

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA

4 v.

S(7) 98 Cr. 1023

5 USAMA BIN LADEN, et al.,

6 Defendants.

7 -----x

8

New York, N.Y.  
April 30, 2001  
9:20 a.m.

9

10

11

12 Before:

13

HON. LEONARD B. SAND,

14

District Judge

15

16

17

18

19

20

21

22

23

24

25

5055

1

APPEARANCES

2 MARY JO WHITE  
United States Attorney for the  
3 Southern District of New York  
BY: PATRICK FITZGERALD  
4 KENNETH KARAS  
PAUL BUTLER  
5 Assistant United States Attorneys

6  
ANTHONY L. RICCO  
7 EDWARD D. WILFORD  
CARL J. HERMAN  
8 SANDRA A. BABCOCK  
Attorneys for defendant Mohamed Sadeek Odeh

9  
FREDRICK H. COHN  
10 DAVID P. BAUGH  
LAURA GASIOROWSKI  
11 Attorneys for defendant Mohamed Rashed Daoud Al-'Owhali

12 DAVID STERN  
DAVID RUHNKE  
13 Attorneys for defendant Khalfan Khamis Mohamed

14  
SAM A. SCHMIDT  
15 JOSHUA DRATEL  
KRISTIAN K. LARSEN  
16 Attorneys for defendant Wadih El Hage

17  
18  
19  
20  
21  
22  
23  
24  
25

5056

1 (Trial resumed)

2 THE COURT: I received a joint request to adjourn  
3 without date the motion we had scheduled for 4:30 concerning a  
4 motion to quash the subpoena to the Defense Department. So  
5 that is adjourned. I hope that shortly after lunch we will  
6 get what I hope will be the penultimate draft of the charge  
7 and verdict form.

8 I have considered the request made to strike overt  
9 act E and have reviewed the material in the record, in the  
10 government's letter of April 28, and I conclude that the  
11 government has made an adequate showing. So that overt act E  
12 is not stricken.

13 The first order of business when the jury comes in  
14 will relate to the striking of the testimony of Special Agent  
15 Yacone, and the government has submitted a letter dated April  
16 30, which unfortunately was not submitted to me until a few  
17 moments ago, in which the government asks that not all of the  
18 agent's testimony be stricken and expresses concern that the  
19 jury may draw significant adverse inferences from the fact  
20 that the court strikes the testimony. What I am not entirely  
21 clear on is how one tells the jury what is and is not  
22 stricken.

23 MR. FITZGERALD: Your Honor, my suggestion would be  
24 that what is stricken could be described as everything is  
25 struck but the fact that, for example, the US was there on a

5057

1 UN mandate and that there were 18 fatalities. Everything else  
2 is stricken. This way you don't remind them what they are not

3 supposed to consider.

4 MR. BAUGH: I am sorry, your Honor. The interpreters  
5 are not picking up.

6 MR. FITZGERALD: The microphone is unplugged.

7 THE COURT: What is the significance of 18 casualties  
8 if they cannot be attributed to defendants?

9 MR. FITZGERALD: First, your Honor, part we were  
10 going to figure out how we were going to prove up those  
11 casualties and when they occurred. It is our view that the  
12 statements made in the Harun computer report indicating that  
13 Al Qaeda feels responsible doesn't negate ultimate  
14 responsibility for those casualties.

15 THE COURT: But when you say 18 casualties, that's a  
16 flag, a trigger that you are not talking about casualties in  
17 general, you are talking about a specific incident in  
18 Mogadishu which everybody is familiar with.

19 MR. FITZGERALD: We could strike the 18, your Honor,  
20 and just establish that there were casualties. Otherwise it  
21 seems that we are going down the road of again proving the  
22 casualties through the Department of Defense witness.

23 (Pause)

24 THE COURT: I propose the following, which I think  
25 meets at least some of the government's concerns. I think

5058

1 beating one's breast as to why it was stricken or whose fault  
2 it is is counterproductive. We have stricken other things

3 before, and I think it is self-defeating. I suggest the  
4 following: The testimony you heard last Monday from Special  
5 Agent Yacone as to a battle in Mogadishu on October 3, 1993,  
6 and casualties received during that battle is stricken, and  
7 you are instructed to disregard it. The government does not  
8 contend that the evidence before you proves that any member of  
9 Al Qaeda or of the conspiracy charged in the indictment were  
10 involved in the events related in the testimony of Special  
11 Agent Yacone with respect to October 3, 1993. The government  
12 does not contend that any defendant now on trial participated  
13 in the actions described by Special Agent Yacone as to the  
14 battle on that date. Accordingly, that testimony is stricken.

15 MR. FITZGERALD: Your Honor, with all due respect,  
16 that is precisely what I am afraid of. Number one, you are  
17 basically charging the jury that Al Qaeda had nothing to do  
18 with that. What we want to argue to the jury -- we are now no  
19 longer proving something that is referred to in the documents  
20 in Harun's computer and Bin Laden's statements and Abu Hafs's  
21 statements, we are now charging the jury that those statements  
22 are wrong.

23 THE COURT: No, no. If this isn't clear, we are  
24 charging that the October 3 battle is not linked up to that.

25 MR. FITZGERALD: And that is precisely our concern,

5059

1 Judge.

2 THE COURT: That's your concern but that's the case,  
3 isn't it?

4           MR. FITZGERALD: I don't believe so, Judge. In terms  
5 of being responsible, Al Qaeda took responsibility for the  
6 attacks on the Americans in Somalia three different ways. Bin  
7 Laden took responsibility, the military command took  
8 responsibility, and Harun in the computer took responsibility.  
9 The problem is, they never said which date. The event it most  
10 fits with is October 3. There are only a few other events,  
11 many of which involve land mines or the mortar attack. We  
12 didn't agree with striking it, but if you strike it and say it  
13 had nothing to do with Al Qaeda, you are basically saying that  
14 the Bin Laden statement and the Abu Hafs statement and the  
15 Harun statement is wrong. We are charging the jury that  
16 basically the testimony is irrelevant and in fact the  
17 conspiracy didn't have anything to do with October 3. It is  
18 one thing not to say -- we are basically telling the jury that  
19 Harun is lying and Bin Laden and Abu Hafs is not telling the  
20 truth and Al Qaeda had nothing to do with it. I think that is  
21 not consistent with what the facts are and I think that would  
22 be heavily prejudicial to the government.

23           THE COURT: Give me another moment.

24           MR. SCHMIDT: May I be briefly heard on that issue?

25           THE COURT: After I come up with some other language.

5060

1           (Pause)

2           THE COURT: Shorter may be better. I propose the  
3 following: The testimony you heard last Monday from Special

4 Agent Yacone as to the battle which took place in Mogadishu on  
5 October 3, 1993, is stricken because of the absence of any  
6 evidence that any defendant or persons affiliated with any  
7 defendant was a participant in this particular event.

8 MR. FITZGERALD: Your Honor, again it is charging the  
9 jury as if we put something improperly before the jury.

10 THE COURT: Every time something is stricken it is  
11 because the court has reached the conclusion that something  
12 put before the jury should not have been.

13 MR. FITZGERALD: The problem is, if we didn't put  
14 forth any proof that there were deaths in Somalia, there would  
15 be nothing to refer to the events discussed by others. We are  
16 telling the jury everything that is not, when in fact Al Qaeda  
17 took credit for the attacks three different ways.

18 THE COURT: Which is why I am limiting it to these  
19 defendants, which is not Al Qaeda, it is these defendants -- I  
20 do say or persons affiliated with any defendant, but that was  
21 a participant in this particular event. I have tried to  
22 narrow it.

23 You will have an opportunity, I hope in a short  
24 period of time, to make the argument. But I don't think it is  
25 appropriate to do anything more than make the ruling, and, as

5061

1 I said, I think to do more than that is counterproductive.

2 I will read it again and you let me know if there is  
3 any particular change you want to make: The testimony you  
4 heard last Monday from Special Agent Yacone as to the battle

5 which took place in Mogadishu on October 3, 1993, is stricken,  
6 because of the absence of any evidence that any defendant or  
7 person affiliated with any defendant was a participant in this  
8 particular event.

9 MR. FITZGERALD: Your Honor, could we just say it is  
10 stricken then? In all fairness, we have testimony that Harun  
11 and Saleh were in a building when the helicopter incident  
12 happened.

13 THE COURT: I am not striking all the testimony. I  
14 am striking a portion of the testimony of one witness.

15 MR. FITZGERALD: In all fairness, that instruction to  
16 a juror sounds like October 3, 1993, has nothing to do with Al  
17 Qaeda whatsoever. First of all, it is saying as a matter of  
18 fact Al Qaeda had nothing to do with the attacks in Somalia,  
19 is the way I hear a juror hearing that.

20 MR. SCHMIDT: May I be heard, your Honor?

21 THE COURT: Yes, in a moment.

22 Yes.

23 MR. SCHMIDT: The testimony of the agent --

24 THE COURT: Before you do that, do you have any  
25 objection to the language I have proposed?

5062

1 MR. SCHMIDT: Before I make any further objection, we  
2 wanted, all counsel wanted to discuss this matter to try to  
3 see if we have a uniform position. But my concern initially  
4 to it, your Honor, is that there was testimony of an October 6



5 event as well that is not linked and also should be stricken  
6 and also should be part of your Honor's instruction to the  
7 jury.

8           As to the entire issue concerning Somalia and  
9 material that the government turned over to us today, I think  
10 all counsel wanted to convene.

11           THE COURT: Let's leave this then and I will give  
12 counsel an opportunity to confer. Let's move on to some other  
13 matters.

14           MR. RUHNKE: We are just trying to figure out how the  
15 government intends to proceed today. We received their  
16 letter.

17           THE COURT: That's where I want to go. Assuming that  
18 I will give this instruction, or this direction or similar to  
19 the jury, I received a letter from Mr. Schmidt indicating that  
20 there were some additional documents that he wished to offer  
21 in evidence and some stipulations. Are you calling the  
22 handwriting expert?

23           MR. SCHMIDT: That is an issue that I wanted to raise  
24 with your Honor and the government. We seem to have not  
25 resolved that. The handwriting expert would be testifying as

5063

1 to the handwriting comparison between the documents, the  
2 notebooks that I would be offering in evidence and notebooks  
3 previously offered in evidence and identified as Mr. El Hage's  
4 circumstantially, and then offer that exhibit into evidence.  
5 The notebooks contain much of the similar information found in

6 other notebooks seized from Mr. El Hage's home and from Mercy.  
7 Your Honor's previous rulings as to authenticity seem to  
8 indicate that unless there is a specific person testifying as  
9 to that particular item, that with an objection by the  
10 government you would bar its admission.

11 THE COURT: The mere fact that a document is written  
12 by a defendant does not make it admissible.

13 MR. SCHMIDT: That is correct, but the fact that it  
14 is written by the defendant, has numerous entries that are  
15 related to other things that are already in evidence, that it  
16 has been testified to by other witnesses, authenticated  
17 sufficiently to allow the jury to make a determination whether  
18 that document is a phony or is real, that is my understanding  
19 as to the authenticity law as it stands now, that it is a  
20 broad law to give the jury a wide scope to make their own  
21 determinations. I am just talking specifically as to those  
22 books. If the government is going to object and your Honor is  
23 going to sustain that objection, there is no reason for me to  
24 place the expert on the stand and go through the testimony as  
25 to comparing those documents with other documents.

5064

1 THE COURT: How many documents are there?

2 MR. SCHMIDT: These are three yellow-bound spiral  
3 notebooks.

4 THE COURT: Have you discussed this with the  
5 government at all?

6 MR. SCHMIDT: I have given it to them, I have  
7 mentioned that I am going to call an expert, I have given them  
8 a stipulation.

9 MR. FITZGERALD: If the expert will testify that the  
10 handwriting is Mr. El Hage or appears to be, we will not  
11 object to authentication and we can give it to the jury for  
12 what it is worth.

13 THE COURT: Are you representing that is what the  
14 expert will testify?

15 MR. SCHMIDT: He will testify that he has compared it  
16 to other documents offered in evidence and say that the  
17 handwriting is basically the same.

18 THE COURT: Is that sufficient?

19 MR. FITZGERALD: Yes, Judge.

20 THE COURT: So I take it you will not call the  
21 handwriting expert.

22 MR. FITZGERALD: I do want the live testimony. I  
23 want to ask questions. If he testifies as to what Mr. Schmidt  
24 says, I will not at that point oppose an authentication  
25 testimony.

5065

1 THE COURT: Is Mr. El Hage going to testify?

2 MR. SCHMIDT: He has no present intention of  
3 testifying. There are other issues that I wanted to address  
4 now.

5 THE COURT: I am sorry. No present intention? What  
6 does that mean?

7 MR. SCHMIDT: That means --

8 THE COURT: You mean five minutes from now he may  
9 decide that he wants to testify?

10 MR. SCHMIDT: We haven't completed our case.

11 THE COURT: As I understand your case, there is no  
12 reason why it can't be completed. You can't protract this for  
13 the simple sake of protracting a decision your client has to  
14 make. We made it clear Thursday in your client's presence  
15 that this was something which has to be resolved. We are now  
16 on El Hage's case. There has already been an objection on  
17 behalf of Odeh that you are injecting matters with respect to  
18 El Hage in their case that prejudice them. For what reason  
19 would you not be resting this morning? You have some  
20 documents and you have a handwriting expert. Then what else?

21 MR. SCHMIDT: Once I am done, your Honor, if Mr. El  
22 Hage remains in the position that he has informed me that he  
23 does not wish to testify, then we will rest. All I am saying  
24 is that at the point where Mr. El Hage's irrevocable decision  
25 is made not to testify is where we rest, and not before.

5066

1 THE COURT: All right, all right. Assuming that El  
2 Hage rests, then we will call on the other defendants.  
3 Anything else?

4 MR. SCHMIDT: Your Honor, there are other issues that  
5 we need to address concerning some evidence. I will address  
6 some of them and then Mr. Dratel will address some of the

7 other ones. There is testimony in the grand jury --

8 THE COURT: Let's not do that. Let's break now so  
9 that we resolve the matter of the Yacone testimony and so we  
10 do not keep the jury waiting.

11 MR. RUHNKE: Your Honor, before we do that, the issue  
12 with respect to the Yacone testimony may depend on how we  
13 proceed today. We had a letter this morning outlining four or  
14 five or six different ways on how the government might  
15 proceed. I think it is fair to ask what does the government  
16 plan to do once the defense case ends, assuming it ends this  
17 morning, which I am assuming it will.

18 MR. FITZGERALD: This letter was written early this  
19 morning. Nothing has changed. It is what it is. I will wait  
20 to hear from you and we will respond.

21 THE COURT: Five minutes, gentlemen. You have five  
22 minutes. You may repair to wherever you want to repair but I  
23 think this is festering more than is appropriate. Five minute  
24 recess.

25 (Recess)

5067

1 THE COURT: Who speaks for the defendants?

2 MR. RICCO: Your Honor, I am speaking on behalf of  
3 the defendant Mohamed Odeh. We object to the instruction as  
4 proposed. Our position is that if the testimony was properly  
5 stricken the testimony should be stricken and no party is  
6 entitled to an explanation as to why evidence is stricken.

7 THE COURT: So you would be content with my simply

8 saying to the jury that testimony is stricken.

9 MR. RICCO: On behalf of the defendant Mohamed Odeh,  
10 yes, your Honor, and part of that decision is based upon the  
11 fact that there is absolutely no unanimity from the defense as  
12 to what the court should do, and the simplest way to resolve  
13 it without duetting involved, in the interests of satisfying  
14 all the parties, including the government and the various  
15 defendants, is to simply strike it. Your Honor, I am only  
16 speaking on behalf of Mr. Odeh, your Honor.

17 THE COURT: I understand, but while there is great  
18 persuasiveness to the position that you take, and I take it  
19 the government would prefer also, there are lots of arguments  
20 that we have yet to address with respect to what the  
21 government may or may not be able to argue in its summation  
22 based on other evidence and other statements, and all we are  
23 really doing now is telling the jury that certain testimony is  
24 stricken. Anybody object to that?

25 So what I would say, the testimony you heard last

5068

1 Monday from Special Agent Yacone as to the battles which took  
2 place in Mogadishu on October 3 and October 6, 1993, is  
3 stricken and you are to disregard it. End of story. Let's  
4 bring in the jury.

5 MR. RUHNKE: One additional matter, your Honor.  
6 Would you please have your clerk collect the notes and  
7 photograph of Agent Yacone that was provided to the jurors so

8 that they don't have photograph and notes of the testimony.

9 THE COURT: We are not going to collect them. I will  
10 say, and if you have taken notes you should strike this  
11 testimony.

12 MR. RUHNKE: Thank you, your Honor.

13 THE COURT: Mr. Schmidt, you should understand that  
14 after you have introduced your documents and after you have  
15 had your handwriting expert, I will ask you in open court  
16 whether there is anything further on behalf of El Hage and you  
17 will then have to respond to that. Do you understand that?

18 MR. SCHMIDT: I understand. That is why I am raising  
19 this now. There are certain issues involving some evidence  
20 and some stipulations that we need to resolve now before we  
21 bring the jury in so I can do that.

22 THE COURT: Before we bring the jury in?

23 MR. SCHMIDT: Before we bring the jury in.

24 THE COURT: I thought the next order of business was  
25 your handwriting expert.

5069

1 MR. SCHMIDT: Yes, but --

2 THE COURT: Then we will recess after that.

3 MR. SCHMIDT: Thank you.

4 THE COURT: Procrastination can't be the order of the  
5 day.

6 I have a lot of notes from the jurors. I have  
7 requests with respect to notification of an employer that they  
8 will be sitting on Fridays. A question whether they will be

9 sitting May 25, Memorial Day weekend. Somebody has a medical  
10 appointment on May 11, an appointment the juror has had for  
11 three months. Or should I try to reschedule it. I think we  
12 will encourage rescheduling.

13 (Jury present)

14 THE COURT: Good morning, good morning.

15 JURORS: Good morning, your Honor.

16 THE COURT: I have a note somewhere that somebody had  
17 a problem on May 2. Is that still a problem for anybody? May  
18 2? I think that was something long since resolved.

19 Ladies and gentlemen, the testimony you heard last  
20 Monday from Special Agent Yacone as to battles which took  
21 place in Mogadishu on October 3 and October 6, 1993, is  
22 stricken, and you are instructed to disregard it. Please, if  
23 you have been taking notes, please indicate in your notes that  
24 that testimony has been stricken.

25 Mr. Schmidt, the defendant El Hage may call its next

5070

1 witness.

2 MR. SCHMIDT: Your Honor, we call Paul Osborn to the  
3 stand.

4 PAUL A. OSBORN,

5 called as a witness by the defense,

6 having been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SCHMIDT:



9 Q. Mr. Osborn, could you move the microphone in front of you  
10 and lift it up so you don't have to bend so much.

11 Mr. Osborn, can you tell us how you are employed.

12 A. I am self-employed.

13 Q. As what?

14 A. I am a forensic document examiner, more commonly termed a  
15 handwriting and typewriting identification expert.

16 Q. Could you tell us what that entails.

17 A. It entails the investigation and identification of most  
18 questioned document problems. This includes the  
19 identification of signatures, handwriting, hand printing, the  
20 age of documents, restorations of obliterations, decipherment  
21 of the erasures, and other such questions.

22 Q. Decipherment, D-E-C-I-P-H-E-R-M-E-N-T?

23 A. Correct.

24 Q. What type of training and background do you have for that?

25 A. I received most of my training from Albert Diaz, who was

5071

1 my father, and through studies of books by both him and Albert  
2 S. Osborn, who was my grandfather in a pioneering field.  
3 Besides the four years of training that I received from Albert  
4 Diaz, I also underwent four years of study, taking written and  
5 oral tests sponsored by the American Society of Questioned  
6 Document Examiners. This period of training was a requirement  
7 before being allowed to become a regular member in that  
8 society. I have continued my training throughout the years  
9 for more than 40 years now by annual society conventions in

10 various parts of the country of not only the American Society  
11 of Questioned Document Examiners but also the American Academy  
12 of Forensic Sciences. I am a regular active member in the  
13 American Society of Questioned Document Examiners. I was a  
14 past president from 1990 to 1992. And I am a fellow in the  
15 American Academy of Forensic Sciences.

16 In 1978, a certification board was set up by various  
17 groups throughout the country called the American Board of  
18 Forensic Document Examiners Incorporated. It was actually set  
19 up for courts and for attorneys as guidelines for whom to turn  
20 to in our field of identification. I became a member of that  
21 certification board, which requires renewal certification  
22 every five years, and have been certified since its inception  
23 in 1978.

24 Q. Have you been qualified to testify in courts in this state  
25 and in federal courts in other states?

5072

1 A. Yes, sir.

2 Q. Can you tell us some of the courts that you have been  
3 qualified as an expert.

4 A. I have been qualified on more than 450 occasions, mostly  
5 in the states of New York, New Jersey, and Pennsylvania and  
6 Connecticut. I have been qualified in 18 other states as well  
7 as in Canada, Puerto Rico, the Virgin Islands, and one time in  
8 the Panama Canal zone. I have been qualified in U.S.

9 Attorney's -- U.S. Southern District Court on at least 10 or

10 15 occasions over the years.

11 Q. Have you done work for both plaintiffs and defendants in  
12 civil cases and for law enforcement and for defendants in  
13 criminal cases?

14 A. Yes. For a long time I did this work for the state police  
15 of New Jersey, and as a result appeared frequently for  
16 prosecutors' offices in New Jersey. For the past 30 years I  
17 have been doing work for different district attorneys' offices  
18 and U.S. Attorney's Offices in the State of New York. Most of  
19 the work that I have done has been for the prosecution, but I  
20 do work for defendants on occasion when my services are  
21 requested, and whoever comes to my office first gets my  
22 services.

23 Q. Were you retained by the defendant Wadih El Hage to --

24 A. Excuse me.

25 Q. Were you retained by the defendant Wadih El Hage through

5073

1 my office to review certain notepads and to give your  
2 professional opinion?

3 A. I was retained through you to conduct certain examinations  
4 of documents relative to this matter.

5 MR. SCHMIDT: Your Honor, at this time I offer  
6 Mr. Osborn as an expert in forensic document examination.

7 MR. FITZGERALD: No objection.

8 THE COURT: Very well.

9 (Continued on next page)

10

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

5074

1 BY MR. SCHMIDT:

2 Q. Mr. Osborn, I'm going to bring up to you three notepads  
3 marked V 1, V 2, V 3, copies of those notepads, and a copy of  
4 a document marked V 5 that are photographic representations of  
5 the same notepads.

6 MR. SCHMIDT: If I may, your Honor?

7 THE COURT: Yes.

8 BY MR. SCHMIDT:

9 Q. Mr. Osborn, I have given you both original documents,  
10 copies of documents, and a document that has additional

11 markings on it. Do you recognize those documents?

12 A. Yes, sir. I recognize the photocopies.

13 Q. Do you recognize what the photo -- withdrawn.

14 Where do you recognize the photocopies.

15 A. They were submitted to me by your office on April 10th,  
16 this year.

17 Q. And did you examine those photocopies and the photocopies  
18 of other documents?

19 A. Yes, sir.

20 Q. I'm going to show you what has been marked as Government  
21 Exhibit 636D, which is an original, not a copy, of another  
22 notepad.

23 MR. SCHMIDT: If I may, your Honor.

24 Q. Did you receive other copies of notepads as well as the  
25 ones marked V 1, V 2 and V 3 for comparison purposes?

5075

1 A. I'm sorry, you have lost me.

2 Q. Other than the documents marked V 1, V 2 and V 3, that's  
3 the orange notepads?

4 A. Yes, sir.

5 Q. Did you receive copies of other pads to compare the  
6 handwriting between those and the other set?

7 A. Actually, I received a total of 146 reproductions of  
8 sheets from notepads. They were not marked other than given  
9 to me as bearing known exemplars of the individual.

10 Q. Looking at the blue pad in front of you -- the blue one,  
11 the small blue one in front of you, Mr. Osborn?

12 A. This book?

13 Q. Yes. Looking at that one, if you could just open it up  
14 and take a look at some of the pages.

15 A. I have.

16 Q. Are those similar to the ones that you reviewed as for  
17 comparison purposes of the copies that have been marked V 1, 2  
18 and 3?

19 A. If the copies that I received included the pages in this,  
20 then, yes, I did examine this.

21 Q. Can you tell us what was the manner of your examination of  
22 the documents that were sent to you?

23 A. The purpose of my examination of these documents was to  
24 determine whether or not reproductions, 31 reproductions of  
25 pages from a notepad could be identified as having been done

5076

1 by the writer of the entries in all of the other notepads,  
2 copies of which had been received.

3 Q. Were you able to do that?

4 A. Yes, sir.

5 Q. How were you able to do that?

6 A. I first examined and compared with one another all of the  
7 entries in the known pages of notepad writings, the purpose  
8 being to determine whether or not they demonstrated various  
9 handwriting identities that were distinctive and were  
10 repetitious.

11 An identification of handwriting is brought about by

12 a combination of general and individual developed habits of a  
13 particular writer, and before going through each one of the  
14 questioned items I had to first determine what that person's  
15 writing habits were and what the normal slight variations of  
16 writing habits were by that person.

17           No one writes exactly the same way each time like a  
18 rubber stamp impression. Everybody has some normal variation  
19 and, of course, some people have a little bit more variation  
20 than others.

21           In this particular case, it was determined that the  
22 writer had average to below average writing ability; that the  
23 general and individual character formations in many instances  
24 were quite distinctive and they were repetitious.

25           I then examined and compared these known writing

5077

1 identities in all of the notepads, or copies of notepads, with  
2 the reproductions of pages from a questioned notepad, being 31  
3 pages in total. I purposefully searched for any identities  
4 that were consistent with the known writings and searched for  
5 any identities in the questioned pages that were unexplainably  
6 different from the developed habits seen throughout the known  
7 writings.

8           It was my conclusion, my qualified conclusion,  
9 following these examinations that the preponderance of writing  
10 in the 31 questioned sheets was done by the same individual as  
11 the writer of all of the other known specimens that were  
12 submitted to me.

13           There were certain exceptions. In one instance, the  
14 seventh reproduction marked Q7, I felt that the evidence  
15 clearly demonstrated that eight lines of entries, handwritten  
16 entries, were done by a different individual.

17 Q. Could you just --

18 A. There were three other pages which are numbered pages 17,  
19 18 and 20 which I felt the evidence did not allow any  
20 identification.

21           I have indicated on each one of the pages that were  
22 attached to my brief report initials that are NI, which stand  
23 for "no identification," initials HPG, which stands for  
24 "highly probable as genuine," and initials PG, which stands  
25 for "probably genuine."

5078

1           The reason for these qualifications is twofold.  
2 Number one, I never examine the original documents, but  
3 copies, and it is important to examine original documents  
4 whenever possible. Secondly, some of these pages have only a  
5 few lines of writing on them, limiting the amount of  
6 comparison with a known material to make an identification.  
7 So that in some instances where there was a great deal of  
8 writing, the problem of identification was relatively easy,  
9 and in others it was more difficult, and in some I felt no  
10 identification should be made.

11           All of my conclusions are qualified because of the  
12 fact that I did not examine the original documents, but did



13 examine what I consider good reproductions.

14 Q. Is it, then -- did you reach a conclusion as to the --  
15 withdrawn.

16 Did you reach a conclusion as to the identity of the  
17 exhibits that have been marked as V 1, 2 and 3 compared to the  
18 other documents that were submitted to you with the exception  
19 of the few pages that you indicated?

20 A. Actually, there were more than two pages, but, yes.

21 Q. I said a few, the few that you mentioned.

22 A. Few, yes.

23 Q. What was that conclusion?

24 A. That they were done by the same individual. It is highly  
25 probable or probable that they were done by the same

5079

1 individual.

2 Q. Just so we can show the jury an example of a few of the  
3 pages, if we can show on the screen --

4 MR. SCHMIDT: Your Honor, at this time I move V 1, V  
5 2 and V 3 into evidence.

6 MR. FITZGERALD: No objection.

7 THE COURT: Received.

8 (Defendant El Hage Exhibits V1, V2 and V3 received in  
9 evidence)

10 MR. SCHMIDT: If we can show, for example, V 1-3 on  
11 the screen, please, and publish those to the jury. The third  
12 page of that document, please.

13 Make that a little darker. Thank you.

14                   Now, can we just show on V 2, can we show page V  
15 2-17 -- excuse me, V 2-16 and 17, for example. Can we show  
16 the next page. Now we show V 20 and V 22.

17                   Can we go to V 3 now, and please show V 3-12, V 3-17.

18                   And I have no further questions for this witness.

19                   THE COURT: Mr. Fitzpatrick.

20                   MR. FITZGERALD: Yes, Judge.

21                   THE COURT: Mr. Fitzgerald.

22                   MR. RICCO: Your Honor, I had a few questions of the  
23 witness.

24                   THE COURT: Yes.

25 CROSS-EXAMINATION

5080

1 BY MR. RICCO:

2 Q. Good morning, sir.

3 A. Good morning.

4 Q. You've been examining documents for over 40 years?

5 A. Yes, sir.

6 Q. During that time period you have examined documents at the  
7 request of law enforcement; isn't that correct?

8 A. Yes, sir.

9 Q. And I think that you've told us that you have been  
10 qualified as an expert in many courts, including this  
11 courthouse?

12 A. Yes, sir.

13 Q. I think that you told us that the field of forensic

14 handwriting includes handwriting identification, right?

15 A. Yes.

16 Q. It also includes the age of documents?

17 A. When possible, yes.

18 Q. Can you explain to the jury what does that mean,  
19 determining the age of a document?

20 A. Well, frequently it is important to determine whether or  
21 not a document, let's say dated in 1980, was actually written,  
22 prepared in 1980 or whether it was prepared two years ago, and  
23 there are different types of evidence that can demonstrate  
24 whether or not a document is of its age or it was made up at  
25 some later time.

5081

1 Q. How were you able to determine that, just generally?

2 A. Oh, there's a variety of things to look for. Number one,  
3 in any handwriting or handprinting itself that might be on  
4 these documents, there may be character formations that a  
5 person used 20 years ago but doesn't use today. The writing  
6 may demonstrate that the person doesn't have the physical  
7 ability to write as well today as he did 20 years ago.

8           The paper is also important because many papers  
9 contain watermarks. Many watermarks contain codes in the  
10 watermarks demonstrating the year that the paper was  
11 manufactured. Now, when you get a, let's say a last will and  
12 testament that's dated in 1980 but the water mark shows that  
13 the paper was made in 1985, then there's something wrong with  
14 that.

15 Q. Okay.

16 A. Sometimes things can be differentiated and some ink  
17 chemists, which I am not, can determine the age of particular  
18 inks, especially inks that have certain ingredients in them  
19 where it is known what ingredients they are and when they were  
20 added to these inks.

21 Q. Now, I don't mean to cut you off, but I think what you are  
22 telling us is that scientists, like yourself, have various  
23 means of being able to determine the age of a document?

24 A. Sometimes. Sometimes there's no evidence whatsoever to  
25 prove it.

5082

1 Q. Okay. But certainly the ability is there to try?

2 A. Yes, sir.

3 Q. Now, in your 40 years of experience, have you ever had the  
4 occasion to deal with the FBI?

5 A. Yes.

6 Q. And can you tell the jury whether or not the FBI has a  
7 handwriting identification unit?

8 A. Yes, they do.

9 Q. In fact, the FBI has one of the most state-of-the-art  
10 handwriting laboratories in the world; isn't that correct?

11 A. Well, it's certainly a very complete laboratory. I do  
12 believe that they have -- well, the last time I heard, they  
13 had 21 different forensic document examiners as well as  
14 another fairly large group of experts who worked solely with

15 the identification of checks, check forgeries.

16 Q. Okay.

17 THE COURT: Anything further, Mr. Ricco?

18 MR. RICCO: Yes, your Honor. Yes.

19 THE COURT: You may proceed.

20 BY MR. RICCO:

21 Q. With respect to handwriting identification, I think that  
22 what you told us is that what you look for is something called  
23 writing habits that the person whose writing that would use  
24 and that helps you detect the identity of the person's  
25 writing?

5083

1 THE COURT: I'll see counsel and the reporter in the  
2 robing room.

3 (Continued on next page)

4

5

6

7

8

9

10

11

12

13

14

15

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

5084

1 (In the robing room)

2 MR. RICCO: Judge, I have two questions and I'll sit  
3 down.

4 THE COURT: What is your question?

5 MR. RICCO: I'm just going to ask him whether or not  
6 documents are capable of being -- if he has a number of  
7 documents, does that help him with his identification. He  
8 probably will say "yes" and that will be it.

9 (Continued on next page)

10  
11  
12  
13  
14  
15

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

5085

1 (In open court)

2 MR. RICCO: Your Honor, I just have one or two more  
3 questions.

4 THE COURT: Yes.

5 BY MR. RICCO:

6 Q. Oftentimes a document, a book, will have entries from  
7 multiple individuals; isn't that correct?

8 A. What's your question?

9 Q. I'm sorry. Oftentimes when you are examining a document,  
10 it will have entries from multiple individuals; isn't that  
11 correct?

12 A. From multiple?

13 Q. Writers.

14 THE COURT: More than one person will --

15 A. In this instance, yes.

16 Q. And a part of your job will be to decipher whether or not

17 the document has been written by one person or has entries  
18 from many different people; isn't that correct?

19 A. In this problem, yes.

20 Q. And that's part of the science that you are engaged in as  
21 a handwriting expert; isn't that correct?

22 A. Yes, sir.

23 Q. Now, my final question is this: Is handwriting analysis  
24 and identification, is it something that's limited to the  
25 Western world, or are there handwriting experts who identify,

5086

1 for example, Arabic handwriting or handwriting in other  
2 languages?

3 A. There are.

4 MR. RICCO: I have no further questions. Thank you  
5 very much, your Honor.

6 MR. FITZGERALD: Thank you, Judge.

7 THE COURT: Mr. Fitzgerald.

8 CROSS-EXAMINATION

9 BY MR. FITZGERALD:

10 Q. Good morning, Mr. Osborn.

11 A. Good morning, sir.

12 Q. First of all, is it fair to say that you have analyzed  
13 other documents than the ones you have testified about here  
14 this morning?

15 A. That's correct.

16 Q. With regard to this case?



17 A. Yes.

18 Q. And with regard to the known exemplar or known examples of  
19 Mr. El Hage's writing, is that the blue book in front of you  
20 to your left that you worked from copies of?

21 A. I don't know because I was given no originals. I was only  
22 given photocopies, and if the photocopies include these pages,  
23 yes, then --

24 Q. Just looking at that book, does that appear to be the  
25 original for the copy?

5087

1 A. It seems to be similar, yes.

2 Q. And is there an exhibit sticker on that book? Is there a  
3 yellow sticker on that book?

4 A. It's in a glassine case which reads 636D.

5 Q. Okay. 636D. Thank you.

6 Now, one of the things you mentioned you compare is  
7 you look for identities between known writing and questioned  
8 writing, correct?

9 A. Correct.

10 Q. So that if a person writes the word the same way, and if  
11 the word is written the same way in the two different  
12 documents, that makes it appear that the same person wrote  
13 both, correct?

14 A. Well, that's one of the things that's done, yes.

15 Q. And sometimes you can compare two words and you can  
16 determine from that that it looks like the same person did not  
17 write both because the words are written differently, correct?

18 A. If there are unexplainable differences present between two  
19 writings, then no identification should be made.

20 Q. Okay. Let me just do a simple example. I'm going to hand  
21 you a blank pad we've marked as Government Exhibit 445. A  
22 blank yellow pad. I'm just going to ask you to write three  
23 things in your own handwriting on that pad.

24 The first thing is the word "pass," P-A-S-S, and if I  
25 could write it in script, lower case, no capital letters.

5088

1 A. You want me to write the word "pass" in script, lower case  
2 letters, three times?

3 Q. No, once.

4 A. Once.

5 Q. Yes.

6 A. My own natural writing?

7 Q. Yes.

8 A. Of course, you realize I'm a little nervous up here and it  
9 may not be too natural.

10 Q. Do your best.

11 A. Yes, sir.

12 Q. And if you could skip a line and write the word "business"  
13 in script, lower case, in your own handwriting. And then if  
14 you could skip a line and draw what is called an ampersand,  
15 A-M-P-E-R-S-A-N-D, which is a shorthand for the word "and,"  
16 just write an ampersand.

17 We'll call that Government Exhibit 445. If I could

18 take that back from you for a moment.

19           You wrote the word "ampersand." If you could just  
20 draw an ampersand.

21 A. Oh, you mean you want me to make an ampersand. I wrote  
22 out the word "ampersand."

23 Q. Okay. Now if I could take that back for a moment. I'm  
24 going to ask Mr. Francisco to place this on the Elmo, and from  
25 Government Exhibit 636D I would like to place first a

5089

1 particular page next to it for comparison purposes.

2           If we could focus on the word "pass," which on 636D,  
3 which is the small notebook to the right, the second line  
4 down, where it appears to say "let him pass by." If you could  
5 compare the word how "pass" is written on the second line --  
6 in fact, if we could move it right over next to the word  
7 "pass" with your handwriting, and tell us by examining the way  
8 the word pass is written if you can tell by that that --  
9 they're obviously two different authors, but how you come to  
10 that conclusion.

11 A. I don't understand your question.

12 Q. The word -- where you wrote "pass"?

13 A. Yes.

14 Q. The way you wrote "pass," how does it compare with the  
15 word "pass" written on the second line on the right?

16 A. The word "pass"?

17 Q. Yes.

18 A. It's quite different.

19 Q. Okay, and can you -- what is the most notable difference?

20 A. What?

21 Q. What is the most notable difference in the way the word

22 "pass" is written on the right versus on the left?

23 A. Formations of the characters.

24 Q. Now if we could turn to the last page -- Mr. Francisco

25 knows the page -- and we look at the word "business" and then

5090

1 ampersand. I believe the word "business" is crossed out, but

2 visible.

3 If you look on the right side, third line from the

4 bottom, the third line containing writing, do you see the word

5 "business" in that crossed out line?

6 A. It's very blurry, but I see it.

7 Q. And how does that compare with the way you write the word

8 "business"?

9 A. It's quite different.

10 Q. Okay. And if you look at the first -- underneath the word

11 71202219, the second line, at the end of the sentence there

12 appears to be an ampersand, do you see that?

13 A. No, it's -- yes, I see it.

14 Q. And how does that ampersand compare with the ampersand you

15 wrote?

16 A. It's quite different.

17 Q. And the one on the right was given to you as the known

18 quantity of Mr. El Hage's writing, that's 636D?

19 A. I believe so. A reproduction of it was.

20 Q. Okay. Now let me approach you with what has been marked  
21 as Government Exhibit 611. I'll approach you with 611 and  
22 611C, and I'll ask you if 611C appears to be a photocopy  
23 before testing of what is Government Exhibit 611.

24 A. It appears to be at a quick glance, yes.

25 MR. FITZGERALD: And now, your Honor, I would offer

5091

1 611C just as photocopy of 611 before testing?

2 THE COURT: Yes, received.

3 (Government Exhibit 611C received in evidence)

4 BY MR. FITZGERALD:

5 Q. Now if I could take 611C and with the notebook, and I  
6 would like to display on the screen a comparison of the entry  
7 of the word "pass," P-A-S-S, from the blue notebook,  
8 Government Exhibit 636D, with a comparison of the word "pass"  
9 in 611C. And we'll focus on the word "pass" the third line  
10 above the word "sincerely" on the bottom. We're going to  
11 magnify both, and I ask you to compare the word "pass" on the  
12 item on the left and the item on the right and whether or not  
13 they compare.

14 A. They're very similar at a quick glance.

15 Q. I sorry?

16 A. At a quick glance, looking at them, they're very similar,  
17 those two particular words.

18 Q. Okay. Would they appear to be written by the same author?

19 A. I wouldn't say.

20 Q. But they appear to be very similar?

21 A. Yes.

22 Q. Now if we could also display -- let me approach you with  
23 Government Exhibit 437 -- 437A, pardon me, and we'll display  
24 on the screen on the left 437A and on the right we'll go to  
25 that other page of Government Exhibit 636D and we'll focus on

5092

1 the word -- first focus on the word "business" -- I'm sorry,  
2 the ampersand, and on the left focus on the ampersand. And  
3 how do they compare, sir?

4 A. They're basically quite similar.

5 Q. Now, sir, you have in front of you Government Exhibit --  
6 Defense Exhibit V 1, V 2 and V 3, correct, the exhibits that  
7 were received this morning?

8 A. Yes, sir.

9 Q. And those are the ones that, with exceptions you have  
10 noted, you determined to be written by the same author as the  
11 other El Hage notebook, correct?

12 A. Yes, sir.

13 Q. I would like to direct your attention to particular pages  
14 if you have in front of you page V 3-13, the 13th page of  
15 Exhibit V 3.

16 Is that a page that you determined to be highly  
17 probably written by El Hage?

18 A. The one that I have marked Q13, yes. I'm looking at the  
19 wrong page.

20 Q. Why don't you take your time and make sure we're looking  
21 at the right page.  
22 A. You said it was marked Q13?  
23 Q. No, I'm sorry, V 3. The 13th page of V 3. I don't think  
24 there's a Q noted on it. It's one of the documents you put in  
25 this morning, was received this morning.

5093

1           Let me take a look at what you have.  
2 A. I don't know which page it is.  
3 Q. And hopefully the page I'm showing you corresponds to the  
4 page on the screen to your left.  
5 A. Yes, it does.  
6 Q. Is that one of the pages that you identified as being  
7 highly probably written by Wadih El Hage?  
8 A. No.  
9 Q. No. Okay.  
10 A. This was given to me as an exemplar, as a known specimen  
11 of one individual.  
12 Q. Okay. So, for your purposes of your analysis, you assumed  
13 that this page was written by Wadih El Hage?  
14 A. Well, it was given to me as a known specimen. I did not  
15 take for granted that every single entry on every page of 146  
16 pages was necessarily done by one individual, but that the  
17 preponderance of these pages contained the writing of the  
18 known writing of one person, and I used those specimens for  
19 comparison with the 31 pages that I previously referred to.  
20 Q. Okay. So at the bottom of that page, those entries,

21 there's -- you see an "Albert," you will see something with a  
22 T-A-F-A and then something that says Ihab, I-H-A-B, Ali?  
23 A. Yes, I see it.  
24 Q. Those were what you understood to be Wadih El Hage's  
25 handwriting, correct?

5094

1 A. Those were given to me as specimens, yes.  
2 Q. And now I'll have one last question. If you could look at  
3 the page you marked Q14?  
4 A. Yes, sir.  
5 Q. Is that a page that you determined to be highly probably  
6 written by Wadih El Hage?  
7 A. Yes, sir.  
8 Q. I ask you to look in the middle of the page. There's an  
9 entry S-I-T-A-H. Do you see that in the left?  
10 A. Yes, I do.  
11 Q. What do you see to the right of that?  
12 A. I see figures.  
13 Q. I ask you to compare those figures with Government Exhibit  
14 598 and see whether the numbers match up. Just read out loud  
15 the numbers next to "Sitah."  
16 A. Yes, sir.  
17 Q. Could you just read them into the record, what the numbers  
18 are in the book?  
19 A. They are the same numbers.  
20 Q. 873682505331?



21 A. Yes, sir.

22 MR. FITZGERALD: Thank you. Nothing further.

23 THE COURT: Anything further of this witness?

24 MR. SCHMIDT: No, your Honor.

25 THE COURT: Thank you, Mr. Osborn. You may step

5095

1 down.

2 THE WITNESS: Yes, sir.

3 (Witness excused)

4 THE COURT: Mr. Schmidt?

5 MR. SCHMIDT: We need to deal with some issues, your  
6 Honor.

7 THE COURT: We'll take our midmorning recess at this  
8 point.

9 (Jury not present)

10 THE COURT: Mr. Schmidt.

11 MR. SCHMIDT: Your Honor, there are two items or set  
12 of items that I wish to offer into evidence and, obviously,  
13 based on your Honor's prior rulings concerning authenticity, I  
14 wanted to raise before I offer them and state the basis of it.

15 One is a set of documents that are the non-plain  
16 paper fax and two that may be plain paper faxes or copies  
17 thereof of documents relating to ZTS and Cycim dealings in  
18 1995 and I believe 1996. Each one of these documents have a  
19 header from a fax machine that authenticates the date and time  
20 of the transmission of those documents.

21 THE COURT: What is the subject matter of the

22 documents?

23 MR. SCHMIDT: These are the business dealings  
24 concerning the tractors for Sudan that Mr. El Hage was  
25 negotiating in 1995 and 1996, and because of the facsimile

5096

1 notations on top, it is my belief that notwithstanding your  
2 Honor's order, that these documents are sufficiently  
3 authenticated to go to the jury in addition to all the other  
4 documents that came in related to the subject and other  
5 writings related to them.

6 Before I obviously offered them, I wanted your  
7 Honor's approval because I did not want to offer them based on  
8 your Honor's last week ruling.

9 MR. FITZGERALD: Your Honor, I'm objecting to the  
10 authentication since no one is authenticating them, and the  
11 reason I told Mr. Schmidt I'm objecting to that is that these  
12 materials were obtained last fall when there was a discovery  
13 order to turn over reverse discovery and we got not a single  
14 page and then we received documents maybe three weeks ago from  
15 the defense, and not knowing that they were not going to call  
16 a witness to authenticate them, we were left with a stack of  
17 documents we didn't know where it came from or what, if  
18 anything, to follow up on.

19 THE COURT: Are these documents being offered for the  
20 sole point of showing that Mr. El Hage was engaged, to the  
21 extent indicated by the documents, in commercial business

22 affairs?

23 MR. SCHMIDT: Well, I think there are a sufficient  
24 number of documents that relate to that. The importance of  
25 these show the time frame of the communications, that is, 1995

5097

1 and 1996. So, therefore, Mr. El Hage's contacts with people  
2 related to Bin Laden in 1995 and 1996 can be shown to be  
3 related also to the ongoing business activities.

4 In the Grand Jury the government had questioned him a  
5 number of times about the dates and times of his contacts. We  
6 are just trying to set forth --

7 THE COURT: They are being offered -- and please  
8 let's be very specific here because I don't want to be faced  
9 with a circumstance on which documents are received on one  
10 theory or for one purpose and then discover during closing  
11 argument some other argument is being made.

12 Are these documents being offered for the sole  
13 purpose of showing that on the dates indicated Mr. El Hage was  
14 involved in commercial transactions reflected in the  
15 documents?

16 MR. SCHMIDT: Yes, on behalf of Bin Laden's  
17 businesses.

18 THE COURT: These were faxed by -- is this a private  
19 fax or is this taken from a commercial fax?

20 MR. SCHMIDT: The headings from these faxes indicate  
21 ZTS Trading's telephone number on the top. They indicate also  
22 Mr. El Hage's telephone number. It obviously says "from" and

23 the phone number is Mr. El Hage's phone number that's in  
24 evidence. So these are all documents that either went one  
25 direction or the other that were obtained through -- these are

5098

1 not all documents from ZTS. These are also documents the  
2 government gave in discovery as well but are not putting  
3 through their discovery.

4 THE COURT: Is that the totality of what you wish to  
5 introduce?

6 MR. SCHMIDT: On those ones, yes.

7 THE COURT: Let me hear what else you want to  
8 introduce.

9 MR. SCHMIDT: The other, your Honor, is that upon  
10 further review of the Grand Jury testimony, the government  
11 questioned Mr. El Hage in the Grand Jury in September 1997  
12 concerning approximately \$7,000 given by Bin Laden to him  
13 related to a project that Mr. El Hage described as an Al Eid  
14 Feast in Mombasa, and the government spent approximately four  
15 pages questioning him about that as if it was a ruse and not a  
16 reality, receiving that money --

17 THE COURT: Is that one of the perjury counts in the  
18 indictment?

19 MR. SCHMIDT: I do not --

20 MR. FITZGERALD: No.

21 MR. SCHMIDT: -- believe it's a perjury count, but  
22 obviously the government is relying on the totality of the

23 Grand Jury testimony to show that Mr. El Hage lied in general.  
24 That's the reason why your Honor has let in so much Grand Jury  
25 testimony in the first place.

5099

1 I wanted to offer a few photographs of indeed the  
2 slaughtering of the goats. The photograph reflects a date of  
3 April 28, 1996.

4 THE COURT: What is it you are offering now?

5 MR. SCHMIDT: Photographs.

6 THE COURT: You are offering photographs of goats?

7 MR. SCHMIDT: It's basically the slaughter that leads  
8 up to the feast of the Al Eid that the government questioned  
9 Mr. El Hage in the Grand Jury. If your Honor recalls,  
10 during --

11 THE COURT: May I see photographs, please?

12 MR. SCHMIDT: Yes.

13 As your Honor recalls, during some of our discussions  
14 about whether the government contests that he's doing NGO  
15 activity or business activities, they said that he didn't, and  
16 it seemed to be part of your ruling to limit the amount of  
17 documents that came in. In the Grand Jury the government made  
18 it very clear that they did dispute that he was doing some of  
19 this activity, and this reflects directly on that activity.

20 What I will also note, your Honor, are the dates of  
21 those photographs, that obviously it's clear from the record  
22 that Mr. El Hage has been in the United States since September  
23 1997, that he testified in the Grand Jury about this activity

24 the following day arriving in the United States.

25 THE COURT: Now, I want to be very clear here because

5100

1 I want to make a ruling and then I want to resolve these  
2 matters. You have one set of documents designed to show that  
3 between 1995 and 1996, Mr. El Hage was engaged in a commercial  
4 transaction involving tractors. Now you are offering these  
5 photographs. Is that what is being offered?

6 MR. SCHMIDT: Yes.

7 THE COURT: And these photographs are to show that  
8 animals were slaughtered behind a slate which says "Help  
9 Africa" and has a date 28-4-96, and that's being offered to  
10 show that Help Africa did engage in slaughtering of goats?

11 MR. SCHMIDT: Engaged in the project as testified to  
12 by Mr. El Hage.

13 THE COURT: But what this photograph shows is that  
14 goats were being slaughtered in front of a blackboard which  
15 says "Help Africa" and has a date.

16 MR. SCHMIDT: Yes.

17 THE COURT: Okay.

18 MR. SCHMIDT: And the evidence that it corroborates  
19 his testimony in the Grand Jury.

20 THE COURT: What else is it that you wish?

21 MR. SCHMIDT: Now Mr. Dratel is going to deal with  
22 the other issues. I understand your Honor's rulings before.  
23 We're going to prepare a document with the exhibits that we

24 would have offered but did not offer because of your Honor's  
25 ruling on authenticity, and we'll have that in short order.

5101

1 Thank you.

2 THE COURT: Mr. Dratel.

3 MR. DRATEL: Yes, your Honor, this is about  
4 stipulations. There are two stipulations about which we're at  
5 odds with the government. One is a question of matters that  
6 the government wishes to add to the stipulation. In other  
7 words, they would condition their stipulation on certain  
8 information being -- it's about the cross-examination of  
9 Mr. Al-Fadhli and his denial of certain -- that he made certain  
10 statements to U.S. officials during his debriefings.

11 THE COURT: Yes.

12 MR. DRATEL: There are four in a stipulation that are  
13 in the statements that we would call the persons who debriefed  
14 him to establish those prior inconsistent statements, that he  
15 in fact did say something and he denied saying it.

16 THE COURT: Yes.

17 MR. DRATEL: The government wants to put in --  
18 there's one in particular that we are in disagreement on. The  
19 government wants to put in other information that Mr. Al-Fadhli  
20 provided in the course of his debriefings that we believe is  
21 not a prior consistent statement that can be admissible for  
22 two reasons, one of which is it's not -- the testimony of an  
23 agent in that regard would be with respect to, did  
24 Mr. Al-Fadhli say X, and that would be it. It's not a question

25 of rehabilitation through some other statement, and Rule 801

5102

1 on prior consistent statements requires that the defendant  
2 have an opportunity to cross-examine the declarant -- I mean,  
3 the witness. In this case, the statements that the government  
4 wants to put in were never the subject of either his direct or  
5 his cross-examination. So we don't have that opportunity to  
6 cross-examine. It doesn't fall under the rule for prior  
7 consistent statements.

8 In addition, it's also at a time that we believe that  
9 he already had a motive to fabricate or exaggerate at that  
10 time. So it wouldn't fall under 801.

11 THE COURT: So what you want to do is you want to  
12 introduce a stipulation that Al-Fadh1 said X and the  
13 government is saying it will not stipulate to that unless it  
14 can also show that Al-Fadh1 also said Y and Z.

15 MR. DRATEL: Correct.

16 THE COURT: Is that it?

17 Okay. All right. I'm trying to get the totality of  
18 issues.

19 MR. DRATEL: Sure. And by the way, also, just on  
20 that stipulation, one of the reasons that it is a stipulation  
21 is because of some CIPA issues.

22 THE COURT: Okay.

23 MR. DRATEL: And with respect to the other one is the  
24 Foreign Intelligence Surveillance Act, electronic surveillance



25 conducted against Mr. El Hage August and September of 1998.

5103

1 THE COURT: Yes. This is a separate issue.

2 MR. DRATEL: This is a separate stipulation. If your  
3 Honor wants me to read your Honor the stuff on the Al-Fadh1 --

4 THE COURT: Just tell me what the issue is.

5 MR. DRATEL: The issue on the FISA stip is that we  
6 wanted a stipulation as to just the date parameters and the  
7 phone numbers and places that were the subject of the  
8 electronic surveillance in August and September of 1998  
9 following the bombing, about a month between the time of the  
10 bombing, essentially, and Mr. El Hage's arrest on September  
11 16.

12 The government disputes the relevance of that. The  
13 relevance is that -- and these are the tapes that have been  
14 destroyed so they're not available in terms of producing  
15 them -- is that there's no contact between Mr. El Hage and  
16 anyone in the conspiracy or anyone remotely related to the  
17 conspiracy and there is no discussion of anything  
18 incriminating in that conversation with respect to anything  
19 else.

20 So our argument would just be that these wiretaps  
21 existed during that time period as further sort of coverage of  
22 Mr. El Hage's activity during that period.

23 THE COURT: Is that it?

24 MR. DRATEL: That's it. Those are the issues.

25 THE COURT: There are the four issues. The first

1 issue is a set of documents which El Hage wishes to offer as  
2 evidence that in 1995 and 1996 he was engaged in business  
3 dealings with respect to tractors, and the government's  
4 objection is authenticity?

5 MR. FITZGERALD: Yes, we're not waiving the  
6 authenticity because it was a discovery violation. Basically,  
7 your Honor, we kept pounding the table to say can we have  
8 discovery, we didn't get it, and then finally we get this  
9 dumped on us.

10 THE COURT: That's the only objection?

11 MR. FITZGERALD: Yes.

12 THE COURT: If we adjourn the case for three months,  
13 three weeks, whatever it is, since these were sent by fax,  
14 some authentication would be available, right?

15 MR. FITZGERALD: Yes, sir. My argument would be they  
16 waived --

17 THE COURT: But the only reason why they are being  
18 offered, and the jury will be told that the only reason they  
19 are being offered, is as evidence that in 1995 and 1996 Mr. El  
20 Hage was engaged in business dealings with respect to  
21 tractors.

22 I'll allow that.

23 With respect to the photographs of Help Africa, first  
24 of all, there are two, four, seven photographs, and I take it  
25 one would be sufficient.

1           MR. SCHMIDT: Probably two, your Honor. Two  
2 different kinds of things.

3           THE COURT: And they are to show that Help Africa in  
4 fact was engaged in the slaughtering of goats on those dates?

5           MR. SCHMIDT: Not the slaughtering goats. It was  
6 engaged in the festival of that particular date.

7           THE COURT: Maybe some Arab interpreter could come  
8 forward, please, and translate for me what is on the sign.

9           The photograph shows what the photograph shows,  
10 right?

11          MR. SCHMIDT: Your Honor, it would -- I understand  
12 it's not a direct statement of the festival. We join that  
13 with Mr. El Hage's Grand Jury testimony and other documents  
14 that have been submitted.

15          THE COURT: Could you, sir, please read out loud for  
16 me what is written on this blackboard in Arabic?

17          THE INTERPRETER: "Help Africa, the Al Eid," which is  
18 the feast, "Al Eid sacrifices. Kenya, Mombasa."

19          MR. SCHMIDT: I adopt the translation, your Honor, as  
20 part of the record.

21          THE COURT: All right.

22          THE INTERPRETER: Same thing on this one.

23          THE COURT: And these are going to be offered with no  
24 witness on the stand, and just being offered?

25          MR. SCHMIDT: Yes.

1 THE COURT: Okay.

2 MR. FITZGERALD: Your Honor, may I see the  
3 photographs?

4 THE COURT: Surely.

5 May I see the stipulation that El Hage proposes?

6 MR. DRATEL: Yes, your Honor. The particular parts  
7 in bold are the parts -- I think it's specifically number C --  
8 D? D. D, your Honor, is the one that we're in  
9 dispute over, in the bold.

10 THE COURT: The bold is what the government proposes  
11 be included?

12 MR. FITZGERALD: Yes. Under D, the first sentence,  
13 that there were reports for September 24th that Mr. --

14 THE COURT: But what about A? A, I have the first  
15 couple of sentences.

16 MR. FITZGERALD: I think we agreed on A in the bold.

17 MR. DRATEL: A we have agreed on.

18 MR. FITZGERALD: The only dispute is in D.

19 THE COURT: Only dispute is in D.

20 MR. FITZGERALD: It breaks down to two sections, one  
21 being the first sentence, and in that regard I would note that  
22 E sets forth that Mr. Al-Fadh1 was interviewed 23 times from  
23 September 6 and October 21. Not including the first line of D  
24 makes it appear that the first time that Mr. Al-Fadh1 talked  
25 about Wadih was October 21, and then to the extent that they

1 point out inaccuracies in the description, it appears to  
2 lead -- could lead the jury to believe that Al-Fadh1 did not  
3 describe the correct Wadih.

4           Taking the first sentence, which describes him as a  
5 Lebanese with United States citizenship who worked at Taba  
6 Investment is fair, and then the latter part where he says the  
7 Wadih he knew traveled to the U.S. and Russia on unknown  
8 business fairly balances the statement that he was uncertain  
9 if Wadih served in Afghanistan. And I think that it's in the  
10 interest of completeness, if were going to get a prior  
11 statement in, we should put a fair summary of it in.

12           THE COURT: I would allow it on the theory of  
13 completeness, and it seems to me the question comes down to  
14 whether it's one stipulation or two.

15           MR. DRATEL: Your Honor, if I may, the specific ones  
16 that are -- particularly the "Wadih traveled to the United  
17 States and Russia on unknown Bin Laden business," he never  
18 testified to that.

19           THE COURT: You're talking about D?

20           MR. DRATEL: Yes, that's not an identification, your  
21 Honor, that's a fact that he testified to that we had no  
22 opportunity to cross-examine Al-Fadh1 on. And I don't think  
23 there's any basis for that to come in.

24           MR. FITZGERALD: Your Honor, it's the same report.

25           THE COURT: I have ruled that for purposes of

1 completion, if the latter part of D comes in, the government  
2 may introduce the first sentence of D.

3 MR. DRATEL: Your Honor, I'm sorry, your Honor,  
4 because we're not talking about the first sentence of D now.

5 THE COURT: I thought we were.

6 MR. DRATEL: We're talking about the last sentence of  
7 D right now.

8 MR. FITZGERALD: The first sentence was the fact that  
9 he mentioned him in September 24 and the last sentence was the  
10 one that he traveled to the U.S. and Russia, which  
11 counterbalances the fact that he did not know if he was in  
12 Afghanistan.

13 THE COURT: Yes.

14 MR. DRATEL: But your Honor --

15 THE COURT: That's my ruling. That's my ruling.

16 MR. DRATEL: Well, what if we withdrew the  
17 Afghanistan part, would you withdraw the rest of that  
18 sentence?

19 MR. FITZGERALD: I think that's misleading.

20 MR. DRATEL: Then, your Honor, then there's no basis  
21 for putting in travel to U.S. and Russia. If we withdrew the  
22 part about he served in Afghanistan, Mr. Fitzgerald said the  
23 first part of that sentence was to rebut the second part of  
24 the sentence.

25 THE COURT: But the whole purpose is to make an

1 argument that Mr. Al-Fadh1 was confused as to his  
2 identification of El Hage or he had somebody else in mind or  
3 he didn't have sufficient opportunity.

4 MR. DRATEL: But, your Honor, if I may make the  
5 record, your Honor. We're talking here about travel to the  
6 United States and Russia. It has nothing to do with  
7 identification. It's a description of conduct. He never  
8 testified to that, so you can't put that in through a hearsay  
9 statement that's not in response to an inconsistent statement,  
10 number one, and number two is that that is not an  
11 identification of Mr. El Hage. That is a description of  
12 conduct. That has nothing to do with Wadih.

13 THE COURT: What purpose is going to be made of this  
14 in closing statement?

15 MR. DRATEL: In closing --

16 THE COURT: Why is this being offered for any purpose  
17 other than to say that Al-Fadh1's identification of El Hage is  
18 subject to question?

19 MR. DRATEL: But, your Honor, that does not -- I just  
20 wanted to -- that doesn't go to that.

21 THE COURT: You have your exception and my ruling is  
22 that if you wish to introduce the material not in bold face in  
23 the proposed stipulation, which we'll mark as Court Exhibit  
24 Roman I of today's date, I will, for purposes of completion,  
25 permit the government to introduce the fact that the

1 statements appearing in bold type in D were also included in  
2 Mr. Al-Fadhli's report.

3 That leaves the FISA, and the issue is the dates and  
4 telephone numbers.

5 MR. FITZGERALD: May I be heard just on the goats  
6 issue, which I never got to address?

7 THE COURT: Yes.

8 MR. FITZGERALD: I object to the goat pictures.  
9 First of all, if they are so critical, they don't prove who  
10 paid for the feast and prove the truth of his testimony, and  
11 if they were so critical, why didn't they comply with the  
12 discovery obligations? Why are we finding out as the case  
13 closes?

14 THE COURT: They are going to be introduced. There's  
15 going to be no witness, and if any argument is made based on  
16 those photographs which are not supported by those  
17 photographs, I will cut it off.

18 MR. SCHMIDT: I have no intention other than doing  
19 that, but I want to respond to the government's constant claim  
20 about violation of the discovery.

21 THE COURT: No. You may do that, but not now. You  
22 may do that, but not now. That has not been the basis of my  
23 ruling. If you listen to my rulings, you will see that I'm  
24 not basing my rulings on the failure of the defendants to  
25 engage in appropriate reciprocal discovery.



1           Now, with respect to the FISA, you want a stipulation  
2 which says what? Is there a written stipulation?

3           MR. DRATEL: Yes, your Honor.

4           THE COURT: May I see it, please?

5           (Pause)

6           THE COURT: Do you have a copy?

7           MR. FITZGERALD: I do have a copy, not the language  
8 of the stipulation. I can tell you what the issue is.

9           MR. DRATEL: Here it is, your Honor.

10          THE COURT: Yes, what is the issue?

11          MR. FITZGERALD: Your Honor, first of all, the data  
12 was lost due to an electronic glitch, but as we set forth in  
13 the pretrial motions, that was not an exculpatory wiretap.  
14 There were conversations on that wiretap, first, where Mr. El  
15 Hage, in response to the bombing, made a comment when he heard  
16 that his wife recognized someone from the embassy being killed  
17 who no more worked for her. The son ran home excited, saying  
18 we saw on T.V. that Abu Abdallah was going to talk about doing  
19 something a few months ago. They talked on the phone about  
20 making up codes so that people couldn't figure out what would  
21 be said. They talked on the phone about evading surveillance.

22          Now, because the wiretap was a new technology and the  
23 data was erased, we're not offering it. What is the probative  
24 value of telling the jury that there is a wiretap that they  
25 hear nothing about? I don't see what the probative value is

5112

1 and it's outweighed by the unfair prejudice. The tapes are

2 lost. We're not using the inculpatory portion, but what is  
3 the relevance of saying there was a wiretap?

4 THE COURT: And the response to that is what?

5 MR. DRATEL: There's no contact with anybody related  
6 to this case. All the conversations he's talking about are  
7 Mr. El Hage and his wife. They're not inculpatory, your  
8 Honor. He's taking out of context of a wide range of  
9 month-long conversations.

10 THE COURT: Are they exculpatory?

11 MR. DRATEL: We don't know because we never got the  
12 tapes. What we got were summaries, so we don't know. This is  
13 like, you know, we find out that the tapes in this case -- the  
14 tapes that are put in are missing, too. We're at a distinct  
15 disadvantage.

16 THE COURT: The bottom line is you want to prove that  
17 there were recorded conversations between certain dates, the  
18 contents of which are not known to either party.

19 MR. DRATEL: The government knows because they made  
20 summaries, and one would -- and the agent listened. One would  
21 assume that if the agent listened and he heard something that  
22 they could use against Mr. El Hage, that the agent would have  
23 written it down.

24 THE COURT: Yes.

25 MR. DRATEL: But we can't make the same assumption if

5113

1 it's exculpatory, that the agent would have written it down.

2 THE COURT: And you can call the agent to testify  
3 about his notes, about his summary, yes?

4 MR. DRATEL: We can call an agent as to what, he took  
5 notes?

6 THE COURT: You say there is some relevance to this,  
7 so let's try and find out what the underlying relevance is and  
8 then we can address the method by which it will be introduced.  
9 I understand what you are saying is --

10 MR. DRATEL: It's really a contact issue. There is  
11 no contact with anyone related to the conspiracy in the case,  
12 no communications.

13 THE COURT: You want a stipulation that the  
14 government has -- that there is no evidence that electronic  
15 surveillance discloses during the period from X to Y any  
16 communication between El Hage and somebody else?

17 MR. DRATEL: Excuse me, your Honor?

18 MR. FITZGERALD: Your Honor, there are two problems  
19 with that. One is Mr. El Hage was wary of electronic  
20 surveillance. Mrs. El Hage wrote in August '97 she assumed  
21 the phones were tapped. They said it on that phone call. So  
22 what would be obvious, any contact they would have would not  
23 be on that telephone. And to say that electronic  
24 surveillance -- there is no proof in the record of any  
25 contact, we're not going to argue there is any contact. They

5114

1 can argue an absence of proof, but to prove up there's a  
2 wiretap and not put the agents on to say what they heard I

3 think is a serious --

4 THE COURT: Suppose, could you agree that during the  
5 period X to Y, there is no evidence by telephone conversations  
6 from those particular numbers, from El Hage to any alleged  
7 coconspirator?

8 MR. FITZGERALD: But, your Honor, then we would want  
9 to put in, to balance it, that he acted as if he understood he  
10 was being listened to and watched.

11 THE COURT: You have that. You have that in a  
12 recorded conversation between El Hage and April Ray in which  
13 she talks in code and they discuss the fact that they are  
14 subject to --

15 MR. FITZGERALD: And they have before the jury that  
16 there is no evidence of any contact after the bombing with  
17 coconspirators. They have that. There's none in the record.  
18 They can argue it. But if we're going to single out and say  
19 there's none, we should also bring out the fair point that  
20 they were wary of surveillance.

21 THE COURT: You can do that, but that's already in  
22 evidence.

23 Mr. Dratel, a stipulation that between those  
24 particular dates, there is no evidence of communications on  
25 those identified telephone numbers between El Hage and any

5115

1 alleged coconspirators?

2 MR. DRATEL: One second.

3 (Pause)

4 MR. DRATEL: If it would indicate that there was in  
5 fact electronic surveillance on the numbers, you are -- I  
6 think what your Honor said earlier, that there was electronic  
7 surveillance on those numbers, no evidence of communication.

8 MR. FITZGERALD: Why doesn't he put in the phone  
9 bills and just say, look at the phone bills, there's no calls  
10 to Afghanistan or anywhere else. If he wants to put in  
11 there's no electronic surveillance, we should be fair and say  
12 that they said on the phone they're worried about  
13 surveillance.

14 THE COURT: Why don't you submit phone bills?

15 MR. DRATEL: Your Honor, it also has incomings as  
16 well.

17 THE COURT: Excuse me?

18 MR. DRATEL: Incoming would not be covered by  
19 telephone bills, but it would be covered by the wiretap.

20 MR. FITZGERALD: Judge, I admit we never thought of  
21 or never will argue that there was an incoming call from Usama  
22 Bin Laden to Wadih El Hage following the bombing and that the  
23 jury missed it because of the incoming calls.

24 THE COURT: I'm going to sustain the government's  
25 objection to this last item for a variety of reasons, one of

5116

1 which is the probative value is minimal and there were other  
2 means available to defendant El Hage, who has had vast

3 resources in the preparation of this case and ample time to  
4 deal with the matter.

5           So where we are, then, right, is you are going to  
6 introduce a set of documents, and they are going to be  
7 introduced for the purpose of showing that during 1995 and  
8 1996, El Hage was engaged in business dealings with respect to  
9 tractors, that two photographs of goat slaughter are going to  
10 be introduced, and defendant El Hage may read those portions  
11 of the stipulation which he wishes to read and the government  
12 will be able to read those portions which it believes are  
13 required by completeness, at which point all of that -- all of  
14 that will take, I would think, a maximum of ten minutes, at  
15 which point the defendant El Hage will either rest or will  
16 call a witness.

17           MR. DRATEL: We have other stipulations, your Honor,  
18 that we're in agreement on. We have about, I think eight or  
19 nine other stipulations that we're in agreement on. It won't  
20 take too long to read.

21           There is one other stipulation that I was working on  
22 with Mr. Karas, but he's not here yet and it was -- I didn't  
23 think there was any problem with it, but he's not here. We  
24 had discussed --

25           THE COURT: I will permit you to rest subject to

5117

1 that, subject to that and subject to that only.

2           We'll take five minutes.

3           MR. DRATEL: Your Honor, may I just make one

4 suggestion with respect to the stipulation on Al-Fadh1?

5 THE COURT: Yes.

6 MR. DRATEL: The statement "Wadih traveled to the  
7 U.S. and Russia on unknown Bin Laden business," and because  
8 801(d)(1), which talks about prior statement of witnesses,  
9 says that the declarant has to testify at the trial or hearing  
10 and be, and I'm quoting here, "subject to cross-examination  
11 concerning the statement," that he wasn't, that was not part  
12 of his testimony. It was not. So we would just ask to strike  
13 "unknown" and if it says "U.S. and Russia on Bin Laden  
14 business," that would be sufficient for us.

15 THE COURT: Appearing where?

16 MR. DRATEL: On the first line of the last page, your  
17 Honor, the second to the last page. The last page of text  
18 there's a line for -- the page for signatures.

19 MR. FITZGERALD: The witness wasn't imputing El Hage.

20 THE COURT: Yes, denied. We'll take five minutes.

21 That will be it.

22 (Recess)

23

24

25

5118

1 THE COURT: Just one other thing, Mr. Schmidt. Out  
2 of an excess of caution, in the event El Hage rests without  
3 testifying, there is to be no statement made in front of the

4 jury as to the reason why that is occurring.

5 MR. SCHMIDT: I am sorry. We are going to rest --

6 THE COURT: We are going to do what we have just  
7 agreed to. It takes about 10 minutes. It may take a little  
8 longer, but relatively speaking. It will be done certainly  
9 before the afternoon recess.

10 MR. SCHMIDT: That is right.

11 THE COURT: Then I am going to call on you and either  
12 El Hage is going to rest or call a witness. In the event that  
13 the decision is to rest and not call him, there is not to be  
14 any statement made as to why Mr. El Hage is not testifying.

15 MR. SCHMIDT: Certainly.

16 THE COURT: It wouldn't occur to you to do so. I  
17 just want to make it clear that --

18 MR. SCHMIDT: I understand that. I don't see what  
19 possible reason I could give that would be valid under the  
20 circumstances.

21 THE COURT: I agree. I agree. No problem. Let's  
22 bring in the jury.

23 (Jury present)

24 THE COURT: A juror wants to know if she can keep a  
25 doctor's appointment May 11, 8:30.

5119

1 MR. COHN: Your Honor, we may well be in  
2 deliberations by then. You might want to suggest that maybe  
3 if you call the doctor they will squeeze her in somewhere else  
4 at an appropriate time so she doesn't have to wait another



5 three months.

6 THE COURT: Friday, May 25, Memorial Day weekend, it  
7 is pretty safe we won't be sitting.

8 MR. COHN: Not on this phase anyway.

9 (Jury present)

10 THE COURT: Mr. Schmidt.

11 MR. SCHMIDT: Your Honor, at this time I am offering  
12 into evidence P51 and P56, two photographs. I would ask that  
13 they be entered into evidence and displayed to the jury.

14 THE COURT: P51 and P56, two photographs, are  
15 received in evidence and they may be displayed to the jury.

16 (Defense Exhibits P51 and P56 received in evidence)

17 MR. SCHMIDT: These photographs also indicate, the  
18 translation of the Arabic is Eid festival, slaughtering,  
19 Kenya, Mombasa, and the date, although it is not clear on  
20 here, is 24/4/96, which would be April 28, 1996.

21 At this time I also offer into evidence the following  
22 exhibits, all beginning with WEHX: WW20A, 20B, 20E, WW31,  
23 WW34. Very briefly, these documents cannot be displayed  
24 because some of them are very faded. Some are facsimiles  
25 relating to correspondence between Cylim Import Export with

5120

1 ZTS Trading, S.R.O. in the Slovak Republic, relating to the  
2 purchase of tractors and parts that date October 1996, May  
3 1996, May 1996, October 1995, and they are between Mr. El Hage  
4 and representatives of ZTS Trading.

5 THE COURT: Received.

6 (Defense Exhibits WEHXWW20A, 20B, 20E, WW31, WW34  
7 received in evidence)

8 MR. SCHMIDT: Mr. Dratel will read a few stipulations  
9 to the jury at this time.

10 MR. DRATEL: May I proceed, your Honor?

11 THE COURT: Yes.

12 MR. DRATEL: Thank you. It is hereby stipulated and  
13 agreed by and between the United States of America by Mary Jo  
14 White, United States Attorney for the Southern District of New  
15 York, Patrick J. Fitzgerald, Kenneth M. Karas and Paul W.  
16 Butler, Assistant United States Attorneys, of counsel, and  
17 defendant Wadih El Hage, by and with the consent of his  
18 attorneys, as follows:

19 1. That if called as a witness a custodian of  
20 records for the nongovernmental organizations board for the  
21 Republic of Kenya would testify that the following document is  
22 a true and accurate copy of a certificate filed with and  
23 maintained by the Nongovernmental Organizations Board of the  
24 Republic of Kenya. That is WEHX-WW5, dated December 14, 1995,  
25 the certificate of registration for Help Africa People, and if

5121

1 we could display that, please. I would move that in evidence,  
2 your Honor.

3 THE COURT: Received.

4 MR. SCHMIDT: It is further agreed that the  
5 stipulation and may be received as a defense exhibit at trial,

6 and it is WEHX-S4.

7 (Defense Exhibits WEHXWW5 and WEHX-S4 received in  
8 evidence)

9 MR. DRATEL: It is hereby stipulated and agreed by  
10 and between the United States of America by Mary Jo White,  
11 United States Attorney for the Southern District of New York,  
12 Patrick J. Fitzgerald, Kenneth M. Karas and Paul W. Butler,  
13 Assistant United States Attorneys, of counsel, and defendant  
14 Wadih El Hage, by and with the consent of his attorneys, as  
15 follows:

16 That if called as a witness, Special Agent Barry Bush  
17 of the Federal Bureau of Investigation of the United States  
18 would testify that the chart designated as WEHX-M1 accurately  
19 reflects the room in which each document was recovered during  
20 the August 20, 1998 search of the offices of Mercy  
21 International Relief Agency, hereinafter Mercy International,  
22 at 100 Mufulo Avenue, Nairobi, Kenya, by Kenyan and United  
23 States law enforcement officials.

24 2. That, reading from left to right, the column  
25 labeled NY1 -- excuse me, your Honor. I have the document.

5122

1 That reading from left to right the column labeled 1B number  
2 indicates the Bates stamp number assigned to each document as  
3 explained at paragraph 4 of the stipulation previously  
4 introduced in evidence as Government's Exhibit 154.

5 3. The column labeled K number, indicating the

6 corresponding K number for the particular document, which  
7 items and/or documents some of which are also Government's  
8 Exhibits previously admitted in evidence, so labeled were  
9 submitted for forensic analysis by United States and/or Kenyan  
10 law enforcement officials.

11           4. The column labeled Q number indicates the  
12 corresponding Q number for the particular document, which  
13 items or documents, some of which are also government exhibits  
14 previously introduced in evidence so admitted by United States  
15 and/or Kenyan law enforcement officials.

16           5. The absence of any corresponding K or Q number  
17 indicates that the particular item or document was not  
18 submitted for forensic analysis by United States and/or Kenyan  
19 law enforcement officials.

20           6. The column labeled RM indicates the room in which  
21 the document or documents were found as explained in paragraph  
22 4 and 5 of the stipulation previously introduced in evidence  
23 as Government's Exhibit 154.

24           7. It is further stipulated and agreed that El Hage  
25 defense exhibit WEHX-M1 may be received in evidence as a

5123

1 defense exhibit at trial.

2           8. It is further agreed and stipulated that this  
3 stipulation may be received in evidence as a defense exhibit  
4 at trial. That is WEHX-S5.

5           THE COURT: Received.

6           (Defense Exhibits WEHX-M1 and WEHX-S5 received in

7 evidence)

8 MR. DRATEL: It is hereby stipulated and agreed by  
9 and between the United States of America, by Mary Jo White,  
10 United States Attorney for the Southern District of New York,  
11 Patrick J. Fitzgerald, Kenneth M. Karas and Paul W. Butler,  
12 Assistant United States Attorneys, of counsel, and defendant  
13 Wadih El Hage, by and with the consent of his attorneys, as  
14 follows:

15 1. That if called as a witness, a custodian of  
16 records for the Department of State of the State of Arizona  
17 would testify that the following document is a true and  
18 accurate copy of a certificate filed with and maintained by  
19 the Department of State for the State of Arizona: WEHX-WW16,  
20 dated June 21, 1989, a certificate of trade name for Al Binion  
21 Islamic Information Center. If we could put WW16, please. I  
22 move WW16 in evidence, your Honor.

23 THE COURT: Received.

24 (Defense Exhibit WEHXWW16 received in evidence)

25 MR. DRATEL: 2. It is further stipulated and agreed

5124

1 that this stipulation may be received in evidence as a defense  
2 exhibit at trial. This is WEHX-S6.

3 THE COURT: Received.

4 MR. DRATEL: Thank you.

5 (Defense Exhibit WEHXS6 received in evidence)

6 MR. DRATEL: It is hereby stipulated and agreed by

7 and between the United States of America, by Mary Jo White,  
8 United States Attorney for the Southern District of New York,  
9 Patrick J. Fitzgerald, Kenneth M. Karas and Paul W. Butler,  
10 Assistant United States Attorneys, of counsel, and defendant  
11 Wadih El Hage, by and with the consent of his attorneys, as  
12 follows: That if called as a witness, a person with fluent  
13 in Arabic and English would testify that El Hage Defense  
14 Exhibit WEHXE-15-T is a fair and accurate translation of the  
15 chart depicted in the photograph of an interior wall of the  
16 Nairobi, Kenya offices of Mercy International Relief Agency  
17 located at 100 Mufulo Avenue, which photograph has previously  
18 been introduced in evidence as El Hage Defense Exhibit  
19 WEHXE15. If we could show WEHXE15 and then if we could show  
20 WEHXE15T.

21 (Mr. Dratel read to the jury from Defense Exhibit  
22 WEHXE15T)

23 MR. DRATEL: 2. It is further stipulated and agreed  
24 that WEHXE15T is received in evidence.

25 3. It is further stipulated and agreed that this

5125

1 stipulation may be received in evidence as a defense exhibit  
2 at trial.

3 THE COURT: Received.

4 MR. DRATEL: Thank you, your Honor. This is WEHXS-7.

5 (Defense Exhibits WEHXE15T and WEHXS7 received in  
6 evidence)

7 MR. DRATEL: It is hereby stipulated and agreed by

8 and between the United States of America, by Mary Jo White,  
9 United States Attorney for the Southern District of New York,  
10 Patrick J. Fitzgerald, of counsel, and the defendants, by and  
11 with the consent of their attorneys, as follows: That if  
12 called as witnesses, representatives of the United States  
13 government who interviewed Jamal Ahmed al Fadhl in September,  
14 October and November 1996 would testify that the interviews of  
15 Mr. Al Fadhl were conducted through a qualified Arab  
16 interpreter and their reports of those interviews state the  
17 following:

18           A. The reports for September 13, 1996, state that  
19 Mr. Al Fadhl told United States officials that he was a former  
20 colleague of Ramzi Ahmed Yousef and that they had trained  
21 together. The reports for October 22, 1996, state that Mr. Al  
22 Fadhl told United States officials that he had never actually  
23 seen World Trade Center bombing mastermind Ramzi Ahmed Yousef.

24           B. The reports for September 13, 1996, state that  
25 Mr. Al Fadhl told United States officials that he traveled to

5126

1 the US in 1985 and 1986 for Islamic military training.

2           C. The reports for October 21, 1996, state that  
3 Mr. Al Fadhl told United States officials that he also used  
4 the money he stole from Mr. Bin Laden's companies to build a  
5 factory for his brother, and I will spell it, A-D-I-L, U-M-M,  
6 new word D-U-R-M-A-N, and that the factory is known as the,  
7 and I will spell again, A-B-U, new word, A-L dash

8 M-U-W-A-F-F-A-Q, next word is oil, O-I-L, and press,  
9 P-R-E-S-S.

10 D. The reports for September 24, 1996, indicate that  
11 Mr. Al Fadhl provided United States officials with handwritten  
12 notes stating, among other things, that Usama Bin Laden's Taba  
13 Investment company in Khartoum, the Sudan, was managed by a  
14 Lebanese person who had United States citizenship. The  
15 reports for October 21, 1996, state that Mr. Al Fadhl told  
16 United States officials that Wadih was a Lebanese individual  
17 who was apparently also a United States citizen, about 5 feet  
18 8 inches tall, with a large chest and almost blondish hair,  
19 and that he was over 45 years old but still youthful looking  
20 and that he had a good relationship with Mr. Bin Laden. The  
21 same report indicates that Mr. Al Fadhl also told United  
22 States officials that Wadih traveled to the US and Russia on  
23 unknown Bin Laden business and that he was uncertain if Wadih  
24 served in Afghanistan.

25 E. United States officials' initial interviews of

5127

1 Mr. Al Fadhl included approximately 23 sessions from September  
2 6, 1996, through October 21, 1996.

3 2. It is further stipulated and agreed that this  
4 stipulation may be received in evidence as a defense exhibit  
5 at trial. That is WEHX-S13.

6 THE COURT: Received.

7 (Defense Exhibit WEHXS13 received in evidence)

8 MR. DRATEL: It is stipulated and agreed by and



9 between the United States of America by Mary Jo White, United  
10 States Attorney for the Southern District of New York, Patrick  
11 J. Fitzgerald, Kenneth M. Karas, Paul W. Butler, Assistant  
12 United States Attorneys, of counsel, and the defendant Wadih  
13 El Hage, by and with the consent of his attorneys, as follows:

14 1. That none of the items seized during the August  
15 21, 1997, search of 1523 Fedha Estates, Nairobi, Kenya, the  
16 residence of Wadih El Hage, have been examined for fingerprint  
17 or other forensic analysis.

18 It is further stipulated and agreed that this  
19 stipulation may be received in evidence as a defense exhibit  
20 at trial. That is WEHX-S8.

21 THE COURT: Received.

22 (Defense Exhibit WEHXS8 received in evidence)

23 MR. DRATEL: It is hereby stipulated and agreed by  
24 and between the United States of America, by Mary Jo White,  
25 United States Attorney for the Southern District of New York,

5128

1 Patrick J. Fitzgerald, Kenneth M. Karas, Paul W. Butler,  
2 Assistant United States Attorneys, of counsel, and the  
3 defendant Wadih El Hage, by and with the consent of his  
4 attorneys, as follows:

5 That Wadih El Hage, his wife April and their six  
6 children departed Nairobi, Kenya, of September 20, 1997, on  
7 Saudi Air flight No. 448 at 5:45 a.m., local Nairobi time,  
8 which arrived later that day in Jeddah, Saudi Arabia.

9                   2. That the El Hage family departed Jeddah, Saudi  
10 Arabia, on September 23, 1997, v. Saudi Air flight No. 21, at  
11 1:10 a.m., local Saudi time, arriving in New York later that  
12 day.

13                   3. That the El Hage family was scheduled to continue  
14 to Dallas, Texas, that day, September 23, 1997, aboard Delta  
15 flight No. 381.

16                   4. That Wadih El Hage informed representatives of  
17 the United States government of all the dates, flights, times  
18 and destinations listed above.

19                   5. That upon arriving at John F. Kennedy  
20 International Airport in Queens, New York, on September 23,  
21 1997, the El Hage family was met by United States government  
22 officials. Mr. El Hage was served with a subpoena to testify  
23 before a Southern District of New York grand jury the next  
24 day, September 24, 1997, and his wife April and their six  
25 children were taken to a hotel.

5129

1                   6. Mr. El Hage spent the next several hours with  
2 officials of the United States government. Mr. El Hage was  
3 driven back to the hotel where his family had been taken for  
4 lodging, arriving before midnight.

5                   7. Representatives of the United States government  
6 picked up Mr. El Hage at the hotel the next morning, September  
7 24, 1997, and he testified before the grand jury commencing  
8 that morning.

9                   8. That in the morning hours of September 14, 1998,

10 Mr. El Hage returned to Arlington, Texas, by car from a trip  
11 to Elgrove, California, where he along with his son had  
12 visited his mother who was visiting from Lebanon and his  
13 sister. On the way back to Arlington, Mr. El Hage had stopped  
14 in Tucson, Arizona, to visit his mother-in-law Marion Brown.

15 9. The next day, September 17, 1998, Mr. El Hage was  
16 subpoenaed to testify again in the grand jury of the Southern  
17 District of New York. Mr. El Hage flew to New York that  
18 afternoon where he was met by FBI agents. He spent the next  
19 several hours in their company and was taken to a hotel for  
20 lodging at approximately 11 a.m. that evening. The next day,  
21 September 18, 1998, Mr. El Hage testified again before the  
22 grand jury.

23 11. It is further stipulated and agreed that this  
24 stipulation may be received in evidence as a defense exhibit  
25 at trial.

5130

1 THE COURT: Received.

2 MR. DRATEL: Thank you. That is WEHX-S9.

3 (Defense Exhibit WEHXS9 received in evidence)

4 MR. DRATEL: It is hereby stipulated and agreed, by  
5 and between the United States of America by Mary Jo White, the  
6 United States Attorney for the Southern District of New York,  
7 Patrick J. Fitzgerald, Kenneth M. Karas and Paul W. Butler,  
8 Assistant United States Attorneys, of counsel, and defendant  
9 Wadih El Hage, by and with the consent of his attorneys, as

10 follows:

11 1. That if called as a witness an agent of the  
12 United States Federal Bureau of Investigation would testify  
13 that on November 14, 1998, Sikander Juma, when shown a  
14 photograph of Wadih El Hage, failed to identify Mr. El Hage  
15 from the photograph.

16 2. It is further stipulated and agreed that this  
17 stipulation may be received in evidence as a defense exhibit  
18 at trial.

19 THE COURT: Received.

20 MR. DRATEL: That is WEHX S10.

21 (Defense Exhibit WEHXS10 received in evidence)

22 THE COURT: Anything further?

23 MR. SCHMIDT: Yes, your Honor. Your Honor, at this  
24 time I am going to read another stipulation, WEHXS12. It is  
25 hereby stipulated and agreed by and between the United States

5131

1 of America by Mary Jo White, the United States Attorney for  
2 the Southern District of New York, Patrick J. Fitzgerald,  
3 Kenneth M. Karas and Paul W. Butler, Assistant United States  
4 Attorneys, of counsel, and defendant Wadih El Hage, by and  
5 with the consent of his attorneys, as follows:

6 That in July 1997, Yumico, Y-U-M-I-C-O, Abueilen,  
7 A-B-U-E-I-L-E-N, also known as Um Badr, U-M, B-A-D-R, and  
8 their four children, B-A-D-R, N-A-S-S-E-R, K-H-A-L-I-D and  
9 Suma, stayed at the home of Wadih el Hage and his family.  
10 Yumico Abueilen is the sister of April Ray, the wife of Wadih

11 El Hage.

12 2. The Abueilen family resided in Qatar. The  
13 children's father and Yumico's husband Atef Abueilen, also  
14 known as Abu Badr, remained in Qatar to work. Abu Badr spoke  
15 with and consulted with Mr. El Hage during the family visit.

16 3. The documents designated as Grand Jury Exhibits  
17 36 and 36T during the testimony of Wadih El Hage in the grand  
18 jury on September 16, 1998, in Government's Exhibit 420C, a  
19 letter recovered from the offices of Mercy International  
20 Relief Agency, is a letter sent by facsimile to Atef Abu Badr  
21 by Wadih El Hage on July 14.

22 At this time, your Honor, I just want to refer to --  
23 to place the letter that is now marked as Defense Exhibit  
24 WEHXWM42 and 42T, the translation, on the monitor and offer  
25 that into evidence.

5132

1 MR. FITZGERALD: No objection.

2 THE COURT: Received.

3 (Defense Exhibits WEHXWM42 and 42T received in  
4 evidence)

5 MR. SCHMIDT: Now if we can have the translation.

6 (Exhibit read)

7 MR. SCHMIDT: I also at this time would like to read  
8 from the grand jury testimony that was previously entered by  
9 the government.

10 MR. FITZGERALD: Your Honor, it has previously been

11 read in evidence.

12 THE COURT: It has already been read?

13 MR. FITZGERALD: Yes.

14 MR. SCHMIDT: Yes, your Honor. It relates to this  
15 document.

16 THE COURT: How long is it?

17 MR. SCHMIDT: I am just going to read a very short  
18 part, about eight lines.

19 THE COURT: You may read it.

20 MR. SCHMIDT: Thank you.

21 BY MR. SCHMIDT:

22 "Q. Do you recognize the text of that letter in any way,  
23 shape or form? Did you write that letter?

24 "A. No, I didn't.

25 "Q. Do you know what it meant when it says concerning the

5133

1 group I have to stay here until I get back so the color gets  
2 just like that of the locals and they get used to the rough  
3 African life?

4 "A. I don't know what that means.

5 "Q. Could it be that you were trying to get Usama Bin Laden's  
6 group into Kenya so they would blend in and fit in with the  
7 rest of the people?

8 "A. I don't know what's meant by that."

9 4. The reference to the group refers to the children  
10 of Yumico and Atef Abueilen.

11 At this time, your Honor, I would like to display a

12 photograph that was entered last week, P3, that had not yet  
13 been displayed to the jury.

14 MR. FITZGERALD: May I object for a moment. I just  
15 want to see the photograph.

16 MR. SCHMIDT: Very well.

17 MR. FITZGERALD: Oh, no objection.

18 MR. SCHMIDT: Please note the date that is difficult  
19 to read on this photograph, July 13, 1997.

20 It is further stipulated and agreed that this  
21 stipulation may be received in evidence as a defense exhibit  
22 at trial, dated April 30, 2001, signed by Patrick Fitzgerald  
23 and Sam Schmidt, and I offer that into evidence.

24 THE COURT: Received.

25 MR. DRATEL: It is hereby stipulated and agreed by

5134

1 and between the United States of America by Mary Jo White,  
2 United States Attorney for the Southern District of New York,  
3 Patrick J. Fitzgerald, Kenneth M. Karas and Paul W. Butler,  
4 Assistant United States Attorneys, of counsel, and the  
5 defendant Wadih El Hage, by and with the consent of his  
6 attorneys, as follows:

7 1. That on September 23, 1998, the premises located  
8 at 94 Dewsbury Road, London, England, were searched by British  
9 law enforcement officials from New Scotland Yard and the  
10 following items among others were recovered:

11 The first item is WEHX-L-GMW/1-159. That is

12 statement No. 1 dated April 10, 1994.

13 WEHX-L-BM/4-119, that is dated September 13, 1994,  
14 entitled Saudi Arabia reveals its battle against Islam and its  
15 clergy.

16 Next is WEHX-L-BM/4-117, dated September 16, 1994,  
17 entitled urgent letter to the security men.

18 Next is WEHX-L-BM/4-115, dated September 19, 1994,  
19 entitled an important message to our brethren in the armed  
20 forces.

21 Next is WEHX-L-BM/4-108, dated October 15, 1994,  
22 entitled the supreme council for damages.

23 Last is WEHX-L-BM/1-140, entitled 1995, second  
24 report.

25 2. The following items with the suffix T are

5135

1 translations of the documents with the correspondence numbers  
2 without the suffix T. They are WEHX-L-JMW/1-159-T;  
3 WEHX-L-BM/4-119-T; WEHX-L-BM/4-117-T. WEHX-L-BM/4-115-T;  
4 WEHX-L-BM/4-108T; and WEHXL-GMW/1-163-T; WEHX-L-GMW/1-140-T;  
5 and WEHX-L-BM/4-81 and 82-T.

6 3. It is further stipulated and agreed that the  
7 government and the defendants are agreeing to the authenticity  
8 of the documents as specifically above and more generally in  
9 the preceding paragraph, and the government and the defense  
10 reserve the right to object to the admissibility of any  
11 particular item or the translation of same as each is offered.  
12 It is the purpose of this stipulation to avoid the necessity



13 of calling and recalling multiple authentication witnesses at  
14 trial during the government and defense cases regarding the  
15 translations. The parties stipulate that if called as a  
16 witness, a person fluent in Arabic and English would testify  
17 that the translations listed above are fair and accurate  
18 translations.

19 4. It is further stipulated and agreed that this  
20 stipulation may be received in evidence as a defense exhibit  
21 at trial.

22 Your Honor, I would move the underlying documents  
23 listed in the stipulation in evidence.

24 THE COURT: Received.

25 MR. DRATEL: Thank you, your Honor. The stipulation

5136

1 is WEHXS11.

2 THE COURT: Received.

3 (Defense Exhibits WEHXS11 and exhibits described  
4 therein received in evidence)

5 MR. SCHMIDT: Your Honor, other than what we briefly  
6 mentioned, defendant rests.

7 THE COURT: Defendant El Hage rests?

8 MR. SCHMIDT: That is correct.

9 THE COURT: That is with the exception of a  
10 stipulation, Mr. Schmidt, which is in the process.

11 MR. FITZGERALD: That was actually executed, Judge.

12 MR. SCHMIDT: Yes.

13 THE COURT: I think it was just executed and read.

14 MR. DRATEL: Yes, we just did that one. Mr. Schmidt  
15 was unaware.

16 MR. SCHMIDT: Your Honor, I think there is one  
17 possible outstanding one.

18 THE COURT: A stipulation which has already been  
19 discussed with the government?

20 MR. SCHMIDT: It has been discussed but not  
21 concluded.

22 THE COURT: But no live testimony?

23 MR. SCHMIDT: No additional live witnesses, that is  
24 correct.

25 THE COURT: Very well. Mr. Cohn.

5137

1 MR. COHN: Thank you, your Honor. Your Honor, I have  
2 one, just one stipulation. It is hereby stipulated and agreed  
3 by and between defendant Al-'Owhali, by and with the consent  
4 of his attorney and the United States of America by Mary Jo  
5 White, United States Attorney for the Southern District of New  
6 York, Patrick Fitzgerald, Kenneth M. Karas, Paul W. Butler and  
7 Michael J. Garcia, of counsel, that:

8 1. Government's Exhibit 562 -- may we have that,  
9 flip the switch for us, please? Thank you -- that  
10 Government's Exhibit 562 is the newspaper photograph which the  
11 witness Charles Mwaka Mula stated in August 1998 that he  
12 recognized as depicting the person that he saw emerge from the  
13 passenger side of the truck and begin throwing items the day

14 of the embassy bombings.

15 Further, it is stipulated that Government's Exhibit  
16 563 is the composite sketch prepared by an FBI agent based on  
17 the description provided by the witness Charles Mwaka Mula on  
18 August 11, 1998, of the individual he observed exiting the  
19 truck and throwing items on the day of the bombing.

20 It is further stipulated and agreed that Government's  
21 Exhibits 562 and 560 may be received in evidence at trial --  
22 and, your Honor, I believe they already are in evidence.

23 It is further stipulated and agreed that this  
24 stipulation may be received as evidence at trial, and this  
25 stipulation is marked Al-'Owhali L.

5138

1 THE COURT: Received.

2 (Defense Exhibit Al-'Owhali L received in evidence)

3 MR. COHN: Thank you, your Honor. Defense rests.

4 THE COURT: Defense rests.

5 MR. RUHNKE: Your Honor, on behalf of Khalfan Khamis  
6 Mohamed, we rest on the present state of the record.

7 THE COURT: As you have heard, ladies and gentlemen,  
8 all the defendants have rested. We will take a recess now  
9 until 1:30. I hope your lunch -- make it 2:00. We will take  
10 a recess until 2:00.

11 (Jury excused)

12 THE COURT: If there is no objection, it is my  
13 present intent to allocute defendants Al-'Owhali, K.K.

14 Mohammed and El Hage concerning their decision not to plead.

15 MR. RUHNKE: No objection.

16 MR. COHN: No objection.

17 THE COURT: Mr. Kenneally, will you place under oath  
18 or have those defendants affirm. They may remain seated.

19 Place them all under oath. Mr. El Hage is fluent in English.

20 (Defendant Wadih El Hage sworn)

21 THE COURT: Now Mr. Al-'Owhali.

22 (Defendant Mohamed Al-'Owhali sworn)

23 THE COURT: Mr. Mohamed.

24 (Defendant Khalfan Khamis Mohamed sworn)

25 THE COURT: The purpose of this proceeding is for it

5139

1 to be clear that you understand that under our system of  
2 criminal justice the defendant has the right, if he wishes, to  
3 take the stand and to testify. If he takes the stand and  
4 testifies, he is treated as any other witness, that is, he is  
5 subject to cross-examination, and he cannot pick and choose  
6 what questions he does or does not answer on  
7 cross-examination.

8 The defendant also has the right not to testify, and  
9 the jury is instructed that the defendant has a constitutional  
10 right not to testify and that no consideration may be given or  
11 adverse inference drawn by virtue of a defendant exercising  
12 his constitutional right not to testify.

13 The decision whether or not to testify is a decision  
14 to be made by the defendant. Although the defendant may

15 receive advice from counsel concerning whether or not it is in  
16 his best interests to testify or not to testify, the ultimate  
17 decision whether or not to testify is one made by the  
18 defendant.

19 Mr. El Hage, do you understand what I have just  
20 stated?

21 DEFENDANT EL HAGE: Yes, I do.

22 THE COURT: Understanding what I have just stated, is  
23 it your desire that you not testify in this proceeding?

24 DEFENDANT EL HAGE: Yes, it is.

25 THE COURT: Mr. Al-'Owhali, have you understood what

5140

1 I have just said?

2 DEFENDANT AL-'OWHALI: Yes.

3 THE COURT: Understanding that, is it your desire not  
4 to testify in these proceedings?

5 DEFENDANT AL-'OWHALI: Yes.

6 THE COURT: Mr. Mohamed, have you understood what the  
7 court has just said?

8 DEFENDANT MOHAMED: Yes.

9 THE COURT: Understanding that, is it your desire not  
10 to testify?

11 DEFENDANT MOHAMED: Yes.

12 THE COURT: All right, thank you.

13 I have had the jury come back at 2, but I don't think  
14 we have any business for the jury this afternoon.

15           MR. SCHMIDT: Your Honor, there is one additional  
16 stipulation that was discussed via correspondence over the  
17 weekend with the government that we want to resolve. If that  
18 stipulation is going to be admitted in evidence then we will  
19 want to read that stipulation. Before your Honor leaves for  
20 lunch, maybe we can deal with that issue now.

21           THE COURT: Does the government have any further  
22 information as to whether it will or will not call a rebuttal  
23 witness?

24           MR. FITZGERALD: Your Honor, we will check the  
25 various status of matters over lunch.

5141

1           THE COURT: So I should keep the jury.

2           MR. FITZGERALD: Certainly there are some documents  
3 we are going to offer regardless that we can do after lunch.

4           MR. SCHMIDT: If the documents that we received today  
5 are the ones they are offering, we are going to have to  
6 discuss that matter because I know that we have an objection  
7 to a number of those documents.

8           THE COURT: Why don't we break now. It is 12:30.  
9 Why don't we reconvene at 1:45, so that if there is anything  
10 for the court to take up, we will take it up at 1:45.

11           Just one other thing. I just want to respond to  
12 these inquiries from the jurors. We will ask the jurors to  
13 cancel the May 11, 8:30 doctor's appointment and tell the jury  
14 that we will not be sitting on Friday, May 23. Very well. We  
15 are adjourned until 1:45.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(Luncheon recess)

5142

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15

A F T E R N O O N   S E S S I O N

1:45 p.m.

THE COURT: Government have any more insight it can furnish with respect to the calling of a rebuttal witness?

MR. FITZGERALD: Yes, Judge. I'll tell you where we stand right now. On one issue, which is with regard to authenticating statements of Usama Bin Laden, my understanding is we're supposed to obtain a certified copy of an original tomorrow morning overseas and have it faxed to us.

Put that to the side for the moment. The effort to identify on short notice the location of the Marines who were in the hotel in Yemen hit a snag, and we thought that it was located in a certain warehouse, which they went to, and it's not there. So they are still looking on that. And similarly, the effort to locate the leaflet described in the letter this

16 morning has not brought fruit. We found evidence that there  
17 was a leaflet, but a description of it, not the leaflet  
18 itself.

19           It's the government's present intention to push  
20 forward on those fronts but not to delay the proceedings. If  
21 we get those documents tomorrow morning or if we find what we  
22 need, we would like to hold open the right to offer that, but  
23 given that experience tells us when we look for these things,  
24 sometimes it takes weeks to find, we don't want to delay the  
25 proceedings.

5143

1           What we do wish to offer are a number of documents  
2 and stipulations -- when I say "number," I mean a small  
3 number. I think there are four corrected stipulations. They  
4 are off the stipulation chart, a single document from a Mercy  
5 International search, a stipulation regarding the chemist's  
6 testimony which is being worked out with the Odeh defense  
7 team, a document which I believe is a stipulation with the El  
8 Hage defense team, and simply to offer the Grand Jury exhibits  
9 as a group. And then we were seeking to call a Department of  
10 Defense witness to establish the time line of American  
11 casualties in Somalia to show that they predated July of 1993,  
12 and that witness is available today.

13           THE COURT: With respect to the casualties in  
14 Somalia, there is no claim, I take it, that all of those  
15 casualties are attributable to al Qaeda but are simply to show  
16 that American troops were sustaining casualties prior to --



17 MR. FITZGERALD: Yes, the Abdi House incident.

18 THE COURT: Okay.

19 MR. FITZGERALD: It's a very limited offer, very  
20 discrete.

21 THE COURT: All right.

22 MR. SCHMIDT: Your Honor, as to that, the problem is  
23 that the nature of the casualties, I know a number of them  
24 involve car accidents, a number of them were a --

25 THE COURT: Don't they break it down to military and

5144

1 non-military? Most military statistics draw that distinction.

2 MR. SCHMIDT: But the issue, then, your Honor, is  
3 that now it leaves -- puts in casualties that are located in  
4 different areas unrelated to anything that is going on. We  
5 need the information that -- more information, not just of the  
6 casualties, but information about it so we can take a look at  
7 it and see what our objections are.

8 THE COURT: My understanding of this is that we  
9 are -- and what the government has just said is that we're  
10 dealing here solely with the claim that anti-American  
11 sentiment in Somalia which manifested itself in the infliction  
12 of casualties on American troops did not begin until there was  
13 this popular response to the attack on Abdi House. And if  
14 that is what we have referred to by shorthand as the temporal  
15 defense, and if that is a defense, I don't see why the  
16 government isn't free to show that in fact American troops

17 were sustaining significant casualties prior to that event.

18 MR. SCHMIDT: The argument, your Honor, wasn't of all  
19 of Somalia, it was relating to the attacks in Mogadishu which  
20 was the subject of the government's evidence. The  
21 government's evidence all throughout the case during our  
22 discussions were related to attacks in southern Mogadishu. We  
23 were addressing the issue about the attacks in southern  
24 Mogadishu.

25 MR. RICCO: Your Honor, if that's so, then

5145

1 Dr. Samatar's testimony with respect to the Abdi House should  
2 be stricken because it is defendant Odeh's position that the  
3 premise that the Court is operating on as advanced by  
4 Mr. Schmidt is not factually correct and it's certainly not a  
5 position that we intend to advance to the jury.

6 And if Mr. Schmidt is taking the position that that  
7 evidence was introduced for the purposes of responding to the  
8 18 casualties, then perhaps the remedy would be to strike that  
9 portion of Dr. Samatar's testimony as relating to the Abdi  
10 House.

11 MR. SCHMIDT: Not related only to the 18 casualties  
12 as testified to by the agent, it's also related to the  
13 testimony of Kherchtou relating to the events in Mogadishu as  
14 related to him by Harun and Abu Mohamed. So if we are able to  
15 eliminate that testimony, we might be in a position that we  
16 would not need the Abdi House issue. However, we can't  
17 eliminate that testimony as part of the case for the

18 government.

19 THE COURT: In answer to what Mr. Ricco says, I don't  
20 think it's the Court's role to judge the persuasiveness of a  
21 claimed defense, and so that unless there is an agreement that  
22 that defense is not going to be asserted, which I take it is  
23 not the case, I can't say that the government can't refuse.

24 MR. RICCO: Judge, I'm making a 403 argument on  
25 behalf of Mr. Odeh, and the prejudicial testimony that the

5146

1 jury is going to hear is about casualties that have no other  
2 connection to him in this case other than the defense raised  
3 by his codefendant. That defense prejudices Mr. Odeh and  
4 because of that, we would ask the Court to either strike that  
5 portion of Dr. Samatar's testimony or grant Mr. Odeh a  
6 severance because that defense, no matter how much merit it  
7 does or does not have, it is about to have the effect of  
8 allowing in extremely prejudicial evidence that would not  
9 otherwise be in this case.

10 THE COURT: I think to refute --

11 MR. RICCO: One other point --

12 THE COURT: I don't see a lot of blood being strewn  
13 around the courtroom. As I understand it, the government is  
14 proposing that it offer what it calls a timeline to show the  
15 period of time during which American troops in Somalia were  
16 sustaining casualties, and it seems to me that that's very  
17 brief and very statistical in nature.

18 MR. RICCO: Your Honor, if the Court would not grant  
19 Odeh's --

20 THE COURT: Tell me, what portion of Dr. Samatar's  
21 testimony would you have the Court strike?

22 MR. RICCO: The portion that dealt with the Abdi  
23 House.

24 THE COURT: That was the whole raison d'etat for his  
25 being called.

5147

1 MR. RICCO: Judge, I've gone through the testimony,  
2 and a very small portion of his testimony goes to the Abdi  
3 House. A great deal of his testimony goes to matters outside  
4 the Abdi House. And I would take the position, your Honor, if  
5 the Court is going to allow this evidence in over our  
6 objection and our request for the striking the testimony and  
7 the severance, then I would request that the Court -- when  
8 this evidence comes in, that the jury is given an instruction  
9 and the instruction is that this evidence is coming in as  
10 against Mr. El Hage for the purposes of the defenses that he's  
11 advancing in the case. It has nothing whatsoever to do with  
12 our case.

13 THE COURT: I don't know that that is the wording  
14 that I would use, but I think maybe something along those  
15 lines might be appropriate.

16 MR. SCHMIDT: Your Honor, if they --

17 THE COURT: Is El Hage willing to stipulate to the  
18 fact that Americans were sustaining significant casualties in

19 military action in Mogadishu and elsewhere in Somalia prior to  
20 the attack on Abdi House?

21 MR. SCHMIDT: Correct, your Honor. That's the  
22 problem. My testimony relating to the Abdi House did not have  
23 to do with the casualties that occurred outside of southern  
24 Mogadishu. It was in direct response to the testimony of the  
25 helicopter pilot and testimony of Kherchtou concerning

5148

1 Mogadishu. I am not going to argue any timeline issue as to  
2 any anti-American activity outside Mogadishu. Now, with the  
3 stricken testimony of the pilot, I'm only dealing with the  
4 statements made by Harun and Abu Mohamed to Kherchtou as to  
5 what they did in Mogadishu. That's how it now is limited.

6 So if there is no testimony by the helicopter pilot  
7 and no later testimony brought out concerning Mogadishu and  
8 Harun and them, then it would not be an issue. I am not  
9 talking about a timeline for all of Somalia. We were talking  
10 about the Mogadishu issue, period.

11 MR. FITZGERALD: Your Honor, that's not true. The  
12 testimony from Al-Fadh1 was that the military commander went  
13 to Somalia and indicated they wanted to work with the Somali  
14 tribes to end up fighting the U.S. and they started off to try  
15 and maybe eventually do something big.

16 Our offer of proof wasn't limited to Mogadishu.  
17 Clearly Yacone's testimony was focused on that event, but that  
18 was stricken. Mr. Schmidt can't now pick and say, well, I'm

19 not only dealing with Mogadishu, which has been struck.

20           The fact is that we have in the overt act in the  
21 indictment that al Qaeda sent trainers to Somalia -- not to  
22 Mogadishu, to Somalia -- and there were casualties occurring  
23 against American troops in Somalia beginning in January 1993  
24 if not the month before. The most casualties were in October  
25 1993, but I think that should be established so we have a fair

5149

1 time line. Those casualties are in Mogadishu and elsewhere.

2           THE COURT: Do your casualties figures have any  
3 regional description where in Somalia this took place?

4           MR. FITZGERALD: They don't, your Honor. I know that  
5 there are two underlying -- well, you can figure out four  
6 underlying events, I believe, seven fatal incidents. One is  
7 obviously the Mogadishu airport attack and one is the mortar  
8 attack. One was a soldier killed in Mogadishu January of  
9 1993, and one from a report was a different area of Somalia,  
10 Belet Ven, in I think later January 1933.

11           THE COURT: I guess one question --

12           MR. SCHMIDT: Your Honor struck the testimony of the  
13 helicopter pilot in relation to --

14           THE COURT: October 3rd and 6th in Mogadishu.

15           MR. SCHMIDT: Because there was no apparent  
16 connection to anything done by members of al Qaeda or the  
17 conspiracy. The testimony or the casualties that the  
18 government is offering now to prove has also -- there is no  
19 connection to the conduct of al Qaeda or the conspiracy. The

20 government argument is training, and that's what we were  
21 always prepared to fight, training.

22 THE COURT: Yes, but I understood, and I repeated it  
23 over and over again and asked you whether that was it, and you  
24 usually equivocate and say, well, that's part of it, but the  
25 part of it was that training -- understand training is the

5150

1 heart of the government's contentions with respect to Somalia.  
2 Training of Somalis. But not to be regarded as anti-American  
3 or in furtherance of a goal to kill Americans prior to the  
4 Abdi House attack, that it was only after that took place that  
5 one could say that the overwhelming sentiment in Somalia was  
6 anti-American.

7 Now, if that's the contention, then the government is  
8 entitled to show that long before the Abdi attack, the  
9 sentiment in Somalia was such that American troops were  
10 sustaining significant casualties.

11 MR. SCHMIDT: Your Honor, you used the word  
12 "significant." First of all, I think the government indicated  
13 something like six was the number.

14 MR. FITZGERALD: There were seven incidents resulting  
15 in fatalities during the entire time frame. That's  
16 significant. He wants to ignore the ones before July 1993 and  
17 just focus on the ones afterwards.

18 MR. SCHMIDT: No, I don't want to do that.

19 THE COURT: Do you want to stipulate to all of this?

20 MR. SCHMIDT: We tried to stipulate earlier on.

21 THE COURT: Maybe you should try again. I understand  
22 that there is --

23 MR. SCHMIDT: Your Honor --

24 THE COURT: Let me finish the sentence.

25 -- the apprehension on the part of the other

5151

1 defendants to the fact that, in rebuttal to an argument, the  
2 factual basis for which is extremely problematic, the case is  
3 going to end with American servicemen being killed, and I can  
4 understand that, but it seems to me if that is an argument  
5 which is going to be made and which has any colorable factual  
6 basis, the government has to be allowed to refute it.

7 MR. SCHMIDT: Your Honor, as I indicated to your  
8 Honor how the issues were not that simple, I am not saying  
9 that there was no anti-American sentiment in all of Somalia  
10 prior to the Abdi House. It was related to the change that  
11 occurred after Abdi House that led to the great number of  
12 casualties in Mogadishu. That was the direct need as to the  
13 Abdi House. It changed.

14 As the witness testified, it became a war between  
15 Aideed and the Americans over there. I am not claiming, and I  
16 will not get up there and claim, that there was no  
17 anti-American sentiment in Somalia during that period of time.  
18 And I'm willing to be bound by that.

19 THE COURT: And therefore, the statements of Harun  
20 and others that they were engaged in training of Somalians is



21 relevant to the government's claim that this was part of the  
22 conspiracy to kill Americans.

23 MR. SCHMIDT: That's right. And that's in. Their  
24 testimony isn't quite as your Honor indicated, but that Harun  
25 and Abu Mohamed and Abu Hafs have made those statements, and

5152

1 I'm absolutely willing to deal with those statements on a  
2 level playing field. I'm looking to prevent the complication  
3 issue of the nature of the casualties, the location of the  
4 casualties --

5 MR. FITZGERALD: And, your Honor --

6 MR. SCHMIDT: -- the connection to the casualties  
7 being brought at the last minute now. But I am easily ready  
8 to deal with the Harun statements and the Bin Laden statements  
9 and Abu Hafs statements. That is not a problem. I am not  
10 looking to change that part of the argument, nor am I looking  
11 to make an argument that there was no anti-American feeling in  
12 Somalia at the time. So of course it couldn't have been  
13 anybody who did it. Obviously there was an anti-American  
14 feeling in Somalia at the time and I'm not saying that there  
15 isn't. There was a change and it was necessary by the  
16 government's case and not mine.

17 THE COURT: I think that we've really gone as far as  
18 we can go with this issue at this time and that maybe tomorrow  
19 before the jury comes in we'll have a further offer of proof  
20 of what it is that the government plans to show, and I suggest

21 some serious soul searching on the part of counsel for El Hage  
22 and others whether it is in the interests of any defendant --  
23 the interests of any defendant -- to raise what we have called  
24 the temporal argument, which I now understand is to be the  
25 temporal Mogadishu argument.

5153

1 MR. FITZGERALD: Your Honor, may I make a suggestion?

2 THE COURT: Surely.

3 MR. FITZGERALD: Not to quote you back, but with  
4 Somalia, if you put it off until tomorrow, it's going to be  
5 put off until the day off after. Why don't we just deal with  
6 it now. It's a moving target. We can't address it anymore  
7 because every time we try and address it, something else comes  
8 up.

9 THE COURT: I will allow a government witness to  
10 testify that American troops in Somalia sustained casualties  
11 resulting from military causes during the period beginning X  
12 and ending Y. What is the date of the Abdi House?

13 MR. DRATEL: July 12, 1993.

14 THE COURT: July?

15 MR. DRATEL: July, your Honor, yes. July 12.

16 THE COURT: Now, is there a pattern? Is there an  
17 escalation or --

18 MR. FITZGERALD: There is. Certainly there is an  
19 escalation in the number of fatalities, and the incidents are,  
20 I believe, two in January, one in March, one in August, one in  
21 September and two in October.

22 THE COURT: And that's it?

23 MR. FITZGERALD: Those are the incidents resulting in  
24 deaths.

25 THE COURT: But that's the totality of the

5154

1 government's proof?

2 MR. FITZGERALD: Your Honor, it depends on where  
3 we're going. I don't know what the defense is going to get  
4 into. There are other incidents involving injuries. We're  
5 trying to make it simple. But that's the nature of the proof.  
6 We're not going to put up --

7 THE COURT: There's going to be no testimony as to  
8 the nature of the events or the nature of the injuries  
9 sustained and so on?

10 MR. FITZGERALD: Unless defense counsel want to  
11 explore that. There were people shot in the head, there are  
12 land mines, there are different incidents. We weren't going  
13 to get into that.

14 MR. COHN: I have to say, your Honor, I thought the  
15 government said they were going to offer evidence of  
16 fatalities as opposed to casualties.

17 MR. FITZGERALD: That was the --

18 MR. COHN: I thought the Court had said casualties  
19 and I would like that ventilated.

20 THE COURT: Casualties does not necessarily limit it  
21 to fatalities.

22 MR. COHN: I want to find out whether it was  
23 limiting. I didn't know what the Court meant. Obviously we  
24 think that they can -- their proof is that there were  
25 casualties. That's what their proof is so far, that Fadh1 and

5155

1 others said there were casualties. I don't know why you have  
2 to say that they were fatalities.

3 MR. FITZGERALD: I was trying to keep it simple.  
4 We'll put up -- there's hundreds of casualties. Every time I  
5 try and take some gore out of the case I get gored. We wanted  
6 to prove up that there were hostile actions against American  
7 troops. If we want to go down the road of charting all the  
8 injuries, we can go down that road.

9 THE COURT: I think that's the road we don't want to  
10 take.

11 MR. RUHNKE: Your Honor, I have not had an  
12 opportunity to voice our view on the situation. Since there  
13 are different positions on the defense, I can't react -- I  
14 can't rely on the general rule of adopting. Under 401 or 403  
15 basis, we object to this evidence. It's not a rebutting of  
16 certainly anything we have done in our case, and I think your  
17 Honor should entertain or tell the jury that this evidence is  
18 being brought in only to rebut matters that were put before  
19 the jury in the defense of El Hage and should not be  
20 considered as to any other defendant.

21 THE COURT: That's what Mr. Ricco suggested, and as I  
22 said, I think there is considerable persuasiveness to it. If

23 one defendant and only one defendant is advancing a particular  
24 contention and the evidence is admissible solely to rebut that  
25 contention, I think there is a basis to advise the jury of

5156

1 that.

2 MR. RUHNKE: To state my objection fully, what I am  
3 concerned about and what worries me is having this spill over  
4 into a potential penalty phase and having a jury consider and  
5 thinking about dead American soldiers that my client is not  
6 charged with being involved in, had no allegation whatsoever  
7 that he had any involvement in it whatsoever, and that the  
8 jury is going to be asked to compartmentalize this evidence to  
9 one defendant. So I object to it on Constitutional grounds as  
10 well as on 401 and 403 grounds.

11 THE COURT: Mr. Schmidt, do you --

12 MR. SCHMIDT: For the --

13 THE COURT: Let me say something. Do you object to  
14 an instruction to the jury to the following effect:

15 The jury is about to hear some testimony presented by  
16 a government witness which deals with the period of time  
17 during which casualties were sustained by United States  
18 military personnel in Somalia. This testimony is being  
19 offered and you may consider it only in connection with any  
20 defense contention that efforts made by al Qaeda and its  
21 representatives to train Somali troops took place at a time in  
22 which such efforts cannot be characterized as being made

23 pursuant to a conspiracy to kill Americans.

24 Would you read that back?

25 (Record read)

5157

1 THE COURT: Would you object to that? Obviously it  
2 requires a little polishing, but the substance of that, do you  
3 object to that?

4 MR. SCHMIDT: One, I would eliminate "troops," but  
5 no, I have no objection. You said "Somali troops," and it's  
6 not Somali troops. You used the word "train Somali troops."

7 THE COURT: Somali --

8 MR. SCHMIDT: It's Somalis.

9 THE COURT: Somalis.

10 MR. SCHMIDT: I have no objection to that.

11 MR. COHN: Can I just say something, your Honor?

12 MR. SCHMIDT: If I may, I object. I still have my  
13 objection to the need for casualties that are not connected  
14 to, obviously, al Qaeda but --

15 THE COURT: But I attempt to do that in that  
16 sentence.

17 MR. SCHMIDT: That coming out, yes, I would accept  
18 that stipulation -- excuse me, that instruction.

19 MR. COHN: Your Honor, just to make our position  
20 clear and to voice the troubles. I join Mr. Ruhnke's position  
21 as announced, but there seems to be no real record in issue  
22 that this all stems from the joinder that started in the  
23 beginning that started this case down this path, and what

24 happens in a case where you have disparate people joined is  
25 that there is always this notion -- and everybody tries to do

5158

1 it, the lawyers on all sides -- that you try to make it work  
2 because they are looking for some solution that makes the  
3 joinder actually work, when the recognition should be it can't  
4 work, and that while it's all very nice for us to have a  
5 limiting instruction which I think is nicely crafted, the  
6 bottom line is if we get to a penalty phase, somebody in  
7 there, when some juror is holding out for my client's life, is  
8 going to say, "but remember those poor people, those poor  
9 American soldiers in Somalia."

10           And we'll never find out because, as you well know,  
11 we're not allowed to interview jurors post-trial without  
12 permission of the Court. I know what you are going to say to  
13 that application about wanting to interview them about that.  
14 So we're in terrible trouble because it's not going to take  
15 much. So it's very nice to say that Mr. Ricco has found the  
16 solution, and it is a solution and it may be the one that your  
17 Honor accepts, but there should not be any mistake we are  
18 going along with it reluctantly, if at all.

19           THE COURT: Government have any objection to it?

20           MR. FITZGERALD: To this instruction, no, except I  
21 think we should make clearer if -- no, that's actually fine.  
22 Thanks.

23           THE COURT: Should we bring in the jury now?

24 MR. RUHNKE: I'm sorry, just one issue on this. Just  
25 so I'm understanding your Honor's ruling, are you limiting

5159

1 casualties or fatalities that predate Abdi House, which was  
2 the July 12, 1993?

3 THE COURT: It's during the period of time.

4 MR. FITZGERALD: Yes. It covers --

5 THE COURT: I think maybe if you --

6 MR. FITZGERALD: Your Honor, I think, knowing your  
7 Honor's ruling, we can show the defense a chart and see if we  
8 can make sure that we're all on the same wavelength.

9 THE COURT: Very good.

10 MR. RUHNKE: I just want to know what the rules are.  
11 We're talking about pre Abdi House.

12 THE COURT: We'll address this again tomorrow  
13 morning, but the jury has been now sitting in that room for  
14 two hours and we have some other business before.

15 MR. FITZGERALD: Your Honor, I'm waiting to see where  
16 we are on stipulations, etc. The bulk of the business -- we  
17 need to just check with counsel if they have signed off on.

18 MR. RUHNKE: I haven't seen it.

19 MR. COHN: We haven't seen it.

20 MR. FITZGERALD: We circulated a letter that we're  
21 going to offer, a MIRA document, Government Exhibit 652. I  
22 just don't want to stand up in front of the jury and then we  
23 have a sidebar.

24 THE COURT: That's why we've kept this jury.



25

MR. SCHMIDT: Your Honor, if I may have a moment.

5160

1 THE COURT: I'll take a recess. Let me know when you  
2 are ready.

3 Now, I believe there's been distributed the latest  
4 draft of the verdict form and the instructions.

5 MR. COHN: We haven't gotten the instructions.

6 MR. DRATEL: Not the instructions, just the verdict  
7 form.

8 THE COURT: They're en route. I assume that  
9 tomorrow, whatever this resolution is, this particular problem  
10 is -- by 11:00 it's all finished, right?

11 MR. FITZGERALD: Yes, your Honor. I think, frankly,  
12 if we sit down maybe we can resolve it now, because tomorrow  
13 morning we'll be where we are now. The witness is here.

14 THE COURT: Even if it's 11:00, we would begin soon  
15 thereafter with the government's summation.

16 MR. FITZGERALD: Yes, your Honor. But my hope is,  
17 the witness is here, we can resolve it now; we can do that  
18 today and be done with it.

19 THE COURT: I would certainly encourage that.

20 MR. SCHMIDT: They want to deal with that document  
21 that we want to put in.

22 THE COURT: Do whatever it is that can be  
23 accomplished with the goal that Mr. Fitzgerald has just  
24 articulated, which is to have all aspects of the record

25 closed.

5161

1 MR. SCHMIDT: If I may, your Honor, the document that  
2 the government wants to put in from Mercy International should  
3 not be received, period. There can be no stipulation on that  
4 document or the other documents that they want to put in. It  
5 is simply inadmissible hearsay and they can't --

6 THE COURT: What is the document?

7 All right, so now we know there's something which is  
8 not going to be resolved. What is it?

9 MR. FITZGERALD: Your Honor, first of all, there was  
10 a stipulation that all the documents that are produced in  
11 discovery on Mercy were authentic. There was a stipulation as  
12 to authenticity.

13 MR. SCHMIDT: It's an authentic, your Honor,  
14 authentic, apparently, document.

15 MR. FITZGERALD: I will hand it up to your Honor.

16 THE COURT: Would you hand me the document and would  
17 you tell me --

18 MR. FITZGERALD: Our position on the document is very  
19 simple. Government Exhibit 652 we're going to offer and not  
20 read, the extent to which Mr. Schmidt has put in several  
21 inches of documents indicating that the relief organizations  
22 were purely about relief work and charity and also to the  
23 extent that he established a lack of an anti-American animus.

24 If you look on page 2, in Luuq and elsewhere, it  
25 discusses Al Ittihad. It shows as of February 9, which is the

1 date on the front page of the report, there was great concern  
2 that the Americans were coming, that the Americans were  
3 hostile to Al Ittihad and the Muslims and America wanted the  
4 oil in the region, that the America's attitude toward the  
5 Muslims was improper, that they were bringing in alcohol, that  
6 they were immoral, and it just shows that there's an  
7 anti-American sentiment among the other motivations going on  
8 with the group and I think it's a fair response to the  
9 presentation of Mr. Schmidt.

10 THE COURT: And this is August and --

11 MR. FITZGERALD: It's February.

12 THE COURT: It's February.

13 MR. FITZGERALD: -- 8, '93 to February 19, which is  
14 precisely six months before.

15 THE COURT: And this document is a document?

16 MR. FITZGERALD: Recovered in the search of Mercy  
17 International, which has been agreed to be authentic.

18 MR. DRATEL: Your Honor, first of all, it's from an  
19 organization South Africa Relief and Rehabilitation. No idea  
20 who they are. This is why hearsay is inadmissible -- because  
21 you can't cross-examine for the truth. And in fact, the  
22 information is not correct. It is just classic hearsay. Our  
23 document --

24 THE COURT: All right. What is this South Africa  
25 Relief and Rehabilitation? What is its relationship to Help

1 Africa?

2 MR. FITZGERALD: The documents were in the files.

3 MR. DRATEL: Whose files? Help Africa's?

4 THE COURT: Could you, please?

5 MR. DRATEL: I'm sorry.

6 MR. FITZGERALD: When I said it was a Mercy search  
7 document, I meant to indicate it was found in a search of the  
8 agency at the Mercy International, which, one, shows a link.  
9 There are other documents showing a number of different relief  
10 agencies came to Mercy.

11 It's not offered to show the truth of the matter  
12 asserted, it's offered to show the attitude of the people who  
13 did an assessment at the Al Ittihad region. The fact that  
14 America was coming to colonize and immoralize Somalia, we're  
15 not trying to prove that.

16

17 (Continued on next page)

18

19

20

21

22

23

24

25

1           THE COURT: But how does the presence of the document  
2 in the file without any endorsement of the document or  
3 memorandum which says this is a group whose views and  
4 attitudes we join -- you know, you could have something in  
5 your files because you keep track of what organizations you  
6 are opposed to.

7           MR. FITZGERALD: Two responses. First, they put in a  
8 stack of documents of other organizations found in the files  
9 to show what that attitude was. Secondly, South Africa Relief  
10 Services was visiting the relief areas Luuq and Belet Ven in  
11 1993, showing that there was an anti-American animus at the  
12 camps.

13           THE COURT: So you are offering this for the truth.

14           MR. FITZGERALD: No, the truth is that their  
15 statement of what they think of America is offered to show  
16 what they think of America, not that their thoughts are  
17 accurate. When you say America is coming here, paraphrasing,  
18 to colonize us, we are not offering that for the truth, we are  
19 offering to show their attitude, which is precisely what their  
20 expert Dr. Samatar was talking about a lack of anti-American  
21 animus before Abdi.

22           THE COURT: Upon whom?

23           MR. FITZGERALD: Upon people visiting those regions,  
24 precisely. Dr. Samatar talked about what he heard on BBC in  
25 London. These are people who visited the regions, they kept

1 the documents, and they are expressing concern about America's  
2 intentions and saying that Mujahideen are in these areas.

3 THE COURT: I think absent some showing that this is  
4 a group that was working with Al Qaeda or a group which was  
5 endorsed by Al Qaeda, the mere presence of the document in the  
6 Mercy file is not a basis for its introduction.

7 MR. FITZGERALD: We are trying to show the state of  
8 mind of the group Al Ittihad and Mercy, because the defense  
9 was trying to show what it was doing in their files. We are  
10 trying to rebut the attempt to show that there was not  
11 anti-American animus. There were conversations later today  
12 about what Mercy people were thinking about Ethiopia. A  
13 number of documents were put in to show what were Mercy's  
14 missions and goal. We are trying to show the state of mind of  
15 Mercy, to rebut the inference that --

16 THE COURT: We are going around in a circle. The  
17 fact that I had something in my files, I could have a copy of  
18 Mein Kampf in my library. It doesn't mean that I support  
19 Hitler.

20 MR. FITZGERALD: But El Hage put in other documents  
21 from other organizations.

22 THE COURT: Is there something that shows that this  
23 organization is an organization with which Mercy International  
24 or Help Africa or anyone from Al Qaeda worked?

25 MR. FITZGERALD: I will have to look at another

1 document this evening. I believe there is a document that  
2 indicated that --

3 THE COURT: There is, I believe, I believe you cited  
4 in your opposition to striking overt act E, I think you cited  
5 testimony there with respect to the selection of --

6 MR. FITZGERALD: Yes, that Al Qaeda selected a  
7 particular tribe with which they were philosophically aligned,  
8 for lack of a better word, and our point is to respond to the  
9 proof about what Mercy International's aims were. I objected  
10 on hearsay grounds and there were documents stating what their  
11 aims were, specifically excluding any political aims.

12 THE COURT: What is the relationship between Al  
13 Ittihad and this South Africa Relief and Rehabilitation?

14 MR. FITZGERALD: From the document itself it  
15 indicates they went to the area where Al Ittihad was and which  
16 I believe Dr. Samatar also said was working with the groups in  
17 that region at the time.

18 MR. DRATEL: Your Honor, the government did not  
19 object to the Mercy International documents that Mr.  
20 Fitzgerald is talking about, and in fact they were just Mercy  
21 documents. The only other things that we had were UN letters  
22 to Mercy commending it on its effort. The government put in a  
23 poem that was --

24 THE COURT: But look at page 2 of the government's  
25 letter of April 28 on the subject of striking overt act E, in

1 which Agent Anticev testified.

2 MR. DRATEL: Tribe Um Rahan. There is nothing about  
3 this organization.

4 THE COURT: While Odeh was training the Um Rahan  
5 tribe, a tribe allied with Al Qaeda in the Al Ittihad group --  
6 what is the basis for saying that tribe is allied with this  
7 group?

8 MR. FITZGERALD: My recollection, that came in the  
9 testimony three different times. I believe that Odeh  
10 testified -- correct me if I am wrong -- from the notes of  
11 Agent Anticev. Secondly, I believe Kherchtou testified that  
12 Al Qaeda worked with Al Ittihad and in doing that worked with  
13 Ahmed Sheikh Adam, the director of Mercy International, of  
14 whom many documents were admitted. I believe besides  
15 Kherchtou and Odeh's statement -- I am slipping on the third  
16 one that came to my mind earlier. But the understanding was  
17 that Al Qaeda worked with the Al Ittihad group because it was  
18 an Islamic group of Somalis. Ahmad Tawhil was someone that  
19 Kherchtou testified and said that Mercy used to give  
20 identification cards to slip across the border to Somalia.

21 MR. DRATEL: There is nothing that says El Hage  
22 endorsed this document. It is describing something from a  
23 source with which there is no connection.

24 THE COURT: I sustain the objection absent any  
25 evidence which indicates an endorsement on affiliation between



1 South Africa Relief and Rehabilitation and the defendants.

2 What else remains?

3 MR. SCHMIDT: There was a discussion concerning a  
4 stipulation between the government and the defendant and I am  
5 withdrawing my offer of a stipulation.

6 MR. FITZGERALD: You are talking about the request?

7 MR. SCHMIDT: Yes.

8 MR. FITZGERALD: Besides the stipulation the only  
9 thing I think productive today -- we can save that for the  
10 morning if we have to work it out. There is one document  
11 there was a stipulation on, I believe with regard to the Ib  
12 Wahith birth document.

13 MR. COHN: I don't know what the purpose of it is.

14 MR. FITZGERALD: Then we will offer the grand jury  
15 witnesses. All that is left is the Department of Defense  
16 employee, and I suggest we sit down with defense counsel and  
17 work out what exhibits we put in so we don't do it again  
18 tomorrow morning.

19 I did want to offer Government's Exhibit 445 which is  
20 the handwriting expert's handwriting.

21 THE COURT: It is received.

22 (Government Exhibit 445 received in evidence)

23 THE COURT: I am hesitating about whether we keep the  
24 jury or send the jury home.

25 MR. FITZGERALD: My suggestion, your Honor, why don't

1 we take 10 minutes, and if we can work something out, fine.  
2 If not, we can give up. Otherwise we will be now where we are  
3 tomorrow, like Ground Hog Day.

4 THE COURT: Let Mr. Kenneally know.

5 Is there a need for a further charging conference  
6 prior to the government's commencement of its summation?

7 MR. COHN: There may be, your Honor.

8 MR. FITZGERALD: Not having read the revised  
9 charge --

10 THE COURT: We will take 10 minutes, see what we do  
11 about the jury, and it may be then that we will adjourn for a  
12 couple of hours and then have a new charging conference. Very  
13 well.

14 Let Mr. Kenneally know where you are.

15 (Recess)

16 MR. FITZGERALD: So the court knows where we are,  
17 what I did was, sticking to fatalities and not just injuries  
18 and serious injuries, to try and minimize the volume, what I  
19 propose are two charts, one of which was handed up to the  
20 court, one which lists the name of the person, date and time  
21 of casualty, leave out the last column, list the names and  
22 dates which people were killed. The second is a month by  
23 month 1993, the number of incidents that resulted in  
24 fatalities. We would call the witness and put that in if that  
25 were acceptable to everyone else. If we go beyond that, we go

5170

1 beyond that.

2           THE COURT: And I would tell the jury and advise that  
3 the government's next witness who will testify as to the  
4 period of time during which American military personnel  
5 sustained casualties in Somalia, this testimony is being  
6 received solely to avoid any contention that Al Qaeda training  
7 of Somalis took place at a time when such training was  
8 considered anti-American.

9           MR. RICCO: Your Honor, we have two points. One  
10 concerns the names and dates. It is totally irrelevant to the  
11 purpose of showing the second chart, which is that there were  
12 casualties at the time. What the government is doing with the  
13 listed individuals is putting the 18 servicemen back into the  
14 case when the court has taken them out.

15           THE COURT: These names are not really relevant to  
16 this point. I know it is sort of personalizing the deaths.  
17 But why isn't the second chart -- isn't the second chart  
18 sufficient?

19           MR. FITZGERALD: Can I answer that -- I keep  
20 negotiating against myself.

21           MR. RICCO: One other point, with respect to your  
22 Honor's instruction. Would you kindly instruct the jury that  
23 it is a defense that Mr. Schmidt is raising on behalf of  
24 Mr. El Hage?

25           THE COURT: Apropos of that, I don't engage in

5171

1 extensive dialogue on severance every time the issue is

2 raised, although, as I said at the time I denied the severance  
3 motions, it is a matter with respect to which I have an  
4 ongoing responsibility. But, you know, the big issue on  
5 severance was separating the death-eligible from the  
6 nondeath-eligible, and it is obvious here that this is a  
7 controversy the proponents of which are two nondeath-eligible  
8 defendants.

9 MR. RICCO: This is an issue that goes both  
10 vertically and horizontally.

11 THE COURT: Yes, but I just want to point out that  
12 had I granted the severance that was requested, Odeh and El  
13 Hage would still be in the same trial.

14 My question is, assuming that the witness testifies  
15 to the chart, the one-line chart which lists no names and  
16 simply testifies to those facts and the court gives the  
17 instruction that I gave, leaving open the question whether I  
18 identify it as a defense being put forth solely by El Hage,  
19 whether anyone has any further objection.

20 MR. SCHMIDT: Your Honor, if I may, the chart is a  
21 good idea. The only problem I have is that it talks about  
22 number of incidents as opposed to giving a percentage of  
23 casualties, and it skews it. It is my understanding that  
24 the number of casualties from January to July suffered by  
25 Americans is 10 percent. The casualties from August to

5172

1 December is 90 percent. I would rather have a percentage than  
2 number of instances since it more accurately reflects --

3 THE COURT: No, you wouldn't. Rather than say 2  
4 people died you would rather have percentages? You can't be  
5 serious about that.

6 MR. SCHMIDT: This is not the number of casualties,  
7 this is number of incidents.

8 MR. FITZGERALD: In terms of incidents, the fact that  
9 in October 18 were killed and 19 --

10 THE COURT: I don't understand that.

11 MR. SCHMIDT: I think you misunderstand.

12 THE COURT: The first chart is headed hostile US  
13 deaths in Somalia. The second is headed incidents.

14 MR. FITZGERALD: That is a misnomer. Incidents in  
15 which -- hostile incidents in which fatalities resulted.

16 THE COURT: So this could read hostile US military  
17 incidents resulting in fatality?

18 MR. FITZGERALD: The other way around. Hostile  
19 incidents in which US military fatalities resulted. The  
20 people killed were the American soldiers.

21 THE COURT: This isn't an automobile accident. This  
22 is hostile action.

23 MR. FITZGERALD: That comes from the bigger chart,  
24 which listed accident and terrorist. The accident ones were  
25 deleted. I took terrorist and called it hostile, anticipating

5173

1 a 403 objection -- give me some credit. Hostile incidents in  
2 which US military fatalities resulted.

3 THE COURT: In this first chart, couldn't the witness  
4 simply testify that during the period of December 9 through  
5 March 28, 1994, as a result of hostile actions against the US  
6 military there were 29 deaths in Somalia, and that the second  
7 chart reflects the dates on which incidents resulting in  
8 fatalities took place. Yes?

9 MR. FITZGERALD: Yes.

10 MR. RICCO: Hold on.

11 MR. SCHMIDT: You don't have to do that, Mr. Ricco.  
12 You don't have to do that, Mr. Ricco.

13 MR. RICCO: My point is that the jury doesn't even  
14 have to hear the number of fatalities in lieu of the court's  
15 instruction. If the government wants to make the point that  
16 there were casualties before Abdi House, then this chart, the  
17 chart that lists the incidents satisfies that. When there is  
18 testimony about the 18 or 29 deaths, then the number of deaths  
19 are right back in the case and the whole purpose of striking  
20 Special Agent Yacone's testimony has been defeated.

21 My position is, if the court is going to allow  
22 testimony with respect to the 18 deaths, which is now 29  
23 deaths, then I say reinstate Yacone's testimony, because this  
24 is more prejudicial to us than Yacone's testimony, and we are  
25 sensitive to this issue because it was raised by a defendant

5174

1 who was never present in Somalia, and our client Mr. Odeh is a  
2 defendant who was present in Somalia and we have to deal with  
3 these issues that took place in Somalia and Mr. El Hage does

4 not.

5           So what we have here are the 18 deaths right back  
6 into the case after they have been stricken, but in a much  
7 more prejudicial form.

8           THE COURT: I don't agree with that.

9           I will hear from Mr. Ruhnke and then I will hear very  
10 briefly and then I am going to make a ruling and I will bring  
11 in the jury. The witness is ready?

12           MR. FITZGERALD: Yes.

13           MR. RUHNKE: Your Honor, first, I join what Mr. Ricco  
14 said. There is also evidence in this case that my client  
15 spent time in Somalia limited to 1997. We started off  
16 striking 18 deaths. Somehow to rebut something that was  
17 hardly a clarion call of the El Hage defense, we are now  
18 letting the government put in 29 deaths with a dangerous  
19 spillover to people on trial facing the death penalty. That  
20 is just not right, your Honor. It should not be allowed to  
21 happen, whether it is a 403 basis or a 401 basis, or even a  
22 cutoff of the Abdi House. If we talk about the number of  
23 fatalities prior and after the Abdi House, there were three  
24 fatalities that occurred prior to the Abdi House incident.  
25 The point needs to be made that there was hostile feeling and

5175

1 action including the fatalities to US troops predating Abdi  
2 House --

3           THE COURT: Your objection is to the number? You

4 want to say during the period of December 9 through March 28,  
5 '94, there were a significant number of deaths in Somalia?

6 MR. COHN: No, casualties.

7 THE COURT: Deaths?

8 MR. RUHNKE: Deaths.

9 MR. FITZGERALD: Why don't we leave out a number and  
10 say casualties including deaths, but no numbers.

11 MR. SCHMIDT: Your Honor, that skewers the whole  
12 purpose of allowing the government to bring out any  
13 casualties. My understanding of the purpose to allow them to  
14 bring out casualties was to show hostility prior to the Abdi  
15 House. There were two deaths. Two appeared to be by running  
16 over a stationary landmine and one appears to be by armed  
17 fire --

18 THE COURT: Thank you, Mr. Schmidt. Mr. Cohn.

19 MR. COHN: Your Honor, I want to make clear that I  
20 join with Mr. Ruhnke but I do need to clarify, as usual,  
21 because I think I am having one of my more slow days. It  
22 seems, to put proof of these casualties in you have to have a  
23 but-for argument, but for the activities of Al Qaeda this  
24 would not have happened, and I don't think anybody has gotten  
25 there. There is no connection.

5176

1 THE COURT: Please, please. The point is, there are  
2 significant statements made by leaders of Al Qaeda concerning  
3 activities in Somalia, and the indictment alleges and the  
4 government has introduced proof that the actions in Somalia



5 were designed to further the overall objection of killing  
6 Americans.

7           You may be seated. Thank you. I have heard  
8 sufficient argument on this.

9           MR. RUHNKE: I have an application that I can state  
10 in 10 words. I move for a mistrial and severance on behalf of  
11 K.K. Mohamed if that evidence goes in.

12           MR. COHN: And I join the application.

13           THE COURT: Denied. What is going to happen is, the  
14 jury is going to be brought back. I will say to the jury I am  
15 advised that the government's next witness will testify as to  
16 the period of time during which American military personnel  
17 sustained casualties in Somalia. This testimony is being  
18 received solely to rebut any contention made on behalf of the  
19 defendant El Hage that some of Al Qaeda's efforts to train  
20 Somalis took place at a time when such training was not  
21 intended to be anti-American.

22           MR. SCHMIDT: Your Honor --

23           THE COURT: That the witness will then testify that  
24 during the period of December 9, 1992, through March 28, 1994,  
25 there were casualties, including deaths, in Somalia. And

5177

1 there will be introduced in evidence the skinny chart, which  
2 indicates the dates on which incidents which resulted in  
3 fatalities took place.

4           MR. SCHMIDT: If I may now respond, your Honor, if

5 you highlight Mr. El Hage, this was an ancillary defense as  
6 stated by Mr. Ruhnke, because Mr. El Hage was not there and  
7 not involved. However, the government has put Somalia in as  
8 part of the conspiracy, and because Mr. El Hage is alleged to  
9 be part of the conspiracy I have been dealing with that issue.  
10 If you are going to put in Mr. El Hage's defense as you have  
11 just stated now, I will do whatever is necessary to take  
12 Mr. El Hage's defense out of play because I think it is so  
13 highly prejudicial to put his name into Somalia when he is not  
14 there that I will do whatever I have to do as a result of  
15 that. I don't think I should have to do it --

16 THE COURT: Are you telling me that you are willing  
17 to stipulate on behalf of El Hage that no claim will be made  
18 that during the time in which Al Qaeda representatives were  
19 engaged in the training of Somalis was such training not  
20 directed against the United States?

21 MR. SCHMIDT: You are asking me to stipulate to one  
22 of the charges? Is that what you are doing, your Honor?  
23 That's what it sounds like.

24 THE COURT: What is it that you are offering to do?

25 MR. SCHMIDT: I am not quite sure what's necessary.

5178

1 All I wanted to do, your Honor, is, after the government  
2 presented their proof is to show that the violence attributed  
3 to somebody in Mogadishu, and that was very clear, that period  
4 of time after Abdi House, was more complicated than the  
5 government set forth. The government's own witnesses have

6 testified that Al Qaeda sent people to train Somalis prior to  
7 the US and the UN being there. I am assuming that I am  
8 allowed to discuss that. I will not discuss that there was no  
9 anti-American feeling prior to Abdi House because there was,  
10 and I won't even mention Abdi House if your Honor indicates  
11 that I shouldn't. I have never said that there was no  
12 anti-American sentiment.

13 THE COURT: Should we strike the testimony of  
14 Dr. Samatar with respect to the Abdi House incident?

15 MR. SCHMIDT: If the government is not going to  
16 allege deaths of Americans subsequent to the Abdi House, then  
17 I will then consent to striking Professor Samatar's testimony  
18 as to the Abdi House.

19 MR. FITZGERALD: But we already have the testimony  
20 concerning Bin Laden and Abu Hafs' statements in the other  
21 testimony that Al Qaeda was responsible --

22 MR. SCHMIDT: Am I barred from saying other people  
23 were responsible for the deaths?

24 MR. FITZGERALD: No, Judge.

25 THE COURT: The question is the motivation of Al

5179

1 Qaeda and the motivation of the people who went to Somalia to  
2 train.

3 MR. SCHMIDT: Your Honor, I will limit my summation  
4 to the motivation of Al Qaeda as alleged by the government's  
5 own witnesses.

6 MR. FITZGERALD: Your Honor, I don't know what he  
7 means when he says that. I know that if the jury was sitting  
8 where we were all sitting last week, they were under the  
9 impression that the anti-American animus rose after the Abdi  
10 House.

11 MR. SCHMIDT: That's not what he said, your Honor.  
12 It changed. It didn't rise, it changed. I think to say that  
13 it didn't change is not truth nor reality. It did change.  
14 The manner or who was involved in it is different.

15 THE COURT: What also changes on an almost daily  
16 basis is the use that El Hage seeks to make of this. At one  
17 time we had this incident which was the key point for the  
18 significant change in the attitude on the part of the  
19 Somali --

20 MR. SCHMIDT: It's a matter of record that indeed it  
21 is. It is a matter of record in the UN reports, it is a  
22 matter of record in the US reports.

23 THE COURT: I have heard your arguments now. Would  
24 you please be seated.

25 MR. SCHMIDT: As I indicated, whatever is necessary

5180

1 to eliminate pointing out Mr. El Hage on a defense that is  
2 ancillary to the rest of his defense, we will do it.

3 THE COURT: What is necessary is the striking of any  
4 testimony of Dr. Samatar as to an attack on Abdi House and any  
5 contention that that event was a precipitating or aggravating  
6 event with respect to anti-American hostilities against the

7 United States.

8 MR. SCHMIDT: I think that is more than necessary.  
9 If your Honor makes that decision, fine. My alternative  
10 suggestion, your Honor, to put us back where we were a few  
11 days ago, reinstate the helicopter pilot's testimony and  
12 simply drop it and move on.

13 THE COURT: Does anybody have any objection to my  
14 calling in the jury and reading -- I will read it again if you  
15 like. I take it then the government will rest --

16 MR. FITZGERALD: We still have a few documents.

17 THE COURT: OK.

18 MR. SCHMIDT: If I may, are you going to read the  
19 contention of Mr. El Hage?

20 THE COURT: No. Listen to what I am going to read.  
21 Listen to what I am going to read: The court strikes any  
22 testimony of Dr. Samatar as to any attack on Abdi House and  
23 any contention that that event was a precipitating or  
24 aggravating event with respect to anti-American hostility in  
25 Somalia. Anybody object to that?

5181

1 Silence is acquiescence. Bring in the jury. I will  
2 read this to them, and then you have some documents?

3 MR. FITZGERALD: Yes, but we have to resolve them  
4 with defense counsel. The one issue that remains outstanding,  
5 we will probably stipulate on the chemist testimony. There is  
6 a possibility that won't happen. If it doesn't, it will be 20

7 minutes tomorrow, if that.

8 THE COURT: So I call the jury in, I read this to  
9 them and I send them home.

10 MR. RICCO: Yes.

11 THE COURT: Bring in the jury, please.

12 When we adjourn, we will adjourn until 4:30 for the  
13 charging conference? Yes? How much time do people want now  
14 that there has been the distribution of the revised  
15 instruction and verdict form before we have the charging  
16 conference? 5:00? Tell me.

17 MR. FITZGERALD: Can we make it 4:30?

18 MR. SCHMIDT: I missed the question. I didn't hear  
19 what the question was, your Honor.

20 THE COURT: How much time you need. The court has  
21 distributed the proposed charge and the revised verdict form,  
22 and how much time do you need before we have our charging  
23 conference, and the suggestion was 4:30. I am going to mark  
24 these two documents Court Exhibit A of today's date and --  
25 that's the charge -- and Court Exhibit B is the verdict form

5182

1 of today's date.

2 MR. FITZGERALD: One issue, so we don't delay  
3 tomorrow. There were a number of stipulations entered into by  
4 all four defendants and the government. There are a couple of  
5 stipulations that are mainly housekeeping changes. As I  
6 understand it now, we have agreement between the government  
7 and three of the defendants to that stipulation. I don't

8 think that the details affect at all the case against the one  
9 defendant who does not wish to stipulate. I just don't want  
10 to have a snag tomorrow. It would be the government's  
11 intention to replace the signature page with a signature page  
12 omitting that defendant's signature and offering that. I  
13 didn't want an issue tomorrow, so that in terms of the jury  
14 looking at the signature page it is not highlighted.

15 THE COURT: Do we have tomorrow morning a summary of  
16 the stipulations?

17 MR. FITZGERALD: Yes, your Honor, but we have to add  
18 in. To save time, your Honor, if we could offer the 1998  
19 grand jury exhibits as one collective exhibit, Government's  
20 Exhibit 420C.

21 THE COURT: OK.

22 (Jury present)

23 THE COURT: I hope via the marshal I have responded  
24 to all your questions with about dates and times, and I have  
25 already dictated the letter that was requested with respect to

5183

1 sitting on Friday.

2 The court strikes from the record, and you are to  
3 disregard, any testimony of Dr. Samatar with respect to an  
4 attack on Abdi House, and any contention that that event was a  
5 precipitating or aggravating circumstance with respect to  
6 anti-American hostilities in Somalia. Let me repeat that.

7 The court strikes from the record, and you are to

8 disregard, any testimony by Dr. Samatar as to an attack on  
9 Abdi House and any contention that that event was a  
10 precipitating or aggravating circumstance with respect to  
11 anti-American hostility in Somalia. I urge that those who are  
12 taking notes make note of that in your notes as well.

13 Is there something ready now?

14 MR. FITZGERALD: Yes, there is. I believe  
15 stipulation 192, and that reads as follows:

16 It is hereby stipulated and agreed by and between the  
17 undersigned parties, including the government and counsel for  
18 El Hage, that Government's Exhibit 455 is a true copy of a  
19 consular report of birth abroad of a citizen of the United  
20 States of America and supporting documentation for the birth  
21 of Suliman, S-U-L-I-M-A-N, Ali, A-L-I, on March 10, 1996,  
22 listing Ihab, I-H-A-B, Mohammed, M-O-H-A-M-M-E-D, Ali, A-L-I,  
23 as the father of Suliman Ali.

24 It is further stipulated and agreed that Government's  
25 Exhibit 455 may be received in evidence as a Government's

5184

1 Exhibit at trial.

2 Your Honor, if I could just display the relevant page  
3 on will Elmo. The first page display indicates that the  
4 person born is Suliman Ali and that the date of birth is March  
5 10, 1996, and the father is Ihab Mohammed Ali, and the second  
6 page we will display indicates the address provided to the  
7 consular section recording of citizen born abroad, and under  
8 the present address is indicates P.O. Box 72239, Nairobi,



9 Kenya.

10 The balance will be ready tomorrow morning, Judge.

11 Thank you.

12 THE COURT: Ladies and gentlemen, it is my  
13 understanding that, as Mr. Fitzgerald just stated, tomorrow  
14 morning there will be some brief period of time devoted to  
15 some further stipulations, but that there will be no further  
16 live witnesses and that tomorrow morning the government will  
17 begin its closing argument to you. Let me explain the  
18 sequence of closing arguments.

19 The government, because it has the burden of proof,  
20 goes first, so we will hear closing argument made on behalf of  
21 the government. Following that, in the order in which they  
22 are listed in the indictment we will hear closing arguments on  
23 behalf of the defendants El Hage, Odeh and Al-'Owhali and  
24 Mohamed. After that, the government is given an opportunity  
25 to make a rebuttal argument. All of that will take all of the

5185

1 week, perhaps the start of next week. Following that, the  
2 court will instruct you, and then our task ends and your task  
3 begins. You will begin your deliberations. So that is our  
4 present expectations and timetable. The only thing else I  
5 have to say is, have a good evening.

6 (Jury excused)

7 THE COURT: We are adjourned until 4:30. For  
8 purposes of the charging conference, if the defendants wish to

9 be present it is certainly their right to be present. If the  
10 defendants wish to be excused and waive their appearance, the  
11 court has no objection to that.

12 MR. COHN: Mr. Al-'Owhali will waive his presence,  
13 except if there is no unanimity they will take him back.

14 MR. RUHNKE: Mr. Mohamed as well would request to be  
15 excused if it is unanimous.

16 MR. SCHMIDT: Mr. El Hage wishes to be excused if it  
17 is unanimous.

18 MR. RICCO: Mr. Odeh would excuse himself.

19 THE COURT: Waives his presence. Adjourned till  
20 4:30.

21 (Continued on next page)

22  
23  
24  
25

5186

1 THE COURT: All right, I have marked as Court Exhibit  
2 A the proposed charge for the jury which is captioned "Third  
3 Working Draft as of April 30th, 2001," and I marked as Court  
4 Exhibit B the verdict form which is marked "Second Working  
5 Draft as of April 30, 2 p.m."

6 The first comment that I have on the proposed charge  
7 to the jury is on page 21. Does anyone have anything before  
8 page 21?

9 MR. COHN: I have my pet project on page 15, your

10 Honor.

11 THE COURT: Page 15?

12 MR. COHN: Yes, in which you promised, because when I  
13 whined about the fact that you made voluntariness invisible,  
14 you said you would put in the words "if any," after the weight  
15 and --

16 THE COURT: I put in "if any."

17 MR. COHN: Not on page 15, you didn't.

18 THE COURT: Page 15, "in deciding what weight, if  
19 any."

20 MR. COHN: You're right. I looked at the wrong  
21 place. You are absolutely right, your Honor. I will be  
22 mortifiedly silent from here on in.

23 THE COURT: On page 21, there was some colloquy in  
24 which I gave the jury an instruction about considering a plea  
25 of guilty and then Mr. Fitzgerald said that I had changed it

5187

1 to take out benefits, and we have reviewed the notes --

2 MR. FITZGERALD: I was wrong, Judge. I checked my  
3 notes as well and I had asked that it be stricken and my notes  
4 said "not stricken."

5 THE COURT: So just the admonition to counsel not to  
6 argue based on the instruction is rescinded. This is what the  
7 charge will say.

8 My next comment is on page 23, the next to the last  
9 line, is it Government Exhibit 7 that has a list --

10 MR. FITZGERALD: Yes.

11 THE COURT: My next comment is on page 93.

12 MR. DRATEL: Your Honor, could the Court incorporate  
13 all our previous objects, or should we state them again just  
14 in terms of certain requests that were made previously that  
15 were denied and then, as a result, obviously is not --

16 THE COURT: There is no need to state them again.  
17 There is no need to state them again. This is what the Court  
18 proposes to charge. This contains the Court's resolution of  
19 all the issues that were left open.

20 MR. FITZGERALD: Your Honor, just looking at page 21,  
21 Government Exhibit 7, as I understand it, is a list of all the  
22 government's stipulations entered into as of today as  
23 government exhibits. So no one is misled, it says, "Here isa  
24 brief description of all the stipulations." There are a  
25 number of defense stipulations that have gone in. We still

5188

1 have to get some copies. A number of them have been entered  
2 in the last few days.

3 THE COURT: What page are you on?

4 MR. FITZGERALD: Page 23.

5 THE COURT: Page 23.

6 MR. FITZGERALD: We just have a description of the  
7 government stipulations. If the defense wants to put in a  
8 corresponding list of what they have put in, but that  
9 technically doesn't describe it accurately, Government Exhibit  
10 7. That's a list of all the stipulations we entered.

11 THE COURT: I should add to that sentence "by the  
12 government"?

13 MR. FITZGERALD: Yes.

14 THE COURT: I'll add "by the government." And if the  
15 defendants want to prepare a like document, I will add to it.

16 MR. FITZGERALD: Thanks.

17 THE COURT: "Defense Exhibit X contains a list of all  
18 the stipulations and description of the defendants'..."

19 Page 23.

20 MR. WILFORD: Your Honor, before we go to page 98?

21 THE COURT: Page 23.

22 Before we go to 98, yes.

23 MR. WILFORD: Page 40.

24 THE COURT: Page 40.

25 MR. WILFORD: In the third full paragraph on that

5189

1 page.

2 THE COURT: Page 40?

3 MR. WILFORD: Beginning with "it is important."

4 THE COURT: Yes.

5 MR. WILFORD: Your Honor, we request that after "as  
6 well as those" you insert the word "independent."

7 THE COURT: After where do I insert "independent"?

8 MR. WILFORD: After "as well as those," so that it  
9 would read "as well as those independent persons alleged to be  
10 coconspirators."

11 THE COURT: I don't know what that means.  
12 Independent person alleged to be a coconspirator? I don't  
13 understand it. I can't grant it because I don't understand  
14 what you are asking for.

15 MR. WILFORD: Your Honor, the sentence reads "by  
16 independent evidence of his own acts or statements as well as  
17 those of persons alleged to be coconspirators."

18 THE COURT: This is what the law is. This is the  
19 Bourjaily case and some other Supreme Court cases.

20 MR. WILFORD: I understand that, your Honor, but it  
21 appears as though, unless I'm reading the sentence  
22 incorrectly, which is possible, maybe even probable, it says  
23 an --

24 THE COURT: It used to be that it would read "by  
25 independent evidence of his own acts or statements." The law

5190

1 is now clear that the rest of that sentence is appropriate.

2 MR. WILFORD: The next objection --

3 THE COURT: As well as those -- do you want "may be  
4 evidence of his own acts or statements as well as acts or  
5 statements of..."?

6 MR. WILFORD: Yes, just trying to get this clarity so  
7 it wasn't --

8 THE COURT: I see. All right. That line will read  
9 "statements as well as those acts or statements of." The  
10 Court doesn't understand that to be a substantive change, but  
11 just for clarification.

12 MR. FITZGERALD: Your Honor, I think if we put in  
13 that extra statement that "those" should come out. I think  
14 the "those" --

15 THE COURT: It will now read, "It is important for  
16 you to note that each defendant's participation in the  
17 conspiracy must be established beyond a reasonable doubt by  
18 independent evidence of his own acts or statements as well as  
19 those acts or statements of persons alleged to be  
20 coconspirators."

21 MR. FITZGERALD: Okay. "Those" is a little  
22 confusing, "as well as those acts." I thought "acts or  
23 statements" would replace "those."

24 THE COURT: We can take out the "those."  
25 "...as well as acts or statements of." Okay.

5191

1 Anything before 93?

2 MR. FITZGERALD: Yes, Judge, just on page 54.

3 THE COURT: Page 54.

4 MR. FITZGERALD: The last full paragraph, the last  
5 sentence, it ends with "the defendant you are considering  
6 knowingly and willfully engaged in an act of conspiracy  
7 outside the United States." If we could just add that if they  
8 find the defendant did that, the fact that he may also have  
9 engaged in conduct inside the United States does not matter,  
10 he can still be found guilty.

11 THE COURT: If he did so --

12 MR. FITZGERALD: We can say, "If he did so, it does  
13 not matter whether he also engaged in conduct within the  
14 United States."

15 THE COURT: "It does not matter if he also engaged in  
16 that conspiracy while in the United States."

17 Mr. Wilford.

18 MR. WILFORD: Yes, your Honor, the next item I have  
19 is on page 80.

20 THE COURT: Page 80. Yes.

21 MR. WILFORD: The series of questions, the second  
22 question, your Honor, which reads, "Do he associate himself  
23 with a group or venture knowingly and willfully."

24 THE COURT: Do you want me to add -- this is time  
25 honored --

5192

1 MR. WILFORD: The only reason that I am suggesting  
2 anything be done with that particular sentence, your Honor, is  
3 that in the earlier charge on conspiracy, you do mention  
4 association and I'm just concerned that there may be some  
5 confusion amongst the jury members -- of course, we as lawyers  
6 can discern the difference between the words in the earlier  
7 association with persons and in this particular instance it's  
8 an association with a criminal venture. I just didn't want  
9 the jury to become confused and propose either here or an  
10 earlier instance when they are considering conspiracy and not  
11 really be clear on which type of association or which  
12 particular association the Court was instructing them to deal



13 with.

14 THE COURT: Denied.

15 MR. WILFORD: All right. Also, in that same section,  
16 your Honor, and this is overall to most of the remaining  
17 counts in which the Court instructs on Five and Six, as an  
18 example, 283 and 284, the Court instructs the jury to  
19 consider -- not on this particular page, your Honor, but this  
20 particular section of the charge, when you are talking about  
21 Counts Five and Six, which begins on page 72, and you talk in  
22 that instance, you talk about Mohamed Sadeek Odeh and Mohamed  
23 Rashed Daoud Al-'Owhali, and also in Count Six, Khalfan Khamis  
24 Mohamed, because the elements are the same, the Court has  
25 grouped in a section both, all three of these particular

5193

1 defendants.

2 However, because of the difference in proof that has  
3 been adduced at trial, the fact that Mr. Odeh has nothing to  
4 do whatsoever with anything in Tanzania, I think that it adds  
5 some confusion for the jury and what we are requesting is that  
6 it be a separate section charging the Kenyan events as opposed  
7 to having them both together. I understand, I think, what the  
8 Court was trying to do was to shorten and have the jury  
9 consider those groups of elements or that group of elements  
10 for those particular crimes, but what it does do --

11 THE COURT: I understand what you are saying, but I  
12 think it sets out the legal principles, which are the same,

13 and then it very clearly indicates which counts are Kenya and  
14 which counts are Tanzania, looking at the first full paragraph  
15 on page 75, and any danger, I think, of that is dissipated by  
16 the structure of the special verdict form.

17           What I usually do is I go back and forth. When I  
18 complete a count, I will then say, "Now turn to the special  
19 verdict form and you will see..." So I don't think that's  
20 worth regurgitating the same.

21           MR. WILFORD: Thank you, Judge.

22           MR. FITZGERALD: Your Honor, the only other comment  
23 the government had that's not tied to a particular page but we  
24 thought maybe might be appropriate around page 81 was to  
25 suggest the possibility of a conscious avoidance charge on the

5194

1 substantive bombings, and the reason I suggest that is looking  
2 ahead specifically with regard to the Odeh case and the  
3 bombing, there was some discussion during the Wahhaj testimony  
4 about whether he inquired about what others were up to, but I  
5 could easily foresee the way the summations might play out  
6 that there may be an argument by the government that he can't  
7 be in the middle of things and, pardon the expression, but  
8 "stick his head in the sand."

9           THE COURT: Like an ostrich. I was thinking about  
10 all our ostrich discussion, that we'll not be able to get  
11 through closing statements without somebody making the analogy  
12 to ostriches.

13           MR. FITZGERALD: I jumped the gun, I guess.

14           What I thought that -- I think it's very likely we'll  
15 end up discussing that issue and I thought it would be  
16 appropriate that we have guidance for the jury on what a  
17 defendant is required to do and not required to do in the face  
18 of evidence of criminal activity.

19           THE COURT: I deny conscious avoidance of guilt  
20 because of thought that that concept comes into play where  
21 someone is seeking to shield himself from criminal liability  
22 by not asking what is in this suitcase that I'm bringing from  
23 one place to another, when any reasonable person would know  
24 that those are narcotics. And you have here such a different  
25 situation where almost as a quasi military operation people

5195

1 were not given more information, not because it would expose  
2 them to criminal liability, this was not a motivation of these  
3 defendants, but would perhaps run the risk of people becoming  
4 informants or people being captured and interrogated, perhaps  
5 interrogated with more vigor than would happen in American law  
6 enforcement. And it seemed to me that the government is free  
7 to make its arguments on what the circumstantial evidence will  
8 show and so on, but that to use that as a predicate for  
9 substantive liability was inappropriate in the facts of this  
10 case.

11           MR. FITZGERALD: The only thing I would suggest, your  
12 Honor, if one participates in a cell structure as part of an  
13 organized enterprise, coconspiracy, but one says, I'm going to

14 follow, I'm not going to ask what else is going on, which is  
15 not -- forgetting what other people want to tell a person,  
16 someone closes his eyes and says, okay, this is "military  
17 work," which we view as terrorism work, and doesn't know the  
18 details because they want to help out the overall enterprise,  
19 why isn't that appropriate?

20 THE COURT: Where is there evidence of that?

21 MR. FITZGERALD: Your Honor, to the extent that there  
22 has been discussion with the witnesses that there was a cell  
23 structure and it's been argued that people didn't tell  
24 everyone that needed to know, if a defendant sees signs around  
25 him that an operation is going on but decides, out of training

5196

1 in the cell structure that's been in the documents and in the  
2 the testimony, not to make further inquiry, then I think it  
3 would be just as appropriate an argument as if the person is  
4 handed a bag to get on the airplane and decides not to look.

5 THE COURT: You see, the other thing is in the  
6 narcotics analogy, again it's a very specific thing, you know,  
7 what is the content of the suitcase. The object of these  
8 conspiracies is much broader and what you are saying is, so  
9 long as he's in a cell, the object of which is to kill  
10 Americans anywhere in the world, he could be held to have  
11 known that one of the means of effectuating that was some  
12 particular episode or endeavor of which he did not have actual  
13 knowledge.

14 MR. FITZGERALD: And my argument, just to make clear,

15 I'm not seeking a conscious avoidance charge on the  
16 conspiracy, just the substantive count. My argument would be  
17 if he's in a hotel and understanding he has to leave that  
18 night because they are expecting retaliation from the  
19 Americans, and a bombing instructor is there, his bomb trainer  
20 from Afghanistan, and people are all leaving, that if he  
21 decides not to ask because he's following the rules of al  
22 Qaeda, that that would be appropriate to hold him to the  
23 conscious avoidance charge.

24 THE COURT: I understand your point. I've given it a  
25 lot of thought, and I decline to do so.

5197

1 MR. COHN: Your Honor, back on page 82 --

2 THE COURT: Back on page 82.

3 MR. COHN: I saw something Ms. Gasiorowski pointed  
4 out to me and I'm not sure whether --

5 THE COURT: Yes.

6 MR. COHN: That is, in your statement of the  
7 indictment, it says "used by the United States and by an  
8 agency of the United States, nationals and an agency," and in  
9 your charge on each of the counts on the elements you charge  
10 the disjunctive.

11 THE COURT: Exactly right.

12 MR. COHN: Pardon?

13 THE COURT: Exactly right. First of all, this is a  
14 quote of the indictment.

15 MR. COHN: That's right.

16 THE COURT: The indictment uses "and" and the  
17 government has the burden of proving "or."

18 MR. COHN: Is it a permissible variance, is what I'm  
19 asking?

20 THE COURT: No. No. Not only is it a permissible  
21 variance, but it's the standard way. Congress says if the  
22 indictment says "or" it would be an invalid indictment. So  
23 the indictment says "and" and the charge always says "or."  
24 This is nothing new. An indictment which would follow the  
25 language and say you did either X or you did Y would be

5198

1 defective because it would not sufficiently inform the  
2 defendant of what he is charged with doing.

3 MR. COHN: Unless it was particularized.

4 THE COURT: No, that's why the statute says "or," the  
5 indictment says "and" and the charge says "or."

6 MR. COHN: Okay.

7 THE COURT: On page 93 we need a stipulation number.  
8 I just need the number. You don't have to give it to me now,  
9 but if you could just tell me what stipulation that is. And  
10 that applies to page 94 and 93.

11 MR. FITZGERALD: We believe that the number on 93 is  
12 39 and we'll --

13 THE COURT: Yes.

14 MR. FITZGERALD: And 94 we'll have to check.

15 THE COURT: Okay. Who else has anything on the

16 charge?

17 MR. DRATEL: Just I put in writing initially but did  
18 not mention at the last charge, which is just venue beyond a  
19 reasonable doubt.

20 THE COURT: We put in venue. We put another sentence  
21 in venue, which I think you saw, which is --

22 MR. DRATEL: Venue proof.

23 THE COURT: Venue is at page 125?

24 MR. DRATEL: Just for the reasons we set forth --

25 THE COURT: That sentence beginning, the bottom of

5199

1 page 126, "that venue has not been proven, then you must find  
2 the defendant you are considering not guilty as to that  
3 count." That's a new sentence.

4 MR. DRATEL: Yes, but -- I was just asking as we  
5 announced initially, just to rerepeat --

6 THE COURT: You are repeating your argument that it  
7 has got to be beyond a reasonable doubt, whereas the charge  
8 says by a preponderance of the evidence.

9 MR. DRATEL: Exactly, your Honor.

10 THE COURT: Your position on that point is preserved.  
11 Anything else?

12 That's it. Very well.

13 MR. FITZGERALD: Your Honor, can I just ask, we  
14 proofed the changes that your Honor said you would make and  
15 the ones you were thinking about, and we're aware of that

16 change and also a change with law enforcement techniques. Is  
17 there anything else in the charge that you are aware of that  
18 substantially changed?

19 THE COURT: Substantially changed, no. I declined  
20 your suggested revision of the multiple conspiracies in light  
21 of, I think it's the Burrows case. I reread that case and  
22 that's a holding -- that language was not was harmless error  
23 and it was a supplementary instruction given after the jury  
24 raised some question, and I decline to use that language and  
25 adhere to the language which is in this charge.

5200

1 Mr. Wilford.

2 MR. WILFORD: Yes, your Honor. This doesn't have to  
3 do with the charge directly but it does have to do with the  
4 indictment.

5 THE COURT: Yes.

6 MR. WILFORD: Your Honor, on behalf of Mr. Odeh, we  
7 are requesting that the Court strike, commencing at page 3,  
8 paragraph 1, little paragraph xi on page 8 of the indictment.

9 THE COURT: I'm buried in paper, but that's a  
10 document that I don't have.

11 MR. WILFORD: Would you like to have mine, your  
12 Honor?

13 THE COURT: My able law clerk is finding it under the  
14 mountain of paper.

15 That's old, but I think --

16 MR. WILFORD: If it's old, it hasn't changed, your



17 Honor. The first indictment has not changed.

18 THE COURT: What is it you want?

19 MR. WILFORD: What the government has characterized  
20 in those particular paragraphs as background of al Qaeda.

21 THE COURT: Yes.

22 MR. WILFORD: For the indictment itself that may have  
23 been very nice and appropriate, but with respect to the jurors  
24 who have sat through the government's proof, all this does is  
25 allow the government to have their theory of the case

5201

1 accompany the jury into the jury room. They are sitting there  
2 reading what the government says the case is all about. Now  
3 what they should be doing is deciding whether or not the  
4 government has proven Counts One --

5 THE COURT: You are moving to strike the background?

6 MR. WILFORD: Yes.

7 THE COURT: Although the Court usually reads the  
8 indictment, I am not planning to read the indictment and I  
9 think that background is an essential part of understanding  
10 the government's theory here and the jury is told this is in  
11 evidence and this is the accusation and that's part of what  
12 the accusation is.

13 Denied.

14 MR. DRATEL: Your Honor, I have one question. From  
15 reading the most recent indictment, there are no more sort of  
16 blank counts. The government does not move up all the counts,

17 so there are no missing counts.

18 THE COURT: These are the final lettering, final  
19 numbering?

20 MR. FITZGERALD: Yes.

21 MR. DRATEL: So whatever was is -- it's all  
22 compressed.

23 THE COURT: Turning, then, to Court Exhibit B, the  
24 verdict form, the only thing I'm aware of is that we didn't  
25 adopt the government's proposed change in the structure of the

5202

1 perjury counts. We thought that the way it appears here is  
2 clearer and --

3 MR. FITZGERALD: Your Honor, can I just ask as an  
4 alternative that, "Please mark all that apply" or "indicate."  
5 My concern is if they find five specifications, they check one  
6 and then there's an appellate issue on that specification if  
7 they don't answer B through E. So, for example, on page 44,  
8 there's just a statement "indicate all that apply."

9 THE COURT: You just want "answer all that apply"?

10 MR. FITZGERALD: Yes.

11 MR. WILFORD: What page, Judge?

12 THE COURT: Page 44. That would be true of all of  
13 the perjury counts.

14 MR. FITZGERALD: You could even put it in front of,  
15 "If there is no answer that you find the defendant, then you  
16 must find the defendant guilty" to make sense.

17 THE COURT: Then put after that, answer --

18 MR. FITZGERALD: Before, "If there is no answer,  
19 answer all that apply." "If there is no answer which you --"

20 THE COURT: Okay. Does everybody follow what Mr.  
21 Fitzgerald is suggesting? I'm having difficulty with "apply."

22 MR. DRATEL: Your Honor, would it be easier after the  
23 which of you --

24 (Pause)

25 THE COURT: If you look at 229, you have a problem

5203

1 with this because it goes from A to N, and to answer all that  
2 apply A to N on, it's a heavy burden.

3 MR. FITZGERALD: That I understand, Judge, but --

4 THE COURT: You think it's less of a burden than  
5 arguing on appeal where there is no response?

6 MR. FITZGERALD: Yes. And frankly, I think it's  
7 important if they find more than one specification that we  
8 have that there.

9 THE COURT: That you know that.

10 All right. Answer which of these do you now find to  
11 to be false."

12 Answer all as to which -- I don't know what "applies"  
13 means. "Answer all as to which you have unanimously" --

14 MR. FITZGERALD: "Found to be false."

15 THE COURT: "Found false." So that on every perjury  
16 count after the letters, the sentence is going to appear,  
17 "Answer all as to which you have unanimously found false."

18 MR. FITZGERALD: Thank you.

19 MR. DRATEL: I think it may be easier to go after the  
20 question, "Which of these do you unanimously find to be  
21 false?" and then say "answer all." That might be the better  
22 direction, and leaving the last sentence by itself.

23 THE COURT: Where would you put it?

24 MR. DRATEL: After the question, "Which of these do  
25 you unanimously find to be false?" Then it says, "Answer

5204

1 all," so that before they get to it, they know, they reach all  
2 of them.

3 THE COURT: I think that's probably right.

4 MR. FITZGERALD: Either way.

5 THE COURT: I think I will accept Mr. Dratel's  
6 suggestion.

7 MR. FITZGERALD: Your Honor, the only other comment  
8 from the government is with regard to the findings with regard  
9 to Al-'Owhali and Khalfan Mohamed on aiding and abetting, when  
10 they have to make the alternate findings, I know in the charge  
11 you have a sentence that says, "Consider whether they are  
12 guilty as a principal first, and if you find that they are, do  
13 not consider what" --

14 THE COURT: Yes.

15 MR. FITZGERALD: In the instructions in the verdict  
16 form, if they don't remember that, I suggest that we put  
17 language in that says, "Consider whether the defendant is  
18 guilty as a principal. If so, indicate yes. If not, consider

19 aiding and abetting."

20 THE COURT: You take the language which is in the  
21 instruction itself, the substance of that?

22 MR. FITZGERALD: Yes.

23 THE COURT: And put it in which count?

24 MR. FITZGERALD: All the counts that involve aiding  
25 and abetting, which are a number of them. I think it shows up

5205

1 first maybe at page 12.

2 THE COURT: Page 12.

3 MR. FITZGERALD: The language is on page 79. Maybe  
4 on -- it may show up actually before then.

5 MR. COHN: Your Honor, is it really necessary to  
6 duplicate language in the charge in the verdict form?

7 MR. FITZGERALD: I think it starts on page 79.

8 THE COURT: 79, you say, "Here, if you find the  
9 defendant you are considering himself committed the crime  
10 charged, you need not consider whether he also aided and  
11 abetted another person's commission of the crime. That is to  
12 say, if you find the defendant you are considering acted as a  
13 principal and personally committed the offense, then you need  
14 not evaluate whether he might also have acted as an aider or  
15 abettor." And that's the language which you want reflected in  
16 the --

17 MR. FITZGERALD: Yes. Maybe we could do a shorthand.  
18 What we might do is the first time aiding and abetting comes

19 up in the special verdict form, incorporate that language so  
20 then you could say, "Thus, you should only check one box," and  
21 then thereafter you can, when you say, "Thus, you should only  
22 check one box," you can even put "see page 7 above."

23 MR. COHN: Why don't you say "check one box only" and  
24 let it go with that?

25 MR. RUHNKE: It does say that.

5206

1 MR. FITZGERALD: But they don't understand which box  
2 to consider first, and that's important because if six think  
3 it's principal, six are aiding and abetting, they can sit  
4 there and hang because they don't have a structure in which to  
5 move forward.

6 THE COURT: Let me suggest now what I was going to  
7 say is the first time we have aider or abettor, we have a  
8 footnote that says, "With respect to the relationship between  
9 the defendant himself committing the crime or aiding and  
10 abetting, bear in mind the instruction at page 79 of the  
11 charge." We could do that. The problem with that is it just  
12 gets too complex.

13 I'm thinking over this jury and we've got some very  
14 sophisticated people who have taken very careful notes and are  
15 very well-educated and will have no difficulty with that and  
16 others as to whom that would not be an accurate description.

17 Let me think about it. The way I might do it is just  
18 do it orally when I go from the first aiding and abetting  
19 charge in the instruction and then go to the count.

20 MR. FITZGERALD: If I could bring up one section  
21 before we get to a page that has aiding and abetting on it,  
22 there might be one sheet that just says, "From here on after,  
23 when you are considering aiding and abetting and the principal  
24 liability as discussed in the charge, please consider the  
25 principal liability first, then aiding and abetting

5207

1 liability." Then everywhere else you need not import the  
2 language, you can say "as discussed at page 8 above," whatever  
3 the number is, "please only check one box."

4 THE COURT: All right. I understand. I don't have  
5 any problem with the substance of it. Whether we do it by  
6 separate paragraph or a footnote or so on, we'll consider.  
7 But I understand the point and I will try to accommodate it.

8 MR. COHN: Your Honor, in regard to those page after  
9 page of answering the question as to various dead people, I  
10 assume that you are leaving it the way it is, it is not an  
11 oversight, you rejected my request that it be chanced into  
12 one?

13 THE COURT: Yes. No, I thought I indicated that the  
14 last time. It was not an oversight.

15 Anything else?

16 MR. RICCO: Your Honor, can I see you in the robing  
17 room with the government?

18 THE COURT: With the government?

19 MR. RICCO: Yes.

20 THE COURT: All right. Surely. Otherwise, we are  
21 adjourned until tomorrow.

22 Should we meet before 10 a.m.? Are there still some  
23 stipulations which at the last moment will be the subject --

24 MR. FITZGERALD: Why don't we meet at 9:45 and I  
25 think were ready to go.

5208

1 THE COURT: 9:45 tomorrow.

2 MR. COHN: One other thing, your Honor, before our  
3 summation, we're using some Powerpoint charts and other things  
4 that we have created out of the evidence which have not been  
5 marked in evidence. I expect to preview that with the  
6 government before my summation, and if there is any problem,  
7 we'll come to the court about it.

8 THE COURT: Very well.

9 MR. COHN: Just to tell you now that that's what  
10 we're going to use.

11 THE COURT: I will be available for that.

12 MR. COHN: I assume that we won't sum up until next  
13 week sometime.

14 THE COURT: Two and a half days. I've got a chart  
15 someplace.

16 MR. COHN: Two and a half days gets us to Thursday  
17 afternoon and El Hage is going first, so it doesn't get me up  
18 until Monday or Tuesday.

19 MR. DRATEL: The government still anticipates --

20 MR. FITZGERALD: I think the best thing to say,



21 having predicted a nine to twelve-month trial, is after the  
22 end of the first day of summation, we'll tell you where we  
23 are. In other words, if it's way ahead of pace, we'll give  
24 you a heads up so there is no surprise.

25 THE COURT: We're adjourned until tomorrow at 9:45.

5209

1 (Adjourned to 9:45 a.m. on May 1, 2001)

2 (Pages 5210 through 5211 filed under seal)

3 (Continued on next page)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24