UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | Case No. 3:07CR57(MRK) |
| | : | |
| v. | : | |
| | : | |
| HASSAN ABU-JIHAAD | : | December 19, 2008 |

**GOVERNMENT'S CONSOLIDATED OPPOSITION TO THE DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL**

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**Introduction**

On March 5, 2008, a jury convicted the Defendant Hassan Abu-Jihaad of two charges: (1) disclosing national defense information, and (2) providing material support to terrorism. At the close of Government's case, he made a timely motion for a judgment of acquittal pursuant to Rule 29, 1028,[1] 1035-51, and he renewed that motion after submitting a defense case, 1158. After the jury returned its verdict, he moved for a new trial pursuant to Fed. R. Crim. P. 33. He subsequently filed written memoranda in support of both motions. *See* Docs. 266, 269.

The Government offers the following response to those two motions. Part I reviews the facts of the case, viewing the evidence in the light most favorable to the jury verdict.

Part II responds to the Defendant's Rule 29 motion, and argues that there was sufficient evidence for the jury to find the charges proven beyond a reasonable doubt. First, there was sufficient evidence that the Defendant had transmitted advance information about the movements of the *Constellation* battlegroup to Azzam Publications. Second, transmission of that information constituted the provision of material support of terrorism, in the form of either personnel or physical assets. Third, the jury was not required to find that Azzam Publications relayed the battlegroup information to others, or that the information was actually used to commit a terrorist act, in order to convict the Defendant of the material support count under 18 U.S.C. § 2339A. Fourth, the evidence showed that the Defendant knew or intended that the information in the Battlegroup Document would be used to kill United States nationals. Fifth, there was ample evidence that the disclosed information about the battlegroup's anticipated movements was closely held information relating to the national defense, within the meaning of 18 U.S.C. § 793(d).

[1] Transcript citations will simply refer to the page number.

In Part III, the Government responds to the Defendant's Rule 33 motion. To the extent the Defendant challenges the weight of the evidence showing that he transmitted the ship movement information to Azzam Publications, his arguments and the Government's response are essentially no different from the Rule 29 issue. And to the extent that he argues that the Court improperly admitted evidence of videotapes marketed by Azzam Publications and purchased by the Defendant, his claim lacks merit.

## I. Statement of Facts

### A. Azzam Publications ran a family of websites dedicated to promoting violent Islamic jihad, or holy war

In late September 2001, Supervisory Special Agent Craig Bowling of the Department of Homeland Security began investigating a group known as Azzam Publications. 266. Under the umbrella of Azzam were a number of other related websites, including qoqaz.net ("qoqaz" meaning "Caucusus" in Arabic, 146) and azzam.co.uk, which were hosted in places like New York, Malaysia, Ireland, the United Kingdom, and other parts of the world. 268-69; 142-43, 146. Azzam was brought to the Government's attention by OLM Hosting, a Connecticut company that was then hosting www.azzam.com. 267; GE 145 (stipulation re: OLM). The investigation eventually included a number of search warrants, subpoenas, and court orders allowing the retrieval of computer records. 269-70. American and British authorities eventually began collaborating on the investigation, and some searches were undertaken in the United Kingdom in response to treaty requests by the United States. 67-71.

From 1997 through 2002, the family of Azzam sites contained information that promoted violent Islamic jihad, or "holy war." 147, 161; *see* GE 31-57 (web pages). Evan Kohlmann, an

expert in international terrorism and the internet, explained that Azzam advertised itself as a provider of breaking news on conflict areas like Afghanistan, Bosnia, and Chechnya. 143, 166. Azzam marketed English translations of books written by their namesake, Sheikh Abdullah Azzam, 149, 167-68, who was instrumental in reviving the idea of violent jihad in the 20th century, 144, GE 33. They also published video and audio recordings extolling the exploits of the mujahideen in various places. 149.

In November 2000, the Azzam website warned its readers of an imminent "Joint U.S.-Russian chemical attack on Afghanistan," which would be targeting the Taliban. 169, GE 37. It reported that the U.S. assault was meant to retaliate for the bombing of the *U.S.S. Cole* in Yemen in October 2000, 171, GE 37 – an attack for which al-Qaida had publicly claimed credit, 176. Azzam recommended that its readers immediately come to the Taliban's aid by sending money or gas masks, or traveling to Afghanistan to provide battlefield medical services. 178-79, GE 37, 40. The website provided a hyperlink to a news article from the *Guardian*, reporting that in 1998, the United States had fired cruise missiles at bin Laden's camps in retaliation for al-Qaida's bombing of U.S. embassies in East Africa. 177-78, GE 38. Azzam's direct appeal for assistance to the Taliban was unusually specific and targeted, even for the Azzam website. 180-81. The website went so far as to solicit cash donations to the Taliban. 180.

The website also offered a copy of Usama bin Laden's "Declaration of War Against the Americans Occupying the Land of the Two Holy Places," which demanded that all Muslims rise up in arms against the United States and kill all U.S. military personnel in the Arabian peninsula, in order to expel all infidels from Saudi Arabia. 213-15, GE 54.

Azzam Publications also glorified the cause of martyrdom in the name of jihad, by telling the stories of martyrs, or "shahada" (sing. "shaheed"). 184-85, 187-89. These biographies were "meant to show how individuals with no real connection to the jihad or to the mujahideen, including people living in western European countries and North America, people who had lived relatively normal lives, could all of a sudden jump up and join the mujahideen and become a hero figure among the mujahideen . . . . " 187-88. *See also* 219-20, GE 60, 62 (articles promoting martyrdom).

Azzam made it clear to readers that their material was original, and that it came directly from mujahideen fighting in hot spots around the globe. One section of the website was designated a "jihad photo library," and it claimed to contain photos taken "by the foreign mujahideen in Chechnya," that they "were taken from actual events that took place," and that "they are exclusive to Azzam Publications." 190, GE 42; *see also* 202, GE 50. Some of the photos depicted ambushes on Russian forces by foreign mujahideen. 192. Viewers could download video clips of influential foreign mujahideen leaders fighting in Chechnya, 196, or order longer videos by mail, 198-99, GE 49. Some of these videos were being newly marketed in September 2000, and the website clearly described their content in the "Products" section. 201-04, GE 50, 150. Azzam's order form clearly stated that it accepted only cash. 208.

**B. On December 2, 2003, British authorities seize a floppy disk from a London residence associated with Babar Ahmad, containing a document that reports the anticipated movement of U.S. naval forces to the Persian Gulf in early 2001**

Since December 2003, British authorities had been involved in an investigation of a man named Babar Ahmad, 55, who worked as an information technology expert at Imperial College,

London, 58, 71-72. Detective Sergeant Ian Vickers of the London Metropolitan Police's counterterrorism command, who had been involved in the investigation from its inception, testified that the investigation came to encompass Ahmad's involvement with Azzam. 55.

On December 2, 2003, British authorities searched Ahmad's workplace, as well as his home at 94 Fountain Road, and his parents' nearby residence at 42A Fountain Road, where he had lived just prior to the investigation. 59-61; GE 5, 6 (London maps). Detective Sergeant Ian Elgeti of the Thames Valley Police Force, 74, was the exhibits officer at 42A Fountain Road that day, 78-83. GE 7 (photo of 42A Fountain Road). In the front bedroom, he found a floppy disk on the shelf of a wardrobe. 85-89; GE 8 (photo of bedroom); GE 2 (floppy disk casing); GE 2A (repackaged floppy disk); GE 143 (stipulation re: repackaging of floppy disk, and forensic imaging process). On the disk was written "password: lp." 89-90. Other items relating to Babar Ahmad were seized from the same bedroom. 91-96; GE 9-12. For example, agents recovered Ahmad's frequent-flyer card and commercial correspondence addressed to him, together with an English version of Usama bin Laden's *Declaration of War against the Americans occupying the land of the two holy places* (GE 10). 93-94. They also found a small notebook bearing Ahmad's name and the 42A Fountain Road address in the cover, as well as what appeared to be a handwritten script for an Azzam audiocassette (GE12). 94-96.

Forensic analysis of the floppy disk revealed that it contained a number of files, including a Microsoft Word document named "letter.doc." GE 1; 108-17. This file was password-protected with the password "lp." 108-09. The file contained a three-page unsigned document discussing the anticipated deployment of U.S. naval forces from the West Coast to the Persian Gulf in early 2001. GE 1. Interspersed throughout the document were notations in brackets, suggesting that the

document had been edited by someone other than the original author. Thus, the document began:

> [Necessary changes made in grammar and spelling, and for the sake of clarity]

The document predicted ship movements beginning on March 15, 2001, and therefore appeared to have been created before that date. For example, the first page of the document began:

> In the coming days the United States will be deploying a large naval/marine force to the Middle East.
>
> This will be a two group force: the Battle Group (BG) and the Amphibious Readiness Group (ARG) - these groups will be replacing the already deployed groups in the gulf.
>
> The BG mission is to hold up the sanctions against Iraq, e.g., patrolling the No-Fly Zone, carry out Maritime Interception Operations (MIO) or launch strikes.
>
> There is a possibility that the ships and submarines that are capable will carry out a strike against Afghanistan. Main targets: Usama and the Mujahideen, Taliban etc.
>
> A two star admiral COMCRUDESRON 1 (his title), a high ranking officer of the BG said that "there will be certain ships of this BG sitting off the coast of Pakistan with 'launch pads.'"
>
> Most of the ships that are part of the BG will deploy on March 15 2001 leaving their home ports out of California and Washington State. They will meet up with the other ships that are part of the BG which are stationed in Hawaii. Their first port stop is Hawaii on March 20, 2001, where some ships will load Tomahawk D missiles. The same missiles used on Afghanistan and Sudan. It has a warhead and 166 [mm?] fragment bomblets. Then the whole BG will head towards Australia. The main ship with high ranking officials will be at Sydney on April 6 2001, other ships - Melbourne, Perth, Bunbary etc. The BG will be going through the straits of Hormuz on the April 29 2001 at night, cutting off certain "infocoms" and "Emcoms" to divert their enemies on how many ships are actually coming through. This will be a night time set-up.

Beneath this text was a diagram labeled "Formations Through Straits," which listed the component ships of the battlegroup in a two-column formation. Next came a ship-by-ship breakdown of the battlegroup, led by the aircraft carrier *U.S.S. Constellation*, plus smaller ships including a destroyer named *U.S.S. Benfold*.

The document then listed the ships to be included in the Amphibious Readiness Group, which was prefaced by the notation that "These consist of three ships which are deploying out of homeport San Diego, March 14 2001." GE 1, at 2. The itinerary for the ARG was less detailed than that of the BG: "The ARG port visit will be in South-East Asia before heading to the ME. Thailand (their favourite), Singapore, etc." GE 1, at 3. After some discussion of the ARG's mission and arms carried by its forces, the document ended with an overall assessment of the naval forces' vulnerabilities:

> **Weakness:**
>
> They have nothing to stop a small craft with RPG etc, except their Seals' stinger missiles.
>
> **Deploy ops in Gulf 29 April - 04 October.**
>
> **29th APRIL is more likely the day through the Straits. For the whole of March is tax-free - a moral booster. Many sailors do not like the Gulf.**
>
> **Please destroy message.**

GE 1, at 3. For convenience, Government's Exhibit 1 will be referred to as the "Battlegroup Document."

### C. E-mail records from Azzam's Yahoo accounts show only one member of the U.S. military – Hassan Abu-Jihaad, a sailor aboard the *U.S.S. Benfold* – in communication with Azzam Publications before the creation of the Battlegroup Document, and in those e-mails Abu-Jihaad indicates his support for violent Islamic jihad against the U.S. military

After the December 2003 search, British authorities forwarded their U.S. counterparts a copy, or "image," of the floppy disk containing the Battlegroup Document. 272-73. Earlier, pursuant to a search warrant, Agent Bowling had obtained the contents of e-mails from Yahoo accounts associated with the Azzam website, as well as registration information pertaining to

those accounts. 270-71. The reference to the *Benfold* in the Battlegroup Document caught Agent Bowling's attention, since he had previously located Yahoo e-mails between Azzam and an American sailor stationed aboard the *Benfold*. 274. The sailor was the Defendant, Hassan Abu-Jihaad. Agent Bowling located eleven e-mails between Azzam Publications and Abu-Jihaad, spanning from August 21, 2000, through September 3, 2001. 282-83; GE 13-23. Some e-mails were to or from Abu-Jihaad's military e-mail addresses (abujihah@benfold.navy.mil and later AbujihaadH@benfold.navy.mil), GE 17, 18, 20, 21, 22, 23, and some were to or from his private e-mail address (abujihaad01@hotmail.com), GE 13, 14, 15, 16, 19.

Navy personnel records confirmed that Abu-Jihaad was, indeed, assigned to the *Benfold* during this period. Abu-Jihaad had enlisted in the Navy on January 26, 1998. 276-79; GE 105, 106. During his tenure in the Navy, Abu-Jihaad was assigned to the *Benfold* from July 1, 1998, until his discharge on January 25, 2002. 278, GE 105. The Defendant had been born Paul Raphael Hall, but had legally changed his name in Arizona court to "Hassan Abu-Jihaad" in 1997. 277-79, GE 106. Evan Kohlmann testified that mujahideen typically choose as a nom de guerre an Arabic "kunya," which begins with "Abu," meaning "father of." 184-85. The term "jihad" (often transliterated from the Arabic with two a's as "jihaad," 161-62) literally means "holy struggle," and in the context of mujahideen "exclusively refers to individuals on a battlefield, fighting in the cause of Allah." 161.

The contents of the e-mails between Abu-Jihaad and Azzam demonstrated that he was reading their websites; that he made known to them both his identity and his status as an active member of the U.S. Navy stationed aboard a warship deployed to the Persian Gulf; that he was sending money to order videos from Azzam that supported violent Islamic jihad; that he

supported violent Islamic jihad against the United States military; and that he had had other communications with Azzam that were not recovered in the e-mails recovered from the Azzam Yahoo accounts after the discovery of the Battlegroup Document in December 2003.

***August 21, 26, and 27, 2000 (GE 13 and 14).*** The earliest e-mail correspondence between Abu-Jihaad and Azzam involved his ordering of jihadi materials from the website. In these e-mails, he used his hotmail address, and the IP addresses resolved back to Navy computers in San Diego, 288, 295-96. Thus, on August 21, 2000, the Defendant followed up on previous correspondence he had had with Azzam (apparently via physical mail), which was not recovered:

> Salaamu"Alaikum [Peace be upon you]
> I will appreciated if you guys can tell me if you guys received the 30.00dollars I sent for the indocumentation of the bosnianwar that going to be issued on SEP 4th. Brothers I will appreciate if you guys can e-mail me at abujihaad01@hotmail.com to confirm my payment.
>
> Salaamu'Alaikum

290-94, GE 13. The Defendant's reference was apparently to a page from the Azzam website, which had been last updated on August 13, 2000, advertising the upcoming release of the "Martyrs of Bosnia" video on September 4th, and inviting pre-orders. 290-93, GE 150.

On August 26, 2000, Azzam responded that they had indeed received his order, and would soon send him the video. 293-94, GE 14. They noted that the video cost only $25, and inquired what to do with the remaining $5. GE 14. At the end of the Azzam e-mail was their "sig" or e-mail signature file, which contained contact information for Azzam, as well as an inspirational quotation extolling martyrdom:

> >Azzam Publications
> >BCM Uhud,London WC1N 3XX,UNITED KINGDOM.
> >http://www.qoqaz.net azzam2000@email.com

>
>"And with the likes of all these (martyrs), nations are established,
>convictions are brought to life and ideologies are made victorious."
>[Shaheed Dr. Sheikh Abdullah Azzam, assassinated 1989]

298-99, GE 14.

The original version of the preceding e-mail (with complete header information) was not recovered in the Yahoo account, having likely been deleted. 297. But the text and abbreviated header information was embedded in Abu-Jihaad's reply the following day, August 27, 2000:

>Assalaamu alaikum
> Dear Brothers you guys can keep the remanding $5.00 and added to the
>funds that you Brothers are spending in the way of Allaah via videos,tapes
>and the great web sites Qoqaz & Azzam Pub .....etc.
Assalaamu'Alaikum

295, GE 14.

The jury was shown selected excerpts from *Martyrs of Bosnia*, after receiving a careful limiting instruction from the Court. 299-305, GE 107a-107*i*. The video was in Arabic with English subtitles, 301-02, and offered hagiographic descriptions of martyrs who had died in violent jihad on behalf of Islam against the West in Bosnia, 301-03. For example, the video discussed a "martyr" of Turkish origin who had been living in the United States, whose death had freed him from living with the "disbelievers" in America. 302-03. The video included a number of combat scenes, in which the videographer was very close, just behind the Islamic fighters. 303. At one point, Sheikh Abdullah Azzam – the website's namesake – was filmed giving a speech, in which he criticizes western Muslims for failing to shed any of their own blood in behalf of the cause. 303-04. The video contained a screen at the end, announcing that it was drawn from "original material produced by the mujahideen regiment of Bosnia-Herzegovina." 304. Toward

the end of the film was an interview of Ibn Khattab, leader of the foreign mujahideen in Bosnia, who instructed viewers who wanted to contact them to go through Azzam Publications. 304-05; 193-95 (Kohlmann describing Khattab).

***March 12, May 15, May 18, 2001 (GE 15, 16, 17, 18)***. On March 12, 2001, Abu-Jihaad wrote again to Azzam from his hotmail account, inquiring about another video order (again, the original of which the Government did not recover):

> Salaamu'Alaikum
> Br/Sis of Islam
> I am wondering did you guise receive my two separate orders the first was Russian hell 2000. Then I ordered Chechnya from the Ashes at a later date.
> If you have any info please e-mail me back Insha'Allah.
> Salaam's
> Hassan Abu-Jihaad

305-08, GE 15. The IP address for his message resolved back to Navy computers in San Diego, 306. Less than six hours later, Azzam replied to the Defendant's hotmail account, asking that he e-mail them at "products@azzam.com" with his name, mailing address, and the dates he ordered the CDs. 309-10, GE 16. This exchange occurred only three days before the date that the Battlegroup Document predicted that the *Benfold* and its sister ships would leave San Diego. 307-08.

Abu-Jihaad sent Azzam another e-mail on May 15, 2001, this time from his Navy e-mail account (abujihah@benfold.navy.mil), from an IP address that resolved back to the *Benfold*. 325-26. The Defendant noted that he was in the "middle of this giant ucean" and inquired about his order for *Chechnya from the Ashes*, and reported that his mother had received his order of *Russian Hell 2000*. 327-28, GE 17. He listed his home mailing address as "1681 s. 9th street San Bernardino Ca,92411," and relayed both his hotmail address (with a typographical error) and his

Navy e-mail address. 328-29, GE 17. Three days later, on May 18, Azzam sent an apologetic reply and promised to send the CD within a week. GE 18. The address listed in Abu-Jihaad's e-mail matched the home address he had listed for his mother on his life insurance paperwork, in his Navy personnel file. 329, GE 105.

The jury watched brief clips from both of the videos that the Defendant ordered, *Russian Hell 2000*, GE 108, and *Chechnya from the Ashes* (which included a number of features, including *Russian Hell 2000 Part II*), GE 109a-109d. *Russian Hell 2000* included footage of mujahideen executing a captured Russian soldier in Chechnya, acting on the orders of Ibn Khattab. 312-13. *Russian Hell 2000 Part II* included scenes with Chechen mujahideen commander Shamil Basayev, 314; and a suicide bomber saying prayers, followed by footage of a suicide truck bombing, 323-24.

***July 19, 2001 (GE 19).*** On July 19, 2001, Azzam sent an e-mail to Abu-Jihaad's hotmail address, praising him for an e-mail that he had previously sent them. Fortuitously, the text of Abu-Jihaad's earlier e-mail appears in Azzam's reply. 332-36, GE 19. Abu-Jihaad's earlier e-mail read as follows:

> Assalaamu'Alaikum
> Brothers/Sisters of Al-Islam
>
> i am a muslim station onboard a u.s. warship currently operating depolyed to the arabian gulf. it shall be noted before usama's latest video was viewed by massive people all over the world. that psychological anxiety had already set in on america's forces everywhere. all this is due to the martyrdom operation against the uss cole. since then every warship station either on the western or eastern shores of america who come to operate in the 5th fleet op area has tobe given a force protect brief. well during the brief, i attended there was one thing that stuck out like thorns on a rose bush. i do not know who was the originator of this either top brass or an american poitician. well here is his/her statement: "america has Never faced an enemy with no borders, no government, no diplomats,nor a standing

> army that pledges allegiance to no state." Allahu Akbar! Allahu Akbar! i give takbirs [praise to Allah] because i know deep down in my heart that the american enemies that this person has discribe is the Mujahideen Feesabilillah [holy warriors fighting in the cause of Allah]. these brave men are the true champions and soldiers of Allah in this dunya [world]. i understand fully that they are the men who have brong honor to this weak ummah [Islamic community] in the lands of jihad afghanistan,bosnia,chechnya, etc. Alhamdulillah! [Praise to Allah!] With their only mission in life to make Allah's name and laws supreme all over this world. i want to let it be known that i have been in the middle east for almost a total of 3 months. for these 3 months you can truly see the effects of this psychological warfare taking a toll on junior and high ranking officers. but after the latest video supporting palestine. the top brass and american officials wererunning around like headless chickens very afraid, wondering if there is a possible threat. but this time the american population got wind of this and they came to know just how afraid the u.s. government is. thomas l. friedman wrote an article in the new york times.called:
> "what it takes to make the americans to turn tail, run." thisarticle was distributed on my ship and most of the sailors said it was so true about the american government, and they feel like they are working for a bunch of scary pussies..........a Brother serving a Kuffar [infidel] nation..
> Astaghfir'Allah [Forgiveness from Allah]....Hassan

333-42, GE 19. Although there was no header information for this original message, since only the text was embedded in the reply, Friedman's column had run in the *New York Times* on June 26, 2001, and so Abu-Jihaad must have authored his e-mail some time between June 26 and July 19 – in other words, at a time while the *Benfold* was in the Persian Gulf. 336-38, GE 25; 1022, GE 147, 147a, 148a. Azzam replied:

> AsSalaamAlaikum brother hassan,
> What can we?
> You said it all, and all I can add is that the Kufar know that they cannot defeat the Mujahideen (the warriors of Allah). I trust that you are doing your best to make sure that the other brothers & sisters in uniform are reminded that their sole purpose of existence in this duniya [world] is purely to worship our Lord and Master, Allah (SWT) [praise being given to Allah].
> May Allah be with you & your brothers and sisters and keep you from all harm.
> Keep up with the Dawah [preaching Islam] and the psychlogical warefare.
> WasSalaam, [peace be upon you]
> From just another slave of Allah at Azzam Publications......

335, 343-44, GE 19.

The jury heard testimony that the incident praised by Abu-Jihaad as a "martyrdom operation" involved a suicide boat bombing of the *U.S.S. Cole* – a U.S. Navy destroyer like the *Benfold* – as it lay off the coast of Yemen in October 2000. 172-76, 339-40, 877. Al Qaida had taken public credit for the bombing, which killed 17 U.S. sailors and caused billions of dollars of damage. 174-76.

The jury was also shown pages from qoqaz.net, one of the Azzam websites, that solicited readers to "keep sending your e-mails of support to qoqaz@azzam.com." 221-22, 344, GE 59. This was the same e-mail address that had been included in the "to" and "reply-to" field of Azzam's July 19 response to Abu-Jihaad's e-mail praising the *Cole* bombing. 344, GE 19. The "e-mails of support" page posted testimonials from people around the world, so that Azzam could demonstrate both its worldwide readership and the visceral effect that its materials were having on people. 222. The page that was introduced, for November 2000, indicated that it was regularly updated every few days, and contained links to archived messages through September 2001. GE 59.

***July 23, July 26, July 27, 2001 (GE 20, 21, 22).*** Shortly after receiving Azzam's reply to his *Cole* e-mail, Abu-Jihaad inquired again about his video orders. Writing from his Navy e-mail address (AbujihaadH@benfold.navy.mil), he explained that he had received part 2 of *Russian Hell 2000*, and had accidentally ordered a second copy (which, he noted, "will be a good gift for someone" in any event), but apparently had not received *Russian Hell* part 1. He then noted that he had previously given his military address (though it does not appear in any other e-mails recovered by the Government), and inquired about whether that address was workable:

the address i gave you Bothers is:

Uss Benfold DDG-65
Fpo Ap 96661-1283

do you guys mail to military addresses
plus do you guys ship through UPS
i ask this because the address above
do not except packages shipped through
(UPS)....

besides that i want to give you Bro/Sis a heads up that i will be sending an
order form
for "RUSSIAN HELL 2000 PART 1", how many days will it take? and should I
send a different
address than the one above.

Your Brother of Al-Islam
Hassan Abu-Jihaad

Keep up the great work it is very well appreciated Alhamdulillah!!!

346-49, GE 20. This IP address for this e-mail resolved back to the *Benfold*. 347.

On July 26, Azzam wrote back, apologizing for the mishap, and stating that "[t]he address is OK as long as you think it is safe and you are confident that you will get our product." 349-50, GE 21. It was signed "Products department (Azzam Publications)." *Id.* One day later, Abu-Jihaad wrote back – again from his Navy e-mail address, from a *Benfold* IP address – confirming that Azzam should send his order to his Navy FPO address. 350-51, GE 22.

***September 2, 2001 (GE 23).*** On September 2, 2001, Abu-Jihaad wrote another e-mail to Azzam from his Navy account and a *Benfold* IP address. He complimented them on their coverage of the Taliban in Afghanistan, but opined that the Taliban were too soft when enforcing Islamic law against infidels. He wrote:

Assalaamu'Alaikum

I feel that Azzam Publication have done a great job on analyzing the notable

> quotes of the western media's and the Taliban officials themselves. I have been keeping myself updated with this particular incident that is occurring there. What disturbs me more is the two decrees. 1st stating that who ever commits apostasy and the one who incites it ,and are found guilty of such actions shall be punished by death. i personally agree with this decrement. 2nd decrement states that a foreign aid worker found guilty of converting Muslims to their faith shall be placed in jail for a month then expelled from Afghanistan. My opinion about this decrement is that it is to weak of a punishment ( watered down ). I personally feel that the foreign aid workers shall get the same punishment that the Afghan Nationals shall receive. I feel that this will be real justice according to Sharee'ah [Islamic law] in the sight of Allah and to the true people who adhere to this Deen [religion]. i would like to know your intake on this matter? That is if you like to share your opinion. Your
> Brother of Al-Islam. Hassan

351-53, GE 23.

Records produced by Yahoo disclosed that the Defendant's military e-mail address had been saved in one of Azzam's electronic address books. 354-55; GE 24. Specifically, the Defendant's e-mail account "Abujihah@benfold.navy.mil" had been saved by a user of azzamproducts@yahoo.com. 355. Yahoo had turned over more than 23,000 e-mail messages to and from Azzam's e-mail accounts, but only a small portion of the e-mail addresses – including the Defendant's – had been saved to the online address books associated with these accounts. 355-56. Only an account user of this Azzam e-mail account could have saved this e-mail address, since it would not have been saved automatically. 356.

Moreover, based on Agent Bowling's forensic analysis of the Yahoo e-mail account information, the Defendant was the only member of the U.S. military in e-mail communication with Azzam during this period. 279-83, 474-76. Agent Bowling searched for e-mail extensions such as .mil or .gov that would indicate use of a U.S. military or government e-mail account; for IP addresses associated with the Navy, or the military or government more generally; and for

particular words that appeared to be unique to the Battlegroup Document itself, such as the names of the ships or other key terms. 279-82. With one exception, the Defendant was the only correspondent with a .mil address that showed up in the pool of Yahoo e-mails to and from Azzam. 475-76. The only exception was a disparaging e-mail sent by a Navy Commander to Azzam in late September 2001, which was met with "an extremely terse and unamicable response from Azzam Publications." 475.

**D. Forensic analysis of the floppy disk containing the Battlegroup Document reveals that it contained documents relating to the administration of the Azzam websites; that the Battlegroup Document had been created and saved on the computer of Syed Talha Ahsan, who was responsible for handling the products backlog at Azzam; and that the author field of the Battlegroup Document had been manually changed from "S A Ahsan" to "Jon Greene"**

On the floppy disk containing the Battlegroup Document were several other files that directly related to administration of Azzam Publications and its websites, some of which were encrypted. For example, one encrypted file on the floppy was entitled "For the guy in charge to read (01_08_01).zip." 371, GE 65, 78. Among other things, this document listed usernames and passwords to afford access to e-mail accounts for qoqaz.net@yahoo.co.uk and azzamcom@yahoo.com; discussed how "our guy" edited material and "all the other guy has to do is put in html format and upload it"; how "EoS" [i.e, "E-mails of Support"] updates would be handled; how to manage inventory of "JR000 CDs" [*Russian Hell 2000*], "MoB videos" [*Martyrs of Bosnia*], "GB labels" [*In the Hearts of Green Birds*, which were books sold on the website], and "JC" [*Join the Caravan*, another book sold on the website]; working with "MA" contacts [Makhtaba al-Ansar, an Islamic bookstore in England that sold jihadi materials] and their bank account details; and editing news to "put it online" in connection with translations

from "q.com" [referring to the sister Azzam website of qoqaz.net]. 372-79, GE 78. Another encrypted file, "readme 31 July 2001.txt," was apparently a response to the "guy in charge" document, and contained instructions for people to do certain things for "AP" [Azzam Publications] and "QN" [qoqaz.net]; to e-mail Makhtaba al-Ansar regarding printing and money; and to "request from Mr. T that the products backlog must be finished by Monday evening 10 p.m." 380-81, GE 81. The disk also included saved e-mail messages that had been addressed to azzam@azzam.com, 382-83, GE 82, 83, 88, including one that had been saved in a directory called "Stuff to give the boss," 383, GE 83. The floppy disk also contained files with content that appeared verbatim on the Azzam websites, such as materials justifying the Taliban's destruction of the Bamiyan Buddhas in Afghanistan as un-Islamic. 383-84, GE 84, 86.

Based on Agent Bowling's forensic analysis of the file containing the Battlegroup Document, the evidence strongly supported the inference that it had been created and saved by a British citizen named Syed Talha Ahsan – the "Mr. T" who handled the products backlog for Azzam – who then transmitted the floppy disk to Babar Ahmad. The Battlegroup Document had been saved in Microsoft Word 97 in "UK English." 362-63. The file had been opened and modified on only two occasions: when it was created on April 2, 2001, and again when it was last saved on April 12, 2001. 364-65, 443-45. On that latter date, the graphic depicting the battlegroup's expected formation was created and embedded, and the "author" field in the document's properties was changed from "S A Ahsan" to "Jon Greene." 360-69, GE 69, 71, 73.[2]

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[2] Agent Bowling explained that Microsoft Word automatically fills in the author field when a document is created, but that a user can later change the contents of the field by right-clicking the file outside of Word, and editing the author field. 366-68, GE 71, 73. There was a one-minute gap between the time the file was "last saved" and "last modified," which indicated that the author field had been modified outside of Microsoft Word. 368-69. Metadata stored

Wiping software called BCWipe had been used on the floppy disk, and so Agent Bowling was unable to recover whatever items had been wiped. 365-66. The Battlegroup Document itself had been password protected, with the password "lp," which had been written on the cover of the floppy disk. 358-60, GE 68, 69.

Forensic analysis of other documents obtained during the investigation linked a person named Syed Talha Ahsan to the Battlegroup Document. For example, a number of computer files recovered from Ahsan's residence at 172 Franciscan Road in London contained references to "S A Ahsan" in metadata. 385, 464. These documents clearly related to Ahsan, 464, and included two versions of his curriculum vitae, 385-86, GE 97, 99, as well as class notes for an Islamic course that Ahsan had sent to Ahmad, and about which they had corresponded by e-mail, 387-89, 464, GE 101, 102, 103. These metadata references to "S A Ahsan" matched the metadata of the Battlegroup Document. 366, 369, 464.

Moreover, the Government introduced evidence indicating that Syed Talha Ahsan was referred to as "Mr. T." Ahsan was ethnically Bangladeshi, and it was common for someone like him to go by his middle name. 385-86. Ahsan's computer, seized from his residence, contained a log-in prompt for either "Ahsan" or "mrt." 389, GE 96. Inside the "mrt" account was another version of Ahsan's personal curriculum vitae. 389-90, GE 94. "Mr. T" was the same name that was used in the file on the floppy disk to refer to the person in charge of clearing up Azzam Publications' products backlog. 382, 389-92, 464, GE 78. And it was in the address book for azzamproducts@yahoo.com where Abu-Jihaad's e-mail address had been stored. 354-55, 392,

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within the file indicated that the "author" field had previously contained the name "S A Ahsan." 360, GE 69b.

GE 24. The version of Abu-Jihaad's e-mail address that had been stored (abujihah@benfold.navy.mil) was the one he used up to May 18, 2001 – after which it changed slightly. 355, 392-93; *compare* GE 18 (May 18, 2001, e-mail containing earlier version of address) *with* GE 20 July 19, 2001, e-mail containing later version of address).

Agent Bowling searched all of the electronic data he had accumulated during 6½ years of investigations, including all the computers seized by British authorities from Ahsan and Ahmad, but found no traces of the information contained in the Battlegroup Document anywhere else. 394. Those computers contained no research relating to U.S. naval forces in the Pacific or elsewhere, transiting the Strait of Hormuz, the *Constellation* battlegroup, or an amphibious readiness group. 394. Nor did Agent Bowling find any evidence of communications between Azzam Publications and anyone named "Jon Greene," or find anyone named Jon Greene who could have had access to this Battlegroup information from the Navy. 456-57.

**E. Navy witnesses testify about the development of the classified transit plan for the *Constellation* battlegroup from San Diego to the Middle East, describe the nonpublic nature of the plan, and explain how signalmen aboard the *Benfold* had access to the plan**

Retired Rear Admiral David C. Hart, Jr., testified about the mission of the *Constellation* battlegroup in 2001. Admiral Hart had served 32 years in the Navy, 484, during which he served two years out of San Diego as a carrier battlegroup commander, with the *U.S.S. Constellation* as his flagship, 488. He held that position from October 1999 to June 2001, and participated in two deployments to the Persian Gulf. 489. A battlegroup typically included an aircraft carrier, five or six combat ships, two submarines, and one or two replenishment vessels. 490-91. The composition of a battlegroup is determined by the commander-in-chief of a particular fleet, here

the Pacific Fleet. 492. In 2001, the *Constellation* battlegroup was deployed to the Middle East to enforce Operations Southern and Northern Watch over Iraq, to enforce U.N.-mandated no-fly zones in the south of that country, and to enforce the U.N. oil embargo against Iraq through maritime shipping operations in the Persian Gulf. 494-96. Admiral Hart described how the battlegroup would train for months before a typical six-month deployment. 497-98.

The drafting of a transit plan from San Diego to the Middle East was a labor-intensive project, taking months to plot out, and was constantly subject to change. The drafting would begin six to twelve months in advance of deployment. 499, 670. Admiral Hart's staff was responsible for promulgating the transit plan order for the *Constellation* battlegroup for the 2001 deployment. 504-05. The person who actually drafted the transit plan was Quartermaster Chief Petty Officer Adam Conaway, who had spent nearly his entire career working in navigation, and had spent almost five years drawing up ship schedules. 653-56, 669-71. Chief Conaway explained that drawing up a battlegroup's schedule was an intensive project, requiring "over a thousand hours of work." 670. He and his supervisor would sit down and determine whether to use the northern or southern route, choose the port calls, and determine the amount of time needed to sail from San Diego to their area of operations. 671-72, 679. He had to consider a range of variables, including the class of ships, their propulsion, and standard transit speeds. 678. The plan would often undergo several revisions for any number of reasons before being finalized. 672. As Conaway explained, "It's kind of a living document." 686; *see also* 831-32.

The first iteration of the *Constellation* Transit Plan was circulated on September 29, 2000, 673, GE 115, with successive revisions on October 3, 2000 (GE 116), December 20, 2000 (GE 117), February 10, 2001 (which could not be located in Navy archives, 682-84), and finally

on February 24, 2001 (GE 118). In each iteration of the transit plan, there was a general "milestones," or executive summary, section up front that listed the anticipated entry into the geographic region controlled by the U.S. Fifth Fleet as happening on April 30, 2001. 643. This entry was known as the "CHOP" point, referring to "change of operational control." 524. The more detailed section of each transit plan, however, described the precise dates, times, and locations for each milestone, and more precisely identified the CHOP as occurring just before midnight on April 29. 643-47, 679-78. Between the various revisions, Chief Conaway had to constantly adjust the dates and locations for the battlegroup's Australian port calls. 681-83. At the time of deployment from San Diego, there was no transit plan for the battlegroup's return trip from the Persian Gulf. 798.

The final version of the transit plan dated February 24, 2001, contained a port call that had not appeared in the September, October, or December 2000 revisions: a brief stop for the *Benfold* to load ammunition at the naval magazine in Lualualei, Pearl Harbor, Hawaii on March 20, 2001. 683-84, 705, GE 118. This stop had first been added in either the February 10 or 24 revision of the transit plan. 683-85. Commander Wylie recalled that the navigation division had to do significant last-minute work before deploying from San Diego on March 15, adding charts for the Hawaii port call. 838-39. He explained that the stop in Hawaii was added because the *Benfold* had been forced to stay at sea for a missile shoot that had cut into the crew's leave during the stand-down period. 839. As compensation, the Navy agreed to reward the *Benfold* crew with a liberty port call in Hawaii. 839. The *Benfold* was the only ship in the battlegroup to pull into Pearl Harbor for an ammunition onload. 742, 840.

The navigation division of each ship in the battlegroup received a copy of the transit plan revisions, and was responsible for plotting its ship's track over the course of the transit. 506. Each revision of the transit plan would be electronically transmitted to each of the member ships of the battlegroup and certain Navy commands via classified message traffic. 505, 676, 688, 780-81, 832-33. Access to the transit plan would have been limited to about 40 out of a destroyer's crew of 300 sailors. 690. Commander Wylie testified that before the *Benfold*'s deployment on March 15, 2001, access to the transit plan would have been limited to the ship's officers, the operations specialists in the CIC, the quartermasters and signalmen, and the radio operators who processed the message. 833. In the monthlong "stand-down" period immediately before the March 15 deployment, the navigation division of the *Benfold* spent hours plotting out the ship's intended movements on paper charts, with a duplicate track being plotted by the operations division. 507, 658, 687, 780-81, 784-87, 835-36. Commander Wylie testified that during this period, the signalmen were working alongside the quartermasters to finish last-minute preparations for the ship's charts. 835-37; *see also* 791.

As a signalman on the *Benfold* in 2001, Abu-Jihaad had access to the ship's transit plan. 790-91, 794-95, 822. The *Benfold*'s navigation division was composed of four quartermasters, supplemented by four signalmen – an enlisted rating responsible for visual communications, but which was then being abolished and folded into the quartermaster rating. 507-10 (Hart), 656-57 (Conaway), 757, 760-63, 768-69 (Amador), 828. Signalmen on the *Benfold* at that time were cross-training to learn quartermaster skills. 763, 828. Commander Wylie, who supervised all ship operations including the navigation division, recalled that Abu-Jihaad participated in that cross-training, and that he had qualified as quartermaster of the watch. 829. Moreover, Abu-Jihaad

regularly worked on the bridge where the chart room was located (where the ship's paper charts and classified transit plans were stored, 773-74, 790-91, GE 123, 127 (photos of chart room)), and the adjacent signal shack, 775-79.

The transit plan was classified at the "confidential" level, and that classification marking appeared on the face of each revision of the plan. 640, 644, 659, GE 115-119. The jury heard evidence about the importance of maintaining the integrity of classified materials. By Executive Orders 12958 and 13292, information can be classified at different levels, ranging in increasing seriousness from "confidential," to "secret," to "top secret." 664-66, GE 113, 114. "Confidential" information is defined as "information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." 664-65. "Secret" information is defined as information that, if disclosed, could cause "serious damage" to national security, and "top secret" information could cause "exceptionally grave damage." 665. The jury also saw an operational instruction that guides the Navy's classification decisions, indicating that "precise current or future operational deployment, locations of surface combatant ships," and "planned foreign port calls" should be classified as "confidential" until after deployment or the visit has been approved by the host government. 666-68, GE 120. Chief Conaway testified that diplomatic clearances sometimes do not get approved until the day before a ship pulls into port. 711. Another Navy document instructed that the "secret" level of classification should apply to transits of "choke points" and deployments in areas "when there are potentially hostile forces present and foreknowledge would permit adversaries to position forces secretly and mount attacks, particularly surprise attacks, on naval forces." 703, GE 151. Commander Wylie was

responsible for approving security clearances aboard the *Benfold*, and granted secret clearances for quartermasters and signalmen due to their work on the bridge. 854-55. He explained that someone in the navigation division would have no authority to release classified information to someone without a security clearance. 856-57.

The jury also heard evidence about steps that the Navy took to maintain the secrecy of classified information, including advance location of its ships. Admiral Hart testified that the Navy did not ever publicize classified information, nor did it publicize in advance the dates of anticipated port calls or the dates of a Strait of Hormuz transit. 646. Chief Petty Officer Adam Conaway testified that he had a security clearance to handle classified information up to the "secret" level. 659. Throughout his career, including while stationed on guided missile destroyers, he had to attend annual briefings by the Navy Criminal Investigative Service about the responsibilities involved with having a security clearance. 659-60. Based on his training and experience in the navigation division, Chief Conaway testified that classified information cannot be transmitted to anyone without a clearance and a "need to know" the information. 660. Signalmen were likewise required to hold a secret clearance due to the nature of their work. 661. Navy records showed that Abu-Jihaad had been granted a secret-level clearance. 662, GE 112. Chief Amador testified that the *Benfold*'s transit plans were stored in the chart room on the bridge, and were accessible only to personnel with appropriate security clearances and a need to know. 790-91, 794. Because advance knowledge of ship movements is classified, Chief Amador would not tell his wife the precise time and date of where he was going to be deployed. 802. Instead, he worked out a system to tell his wife in code the general region of the world where he was located, using coordinates on a map grid that he had drawn up. 802-03.

The jury likewise heard evidence that advance knowledge of the battlegroup's destination and route was not widely known, even aboard the ship. For example, Josh Kelly testified that as a deck seaman and later a personnel specialist aboard the *Benfold*, he had no advance knowledge about where the ship was going. 893 ("No clue."). Before leaving San Diego in March, Petty Officer Kelly did not know which port calls the ship would make before reaching the Persian Gulf. 898-900. He did not know whether the ship would be taking the northern or the southern route. 899.

If the disclosure had come from someone in the Navy, such as an officer, who had broader access to classified information via the Navy's SIPRnet (the secure intranet for classified information), the Battlegroup Document could have contained even more damaging national security information. 688-90. Chief Conaway testified that Navy personnel with SIPRnet access could have accessed significantly more information – including classified information – about the Battlegroup than just the transit plan. 690, 782-83, 820, 833. For example, SIPRnet afforded access to the Pacific Fleet's overall deployment plan. 690. Not all personnel with secret clearances were given SIPRnet access, so the only members of the *Benfold*'s navigation division who were given such access were the two lead petty officers, Amador and Drayton – not Abu-Jihaad. 781-82 (Amador), 814. Commander Wylie testified that he (or most any other officer) could have done a better job putting together the Battlegroup Document. 866.

### F. Navy witnesses testify about the materiality of information in the Battlegroup Document to the national defense

The jury heard evidence about how information contained in the Battlegroup Document about the dates when particular ships would be in particular locations was relevant to the national

defense, and how a disclosure of such classified information from the Navy was of serious concern. By way of background, Navy witnesses testified that force protection became an especially important concept after the *Cole* bombing in October 2000 in Yemen. 877. Admiral Hart explained that Navy ships can be particularly vulnerable while in port as the *Cole* was, 512, and they were "[a]bsolutely" more vulnerable during particular portions of their transits, 512-13. As an example of such a vulnerable area, Admiral Hart pointed to the transit of the Strait of Hormuz, a choke point where geography narrows a ship's opportunities for maneuver. 513-14, GE 110, 111; 880 (Graham). The Strait is a high-traffic area with many large ships – bigger than aircraft carriers – which are very slow to maneuver, together with all sorts of other vessels engaged in cross-strait traffic. 515-16, 880-81.

During a transit of the Strait of Hormuz, the battlegroup would enter a heightened state of readiness, manning additional weapon systems, posting additional watches, sending up patrol aircraft, and closing off more compartments below decks to protect the ship's watertight integrity if hit. 517-19, 745-49, 878-79. In 2001, the battlegroup went into "Emcon D," meaning emissions control to limit which electronics could be used, and steamed in condition of readiness 3, which is only one step up from peacetime steaming. 746-47, 844-46, 879-80; *see also* 891 (Kelly testifies that he manned the SCAT team guns only four teams during *Benfold*'s 2001 deployment, including the inbound and outbound Strait transits at nighttime; "We can't really see anything because it's pretty dark, it's like pitch black."). Admiral Hart testified that at that heightened state, and with all the traffic, it can be difficult to sometimes determine who may or may not pose a threat. 519.

Admiral Hart testified that the Battlegroup Document contained a number of inaccuracies, but that he nevertheless regarded it as a threat to the battlegroup's safety. On direct, he testified:

> Q If you had known, in 2001, prior to deployment or while you were underway that this document was in the hands of individuals in London who were running a website extolling the virtues of jihad and martyrdom, what if anything would you have done?
>
> A I would have immediately alerted my superior, in this case the commander of the Fifth Fleet, and would have sought an opportunity to change the time and nature of our transit through the strait of Hormuz.
>
> Q Why is that?
>
> A Once again, as you earlier indicated by your question in sequence, it's a very vulnerable period of time for us so one of the things you try to achieve, as best you can, is some element of surprise, as you transit through the strait.
>
> Q What specifically about the Battlegroup Document would have compromised that?
>
> A The actual date and time expected to transit the strait.

523-24. Admiral Hart explained that even though the Battlegroup Document predicted that April 29 was the most likely date for transiting the Strait of Hormuz, rather than the date of chopping into the Fifth Fleet operational area, he would still have been concerned. 525. According to Admiral Hart, his concern stemmed from the fact that "we have just given away one of the key tactical elements that you like to have on your side, which is surprise." 525. To Admiral Hart, the single most troubling aspect of the Battlegroup Document was "the time frame at which we would be operating in the Fifth Fleet area of responsibility and intent to try to transmit vulnerabilities, whether necessarily accurate or not, of the ships under my command." 633. Admiral Hart testified that in asymmetrical warfare, it would be critical for attackers to have advance information about where a ship would be. 633-34.

Commander Graham testified that had he been aware that the Battlegroup Document was in the possession of someone in London who was affiliated with a website promoting violent jihad, he would have been greatly concerned. 882. He regarded the Battlegroup Document as containing classified information, and its release as a breach of security. 882. As an officer with force-protection responsibilities for the *Benfold*, he would have considered the ship's vulnerabilities when approaching the straits, and whether to go to a heightened condition level as a result. 883.

### G. The defense attempts to show that certain information contained in the Battlegroup Document could have been derived from open-source information on the internet

The defense introduced pages from a number of websites from 2001, in an effort to show that the *Benfold*'s schedule would have been available in advance for someone performing research on the internet. Some of these pages post-dated the arrival of the *Constellation* battlegroup in each port. For example, one of ships in the battlegroup– the *Thach* – posted a schedule on its website. GE 558. As the Government pointed out, however, the website had been retrieved in April 2001 and hence there was no evidence that it had been posted before the *Thach* departed San Diego on March 15, 2001, 1138; it did not appear to have a link for the March 2001 schedule at all, 1138-39; the schedule itself was limited to describing each day as either "Deployed," "Port Visit," or "Inport San Diego," 1139; and the names of the ports were never added to the website, even after they were completed in March and April 2001, 1139. Likewise, webpages posted by the *Boxer* about its port visits were posted only after those visits had been completed. 1140-43, 1155-56, GE 152, 154, 155. Moreover, although the defense found news articles talking about the battlegroup's Australian port calls, those articles were all

written in April 2001 – after the battlegroup had left San Diego, and hence after the Battlegroup Document appeared to have been written. 1143-44. The only document that the defense was able to locate on the internet predating March 15 that discussed the *Constellation*'s deployment was an entry in the MIT alumni website dating to February 11, 2001. 1104, DE 157. In a class note, a recent graduate told his classmates that he would be deploying for six months as a carrier pilot aboard the *Constellation* from San Diego on March 15, 2001, and that he expected port calls in Sydney, Perth, Bahrain, and Dubai. 1105. The note made no mention of Hawaii, nor did it give dates for any of the anticipated port calls.

The evidence showed that publicly available information about the *Constellation* battlegroup would not have enabled someone researching open sources to compile the *Constellation*'s anticipated route in advance of its departure – particularly not to predict the March 20 stop in Hawaii; the fact that the *Constellation* would be in Australia on April 6; and that April 29 would be the date for the anticipated transit of the Strait of Hormuz. For example, it was publicly known that the U.S. Navy regularly deployed carrier groups to the Persian Gulf to enforce sanctions against Iraq, and that these groups would deploy for six months at a time. 528-40. But the Navy issued a press release listing the component ships and making a general statement about their mission only when the *Constellation* battlegroup deployed. 545. Moreover, although there were two typical routes between the West Coast of the United States to the Persian Gulf – either via Southeast Asia or Australia – ships could take either route westbound. Ships typically, but not always, took one route outbound, and the other route back. 546. Likewise, although it was not uncommon for ships to sometimes stop in Hawaii, 545, 607, Chief Conaway testified that "it's definitely not necessarily the norm by any means." 706. At

standard cruising speed, it took six days to sail from San Diego to Hawaii, 706, yet the Battlegroup Document accurately predicted (as set forth in the latest revisions of the transit plan) that the *Benfold* was scheduled to arrive there on March 20 for an ammunition load. 683-85, 705, GE 118. Admiral Hart testified that there always is some variation in port calls. 548. Although Admiral Hart testified that it wasn't a secret that the *Constellation* would be following the Australian route to the Persian Gulf, 608, there was no evidence that such general information was publicly available, much less that the precise dates of port calls were made known to anyone outside the military. Indeed, the route and dates contained in the transit plans were all classified as "confidential." Because there are two possible general routes west, a member of the general public would not "be able to predict prior to deployment the dates and times of . . . port calls and the strait of Hormuz transit . . . ." 637. Commander Wylie testified that he had been deployed to the Persian Gulf many times, but his route there had been different every time. 840. The jury was able to view a number of publicly available command histories for various ships, showing that prior deployments had varied between the northern and southern routes, with different port calls. 548-49.

The defense pointed out that the Battlegroup Document inaccurately predicted that on April 29 the *Constellation* battlegroup would transit the Strait of Hormuz, but the Government also presented evidence that people confused the Fifth Fleet CHOP line with the Strait of Hormuz. 524, 637 (when asked whether people confuse where the CHOP line is, Admiral Hart testifies, "And in fact they do."). Indeed, Admiral Hart and Chief Conaway provided dramatically different descriptions of the location of the Fifth Fleet CHOP line. *Compare* 554-59, DE 603, 604 (Hart) *with* 707-09, DE 606. While Admiral Hart estimated that the shortest

distance from the CHOP line to the Strait of Hormuz was 1,000 miles, 524, Chief Conaway put the distance at just over 600 nautical miles, 709. Chief Amador testified that in the navigation division, he had observed confusion as to precisely where the Fifth Fleet CHOP line was. 801.

Moreover, the courses actually followed by the member ships of the *Constellation* battlegroup bore out the Navy witnesses' testimony that transit plans are fluid. For example, deck logs showed that the *Constellation* arrived in Sydney on April 5, 2001, and crossed into the Fifth Fleet operating area early on the morning of April 30, about two days' sail from the Strait of Hormuz. 574-75, DE 518. Its deck logs showed that the carrier transited the Strait in the early morning hours of May 2, 2001. 584-91. By contrast, two of the battlegroup ships – the frigate *Thach* and oiler *Rainier* – detached from the main group to accompany another supply ship, the *San Jose*, through the Strait one day later. 612-13, 734-40, 750, GE 523, 523A, 524A. Because the battlegroup effectively divided into two groups, that gave enemies two different opportunities to attack the battlegroup. 750.

Although the Battlegroup Document contained a number of inaccuracies about other information, the Government did not argue that such information was derived from classified sources. Indeed, witnesses testified that some of the information in the Battlegroup Document listing various ships looked like the sort of material that could have been compiled from a standard naval reference work, *Jane's Fighting Ships* (which was also available on the *Benfold*). 618-19, 862-64. *Jane's*, it should be noted, does not predict future deployments. 864.

The defense pointed to a number of inaccuracies in the Battlegroup Document, in an effort to argue that Abu-Jihaad could not have been its author. For example, the Battlegroup Document erroneously stated that the *Constellation* would be accompanied by the submarines

*Olympia* and *Columbia*, whereas it was actually accompanied by the *Santa Fe* and *Columbia*. 522, 1147. The *Olympia* had, however, been present on the *Constellation*'s 1999 deployment to the Middle East – in which Abu-Jihaad had participated. 522, 621, 810.

The Battlegroup Document also contained a graphic depicting two parallel columns of ships as the "Formation Through St[r]aits," GE 1, even though the battlegroup actually used a single-column formation as it went through the Strait, unaccompanied by the submarines. 611-13. The label "Formation Through St[r]aits" appeared only over the left-hand column; Admiral Hart testified that if the left column (which bore the heading) were placed over the right column (which had no heading), the depicted formation would be more reasonable for transiting the Strait (minus the submarines, which were shown flanking the carrier). 645-46. As Commander Graham testified, the formation actually used during a given transit would be decided upon "just immediately prior to the transit itself," after the ships had left Australia. 844.

Other inaccuracies did not relate to classified information. For example, Admiral Hart's title was COMCRUDESGRU1, not COMCRUDESRON1). 521. He did not recall having said that the battlegroup would be sitting off the coast of Pakistan with launch pads, 521, but he did commonly visit the battlegroup ships prior to deployment in San Diego and speak to the enlisted men, 522, and it was not uncommon during deployment to participate in an exercise with Pakistani forces, 521-22. The Battlegroup Document was likewise correct when it noted that SEALS were on the *Constellation,* but they were not on other ships in the battlegroup, and they were not armed with Stinger missiles. 626-28, 751-52, 755.

The Battlegroup Document also correctly noted that the group's deployment to the Middle East would trigger tax benefits for the sailors, though it slightly misstated the month

involved. As Admiral Hart testified, for any month during which personnel serve one day within the Fifth Fleet operating area, that month is tax-free. 591-93. Accordingly, by chopping into the Fifth Fleet area on April 30, the sailors in the *Constellation* battlegroup enjoyed all of April tax-free. 593-94. The Battlegroup Document erroneously stated that April 29 was likely the day through the Strait, making all of March – rather than April – tax-free as a morale booster. GE 1. (This statement also confused the CHOP into the Fifth Fleet operating area with the transit of the Strait of Hormuz. As noted above, there was testimony that even members of the navigation division confused those two points. 524, 637, 801.)

### H. After his discharge from the Navy, the Defendant makes statements to co-conspirators about having been in the business of making "fresh meals" – that is, having disclosed military intelligence in the past

The jury also heard evidence that in late September 2006, the FBI in Rockford, Illinois, asked an informant – William Chrisman – to befriend a person named Derrick Shareef. 949. Shareef soon came to live with Chrisman and his family for about three months starting in October 2006. 951. During that time, Shareef introduced Chrisman to his friend Abu-Jihaad who was then living in Phoenix. 951-52. Chrisman and Abu-Jihaad spoke over the phone and via webcam and instant messaging on a computer. 951-52. The Government had wiretapped the Defendant's telephone, and recorded all phone conversations between the two, as well as conversations that the Defendant had with other people. 953-54. At trial, the jury heard excerpts from a number of recorded calls from late 2006.

Some of the calls showed that the Defendant was familiar with the Azzam family of websites. The Defendant also talked about Maktabah al Ansar, a store in England that markets jihad videos and books, 963, GE 141b; to an article he had read about a "long time ago" in "the Pubs," 965, GE 141b – a reference that corresponded to his reference to "Azzam Pub" in an e-

mail he had written to Azzam itself, 966, GE 14; and to "waaqiah," which was one of the Azzam family of sites, 966.

The calls also showed that the Defendant was security-conscious and sometimes spoke in code. For example, he referred to jihad as "J" or "7" (referring to the seventh heaven, where battlefield martyrs go). 962, 967, GE 141b. In one call, Abu-Jihaad cautioned Shareef that he didn't "like talking on the phone or, or internet . . . just for security purposes . . . ." 968, GE 141d. He continued, "I don't ask any questions – 'cuz . . . asking questions means compromising . . . . You know I ain't trying to compromise anybody . . . Okay?" *Id.* He emphasized the importance of staying "tight" and not "introduc[ing] many people to . . . what you are." *Id. See also* 978, GE 141g (exhorting Shareef not to speak of his associates, so as to "keep them secure," and to use just their "kunyas" rather than their real names); 986-87, GE 141j (Abu-Jihaad tells Shareef, "We can have all the conversations you want – me, you and my shredder . . . . no electronic components. You will be frisked at the door."). In another call, he cautioned Shareef that he doesn't "trust the phones. The phones are tapped. . . . About as tapped as the internet . . . ." 970, GE 141e. He continued, "I'm also about . . . securing myself. I'm not gonna . . . hand myself to a Kafir [infidel]." Abu-Jihaad essentially explained that he wouldn't openly tell a Kafir that he supported jihad: He wouldn't "sit there in front of the Kafir like, 'Yes I thought that was a good . . . M.O.' . . . . You don't tell the Kafir that. 'Yes, I support . . . yes I like – this, this and that.' Man that's a dumb brother." 973, GE 141f. (The initials "M.O." correspond to the first letters of "martyrdom operation," a term Abu-Jihaad used to describe the *Cole* bombing in his e-mail to Azzam. 332-36, GE 19.).

Abu-Jihaad also made coded references to providing support for attacking U.S. military bases. He spoke with a number of individuals, including Shareef, Chrisman, and Miguel Colon,

about "cold meals" as opposed to "fresh" or "hot meals." 975-77. The term "meal" referred to "intelligence about military bases." 976. When Abu-Jihaad spoke about "cold meals," he meant "[o]utdated intelligence," whereas a "fresh meal" or a "hot meal" referred to current intelligence. 976-77. For example, Abu-Jihaad told Shareef that he had talked about "L" (meaning "logistics"), but that "L" for Abu-Jihaad was "like a cold meal. 'Cuz it ain't fresh. . . . you should figure out, what a fresh meal is. And if it ain't fresh, it's outdated. . . . it got a bad date on it . . . ." 974-75, GE 141g.

In coded conversations on these calls, Abu-Jihaad admitted having previously had access to military intelligence, and disclosing it. In one three-way conversation in which Chrisman participated, Abu-Jihaad apologized for his lack of fresh military intelligence, but pointed Shareef to an associate who had just recently left the military:

> And I said, and I'll say it again, with whatever I can give, that's beneficial, I'll give it to you. But whatever's cold turkey, if it's cold turkey, I can't give it to you. . . . 'Cuz that means that, if it's cold turkey – I'm talking about "L" you figure it out – 'cuz then that means that, that's just saying that, *I haven't been on that job,* so I don't – you know what I'm saying, I haven't been there . . . to see . . . what the fresh meal is.
>
> . . . .
>
> If I can't, if I can't give you the fresh meal – I ain't been there is "X" amount of years. . . .
>
> See what I'm saying? Now if . . . the Hispanic, if the Mexican, he just, was there a minute ago – he can give you a fresh meal. . . . So you put that together. . . . If it's if it's in those terms, he can give you a fresh meal 'cuz, you know what I'm saying, he just finished his job, there, less than a month ago, or . . . two . . . . But I, I mean – in those terms and "L's," – I would be giving you a cold meal.

GE 141h (emphasis added). When Abu-Jihaad said the he hadn't "been on that job," Chrisman understood him to mean that he had been out of the Navy for a while. 981. Later in that conversation, Abu-Jihaad again referred Shareef to his associate who could provide a "hot meal . . . where he can eat a whole lot." 141*i*. Chrisman understood this associate, the "Mexican" who

"was there a minute ago," to be Miguel Colon, who left the Marine Corps in September 2006. 983-85, GE 142.

Shortly afterward, Abu-Jihaad spoke with Colon, and told him about his conversation with Shareef. 989, GE 141k ("I told 'em about a cold meal and a hot meal. And I ain't got nothing hot for you, homey."). When describing the earlier call, Abu-Jihaad said:

Abu-Jihaad: I peep, I peep the game that he wants a hot meal. You know what I'm saying?

Colon: Yeah.

Abu-Jihaad: I don't know how to get him no hot meal. I told him I, *I ain't been working uh, in, in, in the field of making meals* and or, you know . . .

Colon: Yeah.

Abu-Jihaad: . . . in a, *in a long time. I've been out of that for, uh, over uh, quatro years* you know.

Colon: Yeah.

Abu-Jihaad: I ain't got nothing for you, homey.

989-90, GE 141k (emphasis added). At the time this call was made in 2006, Abu-Jihaad had been out of the Navy for four years.

## II. There was sufficient evidence to support both of the convictions, and so the Defendant's motion for acquittal under Rule 29 should be denied

### A. Governing law

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), the Court outlined the "heavy burden" faced by a defendant challenging his conviction based upon a claim of insufficient evidence:

> In considering such a challenge, we must credit every inference that could

> have been drawn in the government's favor, and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt[.] We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[.]

*Id.* at 94-95 (internal citations and quotation marks omitted).

A reviewing court must apply this sufficiency of the evidence test "to the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). The government need not disprove every reasonable hypothesis consistent with the defendant's innocence. *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993); *see also United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002) (holding that government "need not negate every theory of innocence"). Rather, a jury's decision to convict may be based solely on circumstantial evidence and any reasonable inferences based upon the evidence. *Id.* In this vein, the Supreme Court has observed that

> [c]ircumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

*Holland v. United States*, 348 U.S. 121, 140 (1954) (affirming tax-evasion conviction based entirely on circumstantial evidence of increase in defendant's net worth, because "proof of a likely source [of taxable income], from which the jury could reasonably find that the net worth increases sprang, is sufficient," and that "the government is not required to negate every possible

source of nontaxable income"). "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." *United States v. Bieganowski*, 313 F.3d 264, 278 (5th Cir. 2002) (citing *Coggeshall v. United States (the Slavers, Reindeer)*, 69 U.S. (2 Wall.) 383, 401 (1864)).

As the Court of Appeals for the Second Circuit has explained, "[t]he ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998). In this regard, "'the court must be careful to avoid usurping the role of the jury.'" *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (quoting *Guadagna*, 183 F.3d at 129). Caution is especially warranted because "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008).

**B. There was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the Defendant had communicated information relating to the national defense to individuals at Azzam Publications**

There was sufficient evidence for the jury to conclude beyond a reasonable doubt that the Defendant had transmitted sensitive information contained in the Battlegroup Document to Azzam Publications. As the Government argued before the jury, one helpful way to examine this question is to ask two questions:

> (1) Was there sufficient evidence that information in the Battlegroup Document had been disclosed from the military – in other words, that it was an inside job? and if so,
>
> (2) Was there sufficient evidence that the Defendant was the one who disclosed that information?

Each question will be examined in turn.

**1. There was sufficient evidence that certain information contained in the Battlegroup Document was disclosed from someone inside the military, who had access to the *Constellation* battlegroup's transit plan, but lesser access to information about other naval groups like the *Boxer*'s amphibious readiness group**

On its face, the Battlegroup Document contained indicia that it contained information that had been leaked from the U.S. military. Most importantly, it contained closely held information about the precise dates when ships in the *Constellation* battlegroup would be in particular places. Specifically, it reported dates for an ammunition on-load in Hawaii on March 20, 2001; that the *Constellation* would be in Sydney on April 6, 2001; and that the battlegroup would be transiting the Strait of Hormuz on April 29, 2001.

Even the Navy personnel most intimately involved in planning the battlegroup's movements had not anticipated a stop in Hawaii until one month before departure. 683-84, 705, GE 118. The stop in Hawaii did not appear on any of the draft transit plans until February 10 or 24, 2001. GE 115-117. The Hawaii port call had been added only for the *Benfold*, and that it had been added only because the *Benfold* happened to be kept at sea longer than anticipated for missile practice during the period immediately preceding the month-long "stand down" prior to deployment. 838-39. It would be implausible to believe that an outsider had simply made a lucky guess that there would be a Hawaii port call on March 20, especially considering that the standard sailing time between San Diego and Hawaii was *six days*, 706 – not the five days contained in the transit plan and accurately predicted in the Battlegroup Document. 741-42.

Even if an outside observer had been lucky enough to correctly guess that there would be a Hawaii stop on March 20, it would require even greater luck to have guessed that the *Constellation* battlegroup would take the southern route to the Persian Gulf (via Australia) rather

than the northern route (via the Straits of Malacca), and that the *Constellation* itself would be in Sydney (as opposed to some other port) on April 6, 2001. The *Constellation* itself had variously taken either of the two routes when heading west. 1135-37, DE 506 (northern route in 1995); DE 509 (northern route in 1999). Moreover, there were two groups of ships leaving San Diego in March 2001, and it would have required inside knowledge to know which group would head north, and which would head south. Although the defense pointed to a posting on the MIT class notes page, where an alumnus told his classmates that he would be deploying aboard the *Constellation* and anticipated port calls that corresponded to the southern route, the alumnus also predicted port calls in Bahrain and Dubai. DE 559 at 5. Neither of those ports were mentioned in the Battlegroup Document, however, which strongly suggests that the MIT page was not a source for that document. And as noted above, all of the other webpages introduced by the defense that described the battlegroup's location all postdated those movements. (The Battlegroup Document did not claim that the *Constellation* would arrive in Sydney on April 6, Doc. 269 at 32; it stated that it would "be at Sydney" on that date, GE 1.)

Another indicator that the disclosure came from inside the military was the Battlegroup Document's focus on April 29, 2001, as the date for transiting the Strait of Hormuz. In every iteration of the transit plan, just before midnight on April 29 was the time and date fixed for the *Constellation* battlegroup to enter the Fifth Fleet operating area. 643-47, 679-78. Navy witnesses testified that people – even in the navigation division – sometimes confused the Fifth Fleet CHOP line with the Strait of Hormuz, which marked the entry into the Persian Gulf. 524, 637, 801. Those two points were separated by only about two days' sailing, 575, which might not necessarily seem significant to sailors who had spent weeks transiting the Pacific Ocean en route

to what they knew to be their ultimate destination: the Persian Gulf. The ease of such confusion was illustrated for the jury when two extraordinarily knowledgeable witnesses – a two-star admiral and a career navigator – each offered dramatically different descriptions of where the CHOP line lay. *Compare* 554-59, DE 603, 604 (Hart) *with* 707-09, DE 606 (Conaway). The transit plan itself simply identified the CHOP point by latitude and longitude, without any descriptors of where that point lay vis-à-vis the Persian Gulf. *See, e.g.,* GE 118 at 5. If a person were disclosing information directly from the transit plan (rather than a map onto which the transit points had been transcribed), such confusion would have been easy.

In any event, the Battlegroup Document accurately predicted that the April 29 date would be driven by the Navy's desire to boost morale by crossing into a tax-free zone before the end of a given month. If an outside observer were simply guessing the date, why name a date that was precisely *two* days before the end of the month, rather than the last day of the month (April 30) or rather an unspecified date described as simply close to the end of the month? The defense's surmise that an outside observer might have guessed that the Battlegroup would be deployed for six months and spend exactly 90 days inside the Gulf, and therefore simply add 45 days to the March 15 departure to come up with the April 29 date, Doc. 269 at 45, is purely speculative – especially when considered together with the accurate forecasting of the ammunition onload in Hawaii, and the date the *Constellation* would be in Sydney. Moreover, this supposition that the source of the Battlegroup Document was assuming a six-month deployment conflicts with the fact that the document lists "October 4" as the expected end date for deployment to the Gulf. GE 1. There is no accounting for the inaccuracy of the October 4 date, but that does not detract from the fact that the dates given for the westbound transit of the *Constellation* group all appeared on

the classified transit plans. In short, the Battlegroup Document's specific naming of April 29 as the relevant date gives rise to a strong inference that it was based on the transit plan.

All of these dates were closely held. The transit plans were all classified as "confidential." 640, 644, 659, GE 115-119. They were transmitted only by secure message traffic on the Navy's SIPRnet. 505, 676, 688, 780-81, 832-33. Access to the SIPRnet was tightly restricted based on security clearances and a need to know. 781-82, 814. Once printed off the SIPRnet by the navigation division, the transit plans were maintained in a classified safe in the chart room on the bridge, and were otherwise accessible only to personnel in the CIC who maintained duplicate charts. 790-91. The Navy regularly trained its personnel on the need to maintain the confidentiality of classified information, 659-60, and Chief Amador illustrated the lengths to which sailors would go to avoid illegal disclosures of ship movements – even to spouses. 802-03.

Tellingly, the Battlegroup Document predicted dates only for the route traced by the *Constellation*'s transit plan. It did not predict dates for port calls within the Persian Gulf, or for the *Constellation*'s return trip to San Diego. Again, the jury could have reasonably inferred that if outsiders were attempting to predict the *Constellation* battlegroup's whereabouts, they would have hazarded guesses beyond the points outlined in the transit plan itself. Further, if an outsider had been simply guessing at the dates when the *Constellation*'s ships would be arriving in various ports and the Strait of Hormuz, why would it not have done likewise for the *Boxer*'s amphibious readiness group – which was also known to be leaving San Diego for the Persian Gulf at the same time? And why limit the guesses to only one carrier battlegroup– the *Constellation* – when the Document professed knowledge that the "already deployed groups in

the gulf" were going to be relieved? The defense's own researcher acknowledged that open source information was available for other carrier groups such as the *Lincoln* and the *Truman*. 1090-95. The Battlegroup Document did not discuss any of those other groups, even though the *Truman* would have been exiting the Persian Gulf around the same time that the *Constellation* would have been relieving it. It is implausible that an outside researcher would have been aware of the movement of all these naval groups through the region, yet chosen to limit its guesses to the *Constellation* battlegroup.

Other content of the Battlegroup Document also pointed to an inside source. Perhaps most blatantly, the document itself ended with the dramatic plea, in bold, "**Please destroy message.**" GE 1 at 3. If the Battlegroup Document had been assembled from open-source information, there would be no need to destroy the message. Instead, that warning supports an inference that the person who drafted the Document feared apprehension – a fear that is most sensibly attributed to a guilty conscience.

There were also indicators that even though the file containing the Battlegroup Document had been electronically created by Ahsan and transmitted to Ahmad, neither of them were the original sources of the information. For one thing, the Document contained numerous bracketed editing comments, including a prefatory note: "[Necessary changes made in grammar and spelling, and for the sake of clarity]." GE 1 At least two of the editorial comments included question marks, suggesting that Ahsan (the likely editor) had not confirmed with the original source the meaning of certain notations. For example, on page 1 of the Document certain armaments were described as having "166 [mm?] fragment bomblets," and on page 2 the term "helos" was followed by "[helicopters?]." GE 1. (There was testimony that "helo" is military

jargon for "helicopter." 747.). The Document's self-description as a "message", *see* GE 1 ("**Please destroy this *message***") (emphasis added), also strongly indicates that it was conveyed from an outside party to Ahsan. Moreover, Special Agent Bowling testified that despite thorough searches of terabytes of electronic media seized from Ahmad and Ahsan during this investigation, he had found no traces of the information contained in the Battlegroup Document, or any research that had been done to put it together. 293-94, 459. Moreover, the fact that the diagram of the ship formation was added to the file on April 12, after the battlegroup had left San Diego, is of no moment. Doc. 269 at 34. The file located in London had been created on April 2, 2001*, see* 264; it had apparently been created by Ahsan, *see* 463-65; and Ahsan appeared to be the editor rather than the source of the material in the Battlegroup Document, *see* GE 1 (containing bracketed comments). The fact that the file containing the Battlegroup Document was created in two sessions ten days apart in April 2001, rather than in a single editing session, does not make any difference.

Although the defense points to a number of inaccuracies in the Battlegroup Document about non-classified information, those errors do not outweigh the powerful evidence that the classified information was too accurate to have been fortuitously guessed at by an outsider. Mistakes in some details like Admiral Hart's title (COMCRUDESRON1 instead of COMCRUDESGRU1) are actually more suggestive of an imperfectly informed insider who had only an approximate familiarity with high-level acronyms, rather than outsider for whom such titles would be irrelevant. Other errors – such as misquoting Admiral Hart about whether the battlegroup would be sitting off the coast of Pakistan – are simply not indicative of whether the author was inside or outside the military.

**2. There was sufficient evidence that the Defendant was the one who transmitted the inside information to Azzam Publications**

There was strong evidence that Abu-Jihaad was the person within the U.S. military who disclosed information in the Battlegroup Document to Azzam Publications. For convenience, much of that evidence can be viewed under four headings.

***First, Abu-Jihaad was the only member of the U.S. military to be in communication with Azzam Publications during the months preceding the* Constellation *battlegroup's deployment.*** Abu-Jihaad was the only member of the U.S. military known to be in communication with Azzam Publications during the period of the disclosure, 475-76, through e-mail correspondence spanning from August 21, 2000, through September 3, 2001. 282-83; GE 13-23. It was essentially undisputed at trial that the Defendant was responsible for sending those e-mails. Nor could he have plausibly have denied that fact, given the use of his personal and Navy e-mail addresses, GE 13-23, the fact that the IP addresses traced back to Navy computers in San Diego and on the *Benfold* itself, GE 146; 287-88, 295-97, 306, 326, 350-51; his use of his own name to sign the e-mails, GE 15, GE 19, GE 20, GE 23; and his provision of his home and military mailing addresses, GE 17, GE 20, GE 105, 328-29. *See also* 1014-25, GE 147, 147a (maps pinpointing *Benfold*'s location at time of e-mails).

Forensic analysis made clear that the Government had not been able to recover every e-mail message between Abu-Jihaad and Azzam through Azzam's Yahoo e-mail accounts. As explained by Agent Bowling, as well as by Jeffrey Stanford of Yahoo, not every e-mail that is sent or received by a Yahoo account is necessarily saved in the account. Yahoo could provide only a "snapshot" of the account, including only those e-mails that were present on the day that it

complied with the search warrant. 297-99, 401. It is up the account user to keep or delete particular messages. 297-98, 345-46, 457-58. In the relevant time period, 2000-2001, users could store only four megabytes of data in Yahoo's web-based e-mail accounts. 480-81. Unless they deleted some messages, they would be unable to receive any further e-mails. 480-81. Moreover, after learning of the Battlegroup Document in December 2003, Agent Bowling had attempted to obtain records from Abu-Jihaad's e-mail accounts with hotmail and the Navy. Unfortunately, both of those accounts had been purged by then. 285; 401-03; 458.

Agent Bowling was able to determine that other e-mails between Abu-Jihaad and Azzam had existed, but had not been stored on the account. Some of the recovered e-mail messages fortuitously included previous e-mail threads – that is, they included copies of previous e-mails sent back and forth, to which the recipient had hit "reply." 291-92, 309-10, 423-24. Agent Bowling testified that some of those embedded e-mail messages, which would have had independent header information, were no longer located on the Yahoo accounts. 435-36; 457-58. For example, the Yahoo account did not contain a copy of the e-mail that Abu-Jihaad had sent to Azzam in the summer of 2001, extolling the bombing of the *U.S.S. Cole*. 332, 457-58. The only reason the Government had been able to learn of that message is because the users of the Azzam accounts had chosen to save their July 7, 2001, reply to the *Cole* e-mail. 457-58. Indeed, they had taken the unusual step of cc'ing their reply to one of their own Yahoo accounts. 335-36. The content of Abu-Jihaad's *Cole* e-mail allowed some narrowing of the time frame, since it referenced a newspaper column by Thomas Friedman, 336, which evidence showed had been published on June 26, 2001, 337, GE 25. Thus, even though the original *Cole* e-mail was not recovered, with its attendant header information, Abu-Jihaad must have written that message

sometime between the publication of Friedman's column on June 26 and Azzam's reply to Abu-Jihaad on July 19, 2001. 338. Moreover, the content of some of Abu-Jihaad's e-mails reference regular mailings that were not recovered. GE 13, GE 20.

Finally, those monitoring the Azzam Publications e-mail clearly viewed Abu-Jihaad as important enough to include his e-mail address in the online address book for azzamproducts@yahoo.com. As Agent Bowling testified, he had recovered more than 23,000 e-mail messages to and from Azzam's e-mail accounts, but only a small portion of the e-mail addresses – including the Defendant's – had been saved to the online address books associated with these accounts. 354-56, 392, GE 24. Only the account user for azzamproducts@yahoo.com could save an e-mail address, 356, and the evidence showed that Ahsan – the apparent creator of the Microsoft Word file containing the Battlegroup Document – was responsible for managing the products backlog for Azzam. 382, 389-92, 464, GE 78.

***Second, Abu-Jihaad had limited but important access to classified information – to the dates in the transit plan that appeared in the Battlegroup Document.*** As a signalman, Abu-Jihaad had a "secret" security clearance, was a member of the navigation division, and had access to the chart room where the transit plan was kept. He was beginning to cross-train with the quartermasters, and therefore had some involvement with the preparation of the *Benfold*'s transit plan before the March 2001 deployment. 763, 828-29. He therefore had access to precisely the dates and locations that were disclosed in the Battlegroup Document.

Strikingly, however, Abu-Jihaad's access to advanced ship movements was limited to the dates and locations contained in the Battlegroup Document – namely, the *Constellation* group's transit plan from San Diego to the Middle East. The *Constellation* battlegroup transit plan did

not contain the dates and milestones for the *Boxer*'s amphibious readiness group, even though it was leaving San Diego at roughly the same time and planned to work with the *Constellation* battlegroup. Nor did the *Constellation* battlegroup transit plan contain information about the intended movements of other carrier groups, such as the one that the *Constellation* would be relieving in the Persian Gulf. Unlike the officers aboard the *Benfold*, Abu-Jihaad had not been granted access to the classified SIPRnet, which contained significantly more classified information, such as the overall deployment plan for the Pacific Fleet. 689-90, 781-83, 814, 820, 833, 866. It is significant therefore, that the limits of Abu-Jihaad's access to classified information about ship movements were co-extensive with the Battlegroup Document's predictions about ship movements.

To the extent there are errors in non-classified information in the Battlegroup Document, that would be expected from an enlisted sailor with only a brief tenure in the Navy, and who presumably would not be fully conversant in details like the arms carried by SEAL teams assigned to the battlegroup. Moreover, the e-mails written by Abu-Jihaad themselves reveal a person who was less than meticulous; imperfections in the Battlegroup Document are exactly what would be expected from someone like him.

***Third, the e-mail traffic showed that Abu-Jihaad clearly had a motive to transmit the classified information to Azzam Publications.*** On the one hand, in late 2000 and early 2001 Azzam Publications had been pleading for its readers to come to the aid of the Taliban against anticipated attacks from the U.S. military. 169-81, GE 37, GE 40. More specifically, the website was alerting readers that these attacks were likely to come from cruise missile strikes, 177-78, GE 38 – the very sort of attack that the *Constellation* battlegroup in general, and the *Benfold* in

particular, would be capable of mounting from the Persian Gulf region. Azzam's website took great pains to extol the virtues of martyrdom, particularly battlefield deaths when fighting infidels like Americans. *See, e.g.,* 184-89, GE 60, GE 62. Abu-Jihaad, for his part, demonstrated his sympathy for these views in his e-mails. He made clear that he regularly visited the Azzam site and followed with particular interest their reports on the Taliban. *See* 290-94, GE 13, GE 150; 351-53, GE 23; *see also* 965, GE 141b (2006 reference to having read article on "the Pubs"). He also ordered videos about the Bosnian and Chechnyan conflicts that were marketed on the site as martyrdom videos, and which were touted as having been produced through direct contacts with the mujahideen themselves. 190-204, GE 42, GE 49, GE 50, GE 150.

Perhaps most disturbingly of all, Abu-Jihaad praised the bombing of the *U.S.S. Cole* – a destroyer of the same class as the *Benfold* – as a "martyrdom operation." 333-42, GE 19. In an e-mail designed to be publicly posted on Azzam's "E-mails of Support" page, Abu-Jihaad derided the United States as a "Kuffar [infidel] nation," and gave thanks to Allah because the "Mujahideen" were "american enemies." GE 19. He was particular overjoyed by a statement during a force protection briefing given aboard his ship, when told that "america has Never faced an enemy with no borders, no government, no diplomats, nor a standing army that pledges no allegiance to no state." *Id.* He lauded the mujahideen as "the true champions and soldiers of Allah," whose "only mission in life [is] to make Allah's name and laws supreme all over this world." *Id.* He was pleased that "you can truly see the effects of this psychological warfare taking a toll on junior and high ranking officers . . . ." *Id.* Abu-Jihaad wrote this e-mail while the *Benfold* was still stationed inside the Persian Gulf. 1022, GE 147.

In an effort to counter this powerful evidence of motive, the defense argues that the Defendant did not hide his sympathies for the causes espoused by Azzam Publications, using ship computers to view radical websites and video clips in front of his shipmates, using his real name when corresponding with Azzam, and arranging for them to mail martyrdom videos to his military FPO address. Doc. 269 at 28-29. He argues that such actions are inconsistent with those of a person who had disclosed classified material to Azzam Publications. *Id.* The problem with this argument is that it is effectively undermined by the *Cole* e-mail, in which Abu-Jihaad praised the bombing of that Navy ship as a "martyrdom operation." GE 19. One would hardly expect a U.S. sailor to write such a testimonial for a website, which is designed to be posted on an "E-mails of Support" page, if he expected word to get back to his shipmates or to the U.S. military more generally. Yet the fact remains that Abu-Jihaad did in fact express open derision for the United States as a "Kuffar nation," praised the terrorists who murdered sailors aboard the *Cole*, and sought to convey those sentiments to Azzam Publications for public viewing. Of course, he did *not* list his identity in the text of that e-mail which was designed for publication – which would certainly allow the jury to infer that Abu-Jihaad himself drew a distinction between those actions he was willing to disclose publicly (such as watching or ordering violent videos) and those he was not (such as praising the *Cole* bombing, and thus by extension, disclosing classified information).

***Fourth, Abu-Jihaad admitted in coded conversations that he had previously disclosed intelligence about U.S. military targets.*** In wiretapped calls with Derrick Shareef, William Chrisman, and Miguel Colon in late 2006, Abu-Jihaad repeatedly spoke in code about his current ability to provide them with only "cold meals" – meaning outdated military intelligence. 976. He

explained that Shareef could obtain "fresh" or "hot meals" – meaning current military intelligence, 976-77 – only from their associate Colon ("the Mexican") because he had been in the military just a "minute ago." GE 141h. (Colon had been discharged from the Marines only two months earlier. 983-85, GE 142.) Abu-Jihaad essentially admitted having disclosed military intelligence in the past, when he explained to Colon: "*I ain't been working uh, in, in, in the field of making meals . . . in a long time. I've been out of that for, uh, over uh, quatro years you know.*" 989-90, GE 141k (emphasis added). Abu-Jihaad had been discharged from the Navy four years earlier, in 2002. 278, GE 105. The jury was certainly entitled to infer that "making meals" referred to providing military intelligence. It could also reasonably interpret Abu-Jihaad's statement that he had been "working . . . in the field of making meals . . . over uh, quatro years" earlier as an admission that he had, in fact, provided such intelligence while he was still in the military. *See United States v. Abu-Jihaad*, 2008 WL 282368 at *6 (D. Conn. Jan. 31, 2008) ("The Court agrees that these statements constitute relevant evidence within the meaning of Rules 401 and 402, since they bear directly on the crimes charged in this case – the provision of intelligence information – precisely as the Government suggests.").

The inculpatory nature of Abu-Jihaad's admission was reinforced by his insistence upon using code words during these conversations. He repeatedly indicated to Shareef his unwillingness to speak openly about these and related matters. *See, e.g.,* GE 141h at 1 ("I'm talking about 'L' *you figure it out*") (emphasis added); *id.* ("Now if . . . the Hispanic, if the Mexican, he just, was there a minute ago – he can give you a fresh meal . . . . *So you put that together*."); *id.* at 3 ("I can elaborate on that more if you want me to . . . to your face – not on the phone."); GE 141*i* at 1 ("I'm throwing it out – cold and, cold and hot meals, you know what I'm saying?"). *See also, e.g.,* 968, GE 141d; 970, GE 141e; 978, GE 141g; 986-87, GE 141j.

### C. There was sufficient evidence at trial to prove beyond a reasonable doubt that the Defendant's conduct constituted the provision of material support or resources

The Defendant argues that there was insufficient evidence to prove that he provided material support or resources as defined by 18 U.S.C. § 2339A(b). *See* Doc. 269 at 46-47. His argument, however, misconstrues the law and ignores a vital part of the indictment. The issue is not whether information in itself constitutes personnel or a physical asset. The salient inquiry is whether the Defendant's conduct qualifies as the provision of personnel and whether the Defendant is secondarily liable under 18 U.S.C. § 2(b) for causing the provision of a physical asset. There was ample evidence admitted at trial for the jury to answer yes to both questions because in clandestinely compiling the information contained in the Battlegroup Document and sending it to Azzam Publications, the Defendant: (1) acted as personnel; and (2) caused Ahsan's creation of a physical asset – the floppy disk.

#### 1. Acting as a spy to secretly gather and transmit sensitive Navy information qualifies as providing personnel

While the Defendant's initial premise that "personnel . . . mean[s] people" is correct, his conclusion that the provision of personnel prohibited by Section 2339A must be narrowly limited to "offering support in person" is not. Doc. 269 at 47. The mere fact that the Defendant did not physically transfer himself to participate in the preparation of the predicate conspiracy does not mean that he did not provide himself as personnel. Rather, the provision of personnel broadly encompasses making available any type of human resource, including one's skills, knowledge or specialized services.

Section 2339A(b) "places no limitation on the type of personnel which is prohibited, or whether the use of any human resources . . . is prohibited." *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1214 (C.D. Cal. 1998) ("*HLP I*"), *aff'd,* 205 F.3d 1130 (9th Cir. 2000).[3] Accordingly, courts have held that activities such as voicing support for the goals or cause promoted by terrorists or their organizations can fall within the ambit of providing personnel. *Humanitarian Law Project*, 205 F.3d at 1137 ("Someone who advocates the cause of the [terrorist organization] could be seen as supplying them with personnel . . . ."); *HLP I*, 9 F. Supp. 2d at 1214 (finding that even writing and disseminating literature supporting the goals of a foreign terrorist organization qualifies as the provision of personnel). Indeed, the *HLP* court implicitly found this to be true even with respect to those activities that were not solicited by the organization or conducted under the organization's direction and control. *See Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1136 (9th Cir. 2007) (holding that the proscription of providing "personnel" under Section 2339B was not unconstitutionally vague only after that statute was specifically amended to exempt from liability people acting entirely independently of the organization); *HLP I*, 9 F. Supp. 2d at 1214 (noting that the scope of personnel in Section

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[3]The *HLP* line of cases examined the scope of the term "personnel" as applied to 18 U.S.C. § 2339B's prohibition against providing material support to designated foreign terrorist organizations, in the context of determining whether the term was void for vagueness under the First Amendment. Section 2339A as alleged in this case is not susceptible to such a First Amendment challenge because the allegations do not concern the scope of membership in an organization or the permissible extent of advocacy. Moreover, "the First Amendment provides no protection for the conduct of providing resources knowing and intending that they are to be used for crimes of violence." *United States v. Sattar*, 314 F. Supp. 2d 279, 301 (S.D.N.Y. 2004); *see also United States v. Amawi*, 545 F. Supp. 2d 681, 683-85 (N.D. Ohio 2008) (citing cases). The *HLP* courts' initial analysis of the general meaning of "personnel" however, applies to Section 2339A because Section 2339B incorporates Section 2339A's definition of material support or resources. *See* 18 U.S.C. § 2339B(g)(4).

2339A(b) is not limited to people working at the headquarters or at the direction of a terrorist organization).[4] If the term "personnel" is broad enough to encompass the *HLP* plaintiffs' advocacy activities in support of a cause espoused by a terrorist organization, then it certainly covers Abu-Jihaad's clandestine collection and transmission of sensitive national defense information for the benefit of a potential terrorist plot.

The case cited by the Defendant, *United States v. Sattar*, does not support his claim. Instead, the *Sattar* court stated that personnel is not limited to the physical transfer of a person. *United States v. Sattar*, 314 F. Supp. 2d 279, 297 (S.D.N.Y. 2004) ("[T]here is no basis to limit the meaning of "provides . . . personnel" to the physical transfer of personnel, and not to include making personnel available . . . ."). In *Sattar*, the defendants were convicted under Section 2339A of providing Sheikh Abdel Rahman as personnel for a conspiracy to kill people outside the United States, even though at the time Rahman was serving a life sentence in the United States. *Id.* at 287-88; *United States v. Sattar*, 395 F. Supp. 2d 79, 82 (S.D.N.Y. 2004). Rahman was an Islamic cleric whose opinion was influential among the leadership of the Islamic Group (IG), a foreign terrorist organization operating in Egypt. *Sattar*, 395 F. Supp. 2d at 85. For national security purposes, the United States imposed Special Administrative Measures (SAM) that limited his ability to communicate with third parties. *Id.* at 84. The defendants assisted Rahman to violate the SAM by, among other things, publicizing his withdrawal of support for a cease-fire and writing a *fatwah* (Islamic legal ruling) on his behalf authorizing renewed violence

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[4]Only Section 2339B was amended to limit the scope of personnel because only that statute was held to be constitutionally infirm. Section 2339A has never contained any such limitation. *Compare* 18 U.S.C. § 2339A(b) (2001) *and* 18 U.S.C. § 2339A(b) (2008) *with* 18 U.S.C. 2339B(h) (2008).

against Jews worldwide. *Id.* at 94. In post-trial motions, the defense argued that simply disseminating speech cannot constitute the provision of personnel. *Id.* The district court, however, rejected this claim on the ground that making Rahman's words and opinions available to the IG fell within the statutory meaning of providing personnel under Section 2339A(b). *Id.* Likewise, Defendant Abu-Jihaad provided himself when he made his specialized knowledge and unique access to classified Navy information available to Azzam Publications.

**2. The Defendant caused Ahsan to provide a physical asset**

The Defendant's next assertion that the information in the Battlegroup Document is not a physical asset also misses the mark because the Government has never made such a claim. Rather, as the Government argued in closing, the Defendant is liable because "by providing . . . the information that [wound] up in the Microsoft Word document on that floppy disk, he essentially set in motion the steps that caused that floppy disk to be created by Ahsan and given to Ahmad." 1224-1225. There was sufficient proof presented at trial to enable the jury to find beyond a reasonable doubt that the Defendant caused the provision of the floppy disk.

The indictment charges the Defendant with violating both 18 U.S.C. §§ 2339A and 2. Section 2 provides in pertinent part:

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The purpose of Section 2(b) is to punish a person "if he is a cause in fact of the criminal violation." *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992). The jury was properly instructed that it could convict the Defendant if it found beyond a reasonable doubt, in addition to the other statutory elements, that the Defendant provided, or caused to be provided,

material support or resources. 1197; *see United States v. Nolan*, 136 F. 3d 265, 272 (2d Cir. 1998).

To show that the Defendant caused Ahsan to provide a physical asset, it is sufficient to prove that he could have reasonably foreseen that the creation of the physical asset would take place. *See United States v. Amico*, 486 F.3d 764, 781 (2d Cir. 2007); *see also Pereira v. United States*, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used" under Section 2(b)).

There was sufficient evidence for the jury to find beyond a reasonable doubt that the Defendant could have reasonably foreseen that the information he provided to Azzam Publications would be put into a physical form. As discussed *supra* at 50 and *infra* at 63-65, the evidence suggested that Defendant Abu-Jihaad was motivated to transmit the information to Azzam Publications at least in part by the website's call for aid for the Taliban in advance of an anticipated U.S. attack. His statements in the *Cole* e-mail, GE 19, indicated that he was also greatly admired 'martyrs' who died fighting 'infidels' like the United States. Thus, the jury could reasonably infer that he intended for the information to be used operationally to help defend the Taliban through a preemptive strike on the battlegroup. As a military enlistee with nearly three years of experience and a prior tour of duty through the Persian Gulf under his belt, 276-79, GE 105, GE 106, the Defendant should have known that his recipient at Azzam Publications would need to put it into some kind of physical form – if it was not already in a physical form when he sent it – in order for it to be effectively passed on and used operationally by anyone preparing or carrying out a conspiracy to kill U.S. nationals. Accordingly, once the

jury determined that it was the Defendant who delivered the information to Azzam Publications, there was sufficient evidence for them to find him liable for causing Ahsan to create the floppy disk pursuant to Section 2(b).

**D. Section 2339A does not require proof that the material support was ever used to implement the predicate crime**

The Defendant next asserts that he cannot be convicted of violating 18 U.S.C. § 2339A because there was no evidence that Azzam Publications ever passed on the information in the Battlegroup Document or that the information was otherwise actually used to promote or facilitate an attack on the battlegroup. Doc. 269 at 48. Contrary to his suggestions, criminal liability under Section 2339A does not require any such proof. This Court should reject the Defendant's invitation to graft an additional element onto the statute.

Nothing in the wording of Section 2339A requires proof that the material support was ultimately used by its recipient or anyone else. Rather, the plain language of the statute establishes that the touchstone for criminal liability is whether the Defendant provided the support with the requisite intent. *See* 18 U.S.C. § 2339A(a) (making it unlawful for one to provide material support *knowing or intending* that it is to be used to prepare for or carry out an enumerated predicate crime). As this Court properly explained to the jury, 1197, to convict under Section 2339A, the Government need only prove: (1) that the Defendant provided material support or resources, or caused to be provided material support or resources; and (2) that he did so, knowing or intending that the support or resources were to be used in preparation for, or in carrying out, a conspiracy to kill United States nationals. *See e.g. United States v. Khan*, 309 F. Supp. 2d 789, 796, 821 (E.D. Va. 2004), *aff'd in part and remanded in part on other grounds*, 461 F.3d 477 (4th Cir. 2006); *United States v. Abdi*, 498 F. Supp. 2d 1048, 1055 (S.D. Ohio

2007). The Defendant never objected to this instruction. Nor does he now cite any precedent supporting his claim that the law requires proof, as an additional element, of subsequent use of the material support.

In fact, courts have explicitly held that a defendant can be convicted of violating Section 2339A regardless of whether the predicate crime that the material support was intended to promote ever subsequently occurs:

> By its elements, § 2339A criminalizes material support given "in preparation for" the object offense – clearly, the object offense need not even have been completed yet, let alone proven as an element of the material support offense.

*United States v. Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2007). Thus, a defendant may be liable under Section 2339A for providing material support even if the predicate crime "had not yet come to exist." *Id.*

For these reasons, the Defendant's assertion that the Government was required to prove subsequent use of the Battlegroup Document to plan an attack is without merit and should be denied.

**E. There was sufficient evidence that the Defendant acted with the requisite mens rea**

Similarly without merit is the Defendant's challenge to the sufficiency of the evidence that the Defendant knew or intended that the information in the Battlegroup Document was to be used to kill United States nationals. *See* Doc. 268 at 48. It is evident from the face of the document itself that the purpose of the information was to facilitate an attack against the battlegroup. Moreover, the circumstances under which the Defendant provided the information, combined with his knowledge of the unique access that Azzam Publications had to terrorists who

were capable of using it to further an attack against United States nationals, establishes beyond a reasonable doubt his knowledge and intent that the information was to be used to further a conspiracy to kill the United States nationals.

At the outset, nothing in the content, tenor or tone of the information in the Battlegroup Document supports the Defendant's contention that it was provided for "propaganda purposes" or as a harmless "research exercise." The Defendant had been granted a security clearance by virtue of his position as a signalman, 854-55, GE 112, and would have been routinely instructed about the prohibition on dissemination of classified information to anyone who does not have a security clearance and a "need to know" the information, 660. He therefore knew that classified information regarding the prospective movements of the battlegroup has no proper place in a propaganda or research document that is passed to uncleared individuals. Moreover, if the information were indeed provided for such benign purposes, there would have been no reason for him to have requested that his "message" be destroyed. GE 1 at 3.

There was ample evidence presented at trial for the jury to infer beyond a reasonable doubt the Defendant's knowledge and intent that the information in the Battlegroup Document was to be used to facilitate an attack on the battlegroup.

***First, the evidence showed that the Defendant sent information that he knew would be useful in planning an attack against the battlegroup.*** The evidence of his experience aboard the *Benfold* during its prior deployment to the Persian Gulf, together with the "force protect brief" that he had received (GE 19), demonstrated that the Defendant understood the sensitivity of the information about the date of the battlegroup's transit into the Persian Gulf and the danger that its pre-deployment disclosure posed to the safety of the ships. Whenever the battlegroup

transited the Strait, it would do so in a heightened state of alert, taking extra security precautions because of the increased vulnerability of the ships in the narrow, high-traffic area. 512-19, 880-81, 887, 890-91 (testimony of Josh Kelly that the *Benfold* manned extra security both times it transited to or from the Gulf on its 1999 and 2001 deployments). Thus, the Defendant well knew that passing information that predicted the approximate timing of the battlegroup's transit into the Gulf, the security precautions that the fleet might undertake during the transit, and the defenses and missile capabilities of each ship would be invaluable to potential terrorists in planning how and when to launch an attack on the fleet.

***Second, the evidence showed that the Defendant sent the information to an organization that he knew supported violent jihad and had direct access to terrorists.*** The Defendant's nefarious intent is further demonstrated by the fact that he sent the information to Azzam Publications, knowing that: (1) it was an organization whose mission was to publicize and glorify the exploits of violent jihadists, recruit fighters, and encourage donations to terrorist organizations; and (2) it had direct access to various terrorist groups and leaders.

Not only was Azzam Publications named after a scholar "who was instrumental in reviving Jihad in the 20th Century" and founded al Qaida with bin Laden, but it also freely admitted that its primary focus was on publicizing violent jihad. 144-46, GE 33 at 2, 4, 5. The website posted bin Laden's Declaration of War on America in which he encouraged Muslims to take up arms to expel the Americans from the Arabian peninsula, GE 9, 53, and other articles encouraging participation in violent jihad including *fatwah* advising readers to engage in fighting and martyrdom operations, and a manual on training to fight holy war. GE 11, 60, 61. The website also featured targeted appeals for assistance to the Taliban, and even went so far as to

provide detailed instructions on the exact procedures that should be employed to collect and courier money directly to the Taliban Consul-General in Pakistan. GE 40 at 1-5.

Azzam Publications also made known that it had uniquely direct access to members and leaders of various terrorist groups. Its websites and products were replete with information and material that could only have been obtained directly from the fighters themselves. *See*, *e.g.*, 190, GE 42-47 ("jihad photo library" claiming to contain photos taken by fighters in Chechnya, and blow-by-blow descriptions of battles with Russian soldiers); GE 41 ("jihad stories" section containing purportedly first-hand accounts of biographies of foreign fighters). Similarly, the sophisticated full-length propaganda and recruiting videos it sold contained significant amounts of raw video and photographic footage supplied by the fighters themselves, *see*, *e.g.*, 304, GE 107b, GE 107f, GE 108, GE 109b, GE 109c, GE 50 at 2, GE 51 at 3, GE 57 at 3, including a personal endorsement of Azzam Publication's access to the Chechen mujahideen by their leader Ibn Khattab, 193-95, 304-05, GE 107i. Azzam's contacts also extended to the Taliban leadership, as evidenced by their possession of specific detailed instructions for providing money to the organization. GE 40 at 1-5.

The Defendant's communications firmly established his knowledge that Azzam Publications supported violent jihad worldwide as well as against the United States, and enjoyed direct access with members and leaders of terrorist groups. The jury could infer that he had frequented their website long before he provided the information in the Battlegroup Document since he praised the Qoqaz and Azzam websites as "great" as early as August 2000. GE 14. Both before and after he transmitted the information, he ordered the videos described *supra* from Azzam Publications that featured original and exclusive footage obtained from the mujahideen

fighters as well as Khattab's testimonial of their ability to directly access him. 290-94, GE 13, GE 107a-107i; 305-8, GE 15, GE 108; 327-29, GE 17, GE 109a-109d. He also watched online video clips of Chechen fighters attacking Russian soldiers, 803-4, 818, and continued to praise Azzam Publications' efforts throughout his deployment, exhorting them to "Keep up the great work[. I]t is very well appreciated . . !!!" GE 20, 22.

***Third, the evidence showed that the timing of the Defendant's provision of the information coincided with the anticipated attacks on the Taliban.*** The timing of the Defendant's transmission of the information in the Battlegroup Document, when viewed in context with certain statements in the document itself, creates a strong inference that he provided the information to help the Taliban launch a counterattack against his battlegroup (and perhaps his own ship) because the ships were capable of launching the anticipated retaliatory attack on Afghanistan.

Since the document predicts that the battlegroup would be deployed "in the coming days," it was reasonable for the jury to infer that the information it contained was transmitted sometime between February 10, 2001 – the first transit plan in which the *Benfold*'s stop in Hawaii could have been added – and the battlegroup's March 15, 2001, deployment date. 683-684, 705, GE 115-118. In the months leading up to this period, Azzam Publications published a "Breaking News Headline" claiming that the United States would be launching a joint attack against the Taliban in Afghanistan in retaliation for harboring bin Laden and others responsible for bombing the *U.S.S. Cole*. 169-171, 175-176, GE 37; *see also* GE 38. In anticipation of the impending attack, Azzam Publications urgently beseeched its readers to do whatever they could to help the Taliban survive, whether by sending money or supplies or by traveling to Afghanistan

to administer medical care or fight. 178-180; GE 37 at 3. According to Mr. Kohlmann, who had been contemporaneously studying Azzam Publications' websites for years (141, 146-47), this type of naked appeal was "highly unusual." 180. Never before had Azzam Publications issued such a blunt warning and request for assistance. 180-181.

The jury could reasonably infer that the Defendant was aware of Azzam Publications' entreaties for help for the Taliban and provided the information in response because the Battlegroup Document itself references the role the battlegroup might play in an anticipated attack on Afghanistan. The document forecasts the "possibility that the ships and submarines that are capable will carry out a strike against Afghanistan. Main targets: Usama [bin Laden] and the Mujahideen [holy warriors]." GE 1 at 1. It also relates a statement by an admiral that certain ships would be "sitting off the coast of Pakistan with 'launch pads.'" *Id.* Furthermore, the document identifies the Tomahawk missiles that were to be loaded aboard the *Benfold* in Hawaii as "the same missiles used on Afghanistan and Sudan." *Id.*; *see also* GE 38 at 2 (reporting that the United States had fired "cruise missiles from a ship off Pakistan's coast" in 1998 in retaliation for bin Laden's bombings of the U.S. Embassies in east Africa). The inclusion of this information strongly indicates that the Defendant knew that his own ship could be sent to attack the same terrorists whose violent bombing of the *Cole* he so ardently admired. The jury could reasonably infer, therefore, that he provided the information in order to allow the Taliban to attack the battlegroup first before that happened.

***Last, the Defendant expressed support for the deadly attack on the U.S.S. Cole and deep admiration for the Muslim fighters who died while committing the attack.*** The Defendant's intent that his information was to be used to prepare for the predicate conspiracy is

further corroborated by his own words. In an e-mail with Azzam Publications, Defendant Abu-Jihaad expressed his pride in the "martyrs" for successfully attacking the *Cole*, GE 19, and killing numerous United States servicemen, 174. He lauded the terrorists who committed the attack in heartfelt language as "the true champions and soldiers of Allah [God]" and as "the men who have brong [*sic*] honor to this weak ummah [Muslim people] in the lands of jihad afghanistan, bosnia, chechnya etc." GE 19 at 2. He described the attack itself as a "martyrdom operation" and expressed joy at the psychological toll it was causing to his fellow sailors. *Id.* at 1-2.

All of these facts provide an ample basis for the jury to find beyond a reasonable doubt that Defendant Abu-Jihaad knew and intended that the information he provided be used to prepare for, or carry out, a conspiracy to kill United States nationals.

### F. There was sufficient evidence that the information Abu-Jihaad disclosed was both "related to the national defense" and "closely held"

With respect to his conviction under 18 U.S.C. § 793(d) for communicating national defense information to persons not entitled to receive it, Abu-Jihaad argues that there was insufficient evidence for the jury to conclude that the information he disclosed "related to the national defense" or was "closely held." Specifically, Abu-Jihaad argues that because certain of the information set forth in the Battlegroup Document was inaccurate it could not and did not relate to the national defense. Abu-Jihaad also argues that because certain of the information set forth in the Battlegroup Document was available in the public domain, the information he disclosed could not be, and was not closely held.

Viewing the evidence in the light most favorable to the Government, however, there was ample evidence for a reasonable trier of fact to conclude (1) that the information Abu-Jihaad disclosed related to the national defense; and (2) that the information Abu-Jihaad disclosed in advance of deployment regarding certain upcoming ports of call and the anticipated date of their transit through the Strait of Hormuz was closely held material.

**1. Governing law**

**a. "Information relating to the national defense"**

Abu-Jihaad claims that because certain of the information set forth in the Battlegroup Document was inaccurate or publicly available there was insufficient evidence that it was closely held national defense information. The information disclosed by Abu-Jihaad, however, fits squarely within long-standing precedent defining the phrase "information relating to the national defense."

Although "[s]ection 793's litigation history is sparse, [it is] nonetheless both pertinent and instructive." *United States v. Rosen*, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006); *see also United States v. Morison*, 844 F.2d 1057, 1067 (4th Cir. 1988) (discussing "understandable" paucity of cases). Indeed, under both Supreme Court and Circuit authority, "it has long been recognized that the phrase 'information relating to the national defense' is quite broad," *Rosen*, 445 F. Supp. 2d at 618 (citing *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945), and has "acquired a well-known meaning 'as a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'" *Id.* at 619 (quoting *Gorin v. United States* 312 U.S. 19, 28 (1941)).

In *Gorin v. United States*, 312 U.S. 19 (1941), for example, the Supreme Court first considered the term "national defense," when it considered the construction and constitutionality of Sections 1 and 2 of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217-19 (which contained nearly identical language to that of the current Sections 793 and 794).

In *Gorin*, the defendant, a citizen of the former U.S.S.R., sought and obtained from a co-defendant, Salich, in exchange for substantial pay, the contents of over fifty reports that related primarily to Japanese activities within the United States. *Id.* at 22. The reports were in the files of a Naval Intelligence branch office located in California. *Id.* Salich, a naturalized, Russian-born citizen, had free access to the records in his capacity as a civilian investigator for that office. *Id*. at 23. In general, the reports detailed the comings and goings on the west coast of Japanese military and civil officials as well as those of private citizens whose actions were deemed of possible interest to the Intelligence Office. For example, some of the statements included information regarding the movements of certain fishing boats that were suspected of espionage in the form of taking photographs of American naval vessels. *Id.*

In rejecting a claim that the language of the statute was unconstitutionally vague, the Supreme Court expressly agreed with the government's definition of the term "national defense" as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id*. at 28 (internal quotation marks omitted); *see also United States v. Drummond*, 354 F.2d 132, 151 (2d Cir. 1965); *Heine*, 151 F.2d at 817; *Rosen*, 445 F. Supp. 2d at 619.[5] Applying this definition to the facts of Gorin's case, the Court

[5] In "find[ing] no uncertainty in th[e] statute," and concluding that such a definition was not unconstitutionally vague, the Court also noted the "obvious delimiting words in the statute . . . requiring 'intent or reason to believe that the information to be obtained is to be used

found that because the information Gorin disclosed

> gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense.

*Id*. at 29.

In *United States v. Drummond*, 354 F.2d 132 (2d Cir. 1965), the Second Circuit provided further guidance on what is meant by "information relating to the national defense" by confirming that testimony and evidence regarding the use to which an enemy could put the information is relevant to the question whether the material related to the national defense. Specifically, in *Drummond*, the Court upheld the district court's jury charge that defined "information relating to the national defense" in terms of its contents and the potential danger inherent in disclosure:

> 18 U.S.C. § 794 forbids conspiracy to transmit information "relating to the national defense." . . .
>
> Defendant claims that the trial court defined information "relating to the national defense" only in terms of its availability to the public, and not in terms of its contents as well. On the contrary, the trial court charged the jury, "The term 'national

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to the injury of the United States, or to the advantage of any foreign nation.'" *Id*. at 27-28. The Court explained that such language establishes a significant scienter requirement, which "requires those prosecuted to have acted in bad faith." *Id*. at 28. In the course of holding that the scienter requirement defeated a vagueness challenge to the espionage statutes, the *Gorin* court observed: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." *Id*. In light of the scienter requirement, the Court concluded that the statutory language was "sufficiently definite to apprise the public of prohibited activities" and "consonant with due process." *Id*.

> defense' is a generic concept of broad connotation referring not only to military, naval and air establishments but to all related activities of national defense.' *See Gorin v. United States*, 312 U.S. 19, 28, 61 S. Ct. 429, (1941). In addition, the trial court told the jury, "in deciding this issue, you should examine the documents, and also consider the testimony of witnesses who testified as to their content and their significance and who described the purpose and the use to which the information contained therein could be put." Such instructions were more than ample.

*Drummond*, 354 F.2d at 151.

"The considerable breadth of the subject matter falling within the phrase 'related to the national defense' has been confirmed in more recent cases." *Rosen*, 445 F. Supp. 2d at 619. For example, in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), the defendants were convicted of espionage, conspiracy to commit espionage, and several espionage-related offenses for transmitting classified information (specifically, packages containing copies of diplomatic cables and other classified papers of the U.S. government dealing with Southeast Asia) to representatives of the Socialist Republic of Vietnam during the 1977 Paris negotiations between that country and the United States. *Id.* at 911. On appeal, the defendants argued that the term "relating to the national defense" limited the reach of the statute to military matters and that none of the materials transmitted related to the "national defense" thus defined. *Id*. at 917-18. In rejecting that claim, the Fourth Circuit indicated that both the legislative history of the statute and the case law interpreting the term established that "relating to the national defense" is broadly defined:

> Contrary to the defendants' argument, the legislative history of the espionage statutes demonstrates that Congress intended "national defense" to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language. *See* Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 972-74 (1973). Resting on a similar reading of the intent of Congress, the Supreme Court in *Gorin v. United States*, 312 U.S. 19, 28, 61 S. Ct. 429, 434, 85 L. Ed. 488 (1941), underscored the breadth of "national

> defense" as used in the espionage statutes: "National Defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning." Thus, the defendants' attempt to constrict the ambit of "national defense" to strictly military matters cannot succeed. *See United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979), *cert. denied*, 444 U.S. 855, 100 S. Ct. 112, 62 L. Ed. 2d 73 (1980).

*Truong Dinh Hung*, 629 F.2d at 918. The Fourth Circuit went on to hold that, in any event, the defendants' conduct fit within either the broad definition as outlined in the case law, or even within the more narrow reading advanced by the defendants:

> Under either the strict definition urged by the defendants or the broad definition endorsed by the Supreme Court in *Gorin*, the defendants transmitted information which related to the national defense. The materials sent to Paris included information which related directly to the United States military, including information about Vietnamese designs on Thailand, American POW's in Indochina, and American military materiel [sic] which had fallen into the hands of the Vietnamese government. In addition, under the broader definition of national defense, the packages contained a great deal of national defense information, in the form of names of United States sources for intelligence about the Vietnamese government. On the facts of this case, there can be no doubt that the information transmitted was information "relating to the national defense."

*Id.*; *see also Rosen*, 445 F. Supp. 2d at 620 ("In sum, the phrase 'information relating to the national defense' has consistently been construed broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities.").

**b. The requirement that the information be "closely held"**

Authority from the Second Circuit and elsewhere has provided additional guidance, defining the phrase "information relating to the national defense" to require that the information was "closely held" by the government. *See*, *e.g.*, *Morison*, 844 F.2d at 1071-72 (approving a jury instruction that "the government must prove that the documents or photographs are closely held in that they have not been made public and are not available to the general public").

In *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), for example, the Second Circuit reversed a defendant's World War II-era conviction for his having collected a significant amount of entirely public information regarding the American airplane industry and the American production of airplanes in order to provide that information to Germany for an assessment of American defense capabilities in the event of war. *Id.* at 815-16. In so doing, the Second Circuit "interpreted the [Espionage Act] as to make it inapplicable to information which our armed forces had consented to have made public." *United States v. Rosenberg*, 195 F.2d 583, 591 (2d Cir. 1952).

Specifically, in *Heine*, the defendant provided a German company with reports about the aviation industry in the United States circa 1940-1941. *Heine*, 151 F.2d at 814-15. The defendant did not obtain or transmit classified materials or information but rather condensed and arranged information that "came from sources that were lawfully accessible to anyone who was wiling to take the pains to find, sift and collate it," including "ordinary magazines, books and newspapers; technical catalogues; handbooks and journals;" communications with airplane manufacturers and their employees; and "exhibits" and "talks with attendants[] at the World's Fair in New York in the summer of 1940." *Id.* at 815. The Court noted that "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes – even including those made for the services – should withhold any facts which they were personally willing to give out." *Id.*

The Second Circuit reasoned that, just as the espionage statutes are not violated by the dissemination of "information about weapons and munitions of war which the [U.S. armed] services had themselves made public," the espionage statutes are not violated by the

dissemination of "information which the services have never thought it necessary to withhold at all." *Id.* at 816. The court stated: "The services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter." *Id*. Thus, in stating that the defendant in *Heine* could not be convicted under the espionage statutes for providing the German company with information that had "once been made public, and ha[d] thus become available in one way or another to any foreign government," *id.* at 817, the Second Circuit confirmed that a defendant does not violate those statutes merely by condensing, arranging, and disseminating information that he has lawfully obtained from entirely public sources.

The Second Circuit provided further guidance in *United States v. Soblen*, 301 F.2d 236, 239 (2d Cir. 1962), when it rejected a challenge to the sufficiency of the evidence and recognized a distinction between the dissemination of publicly available information, as in *Heine*, and the dissemination of classified government information. In *Soblen*, the defendant was convicted under 18 U.S.C. §§ 793 and 794 for conspiring to provide information during the 1940s on behalf of the Russian Secret Service. At trial, the defendant sought to prove that the conspiracy in which he took part did not involve getting information about the national defense of the United States, but rather about the Trotskyite wing of the Party Mensheviks, and Germans, living in the United States. *Id*. at 238. The trial evidence included the testimony of the defendant's brother, who worked for the Office of Strategic Services (or the "O.S.S." – one of the predecessors of the Central Intelligence Agency). The defendant's brother testified that he and the defendant had been recruited to gather any information of value to the Russians and, in that regard, he had "many conversations with [the defendant] about [his] work in the Trotskyite [field], and his work

in the O.S.S." *Id*. at 239. There was also testimony that the conspirators had further infiltrated the O.S.S. and had secured information from persons working there. *Id.* Another co-conspirator testified, for example, that she had received certain reports and other information from an O.S.S. employee, which she then passed on to the defendant. *Id.* The materials had included information on European politicians as well as references to an important military weapon being developed in the far west. The general counsel of O.S.S. testified that certain of the information obtained from O.S.S. employees was classified as secret. *Id.*

The Second Circuit held that the case was distinguishable from *Heine* because the information involved in *Soblen* was classified as secret. *See id.* at 239. The Second Circuit concluded that "the information as to how the O.S.S. carried on its work and who did what was in itself a matter of national defense, as was also the information with respect to the development of an important military weapon in the far west . . . [and that this] testimony, if credited, was alone enough to justify the verdict." *Id*.

More recent Circuit authority provides further guidance. In *Truong Ding Hung*, for example, the Fourth Circuit indicated that so long as a district court does not place too great an emphasis on the official nature of a document or information, the question whether information was "classified" or whether it had been made publically available remains highly relevant to a determination whether such information related to the national defense:

> The defense raises another challenge to the espionage convictions based upon the district court's instruction on classification of documents. An examination of the instruction reveals, however, that it was entirely proper. First, the district judge informed the jury that it might "consider the testimony that the documents were classified." Certainly the classification of the documents was relevant to the question of whether they related to the "national defense." *See United States v. Dedeyan*, 584 F.2d 36, 40-41 (4th Cir. 1978). Second, the district judge correctly instructed the jury

> that the official nature of the documents would be pertinent to whether their transmission would injure the United States or aid a foreign nation. Finally, the jury was told that the defendants would not be guilty of transmitting national defense information if the information were available in the public domain. Thus, the district court did not place too great an emphasis on the classification of the documents or their official nature and specifically instructed the jury that transmission of publicly available information did not fall within the statutory prohibitions.

*Truong Dinh Hung*, 629 F.2d at 918 n.9.

Similarly, in *Morison*, a soon-to-be former employee of the United States Navy who was pursuing employment with *Jane's Defence Weekly* unlawfully disclosed to that publication certain classified, satellite-secured photographs of Soviet naval preparations which were subsequently published. *Id.* at 1060-62. At trial, "[t]he defendant by way of defense presented witnesses who testified that the photographs and the secret documents . . . involved nothing in the way of information that could be harmful to the United States or advantageous to the Soviet Union." *Id.* at 1062. In challenging his conviction on appeal, the defendant claimed that Section 793 was not intended to apply to the disclosure of such material to media outlets and that the terms "willfully" and "relating to the national defense" in the statute were unconstitutionally vague and overbroad. *Id.* at 1063. In rejecting those claims, the Fourth Circuit approved of the following charge with respect to the term "relating to the national defense":

> And that term, the term national defense, includes all matters that directly or may reasonably be connected with the defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness. To prove that the documents or the photographs relate to national defense there are two things that the government must prove. First, it must prove that the disclosure of the photographs would be potentially damaging to the United States or might be useful to an enemy of the United States. Secondly, the government must prove that the documents or the photographs are closely held in that [they] . . . have not been made public and are not available to the general public.

*Id.* at 1071-72.

The *Morison* case also confirmed that whether the materials were classified is highly relevant. For example, in finding that the defendant knew that he was dealing with "national defense material," the *Morison* court found it significant that he was an experienced person who "had been instructed on all the regulations concerning the security of secret national defense materials." *Id*. at 1073 (citing *United States v. Joliff*, 548 F. Supp. 229, 230 (D. Md. 1981); *United States v. Wilson*, 571 F. Supp. 1422, 1426-27 (S.D.N.Y. 1983)). The court further noted that "the materials involved here are alleged in the indictment and were proved at trial to be marked plainly 'Secret' and that classification is said in the Classification Order to be properly 'applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security.'" *Morison*, 844 F.2d at 1073.

The Fourth Circuit again considered the phrase "information relating to the national defense," and the requirement that the information be "closely held" more recently in *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), when it considered, among other things, the question whether liability is precluded where certain of the information has become publically available notwithstanding efforts by the government to safeguard the information. The Fourth Circuit concluded that the question whether national defense information is "closely held" turns on whether and what actions the government has taken action to safeguard the material.

In *Squillacote*, the defendants were convicted of violating 18 U.S.C. §§ 793(b) and 794(a) and (c) for providing, attempting to provide, and conspiring to provide information relating to the national defense to East Germany's intelligence agency and subsequently, to the KGB. *Id*. at 548-52. The record indicated, however, that at least some of the information contained in certain documents transmitted by the defendants was available in the public domain. *See e.g.*, Brief of

United States in Opposition to Petition for Writ of Certiorari to the Supreme Court, *Squillacote v. United States*, No. 00-0969, 2001 WL 34117281 at *19 n.15 (March 2001) ("Contrary to petitioners' suggestion (Pet. 19), the record demonstrates only that "snippets" of information contained in the documents were available to the public. Pet. App. 58a; *see* J.A. 1362 (district court finds that "there is no evidence in this case that all of the information that was put out here was in the public domain").).

During their appeal to the Fourth Circuit, the appellants claimed that "information that is available to the public can never be considered national defense information." *Squillacote*, 221 F.3d at 575. Accordingly, they had unsuccessfully requested the following jury instruction:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness. The information need not be classified information under security criteria as long as you determine that the information has a reasonable and direct connection with our national defense. If, however, the information is lawfully accessible to anyone willing to take pains to find, to sift, and to collate it, you may not find that the defendant is guilty under this section. Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section.

*Id*. at 575-76. The district court, however, refused to give that charge and, instead, gave the charge requested by the government, which stated, in pertinent part, that the government

> must prove that the material is closely held by the United States government. Where the information has been made public by the United States government and is found in sources . . . lawfully available to the general public, it does not relate to the national defense. Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

*Id*. at 576.

The appellants argued that the district court's instructions inappropriately hinged the national defense determination solely on the government's actions, and urged that the proper inquiry is whether the information was available to the general public, regardless of who made the information available. *Id.* The government, however, argued that an espionage conviction can be based upon the transmission of information closely held by the government, even if some form of that information was available to the public, perhaps as the result of an unreliable "leak." *Id*. The government argued that information from an official government source, such as official government documents, carries with it an imprimatur of legitimacy and authenticity. *Id*. Thus, even if speculative information similar to that contained in a document had appeared in the public domain, that should not prevent a conviction based upon the unauthorized release of official material itself. *Id*. The government therefore argued that the district court properly instructed the jury that closely held information must be made available to the public by the government before it loses its status as national defense information. *Id*.

The Fourth Circuit first noted the Supreme Court's statement in *Gorin* that:

> Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.

*Squillacote*, 221 F.3d at 577 (quoting *Gorin*, 312 U.S. at 28). The Fourth Circuit then noted that the Second Circuit in *Heine*, relying on *Gorin*, concluded that the dissemination of information that the *government* had *never* kept secret could not support an espionage conviction. *See id.* The Fourth Circuit concluded that, under *Gorin* and *Heine*, "the central issue is the *secrecy* of the information, which is determined by the government's actions." *Id.* (citing *Gorin*, 312 U.S. at

28; *Heine*, 151 F.2d at 816). Under this analysis, "the instructions given by the district court . . . properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." *Id*.

The Fourth Circuit held that there is a particular sensitivity involved in the disclosure of inside information:

> [T]here is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy . . . [T]hose estimates carry with them the government's implicit stamp of correctness and accuracy. That our government believes the estimates to be correct in and of itself is a fact that would be highly valuable to other countries. While general, unofficial information about the same issues may be available in public sources, that information is merely speculative, and is no substitute for the government's official estimates . . . [A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the *official* information in that document is lawfully available. Thus, as the government argues, mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information.

*Id.* at 578.

"In sum, information related to the national defense typically cannot qualify as such if it is in the public domain; it must be closely held by the government." *Rosen*, 445 F. Supp. 2d at 621. However, this line of cases

> does not stand for the broad proposition urged by the [defendant] that the presence in the public domain of snippets of unattributed and unverified information similar to that contained in official documents closely held by the government prevents a prosecution based on the transmission of the document itself. To accept the [defendant's] argument would effectively require the government to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information. Requiring that kind of "proof of a negative" would unduly hamper the government's ability to protect sensitive information and would render successful prosecutions in cases involving closely-held documents nearly impossible.

*Squillacote*, 221 F.3d at 579; *see also United States v. Richardson*, 30 M.J. 1239, 1244 (A.C.M.R. 1990) (per curiam) ("The appellant contends that evidence of record is insufficient to support his espionage conviction because there is no evidence of record that the information he conveyed to 'Vladimir' was not accessible to the public . . . . Contrary to the appellant's interpretation of the *dicta* in *Gorin* and the decision in *Heine*, the offense of espionage does not require proof of a negative averment. These decisions stand for the simple proposition that an inference of bad faith on the part of the accused may not be justified where the 'national defense information' alleged in the charge is generally accessible to the public or has been published to the public at large by the United States government."), *rev'd on other grounds*, 33 M.J. 127 (C.M.A. 1991).

**c. Whether information is closely held and relates to the national defense are questions of fact properly left to the jury**

Supreme Court and Circuit authority have repeatedly emphasized that the question whether information is closely held and relates to the national defense is generally a question of fact "properly left to the jury." *Gorin*, 312 U.S. at 31-32; *see also id.* at 32 ("It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury . . . ."); *Drummond*, 354 F.2d at 151 ("18 U.S.C. § 794 forbids conspiracy to transmit information 'relating to the national defense' . . . [I]t was for the jury to decide whether the documents defendant conspired to transmit were of such a character."); *Soblen*, 301 F.2d at 239 (question whether materials at issue are "information relating to the national defense" is a question of fact appropriately left to the

jury). As the Fourth Circuit aptly stated in *Morison*, 844 F.2d at 1073-74,

> the trial judge, under proper instructions, left for the jury, as he should have, the determination whether the materials involved met the test for defense material or information and the jury found they did.

(citing *Gorin*, 312 U.S. at 32; *United States v. Boyce*, 594 F.2d 1246, 1251 (9th Cir. 1979); and Note, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 Wayne L. Rev. 205, 214-17 (1986)). As explained below, the evidence – viewed in the light most favorable to the Government – was sufficient for the jury to rationally conclude that the information Abu-Jihaad disclosed was both closely held and related to the national defense.

**2. Discussion**

**a. The evidence was easily sufficient for the jury to conclude that the information Abu-Jihaad disclosed related to the national defense**

Viewing the evidence in the light most favorable to the Government, the evidence was easily sufficient for the jury to conclude that the information Abu-Jihaad disclosed fit within the broad, generic concept of "relating to the national defense."

The information set forth in the Battlegroup Document most certainly related "to the military and naval establishments and the related activities of national preparedness." *Gorin*, 312 U.S. at 28. The Battlegroup Document gave a detailed picture of the makeup, mission and upcoming plans of a United States Navy battlegroup, as well as its anticipated movements as it was to transit from its home port in San Diego for its deployment to the Persian Gulf in 2001.

Specifically, the Battlegroup Document disclosed, circa late February or early March 2001, that "[i]n the coming days the United States will be deploying a large naval/marine force to the Middle East," and that this force would be a "two group force: the "Battle Group (BG) and

the Amphibious Readiness Group (ARG)." GE 1 at 1. The document went on to state that the battlegroup's mission would be to uphold sanctions against Iraq; patrol the no-fly zone; carry out Maritime Interception Operations; and launch strikes. *Id*. The document indicated that the ships and submarines deployed might also carry out a strike against Afghanistan, with the main targets being Usama bin Laden; the Taliban and the Mujahideen. The document went on to offer a quote about the battlegroup's upcoming mission, which was attributed to the admiral assigned to the battlegroup. *Id*.

The document then identified the actual date of deployment and proceeded to disclose the otherwise closely held, confidential fact that an initial port stop would be made in Hawaii on March 20, 2001, for a weapons on-load. *Id*. The document also went on to identify additional stops in Australia and when and where the recipients might target "high ranking officials." *Id*. The document then predicted that the battlegroup would transit the Strait of Hormuz on April 29, 2001, at night, cutting off certain communication signals to divert enemies.

Next came a diagram represented to be the anticipated formation through the Straits; which was followed by a ship-by-ship breakdown of the battlegroup and the amphibious readiness group, including the type of vessel; the number of personnel; and some discussion of the particular mission and capabilities of each ship. *Id.* at 1-2.

The document concluded by identifying the battlegroup's perceived weaknesses to a terrorist attack; identified April 29 as "more likely the day through the Straits"; and requested that the recipients "please destroy [the] message." *Id.* at 3.

The evidence at trial established that the classified information about the upcoming port stop in Hawaii and the anticipated date of transit into the Fifth Fleet area of operation were

available to Abu-Jihaad through the various classified transit plans to which he had access by virtue of his position as a signalman in the navigation division aboard the *Benfold*. 640; 644; 659; 664-66; 703; GE 113, GE 114, GE 115-118; GE 151; *Cf. Gorin*, 312 U.S. at 29 (because the information Gorin disclosed "gave a detailed picture of the counter-espionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with the activities of the military forces."). Testimony at trial also established that the process of drafting and revising the classified U.S. Navy transit plans; circulating them to the member ships; and ultimately preparing a "track" and "plan intended movement" of "PIM" was a labor-intensive, frequently evolving effort that depended on a range of variables including the class of ships, fuel consumption and transit speeds. *See, e.g.,* 499; 504-05; 507; 653-56; 669-72; 679; 687; 690.

Admiral Hart's testimony about the use to which enemies could put the information set forth in the Battlegroup Document further underscored its relation to the national defense. Admiral Hart testified that Navy ships can be particularly vulnerable in port and they would "[a]bsolutely" be more vulnerable during particular points in transit. 512-13. The admiral specifically identified the Strait of Hormuz as an example of such a vulnerable area, because of its high volume of traffic and heightened security concerns, rendering it difficult, at times, to determine who did or did not pose a threat. 513-19; GE 110, 111. Admiral Hart explained that the disclosure in advance of where the battlegroup would be at a given time was of significant concern because such a disclosure eliminates "one of the key tactical elements that you like to have on your side, which is surprise." 525; *see also* 523-24 ("it's a very vulnerable period of time for us so one of the things you try to achieve, as best you can, is some element of surprise"). Admiral Hart testified that in asymmetrical warfare, it is critical for attackers to have such

advance information about where a ship would be. 633-34. *Cf. Drummond*, 354 F.2d at 151 (testimony and evidence regarding the use to which an enemy could put the information is relevant to whether the material related to the national defense).

In short, because "the phrase 'information relating to the national defense,' has consistently been construed broadly to include information dealing with military matters and more generally with matters relating to United States foreign policy and intelligence capabilities," *Rosen*, 445 F. Supp. 2d at 620, and because the information set forth in the Battlegroup Document involved materials that related directly to United States military actions, capabilities and perceived vulnerabilities, there can be no doubt that the information disclosed in this case related to the national defense. *Cf. Truong Dinh Hung,* 629 F.2d at 918 ("Under either the strict definition urged by the defendants or the broad definition endorsed by the Supreme Court in *Gorin*, the defendants transmitted information which related to the national defense. The materials sent to Paris included information which related directly to the United States military . . . . In addition, under the broader definition of national defense, the packages contained a great deal of national defense information . . . . On the facts of this case, there can be no doubt that the information transmitted was information 'relating to the national defense.'").

**b. There was sufficient evidence for the jury to conclude that certain information set forth in the Battlegroup Document – namely, the advance disclosures of the *Benfold*'s stop in Hawaii and the anticipated date and time for the Strait of Hormuz transit – was "closely held"**

The Defendant argues that because "there was so much information in the public realm about Battle Group deployments in general and about the deployment of the *Constellation* Battle Group in particular, the jury could not reasonably have found that the information contained in

the Battle Group Document was closely held." Doc. 269 at 49. The evidence was sufficient, however, for the jury to reasonably conclude that, as of the time of the disclosure in late February or early March 2001, at least (1) the specific – and entirely accurate – date for the *Benfold*'s forthcoming stop in Hawaii; and (2) the predicted date and time for the "likely" transit of the Strait of Hormuz, was classified information that the Navy not only believed necessary to withhold, but also had never made public.

As the relevant case law makes clear, the question whether information was "closely held" focuses on whether *the government* has taken action to safeguard the material. *See, e.g.*, *Squillacote*, 221 F.3d at 575-79; *see also Rosenberg*, 195 F.2d at 591 (Second Circuit, in *Heine*, "interpreted the statute as to make it inapplicable to information *which our armed forces had consented to have made public*.") (emphasis added); *Heine*, 151 F.2d at 816 (the espionage statutes are not violated by information "which *the services* had themselves made public" nor are they violated by the dissemination of "information which *the services* have never thought it necessary to withhold at all.") (emphasis added). In addition, whether the information was classified is highly relevant to the inquiry whether the information was "closely held." *See, e.g., Soblen*, 301 F.2d at 239 ("The fact that the source of the information was classified distinguishes this case from *United States v. Heine* . . . ."); *Truong Dinh Hung*, 629 F.2d at 918 n.9 ("Certainly the classification of the documents was relevant to the question of whether they related to the 'national defense.'"); *Morison*, 844 F.2d at 1074 (materials were closely held national defense material in part because they were alleged in the indictment and proved at trial to be classified); *Rosen*, 445 F. Supp. 2d at 623 ("although evidence that the information was classified is neither strictly necessary nor always sufficient to obtain a prosecution under § 793, the classification of

the information by the executive branch is highly probative of whether the information at issue is "information relating to the national defense").

Here, the evidence was more than sufficient for the jury to reasonably conclude that the Navy had taken action to safeguard advance knowledge of the specific dates for the forthcoming weapons on-load in Hawaii and the anticipated Strait of Hormuz transit. The evidence at trial established that each and every version of the transit plan, which contained the specific dates and times for the transit to the Gulf, was classified "confidential" – indeed, that classification marking appeared on the face of each version of the transit plan introduced at trial. 640, 644, 659; *see also* GE 115-119. Chief Amador testified that the *Benfold*'s transit plans were accessible only to personnel with appropriate security clearances and a need to know. 790-91, 794. The jury also heard testimony and received exhibits demonstrating that, when the transit plans were not in use by the navigation division, they were locked up in a safe in the Chart Room clearly marked with a red "SECRET" label. 774-75, 779; GE 129, 130, 136. *Cf. Morison*, 844 F.2d at 1074 ("the materials involved here are alleged in the indictment and were proved at trial to be marked plainly 'Secret' and that classification is said in the Classification Order to be properly 'applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security'").

The jury also heard evidence from which it could reasonably conclude that the Navy believed it necessary to withhold advance knowledge of ship movements and ports of call. For example, the jury heard evidence of regulations that guide the Navy's classification decisions, which stated that "precise current or future operational deployment, locations of surface combatant ships," and "planned foreign port calls" should be classified as "confidential" until

after deployment or the visit has been approved by the host government. 666-68; GE 120. The jury also saw a regulation instructing that the "secret" level of classification applies to transits of "choke points" and deployments in areas "when there are potentially hostile forces present and foreknowledge would permit adversaries to position forces secretly and mount attacks, particularly surprise attacks, on naval forces," 703; GE 151, and the jury heard testimony that a transit through the Strait of Hormuz was just such a transit. 514; *see also* 512-19; 745-49; GE 110, GE 111. The jury also heard evidence that the circulation of the transit plans was conducted via classified electronic message traffic, *see, e.g.,* 505, and that individuals like Abu-Jihaad, who were assigned to the Navigation Division, were required to, and did hold a "secret" clearance due to the nature of their work. 659-62; GE 112.

The jury also heard evidence from which it could rationally conclude that the Navy neither publicized nor consented to the advance disclosure of the dates of anticipated ship movements. Admiral Hart expressly testified, for example, that the Navy did not ever publicize classified information, nor did it publicize in advance the dates of anticipated ports of call or the dates of a Strait of Hormuz transit. 646.

Moreover, although certain of the information set forth in the Battlegroup Document was available in the public domain, the evidence was sufficient for the jury to reasonably conclude that, as of the time of the disclosure in late February or early March 2001, at least (1) the date for the *Benfold*'s forthcoming stop in Hawaii; and (2) the predicted date and time for the "likely" transit of the Strait of Hormuz, was closely held information.

First, the evidence at trial was sufficient for the jury to rationally conclude that the disclosure in the Battlegroup Document of a port stop in Hawaii on March 20, 2001, to load

weapons was classified, accurate and closely held, inside information. The evidence at trial established that the final version of the classified transit plan dated February 24, 2001, contained a reference to this port call, which had not appeared in the September, October or December 2000 revisions. Specifically, the February 24, 2001, transit plan contained a reference reading: "20MAR01 ARRIVE NAVMAG LUALUALEI FOR BSA (BEN)." GE 118. Chief Conaway testified that this referred to a "brief stop for ammunition" for the *Benfold* at the naval magazine in Lualualei, Pearl Harbor, Hawaii on March 20, 2001. 683-84, 705; GE 118. This stop had first been added in either the February 10 or 24 revision of the transit plan. 683-85.

Simply put, this was inside information. Commander Wylie recalled that, in light of this last-minute change, the navigation division had to do significant last-minute work before deploying from San Diego on March 15, adding charts for the Hawaii port call. 838-39. The *Benfold* was also the only ship in the battlegroup that had to pull into Pearl Harbor for the ammunition onload. 742, 840. Significantly, Chief Conaway also testified that the usual sail from San Diego to Hawaii took *six days*. 706. Accordingly, someone attempting an educated guess regarding the Hawaii port stop, based on prior deployments, the current departure date and typical sail times, would arrive at March 21, 2001, yet the Battlegroup Document accurately predicted (as set forth in the latest and last revisions to the classified transit plan prior to deployment) that the *Benfold* was scheduled to arrive there on March 20 for an ammunition load. 683-85, 705; GE 118. This disclosure of classified, accurate and closely held, inside information, standing alone, is sufficient to uphold the jury's guilty verdict. *See Soblen*, 301 F.2d at 239 ("The fact that the source of the information was classified as secret distinguishes this case from *United States v. Heine* . . . .The information as to how the O.S.S. carried on its work and who did

what was in itself a matter of national defense, as was also the information with respect to the development of an important military weapon in the far west . . . [this] testimony, if credited, was alone enough to justify the verdict.").

Similarly, the evidence was sufficient for the jury to reasonably conclude that the advance disclosure of April 29, 2001 as the "*likely* day through the Straits" and that the transit would take place "at night" GE 1 at 3 (emphasis added), was also closely held information. The evidence at trial showed that in each and every iteration of the classified transit plan, the detailed section describing the precise dates, times, and locations for each milestone during the transit, ended with and identified the CHOP as occurring shortly before midnight on April 29. 643-47, 679-8; GE 115-118. As discussed in Sections I.G. and II.B.1. above, the jury also both heard – and saw – evidence that people confused the Fifth Fleet CHOP line with the Strait of Hormuz. 524, 637; 709; 801; *compare also* 554-59; GE 603, 604 (Hart) *with* 707-09; DE 606.

Moreover, even though the actual date of transit ultimately differed by a few days from the prediction of the "likely" date for the transit disclosed circa late February or March 2001, Admiral Hart testified that he nevertheless considered the disclosure to be a threat to the battlegroup's safety. 523-24. Admiral Hart explained that such a disclosure compromised "one of the key tactical elements that you like to have on your side, which is surprise." 525. Admiral Hart explained that even though the Battlegroup Document predicted that April 29 was the most likely date for transiting the Strait of Hormuz, rather than the date of chopping into the Fifth Fleet operational area, he would still have been concerned. 525. To Admiral Hart, the single most troubling aspect of the Battlegroup Document was "the time frame at which we would be operating in the Fifth Fleet area of responsibility and intent to try to transmit vulnerabilities, whether necessarily accurate or not, of the ships under my command." 633.

The inside information disclosed regarding (1) the date for the *Benfold*'s forthcoming stop in Hawaii; and (2) the predicted date and time for the "likely" transit of the Strait of Hormuz, is therefore different than in *Heine,* where the information the defendant compiled and disclosed was entirely obtained from open source material. There was sufficient evidence for the jury to rationally conclude that the Hawaii stop and predicted date for the likely transit through the Strait of Hormuz did not come "from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it," but rather was derived from closely held, inside information set forth in the classified transit plans.

Moreover, that certain of the information set forth in the Battlegroup Document was available in the public domain does not defeat liability for the disclosure of at least these two pieces of classified information that they Navy sought to withhold and never consented to make public. *See* Govt. Brief in *Squillacote*, No. 00-0969, 2001 WL 34117281 at *19, n.15 (March 2001) (quoting district court finding that "there is no evidence in this case that all of the information that was put out here was in the public domain").

Viewing the evidence in the light most favorable to upholding the verdict, there was sufficient evidence in the record for the jury to have rationally concluded that the information set forth in the Battlegroup Document related to the national defense and that at least the information regarding (1) the date for the *Benfold*'s forthcoming stop in Hawaii; and (2) the predicted date and time for the "likely" transit of the Strait of Hormuz was closely held. As the Supreme Court observed in *Gorin*, under such circumstances, "[i]t is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question

of fact to be determined by the jury . . . ." 312 U.S. at 32; *see also Drummond*, 354 F.2d at 151 ("it was for the jury to decide whether the documents defendant conspired to transmit were of such a character"); *Soblen*, 301 F.2d at 239 (question whether materials at issue are "information relating to the national defense" is a question of fact appropriately left to the jury); *Morison*, 844 F.2d at 1073 ("the trial judge, under proper instructions, left for the jury, as he should have, the determination whether the materials involved met the test for defense material or information and the jury found they did").

**c. That certain of the information set forth in the Battlegroup Document was inaccurate is of no moment**

The Defendant argues that "much of the information contained in the Battlegroup Document was plain wrong . . . and so cannot be regarded as information relating to the national defense." Doc. 269 at 49. During argument after the Defendant's oral motion for a judgment of acquittal at the close of the government's case, the Court also inquired whether inaccurate or incorrect information can still qualify as closely held national defense information. 1037-48; *see also* 1046 ("I'm going to want some case law on the fact that inaccurate information can still be termed classified information if it's roughly around the parameters of what might happen.").

First, the Government respectfully disagrees, as a factual matter, that the information Abu-Jihaad disclosed was all inaccurate. There was sufficient evidence for the jury to rationally conclude that the disclosure in the Battlegroup Document of a port stop in Hawaii on March 20, 2001, to load weapons was classified, closely held – and entirely accurate – inside information. As set forth above, the evidence at trial established that the final version of the classified transit plan dated February 24, 2001, contained a last minute change, involving a "brief stop for

ammunition" for the *Benfold* at the naval magazine in Lualualei, Pearl Harbor, Hawaii on March 20, 2001. 683-84, 705; GE 118. The evidence at trial not only suggested that this was inside information, but that the information was entirely accurate and the stop actually occurred on that date and time. 683-85, 706-06, 742, 838-40; GE 118. The Government expressly relied upon, and argued this very point to the jury as a basis for liability. *See, e.g.,* 1211-12. This disclosure of classified, closely held – and entirely accurate – inside information, standing alone, is sufficient to uphold the jury's guilty verdict. *See Soblen*, 301 F.2d at 239 ("[this] testimony, if credited, was alone enough to justify the verdict").

Second, with respect to the advance disclosure of the likely date for the Strait of Hormuz transit, the Government respectfully submits that the question whether the projected timing for the transit was close enough to reality for it to still be considered closely held national defense information is a question of fact for the jury to decide. The Government agrees that were the Battlegroup Document to have predicted a date for the Straits transit that was so far off as to be entirely removed from reality – say, July or August 2001 – there would not be a sufficient basis for a reasonable jury to conclude that the disclosure of that date was derived from the closely held information set forth in the transit plans. By the same token, and at the other end of the spectrum, no one would disagree that liability could attach if the battlegroup planned to and actually did transit the Strait of Hormuz on April 29, 2001, but was, say, ten minutes behind schedule. The Government respectfully submits that where, on that sliding scale of accuracy, information is close enough to still be considered closely held national defense information is a question of fact for the jury – and that question here was answered by the testimony of Admiral Hart that even though the March 2001 prediction of an April 29 transit turned out to be a few days off, the disclosure was nevertheless of significant concern.

Viewing the evidence in the light most favorable to upholding the verdict, the jury could have reasonably concluded that the advance disclosure, in late February or March, of April 29, 2001, as the "*likely* day through the Straits" and that the transit would take place "at night," GE 1 at 3 (emphasis added) – in light of Admiral Hart's testimony that the projected date (even though slightly off) was nevertheless a significant threat – counted as the disclosure of closely held national defense information. As noted above, the evidence at trial showed that in each and every iteration of the classified transit plan, the detailed section describing the precise dates, times, and locations for each milestone during the transit, ended with the CHOP as occurring shortly before midnight on April 29. 643-47, 679-8; GE 115-118. The jury also heard evidence that Navy personnel confused the Fifth Fleet CHOP line with the Strait of Hormuz, and that even the most experienced personnel were not clear on its location. 524, 637; 801; *compare also* 554-59; GE 603, 604 (Hart) *with* 707-09; DE 606.

Even though the actual date of transit ultimately differed by a few days from the prediction of the "likely" date for the transit disclosed circa late February or March 2001. Admiral Hart's testimony, quoted in Section I.F. above, indicated that he nevertheless considered the disclosure to be a significant threat to the battlegroup's safety. 523-25; 633-34 (had Admiral Hart known of the disclosure of the anticipated date and time for the Straits transit, he would have sought to change the date, time and nature of that transit because the "key element" of surprise had been compromised); *see also* 882-83 (testimony of Commander Graham that had he been aware of the disclosure, he would have been deeply concerned because it contained classified information and its release was a breach of security; as an officer with force-protection responsibilities for the *Benfold*, he would have considered the ship's vulnerabilities when

approaching the straits, and whether to go to a heightened condition level as a result). In light of this testimony that even though the predicted date for the "likely" transit through the Straight of Hormuz was off by a few days, it was still a significant and damaging disclosure, there was a sufficient basis for a rational jury to conclude that this additional disclosure involved closely held national defense information. *See Gorin*, 312 U.S. at 32 ("[i]t is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury . . . ."); *see also Drummond*, 354 F.2d at 151 ("it was for the jury to decide whether the documents defendant conspired to transmit were of such a character."); *Soblen*, 301 F.2d at 239 (question whether materials at issue are "information relating to the national defense" is a question of fact appropriately left to the jury); *Morison*, 844 F.2d at 1073 ("the trial judge, under proper instructions, left for the jury, as he should have, the determination whether the materials involved met the test for defense material or information and the jury found they did.").

Third, although there appear to be only a handful of reported espionage cases that involved, at least in part, the disclosure of inaccurate or incorrect information, and they do not squarely address the question whether inaccurate or incorrect information can still qualify as closely held national defense information, the decisions that do exist tend to support the proposition that ineffective or inaccurate information is not a bar to conviction.

*Gorin* specifically rejected the proposition that it is necessary to prove that information obtained by espionage was to be *used* to the injury of the United States. *See* 312 U.S. at 29. It went further to state, "[t]he evil which the statute punishes is the obtaining or furnishing of this

guarded information, either to our hurt or another's gain," not the accomplishment of that hurt. *Id.* at 30.

Courts have also upheld convictions in which the quality of information transmitted had little potential at best to effectuate injury. In *United States v. Schoof*, the defendant's conviction for conspiracy to commit espionage was upheld despite his specifically choosing to distribute information to the Soviet Union that had been superseded. *See Schoof*, 37 M.J. 96, 100 (1993) (defendants "selected material that, while still classified 'Secret,' had been superseded.").

In *Coplon v. United States*, a conviction for conspiracy to violate § 793 was affirmed for the defendant's distribution of information to a Russian national, certain of which read:

> I have not been able (and don't think I will) to get the top secret FBI report which I described to Michael on Soviet & Communist Intelligence Activities in the US. . . . When I saw the report, for a minute, I breezed through it rapidly, remember very little. It was about 115 pages in length; summarized first Soviet 'intelligence' activities, including Martens, Lore, Poyntz, Altschuler, Silvermaster et al. It had heading on Soviet UN delegation but that was all I remember. The rest of the report I think was on Polish, Yugo, etc. activities and possibly some info on the CP, USA.

191 F.2d 749, 752 (D.C. Cir. 1951).

The Eleventh Circuit also affirmed a conviction under § 793(d) that included the transmission of *false* information to persons not entitled to receive it. *See United States v. Faget*, 35 F.App'x 855 (11th Cir. 2002) (unpublished table decision). Both parties' briefs, referencing facts set forth in the PSR that were adopted by the District Court, indicate that the defendant, under suspicion by the FBI of transmitting national defense information to Cuban officials, was furnished with false information which he immediately conveyed to his Cuban contacts. *See* Def.'s Brief in *United States of America v. Faget*, 2001 WL 34496343 at *14; Govt.'s Brief, 2002 WL 32161636 at *4 ("Faget was shown an FBI document classified 'Secret' and stamped

'Secret' in several places, which indicated that Molina had been identified as a known Cuban intelligence officer. The document shown to Faget was an actual classified document, though the information that Molina was defecting was made up by the FBI as part of its investigation. (PSI ¶ 11.)"); *see also id.* at *3, n.2 (noting, with a record/transcript citation that "Faget did not file any objections to the facts set forth in the PSI, and the district court adopted the facts set forth in the PSI at sentencing"). Faget's conduct nevertheless supported his conviction under § 793(d), and the Eleventh Circuit affirmed without opinion.

In short, although there appears to be no case law directly addressing the question whether inaccurate or incorrect information can still qualify as closely held national defense information, the decisions that do exist suggest that ineffective or inaccurate information is not a bar to conviction.

Finally, courts interpreting 18 U.S.C. § 793(d) more generally have repeatedly found that the statute appropriately focuses on the intent of the discloser and that, coupled with the heightened *mens rea* requirement that the discloser have reason to believe that the information could be used to the injury of the United States, sufficiently limits concerns over the statute's reach. *See, e.g.*, *Gorin*, 312 U.S. at 27-28 ("The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established."); *see also Rosen*, 445 F. Supp. 2d at 621 ("This important requirement is implicit in the purpose of the statute and assures that the government cannot abuse the statute by penalizing citizens for discussing information the government has no compelling reason to keep confidential.").

Moreover, at least one court has found that any questions regarding the *quality* of the information is reflected in the requirement that the discloser have reason to believe the information disclosed will cause the United States harm:

> In addition to proving that the defendants committed the prohibited acts "willfully," the statute imposes an additional and significant scienter requirement when a person is accused of transmitting "information relating to the national defense." Thus, the statute, as-applied to these defendants also requires the government to prove that such information was communicated with "reason to believe it could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. §§ 793(d), (e). This language accompanied Congress's amendment of the statute in 1950 adding the term "information" back into the provisions' list of enumerated items relating to the national defense, and it is clear from both the text and the legislative history that this additional scienter requirement applies only to the communication of intangible "information," and is intended to heighten the government's burden when defendants are accused of communicating intangible information. As has been noted, the statute's "willfulness" requirement obligates the government to prove that the defendants knew that disclosing the NDI could threaten the nation's security, and that it was illegal, but it leaves open the possibility that defendants could be convicted for these acts despite some salutary motive. For example, if a person transmitted classified documents relating to the national defense to a member of the media despite knowing that such an act was a violation of the statute, he could be convicted for "willfully" committing the prohibited acts even if he viewed the disclosure as an act of patriotism. By contrast, the "reason to believe" scienter requirement that accompanies disclosures of information, requires the government to demonstrate the likelihood of [a] defendant's bad faith purpose to either harm the United States or to aid a foreign government. In this sense, requiring the government to prove that "the possessor has reason to believe [the information relating to the national defense] could be used to the injury of the United States or to the advantage of any foreign nation" is not duplicative of the requirement that the government prove the defendant willfully disclose information that is potentially damaging to the United States *because the latter concerns only the quality of the information*, whereas the former relates to the intended (or recklessly disregarded) effect of the disclosure.

*Rosen*, 445 F. Supp. 2d at 625-26. Accordingly, the evidence of Abu-Jihaad's intent, coupled with evidence that the disclosure, months in advance, of the anticipated date of the Straits transit, even if it turned out to be a few days off, could still be used to the injury of the United States,

was an additional basis for the jury to reasonably conclude that Abu-Jihaad disclosed closely held information relating to the national defense.

## III. The Defendant's motion for a new trial under Rule 33 should be denied, because there was no "manifest injustice" in either the jury's unanimous conclusion that the evidence proved his guilt beyond a reasonable doubt, or in the Court's carefully circumscribed admission of video clips purchased by the Defendant

### A. Governing law

Rule 33 provides that the district court may grant a new trial upon the defendant's motion "if the interest of justice so requires." The ultimate question for the district court in ruling on a Rule 33 motion is "whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 133, 134 (2d Cir. 2001). In only "extraordinary circumstances" may the court may grant a new trial based on a defendant's claim that the verdict is against the weight of the evidence:

> Though a district court is entitled to "weigh the evidence and in so doing evaluate for itself the credibility of the witnesses," [*United States v.*] *Sanchez*, 969 F.2d [1409,] 1413 [(2d Cir. 1992)] (internal quotation marks omitted), it "must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurp[ing]' the role of the jury," *Ferguson*, 246 F.3d at 133 (quoting *Autuori*, 212 F.3d at 120). While courts have "broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29," they "nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'" *Ferguson*, 246 F.3d at 134 (quoting *Sanchez*, 969 F.2d at 1414).

*United States v. Triumph Capital Group, Inc.*, 2008 WL 4349318, at *7 (2d Cir. Sept. 25, 2008) (internal quotation marks omitted).

Thus, although a district court has more leeway to evaluate the evidence on a Rule 33 motion than in the Rule 29 context, it still "'must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses.'" *Sanchez*, 969 F.3d at 1414 (quoting *United*

*States v. LeRoy*, 687 F.2d 610, 616 (2d Cir.1982)).“It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.” *Sanchez*, 969 F.3d at 1414. The judge may not “freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury.” *United States v. Landau*, 155 F.3d 93, 104-05 (2d Cir. 1998). Even a “judge’s rejection of all or part of the testimony of a witness or witnesses does not automatically entitle a defendant to a new trial.” *Sanchez*, 969 F.3d at 1414 (citing *United States v. Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979)). The test remains whether the court “is convinced that the jury has reached a seriously erroneous result.” *Landau*, 155 F.3d at 104; *see also United States v. Rivera Rangel*, 396 F.3d 476, 486 (1st Cir. 2005) (holding that district “judge is not a thirteenth juror who may set aside a verdict merely because he would have reached a different result,” and that when the grant of “a new trial is predicated on the district court’s evaluation of the weight of the evidence rather than its concern about the effect of prejudicial acts that may have resulted in an unfair trial, . . . it must be quite clear that the jury has reached a seriously erroneous result”) (internal quotation marks and alterations omitted).

**B. The Government proved beyond a reasonable doubt that the Defendant transmitted the information in the Battlegroup Document**

In his Rule 33 motion, the Defendant again challenges the weight of the evidence that he provided the information contained in the Battlegroup Document. *See* Doc. 266 at 20-22. As discussed *supra* in Section II.B., the evidence was sufficient to prove beyond a reasonable doubt that the person who provided the information in the Battlegroup Document was the Defendant. Because there is no reason to second-guess the inferences that the jury drew from the evidence in this case, the Court should deny the Defendant’s request for a new trial on that basis.

### C. The videos that the Defendant ordered from Azzam Publications were properly admitted into evidence and published to the jury

In his final argument, the Defendant asserts that the Court erred in admitting into evidence three videotapes that he had ordered from Azzam Publications and permitting the jury to review a series of short pre-screened clips therefrom. *See* Doc. 266 at 22. His claim fails because this Court correctly applied Federal Rule of Evidence 403, finding that the probative value of the videos to the jury in determining essential elements of the charges was not substantially outweighed by the minimal risk of unfair prejudice that could arise from their content. Furthermore, the Court took exhaustive steps to minimize any potential prejudice by carefully screening the portions of the video that would be played to the jury and by admonishing the jury multiple times with a limiting instruction designed to ensure that they considered the video evidence only for a proper purpose. Thus, admission of the videos was a proper exercise of this Court's discretion.

#### 1. Governing Law

Evidence is relevant if it tends to alter the probability of the existence or non-existence of a consequential fact or a proposition to be believed. Fed. R. Evid. 401. Relevant evidence is generally admissible unless its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See* Fed. R. Evid. 402, 403. Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," or "'an undue tendency to suggest decision on an improper basis.'" *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 Advisory Committee's notes).

To be potentially excludable under Rule 403, disputed evidence must have "some adverse effect . . . beyond tending to prove the fact or issue that justified its admission into evidence" that substantially outweighs its probative value. *United States v. Gelzer*, 50 F. 3d 1133, 1139 (2d Cir. 1995) (internal quotation marks omitted). Thus,"the graphic or disturbing nature of a [piece of evidence] alone is not enough to render it inadmissible. Rather, the analysis hinges upon whether the [item] is relevant to the resolution of some disputed point in a trial or otherwise aids a jury in a factual determination." *United States v. Salim*, 189 F. Supp. 2d 93, 98 (S.D.N.Y. 2002) (citing *United States v. Velazquez*, 246 F. 3d 204, 210-11 (2d Cir. 2001) and other cases). The appellate court will not overturn a district court's ruling absent "a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (internal quotation marks omitted). To avoid acting arbitrarily, the district court must make a "'conscientious assessment' of whether unfair prejudice substantially outweighs probative value." *Id.* (quoting *United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982)).

**2. Discussion**

**a. The probative value of the videos was not substantially outweighed by the risk of unfair prejudice**

The admitted videos and the clips that were played for the jury were directly relevant to the case and highly probative of essential elements of the charges. Contrary to the Defendant's simplistic formulation, the videos were not offered into evidence just to show that he was in contact with Azzam Publications. *See* Doc. 266 at 22. Rather, they were admitted because their content provides useful circumstantial evidence of several key facts that support a finding "of the understanding or intent with which" the Defendant acted: (1) the Defendant's knowledge of Azzam Publication's connections with and support for terrorist groups - and hence their ability to

forward the Battlegroup Document information to people who could use it to prepare for an attack against the U.S. nationals in the battlegroup; (2) the Defendant's intent to support violent jihad; and (3) the Defendant's motive in providing the information. *See Salameh*, 152 F.3d at 111; *also United States v. Abu-Jihaad*, 553 F. Supp. 2d 121, 127-128 (D. Conn. 2008).

As the producers and distributors of the videos, their content was highly probative of Azzam Publication's motives and intent. *Abu-Jihaad*, 553 F. Supp. 2d at 128. The videos demonstrate Azzam Publication's focused efforts to glorify the so-called "martyrs" who were killed in fighting jihad in Bosnia, including against United Nations forces, and the mujahideen fighting against the Russians in Chechnya, and generate support for their causes. *See supra* Sec. I.C. at 9-12, 803-804, GE 50, GE 51, GE 57. That the videos are largely comprised of raw photographs and battlefield footage – and even a personal endorsement by the legendary Chechen mujahideen leader Ibn Khattab – that could only have been procured from the fighters themselves demonstrate Azzam Publication's substantial and direct ties to terrorist groups. *See*, *e.g.*, 193-95, 304-05, GE 107b, GE 107d, GE 107f, GE 107g, GE 107i, GE 108, GE 109d GE 50 at 2, GE 51 at 3, GE 57 at 3.

Based on the evidence of his orders for the videos, the posting of detailed descriptions of their content on the Azzam Publications' website,[6] and the testimony of a fellow officer that the Defendant had shown him clips from the videos online aboard the *Benfold*, the jury could reasonably find that the Defendant was familiar with the content of the videos. *See* 803-804, GE 13, GE 15, GE 17, GE 50, GE, 51, GE, 57. Watching portions of the videos therefore would

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[6]The Defendant's communications with Azzam Publications confirmed that he frequented their website both before and after his 2001 deployment. *See e.g.* GE 14 (praising the qoqaz and azzam websites as "great"), GE 20, GE 22.

assist the jury to determine whether the Defendant knew that Azzam Publications had the intent, "the connections and the wherewithal to take [the] [Battlegroup Document] information and make it operative," 1225-1226, a fact that is directly relevant to his own intent with respect to both Counts 1 and 2.

Moreover, as Mr. Kohlmann testified based on his expertise in terrorists' use of the internet, the videos were essentially propaganda films, designed to document and glorify the activities of the foreign fighters in Bosnia and Chechnya. 201-02, 204, 210. Therefore, the fact that he repeatedly sought them out demonstrates his personal strong interest in and support for the violent combat in which they are depicted engaging. Evidence of his support for the violent activities of these mujahideen fighters in turn is highly probative of his intent that the Battlegroup Document information be used to prepare for a conspiracy to kill the soldiers onboard the battlegroup. *See*, *e.g.*, *Salameh*, 152 F.3d at 111 (affirming the admission of various materials containing strong anti-American sentiment and advocating violence against the United States in part because they established the defendants' intent to attack the United States).

Finally, the video clips are relevant because they provide useful information about the Defendant's motive in providing the Battlegroup Document information. *See id.* As the Court noted, in reaching a verdict, the jury would likely question why the Defendant would provide information that could be used to launch a deadly attack on his own ship, *Abu-Jihaad,* 553 F. Supp. 2d at 128, or why the Defendant referred to the *Cole* bombing as a "martyrdom operation," GE 19. Viewing the video clips assisted the jury in resolving that issue because the videos explain that fighters who die in jihad against non-Muslims are glorified under extremist Islamic ideology as 'martyrs' and set forth a religious justification for martyring oneself, complete with a detailed explanation of the rewards a martyr could expect upon his death. GE 107b, 107e.

Understanding this context no doubt assisted the jury in determining whether the Defendant intended to aid a conspiracy to kill U.S. nationals and interpreting what he meant in the *Cole* e-mail of support to Azzam Publications.

In contrast to the highly probative nature of the videos, the risk of unfair prejudice from admitting and publishing the video clips was low. Despite the Defendant's hyperbolic claims, the video clips that the jury watched were in reality not overly graphic or gruesome. Several of the video clips depicted scenes devoid of violence such as maps, scenery and clerics giving sermons. *See, e.g.*, GE 107a, GE 107h, GE 109b. As this Court observed, many of the clips that depicted combat were "not particularly violent" and were less inflammatory than "nightly news dispatches from Baghdad" depicting the ongoing war in Iraq. *Abu-Jihaad*, 553 F. Supp. 2d at 128; *see, e.g.*, GE 107c, GE 107d, GE 107e, GE 107i, GE 109b. Those portions containing footage of dead fighters were no more gruesome than what has been shown in rated "R" action movies. *See, e.g.*, GE 107b, GE 107f, GE 107g, GE 109a, GE 109c. Thus, when properly weighed, the risk of unfair prejudice that could occur from their admission into evidence did not substantially outweigh the probative value of the videos.

In addition, the Court conscientiously performed the requisite assessment of the videos under Rule 403. The videos were found admissible only after the Court had expended significant time reviewing each of the videos in their entirety and the clips proposed by the Government to publish to the jury. In doing so, the Court carefully sought to prevent the jury from being exposed to inflammatory material that could cause them to judge the case on an improper basis.[7] *Abu-Jihaad*, 553 F. Supp. 2d at 128 (directing the Government to reduce the length of and excise

[7]The Court also strove to ensure that the jury was not given an inaccurate impression of the content of the videos. *Abu-Jihaad*, 553 F. Supp. 2d at 128.

certain clips in order to avoid displaying unnecessarily graphic images to the jury).

To further minimize the risk of any unfair prejudice infecting the jury's verdict, the Court also repeatedly administered cautionary instructions to advise the jury of the proper use of the videos and warn them not to allow the videos to arouse passion, prejudice or bias. *See, e.g.*, 300, 314-15, 324-25, 1191-92. This instruction, which was submitted by the defense (Doc. 224, 234), directed the jury to consider the videos only for the limited purpose as evidence of the Defendant's intent and knowledge in Counts 1 and 2 and not as evidence that the Defendant in fact provided the Battlegroup Document information. Juries are presumed to follow their instructions. *See, e.g., Britt v. Garcia*, 457 F.3d 264, 272 (2d Cir. 2006). The Defendant offers no basis for finding that the jury did not do so in this case.

Furthermore, the Government did not belabor or unduly emphasize the video evidence during closing argument or at other points during the trial. The Government played each clip for the jury only once and referenced them only a few times during its closing argument. *See* 1207, 1209, 1217, 1225-26, 1267. When the Government did mention the videos, it did so in conformity with the limiting instruction by citing them as evidence only of Azzam Publications' participation in terrorist activity, the Defendant's knowledge of Azzam Publications' capability to use the Battlegroup Document information to further terrorist activity, or of the Defendant's motive and intent in providing the information to Azzam Publications. *Id.*

**b. Admission of the videos is consistent with rulings by other courts, including courts in the Second Circuit**

This Court's admission of these videos is entirely consistent with rulings in other terrorism-related cases. In numerous cases, courts have routinely admitted evidence of videos or other terrorism-related materials belonging to the Defendant to prove his knowledge, intent and

motive. For example, in a case alleging the provision of material support to Hizballah, the Fourth Circuit Court of Appeals affirmed the district court's admission of tapes belonging to the defendant that depicted Hizballah military operations and rallies because they were probative evidence of his knowledge of Hizballah's unlawful activities and his motive in raising funds for Hizballah. *United States v. Hammoud*, 381 F.3d 316, 342 (4th Cir. 2004), *rev'd on other grounds*, 543 U.S. 1097 (2005), *op. reinstated in pertinent part*, 405 F. 3d 1034 (2005); *see also United States v. Abdi*, 498 F. Supp. 2d 1048, 1071-72 (S.D. Ohio 2007) (admitting images from al Qaeda websites found on the defendant's computer and a dissertation exhorting reader to prepare for jihad against the infidels as probative of intent and motive in case alleging provision of material support to terrorism).

The Defendant's reliance on *United States v. Al Moayad*, 545 F.3d 139 (2d Cir. 2008), is misplaced because it involved completely different circumstances than those present here.[8] In *Al Moayad*, the appellate court held that the district court improperly admitted inflammatory and highly emotional victim testimony describing a suicide bombing in Israel that had been committed by Hamas because the only evidence linking the defendants to the bombing was the fact that a Hamas representative had predicted the attack during a speech at a wedding that the defendants had attended. *Id.* at 147, 175. The evidence here, however, established a direct connection between the Defendant and the videos since he himself had ordered them from Azzam Publications and viewed excerpts from them online.

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[8]The Defendant's reference to *United States v. Elfgee*, 513 F.3d 100 (2d Cir. 2008), is similarly inapposite. Unlike the *Elfgee* defendant who was charged with running an unlicensed money transmitting business and structuring financial transactions, *id.* at 107, Mr. Abu-Jihaad is charged with providing material support to terrorism. Thus, evidence linking him to the terrorist supporters to whom he provided the support is properly admitted.

The type of probative information conveyed by the evidence is also markedly different between the two cases. In *Al Moayad*, the only fact to which the court found the testimony to be relevant (namely the defendants' knowledge that Hamas commits terrorist attacks) was not in dispute. Here, in contrast, the videos were probative of facts that spoke directly to the heart of the issue of the Defendant's intent and motivation, two essential elements that the Government was required to prove.

Moreover, the method in which the videos were published to the jury in this case posed a lesser risk of inflaming the jury than did the presentation of victim testimony in *Al Moayad*. In that case, the victim testified at length about the horrific aftermath of the attack, including the death of his cousin, repeating portions of his testimony several times as he commented on photographs and a newscast of the bombing. *Id.* at 153, 161-162. In this case, however, the jury never reviewed any video in its entirety, but rather was permitted only to watch a very short carefully pre-screened clips. In all, the jury watched only a fraction of the four hours of video that Defendant Abu-Jihaad bought. There is a critical difference in the effect on a juror's emotions between watching brief video clips on a screen across the room, and sitting near to a terrorism victim listening to him recount a suicide bombing that killed his relative. And, unlike *Al-Moayad*, the court carefully instructed the jury on the proper use of the video evidence and therefore provided guidance to mitigate any prejudicial effect. *See id.* at 162.

For all of these reasons, the Defendant's motion for a new trial based on the admission of the videos should be denied.

**IV. Conclusion**

The Defendant received a full and fair trial, where the jury was asked by each side to draw competing inferences from a wealth of evidence. The jury unanimously returned a guilty verdict on both counts. All twelve jurors believed that the only reasonable conclusion to draw from the evidence was that the Defendant had transmitted closely held information about the anticipated movements of the *Constellation* battlegroup to a website in London that promoted violent jihad. For all the reasons stated above, there is no basis for disturbing the jury's verdict. The Government therefore respectfully requests that the Court deny the Defendant's motions for a judgment of acquittal or for a new trial.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on December 19, 2008, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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