEIN]: No, ma'am.

14 MJ: All right. Do the parties wish oral argument on why
15 this witness should or should not be qualified as an expert in
16 the areas that the government wants to qualify?

17 ADC[MAJ HURLEY]: Ma'am, we would like to have oral
18 argument.

19 MJ: All right.

20 Why don't we excuse the witness for that portion of
21 the closed proceeding?

22 ADC[MAJ HURLEY]: Yes, ma'am.

23 [The witness was temporarily excused and exited the courtroom.]

24 MJ: All right.

1 ADC[MAJ HURLEY]: Ma'am, would it be possible to request a
2 comfort break first?

3 MJ: Yes. The government has got the burden here, so the
4 government should go first and then you should go second.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: Okay.

7 Anything else we need to address at this point?

8 TC[MAJ FEIN]: No, ma'am.

9 MJ: 1630?

10 ADC[MAJ HURLEY]: Sounds good, ma'am.

11 MJ: All right. Let me--before we do go on the break
12 though, I do want to talk about something. I am going to need
13 some time after oral argument to make a ruling on this.

14 Do you still want to go forward today, or do you want
15 to go forward starting tomorrow morning? I will need about an
16 hour.

17 TC[MAJ FEIN]: Ma'am, we could go tomorrow morning. I
18 mean, looking at what time it is. If the Court needs another
19 hour--ma'am, may we just talk in the recess with the defense and
20 then we will get back to you once we come back on the record.

21 MJ: All right. Why don't we go ahead and do that.

22 ADC[MAJ HURLEY]: Ma'am?

23 MJ: Yes?

1 ADC[MAJ HURLEY]: Just one thing. I know I am going to
2 reference a case, ma'am, in my argument. I printed one out for
3 you and for the government.

4 MJ: Thank you. May I have it please?

5 ADC[MAJ HURLEY]: Yes, certainly, ma'am.

6 MJ: Since we are not in recess yet, we could just announce
7 for the record what it is.

8 ADC[MAJ HURLEY]: It is *U.S. v. King*, ma'am, the cite is 35
9 MJ 337, it is a 1992 Court of Military Appeals case.

10 MJ: Once again, I am a fast reader but I am not that fast.
11 So I will need some time to read and digest the oral argument.

12 TC[MAJ FEIN]: Ma'am, the government has some cases, as
13 well, and we will get it during the recess.

14 MJ: All right. I think I know where we are going with
15 this.

16 All right, court is in recess until 1630.

17 **[The court-martial recessed at 1617, 1 July 2013.]**

18 **[END OF PAGE]**

1 [The court-martial was called to order at 1700, 1 July 2013.]

2 MJ: Court is called to order.

3 Let the record reflect all parties present when the
4 court last recessed are again present in court. This is a
5 continuation of the closed session that we held earlier today.

6 Major Fein, is there any additions we need to--or,
7 anything we need to address regarding the closed session at this
8 time?

9 TC[MAJ FEIN]: No, ma'am. This session is continuing to be
10 classified at the SECRET/NOFORN level.

11 MJ: All right. The parties have asked for oral argument
12 with respect to this motion which we will do now.

13 The Court had a brief 802 session with the parties and
14 we're going to go back on the record tomorrow at 0930, once
15 again, in a closed session. The Court will make its ruling with
16 regard to the qualifications of this expert and we'll continue
17 on, or not, in closed session following that. And, the parties
18 agreed, with the approval of the Court, that we would have a
19 public session at 11 o'clock--or on or about 11 o'clock or at
20 least that is what we'll tell the public it will be--at 11
21 o'clock tomorrow morning.

22 Anything further we need to address?

23 TC[MAJ FEIN]: Ma'am, also, the United States did ask Mr.
24 Prather to notify the public, and he did so, that we will

1 reconvene at 11 for the public session and the Public Affairs
2 Office notified the members of the media.

3 MJ: All right.

4 ADC[MAJ HURLEY]: Ma'am, if I may?

5 ACC: Yes.

6 ADC[MAJ HURLEY]: Our objection to Mr. Lewis's testimony--
7 we don't object to counterintelligence--his expertise in
8 counterintelligence, generally. We would object to that part of
9 it with respect to his experience with offensive
10 counterintelligence operations and----

11 MJ: All right, hold on just a minute. So you don't object
12 to counterintelligence expertise, generally?

13 ADC[MAJ HURLEY]: Yes, ma'am.

14 MJ: But you do object to?

15 ADC[MAJ HURLEY]: Him as an expert in offensive
16 counterintelligence operations.

17 MJ: All right.

18 ADC[MAJ HURLEY]: And we maintain our objection, in its
19 entirety, to him as an expert in [REDACTED]

20 [REDACTED] (b) (1) (B)

21 MJ: So, [REDACTED] you're objecting to
22 that?

23 ADC[MAJ HURLEY]: Yes, ma'am.

1 MJ: [REDACTED]

2 (b) (1) (B)

3 ADC[MAJ HURLEY]: Yes, ma'am.

4 MJ: All right. Are the parties ready--I noted--oh, just
5 for the record, and I did note I have received several cases
6 from the parties to consider; one from the defense, *United*
7 *States v. King*, 35 MJ 337, United States Court of Military
8 Appeals, 1992. From the government, I have received *United*
9 *States v. Hood*, 12 MJ 890, U.S. Army Court of Military Review,
10 1982; Supreme Court of the United States, *Kumho Tire v.*
11 *Carmichael*, 119 Supreme Court 1167, 1999; *U.S. v. Sims*, 514 F.2d
12 147, Ninth Circuit, 1975; *U.S. v. Harris*, Court of Appeals for
13 the Armed Forces, 1997, and that would be at 46 MJ 221; and
14 *United States v. Sanchez*, 65 MJ 145, Court of Appeals for the
15 Armed Forces, 2007.

16 Is the Government ready to argue?

17 ATC[CPT VON ELTEN]: Yes, Your Honor.

18 MJ: Okay.

19 ATC[CPT VON ELTEN]: Your Honor, Mr. Lewis has specialized
20 knowledge regarding United States government information based
21 on his 36 years of government service, and, in particular, his
22 29 years of counterintelligence experience. With regard to its
23 appropriateness, because it's specialized knowledge outside the
24 purview of an average fact-finder, it should be--it is

1 appropriate for expert qualification. In terms of determining
2 the qualifications, Your Honor, CAAF discusses the flexibility
3 of expert analysis, applying the *Daubert* and *Kumho Tire* factors
4 in *United States v. Sanchez*. In that case, they cite *Kumho*
5 *Tires'* liberal application of the *Daubert* factors, noting that
6 not every factor has to be applied and that the military judge
7 has leeway in determining what factors she chooses to apply,
8 saying that the same level of intellectual rigor characterizes
9 the practice of an expert in the relevant field is the test.
10 And, in this case, Mr. Lewis has discussed, in-depth, his
11 experience with counterintelligence operations and
12 investigations and the types of information involved therein.
13 Furthermore, Mr. Lewis has testified he's one of the most--10-
14 most knowledgeable DoD counterintelligence professionals in
15 using the techniques employed by others similarly situated.

16 MJ: Let me just interrupt you there. The defense has
17 objected--has not objected to the expertise in
18 counterintelligence and his expertise, generally, so let's focus
19 on offensive counterintelligence.

20 ATC[CPT VON ELTEN]: Yes, ma'am.

21 MJ: I assume the defense objection is because he hasn't
22 personally done the investigations, himself, and is involved in
23 an oversight role?

24 ADC[MAJ HURLEY]: Yes, ma'am.

1 ATC[CPT VON ELTEN]: Well, ma'am, then I would point out
2 that, under *United States v. Sims*, if the information is the
3 type reasonably relied upon by an expert, then it's appropriate
4 for an expert to testify--to use that information as the basis
5 for his opinion. The rationale in favor of the admissibility of
6 expert testimony based on hearsay is that the expert is capable
7 of determining and assessing the reliability of the information
8 from which he bases his opinion. Furthermore, in *United States*
9 *v. Sanchez*, the Court of Appeals for the Armed Forces noted that
10 "trained experts regularly extrapolate from already existing
11 data" which is what Mr. Lewis has testified about and will
12 testify going forward that the [REDACTED]

13 (b) (1) (B) [REDACTED]

14 [REDACTED]
15 [REDACTED] ; also, the specific information--types of
16 information involved in those operations with the various

17 (b) (1) (B) [REDACTED]

18 [REDACTED] The-----

19 MJ: Let me ask you something. Government, I'm still a
20 little confused on your focus on his value--you want him as an
21 expert on valuation of U.S. info to foreign intelligence
22 service; that's a broad expertise. What, exactly, are you going
23 to have him do if I approve this and he gets up and testifies?

1 What's he going to testify to, and about, and how is he going to
2 do it?

3 ATC[CPT VON ELTEN]: Your Honor, Mr. Lewis will testify
4 that, based on his experience and knowledge of counter-offensive
5 investigations, that a [REDACTED]

6 (b) (1) (B) [REDACTED] So, for instance, he will testify

7 that (b) (1) (B) [REDACTED],

8 [REDACTED] in the [REDACTED] and that--he

9 will then say, having reviewed certain documents that he found

10 the [REDACTED]

11 (b) (1) (B) [REDACTED]

12 MJ: How many countries is he going to talk about?

13 ATC[CPT VON ELTEN]: I believe he will talk about, in

14 particular, (b) (1) (B) [REDACTED]

15 MJ: So are the--so his expertise, then, can be confined to

16 (b) (1) (B) [REDACTED], right?

17 ATC[CPT VON ELTEN]: Yes, ma'am. He will also will--he's

18 also talked a little bit (b) (1) (B) [REDACTED] but that's not relevant to

19 his valuation.

20 MJ: That's my--my point is: what does the government want
21 from this witness? I mean, this valuation of information--

22 ATC[CPT VON ELTEN]: The government wants to offer Mr.

23 Lewis to say that (b) (1) (B) [REDACTED] or

24 intelligence service would want this type of information. So,

1 for instance, for CIDNE-I and CIDNE-A, Mr. Lewis will talk about

2 (b) (1) (B)

3 For information in the Net Centric Diplomacy database,

4 he would talk about (b) (1) (B)

5
6
7 For GTMO, I believe Mr. Lewis will talk about

8 (b) (1) (B)

9
10
11
12 And, for the GAL, for instance, he will talk about

13 (b) (1) (B)

14
15
16
17 MJ: (b) (1) (B)

18 ATC[CPT VON ELTEN]: (b) (1) (B)

19
20 MJ: What's NCD?

21 ATC[CPT VON ELTEN]: Sorry, Net Centric Diplomacy database.

22 MJ: All right. Does the government intend to go beyond
23 those three countries with this witness?

24 ATC[CPT VON ELTEN]: No, ma'am.

1 MJ: Proceed.

2 ATC[CPT VON ELTEN]: And, furthermore, ma'am, under
3 *Daubert*, not applying all factors, but the information relied
4 upon by Mr. Lewis is reliable; the United States government
5 relies on it. Mr. Lewis briefs senior officials on that
6 information. He also briefs Congress on that information. That
7 is also similar to the fifth factor in the *Hauser* analysis.
8 This, also, is related to the fourth *Daubert* factor of general
9 acceptance within the relevant community, being the (b) (1) (B)
10 counterintelligence community involved in [REDACTED]
11 operations.

12 Also, ma'am, the--in *Hood*, the valuation of black-
13 market goods has been accepted and military jurisprudence.
14 Similarly, in *Harris*, documents--to address the defense's case,
15 also, ma'am, in *King*, the Court of Military Appeals said that
16 we--that a proper foundation was needed for the specific
17 information. In this case, Mr. Lewis has testified to [REDACTED]

18 (b) (1) (B) [REDACTED]
19 [REDACTED]
20 [REDACTED] --that they have--that the foreign intelligence services
21 have given to these documents. In this case, Mr. Lewis relies
22 on reports, budgets, financial statements, the classification of
23 the documents, his training and education, and experience, in

1 addition to the verification of the [REDACTED]

2 (b) (1) (B) [REDACTED]

3 [REDACTED] Therefore, ma'am, because the United States government
4 indicates that this is reliable information and it's beyond the
5 purview of an average fact-finder, it's appropriate for expert
6 testimony and the United States government believes we have laid
7 a proper foundation for the specific information and the basis--
8 the specific information on which Mr. Lewis will rely--the basis
9 of that.

10 Finally, ma'am, *Harris* also stands for the proposition
11 that, with a proper foundation, hearsay or other information
12 relied upon by an expert is appropriate basis for expert
13 testimony--opinion testimony, in particular, pointing to 403's--
14 the analysis for that.

15 MJ: All right.

16 Major Hurley?

17 ADC[MAJ HURLEY]: Ma'am, at the outset, do you have any
18 questions that you would like to ask?

19 MJ: Not at this point. Go ahead.

20 ADC[MAJ HURLEY]: Ma'am, today, this--tomorrow would be the
21 day--the first day that Mr. Lewis has offered an opinion
22 regarding the valuation of a classified document--that he--that
23 this is not something that he is ordinarily--that he has not
24 ordinarily, has ever done before; that he's never said, "This

1 document is worth this." And it's the position of the defense,
2 ma'am, that if you look at M.R.E. 702, as I know that you will,
3 that it's not based--the expert testimony is not based on
4 sufficient facts or data. Ma'am--and let me stop right there
5 and put a pin in it.

6 A concept that we're all familiar with, as experienced
7 military justice professionals, is the CID file. And what Mr.
8 Lewis talked about was--what he's relying on isn't the entirety
9 of the file--what you are--what anyone who has seen a CID file
10 would call the entirety of the file--he's just relying on the
11 agent investigative reports; the communiqué from the agent back
12 to say, "This is what's going on," that's it. Not all of the
13 interaction, not data, (b) (1) (B)

14 [REDACTED] that could inform this information,
15 just what the agent is saying back to HQ about what is going in
16 this particular offensive counterintelligence operation.

17 MJ: But doesn't what the government talked about--I mean,
18 if these reports--this is the data they're using to brief
19 Congress, they're using to--in all of their briefings and
20 reports to government officials, doesn't that say something
21 about its reliability?

22 ADC[MAJ HURLEY]: Well, ma'am, it certainly does say
23 something about its reliability, but not only is he just talking
24 about that--he's talking about--I recognize it does say

1 something with respect to its reliability and something positive
2 with respect to that. But, he's talking about his memory of
3 those things, so it's not just the report, itself, but it's also
4 filtered through the brain-housing group of Mr. Lewis.

5 And not only is it filtered through the brain--just
6 those things filtered through, it's also the data call that he
7 asked for. January of 2013, knows he's going to have to be a
8 witness, so he tasks (b) (1) (B) "Ma'am, would you do a data
9 call for me? What I'm looking for is"--the testimony that I
10 understood from--or the defense understood, ma'am, was from 2008
11 and 2009--"I'm looking for portions of the EEI that correspond
12 to these time groups." And, once he gets closer in time to
13 trial, he realizes that--or he realizes that he needs yet more
14 information, so he tasks, as he can, (b) (1) (B) to say, "Give
15 me the most successful counterintelligence operations ever--
16 (b) (1) (B) " and then he also says, "And give me the least
17 successful and by least successful what I mean is the (b) (1) (B)
18 counterintelligence for which we (b) (1) (B)
19 (b) (1) (B) not the ones that totally went south and ask for a brief
20 up on those--and by "went south," ma'am, that's a euphemism for
21 did not--I think the Court understands what I said.

22 And so it's--the sufficient facts are data because
23 it's in his memory and it's--the testimony isn't the product of
24 reliable principle and methods. He's applying his memory to the

1 information that he's given; a person who's never done this
2 before, never been called upon to do it before. That's his role
3 now. "Here you go, Mr. Lewis. How are we going to value this
4 information and get the information to the trier of fact that,
5 in this case, she needs to make the important decisions that she
6 has to make in this case?"

7 MJ: What is--would--is the defense's issues with--if this
8 witness goes back and says, "Okay, looking through my database,
9 [REDACTED]
10 information about [REDACTED] let's put it that way--about
11 situations or [REDACTED] (b) (1) (B)
12 [REDACTED] " therefore drawing the [REDACTED] (b) (1) (B)
13 [REDACTED] I mean, what's--I guess--what's
14 the defense's issues with that? Or are you saying your issue is
15 because they [REDACTED] (b) (1) (B)
16 [REDACTED]
17 [REDACTED]

18 ADC[MAJ HURLEY]: Ma'am, I apologize. Could you please
19 restate your question?

20 MJ: Okay.

21 ADC[MAJ HURLEY]: I didn't follow.

22 MJ: Where I'm looking at this is, if there is a database
23 that is maintained by the entity that Mr. Lewis supervises and
24 it says, "Okay, here, we've got--one of our fields is the

1 (b) (1) (B)

3 ADC[MAJ HURLEY]: All right.

4 MJ: "And then (b) (1) (B) next time, (b) (1) (B)

6 and, by virtue of that, through his experience, he's concluded,

7 "Okay, (b) (1) (B)

8 Therefore, if they were interested in 2010, they're interested

9 in 2013. Back then, (b) (1) (B),

10 (b) (1) (B)

." I guess--

11 where--what is the defense's--based on his experience and his--

12 this database that's maintained, what is the defense's

13 objections to those kinds of questions in value?

14 ADC[MAJ HURLEY]: Well, ma'am, here is the way I would do
15 it--and for--as an appellate exhibit, we could mark the EEI to
16 better illustrate the point that I'm making.

17 MJ: That would be helpful.

18 ADC[MAJ HURLEY]: All right. Yes, ma'am.

19 TC[MAJ FEIN]: Ma'am?

20 MJ: From the government, yeah?

21 TC[MAJ FEIN]: Before that happens, Your Honor, the United
22 States will have to check with the equity holder. That was not
23 originally asked, it was just about disclosure and discovery.

24 MJ: Well, how long is that going to take?

1 TC[MAJ FEIN]: Hopefully, we can get approval tomorrow
2 morning, ma'am. I mean, it's already 1700, so I doubt we can
3 get a--unless we take a brief recess and try and give them a
4 call.

5 MJ: Okay. Why don't we go ahead and make oral argument
6 and then make your phone calls?

7 TC[MAJ FEIN]: Yes, ma'am.

8 ADC[MAJ HURLEY]: Major Fein--or if I just may pose a
9 question----

10 MJ: Yes.

11 ADC[MAJ HURLEY]: ----to someone who may answer, if I
12 summarize the EEI or my read of the EEI, would that--is that an
13 appropriate use of the information or not?

14 TC[MAJ FEIN]: Ma'am, I don't think there is any objection
15 if it's summarized, it's just putting it in the record for all
16 time.

17 MJ: That's fine.

18 ADC[MAJ HURLEY]: So, ma'am--and, again, let's--what
19 happens, as I understand it, in these offensive
20 counterintelligence operations is they

(b) (1) (B)

21
22
23 right? And what they do to identify what this information is--
24 the EEI doesn't say, "A memo from Colonel Denise Lind to Major

1 Tom Hurley, marked SECRET/NOFORN that indicates"--I forget what
2 the example was, ma'am, but let's just----

3 MJ: I used two of them. [REDACTED]

4 (b) (2) [REDACTED]

5 So, either--they would be the same analysis for both.

6 ADC[MAJ HURLEY]: So, from Colonel Lind to Major Hurley,

7 (b) (1) (B) [REDACTED] whatever, and (b) (1) (B) [REDACTED]

8 [REDACTED] What it does is it just summarizes it,

9 generally. So, we're counting on the person that's summarizing
10 it, a faithful public servant of the United States, to be sure,
11 but we're counting on that person to get it right. And that's
12 what Mr. Lewis is relying on. So he's comparing this--the
13 information in the EEI that's not a specific description of the
14 information, but just generalized--a generalized notion of it
15 and then he's using that information to apply to the second bit
16 of the--second bit of data which is the cost. So, it's this--
17 and because--and we're going to go with (b) (1) (B) [REDACTED], ma'am, if that's
18 okay with the court?

19 MJ: That's fine.

20 ADC[MAJ HURLEY]: [REDACTED]

21 (b) (1) (B) [REDACTED]

22 [REDACTED]

23 [REDACTED]

1 (b) (1) (B) That's, I guess--is the position of the defense
2 clear as to why we believe that be problematic?

3 MJ: I'm not sure. I guess I'm--if his expertise is
4 contained at the, "All right, here are the databases we
5 maintain, we are--I supervise all of these offensive operations
6 and, in the past, (b) (1) (B)

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 ADC[MAJ HURLEY]: Well, ma'am, may I have a moment to
12 respond to that question?

13 MJ: Yes.

14 [The defense counsel conferred.]

15 ADC[MAJ HURLEY]: Ma'am, would you--and I apologize to ask
16 the Court to do this, but would you restate your position--or
17 the last question that you asked me when I asked for a moment to
18 answer?

19 MJ: No, I guess--I mean, I'm seeing a variety of different
20 levels, here. The government, as I understand what they want to
21 do, is they want to use Mr. Lewis--have Mr. Lewis qualified as
22 an expert, to be able to go back and say, [REDACTED]

23 (b) (1) (B) [REDACTED]
24 [REDACTED]

1
(b) (1) (B)

2 about

3
4 And the government would then ask the

5 opinion, "Well, all right, now you've gone to the CIDNE-Iraq
6 database, you've plugged in your keywords, you've found certain
7 information in the CIDNE database and that

8 (b) (1) (B)

9 Therefore, my evaluation is, because

10 (b) (1) (B)

11
12
13 Before I continue my question, Government, is that

14 what you want to do?

15 TC[MAJ FEIN]: Essentially, yes, ma'am.

16 MJ: Okay. So I have two things: one is your objection to
17 having all of that, which I think you were arguing to me before,
18 and, say, the Court was to rule, "Okay, that final opinion of,

19 (b) (1) (B)

20
21
22 ADC[MAJ HURLEY]: Indexed for inflation or whatever.

23 MJ: Yes. So, assume that last step is taken out and his
24 expertise is confined to, "In the past, this is the type of

1 information, based on my experience with these investigations
2 that these particular foreign intelligence entities (b) (1) (B)
3 (b) (1) (B) I've put keywords into the compromised documents
4 and found information that is (b) (1) (B)

5
6
7 ADC[MAJ HURLEY]: Yes, ma'am. Our problem with that--the
8 primary problem would be it's not that Mr. Lewis looked at the--
9 that he's going document for document, he's going summary for,
10 at this point, now that he's reviewed the--in this--and, ma'am,
11 my right hand indicates the charged documents, here.

12 MJ: Okay.

13 ADC[MAJ HURLEY]: He's going for the charged documents that
14 he has seen with what, in the EEI, was a summary and what, in
15 his--and even when he reviewed the actual records--when, in his
16 oversight capacity, ma'am, he went into the database and was
17 reading those agent investigative reports, he was just reading
18 what the agent was sending back. (b) (1) (B)

19
20
21 Is that----

22 MJ: Yeah, no, I'm looking--I'm just--you know, this case,
23 this is really turning on Military Rule of Evidence 703, an
24 opinion may--an expert may base an opinion on facts or data in

1 the case that the expert has been made aware of or personally
2 observed if experts in the particular field would reasonably
3 rely on those kinds of facts or data in forming an opinion on
4 the subject and they need not be admissible. So that's where--I
5 mean, I'm throwing my questions out to you--that's what I'm
6 wrestling with. If this is the data used to brief Congress,
7 then----

8 ADC[MAJ HURLEY]: Yes, ma'am.

9 MJ: ----why is it unreliable here?

10 ADC[MAJ HURLEY]: Certainly--well, ma'am, obviously, what
11 we're talking--not to say that briefing the information to
12 Congress requires any less candor, but obviously----

13 MJ: But, I mean, he's reasonably relying on it.

14 ADC[MAJ HURLEY]: Yes, ma'am, this particular expert. You
15 know, going back to the language in 703, if experts in the
16 field--what---question I asked him in open session was, "We're
17 looking to qualify you as an expert. Do you know anyone else
18 that holds them self out as an expert in this field?" And the
19 answer to that question was, "No." So it's not as though there
20 is this cadre of people to look at to say, as we would with
21 orthopedic surgeons or auto accident reenactments or pick an
22 expert, ma'am, that you have seen time and again that's come
23 into one of your courts, this is different. This is a novel
24 expert providing what, for him, would be the first-time opinion

1 with respect to this information. So that's what would be the
2 position of the defense.

3 MJ: Okay.

4 ADC[MAJ HURLEY]: And, ma'am, we would--ma'am, if I could
5 just take a look at one of these cases that the government has
6 given? I believe it's the *Hood* case, with respect to the black
7 market in Korea. I just want to make sure I get the case right.
8 Yes, ma'am, it's 12 MJ 890.

9 MJ: Mm-hmm[indicating an affirmative response].

10 ADC[MAJ HURLEY]: And, I guess that's one point that we
11 would compare this situation to another. In this situation, the
12 expert that testified, who was a CID agent, came and testified
13 and said, "I've been in Korea for 5 years. I have participated
14 in scores of these types of investigations as the principle
15 myself and I have seen sophisticated statistical analysis about
16 the black markets and how they work in Korea. And, based on all
17 of that, here's my opinion." And, ultimately, that opinion was
18 vindicated by the higher Courts that existed at the time.

19 Ma'am, let's notice the differences. First, you're
20 talking about an agent that was, himself, I am supposing, hip-
21 deep in these sorts of investigations, personally, doing them,
22 himself, on the ground. The second piece of that problem is, as
23 he is looking through there, he is going--he is vetting this
24 information--one supposes, just based on our common sense and

1 knowledge of ways of the world--through a series of black market
2 operations that existed on the Korean peninsula.

3 So it wasn't just this made up thieves market that Mr.
4 Lewis will talk about--because it's made up and it's a
5 fabrication to a degree--because the agents have to say to
6 themselves--talking about the facts of this case now--the agents
7 have to say to themselves, "What do we-

(b) (1) (B)

Not

16 like in *Hood*, he was able to look at all--he was--this
17 individual was able to look at the various black markets and be
18 privy to statistical analysis based on those actual markets of
19 things getting bought and sold which Mr. Lewis has no idea
20 about. "I have no idea if there's a thieves market," Mr. Lewis
21 said. "Major Hurley, you are the person that introduced those
22 words to me."

23 So he isn't able to say that and it's that sort of--if
24 Mr. Lewis's testimony was based--was similar to

(b) (1) (B)

1 and I'm just pulling from page two, ma'am, I don't know where it
2 is in the actual MJ. [REDACTED] is pulling this information
3 from all of this data where [REDACTED]

4 (b) (1) (B)

5 [REDACTED] And that's the

6 position of the defense that says this information, whether you
7 look at M.R.E. 703, ma'am, or you look at M.R.E. 702, it fails.
8 And, as the military judge, the defense would request that you
9 not--that you disallow this evidence from being admitted into
10 this Court.

11 Ma'am, just one moment.

12 [pause]

13 And, ma'am, we're talking--you're--you'd mentioned to
14 me before--This is my last statement. You had mentioned to me
15 before that he briefs Congress and as--at the defense table, as
16 we were reflecting on what Mr. Lewis said--he's briefing
17 Congress on what was spent and not the actual intelligence that
18 went forward. So, he's not giving the Congress a rundown of
19 that actual intelligence, just, "Hey, Congress, because this is
20 one of your big functions to conduct oversight as to how we're
21 spending money, this is how we're doing it in these particular
22 cases."

23 Ma'am, that's it, thank you.

24 MJ: All right. Thank you.

1 Government, any final words?

2 ATC[CPT VON ELTEN]: Yes, ma'am. A moment, Your Honor?

3 MJ: Okay. Government, now, I'm going to ask you before
4 you start, I went through with the defense counsel, basically, a
5 scenario of, "Okay, you're going to ask the witness what he's
6 got in his databases," and I believe it was the keyword searches
7 and what was compromised then come up with an opinion, but I
8 want the government just to lay out, for me, exactly how you
9 plan to do this.

10 ATC[CPT VON ELTEN]: Well, Your Honor, the government's
11 plan would be to have Mr. Lewis first talk about--well, he's
12 already talked about his experience so it would then be to say,
13 "In my experience, based on these counter-offensive operations
14 over which I've had visibility, I know that (b) (1) (B)

15 (b) (1) (B) for instance." Then he will say, "I have
16 reviewed documents contained in the CIDNE-I database that

17 (b) (1) (B) I reviewed the documents. I found (b) (1) (B)

18 (b) (1) (B)

19

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24 MJ: And his opinion would be based on what?

1 ATC[CPT VON ELTEN]: His opinion would be based on the

2 (b) (1) (B)

3
4 MJ: So, his opinion--So, that basically is the foundation
5 of his opinion. His opinion that

6 (b) (1) (B)

7
8 ATC[CPT VON ELTEN]: Yes, ma'am.

9 MJ: So why should I let him go beyond, "Here's what
10 they've (b) (1) (B) "?

11 ATC[CPT VON ELTEN]: Your--ma'am, it's that extra
12 inferential step from his expertise that this is similar--
13 essentially, Your Honor, he would be testifying that the
14 information is similar and, because of that, he can assess the
15 value.

16 MJ: How many other--he's never testified as an expert
17 witness, according to his own statement, ever. He's never been
18 qualified as an expert witness----

19 ATC[CPT VON ELTEN]: Yes, ma'am.

20 MJ: ----so why should I be the first?

21 ATC[CPT VON ELTEN]: He's never been asked to provide his
22 specialized knowledge before for-----

23 MJ: To your knowledge, has this kind of specialized
24 expertise ever been in a courtroom before?

1 ATC[CPT VON ELTEN]: One second, ma'am.

2 [The trial counsel conferred]

3 ATC[CPT VON ELTEN]: Your Honor, I would make two points to
4 that. First, as Mr. Lewis testified, he's one of a very small
5 number of people with this type of specialized knowledge. Two,
6 to the United States' knowledge, in the--I'm going to miss the
7 name but--*Truoung Hong* case in the Fourth Circuit, in the 1970s,
8 an FBI agent testified to the value of the information in that
9 case.

10 MJ: Based on what?

11 ATC[CPT VON ELTEN]: Based on his experience.

12 MJ: And----

13 ATC[CPT VON ELTEN]: Your Honor, the----

14 MJ: ----You gave me a number of cases, *Truoung Hong*, is
15 not one of them.

16 ATC[CPT VON ELTEN]: Yes, ma'am.

17 MJ: It would seem to be that--if that is the most closely-
18 -directly on point, the government might want to consider that.

19 ATC[CPT VON ELTEN]: Yes, ma'am.

20 MJ: Go ahead.

21 ATC[CPT VON ELTEN]: I can provide that to you immediately
22 after this, ma'am. Your Honor, Mr. Lewis testified that,
23 through his general knowledge and expertise, he relies on the
24 EEI list and he selected the years 2008 to 2010 because he

1 believes those were reliable. Furthermore, he testified that he
2 produces briefs to Congress, [REDACTED]

3 (b) (1) (B)
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 Mr. Lewis further testified that he does not develop
8 [REDACTED]

9 That is what we

10 are asking him to testify about. Furthermore----

11 MJ: Well, let me stop you there. His expertise is based
12 on the (b) (1) (B) [REDACTED] or the CI operations,
13 is that right?

14 ATC[CPT VON ELTEN]: Yes, ma'am.

15 MJ: Now, I believe he testified that, [REDACTED]

16 (b) (1) (B)
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

1 ATC[CPT VON ELTEN]: That is one potential basis for the
2 information, but also for the types of information; that's where
3 Mr. Lewis' expertise talking about the classification, the types
4 of information, and taking a broad view of the (b) (1) (B)
5 (b) (1) (B) can cull the data and present the relevant
6 factors based on his expertise.

7 MJ: Okay.

8 ATC[CPT VON ELTEN]: And, furthermore, Your Honor, (b) (1) (B)

9 (b) (1) (B)
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14

15 MJ: Well, let me ask you something: on cross-examination,
16 to the defense, Mr. Lewis said, "Well, I didn't look at any of
17 the EEIs regarding (b) (1) (B)

18 (b) (1) (B)
19
20
21

22 ATC[CPT VON ELTEN]: Again, Your Honor this goes to Mr.
23 Lewis' expertise of knowing that--or being able to--first of
24 all, the defense may cross-examine that and elicit those facts,

1 but this is--goes to Mr.--second, it goes to Mr. Lewis'

2 expertise about, "

3 (b) (1) (B)

4 or some other failure that was not related to the operation."

5 MJ: But he can't even testified, at this point, that there
6 is been any failures with respect to the

7 (b) (1) (B)

8
9 ATC[CPT VON ELTEN]: Say again, Your Honor?

10 MJ: Well, as I understand what the government is seeking

11 to elicit, "All right, I went back and looked at the EEIs that

12 Ms."--what's her name? (b) (1) (B) pulled and I

13 only pulled the ones of successful counterintelligence

14 operations and they revealed that there are certain (b) (1) (B)

15 (b) (1) (B) Now, I look at your

16 charged information and I found similar types of (b) (1) (B)

17 (b) (1) (B)

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23 ATC[CPT VON ELTEN]: Your Honor, again, he testified that

24 those missions failed for all sorts of reasons. Second, that

1 would be proving a negative-- (b) (1) (B)

2 [REDACTED] ---- [REDACTED]

3 MJ: Well, okay. I mean, let's do something very simple.
4 I like pizza. So, on Monday, I paid \$10 for pizza. So an
5 expert is going to come in and say, "Colonel Lind--Judge Lind
6 likes pizza so she paid \$10 on Monday so I've got to charge \$10
7 for a stolen pizza on Friday, so Judge Lind would evaluate that
8 pizza at \$10."

9 ATC[CPT VON ELTEN]: Yes, ma'am.

10 MJ: If, on Tuesday, I was presented with the opportunity
11 to eat a pizza and I decided I don't want a pizza and I'm not
12 paying \$10 for that pizza, how reliable is that opinion, on
13 Friday, that if offered a pizza, I'm going to pay \$10?

14 ATC[CPT VON ELTEN]: It's reliable, ma'am, because the
15 value is set at a specific time. To go with your pizza analogy,
16 ma'am, the price is set when somebody will engage in that--when
17 both sides agree to engage in the transaction. In your example,
18 if, on Tuesday, somebody doesn't order a pizza, it doesn't mean
19 the pizza doesn't have value, it just means that that person
20 doesn't----

21 MJ: No, if somebody offers me a pizza and I don't want to
22 and I refuse to pay \$10 for it.

23 ATC[CPT VON ELTEN]: But, if somebody else will offer to
24 pay \$10 for it, then it has the \$10 value and it had \$10 of

1 value the day before which makes it likely that it still has \$10
2 of value.

3 MJ: You're using----

4 ATC[CPT VON ELTEN]: But, the market is not----

5 MJ: ----this expert to say,

6 (b) (1) (B)

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15 ATC[CPT VON ELTEN]: Yes, ma'am. He testified that they--

16 that the value of money is appropriate--or takes place in about

17 (b) (1) (B)

18 MJ:

19 ATC[CPT VON ELTEN]: Of But the

20 (b) (1) (B) go into that price, ma'am. So, for instance,

21 in the pizza price example, they don't expect to sell infinite

22 number of pizzas at \$10, they expect to sell a fixed number of

23 pizzas. So, in this case, it doesn't make the pizza worth \$10--

24 or, you know, \$20 because somebody might pay \$20 for it and then

1 somebody might pay \$5, but the pizza price--the pizza maker sets
2 the price expecting to sell a set number, not an infinite number
3 and proving the negative goes to an infinite number of
4 transactions.

5 MJ: Okay.

6 ATC[CPT VON ELTEN]: Well, Your Honor, the reports Mr.
7 Lewis relied on are exactly the types relied upon by
8 professional counterintelligence professionals[sic] in his
9 field, they're generated in the regular course of business
10 activities. It's the job of the counterintelligence
11 professionals to budget, to report, to gather financial
12 statements, to rely on training, [REDACTED]

13 (b) (1) (B)

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] are inextricably linked with [REDACTED]
17 counterintelligence. The defense's concerns regarding memory
18 are no different than a doctor relying on 30 years of
19 experience. Memory and experience are part of the foundation of
20 Mr. Lewis's expertise.

21 Finally, defense concerns are more appropriate for
22 cross-examination and the weight of Mr. Lewis's testimony. The
23 defense is also welcome to present its own expert to offer a
24 contrary opinion.

1 MJ: Well, let me ask the government a question, again. On
2 the testimony of Mr. Lewis--I want to make sure I understand it
3 and that's what the government's position is going to be--that
4 Mr. Lewis came in and said, "You know, we're involved in a whole
5 host of counterintelligence operations here--counter-offensive
6 intelligence operations, here. I pulled a data set of only the

7 [REDACTED]
8 [REDACTED] So I've got some hits
(b) (1) (B)

9 [REDACTED]
10 [REDACTED] So how does that affect the
11 reliability of this opinion? "I don't know because I didn't
12 look."

13 ATC[CPT VON ELTEN]: Your Honor, your point goes to other
14 potential information that may exist and----

15 MJ: It does exist. He didn't look at it.

16 ATC[CPT VON ELTEN]: He relied upon his--the totality of
17 experience and expertise and he did look at the successful
18 transactions. The transactions that [REDACTED]

19 (b) (1) (B) [REDACTED] those are---- (b) (1) (B)

20 MJ: Wait a minute. Am I misunderstanding his testimony?

21 He didn't look at the transactions that were (b) (1) (B)

22 (b) (1) (B) [REDACTED]
23 [REDACTED]

1 ATC[CPT VON ELTEN]: Your Honor, that's what I meant; where
2 those transactions do not occur. That affects--that, [REDACTED]
3 ultimately, is part of the price of the (b) (1) (B) [REDACTED]
4 So, to go back to the pizza example, someone might pay \$20,
5 somebody might pay \$5----

6 MJ: We're talking--no, no, we're talking about the same
7 entity.

8 ATC[CPT VON ELTEN]: Yes, the same entity--the same pizza
9 seller.

10 MJ: It's the buyer we're focused on.

11 ATC[CPT VON ELTEN]: Okay. All right, same buyer. The
12 buyer only relies on his personal value and it fluctuates; it
13 can change. And so, the value of something, in a market place,
14 including a thieves market, goes up and down based on a variety
15 of factors. There----

16 MJ: So how is this witness's opinion reliable if that's
17 the case?

18 ATC[CPT VON ELTEN]: It's not the United States' position
19 that there is a perfect price that's determinable. It's our
20 position that the expertise offered by Mr. Lewis is based on a
21 lot of experience and a lot of (b) (1) (B) [REDACTED]
22 (b) (1) (B) [REDACTED] and that those are evidence to the value of
23 this information. It's reliable because the United States
24 government and counterintelligence professionals rely on this

1 information. Congress relies on this information deciding
2 whether or not it is worth continuing the funds. Congress will
3 look at it and say, "We got--we're getting these results back
4 from it, so we will continue to fund it at these levels."

5 MJ: Well, wouldn't Congress--wasn't part of the briefing
6 on what the amount is spent on? So, wouldn't that include the
7 negative--the transactions

8 (b) (1) (B)

11 ATC[CPT VON ELTEN]: Yes, ma'am.

12 ATC[MAJ FEIN]: Your Honor, may the United States have a
13 moment?

14 MJ: Yes.

15 [The trial counsel conferred]

16 ATC[CPT VON ELTEN]: One more second, Your Honor.

17 MJ: Do you want to take a 10-minute recess?

18 TC[MAJ FEIN]: Actually, ma'am, if you don't mind, may I
19 take over for Captain von Elten? I'd asked him to do this
20 without much prep only because I just can't stand.

21 MJ: Because you can't stand?

22 TC[MAJ FEIN]: Well, my back, ma'am, and----

23 MJ: Then why don't you sit down and do your argument?

24 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: And, for the record, counsel on both sides, you know,
2 if there's medical issues and things we need to--please let me
3 know that.

4 TC[MAJ FEIN]: Yes, ma'am. Thank you. Just--ma'am, to
5 answer this one question, just because I--this is what was asked
6 of Mr. Lewis. When he was asked what the EEI list was, he said
7 that it was a list that was generated based off of completed
8 missions to know what the enemy--excuse me, foreign intelligence
9 services are looking for and trying to obtain. So the--going
10 back to what Captain Von Elten just briefed a few minutes ago,
11 the EEI list informs Mr. Lewis, as he testified, on what the
12 foreign intelligence services are looking for then the second
13 list informs him that, [REDACTED]

14 (b) (1) (B) [REDACTED] So, going to
15 the Court's question about if there was an unsuccessful mission,
16 would it be annotated? No, Your Honor, because an unsuccessful
17 mission means information wouldn't have been--made it on to the
18 EEI list. It is only based off a completed mission does the

19 (b) (1) (B) [REDACTED]
20 [REDACTED] And, once they have that [REDACTED]
21 information, they now create the database, they share it across
22 the U.S. government, they brief it up, they share it down, and
23 then they use that, then they (b) (1) (B) [REDACTED]
24 is what he testified about, [REDACTED]

1 And it's at--he didn't say this part, Your Honor,
2 but it's clear that it's a circular process. But, if it's an
3 unfounded or unsuccessful mission, you would never have an EEI
4 which is also what he said when we asked--the United States
5 asked him something to the effect of, Your Honor, (b) (1) (B)

(b) (1) (B)

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10 MJ: Did anyone ask Mr. Lewis if there was some kind of
11 list or database or something of unsuccessful transactions?

12 TC[MAJ FEIN]: We have not asked Mr. Lewis that question,
13 ma'am, but we can ask him--recall him to ask him.

14 MJ: Is he here?

15 TC[MAJ FEIN]: He is here, ma'am.

16 MJ: Please recall him.

17 TC[MAJ FEIN]: Ma'am, the United States recalls Mr. Danny
18 Lewis.

19 [END OF PAGE]

1 DANIEL LEWIS, civilian, was recalled as a witness for the
2 prosecution, was reminded of his oath, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel[MAJ FEIN]:

5 Q. Sir, I'm going to ask you a few questions in reference
6 to the EEI [REDACTED]

7 (b) (1) (B)

8 A. Okay.

9 Q. First, does the database that this information is
10 pulled from--does that database contain information in relation
11 to (b) (1) (B)

12 A. Yes.

13 Q. And does--for those (b) (1) (B)
14 does it keep track of [REDACTED]

15 [REDACTED]
16 A. I'm sorry--you initially said from the EEI list. Are
17 we talking EEI----

18 Q. Oh, I'm sorry, sir.

19 A. ----or operations?

20 Q. Let's take both, sir, so first for the EEI list.

21 A. All right. If we got any EEI, (b) (1) (B)

22 (b) (1) (B) then the EEI went in there. But, if it
23 fails from the start, then there would be no EEI so there would
24 be no EEI part of failed operations all the time.

1 Q. Okay, sir. Now, what about the list created by Mr.---

2 - [REDACTED]
(b) (1) (B)

3 A. [REDACTED]

4 Q. [REDACTED] for you--the--with [REDACTED]

5 [REDACTED]

6 MJ: And what is that list and where does it come from?

7 WIT: Your Honor, all the--if they searched through the

8 (b) (1) (B)

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 MJ: All right. And I don't mean to interrupt you, but I
15 do want to follow up with one question. Would those include
16 failed operations where

17 WIT: In the database, yes, ma'am.

18 MJ: In (b) (1) (B) [REDACTED] pull of the----

19 WIT: I did not ask for--I asked for [REDACTED]

20 (b) (1) (B)

21 [REDACTED] I
22 didn't ask him for a list of unproductive or failed operations,
23 ma'am.

24 MJ: Okay. Proceed.

1 [Examination of the witness continued.]

2 Q. And, sir, to go off the Court's question, just now,
3 does that database contain information on unproductive or failed
4 operations?

5 A. Yes.

6 Q. And could you please define what unproductive and then
7 define failed operations are?

8 A. A failed operation would be (b) (1) (B) through
9 the process of

10 (b) (1) (B)

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17 Q. So, sir, I--so that's a failed operation?

18 A. That would be a failed, yes.

19 Q.

20

21 A. Not if it fails at But from an

22 asterisk--the fact that that

23 (b) (1) (B)

24

1 back and figure out why. So we actually would benefit--maybe

2 [REDACTED] So, even by [REDACTED]

3 (b) (1) (B)

4

5

6 Q. And, sir, what about the second type of----

7 A. Right.

8 Q. ----an incomplete mission or----

9 A. There's just times that, for whatever reason, when--

10 (b) (1) (B)

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22 Q. And, sir, why did you choose that criteria to give

23 (b) (1) (B) when you asked him to do the data pull for you to look

24 at?

1 A. That was just one of the data points I was interested
2 in of what is a productive-- [REDACTED]

2 (b) (1) (B)

4

5 [REDACTED] and what was just

6 [REDACTED] --in a

7 relationship, high and low. That was my--what I wanted to know.

8 Q. And why, sir? Why did you set that in your criteria?

9 A. So in my mind I could have a range--I know that from

10 what the

(b) (1) (B)

12

```
13 ; just a data point in my head.
```

14 TC[MAJ FEIN]: Your Honor, one moment, please?

15 MJ: Yes.

16 TC[MAJ FEIN]: No further questions, Your Honor.

17 MJ: Defense?

18 ADC[MAJ HURLEY]: Yes, ma'am.

19 CROSS-EXAMINATION

20 Questions by the assistant defense counsel [MAJ HURLEY]:

21 Q. All right, Mr. Lewis, this--I'm going to ask you about
22 a hypothetical scenario, okay?

23 A. Okay.

1 Q. All right. So, let's say--we're going to call this
2 "Time 1." At--on Time 1, (b) (1) (B)

3

4 A. Okay.

5 Q. Gotcha[sic]--or are you with me so far?

6 A. I got that.

7 Q. Thanks.

8 A. I'm with you.

9 Q. Thank you so much. At Time 2----

10 A. Okay. Meeting--can we call (b) (1) (B) Would that
11 help?

12 Q. Yeah, you know what, we can.

13 A. Okay.

14 Q. It absolutely will. At (b) (1) (B)

15 A. Okay.

16 Q.

17 (b) (1) (B)

18

19

20 A. I'll go with your scenario.

21 Q. Okay. Thank you. A

22 (b) (1) (B)

23

24 A. Okay.

1 Q. ----from (b) (1) (B)
2 , right?

3 A. Yes.

4 Q. All right. So,

5 -- (b) (1) (B)

6 A. No, I'm sorry, that would not get you on an EEI.

7 Q. It wouldn't?

8 A. That would get you on the

9 (b) (1) (B)

10

11

12

13 Q. Right.

14 A.

15 (b) (1) (B)

16

17

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23

24

1 Q. To ask (b) (1) (B)

2 A. Yes.

3 Q. That's when the EEI would come? In that better
4 amount?

5 A. Yeah, the EEI is their request for information.

6 Q. Okay. Well, just--let's stick with my hypothetical
7 scenario for just one second.

8 A. Okay.

9 Q. All right. So, at (b) (1) (B)

10 A. Okay.

11 Q. ----the (b) (1) (B)

12 A. Okay. (b) (1) (B)

13 MJ: ----
14

15 A. Is this the

16 Q. No,

17 A. Different operation?

18 Q. Different operations, (b) (1) (B)

19 A. Okay.

20 Q. And in this hypothetical scenario for (b) (1) (B)

21 A. Okay.

22 Q. ----that person
23 (b) (1) (B)

1 A. Now, generally, why that wouldn't happen is, (b) (1) (B)

2 [REDACTED] we--in a

3 (b) (1) (B)

4 short period of time,

5

6

7

8

9

10 Q. Okay. But--I guess, just hypothetically----

11 A. Hypothetically, no. We wouldn't do that.

12 Q. What I'm saying is the "no" to the same--the "no"
13 response to the same information, is that captured anywhere?

14 A. Yes.

15 Q. Where?

16 A. [REDACTED]

17 (b) (1) (B)

18

19

20 Q. Would that be possible--or did--and did [REDACTED]
21 include that concept when he was doing the data pull for you?

22 A. He didn't have a concept; he pulled exactly what I
23 told him to pull.

24 Q. And you told him--and you didn't----

25 A. I didn't ask for that.

1 Q. You certainly didn't ask to pull unsuccessful
2 counterintelligence operations, did you?

3 A. No, I did not.

4 probably, so I wouldn't

5

6

(b) (1) (B)

7 Q. Right.

8

9 A. Not on the information that I had pulled for my value

10 because, again, if we

(b) (1) (B)

11

12

13

14

15

16

17

18

19

20 Q. Right. And that wouldn't have been what (b) (1) (B)

21 pulled for you? He didn't pull the zero?

22 A. No.

23 ADC[MAJ HURLEY]: Thanks.

24 MJ: Direct?

1 TC[MAJ FEIN]: Yes, ma'am.

2 REDIRECT EXAMINATION

3 Questions by the trial counsel[MAJ FEIN]:

4 Q. Sir, what percentage of the investigations that you
5 oversaw while you were the Chief of the Counter-Espionage
6 section of DIA involved [REDACTED]

7 (b) (1) (B)

8 A. Probably a couple of [REDACTED] ops where we're talking
9 about--we're now talking about investigations?

10 Q. Yes, sir. So, sir, other than (b) (1) (B), [REDACTED]

11 (b) (1) (B) --- (b) (1) (B)

12 A. (b) (1) (B).

13 Q. [REDACTED]

14 (b) (1) (B)

15 A. [REDACTED], but
16 ones that----

17 Q. Sir, is that based off--I'm sorry, sir. Please, go
18 on.

19 A. We were talking about the ones that were [REDACTED]

20 (b) (1) (B)

21 Q. Or, sir, what about ones that [REDACTED]

22 (b) (1) (B)

23 ?

24 A. (b) (1) (B)

(b) (1) (B)

1 (b) (1) (B)

2

3

4

5

6

7

8

9

10 Q. Okay, sir. And earlier, when Major Hurley was asking
11 you a hypothetical, you said that hypothetical wouldn't happen?

12 A. Well, I kind of misunder--yeah, the--within the
13 operations, part of what--one of the things that I said early
14 on, when we're looking across all the operations, if it looks
15 like multiple entities within DoD are going to start (b) (1) (B)

16 (b) (1) (B)

17 that would be highlighted in a dialogue within the

18 the

19 (b) (1) (B)

20

21

22

23

1 (b) (1) (B)

2 : does that fit the operation?

3 TC[MAJ FEIN]: Thank you, sir. One moment, Your Honor,
4 please? No further questions, Your Honor.

5 MJ: Anything further from the defense?

6 ADC[MAJ HURLEY]: No, ma'am.

7 **EXAMINATION BY THE COURT-MARTIAL**

8 **Question by the military judge:**

9 Q. So, Mr. Lewis, when you have these (b) (1) (B)
10 (b) (1) (B) and let's limit our focus, (b) (1) (B)
11 (b) (1) (B)

12 A. Okay.

13 Q. And, (b) (1) (B)
14 (b) (1) (B)
15 (b) (1) (B)

16 A. Yes, ma'am, and that would be considered--even though
17 that is--for that (b) (1) (B) it helps us to
18 know if the (b) (1) (B)

19 (b) (1) (B) somewhere, for
20 whatever reason, then we, as a CI community, we have to (b) (1) (B)
21 determine what (b) (1) (B)

22 Is there--we look for reasons to (b) (1) (B)

23 (b) (1) (B)
24 (b) (1) (B)

(b) (1) (B)

Q. I guess that's where I--I'd like to ask you a--some questions based on your expertise on CI. Now, if, say, the

(b) (1) (B) --I think you brought (b) (1) (B)

A. Yes, ma'am.

Q. The (b) (1) (B) ----

A. Yes, ma'am.

Q. ----in January of 2008. Would there, potentially, be a possibility that, (b) (1) (B)

(b) (1) (B)

A. (b) (1) (B) ma'am, specifically, was the--anything that--between

(b) (1) (B)

(b) (1) (B)

So, those are the big topics that

we know from government to government they have issues with,
yes, ma'am.

Q. When you did your keyword searches--and I'm assuming
that's of the charged documents in this case----

A. Yes.

Q. ----how did you come up with the keywords for

A. Based on my knowledge that

(b) (1) (B)

1 (b) (1) (B)
2 --there's a
3 couple of different acronyms there. And that's how I picked,
4 when I did--I think it was the State Department database, I
5 don't remember the exact acronym for that--that was my keyword
6 search just for the State Department documents, ma'am.

7 Q. What (b) (1) (B) ?

8 A. That's based on just what I know from--specifically,
9 from the EEI (b) (1) (B)

10 (b) (1) (B)

11

12

13

14

15

16 Q. So, just give me a general idea of (b) (1) (B)

17 (b) (1) (B)

18

19

20 A.

21

22

23

1 [REDACTED]
2 [REDACTED]

3 Q. If you had [REDACTED] what's the basis for your--
4 an opinion that you would make that [REDACTED] (b) (1) (B)
5 [REDACTED] and all of
6 that?

7 A. Based on what we saw in [REDACTED] did
8 have, when we would see [REDACTED] (b) (1) (B) we would
9 see, generally, what they were [REDACTED]
10 (b) (1) (B) So it was it's a narrow scope in that
11 theater, but that's what we had there.

12 Q. In [REDACTED]
13 (b) (1) (B)

14 A. Consideration that [REDACTED] were aware of
15 (b) (1) (B)
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 Q. Based on your expertise, what is the likelihood, if
21 any, that the [REDACTED]
22 (b) (1) (B)

23 A. (b) (1) (B)
24 [REDACTED]

1 (b) (1) (B)

2

3 Q. So, if--and this is between 2008 and 2010?

4 A. That was the time frame you specified, yes, ma'am.

5 Q. So, at that time, (b) (1) (B)

6

7 A. That's what we believed was one of the explanations

8 based on the things that we were seeing in some of the

9 investigations. Some of the other

10 (b) (1) (B)

11

12

13

14 Q. What

15 A.

16

17

18

19

20

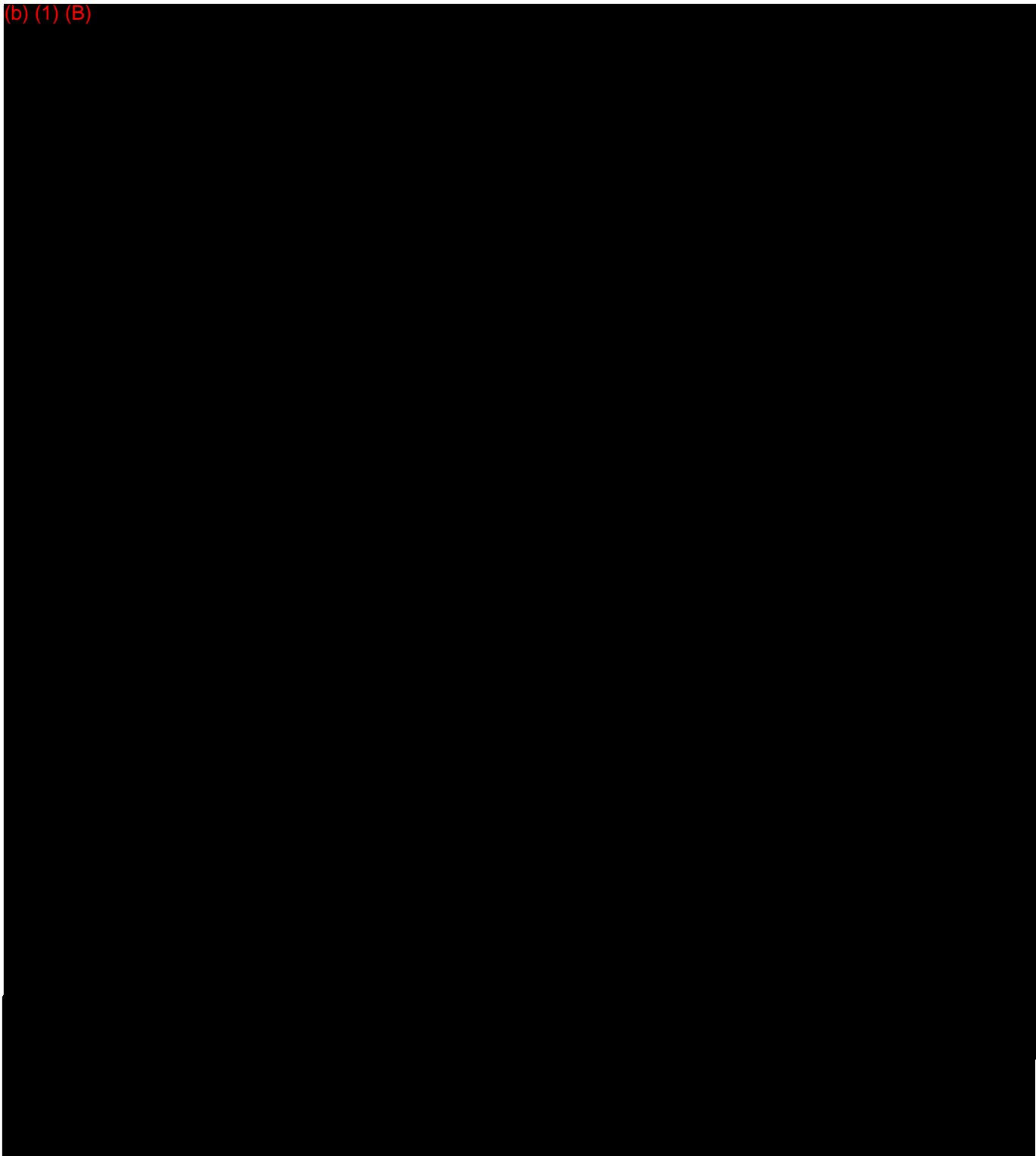
21 Q. What was the percentage of operations

22 (b) (1) (B)

23 A. Against, , ma'am? That would be in

24 territory that I'm--I would be guessing.


(b) (1) (B)



Q. Now, what about [REDACTED] ?

A. We've--some people would say [REDACTED]

(b) (1) (B)



1 (b) (1) (B)

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 Q. What about 2008 to 2010?

8 A.

9 (b) (1) (B)

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 MJ: All right. Any follow-up based on that?

16 TC[MAJ FEIN]: Can we have a moment, Your Honor?

17 MJ: Yes.

18 **REDIRECT EXAMINATION**

19 **Questions by the trial counsel[MAJ FEIN]:**

20 Q. Sir, when there is

21 (b) (1) (B)

, please elaborate--but if

22 there's a successful operation,

23 (b) (1) (B)

24 [REDACTED]

1 A. [REDACTED]

(b) (1) (B)

2 [REDACTED]

3 Q. Yes, sir.

4 A. Depending on the information, if it's about something

5 that needs (b) (1) (B)

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] Create better security education, you know,

10 make sure someone knows if they get an email out of the blue,

11 that we know," it's like they've tipped their hand. We know

12 that (b) (1) (B) really want to know that. It also tells us

13 how [REDACTED] The types of information helps us in

14 our investigations when (b) (1) (B)

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q. Sir, what--does that information go on to the EEI

22 list?

23 A. That would have been a shorter answer; yes, it does go

24 onto the EEI list.

1 Q. And how is that EEI list used other than you reviewing
2 it for your testimony, here?

3 A. The EEI list--the distribution of the EEI list is to

4 the (b) (1) (B)

5

6

7

8 is aware that the

9

It goes to all the OFCO

10

11

12

13

14 Q. And, sir, what is the, I guess, typical success rate

15 of providing information from the EEI list--is that--is the

16 success rate high, low,

17 (b) (1) (B)

18 MJ: Wait a minute. I don't think I understand. What is a

19 success rate? What are you asking?

20 TC[MAJ FEIN]: Yes, ma'am.

21 Q.

22 (b) (1) (B)

23

24

1 A. May I ask if I can clarify your question?

2 Q. Please.

3 A. [REDACTED]

4 (b) (1) (B) [REDACTED]

5 [REDACTED]

6 Q. [REDACTED], sir.

7 A. Yes.

8 Q. And how often, if at all, (b) (1) (B) [REDACTED]

9 A. Well if it's one of the, as the previously discussed

10 (b) (1) (B) [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Q. [REDACTED]

18 [REDACTED]

19 A. [REDACTED]

20 (b) (1) (B) [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

1 Q. (b) (1) (B) ?

2 A. Yes. It is reported to Congress on an annual basis

3 the (b) (1) (B)

4

5 Q. And sir, what was your role in that tracking of funds?

6 A. We compile that list and provide it to the USDI who
7 sends it further up.

8 TC[MAJ FEIN]: Thank you, sir.

9 No further questions, Your Honor.

10 ADC[MAJ HURLEY]: We do have some more questions, ma'am.

11 Your Honor, we do have some more questions.

12 MJ: Okay.

13 **RECROSS-EXAMINATION**

14 **Questions by the assistant defense counsel[Major Hurley]:**

15 Q. So the government sits you down in front of a
16 computer, right? I am talking about your search of the NET-
17 CENTRIC Diplomacy database.

18 A. Okay.

19 Q. The government sits you down in front of a computer,
20 right?

21 A. Uh-huh[indicating an affirmative response].

22 Q. Pulls up a document?

23 A. No.

1 Q. Or pulls something up on the computer? Okay, well
2 let's just skip ahead.

3 A. Okay.

4 Q. You enter in your keyword searches?

5 A. Uh-huh[indicating an affirmative response]..

6 Q. Then you find responsive records?

7 A. Yes.

8 Q. Did you assess those records to see if that
9 information was already known, like already known in 2010? Did
10 you look at it and go, like, "Is this already known or did they
11 already know this or not?"

12 A. I ran the report and made sure that what was keyword
13 searched was in there; was it in the

14 (b) (1) (B)

15 Q. Mm-hmm[indicating an affirmative response].

16 A. And I verified that that was in there and that is as
17 far as I went.

18 Q. You didn't make that additional assessment of would
19 the

20 A. No.

21 Q.

22 (b) (1) (B)

23

24 A. I can't--I couldn't say that. I don't----

1 Q. That----

2 A. I don't know.

3 Q. That would be speculation?

4 A. It would be. [REDACTED]

(b) (1) (B)

6 Q. Right.

7 A. ----all I can say.

8 Q. [REDACTED]

(b) (1) (B)

10 A. It might have an impact.

11 Q. A negative impact (b) (1) (B)

12 A. Possibly. Yes.

13 Q. Right. Now the EEI list is a generalized list, right?

14 It is one sentence.

15 A. It's----

16 Q. Let me restate that.

17 A. Yes.

18 Q. The EEI list that was pulled by (b) (1) (B) for you
19 just has one sentence on what the interest is?

20 A. They are areas, [REDACTED]

(b) (1) (B)

22 [REDACTED] Yeah.

23 Q. Just one blurb?

24 A. It could be two. Two sentences. Yeah, but----

1 Q. Yeah, but very brief?

2 A. Yes.

3 Q. All right. So if the EEI says that, does that mean--

4 if the EEI says that--and let's just go [REDACTED]

5 [REDACTED] (b) (1) (B)

6 A. [REDACTED]

7 Q. [REDACTED]

8 [REDACTED]

9 A. [REDACTED]

10 [REDACTED].

11 Q. So would they [REDACTED] (b) (1) (B) ?

12 A. I guess it would depend on the [REDACTED]

13 (b) (1) (B) [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 Q. Right.

19 A. So we are describing [REDACTED]

20 (b) (1) (B) [REDACTED]

21 Q. Right.

22 A. (b) (1) (B) [REDACTED] Well (b) (1) (B) [REDACTED]

23 [REDACTED]

1 They are going to determine that by reviewing multiple reports
2 about the same type of incidents.

3 Q. Sure. But my questions is

4 (b) (1) (B)

5 A.

6 Q.

7 A.

8

9 Q.

10 A.

11

12

13

14

15

16

(b) (1) (B)

17 Q.

18 A.

19

20 Q.

21 A.

22 Q.

1 A. (b) (1) (B)

2

3

4 Q.

5 A.

6 Q.

7 A.

8 Q.

9 So in

10 this hypothetical scenario----

11 A. Well, that was in the timeframe that she had
12 specified, as well.

13 Q. But what I am saying is,

14 (b) (1) (B)

15 A. Normally in

16

17 It did not happen.

18 Q. Right.

19 A. (b) (1) (B)

20

21 Q.

22

23

24 A. That is very possible.

1 ADC[MAJ HURLEY]: Thanks.

2 No more questions.

3 MJ: Any last questions by the Government?

4 TC[MAJ FEIN]: Yes, ma'am.

5 **REDIRECT EXAMINATION**

6 **Questions by the trial counsel[Major Fein]:**

7 Q. Mr. Lewis, do foreign intelligence services pay for
8 U.S. Government information [REDACTED]

9 (b) (1) (B) [REDACTED]

10 A. [REDACTED] Yes.

11 TC[MAJ FEIN]: Thank you, sir.

12 No further questions, Your Honor.

13 MJ: I still have some.

14 **EXAMINATION BY THE COURT-MARTIAL**

15 **Questions by the Military Judge:**

16 Q. Mr. Lewis, I want you to do a little searching of your
17 expertise here. You testified you've had years and years and
18 years in counterintelligence, both in investigations and
19 oversight.

20 A. Yes, ma'am.

21 Q. You've taken this information and reported to
22 Congress. Now looking at your expertise--and then again, you've
23 never been an evaluation expert or anything like that in a
24 courtroom.

1 A. No, ma'am.

2 Q. So looking at--you've told me (b) (1) (B), for example,
3 between 2008 and 2010, which is the relevant period at issue
4 here.

5 A. Yes. Yes, ma'am.

6 Q. (b) (1) (B)
7 (b) (1) (B)

8 A. Yes, ma'am. But I believe that I was--when I said
9 that, we were talking about the (b) (1) (B)

10 (b) (1) (B)

11 Q. Yes.

12 A. (b) (1) (B)
13
14
15

16 Q. Seeking the same type of information in the
17 (b) (1) (B)

18 A. No. No, ma'am. That is a different set of
19 information, not in that.

20 Q. Targeting that particular set of information----

21 A. Yes, ma'am.

22 Q. Were most of the--when you (b) (1) (B)
23 (b) (1) (B) how did you learn that?

1 A. Yes, ma'am. Well that was having visibility on the
2 (b) (1) (B) Those are fairly significant. Most of the-

3 -and to slightly clarify, the (b) (1) (B) were

4 (b) (1) (B)

5
6
7
8
9 They don't get the same numbers. They don't get the

10 (b) (1) (B)

11
12
13 We were

14 (b) (1) (B)

15 People were willing to report to us----

16 Q. Yeah. I am not trying to suggest that your operation
17 wasn't a success.

18 A. Okay.

19 Q. No. I am looking at, you were comparing the value of
20 information----

21 A. Yes, ma'am.

22 Q. ----from the 5 percent----

23 A. Yes, ma'am.

1 Q. (b) (1) (B)

2

3

4 A. Yeah.

5 Q. ----I think I can say that (b) (1) (B)

6

7 A. Yes, ma'am.

8 Q. Do you believe you can do that?

9 A. I probably boxed myself in

10 (b) (1) (B)

11

12

I

13 that is the number that popped in my head and I know it is

14 important. But I don't----

15 Q. Do you feel--if you were walking into Congress

16 tomorrow and you were conducting a briefing or you were briefing

17 your superiors.

18 A. Yes, ma'am.

19 Q. Would you feel confident in saying, "Okay, based on

20 (b) (1) (B)

21 A. Yes, ma'am.

22 Q.

23 (b) (1) (B)

24 A. Yes, ma'am. Yes, ma'am.

1 Q. ----you've just described----

2 A. Yes, ma'am.

3 Q. ----based on I did a keyword search in the CIDNE-Iraq,
4 CIDNE-Afghanistan databases----

5 A. Yes, ma'am.

6 Q. ----and came up with these documents. Mr.
7 Congressman, Mr. Superior, I, in my expertise, believe that

8 (b) (1) (B)

9 A. Yes, ma'am.

10 Q. Would you feel comfortable saying that?

11 A. I would feel comfortable in saying that but I would
12 qualify my statement as that most of

13 (b) (1) (B)

14 They

15 It

16 was the where we were--had success

17 and that is where

18 (b) (1) (B)

19

20

21

22

23 I am very confident

24 based on my expertise and what I have seen is (b) (1) (B)

1 [REDACTED]
2 [REDACTED] It just isn't how we've
3 [REDACTED] Since CI offensive operations look

4 at the (b) (1) (B)

5 [REDACTED]
6 [REDACTED]
7 So we

8 [REDACTED]
9 [REDACTED]
10 Q. And, I am going to this over to the government in just
11 a moment. But what I am hearing you saying is that you have--
12 you believe you have a basis to have an opinion on what these
13 documents are when you did the keyword search or value, but that
14 opinion isn't from (b) (1) (B)

15 [REDACTED]
16 A. That is based on the EEI. Yes, ma'am. What I know

17 [REDACTED]
18 These were (b) (1) (B)

19 [REDACTED]
20 Yes, ma'am.

21 Q. That is the basis of your opinion. Not from these
22 other sources that you were talking about.

23 A. No. No. No, ma'am. No, ma'am. No, ma'am. It is
24 based on the (b) (1) (B)

1 operations, the [REDACTED]

(b) (1) (B)

2 [REDACTED]

3 [REDACTED]

But

4 the EEI is still what I used to base my opinion on as what we

5 knew (b) (1) (B)

6 MJ: Okay.

7 Any follow up based on that?

8 TC[MAJ FEIN]: May I have a moment, Your Honor?

9 ADC[MAJ HURLEY]: Not from the defense, ma'am. I guess we
10 will wait and see.

11 [The trial counsel conferred.]

12 TC[MAJ FEIN]: No, ma'am.

13 MJ: All right. Do you want temporary or permanent
14 excusal?

15 TC[MAJ FEIN]: Temporary, ma'am.

16 MJ: All right.

17 [The witness was temporarily excused, duly warned, and exited
18 the courtroom.]

19 MJ: Any further oral argument from either side?

20 ATC[CPT VON ELTEN]: No, ma'am. But I have the case I
21 mentioned.

22 MJ: Okay. Thank you.

23 [The assistant trial counsel provided the document to the
24 Military Judge.]

1 MJ: All right. Can you point to me where in the case this
2 expert testimony is.

3 TC[MAJ FEIN]: Ma'am, may we have a moment?

4 MJ: Yes.

5 [The trial counsel conferred.]

6 TC[MAJ FEIN]: Ma'am, as we keep going through this, we
7 realized also that this should be read in conjunction with the
8 actual plaintiff's brief that was actually given to the 4th
9 Circuit, which we will have copies of for the Court to consider.

10 MJ: Okay.

11 [The trial counsel conferred.]

12 MJ: I assume it is somewhere on or after page 18?

13 ATC[CPT VON ELTEN]: Yes, ma'am, in conjunction with the
14 brief.

15 [Pause.]

16 MJ: All right.

17 ATC[CPT MORROW]: Your Honor, if my memory serves me. It
18 not here on the face of the case how the government proved it in
19 that case but it was part of the offer of proof by the
20 government. It is actually State Department information that
21 was compromised.

22 MJ: All right.

23 Well, when you have whatever it is you want me to
24 consider, let me know.

1 Any further oral argument by either side?

2 ATC[CPT VON ELTEN]: No, ma'am.

3 ADC[MAJ HURLEY]: No, ma'am.

4 MJ: All right.

5 Anything else we need to address today?

6 CDC[MAJ HURLEY]: Not from the defense, ma'am.

7 TC[MAJ FEIN]: No, ma'am. And, the United States will
8 email and print immediately after this session, both, the
9 appellate brief.

10 MJ: All right.

11 The one thing I do want to ask you. Defense has not
12 asked this, but since this came up earlier, assume I should
13 grant the government's request for expertise of this witness in
14 whole, or in part. Does the defense want to use these lists,
15 these EEIs or whatever other lists that he had prepared on
16 cross-examination?

17 ADC[MAJ HURLEY]: Yes, ma'am. We will.

18 MJ: Because you need approvals for that, right?

19 TC[MAJ FEIN]: Yes, ma'am. And that will go with the same
20 question of whether--if it is marked as an AE, ma'am, that will
21 be the same approval.

22 MJ: All right. So are we anticipating getting that
23 approval before tomorrow?

1 TC[MAJ FEIN]: Hopefully tomorrow morning, first thing,
2 ma'am.

3 MJ: Okay.

4 TC[MAJ FEIN]: This morning we were able to get the
5 approval to give them to the defense very quickly. So assuming
6 all the right individuals are at DIA, hopefully the same
7 approval will be just as quick.

8 MJ: Okay.

9 MJ: Anything else we need to address?

10 TC[MAJ FEIN]: No, ma'am.

11 CDC[MAJ HURLEY]: No, ma'am.

12 MJ: All right.

13 Court is in recess.

14 **[The court-martial recessed at 1822, 1 July 2013.]**