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1 [The R.M.C. 803 session was called to order at 1156, 31 May
2 2016.]

3 MJ [COL POHL]: Please be seated. Commission is called to
4 order. All parties are again present.

5 Mr. Nevin.

6 LDC [MR. NEVIN]: Yes. Thank you, Your Honor. And I
7 should probably begin by emphasizing that I don't know that
8 I'm speaking for anybody else except Mr. Mohammad and our team
9 in the remarks that I'm going to make. And others may see it
10 differently, and if they do, I don't mean to prejudice any of
11 that.

12 MJ [COL POHL]: Okay.

13 LDC [MR. NEVIN]: I'm very familiar with the idea of
14 preserving testimony when there is good reason to believe that
15 it may not be able to be presented. I think there is a
16 procedure that exists for doing that. I think that's a path
17 that's been walked pretty carefully. I think it does not
18 involve taking the testimony in public for a whole variety of
19 reasons that I -- some of which I can speak to.

20 I will say, I think it's very likely that the defense
21 will want to take such depositions at some point before this
22 case is completed because, given the big time spans that have
23 elapsed between the time of the events, the charges, and when

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1 the trial will likely take place, it's a real possibility that
2 this will be a problem for both sides. But -- and the normal
3 procedure for doing this is pretty straightforward. Mr. Ryan
4 makes the point that it's difficult sometimes to even get to
5 Andrews Air Force Base, and yet the proposal is that these
6 witnesses would not only come to Andrews but also come to
7 Guantanamo and spend a week here and give testimony here.

8 The normal process for doing this would be that you
9 go to where the witness is and you take a deposition. I've
10 done this before in a number of cases myself. And sometimes
11 witnesses, of course, are not even able to travel at all,
12 sometimes a witness may be bedridden. And I know that's not
13 the case with the witnesses we're talking about here, but I
14 say this just because this is how the process has evolved.
15 You don't do it in public. It's not done that way. Rule 806
16 doesn't require it. The rule relating to depositions doesn't
17 require it.

18 And if you think logically about the situation,
19 you're talking about evidence here that may never be
20 presented. So there would be no reason to air this evidence
21 publicly before the time when it becomes even relevant to be
22 presented. I'm not talking about -- I'm not talking about
23 preservation here. I understand the need for preservation,

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1 taking the government completely at its representations about
2 the need for preservation. I'm talking about or focusing on
3 the idea of presentation, and I -- I understood that we were
4 not going to argue about admissibility of this evidence, and
5 so I didn't object to all of the remarks about whether this
6 evidence would be admitted and whether the uniqueness of the
7 individuals who were lost could someday be relevant.

8 MJ [COL POHL]: I think the -- and I don't think we were
9 arguing that, either. I took Mr. Ryan's point on that as to
10 say that he interpreted the defense position as being this
11 evidence is never -- should never be admissible; therefore,
12 there's even no need for deposition, there will be no need for
13 deposition at all, in that sense, as opposed to a -- we do the
14 deposition and determine its admissibility at another time.

15 I think he was just rebutting a -- I don't know that
16 this is necessarily your position, that despite -- I mean, I
17 read your brief and I know what Payne says and I know what the
18 other cases that criticize Payne say, and I just took that as
19 saying if depositions are never admissible in a capital case,
20 therefore, we have no need to do this. Only in that sense I
21 do think he was discussing admissibility.

22 LDC [MR. NEVIN]: You mean testimony of victim -- victim
23 impact testimony.

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1 MJ [COL POHL]: Yeah. Victim impact testimony.

2 LDC [MR. NEVIN]: Like all of us, I know or I have some
3 appreciation of what Payne says, and so I understand the
4 argument for preservation.

5 And that -- I don't mean to concede that I think that
6 any individual testimony would be admissible or would not be
7 admissible. I was really -- I mean, what I had in my mind at
8 the time that Mr. Ryan said essentially what the government --
9 what the defense wants to do is benefit from how many people
10 we killed, you will recall I tendered an objection to that
11 remark because that's not a fair characterization of what the
12 defense argued and it's certainly not a fair characterization
13 of my view.

14 Even Judge Brinkema -- and I take it that the idea of
15 cumulateness, which has been very much at play in other
16 context in this case, would have some role here, and so
17 even -- no matter how you approach this, I take it that there
18 would be -- there would be some limits on this. And that
19 characterizing our position on that, or my understanding of
20 our position on that as wanting to profit from that strikes me
21 as an unfair characterization.

22 I did listen with care as Mr. Ryan described the
23 events of September 11, the extent to which they are

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1 monumental in themselves, the way in which, when you ask
2 people where they were on September 11th, they can tell you.
3 I certainly can. That it has been the inspiration for books
4 and songs and it is part of our national consciousness, and
5 Mr. Ryan's father's remark to him about the comparison to
6 Pearl Harbor, I'm aware of all of that.

7 I think that all of those things bear, and I -- I
8 believe Mr. Ryan was saying the prejudice of those events
9 that's inherent in the case itself is so great that whatever
10 prejudice would flow from victim/witness testimony certainly
11 would pale by comparison; and therefore, we need not consider
12 it or need not be concerned about it.

13 And I will just say both logically and emotionally as
14 a trial lawyer, I see it as -- I see it in a different way.
15 The military commission, if and when the case is tried, will
16 have a huge obligation to provide a level playing field, a
17 fair environment for trying the case. And that -- that
18 obligation will probably be more complicated and deeper in
19 this case than in any case that's ever been tried in the
20 history of American jurisprudence.

21 And so the question that comes to me is why would you
22 complicate that process in any way by the extraordinary --
23 something that I've never seen done before and never heard of

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1 having been done before, a public -- public testimony on an
2 issue before the trial begins? Why would you make that
3 process of providing a level playing field even marginally
4 more difficult? There's not a reason to do that. The answer
5 is -- the question answers itself. There's not a reason to do
6 that.

7 And the argument that was made about the breadth and
8 depth and difficulty of September 11th and the effects of it
9 and its comparisons to the bombing of the Murrah Federal
10 Building in Oklahoma City, all of that illustrates exactly
11 that point. And so I initially have some suspicion that we
12 would -- about the idea of holding public depositions of this
13 type in the fall of 2016. But set all that aside. There's no
14 reason to deviate from what the normal course of business
15 would be here in holding depositions and to do them publicly.

16 My suggestion would be that if the military
17 commission accepts the idea that -- that there is genuine
18 necessity for this testimony, that the testimony simply be
19 done in the place where these people live and that it, in that
20 way, be maximally convenient to them; or in the alternative,
21 that if it is to be done here at Guantanamo, that it be done
22 in a closed courtroom.

23 There is certainly the possibility of prejudice from

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1 the taking of this testimony that is also part of this picture
2 that I think I need to speak to just briefly, and it's
3 potential prejudice that would apply both at the time that the
4 testimony was given and also at the time that it was -- if
5 that time came, that it would be admitted and played in open
6 court, presumably. Presumably these -- the depositions would
7 be videotaped and then would be played back some day if we get
8 to that part of the trial.

9 But the point is, this testimony is not testimony
10 that's admissible in the guilt phase. But when you take it
11 and when you go to considerable lengths, and effort to take it
12 and preserve it, and certainly if you present it publicly
13 you're telling the world that you expect that there will be a
14 penalty phase, and that is not a determination that's been
15 made yet.

16 And furthermore, when you play it, if you do -- and I
17 say you, if the military commission -- if it is played, let's
18 put it that way, in the passive voice, if it's played and
19 jurors recognize that it was -- that it was preserved in an
20 earlier time on a penalty-phase issue, there will be a
21 tendency for the jurors to say to themselves, the military
22 commission knew this day would come and directed or permitted
23 the preservation of this testimony.

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1 I think, again, that prejudice is there and to some
2 extent can be cured by instructions. I'm not saying that --
3 I'm not saying it doesn't mean the testimony should not be
4 preserved. What I'm saying is that I think it's important to
5 bear all -- those kinds of ideas in mind when you make a
6 decision about whether it would be aired publicly.

7 So I guess the military commission can see that my
8 primary concern is with the focus on public presentation. And
9 I appreciate your hearing me.

10 MJ [COL POHL]: Thank you, Mr. Nevin. Mr. Nevin, your
11 brief, I believe, was joined by Mr. Connell. Why don't -- you
12 can go in any order you'd like. I don't know whether you
13 wanted to just piggyback on him or --

14 Ms. Bormann, you're standing. Go ahead.

15 LDC [MS. BORMANN]: Mr. Connell's and Mr. Nevin's brief we
16 join.

17 So I want to start with the following propositions:
18 That family members of the people killed on September 11,
19 2001, suffered great loss and that they still live that daily
20 and that that has resulted in tragic impact is not an issue.
21 No party here has an issue with that proposition.

22 That United Airlines Flight 175, the flight that was
23 flown into the south tower on September 11, 2001, was hijacked

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1 is also not an issue in dispute between the parties here.

2 So now I want to move to what Mr. Nevin addressed and
3 to what I think the commission's biggest concern is, and
4 that's the openness of the hearing. So first, I want to talk
5 a little bit about 806. 806 is titled Public Trial.
6 Evidentiary testimony taken during a deposition, and I, like
7 Mr. Nevin, have done several of them, is not evidence. It's
8 not a public trial. It is intended to preserve evidence for a
9 later time if that evidence becomes relevant or necessary.

10 Rule 702 is the rule that deals with taking of
11 deposition of events here in the military commissions. There
12 is absolutely nothing in any rule or regulation, particularly
13 in Rule 702, that contemplates two things: One, that it would
14 be done in open with a public airing; and, two, that it
15 involved victim impact evidence, and I'll get back to the
16 latter a little bit later.

17 But I want to talk a little bit about the public
18 trial excuse, I guess, is what I would use, justification that
19 Mr. Ryan cited to. They don't claim that in their brief and
20 today was the first time I had heard that. And I certainly
21 would have briefed it had I known about it. 806 talks about a
22 trial, not preservation of evidence, and so 806 doesn't apply.

23 Here what the government is asking to do is to have a

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1 public exposition of the tragedy that these individuals
2 experienced and they're going to do that in a way where the
3 future panel members, future jury members can have exposure to
4 it. By keeping it and making it in an open setting, not only
5 can the press report on it, not only can the public view it at
6 Fort Meade, not only could the public view it here and the
7 commission would have no control over it, but presumably,
8 since the government claims it's an 806 hearing, it would be
9 published on the mc.mil website where prospective panel
10 members could go to read testimony they might never hear.

11 The -- that is an extraordinary situation, and the
12 only thing -- the only reason I can believe that they actually
13 suggest it is that that's exactly what they want. And
14 although there are curative instructions that Mr. Ryan
15 referred to and that Mr. Nevin referred to, the term curative
16 means that it's an attempt to cure a mistake made earlier.
17 Curative instructions are given when jurors hear improper
18 evidence. Here we have an opportunity to prevent that from
19 happening, and I would ask you to prevent that from happening
20 so we can forego a curative instruction here.

21 Mr. Ryan says he doesn't know if the panel members
22 have been selected here. I don't either. I know in the al
23 Nashiri case there was a convening order that was tendered to

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1 the defense. Here no such order has been tendered to the
2 defense. I can only presume that there is a convening order
3 where panel members were selected. If it that is the case,
4 those panel members are now aware that they are panel members
5 because they -- they, under -- I'm told, under military rules,
6 get notified of that.

7 So if they're paying attention and, of course, they
8 would be because, you know, they've been chosen as panel
9 members thus far, it compounds the harm because, unlike a
10 traditional jury trial where a jurors -- jurors might not know
11 they're going to be jurors until they're actually selected,
12 here we have panel members who have been warned in advance.

13 All of those reasons mitigate against an open
14 hearing. And as Mr. Nevin indicated, here where the ten
15 individuals are of some advanced age, although not as advanced
16 as some of my learned colleagues sitting to my left, they --
17 they -- it seems odd that the government would want them to,
18 while being of some advanced age and in some cases suffering
19 from some diseases and disabilities, travel to Andrews Air
20 Force Base and then travel to Guantanamo Bay, Cuba.

21 Depositions. I've done depositions sitting in a
22 hospital room, I've done depositions in a prison, I've done
23 depositions sitting in the outside room next to a courtroom,

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1 but one thing I've never done is done a deposition in open
2 court with people watching.

3 Now, I want to talk a little bit about what I think
4 you were getting at with the cumulative. The word cumulative
5 came up, and I don't think it's really about being cumulative.
6 So 702 and actually the federal rule on this issue require
7 extraordinary circumstances -- exceptional circumstances, I
8 guess, is the proper term -- in order to grant a deposition.
9 And the case law talks about what exceptional circumstances
10 are. So -- and the discussion section of Rule 702 does as
11 well. So I want to direct your attention to 702, I think it's
12 (a)(3) -- (a)(3)(A). And if it I can put that up on the ELMO,
13 the discussion section. Do you have it? It's (c)(3)(A).

14 MJ [COL POHL]: Got it.

15 LDC [MS. BORMANN]: Sure. (C)(3)(A).

16 MJ [COL POHL]: Go ahead.

17 LDC [MS. BORMANN]: It talks about the discussion section
18 under (a) -- well, (a) says a request for a deposition may be
19 denied for good cause, and then gives some reasons why. And
20 then the discussion section talks about good cause for denial.
21 It includes failure to state a proper ground for taking a
22 deposition, failure to show the probable relevance of the
23 witness' testimony, or that the witness' testimony would be

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1 unnecessary.

2 I bring that to your attention because that's the
3 interplay with cumulateness. So the proposition stated here
4 is that for a deposition -- which I generally they're frowned
5 upon in criminal cases -- for a deposition to be taken, the
6 proponent needs to show that it would be necessary. And when
7 other evidence is available that would provide or put the
8 proponent in the same position they would otherwise be, by its
9 very nature, that deposition set to be taken would not be
10 necessary.

11 Rule 702 also contemplates the concept of trial.
12 When you read the cases cited by the government and the cases
13 cited by the defense in both pleadings and you read 702 in its
14 entirety, you understand that there is not a single case nor a
15 single mention of a sentencing hearing in any deposition rule.
16 Everything referred to in 702 talks about trial testimony.
17 The reason I started with there's no dispute that people
18 suffered great harm by the loss of loved ones on
19 September 11th is because it's not a material issue in
20 dispute. And so because it's not a material issue in dispute,
21 it's not a proper subject for taking a deposition. Of course,
22 there are other ways to preserve it. We address those ----

23 MJ [COL POHL]: Is it your position that when it says --

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1 702(a), that when it says, "Preserved for use at a military
2 commission," that that means only on the merits?

3 LDC [MS. BORMANN]: Well, what -- I mean, a commission
4 includes sentencing, if we get to that point.

5 MJ [COL POHL]: No, but ----

6 LDC [MS. BORMANN]: But if you read through the rule, it
7 talks about trial testimony, it does not talk about a
8 sentencing hearing at all.

9 MJ [COL POHL]: You don't think trial testimony
10 encompasses sentencing hearings?

11 LDC [MS. BORMANN]: Well, I think they're distinct.
12 Victim impact evidence has sort of its own area of law, and
13 the cases cited by the government don't talk about deposition
14 testimony being taken in -- as it relates to victim impact
15 evidence either.

16 So I'm unaware -- we did some serious research on
17 this issue. So let me back up. After we got the government's
18 filing, we looked at it and you can see in the government's
19 filing our position is we can't take a position until we
20 actually see what you're proposing. So when we got that, we,
21 along with some of the other defense teams, were contacted by
22 a number of folks in the victim community who were very
23 concerned. They had heard rumors about this; they hadn't read

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1 the motion. They had heard rumors and they were very
2 concerned that, you know, they would be forced to come in to
3 Guantanamo Bay and have a deposition taken in open court and
4 they objected to it. So you will see there's a series of
5 affidavits or declarations that are attached ----

6 MJ [COL POHL]: Are these civilians?

7 LDC [MS. BORMANN]: Yes.

8 MJ [COL POHL]: Did you tell them they can't be forced to
9 come to Guantanamo Bay?

10 LDC [MS. BORMANN]: I did. But yet they ----

11 MJ [COL POHL]: Whatever their perception is, there's
12 perception and reality. You -- but I can't deal with
13 perceptions that are not based on reality.

14 LDC [MS. BORMANN]: I understand. But their objection was
15 not to being a deponent. One woman is 84 years old. Her
16 objection was not that she would be a deponent, her objection
17 was that she would be forced to be a deponent where the press
18 could report on her pain, where there would be a public
19 hearing of it before any trial was ever had, and that it would
20 be sort of put out there before its time. She had watched and
21 followed the Moussaoui trial at length and she knows and knew
22 and expected that her testimony might be admitted later on.
23 But the idea that we would do a deposition in open court

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1 before the trial was really problematic.

2 And so when you read those declarations that are
3 attached, that's what they all say. They all say the same
4 thing. We expect that at some point if there's a finding of
5 guilt, we would want to come forward and tell our story, we
6 might even want to be deponents; but we don't want to be
7 deponents in a public spectacle before the press before
8 there's even a trial.

9 And so what that caused us to do is take a step back.
10 Until we received that kind of information, we took a step
11 back and we looked at all of this and we thought and I
12 thought, gosh, victim impact evidence, I've never done a
13 deposition on that. Why is that? So then we started looking
14 at all of the cases and we couldn't find a single case where a
15 court held that a deposition of victim impact evidence was
16 proper. And so the government doesn't cite to one and we
17 can't cite to one either because they don't seem to exist.

18 That leads me to my next argument, which is this is
19 an extraordinary measure. So when you're doing an
20 extraordinary measure, if you're going to do it at all, then I
21 think you need to take serious precaution to make sure that we
22 don't have to give curative instructions after the fact.

23 Mr. Ryan talked about the incredible amount of media

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1 and publicity that September 11 received, and all of that is
2 absolutely true. It's going to make choosing fair panel
3 members in this case very, very difficult. But that's not an
4 excuse for ignoring the law on this and protecting those very
5 vital interests before the fact. And, in fact, I would
6 suggest to you that if you're going to preserve this evidence
7 by reason of deposition, you do it in a way that is dignified,
8 you do it in a way that causes the least amount of pain and
9 agitation and disruption to the lives of the people being
10 deposed, and that you do it consistent with due process
11 concerns and protecting the integrity of this trial.

12 So we would suggest if you are going to do it, that
13 you order that the deposition be sealed afterward and that it
14 be done in a place that is convenient for the victim family
15 members and where there is no public airing and comment upon
16 the deponent's testimony.

17 MJ [COL POHL]: Thank you, Ms. Bormann.

18 Mr. Harrington.

19 LDC [MR. HARRINGTON]: Judge, when I listened to
20 Mr. Ryan's presentation this morning, he was very measured in
21 the impassioned arguments that he was making, but it seemed to
22 me that there was a contradiction in what he was saying. And
23 he seemed to minimize the effect this could have on the

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1 potential panel and that the court could, and that counsel
2 could voir dire the members and give curative instructions.

3 I've never been a big fan of curative instructions
4 with juries. Whether I am or not doesn't really matter.
5 Appellate courts seem to impose a standard that as long as
6 they're made and there's a representation by jurors or panel
7 members, that that's sufficient in the most cases.

8 But this is an extraordinary case. And I listened to
9 Mr. Ryan tick off the impact that 9/11 has had on the
10 military. And he talked about an attack on the corporate
11 headquarters of the military, an attack on the soil of the
12 country that they are sworn to defend, and so it's not just a
13 question of whether this is heard by the potential members or
14 not, it's going to be heard by all of the military. It's
15 going to be heard by the people that the members associate
16 with, and it just adds to the pressure that's put on these
17 jurors.

18 I, as I think about this, wonder how any person in
19 the military is going to be able to sit here and say, I can be
20 fair and impartial. It's just -- it's just -- the scope of
21 it, as Mr. Ryan talked about, is so extraordinary. So the
22 question becomes is why do we want to add to that if there's a
23 way around it to prevent it that protects everybody, not only

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1 the victim/family witnesses but also the integrity of this
2 court and due process for our clients.

3 When -- I think 702 actually provides the guidance in
4 it, because I separate 702 into two separate parts. The first
5 is a taking of the deposition itself; the second is if and
6 when it's used at trial. And that's the -- that's the public
7 part of 806 is the trial. And if these witnesses are not
8 available at that time and their depositions which are
9 videotaped are played, then that satisfies the public nature
10 of it.

11 I've done depositions before, but I've done them in
12 federal court. In the federal court, the trials are not
13 publicized, at least on video TV. They're publicized with --
14 the press obviously can come and do it, but the press is never
15 present for any deposition or not because we -- you never know
16 whether it, in fact, is going to be evidence at trial.

17 Judge, with respect to where the depositions are
18 taken, if you do order them, I agree with the government that
19 they should be taken here, if possible. If not possible, I
20 understand that something has to be done about that. And 702
21 does not provide for -- that the accused has to be present.
22 But in a case like this, I think the accused should be
23 present, and I think it avoids a lot of problems later and

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1 there may well be a situation which we have bordered on before
2 where one of the accused, or more of them, decide at some
3 point in time that they're going to go pro se. And the
4 question becomes does the court want evidence that's going to
5 be presented at trial with someone who is representing
6 themselves at that phase of the trial where they have not had
7 an opportunity to cross-examine that particular witness.

8 Judge, one last thing that I would say is -- and I'm
9 not necessarily accusing anybody of anything, but it seems to
10 me that the timing of this motion is just incredible. It is
11 right before a national presidential election. And if this is
12 public, it is really going to be public, there's no question
13 about that. And if it's public, it should be public. That's
14 the scope and the nature of this case and the events that
15 happened here. But it seems to me that there's a real
16 question here about certainly the judgment of requesting that
17 it be done at this particular time, if it it's going to be --
18 if it's going to be public.

19 Thank you.

20 MJ [COL POHL]: Thank you, Mr. Harrington.

21 LDC [MR. CONNELL]: Your Honor, I won't repeat my
22 colleagues' comments, but there are two arguments that I don't
23 think have been covered. One of those is the requirements of

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1 702(c) itself with respect to the unavailability requirement,
2 that the -- prior to the taking of a deposition there must be
3 showing that the deponent is likely to be unavailable. I
4 think that the government accurately states the law in its
5 motion. I think its view of the law in AE 422 is much more
6 accurate than its view of depositions that it took in AE 350F
7 when it was opposing our deposition for the CIA interpreter
8 formerly -- or former CIA interpreter utilized by
9 Mr. Binalshibh's team.

10 I do note that simply a cut-off -- I mean a concern
11 that a person is 65 years old does not seem to me to be a
12 demonstration that they're likely to be unavailable. Four of
13 the counsel in this case are over 65 years old, and hopefully
14 we will all be available for the trial. Neither do I think
15 that general health concerns, which we all share, are the sort
16 of demonstration of likely unavailability that is contemplated
17 by Rule 702.

18 The second argument that I separately wish to make is
19 I wish to call the military commission's attention to
20 702(h)(1) which hasn't been mentioned yet, and that's sets up
21 a special rule for depositions which provides that, I quote,
22 "a failure to object prior to the deposition to the taking of
23 the deposition on such grounds which may be corrected if the

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1 objection is made prior to the deposition waives such
2 objection."

3 I'm getting a slow-down from the interpreter, and it
4 doesn't surprise me because the word deposition appears about
5 six times in that sentence. It's a complicated sentence to
6 interpret. But what I think it means is that there is a
7 special rule for objections for depositions. And in 422C, the
8 point that we were trying to make was not to litigate the
9 admissibility question, but rather to point out the many
10 decisions which remain to be made regarding scope of testimony
11 and similar questions and -- about victim impact testimony
12 because there are a lot of open questions.

13 We know from Payne that it, whatever it is, is
14 admissible, but there's a lot of definition that goes -- a lot
15 of work that's done by trial judges in defining exactly what
16 it is. And I think the teaching of 702(h)(1) is that that
17 work all has to be done in advance of the depositions.

18 MJ [COL POHL]: Okay. You lost me on that there,
19 Mr. Connell.

20 The way I read 7(h)(1) [sic] is that what can be
21 cured must be objected to before the error is committed.

22 LDC [MR. CONNELL]: Yes.

23 MJ [COL POHL]: Okay. So you object to the concept of a

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1 deposition whatsoever.

2 LDC [MR. CONNELL]: Yeah, but that's not what I'm talking
3 about.

4 MJ [COL POHL]: Yeah. But what I'm going into is that our
5 use -- let's say they ask a question during the deposition and
6 you believe it is improper so you object to it. That doesn't
7 preserve it?

8 LDC [MR. CONNELL]: I think it does preserve it. I think
9 that there is -- the way that these things often happen, and
10 I'm not telling the military commission how to run your
11 courtroom, but what often happens is that we put in left and
12 right limits; that it might not be the limits that the defense
13 wants, it might not be the limits that the prosecution wants,
14 but we work those out. If this sort of testimony is allowed,
15 this sort of testimony is -- these sorts of comments are not
16 allowed in order to have a common ground of understanding.

17 And if you're saying that 7(h) [sic] means is that we
18 have to make contemporaneous objections, then I don't see why
19 we even have the rule. But if it's just redundant and all it
20 means is they have objections ----

21 MJ [COL POHL]: No, I'm interpreting the rule is you're
22 objecting to the concept of the deposition itself. Now what
23 you're telling me, you want to -- you think you have to say

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1 these questions are okay, these questions aren't okay. Okay.
2 But wouldn't you simply -- let's say a deposition is ordered
3 and then you say -- simply say, we object to any questions
4 outside of this area without -- before the deposition is done,
5 is conducted.

6 LDC [MR. CONNELL]: Sure.

7 MJ [COL POHL]: I mean, is that what we're talking about
8 here?

9 LDC [MR. CONNELL]: I'm not going to set up procedural
10 defaults for myself, don't get me wrong, Judge.

11 MJ [COL POHL]: I know you're not. I got the idea in your
12 first presentation was it was going to be a
13 question-by-question discussion ahead of time with a whole
14 script laid out before we could do the deposition, otherwise
15 you wouldn't have preserved your objection.

16 LDC [MR. CONNELL]: No, I didn't mean that but what I took
17 this to mean was that we needed to have the conversations
18 about what is allowed and what is not allowed. Typically
19 that's handled by -- I don't know what we call it in the
20 military commissions, we would call it a motion in limine.
21 But the ----

22 MJ [COL POHL]: It's the same term.

23 LDC [MR. CONNELL]: Okay. Same term. Usually that's

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1 handled via a motion in limine.

2 MJ [COL POHL]: Okay. I'm with you. Sequentially ----

3 LDC [MR. CONNELL]: My point is there is work to be done
4 in advance of actually taking ----

5 MJ [COL POHL]: If the deposition was ordered, then before
6 the deposition you'd want to file your motion in limine ----

7 LDC [MR. CONNELL]: Of course.

8 MJ [COL POHL]: ---- get my response, litigate that, and
9 then we take the deposition, if we go down this road. I
10 haven't made a decision, understand that.

11 And then any question within there that either
12 exceeds which way the ruling is or is improper for another
13 reason, you object at the time and the deposing officer just
14 notes it usually, and then the judge decides whether or not
15 he's going to sustain the objection or not, even though the
16 deposing officer and the judge might be one and the same. I
17 got that part. That's what you're talking about.

18 LDC [MR. CONNELL]: Yes, sir. Okay.

19 MJ [COL POHL]: Got it. Thank you.

20 Mr. Ruiz, do you have anything to add?

21 LDC [MR. RUIZ]: I do. May I have a moment?

22 MJ [COL POHL]: Sure.

23 [Pause.]

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1 LDC [MS. BORMANN]: Judge, while Mr. Ruiz is conferring, I
2 was handed a note. I argued before I had some information. I
3 asked somebody for -- I'd like to supplement my argument.

4 MJ [COL POHL]: Sure. Go ahead. I'm assuming it will be
5 short?

6 LDC [MS. BORMANN]: Yes. Very short.

7 MJ [COL POHL]: Go ahead, then I'll hear from Mr. Ruiz.

8 LDC [MS. BORMANN]: Unlike Mr. Ryan, I was not present for
9 the Moussaoui case, so I reached out to one of the attorneys,
10 and so I -- this is consistent with what I -- my experience
11 has been. Judges -- and it sort of falls in with what
12 Mr. Connell said. Judges are very careful about limiting
13 prospectively the testimony of victim impact evidence because
14 it can so very often go over the edge and make a jury lose its
15 objectivity. So yes, we will probably be doing motions in
16 limine. I'm sure we will be.

17 But more importantly, as Mr. Ryan noted in the
18 Moussaoui case, Judge Brinkema limited their number of
19 witnesses but also, and this is also consistent with every
20 case I've ever tried, when it comes to victim impact evidence
21 going forward, generally there is a proffer done ahead of time
22 so that we learn the left and the right. Generally, that's
23 done in a written documentation, discovery that's exchanged

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1 between the parties so that we can inform how it is that you
2 draw those parameters so we make sure that in the event that
3 it is -- you know, somewhere down the line in the -- obviously
4 in the Brinkema -- in the Moussaoui case there was no
5 deposition but, you know, it prevents sort of the spill that
6 would prevent that testimony from being admitted.

7 So I just wanted to inform the court that those
8 things should go into your thinking. So if you're thinking
9 about setting a date certain, I suggest that you don't because
10 there's going to be a lot of work after your order, if you
11 order them, no matter where you order them, because we're
12 going to have to get together and figure out what the
13 parameters are.

14 MJ [COL POHL]: I understand.

15 LDC [MS. BORMANN]: Thank you.

16 MJ [COL POHL]: But, Ms. Bormann, while we're on that
17 topic, I understand, having actually done trials with victim
18 impact, that sometimes it can get very emotional and the judge
19 has to intervene with an emotional witness and say, you've got
20 to stop that. Okay. I understand that, how that can occur
21 and it has occurred. But is that the same kind of fear you
22 would have in a video deposition when, after it's over with,
23 the objectionable material can be just cleaned out of it,

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1 edited out of it?

2 LDC [MS. BORMANN]: Well, I don't know that in a
3 deposition -- I've -- I've never seen a deposition of
4 impact -- victim impact evidence ever taken.

5 MJ [COL POHL]: No, I know. But ----

6 LDC [MS. BORMANN]: So I don't know how you would do this
7 because ----

8 MJ [COL POHL]: What I'm saying, in a trial, let's say,
9 for example, in a sentencing hearing, a victim says something
10 inappropriate, I turn to the victim and say, I understand you
11 may be upset, whatever, but that's not appropriate to say.
12 Then I turn to the panel and say, you will disregard it and
13 will everybody agree with that. They all nod their heads yes
14 and no and up and down and, as Mr. Harrington says, that's
15 usually good enough for appellate work, that's unringing the
16 bell.

17 In this scenario, we had a video deposition and the
18 witness went off the reservation like that and the simple
19 part, you would edit it out and the members would never see
20 it.

21 LDC [MS. BORMANN]: Well, if -- in fact, I have
22 participated in evidence depositions on a factual issue where
23 that has occurred. And what we did instead of editing --

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1 because the video would have been chopped, it wasn't really
2 feasible. So what we ended up doing was a transcript -- like
3 a -- like a bystander reading a transcript of what occurred,
4 and cutting out that part. Because otherwise the jury knows
5 there's something missing. You can't go from -- it's really
6 hard with a video to -- because then the jury is left to
7 wonder whether or not and to what extent it was cut.

8 MJ [COL POHL]: It's easier for me to give a curative
9 instruction to ignore what you didn't hear -- -

10 LDC [MS. BORMANN]: No, I'm not saying ----

11 MJ [COL POHL]: ---- than it is to give a curative
12 instruction to ignore what you did hear.

13 LDC [MS. BORMANN]: I'm not saying you shouldn't ever have
14 to give curative instructions, but understand me here, but
15 you're right it probably would be a lot easier to -- in a
16 deposition to remove offensive-to-the-record testimony where
17 somebody just, you know, lost sight of the instructions given
18 by the judge ahead of time than it would be in open court.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: So, yes.

21 MJ [COL POHL]: Mr. Ruiz.

22 LDC [MR. RUIZ]: Judge, I see you looking at the clock so
23 I'm wondering how much time I've got or ----

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1 MJ [COL POHL]: You have all of the time you need, but
2 some of it may be after lunch.

3 LDC [MR. RUIZ]: Okay. Very well.

4 So as you know, Your Honor, on this particular
5 motion, Mr. al Hawsawi, we did not file a separate objection
6 to the prosecution's request. Other parties did, other of our
7 colleagues have, and by operation of your rule we are
8 presumably joined to those.

9 What I want to do -- and we haven't unjoined. What I
10 want to do is be very clear about what Mr. al Hawsawi's
11 position is in relation to some of the arguments that have
12 been made and make that unmistakably clear on the record. On
13 behalf of Mr. al Hawsawi, we do not object to the preservation
14 of testimony from these family members.

15 Mr. Ryan, I think, closed by saying that the -- they
16 wanted their voices to be heard and to be preserved was what
17 he said. And to me, those are distinct in this way: Their
18 desire to have their voices heard now is very separate and
19 distinct from the valid, legitimate goal of preserving
20 testimony that may be necessary at a later time.

21 The desire to have their voices heard in a public
22 setting under the condition that they've proposed to this
23 commission, we absolutely object to having what we believe

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1 would be more of a public spectacle that is not contemplated
2 by the rules and is not necessary at this time.

3 In terms of preserving their testimony for future
4 use, we absolutely do not object to that. We, on behalf of
5 Mr. al Hawsawi, do not object to doing that in a deposition
6 format. Again, what -- where our objection lies is in the
7 public nature, and I think Mr. Nevin alluded to this, although
8 I'm not sure that they necessarily were in agreement on the
9 deposition issue. That's why I want to be clear about this.

10 If you wanted to order depositions of the family
11 members in a closed setting where it's not a public spectacle
12 and preserve their testimony so that we can have a future
13 admissibility determination at a later time, Mr. al Hawsawi
14 would be in agreement with that procedure.

15 In terms of Mr. Ryan's statement that 806 seems to
16 contemplate that this would be a procedure that would be part
17 of a public trial and therefore ought to be held in this
18 courtroom, we disagree with that. I think I heard you say
19 that you did not see anything in 806 to that effect. I concur
20 with that. I would point out, however, in addition to that,
21 that rule 806(c) seems to indicate otherwise. And if you --
22 if you look at 806(c), Judge, I think that a good argument,
23 solid argument can be made that, in fact, that proceeding is

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1 not contemplated to happen in an open courtroom. I'm going to
2 give you an opportunity to read that.

3 MJ [COL POHL]: Go ahead.

4 LDC [MR. RUIZ]: It seems that that specific provision
5 talks about two clear circumstances under which the court
6 could, in fact, allow a video and audio recording within the
7 process of trial of a commission. That would be under
8 closed-circuit video or audio transmission that could be
9 viewed by one of the persons we represent if they were removed
10 from the courtroom so you could pipe that video or audio into
11 their cell.

12 The second one is the one that, of course, we have in
13 place, as you know, because the facilities are not adequate to
14 provide access to other spectators. Aside from that, the rule
15 seems to constrain the use of any type of video or audio
16 recording.

17 So I would say that the rule, if anything, actually
18 stands for a proposition and that there are only very limited
19 circumstances where the commission can have the discretion to
20 do that, and this is not the instance where that ought to
21 happen.

22 That's all I have, Your Honor.

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

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