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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 18 CR 696-1
)
Government,)
) Chicago, Illinois
vs.) September 26, 2019
) 1:30 o'clock p.m.
ASHRAF AL SAFOO (1),)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS - Detention Hearing
BEFORE THE HONORABLE JOHN ROBERT BLAKEY

APPEARANCES:

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1 (The following proceedings were had in open court:)

2 COURTROOM DEPUTY: 18 CR 696-1, USA versus Al Safoo.

3 MS. WELLS: Good afternoon, your Honor. Melody
4 Wells, Barry Jonas and Peter Salib for the United States.

5 THE COURT: Good afternoon, counsel.

6 MR. DURKIN: Good afternoon, Judge. Tom Durkin and
7 Joshua Herman on behalf of the defendant who is present and
8 in custody. And, Judge, with us at counsel table are our two
9 law clerks, Loyola students of mine, Gabriella Hidalgo and
10 Blake --

11 THE COURT: Would they like to make appearances?

12 MR. DURKIN: Pardon me?

13 THE COURT: Would they like to make appearances?

14 MR. DURKIN: They'd like to not take the bar and be
15 able to appear.

16 THE COURT: All right. Well --

17 MR. DURKIN: I think they'll accept the fact if you
18 let them sit at counsel table, that will be good enough for
19 them.

20 THE COURT: All right. Excellent. Tell them they
21 are welcome.

22 MS. MULRY: Good afternoon, your Honor. Heather
23 Mulry. I'm appearing for Officer Ashley Simon with U.S.
24 Pretrial Services.

25 THE COURT: Great. Thanks so much. I know there

1 was a recent supplement. Did everyone have an opportunity to
2 see that?

3 MS. WELLS: Yes, your Honor.

4 MR. DURKIN: The supplemental --

5 THE COURT: Yeah, from Pretrial.

6 MR. DURKIN: Pretrial, yes. Yes.

7 THE COURT: Okay, great. Are the parties prepared
8 for a detention hearing?

9 MS. WELLS: We are, your Honor.

10 THE COURT: All right. Any additional testimony and
11 evidence? I've reviewed the submissions of the parties and
12 the transcripts from the proceedings in front of Judge
13 Weisman. Is there anything else, any other or are we just
14 arguing?

15 MS. WELLS: The government is planning to argue,
16 your Honor.

17 THE COURT: Okay. What about you, counsel?

18 MR. DURKIN: I think we can just argue, Judge.

19 (Brief pause.)

20 MR. DURKIN: Judge, I don't think we need to call
21 any witnesses at this time. However, his mother is here.
22 That's an issue that we addressed as part of the conditions
23 of third-party supervision and she's prepared to move into
24 the house so that there is 24/7 presence in the home with a
25 third-party custodian. If you would like to talk to her,

1 it's really up to you.

2 THE COURT: All right. I'm prepared to accept the
3 proffer of the attorneys.

4 MR. DURKIN: That's fine.

5 THE COURT: So if -- unless the government needs to
6 make an inquiry, the Court is satisfied with the proffer.

7 MS. WELLS: Not at this time, your Honor.

8 THE COURT: Okay. All right. Counsel, it's your
9 motion.

10 MR. DURKIN: Judge, could we -- if you don't mind,
11 I'd like to break this up into two parts so that Mr. Herman
12 can address the more specifics of the evidence. I'd like to
13 just start out with a couple of more general observations
14 that we raise both in the introduction to our pleading and
15 another section which is the section under the presumption of
16 innocence, which would be covered under arguments, Paragraph
17 III under 3142(g) factors, but essentially dialing in to the
18 whole issue of the presumption of innocence.

19 I didn't mean to be flippant but I believe what
20 we're creating is a terrorism presumption of detention.
21 There are so few cases in which a terrorism defendant gets
22 bond, and I don't have all the statistics in front of me, but
23 suffice it to say there are slim to none, very, very few
24 cases. And I think in what's happening in all of these cases
25 is that they are reading the presumption of innocence

1 section, the very last section of the Bail Reform Act right
2 out of existence, that nothing in this chapter should
3 influence the presumption of innocence. And unless we want
4 to just pretend and continue to just pay lip service to that,
5 this is a case where release is appropriate.

6 This is not some foreign national. This is not
7 somebody who swore allegiance to ISIS; and Mr. Herman is
8 going to address that because it's not -- it's not even the
9 organization. There's a different organization that they've
10 listed -- I think it's on Page 14 of their pleading -- with
11 respect to a group that is the official spokesperson for
12 ISIS. Al-Khattab, the group that he's affiliated with, is
13 not the official spokesperson -- spokespeople or press people
14 for ISIS. That's this group Al-Mujab, is it?

15 MR. HERMAN: Hayat.

16 MR. DURKIN: Al-Hayat.

17 MR. HERMAN: H-a-y-a-t.

18 MR. DURKIN: And the significance of all that is
19 that this is not someone who is actively engaged in
20 terrorism. He may, giving them the benefit of the doubt,
21 have been engaged in ISIS beliefs, endorsement of ISIS, and
22 so forth; but as we've suggested to you, that is -- those are
23 issues that are arguably protected by the First Amendment.
24 And I think the government has a long way to go before they
25 should be able to convince you that they have an overwhelming

1 case of material support via this type of advocacy and I
2 think we're going to get into *Holder versus Humanitarian* law
3 considerably.

4 But more importantly, and this is where I am
5 becoming so frustrated in working with these cases, you know
6 that we were before you on the Achmed case. Remember the
7 case that it's now been transferred to you from Ohio that we
8 came in on with the computer-monitoring program?

9 THE COURT: Yes. I remember the case.

10 MR. DURKIN: Well, we said in our pleading that this
11 is now available to the Probation Department and I think it's
12 a fairly persuasive argument that if it's -- if that
13 computer-monitoring system, which they so highly tout and
14 advocate and it's the same system that they use for sex
15 offenders, in the post -- if it's sufficient for
16 post-supervision, post-criminal conviction supervision, how
17 can it not be reasonably sufficient under the presumption of
18 innocence and under 3142(g)?

19 The only argument they advance in light -- to get
20 around that is to say it's not available for Pretrial
21 Service. Now, you know, I don't know what that means. I'll
22 take Pretrial Services' word for it that it's not available
23 but I don't know why and I don't know why this Court couldn't
24 order it to be available. And under these very unique facts,
25 that should solve the problem.

1 Now they spend a lot of time talking about how
2 sophisticated he is but they don't address the sophistication
3 of their own system that when it comes time for them to be
4 advocating in a post-conviction setting, that this is
5 necessary because it's so good and it's so effective.
6 Remember I was advancing the argument that isn't this a
7 little overbroad and their argument was we need it to be so
8 overbroad because you never can be sure and that this system
9 is so good? Well, one of the great things about the war on
10 terror is it goes on long enough -- and it's certainly been
11 going on a long time -- is that sooner or later these
12 positions they start getting contradictory to each other.
13 And I -- I just do not understand how these conditions, now
14 that we've satisfied Judge -- Magistrate Judge Weisman's
15 concern about the 24/7, and I do think I'm correct that he
16 read reasonable right out of the standard with respect to the
17 conditions, you know, it only has to be reasonably be
18 assured. We don't have to, you know, beyond any
19 infinitesimal doubt be assured that nothing could happen.

20 But what I find so ridiculous in this case is that,
21 what, the worst that happens is that he begins advocating for
22 ISIS again? I mean, that's a sufficient danger to the
23 community that we should ignore the presumption of innocence
24 and I just think it's wrong. I think they're just dead wrong
25 on that and I don't think that we should continue to just

1 read the presumption of innocence out of this statute.
2 That's what's happening in these cases. And they do it the
3 same way. They dump all this stuff, you know, oh, my God,
4 look at these pictures. You know, do you want to be the guy
5 that lets this guy out who had these pictures on his computer
6 and -- I mean, that's what this is. This is oh, my God, look
7 at this, look, look here.

8 And I'd like it if Mr. Herman can address some of
9 the issues with respect to the ability of them to connect
10 what's on his phone necessarily to what's in his head, which
11 there's a distinction which I trust you can understand. You
12 know, if somebody would look at my phone, I suppose, or my
13 computer, there would probably be a lot of this on there too
14 because I have a reason to look for those things in my
15 business but that doesn't mean that I endorse those things;
16 but I'd prefer that Mr. Herman can address that.

17 But all these other pictures, you know, the
18 bomb-making, the 9-11, you know, the guy holding the head.
19 This is one that comes up virtually all the time in these
20 cases, this one that's in Exhibit 13. It's towards the back.
21 They're not individually numbered but it's after all the
22 pictures of the pressure-cooker bomb, which I guess should
23 scare us all. But you've got the picture of the burning
24 Towers of September 11th and you've got the iconic picture of
25 the remains of the building. And then the third picture,

1 this one, holding the head. I mean, that's -- I guess that
2 means anybody that would even have that picture is just too
3 dangerous to let out and we're -- regardless of whether we're
4 putting them in the criminal justice system, we're going to
5 have different rules; and that's the other thing I want to
6 address.

7 These are the things that are happening in these
8 cases. We are getting different rules for these cases. And
9 this is the kind of stuff that does it because all of the
10 sudden we got to be concerned because if you're the guy that
11 lets him out and somehow he gets out and walks down in the
12 subway, you'll get blamed and I don't think that's what our
13 system is designed to do. You know, it's ironic that
14 murderers get bond frequently but people charged with these
15 offenses don't.

16 And I -- you know, in most of these cases I don't
17 get as agitated because more of the cases are cases where
18 somebody deliberately did something. They either wanted to
19 go join ISIS, they wanted to go fight overseas, they actively
20 did something that was a tangible kind of assistance -- it
21 wasn't propaganda -- or somebody who sends money and so
22 forth. This is -- there are defenses to this case. We have
23 defenses. There are some significant First Amendment
24 concerns here that I think is going to affect the
25 government's evidence.

1 But the other thing that they -- and I'm
2 disappointed that they so readily discard, which is this
3 argument over the Sixth Amendment counsel of choice, their
4 solution to that is not to modify the order or anything else
5 that would help remedy that and if I take it correctly their
6 argument is that if somebody at the MCC were to see these
7 pictures somehow they might be radicalized in the MCC.
8 That's another argument to let him out if that's what they're
9 so worried about but they don't always follow the logic of
10 their own arguments. But they just discount the idea of
11 counsel of choice by suggesting, well, that's too bad, it's
12 going to cost three times the amount it would cost, you can
13 just appoint him, Judge. Well, we're not looking for an
14 appointment. I mean, you know, we may have to get one but
15 that's not why we took this case and we're not looking for an
16 appointment. We're looking for reasonable conditions of
17 release that would avoid this Sixth Amendment problem. And I
18 can assure you that he won't be getting on the internet if he
19 comes to our office and tries to -- he won't be getting on
20 the internet and it would cut down on the cost dramatically
21 so I'll leave it that. But I would like Mr. Herman, if you
22 don't mind --

23 THE COURT: Of course.

24 MR. DURKIN: -- to address some of the evidentiary
25 issues.

1 MR. HERMAN: Judge, just to pick up on one thing
2 that Mr. Durkin left off on, it's not just a matter of
3 cost -- and I think our motion makes it clear -- there's a
4 whole category of information that we simply cannot review
5 with Mr. Al Safoo based on what is on and the government's
6 response is that we can identify what we would like and there
7 have been modifications to the protective order so we can see
8 things but I don't think defense counsel should be in a
9 position where we have to pick and choose what we'd like to
10 be able to show Mr. Al Safoo. I think he's entitled to see
11 all of the discovery that's been produced and if --

12 THE COURT: Other than the classified, right?

13 MR. HERMAN: Of course.

14 THE COURT: Yeah, okay.

15 MR. HERMAN: Other than the classified material. So
16 if something is on a hard drive or a bluetooth or a Blu-ray
17 and we've, I think, exhausted all measures with the MCC, I
18 don't think the onus is on us to say, well, I'd like these
19 ten pages, can you please print them out. And, you know, I
20 understand there may be some logistical issues with media but
21 I don't think that's our problem and I don't think Mr. Al
22 Safoo should suffer and not be able to review all the
23 evidence in this case especially given the technical nature
24 of some of it and the language issues which put us at a
25 severe disadvantage.

1 But speaking to the merits of our motion that
2 Mr. Durkin didn't -- did not touch on, let's reframe this,
3 right. The question is are there conditions that can be
4 crafted to reasonably assure the safety of the community and
5 what -- that's a question begging analysis. What are we
6 protecting the community from here, right? And the
7 government has as it did at the initial bond hearing and now
8 it expanded on his parade of horrors for everything that
9 ISIS has ever done. And we're not going to sit here and say,
10 well, you know, there's actually a silver lining to the, you
11 know, to Exhibit 18 or something like that. This is not
12 Mr. Al Safoo's image. He has no control over who created
13 that image. If you want to look at what Mr. Al Safoo did in
14 the group as a writer and what he actually personally did as
15 opposed to some type of conspiratorial liability for people
16 who he never even met or knew the real names for, there's an
17 article that's at Page 10 -- or, excuse me, Exhibit 10. It's
18 a four- or five-page article that is extraordinarily dense
19 and if anybody can make heads or tails of it in terms of
20 its -- sitting up here and say explain to us, and explain to
21 you more importantly, how is this going to pose a danger to
22 people in the community, then perhaps we'll sit down, okay,
23 but it's -- this is what the Court should be concerned about,
24 not the exhibits of a headless santa.

25 THE COURT: What exactly -- which page are you on?

1 MR. HERMAN: This is Exhibit 10, 10T, your Honor --

2 THE COURT: 10T, okay. Go ahead.

3 MR. HERMAN: -- of the government's binder. And if
4 the government had not included one of Mr. Al Safoo's actual
5 writings, we would have given you something that he actually
6 had written. And this one is called Refuting Falsehoods,
7 Distortions, The Allegiance of the Arab Rulers to the
8 Infidels against the Muslims. And there's reference to
9 something -- another article that he had written about not
10 joining the United Nations or Arab -- why Arab nations should
11 not join the United Nations. These articles are more of a
12 political and religious nature and that's what the government
13 wants you to not pay attention to and instead look at the
14 grisly and ghastly images.

15 In the *Holder* case which we have cited, Chief
16 Justice Roberts wrote, and I believe this is -- I don't have
17 the exact pinpoint. It looks like star 31, 561 at 31. The
18 statute reaches only material support coordinated with or
19 under the direction of a designated foreign terrorist
20 organization. Independent advocacy that might be viewed as
21 promoting the group's legitimacy is not covered. We cite in
22 our motion as well on Page 17 an FBI report that begins as of
23 May -- 1 May 2018, the Khattab Media Foundation, an
24 independent media group has been producing audio/visual and
25 written media in support of the Islamic State of Iraq and

1 Asham, Asham, ISIS.

2 This is a very unique case, your Honor, from the
3 perspective that there is an independent media group with
4 somebody associated with that media group, not as we will
5 show -- believe the evidence will show, was working under the
6 direct control or supervision or coordination of ISIS, is
7 being prosecuted for political and religious viewpoints.
8 They may be very unpopular but that's what this case is
9 about.

10 And we want to also thank the government for
11 pointing out, as Mr. Durkin noted, the reference at Page 15
12 to its -- the Al-Hayat, quote, an official media arm of ISIS.

13 I'll note also that if you look at the website link
14 that they put here from the Federal Notice of Register -- and
15 we've marked this as an exhibit and can -- it's straight off
16 the Federal Register -- Al-Hayat was not designated as an
17 alias of ISIS under the INA until March of 2019 so this is
18 also after Mr. Al Safoo has been already locked up. But
19 regardless, it is the official media arm of ISIS. There's no
20 unofficial. There's the official and everything else.

21 So the government can point to expressions of
22 affinity towards some of the political objectives of ISIS in
23 this binder and say look here, he likes ISIS, look there, he
24 likes ISIS but the Supreme Court itself has said that
25 independent advocacy in that manner is not illegal.

1 I'm sure the government will also point to these, as
2 it did at the initial bond hearing, pictures of bombs or
3 instructions. What it won't point to is any shred of
4 evidence that Mr. Al Safoo was actively seeking out that type
5 of information nor will it be able to show that he was
6 actively disseminating that type of information independent
7 of anything else that it appeared in and so let me explain.
8 There's an exhibit, I believe it's Exhibit 15, in the
9 government's binder and on the last page of the binder -- and
10 this is for another magazine, it looks like, or periodical
11 called Al-Anfal. And on the last page of this Al-Anfal
12 magazine, there appears to be -- I believe it's in -- it's
13 kind of a How To for acetone peroxide, okay. And the
14 government will say, look, look, there's bomb-making
15 instructions on his phone even though it looks to be on Page
16 12 of a magazine that's on his phone that was at some point
17 downloaded.

18 I'd like to point out that when I was trying to
19 understand what acetone peroxide was in coming in, I found an
20 article from June 7th -- excuse me, September which I'll mark
21 as Defendant's Exhibit No. 1, and I can hand a copy --

22 THE COURT: Sure.

23 MR. HERMAN: Thank you. This is Defense Exhibit No.
24 1 which is from the Daily Mail UK dated September 7th --
25 19th, 2017. Horrific ISIS instruction video showing how to

1 make device likes Parson Green bucket bomb still on Google.
2 And I'll submit to you if you can look at the third page,
3 there's a still of a video where you can actually still
4 access this video of somebody -- and it doesn't appear to be
5 all of the instructions but of somebody now this is on my
6 phone or my computer of these bomb-making instructions.

7 And it's -- it's the entire -- the entirety of the
8 government's argument here is, is that he has somewhere on
9 his phone bomb-making instructions does not make him violent
10 in that manner and that's the question. If you will look at
11 the words that he actually wrote even if they're supporting a
12 political agenda of ISIS, this is not somebody who is saying
13 this is how you make a bomb, let's go make a bomb, let's do
14 these types of things.

15 In the analysis the weight of the evidence is, we
16 acknowledge, one of the lower-pronged considerations but here
17 we think that this -- these points that I'm making, and I'm
18 not going to go through every exhibit because I think your
19 Honor gets our point, the analysis dovetails with the
20 question about conditions because as I said in the beginning
21 it's a question begging analysis, what are we protecting the
22 community from. And here, we're not protecting it from some
23 bomber. We're not protecting it from somebody who is going
24 to do harm to others. We're protecting it from somebody who
25 used words. Thank you.

1 THE COURT: Thank you. Counsel, response?

2 MS. WELLS: Thank you, your Honor. The defendant in
3 this case had a massive collection of videos, infographics
4 and other information that specifically glorified violence
5 against ISIS' enemies and these items specifically attempted
6 to incite violence and attacks in the West, including
7 martyrdom operations --

8 MR. HERMAN: I'm sorry to interrupt but can we --
9 can Mr. Al Safoo sit down?

10 THE COURT: Yeah, you can sit down.

11 MS. WELLS: Oh, of course.

12 THE COURT: Everybody can sit down. Anyone who
13 needs to sit down, go ahead.

14 MS. WELLS: The materials included videos and
15 infographics and other things that attempted to incite
16 attacks on the West, including lone wolf attacks, martyrdom
17 operations and the like. We have mentioned that the
18 defendant had not one, not two, but at least three different
19 sets of bomb-making instructions on his phone. Contrary to
20 defense counsel's statement, I don't think watching a video
21 online puts it on your device. Okay. We're talking about
22 documents that were saved, PDF documents that were saved.
23 One of those, in fact, is a magazine that the defendant
24 contributed an article to and so he's writing for magazines
25 that in the same issue published bomb-making instructions.

1 THE COURT: Did he disseminate the bomb-making to
2 anyone?

3 MS. WELLS: Not -- we are not representing that,
4 your Honor, but we think he is aware of that information and
5 collected that information.

6 THE COURT: All right. So he collected it on three
7 occasions but you don't -- after looking at his phone, you
8 didn't have any evidence that he disseminated to anyone?

9 MS. WELLS: Not to my knowledge.

10 THE COURT: Okay. Go ahead.

11 MS. WELLS: And to put the information of this case
12 in context, before his arrest, the defendant was actively
13 engaged in material support of ISIS. He did something
14 contrary to what defense counsel would have the Court
15 believe. The defendant was the leader of Khattab. This was
16 a sophisticated organization that did a bunch of different
17 things. It created, it translated, it photoshopped, it video
18 edited, it audio edited a number of different pieces of
19 pro-ISIS propaganda directly in conjunction with ISIS at
20 their instruction. They were well aware of what
21 organizations like Hayat, the official ISIS media, and Amaq,
22 the official ISIS media, were doing and they were operating
23 consistent with and at the instruction of those outfits.

24 THE COURT: Is there any material support other than
25 propaganda?

1 MS. WELLS: Yes, your Honor. As alleged -- as
2 alleged in the indictment, he is charged with providing
3 material support in the form of services and personnel,
4 personnel including himself and the other members of the
5 conspiracy.

6 THE COURT: Well --

7 MS. WELLS: The services --

8 THE COURT: Well, hang on a second. Personnel to
9 work on the propaganda or to do something else?

10 MS. WELLS: As members of Khattab, yes. That's
11 correct. But among the things that they did --

12 THE COURT: Well, what does the non-propaganda
13 support?

14 MS. WELLS: Well, it is the government's position
15 that the creation of this organization involved services that
16 go beyond ideas. I think that's the --

17 THE COURT: Okay. And I'm asking you what those
18 are.

19 MS. WELLS: Those are the technical support. So we
20 have production -- we have production divisions, we have
21 editing, video, audio --

22 THE COURT: Okay. That all sounds like propaganda
23 to me so try to get beyond --

24 MS. WELLS: We also --

25 THE COURT: Hang on a second. Hang on a second.

1 Sometimes I have to interrupt. I hate that but it's part of
2 my job. We can't talk at the same time.

3 Tell me about the services that go beyond
4 propaganda. When you talk about editing and stuff, that all
5 makes me think of propaganda unless there's something I'm
6 missing so --

7 MS. WELLS: Well --

8 THE COURT: -- I'm interested in the material
9 support beyond propaganda.

10 MS. WELLS: Yes, your Honor. There were also --
11 there's plentiful information that among the things that the
12 group did, they have trouble as you can imagine pushing this
13 out into the world because the websites where you want to
14 host this kind of information if you're trying to get it out
15 there, they don't like it because it's bad. And so what
16 would happen is there would be terms of service violations,
17 accounts get shut down. And so the defendant himself, along
18 with other members of this group, actively sought to get
19 work-around so that they could access social media sites like
20 Twitter, like Facebook, like YouTube. They used fake names
21 for their accounts. But they also went to great lengths to
22 get unauthorized access, in other words, taking over
23 legitimate users' accounts so that they could use their
24 social media accounts to then push the propaganda because it
25 was able to basically slip through the filters a little more

1 easily and that information is also contained in
2 the pleading --

3 THE COURT: All right. Let me ask my question,
4 again. Something that's not related to propaganda, that's
5 also propaganda related, do you have based on your
6 investigation so far -- and I know the investigation is
7 continuing -- do you have an example of a material support
8 that goes beyond propaganda either creating it or helping get
9 it up online or writing it or having people write it or doing
10 the tech support for it, do you have something in the
11 evidence you have so far that is material support beyond,
12 beyond propaganda?

13 MS. WELLS: No, your Honor. There's a single charge
14 in this case and that is conspiracy to provide material
15 support in connection with the defendant's membership and
16 leadership in Khattab involving all of the services and the
17 personnel that I've described.

18 THE COURT: And all the personnel and services is
19 related to propaganda, correct?

20 MS. WELLS: I'm only hesitating, your Honor, because
21 I think the word propaganda doesn't quite accurately describe
22 what this is because we don't necessarily agree that this is
23 sort of, I guess, mere propaganda as they're describing it.
24 These were items that were intended to recruit people. These
25 were items that were intended to gain new members to ISIS

1 that were intended to cause people to act violently and
2 otherwise in support of ISIS --

3 THE COURT: Well, for example --

4 MS. WELLS: -- as a recruitment.

5 THE COURT: Well, for example --

6 MS. WELLS: Our view is that there's a
7 recruitment --

8 THE COURT: Hang on a second. Again, when I talk,
9 you have to stop talking, please.

10 Well, you know, that's a way to answer my question.
11 Judge, this is not propaganda because it's command and
12 control. It's recruitment for personnel who are going to be
13 engaged in active operations. It's trade craft to explain
14 how to get around security protocols or to mask your
15 identity. I mean, those things are not related to
16 propaganda.

17 So if you have something like that, I'm just asking
18 you to underscore it for me. Is there -- Do you have
19 non-propaganda, which is ideas rather than an offense other
20 than itself, that underscores the request with respect to
21 this case that the material support is more than words?
22 Because the argument that you just heard from counsel is that
23 he not only has a presumption of innocence but he has a First
24 Amendment right like everybody else. And if he wants to spew
25 ideas, ugly ones or unpopular ones, he can get in line with

1 everybody else in America because that's what happens.

2 So I will need you to take on their argument head on
3 and explain to me where in the evidence I need to look to
4 find some material support beyond First Amendment or First
5 Amendment-related speech. Go ahead.

6 MS. WELLS: Yes, your Honor. The charges in this
7 case are not that the defendant had bad ideas. If he wants
8 to stand on the street corner and scream about how much he
9 loves ISIS, that is offensive and probably annoying but that
10 is not what's going on here.

11 What the defendant was, was a member of an
12 organization that took a number of sophisticated steps that
13 involved operational security, it involved protecting their
14 identities, it involved working around and violating terms of
15 service of companies, it involved gaining illegal
16 unauthorized access to accounts. All of that was in service
17 of, among other things, spreading --

18 THE COURT: What kind of accounts, media accounts?

19 MS. WELLS: Twitter accounts, for example.

20 THE COURT: Yeah, okay.

21 MS. WELLS: Okay. There's no version, I think,
22 where it is proper or legal to gain unauthorized access or to
23 hack into someone's account so that you can then spew forth
24 pro-ISIS information and say that that's okay. It is the
25 government's view that that is one of the components of the

1 material support that was provided here. But it is worth
2 noting that under -- we're all familiar with the *Holder*
3 *versus Humanitarian Law Project* case. The services involved
4 here are not simply a group of people sitting in a closed
5 room exchanging their ideas or even blasting them out. It
6 was a sophisticated operation that involved far more than the
7 exchange of ideas. It involves technology, software,
8 personnel, organization, distribution, and it involved
9 coordination with a number of different organizations
10 including, the government believes, ISIS official media
11 outlets which are designated as part of the FTO and others
12 who were part of what we would consider the official ISIS --
13 real official ISIS media.

14 And so the theory of the case encompasses all of
15 that, your Honor, but I think it goes well beyond exchange of
16 ideas. That is not why we're here today. I hope that I've
17 answered my question.

18 THE COURT: Okay. That did. I interrupted you,
19 though, multiple times so go ahead. Go back to wherever you
20 were in your argument.

21 MS. WELLS: And so in conjunction with the
22 defendant's activities here, as he's providing this material
23 support to ISIS, he used his own technical expertise which is
24 very significant here because this criminal conduct took
25 place -- for better or worse the world we live in, this

1 conduct took place on the internet. Okay. He used his own
2 educational background. He's got, according to his own
3 resume, a master's in computer science. He worked as an IT
4 professional. He is far more sophisticated than most people,
5 I gather, even in this room when it comes to technology. He
6 maintained a separate phone, his ISIS phone. That's the
7 white ISIS -- the white iPhone that the government describes
8 in our papers. He had separate email accounts for this. He
9 used multiple VPN services to conceal his IP address and his
10 location. He gave advice to other members of the
11 organization and to the undercover officer involved in the
12 investigation as to how to mask their identities. In
13 addition to all of that before he was ever arrested, he
14 expressed an interest in traveling back to Iraq. He has made
15 that travel in the past. He has close ties there.

16 And so, your Honor, in light of that sort of general
17 summary, the question for the Court today is whether there's
18 clear and convincing evidence that the defendant would be a
19 danger to the community and whether there's a preponderance
20 of evidence that he's a flight risk and the answer to both of
21 those questions is yes.

22 We have given the Court and the defense team a
23 sample, okay, a sample of the evidence to do what the
24 defendants -- mostly his history and characteristics and the
25 factors that pertain to this bond motion. This is not a

1 summary of all of the government's trial evidence. But this
2 binder -- you know, Mr. Durkin said a minute ago that we
3 dumped a whole bunch of stuff on them and Mr. Herman referred
4 to the parade of horrors. I want to be really clear, this
5 is Mr. Al Safoo's parade of horrors. The information in
6 here came from his phone, from his email accounts. This is
7 the stuff that he has. And so there's no way for the
8 government to force him to speak. Obviously, we don't want
9 to do that. That's his choice. We can't read his mind.
10 What we can do is look at the stuff that he has and the stuff
11 that he has is unequivocal about his commitment to ISIS; and
12 not just his commitment in a theoretical sense but his action
13 to support that. And we've outlined several examples of this
14 in our motion and it's probably worth pointing to one or two
15 just quickly here.

16 THE COURT: As part of that highlight, why don't you
17 highlight an imminent threat rather than generalized support
18 or positive feelings for a horrible organization. I think we
19 all agree that an imminent threat is not First Amendment
20 protected.

21 MS. WELLS: Well, yes, your Honor. So, for example,
22 if you look to -- one of the examples, there was a document
23 that was found on his devices or his accounts that we
24 described in our papers as like a working document that was
25 then also re-posted in the Khattab rooms and one of the

1 things that it said there was that they were creating a
2 campaign that was to involve messages of incitement to
3 continue the fight and push back and confront the Infidels.
4 And then when you take a look at some of the examples of
5 Khattab's media here, their publication is in Exhibit 13 --
6 and I can't emphasize enough, your Honor, we have not
7 included all of these. Okay. We've included a few. But one
8 that's worth pointing out here --

9 THE COURT: Well, let me just touch on that. I
10 don't have access to all the discovery so if it's important
11 and you think it's important to my bond consideration, then
12 you got to give it to me. So just saying that you've got
13 other stuff, that's not really helpful.

14 MS. WELLS: I understand, your Honor.

15 THE COURT: Okay.

16 MS. WELLS: I make this point only to say that there
17 is a limit to how many binders I think that any of us can
18 process. It is of the --

19 THE COURT: And I understand that and I didn't
20 expect all the discovery but I expected the things that you
21 thought were important I needed to look at for the purposes
22 of bond you have in front of me so that's what I'm going to
23 proceed on.

24 MS. WELLS: One example here is in Exhibit 13, it's
25 this image. There's a helicopter and a soldier. It's got

1 the Khattab logo on it. State of the Caliphate, Islamic
2 state, the future will be bitter and worse. We will water
3 the earth with your blood. Prepare your coffins and dig your
4 graves.

5 A similar example, your Honor, if you look, there's
6 an image here of Osama Bin Laden. There's an airplane that
7 says Do Not Forget 11 September. This is also in Government
8 Exhibit 13. "We have by Allah's grece made you forget the
9 horrors of the Washington and New York attacks, and today we
10 remind you of it and promise you terror which will make you
11 forget the most precious that you have." There are
12 similar -- a threat to the World Cup, which will not -- this
13 is the image of the Russia 2018 World Cup with a Jihadi
14 soldier. World Cup 2018, we will not exclude anyone from
15 you. There's another one, celebrating the Las Vegas attack.
16 There are examples that we cited in the complaint that are
17 similar, your Honor. So these things are -- they're directly
18 threatening violence.

19 THE COURT: Is a celebration of past violence, do
20 you consider that to be an imminent threat?

21 MS. WELLS: I guess there could be -- I guess
22 there's two different categories there. A celebration of
23 past violence may not in and of itself be an imminent threat.
24 I do believe --

25 THE COURT: Well, it's not, isn't it? I mean, if --

1 MS. WELLS: No. I believe that it's a recruitment
2 tool. I think that --

3 THE COURT: Okay. But it's not an imminent threat.
4 It's something but it's not an imminent threat. If I just
5 say, well, I thought what happened in Vegas was great. I
6 mean, that's not an imminent threat. That's something else,
7 right?

8 MS. WELLS: Regardless of that, I think there's at
9 least two categories here. There's things that celebrate
10 past acts of violence and things that threaten future acts of
11 violence, the first example that I showed you, that we will
12 water the earth with your blood example.

13 THE COURT: Okay. That sounds like a future
14 comment --

15 MS. WELLS: Exactly, your Honor.

16 THE COURT: -- but the other one doesn't, right? I
17 mean, right? If it's a past -- if it's celebrating past
18 violence, that's not an imminent threat.

19 MS. WELLS: The Las Vegas attack. But, for example,
20 the World Cup poster, this was as I recall released in and
21 around the time of that event so we're looking at it in the
22 past now but you have to put this in the context of when it
23 was first published. And the same thing with the Las Vegas
24 attack, my understanding is that stuff was released shortly
25 after. So we're talking about it now in late 2019 but these

1 things came out at a far different period in time and so I
2 think that context matters.

3 THE COURT: Okay.

4 MS. WELLS: And I think these repeated references to
5 September 11, often these campaigns take place around the
6 anniversary of that. Again, that is meant to incite,
7 recruit, and convince folks to do like -- to do similar
8 activities in the future.

9 We've talked a little bit about the operational
10 security measures that the defendant took. He kept his own
11 separate ISIS phone. He had separate email accounts. One of
12 them, as we note in our motion, was his James Foley email
13 account. That was the title. That was a James Foley
14 followed by a series of numbers at Gmail. That obviously is
15 named for the famously murdered American journalist by ISIS.
16 He also provided advice to other members of Khattab and the
17 OCE on how to hide their identities and he discussed
18 various -- with various people his plans or desire to return
19 to Iraq.

20 And so I think that that -- that body of evidence,
21 your Honor, as we've presented here as outlined in the
22 complaint and as previously discussed with Judge Weisman is
23 enough to meet the government's burden and I want to address
24 some of the specific points the defense made.

25 One, Mr. Durkin made a lengthy argument about what

1 happens in terrorism cases and the war on terror and he
2 appears -- his argument, I think, was too many terrorism
3 defendants are not released pretrial. The defense team may
4 not like the law but the law here is really clear and the
5 Court has clear guidance. The 3142 factors apply. We're in
6 2339(b) land. It's a material support case. There is a
7 presumption. That's the law. And it's a rebuttable
8 presumption but we have clear guide posts to follow and
9 there's no need for us to look beyond this case or this
10 defendant in making a determination about detention.

11 THE COURT: The statutory provision is pretty clear
12 and there's similar rebuttable presumptions in drug cases and
13 other types of cases. I think what counsel was saying is
14 that it's not just that Congress has given the Court a
15 rebuttable presumption, which is obviously legal, he's just
16 saying the implementation of that within the context of a
17 particular triggering presumption just doesn't seem to be
18 consistent or been treated in the same way that the other
19 presumption cases are.

20 MS. WELLS: Your Honor --

21 THE COURT: People are overcoming in presumptions in
22 drug cases and other cases and yet he's just sort of
23 underscoring the counterpoint which is the presumption of
24 innocence which is of a constitutional dimension, and the
25 rebuttable presumption regarding flight or danger to the

1 community obviously is a statutory one so I think that's what
2 he was saying.

3 MS. WELLS: And that may be the case, your Honor,
4 but it remains the fact that what we have to look to today is
5 the facts surrounding this particular defendant and that is
6 all the government is arguing is that the information related
7 to his conduct to the information that he possessed to the
8 steps that he took show that he's a danger to the community
9 and show that he is a risk of flight.

10 THE COURT: Well, I agree with that a hundred
11 percent. I can't set bond in all terrorism cases and I'm not
12 inclined to try. I have to set bond in this case or not.
13 That's what I have to do. I agree with that. Go ahead.

14 MS. WELLS: As to questions about this -- what they
15 have proposed, you know, the online monitoring question, we
16 did check with both Pretrial and Probation on this and it is
17 our understanding that whatever online monitoring system
18 Probation has it is simply not available to --

19 THE COURT: What's simple about that? How is it not
20 available --

21 MS. WELLS: Your Honor --

22 THE COURT: -- because that sounds like a
23 bureaucratic response to the Department of Motor Vehicles to
24 me. If they can use it for other things, why can't I order
25 it?

1 MS. WELLS: Your Honor, I don't know whether -- if
2 you issued that order today whether it could be honored or
3 not. I am not a member of the Probation Department. I will
4 say this, though, because I think this goes to sort of the
5 heart of this issue here. There is, however, a difference
6 between pretrial release and supervised release when that
7 probation system would kick in --

8 THE COURT: Yeah, one person has got a presumption
9 of innocence and the other one doesn't.

10 MS. WELLS: That's -- that is exactly right. We
11 certainly agree with that, your Honor. But another issue is
12 that whatever resources are available to Pretrial to someone
13 who is presumed innocent and the probation monitoring
14 systems, someone who is on probation or supervised release
15 has already gone through this whole process. They've already
16 been convicted of some crime and the sentencing judge in that
17 case has been able to weigh whatever that judge needs to do
18 to determine whether a term of incarceration is necessary, to
19 determine whether the defendant remains a risk to the public
20 and whether the public needs to be protected from future
21 crimes of the defendant, whether there's a need to
22 specifically deter that defendant from that conduct and so
23 all of those things will have already been weighed.

24 Here what we have is someone where there is, the
25 government's position, a significant amount of evidence

1 showing that he is interested, has done and would likely
2 continue to do -- take a number of actions on behalf of ISIS
3 to advocate violence, to attempt to recruit new members and
4 he would be able to do it in a way that is very, very
5 difficult if not impossible to monitor. I am not sure --

6 THE COURT: Hang on a second. That's an argument to
7 say that the technology wouldn't be successful. It doesn't
8 answer my question that I'm just getting a blanket response,
9 it's not available. Why, because. That doesn't make any
10 sense to me.

11 MS. WELLS: Your Honor, I would have to defer --

12 THE COURT: Hang on a second. Can you shed any
13 light on why a pretrial detainee can't take advantage of a
14 technology that the government is in possession of and has
15 the ability to implement in other instances?

16 MS. MULRY: Your Honor, I don't know why we don't
17 have that resource available to us. I do know that Pretrial
18 Services is a separate department to Probation so at this
19 point we do not have a computer-monitoring program available
20 to us. We don't have officers that monitor computer programs
21 whatsoever. Certain districts do with Pretrial Services but
22 at this point our district we do not; and I cannot speak to
23 why other than budgetary constraints and lack of resources.
24 Other than that, I really don't know why we don't have that.

25 THE COURT: All right. I totally put you on the

1 spot so I appreciate your candor. Thanks so much. Okay. Go
2 ahead, counsel.

3 MS. WELLS: The other thing with regards to any
4 online monitoring program is it can only apply to devices
5 that have been identified. And in this case, all it takes is
6 any internet-enabled device that doesn't have that software
7 attached to it that someone doesn't know about that then any
8 of this monitoring is sort of all for nothing.

9 And so to that point, it is not clear that there are
10 any conditions of release here that would be able to prevent
11 the defendant from continuing with this conduct. It is a
12 fact that this crime took place using sophisticated means on
13 the internet and that means that that is the world that we're
14 living in. We have to look at those facts and whether there
15 are conditions of release that can account for that and there
16 are none that have been proposed, your Honor.

17 I want to touch a little bit on some of the
18 discovery issues that were raised and the counsel of choice
19 issues that were raised. Mr. Durkin said that the
20 government's proposed solution here is not to modify the
21 order, meaning the protective order. For one thing, if the
22 defense team is having difficulties with discovery, we first
23 want to emphasize that the government has been and remains
24 very willing to work out solutions that accommodate the needs
25 of this case and we agree that it has some unusual factors,

1 but the remedy that they're seeking is not a modification of
2 the protective order which they would be perfectly able to
3 present to your Honor. What they're asking for is release on
4 bond. And again, the factors under the law don't -- they
5 simply don't include access to discovery. If they want to
6 seek relief from the protective order, they can and should do
7 that. If they want to work with the government to get better
8 access and come up with solutions, we want to work with them
9 and make that possible.

10 THE COURT: What improvements in the discovery
11 process are you proposing?

12 MS. WELLS: Your Honor, we have -- there's two
13 different problems with the discovery process as I understand
14 it from defense counsel. One is that as a matter of BOP's
15 policy, certain types of media cannot be brought into the
16 jail. That has nothing to do with the government.

17 THE COURT: Well, BOP is part of the government.

18 MS. WELLS: Well, I can't order them to do much. We
19 can try, though, and we have been willing to work on this but
20 things -- it's a matter of the type of media. I think
21 Blu-ray discs can't be brought in and things -- sort of
22 larger capacity devices can't be brought in. We have tried
23 to take things off of those types of devices and put them on
24 CDs so that that can be brought in and we've done that in a
25 number of places and with the most critical evidence,

1 particularly the back and forth communications between all of
2 the members in the Khattab organization, and we went to great
3 lengths to redact out anything that would be inciting to
4 violence or similar so that they could bring that in and
5 leave it with the defendant and that is really the bulk of
6 the evidence.

7 And so we have, I think, at every turn tried to
8 identify opportunities to do things like that. We remain
9 willing to do so. And so in any event, though, none of that
10 is 3142 factors.

11 THE COURT: Well, if you're willing to do so, go
12 ahead and take your ideas and put them into action. Don't
13 wait for defense counsel to make a request and to express
14 difficulty because they've done that already. And it -- he's
15 got a right to counsel, he's got a right to an attorney that
16 is able to discuss the evidence with him. Obviously, we're
17 not talking about the classified stuff. We're talking about
18 a different category. And a bureaucratic response from the
19 Bureau of Prisons that we can't do that, that becomes your
20 problem also and it's up to you guys to fix the problems with
21 discovery because the failures of discovery will fall upon
22 the government; not upon the defense. And if -- for example,
23 I know people get writted out for proffers all the time. If
24 you need to use your resources to get him out, in custody
25 obviously, in a situation where he's able to review discovery

1 and defense counsel doesn't need to babysit him but there's a
2 secure environment for doing that, if that's the resource you
3 need to expend to properly prosecute the case, then you need
4 to actively be engaged in that process because if we get to a
5 point where we can't set a reasonable trial date and counsel
6 is telling me I didn't get a chance to go through this proper
7 discovery or we get an issue -- or even worse, we get an
8 issue at trial after double jeopardy is attached, I'm not
9 going to hear arguments well they didn't ask us because they
10 did. So totally above and beyond any issue of bond, the
11 discovery issue is something you guys need to actively work
12 on.

13 MS. WELLS: Your Honor, I think we would be more
14 than happy to have him brought over if that's a solution that
15 defense counsel would -- we're happy to talk with them and
16 make that happen if that would move things forward.

17 THE COURT: All right. I'm ordering you to talk
18 about those issues. I don't want to hear about him not being
19 able to prepare his case. I don't want to hear that. I want
20 to hear from him, Judge, discovery is going along perfectly,
21 I'm going to be ready for trial and we're going to have a
22 nice fair trial consistent with the Constitution. That's
23 what I want to hear in a status, not that I might need bond
24 because I can't get my guy to look at this stuff. All right.
25 Okay. Go ahead. I interrupted you again.

1 MS. WELLS: Yes, your Honor. A few other -- just to
2 sort of circle back on some of the points that Mr. Herman
3 made specifically about the evidence, you know, we mentioned
4 the -- pointing to Exhibit 12T, this is one of the
5 translations, again I just wanted to give you a citation.
6 This is for the document that called for messages of
7 incitement to continue fighting, information to obey and
8 denounce disobedience of Emirs and specifically sending
9 letters of intimidation and threat to the enemies of the
10 Islamic State and to say that the State is going to implement
11 its promise to root out the groups of faithlessness and
12 apostasy. This came from the defendant's accounts and
13 devices. The same statement in nearly identical form was
14 then posted in the Khattab rooms by another member of that
15 organization.

16 And so when you're asking questions about are there
17 threats of violence, is that what this organization is about,
18 yes. This was the design for a campaign where they very
19 specifically talked about that as a goal. And so regardless
20 of whether or not Mr. Al Safoo, in addition to all of this,
21 wrote some articles, he did that too, but that's not what the
22 limit of the case is about.

23 Similarly, if you take a look at Exhibit 16, this is
24 one of those magazines that he kept and this is -- 16
25 specifically is called Al-Naba, which is another pro-ISIS

1 magazine. The last page of that is one of the translations
2 that we provided. And this is the tips for the Mujahidin,
3 which also talks about particular threats to people who
4 disagree with ISIS.

5 Turning back to Exhibit 13, there are some other
6 examples that we didn't pull up a moment ago. There's other
7 September 11th graphics there, including one that says: Oh,
8 America, you won't live in peace unless we see it happening
9 in Palestine. Or we end where Ham -- and then there's the
10 name of another person, has ended. Similarly, there's
11 another September 11th graphic: By the grace of allah and
12 his power, we glorify your streets, demoralized by impurity
13 -- your impure blood on your feast days, oh slaves of the
14 cross remember, hash tag, Manhattan battle, again showing the
15 buildings burning. Another September 11th graphic showing a
16 Jihadi fighter, a Caliphate fighter. There's a burning
17 American flag. "O, Crusaders, Allah has enabled us to pluck
18 your heads in Niger. Soon we will do the same in the streets
19 of New York and London." And this one is important, your
20 Honor, because that reference to Niger, this was really
21 shortly after I believe four American soldiers --

22 OFFICIAL COURT REPORTER: I'm sorry. Please slow
23 down.

24 MS. WELLS: Yeah, I'm sorry. This was really
25 shortly after --

1 THE COURT: All right, yeah. I was about to say
2 something myself. You're over 300 words a minute. Don't
3 worry. You have all the time you need.

4 OFFICIAL COURT REPORTER: 440.

5 THE COURT: 440. Oh, my God. That's a new record.
6 All right. Slow down, counsel.

7 MS. WELLS: Yell at me if I'm talking too fast.

8 MR. JONAS: Your Honor, I have to catch a flight.
9 Is it okay if I leave?

10 THE COURT: Yes, you may.

11 MR. JONAS: Thank you, your Honor.

12 MS. WELLS: This reference to plucking -- enabled us
13 to pluck your heads to Niger -- this, I believe, took place
14 shortly after -- I think it was four American soldiers were
15 killed by ISIS fighters in the country of Niger. And so,
16 again, there are a number of different examples. We cited
17 some videos --

18 THE COURT: Counsel, please down just a little bit,
19 just a little bit. Thank you so much.

20 MS. WELLS: We cited a few videos in our papers as
21 well. Two of them were Khattab-specific videos and then
22 another one was featuring Abu Australi, who is an ISIS
23 fighter from Australia. And in that video, he is
24 specifically calling on people again to commit those acts of
25 violence, to commit lone wolf attacks, martyrdom attacks.

1 The Khattab videos celebrated similar acts and glorified
2 ISIS' military successes. Again, these are all recruitment
3 materials. The purpose of this information, the purpose of
4 all of this is to bring people over to the cause and frankly
5 to instill fear in everyone that they perceive to be their
6 enemy.

7 And so the nature of this information is very -- it
8 makes very clear what he believes but also what he was doing.
9 He joined this organization. He was a leader of this
10 organization. And what they were committed to was helping
11 ISIS in every way that they could including media Jihad
12 which, to be clear, was something that ISIS and ISIS'
13 official media arms called for. They issued an order to
14 their supporters to engage in media Jihad. It is considered
15 by them to be an imperative and necessary form of support and
16 that is exactly what the defendant was doing. He followed
17 that order and he did it on an extremely committed basis over
18 a very lengthy period of time.

19 THE COURT: Can you address the current state of
20 discovery? How much more discovery do you anticipate? And
21 also with respect to the superseding indictment that you also
22 talked about, do you have any updates for the Court regarding
23 timing of either of those?

24 MS. WELLS: Discovery is essentially completed. As
25 the Court well knows, there have been additional examples of

1 legal process that continue to be issued so as that
2 continues, we'll obviously continue to turn things over but
3 virtually -- discovery is complete.

4 THE COURT: Okay. What about the superseding
5 indictment?

6 MS. WELLS: We anticipate one in the next couple of
7 months. I realize it's been a long slog but --

8 THE COURT: Okay. Do you need to respond to any of
9 that, counsel? Anything?

10 MR. DURKIN: With what you just said or --

11 THE COURT: Or anything. Anything you want.

12 MR. DURKIN: Well, first of all, I think you
13 articulated my argument better than I did so I'm going to
14 quit while I'm ahead on that. But you asked the right
15 questions and it took them a long time to get around to
16 answering no. There's nothing other than advocacy and there
17 is nothing whatsoever that he did. He didn't write -- the
18 one she was going through, these parade of horrors with
19 September 11th, those are the ones I mentioned to you. He
20 didn't write those. Those are all part of some other thing
21 that was downloaded. He -- There's nothing they can point to
22 that he wrote.

23 And secondly, what they continue to refuse to
24 acknowledge is that -- they're treating Khattab as if it's
25 the official arm of ISIS or it's its own SDTO. Khattab isn't

1 a specially designated terrorist organization so where do
2 they get off saying that just because he was helping them,
3 that's material support to a terrorist organization? They've
4 got a lot of links before they get to Khattab, which is about
5 the only thing that they've argued they can prove which is
6 somehow he helped Khattab, which is not a terrorist
7 organization.

8 And to suggest that somehow he -- that Mr. Al Safoo
9 somehow answered some call by ISIS is wishful thinking and
10 insane. There's no such evidence and they're not going to be
11 able to point to that. Yes, does he obviously believe in
12 some of the things that ISIS believes in? Yes. That's First
13 Amendment protected. That's why he has viable defenses.
14 That's why the whole argument that somehow they have this
15 parade of horrors to make him dangerous is so off base in
16 this case and you asked the right question there. Yes, this
17 is the only case you have to decide and this case deserves
18 bond because we have shown you that there are reasonable
19 conditions.

20 And this argument -- this First Amendment argument
21 that they acknowledge, first of all, it's nice of them to
22 acknowledge that but with all due respect, the First
23 Amendment is expanded beyond street corners today. In the
24 year 2018, we're talking about -- or 2019, the First
25 Amendment, you know. The only place you can espouse your

1 ideas is just not on a soapbox on the street corner like at
2 the turn of the century. We're in a new world. That's First
3 Amendment activity or at least it's a reasonably good defense
4 to this charge which normally you don't have in these cases,
5 which is one of the reasons I put it in perspective of other
6 cases.

7 But, you know, the government -- at the end I wrote
8 this down. She says it's not clear that there are
9 conditions. Well, it is clear that there are conditions and
10 those conditions are reasonable. I would submit on behalf of
11 Pretrial Services that perhaps one of the reasons that there
12 is a bureaucratic difference in terms of what remedies are
13 available for post-conviction and pre-conviction is that
14 Pretrial Services still believes in bond and perhaps it was
15 the decision of the administrative officials who give out
16 money and say what programs are available to whom is perhaps
17 because they don't need to have that many things available
18 because bond is the alternative that remedies that. But to
19 somehow say that because we don't have the service available
20 even though our department or our agency has it is certainly
21 not something that this Court could tolerate
22 constitutionally.

23 I don't -- I think that this detention order is
24 unconstitutional and I think in cases where it's this clear
25 that there are conditions that are reasonable, maybe not a

1 hundred percent certain, but reasonable, then I say this is
2 an unconstitutional order and I think he should be released.

3 THE COURT: One of the, obviously, arguments he's
4 making is that you're pointing to threats but he's in
5 possession of those threats rather than making the threat.
6 Is there any -- and you cited several ones that, you know,
7 sound like imminent threats. Do you -- are any of those in
8 particular any one you want to point out for me as something
9 that he communicated to another person rather than just
10 download or otherwise possess?

11 MS. WELLS: Your Honor, if you go through -- this is
12 in the complaint and generally in the Khattab room
13 discussions, the way that the organization worked -- this is
14 just by way of explaining how they operated -- there are
15 different sections that would create and have different
16 roles, some designed graphics, some proofread, some wrote,
17 some did the video editing, some did audio editing, et
18 cetera. Among the things that would happen is when something
19 was prepared and finalized and got the go ahead from the
20 group, it would be like okay disseminate and then there would
21 be a long list of links, sort of live links where people
22 could then go out to those places, grab the content and then
23 redistribute it. The defendant participated in that kind of
24 activity, okay, and so there are a number of examples of that
25 throughout the discovery.

1 We also pointed out that one of the things that he
2 had on the notes application of his phone was a list of like
3 Twitter accounts and log-ins that were using a method that
4 was shared within the Khattab group to gain unauthorized
5 access to other users' accounts. He had those lists of
6 accounts that he had the user name, the updated password
7 information reflecting his gaining unauthorized illegal
8 access to those accounts and then he had notes about
9 different pro-ISIS related content that, in some of those
10 instances, went out.

11 And so, yes, there is evidence in this case that he
12 was disseminating this kind of information and that he was
13 participating in the process and it is a conspiracy case
14 which is something defense counsel, I think, ignores. If you
15 look through the conversations that he's having in these
16 rooms, he's listed as an administrator in many of those
17 conversations, meaning he had rights and privileges in those
18 rooms that other users did not, and he was well aware of all
19 of the conduct of the organization, he participated in it,
20 and what his particular role if he was -- you know, primarily
21 one of the writers and he was the head of the writers' group,
22 that does not mean that he did not otherwise participate and
23 certainly that he was -- he was aware of the scope of the
24 conspiracy, participated in it.

25 And when you look at some of the comments that he's

1 made -- and I'll direct the Court to Page 12 of the
2 government's filing -- you know, he talks about what he wants
3 the group to do. He wrote in one instance -- and this is in
4 Government Exhibit 17 at Bates number ending 0036 -- the
5 Islamic State mobilized us to migrate but we did not migrate
6 and they are mobilizing us for media support. He is talking
7 about ISIS instructing him and the organization to engage in
8 media support and they are answering that call and it is
9 not -- it is not the case -- Mr. Durkin, I think, is
10 misconstruing things. We're not saying that he provided
11 support to Khattab which then -- he and Khattab, the
12 organization, provided material support. That's the case.
13 He's the member of a larger organization. It's a conspiracy.
14 It's essentially a company, a business, an enterprise that
15 was in the business of providing material support to ISIS and
16 he made his goals clear over and over again. When he says
17 they are mobilizing us for media support, he asks: So should
18 we sit idle again. That's obviously a rhetorical question.
19 And the answer from his point of view is no.

20 He also wrote, and this is the same page: It is a
21 shame for a Mujahidin supporter to sit idle. No Jihad and no
22 support. So he is kind of lamenting inaction by people
23 committing Jihad on behalf of ISIS.

24 In terms of -- at some point earlier today, someone
25 made the point that he had never pledged allegiance to ISIS.

1 To be clear, I don't think that pledging Bay'ah is a
2 requirement for a material support charge. However, there is
3 ample evidence here that the defendant, that his organization
4 and that his co-conspirators did make that oath of
5 allegiance. And I'll direct the Court to Government Exhibit
6 18. This contains a collection of at least three different
7 forms of the renewal of Bay'ah. This was again a push by
8 ISIS supporting groups worldwide to renew, meaning they've
9 done it once already at least, to renew that oath of
10 allegiance. He had a collection of them on his accounts and
11 devices. His organization, as we describe in the complaint
12 and our papers, made that same pledge and renewed that same
13 pledge. And there are ample examples where he spoke out in
14 favor of Abu Bakr al-Baghdadi, who is the leader of ISIS.
15 That is also referenced in Page 12 of the government's
16 papers. And particularly one example is Government Exhibit
17 19 at one. And there he criticized someone who referred to
18 Baghdadi without the title of Shaykh, Caliph or Emir; and
19 then went on to say some disparaging things about someone
20 that would talk about ISIS' leader in that capacity.

21 So when we talk about is this organization dedicated
22 to ISIS, yes. Is it taking steps to provide material support
23 to ISIS, yes. Is part of that following ISIS' explicit
24 instruction to engage in media Jihad, yes. Did they do that
25 by gaining unauthorized access to accounts, yes.

1 THE COURT: All right. Anything further, counsel?

2 MR. DURKIN: Just this: You can't conspire to do
3 something the First Amendment says you can do. It's as
4 simple as that and that's what this case is about and there's
5 a legitimate factual issue in this case based on everything
6 you've heard, everything else you've read. This man has a
7 viable defense and there are conditions that will reasonably
8 assure the safety of the community and whether he's going to
9 flee. That's the issue.

10 And to make these co-conspiratorial corporate leaps
11 that they're making is exactly what I said before is what's
12 unconstitutional about this order in this particular case.
13 It's -- you have to go -- you got to jump through a lot of
14 hoops to get to where they want you to get to and I don't
15 think that -- I think you can see through that.

16 This is a -- he has a viable defense and there are
17 conditions reasonable -- that can reasonably assure, that you
18 could be reasonably assured that he's not a danger -- that
19 the community is not in danger of his conduct, whatever that
20 might be, which is I guess another whole issue too as to, you
21 know, what is it that he could do? And I did want to say
22 this not to be a smart aleck but I'll be a smart aleck --

23 THE COURT: Can you help yourself?

24 MR. DURKIN: No.

25 THE COURT: I didn't think so.

1 MR. DURKIN: I can't. You know that. Their
2 argument would mandate that he be put in the SHU, you know,
3 segregated housing, with SAMS. That what their argument --
4 the logical conclusion of their argument is because he's in
5 the general population now and it's my understanding that
6 it's not too complicated to get access to a cell phone in the
7 MCC and he's been there for quite some time.

8 So if he really was this zealot who was going to try
9 to just do whatever he could do to get the word out and that
10 was his mission in life which was sending the word out on
11 this internet Jihad which I've never heard of before -- and
12 that's a term that's so misused as well. You know from just
13 general reading that's laughable. But the logical conclusion
14 of their argument is that he needs to be put in the SHU with
15 SAMS because there's no other way to guarantee that he can't
16 spread this word and that's what they're asking for. That's
17 what I've said from the beginning. They're looking for a
18 guarantee.

19 Magistrate Weisman, with all due respect -- and he's
20 my friend -- I think he was looking for a guarantee and you
21 -- and when you put a guarantee on instead of reasonable,
22 then we're violating the Constitution and God knows we're in
23 need of that today.

24 MS. WELLS: Your Honor, if I could very briefly.

25 THE COURT: Yeah, sure.

1 MS. WELLS: I want to be really clear, this is not
2 about taking anyone's argument to its logical conclusion. We
3 are not asking that he be put in the SHU. We are not asking
4 that he be subject to SAMS restrictions. We are simply
5 saying that there is ample evidence to show that he's a
6 danger to the community. There's ample evidence that he's a
7 flight risk. Again, we haven't spent a lot of time on flight
8 today but his technical sophistication, his ties to Iraq, his
9 previous travel and his statements to the effect that he
10 would like to return there paired with the fact that he's
11 facing right now a max -- a statutory maximum of 20 years
12 imprisonment if convicted, there is every incentive in the
13 world for him to flee.

14 And so again, Mr. Durkin I think keeps trying to
15 expand this into territory that we're not in. The only
16 question for the Court today is whether this defendant who
17 possessed this information is a flight risk or a danger to
18 the community and the answer is yes.

19 MR. DURKIN: To end on just a government trope as
20 they always do, it's a burden every day that drug dealers and
21 people in serious drug cases meet every day.

22 THE COURT: Okay.

23 MR. DURKIN: Thank you.

24 THE COURT: I'm going to take 109 under advisement.
25 I did not complete my review of the large binder. I tried to

1 but I did not get it done in light of other cases I had in
2 front of me so I'm going to take it under advisement and I'll
3 issue a written order as quick as I possibly can.

4 I'm going to require in ten days that the government
5 submit a report explaining to me how you are going to solve
6 the problems with the review of the non-classified discovery.
7 I'm putting the burden on you guys --

8 MS. WELLS: Yes, your Honor.

9 THE COURT: -- because I don't want this to be a
10 problem in the case. So telling me that you're willing to
11 talk to them, I appreciate the willingness, but I don't want
12 that to be the case because you're the ones who can make the
13 difference. Defense counsel can complain but beyond that he
14 doesn't really have a lot of power to do anything other than
15 complain to you, complain to the Bureau of Prisons and then
16 eventually complain to me. I don't want him complaining to
17 me. I want him happy about his discovery and his trial
18 preparation.

19 So give me a ten-day -- just go ahead and file it;
20 and if you have to file it under seal, you have permission to
21 do so. I don't know that you would need to but I want a
22 procedure going forward. And if the Bureau of Prisons has a
23 reason for security reasons they can't do something, then I
24 need creativity and resources on behalf of the U.S.
25 Attorney's Office to figure out how to solve the problem

1 because what you don't want is me to micro manage it because
2 then it becomes more difficult for the parties than if
3 they're able to work something out on their own. And I know
4 you've got a lot of other things to do. You're preparing a
5 superseding indictment and all those other things but I want
6 to put that on the top of your pile if I can so go
7 ahead and -- Gloria, give me the ten-day date for that
8 report.

9 MS. WELLS: Yes, your Honor. And I want to add,
10 we --

11 THE COURT: Hang on a second. Let me get the date
12 first.

13 COURTROOM DEPUTY: October 7th.

14 THE COURT: Okay. Go ahead, counsel.

15 MS. WELLS: Just that we take this issue seriously
16 and we hear the Court and we're going to come up with some
17 good solutions or do the best we can and we'll get that to
18 you.

19 THE COURT: All right. Excellent. How long should
20 I set the case over?

21 MS. WELLS: Your Honor, I think last time we were
22 here, the government suggested that we go ahead and set a
23 trial date for the late spring and defense counsel, I think,
24 had some -- wanted to defer that decision until today.

25 THE COURT: Do you want to make a trial decision in

1 terms of date?

2 MR. DURKIN: Well, I mean, I could try this case,
3 you know, but I -- relatively earlier, you know, but I'm not
4 sure what this superseding indictment is all about.

5 MS. WELLS: Well, we've made clear we've turned over
6 all of the discovery relevant to that --

7 THE COURT: Yeah, but he doesn't know --

8 MR. DURKIN: But I don't --

9 THE COURT: Hang on a second. He doesn't know what
10 the superseding indictment is. That's kind of a critical
11 thing in preparation of a trial. So when is the superseding
12 coming out because I'd love to set a status right after that.
13 He can look at the superseding and go I'm going to be ready
14 for trial on X and then we all look at everyone's busy
15 calendars, we plug in a date.

16 MS. WELLS: I think we can set that for late
17 November.

18 THE COURT: November?

19 MS. WELLS: End of the --

20 THE COURT: End of November. Are the parties
21 available the first week of December?

22 MS. WELLS: That's fine for the government.

23 MR. DURKIN: We have a case that starts in
24 Washington. It starts on the 4th, Judge, but it's -- there's
25 a very strong chance that it won't go. If you want to set

1 this for, say, Monday the 2nd, it's possible that -- that I
2 know we could make. If we could do the afternoon of the 2nd,
3 that would work.

4 THE COURT: What about that 3rd? Usually Mondays
5 I'm picking juries so those days are all eaten up but
6 Tuesdays I have availability. You can appear by phone if you
7 need to.

8 MR. DURKIN: That's fine. All right. That works.

9 THE COURT: All right. Gloria, what's that Tuesday
10 look like? Can we fit them in?

11 COURTROOM DEPUTY: Tuesday, December 3rd at 1:00
12 p.m.

13 MR. DURKIN: That will be great.

14 MS. WELLS: That's good for the government. Thank,
15 you, your Honor.

16 THE COURT: All right. Is there a motion to exclude
17 time?

18 MS. WELLS: Yes, your Honor.

19 THE COURT: Any objection?

20 MR. DURKIN: We take no position.

21 THE COURT: All right. Oral motion to exclude time
22 is granted. The Court finds the ends of justice are served
23 by the continuance and outweigh the interests of the public
24 and the defense in a speedy trial based upon a reasonable
25 time necessary for effective preparation by counsel taking

1 into account the exercise of due diligence.

2 In the interest of justice, time is excluded from
3 today's date through and including December 3rd for the
4 review of discovery, trial preparation and the completion of
5 the defendant's pending motion.

6 Anything else, counsel?

7 MS. WELLS: Not from the government. Thank you.

8 THE COURT: Anything else, counsel?

9 MR. DURKIN: No, Judge.

10 THE COURT: All right. Thank you. See everyone.

11 MR. DURKIN: Thank you.

12 MS. WELLS: Have a good day, your Honor.

13 THE COURT: Have a good day.

14 (Which concluded the proceedings in the above-entitled
15 matter.)

16 C E R T I F I C A T E

17 I hereby certify that the foregoing is a transcript
18 of proceedings before the Honorable John Robert Blakey on
19 September 26, 2019.

20

21 */s/Laura LaCien*

22 _____
23 Laura LaCien
24 Official Court Reporter

November 22, 2019
Date

24

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