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PRELIMINARY STATEMENT

In the response brief, the prosecution mis-characterized the record as to several highly significant points, including a claim, not supported in the record, that Yassin Aref was told the meaning of a crucial code word - "chaudhry." Aref's understanding of this word was necessary to give any meaning to the key June 10, 2004 conversation, prior to which Aref was acquitted of all counts.

Further, the recently declassified transcript of a pre-trial CIPA hearing shows that cross-examination of certain highly prejudicial "seven reasons" evidence would not have been allowed, and the defense excepted to that ruling. Moreover, said evidence was only to be introduced if the defense opened the door by attacking the motive of the investigation of Mr. Aref. Despite the fact that the defense never opened the door to this evidence, the District Court was prepared to allow it in during the rebuttal case. That led to an extremely prejudicial targeting instruction, in which the judge twice told the jury that there were "good and valid" reasons for the sting case. The "agreement" on the targeting instruction in order to keep out the "seven reasons" evidence was made under duress. It was expected that objections to said instruction be preserved, yet the relevant discussion, in chambers, was inadvertently not recorded. Thus there may be a need for a reconstruction hearing on this crucial point.

Finally, the defense raised a valid objection, under both *Brady* and CIPA, to the withholding of NSA wiretapping evidence which would have countered certain very prejudicial evidence regarding phone calls made by Mr. Aref. Recent case law supports the arguments in the main Aref brief that it is unconstitutional for the defense to be sidelined in this manner by secret evidence.

REPLY ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE

A. The Prosecution Cannot Rely on the Verdict to Support Any Factual Findings Regarding Aref's Knowledge Prior to June 10, 2004

Aref was acquitted of all the indictment counts based on conversations occurring prior to June 10, 2004, and then was only convicted of the counts based on the July 1 and August 1 loan transactions. At the Sentencing, the District Court stated:

> "...By the jury's determination, it can be fairly said that Mr. Aref, while possibly aware of the criminal transaction for some time, did not knowingly, intentionally and criminally associate himself with it until July 1, 2004..." (A-1151)

However, in the response brief the prosecution often seems to rely on the jury findings to support the claim that Mr. Aref had the requisite knowledge and intent prior to June 10. (See response brief, at 84, 85, 89, 92-93, 107, 108, 109.) On Page 109 the prosecution quotes the District Court's Rule 29 Decision, which stated:

> "...[T]he evidence supported the conclusion that, as of February 12, 2004, Aref believed that the missile would be used in New York City against the Ambassador of Pakistan and that JEM would be the group that would carry out the attack."

However, the evidence, and the verdict, did *not* support those conclusions, and the District Court understood that, at least by March 8, 2007, when the sentencing statement was made. It is submitted that it cannot be fairly argued that the jury found sufficient knowledge on the part of Mr. Aref until June 10. And, as discussed in the Aref main brief, at 26-30 and 75-80, *inter alia*, it is submitted that no new information was provided to Mr. Aref on that date, and it is unduly speculative to assume that he somehow remembered everything he had not understand previously, put it all together, and decided to join a criminal plot. Moreover, as discussed below, the prosecution has mischaracterized the evidence regarding the word "chaudhry," a crucial word with respect to the June 10 conversation.

B. The Prosecution Misstated the Evidence With Respect to "Chaudhry" and the February 12, 2004 Conversation

On Pages 14, 40 and 107 of the prosecution's brief, it is stated that on February 12, 2004 (the date the recorder was inexplicably said to have "fallen off" the shrewd and experienced informant) the CW told Aref the meaning of the code word "chaudhry." The Record does not support that claim. As discussed on pages 23 and 112 of Mr. Aref's main brief, Agent Coll, who had earlier tentatively made said claim (saying "I believe" the CW told Aref on the 12th,) later admitted that the CW had *not* explained the meaning of the word "chaudhry" on February 12.

Instead, Coll explained, after having refreshed his memory with a 302 report, the CW had told him that he had told *Mr. Hossain*, at some other point, to tell Aref the meaning of "chaudhry," and that the CW believed that this had occurred. (A-378, 400-402) Coll admitted that he had to rely on the word of the CW for this, and it appears extremely unlikely, as seen by Mr. Hossain's great surprise when the CW told him that Mr. Aref was aware of the missile plot. (See Footnote 6 on Pages 23-24 of Aref's brief; A-777).

In addition, with regard to February 12, Page 92 of the response brief stated that Aref "was told on February 12, 2004 that a missile attack in New York City on the Ambassador from Pakistan was imminent. GA 173-174. " The cite was to the testimony of Kassim Shaar, who said nothing about the Pakistani Ambassador or about an imminent attack. Nor was there any other evidence that any of that was said on that date. As discussed in the Aref main brief at 21-23, 71-73 and 113-114, all Shaar said was that the CW had said "there was an attack coming to New York City, a missile attack coming there" and that he believed that the CW was not serious.

Also with regard to the word "chaudhry," the prosecution stated on Pages 51 and 107 that it was ridiculous for Aref to believe "chaudhry" referred to a local doctor. However, this was the

only reference he had for the word, and Dr. Chaudhry was discussed on January 2. (GA 543, top of page) It is submitted that although the way the word was used on June 10 doesn't make sense if "chaudhry" referred to a person, that just shows that Aref did not understand *many* things said by the CW. He could not possibly have asked about everything he did not understand. All he was mainly concerned with, as a witness to the loan, was that he understood the amount of the loan, and how it was to be repaid. He also responded when asked for his advice on various topics. But there were many statements by the CW which he did not understand, and which he did not consider important.

As discussed extensively in Aref's main brief, understanding the word "chaudhry" was crucial to understanding many of the recorded conversations, in particular the June 10 conversation, which the District Court apparently believed, based on the verdict, was when Aref first had criminal liability. (See A-1151 - July 1 refers to the first count of the indictment occurring after June 10)

The lack of evidence that Aref knew the meaning of the word "chaudhry" was similar in some respects to what occurred in *United States v. Kaplan*, 490 F.3d 110 (2nd Cir. 2007), where this Court recently reversed the conviction based on an evidentiary error where there was a lack of evidence of knowledge. In *Kaplan*, the Court stated:

> "In *Patrisso* [*United States v. Patrisso*, 262 F.2d 194 (2nd Cir. 1958)] a truckload of stolen television tubes was hijacked; Patrisso, who knew they were stolen, sold them to Ellis, who also knew; Ellis, in turn, sold them to Postrel; finally Postrel sold 1,000 of them to defendant Mankes. ... *We reversed Mankes's conviction, finding that the district court had erred by, inter alia, allowing the Government to introduce Postrel's knowledge of the theft without evidence that Postrel or anyone else, had communicated that fact to Mankes."* Id. At 197. ...
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> ***
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> ...[T]he Government proffered no evidence that anyone who allegedly was aware of the fraudulent scheme actually had communicated his knowledge to Kaplan. ...[T]he participants in the fraud were careful not to speak openly... [and] 'generally it was done

very subtly.'... [*A*]*s in Patrisso, the Government failed to offer evidence that would explain how defendant Kaplan would have obtained the third parties' knowledge of the criminal scheme....*" *Kaplan*, supra, at 120-121.

The evidence herein is also analogous to the evidence in *United States v. Carbo*, 2007 US Dist. LEXIS 58593 (EDPA 2007), where the court recently reversed the conviction because there was insufficient evidence of knowledge, stating:

> "...The government admits it has no direct evidence that Carbo knew that Biondi was required to report Carbo's payments to the state. No witness testified at trial that Carbo knew of the reporting requirement and no reference to a reporting requirement is made on the recording the government made of Carbo's conversations with a cooperating witness. ..." *Carbo*, supra, at 63.

C. The Prosecution Mis-characterized the January 2, 2004 Recording

On Page 82 of the response brief, it was stated that "Aref was told the CW's cash came from the sale of a missile to mujahideen." In fact, the recording shows that Aref was looking down counting the loan money when the CW said *to Mr. Hossain*, to whom he had shown the missile previously, "...This is part of the miZZAISLE I showed you..." (The word "you" thus had to apply to only Hossain, and not Aref.) And the word "mujhideen" was never mentioned in that conversation. (GA 543.) See also Pages 15-16, 115-116 of the Aref main brief.

In addition, see Page 15 of the Aref main brief with regard to the prosecution's claim, as stated on Page 31 of the response brief, that Aref looked up when the CW displayed the handle of the missile to Hossain. Agent Coll admitted that Aref was counting the money and did not raise his head, but claimed that his eyes moved up momentarily at that point, and relied on a different version of the video which the defense has never seen. In any event, it is submitted that the jury did not believe this claim.

D. There was a Great Deal of Exculpatory Evidence

As discussed on Pages 93-94, *inter alia*, of the Aref main brief, the prosecution's own

evidence contained a great deal of exculpatory evidence. This included evidence that Aref believed "legalize[1]" meant to pay taxes on the money, discussed on Pages 14, 16-17 and 78-81 of the Aref main brief; Mr. Aref's statements that he promised to obey American laws (along with his statement against suicide bombings and his several statements regarding how important it is for Muslims to fulfill their promises), discussed on Pages 17-18, *inter alia*, of the Aref main brief; and Aref's statements that he could not support JEM, discussed on Pages 18-19, 64-69 and 81-82 of the Aref main brief.

This evidence, along with the acquittals, discussed on Pages 94-96 of the Aref main brief, shows that the jury relied on impermissible speculation, and on the fear likely engendered by the targeting instruction and the other prejudicial evidence, discussed below, to arrive at a verdict based on insufficient evidence.

E. The Court Must Acquit if Innocence is as Likely or Nearly as Likely as Guilt

On Page 67 of the response brief, the prosecution, in discussing the government's

[1]On pages 85-87 of the response brief the prosecution claims that the evidence showed Aref understood that "legalize" meant money laundering, rather than paying taxes, and stated that Aref knew he could pay taxes on cash. The point is that the CW *told* Aref that the reason the money was illegal was because he didn't pay taxes on it. (A-722) And on January 14 Aref stated that this was his belief, based on what the CW had told him about his business. (A-739[Page 6, lines 1-10]) Just because Aref may have payed taxes on some cash income as an imam doesn't imply he would know how taxes worked for businessmen in this country.

evidence, cites *United States v. Guadagna*, 183 F.3d 122 (2nd Cir. 1999) for the proposition that if the court concludes that innocence and guilt are both "fairly possible," the verdict must be upheld. However, this is contrary to the standard set forth in the more recent case of *United States v. Glenn*, 312 F.3d 58 (2nd Cir. 2002), where this Court reversed the conviction because "[t]he government's evidence gave 'nearly equal circumstantial support' to competing explanations," which supported innocence. *Glenn*, at 70. (That standard, as applied to this case, was discussed on Pages 84-87, *inter alia*, of the Aref main brief.)

It seems that this discrepancy is explained by *United States v. Boesen*, 491 F.3d 852 (8th Cir. 2007), where the court discussed the two standards and held that the standard mentioned in *Guadagna* (and *United States v. Baker*, 98 F.3d 330 [8th Cir. 1996]) refers to *all* the evidence in the case, and the standard set forth in *Glenn* and the cases discussed in *Boesen*, such as *United States v. Davis*, 103 F.3d 660 (8th Cir. 1996), refers to the requirement that in order to avoid acquittal the *government's evidence* must provide *more than equal* support for guilt. The *Boesen* court stated:

> "...Mr. Boesen cites *United States v. Dunlap*, 28 F.3d 823, 827 (8th Cir. 1994), for the proposition that where the government's evidence is 'equally consistent' with innocence... a conviction cannot stand. This holding was fully articulated in *United States v. Davis*, 103 F.3d 660, 667 (8th Cir. 1996). '[w]here the government's evidence is equally strong to infer innocence as to infer guilt, the verdict must be one of not guilty.' However, this court has made clear that 'if the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction.' *United States v. Baker*, 98 F.3d 330, 338 (8th Cir. 1996). *This court has reconciled the quoted holdings: Davis refers only to the government's evidence, while Baker refers to all the evidence, including that presented by the defense....*" *Boesen*, supra, at 857.

It is submitted that, as argued in the Aref main brief and herein, a thorough examination of the government's evidence shows that there was equal or nearly equal support for innocence. This was discussed on Pages 84-87 and 91-92, *inter alia*, of the Aref main brief.

F. There was Insufficient Evidence that Aref Made a False Statement Regarding Mullah Krekar

The response brief failed to point to any evidence from which a jury could have properly determined what question Mr. Aref was actually answering when he allegedly said that he did not know Mullah Krekar personally. The question is essential because it is impossible without the question to determine what period of time was assumed within the answer. The only evidence submitted by the government on this issue was elicited during the testimony of Agent Delecki, who discussed Mr. Aref's interrogation on August 4 or 5, 2004. The following occurred:

> "Q: Did anyone ask Mr. Aref any questions about Mullah Krekar?
> A: Yes
> Q: What did Mr. Aref say about Mullah Krekar?
> A: He said he knew him to be the leader of Ansar al-Islam, he didn't know anything personally about him, but he knew him as an important person." (GA 283).

This testimony is the sum total of the government's evidence on the issue of what Mr. Aref was asked and what statements he made. It is significant that nowhere does the government state what question Mr. Aref was answering when he supposedly made his false statement, but Agent Delecki's testimony suggests that Aref was focusing on the period when Mullah Krekar was the leader of Ansar al-Islam. If Aref said that he did not "know anything personally" about Mullah Krekar during the Ansar period if would obviously have been correct. Aref left to come to the US in 1999; Ansar al-Islam was not even formed until 2001 and there is no evidence that Aref had anything to do with Mullah Krekar after 1999.

Moreover, the statement that Aref did not "know anything personally" about Mullah Krekar, is quite different from the statement charged in the indictment that Aref "did not know him personally." The former statement indicates that Aref did not know any personal facts about

Mullah Krekar, while the latter statement indicates that Aref did not have a personal relationship with him. The indictment charges that Aref, after acknowledging to the FBI that he knew Mullah Krekar was a famous person and founder of the terrorist organization Ansar al-Islam, "denied that he knew Mullah Krekar personally." Clearly this charge was not proven if the evidence shows that Aref said that he knew Mullah Krekar was the founder of Ansar al-Islam, but he did not know anything personally about Mullah Krekar during the time of Ansar, which is what Agent Delecki's testimony suggests.

To put this charge in context, it must be remembered that Aref's interrogation took place for hours all through the night of August 4-5, while Aref, chained in a chair, was questioned and at times threatened and yelled at in a foreign language. No tape recording of the interrogation was made. Agent Delecki was allegedly present to take notes, but the Agent did not refer to any notes and simply gave a vague summary of what he remembered Aref saying. In fact it seems apparent that Agent Delecki had no recollection of the specific questions asked, the context in which Aref gave his answers, or the precise words Aref used. Indeed, the night-long interrogation was so stressful that Aref testified that he did not even remember being interrogated about Mullah Krekar that night, and thought that agents might have asked him about it earlier.[1] So there is doubt about precisely what question was asked of Aref, when he was

[1] Aref testified "I believe he ask like this: Did you knew Mullah Krekar? I say he's famous. So this mean I knew. What I say that they say, not, I'm not talking about that. Did you knew him personally, and his hand was like tying me to him (indicating). When said did you knew him personally, I say no, I don't know him personally. (A-591) It is mistakenly stated on Page 102 of the main Aref brief that Aref said these questions and answers occurred on August 4-5. Aref actually said that he believed this had occurred on a prior occasion when he was visited by the FBI, rather than the date charged in the indictment. (A-591)

asked, what time frame and context was involved in the question, and what precisely Aref said in response.

As indicated in the Aref main brief, the reference by Aref to his lack of "personal" knowledge is so inherently ambiguous that no false statement charge could be based on it. And the lack of testimony about the questions asked makes Aref's answers even more ambiguous, since he may have been talking about the period of Ansar, when he clearly would not have known anything personally about Mullah Krekar. Moreover, Agent Delecki's testimony is so vague as to context and the specific words used, and differs to such a degree from the charge in the indictment, that the agent's testimony lacks the specificity and the trustworthiness on which a conviction can be based. See the case law on false statements, discussed on Pages 102-105 of the main Aref brief..

It is significant that the government chose to introduce only the most superficial evidence about Aref's allegedly false statement, and it seems apparent that their real reason for bringing this charge was to ensure that they could introduce Aref's diary and use it to prejudice the jury by falsely implying that Aref was personally connected to a terrorist – Mullah Krekar. In fact Mullah Krekar was not listed as a terrorist until 2003, long after Aref had left for the US. At the time that Aref was working in the IMK office, Mullah Krekar was not considered a terrorist.

II. THE DISTRICT COURT ERRONEOUSLY DENIED THE RULE 33 MOTION - WHEN ALLOWING FOR CREDIBILITY, THERE CAN BE NO CONFIDENCE IN THE GUILTY VERDICTS

Out of hundred of hours of taped conversations, the government's case here depends on just a few sentences of conversation, supposedly told to Yassin Aref over a period of 6 months,

which would have caused him to understand that his completely innocent and gratuitous act of witnessing a routine loan transaction was illegal because the money involved came from the "sale of an illegally imported missile." (Response brief at 83) The government had to prove that Aref understood that the loan money came from an illegal sale. Because the conversations do not provide such proof, the government in its response has been forced to misrepresent the record as to several key points. As discussed above, at 7-8, the government claimed that the CW showed *Aref* the trigger mechanism and was speaking to him when it was clear that he was speaking to Hossain while Aref was counting the money which had been handed to him. Also, as discussed above, the government misrepresented the record by claiming that the word "chaudhry" was explained to Aref by the CW on February 12.

A. Lack of Evidence that "Chaudhry" was Ever Explained to Aref

Agent Coll conceded that the crucial June 10, 2004 conversation, where the CW uses the word chaudhry "would not stand for much" if Aref did not know the code word for missile is "chaudhry." (A-406)

In fact, there was absolutely no evidence with the slightest credibility that Aref was *ever* told of the meaning of "chaudhry." All it came down to was Agent Coll's hearsay statement that when he asked the CW, the CW said that he had asked Mohammed Hossain if *he* had told Aref the meaning of the word, and said to Coll that Hossain told him he had. (See main Aref brief, at 23, and A-378, 400, 402) This double hearsay, dependent on the word of the CW, who was *not* questioned about this by the government when he was on the stand, lacks the slightest shred of credibility, and cannot be relied on to support the government's claim that Aref knew the code word. Without that word, as Agent Coll admits, the June 10 statements by the CW simply do not carry the meaning they need to uphold these convictions.

B. January 14, 2004 Conversation – "Sent the Missile to New York"

During a long rambling conversation on January 14, 2004, the CW, who is from Pakistan, refers to his involvement with JEM and its attempt to liberate Kashmir from India. At one point in a long description about his frustration with President Musharraf's opposition, the CW states:

> "[CW] *...that's why, the [miZZAISLE] that we sent it to New York City to teach Mu, uh, President Musharraf, the lesson to not to fight with us...What do you think about that? I mean, I want to make my mind clear with God.*
> *[Aref]: Right brother.*
> *[CW] About JEM.*
> *[Aref]Right brother, especial, I'm not talking about that group and that organization*"
>
> (GA 561)

Aref has absolutely no reaction to the statement that a "miZZAISLE" was sent to New York to teach Musharraf a lesson and it is clear that he did not hear it or understand its significance.

It is difficult to conceive of someone casually being told that a missile has been sent to New York to teach Musharraf a lesson and have no reaction to it at all. Aref never again referred to the matter in any way, never asked any questions, never asked for a progress report, or in any other way indicated any awareness of the matter and it is clear that he simply did not hear of understand what the CW was talking about. Instead, Aref was focused on JEM, which he said many times he could not support.

C. February 12, 2004 Conversation

Aref's complete non-reaction in the January 14, 2004 conversation must be contrasted to his strong reaction on February 12, 2004, when the CW again referred to an attack coming in New York City. Aref reacted strongly and negatively to the comment, but concluded that the CW was making a bad joke.

Even if Aref heard these statements, neither of these comments – the January 14 statement that a missile was sent to New York City to teach Musharraf a lesson, or the February 12 comment that there would be an attack in New York next week, contains any information about the plot, or its chance for success, or provides any reason for Aref to believe that he would be involved in any way. Since he clearly did not hear the first comment, and rejected the second comment as a bad joke, there was no reason for him to be alerted to anything untoward.

So that is it. Essentially four sentences out of hundreds of hours of tapes, spread over 6 months, that were supposed to alert Aref that by witnessing a loan transaction to help a friend, he was assisting a foreign terrorist organization and engaged in money laundering. It is submitted that Aref did not hear or understand three of these references because the CW made them in ways that Aref could not understand (either in code, or when Aref was distracted, or just slipped into a conversation). The one comment Aref did hear (there will be an attack in NYC next week) provided no clue that Aref was in any way involved and, coming as it did out of the blue, it was natural for Aref to believe that the CW was joking. This was what Kassim Shaar believed even before Aref assured him the CW couldn't possibly be serious. The government has completely failed to provide evidence which supports any confidence in the guilty verdicts.

D. January 14, 2004 Conversation – "Legally your money"

Faced with a complete lack of evidence that Aref was ever aware of any plot, or of any connection of the plot with the loan, the government distorts innocent phrases to create the impression that Aref understood what was never explained to him. Page 85 of the response brief claims that "Aref understood the criminal nature of the transactions" when he referred to the CW's need to "legally" the money. In fact the phrase "legally the money" originated with the CW, not Aref, and the CW used the phrase as part of successful attempt to convince Aref that his

problem was that he had not paid his taxes. This is described herein, at 9, and in detail in the main Aref brief, at Pages 14, 16-17 and 78-81. In short, first the CW told Aref on December 10 that the reason the money was illegal was because the CW didn't pay his taxes. Then on January 2 the CW continued to support this idea that the illegality related to taxes. Finally Aref concluded on January 14 that because the illegality came from not paying tax, "legalizing" (or "legally" as he put it) the money meant allowing the CW to pay taxes on it.

E. Lack of Motive

Throughout the response brief the government fails to deal with a basic problem – the lack of any motivation for Aref to become involved in such a plot. The government claims that Aref was told about the plot to assassinate the Pakistani ambassador on January 14 and then, in front of a complete stranger, the CW said "there was an attack coming to New York City, a missile attack coming there" on February 12. That is the full extent of the information given to Aref about this plot. There is every reason to believe that Aref either did not hear the information or did not take it seriously. He never asked any questions, made no statements indicating that he wanted to be part of it or was aware of it. This is in sharp contrast to his many statements on January 14 that he could not support JEM.

In any event, even if, *arguendo,* Aref had become aware that the CW was involved in some plot, what would have been his motivation to enter into it? He knew basically nothing about it. He did not know who was involved or how it was to be done, and he had no role to play, as far as he knew. Nobody had asked him to do anything in connection with it. Why would Aref, who is a Kurd with no connection to Kashmir, have endangered his family and himself, by becoming part of some Kashmiri plot he knew nothing about?

The credible evidence just does not support these convictions, and there can be no

confidence in the guilty verdicts, which are explained more by the very prejudicial targeting instruction and other prejudicial evidence than by the actual evidence of the sting operation.

III THE DEFENSE WAS FORCED TO AGREE TO THE TARGETING INSTRUCTION WHEN THE COURT WAS PREPARED TO ALLOW TESTIMONY ON THE "SEVEN REASONS" (ABOUT MUCH OF WHICH NO QUESTIONS COULD BE ASKED) AS PART OF THE REBUTTAL CASE, DESPITE THE FACT THAT THE DOOR HAD NEVER BEEN OPENED

As discussed on Pages 46-55 and 119-125 of the main Aref brief, the Court told the jury on two different occasions that the government had "good and valid reasons" for targeting Mr. Aref. (A-678, 690-691) (In his closing the prosecutor also said this, and added that the Government was not permitted to put on its proof on that issue. A-688-689) It is submitted that this nearly unprecedented instruction neatly explains the verdict herein - the jury thought it likely that Mr. Aref may have been innocent, but was afraid to acquit him completely because of what the judge told them. The prejudicial impact of this instruction cannot be overstated.

The prosecution claims that Mr. Aref waived any challenge to this instruction by agreeing to it. However, it is submitted that it was agreed that the challenge to the instruction be preserved, but, as discussed below, unfortunately this took place in chambers and was (probably inadvertently) not recorded. A reconstruction hearing may be necessary.

In addition, the instruction was "agreed to" under duress and only to prevent the government from presenting evidence of the highly prejudicial "seven reasons" for targeting Mr. Aref, which would have come in without any meaningful cross-examination. And Mr. Aref had already taken an exception to the District Court's August 22, 2006 ruling limiting cross examination as to the "seven reasons" why Mr. Aref was targeted. (GA 106)

As discussed in the main brief, it is submitted that this was an "agreement" made at gunpoint because the District Court was prepared to allow the government to introduce the

"seven reasons" evidence, appearing to have finally agreed with the prosecution that the door had somehow been opened to this evidence. However, it is submitted that, as argued below, the door was never opened, and thus it would have been a crucial error for the District Court to allow this rebuttal evidence. The transcript of the August 22, 2006 CIPA conference, recently declassified, shows that cross-examination as to much of the highly prejudicial "seven reasons" evidence would have been prohibited, a ruling to which the defense had excepted.

A. August 22, 2006 CIPA Conference

On August 22, 2006 a conference was held at which several issues were discussed, including the use of classified evidence in the case. The transcript of the portion of the conference dealing with CIPA and classified evidence was itself considered classified until very recently, after the main Aref brief was filed, when the transcript was declassified and slightly redacted.

It is quite clear from the August 22 transcript that cross examination regarding the Rahwah notebook (and similar classified evidence regarding Aref's name and incomplete address having been found in northern Iraq) and warrantless wiretapping, among other issues, would not be allowed. (GA 103-104) At that conference the following occurred:

> "THE COURT: Okay. All right. So that really brings that matter to a close, but there's one matter under CIPA that the government wishes to talk about.
>
> MR. PERICAK: That relates to *limits on cross-examination*. It applies to this document [It was not clear what document was referred to] and it applies to a number of other motions that defense have made and that is this: I'll just say, for example, for example, *on cross examination of Agent Coll, the defense should not be allowed to ask him now where did this come from? What's the source*? *Those types of questions*. *Second of all, there have been a number of motions made - separate motions, multiple motions made with regard to wiretapping, alleged wiretapping. The Court has ruled on that. The defense should be limited to the - to not bring up wiretapping. There have been motions made to the Rahwah notenook and other classified discovery. The Court has ruled on that. The defense should be limited in their cross-examination under CIPA to not bring that up. ....It would be with respect to wiretapping, as one example, the Rahwah notebook*

and other items of discovery that we have provided on classified subjects as to – [redacted]. *Those kinds of things."* (GA 103-104)

Later, after a discussion held off the record, the Court said:

"If Agent Coll is asked anything about the purpose of the government, for targeting Aref, he is going to be giving answers from the seven categories[2] that are in the government's brief and if he's asked anything beyond that, he's going to have to say that's confidential. So I'm going to direct counsel not to ask him anything beyond those seven reasons. Okay." (GA 105)

Contrary to the position stated by the prosecution, on Pages 149-150 of the response brief, it is clear, from the above statements from the prosecutor that the District Court meant that if the "seven reasons" came in at trial, the only answers permitted would be the very limited information provided to the defense via CIPA discovery in March, 2006. (A-210-217) Anything else regarding this information would be considered classified, and thus no questions attempting to elicit any other information about this heavily redacted material would be permitted. Mr. Luibrand pointed out the heavily redacted nature of this material at the August 22 conference, where the following occurred:

"MR. LUIBRAND:...When Mr. Tyrell says we have been provided those [apparently referring to the Rahwah notebook and related evidence], all we have is one-clause descriptions of each of the items without any documents or witnesses or identification of witnesses. ...

MR. PERICAK: That's not true, Kevin. What you have is there was a government filing in response to the Court's order ordering us to make disclosure and attached to that filing were, for example, excerpts from the Rahwah notebook. ...

[2]The "seven reasons" are discussed in the main Aref brief at 47-52 and are included at A-210-217. The first three reasons related to the Rahwah notebook and similar evidence found in northern Iraq which, beyond the heavily redacted information provided, was all classified. Another dealt with 14 calls made by Aref to the IMK office, which were the subject of the defense *Brady* motion regarding wiretapping. Another related to a heavily redacted FBI 302 report from an alleged confidential informant, most of which was classified. The remaining reasons (the letter from "Islamic Cintral" which was introduced at trial) and the criminal histories of Ali Yaghi and John Earl Johnson didn't appear to depend on classified evidence, though in order for them to have been provided via CIPA there must have been some classified evidence related thereto, which the defense never obtained.

MR. LUIBRAND: I agree that there was a filing with Rahwah. That's one of the seven. The other -

MR. PERICAK: Sargat.

MR. LUIBRAND: Sargat, Iraq and also safe house and motel. *There's not identification of people or what was involved.*

MR. TYRELL: That's not –

MR. PERICAK: Disclosure.

MR. LUIBRAND: The point is, I want the record to be clear we weren't provided open ended information regarding these incidents and materials. We were given limited information.

THE COURT: Right. That's right. I agree with that.

MR. TYRELL: Right.

THE COURT: Let's go off the record.

(Discussion held off the record).

(End of CIPA discussion...)" GA 109

Before Mr. Luibrand had pointed out the heavily redacted nature of the discovery regarding the "seven reasons," and after the Court had ruled that any cross-examination regarding the "seven reasons" would be limited to that heavily redacted material, the prosecution stated that said evidence would not be elicited in its direct case, unless the door was opened by the defense attacking the motives of the government in targeting one of the defendants. (GA 105-106) The defense agreed that the motivation for the sting operation would not be challenged. (GA 106)

Significantly, defense counsel for both Aref and Hossain took exception to the District Court's ruling regarding the limitation on cross examination. (GA 106) Having cross-examination limited in this way would have allowed the government to introduce "crucial information while shielding the source of that information ... from potentially devastating cross-examination." *Ryan v. Miller*, 303 F.3d 231 (2nd Cir. 2002), quoting *United States v. Figueroa*, 750 F.2d 232, 240 (2nd Cir. 1984).

B. The Door was Never Opened

At trial, the prosecution claimed at various times that the door had been opened to the "seven reasons" evidence. As discussed in the response brief, the first time was after the

openings. The prosecution claimed then, and continues to claim on appeal, that Aref's attorney somehow had opened the door by stating in his opening that the FBI had chosen someone for the sting operation. It was quite clear from context, if one reads beyond the selected quote from Page 146 of the response brief, that defense counsel was referring to the *choosing of Malik as the CW.* Defense counsel says:

> "Now about this case in particular, we're talking about a sequence of meetings that happened after he arrives in the United States and begins presiding over the local mosque. This is a particular part of an investigation, and the Court instructed you about it, and Mr. Pericak talked about it; one way that law enforcement can proceed in a type of investigation is when they have somebody come to them and say, here's what I'm engaged in, I want to cooperate; and maybe they're already involved in some type of activity; and in that case the Government takes the witnesses, they find them.
>
> There are other cases, sting cases, like we're talking about here, where the Government, before they begin, selects their person; they choose a person that they're going to try to put into a situation; they choose, as Mr. Pericak told you, carefully. Agent Coll decided what facts to introduce and in what fashion. So keep in mind the agent not only controls the facts, but the choice of the actual person they put into the investigation..." (GA 124)

The prosecution also claimed on appeal that defense counsel for Aref somehow opened the door when he was cross-examining Agent Coll. After mentioning that Mr. Aref had been visited by the FBI prior to the sting operation, and referring to the testimony of FBI Agent Hoover, who had visited Mr. Aref, defense counsel said, "...there came a time when you decided you were gonna select somebody to try and speak to Mr. Aref and speak to Mr. Hossain, correct?" (GA 192-193) Again, it is abundantly clear that the word "select" here referred to the choice of the CW. And the defense certainly didn't open the door by referring to the testimony of Agent Hoover, whom the Government had already called to explain how Hoover had visited Mr. Aref prior to the sting operation as part of something called the "Iraqi Initiative." (See GA 192)

Finally, the prosecution claims that Mr. Aref opened the door in his own testimony. Defense counsel asked, "Now, after you became full time, Yassin, can you describe generally the

course of your employment at the mosque on Central Avenue?" Mr. Aref then gave a long answer, quoted in part on Page 147 of the response brief, in which he stated, among other things, that he was spending all his time between his house and the mosque, and wasn't involved in any political activity since he arrived in this country. The prosecution also mentions that subsequently defense counsel asked Mr. Aref about his prior visits from the FBI but, again, this cannot be considered opening the door because the Government had earlier put on evidence of those visits. And none of that attacked the investigation.

It is submitted that, aside from the fact that this information was not elicited by defense counsel, who simply asked about Mr. Aref's employment as an imam, the above testimony of Mr. Aref did *not* open the door to the "seven reasons" because *he did not attack the motive of the investigation*. He simply said he was not involved in politics in this country. The "seven reasons" evidence does not show otherwise. As discussed in the Aref main brief at 48-49, *inter alia,* the evidence involving his name and old, incomplete address found in northern Iraq does not show he was involved in any political activity in this country, though the prosecution would have liked to present this evidence, and would have hoped that the jury would draw sinister implications from it.

As to the phone calls to the IMK office, as explained on Pages 50-51, *inter alia,* of the main Aref brief, Mr. Aref testified that these calls were personal in nature. The fact that these calls were made was introduced in any event. (As discussed below, these calls were the subject of a defense *Brady* motion claiming that the government has transcripts of at least some of the calls, and that this evidence would be exculpatory.) The letter from "Islamic Cintral" was also introduced at trial, and, as discussed on Page 51 of the main Aref brief, it is clear from Mr. Aref's diary that he refused being appointed representative of that group, whatever it was. (This

actually *supports* his testimony that he had decided not to be involved in anything political when he came to this country.)

The highly redacted 302 report regarding statements from a confidential informant has no connection to Mr. Aref, and thus it does not rebut his testimony. And finally, as described on Pages 51-52 of the main Aref brief, the association with Ali Yaghi and John Earl Johnson does not rebut his testimony either as he only knew Johnson because he was the imam of the mosque where Johnson attended services, albeit rarely. While he was a friend of Yaghi's, he had no political connection with him whatsoever.

Thus it is submitted that Mr. Aref's testimony did not open the door to the "seven reasons" testimony, nor was the door opened at any other point. However, it appears that the District Court at some point decided that the door had been opened. The prosecution stated (with a strange verb tense) on Page 146 of the response brief, "Whether intentionally or inadvertently, thorough opening statement, cross-examination, and testimony, the issue of the FBI's motive for investigating Aref *seemed to be arise*."

C. The Record is Incomplete as to the Genesis of the Targeting Instruction, and There May Be a Need for a Reconstruction Hearing

When the prosecution proposed introducing the "seven reasons" evidence as part of its rebuttal case, there was a discussion in chambers which included the District Court, Mr. Pericak, Mr. Sprotbery, Mr. Kindlon, Mr. Luibrand, and most likely AUSA Elizabeth Coombe. It is submitted that the parties probably thought said discussion was being recorded, but for some reason, probably inadvertently, it was not. It is submitted that during that discussion Mr. Pericak proposed that there could be some sort of instruction in lieu of the "seven reasons" evidence.

There followed negotiation about the nature of the instruction, and the District Court participated in those negotiations. It is submitted that it was the understanding of the parties that objections to the instruction would be preserved for appeal.

However, because the genesis of the targeting instruction is not on the record, there may be a need for a reconstruction hearing regarding the above mentioned discussion in chambers to determine several factual issues. These include: 1) whether the District Court had decided that the door had been opened, and if so, how; 2) what the negotiations involved; 3) whether it was indeed the understanding of the parties, or at least of defense counsel, that objections to the proposed instruction were being recorded and were preserved; and any other related issues which this Court or any party wishes to be explored.

The recently declassified August 22, 2006 CIPA transcript, discussed above, is also quite confusing at times. For example, while it is clear that Mr. Pericak said that cross-examination of the "seven reasons" evidence would be limited to the highly curtailed and redacted information provided to the defense in March, 2006, there are other statements by Mr. Tyrrell (from the Department of Justice) which appear to claim that the objection went more to evidence other than the "seven reasons." (See, i.e. GA 107-108) There were many times when the discussion went off the record, and it is submitted that this led to the confusion inherent in what was recorded. Possibly any reconstruction hearing could also help clear up the confusion with respect to what was meant by the various statements made on the record on August 22, 2006.

D. Conclusion

In sum, the defense is arguing that the nearly unprecedented targeting instruction was incredibly prejudicial; that objections to it were preserved; (or that it was the understanding of

the parties that they were recorded and preserved); that the District Court improperly decided that the door had been opened to the "seven reasons" testimony; that the District Court ruled on August 22, 2006 that there could be no cross-examination as to the facts underlying the very limited "seven reasons" evidence which had been provided to the defense in March, 2006; and that the defense took an exception to the August 22, 2006 ruling. There may be a need for a reconstruction hearing to examine this crucial issue.

IV BRADY MOTION

On Pages 191-192 of the response brief, the prosecution quotes *United States v. Paulino*, 445 F.3d 211 (2nd Cir. 2006) as supporting that proposition that the contents of the 14 calls Aref made to the IMK Office between 1999 and 2001 (records of the making of the calls were introduced at trial) were not in the exclusive possession of the government, and that Aref therefore could have taken advantage of said evidence. Mr. Aref did everything he could to "take advantage of" the evidence, but the fact remains that the government introduced evidence that he made 14 calls to the IMK Office after he came to this country, and all that the defense had to counter the implication that these calls were political in nature was Mr. Aref's testimony to the contrary. It is abundantly obvious that transcripts of the calls themselves would be much more credible to a jury than the word of a criminal defendant, however credible he may be. Thus it is preposterous for the government to claim that the defense could have taken advantage of this information, or that it (meaning the transcripts of the calls) was not in the exclusive possession of the government.

The records of the making of the calls was introduced into evidence at trial, and, as discussed on Pages 59-60 of the main Aref brief, the calls were somehow used to justify

testimony by Evan Kohlman that Mullah Krekar had formed Ansar Al-Islam in 2001, and to justify his testimony on Ansar's terrorist activities. This evidence was clearly highly prejudicial. In addition, the prosecutor mentioned the calls in his closing. (GA 430)

The prosecution points out that disclosure under CIPA (the standard, as discussed below, is 'material and helpful to the defense or essential to the fair determination of a cause') is supposed to be *broader* that the *Brady* standard of "materiality." If that is the case, then it is even more clear that the District Court's failure to either direct the government to provide the evidence, or at least exclude the phone records from being used at trial, was erroneous, either under *Brady* or CIPA or both.

As to the *Brady* standard, in *Kyles v. Whitley*, 514 US 419, 434 (1995), the Supreme Court stated:

> "[A] showing of materiality [under *Brady*] does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal... [T]he touchstone of materiality os a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of trial." (*Kyles*, supra, at 434)

It is submitted that given the weakness of the government's evidence, discussed in Point I above, and extensively in the main Aref brief, and the fact that Mr. Aref was acquitted of most of the charges (and only convicted based apparently on the June 10, 2004 conversation, where he was provided with no new information), there can be no confidence in the outcome of the trial. The implication that the 14 calls were political in nature, and the use of the calls to allow Kohlman to connect them to terrorist activity by Mullah Krekar and Ansar Al-Islam, shows the

extreme prejudice attached to this evidence. If Mr. Aref had been able to prove that the calls were personal in nature, or if this evidence had not been admitted at all, the outcome may well have been quite different. Thus it is submitted that the Court should hold that this evidence meets the *Brady* standard of materiality, and order a new trial. In the alternative, the Court could find that the failure to disclose this evidence, or preclude the government from using evidence of the calls at trial, constituted a discovery violation under the CIPA standard. Either way, there should be a new trial.

A. Al-Timimi Case and NSA Wiretapping

The defense has long argued that the government has possession of transcripts of at least some of the calls through the NSA warrantless wiretapping program or a similar program. (As discussed below, it now appears that this warrantless wiretapping may have begun as early as February, 2001, rather than soon after September 11, 2001, as previously stated in the main Aref brief. Thus more of the calls may have been recorded - 6 of the 14 calls took place in or after February, 2001. A-189)

There are several other cases in which the issue of the NSA recordings has been raised. One of those is the case of Ali Al-Timimi, whose lawyers argued, after he was convicted, that he may have been illegally wiretapped under the program. In *United States v. Al-Timimi,* 2006 US App. LEXIS 32554 (4th Cir. 2006), the Fourth Circuit remanded the case back to the trial court, presided over by Judge Leonie Brinkema, who had also presided over the Moussaoui case, for hearings on the use of the NSA evidence. The New York Times reported on November 21, 2007, in an article by Eric Lichtblau entitled, "Wiretap Issue Leads Judge to Warn of Retrial in Terror Case," that Judge Brinkema had warned during a November 20 hearing that she no longer had

confidence in the government's representations after what had occurred in the Moussaoui case, and that *she may order a new trial if the government did not allow the NSA evidence to be seen by the local prosecutor and a cleared defense counsel*. The transcript of that hearing shows that what occurred in the Al-Timimi case - the NSA evidence having been presented to the judge but not disclosed to the lead attorneys in the case - was precisely what occurred in the instant case. This Court should hold, as did Judge Brinkema, that security cleared lead attorneys must be provided with the evidence which underlies substantive motions. Judge Brinkema stated:

> "...I think what's going to happen today is not going to be a resolution of the issue. Rather, it's going to be a direction from the Court that I am no longer willing to work under the circumstances where both the prosecuting team and defense counsel are not getting any kind of access to the materials.
>
> I am sorry to have to say this, but *I have lost a great deal of confidence in the representations made to me by folks in the intelligence world, and I'm responding, frankly, to something that happened not in this case but in the Moussaoui case.*
>
> ...[O]n October 25, 2007, I received a letter from one of the prosecuting attorneys in that case reflecting that although I had been sure that it was not reasonable that key witnesses in their interrogations had not been tape-recorded and/or videotaped, I was assured on numerous occasions that that had not occurred, and we went ahead with that case with that understanding, and, of course, as that letter reveals, that was not, in fact – the representations that were made to me were not, in fact, accurate[3].

[3]The November 20, 2007 hearing occurred before it was publically revealed that the videotapes of the interrogations had been destroyed in November, 2005, very shortly after Judge Brinkema had

ordered, on November 3, 2005, that the government confirm or deny whether the CIA interrogations in question had been recorded. This is described in a redacted version of the October 25, 2007 letter she referred to above, which stated, "...the District Court ordered the Government to disclose various information [redacted] including whether interrogations were recorded. *See* 5/2/05 Order (Docket No. 1275). Judge Brinkema subsequently reconsidered most of that order, at the Government's request (*see* Docket No. 1282), but still directed the Government to 'confirm or deny that it has video or audio tapes of these interrogations,' *see 11/3/05 Order* (Docket No. 1359), at 4. The November 14 Declaration ensued, in which a CIA executive stated that the 'US Government does not have any video or audio tapes of the interrogations of [redacted]" *See 11/14/05 Declaration* (Docket No. 1369), at 3. Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. *[Yet they were destroyed at some point during that month*.] ..." October 25, 2007 Letter to Judge Brinkema and 4th Circuit Judge Karen J. Williams, filed with Court Security Officer Macisso in the case of *United States v. Zacarias Moussaoui*, 01-455-A, on October 26, 2007, and later apparently redacted and filed publically.

> Now this was not the line prosecutors; this was people back across the river; but because of the concept that lawyers who appear on a regular basis before a court are subject to the court's discipline, they know that their reputation rises or falls upon the accuracy of their representations, a court has no way of controlling or adequately policing what is said to it if it's made by attorneys whom we have no connection with, and given the mess that occurred in the *Moussaoui* case, it's not going to result, I don't think, in any change in the posture of that case, but this case is a different situation.
>
> *This defendant did not plead guilty. He has insisted that he is innocent of the crimes. The case is on appeal.*
>
> I read again with care the petition you filed with the Fourth Circuit, the basis of which the Fourth Circuit sent this case back to this Court, and *I don't think I would be doing my job as an Article III judge appropriately if I did not assure both myself and you-all that an absolutely thorough and accurate review had been conducted.*
>
> *And again, I think you make a good argument that defense counsel have a right under our legal system to be involved to a reasonable degree in making judgment calls as to whether material is, in fact, exculpatory or not exculpatory.* It is absolutely, in my view, ludicrous that someone of [prosecutor] Mr. Kromberg's background does not have the ability, a limited ability, to see what's involved in this case. ...
>
> So I am not going to resolve the pending motions, but instead, *I'm directing the government if they want the Court to be able to make this evaluation, then I need to have the trial team, at least Mr. Kromberg, read in. I need to have defense counsel, who have already gone through the hassle of getting security clearances - if you're not cleared highly enough, then so be it, get the clearance, and if you're not qualified for it, then we need to get Mr. Timimi counsel who can be cleared;...*
>
> ...[*F*]*rankly, if I can't get some flexibility on the government's part, then I'm going to be inclined to grant a motion for a new trial, and that's what I'm doing today."* November 20, 2007 Transcript in *United States v. Al-Timimi*, 04-cr-385, at 3-5. (The transcript is only 5 pages long.)

In this case, as in *Al-Timimi*, neither defense counsel nor the local prosecutors have been given access to the NSA evidence. And, with regard to the 14 calls, the main Aref brief noted, at Page 151, that only one of them had been made after September 11, 2001 (quoting President Bush who stated that the NSA warrantless wiretapping program had begun "in the days after September 11, 2001") yet speculated that some (or all) of the other calls may have been recorded through some other program or by another government, such as Syria. However, on December 16, 2007, in an article by Eric Lichtblau, James Risen and Scott Shane entitled "*Officials See to Protect Firms Aiding NSA Spying,"* the New York Times reported that the NSA had written a

report in December, 2000 announcing its intention to greatly increase surveillance using commercial communications networks, and acknowledging that this would raise legal and privacy issues. The article also pointed out that it was known that the NSA had contacted at least two telecommunications companies in *February, 2001* in order to set up warrantless surveillance programs. One, Qwest, declined. Upon information and belief, the other company mentioned in the article, ATT, agreed to work for the NSA, and began intercepting calls soon thereafter. Thus it appears that several more of the 14 calls may have been intercepted by the NSA program than hitherto realized. (Six of the 14 calls took place in or after February, 2001. A-189)

In sum, based on Mr. Aref's assertions that the 14 calls were exculpatory; based on the evidence, discussed at length in the main Aref brief, that he was subjected to warrantless wiretapping by the NSA program (and/or other programs), and that many or all of the calls were likely recorded by the government; and based on the prejudicial use of the evidence of the making of the 14 calls which was presented at trial; Mr. Aref has raised a valid claim under *Brady*. This claim should not and cannot validly be denied based on the classified nature of the NSA program. As pointed out by Judge Brinkema, decisions of this nature cannot be made on an *ex-parte* basis, and this Court should direct the Government to provide the relevant information to the lead prosecutor and security-cleared defense attorneys, or grant a new trial.

V OTHER CIPA MATTERS

First, Mr. Aref joins in the arguments raised by the New York Civil Liberties Union in their recent motion to strike or place on the public docket the Government's *ex-parte* memoranda.

The main Aref brief contains many arguments regarding the secret evidence in this case,

which are discussed at Pages 130-169. Now the government is supplying this Court with the same secret evidence which was kept from the defense (and some of which was kept from the lead prosecutor as well, according to Mr. Pericak's recent letters regarding "secret" and "top secret" memoranda and appendices filed with this Court). Not only is *classified evidence* being provided, but *legal argument* as well - as shown on Page 6 of the response brief, there is a "secret" memorandum and a "top secret" memorandum, which is referred to on Page 196 of the response brief as a "top secret *brief*." Now perhaps *additional* secret evidence is being provided to this Court which was not provided to the District Court - there is simply no way for the defense to know. Moreover, as discussed below, at times in the response brief statements are made in response to the defense statement of facts or arguments, followed by citations to the secret record. (See, ie., Pages 6, 55, 57, 196) Even though there may not have been many citations made to the secret evidence in the response brief provided to the defense, there were also entire *secret memoranda* containing legal arguments of which the defense has no knowledge. The damage done to the defense by secret argument cannot be overstated. It is almost as if we have been relegated to the role of spectator rather than participant with regard to certain crucial aspects of this case. In fact, it's even worse than that - the role is that of a spectator with blinders on, who not only cannot participate, but cannot even *see* a great deal of what is being done in our own case.

In the case of *Doe v. Gonzalez,* infra, the court raises the big picture of the role of the courts in properly interpreting the law rather than just trusting that the other branches of government will do so. As Judge Brinkema points out, Article III judges have a responsibility to make sure the legal system works the way it is supposed to - which means, in our adversarial

system, that both sides need all the relevant information underlying the legal arguments. It is not for the courts alone to look at the evidence and make the decisions without the benefit of arguments *based on those facts* from the main attorneys in the case. (Actually, the government is apparently secretly making legal arguments but some of that has been kept from the lead prosecutor, and all of it has been kept from the defense.)

In *Doe v. Gonzalez*, 500 F. Supp.2d 379 (SDNY 2007), the court recently held a that portion of the Patriot Act was unconstitutional because it violated the doctrine of Separation of Powers by abrogating judicial responsibilities. While the specific issues in that case are different than the issues explored herein, the same principles apply. The court carefully described the traditional role and importance of checks and balances in our system of government, and warned that history provides all too many examples of times when the courts yielded such fundamental ground, and the disastrous results which followed. The court stated:

> "...[S]ometimes we are compelled to recite the obvious again because on occasion, counter to even the most constant refrain of the same theme, the message still goes unnoticed, or inadequately considered, perhaps ignored. ... Whatever the reason, when the risks and the valuables at stake are high enough, some reiteration of the plain and simple may be justifiable, because there comes a point at which the encroachment poses clear and serious danger, and prudence and self-protection then counsel us to take the greater precautions called for by the occasion, which may mean erecting a clearer demarcation of the boundaries, or placing additional, more distinct or sharper warnings.
>
> ...When the Founders designed our constitutional democracy, they divided the government into three branches. ...Each segment was separate but coequal. ...
>
> ...Congress was expressly authorized to write the laws, and in furtherance of this task was granted control over the national purse. The president was empowered to enforce the law and protect the national security, and to those ends bestowed command over the armed forces. And to the judiciary was delegated a duty that, on balance, was perhaps the most delicate responsibility of all: the power to say what, in the last analysis, the law is - an authority that entails ensuring that the Constitution, as interpreted by the courts, remains the supreme law of the land. ...
>
> ...[T]he courts were entrusted as guardians of another vital resource: the fundamental rights and liberties of the people. The success of judicial protection under this mandate depends on ensuring that at all times the governmental system functions as

ordered, that each branch remains within its proper contours in performing the duties assigned to it, and that none encroaches upon the provinces conferred upon the others...

***

...Congress and the executive must abide by the rule of law, in times of domestic tranquility and of national crisis, in war and in peace... '...The interpretation of the law is a proper and peculiar province of the courts.' [*Marbury v. Madison*, 5 US 137, 178; see also *Hamdi v. Rumsfeld*, 542 US 507, 536 (2004) ('We have long since made it clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.')...

***

...Conceivably, what might commence as an innocent... step over a blurry line in the dark, could later stretch into a means of further and more detrimental invasion of the court's prerogatives - the ... equivalent of breaking and entering, with an ominous free pass to the hijacking of constitutional values.

The pernicious consequences which that prospect could trigger cannot be overstated, or lightly discounted...

***

These concerns may be readily dismissed as protesting too much, as conjuring a remote, unduly alarmist parade of horrors. But those who are inclined, for the risk of the moment, to give chance a chance by wagering against the improbable, should consult history for its guidance as to what the roll of the dice may hold in predictable situations. The past is long and so is the future we want to protect. But too often memory is short. The pages of this nation's jurisprudence cry out with compelling instances illustrating that, called upon to adjudicate claims of extraordinary assertions of executive of legislative or even state power, such as by the high degree of deference to the executive that the Government here contends [is demanded] ... of the courts, when the judiciary lowers its guard on the Constitution, it opens the door to far-reaching invasions of liberty. ...See, e.g., Korematsu v. United States, 323 US 214 (1944); Plessy v. Fergusen, 163 *US 537 (1896). These examples, however few in number, loom large in proportions of the tragic ill-effects felt in the wake of the courts' yielding fundamental ground to other branches of government... Viewed from the standpoint of the many citizens who lost essential human rights as a result of such expansive exercises of governmental power unchecked by judicial rulings appropriate to the occasion, the only thing left of the judiciary's function for those Americans in that experience, was a symbolic act: to sing a requiem and lower the flag on the Bill of Rights.*

***

As *Doe I* noted, the Court recognized the 'heavy weight' of September 11, 2001, 'a murderous attack of international terrorism, unparalleled in its magnitude, and unprecedented in America's national security.' that looms over this proceeding. See 334 F. Supp. 2d at 477-78. Its effect is still felt and acknowledged by this Court, which sits just a few blocks from where the World Trade enter towers fell. ... However, new methods of protecting and combating threats that result in asserted expansions of executive power underscore the courts' concerns of the dangers in suffering any infringement on their essential role under the Constitution.[20] *The Constitution was*

designed so that the dangers of any given moment would never suffice as justification for discarding fundamental individual liberties or circumscribing the judiciary's unique role under our governmental system in protecting those liberties and upholding the rule of law. It is the judiciary's independent function to uphold the Constitution even if to do so may mean curtailing ... efforts to confer greater freedom on the executive to investigate national security threats.

20. *For example... "President Bush authorized the NSA to begin a counter-terrorism operation that has come to be known as the Terrorist Surveillance Program ("TSP") ..." ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007). Significantly, while the Sixth Circuit dismissed the ACLU's constitutional challenge to te TSP on standing grounds, the District Court below concluded that the warrantless wiretapping allowed by the TSP violated, among other statutes and constitutional provisions, both the First Amendment and the separation of powers doctrine. ...*" *Doe v. Gonzalez*, supra, at 408-410, 412-415, emphasis supplied.

Like Judge Marrero in *Doe I* and *II*, in her decision to stand up for the rule of law, the separation of powers, and the Sixth Amendment in the *Al-Timimi* case, discussed above, Judge Brinkema was courageously exercising the role described above. As she put it, putting a check on unrestrained executive power was the only way to fulfill her "role as an Article III judge." She recognized that some governmental authorities had, for possibly laudable reasons, stepped over the blurry line in the dark referred to in *Doe II* and, based on her experiences in the *Moussaoui* case, she was no longer able to simply take their word for everything. She realized that their representations must be tested by the adversarial process, a proposition which is in fact fundamental to our system of law.

The penumbra of secret evidence in this case threatens to derail many fundamental principles which are seen in vivid relief in the case of Yassin Aref: the presumption of innocence (dealt a killing blow by the targeting instruction); the Sixth Amendment right to confront evidence; and the separation of powers described so well above. One is struck by the extent to which the defense herein has been sidelined by the amount of secret evidence, *secret legal arguments, and secret court orders* from which even security cleared defense counsel have been

excluded. For example, on Page 194 of the response brief, the prosecution responds to the assertion, discussed on Pages 55-56 and 130-131, *inter alia*, of the main Aref brief, that if a question regarding "surveillance" of Aref in Albany, NY during the sting operation implicates classified evidence, yet when the question is changed to "physical surveillance," no such concerns arise, then some type of warrantless electronic surveillance logically must have been occurring. The prosecution simply states "The logic underlying this argument is fundamentally flawed." However there is no explanation as to *how* this logic is flawed, i.e. how this somehow does *not* point to warrantless wiretapping. Then two pages later, at Page 196, in Footnote 48, , the response brief refers to the evidence which its main author (Mr. Pericak) has not even seen, stating:

> "With respect to the defendants' allegations regarding alleged warrantless wiretapping, the Government asks the Court to refer to the *highly classified, top secret brief and appendix* filed in connection with this appeal. See *supra*, note 3."

A. Disclosure under Section 4 of CIPA and under Rule 16

As discussed in the main Aref brief at 126-128 and 160, *inter alia*, the standard for disclosure under the Classified Information Protection Act (CIPA) Section 4 is that a defendant becomes entitled to disclosure of information which is "relevant and helpful to the defense ... or is essential to a fair determination of a cause." *United States v. Moussaoui*, 382 F.3d 453, 472, (4th Cir. 2004).

On Page 166 of the response brief, the prosecution quotes *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985), for the proposition that the standard for disclosure is that the information must not only be "relevant" but "highly relevant," whatever that means. (*Smith* also states that the information must be "essential to the defense," another unclear standard.)

However, more recent cases, such as *Moussaoui*, supra, have continued to establish that the standard is, as stated above, "relevant and helpful," or "essential to the fair determination of a cause." See also *United States v. Rosen*, 2007 US Dist. LEXIS 81531 (EDVA 2007). In *Rosen*, the court stated:

> "Defendants fare far better on the parties' dispute over the strength of the privilege [against the disclosure of classified evidence], namely what showing a defendant must make to overcome the privilege if the government evokes it. The government, pointing to *Smith*, argues that the privilege is not overcome unless the information as to which the privilege is claimed is 'essential to the defense.' 780 F.2d at 1107. Defendants, in response, point to *Moussaoui* in support of the arguably less rigorous standard of 'relevant and helpful." 383 F.3d at 472. *Putting aside whether there is any practical difference between these standards, defendants have the better argument because Moussaoui is the latest and clearest circuit authority on this issue. In Moussaoui, the Fourth Circuit reiterated that, under Smith and Rovario, 'a defendant becomes entitled to disclosure of classified information upon a showing that the information "is relevant and helpful to the defense...or is essential to a fair determination of a cause."'* 382 F.3d at 472 (quoting *Smith*, 780 F.2d at 1107). *The disjunctive is not accidental.* Thus, a defendant need not show that testimony is essential to his defense to overcome the government's assertion of its classified information privilege; a defendant can defeat the privilege by showing that the evidence as to which the privilege is claimed is either 'relevant and helpful to the defense' *or 'essential to a fair determination of a cause*.' *Id."Rosen*, supra, at 38-40, emphasis supplied.

In *United States v. Mejia*, 448 F.3d 436 (DC Cir. 2006), the court points out that CIPA itself does not create any privilege against the disclosure of classified evidence, and, at 455, that "CIPA [Section] 4 is not intended to affect the discovery rights of a defendant." Courts must look to Rule 16 of the Federal Rules of Criminal Procedure, and the standard there, according to *Mejia*, is that the information must be "helpful to the defense." The *Mejia* court stated:

> "The defendants argue that CIPA is a procedural statute that does not itself create a privilege against discovery of classified information. We agree. Indeed, we said as much in *Yunis I*. See [*United States v. Yunis*, 867 F.2d 617, 621(DC Cir. 1989)] (declaring that CIPA [Section] 4 'creates no new rights of or limits on discovery of a specific area of classified information.') CIPA [Section] 4 was, however, intended to 'clarify' a court's existing 'powers under Federal Rule of Criminal Procedure 16(d)(1)' to protect classified information. ...

***

... '[C]lassified information is not discoverable on a mere showing of theoretical relevance....[;] the threshold for discovery in this context further requires that [the information be] *at least "helpful to the defense of [the] accused*."' *Id.*. (quoting [*United States v. Rovario]*, 353 US 53, 60-61 (emphasis added); see *United States v. Yunis*, 924 F.2d 1086, 1095 (DC Cir. 1991) (*Yunis II*)." *Mejia*, supra, at 455-456, emphasis in original.

Rule 16 (a)(1)(c) provides that the defense must be provided with information "material to the preparation of the defendant's defense" With regard to the Rule 16 standard of "materiality," both in ordinary cases, and in those involving classified evidence, *United States v. O'Keefe*, 2007 US Dist LEXIS 31053 (D DC 2007) (which did not involve classified evidence but included CIPA cases in its discussion) stated:

"As this Court has noted on other occasions, 'the government cannot take a narrow reading of the term "material" in making its decisions on what to disclose under Rule 16. Nor may it put itself in the shoes of defense counsel in attempting to predict the nature of what the defense may be or what may be material in its preparation.' *United States v. Safavian*, 233 FRD 12, 15 (DDC 2005).... *Protective orders are expressly designed to assure that a defendant's right to a fair trial are not overridden by the confidentiality and privacy interests of others. See, e.g., United States v. Libby*, 453 F. Supp.2d 35, 37 (DDC 2006) *(discussing procedures under the Classified Information Procedures Act).*" *O'Keefe*, supra, at 4-5, emphasis supplied.

It is submitted that, as discussed in the main Aref brief on Pages 46-51, 55-58, 125-126, 129, 130-131, 142-143 and 157-159, there are several different ways in which classified evidence affected the trial herein. It is submitted that the District Court abused its discretion under CIPA Section 4 in refusing to disclose certain classified information which would have been "relevant and helpful to the defense" or "essential to a fair determination of a cause." As stated in *O'Keefe* and *Mejia*, supra, this should be a broad standard, giving the defense the benefit of any doubt as to what may be "relevant and helpful" or "essential to the fair determination of a cause."

First and foremost, it is submitted that more information regarding some of the "seven reasons" evidence for targeting Mr. Aref should have been disclosed, at least to security cleared defense counsel. As discussed above, what was disclosed regarding Aref's name and old incomplete address having been found in three cites in northern Iraq was extremely limited, nearly entirely redacted information. This led (based on the fact that cross-examination regarding this material would not be allowed based on its classified nature) to the extremely prejudicial targeting instruction discussed in Point III. And, it was in this information where the government had previously "mistakenly" translated a word ("kak") which meant "brother," as "commander," and tried to use the mistranslation to justify jailing Mr. Aref until trial. That mistranslation alone shows that this information must be tested by the adversarial process and not left solely to the discretion of the court, as pointed out so well by Judge Brinkema in the *Al-Timimi* case.

It is submitted that it would have been very helpful to the defense to have had more information about the material found in northern Iraq, and that this would have prevented the targeting instruction which was so damaging. Along those lines, the same could be said of the extremely heavily redacted 302 report regarding a confidential information allegedly claiming the IMK number could be used to contact Al Qaeda. This was also part of the classified portion of the "seven reasons" evidence which led to the targeting instruction, and which the defense could have challenged if more information had been provided.

In addition, the District Court erroneously failed, under CIPA Section 4, to provide information regarding the "14 calls" made by Aref to the IMK Office. The failure to provide the information requested, or even respond in a substantive fashion to the defense motions, constitutes, as argued in Point IV above, a *Brady* violation, but this failure is also a violation of

CIPA. In fact, if it is true that the CIPA discovery standard is broader that the *Brady* standard, than this information could be required to be disclosed under CIPA even if, *arguendo*, it need not be disclosed under *Brady*. As discussed herein, at 24, the evidence that the 14 calls were made was not only directly introduced into evidence, but the evidence was also used to justify very prejudicial testimony by Evan Kohlman, and was referred to in the closing. Had he had access to the transcripts of the calls, Mr. Aref could have very effectively challenged the implication that the calls were political in nature or somehow sinister. As discussed in the main Aref brief, at 58-59, not only did the District Court fail to direct the government to provide transcripts of the calls, at least to security cleared defense counsel, but did not even respond in a substantive manner to the defense motions, simply stating that they were denied in "classified orders."

Finally, along the same lines, and as discussed extensively in the main Aref brief, the District Court improperly denied the defense motion for reconsideration (which involved the NSA warrantless wiretapping of Mr. Aref) in a "classified order." That motion requested the suppression of all evidence in the case (and the dismissal of the indictment) as the poisonous fruit of unlawful activity by the government, and the District Court denied this substantive motion - referring to it merely as a motion for discovery - in an unprecedented "classified order." Thus the defense still has no idea of the basis for the decision, its reasoning, legal arguments, or anything else regarding said decision.

All of this runs counter to the proposition, as discussed on Pages 127-130, *inter alia*, of the main Aref brief, that CIPA *should not put the defense in a worse position than would have occurred without the classified evidence.* As shown by the above examples, among others, the defense has clearly been placed in a worse position due to the use of classified evidence.

In the recent case of *United States v. Oakley*, 2007 US Dist. LEXIS 85118 (ED TN 2007), defense counsel did not wish to obtain a security clearance to review classified evidence. The court held that a separate attorney must then be appointed, who could obtain the required clearance, review "*potentially exculpatory"* evidence, and report back to the lead attorney, and stated:

> "The Presser court [*United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988)] voiced grave concern for restricted access to *potentially exculpatory material*, observing that 'it is fundamentally unfair for the government to obtain a conviction through the concealment of evidence which undermines the strength of the government's case against the defendant.' *Presser*, at 1292-83...." *Oakley*, supra, at 8, emphasis supplied.

The above statement applies to the evidence of the 14 calls and likely applies to other classified evidence in this case which may be exculpatory.

One frustrating aspect of the way the classified evidence has been handled in this case is that very often the defense, even defense counsel with security clearances, have not been given *any* substantive information about the information requested. This is especially true with respect to the *Brady* motion regarding the "14 calls" and the other motions regarding warrantless wiretapping. This is in contrast to cases such as *United States v. Rahman*, 870 F. Supp. 47 (SDNY 1994) where, even though very little information was actually provided to the defense (and it should be noted that Mr. Aref strongly disagrees with some of the legal analysis therein, and with the way the law was applied therein), *there was a detailed explanation of each category of classified information requested*, something which stands in stark contrast to what occurred herein. The *Rahman* court stated:

> "The government has moved *ex parte* pursuant to Section 4 of the Classified Information Procedures Act and Fed. R. Crim. P. 16(d)(1) for an *in camera* review of groups of documents said to contain classified information...
>
> ***

> The six groups of documents correspond to four exhibits attached to the declaration of Hugh E. Price, Deputy Director of Operations, Central Intelligence Agency..., and two exhibits attached to the affidavit of Robert S. Khuzami, Esq....
>
> ***
>
> The two documents attached to the Khuzami declaration on their face contain confidential evaluations used in dealing with foreign governments ... and confidential information received as part of the conduct of the foreign relations of the United States. ...
>
> ***
>
> The three documents that comprise Exhibit A to the Price Declaration contain three statements of defendant Omar Ahmad Ali Abdel Rahman...
>
> The first of the two documents that comprise Exhibit B to the Price Declaration contains information relating to the credibility of a potential government witness...
>
> Exhibit C to the Price declaration is one document indicating that a person with whom the government has contact may possess information exculpatory of defendant Ibrahim El-Gabrowny....” *Rahman*, supra, at 49-51.

In contrast to the information provided on the different categories of classified information in *Rahman*, no such information has been provided herein, at least not as to the “14 calls” and the warrantless wiretapping, and very little has been provided with respect to the “Rahwah notebook” information found in northern Iraq. This is despite the fact that there was a very significant and exculpatory error made with regard to the “Rahwah notebook” evidence (mistranslation of the word “kak”) and despite the fact that Mr. Aref has made a strong showing as to the exculpatory nature of the “14 calls” evidence. It is impossible to effectively represent Mr. Aref under such circumstances.

B. 18 USC 3504

On Page 180 of the response brief, the prosecution claims that Mr. Aref “has failed to identify any specific evidence allegedly obtained by the exploitation of an unlawful act.” In fact, Mr. Aref has pointed out several examples of such evidence, all related to unlawful warrantless wiretapping. These include the exculpatory evidence of the transcripts of the “14 calls,” which, if provided, could have effectively challenged the prejudicial way the evidence of the calls was

used at trial. In addition, the question of whether Mr. Aref was involved in prior money laundering, discussed on Page 55, *inter alia*, of the main Aref brief, and the question as to whether Mr. Aref was under "24 hour surveillance" as of December 10, 2003, discussed on Page 55-56, *inter alia*, of the main Aref brief, also show how evidence of the unlawful wiretapping impacted the trial.

On Page 182 of the response brief, the government attempts to raise the "state secrets privilege" with regard to the classified evidence herein, and cites *Al-Haramain v. Bush*, 2007 US App. LEXIS 26568 (9th Cir. 2007) for that proposition. However, the "state secrets privilege" is limited to *civil cases*, and *clearly cannot be used to trump a defendant's fundamental constitutional rights*. As pointed out by the 4th Circuit in *Moussaoui* and discussed on Page 156, *inter alia*, of the main Aref brief, if classified evidence is considered relevant and helpful to the defense, or essential to the fair determination of a cause, and the government still refuses to disclose it, then the remedy is "presumptively dismissal of the indictment." *Moussaoui*, supra, at 476. In other words, in contrast to civil cases where the "state secrets privilege[4]" may result in dismissal of lawsuits filed against the government, the government does retain its privilege to

[4]It is submitted that the state secrets privilege is quite problematic even in the civil context, as shown by a recent law review article, which stated, "...the War Against Terrorism again presents the American republic with questions about the propriety of executive secrecy. In response to the terrorist threat, the Bush administration has taken extraordinary measures using secrecy as one of its main tools. It used misinformation based on classified intelligence to promote the Iraq War. It classifies American citizens as 'enemy combatants' using undisclosed facts and then detains them indefinitely, denying their Sixth Amendment rights. It ordered the secret and probably illegal surveillance of American citizens by the NSA. And it secretly captures, imprisons, interrogates, and 'renders' people to states known to torture. Such actions (and others we may not know about) make imperative a revived debate over the wisdom and desirability of the 'expansive and malleable' state secrets privilege. As currently applied, it is a formidable obstacle to civil litigation against the government, an evisceration of the ability of a citizen injured by such executive acts to seek redress, oversee government actions, and hold officials accountable for bad policy or violations of the law." *The State Secrets Privilege and the Abdication of Oversight*, by Jared Perkins, 21 BYU J. Pub. L. 235, 237-238 (2007)

prohibit the disclosure of classified information in criminal cases, *but only at the cost of foregoing the prosecution in question.*

In fact this critical distinction with regard to the use of classified evidence in criminal and civil cases was what led the New York Times to feature this case on Page 1 in an August 26, 2007 article by Adam Liptak entitled "*Spying Program May be Tested by Terror Case*," which stated:

> "...[T]he case may represent the best chance for an appellate ruling about the legality of the N.S.A. program, which monitored the international communications of people in the United States without court approval. *Unlike earlier and pending appeals disputing the program, all of them in civil cases, Mr. Aref's challenge can draw on the constitutional protections available to criminal defendants*..." (NYT, August 26, 2007, at 1, emphasis supplied)

Interestingly, the decision in *Al-Haramain*, supra, (which came down on November 16, 2007, a few months after the above NYT article), where the plaintiffs had been mistakenly given what appeared to be a transcript from the NSA program - called the "Sealed Document" in the decision - the Ninth Circuit held that not only was the "Sealed Document" protected by the state secrets privilege, but that the plaintiffs could not even rely on their memories of having seen the document... (However, the court did not dismiss the case, but remanded it to the district court for a determination as to whether "FISA preempts the common law state secrets privilege." *Al-Haramain*, supra, at 5. Apparently the district court has not yet made a ruling on that issue, but it is likely that any ruling made there will be appealed to the Ninth Circuit once again.) In any event, it is submitted that all the civil cases may be dismissed on standing or state secrets grounds, and this case may be the only criminal case where there is clear evidence of the defendant having been subject to the NSA warrantless wiretapping program.

On Page 185 of the response brief, the prosecution appears to argue, amazingly, that

Aref's 18 USC 3504 argument regarding the unlawful warrantless wiretapping bypasses the Foreign Intelligence Surveillance Act (FISA)! The response brief states:

> "In the context of 50 USC 1806(f) [part of FISA] - which provides for *in camera, ex parte* district court review of governmental notifications of intent to use FISA information and motions to suppress FISA information - the Senate Judiciary Committee made it clear that *defendants could not use Section 3504 to avoid these carefully crafted procedures...*"

Clearly that statement cannot possibly apply in the instant case, where it was not *the defense* who avoided the "carefully crafted procedures" of FISA, but *the government* which, by using warrantless wiretaps to illegally monitor Mr. Aref in Albany, NY, both before and during the sting operation, not only *avoided* the FISA procedures but *violated FISA* as well as the Fourth Amendment, the First Amendment and the doctrine of separation of powers. 18 USC 3504 exists precisely to deal with unlawful activity such as this.

C. Derivative Classification

On Page 176-177 of the response brief, the prosecution cites to Section 2.1 of Executive Order 13292 as supporting the proposition that it was proper for the District Court to issue 'classified orders." This point is discussed on Pages 165-166 of the main Aref brief. Executive Order 13292 was issued in 2003, and Section 2.1 provides that persons who reproduce classified material should "carry forward to any newly created documents the pertinent classification markings." First, it is submitted that this section is not intended to apply to entire court orders or, for that matter, entire legal memoranda. If classified information needs to be included within a court order, then there should be a separate section, or appendix, which may be classified, but, as argued in the main Aref brief, it is a violation of due process for court orders or legal arguments to be entirely classified. If, in the alternative, Section 2.1 *was* intended to apply to court orders, it

is submitted that said section, which has never been tested in court, is unconstitutional. As pointed out in the main Aref brief, at 166, even protective orders are not supposed to be classified. *United States v. Ressam*, 221 F. Supp. 2d 1252 (WD WA 2002).

VI OTHER EVIDENTIARY RULINGS

A. Objections to the Introduction of the Diary and Speeches were Preserved

On Page 124 of the response brief the prosecution claims that some of the objections to the introduction into evidence of Mr. Aref's 1999 diary were not preserved at trial, despite having been argued extensively pre-trial. (The prosecution claims that only the relevance objections were preserved at trial.) However, it is clear that the all the objections *were* preserved at trial. A-425. When the diary (Exhibit 17-A) was received into evidence, defense counsel requested a sidebar to preserve the pre-trial objections (which were based on both relevance and prejudice) to the diary. At the sidebar the District Court stated:

> "The Court understands that the defendants object to the admission of this exhibit, 17-A, and there's been a record made in Binghamton, here in Albany, about those objections and the Court's ruling on it. And the Court, in no way, thinks that the defense has waived its objections. They're still there, still on the record and they're still existing." (A-425)

Similarly, it is clear that the objections to the introduction of Mr. Aref's 1994 speeches, on grounds of both relevance and prejudice, were also preserved at trial. (GA 253.) At a sidebar defense counsel stated:

> "...[A]s far as the speeches are concerned, four years passed between the giving of the speeches and the events that are the subject of this indictment [it is submitted that defense counsel meant to say *10 years* rather than 4 years as the speeches were made in 1994 and the sting operation took place 10 years later in 2004] and we feel that there is a sufficient attenuation there to render them irrelevant, and because of the nature of the information contained in them, we feel that they would be extremely prejudicial." (GA 253)

B. Expert Testimony

On Pages 141-142 of the response brief, the prosecution cites *United States v. Locasio*, 6 F.3d 924 (2nd Cir. 1993), *United States v. Ruggerio*, 928 F.2d 1289 (2nd Cir. 1991), and *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978) for the proposition that the District Court did not err in its gatekeeping role with respect to Evan Kohlman. However, in none of those cases did the court fail to rule on whether the individual was actually an expert. As argued on Pages 183-186 of the main Aref brief, the district court said only that Kohlman *claimed* to be an expert, and that the jury would have to evaluate his credentials, his background and his knowledge. (A 477-478 and 487) These are conclusions the court is supposed to make in deciding whether to accept someone as an expert, and the District Court failed to properly exercise that role.

C. Inaudible Phrase Transcribed as "Send Terrorists"

The prosecution submitted a transcript for the September 6, 2007 audibility hearing. (GA 111-115) Defense counsel was not aware that any transcript had been made of said hearing. However, even though the District Court stated at said hearing that he believed he heard the disputed phrase as including the word "terrorist," (GA 113), it is clear that this phrase was disputed by the defense (which was why it was dealt with at the audibility hearing). The defense had wished the phrase to be transcribed as "UI" or "unintelligible." As discussed on Pages 192-194 of the main Aref brief, when there is a dispute over a transcript, the proper procedure is to allow both parties to submit a transcript, which would have been very simple in this case, as it just involved a single, albeit very prejudicial, phrase. By leaving in only the prejudicial version of the disputed phrase, more weight was given to said phrase.

CONCLUSION

For the foregoing reasons, and the reasons stated in the main Aref brief, the Court should reverse the convictions herein.

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Respectfully Submitted,

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