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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 548 (JMF)

5 JOSHUA ADAM SCHULTE,

6 Defendant.

Trial

7 -----x

New York, N.Y.
July 6, 2022
9:05 a.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge
13 -and a Jury-

14 APPEARANCES

15 DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

16 BY: DAVID W. DENTON JR.

17 MICHAEL D. LOCKARD

Assistant United States Attorneys

18
19 JOSHUA A. SCHULTE, Defendant *Pro Se*

20 SABRINA P. SHROFF

21 DEBORAH A. COLSON

Standby Attorneys for Defendant

22 Also Present: Charlotte Cooper, Paralegal Specialist

M765sch1

1 (Trial resumed; jury not present)

2 THE COURT: You may be seated.

3 Good morning. Welcome back. I hope everyone had a
4 good long weekend, happy 4th of July. Last I heard a couple
5 minutes ago we were still missing one or two jurors, but in the
6 meantime I think we have various items to cover. So let me
7 start with the evidentiary issues that I think I had reserved
8 on and said I would circle back on.

9 First with respect to defense Exhibit 809-2, my ruling
10 remains on that, that is to say that I think that that exhibit
11 is not admissible for the reasons that I previously gave,
12 namely it's hearsay and the arguments that Mr. Schulte asserts
13 for its relevance depend on the truth of the statement, that is
14 his own statement, nor do I think it is admissible pursuant to
15 Rule 106 given that it is a discrete writing and it is not
16 necessary to complete the other exhibit.

17 I also adhere to my ruling on Defendant's Exhibit 812.
18 It is not admissible because it is not relevant to any point at
19 issue in the trial. In particular, it is the transmission of
20 national defense information, not the initial writing of that
21 information that is the crime and must be willful, so in that
22 regard, as I said on Thursday, the fact that in the first
23 instance Mr. Schulte may have drafted a portion of the document
24 that he later shared with the Washington Post reporter or
25 counsel is not relevant to his intent at the time that he

M765sch1

1 actually shared it with the Washington Post reporter.

2 Again, I note that Mr. Schulte may already have waived
3 attorney-client privilege by sharing, disclosing that document
4 to the government and putting it at issue, but it doesn't sound
5 like the government seeks to enforce it on the basis of what
6 has happened already. Certainly, if he were to put it into
7 evidence, if there were any basis to put it into evidence, I
8 think it would clearly constitute a waiver.

9 Finally, I do think that some version of Defendant's
10 Exhibit 410 -- that is, the Wordpress document -- is
11 admissible. The government raised the issue of the content of
12 the articles and admitted one portion of them. I think that to
13 put that in context and make clear what it was about, what
14 Mr. Schulte's intentions were that he should be allowed to put
15 the remainder of what he posted or attempted to post on
16 Wordpress into evidence, it would not be for the truth, so for
17 that reason there is no hearsay issue and it would be subject
18 to any redactions for 403 issues. Obviously, the child
19 pornography reference would need to be redacted and I invited
20 the government to identify any other Rule 403-type issues. I
21 also want to make sure we are all on the same page in terms of
22 what that exhibit actually is given that it sounded like what
23 you guys were looking at might be different from what I was
24 looking at.

25 So, bottom line is that's where I stand on those three

M765sch1

1 exhibits. Anything to discuss on those, and especially
2 Defendant's Exhibit 410?

3 MR. DENTON: No, your Honor; except to say I think our
4 understanding had been that given that it was the defendant's
5 exhibit and sort of the prejudice to him that he was going to
6 propose redactions in the first instance. We discussed that --
7 or I should say Mr. Lockard discussed that with him yesterday
8 during a phone call. I apologize if we misunderstood the
9 Court's instruction on that but I think collectively we should
10 be able to put something together consistent with the Court's
11 ruling on the exhibit overall that addresses any of those
12 issues.

13 THE COURT: Mr. Schulte?

14 MR. SCHULTE: Yes. I spoke with Mr. Lockard yesterday
15 about who it was that was going to review that, and the
16 government's position was that the Court asked me to do that so
17 I have done that and I have a couple updates for the government
18 and I can provide that to the government. What I have done is
19 I have just redacted out the content of the two posts that
20 detailed both the child pornography charges and the sexual
21 assault charges, they were both in there so I removed the
22 contents of those, and then have that as 410-A, I believe, and
23 I can provide that to the government to review.

24 THE COURT: Great. Do you have that here and can you
25 provide that to them now?

M765sch1

1 MR. SCHULTE: Yes. I just -- if I can get the blank
2 CD from them or something I can just give it to them and they
3 can review it.

4 THE COURT: Great. So we will do that. Anything else
5 on those issues? I would assume not?

6 Mr. Schulte, you were supposed to advise me by I think
7 yesterday if you had any objections with respect to the
8 government's proposed excerpts of Government Exhibit 1703-1 and
9 1704-1 that were offered under Rule 1006. I didn't receive
10 anything so I assume you have no objection. Is that an
11 accurate assumption?

12 MR. SCHULTE: That's correct.

13 THE COURT: So I will admit those, happy to do that --
14 do you want to offer them, Mr. Denton, so that the record is
15 clear? How do you want to handle this?

16 MR. DENTON: I think that makes the most sense, your
17 Honor. We can do that at the start of the day or we can wait
18 until Special Agent Schlessinger is done or whenever the
19 government rests. Whatever seems most convenient.

20 THE COURT: I leave it to you insofar as we are in the
21 middle of cross so Mr. Schulte has the floor, so to speak, so
22 why don't you wait until the agent is done and you can offer it
23 at that point.

24 MR. DENTON: That makes sense, your Honor.

25 THE COURT: Mr. Schulte, you were also supposed to

M765sch1

1 review the government's exhibit list to see if you agreed with
2 the government's view on what has been admitted or if you have
3 any corrections.

4 MR. SCHULTE: As far as my review goes it seems
5 accurate, but I have also asked standby counsel to do reviews,
6 too, and if there is anything that we find we will raise it
7 with the Court.

8 THE COURT: Great. So sooner rather than later. So
9 rush until the case is to be submitted to the jury but I want
10 to mention I want to make sure we are all on the same page as
11 to what is in evidence and gather those and submit them to the
12 jury. I would ask you guys to speak with Ms. Smallman and find
13 out the best way to do that and coordinate with her about
14 getting it done.

15 Any update on the transcripts? Are we up-to-date on
16 the transcripts? Is there any open transcript items, that is
17 to say, redactions?

18 MR. DENTON: Your Honor, I don't think that there are
19 any substantive issues. We have no additional proposed
20 redactions. The Court has addressed the couple we have already
21 submitted. I'm not entirely sure where we are procedurally in
22 terms of finalizing them, making them public ensuring that all
23 of the orders are implemented, but we will confer with the
24 court reporters and make sure that that's all taken care of.

25 THE COURT: I think in theory the aim is to have them

M765sch1

1 made public no later than the night after the trial day and
2 since we had a couple days off we should be up-to-date on that
3 so let's make sure we are.

4 I got the government's letter identifying the
5 witnesses that Mr. Schulte may call as part of his case. I
6 take it we are down to five CIA witnesses from that letter. Is
7 that an accurate assumption?

8 MR. DENTON: Yes, your Honor.

9 THE COURT: And they're all present?

10 MR. DENTON: Yes, your Honor.

11 THE COURT: Anything to discuss on that front,
12 recognizing that we need to be careful with what we say in this
13 setting?

14 MR. DENTON: Yes, your Honor. There are a couple of
15 things we wanted to raise with respect to the defense
16 witnesses.

17 First, with respect to the CIA witnesses in
18 particular, now that we have finalized the list and reviewing
19 again the defendant's proffers with respect to them, we wanted
20 to emphasize a couple of concerns that we have previously
21 expressed in our letter. The first and most significant
22 applicable to all of them is that since none of those witnesses
23 are testifying as experts, we would object to them being asked
24 to express any opinions or being posed hypothetical questions
25 that go beyond their personal knowledge. So, again, I think

M765sch1

1 that's a generally applicable concern.

2 With respect to three of the witnesses, Sherry Hart,
3 Cheng, and Philip, it is not clear to us the non-hearsay basis
4 of personal knowledge they have for the facts that the
5 defendant has proffered and so, again, we will take it as it
6 comes but I expect that the government may object to questions
7 for which the defendant does not lay an appropriate foundation
8 of personal knowledge for those witnesses.

9 THE COURT: So, Mr. Schulte, it sounds like Mr. Denton
10 is just flagging these and not proposing or asking for any
11 relief at the moment. In that sense I'm not sure there is much
12 to be discussed, but anything you wish to say?

13 MR. SCHULTE: No, not on this. I just had two other
14 issues.

15 THE COURT: OK. What are they since we do now have
16 all 14 jurors.

17 MR. SCHULTE: Well, the first one is whether the
18 witnesses that are here, if they're willing to speak with
19 standby counsel.

20 THE COURT: I don't know the answer to that.

21 Is there some way to find that out, Mr. Denton?

22 MR. DENTON: We can ask. If the Court wants us to do
23 that now we can do that right now.

24 THE COURT: OK. Does that need to be one of you or
25 can some other representative from the government go inquire

M765sch1

1 while we are taking care of the remaining witnesses?

2 MR. DENTON: I think we can have someone else pose the
3 question.

4 THE COURT: The question would be: Standby counsel
5 would like the opportunity to speak with you, before calling
6 you to the stand.

7 I don't know if there is anything else you wish to
8 convey, Mr. Schulte or standby counsel. I am trying to craft
9 the message here.

10 MR. SCHULTE: I think standby counsel would just like
11 to say -- they would like to speak with them before they get on
12 the stand. It may impact a decision on whether we actually end
13 up calling them.

14 THE COURT: Can I actually back up a second?

15 Mr. Denton, just any objection to one of standby
16 counsel going with the representative of the government and
17 actually putting the question directly? I mean, they're
18 cleared.

19 MR. DENTON: Substantively no, your Honor. I think
20 there is a -- I don't know exactly how the CISOs and the
21 marshals have set up the security for who can go in and who can
22 go out. I think if we can have a moment, your Honor, I think
23 we can probably make sure that that's OK.

24 THE COURT: OK. Why don't you do that. I think that
25 would be a more direct and appropriate way of handling it, if

M765sch1

1 we can.

2 MR. DENTON: OK.

3 THE COURT: Before we do that, Mr. Schulte, what is
4 your last issue?

5 MR. SCHULTE: There is two issues; one is a very minor
6 issue I just wanted to raise for the Court. The government
7 showed Schlessinger five exhibits that are parts of article 8
8 that was published and it was approximately 80 percent of that
9 article, so I think due to the rule of completeness that the
10 whole thing should come in and I would try to introduce that
11 through Schlessinger.

12 THE COURT: Can you point me to the actual exhibit
13 that we are talking about?

14 MR. SCHULTE: Yes; 820-419, 820-420, 820-423, 820-424,
15 and 820-428. Those were the screenshots taken by Mr. Betances
16 of that article and it is about 80 percent or so of it.

17 THE COURT: What is the portion that you would propose
18 to offer?

19 MR. SCHULTE: I just propose to -- I have Defendant's
20 Exhibit 408 that is the entire article, I think it is five or
21 six pages, it is easier to read and it shows the whole thing
22 complete.

23 THE COURT: Mr. Denton?

24 MR. DENTON: So I think there is two issues, your
25 Honor.

M765sch1

1 First of all, the rule of completeness is not a
2 percentages question. The defendant has to make a showing that
3 the omitted portion is necessary to avoid sort of
4 misunderstanding of the admitted portions.

5 Secondly, I think to the extent that the exhibits that
6 the government showed Mr. Betances were screenshots that he
7 took and that reflect that sort of particular iteration or
8 image, offering some different exhibit that the defendant
9 contends represents the text is not actually completing the
10 exhibit. There is no sort of omitted portion from the
11 screenshots that he is making the assertion that he is saying
12 there are other parts of another document that are relevant.
13 I'm not sure that comes in appropriately under 106.

14 THE COURT: Putting aside the first point, I am
15 inclined to agree with the second and certainly think that the
16 agent isn't in a position to confirm or lay a foundation that
17 this is the same document that is reflected in the screenshot,
18 so in that sense I'm not sure that you can satisfy the
19 requirements of the rule of completeness, putting aside whether
20 portions of this would otherwise be admissible under the rule.

21 MR. SCHULTE: Your Honor, so I think these all came in
22 through Schlessinger so it starts, the very first one is a
23 screenshot of the very beginning of it, the name title
24 Presumption of Innocence Origins. The government went into a
25 lot of detail about this on direct and so just showing the

M765sch1

1 government --

2 THE COURT: Mr. Schulte, I think the point is if there
3 is a screenshot that Mr. Betances took in the jail that wasn't
4 offered by the government that is part of -- that would be
5 necessary to complete the portions that were admitted that
6 would be one thing, but you are proposing to offer a completely
7 different document that bears resemblance to the document that
8 is in the screenshots but there is no confirmation, in other
9 words there is no way of knowing that this is in fact the same
10 document, whether changes were made to it after the
11 screenshots, whether it reflects the same document as depicted
12 in the screenshot.

13 So given that, you are basically extending the rule of
14 completeness to an entirely separate document that may or may
15 not even be the same document.

16 MR. SCHULTE: I mean, I think the issue is -- I think
17 there is a separate issue under Rule 403 that it will confuse
18 the jury because they will understand that this is one
19 document. You know, they showed -- the screenshots are
20 actually from the document that was published on Wordpress so I
21 think that's one thing, but the second thing is the six or
22 seven different screenshots, it is confusing and misleading to
23 the jury as to what this actually is so --

24 THE COURT: Mr. Schulte, Rule 403 is a rule of
25 exclusion, it is not a rule of admission. It doesn't get you

M765sch1

1 over the hump to admit another document. It was a ground to
2 object to those documents being offered but there was no
3 objection when they were offered so 403 doesn't apply, and for
4 the reasons I have stated I don't think 106 applies.

5 Anything further?

6 MR. SCHULTE: No. I guess nothing else on that issue
7 then.

8 THE COURT: Anything else that we need to take up
9 before we get the jury?

10 MR. SCHULTE: Yes. One final issue is the proposed
11 redactions.

12 So I just wanted to raise the Court's attention that I
13 just was able to see the June 28th proposed redactions and they
14 redact the very key point of the defense that I intended to
15 bring out on summation. So throughout this time the government
16 hasn't sent their proposed redaction or I haven't seen any of
17 this until just yesterday. You know, for the first time I am
18 reviewing this.

19 There is two different issues. One is to the degree
20 that the government is saying things I am saying are
21 classified, it is important for me to know so I don't say these
22 same things again and cause issues but the most important thing
23 is a lot of these redactions that they proposed specifically at
24 1403 to 1404, it redacts out a key point I need to bring out on
25 summation to undermine the government's -- one of the elements

M765sch1

1 to the count. So I just wanted to raise that to the Court's
2 attention and I don't know how to address this now.

3 THE COURT: The short answer is we don't need to
4 address it now, namely before the jury. It certainly seems
5 like something we need to discuss before summations but we have
6 some time to do that so let's table that and discuss it later.

7 MR. DENTON: One other issue with respect to defense
8 witnesses, your Honor.

9 In addition to the five CIA witnesses, we understand
10 that the defendant still intends to call Ms. Sotnick, the
11 former paralegal from the Federal Defenders. I think in light
12 of where we are now, we want to renew our objection to the
13 defendant calling her to testify. We have been provided with
14 no 26.2 material, the defendant has represented there is none,
15 so we are shooting a little bit in the blind as far as her
16 testimony but it strikes us that one of two things is true,
17 either of which would pose problems for her testifying. Either
18 the defendant intends to call her exclusively for the purpose
19 of saying that she received a copy of the malware document from
20 him at some point in time and provided it to the Federal
21 Defenders, at which point I think if that is what it is limited
22 to, her testimony would have the same problem as Defendant's
23 Exhibit 812. It is not clear what relevance that would have to
24 anything. To the extent that he intends to call her to ask any
25 more substantive questions about his interactions with the

M765sch1

1 Federal Defenders about that document, we then think that we
2 are back in the territory of back-dooring in the advice of
3 counsel defense that the defendant has expressly foresworn.
4 And so we think under either scenario, whatever the defendant
5 intends to do with her, it is not clear that there is an
6 admissible purpose for her testimony and so we would object to
7 that.

8 THE COURT: I assume that we are going to break after
9 the government rests, at which point we have various things to
10 discuss. I put out an order this morning raising a few issues
11 that you should be prepared to discuss. I think that is
12 another one to add to the list so let's table it until then.

13 Anything else other than the question of whether
14 standby counsel can go with the representative of the
15 government to speak with the witnesses?

16 MR. DENTON: Not from the government, your Honor.

17 THE COURT: Why don't you find out the answer to that
18 question, let's get the agent on the stand, and then we will
19 get the jury up in a moment.

20 (pause)

21 THE COURT: Mr. Denton?

22 MR. DENTON: Your Honor, we have conferred with
23 everyone and we will be able to make that work, so whenever the
24 Court would like us to make time for that it is all set up.

25 THE COURT: Mr. Schulte, standby counsel, would you

M765sch1

1 like to do that now while we are finishing up cross-examination
2 of the testimony of the current witness? I would like to
3 minimize delays during the day so I assume we will take a break
4 after the government rests to discuss various things but after
5 that break I'm expecting the defense case to proceed, if there
6 is a defense case.

7 MR. SCHULTE: I think we will wait during the break
8 and try and do all of that.

9 THE COURT: Meaning one of standby counsel will be
10 absent during whatever discussion we have during the break? Is
11 that the plan?

12 MR. SCHULTE: Yes.

13 THE COURT: Great. All right. I will have the jury
14 come up and we will get going.

15 (Witness resumes the stand)

16 THE DEPUTY CLERK: Jury entering.

17 (Continued on next page)

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24
25

1 (Jury present)

2 THE COURT: You may be seated.

3 Welcome back, ladies and gentlemen. I hope you had a
4 wonderful and very long weekend. Happy 4th of July. Those of
5 you who traveled, I hope your travels were safe and smooth.
6 There is a lot of press reports about crazy travel issues out
7 there these days so hopefully you didn't run into any of that,
8 but beyond that I hope you had a wonderful holiday with your
9 family and friends.

10 We will pick up where we left off, that is with
11 cross-examination of Special Agent Schlessinger and with that,
12 we will proceed.

13 Special Agent Schlessinger, you may remove your mask
14 at this time and I remind you that you remain under oath and
15 Mr. Schulte, you may proceed.

16 EVAN SCHLESSINGER, resumed.

17 CROSS-EXAMINATION (cont'd)

18 BY MR. SCHULTE:

19 Q. Good morning.

20 A. Good morning.

21 Q. You testified about the Buffer accounts last week, right?

22 A. Yes.

23 Q. You testified that you did not recall whether it was used,
24 right?

25 A. I don't recall that, no.

M765sch1

Schlessinger - Cross

1 THE COURT: You don't recall testifying to that effect
2 or you don't recall whether it was used? What don't you
3 recall?

4 THE WITNESS: Both of those things.

5 BY MR. SCHULTE:

6 Q. OK. I'm going to show the witness and the parties what's
7 been marked as Defendant's Exhibit 815. Do you recognize this
8 document?

9 A. I don't have anything displayed on my screen.

10 Q. Sorry.

11 A. I don't recall that specifically, no.

12 Q. Do you know what type of document this is?

13 A. Yes. Generally.

14 Q. And part of your -- through part of your investigation you
15 would issue search warrants, correct?

16 A. Yes.

17 Q. And the entities that you would issue the search warrants
18 to, they would respond to those search warrants, correct?

19 A. Yes.

20 Q. And they would give you what is called returns or whatever
21 is relevant to the search warrant to you, right?

22 A. Yes.

23 Q. Is this a type of document that would reflect that?

24 A. Yes.

25 MR. SCHULTE: I move to introduce Defendant's Exhibit

M765sch1

Schlessinger - Cross

1 815.

2 MR. DENTON: Your Honor, we didn't previously receive
3 this as a marked exhibit. I don't think we have any objection
4 but it would help to see the rest of the document.

5 THE COURT: Can you scroll through, Mr. Schulte?

6 MR. SCHULTE: Yes. That's it.

7 THE COURT: Any objection?

8 MR. DENTON: No, your Honor.

9 THE COURT: Admitted.

10 (Defendant's Exhibit 815 received in evidence)

11 BY MR. SCHULTE:

12 Q. So this is a return from the Buffer account pursuant to
13 your search warrant in October 2018, correct?

14 A. Yes. It appears to be a response from Buffer.

15 Q. Can you read this highlighted sentence?

16 A. Starting with: It appears?

17 Q. Yes.

18 A. It appears that this user signed up for our service on
19 September 3rd, 2018, at which they linked a Twitter account but
20 did not post any content through our service.

21 Q. I am just going to go through page 2 of the document. This
22 is what the service looks like, correct?

23 A. I wouldn't know, I haven't used the service.

24 Q. Oh OK.

25 But just to refresh or just to review quickly, the

M765sch1

Schlessinger - Cross

1 Buffer is used to queue up Tweets or other types of things to
2 be posted, correct?

3 A. Yes.

4 Q. And then page 3. All right. I will take that down.

5 I am going to show just the witness and the parties
6 what is marked as Government Exhibit 830. Do you recognize
7 this document?

8 A. Yes.

9 Q. And through your investigation you testified previously
10 about publications through Wordpress, correct?

11 A. Yes.

12 Q. And you are able to -- Wordpress essentially posts
13 documents on the web that you can browse to, correct?

14 A. Yes.

15 Q. And the Wordpress account that you were investigating was a
16 public account, correct?

17 A. Yes.

18 Q. And does this reflect browsing to that site?

19 A. Yes.

20 MR. SCHULTE: I move to introduce this.

21 MR. DENTON: No objection.

22 THE COURT: Admitted.

23 (Defendant's Exhibit 830 received in evidence)

24 BY MR. SCHULTE:

25 Q. So each of the notebooks that we have pulled up and that

M765sch1

Schlessinger - Cross

1 you went through with the government, they were marked as
2 80-sheet notebooks, correct?

3 A. I think that's right. I don't recall specifically.

4 Q. OK.

5 If I can pull up what is in evidence as Government
6 Exhibit 806, just the front cover. This is what they looked
7 like, right?

8 A. Yes.

9 Q. So that's 160 total pages, right?

10 A. Yes.

11 Q. And then the government essentially cherry-picked one or
12 two pages from each of those documents, correct?

13 MR. DENTON: Objection.

14 THE COURT: Sustained.

15 Q. The majority of the pages from the notebooks were not
16 displayed, correct?

17 MR. DENTON: Objection.

18 THE COURT: Sustained.

19 Q. And nothing in the notebooks was ever transmitted, correct?

20 THE COURT: Mr. Schulte, I am pretty confident that
21 these questions were asked and answered last week.

22 MR. SCHULTE: OK.

23 Q. You testified on direct that my parents' home was not
24 raided, right?

25 A. Yes.

M765sch1

Schlessinger - Cross

1 Q. And you say that only because you did not execute a search
2 warrant at my parents' home, right?

3 A. Yes. That's right.

4 Q. Isn't it true that FBI agents went to my parents' home in
5 Lubbock, Texas?

6 A. Yes.

7 Q. And how many agents went to their home?

8 A. I believe it was two or three total.

9 Q. And what time of day was it?

10 A. I believe it was during the day. I don't know, I wasn't
11 present for that.

12 Q. Do you know if that was an announced visit?

13 MR. DENTON: Objection.

14 THE COURT: Sustained.

15 Q. Did you call and set up a time to meet with them?

16 MR. DENTON: Objection.

17 THE COURT: The question is whether you did, not
18 whether you know from someone else whether they did. Did you
19 ever call Mr. Schulte's parents at all?

20 THE WITNESS: No, I didn't.

21 (defendant conferring with standby counsel)

22 Q. You testified this was not a raid, right?

23 A. That's right.

24 Q. But unannounced people were going to my parents' home,
25 right?

M765sch1

Schlessinger - Cross

1 A. I don't know if they were announced or not. I wasn't
2 involved with the visit in Lubbock.

3 Q. So then you don't know if it was a raid, correct?

4 A. I didn't think it met the definition of a raid.

5 Q. And what is your definition of a raid?

6 A. Generally, I think of a raid as involving either the
7 execution of a search warrant or an arrest warrant in which a
8 lot of things would go into it logistically. There would be a
9 whole operational plan. You would have a minimum number of
10 agents, it would be more than two or three. Those sorts of
11 things. That's not what it was.

12 Q. But you do know that the point of this was to demand the
13 return -- to demand that certain documents that I wrote were
14 deleted, correct?

15 A. Yes. There was a concern that there was classified
16 information that was included in one of the documents you had
17 submitted that they may have had in their possession and they
18 were trying to get it back, yes.

19 THE COURT: What do you mean by Mr. Schulte had
20 submitted? What are you referring to?

21 THE WITNESS: It was a pro se bail application.

22 Q. I mean, nobody called them and asked them if they had this,
23 right?

24 MR. DENTON: Objection.

25 THE COURT: Sustained.

M765sch1

Schlessinger - Cross

1 Q. But you know that the agents demanded everything that I had
2 ever written that they asked to be deleted, correct?

3 A. I'm not aware of that, no.

4 Q. You are aware that they confiscated the computers there,
5 right?

6 A. No, I'm not.

7 Q. But you determined there was nothing classified sent to
8 them, correct?

9 A. Well, there was concern that the pro se bail application
10 contained classified information. That was the purpose of
11 their visit.

12 THE COURT: Ladies and gentlemen, just so you know,
13 the words "pro se," that's a legal term and it refers to the
14 submission that is made on behalf of a defendant by the
15 defendant himself, so not through counsel. So I presume and
16 let me confirm, Agent, that when you say "pro se submission"
17 you are referring to something that Mr. Schulte filed on his
18 own behalf in this case? Is that correct?

19 THE WITNESS: Yes, your Honor. That's correct.

20 BY MR. SCHULTE:

21 Q. But that application was sent to an attorney in Lubbock,
22 Dan Hurley; right?

23 MR. DENTON: Objection.

24 THE COURT: Sustained.

25 Also, let me make clear that while I am permitting

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Schlessinger - Cross

1 this testimony to explain what was and wasn't going on at the
2 time, Mr. Schulte is not charged with revealing any classified
3 information or national defense information in the submission
4 that the Agent is testifying about now.

5 BY MR. SCHULTE:

6 Q. And through your investigation in this case did you
7 interview an individual named Mike K.?

8 A. Yes.

9 Q. How many times did you interview him?

10 A. I believe I was only present for one interview with Mike.

11 Q. And you knew that he was placed on administrative leave by
12 the CIA, correct?

13 MR. DENTON: Objection.

14 THE COURT: Sustained.

15 MR. SCHULTE: I move to introduce stipulation
16 Government Exhibit 3007.

17 MR. DENTON: I don't think we have an objection. I'm
18 not sure which one that refers to. Just one second, your
19 Honor? (pause) No objection, your Honor.

20 THE COURT: OK. You may proceed.

21 MR. SCHULTE: A group with the Central Intelligence
22 Agency prepared an internal assessment stating that (i) CIA
23 engineer and development group employee Michael was approved in
24 June 2017 for personal foreign travel to Thailand (Bangkok and
25 Phuket) to vacation with three friends; and (ii) a U.S.

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Schlessinger - Cross

1 government record with a name match only of a WikiLeaks
2 affiliate showed travel in June 2017 by that individual with an
3 overlapping time and location with Michael's travel to
4 Thailand.

5 BY MR. SCHULTE:

6 Q. Through your investigation in this case, did you send a
7 memo to the CIA requesting that Michael be placed on
8 administrative leave?

9 MR. DENTON: Objection.

10 THE COURT: Sustained.

11 Q. Were you involved in the CIA's decision to put Michael on
12 administrative leave?

13 MR. DENTON: Objection.

14 THE COURT: Sustained.

15 (Defendant conferring with standby counsel)

16 Q. Michael was an employee at the CIA during the same time
17 that I was, correct?

18 A. Yes.

19 Q. And he worked in OSB, correct?

20 A. I think that's right.

21 MR. SCHULTE: No further questions.

22 THE COURT: Redirect.

23 MR. DENTON: Very briefly, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. DENTON:

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Schlessinger - Cross

1 Q. Good morning, Special Agent.

2 A. Good morning.

3 Q. When you were testifying on cross-examination on Thursday,
4 Mr. Schulte asked you about whether classification reviews had
5 been conducted of certain documents he wrote. Do you remember
6 that?

7 A. Yes.

8 Q. And in particular he asked you about a determination that
9 the documents on Wordpress did not contain classified
10 information. Do you remember that?

11 A. Yes.

12 Q. Were there classification reviews conducted of documents
13 other than what was posted on Wordpress?

14 A. Yes.

15 MR. DENTON: Ms. Cooper, could we put up what is in
16 evidence as Government Exhibit 812, please?

17 Q. Special Agent, was a classification review of this e-mail
18 and its attachments conducted?

19 A. Yes.

20 MR. SCHULTE: Objection.

21 THE COURT: Overruled.

22 MR. DENTON: And if we could turn to page 3,
23 Ms. Cooper, and blow up the top sort of half of the page?

24 Q. What, if any classification determination, was made about
25 the information contained here?

M765sch1

Schlessinger - Cross

1 A. It was determined to be classified.

2 MR. DENTON: Ms. Cooper, could we then go to
3 Government Exhibit 801, please?

4 Q. What about this document, Special Agent? Was a
5 classification review conducted of this document?

6 MR. SCHULTE: Objection. Beyond the scope of cross.
7 He has no direct knowledge.

8 THE COURT: Overruled. I will allow the witness to
9 answer at least this question.

10 THE WITNESS: Yes.

11 MR. DENTON: If we can go to page 3 of this exhibit as
12 well, Ms. Cooper?

13 MR. SCHULTE: Same objection.

14 THE COURT: There is no question yet.

15 BY MR. DENTON:

16 Q. Special Agent, do you know if there was a classification
17 determination made about the information contained on this
18 page?

19 MR. SCHULTE: Objection.

20 THE COURT: Overruled.

21 A. Yes.

22 Q. And what was that?

23 A. It was determined to be classified.

24 MR. DENTON: Then finally, Ms. Cooper, can we put up
25 the first page of Government Exhibit 809?

M765sch1

Schlessinger - Recross

1 Q. Special Agent, do you know if a classification review was
2 conducted of this document?

3 A. Without seeing the specific contents -- I would have to
4 see.

5 MR. DENTON: Let's take a look at page 10, Ms. Cooper,
6 and if we could just blow up the top half of the page?

7 Q. Do you know if a classification review was conducted of
8 this portion of Government Exhibit 809?

9 A. Yes.

10 Q. And do you know what the result of that was?

11 A. It was determined to be classified.

12 MR. DENTON: No further questions, your Honor.

13 THE COURT: Can we let Agent Schlessinger step down?
14 Mr. Schulte?

15 (Defendant conferring with standby counsel)

16 MR. SCHULTE: Just briefly.

17 RECROSS EXAMINATION

18 BY MR. SCHULTE:

19 Q. Do you know if that document was ever shared with anybody
20 that was just displayed, those two notebooks?

21 A. The last document?

22 Q. The notebooks, right.

23 A. I don't know.

24 Q. Well, they were found in my cell at MCC, correct?

25 A. Yes.

M765sch1

1 Q. They were not found on the Internet, right?

2 A. No.

3 MR. SCHULTE: No further questions.

4 THE COURT: Thank you very much, Agent. You may put
5 your mask on and step down.

6 (witness excused)

7 THE COURT: Mr. Denton?

8 MR. DENTON: Your Honor, at this time the government
9 would also offer into evidence Government Exhibit 1703-1, which
10 is an excerpted portion of the expert presentation of Pat
11 Leedom, and Government Exhibit 1704-1 which is an excerpt from
12 the expert presentation of Michael Berger pursuant to
13 Rule 1006.

14 THE COURT: Mr. Schulte, just confirming, no
15 objection, correct.

16 MR. SCHULTE: Right.

17 THE COURT: Those are admitted.

18 (Government's Exhibits 1703-1 and 1704-1 received in
19 evidence)

20 THE COURT: Ladies and gentlemen, you may recall, I
21 think I mentioned at the time when the government called its
22 expert witnesses it used the slide decks and I said at the time
23 that at a minimum they were -- they could show them to you as a
24 demonstrative aid in understanding the witness' testimony but
25 it was the witness' testimony that was the evidence. I said

M765sch1

1 that I might circle back to that.

2 So, the government has now offered, as you just heard,
3 excerpts from those slide decks as actual evidence. The rules
4 permit, in certain circumstances, where the underlying evidence
5 is voluminous or hard to display or observe in court, permit
6 the parties to offer essentially a summary or a chart of
7 evidence and in those circumstances it can be admitted as
8 evidence in and of itself and I have now admitted those two
9 exhibits into evidence so you may consider them as you do any
10 other evidence. It is up to you, number one, to decide if they
11 accurately reflect evidence that is otherwise in the record; or
12 number two, as with all the evidence, determine what weight, if
13 any, to give to it in your deliberations. I will give you
14 further instructions on these scores at the conclusion of the
15 case.

16 Mr. Denton?

17 MR. DENTON: Your Honor, the government rests.

18 THE COURT: All right. So, ladies and gentlemen, we
19 have reached a fairly significant juncture in the trial. You
20 heard Mr. Schulte just say that the government rests. That is
21 the conclusion of the government's case-in-chief. I have
22 mentioned to you several times, will mention to you many times
23 before you begin your deliberations, that the burden rests at
24 all times on the government so Mr. Schulte has no burden
25 whatsoever to put on a case, to call any witnesses, to put in

M765sch1

1 any evidence, but the rules do permit him to do that if he
2 wishes to do so.

3 There are a couple, both legal and logistical issues
4 that I need to discuss with the parties at this time, basically
5 in determining whether Mr. Schulte will be putting on a case,
6 and given that that discussion may be a little bit long I'm
7 going to beg your indulgence and actually excuse you to go to
8 the jury room rather than making you sit here while we have
9 those discussions.

10 So, with apologies and with my thanks, we are reaching
11 the point in the trial where it just becomes necessary to sort
12 of take care of some legal issues here and there outside of
13 your presence and when we are doing that I am likely to excuse
14 you either to a jury room or depending on the time of day maybe
15 altogether. I don't know how long this will take.

16 I thank you in advance for your patience and
17 indulgence but we will bring you back when it is time to
18 proceed and go to the next phase of the case, whatever that may
19 be, and I will certainly be in a better position at that time
20 to let you know what our plans are, what the schedule looks
21 like and so forth.

22 A couple quick things: Number one, please don't leave
23 the jury room. This discussion may not take long, it may take
24 long, I don't know. We will try to keep you posted and get you
25 as soon as we can proceed but given that, I don't want to be in

M765sch1

1 a scenario where we are ready to go and one of you is missing.
2 So with my thanks, please stay in the jury room while we are
3 doing what we need to do. And then otherwise, my standard
4 instructions apply. Don't discuss the case. All right? You
5 have now heard the government's case-in-chief but you haven't
6 heard any defense case if there is going to be a defense case.
7 You haven't heard the closing arguments. You haven't heard my
8 instructions about the law. So while you certainly heard one
9 portion of the case, you are far from done and your
10 deliberations aren't starting yet so don't discuss the case,
11 continue to keep an open mind, don't do any research about the
12 case, and enjoy your break, however long it may be. With that,
13 you are excused and we will bring you back when we are ready to
14 proceed.

15 THE DEPUTY CLERK: All rise.

16 (Continued on next page)

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M765sch1

1 (Jury not present)

2 THE COURT: You may be seated.

3 We do need to circle back to take care of Defendant's
4 Exhibit 410. When that issue is resolved I will tell the jury
5 that later.

6 Anything to discuss before I ask Mr. Schulte if there
7 are any motions? Mr. Denton?

8 MR. DENTON: Not at this time, your Honor.

9 THE COURT: Mr. Schulte?

10 MR. SCHULTE: I just wanted to say that the Court's
11 order from today, I haven't had a chance to read through it. I
12 just ask an opportunity -- so before -- I think the next thing
13 the Court was going to ask, I do move pursuant to Rule 29 to
14 dismiss all counts and to issue a directed verdict of not
15 guilty. But, specific to some of the counts, particularly the
16 espionage counts which I don't believe the government has
17 submitted sufficient evidence to show that this is
18 information -- to show that these are documents as opposed to
19 information and the Count Nine issues the Court raised, I
20 haven't had a chance to go through those so I would ask for an
21 opportunity to do that.

22 THE COURT: So I will certainly give you an
23 opportunity to read my order since I want to discuss those
24 issues and it is necessary for you to read it before we do
25 that, but do you want to articulate or elaborate on your Rule

M765sch1

1 29 motions with respect to the other counts? I think it might
2 be helpful to distinguish the so-called WikiLeaks counts from
3 the MCC counts. Or are you just making a motion? Is there
4 anything particular you want to say on those counts? We will
5 bracket Count Nine for a moment.

6 MR. SCHULTE: Yes.

7 I just want to specifically touch on the NDI counts,
8 particularly Count Two and Counts Three and Four where the
9 government has not proved or presented any evidence that these
10 are documents as opposed to information because the statute
11 requires the additional requirement for information and I think
12 that this is -- without providing the proof that these are
13 documents, it's a modification of the indictment. So at the
14 very least I would ask, if the Court denies the motion, to
15 allow me to present certain jury instructions to the jury that
16 if they determine that this is information as opposed to
17 documents that they have to acquit according to the law; that I
18 would provide the specific language to that, to the Court at a
19 later time.

20 THE COURT: You can submit any instructions you want
21 as long as they accurately state the law. My reaction is I
22 don't think that accurately states the law. I think there is
23 probably a Venn diagram situation where there are certain
24 things that would qualify as information but not documents and
25 other things that would qualify as documents that may or may

M765sch1

1 not be chargeable as information. The fact that there may be a
2 middle ground of overlap where the government has the ability
3 to charge under either prong doesn't necessarily mean that it
4 is information, it is not documents.

5 What am I missing?

6 MR. SCHULTE: I think the point is if it could be
7 charged as both then I think the statute just makes clear that
8 there is a distinction between these two things because if the
9 government always had the opportunity to choose which one, they
10 would always choose the one with lesser requirements for them
11 to prove and I note that at the first trial I was specifically
12 charged under the documents clause and now the government has
13 changed.

14 (Continued next page)

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M76Wsch2

1 THE COURT: You mean the opposite, under the
2 information.

3 MR. SCHULTE: I'm sorry. Under the information, which
4 required the additional element. And this time they chose the
5 lesser one so they didn't have to prove as much.

6 But I think the distinction in the law was that the
7 documents clause, the reason that requires less is because
8 these are specific CIA documents that have particular markings
9 and are provided to the defendant in the case. And
10 particularly with respect to the MCC counts, where this is
11 literally information that I'm writing down and the government
12 hasn't shown that there was any particular document with this
13 information, such as the Bartender information, that there was
14 no document communicated to me that had top secret or any types
15 of identification of the government that this is classified, I
16 think that's the point of the information clause, is so that if
17 this is verbal information or information in someone's head or
18 information that's communicated in some way besides physical
19 documents, then Congress intended there to be this additional
20 requirement just because of how ambiguous it would be
21 otherwise.

22 THE COURT: OK. Do you have any authority that
23 supports that interpretation of the statute? Because certainly
24 on the plain language of the statute, it refers to document,
25 writing, code book, signal book, sketch, photograph,

M76Wsch2

1 photographic negative, blueprint, plan, map, model, instrument,
2 appliance, or note relating to the national defense, and I
3 don't see why the notebooks that you are charged with respect
4 to here would -- I mean it seems to me that the jury could
5 conclude that those fall within the scope of that as a matter
6 of plain language.

7 I recognize that there is an overlap between the two
8 prongs, and to the extent that the information prong requires
9 an additional element, it certainly raises interesting
10 questions, but I'm not sure as a matter of plain language why
11 the jury could not conclude that these are documents, notes,
12 and so forth, writings. There's nothing in the language of the
13 statute that suggests it has to be a particular form of
14 document or the kinds of document that you're describing. That
15 may be the mine run of cases, the core, heartland of cases, but
16 I'm not sure it means it follows that the documents here are
17 outside the scope of the statute.

18 MR. SCHULTE: I think there was a case that looked
19 into this specific issue. I think it may have been the *Rosen*
20 case, actually, but I have the language that I can provide to
21 the Court that states both the reasons, based on the decision
22 in that court, why this -- the reasons for my argument here,
23 and also, if the Court denies it, the language for the jury
24 instruction that I can provide to the Court.

25 THE COURT: All right. Well, particularly in light of

M76Wsch2

1 that, I think I will reserve judgment on it. But expressing my
2 skepticism, I would invite you at a minimum to submit whatever
3 instructions you think would be appropriate, but your time to
4 do so is rapidly disappearing, so the sooner the better on that
5 score. But I'll reserve judgment on that.

6 I guess just to distinguish and understand what I'm
7 reserving judgment on, it seems that we can distinguish the NDI
8 counts with respect to WikiLeaks from the NDI counts with
9 respect to the MCC charges. As to the WikiLeaks charges, is it
10 your argument that they also don't qualify as documents,
11 writings, plans, etc., that it's only chargeable under the
12 information prong?

13 MR. SCHULTE: I do think that there is a major
14 distinction between the two because those documents -- or that
15 information was -- there are classification markings on there,
16 so I think there is a significant distinction between the MCC
17 and the WikiLeaks charges. But I still think that it can only
18 be charged under information because it's electronic as opposed
19 to hard-copy documents. So that's a different argument for
20 those.

21 THE COURT: OK. So the argument there is that an
22 electronic document is not a document within the meaning of the
23 statute?

24 MR. SCHULTE: That's correct, yes.

25 THE COURT: OK.

M76Wsch2

1 MR. SCHULTE: Tangible and intangible is -- anything
2 intangible is only related to information, whereas --

3 THE COURT: So it's your argument that in a world
4 where we have e-books, that if somebody disclosed a book that
5 contained national defense information, a physical book with
6 physical pages, it could be charged under the documents prong,
7 but if you transmitted an e-book containing the very same
8 words, that would only be chargeable under the information
9 prong; is that your position?

10 MR. SCHULTE: I believe under the statute from,
11 whatever, 1945, I think that that is correct.

12 THE COURT: Do you have any authority to support that
13 interpretation and distinction?

14 MR. SCHULTE: Just the distinction from the court's --
15 I think there's information from the, when Congress actually
16 passed the law, the legislative history, as well as
17 determination from the *Rosen* court, which I intend to present
18 the Court along with everything else.

19 THE COURT: All right.
20 Any response from the government on this particular
21 issue?

22 MR. DENTON: Your Honor, I think with respect to the
23 question on Counts Three and Four, I think the Court is
24 correct. There's nothing in the statute that limits the
25 definition of documents, writings, and notes, in the way that

M76Wsch2

1 the defendant suggests. Quite to the contrary, I think there
2 are a number of portions of that litany that suggests that
3 Congress did intend things like sketches and notes to be
4 encompassed within the scope of the tangible materials covered
5 by 793.

6 I think there is no basis to support his argument with
7 respect to Count Two, that the fact that the documents were
8 electronic somehow takes them outside the ambit of the statute,
9 and I'm not aware of anything of what he's referring to in
10 either *Rosen* or the legislative history. We'll be happy to
11 address it. I do think we can take this up in more detail when
12 we see the defendant's proposed jury instruction.

13 I do think, however, that there is a substantial
14 overlap between documents and information. Documents
15 necessarily contain information. I think it's not clear to me
16 that you could ever have something under the tangible prong
17 that wouldn't at least in theory also be chargeable as
18 information. And so to instruct the jury that if you conclude
19 that it's information, you can't conclude that it's a writing
20 would be incorrect. And the proper course, I think, is what
21 the parties have suggested so far, is that the Court instructs
22 the jury that they must find that these are documents,
23 writings, and notes and then find that they also relate to the
24 national defense, as the terms of the statute require.

25 THE COURT: All right. I'll reserve judgment on those

M76Wsch2

1 counts, awaiting whatever authority Mr. Schulte wants to
2 submit, and to the extent that I continue to reserve judgment
3 and/or deny the motion, any proposed jury instructions on that
4 score, but I've expressed my skepticism and I'll leave it there
5 for the moment.

6 Again, bracketing Count Nine for a moment, any other
7 issue you want to raise on Rule 29, Mr. Schulte?

8 (Defendant conferred with standby counsel)

9 MR. SCHULTE: I think one final, one final issue is
10 the Computer Fraud and Abuse Act, which I believe are Counts
11 Seven and Eight or it could be Six as well. But the government
12 is alleging violations of this act due to actions taken by me
13 on the ESXi server that they say constitute, you know,
14 increasing unauthorized access. But I think the record
15 evidence clearly shows that I had an ESXi root server key,
16 according to the technical experts, that this gives you the
17 authorization to perform any actions, without any limitation,
18 that the government has failed to show, either from
19 management's showing what limitations there are or any types of
20 limitations that were communicated to me as to what I could or
21 could not do or what I was authorized to do or not authorized
22 to do, and especially in light of my email to management
23 informing them that I owned this equipment still, according to
24 the accountable property, and requesting removal of the access,
25 which never happened, I think the CFFA count should be

M76Wsch2

1 dismissed due to this.

2 THE COURT: All right.

3 Mr. Denton.

4 MR. DENTON: Your Honor, I think a couple of things.

5 First of all, purely as a factual matter, the
6 allegations of unauthorized access are not limited to the ESXi
7 server. They also deal with the defendant's unauthorized
8 access to the Altabackups folder on the NetApp file share and
9 the Confluence virtual machine that was used to access that and
10 on which he performed the reversions.

11 There is clearly a significant distinction and,
12 arguably, disagreement between the defendant and everyone else
13 about the distinction between power and authority. The fact
14 that he had a key that allowed him to do things is quite
15 different from the fact that I think literally all of the
16 testimony is that he was not authorized to take administrative
17 actions on any of those three systems at that time, and we
18 think that from the record evidence, including the testimony
19 about conversations with the defendant, the memorandum that he
20 received on April 18, the message he sent confirming that he
21 did not have any such access anymore, that the jury would well
22 be within its rights to conclude that he exceeded his
23 authorized access on any of those three systems to perform the
24 actions alleged in those counts.

25 THE COURT: All right. I agree. I think the evidence

M76Wsch2

1 is certainly more than sufficient for the jury to reach those
2 conclusions, so the Rule 29 motion on that front is denied.

3 Anything else, other than Count Nine, Mr. Schulte?

4 MR. SCHULTE: No. Just generic for the rest.

5 THE COURT: OK. I guess it preserves whatever that
6 preserves, but I'm certainly not granting any motion without an
7 articulated basis.

8 Why don't you take a minute to review the order that I
9 entered on Count Nine. I notice that standby counsel are both
10 here. I don't know if this is the time when you said you were
11 going to go try to speak to any of the witnesses. Maybe you've
12 already done that and come back, but just a reminder that if
13 you want to use your time for that purpose, this is the time to
14 use it.

15 (Defendant conferred with standby counsel)

16 MR. SCHULTE: OK. I think standby counsel is going to
17 go and see if anyone wants to talk with them and point out the
18 couple documents for the --

19 (Defendant conferred with standby counsel)

20 MR. SCHULTE: -- that are needed to address some of
21 these issues that we just discussed.

22 THE COURT: OK. In the meantime, are you going to
23 review the order regarding Count Nine?

24 MR. SCHULTE: Yes.

25 THE COURT: How long do you need before you're

M76Wsch2

1 prepared to discuss those issues? And I should ask the
2 government the same thing because it raises issues that the
3 government, I presume, would want to address as well.

4 MR. DENTON: Your Honor, I think that depends on how
5 deep the Court wants to go at this point. I think at a high
6 level, we'd be prepared to address it now. I think that there
7 are some questions with respect to, I think, in particular,
8 sort of the question regarding particular statements as kind of
9 a subcomponent of Count Nine as a whole that we might need a
10 minute to do a little bit of work on. If the Court wants us to
11 do that now, we can. But I also think in light of the issues
12 the Court has reserved, we're also happy to proceed as
13 efficiently as we can with the jury's time and take that up at
14 another point.

15 THE COURT: OK. Why don't we, I guess, do that, which
16 is to say -- well, I guess there are a couple things going on.

17 I think standby counsel should go speak with the
18 defense witnesses so we can nail down which witnesses
19 Mr. Schulte plans on calling. I think this is the time where
20 we need to discuss the proposed testimony of Ms. Sotnick, if
21 that's the correct name. I take it the government is basically
22 raising questions about, if not moving to preclude, her
23 testimony.

24 Mr. Schulte, I think a proffer would be appropriate
25 under the circumstances because I think there is some doubt,

M76Wsch2

1 given your waiver of the advice-of-counsel defense, combined
2 with the relevance issues that I raised with respect to defense
3 exhibit 812; it casts some doubt on whether she has any
4 admissible testimony to offer.

5 MR. SCHULTE: Yeah. So, the argument that the
6 government raised about exhibit 812 is not relevant here
7 because 812 was a document that was transmitted. That's Count
8 Three.

9 So Count Four is a document that was never
10 transmitted. So it goes to whether or not there was ever any
11 intent or any substantial step. So that's why this testimony
12 is significantly different from that exhibit. So I think her
13 testimony -- and I think we've litigated this a little bit
14 before, but her testimony has nothing to do with privilege, and
15 anything that had to do with privilege has already been
16 disclosed to the government. So we notified the government a
17 long time ago about Ms. Sotnick, several motions and letters
18 describing exactly what her testimony would be at trial and
19 what she would offer.

20 It's very simple, five, six questions. Basically, the
21 fact that she, that I gave her a document and she took it to
22 counsel. And then that's it. So I think that testimony is
23 relevant. It goes to show that there was no intention to do,
24 to release it or to do anything without getting advice, some
25 kind of advice from counsel. But as we've already litigated,

M76Wsch2

1 the fact that I'm requesting advice does not waive privilege as
2 to if there was any advice given or what the back-and-forth
3 was. So I believe -- I mean I could be mistaken, but I thought
4 that the Court's ruling -- issued a ruling about that, stating
5 that there's no waiver to privilege as far as simply sending
6 the device -- sending a document through a paralegal to
7 counsel.

8 THE COURT: I can't actually remember how definitively
9 we resolved this, but I think my view is that it would
10 constitute a waiver at least with respect to the communications
11 surrounding that transmission; that is to say, it puts at issue
12 the purpose for which it was given to the Federal Defenders,
13 and in that sense, any communications surrounding it that would
14 make clear the purpose for which you gave it to Ms. Sotnick
15 would be fair game. But I think, if I remember correctly, your
16 representation was there were no transmissions, communication
17 or communications around it, other than the actual document
18 itself, in which case maybe you're right and, you know, the
19 government can cross her on what communications, if any, you
20 made in giving it to her. But it wouldn't waive anything.
21 There wouldn't be anything else to waive as to.

22 Am I remembering that correctly?

23 MR. SCHULTE: I believe so. I believe so. That's
24 correct. There's no -- I wasn't eliciting any communications
25 surrounding the document, but I did go through and we pulled

M76Wsch2

1 any emails sent about it from the Federal Defenders. We tried
2 to pull any kind of document at all about this, and we found
3 nothing at all, and we alerted the government to that, that
4 we -- anything -- that we didn't believe that there was
5 anything to be waived because there was no -- regarding the
6 communication surrounding it. But we took the extra step of
7 saying OK, well, let's go through and see what communication
8 there was surrounding it, and we found nothing. And so we
9 alerted the government to that, that the only communication
10 about this is through Ms. Sotnick, giving the document to her,
11 and then she was giving it to Sabrina, who was actually on
12 trial during that time. So that's why there's not really any
13 communication, because she was busy. She was doing things.
14 And there was no email sent between them. There was no --
15 there's no documentation from Federal Defenders or anything
16 like that.

17 THE COURT: And that is consistent with the discussion
18 during the final pretrial conference.

19 Mr. Denton, back to you. I think Mr. Schulte's point
20 that there's a distinction between Count Three and Count Four
21 on the transmission versus attempt point is somewhat
22 well-taken; that is to say, I think he's entitled to argue from
23 the fact, for example, that it's labeled attorney-client
24 privilege, that the government hasn't sustained its burden of
25 showing that he had -- I'm just floating this as one possible

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1 argument.

2 I think he can certainly argue that the government has
3 not sustained its burden that he had the intent to release this
4 information. Right? I think we can agree that the government
5 does have to prove that to convict him of the attempt charge in
6 Count Four. And I think that he can point to the
7 attorney-client privilege marking to say that the jury can
8 infer from that that he intended these communications to be
9 only with his counsel and he never intended to disseminate them
10 to the world. You can obviously point to the fact that he
11 drafted tweets and set up a Twitter account and all sorts of
12 other things that suggest that he intended to disseminate it
13 much beyond counsel, to argue otherwise. But I think that
14 those are arguments both sides can make to the jury and it's up
15 to the jury to make that decision.

16 Do you agree on those issues thus far? Are you with
17 me?

18 MR. DENTON: I am.

19 I will just note that there's a delta there between
20 that and the purpose that Mr. Schulte expressed just a moment
21 ago, which was to show that he did not intend to act without
22 obtaining the advice of counsel.

23 THE COURT: Hold on. I just want to say do you agree
24 with what I just stated?

25 MR. DENTON: Yes, your Honor.

M76Wsch2

1 THE COURT: OK.

2 Then I think the question becomes, it seems to me that
3 having Ms. Sotnick testify, and I apologize for getting her
4 name wrong earlier, to the effect that he gave this document to
5 her is sort of akin to the evidence that he marked it as
6 attorney-client privilege, it's evidence that he drafted this
7 for her, for counsel, or at least evidence from which the jury
8 could infer that. Again, you can argue that just because he
9 shared it with counsel doesn't preclude his intention to
10 release it to the world and so on and so forth. But it seems
11 to me that it's somewhat akin to marking it attorney-client
12 privilege and in that sense may well be admissible. I'm not
13 sure how compelling the argument is, but I would think that
14 that is certainly an argument that can be made to the jury. Am
15 I missing something?

16 MR. DENTON: Again, your Honor, I guess the question
17 is how much do we sort of go down the road of the problem that
18 we talked about on Thursday, which is the fact that he did an
19 otherwise innocent thing with the document isn't necessarily
20 relevant to what his intentions were or what sort of the other
21 evidence is. To the extent that all Ms. Sotnick can testify to
22 is not Mr. Schulte's intentions, is not what any lawyer did
23 with the document, but merely I got this thing from him and
24 gave it to this other person, it's not clear that it's actually
25 relevant to sort of the implications that the Court is

M76Wsch2

1 suggesting. And so I think properly limited to those basic
2 facts, it's not clear that that limited piece is actually
3 really relevant here.

4 THE COURT: All right. Although you could also get up
5 on cross and ask a single question: You don't know whether he
6 intended to or did provide this to anyone other than you,
7 correct? And if the answer is yes, then that sort of cabins
8 the importance of that testimony. Am I wrong about that?

9 MR. DENTON: I'm not sure I'd even feel the need to
10 ask that, your Honor.

11 THE COURT: OK.

12 Mr. Schulte, anything you want to say in response to
13 Mr. Denton's argument?

14 (Defendant conferred with standby counsel)

15 MR. SCHULTE: Yeah, just, you know, it may not be
16 determinative, but it's definitely relevant. The fact that --
17 and there's a big distinction between this document and the
18 tweets. The malware document has nothing to do with the
19 tweets, and there was nothing -- so these are two completely
20 different documents. There's nothing -- the only thing in the
21 notebooks about malware is one thing talking about rewriting
22 it. So I think that it's relevant and it goes a long ways to
23 show that not only that but the time frame.

24 You know, this document was given to Ms. Sotnick in
25 March or spring of 2018. Right? So there's six, seven months

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1 in between, where the document's never transmitted. There's
2 nothing -- so pointing out the time frame of the document, when
3 it was first given to them and the fact that there's nothing in
4 the notebooks about it except for rewriting it is very relevant
5 to the charge.

6 THE COURT: All right. I'm going to deny the motion
7 to preclude her from testifying. I'm not sure how compelling
8 the argument is, as I've said, but I do think that it provides
9 some corroboration of Mr. Schulte's argument that these things
10 were not drafted for the world, but they were drafted for
11 counsel. Granted it doesn't preclude the alternative
12 inference, but that's an issue that I think the government can
13 argue to the jury.

14 I will caution you, Mr. Schulte, that I will certainly
15 be vigilant to ensure that you don't ask anything that would
16 even remotely suggest that you were relying on advice of
17 counsel, since you have explicitly waived any reliance on that
18 defense. And to the extent that there is any suggestion on
19 that score in front of the jury, I'm prepared to give a
20 curative instruction to the jury that you're not relying on,
21 and they may not consider, any advice you may have received
22 from counsel. Understood?

23 MR. SCHULTE: Yes. I've made -- I've put the
24 questions through standby counsel to make sure everything
25 should be good, so I don't anticipate any problems.

M76Wsch2

1 THE COURT: All right. Well, standby counsel
2 sometimes gets it wrong too, but that's OK.

3 OK. Other than Sotnick, I don't know. Are we in a
4 position to know how many other witnesses of the five that you
5 intend to call?

6 MR. SCHULTE: So, I'm waiting on, you know, Ms. Shroff
7 to talk to them and see, you know, if there's any changes. But
8 at this point, I expect to call all of them. But I expect the
9 testimony to be very brief, and I expect to rest today, so --

10 THE COURT: OK. That brings me to the next question,
11 which is am I correct in inferring that you're not intending to
12 testify yourself?

13 MR. SCHULTE: That's correct.

14 THE COURT: OK. And obviously you're representing
15 yourself, so in that sense, I think it's fair to assume and
16 infer that that is your decision and your decision alone. Is
17 that correct?

18 MR. SCHULTE: That's correct.

19 THE COURT: To the extent that you have discussed it
20 with standby counsel -- you're obviously welcome to have done
21 so; I'm not asking if you've done so or if they gave you
22 advice. But I just want to confirm that whatever advice they
23 may or may not have given you, it is your decision and your
24 decision alone not to testify. Is that correct?

25 MR. SCHULTE: That's correct.

M76Wsch2

1 THE COURT: And you understand that you do have the
2 right to testify and that if you choose not to testify, I'll
3 instruct the jury that it may not infer any suggestion of guilt
4 from the fact that you did not testify. Do you understand all
5 that?

6 MR. SCHULTE: Yes, I do.

7 THE COURT: All right.

8 Mr. Denton, do you have any other questions on that
9 score that you would ask me to pose to Mr. Schulte?

10 MR. DENTON: No, your Honor.

11 THE COURT: All right.

12 If that's the case, what I would suggest is why don't
13 we take a brief recess, Mr. Schulte can try and pin down how
14 many of the five CIA witnesses he intends to call, and then we
15 can pick up where we left off.

16 We also need to nail down defense exhibit 410. So if
17 the government has been provided with Mr. Schulte's proposals
18 on that, are you in a position to speak to that now, or do you
19 need to review it?

20 MR. DENTON: We need a minute to review it, but we
21 should be able to do that here, your Honor.

22 THE COURT: OK. Why don't we take a brief recess
23 during which Mr. Schulte can try and nail down how many of
24 these witnesses he intends to call, the government can review
25 defense exhibit 410.

M76Wsch2

1 I'll reserve judgment on the Count Nine issues and we
2 can discuss those later, perhaps at the end of today, or we can
3 discuss when we are going to have a charge conference and
4 perhaps combine it with that. But in any event, I'll reserve
5 judgment until both sides have had more of an opportunity to
6 review the questions that I posed in the order and do any
7 research on it, etc., etc.

8 Anything else that we need to discuss now other than
9 how long the break is going to be before we check back on these
10 issues and proceed?

11 MR. DENTON: Not from us, your Honor.

12 THE COURT: Mr. Schulte.

13 MR. SCHULTE: It may not be important now, but is the
14 Court intending to do the jury charge before the summations or
15 at least provide the parties with what your instructions will
16 be, so we can incorporate that into the summations?

17 THE COURT: Well, we'll have the charge conference
18 before summations. I think it depends a little bit on when you
19 rest today whether we do the charge conference later today or
20 tomorrow morning, and I don't want to definitively resolve that
21 until we see what time you conclude.

22 In any event, we will do the charge conference; that
23 is to say, I'll give you a proposed charge and give you
24 opportunities to raise objections and the like so that
25 everybody's on the same page with respect to what the charge

M76Wsch2

1 will be before summations. But then the instructions
2 themselves are given to the jury after summations, so you'll
3 know what the charge will be before summations, but I will not
4 actually give those instructions to the jury until after
5 summations. That's how it works.

6 MR. SCHULTE: OK.

7 THE COURT: On that score, I'm quite confident that
8 standby counsel will properly advise you how that process
9 works, so they can fill you in and we'll discuss it further
10 later as well.

11 All right. Mr. Schulte, how long do you think you
12 need to conclude any discussions that standby counsel may or
13 may not be having with these witnesses before you're in a
14 position to tell me what your intentions are as to them?

15 MR. SCHULTE: I'd say another 15 minutes.

16 THE COURT: All right. It's 10:33. Let's be prepared
17 to start at 10:50 on the dot, at which point I want to know
18 where things stand on defense exhibit 410 and what witnesses
19 Mr. Schulte plans to call. And then absent any reason to do
20 otherwise, we'll get the jury up and we'll proceed with the
21 defense case.

22 I'll see you at 10:50.

23 Thank you.

24 (Recess)

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M765sch3

1 THE COURT: You may be seated.

2 So first Defendant's Exhibit 410, are we squared away
3 on that? What is the status?

4 MR. DENTON: Your Honor, I think we agree
5 substantively on what should happen and what parts should be
6 taken out. The version that the defendant marked as 410-A
7 actually deleted those portions from the document. I think our
8 view is that to the extent they should be taken out they should
9 be redacted, like all of the other documents. I think we are
10 in agreement on that as a reasonable way to proceed. So, the
11 inestimable Ms. Cooper almost has that complete right now. I
12 think we are in agreement on approach and finalizing
13 implementation.

14 THE COURT: Mr. Schulte, are you in agreement with
15 that?

16 MR. SCHULTE: That's right.

17 THE COURT: So once we are done with that, I will
18 explain to the jury that Defendant's Exhibit 410, which I
19 previously reserved judgment on, it has been admitted.

20 On the defense witness front, Mr. Schulte, what is
21 your intention?

22 MR. SCHULTE: After speaking with the witnesses, I'm
23 only going to call two of the CIA witnesses and Ms. Sotnick.

24 THE COURT: In what order?

25 MR. SCHULTE: Ms. Sotnick will be first, and then --

M765sch3

1 actually, I don't think I have the list from the government
2 about what they should be called so I just need to --

3 THE COURT: There is David, Sherry Hart, Cheng, Philip
4 and Gordon.

5 MR. SCHULTE: David and Cheng. So Cheng will be
6 called next and David will be called last.

7 THE COURT: So then we need to discuss logistics of
8 how that will work since those two witnesses would be subject
9 to the partial courtroom closure. It would be ideal if I
10 didn't need to excuse the jury again after Ms. Sotnick's
11 testimony to implement that but I'm not sure there is any way
12 to do it otherwise.

13 Mr. Denton, do you have any guidance or thoughts?

14 MR. DENTON: Unfortunately, your Honor, I think we
15 need the CISOs to make that sure everybody who is in the
16 courtroom is allowed to be. I don't know if we can start that
17 process and figure it out and see whether we need to or not but
18 I think that would be the main reason why we would need to
19 excuse the jury.

20 THE COURT: OK.

21 MR. DENTON: I would think we can do that to the jury
22 room as briefly as humanly possible.

23 THE COURT: So I can confirm that there are some
24 people in the courtroom who would not be allowed to remain
25 because I know that, but why don't we just plan to -- I will do

M765sch3

1 that. It is not ideal but I have already told the jury that
2 they'll need to indulge us at this phase and we will need to go
3 from there.

4 Anything else that we need to discuss before we bring
5 the jury up and get ready to proceed?

6 MR. DENTON: Not from the government, your Honor.

7 MR. SCHULTE: No.

8 THE COURT: All right. Is Ms. Sotnick present?

9 MS. SHROFF: I'm going to go get her.

10 THE COURT: Let's bring her in and get her on the
11 stand.

12 For those who may not know, I previously entered
13 orders that authorize the partial courtroom closure for
14 testimony of certain witnesses, employees -- current or
15 former -- of the CIA, so the two witnesses after next witness
16 are subject to that order. Anyone who wishes to listen or
17 watch the Court proceedings and who is not within the scope of
18 that order and can't remain in the courtroom -- and we will
19 make that clear during the break -- you can watch it in the
20 overflow courtroom which is courtroom 20B in this court house
21 where audio can be heard and video of counsel and me is visible
22 but the witness would not be visible.

23 So just for anyone who is here who wishes to continue
24 to watch, that is the situation.

25 (pause)

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THE COURT: The jury is making its way up.

THE DEPUTY CLERK: Jury entering.

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M765sch3

1 (Jury present)

2 THE COURT: You may be seated.

3 Welcome back. Thank you for your patience. As I
4 said, we are entering a phase where you will need to tolerate a
5 bit more those kinds of interruptions. I think by this point
6 you know I don't like to do this but certain things need to be
7 done and hard to choreograph. That is where we are as easy as
8 it was earlier.

9 First, a bit of housekeeping. Last Thursday you may
10 recall that I reserved judgment on an exhibit that Mr. Schulte
11 had offered that was marked for identification as Defendant's
12 Exhibit 410, it was the Wordpress returns -- returns, the
13 response to the subpoena that had been served on Wordpress. I
14 have reviewed that. Subject to certain redactions that is now
15 admitted. I think it is admitted as 410-A; is that correct,
16 Mr. Denton.

17 MR. DENTON: Yes, your Honor.

18 THE COURT: Mr. Schulte?

19 MR. SCHULTE: Yes.

20 THE COURT: That is now in evidence as 410-A with
21 limited redactions. I remind you and will remind you at the
22 conclusion of the case that are you not to speculate as to what
23 is behind any redactions or as to the reasons for any
24 redactions. Redacted information is totally irrelevant for
25 your purposes. So that's first.

M765sch3

1 The second is you may have inferred from the presence
2 of someone to my left but Mr. Schulte is going to present a
3 defense case. I remind you of what I said earlier and will say
4 again, that Mr. Schulte bears no burden whatsoever at this
5 trial so he is allowed to call witnesses but even if he does --
6 and he does intend to -- the burden rests at all times with the
7 government to prove Mr. Schulte's guilt beyond a reasonable
8 doubt. So the fact that he may call witnesses does not shift
9 that burden in any way, shape, or form to him. But, that being
10 said, the defense is entitled to put on a case if it wants to
11 do so and Mr. Schulte has elected to present a case. So with
12 that, we will proceed with the defense case and, Mr. Schulte, I
13 would ask you to call your first witness.

14 MR. SCHULTE: The defense calls Hannah Sotnick.

15 THE COURT: Ms. Sotnick, if you would take off your
16 mask and rise and raise your right hand for the oath, please?

17 HANNAH SOTNICK,

18 called as a witness by the Defendant,

19 having been duly sworn, testified as follows:

20 THE DEPUTY CLERK: Please state and spell your full
21 name for the record.

22 THE WITNESS: Hannah Sotnick. H-A-N-N-A-H,
23 S-O-T-N-I-C-K.

24 THE COURT: You may proceed, Mr. Schulte.

25 DIRECT EXAMINATION

1 BY MR. SCHULTE:

2 Q. Good morning, Ms. Sotnick.

3 A. Good morning.

4 Q. I want to direct your attention to the March-April time
5 period of 2018. Where were you employed at that time?

6 A. At the Federal Defenders of New York.

7 Q. And in what capacity?

8 A. I was a paralegal.

9 Q. Were you assigned to my case?

10 A. Yes.

11 Q. And in what capacity were you assigned?

12 A. I was the paralegal working on your case.

13 Q. And again, directing your attention to April of 2018, as a
14 paralegal on my case, did your duties include visiting me at
15 the MCC?

16 A. Yes.

17 Q. I am going to show you what has been marked as Government
18 Exhibit 801.

19 THE COURT: Before you do that, can I just clarify?
20 Is it correct that the Federal Defenders are a group of
21 lawyers? Is that correct?

22 THE WITNESS: Yes.

23 THE COURT: And at that time were the Federal
24 Defenders representing Mr. Schulte in connection with this
25 case?

1 THE WITNESS: Yes.

2 THE COURT: Ladies and gentlemen, just a reminder that
3 for purposes of this trial Mr. Schulte has, as you know,
4 elected to proceed without counsel, that is to say he waived
5 his right to counsel and he is representing himself. I gave
6 you some instructions about that earlier. We will have some
7 instructions on that score as part of my final instructions to
8 you but the bottom line is you may not consider his decision to
9 do that in any way in your deliberations, nor should you
10 consider the fact that he was previously represented, you
11 shouldn't hold that against him. You may consider it to the
12 extent that it contextualizes what Ms. Sotnick is going to be
13 testifying about. But, the fact that he was previously
14 represented and the fact that he is now representing himself
15 are not issues that you should consider either favorably or
16 unfavorably to Mr. Schulte in your deliberations.

17 You may proceed, Mr. Schulte.

18 BY MR. SCHULTE:

19 Q. Let me show you what has been marked as Government Exhibit
20 801. Do you recognize this document?

21 A. Can I scroll a little bit?

22 THE COURT: I don't think you can but Mr. Schulte can
23 scroll through.

24 A. Yes, I do.

25 Q. Are you familiar with the title: Malware of the Mind?

M765sch3

Sotnick - Direct

1 A. Yeah. It sounds familiar.

2 Q. Did there come a time when I gave this document to you?

3 A. Yes.

4 Q. How did I give it to you?

5 A. When I visited you at the MCC.

6 Q. And what did you do with it after I gave it to you?

7 A. I gave it to Sabrina Shroff who was your lawyer at the
8 time.

9 Q. Do you have a normal practice of what you would do with a
10 document given to you by a client?

11 MR. DENTON: Objection.

12 THE COURT: Sustained.

13 Q. What else did you do with it?

14 A. Other than give it to your lawyer I don't remember.

15 Q. In your normal practice would you typically do anything
16 else with the document?

17 MR. DENTON: Objection.

18 THE COURT: I will allow it. Overruled.

19 That is to say, to the extent you received a document
20 from a client like Mr. Schulte at the time, is there anything
21 that you would normally do with it other than give it to the
22 lawyer on the case?

23 THE WITNESS: It would depend what the document was,
24 but --

25 THE COURT: Keep your voice up, please.

M765sch3

1 THE WITNESS: It would depend what the document was,
2 but sometimes scan it in or give it to the lawyer or make a
3 copy.

4 BY MR. SCHULTE:

5 Q. And did you distribute this document to anyone else besides
6 the lawyer?

7 A. No.

8 MR. SCHULTE: No further questions.

9 THE COURT: Cross-examination?

10 MR. DENTON: No, your Honor.

11 THE COURT: Ms. Sotnick, can you put your mask back on
12 and step down? You are excused at this time.

13 (witness excused)

14 THE COURT: Ms. Smallman, can I talk to you for one
15 second, please?

16 (pause)

17 THE COURT: Ladies and gentlemen, forgive me for doing
18 this but I'm having a technology issue that I need to fix, it
19 may take about five minutes. So rather than having you sit
20 here, what I am going to do is have Ms. Smallman take you into
21 the jury room here and not bother to take you all the way to
22 the jury room downstairs; we will fix it, and then we will
23 proceed with the next defense witness.

24 So don't discuss the case, don't do any research about
25 the case, continue to keep an open mind, and with that you are

M765sch3

1 excused to follow Ms. Smallman just into the jury room here.

2 THE DEPUTY CLERK: All rise.

3 (Continued on next page)

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1 (Jury not present)

2 THE COURT: You may be seated.

3 I obviously said that. There is no reason the jury
4 should know we are implementing partial courtroom closure but
5 that's the plan, so to the extent that you are not authorized
6 to remain in the courtroom pursuant to the orders that I
7 issued, that is, members of the defendant's family, parties,
8 and two pool reporters I think are the extent of it, please
9 leave at this time and you may watch in the overflow courtroom
10 20B. And once folks have left, I will ask the CISO to just
11 confirm that everybody remaining is authorized to be here.

12 (pause)

13 THE COURT: Are we in position to confirm?

14 CISO: Yes, your Honor.

15 THE COURT: Anything else that need to happen outside
16 to implement the order? Are we ready to go?

17 CISO: As long as the hallway is cleared we are good
18 to go.

19 THE COURT: Mr. Schulte, the first witness you intend
20 to call is Cheng, you said?

21 MR. SCHULTE: Yes. That is correct, yes.

22 THE COURT: So whoever is taking care of the logistics
23 out there, as soon as the hall is clear and we are ready to go,
24 let's bring Cheng into the witness stand and we will go from
25 there and proceed directly after with David after we are done

M765sch3

1 with him.

2 Just so we are all on the same page, these are
3 witnesses who are testifying only with first names? Any
4 thoughts? I think I will have Ms. Smallman say "please state
5 and spell your first name" or should I say no name at all?
6 What's the best way to handle it?

7 MR. DENTON: I think it is fine to just say first
8 name, your Honor. The Court has previously explained to the
9 jury the different sets of rules. If there is any indication
10 that they don't seem to understand why that's the question here
11 and not the full name, if the Court wants to remind them of
12 that instruction, that's fine with us.

13 THE COURT: I think my thought is Ms. Smallman should
14 ask them to state and spell their first name, and first name
15 only, and I will remind the jury that I have previously
16 authorized certain witnesses to testify and/or be referred to
17 only by first names and that this is one such witness and they
18 shouldn't consider that in connection with their deliberations.

19 Good?

20 MR. DENTON: That makes sense to us, your Honor.

21 THE COURT: Mr. Schulte?

22 MR. SCHULTE: Yes, that's fine.

23 THE COURT: As soon as Cheng is here we will proceed.

24 THE COURT: Mr. Cheng, could you please come up to the
25 witness stand? Step up here, have a seat, and Ms. Smallman

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will get the jury.

(witness takes the stand)

THE DEPUTY CLERK: All rise.

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M765sch3

1 (Jury present)

2 THE COURT: You may be seated. Sorry about that.
3 Thank you for your patience to fix my problem. So we are ready
4 to proceed.

5 Mr. Schulte, please call your next witness.

6 MR. SCHULTE: The defense calls Cheng.

7 THE COURT: Ladies and gentlemen, just a reminder, I
8 think I told you this earlier in the case but certain witnesses
9 I have approved, have allowed some witnesses to be identified
10 or to testify under only their first names or even under a
11 pseudonym, and that's to protect their work at the CIA, either
12 present or former. This is one such witness so he will be
13 testifying only with his first name. You should weigh the
14 testimony of any witness just as you would any other witness
15 and I will give you instructions on that score at the
16 conclusion of the case and not weigh it differently just
17 because I have authorized them to use first names only or
18 pseudonym, nor should you consider the fact that I have allowed
19 them to proceed in that manner is in any way an expression of
20 my opinion as to the facts in the case. You, and only you, are
21 the exclusive judges of the facts in this case.

22 So with that, Cheng, if you could please rise and rise
23 your right hand?

24 CHENG,

25 called as a witness by the Defendant,

1 having been duly sworn, testified as follows:

2 THE COURT: You may remove your mask at this time.

3 Could you just spell Cheng for the record, please?

4 THE WITNESS: C-H-E-N-G.

5 THE COURT: Could you move your chair forward and move
6 the microphone so that you are an inch or two away from the
7 microphone, as I am? And, please keep your voice up.

8 THE WITNESS: C-H-E-N-G.

9 THE COURT: Mr. Schulte, you may proceed.

10 DIRECT EXAMINATION

11 BY MR. SCHULTE:

12 Q. Good morning, sir. Where do you work?

13 A. Presently?

14 Q. Yes.

15 A. I work at a company called XXXXXX.

16 Q. Where did you work during the 2016 to 2018 time period?

17 A. From 2016 to 2018 I worked at the same company.

18 Q. And your work, through your work you were contracted to
19 work at the CCI office, right?

20 A. Yes.

21 Q. Which branch did you work for?

22 A. I worked in RDB.

23 Q. And that's part of EDG, correct?

24 A. Yes.

25 Q. And have you heard of the DevLAN system?

1 A. I have.

2 Q. What is DevLAN?

3 A. It is a software development network.

4 Q. And this network was run through EDG, correct?

5 A. Yes.

6 Q. Did you work on the DevLAN system?

7 A. I did.

8 Q. Have you heard the term wild, wild west associated with
9 DevLAN?

10 A. That would be opinions of people who had worked on DevLAN.

11 THE COURT: Just keep your voice up, please, and move
12 closer to the microphone.

13 Have you heard that term in connection or in reference
14 to DevLAN?

15 THE WITNESS: Yes. People who had worked on DevLAN
16 had given that opinion.

17 BY MR. SCHULTE:

18 Q. And what did you understand it to mean?

19 MR. DENTON: Objection.

20 THE COURT: Sustained.

21 THE WITNESS: I'm sorry?

22 THE COURT: You don't need to answer it.

23 Next question.

24 BY MR. SCHULTE:

25 Q. And prior to your work here, did you work at the NSA?

1 A. I did.

2 Q. And did you work at NSA during the Snowden leak?

3 A. Yes.

4 Q. And when you moved to the CIA, how did the DevLAN network
5 compare?

6 A. As far as development-wise the tools available were to, you
7 know, the specific work, that kind of thing. As far as how it
8 was maintained, that kind of thing, it was maintained
9 differently.

10 Q. Particularly the security?

11 A. Yes. The difference in security was different between when
12 I was working at NSA and with the Agency.

13 Q. It was an open system, right?

14 MR. DENTON: Objection. Form.

15 THE COURT: Will you just define what you mean by
16 that?

17 MR. DENTON: Leading.

18 THE COURT: Sustained.

19 BY MR. SCHULTE:

20 Q. Was DevLAN an open system?

21 A. I'm not familiar with what you may be referencing as an
22 open system.

23 Q. OK.

24 Were there shared passwords on DevLAN?

25 A. I do not recall that.

1 Q. What is the difference in security between the NSA system
2 and DevLAN?

3 MR. DENTON: Objection.

4 THE COURT: Just in general terms. You said that they
5 were different. Can you explain what you meant by that?

6 THE WITNESS: As far as the security restrictions put
7 in place, there were differences.

8 THE COURT: Can you just generally describe what those
9 differences were?

10 THE WITNESS: The policies put in place at the NSA
11 were at a heightened posture.

12 BY MR. SCHULTE:

13 Q. On DevLAN system you were an administrator, right?

14 A. No, I was not.

15 Q. On your local -- on your DevLAN box, right?

16 A. Correct.

17 THE COURT: Meaning you were an administrator on your
18 DevLAN box?

19 THE WITNESS: Within my workstation.

20 THE COURT: Can you explain what you mean by that?

21 THE WITNESS: Yes.

22 So when you are given your workstation you are allowed
23 to set it up, configure it, that kind of thing, but that's
24 restricted to the workstation that you perform your work on.

25 THE COURT: And by "workstation," is that a computer

1 or computer system? What do you mean by workstation?

2 THE WITNESS: Workstation meaning a computer.

3 THE COURT: So in other words, you were sort of an
4 administrator of your own computer that you were given to work
5 on? Is that what you are saying?

6 THE WITNESS: Yes.

7 BY MR. SCHULTE:

8 Q. And you said the security at NSA was heightened. Can you
9 explain what you mean by that?

10 A. There are essentially a set of policies and what not
11 assigned to each -- every account as well as every work station
12 such that -- for security purposes.

13 Q. Were you concerned by the security practices on DevLAN?

14 A. As far as the differences?

15 Q. Yes.

16 A. I was -- coming from a network that was in an increased
17 security posture it was surprising.

18 THE COURT: Meaning you were surprised at the
19 relative -- the fact that it was not similarly heightened, that
20 the DevLAN security system was not heightened? Is that an
21 accurate statement?

22 THE WITNESS: Yes.

23 BY MR. SCHULTE:

24 Q. And it is fair to say -- so it is fair to say that you
25 believed security on DevLAN was lax?

1 MR. DENTON: Objection.

2 THE COURT: Sustained as to form.

3 Q. Was the security on DevLAN lax?

4 A. Just by personal opinion?

5 Q. Yes.

6 MR. DENTON: Objection.

7 THE COURT: Sustained.

8 Q. What, in particular, surprised you about DevLAN security?

9 A. It's mainly that developers can essentially work on their
10 own workstations without restrictions, that kind of thing. The
11 policies put into place as far as transferring data onto the
12 network was trust-based. Things like that.

13 Q. Did you ever communicate any of your concerns with anyone?
14 I'm sorry?

15 A. I'm sorry. No, I did not. When you are introduced to the
16 network there is just the general comments, that kind of thing,
17 and that's where the wild, wild west terminology comes from, is
18 just a broad understanding of the staff working at that
19 location.

20 Q. So essentially there are no controls -- there are no --

21 THE COURT: Sustained as to form.

22 Q. So what sorts of restrictions existed at the NSA that were
23 not on DevLAN?

24 MR. DENTON: Objection.

25 THE COURT: Sustained.

1 MR. SCHULTE: No further questions.

2 THE COURT: Cross-examination.

3 CROSS-EXAMINATION

4 BY MR. DENTON:

5 Q. Good morning, sir.

6 A. Good morning.

7 Q. When Mr. Schulte was asking you some questions just now he
8 asked you about administrator privileges on workstations on
9 DevLAN. Do you remember that?

10 A. Yes.

11 Q. There were also servers on DevLAN, right?

12 A. Yes.

13 MR. SCHULTE: Objection. Beyond the scope.

14 THE COURT: Overruled.

15 BY MR. DENTON:

16 Q. You were not an administrator on those servers, right?

17 A. No, I was not.

18 Q. You don't know what the security settings were on those
19 servers, right?

20 MR. SCHULTE: Objection.

21 THE COURT: Overruled.

22 A. No, I did not.

23 Q. Mr. Schulte asked you about your use of DevLAN for your
24 work. Do you remember that?

25 A. Yes.

M765sch3

1 Q. And one of the things you used on DevLAN were products made
2 by a company called Atlassian, right?

3 MR. SCHULTE: Objection. Beyond.

4 THE COURT: I will allow just to see where it goes but
5 go ahead, Mr. Denton.

6 Sorry. Answer the question, Cheng.

7 THE WITNESS: Can you repeat the question?

8 THE COURT: Yes. Just keep your voice up, please.

9 BY MR. DENTON:

10 Q. One of the things that you used to do work on DevLAN was
11 software made by a company called Atlassian, right?

12 A. Yes.

13 Q. And you were not an administrator of the Atlassian
14 services, right?

15 A. No, I was not.

16 MR. SCHULTE: Objection.

17 THE COURT: Overruled.

18 Q. You do not know what security settings there were on the
19 Atlassian products, right?

20 A. No, I do not.

21 MR. DENTON: No further questions, your Honor.

22 THE COURT: All right. You may step down, Cheng.

23 Thank you. Please put your mask on before you step down and
24 you are excused.

25 (Witness excused)

M765sch3

Dave - Direct

1 THE COURT: Your next witness, Mr. Schulte?

2 MR. SCHULTE: The defense calls Dave.

3 THE COURT: All right. As we await the next witness,
4 probably obvious but this next witness is another one I have
5 authorized to use a first name only so my instructions about
6 that earlier would apply to him as well.

7 Dave, please step up. You can remove your mask and
8 please raise your right hand for my deputy to administer the
9 oath to you.

10 DAVE,

11 called as a witness by the Defendant,

12 having been duly sworn, testified as follows:

13 THE COURT: I think we can do without spelling Dave's
14 name. With that, Mr. Schulte, you may proceed.

15 Move your chair up so you are speaking into the
16 microphone and keep your voice up. With that, we will proceed.

17 Mr. Schulte, Go ahead.

18 DIRECT EXAMINATION

19 BY MR. SCHULTE:

20 Q. Have you heard of the DevLAN system?

21 A. Yes.

22 Q. What is DevLAN?

23 A. DevLAN is a closed network used for development of network
24 exploitation tools.

25 Q. Was DevLAN a secure system?

M765sch3

Dave - Direct

1 A. Yes.

2 Q. You described it to the FBI as the wild, wild west;
3 correct?

4 MR. DENTON: Objection.

5 THE COURT: Sustained.

6 Q. How did you describe DevLAN to the FBI?

7 A. As the wild, wild west.

8 Q. And what sorts of work was done on DevLAN?

9 A. Development of network exploitation tools, reverse
10 engineering of malware primarily.

11 Q. Did it have the same security policies as the other
12 networks at the CIA?

13 A. No.

14 Q. Was every developer a local admin on their own systems?

15 A. Yes.

16 Q. How many developers were developing malware on DevLAN?

17 A. I don't remember specifically but somewhere in the 120,
18 maybe, 120 folks.

19 Q. Were there shared passwords on DevLAN?

20 A. Yes.

21 Q. Developers could access each other's projects, right?

22 A. Yes.

23 MR. DENTON: Objection.

24 THE COURT: Sustained as to form.

25 Watch your form, please, Mr. Schulte.

1 BY MR. SCHULTE:

2 Q. Could developers access each others' projects?

3 A. Yes.

4 Q. Could you connect DevLAN to the Internet?

5 A. Potentially, yes.

6 Q. And how would this be done?

7 A. If someone were to --

8 MR. DENTON: Objection.

9 THE COURT: Overruled.

10 A. If someone were to move a network cable from one machine to
11 another.

12 Q. And what other computer systems did developers have at
13 their desks?

14 A. They had Internet work stations.

15 Q. And what were -- what networks were those systems on?

16 A. The systems were on an Internet connected system.

17 Q. And was there any security monitoring tools in place that
18 would have prevented the swapping?

19 A. There were monitoring systems on the Internet that showed
20 connections to websites and machines that were on the network.

21 Q. Was there any monitoring in place to detect if a computer
22 from DevLAN was connected?

23 A. You would see a computer connect on, if it had a computer
24 name that would connect on -- pull an IP address or connect to
25 the screen, you would see it.

M765sch3

Dave - Direct

1 Q. So you would see a new connection on the network?

2 A. Correct.

3 Q. But you wouldn't know if that system was on DevLAN?

4 MR. DENTON: Objection.

5 THE COURT: Sustained as to form.

6 Q. Would you know if a system newly connected to the Internet
7 came from DevLAN?

8 A. We could tell by the computer name.

9 Q. And what do you mean by that?

10 A. Each computer name on each network was named uniquely as to
11 which network it was connected to.

12 Q. So you are referring to the domain that it is registered
13 to; is that right?

14 MR. DENTON: Objection.

15 A. I am referring to the computer name which is different from
16 the domain.

17 Q. OK, but developers could change the computer name, right?

18 A. Yes.

19 THE COURT: Sustained as to form.

20 Mr. Schulte, please watch the leading questions,
21 please.

22 BY MR. SCHULTE:

23 Q. Could developers change the computer name on their systems?

24 A. Yes.

25 Q. And developers could bring malware on to -- let me

1 rephrase.

2 Could developers bring malware onto the DevLAN system?

3 A. Yes.

4 Q. And malware is -- malware is a way to infect computer
5 systems, right?

6 THE COURT: Sustained as to form.

7 Q. How do you define malware?

8 A. I would define malware as any type of software that is
9 executed on a computer for the purposes of obtaining
10 information without the user's knowledge or damage to the
11 computer or something other than what the expressed purpose for
12 that computer is supposed to be doing.

13 Q. Was there malware on the DevLAN system?

14 A. Yes.

15 Q. What is Stash?

16 A. Stash is a code repository for code that the developers
17 used for building software.

18 Q. What would you say to be the most important component on
19 the DevLAN system?

20 A. I guess I would need a little more clarification on that
21 question.

22 Q. So why was DevLAN created?

23 A. DevLAN was created for reverse-engineering of malware,
24 creation of new software tools to be used by other groups
25 within CCI.

M765sch3

Dave - Direct

1 Q. With respect to that goal, what would you say is the most
2 important component on the DevLAN network?

3 A. I would say the code repository.

4 Q. And that would be Stash, right?

5 A. Yes.

6 Q. Did you ever copy Stash into your home directory?

7 A. I did.

8 Q. Do you know how the home directories were set up on DevLAN?

9 A. I do.

10 Q. Could developers copy code into home directories?

11 A. Developers could copy code to home directories if the other
12 developers allowed those developers to have access to those
13 directories.

14 Q. So your testimony is each developer could set up controls
15 on his home directory?

16 A. Yes.

17 Q. And how would that happen?

18 A. It is all based upon Windows active directory and Windows
19 permissions. Because you have control of your home directory
20 you can assign permissions to whoever you would like to have
21 access to that folder.

22 Q. I am going to show what is in evidence as Defendant's
23 Exhibit 1201. Does this list access controls?

24 A. Yes.

25 Q. Do you see the entry for home directories?

M765sch3

Dave - Direct

1 A. Yes. Let me look -- yes, I see home right in the middle of
2 the page.

3 Q. Yes.

4 A. OK.

5 Q. Do you see the user or group name associated with this
6 access control?

7 A. I do.

8 Q. What is that?

9 A. It is everyone.

10 Q. And what is the access type for everyone?

11 A. Full control.

12 Q. And what does full control mean?

13 A. Full control means that you can have access if -- anything
14 underneath home unless specifically -- what is the easiest way
15 to explain this?

16 The home directory everyone has access to. The
17 folders underneath will have specific permissions on them but
18 if new folders -- someone could add a folder to home and it
19 would -- it would -- add a folder to home and they would be --
20 it would inherit permission for everybody -- full control for
21 everybody.

22 Q. So everyone had full control through this directory?

23 MR. DENTON: Objection.

24 THE COURT: Sustained as to norm.

25 Q. Did everyone have full control to this directory?

1 A. To that head -- to the top directory which was home, they
2 did.

3 Q. And do you see any other access controls in this document
4 that would change those controls? It is five pages, I am just
5 going to scroll through it.

6 A. Yes, read. So everyone's directory underneath was read.

7 Q. I'm sorry?

8 A. Everyone's access type underneath was read so they could
9 read the contents of the directory.

10 THE COURT: What other forms of access are there aside
11 from read?

12 THE WITNESS: That's all it shows here; source gold @
13 @everybody loan, gold copies, Windows, user group Windows,
14 access type: Read.

15 THE COURT: My question is, is read access different
16 than full access?

17 THE WITNESS: Yes. Yes, it is.

18 THE COURT: How does it differ?

19 THE WITNESS: The difference is you can read the
20 contents of the directory, you cannot upload new files, you
21 cannot delete files, you can only see what is there.

22 BY MR. SCHULTE:

23 Q. And this access control applies to a different directory on
24 that server?

25 A. Yes.

M765sch3

Dave - Direct

1 Q. And that, I think you said it in your testimony but what is
2 the name of that share?

3 A. Source gold and binary gold copies.

4 Q. And that's different from the home share, right?

5 A. Yes.

6 Q. And this directory, are there any additional restrictions
7 to the home directory?

8 A. There is different shares with different permissions, yes.

9 Q. Specifically, with respect to the home directory, are there
10 any other access controls for that directory?

11 A. Below home, yes. Everyone -- under home, everyone had
12 their own personal directory. By default, that directory was
13 set up upon user creation as full control for only that user
14 and only that user could read, write, or see into that
15 directory.

16 Q. Do you see that reflected in this document?

17 A. You would have to scroll up so I could see the rest of it.
18 These are different share names off of the server FS-01.

19 THE COURT: Just to clarify so I understand, the home
20 directory is home for the entire DevLAN server; is that
21 correct?

22 THE WITNESS: It's for user shares so individual user
23 shares. It was organized that most -- everyone would have
24 their own personal drive that they could store stuff up to the
25 network so that it could be network backed up. Branches would

1 have their own group share directory so they could collaborate
2 within the branch. So it was a tiered setup as across the
3 organization, a setup the way the organization was defined.

4 THE COURT: But would your own individual personal
5 drive be in the home folder?

6 THE WITNESS: Yes. Correct.

7 THE COURT: So the home folder itself was full control
8 to everybody across OSB; is that correct?

9 THE WITNESS: So the way Windows permissions work, in
10 order for people to be able to get to their directory you have
11 to give them access -- everyone has to have access to the
12 primary directory so you have home and then you will have all
13 the users under home. You need to enable -- everyone has
14 permission to Home so they can drill down into their individual
15 directory. Now, they won't be able to get to other directories
16 but they will be able to get to theirs unless they
17 specifically, the developers tended to give permissions to some
18 of the folks that they were working with to access their home
19 directory but they would specifically add permissions to their
20 folder.

21 THE COURT: So your personal folder within the home
22 directory could have different access control?

23 THE WITNESS: It could, yes; from what we initially
24 set up.

25 THE COURT: And the default setup for the personal

M765sch3

Dave - Direct

1 folder within home is limited just to the user?

2 THE WITNESS: Correct.

3 THE COURT: And then the user had administrative
4 privileges to grant access to others?

5 THE WITNESS: Correct.

6 THE COURT: OK.

7 THE WITNESS: Because they own that folder.

8 BY MR. SCHULTE:

9 Q. OK, but the access controls in this document do not reflect
10 that, do they?

11 A. So what you have shown here is -- are the Windows default
12 permissions, built-in administrators, FS-01 DC backup. These
13 are different shares off FS-01 that have different access
14 controls. So the one you have showing right now that you just
15 scrolled off is division -- share name Division, so that would
16 be the different divisions within EDG. The owner is the DevLAN
17 admins, domain admins, access is full control.

18 Q. OK, but if the restrictions as you described existed, then
19 you would see those permissions for each individual user, you
20 would see a different set of permissions than everything?

21 THE COURT: Sustained.

22 A. Potentially.

23 THE COURT: Sustained as to form. Please don't answer
24 the question.

25 THE WITNESS: Sure.

1 THE COURT: Mr. Schulte, because it is direct
2 examination you are not permitted to ask leading questions so
3 please try to refrain from doing so.

4 BY MR. SCHULTE:

5 Q. Access control lists -- to your knowledge, what do access
6 control lists show?

7 A. Access control shows who is allowed to view that directory
8 or the files within that directory, read them, write them, or
9 delete them, or copy them.

10 Q. So if the restrictions that you testified about were in
11 place, would you not see it on this document?

12 THE COURT: Sustained as to form.

13 Q. If the restrictions you testified about were in place,
14 would you see it on this document?

15 A. You would see some of them. This is not a directory
16 listing of everything, it enumerated of all the directories and
17 folders and files on FS-01. This is a very high level of it.
18 There were probably thousands of directories.

19 Q. OK. But if there were access controls different on those
20 subdirectories, would they be listed here?

21 A. No.

22 Q. How do you know?

23 A. Because they would not be listed -- you have to list the
24 subdirectories to show them. Things are not inherited, it is
25 called inheritance in Windows active directory. So, the

1 subdirectories that are below the primary directories will, by
2 default, inherit the permissions from the directory above
3 unless specifically changed.

4 Q. OK, so what would you need to do to get those access
5 controls?

6 A. You would have to list them, you would have to get those
7 individual directories, and you would have to look at the
8 permissions. In Windows it is typically a right click in
9 properties in selecting the security tab.

10 Q. So in order to get the full listing of all the access
11 control lists from the FS-01 server, what would you need to do?

12 A. You would need to look at almost every directory and follow
13 it down each path and pull directories -- subdirectories to
14 make sure that inheritance is not blocked if there were special
15 permissions put on each subdirectory file all the way down to
16 the file level. It would be quite a task.

17 Q. Can you tell from this document what the -- if there were
18 access controls on any of the home directories?

19 A. No. Besides full control on the top home directory.

20 Q. Did you make a second copy of Stash?

21 A. I did.

22 Q. What did you do with that?

23 A. That was per our customer's request, was saved to an
24 external hard drive to be stored offline.

25 Q. And when did you make this copy?

1 A. I made that copy on April 16th, I believe is the date,
2 2016.

3 Q. Where did you place that hard drive?

4 A. That hard drive was initially placed in the safe at my
5 desk.

6 (Continued next page)

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M76Wsch4

Dave - Direct

1 BY MR. SCHULTE:

2 Q. And did there come a --

3 THE COURT: Can you just explain, obviously not
4 specifying, but what you mean by a customer. Was that an
5 office or --

6 THE WITNESS: Yeah.

7 THE COURT: -- person within the CIA?

8 THE WITNESS: Yeah, that was -- Jeremy Weber directed
9 me to do that. Jeremy Weber directed me to do that.

10 BY MR. SCHULTE:

11 Q. And did there come a point when you retrieved the Stash
12 hard drive from the safe?

13 A. There was a time that I moved it out of the safe and into
14 my desk drawer.

15 Q. And the hard drive -- and at that point did the hard
16 drive -- at that point you didn't do anything to delete Stash
17 from that hard drive?

18 A. I did not, not that I remember. That was quite some time
19 ago.

20 Q. And do you know what happened to that hard drive?

21 A. Specifically, no, I can't remember exactly if I had the
22 disk -- most likely had the disk destroyed, but I can't
23 honestly tell you. I don't remember. It was quite some time
24 ago.

25 Q. OK. But to your knowledge, did you ever find that drive?

M76Wsch4

Dave - Direct

1 A. To my knowledge, I do not remember specifically what the
2 end result of that drive was. I can testify what I probably
3 did to it, but I don't specifically remember.

4 Q. Did you make any notation about destroying it?

5 A. I did not.

6 Q. OK. Did you lose track of it?

7 A. I would say I did not. I just don't remember the exact
8 disposition of what ended up with that drive.

9 Q. OK. So sitting here -- OK.

10 Where did you track it to?

11 A. The drive remained in my desk after I had the safe removed
12 for a while. So it most likely -- if it left my desk, it went
13 into a destruction bin. That would be the only thing I would
14 do to it. No one would take stuff out of my desk. My desk was
15 typically locked, and we worked in a small vault with only
16 about six people in that vault, with access to only those six
17 people, to gain access to that vault.

18 Q. Is it in your desk now?

19 A. No. The FBI, when they came through, took everything out
20 of my desk. All media.

21 Q. But did the FBI find the drive?

22 A. I don't know. I don't remember.

23 Q. OK. So sitting here today --

24 THE COURT: Just to clarify, when you say the FBI came
25 through and removed everything from your desk, is that after

M76Wsch4

Dave - Direct

1 the WikiLeaks leak --

2 THE WITNESS: Yes.

3 THE COURT: -- in March 2017?

4 THE WITNESS: That is correct.

5 THE COURT: So as part of their investigation, they
6 took everything from your desk?

7 THE WITNESS: Correct.

8 THE COURT: And do you know if they did that for other
9 people who worked in the vault?

10 THE WITNESS: Yes. They did that for everybody.

11 BY MR. SCHULTE:

12 Q. OK. When the FBI began its investigation, did they ask you
13 where the hard drive was?

14 A. Not that I recall.

15 Q. OK. I'm going to show you -- do you recall another
16 proceeding that took place in this case?

17 A. You would have to give me some more information.

18 Q. Yeah. Did you -- did you ever testify under oath about
19 this case before?

20 A. I did.

21 Q. And that was in 2020, correct?

22 A. Yes.

23 Q. OK. And at that proceeding, you were asked by the FBI if
24 you ever made a copy of Stash and put it on a hard drive, and
25 you answered yes?

M76Wsch4

Dave - Direct

1 MR. DENTON: Objection.

2 THE COURT: Sustained.

3 (Standby counsel conferred with defendant)

4 BY MR. SCHULTE:

5 Q. OK. Were you asked this question at the proceeding?

6 MR. DENTON: Objection.

7 THE COURT: May we have a page number, Mr. Schulte.

8 MR. SCHULTE: Sorry. It's transcript page 860 to 861.

9 Q. And at that proceeding, the FBI -- do you recall being
10 asked whether the FBI asked you where the hard drive was?

11 A. I -- I don't remember. That was a long time ago.

12 (Defendant conferred with standby counsel)

13 MR. SCHULTE: OK. I'm going to show just the witness
14 and the parties page 860 to 861.

15 Q. Do you recall being asked at that proceeding whether the
16 FBI inquired into where the hard drive was?

17 MR. DENTON: Objection.

18 THE COURT: Sustained.

19 You can have the witness look at the document if you
20 wish, and then you can ask a question about whether that
21 refreshes his recollection.

22 BY MR. SCHULTE:

23 Q. Does this refresh your recollection that you testified that
24 you were unsure --

25 THE COURT: Sustained.

M76Wsch4

Dave - Direct

1 You can ask him if it refreshes his recollection about
2 the issue that you previously asked that he didn't recall, but
3 not about what he previously testified to.

4 BY MR. SCHULTE:

5 Q. Does this refresh your recollection about the hard drive?

6 A. Yes.

7 Q. OK. And when the FBI began its investigation, did you
8 still possess that hard drive?

9 A. I don't remember.

10 Q. Does this refresh your recollection about that?

11 MR. SCHULTE: Let me scroll down.

12 THE WITNESS: It says here --

13 THE COURT: No. Don't say what's on the document.

14 THE WITNESS: No, I'm not. Sorry.

15 THE COURT: The question is looking at the document,
16 does it refresh your recollection about whether you still
17 possessed the hard drive when the FBI began --

18 THE WITNESS: And I wasn't sure back -- I was not sure
19 if I still had the hard drive.

20 THE COURT: So sitting here today, having looked at
21 this document, you don't recall whether --

22 THE WITNESS: I do not recall.

23 BY MR. SCHULTE:

24 Q. OK. But by the time the FBI came, had you lost track of
25 the hard drive?

M76Wsch4

Dave - Direct

1 THE COURT: Mr. Schulte, he testified he doesn't
2 remember whether he had it at the time the FBI came or not. So
3 let's move on, please.

4 BY MR. SCHULTE:

5 Q. Did you ever mention the safe to the FBI?

6 THE COURT: Let's take this document down, please.

7 A. I do not recall whether I mentioned that to the FBI or not.

8 MR. SCHULTE: OK. I'm going to show the witness the
9 page again.

10 Q. Specifically about the safe, does this refresh your
11 recollection about that?

12 A. Yes, it does.

13 THE COURT: So sitting here today, do you recall
14 whether you told the FBI about the safe?

15 THE WITNESS: I do recall that, and I did not tell
16 them about the safe.

17 BY MR. SCHULTE:

18 Q. OK. Did you tell them about ever wiping the drive?

19 A. I don't recall that as well.

20 Q. Does this refresh your recollection about wiping the drive?

21 THE COURT: No. The question is whether it refreshes
22 your recollection about whether you told the FBI about wiping
23 the drive.

24 MR. SCHULTE: All right.

25 Q. Does this refresh your recollection about telling the FBI

M76Wsch4

Dave - Direct

1 whether you had wiped the drive?

2 A. That is correct. It does.

3 Q. OK. And did you tell the FBI -- or --

4 (Defendant conferred with standby counsel)

5 BY MR. SCHULTE:

6 Q. Did you tell the FBI that you had wiped the hard drive?

7 A. I did not.

8 THE COURT: Do you know sitting here today whether you
9 wiped the hard drive?

10 THE WITNESS: Honestly, your Honor, I do not remember.

11 BY MR. SCHULTE:

12 Q. OK. Did you ever make copies of Confluence or Stash on to
13 other drives?

14 THE COURT: Let's split that up, please.

15 BY MR. SCHULTE:

16 Q. OK. Did you ever make copies of Confluence on to other
17 drives?

18 A. Could you give me a better definition of what you mean by
19 copies? To other hard drives? To file system shares?

20 Q. Well, specifically, did you ever make copies of Confluence
21 on to other shares on the FS01 server?

22 A. Yes.

23 Q. And what shares did you copy it to?

24 A. I do not remember the share specifically. The Confluence,
25 the two servers in question were originally running, they were

M76Wsch4

Dave - Direct

1 virtual machines running on a server managed by OSB. At some
2 point we, when we took control of the servers, shortly
3 thereafter, we moved those servers, copied them to our
4 infrastructure, ISB's infrastructure, to run on ISB's ESX
5 servers.

6 THE COURT: And where did you work; in ISB?

7 THE WITNESS: I worked in ISB.

8 THE COURT: At all times, in 2016 --

9 THE WITNESS: Yes.

10 THE COURT: -- and 2017?

11 THE WITNESS: Yes. I was there for about 11 years.

12 BY MR. SCHULTE:

13 Q. OK. Do you recall the FS01 shares OSB test repo?

14 A. Yes.

15 Q. Do you recall the share DS00?

16 A. I do not recall DS00.

17 Q. OK. And did you ever make copies of Confluence on OSB test
18 repo?

19 A. Looking back, I do remember making a copy to OS test repo.
20 If I remember correctly, it was because we had to stage the
21 virtual machine copy somewhere because we could not make a
22 direct connection from ISB's shares to the ESX server that was
23 running Confluence. So we had to stage it to OSB repo and then
24 move it off of there.

25 Q. OK.

M76Wsch4

Dave - Direct

1 A. Into where its final destination was.

2 Q. And where was the final destination?

3 A. It was on the virtual machine share that was used off of
4 FS01 for running all the EDG VMs that we managed.

5 Q. And do you recall what that share name was?

6 A. Top of my head, I do not recall right now.

7 Q. OK. I'm going to show you what's marked as 3515-505, and
8 if you can just read this to yourself and look up when you're
9 done.

10 THE COURT: Have you finished reading that paragraph?

11 THE WITNESS: Yes, sir.

12 THE COURT: OK. Your question.

13 BY MR. SCHULTE:

14 Q. OK. Does this refresh your recollection about where it was
15 copied to?

16 A. Yes.

17 Q. So what share was it copied to?

18 A. DS00.

19 Q. OK. And do you know what the access controls were for OSB
20 test repo?

21 A. I do not know off the top of my head.

22 Q. Do you know what the access controls were for DS00?

23 A. Specifically, no. But I can, in -- generally tell you that
24 they were NFS-controlled and -- I will retract that.

25 No, I do not know specifically.

M76Wsch4

Dave - Direct

1 Q. All right. I'm going to pull back up Defense Exhibit 1201.
2 And can you tell me what the access controls were on the FS01
3 OSB test repo?

4 A. Everyone.

5 Q. OK. And do you recall if you made copies to any other
6 directories on the FS01 server?

7 A. Not that I recall from anything we've already talked about.

8 Q. OK. Do you know how many server rooms there were for
9 DevLAN infrastructure?

10 A. For DevLAN infra -- for DevLAN, there were three server
11 rooms.

12 Q. OK. And did you have to badge in to those rooms?

13 A. Only one.

14 Q. In the server room, were there Post-its with passwords on
15 them?

16 A. I personally don't recall that.

17 Q. OK. Do you know what RDP is?

18 A. I do.

19 Q. What is RDP?

20 A. Remote Desktop Protocol.

21 Q. You can -- can you use RDP to access someone else's
22 computer?

23 MR. DENTON: Objection.

24 THE COURT: Sustained as to form.

25 BY MR. SCHULTE:

1 Q. Have you ever used RDP to access someone else's computer
2 before?

3 A. Yes.

4 Q. Did you ever RDP into my computer?

5 A. I may have, yes.

6 (Defendant conferred with standby counsel)

7 MR. SCHULTE: No further questions.

8 THE COURT: All right.

9 Ladies and gentlemen, you may be wondering about our
10 schedule today. I'd very much like to finish this witness
11 before we take any sort of break. So with your indulgence and
12 your patience, we will proceed with cross-examination at this
13 time.

14 Mr. Denton.

15 MR. DENTON: Thank you, your Honor.

16 CROSS-EXAMINATION

17 BY MR. DENTON:

18 Q. Good afternoon, sir.

19 A. Good afternoon.

20 MR. DENTON: Ms. Cooper, could we put up Defense
21 Exhibit 1201 for a second, please.

22 Q. Mr. Schulte spent a while asking you a number of questions
23 about this document. Do you remember that?

24 A. Yes.

25 Q. Do you see at the top where it says CIFS share ACL?

M76Wsch4

Dave - Cross

1 A. Yes.

2 Q. CIFS is an acronym, right?

3 A. Yes.

4 Q. What does it stand for?

5 A. I do not recall off the top of my head. It's Windows --
6 it's for Windows permissions, basically, Windows protocol.

7 Q. And what is a share?

8 A. A share is just an ability for -- it's a place to share
9 folders, files, information, based upon permissions.

10 Q. It's network storage, right?

11 A. Correct.

12 MR. SCHULTE: Objection.

13 THE COURT: Overruled.

14 BY MR. DENTON:

15 Q. Mr. Schulte asked you a number of questions about a share
16 named Home, right?

17 A. Yes.

18 Q. Just at the share level, what is Home?

19 A. Home is the central point for all individual user shares on
20 DevLAN.

21 MR. DENTON: Ms. Cooper, could we put up what's in
22 evidence as Government Exhibit 1207-60.

23 Q. Now, sir, this is what you would see if you navigated to
24 that share, right?

25 A. Correct.

M76Wsch4

Dave - Cross

1 Q. And you've got all these individual folders with people's
2 names on them, right?

3 A. Correct.

4 Q. And those individuals could decide what permissions they
5 wanted on those folders, right?

6 A. Yes.

7 Q. You had a folder there, right?

8 A. I did.

9 Q. What permissions did you set on your folder?

10 A. I was the only one allowed to access my folder.

11 Q. So where it said on defense exhibit 1201 that access was to
12 everyone, that just got you to this page, right?

13 A. Correct.

14 Q. Mr. Schulte then asked you some questions about a copy of
15 Stash that you made. Do you remember that?

16 A. Yes.

17 MR. DENTON: Ms. Cooper, we can take this down.

18 Q. And you said you did that on April 16, right?

19 A. Correct.

20 Q. And was that of 2016?

21 A. Yes.

22 Q. What were you doing on April 16 of 2016?

23 MR. SCHULTE: Objection.

24 THE COURT: Overruled.

25 A. On April 16, 2016, we were asked to come in on a Saturday

M76Wsch4

Dave - Cross

1 to change administrative privileges on all the Atlassian
2 products.

3 Q. And specifically, what privileges were you changing?

4 A. Administrative.

5 Q. And you were taking privileges away from people, right?

6 A. Yes.

7 Q. And specifically, you were taking privileges away from the
8 developers who used to run the products, right?

9 MR. SCHULTE: Objection. Beyond the scope.

10 THE COURT: Overruled.

11 A. Yes.

12 Q. And that included taking privileges away from Mr. Schulte,
13 right?

14 A. Yes.

15 Q. After April 16, 2016, Mr. Schulte was not authorized to do
16 anything --

17 MR. SCHULTE: Objection.

18 Q. -- with the Atlassian products, right?

19 MR. SCHULTE: Objection.

20 THE COURT: Sustained.

21 BY MR. DENTON:

22 Q. The copy of Stash that you made on April 16, 2016, was what
23 you call a backup copy, right?

24 A. Yes.

25 Q. Has two components, right?

M76Wsch4

Dave - Cross

- 1 A. Yes.
- 2 Q. A SQL database and a zip file, right?
- 3 A. Correct.
- 4 Q. And you made a copy of the specific backup for that day,
5 April 16, right?
- 6 A. Correct.
- 7 Q. That was not the March 3 backup, right?
- 8 A. No.
- 9 Q. Mr. Schulte then asked you a number of questions about
10 copies of Confluence that you made, right?
- 11 A. Yes.
- 12 Q. Those are a different kind of copy, right?
- 13 A. Yes.
- 14 Q. That's a copy of the entire virtual machine, right?
- 15 A. Yes.
- 16 Q. Not that two-part backup with a SQL and a zip file, right?
- 17 A. Yes.
- 18 Q. And you were doing that because you were moving that server
19 to new infrastructure, right?
- 20 A. Yes.
- 21 Q. Why were you moving it off of OSB infrastructure?
- 22 A. We were moving it off OSB infrastructure for control of the
23 virtual machine. There were -- if you have a virtual machine
24 on an ESX or host that hosts virtual machines, if you have
25 access to that virtual machine, you don't have access to the

1 VM. That VM could be copied, deleted, snapshotted, and
2 changed. You do not have full control over that VM.

3 Q. And so the purpose of the copies that you made that
4 Mr. Schulte was asking you about was to move that VM off of
5 OSB's infrastructure so you would control it, right?

6 A. Yes.

7 MR. SCHULTE: Objection.

8 THE COURT: Overruled.

9 BY MR. DENTON:

10 Q. And I think you described what you were doing with that
11 copy of the virtual machine as staging, right?

12 A. Correct.

13 Q. And Mr. Schulte asked you some questions about the test
14 repo share, right?

15 A. Yes.

16 Q. And that's where you were staging the virtual machine,
17 right?

18 A. That is correct.

19 Q. Staging is temporary, right?

20 A. Yes.

21 Q. A virtual machine is a pretty big file, right?

22 A. Yes.

23 Q. Takes up a lot of space, right?

24 A. It does.

25 Q. And so you moved it off of OSB test repo when you set it up

M76Wsch4

Dave - Cross

1 later, right?

2 A. Yes.

3 Q. Did it stay on OSB test repo when you set up the virtual
4 machine on ISB infrastructure?

5 A. At this time I don't remember. I -- based upon the nature
6 of what we were doing, I would have cleaned it off OSB repo.

7 Q. And again, that was a different copy of Confluence than the
8 backup files, right?

9 MR. SCHULTE: Objection.

10 A. Correct.

11 THE COURT: Overruled.

12 BY MR. DENTON:

13 Q. Mr. Schulte then asked you some questions about something
14 called RDP, right?

15 A. Yes.

16 Q. Now, in your work in ISB, you essentially provided IT
17 support to EDG, right?

18 A. Yes.

19 Q. And RDP is something you used to help people with their
20 computers, right?

21 A. Yes. We were -- if I could continue?

22 Q. Yes.

23 A. RDP is used as a little bit of a troubleshooting. If we
24 have a user that's having issues with connections, it allows us
25 to connect to that workstation and view the problem as they

M76Wsch4

Dave - Redirect

1 would be viewing it without us having to go down and sit down
2 and log in to their computer. Rarely did we use RDP.

3 Q. And it's the kind of thing where, like, a little box pops
4 up that says do you want to accept the connection from this
5 person, right?

6 A. Correct.

7 Q. So when you RDPed into someone else's computer, you
8 essentially got their permission, right?

9 A. Correct.

10 MR. SCHULTE: Objection.

11 THE COURT: Overruled.

12 MR. DENTON: If I could just have a second, your
13 Honor?

14 No further questions, your Honor.

15 THE COURT: Any redirect?

16 MR. SCHULTE: Very brief.

17 REDIRECT EXAMINATION

18 BY MR. SCHULTE:

19 Q. Mr. Denton asked you about copying the entire Confluence
20 virtual machine, correct?

21 A. Yes.

22 Q. But the Confluence virtual machine would contain all the
23 data from the backups, right?

24 MR. DENTON: Objection.

25 THE COURT: Sustained as to form.

M76Wsch4

Dave - Redirect

1 BY MR. SCHULTE:

2 Q. Would the Confluence virtual machine contain all the data
3 from the backups?

4 A. It depends. I don't recall specifically if there was
5 backup data on that Confluence virtual machine. As I recall,
6 the Confluence backed up to another file structure on FS01. I
7 believe it was called Altabackup.

8 Q. So let me -- the -- there were -- the data on Confluence
9 was what was backed up, right?

10 MR. DENTON: Objection to form.

11 BY MR. SCHULTE:

12 Q. Was the data on Confluence backed up?

13 A. As I previously described, the data was backed up into the
14 Altabackup on FS01, which is an NFS share.

15 Q. OK.

16 A. Are you talking about the back -- was Confluence actually,
17 the VM actually backed up?

18 Q. No. I'm sorry. The question is if you had a copy of the
19 Confluence virtual machine, that would contain all the data
20 from any backup, right?

21 MR. DENTON: Objection.

22 THE COURT: Sustained.

23 (Defendant conferred with standby counsel)

24 BY MR. SCHULTE:

25 Q. Would the Confluence virtual machine contain the data from

M76Wsch4

Dave - Redirect

1 Confluence?

2 A. Yes.

3 Q. OK. And that's the same data that is eventually -- that's
4 the same data that's created in backup?

5 A. I don't understand that question.

6 Q. When you run a backup of Confluence, it copies the same
7 data from the VM, correct?

8 MR. DENTON: Objection to form, but --

9 BY MR. SCHULTE:

10 Q. OK. He asked you about staging VMs, correct?

11 A. Yes.

12 Q. And you don't -- do you recall ever deleting a copy of the
13 Confluence from OSB test repo?

14 A. Specifically, I would have as a matter of form.

15 Q. No. The question was just do you recall?

16 A. At this -- at this moment, many years later, no, I don't
17 remember doing that --

18 Q. OK.

19 A. -- specifically.

20 Q. When was the first time that you met with Mr. Denton here?

21 MR. DENTON: A little beyond the scope, your Honor.

22 THE COURT: Sustained.

23 MR. SCHULTE: Nothing further.

24 THE COURT: Any recross?

25 MR. DENTON: No, your Honor.

M76Wsch4

1 THE COURT: All right. Dave, you may put your mask on
2 and step down.

3 (Witness not present)

4 THE COURT: All right.

5 Mr. Schulte.

6 MR. SCHULTE: The defense rests at this point.

7 THE COURT: OK.

8 Ladies and gentlemen, you just heard that Mr. Schulte
9 has rested his case as well, which means that at this point you
10 have, in fact, heard all of the evidence. Bear with me for one
11 moment. I'm going to ask the parties to come up to sidebar
12 just so we can talk through some logistical and scheduling
13 issues.

14 Just so you know, I think what I'm going to do is
15 actually let you go home for the day; that is to say, we're not
16 going to proceed this afternoon. In part, that is because, as
17 you know, at the conclusion of the case, I'm going to give you
18 instructions about the law. They're going to be fairly
19 lengthy; I'm giving you a heads-up now. And we need to sort of
20 work through those and make sure that everybody's in agreement
21 about the precise language, and so forth, as you'll see.

22 That will take some time. My hope is that we can do
23 that this afternoon. What I want to talk to them about is just
24 to get a sense of scheduling issues so that I can tell you when
25 to appear tomorrow and what our plans are. If you bear with

M76Wsch4

1 me, you're welcome to stretch where you are, but just remain
2 where you are for the moment, and I will return to you and give
3 you an update on our plans.

4 Parties.

5 (At sidebar)

6 THE COURT: First, before we talk about the schedule,
7 I think it would be helpful, it makes sense for me to just
8 confirm for the jury they heard testimony throughout the trial
9 about Dave C. I assume that everybody agrees that this is the
10 Dave C. that was referenced earlier. I think given the
11 ambiguities that could otherwise arise from the use of a first
12 name and first name without initials it would pay for me to
13 advise the jury that they heard testimony about a Dave C.
14 Everybody agrees that that was the Dave C. that was referenced
15 in that testimony.

16 Any objection to that?

17 MR. DENTON: No, your Honor.

18 MR. SCHULTE: No.

19 THE COURT: OK.

20 So let's talk about scheduling. It's about 12:40 now.
21 We need to put some finishing touches on the draft charge.
22 Also, Mr. Schulte probably needs some time to propose those
23 charges that he mentioned earlier as well as any proposed
24 charges on the NDI issue and the Counts Three and Four issues
25 that I flagged over the weekend. I guess the question is can

M76Wsch4

1 we do the following.

2 If we got you the draft jury charge -- I'll figure out
3 what that would mean in your case, Mr. Schulte. If we got it
4 to you in about two hours, so about 2:45 or so at the latest
5 and possibly even earlier, could we reconvene at 4:00 to have a
6 charge conference so that we can begin promptly tomorrow
7 morning with summations?

8 MR. DENTON: That's fine with us, your Honor.

9 (Defendant conferred with standby counsel)

10 MR. SCHULTE: Yeah, so, I think -- am I able to -- if
11 I'm able -- am I able to go back to the SCIF to work on this
12 and finish this up; I think that should be enough time.

13 THE COURT: OK. I think the answer is yes, but I'll
14 confirm that when we let the jury go.

15 Just for my planning purposes tomorrow, do you have an
16 estimate, government, how long your summation is likely to be?

17 MR. LOCKARD: Around two hours, hopefully a little
18 shorter.

19 THE COURT: And Mr. Schulte.

20 MR. SCHULTE: About the same.

21 THE COURT: And obviously hard to tell rebuttal, but
22 I'm guessing half an hour, give or take.

23 MR. DENTON: At the outside, your Honor.

24 THE COURT: OK. Very good.

25 Anything else you need to discuss now? I'm going to

M76Wsch4

1 let the jury go, and then we can talk about logistics of all
2 this.

3 MR. DENTON: Not from the government, your Honor.

4 (Defendant conferred with standby counsel)

5 MR. SCHULTE: Oh, I need to move for a Rule 29 at the
6 end of the defense case.

7 THE COURT: All right. We'll take that up after the
8 jury goes.

9 MR. SCHULTE: OK.

10 THE COURT: Thank you. Very good.

11 (In open court)

12 THE COURT: All right. Thank you for your patience,
13 and not just that moment, but throughout today. I know it's
14 been a little bit of a different schedule and structure today.
15 But as I said, it's just harder to choreograph at this stage.

16 I am going to let you go in a moment so that we can
17 take care of everything that we need to take care of before we
18 can proceed with the summations. It may take a while, and so
19 rather than have you sit in the jury room and come back today
20 so we can only get the beginning of the summations done, I
21 think it makes a lot more sense to finish what we need to do
22 today and then proceed with all the summations tomorrow. So
23 that's the plan. Hopefully you don't mind getting dismissed
24 early from school today.

25 We will start tomorrow, I hope, at the same time.

M76Wsch4

1 Same time, same place, which means you should be in the jury
2 room by 8:45. Summations are also a little bit hard to
3 choreograph, because it makes sense to wait to finish each
4 before taking any sort of break. So I'll ask you to bear with
5 us tomorrow as well. I did ask you to sit at least until 4:00.
6 It's possible that I will end up dismissing you early tomorrow
7 if it didn't make sense to me to begin my instructions
8 tomorrow. If I think I can get through my instructions
9 tomorrow, then I may ask you to stay for that, but we'll have
10 to play it a little bit by ear. Again, it's just harder to
11 choreograph these stages of things.

12 Either way, I would anticipate that your deliberations
13 would begin no later than the day after tomorrow. I mentioned
14 to you earlier that when your deliberations begin, I would be
15 asking you to stay until 5:00, so I'm going to ask you to do
16 that not tomorrow but beginning the day after tomorrow. So
17 please plan accordingly. I hope this is welcome news, all
18 things considered. It does mean that we're actually ahead of
19 the pace that I had previously thought we'd be on, so in that
20 sense, hopefully that's welcome news and not unwelcome news.

21 Very important reminders. Do not discuss the case
22 with each other or with anyone else. All right? You've now
23 heard all the evidence. All the evidence is in, but you have
24 not heard the parties' arguments, and those are very, very
25 important in understanding the evidence and contextualizing it,

M76Wsch4

1 deciding what conclusions to draw from it and so on and so
2 forth. So that's a very important part of the case even if
3 it's not technically evidence. Nor have you heard my
4 instructions about the law, which includes what conclusions
5 you'll need to draw; that is to say, what issues you will need
6 to decide.

7 Those are very important things, and for that reason,
8 you should continue to keep an open mind. You should continue
9 to ensure that you don't discuss the case with each other or
10 anyone else for that matter, and obviously, you should continue
11 to avoid any research about the case or reading anything about
12 the case or anything of that sort. So with those very
13 important but surely familiar instructions at this point, I
14 will excuse you for the day. Please be back in the jury room
15 no later than 8:45 tomorrow.

16 Ms. Smallman will correct me if I'm wrong. I think we
17 will probably have lunch order forms for you tomorrow -- no,
18 not tomorrow. Beginning with deliberations we'll have lunch
19 order forms, so not tomorrow, but I'll give you further
20 instructions about that tomorrow. Bottom line is tomorrow,
21 bear with us as we get through the day, but be in the jury room
22 by 8:45 so we can start promptly.

23 With that, I wish you a very pleasant afternoon and
24 evening, and we'll see you tomorrow.

25 Thank you very much.

M76Wsch4

1 (Jury not present)

2 THE COURT: You may be seated. If somebody can close
3 the door back there, I'd be grateful.

4 Thank you.

5 All right. As discussed at sidebar, I need to put
6 some finishing touches on the draft jury instructions.
7 Obviously, I won't have an opportunity to consider any
8 instructions that Mr. Schulte submits.

9 But while I do that, Mr. Schulte, you'll have an
10 opportunity to draft any that you wish to submit for my
11 consideration, either in response to my order over the weekend
12 about the NDI instructions and the Count Three and Count Four
13 instructions or with respect to the documents-information
14 distinction that you referenced earlier or, for that matter,
15 anything else. So while I'm putting the finishing touches on
16 my draft, you can come up with any proposals that you want to
17 make.

18 I'm going to try to get you the draft instructions no
19 later than 2:45. First, my impression is, Mr. Schulte, the
20 marshals are OK with Mr. Schulte going to the SCIF.

21 THE MARSHAL: Yes, your Honor.

22 THE COURT: Great. And what's the easiest way for us
23 to get a copy of the draft charge to Mr. Schulte in the SCIF?

24 MR. SCHULTE: I think you can email it to standby
25 counsel, and they can get a copy.

M76Wsch4

1 THE COURT: Great. As soon as we are done, we will
2 email copies to standby counsel and counsel for the government.
3 Again, I'm hoping that that will be no later than 2:45. It may
4 even be sooner. We certainly had a solid draft before this
5 morning, but there are some issues that we're still working on.
6 In the meantime, frankly, if either side has additional
7 proposals that they want me to consider, you can either draft
8 those or submit them, as the case may be, recognizing that,
9 obviously, I can't consider them until I get them.

10 As you'll see, the draft charge will have two things.
11 One is line numbers. The second is annotations for anything
12 that is not a standard charge of mine. The annotations will be
13 stripped from the copy of the instructions that is ultimately
14 given to the jury. That's just for your reference and my
15 reference as to sources and authority for a particular
16 instruction.

17 I will keep the line numbers in just because I think
18 it's helpful for us in the charge conference to be able to
19 reference particular lines, and if the jury has any questions
20 about the instructions, it also enables them to do so in an
21 easy way. So when we have the charge conference, and we will
22 do that this afternoon, I would expect, beginning with the
23 government, to go through basically from beginning to end, for
24 you to reference by page number and line number anything that
25 you have an objection to or correction to, any sort of

M76Wsch4

1 suggestion or submission.

2 Needless to say, if you catch typos, please bring them
3 to my attention. No ego here on that front. I'm sure you'll
4 find typos, and I would much prefer to catch them on the front
5 end, so the more eyes the better. So if anyone catches a typo,
6 please share it with us. But bottom line is, more
7 substantively, any objections or suggestions that you have, you
8 should reference by page number and line number, and we'll go
9 through from beginning to end, and then Mr. Schulte will have
10 an opportunity to do the same.

11 At that time, you should also plan to discuss the
12 Count Nine issues that I raised in my order yesterday and also
13 the issues that Mr. Schulte raised earlier about the redactions
14 to the transcript that he wishes to rely on as part of closing.
15 So I need to know what that involves. Hopefully we can discuss
16 that in open session. If not, we'll figure out how to proceed.

17 So the plan would be to reconvene here at 4 p.m. for
18 the charge conference, assuming that I can get you the charge
19 within approximately two hours.

20 Anything else that you need to discuss?

21 I neglected to tell the jury that Dave was Dave C. I
22 apologize for that. I'll do that first thing tomorrow. I
23 think no harm in that delay, but that is my plan.

24 Anything else from the government?

25 MR. DENTON: Just one point to note for the record

M76Wsch4

1 regarding the Court's order yesterday about the NDI issue.

2 Your Honor, we, per the Court's order, got the process
3 started for classification review on the transcript of those
4 conferences. That is very much in process. In taking a look
5 at it, I do think that there are some potential complications
6 of the interaction between the public right of access
7 referenced in the order and the sealing provisions of Section 6
8 of CIPA. Bottom line, we're getting a redacted version done,
9 and we would just appreciate the opportunity to be heard when
10 the time comes on what should or should not be public there.

11 THE COURT: That is fine, and we can do that in due
12 course.

13 There's more urgency, obviously, with respect to any
14 redactions that need to be made to the trial transcript, since
15 I think it's in everybody's interest to ensure that before
16 summations tomorrow, we're all on the same page with respect to
17 what, if anything, is redacted. That means, again per my
18 discussion earlier, I take it that we're up to date through
19 last Thursday. I think whoever needs to review the transcript
20 from today, that needs to be done expeditiously, and by the end
21 of today, we need to all be on the same page as to whether
22 there's any redactions to be made there. OK?

23 MR. DENTON: Understood, your Honor.

24 THE COURT: Anything else from you, Mr. Denton?

25 MR. DENTON: No, your Honor.

M76Wsch4

1 THE COURT: Mr. Schulte.

2 MR. SCHULTE: Yes, a couple things.

3 I just wanted to make sure to put on the record that I
4 move for a Rule 29 motion after the defense rests.

5 THE COURT: OK.

6 MR. SCHULTE: And --

7 THE COURT: And I would say same ruling as earlier.
8 Denied with respect to the CFFA -- I think that's the
9 acronym -- counts, and I reserve judgment on the other
10 arguments that you made.

11 MR. SCHULTE: OK.

12 And then if -- standby counsel was saying that they
13 may be able to email you versions that we have for the NDI and
14 other stuff that the Court requested. So I don't know if the
15 Court wants us to do that or would prefer just to wait until
16 the charge conference at four.

17 THE COURT: If you have something, the earlier the
18 better for my purposes because then I can consider it before I
19 give you my initial proposed draft.

20 MR. SCHULTE: OK.

21 THE COURT: So if you have it, fantastic. Email it,
22 and then you should also file it on ECF so that it's part of
23 the public record. But the sooner the better.

24 MR. SCHULTE: OK.

25 THE COURT: And that goes for anything else that you

M76Wsch4

1 draft in the next two hours. If you're faster than I am and
2 you're able to get me something before I get you anything, then
3 great; send it along.

4 MR. SCHULTE: OK.

5 And then the last thing, I just wanted to put on the
6 record that defense exhibit 1201 that was showing the access
7 controls, so we had requested from the government all access
8 controls, including home directories and everything, and in
9 discovery, this is the only document they produced and they
10 said there were no access controls on the home directory.

11 So I think there's, you know, a significant issue, and
12 this is not the only testimony. There's other testimony from
13 the tech experts where they were able to say things that we had
14 requested and weren't able to review since we didn't have
15 access to any forensic images of those servers. So I just
16 wanted to put that on the record, that it's caused significant
17 issues.

18 THE COURT: OK. Given your role at the CIA at the
19 time, I have to imagine that you would have personal knowledge
20 of the fact that the access controls might be different than
21 what's reflected in 1201, but be that that as it may.

22 Mr. Denton, anything you want to put on the record
23 about this? I hear no application, so in terms of just making
24 a record, anything you wish to say?

25 MR. DENTON: No, other than to note that obviously the

M76Wsch4

1 Court has addressed the defendant's access to these materials
2 repeatedly, and we don't think this changes anything.

3 THE COURT: All right.

4 And then final thing, let get an updated version of
5 the exhibit list with respect to what was admitted today. If
6 the government can complete that and get it to Mr. Schulte, I
7 want to make sure that, no later than tomorrow morning,
8 everybody's in agreement about what is in evidence and we have
9 a plan for getting that to the jury as soon as they begin their
10 deliberations.

11 On that score, we can discuss this later, but am I
12 correct that the only classified exhibit that came into
13 evidence was GX1, the WikiLeaks leak; that there's no other
14 classified exhibit in evidence?

15 MR. SCHULTE: There was a second exhibit. It was just
16 a technical thing, like, 1207 something, I believe. That was
17 the other. It had all the forensic stuff from my workstation.
18 It was, like, a massive document. That was the other
19 classified exhibit.

20 THE COURT: OK. I wasn't sure. So 1207 --

21 MR. DENTON: It's 1203-28, your Honor.

22 THE COURT: OK. And is the plan, would both of those
23 be on a laptop that's provided to the jury in the jury room
24 separate and apart from any exhibits that are loaded on to our
25 system for them?

M76Wsch4

1 MR. DENTON: Government Exhibit 1 is on the laptop.
2 The laptop itself is the evidence item from the FBI.

3 1203-28 is currently on a classified disk. I think we
4 can probably provide a classified laptop that has just that,
5 but I think I'll talk to Ms. Cooper and to the security folks,
6 and we'll work something out with Ms. Smallman and chambers on
7 how to handle that.

8 THE COURT: And GX1, does the laptop work? Does it
9 have a power cord?

10 MR. DENTON: Yes.

11 THE COURT: OK. Great. Why don't you talk through
12 how that will be handled. Most of the documentary exhibits
13 will all be loaded on to our system, which enables them to
14 access it through the network, so obviously, the classified
15 exhibits should not be loaded on to that and should be handled
16 separately. But you should think through how that should be
17 done.

18 Anything else to discuss before we break so that we
19 can make the most of our afternoon?

20 Mr. Denton.

21 MR. DENTON: Just on that point, your Honor, am I
22 correct in my impression that it is not the Court's practice to
23 give the jury copies of either the indictment or the jury
24 charge in their deliberations?

25 THE COURT: You're wrong. It is my current practice

M76Wsch4

1 to give them copies of the jury charge. I always do that. And
2 whether I give them copies of the indictment turns, actually,
3 on the particulars of the case.

4 I think it would make sense to do it here just given
5 the number of charges and the nuances between them. And in
6 particular, with respect to Count Nine, perhaps, given the
7 statements that are referenced therein, I think it would
8 probably be helpful to them, but I'm happy to discuss that as
9 part of the charge conference if there's disagreement or
10 discussion about what that would entail.

11 MR. DENTON: Happy to take it up then, your Honor.

12 THE COURT: All right.

13 Mr. Schulte, anything else before we break?

14 MR. SCHULTE: Yes. Just one thing about the laptop
15 with the classified exhibits. I don't think that it should be
16 marked as classified or sensitive, or anything like that, in
17 any way to give prejudice to the defense about the documents.

18 THE COURT: All right. GX1, I think, is in evidence,
19 and however it's marked it's marked. So we're not going to
20 change that.

21 MR. SCHULTE: I'm talking about the laptop itself, the
22 physical laptop, like no stickers on it or anything.

23 THE COURT: But I think GX1 is a physical laptop, and
24 whatever form it's in now is the form it's going to go to the
25 jury. So that is what that is.

M76Wsch4

1 To the extent that Mr. Schulte is raising issues with
2 respect to the other exhibit, 1203-28, I guess, why don't we
3 plan to discuss that at the charge conference and discuss how
4 that would be done. All right?

5 Anything else that we need to discuss now or want to
6 put on the radar for later discussion?

7 (Defendant conferred with standby counsel)

8 THE COURT: The clock is ticking.

9 MR. DENTON: Not that I think we need to take up now,
10 your Honor. Thank you.

11 THE COURT: All right.

12 Mr. Schulte.

13 MR. SCHULTE: No, nothing further.

14 THE COURT: All right. I will see you here at 4:00,
15 and hopefully we can work through all these issues and the
16 charge.

17 See you then.

18 (Recess)

M765sch5

1 THE COURT: You may be seated.

2 We are starting five minutes late because I started
3 editing the draft six minutes after I told you I would aim for
4 so I made up for it.

5 So, in addition to the charge we have a handful of
6 other things to address. Maybe it makes sense to take up
7 Rule 29-related issues as to Count Nine first since that may
8 have bearing on the proposed charge, although I think to some
9 extent the proposed charge flags some of the issues or attempts
10 to address some of the issues that I think there may be.

11 So I guess let me put to the government two things.
12 One is do you agree or concede that there is no basis for an
13 instruction charge based on any statements that Mr. Schulte
14 made in the first initial interview on March 15th, 2017 prior
15 to his receipt of the grand jury subpoena, that is to say is
16 there any evidence in the record from which a jury could find
17 that he knew when he made those statements before receiving the
18 subpoenas that he knew that there was a pending grand jury
19 proceeding?

20 MR. DENTON: So let me take that in a couple of parts,
21 your Honor.

22 I think, first of all, it is a question of how much is
23 a reasonable inference for the jury to draw. There is
24 obviously evidence that the defendant was searching for and
25 visiting websites about the investigation of the leaks and the

M765sch5

1 FBI's involvement in it and the fact of a criminal
2 investigation that predates that interview, so there is
3 evidence in that. I don't think there is any evidence in the
4 record that specifically uses the words "grand jury" at that
5 point. We didn't introduce what the actual websites were that
6 he visited, only the searches. I think, however, this gets to
7 a broader question which is kind of the distinction between an
8 obstruction charge in this context and, for example, a false
9 statements charge in which the unit would be sort of the
10 particular statement as opposed to, as charged here, the effort
11 to impede or obstruct the grand jury proceeding which is
12 charged as a single offense and is a ongoing offense that
13 involves multiple false statements to the grand jury. And so,
14 in that context if we were taking alone the statements that
15 were made during the first interview there might be a separate
16 question, but in the context of an ongoing pattern of conduct
17 of false representations made to the FBI in connection with
18 their investigation which he learned, beyond any doubt, at the
19 end of that proceeding -- the end of that first interview I
20 should say, was a grand jury proceeding which he personally was
21 served with a subpoena as well as a subpoena for his phone. I
22 think, again, the jury can consider the conduct during the
23 first interview as part of the overall effort to impede the
24 grand jury's investigation.

25 THE COURT: So it is your position that, let's say,

M765sch5

1 there is an effort to impede a government investigation but the
2 defendant acquires knowledge that it is a grand jury
3 investigation at some point after the efforts begin but before
4 they conclude, that the jury could base the obstruction
5 conviction on conduct before the defendant learned of the grand
6 jury proceeding?

7 MR. DENTON: Not exclusively on that conduct, no.
8 Like I said, I think here it is a continuing course of conduct
9 that includes components that occurred both before and after
10 the specific provision of the grand jury subpoena to him.

11 THE COURT: So that may be so, but how could it
12 possibly constitute obstruction at a point in time when he is
13 not aware that there is a proceeding to obstruct?

14 First of all, I think the argument you are
15 articulating sounds a lot like Justice Scalia's dissent in
16 *Aguillar*, but bracket that for a moment, even if that is right,
17 it strikes me that it requires subjective knowledge that there
18 is a grand jury proceeding because, in the absence of that
19 knowledge it's not possible, by definition, to have the
20 necessary intent, namely the corrupt intent to obstruct or
21 interfere with a proceeding if you don't know about the
22 proceeding at all.

23 MR. DENTON: That much is certainly true, your Honor.
24 So there is no disagreement on that score. Again, like I said,
25 I think the difference here between an obstruction charge and a

M765sch5

1 false statements charge is that there are not six different
2 counts of obstruction for the false statements conviction
3 because if we parsed that finely, there is a course of conduct
4 being the obstructing the grand jury proceeding -- I think we
5 can address this when we get to the Court's charge -- but I
6 think the Court's charge on what is required with respect to
7 both nexus and knowledge does appropriately inform the jury
8 about what they can and should consider there. And so, if the
9 question is would the statements from the first interview, if
10 that was all there was, suffice to support a conviction on
11 Count Nine, the answer is probably not but that's not what
12 there is here and that's not what is charged either. So I
13 think in that context it is certainly reasonable for the jury
14 to consider conduct that is part of the continuing pattern,
15 subject to the instruction that the Court intends to give them
16 that an element of the offense is did the defendant have
17 knowledge of the proceeding.

18 THE COURT: So I said we would bracket the charge for
19 a moment but just jumping to the language that I proposed on
20 page 44, do you agree with that way of handling it? So lines 5
21 to 7: For that reason, I instruct you that you may not find
22 this element of Count Nine satisfied based on the defendant's
23 conduct including any statement he may have made before he was
24 served with a grand jury subpoena.

25 MR. DENTON: So I think there is some -- I think we

M765sch5

1 sort of question whether that last sentence is necessary in
2 that it sort of directs them to the service of the grand jury
3 subpoena separate and apart from the knowledge of the
4 investigation. In principle, though, we do agree with that.
5 And certainly the first two sentences, lines 1 through 5 on
6 page 44, certainly do accurately convey the necessary
7 instruction we think.

8 THE COURT: OK. So how does this differ from the
9 facts in *Aguillar* where first of all there was a federal
10 district judge who was the target of that investigation,
11 probably someone far more schooled than Mr. Schulte with
12 respect to the ways of criminal investigations and the
13 likelihood of a grand jury investigation and, indeed, the
14 evidence there, I gather, is that during the conversation he
15 explicitly asked the agent if the matter was the subject of a
16 grand jury investigation and was told that it was, albeit not
17 that his statements would be repeated to the grand jury and,
18 indeed he testified, as Justice Scalia notes in dissent, that
19 it was his impression that his statements to the FBI agents
20 would be reported to the grand jury. And, even so, the
21 majority found that that did not satisfy the elements of the
22 obstruction count that you are charging here.

23 MR. DENTON: So I think there is two things, your
24 Honor. The first is what *Aguillar* does not address. The
25 Second Circuit has subsequently noted that sort of the nexus

M765sch5

1 requirement from *Aguillar* is satisfied in situations where the
2 obstruction is aimed at a third-party in a way in which it is
3 foreseeable to the defendant that the third-party would act on
4 the false statement or otherwise in a way that would result in
5 obstructing the proceeding. Among others, that's *United States*
6 *v. Desposito*, 704 F.3d 221, 231 (2d Cir. 2013), and for that
7 reason there was some fairly extensive testimony I think from
8 Special Agent Evanchech about not just what he said to the
9 defendant, kind of how that informed actions that were taken as
10 part of the investigation which were sort of before the grand
11 jury at that point. So I think in that context there is sort
12 of more than there was in *Aguillar*.

13 Second, I think again at the point at which the
14 defendant has, if we are talking about the second and third
15 interviews which form the bulk of the statements, the defendant
16 was actually given a grand jury subpoena for his own testimony
17 at that point and so we are, at that point, well beyond sort of
18 the impression from *Aguillar* that his statements might be
19 conveyed to a grand jury that an FBI agent had told him existed
20 and was generally looking into the conduct. At that point the
21 defendant is well on notice that his own statements are the
22 subject of the grand jury's investigation.

23 THE COURT: Is that so? He is certainly on notice
24 that the grand jury wishes to hear from him, but directly. It
25 might actually lead someone to draw the opposite inference,

M765sch5

1 that his statements to the FBI aren't going to be reported to
2 the grand jury unless they're inconsistent with what he
3 testifies to before the grand jury directly.

4 MR. DENTON: Well, I think, your Honor, first of all,
5 I don't think there is anything in *Aguillar* or the subsequent
6 case law that limits the form of obstruction through false
7 statements to perjury before the grand jury itself. Certainly
8 the statute does not contain any such limitation and I am not
9 sure of any case law that goes that far. I think this is also
10 an issue that would present fairly staggering consequences for
11 criminal investigations more generally and that it is obviously
12 the case that it is frequently the election or preference of
13 criminal defendants, including in this case Mr. Schulte and his
14 counsel, to meet with the government and FBI rather than
15 testify before the grand jury. It would be sort of an odd
16 conclusion to find, absent any limitation in the statute, that
17 somehow that precluded an obstruction of the investigation of
18 which he is aware.

19 THE COURT: I don't know if I agree with that. Among
20 other things you could, as you have, charged him with a 1001
21 violation, indeed he has been convicted of the 1001 violation
22 so the question it just whether it fits the elements of a
23 particular crime you have charged here.

24 I am going to look at the case that you cited in a
25 moment. Assume for the moment that, if I am not persuaded that

M765sch5

1 this is distinguishable from *Aguillar*, right now I am at least
2 persuaded that I need to think about it more carefully and
3 therefore we want to reserve judgment on whether the count, as
4 a whole, survives *Aguillar*. I am very concerned about the
5 possibility of a verdict that doesn't make clear -- I take what
6 you said before as something close to a concession that if the
7 jury's verdict were based solely on the statements that he made
8 before he received the grand jury subpoena that there may well
9 be a problem with that verdict. So I'm concerned about a
10 verdict, if the jury convicts on Count Nine, where it's either
11 I or a later Court conclude that a verdict, based on statements
12 during that interview, would not support a conviction and the
13 verdict is not clear as to whether the jury relied on those
14 statements. That was the effort that I made on page 44 to
15 essentially avoid any possibility of that.

16 What is your thought on that score?

17 MR. DENTON: So again, I think your Honor correctly
18 instructs the jury about the requirement of the defendant's
19 knowledge but, again, I think this is sort of an odd
20 circumstance. It was not necessarily incumbent on the
21 government to itemize sort of the overt acts of falsehood in
22 the indictment. We could have charged this case simply by
23 referring to the statutory element of acting corruptly to
24 impede, endeavor to impede, etc. an ongoing proceeding, to wit,
25 by making false statements to the FBI. So I don't think there

M765sch5

1 is a circumstance here in which sort of the inclusion of what
2 might, in another context, be considered overt acts,
3 necessarily sort of leads to the conclusion that the jury is
4 going to reach an improper verdict in a circumstance where they
5 are, as either some or all of the top seven lines of page 44,
6 correctly instructs them as to the level of knowledge that they
7 must find the defendant had in order to convict him on Count
8 Nine.

9 THE COURT: Mr. Schulte, anything you wish to say?
10 Let's take it in order. First on Count Nine, generally with
11 respect to *Aguillar* and its progeny, I am just reading
12 *Desposito* now.

13 MR. SCHULTE: Yes.

14 So I think the mere knowledge of an investigation is
15 not equivalent knowledge of a grand jury proceeding. These are
16 distinct legal things so for the government to say that, oh,
17 because he Googled and saw that there was an investigation that
18 that means that there is a grand jury proceeding. I think the
19 Court is right to say that these are not the same thing so I
20 don't think that these statements or anything made prior to
21 knowledge of a specific -- prior to knowledge of a grand jury
22 investigation that those statements, that it is just not
23 possible for statements to be made to impede a grand jury that
24 there is no knowledge about that proceeding at all.

25 With respect to the testimony or what evidence is

M765sch5

1 actually -- what is actually in evidence, it was only Agent
2 Evanche, the first witness, who testified about the statements
3 relevant for Count Nine and he testified about the March
4 interview at Pershing Square but he gave very bare bones
5 testimony about any subsequent interviews. The government did
6 not elicit specific testimony about the statements during the
7 subsequent interviews. It was very specific to the actions
8 before the grand jury subpoena was issued. There wasn't
9 testimony elicited about the various statements that are
10 actually outlined in the indictment so I think that's another
11 big issue there.

12 As far as -- there is no evidence that the agents ever
13 even informed me, aside from giving me the grand jury subpoena
14 after which I don't go to a grand jury, there is no -- there is
15 no grand jury proceeding that actually occurs, and that meeting
16 directly with the FBI there is no -- there is nothing in
17 evidence to say that I would think that there would be a grand
18 jury proceeding still, that it wasn't cancelled because I
19 agreed to talk with the FBI. I have no knowledge about the
20 fact that there is even a grand jury proceeding that exists
21 after the fact because there was just no testimony, there is
22 nothing on the record to show that I would know that that would
23 continue. But I think the biggest issue is, like I said, is
24 simply that the only statements that Evanche testified about
25 were statements that were made before there was ever a grand

M765sch5

1 jury subpoena, and then after the fact there is nothing in
2 evidence.

3 THE COURT: All right. So I think I am going to
4 reserve judgment on the Rule 29 motion with respect to Count
5 Nine. I will confess that I have pretty serious doubts about
6 whether it should be granted. In light of *Aguillar* it does
7 seem to me that the argument is making is quite close to the
8 argument rejected -- argument of dissent -- that did not carry
9 the day. That being said, looking at *Desposito*, the Second
10 Circuit, for example, has found that the nexus requirement is
11 satisfied in situations where the discretionary actions of a
12 third person are required to instruct the judicial proceeding
13 if it was foreseeable to the defendant that the third-party
14 would act on the communication in such a way as to obstruct the
15 judicial proceeding. I think I would like to see -- I think I
16 need to do further research or you to do further research in
17 the first instance on how far that principle has been taken and
18 whether it would extend to this situation which does seem quite
19 close to the facts of *Aguillar* to me.

20 So, I will reserve judgment on the Rule 29 motion and
21 I guess we can bracket, for the moment until we get to it in
22 the jury instructions, how to deal with the count as a matter
23 of instructions mindful of my concern, again, that I think we
24 want to know precisely what the jury -- we want to minimize, to
25 the extent possible, any possibility, if the jury returns a

M765sch5

1 verdict on the basis of statements for which there is
2 insufficient evidence to support a verdict.

3 So, two things we need to be thinking about before we
4 get there. One is whether I ought to incorporate some of the
5 language that I just read from *Desposito* into the instructions
6 somehow; and the second is whether to keep what I have done,
7 which is to keep a pretty explicit instruction that they cannot
8 rely on statements that were made before the service of the
9 grand jury subpoenas at the end of that interview. So bracket
10 those for now but we will discuss them when we get there.

11 We also need to talk about the transcript redactions.
12 I am happy to do that now or after we conclude with the jury
13 instructions. I don't have a particularly strong feeling one
14 way or another.

15 MR. DENTON: So, your Honor, I think from an
16 administrative perspective all of the transcript redactions
17 have been completed. We have confirmed that from a substantive
18 perspective we are happy to discuss that whenever the Court
19 would prefer with respect to the one issue the defendant
20 raised. I will note that I think there will be one very
21 limited application with respect to the transcript today that
22 literally concerns I think a single word but --

23 THE COURT: I am guessing that I can guess it.

24 MR. DENTON: I imagine you probably can, your Honor,
25 but I think that is sufficiently not substantive, that it

M765sch5

1 shouldn't affect the parties' preparations for tomorrow.

2 THE COURT: OK. So I guess, Mr. Schulte, to the
3 extent we can discuss it in this setting, do you want to tell
4 me what redactions, assuming you have seen all of them, what
5 redactions to the earlier transcripts you would object to or
6 have a problem with?

7 MR. SCHULTE: I think the problem is through the
8 process I haven't really been alerted to what the redactions
9 are. I only just yesterday saw the redactions for the Jeremy
10 Weber testimony which is important for me to sum up on that I
11 gave the numbers earlier. So it refers to the -- his testimony
12 about the Bartender and basically whether this information is
13 already exposed by WikiLeaks.

14 THE COURT: There are two issues; one is I agree that
15 Mr. Schulte needs to know what has been redacted. I sort of
16 idly assumed perhaps that he was privy to the redactions that
17 were being proposed as we were proceeding but I think he needs
18 to know that. Can that be done now? Has that been done?

19 MR. DENTON: To the extent he is not, your Honor, we
20 are happy to do that. I think we were operating under the same
21 assumption that as we conveyed these things to the Court,
22 standby counsel was conveying them to him. I think we provided
23 him with hard copies when we could but obviously a lot of this
24 was happening over nights and weekends as well.

25 THE COURT: Is there a way to quickly provide him with

M765sch5

1 whatever the redactions are? What's the best way to do this?

2 MR. DENTON: I think we can put something together
3 quickly to provide to him, your Honor.

4 THE COURT: Then why don't we table that until we
5 conclude the rest of the charge conference and hopefully we
6 will be able to circle back to it.

7 Again, beginning with the government going in order,
8 any suggestions to the draft I submitted earlier?

9 MR. DENTON: We have a few things, some more
10 significant than others as we go. Do you want me to proceed in
11 order, your Honor?

12 THE COURT: Yes, please.

13 MR. DENTON: So the first proposal is on page 4 and I
14 caveat this at the beginning by saying I am very loathe to make
15 suggestions to the Court's standard charges, but I think in
16 light of some of the cross-examination that has happened and
17 what we anticipate Mr. Schulte is going to argue, it may be
18 worth, in this instance, adding a sentence to the Court's
19 instruction on reasonable doubt that comes from the Sand charge
20 and that I think is common in this court house at least, that
21 informs the jury that a reasonable doubt is not a guess or
22 whim, it is not speculation or suspicion. Again, recognizing
23 that the Court's language is the Court's language, in view of
24 the some of the cross-examination that I think has invited
25 speculation, it is appropriate to include that language from

M765sch5

1 the Sand charge.

2 THE COURT: Where would you put that? Line number?

3 MR. DENTON: I would put it at the end of line 16,
4 your Honor.

5 THE COURT: Mr. Schulte?

6 MR. SCHULTE: I disagree. I don't think that that is
7 necessary on this instruction so I'm not sure what the
8 government is saying or what they're trying to anticipate the
9 arguments to be, but I think the Court's instruction here is
10 very standard and there is no need to add anything that would
11 confuse or be unnecessary for the jury.

12 As far as whatever issues that they said occurred on
13 cross-examination they were free to object and they did object
14 to whatever things they felt were objectionable.

15 THE COURT: I think I will add it. I do think, as we
16 have discussed in the context of pretrial litigation, there
17 have been various things sort of thrown out as possibilities
18 for how the information could have been leaked, other
19 perpetrators, etc., and I think it is important that the jury
20 know that simply speculating on that sort of stuff is not what
21 a reasonable doubt is.

22 Next?

23 MR. DENTON: Just a typo on page 11, your Honor. In
24 the first word of line 6, I think that should be "cooperating
25 witnesses."

M765sch5

1 THE COURT: Indeed.

2 OK, next?

3 MR. DENTON: At the top of page 15, your Honor, and
4 this is more stylistic than anything, I think it just read a
5 little awkwardly to refer to the defendant you are considering
6 and --

7 THE COURT: Oh.

8 MR. DENTON: So to the extent that the Court wanted to
9 delete that or just make reference to: You may not consider
10 the fact that the defendant was in custody, and leave it at
11 that. No substantive use there, just purely semantic.

12 THE COURT: Yes. That was due to the fact that this
13 came from a charge I gave in a multi-defendant case so that is
14 the reason for it. I will say: However, you may not consider
15 the fact that the defendant was in custody as evidence that he
16 is of bad character or has propensity to commit a crime.

17 MR. DENTON: Sounds good to us, your Honor.

18 THE COURT: Mr. Schulte, any objection to that?

19 MR. SCHULTE: No.

20 THE COURT: Next?

21 MR. DENTON: On page 17, your Honor, line 5, again,
22 this is more semantic than anything. It just struck us as odd
23 to refer to the video recordings as "of certain incidents."
24 They're obviously not surveillance videos or anything like that
25 so we were going to propose substituting "events" there. Like

M765sch5

1 I said, "incident" seemed like a more loaded word than what the
2 recordings actually were.

3 THE COURT: Why doesn't it just say: Some video
4 recordings have been admitted into evidence; and not
5 characterize what they're of.

6 MR. DENTON: That's fine with us, your Honor.

7 THE COURT: Mr. Schulte, any objection?

8 MR. SCHULTE: No.

9 THE COURT: Next?

10 MR. DENTON: On page 20, your Honor, again entirely
11 semantic, line 6 and 7 of two sentences that both start with
12 "specifically." So to the extent it is easier to use one or
13 not the other. Again, not a substantive point.

14 THE COURT: All right. I will strike it from the
15 first one.

16 Go ahead.

17 MR. DENTON: Line 19, just a typo in the first word
18 there.

19 THE COURT: Thank you.

20 MR. DENTON: The next is the largest and most
21 substantive one which is the NDI instruction on pages 23 and
22 24.

23 THE COURT: I am not surprised.

24 MR. DENTON: So I think, your Honor, we are happy to
25 get into the specifics of the language. I think we think that

M765sch5

1 the instruction that we proposed this morning is more
2 appropriate for a number of reasons. I think first of all, the
3 way the Court has framed this ultimately results in a frankly
4 fairly imbalanced charge on NDI that sort of freights the
5 jury's consideration of public disclosure almost to the
6 exclusion of everything else. There is sort of the brief
7 reference to it being classified being relevant later, but
8 given the Court's ruling and the clear law that public
9 disclosure is, at best, a fact that the jury can consider and
10 like classified status is not dispositive one way or the other,
11 it seemed odd to overly emphasize it. It is also language that
12 departs pretty substantially from the language that has been
13 used to describe the closely held element in a number of other
14 cases. *Sterling* and *Abu-Jihaad* are essentially verbatim copies
15 of one another which are copies of the language from the Fourth
16 Circuit in *Squillacote*. As the Court has observed, in
17 *Abu-Jihaad* the same exact issue was presented regarding
18 whether the public availability of some information somehow
19 meant it was no longer closely held, neither Judge
20 Kravitz nor the Second Circuit thought any further prophylaxis
21 of the public availability was necessary. So I think, given
22 sort of the similarity there and the lengthy history of
23 approval of that language, it is better to use sort of the
24 tried and true rather than to write on a blank slate here.

25 THE COURT: So I have obviously thought a lot about

M765sch5

1 this, starting with the May 24th opinion that I issued but
2 plenty of thought since then and I am not sure I agree.

3 First of all, plenty of this language comes almost
4 verbatim from the decision in *Rosen* and in that sense it is not
5 entirely blank slate. But second, as you I think yourself
6 noted in the earlier discussion on this issue which might have
7 been in the classified hearing, this case is, if not unique it
8 is certainly rare and the situation that we have with respect
9 to Count Three and Four where, in essence, the defendant is
10 charged, arguably, with sort of a second order leak, that is to
11 say leaking information that had already been leaked. Now, I
12 recognize the government has limited its theory in light of my
13 ruling and is now relying principally, though not necessarily
14 entirely, on information that was not in the leak, but the rub
15 is in the not entirely part because I do think that that makes
16 this issue still a live issue by virtue of my conclusion that
17 the statements in the WikiLeaks leak about where Hickok was,
18 etc., being in the leak, that that rendered it -- that portion
19 of the statement on which you were relying for Count Three made
20 it already in the public domain, albeit by way of an illegal,
21 unlawful leak. It didn't moot the prior public disclosure
22 issue.

23 So that's the context and a little bit of the
24 background. I think I have frankly come around to thinking
25 that for reasons and constitutional avoidance and otherwise

M765sch5

1 that there is a lot to -- that Mr. Schulte is not entirely
2 correct but is substantially correct, that is to say that if
3 all -- let me put it differently. I think the reason that
4 Mr. Schulte is in a different position with respect to the MCC
5 counts is that he is someone in a position to know whether the
6 information was classified, was NDI, was CIA information and in
7 that sense by virtue of leaking it again, so to speak, he is
8 providing official confirmation but it is the official
9 confirmation that is the new information that would qualify as
10 NDI and I think *Rosen* kind of highlights that, that particular
11 nuance. I think that distinguishes Mr. Schulte from -- I gave
12 you a hypothetical, again, I think it is currently in the
13 classified hearing and therefore not yet public, but I gave you
14 two hypotheticals. I think one is where a member of the public
15 goes on WikiLeaks today and downloads Vault 7 and Vault 8 and
16 then provides the hard drive with the download to someone who is
17 not authorized to receive NDI, and I posed the question of
18 whether that person would be guilty of violating the Espionage
19 Act and I think your answer was yes. That strikes me as a very
20 bold, kind of striking proposition because in that instance, if
21 the person is not in a position to know whether it is actual
22 classified information, actual government information, accurate
23 information, etc., simply providing something that's already
24 public to another person doesn't strike me as -- I mean,
25 strikes me as, number one, would be sort of surprising if that

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M765sch5

1 qualified as a criminal act. But, to the extent that the
2 statute could be construed to the extend to that act one would
3 think that there might be serious constitutional problems with
4 it.

5 I also posed the hypothetical of the New York Times is
6 publishing something that appears in the leak and somebody
7 sharing that article in the New York Times with someone else.
8 That would be a crime and there, too, I think you said it might
9 well be violation of the law. I think to the extent that that
10 would extend to the New York Times reporter for reporting on
11 what is in the leak, or to the extent that it would extend to
12 someone who is not in position to know or position to confirm,
13 that raises serious constitutional doubts in my mind. That, to
14 me, is distinguishable from somebody who is in a position to
15 know. I think there is a distinction if that person transmits
16 a New York Times article containing classified information and
17 in that transmission does something that confirms that that
18 information is accurate -- right -- or reliable or government
19 information, then that's confirmation, it strikes me, as NDI.
20 But it just strikes me as a very bold and kind of striking
21 proposition to say that somebody, who is not in position to
22 know or does not act in a way that would confirm the
23 authenticity or reliability of that information by sharing a
24 New York Times article, could be violating the Espionage Act.
25 That strikes me as a kind of striking proposition.

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M765sch5

1 So all of which is to say I think I have come around
2 to the view that merely sharing something that is already in
3 the public domain probably can't support a conviction under
4 this provision except that if the sharing of it provides
5 something new, namely, confirmation that it is reliable,
6 confirmation that it is CIA information, confirmation that it
7 is legitimate bona fide national defense information, then that
8 confirmation is, itself, or can, itself, be NDI. I otherwise
9 think that we are just in a terrain where, literally, there are
10 hundreds of thousands of people unwittingly violating the
11 Espionage Act by sharing the New York Times report about the
12 WikiLeaks leak.

13 MR. DENTON: So, your Honor, I think there is a couple
14 of different issues there and one of them is sort of whether
15 the question that you are posing right now is actually the
16 right question for this moment in time when we are talking
17 about the elements of the offense.

18 In the context of that earlier discussion, and I will
19 repeat it here, I think one of the things that we emphasized is
20 there is a difference between whether a set of conduct, either
21 the hypotheticals that you describe would satisfy the elements
22 of a violation of 793 as opposed to the separate question of
23 whether a person or an organization in that context would have
24 a well-taken, as-applied First Amendment challenge to the
25 application of the statute to them in that context.

M765sch5

1 THE COURT: But I have to say -- and I recognize this
2 may be in tension with my prior holding on this issue -- the
3 First Amendment is an area where somebody -- I mean, the
4 overbreadth doctrine in the First Amendment context allows
5 somebody, as to whom a statute could be applied,
6 constitutionally to challenge the statute on the grounds that
7 it does cover conduct that would violate the First Amendment.
8 So in that regard, it is distinct from a vagueness challenge.
9 I think to the extent that you are saying that in those
10 instances -- I mean, the reason being that the First Amendment
11 embodies a concept of chilling. If a New York Times reporter
12 doesn't know whether he is violating the Espionage Act by
13 repeating what is in the WikiLeaks leak notwithstanding the
14 fact that there is serious public interest in it, it may chill
15 the suppression and that suppression is protected by the First
16 Amendment. That's the point in the overbreadth doctrine.

17 Go ahead.

18 MR. DENTON: I think, your Honor, I understand that is
19 the point of the overbreadth doctrine. That is a fear that
20 every Court to have considered the question in the context of
21 793 has considered sufficiently hypothetical that no
22 overbreadth challenge has ever been sustained as to 793,
23 despite many who have tried, including Mr. Schulte before Judge
24 Crotty.

25 I think my point is more to say that those

M765sch5

1 constitutional questions are a little bit aside from the
2 approach that the Court takes with respect to instructing the
3 jury on the elements of a constitutionally applied statute as
4 to the defendant. I think it is not necessarily the case that
5 at this point it is appropriate to sort of get into
6 constitutional avoidance, and particularly where here we are
7 talking about the closely held element -- what does it mean for
8 it to be closely held -- the Court has ruled and it is
9 consistent with the law across the board that the fact that the
10 information has become public is a fact that the jury can
11 consider. Every Court to have addressed this question frames
12 that in the context of information that is lawfully available.
13 I recognize that we, in our previous discussions on this, had
14 sort of some questions about what the specific parameters of
15 "lawfully available" are, but that is language that has been
16 included in every charge we can find with respect to a 793(e)
17 offense.

18 THE COURT: Right, but I think when we had that
19 discussion I posed the question of what lawfully available
20 means and you didn't really have an answer at hand, which is to
21 say is the WikiLeaks leak lawfully available. I mean, the
22 government's view is that it is on -- it remains classified,
23 that it was unlawfully leaked, but I don't think it is a crime
24 for somebody -- a member of the public to go own a computer and
25 access Vault 7 on WikiLeaks.

M765sch5

1 MR. DENTON: And your Honor, this is why I think
2 interpreting what it means for it to be lawfully available,
3 both sort of the standard language that refers to where the
4 information is lawfully available to the public and the
5 government has made no effort to guard the information, which
6 is sort of a, you know --

7 THE COURT: But I'm not going to include a term, in
8 fact, I'm not going to explain to the jury what it means, and
9 if you can't persuade me that we understand -- that you and I
10 and Mr. Schulte and those of us who have wrestled with this
11 statute for weeks and months, if we don't understand what it
12 means there is no way I can explain to the jury what it means,
13 let alone have them understand what it means.

14 MR. DENTON: Sure. So your Honor, I think in that
15 context the right thing is to the extent the Court is borrowing
16 from decisions rather than from prior instructions is to use
17 the language from *Squillacote* which says that the instructions
18 should focus the jury's attentions on the actions of the
19 government in deciding whether the information has been closely
20 held. In this case that's an easy question, the government has
21 done nothing whatsoever to authorize its disclosure.

22 THE COURT: Let me give you another hypothetical.

23 Let me say during the course of the trial Mr. Schulte
24 had revealed -- let's say there was spillage, leakage, whatever
25 the phrase we have used in this setting during trial, right,

M765sch5

1 and he revealed something that was highly classified. Let's
2 say that there is a reporter who was present in the court and
3 recognizes that that is significant -- recognizes that it is
4 likely classified information and sensitive and so on and so
5 forth, which is to say recognizes that it would fall within the
6 ambit of the statute and that the statute prohibits the
7 transmission of national defense information to someone who is
8 not clear to have it but says it is in the public interest to
9 report on it and writes an article that during trial
10 Mr. Schulte revealed X. Is that person guilty of violating the
11 statute?

12 MR. DENTON: Again, your Honor, I think you are asking
13 a lot of different questions all at once there.

14 THE COURT: I think it is just one.

15 MR. DENTON: Well, your Honor, so if the question is
16 does that conduct satisfy the elements of a violation of 793,
17 almost certainly yes. In that context, does he have an
18 as-applied First Amendment challenge? Quite possibly. So I
19 think, again, the First Amendment, as applied as a particular
20 defense to conduct, that's what an as-applied challenge is. In
21 that particular context does it abridge --

22 THE COURT: An overbreadth challenge allows someone
23 like Mr. Schulte to raise this issue. I don't think that it --
24 I think that construed in the manner that I am construing it I
25 don't think there is a constitutional problem and for that

M765sch5

1 reason I don't think there is infirmity in the charge, which is
2 to say I would still deny any motion to dismiss the charge but
3 it strikes me that there is a -- and I don't know if any Court
4 has considered this, the language in *Rosen* is certainly
5 consistent with what I am proposing because it is drawn largely
6 from *Rosen*, but it strikes me that that may be a necessary
7 construction of the statute to avoid constitutional infirmity
8 and it doesn't matter that it's constitutional as applied to
9 Mr. Schulte. If that's the way the statute should be
10 interpreted to avoid an overbreadth problem and First Amendment
11 problem, then that's the way the statute should be interpreted
12 and the way the instructions should be given to the jury.

13 MR. DENTON: So, your Honor, I think the problem is
14 you are approaching this in the context of what is the furthest
15 out there hypothetical of sort of the bleeding edge of the
16 Espionage Act in this context. Obviously an overbreadth
17 challenge considers sort of a broader spectrum, right, as a
18 comparison of the total potential conduct that could be reached
19 by a statute versus its plainly legitimate sweep, which Courts
20 have uniformly held in the context of the Espionage Act, a
21 plainly legitimate sweep is quite broad. And so, to the extent
22 that there is conduct at its bleeding edges that would merit an
23 as-applied challenge by someone in a position to bring one,
24 overbreadth challenges are not well taken because they are not
25 adjudged by what is sort of the most extreme example that

M765sch5

1 anyone can come up with but rather do look at that sort of Venn
2 diagram.

3 THE COURT: Until you narrowed your theory of
4 prosecution here this wasn't hypothetical, it was this case,
5 that is to say that you charged Mr. Schulte with leaking what
6 he had already allegedly leaked.

7 MR. DENTON: So, your Honor, I think I am not sure
8 that we, with one exception, necessarily believed that there
9 was ever really that overlap. There was one particular piece
10 of NDI that certainly was in the leak that was also discussed
11 separately by Mr. Schulte. I think in the main, the focus has
12 always been on the same NDI which I think our position is the
13 evidence we believe has shown overwhelmingly was not
14 information that was in the leak.

15 THE COURT: OK. So I think you have largely failed to
16 persuade me that I should take a wholly different approach so
17 let's start to reign this in and talk about the particulars of
18 my proposed instruction. If you think there is any infirmity
19 with it, or problem with it, or you even think that there is --
20 I mean, if you have particular suggestions I am certainly open
21 to them but I think, in general, I am inclined to take the
22 approach that I have taken.

23 MR. DENTON: Sure.

24 So, your Honor, I think a couple of specific things.
25 On page 23 at line 14, I think it is not particularly helpful

M765sch5

1 in the context of this case to make reference to what
2 information typically can or cannot qualify as NDI, and so we
3 would suggest that the Court sort of delete the reference after
4 the semicolon on 14 and 15 and simply instruct them that they
5 should consider whether the information is in the public
6 domain. The Court then proceeds to give more specific
7 instructions so a generality is not really helpful there, in
8 our view.

9 THE COURT: That language is straight from *Rosen*.
10 That does not change your view, I take it?

11 MR. DENTON: No, your Honor. Like I said, the
12 proposal we have about focusing on the actions of the
13 government is straight from *Squillacote*. I'm not sure why
14 *Rosen* would be more persuasive in that context.

15 THE COURT: I think it is more directly on point.
16 That's why. In other words, I think *Rosen* addresses the
17 precise issue that is implicated here. I'm not sure
18 *Squillacote* does.

19 MR. DENTON: Your Honor, again, I think there is a
20 difference between an observation by a district judge in an
21 opinion and the actual instruction that the Court gives the
22 jury instructing the jury on what is typically the case I don't
23 think is necessarily helpful, particularly in a case like this
24 which is anything but.

25 THE COURT: OK. I will ponder that for a moment.

M765sch5

1 What else?

2 MR. DENTON: So I think, your Honor, on page 24, the
3 language on -- I guess the second paragraph, line 6 through 9,
4 I think, again, recognizing that that does come from some of
5 the cases that have discussed this, I don't think there is any
6 sort of relevance of that to this case or any sort of factual
7 basis. I think the disclosure of the information by WikiLeaks
8 is there. There is nothing in the record regarding sort of
9 general belief regarding the truth of the statements or whether
10 it is believed to have come from the U.S. government. I think
11 absent anything in the record to sort of support an argument
12 that that was true, that language is not really applicable
13 here.

14 THE COURT: OK. Anything else on this charge?

15 MR. DENTON: Yes, your Honor.

16 On line 10 of page 24, I think that to the extent that
17 the Court is going to instruct the jury that they should
18 consider whether the information was in the public domain. It
19 is also appropriate to instruct them that they should consider
20 whether it has been classified. I'm not sure we have a view as
21 between them but we think it should be symmetric.

22 THE COURT: All right. Anything else?

23 MR. DENTON: Then finally, I think we would suggest
24 that the Court include the language from *Sterling* and
25 *Abu-Jiahaad* that was in our letter at page 2 that says: In

M765sch5

1 deciding this issue, you should examine the information and
2 also consider the testimony of witnesses who testified as to
3 its content and significance and who described the purpose and
4 use to which the information could be put.

5 And we would propose to put that sort of as a
6 stand-alone paragraph between what are currently lines 14 and
7 15.

8 THE COURT: All right. So anything else on this
9 charge or is that it?

10 MR. DENTON: That's it, your Honor.

11 THE COURT: OK. Mr. Schulte, let me turn to you. I
12 guess my inclination I think is to, as I said, generally leave
13 this as is but I would ask you to respond to the government's
14 objection. First of all, I am going to change "should" in line
15 13 to "may" just so it is symmetrical. I agree that they
16 should be symmetrical and I think "may" is the better
17 instruction.

18 So, first the government's objection to the clause
19 after the semicolon in lines 14 and 15 on page 23 and --

20 MR. SCHULTE: Yes.

21 Like you noted, Judge, it is straight from *Rosen*, it
22 was carefully considered. I think your instruction for NDI was
23 carefully considered in the adaptations that you note,
24 especially from the prior case as well. I think this is
25 important and it's a balance of -- a balance charge and it is

M765sch5

1 critical to the issues here; the fact that this case is unique
2 in that, as you said, Counts Three and Four is basically
3 information circulated by WikiLeaks already and it is in the
4 public domain so I think it is important to include that.

5 THE COURT: OK. I'm not sure that's an accurate
6 characterization of where the case stands at this juncture, but
7 be that as it may.

8 Turning to page 24 to paragraph lines 6 through 9, I
9 think Mr. Denton's point there is somewhat well taken, which is
10 to say that there is no factual basis to argue that proposition
11 here. I guess my question would be what is the factual basis
12 to make that argument? That language comes from a Fourth
13 Circuit case that I quoted in my May 24th opinion and certainly
14 is one reason why the fact of information being in the public
15 domain is not categorically irrelevant but I'm not sure there
16 is any factual basis for the jury to find here that it would be
17 so widely circulated and generally believed to be true to have
18 come from the U.S. government as to qualify for this.

19 (Defendant and standby counsel conferring)

20 THE COURT: Mr. Schulte?

21 MR. SCHULTE: I think on one point, since it was
22 posted on WikiLeaks it was something that was widely circulated
23 and, you know, it is on the Internet, it is a big -- WikiLeaks
24 is a major news site. As for generally believed to be true or
25 have come from the U.S. government, I don't think the

M765sch5

1 government has issued any information as to whether the
2 government ever denied that this information came from U.S.
3 government. In fact, there was search warrants soon after in
4 which it was declassified that this is the case so I don't
5 think there is anything in the evidence to show that it
6 wasn't -- that the government did not deny it. And then also
7 it is reported on by every newspaper, TV outlet, so it is
8 something that is widely circulated, for sure.

9 THE COURT: I think the information has to be the
10 specific information that is the subject of the charge so with
11 respect to Count Three, for instance, it would have to be the
12 information pertaining to Hickok that the government is now
13 relying on. Is it your position that just by virtue of being
14 on WikiLeaks that would qualify under this sort of scenario or
15 exception?

16 MR. SCHULTE: I think it could, yes. I think the fact
17 that it is -- I think all the information that WikiLeaks
18 published, all of that information is widely circulated. If
19 the major newspapers are leaking to it, posting things saying
20 CIA hacking tools; I think that and the fact that there have
21 been articles specifically about that content circulated, I
22 think that is what constitutes -- could be argued to constitute
23 something that is widely circulated.

24 THE COURT: And then your position on the addition of
25 the paragraph from the government's letter between lines 14 and

M765sch5

1 15?

2 MR. SCHULTE: I would object. I don't think that --
3 it is not necessary, it is not something that is needed,
4 especially in the facts of this case.

5 THE COURT: I think I'm going to rule, as follows:

6 I'm going to leave the "typically" line on page 23 in.
7 I am also going to leave the paragraph line 6 through 9 on page
8 24 in. I think it is a stretch to say that that would apply
9 here but I also think it is an accurate statement of the law
10 and the government can easily argue the point. I will,
11 however, add the paragraph that the government proposes from
12 its letter at the place that it suggests. I think it is
13 appropriate to explain to the jury that they can consider not
14 just the information but other evidence in making their
15 findings on that element.

16 Mr. Denton, back to you.

17 MR. DENTON: Just briefly, your Honor, in light of
18 that ruling and given the observation the Court made which we
19 agree with, I think it would be appropriate on line 6 not to
20 refer generally to information but say, All that said, if the
21 particular information at issue has been so widely circulated
22 and is so generally believed to be true; that way we are just
23 focusing the attention which I think will dovetail with the
24 Court's later instructions with the NDI at issue.

25 THE COURT: I am inclined to agree.

M765sch5

1 Mr. Schulte, I presume you object but anything you
2 want to say beyond that?

3 MR. SCHULTE: I think the way it is worded here is
4 clear. I don't think it is coercive to the jury's thinking to
5 add any of that.

6 THE COURT: I don't think it is coercive, I think it
7 accurately states the law so I will make that change.

8 Next, Mr. Denton?

9 MR. DENTON: On page 25, your Honor, in line 10 near
10 the end of the line we would propose, just again framing it
11 that the information would be used to the injury of the United
12 States rather than against. "Against," particularly in this
13 context where we are talking about the cyber tools, has
14 complicating connotation so the statutory language is just a
15 little cleaner.

16 THE COURT: I think that's right.

17 Mr. Schulte, any objection?

18 MR. SCHULTE: I guess the government is saying they
19 want to take out on line 10, "be used against the United
20 States" and change that to "be used to the injury," like on
21 line 7 and lines 5 that's already stated?

22 MR. DENTON: That's correct, your Honor.

23 THE COURT: We are just talking about line 10 though
24 right, Mr. Denton?

25 MR. DENTON: Yes.

M765sch5

1 MR. SCHULTE: I don't think it matters.

2 THE COURT: All right. So I will make that change.

3 Next?

4 MR. DENTON: On page 30, your Honor, in line 16 in the
5 reference to the third item of NDI, I think the word is
6 actually "discovered" rather than "discussed."

7 THE COURT: What line is this?

8 MR. DENTON: Line 16 on page 30, the fourth bullet.

9 THE COURT: Mr. Schulte, do you agree with that?

10 MR. SCHULTE: I don't know off the top of my head what
11 that is but I think it touches on a different issue which is
12 the Court is kind of directing the jury as to how to read the
13 notebooks here.

14 THE COURT: So I recognize that, and it is a little
15 bit in tension with the instructions that I gave them
16 repeatedly during trial that it is up to them to read the
17 notebooks but I'm not sure it struck me that it was better to
18 do it this way and to ensure that the jury was properly
19 instructed about the government's more limited theory on these
20 two counts, and that is to say I wasn't sure that there was an
21 alternative to quoting the actual language.

22 So I guess bracketing that issue for a moment, it does
23 look to me like it is "discovered" and not "discussed." You
24 are welcome to tell me if you think otherwise, Mr. Schulte, it
25 is your handwriting. But if you want to look at the exhibit

M765sch5

1 looking at it more closely, I think that is a fair point,
2 bracketing whether I should be including the recitations or
3 not. I am inclined to change "discussed" -- if I include this
4 at all -- to "discovered."

5 Any objection?

6 MR. SCHULTE: No.

7 THE COURT: Mr. Denton, next?

8 MR. DENTON: So, your Honor, I think the next is -- it
9 is a question of semantics that may have substantive
10 implications on page 32 in the last sentence, lines 22 to 24.

11 THE COURT: OK.

12 MR. DENTON: I think it may make sense to -- well, let
13 me explain the concern and then I can provide sort of a
14 specific proposal.

15 I think the second clause that refers to when he
16 accesses a computer to obtain information he is authorized to
17 access contains a number of different components and so the
18 portion that comes after the em dash simply just refers to even
19 if he does so, kind of embeds a lot of those different things
20 together. I think given, sort of *Van Buren*, the specific
21 references the obtaining of the information rather than the
22 accessing of the computer. So I think it might make sense, on
23 line 24, to just say rather than even if he does so say, even
24 if he obtains the information for an improper purpose.

25 THE COURT: OK. I will think about that. I would

M765sch5

1 note that the language here is straight from Judge Crotty's
2 charge in the first trial from your request, but be that as it
3 may.

4 MR. DENTON: Like I said, your Honor, I don't think
5 that the charge, as written, is incorrect. Just in reading it
6 struck us -- and perhaps should have struck us in our original
7 submission -- as a little bit opaque on what the "does so" is
8 specifically referring to.

9 THE COURT: So your suggestion is change "does so" to
10 "obtain information?"

11 MR. DENTON: For an improper purpose.

12 THE COURT: OK. I don't think there is anything
13 incorrect or wrong or problematic about that, Mr. Schulte. So
14 changing "does so" to "obtaining the information." Any
15 objection?

16 MR. SCHULTE: Yes. I think the point of this element
17 is the access. So if you change it to even if he accesses the
18 computer for an improper purpose, that would be the better
19 substitution there because this element is specifically about
20 the access. The obtaining -- obtained information is the third
21 element so I think that's what this is discussing.

22 THE COURT: But I think the point here is to ensure
23 that the jury understands that even if, say hypothetically the
24 jury were to conclude that you entered the Altabackups to
25 obtain the information to leak it, that that, alone, would not

M765sch5

1 constitute a violation if you were authorized to access the
2 Altabackups. In other words, the improper purpose with the
3 information is not a substitute for unauthorized access. In
4 other words, this strikes me as clarifying the point and
5 essentially clarifying it in a way that is favorable to you.

6 Am I missing something?

7 MR. SCHULTE: No. I guess that's fine. I just --
8 yeah. No problem.

9 THE COURT: OK. So I will make that change.

10 Next, Mr. Denton?

11 MR. DENTON: Next is on page 34, your Honor, in line
12 9. I think that that misstates the element of the offense
13 which is correctly described down in lines 13 through 15 that
14 the defendant obtained the information with reason to believe
15 that the information could be used against the interests of the
16 United States, not with the intention to use such information.

17 THE COURT: So your suggestion would be?

18 MR. DENTON: That the defendant obtained information
19 protected against unauthorized disclosure for reasons of
20 national defense or foreign relations, with reason to believe
21 such information could be used against the interests of the
22 United States or to the advantage of a foreign nation.

23 THE COURT: So changing the "intent to use" to "reason
24 to believe" and adding "could be used" after information?

25 MR. DENTON: Yes, your Honor.

M765sch5

1 THE COURT: Mr. Schulte, any objection?

2 (Defendant conferring with standby counsel)

3 MR. SCHULTE: I don't have the indictment in front of
4 me or the language but if that's the language in the statute or
5 in the indictment, I don't have an issue, but if it is not then
6 I think that would be a problem.

7 THE COURT: The indictment reads: With reason to
8 believe that such information so obtained could be used to the
9 injury of the United States or to the advantage of any foreign
10 nation.

11 MR. SCHULTE: OK.

12 THE COURT: All right. I think the language that we
13 had may have come from Sand but I agree that the government's
14 proposal is more consistent with the statute so I will change
15 it.

16 Next?

17 MR. DENTON: On page 38, your Honor, line 18, just a
18 typo in the year which I think should be 2016 rather than 2012.

19 THE COURT: Certainly correct; yes. Thank you.

20 Next?

21 MR. DENTON: So then, your Honor, that brings us to
22 Count Nine, and I think putting aside the larger issues the
23 Court has raised, our proposal here is actually quite modest.
24 I think rather than highlighting the service of the grand jury
25 subpoena to the extent that the Court is inclined to keep the

M765sch5

1 language on lines 5 through 7, I think we would just suggest
2 that it should be before he was -- or before you find he knew
3 there was a grand jury proceeding rather than directing them to
4 a particular sort of way of drawing that conclusion.

5 MR. SCHULTE: What page is this?

6 THE COURT: Page 44, line 7.

7 I think the suggestion is basically to change the last
8 phrase from "was served with a grand jury subpoena" to "before
9 he had knowledge of an ongoing grand jury." Something to that
10 effect.

11 Is that it?

12 MR. DENTON: Yes, your Honor. I think and also to add
13 an "only," so "based only on the defendant's conduct."

14 THE COURT: Mr. Schulte?

15 (defendant and standby counsel conferring)

16 MR. SCHULTE: I think this is very clear with the law.
17 I wouldn't have any knowledge before the grand jury subpoena so
18 I think this is consistent with what we have already discussed
19 and what the law says and what a layperson would know.

20 THE COURT: Mr. Denton, my inclination is to accept
21 the change to the end of the sentence to make it "had knowledge
22 of an ongoing grand jury proceeding," but not to include the
23 word "only." I will give you an opportunity to respond but I
24 will say it does heighten the danger that either I or the Court
25 of Appeals would conclude that there is -- I think it makes it

M765sch5

1 less clear to the jury, precisely the relevant point in time,
2 and if either I or the Court of Appeals were to conclude, for
3 instance, that stuff you pointed to about Mr. Schulte's general
4 awareness of a criminal investigation, the FBI's involvement,
5 etc., was not, as a matter of law, sufficient to find that he
6 knew of a grand jury proceeding, I think it heightens the
7 vulnerability of a conviction on this count if it's not
8 abundantly clear -- if it is not made abundantly clear to the
9 jury that they can't rely on statements made prior to the grand
10 jury subpoena.

11 So I am not saying I will agree but I guess my
12 question to you is you are prepared to buy that issue?

13 MR. DENTON: So I think so, your Honor, and just to
14 put it in what I think, for us, is an analogous and simpler
15 context, in a case where you have a narcotics conspiracy with a
16 particular charged time frame, it is often the case that acts
17 that occurred before that are admitted as direct proof of the
18 conspiracy or even acts in furtherance of the conspiracy and so
19 are not limited by 404(b), but obviously the Court still
20 instructs the jury on sort of a finding about making
21 conclusions about facts that occur within the charged time
22 period. I think here, highlighting that as long as the jury's
23 verdict is based on conduct that occurs after he has
24 knowledge -- and again, taking this sentence in context with an
25 otherwise very robust expression of the nexus and knowledge

M765sch5

1 requirements -- the "only" actually serves to protect everybody
2 by highlighting to the extent that they do not find conduct
3 after that point, they can't rely just on the conduct that
4 falls in the window that would be problematic.

5 THE COURT: Let me think about that but I think I have
6 made clear my concern.

7 Next?

8 MR. DENTON: The only other thing we have is at the
9 bottom of that page, a comma after "venue." Otherwise, that's
10 all we have, your Honor.

11 THE COURT: Where are we looking?

12 MR. DENTON: On line 22, the end of the --

13 THE COURT: Yes. Thank you. OK. Nothing with
14 respect to the rest of the charge?

15 MR. DENTON: Only one suggestion with respect to
16 formatting on the verdict form but we can deal with that later,
17 if that's easier.

18 THE COURT: No. Go ahead.

19 MR. DENTON: I just think bumping down Count Eight,
20 that conclusion to the next page.

21 THE COURT: Yes. I agree completely. I didn't really
22 see that before, but thank you.

23 OK. Mr. Schulte, turning to you, we can go in order
24 as well.

25 I thank everybody, especially the court reporter, for

M765sch5

1 staying past 5:00 and bearing with me but let's see if we can
2 get this done.

3 Mr. Schulte?

4 MR. SCHULTE: Starting on page 5, I have an adaptation
5 for the circumstantial evidence that standby counsel has that
6 if they can hand it up to the parties?

7 THE COURT: Sure. Do you want to just articulate it
8 though? This is in lieu of the rain example?

9 MR. SCHULTE: I think the charge, as written, only
10 comes to establishing an inference that something has occurred
11 but this instruction, also, shows that the inference cannot be
12 drawn, such as it says: In other words, the fact of rain is an
13 inference that could be drawn from the wet raincoat and
14 dripping umbrella but need not be. Each juror must be guided
15 by his or her own common sense, experience, or judgment, in
16 determining what inference, if any, is justified or reasonable.

17 THE COURT: I'm going to leave it as is. I think this
18 is a pretty time-tested instruction and I think it has been
19 given in this court house for decades. I don't think it has
20 been -- I certainly recognize the point, but taken as a whole
21 with the rest of the instructions, it is quite clear that it is
22 up to the jury to draw what inferences it wants and it can draw
23 inferences in either direction or no inferences at all and you
24 can argue the point as it actually applies to this case, not as
25 to whether it is raining.

M765sch5

1 Next?

2 MR. SCHULTE: Page 15, a couple issues. We think that
3 the false exculpatory statements instruction is -- should be
4 taken out entirely. We don't think even the government is
5 alleging that there are false exculpatory statements. We don't
6 know what this would be referring to exactly.

7 THE COURT: I mean, I don't know what your
8 befuddlement is. You are convicted of making false statements
9 to the FBI and the gravamen of Count Nine is that you made a
10 whole set of false and misleading statements. That is the
11 false exculpatory statement, so no. I know you objected to it,
12 you raised that in your response to the government's
13 submission, but this seems like a totally appropriate case for
14 false exculpatory instruction. I think the jury is properly
15 instructed that they may draw inferences from false exculpatory
16 statements if they find such statements were made. So I am
17 puzzled by your puzzlement but, bottom line, it is staying in.

18 Next?

19 MR. SCHULTE: The other issue on this page was if the
20 title for false exculpatory statements would just be instead of
21 "false" just "exculpatory statements" and then have the jury
22 decide, because it leads the jury on to lead that they're false
23 exculpatory as opposed to just the exculpatory statements.

24 THE COURT: I think the instruction makes clear that
25 it is up to them to decide whether they were false and then

M765sch5

1 just properly instructs them about what inferences they can
2 draw if they conclude there were false exculpatory statements
3 so I think it accurately characterizes it. As you will see,
4 when I read the instructions I don't actually read the header
5 in any event, so it is the instruction that controls.

6 Next?

7 MR. SCHULTE: I think on page 20 there was a minor
8 thing on line 2. Your verdict on one count should not control
9 your decision. I think it might be better to say should not
10 "influence" instead of "control."

11 THE COURT: I'm not sure if that's accurate. If they
12 conclude you didn't engage in an obstruction by making false
13 statements they can, as we just discussed, consider that in
14 evaluating whether you committed the crimes that you falsely
15 denied. I would think that is a form of one verdict
16 influencing the other even if the verdicts are separate.

17 Mr. Denton?

18 MR. DENTON: I think we would agree with that, your
19 Honor, and that also implicates some of the overlapping conduct
20 of the 1030 counts with the 793 counts, relating to the
21 WikiLeaks charges as well.

22 THE COURT: And I would also point out I think some of
23 the counts involve overlapping elements altogether and, in that
24 sense, the verdict on one could well influence the verdict on
25 the other. I think it is a more accurate statement.

M765sch5

1 Next?

2 MR. SCHULTE: On page 23 and 24, we already kind of
3 went through the NDI but I think standby counsel sent up our
4 proposal and I think specifically at issue here is what you
5 raised in your order, particularly about the second
6 judicially-created limitation to NDI that it must be
7 potentially damaging to the U.S. So the fact, you know, that I
8 note in the document that I provided the Court that if the
9 government has recipes for hot chocolate that keeps it closely
10 held, that someone can't be charged under the Espionage Act for
11 that. It has to actually be established that information must
12 be potentially damaging to the U.S. or beneficial to --

13 THE COURT: I think the hot chocolate example is not a
14 very good one because it wouldn't be national defense
15 information in the first instance.

16 MR. SCHULTE: I think that's the point, is in defining
17 national defense information there is two things that establish
18 that. One that we have been discussing a lot is closely-held,
19 but the second is that it actually needs to be defense
20 information, be potentially damaging to the U.S. or beneficial
21 to a foreign nation. I think, as I stated in the letter to the
22 Court, that the legislative history behind it is clear and I
23 think the *Rosen* Court also brought that issue up and several
24 Courts have.

25 THE COURT: Right, but I think the *Rosen* Court was

M765sch5

1 dealing with the information prong, not the documents prong,
2 and I expressed several reasons in my opinion for why I had
3 some pause about whether this second gloss, if you will,
4 applied to the concept in the context of the documents prong.

5 MR. SCHULTE: Right. I think that you noted also,
6 though, that even when the information prong is not used, when
7 only the documents prong is used, that this language was still
8 used in those cases. I think it's not dependent upon the
9 specific type, whether it is information or documents or
10 anything like that, it is particularly with respect to defining
11 what NDI is. So it doesn't matter the type, whether it is
12 documents or information, but what exactly is NDI. I think
13 that's --

14 THE COURT: I understand and I did cite one example of
15 a case involving the documents prong where this additional
16 gloss was included, that's the *Kiriakou* case but, as I noted,
17 it wasn't included in *Abu-Jihaad*, it wasn't included in Judge
18 Crotty's instructions, it wasn't included in either side's
19 request to charge. So in that sense I think it is not entirely
20 clear and there is some good reasons to think it doesn't apply
21 to the documents prong and it would sort of swallow the
22 distinction between the two and the additional signed or
23 requirement hole.

24 Mr. Denton, do you have a view? I am not sure the law
25 is entirely clear. I am also not sure there is any reasonable

M765sch5

1 procedure here that the information would trigger or would
2 satisfy that requirement, but.

3 MR. DENTON: So I think, your Honor, we particularly
4 share the concern that in this context it would sort of swallow
5 the statutory distinction to engraft the application onto the
6 documents prong given that the legislative history and the
7 subsequent interpretations are quite clear that at least, as a
8 statutory element, it does only modify the information prong.

9 Also, I think, as the Court observed, the term
10 "national defense" does not do no work in this context. The
11 fact that it is frequently sort of undisputed what it pertains
12 to, but there is still an element of this that it has got to be
13 relating to a subject of the national defense and not just any
14 information that the U.S. government has decided to keep
15 closely held. So in that context, I don't think there is any
16 sort of infirmity in the statute that would warrant engrafting
17 a further limitation on it, particularly given that that raises
18 issues of statutory interpretation that have been resolved the
19 other way.

20 THE COURT: Mr. Schulte?

21 MR. SCHULTE: I think it is particularly important
22 here. Lines 10 and 11 are kind of vague as to what this
23 national defense means or applies to, but if you look at this
24 case in particular, the Count Three that is talking about
25 Hickok, the connection between DevLAN and the COG network, the

M765sch5

1 important part is that has come out through the evidence was
2 this was all shut down after WikiLeaks in 2017. So is this
3 information even damaging or relevant to the United States if
4 these networks are not even in use anymore? I think that's a
5 very particular point that I would like to argue or would be a
6 strong argument, the fact that this network has been shut down,
7 the tools are not being used, Hickok doesn't exist anymore so
8 how can this possibly qualify as NDI? How can knowledge of
9 this even endanger U.S. national security or anything like
10 that.

11 So that's why I think it is relevant to this case.

12 THE COURT: I could be wrong but I'm not sure there is
13 anything in the record that Hickok was taken down. I think you
14 tried to elicit that through one of the witnesses and he
15 actually didn't know the answer.

16 MR. SCHULTE: That's correct, but the definition of
17 Hickok is it is a bridge between EDG and COG, so if EDG doesn't
18 exist then Hickok can't exist. If you are bridging two
19 networks and one network is taken off, that is through evidence
20 so basically Hickok can't exist, it doesn't do anything.

21 THE COURT: Unless a new network was created to
22 substitute for DevLAN, in which case perhaps it just became a
23 bridge between that new network and COG so I don't know, I am
24 just not sure there is an evidentiary basis to say that Hickok
25 was taken down but I will leave it to argument and we will see

M765sch5

1 on that issue.

2 I will ponder, but I think my considered view is that
3 it is inappropriate to engraft this requirement onto the
4 documents prong for the reasons that I have discussed in my
5 opinion. I will confess that I am not sure that the law is
6 crystal clear on this, as with many other issues in this case.
7 So in that sense, Mr. Denton, I hope you are prepared to buy
8 the appellate issue if it comes to it but my, at least
9 considered view at the moment, is not to add that language.

10 Next?

11 MR. SCHULTE: I just want to note quickly on page 23,
12 line 21, there is a typo there. That the information came *from*
13 the United States government. I think the "from" is missing.

14 THE COURT: Thank you.

15 Next?

16 MR. SCHULTE: On page 30 we kind of went through this
17 a little bit about the passages but I think it is important to
18 note the very top one, Government Exhibit 801, page 3. The
19 government didn't actually elicit testimony from CIA experts or
20 anyone about this particular passage or that it was classified,
21 let alone NDI. So I think at least for this particular passage
22 it shouldn't -- because the government didn't do their job to
23 actually identify this passage or eliciting any testimony about
24 it, I don't think that it should be -- the Court should point
25 it out to the jury. It would be basically for the government

M765sch5

1 to prove to the jury that this was part of their case. The
2 other things they went through various CIA witnesses but the
3 top thing they didn't even bring out at all. It is not even in
4 evidence.

5 THE COURT: Well, the statement is certainly in
6 evidence and I think that there was evidence that any
7 information that would link a particular person to particular
8 tools would raise issues of -- was sensitive and problematic
9 because it would essentially enable or could enable an
10 adversary, for instance, to -- I can't remember the word I am
11 blanking on at the moment -- but essentially attribute, I think
12 attribution, attribute malware to the United States that
13 otherwise wouldn't be linkable. So my inclination is to think
14 that it is -- you may well be right or it may be a fair
15 argument but that it is argument so I am going to leave it in.
16 It is one of the statements that the government relied on in
17 its Section 10 notice.

18 I just noticed there is a typo in line 9, I think it
19 should be "fool" and not F-O-L-L, so I will correct that as
20 well.

21 MR. DENTON: Yes, your Honor, and apologies for not
22 catching these before. I think in line 7 it should be "to
23 conceal the crypto."

24 THE COURT: Yep.

25 MR. DENTON: And then in line 8 "indicative of

M765sch5

1 potential crypto."

2 THE COURT: Yep. Thank you.

3 Mr. Schulte, next?

4 MR. SCHULTE: I think on page 33 there is essentially
5 a conscious avoidance paragraph here starting on line 17
6 through 23 that I don't think is relevant in this case or that
7 has come out in evidence. There is no denial of knowledge.

8 THE COURT: I mean, I guess thinking out loud here but
9 to the extent that you have argued that you could have
10 construed the e-mails or the fact that you had an SSH key to
11 mean that you had authorization to access the things that you
12 allegedly accessed, I would think that the jury is entitled to
13 understand that basically blinding yourself to all of the
14 reasons that you should have known that that wasn't the case
15 would be an evidentiary basis to --

16 MR. SCHULTE: You are referring to -- what are you
17 referring to? The SSH key?

18 THE COURT: In other words, you have, I think,
19 suggested through some of your questions to the jury -- and I
20 assume you may argue tomorrow -- that you were in fact
21 authorized to access the virtual machine and the backups and
22 whatever the case may be because you were an administrator,
23 because you had an SSH key, so on and so forth. I mean, you
24 will make whatever arguments you want to make but I think to
25 the extent that you have made that argument, I think that there

M765sch5

1 is an evidentiary basis for the government to argue that
2 essentially for you to conclude that would be to stick your
3 proverbial head in the sand which is what a conscious avoidance
4 charge perfect is for.

5 MR. SCHULTE: But I think that for this instruction it
6 would require deliberate disregard, like you said, but the
7 evidence shows there is a direct e-mail from me to Leonis
8 telling him I have these accesses and can he remove them. So I
9 don't think that, especially with respect to that that there
10 was any deliberate disregard or anything like that; it was an
11 up-front e-mail to the individual telling them that I have this
12 access.

13 THE COURT: Mr. Schulte?

14 MR. DENTON: I think, your Honor, first of all, this
15 highlights an issue for tomorrow in terms of what is
16 appropriately the scope of argument versus testimony from the
17 defendant. Either way, I think it is entirely within the ambit
18 given that the defendant has tried to suggest that e-mails
19 didn't exist telling him that he wasn't authorized things, that
20 other, you know, things suggested to him that he was in fact
21 authorized, his interpretation of the memorandum and
22 conversation that he had with Mr. Leonis. So we do think a
23 charge on this is appropriate here and we think the Court's
24 language accurately states the law and balances it with the
25 actual brief requirement that the Second Circuit has instructed

M765sch5

1 should be there for balancing.

2 MR. SCHULTE: Well, I think that in this case whatever
3 arguments can be made about the interpretation or how you --
4 how any communications were between Leonis there is a specific
5 e-mail in evidence that I am e-mailing Leonis and the e-mail
6 says the subject, the OSB ESXi server, can you take this off my
7 CMR -- which is in evidence -- as this is accountable property
8 assigned to me. The e-mail specifically says I still have
9 access to this server, I still own the server, can you transfer
10 this server to someone else. So that is the clear evidence.
11 So it is not the case that I am pretending or I don't think
12 that I should have these accesses. The government is free to
13 argue, oh, well -- whatever the government wants to argue but
14 they can't say that I tried to hide it or I had deliberately
15 disregarded whether I knew I should have this or not because
16 the e-mail is addressed to --

17 THE COURT: The point is that the government is able
18 to argue that you had knowledge that it was not -- you were not
19 authorized to access what you accessed and that for you to
20 suggest otherwise to the jury is to basically -- that you can't
21 blind yourself to what is glaringly obvious and if there were
22 any red flags to suggest that you didn't have satisfaction,
23 that you have been stripped of access, and for you to exercise
24 administrative privileges was a violation of the access that
25 you were authorized to have, and that for you to conclude

M765sch5

1 otherwise if the jury were to reach the conclusion that you did
2 conclude otherwise, you would basically be blinding yourself to
3 reality. So, I will leave it in.

4 Next?

5 MR. SCHULTE: I think the last thing is for Count Nine
6 and Count Four. I think you mentioned in your order dated
7 today about that the decision should be unanimous as to which
8 specific statements. On Count Nine, to the degree that the
9 Court is going leave Count Nine in and also for Count Four, I
10 think there should be language in both of those that the jury
11 must be unanimous as to -- for Count Four which particular
12 attempts that the jury agrees on and to be unanimous as to
13 that, and then for Count Nine for them to be unanimous as to
14 which statement they find to be the violation.

15 THE COURT: So I think I just raised the issue but I
16 also cited a case *United States v. House*, which is a Second
17 Circuit, albeit granted it is a summary order but it doesn't
18 seem to view the issue as even a close one. It seems to
19 suggest that unanimity is not actually required for a 1503
20 charge as to specific conduct or statements that underlie that
21 charge. And, I think it may be distinguished or
22 distinguishable from the false statements charge, for instance,
23 on that score. So I read *House* to suggest that the law is
24 directly contrary to what you just suggested and for that
25 reason that the general unanimity instruction is probably

M765sch5

1 appropriate.

2 I'm not sure I have looked into it with respect to
3 Count Four but, Mr. Denton, do you have response on either
4 count?

5 MR. DENTON: So, I think with respect to Count Nine,
6 your Honor, we read it the same. We did not find anything
7 additional during the period that we had to take a look at it.
8 I do think that that is the case and it gets to sort of the
9 distinction that I made earlier and that the Court just
10 referenced as between the gravamen of the conduct being
11 obstructing the proceeding versus the specific false statement.

12 I think with respect to Count Four, that falls more
13 within the Second Circuit's kind of general -- I guess guidance
14 is the right word -- that as a general matter where it is not
15 particularly confusing of what conduct is at issue or there is
16 not sort of that kind of overlap, a general unanimity
17 instruction will generally suffice given how comparatively
18 little we are talking about in the context of Count Four. I
19 don't think there is any need to highlight it for the jury and
20 the general unanimity instruction will do the trick there as
21 well.

22 THE COURT: I think I agree. I will look and see if I
23 can find any authority with respect to Count Four but I think
24 *House* disposes of the issue with respect to Count Nine and my
25 guess is the law is the same under Count Four.

M765sch5

1 Anything else, Mr. Schulte?

2 MR. SCHULTE: No. That's it.

3 THE COURT: I think I had said on Count Nine whether
4 the language from just *Desposito* the government had to draw my
5 attention to and we ought to incorporate that somehow. Anyone
6 have a thought on that that that is where the discretionary
7 actions of a third person are required to obstruct the judicial
8 proceeding. The nexus requirement is satisfied if it was
9 foreseeable to the defendant that the third-party would act on
10 the communication in such a way as to obstruct the judicial
11 proceeding. I guess there are two options; one is that that
12 concept is adequately conveyed here, the second would be to add
13 it somewhere in which case let's discuss where that ought to
14 go.

15 Mr. Denton, do you have a view?

16 MR. DENTON: So I think in view of the concerns your
17 Honor has expressed and which we certainly hear, there is value
18 in adding it and being more specific. I think my inclination
19 would be to put it at the end of page 43.

20 THE COURT: Before you go further can I suggest
21 perhaps 42, line 13, the end of that paragraph since it is
22 really discussing the nexus requirement and this is a gloss on
23 the nexus requirement?

24 MR. DENTON: That makes sense, your Honor.

25 THE COURT: OK. So, Mr. Schulte, any objection to

M765sch5

1 adding -- I mean, I would obviously just modify it as
2 appropriate to fit here but something to the effect of where
3 the discretionary actions of a third person are required to
4 obstruct the judicial -- a proceeding or the proceeding, the
5 nexus requirement is satisfied if it was foreseeable to the
6 defendant that the third-party -- and then just quote the
7 language from *Desposito*.

8 MR. SCHULTE: I'm not sure. I haven't read it or I
9 haven't seen it. I think our position is that it's not needed
10 and I am not entirely even sure what that language really
11 means. It is kind of confusing, what is the third-party that
12 it is referring to?

13 THE COURT: I don't think it is confusing, let alone
14 confusing in the context of this case, so I am not inclined to
15 think there is merit to that. I guess if you can -- do you
16 have any quarrel with that being an accurate statement of the
17 law? It is from a 2013 Second Circuit case.

18 MR. SCHULTE: No. It is in there so there is nothing,
19 you know -- it seems to be the accurate statement.

20 THE COURT: So I will add it at that spot along the
21 lines of what I just quoted.

22 Mr. Schulte, any objections with respect to the
23 verdict form? I am going to move Count Eight down to page 2 of
24 the form so it appears with the not guilty/guilty options.

25 MR. SCHULTE: No.

M765sch5

1 THE COURT: All right. Very good. So we will fix all
2 of these things. Thank you, all, for your helpful suggestions
3 and comments. Some of the issues are quite interesting and
4 thorny.

5 Two further things to discuss before we finish. One
6 is the redaction issue and the second, before we get to that,
7 is I do think it does pay for me to just admonish you,
8 Mr. Schulte, the need to be very, very careful in your
9 summation not to testify. If you verge into anything that
10 sounds like testimony that you are providing information that
11 is not part of the record, I will not hesitate to both sustain
12 an objection or remind the jury that what you say is not
13 evidence. But, it has obviously been an issue throughout this
14 case, it is to some extent an unavoidable issue where the
15 defendant is representing himself, but I think in the summation
16 it really counsels heavily in favor of, rather than arguing "I
17 did this," "I did that," or "I said this," or "I meant that,"
18 "the evidence showed that" and then adding to it. I think,
19 using that formulation to make abundantly clear that you are
20 not testifying, you are not offering your version of the events
21 but rather sticking to what is in the record and basing your
22 arguments on the evidence is very, very important.

23 (Continued on next page)

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M76Wsch6

1 THE COURT: So I would just urge you, admonish you to
2 try and adhere to that line, and to the extent possible, use
3 formulations of that sort to avoid any problems, with the
4 understanding that I will have to interrupt and address the
5 issue if it is a problem.

6 Do you understand all that?

7 MR. SCHULTE: Yes. I think it's definitely a fine
8 line that we've tried to walk, you know, taking stuff from her
9 closing last time, where she's referring to me as Mr. Schulte
10 and I substitute "I" in, I don't know how much -- it's just,
11 the pronoun is at issue, right? I have to, referring to myself
12 in the third person would be kind of strange.

13 THE COURT: And I'm not requiring that you do that,
14 since I think that would be awkward, although some courts have
15 indeed required that to make this distinction clear. But the
16 problem is that an argument that Ms. Shroff made in the first
17 trial being made by you, even if the language is identical
18 except for substitution of a personal pronoun for your name,
19 that is the rub. Right? You're making the argument, so when
20 you make it and substitute your personal pronoun without any
21 couching that it is based on the evidence, there's no ambiguity
22 when Ms. Shroff make the argument that the jury is going to
23 think that she's testifying and providing a firsthand account
24 of what happened. There is that potential and that danger when
25 you're making the argument, which is why I think it counsels in

M76Wsch6

1 favor of erring on the side of caution and rather than simply
2 taking Ms. Shroff's closing and substituting "I" throughout to
3 basically ensure that when you're making statements of that
4 nature, that you're tethering it to the evidence in the record,
5 if not citing the specific exhibit, to at least say that "I
6 argue that the evidence shows that I" did X, Y, and Z. And I
7 think that is something that you should try to do as much as
8 possible.

9 I'm not saying that if you stray from it in any
10 instance I will sustain an objection or provide a curative
11 instruction, but it's something that I will be on the lookout
12 for, so you should be mindful of it. All right?

13 MR. SCHULTE: All right. Yes.

14 THE COURT: Mr. Denton, you sort of alluded to that
15 issue. I don't know if you feel the need to say anything
16 beyond that, but I think that would hopefully suffice.

17 MR. DENTON: Yes, your Honor.

18 THE COURT: On the redactions, anything we can discuss
19 there? Has Mr. Schulte now seen what the redactions are?

20 MR. DENTON: Your Honor, I think we were a little
21 confused about the issue. I think we had understood
22 Mr. Schulte's concern to be that he didn't know what had been,
23 what the redacted versions looked like. It sounds like the
24 issue is actually that he does not have the underlying sort of
25 pre-redacted versions, which we did not realize. I would hope

M76Wsch6

1 that that's something that the CISOs could help get a copy of
2 to him in the SCIF. But I also think that --

3 THE COURT: The problem is that it's 6:00. I'm
4 assuming that the marshals are long past the time that they
5 want to get him back to the MDC, which is to say that he may
6 not be going to the SCIF, and I'm not confident that he'll have
7 time to go there in the morning. But he needs to know what he
8 can say in his closing, so that's certainly a fair question and
9 concern.

10 MR. DENTON: I think from that perspective, your
11 Honor, he does have that. He has the redacted transcripts with
12 the redactions that the Court has approved. So insofar as
13 there is a version that is appropriate to be used in a public
14 proceeding, that he's got.

15 THE COURT: OK. But I don't think he's been given an
16 opportunity to take issue with any of the redactions, and I
17 didn't think that there was anything problematic with them, but
18 maybe I was wrong about that. So to the extent that he does
19 think that there's something that prevents him from making an
20 argument that he wishes to make, I think he has to be heard on
21 that. I want to ensure that he can be heard, and the question
22 is how to do that and when to do that.

23 MR. DENTON: Your Honor, I think whatever opportunity
24 he has to be in the SCIF, you know, would make the most sense
25 for the CISOs to provide him with copies of those pages.

M76Wsch6

1 Certainly while we're here in the courthouse, we would need
2 their assistance to make copies of our classified copies. If
3 that is for some reason a problem, one of us can run back to
4 the U.S. Attorney's Office and try and do it in our SCIF, but
5 it seems like we're overcomplicating the process at that point.

6 THE COURT: Mr. Schulte.

7 MR. SCHULTE: Yeah. So I think I raised this morning
8 that there's one specific thing. When I received the Weber,
9 redactions from Weber, there's a very important piece of
10 evidence that I want to sum up on that has been redacted.

11 THE COURT: What page are we talking about and what,
12 generally speaking -- well, what page are we talking about?
13 Let's start there.

14 MR. SCHULTE: I said it this morning, but I don't have
15 access to this information right now. I can try and pull it
16 up, but I think it was -- it was the testimony from Weber with
17 respect to Bartender and what information had been released
18 already. And the Court redacted --

19 It's 1483 to 1484.

20 THE COURT: This morning you said 1403 to 1404, which
21 is what was causing me some confusion at least.

22 OK. Mr. Denton, obviously, we need to be careful with
23 what we're saying in this setting, so that makes it a little
24 harder to discuss.

25 MR. DENTON: I actually don't think this is a

M76Wsch6

1 particularly hard one, your Honor.

2 The portion that's redacted is the identification of a
3 specific document that the defendant did not have the Court's
4 approval to disclose. To the extent that what he wants to do
5 is argue that certain information had been made public, none of
6 that is redacted. What was or was not disclosed, you know, to
7 the extent that the witness was able to respond to the
8 questions on that, that is all there. The only thing that's
9 been redacted is sort of the reference to a particular
10 document, for which notice was not given and approval was not
11 obtained. So I think he's really not in any problematic
12 position here.

13 MR. SCHULTE: I think, I mean this was actually
14 litigated, the specific information from that page. But the
15 question was generically whether or not Bartender information
16 was or was not exposed on WikiLeaks. So since that particular
17 type of document is redacted, the question is how do I make the
18 argument or how do I refer to that? There wasn't a
19 substitution. The whole type of document is redacted, so I
20 need to have some way to reference that.

21 THE COURT: Here's the problem. I think Mr. Denton
22 has a point that, at least to my recollection, Mr. Schulte
23 didn't identify that particular document in the CIPA litigation
24 that preceded trial. On the other hand, nor was there an
25 objection, and it came into evidence, and it's in evidence.

M76Wsch6

1 The jury heard it. They can rely on it, and I'm a little bit
2 reluctant to redact something that's in evidence and
3 Mr. Schulte is entitled to rely on as being in evidence.

4 I don't know if there's a way that we could -- I
5 realize that this isn't the way CIPA litigation is supposed to
6 go; I don't know if there's an appropriate substitution that
7 could be used here, something that would mitigate any concerns.
8 But that's the problem. I think if the government had
9 objected, even if I hadn't sustained the objection, just
10 because I didn't understand it at the time, the government
11 would be on firmer ground. But having not objected and let it
12 come into evidence, it's now in evidence.

13 MR. SCHULTE: I think one of the issues here is that
14 this is such a generic thing that I don't think the government
15 even believed it to be classified. So I think that's the
16 problem. It's something so generic anyway that I would have no
17 reason to believe that it would be classified. I don't think
18 the government did either, so I'm not even sure why it's being
19 redacted or what the reasons are for that. But since it's in
20 evidence, unless the government is going to agree to some kind
21 of substitution, but if that was already the most generic way
22 to refer to that, so I don't know what substitution there would
23 be.

24 I also raise to the Court's attention that this raises
25 another issue, because I haven't really seen these and I don't

M76Wsch6

1 know what's behind them. I don't really know what is, you
2 know, off limits. I don't know what things I said that the
3 CISO or the CIA took umbrage at, so, you know, going forward
4 tomorrow, you know, I don't really know what has been ruled to
5 be -- what they've decided to be classified. So it kind of
6 puts me in a bad position, that I don't know what the basis is
7 for those redactions too.

8 THE COURT: Mr. Denton.

9 MR. DENTON: So, a couple of things, your Honor. I
10 think, first of all, the defendant has the redacted
11 transcripts, as the Court has previously observed. Possibly
12 with this one or maybe one other exception, everything that's
13 been redacted was in response to objections, so the defendant
14 shouldn't be relying on it in any event.

15 I would disagree with his characterization that the
16 government didn't know this was classified. Honestly, it's
17 taken a certain amount of judgment to decide what to object to
18 and what not to of the defendant's questions. The fact is it
19 is classified. The fact that it came into evidence does not
20 change that fact. It is a reference to a specific, particular
21 document, which is the problem. And so I think to the extent
22 that what the defendant wants to do, the point for which it is
23 relevant is not a specific document for which he did not give
24 notice or anything like that, but simply a generic and,
25 frankly, fairly confusing set of questions about what

M76Wsch6

1 information is where, substituting simply "document" would
2 probably get the job done. Say "I reference the document"
3 rather than the specific identification of what that document
4 is.

5 THE COURT: In one of the notebooks, I think vendor,
6 there was an @vendor substituted for what I assume was the name
7 of the vendor, perhaps. Taking a key from that, what about, to
8 make it clear that it's a particular document, substituting
9 @document? So it would be the @document would have talked to
10 that and the @document was exposed by WikiLeaks, and on 1484,
11 the @document would have made the statement.

12 MR. DENTON: So, your Honor, I think just the
13 reference in the notebooks is actually a reference to the
14 defendant having cited the vendor's actual Twitter handle.
15 Whether we do it with an "at" or capital-D document or some
16 version of that, I don't think we'd have any problem with
17 something that suggests a particular document.

18 THE COURT: All right. Fair point.

19 MR. SCHULTE: I think the other thing to say, you
20 know, to the extent that the government says that they made a
21 judgment call, you know, if they made a judgment call and
22 decided not to object, it came into evidence the way that it
23 came into evidence. So they kind of have to live with, you
24 know, the judgment that they made. And it's unfortunate like
25 that, but the particular type of document is critical to that

M76Wsch6

1 charge and critical to that -- or attempted charge and to show
2 that the information, that this type of document is out there
3 and the types of information that the jury has seen from, for
4 example -- I forget whatever it is, for Brutal Kangaroo, they
5 were able to see that type of document.

6 So basically by saying the type of document, it's
7 critical for the defense in summations to make the argument
8 that, you know, you saw the types of information in this
9 document and then relying on the testimony that he gave that
10 this document's out there and the fact that, to his knowledge,
11 nothing -- that that document would contain all the
12 information.

13 THE COURT: Well, let's not go any further in this
14 setting. I think the fact of the matter is yes, the government
15 could have and perhaps should have objected. But so, too, you
16 could have and should have noticed it in your Section 5 notice
17 pretrial, because it certainly seems like you anticipated
18 wanting to rely on this document, and the burden was on you to
19 notice it before trial. So in that regard, while, yes, the
20 government could have objected, it also has to make a judgment
21 call about making objections on this score since it underscores
22 and draws attention to the problem, and those problems are
23 supposed to be headed off in pretrial litigation.

24 It seems to me that the appropriate resolution here is
25 essentially a form of substitution and that that enables you,

M76Wsch6

1 given the context of the question and answer, which is
2 discussing whether the document would have contained the sorts
3 of information that you're discussing, you're able to make that
4 argument without reference to the particular kind of document
5 that it may be. So it strikes me that that strikes the right
6 balance and is the equitable and fair resolution here.

7 On that score, let's look for an appropriate
8 substitute.

9 MR. SCHULTE: Why don't we just call it the Bartender
10 document, by the way it's specific to Bartender.

11 THE COURT: Mr. Denton, any objection to that?

12 MR. DENTON: I think potentially, your Honor, I think
13 our view would be if we just call it the capital-D document,
14 that serves the specificity purpose and otherwise avoids any
15 potential other complications.

16 MR. SCHULTE: I think that would be too generic, and
17 it would send the wrong message. I think it's important to
18 note that the document's specifically about Bartender. It
19 doesn't matter what type it is, but I think saying specifically
20 the Bartender document is a better substitution for what that
21 is and how the jury should infer what types of information is
22 in that document.

23 THE COURT: All right. I agree that Bartender
24 document is more appropriate. I think even in the absence of
25 the adjective, use of Bartender there it's clear that that's

M76Wsch6

1 essentially what the document would be. So let's do that.

2 I guess the question is how to tell the jury that I've
3 approved that substitution. Should I do that before
4 summations? Should I leave it to Mr. Schulte, if he's going to
5 show this to essentially make the substitution and show it to
6 the jury with the substitution, and I'll explain to the jury
7 that I've approved that substitution?

8 What are your thoughts?

9 MR. SCHULTE: My interpretation or my opinion is I
10 don't think the Court really needs to explain it. I can put it
11 up from the redactions and have, you know, the Bartender
12 document and just refer to it like that. I don't really know
13 if there's really any -- based on the Court's prior rulings
14 about redactions and substitutions, just the generic name
15 should suffice. I don't think we need to go into any detail.

16 THE COURT: Well, I think the difference is this is a
17 transcript of something that they heard in court, and they need
18 to understand that I said it was necessary or OK to redact in
19 that way.

20 All right. Tell you what. Why don't I leave it to
21 you to make the argument, and when you make it, I may just
22 briefly interrupt you to make clear to the jury that I approved
23 that redaction/substitution and that they're not to concern
24 themselves with what was behind it and leave it there. All
25 right?

M76Wsch6

1 Mr. Denton.

2 MR. DENTON: I don't have any issue with the Court's
3 process on that. I will note, your Honor, that the proposed
4 intention of the defendant to invite the jury to infer the
5 contents of a classified document not in evidence are
6 problematic on any number of levels, and so to the extent that
7 he wants to refer to the evidence to make his point about what
8 is or is not public, that's one thing. To the extent that he
9 invites the jury to speculate about the contents of a
10 classified document, then we're going to have a problem.

11 THE COURT: All right.

12 MR. SCHULTE: I think the point is the testimony
13 that's coming in through evidence about what types of
14 information is in that document. That's what's in evidence.
15 There's no speculation being done or I'm not inviting the jury
16 to speculate. I'm saying look at the testimony. What he
17 testified is in this document, and he's testifying that all of
18 this information about Bartender is in the document. And he's
19 testifying that he doesn't believe, you know, anything from --
20 anything from the notebooks was not already released by
21 WikiLeaks. The point is that specific testimony. It's not
22 about speculation or anything like that.

23 THE COURT: All right. I think as long as you hew to
24 what the witness testified to and what the evidence is, then
25 there shouldn't be any issue, and I already gave you an

M76Wsch6

1 admonition on that score.

2 Upon reflection, I think what I may do is before the
3 summations begin, note that on occasion in the transcripts,
4 that I've approved some redactions or substitutions to the
5 transcripts themselves and so to the extent that they request
6 any transcripts during their deliberations, they may see that,
7 and it's also possible that during the parties' summations
8 they'll see transcripts in which there are redactions or
9 substitutions and that I've approved those, and that way I
10 won't have to interrupt Mr. Schulte. So I think that's the
11 better way of doing that.

12 All right. Anything else?

13 MR. DENTON: Not from the government, your Honor.

14 THE COURT: Mr. Schulte.

15 MR. SCHULTE: Yeah. The only last problem is I don't
16 have today's transcript to sum up on, so if there's any way I
17 can get that before I go back.

18 THE COURT: I don't know the answer to that. I assume
19 you mean the trial transcript, not the transcript of this
20 proceeding.

21 MR. SCHULTE: That's correct, yeah. The trial
22 transcript from today.

23 THE COURT: I'm not generally involved in the process
24 of getting that to either side, but do we know where that
25 stands or what the status of it is?

M76Wsch6

1 There is the one word that I suspect I know what it
2 is, but given that there may be an issue with at least one
3 page.

4 MR. DENTON: I'm not sure, your Honor. I think as of
5 when we came up this afternoon, that was still in process with
6 the court reporters, so I don't think we have a copy of it yet.
7 I assume this will go in the normal course, and we'll all get
8 it when we all get it.

9 THE COURT: All right. I think that's right.

10 The fact is, Mr. Schulte, in some cases summations are
11 done immediately after the close of evidence or the same day,
12 and in that sense, it is what it is, and hopefully you'll get
13 it as quickly as you can, if not this evening before you
14 return, then certainly tomorrow morning. If not, you'll have
15 to make do with your recollection, and it's the jury's
16 recollection that governs anyway.

17 Other than that, anything else?

18 Mr. Denton.

19 MR. DENTON: No, your Honor.

20 THE COURT: Mr. Schulte.

21 MR. SCHULTE: No.

22 THE COURT: Exhibit lists, my law clerk reminds me.

23 Mr. Schulte, have you had an opportunity to review the
24 most recent exhibit lists? Are we all on the same page about
25 that? Have we discussed it?

M76Wsch6

1 You know what? Bottom line is we've been at this long
2 enough, let's leave it there. First thing tomorrow I expect an
3 update on this score. Hopefully everybody will agree on what's
4 in and what isn't, and if you haven't already spoken to my
5 deputy, you should speak to her in the morning about the best
6 way to actually get it on to the system. But as long as you
7 guys have done that, we have plenty of time before that needs
8 to happen, so we'll take it up tomorrow.

9 All right. Very good. With that, thank you all for
10 sticking with me for so long, and especially the court
11 reporters. And I'll see you tomorrow morning first thing.
12 We'll proceed with summations.

13 Thank you very much and have a good night.

14 MR. DENTON: Thank you, your Honor.

15 (Adjourned to July 7, 2022, at 9:00 a.m.)
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17
18
19
20
21
22
23
24
25

INDEX OF EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Examination of:	Page
EVAN SCHLESSINGER	
Cross By Mr. Schulte . . . . .	.1930
Redirect By Mr. Denton . . . . .	.1939
Recross By Mr. Schulte . . . . .	.1942
HANNAH SOTNICK	
Direct By Mr. Schulte . . . . .	.1976
CHENG	
Direct By Mr. Schulte . . . . .	.1985
Cross By Mr. Denton . . . . .	.1991
DAVE	
Direct By Mr. Schulte . . . . .	.1993
Cross By Mr. Denton . . . . .	.2017
Redirect By Mr. Schulte . . . . .	.2024

GOVERNMENT EXHIBITS

Exhibit No.	Received
1703-1 and 1704-1 . . . . .	.1943

DEFENDANT EXHIBITS

Exhibit No.	Received
815 . . . . .	.1932
830 . . . . .	.1933