

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD;  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH;  
RAMZI BINALSHIBH;  
ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED AL HAWSAWI

AE 422 (GOV)

**Government Motion**  
To Conduct Depositions of Certain  
Witnesses

21 April 2016

**1. Timeliness**

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

**2. Relief Sought**

Pursuant to Rule for Military Commissions ("R.M.C.") 702, the United States respectfully moves this Commission for an Order scheduling depositions of certain witnesses to be conducted in court during two days of the scheduled October 2016 hearings. Specifically, the Prosecution requests that five depositions be taken during the week of 3 October 2016, and five depositions be taken during the week of 10 October 2016.

**3. Overview**

In addition to proving aggravating factors, at least one of which is required to establish each of the Accused's eligibility for capital punishment, *see* R.M.C. 1004(c), the Prosecution will present, during the pre-sentencing phase of trial, a number of victim impact witnesses. Victim impact testimony is clearly admissible pursuant to United States Supreme Court precedent, *see Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991), and the Rules for Military Commissions. *See* R.M.C. 1001(b)(2). While the Prosecution is doing all it possibly can to allow this Commission to schedule trial at the earliest possible date, it is inescapable that the

September 11, 2001 attacks that have given rise to this criminal prosecution occurred almost 15 years ago. It is a likewise unavoidable fact of life that some of the Prosecution's witnesses, particularly the parents of adult children who lost their lives as a result of the September 11, 2001 attacks, are aging and developing health issues that may render them unavailable for a future trial. Accordingly, to preserve their testimony, the Prosecution requests that this Commission set aside two days during the previously-scheduled October 2016 hearings to conduct depositions under parameters discussed herein.

R.M.C. 702 provides that a "deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission." Unlike the law governing general courts-martial, *see* 10 U.S.C. § 849, neither the M.C.A. nor the R.M.C. place limits on the use of depositions in capital cases.

The Prosecution requests authorization to conduct in-court depositions of the following persons: (1) Mr. Lee Hanson; (2) Mr. Robert Hemenway; (3) Ms. Rosemary Dillard; (4) Mr. John Vigiano; (5) Mr. Gordon Haberman; (6) Ms. [REDACTED] (7) Mr. [REDACTED] (8) Ms. [REDACTED] (9) Ms. [REDACTED] and, (10) Mr. David Beamer. Consistent with R.M.C. 702(c)(2), the testimony of each witness is relevant to the capital-sentencing decision in this case, and there is good cause for taking of the depositions.<sup>1</sup> Each of these persons is the parent, grandparent, or spouse of a victim of the September 11, 2001 attacks who suffered real and substantial harm (emotional, psychological, physical, or other) as a result of the Accuseds' actions in perpetrating the attacks. Each is at or over the age of 65, and several have expressed to the Prosecution health concerns that affect their life expectancy or future ability to travel. Each strongly seeks to ensure that his/her voice honoring their lost loved one is

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<sup>1</sup> The Prosecution also intends to present testimony from Mr. Hanson during the merits phase of trial to prove facts in support of numerous substantive offenses charged against the Accused. Mr. Hanson, who was speaking on the telephone with his son from Flight 175 at the time the plane was being hijacked, provides necessary information relating to how the plane was hijacked and what occurred in the course of the hijacking. Accordingly, the need to preserve his testimony serves the purposes of the case.

preserved. Because a date for the commencement of trial is uncertain and, indeed, members of the defense have publicly stated their expectations that trial is still years away,<sup>2</sup> and because this trial is likely to last several months once it begins,<sup>3</sup> there is a legitimate need to preserve the testimony of the listed witnesses as soon as possible.

The Prosecution requests that the Military Judge appoint himself as the deposition officer. The Prosecution also requests that the Accused be present with counsel for these depositions and that counsel for the Accused be permitted to conduct cross-examination of the witnesses if they so wish. R.M.C. 702(g)(1)(A)-(B). Finally, the Prosecution requests that the Commission authorize video and audio recordings of the depositions, and that it authorize the use of transcription services. R.M.C. 702(f)(6)-(8); (g)(3).

#### **4. Burden of Proof**

As the moving party, the United States must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

#### **5. Facts**

On 31 May 2011 and 25 January 2012, charges in connection with the September 11, 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The five co-accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

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<sup>2</sup> See, e.g., Carol Rosenberg, *9/11 Pretrial Hearings to Resume at Guantanamo, but Trial Date Still Not In Sight*, Miami Herald, Feb. 14, 2016, [www.miamiherald.com/news/nation-world/world/americas/guantanamo/article60385116.html](http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article60385116.html) (stating that counsel for Mr. Hawsawi predicted “a decade of pretrial preparation” and counsel for Mr. Ali predicted that, unless the United States provides open discovery of over 6.3 million classified documents, trial would begin in 2021).

<sup>3</sup> See AE 380MM (CDC), Attachment E, Memorandum for the Convening Authority from CDC BG Baker, at 2 n. 3 (“The 9/11 trial will likely last a minimum of 12 months and could very well last much longer depending on a multitude of factors.”).

The United States has averred in this case, in short, that the five Accused planned, coordinated, and directed the September 11, 2001 attacks upon the United States that resulted in the deaths of 2,976 people. Among those killed were: Peter B. Hanson, Victim # 117, Sue Hanson, Victim # 118; Christine Lee Hanson, Victim # 116; Ronald J. Hemenway, Victim # 2850; Eddie A Dillard, Victim # 2769; Joseph Vigiano, Victim # 2601; John Vigiano, Victim # 2600; Andrea Lyn Haberman, Victim # 1082; Colleen Ann Barkow, Victim # 263; Paul Acquaviva, Victim # 157; Gerald Francis DeConto, Victim # 2831; Dr. Paul Ambrose, Victim # 2759; and, Todd Beamer, Victim # 2945.

Now, four years after referral of charges, and nearly 15 years after the September 11, 2001 attacks, the Parties remain ensnared in a number of pretrial battles. The Prosecution has openly declared its intent to conclude the discovery process by 30 September 2016. This would potentially allow for trial to commence during calendar year 2017. That said, a number of issues remain in pretrial litigation. Additionally, while the Parties' estimates differ, trial is expected to last at least several months.

While this case remains in a pretrial posture, on December 8, 2015, Brad Burlingame, the brother of Charles "Chic" Burlingame (Victim # 2753) died. Chic Burlingame was the pilot of American Airlines Flight #77, which was crashed into the Pentagon on September 11, 2001. Brad Burlingame was a significant voice for his deceased brother and all the victims of the September 11, 2001 attacks. He was only 63 years old at the time of his death from cancer. Similarly, Muriel Kuhn, the grandmother of DM2 Michael Noeth, (Victim # 2883), who was killed at the Pentagon on September 11, 2001, died in January 2016. Ms. Kuhn was 97 years old. She had been an important parental figure for her murdered grandson and would have described poignant stories of his life and the loss she felt after September 11, 2001. The Prosecution had intended for Mr. Burlingame and Ms. Kuhn to be important victim impact witness at trial in this case, giving unique accounts of their lost loved ones and the resulting loss endured by their families. In fact, Ms. Kuhn was to be the last witness presented by the Prosecution. Their voices are but two of the many voices of the September 11, 2001 victims that

have been quieted in the last 15 years, but future loss of additional voices is, unfortunately, inevitable as time marches on. Thus, the Prosecution now seeks to begin preserving testimony of victim family members who are at advanced ages and have expressed general health concerns to the Prosecution team or those who, like Mr. Burlingame, suffer from a life-threatening medical condition.

## **6. Law and Argument**

### **I. Exceptional Circumstances Exist to Justify the Requested Depositions**

Depositions can be “a useful tool in the search for truth in a criminal case by preserving evidence that would otherwise be lost to the finders of fact. *United States v. Cokeley*, 22 M.J. 225, 227 (C.M.A. 1986). Rule for Military Commission 702 states in pertinent part:

A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.

R.M.C. 702(a). *See also* Fed. R. Crim. P. 15(a) (stating a court may grant a motion to depose witnesses “because of exceptional circumstances and in the interest of justice”).

Consistent with Rule 702, federal courts have generally held that, to establish “exceptional circumstances” to justify taking a deposition in a criminal case, the proponent must show (1) that the witness is unlikely to be available to testify at trial; (2) the witness’ testimony is material; and (3) it is in the interests of justice to preserve the testimony. *See United States v. Kelley*, 36 F.3d 1118, 1125 (D.C. Cir. 1994). *See also* R.M.C. 702(c)(3), Discussion (“Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness’ testimony, or that the witness’ testimony would be unnecessary.”). As follows, the Prosecution’s request to depose certain victim impact witnesses satisfies these criteria.

**A. There Are Significant Concerns That the Witnesses Will be Unavailable to Testify at Trial**

To show unavailability of witnesses at this pretrial stage, the government “need not prove conclusively that the prospective deponent will be unavailable to testify at trial.” *United States v. Cooper*, 947 F. Supp.2d 108, 113 (D.D.C. 2013) citing *United States v. Drogoul*, 1 F.3d 1546, 1553 (11th Cir. 1993) (holding it “would be unreasonable and undesirable to require the government to assert with certainty that a witness will be unavailable for trial months ahead of time, simply to obtain authorization to take his deposition”). Rather, the government need only show a “substantial likelihood exists” that the witness will be unavailable for trial. *Id.*

Here, it is impossible to predict the life expectancy of any witness. Nonetheless, each of the witnesses listed herein is at or over the age of 65, some well over this threshold. Each of the witnesses has also stated a desire to memorialize his/her testimony due to concerns with their long-term health and the possibility of being incapable of traveling to Naval Station Guantanamo Bay, Cuba, at a future date that is yet undetermined. Accordingly, this Commission should find that the Prosecution has satisfied the “substantial likelihood” standard for each of the witnesses.

**B. The Witnesses Provide Relevant and Material Victim Impact Testimony**

Evidence about the victim and about the impact of the murder on the victim’s family and friends is relevant to the Commission Members’ decision as to whether or not the death penalty should be imposed in this case. *See Payne*, 501 U.S. at 827; *see also United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998), *disapproved of on other ground by Hooks v. Ward*, 184 F.3d 1206, 1227 (10th Cir. 1999) (explaining that because the consequences of the crime are an important ingredient in the capital sentencing equation, the government can present testimony demonstrating the harm caused by the defendant’s actions). What is more, the R.M.C. expressly permit the members to consider victim impact evidence. R.M.C. 1001(b)(2) (“Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused.”).

Here, should the Accused be convicted and the case proceed to the pre-sentencing phase of the proceedings, each of the witnesses will testify about the unique and substantial harm they have suffered as a result of the murder of their respective family members. For instance, Mr. Gordon Haberman will provide testimony to the Commission Members about his daughter, Andrea Haberman (Victim # 1082), a small-town Wisconsin girl, and his only child, who was on her first business trip and first trip to the East coast of the United States and was tragically in the direct path of American Airlines Flight #11. He will tell the Commission Members about unique harm he, his wife, Andrea's fiancée, and others have endured since she was murdered. Similarly, John Vigiano will give the Commission Members a glimpse into the lives of his two sons and only children, John Vigiano (Victim #2600) and Joseph Vigiano (Victim # 2601) who worked respectively for the New York City Fire and Police Departments. Mr. Vigiano, himself a 36-year veteran of the FDNY, will describe, among other things, the personalities of his sons, his last contacts with his sons, and the impact their deaths have had upon he and his wife, and upon the wives and five children his sons left behind. This testimony is undoubtedly important evidence for the Commission Members to consider when evaluating the harm caused by the actions of the Accused.

### **C. The Interests of Justice Compel Preserving the Witness' Testimony**

The interests of justice compel preserving the testimony of the above-listed witnesses. Testimony from victim family members is a compelling and necessary element of the government's penalty phase evidence, detailing for the Commission Members the harm caused by the Accused. When it comes to victim impact evidence, the Prosecution is generally restricted only by the bounds of due process. *See Payne*, 501 U.S. at 825 (stating relevant victim impact evidence is generally admissible so long as it is not "so unduly prejudicial that it renders the trial fundamentally unfair").

It is impossible to say, at this pretrial stage, that the testimony of any certain victim impact witness is "unnecessary." *See R.M.C. 702(c)(3)(A) Discussion*. The Accused are alleged

to have collectively caused the deaths of 2,976 unique individuals on September 11, 2001. Each murder, in turn, caused unique and devastating harm to the victims' families and friends. In affirming substantial victim impact testimony in the *McVeigh* case, the Tenth Circuit stated in pertinent part:

Taken as a whole, this evidence is poignant and emotional. The question before us, then, is whether allowing such a substantial amount of victim impact testimony reflecting the magnitude of such a large-scale crime violates the limits on such testimony set forth in *Payne*. We conclude that it does not. The bombing of the Murrah Building was the deadliest act of domestic terrorism in the history of the United States. The magnitude of the crime cannot be ignored. It would be fundamentally unfair to shield a defendant from testimony describing the full effects of his deeds simply because he committed such an outrageous crime. The sheer number of actual victims and the horrific things done to them necessarily allows for the introduction of a greater amount of victim impact testimony in order for the government to show the "harm" caused by the crime.

153 F.3d at 1221. The Prosecution must have discretion to choose the pre-sentencing witnesses to prove its case. Accordingly, it is now vital that the Prosecution preserve the testimony of potential victim impact witnesses whose testimony may be critical to obtaining justice in this case, but who may be lost in the delays before trial.

The Accused are not unduly prejudiced by this request. In contrast to the law for general courts-martial, *see* 10 U.S.C. § 849, which limits the use of depositions when the government pursues capital punishment, nothing in the M.C.A. limits the Prosecution's ability to present a recorded deposition as evidence in this case simply because it is a capital case. While the U.C.M.J. and M.C.A. are separate Acts, it is clear that the latter is modeled on the former. *See* 10 U.S.C. § 948b(c). Thus, under basic tenets of statutory construction, this Commission should infer that Congress intended for depositions to be admissible in capital trials held under the M.C.A. *See generally Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Further, Congress explicitly authorized the Secretary of Defense to prescribe procedures for trial, and the M.C.A. is silent as to the taking of and admissibility of depositions in Commission proceedings. Thus, the Secretary of Defense properly exercised his discretion to promulgate Rule 702, which specifically allows for the use of depositions in Commission cases. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations.”).

Also, while it is not for the Commission to determine at this time whether the recorded depositions would be admissible at trial, *see Cooper*, 947 F. Supp.2d at 114, the Prosecution requests herein that this Commission order procedures that would maximize the protection of the Accuseds’ trial rights and the likelihood of admissibility of the recorded depositions, if necessary. The Prosecution in no way concedes that the Accused are afforded the equivalent of Sixth Amendment confrontation rights.<sup>4</sup> Nonetheless, to avoid litigation risks and heighten

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<sup>4</sup> While the M.C.A. requires that the Accused be provided the right to cross-examine witnesses, 10 U.S.C. § 948a(b)(2)(A), it is clear from reading the Act as a whole that Congress did not intend for the Accused to be afforded the fully panoply of confrontation rights afforded to United States citizens under the Sixth Amendment in this Military Commission. Particularly, Congress carved out liberal hearsay exceptions that permit the introduction of evidence without confrontation. *See* 10 U.S.C. § 949a(b)(3)(D) (allowing for the introduction of out of court statements where, among other things, the military judge determines the statement carries adequate indicia of reliability and direct testimony from the witness is not available as a practical matter); *see also* 10 U.S.C. § 949a(b)(1) (authorizing the Secretary of Defense to “make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need”).

What is more, evidence, such as victim impact testimony, that is relevant only to the selection stage of the capital-decision-making process, as opposed to the death-eligibility inquiry, need not be subjected to confrontation even in federal district courts. *See United States v. Umana*, 750 F.3d 320, 348 (4th Cir. 2014) (holding the Confrontation Clause did not apply to the selection phase of a federal capital trial); *United States v. Fields*, 483 F.3d 313, 337-38 (5th Cir. 2007) (holding same). Indeed, federal courts presiding over capital cases prosecuted under the Federal Death Penalty Act, 18 U.S.C. § 3591, *et seq.*, have repeatedly allowed the introduction of hearsay victim impact testimony. *See, e.g., United States v. Bolden*, 545 F.3d 609, 626 (8th Cir. 2008) (affirming introduction of victim impact testimony that included, among other things: (1) testimony from victim’s friends and pastor about the effect of the victim’s death upon the victim’s parents; (2) witnesses reading passages from a memorial journal; (3) a 9-1-1 recording of victim’s girlfriend requesting a police escort to the hospital on the afternoon he was

reliability of the proposed witness testimony, the Prosecution urges the Commission to hold depositions in open court, with the Accused present, and to permit counsel for the Accused to cross-examine witnesses if they so desire. *See* R.M.C. 702(g)(1)(A)-(B).

Finally, to the extent the Defense may argue that it is incapable of preparing to cross-examine victim impact witnesses until all discovery is provided, this Commission should reject any such claims. First, the Prosecution, as stated in open court, expects to complete discovery by 30 September 2016. More importantly, however, evidence regarding the offenses and how the Accused were captured, detained, and interrogated is, quite simply, irrelevant to the potential cross-examination of the proposed victim impact witnesses. In fact, cross-examination of witnesses on such topics would likely be improper, delving into such issues concerning the witnesses' opinions about the crimes, the Accused, how the Accused were treated, or what might be appropriate punishment for the Accused. *See Booth v. Maryland*, 482 U.S. 496, 508 (1987), *overruled on other grounds by Payne*, 501 U.S. at 830 (holding victim impact witnesses are prohibited from stating characterizations and opinions about the crime, the defendant, and the appropriate sentence because such testimony could "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant"). Thus, it is not necessary that the discovery process be completed before the requested depositions take place.

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killed; and (4) reading resolutions passed by local governments in honor of the victim); *United States v. Whitten*, 610 F.3d 168, 187-88 (2nd Cir. 2010) (affirming introduction of victim impact testimony in case involving killing of two police officers where, among other things, two of the victims' fellow police officers testified that the murders "had a profound influence on other officers who worked with" the victims); *United States v. Fulks*, 454 F.3d 410, 436 (4th Cir. 2006) (affirming introduction of victim impact testimony consisting of a letter read by victim's sister written by deceased victim to her sister; concluding the "relevant inquiry" was not whether the letter was admissible under the Federal Rules of Evidence, which do not apply in a capital sentencing hearing, but whether the letter was so unreliable that its admission would violate due process); *United States v. Hall*, 152 F.3d 381, 404-06 (5th Cir. 1998) (holding the admission of nontestimonial victim impact statements did not violate defendant's Sixth Amendment confrontation rights) *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *see also State v. Johnson*, 284 S.W.3d 561, 584 (Mo. 2009) (*en banc*) (holding a victim impact statement is not subject to the Confrontation Clause) *citing Fields*, 483 F.3d at 337-38; *State v. Martinez*, 189 P.3d 348 (Ariz. 2008) (*en banc*) (affirming introduction of victim impact statement that was unsworn and not subject to cross-examination).

Of course, should the Military Judge grant the Prosecution's motion, the Prosecution will comply with R.M.C. 914 prior to the testimony at the deposition.

For the reasons set forth above, this Commission should find that exceptional circumstances exist to warrant taking the requested depositions and that taking these depositions serve the interests of justice.

## **7. Request for Depositions**

Rule for Military Commission 702, Depositions, states:

(2) A request for a deposition shall include:

- (A) The name and address of the person whose deposition is requested;
- (B) A statement of the matters on which the person is to be examined;
- (C) A statement of the reasons for taking the deposition; and,
- (D) Whether an oral or written deposition is requested.

R.M.C. 702(c)(2). Accordingly, the Prosecution requests to conduct oral depositions of the following persons:

1. Mr. Lee Hanson, age 83, [REDACTED] Mr. Hanson's son, Peter Hanson (Victim # 117), daughter-in-law, Sue Hanson (Victim # 118), and grand-daughter, Christine Hanson (Victim # 116), were passengers on United Airlines Flight #175, which was crashed into the South Tower of the World Trade Center. All three died as a result of the crash. Christine, who was two years old, was the youngest victim of the 2,976 people who were killed on September 11, 2001. Notably, Mr. Hanson is expected to be both a merits and sentencing phase witness for the Prosecution. At the merits phase, he will provide testimony confirming that Flight #175 was hijacked prior to being crashed into the South Tower. At the penalty phase, like all other witnesses discussed herein, he will provide testimony about the family members who were killed and the loss caused to himself and his family as a result of their murders. The Prosecution submits that it is necessary to take Mr. Hanson's deposition prior to trial due to his advanced age and general health concerns.

2. Mr. Robert Hemenway, age 76, [REDACTED] Mr. Hemenway's son, ET1 Ronald J. Hemenway (Victim # 2850), was a Sailor in the United States Navy serving at the Pentagon at the time of the September 11, 2001 attacks. Mr. Hemenway will provide testimony about his son and the impact of his son's murder on his family and friends. The Prosecution submits that it is necessary to take Mr. Hemenway's deposition prior to trial due to his advanced age and general health concerns.

3. Mrs. Rosemary Dillard, age 68, [REDACTED] Ms. Dillard lost her husband, Eddie Dillard (Victim # 2769), a passenger on American Airlines Flight #77, as a result of the September 11, 2001 attacks. Ms. Dillard will provide testimony about her husband and the impact of her husband's death on her and her family. The Prosecution submits that it is necessary to take Ms. Dillard's deposition prior to trial due to her advanced age and because she suffers from severe diabetes.

4. John Vigiano, Sr, age 77, Deer Park, New York. Mr. Vigiano's sons, NYPD Detective Joseph Vigiano (Victim # 2601) and FDNY Firefighter John Vigiano, Jr (Victim # 2600) were both killed while serving at the World Trade Center on September 11, 2001. These were Mr. Vigiano's only children and they both left behind wives and children of their own. Mr. Vigiano is, himself, a 36-year veteran of the FDNY, retiring as a Captain. He is currently battling throat cancer. Mr. Vigiano will provide testimony about his sons and the impact of their deaths on him and his family, as well as friends and co-workers of his sons. The Prosecution submits that it is necessary to depose Mr. Vigiano prior to trial due to his advanced age and general health concerns.

5. Mr. Gordon Haberman, age 65, [REDACTED] Gordon's daughter, Andrea Haberman (Victim # 1082), was killed inside the North Tower of the World Trade Center on September 11, 2001. She was raised in a small-town in Wisconsin and, at 25 years old, was on her first business trip for her Chicago brokerage firm and her first trip to New York City. Mr. Haberman will provide testimony about his daughter and the impact her murder has had upon him and his family, as well as his daughter's close friends. Mr. Haberman underwent

back surgery in 2015. The Prosecution submits that it is necessary to depose Mr. Haberman prior to trial due to his advanced age and general health concerns.

6. [REDACTED] Colleen

Meehan Barkow (Victim # 263), was killed at the World Trade Center on September 11, 2001.

Her body was recovered days later, on what would have been her first wedding anniversary.

[REDACTED] will provide testimony about [REDACTED] and the impact of [REDACTED] death on [REDACTED] family. The Prosecution submits that it is necessary to depose [REDACTED] prior to trial due to [REDACTED] advanced age and general health concerns.

7. [REDACTED]

Paul Acquaviva (Victim # 157), an employee of Cantor Fitzgerald, was killed at the World Trade Center on September 11, 2001. [REDACTED] will provide testimony about [REDACTED] and the

impact of [REDACTED] murder upon [REDACTED] family. The Prosecution submits that it is necessary to depose [REDACTED] prior to trial due to [REDACTED] advanced age and general health concerns.

8. [REDACTED]

U.S. Navy Captain Gerald DeConto (Victim # 2831), was killed at the Pentagon on

September 11, 2001. [REDACTED] will provide testimony about [REDACTED] and the impact of [REDACTED]

murder on [REDACTED] family. The Prosecution submits that it is necessary to depose

[REDACTED] prior to trial due to [REDACTED] advanced age and general health concerns.

9. [REDACTED]

Dr. Paul Wesley Ambrose (Victim # 2759), was a passenger on American Airlines Flight #77 on September 11, 2001 and was killed when hijackers deliberately crashed the plane into the

Pentagon. His [REDACTED] will provide testimony about Dr. Ambrose and the impact his murder has had upon [REDACTED] family. The Prosecution submits it is necessary to depose [REDACTED]

prior to trial due to [REDACTED] advanced age and general health concerns.

10. Mr. David Beamer, age 74, [REDACTED] Mr. Beamer's son, Todd

Beamer (Victim # 2945), was a passenger on United Airlines Flight #93 on September 11, 2001, and was killed when hijackers crashed the plane into a field near Somerset, Pennsylvania. Todd

Beamer had a telephone conversation with a telephone company operator detailing the hijacking, in which he recited the Lord's Prayer, uttered the famous words, "let's roll" and then joined other passengers in a hand-to-hand struggle to regain control of Flight #93. Mr. Beamer will provide testimony about his son and the impact of his son's murder on him and his family. The Prosecution submits it is necessary to depose Mr. Beamer prior to trial due to his advanced age and general health concerns.

**8. Conclusion**

For the reasons set forth above, the Prosecution requests that the Commission grant its request to hold depositions during the scheduled October 2016 hearings.

**9. Oral Argument**

The Prosecution is prepared to provide the Military Judge any other information he feels he needs to rule on this motion during oral argument, but is not specifically requesting oral argument on this motion.

**10. Witnesses and Evidence**

None

**11. Certificate of Conference**

On 11 April 2016, the Prosecution consulted with the Defense on the instant motion. The Prosecution received the following responses:

Counsel for Mr. Bin 'Attash stated that they were "unable to take a position without reviewing the Prosecution's motion, its factual allegations and the law cited."

Counsel for Mr. Ali stated that they "consent[] to the government's motion if (1) the government motion complies with R.M.C. 702; and, (2) the government consents to the same procedure for defense witnesses in an analogous situation."

Counsel for Messrs. Mohammad, Binalshibh, and Hawsawi did not respond within the 24-hour timeframe established by Military Commissions Trial Judiciary Rule of Court 3.5.k.

**12. Additional Information**

None

**13. Attachments**

A. Certificate of Service, dated 21 April 2016.

Respectfully submitted,

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*//s//*

Clay Trivett  
Managing Trial Counsel

Edward Ryan  
Trial Counsel

Robert Swann  
Trial Counsel

Jeff Groharing  
Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 21st day of April 2016, I filed **AE 422 (GOV) Government Motion To Conduct Depositions of Certain Witnesses with the Office of Military Commissions Trial Judiciary** and I served a copy on counsel of record.

\_\_\_\_\_  
*//s//*

Clay Trivett  
Managing Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions