

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE KIMBERLY J. MUELLER, JUDGE

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 2:13-CR-00082

MATTHEW KEYS,

Volume 6

Pages 625 through 790

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

VOLUME 6

MONDAY, OCTOBER 5, 2015, 8:30 A.M.

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(Appearances continued next page...)

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INDEX

GOVERNMENT'S WITNESSES:

PAGE:

JOHN CAUTHEN

DIRECT EXAMINATION (Cont'd) BY MR. SILVER	628
CROSS-EXAMINATION BY MR. LEIDERMAN	650
REDIRECT EXAMINATION BY MR. SILVER	701

GERALD DEL CORE

DIRECT EXAMINATION BY MR. SEGAL	704
CROSS-EXAMINATION BY MR. JAFFE	713
REDIRECT EXAMINATION BY MR. SEGAL	717

GOVERNMENT'S EXHIBITS RECEIVED IN EVIDENCE

NO.:

DESCRIPTION:

PAGE:

612	IRC chat	634
613	IRC chat	634

1 SACRAMENTO, CALIFORNIA

2 MONDAY, OCTOBER 5, 2015, 8:37 A.M.

3 ---o0o---

4 (Jury not present.)

5 THE CLERK: Calling criminal matter 13-0082, the United
6 States versus Matthew Keys, jury trial, day six, Your Honor.

7 THE COURT: All right. Good morning.

8 MR. LEIDERMAN: Good morning.

9 THE COURT: All counsel are present. Agent Cauthen is
10 in the hall?

11 MR. SEGAL: Yes, Your Honor.

12 THE COURT: All right. And Mr. Keys is present?

13 MR. LEIDERMAN: Mr. Keys is present.

14 THE COURT: Yes. And I had forgotten to bid farewell
15 to Mr. Ekeland. I'll advise the jury that he had previously
16 let the Court know that he needed to be someplace else and that
17 everyone has agreed to proceeding without him.

18 How much longer with Agent Cauthen this morning? Still
19 about an hour and a half?

20 MR. SILVER: I would say closer to 45 minutes, Your
21 Honor.

22 THE COURT: All right. Do you have any estimate on
23 cross at this point?

24 MR. LEIDERMAN: It's difficult to tell. The best I
25 could do is tell the government somewhere between half an hour

1 and an hour.

2 THE COURT: All right.

3 MR. LEIDERMAN: But that's real rough, Your Honor.

4 THE COURT: All right. And then how many more
5 witnesses will the government be calling?

6 MR. SEGAL: One.

7 THE COURT: And how long will that witness take?

8 MR. SEGAL: Short as I can. It's Jerry Del Core. He
9 was the station manager at the time this was all going on. I'm
10 going to ask him how much time he spent and sit him down.

11 THE COURT: So is the parties' proposal -- that would
12 mean that we could move into closing today if we were done with
13 jury instructions. But obviously we have a fair amount of work
14 to do on those.

15 So is the thought we would excuse the jury early today?

16 MR. SEGAL: That's ours, yeah. I think --

17 THE COURT: Mr. Leiderman?

18 MR. LEIDERMAN: I'm not going to force them into
19 closing if they don't want to, yeah.

20 THE COURT: And are we still talking about two hours
21 each closing?

22 MR. HEMESATH: Yes, conservative --

23 THE COURT: No more than two hours.

24 MR. HEMESATH: No more than two hours.

25 THE COURT: I'm going to make that a hard limit.

1 MR. HEMESATH: Yes, that's I would say the upper limit.

2 THE COURT: Mr. Leiderman?

3 MR. LEIDERMAN: I can be done in two hours comfortably.

4 THE COURT: All right. Well, I'm going to advise the
5 jury that it looks as if we'll excuse them early today because
6 we're a little ahead of schedule at this point and then be
7 ready to start with closing tomorrow morning. I may say 9:00
8 tomorrow morning just to make certain we'll all done with jury
9 instructions.

10 But I guess my thought is they might want to stay later
11 tomorrow once the case goes to them. We'll try to get a sense
12 of that before they leave today. Mr. Streeter can check with
13 them on that.

14 All right. Let's call the jury in. You can bring the
15 agent in.

16 (Jury present.)

17 THE COURT: You may be seated.

18 Welcome back, Ladies and Gentlemen of the jury. We
19 hope you had a good weekend. We are ready to go again.

20 I'm just letting you know what I know at this point
21 about the schedule. It appears that Agent Cauthen will be on
22 the stand for another couple of hours total. That could --
23 that's give or take. And then we'll have one more witness, and
24 then the presentation of evidence may be concluded. We never
25 know until the parties tell us for certain.

1 So it may be that we excuse you a bit early today but
2 with the plan of having closing argument tomorrow morning, and
3 then I would instruct you. And so Ms. Streeter will check with
4 you before you leave today to see if you had a chance to think
5 about your schedule once you retire. I'm quite certain the
6 case will go to you tomorrow, and the question is would you
7 want to work past the normal 1:30 end date to deliberate and
8 would you want to work Wednesday morning. So we'll check with
9 you later on that. That's what I know.

10 Mr. Silver.

11 JOHN CAUTHEN, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN

12 THE COURT: And you were sworn last week, Agent
13 Cauthen. You continue to testify subject to that oath.

14 Understood?

15 THE WITNESS: Yes, ma'am.

16 THE COURT: All right.

17 MR. SILVER: Thank you, Your Honor.

18 DIRECT EXAMINATION (Continued)

19 BY MR. SILVER:

20 Q. Good morning, Agent Cauthen.

21 A. Good morning.

22 Q. When we broke last week, we were discussing, among other
23 things, Tribune CMS logs; is that right?

24 A. Yes.

25 Q. And those are logs from Tribune Company's content

1 management system?

2 A. Yes.

3 Q. Did you examine those logs with regard to records relating
4 to Samantha Cohen, formerly Samantha Scholbrock?

5 A. Yes, I did.

6 Q. And did you find anything significant?

7 A. Yes.

8 MR. SILVER: Next slide, please.

9 Q. Agent Cauthen, can you walk us through these log entries
10 with regard to what is significant in them?

11 A. Yes.

12 So what these log entries reflect --

13 UNIDENTIFIED JUROR: We can't see it.

14 THE COURT: Is the screen showing at all? There's
15 nothing on the screen. All right. There we go.

16 THE WITNESS: So what these log entries reflect are the
17 dates and times that correspond with the e-mails that Samantha
18 Cohen provided describing the problems that she was having
19 logging in.

20 And so I went through those e-mails, and I correlated
21 what was going on, the times of the e-mails with what was
22 happening in the logs. And in that I could see that changes
23 were being made to her credentials. And if you recall, by
24 credentials, I mean the username and password were being --
25 something about that was being edited.

1 And so there's several dates here that correlate to
2 those e-mails, the 6th, the 8th, and the 14th. And those edits
3 were coming from a VPN IP address that belonged to Overplay.
4 And those edits all came from an Apple computer using a Firefox
5 browser.

6 BY MR. SILVER:

7 Q. Agent Cauthen, is this the same 91.172 address that we were
8 discussing on Friday?

9 A. Previous, yes.

10 MR. SILVER: Next page, please.

11 Q. And there in orange are Overplay logs at the bottom?

12 A. Yes.

13 Q. Showing that same 91.172 IP address?

14 A. Yes. And those are the log entries from Overplay that
15 correlate with those exact times as well, indicating the origin
16 and the Overplay user assigned.

17 MR. SILVER: Next slide, please.

18 Q. Agent Cauthen, did you testify last week regarding a 75.204
19 IP address?

20 A. Yes, I did.

21 Q. And did you testify regarding AT&T records pertaining to
22 that IP address?

23 A. Yes, I did.

24 Q. And did those indicate the user of that IP address?

25 A. They did. Those belong to Matthew Keys.

1 Q. Did you look at the CMS logs with an eye for this 75.204 IP
2 address?

3 A. Yes.

4 MR. SILVER: Let's just start with the top four here,
5 zoom in.

6 Q. Agent Cauthen, what is significant here?

7 A. There's a couple things that are significant here.

8 The first thing that is significant is the date. It's
9 January 2nd, 2011. The second thing that is significant is the
10 IP address, the 75.204. And, of course, that belongs or is
11 assigned to Matthew Keys himself in his home here in
12 Sacramento.

13 The third thing that is interesting about this is the user
14 agent. It shows that it's an Apple computer using Firefox.
15 And, finally, it shows that they're on the Tribune CMS log-in
16 screen.

17 Q. So Overplay is out of the connection here, it's straight
18 from the residential AT&T IP address to the CMS logs?

19 A. Correct.

20 MR. SILVER: If we could zoom in on the bottom half as
21 well, please.

22 Q. How about these, Agent Cauthen? What is significant here?

23 A. Well, this is similar except for the third one down. Where
24 all the others are get commands, essentially the computer is
25 sending the information, which would happen just by landing on

1 that screen.

2 The post command means that something was sent to the
3 computer, and it was sent to the log-in module, meaning there
4 was some sort of attempt to log in.

5 But --

6 THE COURT: Wait for the next question.

7 THE WITNESS: I'm sorry.

8 BY MR. SILVER:

9 Q. And that was the post command rather than the get command
10 you said?

11 A. Correct.

12 MR. SILVER: Next slide, please.

13 Q. Agent Cauthen, here you're comparing two different IP
14 addresses, both starting with 75.53?

15 A. Correct.

16 Q. Does the fact they both start with the same four numbers
17 have any significance?

18 A. Yes.

19 Q. And what significance is that?

20 A. On the Internet, these IP addresses are critical to, ah,
21 making sure data goes from one computer to another computer,
22 and they are assigned. So, in this instance, all the IP
23 addresses that start with 75.53 belong to AT&T, and AT&T
24 reassigns that to their customers when they buy Internet
25 service. So the fact that it's 75.53 is significant in that

1 it's still AT&T in both instances.

2 That's all I have to say about that.

3 Q. And you had previously discussed the 75.11 IP address in
4 connection with the M. Keys username; is that right?

5 A. Correct.

6 Q. What was the relationship there, if any?

7 A. Well, that was an IP used by Matthew Keys when he was
8 working at Fox 40 and up until December the 8th, and then his
9 IP address was changed to the 75.204 on or about December 8th.

10 Q. And the entries from these 2 IP addresses, these two AT&T
11 IP addresses, do they both have the same user agent string?

12 A. They do.

13 MR. SILVER: Next slide, please.

14 Q. Did you find the 75.204 IP address in another one of the
15 sources of electronic evidence that you reviewed?

16 A. I did, yes.

17 Q. And where was that?

18 A. I found that in those IRC chat logs as well.

19 MR. SILVER: Next slide, please. Thank you.

20 Q. Agent Cauthen, do these excerpts come from Exhibit 614
21 through 616?

22 A. I -- I don't remember from last week. I'll have to check.

23 Q. You'll be able to check the binder. Thanks.

24 A. I believe it's 612 through 616.

25 Q. Thank you.

1 Agent Cauthen, what is significant in these IRC excerpts?

2 A. Well, there's three things that are important.

3 The first thing of interest is, of course, the dates on
4 those excerpts. Each identified several different dates from
5 December through January.

6 THE COURT: Let me just check. 612 and 613 I do not
7 believe are in. 614 through 616 are.

8 Is the defense stipulating to 612 and 613 as well?

9 MR. LEIDERMAN: I have to see what they are.

10 (Counsel conferring.)

11 THE COURT: Let's just take a moment to make certain.

12 I've told you before that the slide show itself is not
13 an exhibit, but the documents on which the witness is relying
14 are exhibits.

15 MR. SILVER: I understand from the defense that they're
16 comfortable stipulating to these as well, Your Honor.

17 MR. LEIDERMAN: I thought we had already --

18 THE COURT: All right.

19 MR. LEIDERMAN: These are from the same series of
20 evidence that we had previously stipulated to.

21 THE COURT: All right. Well, 612 and 613 are in, then.

22 (GOVERNMENT'S EXHIBITS 612 and 613, IRC chats,
23 ADMITTED INTO EVIDENCE.)

24 THE COURT: You may continue.

25 THE WITNESS: I was talking about dates here. There

1 are several dates on the screen between December and January.
2 The second thing of interest is, of course, the reference to
3 AEScracked and some of the connections. And then the final
4 thing is the fact that AEScracked in these channels is coming
5 directly from the IP address 75.204, which goes back directly
6 to Matthew Keys' home.

7 BY MR. SILVER:

8 Q. So, again, no Overplay here. Straight from the residential
9 AT&T IP address to the IRC chat logs?

10 A. Correct. There's no VPN connection. It's just a direct
11 connection.

12 MR. SILVER: If we could zoom out, please, and zoom in
13 on the bottom half.

14 Q. And here, Agent Cauthen, is this the same type of data
15 being displayed?

16 A. That's correct. The second one shows AEScracked, and there
17 are specific references to this being -- relating to the
18 Internet Feds IRC chat channel.

19 Q. Agent Cauthen, last week you discussed your execution of a
20 search warrant at Mr. Keys' residence.

21 Did you review the contents of digital devices that were
22 seized from that search warrant?

23 A. Yes, I did.

24 MR. SILVER: If we could go forward two slides, please.

25 Q. Agent Cauthen, is this slide based on Exhibit 505?

1 A. I forgot the specific number. I'd have to refer to the
2 notes here.

3 Q. Okay.

4 A. Yes, that's Exhibit 505.

5 Q. And what is significant about this image here?

6 A. Well, this is an image that -- is what you would see or a
7 portion of what you would see if you logged on directly to the
8 CMS. After you've logged in, you would see this on your
9 screen. So it's an actual image that would appear on the CMS
10 itself after logging in successfully.

11 Q. And where did you find this, Agent Cauthen?

12 A. I found this on Matthew Keys' digital media in one of the
13 external hard drives.

14 Q. Did you find any information -- is -- let me rephrase.

15 Is this what some might call a screenshot or a screen grab?

16 A. Yes. This could be created by a screenshot or a screen
17 grab.

18 Q. Did you find any information about when this screen grab
19 was created?

20 A. Yes.

21 MR. SILVER: Next slide, please.

22 Q. Agent Cauthen, can you walk us through this information,
23 please?

24 A. Yes.

25 The name of this file is screenshot 2010-12-11 and

1 11.32.28am.png. And what this tells you is that it was
2 essentially a screenshot using an Apple computer. And when
3 you're using an Apple computer, it automatically names whatever
4 you're taking a screenshot of with the word "screenshot," and
5 then it plugs in the date and the time and gives it a PNG,
6 which tells the computer that it's a graphic type of image.

7 So the name of this file as 2010.12.11 indicates that it
8 was a screenshot taken on December 11th at 11:32 in the
9 morning.

10 Q. Agent Cauthen, did you then go to the Tribune CMS logs to
11 look for entries from the same time?

12 A. Yes. Yes, I did. It's so long ago. I saw what the CMS
13 logs recorded by a person who might be on the CMS.

14 MR. SILVER: Next slide, please.

15 Q. And what are we looking at here, Agent Cauthen, in green?

16 A. What the green is, is the actual log entry that correlates
17 to whoever was on the CMS at that exact time of 11:32 a.m. on
18 December the 11th. And we see that it comes back to an IP
19 address, 91.172, which is an Overplay VPN IP address.

20 It refers to username test1234, which we saw before with
21 the e-mail collection. It shows the exact time, December 11th
22 at 11:32. And it has the user agent indicating that it's an
23 Apple computer with a Firefox browser.

24 MR. SILVER: If we could zoom in.

25 Q. Was there a corresponding Overplay record as well for this

1 particular date and time?

2 A. There was. The corresponding Overplay record shows that
3 the person assigned IP address 91.172 was in fact Matthew Keys,
4 with his username of Keys JOM, from his IP address in his
5 house, 75.204, which was the one assigned to him there by AT&T.
6 So it was Matthew Keys who was on the CMS on December the 11th
7 with that picture, and it was Matthew Keys who made that screen
8 grab from the CMS.

9 MR. SILVER: Next slide, please. Next slide, please.

10 Q. Agent Cauthen, did you also find this image on Mr. Keys'
11 digital devices?

12 A. Yes.

13 Q. And could you check Exhibit 503. Is that the exhibit this
14 slide is based on?

15 A. Yes.

16 Q. Agent Cauthen, what is depicted here?

17 A. That is a picture of the alteration on the Los Angeles
18 Times that was affected from the changes to -- or the
19 unauthorized access to the CMS.

20 MR. SILVER: Next slide, please.

21 Q. Did that picture have any dates -- I'm sorry -- data
22 showing when it was created?

23 A. Yes.

24 Q. And what did that data show?

25 A. The file data shows that file was created on December 15th,

1 2010, at about 4:32 in the morning Sacramento time.

2 Q. Did you find other --

3 MR. SILVER: Next slide, please.

4 Q. Did you find other files in the computer from the same time
5 period?

6 A. Yes, I did.

7 Q. And can you explain to us what we're looking at here? And
8 I'll start by zooming in on the top half.

9 First, Agent Cauthen, you see the FBI note on the top
10 right. That's something that you added, right?

11 A. Yes, I did.

12 Q. That was not on this original file?

13 A. No. I wrote that in there in red.

14 Q. Can you explain to the jury what that note means?

15 A. So if you look to the left of that note, you'll see
16 something written by Sharpie, referring to imgur.com and
17 zhzus.jpg. That's called a hyperlink, and if you click on
18 that, it takes you someplace on the Internet.

19 And I did this back in August of 2015, I actually went and
20 went to that website and found that that picture that we saw,
21 the Chippy 1337, the screen grab from December I think it was
22 15th, it's still there. And so I looked at the two pictures
23 and identified them as being the same. It's the Chippy 1337,
24 which was the web page defacement which was the one we found on
25 Matthew Keys, also dated for December 15th at 4:32.

1 And if you look to the right -- oh, I'm sorry.

2 Q. Agent Cauthen, you were referring to something to the right
3 of this?

4 A. Right.

5 If you look to the right, you may not be able to see this
6 well, but you'll see some time stamps there. And right next to
7 that, you'll see 4:30 a.m., 4:32 a.m. And so what that tells
8 you is that picture was created on Matthew Keys' computer, that
9 screen grab was created on December 15th at 4:32 a.m.

10 Which is exactly the same time that this IRC chat
11 conversation is occurring, which is where Sharpie posts the
12 link to that image indicating that Matthew Keys clicked on a
13 link, and that's how that was created on his computer.

14 Q. Agent Cauthen, what program did this image come from?

15 A. That image is created as a screen grab when Matthew Keys
16 created it, and it's an image depicting a colloquy, an IRC chat
17 conversation.

18 Q. And Colloquy is the IRC program that came up during your
19 conversation with Mr. Keys?

20 A. Yes, it is.

21 Q. And what is Colloquy?

22 A. Colloquy is an IRC client. It's a program that allows you,
23 using an Apple computer system, to participate in the IRC chat
24 channels.

25 Q. And can you walk us through this conversation beginning

1 after the discussion of the link?

2 A. Yes. So what you have here is Sharpie talking -- he's
3 posted the link to the picture, the defaced website.

4 He says, I taught myself the -- there's a spelling error
5 here -- system using N. Garcia, N. Garcia being a username on
6 the CMS. He makes his correction, he puts asterisk system.

7 AESCracked replies, LOL.

8 Sharpie goes on, And had a whole front page layout made for
9 the Chicago Tribune.

10 AESCracked asks, Is it live?

11 Sharpie says, But, damn, their system admins were good.

12 System admins are the people that are responsible for
13 running the computer system, making sure it's working properly
14 and making sure that it's secure.

15 Sharpie goes on, Now they killed me. That was up for half
16 an hour.

17 AESCracked replies, Screenshot?

18 Sharpie, No.

19 AESCracked, Sucks.

20 Sharpie goes on, I meant the L.A. Times was up for half an
21 hour. And it's spelled incorrectly.

22 AESCracked replies, I can grant you access again.

23 Sharpie, That would be great. I know how to use it now.

24 Q. If we could zoom in on the bottom portion, please.

25 A. Now it's about 4:33 in the morning.

1 Sharpie says, I know how to use it now.

2 AESCracked says, Stand by. Have to VPN to cover my tracks.

3 That's using Overplay as a VPN service or some other
4 service such as.

5 AESCracked goes on, I -- ah, already. And I don't know
6 what NVM is.

7 Sharpie says, I see that you can do a bunch of different
8 layouts on different papers.

9 AESCracked interjects, Damn, they cut off my account.

10 Sharpie continues from his previous line, And have them all
11 go live at the same time.

12 AES continues, Hang on. Nope, I'm locked out for good.

13 I don't need to read the next one, and then the next one is
14 an unhappy face. And Sharpie says, Yeah.

15 MR. SILVER: Next slide, please.

16 Q. Did you find other files on Mr. Keys' devices from this
17 same time period?

18 A. Yes, I did.

19 Q. And what were they?

20 A. Now, this is another picture referring to the web page
21 story alteration on the L.A. Times. This was created on
22 December 15th at 4:45 a.m., about 15 minutes after the first
23 one.

24 Q. Could you check Exhibit 504, please.

25 A. And that is Exhibit 504.

1 Q. Did the colloquy chat we were just looking at, did it
2 continue?

3 A. It did.

4 MR. SILVER: Next slide, please. Thanks.

5 Q. Agent Cauthen, if you could start there and walk us through
6 this one.

7 A. So this is about 4:35 in the morning.

8 AESCracked goes on talking in his conversation with
9 Sharpie, Let me see if I can find some other users/pass --
10 passwords -- I created while there.

11 Sharpie, All those other accounts were dead in minutes, and
12 they found N. Garcia damn quick. I got to give props to the
13 sys admins, meaning he's congratulating the systems
14 administrators. He corrects it and says admin.

15 AESCracked, LOL.

16 Sharpie, Any joy? Meaning were you successful?

17 AESCracked, Not yet.

18 Sharpie, Okay, Bro.

19 AESCracked, Will check a little later for sure.

20 Sharpie, I think he's saying after five minutes anyway.

21 Cool, and then some sort of emoticon.

22 AESCracked, I have a hard drive full of Tribune crap, but
23 it's in another location.

24 Sharpie, Thanks.

25 AESCracked, Sure thing.

1 Sharpie, That was such a buzz having my edit on the L.A.
2 Times.

3 AESCracked, Nice.

4 Sharpie, I could have done so much more if I had known the
5 interface at the start. It's both easy and complicated.

6 Q. Agent Cauthen, did you look at the Tribune CMS logs for
7 entries at the same time period?

8 A. Yes, I did.

9 MR. SILVER: Next slide, please.

10 Q. These are not in green like they usually are because you
11 used a different software program to retrieve these?

12 MR. LEIDERMAN: I'm going to object as leading.

13 THE COURT: Sustained.

14 BY MR. SILVER:

15 Q. Agent Cauthen, can you explain why these are not in green?

16 A. Yes.

17 Q. Why is that?

18 A. Because I used Excel to open the logs with this, and the
19 other ones were just a text. So -- because you're seeing it in
20 Excel, it's the same data, but it's just presented differently
21 in Excel. I did a screen grab to create that in lieu of a cut
22 and paste, and so I couldn't change the color to green.

23 MR. SILVER: Can we zoom in any more on these?

24 Q. Agent Cauthen, first turning your attention to the IP
25 address on the left, is this the same IP address for all of

1 these entries?

2 A. It is.

3 Q. And is it one we've discussed previously?

4 A. It is. This is the 91.172, which is one of the Overplay
5 VPN IP addresses assigned to Matthew Keys.

6 MR. SILVER: If we could zoom out from there.

7 Q. Agent Cauthen, I see the word or the phrase "log-in module"
8 here. Is that significant?

9 A. Yes.

10 Q. What is the significance of the log-in module on these
11 entries?

12 A. The significance is it indicates a log-in or attempt to log
13 in to the CMS, and it occurs at the same time this chat
14 conversation is going on where Matthew Keys as AEScracked is
15 telling Sharpie I'm trying to get back in.

16 It shows it's a VPN IP address assigned to Overplay, which
17 Overplay has told us belongs to Matthew Keys.

18 Q. And how many entries in total are depicted here?

19 A. I'm having a little trouble seeing that. Bear with me a
20 moment.

21 Q. That's okay. That's okay.

22 And this is exhibit -- can you check Exhibit 307, please.

23 A. Thank you.

24 So this is better defined in Exhibit 307. There are nine
25 entries.

1 Q. Agent Cauthen, did you review multiple IRC channels with an
2 eye toward entries by AEScracked?

3 A. Yes, I did.

4 MR. SILVER: If we could go forward two slides, please.

5 Q. Could you check Exhibit 603, please.

6 A. Yes, I have it.

7 Q. And this is from the IRC channel Target?

8 A. Yes.

9 MR. SILVER: Next slide, please.

10 Q. If you could check Exhibit 602-13.

11 A. Yes.

12 Q. And this is from a different channel, the Command channel?

13 A. Yes, pound command IRC.

14 MR. SILVER: Next slide, please.

15 Q. This is from the Operation Payback channel?

16 A. Yes.

17 Q. And is this based on Exhibit 605?

18 A. Yes.

19 MR. SILVER: Next slide, please.

20 Q. Is this from 606?

21 A. Yes.

22 Q. This is the Operation Payback channel?

23 A. Yes.

24 MR. SILVER: Next slide, please.

25 Q. Can you check the second page of 611.

1 A. Yes.

2 Q. That's where this is from?

3 A. Correct.

4 Q. And this is the Internet Feds channel?

5 A. That's correct.

6 MR. SILVER: Next slide, please.

7 Q. Is this from Exhibit 607?

8 A. That's correct.

9 MR. SILVER: Could we zoom it so it has those two lines
10 by AEScracked, please. Thank you.

11 Q. Agent Cauthen, drawing your attention to the web link at
12 the bottom of that excerpt, did you go to that link?

13 A. I did.

14 Q. And what was there?

15 A. That's an opinion piece, a story written by the L.A. Times
16 back in December 2010 titled Why the WikiLeaks are not quite
17 Rosa Parks.

18 MR. SILVER: Next slide, please.

19 Q. Is this from Exhibit 608?

20 A. Yes, it is.

21 MR. SILVER: Next slide, please.

22 Q. Is this 603?

23 A. This one is not 603. I can look for it quickly here.

24 Q. Why don't we go to the next one.

25 THE COURT: I think that's a good plan. Next question.

1 BY MR. SILVER:

2 Q. Agent Cauthen, is this from the Operation Payback --

3 A. Yes.

4 Q. -- channel?

5 MR. SILVER: And the next slide, please.

6 Q. This is also from Operation Payback?

7 A. Yes.

8 Q. Agent Cauthen, stepping away from the IRC logs for one
9 question about the CMS entries.

10 Between October -- I'm sorry.

11 Between November and January, how many entries in the CMS
12 logs do you associate with Matthew Keys?

13 A. Hundreds, if not thousands. I didn't specifically count
14 them up, there were too many.

15 MR. SILVER: Your Honor, if I may have one moment to
16 confer with co-counsel.

17 THE COURT: You may.

18 (Government counsel conferring.)

19 MR. SILVER: Your Honor, the direct is done except we
20 would like just a bit of time to reopen later to pin down the
21 exact numbers those excerpts came from.

22 THE COURT: All right. I'll allow that if you're able
23 to do so.

24 MR. SILVER: Thank you.

25 THE COURT: Mr. Leiderman, are you ready?

1 MR. LEIDERMAN: Yes, one second.

2 (Defense counsel conferring.)

3 THE COURT: Before Mr. Leiderman begins, let me also
4 make certain you understand. You probably have noticed that
5 Mr. Ekeland is not with us this morning, and I forgot to advise
6 you on Friday that Mr. Ekeland has previously let the Court
7 know that his schedule had a conflict, he was not able to be
8 with us this week, and so the Court granted him permission to
9 not be here this week. His client is fine with that, his
10 co-counsel and opposing counsel. So you should read nothing
11 into his absence.

12 All right. Mr. Leiderman.

13 MR. LEIDERMAN: May I start by briefly approaching the
14 witness, please?

15 THE COURT: With --

16 MR. LEIDERMAN: A late-breaking exhibit.

17 THE COURT: All right. Have you shown that to the
18 government?

19 MR. LEIDERMAN: I have.

20 THE COURT: All right. You may approach.

21 MR. LEIDERMAN: Thank you.

22 THE COURT: Do you have a courtesy copy for the Court?
23 If you could hand that to Ms. Streeter, who is covering for
24 Ms. Schultz this morning.

25 /////

CROSS-EXAMINATION

BY MR. LEIDERMAN:

Q. I am going to ask you some questions about that first just really briefly. And I want you to listen to the questions closely because I don't want you going outside of what would be permissible.

A. Yes, sir.

Q. In the top left-hand corner, do you see a logo?

A. Yes.

Q. Do you recognize that logo?

A. Yes.

Q. Does that logo correspond with something you used a number of times?

A. Yes.

Q. Okay. What then does that, at least that front page -- you haven't flipped through it, have you?

A. No.

Q. What then does that front page purport to be?

A. A cached version of a web page.

Q. And what website would it be from? The -- what's the website commonly called?

A. The Wayback Machine?

Q. Yes. Okay. And you're not talking about the Wayback Machine from the Sherman and Peabody cartoons, right?

A. No.

1 Q. What is the Wayback Machine?

2 A. The Wayback Machine is an Internet service, provided I
3 believe by Google, that offers cached versions of web pages.

4 Q. And what is a cached version of a web page?

5 A. It's essentially a picture of what the web page looked like
6 at a particular date.

7 Q. Are you familiar with something called archive.org?

8 A. Yes, and I think that is associated with the Wayback
9 Machine --

10 Q. And --

11 A. -- as far as --

12 Q. -- does Google own archive.org?

13 A. I don't know.

14 Q. Okay. The Wayback Machine is on archive.org and not
15 necessarily Google?

16 A. I think -- I believe you're correct.

17 Q. Okay. But with the amount of things that Google owns, it's
18 possible that they own anything on the Internet?

19 A. Anything is possible.

20 Q. Okay. So we're going to talk about archive.org and the
21 Wayback Machine. How does the Wayback Machine function?

22 You want a better question than that?

23 A. No.

24 Q. Okay.

25 A. The Wayback Machine goes out to the Internet and takes

1 pictures of websites and stores them and notes the date.

2 Q. Notes the date and the exact time that the snapshot was
3 taken?

4 A. I don't recall. I think so.

5 Q. Okay. If you can look, then, at the -- not the slug line,
6 the line at the bottom of the page. I forgot what it's called.

7 What's it called, the little line at the bottom of the page
8 that tells you what website you visited?

9 A. The URL?

10 Q. It has another -- I know the URL. Never mind. Never mind.

11 If you could look at the URL, does that tell you whether
12 it's down to the precise second?

13 Are you able to see it that small?

14 A. I can see it. I'm not confident about the meaning of the
15 URL.

16 Q. Okay.

17 A. I can see there is something that appears to be a date and
18 a time and then some numbers.

19 Q. And that --

20 THE COURT: The Court's exhibit sticker is covering
21 part of the line you're referring to, so I don't know if that's
22 the case on the witness's copy.

23 MR. LEIDERMAN: It isn't.

24 THE COURT: All right.

25 MR. LEIDERMAN: I apologize for that.

1 THE COURT: All right. That's all right. I just
2 wanted to make certain the witness is looking at the same thing
3 you're referring to.

4 MR. LEIDERMAN: Okay.

5 THE COURT: All right.

6 BY MR. LEIDERMAN:

7 Q. So you don't know for sure if that, like -- well, for
8 example, on that one does it purport to be from perhaps 2014 in
9 December, on the 14th of December, and then it gives you six
10 more numbers?

11 A. Yes.

12 Q. And those six more numbers, if I'm remembering correctly,
13 are -- correspond to, like, 5:00 in the afternoon, something
14 like that? Would be read as numerical chronological time?

15 A. I --

16 Q. You'd have to speculate?

17 A. I would have to speculate. I'm sorry.

18 Q. Is that at least --

19 THE COURT: You said 2014? Is that what you meant?

20 MR. LEIDERMAN: Didn't I -- I said the 14th of December
21 2010.

22 THE COURT: I think you said 2014. You meant 2010?

23 MR. LEIDERMAN: If I said 2014, I clearly meant 2010,
24 Your Honor. I apologize.

25 THE COURT: All right. Did you understand the question

1 to mean 2010?

2 THE WITNESS: Yes, Your Honor, I did.

3 THE COURT: All right.

4 BY MR. LEIDERMAN:

5 Q. What website does that appear to be a cached copy of?

6 A. Www.latimes.com.

7 Q. And that would be what we call the front page of the L.A.
8 Times?

9 A. I believe that is the front page.

10 Q. Is it fair to say some days the Wayback Machine captures
11 several different times of a particular website?

12 A. I'm not clear how the machine actually works or how many
13 times per day it would capture a website or which days of the
14 week.

15 Q. Well, are you familiar with it being random, some websites
16 it will pick up once a week, once every two weeks, and some
17 websites it will pick up several times a day?

18 A. I don't use it enough -- I do know it seems to me, based on
19 my experience, that it's sporadic in terms of the dates and
20 times that it captures.

21 Q. So even on a site like the L.A. Times, it might miss a day?

22 A. It's possible.

23 Q. Anything is possible.

24 But a site like the L.A. Times would be captured more often
25 than, for example, like -- I don't know, my law office website

1 or -- or this court's home page or something like that?

2 A. I don't know.

3 Q. Okay. You're not an expert on the Wayback Machine?

4 A. I don't use it a lot. It's not something I rely upon.

5 Q. But it is something that is generally reliable; is that
6 fair to say?

7 A. I don't rely on it.

8 Q. I'm just going -- you can't tell me anything more than
9 what's on the paper, and I'm just going to ask you in terms of
10 what's on the paper, if you can look on it, whether the Chippy
11 1337 story has been archived in at least just that version of
12 the Wayback Machine from December of 2010.

13 A. I understand.

14 Q. If you could just take a look and see.

15 A. Oh.

16 It's pretty small print. I need to really look just to
17 make sure I get the right answer. I'm sorry I'm taking so
18 long.

19 THE COURT: Take as much time as you need.

20 MR. LEIDERMAN: Go ahead.

21 Could I have a second to confer with the government?

22 THE COURT: You may.

23 (Counsel conferring.)

24 THE COURT: If the jury wants to stand and stretch
25 quietly without making any noise or talking, you may do that.

1 I heard that yawn.

2 (Pause in proceedings.)

3 MR. LEIDERMAN: Okay.

4 THE WITNESS: I think I'm ready.

5 MR. LEIDERMAN: You think you're ready.

6 Q. Do you have the question in mind?

7 A. Could you repeat it, please?

8 Q. Okay. Do you see the Chippy 1337 story there?

9 A. I do not.

10 Q. Presuming that is the only archived copy from -- on the
11 Wayback Machine from December 14th, 2010, then the story would
12 not be on the Wayback Machine, assuming hypothetically, right?

13 MR. SILVER: Objection, calls for speculation.

14 THE COURT: Sustained.

15 BY MR. LEIDERMAN:

16 Q. If there's only one cached version of a web page on a day
17 on the Wayback Machine, and it doesn't contain a specific item
18 that you're looking for, that means it's not there, correct?

19 A. If I understand your question, you're asking if it's not
20 there, then it's not there?

21 Q. That's what I'm asking.

22 A. Then I agree with that.

23 Q. Okay. Can you just put that toward the defense binder, the
24 six pages that I gave you.

25 Are you familiar with the kind of nuts and bolts of how

1 VPNs and proxy servers work?

2 A. Nuts and bolts, I have a familiarity with them. I believe
3 so.

4 Q. Much more so than the average person might?

5 A. I would assume so, yes.

6 Q. You have some specialized training in these areas?

7 A. I do.

8 Q. Likewise of IRC, you have some kind of specialized training
9 there?

10 A. General training in IRC. I haven't personally used it, I
11 haven't personally set up on an IRC server, but I have reviewed
12 thousands of IRC logs.

13 Q. Is that what we heard from Mr. Kulesza about IRCs kind of
14 generally, if you know?

15 A. I don't know.

16 Q. Are you familiar with the culture and the language
17 from hacktivist forums like -- are you familiar with the term
18 "hacktivist"?

19 A. I am.

20 Q. What does that word mean?

21 A. Portmanteau.

22 Q. Okay. It's P-O-R-T-M-A-N-T-E-A-U.

23 Portmanteau is a scripting together of two words for lack
24 of a more elegant term?

25 A. In English I think so, but in French it means raincoat.

1 Q. Is that right?

2 THE COURT: This is a tutorial on a whole range of
3 things.

4 MR. LEIDERMAN: This is great subject matter, Your
5 Honor.

6 THE COURT: We're back in school.

7 MR. LEIDERMAN: Okay.

8 Q. Presuming I'm not asking about a raincoat, what does
9 hacktivist mean?

10 A. Hacktivism is a term used -- you'll see it in the
11 newspapers. It refers to people that hack or break into
12 computer systems or do cyber crimes for political purposes.

13 Q. And would you consider Anonymous, capital A Anonymous to be
14 a hacktivist group?

15 A. Anonymous is a very large organization and very diffuse, so
16 I can't be specific in terms of the characterization of the
17 organization as a whole.

18 Q. That's fair enough.

19 How about are there parts or portions, clicks within
20 Anonymous that walk the walk of hacktivists?

21 MR. SILVER: Objection to foundation and hearsay.

22 THE COURT: Overruled. If you know.

23 THE WITNESS: There are individuals that claim to be
24 part of Anonymous that purport to be hacktivists, yes.

25 MR. LEIDERMAN: Okay.

1 Q. And you say that purport to be. There were some that were
2 actually been arrested and convicted for being so; is that --

3 MR. SILVER: Objection.

4 THE COURT: Sustained.

5 BY MR. LEIDERMAN:

6 Q. Would there be what you would consider hacktivists in the
7 Internet Feds chat room?

8 A. I don't -- I can't characterize them as such.

9 Q. Do you have a personal opinion of the people in the
10 Internet Feds room that is preventing you from characterizing
11 them? Or is it just too broad a term to characterize?

12 A. Well, I believe in this case, you know, when you talk about
13 hacktivism and the people in the Internet Feds chat room, I
14 think some of them may have said they were doing hacktivism
15 things or the intent of what they were doing was for political
16 reasons. Having said that, I also believe what they were doing
17 was criminal acts. And so I don't want to, ah, indicate that
18 what they were doing as hacktivists legitimized the criminal
19 activity.

20 Q. I understand entirely. Thank you, sir.

21 But at the time, at least some of them thought they were
22 hacking for right or justice or whatever it might be?

23 MR. SILVER: Objection, relevance.

24 THE COURT: Overruled.

25 THE WITNESS: I don't recall that in the Internet Feds

1 chat room, but I do recall that on other chat sites by others.

2 BY MR. LEIDERMAN:

3 Q. Such as Operation Payback?

4 A. That might be a good example. I don't -- I can't -- I
5 can't point to a specific instance, but my recollection of that
6 chat room was that there were people indicating, ah, political
7 feelings about what was going on in the chat room.

8 Q. Okay. Without getting into it further, other than maybe a
9 yes or no answer if it suits the question, wasn't Operation
10 Payback itself a political operation, a political motive?

11 MR. SILVER: Objection, the document speaks for itself.
12 The excerpts speak for themselves.

13 THE COURT: Overruled. Overruled.

14 THE WITNESS: The actual history of Operation Payback,
15 I don't have enough information to give you an accurate answer.
16 I'm sorry.

17 BY MR. LEIDERMAN:

18 Q. Okay. You said the history of it.

19 Are you familiar with what -- again, just yes or no -- with
20 what Operation Payback was about?

21 A. Yes.

22 Q. Okay. That was -- would readily be characterized as
23 political, no?

24 A. Well, the problem I am having is I don't remember when it
25 started or how it started. And I haven't read all of the logs

1 regarding Operation Payback, and I don't know the history of it
2 and the participants' history of it. I focused on a very
3 narrow subset, and I know it goes back a long time.

4 Q. Okay. Are you familiar -- without telling us what that
5 title was, are you familiar with the second title that was
6 given to sort of the December 8th, 9th and 10th portions of
7 Operation Payback?

8 It had to do with a certain individual.

9 A. I think so.

10 Q. Okay. So before I ask you another question, I need to know
11 to what degree -- to what degree of certainty -- you say you
12 think so. You have reasonable confidence in it?

13 A. I have a reasonable confidence, and I know the general
14 subject matter, but not the specific name of the chat channel
15 or the participants.

16 Q. Okay. Let me ask you this.

17 Do you know the targets that were hit on December 8th, 9th
18 and 10th, separate and apart from --

19 A. I think so.

20 Q. Okay. And that then would be a political motive, correct?

21 MR. SILVER: Objection, foundation.

22 THE COURT: Do you want him to lay more of a
23 foundation?

24 MR. LEIDERMAN: I can.

25 THE COURT: I'll sustain subject to laying a

1 foundation.

2 MR. SILVER: The foundation seems to be hearsay, Your
3 Honor.

4 THE COURT: Overruled. You can try to lay a
5 foundation.

6 MR. LEIDERMAN: Okay.

7 Q. On December 8th, 9th and 10th, were there a series of
8 attacks by Anonymous on websites Paypal, Amazon, Visa and
9 Mastercard having to do with a banking blockade of WikiLeaks
10 and Julian Assange?

11 A. You have refreshed my memory. Thank you. That is correct.

12 Q. Okay. And was that portion of the operation referred to as
13 Operation Avenge Assange?

14 A. I don't recall that name, but I do remember the event.

15 Q. Okay. And did that portion of the operation conglomerate,
16 did people come into the Operation Payback channel?

17 A. I don't know where they all came from, but there are a lot
18 of people in Operation Payback, and they were discussing in
19 that time frame Assange and the WikiLeaks and attacks on
20 financial institutions.

21 Q. Okay. And you said you knew Operation Payback as an
22 older -- as an order operation.

23 Did Operation Payback itself start with kind of a tit for
24 tat, this being the tat portion of the tit for tat, with the
25 RIAA, the Recording Industry Association of America?

1 A. I don't know if that was the start of it, but there were --
2 there was talk about that early on, earlier on in that chat
3 room.

4 Q. And that it started from the recording industry actually
5 hiring people from India to hit servers that were sharing --
6 unlawfully sharing music?

7 A. I don't know about that.

8 Q. Operation Payback was a very busy chat room as of December
9 8th, 9th, and 10th; fair to say?

10 A. Yes.

11 Q. Okay. In this specific case, you reviewed VPN logs sent by
12 Overplay?

13 A. Yes.

14 Q. And I believe you already testified -- I know you already
15 testified to this, but I'm just reviewing.

16 You went over chat logs relevant to -- relevant to the date
17 range in question?

18 A. Yes.

19 Q. As well as CMS logs?

20 A. Yes.

21 Q. In terms of Overplay, the IP addresses from Overplay
22 were -- you used the term "geolocate." Do you recall?

23 A. I used that in the context of IP address 75.11. In terms
24 of the --

25 Q. Was that the Switzerland one?

1 A. No, that was Matthew Keys' home IP address.

2 Q. Okay. For the one that resolved to his address; is that
3 fair to say?

4 A. It resolved to -- yes, here in Sacramento. It resolved to
5 Matthew Keys in Sacramento.

6 Q. Matthew Keys' address?

7 A. No, the 75.204 went back to his address.

8 Q. Right.

9 A. I didn't have records for the 75.211 linking to an address.
10 It had already been superseded by the 75.204 one that had
11 replaced it.

12 Q. What date range was the 75.211?

13 A. I don't know the start date, but the -- it ended, I
14 believe, on December the 12th, 2010.

15 And I believe, according to the log --

16 Q. Sorry, sir. There's no question pending. You've answered
17 the last one. Thank you.

18 A. Okay.

19 Q. Okay. I'm going to use geolocated again, this time with
20 respect to Switzerland.

21 Overplay geolocated their IP addresses, one to Switzerland;
22 is that right?

23 A. I believe that's correct, yes.

24 Q. And another to somewhere in the UK?

25 A. I believe the radius server was in the UK. Ah, there were

1 others in France and other European countries. I don't recall
2 off the top of my head which one was one.

3 Q. Fair enough.

4 There were multiple addresses, correct?

5 A. Yes.

6 Q. And the logs we've seen show routing out that ties -- that
7 you've tied out to IP addresses to the Keys JOM account?

8 A. Yes.

9 Q. Are you aware that VPN services regularly route multiple
10 users through a given IP address?

11 A. Yes.

12 Q. Okay. Which, in other words, is more traffic than just the
13 Keys JOM is going through that one IP address in the UK or
14 France or Switzerland; is that --

15 A. Correct.

16 Q. All right. Going back to the IRC, I want to talk to you
17 about locking or registering a nick, N-I-C-K.

18 What is a nick?

19 A. A nick stands for nickname. AEScracked was a nick, as an
20 example.

21 Q. And that's the language that people use in IRC about these,
22 they call it a nick?

23 A. Yes.

24 Q. No one wants to type nickname; is that what's going on?

25 A. I don't know why they do it. I would assume so.

1 Q. Yeah.

2 But that's the point of all these sort of shortcuts, right?

3 A. I believe it is, yes.

4 Q. Yeah.

5 No one wants to type out laugh out loud, so they do LOL?

6 A. I think that's the case.

7 Q. Okay. I had one for you.

8 You said AFK was after five minutes. Sharpie telling

9 Mr. Keys AFK 5 minutes you thought was after five minutes.

10 You ever heard of the term "AFK" is away from keyboard,
11 I'll be gone for five minutes?

12 A. You could be right. I might have misread that.

13 Q. There are an awful lot of these little shortcuts, aren't
14 there?

15 A. There are.

16 Q. Okay. One was -- you know more than me, but one I saw was
17 NVM.

18 Did you know what that was?

19 A. I don't.

20 Q. That was never mind maybe --

21 A. Okay.

22 Q. -- in the context. I'm just -- that's it, going back to
23 that.

24 All right. So someone used the nickname AEScracked in the
25 Internet Feds channel, correct?

1 A. Yes.

2 Q. And you're basically familiar with how usernames work on
3 IRC, correct?

4 A. Correct.

5 Q. And you heard Mr. Kulesza's testimony, correct?

6 A. Yes.

7 Q. So some servers will allow a username to be registered?

8 A. Yes.

9 Q. And you're aware that the Internet Feds channel allowed
10 usernames to be registered. Yes?

11 A. I don't remember.

12 Q. You don't remember?

13 A. I'm sorry.

14 Q. Okay. You don't know -- are you or are you not aware that,
15 for example, the Sabu and Kayla nicknames were registered,
16 logged?

17 A. I don't know.

18 Q. So what would be the purpose of registering something,
19 registering a nick on an IRC?

20 Let me ask a better question.

21 One of the purposes of registering a nick on an IRC is so
22 when you go in, everyone knows it's you?

23 A. Okay. Yes.

24 Q. You sure?

25 A. That sounds reasonable. I'm not 100-percent confident of

1 all the reasons why a person might want to have their name
2 registered, but that sounds reasonable.

3 Q. Okay. And the another one would be to keep other people
4 from using that nick, correct?

5 A. That sounds correct, yes.

6 Q. You started this investigation in December of 2010, right?

7 A. I did.

8 Q. Were you familiar with really who all these people in
9 Internet Feds were?

10 A. No.

11 Q. Did you become familiar with the grand majority of the
12 people that were in the Internet Feds chat room sometime
13 after -- I see you're nodding already -- sometime after
14 December of 2010?

15 A. Yes.

16 Q. And without saying why or who, most especially after
17 June -- early June, June 8th or so, 2011?

18 A. I don't remember the dates.

19 Q. Okay. But is that when everything came into full focus or
20 at least began to come into focus?

21 A. That day doesn't actually ring a bell other than the fact
22 that it's my birthday.

23 Q. Oh. I'd say happy birthday, but I don't think it's June.

24 A. Thank you.

25 Q. Sure.

1 I'll say it this way, then. There was one big arrest, and
2 that led to a good deal of information that shed light on the
3 Internet Feds chat room; is that fair?

4 MR. SILVER: Objection, hearsay, relevance.

5 THE COURT: Overruled.

6 THE WITNESS: There were a lot of arrests that we made
7 relating -- when I say we, I mean the FBI -- made relating to,
8 you know, these hacking groups.

9 BY MR. LEIDERMAN:

10 Q. Internet Feds specifically?

11 A. Internet Feds.

12 MR. SEGAL: Objection, Your Honor, this is covered by a
13 motion in limine.

14 THE COURT: I understand that.

15 THE WITNESS: I'm trying to think. I think -- I think
16 I know what you're talking about, and I'm happy to talk about
17 it.

18 MR. LEIDERMAN: Okay. Well, that was --

19 THE WITNESS: But I'm not confident.

20 MR. LEIDERMAN: That was all I wanted to know is if
21 that brought the picture into clearer focus, and I think it
22 really was June 8th, 2011.

23 THE WITNESS: And I think you're right, it was.

24 MR. LEIDERMAN: Okay.

25 Q. And it was at that time, six, seven months later that at

1 least the government began to understand who these people were;
2 is that fair to say?

3 A. Oh, no, I don't think that's accurate. I think we had been
4 working on it prior to that.

5 Q. Wasn't from almost a whole year after, or at least until
6 March of 2012, that the general public became aware of sort of
7 who these people were, real names, actual capabilities, jobs,
8 training, things like that?

9 MR. SILVER: Objection, calls for speculation.

10 THE COURT: Sustained.

11 BY MR. LEIDERMAN:

12 Q. Was it sometime -- did some event happen on March 6th,
13 2012?

14 A. I don't remember a specific date, on March the 6th, but I
15 do recall several big events that happened relating to various
16 arrests that were made.

17 Q. Well, let me ask it this way.

18 Were there some indictments unsealed in March of 2012, in
19 early 2012?

20 MR. SILVER: Objection, covered by a motion in limine.

21 THE COURT: Well, it's not just that. Let me just make
22 certain the jury understands.

23 There's only one case being tried here, and whatever
24 might have happened in another case is not relevant to this
25 case. To the extent, Mr. Leiderman is trying to chart a

1 timeline, I'm allowing some very general questions, and that's
2 all, given the witness's answers so far. So for the purposes
3 of charting a timeline, these general questions are allowed.

4 MR. LEIDERMAN: Okay.

5 Q. Some indictments happened then in March 2012 that give the
6 public a broader view of who these people were?

7 A. I don't remember the dates of the indictments, and I don't
8 remember when they were unsealed, but I do have a recollection
9 about a series of indictments that were released to the public.
10 And I do recall a number of arrests.

11 Q. Do you recall a news story that was written by Matthew Keys
12 when he worked for Reuters in March of 2012?

13 MR. SILVER: Objection, hearsay.

14 THE COURT: Overruled. You can answer yes or no.

15 THE WITNESS: Could you repeat the question? Who wrote
16 it?

17 MR. LEIDERMAN: Matthew Keys.

18 THE COURT: Just yes or no.

19 THE WITNESS: No.

20 BY MR. LEIDERMAN:

21 Q. As far as you're aware then, as you sit there now, the only
22 use of the screenshots that you purported to have found on
23 Matthew Keys' computer was to give to a woman named Parmy
24 Olson, the only actual use of them?

25 MR. SILVER: Objection, calls for speculation.

1 MR. LEIDERMAN: I asked if he knows.

2 THE COURT: Overruled.

3 THE WITNESS: I believe that in the interview that we
4 listened to on the tape, there were several reasons he
5 discussed. One was to protect himself.

6 MR. LEIDERMAN: No, no, no. I asked the actual use,
7 what he did with them, who he gave them to journalistically.

8 THE WITNESS: Oh, journalistically who he gave them to?

9 MR. SILVER: Objection, foundation.

10 THE COURT: Is this still does he know?

11 MR. LEIDERMAN: Yes.

12 THE COURT: All right. So yes or no.

13 THE WITNESS: Yes.

14 MR. LEIDERMAN: Okay.

15 Q. And you believe that one person to be a writer named Parmy
16 Olson?

17 A. No. I'm sorry. Maybe I didn't answer the question
18 properly.

19 I believe he did release and have the snapshots, and one of
20 the people he released it to was Parmy Olson.

21 Q. Okay. Parmy Olson was a journalist?

22 A. Yes.

23 Q. A writer for Forbes that covered Anonymous?

24 A. Covered Anonymous, yes.

25 Q. And another person would be Adrian Chen; is that right?

1 A. That sounds familiar. I don't know all the people.

2 Q. Would another publication be Gawker?

3 A. I don't know.

4 Q. Fair to say you don't recall?

5 A. Ah, no. But fair to say it's not an area of investigation
6 in terms of where he sent all the screenshots to. I don't know
7 the full universe of where he would have sent the
8 screenshots -- or the altered screenshots, where they were sent
9 or to whom.

10 Q. The takeaway, though, is the screenshots were used by
11 journalists; is that right?

12 A. Somewhere, yes.

13 Q. Did Mr. Keys ever refer to himself as a member of
14 Anonymous?

15 MR. SILVER: Objection, hearsay.

16 THE COURT: Again, overruled. Yes or no.

17 THE WITNESS: I don't recall a specific instance, no.

18 BY MR. LEIDERMAN:

19 Q. He referred to himself many times, though, as a journalist
20 observing the proceedings, correct? And that's part of the
21 tape that you played?

22 A. Yes.

23 Q. Were you already contacted by the -- someone at Tribune
24 Company, the larger Tribune Company including the affiliates,
25 before December 14th, 2010?

1 A. Yes.

2 Q. Was that person Brandon Mercer that contacted you first or
3 do you -- well, let me ask the question differently.

4 Do you know who contacted you first?

5 A. Yes.

6 Q. Who was that?

7 A. Brandon Mercer.

8 Q. Do you know what date that was?

9 A. December 2nd. Sorry. Yes.

10 Q. December 2nd, 2010?

11 A. Yes.

12 Q. And then the L.A. Times, of course, was edited on December
13 14th, 2010?

14 A. Yes.

15 Q. And that's the Chippy article at issue here?

16 A. Yes.

17 Q. And part of your duties were to review what happened with
18 that -- you refer to it as a defacement?

19 A. I --

20 Q. The term that people use --

21 A. Are you referring to the hack at the L.A. Times?

22 Q. The Chippy incident.

23 A. The Chippy incident, I refer to that as a hack, a computer
24 intrusion. And part of that was there was a web page
25 defacement.

1 Q. Okay. So then I'm asking about the web page defacement.

2 Part of your duties was to review information about the
3 response time that the Tribune and L.A. Times employees sent
4 you?

5 A. Yes.

6 Q. To step back for a moment, where is the CMS itself located,
7 physically located, if you know?

8 A. I believe the server in the -- at least for the portion
9 that manages the L.A. Times is in -- and for Fox 40 is in Los
10 Angeles.

11 Q. And who controls that physical location? Is it Tribune
12 Company or is it a third party vendor?

13 A. I don't know.

14 Q. Are you familiar with something that I'm going to refer to
15 as N. Garcia edits or how about N. Garcia defacement?

16 A. Yes.

17 Q. That occurred at 3:49 p.m. Pacific time; is that right?

18 A. That time doesn't sound right to me. Is it -- if I could
19 refer to my notes.

20 Q. Hold on one second.

21 Why don't we go ahead and refer to that. I want to get the
22 times right.

23 THE COURT: Referring to an exhibit or the power point?

24 BY MR. LEIDERMAN:

25 Q. Is there an exhibit that would refresh your recollection?

1 A. I don't know if it's an exhibit, but in the report on the
2 Tribune -- that Tribune prepared, they pulled the logs for the
3 actual edit. In that it shows the N. Garcia and the exact
4 time.

5 Q. Okay. Are you able to readily find that?

6 A. I'll look for it as fast as I can.

7 Q. Well, I can get it real quick. So --

8 A. Okay. I'm ready.

9 MR. LEIDERMAN: Excuse me one moment, Your Honor.

10 THE COURT: All right.

11 BY MR. LEIDERMAN:

12 Q. 3:49 p.m. Pacific standard time is when it went up? Does
13 that sound right?

14 A. I -- in my head, I had 2:49, but can I look at the exhibit
15 just to verify I'm correct? Did you read it off of there? If
16 you did, then that's correct.

17 Q. I --

18 A. I'm sorry.

19 Q. And it was up for 40 minutes till 4:29 p.m. Pacific
20 standard time?

21 MR. SILVER: Objection, the witness has not been able
22 to refresh his recollection as to the time.

23 MR. LEIDERMAN: If he knows.

24 THE COURT: Sustained. Well, ask the question again.

25 BY MR. LEIDERMAN:

1 Q. Was the article up just a short while?

2 A. On the website, yes. If you just are talking about the
3 website, but not the mobile.

4 Q. Let's talk about the mobile.

5 The mobile was up longer than the website, is that some of
6 the testimony that you've heard in this trial?

7 A. Correct.

8 Q. You've been sitting through this trial inside the
9 courtroom, correct?

10 A. That's correct.

11 Q. You're something known as, designated as an investigating
12 officer?

13 A. I don't know the term.

14 Q. Okay.

15 A. But that sounds right.

16 Q. But you're allowed -- because you're the case agent, you're
17 allowed to sit at counsel table?

18 A. That's what I'm told, yes.

19 Q. And you've been sitting at counsel table?

20 A. Yes.

21 Q. No one has kicked you out?

22 A. Ah, no.

23 Q. Okay. Has everybody been nice to you?

24 A. Yes.

25 Q. Okay. Good.

1 You've heard testimony that it was up a short while,
2 approximately 40 minutes?

3 A. That's correct.

4 Q. And that it came down during the time of a shift change,
5 which would be around 5:00 o'clock?

6 A. That sounds correct. Up for 40 minutes is my recollection.

7 Q. Okay. Changes were rolled back by Mr. Hanrahan?

8 A. Yes.

9 Q. Well, I think I've asked that.

10 THE COURT: You do have a little more yet?

11 MR. LEIDERMAN: I do have a little more, yes.

12 THE COURT: I think we should take our midmorning
13 break, our first break. We've been going for an hour and a
14 half.

15 During that break, and it can be a 15-minute break,
16 please remember my admonitions not to discuss the case, not to
17 do any research. If anyone does discuss the case with you,
18 please let me know.

19 Have a good break.

20 (Jury not present.)

21 THE COURT: You may step down. Just be back in 15
22 minutes. If you are looking for an exhibit, that's fine, too.

23 THE WITNESS: Yeah, I'm trying to find that --

24 THE COURT: How much longer, Mr. Leiderman, just an
25 estimate?

1 MR. LEIDERMAN: I'm sorry. I'm looking, Your Honor.

2 THE COURT: All right. You can let me know when we
3 come back.

4 MR. LEIDERMAN: Less than 45 minutes, more than 25.

5 THE COURT: All right. All right. Then redirect?

6 MR. SEGAL: Your Honor, from the motions in limine, we
7 thought that there would be no mention of any other charges
8 against other people.

9 THE COURT: I granted it without prejudice. I had
10 mentioned to the defense I needed some authority. We're not
11 getting into the guts of those. I think I've clarified for the
12 jury what I understand the defense --

13 MR. SEGAL: Well, I'm not asking you to reconsider.

14 THE COURT: If you want me to give a further clarifying
15 instruction, I'm willing to consider that.

16 MR. SEGAL: No, I just want to know if it's going to
17 come up any more in the examination, because then I would want
18 to be heard.

19 THE COURT: You want to ask --

20 MR. LEIDERMAN: No, it isn't. I wanted to establish
21 something that I wasn't able to establish through this witness,
22 number one. And, number two, it's part of the linear argument
23 or the linear facts for argument, and I'm not going any further
24 than that. And I think I was judicious where I went with that.
25 I didn't use names, and I built a straight timeline on it.

1 MR. SEGAL: And that's the thing. If it's going to be
2 used for argument, the relevancy has to be constrained by what
3 the Court instructed, which is, you know, there's nothing about
4 these -- about that fact except that it helps establish some
5 date.

6 THE COURT: Well, the defense is on notice of the
7 government objection. You can meet and confer. What I've
8 clarified is I understood it is being used to plot a
9 chronology, and that's what I've clarified for the jury.

10 MR. LEIDERMAN: And that's what I've said.

11 THE COURT: All right. Anything else?

12 MR. SEGAL: No. Thank you, Your Honor.

13 MR. LEIDERMAN: No.

14 THE COURT: All right.

15 THE WITNESS: I did find that --

16 THE COURT: Well, tell your counsel that.

17 All right.

18 THE WITNESS: So I can talk to them?

19 THE COURT: Just so you hear what I'm hearing, Agent
20 Cauthen said he found the exhibit that he would have referred
21 to I think on direct.

22 MR. LEIDERMAN: So did we.

23 THE COURT: So you've now heard that, and you can do
24 with it whatever you want.

25 MR. SEGAL: The e-mail exhibit or the 349 --

1 THE COURT: He has identified the exhibit that he would
2 have referenced --

3 THE WITNESS: Exhibit 301.

4 MR. LEIDERMAN: The chart?

5 THE WITNESS: The chart I was looking for.

6 MR. SEGAL: We got that, too.

7 THE COURT: All right. So now you may step down and
8 not talk to government's counsel.

9 (Recess taken.)

10 THE COURT: Let's bring the jury back in. I think
11 we're likely to get through the presentation of evidence before
12 the next break?

13 MR. LEIDERMAN: Yes, I think so.

14 MR. SEGAL: Our next witness is quite short --

15 THE COURT: All right.

16 MR. SEGAL: -- in duration and stature.

17 THE COURT: Counsel, stay behind the table while the
18 jury comes in, including Mr. Leiderman.

19 (Jury present.)

20 THE COURT: All right. Welcome back. You may be
21 seated. And we will continue with the cross-examination of
22 Agent Cauthen.

23 MR. LEIDERMAN: Agent Cauthen, I wanted to go back to
24 one point just to clean something up.

25 Q. Were you able to find I believe it was Exhibit 301?

1 A. Yes.

2 Q. Okay. Did that refresh your recollection as to the times
3 regarding the L.A. -- or the times regarding the L.A. Times
4 story?

5 A. Yes.

6 Q. Was it in fact 3:49 to 4:29 p.m.?

7 A. Central standard time.

8 Q. Central standard time?

9 A. Yes.

10 Q. Okay. And that was the last of Mr. Hanrahan's edits was at
11 4:29 p.m. central standard time?

12 A. The last edit was at 4:30 central standard time.

13 Q. 4:30. Okay.

14 All right. We were talking about the mobile site when we
15 quit.

16 When was the mobile site last updated with the Chippy 1337
17 story?

18 A. Do you mean when it was created or when was it modified
19 last?

20 Q. When was it modified last?

21 A. I don't know.

22 Q. When did it first appear on the mobile site?

23 A. I don't have a specific time for that. I don't know.

24 Q. Any other articles on the L.A. Times edited that day that
25 you were able to find?

1 A. Were any articles edited for that day?

2 Q. Other than the Chippy 1337, any other articles?

3 A. I don't know.

4 Q. You ever review the official Tribune time logs?

5 A. The official Tribune time logs?

6 Q. If they exist.

7 A. Could you --

8 Q. Well, let's do this.

9 Do official Tribune time logs, time stamps, timecards exist
10 for the people that we've seen in this case?

11 A. I don't know.

12 Q. Did you ever review their financial data?

13 A. Other than what they provided to me, no.

14 Q. They provided you verbal testimony. Yes?

15 A. Correct.

16 Q. You ever look at any of their tax returns?

17 A. No.

18 Q. Did you ever subpoena the Tribune Company for their
19 salaries?

20 A. I don't recall.

21 Q. Let's go to Fox 40.

22 Did you ever pull salaries there?

23 A. Pull salaries there? I asked them about salaries from
24 people that worked there, yes.

25 Q. You asked the people what their salaries were?

1 A. Yes.

2 Q. You never subpoenaed or did anything to officially confirm
3 that?

4 A. I don't recall.

5 Q. Well, you would recall if you had done something, wouldn't
6 you?

7 A. If I had notes in front of me, I might. I have a log that
8 keeps track of all the subpoenas that we issued. I'm trying to
9 be very truthful in all of my answers. I just don't have a
10 recollection of sending subpoenas there.

11 I do recall sending subpoenas -- I'll slow down.

12 I recall sending subpoenas. Some of these subpoenas, ah,
13 may have included salary information. But I don't have a
14 specific recollection about asking with a subpoena for salary
15 information.

16 Q. So you basically talked to people and, for example, Sam
17 Cohen told you that she spent 40 hours in response, and she
18 made \$50,000 a year; is that accurate?

19 A. That's pretty accurate, yes.

20 Q. And you also reviewed e-mails from her that went back and
21 forth between her and Chicago that talked about when her
22 password was out and when she needed it reset?

23 A. Yes.

24 Q. Yes?

25 And did you add up the times that were -- that would have

1 accounted for her down time on those e-mails?

2 A. No.

3 Q. Let's talk about Mr. Keys' statement for a minute.

4 You were asked previously about his statement, and you said
5 you didn't tell him what to write exactly. Do you recall
6 saying that?

7 A. Yes.

8 Q. And at the time Mr. Keys wrote his statement, you came to
9 learn he was under the influence of sleep medication or
10 tranquilizing medications?

11 MR. SILVER: Objection, hearsay.

12 THE COURT: Overruled.

13 THE WITNESS: I heard -- I don't have any information
14 about that other than what one of the prosecutors told me.

15 Apparently in a hearing sometime --

16 THE COURT: Well, stop there. This was about at the
17 time he wrote the statement. That's the question.

18 MR. LEIDERMAN: That's the question.

19 THE COURT: All right. So what this witness knew at
20 the time --

21 MR. LEIDERMAN: Well, no.

22 THE COURT: -- the statement was being written.

23 MR. LEIDERMAN: What he knows now. I'm sorry.

24 THE COURT: All right. Well, there's your answer, so
25 next question.

1 MR. LEIDERMAN: Got it.

2 Q. At the time the statement was written, did Mr. Keys tell
3 you that he wasn't in a cognizant state of mind to write a
4 statement?

5 A. No.

6 Q. Did he tell you that right now I'm in a state of mind where
7 I can -- it's not because I don't want to, it's because I want
8 to be cognizant of an event?

9 A. Yes.

10 Q. And he told you, as of right now, he just didn't -- didn't
11 know, he guessed and sort of stumbled around on that?

12 A. No.

13 Q. No?

14 A. No.

15 Q. Okay. Let's move on to some other things for a minute.

16 Are you familiar with something called static and dynamic
17 IP addresses?

18 A. Yes.

19 Q. What are they?

20 A. A static IP address remains static, meaning unchanging.

21 And a dynamic IP address changes every time you would log in.

22 So that in the logs, you'd have a different IP address assigned
23 to you when -- over different days depending on how much time
24 you log in and log out. And your Internet service provider can
25 also change it randomly.

1 A static IP address is like a telephone number for that
2 period of time. It's assigned to you, and it stays the same.

3 Q. And even static IP addresses change from time to time?

4 A. Yes.

5 Q. I want you to clear something up, if you can.

6 Did Mr. Keys quit, was he fired, was he laid off, or is it
7 a combination of all three?

8 MR. SILVER: Objection, foundation.

9 THE COURT: Ask do you know. So ask the question in
10 that way.

11 BY MR. LEIDERMAN:

12 Q. If you know, did Mr. Keys quit Fox 40, was he fired from
13 Fox 40, or was he laid off from Fox 40?

14 A. The information I have came from what Brandon Mercer told
15 me and what Jerry Del Core also told me.

16 Q. And what Matthew Keys told you. Yes?

17 A. And what Matthew Keys told me.

18 Q. And do they all match?

19 MR. SILVER: Objection, hearsay.

20 THE COURT: Overruled.

21 THE WITNESS: I believe that he was fired, but that he
22 also, ah, quit before they could officially fire him.

23 MR. LEIDERMAN: Okay.

24 Q. Something like you can't fire me, I quit; you can't quit, I
25 fire you was going on?

1 A. I think that sounds about right.

2 Q. Okay. Are you familiar with something called a RAT or a
3 remote access trojan?

4 A. Yes.

5 Q. Can you explain what that is?

6 A. That's a piece of software that you would put on someone
7 else's computer to track their activity on that computer. It's
8 a -- I think you would understand it as a piece of malware or
9 virus that would get on your computer, that would allow
10 someone, if they got onto your computer, to see what you're
11 doing.

12 Q. A remote access trojan can also be used to activate the
13 computer, correct? Have it execute commands?

14 A. Activate -- or execute commands, yes. I thought you meant
15 turn it on. I'm not sure how you would do that.

16 Q. Okay. No, not turn it on.

17 Execute commands, for example, do things?

18 A. Yes.

19 Q. Okay. It can make your computer operate remotely, in other
20 words?

21 A. Yes.

22 Q. Can someone steal Wi-Fi?

23 A. Yes.

24 Q. How would someone go about doing that?

25 A. You would get access to that user's password, and when you

1 had your device, you could see what the signal is. If you had
2 the password, you can log onto it and be on their network.

3 Q. Your answer presumes a password.

4 Is there a different answer if the Wi-Fi is unsecured?

5 A. Well, then there would be no password, and you would just
6 log on. It would be a no password, if you will.

7 Q. And -- well, never mind. I think that's enough.

8 MR. LEIDERMAN: May I have a moment? I'm trying to
9 shave some questions off.

10 THE COURT: You may.

11 (Pause in proceedings.)

12 BY MR. LEIDERMAN:

13 Q. By the way, who is Chippy 1337?

14 A. I don't know.

15 Q. Okay. You spent a good deal of time, a really good deal of
16 time in direct going over matching up specific logs, IP
17 addresses, time stamps, things like that to Mr. Keys.

18 You recall doing that?

19 A. Yes.

20 Q. When you say that something comes from -- and you
21 definitively said, at the termination of each of those areas,
22 that you were able to trace it back to Matthew Keys.

23 A. Yes.

24 Q. Okay. When you say that something comes from Matthew Keys,
25 you mean that it comes from his IP, possibly his user password,

1 possibly his computer, possibly all three? Possibly his VPN,
2 possibly all four? Is that what you mean?

3 A. Well, when I'm trying to link it back to M. Keys, I'm
4 trying to be as specific as possible.

5 In my mind, what I'm meaning is, in the global context of
6 everything, his computer, his IP and everything. And in each
7 instance, I tried to bring it back at least to his IP in his
8 house.

9 Q. Okay.

10 A. Or his computer in his house.

11 Q. But it could have been someone else typing on the computer?

12 A. Anything is possible.

13 Q. Well, it's not that anything is possible.

14 It's that you can't necessarily in each occasion put his
15 fingers on that keyboard at that time that you're going over in
16 these logs; is that correct?

17 A. I disagree.

18 Q. You disagree?

19 A. Yes.

20 Q. You can put his fingers on those keyboards? Is that
21 because in part of his statement?

22 A. No. In part, yes, but also the logs and the activity in
23 the logs.

24 Q. Okay. But it's --

25 A. Want me to explain?

1 Q. No, I don't need you to explain. I wanted to know what you
2 were going to say about it, and you've said it.

3 A. Okay.

4 Q. Do you believe Mr. Keys was truthful with you throughout
5 his entire statement?

6 A. Not entirely, no.

7 Q. I'm going to ask you some general questions about the
8 interview you had with Mr. Keys.

9 This was in December 2012?

10 A. October.

11 Q. October 2012.

12 And we talked a lot about other events involving Anonymous
13 and indictments being unsealed and him working with other
14 journalists. That would have -- those events would have been
15 in March 2012, so several months before?

16 A. I don't remember the exact date that all of the
17 journalistic activity happened that you've referred to. But it
18 did occur prior to the interview.

19 Q. Okay. And did it occur proximate or close to the times
20 when the indictments were unsealed, the indictments I spoke of
21 earlier?

22 A. I don't know when those indictments were unsealed.

23 Q. Or when the articles came out?

24 A. Again, I don't have a specific recollection. March sounds
25 right, but I don't remember the dates.

1 Q. And it would be consistent with news practice in general
2 that articles would come out real close to an event happening
3 because it's news?

4 A. Yes.

5 Q. Okay. I know it seems basic, but an article, a news
6 article would have to come out sometime when the news is
7 happening for it to be relevant?

8 A. Correct.

9 Q. You started off your interview with Mr. Keys -- and in
10 general terms, I'm not asking for anything specific -- trying
11 to what they call build rapport and put him at ease?

12 A. I think I started out with the Miranda, and then I went
13 into rapport building.

14 Q. Okay. And just real basic, what is rapport building?

15 A. Well, just introducing yourself to someone. You know,
16 making them as comfortable as possible. Getting them in a
17 frame of mind so that they can understand the questions and
18 answer them.

19 Q. How did you make Mr. Keys comfortable in this case?

20 A. Well, I think -- I don't recall all of the details, but
21 it's customary, if I am interviewing someone after a search,
22 that it's in the morning, and so they're pretty much, you know,
23 probably in a state of undress, you know, ready for bed. So
24 you ask them if they'd like to get comfortable with their
25 clothes. You want them to feel comfortable with how they're

1 dressed in front of you so they can talk to you.

2 They might be thirsty. You know, you offer them something
3 to drink if they want something to drink. You ask them about
4 the environment, if it's a good place to talk or if they would
5 rather go someplace else.

6 Q. It wasn't in fact a good place to talk with Mr. Keys
7 initially; is that fair to say?

8 A. My recollection with regard to the location was that I
9 offered to take it someplace else since he lived with
10 roommates. But, as I recall, he was fine. That's where we
11 were.

12 Q. You mean once you moved?

13 A. No, we did it in the bedroom.

14 Q. So you never moved at all?

15 A. No.

16 He sat on his bed --

17 Q. Okay.

18 A. -- and I went and got a chair from another room, my partner
19 and I.

20 Q. At that point in time, Mr. Keys had just moved in with a
21 couple of roommates?

22 A. I don't know the specific timing on the roommates.

23 Q. Did he tell you about a month ago?

24 A. That sounds right. I don't recall specific timing.

25 Q. And this interview -- and we've already established the

1 spelling of Secaucus.

2 This interview occurred in Secaucus, New Jersey?

3 A. That's correct.

4 Q. Why wasn't it in Sacramento?

5 A. Because we did it where he lived.

6 Q. Which was in Secaucus, New Jersey?

7 A. Which was in Secaucus, New Jersey.

8 Q. At the time, Mr. Keys was working for Reuters News Service?

9 A. Yes, that's my understanding.

10 Q. Well, did you confirm that or is that just from your
11 interview with Mr. Keys?

12 A. We checked on that before we did the search and confirmed
13 it with Mr. Keys as well.

14 Q. What is Reuters?

15 A. I believe it's a reporting agency or a newspaper, a media
16 company.

17 Q. Is it something like -- are you familiar with the
18 Associated Press or AP?

19 A. I am.

20 Q. Is it something like that where --

21 A. Something like that. I think they do more.

22 Q. Reuters is a little bigger?

23 A. I think it is.

24 Q. And have you ever heard the word "news aggregating
25 service"?

1 A. Yes, I have.

2 Q. And is that what Reuters and AP and maybe one or two others
3 are?

4 A. Ah, you know, I thought a news aggregating service was like
5 a website that got news from a lot of different sources and put
6 it on one web page. Maybe I don't know what a news aggregator
7 is, then.

8 Q. Well, how would a website get information if not from a
9 news aggregator?

10 A. They go to other news sources and copy the story.

11 Q. Okay. And the news source they would go to would be, for
12 example, Reuters?

13 A. Yes.

14 Q. You woke Mr. Keys up at 5:45 a.m.?

15 A. That seems -- I think we would have started about 6:00, but
16 about that time.

17 Q. But --

18 A. I'm sorry.

19 Q. I know the warrant said 6:00, but did you in fact start
20 your interview with him at 5:45 a.m.?

21 A. No. I think I started a little after 6:00 a.m.

22 Q. Did you serve the warrant at 5:45 a.m.?

23 A. I don't think so. I don't have a specific recollection as
24 to time. Someone else was recording the times. I could refer
25 to those notes.

1 MR. LEIDERMAN: May I have a second to see if I can
2 find them quickly, Your Honor?

3 THE COURT: You may.

4 MR. LEIDERMAN: Thank you.

5 (Pause in proceedings.)

6 MR. LEIDERMAN: Forget it.

7 Q. Did you tell Mr. Keys you wanted to be as helpful to him as
8 possible?

9 A. Yes.

10 Q. Okay. We talked a little bit about Mr. Keys -- what
11 Mr. Keys referred to as his journalism and the Internet Feds
12 chat room and the saving of the screen logs going to someone
13 named Parmy, P-A-R-M-Y, Olson?

14 A. Yes.

15 Q. Who -- and I think we said she was a journalist who wrote
16 for Forbes, but covered Anonymous.

17 What else did she do regarding Anonymous?

18 A. She wrote a book.

19 Q. And what relation, if any, did Mr. Keys' logs have to that
20 book?

21 A. I think she used it as source material for her book.

22 Q. Mr. Keys gave her his logs?

23 A. That's my understanding, yes.

24 Q. Can logs be altered?

25 A. Yes.

1 Q. How would that -- how would that work?

2 A. Well, it would be -- you could do it a number of different
3 ways.

4 Q. Simply typing?

5 A. You could.

6 Q. You altered one of the logs in this case by putting an
7 asterisk next to a time, I think?

8 A. Yes.

9 Q. All right. And to do that, did you just put a cursor up
10 there, click and then put asterisk, and that was the end of it?

11 A. That was the end of it.

12 Q. So pretty easy to alter?

13 A. Easy to make a change, but difficult, ah, to alter in such
14 a way that it can't be detected.

15 Q. You mean with respect to metadata?

16 A. Yes.

17 Q. Metadata can be stripped from a document, couldn't it?

18 A. It could be.

19 Q. Now at this point we better -- what is metadata?

20 A. Metadata specifically means data about data. So when you
21 write a file, like those screenshots we talked about that gave
22 a screen name, you know, screenshot 12/15/10, it saves it with
23 a file name so you can find it when you go to your computer
24 looking for a file. But the computer saving data about that
25 file is in a lot of locations in other files saying when it was

1 created, when it was changed, and that is called metadata.

2 Some documents incorporate metadata within the document
3 itself. Like in a Word document, when you type your Word
4 document, it's actually saving, in some cases, who is the
5 person typing it, what time they're typing it and how many
6 edits were made to it. All that is called metadata.

7 Q. And, in fact, metadata can be faked, spoofed, you know,
8 typed on its own as well, correct?

9 A. Anything is possible.

10 Q. Well, that's something that has been done.

11 A. It's very difficult to do and not be detected.

12 MR. LEIDERMAN: Your Honor, I'm again seeing if I can
13 get rid of some questions to speed up, if I can just have a
14 second.

15 THE COURT: All right.

16 (Pause in proceedings.)

17 BY MR. LEIDERMAN:

18 Q. You give the search warrant to Mr. Keys?

19 A. Yes.

20 Q. Was he able to read the whole thing?

21 A. We gave it to him as soon as we walked in. He scanned it
22 and was afforded the opportunity to read the whole thing. I
23 believe he did, ah, read it as we were there talking with him.

24 Q. It was a long search warrant, wasn't it, 40 or so pages, 50
25 pages maybe?

1 A. Yes. It had a number of attachments including these logs
2 that you showed.

3 Q. Had a lot of text in those logs. Yes?

4 A. Yes.

5 Q. So you don't know if he scanned it or read it?

6 A. I think he scanned and read portions. Some parts I know
7 specifically that he read in detail, specifically the logs I'm
8 referring to, because he and I talked about those.

9 Q. I want to talk to you about the overlap between Twitter and
10 the IRC for the people in the chat rooms you were monitoring,
11 Operation Payback, Internet Feds.

12 Did you find a significant overlap between IRC and Twitter,
13 for example, with people being on Twitter and IRC at the same
14 time during these operations, tweeting out what they were
15 doing, and then going back and talking about that, and then
16 tweeting out what they're doing, and then going back and --

17 MR. SILVER: Objection, compound.

18 THE COURT: Overruled.

19 THE WITNESS: I didn't review any Twitter feeds or logs
20 or chats or tweets.

21 MR. LEIDERMAN: Okay.

22 Q. And I guess you would agree what every other witness said,
23 Twitter in 2010 wasn't like what it is now. You don't go to --
24 you didn't go to Twitter in 2010 to find out what the
25 President's latest statement was?

1 A. That sounds right. Everything changes very quickly on the
2 Internet. I'm not sure what the state of Twitter was in 2010,
3 but I knew what it was.

4 Q. Mr. Keys expressed to you concern about people moving
5 things in his apartment during the interview?

6 A. Yes.

7 Q. Were you able to determine whether he knew the full impact
8 of who the people in the Internet Feds chat room were at the
9 time he was in the Internet Feds chat room in December of 2010?

10 MR. SILVER: Objection, calls for speculation.

11 THE COURT: Overruled. Just yes or no.

12 THE WITNESS: I'm not sure I understand what you mean
13 by full impact. You mean other than the website getting
14 hacked?

15 MR. LEIDERMAN: No. I mean if he knew who was -- if he
16 knew the true character, the true capabilities of the people he
17 was walking to.

18 THE WITNESS: Other than the fact that they were, you
19 know, just malicious hackers, no. I don't know if he knew what
20 they had hacked or the full list of things that they had
21 hacked.

22 BY MR. LEIDERMAN:

23 Q. As of December 2010. But as of October 2012, you did know
24 all of that information, correct?

25 A. I believe he had more information, yes.

1 Q. A substantial amount of more information, a lot more
2 information?

3 A. Yes, I believe he did.

4 MR. LEIDERMAN: That's all I have, Your Honor.

5 THE COURT: All right.

6 MR. LEIDERMAN: Thank you.

7 THE COURT: Any redirect, Mr. Silver?

8 MR. SILVER: Yes, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. SILVER:

11 Q. Agent Cauthen, you stated that you did not believe Mr. Keys
12 was entirely truthful during his interview; is that correct?

13 A. Yes, I did.

14 Q. And can you explain why you think that?

15 A. He was, ah, not telling me the truth, and he was doing what
16 I call minimizing. That is, he was acknowledging the facts,
17 but he wasn't acknowledging his intent so much as he had some
18 excuses earlier on in the interview. Now, as the interview
19 progressed, he became more forthcoming about his role.

20 The example I'm specifically thinking about is where he was
21 saying, you know, I didn't intend for those credentials to
22 work. And as we talked about it during the interview, ah,
23 clearly that was not accurate. That was a lie. And as we
24 continued with the interview, then he kind of changed his tune
25 and acknowledged that he did understand that they would do

1 damage with it.

2 Q. Anything else, Agent Cauthen?

3 MR. LEIDERMAN: I'm going to object, vague, overbroad.

4 THE COURT: Sustained.

5 BY MR. SILVER:

6 Q. Further reasons why you believed that he was not entirely
7 truthful during the interview?

8 A. I don't have anything else other than, off the top of my
9 head, I guess I could go through the whole interview and list
10 out line by line the inconsistencies in his statement, that I
11 had to stop him and put him back on track or --

12 THE COURT: Okay. Wait for the next question.

13 MR. SILVER: Nothing further, Your Honor.

14 THE COURT: All right.

15 MR. SILVER: Leaving open the option to redirect when
16 we do find that exhibit that the excerpt came from in the show
17 slide. We're still looking for the exact exhibit that came
18 from.

19 THE COURT: All right.

20 MR. SILVER: That would be a very brief.

21 THE COURT: Well, how --

22 MR. SILVER: Why don't we just strike it, if that's
23 easier.

24 THE COURT: Well, all right. So this witness may step
25 down for now. Agreed?

1 MR. SILVER: Yes.

2 THE COURT: Or did you have further --

3 MR. LEIDERMAN: No, I don't have further recross.

4 THE COURT: All right. You may step down, Agent. You
5 may be re-called briefly.

6 THE WITNESS: Go back into the hall?

7 THE COURT: Any objection to the agent re-taking his
8 seat at counsel table?

9 MR. LEIDERMAN: No, I don't.

10 THE COURT: All right. You may sit at counsel table.
11 The government has an additional witness?

12 MR. SEGAL: Yes, Your Honor. The United States calls
13 Jerry Del Core.

14 Agent Cauthen, can you leave the government exhibit
15 binder on the table there, please.

16 May I step out for a second, Your Honor? I don't know
17 what's happening.

18 (Pause in proceedings.)

19 THE CLERK: Please come forward, sir. If you would
20 stand right on that tape so I can take your photograph, please.

21 THE WITNESS: Sure.

22 THE CLERK: If you would step into the witness box.

23 MR. JAFFE: Your Honor, the defense objects to the
24 testimony on the grounds previously discussed.

25 THE COURT: All right. That's overruled at this point.

1 THE CLERK: Please raise your right hand.

2 GERALD DEL CORE, GOVERNMENT'S WITNESS, SWORN

3 THE WITNESS: I do.

4 THE CLERK: Please state and spell your full name for
5 the record, first and last. And please speak into the
6 microphone.

7 THE WITNESS: Gerald Del Core. It's G-E-R-A-L-D. The
8 last name is two words. It's D-E-L, and then Core, C-O-R-E.

9 THE COURT: You may proceed.

10 MR. SEGAL: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. SEGAL:

13 Q. Sir, in December of two thousand -- well, did you get a new
14 job in 2010?

15 A. Yes.

16 Q. What job was that?

17 A. The vice president and general manager of KTXL Fox 40.

18 Q. When did you start there?

19 A. October of 2010.

20 Q. And then just broadly what was your experience in the
21 broadcast business prior to becoming general manager at KTXL?

22 A. I have worked in the industry since 1977, both in radio and
23 in television.

24 Q. Okay. Was there anybody higher than you in the line of
25 reporting located in Sacramento?

1 A. In Sacramento, no.

2 Q. Okay. So to whom did you report?

3 A. I reported to the senior vice president and the president
4 of the television division.

5 Q. Of?

6 A. Of Tribune. Sorry.

7 Q. Okay. Of Tribune Company at that time?

8 A. At that point, it was Tribune Company, yes.

9 Q. By the way, did KTXL -- was KTXL actually part of Fox News
10 at all?

11 A. No, they're completely separate. Fox News is a cable
12 company owned by Fox. Ah, KTXL is what's called an affiliate.
13 An affiliate is essentially a franchisee. So we would pay Fox
14 for their Fox name and for their primetime programming and
15 sports. So what we got from them essentially are shows like
16 American Idol, 49ers football, things like that. No
17 affiliation to the Fox cable news network.

18 Q. No ownership relationship?

19 A. Really any relationship to them.

20 Q. Okay. So you're not Fox News at all?

21 A. Correct.

22 Q. Okay. And what were your responsibilities as the general
23 manager at KTXL?

24 A. It's the overall operation of the station. Essentially it
25 stems from making sure the station is run and delivery of the

1 community service it needs to. So you have to protect the
2 license. It's to make sure the operation is run profitably.
3 We are delivering the revenue goals, controlling our expenses.
4 It's really done in terms of trying to maximize the amount of
5 viewers that come to the station. And if you do that, you
6 generally run a pretty profitable operation.

7 Q. Okay. What was the relationship, the reporting
8 relationship between you and Brandon Mercer?

9 A. Brandon reported directly to me. He was the news director
10 of the station.

11 Q. Okay. In December of two -- I'm going to -- in December of
12 2010, do you recall an incident that had to do with some
13 curious e-mails?

14 A. Yes.

15 MR. JAFFE: Objection to the characterization, Your
16 Honor.

17 THE COURT: Sustained. The jury shall disregard the
18 word "curious."

19 MR. SEGAL: Just trying to move it, Your Honor.

20 THE COURT: I understand, but you're not narrating. I
21 think that's the -- you're not the narrator. You're eliciting
22 testimony.

23 BY MR. SEGAL:

24 Q. Describe the e-mails that were called to your attention in
25 December of 2010.

1 A. Well, the one that comes to mind was the one where we had
2 gotten an e-mail to the station that said our station database
3 had been compromised.

4 We were running a contest where we were giving away iPads
5 at the time, which were very popular. I think we were doing an
6 iPad a day giveaway if I remember correctly. And it basically
7 said the contest was a fraud, that you really couldn't win.

8 And it then told people that their personal information had
9 been compromised, which had been their Social Security number
10 and their credit card numbers.

11 Q. Did it say that exactly? Open up Government Exhibit --
12 well, never mind.

13 Who managed the direct response to this at your station?
14 Who spent the most time on it?

15 A. Brandon Mercer.

16 Q. And how do you know that?

17 A. The amount of time he put into it, and he would constantly
18 give me updates. He --

19 MR. JAFFE: Objection to hearsay, Your Honor.

20 THE COURT: Overruled.

21 BY MR. SEGAL:

22 Q. He would constantly give you updates?

23 A. Yes.

24 Q. What did that -- why did he have to give you updates?

25 A. It was a problem. We had gotten calls and e-mails to the

1 station from people who were viewers, who were part of our
2 database, and we built the database to try and get people to
3 watch more frequently. So essentially it was like a frequent
4 flyer, a frequent stay club. We would give words out in the
5 individual newscasts, and people were asked to get the word and
6 then enter it onto the website, and they would earn points.
7 And with points, they had chances to win prizes, money, things
8 like that.

9 Q. How important -- did you keep track, do anything to keep
10 track of how much time you spent personally on this issue?

11 A. Yes.

12 Q. Would you turn, please, to Government Exhibit 304 in your
13 binder, please.

14 A. What number?

15 Q. 304.

16 MR. SEGAL: May I approach, Your Honor?

17 THE COURT: Are you finding that exhibit?

18 THE WITNESS: I found it.

19 MR. SEGAL: Okay.

20 Q. Do you recognize this?

21 THE COURT: This exhibit is not in evidence.

22 MR. SEGAL: Right.

23 THE WITNESS: Yes.

24 BY MR. SEGAL:

25 Q. Do you remember precisely every meeting that you attended

1 and every person you talked with about this issue?

2 A. No. I looked this up through a calendar of appointments.

3 Q. Okay. How do you -- how do you recognize 304, sir?

4 A. I typed it. I'm the one who did the research on it.

5 Q. Okay. Please explain how you built Government Exhibit 304.

6 A. Certainly. There are different parts to it, so if I can go
7 through the different parts.

8 One was setting up the number of meetings that we had.

9 Second was tracking the e-mail conversations that we had. And
10 then the other part was assessing phone calls. And then the
11 last part was really assessing some of the damage that was done
12 by the act.

13 Q. Okay. I just want to ask you about --

14 THE COURT: Just so the jury is clear, the witness here
15 is, again, not a legal expert. The word "damage" is one I will
16 define for you.

17 BY MR. SEGAL:

18 Q. Now I just want to ask you about the time that you spent
19 personally and nothing else on that list.

20 Do you understand?

21 A. Okay.

22 Q. Okay. I want you to turn to the second page, please.

23 A. Okay.

24 Q. Who is Kersting?

25 A. He was president of the television division for Tribune.

1 Q. And where did he sit?

2 A. In Chicago.

3 Q. And who was Shaun Beck?

4 A. He was the supervisor for the Fox affiliate stations owned
5 by Tribune, and he was based in San Diego.

6 Q. There's an entry there with your -- with the name Jerry
7 there. Is that Jerry Del Core?

8 A. Yes, that's me.

9 Q. Okay. What did you talk to them about?

10 A. These were the conversations pertaining to someone claiming
11 to have accessed the database and compromised some of the
12 information in there and what we needed to do to protect the
13 database and what we needed to do to protect the viewers.

14 Q. Okay. Did you speak with Mr. Shaun Beck a second time?

15 A. We had -- we had weekly calls, so yes. There were -- I
16 think in here I noted that there were five that specifically
17 pertained to this.

18 Q. Five -- and you have a time estimate for those --

19 A. Probably about a half hour on each.

20 Q. Okay. And then you did something to track e-mails as well;
21 is that right?

22 A. I'm not sure when you say track e-mails. To track e-mails?

23 Q. Yeah.

24 Actually let me ask you, you've had a chance to refresh
25 your recollection based on this document; is that right?

1 A. A little bit, yes.

2 Q. Okay. And so can you -- what is -- do you have a
3 conservative estimate for how much time you spent on this?

4 A. I'd have to tally it. You know, probably 15 hours, 20
5 hours, maybe more. I could do the math if you give me the
6 time.

7 Q. Did -- do you recall meeting with Agent Cauthen and me
8 about a week ago?

9 A. Yes.

10 Q. Okay. Did we go over this list?

11 A. Yes.

12 Q. Did we try to -- and did we try to narrow it down, sir?

13 A. Yes.

14 Q. What were we trying to eliminate with you?

15 THE COURT: Not eliminate.

16 MR. SEGAL: Narrow it down. He said, yes, narrow it
17 down.

18 MR. LEIDERMAN: I don't have a problem with counsel
19 leading.

20 THE COURT: All right. All right. You may answer.

21 BY MR. SEGAL:

22 Q. What were you trying to narrow down?

23 A. I think we were trying to narrow down my actual
24 involvement.

25 Q. Okay. And did we narrow it down to a number that was less

1 than 15 hours, if you remember?

2 A. I don't remember the exact number.

3 Q. Okay.

4 A. Sorry.

5 Q. That's all right.

6 MR. SEGAL: May I have one moment to go to counsel
7 table, Your Honor?

8 THE COURT: You may.

9 (Pause in proceedings.)

10 BY MR. SEGAL:

11 Q. Sir, in 2010, what was your salary?

12 A. 275,000.

13 Q. 275. Okay.

14 And just technically was that for a 40-hour week?

15 A. Yes.

16 Q. And can we say 52 weeks for the year?

17 A. Yes.

18 Q. Okay. And today is it possible you told us seven hours
19 before?

20 A. I think technically it's seven hours and an hour for lunch,
21 so --

22 Q. No, no.

23 I mean, is it possible you said you spent seven hours on
24 this issue when you tried to narrow it down?

25 A. Yes.

1 Q. Okay. Would that be -- is that your most conservative
2 estimate?

3 A. That would be conservative, yes.

4 Q. Okay. All right. Thank you, sir.

5 MR. SEGAL: Nothing further.

6 THE COURT: All right. Mr. Jaffe, do you have
7 questions?

8 MR. JAFFE: Yes, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. JAFFE:

11 Q. Good afternoon, sir. My name is Mark Jaffe. I'm counsel
12 for the defendant Matthew Keys, and this is my colleague Jay
13 Leiderman, counsel for Matthew Keys.

14 How are you?

15 A. Well. And you?

16 Q. Okay. Sir, you're no longer at Fox 40; is that correct?

17 A. That is correct, yes.

18 Q. And under the circumstances, were you terminated or did you
19 quit?

20 A. I was terminated.

21 Q. Okay. You had disagreements with other people regarding
22 the operation of the station; is that correct?

23 A. No.

24 Q. No disagreements? Okay.

25 You testified as to e-mails that you recall, correct?

1 A. Yes.

2 Q. Okay. I'm going to direct your attention to another e-mail
3 which was previously introduced as Defendant's Exhibit G. In
4 your binder, I believe it's under tab 7.

5 THE COURT: This is admitted, so it can be displayed to
6 the jury.

7 MR. JAFFE: Yes.

8 THE COURT: So it's on the screen. Can you see the
9 screen clearly?

10 THE WITNESS: Yes.

11 THE COURT: All right.

12 BY MR. JAFFE:

13 Q. Mr. Del Core, do you recall getting this e-mail?

14 This is an e-mail from -- this is an e-mail from Brandon
15 Mercer; is that correct?

16 A. Yes, it is.

17 Q. Do you recall receiving an e-mail from Brandon Mercer that
18 said the FBI cannot prosecute a case unless there's \$5,000 in
19 damages?

20 A. Yes.

21 Q. Okay. And you reported that Brandon Mercer reported to
22 you; is that correct?

23 A. Correct.

24 Q. Okay. I believe on direct you said your responsibilities
25 include delivering community service.

1 A. Yes.

2 Q. Is that right?

3 And you said your job responsibilities include protecting
4 the license?

5 A. Yes.

6 Q. And your job responsibilities include delivering revenue
7 goals?

8 A. Yes.

9 Q. And maximizing viewers?

10 A. Yes.

11 Q. You didn't typically log the hours you spent delivering
12 community service, did you?

13 A. Ah, typically log them, no.

14 Q. And you didn't report the hours you spent delivering
15 community service to Brandon Mercer or to anyone else, did you?

16 A. No.

17 Q. You didn't typically log the hours you spent protecting the
18 license at Fox 40; is that correct?

19 A. No, that's correct.

20 Q. And you did not typically log the hours you spent
21 delivering revenue goals at Fox 40, did you?

22 A. No, I did not.

23 Q. And you did not typically log the hours you spent
24 maximizing viewers at Fox 40; is that correct?

25 A. Correct.

1 Q. Okay. And you did not assign a monetary value to any of
2 the time you spent on any of those responsibilities; is that
3 correct?

4 A. Correct. But we could.

5 Q. Okay. But you did not?

6 A. Correct.

7 Q. And you never had Sam Cohen log -- report the hours spent
8 doing her job responsibilities to you, did you?

9 A. No, I did not.

10 Q. And you never asked -- you never had Jared Jedlinski log
11 hours and report to you on his responsibilities; is that
12 correct?

13 A. He actually worked in Chicago, so I wouldn't have any
14 responsibility for him.

15 Q. And you never had Brandon Mercer log hours spent and report
16 back to you the hours spent on his responsibilities; is that
17 correct?

18 A. Correct.

19 Q. Okay. You don't have any specifications in computer
20 forensics, do you, Mr. Del Core?

21 A. No, not at all.

22 Q. And you don't have any certifications in computer security;
23 is that correct?

24 A. Correct.

25 Q. Okay. And at or around December of 2010, did you work for

1 the L.A. Times?

2 A. No, I did not.

3 MR. JAFFE: No further questions.

4 THE COURT: All right. Any redirect?

5 MR. SEGAL: Just very briefly, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. SEGAL:

8 Q. So you said you were terminated at Fox 40. What if
9 anything did that have to do with any misconduct by you?

10 A. Nothing.

11 Q. Okay. And by the way, what if anything, as you testified
12 today, do you owe Tribune Corporation?

13 A. Nothing.

14 Q. Okay.

15 MR. SEGAL: Thank you, Your Honor.

16 THE COURT: Any further recross?

17 MR. JAFFE: No further questions, Your Honor.

18 THE COURT: All right. Is this witness excused?

19 MR. SEGAL: Yes, Your Honor.

20 THE COURT: All right. You may step down, sir. You're
21 excused.

22 Does the government have additional evidence to
23 present?

24 MR. SEGAL: May I have one moment, Your Honor?

25 (Counsel conferring.)

1 MR. SEGAL: Your Honor, subject to putting in one
2 document that we're not going to have a witness for, it will
3 just go in the exhibit binder, the United States rests.

4 THE COURT: All right. All right. And you understand
5 there's that one additional exhibit that may be provided to the
6 jury for deliberations?

7 MR. LEIDERMAN: Yes, we have spoken about it.

8 THE COURT: All right. So we'll work that out in a
9 housekeeping session.

10 Is there any case in defense?

11 MR. LEIDERMAN: There is not, Your Honor. The defense
12 rests.

13 THE COURT: All right. Ladies and Gentlemen, that does
14 mean that the evidence is now in in the case. As I told you
15 earlier, we are going to excuse you a bit early today because I
16 need to work with counsel to finalize the jury instructions
17 that I will provide to you tomorrow. They're my instructions,
18 but I need to hear from the attorneys.

19 And I'm going to ask that you be ready to go promptly
20 at 9:00 a.m. tomorrow just to make certain we have sufficient
21 time, all things considered. And we will start with closing
22 argument from the government, then we'll hear from the defense,
23 and then any rebuttal from the government, and then I will
24 instruct you. I think at this point, all of that will be
25 concluded by about the time we would normally be leaving for

1 the day. So I'll just ask Ms. Streeter to let me know at some
2 point what you've determined, if you have, about your schedule
3 for tomorrow and Wednesday.

4 As we leave for today, please keep in mind every single
5 one of those admonitions I've been giving you. It's more
6 important than ever, given the stage of the case, that you not
7 discuss the case with anyone, including your fellow jurors,
8 family members, people involved in the trial or anyone else.
9 Don't allow anyone to talk with you about the case. If anyone
10 does approach you and tries to talk to you about the case or
11 anyone tries to contact you in any way, please let me know
12 immediately first thing tomorrow morning. If you start to hear
13 or start to read articles you think may be related to this
14 case, please stop immediately and don't consider or look any
15 further. Don't do any research of any kind, electronic or
16 otherwise. Please keep an open mind until you hear the
17 arguments of counsel, the instructions of the Court, and the
18 views of your fellow jurors. And, as always, remember if you
19 do need to communicate with me in any way, you can give a note
20 to Ms. Streeter.

21 Thank you for your service today, and we'll see you
22 tomorrow morning ready to go promptly at 9:00. Thank you very
23 much.

24 (Jury not present.)

25 THE COURT: All right. My suggestion would be that we

1 take a break, you review the exhibit list, make certain you
2 agree and your list corresponds with the Court's list so you
3 know what set of exhibits is going in.

4 I had one question about Exhibit 112. At one point,
5 the Court had instructed that the top of the first page would
6 be disregarded, and I think there was some defense questioning.
7 And so if you can clarify for me what your position is on 112
8 at this point or your respective positions?

9 MR. JAFFE: Your Honor, that is the e-mail chain
10 between Sam Cohen and Ryan Pollyea. To the extent that there
11 was an objection based on Ryan Pollyea's statements which
12 weren't covered by the hearsay exception, that objection is
13 withdrawn.

14 The defense did want to speak with the government
15 regarding excerpts of the chain which appear to refer to, ah,
16 statements regarding facts that are not part of what's being
17 accused of him at trial.

18 THE COURT: All right. So that is --

19 MR. JAFFE: That can be redacted.

20 THE COURT: All right. That is with respect to 112?
21 So meet and confer on 112.

22 MR. SEGAL: I thought the problem with 112 was just
23 that there was a forwarding e-mail. Mercer -- Scholbrock
24 forwards it to Mercer, and then Mercer forwards it to Cauthen.
25 And I --

1 THE COURT: Well, my point is there was some
2 discussion, but then there was the eliciting of some testimony
3 that might have modified what the parties' respective positions
4 is. So meet and confer on that. We'll come back to that this
5 afternoon.

6 THE CLERK: Oh, wait a minute. I think I've got a
7 juror knocking.

8 (Pause in proceedings.)

9 THE COURT: They may want to share the schedule.

10 THE CLERK: They wanted to know if they can talk among
11 themselves regarding whether they want to come and deliberate.

12 THE COURT: Schedule only? Yes.

13 THE CLERK: Schedule only.

14 THE COURT: Yes, they may confer about that if I didn't
15 make that clear.

16 THE CLERK: They just wanted clarification.

17 THE COURT: All right. All right.

18 (Pause in proceedings.)

19 THE COURT: All right. So meet and confer on 112. I
20 don't think there are any other issues with exhibits unless
21 there are discrepancies in the exhibit lists.

22 MR. SEGAL: There's that one outstanding issue where we
23 couldn't link a power point slide to an exhibit.

24 THE COURT: That's what you're seeing if you can
25 stipulate to coming in?

1 MR. SEGAL: Right.

2 THE COURT: All right. So, again, meet and confer on
3 that.

4 THE CLERK: I'll print them the list.

5 THE COURT: All right. My suggestion is we come back
6 at 1:00 and have a housekeeping session on the jury
7 instructions. And what we'll do at this point is we'll just go
8 one by one through the set. I'll let you know my questions.
9 We'll take your objections and comments. And then my plan
10 would be later in the day to e-mail you another set.

11 I'll have a better sense at the end of the working
12 session whether or not what I'm e-mailing you later this
13 afternoon is what I'm prepared to say is my final proposed set.
14 If it is, then tomorrow morning would be for the purpose of
15 lodging objections. If I think we need to meet later on this
16 afternoon, if you can just stay on call after that 1:00 o'clock
17 session, we might need another session around 4:00.

18 MR. SEGAL: I may have answered prematurely whether we
19 have another exhibit issue to raise.

20 May I confer for a moment, Your Honor?

21 THE COURT: Why don't you just meet and confer and let
22 me know when we come back at 1:00.

23 MR. SEGAL: All right. Thank you, Your Honor. We'll
24 do that.

25 THE COURT: Is there anything else that we need to be

1 discussing besides finalizing the exhibits, jury instructions
2 and the verdict form?

3 MR. SEGAL: No, Your Honor.

4 THE COURT: Mr. Leiderman?

5 MR. JAFFE: Okay. I'm going to have to show a little
6 greenness here. I beg your pardon.

7 The timing regarding moving under Rule 29 for a
8 directed verdict of acquittal, which the defense plans to do.

9 THE COURT: All right.

10 MR. JAFFE: It could be now if it's acceptable.

11 THE COURT: All right. That motion is made now. And
12 I'll hear -- how long do you need to argue that?

13 MR. JAFFE: Well, we move under -- the defense's
14 position is that the elements have not been established for any
15 of the counts charged. However, the defense -- the motion is
16 for all of them.

17 About 15 minutes, Your Honor --

18 THE COURT: All right.

19 MR. JAFFE: -- depending on the government's response.

20 THE COURT: Are you prepared to respond? I would hear
21 the argument now.

22 MR. SEGAL: Okay.

23 THE COURT: I think that makes the most sense.

24 You're still all right, Madam Court Reporter?

25 THE COURT REPORTER: Yes.

1 THE COURT: All right. So, Mr. Jaffe.

2 MR. JAFFE: The defense moves under Rule 29 for a
3 directed verdict of the defendant Matthew Keys on all charges
4 on the basis that the elements of each of the counts alleged
5 against him have not been established and, therefore, a
6 directed verdict is appropriate.

7 Although we move on all of the grounds, the defense
8 wants to point specific attention to Count Three. Count Three
9 is the attempt. And although it's not entirely clear to the
10 defense exactly what -- exactly which attempt the government is
11 referring to, but it is our understanding, based on the trial
12 brief and what was presented, was that the attempt was after
13 the completed offense. After the alleged attack on the
14 website, which changed a headline to Chippy 1337, there was a
15 second attempt to deface the L.A. Times web page, for which
16 AEScracked was unable to do because he was unable and locked
17 out of the system.

18 The evidence presented in support of the attempt
19 charge, which, again, it's our understanding is a separate
20 attempt, is solely based on the statements attributed to
21 AEScracked on a chat log, wherein he tells someone else on the
22 chat log that he can get back into the system. Someone else
23 replies something like that would be a good idea. AEScracked,
24 which other people testified is Matthew Keys, AEScracked then
25 says I can't get in, I'm locked out and swears. This was the

1 sole evidence presented in support of the attempt charge on
2 Count Three.

3 Attempt, of course, requires -- attempt, of course,
4 requires intent, and it requires a substantial step. Although
5 the chat log is hardly sufficient evidence of that intent, of
6 this separate attempt, of this wholly separate offense, there
7 has been no evidence at all presented of the substantial step
8 besides the unreliable statement in a chat room of AEScracked,
9 and that is insufficient to support a verdict beyond a
10 reasonable doubt of the attempt.

11 THE COURT: All right. Do you wish to argue the other
12 counts as well?

13 MR. JAFFE: It is the defense's position that, under
14 Count One and Count Two, that the requisite damage to the
15 protected -- to the system has not been established because the
16 evidence has shown that the CMS system has operated securely,
17 it operated properly, it did everything that it was supposed to
18 do, and that none of the information was lost. It was all
19 immediately retrieved and, therefore, there is no damage under
20 1030(a)5(A).

21 Furthermore, loss has not been established because the
22 testimony introduced to establish loss was based on
23 speculation. There was no expert testimony introduced to
24 determine what was a reasonable investigation. Each and every
25 witness testified as to -- without any precision or any detail

1 as to the work done. The work was excessive and unreasonable
2 under Section 1030. And, moreover, most of the evidence
3 introduced was loss attributed to things that had nothing to do
4 with the alleged attack on the L.A. Times.

5 To wit, there was much evidence and prejudicial
6 evidence introduced regarding the Cancer Man e-mails, the
7 Skinner e-mails, tracking the identity of the person behind all
8 of the Cancer Man and Skinner e-mails, tracking the identity of
9 who was interfering with Sam Cohen's system, which all took
10 place days before the alleged L.A. Times attack, and nothing
11 left to establish the requisite loss of \$5,000 under Section
12 230. I'm sorry, Section 1030.

13 THE COURT: All right. Understood.

14 Who is arguing in opposition?

15 MR. SEGAL: I am, Your Honor.

16 THE COURT: All right.

17 MR. SEGAL: So I'm just going to start and address this
18 in the order presented by the defense.

19 The defendant claims that the only evidence to support
20 the Count Three attempt charge is the chat log in which he's
21 telling Sharpie that -- well, let me help you get back in, and,
22 that's not true. Special Agent Cauthen's power point tied that
23 chat log where -- to events in the CMS log that correspond to
24 it exactly.

25 And if Your Honor -- so 506 and 507 are the chat logs

1 where, in Internet Feds, Keys is telling Sharpie, let me get
2 back in. But what the defendant is omitting is that Government
3 Exhibit 307 -- first of all, that would be sufficient anyway
4 because it's the defendant's admission. But, second, if you
5 look at Government Exhibit 307, that's the attempted log-in
6 from the LDAP system of the Tribune CMS.

7 And LDAP stands for -- is it lightweight something
8 authentication protocol? He's trying to log in, and that was
9 Agent Cauthen's testimony. So that's a pretty substantial
10 step. Not only is the defendant saying what he's doing and
11 why, he's also actually doing it. We have, you know, the pin
12 jimmying the door on the system, and it's unsuccessful. So
13 there's that.

14 The other claim is that there's no -- so that's the, I
15 think, complete and sufficient response that there's certainly
16 enough for a reasonable -- for a reasonable jury to find beyond
17 a reasonable doubt that there was a substantial step based on
18 that attempted log-in on 12/15, again, Exhibits 307 and 309.

19 Then, with regard to the other counts, witness after
20 witness in this trial testified that there were back doors
21 installed to re-access the system. And, I mean, there is -- a
22 reasonable juror could certainly find that what Keys did -- you
23 know, again to make the house metaphor -- is he installed
24 scores of back doors and elevated the privileges of each of
25 these passwords for this entire period.

1 Agent Cauthen testified that there were hundreds, if
2 not thousands of commands executed or communications between
3 Keys and the Tribune CMS. He's all over the place. And then
4 what he does is he tells Anonymous, because his hacking skills
5 aren't good enough, he tells Anonymous here's how to get back
6 in, here's a password, here's how to create a new username,
7 here's how to escalate its privileges. That -- and based on
8 the testimony of the IT witnesses, that is a compromise to the
9 integrity of the system because he's building back doors.

10 Then, there are the things that they accomplished once
11 they were in. Right? He -- there is the defacement of the
12 story, which is what he actually suggested Anonymous do. And
13 then there's also the downloading of these e-mails. And the
14 thing that is particularly special about this case is that what
15 he -- so there's the damage to the integrity of the system and
16 to the availability of data. Right? I mean, if you want that
17 kind of damage, it's there as well because readers could not
18 read the real L.A. Times story from the L.A. Times when they
19 needed to for 45 minutes from the regular site and for a day
20 from the mobile site.

21 And it's any impairment to the integrity of data, any
22 impairment to the integrity of a system. And what they're
23 trying to do in their Rule 29 motion is kind of make you think
24 that -- you know, they're hoping that somehow if the system
25 works even for an intruder, that that's not -- that somehow the

1 system is not impaired. But witness after witness talked about
2 how the security of the system is part of its integrity.

3 Finally, on the issue of loss, there is -- I'll just
4 say there's enough to go to a jury on loss. A lot of people
5 burned a lot of time over this. And it's particularly ironic
6 for the defendant to be arguing that there wasn't enough loss
7 or that certain things cannot be counted as loss because what
8 Keys is doing in this case is not only building all these back
9 doors, not only downloading, you know, this e-mail list which
10 is a valuable asset, not only altering stories in the
11 newspaper, not only calling upon Anonymous to punish the L.A.
12 Times for what it publishes, but he's also sending these
13 e-mails to KTXL to make them spin their wheels. Right? The
14 only way to read the Cancer Man e-mails is that way.

15 I mean, if Keys had only wanted to tell viewers that --
16 you know, whatever conspiracy theory truth he had about Fox 40,
17 he just would have sent out the blast to the e-mail. Right?
18 But that's not what he does. What he does is drip, drip, drip,
19 I'm going to do this, I'm going to do this, I did it. And
20 again, drip, drip, drip, I'm going to send another one, I'm
21 going to send another one, by the way, your system is still not
22 secure, to get them doing exactly what they did, which was
23 work. Right?

24 He worked in that small newsroom that is only twice as
25 big as the jury box, and he knew exactly the effect that it was

1 going to have, a reasonable juror could conclude. All of that
2 damage -- excuse me -- all of that loss, all of that time spent
3 is exactly what he wanted.

4 Another way that you know that that's what he intended
5 is the e-mail on December 20th. Right? After all this appears
6 to be over -- remember, the last time he hits the LDAP server
7 is January 2nd or 4th, I forgot. But on December 20th, Brandon
8 Mercer gets an e-mail that is in evidence, and I can't remember
9 the exhibit number, but it's just ding. There's no reason to
10 send that e-mail, the ding e-mail except for remember me? I'm
11 still out there. Go burn some time. Don't do your regular
12 job.

13 So, I mean, I'll have more to say about it in closing,
14 Your Honor, but we think a reasonable juror could --

15 THE COURT: This is not closing.

16 MR. SEGAL: Yeah.

17 THE COURT: Rebuttal?

18 MR. JAFFE: With regard to the attempt, first of all,
19 it's not accurate to say that a couple of vague statements
20 attributed to AEScracked in a chat room would be sufficient
21 evidence of intent and certainly not of the substantial step in
22 addition to that, and no evidence was introduced regarding the
23 substantial step. Cauthen was to testify regarding information
24 related to the actual defacement of the L.A. Times site which
25 resulted in the Chippy 1337 and not a separate successive

1 attempt by AEScracked or Matthew Keys or anyone else. There's
2 little more to say about that because there was no more
3 presented to that.

4 With regard to the government's argument regarding
5 damage and loss, the argument that the damage was the damage to
6 the CMS system, and then the government then proceeded to
7 discuss loss solely in terms of investigation and facts that
8 preceded the damage, the alleged damage to the CMS system.

9 It's true, multiple witnesses testified, multiple
10 witnesses testified as to events and facts and allegations that
11 took place before AEScracked ever allegedly gave Sharpie or N.
12 Garcia any information that would provide access to the CMS.
13 The Cancer Man e-mails, the Skinner e-mails, Sam Cohen having
14 to log in with a username and password, it's noise. It's a
15 back story. It has distracted the jury. In fact, it has
16 distracted us because it's too difficult for us to tell how
17 that even fits into the allegations against Mr. Keys. They're
18 not part of the indictment.

19 The indictment is wholly dedicated to the defacement of
20 the L.A. Times website and begins with a story that's only
21 related to that. It has nothing to do with Cancer Man or
22 Skinner e-mails. There are no allegations in the indictment of
23 accessing an e-mail list and downloading it, obtaining or using
24 e-mail addresses from iPad users or anybody else from Fox 40.

25 THE COURT: All right. The motion is denied. It's

1 without prejudice. I believe there's enough to send to the
2 jury.

3 What your arguments have previewed is the challenge of
4 clarifying some jury instructions to tell the jury what its job
5 is. But I think there's enough, including circumstantially on
6 each count, to send the case to the jury. But the motion is
7 denied without prejudice.

8 MR. SEGAL: Thank you, Your Honor.

9 THE COURT: All right. We'll see you at 1:00.

10 MR. SEGAL: See you at 1:00.

11 (Lunch recess taken.)

12 ---o0o---

1 SACRAMENTO, CALIFORNIA

2 MONDAY, OCTOBER 5, 2015, 1:00 P.M.

3 ---o0o---

4 (Jury not present.)

5 THE CLERK: You may remain seated and come to order.
6 Court is now back in session.

7 We're back on the record, Your Honor.

8 THE COURT: All right. We're on the record for a jury
9 instructions workshop. Any update on exhibits?

10 MR. HEMESATH: We met and conferred, Your Honor. We're
11 still confirming the last details. And we've come to an
12 agreement about how to submit the audio files and so forth, and
13 so we are very close.

14 THE COURT: All right. Do you want to record any
15 stipulations? Or do you want to wait and do that tomorrow
16 morning?

17 MR. LEIDERMAN: At the government's pleasure.

18 MR. HEMESATH: Let's do that tomorrow morning.

19 THE COURT: All right. All right. Let's go through
20 the proposed jury instructions.

21 You have a working set that is 37 pages, unnumbered
22 instructions. So I'm going to refer to the page numbers, and
23 we'll just go page by page. Some I assume are not
24 objectionable, but some will be the subject of intense
25 discussion.

1 Any problem with page 2 as worded? Mr. Segal?

2 MR. SEGAL: No, Your Honor.

3 THE COURT: Mr. Leiderman or who's on point here?

4 MR. LEIDERMAN: Actually Mr. Jaffe is going to be on
5 point here, but I'll answer for both of us. No.

6 THE COURT: All right. So page 2? Mr. Jaffe?

7 MR. JAFFE: No objections.

8 THE COURT: All right. So that will be given as shown.
9 Page 3, Mr. Segal?

10 MR. SEGAL: No, Your Honor.

11 THE COURT: Mr. Jaffe?

12 MR. JAFFE: No objections.

13 THE COURT: All right. That will be given as shown.
14 Page 4. Mr. Segal?

15 MR. SEGAL: Nope.

16 THE COURT: Mr. Jaffe?

17 MR. JAFFE: No objections.

18 THE COURT: All right. Page 5, general presumption of
19 innocence. Reasonable doubt instruction. Mr. Segal?

20 MR. SEGAL: Your Honor, what is the modification from
21 the pattern instruction in this one on reasonable doubt? I
22 couldn't find it.

23 THE COURT: I'm actually thinking that you had proposed
24 a modification, and the Court deleted the modification.

25 MR. LEIDERMAN: I had proposed a modification.

1 THE COURT: You did?

2 MR. LEIDERMAN: Yes.

3 THE COURT: Is the modification incorporated? Can you
4 remind me?

5 MR. LEIDERMAN: Can you go down a little bit further?

6 MR. SEGAL: I would ask that the Court give the pattern
7 instruction on reasonable doubt. I think that's --

8 MR. LEIDERMAN: My proposed modification was between
9 lines -- would have fell between lines 9 and 10, and I ask that
10 it be amended to say in partial consideration of all the
11 evidence, comma, a conflict in the evidence, comma -- a
12 conflict in the evidence or from lack of evidence. So I was
13 asking for the clause "a conflict in the evidence," and I see
14 that the Court has left that out.

15 THE COURT: Right. And your authority for that?

16 MR. LEIDERMAN: My authority for putting in the
17 conflict of the evidence?

18 THE COURT: Correct.

19 MR. LEIDERMAN: It's -- I took it from the state court
20 instruction.

21 THE COURT: California state court?

22 MR. LEIDERMAN: California state court.

23 THE COURT: All right. Any case law addressing the
24 possibility of adding that language?

25 MR. LEIDERMAN: I didn't pull Ninth Circuit case law on

1 it. If the Court recalls, that was -- and I apologize --
2 submitted rather late.

3 THE COURT: So any comment based on the fact that
4 language does appear in the state instruction, Mr. Segal?

5 MR. SEGAL: We're in federal court. I don't think the
6 Court should be altering the definition of reasonable doubt.
7 All the evidence gives counsel the opportunity to argue
8 conflict in the evidence.

9 And in this case, we have -- and, furthermore, even if
10 we were in state court in a case where a defendant hasn't put a
11 case on, there's not -- there's a conflict of evidence anyway.
12 It's really --

13 THE COURT: No comment on the last bit, but I'd give
14 the tried and true instruction. I don't think there's any
15 reason not to, not that the Court always does that. So the
16 instruction will be given, and we'll note that was not modified
17 in terms of what the Court gave the parties. We will track
18 Ninth Circuit instruction 3.5.

19 Page 6, right not to testify. Mr. Segal?

20 MR. SEGAL: No objection.

21 THE COURT: Mr. Jaffe?

22 MR. JAFFE: No objections.

23 THE COURT: Page 7, what the evidence is. Mr. Segal?

24 MR. SEGAL: No objection.

25 THE COURT: Mr. Jaffe?

1 MR. JAFFE: No objections.

2 THE COURT: Page 8, what is not evidence.

3 MR. SEGAL: No objection.

4 THE COURT: Mr. Jaffe?

5 MR. JAFFE: One moment, Your Honor.

6 No objections.

7 THE COURT: All right. Page 9?

8 MR. SEGAL: No objection.

9 THE COURT: So this refers to the 1006 summary. Is
10 that the only one really?

11 MR. SEGAL: This doesn't refer to the 1006 summary.
12 This refers to the argumentative exhibit that Agent Cauthen
13 testified about and is not going back to the jury. We gave up
14 on our effort to admit that as a 1006 summary.

15 THE COURT: All right. You had continued to refer to
16 it, I thought, as a 1006 summary. We're talking about the
17 power point?

18 MR. SEGAL: Right, until the moment we gave up. So I
19 think this instruction is appropriate, and the next one is not
20 necessary.

21 THE COURT: All right. And is it correct to say charts
22 and summary?

23 MR. SEGAL: Fair enough.

24 THE COURT: Mr. Jaffe?

25 MR. JAFFE: No objection to that language.

1 THE COURT: All right. So page 9 will be given as
2 provided to the parties, Ninth Circuit 4.15.

3 And 10, Mr. Jaffe, you agree that is not needed?

4 MR. JAFFE: It's not necessary, Your Honor. The
5 defense agrees.

6 THE COURT: All right. So 10 will not be given.

7 Page 11, standard direct and circumstantial evidence
8 instruction. Mr. Segal?

9 MR. SEGAL: I agree with this, Your Honor.

10 MR. LEIDERMAN: I had given the Court a proposed
11 instruction that was considerably lengthier that had both this
12 portion of the instruction and then the entirety of the state
13 instruction, which explains not only what evidence is, but how
14 you are to use it.

15 For example, the most salient point of it is that, if
16 circumstantial evidence has two possible interpretations, one
17 which points to guilt, the other which points to a lack of
18 guilt, then the interpretation which points to guilt has to be
19 rejected in favor of the interpretation which points to a lack
20 of guilt.

21 THE COURT: And the authority for that? I do recall
22 reviewing that.

23 MR. LEIDERMAN: Right.

24 THE COURT: Remind me of the authority.

25 MR. LEIDERMAN: Your Honor, I have to apologize. I had

1 literally just, like, stepped off the plane from a very long
2 vacation in Greece, and I didn't -- I looked at what my
3 colleagues had done and got this filed late without doing the
4 research, just looking over what they were and putting in the
5 California instructions that I felt I needed, and it was just
6 the two of those.

7 So I didn't do --

8 THE COURT: So this is also based on a California
9 instruction?

10 MR. LEIDERMAN: It is verbatim the California
11 instruction on direct and circumstantial evidence.

12 And while I recognize we're not in state court, it's a
13 helpful instruction. It's a correct statement of the law. And
14 it doesn't just tell them what the evidence is, but it tells
15 them how to use the evidence, and that's different than, you
16 know, arguing a reasonable doubt instruction. How to use the
17 evidence is extremely helpful to them.

18 THE COURT: The Court at times gives the water on the
19 sidewalk example. That's the most I've done to further
20 explain.

21 Has that language from the California instruction been
22 addressed by the Ninth Circuit; do you know, Mr. Leiderman?

23 MR. LEIDERMAN: I don't.

24 THE COURT: Mr. Segal, do you know?

25 MR. SEGAL: Your Honor, if the Court wants to give the

1 water on the sidewalk instruction or the guy with the umbrella
2 coming in, any of that is fine. But the exact reason that
3 Mr. Leiderman wants this instruction is -- is not federal law.
4 The jury is supposed to be instructed in federal court that
5 there is no distinction between direct and circumstantial
6 evidence, and it's all for the jury to decide. And I think it
7 actually would be -- they have no case that entitles them to
8 the judge telling the jury that, if circumstantial evidence can
9 go either way, you know, tie goes to the defendant.

10 That's not -- I've never seen that instruction given in
11 federal court, and I think it's error.

12 THE COURT: Did you say there is case law saying that?

13 MR. SEGAL: No, I said they never --

14 THE COURT: I understand that. So it's not been
15 addressed one way or the other.

16 MR. SEGAL: Well, except that it is in direct
17 contradiction to the federal pattern instruction.

18 THE COURT: I understand that argument.

19 No Ninth Circuit case has discussed the Court's
20 declining to give it --

21 MR. SEGAL: I don't --

22 THE COURT: -- in the face of a defense objection.

23 MR. LEIDERMAN: Well, yeah, if I could just make a
24 further record, please.

25 There's a difference between talking about a

1 distinction between the weight to be given and how to use the
2 evidence. It's different to say it's for you to decide how
3 much weight to give any evidence as opposed to telling them
4 that, if the evidence is equivocal, the government has stated
5 it correctly, tie goes to the defendant, which is the way the
6 evidence is to be used, not how much weight is to be given to
7 it. That's one thing.

8 The other thing is, not hearing any prohibition on if
9 it's not given by the Court, I should be allowed to argue it.

10 THE COURT: Any argument on that point? Mr. Segal?

11 MR. SEGAL: I'm just thinking about my answer before --
12 I think if counsel wants to argue that -- I mean, if counsel
13 makes a statement that is contrary to federal law, the Court is
14 supposed to correct him, and so it really depends what the
15 argument that gets made is.

16 I don't know exactly what is going to be said, but how
17 to weigh evidence is -- is the province of the jury. They can
18 be -- things can be suggested. But to say that the law
19 requires that evidence be weighed in a particular way is not
20 how federal civil or criminal trials work, except in very
21 limited exceptions, which are not so general as to single out a
22 particular kind of evidence like circumstantial evidence for
23 extra doubt.

24 That's not -- he can say this is circumstantial, and
25 his voice can drip -- you know, counsel's voice can drip with

1 contempt when he uses the adjective "circumstantial." But to
2 say that the law requires it to be weighed differently from
3 direct is running some risks that, you know, he'll decide
4 whether to run based on, you know, how far he wants to go out
5 on that limb.

6 THE COURT: All right. Whatever I give you next will
7 show how I resolved the issue of the instruction, and the
8 defense can stay alert for objections from the government if it
9 argues in the absence of an instruction.

10 Page 12.

11 MR. LEIDERMAN: Well, hold on. Can I rebut that? I'm
12 sorry, Your Honor, I don't mean to say hold on, but with
13 respect.

14 I'm not telling the jury what the law is. I'm arguing
15 to them at this point, in the absence of an instruction, how
16 the evidence should be used.

17 THE COURT: I think I understand that.

18 MR. LEIDERMAN: Okay.

19 THE COURT: All I'm saying is I'm not -- without
20 hearing the argument, I don't know if it's going to draw an
21 objection. I'm going to go look again at the California
22 language and just make a final decision after this session.
23 So, again, you will see how I resolved the issue in the next
24 packet of instructions.

25 MR. LEIDERMAN: Oh, I see what you're saying.

1 THE COURT: That's what I'm saying.

2 MR. LEIDERMAN: I'm sorry, Your Honor.

3 THE COURT: I'm not resolving it at this time.

4 MR. LEIDERMAN: Got it.

5 THE COURT: Page 12, any objection? Mr. Segal?

6 MR. SEGAL: No, Your Honor.

7 THE COURT: Mr. Jaffe?

8 MR. JAFFE: No objections.

9 THE COURT: Page 13. Mr. Segal?

10 MR. SEGAL: No Your Honor.

11 THE COURT: Mr. Jaffe?

12 (Defense counsel conferring.)

13 MR. JAFFE: The concern -- again, this concern recently
14 occurred to the defense. This doesn't distinguish between the
15 statement offered through Agent Cauthen and other statements
16 that have been attributed to Matthew Keys. And that there is
17 a -- so that there is a statement, and there are other
18 statements that have been attributed to Matthew Keys that may
19 or may not have been Matthew Keys based on whether or not the
20 government has satisfied that burden.

21 THE COURT: So is that solved by simply changing
22 statement to statements, you have heard testimony that the
23 defendant made statements?

24 MR. JAFFE: May have made statements?

25 THE COURT: It is for you to decide whether the

1 defendant made the statements? If so, how much weight to give
2 to them?

3 MR. JAFFE: Yes.

4 MR. SEGAL: The testimony was that he did make
5 statements, but it remains for the jury to decide whether to
6 credit that testimony.

7 THE COURT: There are two categories of statements.
8 There are two recorded statements --

9 MR. JAFFE: Yes.

10 THE COURT: and there are written statements.

11 Is there a need to make that distinction in the
12 instruction?

13 MR. SEGAL: I don't think so, Your Honor.

14 MR. JAFFE: No, Your Honor.

15 THE COURT: All right.

16 MR. SEGAL: So we're just -- how are we revising it?

17 THE COURT: Just converting it so it's a plural.

18 MR. SEGAL: Okay.

19 THE COURT: So changes throughout to reflect that
20 statements should be plural.

21 Page 14, here my question really is with respect to
22 the -- I think there are -- there is the Mercer recording,
23 which I think most closely invokes the need for this kind of
24 instruction. And so "agent" probably isn't the right word in
25 the first sentence. My question to the parties is, is that the

1 only bit of evidence that invokes the need for this
2 instruction? Mr. Segal?

3 MR. SEGAL: Your Honor, the recording of the defendant
4 in his interview in his apartment was also without the
5 defendant's knowledge. And so --

6 THE COURT: Correct.

7 MR. SEGAL: And so for that reason, I submitted an
8 instruction you've heard testimony -- that is a modification
9 because there was no other -- you know, it's not like a
10 narcotics case where we sent somebody in to buy drugs or
11 something like that. The only stuff in deception was
12 surreptitious recording. Some people have a problem -- some
13 jurors might come to court with a problem with that, and others
14 might not. So --

15 THE COURT: Do you agree with that, that that's the
16 only evidence implicated, the Mercer recording and Agent
17 Cauthen's recording?

18 MR. JAFFE: We did seek to introduce other evidence
19 regarding the Cauthen interview, but I think that was not -- it
20 did not come into play.

21 THE COURT: But, for example, just so -- there is no
22 evidence to allow a conclusion that there was an informant in
23 the IRC.

24 MR. SEGAL: Right.

25 THE COURT: All right.

1 MR. SEGAL: So --

2 THE COURT: Or an agent in the IRC.

3 MR. SEGAL: Right.

4 THE COURT: So this needs to be modified to apply to
5 both Mercer and Cauthen.

6 MR. SEGAL: May I suggest one, Your Honor?

7 THE COURT: And that's -- you already have submitted
8 that to the Court?

9 MR. SEGAL: Page 5 --

10 THE COURT: All right.

11 MR. SEGAL: -- of the government's proposed.

12 THE COURT: Any objection to that proposal?

13 MR. JAFFE: We're looking for it.

14 THE COURT: Mr. Jaffe?

15 (Counsel conferring.)

16 MR. LEIDERMAN: That's fine.

17 THE COURT: That's fine with you?

18 MR. LEIDERMAN: It's fine. Yes, Your Honor.

19 THE COURT: All right. So we'll plan to give that
20 instruction. I'll double-check. You may see at least
21 wordsmithing from me, if not more.

22 MR. LEIDERMAN: So this one is out, and the
23 government's proposed is in?

24 THE COURT: Subject to my final review.

25 MR. LEIDERMAN: Okay. The defense joins in the request

1 to have it made that way.

2 THE COURT: All right. Page 15, Mr. Segal?

3 MR. SEGAL: We haven't offered any 404(b) evidence so I
4 don't think this one is necessary.

5 THE COURT: Mr. Jaffe, you agree?

6 MR. JAFFE: The defense does not agree that 404(b)
7 evidence was not offered. We believe that much of it can only
8 be admissible for, if anything, 403 purposes and are part of
9 the -- of what was in the superseding indictment or part of
10 what was charged.

11 That being said, this instruction, we do not object.

12 THE COURT: Just so I'm perfectly clear on what you
13 believe would fall under the description of other acts.

14 MR. JAFFE: Everything related to Cancer Man,
15 everything related to Skinner, everything related to Fox
16 Mulder, everything related to Sam Cohen's username and
17 password, everything related to the alleged accessing of
18 e-mails from iPad users, none of which was alleged in the
19 superseding indictment, which only relates to acts involving
20 the alleged attack on the L.A. Times, and we don't believe to
21 be relevant to the counts against Mr. Keys.

22 THE COURT: All right. So we may come back to this
23 after we discuss the counts.

24 So page 16 is introduction to the instruction on Count
25 One. Any objection to this page, Mr. Segal?

1 MR. SEGAL: No.

2 THE COURT: All three counts, it identifies all three
3 counts as set forth in the indictment.

4 MR. SEGAL: So there should just be -- conspiracy to
5 cause damage to a protected computer, we have gone back and
6 forth on what to call this, the substantive offense for short,
7 malicious code or damage to a protected computer. And I tried
8 to be consistent in my proposed ones. I think in the end what
9 we settled on in our jury instructions was that it might be
10 better to call it -- hang on. Sorry, Your Honor.

11 THE COURT: What's wrong in this instruction with just
12 tracking the --

13 MR. SEGAL: I'm -- there's nothing --

14 THE COURT: -- name is assigned to the count.

15 MR. SEGAL: There's nothing wrong with it
16 substantively. I think -- I would just ask that we revisit it
17 once we settle on all of the instructions to make sure that
18 what we call the offenses for short do not confuse the jury
19 once we've decided on the elements.

20 Am I making -- that's all I'm asking.

21 THE COURT: Right. Any objection to this language,
22 Mr. Jaffe, page 16?

23 MR. JAFFE: The defense isn't clear on what the
24 government is requesting at this time. The language in this
25 instruction, as far as I can see, tracks the superseding

1 indictment, so no objections.

2 THE COURT: All right. Page 17 begins the Count One
3 instructions, which currently are appearing on pages 17 through
4 24. So the first instruction, pages 17 to 18. Mr. Segal?

5 MR. SEGAL: There are a few problems with this one,
6 Your Honor.

7 The first is on the first line. This is not -- there
8 are two kinds of 371 conspiracy, and we've only charged one;
9 that is, to commit an offense against the United States. We're
10 not invoking the defraud clause in this case. So "or to
11 defraud the United States" should be out, and it should just be
12 conspiracy to commit an offense against the United States.

13 THE COURT: All right. The Court accepts that. Any
14 problem with that, Mr. Jaffe?

15 MR. JAFFE: No. We believe that's correct, Your Honor.

16 THE COURT: All right.

17 MR. SEGAL: Okay. And then the second is it's -- the
18 first paragraph after that misstates the object of the
19 conspiracy. As drafted now, it says intending to cause damage
20 to the Los Angeles Times website without authorization. And
21 what the indictment says was the object -- first, the L.A.
22 Times website is not a computer. Right? The computer that was
23 identified in the indictment and in the evidence was the
24 Tribune content management system.

25 If there is going to be a website specifically

1 identified that's come up in the evidence, that would be
2 tribuneinteractive.com. That's the website that they all came
3 in through. That was the URL of the Assembler CMS used to make
4 the modifications.

5 What the indictment itself says was the object of the
6 conspiracy is twofold, to make unauthorized changes to websites
7 that Tribune Company used to communicate news features to the
8 public, and to damage computer systems used by Tribune Company.
9 That's in paragraph 3 of the -- you know, it's the objects
10 clause of the conspiracy count.

11 THE COURT: All right. But --

12 MR. SEGAL: So my concern is basically constructive
13 amendment to the indictment. The -- if we're going to identify
14 the computer, it should be identified as it was, which is
15 Tribune Company's CMS in the indictment and the evidence. And
16 if we're going to refer to the objects clause of the
17 indictment, it should be verbatim, because this language is
18 likely to be confusing and I think an amendment of the
19 indictment.

20 THE COURT: All right. I understand, and I'm prepared
21 to make some modifications based on what I've heard.

22 Should the word "computer" say protected computer? And
23 do we need a definition of protected computer?

24 MR. SEGAL: I think that in the substantive clause, in
25 the instruction for the substantive count, it says a computer

1 used in interstate commerce, and that's what a protected
2 computer is. Let me just find that in the proposed -- yeah.
3 So at Your Honor's page 25.

4 THE COURT: That's Count Two.

5 MR. SEGAL: Yes. And so the object of the offense is
6 to commit the substantive -- I'm sorry. Let me back up.

7 THE COURT: We're not to Count Two yet.

8 MR. SEGAL: I know, but it's --

9 THE COURT: But the same definition.

10 MR. SEGAL: Right.

11 THE COURT: All right.

12 MR. SEGAL: And if I may, the jurisdictional element of
13 the substantive offense is not part of the mens rea requirement
14 of the conspiracy. So, for example -- and so they don't have
15 to have known that it was a protected computer for the
16 conspiracy.

17 THE COURT: Do you agree with that, Mr. Jaffe?

18 MR. JAFFE: That is true. Protected computer is not
19 typically a contentious area or definition under this act.

20 The defense wants to add that it agrees that the
21 intended damage, according to the indictment and indeed
22 according to the law, is damage to the computer management
23 system. And the defense strongly agrees that the instruction
24 should be modified accordingly so that it's intending to cause
25 damage to the computer management system.

1 THE COURT: All right. Should we import the definition
2 of protected computer or not? Do we just say the parties agree
3 that this was a protected computer? Does it matter?

4 MR. JAFFE: It can be added.

5 MR. SEGAL: It doesn't --

6 MR. JAFFE: Whether or not there needs to be an intent
7 or knowledge that this is a protected computer is not the same
8 as whether or not. It must be determined that this is a
9 protected computer. So the defense has no objection to
10 including that definition.

11 THE COURT: Are you saying the jury doesn't have to
12 find that, Mr. Segal?

13 MR. SEGAL: Not to convict of conspiracy. But if you
14 want to add it, I mean, it just -- I'm not going to -- I'm not
15 going to have this academic debate when it doesn't matter here.
16 If you want to make that change, it would be -- you could do it
17 easily by saying information to a computer used in interstate
18 or foreign commerce.

19 THE COURT: All right. All right. Anything else on
20 this instruction?

21 MR. SEGAL: Just that either -- well, I think in order
22 to talk about other instructions, we need to know what the
23 Court intends with regard to putting the -- identifying the
24 computer to be damaged or putting the objects clause of the
25 conspiracy in.

1 THE COURT: What's the defense's response to the object
2 clause, Paragraph 3 on page 3 of the indictment, top of the
3 page?

4 Any objection to adding --

5 MR. JAFFE: Paragraph 3 that begins with --

6 THE COURT: The conspiracy had the following object.

7 MR. JAFFE: The one that says third or the one that
8 says second?

9 THE COURT: Objects, page 3, paragraph 3 at the top.
10 The conspiracy had the following objects, among others. The
11 government is asking for that information.

12 MR. SEGAL: Or just the -- if they want the CMS, that's
13 fine with me, too.

14 MR. JAFFE: It was my understanding that that's what
15 the government had proposed.

16 MR. LEIDERMAN: Yeah.

17 THE COURT: But I also heard a request for the language
18 verbatim from paragraph 3. Correct, Mr. Segal?

19 MR. SEGAL: Yes. That is -- that I think --

20 THE COURT: I'm trying to clarify the defense response
21 to that request.

22 MR. JAFFE: That's acceptable, Your Honor.

23 THE COURT: All right. Anything else on Count One,
24 Mr. Segal?

25 MR. SEGAL: If I may have just one moment.

1 The rest of it looks like the form language; is that
2 right, Your Honor?

3 THE COURT: It should track the form language.

4 MR. SEGAL: Oh, is there a typo? Hang on.

5 MR. JAFFE: Are you talking about --

6 MR. SEGAL: There should be an offense on line 1.

7 THE COURT: All right.

8 MR. SEGAL: And that's all I have.

9 THE COURT: Mr. Jaffe, again, we're looking at pages 17
10 and 18. Is there anything else?

11 MR. JAFFE: Yes. I believe at least one more time
12 there is the use of the term "defraud the United States."

13 MR. SEGAL: Oh.

14 MR. JAFFE: In the paragraph that begins for a
15 conspiracy to have existed.

16 MR. SEGAL: It's also at -- yeah, at line 21.

17 THE COURT: All right.

18 MR. SEGAL: Right, that should come out.

19 May I have a moment to read it for other defraud clause
20 reference?

21 THE COURT: You may. We can also word search for that.

22 MR. SEGAL: Okay.

23 THE COURT: All right. Page 19, Mr. Segal? This is
24 just tracking the statute.

25 MR. SEGAL: No objection, Your Honor.

1 THE COURT: Mr. Jaffe?

2 MR. JAFFE: The defense requests the modification or
3 the addition to the instruction that was in the defense's
4 proposed jury instructions, which includes this language, and
5 then also includes language to the effect "if the data was
6 still available to the alleged victim either because it was
7 backed up or elsewhere, there is no damage under Section 230.

8 We cited numerous cases cited in the civil context, but
9 also tracking the same language, where information was altered
10 but in a way that the alleged victim was able to retrieve it,
11 and there was not determined to be damage within Section 230
12 within the Computer Fraud and Abuse Act.

13 Now, the issue here isn't whether something was wrong
14 or whether something was accessed without authorization.
15 Indeed, that's a very different provision of the Computer Fraud
16 and Abuse Act, but a very specific definition of damage which
17 only applies when information is lost so that it's not able to
18 be retrieved.

19 THE COURT: What about the back door evidence? So if
20 it's not just copying a username and password, but --

21 MR. JAFFE: It's my understanding that the damage
22 alleged is not damage to the username and password. That would
23 be the information transmitted under the statute. The damage
24 alleged is the damage to the content management system.

25 THE COURT: Which goes beyond the information required

1 to display the Chippy article. Agreed?

2 MR. JAFFE: Which goes beyond the information -- I
3 don't understand the question, Your Honor.

4 THE COURT: Well, the damage between the period alleged
5 here, between December 8th and 15th.

6 MR. JAFFE: Perhaps the government can clarify what the
7 government alleges has been damaged.

8 THE COURT: So there is obtaining control of at least
9 one username and password combination. Share at least one
10 username and password that could be used to log in and make
11 changes. To obtain control of at least one additional username
12 and password --

13 MR. JAFFE: Right.

14 THE COURT: -- without authorization.

15 MR. JAFFE: It's not the username and the password that
16 is damaged under Section 1030 of the CFAA. It's damage to the
17 system itself. The username and password may be the
18 information, may be the command under Section 1030, but the
19 damage is to the protected computer. And that tracks the
20 language of 1030(a)(5)(A). So to the extent that the damage
21 alleged is alleged to be damage to the username and password,
22 that doesn't track the statute at all.

23 THE COURT: Is the damage to the username and password?

24 MR. SEGAL: The damage is to the integrity of the
25 system, the construction of all of these back doors, damage to

1 the integrity of the system. It's how they spent most of
2 their -- they spent much of their time trying to find and
3 eliminate back doors that were constructed in furtherance of
4 the conspiracy by Keys and his co-conspirators.

5 THE COURT: So what's the evidence, just so I'm clear,
6 that supports the creation of back doors?

7 MR. SEGAL: Sure.

8 THE COURT: And what dates?

9 MR. SEGAL: Dylan Kulesza -- I'll get you the dates
10 when my colleague hands them to me. But I'll remind the Court
11 that, for example, there was a line of code shown to Dylan
12 Kulesza -- he was the technically proficient giant who
13 testified -- and he just said unequivocally that's the
14 construction of a back door.

15 THE COURT: But the date is really what's key.

16 MR. SEGAL: Okay. May I have a moment?

17 (Government counsel conferring.)

18 MR. SEGAL: Okay. It's Government Exhibit 303 on
19 December 8th. The first thing that we show -- I think that's
20 from the Tribune logs, that's part of the conspiracy -- shall I
21 walk over?

22 THE COURT: That's okay. I've looked at that. That
23 was one of my hypotheses. Anything else?

24 MR. SEGAL: Yes. In the chat logs themselves, Keys
25 tells them that he's credentialing up different usernames with

1 the second --

2 THE COURT: So again December 8th?

3 MR. SEGAL: I have to check. Hang on, Your Honor.

4 Yeah, so that corresponds with AEScracked saying, when
5 it says find user, type anon1234 and then click find.

6 And then later, Sabu says -- they verify that it's
7 legit, and Keys warns them that they'll identify super user
8 accounts. And then they --

9 THE COURT: All right. So let me ask the defense. How
10 is not the alleged creation of fake usernames, using access --
11 how is not the creation of fake names -- why isn't that
12 impairment to integrity at least potentially?

13 MR. JAFFE: In this case because everything operated
14 the way it was supposed to, so the system itself was not
15 damaged. And there was much testimony as to the system itself
16 operating, that people were able to get access, people were
17 able to use it. It was utilized exactly the way it was before.
18 And no -- no information was lost that wasn't available
19 elsewhere on the same system.

20 THE COURT: But the link is integrity to -- to at least
21 information, that is, the information available on the L.A.
22 Times website.

23 MR. JAFFE: That's more of an allegation that there was
24 access to a system without authorization. There is a provision
25 under the CFAA for that, but this is not it. This is damage to

1 the system.

2 And we're not arguing that --

3 THE COURT: Just using the government's mode of
4 thinking about this, if the back door creates a hole in the
5 dike, that's not a hole in the dike? If there's an anonymous
6 new username that allows someone --

7 MR. JAFFE: That's access into the system.

8 THE COURT: That's unauthorized access.

9 MR. JAFFE: That may be unauthorized access, which was
10 not charged.

11 THE COURT: And what's your best case of the cases
12 you've cited to me on that point?

13 MR. JAFFE: Hold on just a moment.

14 (Pause in proceedings.)

15 MR. JAFFE: There is the AtPac decision, AtPac versus
16 Aptitude Solutions, 730 F.Supp.2d 1174 in the Eastern District
17 of California. From the Central District of California, the
18 Sprint Solutions, Inc. versus Pacific Cellupage, Inc., which is
19 available on Westlaw 2014 WL3715122, Central District of
20 California, 2014. And New Show Studios, LLC versus Needle,
21 2014 WL2988271, Central District of California, 2014.

22 THE COURT: All right. I understand the parties'
23 arguments. I'm going to have to think a little bit more about
24 that.

25 Page 20.

1 MR. SEGAL: May I -- we're not just saying that a
2 single unauthorized access itself is damage. What we're saying
3 is that access -- the construction -- it's not just one access,
4 it then multiplied --

5 THE COURT: I understand that.

6 MR. SEGAL: Okay. Great. I'm moving on.

7 20?

8 THE COURT: Page 20.

9 MR. SEGAL: This looks like the form instruction. We
10 have no objection.

11 THE COURT: It should be.

12 Any objection, Mr. Jaffe?

13 MR. JAFFE: No objections, Your Honor.

14 THE COURT: Page 21.

15 MR. SEGAL: This looks like just the ordinary aiding
16 and abetting instruction, and we have no objection.

17 THE COURT: Mr. Jaffe?

18 MR. JAFFE: No objections.

19 THE COURT: Page 22. Mr. Segal?

20 MR. SEGAL: No objection.

21 THE COURT: Mr. Jaffe?

22 MR. JAFFE: No objection.

23 THE COURT: Page 23?

24 MR. SEGAL: This looks like what we submitted to try to
25 solve any Apprendi problem, Your Honor. Let me see.

1 THE COURT: Mr. Jaffe?

2 MR. SEGAL: No objection from the government.

3 THE COURT: I've added the cross-reference to the loss
4 definition. I think that's what I added.

5 MR. SEGAL: Yeah.

6 THE COURT: Mr. Jaffe?

7 MR. LEIDERMAN: If we can have one second.

8 (Defense counsel conferring.)

9 MR. JAFFE: The defense doesn't have an objection to
10 this language specifically. What we've been discussing is a
11 concern that will arise and will need to take place somewhere
12 within these instructions, and this could be the place. And
13 that's in regard to the evidence submitted in the form of an
14 e-mail by Brandon Mercer regarding his statement, Mercer's
15 statement that the FBI needs \$5,000 in order to prosecute.

16 Now, I think it's apparent to everyone in this room and
17 probably to the jury why that e-mail has been introduced and
18 used by the defense. The concern is that the language itself
19 that the FBI needs \$5,000 to prosecute is not accurate.

20 And somewhere, perhaps this is the place --

21 MR. SEGAL: Wait. That's fine with us. If the Court
22 wants to give an instruction, I just -- just to shortcut it, I
23 think the Court should give an instruction that any claims
24 about the law in the evidence -- that the jury should get its
25 understanding of the elements of the offense and the law only

1 from the Court's instructions, and that nothing in the evidence
2 should be considered an accurate statement of the law.

3 We -- I agree, I think that's --

4 THE COURT: What's the exhibit number? I remember the
5 exhibit. I just don't know the number.

6 MR. SEGAL: There's more than one --

7 MR. JAFFE: Exhibits F and G.

8 MR. SEGAL: There's more than one, Your Honor, and I'd
9 like to -- we could either refer to them or give a general
10 instruction. If you want us to refer to them exhaustively,
11 we'll have to go back and look at them again.

12 THE COURT: I don't know that we need to do that.

13 MR. SEGAL: You stopped court at times and told the
14 jury essentially this.

15 THE COURT: No, I understand that. I understand the
16 point. My question is, would it facilitate finalizing these
17 instructions to provide a joint instruction on this question?

18 You think you could do that by the end of the day?

19 MR. JAFFE: Yes.

20 MR. SEGAL: Yes.

21 THE COURT: And I believe I would -- do you agree that
22 this is the place to insert it? My thought would be to insert
23 it after page 24.

24 MR. SEGAL: I think you should put at either duty to --
25 under duty to follow the law or what is evidence, in that area.

1 But we can come up with something and propose it to Your Honor.

2 THE COURT: All right. So why don't you not only
3 propose exact language, but a location in the instructions.

4 All right. Then on page 24, my question on this
5 instruction -- again, I'm tracking the statutory language in
6 defining loss. Is the last part of this instruction implicated
7 by this case?

8 MR. SEGAL: No, and that was in my notes to raise. We
9 have not -- for various reasons, we have not adduced evidence
10 of consequential damages. So I think from the comma -- the
11 comma before "and" can be made a period, and you can strike
12 everything that follows after that.

13 THE COURT: All right. With that clarification that I
14 will do that, Mr. Jaffe, any objection?

15 MR. JAFFE: There are no objections to striking that
16 part of it. What the defense had requested and sought for this
17 was out of concern that cost unrelated to computer impairment
18 or computer damages had been introduced. In this case, more
19 moderately and more conservatively than the defense had
20 expected based on representations, but there is still concern
21 of confusion related to statements made to subscribership,
22 viewership and effect on the station and effect on the L.A.
23 Times that is not related to the computer impairment.

24 Loss not being defined in the CFAA, but generally
25 understood to mean what it means there. So the defense had

1 requested an addition to this that says costs unrelated to
2 computer impairment or computer damages are not loss under
3 Section 1030.

4 THE COURT: Mr. Segal, any objection to adding that?

5 MR. SEGAL: I do have an objection because loss is
6 defined under the statute for any reasonable cost to any
7 victim, and reasonable is the classic thing that it's up to
8 juries to define.

9 In this case, as I indicated, and as I argued in the
10 Rule 29, the defendant is actually the one trying to get them
11 to burn time responding to e-mails, you know, sort of the
12 effect of rattling before he strikes and causing all these
13 viewers to call in. That's all -- that should be for the jury
14 to decide what is a reasonable cost.

15 All these witnesses testified to what they did and why
16 they did it and why it was important. So --

17 THE COURT: You're talking about the case as a whole.
18 This count is December 8th through 15th. Just so we're being
19 clear about that.

20 MR. SEGAL: Yes. But, still, I don't think -- I think
21 you're going to walk the jury into a lot of confusion if you
22 try to distinguish among loss for different counts.

23 THE COURT: I'm not talking about providing pinpoint
24 information. I'm just looking at the counts as charged.

25 MR. SEGAL: Right.

1 THE COURT: And I'm really -- this is really leading
2 towards the Pinkerton charge, which I have big questions about.

3 So I understand the defense objection. I'll go back
4 and look at your language. I'm inclined not to give it, but,
5 again, you'll see how I resolve it in the next set of
6 instructions you get from me.

7 Pages 25 and 26 are the Count Two instructions. Any
8 objection to page 25, Mr. Segal?

9 MR. SEGAL: No. Thank you.

10 MR. JAFFE: No objection, Your Honor.

11 THE COURT: Do we need to include the date range here,
12 October 28th --

13 MR. JAFFE: There is a general concern, and if it
14 arises here or somewhere else we're not certain, that so much
15 of the facts and information and evidence that was introduced
16 is unrelated to what was expected out of Count Two under the
17 superseding indictment; that nothing in the superseding
18 indictment begins on October 28th and nothing happens after
19 September 15th -- or December 14th, December 15th of that time
20 period.

21 And yet the jury was introduced with just a blitz of
22 information regarding Cancer Man and Skinner e-mails, yet the
23 alleged access of e-mail addresses from the iPad and other --
24 Sam Cohen's account, none of which relates to the alleged
25 defacement of the L.A. Times website, all of which is

1 completely separate and wholly different activity and would
2 only seek to confuse the jury.

3 And I think it would be inevitable at this point that
4 the jury would be confused. I don't see how the jury would
5 exactly understand what it's asked to decide here. And on top
6 of that, none of those facts, nothing regarding Cancer Man and
7 Skinner e-mails, nothing that took place before December 8th,
8 nothing regarding e-mail addresses attributed to iPad users
9 were included in the superseding indictment.

10 THE COURT: What about the CMS? You've already said
11 that reference to damage to the CMS system is what's alleged.

12 I think the only thing that could give the defense
13 notice that the government was going after the Fox e-mail, the
14 accessing and using of Fox e-mails to send a notice to viewers
15 is that date, October 28th, 2010. Agreed?

16 MR. SEGAL: Was that the only thing?

17 So here's --

18 THE COURT: I understand -- here's the other problem
19 I'm having with Count Two. I understand that you're sweeping
20 in the allegations from paragraphs 1 and 3 through 15.

21 MR. SEGAL: Yes.

22 THE COURT: The substantive count set forth in Count
23 Two is set forth fully in paragraph 2.

24 MR. SEGAL: Right. So that's the thing, and that's
25 what I think --

1 THE COURT: So why do you need paragraph 1 in Count
2 Two?

3 MR. SEGAL: It's surplusage.

4 THE COURT: Conceded. All right.

5 MR. SEGAL: It's surplusage, but here's the thing. I
6 mean, it's not a concession. It's -- the only thing that we
7 need that -- what makes this indictment, this count sufficient
8 to charge any transmission of any code or command to the
9 Tribune server in that date period is paragraph 2. Right?

10 THE COURT: Of Count Two.

11 MR. SEGAL: Of Count Two, right.

12 And so you know that the defense, this defense attempt
13 to limit Count Two to just the L.A. Times defacement is wrong
14 when they say, oh, but, Your Honor, the only things that
15 happened outside that date range are, you know, the
16 exfiltration of Cancer Man, you know, the get command for the
17 e-mail, the construction of the back doors, Samantha Cohen's
18 e-mail. If we had come to court just with Count Two and with
19 no other allegations in this indictment, all of that evidence
20 would have been admissible to charge -- to prove just the bare
21 statutory language charged in paragraph 2 of Count Two because
22 all of those things were commands, information, whatever, sent
23 to the Tribune CMS between October 28th, 2010 and January 5th,
24 2011.

25 And so we showed -- I know we have a command on

1 November 3rd. I'm not -- I don't recall if we have them
2 between the 28th and the 3rd. And I know that Agent Cauthen
3 testified about showing specific entries in the CMS log with
4 Keys trying to get into the CMS as late as January 2nd of 2011.
5 All of that was admissible. It was properly admitted to prove
6 paragraph 2 of Count Two. And the only thing that it's -- that
7 paragraph 2 says is he did all these things to cause damage to
8 Tribune Company.

9 You know, it's well settled that an indictment does not
10 have to describe the government's evidence, plead evidentiary
11 detail or identify all the facts supporting the allegations.
12 And that goes as far back as, you know, Wong Tai versus United
13 States 273 U.S. 77.

14 THE COURT: But the issue is the damage.

15 MR. SEGAL: Uh-huh.

16 THE COURT: The damage is different -- even if I accept
17 the government's argument, the damage is different with respect
18 to the CMS and targeting of Fox 40 information and,
19 alternately, the L.A. Times website.

20 MR. SEGAL: I don't -- I don't understand that argument
21 even. The damage is just -- is generally pled as damage.
22 Right? So that sweeps in everything that is damage --

23 THE COURT: Allowed by the statute.

24 MR. SEGAL: Right. And so that is -- and so, now to go
25 to the statute, that includes not just the integrity of the

1 system and the --

2 THE COURT: I've read the statute over and over again.

3 MR. SEGAL: Okay.

4 THE COURT: So just back to Count Two, just so I'm
5 clear, are the parties agreeing that no date range should be
6 mentioned?

7 MR. SEGAL: We're fine with a date range, if you want
8 to put in that date range.

9 THE COURT: But you don't believe it's necessary? How
10 could it not be necessary? And what's the defense position on
11 that?

12 MR. SEGAL: It's not -- there's no danger of a variance
13 because all of the evidence that we put in fell within that
14 date range. So there's no risk of the jury convicting based on
15 code or command transmitted outside of that period.

16 But at the same time --

17 THE COURT: You agree with that, Mr. Jaffe?

18 MR. JAFFE: Well, the defense is concerned about the
19 nature of the charge. However, it was our understanding up
20 until this point that the damage to the protected computer was
21 the damage to the content management system. Just a moment
22 ago, I heard damage to the Tribune Company itself.

23 The concern --

24 THE COURT: But the CMS includes -- the CMS is --

25 MR. JAFFE: Is the protected computer. And our

1 understanding to this point is that that was the L.A. Times.

2 And the L.A. Times defacement --

3 THE COURT: But CMS was defined more broadly during
4 trial, correct?

5 MR. JAFFE: It was defined so broadly so as to be
6 confusing and inconsistent, and really there are two different
7 possibly acts alleged that are being merged together. In fact,
8 there may even be multiple conspiracies.

9 But one is a conspiracy to deface -- one, in this case,
10 is the L.A. Times website and entering into the L.A. Times
11 website, which begins on December 8th. And the other is a
12 series of information regarding iPad addresses and nasty
13 e-mails, which are wholly unrelated. And I don't think it's
14 clear from this instruction at all what the jury is being asked
15 to do.

16 THE COURT: Do you agree that Count Two at least is
17 charging something completely separate from what's in Count
18 One, Mr. Segal?

19 MR. SEGAL: I'm thinking about that answer.

20 So it's complete -- it is overlapping but different,
21 and let me explain why. First of all, it's different
22 substantively. Right? Like many indictments, this one charges
23 the inchoate offense of conspiracy to commit a substantive
24 crime and a substantive crime. Right?

25 The other way that it's different, though, is in the

1 date range. Because the conspiracy is Keys going out and
2 saying, you know, go do these things to the Tribune Company
3 CMS.

4 THE COURT: Starting in December, the earliest possible
5 December 8th.

6 MR. SEGAL: Right, exactly. But Count Two is a
7 different kind of continuing offense. Right? My friend is
8 right that Count Two is a continuing offense, but it continues
9 from different dates, and it's a substantive count that's
10 alleged against a particular person, Matthew Keys.

11 So, if I may, he's doing this substantive offense,
12 which is a continuing offense, all the way from October 28th to
13 January 5th. And we get to aggregate all the loss that occurs
14 in that period of time up to \$5,000 in order to convict him of
15 Count Two.

16 In the middle -- I'm sorry.

17 In the middle of that conduct, he has friends or
18 co-conspirators who are doing this reconnoitering and back-door
19 construction and web defacement. But that -- but Count Two
20 captures everything that Keys did to the CMS and aiding and
21 abetting in that period. The difference between it and the
22 conspiracy is that, for Count Two, we actually have to prove
23 loss in order to convict him, not that it was within the scope
24 of an agreement or reasonably foreseeable. We've got to put
25 on, and we did, people who, you know, burned time and whatever.

1 Does that -- am I --

2 THE COURT: I understand what you're saying.

3 MR. SEGAL: Okay.

4 THE COURT: And if the instruction is given as
5 proposed --

6 MR. SEGAL: I think this is fine.

7 THE COURT: -- does it avoid any double jeopardy issue?

8 MR. SEGAL: No, absolutely not. So there's no double
9 jeopardy issue, and actually that's the core of why --

10 THE COURT: That's why I said, does it avoid double
11 jeopardy?

12 MR. SEGAL: There can't be double jeopardy -- there's
13 no double jeopardy problem ever between a substantive count and
14 a conspiracy count. You can always charge conspiracy to commit
15 a substantive offense and a substantive offense itself.

16 And the reason is that under --

17 THE COURT: I'm talking about in terms of any future
18 charges --

19 MR. SEGAL: Oh, okay.

20 THE COURT: -- that Mr. Keys might face.

21 MR. SEGAL: Perfect. Thank you.

22 So if this is charged this way, and we have proven this
23 through other accesses to the Tribune CMS, including the Cancer
24 Man e-mail, then -- you know, if we were disappointed in the
25 verdict in this trial and came back and charged him with, you

1 know, the Fox Mulder episode, you would dismiss it for double
2 jeopardy.

3 And that's why that conduct is captured by Count Two.
4 It is within that course of conduct. And by standing trial on
5 this count, he will either be convicted of the Fox Mulder
6 conduct, or he will be able to plead a double jeopardy bar to
7 re-prosecution for that conduct.

8 THE COURT: All right. Anything else, Mr. Jaffe? I
9 believe I understand the parties' differing positions. But
10 anything you want to say in response to what you've just heard?

11 MR. JAFFE: Not to those most recent statements, no,
12 Your Honor.

13 THE COURT: All right. Then on page 26, any problem
14 with that language, Mr. Segal?

15 MR. SEGAL: No. Thank you.

16 THE COURT: Mr. Jaffe?

17 MR. JAFFE: No, Your Honor.

18 THE COURT: Page 27, Count Three, the attempt charge.
19 Mr. Segal?

20 MR. SEGAL: No objection, Your Honor.

21 THE COURT: Should December 15th be noted?

22 MR. SEGAL: That's fine. Yes.

23 THE COURT: Mr. Jaffe --

24 MR. JAFFE: Yes, Your Honor.

25 THE COURT: -- assuming the date is added?

1 MR. JAFFE: It just occurred to the defense, going --
2 if we haven't lost the opportunity to discuss page 26.

3 THE COURT: All right.

4 MR. JAFFE: That loss is -- loss is as previously
5 defined? Or does that come up?

6 THE COURT: We can reference back --

7 MR. JAFFE: Okay.

8 THE COURT: -- loss as previously defined.

9 Agreed, Mr. Segal?

10 MR. SEGAL: Yes. And are we putting the dates in page
11 25 or not? It's fine with us if that's --

12 THE COURT: I'm inclined to do that.

13 MR. SEGAL: Great.

14 THE COURT: It's what's alleged.

15 MR. SEGAL: Please, Your Honor, that's fine.

16 THE COURT: I'm thinking more about whether or not
17 these are completely separate. And -- I mean, what's your -- I
18 understand your consistent position from the defense that you
19 really haven't been on notice, that you've construed the
20 indictment as going after the L.A. Times hack.

21 MR. JAFFE: Yes, Your Honor.

22 THE COURT: But do you dispute the government's
23 characterization that they can proceed on general allegations?

24 MR. JAFFE: In this case --

25 THE COURT: That that's enough?

1 MR. JAFFE: It's not so much the general allegations,
2 it's what the superseding indictment created the impression of
3 what the indictment is based on.

4 THE COURT: Just based on the contents of the
5 superseding indictment itself?

6 MR. JAFFE: The superseding indictment, as you said,
7 incorporated in Count Two the allegations specifically
8 regarding to the L.A. Times hack, as the Court mentioned now.
9 And only those, and the only facts alleged that would suggest
10 otherwise, are dates which on the superseding indictment do not
11 appear to be consistent with anything alleged specific for that
12 count. And up until this point, it had not been clear what --
13 the damage and what had particularly been alleged in Count Two.

14 THE COURT: So what about that, that you have just
15 conceded the incorporation of the conspiracy allegations as
16 surplusage?

17 MR. SEGAL: So.

18 THE COURT: Well, the defense is saying that, even if
19 you've done that now, previously they relied on the
20 incorporation of those allegations to think Count Two was about
21 the L.A. Times website hack.

22 MR. SEGAL: So here's the thing. I mean, surplusage
23 just means something that is outside the count -- I'm sorry --
24 that's outside the statutory language. But, look, you know,
25 it's just not true that they're surprised that the

1 government -- that they're surprised by this today.

2 This has been the subject of pre-trial litigation. The
3 Cancer Man e-mails were among the first things that went out in
4 discovery. If they -- there is a vehicle to force, a
5 procedural vehicle to force the government to be more specific
6 in charging language, and it's called a bill of particulars,
7 and they never moved for one. Right?

8 And so we proceeded with this indictment that says,
9 among other things, that even before the conspiracy started --
10 this is a paragraph that is charged in Count One and
11 re-incorporated in Count Two also. It says that after his
12 employment was terminated, Matthew Keys kept and used for
13 malicious purposes log-in credentials to the Tribune Company's
14 CMS. That's at page 2 of the indictment, paragraph 1,
15 sub-paragraph H. If they wanted more flesh on that bone, you
16 know -- it was in the discovery. They probably wouldn't even
17 have been entitled to a bill of particulars. But if they
18 thought -- but that was a procedural vehicle always available
19 to them.

20 May I have one moment, Your Honor?

21 (Government counsel conferring.)

22 MR. SEGAL: I mean, it's just -- there's nothing in
23 here that says -- for example, even among the objects of the
24 conspiracy, they're on notice at paragraph 3 that the
25 conspiracy had the following objects among others. Among the

1 manner and means, it said the conspiracy used several means to
2 accomplish the objects of the conspiracy, including the
3 following.

4 THE COURT: I understand all that. I've read and
5 reread the indictment.

6 MR. SEGAL: Okay. So --

7 THE COURT: We also discussed this at motions in
8 limine.

9 MR. SEGAL: Right.

10 THE COURT: We now have the benefit of the evidence
11 that's come in.

12 So, on Court Three -- I'll consider what you're saying,
13 and you'll see how I resolve that in the next set of
14 instructions.

15 Count Three?

16 MR. LEIDERMAN: Your Honor, may I ask a question about
17 Count Two?

18 Depending upon how the Court resolves it, presuming the
19 Court resolves it in favor of the government, would we still --
20 would we be in a dangerous area if we argued that, as to Count
21 Two, the conspiracy is the -- I suppose the second conspiracy,
22 the one that Mr. Segal just described as dealing with Mr. Keys'
23 friends, we argued -- to use surplusage a different way -- that
24 all the Cancer Man matters were surplusage, argue this to the
25 jury as our theory of it?

1 Because I don't want to -- I don't want to create an
2 argument for closing and end up having that argument sort of,
3 you know, swatted back on me. So I guess I have to know, if
4 the Court rules in favor of the government on this, am I going
5 to be precluded from making that argument?

6 THE COURT: Well, does this link to the Pinkerton
7 charge? I'm not thinking that a Pinkerton charge is warranted
8 here.

9 MR. SEGAL: I want to think --

10 THE COURT: I've seen one conspiracy, one conspiracy
11 and two substantive counts.

12 MR. SEGAL: Well, it's a conspiracy, a substantive
13 count and an attempt. Attempt is another -- but all of this --
14 there may be a variance argument. That's something --

15 THE COURT: I understand that, so answer my Pinkerton
16 question. Why do you need a Pinkerton instruction?

17 MR. SEGAL: So Keys can be guilty of the substantive
18 offense in Count Two because of the conduct of his
19 co-conspirator.

20 THE COURT: Sharpie.

21 MR. SEGAL: Right. So Count Two asks you -- because
22 it's a continuing offense that asks for the aggregation of
23 loss, that is adding up all of the loss that he -- for the --

24 THE COURT: But there's no backward looking conspiracy,
25 so loss can't be counted before December 8th.

1 MR. SEGAL: Loss is not being counted before December
2 8th. For the only count -- for the only count where actual
3 loss has to be counted, the time scope is October 28th to
4 January 5th. Right? For the conspiracy count, we're only
5 asking what loss was reasonably foreseeable or within the scope
6 of the agreement.

7 This is -- you don't need to worry about this now
8 actually because the argument that the defense is making that
9 somehow they were head-faked into thinking they didn't have to
10 worry about the Fox Mulder e-mails, that's actually not a jury
11 instructions argument. It's an argument about prejudicial
12 variance, and it's the basis for a motion to dismiss the count
13 for variance. Right?

14 It's not addressed to the jury based on a jury
15 instruction. It should be addressed to Your Honor, and you can
16 decide that.

17 THE COURT: All right. So you do need the Pinkerton
18 charge?

19 MR. SEGAL: I want to -- well --

20 THE COURT: That's your position?

21 MR. SEGAL: Hang on. Let me find -- what page is the
22 Pinkerton charge?

23 THE COURT: Page 29.

24 I included it because I think you included it. I
25 modified it. I don't -- I'm not inclined to give the Pinkerton

1 charge.

2 So, Mr. Leiderman, while they're thinking about that,
3 you have been proceeding as if there were two conspiracies?

4 MR. LEIDERMAN: Meaning one starting on October 28th
5 lasting through January 11th or whatever the charge date is
6 and --

7 THE COURT: You think something started on -- does the
8 evidence support the conclusion that there was a conspiracy
9 starting as early as October 28th?

10 MR. LEIDERMAN: No.

11 THE COURT: All right.

12 MR. LEIDERMAN: No.

13 THE COURT: Do you agree December 8th is the earliest
14 the evidence would support a conclusion there was any
15 conspiracy?

16 MR. LEIDERMAN: I do.

17 THE COURT: All right.

18 MR. LEIDERMAN: Yeah, I do agree to that. I do agree
19 to that. Although, they're taking the facts from outside --
20 like, for example, the creation of credentials -- and making
21 that part of the conspiracy. And that was December 1st,
22 December 2nd.

23 So, no, I don't agree with December 8th. Because now
24 they're saying -- or from the arguments I've been hearing, I
25 think they're saying that the conspiracy in fact started on

1 December 1st when Mr. Keys made the credentials in the first
2 place.

3 MR. SEGAL: No, we're not arguing Keys -- December 1st
4 is background evidence for the conspiracy, but it's not -- they
5 start -- they are messing with credentials on December 8th,
6 that's our evidence, and that is something they do in
7 furtherance. We showed you the exhibit.

8 THE COURT: All right. So tell me, again, on Count
9 Two, what are you asking to argue?

10 MR. LEIDERMAN: That the -- we want to argue with
11 respect to Count Two that the -- that the October 28th through
12 January 11th date range isn't the date range at issue in Count
13 Two, that the date range at issue is the December 8th through
14 December 15th date range, and that the rest of the evidence
15 should be disregarded. That's what I want to argue to the
16 jury, if I can.

17 THE COURT: I think that would be a variance based on
18 the allegations.

19 MR. LEIDERMAN: Then I suppose we are arguing to the
20 Court that it's a variance. And we'll make that -- you know,
21 we'll make that argument now or make that motion to dismiss
22 thereon now, or at whatever time the Court deems proper.

23 THE COURT: All right. I understand that position. I
24 don't think you're going to be able to argue that.

25 So Count Three, in addition to adding the date,

1 anything else, Mr. Segal? You said you were fine with that
2 instruction?

3 MR. SEGAL: Now I'm lost. Can you tell me what page
4 we're on? I'm sorry.

5 THE COURT: Page 27.

6 MR. SEGAL: 27. No, we're good. Thank you.

7 THE COURT: Mr. Jaffe?

8 MR. JAFFE: No objections to this instruction.

9 THE COURT: All right. Page 28, again, the loss issue.
10 And I would add cross-referencing the prior definition of loss.

11 MR. JAFFE: Yes, Your Honor.

12 THE COURT: With that clarification, any objection,
13 Mr. Segal?

14 MR. SEGAL: No, Your Honor.

15 MR. JAFFE: With that addition, the defense agrees,
16 Your Honor.

17 THE COURT: Page 29, Pinkerton. So where are you on
18 this, Mr. Segal?

19 MR. SEGAL: I have no doubt that we're entitled to a
20 Pinkerton instruction based on proof of a conspiracy, and the
21 defendant should get vicarious criminal liability.

22 THE COURT: What's the error in not giving it?

23 MR. SEGAL: Well, it's error not to inform the jury of
24 the basis for criminal responsibility.

25 I don't know -- I want to think about this. I might

1 withdraw this. We have an aiding and abetting instruction, and
2 maybe it would be confusing to them.

3 THE COURT: That's my -- my position is I think it is
4 confusing. What's the defense position?

5 MR. JAFFE: The defense accepts --

6 MR. LEIDERMAN: Yeah.

7 MR. JAFFE: The defense agrees, Your Honor, with the
8 instruction.

9 THE COURT: So you want the instruction given?

10 MR. LEIDERMAN: No. The defense is in accord with the
11 Court, we do not want the instruction given.

12 THE COURT: All right. I don't plan to give it. If
13 the government wants to make a further argument, it can submit
14 something in writing by the end of the day.

15 MR. SEGAL: No, my colleagues have stopped me.

16 THE COURT: All right.

17 MR. SEGAL: Thank you.

18 THE COURT: All right. Page 30, back to smooth
19 sailing, I think. Any objection?

20 MR. SEGAL: No.

21 MR. LEIDERMAN: That's fine.

22 MR. SEGAL: No, Your Honor.

23 THE COURT: All right. Page 31 through the end are the
24 standard instructions. Any objection to any of those
25 instructions, pages 31 to 37?

1 MR. LEIDERMAN: Just one second, please.

2 No objection by the defense.

3 THE COURT: Mr. Segal, you're fine with those?

4 MR. SEGAL: Yes, Your Honor. Thank you.

5 THE COURT: All right. Then on the verdict form.

6 MR. SEGAL: For some reason, I don't have the verdict
7 form. I thought I printed it, Your Honor. I'm sorry.

8 THE COURT: I believe it tracks what the government had
9 proposed. I didn't see any objection from the defense.

10 MR. SEGAL: They shouldn't -- it basically allows
11 conviction on the lesser included, so I imagine that they would
12 be happy with it.

13 MR. LEIDERMAN: I'm sorry.

14 THE COURT: Any objection to the verdict form?

15 MR. JAFFE: This is acceptable subject to we discussed
16 your giving an instruction with regard to the Mercer e-mail and
17 the FBI prosecution. So long as that is clear to the jury --

18 THE COURT: What prosecution?

19 MR. JAFFE: The e-mail where --

20 THE COURT: No, I understand that. What was the last
21 part of what you said?

22 MR. LEIDERMAN: Where Mercer said you need \$5,000 --

23 THE COURT: Oh, right.

24 MR. LEIDERMAN: -- to get a prosecution.

25 THE COURT: I will add that.

1 And you're going to give me by the close of business,
2 can we say by 4:30, a proposed instruction to clarify that.

3 MR. SEGAL: Yes.

4 MR. LEIDERMAN: Yes, Your Honor.

5 THE COURT: And a proposed location in the set of
6 instructions you currently have.

7 So the verdict form I'll plan on using. You will get
8 from me, before too late this evening, a final set of
9 instructions and the verdict form, and you may use those in
10 closing.

11 MR. SEGAL: Okay.

12 THE COURT: We will meet at 8:30 so you can record any
13 final objections to the final instructions. We'll talk about
14 exhibits if we need to.

15 Is there anything else we need to talk about today?

16 MR. LEIDERMAN: I think just a matter of housekeeping,
17 which is this.

18 I understand now what I'm not -- what either I'm going
19 to be allowed to argue or, if I argue it, I'm going to have an
20 objection sustained and be very embarrassed about. However, I
21 think the Court impliedly ruled on the motion to dismiss based
22 on the variance, but I don't think the Court actually ruled on
23 it.

24 THE COURT: Based on the variance?

25 MR. LEIDERMAN: Yes.

1 THE COURT: I'm going to think about that some more.

2 MR. LEIDERMAN: Oh, okay.

3 THE COURT: So you can -- let's revisit that in the
4 morning as well.

5 MR. LEIDERMAN: Okay.

6 MR. SEGAL: You can hold that until after trial, too.
7 You can hold that until after the verdict as well.

8 THE COURT: Well --

9 MR. LEIDERMAN: But I'd like --

10 THE COURT: You can always make more of a record and
11 then revisit the question.

12 MR. LEIDERMAN: I'd like to put on a clean closing, so
13 I want to know what's --

14 THE COURT: The jury instructions will essentially tell
15 you what you can do with that.

16 MR. SEGAL: Well, if the Court is thinking of
17 dismissing based on variance and -- the problem is that I want
18 to submit e-mail correspondence that goes back maybe six months
19 or a year where this issue has been discussed. There's not
20 an --

21 THE COURT: I'm thinking about that.

22 MR. SEGAL: All right. Thank you.

23 THE COURT: All right. Anything else today?

24 MR. HEMESATH: Merely that, as I mentioned earlier,
25 we're very close on exhibits. And the only change that we're

1 contemplating so far is based on a discussion that we had about
2 Exhibit 604, that is largely similar to one of the other
3 exhibits.

4 MR. JAFFE: 611 and 112.

5 MR. HEMESATH: 604 and 611. And we're discussing still
6 the redaction of one of the exhibits.

7 THE COURT: I show that 611 is in, but 604 was not
8 admitted.

9 MR. HEMESATH: Well, that's corrected. I believe that
10 the defense --

11 MR. JAFFE: I think the government wants to swap them.

12 MR. HEMESATH: I think we want them both in, but if
13 choosing between them, we would prefer 604.

14 MR. LEIDERMAN: I think two of them is duplicative, but
15 you can put in 604 instead of 611.

16 THE COURT: Just let me know in the morning how you
17 work that out.

18 MR. HEMESATH: And then the other thing, and this is
19 important to resolve between then and now so we'll have time to
20 do it, is that what the defense intends with regard to the
21 individual snippets of the interview is to decide for certain
22 which of those were admitted and burn a disk that has all of
23 those conversations labeled by exhibit number on the file name
24 and submitting one single disk that has the --

25 THE COURT: That's the government's plan?

1 MR. HEMESATH: Well, yes. Unless --

2 MR. LEIDERMAN: That's --

3 THE COURT: That's the defense plan?

4 MR. LEIDERMAN: I think that's the joint plan.

5 THE COURT: All right. As long as you work together,
6 and you have an unobjected-to exhibit.

7 Which exhibit are you talking about?

8 MR. HEMESATH: Well, it's a series of exhibits.

9 THE COURT: The series --

10 MR. HEMESATH: It's the audio clips.

11 THE COURT: The 200 series?

12 MR. HEMESATH: Yes.

13 MR. SEGAL: You don't need to worry about this now.

14 THE COURT: That's what I'm saying. I mean, if you
15 represent that it is what has been admitted, and you both agree
16 and you've had a chance to fully review it, then I'm prepared
17 to accept that.

18 If there's a dispute, though, about the content not
19 reflecting what was admitted -- are you talking about excerpts
20 of what was admitted?

21 MR. HEMESATH: No.

22 MR. SEGAL: No.

23 THE COURT: All right. Just creating a usable format
24 of what has been admitted?

25 MR. HEMESATH: Yes.

1 MR. LEIDERMAN: That's what I thought we were talking
2 about.

3 MR. HEMESATH: Yes, that's correct.

4 THE COURT: Again, no exhibit that is disputed will go
5 to the jury until I've resolved any dispute.

6 MR. HEMESATH: Absolutely.

7 MR. SEGAL: Well, the audio recordings don't go back
8 anyway. That's why you don't have to worry now. It's just in
9 what form they're going to be preserved. But the jury should
10 not be allowed -- it would be error for the jury to listen to
11 these unsupervised.

12 THE COURT: Well, unsupervised unless there's a
13 stipulation to the contrary. That's agreed?

14 MR. LEIDERMAN: Are you asking me if I agree that the
15 jury can listen to the snippets --

16 THE COURT: Will not listen.

17 MR. LEIDERMAN: Will not listen unsupervised.

18 THE COURT: Is that understood? Do you agree with
19 what --

20 MR. LEIDERMAN: No, I agree with that.

21 THE COURT: Right.

22 MR. LEIDERMAN: Yes.

23 THE COURT: All right. I mean, we can cross that
24 bridge when we come to it. If they ask to listen, we consider
25 what it is they're asking and what we do with that.

1 All right.

2 MR. SEGAL: Thank you, Your Honor.

3 THE COURT: See you tomorrow morning at 8:30.

4 (Proceedings were adjourned at 2:24 p.m.)

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1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.

3
4 /s/ Kathy L. Swinhart
5 KATHY L. SWINHART, CSR #10150
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