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1 [The R.M.C. 803 session was called to order at 1020, 31 May  
2 2016.]

3 MJ [COL POHL]: Please be seated. Commission is called to  
4 order. We're waiting for?

5 LDC [MR. HARRINGTON]: Major Wichner, Judge.

6 MJ [COL POHL]: Major Wichner.

7 LDC [MR. RUIZ]: Your Honor?

8 MJ [COL POHL]: Yes.

9 LDC [MR. RUIZ]: Just a quick request, because there are  
10 so many parts of 018, we're constantly reassessing where we  
11 are on that. I'm going to ask or make a request that you try  
12 to address 018FFF (MAH), that is a motion to compel witnesses  
13 to some underlying motions, it has to be done before 018PP.  
14 And the discussion that we just had on marking of notes after  
15 attorney meetings kind of prompted my thought on that issue  
16 because those are very much interrelated issues. And I think  
17 if we can fit that in at some point, it would make sense, the  
18 context is good for it, and it would help us move forward.

19 So I'm asking for that. I conferred with the  
20 prosecution. I'm not exactly sure what their position is on  
21 it, but we talked ----

22 MJ [COL POHL]: Before we get involved with stuff, let's  
23 wait for Major Wichner to come back. Is she coming back, is

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1 my question. Mr. Harrington?

2 LDC [MR. HARRINGTON]: Yes, Judge. She went to check on  
3 filing of something.

4 [Pause.]

5 MJ [COL POHL]: Well, we're going to start without her.  
6 Commission is called to order. All parties are again present  
7 that were present when commission recessed. Major Wichner is  
8 absent and will be joining us presently, in fact, as in right  
9 now. Okay. Mr. Ruiz, you indicated you wanted to see also --  
10 maybe to touch 018FFF; is that correct?

11 LDC [MR. RUIZ]: That is correct.

12 MJ [COL POHL]: Just kind of like yesterday when I asked  
13 if there's any motions people wanted to discuss, that's when  
14 we were kind of setting the way ahead. That's okay. We can  
15 catch up. Ms. Bormann, you wanted to say something?

16 LDC [MS. BORMANN]: In case it wasn't clear, when  
17 Mr. Schwartz was up here, we suggested that we try and combine  
18 all of the 18 things sort of in a row because it will prevent  
19 us from having to repeat some of the stuff that was just  
20 argued because a lot of what was just argued also pertains to  
21 018MM and 018HH. They all deal with PRT issues ----

22 MJ [COL POHL]: Okay.

23 LDC [MS. BORMANN]: ---- and the ability of the --

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1 Mr. Bin'Attash to get materials through the PRT in a  
2 reasonable fashion. So we suggest to the court that we just  
3 sort of continue in this vein, sort of getting everything done  
4 at once.

5 MJ [COL POHL]: Okay. It's just that some of the 018  
6 series requires a classified session, but I'm with you.

7 LDC [MS. BORMANN]: Oh. 018MM, 018HH do not.

8 MJ [COL POHL]: Okay. Okay. I think we're done with  
9 018W.

10 Mr. Connell, you were consulting when we last left.

11 LDC [MR. CONNELL]: Nothing further, sir.

12 MJ [COL POHL]: Nothing further. Okay.

13 Then just -- okay, I'm just going to go down rather  
14 than -- let's just go down in the order that they're in the  
15 docket order rather than pick and choose.

16 018BB.

17 DDC [Mr. SCHWARTZ]: Your Honor, we can't do that one now.  
18 That one isn't as much in the lane of the other 018 issues.

19 MJ [COL POHL]: Okay.

20 DDC [MR. SCHWARTZ]: That's more of a paper discovery.

21 MJ [COL POHL]: Okay. EE.

22 LDC [MR. NEVIN]: Yes, Your Honor, can I speak to that?  
23 But if I can have just a second to get my materials together.

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1 MJ [COL POHL]: I'll come back to that because

2 Mr. Schwartz was ready for HH.

3 TC [MR. RYAN]: Excuse me, Judge, can I interrupt, please?

4 MJ [COL POHL]: Sure.

5 TC [MR. RYAN]: Can you tell me where we're a going after  
6 this? Because it sounds like there may be a few that we  
7 didn't bring our files on.

8 MJ [COL POHL]: Like I said when we discussed this  
9 yesterday at the 802, the idea was that we would know what we  
10 are going to do, but it's kind of changed. Any of the 018  
11 series we discussed, we're talking about HH, are we ready for  
12 that one? If you're not because it wasn't on the docket when  
13 we discussed it yesterday, we can do this in a different  
14 order.

15 LDC [MS. BORMANN]: It was on the docket, Judge. It was  
16 added.

17 MTC [MR. TRIVETT]: Can we just have one second to confer  
18 amongst ourselves, sir?

19 MJ [COL POHL]: Okay.

20 [Pause.]

21 MTC [MR. TRIVETT]: Sir?

22 MJ [COL POHL]: Yes.

23 MTC [MR. TRIVETT]: We had prepared to do 422 at some

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1 point, understanding it's not an 018.

2 MJ [COL POHL]: Got it.

3 MTC [MR. TRIVETT]: So for the 018s that we're prepared to  
4 do right now, and obviously if they're on the docket, we're  
5 prepared to argue anything, we're just trying to figure  
6 out ----

7 MJ [COL POHL]: The order.

8 MTC [MR. TRIVETT]: ---- prioritizing our morning. So  
9 018MM is fine, and FFF, but we would need to go get our files  
10 for that. HH is fine, 018HH.

11 MJ [COL POHL]: Okay. Let's do this ----

12 MTC [MR. TRIVETT]: And MM, sir.

13 MJ [COL POHL]: And MM, okay. We'll discuss HH, MM, and  
14 FFF. You said you're prepared on all of those three?

15 MTC [MR. TRIVETT]: We would need to go get files for FFF.

16 MJ [COL POHL]: Okay. We'll do that after lunch. If we  
17 exhaust the 018 series prepared for -- before lunch, we'll go  
18 to 426, then come back to the 018 series, okay -- or 422.

19 MTC [MR. TRIVETT]: 422.

20 LDC [MR. NEVIN]: And I have my materials on EE as well.

21 MJ [COL POHL]: Was EE ready to go or is that another one  
22 you need your files?

23 TC [MR. RYAN]: That's a newly emerging one, but Judge,

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1 same thing, I would have to be able to get my files to be  
2 prepared.

3 MJ [COL POHL]: Okay. So what we'll do, we'll do HH and  
4 MM, and then we will move from the 018 series to 422 and then  
5 come back.

6 TC [MR. RYAN]: Thank you.

7 MJ [COL POHL]: Okay, Mr. Schwartz.

8 DDC [MR. SCHWARTZ]: Thank you, sir. With our continuing  
9 request to be heard on the public health issue, 426, 018HH,  
10 this is the lowest of low-hanging fruit. It's a request to  
11 amend paragraph 3.d(2) of 018U. On papers the parties  
12 disagree on this, but in reality we don't.

13 Here's the problem. I'll start with the problem.

14 Since 018U -- since the inception of this case, we've  
15 been unable to process, to bring into the detention facility,  
16 to bring into Echo II for attorney-client meetings any  
17 classified information that is releasable to the defendant  
18 other than what's in his own handwriting.

19 So 3.d(2) talks about an affirmation that defense  
20 counsel are required to sign before submitting any information  
21 to the PRT. That language includes that, to the best of our  
22 knowledge, the information does not contain -- and I'm going  
23 to skip through it -- but does not contain classified

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1 information, and then it's qualified by the phrase, "the  
2 intended recipient of the communication is not authorized to  
3 receive."

4           The government believes and we certainly believe that  
5 that permits defense counsel to bring classified information  
6 to the PRT or, in some cases, the PRT would have to come to  
7 the classified information inside the appropriate facility.  
8 But that the PRT could stamp, for example, typed or attorney  
9 handwritten or any other type of classified information if the  
10 intended recipient is authorized to receive it.

11           The only party here who seems to disagree with that  
12 language is the PRT. Sort of out of order, maybe two years  
13 ago we asked for you to rule on the record that at least  
14 handwritten information could be processed through the PRT if  
15 it was in the handwriting of the defendant himself. That was  
16 successful, convinced the PRT that that was your intention,  
17 but the PRT is yet convinced on the question of other  
18 material, anything not in the handwriting of Mr. Bin'Attash.

19           And so we're asking you for clarification that your  
20 intention is that motions containing classified information  
21 that is releasable to the detainee, attorney-client notes and  
22 communications that include similar material, be processed  
23 through the PRT at the appropriate facility.

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1           Whether that requires an amendment to 3.d(2), I  
2 think -- I might live to regret this, but just a ruling on the  
3 record that that is your intent should satisfy the PRT.

4           MJ [COL POHL]: Does the document say "releasable to the  
5 detainee"?

6           DDC [MR. SCHWARTZ]: It would depend. In some cases. So  
7 there is classified discovery, for example, that says "release  
8 to detainee."

9           MJ [COL POHL]: Okay.

10          DDC [MR. SCHWARTZ]: That's a very small category. Most  
11 of the time ----

12          MJ [COL POHL]: Those get through okay?

13          DDC [MR. SCHWARTZ]: Those get through okay.

14          MJ [COL POHL]: Okay. So what world are you talking about  
15 that doesn't get through?

16          DDC [MR. SCHWARTZ]: Say today, Mr. Bin'Attash, a  
17 defendant, writes some kind of fact -- and I wouldn't even  
18 concede that there's anything they can say that isn't  
19 classified, but let's just say that we have to treat it as  
20 classified. If that's in his handwriting, it goes through the  
21 PRT back and forth forever. If I type it up, the same  
22 sentence, it doesn't go through the PRT.

23                 That's not what you intended. I don't think that's

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1 what the rule states, I don't think the government thinks  
2 that's what the rule states, but it's just where the PRT falls  
3 on this.

4 MJ [COL POHL]: And their objection is that he's not  
5 authorized to receive it? What's -- what are they hanging  
6 their hat on in the order?

7 DDC [MR. SCHWARTZ]: So what they -- okay, the phrase, if  
8 you look, fifth line of that paragraph, I said that this is a  
9 qualifier, "the intended recipient of the communication is not  
10 authorized to receive," that language clearly qualifies that  
11 the information does not contain classified information. They  
12 don't see it that way.

13 They believe that the affirmation says, "this  
14 information is not classified." Now, I know that doesn't make  
15 any sense because they do accept classified information if  
16 it's -- but, you know, this is where we are.

17 MJ [COL POHL]: Okay. Got it.

18 DDC [MR. SCHWARTZ]: So this prevents us from being able  
19 to take any type of information provided by a client, turn it  
20 into a motion to seek relief on a variety of issues. Once it  
21 leaves his handwriting, once it's in any other format, it's  
22 lost for purposes of being brought back into Echo II.

23 MJ [COL POHL]: So they're reading this in the

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1 conjunctive, that it does not contain classified information?

2 DDC [MR. SCHWARTZ]: Yes, sir. That's right.

3 MJ [COL POHL]: And it's not authorized to receive it. So  
4 either -- so -- if it contains classified information -- or,  
5 excuse me, in the disjunctive, if it contains classified  
6 information, they don't give it to your client?

7 DDC [MR. SCHWARTZ]: That's right. Either -- however you  
8 want to look at it.

9 MJ [COL POHL]: Yeah.

10 DDC [MR. SCHWARTZ]: It could be either way. They don't  
11 believe that this qualifies -- that the second part qualifies  
12 the first part. They believe that classified information  
13 can't go in and is information that he's not authorized to  
14 receive. So like I said, they're the only ones. I think  
15 everybody else is on the same page here. So if your intention  
16 is clearly on the record, that information that defense  
17 counsel attests can be provided to the detainee, whatever the  
18 classification level, the PRT must process that information.

19 MJ [COL POHL]: Okay. And you get somehow permissions to  
20 give him classified information?

21 DDC [MR. SCHWARTZ]: Say that again, sir.

22 MJ [COL POHL]: You get permission to give him the  
23 classified information?

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1 DDC [MR. SCHWARTZ]: In rare cases. Most often this is  
2 language that comes from him, information that comes from him.

3 MJ [COL POHL]: Got it. Got it. Okay.

4 Trial Counsel. Mr. Swann.

5 TC [MR. SWANN]: Your Honor, our response to that is  
6 contained in 018JJ, 15 April 2014.

7 We have marked quite a bit of information that is  
8 classified that's releasable to the accused. I don't think  
9 there's any objection there. And I don't think that we have  
10 any objection to the material that's prepared by the client,  
11 okay?

12 So if you would look at our paragraph, our response,  
13 I think it lays it out for you exactly what we need to do and  
14 what we say. Of course, we want to make sure that there's no  
15 impetus to take other information in there and we're going to  
16 rely on the good graces of counsel that that doesn't happen.

17 MJ [COL POHL]: Okay. Thank you.

18 That brings us to -- unless there's any further  
19 discussion on this, doesn't appear to be, brings us to MM.

20 Mr. Schwartz.

21 DDC [MR. SCHWARTZ]: Your Honor, this is another easy one.

22 MJ [COL POHL]: I like easy ones.

23 DDC [MR. SCHWARTZ]: I don't know how many times you've

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1 heard in this room that we were unable to do our jobs, defense  
2 counsel were unable to do our jobs because the PRT doesn't  
3 work weekends. I don't know how many times we've been delayed  
4 in sessions because we had to take breaks to do work that  
5 could have been done if the PRT would process information on  
6 the weekends.

7 In 018MM, we seek the simple relief that you order  
8 the Privilege Review Team to maintain reasonable work hours  
9 for the weekend. We had worked out an agreement with the  
10 prosecution, again about two years ago. This was filed  
11 July 2014. Prior to that, we had worked out what seemed to be  
12 a solution, that if we notified the PRT by Friday at 5:00 p.m.  
13 of our need for weekend assistance, that they would meet our  
14 requests, and that just hasn't worked.

15 What we request is something in writing from you that  
16 says the PRT will work reasonable weekend hours in support of  
17 defense's mission in this capital case.

18 MJ [COL POHL]: Looking at the government response, and  
19 again, some of these things have been lingering, so I  
20 understand that, being they said they didn't oppose it is the  
21 way I read it. Would make adjustments. But you're saying the  
22 truth on the ground is it hasn't occurred?

23 DDC [MR. SCHWARTZ]: Right. This issue has probably come

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1 up -- I must have had ten conversations at a point where we  
2 said we're going to file a motion on this and then we pulled  
3 it back and a said, no, let's not waste the commission's time,  
4 we'll solve this. But it just -- it's unsolvable until it's  
5 something in writing from you.

6 MJ [COL POHL]: Okay. Thank you.

7 Mr. Connell.

8 LDC [MR. CONNELL]: Your Honor, I have one contribution,  
9 which is, I think to some extent this problem has two aspects.  
10 One of them is personnel inconsistency, in that some members  
11 of the Privilege Review Team have been quite responsive. We  
12 had a Privilege Review Team meeting on Sunday and we -- a lot  
13 of people have been really responsive and have worked on  
14 weekends. Some people decline to do so. And I think that  
15 that brings us to the second part of the problem, which is,  
16 that if the -- if this were in the order, the -- then the  
17 Privilege Team could contract around it, that they could ----

18 MJ [COL POHL]: Are these contract employees?

19 LDC [MR. CONNELL]: Yes, sir. And they have a contract  
20 that defines the times that they're supposed to work and how  
21 many hours and what those hours are. And if this were in the  
22 order, then the powers that be could wrap it into the contract  
23 and then we would have appropriate administrative and ----

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1 MJ [COL POHL]: Well, it appears to be already wrapped in  
2 the contract.

3 LDC [MR. CONNELL]: I don't know whether those people are  
4 just ----

5 MJ [COL POHL]: I don't know how some say they can work on  
6 Sunday and some say they can't.

7 LDC [MR. CONNELL]: It may be that people are just acting  
8 out of the goodness of their hearts. You know, that's  
9 possible.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: I don't know.

12 MJ [COL POHL]: Okay. Thank you.

13 Mr. Ruiz, you wanted to add something?

14 LDC [MR. RUIZ]: Judge, I think that covers it.

15 MJ [COL POHL]: Okay. Thank you.

16 Trial Counsel?

17 TC [MR. SWANN]: I think when you wrote the original 018,  
18 you told the defense that in order for the Privilege Review  
19 Team to review material, they got two weeks. That's in the  
20 order. But what seems to happen is that, maybe on a Friday  
21 night you show up and then you want them to be working on the  
22 weekend when, of course, maybe they have other plans.

23 Now, I have never talked to the Privilege Review

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1 Team, but quite frankly, I think they are hard working, good  
2 individuals, well-intentioned to do the right thing, and  
3 that's what's happened in a number of these instances.

4           You've got our filing. You've seen where we worked  
5 out an understanding with their boss that was subsequently  
6 directed at them. But if they were told by Friday at 1700,  
7 they would make provision to do precisely that. What happens  
8 is, though, as I've further learned, is that you make those  
9 plans and then somehow you don't show up at the time that you  
10 said you'd be there. They take off to go do other things,  
11 having worked a full 40 hours a week, and then they're called  
12 back again to say, hey, I'm sorry we missed that first  
13 appointment, can you open up a second one for us? And for the  
14 most part, they do precisely that.

15           I don't think it's necessary, sir, for you to direct  
16 them that they be open on the weekends. They're open  
17 throughout the week. Come prepared. Come planned. I  
18 understand those last-minute things that develop, but you  
19 can't be blaming it on the PRT.

20           MJ [COL POHL]: Okay. Just so I'm clear then, the current  
21 contract, the current procedure is that if by 5:00 Friday a  
22 request is that I need to have the PRT come morning, they will  
23 have somebody there?

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1 TC [MR. SWANN]: That's how we worked it. That's what's  
2 in the filing that we provided to you.

3 MJ [COL POHL]: And similarly, I suspect there's a  
4 similar -- what's the suspense on Sunday, still 5:00 on  
5 Friday?

6 TC [MR. SWANN]: Yes, of course. All it is is just a  
7 courtesy.

8 MJ [COL POHL]: I got it.

9 TC [MR. SWANN]: Let us know you're coming.

10 MJ [COL POHL]: And there's a time to be there; and if  
11 they're not there, then the PRT leaves.

12 TC [MR. SWANN]: That's it. And they shouldn't be pulled  
13 into this discussion, you know, we weren't there. If they  
14 have an appointment, they'll be there to accommodate them.

15 MJ [COL POHL]: Okay. So you're representing on behalf of  
16 the United States Government that if they put a request for a  
17 PRT to work there on the weekend by 5:00 Friday, there will be  
18 somebody available?

19 TC [MR. SWANN]: I will commit that if somebody makes an  
20 appointment and they say we'll get with you on the weekend,  
21 they'll be there.

22 MJ [COL POHL]: Okay. Thank you.

23 DDC [MR. SCHWARTZ]: Your Honor, the problem with this is

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1 the United States has represented exactly that since 2014. We  
2 wouldn't be in here, we wouldn't be bringing this back to you  
3 if that worked.

4 I don't know how Mr. Swann knows so much about the  
5 function of the PRT given the wall that apparently exists.

6 MJ [COL POHL]: But you can't have it both ways,  
7 Mr. Schwartz. You can't ask me to issue an order to the PRT  
8 and give it to the government and say to the government, oh,  
9 by the way, you can't talk to the PRT. They have to play a  
10 role here if you want me to get involved.

11 DDC [MR. SCHWARTZ]: And I understand that. There's going  
12 to be some administrative coordination by somebody in the  
13 government. I get it.

14 The PRT does, however, pay close attention to the  
15 record. They do their best to read the filings. They'll  
16 follow what you say. And that -- you know, the point here is  
17 that nobody's saying the PRT aren't good people or aren't  
18 doing their jobs. I think they're doing their jobs as well as  
19 they can and with the understanding of the facts that they  
20 have. But the reality is the system of notifying them by 5:00  
21 p.m. isn't enforceable because it's something that the  
22 government represents will be ----

23 MJ [COL POHL]: Have you ever notified them by 5:00 p.m.

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1 and they said they couldn't be there?

2 DDC [MR. SCHWARTZ]: Yes. And we can happily supplement  
3 the record with that. It just takes us away from something  
4 that's more important.

5 MJ [COL POHL]: Have there been some times that you  
6 notified them at 5:00 p.m. and you weren't there?

7 DDC [MR. SCHWARTZ]: I have heard of missed appointments,  
8 I have not missed an appointment myself. When there are  
9 weekend meetings requested by 5:00 p.m., for a period of time  
10 the system worked. At some point it stopped working and the  
11 result of that is we spend time either drafting motions,  
12 drafting supplements to the record, or we spend time just  
13 trying to track them down.

14 So what will happen is we give notice by 5:00 p.m.,  
15 they fight us on it, they finally agree to it begrudgingly.  
16 Saturday comes around and they're not there, they're late and  
17 we have to track them down and we have to talk to their boss  
18 to convince them that this is the procedure, look at the  
19 government's response. Part of the problem, as Mr. Connell  
20 says, it's different people ----

21 MJ [COL POHL]: I got it. I got it. Also, you don't  
22 always wait until 5:00 p.m. to call them, do you?

23 DDC [MR. SCHWARTZ]: No. No, sir. Typically we would

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1 know, you know, by Friday morning if we're going to have  
2 something over the weekend.

3 But this is -- and this gets -- I don't think it's a  
4 two-week standard. I think 018U currently contains a five-day  
5 standard and the PRT does a good job of processing a lot of  
6 information most of the time. This isn't about defense  
7 counsel sitting on information until the last minute. This is  
8 information that comes up over the course of attorney-client  
9 meetings, is brought out, needs to go back in the next day in  
10 order to prepare for often an upcoming hearing. And when that  
11 can't happen, it prevents us from being able to fully prepare,  
12 which brings us into court Monday morning at 9:00 asking Your  
13 Honor for time to continue to consult with Mr. Bin'Attash.

14 MJ [COL POHL]: Okay. Got it.

15 DDC [MR. SCHWARTZ]: Thank you.

16 MJ [COL POHL]: Thank you.

17 LDC [MR. NEVIN]: Your Honor, could I raise -- just make a  
18 comment about this?

19 MJ [COL POHL]: Sure, Mr. Nevin.

20 LDC [MR. NEVIN]: I just want to be clear that this --  
21 that what we're talking about here applies to all weekends,  
22 not just to weekends right before hearings. It becomes  
23 particularly acute right before hearings.

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1 MJ [COL POHL]: Yeah, but, of course, it would strike to  
2 me that -- you know, it's one thing to call somebody at 5:00  
3 on Friday and say I want you to work on a day that you weren't  
4 supposed to work. Okay. I understand that. But it's another  
5 thing that if you know you're coming here 14 days out to say,  
6 hey, I need something.

7 I mean, it's -- I mean, I understand both concerns  
8 here. But like I said, on the -- and for the  
9 noncommission-related meetings, theoretically, you would have  
10 more time to give them the notice.

11 LDC [MR. NEVIN]: Yes, although the problem -- the problem  
12 is that as you -- there are a million things to do. And as  
13 you come down to finally preparing yourself to walk into the  
14 meeting, you inevitably realize that there are additional  
15 things that could be brought with you and you -- and it's just  
16 not possible to foresee everything. Just the way we're -- we  
17 work our schedule around during the course of these hearings.  
18 Things come up, things change. It's not anybody's bad faith.  
19 And you take, for example, the question of the most recent  
20 draft of a pleading, for example, that we want to share with  
21 our client that didn't get drafted until yesterday or while we  
22 were on the plane or whatever the matter is.

23 I agree that if the military commission made it an

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1 order, made this explicit in some way, that it would allow --  
2 and I'm, like everybody else, not trying to cast aspersions on  
3 the Privilege Team. But if you issued this as an order, it  
4 would allow the powers that be to contract around this so that  
5 there wouldn't be misunderstandings about this.

6 But the thing where we've -- where the government  
7 has, at considerable expense, has caused defense lawyers and  
8 defense personnel to be present at Guantanamo over a weekend  
9 to try to do this work, and where you have guard force members  
10 who are moving people back and forth and all of the rest of it  
11 and the thing is -- the thing can't be done efficiently  
12 because a single Privilege Team member -- and we're just  
13 talking about a review for contraband. We're not talking  
14 about reviewing these materials for content, we're just  
15 determining whether they're marked correctly and whether  
16 there's contraband in them.

17 It's the kind of thing that it's a little bit -- has  
18 the aspect of the tail wagging the dog. So thank you for  
19 hearing me.

20 MJ [COL POHL]: Got it.

21 Go ahead.

22 LDC [MR. CONNELL]: Your Honor, thank you. I just wanted  
23 to make a couple of quick observations. One of those is, you

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1 know, there's a shocking number of moving parts down here  
2 between clients visits and 802s and travel and, you know, and  
3 a lot of people put in a lot of effort to make all of those  
4 moving parts work properly. The JTF does, the CLO does, the  
5 Privilege Team does, the prosecution does, the defense team,  
6 every -- the trial judiciary, everybody.

7           The regular rules written in an order help everyone.  
8 It is not -- doesn't cast any aspersion on the efforts of the  
9 Privilege Review Team to regularize the order. Instead, it  
10 makes the expectations of all of the parties clear and avoids  
11 the problem of interpretation and having to wave around, you  
12 know, a government's response to get things to happen.

13           I completely agree, we try -- we do not wait until  
14 5:00 on Friday to make requests. That system is complicated  
15 by the fact that the prosecution -- that the Privilege Team  
16 does not accept requests more than seven days in advance. So  
17 I would love it if it were possible for us to make a request  
18 two weeks in advance and make our appointment. That is not  
19 possible. They don't accept requests more than seven days in  
20 advance. I suspect the reason for that is that the mission  
21 does evolve constantly. Things get canceled. Things get  
22 added. And so probably that is their way to deal with that  
23 situation. But for the most part, everybody's doing their

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1 best and all we're asking is that the order reflect the  
2 representation of the government and regularize everyone's  
3 expectations.

4 Thank you.

5 MJ [COL POHL]: You're welcome.

6 Mr. Ruiz.

7 LDC [MR. RUIZ]: Judge, I just simply want to echo  
8 particularly Mr. Connell's comments that we do need you to  
9 write this into the order, and for us as an access -- an  
10 adequacy of access issue.

11 You told Mr. Schwartz that he couldn't have it both  
12 ways, and I understand what you mean by that. I would say  
13 that the prosecution and Mr. Swann can't have it both ways  
14 either. I heard some arguments yesterday on -- arguments  
15 yesterday on regarding access to counsel by telephonic  
16 methods, and much of the government's presentation was geared  
17 towards the unprecedented access that counsel have to our  
18 clients here in Guantanamo Bay, the amount of time that we can  
19 spend. And he mentioned that, in fact, that we could do it  
20 over the weekends. I'm willing to put my record up against  
21 anyone else in terms of the amount of time I spent on the  
22 ground in Guantanamo making sure that happens before, after  
23 hearings in order to maximize that.

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1           But the adequacy of our access is also driven by the  
2 information that we can bring in. I can't speak for any other  
3 team, but this whole notion that appointments are made at 5:00  
4 on Friday doesn't apply to us. This whole notion there aren't  
5 courtesies extended do not apply to the way that we interact  
6 with the Privilege Team.

7           I think Mr. Connell hit on a point that is important  
8 for you to understand, that it's in many ways personality  
9 driven by the individual Privilege Team's personnel's  
10 interpretation of what their requirements are. But when we  
11 are in an environment where we have to meet over the weekends,  
12 there needs to be a mechanism that is consistently structured  
13 to make it very clear that there needs to be certain support.  
14 I think that's where your building structure into it, into the  
15 order itself would bring that.

16           And I, quite frankly, Judge, I don't -- I don't look  
17 at working over the weekends thing as being such a -- such a  
18 great thing. That happens to be my personal opinion. There  
19 are obligations and commitments that we have. We have worked  
20 through the weekends here at least on one occasion. You  
21 didn't hear any complaint from us. That's what we're here to  
22 do and that goes with the territory.

23           And so to the extent that the Privilege Team is one

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1 of the moving pieces in this great mechanism that is the  
2 military commissions and moving the litigation forward and our  
3 representation, I'm asking you, on behalf of Mr. Hawsawi, to  
4 structure that, build that into your order, and make it very  
5 clear what times -- what -- when they should be present and  
6 make that clear to all parties involved so that we cannot have  
7 to keep coming back because somebody has a different  
8 interpretation of that. Thank you.

9 MJ [COL POHL]: Thank you.

10 I think the rest of the 018 series, as we discussed  
11 earlier, we'll take up after lunch. Just so we know the  
12 roadmap ahead on the 018 series, is I have FFF on the agenda.  
13 I think TT is a classified one; is that correct? Ms. Bormann?

14 TC [MR. SWANN]: That belongs to Mr. Hawsawi, and  
15 that's ----

16 MJ [COL POHL]: I'm sorry.

17 TC [MR. SWANN]: ---- that's a classified one.

18 MJ [COL POHL]: Okay. QQ?

19 LDC [MR. CONNELL]: Sir, QQ has somewhat merged with 373.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: I spoke with the government this  
22 morning and we all agree that we need a 505 before we deal  
23 with that situation.

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1 MJ [COL POHL]: Okay. Okay. Any other of the 018 series  
2 other than EE, defense, that have not already discussed?

3 LDC [MR. CONNELL]: Sir, you did mention KK yesterday.

4 MJ [COL POHL]: Yes.

5 LDC [MR. RUIZ]: Judge, I would just point out that ----

6 MJ [COL POHL]: I thought that was -- I'm sorry. Didn't  
7 you just tell me that requires a 505?

8 LDC [MR. CONNELL]: No. No, sir, you asked about QQ,  
9 that's what required the 505.

10 MJ [COL POHL]: Okay. I'm sorry. KK. You're right.  
11 Okay.

12 So the ones that we can discuss are KK, FFF, and EEE.

13 MTC [MR. TRIVETT]: Sir, my recollection of KK in the  
14 conversation yesterday in the 802 is that it was subsumed by  
15 018Y and it wasn't necessary.

16 DDC [MR. SCHWARTZ]: That might be right, if we have  
17 lunch, we can -- it's a possibility.

18 MJ [COL POHL]: Okay. Maybe KK is not there. So again,  
19 EE and FFF and maybe KK.

20 DDC [MR. SCHWARTZ]: And BB is the other one you  
21 mentioned. It's on the order, it's just separate from 018U.

22 MJ [COL POHL]: And BB. Got it. So, BB, EE, maybe KK,  
23 and FFF. I think I'm forgetting one. Am I? Is that good?

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1 Okay. Let's start those if we get those after lunch.

2 So that brings us to 422 now. Mr. Ryan.

3 TC [MR. RYAN]: Good morning, sir.

4 MJ [COL POHL]: Good morning.

5 TC [MR. RYAN]: Your Honor, pursuant to Rule For Military  
6 Commission 702, the United States respectfully moves this  
7 commission for an order scheduling depositions of certain  
8 witnesses to be conducted in court during two days of the  
9 scheduled October 2016 hearings. Specifically, the  
10 prosecution requests that five depositions be taken during the  
11 week of 3 October and five be taken during the week of 10  
12 October.

13 702 authorizing depositions reads, in pertinent part,  
14 "A deposition may be ordered whenever, after swearing of  
15 charges, due to exceptional circumstances of the case, it is  
16 in the interest of justice that the testimony of a prospective  
17 witness be taken and preserved for use at a military  
18 commission."

19 I want to emphasize, Judge, up front that it is our  
20 hope, our sincere hope, that any argument at some point as to  
21 actual admission of the deposition evidence actually never  
22 occurs and that it will be completely a moot point. So to a  
23 great extent, we are not seeking admission at this time as

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1 much as we are seeking to preserve. I understand -- we  
2 understand and accept that if we do seek to admit such  
3 testimony from the deposition, we will have to show  
4 unavailability or unusual circumstances as it is provided for  
5 in the discussion section of 702.

6 For purposes of preserving such testimony as a  
7 cautionary measure, as a preservation measure, but with the  
8 hope and intent to have the evidence actually presented in  
9 live testimony, I submit to you, sir, that the exceptional  
10 circumstances in the interest of justice called for in 702 are  
11 satisfied by the following three points: First, we have  
12 listed ten individuals from whom we seek to take such  
13 depositions, and we have listed their respective ages as well  
14 as any related health concerns for those individuals.

15 In the course of our initial motion, Judge, we made  
16 reference to two individuals, Ms. Kuhn and Mr. Burlingame,  
17 both of whom have passed away. Those events, those sad  
18 events, for us brought home very directly that these types of  
19 passages of life are happening and, in fact, they can actually  
20 happen quickly.

21 Both of those individuals were persons we knew,  
22 persons we had interviewed, persons that we intended to call  
23 as witnesses if, in fact, there is a need for a sentencing

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1 hearing, and both of whom wanted very much to testify. We  
2 concluded at that time that we needed to find a strategy, that  
3 we needed to take care of this kind of issue, and we shouldn't  
4 just be sitting back waiting for bad health to arrive. So  
5 that's number one as to those individuals.

6           Number two, Your Honor, is the uncertain posture of  
7 the case in terms of when the case will be tried. And for  
8 this, I don't know that an awful lot of explanation is even  
9 needed. The location and the proceedings that we have have an  
10 awful lot of difficulties built into them, even just in terms  
11 of logistics. Then you put into the case itself, as Your  
12 Honor has said on many occasions, this is a complex case with  
13 lots of complex issues. Time is needed to handle it in a  
14 proper fashion.

15           And we also take into account the predictions that  
16 were made public not too long ago by the defense as to when  
17 they expect to get to trial and then also as to the length of  
18 the trial that was predicted by the chief defense counsel in a  
19 written document to the convening authority that was given to  
20 the commission as an exhibit.

21           Then as a final point in this quick section is, you  
22 also have the disadvantage that many judges don't have in the  
23 sense that you can't say, be in my courtroom at 9:00 on Monday

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1 morning. I'm -- lots of judges use that with great passion.  
2 Your Honor could say it, but you would have trouble getting us  
3 over the Straits of Florida, so you're constrained to a  
4 significant degree by the logistics as well as all of the  
5 other matters that I'm talking about. So where we are in the  
6 case and where there is to go is a significant issue that I  
7 think the court can take into account for that discussion as  
8 to interests of justice.

9           The third point as to this, Your Honor, is the --  
10 related to what I just said, the great difficulties that are  
11 conducted with getting down here. I shouldn't say great  
12 difficulties, but the significant distance and the logistical  
13 difficulties, not so much for us but for persons who, as they  
14 age, become more constrained in their abilities to travel.

15           From our pleading, you see -- you can see the  
16 residences of some of our folks. Mr. Hanson who lives in  
17 Connecticut, Mr. Hemenway who lives in Kansas, Ms. Dillard who  
18 lives in Michigan, Mr. Haberman who lives in Wisconsin,  
19 Ms. DeConto who lives in Massachusetts, these -- out of Cape  
20 Cod in Massachusetts; these are all folks who've got a heck of  
21 a trip just to get to Andrews sometimes.

22           MJ [COL POHL]: Mr. Ryan, but is there any requirement  
23 that the depositions be held down here?

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1 TC [MR. RYAN]: No, there is not, Judge, under the law.  
2 What is important to us, though, what we think is advisable,  
3 is that it happen down here so that the accused should be  
4 present.

5 MJ [COL POHL]: Is there a requirement that the accused be  
6 present?

7 TC [MR. RYAN]: As it is now, no, Judge. I submit,  
8 though, it's -- it's something the commission should err on  
9 the side of for a variety of reasons. One, it just -- it  
10 helps in the larger sort of picture of due process and their  
11 abilities to ----

12 MJ [COL POHL]: Do you anticipate this being a public  
13 deposition?

14 TC [MR. RYAN]: I do, sir. I -- I do, just because I  
15 believe 806 requires that. I know there's this issue that the  
16 defense is making much of in terms of possible taint if it's  
17 done in a public setting and I'm going to address that in  
18 significant detail.

19 So, Your Honor, with those three factors, within  
20 the -- starting with the age of the persons we seek to depose,  
21 the posture of the case, and finally, our location down here,  
22 we suggest that Your Honor has enough -- has plenty to decide  
23 the taking of deposition in the interest of justice is, in

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1 fact, appropriate at this time, while at the same time -- and  
2 I think I'm saying this accurately -- sort of holding in  
3 abeyance the issue of the actual admissibility of the  
4 depositions. Because if all things go the way we want them  
5 to, the defense in 422C takes pains -- or takes care to state  
6 that they care about victims and family members and point out  
7 the steps they have taken to show that respect, including even  
8 visiting memorials to those murdered as proof of their  
9 compassion.

10 But then they pivot quickly and say, quote,  
11 presentencing victim impact testimony is unduly prejudicial to  
12 the defendants. They go on to quote as authority a university  
13 study and say victim impact evidence can create unfair  
14 prejudice to the accused that would substantially outweigh the  
15 probative value for which such evidence is offered, thereby  
16 requiring its exclusion.

17 MJ [COL POHL]: So that's just a 403 analysis about  
18 introduction of the evidence, and I thought we weren't going  
19 to get to that. You are talking about admissibility of the  
20 evidence.

21 TC [MR. RYAN]: Say again, sir. I'm sorry.

22 MJ [COL POHL]: What I'm saying is what you just said is  
23 basically a 403 test about admissibility of the evidence, and

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1 I thought you started out by saying we're not going to worry  
2 about that. They're addressing the admissibility now.

3 TC [MR. RYAN]: The defense is saying admissibility now  
4 because this should never come in.

5 MJ [COL POHL]: Because it shouldn't happen at all.

6 TC [MR. RYAN]: That's right. I'm sorry, sir. I should  
7 have pointed this out. So from the human standpoint, they do  
8 not want family members to speak for those taken from them by  
9 murder under any circumstances. From a legal standpoint, and  
10 far more concerning to you at this point ----

11 LDC [MS. BORMANN]: Judge, I object.

12 MJ [COL POHL]: Stop. Stop.

13 TC [MR. RYAN]: ---- they're asking you to ignore the  
14 Supreme Court of the United States.

15 MJ [COL POHL]: Mr. Ryan, stop. There's an objection.

16 LDC [MS. BORMANN]: Judge, I object because it misstates  
17 either of the defense -- either of the pleadings in this case.  
18 We have not taken the position that the victim family members  
19 shouldn't be heard. In fact, we have one titled that. We  
20 encourage them to be heard, but properly.

21 MJ [COL POHL]: Mr. Ryan?

22 TC [MR. RYAN]: Yes, sir.

23 MJ [COL POHL]: Let me do my job, please. Ms. Bormann,

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1 you'll get an opportunity to represent your position. Your  
2 objection is overruled.

3 Mr. Ryan, go ahead. I can read the pleadings for  
4 what they said. Go ahead.

5 TC [MR. RYAN]: Thank you, sir. In short they're asking  
6 you to ignore the Supreme Court's decision in Payne v.  
7 Tennessee and disallow victim impact testimony, which is  
8 called in at least one pleading a spectacle. In Payne, the  
9 Supreme Court took the very unusual step of overruling itself  
10 on this subject in the cases of Booth and Gathers, and  
11 specifically held victim impact testimony is, in fact, proper.

12 Such evidence, and this will be an important point  
13 going forward, Your Honor, such evidence, and I'm committing  
14 to this right now with you, includes facts about the victim's  
15 life to some degree and the effects on the surviving family  
16 members caused by that person's murder. And that's really the  
17 extent of it. And when I say evidence, the facts about the  
18 victim's life, it's often referred to in the case law as a  
19 glimpse. So I can't spend days talking about a person,  
20 although it may very well be justified, but we can provide a  
21 glimpse into what that person was, what that person did, what  
22 that person -- what kind of life that person lived.

23 The authority of Payne and applicability to this case

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1 is demonstrated, I'd submit, in many, but at least in these  
2 two. First the Akbar case, which was a decision from the  
3 Court of Appeals of the Armed Forces and also a military case,  
4 but also an act of murder committed by a defendant acting out  
5 of religious fanaticism in what he felt was on behalf of  
6 Islam.

7           The McVeigh case was decided, of course, by the Tenth  
8 Circuit. Both Akbar and McVeigh recognize Payne as  
9 controlling, and I'd submit, Your Honor, that McVeigh is  
10 particularly instructive for us in this case as to  
11 admissibility, but also as to the breadth of such evidence  
12 that can be presented in front of a military commission.

13           The court said as follows: "The bombing of the  
14 Murrah Building was the deadliest act of domestic terrorism in  
15 the history of the United States. The magnitude of the crime  
16 cannot be ignored. It would be fundamentally unfair to shield  
17 a defendant from testimony describing the full effects of his  
18 deeds simply because he committed such an outrageous crime.  
19 The sheer number of actual victims and the horrific things  
20 done to them necessarily allows for the introduction of a  
21 greater amount of victim impact testimony in order for the  
22 government to show the harm caused by the crime." McVeigh, of  
23 course, was the bombing in Oklahoma City.

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1           The blowing up of the Murrah Federal Building  
2 resulted in the deaths of 168 people. And thinking back, the  
3 country probably couldn't imagine it ever being any worse.  
4 168, Your Honor, is less than half of just the firemen killed  
5 on September 11. It's about a quarter, about one-quarter of  
6 just the people killed in the financial firm Cantor  
7 Fitzgerald, who occupied the top floors of the North Tower of  
8 the World Trade Center.

9           The wrap-up on this, Judge, is this type of evidence  
10 will clearly be proper at some point in this case and  
11 admissible as well. And per McVeigh, the government should  
12 have leeway, considerable leeway in presenting the evidence.  
13 And I'll come back to that slightly in a little bit.

14           Now, sir, there's this issue of taint and part of it  
15 is this issue of public -- happening in public court or not.  
16 The defense's argument, I believe I can state fairly that  
17 there is a concern that this commission should not let this  
18 happen because somewhere in the world right now wherever the  
19 United States military may be, there is a large pool of people  
20 that could end up as jurors in this case. So I guess you  
21 would call -- I guess it's called commission members. Forgive  
22 me if I don't get the terms right always, Judge ----

23           MJ [COL POHL]: That's okay. Go ahead.

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1 TC [MR. RYAN]: ---- and I may call them jurors on  
2 occasion.

3 And the defense's argument is that if these  
4 depositions occur in a public setting as required, we believe,  
5 by Rule 806, that these potential jurors, wherever they are,  
6 they may know they're potential jurors, they may not, will  
7 hear about these depositions, presumably from press accounts  
8 that haven't even been written yet and that they will become  
9 so tainted, so biased, so prejudiced by that testimony, by  
10 that deposition testimony, that they can't possibly be fair  
11 and impartial, that they'll be unfair jurors to these accused.

12 This completely disregards the fact that, in any case  
13 but certainly this one, presumably, the commission will be  
14 doing extensive voir dire and the commission will be doing  
15 extensive instructions even before anyone gets set in terms of  
16 wipe away anything you may have thought. What you have heard  
17 about, can you put that aside? I instruct you the evidence  
18 isn't in. I instruct you a verdict must be based on the  
19 evidence only, et cetera.

20 Now, this concern by the defense, this doomsday  
21 scenario that a jury is impossible to find based on  
22 depositions, I have to address.

23 And I start by saying that the testimony would be

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1 limited to one close relative of the ten we've asked for; nine  
2 of them would be parents of adult children and in one case the  
3 wife of a husband. Those witnesses would testify about the  
4 deceased's life and about the effect that that person's murder  
5 had on those who are left behind. I emphasize there would be  
6 no -- no attempt nor would there be any testimony as to  
7 opinions on penalty. There would be no identification of the  
8 accused because it couldn't be. None of them know any of the  
9 accused. Nor would there be any even mention of the accused.

10           The only caveat I want to provide is as to the extent  
11 of the evidence as we put in our motion. One of our proposed  
12 witnesses, Mr. Hanson, would occupy a dual role, so we'd have  
13 to sort of bifurcate his deposition testimony. He is also a  
14 fact witness in this sense: On the morning of September 11,  
15 he received a phone call from his son, Peter. Peter was  
16 on United 175 flying to the west coast with Peter's wife, Sue  
17 Kim and their daughter, Christine, the youngest victim of  
18 9/11. During the hijacking, Peter called our witness,  
19 Mr. Hanson, and described for him the events that were going  
20 on inside the plane: Stabbings of flight attendants, flying  
21 erratically, people screaming, hijackers claiming they had a  
22 bomb. That phone call ended with Mr. Peter Hanson saying to  
23 his father, "Oh, God. Oh, God," and the plane crashed into

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1 the South Tower.

2           So in that sense, Mr. Lee Hanson would be a fact  
3 witness as to that event because, Judge, that is -- that is  
4 about the only evidence, direct evidence, we have from a  
5 person on 175 saying -- describing the events as they were  
6 occurring. For some of the other flights we have other  
7 witnesses, but 175, it's that. So we consider Mr. Lee Hanson,  
8 from a factual standpoint, an important trial witness.

9           MJ [COL POHL]: What's his age and physical condition?

10          TC [MR. RYAN]: Mr. Lee Hanson is 83, Your Honor.

11          MJ [COL POHL]: Okay.

12          TC [MR. RYAN]: We would then ask that Mr. Hanson be able  
13 to testify also as to -- as to, like everyone else, this sort  
14 of glimpse of life and the effects of the loss of his son,  
15 daughter-in-law and granddaughter on he and his wife and  
16 others.

17                As the fact witness, I'll just point out, because I  
18 know discovery was discussed at some point, Mr. Lee Hanson  
19 would have the only sort of law enforcement discovery to be  
20 turned over. It consists of an FBI 302 that's exactly three  
21 pages in length.

22                Now, the defense says that this evidence,  
23 Mr. Hanson -- but all the others from a victim/family member

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1 standpoint, from this Payne/McVeigh type evidence -- would be  
2 a point that would make a fair trial impossible. Now, Judge,  
3 this is how I want to address this. We are talking about the  
4 events of September 11. And within the context of that event  
5 and what is known about it, and I'll get into it in a moment,  
6 our submission to you, sir, is that the testimony of people  
7 saying, my child meant the world to me, or my husband meant  
8 the world to me and their loss has devastated me, that won't  
9 be anywhere near a point of jeopardizing a fair trial.

10           And I'll start by addressing the context this way:  
11 Judge, if you were to ask any member of the United States  
12 military and maybe any American at all where they were and  
13 what were they doing when they first heard about the attacks  
14 of September 11, I'll bet an awful large majority would be  
15 able to tell you in exact detail. You could quote the song,  
16 "Where were you when the world stopped turning that September  
17 day?"

18           It is one of the most infamous crimes in history and,  
19 by their design, it happened in such a way that the whole  
20 world was watching. It was 15 years ago and it's still fresh  
21 today. And it lives on through the miracles of modern media.  
22 On Google, on YouTube, on any sites, you can find stories, you  
23 can find photos, you can find an enormous amount of videos --

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1 enormous amount of videos that are terribly compelling and  
2 absolutely agonizing to watch.

3           That day was the inspiration for books, for songs,  
4 for movies, and countless articles that cover the attacks, the  
5 victims, and those left behind. This day, Your Honor, I  
6 submit is part of our national consciousness and it's part of  
7 our national soul. As my father once said to me, "Now you  
8 know what Pearl Harbor felt like." Of course, this was worse.  
9 That's for America as a whole.

10           For a potential military jury, military officers, the  
11 case they will hear will concern also the attack on their  
12 corporate headquarters, the Pentagon, and also on the homeland  
13 they swore to defend. The events that led to this case might  
14 have inspired their military careers and/or altered their  
15 military careers. It might have also led to losses of  
16 comrades in the years and wars that followed. So that's for  
17 the jury.

18           Next, within this case itself, the accused sit here  
19 formally charged by the United States. A charge sheet is  
20 publicly available, is often quoted in media sources, and in  
21 our charge sheet, it lays out in exacting detail in the course  
22 of 167 overt acts small actions and large taken by each of the  
23 accused and co-conspirators, such as the hijackers and Usama

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1 bin Laden, all that they did to make that day happen.

2 That charge sheet is is available also on the  
3 website, and any juror who is out there could have, if he or  
4 she chose, looked at it at any time. Within this case at  
5 another time and place -- no, same place, different time, all  
6 of the accused announced their desire to plead guilty, and  
7 some even went through the colloquy. That occurred in open  
8 court and was covered extensively by the media.

9 Khalid Shaikh Mohammad in a combatant status review  
10 tribunal announced that he was responsible for the attacks,  
11 quote, from A to Z. A transcript of that tribunal is  
12 available on all sorts of websites and could be accessed by  
13 anyone who seeks it.

14 Those are all items that I readily acknowledge will  
15 cause concern, will cause the commission to have to take steps  
16 in discussing with a potential jury. That's from the  
17 government's side.

18 On the defense side, as Your Honor knows well, much  
19 has been injected into these proceedings regarding the  
20 treatment of the accused. Since the proceedings began in  
21 2012, the word torture has been used over 500 times in this  
22 courtroom. By comparison, the phrase September 11, 11  
23 September, 9/11, about 200 times. All of this has occurred in

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1 open court and without government objection.

2           The Senate Select Committee on Intelligence made  
3 public their report over a year ago now. It is publicly  
4 available. It's referenced often in the media. It's been  
5 referenced many times in this courtroom as well.

6           And at the last session, we even got to watch movies.  
7 That movie, Zero Dark Thirty, was in theaters generally, was  
8 nominated for awards, was a DVD, and it's now on television.  
9 We were able to watch clips as presented by the defense. In  
10 those clips, an actor playing that accused specifically by  
11 name was shown being interrogated in what the defense would  
12 certainly -- would be called mistreatment. Now, the accuracy  
13 of those clips I know we'll have to sort out later. But once  
14 again, all of that was done in open court without government  
15 objection.

16           My point, Judge, is this: Your Honor will have to  
17 oversee this case, which may very well have more pretrial  
18 publicity, opinions, knowledge about it than maybe any other  
19 case ever. Very well might be. I acknowledge that and we're  
20 ready for that challenge. There will have to be significant  
21 voir dire. But my point is, when you take the entire context  
22 of everything I just mentioned, and I probably could have gone  
23 on a ways longer, within that context, to suggest that a

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1 potential juror, knowing parts of all of that context, some of  
2 it, personal feelings, to say that that person will say, wow,  
3 a parent who misses an adult child who was murdered, I can't  
4 possibly be fair just has no credibility to it and carries no  
5 weight. Especially when you consider, as I said, the  
6 testimony would have nothing to do with these accused, except  
7 what they caused, of course.

8           Defense in pleading 422B says, quote, "Here the  
9 government has access to thousands of victim/family members  
10 who might testify at a sentencing hearing. The taking of  
11 depositions of ten such family members is not necessary and is  
12 cumulative." In short, they want to benefit from having  
13 killed so many people. In other words, you don't need these  
14 ten, you got lots more.

15           LDC [MR. NEVIN]: I object to that, Your Honor. That's  
16 not fair argument, that's not what we're saying. It's really  
17 not fair to say that.

18           MJ [COL POHL]: Objection is overruled.

19           Mr. Ryan, while we're on that point, let me -- and  
20 again, I understand the breadth of the allegations here, so  
21 got it.

22           TC [MR. RYAN]: Well, this is just -- I understand, Judge.  
23 I'm going to move to this right now.

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1 MJ [COL POHL]: No, but I want to talk about kind of what  
2 you're just talking about now.

3 TC [MR. RYAN]: Okay. Yes, sir. I'm sorry.

4 MJ [COL POHL]: And not in the context that you  
5 characterized defense or whether defense says that's accurate.  
6 That's not what I'm talking about. What I'm talking about  
7 here is the breadth of the charged offenses. If we get to  
8 sentencing, the pool, the set of potential victim impact  
9 witnesses ----

10 TC [MR. RYAN]: Yes, sir.

11 MJ [COL POHL]: ---- is in the thousands.

12 TC [MR. RYAN]: Yes, sir.

13 MJ [COL POHL]: Okay. Okay. And I'm not binding you now,  
14 though, but is there some number that the government intends  
15 to call less than the thousands? I mean, eventually we're  
16 going to address this in a more substantive manner, but here's  
17 where I'm coming from, Mr. Ryan, is that you're asking for  
18 these ten. Okay. Now, if these ten are 10 percent or  
19 20 percent of all of the witnesses that you're going to call,  
20 that's -- rephrase that -- that you are going to request to  
21 call ----

22 TC [MR. RYAN]: Right.

23 MJ [COL POHL]: ---- or do you plan to call a thousand?

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1 I'm not binding you into it, but it just seems ----

2 TC [MR. RYAN]: No. I understand. I understand.

3 MJ [COL POHL]: I understand the McVeigh logic and I  
4 understand when you have multiple -- when you have these many  
5 victims, but there's also a point where ----

6 TC [MR. RYAN]: It's -- as we point out in our brief,  
7 there's -- it's bound ultimately by due process and, you know,  
8 that term can be a bit vague. I'm going to answer it -- I'm  
9 going to answer you, Judge, and it is exactly where I was  
10 going right now.

11 MJ [COL POHL]: Okay. Good.

12 TC [MR. RYAN]: As to that lack -- I'm sorry. As to that  
13 remark regarding cumulateness, et cetera, and I think going  
14 to Your Honor's point, in Payne, the Supreme Court said, and  
15 it's particularly instructive for us, "As a general matter,  
16 however, victim impact evidence is not offered to encourage  
17 comparative judgments of this kind; for instance, that the  
18 killer of a hard-working, devoted parent deserves the death  
19 penalty, but that the murderer of a reprobate does not."

20 It is designed to show instead each victim's, quote,  
21 uniqueness as an individual human being, end quote, whatever  
22 the jury might think the loss to the community resulting from  
23 his death might be.

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1           The facts of Gathers, which Payne overruled, are an  
2 excellent illustration of this. The evidence showed that the  
3 victim was an out of work, mentally handicapped individual,  
4 perhaps not in the eyes of most a significant contributor to  
5 society, but nonetheless a murdered human being. So, let me  
6 start with this general rule to answer Your Honor's question.  
7 As we read it, between McVeigh, between Payne and everything  
8 else, every life taken that day has equal value to every other  
9 because, as the Payne court said, it goes to the uniqueness as  
10 an individual human being.

11           Now, getting to Your Honor's point of sort of is  
12 there a line ----

13           MJ [COL POHL]: I understand. I understand.

14           TC [MR. RYAN]: It's a fair question.

15           MJ [COL POHL]: And I just want to make it clear. The  
16 term cumulative has surface appeal but it really doesn't  
17 necessarily apply on this type of situation, okay? Because  
18 each person is different. Okay. But it does come back to, as  
19 you phrased, the due process issue ----

20           TC [MR. RYAN]: Right.

21           MJ [COL POHL]: ---- that 3,000 sentencing witnesses may  
22 be ----

23           TC [MR. RYAN]: Right. Understood.

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1 MJ [COL POHL]: ---- too much.

2 TC [MR. RYAN]: Understood. And I'll answer your question  
3 first by noting something that probably doesn't help me at  
4 all, which is that in the Moussaoui case, Judge Brinkema  
5 limited considerably the government's evidence in this regard.  
6 I'm not 100 percent sure of this, Judge, but I believe it was  
7 in the range of 30 to 40 people. I know the prosecutors in  
8 that case had to make very, very difficult choices. With all  
9 due respect to her honor, Judge Brinkema, I don't know how you  
10 come up with a number like that. And I believe that number,  
11 in any event, was ridiculously small.

12 MJ [COL POHL]: If you know, do you know how many the  
13 judge allowed in McVeigh?

14 TC [MR. RYAN]: I do not, sir, although I'm sure we can  
15 get to that.

16 As to -- as to this case, though, I'll say this,  
17 Judge, I've said it before in open court, I think at some  
18 point we were at the number of about 400 people who at one  
19 time or another raised their hand and said, I want to testify.  
20 And our attitude has -- our answer has always been, if you so  
21 choose to, it is our obligation, our responsibility, we feel,  
22 to honor that as best we can.

23 Now, as a practical matter, Judge, I don't think it

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1 will be that high. I think over the course of time, and we've  
2 seen it, some folks just drop out for a variety of reasons,  
3 personal and all of them to be respected.

4 I do not know, and I cannot answer the commission on  
5 where we'll be when we get to that point other than to say, I  
6 think the government understands that there will be a line of  
7 reason at some point. It might be that it's something that we  
8 have to argue about. It might be that it's something that we  
9 just -- that just comes about naturally. In any event, I  
10 don't think the commission needs to spend a lot of time on  
11 that right now, at least as to these ten.

12 MJ [COL POHL]: But doesn't -- wouldn't that play a role  
13 in how necessary the depositions are?

14 TC [MR. RYAN]: No, sir. No, sir. These ----

15 MJ [COL POHL]: You treat these just as a case by -- let  
16 me ask you this: Would these be the only ten depositions  
17 you're requesting?

18 TC [MR. RYAN]: I cannot say that, sir, because I -- quite  
19 frankly, and as Your Honor, I'm sure, can understand, we  
20 have -- there will probably be many people within this  
21 category, typically it was folks who had an adult child  
22 killed, and our own observation is very often those people in  
23 those circumstances suffered in some ways more. I hate to say

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1 it that way, but it does seem that way.

2 MJ [COL POHL]: I understand. Let me ask you this.

3 TC [MR. RYAN]: Yes, sir.

4 MJ [COL POHL]: The mechanics of it. You indicated that  
5 it's required to be done in open court?

6 TC [MR. RYAN]: I believe 806 would require it, Judge.

7 MJ [COL POHL]: Does this come under 806?

8 TC [MR. RYAN]: Well, in the sense ----

9 MJ [COL POHL]: In a deposition ----

10 TC [MR. RYAN]: ---- if Your Honor -- I'm sorry.

11 MJ [COL POHL]: No, I mean, the rules of a deposition  
12 in -- I don't see anywhere in 806 that a deposition has to be  
13 in open court. And I look at the rules of the deposition, it  
14 doesn't directly address the issue, but it does talk about a  
15 deposing officer ----

16 TC [MR. RYAN]: Yes, sir.

17 MJ [COL POHL]: ---- which would imply it doesn't have to  
18 be the judge. And if it doesn't have to be the judge, it  
19 strikes to me that it wouldn't fall within the purview of 806.  
20 Again, it's just something that I kind of assumed when we came  
21 into here. Until you told me that, I never thought that was a  
22 requirement. And, again, I don't -- I'm not making a  
23 definitive ruling on that, but it strikes to me that a

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1 deposition does not have to be in -- subject to the rules of  
2 806 until it's played. That's a different issue.

3 TC [MR. RYAN]: I would certainly agree with that, Judge.

4 As to your initial point, a deposition is provided  
5 for as part of the trial process. If Your Honor sees a  
6 distinction between that and the rest of military commissions  
7 as it's stated in 806, I think Your Honor probably is not on  
8 its face wrong to say that.

9 MJ [COL POHL]: Is not on its face wrong. Okay.

10 TC [MR. RYAN]: The commission is not on its face wrong.

11 MJ [COL POHL]: Okay. Okay.

12 TC [MR. RYAN]: However, I would submit, Judge, that what  
13 we've proposed is the proper way to go in this case. We want  
14 you as the deposing officer because, as so many other things  
15 in this case, things tend to be hard-fought, decisions have to  
16 be made, things don't go exactly to plan, and in this  
17 situation as to these witnesses, I submit, Judge, that this is  
18 of critical importance to us, and that it be handled as  
19 properly as possible, which is why we hope Your Honor  
20 would ----

21 MJ [COL POHL]: But if the defense concern, one of their  
22 concerns is -- and again, we're not talking about  
23 admissibility here. One of the concerns is potentially

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1 polluting or impacting the members. If it doesn't have to be  
2 in an open session, if it doesn't have to be subject to 806,  
3 in fact, it doesn't even have to be in Guantanamo Bay, is -- I  
4 mean, that's what the rules say. And therefore, you could do  
5 a deposition in a closed session with a videotape and,  
6 therefore, it would only be played at the time of the trial,  
7 and, therefore, you would avoid the potential issue of adding  
8 to the members' being aware of it before the trial.

9 TC [MR. RYAN]: I understand Your Honor's point. Again,  
10 as to effects on the jurors, I think that amounts to  
11 absolutely nothing for all of the reasons I stated.

12 As to something else you said, Judge, it is our  
13 strong request to you that it do take place down here and that  
14 the accused be required to sit in, for all of the reasons of  
15 trying to make sure we do this as better than right as we  
16 possibly can to foreclose any complaints later.

17 And as for closed session, Judge, as you recall,  
18 we've had objections to closed sessions, even in the 802  
19 sense, going way back, or anything happening without the  
20 accused. So our request is that it happen in open court. In  
21 the light of everything else that's happened in open court, we  
22 see no risk from this, and that Your Honor be the deposing  
23 officer and that the accused be present.

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1           Now, Judge, back to the issue of -- that you asked me  
2 about in terms of these ten persons versus the wider  
3 community, the very significantly wider community. I can  
4 represent this to you Your Honor: These ten, several of whom  
5 have visited -- have accompanied us down here for court  
6 sessions, these ten have always been strong advocates of  
7 wanting very much to testify on behalf of their loved ones.  
8 Furthermore, they are persons that the government wants to  
9 call as witnesses for victim impact testimony within that  
10 considerable leeway that we see we will have under McVeigh.

11           Within -- going back to that quote from Payne, Judge,  
12 within these ten witnesses who represent more than that in  
13 terms of people who were killed that day, there is an amazing  
14 range of that, quote, uniqueness in these people. The  
15 prosecution and the individual witnesses have determined that  
16 the jury should know that uniqueness as an individual human  
17 being.

18           Based on the case law that I have cited, the defense  
19 cannot prevent the evidence simply by saying, well, there's  
20 lots of others you can use. That's the cumulative argument.  
21 I understand, Judge, there's a due process argument in terms  
22 of at what point is there a line to be drawn is something that  
23 we'll have to answer at another time.

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1 I'd like to close, Judge, by saying this: As you've  
2 said, it's a complex case. You're in an unenviable position.  
3 You're trying a multidefendant case about a horrible, horrible  
4 crime with many novel and difficult issues in a faraway place.  
5 Also, an awful lot of vitriol has been thrown on top. I  
6 understand that. But I speak right now for these ten people  
7 and say that they are truly the innocents in this whole event.  
8 They wish, and the prosecution asks, that their voices be  
9 heard and preserved.

10 Your Honor, subject to your questions, that's all I  
11 have, sir.

12 MJ [COL POHL]: I have no additional questions.

13 Defense, do you want to be heard, or you would like a  
14 short break first? Just the way prayer time goes so late, I  
15 generally don't take two morning breaks, but I think it might  
16 be appropriate. Okay, now, when I say 15 minutes, just so  
17 everybody understands, I mean 15; not 16, not 17, 15. It's  
18 now 11:36 on that clock. We'll reconvene in 15 minutes.

19 Commission is in recess.

20 [The R.M.C. 803 session recessed at 1136, 31 May 2016.]

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