

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA, 15-CR-268 (BMC)
4 Plaintiff, United States Courthouse
5 -against- Brooklyn, New York
6 MUHANAD MAHMOUD AL FAREKH, September 27, 2017
7 Defendant. 9:30 a.m.

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8 TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL
9 BEFORE THE HONORABLE BRIAN M. COGAN
10 UNITED STATES DISTRICT JUDGE
BEFORE A JURY

10 APPEARANCES

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24 Proceedings recorded by mechanical stenography. Transcript
25 produced by computer-aided transcription.

JURY CHARGE

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1 (In open court; Jury not present.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning. Let's bring in the jury.

4 (Jury enters the courtroom.)

5 THE COURT: All right. Everybody be seated.

6 Good morning, ladies and gentlemen.

7 THE JURY: Good morning.

8 THE COURT: Ladies and gentlemen, now that the
9 evidence in the case has been presented, it's my job to
10 instruct you as to the law that governs this case.

11 You're going to be given a copy of these
12 instructions that I'm reading to you when you go in to
13 deliberate, so don't feel like you have to write everything
14 down. They are fairly complex. But for now you should just
15 listen. If you want to take notes, though, you're free to do
16 that.

17 The instructions I'm going to give are you in three
18 parts:

19 First, I'm going to instruct you on the general
20 rules that define and govern the duties of a jury in a
21 criminal case.

22 Second, I'm going to instruct you as to the legal
23 elements of the crimes charged in the indictment; that is, the
24 specific elements that the Government has to prove beyond a
25 reasonable doubt to warrant a finding of guilt.

1 And then third, I'm going to give you some important
2 principles that you'll use during your deliberations.

3 Now the first and the second part are very long.
4 The third part is very short.

5 You're about to enter your final duty, which is to
6 decide the fact issues in this case. Please pay close
7 attention to me now. As I told you before, it's been very
8 obvious to me, and to the lawyers in the case, and the
9 parties, that you have faithfully discharged your duty to
10 listen carefully and observe each witness who testified during
11 the trial.

12 I want to thank you for that, and I want to thank
13 the attorneys for their conscientious efforts on behalf of
14 their clients. Please give me the same careful attention that
15 you gave at trial as I instruct you on the law.

16 It's your duty to accept these instructions and
17 apply them to the facts as you determine those facts. Don't
18 single out any one instruction alone as stating the law. You
19 have to consider my instructions as a whole when you go to
20 deliberate in the jury room.

21 On these legal matters, you have to take the law as
22 I give it to you, regardless of any opinion that you may have
23 as to what the law is, or what you think it should be. It
24 would violate your sworn duty to base a verdict on any view of
25 the law, other than that which I'm about to give you.

JURY CHARGE

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1 If any attorney has stated a legal principle during
2 their arguments to you that's any different from what I tell
3 you during these instructions, you have to follow my
4 instructions, not what the attorney said.

5 Now as members of the jury, you are the sole and
6 exclusive judges of the facts. You could be wearing black
7 robes just like this for the job that you're about to
8 undertake.

9 You determine the credibility of the witnesses and
10 resolve any conflicts that there may be in the testimony. You
11 draw whatever reasonable inferences you decide to draw from
12 the facts as you have determined them, and you determine the
13 weight of the evidence.

14 In carrying out your duty, remember that you took an
15 oath to render judgment impartially and fairly, without
16 prejudice or sympathy, and without fear, solely based on the
17 evidence in the case and the applicable law. I know that
18 you're going to do that and reach a just and true verdict.

19 Now, as I told you at the outset of the case, I have
20 no opinion on the verdict that you should render. If I made
21 any kind of facial expression, or asked a question, or made a
22 particular ruling that you think indicated that I have some
23 view as to how you ought to resolve any issue that you have to
24 resolve, you should disregard it because I wasn't trying to do
25 that.

1 Similarly, you should not concern yourselves with,
2 or speculate about, the contents of any discussion that I
3 might have had with the lawyers, either while you were out of
4 the courtroom or over here at sidebar.

5 In reaching your verdict, remember that all parties
6 stand equal before a jury in the courts of the United States.
7 The fact that the Government is a party, and that the
8 prosecution is brought in the name of the United States,
9 doesn't entitle the Government or its witnesses to any greater
10 or lesser consideration than that accorded to the defendant.
11 The parties, the United States Government, and the defendant,
12 are all equal before this Court and they're entitled to equal
13 consideration.

14 Now your verdict has to be based solely on the
15 evidence, or lack of evidence, developed during the trial.
16 You cannot be swayed by sympathy for any of the parties, or
17 what the reaction of the parties, or the public to your
18 verdict might be. It would be equally improper for you to
19 allow any feelings you might have about the nature of the
20 crimes charged against the defendant to influence you in any
21 way.

22 You should not consider any personal feelings you
23 may have about the race, religion, national origin, gender or
24 age of any of the parties, or anyone participating in the
25 trial. Your verdict will be determined by the conclusion that

1 you reach, no matter who it helps or hurts.

2 You also can't bear any prejudice against any
3 attorney, or that attorney's client, because the attorney
4 objected to the admissibility of evidence, or asked for a
5 sidebar outside of your hearing, or asked me to make a ruling
6 on a point of law. If you formed reactions of any kind to the
7 lawyers in the case, whether favorable or unfavorable, whether
8 you approved or disapproved of their behavior's advocates,
9 those reactions should not enter into your deliberations. The
10 personalities and conduct of counsel in the courtroom are not
11 in any way in issue.

12 Now, I also want to tell you that Mr. Al Farekh's
13 defense counsel were appointed and compensated by the Court.
14 The reason I'm telling you this is to avoid any speculation on
15 your part as to the source of funds for the defense. The
16 source of payment for Mr. Al Farekh's lawyers should not
17 enter into your deliberations in any way.

18 In addition, you shouldn't concern yourself with the
19 possible punishment of the defendant if you decide to return a
20 verdict of guilty. The duty of imposing a sentence, if
21 there's a finding of guilt, rests exclusively with me and you
22 must not let it influence your deliberations or the verdict
23 that you reached.

24 Now let me turn now to the burden of proof by which
25 you have to judge this case. Although the defendant has been

1 charged in an indictment, the indictment is only an accusation
2 in a writing. It's entitled to no weight in your
3 determination of the facts.

4 The defendant has pleaded not guilty to the
5 indictment, and as a result, the burden is on the Government
6 to prove guilt beyond a reasonable doubt. That burden never
7 shifts to the defendant for the simple reason that the law
8 never imposes on a defendant in a criminal case, the burden or
9 duty of calling any witnesses, or producing any evidence, or
10 even cross-examining witnesses.

11 The law presumes the defendant is innocent of the
12 charges against him. I therefore instruct you that you have
13 to presume the defendant to be innocent throughout your
14 deliberations until such time, if ever, that you, as a jury,
15 are satisfied that the Government has proven the defendant
16 guilty beyond a reasonable doubt.

17 Now, this presumption of innocence alone is
18 sufficient to acquit the defendant, unless you as jurors are
19 unanimously convinced beyond a reasonable doubt of his guilt
20 after a careful and impartial consideration of all the
21 evidence in the case. This presumption of innocence was with
22 the defendant when the trial began, it remains with him even
23 now as I speak to you, and it will continue with the defendant
24 into your deliberations, unless and until you're convinced
25 that the Government has proven his guilt beyond a reasonable

1 doubt. If the Government fails to sustain that burden, then
2 you have to find him not guilty.

3 Now, you have heard me say more than a few times
4 that the Government has to prove the defendant guilty beyond a
5 reasonable doubt. And the question naturally is, Well, what
6 is a reasonable doubt? The words almost define them
7 themselves. It's a doubt based on reason and common sense.
8 It's a doubt that a reasonable person has after carefully
9 weighing all of the evidence. It's a doubt that would cause a
10 reasonable person to hesitate to act in a matter of importance
11 in their own personal life. A reasonable doubt can arise from
12 the evidence or from the lack of evidence.

13 Proof beyond a reasonable doubt, therefore, has to
14 be proof of such a convincing character that a reasonable
15 person would not hesitate to rely and act on it in the most
16 important of their own personal affairs. A reasonable doubt
17 is not an impulse or a whim. It's not a speculation or
18 suspicion. It's not an excuse to avoid the performance of an
19 unpleasant duty, and it is not sympathy.

20 As I told you, in a criminal case, the burden is at
21 all times on the Government to prove guilt beyond a reasonable
22 doubt. Now the law does not require that the Government prove
23 guilt beyond all possible doubt. Proof beyond a reasonable
24 doubt is sufficient to convict. But it is the Government's
25 burden to prove each of the elements of the crimes charged,

1 which I'm going to explain to you, beyond a reasonable doubt.

2 If after a fair and impartial consideration of all
3 the evidence, you have a reasonable doubt, then it's your duty
4 to acquit the defendant. On the other hand, if after fair and
5 impartial consideration of all the evidence you're satisfied
6 of his guilt beyond a reasonable doubt, then you should vote
7 to convict.

8 Now let me talk to you about the evidence in this
9 case.

10 First of all, in determining the facts, it's your
11 own recollection of the evidence that controls. The evidence
12 on which you have to decide the case came in in three forms:

13 First, the sworn testimony of witnesses, both on
14 direct and cross-examination.

15 Second, the exhibits that I received in evidence.
16 And again, you may consider only the exhibits that I said
17 "received" or I overruled an objection when the exhibit was
18 admitted into evidence. There were some that were not.

19 And third, the stipulations between the parties. As
20 I told you before, a stipulation is an agreement between the
21 parties that certain facts are true. And you have to regard
22 such agreed-on facts as true.

23 Let me remind you of certain things that are not
24 evidence that have to be disregarded by you in deciding what
25 the facts are.

1 Arguments, questions, objections, or statements by
2 the lawyers are not evidence. Anything I may have said or
3 done is not evidence. Anything you may have seen or heard
4 outside the courtroom, I know you all made efforts not to see
5 or hear anything outside the courtroom, but anything that you
6 did see or hear is not evidence. In addition, when I
7 sustained an objection or ordered that an answer be stricken,
8 you have to disregard that answer in its entirety.

9 Now the Government presented some exhibits in the
10 form of charts or summaries. Those charts were shown to you
11 to make other evidence more meaningful and to aid you in
12 considering the evidence. They're no better than the
13 testimony or the documents on which they are based. And they
14 are not themselves independent evidence. Therefore, you're to
15 give no greater consideration to these charts or summaries,
16 than you would to the evidence on which they are based.

17 It's for you to decide whether any charts or
18 summaries correctly presented the information contained in the
19 testimony, and in the exhibits on which they're based. You're
20 entitled to consider the charts or summaries if you find they
21 are of assistance to you in analyzing and understanding the
22 evidence.

23 Remember, that if you decided to take notes during
24 the trial, the notes should only be used by you as memory
25 aids. You should not give your notes greater weight than your

1 independent recollection of the evidence. If you look at your
2 notes and you go, that's not what I remember him having said,
3 it's what you remember, it's not what's in your notes.

4 Now there are two types of evidence that you may
5 properly use in deciding whether the defendant is guilty or
6 not guilty. One type of evidence is called direct evidence.
7 Direct evidence is where a witness testifies to what is known
8 to that witness by virtue of the witness' senses; what the
9 witness saw, heard, or observed.

10 The other type of evidence, circumstantial evidence,
11 is evidence that tends to prove a fact by proof of other
12 facts. Now there's a simple example of this distinction
13 between direct and circumstantial evidence that we always use.

14 Let's assume when you came in this morning you saw
15 it was raining outside. Well you have direct evidence that it
16 was raining. You saw the water coming down with your own
17 eyes. That's direct evidence. On the other hand, we're
18 sitting in here with no windows. You don't know what's going
19 on outside. But if someone walks in here carrying a dripping
20 wet umbrella and wearing a dripping wet raincoat, you could
21 conclude that it's raining outside. By the same token, if
22 people are coming in with no raincoats and no umbrellas and
23 everything is dry, you could conclude that it's not raining
24 outside.

25 That's really all there is to it. It's entirely

1 permissible for you to conclude that a fact or set of
2 circumstances exists, based on an absence of evidence. You
3 infer on the basis of reason, experience and common sense from
4 an established fact, the wet raincoat and umbrella, or the
5 lack of an established fact, the lack of a wet raincoat or
6 umbrella, the existence or nonexistence of some other fact;
7 that is, whether it's raining outside or not.

8 The law doesn't make any distinction between direct
9 and circumstantial evidence. Rather, it simply requires that
10 before convicting the defendant, you must be satisfied of the
11 defendant's guilt beyond a reasonable doubt based on all of
12 the evidence in the case.

13 Now during the course of trial, you heard videotaped
14 foreign and English language recordings and you saw documents
15 that contained foreign writings. At times you heard from the
16 recordings themselves, which had been translated for you, and
17 you also heard from other witnesses that recounted some
18 portion of the documents that were presented in foreign
19 languages. For that reason, we had to get translations of
20 those documents into English.

21 The translations of those portions of the documents
22 and recordings embody the testimony of interpreters. As such,
23 those portions of the material reflecting the foreign language
24 to English translation have been admitted into evidence. You
25 have to evaluate translators and interpreters as you do any

1 other witness, and you may accept or reject the testimony of
2 any interpreter or translator. You may also accept or reject
3 the accuracy of the transcript or the translation itself. If
4 there's any discrepancy between a video that you saw in
5 evidence and any transcript or translation that you saw in
6 written form, you should rely on what you heard as the best
7 evidence of the original speech.

8 Now, one more item on videotapes. You saw the
9 videotaped testimony of a witness that was taken by deposition
10 in another country. As I think I mentioned to you at the
11 time, but I'll emphasize it here, that testimony has to be
12 evaluated by you in exactly the same way as if the witness had
13 appeared in this courtroom and testified in person from the
14 witness stand. You can't treat that testimony any differently
15 solely because of the form in which it was presented to you.

16 Now, several times already you've heard me use the
17 term "inference," and in the lawyer's arguments they asked you
18 to infer on the basis of your reason, experience and common
19 sense, from one or more established facts, the existence or
20 nonexistence, of some other fact. It's for you and you alone
21 to decide what inferences you want to draw.

22 An inference is not a suspicion or a guess. It's a
23 reasoned, logical decision to conclude that a fact exists on
24 the basis of another fact that you know exists. It's a
25 deduction or conclusion that you are permitted, but not

1 required, to draw from the facts that have been proven by
2 direct or circumstantial evidence. You are not to engage in
3 speculation based on matters that are not in evidence.

4 Now, although the Government bears the burden of
5 proof beyond a reasonable doubt, and although a reasonable
6 doubt can arise from lack of evidence, there is no
7 requirements, no legal requirement, for the Government to use
8 any specific investigative technique to prove its case. Law
9 enforcement techniques are not your concern. Your concern is
10 to determine whether or not, based on all the evidence in the
11 case, the Government has proven that the defendant is guilty
12 beyond a reasonable doubt as to each charge made against him.

13 In addition, the evidence before you was properly
14 admitted and you should not concern yourself with the
15 methodology used to obtain that evidence. Everything I let
16 into evidence was properly let into evidence and you need not
17 worry about that.

18 You may not draw any inference, favorable or
19 unfavorable, towards either the Government or the defendant on
20 trial from the fact that other persons were not charged as
21 defendants in the indictment. You should draw no inference
22 from the fact that any other person is not present at this
23 trial. And you should not speculate as to the reasons why
24 these individuals are not on trial before you. Your concern
25 is solely the defendant who is on trial before you.

1 Now, I'm going to give you a copy of these
2 instructions. The instructions quote from the indictment at
3 various places. And when you read those quotes, you'll see
4 that there's references to things happening on or about, or
5 between certain dates. The proof does not need to establish
6 with certainty the exact date of the alleged offense. And the
7 Government doesn't have to prove that the defendant committed
8 the acts that are charged throughout the entire period.
9 Rather, the conduct during any part of the charged time frame
10 is sufficient.

11 Now let me talk to you about witness credibility.
12 You had the opportunity to observe all the witnesses. It's
13 now your job to decide how believable each witness was in
14 their testimony. As jurors, you are the sole judges of the
15 credibility of each witness and the importance of their
16 testimony.

17 As I'm sure it's clear to you by now, you're being
18 called upon to resolve factual discrepancies. You're going to
19 have to decide where the truth lies, and an important part of
20 that decision will involve making judgments about the
21 testimony of witnesses that you listened to and saw. In
22 making those judgments, you should carefully scrutinize all
23 the testimony of each witness, the circumstances under which
24 each witness testified, and any other matter in evidence that
25 may help you decide the truth and the importance of each

1 witness' testimony.

2 Your decision whether or not to believe a witness
3 may depend on how the witness impressed you. Was the witness
4 candid and frank? Or did it seem as if the witness was hiding
5 something, being evasive or suspect in some way? How did the
6 way the witness testify on direct examination compare with the
7 responses of the witness on cross-examination? Was the
8 witness' testimony consistent or inconsistent? Did it appear
9 that the witness knew what the witness was talking about? Did
10 the witness strike you as someone who was trying to report
11 that witness' knowledge accurately?

12 How much you choose to believe a witness may also be
13 influenced by the witness' bias.

14 Does the witness have a relationship with the
15 Government or the defendant that may affect how the witness
16 testified? Does the witness have some incentive, loyalty or
17 motive that might cause the witness to shade the truth? Or
18 does the witness have some bias, prejudice or hostility that
19 may have caused the witness, consciously or not, to give you
20 something other than a completely accurate account of the
21 facts?

22 Evidence that a witness may be bias towards one of
23 the parties requires you to view that witness' testimony with
24 caution, to weigh it with great care, and subject it to close
25 scrutiny.

1 How much you believe a witness may also be
2 influenced by any interest that the witness may have in the
3 outcome of the case. If a witness may benefit in some way
4 from the outcome of the case, that interest may create a
5 motive to testify falsely to advance that witness' own
6 interest, whether those interests are personal or
7 professional.

8 This is not to suggest that every witness who has an
9 interest in the outcome of the case is going to testify
10 falsely. It's for you to decide to what extent, if at all,
11 the witness' interest has affected or colored that witness'
12 testimony.

13 Even if you think a particular witness was not
14 biased, you should consider whether the witness had an
15 opportunity to observe the facts that the witness testified
16 about, as well as the witness' ability to communicate
17 effectively. Ask yourselves whether a witness' recollection
18 of the facts stands up in light of all the other evidence.

19 In other words, what you have to try to do in
20 deciding credibility, is to size a person up in light of that
21 person's demeanor, the explanations given, and all the other
22 evidence in the case, just as you would in any important
23 matter where you're trying to decide if a person is truthful,
24 straighted forward, and has an accurate recollection. You
25 need to be guided by your common sense, your good judgment,

1 and your experience.

2 Now, you may have heard evidence that a witness made
3 a statement on an earlier occasion that the attorney argues is
4 inconsistent with the testimony of the witness that you heard
5 at trial. If you find that a witness made an earlier
6 statement that conflicts with or contradicts another statement
7 the witness made, you may consider that fact in deciding how
8 much of the trial testimony, if any, to believe. In making
9 that determination, you may consider whether the witness
10 purposefully made a false statement, or whether it was an
11 innocent mistake; whether the inconsistency concerns an
12 important fact, or whether it had to do with a small detail;
13 whether the witness had an explanation for any inconsistency;
14 and whether that explanation appeals to your common sense.

15 Now, the fact that the Government called more
16 witnesses and introduced more evidence does not mean that you
17 should find the facts in favor of the side calling more
18 witnesses. It's not a numbers game.

19 By the same token, you don't have to accept the
20 testimony of any witness, even if that witness was not
21 contradicted or impeached, if you find that the witness wasn't
22 credible. You do have to decide which witnesses to believe
23 and which facts are true. To do this, you have to look at all
24 of the evidence, drawing on your own common sense and personal
25 experience.

1 Now the law doesn't require the Government to
2 produce all available evidence, or call as witnesses all
3 persons involved in the case who may have been present at any
4 relevant time or place, or who may appear to have some
5 knowledge of a matter at issue in the trial. Nor does the law
6 require any party to produce as exhibits all papers and
7 objects mentioned during the course of the trial. You're
8 always entitled, however, to consider any lack of evidence in
9 determining whether the Government has met its burden of proof
10 beyond a reasonable doubt.

11 If you were to find that any witness has willfully
12 testified falsely as to any material fact; that is, as to an
13 important matter, then the law permits you to disregard the
14 entire testimony of that witness based on the principle that
15 somebody who testifies falsely about one material fact is
16 likely to testify falsely about everything. However, you are
17 not required to consider such a witness as totally
18 unbelievable. You can accept as so much of the witness'
19 testimony as you deem true and disregard what you feel is
20 false.

21 By the processes that I've just described to you,
22 you as the sole judges of the facts, are going to decide which
23 witnesses to believe, what portion of their testimony you will
24 accept, and what weight you're going to give to it.

25 Now you also heard testimony from current law

1 enforcement and military witnesses. The testimony of these
2 witnesses should be evaluated in the same manner as the
3 testimony of any other witness. The fact that the witness is
4 or was a law enforcement agent or member of the armed forces,
5 doesn't mean that the witness' testimony is entitled to any
6 greater weight; but by the same token, a law enforcement or
7 military witness' testimony is not entitled to less
8 consideration just because the witness is or was a Government
9 employee.

10 You should consider the testimony of Government
11 employees just as you would consider any other evidence in the
12 case and evaluate credibility just like you would that of any
13 other witness. After reviewing all the evidence, you'll
14 decide whether to accept the testimony of Government employee
15 witnesses and what weight, if any, that testimony deserves.

16 Now there was some testimony at the trial that the
17 attorneys for the Government interviewed witnesses when
18 preparing for trial. You should not draw any inference,
19 favorable or unfavorable, from that testimony. You need to
20 understand that attorneys are entitled to and regularly do
21 prepare their case as thoroughly as possible. And in the
22 discharge of that responsibility, that properly includes
23 interviewing witnesses before trial and is necessary
24 throughout the course of the trial.

25 You also heard a witness who testified that he was

1 involved in planning and carrying out certain crimes. That
2 witness testified pursuant to a cooperation agreement which
3 provides that in exchange for agreeing to cooperate and
4 testify, the witness' cooperation would be brought to the
5 attention of the sentencing judge.

6 Now, Section 5K1.1 of the United States Sentencing
7 Guidelines sets forth a framework for judges to use to
8 determine the sentences of cooperating witnesses.

9 Section 5K1.1 provides that the Government can make a motion,
10 which can be in the form of a letter, stating that a defendant
11 has provided substantial assistance in the investigation or
12 prosecution of another person. That witness' sentencing judge
13 may then consider the motion in deciding what sentence to
14 impose. The judge may, but isn't required to, impose a
15 sentence below the minimum sentence that would otherwise be
16 required by law.

17 Two factors to keep in mind in this regard are,
18 first, that only the Government can make such motions, and the
19 Government can't be forced to do so, provided it has acted in
20 good faith; and second, the sentencing judge has complete
21 discretion as to whether or not to grant the motion to take
22 the cooperation into account in determining the sentence.
23 Thus, regardless of whether or not a 5K1.1 motion is made, the
24 final determination as to the cooperating witness' sentence
25 rests with the court and not with the Government.

1 The testimony of cooperating witnesses is of such a
2 nature that it should be scrutinized by you with great care
3 and viewed with particular caution when you decide how much
4 weight that testimony should be given and whether or not you
5 want to believe all or part of it. I gave you some
6 considerations generally on credibility. I'm not going to
7 repeat them here. Just let me say a few things you may want
8 to consider during your deliberations on the subject of
9 cooperating witnesses.

10 Ask yourselves whether this witness would benefit
11 more by lying or by telling the truth. Was the cooperating
12 witness' testimony made up in any way because he believed or
13 hoped that he would receive favorable treatment by testifying
14 falsely? Or did he believe that his interests would be best
15 served by testifying truthfully?

16 If you believe that a cooperating witness was
17 motivated by hopes of personal gain, was that motivation one
18 that would cause him to lie? Or was it one that would cause
19 him to tell the truth? Did this motivation color his
20 testimony?

21 In sum, you need to look at all of the evidence in
22 deciding what credence and what weight, if any, you want to
23 give the testimony of the cooperating witness.

24 Now you also heard testimony about an out-of-court
25 photographic identification. Identification testimony is an

1 expression of belief or impression by the witness who makes
2 the identification. You should consider whether, or to what
3 extent, the witness had the ability and the opportunity to
4 observe the person at the time of the events, and to make a
5 reliable out-of-court photographic identification later.

6 You should also consider the circumstances under
7 which the witness later made that out-of-court photographic
8 identification. Remember, the Government always has the
9 burden of proving beyond a reasonable doubt that the defendant
10 was the person who committed the crime charged.

11 Now, as you know, the defendant did not testify in
12 this case. Under our Constitution, he has no obligation to
13 testify or to present any other evidence, that's because it's
14 the Government's burden to prove his guilt beyond a reasonable
15 doubt. You may not attach any significance to the fact that
16 the defendant did not testify. Nor may you draw any adverse
17 inference against the defendant because he did not take the
18 witness stand. In other words, in your deliberations in the
19 jury room, you may not consider this decision against the
20 defendant in any way.

21 Now, you also heard witnesses testify as experts
22 about matters that are at issue in this case. A witness may
23 be permitted to testify to an opinion. Witnesses usually
24 can't testify as to opinions. But an expert may be able to,
25 if he has special skill, experience, knowledge, or training.

JURY CHARGE

1602

1 That testimony is presented to you on the theory that someone
2 who is experienced and knowledgeable in a particular field can
3 assist you in understanding the evidence or in reaching an
4 independent decision on the facts.

5 In weighing that kind of opinion testimony, you may
6 consider the witness' qualifications, the witness' opinions,
7 the reasons for testifying, as well as all the other
8 considerations that ordinarily apply when you're deciding
9 whether or not to believe a witness' testimony and what
10 weight, if any, you find the testimony deserves. You should
11 not accept opinion testimony merely because I allowed the
12 witness to testify concerning his opinion. Nor should you
13 substitute it for your own reason, judgment and common sense.
14 The determination of the facts in this case rests solely with
15 you.

16 Now, as you heard throughout the trial, the acts
17 alleged to have taken place occurred outside the United
18 States. Nevertheless, American law provides that the
19 defendant may be prosecuted here in the Eastern District of
20 New York if you find, by preponderance of the evidence, that
21 the defendant was first brought into the United States in
22 connection with these charges within the Eastern District of
23 New York. It does not matter if the defendant was brought to
24 the United States involuntarily or in the custody of law
25 enforcement officers. All that matters is was he brought into

1 this district.

2 To prove something by a preponderance of the
3 evidence means to prove that it's more likely true than not
4 true. It's determined by considering all the evidence in
5 deciding which evidence is more convincing. If the evidence
6 on this question of venue appears to be equally balanced, or
7 you can't say on which side it weighs heavier, then you must
8 resolve this question against the Government.

9 Proof by a preponderance of the evidence is a lower
10 standard than proof beyond a reasonable doubt. This is the
11 only time in the case; that is, in determining whether a
12 defendant was brought into the United States in connection
13 with these charges to this district that you can use the
14 preponderance of the evidence standard to find that a legal
15 element has been established. Everything else has to be found
16 beyond a reasonable doubt.

17 All right. That completes the first section, ladies
18 and gentlemen. I'm going to show you these instructions on
19 the overhead screen just to help you follow along, they're a
20 bit complex, please listen to me nevertheless and remember you
21 will have a set of these instructions in the jury room.

22 The defendant is formally charged in the indictment.
23 The indictment and each count refers to the defendant by his
24 complete name, Muhanad Mahmoud Al Farekh, and alleged
25 aliases: Abdullah al-Shami and Abdallah al-Shami.

1 As I instructed you, the indictment is a charge or
2 accusation. It is not evidence. The indictment in this case
3 contains nine counts or charges on which are you being called
4 to render a verdict. Whether you find the defendant guilty or
5 not guilty as to one count, however, should not affect your
6 verdict as to any other counts. You have to consider each
7 count separately and return a separate verdict of guilty or
8 not guilty on each count.

9 Now I'm going to go over with you now the specific
10 elements of each crime, each of which the Government has to
11 prove beyond a reasonable doubt to warrant a finding of guilt
12 here.

13 Every one of the charges implicates the concepts of
14 knowledge and intent. As a general rule, the law holds
15 individuals accountable only for conduct in which they
16 intentionally engage.

17 A person acts knowingly if he acts intentionally and
18 voluntarily, and not because of ignorance, mistake, accident,
19 or carelessness. Whether a defendant acted knowingly may be
20 proven by his or her conduct and by all the facts and
21 circumstances surrounding the case.

22 A person acts intentionally when he acts
23 deliberately and purposefully. That is, the defendant's acts
24 must have been the product of his conscious objective rather
25 than the product of a mistake or accident. It is sufficient

1 that a defendant intentionally engages in conduct in which the
2 law forbids. The Government isn't required to prove that a
3 defendant is aware of the law that actually forbids his
4 conduct.

5 Now let me tell about the law of conspiracy. That
6 covers Counts Two, Three, Four, Five, Six and Eight of the
7 indictment.

8 A conspiracy is kind of a criminal partnership; a
9 combination or agreement of two or more people to join
10 together to accomplish some unlawful purpose. The crime of
11 conspiracy to violate a federal law is an independent offense.
12 It's separate and distinct from the actual violation of any
13 specific federal laws. Conduct that violates specific laws
14 and that is the object of the conspiracy, we refer to that as
15 the "substantive crime" or the "substantive offense." You may
16 find the defendant guilty of the crime of conspiracy to commit
17 an offense against the United States even if you find the
18 defendant not guilty of the substantive offense itself.

19 Before you may convict the defendant of conspiracy,
20 the following two essential elements have to be established
21 beyond a reasonable doubt:

22 First, that the conspiracy existed; and

23 Second, that the defendant knowingly and
24 intentionally became a member of that conspiracy.

25 Let me go over each of those elements.

1 First as to whether a conspiracy existed. A
2 conspiracy, as I just said, is an agreement between two or
3 more persons to accomplish some unlawful purpose. The gist or
4 essence of the conspiracy is the unlawful agreement to violate
5 the law, whether or not the participants were successful in
6 carrying out the objection of the conspiracy, it's the
7 agreement itself.

8 A conspiracy is sometimes referred to as a
9 "partnership in criminal purposes," where each member of the
10 conspiracy becomes the agent of every other member of the
11 conspiracy. To establish the existence of a conspiracy, the
12 Government isn't required to prove that two or more persons
13 entered into a solemn contract, orally or in writing, stating
14 that they have formed a conspiracy to violate the law. The
15 Government need only show that two or more persons explicitly
16 or implicitly came to an understanding to achieve the
17 specified unlawful object.

18 Of course, you could find that the existence of an
19 agreement between two or more persons to commit a crime has
20 been established by direct proof. But since a conspiracy is,
21 by its very nature, characterized by secrecy, direct proof is
22 often not available. Therefore, you may infer the existence
23 of a conspiracy from the circumstances of the case and the
24 conduct of the parties involved. In the context of conspiracy
25 cases, actions can speak louder than words.

1 In determining whether or not the Government has
2 proven the existence of a conspiracy beyond a reasonable
3 doubt, you may consider the actions and statements of all of
4 those whom you find to be participants. We refer to those
5 people as the coconspirators. Ask yourselves whether the
6 coconspirators were acting together to accomplish an unlawful
7 purpose. If they were, the first element is satisfied. If,
8 however, the coconspirators were acting together for some
9 purpose unrelated to the substantive crime, the object of the
10 conspiracy, then the Government would not have satisfied that
11 first element.

12 Again, it's not necessary for the Government to
13 prove that the ultimate objectives of a conspiracy were, in
14 fact, successfully accomplished, it's enough that the
15 Government has proved that to two or more persons, one of whom
16 is the defendant, in any way expressly or impliedly came to a
17 common understanding to violate the law.

18 If when you consider all the evidence, direct and
19 circumstantial, you're satisfied beyond a reasonable doubt
20 that the minds of at least two alleged coconspirators met and
21 they agreed to work together to accomplish the object of the
22 conspiracy charged in the indictment, then the first element,
23 the existence of the conspiracy, has been established.

24 Now the second element that the Government has to
25 prove beyond a reasonable doubt is that the defendant

1 knowingly and willfully became a member of a conspiracy; that
2 he joined the conspiracy.

3 An individual may become a member of a conspiracy
4 without full knowledge of all of the details of the
5 conspiracy. However, merely being present at a place where
6 criminal conduct is happening or mere association with one or
7 more members of the conspiracy does not automatically make a
8 person a member of the conspiracy to commit a crime. So a
9 person who has no knowledge of a conspiracy, but happens to
10 act in a way that furthers some objective or purpose of the
11 conspiracy, doesn't automatically become a member of the
12 conspiracy. Mere association by a defendant with a
13 conspirator does not make the defendant a member of the
14 conspiracy, even if he knows of the conspiracy. In other
15 words, knowledge isn't enough. The law require that the
16 defendant himself intentionally have participated in the
17 conspiracy with knowledge of at least some of the purposes or
18 objectives of the conspiracy, and with the purpose of helping
19 to achieve at least one of the conspiracy's unlawful purposes.

20 The extent of a defendant's participation in a
21 conspiracy doesn't bear on the issue of guilt. Some
22 conspirators might play major roles. Others may play minor
23 roles. An equal role is not what the law requires. In fact,
24 even a single act may be enough to find the defendant guilty
25 of conspiracy if that act was done knowingly and

1 intentionally. Moreover, a defendant doesn't need to know the
2 identity of each and every member of the conspiracy, and he
3 doesn't need to know everything the conspiracy intends to do.
4 A defendant also doesn't have to be a member of the conspiracy
5 for the entire time of the conspiracy's existence.

6 The key inquiry is whether the defendant joined the
7 charged conspiracy with an awareness of at least some of the
8 basic aims and purposes of the unlawful agreement and with the
9 intent to help it succeed.

10 I'm now going to turn to the specific counts of the
11 indictment. I emphasize again that you have to consider each
12 count separately. You're going to be asked to render separate
13 verdicts as to each count.

14 Now I'm going to go through these counts a little
15 bit out of order, because I grouped them in a way that I think
16 will make it easier to understand. You can do them out of
17 order. You can do them together. You can select whatever
18 order you believe makes the most sense.

19 Let me start with Count Two first.

20 Count Two of the indictment charges the defendant
21 with conspiracy to commit murder of United States nationals.
22 It alleges that the defendant, together with others, undertook
23 the following overt acts to further the conspiracy: In or
24 about January 2009, he assisted in the preparation of a
25 vehicle-borne improvised explosive device for use in an attack

1 on a United States military base in Afghanistan. On or about
2 January 19th, 2009, a coconspirator detonated a vehicle-borne
3 improvised explosive device during an attack on a United
4 States military base in Afghanistan. And, on or about
5 January 19th, 2009, a second coconspirator drove a truck
6 containing a second vehicle-borne improvised explosive device
7 to a United States military base in Afghanistan but didn't
8 detonate that explosive device.

9 The relevant statute, the law, to Count Two is
10 Section 2332(b) of Title 18 of the United States Code, and
11 that statute says the following:

12 Whoever outside the United States engages in a
13 conspiracy to kill a national of the United States, in the
14 case of a conspiracy by two or more persons to commit a
15 killing that is a murder, and if one or more such persons do
16 any overt act to effect the object of the conspiracy, then
17 that person's guilty of a crime.

18 In order to prove that the defendant committed the
19 crime charged in Count Two, the Government has to prove each
20 of the following elements beyond a reasonable doubt:

21 First, that a conspiracy to murder one or more
22 United States nationals existed;

23 Second, that the defendant knowingly and
24 intentionally became a member of the conspiracy;

25 Third, that an overt act occurred; that is, someone

1 within the conspiracy, the defendant or some other
2 coconspirator, took some action that advanced the goals of the
3 conspiracy; and

4 Fourth, that the defendant engaged in this
5 conspiracy while he was outside of the United States.

6 Now as to the first and second elements, I've
7 already explained what it means to commit an offense, to have
8 a conspiracy and to knowingly and intentionally become a
9 member. Those same instructions apply here.

10 The third element is that an overt act occurred;
11 that is, someone within the conspiracy took some action that
12 advanced the goals of the conspiracy. This means that the
13 Government has to prove beyond a reasonable doubt that at
14 least one of the conspirators, not necessarily the defendant,
15 committed at least one overt act in furtherance of the
16 conspiracy. In other words, there must have been something
17 more than an agreement. Some overt step or action must have
18 been taken by the defendant or one of the conspirators in
19 furtherance of the conspiracy. The overt act element, to put
20 it another way, is a requirement that the agreement went
21 beyond the mere talking and agreement stage. Someone did
22 something to further it.

23 With respect to this overt act requirement, the
24 Government may satisfy it by proving one of the overt acts
25 alleged in the indictment, but it's not required to prove any

1 of those particular overt acts. It's enough that the
2 Government proved that at least one overt act was committed in
3 furtherance of the conspiracy, whether or not that particular
4 act is alleged in the indictment.

5 Similarly, it's not necessary for the Government to
6 prove that each member of the conspiracy committed or
7 participated in the overt act. It is sufficient if you find
8 at least one overt act was, in fact, performed by at least one
9 coconspirator, whether the defendant or another coconspirator,
10 to further the conspiracy within the time frame of the
11 conspiracy.

12 Remember, as I've told you a couple minutes ago, the
13 act of any one of the members of a conspiracy done in
14 furtherance of the conspiracy becomes under the law the act of
15 all the other members of the conspiracy. To be a member of
16 the conspiracy, therefore, it's not necessary for the
17 defendant to have committed the overt act.

18 Now, the fourth and final element is that the
19 defendant engaged in the charged conspiracy while outside the
20 United States. Thus, you must find that the defendant's
21 illegal agreement to kill United States nationals existed
22 outside of the United States and that the defendant knowingly
23 and willfully engaged in that conspiracy while outside the
24 United States.

25 For you to determine whether the Government has

1 proved the charged conspiracy, I need to explain the meaning
2 of two phrases: "United States national" and "murder."

3 The "United States national," that just means a
4 citizen of the United States.

5 "Murder" is the unlawful killing of a human being
6 with what is called "malice aforethought." To act with malice
7 aforethought means to act willfully with the intent to kill
8 another person. "Willfully" means to act with knowledge that
9 one's conduct is unlawful and with the intent to do something
10 that the law forbids; that is to say with the bad purpose
11 either to disobey or disregard the law. The defendant's
12 conduct isn't willful if it's due to negligence, inadvertence,
13 or mistake. However, the Government doesn't need to prove
14 spite, malevolence, hatred, or ill will.

15 I remind you that this count does not allege that
16 the murder of a United States national was actually committed,
17 and the Government doesn't need to prove that the murder of a
18 United States national was actually committed or attempted.
19 Rather, Count Two charges the defendant with a conspiracy;
20 that is, conspiring to murder United States nationals.

21 Let's go on to Count Three.

22 Count Three is conspiracy to use a weapon of mass
23 destruction. It alleges in relevant part that in or about
24 January 2009, within the extraterritorial jurisdiction of the
25 United States, the defendant, without lawful authority, did

1 knowingly and intentionally conspire to use a weapon of mass
2 destruction, here, an explosive device, against one or more
3 nationals of the United States, here, U.S. military personnel
4 in Afghanistan, or property that is owned, leased, or used by
5 the United States, here, a U.S. military base in Afghanistan.

6 Now, the statute from the which Count Three comes is
7 Section 2332a(a) (1) and (3) of Title 18 of the U.S. Code. It
8 says that:

9 A person who, without lawful authority, uses,
10 threatens, or attempts or conspires to use a weapon of mass
11 destruction against a national of the United States -- again,
12 that's a citizen -- while such national is outside the United
13 States, or against any property that is owned, leased, or used
14 by the United States, whether the property is within or
15 outside of the United States is guilty of a crime.

16 Now, to prove that the defendant committed the crime
17 charged in Count Three, the Government has to prove each of
18 the following elements beyond a reasonable doubt:

19 First, that there was a conspiracy to use a weapon
20 of mass destruction against a national of the United States
21 while that national was outside the United States, or against
22 property that is owned, leased, or used by the United States,
23 wherever that property is located.

24 Second, the Government has to prove beyond a
25 reasonable doubt that the defendant knowingly and

1 intentionally became a member of the conspiracy.

2 Now I've already explained what it means to conspire
3 to commit an offense. I've told you about what a conspiracy
4 is. Those same instructions apply here.

5 A "weapon of mass destruction" means a destructive
6 device, including any explosive or incendiary bomb or similar
7 device. As I told you earlier, "United States national" or
8 "national of the United States" is simply a U.S. citizen. The
9 term "outside of the United States" obviously includes
10 Afghanistan.

11 Unlike the conspiracy charge in Count Two, there is
12 no overt act requirement for Count Three. And you'll notice
13 that some conspiracies require an overt act. Some do not.
14 Count Two does. Count Three does not. This means that you
15 can find the elements of Count Three satisfied without finding
16 that an overt act was committed.

17 You don't need to find that the object of the
18 conspiracy in this Count Three was to use a weapon of mass
19 destruction against both a person and property. You just need
20 to find beyond a reasonable doubt that the object of the
21 conspiracy in Count Three was to use a weapon of mass
22 destruction against either a person or property. However, you
23 all have to be unanimous as to which one it is or if it's
24 both. You all have to agree on that.

25 Now, Count Four charges the defendant with

1 conspiracy to use a weapon of mass destruction by a U.S.
2 national. Specifically, Count Four alleges that in or about
3 January 2009, within the extraterritorial jurisdiction of the
4 United States, the defendant, as a national of the United
5 States, without lawful authority, did knowingly and
6 intentionally conspire to use a weapon of mass destruction,
7 here, an explosive device, outside of the United States, again
8 to attack a U.S. military base in Afghanistan.

9 The statute from which this Count Four comes from is
10 Section 2332a(b) of Title 18. That statute states that:

11 Any national of the United States, who without
12 lawful authority, uses, or threatens, or attempts, or
13 conspires to use a weapon of mass destruction outside the
14 United States, is guilty of a crime.

15 To prove that the defendant committed the crime
16 charged in this Count Four, the Government has to prove each
17 of the following elements beyond a reasonable doubt:

18 First, that a conspiracy to use a weapon of mass
19 destruction outside the United States existed;

20 Second, that the defendant knowingly and
21 intentionally became a member of that conspiracy;

22 And third, that the defendant is a national of the
23 United States.

24 As to that first element, that a conspiracy to use a
25 weapon of mass destruction outside the United States existed,

1 the conspiracy does not require that the defendant have
2 intended the weapon to be used against any particular
3 interest, whether U.S. or foreign, as long as he knew that the
4 weapon would be used against some interest, and that the
5 interest was located outside the U.S.

6 Now I've already told you about conspiracy. Use
7 those same instructions on this charge.

8 I've already told you weapons of mass destruction
9 and national of the United States. Use those same definitions
10 here.

11 As with the conspiracy charge in Count Three, but
12 not Count Two, this Count Four has no overt act requirement.
13 Thus, you can find that the elements of Count Four are
14 satisfied without finding any overt act.

15 Count Five is conspiracy to bomb a government
16 facility. It charges that in or about January 2009, within
17 the extraterritorial jurisdiction of the United States, the
18 defendant, together with others, did knowingly and
19 intentionally conspire to unlawfully deliver, place,
20 discharge, or detonate one or more explosives and other lethal
21 devices in, into or against a U.S. military base in
22 Afghanistan, with the intent to cause death, serious bodily
23 injury, and extensive destruction of the facility, where such
24 destruction was likely to result in major economic loss.

25 The statute here is 2332f of Title 18. It states

1 that:

2 Whoever conspires to unlawfully deliver, place,
3 discharge, or detonate an explosive or other lethal device,
4 in, into or against a government facility is guilty of a
5 crime.

6 To find the defendant guilty of conspiracy to bomb a
7 U.S. government facility, you have to find that the Government
8 has proven each of the following elements beyond a reasonable
9 doubt:

10 First, that a conspiracy to deliver, place,
11 discharge, or detonate an explosive in, into, or against one
12 or more U.S. government facilities, specifically, a U.S.
13 forward operating base in Afghanistan existed;

14 Second, that the defendant knowingly and
15 intentionally became a member of that conspiracy;

16 And third, that there was federal jurisdiction over
17 the offense.

18 Again, as to the first and second elements, I've
19 explained to you what it means to have a conspiracy and to
20 knowingly join it. Those same instructions apply here.

21 As to the third element, there's federal
22 jurisdiction over an offense that occurred outside the United
23 States if:

24 The defendant is a national of the United States, a
25 U.S. citizen; or the intended victim or victims are nationals

1 of the United States; or the target of the offense was a
2 government facility of the United States, including a military
3 base.

4 You need to find only that one of these three facts
5 was proven beyond a reasonable doubt to find that there's
6 federal jurisdiction over the events. You don't need to find
7 all the three. However, you have to be unanimous as to which
8 one it is.

9 For you to determine whether the Government has
10 proven the charged conspiracy, I have to explain briefly what
11 it means to "bomb a Government facility" under this statute.
12 To prove this, the Government has to establish the following
13 elements beyond a reasonable doubt:

14 First, that the defendant unlawfully delivered,
15 placed, discharged, or detonated an explosive in, into, or
16 against a place of public use, or a state or government
17 facility;

18 And two, that the defendant had the intent to cause
19 death or serious bodily injury, or extensive destruction of
20 that place or facility, where the destruction would result, or
21 likely result, in major economic loss.

22 "Government facility" includes any permanent or
23 temporary facility that is used or occupied by U.S. Government
24 representatives. An "explosive" includes any explosive or
25 incendiary device, such as "dynamite" and all other forms of

1 high explosives, including a bomb, grenade, missile, similar
2 device, and any incendiary bomb or grenade, fire bomb, or
3 similar device.

4 The second element that the Government has to prove
5 beyond a reasonable doubt is that the defendant had the intent
6 to cause either death or serious bodily injury, or extensive
7 destruction of such place or facility, where such destruction
8 results in or is likely to result in major economic loss.

9 The Government needs to prove only one of these
10 objects; it doesn't have to prove both. However, you again
11 must all be unanimous as to which one or both it has proved.

12 I don't need to define the word "death" for you.
13 You know what that means. "Serious bodily injury" means
14 bodily injury that involves a substantial risk of death,
15 extreme physical pain, protracted and obvious disfigurement,
16 or protracted loss or impairment of the function of a bodily
17 member, organ or mental faculty.

18 With respect to the "intent to cause extensive
19 destruction" requirement, it's sufficient if the defendant's
20 intent was to significantly damage the government facility.
21 When determining whether the act resulted in, or was likely to
22 result in, major economic loss, you may consider the likely
23 physical damage to the government facility, as well as other
24 types of economic loss, including the monetary loss or other
25 adverse affects resulting from the interruption of the

1 facility's activities. You may also consider the adverse
2 effects on the economy and the government.

3 Count Five doesn't allege that a bombing of a
4 government facility was actually committed, and the Government
5 doesn't need to prove that a government facility was bombed or
6 even attempted to be bombed. Rather, Count Five, like Counts
7 Two, Three and Four, charges the defendant with conspiracy;
8 that is, conspiring and entering into and joining an agreement
9 to bomb a government facility.

10 Now let me go backwards in the indictment to Count
11 One.

12 Count One charges the defendant with the use of
13 explosives, attempted use of explosives, or aiding and
14 abetting the use of explosives. Specifically, Count One
15 alleges, in relevant part, that on or about January 19th,
16 2009, within the extraterritorial jurisdiction of the United
17 States, the defendant, together with others, did knowingly,
18 intentionally, and maliciously damage or destroy, or attempt
19 to damage or destroy, by means of fire and explosives,
20 buildings, vehicles, or other personal or real property, in
21 whole or in part, owned or possessed by, or leased to the
22 United States, here, the military base in Afghanistan, causing
23 personal injury or creating a substantial risk of injury.

24 The applicable statutes here's are
25 Sections 844(f) (1) and (f) (2) of Title 18, and they state:

1 Whoever maliciously damages or destroys, or attempts
2 to damage or destroy, by means of fire or an explosive, any
3 building, vehicle or other personal or real property, in whole
4 or in part, owned or possessed by, or leased to, the United
5 States is guilty of a crime.

6 The Government has charged the defendant with this
7 crime under several legal theories. One that is called
8 "primary liability," and then two others that are "alternative
9 theories of liability." The Government charged the defendant
10 in the alternative with using explosives, that's the primary
11 liability theory; attempting to use explosives, that's a
12 secondary liability theory; and aiding and abetting the use of
13 explosives, another secondary liability theory. These latter
14 two are called the "alternative theories." The Government
15 also has alleged a fourth theory, which is called
16 "coconspirator liability." I'm going to go through each one
17 of these.

18 First, to prove that the defendant violated
19 Count One by using explosives, the Government has to prove
20 each of the following elements beyond a reasonable doubt.

21 First, that the defendant, by means of fire or
22 explosive, damaged or destroyed property;

23 Second, that the property was, in whole or in part,
24 owned by, possessed by, or leased to, the United States;

25 And third, that the defendant acted maliciously.

1 The first element means that the Government must
2 prove beyond a reasonable doubt that the defendant, by means
3 of fire or explosive, damaged or destroyed property. I told
4 you what "explosive" means; use that definition here.

5 To find beyond a reasonable doubt that the property
6 in question was destroyed or damaged by an explosive, you
7 don't need to find that the explosion actually occurred, you
8 only need to find that the substance as used was such that
9 when ignited it may cause an explosion.

10 The term "explosion" is used in its customary and
11 ordinary sense; that is, an explosion is the rapid expansion
12 of gases caused by a rapid combustion of a material which may
13 cause a sharp noise.

14 If you find that the defendant damaged or destroyed
15 property, by means of fire or explosive, as I have defined
16 that term for you, the first element of the offense is
17 satisfied.

18 Now the second element that the Government has to
19 prove beyond a reasonable doubt is that the property that was
20 damaged or destroyed was federal property. Federal property
21 includes any building, vehicle, or other real or personal
22 property in whole or in part owned, possessed, or used by the
23 U.S. Government, or any of its departments or agencies, or any
24 institutional organization receiving federal financial
25 assistance.

1 The third element that the Government has to prove
2 beyond a reasonable doubt is that the defendant acted
3 maliciously, with malicious intent.

4 To act with malicious intent means to act either
5 intentionally or with willful disregard of the likelihood that
6 damage will result, and not by mistake or through
7 carelessness. To find the defendant guilty, you must also
8 find the defendant used the explosive with the intent to cause
9 damage or harm, or that he did so recklessly and without
10 regard to the likelihood that such damage or harm would
11 result.

12 Now, if you find that the Government did not prove
13 beyond a reasonable doubt that the defendant used explosives,
14 the Government has three other theories on which it could
15 still prevail. The first is the theory of "attempt." The
16 second is the theory of "aiding and abetting." The third is
17 "coconspirator liability."

18 If you find that the Government has not proven
19 beyond a reasonable doubt that the defendant used explosives,
20 then you should also consider whether the Government has met
21 its burden of proving defendant's guilt beyond a reasonable
22 doubt by considering the theories of attempt, aiding and
23 abetting, and coconspirator liability. I remind you that the
24 Government needs to prove only one of these alternatives for
25 you to find the defendant guilty on Count One. The Government

1 doesn't need to prove all of them. So let me go through each
2 one.

3 To find the defendant guilty of attempt, that is
4 attempted use of explosives, the Government must prove the
5 following two elements beyond a reasonable doubt:

6 First, that the defendant intended to commit the
7 crime of using explosives;

8 And second, that the defendant did some act that was
9 a substantial step in an effort to bring about or accomplish
10 the crime.

11 Merely intending to commit a specific crime, without
12 more, does not amount to an attempt. To convict the defendant
13 of an attempt, you must find beyond a reasonable doubt that
14 the defendant intended to commit the crime charged and that he
15 took action that was a substantial step towards the commission
16 of that crime.

17 Now, ladies and gentlemen, I know these instructions
18 are long, but I want to be sure everyone's following me,
19 everyone's still paying attention. Okay. That's good.

20 Now, in determining whether the defendant's actions
21 amounted to a substantial step, it is necessary to distinguish
22 between mere preparation on the one hand and the actual doing
23 of the criminal deed on the other. Mere preparation, which
24 may consist of planning the offense, or of devising,
25 obtaining, or arranging a means for its commission, is not an

1 attempt, although some preparations may amount to an attempt.
2 The acts of a person who intends to commit a crime will
3 constitute an attempt when the acts themselves clearly
4 indicate an attempt to commit a crime and the acts are a
5 substantial step in the course of conduct planned to end in
6 the commission of that crime. A defendant may be convicted of
7 an attempt even where significant steps necessary to carry out
8 the substantive crime are not completed.

9 Now, next theory. The defendant may also be found
10 guilty on Count One if you find beyond a reasonable doubt that
11 he aided and abetted the use of explosives. As I told you
12 before, aiding and abetting, like attempt, is an alternate
13 legal theory under which the Government can prove the
14 defendant guilty of the crime charged in this Count One. You
15 only need to consider this alternative if you find that the
16 Government did not prove beyond a reasonable doubt that the
17 defendant used explosives or attempted to use explosives.

18 The "aiding and abetting" statute provides that:

19 Whoever commits an offense against the U.S., or
20 aids, abets, counsels, commands, induces or procures its
21 commission is punishable as a principle; that is, as the one
22 who committed the crime.

23 Under the aiding abetting statute, it's not
24 necessary for the Government to show that the defendant
25 himself physically committed the crime charged in Count One to

1 meet its burden of proof. This is so because, under the law,
2 somebody who aids and abets somebody else to commit an offense
3 is just as guilty of that offense as if he committed it
4 himself.

5 Accordingly, you can find the defendant guilty of
6 the offense charged in Count One if you find beyond a
7 reasonable doubt that the Government has proven that another
8 person actually committed the offense with which the defendant
9 is charged, and that the defendant aided or abetted that
10 person in the commission of the offense.

11 To find the defendant guilty of aiding and abetting
12 a crime, you have to first find that some person did actually
13 commit the crime charged. So it's different in that way than
14 attempt. Obviously, no one can be convicted of aiding or
15 abetting the criminal acts of another if no crime was
16 committed by the other person in the first place. But if you
17 do find that a crime was committed, then you must consider
18 whether the defendant aided or abetted the commission of that
19 crime.

20 To aid or abet another person to commit a crime,
21 it's necessary that the defendant knowingly associate himself
22 in some way with the crime, and that he participate in the
23 crime by doing some act to help make the crime succeed. To
24 establish that the defendant knowingly associated himself with
25 the crime, the Government has to establish that the defendant

1 knew and intended that the crime charged in Count One be
2 committed.

3 To establish that the defendant participated in the
4 commission of the crime, the Government must prove that the
5 defendant engaged in some affirmative conduct or overt act for
6 the specific purpose of bringing about that crime.

7 The mere presence of the defendant where a crime is
8 being committed, even coupled with knowledge by the defendant
9 that a crime is being committed, or merely associating with
10 others who were committing a crime, is not sufficient to
11 establish aiding and abetting. One who has no knowledge that
12 a crime is being committed or is about to be committed but
13 inadvertently or accidentally does something that aids in the
14 commission of that crime, isn't an aider or abettor. An aider
15 and abettor must know that the crime is being committed and
16 act in a way which is intended to bring about the success of
17 the criminal venture.

18 To determine whether the defendant aided or abetted
19 the commission of the crime charged in Count One, or caused
20 the commission of that crime, ask yourself these questions:

21 First, did the defendant participate in the crime
22 charged as something he wanted and wished to bring about?

23 Second, did the defendant knowingly and willingly
24 associate himself with the criminal venture?

25 And third, did the defendant seek by his actions to

1 make the criminal ventures succeed?

2 If he did, then the defendant is an aider and
3 abettor and guilty of the offense. If, on the other hand, he
4 didn't, then he's not an aider and abettor and you must find
5 him not guilty on this aiding and abetting theory under Count
6 One.

7 (Continued on next page.)

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1 THE COURT: Now, let me keep going through the
2 alternatives.

3 If you do not find that the Government has proven
4 beyond a reasonable doubt each element of Count One as the to
5 defendant's personal participation in either using explosives,
6 attempting to use explosives, or aiding and abetting somebody
7 else in the use of explosives, then you must evaluate the
8 possible guilt on Count One on the basis of what is called
9 co-conspirator liability. If you find that the Government has
10 proven beyond a reasonable doubt that the defendant was a
11 participant in the conspiracy charged in Count Five,
12 conspiracy to bomb a Government facility, then under certain
13 specific conditions that I'm going to explain to you, you may,
14 but are not required to, find the defendant guilty of the
15 substantive crime charged against him in Count One under the
16 theory of co-conspirator liability. To find the defendant
17 guilty using this theory of co-conspirator liability. You,
18 have to find that the Government has proven beyond a
19 reasonable doubt each of the following five additional
20 elements.

21 First, of that someone in fact committed the
22 substantive crime charged in Count One.

23 Second, that the person or persons who committed
24 that substantive crime charged in Count One were members of
25 the conspiracy charged in Count Five.

1 Third, that the commission of the substantive crime
2 charged in Count One was pursuant to a common plan and
3 understanding that you found to exist among the conspirators.

4 Fourth, that the defendant was a member of that
5 conspiracy charged in this Count Five at the time that the
6 substantive crime charged in Count One was committed.

7 And Fifth, that the defendant could have reasonably
8 have foreseen that one of his co-conspirators might commit the
9 substantive crime charged in Count One. An offense by a
10 co-conspirator is deemed to be reasonably foreseeable if it is
11 a necessary or natural consequence of the unlawful agreement.

12 If you find that the Government has proven all five
13 of these elements beyond a reasonable doubt then you may find
14 the defendant guilty of the substantive crime charged in Count
15 One, even if the defendant did not personally participate in
16 the acts constituting the crime and even if he did not have
17 actual knowledge of it, but only if that offense was
18 foreseeable to the defendant.

19 The reason for this rule, this theory, is simply
20 that a co-conspirator who commits a substantive crime pursuant
21 to a conspiracy is regarded as a partner of the other
22 co-conspirators. Therefore, all of the co-conspirators must
23 bear criminal responsibility for the commission of the
24 foreseeable substantive crimes committed by the conspiracy's
25 members.

1 If, however, you're not satisfied as to the
2 existence of any of these five elements beyond a reasonable
3 doubt, then you may not find the defendant guilty of the
4 substantive crime charged in Count One, unless the Government
5 proves beyond a reasonable doubt that the defendant personally
6 committed, attempted to commit, or aided or abetted the
7 commission of the crime.

8 So what I just said, ladies and gentlemen, that
9 brings you back to the other theories that I went through
10 previously. If you find that the Government has proven the
11 defendant's guilt on Count One beyond a reasonable doubt,
12 whether you find that he committed the crime, or he attempted
13 to commit the crime, or he aided and abetted the commission of
14 the crime, or is liable under the theory of co-conspirator
15 liability that I just explained, then there is one more issue
16 for you to decide. You'll see this question on the verdict
17 form that I give you. It asks to you indicate whether the
18 Government has proven that the defendant's actions directly or
19 proximately caused personal injury or created a substantial
20 risk of injury to any person.

21 "Directly caused" means that the conduct of the
22 defendant or a co-conspirator directly resulted in the injury
23 in question.

24 "Proximately caused" means there had to have been a
25 sufficient causal connection, causation in fact, between some

1 member of the conspiracy and the injury to any victim. An act
2 is a "proximate cause" if it naturally and probably led to and
3 might have been expected to produce the injury, or if a
4 reasonable person would regard the act as the cause of the
5 injury.

6 "Personal injury" means any injury, no matter how
7 temporary. It includes physical pain, as well as any burn,
8 cut, abrasion, bruise, disfigurement, illness or impairment of
9 a bodily function.

10 An act creates a "substantial risk of injury" if
11 it's substantially likely to produce an injury to any person,
12 whether or not the injury results.

13 All right. Let me talk to you about Count Six and
14 Seven, which has some overlaps so that we'll discuss them
15 together. Count Six charges the defendant with conspiring to
16 provide material support to terrorists, while Count Seven
17 charges the defendant with providing or attempting to provide
18 material support to terrorists. Specifically, Count Seven of
19 the Indictment alleges that "in or about and between
20 December 2006 and October 2014, both dates being approximate
21 and inclusive, within the extraterritorial jurisdiction of the
22 United States" the defendant, together with others, did
23 knowingly and intentionally provide or attempt to provide
24 material support and resources, including providing himself or
25 others, knowing and intending that they were to be used in

1 preparation for or in carrying out one or more of the
2 following violations of Title 18.

3 First, killing or attempting to kill U.S. military
4 personnel while such officers and employees were engaged in or
5 on account of the performance of their official duties.

6 Two, killing a national of the United States, here,
7 U.S. military personnel stationed outside of the U.S.

8 Three, while outside the U.S. attempting or
9 conspiring to kill a national of the U.S., here U.S. military
10 personnel.

11 Count Six charges the defendant with conspiring to
12 commit the same offense during the same time frame. Now the
13 statute relevant to both of these counts, Six and Seven, is
14 section 2339(A) (a). It says that, "Whoever provides material
15 support or resources knowing or intending that they are to be
16 used in preparation for or in carrying out a violation of
17 section 1114 or 2332, is guilty of a crime."

18 Now because Count Seven is the substantive offense
19 and Count Six is conspiracy to commit that substantive
20 offense, I'm going to explain them to you in reverse, Count
21 Seven first.

22 In Count Seven the Government has charged the
23 defendant in the alternative with either providing or
24 attempting to provide material support to terrorists. To find
25 the defendant guilty of Count Seven, you have to find that the

1 Government has proven that the defendant either provided
2 material support to terrorists or that he attempted to do so.
3 The Government doesn't have to prove both.

4 To prove a violation of Count Seven for providing
5 material support to terrorists, the Government has to
6 establish each of the following elements beyond a reasonable
7 doubt.

8 First, the Government has to prove that the
9 defendant provided material support or resources including
10 himself or others. The term "material support or resources"
11 includes personnel, people. The term "personnel" means one or
12 more persons, which can include the defendant himself. The
13 material support that triggers this offense does not need to
14 be support to any particular person or specified group.
15 Instead, the material support or resources must be given in
16 furtherance of a criminal offense. If you find that the
17 defendant made himself or other persons available to the
18 charged offense, then this element is satisfied.

19 Second, the Government has to prove that the
20 defendant provided such material support or resources knowing
21 or intending that they were to be used to prepare for or carry
22 out a violation of any of the three sections I stated earlier;
23 that is, 1114, which prohibits killing or attempting to kill
24 U.S. personnel while they are engaged in their duties; or
25 2332(a), which prohibits killing a U.S. citizen while that

1 citizen is outside the U.S; or 2332(b), which prohibits while
2 someone is outside the United States attempting to kill a U.S.
3 citizen.

4 You don't need to find that the defendant knew any
5 particular statute would be violated. Instead, you must find
6 the defendant knew or intended that his actions would result
7 in the type of conduct forbidden under the statutes as I've
8 just described them to you.

9 You don't need to find that the defendant knew and
10 intended that the material support or resources be used to
11 prepare for or carry out all of these three objectives. You
12 must, however, be unanimous as to which objective or
13 objectives you find that the defendant intended the material
14 support or resources to be used for or to carry out -- sorry,
15 to be used to prepare for or carry out. "Preparation" has the
16 same meaning that you use in your lives everyday, to make
17 ready. "Carrying out" also has the same everyday meaning, to
18 act or to do.

19 Now for the objectives that involve killing or
20 attempting to kill U.S. nationals or officers or employees of
21 the U.S. The Government doesn't need to prove that the
22 underlying crime was in fact committed. So long as the
23 defendant provided the material support or resources with the
24 knowledge or intent that that support or resources be used to
25 prepare for or carry out one of these objectives. For you to

1 find that the defendant provided material support or resources
2 to prepare for or carry out conspiracy to kill a national of
3 the U.S. while outside the United States, then you must find
4 that the Government has proven the existence of that
5 conspiracy beyond a reasonable doubt, whether or not the
6 defendant was a participant in that conspiracy. In other
7 words, the Government needs to prove only that the conspiracy
8 to kill U.S. nationals existed. The Government doesn't have
9 to prove that the defendant joined in it. The elements of
10 that conspiracy are:

11 First, that there was a conspiracy to kill U.S.
12 nationals, whether or not the defendant joined it.

13 Second, that an overt act was committed in
14 furtherance of this conspiracy, that is, that at least one
15 member of the conspiracy took some action to advance the goal
16 or goals of the conspiracy.

17 And Third, that someone engaged in the conspiracy
18 while outside the United States.

19 Now, to prove the charge of attempted provision of
20 material support to terrorists, which is the alternative
21 theory that the Government has offered for Count Seven, the
22 Government has to prove the following two elements beyond a
23 reasonable doubt.

24 First, that the defendant intended to commit the
25 crime of providing material support to terrorists as I've

1 explained above.

2 And Second, that the defendant did some act that was
3 a substantial step in an effort to bring about or accomplish
4 the crime.

5 I've already instructed you on what it means to
6 attempt to commit a crime, apply those instructions here to
7 Count Seven.

8 As to Count Six, conspiracy to provide material
9 support to terrorists, the Government has to establish each of
10 the following elements beyond a reasonable doubt.

11 First, that a conspiracy to provide material support
12 to terrorists as described above in Count Seven existed.

13 Second, that the defendant knowingly and
14 intentionally became a member of that conspiracy. Those are
15 the two elements.

16 Since I've already told you the elements of a
17 conspiracy, I'm not going to repeat them again here.

18 If you find that the Government has proven beyond a
19 reasonable doubt that the defendant is guilty on Count Six,
20 that is, conspiring to provide material support to terrorists,
21 but not that the defendant has provided or attempted to
22 provide material support to terrorists as charged in Count
23 Seven, then you must also evaluate the defendant's possible
24 guilt on Count Seven using the theory of co-conspirator
25 liability that I previously explained to you. Just to remind

1 you of those elements defined co-conspirator liability, you
2 have to find that the Government has proven beyond a
3 reasonable doubt each of the following five additional
4 elements.

5 First, that someone in fact committed the
6 substantive crime charged in Count Seven.

7 Second, that the person or persons who committed
8 that substantive crime in Count Seven were members of the
9 conspiracy charged in Count Six.

10 Third, that the commission of the substantive crime
11 charged in Count Seven was pursuant to a common plan and
12 understanding that you found to exist among the conspirators.

13 And Fourth, that the defendant was a member of that
14 conspiracy charged in Count Six at the time the substantive
15 crime charged in Count Seven was committed.

16 And fifth, that the defendant could reasonably have
17 foreseen that one of his co-conspirators might commit the
18 substantive crime charged in Count Seven.

19 If you find that the Government has proven all five
20 of these elements beyond a reasonable doubt, then you may find
21 the defendant guilty of the substantive crime charged in Count
22 Seven, even if the defendant did not personally participate in
23 the acts constituting the crime and even if he did not have
24 actual knowledge of it, so long as the offense in Count Seven
25 was reasonably foreseeable to him.

1 Now I'm going to put Counts Eight and Nine together
2 because they also overlap. Eight, charges the defendant with
3 conspiring to provide material support to a foreign terrorist
4 organization, in particular al-Qaeda, while Count Nine of the
5 Indictment charges the defendant with providing and attempting
6 to provide material support to a foreign terrorist
7 organization, in particular al-Qaeda. Specifically, Count
8 Nine of the Indictment alleges that "in or about and between
9 December 2006 and October 2014, both dates being approximate
10 and inclusive, within the extraterritorial jurisdiction of the
11 U.S.," the defendant together with others did knowingly and
12 intentionally provide or attempt to provide material support
13 or resources, including himself or others, to the foreign
14 terrorist organization, al-Qaeda, which has been designated by
15 the Secretary of State as a foreign terrorist organization
16 since October 1999, and that defendant provided those
17 resources knowing that al-Qaeda was a designated terrorist
18 organization and that al-Qaeda had engaged in and was engaging
19 in terrorist activity and terrorism. Count nine further
20 alleges that the defendant is a national of the United States,
21 that the offense occurred in and affected interstate and
22 foreign commerce, and that, after providing that support the
23 defendant was brought into and found in the United States.

24 Count Eight charges the defendant with conspiracy to
25 commit the same offense during the same time frame. That

1 statute for Count Eight says, whoever knowingly provides
2 material support or resources to a foreign terrorist
3 organization or attempts or conspires to do so, is guilty a
4 crime. Because Count Nine is the substantive offense and
5 Count Eight is the conspiracy to commit that substantive
6 offense, I'm going to explain them to you in reverse like I
7 did in Six and Seven.

8 Count Nine charges the defendant in the alternative
9 with either providing or attempting to provide material
10 support to a foreign terrorist organization. To find the
11 defendant guilty of Count Nine you have to find that the
12 Government has proven that the defendant either provided
13 material support to a foreign terrorist organization, or that
14 he attempt to do so. The Government does not need to prove
15 both.

16 To prove a violation of Count Nine for providing
17 material support to al-Qaeda, the Government must establish
18 each of the following elements beyond a reasonable doubt.

19 First, that the defendant provided material support
20 or resources.

21 Second, that the defendant provided the support or
22 these resources to a foreign terrorist organization,
23 specifically al-Qaeda.

24 Third, that the defendant did so knowingly and
25 intentionally.

1 And Fourth, that there was federal jurisdiction over
2 the offense.

3 I'm going to go through each one of these elements.
4 The first element is that the defendant provided material
5 support or resources. The defendant can be convicted for a
6 violation of this statute in connection with providing
7 personnel if you find that he has knowingly provided one or
8 more individuals, which may include himself, to work under
9 al-Qaeda's direction or control. However, the defendant can't
10 be convicted if he were entirely independent of al-Qaeda to
11 advance its goals and objectives. I've already defined the
12 terms "material support or resources" and "personnel" and you
13 should apply those definitions on this count.

14 The second element that you have to find beyond a
15 reasonable doubt is that the defendant provided these
16 resources to a foreign terrorist organization; namely,
17 al-Qaeda. I instruct you as a matter of law that al-Qaeda is
18 in fact designated as a foreign terrorist organization. That
19 was done by the U.S. Secretary of State on October 8, 1999.
20 For that reason, if you find beyond a reasonable doubt that
21 the defendant provided material support or resources, as I've
22 just defined those terms, to al-Qaeda during the period
23 charged in the Indictment, the Government's burden with
24 respect to the element of foreign terrorist organization will
25 have been met.

1 The third element that you must find beyond a
2 reasonable doubt is that in providing material support or
3 resources to al-Qaeda, the defendant did so knowingly and
4 intentionally. I previously explained to you what "knowingly"
5 and "intentionally" means, use those definitions. For this
6 element to be satisfied the Government must prove that the
7 defendant knew one of the following three things.

8 First, that al-Qaeda had been designated by the
9 Secretary of State as a foreign terrorist organization.

10 Or Two, that al-Qaeda engaged in terrorist activity.

11 Or Three, that al-Qaeda engaged in terrorism.

12 For these purposes the term "terrorist activity"
13 includes any of the following actions:

14 Hijacking, or sabotage of an aircraft, vessel,
15 vehicle, train or other conveyance.

16 Seizing, detaining or threatening to kill, injure or
17 further detain another person to compel or coerce some
18 third-party, including a Government, to do or abstain from
19 doing some act.

20 Three, a violent attack on an internationally
21 protected, person including employees and officials of
22 Governments or international organizations.

23 Four, assassination.

24 Five, use of any chemical, biological or nuclear
25 weapon or device with intent to endanger directly or

1 indirectly, the safety of one or more individuals or to cause
2 substantial damage to property.

3 Six, using any explosive, firearm or weapon or other
4 dangerous device other for monetary gain and with intent to --
5 the use of any explosive, firearm or other weapon or dangerous
6 device other than for monetary gain. And with the intent to
7 endanger directly or indirectly the safety of one or more
8 individuals, or to cause substantial damage to property.

9 Or, a threat, attempt or conspiracy to do any of
10 those first six things I read to you.

11 For these purposes the term "terrorism" means
12 premeditated, politically motivated violence perpetrated
13 against non-combatant targets by sub-national groups or
14 clandestine agents.

15 The fourth element is that there was federal
16 jurisdiction over the offense. The Government has to prove
17 that was well. There is federal jurisdiction over the offense
18 if the defendant is a United States national; or after the
19 conduct required for the offense occurred, the defendant was
20 brought into or found in the United States; even if the
21 conduct required for the offense occurred outside the United
22 States; or the offense occurs in or affects interstate or
23 foreign commerce.

24 With respect to the second option, it doesn't matter
25 if the defendant was brought to the U.S. by law enforcement

1 personnel. It's sufficient to satisfy this element so long as
2 you find that he was brought into the U.S. after the conduct
3 required for the offense occurred.

4 With respect to the third option, the Government
5 needs to prove only that there was a minimal affect on
6 interstate or foreign commerce. Any affect, even an indirect
7 or slight one, is sufficient, and that affect may be harmful
8 or beneficial to interstate or foreign commerce.

9 Now as to Count Nine, to prove the charge of
10 attempting to provide material support to a foreign terrorist
11 organization, the Government has to prove two elements beyond
12 a reasonable doubt.

13 First, that the defendant intended to commit the
14 crime of providing material support to a foreign terrorist
15 organization.

16 And Second, that the defendant did some act that was
17 a substantial step in an effort to bring about or accomplish
18 the crime. I already told you what it means to attempt to
19 commit a crime, so I'm not going to repeat that again.

20 As to Count Eight, conspiring to provide material
21 support to a foreign terrorist organization, the Government
22 has to establish each of the following elements beyond a
23 reasonable doubt.

24 First, that a conspiracy to provide material support
25 to a foreign terrorist organization, specifically al-Qaeda,

1 exists.

2 Second, that the defendant knowingly and
3 intentionally became a member of the conspiracy. Those are
4 the two elements.

5 As I've already explained those elements of the
6 conspiracy, I'm not going to repeat them here.

7 If you find that the Government has proven beyond a
8 reasonable doubt that the defendant is guilty on Count Eight;
9 that is, conspiring to provide material support to a foreign
10 terrorist organization, but not that the defendant has
11 provided or attempted to provide material support to a foreign
12 terrorist organization as charged in Count Nine, then you must
13 also evaluate the defendant's possible guilt on Count Nine
14 using the theory of co-conspirator liability that I previously
15 explained. I'll remind you of those elements again as they
16 apply to this Count Nine.

17 First, that someone in fact committed the
18 substantive crime charged in Count Nine.

19 Second, that the person or persons who committed the
20 substantive crime charged in Count Nine were members of the
21 conspiracy charged in Count Eight.

22 Third, that the commission of the substantive crime
23 charged in Count Nine was pursuant to a common plan and
24 understanding that you found to exist among the conspirators.

25 Fourth, that the defendant was a member of that

1 conspiracy charged in Count Eight at the time the substantive
2 crime charged in Count Nine was committed.

3 Fifth, that the defendant could reasonably have
4 foreseen that one of his co-conspirators might commit the
5 substantive crime charged in Count Nine.

6 If you find that the Government has proven all five
7 of these elements beyond a reasonable doubt, then you may find
8 the defendant guilty of the substantive crime charged in Count
9 Nine, even if the defendant did not personally participate in
10 the acts constituting the crime and even if he did not have
11 actual knowledge of it so long as the offense in Count Nine
12 was reasonably foreseeable to the defendant.

13 Okay. Just a few brief instructions, ladies and
14 gentlemen, about how to deliberate. I want to give you a
15 little guidance to undertake the difficult job that you're
16 about to undertake. Your function to reach a fair conclusion
17 from the law and the evidence is a vital one. If the
18 Government succeeds in meeting its burden of proof your
19 verdict should be guilty. If it fails, it should be not
20 guilty.

21 Each of you on the jury has to decide the case for
22 yourself after consideration of the evidence in this case with
23 your fellow jurors. You shouldn't hesitate to change an
24 opinion that, after discussion with your fellow of jurors,
25 appears erroneous. That's the very purpose of jury

JURY CHARGE

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1 deliberation, to discuss and consider the evidence, to listen
2 to the arguments of fellow jurors, to present your individual
3 views, to consult with one another, and to reach an agreement
4 based solely and wholly on the evidence. If you can do so
5 without violence to your own individual judgment.

6 Your verdict has to be unanimous. That is, all of
7 you must ultimately reach the same conclusion as to each of
8 the nine charges. Although you can reach a unanimous verdict
9 of not guilty on one or more charges and guilty on other
10 charges. However, if after carefully considering all the
11 evidence and the arguments of your fellow jurors, you
12 entertain a conscientious view that differs from the others,
13 you shouldn't yield your conviction simply because you're out
14 numbered. Your final vote has to reflect your conscientious
15 judgment as to how the issues should be decided.

16 Now, no member of the jury should attempt to
17 communicate with me or any court personnel by any means other
18 than signed writing, sign it on your notepads. I'm appointing
19 Juror Number One as the Foreperson. Any notes will be given
20 by him to the court officer standing outside the door. I'm
21 afraid there is no more money in being the Foreperson, there
22 is not really any real power, just serves as the focal point
23 for the communications with the Court. If you have any
24 questions I'll respond to your request as promptly as I can by
25 having to you return to the courtroom so I can speak with you

1 in person. I'm not going to communicate with any of you on
2 any subject touching on the merits of case other than here in
3 open court.

4 In any event, if you send out a note do not tell me
5 or any one else in the note or otherwise how you stand
6 numerically on the issue of the defendant's guilt. Don't even
7 say that in open court until you've reached an unanimous
8 verdict on each count. Now most, if not all, of the exhibits
9 are going to be sent into the jury room with you. If during
10 deliberations you think there was an exhibit and you don't
11 have it, send out a note to the court security officer outside
12 your door and we'll look at that and see if we can get that
13 exhibit for you. If you want to hear read back to you a
14 portion of the testimony, we can do that. But please, if you
15 ask for that be as specific as you possibly can because it
16 takes sometime to go through the transcript and find the
17 portion that you're looking for. So the more specific you
18 are, the less time you'll have to wait to get it. Tell us who
19 the witness is and what particular topic you need to hear read
20 back to you so that it's easier and faster for us to find.

21 Now the way it's going to work, when you've reached
22 the verdict is this. You're going to send out a note on a
23 piece of note paper by your Foreperson that simply is going to
24 say we have reached a unanimous verdict signed foreperson.
25 Give that to the court officer, the court officer will give it

1 to me, then I will bring you in.

2 Now you also have with you in the jury room this
3 verdict sheet, just a series of questions as to each one of
4 the counts, how do you find guilty or not guilty as to each
5 one of the counts. When I bring you back into the courtroom
6 after you sent out your note saying you have reached a
7 unanimous verdict, the Foreperson will bring this form with
8 the completed form. I will then ask you, is it correct that
9 it says in your note that you reached a unanimous verdict as
10 to each count. If you say yes, then I'll take the verdict
11 form from you at that point and I'll read it out loud.

12 So the verdict form, as I said, it's very straight
13 forward. But for that reason don't infer from the wording of
14 any question on the form or from anything that I said or said
15 in instructing you concerning any of the issues that I have a
16 view as to what your answer should be. As I told you, this is
17 all yours, this case. I have no view. It is your
18 responsibility and obligation.

19 All right, remember again, that your final vote has
20 to reflect your conscientious conviction as to how the issue
21 should be decided. Your verdict has to be unanimous as to
22 each count. Remember that the parties and I are relying on
23 you to give full and conscientious deliberation and
24 consideration to the issues and evidence before you.

25 Your oath sums up your duty, and it's this, without

JURY CHARGE

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1 fear or favor, you will truthfully try the issues between
2 these parties according to the evidence given to you in court
3 and the laws of the United States.

4 All right. Let's have the court officer come
5 forward.

6 COURTROOM DEPUTY: Raise your right hand.

7 (Whereupon, the Court Officer was sworn.)

8 THE COURT: Ladies and gentlemen, you may commence
9 your deliberations. I'm going to ask the last three jurors on
10 the top row to remain there for a minute. Ms. Clarke will
11 come back in after she puts the jurors in the jury room.

12 MR. RUHNKE: Judge, sidebar before the jury leaves?

13 THE COURT: Yes.

14 (Continued on the next page.)

15 (Sidebar conference.)

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SIDEBAR CONFERENCE

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1 THE COURT: Anything I read wrong that needs to be
2 corrected, not a late attempt to redo the instructions?

3 MR. RUHNKE: No, sir. But we do wish to reserve our
4 objections to any of the objections previously made.

5 THE COURT: So noted.

6 MR. RUHNKE: We come to sidebar for that purpose.

7 MR. MAHER: May we request that your Honor tell the
8 jury one more time so that it's clear that your Honor's
9 displaying the Part Two of the instructions on the computer
10 screen in no way means that Part One and Three are not as
11 important. It was just for their convenience.

12 THE COURT: That's fine.

13 (End of sidebar conference.)

14 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: The only other thing I would mention to
3 you, I put Part Two, the substantive charges, up on the screen
4 because, as you can tell, that was rather complex. I thought
5 it might help to you read along. Don't think for a minute
6 that that section of the instructions is any more important
7 than parts One and Three. You have to consider the
8 instructions all together, all equally important during your
9 deliberations.

10 Thank you all, the top row may begin deliberations.

11 (The jury retired to commence deliberations at
12 11:38 a.m.)

13 (Jury exits.)

14 THE COURT: Everyone be seated. I want to thank you
15 and let you know that whatever happens to the case from this
16 point on, having you here is a tremendous security blanket.
17 We could not have done a trial if we were all apprehensive
18 about the possibility of needing you alternates. Because we
19 still may, I'm not going to let you completely go yet. What
20 I'm going to do is this. Ms. Clarke is going to bring you to
21 another room, separate from the jurors. You can stay in that
22 room if you want or can you leave that room and go around the
23 courthouse, if you want. But she's got to have your number so
24 we can get you back here on a moment's notice in case we do
25 need you.

1 The admonitions I've been giving you throughout the
2 case continue. You still can't talk about the case with
3 anyone nor amongst yourselves. If you do run into any of the
4 other jurors, I don't think you should they won't be leaving
5 here not until the end of day and I'll let you go first, do
6 not talk about the case with them, don't ask them how it's
7 going. You're separate and apart from them. I need you to
8 stay clean, keep an open mind for now. And we'll call upon
9 you if we need you. You'll have a place to go to if you want
10 in the meantime. You can also go to the main jury room
11 downstairs, if you'd rather go there, but stick close to the
12 courthouse. Thank you very much.

13 (Alternate jurors exit.)

14 THE COURT: All right. I'd like the parties to
15 agree upon the exhibits, put them all together, and we'll get
16 the instructions and verdict form and bring those to the jury.

17 MR. TUCKER: One point, I don't think we're going to
18 send certain of physical exhibits back in at the first
19 instance. Obviously, if the jurors want to see them --

20 THE COURT: We'll see if they ask. Thank you very
21 much.

22 (Continued on next page.)

JURY CHARGE

1655

1 (In open court; Jury not present.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Okay, be seated, please.

4 There's a couple of things. Number one, you all
5 noticed Mr. Al Farekh's father yesterday calling out to meet
6 with his son. Today he delivered a letter with that same
7 request to me.

8 I have spoken to the marshal and I must regrettably
9 deny that request. The marshal has explained to me the
10 serious security issues that are involved in something like
11 this. I know that the defendant's father, who is not involved
12 in this case and may not be fully aware of the concerns that
13 are present. I hope there is an opportunity for the two of
14 them to meet at some point in the future but there are
15 procedures that have to be followed to do that and I do not
16 believe it would be appropriate for me to suspend those
17 procedures, so I am going to deny the request.

18 MR. RUHNKE: Your Honor, just for the Court's
19 information, we are in the process of trying to arrange for a
20 visit through the SAM's program and MCC and that is in
21 progress. So I have conveyed that to Dr. Al Farekh, and
22 I've asked him also not to write the Court any more letters
23 until we get that resolved.

24 THE COURT: I appreciate that, and that is the way
25 that this is going to have to be done.

JURY CHARGE

1656

1 In addition, we have two notes from the jury. The
2 first one is:

3 "Can we have a second copy of the Judge's jury
4 charge?" Mark that as Court Exhibit Number 1.

5 Does anyone have a problem with that?

6 (Court Exhibit 1, was received in evidence.)

7 (Court Exhibit 2, was received in evidence.)

8 MR. TUCKER: No, sir.

9 MR. MAHER: No, sir.

10 THE COURT: All right, we will send them that.

11 And then Court Exhibit Number 2 says:

12 "Can Juror Number 9 make a phone call?"

13 I don't know the nature of the phone call. Melonie,
14 did he tell you? Is it personal?

15 Okay, it's an employment matter, a personal
16 employment matter. I think the way we have do that is to have
17 Ms. Clarke tell the jury to stop deliberating and excuse, have
18 her escort Juror Number 9, make the phone call, and the jury
19 will be told by Ms. Clarke that they can start deliberating
20 when this juror gets back.

21 MR. TUCKER: No objection.

22 MR. RUHNKE: We agree, Your Honor.

23 THE COURT: All right, we will proceed from there.

24 Thank you.

25 (Whereupon, a recess was taken at 1:15 p.m.)

JURY CHARGE

1657

1 (In open court; Jury not present.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Have a seat please.

4 Bring in the defendant.

5 All right, we have two notes from the jury. The
6 first is:

7 "We want to hear the testimony from Kendra Sibley
8 and the Exhibit 330. Can we get that?"

9 That note also says:

10 "Can we get the conclusion of Gabriel Watts'
11 testimony, the cross and the redirect?"

12 And then there's written:

13 "Conclusion of Gabriel Watts' analysis."

14 Now I've marked that note as Court Exhibit 3.

15 Court Exhibit Number 4 is:

16 "Can we leave at 4:30 p.m. and begin again
17 tomorrow?"

18 It's 4:30. So what I would suggest, subject to
19 hearing from both sides, is that we let the jury go and the
20 parties continue to stay here and work on assembling the
21 materials that the jury has requested.

22 Was 330 the summary chart?

23 (Court Exhibit 3, was received in evidence.)

24 (Court Exhibit 4, was received in evidence.)

25 MR. TUCKER: No, Your Honor, 330 is a slide that

1 pertains to -- it's one of the generic slides about the
2 different types of fingerprint configurations. I think, in
3 fact, it's a reasonable inference that they're asking for 330,
4 but we can ask the question to clarify, that would be my vote
5 of suggestion.

6 MR. MAHER: I don't think it's a reasonable
7 inference, I think if they have 330 in the packet, perhaps it
8 can be asked of them, 330 is supposed to be in the packet, is
9 it missing or is there something else that they're asking for?

10 MR. TUCKER: I apologize, Judge, that's what I
11 meant. I'm not suggesting --

12 THE COURT: Okay, that's fine.

13 So I'll ask them to send us another note tomorrow
14 morning clarifying that.

15 But other than that, I think we should try to
16 assemble what they want.

17 MR. RUHNKE: The only question I have is what do
18 they mean by "Gabriel Watts' conclusion"?

19 THE COURT: Well, I think they're asking for just
20 about all of it. "Can we get the conclusion of Gabriel Watts'
21 testimony, the cross and the redirect?"

22 MR. RUHNKE: Oh, okay.

23 THE COURT: And that's followed by: "Conclusion of
24 Gabriel Watts' analysis," which I think is at least part of
25 the direct. Because that's where his conclusion was, that the

1 conclusion was expressed.

2 MR. RUHNKE: I have a different take on it. I think
3 they're referring to the slide where he said he could not make
4 a definitively determination.

5 MR. TUCKER: That's a defense exhibit.

6 MR. RUHNKE: Yes, that's a defense exhibit,
7 Defense 7.

8 THE COURT: Well, I'm still inclined to let the
9 parties try to pull it together. To the extent there's
10 disagreements tomorrow morning, I'll resolve them.

11 MR. RUHNKE: Sure.

12 THE COURT: Okay, let's bring in the jury.
13 So the bottom line is we think they've got 330,
14 right?

15 MR. TUCKER: Yes.

16 MR. MAHER: Yes.

17 (Jury enters the courtroom.)

18 THE COURT: Everyone be seated.

19 Ladies and gentlemen, we have your notes. Just a
20 couple of points about them.

21 We'll try to pull together the testimony that you're
22 looking for, but you've referenced Kendra Sibley and
23 Exhibit 330. We believe you've got 330. If it's some other
24 exhibit you want, let us know, but 330 ought to be back there
25 with you. You may have the wrong number.

JURY CHARGE

1660

1 With regard to your request to leave at 4:30, it's
2 already 4:35, that's fine, we'll send you home now.

3 Just a couple of caveats about tonight. You
4 remember the admonitions that are in place, right? No
5 internet. No communications, particularly at this sensitive
6 stage. No discussion of the case with anybody. No research
7 on the case. Stay away from media coverage of the case.

8 And in addition, when you come back tomorrow
9 morning, again, you go straight to the jury room, but you
10 cannot start deliberating until you are all there, all right?
11 All 12 of you need to be there before you can start
12 deliberating, so it's going to be like it was during the trial
13 where you can't talk about the case until you are all there in
14 the morning.

15 All right. Have a good evening. We will see you at
16 9:30.

17 (Jury exits the courtroom.)

18 THE COURT: Okay, I'll be around. Why don't the
19 parties see what you can find. Have a seat.

20 MR. TUCKER: Just a clarifying question, Judge.

21 Is the Court's intention to send the transcripts
22 back or to do in-court read backs?

23 THE COURT: I'm reserving on that until I see the
24 quantity of it. If the quantity looks like it's going to take
25 more than a half an hour or 45 minutes to read, then I'm

1 inclined to send it back. But I'm not ruling on that
2 definitively until I give everybody a chance to be heard on
3 it.

4 MR. TUCKER: Okay.

5 THE COURT: I'll be here, I have a sentencing in I
6 think five or so, so I would suggest you all get working on it
7 now, but you'll need to make room for me.

8 Okay, we're in recess.

9 MR. TUCKER: Thank you, Judge.

10 (Proceedings adjourned at 4:40 p.m. to resume on
11 September 28, 2017 at 9:30 a.m.)

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EXHIBITS

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