



2 PATRICK M. RYAN, United States Attorney for the  
3 District of Oklahoma, appearing for the plaintiff.

4 JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A. MACKEY,  
5 BETH WILKINSON, SCOTT MENDELOFF, and VICKI BEHENNA, Special  
6 Attorneys to the U.S. Attorney General, 210 West Park Avenue,  
7 Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the  
8 plaintiff.

9 STEPHEN JONES, ROBERT NIGH, JR., AMBER McLAUGHLIN,  
10 RANDALL COYNE, and MANDY WELCH, Attorneys at Law, Jones, Wyatt  
11 & Roberts, 114 East Broadway, Suite 100, Post Office Box 472,  
12 Enid, Oklahoma, 73702-0472, and JERALYN MERRITT, 303 East 17th  
13 Avenue, Suite 400, Denver, Colorado, 80203, appearing for  
14 Defendant McVeigh.

15 MICHAEL E. TIGAR, RONALD G. WOODS, ADAM THURSCHELL,  
16 and REID NEUREITER, Attorneys at Law, 1120 Lincoln Street,  
17 Suite 1308, Denver, Colorado, 80203, appearing for Defendant  
18 Nichols.

19

20 \* \* \* \* \*

21

22 PROCEEDINGS

23 (In open court at 9 a.m.)

24 THE COURT: Please be seated.

25 I assume all appearances are the same as from

286

1 yesterday.

2 MR. JONES: Yes, your Honor.

3 MR. HARTZLER: That's correct, your Honor.

4 MR. TIGAR: Yes, your Honor.

5 THE COURT: All right. Thank you.

6 When we recessed yesterday afternoon, we had some

7 discussion about Exhibit 35 and some discussion of a transcript  
8 and indication that only a portion of it might be received; and  
9 Mr. Tigar, I think you were going to review it.

10 MR. TIGAR: Yes, your Honor. Overnight we reviewed  
11 it, and I have three copies of Exhibit 35. On those copies, we  
12 have marked with pink highlighter the portions designated by  
13 the Government in a note to me from Mr. Mendeloff and in yellow  
14 highlighter the portions that we wish to cross-designate. We  
15 thought that was the easiest way to do it. I can tender those  
16 to the Government now so if they wish to cross cross-designate,  
17 they can do so, but we should pass them up to your Honor --

18 THE COURT: That's fine. So we are treating it as if  
19 it were a deposition.

20 MR. HARTZLER: Thank you, your Honor.

21 MR. TIGAR: We didn't think your Honor wanted to read  
22 the whole thing.

23 MR. MENDELOFF: Your Honor, do you have any time you'd  
24 like to have this finished for you?

25 THE COURT: Whatever is appropriate in connection with

287

1 the submission of the motions; so it's fine if you take some  
2 time, and the end of the day is fine as far as I'm concerned,  
3 unless it is necessary for some witness.

4 MR. MENDELOFF: No, it isn't.

5 MR. TIGAR: No, your Honor.

6 THE COURT: So we're ready for the next witness?

7 MR. TIGAR: Mr. Phillips.

8 THE COURT: Please come forward to be sworn.

9 THE COURTROOM DEPUTY: Please raise your right hand.

10 (David J. Phillips was sworn.)

11 THE COURTROOM DEPUTY: Please state your full name and  
12 spell your last name for the record.

13 THE WITNESS: My name is David J. Phillips,  
14 P-H-I-L-L-I-P-S.

15 DIRECT EXAMINATION

16 BY MR. TIGAR:

17 Q. Mr. Phillips, what do you do for a living?

18 A. I'm the federal defender for the District of Kansas.

19 Q. So your responsibility extends over the whole venue called  
20 Kansas; is that correct?

21 A. That's correct.

22 Q. How long have you been the federal defender for Kansas?

23 A. I've been head the office since February 1 of '94. I  
24 became an assistant for the office in 1973.

25 Q. Where did you go to law school?

288

1 A. Kansas University.

2 Q. You grew up in Kansas?

3 A. I did. Weskan, Kansas.

4 Q. And Colby?

5 A. That's correct.

6 Q. Before becoming a federal public defender in 1973, what  
7 jobs did you have after leaving law school?

8 A. After law school, I became a law clerk for Wesley Brown,  
9 who is the Chief Judge -- federal judge in Wichita, Kansas; and  
10 then I became an assistant or deputy defender for a new pilot  
11 program in the state public defender program. They had just  
12 started a program.

13 Q. I want to ask you some questions about April 21, 1995. On  
14 that day, when did you first hear the name Terry Nichols?

15 A. Well, I'm not certain exactly when I had heard that name

16 that day; but his name was, as I recall, being used on the  
17 television reports in connection with the bombing in Oklahoma.  
18 They were, as I recall, trying to locate him.

19 Q. And what was the gist of that television coverage so far as  
20 you remember it?

21 A. Well, when I actually recall being focused on Mr. Nichols  
22 was when I believe I heard from the news that he had -- he was  
23 in custody, and I believe he had gone into the Herington Police  
24 Department.

25 Q. Did you call someone for advice and counsel about what was

289

1 the proper step to take?

2 A. I called, as I recall, an attorney by the name of Kevin  
3 McNally. He and another attorney have extensive prior practice  
4 in death penalty cases, and they had some arrangement with the  
5 administrative office for the United States courts as kind of a  
6 liaison with the federal defenders if we ever came close to  
7 getting a death case -- a possible death case that we should  
8 contact them and just kind of if they had any suggestions, we'd  
9 talk about the case.

10 So I called Kevin and indicated that I believe that  
11 Mr. Nichols was in custody, and he concurred that that was his  
12 understanding, that he was possibly being detained or at least  
13 was -- had gone into the police department and that because it  
14 had been announced once again I believe in the media that this  
15 was a possible death case and that they were going to seek the  
16 death penalty that it would be appropriate for me to attempt to  
17 find out where he was and offer my services as counsel.

18 Q. After you talked to Mr. McNally, what's the next thing you  
19 did on this issue of potential counsel for Mr. Nichols?

20 A. Mr. -- he had advised me that it was his understanding that  
21 Mr. Nichols possibly had been taken to Abilene, which is a  
22 little bigger city than Herington, obviously. And so I called  
23 the Dickinson County Jail, which is in Abilene, Kansas, and I  
24 talked to an Officer Ginder, who advised me that Mr. Nichols  
25 was not there. And I left my name and told him that I was the

290

1 federal defender for Kansas and if Mr. Nichols was eventually  
2 taken there that I was available to represent him.

3 Q. Now, about what time did you call the Dickinson County  
4 Jail?

5 A. That was approximately 8:15.

6 Q. Did you take notes of what you were doing that evening?

7 A. I did.

8 Q. And have you had an opportunity before coming here today to  
9 look at your notes?

10 A. Yes, I have.

11 Q. After the Dickinson County Jail people had said he wasn't  
12 there, what's the next thing that happened with respect to this  
13 Nichols representation?

14 A. According to my notes, I next received a phone call from an  
15 attorney by the name of Jay Greno. At that time, Mr. Greno was  
16 the head of the public defender's office in Wichita, Kansas,  
17 for Sedgwick County. Mr. Greno indicated that it was his  
18 understanding that Mr. Nichols might still be at the Herington  
19 Police Department and that he had heard that possibly a search  
20 warrant had been issued for his home and vehicle.

21 Q. Now, do you know how Mr. -- Mr. Greno's name is spelled  
22 G-R-E-N-O; is that correct?

23 A. I believe that's correct.

24 Q. Do you know how Mr. Greno came to call you?

25 A. Mr. Greno had indicated that he had talked with the

291

1 attorney who was the federal defender for Hawaii, who was from  
2 Wichita and they were friends. That individual and another  
3 individual -- another attorney in Kansas had represented a lady  
4 by the name of Lisa Dunn in a murder case that happened out in  
5 western Kansas from close to where I'm from. In their  
6 discussions, they were talking about where Mr. Nichols might be  
7 and this kind of thing; and I'm not sure where Mr. Greno got  
8 his information that he might still be at Dickinson, but it may  
9 have been from those individuals, but I'm not sure.

10 Q. Did there come a time when you called the Herington police  
11 station?

12 A. Yes. Approximately 8:36 I called the police station.

13 Q. To whom did you speak?

14 A. I spoke to a lady by the name of Leslie. She did not want  
15 to give her last name because her name was in the phone book  
16 and she didn't want that to be publicized.

17 Q. And what conversation did you have with Leslie at the  
18 Herington police station?

19 A. Well, I asked her if I could speak to the police chief.  
20 She put me on hold briefly and then came back and said that the  
21 police chief was not available to speak with me.

22 Q. Had you identified yourself?

23 A. I had identified myself; and I told her I was calling in  
24 reference to Terry Nichols and that I was the federal defender  
25 for Kansas and that I -- well, first I wanted to talk to the

292

1 police chief and I was going to explain things to him; but when  
2 he was not available, I again told her who I was, gave her my  
3 phone number and told her that I was available to, once again,  
4 represent Mr. Nichols.

5 Q. After you got off the phone with Leslie at the Herington  
6 police station, did you call someone connected with the United  
7 States Government?

8 A. Approximately 9:10, I called Jim Flory, F-L-O-R-Y, who was  
9 an assistant U.S. attorney in Kansas. He had been in the  
10 Kansas City office for, oh, a couple years and then he had  
11 recently gone to Topeka to head the U.S. attorney's office in  
12 Topeka; and I thought he might have some knowledge of what was  
13 going on with Mr. Nichols.

14 Q. Now, did you know Jim Flory from before this?

15 A. I knew him in connection with his being an assistant in  
16 Kansas City. We are basically adversaries or I represent the  
17 people that he charged, yes. We had several cases together.

18 Q. And do you know Randal Rathbun?

19 A. I do.

20 Q. And he knows who you are; correct?

21 A. Yes.

22 Q. What did Mr. Flory tell you?

23 A. Well, Mr. Flory said that the last word that he had was  
24 that Mr. Nichols was not being arrested; that they did not  
25 believe that he was John Doe -- the other John Doe that they

1 were looking for, and so I told Mr. Flory then that I was  
2 available and I was hoping that Mr. Nichols would know that I  
3 was available to represent him.

4 Q. Did Mr. Flory tell you that a warrant had been issued for  
5 Mr. Nichols' arrest?

6 A. No.

7 Q. Did Mr. Flory tell you that a security perimeter had been  
8 set up around Mr. Nichols' house?

9 A. No.

10 Q. Would any of that information have been significant to you  
11 in your role as a public defender?

12 A. Well, it -- its significance -- I already thought it was  
13 extremely important that Mr. Nichols get counsel and that would  
14 have just heightened the concern.

15 Q. After you got off the phone with Mr. Flory, did you make  
16 another telephone call?

17 A. Yes. I called back to the Herington Police Department  
18 approximately 9:38 and once again talked to Leslie; and I asked  
19 her if I could talk to the police chief or anybody else in  
20 charge. And she once again put me on hold briefly and then  
21 came back and said there wasn't anybody available to talk to  
22 me.

23 Q. When you called again at 9:30, did you tell Leslie who you  
24 were and what your title was?

25 A. I left that information again, yes.

294

1 Q. When is the next time that you heard anything about the  
2 status of Terry Nichols?

3 A. Approximately 10:00 the next morning, I received a call  
4 from Steve Gradert, who is one of my assistants in Wichita. He  
5 had just received word that Mr. Nichols was being transported  
6 to Wichita and would be there for a hearing approximately 2:00  
7 that afternoon. I immediately changed clothes, hopped in the  
8 car and drove to Wichita.

9 MR. TIGAR: Pass the witness.

10 MR. MENDELOFF: Thank you, Judge.

11 THE COURT: Yes. You may proceed.

12 CROSS-EXAMINATION

13 BY MR. MENDELOFF:

14 Q. Good morning, Mr. Phillips.

15 A. Good morning.

16 Q. Just a couple of clarification -- questions of

17 clarification first. What time did you call Mr. Flory?

18 A. Approximately 9:10, according to my notes.

19 Q. Okay. Now, as I understand it, your information as to

20 Mr. Nichols on the afternoon and evening of the 21st was based

21 on things you had seen in the media, television and radio?

22 A. That's the best I can recollect.

23 Q. And whatever you heard was through that -- the prism of

24 that communication system; right?

25 A. Yes.

295

1 Q. Nobody called you and gave you any firsthand knowledge?

2 A. No.

3 Q. And when you talked to Mr. McNally, my understanding is

4 that he, too, was getting his information through the media.

5 Is that right?

6 A. Now, I'm not certain where Mr. McNally was getting his

7 information. As I say, he was connected with the -- the

8 administrative office of the U.S. courts. Earlier that day he

9 had been working on attempting to find counsel for Timothy

10 McVeigh.

11 Q. All right.

12 A. And so I don't know if he had information through those

13 kind of sources or where he got his information.

14 Q. So you don't know where he got his information?

15 A. No.

16 Q. And you spoke with him at what time?

17 A. I don't -- I did not note, but it must have been shortly

18 before I called the Abilene jail.

19 Q. And you called the Abilene jail at what time? By 8:30?

20 A. That was 8:15, I believe.

21 Q. 8:15. And he told you at that time, 8:15 on the evening of

22 the 21st, that search warrants had been issued already. Is

23 that what he told you?

24 A. No. I believe that was Jay Greno that told me that; and

25 that was between my first and second phone calls -- well, no,

296

1 no. After I called the Dickinson County Jail in Abilene, then

2 I talked to Mr. Greno, and Greno is the one who mentioned

3 anything about a search warrant.

4 Q. And what time was that?

5 A. I didn't note the exact time, but it was after 8:15 and

6 between 8:36.

7 Q. So -- and he was telling you that search warrants had been

8 issued for Nichols' home and his vehicle?

9 A. That was his understanding. And I don't know where he got

10 that information.

11 Q. Thank you. That was my next question.

12 Now, sir, when you called in, nobody from the Nichols

13 family had contacted you. Is that right?

14 A. That's correct.

15 Q. And to your knowledge, nobody from the Nichols family had

16 contacted any of the other attorneys that you spoke with that

17 night. Isn't that correct?

18 A. I have no knowledge that they were contacted by the Nichols

19 family.  
20 Q. In fact, you had never spoken to Terry Nichols, had you?  
21 A. No.  
22 Q. And you had no idea whether Terry Nichols wished to have  
23 counsel; isn't that correct?  
24 A. I did not know his situation. I knew that he was either in  
25 custody or at least at the police department. He had gone

297

1 there. I didn't know where he was at that time.  
2 Q. To your knowledge, you did not -- you do not know whether  
3 or not Terry Nichols even wished to have counsel; isn't that  
4 correct?  
5 A. That's correct.  
6 Q. Now, you understand that it is the right of a defendant to  
7 ask for counsel and a person who is being interviewed to ask  
8 for counsel; isn't that correct?  
9 A. That's correct.  
10 Q. And a person who is being interviewed doesn't need to have  
11 counsel if he doesn't wish it; isn't that correct? He can  
12 speak to the police without counsel at his own will; isn't that  
13 right?  
14 A. He can.  
15 Q. When you called the Herington Police Department, Terry  
16 Nichols was not your client, was he?  
17 A. He was not.  
18 Q. Have you ever heard of a case called Moran vs. Burbine?  
19 A. I believe so.  
20 Q. And are you familiar with the holding in that case?  
21 A. I am.  
22 MR. TIGAR: Your Honor, I object.  
23 THE COURT: Yes. What are we seeking, expert

24 opinions?

25 MR. MENDELOFF: No, your Honor. I'll continue. Thank

298

1 you.

2 THE COURT: All right.

3 BY MR. MENDELOFF:

4 Q. Now, when you called the Herington police station that  
5 night, you said you had heard of the situation with Mr. Nichols  
6 as a result of TV coverage; is that right?

7 A. I had heard that he had gone to the Herington Police  
8 Department, yes.

9 Q. And when you called the Herington Police Department, did  
10 you get connected immediately or did you have to call back  
11 several times?

12 A. The line was busy at first, but I called right back and it  
13 was -- I got in.

14 Q. Now, did anybody at the Herington Police Department ever  
15 refuse -- tell you that they were going to refuse to pass your  
16 message along to somebody?

17 A. No.

18 Q. When you first called, you asked to speak to the chief of  
19 police; is that correct?

20 A. Yes.

21 Q. Now, you knew as of that point that this -- the matter you  
22 were calling on was a case of tremendous national significance,  
23 didn't you?

24 A. That's why I was calling.

25 Q. And you knew that there was significant -- your concern for

299

1 defendants doesn't extend to only cases of tremendous national  
2 significance, though; right?

3 A. Of course not.

4 Q. And you knew that Herington was a small town, didn't you?

5 A. Well, I wasn't -- quite honestly, I didn't know exactly  
6 where it was, but I did know it was relatively small.

7 Q. And did you know when you called that it was a very quiet  
8 town that didn't have much attention like this as a general  
9 matter?

10 A. I -- as I say, I wasn't familiar with Herington at all; so

11 I -- I was not thinking those things, no.

12 Q. Now, when you called the first time at the Herington Police  
13 Department, you called at 8:36?

14 A. That's my understanding.

15 Q. Did you know as of the time you called that the events in  
16 the police station had been going on for about five hours? Did  
17 you know that?

18 A. I did not know that.

19 Q. Did you know at the time that you called that agents had  
20 been flowing in and out of the building, large numbers of  
21 people?

22 A. I did not.

23 Q. Did you know as of the time you called, the police  
24 department was fielding about 200 calls an hour?

25 A. Of course not.

300

1 Q. Did you know at the time you called, people had just been  
2 involved evacuating portions of the neighborhood in the area  
3 for fear of a truck bomb?

4 A. No.

5 Q. Did you know who was responsible -- specifically who was  
6 responsible for passing your message along other than giving  
7 this message to Leslie?

8 A. Well, I assumed the person that I talked to on the phone  
9 would be the person that would pass along messages.

10 Q. But you didn't know to whom -- who would receive those  
11 messages, did you?

12 A. Well, I asked her for the police chief and I assumed she  
13 talked to him, and she said he wasn't available.

14 Q. Do you know that as a matter of your own knowledge?

15 A. No.

16 Q. Did you know anything about what was going on inside that  
17 police station that evening?

18 A. No.

19 Q. Did there come a time when you -- I believe you said the  
20 next day you were informed that Mr. Nichols had been arrested  
21 and you were calling in relation to the case; is that right --  
22 on the 22nd? You received a call from Mr. Gradert?

23 A. Yeah, I received a call from Mr. Gradert, and he advised  
24 that he was being transported to Wichita for a hearing later  
25 that afternoon.

301

1 Q. All right. And eventually, you did briefly represent  
2 Mr. Nichols; is that correct?

3 A. Approximately a month or so.

4 Q. Did you ever represent his wife, Marife Nichols?

5 A. No.

6 Q. Did you ever have a conversation with her?

7 A. I did not.

8 MR. MENDELOFF: One moment, please, your Honor.

9 THE COURT: Yes.

10 MR. MENDELOFF: Nothing further, Judge.

11 THE COURT: Any follow-up?

12 MR. TIGAR: No redirect. Thank you, Mr. Phillips.

13 THE COURT: He's excused, I take it.

14 MR. TIGAR: Yes.

15 THE COURT: Mr. Phillips, you may step down.

16 You're excused.

17 THE WITNESS: Thank you, Judge.

18 THE COURT: Next, please.

19 MR. TIGAR: Agent Smith.

20 THE COURTROOM DEPUTY: Please raise your right hand.

21 (Stephen E. Smith was sworn.)

22 THE COURTROOM DEPUTY: Please have a seat. Please

23 state your name for the record and spell your last name.

24 THE WITNESS: Stephen, S-T-E-P-H-E-N, E. Smith,

25 S-M-I-T-H.

302

1 DIRECT EXAMINATION

2 BY MR. TIGAR:

3 Q. Mr. Smith, you are a special agent of the Federal Bureau of

4 Investigation?

5 A. That's correct.

6 Q. How long have you been a special agent?

7 A. Five years approximately.

8 Q. Were you employed by the bureau before that?

9 A. No, sir.

10 Q. What is your education?

11 A. I've got a bachelor of science degree in accounting from

12 Quincy College.

13 Q. And after getting your bachelor of science degree in

14 accounting, what work did you do?  
15 A. I worked for Arthur Andersen & Company, accounting firm in  
16 St. Louis.  
17 Q. For how long?  
18 A. Approximately three years.  
19 Q. And then what did you do?  
20 A. And then I came into the FBI.  
21 Q. When is the first time that you can remember hearing the  
22 name Terry Nichols?  
23 A. April 21.  
24 Q. 1995?  
25 A. 1995.

303

1 Q. About what time?  
2 A. In the morning.  
3 Q. What time?  
4 A. Approximately 10 a.m.  
5 Q. Where were you?  
6 A. I was in Junction City, Kansas, on post at Fort Riley.  
7 Q. Were you at that Junction City command post there?  
8 A. We were in the CID offices at that point.  
9 Q. At 10:00 in the morning, was there communication with Agent  
10 Chornyak in Kansas City?  
11 A. Not by me.  
12 Q. Was there a communication link set up with -- where Agent  
13 Chornyak was in Kansas City?  
14 A. Yes, there was telephones.  
15 Q. What was Agent Chornyak's job as you understood it that  
16 morning?  
17 A. Agent Chornyak is a supervisor in Kansas City, and he was

18 handling any telephone messages or any communications we would  
19 need out in Junction City, Fort Riley area, that was relayed  
20 through Kansas City.  
21 Q. So was he able to get in touch with you if he needed to?  
22 A. Yes, sir.  
23 Q. Did you have a pager that day?  
24 A. Yes.  
25 Q. Did you have a cellular phone that day?

304

1 A. No, I did not.  
2 Q. When you first heard the name Terry Nichols at about 10:00,  
3 what did you hear about Terry Nichols?  
4 A. I had heard that Terry Lynn Nichols was a possible  
5 associate of Timothy McVeigh.  
6 Q. And how did you get that information?  
7 A. I got that information from our Las Vegas division.  
8 Q. Was that from Agent Hawkins?  
9 A. I do not recall.  
10 Q. Was it your understanding that someone in Las Vegas was  
11 interrogating Terry Nichols' son and his former wife?  
12 A. That is correct.  
13 Q. That was your understanding?  
14 A. Yes, sir.  
15 Q. And that was the basis of the information that Terry  
16 Nichols was an associate of Tim McVeigh; is that right?  
17 A. Yes.  
18 Q. Did you at that time or later get information from Michigan  
19 about an association between Terry Nichols and James Nichols?  
20 A. Yes, sir.  
21 Q. When did you get that information?  
22 A. Same day, on the 21st of April, 1995, in the early

23 afternoon, approximately 1 p.m.

24 Q. Did you have information as of 1 p.m. in the afternoon that

25 someone had said that Terry Nichols and James Nichols had some

305

1 contact with explosives?

2 A. I did not have that information at that point.

3 Q. As of 1:00 in the afternoon, did you think there was a

4 chance that Terry Nichols could be involved in the Oklahoma

5 City bombing?

6 A. At that point, I did not know.

7 Q. I didn't ask you that, sir. At 1:00 in the afternoon, did

8 you think there was a chance that Terry Nichols could be

9 involved in the Oklahoma City bombing?

10 A. I did not believe at that point that there was a

11 possibility of that.

12 Q. Did you believe it was something worth investigating?

13 A. His association with Timothy McVeigh, yes.

14 Q. That's what you wanted to investigate; right?

15 A. That's correct.

16 Q. Did you become aware at some time during the day that a

17 warrant was going to be sought for Terry Nichols as a material

18 witness?

19 A. I found that out during the interview of Terry Nichols.

20 Q. That's at 10:21 p.m.

21 A. I heard about it during that last break, yes, sir.

22 Q. Now, my question is: Did you -- when is the first time you

23 heard that day that someone was going to seek a warrant, seek a

24 warrant, for Terry Nichols?

25 A. During that last break at 10:21.

- 1 Q. 10:21 p.m.?
- 2 A. Yes, sir.
- 3 Q. Who is Agent Price?
- 4 A. He's -- Tom Price is a supervisor in Kansas City.
- 5 Q. Is he your supervisor?
- 6 A. No, sir.
- 7 Q. What time did you leave Fort Riley that day?
- 8 A. I left Fort Riley at approximately 1:40 p.m.
- 9 Q. Were you driving?
- 10 A. Yes, sir.
- 11 Q. Who were you with?
- 12 A. By myself.
- 13 Q. What other agents to your knowledge were leaving Fort Riley
- 14 at that time?
- 15 A. To my knowledge, there was no one else leaving Fort Riley.
- 16 Q. What other agents were leaving the Fort Riley/Kansas City
- 17 area at that time?
- 18 A. At that time, there was no other agents.
- 19 Q. Altogether, by 2:00 in the afternoon, do you know how many
- 20 FBI agents were either in or on their way to Herington, Kansas?
- 21 A. I was in Herington, Kansas a little after 2 p.m. At that
- 22 point, there was no one else in Herington, Kansas. On the way,
- 23 I do not know how many agents were on their way to Herington.
- 24 Q. Was a S.W.A.T. team dispatched --
- 25 A. No, sir.

- 1 Q. -- to Herington, Kansas?
- 2 A. Not at that point.
- 3 Q. Was a -- was a S.W.A.T. team dispatched to Herington,

4 Kansas, on April 21?

5 A. Yes, sir.

6 Q. When?

7 A. I do not know when they were dispatched.

8 Q. When did they get there?

9 A. Approximately 10:30 p.m.

10 Q. Is it your testimony that the -- there was no S.W.A.T. team

11 in Herington, Kansas, until 10:30 p.m.?

12 A. I believe that was the time.

13 Q. Do you know of a S.W.A.T. team being dispatched around

14 12:30?

15 A. I do not know that.

16 Q. On your way to Herington, Kansas -- I'm sorry. What time

17 did you leave for Herington?

18 A. I left for Herington at approximately 1:40.

19 Q. Left for Herington at 1:40 from Fort Riley?

20 A. Yes.

21 Q. You had your pager with you; is that right?

22 A. Yes.

23 Q. How was it -- was there some method to keep in

24 communication with either Fort Riley command post or Kansas

25 City?

308

1 A. Yes. I had a bureau radio in the car where I had

2 communications between myself and the command post.

3 Q. In Fort Riley?

4 A. Yes.

5 Q. Was the purpose of that radio to tell you important things

6 that you needed to know to do your job?

7 A. Yes.

8 Q. Who was communicating with you over that radio?  
9 A. I do not recall the agent or agents in Fort Riley who were  
10 communicating with me on that radio.  
11 Q. Would Agent Chornyak have been able to get through to you  
12 through somebody that had access to that radio?  
13 A. Yes, sir.  
14 Q. If someone in Oklahoma -- do you know who Rick Baker is?  
15 A. No, I do not.  
16 Q. All right. If a senior FBI agent in Oklahoma City wanted  
17 to get in touch with you, were there communications facilities  
18 to get in touch with you?  
19 A. Would go through Kansas City and possibly through the  
20 command post at Fort Riley to get to me, yes, sir.  
21 Q. If an FBI legal counsel, Howard Shapiro, wanted to get in  
22 touch with you, would he have been able to do so?  
23 A. The same route, yes, sir.  
24 Q. What was your duty assignment that brought you from  
25 Herington -- from Fort Riley to Herington?

309

1 A. I was tasked to go to Herington to find out about Terry  
2 Nichols.  
3 Q. What were up supposed to find out?  
4 A. Any background information on Terry Nichols from the police  
5 department.  
6 Q. Were you instructed to do -- conduct a surveillance of  
7 Terry Nichols?  
8 A. Not at this point.  
9 Q. Did the time come when you were instructed to conduct a  
10 surveillance of Terry Nichols?  
11 A. Yes, sir.  
12 Q. What time was that?

- 13 A. Approximately 2:20 p.m. on April 21.
- 14 Q. Who gave you that instruction?
- 15 A. Command post in Junction City.
- 16 Q. How many agents were involved in that surveillance?
- 17 A. Myself and I met up -- I met with Jack Foley, another agent
- 18 from Kansas City, at approximately 2:30 p.m.
- 19 Q. What time did you begin the surveillance?
- 20 A. 2:42 p.m.
- 21 Q. How many agents were involved in the surveillance?
- 22 A. At that point, there were three agents involved.
- 23 Q. At 2:42?
- 24 A. Yes.
- 25 Q. Well, how many were involved three minutes later at 2:45?

310

- 1 A. I don't know the exact number, sir.
- 2 Q. Eight? Go ahead. The white notebook is in front of you.
- 3 Please open it to Tab 29.
- 4 A. Eight. That's correct.
- 5 Q. 29 is a surveillance log?
- 6 A. Yes, sir.
- 7 MR. TIGAR: Your Honor, I'm going to be referring to
- 8 it. I don't think it's in evidence. It's a Government's
- 9 exhibit. If they'd like to offer it, we have no objection.
- 10 MR. MACKEY: Your Honor, we do so.
- 11 THE COURT: All right. They accept the offer to offer
- 12 it; so 29 is received.
- 13 MR. TIGAR: Thank you, your Honor.
- 14 BY MR. TIGAR:
- 15 Q. You began the surveillance at 2:42; is that correct?
- 16 A. Yes, sir.

17 Q. Why did you begin the surveillance?  
18 A. We were tasked to do that.  
19 Q. All right. Well, was it explained to you why you were  
20 tasked to do it?  
21 A. It was determined that we wanted to talk with Terry Nichols  
22 because of his association with Tim McVeigh.  
23 Q. When was the determination made that you wanted to talk to  
24 Terry Nichols because of his association with Tim McVeigh?  
25 A. When we were -- we started the surveillance from the get --

311

1 from 2:20 p.m. approximately, from the word from the command  
2 post.  
3 Q. But who first told you that you wanted to talk to Terry  
4 Nichols?  
5 A. At the command post in Junction City, my supervisors  
6 advised me that we would like to talk with anyone who was an  
7 associate of Tim McVeigh.  
8 Q. Sir, who told you that you wanted to talk to Terry Nichols?  
9 A. I do not recall the specific person.  
10 Q. Was it someone in your command post in Fort Riley?  
11 A. Yes, sir.  
12 Q. What time was that?  
13 A. Approximately 1:30 p.m.  
14 Q. Were you one of the people that was told to go try to talk  
15 to Terry Nichols?  
16 A. I was the person told to go and obtain background  
17 information on Terry Nichols.  
18 Q. Sir, I didn't ask you that. Were you one of the people  
19 that was told to go talk to Terry Nichols?  
20 A. Yes.  
21 Q. And how did you intend to carry out the order to go talk to

22 Terry Nichols?

23 A. When we would observe Terry Nichols, we would --

24 Q. No, I'm not talking we, sir. How did you intend to carry

25 out the order to go talk to Terry Nichols?

312

1 A. When the opportunity would present itself.

2 Q. Did you intend to walk up to him in the street and

3 introduce yourselves as an FBI agent and say I want to talk to

4 you?

5 A. If that's -- yes, if that's -- if that opportunity

6 presented itself.

7 Q. You were looking for that opportunity; right?

8 A. Yes, sir.

9 Q. And you began looking for that opportunity at 2:20 in the

10 afternoon, didn't you, sir?

11 A. Yes, sir.

12 Q. Did you begin looking for that opportunity earlier than

13 2:20 in the afternoon?

14 A. No, sir.

15 Q. Now, at 2:42, you began the surveillance; correct?

16 A. That's correct.

17 Q. And you observed the blue pickup truck as it drove from

18 Mr. Nichols' house to the Surplus City and then to the police

19 station; correct?

20 A. I did not observe the pickup truck leave Surplus City and

21 go to the police department.

22 Q. You observed it go to Surplus City; is that right?

23 A. Yes, sir.

24 Q. All right. When the pickup truck went to Surplus City, did

25 anybody get out?

- 1 A. Yes, sir.
- 2 Q. Who got out?
- 3 A. Terry Nichols.
- 4 Q. He then got back in the pickup truck; correct?
- 5 A. I did not see him get back in the pickup truck.
- 6 Q. All right. What did you do?
- 7 A. Myself and Jack Foley drove a little further south on
- 8 Highway 56, turned around, came back to Surplus City; and when
- 9 we got back, the truck was gone.
- 10 Q. And then what did you do?
- 11 A. We stayed there at Surplus City and found out that the
- 12 truck had gone to the Herington Police Department.
- 13 Q. Did you go inside Surplus City?
- 14 A. Yes.
- 15 Q. Did you conduct a search in Surplus City?
- 16 A. Yes.
- 17 Q. What were you looking for?
- 18 A. Terry Nichols.
- 19 Q. Okay. What else were you looking for?
- 20 A. Nothing else.
- 21 Q. Did you look to see if something might have been hidden
- 22 there or left there?
- 23 A. No, sir.
- 24 Q. When did you first become aware that Mr. Nichols had gone
- 25 to the police station?

- 1 A. At approximately 2:50 p.m.
- 2 Q. Now, you had gone to the police station earlier in the day,

3 hadn't you?

4 A. Yes, sir.

5 Q. And to whom did you speak?

6 A. I spoke to Barry Thacker and Dale Kuhn.

7 Q. Were you looking for an address for Mr. Nichols?

8 A. Yes, sir.

9 Q. Did you give them information about why you were looking  
10 for an address?

11 A. Yes. I told both Mr. Thacker and Mr. Kuhn that I was  
12 looking for information on Terry Nichols because he was an  
13 associate of Timothy McVeigh.

14 Q. Did you tell them who Timothy McVeigh was or what he was  
15 suspected of?

16 A. They told me and I -- and I affirmed with them that Timothy  
17 McVeigh was involved with the Oklahoma City bombing.

18 Q. So you -- now, I want to be clear about this. You told the  
19 two people, the deputy chief and the chief, that this was about  
20 an associate of Timothy McVeigh and the Oklahoma City bombing;  
21 correct?

22 A. Yes, sir.

23 Q. They gave you an address; correct?

24 A. Yes, sir.

25 Q. Did you give them any instructions about what to do if they

315

1 should encounter Terry Nichols?

2 A. No, I did not.

3 Q. Did they tell you what they intended to do when they  
4 encountered Terry Nichols?

5 A. They did not tell me.

6 Q. Did there come a time when you had a telephone conversation

7 with Chief Kuhn?

8 A. No, sir.

9 Q. You never talked to Chief Kuhn from outside the Herington  
10 police station to inside?

11 A. No, sir.

12 Q. Do you know whether some other agent called into the  
13 Herington police station to find out what was going on?

14 A. Yes. That would be supervisor Bill Chornyak.

15 Q. Chornyak called?

16 A. Yes, sir.

17 Q. Did you ever have a conversation on the telephone with  
18 Chief Kuhn about a potential hostage situation?

19 A. No, I did not.

20 Q. What time did you get to the police station?

21 A. Approximately 3:00 on the 21st.

22 Q. Now, your surveillance log says 3:10. Did you get there a  
23 little earlier?

24 A. I was in the parking lot of the police station at 3.

25 Q. Why did you wait for 10 minutes in the parking lot?

316

1 A. We wanted to verify that Terry Nichols was in there and  
2 that there were no problems.

3 Q. Well, what verification -- what kinds of problems were you  
4 concerned about?

5 A. That there was a potential for a hostage situation.

6 Q. Well, how were you clarifying whether or not there was a  
7 hostage situation?

8 A. That's when Mr. Chornyak called Mr. Kuhn and asked him that  
9 question.

10 Q. Who determine that there might be a hostage situation?

11 A. I do not know who determined that, sir.

12 Q. Did you believe there might be a hostage situation?  
13 A. I thought it was a possibility.  
14 Q. And you thought it was a possibility that Mr. Nichols and  
15 his wife and baby were holding hostages in there. Is that what  
16 you thought?  
17 A. Possible.  
18 Q. Well, after you waited your 10 minutes to determine that  
19 wasn't happening, you went into the police station; correct?  
20 A. That's correct.  
21 Q. You identified yourself as an FBI agent; correct?  
22 A. Yes, sir.  
23 Q. Now, was Agent Price with you?  
24 A. Yes, sir.  
25 Q. Did Agent Price ask Mr. Nichols some questions?

317

1 A. No, he did not.  
2 Q. Did -- at any time, so far as you observed, did Agent Price  
3 have a conversation with Mr. Nichols?  
4 A. Yes, he did.  
5 Q. All right. When was that?  
6 A. Approximately 3:12 p.m.  
7 Q. What was that conversation?  
8 A. Tom Price introduced himself to Terry Nichols and told him  
9 that he was an FBI agent.  
10 Q. Did Mr. Nichols say anything?  
11 A. No, he did not.  
12 Q. Did Mr. Nichols say, Why is my name on television and  
13 radio, to Agent Price?  
14 A. He mentioned that. Terry Nichols mentioned that to Tom  
15 Price and myself and Jack Foley. He wanted to know why his

16 name was in the --

17 Q. So he did say that to Agent Price?

18 A. Yes, sir.

19 Q. And to you and Jack Foley?

20 A. Yes, sir.

21 Q. Now, did any of you respond when Mr. Nichols asked, Why is  
22 my name on radio and television?

23 A. We advised -- we told Terry Nichols that we did not know  
24 but we'd like to talk to him.

25 Q. But you did know, didn't you?

318

1 A. Pardon me?

2 Q. You knew why Mr. Nichols' name was on radio and television,  
3 didn't you, sir?

4 A. At that point, no.

5 Q. Sir, you knew that he had been identified as an associate  
6 of Tim McVeigh, didn't you?

7 A. Yes, sir.

8 Q. You knew that the media interest in the case was intense,  
9 didn't you?

10 A. Yes, sir.

11 Q. You knew that the media was catching up on leads it --  
12 whatever leads were being developed as best they could;  
13 correct?

14 A. I imagine.

15 Q. I'm not asking for your imagination, sir. You knew that  
16 the media was following up; correct?

17 A. Yes, sir.

18 Q. Had you seen media people in Junction City?

19 A. No, I had not.

20 Q. Did you see media people anywhere during the several days

21 before that, from the 19th through 21st, when you were going  
22 about your business?

23 A. No, I did not.

24 Q. Did you have a pretty good idea why Terry Nichols' name  
25 would have been on radio and television?

319

1 A. That he was an associate of Timothy McVeigh.

2 Q. Sure. And so when you told Mr. Nichols that you didn't  
3 know, you lied to him, didn't you?

4 A. No, I did not.

5 Q. Were you economical with the truth?

6 A. No, I was not.

7 Q. Did you share with him the feeling that you had, the reason  
8 that you thought his name might have been on radio and  
9 television?

10 A. Yes, I told him I would like to talk to him because he was  
11 an associate of Timothy McVeigh.

12 Q. Did you tell Mr. Nichols that you thought he was an  
13 associate of Timothy McVeigh?

14 A. I believe that.

15 Q. I'm sorry. Did you tell Mr. Nichols at 3:12 p.m.,  
16 Mr. Nichols, I want to talk to you because I believe you are an  
17 associate of Timothy McVeigh? Did you tell him that?

18 A. Yes, sir.

19 Q. And who was listening when you told him that?

20 A. Jack Foley and Tom Price.

21 Q. Did -- did what you just told the Court that you told  
22 Mr. Nichols manage to find its way into your notes, sir?

23 A. I don't believe they're in the notes.

24 Q. Did it manage to find its way into any FBI 302, sir?

25 A. I do not know.

320

1 Q. After you were in the police station, other agents were  
2 conducting other activities; correct?

3 A. That's correct.

4 Q. Well, I want you to look here at No. 29, at Exhibit 29, the  
5 second page. Agents Maxwell and Barger. Do you see that?

6 A. Yes, sir.

7 Q. Do you know Agents Maxwell and Barger?

8 A. Yes, sir.

9 Q. All right. Now, what does it mean, secure the premises?

10 A. The only thing that they performed was to make sure that no  
11 one was coming or going from the premises.

12 Q. All right. It said also security is established around the  
13 truck. What does it mean, security is established around the  
14 truck?

15 A. The same situation where we would not want anyone to go  
16 into the truck.

17 Q. Then at 4:20 p.m., the house at 109 2nd Street is  
18 surrounded by police security tape; is that right?

19 A. Yes, sir.

20 Q. Did you ever see that security tape?

21 A. On April 22, yes, sir.

22 Q. And what did it say?

23 A. I do not recall what it said.

24 Q. Did it say, Police Line, Do Not Cross?

25 A. It's possible.

321

1 Q. At 3:20 p.m., sir, was Terry Nichols free to leave the

2 Herington police station, get in his pickup truck, drive home,  
3 go in his front door and sit on his sofa?

4 A. At 3:20 p.m., Terry Nichols was free to go, yes, sir.

5 Q. No, sir. At 3:20 p.m., was Terry Nichols free to leave the  
6 Herington police station, get in his pickup truck with his wife  
7 and child, drive home to his house, open his door, go in his  
8 living room and sit on his sofa?

9 A. Yes.

10 Q. You don't think Agents Maxwell and Barger would have had  
11 anything to say about that?

12 MR. MACKEY: Objection.

13 THE COURT: Sustained.

14 BY MR. TIGAR:

15 Q. You began to -- you searched Mr. Nichols; is that correct?

16 A. Jack Foley searched Mr. Nichols.

17 Q. And someone searched Mrs. Nichols?

18 A. Yes, sir.

19 Q. You began your interrogation of Mr. Nichols?

20 A. Yes, sir.

21 Q. What time did you begin that?

22 A. Approximately 3:20 p.m.

23 Q. Who was -- where did you begin the interrogation?

24 A. We began the interview in the basement of the Herington  
25 Department of Public Safety.

1 Q. That was in a large open room down there in the basement?

2 A. Yes, sir.

3 Q. And who were the agents interrogating?

4 A. Myself and Jack Foley.

5 Q. Did -- did Mr. Nichols tell you he was frightened?

6 A. No, sir.

7 Q. Did he appear frightened?

8 A. No, sir.

9 Q. Did he say he didn't want another Waco?

10 A. Yes, sir.

11 Q. When did he say that?

12 A. Shortly after the start of the interview.

13 Q. Did you ask him what he meant by that?

14 A. No.

15 Q. Did you understand what he meant by that?

16 A. Yes.

17 Q. What did you think he meant?

18 MR. MACKEY: Objection.

19 THE COURT: Overruled.

20 THE WITNESS: I believed he meant he did not want a

21 confrontation with law enforcement.

22 BY MR. TIGAR:

23 Q. Did you believe he didn't want any innocent bloodshed?

24 MR. MACKEY: Objection.

25 THE WITNESS: No.

323

1 THE COURT: It's already answered.

2 MR. MACKEY: Thank you.

3 THE COURT: I'll permit the answer.

4 BY MR. TIGAR:

5 Q. Now, you and Agent Foley -- were you still wearing your

6 pager at this time?

7 A. Yes.

8 Q. Was Agent Foley wearing a pager?

9 A. I do not know.

10 Q. During the interview, did other agents come in and out and

11 bring you messages?  
12 A. To bring me messages?  
13 Q. Yes.  
14 A. No, sir.  
15 Q. Did Police Chief Kuhn ever come down to bring you a message  
16 during all the time you were there?  
17 A. Mr. Kuhn came down to -- to turn down the -- or turn down  
18 the noise system. It was a little noisy in there.  
19 Q. So from what you observed, if Chief Kuhn wanted to come in,  
20 he could come in; right?  
21 A. He did on one occasion, yes, sir.  
22 Q. All right. Now, had you been aware on the 21st that  
23 Mr. McVeigh was going to be arrested?  
24 A. I'm sorry. Could you repeat that question.  
25 Q. Yes. Did you become aware on the 21st that Mr. McVeigh was

324

1 going to be arrested?  
2 A. Yes, sir.  
3 Q. When did you become aware that Mr. McVeigh was going to be  
4 arrested?  
5 A. I do not recall the time.  
6 Q. Was it before 10:00 in the evening?  
7 A. Yes, sir.  
8 Q. When was that? When was it? Do you have any better idea  
9 than that?  
10 A. No, sir.  
11 MR. MACKEY: Objection. Asked and answered.  
12 THE COURT: Overruled.  
13 BY MR. TIGAR:  
14 Q. Was it before you started your interview with Mr. Nichols?

15 A. Yes.

16 Q. Who told you that Mr. McVeigh was going to be arrested?

17 A. I do not recall.

18 Q. Where were you when you heard that Mr. McVeigh was going to

19 be arrested?

20 A. The command post in Junction City.

21 Q. Now, you kept handwritten notes -- is that right -- of your

22 meeting with Mr. Nichols?

23 A. Yes, sir.

24 Q. Would you please turn to Tab 72 -- yes, Government

25 binder -- in the white binder, Government's 72.

325

1 Is that a typewritten version of your handwritten

2 notes?

3 A. Yes, sir.

4 MR. TIGAR: Your Honor, may I have a moment to confer

5 with counsel?

6 THE COURT: Yes.

7 MR. TIGAR: Your Honor, these handwritten notes are

8 the notes made and then later Agent Smith --

9 BY MR. TIGAR:

10 Q. Agent Smith, you later did a 302; is that correct?

11 A. Yes.

12 MR. TIGAR: The 302, your Honor, is sealed; and the

13 Court will recall the controversy about it. I have spoken to

14 co-counsel and Mr. Nichols. We have no objection to this

15 exhibit now being received in evidence as a part of the public

16 record in the case.

17 MR. MACKEY: Your Honor, nor do we. One

18 clarification. Exhibit 72 is a typewritten version of original

19 handwritten notes.

20 MR. TIGAR: I'm sorry.  
21 THE COURT: A typewritten version of the notes?  
22 MR. TIGAR: Yes.  
23 THE COURT: He's correcting your statement. I think  
24 that we should give counsel for Mr. McVeigh an opportunity on  
25 this.

326

1 MR. JONES: Thank you, your Honor. I want to be sure  
2 I understood. Which is the exhibit you're offering? 72 or the  
3 302?  
4 MR. TIGAR: I'm offering Government's Exhibit 72,  
5 which is the typed version of the handwritten notes. We've had  
6 a chance to review those overnight, your Honor, and make our  
7 determination.  
8 MR. JONES: If I might have a moment.  
9 THE COURT: Yes.  
10 MR. JONES: We object. Do you want me to address the  
11 objection from here or from the podium?  
12 THE COURT: Why don't you go to the podium, to be sure  
13 we have the record.  
14 MR. JONES: The basis for our objection is that the  
15 introduction of this document is extremely prejudicial unfairly  
16 to the defendant Mr. McVeigh. The Court can observe that there  
17 are probably 100 newspaper reporters either outside or inside  
18 including television and radio. This will become a public  
19 document and available to them. Portions of it will be widely  
20 disseminated without the entire document. Although this is not  
21 the 302, I have -- I have reviewed the 302 and Mr. Nichols  
22 mentions Mr. McVeigh's name over 60 times in that document.  
23 Now, at the appropriate moment, we will ask for

24 severance from Mr. Nichols under Bruton and other decisions.

25 We opposed initially, if the Court will recall, the seal of

327

1 these documents because their release into the public then  
2 would have been further in distance from the date of the  
3 prospective trial date than the release today.

4 I don't see any way or explanation or reason, if the  
5 Court please, why it is necessary to introduce this document as  
6 a public record. I don't believe that Mr. Tigar wishes to  
7 cross-examine or direct examine this witness on what was said  
8 that Mr. Nichols reported was about Mr. McVeigh; and so  
9 therefore, for the narrow purpose of this hearing, I do not  
10 believe that this document is relevant or necessary and even if  
11 it is to introduce it without our being able to cross-examine  
12 the declarant, Mr. Nichols -- and we'll never have that right  
13 unless he takes the stand at some point -- then we are the ones  
14 that are going to be harpooned by it. And for that reason, we  
15 object.

16 THE COURT: Mr. Tigar, will you speak to the purpose  
17 of your offer?

18 MR. TIGAR: Yes, your Honor. Having heard Mr. Jones'  
19 remarks, I can see the point he's making. And it's true that  
20 there are items in here that he refers to that are prejudicial  
21 in that way.

22 My interrogation or my -- I guess I shouldn't call it  
23 interrogation -- my interview with Agent Smith is not going to  
24 focus on the matters to which Mr. Jones objects. Perhaps the  
25 best way to proceed would be to let me examine the witness with

328

1 respect to the document and then at some appropriate point  
2 after a recess, we could present a redacted version to be made  
3 part of the public record, because I do not intend to get into  
4 any of the matters that -- to which Mr. Jones refers and as to  
5 which although I -- I don't know if I have the right to say it,  
6 it seems to me his point is well -- is well taken.

7 THE COURT: Well, we'll proceed as you've just  
8 suggested; and you may use those portions of the exhibit  
9 necessary to your examination of the witness subject to whether  
10 there is an objection at some point with respect to that  
11 questioning by -- and I'll permit counsel for Mr. McVeigh to  
12 make such an objection.

13 We have here a situation in which portions of this  
14 exhibit relate to, of course, what's sought to be suppressed,  
15 but you're not raising that issue, and that's Mr. Nichols'  
16 issue; but it also relates to the Government's motion in limine  
17 with respect to admissibility of these statements to  
18 Mr. McVeigh in either a joint or separate trial of Mr. McVeigh.  
19 And I think that we must preserve that objection, which hasn't  
20 been heard, that motion in limine. So I do not intend to make  
21 those portions that would be subject to not being admissible  
22 against Mr. McVeigh, you know -- I don't want to put them into  
23 the record here.

24 MR. TIGAR: I understand that, your Honor; and I must  
25 say that in looking at this, I had not reviewed it, as I

1 suppose I would not be expected to, with the eyes that  
2 Mr. Jones has. So I appreciate it -- your Honor's assistance.

3 THE COURT: That's why Mr. McVeigh and his counsel are  
4 here, so that his interests can be protected.

5 MR. JONES: May I ask a clarification? Your Honor  
6 said something, and I didn't quite catch it. Did you say that  
7 I did have the right to object?

8 THE COURT: Yes.

9 MR. JONES: Thank you.

10 THE COURT: If there is a question here that touches  
11 upon the concern that you've raised in your objection, you may  
12 raise it.

13 MR. JONES: Thank you.

14 THE COURT: So we'll be careful in the use of the  
15 document. You may proceed.

16 BY MR. TIGAR:

17 Q. Agent Smith, at 4:45 p.m., was Mr. Nichols free to leave  
18 the Herington police station, get in his truck with his family,  
19 go home, open his front door and sit on his sofa so far as you  
20 were aware?

21 A. Yes, sir.

22 Q. Now, have you later learned that a warrant was issued?

23 A. Yes, sir.

24 Q. And do you know what time that warrant was issued?

25 A. During a review for this hearing, I learned when the

330

1 warrant was issued.

2 Q. Who did you conduct the review with?

3 A. Larry Mackey.

4 Q. Did Mr. Mackey interview you in preparation for your  
5 testimony?

6 A. Yes, sir.

7 Q. Did he take notes of what you were saying?

8 A. I believe so.

9 Q. Did he show you documents?

10 A. Yes, sir.

11 Q. Did the documents refresh your recollection?

12 A. Yes, sir.

13 Q. Which documents refreshed your recollection?

14 MR. MACKEY: Objection, your Honor, without more  
15 foundation as to what subject matter.

16 THE COURT: Yes. If you'd be more specific, please.

17 BY MR. TIGAR:

18 Q. Did documents he showed you refresh your recollection about  
19 your interrogation of Terry Nichols?

20 A. No, sir.

21 Q. Did documents he showed you refresh your recollection about  
22 your surveillance of Terry Nichols?

23 A. No, sir.

24 Q. What subjects did those documents or things he showed you  
25 to refresh your recollection cover?

331

1 A. You were just asking about the material witness warrant?

2 Q. Is that the only -- the material witness warrant material  
3 is the only thing he showed you to refresh your recollection?

4 A. On that issue, yes, sir.

5 Q. On what issues did he show you things to refresh your  
6 recollection?

7 A. Other issues.

8 THE COURT: I suggest we proceed here with issue by  
9 issue.

10 MR. TIGAR: And then we'll find out, I guess, your  
11 Honor.

12 THE COURT: And then get to things that are relevant  
13 here.

14 BY MR. TIGAR:  
15 Q. Did Mr. Nichols tell you that his brother James was in the  
16 process of being arrested?  
17 A. He believed that, yes, sir.  
18 Q. Did you give him information about that?  
19 A. No, I did not.  
20 Q. Did you know whether his brother James was being arrested?  
21 A. No, I did not.  
22 Q. Did you have any information about whether James Nichols  
23 was being searched?  
24 A. No, I did not.  
25 Q. Did you have any information at all about what the FBI was

332

1 doing in Michigan?  
2 A. No, I did not.  
3 Q. When did you first learn that the FBI in Michigan was  
4 conducting searches?  
5 A. I believe it was the next day, sir.  
6 Q. Did you know when you started the interview that  
7 Mr. McVeigh had given an address in Decker, Michigan?  
8 A. Yes, sir.  
9 Q. Did you know who owned the house located at that address?  
10 A. James Nichols.  
11 Q. You knew that at 3:00 in the afternoon?  
12 A. Yes, sir.  
13 Q. Did you think that James Nichols was an associate of  
14 Mr. McVeigh's?  
15 A. I believe that was a possibility.  
16 Q. Did you tell Mr. Nichols that you knew or believed --  
17 excuse me -- did you tell Mr. Nichols that you believed it was  
18 possible that his brother James was an associate of Timothy

- 19 McVeigh's?
- 20 A. I did not tell Terry Nichols that.
- 21 Q. Did you ask Mr. Nichols for information about Decker,
- 22 Michigan?
- 23 A. Yes, sir.
- 24 Q. Did you ask him that information between 3:12 and 3:26?
- 25 A. Yes, sir.

333

- 1 Q. Did he answer your questions?
- 2 A. Yes, sir.
- 3 Q. Did he ask you what this was all about?
- 4 A. Yes, sir.
- 5 Q. How many times did Mr. Nichols say to you in words or
- 6 substance between 3:12 and 4:45 why is my name being sought or
- 7 what is this all about?
- 8 A. Two or three times, sir.
- 9 Q. And the first time he told you was when you saw him
- 10 upstairs? Is that right?
- 11 A. Yes, sir.
- 12 Q. What was the second time?
- 13 A. When we were downstairs between 3:15 and 3:30.
- 14 Q. And what did you say to him?
- 15 A. I said that I did not know.
- 16 Q. What it was all about?
- 17 A. I told him I did not know why his name was in the news.
- 18 Q. Did he ask you what's this all about?
- 19 A. Yes, sir.
- 20 Q. What did you say?
- 21 A. Told him we were talking to him because we believed he was
- 22 an associate of Timothy McVeigh.

23 Q. All right. Now, when did you first tell him you thought he  
24 was an associate of Timothy McVeigh?  
25 A. Downstairs.

334

1 Q. What time?  
2 A. Roughly 3:20 p.m.  
3 Q. 3:20?  
4 A. Yes, sir.  
5 Q. And is that reflected on your notes?  
6 A. No, sir.  
7 Q. At 3:26, you presented him with a form FD 395; is that  
8 correct?  
9 A. Yes, sir.  
10 Q. And you asked him to read the form out loud?  
11 A. Jack Foley asked him to read the form out loud.  
12 Q. Did he read it out loud?  
13 A. Yes, sir.  
14 Q. He said -- and then what did he say? It said,  
15 "interrogation." You saw that word? He said it was like the  
16 Nazis?  
17 A. That's correct.  
18 Q. He said he didn't like that word; correct?  
19 A. That's correct.  
20 Q. He refused to sign the form; correct?  
21 A. That's correct.  
22 Q. At any time during the evening, did you conclude that Terry  
23 Nichols might be a person who had aided and abetted Timothy  
24 McVeigh?  
25 MR. MACKEY: Your Honor, objection. His personal

335

1 belief about the state of the criminal investigation --

2 THE COURT: Overruled.

3 THE WITNESS: Can you please repeat the question.

4 BY MR. TIGAR:

5 Q. Yes. At any time during the evening, did you conclude that

6 Mr. Nichols might be an aider and abettor of Timothy McVeigh?

7 A. Yes.

8 Q. What time?

9 A. I don't recall a specific time as to when I believed that.

10 Q. Was it before 5:00?

11 A. No, sir.

12 Q. Was it before 6:00?

13 A. No, sir.

14 Q. Was it before 10:21 in the evening?

15 A. Yes, sir.

16 Q. Now, will you please take a look at Tab 31 in your book.

17 That's the advice of rights form; correct?

18 A. That's correct.

19 Q. And you wrote at the bottom, "Nichols acknowledged that he

20 understood his constitutional rights but refused to sign this

21 FD 395 form, S.S."; is that correct?

22 A. That's correct.

23 Q. When did you write that?

24 A. Approximately 3:43 p.m.

25 Q. Did you show that to Mr. Nichols and ask him to initial it?

1 A. The form, yes.

2 Q. No, did you show your handwritten note there and ask

3 Mr. Nichols to at least acknowledge that he understood his

4 rights?

5 A. Yes, I handed him the form.

6 Q. Did you hand him the form after you had made that notation?

7 A. No, I did not.

8 Q. All right. And he wouldn't sign your form; correct?

9 A. No, sir.

10 Q. Now, didn't Mr. Nichols ask you if -- did he see you taking

11 notes?

12 A. Yes, sir.

13 Q. And he asked you if he would be able to get a copy of your

14 notes; right?

15 A. Yes, sir.

16 Q. And what did you tell him?

17 A. I told him he could get a copy of the notes.

18 Q. Did you ever give him a copy?

19 A. I did not give him a copy, no, sir.

20 Q. Well, did you ever give him the notes or the 302 to look

21 over and see if he agreed with what was on there?

22 A. No, sir.

23 Q. Did you have any intention of giving Mr. Nichols your

24 notes?

25 A. At some point.

337

1 Q. Did you, Agent Smith, have any intention of giving

2 Mr. Nichols your notes?

3 A. Myself personally, no.

4 Q. When did you think he'd get them?

5 A. At some point in the future.

6 Q. In discovery?

7 A. Possibly.

8 Q. Well, what point in the future? When you said to him he

9 could get the notes, what message did you intend to give him  
10 about when he was going to get them?  
11 A. I was not giving him any message. I just told him he would  
12 get a copy of the notes.  
13 Q. Well, when you told him that, were you telling him the  
14 truth?  
15 A. Yes, sir.  
16 Q. When did you think that he was going to get these notes you  
17 promised him?  
18 A. At some point in the future.  
19 Q. Sir, at what point in the future did you think he was going  
20 to get the notes you were promising him?  
21 A. Through discovery.  
22 Q. And discovery is a process that takes place in an adversary  
23 proceeding, isn't it, sir?  
24 A. That's correct.  
25 Q. And what is an adversary proceeding?

338

1 A. There is a defendant and the Government.  
2 Q. And people who aren't defendants don't have the right to  
3 get discovery, do they?  
4 A. That's correct.  
5 Q. So at what time during the interview did you tell him that  
6 he was going to get the notes?  
7 A. Roughly 4:15 in the afternoon.  
8 Q. Now, at 4:20 p.m. -- all right -- and did I ask you this?  
9 Do you think -- did you think Mr. Nichols was free to go at  
10 4:20?  
11 A. Yes, sir.  
12 Q. All right. Did you ask Mr. Nichols some questions about

13 fertilizer?  
14 A. Yes, sir.  
15 Q. Mr. Nichols told you a great deal about his life story;  
16 correct?  
17 A. That's correct.  
18 Q. Now, did you talk to Mr. Nichols about fertilizer bombs?  
19 A. Yes, sir.  
20 Q. In fact, sir, Mr. Nichols said that some people say urea  
21 does and some people say it does not; correct?  
22 A. That's correct.  
23 Q. And then he said, "I do not know;" correct?  
24 A. That's correct.  
25 Q. Now, do the words "I do not know" find your way into your

339

1 302 -- find their way into your 302?  
2 MR. MACKEY: Judge, could I have counsel assist me in  
3 finding out what portion of the notes we're referring to?  
4 MR. TIGAR: I'm sorry. I'm looking at page 17 of the  
5 notes -- your Honor, the 302 is evidence.  
6 THE COURT: I understand.  
7 MR. TIGAR: He has a copy of it in front of him and  
8 it's available to him.  
9 BY MR. TIGAR:  
10 Q. Do you have that, Agent?  
11 A. Yes, sir.  
12 THE COURT: You may look at it to make the comparison  
13 requested of you.  
14 THE WITNESS: Yes, that made it in the 302.  
15 BY MR. TIGAR:  
16 Q. What page is that, sir?  
17 A. Page 17.

18 THE COURT: Page 17 of the 302?  
19 THE WITNESS: Yes, sir.  
20 THE COURT: All right.  
21 BY MR. TIGAR:  
22 Q. He said he does not know but he is aware that it's a  
23 granular solid; correct?  
24 A. That's correct.  
25 Q. And in addition to that, he told you that a farmer had

340

1 stopped by one of his shows and told him about ammonium nitrate  
2 and diesel fuel; is that correct?  
3 A. That's correct.  
4 Q. And you put that in the 302; correct?  
5 A. Yes, sir.  
6 Q. And then he says, "I have not made any so I do not know if  
7 it stays granular or becomes liquid"; correct?  
8 A. That's correct.  
9 Q. And he was referring to ammonium nitrate and fuel oil;  
10 correct? Is that right? That's page 17 of your notes and  
11 that's what he said to you; correct?  
12 A. Yes, sir, that's correct.  
13 Q. He said there are ratios for mixtures in books; right?  
14 A. Yes, sir.  
15 Q. He said I would assume electricity could start it; correct?  
16 A. Yes, sir.  
17 Q. How long were you with Mr. Nichols on that evening?  
18 A. Mr. Nichols was being interviewed from approximately  
19 3:15 p.m. until approximately 12:11 a.m., and I had three  
20 breaks in between there.  
21 Q. Now, how long were you with him during the first period of

- 22 time?
- 23 A. I was with him the whole time from 3:15 until the first
- 24 break.
- 25 Q. What time was the first break?

341

- 1 A. 6:10 p.m.
- 2 Q. 6:10 p.m. Did you leave the room at your break?
- 3 A. Yes, sir.
- 4 Q. How long were you out of the room?
- 5 A. Till 7:07 p.m.
- 6 Q. And then you were back in the room from 7:07 till when?
- 7 A. 8:14 p.m.
- 8 Q. And then how long did you leave?
- 9 A. 30 minutes, until 8:44 p.m.
- 10 Q. And were you then in the room from 8:44 until 12:11?
- 11 A. No, sir. I took a break at 10:21 p.m. until approximately
- 12 10:50 p.m.
- 13 Q. Now, when you took your first break, that was at 6:07?
- 14 A. 6:10.
- 15 Q. 6:10. At 6:10 p.m., what did you do on your break?
- 16 A. I reviewed, went over what Mr. Nichols had told us.
- 17 Q. Who did you go over it with? Agent Price?
- 18 A. No, sir.
- 19 Q. Who did you go over it with?
- 20 A. Scott Crabtree.
- 21 Q. He is outside the courtroom?
- 22 A. Yes, sir.
- 23 Q. Anybody else?
- 24 A. Not to my recollection.
- 25 Q. Did you have any communication with any of the command

- 1 posts during that break?
- 2 A. I did not, no, sir.
- 3 Q. Did anyone tell you of anything that had come in from the
- 4 command posts?
- 5 A. I don't specifically recall.
- 6 Q. Did someone tell you that Tim McVeigh had been arrested at
- 7 any time during the evening?
- 8 A. Yes, sir.
- 9 Q. When did they tell you?
- 10 A. During one of those breaks, sir. I don't recall which one.
- 11 Q. Was it your first break, do you think?
- 12 A. I do not know.
- 13 Q. Do you know what time Mr. McVeigh was arrested?
- 14 A. No, I do not.
- 15 Q. Would you take a look, please, at Tab 26. Look at page 2.
- 16 A. Yes, sir.
- 17 Q. Is that the warrant to arrest Terry Nichols?
- 18 A. Page 2?
- 19 Q. The second page of that? Tab 26?
- 20 A. Yes, sir.
- 21 Q. Now, when did you first see that document?
- 22 A. During my review with Larry Mackey.
- 23 Q. Did you see any other arrest warrant? That is the first
- 24 time you had ever seen a warrant for the arrest of Mr. Nichols
- 25 during your review with Mr. Mackey?

- 1 A. Yes, sir.
- 2 Q. Well, how did you become aware that there was an arrest

3 warrant for Mr. Nichols?

4 A. I had heard it was issued during the last break that we

5 took at 10:21 p.m.

6 Q. All right. When you went upstairs at 10:21 p.m. who told

7 you there was a warrant?

8 A. One of my superiors.

9 Q. Which one?

10 A. I do not recall.

11 Q. Well, how many people in the station at that time were your

12 superiors?

13 A. Approximately six.

14 Q. Well, did you hear it face to face?

15 A. Yes, sir.

16 Q. And it wasn't Mr. Price; right?

17 A. Not that I recall.

18 Q. Who else in the station was your superior at that time at

19 10:21?

20 A. Mr. Watson, Mr. Tubbs, Mr. Price, Mr. Bross.

21 Q. Mr. Bross, you say?

22 A. Yes, sir.

23 Q. He had been up at Fort Riley; correct?

24 A. He had been, yes.

25 Q. All right. Go ahead.

344

1 A. I think those are the superiors at the time.

2 Q. You heard it from one of them; right?

3 A. Yes, sir.

4 Q. Did you ever during the evening hear that a lawyer, a

5 public defender had called to speak to Mr. Nichols?

6 A. No, sir.

7 Q. Did you think Mr. Nichols had the right to counsel?

8 MR. MACKEY: Objection.

9 THE COURT: Overruled.

10 THE WITNESS: I did not believe so.

11 BY MR. TIGAR:

12 Q. When you had the conversation where you were told about the

13 warrant, what did that person say to you?

14 A. That a warrant had been issued.

15 Q. Did they describe the warrant, tell you what kind it was?

16 A. Yes. They told me it was a material witness warrant.

17 Q. Do you know what a material witness warrant is?

18 A. Yes, sir.

19 Q. What is it? I'm asking what you knew on April 21, 1995.

20 A. Yes, sir.

21 Q. What was your understanding of what that warrant required?

22 A. It required Mr. Nichols' appearance before the federal

23 grand jury.

24 Q. Had you seen material witness warrants before then?

25 A. No, I had not.

345

1 Q. Did you know -- had you ever handled a material witness

2 situation before?

3 A. No, I had not.

4 Q. All right. Was there someone there who had handled one

5 before?

6 A. I do not know.

7 Q. Did you ask what you should do about this situation?

8 A. I was not executing the warrant.

9 Q. Did you ask what you could -- should do about this

10 situation?

11 A. No, I did not.

12 Q. Did anyone tell you what to do about this situation?  
13 A. They advised me that we had a material witness warrant  
14 issued and no, I did not.  
15 Q. Did you at that time make a decision to no longer tell  
16 Mr. Nichols he was free to leave?  
17 A. Yes, sir.  
18 Q. Did anyone advise you about that issue?  
19 A. No, sir.  
20 Q. Did you discuss with anyone what you should tell  
21 Mr. Nichols about this?  
22 A. No, sir.  
23 Q. Did you consider going back downstairs and saying,  
24 Mr. Nichols, there is a warrant for your arrest?  
25 A. No, sir.

346

1 Q. Why not?  
2 A. We wanted to continue to talk to Terry Nichols.  
3 Q. Your job that day as of 1:00 in the afternoon -- 1:40 in  
4 the afternoon was to talk to Terry Nichols; correct?  
5 A. To obtain background information and, if possible, talk to  
6 Terry Nichols.  
7 Q. Yes. At 1:40 p.m., you received the assignment to talk to  
8 Terry Nichols if possible; right?  
9 A. Yes.  
10 Q. And nobody told you to stop doing it, did they?  
11 A. No, sir.  
12 Q. So you kept on doing it; right?  
13 A. Yes, sir.  
14 Q. All right. Well, when did you decide to stop talking to  
15 Mr. Nichols and tell him that there was a warrant for him?  
16 A. I never told him that there was a warrant for him.

17 Q. All right. Did anyone that night ever tell him there was a  
18 warrant for him?  
19 A. Yes.  
20 Q. Who told him?  
21 A. Dan Jablonski told him.  
22 Q. All right. Did you talk with Mr. Jablonski before he told  
23 him there was a warrant for him?  
24 A. During the evening? Yes.  
25 Q. Did you talk to him about whether he was going to tell him?

347

1 A. No, sir.  
2 Q. Did Mr. Jablonski receive instructions that you know of to  
3 tell Mr. Nichols there was a warrant for him?  
4 A. Yes, sir.  
5 Q. From whom did he receive instructions?  
6 A. I would not know.  
7 Q. What time did Mr. Jablonski say to Mr. Nichols there is a  
8 warrant for you, or words to that effect?  
9 A. Approximately 12:23.  
10 Q. How long had Mr. Jablonski been in that downstairs room  
11 before he told Mr. Nichols that?  
12 A. During the last session, approximately 12 minutes.  
13 Q. Now, did Mr. -- and Mr. Jablonski didn't say anything to  
14 you before he told Mr. Nichols that or that he was going to  
15 tell him that?  
16 A. No, sir.  
17 Q. And you never saw any copy of any material witness warrant  
18 in any form that night; correct?  
19 A. That's correct.  
20 Q. Where was Mr. Nichols taken that night?

21 A. To Dickinson County Jail.  
22 Q. Did you take him there?  
23 A. No, I did not.  
24 Q. Who did?  
25 A. Jack Foley and Dan Jablonski.

348

1 Q. When is the next time that you saw Mr. Nichols?  
2 A. Same day at approximately 1:58 p.m., April 22, '95.  
3 THE COURT: Is this a convenient interrupting point?  
4 MR. TIGAR: Yes, your Honor. I've just received a  
5 note. It would be a convenient point.  
6 THE COURT: All right. I think we'll take our recess  
7 now. We're under a procedure here which I'm sure you  
8 understand, Agent Smith. You're not to talk about your  
9 testimony with anyone during the recess.  
10 THE WITNESS: Yes, sir.  
11 THE COURT: All right. We'll recess 20 minutes.  
12 (Recess at 10:20 a.m.)  
13 (Reconvened at 10:40 a.m.)  
14 THE COURT: Be seated, please.  
15 MR. TIGAR: Thank you, your Honor.  
16 BY MR. TIGAR:  
17 Q. Agent Smith, you knew this was a death penalty case, didn't  
18 you, sir?  
19 A. Yes, sir.  
20 Q. And you heard Attorney General Reno's statement to that  
21 effect?  
22 A. Yes, sir.  
23 Q. And yet you heard that before you went to Herington?  
24 A. Yes, sir.  
25 Q. Now, was that Agent Gillispie on duty down there on the

1 21st?

2 A. Yes, sir.

3 Q. Did you have any conversation with him between 1:00 in the  
4 afternoon and 6:00 in the afternoon?

5 A. Yes, sir.

6 Q. Did that conversation concern the pickup truck?

7 A. No, sir.

8 Q. What did it concern?

9 A. It concerned that Terry Nichols was free to go. We had no  
10 arrest warrant or any -- any documents.

11 Q. Did Mr. Gillispie tell you that -- that we have no arrest  
12 warrant?

13 A. We discussed it. I don't know if he told me that.

14 Q. All right. Now, what time was this discussion with  
15 Mr. Gillispie in which someone said, We don't have an arrest  
16 warrant?

17 A. The discussion was approximately 3:05 p.m., between  
18 Mr. Price, myself, Jack Foley and Mr. Gillispie.

19 Q. Did any of those people tell you that they had been in  
20 touch with Agent Chornyak on the subject of an arrest warrant?

21 A. No, sir.

22 Q. Did you have any other conversation with any of those four  
23 people about an arrest warrant after this conversation at  
24 approximately 3:05?

25 A. No, sir.

1 Q. Specifically not with Agent Price; is that right? No

2 conversation with him about an arrest warrant after 3:05; is  
3 that right?  
4 A. That's correct.  
5 Q. And not with Agent Gillispie? No conversation with him  
6 about an arrest warrant after 3:05?  
7 A. That's correct.  
8 Q. At 4:34 p.m., Mr. Nichols signed a consent to search form;  
9 is that correct?  
10 A. Yes, sir.  
11 Q. Will you turn in the notebook there to tab B1. It's the  
12 black notebook.  
13 MR. TIGAR: May I approach, your Honor?  
14 THE COURT: Well, the clerk can get it for him.  
15 MR. TIGAR: It's one of those two black notebooks.  
16 It's the --  
17 BY MR. TIGAR:  
18 Q. Do you see that, sir?  
19 A. Yes, sir.  
20 Q. Is that the form that was signed at 4:34 p.m.?  
21 A. Yes, sir.  
22 Q. And you noted that time in your notes; correct?  
23 A. That's correct.  
24 Q. It also appears in your 302?  
25 A. That's correct.

351

1 Q. Who wrote the words at the top "109 South 2nd Street,  
2 Herington, Kansas," in sort of scrawly letters?  
3 A. That's my handwriting.  
4 Q. And then who wrote the rest of the form?  
5 A. Dan --  
6 Q. 67449 and the rest of the things before the typed No. 2?

7 A. Dan Jablonski.

8 Q. Now -- and then you see the words "without prejudice, UCC  
9 1-207," yes?

10 A. Yes, sir.

11 Q. Who wrote that in there?

12 A. Terry Nichols.

13 Q. And then did Mr. Nichols sign --

14 A. Yes, sir.

15 Q. -- the form?

16 A. Yes, sir.

17 Q. Now, in connection with his signing the form, did you  
18 discuss the form?

19 A. Jack Foley -- I'm sorry. Dan Jablonski discussed the form.

20 Q. Did Mr. Jablonski say to Mr. Nichols that a warrant was  
21 being sought to arrest him as a material witness and that they  
22 wanted to search?

23 A. No, sir.

24 Q. Did he say to Mr. Nichols that they thought that he --  
25 Mr. Nichols was an associate of Mr. McVeigh's and they wanted

352

1 consent to search?

2 A. Mr. Jablonski did not tell him that.

3 Q. All right. Now, did Mr. Nichols tell you that he wanted  
4 either his wife or himself to be present during a search?

5 A. Yes, sir.

6 Q. To whom did he address that request?

7 A. To myself, Jack Foley, Dan Jablonski, Scott Crabtree.

8 Q. And he said he wanted his wife or himself to be there;  
9 right?

10 A. Yes, sir.

- 11 Q. What did you tell him?
- 12 A. We told him that was possible.
- 13 Q. What did you do with the form after he signed it?
- 14 A. Dan Jablonski took it.
- 15 Q. Where did he take it?
- 16 A. Dan Jablonski left the interview room at approximately 20
- 17 minutes later, at 4:53 p.m., and took the form with him.
- 18 Q. And did you later talk to Agent Jablonski about what --
- 19 what was to be done with the form?
- 20 A. No, I did not.
- 21 Q. What did you intend be done with the form?
- 22 A. It would be used to execute a search warrant.
- 23 Q. It would be used to execute what, sir?
- 24 A. A search warrant.
- 25 Q. A search warrant?

353

- 1 A. I'm sorry. Pardon me. A consent search.
- 2 Q. And did you have in mind when that search would take place?
- 3 A. I believed it would take place that evening.
- 4 Q. That evening while Mr. Nichols was in the police station?
- 5 A. Yes, sir.
- 6 Q. Did you intend that Mr. Nichols be present during the
- 7 search?
- 8 A. Either himself or his wife.
- 9 Q. Now, do you know where Mrs. Nichols was at that time?
- 10 A. Mrs. Nichols was upstairs in the Herington Police
- 11 Department.
- 12 Q. Who was with her?
- 13 A. I believe Gene Thomeczek, another agent from Kansas City.
- 14 Q. Did Mr. Nichols tell you why he wanted to be present or
- 15 have his wife present during the search?

16 A. He did not specify a reason.

17 Q. He did tell you that he hoped that whoever was doing the  
18 search would know the difference between innocent items and  
19 items that you might think were incriminating; correct?

20 A. He told us he would -- that he wanted to make sure that  
21 agents searching would be able to tell the difference between  
22 cleaning solvents and bomb-building materials.

23 Q. And he told you that there was nothing in his house or  
24 truck that could be construed as bomb-making materials, didn't  
25 he?

354

1 A. Yes, sir.

2 Q. And did you understand him then to be telling you why he  
3 wanted to be present or have his wife present at the search?

4 A. He did not specify.

5 Q. Did you understand him to be telling you then why he wanted  
6 to be present or have his wife present at the search?

7 A. No.

8 Q. You didn't understand him to be telling you what function  
9 he would be performing if he were present; is that your  
10 testimony?

11 A. Sir, he wanted to make sure that agents searching would be  
12 able to tell the difference in the cleaning solvents and  
13 bomb-making materials. So yes, that is correct.

14 Q. Now, I want to ask you about the questions you posed to  
15 Mr. Nichols concerning fertilizer.

16 A. Yes, sir.

17 Q. You brought up the subject of fertilizer, didn't you?

18 A. Some -- one agent brought up --

19 Q. Who brought up the subject of fertilizer?

20 A. I do not recall specifically.  
21 Q. You asked leading questions of him, didn't you?  
22 A. No, we did not.  
23 Q. Did you ask him questions such as how does it ignite? Do  
24 you remember asking the question how does a fertilizer device  
25 ignite?

355

1 A. We asked that question.  
2 Q. Did you ask him does it remain granular or solvent?  
3 A. No. That was a statement that Terry Nichols made.  
4 Q. From your notes, it is apparent -- was apparent to you that  
5 he was telling you what he had learned at gun shows in part;  
6 correct?  
7 A. In part, yes, sir.  
8 Q. He was telling you things he learned from books; correct?  
9 A. Yes, sir.  
10 Q. He told you what -- how farmers used ANFO devices; correct?  
11 A. Yes, sir.  
12 Q. Had you had any experience with ammonium nitrate fuel oil  
13 exploding devices before April 21, 1995?  
14 A. No, sir.  
15 Q. Did you know anything about dynamite?  
16 A. Limited knowledge.  
17 Q. Did you know anything about blasting caps?  
18 A. No, sir.  
19 Q. Did you know what ammonium nitrate smells like?  
20 A. Yes, sir.  
21 Q. What does it smell like?  
22 A. It has a putrid smell.  
23 Q. A putrid smell? Can you compare it to something else,  
24 putrid, so that we both know what we're talking about?

25 A. It's a -- it's a smell that's not pleasing.

356

1 Q. Like a -- what, like manure?

2 A. No, sir.

3 Q. Or like -- can you think of something else that smells like

4 it?

5 A. Other chemicals, sir.

6 Q. What do you clean -- do you use ammonia to clean your

7 windows at your house? Use ammonia?

8 A. Yes, sir.

9 Q. It doesn't smell like ammonia, does it?

10 A. Partially, yes, sir.

11 Q. Smells a little bit like it?

12 A. Yes, sir.

13 Q. Now, let's move on to the conversation on the 22nd of

14 April. By that time, you knew that Mr. Nichols was in custody

15 under a material witness warrant; right?

16 A. That's correct.

17 Q. And what did you -- but you hadn't seen the warrant yet;

18 correct?

19 A. No, sir.

20 Q. Did someone with you have a copy of the warrant?

21 A. Not with me, no, sir.

22 Q. What did you understand was going to happen to Mr. Nichols

23 when he got to court in Wichita?

24 A. He was going to have his initial appearance before the

25 judge.

357

1 Q. And what was going to happen at that initial appearance so  
2 far as you were aware?

3 A. Terry Nichols would be advised what he -- that he was a  
4 material witness. That was the warrant that was executed.  
5 That he would be -- have retained counsel -- counsel would be  
6 appointed for him.

7 Q. I'm sorry. Counsel would be appointed for him?

8 A. Yes.

9 Q. And when you got in the car with him, were you worried  
10 about booby traps?

11 A. Yes, sir.

12 Q. You knew that some agents were going to search the house;  
13 correct?

14 A. Yes, sir.

15 Q. And you were worried that if agents went in the house, they  
16 might get blown up; right?

17 A. That was a possibility, yes, sir.

18 Q. Well, were you worried about that?

19 A. Yes, sir.

20 Q. And you brought that to the attention of Mr. Nichols, you  
21 were worried about booby traps; correct?

22 A. After Mr. Nichols mentioned --

23 Q. Mentioned what?

24 A. Mr. Nichols asked Scott Crabtree and myself if agents had  
25 searched his home. We advised him that we had not searched the

1 home. And then we asked him about any booby traps or other  
2 devices in his home that we should be worried about.

3 Q. So Mr. Nichols as -- he got in the car; correct?

4 A. Yes, sir.

5 Q. About what time was that?

6 A. Approximately 2 p.m.

7 Q. All right. And you told -- Mr. Nichols said, Has anyone  
8 searched my home; is that right?

9 A. Not initially, no, sir.

10 Q. What happened first? What was the first thing that was  
11 said by or to Mr. Nichols when you got in the car?

12 A. Scott Crabtree told Terry Nichols what the proceedings at  
13 federal court down in Wichita -- what was going to take place.

14 Q. All right. What did he say to him?

15 A. Told him that there would be an initial appearance, that he  
16 would be -- that counsel would be appointed for him and other  
17 proceedings would be scheduled.

18 Q. All right. And did someone make a note that this advice  
19 was given, any handwritten notes? Are there handwritten notes  
20 that reflect that advice was given?

21 A. That that advice was given?

22 Q. Yes. By Agent Crabtree?

23 A. It's not in notes.

24 Q. It's not in your notes, is it?

25 A. No, sir. I was driving.

359

1 Q. All right. Is it in his notes?

2 A. No.

3 Q. Did you make notes of your conversation with Mr. Nichols in  
4 that car?

5 A. I could not. I was driving.

6 Q. Did you ever make notes of that conversation?

7 A. In the --

8 Q. Are there notes of your conversation?

9 A. In the car, no, sir.

10 Q. All right.

11 A. Of mine?

12 Q. Yes, of yours.

13 A. No.

14 Q. Mr. Nichols was then -- asked the question, Has anybody

15 searched my house; right?

16 A. Yes, sir.

17 Q. And did you respond to him?

18 A. No.

19 Q. Agent Crabtree responded?

20 A. Yes, sir.

21 Q. And he wanted to know about booby traps; right?

22 A. Yes, sir.

23 Q. All right. Mr. Nichols said there was nothing of that

24 nature; right?

25 A. Booby traps, no. There was some intrusion alarms that

360

1 Mr. Nichols mentioned to us.

2 Q. And intrusion alarms that emit a signal if somebody goes

3 in?

4 A. Correct.

5 Q. And he told you they weren't operative; right?

6 A. That's correct.

7 Q. Now, then did Agent Crabtree continue to question

8 Mr. Nichols?

9 A. No, sir.

10 Q. Did you continue to question Mr. Nichols?

11 A. We would not question Mr. Nichols until he would mention

12 something, but the questioning did continue.

13 Q. And the questioning did continue; is that right?

14 A. Yes.

15 Q. And did it continue pretty well all the way to Wichita?  
16 A. We talked on the way to Wichita. I do not know when the  
17 questioning ended.  
18 Q. Now, after that initial appearance in Wichita, when is the  
19 next time you saw Mr. Nichols?  
20 A. On the 26th of April, 1995.  
21 Q. Now on the 26th of April, did you have a conversation with  
22 Mr. Randal Rathbun?  
23 A. Yes, sir.  
24 Q. Who's Randal Rathbun?  
25 A. Mr. Rathbun was the United States Attorney for the District

361

1 of Kansas.  
2 Q. Did you see Mr. Rathbun on April 21, 1995?  
3 A. Yes, sir.  
4 Q. In the Herington police station?  
5 A. Yes, sir.  
6 Q. Did you ask for his advice about anything?  
7 A. No, sir.  
8 Q. Did you have a conversation with him?  
9 A. Yes, sir.  
10 Q. What did you talk about?  
11 A. Just talked about what Terry Nichols had told us.  
12 Q. Now, did you ever report to anyone in the Herington police  
13 station on April 21 that Mr. Nichols said that he drove  
14 Mr. McVeigh to Oklahoma City?  
15 A. Did I tell anyone that?  
16 Q. Yes.  
17 A. Yes, sir.  
18 Q. Who did you tell?

19 A. I would have told my superiors.  
20 Q. Did Mr. Nichols tell you that he had driven Mr. McVeigh to  
21 Oklahoma City?  
22 A. He never told me that. He told me that he had picked up  
23 Mr. McVeigh from Oklahoma City.  
24 Q. Yes. Well, I want to make sure that you understood my  
25 earlier question, sir. Did you ever tell anyone the evening of

362

1 April 21 that Mr. Nichols said he drove Mr. McVeigh to Oklahoma  
2 City?  
3 A. No, sir. I'm sorry. I was incorrect.  
4 Q. Did you ever hear anyone on April 21 tell anyone else that  
5 Mr. Nichols said he had driven Mr. McVeigh to Oklahoma City?  
6 A. No.  
7 Q. As you would come out of the interview with Mr. Nichols,  
8 you would relay what was happening to the other agents present;  
9 correct?  
10 A. Yes.  
11 Q. Would other agents participating in the interview do the  
12 same, relay what was happening to the senior agents present?  
13 A. Yes, sir.  
14 Q. Did you assume that that information was being relayed to  
15 the command post?  
16 A. Yes, sir.  
17 Q. All right. Now, directing your attention to April 26  
18 again. You talked to Mr. Rathbun; is that right?  
19 A. Yes, sir.  
20 Q. April 26 is the next time after the 22nd you saw  
21 Mr. Nichols; correct?  
22 A. Yes, sir.  
23 Q. What was the subject of your conversation with Mr. Rathbun?

24 A. Mr. Rathbun called the command post in Fort Riley,  
25 approximately 8 a.m. on the 26th of April with a request of the

363

1 FBI.

2 Q. He was requesting the FBI make possible a telephone  
3 conversation between Mr. Nichols and his wife; correct?

4 A. That's correct. And -- and a telephone conversation  
5 between Mr. Nichols and his mother.

6 Q. And were you the agent assigned to handle those telephone  
7 conversations?

8 A. Yes, sir.

9 Q. Now, where was Mrs. Nichols at this time?

10 A. She was in a hotel in Junction City, Kansas.

11 Q. Had she not been able to get any telephone calls from  
12 Mr. Nichols?

13 A. I don't believe so, no.

14 Q. Why not?

15 A. I don't know.

16 Q. Where was Mr. Nichols' mother? In Michigan?

17 A. Yes, sir.

18 Q. And did you then help to set up so that Mr. Nichols could  
19 talk to his wife?

20 A. Yes, sir.

21 Q. Where did you meet Mr. Nichols on that day, the 26th?

22 A. Sedgwick County jail.

23 Q. Did you watch while he came out of his cell?

24 A. Yes, sir.

25 Q. Was he handcuffed?

364

1 A. No, sir.

2 Q. Where did you go with him?

3 A. We went to a phone room.

4 Q. And who was present in the phone room other than you and

5 Mr. Nichols? Anyone?

6 A. No, sir.

7 Q. And what did you tell Mr. Nichols?

8 A. Told him that he was going to have an opportunity to call

9 his wife and his mother.

10 Q. What else did you tell him about that?

11 A. Nothing else.

12 Q. Had you -- now, let's just focus now on the call with

13 Mrs. Nichols. You knew she was in a motel in Junction City;

14 correct?

15 A. Yes, sir.

16 Q. Had you talked to the agents that were there with her in

17 Junction City?

18 A. I talked to them previously, yes, sir.

19 Q. Previous to that telephone conversation; correct?

20 A. Yes, sir.

21 Q. And did you discuss recording the call?

22 A. Yes, sir.

23 Q. Well, what conversation did you have about recording the

24 call?

25 A. The agents with Marife Nichols were going to get her

365

1 consent to have the telephone call recorded.

2 Q. Now, did you tell Mr. Nichols that the telephone call was

3 going to be recorded?

4 A. No, sir.

5 Q. Mr. Nichols went into the room; is that correct?

6 A. Yes, sir.

7 Q. Who dialed the phone?

8 A. I dialed the number.

9 Q. Dialed the number of the hotel?

10 A. Yes, sir.

11 Q. Did you talk to someone?

12 A. Yes, sir.

13 Q. Who answered?

14 A. Agent Gene Thomeczek.

15 Q. Then what did you say to him?

16 A. I said, Terry Nichols is here and he'd like to talk with

17 his wife.

18 Q. What did Agent Thomeczek say?

19 A. He said "okay."

20 Q. Did you understand by "okay" that everything was ready to

21 go do the recording?

22 A. Yes, sir.

23 Q. Was that some signal you'd worked out beforehand?

24 A. No signal, sir.

25 Q. What did you say to Mr. Nichols?

366

1 A. I handed him the phone, told him that his wife should be on

2 the phone.

3 Q. Did you leave the room?

4 A. Yes, sir.

5 Q. What did you say when you left the room?

6 A. I didn't say anything.

7 Q. In fact, sir, you said, I'm going to give you some privacy,

8 didn't you?

9 A. I may have, yes, sir.

10 Q. Did you specifically tell Mr. Nichols that the call was not  
11 being recorded?

12 A. No, I did not.

13 Q. Did anyone in your presence tell him it was not being  
14 recorded?

15 A. No, they did not.

16 Q. How long did the telephone call take?

17 A. Specifically, I don't know how long the telephone call  
18 took. Approximately 13 minutes.

19 Q. Approximately 13. Now, let's talk about the call to  
20 Mrs. -- to Mr. Nichols' mother, Joyce Wilt.

21 A. Yes, sir, Joyce Wilt.

22 Q. Did you first try to reach Joyce Wilt at her residence?

23 A. Yes, sir.

24 Q. She wasn't there, was she?

25 A. No, she was not.

367

1 Q. Where was she?

2 A. She was at the FBI office in Ann Arbor, Michigan.

3 Q. Did you know she was going to the FBI office?

4 A. No, I did not.

5 Q. Did you know what conversations the FBI had had with her?

6 A. No, I did not.

7 Q. Did you know that call was going to be recorded?

8 A. I knew they had volunteered -- a volunteer consent from  
9 Mrs. Wilt, yes.

10 Q. You knew the call was going to be recorded?

11 A. Yes, sir.

12 Q. Did you know what the FBI told Mrs. Wilt before the call?

13 A. No, sir.

14 Q. Do you know what they told -- did Mr. Nichols also talk to  
15 his sister, Suzanne McDonnell?  
16 A. Not during that conversation that I know of.  
17 Q. Do you know what the FBI told Mrs. McDonnell?  
18 A. No, I do not.  
19 Q. Once again, did you leave the room while Mr. Nichols was  
20 talking?  
21 A. Yes, sir.  
22 Q. Did you say, I'm going to give you some privacy?  
23 A. I don't believe so.  
24 Q. Did you mention the word "privacy"?  
25 A. I don't recollect.

368

1 Q. Now, had you been directed to leave the room?  
2 A. Yes, sir.  
3 Q. By whom?  
4 A. Randy Rathbun.  
5 Q. Did you tell Mr. Rathbun that the calls were going to be  
6 recorded?  
7 A. No, sir.  
8 Q. Did he evidence by anything he said, to your knowledge,  
9 that the calls were going to be recorded?  
10 A. No, sir.  
11 MR. TIGAR: Your Honor, indulge me for a moment,  
12 please?  
13 THE COURT: Yes.  
14 MR. TIGAR: Thank you.  
15 BY MR. TIGAR:  
16 Q. One more thing, sir. During that interview on the 21st,  
17 when Mr. Nichols refused to sign the advice of rights

18 interrogation form, did you inform any of your superiors that  
19 he wouldn't sign?  
20 A. Yes, sir.  
21 Q. Who did you inform?  
22 A. Superiors upstairs.  
23 Q. Which one?  
24 A. I do not recall.  
25 Q. Well, was it -- let's get the list so we know which ones it

369

1 could have been. Price, Tubbs, Bross, anybody else it might  
2 have been?  
3 A. It may have been Tom Moore and Mike Shannahan, who were  
4 also supervisors from Kansas City.  
5 Q. Now, why did you tell them that, that he wouldn't sign?  
6 A. I told him that among many things that Terry Nichols had  
7 told us.  
8 Q. Did they give you any advice about how to handle that  
9 situation?  
10 A. No, sir.  
11 MR. TIGAR: Pass the witness.  
12 THE COURT: Mr. Mackey.  
13 MR. JONES: Your Honor, I have some questions I want  
14 to ask, but I don't know at what point.  
15 THE COURT: Well, this is going to relate to the  
16 admissibility issue?  
17 MR. JONES: Yes, sir.  
18 THE COURT: Do it now.  
19 CROSS-EXAMINATION  
20 BY MR. JONES:  
21 Q. Mr. Smith, during the recess this morning while you were a  
22 witness on the stand, did you review or read anything?

23 A. Yes, sir.

24 Q. What did you review or read?

25 A. My 302 from April 21 and 22, '95.

370

1 Q. That's the conversation that you had with Mr. Nichols?

2 A. Yes, sir.

3 Q. Did you have a discussion or talk with anyone during the  
4 recess?

5 A. Yes, sir.

6 Q. Who?

7 A. Court reporter here.

8 Q. Okay. Anyone else?

9 A. No, sir.

10 Q. So you had no discussion concerning your testimony during  
11 the recess; is that correct?

12 A. No, sir.

13 Q. All right. Mr. Smith, there has been submitted as a  
14 Government exhibit a chronology of the interview with  
15 Mr. Nichols that day; is that your understanding?

16 A. Which exhibit, sir?

17 Q. Let me get it here just a moment. It's a Government  
18 exhibit. Do you have the book in front of you, sir?

19 A. Yes, sir.

20 Q. By the book, I mean the Government's exhibits. I believe  
21 it's Government's Exhibit 30.

22 A. Yes, sir.

23 MR. JONES: And may I ask, has this exhibit been  
24 offered or admitted?

25 COURTROOM DEPUTY: No, it has not.

1 MR. JONES: Thank you. Then I'll offer it at this  
2 time unless the Government wishes to offer it.

3 MR. MACKEY: We have no objection to its admission.

4 THE COURT: Just a moment. Mr. Tigar?

5 MR. TIGAR: I'm sorry, your Honor.

6 THE COURT: 30. Exhibit 30.

7 MR. TIGAR: No, I don't have any objection, I'm sorry.

8 THE COURT: All right. We'll receive 30.

9 MR. TIGAR: Thank you.

10 BY MR. JONES:

11 Q. Have you reviewed this exhibit, Mr. Smith?

12 A. Yes, sir.

13 Q. Are you satisfied that it's accurate?

14 A. Yes, sir.

15 Q. So although the exhibit is in evidence, this chronology  
16 reflects that the interview started at 3:15 p.m. on April 21  
17 and, for all practical purposes, concluded at 12:28 a.m. the  
18 following day?

19 A. Yes, sir. That's correct.

20 Q. Now, the individuals that questioned Mr. Nichols during  
21 this period of time, were there four of them?

22 A. Yes, sir.

23 Q. And only four?

24 A. Yes, sir.

25 Q. And would you identify for his Honor those four? Would

1 that be yourself, Mr. Crabtree, Mr. Foley and Mr. Jablonski?

2 A. Yes, sir.

3 Q. All right. Now, in the interview log, there's also a

4 reference to Special Agent Thomeczek. Did he actually do any  
5 of the interviewing?

6 A. No, sir.

7 Q. All right. And at all times during the interview, there  
8 were at least two of you present?

9 A. That's correct.

10 Q. And with the exception of a rest room break or break to  
11 smoke a cigarette or get a drink of water or have a bite to  
12 eat, it was one continuous interview; is that correct?

13 A. That's correct.

14 Q. All right. And the subject of the interview in a broad  
15 sense was the same; that is to say, the knowledge, if any, of  
16 Mr. Nichols concerning the Oklahoma City bombing?

17 A. Yes, sir.

18 Q. And would it be a fair statement to say, sir, that for the  
19 most part, the interview proceeded after the basic information  
20 was obtained concerning Mr. Nichols' background and Social  
21 Security number and that type of thing primarily in a  
22 chronological sequence?

23 A. Yes, sir. With -- with review.

24 Q. Right. At any time since the interview was concluded at  
25 12:28 a.m. on the morning of the 22nd, have you shown your

373

1 notes or the 302 to Mr. Terry Nichols for verification or  
2 correction?

3 A. No, I have not.

4 Q. All right. Was any portion of the interview that day tape  
5 recorded?

6 A. No, sir.

7 Q. The material witness arrest warrant that was secured that

8 day concerned bringing Mr. Nichols before the grand jury on the  
9 very matters that you were questioning him about, which is his  
10 knowledge, if any, of the Oklahoma City bombing; is that  
11 correct?

12 A. That's correct.

13 Q. And that was a material witness arrest warrant secured upon  
14 information supplied by the Federal Bureau of Investigation,  
15 the same agency that employs you?

16 A. Yes, sir.

17 Q. And that was a proceeding in United States District Court,  
18 was it not?

19 A. Yes, sir.

20 Q. All right. Is it accurate to say that at 3:15, Mr. Nichols  
21 was searched?

22 A. Yes, sir.

23 Q. Now, as I understand it, at 3:15, he was free to leave?

24 This was a voluntary interview?

25 A. Yes, sir.

374

1 Q. Conducted at the Herington Department of Public Safety?

2 A. Yes, sir.

3 Q. But nevertheless, he was searched?

4 A. Yes, sir.

5 Q. Is it usually the practice of the FBI to conduct a search  
6 of individuals that they are interviewing?

7 A. No, sir.

8 Q. I am also advised by the chronology that you prepared, sir,  
9 that at 3:26 you advised him or someone advised him of his  
10 Miranda warnings.

11 A. Yes, sir.

12 Q. Is it the usual practice of the FBI, sir, to advise persons

13 being interviewed who are not in custody of their Miranda

14 warnings?

15 A. No, sir.

16 Q. At his residence, was a security tape put around the

17 residence?

18 A. Yes, sir.

19 Q. And what did that security tape say?

20 A. As I mentioned earlier, I do not specifically recall what

21 the security tape --

22 Q. Well, do you recall enough to know whether it was the

23 standard police line, do not cross?

24 A. I believe it was, yes, sir.

25 Q. Was that a tape provided by the Herington Department of

375

1 Public Safety or the FBI or some other agency?

2 A. I believe it was the Herington Department of Public Safety.

3 Q. And what was the purpose of that tape being placed around

4 his house?

5 A. To secure the house.

6 Q. And when you say "to secure the house," what do you mean by

7 that, sir?

8 A. To make sure that there will be no people coming or going

9 from that residence.

10 Q. And was a security tape placed around his automobile?

11 A. No, sir.

12 Q. But there was -- at no time?

13 A. That's correct.

14 Q. But there was an FBI agent standing near the automobile?

15 A. Yes, sir.

16 Q. And by "automobile," I mean the pickup truck.

17 A. Yes, sir.  
18 Q. And do you recall what time he assumed that position?  
19 A. I do not recall what time he did, no, sir.  
20 Q. Was it before 4:00?  
21 A. I do not recall.  
22 Q. Well, let's look and see if we can -- sir, if you will look  
23 at Exhibit No. 29 on the second page, sir.  
24 A. Yes.  
25 MR. JONES: Has that exhibit been offered?

376

1 COURTROOM DEPUTY: Yes, it has been offered.  
2 THE COURT: It's in evidence.  
3 MR. JONES: Thank you.  
4 BY MR. JONES:  
5 Q. Thank you. Would you look at the reference at 3:20 p.m.  
6 Would that evidence at the same time security is also  
7 established around the blue GMC pickup truck?  
8 A. Yes, sir.  
9 Q. That's Mr. Nichols' truck?  
10 A. Yes, sir.  
11 Q. And by "security," what did you mean by that?  
12 A. Just for those agents to make sure that no one was going to  
13 enter that vehicle.  
14 Q. No one was to enter the vehicle?  
15 A. Yes, sir.  
16 MR. JONES: I believe that's all. Thank you, your  
17 Honor.  
18 THE COURT: All right. Mr. Mackey.  
19 CROSS-EXAMINATION  
20 BY MR. MACKEY:  
21 Q. Agent Smith, as you reflect on the interview you conducted

22 with Terry Nichols on April 21, 1995, could you say that your  
23 manner and demeanor with Mr. Nichols is substantially the same  
24 as your manner and demeanor in this courtroom this morning?  
25 A. Yes, sir.

377

1 Q. Mr. Tigar asked you some opening questions about your  
2 background. Do you recall those questions?  
3 A. Yes, sir.  
4 Q. You told him that you graduated from Quincy College in  
5 Quincy, Illinois?  
6 A. Yes, sir.  
7 Q. 1988 and went straight to Arthur Andersen?  
8 A. That's correct.  
9 Q. And sharpened your accounting skills --  
10 A. That's correct.  
11 Q. -- for about three years where you worked there for the  
12 FBI?  
13 A. That's correct.  
14 Q. And you have had the FBI assignment since May of 1991?  
15 A. Yes, sir.  
16 Q. All right. During that time, you have been assigned, have  
17 you not, largely to white collar investigations?  
18 A. No, sir.  
19 Q. All right. Has some portion of your caseload been involved  
20 in white collar?  
21 A. Yes, sir.  
22 Q. Have you prior to April of 1995 investigated the making and  
23 detonation of ammonia nitrate fuel oil devices?  
24 A. No, sir.  
25 Q. Had you been to bomb tech school?

1 A. No, sir.

2 Q. So at any point in time in April of 1995, would you have  
3 been in a position to lead Mr. Nichols in questions about  
4 blasting caps?

5 A. No, sir.

6 Q. Or det cord?

7 A. No, sir.

8 Q. Or the mixture ratios of ammonia nitrate and fuel oil?

9 A. No, sir.

10 Q. Mr. Smith, when you -- Agent Smith. I'm sorry. When you  
11 first got to Herington P.D. early afternoon on Friday, April 21  
12 and you talked to Barry Thacker, did you mention to him that  
13 you were interested in talking to or interviewing Terry  
14 Nichols?

15 A. I mentioned to him I was looking for background information  
16 on Terry Nichols.

17 Q. In connection with the Oklahoma City bombing case?

18 A. Yes, sir.

19 Q. All right. And after leaving the police department, do you  
20 know if any attempts were made to contact you?

21 A. I do not know that.

22 Q. When you left the police department, was there an  
23 outstanding request by you of additional information about  
24 Terry Nichols?

25 A. Yes.

1 Q. And what was the nature --

2 A. I asked Director Kuhn and Barry Thacker for more

3 information or any information they may have on Terry Lynn  
4 Nichols.  
5 Q. You had more than one name of persons that you asked  
6 background for, did you not?  
7 A. Yes, sir.  
8 Q. And what were those names?  
9 A. I asked for Terry Lynn Nichols and Ted Parker.  
10 Q. And from whom had you received those two names?  
11 A. From our office in Las Vegas.  
12 Q. As relayed through Fort Riley?  
13 A. Yes, sir.  
14 Q. Did you know when you entered the police department whether  
15 Ted Parker was a real person or not?  
16 A. I did not know.  
17 Q. As a result of that meeting, did you get a correct address  
18 for Terry Nichols?  
19 A. Yes, sir.  
20 Q. And as of that point in time, a little bit after 2 of that  
21 afternoon, you had not had a correct address for Mr. Nichols?  
22 A. That's correct.  
23 Q. Tell the Court, if you would, Agent Smith, what transpired  
24 after you left the police department early afternoon 19 --  
25 April 21, 1995.

380

1 A. Left the police department at approximately 2:20. Drove  
2 around Herington and met up with Jack Foley, another agent from  
3 Kansas City, at approximately 2:30; and we proceeded to go near  
4 Terry Nichols' home.  
5 Q. And describe for the Court and for the record precisely  
6 where you began your stationary surveillance.

7 A. We began our stationary surveillance approximately 70 to  
8 100 yards south of Terry Nichols' home on 2nd Street. Our car  
9 was parked on the east side of the street between McLaren and  
10 Sturgiss, facing north.

11 Q. And where were each of you and Agent Foley seated?

12 A. I was seated in the passenger seat, and Mr. Foley was  
13 driving.

14 Q. And did you have a vantage point then to the Nichols  
15 residence?

16 A. Yes, sir.

17 Q. And how many minutes transpired before you saw activity at  
18 that residence?

19 A. Approximately 12 minutes.

20 Q. And describe what you saw.

21 A. I saw Terry Nichols exit his home with his wife, and Terry  
22 Nichols was carrying a small child.

23 Q. What did they do?

24 A. They got into the pickup truck with Terry Nichols driving.  
25 They backed out of the driveway, headed south on 2nd Street,

381

1 passing Jack Foley and myself; and they proceeded to turn right  
2 or west on Sturgiss. And then they took a left or south on 3rd  
3 Street, and then took a right or west on 56 E Trapp Boulevard  
4 heading south.

5 Q. This is on a Friday afternoon; correct?

6 A. Yes, sir.

7 Q. And you're situated in the vehicle parked at the curb side?

8 A. Yes, sir.

9 Q. And Mr. Nichols and his family passed right by you?

10 A. Yes, sir.

11 Q. All right. How fast was he driving?

12 A. He was going approximately 10 miles an hour.  
13 Q. And what did you do after he passed you?  
14 A. We went up the street and turned around at McLaren and  
15 proceeded to follow Terry Nichols.  
16 Q. Did his rate of speed change?  
17 A. It stayed constant, but it was very slow.  
18 Q. Were you able to see him pull into, or at least the vehicle  
19 pull into Surplus City?  
20 A. Yes, sir.  
21 Q. All right. And you continued past that point?  
22 A. Yes, sir.  
23 Q. And when you returned then, the vehicle was gone?  
24 A. Yes, sir.  
25 Q. Did you hear radio traffic or reports that that same

382

1 vehicle had been followed then to the police department?  
2 A. Yes, sir.  
3 Q. And is that why you then went to that location?  
4 A. Yes, sir.  
5 Q. When you got there, what did you do first?  
6 A. Myself and Jack Foley met with Mike Gillispie and Tom  
7 Price.  
8 Q. And before any FBI agent entered the building, you're aware  
9 that someone made a phone call inside to ascertain what was  
10 going on?  
11 A. Yes, sir.  
12 Q. And based on everything you knew and concerns you had, did  
13 you deem that to be a prudent course of action?  
14 A. Yes, sir.  
15 Q. Walk through for the Court, Agent Smith, the initial

16 contact with Nichols in the Herington Police Department upon  
17 your entry.

18 A. Myself and Jack Foley and Mike Gillispie and Tom Price  
19 entered the police department at approximately 3:10 p.m. We  
20 walked through the door to the first officers' office on the  
21 right. And that is where Dale Kuhn introduced us to Terry  
22 Nichols, his wife and his daughter.

23 Q. Do you have any doubt that Mr. Nichols understood who you  
24 were and that you were with the FBI?

25 A. No doubt.

383

1 Q. Was Mr. Price in the room very long?

2 A. No, sir. He was in the room less than a minute.

3 Q. Do you know why he left?

4 A. He left with Director Kuhn to decide where we would  
5 continue the interview.

6 Q. And had there been some conversation in the room that  
7 triggered Mr. -- or Agent Price and Director Kuhn leaving?

8 A. Yes.

9 Q. Describe that conversation.

10 A. Terry -- this office was small, and we had told Terry  
11 Nichols that we'd like to talk to him. He told us he'd like to  
12 talk to us. And Director Kuhn said he would find an  
13 appropriate spot for the interview.

14 Q. So before Agent Price left the room, there was an  
15 understanding between the agents and Terry Nichols that he  
16 desired to speak with them?

17 A. Yes.

18 MR. TIGAR: Object to the conclusion, your Honor.

19 THE COURT: Sustained.

20 BY MR. MACKEY:

21 Q. Did Agent Price return shortly thereafter?

22 A. Yes, sir.

23 Q. And eventually, were Mr. Nichols and the agents, including  
24 yourself, taken downstairs in the Herington Police Department?

25 A. Yes. We walked downstairs.

384

1 Q. Before Terry Nichols left the upstairs room, did he make  
2 any comment in your presence to his wife?

3 A. Yes. Terry Nichols told his wife that he intended to speak  
4 with the FBI agents present.

5 Q. Agent Smith, did you have a weapon on that day?

6 A. Yes, sir.

7 Q. And what did you do with it before going downstairs?

8 A. I took my weapon off and gave it to Tom Price to have him  
9 secure the weapon.

10 Q. And how were you dressed otherwise?

11 A. Casual clothes.

12 Q. At the outset of the interview, Agent Smith, did it fall to  
13 you to take notes of the interview?

14 A. Yes, sir.

15 Q. And did you do so throughout the -- your participation in  
16 that interview?

17 A. Yes, sir.

18 Q. And since that day, have you assisted in preparing those  
19 handwritten notes into typewritten form?

20 A. Yes, sir.

21 Q. And are those same notes Government Exhibit 72?

22 A. That's correct.

23 Q. And do they fairly and accurately reflect the notes you  
24 were taking in the course of that interview?

25 A. Yes, they do.

385

1 MR. MACKEY: Your Honor, we would offer Government  
2 Exhibit 72.

3 THE COURT: Well, we had this discussion about  
4 possible redaction.

5 MR. MACKEY: Your Honor, what I would propose  
6 respecting the Court's earlier ruling is that they be submitted  
7 in their entirety under seal consistent with the 302.

8 THE COURT: Well, I mean, it would be easier for us to  
9 do it in a redacted form.

10 MR. JONES: Either way is fine with us.

11 THE COURT: Yes. I understand. Mr. Tigar, you had --  
12 were offering this exhibit at an earlier time.

13 MR. TIGAR: I'm the one that started all this, your  
14 Honor.

15 THE COURT: Yes. That's why I'm calling on you.

16 MR. TIGAR: I think your Honor's suggestion accords  
17 with our position; that is, that it would be easier to offer it  
18 in a redacted form because in that way, with the assistance of  
19 the parties, the Court could make the findings required by the  
20 Court's earlier order with respect to sealing directed at  
21 specific portions --

22 THE COURT: Yes.

23 MR. TIGAR: -- and thus maximize the First Amendment  
24 interests of the lawyer who is sitting five feet from where I'm  
25 talking.

386

1 THE COURT: I had him in my vision when I was

2 discussing that.

3 MR. TIGAR: He's just back from the Court of Appeals,  
4 and we know he's to be reckoned with.

5 THE COURT: Well, I'm proposing that we redact it and  
6 that counsel get together on that.

7 Mr. Kelley, do you want to be heard on this point? By  
8 doing this, I'm suggesting that there's a portion or there are  
9 portions which are a part of this public hearing relative to  
10 the suppression. There are also portions that are subject to a  
11 pending motion.

12 MR. KELLEY: Well, it may be that I need to watch the  
13 plot unhatch a little bit longer before we can argue it. We  
14 obviously object to a redacting of an exhibit that's been  
15 offered in its entirety.

16 THE COURT: Well, your objection is noted. We'll do  
17 the redaction. And then I can make a determination with  
18 respect to the specific item.

19 MR. KELLEY: Your Honor, at some point, I would like  
20 an opportunity to be heard on the standard that needs to be --

21 THE COURT: Well, this isn't it. Proceed.

22 MR. MACKEY: Your Honor, what I would propose then is  
23 that we'll consult with defense counsel and designate those  
24 portions that allow the record to be complete as to specifics  
25 asked this witness.

387

1 THE COURT: Yes.

2 MR. MACKEY: All right. Thank you, your Honor.

3 BY MR. MACKEY:

4 Q. Agent Smith, before coming to court, did you examine  
5 certain photographs of the interview room previously admitted

6 into evidence in this case?

7 A. Yes, sir.

8 Q. Do you recall seeing a photograph of the television set

9 located in one of the walls of that room?

10 A. Yes, sir.

11 Q. At any point in the several hours of the interview, do you

12 remember that television being on?

13 A. No, sir.

14 Q. Could you summarize, Agent Smith, the general nature of the

15 information that you elicited from Terry Nichols prior to

16 discussions about the Miranda form.

17 A. We discussed his date of birth, Social Security account

18 number, driver's license number, and background information on

19 Terry Nichols.

20 Q. And did there come a time then when the subject matter of

21 the Miranda rights was raised?

22 A. Yes, sir.

23 Q. And do you find the exhibit previously referred to before

24 you?

25 A. Yes, sir.

388

1 Q. What number is that, please?

2 A. The notes are 72.

3 Q. The Miranda form.

4 A. 31.

5 Q. With reference to that exhibit, Agent Smith, would you

6 detail for the Court how the discussion about the Miranda

7 rights began and how it transpired.

8 A. The Miranda rights began at approximately 3:26 p.m., when

9 Jack Foley advised Terry Nichols that we would like to

10 Mirandize him. Jack Foley handed the form to Terry Nichols and

11 told Terry Nichols to read the form out loud, which he did,  
12 finishing at approximately 3:31. Jack Foley told Terry Nichols  
13 to ask any questions, if he had any questions while he was  
14 reading the form. And Terry Nichols read the form.

15 Q. May I ask you, Agent Smith -- there are two different times  
16 on that same exhibit, one in the upper right-hand corner, the  
17 other in the bottom left; correct?

18 A. That's correct.

19 Q. Tell the Court what each of those times are and what they  
20 represent.

21 A. 3:26 p.m. represents the time that this form was initiated  
22 by Jack Foley and myself. The 3:31 time is when the Agent  
23 Foley and myself signed the form, acknowledging that Terry  
24 Nichols understood his rights.

25 Q. What exactly happened in that five minutes?

389

1 A. Terry Nichols read the form and that -- we asked him if he  
2 had any questions in regards to the form and that was -- that  
3 was it.

4 Q. Did he exhibit any difficulty in reading the content of  
5 that form?

6 A. No, sir.

7 Q. You heard him read it out loud?

8 A. Yes, sir.

9 Q. And describe the manner that he read it.

10 A. He read it in a very deliberate fashion, as evidenced by  
11 taking five minutes to read it.

12 Q. And at any point in doing so, did he stop and ask questions  
13 about the content of that form?

14 A. No, sir.

15 Q. His only comment was a comment; is that correct?

16 A. That's correct.

17 Q. And that again had something to do with a single word,

18 "interrogation"?

19 A. Yes, sir. He did not like the word "interrogation" because

20 it reminded him of the Nazis.

21 Q. What happened next?

22 A. We had a discussion about signing the form. That we told

23 Terry Nichols that, of course, he was free to go and that he

24 could sign the form or not. It did not -- signing the form did

25 not make -- did not have him to admit to anything at all. We

390

1 just told him that it was a form to be signed; if he did not

2 want to sign it, that's fine. We just wanted to make sure that

3 he had a voluntary understanding of his rights and that's what

4 he had.

5 Q. And did you ask him whether he understood his rights?

6 A. Yes, sir.

7 Q. And what was his response?

8 A. He understood his rights, and the only stated objection to

9 signing the form was that he did not like the word

10 "interrogation."

11 Q. Did that discussion and reflection take approximately 12,

12 13 minutes?

13 A. Yes, sir.

14 Q. So that you noted in your log at 3:43 that he had refused

15 to sign the form?

16 A. That's correct.

17 Q. Were you satisfied, Agent Smith, at that point in time that

18 Terry Nichols fully understood the rights recited in that form?

19 MR. TIGAR: Objection.

20 THE COURT: What's the objection?  
21 MR. TIGAR: Calls for a conclusion. No foundation.  
22 THE COURT: Overruled.  
23 THE WITNESS: Yes, sir. I believe he did understand  
24 his rights at that point.  
25 BY MR. MACKEY:

391

1 Q. One of the rights recited in that form and read aloud by  
2 Mr. Nichols had something to do with right to counsel; correct?  
3 A. That's correct.  
4 Q. Did he at that point in time or at any other point of time  
5 in the rest of the evening exercise that right?  
6 A. No, sir.  
7 MR. TIGAR: I'm sorry, your Honor. I object, ask the  
8 answer be stricken. The word "exercise" is a -- calls for a  
9 conclusion this witness can't possibly know.  
10 MR. MACKEY: I'll withdraw --  
11 THE COURT: All right.  
12 BY MR. MACKEY:  
13 Q. At any point in the evening, did Terry Nichols say, I would  
14 like to talk to a lawyer?  
15 A. No, sir.  
16 THE COURT: For your benefit, Mr. Tigar -- I'm sure  
17 you understand it -- my overruling of your objection to the  
18 conclusion is that I have made this admissible for what the  
19 agent understood as compared to his opinion that would persuade  
20 the Court, just as I have permitted you to inquire about his  
21 subjective intent.  
22 MR. TIGAR: Yes, your Honor.  
23 THE COURT: All right.

24 BY MR. MACKEY:

25 Q. On that score, Agent Smith, one final question: Would you

392

1 have continued the questioning of Agent (sic) Nichols if you  
2 were uncertain as to his understanding of those rights?

3 MR. TIGAR: I object to that.

4 THE COURT: That objection is overruled.

5 THE WITNESS: No, sir.

6 BY MR. MACKEY:

7 Q. At any point in time before the substantive interview  
8 began, did Terry Nichols ask you, Am I under arrest?

9 A. No, sir.

10 Q. So between 3:26 and 3:43, the time was devoted to  
11 discussing, reviewing, reflecting on the rights set forth in  
12 that government form?

13 A. That's correct.

14 Q. And the only stated reason from Terry Nichols for not  
15 signing the form was that which you testified about?

16 MR. TIGAR: Asked and answered. Objection.

17 THE COURT: Sustained.

18 BY MR. MACKEY:

19 Q. Agent Smith, at the outset of the interview were yourself  
20 and Agent Foley; correct?

21 A. Yes, sir.

22 Q. And shortly thereafter, two other agents arrived?

23 A. Yes, sir.

24 Q. Are you the only agent who participated in the interview of  
25 Terry Nichols from beginning to end?

393

1 A. Yes, sir.

2 Q. All right. The two other individuals who arrived later  
3 were there only shortly -- a short time?

4 A. Yes.

5 Q. All right. Could you describe for the Court what took  
6 place when the two agents, Scott Crabtree and Daniel Jablonski,  
7 arrived?

8 A. Dan Jablonski and Scott Crabtree came in at approximately  
9 4:12 p.m. And at that point, we decided to go over -- review  
10 the notes of the -- of the interview of Terry Nichols so those  
11 two agents would be able to understand and know what we had  
12 previously discussed.

13 Q. And tell the Court exactly what procedure you followed.

14 A. I went back to the first page of my notes and started  
15 reading them aloud. And I advised Terry Nichols to stop me at  
16 any time to tell me if there was any errors or inconsistencies  
17 in the work product and to make additions if necessary.

18 Q. And how exact were you in your review of those notes in  
19 Mr. Nichols' presence?

20 A. Fairly good. Mr. Nichols added certain things to clarify  
21 what he had previously stated.

22 Q. In your briefing of the two new agents, did you tell them  
23 that you had discussed with Mr. Nichols his Miranda rights?

24 A. Yes, we had.

25 Q. And what exactly did you tell them?

1 A. I told them that Terry Nichols had been advised of his  
2 rights; that he understood his rights, and that he would like  
3 to speak with the agents but that he did not sign the form, the  
4 FD 395 form. At this point, Agent Jablonski made sure with

5 Terry Nichols that he understood his rights and that he was

6 free to go.

7 Q. How did he do so in your presence?

8 A. He asked Terry Nichols if he understood his rights. Terry

9 Nichols said he did understand his rights, and that was it.

10 Q. At any point, did Terry Nichols object to your summary of

11 what had happened with regard to the Miranda rights?

12 A. There was no objections to my summary. He just added

13 clarifications.

14 Q. Was it in the course of this review of what had transpired

15 to that point that Mr. Nichols asked for a copy of the notes?

16 A. Yes, sir.

17 Q. And you told him that would be possible?

18 A. Yes, sir.

19 Q. Did he condition that request on time?

20 A. No, sir.

21 Q. Did he say, I want the notes today?

22 A. No, sir.

23 Q. Tomorrow?

24 A. No, sir.

25 Q. At any point in time?

395

1 A. No, sir.

2 Q. Did you make a promise as to a specific time for

3 production?

4 A. No, sir.

5 Q. His only request was that he get a copy?

6 A. That's correct.

7 MR. TIGAR: Object.

8 BY MR. MACKEY:

9 Q. And --

10 MR. TIGAR: Object to repetition, your Honor.  
11 THE COURT: Overruled.  
12 MR. MACKEY: Thank you.  
13 BY MR. MACKEY:  
14 Q. To your knowledge, has Mr. Nichols, then, since April 21,  
15 1995, received a copy of those notes?  
16 A. Yes, sir.  
17 Q. Let me turn your attention, Agent Smith, to Government  
18 Exhibit 32. Tell the Court what that is, please.  
19 A. Exhibit 32 is a consent to search form.  
20 Q. And is that the same document previously identified by you  
21 bearing Defendant's B1?  
22 A. Yes, sir.  
23 Q. At what point in time did the discussion about the consent  
24 to search form begin?  
25 A. Consent to search form began at approximately 4:25 p.m.

396

1 Q. And tell the Court how that came up.  
2 A. Dan Jablonski and Scott Crabtree came into the interview at  
3 approximately 4:12. Dan Jablonski brought in a consent to  
4 search form, which is further described as an FD 26, and we  
5 started at approximately 4:25, explaining the search form to  
6 Terry Nichols.  
7 Q. And how did Agent Jablonski handle that matter?  
8 A. Agent Jablonski first handed it to me and told me to fill  
9 this out. So my writing -- I wrote down the address of 109  
10 South 2nd Street, Herington, Kansas, and dated it and handed it  
11 back to Dan Jablonski. And Dan Jablonski then read the form  
12 out loud to Terry Nichols, explaining it as he went on.  
13 Q. At any point in that process, did Mr. Nichols express any

14 confusion?  
15 A. No, sir.  
16 Q. Did he ask any questions about what had been read to him?  
17 A. No, sir.  
18 Q. After that review, what did Terry Nichols say?  
19 A. He would consent to -- he gave us voluntary consent to  
20 search his home and his vehicle.  
21 Q. He expressed that orally first?  
22 A. Yes, sir.  
23 Q. And then what happened with the form?  
24 A. He signed the format approximately 4:34 p.m. Subsequent to  
25 that, he asked that if it was possible with his wife or himself

397

1 could be present.  
2 Q. Incidentally, Agent Smith, among your duties on April 21,  
3 were you assigned the responsibility of deciding if and when a  
4 search at that residence would take place?  
5 A. No, sir.  
6 Q. Mr. Tigar asked you some questions about comments made by  
7 Mr. Nichols shortly after signing that form. Do you recall  
8 those questions?  
9 A. Yes, sir.  
10 Q. And tell the Court again, please, what it was that  
11 Mr. Nichols expressed.  
12 A. He expressed that -- a concern that the searching agents  
13 would be able to tell the difference between cleaning solvents  
14 and bomb-building materials.  
15 Q. And do you know for a fact that since the search of that  
16 residence, both were found?  
17 A. Yes.  
18 Q. And in your experience, have you found occasions when

19 suspects when questioned first are not entirely truthful?  
20 A. That's correct.  
21 Q. The first break that you took with yourself and Mr. Nichols  
22 took place at what time?  
23 A. 6:10 p.m.  
24 Q. And how long again was that break?  
25 A. Approximately 57 minutes, until 7:07 p.m.

398

1 Q. Prior to that point in time -- that is, prior to 6:10 --  
2 had Terry Nichols admitted to you that his truck and himself  
3 had been in Oklahoma City on Easter Sunday?  
4 A. Yes, sir.  
5 Q. Later in that same evening, Agent Smith, did the subject of  
6 the consent to search come up?  
7 A. Yes, sir.  
8 Q. Approximately what time?  
9 A. Approximately 7:14 p.m.  
10 Q. What happened then?  
11 A. I verified with Terry Nichols again that his wife could be  
12 present during a search, and that would be appropriate.  
13 Q. Tell the Court exactly what that conversation was.  
14 A. We wanted to verify -- we verified -- we verified with  
15 Terry Nichols that his earlier consent would be satisfied with  
16 Marife, his wife, present during the search.  
17 Q. And at that second occasion -- for that matter, on the  
18 first occasion as well, did Terry Nichols ever condition his  
19 consent on a time of day of a search?  
20 A. No, sir.  
21 Q. Your interview then continued until about 8:15, starting  
22 shortly after 7?

23 A. 8:14, 8:15, yes, sir.

24 Q. All right. And then a second break was taken?

25 A. Yes, sir.

399

1 Q. During these breaks, is Mr. Nichols afforded an opportunity

2 to use the restroom?

3 A. Yes, sir.

4 Q. Take in food and drink?

5 A. Yes, sir.

6 Q. And do you know whether he did so?

7 A. Yes, sir, he did.

8 Q. When you returned to the interview at approximately a

9 quarter to nine, what was Terry Nichols doing?

10 A. Terry Nichols had finished drawing a diagram of his home

11 with Agents Foley and Jablonski.

12 Q. Let me direct your attention, Agent Smith, to Government

13 Exhibit 33. You'll find that in your binder.

14 A. Yes, sir.

15 Q. Tell the Court what that is.

16 A. This is Terry Nichols' diagram of his home at 109 South 2nd

17 Street, Herington, Kansas.

18 Q. Did you see Terry Nichols complete any portion of this?

19 A. No, I did not.

20 Q. What state of completion was the diagram in when you

21 arrived?

22 A. It had been completed.

23 Q. And were there signatures on it?

24 A. No, sir. There was signatures of Terry Nichols on there,

25 but no agent signatures.

400

1 Q. Were those signatures later affixed?  
2 A. Yes. We -- we signed that at approximately 8:53 p.m.  
3 MR. MACKEY: All right. Your Honor, I would offer  
4 into evidence Government Exhibit 33.  
5 MR. JONES: May I have just one moment, your Honor?  
6 THE COURT: Yes.  
7 MR. TIGAR: No objection, your Honor.  
8 MR. JONES: No objection.  
9 THE COURT: 33 is received.  
10 BY MR. MACKEY:  
11 Q. That portion of the interview then continued, did it not,  
12 Agent Smith, until about 10:21?  
13 A. That's correct.  
14 Q. And it was during that last break that you first learned  
15 about a material witness warrant?  
16 A. That's correct.  
17 Q. And prior to coming to court, did I show you Government  
18 Exhibit 26, the material witness warrant, and ask you whether  
19 you had seen that at the Herington Police Department on --  
20 A. Yes.  
21 Q. -- Friday, April 21?  
22 A. Yes, sir.  
23 Q. Was your answer then the same as it was earlier?  
24 A. Yes, sir.  
25 Q. Mr. Tigar asked you if you had formed an opinion by the

1 time of that last break as to whether Terry Nichols had aided  
2 and abetted Tim McVeigh in the Oklahoma City bombing.  
3 A. That's correct.

4 Q. And you said you did?

5 A. Yes, sir.

6 Q. He didn't ask you why.

7 A. No, sir.

8 Q. I do.

9 MR. JONES: Your Honor, I object to that.

10 THE COURT: Well, it is going to get, I assume, into  
11 statements that affect this admissibility against Mr. McVeigh.

12 MR. MACKEY: May I ask a couple preliminaries?

13 THE COURT: You may.

14 BY MR. MACKEY:

15 Q. Are the reasons that you formed that opinion reflected in  
16 your notes, Government Exhibit 72?

17 A. Yes, sir.

18 Q. Are they throughout the content of those notes?

19 A. Yes, sir.

20 MR. MACKEY: Your Honor, we would offer in its  
21 completion Government Exhibit 72 and rely upon that exhibit as  
22 the basis for that testimony and ask no specific questions  
23 here.

24 MR. JONES: May I just ask the witness a couple voir  
25 dire questions?

402

1 THE COURT: Yes.

2 MR. JONES: May I stand here?

3 THE COURT: Yes.

4 VOIR DIRE EXAMINATION

5 BY MR. JONES:

6 Q. Mr. Mackey's second question to you, I believe, was was  
7 your opinion based upon the notes or the 302 in its entirety;  
8 is that correct?

9 A. He asked me if it was based on my notes.

10 Q. I think he used the word "in their entirety," or

11 "throughout." I believe the word "throughout."

12 A. Yes, sir.

13 Q. And is that correct?

14 A. I formed my opinion based on the interview notes up until

15 that break, yes, sir.

16 Q. So you can't isolate one particular section of your 302 or

17 your notes to the exclusion of others to reach that opinion.

18 It permeates the notes, doesn't it?

19 A. Yes, sir.

20 Q. And it permeates the 302?

21 A. Yes, sir.

22 Q. Because it permeated the interview?

23 A. Yes.

24 Q. And when I say, "permeated the interview," my question to

25 you, sir, in other words, the basis for your opinion that

403

1 Mr. McVeigh was involved goes throughout the interview with

2 Mr. Nichols; is that correct?

3 A. Yes.

4 Q. As reflected in your notes?

5 A. Yes.

6 Q. And you couldn't excise one portion of the note over the

7 other, could you?

8 A. Not one portion, no, sir.

9 MR. JONES: Thank you.

10 MR. MACKEY: I would renew the offer.

11 THE COURT: Well, we will deal with this exhibit again

12 after there's been an opportunity to discuss redaction. And,

13 you know, I don't think that this changes it, because what  
14 you're really doing is responding to the question put by  
15 Mr. Tigar with respect to his opinion, and I don't believe that  
16 his opinion is going to be critical in this determination.

17 MR. MACKEY: Thank you, your Honor.

18 THE COURT: I mean the determination of motions that  
19 are before the Court, Mr. Nichols' motion.

20 MR. MACKEY: May I direct, then, one specific question  
21 to the notes?

22 THE COURT: You may.

23 BY MR. MACKEY:

24 Q. Agent Smith, refer to page 19, if you would.

25 THE COURT: 19 of 72?

404

1 MR. MACKEY: Yes, your Honor.

2 BY MR. MACKEY:

3 Q. And do you find upon review certain notes you made at the  
4 time of statements made by Terry Nichols that bear on the topic  
5 of his capacity to construct an ANFO device?

6 A. Yes, sir.

7 Q. And were the entries that appear on page 19 about that same  
8 subject matter statements made by Terry Nichols in relatively  
9 short order?

10 A. Yes, sir.

11 Q. How much time elapsed between those various references?

12 A. Not more than five minutes.

13 Q. Agent Smith, could you describe for the Court Terry  
14 Nichols' demeanor in the course of the interview beginning some  
15 time after 3 and continuing until you left shortly after  
16 midnight?

17 A. Terry Nichols was very calm and -- calm demeanor and very

18 deliberate approach to answering questions.  
19 Q. In the course of the interview, were there many  
20 interruptions of the interview?  
21 A. There were no interruptions except breaks that were taken.  
22 Q. Did you find any external or extraneous source that  
23 interfered with the flow of the interview?  
24 A. No, sir.  
25 Q. You took, did you not, what is approximately 24 pages of

405

1 typewritten notes?  
2 A. Yes, sir.  
3 Q. Can you tell the Court how it was that you were able to  
4 write down that much information?  
5 A. Terry Nichols would respond to questions or just state  
6 things in a deliberate fashion to where I was able to keep up  
7 contemporaneously with his statements.  
8 Q. Who decided that the interview was at an end?  
9 A. We did not decide, Terry Nichols -- I'm sorry. Terry  
10 Nichols did not end the questioning.  
11 Q. At any point in the interview, did you say no more?  
12 A. No, sir.  
13 Q. At any point in the interview, did Terry Nichols complain  
14 about the duration?  
15 A. No. Terry Nichols never complained about the duration, the  
16 site, the scope or the substance of the questions during the  
17 interview.  
18 Q. Agent Smith, you were down in the basement during the  
19 interview; is that correct?  
20 A. That's correct.  
21 Q. From that vantage point, were you in a position to know

- 22 what was going on outside that same building?
- 23 A. No, I was not. There was no windows in that basement and I
- 24 was not aware of anything happening outside that building.
- 25 Q. Could you hear any outside commotion from that same spot?

406

- 1 A. No, sir.
- 2 Q. At any point in the interview, Agent Smith, did Terry
- 3 Nichols exhibit any physical signs of stress?
- 4 A. No. Terry Nichols never sweated, never cried, was very
- 5 calm throughout the interview. No outward or physical signs of
- 6 stress.
- 7 Q. At any point in time, did he express any reason for why he
- 8 was prepared to answer your questions? An explanation as to
- 9 why it was that he wanted to answer your questions?
- 10 A. Terry Nichols wanted to answer our questions because he had
- 11 questions himself.
- 12 Q. Agent Smith, in the course of the interview, did you raise
- 13 your voice in a confrontational fashion with Mr. Nichols?
- 14 A. No. No voices were raised while I was in the interview
- 15 room at all and it was very -- I did not raise my voice at all.
- 16 Q. Any agent display a weapon?
- 17 A. No, sir.
- 18 Q. At the close of the interview, Agent Smith, what did you
- 19 do?
- 20 A. I got up and left the room with Scott Crabtree and Jack
- 21 Foley and Dan Jablonski came into the room.
- 22 Q. And after leaving the Herington Police Department, where
- 23 did you go?
- 24 A. I drove to Wichita, Kansas.
- 25 Q. What did you do there?

1 A. I arrived in Wichita at approximately 2:30 a.m. on the 22nd  
2 of April, 1995 and myself and Scott Crabtree and an Assistant  
3 United States Attorney, Robin Fowler and United States Attorney  
4 Randy Rathbun prepared an affidavit for search.

5 Q. And did you rely upon the notes, the same ones you've  
6 identified here as the basis for that affidavit preparation?

7 A. We relied on my notes and recollections of the interview.

8 Q. Was the affidavit relied on in any part on the material  
9 witness warrant that's been discussed in these proceedings?

10 A. No, sir.

11 Q. Let me turn your attention then to later in that same day  
12 when you picked up Mr. Nichols up in Abilene.

13 A. Yes, sir.

14 Q. And you described for Mr. Tigar essentially the course of  
15 events thereafter.

16 A. Yes, sir.

17 Q. At any point in time in the car ride, did agents tell Terry  
18 Nichols that a search warrant had been issued or was being  
19 sought?

20 A. No, sir.

21 Q. During the car ride, did Terry Nichols ask your opinion  
22 about the implication or the involvement of Tim McVeigh in the  
23 Oklahoma City bombing case?

24 A. Yes. He asked us if we thought that Tim McVeigh was  
25 involved in the Oklahoma City bombing and we advised that we

1 did believe so.

2 Q. Did that discussion then begin to focus on a storage shed?

3 A. Yes, sir. He -- Terry Nichols went over --

4 MR. JONES: Excuse me. I believe the question has  
5 been asked and answered. He said yes.

6 THE COURT: All right. Do you have a follow-up  
7 question perhaps?

8 MR. MACKEY: Yes, I do.

9 MR. JONES: That's what I want to object to.

10 BY MR. MACKEY:

11 Q. What did you say next, Agent Smith?

12 MR. JONES: If the Court please, I object to that if  
13 it's going to get into discussions of what Mr. Nichols is  
14 claiming Mr. McVeigh said or did to him.

15 THE COURT: Well, what's the point of the question in  
16 connection with this suppression motion?

17 MR. MACKEY: Let me do it in a more sanitized fashion.

18 THE COURT: All right.

19 BY MR. MACKEY:

20 Q. Did the topic of the storage shed lead to further  
21 discussion later inside the marshal's?

22 A. Yes, sir.

23 Q. And did you make notes about those discussions?

24 A. Inside the marshal's office, yes, sir.

25 Q. And did you reduce those notes then to a 302?

409

1 A. Yes, sir.

2 Q. And is that 302 part of the sealed Court record, to your  
3 knowledge?

4 A. Yes, sir.

5 Q. While you were in the marshal's service space, Agent Smith,  
6 did Terry Nichols exhibit any concern or objection to  
7 continuing his conversation with you?

8 A. None at all.

9 Q. Mr. Tigar asked you some questions about telephone  
10 conversations recorded on April 26.

11 A. That's correct.

12 Q. Do you recall that?

13 A. Yes.

14 Q. Was it your belief and understanding at that time that  
15 consents had been obtained from the other parties to those same  
16 conversations?

17 A. Yes, sir.

18 Q. You had other reasons for being in Wichita that day, did  
19 you not?

20 A. Yes, sir. We needed to return the search warrant and  
21 appear for an omnibus and arraignment Rule 40 hearing in  
22 Wichita.

23 MR. MACKEY: And for the record, I would move to admit  
24 Government's Exhibits 31 and 32, 31 being the advice of rights  
25 form and 32 being the consent to search form.

410

1 THE COURT: 32 is a duplication of B1, as I understand  
2 it.

3 MR. MACKEY: It is, your Honor.

4 THE COURT: Do we need it twice?

5 MR. MACKEY: No, we don't. I withdraw.

6 THE COURT: 31 is offered.

7 MR. TIGAR: No objection, your Honor.

8 THE COURT: 31 is received.

9 BY MR. MACKEY:

10 Q. Just a couple final matters, Agent Smith. On the drive to  
11 Wichita, I think your testimony earlier was that there was no

12 questioning initiated by either yourself or Agent Crabtree; is  
13 that correct?  
14 A. That's correct. Scott Crabtree advised Terry Nichols as to  
15 the hearing that was coming up and there was roughly 15 to 20  
16 minutes of silence after that and then Terry Nichols asked us  
17 about a search warrant.  
18 Q. Did he ask you for something to drink?  
19 A. Yes, sir.  
20 Q. And did you provide that for him during the ride?  
21 A. I provided him some water on the ride.  
22 MR. MACKEY: One moment, your Honor.  
23 THE COURT: Yes.  
24 MR. MACKEY: Nothing else. Thank you.  
25 THE COURT: Mr. Tigar?

411

1 REDIRECT EXAMINATION  
2 BY MR. TIGAR:  
3 Q. Did you hear Agent Jablonski kick a chair?  
4 A. No, I did not.  
5 Q. Did you know that Agent Jablonski had kicked a chair?  
6 A. No, I did not.  
7 Q. Have you learned subsequently to Agent Jablonski kicked a  
8 chair?  
9 A. No, I did not.  
10 Q. Did you participate in any discussions about changing the  
11 tone of the interview to a more confrontational style?  
12 A. No, I did not.  
13 Q. You said in cross-examination that you had experience when  
14 suspects are not entirely truthful. Do you remember saying  
15 that?  
16 A. Yes, sir.

17 Q. You said that about the discussion you had with Mr. Nichols  
18 at approximately 4:15 p.m. concerning the consent to search.  
19 Do you remember that?  
20 A. Yes.  
21 Q. Did you think that Mr. Nichols was a suspect?  
22 A. At that point?  
23 Q. Yes.  
24 A. No, sir.  
25 Q. So your remark about suspects not being entirely truthful

412

1 in response to Mr. Mackey's question is irrelevant to the  
2 search consent; is that right?  
3 A. That's incorrect.  
4 Q. How is it relevant?  
5 A. Terry Nichols advised that he wanted to make sure that the  
6 searching agents did not confuse cleaning solvents with bomb  
7 building materials.  
8 Q. He stated that.  
9 A. Yes.  
10 Q. But he wasn't a suspect as far as you were concerned?  
11 A. At that point, no, sir.  
12 Q. Now, Jablonski arrived and he brought the consent form in;  
13 is that correct?  
14 A. Yes, sir.  
15 Q. Did you have a conversation with him about it, about the  
16 consent form?  
17 A. Not without Terry Nichols' presence, no, sir.  
18 Q. Did you have one with him later?  
19 A. No, sir.  
20 Q. Did you ever find out why he had brought that form in at

21 that time?  
22 A. No, sir.  
23 Q. Did you find out where that form had come from?  
24 A. No, sir.  
25 Q. Did you find out who directed that an effort be made to get

413

1 it signed?  
2 A. No, sir.  
3 Q. Isn't it a fact that Mr. Nichols said before he signed the  
4 form that he wanted himself or his wife present?  
5 A. No. Mr. Nichols asked that after he signed the form.  
6 Q. Look, please, at Exhibit A1, page 9. That's not it. Page  
7 3. I'm sorry. You see the top paragraph?  
8 A. Yes, sir.  
9 Q. After -- after -- "Nichols asked that it was possible for  
10 either his wife or himself to be present during any search."  
11 Do you see that?  
12 A. Yes, sir.  
13 Q. Did he ask that?  
14 A. Yes, sir.  
15 Q. After being told this was possible, he executed the form by  
16 signing it. Do you see that?  
17 A. Yes. I was mistaken.  
18 Q. All right. You were mistaken just a moment ago; correct?  
19 A. Yes, sir.  
20 Q. Your 302 is right?  
21 A. That's correct.  
22 Q. You said that you read over your notes in Mr. Nichols'  
23 presence; correct?  
24 A. That's correct.  
25 Q. You did that at 4:12 p.m.?

- 1 A. Approximately, yes, sir.
- 2 Q. Mr. Nichols made comments?
- 3 A. Yes, sir.
- 4 Q. Did you make changes on your notes?
- 5 A. I made clarifications, yes, sir.
- 6 Q. And are those clarifications reflected in the notes that
- 7 exist of your conversation up to 4:12 p.m.?
- 8 A. Yes, sir.
- 9 Q. Did there ever come another time when you reviewed your
- 10 notes with Mr. Nichols in his presence?
- 11 A. Yes, sir.
- 12 Q. What time was that?
- 13 A. At approximately 7:19 p.m.
- 14 Q. And did you read over all your notes then?
- 15 A. We went over the notes with Terry, yes, sir.
- 16 Q. Is that reflected in your notes that you went over them?
- 17 A. That we went over the story, yes, sir.
- 18 Q. Went over the story?
- 19 A. That's correct.
- 20 Q. Did you show him your notes at that time?
- 21 A. No, sir.
- 22 Q. All right. When you were -- at 4:12 p.m., when you were
- 23 reading aloud from your notes and Agent Jablonski was present,
- 24 did Mr. Nichols have your notes in his possession?
- 25 A. I would need them to read, so Mr. Nichols did not have them

- 1 in his possession.

2 Q. Were you sitting next to him where he could see them?

3 A. Yes, sir.

4 Q. Now, you talked about the automobile surveillance. You

5 said that Mr. Nichols backed out of his driveway?

6 A. Yes, sir.

7 Q. Did you see him back out of his driveway?

8 A. Yes.

9 Q. Isn't it a fact that he drove frontwards out of his

10 driveway?

11 A. He backed out of his driveway, yes, sir.

12 Q. Backed out. How many cars did you have surveiling him?

13 A. At that point, one.

14 Q. Did you get another car later?

15 A. Yes, sir.

16 Q. Were you in radio contact with the other car or cars?

17 A. Yes, sir.

18 Q. Are there radio logs?

19 A. I don't believe so.

20 Q. Is it the practice of the Bureau to keep radio logs?

21 A. No, sir.

22 Q. Did you think it was prudent to make a telephone call to

23 the police station as you've testified?

24 A. Yes, sir.

25 Q. Did you think it was prudent based on the concerns you had

416

1 and everything you knew?

2 A. Yes, sir.

3 Q. What were the concerns you had? A hostage situation?

4 A. Yes, sir.

5 Q. What did you then know that led you to believe that there

6 might be a hostage situation?

7 A. At that point, we knew that -- we believed --

8 Q. I'm asking you, sir. What did you, Agent Smith -- you were  
9 asked on cross-examination if you thought it was prudent. You  
10 responded yes, based on, quote, everything you knew. What did  
11 you know?

12 A. I knew that Terry Nichols had entered the police department  
13 and that he was a possible associate of Tim McVeigh and wanted  
14 to make sure that they -- there was no problems inside.

15 Q. That's all you knew? He was a possible associate of Tim  
16 McVeigh?

17 A. Yes, sir.

18 Q. Now, earlier when I started to ask you, you said "what we  
19 knew." You were quite accustomed during that day to keeping  
20 regular communication with the other agents so that everybody  
21 knew the relevant information; correct?

22 A. That's not correct.

23 Q. Well, for example, you had information that came from Las  
24 Vegas that you could use in the interrogation; correct?

25 A. Yes, sir.

417

1 Q. You knew about a letter that Terry Nichols had left in Las  
2 Vegas; correct?

3 A. Yes, sir.

4 Q. And you knew about that some time between 4 and 5 p.m.;  
5 correct?

6 A. I did not know about that at that point, sir.

7 Q. When did you know it?

8 A. During the last break at 10:21 to 10:50.

9 Q. 10:21, that's the first time you found out about that?

10 A. Yes, sir.

11 Q. You had regular communication with the other agents in the  
12 station during the day; right?

13 A. During that evening, yes, sir.

14 Q. Yes. All right.

15 MR. TIGAR: Nothing further.

16 THE COURT: Mr. Mackey, do you have some additional  
17 questions?

18 MR. MACKEY: Only two questions, your Honor.

19 THE COURT: All right.

20 RE CROSS-EXAMINATION

21 BY MR. MACKEY:

22 Q. Agent Smith, was your concern about the situation inside  
23 the Herington Police Department at all heightened by the  
24 magnitude of the crime that had taken place 48 hours earlier?

25 A. Yes, sir.

418

1 Q. Did you know that the bomb (sic) suspected of exploding in  
2 downtown Oklahoma City had been rented at a Ryder dealership  
3 not too far from Herington?

4 A. That's correct.

5 Q. And that the person that you knew was being arrested that  
6 same afternoon was staying in that same city --

7 A. That's correct.

8 Q. -- shortly before?

9 A. Yes, sir.

10 Q. Did all those factors go into your mind as you thought  
11 about whether the truck should be swept or the house secured?

12 A. Yes, sir.

13 MR. MACKEY: Thank you.

14 MR. TIGAR: I'm sorry, your Honor. I --

15 FURTHER REDIRECT EXAMINATION

16 BY MR. TIGAR:

17 Q. When did you first learn that Tim McVeigh was arrested? I  
18 thought you told me it wasn't until the next day you learned  
19 it.

20 A. I learned it that evening.

21 Q. That evening. What time?

22 A. I don't recollect what time I heard that.

23 MR. TIGAR: Okay. Thank you.

24 THE COURT: Is Agent Smith to be excused now as a  
25 witness?

419

1 MR. TIGAR: We have nothing further. I'm sorry.

2 MR. MACKEY: Nothing. Thank you, your Honor.

3 THE COURT: You may step down. You are excused now.  
4 Having completed one witness, maybe we can take a recess.

5 MR. TIGAR: Your Honor, I -- the next -- others will  
6 be more brief because they were around during the same --

7 THE COURT: Yes. I assumed that. We'll be talk --  
8 1:30? Does that give everybody ample time? Recess until 1:30.

9 (Recess at 12:04 p.m.)

10 \* \* \* \* \*

11

12

13

14

15

16

17

18

19

20  
21  
22  
23  
24  
25

1	INDEX					
2	Item				Page	
3	WITNESSES					
4	David J. Phillips					
5	Direct Examination by Mr. Tigar				287	
6	Cross-examination by Mr. Mendeloff				294	
7	Stephen E. Smith					
8	Direct Examination by Mr. Tigar				302	
9	Cross-examination by Mr. Jones				369	
10	Cross-examination by Mr. Mackey				376	
11	Voir Dire Examination by Mr. Jones				402	
12	Redirect Examination by Mr. Tigar				411	
13	Recross-examination by Mr. Mackey				417	
14	Redirect Examination by Mr. Tigar				418	
15	PLAINTIFF'S EXHIBITS					
16	Exhibit	Offered	Received	Refused	Reserved	Withdrawn
17	29		310			
18	30		371			
19	31	410	410			
20	33	400	400			
21	72	385				
22	72	401				
23		* * * * *				
24						

1 REPORTERS' CERTIFICATE

2 We certify that the foregoing is a correct transcript  
3 from the record of proceedings in the above-entitled matter.

4 Dated at Denver, Colorado, this 27th day of June,  
5 1996.

6

7

---

Paul Zuckerman

8

9

---

Bonnie Carpenter

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25