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 18 UNITED STATES OF AMERICA

19 UNITED STATES DISTRICT COURT

20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 SOUTHERN DIVISION

22 UNITED STATES OF AMERICA,  
 23 Plaintiff,  
 24 v.  
 25 NADER SALEM ELHUZAYEL and  
 MUHANAD ELFATIH M. A. BADAWI,  
 26 Defendants.

No. SA CR 15-00060(A)-DOC

GOVERNMENT'S UNOPPOSED EX PARTE  
APPLICATION FOR ORDER AUTHORIZING  
THE CONDITIONAL RELEASE OF COPIES  
OF CERTAIN TRIAL EXHIBITS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF;  
DECLARATION OF JUDITH A. HEINZ;  
ATTACHMENT A

1 Plaintiff United States of America, by and through its counsel  
2 of record, the United States Attorney for the Central District of  
3 California and Assistant United States Attorneys Judith A. Heinz,  
4 Deirdre Z. Eliot, and Julius J. Nam, hereby applies ex parte for an  
5 order authorizing the conditional release of copies of certain trial  
6 exhibits to an academic researcher/writer.

7 This application is based upon the attached Memorandum of Points  
8 and Authorities, the accompanying Attachment, and the files and  
9 records in this case.

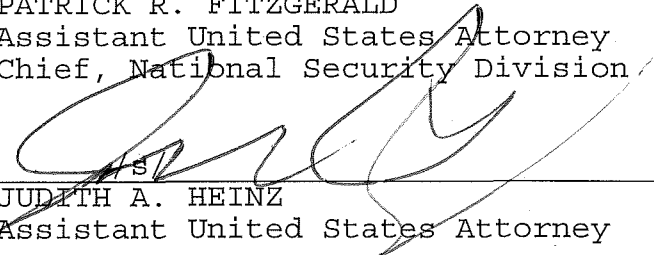
10 As set forth in greater detail in the attached declaration of  
11 Judith A. Heinz, counsel for defendant Elhuzayel does **not** object to  
12 the government's ex parte application, and counsel for defendant  
13 Badawi does **not** object to the government's ex parte application.

14 Dated: July 24, 2017

Respectfully submitted,

15 SANDRA R. BROWN  
United States Attorney

16 PATRICK R. FITZGERALD  
17 Assistant United States Attorney  
18 Chief, National Security Division

19   
20 JUDITH A. HEINZ  
Assistant United States Attorney

21 /s/  
22 DEIRDRE Z. ELIOT  
Assistant United States Attorney

23 /s/  
24 JULIUS J. NAM  
25 Assistant United States Attorney

26 Attorneys for Plaintiff  
27 UNITED STATES OF AMERICA  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Recently, a researcher/writer, who is affiliated with George  
4 Washington University, contacted counsel for the government and  
5 requested copies of certain exhibits admitted as evidence during the  
6 jury trial in this matter. The specific trial exhibits requested are  
7 listed in the chart attached hereto, and include English-language  
8 translations and/or transcripts of some of the exhibits. See  
9 Attachment A. It is the government's understanding that the  
10 researcher/writer: (1) intends to describe and include copies of  
11 these exhibits in academic reports prepared in conjunction with  
12 George Washington University (located in Washington DC); (2) intends  
13 to describe and reference, but not include copies of, the exhibits in  
14 reports prepared for other publications; and (3) expects that these  
15 reports and publications will likely be disseminated on the internet.  
16 The government understands further that the researcher/writer agrees  
17 that the government shall redact or obscure certain information,  
18 including third-party identity information, from the copies of the  
19 trial exhibits before disclosing them to the researcher/writer.

20 The government does not oppose, and believes the controlling  
21 legal authority supports, the researcher/writer's request.

22 In addition, as set forth in greater detail in the attached  
23 declaration of Judith A. Heinz, counsel for defendant Elhuzayel does  
24 not object to the government's ex parte application, and counsel for  
25 defendant Badawi does not object to the government's ex parte  
26 application.

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1    **II.   LEGAL ANALYSIS**

2           The issue presented here -- when the media (including a  
3 researcher/writer affiliated with an academic institution) has the  
4 right to copy and inspect judicial records -- has been considered by  
5 several courts of appeals, including the Ninth Circuit.  See Valley  
6 Broadcasting Co. v. U.S. Dist. Court for Dist. Of Nevada, 798 F.2d  
7 1289, 1292 (9th Cir. 1986) (citing and discussing cases).  The  
8 media's right to copy and inspect judicial records is based on common  
9 law, and is independent of the Constitution.  Id. at 1293.  While  
10 this "common-law right of access has historically developed to  
11 accomplish many of the same purposes as are advanced by the first  
12 amendment," it "is not of constitutional dimension, is not absolute,  
13 and is not entitled to the same level of protection afforded  
14 constitutional rights."  Id. (citing Nixon v. Warner Communications,  
15 Inc., 435 U.S. 589, 597-98 (1978)).  "But it is also clear that the  
16 importance of public access to judicial records and documents cannot  
17 be belittled."  United States v. Schlette, 842 F.2d 1574, 1582,  
18 amended, 854 F.2d 359 (9th Cir. 1988) (reversing district court's  
19 refusal to disclose presentence report to newspaper).

20           Accordingly, the Ninth Circuit has instructed that, when  
21 considering whether to permit the media to copy for subsequent  
22 broadcast trial exhibits, including videotapes, the trial court must  
23 "start with a strong presumption in favor of access, to be overcome  
24 only on the basis of articulable facts known to the court, not on the  
25 basis of unsupported hypothesis or conjecture."  Valley Broadcasting  
26 Co., 798 F.2d at 1293 (internal quotation marks and citations  
27 omitted).  This "strong presumption" in favor of such media access is  
28 justified by the promotion of the public's understanding of the

1 judicial process and of significant public events. Id. at 1294.  
2 Factors that counsel against such access include the likelihood of an  
3 improper use, infringement of fair trial rights of the defendants or  
4 third parties, and residual privacy rights. Id. If a district court  
5 denies access, it must do so on the basis of articulated facts known  
6 to the court, and should state those facts on the record. Id.

7 Here, the researcher/writer seeks access to 28 trial exhibits  
8 (plus some translations of the same) for the purpose of informing the  
9 public about terrorism. Jury trials in which terrorism charges are  
10 contested are few; thus, there is a legitimate public interest in the  
11 28 trial exhibits the researcher/writer seeks. Although both  
12 defendants were convicted at trial on all charges and have been  
13 sentenced, both defendants have appealed those convictions and  
14 sentences, and those appeals are currently pending. Thus, in light  
15 of the possibility of a re-trial, the Court may properly weigh the  
16 prospect of potential prejudice against the strong presumption in  
17 favor of access. Information about this case, including information  
18 about the trial, was widely reported by the media. The 28 trial  
19 exhibits at issue were presented at trial, and several were included,  
20 and/or described, in the government's sentencing briefs. Given this  
21 previous public exposure, the Court may properly consider what, if  
22 any, potential added prejudice might result from the  
23 researcher/writer's dissemination of the 28 exhibits. See id. at  
24 1295. The Court may also properly consider whether voir dire  
25 (including the use of a jury questionnaire), the large jury venire in  
26 the Court's district, and instruction during any future jury  
27 selection will adequately cure any future contamination of a future  
28 juror. In addition, the Court may properly consider the impact on

1 any residual third-party privacy rights, in light of the  
2 researcher/writer's agreement to accept copies of the trial exhibits  
3 from which any third-party identity information is redacted.

4 **III. CONCLUSION**

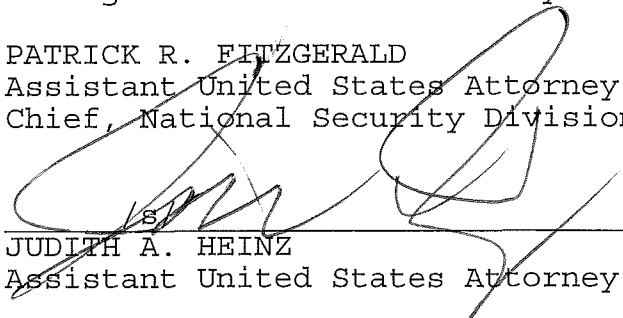
5 In conclusion, the government respectfully submits that the  
6 controlling authority supports the release of copies of the 28 trial  
7 exhibits listed in Attachment A to the researcher/writer,  
8 conditioned upon the described measures to protect third-party  
9 identity information.

10 Dated: July 24, 2017

Respectfully submitted,

11 SANDRA R. BROWN  
Acting United States Attorney

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13 PATRICK R. FITZGERALD  
Assistant United States Attorney  
Chief, National Security Division

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16 JUDITH A. HEINZ  
Assistant United States Attorney

17  
18 /s/  
DEIRDRE Z. ELIOT  
Assistant United States Attorney

19  
20 /s/  
JULIUS J. NAM  
Assistant United States Attorney

21  
22 Attorneys for Plaintiff  
UNITED STATES OF AMERICA

DECLARATION OF JUDITH A. HEINZ

I, Judith A. Heinz, declare as follows:

1. I am an Assistant United States Attorney in the National Security Division of the United States Attorney's Office for the Central District of California. I am one of the attorneys representing the government in this matter.

2. Attached hereto as Attachment A is a true and correct copy of a list of some of the exhibits that were admitted during the trial in this case, copies of which are now sought by a researcher/writer.

3. On July 21, 2017, I sent an e-mail to appellate counsel for defendant Nader Salem Elhuzayel ("defendant Elhuzayel") and defendant Muhanad Elfatih M. A. Badawi ("defendant Badawi") seeking their position on the government's ex parte application for an order authorizing the conditional release of copies of certain trial exhibits. Attached to that e-mail, I provided to both appellate counsel a copy of the government's ex parte application in its then-existing draft form, including Attachment A, that listed the trial exhibits sought by the researcher/writer. Set forth below are the responses I have received to my e-mail seeking appellate counsels' position on the government's ex parte application:

a. Defendant Elhuzayel's appellate counsel advised that he has no objection to the application.

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**Attachment A**

**U.S. vs. Elhuzayel and Badawi**  
**EXHIBIT LIST - Researcher/Writer Request**

<b>Exh. No.</b>	<b>Description</b>	<b>Additional Information</b>	<b>Notes</b>
15	Abu Hussain al-Britani Twitter Communications	Tweets by Abu Hussain al-Britani re Garland TX shooting	
15A	Translation of Exhibit 15		
16	Abu Hussain al-Britani Twitter Communication	Tweet by Abu Hussain al-Britani re Garland TX shooting	
16A	Translation of Exhibit 16		
17	Abu Hussain al-Britani Twitter Communications	Tweets by Abu Hussain al-Britani re Garland TX shooting	
17A	Translation of Exhibit 17		
18	Abu Hussain al-Britani Twitter Communications	Tweets by Abu Hussain al-Britani re Garland TX shooting	
19	Abu Hussain al-Britani Twitter Communications	Tweets by Abu Hussain al-Britani re Garland TX shooting (retweets Shariah is Light @atawaakul)	
19A	Translation of Exhibit 19		
21	Twitter Communication by Abu Rayan al'Arabee	Tweet about life being beautiful in this State (Khaliphate)	
21A	Translation of Exhibit 21		
22	Twitter Communication by Muhanad@darrulislam	Tweet about Muslims against the United Nations of Kuffr	
22A	Translation of Exhibit 22		
23	Tweets by Victory4ALLah to Shariah is Light @atawaakul	Tweets: allahuakbar brother was it you? [and] may Allah grant you jannat al ferdaus	
23A	Translation of Exhibit 23		
24	Tweet by Shariah is Light@atawaakul	Tweet: : The bro with me and myself have given bay'ah to Amirul Mu'mineen	
24A	Translation of Exhibit 24		
65	Badawi's communications with Abu Husain Brittani on 5/10/15	Badawi sends photo	redact references to communication platform
66	iMessages between Elhuzayel and Badawi on 5/14/15	New speech by al-Baghdadi	
67	iMessages between Badawi and Elhuzayel on 5/21/15	Ready for one-way trip	
68	Twitter Communications between Badawi and MM on 5/10/15	Badawi seeks travel advice for Elhuzayel	
68A	Translation of Exhibit 68		
201	Twitter Communication on 4/17/15 from Shariah is Light @atawaakul to Victory4ALLah	Tweet: May Allah give you food in jannah	

**U.S. vs. Elhuzayel and Badawi**  
**EXHIBIT LIST - Researcher/Writer Request**

202	Twitter Communication on 5/3/15 from Shariah is Light @atawaakul	Tweet: The bro with me and myself have given bay'ah #texasattack	
203	Victory4ALLah_ Screen Shot with @atawaakul and @_AbuHu55ain Twitter Communications	Tweets include I love you for the sake of Allah brother	
204	Victory4ALLah_ screenshot with Twitter Commuications to @atawaakul	Tweets include: allahuakbar brother was it you?	
205	Victory4ALLah_ Twitter Communications and Photographs regarding Elton Simpsion and Nadir Soofi	Tweets include: May allah accept our brother Mutawakil and Nadir Soofi as martyrs	
206	Victory4ALLah_ follows Abu Hussain al Britani on Twitter		
207	Victory4ALLah_ Twitter Communications with Shout Outs to follow and support brothers		
208	Repent2ALLah_ Twitter Communications	Tweets include: Come out O munafiqueen and May Allah destroy [US coalition] air support	
210	Muhanad @darralislam Twitter Screen Shots		
210A	Translation of Exhibit 210		
211	Muhanad @darrulislam Twitter Screen Shot	Tweet: Either You Are with Khalifa Ibrahim or Barack Obama	
212	Muhanad @darrulislam Twitter Screen Shot	Tweet: I Can't Wait to Make Hijra #oAllah help Us to Go to Alsham	
213	Muhanad @darralislam Twitter Communications		
367	Victory4ALLah_ Twitter Communications in Response to Garland, Texas Shooting		
368	Victory4ALLah_ Twitter Communications Abu Hussain Shout Outs		
370	Victory4ALLah_ Twitter Communication	Tweet: Murtadeen running out of food and water	