

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 7

Pages 791 through 927

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

VOLUME 7

TUESDAY, OCTOBER 6, 2015, 8:30 A.M.

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(Appearances continued next page...)

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1                   SACRAMENTO, CALIFORNIA

2                   TUESDAY, OCTOBER 6, 2015, 8:33 A.M.

3                   ---o0o---

4           (Jury not present.)

5           THE CLERK:   Calling criminal matter 13-82, the United  
6   States versus Matthew Keys.   This is jury trial, day seven,  
7   Your Honor.

8           THE COURT:   All right.   Good morning.

9           MR. SEGAL:   Good morning, Your Honor.

10          THE COURT:   All counsel are present.   Mr. Keys is  
11   present.

12          This is our final session on jury instructions.   You  
13   have the final verdict form that just tracks the language of  
14   the indictment using the between on or about, not beginning and  
15   ending in terms of the time frame.

16          In terms of the final jury instructions, let me share  
17   one thing with you, and then I would take objections.

18          We will, while you are giving closings, prepare a  
19   sanitized version.   But to the extent you're using any of the  
20   instructions in your closing, please don't reference the  
21   authorities at the bottom of the page.   What you have is my  
22   working packets.   So if you're going to show an instruction on  
23   the Elmo, just make certain the bottom of the page does not  
24   show.

25          Understood?

1 MR. LEIDERMAN: Yeah, not an issue for the defense.

2 THE COURT: All right. So the main issue I've caught,  
3 I don't think aiding and abetting belongs in the conspiracy  
4 instruction. Aiding and abetting is incorporated into  
5 substantive charges, but I think the authority is pretty clear.  
6 And I know you did highlight that yesterday, Mr. Segal, and  
7 link that to the Pinkerton charge.

8 So my plan would be to delete what is shown on page 20,  
9 currently instruction No. 18, and re-number the subsequent.

10 MR. SEGAL: Your Honor, this is embarrassing, but I  
11 don't actually have a printed copy in my hands right now of  
12 the -- I'm sorry.

13 THE COURT: I think it was the government that proposed  
14 this with respect to Count One.

15 So any disagreement on the law?

16 MR. SEGAL: You can aid and abet a conspiracy. That  
17 is --

18 THE COURT: What is your authority for that?

19 MR. SEGAL: There's a Ninth -- so I haven't reached  
20 this in a long time, but I'm sure --

21 THE COURT: The research I've done confirmed my sense  
22 that that's not case. But if you have a case that says  
23 otherwise --

24 MR. SEGAL: There's a Ninth Circuit case that 1950s or  
25 1960s, and if you give me 20 minutes or less, I could find it.

1           Essentially -- I don't know if we need this  
2 instruction, but I am familiar with this concept from my days  
3 in the anti-trust division, where basically if there's a  
4 general contractor that arranges a bid-rigging conspiracy among  
5 his subs in order to pass along their charges in a cost-plus  
6 contract, that is actually aiding and abetting a Sherman Act  
7 conspiracy. You can aid and abet any offense.

8           But this may be academic. I don't know if I need this.

9           THE COURT: That's the first question.

10          Anything to say on this point?

11          MR. JAFFE: No. The defense agrees, Your Honor, that  
12 it's not necessary or applicable to this charge.

13          MR. SEGAL: Can I just find where we're talking about  
14 so I can --

15          THE COURT: It's page 20, instruction 18.

16          And the Court's proposal -- I mean, I'm the one  
17 responsible for these instructions, I know. My proposal is to  
18 delete 18 and re-number the subsequent instructions and any  
19 cross-references.

20          MR. SEGAL: You mean cut out an aiding and abetting  
21 instruction completely?

22          THE COURT: Yes, with respect to Count One, and that's  
23 the only place it's been proposed and appeared.

24          MR. LEIDERMAN: Well, it appears in Count --

25          MR. SEGAL: No, this is for the substantive count.

1 THE COURT: Well, it's embedded right now in the  
2 conspiracy instructions. Is it also --

3 MR. SEGAL: We need a vicarious criminal liability  
4 instruction. The reason I dropped my issue with Pinkerton is I  
5 knew we were getting aiding and abetting.

6 THE COURT: No, I know you said that. That's why  
7 I'm --

8 MR. SEGAL: We absolutely need a vicarious criminal  
9 liability instruction so we can argue that Matthew Keys is  
10 personally accountable for the conduct that Sharpie engaged in  
11 that he assisted in.

12 THE COURT: So is that Count One or Count Three?

13 MR. SEGAL: That is Counts Two and Three.

14 THE COURT: And aiding and abetting is incorporated  
15 into the substantive offenses.

16 MR. LEIDERMAN: That's what I was saying.

17 THE COURT: So any problem with moving aiding and  
18 abetting to the Count Two and Three sets of instructions?

19 MR. SEGAL: No, but I don't know -- hang on.

20 THE COURT: If that's the request, and there's no  
21 objection or reason not to --

22 MR. SEGAL: No, I don't care. I'm not -- but let me --

23 THE COURT: It doesn't belong -- at this point, my view  
24 is it doesn't belong in the conspiracy set of instructions,  
25 which is where it shows now.

1           MR. SEGAL: The Court is just talking about moving the  
2 instruction?

3           THE COURT: Based on what I've heard in the last two  
4 minutes, that's my proposal.

5           MR. SEGAL: Without adding or subtracting to its  
6 language?

7           THE COURT: Yes. Because it's the general instruction,  
8 so it would be moved from page 20 -- so the language at the  
9 top, the introductory language identifying the crime charged  
10 would be modified to track Counts Two and Three.

11          MR. SEGAL: That's fine with us in this case. There  
12 may be another day when I'll come to you and care about the  
13 principle that you can aid and abet a conspiracy, but that's  
14 not today.

15          THE COURT: All right. So what's currently showing on  
16 page 20, instruction No. 18, would be moved to two locations,  
17 one at the end of the Count Two instructions, so between what's  
18 currently 25 and 26, and to the end of the Count Three --

19          MR. SEGAL: I would say -- my own view is you only need  
20 to give this instruction once. If it just refers to Count Two  
21 and Three, that is probably the most --

22          THE COURT: All right. So before page 28, would you  
23 agree with that, Mr. Leiderman, that specifically reference  
24 Counts Two and Three?

25          MR. LEIDERMAN: We're looking, if we may.



1           MR. JAFFE: So this is the instruction that begins --  
2 we're looking at the previously submitted instructions, Your  
3 Honor, the one that begins with a member of conspiracy commits  
4 an act? Oh, no, that's the one --

5           THE COURT: No, this is the aiding and abetting.

6           MR. JAFFE: Okay.

7           THE COURT: So the first paragraph references aiding  
8 and abetting twice. So a defendant may be found guilty of --

9           MR. LEIDERMAN: Your Honor, I'll save the Court some  
10 trouble. I don't like it obviously because it's harmful to us,  
11 but it's a correct statement of the law.

12          THE COURT: With respect to Counts Two and Three.

13          MR. LEIDERMAN: With respect to Counts Two and Three  
14 only. I'm not aware of --

15          THE COURT: Well, then structurally I'm going to accept  
16 the government's suggestion and move what's currently numbered  
17 18 to follow the Counts Two and Three sets of instructions.  
18 And so it will be a new -- it will show between pages 27 and 28  
19 with re-numbering.

20          MR. LEIDERMAN: Yeah, it's --

21          THE COURT: And the introduction will be modified to  
22 reflect that it's talking only about Counts Two and Three.

23          MR. LEIDERMAN: It's difficult to credibly object to  
24 such a move.

25          THE COURT: All right. So that's the only substantive

1 change I plan to make.

2 MR. HEMESATH: So, Your Honor, from my presentation's  
3 perspective, this is my current slide. I did delete just right  
4 now the reference to instruction 18 at the top, but you seem to  
5 be suggesting that the introduction will be changing as well?

6 THE COURT: A defendant may be found guilty of the  
7 crimes charged in Counts Two and Three, even if the defendant  
8 personally did not commit the act or acts constituting the  
9 crimes, but aided and abetted in their commission.

10 MR. SEGAL: Obviously if we put this up, the defendant  
11 can't prejudiced because this one only refers actually to Count  
12 One as it is now.

13 MR. HEMESATH: It doesn't refer to any crime actually.

14 MR. SEGAL: The crime of transmitting a program --

15 THE COURT: But it's only -- my conclusion, without  
16 your bringing in your case from the 1950s, if you reference it  
17 with respect to Count One --

18 MR. HEMESATH: Oh, yeah.

19 THE COURT: -- I would sustain an objection.

20 MR. HEMESATH: Yes.

21 MR. SEGAL: We're not going to do that.

22 THE COURT: It's only applicable to Counts Two and  
23 Three.

24 MR. SEGAL: While waiting on the jury, I'm going to  
25 find that case for you just for kicks.

1 THE COURT: All right.

2 MR. SEGAL: But we're not arguing it.

3 THE COURT: All right. So I'm prepared to take any  
4 other objections to the instructions. Mr. Segal?

5 MR. SEGAL: None other than what we discussed  
6 yesterday, Your Honor. As long as --

7 THE COURT: That created your record.

8 MR. SEGAL: This is everything that -- I'm sorry.  
9 Except for the modification that the Court explained, these are  
10 the same as what went out in the e-mail last night?

11 THE COURT: Except for the moving of the aiding and  
12 abetting to follow Counts Two and Three and specifically  
13 reference them --

14 MR. SEGAL: Yeah, I have nothing to add, Your Honor.

15 THE COURT: All right. Let me just check.

16 The other modification to aiding and abetting would be  
17 on lines 7 and 8 just to reference the crimes in Counts Two and  
18 Three.

19 MR. SEGAL: There is one problem. It's in instruction  
20 15, Your Honor. May I approach? I don't think the defense is  
21 going to have trouble with this.

22 There are a couple of words left from the defraud  
23 clause. I'm looking at instruction 15.

24 THE COURT: All right.

25 MR. SEGAL: And at line 22, the words "or agency

1       thereof" should be deleted.

2               THE COURT: All right. Agreed, Mr. Leiderman?

3               MR. LEIDERMAN: That's agreed.

4               THE COURT: All right. So it will go "against the  
5       United States in any manner or for any purpose"?

6               MR. HEMESATH: What line is that?

7               MR. SEGAL: 22.

8               THE COURT: All right. Anything else, Mr. Segal?

9               And you got that further modification to the aiding and  
10       abetting, Mr. Hemesath? That is so the first element, page 20,  
11       line 7 as it now appears would read first the crimes charged in  
12       Counts Two and Three were committed by someone.

13              MR. HEMESATH: If I may, I just want to make sure that  
14       my presentation tracks.

15              THE COURT: Currently page 7 and 8 tracks the language  
16       of Count One.

17              MR. HEMESATH: So this is what I have for aiding and  
18       abetting. If -- yeah.

19              THE COURT: So the second paragraph beginning with the  
20       word "first."

21              MR. HEMESATH: Is this a substantive --

22              THE COURT: What my instruction is going to read, "A  
23       defendant may be found guilty of the crimes charge in Counts  
24       Two and Three."

25              MR. HEMESATH: Okay.

1 THE COURT: So your language is tracking the charge in  
2 Count One.

3 MR. HEMESATH: I see.

4 THE COURT: So you need to generalize.

5 MR. SEGAL: For the aiding and abetting?

6 MR. HEMESATH: No, no, in the first.

7 MR. SEGAL: Transmission is Count Two.

8 THE COURT: Is it tracking exactly the language of  
9 Count Two, knowingly causing?

10 MR. SEGAL: Right. We were going to -- we will use the  
11 short explanation of the crime, but it's not telling them to  
12 convict of conspiracy, which is the only problem that the Court  
13 has pointed out.

14 THE COURT: All right. You agree with that,  
15 Mr. Leiderman, it's all right to leave that language as is?

16 MR. SEGAL: The instruction goes back and it's as the  
17 Court identified it. But we're not going to say to convict on  
18 conspiracy --

19 THE COURT: All right. I think that's fine.

20 You agree with that, Mr. Leiderman?

21 MR. LEIDERMAN: Okay. Yes.

22 THE COURT: All right. All right. We'll change  
23 instruction 15. No other objections from the government. The  
24 government is prepared to rest on its record made yesterday.

25 Mr. Leiderman, objections to the instructions in this

1 set?

2 MR. LEIDERMAN: No. We're prepared -- we made, I  
3 think, quite a record yesterday. We're prepared to stand on  
4 that.

5 THE COURT: All right. Just so it's clear as to the  
6 Court's resolution, in looking back at the cases cited by the  
7 defense, looking back at the NetApps case I had cited on the  
8 first day, and having considered the evidence that is now in, I  
9 do believe there is sufficient evidence before the jury that  
10 the government could prove by circumstantial evidence, with  
11 respect to the 10(a)(5) -- I'm sorry -- 1030(a)(5) charges,  
12 damage. And that is because this is not -- I think the  
13 government has presented sufficient evidence to support a  
14 conclusion that a reasonable juror could conclude beyond a  
15 reasonable doubt supports more than just mere misappropriation;  
16 that this is not just taking information, it's taking usernames  
17 and passwords, and so it's taking information plus. And the  
18 NetApps case towards the end does discuss the risk of taking  
19 usernames and passwords alone.

20 But here, if the jury believes the back door evidence  
21 that the government has presented, I think it would support the  
22 charges in this indictment. So my view has shifted since the  
23 beginning of the case based on the evidence that has come in.

24 MR. SEGAL: May I --

25 THE COURT: It doesn't mean I'm deciding who is right

1 or wrong here. I'm just allowing those charges to go to the  
2 jury.

3 MR. SEGAL: Your Honor, there is one more thing with  
4 the jury instructions.

5 THE COURT: Yes.

6 MR. SEGAL: Looking at instruction 22, which is the  
7 instruction for the substantive count, it says -- the word  
8 "protected" has been added to the second element. And the  
9 way -- but there's no definition of protected computer in the  
10 jury instructions.

11 I think that the way that the Ninth Circuit pattern  
12 instruction operates is the person intentionally damaged a  
13 computer and, third, the computer was used in or affected  
14 interstate or foreign commerce. And --

15 THE COURT: I decided not to add a definition of  
16 protected. Protected does appear in the description of the  
17 charged offenses.

18 MR. SEGAL: Yes.

19 THE COURT: But based on the representation of the  
20 parties that there was no material dispute that the computer at  
21 issue here was a protected computer, I can delete the word  
22 "protected" in what's currently numbered instruction No. 22,  
23 will become instruction No. 21, to delete the word "protected"  
24 on line 10.

25 Any problem with that, Mr. Leiderman?

1           MR. LEIDERMAN: No. It's conceded that this is a  
2 protected computer.

3           THE COURT: All right. Anything else, Mr. Segal?

4           MR. SEGAL: I'm just checking for the attempt  
5 instruction to see if there's anything that related to that in  
6 the attempt instruction.

7           No, Your Honor. Thank you.

8           THE COURT: All right. All right. Anything else  
9 before we take a short break? Ms. Streeter will check with the  
10 jury to see if they have a schedule for us so we'll know that  
11 before you begin closings hopefully.

12           Are you currently thinking a total of two hours,  
13 Mr. Hemesath?

14           MR. HEMESATH: Yes, Your Honor.

15           THE COURT: Did you want to reserve time?

16           MR. HEMESATH: Yes, Your Honor. I would like to  
17 reserve any remaining time that I have for rebuttal.

18           THE COURT: Do you want a warning notice when you reach  
19 a certain time?

20           MR. HEMESATH: If you could tell me when I maybe hit an  
21 hour.

22           THE COURT: All right.

23           MR. HEMESATH: And then for sure a half an hour after  
24 that.

25           THE COURT: All right.



1 MR. HEMESATH: That would be great.

2 THE COURT: All right. And, Mr. Leiderman, are you  
3 thinking two hours?

4 MR. LEIDERMAN: I'm thinking and I'm targeting 90  
5 minutes. So if I --

6 THE COURT: Do you want a 15-minute warning?

7 MR. LEIDERMAN: No, I'd actually love a half an hour  
8 warning. If I find myself on a slide -- you know, on a slide  
9 too far away from my last slide, I know I better pick it up.

10 But I --

11 THE COURT: All right. You would have equal time, but  
12 I'll let you know at one hour.

13 MR. LEIDERMAN: Yeah, I just want -- to Court and  
14 counsel, my plan is for 90 minutes. I want two hours just in  
15 case I don't hit that target.

16 THE COURT: All right. All right. So I think we can  
17 get through closings if your estimates are correct.

18 I'm going to cut you off, Mr. Hemesath, at two hours,  
19 just so you know.

20 MR. SEGAL: I'll cut him off at one.

21 THE COURT: All right. And so the case would go to the  
22 the jury by the 1:30 adjournment time, and the only question is  
23 will they work the rest of the day. And I think we'll know  
24 soon.

25 All right. We'll take a short break.

1 (Off-the-record discussion with Courtroom Deputy.)

2 THE COURT: Have you finalized the exhibits? Good  
3 question. Ms. Streeter is asking.

4 MR. LEIDERMAN: No.

5 THE COURT: Are there any disputes for me to resolve is  
6 really the question.

7 MR. LEIDERMAN: There are no disputes to resolve.  
8 There are proper copies for us to locate and make sure to make  
9 it back.

10 THE COURT: All right. What I tell the jury, as they  
11 are excused to deliberate, is they will have the exhibits  
12 shortly.

13 MR. HEMESATH: And for the record, I think we discussed  
14 yesterday is that we're adding 604 to the admitted list.

15 THE COURT: Is that the final resolution?

16 MR. LEIDERMAN: Is it adding 604 and withdrawing 611?  
17 I thought that's what it was.

18 MR. HEMESATH: No. I thought about that, and the thing  
19 is is that I believe that the government at various points did  
20 refer to 611 as well. So I think would be a little too  
21 confusing to keep 611 -- or to reject 611 in favor of 604. But  
22 they are 80 percent the same.

23 THE COURT: Well, the Court can give an instruction to  
24 clarify. Why don't you meet and confer and tell me --

25 MR. LEIDERMAN: I'm not offended by it, Your Honor.

1 They're both the same thing. 604 is in a different format.  
2 It's in basically like a Word document type format, so it's  
3 easier to read. And it has some extra language, some different  
4 or superfluous -- not superfluous, but extra verbiage.

5 THE COURT: So 604 will come in

6 MR. LEIDERMAN: I can live with it.

7 THE COURT: All right. Is that the only change to the  
8 list?

9 MR. LEIDERMAN: 112 is going to have a redaction.  
10 Mr. Jaffe is working with Mr. Hemesath on that. And like I  
11 said, we're still looking for the correct defense F.

12 MR. SEGAL: May I have a moment?

13 THE COURT: Okay. You let me know if there are  
14 disputes to resolve. I will note that 604 is coming in.

15 MR. LEIDERMAN: 604 can come in.

16 THE COURT: All right. 112 will be redacted. If  
17 there's any other dispute, you can let me know.

18 MR. LEIDERMAN: Okay.

19 THE COURT: All right. We'll just take a break.

20 (Recess taken.)

21 (Jury not present.)

22 THE CLERK: Please remain seated and come to order.  
23 Court is now back in session.

24 THE COURT: All right. We were waiting on a juror who  
25 was late because of child care issues. If you haven't heard,

1 the jury is saying they would like to leave at 1:30 today, but  
2 they will report tomorrow morning at either 8:30 or 9:00 and  
3 then work all day tomorrow.

4 What they've said to Ms. Streeter, as I understand it,  
5 is they just want to get it done tomorrow. I will emphasize  
6 for them that they need to take as long as they need, and they  
7 can't count on finishing tomorrow even if that's their goal. I  
8 don't want a verdict driven by their own sense of a limited  
9 schedule. And the Court will remain available if needed  
10 Thursday and Friday.

11 Ms. Streeter is going to e-mail you the final  
12 instructions, still unsanitized but the final instructions with  
13 the edits we just talked about. We'll have sanitized versions  
14 by the time I instruct. Those will go into binders, and the  
15 jurors can follow along if they wish. So just during one of  
16 the breaks we'll load those into the binders.

17 MR. SEGAL: Your Honor, would it be possible to get  
18 printed copies of the final instructions? I may want to put  
19 them up on the Elmo during my rebuttal with the bottom folded  
20 over.

21 THE COURT: So you're splitting the closing?

22 MR. SEGAL: Oh, yes.

23 THE COURT: Oh, I had not understood that. Typically  
24 it's the same attorney.

25 Any objection to the splitting of the argument?

1 MR. LEIDERMAN: No.

2 THE COURT: All right. All right.

3 MR. LEIDERMAN: No.

4 THE COURT: You have, again, the unsanitized version.  
5 If they're ready, if the sanitized versions are ready before  
6 your rebuttal, we'll provide you a copy.

7 MR. SEGAL: Thank you, Your Honor.

8 THE COURT: All right. Let's bring the jury in.

9 (Jury present.)

10 THE COURT: You may be seated.

11 Welcome back, Ladies and Gentlemen. We hope you had a  
12 good evening. We are ready, as I told you, for closing  
13 argument.

14 Let me tell you how the schedule will work today given  
15 what you've shared with us. I understand that there is a total  
16 between the prosecution and the defense of about three and a  
17 half hours of closing. The government may go up to two hours.  
18 The defense believes up to an hour and a half. We'll take  
19 breaks along the way according to our -- as close as possible  
20 to our normal schedule without interrupting the flow of  
21 argument. Then I will instruct you.

22 That may get us close to our 1:30 closing time, and I  
23 understand you do want to adjourn today at 1:30. You want to  
24 begin tomorrow morning at 8:30 or 9:00 and then work all day  
25 tomorrow.

1           As I'll instruct you, it's very important you not put  
2     an artificial end time on your negotiations -- on your  
3     deliberations. So if you need more time than tomorrow, the  
4     Court and counsel of course will be available. You need to  
5     take as long as you need to do your job. I'll give you full  
6     instructions on that when I instruct you.

7           So that's our schedule. We'll begin with Mr. Hemesath,  
8     the government's closing.

9           MR. HEMESATH: Members of the jury, good morning.

10          You have now heard a story about online, anonymous  
11     revenge, a self-described angry employee who began a campaign  
12     to impose what he called consequences against his former  
13     employer using illicitly obtained passwords and usernames.

14          But that wasn't enough. When Cancer Man and Fox Mulder  
15     no longer seemed sufficient, the defendant then turned to the  
16     Internet, and specifically to members of online chat rooms who  
17     were ready and willing to agree with him to impose even greater  
18     damage on the Tribune Company.

19          Members of the jury, you've now heard and seen the  
20     evidence in this case. Now is the time to apply the evidence  
21     that you've seen with the charges alleged by the United States.  
22     And the United States submits to you that the evidence proves  
23     beyond a reasonable doubt that Matthew Keys is guilty of three  
24     charges in the indictment.

25          Now, the purpose of this closing statement is to

1 present to you an organized structure and to show you that the  
2 evidence applies to each of the elements that the government is  
3 required to prove, and that is why I began today by showing you  
4 the charges in this case. And we began with Count One, the  
5 conspiracy.

6 Now, Judge Mueller will instruct you specifically with  
7 regard to the application of this count as follows:

8 The defendant is charged in Count One with a conspiracy  
9 to commit an offense against the United States, namely, to  
10 cause damage to a protected computer in violation of Section  
11 371. I'm skipping ahead.

12 In order for the defendant to be found guilty of that  
13 charge, the government must prove each of the following  
14 elements beyond a reasonable doubt:

15 On a timeline that there was an agreement between  
16 December 8th, 2010 and December 15th, 2010, between two or more  
17 people to transmit a program, code, command or information to a  
18 computer. We'll talk about this. The second element, that the  
19 defendant became a member of the conspiracy knowing at least  
20 one of its objects and intending to help accomplish it. And,  
21 third, that one of the members of the conspiracy performed at  
22 least one overt act on or after December 8th, 2010 for the  
23 purpose of carrying out the conspiracy.

24 Now, you will see this date range here seems relatively  
25 narrow, for comparison, to the date range in Count Two. That's

1 the campaign. Again, you will receive the following  
2 instructions from Judge Mueller:

3 The defendant is charged in Count Two specifically with  
4 knowingly causing the transmission of a program, information,  
5 code or command and, as a result of such conduct, intentionally  
6 causing damage without authorization to a protected computer.

7 The elements to that charge are as follows:

8 First, the person knowingly caused the transmission of  
9 at least one program, code, command or information to a  
10 computer; second, as a result of that transmission, the person  
11 intentionally damaged a protected computer; and, third, the  
12 computer was used or affected interstate commerce.

13 Again, this is the range of the two counts that we've  
14 spoken about so far. That brings us to Count Three, the  
15 attempt.

16 The defendant is charged in Count Three specifically  
17 with knowingly attempting to cause the transmission of a  
18 program, information, code or command and causing intentionally  
19 damage to a protected computer on December 15th.

20 The elements here:

21 That the defendant intended to transmit a program,  
22 command, code, information to a computer and cause damage  
23 without authorization; and, second, that the defendant did  
24 something that was a substantial step toward committing the  
25 crime.



1           Now, note the relationship datewise of these three  
2 counts.

3           Now, to help you, the jurors, conduct a searching  
4 analysis of these topics, the government submits to you a  
5 chronology of events. The witnesses here did not testify in  
6 any particular order, and so a chronological summary may be of  
7 use to you in your deliberations.

8           Note a couple of details before I begin. Nothing I say  
9 or show you on the screen is evidence. I may refer to  
10 something in evidence, but nothing I say independent of that is  
11 evidence, only my words, only argument.

12           Secondly, you will not be permitted to take this  
13 presentation back to the jury room for your own study. If you  
14 see something that you remember and that you want to remember  
15 to discuss back in the jury room, please take a note of it,  
16 particularly the exhibit numbers that you will see flashing by.

17           So you heard evidence that this story began on October  
18 28th, 2010 when Matthew Keys left Fox 40 under heated  
19 circumstances. Witnesses testified that, after an argument  
20 with Brandon Mercer, he was terminated and left voluntarily,  
21 probably both. That was October 28th, 2010.

22           Not long after that, the evidence shows, someone -- and  
23 John Cauthen showed you the analysis of why he believed it to  
24 be Matthew Keys, but someone operating behind the cover of a  
25 virtual private network, downloaded an e-mail file from the

1 CMS. You heard evidence from both Dylan Kulesza and John  
2 Cauthen explaining these entries showed that someone downloaded  
3 an e-mail list. That's Exhibit 303, page 4.

4 Not long after that, someone else downloaded another  
5 e-mail list, or the same e-mail list perhaps, using user  
6 test5678. Again, the evidence shows that it was someone using  
7 a VPN and using an IP address that ultimately resolved to  
8 Matthew Keys.

9 Then, on December 1st, 2010 at 3:36 in the afternoon,  
10 Matthew Keys, using the moniker Fox Mulder 4099, sent his first  
11 e-mail to Brandon Mercer referencing the breach of the CMS.  
12 Now, note the importance of the reference to the CMS, the  
13 content management system. This was not just a scolding  
14 e-mail. This was an e-mail anonymously sent -- anonymous,  
15 small A -- referencing not only a complaint, but suggesting a  
16 breach to the content management system.

17 This is important because Fox Mulder claimed a breach  
18 of the security system, and he provided evidence to back that  
19 up. He suggested that someone had access to the system that  
20 shouldn't have had access.

21 Not long after that, a second e-mail referencing a  
22 breach of the CMS, Exhibit 101 again. Specifically we already  
23 sent you five e-mail addresses to show that these addresses  
24 were legit. You can find them in your content management  
25 system.

1 Another e-mail the same day. Your viewers can decide  
2 for themselves when we e-mail them with the e-mail addresses  
3 provided upon registration.

4 This was not some mass e-mail to someone that Fox  
5 Mulder thought was a viewer of Fox 40. These were e-mail  
6 addresses provided on registration.

7 Now, you may be asking yourselves at this point, how do  
8 we know that Matthew Keys was Fox Mulder or, as you'll see in a  
9 moment, Cancer Man. Well, you heard John Cauthen's analysis of  
10 the logs, his use of the Overplay VPN and how ultimately,  
11 despite the fact that the IP addresses looked like they came  
12 from Ireland or Switzerland or France, they were actually  
13 originating from Matthew Keys' Internet connection.

14 But more telling than that, his own words.

15 (Audio recording played, not reported.)

16 MR. HEMESATH: So not only admitting Overplay, not only  
17 admitting that he knew that he was appearing as a different IP  
18 address, Matthew Keys admits that he downloaded e-mail -- that  
19 he had access to e-mail addresses.

20 (Audio recording played, not reported.)

21 MR. HEMESATH: And if that's not enough, he wrote a  
22 written confession to the same thing.

23 In December 2012, I gained access to a list of e-mail  
24 addresses from the Tribune Company content management system.  
25 I used these e-mail addresses to send correspondence to people

1 I have reason to believe were viewers of my former employer,  
2 KTXL, a part of Tribune Company.

3 Ladies and Gentlemen, the government submits that there  
4 is no doubt who was sending these e-mails to viewers and who  
5 was threatening Tribune Company and, beyond that, who had  
6 accessed the e-mail system from the content management system.

7 Now, at this point, Tribune employees don't know who is  
8 sending these e-mails, and they don't know who is suggesting  
9 that the security of the CMS has been breached. They just  
10 continue to get e-mails.

11 Once again, we have decided to begin sending the  
12 e-mails to the first group of people tomorrow morning to people  
13 who have registered on fox40.com.

14 Now, certain e-mails suggested that the identification  
15 of the intruders was an important task. In fact, you heard  
16 from multiple IT workers that identifying the intruder was  
17 important for system security.

18 The other thing that the e-mails suggested, and this is  
19 an e-mail on December 2nd, that the identification process  
20 would be a long and painstaking process. Matthew Keys knew  
21 that he was operating behind a foreign IP address with a  
22 virtual private network, and that was for his protection, a  
23 cloak of anonymity. Those same IT workers confirmed that fact,  
24 and the fact that it was a long and painstaking process to  
25 identify him and plug the holes.

1           And by the way, we know that e-mails were actually sent  
2           to the viewers because some of those viewers actually  
3           complained to Fox 40, as you can see in Exhibit 105.

4           On December 3rd, yet another e-mail from Cancer Man  
5           specifically referencing damage to the integrity of the content  
6           management system.

7           You Fox people make it incredibly easy to gain access  
8           your subscriber list.

9           On December 3rd, later that day -- or on December 5th,  
10          the e-mails continue to roll in, suggesting more and more that  
11          it was the security of the system that was at stake in the most  
12          important detail.

13          There is a new urgency to addressing information  
14          security. At risk are company secrets, e-mails, documents,  
15          databases and internal websites that are thought to be locked  
16          to the outside world.

17          Why was Cancer Man doing this? Now, later we would  
18          hear directly from him.

19          (Audio recording played, not reported.)

20          MR. HEMESATH: Was he really saying to viewers what was  
21          going on? Or was he instigating a series of persistent threats  
22          about security to the system, backed up by proof in the form of  
23          stolen e-mail addresses?

24          Now at a certain point, December 5th, not even  
25          references to information security were enough. There's the

1       extraordinarily direct, first, your database is not secure.

2               Now, on December 6th, we learn that the evidence shows  
3       that Matthew Keys' tactics went beyond merely sending messages  
4       to Brandon Mercer and to viewers using stolen e-mail addresses  
5       from the CMS. Instead of using the system just to create IT  
6       expenses and headaches, he uses credentials to antagonize his  
7       successor Samantha Cohen, then Samantha Scholbrock.

8               You heard Agent Cauthen, in Exhibit 303, explain what  
9       was going on with this Assembler log entry, that somebody had  
10      changed Samantha Scholbrock's credentials. And without her  
11      credentials, you heard Samantha Cohen say she was initially not  
12      able to work, so she got a new password. But then on December  
13      8th, 2010, her password was changed again. And then on a later  
14      occasion, both her passwords to S. Scholbrock and S. Scholbrock  
15      2 why changed at once. You will recall that she was not able  
16      to do her job, which was to post content to the CMS, for a  
17      week.

18              Now, at this point I'm going to ask you to  
19      simultaneously think about Count Two, which was the campaign,  
20      Keys' campaign to cause damage, and also think about Count One,  
21      conspiracy, because we are now at December 8th. And it is on  
22      December 8th that Keys decided to take efforts from his own  
23      solo work, obtaining e-mail lists, sending e-mails on his own,  
24      to the big time, specifically to the IRC, the Internet relay  
25      chat room, where he begins advertising his desire to attack his

1 former employer.

2 Specifically, if you want to attack Fox News, PM me. I  
3 have a user password to their CMS. That's on December 8th.

4 Now you can see right here that the reference is to  
5 AEScracked. You heard testimony that when there is a term  
6 within brackets like that, the greater/less than symbols, that  
7 that means in an Internet chat room that that is the person  
8 talking.

9 But how do we know that AEScracked is Matthew Keys? He  
10 tells us in his own words.

11 (Audio recording played, not reported.)

12 MR. HEMESATH: So now we know AEScracked is Matthew  
13 Keys. Not to mention all of the analysis that John Cauthen  
14 took you through in his presentation showing that IP addresses  
15 associated with AEScracked resolved back to Matthew Keys.

16 So what is AEScracked saying on December 8th? Well,  
17 here it appears that he is giving away the subject of this very  
18 case. He is giving away passwords to the content management  
19 system.

20 You can publish content, change user settings, all  
21 sorts of shit.

22 Further on down the page: Is this where I put the  
23 super user username and pass code?

24 And then a little further down: User anon1234, pass,  
25 common two. And, notably, go fuck some shit up.

1           This is confirmed by Keys' later statement.

2           (Audio recording played, not reported.)

3           MR. HEMESATH: Let's continue to look at the highlights  
4 from December 8th and note that what's coming back to you in  
5 the jury room is a complete version unhighlighted of these  
6 chats.

7           Notably on this page, you can see that Sharpie is  
8 indicating that they have access, they are successful now in  
9 entering the the CMS. But that's not enough. Matthew Keys  
10 offers the following advice.

11           If you want the largest impact, target the Chicago  
12 Tribune, the Los Angeles Times, WPIX, KTLA, KCPQ, KTLX, WGN-TV,  
13 Antenna TV.

14           Also Tribune wises up. They deleted a super user  
15 account of mine two weeks ago after it was created. They're  
16 not the fastest bunch, but they're close.

17           More stations. And what are those stations? They are  
18 Tribune's bread-and-butter assets. The ones to target, once  
19 again, Chicago Tribune, L.A. Times.

20           (Audio recording played, not reported.)

21           MR. HEMESATH: At this point right here, where Sharpie  
22 says we're in. Is there any doubt about whether these  
23 credentials worked?

24           The advice and the exhortation goes on.

25           A question, So these log-ins will be for everything?



1           AESCracked, yes, absolutely. And then a Wikipedia  
2 entry for Tribune Broadcasting to further explain the reach of  
3 what has been breached in this case.

4           Here a chat member presents a problem that anon1234  
5 stands out like a sore thumb. Keys offers advice in response.  
6 Create a fictitious name, essentially blend in.

7           The advice goes on, how to fool the system to stay in.

8           And another chat room member can't believe that this  
9 was quote, legit. He's glad he stayed up to witness this.

10          And after that, yet more advice. Make your move soon  
11 because they will wise up. But if they do, I can create -- and  
12 note the use of the term -- another super user account.  
13 Remember that a super user is a user that can create other  
14 users.

15          At the same time, another chat room member tells him,  
16 I'm looking for a way to do even more damage.

17          The reaction to that, I did not give you those  
18 passwords for, quote, research. I want you to fuck some shit  
19 up.

20          And more advice beyond that. In the event Tribune  
21 removes the super user account, how do I gain access to this  
22 chat when I create another one?

23          This foretells the difficulty that Tribune IT staff  
24 will have. It's not just about plugging one hole, it's about  
25 stopping an attack in which there may be dozens or hundreds of

1 super users created by super users created by super users.

2 And then he asks for feedback. Did I help? Here is  
3 some more information. Yet another URL.

4 And by the way, I can tell you who I am, I am the man.

5 So what happened after that? What happened after  
6 December 8th?

7 On December 9th, he offers to peddle his wares again.  
8 I've already given ops, the user/pass to several Fox websites.

9 Later that day on the 9th, he argues that the L.A.  
10 Times should be demolished, citing around article that might be  
11 unpopular with some in the chat room.

12 On December 10th, he tries again. Target Fox News.

13 He supports his argument on December 10th by calling  
14 Fox News infotainment for inbreds, target them.

15 Now continuing with the chronology, Assembler logs show  
16 a user logging in as N. Garcia on December 11th. You may  
17 recall that N. Garcia ultimately was the username that  
18 officially accessed the CMS to change the defacement -- to  
19 change the story that was the defacement that we will be  
20 talking about. Here's the log entry for that.

21 But the next day, you may recall, December 12th, 2010,  
22 Brandon Keys called Matthew Keys specifically about the Cancer  
23 Man e-mails. Keys denied that he was Cancer Man, denied that  
24 he was Fox Mulder. And he audaciously predicted the L.A. Times  
25 attack while claiming to be a journalist covering the

1     Anonymous, big A, movement.

2             Among other things Keys says in the recorded call:

3             I haven't sent any e-mails about your contests or your  
4     website or your e-mail addresses. I don't know what you're  
5     talking about.

6             At no point was I involved in advising on any of their,  
7     ah, operations, and at no point did I volunteer any of my  
8     services as a former or current journalist to help get their  
9     message out.

10            Now, with regard to potential cost and whether Keys  
11     knew about the cost, he said specifically, attempting to advise  
12     Brandon Mercer:

13            Get a computer forensics team involved in it. Cal  
14     Forensics I hear is a really good company. Private eyes that  
15     had access my e-mail and my Facebook and my -- you know, my  
16     usernames and passwords that are computer forensics experts.  
17     It really sucked, umm, but I knew I hadn't done anything. So,  
18     you know, they wound up charging my ex a bunch of money to do a  
19     bunch of bullshit investigative work. It didn't pan out into  
20     anything.

21            This is the point where we know that Matthew Keys knows  
22     that this is an expensive and an intensive investigation. And  
23     he knows, by the way, that he's using a VPN.

24            Even though they are criminals, referencing his use of  
25     the word "criminals" in the previous sentence, 'cause they are

1 clearly doing do a lot of illegal shit, but I don't know what  
2 they're planning on doing with the Times, and that's why I  
3 didn't say anything.

4 That was on December 12th. But on December 14th, the  
5 campaign continues. Anyone interested in defacing Fox, L.A.  
6 Times? And finally what Matthew Keys was waiting for, the chat  
7 room participants attacked L.A. Times on December 14th, 2010.

8 Now, how do we know about this conversation between  
9 Matthew Keys and a member of the chat room? Here we don't have  
10 to rely on IRC chats taken from some other computer. We can  
11 find evidence of this on Matthew Keys' own computer in the form  
12 of a screenshot. Here it is specifically.

13 Sharpie, I taught myself the system using N. Garcia.

14 AEScracked responding to the fact that Sharpie was cut  
15 off. I can grant you access again.

16 Notably, Sharpie, And I see that you can do a bunch of  
17 different layouts on different papers and have them all go live  
18 at the same time.

19 Remember that.

20 The next screenshot. Let me see if I can find other  
21 users/pass I created while there.

22 Again, I encourage you to read this in total in the  
23 jury room.

24 In response at the bottom, I could have done so much  
25 more if I'd known their interface at the start.

1           And, of course, here is the result from the web page,  
2           from the mobile version. That was up for a day you heard  
3           testimony about. Had he not been locked out or had Keys' other  
4           accounts not been locked out, you can easily for see what would  
5           have happened. That is a chronology.

6           Now let's move on to what will be important to your  
7           analysis in the jury room, and that is a loss analysis with  
8           regard to each count. You will have to answer the question of  
9           loss on all three of the counts, and the analysis is slightly  
10          different with regard to each of the counts.

11          With regard to Count One, you recall, the conspiracy,  
12          the range of the conspiracy is limited to December 8th through  
13          December 15th. The judge's instruction, you will find, is that  
14          if you find beyond a reasonable doubt that the defendant  
15          committed the offense charged in Count One, you must then  
16          decide whether the government has proved beyond a reasonable  
17          doubt either that the defendant could reasonably foresee that  
18          the conspiracy could cause \$5,000 or more in loss to the  
19          Tribune Company; or, two, causing \$5,000 or more in loss to the  
20          Tribune Company fell within the scope of the defendant's  
21          particular agreement with his co-conspirators.

22          We'll get to the definition of loss in just a moment,  
23          but it goes on.

24          Note that for Court One, the government is not required  
25          to prove that any loss actually occurred. And this is the

1 nature of conspiracy.

2 And how can you calculate, how could you possibly  
3 calculate what the defendant could reasonably foreseen with  
4 regard to the conspiracy costing \$5,000 or more? What evidence  
5 do we have of that? And before we get to that evidence,  
6 though, let's talk about what loss is.

7 A loss is any reasonable cost to any victim, including  
8 the cost of responding to an offense, conducting a damage  
9 assessment and restoring the data, program, system or  
10 information to its condition prior to the offense.

11 And I note that a jury instruction changed.

12 THE COURT: Well, are you going to clarify that?

13 MR. HEMESATH: Yes.

14 THE COURT: Again, you will be told that what the Court  
15 instructs is what the instructions are. There is language  
16 included in this that is not part of any instruction that the  
17 Court is going to give.

18 MR. HEMESATH: Some instructions changed very recently  
19 and --

20 THE COURT: Well, the Court's instructions are the  
21 Court's instructions.

22 MR. HEMESATH: Yes, that is absolutely correct.

23 With regard to these instructions, you will see that  
24 this last section here, and any revenue lost was not argued  
25 and, therefore, there will be no reference to that.

1           THE COURT: So you are to disregard that part of that  
2 slide, just so it's perfectly clear.

3           MR. HEMESATH: How do we know that? How do we know  
4 what the defendant could have foreseen? Ladies and Gentlemen,  
5 I submit to you that you have seen exactly what the defendant  
6 intended through his own words on the IRC chat channel.

7           He wanted to, quote, fuck some shit up. He knew -- he  
8 told Brandon Mercer that he knew about the skill that these  
9 chat room members had. He exhorted them. He told them where  
10 to go. He gave them the password. He told them what to do.

11           Now, with regard to the second part, causing \$5,000 or  
12 more in loss to the Tribune Company, whether that fell within  
13 the scope of the defendant's particular agreement with the  
14 co-conspirators, this is a little different than the first one.  
15 It may not be what the defendant personally foresaw. But, with  
16 regard to the scope of what was agreed upon in the conspiracy,  
17 what were the stakes?

18           (Audio recording played, not reported.)

19           MR. HEMESATH: Matthew Keys admits the stakes. He  
20 knows what a hacking attack would mean to the Tribune Company.

21           Beyond that, once again, we go back to the chat.

22           Yet another reason why the Times must be demolished. I  
23 did not give you those passwords for research. I want you to  
24 fuck some shit up. Here are the assets that they can target.  
25 Is this where I put the password? Go fuck some shit up.

1           Ladies and Gentlemen, that, under Count One, is how you  
2 will determine whether the stakes or the foreseeability, either  
3 one, meet the \$5,000 threshold. You note that the instructions  
4 will say that an actual loss is not required for you to find a  
5 \$5,000 loss on that point. And either one under count -- or  
6 under option one or two is sufficient. Only one is required  
7 for the government to be able to provide -- to prove guilt on  
8 this element.

9           Now, with regard to Count Two, you may recall the  
10 timeline, that the range is different than under Count One.  
11 That's October 28th to January 5th, 2011.

12           This is the correct loss statement. Again, the loss is  
13 any reasonable cost to any victim, including the cost of  
14 responding to an offense, conducting a damage assessment and  
15 restoring the data, program, system or information to its  
16 condition prior to the offense.

17           Now, how do we count that? Well, we've got to go back  
18 to our witnesses.

19           We start out with Brandon Mercer, Matthew Keys'  
20 supervisor and recipient of the Cancer Man e-mails. So you  
21 know we followed the standard formula to determine the hourly  
22 rate. That's the total salary divided by the number of working  
23 hours in a year; that's 2,080. There may be some rounding so  
24 the figures may not be exact.

25           Dan Gaines, the veteran reporter, who found the story.



1           Tom Comings, the engineer who identified N. Garcia as  
2           the account that made the change.

3           Brian Hanrahan, who fixed the story the best he could.

4           Armando Caro, who led the IT team in the security  
5           response.

6           Dylan Kulesza, who identified Chippy leet and the IRC  
7           chat room.

8           Tim Rodriguez and another IT professional who spent 50  
9           hours on the response.

10          And you may recall, Ladies and Gentlemen, throughout  
11          the testimony there was a differentiation between what was  
12          spent in response and what was spent on upgrades. Your memory  
13          controls, but the government submits that these figures only  
14          count the response, only count the identification. The rest,  
15          the money that was spent and the man-hours expended, are not  
16          included in this chart.

17          Samantha Cohen, who lost a week of being able to post  
18          to the CMS, which was her job. In her words, that was my job  
19          to post to the CMS.

20          Jason Jedlinski, who organized the security response on  
21          both of the incidents, Cancer Man and the L.A. Times  
22          defacement.

23          Finally Jerry Del Core, station manager at Fox 40,  
24          spent hours in meetings and on the phone in direct incident  
25          response.

1           Note that we listed the high and the low estimates of  
2       these witnesses. We didn't count benefits. These are  
3       conservative estimates by any measure, and they exceed \$5,000  
4       even in the poorest case scenario.

5           Now as to Count Three, attempt, the instruction here  
6       with regard to loss is that, if the offense had been completed,  
7       would it have caused loss adding up to at least \$5,000 to the  
8       Tribune Company? To answer this, once again we go back to the  
9       chats, and specifically in this case to the chat that occurred  
10      on the date that the attempt was perpetrated, December 15th.

11          And I see that you can do a bunch of different layouts  
12      on different papers and have them all go live at the same time.

13          If the damage from one story exists in the way that the  
14      government suggests that it does, what would the damage have  
15      been from all of the layouts on the front page at the same  
16      time? He could have done so much more.

17          So, with that, briefly let me circle around and give a  
18      brief review of all of the elements for all of the counts.

19          Once again, Count One, the conspiracy. You will ask  
20      yourselves, was there an agreement? Was Matthew Keys a member  
21      of the conspiracy knowing of least one of its objects? Was one  
22      of the members performing at least one overt act?

23          Well, the chat logs sure seem to prove every single one  
24      of the points, all of the assets that they could target.

25          Now did Keys, with regard to Count Two, know of the

1 object of the conspiracy and intend to help accomplish it? How  
2 do we know that? Once again, let's go back to the chat rooms.

3 Is this where I put the super user username and pass  
4 code?

5 (Audio recording played, not reported.)

6 MR. HEMESATH: He incited it. He knew it.

7 Finally, did one of the members perform at least one  
8 overt act after December 8th? Now the evidence shows that  
9 there were quite a few, but one sticks out, and only one is  
10 necessary. They defaced the L.A. Times website.

11 Ultimately this is the form that you will fill out.  
12 This is Count One, and this what you will have to decide in the  
13 jury room.

14 With regard to Count Two, the campaign, this is the  
15 course of conduct between October 28th, 2010, and January 5th,  
16 2011. That includes everything that Keys did, including with  
17 the individuals in the chat room. And, again, here are the  
18 elements.

19 Knowingly. We know that Keys knowingly caused the  
20 transmission of at least a command. According to Agent Cauthen  
21 and his IP address analysis, he transmitted many, many codes  
22 and commands to download e-mail lists, to harass Samantha  
23 Scholbrock, and then to aid and abet Sharpie sending a code.

24 Now note that as to another instruction that you will  
25 be getting. And, again, the copy that the judge provides you

1 with in the jury instructions is what will control.

2 These instructions will tell you that aiding and  
3 abetting someone following these elements counts just the same  
4 as having done it yourself. The fact that Matthew Keys merely  
5 incited the conduct does not absolve him of the responsibility.

6 Did he intentionally damage or aid or abet someone  
7 damaging a protected computer? Once again, the chat logs. He  
8 passed along a password, and then he told them what to do with  
9 it.

10 Finally, was this computer used in or affecting  
11 interstate commerce? You heard that the system was used,  
12 located, administered throughout the the United States,  
13 California, Texas, Chicago. And you know that these  
14 conservative estimates exceed \$5,000.

15 Members of the jury, this is Count Two. Here's the  
16 form that you will fill out in the jury room.

17 And then Count Three, the attempt, on December 15th,  
18 2015. Here the required elements are that: First, the  
19 defendant intended to transmit a code that could cause damage  
20 to a computer. And that same aided and abetted instruction  
21 works here for those that would assist or aid or abet the  
22 transmitter of that code.

23 Second, the substantial step. Here the step is located  
24 on the screenshots found on the computer. They tried. They  
25 tried to get in again and again, and they failed. Not only is

1 the evidence there on the screenshots, but Agent Cauthen told  
2 you that, in Exhibit 307, the Assembler logs reflect an  
3 attempted entry on the system at about that time.

4 You will also learn from the instructions that mere  
5 preparation is not a substantial step for the purposes of these  
6 elements. To constitute a substantial step, a defendant's acts  
7 or actions must demonstrate that the crime will take place  
8 unless interrupted by independent circumstances.

9 Let's look at the screenshot again. What was the  
10 independent circumstance? It was that he was locked out. It  
11 was that the system admins were that good.

12 This is Count Three, and here is the form that you will  
13 fill out in the jury room.

14 And so went this bitter, expensive, exhausting tale of  
15 online anonymous revenge against a media organization. You  
16 will now hear from the defense. Please listen carefully. And  
17 your job is not to be taken lightly. I ask you to recall  
18 Matthew Keys' own words when interviewed by John Cauthen.

19 (Audio recording played, not reported.)

20 MR. HEMESATH: He did it.

21 Consider also the reasons that Matthew Keys offered for  
22 doing it.

23 (Audio recording played, not reported.)

24 MR. HEMESATH: Members of the jury, thank you for your  
25 service.

1 THE COURT: All right. Ladies and Gentlemen, that  
2 concludes the government's closing argument. It has reserved  
3 time for rebuttal, so you will hear from the government again.

4 My question is, do you expect your closing to go an  
5 hour and a half?

6 MR. LEIDERMAN: Yes.

7 THE COURT: Let's go ahead and take a break now so we  
8 can come back and hear the defense closing in one piece.  
9 During that break, all my admonitions remain in place. Do not  
10 discuss the case. Don't think about its ultimate conclusion.  
11 No research of any kind.

12 Let's take a 15-minute break, and then we'll come back  
13 and hear from Mr. Leiderman.

14 (Jury not present.)

15 THE COURT: All right. 15-minute break.

16 Just two things. There was a slip of the tongue. You  
17 said Count Two when you meant element two with respect to  
18 conspiracy. I think it's clear in context.

19 But you also showed transcript excerpts of the Mercer  
20 recording, and the evidence did not come in in that form. I  
21 didn't hear an objection, so I'm assuming there's no dispute  
22 but that those transcript excerpts properly reported what was  
23 said.

24 MR. LEIDERMAN: There were a number of things that I  
25 thought were objectionable that I let go, you know, in

1 deference to counsel, and that was one of them. I looked at it  
2 and listened, and it appeared to -- it appeared to reflect what  
3 was being said. That's the best I can give you, Your Honor, is  
4 that it appeared to reflect. I afford counsel leeway in the  
5 hopes that, you know, it's reciprocal.

6 THE COURT: All right. Well, I'm not going to give any  
7 special advisement, but specifically the evidence did not come  
8 in in that form.

9 MR. HEMESATH: That's correct.

10 MR. SEGAL: But just as much -- that's right, but as  
11 long -- it's argument. And he played that tape, and so much as  
12 he could say this is what he said and read it back to the jury,  
13 he could put it up on a power point.

14 I mean, that was not Mr. Hemesath's decision. My own  
15 view was that that was perfectly fine, I saw the slides, so  
16 it's on me.

17 THE COURT: I've raised the issue. I'm not going to do  
18 anything at this point. The more you talk, the more I might do  
19 something.

20 MR. SEGAL: See you after the break, Your Honor.

21 MR. LEIDERMAN: Well, hold on, just to settle that.

22 It is argument, and I think people are entitled more  
23 leeway in argument.

24 I just wanted to get that out --

25 THE COURT: And I will clarify --

1 MR. LEIDERMAN: -- because I'm about to argue.

2 THE COURT: All right. I understand.

3 At this point, 10 minutes.

4 (Recess taken.)

5 (Jury not present.)

6 THE CLERK: You may remain seated and come to order.

7 Court is now back in session.

8 THE COURT: All right. Let's bring the jury in.

9 Mr. Hemesath ran for 52 minute and 12 seconds.

10 MR. SEGAL: 52?

11 THE COURT: 52 minutes, 12 seconds.

12 MR. SEGAL: That's precision.

13 (Jury present.)

14 THE COURT: You may be seated. Welcome one more time,  
15 Ladies and Gentlemen.

16 We'll move now to the defense closing argument. You  
17 heard me say before this is argument, not evidence. And  
18 Mr. Leiderman informs the Court that he may take up to 90  
19 minutes.

20 So you may proceed.

21 MR. LEIDERMAN: Thank you, Your Honor.

22 If it pleases the Court and counsel, on behalf of  
23 Matthew Keys, we will deliver our closing statement at this  
24 point.

25 The first thing I want to tell you is that I think it's



1 important that we start with this before we go into any of my  
2 slides. My words are not jury instructions. They are  
3 argument. You're going to get a pack of jury instructions  
4 after we finish. The government has chance for rebuttal. That  
5 is the law in this case. What I'm saying is argument. I want  
6 to make clear that because I have a lot of mixed in slides of  
7 argument and actual jury instructions.

8 So, having said that, there is no dispute that this is  
9 a protected computer. Just about any computer these days is a  
10 protected computer. This is an unauthorized damage case. You  
11 have a happy computer there, and he's happy because it wasn't  
12 damaged.

13 You're not being asked to decide in this case if  
14 Mr. Keys gained unauthorized access to a protected computer.  
15 You're being asked to decide if he caused unauthorized damage.  
16 And as the Court will instruct you, damage means a very  
17 specific thing under the Computer Fraud and Abuse Act, or CFAA,  
18 which is the statute at issue. And I tell you that because I  
19 may use that term. Just because it's what sticks in my mind, I  
20 want you to understand what I'm saying if I happen to say CFAA  
21 instead of Count One, Two or Three. But under the CFAA,  
22 there's a specific definition of damage, and you'll get that.

23 Okay. The first thing is this. The Cancer Man and the  
24 X Files e-mails, these are, we assert, irrelevant. They were  
25 brought out solely for prejudice, to have you not like

1 Mr. Keys. We believe the evidence has shown that Mr. Keys did  
2 not have the knowledge he needed to have regarding whether  
3 Sharpie could do any computer damage, had the skills, was, as  
4 the testimony came in, leet or elite.

5 The government wants to make you believe that Matthew  
6 Keys is a vengeful, horrible person. It's distracting. It's  
7 confusing. It's irrelevant. It's unimportant. You should  
8 take it, and you should crumble it up into a little ball, and  
9 you should throw that evidence into the garbage. That's what  
10 you should do with that evidence.

11 The last thing you see on this slide is the X Files  
12 movie. It's I Want to Believe, I think that was the name of  
13 the movie or something like that. The government wants to make  
14 you believe these things, that Matthew Keys is this horrible  
15 person who did these horrible things. And by that, they threw  
16 in all of this, what we assert is irrelevant, prejudicial  
17 evidence for no reason other than to make you think that  
18 Matthew Keys is horrible. And I think it comes out in the  
19 tapes that he's not horrible.

20 What then is this case about? It's really about this  
21 edit to the L.A. Times. That's the bulk of everything that  
22 came in except for the prejudicial, irrelevant evidence. It's  
23 this Chippy 1337, that's what we're gathered here for, or  
24 Chippy leet.

25 There is a computer language that is spoken by these

1 people, and it really didn't come out so much in these logs,  
2 and the language wasn't quite as coarse as some of the -- some  
3 of the traditional logs of this type have. It can get really  
4 ugly in there. The government, to their credit, put in sort of  
5 cleaner logs for you. But that's what this is about, Chippy  
6 1337, an edit for 40 minutes. And we'll talk more about that.

7 This is the story as corrected by Mr. Hanrahan. As he  
8 testified, it's the story that is still online if you go after  
9 this case is over -- because you can't do any independent  
10 research. If you go after this case is over, you can see this  
11 story will come up, you know, if you can remember pressure  
12 builds in house to pass tax cut package.

13 So, as I said, we'll talk more about it. This story  
14 was up on December 14th from 3:49 p.m. to 4:29 p.m. Pacific  
15 standard time. That is actually a fact in dispute because  
16 someone else testified that it was central standard time. In  
17 any event, 40 minutes is 40 minutes. And that's according to  
18 the L.A. Times. And as I said, it was discovered by Brian  
19 Hanrahan, an L.A. Times editor.

20 This is not exactly the most unforgettable act of  
21 hacktivism ever there was, but here we're in a federal case.  
22 And I don't know if you know the expression, don't make a  
23 federal case out of it. My grandpa always used to say that to  
24 me, and now I say it. They have made a federal case out of  
25 this, out of a 40-minute deface to a story that probably no one

1 saw. This is not a front page story. This is something  
2 that -- that probably wouldn't have made the print edition,  
3 although I think the testimony might have been that they were  
4 looking at it for the print edition.

5 The other thing they talked about was the Wayback  
6 Machine and the mobile site. There were worries about both of  
7 these things. I'll talk about circumstantial evidence later,  
8 but inferentially, I think perhaps you can conclude that this  
9 is not in the Wayback Machine, that you can't find this story  
10 or this Chippy 1337 story anywhere except for in articles about  
11 this case. There's no proof that it's on the Wayback Machine.  
12 There's no proof that it was ever in the Internet archive.  
13 There is some testimony to the contrary.

14 We don't know what the mobile site feed had originally  
15 regarding the Chippy story. We don't know when it first  
16 appeared. That's the issue. Because they talked about  
17 something called RSS feeds, it was on the next day. So because  
18 you don't know when it came out, you also don't know when it  
19 came on.

20 And, of course, this didn't do any lasting damage to  
21 the brand. That was just discussed by Mr. Hemesath, this  
22 lasting damage to the brand. There was no testimony about how  
23 damaged correlated with loss to the brand, and that's not  
24 something you should be considering in terms of damage and loss  
25 in this case. And, again, this case is about damage and loss.

1           So we go to Anonymous. And we have the same questions  
2 we had in opening, right? Who is Sharpie? Who is Sabu? And  
3 who is Anonymous?

4           I think the question what is Anonymous has been  
5 answered. Sabu in this case is someone that passed -- had  
6 credentials passed to him and seemed to be quarter-backing at  
7 least the beginning of this -- of the incidents in the Internet  
8 Feds chat room.

9           Sharpie, on the other hand, astoundingly we really  
10 heard very little about. You don't know who he is. You don't  
11 know what his capabilities were at any time. You don't know if  
12 he came out in any indictment. You don't know where he is in  
13 relation to this case. There are all kinds of open questions  
14 about Sharpie.

15           So some of the most important open questions are, did  
16 Matthew Keys know, truly know that Sharpie and Sabu were  
17 actually hackers? You don't know that, that didn't come out in  
18 this trial, what they specifically were. And that was one of  
19 the most important questions of the trial, and it didn't get  
20 answered.

21           Like I said, Sharpie was hardly even discussed. No one  
22 knows who he is. There was no evidence that was relevant to  
23 this case about Sharpie.

24           Pardon me.

25           He's the second biggest part of this case, and he's

1 nobody. He's literally nowhere. Sharpie is a hole big enough  
2 to fill this case with reasonable doubt.

3 The next question unanswered, who is N. Garcia? Is  
4 there any connection between Matthew Keys and someone logging  
5 in as N. Garcia? If there is, the government needs to prove it  
6 to you beyond a reasonable doubt. They haven't done that.

7 We'll talk about what a reasonable doubt means later,  
8 but I want you to obviously keep that phrase in mind because  
9 that's what this case is about. This case is about reasonable  
10 doubt. I'll discuss, you know, some other points very briefly,  
11 but ultimately this is a reasonable doubt case. Did the  
12 government prove their case to you beyond a reasonable doubt?  
13 And, of course, they didn't.

14 In terms of N. Garcia, there's no N. Garcia in the IRC  
15 logs. There's no allegation that AEScracked gave any  
16 information or sent any information to or from an N. Garcia.  
17 And there's no evidence that anyone at all gave access to an N.  
18 Garcia.

19 And then there's anon1234 and N. Garcia, and the  
20 government never made the connection between the two.

21 I apologize for reading these slides to you, but there  
22 is a record going, and the argument needs to be in the record.  
23 Some slides I won't, but I understand that you guys can read.

24 Old usernames. Jedlinski testified that when they  
25 finally took a close look at their system, they discovered that

1     there were many valid usernames and passwords that belonged to  
2     people that no longer were with Tribune Company. I'm not  
3     blaming the victim, but this was not a secure site at the  
4     outset. Old usernames. Jedlinski testified they spent a lot  
5     of time cleaning up the system, cleaning up the system from  
6     their old usernames. Not in response to the attack, but  
7     because they had work to do that they had never done. Time  
8     cleaning up the system, we assert, is not loss or damage within  
9     the meaning of the CFAA, within the meaning of this case.

10           Before I get into jury instructions, I wanted to tell  
11     you, something else. Take your time with this case. This  
12     wasn't an easy case. It involves a lot of technical issues.  
13     It wasn't easy for the lawyers. It can't possibly be easy for  
14     you, I would think.

15           Sometimes I tell a jury don't be a Friday 4:30 jury.  
16     And, you know, it's Tuesday morning. You're not going to be --  
17     what happens a lot of times is Friday at about 4:30 a jury will  
18     come back with a verdict because they don't want to come back  
19     on Monday, which, when you think about it being jurors, is kind  
20     of a natural thing. But it deprives both the government and  
21     the defendant of your full consideration of the case.

22           I would think this case is important to the government,  
23     but I can assure you of one thing, there's nothing more  
24     important in Matthew Keys' life than this case. And I don't  
25     expect you to come back Friday at 4:30 from Tuesday morning,

1 but I do hope that you will take all the time that is necessary  
2 in this case. There was a lot of evidence introduced. There  
3 was six days of testimony. I don't think this is an easy  
4 verdict either way.

5 Of course, I think it's a not guilty verdict on all  
6 three counts, but I don't think it's an easy -- I don't think  
7 it's an easy you're going to walk back there and come back in  
8 15 minutes.

9 So let me start talking about some of the jury  
10 instructions we have.

11 The first is just because a witness or document in  
12 evidence says something about the law doesn't mean it's an  
13 accurate statement. To determine what the law is, you may rely  
14 upon the jury instructions.

15 The judge is going to give you copies of all the law  
16 that applies to this case. That is the universe of materials  
17 that you have to decide this case upon. Don't go outside the  
18 jury instructions. And I'm going to show you an example of  
19 what I mean by this.

20 This is the e-mail from Brandon Mercer to a number of  
21 different people. No? This is the other one. This is just  
22 the one to Cecilia Osborne. It says the FBI cannot prosecute  
23 this case unless there's \$5,000 or more of actual damages  
24 caused by this. Your time and hourly rate counts as damages.

25 That's an incorrect statement of the law. In fact, if



1 this statement even matters, you've already found Mr. Keys  
2 guilty. And what I mean is, when Mr. Hemesath put up the jury  
3 verdict forms, it says, do you find him guilty or not guilty?  
4 And then if you found him guilty, then it comes into play  
5 whether or not \$5,000 is at issue. \$5,000 has something  
6 completely different to do with this case than whether he's  
7 innocent or -- I'm sorry -- whether he's not guilty or guilty.  
8 And there's a difference between innocent and not guilty, a big  
9 difference.

10 Not guilty can mean the case wasn't proved, and that's  
11 what we're asserting in this instance. Innocent, didn't do  
12 anything, had nothing to do with this, and we'll talk about  
13 that a little bit later.

14 But don't speculate about what this \$5,000 line has to  
15 do with -- you're not to consider punishment. That will be in  
16 the instructions. And even a loss of \$5,000 or more, you must  
17 determine that beyond a reasonable doubt.

18 And, of course, I want you to call into question their  
19 entire accounting process, and we're going to go over this in  
20 detail why it's flawed.

21 However, it's important that Brandon Mercer thought  
22 this was true, because this is the inception. This is December  
23 2nd before the December 8th conspiracy dates. Brandon Mercer  
24 thought this was true, and I'm going to come back to that also  
25 in a little bit.

1           Okay. Here's the cookie, the elements of the crime.  
2       Right? You can't have a chocolate chip cookie unless you have  
3       your ingredients. In my case, it's typically cookie dough.  
4       However, I recognize that cookie dough is made out of certain  
5       things, milk, eggs, sugar, chocolate chips. That's how you  
6       build a case. There has to be -- you have to meet the elements  
7       of the crime.

8           And the first is, in a conspiracy, there has to be an  
9       agreement between two or more persons in this case to either  
10      transmit a code, transmit a program, transmit a command or  
11      transmit information, and you see in even smaller print to a  
12      protected computer, and I'll tell you again it's a protected  
13      computer, we concede it, with the intent to cause damage to the  
14      L.A. Times website.

15           So damage is the most critical question to answer in  
16      this case. Let's look at it. Here's the Chippy 1337 article  
17      again. And the yellow highlights are, of course, my  
18      highlights.

19           There was a back-up of the data. As everyone  
20      testified, it could have been -- they could go into the system,  
21      click a button, and restore it. That's not what Mr. Hanrahan  
22      did. He did it from memory and also from the fact that a lot  
23      of the words weren't even changed.

24           However, the question is, is this damage? Did it hurt  
25      this computer system in any way such that it was unlawful?

1           There was a back-up right there. Bless you.

2           It's not the question of the 40 minutes that it was up.  
3       It's the question of within a few minutes of Mr. Hanrahan  
4       seeing this, it was restored. There is no damage.

5           So let's talk about what damage is, and I think this is  
6       from the actual jury instruction. I'll be corrected if I'm  
7       wrong. It's any impairment to the integrity or availability of  
8       data, program, system or information.

9           The system wasn't hurt. The information wasn't hurt.  
10       There was a back-up. The integrity or the availability of data  
11       wasn't hurt.

12           As I said, data was backed up and available to the L.A.  
13       Times at all relevant -- all relevant times herein. That is  
14       clearly just lawyer babble. Sorry. During this 40 minutes is  
15       what I mean, there was a back-up. There was a button to click.  
16       There was no damage.

17           This is our argument on damage. If the data was still  
18       available to the complaining witness -- and by that, we mean  
19       several different things. To the L.A. Times, to Tribune  
20       Company, to what is now Tribune Publishing. It's hard -- I  
21       don't think the term "victim" applies in this case.  
22       Complaining witness, they're the ones who complained about the  
23       issue and got the FBI response.

24           If it was still available to the complaining witness  
25       either because it was backed up or elsewhere, there is not

1 damage within the meaning of this case.

2 Using a username and password to download data, we  
3 assert, is not damage. It's not harming a computer.

4 And now we're talking about damage and loss together.  
5 There is no loss without damage. They want you to find all  
6 these numbers of loss based upon these hours. Again, we're  
7 going to go over the hours. They want you to find loss based  
8 upon that. There is no loss without damage. You don't get  
9 there. And as I said, we'll talk about loss in a minute.

10 So here's the conspiracy, Count One. Matthew Keys had  
11 to have joined the conspiracy knowing what the object of the  
12 conspiracy was. So you have to decide if, quote/unquote, go  
13 fuck some shit up meant Sabu and Sharpie go deface the L.A.  
14 Times or do some specific illegal act.

15 In other words, Matthew had to know and agree that  
16 certain people with whom he conspired -- that's from the jury  
17 instruction, with whom he conspired -- were about to do certain  
18 things, and he had to help them accomplish these goals.

19 Conspiracy still, conspiracy is a criminal partnership.  
20 Matthew entered into a partnership with these people? The  
21 existence of a partnership must be to do something unlawful.  
22 Did he know they were going to do something unlawful?

23 Plus you must find that there was a plan to harm the  
24 victim. Matthew didn't know what they were going to do with  
25 the keys to the -- or the credentials to the Tribune. And,

1 further, it didn't appear that he cared. There has to be a  
2 willfulness to this, a willfulness to the act. He has to care  
3 what they did. And he didn't have the intent to further this  
4 conspiracy.

5 So we go to damaging a computer, the conspiracy  
6 elements of it. The crime of transmission of a command or  
7 information to a computer intending to cause damage or the  
8 attempt to commit such crime was committed by someone in this  
9 case, they're asserting Matthew Keys, or in conjunction or in  
10 conspiracy with Sharpie -- well, it would be Sharpie.

11 Mr. Keys must have intentionally aided, counseled,  
12 commanded, induced or procured that person to commit each  
13 element of the crime, which must be proved beyond a reasonable  
14 doubt, each element. So while no loss has to occur in a  
15 conspiracy charge, there still must be a plan to create damage,  
16 and it's in the name of the crime, damaging the computer, the  
17 conspiracy to damage a computer. We're on damaging the  
18 computer, the conspiracy count. This is Count One still.

19 Mr. Keys had to have acted before the crime was  
20 completed. And the evidence must show beyond a reasonable  
21 doubt that Mr. Keys acted with the knowledge and intention of  
22 helping someone else commit this crime.

23 Now let's turn to loss. I believe this is the jury  
24 instruction on it that you'll get.

25 Any reasonable cost to any victim, including the cost

1 of responding to the offense -- you can read this one. This is  
2 the heart of the case after damage. Right? First you have to  
3 decide if the computer was damaged, and then you have to decide  
4 if there was loss to it.

5 Look at where it says restoring the data. It took  
6 three minutes to restore the data, three minutes.

7 They're entitled to conduct a damage assessment. We're  
8 going to talk about whether that was reasonable. These costs  
9 have to be reasonable and reasonably related to the actions at  
10 hand.

11 This is our argument, that costs unrelated to computer  
12 impairment or computer damages, such as subsequent economic  
13 losses unrelated to the alleged damage, are not loss within the  
14 meaning of this crime. In other words, if it doesn't flow  
15 from, directly flow from the Chippy 1337, it's not loss.

16 In this instance, we argue the only impairment that the  
17 government has alleged is the edit to the L.A. Times website.  
18 Our, again, take on this is that all of this Fox Mulder stuff  
19 is nothing but a red herring. It's not nothing but prejudice,  
20 isn't damage, isn't loss within the meaning of the CFAA, within  
21 the meaning of this case, within the meaning of the law, within  
22 the meaning of conspiracy, the completed crime of damaging a  
23 protected computer or the attempt to damage a protected  
24 computer, Counts One two and three.

25 So, as I said, the Cancer Man e-mails and all the time

1 spent on them cannot be counted as loss because there was no  
2 impairment to this e-mail address list. They kept talking  
3 about an e-mail address list, but you've never seen it. It's  
4 not been introduced into evidence. It's just like Sharpie,  
5 it's just kind of floating out there and wasn't tied up in this  
6 case.

7 Nor was there any impairment to the content management  
8 system or CMS caused by the Cancer Man e-mails. If they --  
9 there's -- there were different crimes that could have been  
10 charged that were not. You're asked to decide what's in front  
11 of you. This is not a trespass, computer trespass, computer  
12 intrusion case. This is a computer damage case. Those two are  
13 wildly different things especially under the evidence here.  
14 You're not asked to decide about a trespass.

15 Misappropriation and misuse of data, we assert, aren't  
16 damage or loss within the meaning of this case. A robbery  
17 isn't a burglary isn't a grand theft isn't a petty theft isn't  
18 receiving stolen property isn't shoplift. They are all  
19 different things, and they have different statutes. Likewise  
20 in this case.

21 Moreover, all of the e-mails and investigation into the  
22 e-mails occurred before the intrusion into the L.A. Times  
23 website.

24 Do not count the cost of upgrading a security system as  
25 loss in this case. It is not. Upgrading a security system is

1 not loss. To the government's credit, they're not asserting it  
2 is loss. However, I want to make this crystal clear.

3         They used the house analogy. There's the keys, and  
4 there's a front door, and there's perhaps a window left open,  
5 which is a back door. And then I asked Mr. Kulesza about  
6 building a new house, which is what they did. Any portion of  
7 time related to any part of building a new house is not loss in  
8 this case.

9         So let's talk again more about loss as it relates  
10 specifically. There is no interruption of services. The CMS's  
11 functionality was not impaired; it worked just fine. The Fox  
12 40 website never went down. The L.A. Times website never went  
13 down.

14         Mr. Hemesath discussed damage to the brand or its  
15 integrity. That's not loss, number one. And, number two, a  
16 quantifiable number was never placed upon brand loss. You  
17 heard from no expert. There was no goodwill number introduced  
18 into this case. It's not loss.

19         So the evidence of loss is muddled and imprecise and  
20 has caused a reasonable doubt as it relates to the loss figure  
21 at which the government has arrived.

22         When the witnesses logged their time as a normal part  
23 of their job, did they include that as part of their hours? I  
24 don't know. And if so, how long did it take them to log their  
25 time? These are questions to be asked because that's the heart



1 of the people's damage. They put these inside and outside  
2 numbers, which are interesting, and I'll go into that in a  
3 little bit. They put these inside and outside numbers into  
4 their loss calculations, but what went into that?

5 We'll talk about this again, but I want to -- when I  
6 say I'm going to talk about this again, I'm mentioning things  
7 twice because they're important to me, and I want to make them  
8 important to you.

9 But note that all of the witnesses recorded their time  
10 in these very tidy hour, half-hour increments. Nothing is like  
11 I spent, you know, 22 minutes on this, 16 minutes on this.  
12 It's all, you know, I spent 15 hours. It was 20 hours total.  
13 And you don't know where these things are coming from.

14 To find Mr. Keys guilty, you must find that Mr. Keys  
15 knowingly caused the transmission of at least one program,  
16 code, command or information to a computer. This is Count Two.  
17 This is what we call the full offense. This is no longer  
18 conspiracy. This is him damaging a computer.

19 And then you have Count Three, attempt to damage a  
20 protected computer. And to find Mr. Keys guilty, you must find  
21 Mr. Keys intended to transmit at least one program, code,  
22 command or information to a computer. Additionally, Mr. Keys  
23 must have done something that was a, quote/unquote, substantial  
24 step toward committing the crime.

25 So for Count Three, substantial step, this is the most

1 important thing. This is the count -- this Count Three is the  
2 count that relates to the deface of the whole front page of the  
3 Chicago Tribune. You barely heard about this during trial, but  
4 nonetheless it comprises one of the three counts, one-third of  
5 this entire case, even though you barely heard about it.

6 Here there was no substantial step that Matthew Keys  
7 took toward helping Sharpie deface the Tribune. He did no act  
8 of his own on this count. In fact, they meet up later on, and  
9 Sharpie says I have this great plan. And Matthew says, oh,  
10 wonderful. But they're locked out at that point. Sharpie  
11 says, if I only had known, you know, what could have been, and  
12 they're locked out. There's no substantial step toward the  
13 commission of this crime. They were blocked. There was no way  
14 to complete this crime. And it wasn't an attempt to do it  
15 because they didn't actually make the try.

16 Sharpie said, I could have done so much more if I knew  
17 the interface at the start. There was no ability for a  
18 substantial step. He didn't know the interface. He didn't do  
19 anything before he was locked out. And he was in fact locked  
20 out by the time that Count Three came into play.

21 Again, these crimes were not committed in this case.  
22 These are keys to the front door. This is not a pun on  
23 Mr. Keys' name. I recognize they're the same.

24 Taking an analogy, you could have been kicked out of  
25 your office and still had the keys. You give someone your

1 keys, and they go into your old office and move desks around.

2 You're charged with robbery. Are you guilty of robbery? No.

3 That does not mean you're guilty of some other lesser  
4 crime. You're not being asked to decide that. You're being  
5 asked to decide three specific crimes.

6 There is no substantial step with respect to Count  
7 Three. There's no damage, there's no loss, and there is no  
8 conspiracy to commit specific damage or loss.

9 So we go back to -- you've seen this slide before in  
10 opening -- hacking or vandalism, and what's the difference? So  
11 what did Sharpie do? Is this computer hacking or is this  
12 deface vandalism?

13 Well, Special Agent Cauthen says, no, I consider this a  
14 hack, but everyone else says this a deface. So what's the  
15 difference? You know, vandalism is one thing, and hacking is  
16 another. And do they fit the elements for Mr. Keys? This is  
17 essentially the heart of the legal dispute in this case, but  
18 think about this.

19 In terms of vandalism, someone spray-paints on the wall  
20 like the picture there. You cannot click a button on your wall  
21 that says revert to back-up and put it right back the way it  
22 was. Okay. That's part of building a new house when you are  
23 repainting a wall.

24 This was a case of click and revert to back-up. Or in  
25 Mr. Hanrahan's case, he decided within three minutes to just

1     rewrite the headline, and it was back up. Three minutes since  
2     he noticed it till when it went back up.

3             So, again, one thing is indisputable in this case, and  
4     that's Mr. Keys is a journalist. In late November 2010, after  
5     resigning -- well, I think the evidence was after resigning and  
6     being fired from Fox 40, he gained access to a chat room of  
7     hackers that sat around all day talking about hacktivism and,  
8     you know, these ops, as they call them, that they were doing,  
9     ops.

10            Matthew was writing a story about them, and he was  
11     welcomed into the room for that purpose. His personal purpose  
12     was to find out who Sabu, Sharpie and others were and what, if  
13     any, capabilities that they had.

14            In terms of an intent to cause damage, the evidence did  
15     show that two of Keys' goals as a journalist were to catch a  
16     headline-grabbing story and understand Anonymous, something no  
17     one had done yet. Screen grabs on his own computer -- and not  
18     only on own computer, but published in the media and given to a  
19     journalist who was writing a book, were these screen grabs. It  
20     is are hardly the actions of a person who is guilty to take  
21     their own work capturing their guilt and give it over to the  
22     media for publication.

23            This is a journalist trying to get a story. And we've  
24     heard that he gave logs to -- for the book. He gave logs to  
25     someone named Adrian Chen and Gawker. I don't think the

1 evidence came in quite cleanly about whether he wrote his own  
2 story. I think there is some conflict in the evidence about  
3 that.

4 Moreover, he made a complete statement. We'll talk a  
5 little bit about the statement somewhat later, but he made a  
6 complete statement in this case.

7 So he purposely documents these actions, and I think  
8 the evidence of Twitter kind of came in a little bit light. He  
9 personally documents these actions because in 2010 Twitter is  
10 unreliable. You don't have Barack Obama tweeting I'm doing  
11 this or I'm signing this bill or, you know, I'll be at this  
12 town hall meeting in 2010. It was only later that Twitter  
13 became what it is today. Remember, this is five years ago at  
14 this point. In fact, it's almost exactly five years ago.

15 Because there must be proof that Anonymous exists, not  
16 simply braggadocio and innuendo. Who were these people on  
17 Twitter? Who were these nicknames? Anyone can lie, anyone can  
18 be whatever they want in an IRC and on Twitter. It takes a  
19 journalist to get to the truth, and that's what Matthew was  
20 trying to do.

21 The charge in this case really is intent to commit  
22 journalism. That's what we're here for, intent to commit  
23 journalism.

24 Once again, none of the loss at Fox 40 had anything to  
25 do with the L.A. Times, so where do the numbers come from?

1 Let's talk about that a little bit, loss.

2 Here's Brandon Mercer's improvident e-mail that you  
3 should bill a thousand dollars an hour. Legal costs aka time  
4 spent talking to Tribune general counsel, Charles Sennet and  
5 company. Mr. Sennet's e-mail or name is on the "to" line in  
6 the e-mail. Sennet responded, as you'll recall, don't worry,  
7 we have a bunch of people on it.

8 They don't count as CFAA loss. They don't count as  
9 loss within the meaning of Counts One, Two and Three. And,  
10 again to the government's credit, they don't assert they do.  
11 They're clearly not reasonable.

12 Loss, take a look at that "to" box. So the first thing  
13 is to KTXL news managers, all of them. And then you have a  
14 number of other people, including Jason Jedlinski, Sam Cohen,  
15 Jerry Del Core, and Charles Sennet cc'd to this e-mail.

16 It says maintain very accurate logs. Were very  
17 accurate logs maintained in this case? If you spend two  
18 minutes on something, do you get to put down an hour? That  
19 seems to be what they were doing.

20 He gives them an example. Let's look at this example.

21 11/30, 4:00 to 6:00 p.m., e-mailing back, coordinating  
22 with Chuck, Troy, Andy, Jason and Sam. He gives himself two  
23 hours for that. An hour and 45 minutes, e-mailing back and  
24 coordinating with the newsroom. First of all, what does that  
25 mean? Second of all, is it reasonable? Third, how long does

1 it take to send an e-mail? What was this e-mail? Was this a  
2 giant, long e-mail that looks like it would have taken over an  
3 hour to write? Do you know? Did you see the e-mail? No.

4 And then, of course, you have the truth of the matter,  
5 which is that, by his inflated numbers, the loss to Fox 40 was  
6 \$3,583.91. They're running up numbers in this case. It's not  
7 a regular part of the Fox 40 employees' jobs to log time as it  
8 relates to responding to someone's e-mails. As you can see,  
9 these numbers are rapidly expanding.

10 What's the best -- well, what's the second best example  
11 of this? Yesterday. Oh, sorry. Yesterday. Jerry Del Core,  
12 the last witness, hopefully fresh in your mind.

13 He testified that his hours were somewhere between 15  
14 and 20 responding to this incident. He had met with the  
15 government a week ago. Again, to the government's credit, in  
16 redirect they steered him to what he only discussed a week ago,  
17 which was on the inside what are your reasonable hours? Seven.

18 If government wasn't honest about this, what you would  
19 have had for evidence was 15 to 20 hours at Jerry Del Core's  
20 \$275,000 salary. Quite a difference, isn't it? And you have  
21 to ask if Jerry Del Core, with his inflated numbers, is the  
22 typical witness in this case. And did everyone keep their  
23 hours this way?

24 I understand the make-up of my jury. I do not seek to  
25 pick on Sam Cohen. I recognize that she made half what anyone

1     else, even the lowest salaried of the men called in this case  
2     made.  However, she is the only witness for which we have  
3     precise data to show you the discrepancies between reported  
4     time and actual time.

5             So, first things first, even before we get to that, Sam  
6     Cohen, while she was in her down time, could have done other  
7     duties, could have used other users' accounts.  Well, let's go  
8     back.  Other duties, updating the Facebook and Twitter, she  
9     gave no reason why she couldn't do that.  Those credentials are  
10    totally separate from the CMS.

11            She could have used other people's access.  She  
12    testified she didn't want to do that.  And she overstated her  
13    loss grossly.  Her computer was down for a few hours total.

14            Now, believe me, I'm not trying to pick on her as  
15    opposed to anyone else.  However, I'm going to go into the hard  
16    evidence on Ms. Cohen.  You have it.  It's in evidence.  It's  
17    going to come back to the jury room with you.  These are  
18    e-mails.

19            She testified to 40 hours of loss.  On December 6th,  
20    she was down from 10:05 to 11:09, including a period where she  
21    had access from 10:15 to 10:50.  December 8th, she was down  
22    from 11:19 a.m. to 1:28 p.m.  And on December 14th, she was  
23    down from 11:05 to 11:18.  She testified to 40 hours of loss.  
24    Even with that time on day one, including the 10:15 to 10:50,  
25    35 minutes, your total is two hours and 51 minutes.



1           This is why you should find Mr. Keys not guilty. This  
2 isn't an issue of \$5,000. This is an issue of proof beyond a  
3 reasonable doubt. This is sloppy. This is not proper  
4 evidence, and this is evidence that is unreliable to the point  
5 it should be disregarded. The difference between 40 hours and  
6 two hours and 51 minutes is stunning.

7           And even at her salary of \$50,000 a year, it works out  
8 to \$72.09. She testified to a full workweek. 52 weeks a year,  
9 \$50,000 is close to a thousand dollars. It's nine hundred  
10 something dollars. The difference between nine hundred and  
11 something dollars and \$72.09 in this case is staggering. And  
12 it doesn't go to loss. It goes to reasonable doubt.

13          Pardon me.

14          Okay. I'm going to argue some different things to you,  
15 and it starts out with not so important, but -- and it really  
16 isn't that important to us, but I think I'd be remiss if I  
17 didn't bring up these points.

18          There are a number of things that we could have argued,  
19 that we could have really gone into in this case that would  
20 make Matthew Keys the person who didn't do the alleged acts at  
21 all. We didn't really go there because this is a reasonable  
22 doubt case. It isn't a whodunit.

23          While we're not relying on this, we do want to point  
24 certain things out. As I said before, we're relying on the  
25 fact that the government failed to prove its case beyond a

1 reasonable doubt to you.

2 We're going to come back to the other witnesses in just  
3 a second. I'm not only going to talk about Jerry Del Core and  
4 Sam Cohen, but I felt this was a good time to talk about other  
5 things. So is it important for you to decide? I wanted to  
6 raise these issues just because they were hanging out there.

7 Again, did Matthew do this? It doesn't matter because  
8 there was no loss or damage. They didn't prove their case.

9 For example, I asked both Mr. Kulesza and Agent  
10 Cauthen, can you lock a nickname or reserve a nickname such  
11 that other users couldn't have used it? The answer was yes.  
12 No one knew in that chat room whether you couldn't do it.

13 Multiple pieces of traffic came through the same  
14 Internet protocol or IP address on that VPN. They routed a  
15 number of people through it, not just Mr. Keys, but Agent  
16 Cauthen was strident that it was Mr. Keys.

17 Special Agent Cauthen admitted to editing a chat log.  
18 These could have been edited. Not necessarily by him, I don't  
19 think he'd do that, but these came from a computer in Ohio by  
20 some guy named Owen. Who knows what Owen did.

21 RAT, computer type rat, a remote access trojan. It's a  
22 piece of software that goes on your computer where someone can  
23 remotely access it and execute commands. Maybe you've seen it  
24 or had it -- had it occur to you. You have a problem with, you  
25 know, Microsoft, and you just bought their office suite or

1 something like that. You can call up for technical support,  
2 and there's a little program --

3 MR. SEGAL: Objection, this is outside the evidence  
4 now, Your Honor. I've been --

5 THE COURT: Sustained.

6 MR. LEIDERMAN: There's a way to get into desktops. Or  
7 there's a way to get into computers.

8 There's also an issue of stolen Wi-Fi, which we  
9 discussed.

10 You can say that the remote access trojan doesn't  
11 matter because there's a statement in this case. Well, let's  
12 go into the statement, the written statement.

13 Agent Cauthen, I didn't tell him what to write exactly,  
14 meaning he did suggest what to write in part. Tell me what I  
15 want to hear.

16 Agent Cauthen said when he felt that Mr. Keys was not  
17 on track, he would, quote/unquote, stop and put him back on  
18 track. He said this because he wanted to make sure that he got  
19 the story out of Matthew that he wanted, not the one that  
20 Matthew wanted to tell.

21 Cauthen testified that the whole statement was two  
22 hours, and you only heard snippets, maybe 20 minutes total.

23 And there's a timeline. In March 2012, some Anonymous  
24 indictments were unsealed. It was only after March 2012 that  
25 it was known the true capabilities of some of the people in the

1 Internet Feds chat room. Now this could have been brought into  
2 evidence, but it wasn't by the government. And, again, we  
3 don't know what Sharpie's capabilities were. We don't know  
4 what Sabu's capabilities were. And those were the only two  
5 people that Mr. Keys interacted with.

6 And, of course, Matthew's statement happened after  
7 March 2012; it was in October 2012. So he had, by the time of  
8 the statement, the benefit of the knowledge of what everyone  
9 had done, who everyone was, what their real names were, what  
10 their real jobs were, things like that. So we believe the  
11 evidence showed that Mr. Keys did not have the knowledge that  
12 he needed to have regarding whether Sharpie could do any  
13 computer damage, and it wasn't proven to you.

14 And then there's mental state, and this was the quote  
15 from Mr. Keys regarding whether he would write a statement  
16 for -- the written statement for Agent Cauthen.

17 I don't know that right now I'm in the state of mind  
18 where I can -- and it's not because I don't want to, it's  
19 because I want to be cognizant of any event.

20 And the evidence was somewhat peripheral about what  
21 medication he was on, but there was some medication --

22 MR. SEGAL: Your Honor, this is outside of the evidence  
23 again. The agent didn't --

24 THE COURT: Overruled.

25 MR. LEIDERMAN: Again, we're not relying on this, but I

1 do want to point out that there is more to this case than just  
2 reasonable doubt that the government failed to meet its burden.

3 Then there's the IP address, and I think this is more  
4 important than the other stuff because the government is  
5 relying heavily upon this.

6 An IP is a numerical string that identifies the origin  
7 of a computer connection. The IP address 75.53.168.11, or what  
8 they called the 75.11 address, was said to have connected to  
9 the proxy when the username and password was handed over in the  
10 IRC. The government did not prove that the IP 75 point --  
11 well, who the 75.11 IP belonged to.

12 The evidence shows an IP is like a phone number, it  
13 helps identify a computer connected to the Internet. The  
14 government says 75.11 was connected to a proxy server that was  
15 identified as Internet Feds on December 8th, 2010, and was the  
16 IP address of a user who passed a username and password in the  
17 Internet Feds chat room.

18 He testified that the IP address geolocated to  
19 Sacramento, and so there was enough to make a connection to  
20 Matthew Keys. But there are tens of thousands, if not hundreds  
21 of thousands of Internet users in Sacramento, and that IP  
22 address can belong to any of them. And while John Cauthen  
23 acknowledged getting IP addresses from AT&T showing Matthew  
24 Keys' home address, that record was not for the 75.11.

25 Cauthen testified that he was unable to get any record

1 from AT&T on 75.11, and so why is that important? Well, it's  
2 the date range. The next IP address doesn't come into play  
3 until December 12th, after the credentials are passed. So the  
4 75.11 does not match up, in fact, to the passing of credentials  
5 at Matthew Keys' address.

6 Another thing on IP addresses, there is no way to link  
7 Matthew Keys to the 75.11, which is the IP the government  
8 associates with the Tribune Company system intrusion. Bottom  
9 line, you can't link Matthew Keys to that IP address.  
10 Remember, he had a static IP address, one that didn't change.  
11 And Cauthen didn't go get those logs, didn't go get those --  
12 didn't go get that from AT&T.

13 So, again, is any of this important? It's not so  
14 important to us if you think he did this or didn't do it. It  
15 isn't that type of case. It isn't a whodunit. It's a failure  
16 of proof case, so let's get back to that.

17 THE COURT: You're coming up on one hour, just so you  
18 know. You asked to be advised.

19 MR. LEIDERMAN: Thank you.

20 THE COURT: You're almost 59 minutes.

21 MR. LEIDERMAN: Okay. Thank you.

22 Armando Caro, he testified to 40 hours responding to  
23 the breach and then, quote/unquote, 20 more hours. He didn't  
24 specify it, just, quote/unquote, 20 more hours. How much of  
25 this was, as they use in the house analogy, locking the door

1 and how much of it was building a new house?

2 Notice how round the numbers are? It's like he broke  
3 his time into full workweeks and half work weeks, and there was  
4 nothing more. This is just like Del Core. This is just like  
5 Sam Cohen. This is unreliable. This is the essence of  
6 reasonable doubt.

7 Moreover, this door versus rebuilding the house analogy  
8 was undifferentiated at trial. How much of this with regard to  
9 Mr. Caro was relocking the door? How much of this was building  
10 portions of a new house? You don't know.

11 Remember, Dylan Kulesza testified that they did in fact  
12 build a new house. Finally -- I think he said finally we got  
13 upper management to agree that we needed these upgrades, and  
14 they started making the upgrades. And Caro testified that  
15 these hours happened over months, which is consistent when the  
16 upgrades were -- were put in. So ask yourself this, how much  
17 do you trust this estimation of hours in light of Del Core and  
18 Cohen?

19 Dylan Kulesza -- and I added up all his hours -- said  
20 he spent 32 to 58 hours on the response. Actually he said more  
21 than the response. His salary is a hundred and five. Is this  
22 reliable? Is it reasonable?

23 Jason Jedlinski, he testified -- and this is the Del  
24 Core again -- 15 hours. It's like this arbitrary figure yanked  
25 out of thin air, 15 hours responding to Chippy 1337 or Chippy

1 leet, at a salary of \$170,000 annually.

2 Tim Rodriguez testified to 50 hours at a salary of 105.  
3 Here's what is interesting about Mr. Rodriguez. He testified  
4 that he finished the analysis on January 25th, 2011. So you  
5 have to ask was a full month investigation reasonable,  
6 reasonably related for an edited title that stood on the  
7 Internet for 40 minutes? It was fixed in three minutes. Was  
8 it reasonable? Was any of this reasonable?

9 This is the meal the government has served you in this  
10 case, and the question is, do you want to eat this meal, eat  
11 this meal being find beyond a reasonable doubt he's guilty.  
12 Would you eat this meal, should you eat this meal, was this  
13 meal fit for human consumption? Then, again, is this right and  
14 proper for the government to put on this evidence and get a  
15 guilty verdict? Would you eat it? Would you convict in this  
16 case? That's the real question.

17 This evidence has a truckload of holes in it, and this  
18 is all the government has served you. That's the whole  
19 kitchen. They put it all out for you. That's -- that's what  
20 to eat, that's the universe of materials for you. What you  
21 heard at trial is all you get. What's in the exhibits, what  
22 you've heard, that's it.

23 There are too many open parts of this case to convict  
24 Matthew Keys beyond a reasonable doubt. And would you eat it?  
25 This -- it's absolutely inedible. It's full of reasonable



1 doubt.

2 One of the other things to consider, there is no expert  
3 put on in this case. The government could have brought in an  
4 expert witness on loss and damage to prove their case to you.  
5 They could have gone through logs. I asked Agent Cauthen did  
6 he go through Tribune Company salary logs, tax returns,  
7 anything like that, where it would actually prove salaries that  
8 people are trying to remember from five years ago, that it  
9 would actually prove hours worked from Tribune Company.

10 You remember they went over every log with respect to  
11 Matthew Keys, but they didn't go over any logs with respect to  
12 what Dylan Kulesza was doing, with respect to what Armando Caro  
13 was doing, Armando Caro, who broke his time to into week and  
14 half week increments.

15 And when you look at Sam Cohen's actual hours compared  
16 to the week that she estimated, it calls into question  
17 everything. Del Core, the 15 to 20 hours versus the seven  
18 hours, calls everything into question. We submit to you that  
19 they needed an expert to prove loss to you in this case.

20 Damage and loss. Is it reasonably foreseeable to  
21 expect someone to restore the article quickly and maybe do some  
22 checking to make sure that the door lock is functioning  
23 properly? Yes, of course it is. That was Mr. Hanrahan.

24 It's not reasonably foreseeable that the Tribune  
25 Company would have to clean up their entire system because it

1 was a mess and to charge that tab to Mr. Keys. There was no  
2 differentiation between response times and upgrade times in the  
3 testimony. This is in and of itself reasonable doubt.

4 Mr. Keys didn't testify. He has the absolute  
5 constitutional rights not to testify. And as we said, this is  
6 a reasonable doubt case. He relied on the state of the  
7 government's case when choosing not to testify. He didn't need  
8 to testify. The government didn't prove to you that there was  
9 loss and damage in this case. They didn't prove to you that he  
10 took a direct and substantial step toward the completion of an  
11 attempt. They didn't prove to you that he knowingly and  
12 willfully engaged in a conspiracy with these people.

13 Circumstantial evidence. Evidence may be direct or  
14 circumstantial. Direct evidence is direct proof of a fact such  
15 as testimony by a witness about what they saw or heard or did.  
16 Testimony by Mr. Mercer that he and Mr. Keys had an argument in  
17 the newsroom is direct testimony. Ah, testimony by Sam Cohen  
18 that she was locked out of her account was direct testimony.

19 Circumstantial evidence is indirect evidence. It's  
20 proof of one or more facts from which you may find another  
21 fact. What Agent Cauthen did with relying on one thing to  
22 prove another to prove another is circumstantial evidence.

23 What do you do with circumstantial evidence that has  
24 two reasonable interpretations, one pointing to guilt and one  
25 pointing to innocence? Here's the animation of that.

1           So one points to guilt, and one points to innocence.  
2       We suggest the way to use circumstantial evidence, the way to  
3       use circumstantial evidence is you reject that interpretation  
4       which points to guilt, and you adopt that interpretation which  
5       points to a lack of guilt, not guilty, not necessarily  
6       innocent. Again, I don't think it's an innocence case. I  
7       don't think that matters.

8           But when there are two reasonable interpretations of  
9       circumstantial evidence, he is entitled to a reasonable doubt  
10      on circumstantial evidence. You reject, then, based on the  
11      entitlement to a reasonable doubt that which points to guilt  
12      and adopt that which points to a lack of guilt.

13          Burden of proof. The government bears the burden of  
14      proving every part and subpart of the crime, including the two  
15      parts I just mentioned over and over and over again, damage and  
16      loss. You can't have loss without damage. Remember that.  
17      It's not our job to prove anything to you in this case, and the  
18      judge will affirm that.

19          Hold the government to their burden of proof. They  
20      have to show you that Mr. Keys took a substantial step with  
21      respect to a deface of the entire Chicago Tribune front page.  
22      Mr. Keys didn't even know about it.

23          Sharpie tells him after he couldn't do it. Oh, well,  
24      you know, I wish I knew the CMS system, I would have done this.  
25      That's not a direct substantial step toward the completion of

1     that crime. That's not guilty on Count Three.

2             There's no damage related to the X Files e-mails, the  
3     Fox Mulder, the Cancer Man. There's no damage related to that.  
4     And it's the wrong charge. That's a trespass. It's not  
5     damaging a protected computer.

6             Reasonable doubt. Pardon me.

7             Okay. This is -- again, I cut a line or two out, but  
8     this is the instruction that you're going to have back there.  
9     I cut a line or two out to make sure that you pay attention to  
10    the instruction that the judge gave you and not specifically  
11    what's up on the screen. Most -- this is, I think, 98 percent  
12    complete, but make sure you get the one that is 100-percent  
13    complete.

14            Proof beyond a reasonable doubt is proof that leaves  
15    you firmly convinced the defendant is guilty. Let's talk about  
16    that, firmly convinced. What does that mean? It's a kind of  
17    nebulous concept, firmly convinced. It can mean a lot of  
18    things, but it's the highest burden, it's the highest standard  
19    we have in law.

20            They use proof beyond a reasonable doubt in a death  
21    penalty case, to kill someone. Proof beyond a reasonable doubt  
22    is not -- I believe some of you have served on civil juries.  
23    It's not this 51-percent standard where it's just a little more  
24    than not. There's a standard in law called clear and  
25    convincing which they consider about three-quarters proof.

1           What is beyond a reasonable doubt? It can't be  
2   quantified, I mean, is it 98 percent, is it 99 percent sure?  
3   It can't be quantified. But you need to be sure, so sure that  
4   you can wake up 10 years from now, 20 years from now, 30 years  
5   from now knowing you did the right thing in this case.

6           Computers are changing overnight. The new iPhone just  
7   came out. There will be another new one next year, and I'm  
8   sure Samsung is going to doing something to counter the new  
9   iPhone, and there you go, and we have this wonderful digital  
10  revolution going on right now.

11          This case is five years old. The events that have --  
12  excuse me. I guess it's that point in the trial where I'm  
13  losing my voice. Pardon me for that.

14          Things are changing so rapidly that this case is  
15  fraught with peril. Something from five years ago doesn't  
16  necessarily translate to today, so you have to look at this  
17  evidence through the eyes of five years ago.

18          What was known in this chat room? I've asked you that  
19  question, what, five times now? It's because it's unanswered.  
20  It could have been answered in this case. It wasn't.

21          We didn't put on a case. We stood on our evidence  
22  because there is reasonable doubt. We didn't -- we didn't put  
23  on a case. Don't hold that against us. We didn't put on a  
24  case because the government didn't prove to you what they  
25  needed to prove to you. They didn't bake you a chocolate chip

1 cookie. They did something that fell short of the cookie.  
2 They didn't have all of the elements.

3 And that's why I think this case is going to take you a  
4 little while. These jury instructions, not constructions, jury  
5 instructions are -- they're thick, they're dense. And the  
6 evidence was -- there was a lot of it, and a lot of it was very  
7 technical. Everyone did a really good job staying awake the  
8 whole time. There was a lot -- it was -- it was difficult  
9 going through all of those logs. It was difficult for us. I  
10 can't imagine how difficult it was for you. But they went  
11 through those logs in painstaking detail. And, I mean, did  
12 they even matter when someone logged in, when someone logged  
13 out?

14 You're talking about e-mails from Cancer Man that are  
15 irrelevant in the nth degree. You're talking about a deface to  
16 a website that took three minutes to correct. You're talking  
17 about a company that had to go back and clean out all of the  
18 old usernames and passwords that were still live for employees  
19 that had long since been gone. You're talking about all of  
20 these things. Those things, when put together, are reasonable  
21 doubt.

22 Take a look at the instructions. Take a look at the  
23 instructions for the substantive crimes. By substantive  
24 crimes, I mean Count One, the conspiracy, Count Two, the  
25 damaging a protected computer, and Count Three, the attempt.

1           Did Mr. Keys conspire to do something? Did he tell  
2 Sharpie, you know, go hit this article? The evidence is, if  
3 it's reliable, he said -- I hate to keep repeating it, but he  
4 said go fuck some shit up. Is that a specific plan to do a  
5 specific thing? Is that a conspiracy? That's for you to  
6 decide.

7           I talked a number of times about a substantial step,  
8 and I can't talk about it enough. Even if it's driving you  
9 nuts, I can't talk about it enough because there was no  
10 substantial step taken in the attempt. They were locked out by  
11 the time that Sharpie talked to Mr. Keys about, oh, I was going  
12 to do this deface of the Chicago Tribune and, you know, I  
13 couldn't. I was going to put the Anonymous flag up on the  
14 Chicago Tribune.

15           The second part of this is, it's not required that the  
16 government prove guilt beyond all possible or imaginary doubt.  
17 I think I talked to you a little bit about this in opening.  
18 Martians did it. You know, magic happened. I'll stipulate  
19 nothing can be proved to a scientific certainty because even  
20 that is subject to some kind of doubt. The doubt just needs to  
21 be reasonable. It's for you to determine what is reasonable  
22 and what is not reasonable in this case.

23           But reasonable, look at all the things I've pointed  
24 out. There is so much doubt in this case on an article that  
25 was fixed in three minutes. They're asserting \$20,000 worth of

1 damage -- or worth of loss? They're asserting damage?

2 Again, it's not spray-paint all over the wall of the  
3 house such that you need to build a new wall. One click would  
4 have restored this. That's the testimony. Mr. Hanrahan felt  
5 it was quicker, based on what was going on in the newsroom, to  
6 just rewrite the title. Three minutes. Up for 40 minutes.

7 More on reasonable doubt. Reasonable doubt is doubt  
8 based on reason and common sense and is not based purely on  
9 speculation. It may arise from a careful and impartial  
10 consideration of all the evidence or from lack of evidence.

11 Well, that's what we have been talking about this whole  
12 time, consideration of the evidence. Right? All the problems  
13 with the evidence, and all of the lack of evidence in this  
14 case, the thing that wasn't -- who is Sharpie? For that  
15 matter, who is Chippy?

16 I mean, front and center in this case is Chippy 1337 is  
17 elected house leader. Who is Chippy? They couldn't even  
18 answer that question for you. No one could, and that's right  
19 at the heart of the case. Who is Chippy? Who is Sharpie?  
20 What do they mean? What are their capabilities?

21 And keep in mind that this doubt based on reason and  
22 common sense, it goes to each and every portion of the  
23 instructions. So, for example, I think there are three  
24 different parts that you need to find to find a conspiracy. It  
25 will tell you -- or to find damaging a protected computer. It



1 will tell you, you know, one, two, three. You have to find  
2 these three things. Those are the elements, those are the  
3 chocolate chips, eggs, flour and milk to get a cookie.

4 Obviously I don't know how to bake a cookie. I hope  
5 I'm right on the ingredients.

6 Every piece has to be proof to you. If you find that  
7 part one is true and part -- or part one was proof beyond a  
8 reasonable doubt and part two was proof beyond a reasonable  
9 doubt, but instruction part three you have a reasonable doubt  
10 about, that means not guilty. That's what that means.

11 And finally, the last part of the reasonable doubt  
12 instruction, if after a careful and impartial consideration of  
13 the evidence, you are not convinced beyond a reasonable doubt  
14 the defendant is guilty, it is your duty to find the defendant  
15 not guilty. It's your duty. He is entitled to it. In fact,  
16 as he sits there right now, before you've had a chance to  
17 deliberate, he's entitled to a not guilty verdict.

18 Everyone comes before you not guilty. It is unless and  
19 until the government proves their case to you beyond a  
20 reasonable doubt that you can check that box of guilty and then  
21 move on to whether this was \$5,000 worth of loss, which, again,  
22 you have to find beyond a reasonable doubt. No matter how they  
23 got here, they stand before you not guilty. It's only through  
24 proof beyond a reasonable doubt that they can become guilty,  
25 and that's not present here.

1           Don't speculate on what Mr. Keys is doing in that seat.  
2           Don't think that there must be some reason he's there;  
3           therefore, I'm going to vote guilty. Well, he's in court.  
4           This is a federal case. He must have done something illegal.  
5           Otherwise the government wouldn't, you know, have a table of  
6           five or six people trying this case. There wouldn't be, you  
7           know, three or four people over at defense counsel defending  
8           this case.

9           In other words, Mr. Keys is entitled to a not guilty  
10          verdict unless and until the prosecution satisfies every  
11          element beyond a reasonable doubt. He's not guilty, and it's  
12          only through proof beyond that very lofty burden, that very  
13          lofty standard beyond a reasonable doubt, that he can leave  
14          here any different than he came here, not guilty.

15          Let's look at this. This is kind of an escalator. I  
16          hope everyone can see it all right. Just take a look.

17          Not guilty, that's at the bottom. Right? You have  
18          other things that should go into your mind in terms of -- in  
19          terms of what is proof beyond a reasonable doubt, and this is  
20          just some help for you to do that. So not guilty.

21          It's unlikely that he's guilty. That's not guilty. It  
22          is likely that he is guilty. That's not guilty. Maybe he is  
23          guilty. That is not guilty. Possibly he is guilty. That's a  
24          not guilty verdict. Probably he is guilty. That is a not  
25          guilty verdict.

1           Probably is not proof beyond a reasonable doubt. It is  
2   only proven beyond a reasonable doubt, you don't have any  
3   doubts. Probably is still some doubt, and probably is  
4   probably -- probably is probably -- probably is probably the  
5   biggest challenge for the defense because a lot of juries think  
6   that probably is good enough. And this is -- it's so hard to  
7   distinguish between probably and beyond a reasonable doubt  
8   because probably means I think there's a lot there. I mean,  
9   I'm pretty sure that he did this. But pretty sure isn't beyond  
10   a reasonable doubt.

11           If there is any sort of doubt in your mind, besides  
12   like the Martians did it, this was magic, this was, you know,  
13   something not permissible, if there is any doubt in your mind,  
14   even probably, even likely, evenly highly likely, that's  
15   reasonable doubt. That's reasonable doubt.

16           You have to be firmly convinced. Firmly convinced is  
17   your operative phrase, and I'm going to skip this slide.

18           Again, what does firmly convinced mean? That's for you  
19   to decide. Sometimes reasonable doubt is a feeling. It's a  
20   feeling that they just haven't proved their case. There just  
21   isn't enough evidence. They're just missing something. I have  
22   a doubt because I'm missing this piece of evidence, I'm missing  
23   that piece of evidence. This piece of evidence doesn't do  
24   quite what it was supposed to do. That's what we have in this  
25   case.

1 I'm not sure if this is an instruction that you're  
2 getting now, but this is an instruction that you got at the  
3 beginning of the case. All persons stand before the law and  
4 are to be treated as equals. That means that all persons are  
5 entitled to a verdict of not guilty until and unless they're  
6 proven guilty beyond a reasonable doubt. All humans in this  
7 nation stand before you not guilty. There is to be no  
8 speculation that a charge or an investigation or an arrest  
9 makes someone guilty.

10 Matthew is entitled to acquittal unless you find guilt  
11 proven reasonable doubt. I've said that, what, 20 times  
12 already? That is what this case is about. That's the whole --  
13 that's the sum of this case.

14 The chocolate chip cookie was never baked in this case.  
15 We don't even know who Chippy is.

16 Thank you for your time. I ask you to please find  
17 Matthew Keys not guilty.

18 THE COURT: All right. Ladies and Gentlemen, that  
19 concludes the defense closing argument.

20 We'll take another break now. I believe when we come  
21 back you'll hear rebuttal from the government and then my  
22 instructions. And we'll be close, if not there, to our  
23 concluding time.

24 So, during this break, remember all of my admonitions.  
25 Have a good break. We'll start up again in 15 minutes.

1 (Jury not present.)

2 THE COURT: All right. That was 91 minutes and nine  
3 seconds, just so you know.

4 How much time do you estimate on rebuttal, Mr. Segal?

5 MR. SEGAL: I'll probably use what we have left, Your  
6 Honor.

7 THE COURT: The entirety of it?

8 MR. SEGAL: I mean, I'm not sure --

9 THE COURT: If that's the case, I'm just not certain we  
10 have time then for the instructions today.

11 MR. SEGAL: Oh.

12 THE COURT: So you're clear.

13 MR. SEGAL: Well, I'll bear that risk. I'll do my  
14 best, Your Honor.

15 THE COURT: All right. If we don't get to instructions  
16 today, then we'll have to figure out timing in the morning. If  
17 they don't want to come in until 9:00, I have criminal calendar  
18 at 9:00.

19 MR. SEGAL: How long will it take to instruct them do  
20 you think?

21 THE COURT: 20, 30 minutes.

22 MR. SEGAL: Well, I'll see if --

23 THE COURT: Think about that.

24 MR. SEGAL: I'll try to wrap up before -- I'll try to  
25 wrap up as fast as I can. I'd like to instruct them also.

1           THE COURT: If I could start by 1:00, that would be  
2 ideal.

3           All right. 15 minutes.

4           (Recess taken.)

5           THE CLERK: Please remain seated and come to order.  
6 Court is now back in session.

7           THE COURT: All right. Let's bring the jury in.  
8 (Jury present.)

9           THE COURT: You may be seated.

10          Welcome back, Ladies and Gentlemen. We'll now move to  
11 the government's rebuttal. It has the right to a rebuttal and  
12 has some time reserved for that, and so Mr. Segal is going to  
13 handle that portion of the government's closing.

14          Mr. Segal.

15          MR. SEGAL: Thank you, Your Honor.

16          Good afternoon.

17          So the function of this jury address is just as it  
18 sounds, it's rebuttal. It's to address some of the things that  
19 were said in the defense closing claiming that we have not met  
20 our burden of proof. And so -- on the elements of the offense.  
21 And so what I'm going to focus on a lot are -- excuse me -- two  
22 things, the evidence that we've shown and the actual elements  
23 of the offense.

24          And I urge you -- I'll come to this later -- when you  
25 think about the elements of the offense, look at the jury

1 instructions. Don't try to remember the slides that either  
2 side put up. Because, as I'll show you, once you actually look  
3 at the jury instructions, it's possible that the defense has  
4 asked you to return a not guilty verdict based on some things  
5 that aren't on the slides, and so I want to show you that.

6 First, it was asked -- it was asserted in the defense  
7 closing that it wasn't known what was in the chat room. Nobody  
8 knew what was going on in there. Matthew Keys knew.

9 Let's play Government Exhibit 211, please, and start at  
10 25 minutes and 7 seconds.

11 (Audio recording played, not reported.)

12 MR. SEGAL: So he knew. Matthew Keys knew what these  
13 guys were about. They could -- they were the people doing the  
14 most damage. They had no regard for any kind of consequences  
15 and the magnitude of the scale.

16 And so what did he do? He gave them log-in credentials  
17 to the L.A. Times -- excuse me -- to the entire Tribune  
18 Company's content management system and gave them instructions  
19 to go mess stuff up. That's what he did.

20 Then after, after Sharpie says in the chat log, we're  
21 in. Right? And you'll see that in Government 611. He goes  
22 ahead and gives him tech support. Right? He says this is  
23 where in the Assembler log you can edit usernames, you can  
24 change content, scroll down here. And tells them to do what?  
25 He talks not just about using the anonymous -- the anon1234

1 password, but he talks about building back doors.

2           You heard Dylan Kulesza, the gigantically tall guy,  
3 testify about an actual line of code that he recognized. He  
4 says that is building a back door. Right? And that is damage  
5 to the integrity of the system. This is what they said, and  
6 that is what is obvious. Right?

7           If a guy break into your house, say keys into your  
8 house and then cuts a bunch of, you know, extra doors in the  
9 house, that's damage. That's damage. The integrity of the  
10 system is compromised.

11           And almost all of the incident response that you heard  
12 about -- this house metaphor didn't come out of nowhere. It  
13 came from Matthew Keys. Right?

14           Let's play Government Exhibit 212, please.

15           (Audio recording played, not reported.)

16           MR. SEGAL: And there's another metaphor that he gave  
17 the agent where he says it is as if I'd been the night manager  
18 of a warehouse, and I was supposed to lock up, but they never  
19 took the keys from me. So then he finds this basically street  
20 gang and gives them the keys and says go jack stuff up. Right?  
21 People he knew were malicious, knew were interested in doing  
22 other things, knew could cut back doors. In fact, he tells  
23 them how to cut back doors, and he wants to say that's not  
24 damage, and he wants to say that he didn't know what he was  
25 doing?



1 I mean, this is an extraordinary case, Ladies and  
2 Gentlemen, because not only can you see the conspiracy from the  
3 concert of action from everybody doing -- everybody acting  
4 together towards a common goal, but you actually have -- it's  
5 almost like having a tape recording right there in the  
6 conspiratorial meeting because they were doing it over IRC, and  
7 somebody who wasn't criminally sophisticated enough logged it,  
8 and we can see it. Right? You can see the actual words while  
9 they are agreeing.

10 And read that instruction, it's not -- it's not yes --  
11 the word "agree" doesn't have to be used. You know, but you  
12 can see this in the concert of action, we're in. You know, go  
13 mess stuff up. We're in. Here's more help. That's a  
14 conspiracy.

15 Now I want to address right now something that, again,  
16 was said with reference to a power point slide, but not the  
17 jury instructions. Think about Count Three. Count Three is  
18 the attempt. Now it's been argued that there wasn't a  
19 substantial step, you haven't seen any evidence of a  
20 substantial step. That's just not true.

21 Let's look at Government Exhibit 507, please.

22 507 is a screenshot taken from Matthew Keys' electronic  
23 media. Right? Where he's saying -- they've told him what  
24 they've done, and he's looking for other users and passwords he  
25 created while he's there. Let me see if there's still another

1 good back door.

2 Let's go -- let's go to the next one, next page,  
3 please.

4 And he's locked out for good. Right? And all the  
5 while, this man, who says that he was acting as a journalist,  
6 is trying to help some anonymous, you know, hacker, whose  
7 street name -- who only goes by his street name, not by a real  
8 name -- that's not evidence that is good for the defense,  
9 that's evidence that's good for the government -- he's trying  
10 to help him get back into the CMS. To do what? Put up front  
11 page layouts all across Tribune properties. Okay. So that's  
12 what they're talking about.

13 And so you have, was there a substantial step taken?  
14 Are they doing -- is Keys really taking that substantial step  
15 to get him, to get Sharpie back in? That's what he's talking  
16 about. And, in fact, yes.

17 Let's look at Government Exhibit 307. This was  
18 testified about by Special Agent Cauthen. And it's too small  
19 to read there, but you'll see the command -- here are the  
20 commands coming in from Overplay at -- and I think this one,  
21 the times are even correct without an offset by hours.

22 That's what is happening during that chat log  
23 conversation. He's transmitting those commands that trace back  
24 to IPs that he's using right then.

25 Now, the defense makes -- wants you to think, well,

1 nothing could have happened and, therefore, it wasn't a  
2 substantial step. But that's not what substantial step means.  
3 Right? A substantial step does not require success. If it  
4 required success, the charge wouldn't be attempt, it would be a  
5 charge of a completed crime. He did something. That's what he  
6 did.

7           It says mere preparation is not a substantial step. To  
8 constitute a substantial step, his act or actions must  
9 demonstrate that the crime would take place unless interrupted  
10 by independent circumstances. Well, the system administrators  
11 were too good. If Keys had been successful in getting Sharpie  
12 back in, you know that would have happened because they --  
13 because they had already done it once already but to less  
14 severe consequences.

15           And just as long as we're on Count Three, we'll talk  
16 about the loss in Count Three. You know, when you see the loss  
17 instruction, it says would the loss have been \$5,000 or more if  
18 the crime had been completed? You know, it's a little hard to  
19 figure out how much it's worth except what the witnesses from  
20 the paper said.

21           You know what the loss would have been? More. More.  
22 More. I mean, if you put up entire front page layouts for all  
23 the Tribune properties, that is a greater harm than what the  
24 defense has sought to minimize by saying, oh, it was just a  
25 single edit to a single story that nobody saw. That would have

1     been an even bigger deal.

2             Now, the defense kind of makes a sleight, though, at  
3     contesting identity. They say, oh, it could have been a remote  
4     access trojan. Because you heard testimony from the agent that  
5     such things exist, and I think he said, well, anything is  
6     possible.

7             You know, reasonable doubt is not -- you'll get an  
8     instruction on it. It's not supposed to be based on pure  
9     speculation. And I will argue to you, Ladies and Gentlemen,  
10    that if this were a remote access trojan, it really would have  
11    to be the most cunningly written, magical remote access trojan  
12    ever invented known to man or woman.

13            Because it not only had to execute the e-mail campaign  
14    prior to meeting Anonymous, it not only had to choose Samantha  
15    Cohen as his replacement as the person to target for changing  
16    her password, it also had to have the same -- nobody else had  
17    the same motive for the attack. It had to take screenshots of  
18    these events, save it on his removable hard drive.

19            And then it wasn't really like a remote access trojan,  
20    it was more like those worms that they put in the guy's ears in  
21    Star Trek 2, because then what it did is it made him confess.  
22    It made him say, yeah, I was AEScracked. I used Overplay. I  
23    did this because I was angry and hurt, and they need  
24    consequences. And then -- well, you've seen it before. Then  
25    it would have to write his confession for him, too, which is

1 Exhibit 204. So that would be a really cunning piece of  
2 software, and that's not what happened.

3 The next thing I'd say to you, Ladies and Gentlemen, as  
4 you going through the evidence, is look at the jury  
5 instructions. Right? I mean, it's tempting when you see  
6 something up on the screen as power point slide to think, oh,  
7 yeah, that's the law. You gotta look at the jury instructions  
8 because that is the only thing -- that is the law.

9 So, for example, it's been argued to you that the  
10 conspiracy was to damage the Los Angeles Times website, and  
11 that's why this whole Fox Mulder narrative and carving out all  
12 of the back doors is irrelevant. That's not true. That's just  
13 not it.

14 Let's look at government -- I'm sorry -- at the Court's  
15 jury instruction No. 15 that tells you what the conspiracy is.

16 These are the dates of the conspiracy. There was an  
17 agreement --

18 THE COURT: Is there anything on the screen? If you  
19 mean something to be on the screen --

20 MR. SEGAL: I do.

21 THE COURT: All right.

22 MR. SEGAL: Thank you, Your Honor. Can you jury see it  
23 now?

24 UNIDENTIFIED JUROR: Yes.

25 MR. SEGAL: Okay.

1           Here's what they the agreement was to do, to make  
2           unauthorized changes to websites that Tribune Company used to  
3           communicate news and features to the public; and to damage the  
4           computer management systems used by the Tribune Company. Okay?

5           So it's not just a web defacement, and that's where --  
6           and that's why this crime was so serious. Right? It's also to  
7           carve out all these back doors to compromise the integrity of  
8           the system, which they needed to do in order to get back in  
9           when they wanted to do other dirt.

10          Now, the defense argues to you, well, there can be --  
11          legally, Ladies and Gentlemen, there can be no damage if there  
12          was a back-up copy of the news story. And that's up on a slide  
13          as if it were a jury instruction, but it's not true. It's not  
14          in the jury instructions. Damage is defined.

15          Damage means any impairment to the integrity or  
16          availability of data, a program, a system or information. Any  
17          impairment. So we know that because of all the back-door  
18          access that the system integrity was damaged. Right? I mean,  
19          they want to say, oh, if you tried to post a story, it would go  
20          up on the site. Yeah, that's the whole problem. Right?  
21          Because the content management system didn't only work for Fox  
22          40 and the L.A. Times and everybody else, but it also would  
23          work for these clowns at Anonymous who want to put nonsense up.  
24          That's not how it's supposed to work. That's a compromise to  
25          the integrity of the system.

1           And then there was also an impairment to the  
2   availability of what? There was an impairment to the  
3   availability of news stories. Because if you were reading the  
4   L.A. Times that day, you were not reading about Steny Hoyer.  
5   You were reading about Chippy leet, and that's not what you set  
6   out to do. That's not what the L.A. Times intended, and they  
7   had a right to run their business and publish what they wanted,  
8   which was read by multiple sets of eyes and all the other stuff  
9   that you heard and have their website function making their  
10   news available.

11           And think of the damage that would have occurred if  
12   they had succeeded in their Count Three attempt. The entire  
13   front page would have been unavailable to readers. That's an  
14   impairment to the integrity of information, certainly to  
15   readers.

16           There is -- you will search these instructions high and  
17   low for anything that says that if a back-up is available, the  
18   data is not impaired. And it's not there because it's not the  
19   law. Okay? The law is any impairment.

20           And that argument -- well, and certainly the system is  
21   impaired because anybody can get in through all the back doors.

22           It's also been argued that there's no -- that you have  
23   to ignore Fox Mulder, and this is all prejudicial and this sort  
24   of stuff. There is no instruction to ignore Fox Mulder.  
25   That's not true.

1           And if you think about the reason why those e-mails are  
2       there, remember, in this time you saw he's carved all this  
3       back-door access, right, to the CMS. The system integrity is  
4       gone. And you've seen the get commands that he's transmitting  
5       to the CMS to get these. And let's look at 303, page 4,  
6       please.

7           So when you look at page 4, here he is bringing down  
8       that -- well, a little farther up, please. That's great.  
9       Thank you.

10          So here he is transmitting a get command to the e-mail  
11       page on the CMS and bringing down 178 K worth of data, which  
12       may not be impressive as a picture, but is impressive as a text  
13       list. That's the e-mail list. Right? And he does it again on  
14       the next page, on November 22nd.

15          And then what you have to think about for the Fox  
16       Mulder e-mails is -- so now he's damaged the system. He's  
17       carved back doors. He's transmitting commands the whole time.

18          Agent Cauthen testified that in his review of these  
19       logs, he found that Keys had accessed these logs hundreds, if  
20       not thousands of times. It was like his job to mess with the  
21       CMS system.

22          And read the Fox Mulder e-mails. What they're  
23       calculated to do, if you think about it, is to maximize the  
24       amount of time that Tribune employees -- Mercer, Del Core,  
25       Jedlinski, people you've never -- Sennet, who did not testify,



1 the lawyer -- maximize the amount of time that they were  
2 responding to the incident, dealing with these e-mails.

3 Because not only did they have to deal with their  
4 e-mail being hijacked, their e-mail list being hijacked and all  
5 their customers hearing about how bad the company was, but --  
6 he didn't just do that. What he would do is he would say  
7 there's another e-mail going out, I'm going to send an e-mail,  
8 I'm going to send an e-mail. And everybody is -- he doesn't  
9 even have to get dressed. Right? He's sitting on a computer  
10 somewhere, and everybody is in this tiny newsroom spinning  
11 around, calling Chicago, we've got a data breach. You know,  
12 your data is not secure. These are legit. Check on your CMS.  
13 Right?

14 So the object is not just to communicate whatever the  
15 scandal at Fox 40 is. The object is to get people spinning, to  
16 have everybody dancing, and he succeeded in that.

17 And when it wasn't good enough for him, then he starts  
18 jacking with Samantha Cohen's e-mail. And we'll get to that in  
19 a few minutes.

20 There just isn't any instruction to ignore Fox Mulder  
21 because those commands were all transmitted when? In the time  
22 period charged for Count Two, and that is between October 28th,  
23 2010, when he was fired or quit or whatever happened -- oh,  
24 thanks -- between October 28th of 2010 and January 5th of 2011.  
25 When you get jury instruction 21, you will see this.

1           That's within -- no, I've given up. But that's jury  
2 instruction 21. Those dates are in there, all those Fox Mulder  
3 e-mails are within that time range, all that back-door access.

4           And then you have to ask, well, what's a reasonable  
5 response? What was their reasonable response to this? And  
6 loss is, again, something that is defined right here.

7           You know, it's been said it wasn't reasonable for Tim  
8 Rodriguez to spend all that time trying to figure out what was  
9 compromised because he should have known that all they could  
10 really do was, ah, make modifications to the website.

11           Tim Rodriguez told you that he spent 40 hours -- I  
12 don't even think it was 40 hours. He spent time, and I'll get  
13 to the slide that shows you how much time it was, trying to  
14 figure out if he compromised payment systems. Right? Because  
15 what are they supposed to do, take the hacker's word for it?  
16 All we really got was your e-mail system. How negligent would  
17 that be? That would be stupid. Right?

18           So they shut down everybody's password. Right? Not  
19 just all these old user accounts, but anybody. You saw these  
20 blast e-mails out to all of Tribune from Jedlinski's office.  
21 They do that.

22           And then Rodriguez says have they compromised the  
23 system that decides -- that puts stuff on the plates? Right?  
24 The plates meaning the -- that go on the printing press. That  
25 is computer driven, what actually gets printed. We need to

1 make sure that there is integrity of that system because who  
2 knows what else they got into. That is entirely reasonable.  
3 Right?

4 If somebody gets into your house, and let's say they  
5 take one ring out your jewelry box. Right? And you know --  
6 you get home. The door is open. There is stuff missing. You  
7 want to figure out what else they got into, and you want to  
8 make sure that they're not going to be able to come back.  
9 Right? You're going to clear the house. I mean, they could  
10 still be in there. They could be hiding in your closet. They  
11 could be hiding in your kids' closet. It's finding all the  
12 other systems that might be compromised. That was Rodriguez's  
13 primary job.

14 And, sure enough, it's not just that the loss is what  
15 you as the jury are empowered to find was any reasonable cost  
16 to any victim. But, look, conducting a damage assessment is  
17 right there. It's right there. That is a reasonable cost.  
18 The jury instruction and the law says that it's reasonable to  
19 conduct a damage assessment.

20 Responding to an offense, that's reasonable. And  
21 indeed that's what Keys wanted them to do because he thought he  
22 was anonymous. He thought he was protected. He thought he had  
23 this layer of anonymity of saying we are overseas and using the  
24 Fox Mulder e-mail, by using a Yahoo dot UK address, by using  
25 Overplay to create a layer of anonymity. When he's anonymous,

1 when he thinks he's got a mask on, that's how he behaves.

2 Now another jury instruction that just doesn't say what  
3 the defense wants it to say is the one about circumstantial  
4 evidence. That instruction does not say always favor -- if  
5 there's any inference to be drawn, always, you know, put a  
6 finger on the scale to favor the defense. It doesn't say that.

7 You guys are the jury. The law makes no distinction  
8 between the weight to be given either to direct or  
9 circumstantial evidence. It's for you to decide how much  
10 weight to give that evidence.

11 And, Ladies and Gentlemen, I would suggest you read all  
12 the evidence together. And when you're reading the  
13 circumstantial evidence, do it in light of the fact that he  
14 confessed. Were we in the same courtroom? Is there some  
15 dispute about the reasonable inferences that could be drawn  
16 from the circumstantial evidence when there's a confession?  
17 Look, he was in the CMS system like it was his job. He was in  
18 the chat room doing his best to get them to mess things up.

19 And when he was on the phone with Brandon Mercer, and  
20 when he thinks he's safe, what does he do? He says, I don't  
21 have anything to do with any e-mails. I haven't sent you  
22 e-mails in a long time. But I'll tell you something big is  
23 going to happen at the L.A. Times. I'm not going to tell you  
24 how to stop it. Right? Because he knew how to stop it. He  
25 could have said -- even through the Fox Mulder identities, if

1 he wanted the thing to stop, he could have said they have super  
2 user accounts for the CMS. I'm not going to tell you how it  
3 all happened, but -- but this is going to happen.

4 What that conversation with Brandon Mercer was about  
5 was a two-fer. Right? Matthew Keys wanted a two-fer. He  
6 wanted pay back against Tribune because he was angry and hurt  
7 after the conversation with Mercer, and he wanted to mess with  
8 them and make them spin their wheels. And then having, in his  
9 words, incited this crime, he wanted to be, you know, the press  
10 man to break -- to be the first to break the story. I'm the  
11 only one who has gotten access. I've been talking to PBS. Oh,  
12 there's a call from PC Magazine. Something is going to happen.  
13 Only I know this. Maybe you guys want to go up on a story  
14 about this.

15 It's not that he was trying to be a journalist. It's  
16 that it's all about Matthew Keys. He is just advancing his  
17 agenda of pay back and personal self-promotion for being the  
18 one -- it's like the fireman/arsonist. Right? I'm the -- this  
19 stuff is going to happen, and I'll be here to put it out.  
20 Well, it's like the web vandal/journalist.

21 There's been an attack on loss. Right? The defense  
22 claims that you haven't gotten proof beyond a reasonable doubt  
23 of the loss. Look at the defense exhibits for this. Okay.  
24 Look at the Mercer e-mail, Defense Exhibit G as in golf.

25 Mercer says a couple of things in there. He says we

1 need \$5,000 and everybody should document their time. But he  
2 also says, by the way, because of all the manager time and  
3 everything, we've probably got it already. And he testified on  
4 the stand, you know, that that was related to sloppy  
5 recordkeeping. Look at -- and it's not even sloppy. How could  
6 this not have burned that much time for all these people? It  
7 was the whole point of this campaign.

8 And then think of all the people -- if you want to  
9 think about how conservative these estimates are, I do  
10 encourage you to think by Del Core. Right? Del Core was sat  
11 down, you heard, and his estimate cut down to the lowest amount  
12 possible. Right? And none of these estimates accounted for  
13 people's benefits. People were under oath. Right? And they  
14 went in, and they gave you testimony that really hasn't been  
15 impeached.

16 And I think it's worth -- unless it seems that they  
17 were not telling the truth, I mean, it's for you, the jury.  
18 It's -- you can credit that testimony. You are the people who  
19 decide whether people are telling the truth. Did any of them  
20 look like they were, you know, misremembering or fibbing or any  
21 of that?

22 I mean, the big two they attack are Jerry Del Core --  
23 and really all they say about Jerry Del Core is don't listen to  
24 the first thing he said, listen to the conservative estimate  
25 that the government has presented. Right? But that's all

1 we're asking you to believe is that he worked seven hours.

2 And then they attack Sam Cohen. And this is their big  
3 argument on Sam Cohen, well, she could have been doing other  
4 things. I mean, are you kidding? This is when all the Fox  
5 Mulder e-mails are going to the newsroom. This is all the  
6 first half of December of 2010.

7 And then how often -- if her password is constantly  
8 being deactivated, how often is she supposed to be checking in?  
9 Are they assuming that she's getting kind of immediate tech  
10 support, that she's the only person in the Tribune universe?

11 Read the e-mail. Let's look at Government Exhibit 112,  
12 which is her e-mail, at page 3. She testified that this e-mail  
13 is not a complete account of all the times that her password  
14 was messed with. Now let's look at page 3 of this one.

15 Here she says the password for Scholbrock 2, this is  
16 the alternative one, has been working for the last three hours,  
17 a new record. Right? That corroborates her testimony that she  
18 was e-mailing but there were other -- other password resets,  
19 and basically all week her password was being messed with.

20 There's no reason to doubt her. She doesn't even work  
21 at Tribune any more. Right? She's at some other television  
22 station. What does she care? Why is she -- does she have any  
23 reason to shade her testimony to favor Tribune? Nothing came  
24 out like that. Her testimony was the truth. This happened.

25 Let's look at the next page.

1 MR. JAFFE: This is not the redacted version.

2 THE COURT: Mr. Segal, please kill the screen.

3 MR. SEGAL: What's the problem?

4 THE COURT: If you can show only what's been admitted,  
5 you may.

6 MR. SEGAL: This has been admitted. They've asked us  
7 to redact some other passage in this thing after court. I told  
8 them we'll accommodate them, but I'm not sure --

9 THE COURT: Well, if there was any dispute, the Court  
10 was to have resolved those. So I would suggest you just argue.

11 MR. SEGAL: Okay.

12 If you look at the bottom of page 5 on this one, you  
13 will see, Ladies and Gentlemen, I'm not sure why it keeps  
14 reverting. Right? This is happening over and over, so  
15 Samantha Cohen was telling the truth.

16 Now, the next thing that the defense wants you to think  
17 is, well, the testimony, ah, didn't distinguish between closing  
18 all the back doors, checking the windows, whatever, and then  
19 building a new house and putting a stronger door on. That is  
20 not true. The entire purpose of that testimony was to get them  
21 to distinguish between exactly those two kinds of conduct.

22 The numbers you heard -- think about Dylan Kulesza.  
23 Right? What the defense would have you think is that the  
24 government put on Kulesza to say that he has 40 hours of time.  
25 Not so. Let's look at the chart with Kulesza's loss on it, the



1 global loss chart.

2 Kulesza was asked about those things, but what Kulesza  
3 said actually was that his time spent on closing back doors and  
4 responding was 8 to 16 hours. That's what those numbers  
5 recorded, not -- it was the time incident response and damage  
6 assessment.

7 And look at all these people. Jason Jedlinski says I  
8 worked for 20 hours. I mean, that's not even -- that's a  
9 conservative estimate. Right? That's not even counting the  
10 entire team that Jason Jedlinski said he had working for him  
11 pulling 5,000 pages of server logs. You'll see an exhibit that  
12 says that. Ordering in dinner that night. Working until  
13 midnight on the 15th. Being present when Steve Gable called  
14 the president of Tribune Company.

15 This estimate, Ladies and Gentlemen, from the evidence  
16 you've heard, is conservative. There was easily \$5,000 in burn  
17 time -- in burned down time, which is exactly what he wanted,  
18 from Count Two.

19 Now, the burden of proof is always on the government.  
20 But as you consider whether to credit this testimony, it's also  
21 true that this -- you know, the big missing expert witness,  
22 whatever they could have said, the defendant could have called  
23 an expert witness, too. Who knows what that person would have  
24 said. What you're left with is the evidence that you've  
25 actually seen. Don't speculate about what some other witness

1 would have said if some party had called them.

2 The defendant could have subpoenaed records from  
3 Tribune Company and presented them, too.

4 MR. LEIDERMAN: Objection, that is burden shifting.

5 THE COURT: Sustained. The jury shall disregard this  
6 last argument.

7 MR. SEGAL: Ladies and Gentlemen, the only evidence in  
8 front of you is the testimony of these witnesses, and they told  
9 the truth, and their testimony is uncontested. There was --  
10 there were a lot of people there on those lists. Not one of  
11 them said that that pizza party didn't happen.

12 And then the next thing is was it reasonable -- was it  
13 reasonably foreseeable to Keys? Think about Government Exhibit  
14 103. Government Exhibit 103 is one of the Fox Mulder e-mails  
15 to Brandon Mercer when Fox Mulder is -- maybe it's Cancer  
16 Man -- is talking about how expensive it is to figure out who  
17 the hackers are, especially when they might be in a foreign  
18 country, which he was pretending to be in. Keys knew that.  
19 Keys knew it was expensive. It was reasonably foreseeable to  
20 him.

21 And then in the phone call with Brandon Mercer, you  
22 remember he says, oh, yeah, you know, why don't call Cal  
23 Forensics. They tried to figure out something about my ex and  
24 me. They're really expensive. I mean, Keys was doing informal  
25 tech support for people at Fox 40, he knew their computer

1 system, and he knew that this stuff was expensive to figure  
2 out. Of course \$5,000 of loss was reasonably foreseeable to  
3 him. That was part of the -- he's accountable for that when he  
4 essentially calls an Internet street gang and says go mess  
5 stuff up. It's reasonably foreseeable to him that that's going  
6 to cause exactly the loss that he knew was involved when you  
7 get these computer whiz guys involved burning their time.

8 And then when you say go F stuff up, it's within the  
9 scope of your agreement.

10 So, wrapping up now, I want to -- the core thing about  
11 this case is that Keys is always doing as much as he can.  
12 Right? After he gets fired, he downloads their e-mail system,  
13 builds some back doors, does what he has the technical  
14 capability to do.

15 And then he still wants more, and he reaches out to  
16 Anonymous. And from that, he gets a two-fer. Right? He gets  
17 to be the guy on the scene and predict the attacks that, of  
18 course, he has made possible, and he gets more damage.

19 But he's not -- he's not acting -- well, first, it's  
20 not really a defense that he also was writing about this, but  
21 he was not acting as a journalist, Ladies and Gentlemen.

22 Let's look at -- let's play 229, please.

23 (Audio recording played, not reported.)

24 MR. SEGAL: This offense was committed against a news  
25 organization. And let's see what kind of journalistic values

1 Matthew Keys was trying to promote when he was in the chat  
2 room. Let's look at Government Exhibit 607, please.

3 You guys heard that what Anonymous' big beef was is  
4 they were angry about WikiLeaks and the rest of this, and Keys  
5 knows that, too. And in order to hurt Tribune, he waves a red  
6 flag in front of a bull. He says yet, another reason the Times  
7 must be demolished. And then he links to a story by the L.A.  
8 Times and says it's about why the WikiLeaksers are not quite  
9 Rosa Parks.

10 In other words, he's calling out to this mob basically  
11 and saying the L.A. Times is saying stuff you guys don't like,  
12 demolish them. And then three days later, he goes to Brandon  
13 Mercer, and he says something is going to happen at the L.A.  
14 Times. Yeah. This is what happened.

15 The last tape I'm going to play you is Government  
16 Exhibit 210. And if we can somehow fast-forward it to minute  
17 18 of it, that would be great.

18 (Audio recording played, not reported.)

19 MR. SEGAL: Can we -- stop it.

20 You may recall that what he said was:

21 What concerned me, you know -- I don't remember if it  
22 was the night or if it was, you know, over the course of a  
23 couple of days, but it became very clear to me -- and this is  
24 something I told -- you know, I told Parmy, I told a couple of  
25 other people. And it became very clear to me that these are

1 the people who are doing the most damage, the kind of things  
2 you would hear about on the news, you know, which unfortunately  
3 I was not contributing to news product at the time. I mean, I  
4 kind of was, and we'll get to that in a second, but for the  
5 most part I wasn't. It was -- a few things stressed me out. I  
6 mean, it's -- even just thinking about the gravity of the skill  
7 that was going on in there.

8 That was 211.

9 He says: My game was to find out what was going on,  
10 and my attention quickly shifted from let's give these hackers  
11 to -- get these hackers that don't get caught and do some  
12 damage.

13 He incited this incident. He made this thing happen by  
14 telling them this is what you want to target. And, of course,  
15 you know he did it because he said he did it. And you know it  
16 was -- that the loss was within the scope of the agreement  
17 because you have the words of the conspiracy right in the IRC  
18 chat channels, and you know it was reasonably foreseeable to  
19 Keys.

20 You know the loss happened because the witnesses told  
21 the truth. And you know that the attempt exceeded \$5,000  
22 because, if this was the response to just a single front  
23 page edit -- story edit in Los Angeles Times, having multiple  
24 front page layouts across Tribune go up would have been a bomb.  
25 And this was a bomb. It was a bomb not only for what you could

1 see, but, as Tim Rodriguez said, it was a bomb for what you  
2 didn't know. Right?

3           They came home and found, you know, that somebody had  
4 spray-painted something on the wall of their bedroom, and they  
5 were terrified because they didn't know what other rooms and  
6 what other things they had gotten into and whether they could  
7 get back in. And to call this a juvenile prank, it just -- it  
8 doesn't give sufficient respect to the harm that it did to a  
9 news organization, to the panic that it caused, and to the huge  
10 uncertainty that necessitated a damage assessment because God  
11 knows what else they would have gotten into. And that's what  
12 Keys knew would happen and what Keys intended.

13           And so we ask you to convict him of conspiracy, of  
14 transmission of a malicious code and of attempt because these  
15 things happened, he did them, and they had the effects on the  
16 victims that you heard about.

17           Thank you.

18           THE COURT: All right. Ladies and Gentlemen, that  
19 concludes the government's closing argument and the parties'  
20 closing arguments. I need to instruct you, and so I am going  
21 to -- I believe I have just enough time to get through the  
22 closing instructions. I may go a few minutes past 1:30, if you  
23 would bear with me.

24           The final instructions, so you know, are in the binders  
25 you have. You are not required to follow along. You'll take

1 those binders with you into the jury room. The binders also  
2 have the preliminary instructions I gave to you at the  
3 beginning of the case and the photos of witnesses just to help  
4 you recall who testified and what their names were.

5 So, Members of the Jury, now that you have heard all  
6 the evidence, it is my duty to instruct you on the law that  
7 applies to this case. A copy of these instructions will be  
8 available in the jury room, in your binders as I said.

9 It is your duty to weigh and to evaluate all the  
10 evidence received in the case and, in that process, to decide  
11 the facts. It is also your duty to apply the law as I give it  
12 to you to the facts, as you find them, whether you agree with  
13 the law or not.

14 You must decide the case solely on the evidence and the  
15 law, and you must not be influenced by any personal likes or  
16 dislikes, opinions, prejudices or sympathy. You'll recall that  
17 you took an oath promising to do so at the beginning of the  
18 case.

19 You must follow all these instructions and not single  
20 out some and ignore others. They are all important.

21 Please do not read into these instructions or to  
22 anything I may have said or done any suggestion as to what  
23 verdict you should return. That is a matter entirely up to  
24 you.

25 The superseding indictment, the charging document, is

1 not evidence. The defendant Mr. Keys has pleaded not guilty to  
2 the charges. The defendant is presumed to be innocent unless  
3 and until the government proves the defendant guilty beyond a  
4 reasonable doubt.

5 You are here only to determine whether the defendant is  
6 guilty or not guilty of the charges in the superseding  
7 indictment. The defendant Mr. Keys is not on trial for any  
8 conduct or offense not charged in the superseding indictment.

9 Because of the presumption of innocence, a defendant  
10 does not have to prove innocence. The burden of proof is  
11 always on the government and never shifts to the defendant.

12 The burden on the government is to prove every element  
13 of the charges beyond a reasonable doubt. Proof beyond a  
14 reasonable doubt is proof that leaves you firmly convinced that  
15 the defendant is guilty. It is not required that the  
16 government prove guilt beyond all possible doubt.

17 A reasonable doubt is a doubt based upon reason and  
18 common sense and is not based purely on speculation. It may  
19 arise from a careful and impartial conversation of all the  
20 evidence or from lack of evidence.

21 If, after a careful and impartial consideration of all  
22 the evidence, you are not convinced beyond a reasonable doubt  
23 that a defendant is guilty, it is your duty to find that  
24 defendant not guilty. However, if, after a careful and  
25 impartial consideration of all the evidence, you are convinced



1 beyond a reasonable doubt that the defendant is guilty, it is  
2 your duty to find that defendant guilty.

3 A defendant in a criminal case has a constitutional  
4 right not to testify. You may not draw any inference of any  
5 kind from the fact that the defendant did not testify.

6 The evidence you are to consider in deciding what the  
7 facts are consists of: Number one, the sworn testimony of any  
8 witnesses; two, the exhibits received into evidence; and,  
9 three, any facts to which the parties have agreed.

10 In reaching your verdict, you may consider only the  
11 testimony and exhibits received into evidence. The following  
12 things are not evidence, and you may not consider them in  
13 deciding what the facts are.

14 And this is reviewing some of what I told you on the  
15 first day.

16 Number one, questions, statements, objections and  
17 arguments by the lawyers are not evidence. The lawyers are not  
18 witnesses. Although you must consider a lawyer's questions to  
19 understand the answers of a witness, the lawyer's questions are  
20 not evidence.

21 Similarly, what the lawyers have said in their opening  
22 statements, closing arguments and at other times is intended to  
23 help you interpret the evidence, but is not evidence. If the  
24 facts as you remember them differ from the way the lawyers  
25 state them, your memory of the facts controls.

1           Secondly, any testimony that I have excluded, stricken  
2           or instructed you to disregard is not evidence. In addition,  
3           some evidence was received only for a limited purpose. When I  
4           have instructed you to consider certain evidence in a limited  
5           way, you must do so.

6           Third, charts and summaries were shown to you in order  
7           to help explain the evidence. These charts and summaries have  
8           not been admitted into evidence and will not go into the jury  
9           room with you. They are not themselves evidence or proof of  
10          any facts. If they do not correctly reflect the facts or  
11          figures shown by the evidence in the case, you should disregard  
12          the charts and summaries and determine the facts from the  
13          underlying evidence.

14          Fourth, anything you may have seen or heard when court  
15          was not in session is not evidence. You are to decide the case  
16          solely on the evidence received here at trial.

17          Now, to review the charts and summaries, during the  
18          trial, certain charts and summaries were shown to you in order  
19          to help explain the evidence. Again, those charts and  
20          summaries were not admitted in evidence and will not go into  
21          the jury room with you. They are not themselves evidence or  
22          proof any facts. If they do not correctly reflect the facts or  
23          figures shown by the evidence, you should disregard the charts  
24          and summaries and, again, determine the facts from the  
25          underlying evidence.

1           Now regarding evidence and whether it's direct or  
2       circumstantial.

3           Evidence may be direct or circumstantial. Direct  
4       evidence is direct proof of a fact such as testimony by a  
5       witness about what that witness personally saw or heard or did.  
6       Circumstantial evidence is indirect evidence; that is, it is  
7       proof of one or more facts from which you could find another  
8       fact.

9           You are to consider both direct and circumstantial  
10      evidence. Either can be used to prove any fact. The laws  
11      makes no distinction between the weight to be given to either  
12      direct or circumstantial evidence. It is for you to decide how  
13      much weight to give to any evidence.

14          By way of example, if you wake up in the morning and  
15      see that the sidewalk is wet, you may find from that fact that  
16      it rained during the night. However, other evidence such as a  
17      turned-on garden hose may provide an explanation for the water  
18      on the sidewalk. Therefore, before you decide that a fact has  
19      been proved by circumstantial evidence, you must consider all  
20      the evidence in the light of reason, experience and common  
21      sense.

22          Now, in deciding the facts in this case, you may have  
23      to decide which testimony to believe and which testimony not to  
24      believe. You may believe everything a witness says or part of  
25      it or none of it.

1           In considering the testimony of any witness, you may  
2       take into account the following:

3           No. 1, the witness's opportunity and ability to see or  
4       hear or know the things testified to; No. 2, the witness's  
5       memory; No. 3, the witness's manner while testifying; No. 4,  
6       the witness's interest in the outcome of the case, if any; No.  
7       5, the witness's bias or prejudice, if any; No. 6, whether  
8       other evidence contradicted the witness's testimony; No. 7, the  
9       reasonableness of the witness's testimony in light of all the  
10      evidence; and, No. 8, any other factors that bear on  
11      believability.

12           The weight of the evidence as to a fact does not  
13      necessarily depend on the number of witnesses who testify.  
14      What is important is how believable the witnesses were and how  
15      much weight you think their testimony deserves.

16           You are here only to determine whether the defendant is  
17      guilty or not guilty of the charges in the superseding  
18      indictment. The defendant is not on trial for any conduct or  
19      offense not charged in the superseding indictment.

20           Instruction No. 11 if you are following along.

21           You have heard testimony that the defendant made  
22      statements. It is for you to decide, No. 1, whether the  
23      defendant made the statement; and, No. 2, if so, how much  
24      weight to give to them. In making those decisions, you should  
25      consider all the evidence about the statements, including the

1 circumstances under which the defendant may have made them.

2 Evidence may have been introduced containing statements  
3 regarding the law. You must follow the law as I explain it to  
4 you. Just because a witness or a document in evidence has said  
5 something about the law does not mean that it is an accurate  
6 statement. To determine what the law is, you may rely only on  
7 the jury instructions.

8 You have heard testimony that the defendant was  
9 recorded without his knowledge during the government's  
10 investigation in this case. Federal law enforcement officials  
11 may make surreptitious recordings and may have others make  
12 surreptitious recordings in order to investigate criminal  
13 activities.

14 Now regarding the counts charged.

15 The defendant is charged in Count One of the  
16 superseding indictment with conspiracy to cause damage to a  
17 protected computer in violation of Title 18 of the U.S. Code,  
18 Section 371; in Count Two, with transmission of malicious code  
19 in violation of Title 18 of the U.S. Code, Section  
20 1030(a)(5)(A) and (c)(4)(B); and in Count Three with attempted  
21 transmission of a malicious code in violation of 18 U.S. Code  
22 1030(a)(5)(A) and 1030(b).

23 Instructions on the elements that the government must  
24 prove with respect to each count follow. Now instruction 15,  
25 beginning instructions regarding Count One.

1           The defendant is charged in Count One with the  
2       conspiracy to commit an offense against the United States,  
3       namely to cause damage to a protected computer in violation of  
4       Section 371 of Title 18 of the U.S. Code. In order for the  
5       defendant to be found guilty of that charge, the government  
6       must prove each of the following elements beyond a reasonable  
7       doubt:

8           First, between on or about December 8th, 2010, and on  
9       or about December 15th, 2010, there was an agreement between  
10      two or more persons to transmit a program, code, command or  
11      information to a computer intending to make unauthorized  
12      changes to websites that Tribune Company used to communicate  
13      news features to the public and to damage the computer  
14      management systems used by Tribune Company. Damage is defined  
15      in the next instruction.

16          Second, the defendant became a member of the conspiracy  
17      knowing of at least one of its objects and intending to help  
18      accomplish it.

19          Third, one of the members of the conspiracy performed  
20      at least one overt act on or after December 8th, 2010, for the  
21      purpose of carrying out the conspiracy.

22          A conspiracy is a kind of criminal partnership, an  
23      agreement of two or more persons to commit one or more crimes.  
24      The crime of conspiracy is the agreement to do something  
25      unlawful. It does not matter whether the crime agreed upon was

1 committed.

2 For a conspiracy to have existed, it is not necessary  
3 that the conspirators made a formal agreement or that they  
4 agreed on every detail of the conspiracy. It is not enough,  
5 however, that they simply met, discussed matters of common  
6 interest, acted in similar ways or perhaps helped one another.  
7 You must find that there was a plan to commit an offense  
8 against the United States in any manner or for any purpose as  
9 an object of the conspiracy with all of you agreeing as to the  
10 particular crime which the conspirators agreed to commit.

11 One becomes a member of a conspiracy by willfully  
12 participating in the unlawful plan with the intent to advance  
13 or further some object or purpose of the conspiracy, even  
14 though the person does not have full knowledge of all the  
15 details of the conspiracy.

16 Furthermore, one who willfully joins an existing  
17 conspiracy is as responsible for it as the originators. On the  
18 other hand, one who has no knowledge of the conspiracy, but  
19 happens to act in a way which furthers some object or purpose  
20 of the conspiracy does not thereby become a conspirator.

21 Similarly, a person does not become a conspirator  
22 merely by associating with one or more persons who are  
23 conspirators, nor merely by knowing that a conspiracy exists.

24 An overt act does not itself have to be unlawful. A  
25 lawful act maybe an element of a conspiracy if it was done for

1 the purpose of carrying out the conspiracy. The government is  
2 not required to prove that the defendant personally did one of  
3 overt acts.

4 Now, instructions Nos. 16 through 20, which also apply  
5 to Count One.

6 Regarding the term "damage," damage means any  
7 impairment to the integrity or availability of data, a program,  
8 a system or information.

9 An act is done knowingly if the defendant is aware of  
10 the act and does not act through ignorance, mistake or  
11 accident. The government is not required to prove that the  
12 defendant knew that his acts or omissions were unlawful. You  
13 may consider evidence of the defendant's words, acts or  
14 omissions along with all the other evidence in deciding whether  
15 the defendant acted knowingly.

16 A conspiracy may continue for a long period of time and  
17 may include the performance of many transactions. It is not  
18 necessary that all members of the conspiracy join it at the  
19 same time. And one may become a member of a conspiracy without  
20 full knowledge of all the details of the unlawful scheme or the  
21 names, identities or locations of all of the other members.

22 Even though a defendant did not directly conspire with  
23 other conspirators in the overall scheme, the defendant has in  
24 effect agreed to participate in the conspiracy if the  
25 government proves each of the following beyond a reasonable



1     doubt:

2             That, No. 1, the defendant directly conspired with one  
3     or more conspirators to carry out at least one of the objects  
4     of the conspiracy; No. 2, the defendant knew or had reason to  
5     know that other conspirators were involved with those with whom  
6     the defendant directly conspired; and, No. 3, the defendant had  
7     reason to believe that whatever benefits the defendant might  
8     get from the conspiracy were probably dependent upon the  
9     success of the entire venture.

10            It is not a defense that a person's participation in a  
11     conspiracy was minor or for a short period of time.

12            If you find beyond a reasonable doubt that the  
13     defendant committed the offense charge in Count One, you must  
14     then decide whether the government has proved beyond a  
15     reasonable doubt, either: That, No. 1, the defendant could  
16     reasonably foresee that the conspiracy could cause \$5,000 or  
17     more in loss to the Tribune Company; or, No. 2, causing \$5,000  
18     or more in loss to the Tribune Company fell within the scope of  
19     the defendant's particular agreement with his co-conspirators.

20            In determining this question, please reference the  
21     definition of loss in the next instruction.

22            For Count One, the government is not required to prove  
23     that any loss was actually caused.

24            Now that definition of loss. Loss is any reasonable  
25     cost to any victim, including the cost to responding to an

1 offense, conducting a damage assessment and restoring the data,  
2 program, system or information to its condition prior to the  
3 offense.

4           Regarding Count Two, the defendant is charged in Count  
5 Two specifically with knowingly causing the transmission of a  
6 program, information, code or command and, as a result of such  
7 conduct, intentionally causing damage without authorization to  
8 a protected computer in violation of Section 1030(a)(5) of  
9 Title 18 of the United States Code. And this is between on or  
10 about October 28th, 2010 and on or about January 5th, 2011.

11           In order for the defendant to be found guilty of this  
12 charge, the government must prove each of the following  
13 elements beyond a reasonable doubt:

14           First, the person knowingly caused the transmission of  
15 at least one program, code, command or information to a  
16 computer; second, as a result of the transmission, the person  
17 intentionally damaged a computer; and, third, the computer was  
18 used in or affected interstate or foreign commerce or  
19 communication.

20           Instruction 22, which follows, also applies to Count  
21 Two.

22           If you find beyond a reasonable doubt that the  
23 defendant committed the offense charged in Count Two, you must  
24 then decide whether the government has proved beyond a  
25 reasonable doubt that the offense caused loss to the Tribune

1 Company adding up to at least \$5,000. Loss is defined as  
2 previously instructed in instruction No. 20.

3 Now regarding Count Three, the defendant Mr. Keys is  
4 charged in Count Three specifically with knowingly attempting  
5 to cause the transmission of a program, information, code and  
6 command and, as a result of such conduct, intentionally causing  
7 damage without authorization to a protected computer in  
8 violation of 18 U.S. Code Section 1030(a)(5)(A) on or about  
9 December 15th,, 2010.

10 In order for the defendant to be found guilty of this  
11 charge, the government must prove each following elements  
12 beyond a reasonable doubt:

13 First, the defendant intended to transmit a program,  
14 code, command or information to a computer and caused the  
15 damage without authorization; and second, the defendant did  
16 something that was a substantial step toward committing the  
17 crime.

18 Mere preparation is not a substantial step toward  
19 committing the crime. To constitute a substantial step, a  
20 defendant's act or actions must demonstrate that the crime will  
21 take place unless interrupted by independent circumstances.

22 Now, damage as used in this instruction is defined as  
23 previously instructed in instruction No. 16. And it doesn't  
24 say at the bottom of this page, but the next instruction,  
25 instruction No. 24, also applies to Count Three, as I believe

1 it's clear from the content of instruction No. 24 itself.

2 If you find beyond a reasonable doubt that the  
3 defendant committed the offense charged in Count Three of the  
4 superseding indictment, you must then decide whether the  
5 government has proved beyond a reasonable doubt that, if that  
6 offense had been completed, it would have caused loss adding up  
7 to at least \$5,000 to the Tribune Company.

8 Here again, loss is defined as previously instructed in  
9 instruction No. 20.

10 A defendant may be found guilty of the crime charged in  
11 Counts Two and Three even if the defendant personally did not  
12 commit the act or acts constituting the crimes, but aided and  
13 abetted in their commission. To prove a defendant guilty of  
14 aiding and abetting, the government must prove beyond a  
15 reasonable doubt:

16 First, each crime charged with committed by someone;  
17 second, the defendant knowingly and intentionally aided,  
18 counseled, commanded, induced or procured that person to commit  
19 each element of the crime; and, third, the defendant acted  
20 before the crime was completed.

21 It is not enough that the defendant merely associated  
22 with the person committing the crime, or unknowingly or  
23 unintentionally did things that were helpful to that person, or  
24 was present at the scene of the crime. The evidence must show  
25 beyond a reasonable doubt that the defendant acted with the

1 knowledge and intention of helping that person commit the crime  
2 charged. And it's really the crime charged in Count Two or  
3 Count Three.

4 The government is not required to prove precisely which  
5 person actually committed the crime and which person aided  
6 and/or abetted.

7 A separate crime is charged against the defendant in  
8 each count. You must decide each count separately. Your  
9 verdict on one count should not control your verdict on any  
10 other count.

11 When you begin your deliberations, elect one member of  
12 the jury as your foreperson, who will preside over the  
13 deliberations and speak for you here in court. You will then  
14 discuss the case with your fellow jurors to reach agreement, if  
15 you can do so. Your verdict, whether guilty or not guilty,  
16 must be unanimous.

17 Either of you must decide for yourself, but you should  
18 do so only after you have considered all the evidence,  
19 discussed it fully with the other jurors, and listened to the  
20 views of your fellow jurors.

21 Do not be afraid to change your opinion if the  
22 discussion persuades you that you should, but do not come to a  
23 decision simply because other jurors think it is right. It is  
24 important that you attempt to reach a unanimous verdict but, of  
25 course, only if each of you can do so after having made your

1 own conscientious decision. Do not change an honest belief  
2 about the weight and effect of the evidence simply to reach a  
3 verdict.

4 Because you must base your verdict only on the evidence  
5 received in the case and on these instructions, I remind you  
6 that you must not be exposed to any other information about the  
7 case or the issues it involves. So now, except for discussing  
8 the case with your fellow jurors during deliberations, do not  
9 communicate with anyone in any way and do not let anyone else  
10 communicate with you in any way about the merits of the case or  
11 anything to do with it. This includes discussing the case in  
12 person, in writing, by phone or electronic means, by e-mail,  
13 text messaging or any Internet chat room, blog, website or  
14 other feature. This applies to communicating with your family  
15 members, your employer, the media or press, and the people  
16 involved in the trial.

17 If you are asked or approached in any way about your  
18 jury service or anything about this case, you must respond that  
19 you have been ordered not to discuss the matter and report that  
20 contact to me immediately.

21 Do not read, watch or listen to any news or media  
22 accounts or commentary about the case or anything to do with  
23 it. Do not do any research, such as consulting dictionaries,  
24 searching the Internet or using other reference materials. And  
25 do not make any investigation or in any other way try to learn

1 about the case on your own.

2 The law requires these restrictions to ensure the  
3 parties have a fair trial based on the same evidence that each  
4 party has had an opportunity to address here in court. A juror  
5 who violates these restrictions jeopardizes the fairness of  
6 these proceedings, and a mistrial could result that would  
7 require the entire trial process to start over. So if you  
8 learn that any juror has been exposed to any outside  
9 information, please notify me immediately.

10 Again, your verdict must be based solely on the  
11 evidence and on the law as I have given to you in these  
12 instructions. However, nothing I have said or done is  
13 intending to suggest what your verdict should be. That is  
14 entirely for you to decide.

15 Ladies and Gentlemen, those are your instructions. As  
16 you retire, here's some additional clarification.

17 A verdict form will be provided to you. The exhibits  
18 will be provided to you as promptly as we can get them into the  
19 jury room. We have not had to draw on our alternates. They  
20 are still sitting with us. We need you to remain available,  
21 although you will not retire with the jury. And so, when you  
22 report tomorrow morning, if you can report to the fourth floor.

23 And the instructions to you are that you should not  
24 talk between the two of you about the case. The ground rules  
25 I've been instructing you on apply to the two of you. And we

1 appreciate your continuing service in that way.

2 The twelve constituting our jury will retire with the  
3 security officer. Ms. Streeter is going to swear that officer  
4 so that he can escort you to the jury room.

5 We understand that you'll be leaving immediately after  
6 you retire today. Is the time 8:30 or 9:00 tomorrow morning?

7 THE JURY: 8:30.

8 THE COURT: All right. We'll be available starting at  
9 8:30.

10 MR. SEGAL: Your Honor?

11 THE COURT: Yes.

12 MR. SEGAL: I think the Court may not have read  
13 instructions 29 and 30. I don't know --

14 THE COURT: Well, they may have ended up not in my  
15 packet.

16 THE CLERK: Yeah, I've got them.

17 THE COURT: They did feel truncated. I was handed  
18 something. All right. Thank you.

19 Sorry about that. There are actually four more --

20 MR. SEGAL: Sorry.

21 THE COURT: -- pages.

22 I wondered about that, but relied on what was in front  
23 of me. So these are instructions, some of them you have heard  
24 before.

25 Some of you have taken notes during the trial. Whether



1 or not you took notes, you should rely on your own memory of  
2 what was said. Notes only to assist your memory. You should  
3 not be overly influenced by your notes or those of your fellow  
4 jurors.

5 The punishment provided by law for this crime is for  
6 the Court to decide, if I need to. You may not consider  
7 punishment in deciding whether the government has proved its  
8 case against the defendant beyond a reasonable doubt.

9 The verdict form I just mentioned has been prepared for  
10 you. After you have reached unanimous agreement on a verdict,  
11 your foreperson should complete the verdict form according to  
12 your deliberations, sign and date it, and advise the clerk that  
13 you are ready to return to the courtroom.

14 As I indicated previously, if it does become necessary  
15 to communicate with me now during deliberations, you may send a  
16 note through the security officer who will be assigned to you,  
17 signed by any one or more of you. No member of the jury should  
18 ever attempt to communicate with me except by a signed writing.  
19 And I will respond to the jury concerning the case only in  
20 writing or here in open court.

21 If you do send out a question, I will consult with the  
22 lawyers before answering it, which may take some time. You may  
23 continue your deliberations while waiting for the answer to any  
24 question.

25 Remember that you are not to tell anyone, including me,

1     how the jury stands, numerically or otherwise -- I should never  
2     learn a vote count -- on any question submitted to you,  
3     including the question of the guilt of the defendant, until  
4     after you have reached a unanimous verdict or have been  
5     discharged.

6             So that does complete your instructions. You have all  
7     of those instructions in your binder, for those of you who were  
8     following along? All right.

9             All right. Now, Ms. Streeter, could you please swear  
10    the security officer?

11            THE CLERK: Yes.

12            (Oath administered to Court Security Officer.)

13            THE COURT SECURITY OFFICER: I do.

14            THE CLERK: Thank you.

15            THE COURT: All right. You may now follow the security  
16    officer.

17            Do the alternates need to retrieve any personal items  
18    from the jury room?

19            UNIDENTIFIED JUROR: Yes.

20            THE COURT: So you can do that, and then move on.

21            You may take the binders now. You may take your  
22    notepads.

23            Leave the binders here on your chair with the notepad.  
24    They will be there if you need them.

25            THE CLERK: All the exhibits and the verdict form will

1 be in the jury room in the morning when you come in.

2 (Jury not present.)

3 THE COURT: All right. So 8:30.

4 Any exhibit disputes I need to resolve?

5 MR. HEMESATH: No.

6 MR. LEIDERMAN: No, right?

7 THE COURT: All right. Very good.

8 So if you can be on call starting at 8:30 tomorrow  
9 morning. We'll keep you posted, let you know if they take a  
10 full lunch break. Sometimes they do, sometimes they work  
11 through lunch. At this point, I would expect to remain on call  
12 until 5:00.

13 MR. SEGAL: So if they're on lunch break, we're gone  
14 from the courthouse. Otherwise we'll be around.

15 THE COURT: My rule is stay within 10 minutes of the  
16 courthouse when they are working.

17 MR. HEMESATH: And one note from my part, Your Honor,  
18 that tomorrow I will not be around here. Mr. Segal will be  
19 more than --

20 THE COURT: All right.

21 MR. HEMESATH: -- adequate.

22 (Off-the-record discussion with Courtroom Deputy.)

23 MR. LEIDERMAN: Your Honor, one more thing.

24 I am presently scheduled to fly out tomorrow afternoon,  
25 I may change that -- or tomorrow late afternoon, I may change

1 that depending upon what goes on tomorrow. But if it goes into  
2 Thursday, there is a reasonable possibility that I will turn  
3 this over to Mr. Jaffe.

4 THE COURT: All right. If that's acceptable to  
5 Mr. Keys.

6 MR. SEGAL: I'll just say, if there's a conviction,  
7 we're not going to move to remand him, so that may help inform  
8 who they want to keep around.

9 MR. LEIDERMAN: That --

10 MR. SEGAL: We might ask for a modification of a  
11 release condition, but that's all, if that --

12 THE COURT: All right.

13 MR. LEIDERMAN: What did you have in mind?

14 MR. SEGAL: We'll talk about it.

15 THE COURT: I am currently scheduled to fly out at 5:58  
16 tomorrow, but I'm not if we don't have some resolution here, so  
17 we will see. All right.

18 MR. SEGAL: Thank you, Your Honor.

19 THE COURT: We'll see you tomorrow.

20 (Proceedings were adjourned at 1:44 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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