

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 422B(WBA)

**Mr. bin 'Atash's Response to AE 422(GOV),
Government Motion to Conduct Depositions
of Certain Witnesses**

Date Filed: 12 May 2016

1. Timeliness: This Response is timely filed.

2. Relief Sought:

The Government relief requested in AE 422(GOV) violates the United States Constitution, applicable law, and treaties, and must be denied.

3. Overview:

In AE 422(GOV) the Government seeks to schedule ten depositions of victim family members during the October 2016 hearings. Of the ten proposed deponents, only one is propounded as a fact witness. The others are witnesses presented solely for purposes of sentencing and are called to assist the prosecution in executing Mr. bin 'Atash. (AE 422(GOV) at 2 n.1). The Government asserts, without evidence, that some of their potential witnesses are aging and developing health issues "that may render them unavailable for a future trial." (AE 422(GOV) at 2).

Mr. bin 'Atash has a right to cross-examine all fact witnesses during the merits phase in front of the Panel; a right that cannot be properly exercised until receipt and review of all of the

discovery. The Panel also has the important function of being able to pose their own questions to the witnesses. Accordingly, this Commission should not order a deposition of a fact witnesses unless the Government has established the requisite extraordinary circumstances: (1) substantial likelihood that witness will be unavailable at trial; (2) materiality of testimony; and (3) interests of justice to preserve the testimony. The Government has failed to demonstrate the substantial likelihood that a fact witness would be unavailable at trial; providing only general concerns regarding age and health is insufficient. Because depositions in the instant request would negatively impact important rights and procedural guarantees under the Constitution, applicable laws, and treaties, this Commission should deny the prosecution's motion.

Applicable law and rules allowing for depositions in this matter only concern the preservation of testimony for trial, i.e., evidence material to guilt or innocence. There exists no governmental right to present victim impact testimony, and because the Rules of Evidence do not apply at sentencing, the availability of a victim impact witness is irrelevant. The Government could submit written or videotaped victim impact statements for potential admission, thereby preserving the voices of the ten people identified in AE 422, and obviate the need for them to experience the inconvenience or pain of travel from the continental United States to JTF-Guantanamo Bay. Moreover, cross-examination of any victim impact witness at this point in the pretrial litigation phase of the case would be premature. Counsel for Mr. bin 'Atash have not yet received discovery from the Government and are unable to fashion appropriate cross-examination. Panel members would be foreclosed from asking questions they might have because appropriate questions could only be fashioned after concluding the merits phase of the trial.

4. Burdens of Proof:

The Government bears the burden of persuasion; although the standard of proof is normally preponderance of the evidence, because with respect to one witness the Government seeks introduction of a deposition to prove an element of the offenses charged, the Government must be held to the standard of proof in all criminal cases: beyond a reasonable doubt. R.M.C. 905(c)(1).

5. Facts:

A. On 31 May 2011 and 25 January 2012, the Government charged Mr. bin 'Atash and the other codefendants with the following offenses under the Military Commissions Act of 2009 ("MCA"): (1) conspiracy, 10 U.S.C. § 950t(29); (2) attacking civilians, 10 U.S.C. § 950t(2); (3) attacking civilian objects, 10 U.S.C. § 950t(3); (4) murder in violation of the Law of War, 10 U.S.C. § 950t(15); (5) destruction of property in violation of the Law of War, 10 U.S.C. § 950t(16); (6) hijacking an aircraft, 10 U.S.C. § 950v(23); and (7) terrorism, 10 U.S.C. § 950t(24) (2012). These charges were referred to the Military Commission on 4 April 2012 as capital offenses.

B. The MCA grants the Secretary of Defense express authority to promulgate rules of evidence and procedure for trial by military commission. 10 U.S.C. § 949a(a). Accordingly, the Secretary of Defense issued the Rules of Military Commission ("R.M.C.") and the Military Commission Rules of Evidence ("MCRE") on April 27, 2010. The current version of the R.M.C. was amended in 2012. See Manual for Military Commissions, Foreword by Sec. of Defense Leon Panetta (2012).

C. On 21 April 2016, the Government filed AE 422(GOV), Government Motion to Conduct Depositions of Certain Witnesses. In the motion, the Government seeks to schedule ten

depositions of victim family members during the October 2016 hearings. Of the ten proposed, only 1 is presented as a fact witness. (AE 422(GOV) at 2 n.1). The Government argues that some of the potential witnesses are aging and developing health issues “that may render them unavailable for a future trial.” (AE 422(GOV) at 2).

6. Law and Argument:

A. Deposition testimony about matters bearing on guilt does not satisfy constitutional and statutory rights to confrontation and due process.

This Commission must deny the Government’s attempts to circumvent Mr. bin ‘Atash’s right to test testimonial evidence introduced against him to prove an element of the offenses charged. The Government has previously sought “preadmission” of testimonial hearsay in violation of the Sixth Amendment, the MCA, and international law, (AE 391; AE 415), and now the Government seeks to conduct depositions of ten witnesses in violation of the Due Process Clause of the Fifth Amendment, the MCA, and international law. The Government asserts that it “openly declared its intent to conclude the discovery process by 30 September 2016 . . . allow[ing] for trial to commence in during calendar year 2017.” (AE 422(GOV) at 4). This is pure nonsense; all of the Government’s previous statements regarding the provision of discovery and the time needed to prepare for litigation have been grossly incorrect. Compounding the Government’s incorrect predictions is the fact that depositions in a capital criminal case are not a matter of course; they should only be done when there is no alternative. If they are to be done, depositions must be done in a manner that does not taint the prospective panel members and that protects the trial process in general. Because the Government fails to establish circumstances to warrant a detour from the normal procedure of this case, this Commission should deny the requested depositions.

Depositions are a recognized procedure in federal courts, courts-martial, and under the R.M.C., to preserve evidence for the triers of fact that would otherwise be lost. In all three systems, the proponent must establish “exceptional circumstances” to justify deposing a witness outside of the normal procedure of the case. See Fed. R. Crim. P. 15(a); 10 U.S.C. § 849(a)(2); R.M.C. 702(a). In federal court, the moving party bears the burden of establishing exceptional circumstances by demonstrating: (1) a substantial likelihood that the witness will be unavailable at trial; (2) the testimony is material to an issue in dispute as to the offenses charged; 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); United States v. Drogoul, 1 F.3d 1546, 1551-53 (11th Cir. 1993).

Rule 15(a) of the Federal Rules of Criminal Procedure, Section 849 of the UCMJ, and Rule 702 of the Rules for Military Commission contemplate depositions to be used at trial and not at sentencing. The reason for this is obvious: because the Sixth Amendment confrontation right and the Rules of Evidence do not apply at sentencing, there is no need for depositions in the sentencing phase. The Government has failed to cite a single case standing for their proposition that depositions of witnesses in aggravation are permitted. Defense counsel have likewise found no federal or courts-martial case reviewing the grant or denial of a deposition by a court at sentencing and defense counsel will never find one; they simply do not exist.

Depositions are disfavored in criminal cases. United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987). Their “only authorized purpose is to preserve evidence, not to afford discovery” and certainly not when they are unnecessary and the moving party has other means by which to present the evidence in court. Simon v. United States, 644 F.2d 490, 498 n.12 (5th Cir. May 7, 1981). The optimal way of conducting a trial under American practice is for the witness in person in court to face the defendants and the trier of fact, and to be subject to

immediate cross-examination in their presence. See, e.g., Maryland v. Craig, 497 U.S. 836, 849 (1990) (noting historic preference for in-person encounters between accused persons and their accusers). Nevertheless, the Federal Rules of Criminal Procedure expressly authorize parties to take depositions and use them at trial, when doing so is necessary to achieve justice and may be done consistent with the defendant's constitutional rights. Drogoul, 1 F.3d at 1551 (11th Cir. 1993). "An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence." Fed. R. Crim. P. 15(f).

Depositions in criminal cases are disfavored because depositions do not allow jurors to adequately assess a witness' demeanor, thereby undermining the defendant's Sixth Amendment confrontation rights. See Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987); United States v. Wilson, 601 F.2d 95, 97 (3d Cir. 1979); United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978). Under the Uniform Code of Military Justice (UCMJ), in a capital case, only the defendant may seek and present a deposition to the Panel. See 10 U.S.C. 849(e). Because depositions occur outside the presence of military panel members, a deposition strips the Panel of its ability to pose questions directly to the witness. Mil. R. Evid. 614(b). ("The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party."). The members of a courts-martial panel may even object to the calling of a witness. Mil. R. Evid. 614(c).

The production and confrontation of witnesses before the finder of fact is also guaranteed under international law. Common Article 3 of the Geneva Conventions of 1949 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as

indispensable by civilized peoples.” Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The right to call and confront witnesses is one of those indispensable judicial guarantees. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(4), Jun. 8, 1977, 1125 U.N.T.S. 3 (“Protocol I”), which provides that “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); see also United Nations International Covenant on Civil and Political Rights, art. 14(3)(e), Dec. 16, 1966, 999 U.N.T.S. 171 (recognizing right to obtain the attendance and examination of witnesses in a criminal proceeding as a “minimum guarantee”).

Unless the above-described treaty obligations are abrogated by an act of Congress or the United States exercises an option present in the treaty to withdraw, these obligations remain the law of the land under the Supremacy Clause. See, e.g., U.S. Const. art. VI., cl. 2; Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) (providing that it well-settled that an act of Congress, “if clear and explicit” must be upheld by the courts even if contrary to obligations in an earlier treaty); Treaty on the Limitation of Anti-ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, art. XV(2) (allowing for right to withdraw for each party if it decides extraordinary events have jeopardized its supreme interests, so long as the party provides six-month notice and explains those extraordinary events; which the United States provided on December 13, 2001 in a White House Press Release).

In the absence of expressed abrogation, a subsequent statute, even if it conflicts with the treaty, does not necessarily nullify the obligation. See, e.g., United States v. Dion, 476 U.S. 734,

773-74 (1986) (expressed abrogation need not be a piece of legislation designed to specifically abrogate the treaty—although the Court viewed that as preferable—but may be demonstrated by legislative history that showed “clear evidence that Congress actually considered the conflict between the intended action on the one hand . . . and treaty rights on the other, and chose to resolve that conflict with by abrogating the treaty.”); Cook v. United States, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (“When the [stipulations of the treaty and the requirements of the law] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.”).

In passing the MCA, Congress did not debate, much less explicitly mention, the abrogation of Article 3 of the Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field or Article 14(3)(e) of the United Nations International Covenant on Civil and Political Rights. On the contrary, Congress specifically and consciously recognized the importance of calling and confronting witnesses to develop a robust factual record when it directed that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” 10 U.S.C. § 949j. In other words, the Government bears the burden of persuasion with respect to any finding by this Commission that the MCA abrogated a treaty obligation of the United States, and thereby will allow this Commission to

more liberally allow depositions of fact witnesses. See R.M.C. 905(c)(1). The Government has failed to advance an argument on this issue.

B. The Government has failed to establish that any of the proposed deponents are substantially unlikely to appear at trial.

The Government speculates, without affidavits or detail, that the ten proposed witnesses must be deposed in October 2016 because “they 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.” (AE 422(GOV) at 6).

The moving party must demonstrate the probable unavailability of a prospective deponent “through affidavits or otherwise.” United States v. Alvarez, 837 F.2d 1024, 1029 (11th Cir. 1988). A more concrete showing of unavailability, of course, may be required at the time of trial before a deposition will be admitted in evidence. See Fed. R. Crim. P. 15(f). A potential witness is unavailable for purposes of Rule 15(a), however, whenever a substantial likelihood exists that the proposed deponent will not testify at trial. See Drogoul, 1 F.3d at 1553. When illness or age is submitted as the cause of unavailability, the moving party must present adequate medical evidence to substantiate its concerns. See United States v. McGowan, 590 F.3d 446, 454 (7th Cir. 2009). It is not enough to state concerns about age and health. See United States v. Musgrave, 2012 U.S. Dist. LEXIS 121034, *10-11 (S.D. Ohio Aug. 27, 2012).

The Government in this instance has failed to submit any basis—beyond mere concern and conjecture—for their claim that the one fact witness submitted for consideration (Mr. Lee Hanson) is substantially unlikely to be available at trial. Instead, the Government submits simply that Mr. Hanson is advanced in age and has general health concerns. (AE 422(GOV) at 11). The Government’s general concern about Mr. Hanson’s age or health—absent adequate medical

evidence—cannot establish unavailability. See McGowan, 590 F.3d at 454. Accordingly, the Government has failed its burden to establish a substantial likelihood that Mr. Hanson will be unavailable for trial and its request must be denied. See Kelley, 36 F.3d at 1125.

C. The Government has failed to establish that the proposed testimony of the ten requested victim impact witnesses is material to an issue in dispute or that other means do not exist to present this evidence at sentencing.

The Government submits that the testimony of ten victim impact witnesses is material because it is “relevant to the Commission Members’ decision as to whether or not the death penalty should be imposed in this case” and R.M.C. 1001(b)(2) expressly allows the Panel to consider victim impact evidence. (AE 422(GOV) at 6). The Government does not justify, however, why victim impact evidence from the ten listed individuals must be presented by deposition and how (with the exception of Mr. Hanson) it concerns an issue in dispute.

“[T]he Eighth Amendment erects no per se bar” to the admission of victim impact evidence and to prosecutorial argument on that subject. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987), but leaving intact the Eighth Amendment’s prohibition of a victim family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence). In the Federal Death Penalty Act (“FDPA”), Congress provided that the government may introduce as a non-statutory aggravating factor “victim impact evidence” including “oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.” 18 U.S.C. § 3593(a). Evidence “about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed [and t]here is no reason to

treat such evidence differently than other relevant evidence is treated.” Payne, 501 U.S. at 827. However, admission of evidence “so unduly prejudicial that it renders the trial fundamentally unfair” violates the Due Process Clause. Id. at 825.

While victim impact testimony is admissible, the use of deposition must still satisfy the exceptional circumstances requirement and the proposed deposition testimony must be material to an issue in dispute, i.e., have probative value with respect to an element of the offenses charged. See United States v. Cohen, 260 F.3d 68, 78 (2d Cir. 2001) (affirming denial of request to depose unavailable witness due to medical concerns because the testimony would not have been relevant to the question of guilt); Ismaili, 828 F.2d at 159-61. Furthermore, where the proposed deposition testimony would be cumulative, it cannot be material. See United v. Carter, 776 F.3d 1309, 1326 (11th Cir. 2015) (affirming denial of request to depose unavailable witnesses where other available witnesses, including victims, provided similar evidence).

Victim impact evidence, by definition, is not material to an issue in dispute and does not bear on guilt or innocence. As Chief Justice Rehnquist described it, “[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.” Payne, 501 U.S. at 825. That family members suffer great loss as a result of the tragic death of a loved one is not a disputable proposition. Thus, contrary to what the Government argues in AE 422, deposition is unavailable for victim impact evidence because such testimony is not material to an issue in dispute.

Furthermore, in assessing whether the Government has made a showing of materiality sufficient to justify the taking of depositions, the Commission must consider whether such deposition evidence would be cumulative. Here, the Government has access to thousands of

victim family members who might testify at a sentencing hearing. The taking of depositions of ten such family members is not necessary and is cumulative. Assuming arguendo that the Government can supplement their pleading and establish a substantial likelihood that one or more of the ten proposed witnesses will be unavailable at trial, deposition is still not appropriate. Because the proposed deposition evidence would be cumulative to other evidence available at sentencing, the Government cannot establish materiality required to show exceptional circumstances. See Carter, 776 F.3d at 1326.

D. Denying the Government request to depose ten victim impact witnesses does not mean that their voices will not be heard.

The Government argues that this Commission must allow the deposition of the ten witnesses because otherwise their voices will not be heard. (AE 422(GOV) at 8). The Government fails to mention, however, that a deposition is not the only means by which victim impact evidence may be presented at a sentencing hearing.

So long as there is adequate prior notice of intent to admit victim impact evidence, the FDPA allows the government to introduce at sentencing “oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.” 18 U.S.C. §§ 3593(a), (e). The victim impact statement can be oral or written, in court or videotaped. See, e.g., United States v. Taylor, 316 F. Supp. 2d 730, 743 (N.D. Ind. 2004). While the Federal Rules of Evidence do not apply, the Supreme Court instructs that the sentencing court must ensure that any victim impact evidence be weighed against the danger of unfair prejudice, lest the proceedings become “so unduly prejudicial that it renders the trial fundamentally unfair” in violation of the Due Process Clause. Payne, 501 U.S. at 825.

In the sentencing hearing of Zacarius Moussaoui, for example, Ms. Rosemary Dillard did not testify in a sentencing hearing and subject herself to cross-examination, but rather gave an oral statement to the court after the jury had rejected a sentence of death. See Suzanne Goldenberg, You'll die with whimper, Moussaoui told, The Guardian, May 5, 2006, available at: <http://www.theguardian.com/world/2006/may/05/alqaida.september11>. The Government has the ability to propose similar victim impact statements in this Commission, involving Ms. Dillard and the other 9 witnesses subject to AE 422, oral or written, in court or videotaped, so as to preserve their voices and ensure that their loss is conveyed to the Panel in due course.

E. The Government request to depose victim impact witnesses in an open setting, making a public spectacle of the deponents' pain and tragedy, violates the dignity of the proceedings and Mr. bin 'Atash's right to a fair trial.

The Government's motion in AE422 specifically requests that the ten victim family members be deposed in an open Commission setting permitting the public and the press to view and report upon the deponents' words and demeanor. Such a spectacle is unnecessary and unwise.

While Payne opened the possibility of the introduction of victim impact evidence, its admissibility (and therefore production to the jury and public) can only be considered upon conclusion of the merits phase and determination of statutory factors in pre-sentencing. This process cannot be disturbed lest the proceedings taint the jury and violate the defendant's due process rights.

In United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005), the district court rejected a request of the Government to introduce victim impact evidence before the jury had made a determination on the defendant's eligibility for the death penalty. In its rejection, the court noted "as a general matter—and certainly in this case—the danger of unfair prejudice

arising from hearing ‘victim impact’ evidence or evidence on other ‘non-statutory’ aggravating factors before the jury makes its determination on the defendant’s ‘eligibility’ for the death penalty, on the basis of the ‘gateway’ and ‘statutory’ aggravating factors, substantially outweighs any probative value of such evidence to the determination of the defendant’s ‘eligibility’ for a death sentence.” Id.

If this Commission were to grant the Government request and, instead of sealing the transcripts and clearing the gallery, allow the testimony of the ten witnesses to be broadcast publicly, there are two potential bases for unfair prejudice to the prospective Panel: (1) the taint of the evidence, because some or all of the depositions may ultimately not be admitted into evidence during the trial or pre-sentencing hearing; and (2) the prospective Panel might infer that the military judge permitted such an unusual process because the conviction was a foregone conclusion, thus giving the imprimatur of the military judge to the notion that there is no reasonable doubt about guilt. The realization of either one of these potential bases would foreclose the ability of Mr. bin ‘Atash to receive a fair trial. Because such inferences would violate the due process and statutory rights of Mr. bin ‘Atash, this Commission must reject the request of the Government. See Payne, 501 U.S. at 825.

Several victim family members have made their objections to this proposed spectacle known to defense counsel. Ms. Rita Lasar, Ms. Colleen Kelly, Ms. Terry Rockefeller, Ms. [REDACTED], and Mr. [REDACTED] have provided declarations to this Commission voicing their objections to a public airing of any deposition about the loss of their loved ones prior to sentencing. (Attachment B). While these victim family members are willing to provide their voice to this Commission in the proper procedure of the case and after a finding of guilt, they recognize the danger to the legitimacy of these proceedings if they were to provide that

voice now. (Attachment B at 2, 4, 6, 8, 10). For example, Ms. Lasar characterizes the request of the Government as a blatant attempt to influence jurors. (Attachment B at 2, ¶ 14). In the event this Commission were to allow the depositions of one more witnesses pretrial and before a finding of guilty, Ms. Lasar asks that the witnesses testify in a closed session so that the trial is consistent with due process and grants the victim impact evidence the proper degree of dignity and solemnity that it deserves. (Attachment B at 1-2, ¶¶ 11, 15). Ms. Kelly, Ms. Rockefeller, Ms. [REDACTED], and Mr. [REDACTED] join in that request. (Attachment B at 4, 6, 8, 10).

F. The Military Commissions Act and Rules for Military Commission do not expand deposition use to cover victim impact evidence.

The Government proffers that because the MCA is silent as to whether depositions should be a part of trial by military commission, this Commission should infer that the Secretary of Defense had carte blanche to expand the role of depositions into the area of victim impact testimony. (AE 422(GOV) at 8-9). Such a reading belies the general mandate of the MCA regarding testimonial evidence, Due Process protections, and federal court practice.

While R.M.C. 702(a) may appear to expand depositions beyond what would be permitted in federal court and courts-martial, this provision cannot be reconciled with the MCA's mandate that "[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution." 10 U.S.C. 949j(a)(1). Indeed, Rule 702(a) uses the same language of Federal Rule of Criminal Procedure 15(a), requiring "exceptional circumstances" and the "interests of justice" before granting a motion to depose a witness. The discussion section of Rule 702 similarly provides that "[g]ood 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 discussed supra, the Government has failed to establish extraordinary circumstances by failing to show unavailability or materiality. In other words, the Government has failed to state a proper ground for a deposition.

If the witness and evidentiary rules are to be comparable to an Article III court, there can be no more appropriate mechanism to realize that mandate than by applying the Sixth Amendment and Due Process jurisprudence regarding “exceptional circumstances” of federal court to this Commission. By that measure, and the requirements of international law, the motion by the Government falls short and this Commission must deny the request to depose the ten witnesses identified in AE 422.

7. **Oral Argument:** The defense requests oral argument.
8. **Witnesses:** Mr. bin ‘Atash reserves the right to request the production of witnesses at a later date.

9. Attachments:

A. Certificate of Service

B. Declarations of Rita Lasar, Terry Kay Rockefeller, Colleen Kelly, [REDACTED],
and [REDACTED].

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

EDWIN A. PERRY
Detailed Defense Counsel

//s//

MATTHEW H. SEEGER
Major, USA
Detailed Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Detailed Defense Counsel

//s//

JASON MILLER
Captain, USA
Detailed Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 12 May 2016, I electronically filed the attached **Mr. bin 'Atash's Response to AE 422(GOV), Government Motion to Conduct Depositions of Certain Witnesses**, with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

CHERYL T. BORMANN

Learned Counsel

Attachment B

Declaration of Rita Lasar

Under the applicable law and subject to penalties for perjury, I hereby state the following:

1. I am 84 years of age.
2. I am the sister of Abraham Zelmanowitz.
3. On September 11, 2001, Abe was killed while he remained by the side of his friend and colleague, Edward Beyea, who was a quadriplegic and needed assistance to get out of the building. Both men were killed in the North Tower of the World Trade Center in New York.
4. I have been following the cases of United States v. Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and Mustafa al Hawsawi, each of whom is charged with committing the murders of my brother and 2975 other people on September 11, 2001.
5. The legal proceedings against these five defendants are still in the pretrial phase, so no one has been found guilty of any crimes.
6. If Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and/or Mustafa al Hawsawi are convicted of murdering Abe, I would like to attend and testify at the sentencing hearing(s).
7. It is important to me that the commission be apprised of the impact Abe's death has had on me and the other members of our family.
8. I am informed by several of the defense teams that the prosecution has filed a motion requesting that depositions of ten specific victim family members be taken prior to trial and, of course, prior to sentencing.
9. I am informed that the prosecution requests that these depositions be held in an open court session which the public can view at Guantanamo and remotely, and about which the press can report in detail -- including the substance of the testimony and the demeanor of that particular family member.
10. I have been asked by some defense counsel if I might be interested in being deposed, in this or a similar open session, about the impact of my brother's death. I have refused.
11. In keeping with the dignity and solemnity of victim impact testimony, I object to the prosecution deposing victim family members prior to sentencing in a forum open to the press, the public, and prospective jury panel members yet to be selected.

12. I am appalled that the prosecution is requesting to hold a public hearing to highlight the pain and agony experienced by those whose loved ones were killed on September 11, 2001.
13. Although I understand that such public hearing would and should be required if the defendants are convicted of murdering my brother and others, it is premature to hold such a hearing prior to any convictions.
14. The use of an open, public hearing to obtain statements from victim's family members whose testimony might not be deemed admissible after a trial appears to be an attempt to influence prospective jurors and the public, while utilizing the very real pain felt by the survivors of those who were killed on September 11, 2001.
15. If the Commission is going to allow pretrial and pre-sentencing depositions, I request that they be held in closed session so that the memories of my brother and the other victims are not laid bare before a jury has been selected, and so that the trial concerning my brother's murder is consistent with due process and the other rights guaranteed by the United States Constitution.

Signed this 11th day of May, 2016.



Declaration of Terry Kay Rockefeller

Under the applicable law and subject to penalties for perjury, I hereby state the following:

1. I am 65 years of age.
2. I am the sister of Laura Rockefeller.
3. On September 11, 2001, Laura was killed while she was managing an event on finances and risk assessment at the Windows on the World facilities in the North Tower of the World Trade Center in New York.
4. I have been following the cases of United States v. Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and Mustafa al Hawsawi, each of whom is charged with committing the murders of my sister and 2975 other people on September 11, 2001.
5. The legal proceedings against these five defendants are still in the pretrial phase, so no one has been found guilty of any crimes.
6. If Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and/or Mustafa al Hawsawi are convicted of murdering Laura, I would like to attend and testify at the sentencing hearing(s).
7. It is important to me that the commission be apprised of the impact Laura's death has had on me and the other members of our family.
8. I am informed by several of the defense teams that the prosecution has filed a motion requesting that depositions of ten specific victims' family members be taken prior to trial or the delivery of a verdict.
9. I am informed that the prosecution requests that these depositions be held in an open court session which the public can view at Guantanamo and remotely, and about which the press can report in detail -- including the substance of the testimony and the demeanor of that particular family member.
10. I have been asked by some defense counsel if I might be interested in being deposed, in this or a similar open session, about the impact of my sister's death. I have absolutely refused, as I am deeply concerned about what seems to be a highly irregular proceeding.
11. In keeping with the dignity and solemnity of victim impact testimony, I object to the prosecution deposing victims' family members prior to sentencing in a forum open to the press, the public, and prospective jury panel members yet to be selected.
12. I am appalled that the prosecution is requesting to hold a public hearing to highlight the pain and agony experienced by those whose loved ones were killed on September 11, 2001.
13. Although I understand that such public hearing would and should be required if the defendants are convicted of murdering my sister and others, it is premature to hold such a hearing prior to any convictions.
14. The use of an open, public hearing to obtain statements from victims' family members whose testimony might not be deemed admissible after a trial is concluded appears to

be an attempt to influence prospective jurors and the public, exploiting the very real pain felt by the relatives of those who were killed on September 11, 2001.

15. Furthermore, I am concerned that this highly irregular proceeding could lead to further delays in getting through the pretrial phase, may severely complicate jury selection, could raise critical issues that may have to be addressed during any appeal of the case, and might even possibly lead to a mistrial.
16. If the Commission is going to allow pretrial and pre-sentencing depositions, I request that they be held in closed session so that the memories of my sister and the other victims are not laid bare before a jury has been selected, and so that the trial concerning my sister's murder is consistent with due process and the other rights guaranteed by the United States Constitution.

Signed this 11th day of May, 2016.

A handwritten signature in black ink that reads "Terry Kay Rockefeller". The signature is written in a cursive style with a large, looping "T" and "R".

Declaration of Colleen Kelly

Under the applicable law and subject to penalties for perjury, I hereby state the following:

1. I am 53 years of age.
2. I am the sister of William H. Kelly, Jr.
3. On September 11, 2001, Bill was killed while he was attending a one-day business conference in the North Tower of the World Trade Center in New York.
4. I have been closely following the cases of United States v. Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and Mustafa al Hawsawi, each of whom is charged with committing the murders of my brother and 2975 other people on September 11, 2001.
5. The legal proceedings against these five defendants are still in the pretrial phase. As such, no one has been found guilty or innocent of any crimes.
6. If Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and/or Mustafa al Hawsawi are convicted of murdering Bill, I will make my intention known that I want to testify at the sentencing hearing(s).
7. It is vitally important to me that the commission understand the loss of Bill, and the impact that Bill's death has had on me and other members of my family.
8. I have been informed by several of the defense teams that the prosecution has filed a motion requesting that depositions be taken of ten specific victim family members, prior to trial and sentencing.
9. I have not seen the actual motion as it is not available to date on the mcmil.com website.
10. I was further informed that the prosecution requests that these depositions be held in open court. I understand 'open court' to mean that the press, NGO observers, other family members, any person in the Guantanamo court viewing area, and anyone watching at the CCTV sites would be able to view the depositions.
11. I further understand that the press and others would be able to report in detail -- including the substance of the testimony and the emotional state of a particular family member -- if viewed in open court.
12. I have been asked by some defense counsel if I might be interested in being deposed, in this or a similar open session, prior to the conclusion of a trial, about the impact of my brother's death. I have refused.
13. I object to the prosecution deposing victim family members prior to sentencing in a forum open to the press, the public, and prospective jury panel members yet to be selected.
14. Although I understand that a public hearing of testimony from victim family members would and should be required if the defendants are convicted of murdering my brother and others, it is premature to hold such a hearing prior to any convictions.

15. The use of an open, public hearing to obtain statements from victim's family members prior to any possible conviction could very well influence prospective jurors and the public.
16. If the Commission decides to allow pretrial and pre-sentencing depositions, I request that they be held in closed session so that the impact of the deaths of our family members, and my brother's death in particular, not be made public until a trial is held and a verdict is reached

Signed this 12th day of May, 2016.

A handwritten signature in cursive script that reads "Colleen Kelly". The signature is written in black ink and is positioned below the text "Signed this 12th day of May, 2016."

Declaration of [REDACTED]

Under the applicable law and subject to penalties for perjury, I hereby state the following:

1. I am [REDACTED]
2. I am [REDACTED]
3. On September 11, 2001, [REDACTED] was killed while he was at work at Cantor Fitzgerald in the North Tower of the World Trade Center in New York.
4. I have been following the cases of United States v. Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and Mustafa al Hawsawi, each of whom is charged with committing the murders of [REDACTED] and 2975 other people on September 11, 2001.
5. The legal proceedings against these five defendants are still in the pretrial phase, so no one has been found guilty of any crimes.
6. If Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and/or Mustafa al Hawsawi are convicted of murdering [REDACTED], I would like to attend and testify at the sentencing hearing(s).
7. It is important to me that the commission be apprised of the impact [REDACTED] death has had on me and the other members of our family.
8. I am informed by several of the defense teams that the prosecution has filed a motion requesting that depositions of ten specific victim family members be taken prior to trial and, of course, prior to sentencing.
9. I am informed that the prosecution requests that these depositions be held in an open court session which the public can view at Guantanamo and remotely, and about which the press can report in detail -- including the substance of the testimony and the demeanor of that particular family member.
10. I have been asked by some defense counsel if I might be interested in being deposed, in this or a similar open session, about the impact of [REDACTED] death. I am not interested in being deposed in this or any similar open session.
11. In keeping with the dignity and solemnity of victim impact testimony, I object to the prosecution deposing victim family members prior to

sentencing in a forum open to the press, the public, and prospective jury panel members yet to be selected.

12. I am appalled that the prosecution is requesting to hold a public hearing to highlight the pain and agony experienced by those whose loved ones were killed on September 11, 2001, prior to any finding of guilt of any of the five defendants.
13. Although I understand that such public hearing would and should be required if the defendants are convicted of murdering [REDACTED] and others, it is premature to hold such a hearing prior to any convictions.
14. The use of an open, public hearing to obtain statements from victim's family members whose testimony might not be deemed admissible after a trial appears to be an attempt to influence prospective jurors and the public, while utilizing the very real pain felt by the survivors of those who were killed on September 11, 2001.
15. If the Commission is going to allow pretrial and pre-sentencing depositions, I request that they be held in closed session so that the memories of [REDACTED] and the other victims are not laid bare before a jury has been selected, and so that the trial concerning [REDACTED] murder is consistent with due process and the other rights guaranteed by the United States Constitution.

Signed this 11th day of May, 2016.

[REDACTED]

Declaration of [REDACTED]

Under the applicable law and subject to penalties for perjury, I hereby state the following:

1. I am [REDACTED]
2. I am [REDACTED]
3. On September 11, 2001, [REDACTED] was killed while he was at work at Cantor Fitzgerald in the North Tower of the World Trade Center in New York.
4. I have been following the cases of United States v. Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and Mustafa al Hawsawi, each of whom is charged with committing the murders of [REDACTED] and 2975 other people on September 11, 2001.
5. The legal proceedings against these five defendants are still in the pretrial phase, so no one has been found guilty of any crimes.
6. If Khalid Sheikh Mohammad, Walid bin 'Atash, Ramzi bi al Shibh, Ammar al Baluchi and/or Mustafa al Hawsawi are convicted of murdering [REDACTED], I would like to attend and testify at the sentencing hearing(s).
7. It is important to me that the commission be apprised of the impact [REDACTED] death has had on me and the other members of our family.
8. I am informed by several of the defense teams that the prosecution has filed a motion requesting that depositions of ten specific victim family members be taken prior to trial and, of course, prior to sentencing.
9. I am informed that the prosecution requests that these depositions be held in an open court session which the public can view at Guantanamo and remotely, and about which the press can report in detail -- including the substance of the testimony and the demeanor of that particular family member.
10. I have been asked by some defense counsel if I might be interested in being deposed, in this or a similar open session, about the impact of [REDACTED] death. I am not interested in being deposed in this or any similar open session.
11. In keeping with the dignity and solemnity of victim impact testimony, I object to the prosecution deposing victim family members prior to

sentencing in a forum open to the press, the public, and prospective jury panel members yet to be selected.

12. I am appalled that the prosecution is requesting to hold a public hearing to highlight the pain and agony experienced by those whose loved ones were killed on September 11, 2001, prior to any finding of guilt of any of the five defendants.
13. Although I understand that such public hearing would and should be required if the defendants are convicted of murdering [REDACTED] and others, it is premature to hold such a hearing prior to any convictions.
14. The use of an open, public hearing to obtain statements from victim's family members whose testimony might not be deemed admissible after a trial appears to be an attempt to influence prospective jurors and the public, while utilizing the very real pain felt by the survivors of those who were killed on September 11, 2001.
15. If the Commission is going to allow pretrial and pre-sentencing depositions, I request that they be held in closed session so that the memories of [REDACTED] and the other victims are not laid bare before a jury has been selected, and so that the trial concerning [REDACTED] murder is consistent with due process and the other rights guaranteed by the United States Constitution.

Signed this 11th day of May, 2016.

[REDACTED]