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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA

4 v. S(7)98CR1023

5 USAMA BIN LADEN, et al.,
6 Defendants.

7 -----x

8
9 New York, N.Y.
10 March 29, 2001
11 10:00 a.m.

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Before:

HON. LEONARD B. SAND,
District Judge

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1 APPEARANCES

2 MARY JO WHITE
3 United States Attorney for the
4 Southern District of New York
5 BY: PATRICK FITZGERALD
6 MICHAEL GARCIA
7 KENNETH KARAS
8 PAUL BUTLER
9 Assistant United States Attorneys

10 SAM A. SCHMIDT
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12 ANTHONY L. RICCO
13 EDWARD D. WILFORD
14 CARL J. HERMAN
15 Attorneys for defendant Mohamed Sadeek Odeh

16 FREDRICK H. COHN
17 DAVID P. BAUGH
18 LAURA GASIOROWSKI
19 Attorneys for defendant Mohamed Rashed Daoud Al-'Owhali

20 DAVID STERN
21 DAVID RUHNKE
22 Attorneys for defendant Khalfan Khamis Mohamed

23 (In open court; jury not present)

24 THE COURT: Good morning. You may be seated.

25 This matter is being addressed in open court. If at
any point anybody believes that they for security reasons,
meaning security in the broader sense, they wish to repair to
the robing room, I should be so advised.

The Court has --

MR. BAUGH: Excuse me, your Honor, for some reason --

MR. COHN: I'm going back to the interpreter's booth.

We're having a problem.

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1 (Pause)

2 MR. COHN: It's fine now, your Honor. Thank you for
3 the indulgence.

4 THE COURT: There has been submitted to the Court for
5 its signature a number of subpoenas on behalf of the defendant
6 Al-'Owhali, to which the government has made objections orally
7 and by letter dated March 29th, which I'll mark Court Exhibit
8 I of today's date.

9 (Court Exhibit I marked)

10 THE COURT: The Court notes that there are present
11 the defendants Al'Owhali and Odeh. The Court stated on
12 Tuesday the nature of this conference and said that any
13 defendants who wished to attend might do so, but that the
14 appearance of defendants not immediately involved in these
15 matters was not required.

16 I think in addressing the subpoenas it is important
17 to understand what counsel for Mr. Al-'Owhali has advised the
18 Court, and which is apparent from the nature of the subpoenas
19 and their return date, these subpoenas are relevant to the
20 penalty phase of the case, and that the context in which one
21 will address issues of relevance and admissibility is a
22 context in which one supposes that the jury has found the
23 defendants guilty of crimes which carry the potential of the
24 death penalty.

25 So that at this stage of the case issues of guilt are

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1 behind us and we deal with issues of mitigation or aggravating
2 circumstances.

3 I think we should begin with the issues relating to
4 American military actions against Iraq. I think then we have
5 to consider under what circumstances the nature or extent of
6 military actions taken by the United States against Iraq are
7 relevant. Subdivisions of that would be what is the relevance
8 of military actions taken by the United States against Iraq
9 subsequent to August 7, 1998, and what is the relevance of
10 information which was never known to Mr. Al-'Owhali, including
11 especially information which has never been made public and
12 would be made public presumably for the first time by the
13 response to the subpoena. Mr. Baugh, first of all, just as a
14 framework.

15 MR. BAUGH: Yes, sir.

16 THE COURT: The relevance of American military action
17 with respect to Iraq is what?

18 MR. BAUGH: If I may answer your question directly
19 and then give the background, all right?

20 THE COURT: If you do it in that sequence I'd
21 appreciate it.

22 MR. BAUGH: Yes, sir. Just when I thought the
23 honeymoon was over. I will do it in that sequence, your
24 Honor. The relevance would be to this. The defendant has not
25 only the right under the Constitution to present mitigators

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1 and I believe in the McVeigh case he was trying to prove a
2 mitigator by showing these things happened subsequent, but
3 what I think the government misses and McVeigh affirms is that
4 the defendant has the right not only to present mitigators,
5 but to resist aggravators either to deny the existence of the
6 fact, to rebut that the mitigator, that the aggravator is
7 actually and aggravator -- yes, I'm sorry, that's drama
8 training -- or to deny the existence.

9 By that I mean, if for instance, and that was my
10 direct answer, it is relevant to his right to rebut factually
11 that a chosen aggravator is actually an aggravator, whether
12 statutory or nonstatutory, as we have cited in our answer and
13 I don't mean to belabor the point, or to be brief, Congress
14 has stated when they reinstated the death penalty that all
15 murders are not death qualified; that first there must be a
16 process arising from the statutory aggravators to show that,
17 for want of a better term, the jurisdiction exists for the
18 jury to consider whether or not death is appropriate.

19 Once the government has shown the existence of
20 aggravators that are not, that are overborne by the statutory
21 mitigators then that qualifies the case to go to the next step
22 where the jury will consider whether or not the nonstatutory
23 aggravators overbear any nonstatutory mitigators and death is
24 the only appropriate sentence.

25 Now, if for instance, a defendant, and I'm being

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1 hypothetical here, a defendant is charged with murder and the
2 government were to allege, by example, that this murder is
3 aggravated because he used a pistol, we could come in and
4 prove, one, that he didn't use a pistol, or, two, we can say
5 that he had to use a pistol, and the factual basis of that is
6 minimized, or, we can say, a pistol really isn't an aggravator
7 because everybody does it, and in the great scheme of things
8 pistols are not unique in this.

9 In the case before you, the United States has alleged
10 that my client -- I won't go through all the aggravators
11 because I know the Court is aware of them -- that the
12 aggravators include things like my client used a weapon of
13 mass destruction, or that my client used a weapon of mass
14 destruction with a reckless disregard for the lives of
15 innocents who might have been in the target area, and,
16 further, that these people, these victims, and they are
17 victims, were targeted solely because of their status as
18 American citizens.

19 Yes, sir? I can see you have a question.

20 THE COURT: No, I just took my glasses off. I'm
21 still not used to this having on my reading glasses.

22 MR. BAUGH: So, therefore, if we can come in and show
23 that this sort of activity is common and routine --

24 THE COURT: What sort of activity is common and
25 routine?

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1 MR. BAUGH: The use of weapons of mass destruction
2 and killing of innocents. If we can show in this case, and
3 this theater that is common, that would compel the jury to say
4 that aggravator may exist, but it's not that strong.

5 THE COURT: You're saying that because the United
6 States used bombs against Iraq that's a mitigator for
7 Al-'Owhali using bombs against the embassy?

8 MR. BAUGH: No, sir, it is not a mitigator. It is
9 rebuttal to the status of the allegation as an aggravator.
10 We're not just mitigating. We're coming in and saying this
11 isn't a really an aggravator in this case because it is a
12 matter of routine in this particular case. We're not offering
13 a mitigator. We are challenging, which is his right under the
14 United States Constitution, we're challenging the status of
15 the assertion as an actual aggravator, because, remember, your
16 Honor --

17 THE COURT: I just want to make clear again, so that
18 we know the context in which this colloquy is taking place --

19 MR. BAUGH: Yes, sir.

20 THE COURT: -- that the government has said --

21 MR. BAUGH: Which page are you reading from, your
22 Honor?

23 THE COURT: On page 2, the last sentence of the
24 second paragraph: The government will argue at the guilt
25 phase and any penalty phase that Al-'Owhali's actions --

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1 actions emphasized -- were unlawful, entirely unreasonable,
2 and were motivated by his political beliefs, though we will
3 not seek to prove one way or the other whether his political
4 beliefs themselves are reasonable, and I think that's relevant
5 because as we know from the McVeigh case, which is in many
6 respects quite analogous to this where McVeigh was seeking to
7 show that law enforcement significantly mishandled Waco and
8 the Court limited the defense to issues related to what
9 McVeigh knew or could have known relevant to his state of
10 mind.

11 Then the question raised was whether the facts were,
12 regardless of whether McVeigh knew them or not, were
13 relevant to the reasonableness of McVeigh's perception, and
14 the Court analyzing the record concluded that was not a basis
15 for admitting it.

16 Here the government is explicitly saying, we are not
17 going to challenge the reasonableness of his political
18 beliefs. The argument that I understand that you are now
19 advancing is an argument in which Al-'Owhali's state of mind
20 is irrelevant. You are arguing that you should be able to
21 argue to the jury that it is a mitigating factor with respect
22 to Al-'Owhali's use of explosives against the embassy that the
23 United States used and uses explosives with respect to Iraq?

24 MR. BAUGH: Your Honor, I'll try to answer the four
25 questions you just asked.

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1 THE COURT: All right.

2 MR. BAUGH: You ganged up on me. First, you say I am
3 now arguing. No, I have always argued this perspective. I
4 assumed that everyone knew the role that aggravators and
5 mitigators play in determining who gets death, and the fact
6 that a defendant has the obligation and the right not only to
7 present mitigators but to rebut aggravators, not only to rebut
8 them factually, but to rebut them as aggravators.

9 THE COURT: The aggravators that you're seeking to
10 rebut is that Al-'Owhali used weapons of mass destruction?

11 MR. BAUGH: No, your Honor. I am not rebutting the
12 fact. I am rebutting the assertion by the United States that
13 the use of that aggravator in this case is so great that it
14 qualifies to kill. Remember in these aggravators there is a
15 balancing test, all right? I have the option of putting
16 stuff, for wont of a better term, on the mitigation side and
17 try to tip it in my favor.

18 I also have the right, as indicated in McVeigh, over
19 here in the aggravator side to lessen the weight or the
20 intensity of the aggravator, not only factually but by
21 comparison to other cases and other uses. So, no, when you
22 said that I'm now saying that it's not mitigating, no, -- I'm
23 sorry -- I'm not saying it is a mitigator. The purpose of
24 this information is to lessen the effect of the aggravator. I
25 also want to point out what I --

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1 THE COURT: Tell me how, what lessens the effect of
2 the use of weapons of mass destruction?

3 MR. BAUGH: As the Court is aware factually in this
4 case, because while we are to a certain extent fortunate
5 because under 801(d)(2)(E), the United States has presented
6 all of these fatwas of the organization that my client is
7 charged with conspiring with, additionally, we have
8 Mr. Gaudin's recitation of my client's statement, his coerced
9 statement, wherein he says, he is doing -- it's motivation --
10 but also, not only is it motivation, but, additionally, he's
11 talking about things that were in his knowledge about the
12 gravity of the situation. Specifically, as we have pointed
13 out in our answer, and also in Mr. Bin Laden's fatwas, the
14 reason the people in this organization, this al Qaeda, the
15 reason they hate Americans, they hate me, they hate us, is
16 because they say we have done certain things, and that these
17 things are being done to them are being done to them
18 frequently.

19 We are saying that we can lessen -- if we have access
20 to this information, and, by the way I'm not even getting to
21 the admissibility standards yet, because we're just talking
22 now about duces tecum standards, and if the admissibility
23 standard is a 401 standard the duces tecum standard is real
24 low, I mean low so you can step over it. That the access to
25 this information will permit us to develop information that

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1 will challenge the sufficiency of whether or not these
2 aggravators can be used. I'm not saying that by your granting
3 these duces tecums you are saying, Mr. Baugh, you can have
4 this information, and, by the way, it's admissible.

5 THE COURT: You know, maybe we have to be a little
6 more specific.

7 MR. BAUGH: Yes, sir. I have the list in front of
8 me.

9 THE COURT: You asked in the subpoena directed to the
10 General who is in charge of the Central Command the total
11 number of United States aircraft based in Kuwait and Saudi
12 Arabia during any part of any years since the cease fire in
13 the Gulf War.

14 I don't expect that is a request which is calculated
15 to invite an objection, but apart from that, tell me how any
16 of that information dealing with events unknown to the
17 defendant and subsequent to the bombing lessens the aggravator
18 of the use on his part of weapons of mass destruction in
19 bombing the embassy.

20 MR. BAUGH: Your Honor, thank you. Here is what,
21 here is the aggravator attack. One of the aggravators alleged
22 by the United States against my client, one of the
23 nonstatutory is lack of remorse. They are saying that because
24 my client is not sitting here feeling bad for his actions he
25 should die.

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1 In the fatwa of June 1998 which was read in this
2 court, and is admitted in the record and predates the bombing,
3 Mr. Usama Bin Laden said: We must declare jihad against the
4 United States -- and believe me, I didn't know all this stuff
5 before -- we must declare jihad against the United States
6 because the Prophet said that there should be no two forces,
7 there shouldn't be Americans on the peninsula, and that we are
8 religiously bound to drive them out. Now, he said that.

9 My client, on the other hand, assuming the theory of
10 the United States is correct as alleged in their indictment,
11 they are saying that my client bought into this theory, and
12 was convinced that in order to do what is perceived as a
13 dictate from Allah, they must do this.

14 But there is not just motivation. If my client
15 because of acts that have occurred subsequent to 1998, if the
16 United States has used the Gulf War to get military forces
17 into Saudi Arabia and leave them there, that would explain his
18 lack of remorse today. Lack of remorse is not measured from
19 on the date of offense. It is whether or not at the time of
20 sentencing he exhibits remorse. If the action since 1998
21 proved in my client's mind the correctness of his position,
22 that explains his lack of remorse, because what was told by --

23 THE COURT: The correctness of his position that?

24 MR. BAUGH: I'm sorry. I didn't hear the first word.

25 THE COURT: Correctness of his position that --

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1 finish the sentence.

2 MR. BAUGH: All right. That his lack of remorse
3 today is, in his estimation, justified because what he was
4 told would happen, did happen, and that --

5 THE COURT: How does anything of which he does not
6 have knowledge reflect on the reasons for his lack of remorse?

7 MR. BAUGH: Well, first, your Honor --

8 THE COURT: I want to also say in the context of this
9 issue that you have sought to subpoena various information
10 agencies allied with supporters of Iraq.

11 MR. BAUGH: Yes, well, not supporters, but, yes.

12 THE COURT: I'm choosing my words carefully,
13 information agencies who --

14 MR. BAUGH: Who are knowledgeable of the situation.

15 THE COURT: -- are knowledgeable of the situation and
16 who have, like Friends of Iraq. That's not the exact name.
17 But who have an identification of that nature. And presumably
18 they will present evidence of those things which were known
19 and which deal with the nature of America's retaliations or
20 aggressions, depending on your viewpoint, with respect to
21 Iraq, which were known or could have been known to the
22 defendant both at the time of the bombing and at the time of
23 his lack of remorse.

24 MR. BAUGH: No. Now, I understand. Your Honor,
25 there are two answers to your question, both of which are

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1 accurate. The first one is, no criticism intended, but you
2 must take yourself outside of the mitigation evaluation
3 process.

4 What I'm saying is this. If the United States said
5 that my client should die because he has a reckless disregard
6 and he used weapons of mass destruction against Americans, and
7 they say that qualifies under the law as an aggravator and
8 should be balanced against mitigators, if, by example I
9 introduce evidence that it's almost like saying: United
10 States, you're alleging this man is wrong because he does
11 this, and I can present evidence that the United States has
12 purposely prior to 1998, and continues to this day to
13 intentionally pollute the water system of this nation, Iraq,
14 causing the death of a half million children. I have a
15 videotape over there dated the summer of 1998 where Madeline
16 Albright in a 60 Minutes interview -- I have a transcript as
17 well -- said: We know we've killed a half million children
18 but we think the price is worth it.

19 Now, the question is when the jury hears that, will
20 they to a certain extent lessen the importance of the
21 government assertion that the fact that a bomb was used is a
22 true criteria for who lives and dies? Because if that's true,
23 then when Madeline Albright, I mean, if she ever gets
24 prosecuted, she's in trouble.

25 So what we're doing is we are legally attacking the

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1 sufficiency of the aggravator in the balancing test as an
2 aggravator. We are not putting stuff on the mitigation side.
3 We are lessening the weight. We're lessening the impact
4 legally and factually then of the government's assertion of
5 aggravation. And I also want to point out when you say -- and
6 I must say this, because I know that the --

7 THE COURT: I'm really trying to understand this.

8 MR. BAUGH: Can I explain --

9 THE COURT: You're not saying two wrongs make a
10 right.

11 MR. BAUGH: No, your Honor, that's not my job.

12 THE COURT: And you're not saying --

13 MR. BAUGH: That would be justification.

14 THE COURT: And you're not saying that it is less
15 shocking, to use a lay term, less shocking that the defendant
16 caused the death of hundreds of innocent Kenyans because
17 America in its actions with respect to Iraq also caused the
18 death of countless people. Is that the argument?

19 MR. BAUGH: Not quite. If I might, your Honor, can I
20 answer your question with a question?

21 Let me ask the question you should ask of me, all
22 right? Mr. Baugh, under McVeigh how is this appropriate? And
23 here is the answer. If Mr. Jones in the McVeigh trial instead
24 of trying to prove motivation had tried to prove that the
25 aggravator does not really amount to a valid aggravator, then

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1 this opinion in McVeigh wouldn't control. McVeigh only limits
2 evidence of motivation on a mitigator. It does not limit, and
3 in fact, they come out and say that he can rebut any issue
4 that's raised. McVeigh doesn't say that.

5 So if you were to ask me that question, I would say,
6 counsel for Mr. McVeigh, rather than alleging this as purely
7 motivation, should have challenged the sufficiency of the
8 aggravator, and I'm assuming they used the weapon of mass
9 destruction as an aggravator. I have not seen the death
10 notice and I couldn't find it over the weekend. If they had
11 challenged the aggravator as sufficient, then it would have
12 been admissible.

13 Now, remember --

14 THE COURT: And would lessen the significance of the
15 aggravator is what?

16 MR. BAUGH: I'm sorry, is what? I'm not being coy.
17 I'll really trying to follow you.

18 THE COURT: What is it, articulate for me what is it
19 that lessens the weight or the significance of the aggravator
20 of use of weapons of mass destruction?

21 MR. BAUGH: I'm sorry, your Honor, I'm trying to read
22 the note of my co-counsel, and it's really dreadful.

23 THE COURT: You say it's not two wrongs making a
24 right?

25 MR. BAUGH: No, your Honor, that would be

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1 justification.

2 THE COURT: And you're not saying the fact that
3 hundreds of people die in the bombing, which is the subject of
4 this case, you're not saying, well, that's mitigated by the
5 fact that America's actions caused death of hundreds of
6 people. So tell me --

7 MR. BAUGH: What I'm saying your Honor --

8 THE COURT: -- what it is that reduces the weight or
9 the significance of the aggravating factor of use of weapons
10 of mass destruction?

11 MR. BAUGH: I have been able to decipher the
12 brilliance of my co-counsel. What I'm saying, your Honor, is
13 that because the use of weapons of mass destruction and the
14 death of innocents is an accepted norm in this nature of
15 warfare or in this nature of conflict, and, therefore, the
16 impact of the aggravator should be lessened, and if the jury
17 agrees --

18 THE COURT: The more prevalent, the more prevalent a
19 terrorist act causing the death of innocent bystanders, the
20 more prevalent that is the less weight there is to the fact
21 that that occurred in this instance?

22 MR. BAUGH: No, your Honor, not less that it
23 occurred. Less weight should be given to it if proven that it
24 occurred. I'm assuming they can prove -- I mean.

25 THE COURT: We're past the guilt stage. I tried to

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1 make that clear.

2 MR. BAUGH: Yes.

3 THE COURT: I want to point that out. The jury has
4 unanimously found beyond a reasonable doubt that your client
5 intentionally caused the death of hundreds of people.

6 MR. BAUGH: Yes, sir.

7 THE COURT: So we're not arguing justification and
8 we're not arguing guilt. I'm just trying to understand.

9 MR. BAUGH: Yes, sir, I know.

10 THE COURT: You're saying, reading your learned
11 colleague's note, that the fact that it's a norm impacts on
12 the significance of it, but when I paraphrase that and say,
13 you're saying that the more prevalent terrorist bombing
14 killing innocents are the less significant it becomes? You
15 know if that's the argument you want to make to the jury, I
16 think the government would be well advised to wish you God
17 speed.

18 MR. BAUGH: Well, if answering yes gets me past this
19 point I'll say yes, and we'll move on to the next issue.

20 I believe I'm entitled to see this information to see
21 if there is -- this is a duces tecum. We're not talking
22 admissibility here. We're talking whether I have access to
23 the information. If there is evidence to support this, and I
24 will tell the Court we are confident that it does, because for
25 instance, I notice in their brief they say that I had the

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1 audacity to ask for a digitalized subset of wound studies.
2 This is the wound data and munitions effectiveness team at the
3 US hospital. It's a military website. And it brags about the
4 fact that they have computerized subsets of lethality studies.
5 So they have this stuff. So if I get access to this, and with
6 consultation with my co-counsel, and in consultation with my
7 client we determine that we should assert this position, then
8 we can.

9 I would also point out that as has been pointed out
10 in the Friend opinion, the aggravator by its very nature is
11 supposed to be --

12 THE COURT: What opinion are you --

13 MR. BAUGH: Friends. We cited the F. Supp. from
14 Judge Payne in Richmond. The aggravator by its nature in
15 order to get around the affirmance issue must be unique and
16 individualized.

17 The proposed rebuttal is an attempt to take the
18 impact of that aggravator out of the class of factors that are
19 unique or individualized, and it's nothing to do with
20 motivation. It's nothing to do with mitigation. It has to do
21 with rebutting whether or not, how much weight should be given
22 to this aggravator when and if proven.

23 Now, in saying that it is important that we go back
24 to the original death penalty cases and understand and reflect
25 upon the phases, the guilt phase which is distinct, then we

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1 have the statutory phase, then we have the nonstatutory phase.
2 I mean we have, there is one penalty phase, but the
3 deliberation process is two-fold.

4 Anywhere in that deliberation process there are two
5 balancing tests or weighing considerations the jury is
6 supposed to give, and as I point out, any weight I can take
7 off their aggravator not only should I do, but my client under
8 McVeigh and under I think it's Gardener opinion we cited,
9 gives him a Constitutional right to do it. He must do it.

10 Now, going back to the duces tecum standard, I can
11 show you that everything I've asked for exists, and I mean
12 when you see my vouchers with all that Internet time it's not
13 wasted. That's what I'm doing. All this stuff is on the
14 Internet and it exists.

15 THE COURT: When you say "all this stuff," the total
16 number of US aircraft based in Kuwait and Saudi Arabia during
17 any part of any years?

18 MR. BAUGH: I can tell you based on an Internet site
19 that there are American squadrons that were not there prior to
20 the Gulf War, that are there. Now, and Mr. Bin Laden several
21 of his fatwas that were read here said, that the United States
22 used the Gulf War as a subterfuge to put troops in the
23 peninsula. And he did say that and the Court heard it. And
24 if you check the websites for various fighter squadrons you
25 will find, and, also, I will tell you I know the Virginia Air

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1 Guard sends aircraft over there to serve tours that did not go
2 before the Gulf War.

3 Now, we're now going beyond the aggravator situation.
4 You've changed subjects on me, but --

5 THE COURT: Yes.

6 MR. BAUGH: Well, you did.

7 THE COURT: Okay.

8 MR. BAUGH: Excuse me?

9 THE COURT: Yes.

10 MR. BAUGH: It's a Socratic process. I'm used to it.

11 THE COURT: You said all that you asked for, and I
12 was simply rebutting that.

13 MR. BAUGH: You were checking me. You were checking
14 me.

15 I will also tell the Court that just as an aside to
16 my personal knowledge I was exposed to being in the military.
17 My father is retired Air Force fighter pilot. Believe me I
18 know all this stuff. I was raised on military bases.

19 When I asked, well, the other things we asked for I
20 know from my training and experience, I know from my Internet
21 investigation and research, I know from the people in my
22 office who are so smart, I know that these things exist. I
23 know that they could have the potential. And that's the only
24 standard I have now on the duces tecum. They do have the
25 potential for me and my co-counsel to be able to utilize these

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1 assets once we get them.

2 I also want to point out one other thing. There is a
3 unique legal issue you're going to have to resolve for the
4 first time. The government has objected to my subpoenas for
5 Madeline Albright and certain of these records under the Code
6 of Federal Regulations.

7 What I find interesting in the, and we cited it in
8 our letter, McVeigh asserts a Constitutional standard of
9 relevancy at a 401 level to acquire information and present
10 information on the penalty phase.

11 The Code of Federal Regulations creates a much higher
12 standard that the government can determine whether or not to
13 answer my subpoena. So I have a Constitutional right
14 mentioned in McVeigh, and we have some CFR paragraph stating
15 the government can decide the relevancy of these things, and
16 that's not the standard, and, of course, I've got a
17 Constitutional standard that controls.

18 It is the Court's job to determine relevancy, not the
19 United States government. So I'm objecting to that portion.
20 In fact, I'm also objecting to a certain extent, now, with
21 Madeline Albright we went in and supplemented yesterday, I
22 buckled, I said, I'm going to do it, because time is of the
23 essence, but, actually, I would say that the CFR --

24 THE COURT: You raises again an issue which we
25 addressed during the testimony of Ambassador Bushnell, the

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1 relevance of the alleged failure of the United States to alert
2 Kenyans to the threat of bombing? Now we're dealing
3 hypothetically in the sentencing phase.

4 MR. BAUGH: You changed gears again on me, okay.

5 THE COURT: I change again and this time I signaled
6 I'm changing.

7 MR. BAUGH: Yes, sir. Thank you.

8 THE COURT: Another issue, right?

9 MR. BAUGH: Yes, sir.

10 THE COURT: And tell me, you know, I analogized that
11 in my guilt phase in my May 6th memorandum.

12 MR. BAUGH: Oh, I remember the May 6th memorandum.
13 Yes, I remember that one.

14 THE COURT: But can you tell me --

15 MR. BAUGH: The lawful effect of this?

16 THE COURT: This isn't a comparative negligence case,
17 right? Tell me what is the relevance to the fact that the
18 United States didn't say to Kenyan authorities: Look, we've
19 got this embassy and, we have all kinds of services and things
20 that we conduct in the embassy, but you should stay away from
21 it because there is a potential terrorist target.

22 MR. BAUGH: I am only hesitant because it's hard to
23 keep my personal views out of this. When I was
24 cross-examining Mr. al-Fadl, Jamal al-Fadl, the first
25 government informant, when he told this Court that part of his

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1 job in 1994 -- I'm sorry -- 1996 was to find a million and a
2 half dollars worth of atomic explosives or raw material to
3 make a device, and that they were targeting US embassies, and
4 that this information was not disseminated, or whether it was
5 disseminated or not became very significant to me. That's
6 like saying: Can I come stay in your house? Of course you
7 can. By the way, the mafia's after me. That's relevant.

8 If the United States knew as early as 1996 when Mr.
9 al-Fadl came in and gave up the ghost and told all this, if
10 the United States chose not to warn those people who could be
11 injured by this, is that a reckless disregard for human life,
12 not two wrongs make a right.

13 THE COURT: Let's take the countervailing. Let us
14 say that every time there is any information that any public
15 facility, take the hypothetical, this courthouse, is a
16 potential target for terrorist activity, there is an
17 obligation to tell people, you come here at your own risk.
18 What a tremendous weapon that would give to terrorists to
19 modify the lifestyles of almost any aspect of public life.

20 MR. BAUGH: Two issues, your Honor. First, being a
21 Judge you and I have sworn an oath not to worry about the
22 security. I mean we're supposed to just protect the
23 Constitution, period, dot, and if the United States doesn't
24 want that to happen, they shouldn't bring a death notice
25 because I mean if we don't have a penalty phase, we don't have

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1 that problem. But, more importantly I think to qualify
2 Mr. Bin Laden as any threat greatly underestimates -- remember
3 that when in 1996 the first time I found out about it was in
4 this courtroom and you, too, there are people out there trying
5 to find nuclear material to use in a "terrorist attack," and
6 by the way --

7 THE COURT: What is going to happen? Tell me what
8 you would argue to the jury should happen when any such
9 intelligence information is gathered? Understand, I have a
10 vivid recollection. It wasn't in this courtroom. It was two
11 floors below. The jury was about to deliberate in a
12 waterfront organized crime case, and the Chief Judge burst in
13 and said, there is a bomb threat, everybody leave, which we
14 did. It became the subject of argument the following day.

15 But the number of threats one receives are very great
16 and the greater the disruption which will occur by virtue of
17 the threats, the more incentive there is for the making of
18 threats.

19 MR. BAUGH: Your Honor.

20 THE COURT: I take it this is something, you know, at
21 one point the point was made that it's the government's fault
22 that I wasn't caught sooner, before I could have committed
23 these crimes, and, you know, we don't really pay too much
24 attention to that type of argument.

25 MR. BAUGH: Your Honor, that's three questions. The

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1 last one I'll answer first. The school yard mentality of
2 you're another one, or you did it to me first, I don't think
3 the jury would go with that. However, the answer to your
4 question is, you asked me what should be done when information
5 concerning terrorist threat --

6 THE COURT: Let me modify my question. What is the
7 relevance in this case to the culpability of the defendant --

8 MR. BAUGH: It's not culpability, your Honor.

9 THE COURT: -- to the appropriateness of a death
10 penalty in this case that no warning were given to Kenyans?

11 MR. BAUGH: Again, your Honor, you can criticize me
12 and ask again if you want to. I'll answer your question with
13 a question.

14 Two points. One is in making that determination of
15 what should be done with that information, does the person
16 making the determination have to weigh in their own mind the
17 potential impact of that destruction on innocents in making
18 their decision? And the answer is yes. So, therefore, if I
19 say in my own mind I think the risk is worth it, does that
20 impact on an assertion that my client has shown disregard for
21 human life?

22 By example again, if this Court, not as a robed
23 federal judge, receives information that there is an airplane
24 coming at the City of New York, there are 213 innocents aboard
25 and a number of terrorists, and on board is a nuke device, and

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1 they're going to crash it into New York, and they're going to
2 kill a million people, do you risk the death of those 213 or
3 is that reckless disregard?

4 I am saying, your Honor, that the United States has
5 alleged that my client is showing reckless disregard. I am
6 saying that reckless disregard for innocents in this area is
7 as routine, as everyday as water.

8 THE COURT: Reckless disregard. You are equating
9 reckless disregard --

10 MR. BAUGH: I'm equating disregard.

11 THE COURT: -- to the blowing up of the embassy on a
12 main thoroughfare in Nairobi to the failure to warn of a
13 rather amorphous threat?

14 MR. BAUGH: Excuse me, your Honor. Wait. First, a
15 rather amorphous -- and informant who was paid nine hundred
16 grand --

17 THE COURT: Before you answer that --

18 MR. BAUGH: Okay.

19 THE COURT: -- tell me what should have happened?
20 Should the embassy have been cordoned off? Should a lot of
21 those victims -- we had the woman who was just on the bus who
22 was going by. Should the buses have been diverted? Should
23 pedestrians not have been permitted in front of the embassy?

24 MR. BAUGH: Your Honor, I will answer that question.
25 What's going to happen is this -- what ought to happen? We

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1 should stop killing each other. We should stop that. That's
2 what we should do. And believe me, that's not a flip answer.

3 But, more importantly, every time you make a decision
4 that could possibly risk the lives of "innocents," that is an
5 issue that the jury should consider in determining whether or
6 not that aggravator justified this man's dying, period. Yes,
7 it should. I'm not talking about justification. I'm not
8 talking about motivation. I'm talking about attacking the
9 validity and weight to be given the aggravator in the weighing
10 process that is mandated by the statute. I'm talking straight
11 law. I'm not talking, and I agree with you.

12 And some day when this trial is over I hope you and I
13 get a chance to sit down and we can talk about these
14 questions. No, I'm serious. We argued these things over
15 there on John Street. We discussed these things. We very
16 often slide off into what-ifs, and it is, but that's not the
17 issue here.

18 The issue here now is have I met the threshold under
19 less than 401 to show that I should have access to this
20 information so later you can determine whether or not it's
21 admissible, and I can determine later whether or not I want to
22 implement that tactic, which is permissible and required under
23 McVeigh. And I'm not shorting your question by the way.

24 THE COURT: Excuse me?

25 MR. BAUGH: I'm not ducking out of your question, I

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1 don't think. I'm not avoiding answering your question. I
2 really think I am answering your question. If I'm not, you
3 can ask it again. But you keep asking three at a time and
4 it's hard to keep track of them.

5 THE COURT: Is there anything that you want to tell
6 me that I've cut you off about?

7 MR. BAUGH: Your Honor --

8 THE COURT: I have all day.

9 MR. BAUGH: No, your Honor. I want you to know that
10 you know if I thought were you cutting me off, I'd tell you
11 and I do not believe, in fact, I believe you were honestly --
12 I'm not going to say that because people will say I'm getting
13 lax in my old age -- but I believe you are trying to determine
14 and I will tell the Court without slighting you, that the
15 problem is looking at what McVeigh does and not looking at
16 what McVeigh stops short of doing, and the fact that if you go
17 back to Gregg and Forman and the cases that led to the federal
18 death penalty statute, and you review the phases, that what we
19 are seeking to do here, which what Mr. McVeigh's counsel
20 should have done is challenged the validity of the aggravator
21 and weakened it's impact. I will also close by saying --

22 THE COURT: Before you close.

23 MR. BAUGH: Yes, sir.

24 THE COURT: Bin Laden was asked in the interview
25 which is in evidence --

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1 MR. BAUGH: One of the many, yes.

2 THE COURT: -- what would be required to end the
3 terrorist activity. And his reply was: The withdrawal of all
4 American forces from the Arabian peninsula. When you say, the
5 answer is the to stop the killing, to what extent, if any, do
6 you think you are entitled to argue to the jury that error in
7 American foreign policy is a relevant consideration in
8 determining the appropriateness of the death penalty here?

9 (Continued on next page)

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1 MR. BAUGH: I'm going to make a deliberate effort to
2 duck your question by answering it this way. The question is
3 not, now am I entitled to argue? The question now is, am I
4 entitled to have access to the information to determine
5 whether or not I have a valid argument and come to this Court
6 and prove the admissibility of the standard under 401?

7 Now, if you want me to go farther than that, I will,
8 but I would submit that would be the first part. And in
9 response to that, if a given fact in support of an aggravator
10 becomes more and more common in a given area or in a given
11 offense, does that, could that have the potential to lessen
12 the impact of it? And the answer must be a resounding yes,
13 and --

14 THE COURT: I know I'm interrupting you.

15 MR. BAUGH: Yes, sir.

16 THE COURT: Again you are arguing that the prevalence
17 of terrorist acts lessens their significance for purposes of
18 the death penalty, and that strikes me as being a very tenuous
19 argument.

20 MR. BAUGH: Your Honor, it is very hard -- well, the
21 Court might view it as a tenuous argument. However, first,
22 the Court uses the word "terrorism" a lot and the government
23 does, too. And the government does have a definition of
24 "terrorism" and I think it's a pretty good definition.

25 THE COURT: Tell me what word you would rather have

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1 me use.

2 MR. BAUGH: What word I would rather use is "warfare"
3 between established states and non-established states. That's
4 what it is.

5 I can tell the Court from my ROTC training, generally
6 recognized there are two types of bombings, strategic and
7 tactical. Strategic is a wiping out of facilities, wiping out
8 petroleum facilities, for example. Tactical are destroying
9 its troop assets, its tank farm, its aircraft.

10 Whenever you drop bombs with the intention to coerce
11 the people into trying to stop a given course of action,
12 which, by the way, is the definition given in Title 18,
13 whenever you try to coerce a political result by bombing and
14 killing people, that is classified under the federal code as
15 terrorism.

16 Unfortunately, we do it, they do it, everybody does
17 it. We all attempt to coerce political results through the
18 use of force and the destruction and death of innocents.

19 THE COURT: But stating the equation that way --
20 let's talk about McVeigh -- puts McVeigh on the par with
21 United States law enforcement; would put any terrorist --

22 I'm using terrorism.

23 MR. BAUGH: Yes, sir, and I'm not finished. I
24 understand.

25 THE COURT: -- as for these purposes, as use of

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1 instruments of mass destruction --

2 MR. BAUGH: Yes, sir.

3 THE COURT: -- against targets, a large component of
4 which are civilian innocents, for purposes of making some
5 political point or applying some coercion.

6 And it seems to me that your argument, when you
7 analogize that the warfare, etc., is to say that everybody who
8 is capable of manufacturing instruments of mass destruction --
9 and the state-of-the-art now makes that quite easy for people
10 to do -- is on the same par as the government because you are
11 dealing with warfare between the two.

12 MR. BAUGH: I am hesitant to answer this, but I think
13 it's important that you understand my perspective for my
14 argument.

15 No, your Honor, I'm not saying that. I'm saying that
16 that man over there is a person accused under the laws of the
17 United States and he has been entitled to certain
18 Constitutional protections, and under my oath and your oath,
19 our sole purpose in being here is to make sure that those
20 protections continue.

21 THE COURT: I have no quarrel with that at all.

22 MR. BAUGH: Notice, however, that we are not charged
23 when we took our oaths, we don't take an oath to a flag or
24 even to a government, we take an oath to a philosophy that
25 protects him. If we were on the street, my answer might be

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1 different, but in here, in front of you, the only issue is
2 under that Constitution, does he have a right to look under
3 these records to determine if there is evidence there; and,
4 number two, if we find it, and I know we will --

5 THE COURT: Evidence that the United States was
6 engaged in warfare against Iraq; evidence that the United
7 States has sought to impose sanctions which have caused great
8 hardships, evidence that the United States sought to --

9 MR. BAUGH: I can tell from the question --

10 THE COURT: Please, please. I have the right to
11 interrupt you. You don't.

12 MR. BAUGH: Yes, sir.

13 THE COURT: It's not a level playing field.

14 MR. BAUGH: Another myth shattered.

15 THE COURT: -- that the United States sought military
16 retaliation.

17 You can equate those two? You can equate an
18 individual bombing to the governmental responses?

19 MR. BAUGH: Your Honor, that's not the issue. If you
20 want to ask me outside, I'll say coming from a country that
21 was born of revolution, you bet I can. However, that's not
22 the question.

23 The question is, whether or not the jury could,
24 listening to -- that's the next question. The first question
25 is whether or not evidence of this could lead to admissible

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1 evidence under a 401 standard which could compel a jury or
2 even influence a jury to lessen the impact of the aggravators
3 that are alleged by the United States in its death notice.
4 That's the sole question.

5 THE COURT: This says the quantity, the cost, the
6 impact.

7 MR. BAUGH: Cost.

8 THE COURT: Oh, yes, you ask for the cost. Your
9 subpoena asked what has been the cost to the United States.

10 MR. BAUGH: Oh, yes. I'll tell you, you want me to
11 go to the cost? I tell you why --

12 THE COURT: Let me --

13 MR. BAUGH: I'm sorry. I'm trying to keep track.

14 THE COURT: Finish your thought and then let's look
15 at the specific subpoenas and the specific information that
16 you say you wish, and let's try to then have you tell me again
17 why you think it's appropriate, recognizing the threshold that
18 you have to surmount is very, very low.

19 MR. BAUGH: I will abandon my answer because you have
20 abandoned your question.

21 THE COURT: All right.

22 MR. BAUGH: We will move on to the other items.

23 THE COURT: Let's look at what you have asked of the
24 United States Central Command.

25 MR. BAUGH: Yes, sir, I have the list before me.

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1 THE COURT: First thing, "a list of all Iraqi targets
2 struck by the United States and ally" -- let's assume that's
3 to be "allied forces since the conclusion of the Gulf War and
4 the date of each strike, either by aircraft, manned or
5 unmanned, the locations attacked, including the government to
6 the geographic locations, using the city name or region of the
7 Country of Iraq, if appropriate, and the nature or type of
8 target, i.e., water treatment facility, communication,
9 electrical grid or radar station."

10 MR. BAUGH: Yes, sir. Okay.

11 THE COURT: Yes. You need all of that for these
12 purposes?

13 MR. BAUGH: Without giving the government a peek at
14 everything, but just enough to meet my burden, I would submit,
15 your Honor, that if the United States -- and first, your
16 Honor, these things exist because there are pre-strike and
17 post-strike photos of every air strike. That is a matter of
18 routine. So I know it exists.

19 THE COURT: Are there post?

20 MR. BAUGH: There's pre-strike and post-strike
21 damage.

22 THE COURT: We have not addressed from the government
23 the extent to which this is classified information, and I
24 assume we will. We've been trying to kind of deal with this
25 apart from that, but --

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1 MR. BAUGH: First, I want to answer the classified
2 information. Can I answer that one first?

3 THE COURT: Yes, and when you answer that would you
4 also answer -- you're making a very broad philosophical-type
5 argument which, although you have worded it several times, you
6 probably best expressed it when you said this is warfare.
7 Even if one were to assume, arguendo, that you are entitled to
8 show that a state of warfare exists, is it necessary or
9 relevant to that argument? That argument you can make based
10 on the information that you get from your other subpoenas, to
11 which the government has not objected, to know in this detail.

12 MR. BAUGH: First, your Honor, in answer to your
13 question, I'm sure the Iraqis know where there have been
14 bombs, so I don't think it's a security issue. They get
15 bombed, I guess they know it. So the only people who don't
16 know it are you and me. The Americans know -- the American
17 Air Force knows and the Iraqis know.

18 THE COURT: And the nature or type of target?

19 MR. BAUGH: They know it, too.

20 THE COURT: They know if the targets were missed?

21 MR. BAUGH: Excuse me?

22 THE COURT: We know that happens with some frequency.

23 MR. BAUGH: I'm assuming they don't miss that much,
24 but that could be an error on my part. By getting this
25 information --

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1 THE COURT: And you talk about "representative" -- I
2 don't know what that means -- "pre-strike photographs and
3 other forms of visual imagery, including the proximity of the
4 target area to homes, other residences and non-military
5 strictures and facilities" [sic].

6 MR. BAUGH: By "representative," I don't mean -- you
7 don't have to give me all of them, and by "visual imagery," I
8 include infrared or digitalized inventory that doesn't include
9 photographs.

10 THE COURT: "And inventory and list of all weapons
11 expended during each of the strikes and attacks listed above."

12 Do you think that is necessary for your argument, or
13 do you think that might create some --

14 MR. BAUGH: Would the use of a fuel air 750-pound
15 weapon against a small structure increase the likelihood of --
16 and I hate to use this term -- collateral damage? And the
17 answer is yes. So, therefore, if they are using fuel air or
18 if they are using solid or submunitions, that could determine
19 whether or not they have increased a certain recklessness or
20 concern about innocents.

21 THE COURT: All right, maybe I should hear the
22 government.

23 Before I hear from the government, does anybody else
24 want to be heard on these issues?

25 MR. RUHNKE: No, your honor.

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1 THE COURT: Mr. Ruhnke, let me address a question to
2 you. Mr. Baugh correctly points out that the issue before me
3 now is not admissibility, and we could let this play its
4 course. Perhaps that would be the most prudent thing to do,
5 but you know that we will be spending vast amounts of time on
6 objections made to these opinions, and I'm sure that the
7 communications media, the subpoenas, I think every network
8 will be in with motions to quash.

9 And so I somehow have the impression that counsel
10 feel pressed, so that if there is a way where, preserving
11 everyone's rights, we can more quickly get to the quick, it
12 might be useful. Whether it's one trial or two really doesn't
13 matter. If there are two trials, I understand it is the wish
14 of the defendants and their clients -- your client -- that
15 there be a second trial.

16 MR. RUHNKE: Yes, your Honor.

17 THE COURT: And the same jury will have heard all of
18 this. Do you have any views which you wish to express as to
19 these issues being presented to the jury?

20 MR. RUHNKE: Your Honor, it is not our present
21 intention, nor do I perceive it to become our future
22 intention, to offer this kind of defense or this kind of
23 mitigation in our case. We have different clients who come
24 from different circumstances, etc. I do not disrespect what
25 Mr. Baugh is doing, it's just a different set of

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1 circumstances, different clients.

2 I join him on the point that simply this issue is
3 whether a subpoena is likely to produce evidence that may be
4 relevant to penalty, but we do not intend to issue a similar
5 subpoena on behalf of our client or similar class of
6 subpoenas.

7 MR. FITZGERALD: Your Honor, what I would point out
8 is if you look at the statute concerning the penalty phase,
9 3592, two things that I would emphasize is that 3592(A)(8),
10 when it discusses what may be offered in terms of mitigating
11 factors, describe the factors as "factors in the defendant's
12 background, record or character, or any other circumstance of
13 the offense that mitigate against imposition of death
14 sentence," and the way I understand Mr. Baugh's argument, he
15 seems to construe "circumstance" of the world. Once we go
16 down a road of --

17 THE COURT: What does "any other circumstance of the
18 offense," what -- that's a very inclusive term, isn't it?

19 MR. FITZGERALD: It is, your Honor, but there is a
20 limit. "Circumstance of the offense" concerns a plot to bomb
21 embassies in Nairobi. It does not mean that we try before the
22 jury, where the statute still provides that the evidence is
23 excluded if the probative value is outweighed by a danger of
24 unfair prejudice and confusion to the issues, that we try
25 world history.

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1 Do we try the U.S. bombing of Iraq? Do we then prove
2 up the response of the Iraqi invasion of Kuwait, invasion of
3 the Kurds? Do we counterbalance that with whether the U.S.
4 did become involved in Serbia and Bosnia? Do we go back to
5 World War II? Where do we stop trying warfare? This is not
6 warfare. This is terrorism. This is not conduct of lawful
7 authority.

8 It seems to me that to the extent it's relevant to
9 discuss Mr. al-'Owhali's motivation, he has that information.
10 He knows what he thought. He has Mr. Bin Laden's statements.
11 And if we focus on the practical, when we look at the
12 airplanes in Saudi Arabia, we all know there are airplanes
13 there. Whether there is hundreds, or 1,000 or 10,000 is not
14 relevant right now if Mr. al-'Owhali had the belief that they
15 were there. That fact we put before the jury.

16 But to go down a path where we are rummaging upside
17 down all over the government to get discovery of something of
18 which the relevant material he already knows, he knows what he
19 believes, he knows what he's read, he knows what he's been
20 influenced by, and that could be put before the jury.

21 The relevance in McVeigh is a very analogous
22 circumstance. They also addressed the issue of what evidence
23 the defendant might offer in opposition to evidence of an
24 aggravated factor, but it does not say that I can try world
25 history. This is an offense. His background should be before

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1 the jury, his record, his history, and the circumstances of
2 the offense.

3 THE COURT: Mr. Baugh argues that the government is
4 going to assert a lack of remorse as a ground for imposition
5 of the death penalty and argues that to deal with the issue of
6 lack of remorse, which is as of the time the jury speaks,
7 involves consideration of events subsequent to the bombing.
8 What is your response to that?

9 MR. FITZGERALD: And to the extent that his own lack
10 of remorse, his mind-set is influenced by what he knows has
11 happened after the bombing, he has that information. If, for
12 example, he -- it doesn't matter whether there are 12
13 airplanes or 2,000 in Saudi Arabia as of today, it's his
14 belief. I don't think we need to go out and gather
15 information he's unaware of, hand it to him and then have him
16 say, now I'm truly not remorseful because I've learned more.

17 If he believes that there are planes in Saudi Arabia
18 and they have not left, and that's true, he has that
19 information. He knows that. If he has a belief as to a
20 number, he has that. Whether it's accurate or not is
21 irrelevant. His lack of remorse comes from what his
22 understanding of the facts are, and he knows that.

23 And the lack of remorse is often in the context of
24 future dangerousness in the case, but I don't think we have to
25 get past his lack of remorse. He knows what is influencing

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1 his own belief that he is not sorry for what he did.

2 THE COURT: I'm going to ask, Mr. Baugh, that you
3 submit another set of subpoenas, because even if one accepts
4 your contentions, you a number of times said to the Court, you
5 know, we know these documents exist because we have them
6 already.

7 MR. BAUGH: We have indications of them.

8 THE COURT: It seems to me that, in all respect, that
9 insofar as the military operations are concerned, that there's
10 really very little you need to make your argument. You don't
11 need the minutia. Whether the cost was X billion dollars or Y
12 billion dollars is really not going to be relevant, and the
13 number of aircraft and the number of air carriers and what it
14 cost really is really not necessary. It will simply generate
15 a tremendous amount of good faith litigation on both sides as
16 to whether that information is classified or is not
17 classified.

18 With respect to the subpoenas directed to the news
19 agencies, I will sign those. They have not been reluctant to
20 challenge when they think it's appropriate.

21 MR. BAUGH: Your Honor, I would like you to
22 reconsider your ruling for these grounds.

23 THE COURT: Yes.

24 MR. BAUGH: First, the United States just stood here
25 and, in response to my requests, cited 3592(a)(8), talking

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1 about what can be offered in mitigation.

2 THE COURT: Yes.

3 MR. BAUGH: We're not talking about mitigation, we're
4 talking about negating aggravator. Secondly, the Court says
5 that I --

6 THE COURT: Mr. Baugh, in all respect --

7 MR. BAUGH: Yes, sir.

8 THE COURT: -- do you quarrel with the proposition
9 that it is irrelevant to your argument, the argument which you
10 would propose to make, what the exact cost was? And you know
11 you're going to get an answer from the Department of Defense,
12 which will, of course, object, but then say, in order to come
13 up with such a compilation, we're going to need, you know, six
14 months.

15 MR. BAUGH: The answer to that, if I might, first, I
16 agree with you that I do not need that information to make an
17 argument. I would submit I need that information to win the
18 argument. And the purpose is not to make the argument, it is
19 to keep him from dying. And so --

20 THE COURT: I'm aware that this is a capital case.
21 Were this not a capital case --

22 MR. BAUGH: We wouldn't be having this argument. I
23 would be home.

24 THE COURT: This would have ended much earlier,
25 right.

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1 MR. BAUGH: Is that a motion? Because I'll second
2 it.

3 THE COURT: No. I don't have to prepare a defense
4 case. I have lots of time and I've got a calendar which, you
5 are aware, is virtually exclusively directed to this case.
6 But I don't know how much time you have to spend arguing about
7 the estimated cost in United States dollars of air strikes in
8 Iraq since the Gulf War cease fire, including weapons cost,
9 aircraft fuel and support services for air strikes, including
10 unmanned missile attacks.

11 Now, I know the process of sitting back to prepare a
12 subpoena or request for a bill of particulars or so on in
13 which one create actively engages in the process of thinking,
14 what --

15 MR. BAUGH: Your Honor --

16 THE COURT: Let me just finish the sentence.

17 MR. BAUGH: Yes, sir.

18 THE COURT: What possibly could I ask for?

19 Now, if you are telling me that these are the
20 subpoenas and you're not going to change a word of these
21 subpoenas, the task before this Court is very, very easy. Is
22 that what you are telling me?

23 MR. BAUGH: Your Honor, I'm not going to say that,
24 but I will tell the Court this. For the Court to assume that
25 the United States Pentagon has not prepared a budget for this

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1 war --

2 THE COURT: That is not what you are asking for.

3 MR. BAUGH: I want to know how much money is being
4 spent.

5 THE COURT: Now, a request of the future budget, I'm
6 sure that would be of great interest.

7 MR. BAUGH: I want to go back and look at the past
8 budgets. I don't want their future budget. I'm not asking
9 for it.

10 And your Honor, lastly, you say how much time have I
11 spent? What I'm asking for is burdensome on me and it's
12 burdensome on the government. However, my client --

13 THE COURT: The argument that you have made this
14 morning --

15 MR. BAUGH: Yes, sir.

16 THE COURT: -- I'm going to try to state it again,
17 because if I still have it wrong then I would like to have it
18 right --

19 MR. BAUGH: Yes, sir.

20 THE COURT: -- is that you want to put before the
21 jury evidence that the United States has engaged in types of
22 warfare directed against Iraq; that this warfare included the
23 utilization of weapons of mass destruction; that civilians
24 were killed; that the nature of the targets and the nature of
25 the warfare is such that one could reasonably contemplate that

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1 some civilians would be killed; and that the United States
2 continues to have a military presence in the Arabian
3 peninsula; and that the United States continues to impose
4 sanctions against Iraq which cause hardship, and, you say, the
5 totality of that is such that the jury should view the
6 aggravating factor of use of a weapon of mass destruction
7 causing the death of civilians in the context of a warfare, a
8 warfare between a governmental and a quasi governmental
9 agency.

10 Is that a fair statement of what your argument is?

11 MR. BAUGH: No, sir.

12 THE COURT: No?

13 MR. BAUGH: What I'm saying is that I have met the
14 threshold of looking to determine whether or not that issue
15 can be successfully argued. No, I am not arguing
16 admissibility. I am not arguing that I'm going to present
17 this defense. I am saying that under the rules, I have the
18 right to look --

19 THE COURT: But, you know, I also have some
20 obligations.

21 MR. BAUGH: Yes, sir.

22 THE COURT: An obligation not to impose on reasonably
23 high-level governmental officials the burden of complying with
24 a subpoena in this detail, most of which, it seems to me, is
25 unnecessary for the purposes of the argument you are

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1 considering making.

2 MR. BAUGH: Thank you, your Honor.

3 THE COURT: Okay.

4 MR. BAUGH: I would --

5 THE COURT: Will you do that?

6 MR. BAUGH: Yes, sir. Reserving my objection, of
7 course. Yes, sir, I will.

8 THE COURT: And when will you have that to me?

9 MR. BAUGH: I can't do it tomorrow. My secretary
10 lost her grandmother, but I will it by Tuesday.

11 THE COURT: All right. I will sign the subpoenas
12 directed to the photographic department of the -- I don't know
13 what. The subpoena directed to Ms. Kelly? I'm not familiar
14 with the name.

15 MR. BAUGH: It's an organization in Chicago called
16 Voices of the Wilderness.

17 MR. FITZGERALD: Your Honor, just for the record, I
18 recognize there were subpoenas which we were not provided
19 copies of and there are some that we were. Whatever the
20 photographic department is, we were not given a copy of that,
21 just so the record is clear.

22 MR. BAUGH: Oh, yes, that's true.

23 THE COURT: That's true?

24 MR. BAUGH: That's true.

25 THE COURT: I think you were given copies only of the

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1 subpoenas to governmental entities.

2 MR. FITZGERALD: Yes, the Department of Defense,
3 former Secretary of State and the Bureau of Prisons were the
4 subpoenas we received. And I understand the Bureau of Prisons
5 is reviewing the subpoenas to get back to us, as they said in
6 the letter.

7 THE COURT: All right.

8 MR. COHN: That's mine, your Honor. The government
9 has no objection to it.

10 MR. FITZGERALD: That's correct, Judge. That's an
11 update of an old subpoena for Mr. Al-'Owhali's prison records.

12 THE COURT: I am not signing the subpoenas directed
13 to present or ex government officials. That includes
14 Madeleine Albright.

15 On another topic.

16 MR. BAUGH: Your Honor, can my client be excused at
17 this time? I have a lot of work to do on these subpoenas.

18 THE COURT: I think we're almost finished. It
19 depends on Mr. Submit.

20 Mr. Schmidt, we had some colloquy on Tuesday when
21 talking about a timetable and you said it was all subject to
22 the status of discovery requests that you had made which had
23 not been complied with, and I said I don't want to make any
24 statements or commitments to the jury with respect to
25 timetable and then discover that there was going to be an

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1 application for a continuance and that I was available, and
2 what is the story?

3 MR. SCHMIDT: Your Honor, we had further discussions
4 with the government yesterday. As to some of the material
5 concerning statements made by others, whether exculpatory or
6 806 or impeachment, the government told me yesterday that they
7 have been reviewing the documents and they are going to make
8 them available as soon as they complete their review. I'm not
9 sure exactly when that is.

10 The reason why it took them until now, the government
11 obviously have been pressing their case and they now seem to
12 be working on it. I don't have an answer when they are going
13 to have that material turned over to us. So maybe they can
14 answer that question.

15 MR. FITZGERALD: Your Honor, as to those materials to
16 which he is entitled, we are reviewing them to determine what
17 he is entitled to. We intend to have them available -- today
18 is Thursday -- a week from tomorrow. We have to focus on the
19 April 3rd submission, the bifurcation motion for Mr. Ruhnke,
20 and then the 806 demands and the demands for review of any
21 materials that may exist that may contain Brady with regard to
22 his client.

23 MR. SCHMIDT: As to receipt of it, if the material
24 itself is self-inclusive and you decide that we are free to
25 use it and we can either get a stipulation that the witness is

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1 available, that will not present any problems. If the
2 material is something that requires us to go another step,
3 which we don't know now, it may or may not present a time
4 problem. I can't say.

5 We're still working on the last major piece, which is
6 a stipulation concerning Somalia. We hit some roadblocks. We
7 are hoping to have further discussions, I guess tomorrow, and
8 hope to resolve that. If we don't resolve that, there is the
9 order of the Court relating to discovery material that the
10 government is supposed to turn over. We'll have to deal with
11 that issue if we can't reach a stipulation.

12 I don't know what to say to your Honor as to how long
13 the government will take to turn over that material if they
14 are required to.

15 THE COURT: All right. Just one other unrelated
16 matter --

17 MR. SCHMIDT: One other matter, your Honor. There is
18 apparently ex parte discussions that the government wants to
19 have with your Honor concerning Sudan, which we'll want to
20 deal with that next week as well. We can do that in chambers
21 ex parte one after the other, I guess, and make arrangements
22 for that.

23 THE COURT: I just want to present one other thing
24 which deals with the defense case on behalf of Odeh and the
25 question of permissible cross-examination of Agent Gaudin, and

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1 that's a matter which I want to address well in advance of
2 that matter being before the jury. And I'm sure that's in
3 everyone's best interests, so that sometime next week I would
4 like to take that issue up with counsel.

5 You want to see me about some ex parte matter now?

6 MR. WILFORD: Your Honor, not an ex parte matter, but
7 Mr. Herman has a matter.

8 MR. HERMAN: Can we see you in the robing room about
9 a CIPA matter having to do with Mr. Odeh?

10 THE COURT: About a CIPA matter?

11 MR. HERMAN: With the government.

12 THE COURT: CIPA.

13 MR. RUHNKE: Your Honor, before they do that, one
14 housekeeping -- I don't think we're involved in the CIPA
15 argument. Just one housekeeping matter. Mr. Fitzgerald has
16 told me that they will respond to the motion for separate
17 penalty phases by next Friday. We would like until the
18 following Friday to reply to that, and that's okay with the
19 government.

20 THE COURT: All right.

21 MR. RUHNKE: Thank you.

22 THE COURT: Yes. All right. We'll adjourn, then,
23 except for the ex parte matter, until Monday morning.

24 MR. HERMAN: Judge, Mr. Odeh should be permitted to
25 stay to review certain evidence.

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1 THE COURT: All right.
2 (Conference in the robing room filed under seal)
3 (Adjourned to April 2, 2001, at 10:00 a.m.)

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