

1    UNITED STATES DISTRICT COURT

1    SOUTHERN DISTRICT OF NEW YORK

2    -----x

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3    UNITED STATES OF AMERICA,

3

4            v.                      S1 06 Cr. 442 LAP

4

5    SYED HASHMI,

5

6            Defendant.

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7    -----x

7

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9                                      February 17, 2009

9                                      11:20 a.m.

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11

12    Before:

12

13                      HON. LORETTA A. PRESKA,

13

14                                      District Judge

14

15

16

APPEARANCES

17

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18 LEV L. DASSIN,

19 Acting United States Attorney for the

19 Southern District of New York

20 IRIS LAN,

20 BRENDAN R. McGUIRE,

21 Assistant United States Attorneys

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23 SEAN MAHER,

23 Attorney for defendant Hashmi

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92HJHASM Motions

1 (In open court)

2 THE COURT: Good morning, ladies and gentlemen. Won't  
3 you be seated.

4 (Case called)

5 THE COURT: Good morning. Mr. Maher, shall we arraign  
6 Mr. Hashmi on the superseding indictment?

7 MR. MAHER: Yes.

8 THE COURT: Mr. Hashmi, would you stand, please.  
9 Have you received a copy of the indictment against  
10 you, S1 06 Cr. 442?

11 MR. MAHER: Your Honor, he does not have a copy of it.  
12 We have gone over it, though.

13 THE COURT: Have you gone over it with your attorney,  
14 sir?

15 THE DEFENDANT: Yes.

16 THE COURT: Has your attorney explained to you the  
17 charges against you?

18 THE DEFENDANT: Yes.

19 THE COURT: Would you like me to read the whole  
20 indictment here in court now or is it sufficient that you've  
21 gone over it with Mr. Maher?

22 THE DEFENDANT: It is sufficient.

23 THE COURT: How do you now plead, sir?

24 THE DEFENDANT: Not guilty.

25 THE COURT: Excellent. Won't you be seated.

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1 Mr. Maher, how would you like to proceed?

2 MR. MAHER: I can begin with our motion.

3 THE COURT: Yes, sir.

4 MR. MAHER: Thank you.

5 Your Honor, for today's argument, I would like to  
6 focus on two areas, obviously without waiving the other  
7 arguments we've raised in our written pleadings.

8 THE COURT: Yes, sir.

9 MR. MAHER: I would like to focus on the failure to  
10 state a claim under Rule 7 and also --

11 THE COURT: On all the counts?

12 MR. MAHER: On all counts and our vagueness challenge.

13 THE COURT: Yes, sir.

14 MR. MAHER: Regarding the failure to assert or state a  
15 claim, the crux of our position is the use of this term  
16 military gear in all four counts fails to apprise the defense  
17 of specific facts so that we can be on notice of what we're  
18 defending against, so that the court and the defense and future  
19 courts can be aware of what the grand jury actually considered  
20 to be military gear, and whether the evidence that actually the  
21 grand jury considered military gear is the same evidence that  
22 will be brought forth by the government at trial, and also  
23 protect the double jeopardy concerns we raised in our papers.

24 THE COURT: Which actually goes more to the point,  
25 right?

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1            We all agree that an indictment has to more or less  
2 track the statutory language, but then the second prong, of  
3 course, is to permit a defendant to make a double jeopardy  
4 argument if he has to at some time in the future, right?

5            MR. MAHER: Exactly.

6            THE COURT: From that point of view, it would seem  
7 that currency and military gear are sufficient, right?

8            MR. MAHER: Military gear, I think it really turns  
9 into an apples and oranges type of discussion. We can't get a  
10 handle on what military gear is from our perspective. To a lay  
11 person and a person of ordinary intelligence, I would proffer  
12 military gear brings out images of hand grenades, machine guns,  
13 ammunition, hardware best used towards killing people or to  
14 help facilitate killing people.

15            From my understanding of the discovery, I don't  
16 believe that's what the government is going to bring in as  
17 evidence in this trial, that Mr. Hashmi helped provide this  
18 type of military hardware to Al Qaeda..

19            THE COURT: Your understanding of the discovery, sir,  
20 leads you to believe it is going to be what?

21            MR. MAHER: In my mind, at this point it is still  
22 vague.

23            THE COURT: What does the discovery tell if it doesn't

24 tell you hand grenades and machine guns?

25 MR. MAHER: The discovery at this point, I think as

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1 far as that aspect is going to come out through the testimony  
2 of cooperating witnesses with the government.

3        THE COURT: That is not what I asked you.

4        You just told me that the discovery leads you to  
5 believe that we're not talking about hand grenades and machine  
6 guns. What does the discovery lead you to believe we're  
7 talking about in terms of military gear? And I am putting  
8 currency aside for a moment.

9        MR. MAHER: My understanding at this point, and this  
10 also takes into account representations that the government has  
11 made in the extradition process in the United Kingdom, military  
12 gear by the government means raincoats, ponchos and waterproof  
13 socks and potentially permitting a person to use a cell phone.

14        THE COURT: All right. If that's what it means, why  
15 would Mr. Hashmi not be able to make a good argument on a  
16 double jeopardy claim at some time in the future using the  
17 words military gear?

18        MR. MAHER: Because I think for the lay person,  
19 military gear is not comprised of socks. It is not going to be  
20 the definition that most people look at and it won't be the  
21 definition --

22        THE COURT: It isn't exclusive, though. Military gear  
23 does not exclusively refer to hardware?

24 MR. MAHER: It doesn't exclusively refer to hardware,  
25 but it dovetails into our vagueness argument as well because we

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1 have such huge concepts that we need to be grounded in some  
2 type of factual particularity. We are not asking for the moon  
3 here. We want to know what the specific items are that the  
4 government is alleging so that we can be sure --

5        THE COURT: Is this part of the of the bill of  
6 particulars argument or is this part of the Constitutional  
7 argument?

8        MR. MAHER: It blows into both. It blows into both.

9        THE COURT: You have told me on the bill of  
10 particulars side that the discovery tells you that it is  
11 raincoats, ponchos, waterproof socks. The question then is:

12        Is the word -- and it would seem to me from a  
13 defendant's point of view, a description of military gear would  
14 be more useful to a defendant in making a double jeopardy  
15 argument in the future, in that it would include lots of  
16 things, hardware and not hardware.

17        MR. MAHER: Part of the issue is we have at least  
18 three prongs that we're juggling at the same time. It is not  
19 only this double jeopardy issue, we also have the issue of  
20 notice preparing for trial now and we have the grand jury  
21 issue.

22        As a general rule, yes, the defense would like the  
23 most expansive definitions possible in the indictment because

24 that would potentially have a broader sweep in a double  
25 jeopardy argument no doubt. When we're looking in the

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1    specifics of this case, that doesn't help us. In fact, it  
2    hurts us tremendously.

3            THE COURT: I don't get it.

4            MR. MAHER: It hurts us because of the notice issue  
5    right now that although it is my conjecture at this point that  
6    is what the government means by military gear, the government  
7    still has not put anything in writing that binds the government  
8    that this is their definition of what military gear is in the  
9    specifics of this case and under the counts of their  
10   indictment.

11           THE COURT: You're not necessarily entitled to that if  
12   you have adequate indications, for example, in the discovery,  
13   which you're telling me you do.

14           MR. MAHER: I disagree, your Honor. Discovery can  
15   help the court make that decision. In a case like this, which  
16   is similar to the Bin Laden case, we have voluminous discovery,  
17   you have a great geographic reach, you have a large time span,  
18   multi-years. You have lots and lots of names. Pointing the  
19   discovery does not help ground the defense.

20           THE COURT: You just told me the discovery indicated  
21   to you that the military gear we are talking about are three  
22   types of items. Why is that not sufficient?

23           MR. MAHER: What I am trying to make clear to the

24 court -- and perhaps I'm not -- that is my conjecture. There  
25 isn't a document that the government has said --

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1            THE COURT: They don't have to. The law is that you  
2 are not entitled to a bill of particulars if the discovery  
3 indicates what we're talking about. You've just told me that  
4 it does, so when you say you speculate, you're not speculating  
5 as in made up out of your head, you're basing it on the  
6 discovery that has been provided to you, yes?

7            MR. MAHER: The case law states in the general cases  
8 that tracking the statute is sufficient. However, under Pirro  
9 and Awan and other cases, there are times when that is not  
10 sufficient. This is one of these cases.

11          THE COURT: This is not like those. This is not like  
12 those cases.

13          For example, Judge Sifton told us in Awan that the  
14 indictment used the generic expression material support, and  
15 then he says -- this is at Page 175 -- "The government has  
16 indicated in its papers on this motion that it plans to prove  
17 that defendant provided 'money,' referring presumably to  
18 'currency or monetary instruments or financial securities,' and  
19 'personnel' referring to 'one or more individuals who may or  
20 may not include [the defendant].'"

21          That's not what we have here. We have here the  
22 government saying and the grand jury saying in the indictment  
23 not just money, but specifically currency and military gear, so

24 this is a far different case from Awan.

25 MR. MAHER: I disagree.

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1 THE COURT: How can you disagree? I just read it to  
2 you.

3 MR. MAHER: I am trying to explain how I disagree.

4 THE COURT: Okay.

5 MR. MAHER: I disagree in that this term military gear  
6 is so vague that it does not give the same type of notice as a  
7 more specific term would.

8 THE COURT: That's the obvious. The question is: Is  
9 it sufficient?

10 MR. MAHER: Look at the Assi case.

11 THE COURT: You can say Size 9 socks, but it doesn't  
12 have --

13 MR. MAHER: Like at the Assi case that the government  
14 cites. In the Assi case, which is somewhat similar, there the  
15 government in their indictment alleged that the defendant had  
16 night vision goggles and thermal imaging equipment. That came  
17 under the same property definition of material support.

18 Now there they could have perhaps said military  
19 gear --

20 THE COURT: Yes, sir.

21 MR. MAHER: -- but they didn't. They used specific  
22 terms. In that case, that defense was able to then plan and  
23 develop an investigation and theory defense to address those

24 specific types of equipment.

25 THE COURT: Mr. Maher, that doesn't prove that this

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1 case has insufficient specificity. In fact, I didn't see any  
2 case cited in your papers that required anything beyond what we  
3 have here. I think Awan is the perfect contrast.

4        MR. MAHER: I respectfully disagree.

5        THE COURT: Tell me which case, sir, requires the kind  
6 of specificity that you just suggested, night goggles and  
7 something else?

8        MR. MAHER: I think --

9        THE COURT: Requires, requires, not just approved.

10       MR. MAHER: -- well, I think Pirro does.

11       THE COURT: That is a little bit different.

12       MR. MAHER: Pirro said the indictment, because the  
13 Fifth Amendment requires an indictment contains some amount of  
14 factual particularity to ensure that the prosecution will not  
15 fill in elements of its case with facts other than those  
16 considered by the grand jury.

17       THE COURT: Yes, sir.

18       MR. MAHER: That is what we are talking about, factual  
19 particularity, and the Pirro court also talks about the  
20 distinction between alleging a crime and the facts that go with  
21 the crime in some type of factual grounding.

22       THE COURT: Yes, sir. With all respect, although the  
23 general language is applicable, that case doesn't help us any,

- 24 I don't think, in applying the general principles to the facts  
25 we have here.

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1 The grand jury told us in the indictment currency,  
2 military gear. Again I don't see a case telling me that that  
3 or something like that is insufficiently specific for  
4 Constitutional purposes.

5 MR. MAHER: I think this gets into exactly what is  
6 highlighted in U.S. versus Brozyna, when at 571 F.2d 746, it  
7 says that the court said the indictment must be sufficiently  
8 clear so that the defendant, "will not be misled while  
9 preparing his defense."

10 That is the danger that we have here. Again, I am  
11 proffering what I think is a good-faith basis on what the  
12 government has provided and what I have been able to develop  
13 through my own investigation what I think they mean by military  
14 gear. The government still has not filed anything or given us  
15 a specific piece of paper that says this is what is meant by  
16 military gear.

17 THE COURT: You keep telling me that, but you haven't  
18 directed me to a case that says it's required.

19 MR. MAHER: I believe the cases that I have cited just  
20 now and also in our papers require factual specificity and are  
21 on point with the facts in this case.

22 I disagree with how the court is applying Awan to the  
23 facts of this case because I think military gear, as used in

24 this superseding indictment, is meaningless. It is no  
25 different than in the Awan case when the government said well,

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1 we're going to be bringing in evidence of money.

2        THE COURT: The difference, and that is why I did read  
3 it to you, Mr. Maher, the difference is that in Awan, the  
4 indictment merely said material support. As we know, there is  
5 an enormous bunch of definitions that go with that. It was  
6 only in the government's papers that it specified X and Y,  
7 currency and personnel support which might or might not include  
8 the defendant himself, right?

9        Here it is different in that the indictment itself  
10 specifies currency, already more specific than Awan, and  
11 military gear. So they are not the same.

12        MR. MAHER: In Awan, both terms that the court just  
13 used are terms of art that are subsumed within the statutory  
14 definition of material support --

15        THE COURT: Yes, sir.

16        MR. MAHER: Under 2339 (B)(A), military gear is not,  
17 it is not defined in the statute.

18        THE COURT: Any reasonable person knows what military  
19 gear is. It is gear used by the military.

20        MR. MAHER: Reasonable people do not interpret  
21 military gear as waterproof socks.

22        THE COURT: How do we know that? Is that your  
23 testimony?

24 MR. MAHER: That is my testimony right now, but I

25 think --

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1            THE COURT: You are not allowed to testify.

2            MR. MAHER: -- we can take a poll.

3            THE COURT: I know.

4            MR. MAHER: We know what military gear means. When  
5 people get the first image of it, it is hardware used for  
6 killing people.

7            THE COURT: Mr. Maher --

8            MR. MAHER: This is easily remedied.

9            THE COURT: -- mr. Maher, that is not the test. That  
10 is not the test. That's not the test.

11            The test is not give me the most specific thing you  
12 have. As you and I have already reviewed, the test is, the  
13 second prong is the one applicable here, protecting against  
14 double jeopardy.

15            MR. MAHER: That is one of three. There is also  
16 notice to the defense so that the defense can sufficiently  
17 prepare for trial.

18            THE COURT: Why don't we ask the government how they  
19 say you're supposed to prepare for trial. Do you want to do  
20 that? Do you want me to do that?

21            MR. MAHER: I would love for the court have the  
22 government state on the record what they mean by military gear.

23            THE COURT: That isn't the question I asked you, but

24 that is okay. Mr. McGuire, Ms. Lan who is going to talk?

25 MR. McGUIRE: I can talk, your Honor.

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1            THE COURT: Mr. Maher says that the defendant does not  
2 know how to prepare for trial with the allegation about  
3 military gear.

4            MR. McGUIRE: I think as your Honor noted, it seemed  
5 to be two issues here: One is what was presented to the grand  
6 jury; and, secondly, whether the indictment puts the defendant  
7 on fair notice.

8            I think certainly the government's position is the  
9 indictment provides in addition -- we have been focusing on  
10 currency and military gear -- there is additional language in  
11 there which also discusses the time and manner and final  
12 destination of this military gear, which provides further  
13 specifics to allow defendant to properly defend against these  
14 allegations.

15           I think in addition, where Mr. Maher is getting, the  
16 reference to socks as well as ponchos and other clothing is not  
17 made up, it is from documents he has received from the  
18 government.

19           THE COURT: I think he has acknowledge that.

20           MR. McGUIRE: I think he has acknowledged that as well  
21 as far as the notice issue to the defendant is relevant and  
22 that has also been made clear to him in government documents.

23           With all due respect to Mr. Maher, military gear in

24 his view may be one thing. It may be subject to various  
25 interpretations. As your Honor points out, that is not the

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1 test. To the extent we have been very open with Mr. Maher from  
2 the get-go on our theory of the case, we would be happy to  
3 discuss with him in more specifics, although again the  
4 government's position is that we are not required to do so, but  
5 we don't want him to be forced to guess here as to what the  
6 charges are.

7        Certainly the indictment as stated is sufficient under  
8 the rules and under the case law, and I think that coupled with  
9 the discovery he has been provided, provides him with  
10 sufficient notice to defend these charges.

11        THE COURT: Is there a need to separate the material  
12 provided in discovery from the allegations in the indictment?

13        Mr. Maher says the indictment says on this issue only  
14 military gear; and, thus, he is unable to prepare. You point  
15 out that discovery, as Mr. Maher acknowledges, indicates  
16 raincoats, ponchos and waterproof socks.

17        Are we to take those together?

18        MR. McGUIRE: Those would be, all of those items that  
19 were spelled out in discovery would be part of the term  
20 "military gear" as used in the indictment. The term in the  
21 indictment was used in order to encapsulate all of those, and  
22 then there was also the specific notation of currency.

23        I think that with respect to the Awan case, as your

- 24 Honor points out, it is distinguishable. Here within 2339 (A),  
25 there is a definition of what constitutes material support, and

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1    that includes any property, tangible or intangible.

2            The government has gone one step further here to  
3    describe what that property is and has gone beyond what the  
4    definition in the statute provides. So that, in the  
5    government's view, is more than specific to put the defense on  
6    notice, again when considering that all that is included in the  
7    indictment is the timing of this conspiracy and provision of  
8    this material support as well as the recipients and the  
9    location of the recipients.

10          THE COURT: All right. Mr. Maher, Mr. McGuire says  
11    that based on the military gear noun in the indictment together  
12    with the discovery, the defendant should be ready to prepare  
13    for trial and able to prepare for trial.

14          MR. MAHER: I think the government's response that was  
15    just given the court encapsulates the problem that we have to  
16    the defense. Mr. McGuire still did not answer the court's  
17    question whether the government means military gear equals  
18    specifically --

19          THE COURT: I didn't ask him that question. I said  
20    that you argued that defendant couldn't prepare for trial. The  
21    government says that the indictment's language about military  
22    gear, taken together with the discovery, permits the defendant  
23    to prepare for trial and not to be surprised.

24 MR. MAHER: And I disagree with that.

25 THE COURT: Tell me why if you have something

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1    different to say from what you said before.

2            MR. MAHER: It's the issue of trial by ambush is the  
3    issue we have.

4            THE COURT: Where are you being ambushed if you know  
5    from the discovery that the military gear comprises raincoats,  
6    ponchos and waterproof socks or whatever else the discovery  
7    shows?

8            MR. MAHER: That's the catch, whatever else the  
9    discovery shows.

10          THE COURT: You have got the discovery.

11          MR. MAHER: The discovery is voluminous.

12          THE COURT: What do you want me to do about that? I  
13    can't do anything about that.

14          MR. MAHER: It is something very simple: Direct the  
15    government to tell us what it means by military gear, it is  
16    that simple.

17          THE COURT: There is no case requiring that,  
18    voluminous discovery or not.

19          MR. MAHER: That was one of the factors in Bin Laden  
20    that the court cited specifically in ordering the bill of  
21    particulars in that case.

22          THE COURT: But the indictment wasn't as particular as  
23    the one is.

24 MR. MAHER: I beg to differ in that case. The term  
25 military gear, without being grounded in specific pieces of

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1 equipment, is virtually meaningless.

2 THE COURT: But, of course. I'll even give you that.

3 But what do you say about the discovery? There is a  
4 reason discovery is required.

5 MR. MAHER: Absolutely.

6 THE COURT: Are you saying you're permitted to ignore  
7 the discovery?

8 MR. MAHER: Absolutely not.

9 THE COURT: I don't understand why you're surprised.  
10 Where are you surprised?

11 MR. MAHER: The surprise is right now there is nothing  
12 binding the government that when they say military gear, they  
13 mean only raincoats, ponchos, waterproof socks.

14 THE COURT: Or whatever else is in the discovery.

15 MR. MAHER: That is the thing, whatever else is in the  
16 discovery and other discovery I haven't received yet and other  
17 statements we haven't received yet.

18 THE COURT: That is not today's problem.

19 MR. MAHER: That is today's problem because we are  
20 trying to prepare for trial on a very serious case where our  
21 client faces 70 years in prison, and I think in fairness -- not  
22 just fairness, but let's ground it in the Fifth and Sixth  
23 Amendment, we are entitled to greater factual specificity than

24 this great big amorphous term "military gear," and this is not  
25 something that is putting the government out. This is not a

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1 stretch to ask them to just put the defense on specific notice  
2 what they mean. Why are they hiding? Why can't they divulge  
3 that and put it out there?

4 THE COURT: Not the test. Not the test. Not the law.

5 Is there Anything else on this point because I know  
6 you had others you wanted to talk about. Let me ask the  
7 government if it has anything on this point?

8 MR. McGUIRE: Nothing further, Judge.

9 THE COURT: Mr. Maher.

10 MR. MAHER: I'll move to our vagueness argument.

11 THE COURT: Yes, sir.

12 MR. MAHER: Again it dovetails somewhat off the  
13 argument I was just making as applied challenge, but we also  
14 have the facial challenge.

15 The closest case on point is the Humanitarian Law  
16 Project case that was I guess you say redecided or decided  
17 again just in January of this year.

18 THE COURT: It is like the 9th Circuit doesn't have  
19 enough work to do, right?

20 MR. MAHER: They have done that case seven times I  
21 think now. The issue that the court just decided, though, and  
22 made clear is they went over the new statutory language under  
23 the definition of material support and they found it wanting,

24 in that they found three provisions void for vagueness.

25 One of those provisions, the term "services" is the

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1 exact term that the government has inserted into the first two  
2 counts of the superseding indictment. We think that that --

3        THE COURT: There is a "to wit" phrase after that.

4        MR. MAHER: There is a "to wit."

5        There are multiple prongs to this argument, but  
6 looking at the charging statute --

7        THE COURT: It is not just "service" hanging out there  
8 with nothing attached to it, no more detail given to it.

9 Essentially we are back where you and I just started, military  
10 gear and currency, right?

11        MR. MAHER: Well, first before we get there, we're  
12 first dealing with a statute that is hopelessly vague for the  
13 reasons that the 9th Circuit has gone into, that the term  
14 "service" can mean anything and it subsumes all the other  
15 definitions within 2339 (B)(A), so you're starting off with a  
16 statute that under the Constitutional standard for vagueness,  
17 i.e., a statute that puts the ordinary citizen on notice as to  
18 what the law prohibits and it's vague in that it encourages or  
19 allows arbitrary and discriminatory enforcement by law  
20 enforcement because there isn't the guidance as to what it  
21 meant by service.

22        THE COURT: I know service is in there, but the  
23 additional detail sets out military gear and currency. So what

- 24 are we talking about service for? That is really a
- 25 hypothetical in this case, isn't it?

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1 MR. MAHER: Absolutely not. That is what he is being  
2 charged with. This is a prong under material support that  
3 Mr. Hashmi is being charged under. The first layer is that he  
4 is being charged under a statute that has been declared  
5 unconstitutionally vague by the 9th Circuit.

6 THE COURT: But in very, very different circumstances  
7 from here, right? Petitioning and teaching them how to seek  
8 humanitarian aid, that is not what we're talking about here.

9 MR. MAHER: How do we know that?

10 THE COURT: Because the indictment says "providing  
11 military gear to co-conspirators not named as defendants herein  
12 who transported the gear to Al Qaeda associates in South  
13 Karastan, Pakistan."

14 MR. MAHER: I think it is important to note.

15 THE COURT: That has nothing to do with teaching  
16 people how to petition the UN, which is what the Humanitarian  
17 Law Project talked about.

18 MR. MAHER: It is very important to note that this  
19 Humanitarian Law line of cases were from a civil lawsuit. That  
20 is where people on behalf of the Tamil groups affirmatively  
21 brought a lawsuit to say this is the type of aid we would like  
22 to give to these groups designated foreign terrorist  
23 organizations. That was the posture of this case as it has

24 wound up and down from the 9th Circuit and back and forth.

25 THE COURT: Seven times, you say?

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1 MR. MAHER: That was a guesstimate. But because it  
2 came through the posture of these groups affirmatively going to  
3 the courts to give us basically a declaratory judgment, that is  
4 different than the position that we're in here.

5 If, I submit, those groups had not first sued to get  
6 this type of declaratory relief and just went ahead and did it,  
7 they would be in the same position Mr. Hashmi would be in.

8 THE COURT: I don't understand your point.

9 MR. MAHER: They would have been charged with material  
10 support, they would have been charged with providing material  
11 support and providing expert assistance to the Tamil groups and  
12 providing material support in property and giving pleadings or  
13 filing papers on their behalf.

14 THE COURT: I certainly have the point, but I don't  
15 understand what the different procedural posture has to do with  
16 anything. At the end of the day I don't think that case is  
17 very applicable here because service, which is what they went  
18 in on, is more vague, in my view, particularly given what they  
19 were doing for a living than what we have here. So I don't  
20 actually see the relevance, and I think the procedural posture  
21 is of little moment.

22 MR. MAHER: I respectfully disagree. I think the  
23 court just acknowledged this term service is vague, and it is.

24 THE COURT: Is more vague. You are not listening to  
25 me.

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1 MR. MAHER: I am listening.

2 THE COURT: The reporter is here. Is more vague than  
3 military gear and currency.

4 MR. MAHER: Right. Again what we're doing is we're  
5 starting with the same statute. It is the same material in HLP  
6 and in here. We are starting with a flawed statute.

7 Then you couple that with not only services is  
8 hopelessly vague, but this term property, tangible and  
9 intangible, if that means anything.

10 THE COURT: It is not the end of the story, though.  
11 You are ignoring the remainder of the indictment and the  
12 discovery, which you may not do.

13 MR. MAHER: I am in Chapter 1, your Honor. There is  
14 more to the story. I haven't gotten there yet. We're starting  
15 with the original flaw, and the original flaw is the statute  
16 which is hopelessly vague for these provisions.

17 Service and this idea that if somebody gives property,  
18 either tangible or intangible, to a foreign terrorist  
19 organization, that they are then liable for 15 years in prison  
20 or life. "Intangible," as we know, means ideas, things that  
21 can be trademarked perhaps. That is what the statute says,  
22 intangible property.

23 If Mr. Hashmi wanted to give a slogan to Al Qaeda or a

- 24 group designated as FTO, that would be under this statute as it
- 25 is currently constructed.

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1 THE COURT: But it is not under this indictment as it  
2 is currently constructed.

3 MR. MAHER: It is in that there are two provisions  
4 that the government has gone after here. They have cited the  
5 property, tangible and intangible, which means the universe,  
6 and services.

7 What they didn't say, they didn't say safe houses,  
8 which is in the definition. One interpretation of what the  
9 government is saying is that Mr. Hashmi didn't provide anything  
10 to anybody. There is an interpretation of what the government  
11 is really trying to allege is that Mr. Hashmi allowed someone  
12 to stay in his apartment and that person had these items, kept  
13 them in Mr. Hashmi's apartment and then that person left.

14 Mr. Hashmi never touched anything, never went out of  
15 his way to provide anything. He merely provided what the  
16 government could at best consider a safe house. That is a  
17 definition in the material support definition. The government  
18 did not invoke that here. They chose to invoke property,  
19 tangible and intangible, and services, which likely are not  
20 going to apply at all to the specific facts.

21 The next layer then is the "to wit" part.

22 THE COURT: That is not a motion to dismiss. You're  
23 now talking about what kind of evidence might come in at trial.

24 That is not today's problem.

25 MR. MAHER: It is today's problem in that we are

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1 making an as applied vagueness challenge and we're also looking  
2 to --

3        THE COURT: We're doing, if we're doing as applied  
4 then, the question is whether or not the indictment provides  
5 folks of ordinary intelligence notice as to what conduct is  
6 prohibited and whether it encourages arbitrary enforcement on  
7 the part of the government.

8        If we are looking at providing or conspiring to  
9 provide military gear and currency to Al Qaeda, how is that not  
10 specific enough to put a person of ordinary intelligence on  
11 notice of what is prohibited and how is it not specific enough  
12 to prohibit, if you will, arbitrary enforcement?

13        MR. MAHER: Because if the government's theory is that  
14 the prohibited conduct that Mr. Hashmi displayed was allowing  
15 this person to keep this so-called gear, waterproof socks and  
16 ponchos in his apartment, that is a problem because a person of  
17 ordinary intelligence would not think that allowing a  
18 houseguest to keep luggage that they brought in that doesn't  
19 have any type of lethal characteristic and then they leave with  
20 that luggage, that somehow the person who let them stay there  
21 with this nonlethal clothing somehow provided material support  
22 to Al Qaeda. They would never think that.

23        THE COURT: However, you're ignoring the scienter

- 24 requirement which the Supreme Court says we may take into  
25 account in this argument. It is a very different thing to say

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1 some guy came in, spent the night at my house with a suitcase  
2 and he took his suitcase when he left, from some guy came in,  
3 spent the night in my house, brought with him raincoats,  
4 ponchos and waterproof socks which he was going to take to Al  
5 Qaeda, and knowing that Al Qaeda engages in terrorism  
6 activities, I allowed him to stay.

7 Those are two different things.

8 MR. MAHER: We disagree.

9 THE COURT: You can't disagree. The Supreme Court  
10 says we may take the scienter requirement into account in this  
11 argument.

12 MR. MAHER: The Supreme Court has never ruled in the  
13 context of 2339 (B) or 2339 (A), but we're stick on (B), that  
14 the scienter requirement in the 2004 amendment salvages this  
15 statute. It has never considered that.

16 THE COURT: No. If it did, we wouldn't be here,  
17 right? Right?

18 MR. MAHER: There is no precedent.

19 THE COURT: But the Supreme Court has said we may take  
20 into account a scienter requirement in a statute in determining  
21 whether it is overbroad, right?

22 MR. MAHER: It is a factor that the court may take  
23 into account.

24 THE COURT: Exactly.

25 MR. MAHER: I agree with that, but it is not

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1    determinative.

2            THE COURT: Of course not. There are lots of things

3    we take into account.

4            MR. MAHER: It is important to note because the court

5    is putting forth the argument that this scienter requirement

6    that was put in the 2004 amendment somehow saves the vagueness

7    that is otherwise there, now considering I am saying it is

8    vague.

9            THE COURT: I got that, all right?

10          MR. MAHER: But it doesn't, there is no Supreme Court

11    case that says at this point --

12          THE COURT: That is why we're here.

13          MR. MAHER: -- we have challenged that in this

14    specific instance, that this scienter requirement salvages this

15    statute, and we have put forth the reasons in the Al-Arian case

16    and dissent in Hammoud case by Justice Gregory that we think if

17    the Supreme Court gets this, that they would adopt.

18          Putting that argument aside as well, in the specifics

19    of this case there is the associational rights that are

20    encroached upon by this statute.

21          THE COURT: I don't understand that argument in the

22    least. There is nothing in the statute that prohibits the

23    defendant from associating with folks on its face. It is the

- 24 providing of material support. That is conduct. It is not
- 25 associational.

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1            MR. MAHER: There are a number of cases -- as the  
2 court is well aware from the briefs on both sides which have  
3 brought those to the court's attention -- that have made this  
4 line, they say, these courts, there is a distinction between  
5 the conduct and the free speech.

6            THE COURT: Yes, sir.

7            MR. MAHER: I think that is a line that does not hold.

8            THE COURT: The Supreme Court seems to think it holds  
9 the line.

10           MR. MAHER: Not specifically in the context of this  
11 material support statute.

12           THE COURT: Tell me what association is prohibited,  
13 sir, by the statute?

14           MR. MAHER: Well, right now currency is prohibited,  
15 providing of currency. But many --

16           THE COURT: That is conduct.

17           MR. MAHER: -- but it is also association. If you  
18 look at Buckley versus Valvo, all right, currency and providing  
19 of money has been seen by the Supreme Court as a core First  
20 Amendment right of expression, that there are certain parts of  
21 our First Amendment right to free speech that you cannot take  
22 in isolation from conduct.

23           Free speech and association does not exist in a

- 24 person's mind unless you have behavior that ties your thoughts  
25 to other people in the community, it is meaningless. So the

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1 courts can say in these cases that you have a right to free  
2 speech, but as long as you don't do anything with these groups  
3 that also have this same idea as you, it is a fallacy.

4 THE COURT: I don't understand this.

5 MR. MAHER: Let's take this. Many organizations have  
6 a membership fee.

7 THE COURT: All right. I saw that in your brief.

8 MR. MAHER: That is a standard thing.

9 THE COURT: I saw that.

10 MR. MAHER: Under this law, if you want to be a part  
11 of an association, you cannot pay that fee because --

12 THE COURT: I got that. That is actually my question  
13 for Mr. McGuire.

14 From your view, I wanted to know how this is  
15 associational and not specifically conduct, and even if there  
16 is some incidental infringement on First Amendment rights, we  
17 have a test for that. The Supreme Court told us in O'Brien  
18 what we're supposed to do here.

19 MR. MAHER: The problem it is not incidental.

20 As far as we can tell from the specifics in this case,  
21 the person who allegedly stored this material -- we'll call it  
22 material at this point -- in Mr. Hashmi's apartment was not a  
23 member of Al Qaeda. He was not a member.

24       What Mr. Hashmi is going to be put on trial for is his  
25   association with a person who is not a member of Al Qaeda and

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1 allowing that person within his privacy zone of his house.  
2 Mr. Hashmi has a right to associate with friends and  
3 acquaintances, to have house guests as long as he is not  
4 engaged in some type of criminal activity or trying to promote  
5 criminal activity.

6 Under the material support statute as it is construed  
7 now under 2339 (B), Mr. Hashmi can be convicted even if he has  
8 absolutely no intent whatsoever to further any criminal  
9 activity of Al Qaeda at all.

10 THE COURT: But if he has the intent in that he knows  
11 that the individuals who are being aided to whom he is giving  
12 the support are engaged in terrorism, that is different.

13 We certainly know that the government has a legitimate  
14 interest in curbing terrorism and curbing the provision of  
15 currency and military gear, just to take an example, to  
16 terrorist organizations even if it has some incidental  
17 infringement on one's First Amendment rights, right?

18 MR. MAHER: The court is going into the fourth part of  
19 the O'Brien standard.

20 THE COURT: Yes, sir. That is our test, right?

21 MR. MAHER: We would say the strict scrutiny incident  
22 here. Even looking at the O'Brien standard, we conceded there  
23 is a legitimate government interest in curbing terrorism. We

24 put that in our brief.

25 THE COURT: Yes.

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1            MR. MAHER: The other three factors we do not concede.

2            THE COURT: It is part of the Constitutional power of  
3 the government to curb aid to terrorism, right?

4            MR. MAHER: Not if it violates a U.S. Citizens'  
5 Constitutional protections, it cannot.

6            THE COURT: It is certainly part of the Constitutional  
7 power of the government, the first power of government. The  
8 first obligation of government is the safety of its citizenry.

9            MR. MAHER: The government can say it would make us  
10 safe if we locked up every Muslim in this country sua sponte,  
11 with no trial.

12           THE COURT: Then you're getting to the fourth factor,  
13 no greater than is necessary, right?

14           MR. MAHER: That is also subsumed in the first factor.

15           THE COURT: The government interest in curbing  
16 terrorism is present. There is no way you get around that.

17           MR. MAHER: That is the second factor.

18           THE COURT: It is within the Constitutional power of  
19 the government, that is, to keep the country safe, keep the  
20 country safe.

21           MR. MAHER: But again you can't --

22           THE COURT: 1 and 2 are fulfilled. 4, no greater than  
23 is necessary, and then the other, the third factor is whether

24 or not the governmental interest is unrelated to expression,  
25 and here it is. It is to the giving of material support. It

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1 is to conduct, just like in the bookstore case, St. Cloud, the  
2 name of it, where the store was selling all manner of books,  
3 but the charge was public prostitution and lewdness.

4        Well, the effect was that the bookstore was closed  
5 down, a much more serious infringement on First Amendment  
6 rights, it seems to me, but the other factors were met.

7        MR. MAHER: Your Honor, with this material support  
8 statute, what the government has, it has usurped unbridled  
9 power to go after citizens for any type of association with  
10 groups that the government has been making a political decision  
11 that some group is quote terrorist. This has a profoundly  
12 chilling effect.

13        THE COURT: Show me why it is associational when the  
14 statute speaks in terms of conduct, the giving of material  
15 support?

16        MR. MAHER: How can you associate with a group if part  
17 of the group's functioning, nonlegal functioning, incorporates  
18 having a membership dues so that the group can actually exist?

19        What if part of the group's function is to provide  
20 humanitarian assistance?

21        What if Mr. Hashmi, in allowing a person to stay in  
22 his apartment who had waterproof socks, what if he thought that  
23 those waterproof socks were going to go to victims of an

24 earthquake?

25 THE COURT: Then he wouldn't have the proper mens rea

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1 for the statute.

2 MR. MAHER: Wrong. Even if he thought that that  
3 person was going to give them to Al Qaeda, he absolutely would  
4 come under it.

5 THE COURT: Okay, then it is, I submit, within the  
6 valid interest of the government to prevent a terrorist  
7 organization from getting support, whether it is waterproof  
8 socks or waterproof underwear.

9 MR. MAHER: What happens is the government has gone  
10 too far in this balance. There is no countervailing. The  
11 government does not have unbridled power.

12 THE COURT: It is still directed at conduct, not  
13 expression. The example -- and I haven't gotten back to Mr.  
14 McGuire. I want to yell at him a little while if you you don't  
15 mind.

16 Let's hear what your answer is, please, Mr. McGuire,  
17 to Mr. Maher's example of the membership fee, right? Defendant  
18 pays a membership fees to Al Qaeda to associate?

19 MR. McGUIRE: The statute, your Honor, as you're well  
20 aware, was enacted by Congress to prohibit the provision of  
21 material support and resources to designated terrorist  
22 organizations to the fullest extent possible consistent with  
23 the Constitution. Those are the words that Congress used.

- 24 The payment of a membership fee, for example, if Al
- 25 Qaeda were to charge a membership fee, the government's view on

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1    that would be that that would be qualified as the provision of  
2    material support in the form of currency to a designated  
3    foreign terrorist organization.

4            THE COURT: Mr. Maher says that would infringe upon a  
5    defendant's associational rights.

6            MR. McGUIRE: Well, Mr. Maher was talking about  
7    various different types of hypotheticals. Obviously the test  
8    is not if there is a hypothetical out there, the statute is  
9    therefore, by definition, vague; therefore, unconstitutionally  
10   vague.

11           In the instance of where you pay a membership fee to a  
12   foreign terrorist organization, you are -- as your Honor noted  
13   earlier, there is conduct there -- you are providing in the  
14   form of currency or some kind of financial instrument a benefit  
15   to a designated foreign terrorist organization.

16           That is different, for example, than speaking out in  
17   favor of that organization. That is different, for example,  
18   than attending a demonstration, associating with other  
19   professed members of the organization. That type of  
20   association would not be, would not fall under the material  
21   support statute. That is where you get into the gray area that  
22   the 9th Circuit has recently addressed in their recent opinion.

23           There are certainly, as that opinion reveals,

- 24 instances where you can have difficulty in interpreting what  
25 may constitute material support and what does not. This case,

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1    though, we would submit, is not even close. This case falls  
2    within the core concerns of what the statute was enacted for,  
3    which is to say, military gear and money being provided with  
4    knowledge that Al Qaeda was engaged in terrorist activities.  
5    We are not on the fringe there. That is the question with  
6    respect to the vagueness argument that Mr. Maher is making.

7            Does the statute put his client on notice that his  
8    conduct would fall within it? I think unquestionably not only  
9    does it fall within it, it goes to the heart of the statute.

10            Secondly, under the vagueness analysis, the  
11    question is whether there would be some kind of unfettered  
12    enforcement. As your Honor found at the end of your opinion in  
13    the Shah case, because of the multiple definitions and the  
14    fairly specific definitions and language within this particular  
15    statute which was addressed, it prevents that kind of  
16    unfettered enforcement.

17            I think on both prongs, vagueness analysis with  
18    respect to these charges and not certain hypotheticals, we are  
19    addressing the core concerns that Congress had in enacting the  
20    statute this statute.

21            THE COURT: Mr. Maher.

22            MR. MAHER: I think we should look at the Iqbal Javid  
23    case. That was a prosecution brought in this district within

24 the last couple of years in which a man pled guilty to material  
25 support. The allegations were that this man helped with

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1    setting up satellite transmissions in Staten Island so that  
2    Al-Manar, a quote Hezbollah-affiliated television station, could  
3    be beamed to people in Staten Island and across the water a  
4    certain distance.

5            That is the slope we are on with this type of statute.  
6    That is an associational freedom, that if there is a right to a  
7    standard demonstration like Mr. McGuire says, and say what you  
8    want at the demonstration, but you don't have the means to  
9    transmit it, that is showing that his material support statute  
10   is used to cut off freedom of expression until you get to the  
11   point where it remains safely confined between a person's two  
12   ears.

13           THE COURT: Not today's problem.

14           MR. MAHER: It is today's problem in that Mr. Hashmi's  
15   indictment, the indictment against Mr. Hashmi, is infused with  
16   the vagueness, as we have said, from this idea that any  
17   property, both tangible and intangible, comes within the ambit  
18   of government prosecution and services that's unbridled, that  
19   is unbridled.

20           THE COURT: No. What we are talking about here is  
21   military gear and currency to an organization that the  
22   defendant knows is engaged in terrorist acts, that is what we  
23   are talking about here, to a person of reasonable intelligence,

24 he or she knows what is prohibited.

25 MR. MAHER: A person of reasonable intelligence would

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1 not think that allowing a houseguest to keep socks in his own  
2 luggage would be somehow construed as providing material  
3 support to Al Qaeda.

4 THE COURT: You and I just did this already. We just  
5 did this.

6 MR. MAHER: Not entirely, not entirely. These courts  
7 that the decisions we are talking about earlier, the scienter  
8 requirement don't take into account the Scales issue, which is  
9 the idea of personal guilt.

10 THE COURT: First of all, Scales was expressive.

11 Second of all, the requirement that a defendant know  
12 that the organization at issue was engaged in terrorist acts or  
13 any of the other "ors" is sufficient for personal guilt. By  
14 the way, I've already held that, but okay, in a different case,  
15 as you know.

16 MR. MAHER: I am well aware.

17 THE COURT: Yes. So it is not a Scales issue at all.

18 MR. MAHER: It is in that you don't have a scienter  
19 requirement under 2339 (B) as you do with 2339 (A).

20 THE COURT: Well, it just goes to show Congress knew  
21 how to do it when they wanted to do it, but determined not to  
22 do it here.

23 MR. MAHER: Because the legislative history is not

24 clear about that.

25 THE COURT: But the legislative history is clear on

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1 one thing: Congress intended to make the sweep of the statute  
2 as broad as possible within the bounds of the Constitution, and  
3 in requiring a more specific intention that the material  
4 support given further the terrorist activities of the group is  
5 inconsistent with the clear Congressional intent to exercise  
6 Congress's powers as broadly as possible, right?

7 MR. MAHER: I disagree.

8 THE COURT: How can you?

9 MR. MAHER: Because just by saying it should be as  
10 broad as possible, Congress, when they say that, also takes  
11 into account the limits that the Constitution puts on their  
12 action.

13 THE COURT: But of course.

14 MR. MAHER: The clearest limits come under the Bill of  
15 Rights, and the First Amendment comes under that. The freedom  
16 of association which again brings us back to Scales, the  
17 legislative history regarding 2339 (B) is not as clearcut.

18 You have a statement from Senator hatch where he  
19 basically makes it clear that Congress is looking to prohibit  
20 terroristic acts, acts. Allowing someone to keep nonlethal  
21 material such as socks in one's apartment is not consistent  
22 with a Congressional intent to stop terroristic acts. Those  
23 are completely different things.

- 24 But Mr. Hashmi now finds himself facing this statute,  
25 and again we are still not grounded in what is actually meant

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1 by military gear.

2 THE COURT: I suggest, among many other things, a  
3 statement by a senator is quite different from the published  
4 legislative history and the statement in the statute.

5 MR. MAHER: And the history is not indicative that  
6 Congress had an intent to viscerate the First Amendment.

7 THE COURT: Thank you for that.

8 It says Congress intended, Section 2339 (B), blah,  
9 blah, blah, "to prohibit the provision of support to foreign  
10 terrorist organizations" to the "fullest possible basis,  
11 consistent with the Constitution."

12 That is what Congress said, and making a more specific  
13 intent as required, that is, that the defendant intend the  
14 material support to further the organization's terrorist  
15 activities is not consistent with that statement.

16 MR. MAHER: I would argue that it is consistent with  
17 that statement if you read the statement as meaning that  
18 Congress recognizes that it cannot impinge upon people's First  
19 Amendment rights or their core Fifth Amendment due process  
20 rights.

21 THE COURT: Okay. We have already gone over that  
22 ground.

23 MR. MAHER: We disagree with each other.

24 THE COURT: What else did you want to discuss?

25 Mr. McGuire, did you have something else on this

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1    issue?

2            MR. McGUIRE: I only wanted to add, your Honor, that  
3    the plaintiffs in the Humanitarian Law Project case Mr. Maher  
4    relied upon earlier offered or requested that that court extend  
5    the Scales holding to invalidate this statute along the lines  
6    of what Mr. Maher is arguing. That court declined to do that  
7    as recently as a month ago for the reasons that your Honor  
8    stated.

9            Secondly, with respect to the Iqbal case --

10          THE COURT: Could I just interrupt for one minute?

11          You don't think it makes a difference what the  
12    procedural posture of the Humanitarian Law Project was  
13    vis-a-vis our case?

14          MR. McGUIRE: No. I think a vagueness challenge is a  
15    vagueness challenge.

16          Secondly, with respect to the Iqbal case, which was  
17    the case involving the projection of satellite programming on  
18    behalf of Hezbollah, it should be noted, I think, that in that  
19    case Judge Berman rejected essentially the same arguments  
20    Mr. Maher is making, the First Amendment arguments he is making  
21    here, and both defendants subsequent to that pled guilty to the  
22    material support charge there.

23          That, for the record, is worth knowing.

24 THE COURT: Thank you. Mr. Maher.

25 MR. MAHER: The final thing I want to end with, the

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1 cases that the government cites regarding the vagueness  
2 challenge, all of them dealt with the terms such as personnel  
3 and training. The only one that I saw -- and I could be wrong  
4 on this -- the only one I saw that dealt with the idea of this  
5 property, tangible or intangible, the closest would be the Assi  
6 case.

7        Again it is our position that that case is not the  
8 same as here because there the indictment was grounded in  
9 specific references of night vision goggles and thermal imaging  
10 equipment, which is very different here, where we have a range  
11 of whatever military gear could conceivably be meant by  
12 anybody.

13        THE COURT: Okay. Anything else?

14        MR. MAHER: I'll rely on my briefs for my other  
15 arguments.

16        THE COURT: Anything else from the government?

17        MR. McGUIRE: Only if the court has any questions?

18        THE COURT: No. I thought we probably beat the horse  
19 of bill of particulars.

20        Did you want to add anything on that, Mr. Maher? I  
21 thought we included that in our earlier argument.

22        MR. MAHER: It is included. We also had a reply that  
23 we filed with the court last week. I would just note there are

- 24 cases I didn't address in the reply, the idea that unindicted  
25 co-conspirators are not discoverable in a bill of particulars.

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1    There are clearly cases in the Second Circuit that hold the  
2    government's position on that. I would just point out there  
3    are other circuits that do that differently, particularly the  
4    11th Circuit.

5            THE COURT: Yes, you know, but we're here. You know  
6    how that works.

7            MR. MAHER: I am bringing it to this Court's  
8    attention.

9            THE COURT: Yes, sir.

10          MR. MAHER: It is not a crazy idea to want  
11    information.

12          THE COURT: It just isn't the idea our Court of  
13    Appeals has accepted.

14          MR. MAHER: Not yet.

15          THE COURT: All right. I got it.

16          The government took issue with your asking for the  
17    bill of particulars, and you put in your affidavit saying that  
18    you faxed the letter and didn't hear back. Do we think that  
19    constitutes conferring?

20          MR. MAHER: I will be clear. I sent that letter after  
21    I received their reply. So did I specific meet with them and  
22    set up a meeting with them beforehand and say we want a bill of  
23    particulars and let's confirm this? No, I didn't do that.

24 I discussed with them and told them beforehand I was  
25 going to file a bill of particulars. We talked about the

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1 indictment before. I did not make the same type of outreach  
2 that I did with that letter. I want to be clear on that. I  
3 didn't want to say I did something I didn't do.

4 THE COURT: Anything else today, Friends?

5 MR. McGUIRE: No, your Honor. I think we're next  
6 before you on March 5th.

7 THE COURT: Right.

8 MR. McGUIRE: Which has been rescheduled. The  
9 government respectfully requests time be excluded until March  
10 5th.

11 THE COURT: Mr. Maher, you're going to give me your  
12 papers on that Friday instead of the earlier date, and then you  
13 folks are going to come in and argue on March 5th instead of  
14 the Monday, right?

15 MR. MAHER: Yes.

16 THE COURT: The governments wants to exclude time  
17 until the Thursday. Is that alright with you?

18 MR. MAHER: Yes.

19 THE COURT: In order to give defense counsel adequate  
20 time to put in papers, and I hesitate to add, the court time to  
21 read the papers, time between whenever it was last ended and  
22 March 5th is excluded from calculation under the Speedy Trial  
23 Act in the interests of justice.

24        So that you will know and be able to prepare  
25 yourselves, the defendant's motions of today are denied. An

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1 opinion will follow. The request for a bill of particulars is  
2 denied. An opinion will follow. I'll see you on oral argument  
3 shortly.

4 May I ask you, and you can tell me if you want it on  
5 the record or not, may I ask you how we're doing looking toward  
6 a May trial date? Do you want this on the record, gents?

7 MR. MAHER: I think all parties are striving to do  
8 that. I don't know if it is going to be realistic. Our CIPA,  
9 we initially tried to have our defense CIPA notices due this  
10 week and from the government. There is no way we are going to  
11 be able to do that. We will ask for another month to do that,  
12 end of March to get that completed.

13 THE COURT: Do you have a sense as you stand here what  
14 the volume of material that will be, the subject of that notice  
15 will be?

16 MR. MAHER: I can't say. There is a possibility that  
17 it might not take up a tremendous amount of court time, there  
18 is that possibility, but it might be we still have decisions to  
19 make. I understand on some information that the government is  
20 going to allow us to potentially discuss with our client we  
21 couldn't before, which will also impact this.

22 THE COURT: Yes, sir.

23 MR. MAHER: I want to put the court on notice we put a

- 24 letter in asking for a formal extension of that. I guess the
- 25 parties will keep conferring and let the court know about trial

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1    dates.

2            THE COURT: Yes, sir. Anything to add?

3            MR. McGUIRE: No, Judge. I do think, as your Honor  
4 indicated, that that issue may be the one that either allows us  
5 to go forward or causes us to delay.

6            We have been conferring with Mr. Maher as to the small  
7 subset of this discovery that we intend on using, so hopefully  
8 that will inform his review of it, and as soon as we keep on  
9 telling the court, as soon as we have an idea of the timing of  
10 that, we'll be in touch.

11           THE COURT: All right. Whenever you folks have some  
12 idea, just let us know. It will help us with planning. Thank  
13 you, Friends. Good afternoon. I look forward to your papers  
14 and seeing you on March 5.

15           (Court adjourned)

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