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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)
)
v.) Criminal No. 01-455-A
)
ZACARIAS MOUSSAOUI,)
)
Defendant.)

DEFENDANT'S MOTION FOR A SEPARATE HEARING AS TO THE THRESHOLD FACTOR AND MOTION IN LIMINE, AND MEMORANDUM IN SUPPORT

The Defendant, Zacarias Moussaoui, by counsel, moves the Court to Order a separate hearing for the determination of the threshold mental state factor, pursuant to 18 U.S.C. § 3591(a)(2), and to Order separate hearings for the remainder of the death eligibility phase (the statutory aggravating factors) and the determination of the appropriate punishment, if the Defendant is found to be death eligible. Consistent with the basis for that motion, as set forth below, the Defendant also moves the Court to exclude from the first of those hearings any additional evidence of the deaths of the victims beyond the admissions contained in the Statement of Facts[1] supporting his guilty plea. Mr. Moussaoui can receive a fair trial only if the threshold factor is tried separately and the noted unnecessary additional evidence is excluded from that part of the trial. The alternative to such a process will deny him his right to due process of law under the Fifth Amendment, his right to an impartial jury under the Sixth Amendment and his right to fair sentencing proceeding under the Eighth Amendment to the United

[1] Dkt. no. 1264.

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States Constitution.

ARGUMENT

To render the defendant eligible for the death penalty, the Government must establish a mental state threshold (or "gateway") factor, as set forth in 18 U.S.C. § 3591(a), and at least one statutory aggravating factor, as set forth in § 3592(b). *See Jones v. United States*, 527 U.S. 373, 376-77 (1999).

The Government has declared that it intends to advance only [redacted] [3] In a subsequent pleading, the Government argued that [redacted] [4] In that same pleading, the Government claimed that the [redacted]

[redacted]

[3] Government's Motion for Reconsideration of the Court's Order of May 2, 2005, at 4-5 (dkt. no. 1282).

[4] Government's Opposition to Defendant's Motion for Pre-Trial Access and for Writs *Ad Testificandum* [redacted] at 7 (dkt. no. 1305).

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To complete its death eligibility case, the Government intends to rely on three statutory aggravating factors: that the Defendant, (1) "[i]n committing the offenses described in Counts One, Two, Three, and Four, [ ] knowingly created a grave risk of death to one or more persons in addition to the victims of the offense;" (2) committed those offenses "in an especially heinous, cruel and depraved manner in that they involved torture and serious physical abuse to the victims;" and (3) committed those offenses "after substantial planning and premeditation to cause the death of a person and commit an act of terrorism."[6]

I. The Defendant Has A Substantial Defense To The Threshold Factor In The Eligibility Phase

For the Government to sustain its burden of proof it will be required to show something entirely speculative and patently hypothetical; that is, that something that Mr. Moussaoui *could have* told them *would have* prevented the attacks. Stated otherwise, the only "act" that could sustain the Government's claim would be the failure of Mr. Moussaoui to tell the authorities something that he knew that the Government did not

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[5] Id. at 7-8.

[6] Notice of Intent to Seek a Sentence of Death (dkt. no. 89); 18 U.S.C. §§ 3592(c)(5), (6) and (9).

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already know. This is obvious because, even armed with all of its suspicions about Mr. Moussaoui's presence in the United States and his activities here and abroad, and with the full engagement of the CIA, FBI, Justice Department, State Department and investigators in France and England, the attacks occurred anyway with Mr. Moussaoui in custody. Therefore, the jury will be required to compare what, if anything, Mr. Moussaoui actually knew about the pending attacks to that which was already known to the Government. No other "act," as that term is used in the FDPA, is alleged and if that act did not result in death, Mr. Moussaoui is not eligible for the death penalty.

Substantial evidence will be presented at trial that the United States Government knew more about Al Qaeda's plans to attack the United States than did Mr. Moussaoui. Taking the Government's statement as to its burden in reverse, there is no evidence in the record that Mr. Moussaoui knew any of the actual September 11 hijackers by name, that they were in the United States or their locations. Mr. Moussaoui has never offered such an admission and the Government has conceded as much.[7]

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[7] In a hearing on January 30, 2003, Mr. Karas stated the following regarding the defense claim of the materiality of the proposed testimony [redacted]

[redacted]

[redacted]

Given this concession, it is difficult to see how the Government could prove, beyond a reasonable doubt, that something Mr. Moussaoui could have told them would have led to the prevention of the September 11 attacks. This claim is especially surprising given the fact that the Government actually knew the names of at least two of the September 11 hijackers -- Nawaf al-Hazmi and Khalid al-Mihdhar – and did absolutely nothing to prevent them from boarding aircraft on September 11, 2001, with tickets purchased in their real names. Al-Hazmi and al-Mihdhar were no strangers to the authorities in the United States. Both traveled to Kuala Lumpur in January of 2000 where they met with other al-Qaeda operatives. That meeting was watched by agents of the CIA and the names of these two hijackers were thus known to the CIA, as well as their status as al-Qaeda operatives. As is stated in the *9/11 Commission Report*,[8] the CIA even learned that al-Hazmi had entered the United States in March of 2000.

> In early March 2000, Bangkok reported that Nawaf al Hazmi, now identified for the first time with his full name, had departed on January 15 on a United Airlines flight to Los Angeles. . . .No one outside the Counterterrorist Center was told any of this. The CIA did not try to register Mihdhar or Hazmi with the State Department's TIPOFF watchlist–either in January, when word arrived of Mihdhar's visa, or in March, when word came that Hazmi, too, had had a U.S. visa and a ticket to Los Angeles.
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> None of this information–about Mihdhar's U.S. visa or Hazmi's travel to the United States–went to the FBI, and nothing more was done to track

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[redacted]

Transcript of January 30, 2003, Classified CIPA Hearing, at 18-19. (Attachment 1)

[8] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, W.W. Norton & Company (2004)

[redacted]

[redacted]

any of the three until January 2001. . . .

9/11 Commission Report at 181-2.[9]

The information about al-Hazmi and al-Mihdhar known to the Government prior to September 11 highlights the obviously speculative nature of the Government's evidence as it relates to eligibility. Mihdhar and Hazmi were, as a matter of fact, identified as terrorists who were not allowed to board aircraft in the United States.[10] Despite that fact, and the fact that there was an FBI operation in place to track them down, the Government allowed them to board planes on September 11. In this instance, there can be no doubt that the Government knew more about al-Hazmi and al-Mihdhar and their locations than did Mr. Moussaoui. Nothing he could have told them -- since the Government concedes he was not in contact with them -- could have led to their arrests.

Further, the defense has recently learned of a Pentagon project known as Able Danger.[11] The Defense Department has confirmed that at least five people associated

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[9] The details of the Government's failure to follow up on the information that it actually possessed regarding the presence of these two al-Qaeda operatives in the United States is detailed at pages 266-272 of the *9/11 Commission Report* as well.

[10] [redacted] (A copy [redacted] is attached as Attachment 2).

[11] The defense has submitted a discovery request for information regarding Able Danger and has yet to receive a formal response to that request.

with Able Danger remember certain facts regarding the pre-September 11 identification of Mohammed Atta.[12]

Given its concession about Mr. Moussaoui's lack of contact with the 19 hijackers, had the Government actually identified Atta as an al Qaeda operative before September 11, 2001, nothing Mr. Moussaoui knew, or arguably concealed, could have led to the incarceration or detention of Atta beyond what the Government already knew about him.

The idea that something Mr. Moussaoui could have told the Government would have [redacted][13] is similarly speculative and unsupported by evidence. First, the defense is not aware of any security measures that have been employed by the Government after September 11, 2001 that could not have employed before that date.

The United States had known for at least five years that terrorists -- particularly Muslim terrorists – were seeking to hijack aircraft and to strike targets in the United States.[14] In addition, the President was warned on December 4, *1998*, that Bin Laden

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[12] News Transcript, Department of Defense, Special Defense Department Briefing, September 1, 2005, at 2. (A copy of the news transcript is attached as Attachment 3).

[13] Government's Opposition to Defendant's Motion for Pre-Trial Access and for Writs *Ad Testificandum* [redacted], at 7-8

[14] A plan, known as the Manila air or Bojinka plot, was devised by Khalid Sheikh Mohammed and Ramzi Yousef in 1994 in Manila to blow up 12 United States commercial jumbo jets over the Pacific during a two-day span using timers and homemade bombs. Yousef successfully tested the devices by bombing a movie theater and a Philippines Airlines flight en route to Tokyo. The plan unraveled after Philippine authorities discovered Yousef's bomb-making operation in Manila. *See 9/11 Commission Report* at 147.

was preparing to hijack United States aircraft.[15] More significantly, on August 1, 2001, while Mr. Moussaoui was preparing to travel to Minnesota, the President was given a classified briefing captioned "Bin Laden Determined to Strike in U.S." It warned that "Al-Qaeda members - including some who are United States citizens - have resided in the United States for years, and the group apparently maintains a support structure that could aid attacks."[16] That report includes a direct reference to a plan to hijack a United States aircraft to free the Blind Sheikh. Still, no additional preventative measures were put in place. It is pure speculation that had Mr. Moussaoui told the Government that such a plan existed, preventative measures would have been put in place in the weeks between his interrogation and the attacks.

Finally, the questions actually posed to Mr. Moussaoui demonstrate that the FBI,[17] as well as the CIA,[18] had more than sufficient suspicions to justify preventative actions following Mr. Moussaoui's arrest. At a time when the system was "blinking red"[19] and the CIA and FBI were searching for two known al Qaeda operatives in the United States, the FBI detained a known Muslim fundamentalist who, with no abilities or

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[15] Presidential Daily Brief, Bin Laden Preparing to Hijack US Aircraft and Other Attacks, December 4, 1998. *Id.* at 128-9.

[16] *Id.* at 261.

[17] In response to a [FBI] headquarters agent's "complaint that the Minneapolis FISA request was couched in a manner intended to get people 'spun up,'" a [FBI] supervisor in Minneapolis said that he was "trying to keep someone from taking a plane and crashing into the World Trade Center." *Id.* at 275.

[18] On August 23, 2001, the Director of the CIA was given a briefing about Mr. Moussaoui entitled "Islamic Extremist Learns to Fly." *Id.* at 275.

[19] The Director of the CIA told the 9/11 Commission that in his world, "the system was blinking red" and by late July, 2001, "it could not 'get any worse.'" *Id.* at 259.

experience as a pilot, was seeking training on jet simulators. Sensing the obvious, the agents final question to Mr. Moussaoui was whether he was a Muslim fundamentalist bent upon using his flight training to perpetrate a terror attack. Asked this question, Mr. Moussaoui requested an attorney. The issue in this case then is whether, in light of all of the previous failures set forth above, the Government would actually have done anything different had Mr. Moussaoui responded "yes" to the final question.

II. The Distinction Between The Eligibility Phase And The Selection Phase.

The Supreme Court has drawn a clear distinction between the eligibility and selection phases of a capital sentencing proceeding. *See Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) (discussing Court's distinct jurisprudence as to eligibility and selection phases) (citations omitted); *Tuilaepa v. California*, 512 U.S. 967, 971-73 (1994). Since *Buchanan*, the Court has made it clear that the criteria for death eligibility -- that is, the facts which increase the potential penalty to death – are offense elements. The mental state threshold factors set forth in 18 U.S.C. § 3591(a)(2) and the statutory aggravating factors set forth in 18 U.S.C. § 3592(c) are the "functional equivalent" of the elements of a greater offense than "*murder simpliciter.*" *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (plurality opinion); *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003) ("Because a defendant may be sentenced only to life imprisonment unless the jury finds the existence of at least one Intent factor and one statutory aggravating factor . . . those intent and aggravating factors which the government intends to rely upon to render a defendant death-eligible under the FDPA are the functional equivalent of elements of the capital offenses . . ."); *see also Ring v.*

Arizona, 536 U.S. 584, 605 (2002) (a "sentence enhancement" which increases "the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.") (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

III. The Trial Of The Selection Phase Is Different In Kind From The Trial Of The Eligibility Phase

Not only are the death eligibility factors, as a conceptual matter, the equivalent of offense elements, as a proof matter the threshold factors in particular very much resemble homicide offenses, *see, e.g.*, 18 U.S.C. § 1111, and the trial of the threshold factor in the instant case will very much resemble the trial of a criminal charge. And to a substantial degree, the evidence supporting the statutory aggravating factors will far more closely parallel evidence in support of a criminal charge than will the evidence which may be introduced at the selection phase – victim impact evidence, life history (mitigation) evidence, future dangerousness evidence, and mental health evidence. Such evidence is simply not relevant to the eligibility phase. *See United States v. Johnson*, 362 F. Supp. 2d 1043, 1105-06 (N.D. Iowa 2005).

Worse yet, the selection phase evidence has the great potential to overwhelm less emotional issues in the case. *See id.* at 1106-07 (noting that victim impact testimony in co-defendant's trial "as the most forceful, emotionally powerful, and emotionally draining evidence that [the Court had] heard in any kind of proceeding in any case, civil or criminal in [the Judge's] entire career as a practicing trial attorney and federal judge spanning nearly 30 years," "even though the . . . prosecutors . . . used admirable restraint," and pondering whether *Payne v. Tennessee*, 501 U.S. 808 (1991),

"would have been decided the same way if the Supreme Court Justices in the majority . . . had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury"[20]; *see also United States v. Sampson*, 335 F. Supp. 2d 166, 186-87 (D. Mass. 2004) (recognizing problems inherent in victim impact testimony); see also *Payne*, 501 U.S. at 825; *id.* at 836 (Souter, J., concurring) ("Evidence about the victim and survivors, and any jury argument predicated on it, can of course, be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"). Consequently, the *Johnson* court concluded that the danger of unfair prejudice from powerful victim impact testimony required that the eligibility and selection proceedings be separated. *See* 362 F. Supp. 2d at 1110.

The *Johnson* court also concluded that the potential for confusion of the issues and misleading the jury – both grounds for the exclusion of information under 21 U.S.C. § 848(j) (the equivalent section to 18 U.S.C. § 3593(c)) – justified bifurcation of the penalty phase.

> If the jury is permitted to hear information on *all* of the factors in one proceeding, the jury is reasonably likely to be misled into believing that *all* information is pertinent to the determination of *all* factors and the balance of factors when the process under § 848 is actually sequential and cumulative: The jury must first find the defendant guilty; then must find one "gateway" aggravating factor; then must find at least one "statutory" aggravating factor; then *may* find one or more "non-statutory" aggravating factors and one or more mitigating factors; then must balance *all* of the factors to determine the appropriate penalty.

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[20] The judge noted on a personal level that "[i]t has now been over four months since I heard this testimony . . . and the juror's sobbing during the victim impact testimony still rings in my ears." *Johnson*, 362 F. Supp. 2d at 1107.

362 F. Supp. 2d at 1109. The Court proceeded to order a trifurcated trial, with a merits phase (unnecessary here), a death eligibility phase and a selection phase. See *id.* at 1110-11.

The rationale of the court in *Johnson* applies to the instant case, although the potential for prejudice, confusion of the issues and misleading the jury is incalculably greater here. The magnitude and intensity of the actual events of 9/11 – e.g., images of the planes hitting the World Trade Center ("WTC"), of the burning and eventual collapse of the WTC, of victims jumping from the top of those buildings, and, as the attached video[21] shows, the sound of those bodies hitting the pavement – will make it impossible for the Court, or the public, to have any confidence in the ability of the jury to dispassionately consider the other evidence and deliberate as to the critical legal issues upon which the issue of the defendant's eligibility for the death penalty must be predicated. Plainly, if the Government successfully proves its threshold factor case, the defense will ultimately have to confront a measure of that evidence, but there is no legitimate reason to do so at every turn and, most importantly, where it is only marginally probative of the ultimate facts at issue. Consequently, fundamental fairness demands, in addition to a separate proceeding for the determination of the threshold mental state factors, separate proceedings for the death eligibility phase and the

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[21] The Defendant has attached, as Attachment 4, a DVD of a recent program presented by National Geographic on the events of September 11. While the Defendant obviously does not know what evidence the Government will present, this DVD provides a sense of the nature and scope of the evidence which could be presented to prove the deaths.

selection phase.[22]

As the court in *Johnson* noted, the sentencing process is sequential and the finding of the threshold factor and the finding of the statutory aggravating factors are two distinct steps in that process. The threshold factor in the instant case involves simply a determination of whether Mr. Moussaoui lied to law enforcement authorities (the "act") and whether the victims died as a direct result of that act. The Defendant, of course, was not present at the crash sites; he was in jail. Thus, the determination of the threshold factor should flow from a reasoned process, unaffected by the extraordinary and entirely understandable emotions that would be provoked by a display of the events of 9/11 themselves. See *Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence . . .") (quoted in *Payne*, 501 U.S. at 836 (Souter, J., concurring)).

What is truly relevant to that determination is the fact that thousands of persons died as a result of the attacks, not *how they died*. How they died, and the details of the impact of the actual attacks on 9/11 victims, may be relevant in three other contexts – the "heinous, depraved or cruel" and "grave risk of death to other persons" statutory

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[22] In addition to *Johnson*, the penalty phase has been bifurcated in at least the following federal capital prosecutions: *United States v. Simmons*, No. 5:04CR314-01 (W.D. Va. 2004); *United States v. Waldon*, No. 3:00CR00436-HLA-1 (M.D. Fla. 2002); *United States v. Kristen Gilbert*, No. 1:98CR30044 (D. Mass. 2000); *United States v. Williams*, No. 1:2000CR1008 (S.D.N.Y. 2005); *United States v. Honken*, No. 01CR3047-MWB (N.D. Iowa 2001); *United States v. Davis*, 912 F. Supp. 938, 949 (E.D. La. 1996); *United States v. Breeden*, No. 3:03CR00013-SGW (W.D. Va. 2004); *United States v. Rivera*, No. 1:04CR00283-GBL (E.D. Va. 2005); *United States v. Bodkins*, 4:04CR70083 (W.D. Va. 2005); *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005) (bifurcated penalty phase based on Confrontation Clause issue).

aggravating factors, *see* 18 U.S.C. §§ 3592(b)(5) and (b)(6), and victim impact in relation to selection of the appropriate punishment if the Defendant is found death eligible. However, it is no more than "technically relevant," at best, to the threshold factor under § 3592(a). *See Old Chief v. United States*, 519 U.S. 172, 186 (1997) (stating, in holding that proffered stipulation of a prior felony conviction provided the Government with all that it needed as proof, that name of offense was only "technically relevant"). *See also, United States v. Hays*, 872 F.2d 582, 586-87 (5th Cir. 1989) (distinguishing between "logically relevant" and "legally relevant" evidence, the latter being evidence which, while relevant, fails the probative value/unfair prejudice, etc. balancing test of Fed. R. Evid. 403).

The fact is that the Government and the Defendant have already eliminated from the case *any contest over the question of whether persons died as a result of the 9/11 attacks*. The Defendant signed a Statement of Facts, *drafted by the Government*, which states that thousands of persons died in the Al Qaeda attacks of September 11. *See* Statement of Facts, ¶¶ 17-21. As with a stipulation between the parties, the Government should not be allowed to prove a fact which has been formally admitted by the Defendant in a Statement of Facts. Indeed, as the Court made absolutely clear to Mr. Moussaoui during the plea colloquy, it is the very purpose of the Statement of Facts to eliminate any controversy over the facts set forth.[23]

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[23] The Court: "Do you understand that if the Court accepts your guilty pleas today, there will be no further trial of the issue of guilt, you will not be able to come back and try to refute any of the facts in the statement of facts . . . ?"

The Defendant: "I understand that these statements of fact is there to stay and I cannot go back and say no."

[redacted]

While it is true that the Government may normally elect its method of proof, *see, e.g., Old Chief*, 519 U.S. at 186-87, that right has limits. Indeed, the Government may even be required to accept a stipulation offered by the defendant. *See id.* at 191.

Here, however, the Defendant makes no attempt to foist a stipulation on the Government. Rather, his formal, binding admission that thousands of deaths were caused by the 9/11 attacks is the fruit of the Government's own efforts to advance the death eligibility ball well beyond the mere offenses of conviction.

> The Court: [T]he written statement of facts . . . is *more than sufficient evidence* to establish your guilt beyond a reasonable doubt as to all six counts.

(emphasis added).[24] Thus, in terms of establishing the fact which is truly relevant to the threshold factor, the Government has all that it could possibly need -- a conclusively binding admission it induced from the Defendant that thousands of deaths resulted from the attacks of 9/11. *See, e.g., Gander v. Livoti*, 250 F.3d 606, 609 (8th Cir. 2001) ("Valid stipulations [of fact] are controlling and conclusive, and courts must enforce them . . . . *Courts cannot make contrary findings.*" (Emphasis added) (citations omitted)).

In light of the binding concessions contained in the Statement of Facts, there is simply no justifiable reason for the Government to introduce additional evidence to prove that fact again. The rationale for the general rule that the Government may choose its method of proof simply does not apply here. There is no cause for the

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Transcript of April 22, 2005 Plea Hearing at 19-20.

[24] *Id.* at 23-24.

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Government, in connection with its presentation as to the threshold factor, to "tell[] a colorful story with descriptive richness." *Old Chief*, 519 U.S. at 187. This is not a case in which, without the Government's help, the jury will not know about the deaths of which the Government speaks. To the contrary, the problem will be finding jurors who can set their pre-existing notions -- and emotions, for that matter -- about September 11 aside. Nor can the Government possibly claim with a straight face that, in relation to the threshold factor at least, it needs to show the deaths associated with the devastation of the World Trade Center or the Pentagon in order to "sustain the willingness of jurors to draw inferences . . . necessary to reach an honest verdict."[25] *Id.*

In *Old Chief*, 519 U.S. at 184, the Supreme Court stated that the Fed. R. Evid. 403 analysis must, at its core, take into consideration the "'probative value' of an item of evidence" in determining whether to exclude evidence. And the Court noted that "[t]he Committee Notes to Rule 401 [F.R.E.] explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point conceded. Such a concession . . . will sometimes 'call for the exclusion of evidence offered to prove [the] point conceded by the opponent . . . .'" *Old Chief*, 519 U.S. at 184 (quoting Advisory Committee's Notes on Fed. R. Evid. 401, 28 U.S.C.App., p. 859). When, as is the case here, an admission is "not merely relevant but seemingly conclusive evidence of [an offense] element," the Government's interest in introducing "technically relevant" evidence which "addressed no detail in the definition of the [element] that would not

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[25] Of course, under the Defendant's proposal, the Government will still be able to use that evidence where it is more than just "technically relevant," -- for the determination of the statutory aggravating factors and, perhaps, in the selection phase.

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have been covered by the stipulation or admission," 519 U.S. at 186, pales by comparison to the prejudice, waste of time and confusion that such evidence will create.

That being the case, the obvious remedy for the potential for prejudice, waste of time and confusion of the issues is to provide a separate trial for the determination of the threshold factor. If the jury unanimously finds the threshold factor, additional evidence could be presented as to the statutory aggravating factors, including, presumably, evidence of the actual events of the 9/11 attack. Consistency would suggest that be done in a hearing dedicated to a determination of the statutory aggravating factors, which would complete the trial of the issues upon which the question of death eligibility rests, free from any prejudicial, time consuming evidence such as victim impact evidence, which the Government is expected to present during the selection phase.[26] If the jury were to find at least one statutory aggravating factor, the case would then proceed to the selection phase, but the terrible and unnecessary prejudice and confusion that would otherwise have arisen in connection with the jury's consideration of the threshold factor would have been avoided.

In *Old Chief*, the Court established a balancing test for courts to apply in determining whether a defendant's proposed stipulation should be imposed on the Government. Relying on Fed. R. Evid. 403, the Court instructed trial courts to "decide

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[26] The Defendant does not claim that the factors supporting separate hearings for the aggravating factors and the selection phase are nearly as compelling as those supporting a separate hearing for the threshold factor. It would appear to be the wise course, however, since not only would it protect some of the same interests that compel a separate hearing for the threshold factor, but it would present the case in a more logical fashion to the jury.

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whether a particular item of evidence raised a danger of unfair prejudice."

> If it did, the judge would go on to evaluate the degree of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and excluded if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

519 U.S. at 182-83.

Here, the Rules of Evidence do not apply, but that only strengthens the case for excluding additional evidence to prove that deaths resulted from the 9/11 attacks. Section 3593(c) deletes the Rule 403 requirement that the probative value of evidence be *substantially* outweighed by its potential for prejudice in order to be excluded, in favor of a lesser "outweighs" standard. *See United States v. Fell*, 360 F.3d 135, 145 (1st Cir. 2004) (noting lower standard for exclusion of evidence under Federal Death Penalty Act than under Rule 403). Applying that standard to the formulation in *Old Chief*, this Court could authorize the introduction of the details of the 9/11 deaths only after comparing the lack of prejudice, the time efficiency, and the clarification of the issues associated with the admission in the Statement of Facts to the amount of prejudice, wasted time and confusion that would arise from the Government's attempt to prove the same, uncontested fact, without regard to whether that prejudice, waste of time and confusion was "substantial."[27] *See Old Chief*, 519 U.S. at 184-85. The answer unquestionably is that reliance on the admission is preferable.

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[27] Of course, the fact that the evidence might be admissible at a subsequent hearing on the aggravating factors does not mean that the presentation of the evidence at the hearing on the threshold factor would not involve a waste of time. The case might not advance to the aggravating factors stage.

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[redacted]

Separate hearings for the threshold factors, the statutory aggravating factors and the selection stage are entirely appropriate. As Judge Hudson noted in *United States v. Jordan*, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005), nothing in the penalty phase procedures set forth in 21 U.S.C. § 848, which, in relevant respect, are identical to those in the Federal Death Penalty Act, precludes the use of multiple stages in a capital sentencing proceeding. Confronted with evidence it had held admissible at the eligibility phase but not at the selection phase, the Court, at the Government's urging,[28] ordered a bifurcated penalty phase. *See id.* at 903-04. "It is a matter on which the Court should exercise its discretion *based on the circumstances at hand.*" *Id.* at 903 (emphasis added). Here, the circumstances at hand and the balancing mandated by *Old Chief* and § 3593(c) compel the conclusion that the Court exercise its discretion in favor of the division of the sentencing proceeding, as requested by the Defendant, and the exclusion of additional evidence in the threshold factor stage, beyond the admission In the Statement of Facts, to prove the deaths of the victims.

In *Martin v. Estelle*, 546 F.2d 177 (1977), the Fifth Circuit addressed a prosecutor's introduction of, and comment on, in a competency hearing, "[inflammatory] evidence material in the main only to the substantive offense with which [the] appellant was charged." *Id.* at 179. The court noted that Due Process[29] requires a separate hearing for a competency determination and that State law protected that right by

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[28] The decision does not reflect that the Government urged this solution, but, in fact, it did, as counsel is confident the Government will concede. Defense counsel will provide the relevant pleadings if there is any question. Counsel for the Government and the defense in *Jordan* includes some of the same attorneys who are counsel here.

[29] *See* 546 F.2d at 178.

[redacted]

providing for a separate hearing before a separate jury. *See id.* (citing *Pate v. Robinson*, 383 U.S. 375 (1966)). The court stated,

> [t]he reason for this concern for a separate hearing on the question of competency to stand trial is, quite obviously, so that a determination of defendant's competency can be made "uncluttered by the evidence of the offense itself." [Citation omitted]. *Such an uncluttered hearing makes it easier to determine fairly the issue of competency without introducing facts which might tend to cloud the issue at hand, "facts which alone might so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question of present [incompetency]."* [Citation omitted].

546 F.2d at 179 (emphasis added).

The same rationale applies here. In the face of a binding admission that the victims died as a result of the 9/11 attacks, the Defendant is entitled to a separate trial on the question of the threshold factor, untainted by tangential, highly inflammatory evidence concerning the marginally (if at all) relevant question of how the victims of the 9/11 attacks died – evidence which, as much as any evidence in American history, "alone might so stir the minds of the jury as to make difficult the exercise of calm judgment . . . ."

To do otherwise would be inconsistent not only with the statutory scheme, but with the Defendant's rights to due process (a fundamentally fair trial) and a fair and impartial jury, under the Fifth and Sixth Amendments to the United States Constitution. In *Payne*, the Supreme Court stated that, in any case in which "[victim impact] testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause . . . ." 501 U.S. at 831; *see also id.* at 836 (Souter, J., concurring) (stating that the protection against the inflammatory risk associated with victim impact testimony lies

"in the trial judge's authority and responsibility to control the proceedings consistently with due process") (citing *Darden v. Wainwright*, 477 U.S. 168, 178-83 (1986) (other citations omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (". . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); *Spears v. Mullin*, 343 F.3d 1215, 1225-29 (10th Cir. 2003) (affirming district court's finding that inflammatory photographs of victim denied defendant fundamentally fair capital sentencing proceeding, in violation of due process); *United States v. Barnette*, 390 F.3d 775, 800 (4th Cir. 2004) (introduction of inflammatory photographs of victim violate due process if they deny the defendant a fair trial).

Similarly, the unnecessary introduction of the September 11 images, in the face of the Defendant's admissions would violate the Eighth Amendment's requirement of heightened reliability in capital cases. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 8 (1989) ("The finality of the death penalty requires 'a greater degree of reliability' when it is imposed.") (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Heightened reliability is simply inconsistent with the heightened passions which those images will understandably provoke.

The same principles apply here. Moreover, given that the defense, despite the Compulsory Process Clause, has been limited to written substitutions for substitutions for what witnesses it has been prevented from interviewing have said, it is hardly too much of a burden for the Government to bear to be limited, in the interests of a fair trial

[redacted]

for the Defendant, to the use of a stipulation which it chose to extract from the Defendant.

CONCLUSION

For the reasons stated above, the Court should Order a separate hearing as to the threshold factor and preclude the Government from introducing additional evidence to prove the point conclusively established by the Statement of Facts -- that victims died in the attacks of September 11. In addition, the Court should Order separate hearings for the remainder of the eligibility phase and for the selection phase.

Respectfully submitted,

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[redacted]

[redacted]

CERTIFICATE OF SERVICE

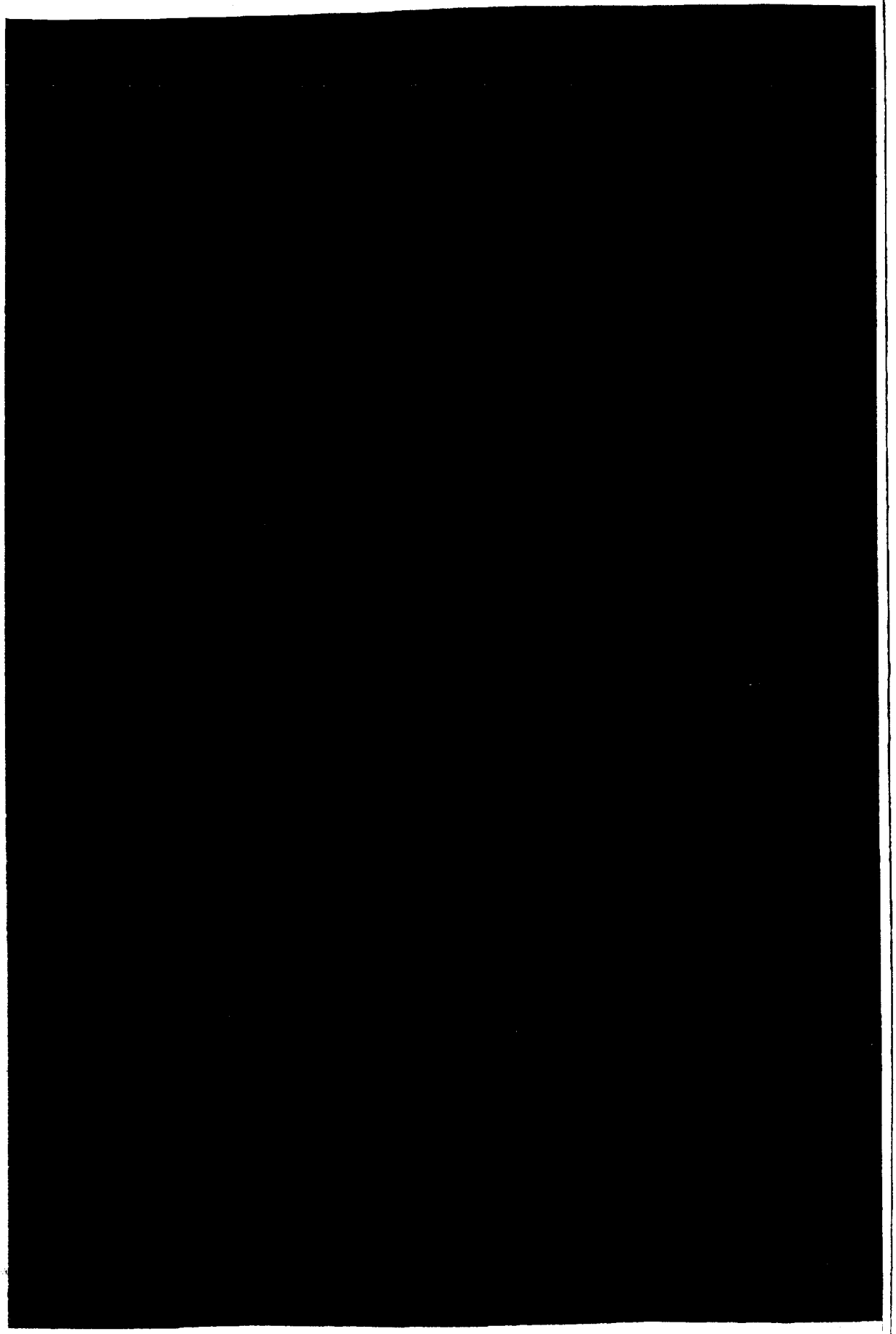
I HEREBY CERTIFY that a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer on this 3rd day of October 2005.[30]

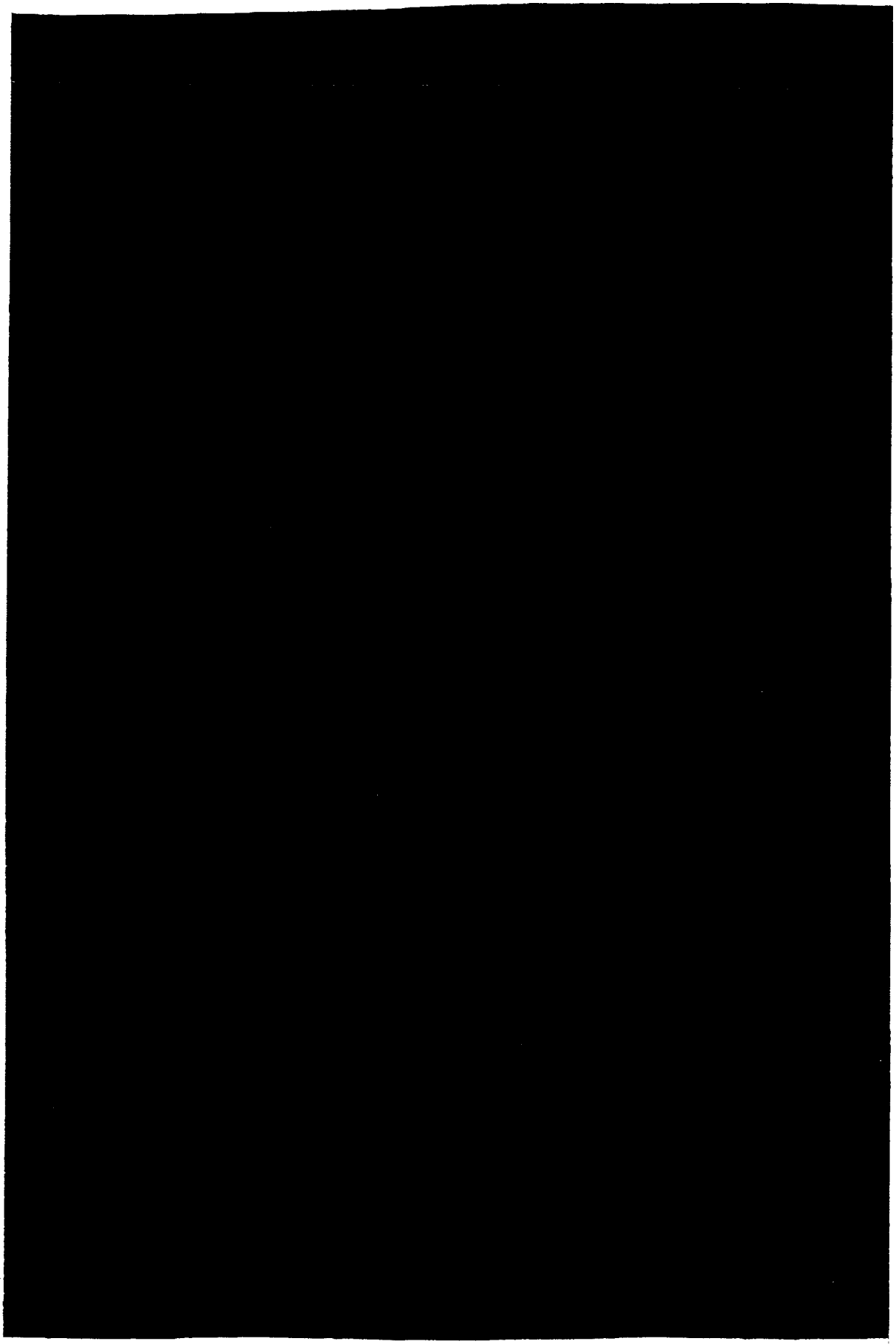
/S/
Alan H. Yamamoto

[30] Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to defense counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Moussaoui until counsel receive confirmation from the CSO and/or classification specialist that they may do so.

[redacted]

ATTACHMENT 1





ATTACHMENT 2

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ATTACHMENT 3

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)
News Transcript

On the Web:
http://www.defenselink.mil/cgi-bin/dlprint.cgi?
http://www.defenselink.mil/transcripts/2005/tr20050901-3844.html
Media contact: +1 (703) 697-5131

Public contact:
http://www.dod.mil/faq/comment.html
or +1 (703) 428-0711

Presenter: Various DoD Officials

Thursday, September 1, 2005

Special Defense Department Briefing

Participating in this brief were:

Mr. Bryan Whitman, Deputy Assistant Secretary of Defense for Public Affairs (Media Operations)

Ms. Pat Downs, Senior Policy Analyst, Office of the Undersecretary of Defense (Intelligence)

Mr. Thomas Gandy, Army G-2 Director of Counterintelligence and HUMINT

Mr. Bill Huntington, Vice Deputy Director for HUMINT, Defense Intelligence Agency

Cmdr. Christopher Chope, Center for Special Operations, U.S. Special Operations Command

Whitman: When I scheduled this particular room I hadn't anticipated that we would have these other activities that are going on down south, but I'm glad there are some of you here to report on this and have an interest in this.

As you know, the department has been aggressively looking into this Able Danger program since there were some allegations that were made some three weeks ago I think now, about three weeks. There's been a very extensive effort by the department to look broad, to look deep, and to document as well as to interviewing individuals that are associated with the project. Today we have reached the point where we're prepared to tell you what that broad and deep and extensive review has revealed to us.

I've got a number of subject matter experts here whose organizations were involved. By the mere fact of the representatives here you can see that this was not something that was just looked at narrowly. What we'll be able to do today is talk a little bit about what Able Danger was and maybe more importantly what it wasn't; what type of products were a result of this activity; discuss a little bit about some of the legal authorities and things that have been reported on, sometimes inaccurately about this; and to really talk to you a bit about our interactions with the 9/11 Commission when they were doing their work.

I got you all here under the guise of a background briefing, but I think what we'll do is, we've discussed this and these individuals have agreed to be on the record. There has been a lot of anonymous reporting on this which I think has been unhelpful. I hope that as you write these reports that you give weight to those people that have been directly involved in this effort and are on the record to discuss what the department has found for you on this.

With that they're going to kind of open up with a little bit of a presentation, talk about it just a little bit. Pat's going to start I think, Pat Down is going to start from the Under Secretary of Defense Intelligence Office. Then the commander here from Special Operations Command is going to give you a bit of a thumbnail on the activities. We've got some other subject matter experts if we get into Q&A that involves their areas. I promise not to make it too long because I know you all have day jobs on this other story too.

With that, Pat, why don't you go ahead and start us off.

Down: Let me give you an overview of what we have done to determine the facts concerning the recent public statements on Able Danger and where we are to date and what we've found. And then I'll turn it over to Commander Chope so he can give you background information on Able Danger. Some of you may not be as familiar with exactly what that is, what it isn't, and what the timeline is here. It can be confusing with all the various accounts that are in the press.

We have conducted two types of activities. One is extensive document searches from all the organizations including contracting firms that were associated with the Able Danger program. To date we have not identified the chart that is

referenced in public statements by Mr. Schaeffer and Captain Philpot in particular, who say they saw a chart with the photo of Mohammed Attah and other hijackers, particularly Mohammed Attah, pre-9/11. We have not discovered that chart. We have identified a similar chart, but it does not contain the photo of Mohammed Attah or reference to him or reference to the other hijackers.

The second type of activity we've conducted is interviews of people involved, again associated with the Able Danger project. To date we've conducted interviews with 80 people, and that is still ongoing. We're not done yet. We're still refining the questions. As we talk to some people we have to come back to other and ask additional questions.

Most of those people do not recollect the existence of a chart with the picture of Mohammed Attah on it, or again, other hijackers pre-9/11. We have identified three other individuals besides Mr. Schaeffer and Captain Philpot who have a recollection of either a chart with a photo of Mohammed Attah or a reference to Mohammed Attah. That's basically where we are.

As I said, we continue, we also have searched the records, the documents that we sent to the 9/11 Commission just to be sure that our copies of those records don't include anything additional we might have missed, including a whole number of documents that were deemed non-responsive to Commission requests. It's possible we might have missed something in that collection. It's a fairly extensive collection. We have reviewed all that documentation and at this point have not identified, again, such a chart which references pre-9/11 hijackers.

Media: But the three people who do remember, those three people are from which agency or what's their function?

Down: We have from SOCOM, two individuals. One of those is Captain Philpot. We have, of course Tony Schaeffer, he's actually a DIA civilian employee. We have, the two other individuals are, one is from the Land Information Warfare Activity, the Army's Land Information Warfare Activity, now actually part of the Information Dominance Center. The last one is with the O'Ryan contractors.

Media: At the time.

Down: At the time, yes. And we can answer, Mr. Gandy can answer more questions on the contractors and some of these – Five individuals all told. Four of them, five individuals including Captain Philpot and Mr. Schaeffer. Four of them remember a chart with a photo of Mohammed Attah pre-9/11; the fifth person remembers a chart with a reference to Mohammed Attah, but not a photo.

As I said, we're continuing to interview or re-interview based on what we've discovered so far to be sure that we're not missing anything.

I think it probably is a good idea at this point to turn it over to Commander Chope, and he'll describe to you what Able Danger is. I think that would be helpful. Again, describe some of the timelines because, as I said, we're confused by some of the reports out. We're trying to find the facts. Some of the various accounts have conflicted somewhat. I think it would be helpful to put this in some context for you.

Chope: I'm Commander Chope from the Special Operations Command and I'll offer a brief chronology and overview of what Able Danger was and try and dispel some of the myths and rumors surrounding the effort.

In early October 1999 the Chairman of the Joint Chiefs of Staff tasked the United States Special Operations Command with developing a campaign plan against transnational terrorism, specifically al-Qaida. That effort would result, or that tasking would result in a 15-month effort undertaken mostly out of Tampa, Florida with some peripheral collaborative partners, that would span a 15-month period. In order to accomplish this tasking SOCOM turned to an internal working group who again worked with elements within the Department of Defense and with the Department of the Army to construct this plan. Captain Scott Philpot, then Commander Scott Philpot was probably the team leader, you would call him, for the Able Danger effort.

Able Danger was never a special access program. Able Danger was never a military unit. Able Danger was never a targeting effort. It was not a military deception operation. It was merely the name attributed to a 15-month planning effort.

In January of 2001 the U.S. Special Operations Command delivered the final product of their plan which was a draft operations plan to the Joint Staff, and for all intents and purposes Able Danger ended at that time.

Media: Can you say how many people were involved in it?

Chope: From the Special Operations Command, probably ten people were involved throughout the effort.

Media: You say it wasn't military? It was –

Chope: It was not a military unit. It was a name given to the effort. It's like calling all of us in here Able Danger. That's not –

Media: Were they all military people?

Chope: No, not uniformed service members, no.

Media: You say it wasn't a targeting effort.

Chope: Correct.

Media: I'm very ignorant about military affairs, but wouldn't any kind of plan against transnational terrorism involve a list of targets?

Chope: It would, and that's a good question. Throughout the Able Danger effort we're going to talk about data mining and nodal analysis. What the data mining and nodal analysis actions were designed to do was characterize the al-Qaida terrorist network. Those were some of the tools they used in order to do that mapping, if you will. When I said it was not a targeting effort, I mean it was not meant to go after individual people. It was meant to determine vulnerabilities, key nodes, linkages among and within al-Qaida.

Media: Nodal analysis? What does that mean?

Chope: I think in layman's terms it means determining linkages and relationships among disparate entities.

Down: Looking for patterns based no previous activity.

Media: It would seem you would want to deal with individual names of people if you were trying to understand vulnerability and linkages. No?

Chope: I'm sure that they got to that level of detail, however when you look at the plan, what the task was rather, the task was develop a plan, so that was the focus of the effort. The effort was never determine which individuals we ought to roll up. Did Osama bin Laden's name come up? Of course it did. But as far as that granularity, that level of detail, that was not the desired or required level of effort on the project. It was a by-product.

Gandy: This is Tom Gandy from the Army. Let me just help out here a little. The way it works is there's a campaign plan and then if someone decides to act upon that plan they will give that plan to someone to execute. At that point you get into various specifics about how you're going to execute it, phases of the operation, what the targets are in each phase, and get really down to the down and dirty side of things.

But in a plan you're saying here's what we're trying to do against this threat element, in this case transnational terrorism, not al-Qaida, so it's a more generalized level. I'm just trying to help out there.

Media: Can I get some clarity on the subsets that people are talking about. There were ten in Able Danger.

Gandy: SOCOM personnel.

Media: SOCOM personnel. How large was Able Danger in all then?

Gandy: I would say in the 15-month period it waxed and waned. It depended on which collaborative partner SOCOM dealt with at the time. AT some points there was a partnership with the Army; other points there were contracted personnel involved?

Media: What was the maximum number –

Media: Hang on just a second and let me finish this line of questioning.

So you've interviewed 80 people. Were all 80 of them Able Danger or were they people who got briefings by Able Danger? What is that universe that gave you 80 people?

Gandy: It probably spans both of those representations you just gave. Not only folks who were integrally involved in the effort, but also those that were peripherally involved. I don't think that we necessarily went out and amongst those 80 we'd count people who just happened to have been exposed. Those 80 I would say had something to do with Able Danger.

Media: And the five who have some recollection of something, are those Able Danger core members, are they people who received briefings, are they the peripherals?

Gandy: Out of the ten I quoted you, two of them are from that ten. So the other three would be from the other 70, if you will, if that math makes sense to you.

Media: So three are peripheral, quote/unquote, to use your phrase; and two are from Able Danger.

Gandy: No. The hard core U.S. SOCOM part of Able Danger was ten people. There were other collaborative partners who were as involved in Able Danger. I'm only speaking to the SOCOM Personnel involved in Able Danger with those ten. There were other people who were as involved in Able Danger during the time.

Media: Who were the five who have some recollection of something?

Gandy: We have two SOCOM personnel, one of whom is Captain Philpot, one is Mr. Schaeffer who is a DIA employee.

Down: Actually –

[Multiple voices].

Media: Just simple math here. This is a really –

Whitman: In the SOCOM people there's an unnamed analyst who's going to remain unnamed. Then there's Captain Philpot. Those are the two from the ten.

Media: Civilian analyst?

Whitman: Yes.

Media: But there are five with some recollection, so who are the other three?

Whitman: The other three, one was an analyst associated with the Land Information Warfare Activity (LIWA) which is the Army activity, one of the partners spoke of where LIWA was supporting the SOCOM effort for a period of time in the planning effort.

Another was a contractor who supported the Land Information Warfare activity. That's one of the other.

The other was Mr. Schaeffer.

Media: That's very helpful. Thank you.

Media: One further thing on that, how would you characterize, of those three people – the analyst from LIWAC (sic) and the, well Schaeffer I think we know his relationship with Able Danger. But the other two. The analyst from LIWAC (sic) and the, associated with LIWAC (sic) and the contractor, how would you characterize their degree of – Were they part of the core? Were they in the periphery, out of periphery?

Whitman: They were doing analysis and production support of requirements to help build the plan. So they were provided with requirements from the core group of SOCOM planners and they would try to meet those requirements of intelligence analytical products.

Media: Intelligence requirements.

Whitman: Right. It's LIWA, by the way, Activity. Not LIWAC.

Down: And Captain Philpot was more managing the whole effort. As opposed to an analyst.

Media: So five people remember this, but you haven't been able to come up with the chart. So you're not here telling us this chart does exist or doesn't exist.

Down: We don't know. We don't have it. We have not to date identified that chart, discovered it in our recent searches, nor did we pull it up during the life of the 9/11 Commission where the Commission itself did ask us, sent us two document requests for information on Able Danger. It was not pulled up at that time.

Media: What could have happened to it? Could someone have destroyed it to cover up?

Whitman: Let me say something there, just for any other questions that might come up too. We're not going to get into the business of speculating in terms of what might have happened. We're here today to present the facts as they exist and as we know them.

Like Pat was saying, what we know is that we didn't discover such a chart when we first responded to the Commission back in November and December of '03 and we haven't discovered such a chart in the current search. That's the facts. It's just not productive for us to get into speculating beyond what we actually know.

Media: Does that mean that because it was a classified operation a lot of documents including the chart could have been destroyed and that's why you can't find it?

Down: There are regulations. At the time how they were interpreted, very strictly pre-9/11, for destruction of information which is embedded, I guess is the way I would say it, that would contain any information on U.S. persons. In a major data mining effort like this you're reaching out to a lot of open sources and within that there could be a lot of information on U.S. persons. We're not allowed to collect that type of information. So there are strict regulations about collection, dissemination, destruction procedures for this type of information. And we know that that did happen in the case of Able Danger documentation.

Media: So it's possible then that this is how the chart cannot be found. Along with other documents, they could have been destroyed and that's why you can't corroborate what these people are saying or say it's wrong.

Down: Correct.

Media: What is the definition for U.S. person?

Down: I wish we had our lawyer here.

Chope: A U.S. citizen or someone who is in the country legally.

Media: So a tourist is a U.S. person.

Chope: Can be.

Media: Under what circumstances?

Chope: For instance on a work visa. I think it's more than just a tourist, on a work visa or something like that.

Media: But there are work visas that allow you to come, I'm here on one –

Gandy: We have a whole class on that if you'd like to attend it. I'll invite you. We have it annually.

We have lots of regulations on this that spell out precisely what they are. I'd hate to make an off-the-cuff comment here.

Media: Okay.

Gandy: But there are strict definitions.

Media: Maybe you can direct me to –

Gandy: Executive Order 12333. You can go on the web tonight and do it. DoD Directive 5240-1R.

Media: That does not –

Gandy: And Army Regulation 381-10.

Media: Does that mean there could have been legal advice given by the department or somebody within SOCOM to destroy it before it got out of the military's possession?

Chope: We have negative indications that that was ever the case. We've spoken to all the attorneys at all levels of command and organization that were involved with Able Danger, and there was no legal advice given along those lines.

Media: That lines?

Chope: Along the lines to destroy anything.

Down: We have not discovered that legal advice was given to date.

Media: On this chart, can you say approximately what the date of the chart is these five people recall? And do all of them recall not only Attah, but the other hijackers?

Down: Maybe Tom can help with the details of the interviews, but I believe Captain Philpot says he saw the chart in January, February 2000. That's the general reference point.

Media: Are you saying that the recollections of Schaeffer and Philpot are incredible?

Down: They're our starting point. They're DoD people who -- Captain Philpot, or then Commander during when the 9/11 Commission was wrapping up, came to us and said I have this information. We took him to the 9/11 Commission to examine it further. It's really up to the Commission to determine the relevancy of the information.

Fortunately, Captain Philpot or then Commander Philpot did not have documentation either, and so the staff questioned, and you can talk to the 9/11 Public Discourse Project where the two former chairmen of the Commission now work. But in terms of the clarity of the dates, when things were produced. At the time that Commander Philpot spoke with the Commission, the Commission staff at that time believed it wasn't strong enough evidence, especially without documentation, to make a change in their report which was at that time being coordinated with us and had already been drafted.

Media: So now that you have three other individuals corroborating this chart, saying they've seen this chart, are you going back to brief the Discourse Project now? The 9/11 Commission?

Down: No, not at this point, but we will be shortly. Or at least –

Media: Has anything changed. Sorry, I didn't mean to interrupt.

Down: That's okay.

Media: Has anything changed about the way that U.S. persons who get sucked up in a data mining operation would be handled today as opposed to how they might have – completely independent of this. Say if my name gets sucked up into a database tomorrow morning would it be handled differently today than it would have before 9/11?

Down: My understanding is that the same procedures are in place. We may exercise some flexibility, but I have to be careful here because the same procedures, the same regulations, they are still accurate. We have to be very careful of what we protect against U.S. persons –

Media: – different or –

Down: Again I have to be careful. The procedures stand and I really can't speak for the analytical side at the moment, but I would think that in the post-9/11 mindset –

Chope: Let me get into some of the problems we have. We're looking back about 5.5 years. Data mining is a relatively new thing in the intelligence community. They were not using the most sophisticated tools. They were using what tools were available. Sophisticated at the time, but compared to now of course we're Moore's law a couple of times down and we've got a lot better tools. So at this point now in the analytical side, we're a lot better in identifying the type of data we get and where we get it from. Back then you would do what they called a web crawl and you'd get a lot of data and it would go in one pile.

Now when we put the data in a pile we tag it, you've heard about XML tagging and those sorts of things. So we understand where the data came from better, we understand the nature of that, and we have tools to help us identify the data.

So while the procedures haven't changed, the interpretation has probable become a little more flexible with hindsight on 9/11, a little more flexible, but we still have the procedures in place, believe me, and we have the training, but we also have the better ability now to say okay, this data came from this source, it's a U.S. person that has nothing to do with our problem set and we can expunge it a lot more easily than we could in the past. In the old days it was kind of an all or nothing.

Media: All these questions about Able Danger seem to sound like how could you possibly have missed Mohammed Attah did this, but I'm wondering if Mohammed Attah came in under the same circumstances at the same time tomorrow, he would still be of the same class. Wouldn't they get ditched, thrown out? Not that that's what happened with this, but if you were to tag him as a U.S. person wouldn't he automatically be thrown out of the data base tomorrow just as –

Chope: I don't know.

Media: Can you say whether you have gone through all the documents yet? You say you you're now going back and reintegrating, but have you looked through all the documents? Is that why you're here, to say you've completed that?

Down: We have done extensive searches including the documents that we delivered to the 9/11 Commission and the group of documents that were deemed unresponsive to the Commission's particular request. There are boxes and boxes of these.

As you can imagine, an organization as large as DoD with the speed at which we had to respond to the Commission's request, there were numerous documents that came through for all 39 of the Commission's requests that

weren't really relevant to specific requests. So we have like a non-responsive pile. We weeded those out. If we had any doubt we left it up to the Commission to decide. It's their job to decide what's really relevant for them. But we went back through the old piles just to be sure we had not missed anything or to see if we could potentially identify this chart. And in terms of the other organizations, there have been very extensive document searches.

Media: Is there an estimate about how many pages you searched?

Down: Oh, boy –

Chope: We did a complete electronic search –

Down: Pages.

Chope: All holdings, physical searches, –

Down: Hundreds of thousands probably.

Media: Are you done with your effort?

Down: Including electronic files, of pages

Media: I'm sorry. Are you done with your review? Is this, are you finished or is this ongoing?

Down: Not in terms of the interview process. But in terms of document searches, unless there is some other source of documents that we find out through the interview process that we haven't looked at, and again, we haven't identified what that would be, right now we are complete on our document.

Media: Can I just return briefly on this chart that had Attah's picture or reference, did the chart, did all the people have a recollection that the other hijackers who have been mentioned were also on the chart or just Attah?

Chope: Most of the discussion's been about Attah –

Whitman: Before we get into that, let's address the question. You said the chart that had Attah on it. We have not found a chart that had Attah on it. I just want to make sure –

Media: You said five people said they recall –

Whitman: I just didn't want that to be out there as that there is a chart that exists that has Attah on it. Okay?

Chope: If there was a chart with Attah, [Laughter].

Whitman: It's important.

Media: These five people recall, do they recall it having Attah and additional hijackers on it?

Chope: I can't be certain. That would really be the, then Commander Philpot would be the one. The remainder talk about Attah and a picture, or Attah's name. The one person who only saw a name and no picture, and the others saw a picture and a name.

Media: So Philpot is the only one who recalls other hijackers?

Chope: I believe, but I'd have to check the notes I have from the discussions we had.

Media: Let me go back to the U.S. persons question for a second. To what extent did any controversy over that issue lead to the shutdown of this program? I talked to several people who said there was a separate program developing. They were looking at Chinese tech transfer. It wasn't Able Danger, but it used some of the same personnel, some of the same facilities at LIWA and came up with a name list of some very prominent U.S. persons and led to somebody saying terminate this thing. Is there any truth to that at all?

Chope: No. It had nothing – There was a prior effort involved with those topics that you mentioned. That effort ended with a subpoena by Congress in November of '99. That was the end of it. It was a completely different target, different subjects, different data, everything.

Media: You say ended with a subpoena from Congress. From where? From which committee?

Chope: I'm not sure about the committee. That was a completely different effort. There were similar tools, but you've got to remember back here, let me just for the Land Information Warfare Activity, this was very experimental stuff back then.

So what that was about was demonstrating can experimental stuff like this be useful in helping us solve some technology transfer riddles. That was kind of the purpose of that effort. That effort ended in the LIWA's eyes in November. LIWA did a lot of other analytical projects. That's what they do. They do intelligence analysis.

Media: – open source, classified?

Chope: In which?

Media: In both.

Chope: In Able Danger it was mixed, both open source and classified.

Media: The five people that recall seeing either Attah's name or photograph on the charts, do they have any recollection of where that photograph might have come from, number one? How many people's names were on that chart? Was it five, was it 10,000?

Chope: We don't know what was on the chart.

Media: In their recollection, what is their recollection of that chart?

Chope: It's different compared to any person you talk to.

Gandy: Captain Philpot will contend there are upwards of 60 names on that chart. Not all of them will have photographs attributed to them. Some will just be outlined silhouettes of a head.

Media: Given the differences in their recollection, are their claims considered credible?

Chope: Don't know. We're just in the fact-finding mode.

Media: This is kind of a fair question, actually. We won't ask you to do hypotheticals or conjectures, but you all live in a world of analyzing data. Clearly if you're supervisors or Dr. Cambone said to you want do you think now? You've now gone from two to five people who recall it. You haven't found the document. What do you think?

Down: These people are, Captain Philpot for instance and the others, especially the ones that are involved in data mining, the contracting firms, are credible people. Again, we just – We are unable to again provide corroborating evidence. We just, as I've said, can't find the document. But as I said, they are credible people.

Media: What do you make of that? That disparity. How do you conclude?

Chope: We can only hypothesize on how this –

Down: I don't –

Chope: – might have come about is all you can do, hypothesize.

I agree with Pat. Most of the people involved in this are credible folks. We've checked out everything they've said. We can go to the same group of people you would think were sitting next to each other and say did you see a chart with a picture of Attah on it? No, no, no, yes. That's kind of the situation we're in right now. We drill into that and we still have the no, no, no, yes kind of situation.

Media: If these people are credible, what could account for this difference in your view?

Down: I don't know. We've seen a chart with different Mohammed's on them. Is it possible that Mohammed Ajaz, Mohammed -- what's the other one.

Chope: Arateff.

Down: Arateff, thank you. So we have charts with those names but not Mohammed Attah. Is there confusion there? Again, we don't know. We simply don't know. Was the reference to Mohammed Attah, did it come out early on in a chart? In that case if it came out early on, were there any kind of concerns which we again can't corroborate for our interviews. If it came out early, such as in a proof of concept chart, we may never find it.

So as I said, we haven't found any supporting evidence at this point, especially that documentation, to back those claims up.

[Multiple voices].

Down: We didn't, no.

Media: -- head of Special Ops at the time, wasn't he?

Chope: – do not.

Media: You do not?

Down: Not yet.

Media: Can I ask a real basic question here? This effort to try to get to the bottom of this, this is responsive to Congress, to a directive from the Secretary, to what? Maybe you got into that in the beginning or maybe everyone in here knows it but me, I just – You're getting to the bottom of this because Congress wants an answer or because you just want to know, because we're all asking these questions and you want us to shut up? [Laughter].

Down: Maybe all of the above. We –

Chope: – Cambone has directed that we do fact-finding and find the facts in this case. Each of the components involved, SOCOM as the headquarters and supporting agencies have stepped forward and are doing their part to try and figure out what the facts are.

Media: Can I ask another question about the lawyers? You said I think that you had negative indication that that has happened, i.e. the destruction of documents.

Chope: That was taken a little out of context. No lawyer ever directed any Able Danger personnel to destroy documents. Any destruction of documents was conducted in accordance with established regulations and directives.

Media: What about the question of the meetings with the FBI?

Chope: Aside from the statements by Mr. Schaeffer and Captain Philpot we have found no corroborating statements or evidence or whatever you want to call it to that effect in the course of our interviews.

Media: So you talked to all of the lawyers who might have tried to stop this because it was U.S. person information and couldn't be disseminated to domestic agencies. And no one remembers –

Chope: We have talked to all the lawyers involved in the project and there is no hindrance upon the sharing of information.

Gandy: We know that data was destroyed, the Land Information Warfare Activity. But it was destroyed in compliance with our intelligence oversight directives, 12333, DoD 5240-1R, et cetera. So it was destroyed in complete protocols, normal protocols that we would follow with any kind of U.S. person data. It wasn't destroyed because a lawyer came in and said you've got to get rid of this stuff. It was the clock is ticking, show us how you can pull this U.S. person information out of here or not, you can't do it we have protocols and directives to comply with, we're going to comply, and they did. That's how the data was destroyed at LIWA and I believe later on in SOCOM was in a similar manner destroyed.

Media: So the people involved in the project were asked whether there was a way that they could extract intelligence which could be shared from this massive data that they had from this pile you talked about –

Gandy: I think you're confusing the sharing of data – Data can be shared with anybody. U.S. person data can be shared in a wide variety of situations. We do that every day in the Department of Defense. For instance on the counter-intelligence side of the house which I am responsible for for the Army, our intelligence agents share information every day with the FBI no U.S. persons, and who has primacy in an investigation, and who doesn't. It's all laid out in the protocols surrounding EO-12333 and 5240, our counter-intelligence regulations. Promulgation of those sharing agreements. So we can share data with U.S. persons.

In this case because of the nature in which the data was collected, now we're 5.5 years ago. It was a gobbling up of a lot of data from a lot of sources and put in one pile. You had this commingling of U.S. person data with lots of other data, and there was no way to really pull it out. So the protocols were applied as they stood and really as they stand saying do you have a reason to do this. Like in the counter-intelligence case we have a reason, that we're doing a counter-espionage investigation or we're doing a force protection investigation. In this case there was no perceived imminent threat, imminent crime going to occur, any danger, those kinds of things that say that you can share it. That was not perceived to be the case in these situations and it was destroyed.

Media: So the identification of individuals who were linked to al-Qaida inside the United States was not perceived as an imminent threat after the USS Cole and after the embassy bombings –

Gandy: We don't know that they identified those people in this data.

Media: You say there was no imminent threat, there was no perceived imminent threat.

Gandy: That might be a reason you would keep the data. Those are the kind of reasons we're allowed to keep data about U.S. persons.

Media: And share it, right?

Gandy: Absolutely. It depends on the situation. If that person, for instance, if that person is located overseas, then you would share it with a different group of people than if the person was located in the United States. Just that there are links established doesn't really mean anything. And by the way, some of these links, in the primacy of this technology you get some very goofy links that require research. In fact when we interviewed these analysts to a person they said what was the nature of the stuff? They said you really need to dig into this to find out what these links meant.

Media: I was told that the, after the data run had been done on unclassified data bases it was then scrubbed against classified data in order to try and do this process. Like burrowing in and finding out what the links might be and which might be meaningful and so on. Have you been able to discover whether this chart that these five people remember was the product of a first stage of that or a second stage?

Gandy: One, we don't know there's a chart. But if there was a chart we believe it came from open source information.

Media: And not being scrubbed against classified --

Gandy: I don't know.

Media: Just to return to the question of the lawyers, Schaeffer said there were two occasions on which military lawyers intervened, the first was he said, that the military couldn't do anything with it and then when he tried to take it to the FBI again -- But you're saying that no -- Can you clarify exactly what you're saying about what the lawyers did? The document destruction stuff was SOP. You haven't found anything about a meeting with the FBI. I mean apart from the SOP on document destruction, what role did the regulations about U.S. persons and the legal interpretation of those made by lawyers of SOCOM play in how this all played out?

Gandy: Intelligence oversight drives how long we can store information on U.S. persons. It's really proscribed pretty clearly.

Media: Any activity that was proposed by people involved in Able Danger that was prohibited by lawyers --

Gandy: No. That's not the lawyers' job in this kind of a, in any situation within here. Their job is to give advice to the commander. The commander makes the ultimate determination. In no way, shape or form did the lawyers dissuade or hinder people from turning information over.

Media: The additional three people that recall seeing references to Mohammed Attah, do any of them recall what that was based on? You said --

Gandy: We asked where did this data come from and the person who saw the name and not the face couldn't tell. What it comes from is a big large conglomeration of data from lots of sources, and you drag a problem set through this data and you get lots of linkages and then you research the linkages is how it works.

We asked every single analyst if there was such a chart where would the data from that have come from? They didn't know. What they're doing is this huge data mining and they just get a pile of data, and in those days -- Now if you say okay, I have this piece of information, you could probably trace it back to its original parentage.

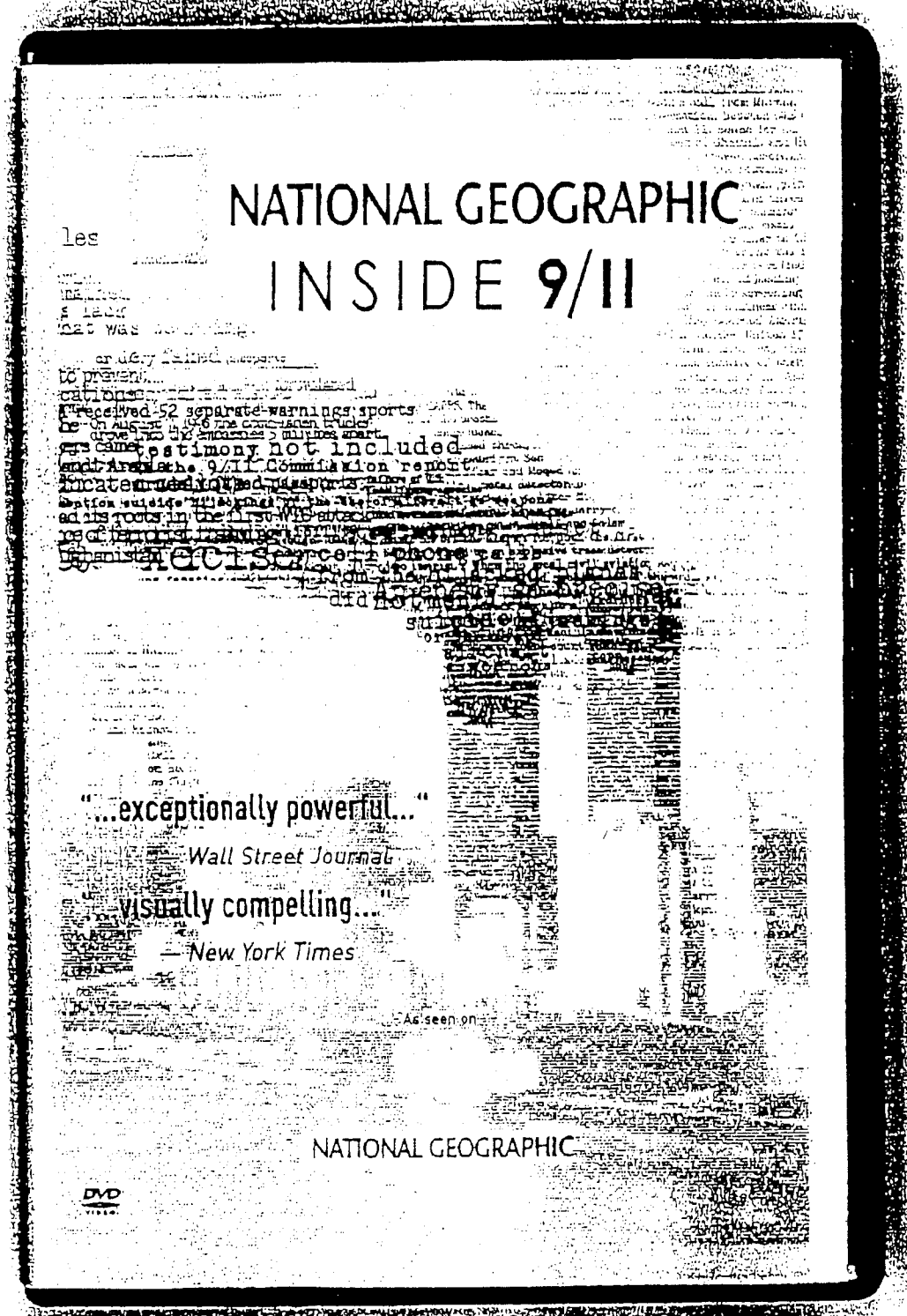
Media: But not in those days.

Gandy: In those days I think you could with some of the tools, but it depends upon analyst input to the tools, the linkages and all. They had some capability to do that because they would describe an anecdote where they'd say we'll read this information, and they'd say well, it's from a web site. They got to the web site it's kind of like a goofball web site. Then okay, get rid of that stuff. It's from something that really is not credible information. So they had some capability but I don't think they had the capability to scrub it in the fashion that the oversight rules could live with.

Media: The documents that were destroyed, is there a, if it's a standard operating procedure, are there rudimentary records that are kept of what documents are destroyed?

Gandy: There are certificates of destruction. What you'll have, traditionally for electronic it's very difficult. They'll say I destroyed so many disc drives, so many zip drives, so many CD roms were in the cruncher, that kind of stuff. You have lots and lost of data. So it's very general in nature.

ATTACHMENT 4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