APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 11, 2022 Decided July 26, 2022

No. 18-3041

UNITED STATES OF AMERICA,
APPELLEE

v.

AHMED SALIMFARAJ ABUKHATALLAH, ALSO KNOWN AS AHMED MUKATALLAH, ALSO KNOWN AS AHMED ABU KHATALLAH, ALSO KNOWN AS AHMED BUKATALLAH, ALSO KNOWN AS SHEIK,
APPELLANT

Consolidated with 18-3054

Appeals from the United States District Court
for the District of Columbia
(No. 1:14-cr-00141-1)

Julia Fong Sheketoff, Assistant Federal Public Defender, argued the cause for appellant/cross-appellee. With her on the briefs was *A. J. Kramer*, Federal Public Defender. *Mary M. Petras*, Assistant Federal Public Defender, entered an appearance.

Daniel J. Lenerz, Assistant U.S. Attorney, argued the cause for appellee/cross-appellant. With him on the briefs were *Elizabeth Trosman*, Assistant U.S. Attorney at the time the brief was filed, and *Elizabeth H. Danello* and *John Crabb Jr.*, Assistant U.S. Attorneys. *Chrisellen R. Kolb*, Assistant U.S. Attorney, entered an appearance.

Before: MILLETT, KATSAS, and RAO, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

Concurring Opinion filed by *Circuit Judge* MILLETT.

PER CURIAM: Ahmed Abu Khatallah ("Khatallah") was convicted on several counts related to his involvement in the September 11, 2012, terrorist attack on the United States' diplomatic outpost in Benghazi, Libya. He was sentenced to 22 years of imprisonment and five years of supervised release. He now appeals his convictions under several theories, seeking acquittal or at least a new trial. The government has cross-appealed, arguing the district court's 22-year sentence is substantively unreasonably low. We hold for the government. Khatallah has failed to show that he was convicted on legally insufficient evidence, that he was prejudiced by any erroneous evidentiary rulings or jury instructions, or that he was substantially prejudiced by the prosecution's closing arguments. On the other hand, Khatallah's sentence is substantively unreasonably low in light of the gravity of his crimes of terrorism. The district court's decision to disregard conduct for which Khatallah was acquitted cannot account for its dramatic downward departure from the Sentencing Guidelines' recommendation. We therefore reverse his sentence and remand for resentencing.

I

A

In 2011, after the fall of Muammar Gaddafi's regime, the United States established a diplomatic outpost, the United States Special Mission ("the Mission"), in the city of Benghazi "to maintain a diplomatic relationship with those in eastern Libya and to support the people of Libya in rebuilding their war-torn country." Government's Supplemental Appendix ("S.A.") 84. "The Mission was typically occupied by a small contingent of [State Department] personnel and members of a local guard force, who were employed by [the State Department]." S.A. 84. The CIA also established a covert facility ("the Annex") about a mile away. During the events relevant here, the U.S. Ambassador to Libya, J. Christopher Stevens, was temporarily staying at the Mission.

On the night of September 11, 2012, dozens of terrorists assaulted the Mission under cover of darkness. Around 9:45 p.m., the heavily armed militants assembled and forced their way through the Mission's main gate. They opened fire on the American and allied security personnel stationed there. They bashed and poured gasoline on Mission vehicles. And the militants set fire to the "Villa," the main residential facility in the Mission, which was occupied by Ambassador Stevens and Sean Patrick Smith, a State Department Foreign Service officer. After initially seeking refuge in a safe room, both men died from smoke inhalation while trying to escape the Villa. U.S. and allied forces counterattacked, and by around 10:15 p.m., this first wave of the attack had been repulsed.

The second wave began around 11:15 p.m., when the militants returned to the Mission at another gate and attacked the American allies still on the premises using AK-47s and rocket-propelled grenades. The remaining Americans on site

quickly evacuated the facility and made a perilous drive to the Annex. The militants gained entry around 11:45 p.m. and ransacked the Mission, lighting vehicles on fire and taking sensitive information from the Mission's Tactical Operations Center. Their work at the Mission done, the militants attacked the Annex around 12:30 a.m. on September 12 and then retreated after two violent skirmishes. Around 5:15 a.m., they resumed their attack with mortar fire that killed two more Americans, security officers Tyrone Woods and Glen Doherty, and injured two others. U.S. reinforcements eventually arrived and evacuated the U.S. personnel in the Annex to safety in Tripoli.

Ambassador Stevens' death shocked the American public. As the district court remarked at sentencing, "it was the first time in 40 years that a United States ambassador had been killed in the line of duty." Sentencing Tr. 50 (June 27, 2018). In response, the U.S. government deployed substantial resources to find and punish those responsible. These efforts led to Khatallah's 2014 capture.

Khatallah is a 51-year-old Benghazi native. He was imprisoned by the Gaddafi regime—allegedly for his religious beliefs. At some point after his release from custody, Khatallah became the leader of "Ubaydah Bin Jarrah" ("UBJ"), an Islamist militia active in the Benghazi area. UBJ was one of many local "brigades" that formed a coalition against the Gaddafi regime in the Libyan Civil War but afterward continued to operate independently of the recognized successor government. Testimony at trial linked UBJ to Ansar al-Sharia,

a notorious Al-Qaeda affiliated organization whose camp served as a base of operations for the Benghazi attack.[1]

Khatallah was captured pursuant to a joint operation among multiple U.S. agencies. The government principally relied on the cooperation of Ali Majrisi, a wealthy Benghazi-based businessman who befriended Khatallah at the United States' urging.[2] Majrisi approached Khatallah with an offer of financing and convinced him to go to a purported "safe house" on the coast. In fact, U.S. forces were waiting to arrest Khatallah. He was subdued and disarmed upon entering the building, and U.S. forces loaded him onto a Navy vessel for transport to the United States. American officials also interrogated Khatallah about the attack en route.

B

Khatallah was indicted on 18 counts. Count 1 was for "conspiracy to provide material support and resources to terrorists resulting in death." Appellant's Appendix ("App.") 2–8; *see* 18 U.S.C. § 2339A. Count 2 was for "providing material support and resources to terrorists resulting in death." App. 8–9; *see* 18 U.S.C. § 2339A. Counts 3–15 were for the murders, attempted murders, and killings by fire or explosives of Ambassador Stevens and the three other Americans. App.

[1] The parties dispute the proper way to characterize UBJ. The government describes UBJ as "comprised of Islamist extremists who refused to operate under the authority of the post-revolution government in Benghazi," Gov't Opening Br. 7, and there is testimony supporting this characterization. Khatallah emphasizes that at one point UBJ was working with the United States and received some indirect protection from the United States.

[2] Like other witnesses, including Bilal al-Ubydi, Majrisi used a pseudonym for his safety and that of his family.

9–17. Counts 16 and 17 were for "maliciously destroying and injuring dwellings and property and placing lives in jeopardy within the special maritime and territorial jurisdiction of the United States and attempting to do the same" in violation of 18 U.S.C. § 1363. App. 17–18; *see* 18 U.S.C. § 7 (defining the "special maritime and territorial jurisdiction of the United States"). Count 16 was for the destruction of the Mission buildings and property, while Count 17 was for the damage to the Annex. And Count 18 was for "using, carrying, brandishing, and discharging a firearm during a crime of violence" in violation of 18 U.S.C. § 924(c). App. 18–19.

At trial, after presenting testimony about the nature of the attack and the deaths of the four Americans, the government presented a series of witnesses to tie Khatallah to the attack on the Mission. *See United States v. Khatallah* ("*Khatallah IV*"), 313 F. Supp. 3d 176, 182–85 (D.D.C. 2018) (summarizing the evidence presented at trial).

First, the government called Khalid Abdullah, a Libyan army commander. He claimed Khatallah told him he resented the presence of American intelligence personnel in the country and that he was planning to attack the consulate. Although Abdullah was a part of the U.S.-friendly army, he testified that Khatallah warned him not to interfere with the attack and asked for military equipment and vehicles. *Khatallah IV*, 313 F. Supp. 3d at 182–83.

Second, the government called Bilal al-Ubydi, who grew up with Khatallah and was a local leader of the militia groups friendly to the United States. *Khatallah IV*, 313 F. Supp. 3d at 183. Al-Ubydi testified that Khatallah was UBJ's commander and religious leader. While viewing surveillance footage in court, al-Ubydi identified several people carrying assault rifles during the first wave of the attack as UBJ members and close

associates of Khatallah. Al-Ubydi further testified that Khatallah called him around 10:15 p.m. the night of the attack and told him—in a manner al-Ubydi perceived as hostile and threatening—to "pull back" a group of guards stationed near the Mission. Trial Tr. 2533 (Oct. 18, 2017, AM). Finally, in Mission surveillance footage timestamped 11:55 p.m., al-Ubydi identified Khatallah as a figure holding an assault rifle and surrounded by other attackers including the local commander of Ansar al-Sharia.

Third, the government called the agents who captured Khatallah and interrogated him on his way to the United States. *Khatallah IV*, 313 F. Supp. 3d at 184. They testified that during the interrogation, Khatallah identified people from the surveillance footage of the Benghazi attack. According to one of the agents, Khatallah also admitted to manning a roadblock and turning away U.S.-friendly forces, to driving to the compound after the attack began with a gun, and to entering a Mission building.

Finally, the government called Ali Majrisi, the local businessman who helped capture Khatallah. He testified that Khatallah knew he was suspected of involvement in the attack and that Khatallah expressed disappointment that more Americans had not been killed. *Khatallah IV*, 313 F. Supp. 3d at 183. Majrisi also testified that Khatallah essentially admitted involvement in the attack by referring to "when we were attacking the compound" and stating that he "intended then to kill everybody" associated with the Mission. Trial Tr. 4995 (Nov. 6, 2017, PM).

The government also relied heavily on spreadsheets it claimed were records of Khatallah's phone calls. *Khatallah IV*, 313 F. Supp. 3d at 183–84. A witness from Libyana Mobile Phone testified that the documents appeared to be Libyana

forms. Witnesses also matched the numbers on the spreadsheet to phone numbers belonging to UBJ members. The government used this testimony, in concert with video footage showing UBJ members speaking on the phone during the attack, to show both that the records were authentic and that Khatallah was in touch with UBJ members on site during the first wave of the attack.

Khatallah's first main witness was a friend, Ahmed Salem, who claimed Khatallah was at his house the evening of the attack and that when Khatallah was called and told about the attack he was surprised to hear there was a U.S. diplomatic facility in Benghazi. *Khatallah IV*, 313 F. Supp. 3d at 184. His other main witness was Abdul Basit Igtet, who testified that Khatallah was eager to speak with the United States before he was captured. *Id.* Beyond that, because of national security concerns that limited the evidence he could bring, Khatallah had to rely on stipulations read to the jury to bolster his defense. "Most of the stipulations described information in the government's possession concerning other possible perpetrators of the attack," while other stipulations conveyed the compensation provided to the government's cooperating witnesses. *Id.* A final stipulation reported that the cell phone registered to Khatallah's phone number was in his house three miles from the Annex during most of the attack on the Annex. *Id.* at 184–85.

After a seven-week trial, the jury found Khatallah guilty on four counts. It convicted on Counts 1 and 2 for conspiring to provide material support to terrorists and providing that support. It convicted on Count 16 for injuring a building, "that is, the U.S. Special Mission," within the U.S. "special maritime and territorial jurisdiction." App. 165. And it convicted on Count 18 for carrying a semi-automatic weapon during a crime of violence. For Counts 1 and 2, the jury made special findings

that Khatallah was not guilty of conduct "resulting in death." App. 163. And Khatallah was acquitted of Counts 3–15 and Count 17. Thus, Khatallah was acquitted of all murder and related homicide charges and for any liability directly involving the Annex. *See Khatallah IV*, 313 F. Supp. 3d at 186.

During trial, Khatallah had moved for a judgment of acquittal after the government rested, and he renewed it after he presented his case. *United States v. Khatallah* ("*Khatallah VI*"), 316 F. Supp. 3d 207, 210 (D.D.C. 2018). The court reserved consideration of the motion and allowed the jury to decide. *Id.* After the jury delivered its verdict, Khatallah renewed his acquittal motion with respect to his conviction for carrying a semi-automatic firearm during a crime of violence (Count 18). *Id.* But the district court denied the motion on the ground that a conviction under Section 1363 for damaging property necessarily involved "the use, attempted use, or threatened use of physical force against the … property of another" as required for Count 18. *Id.* at 213 (quoting 18 U.S.C. § 924(c)(3)(A)).

Before and after the jury delivered its verdict, Khatallah also moved for a mistrial on the basis of the prosecution's closing arguments. He claimed the prosecutor's references to matters outside the record, her denigration of the defense's stipulations, and her emotive appeals to patriotism deprived him of due process. While agreeing some of the prosecutor's behavior was outside the bounds of acceptable advocacy, the court denied the motion on the ground that Khatallah failed to show he was prejudiced. *Khatallah IV*, 313 F. Supp. 3d at 185–86, 190–96.

At sentencing, the court calculated Khatallah's Guidelines-recommended sentence as life plus ten years. *United States v. Khatallah* ("*Khatallah V*"), 314 F. Supp. 3d

179, 202–03 (D.D.C. 2018). Nonetheless, the court varied downward from that calculation to impose a 22-year sentence—a 12-year sentence for Counts 1, 2, and 16, and a statutorily mandated consecutive ten-year sentence for Count 18.

Khatallah appealed, and the government cross-appealed Khatallah's sentence.

II

At trial, the government introduced records of telephone calls purportedly made and received by Khatallah around the time of and during the attack on the Mission. Those records were obtained from Libyana Mobile Phone. Khatallah argues that the records were erroneously admitted into evidence because they were not authenticated before the jury.

We review the district court's decision to admit the records into evidence for an abuse of discretion. *United States v. Lawson*, 494 F.3d 1046, 1052 (D.C. Cir. 2007).

Generally speaking, documents offered to prove the truth of their content—here, to show that Khatallah communicated with certain persons at certain times—are inadmissible hearsay. *See* FED. R. EVID. 801, 802. But "[a] record of an act[] [or] event" is admissible notwithstanding the rule against hearsay if it (1) "was made at or near the time by … someone with knowledge[,]" (2) "was kept in the course of a regularly conducted activity of a business," (3) was made as part of "a regular practice of that activity[,]" and (4) "the opponent" of its admission "does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." *Id.* 803(6). "[A]ll these conditions" may be

"shown by … a certification that complies with … a statute permitting certification[.]" *Id.* 803(6)(D).

Congress has enacted a certification statute specifically to govern the admission of "a foreign record of regularly conducted activity," like the telephone records here. 18 U.S.C. § 3505(a)(1). "In a criminal proceeding[,]" such a record "shall not be excluded as evidence by the hearsay rule if a foreign certification attests" to conditions similar to those specified by Federal Rule of Evidence 803(6): That is, that the record (1) "was made, at or near the time of the occurrence of the matters set forth, by … a person with knowledge of those matters[,]" (2) "was kept in the course of a regularly conducted business activity[,]" (3) was made "as a regular practice" of "the business activity[,]" and (4) is either an original or "a duplicate of the original[.]" *Id.* § 3505(a)(1), (a)(1)(A)–(D).

Another "condition precedent to admissibility" is authentication. *United States v. Rembert*, 863 F.2d 1023, 1026 (D.C. Cir. 1988) (internal quotation marks omitted). Ordinarily, to authenticate a proffered item, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a). Under Section 3505, Congress directed that the foreign certification itself "shall authenticate such record or duplicate" of the record as long as the district court finds "trustworth[y]" the "source of information or the method or circumstances of [the document's] preparation." 18 U.S.C. § 3505(a)(1)–(2).

Consistent with Section 3505, the government moved prior to trial for an order authenticating and admitting into evidence the Libyana telephone records. The district court granted that motion, crediting the foreign certification of the Libyana records by Mohammed Ben Ayad, the Chief Executive Officer of Libyana. *United States v. Khatallah*, 278

F. Supp. 3d 1, 6 (D.D.C. 2017). Ben Ayad attested that the telephone records satisfied Section 3505's four conditions of admissibility. S.A. 8.

In finding that the telephone records satisfied Section 3505's requirements for admissibility, the district court provided that the admissibility of testimony about the records was "subject to the Government later establishing [the records'] relevance as Mr. Khatallah's phone records." Trial Tr. 2597 (Oct. 18, 2017, PM); *see* FED. R. EVID. 104(b).

Khatallah does not challenge the district court's pretrial ruling deeming the records admissible under Section 3505. Instead, he contends that the government failed subsequently to authenticate the telephone records before the jury. That argument fails because, by connecting the records to Khatallah as the district court required, the government simultaneously "produce[d]" for the jury "evidence sufficient to support a finding" that the records were authentic, consistent with Federal Rule of Evidence 901(a).

First, "[t]he appearance, contents, substance, internal patterns, [and] other distinctive characteristics" of the records supported the inference that they were genuinely Libyana phone records documenting Khatallah's calls. FED. R. EVID. 901(b)(4). The records consisted of a table with fields labeled, in Arabic, "time of call," "duration of call," "number of receiver," and "number of caller." App. 839 (records' first page); App. 504–06. The table also had technical headings indicating the cell tower used for each call. App. 839.

Second, a Libyana security guard who had previously obtained information from Libyana's computer system for the FBI testified that the records were in the "[s]ame format" as Libyana call records he had seen. Trial Tr. 4808 (Nov. 2, 2017, PM); *id.* at 4815. He observed that the phone number attributed

to Khatallah began with the number 92, a Libyana prefix, and that "all the numbers" were preceded by Libya's country code, 218. *Id.* at 4808–09. The records also contained a colorized page that, according to the guard, bore the same purple hue as other Libyana records. *Id.* at 4812. This purple coloring was consistent with photographs taken of Libyana subscriber records. S.A. 116–21. The guard confirmed that the records were "for sure" Libyana records. Trial Tr. 4892 (Nov. 6, 2017, AM).

Third, Ali Majrisi, the Benghazi businessman recruited by the United States to help apprehend Khatallah, testified that the subscriber indicated in the records was Khatallah's brother and that the address listed was Khatallah's. Trial Tr. 4979–80 (Nov. 6, 2017, PM). Additionally, multiple witnesses testified that phone numbers in the spreadsheet belonged to associates of Khatallah. *See, e.g.*, Trial Tr. 2608 (Oct. 18, 2017, PM); Trial Tr. 3887 (Oct. 30, 2017, AM); Trial Tr. 4810–11 (Nov. 2, 2017, PM); *id.* at 4812.

Fourth, witness testimony corroborated that certain calls documented in the records actually were made by or to Khatallah. Special Agent Michael Clarke testified that Khatallah told him he "may have" called Salah al-Amari after receiving a call from Jamaica—both UBJ members—between 8:30 and 9:00 p.m. on the evening of the attack. Trial Tr. 3874 (Oct. 30, 2017, AM); *see id.* at 3867. The records indicate a call from Khatallah to al-Amari at 8:39 p.m. *Id.* at 3878–79; App. 868. Similarly, Bilal al-Ubydi testified that Khatallah called him around 10:15 p.m. that same evening. Trial Tr. 2531–33 (Oct. 18, 2017, AM). A call from Khatallah to al-Ubydi at 10:20 p.m. appears in the records. Trial Tr. 2609–10 (Oct. 18, 2017, PM); App. 868.

Khatallah objects that there were many reasons for a jury to discredit the government's authenticating evidence. For example, he argues that while the records' "headings are *consistent* with what one might expect to see on genuine and accurate foreign call records, they hardly help to *prove* that the spreadsheet actually comprised such records." Khatallah Reply Br. 8 (emphasis in original). He also notes that while Agent Clarke reported that al-Ubydi told him that he and Khatallah spoke for "over ten minutes" on the night of the attack, the corresponding entry in the records indicates the call lasted just 36 seconds. Khatallah Opening Br. 15; *compare* Trial Tr. 5584–85 (Nov. 13, 2017, PM), *with* App. 868.

To be sure, Khatallah had grounds for challenging the government's showing and arguing to the jury that they should not credit the telephone records—and he did so. *See, e.g.*, Trial Tr. 6093 (Nov. 16, 2017, PM) (defense counsel arguing in closing that "there's absolutely no[] foundation for you to believe that … what they keep calling phone records are, in fact, phone records"). But in deciding the telephone records' admissibility, the question is not whether the government conclusively proved their authenticity. It is only whether the government's showing "permit[ted] a reasonable juror to find that the evidence is what its proponent claims." *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982) (citation omitted). The government's evidentiary showing was sufficient to that task. And with Rule 901's requirements met, Khatallah's arguments "go to the *weight* of the evidence—not to its *admissibility*." *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) (emphases in original); *see also United States v. Mitchell*, 816 F.3d 865, 871–72 (D.C. Cir. 2016); 31 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE EVIDENCE § 7104 (2d ed. April 2022 update) ("[T]he jury retains the power to determine what

weight to give evidence in light of any questions concerning its authenticity.").[3]

III

Khatallah challenges his conviction on Count 16 for "maliciously destroying and injuring dwellings and property, that is the U.S. Special Mission, and placing lives in jeopardy within the special maritime and territorial jurisdiction of the United States and attempting to do the same." App. 165. He maintains that the evidence was legally insufficient to demonstrate that his actions fell within the special maritime and territorial jurisdiction of the United States ("the special jurisdiction") or alternatively that the conviction should be vacated because the jury was wrongly instructed regarding this jurisdictional element. We decline to set aside this conviction on either ground.

A

Khatallah was convicted under 18 U.S.C. § 1363, which criminalizes the malicious destruction of buildings and property "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1363.[4] The jury

[3] Because the government introduced sufficient evidence to permit a rational jury to conclude that the records were authentic, we need not decide whether the district court's pretrial authentication ruling under 18 U.S.C. § 3505 made authentication before the jury unnecessary. *See* Gov't Opening Br. 22–29.

[4] Section 1363 provides in full that, "[w]hoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act, shall be fined under this title or

also convicted him of the aggravating factor that applies "if the building be a dwelling, or the life of any person be placed in jeopardy." *Id.*; *see* App. 165.

To bring Khatallah's offense within the special jurisdiction, the government relied only on the diplomatic premises definition of the special jurisdiction. 18 U.S.C. § 7(9). This definition applies to "offenses committed by or against a national of the United States" on the premises of U.S. diplomatic facilities abroad, including "United States Government Missions … in foreign States." *Id.* § 7(9), 7(9)(A). The government maintains that this definition applies because the destruction of property was "committed … against a national of the United States" on the premises of the Mission. Khatallah argues he is entitled to acquittal on Count 16 because there was legally insufficient evidence that his actions satisfied the diplomatic premises definition of the United States' special jurisdiction.

Khatallah's challenge "faces a high threshold." *United States v. Tucker*, 12 F.4th 804, 826 (D.C. Cir. 2021) (per curiam) (cleaned up). The question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). Because the question is what "*any* rational trier of fact" could have found, our determination "does not rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016).

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imprisoned not more than five years, or both, and if the building be a dwelling, or the life of any person be placed in jeopardy, shall be fined under this title or imprisoned not more than twenty years, or both."

To meet this high bar, Khatallah makes a purely legal argument that no Section 1363 conviction can rest on the diplomatic premises definition of the special jurisdiction regardless of the evidence in the case because of the intersecting elements of that definition and Section 1363.

The diplomatic premises definition of the special jurisdiction has two parts as relevant here: (1) the crime has to take place on the premises of a diplomatic or military facility, and (2) it has to be an "offense[] committed by or against a national of the United States." 18 U.S.C. § 7(9)(A), 7(9). Khatallah does not dispute that the attack occurred at a diplomatic mission, but he argues a violation of Section 1363 can never be an offense committed "against a national of the United States." He invokes the traditional distinction between crimes against the person and crimes against property. *Cf. Borden v. United States*, 141 S. Ct. 1817, 1839–40 (2021) (Kavanaugh, J., dissenting). Section 1363, he says, is "essentially a property crime" because it requires the "willful[] and malicious[] destruction" of a structure or property. 18 U.S.C. § 1363. The destruction of property cannot be a crime "against" an American national or any person, Khatallah insists, regardless of the circumstances or effects of the crime. Because Section 1363 is never a crime against an American person, Khatallah argues its special jurisdiction element can never be satisfied by the diplomatic premises definition, which applies only to offenses against persons, namely U.S. nationals.[5] Therefore, because the jurisdictional element of

[5] This is not the first time Khatallah has made this argument: the district court rejected it in an opinion denying a motion to dismiss that count of the indictment before trial. *United States v. Khatallah*, 168 F. Supp. 3d 210, 213–15 (D.D.C. 2016).

Count 16 cannot be satisfied by the charged category of special jurisdiction, Khatallah claims he is entitled to an acquittal.

Section 1363 does not just define a property crime. Some violations of Section 1363 may be exclusively property crimes. *See, e.g.*, *United States v. Grady*, 18 F.4th 1275, 1281–83 (11th Cir. 2021) (affirming a conviction under Section 1363 for a peaceful protest that involved spray painting naval facilities). But Section 1363 also creates an enhanced offense that can be committed by destroying property in a way that places a life in jeopardy. 18 U.S.C. § 1363 (enhancing the maximum penalty "if … the life of any person be placed in jeopardy"). These violations of Section 1363 are not just property crimes. When placing a person in jeopardy is an element of the offense, that offense is committed against the person threatened.[6] We thus agree with the district court that when an American life is the one placed in jeopardy as required for the statutory enhancement, the malicious destruction of property in violation of Section 1363 is an "offense committed … against a national of the United States" and can occur within the special jurisdiction's diplomatic premises definition. *See United States v. Khatallah*, 168 F. Supp. 3d 210, 213 (D.D.C. 2016).

Because Khatallah's purely legal argument cannot succeed, there is no basis for a judgment of acquittal on appeal. On the facts here, a rational trier of fact could have found beyond a reasonable doubt that Khatallah violated Section 1363 in a way that placed an American's life in

[6] Because it is sufficient that placing an American life in jeopardy is an offense committed against an American, we need not address whether someone can violate Section 1363 within the special jurisdiction by injuring an American's dwelling. *See* 18 U.S.C. § 1363 (enhancing the maximum permissible sentence "if the building be a dwelling").

jeopardy. Khatallah's co-conspirators perpetrated a violent attack on Americans while damaging U.S. property, so a rational jury could have convicted Khatallah as vicariously liable for their actions. "[A] conspirator can be found guilty of a substantive offense based upon acts of his coconspirator so long as the act was done in furtherance of the conspiracy, was within the scope of the unlawful project, and could be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *United States v. Sampol*, 636 F.2d 621, 676 (D.C. Cir. 1980) (per curiam) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

Here videos showed that UBJ members Aymen al-Dijawi, Jamaica, and Zakaria Barghathi "stormed a secure government compound with guns, entered Mission buildings while armed, and spread gasoline on vehicles located at the Mission," all while Americans were still present. *See Khatallah V*, 314 F. Supp. 3d at 196. The video provides ample evidence that UBJ members were placing American lives in jeopardy while damaging the Mission. In light of the testimony that Khatallah was UBJ's leader, the phone records purporting to show Khatallah communicating with UBJ members during the attack, and the fact that Khatallah showed up armed later on the same night, a reasonable juror could have found those armed UBJ members present to be Khatallah's co-conspirators. Finally, the conspiracy was to destroy the Mission, so the assault on the Mission was clearly in furtherance of the conspiracy. Given that the Mission was heavily guarded, the UBJ members' violent actions against Americans were a reasonably foreseeable consequence of the conspiracy. A rational jury had plenty of evidence to find beyond a reasonable doubt that Khatallah violated Section 1363 within the diplomatic premises definition of the special jurisdiction.

Khatallah makes three arguments to resist this conclusion, but none is persuasive.

First, he argues that even if violating the enhanced version of Section 1363 by placing a life in jeopardy is an offense against a person, that is "irrelevant" because the jury was not told that this was the only path for conviction. Khatallah Reply Br. 29. But motions for an acquittal based on insufficient evidence cannot depend on jury instructions. *See Musacchio*, 577 U.S. at 243; *see also Griffin v. United States*, 502 U.S. 46, 49 (1991) (explaining the pre-Revolutionary common law principle that "a … verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action"). As such, it does not matter for Khatallah's sufficiency of the evidence challenge if the jury was provided with an erroneous path to a guilty verdict via the dwelling enhancement as long as a properly instructed jury had enough evidence for conviction.

Khatallah's second argument is that we should apply a categorical approach to the diplomatic premises definition. He argues unless the "offense" in the diplomatic premises definition has, as an essential element, that the crime be committed against an American, that definition of the special jurisdiction cannot apply.

We disagree; whether an offense is "committed by or against a national of the United States" is determined by the facts of the charged offense, not by the offense's legal elements. The diplomatic premises definition applies to "offenses committed by or against a national of the United States" that take place on U.S. diplomatic premises. 18 U.S.C. § 7(9). The term "offense" is ambiguous: it can refer to "a generic crime, say, the crime of fraud or theft in general," but

it can also "refer to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed." *Nijhawan v. Holder*, 557 U.S. 29, 33–34 (2009). Despite Khatallah's arguments, we have little trouble concluding that "offense" in the diplomatic premises definition is circumstance specific, not categorical.

In this case, none of the "three basic reasons for adhering to an elements-only inquiry" are present. *Mathis v. United States*, 579 U.S. 500, 510 (2016). Applying the factors in *Mathis*, it would be inappropriate to apply a categorical approach to the phrase "offenses committed by or against a national of the United States." First, reference to the offense "committed" does not suggest a categorical approach; instead, it suggests the facts are what matter. *See id.* at 511 (citing *United States v. Hayes*, 555 U.S. 415, 421 (2009) (interpreting "offense … committed" in a circumstance-specific way)). Courts typically apply the categorical approach when the statute depends on "convictions" or explicitly relies on the "elements" of a crime, not when it refers to what was "committed." *See, e.g.*, *id.* (applying the categorical approach in part because the Armed Career Criminal Act (ACCA) refers to "convictions" for violent felonies). Second, the Sixth Amendment right to a trial by jury is not implicated because the diplomatic premises definition asks about the facts of the offense for which the defendant is being tried at the moment, not a past offense such as a conviction for a violent felony that serves to aggravate a sentence in the ACCA context. *Id.* at 511–12. And for the same reason—there is no prior litigation involved—there is no question of relying on facts that were found without adversarial process. *Id.* at 512. We thus conclude that a categorical approach is inappropriate to interpret the diplomatic premises definition of the special jurisdiction.

Khatallah's third argument is that the diplomatic premises definition can never apply to Section 1363 because that statute's "focus … is on the property," as evidenced by the fact that the defendant must "willfully and maliciously" destroy property but does not have to "willfully and maliciously" place a life in jeopardy. Khatallah Reply Br. 29–30; *see* 18 U.S.C. § 1363. We reject this argument as well. The special jurisdiction definition does not apply only to offenses that "are primarily committed against a national of the United States" or that have a "focus on harming American persons," so we fail to see the significance of the statute's "focus" when determining whether there was sufficient evidence that Khatallah's crime occurred within the special jurisdiction.

In sum, the jury had ample evidence to find beyond a reasonable doubt that Khatallah was vicariously liable for placing American lives in jeopardy on the premises of an overseas diplomatic mission, so it could have found, and reasonably did find, Section 1363's jurisdictional element satisfied.

B

In the alternative, Khatallah argues he is entitled to a new trial because the jury was not properly instructed about Count 16's jurisdictional element and would have acquitted him if it had been.

Khatallah did not object to the jury instructions, so he must at least meet the requirements of plain error review.[7] *See* FED.

[7] Because Khatallah jointly proposed the jury instructions with the government, the government argues that any instructional error was invited by Khatallah and he is "barred from complaining about it on appeal." Gov't Opening Br. 52 (quoting *United States v.*

R. CRIM. P. 52(b); *United States v. Purvis*, 706 F.3d 520, 522 (D.C. Cir. 2013) (courts review unobjected-to jury instructions for plain error). "Under that standard," we grant a new trial only if there was "(1) error, (2) that is plain, and (3) that affects substantial rights … [and] if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up). "Meeting all four prongs of plain error is difficult, as it should be." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (cleaned up).

In its jury instructions for Count 16, the district court properly explained the substantive conduct required to violate Section 1363. It also explained that because Khatallah was charged with the enhanced version of the crime, the jury had to find beyond a reasonable doubt that "the building was a dwelling or the life of any person was placed in jeopardy." Trial Tr. 5897 (Nov. 15, 2017, PM). As to that statute's special jurisdiction element, the court listed the various facilities that are covered by the diplomatic premises definition while omitting the preface that the crime in question must be committed "by or against a national of the United States." *Id.*; *see* 18 U.S.C. § 7(9).

This omission was erroneous, as the government concedes. Violations of Section 1363 can occur only "within the special maritime and territorial jurisdiction of the United States," so the government had to prove, and the jury had to find beyond a reasonable doubt, that the damage to the Mission occurred within that special jurisdiction. *United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal

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Harrison, 103 F.3d 986, 992 (D.C. Cir. 1997)). We hold that Khatallah's challenge fails even under the plain-error standard, and therefore do not reach the question whether Khatallah's challenge is barred by the invited error doctrine.

defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."). Here, the government asserted only the diplomatic premises definition of the special jurisdiction as its jurisdictional hook. The jury, however, was not instructed that this definition required the offenses be "committed by or against a national of the United States." 18 U.S.C. § 7(9). The instructions were therefore erroneous: they omitted a factual element that the jury had to find in order to convict Khatallah of violating Section 1363. Moreover, although we need not decide the issue, we assume for the purpose of this appeal that the error was plain.

For the third prong of plain error, the error's effect on substantial rights, Khatallah has to show "a reasonable probability that, but for the error claimed, the outcome of the proceeding would have been different." *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021) (cleaned up). The error affected Khatallah's substantial rights only if there is a "reasonable probability" that the jury would have acquitted him of Count 16 if properly instructed. *Id.* Khatallah's arguments fall short.

Khatallah's argument for prejudice boils down to an implicit jury finding he claims is "[t]he only sensible way to understand the jury's verdicts." Khatallah Opening Br. 49. Khatallah points out that the jury acquitted him of all the counts in the indictment charging him with the deaths in the Mission. Those acquittals, he claims, are inconsistent with finding him responsible for the first wave of the attack on the Mission. After all, if the jury thought he was responsible as a co-conspirator for what happened at that time, it would have found that he was liable under *Pinkerton* for the deaths in the Villa that resulted from the fire started in the first wave. Therefore, Khatallah asserts, the jury implicitly found that he was responsible only for what happened during the second wave of

the attack on the Mission, after the Americans had evacuated.[8] He claims that if the jury had been properly instructed that it could convict on Count 16 only if Khatallah committed a crime "against a national of the United States," the jury likely would have acquitted him.

In addition, Khatallah maintains the jury's conviction under Count 16 can be explained by the jury's finding that he injured a dwelling. The jury was instructed that it could apply the Section 1363 enhancement if a life was placed in jeopardy *or* if the building damaged was a dwelling. During the second wave of the attack on the Mission, Khatallah was caught on camera while the Tactical Operations Center was ransacked, and testimony at trial suggested that the Tactical Operations Center was a dwelling. There were no American lives to place in jeopardy at that point in the attack. Khatallah reasons that the jury must have convicted him on Count 16 because of the dwelling enhancement, because the jury was not instructed that the offense had to be committed against a national of the United States. Destruction of a dwelling satisfies the statutory enhancement in Section 1363, but Khatallah says it does not come within the special jurisdiction under the diplomatic premises definition. Therefore, Khatallah posits, if the jury had been properly instructed that it must find an American life was in jeopardy, it would have likely acquitted him.[9]

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[8] The jury also acquitted Khatallah of Count 17, which was for "destroying and injuring dwellings and property, that is, the Annex," so we assume that he correctly reads the verdicts to at least rule out his criminal responsibility for what happened *after* the second wave of the attack. App. 165.

[9] Nor is the government arguing in this case that Khatallah's conviction could survive if the jury only convicted under the

Khatallah's theory of an implicit jury finding is not wholly implausible, but he has fallen short of demonstrating a "reasonable probability" that a properly instructed jury would have acquitted him. *Greer*, 141 S. Ct. at 2096. There was overwhelming evidence that Khatallah's co-conspirators attacked the Mission while Americans were present, but there is a much weaker link between Khatallah and the deaths at the Villa. So it was eminently sensible for the jury to find both that Khatallah was responsible for endangering American lives and that there was reasonable doubt that he was responsible for any deaths. *See Khatallah V*, 314 F. Supp. 3d at 189.

The jury could have found that Khatallah was vicariously responsible for the first wave of the attack on the Mission where American lives were in danger but was not responsible for either the deaths that resulted from the first wave or the subsequent attack on the Annex. There was substantially more evidence linking Khatallah to the first wave of the attack in general—when American lives were placed in jeopardy—than there was connecting him to the specific fires that caused the deaths at the Mission. The Libyana phone records—discussed above and which a reasonable jury, we hold, could have found to be authentic—showed that Khatallah was in frequent communication with specific UBJ militants during the first wave of the attack, but neither they nor the surveillance footage show who set the Villa on fire. *Khatallah IV*, 313 F. Supp. 3d at 183–84. We agree with the district court that "[t]he jury may have … believed that the fires were set by other militants on the scene—of which, according to evidence introduced at trial, there were dozens." *Khatallah V*, 314 F. Supp. 3d at 189.

"dwelling" enhancement of Section 1363, an issue we need not decide. *See supra* note 6.

While the government argued that all those who attacked were Khatallah's co-conspirators, they did little to support this assertion. Khatallah was not a member of any of the other militias, and the government did not point to any phone records indicating coordination with other attackers. *Khatallah IV*, 313 F. Supp. 3d at 183–84. The government argued at closing that Khatallah spoke with commanders of other militias at the Mission, but even if the jury believed that, it does not show that Khatallah was party to an affirmative agreement with any other militia, let alone whichever militia members killed Ambassador Stevens and Sean Smith. Thus, there was ample room for reasonable doubt about Khatallah's vicarious liability for the deaths in the Mission. A reasonable juror could acquit for these deaths, but still find that Khatallah was liable for placing Americans' lives in jeopardy.[10] In fact, given the strength of the evidence for Khatallah's conspiratorial involvement in the first wave of the attack, that is the best explanation of the verdicts. There was therefore no reasonable probability the jury would have acquitted Khatallah on Count 16 if properly instructed.

Finally, we note that Khatallah's interpretation of the jury's verdicts is difficult to reconcile with the evidence. For the jury to have implicitly found that Khatallah was not responsible for the first wave of attacks, it would have had to believe that Khatallah—who was portrayed by multiple witnesses as UBJ's leader—was totally uninvolved in his subordinates' plan to launch a terrorist attack even though he joined it halfway through, armed with an AK-47. The jury also

[10] There was also plenty of evidence that UBJ members damaged U.S. property even if they had nothing to do with burning down the Villa. For example, one UBJ member and close associate of Khatallah's was identified on video pouring gasoline on a Mission vehicle to light it on fire.

would have had to discount the telephone records and al-Ubydi's testimony, which the court found credible. Finally, Khatallah's theory was not presented to the jury and was inconsistent with the defense offered. The defense's primary argument was that Khatallah showed up knowing nothing of the attack and went to the Mission just to "see what was going on," not that he joined the conspiracy when he arrived. Trial Tr. 6133–34 (Nov. 16, 2017, PM). The jury's convictions indicate it did not accept the defense's account.

Khatallah has not demonstrated it is reasonably probable that this jury would have acquitted him if it had been properly instructed as to Count 16. *See Greer*, 141 S. Ct. at 2096. Finding the instructional error did not affect his "substantial rights," we decline to vacate his conviction.[11]

IV

Khatallah challenges his conviction on Count 18 for using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). He claims that his Section 1363 conviction does not qualify as a predicate crime of violence and that the district court therefore should have granted his motion for an acquittal on Count 18. Alternatively, he claims his conviction on Count 18 should be vacated because the district court wrongly instructed the jury that violating Section 1363 was a crime of violence.[12]

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[11] Because we decline to vacate Count 16, we need not address Khatallah's claim for vacatur of his other convictions because they were "premised upon Count 16." Khatallah Opening Br. 52.

[12] Khatallah also argues that the application of Section 924(c) in this case would be impermissibly extraterritorial. Section 1363 expressly applies to offenses committed "within the special maritime

A

Section 924(c) subjects any person who uses or carries a firearm "during and in relation to any crime of violence" to a mandatory minimum prison sentence of five years, 18 U.S.C. § 924(c)(1)(A)(i), to run consecutively with any other prison sentence, *id.* § 924(c)(1)(D)(ii). An enhanced minimum sentence of ten years applies if the defendant used a semiautomatic assault weapon. *Id.* § 924(c)(1)(B)(i).

Section 924(c) defines two categories of offenses as predicate crimes of violence. Its elements clause covers any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). And its residual clause covers any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(B). The Supreme Court has held that the residual clause is void for vagueness. *United States v. Davis*, 139 S. Ct. 2319 (2019). An offense must therefore fall within the elements clause to support a Section 924(c) conviction.

We apply a "categorical approach" to determine whether an offense falls within Section 924(c)'s elements clause. *Davis*, 139 S. Ct. at 2328. Under this approach, we "focus solely on whether the elements of the crime of conviction" require the use, attempted use, or threatened use of physical force against the person or property of another, "while ignoring

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and territorial jurisdiction of the United States." And after Khatallah filed his opening brief, we held that the territorial reach of Section 924(c) is coextensive with the territorial reach of the underlying predicate offense. *United States v. Garcia Sota*, 948 F.3d 356, 362 (D.C. Cir. 2020). In light of *Garcia Sota*, Khatallah presses his extraterritoriality claim only to preserve it for further review.

the particular facts of the case." *Mathis*, 579 U.S. at 504. In other words, we presume that the defendant's conviction "rested upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (cleaned up).

Some statutes, known as "divisible" statutes, "list elements in the alternative, and thereby define multiple crimes." *Mathis*, 579 U.S. at 505. When a statute defines multiple offenses and only some of them are crimes of violence, we apply a "modified categorical approach." *Id.* Under this approach, we look to "a limited class of documents," such as the indictment, jury instructions, and verdict form, "to determine what crime, with what elements, a defendant was convicted of." *Id.* at 505–06; *see Johnson v. United States*, 559 U.S. 133, 144 (2010). If the relevant documents establish with "legal certainty" that the conviction was for a crime of violence, the conviction may be used as a predicate offense. *Mathis*, 579 U.S. at 515 n.6 (cleaned up). If the relevant documents are "ambiguous," the conviction "may not be used." *United States v. Mathis*, 963 F.2d 399, 410 (D.C. Cir. 1992).

Other statutes merely list "various factual means of committing a single element." *Mathis*, 579 U.S. at 506. For these statutes, we may not consider how the defendant committed the offense. *See id.* at 509. If any of the means does not require the use, attempted use, or threatened use of physical force against the person or property of another, then the offense is not a crime of violence. *See id.*

Count 18 of the indictment charged that Khatallah and others used or carried firearms during and in relation to several crimes of violence, namely the offenses charged in Counts 1–17. The jury instructions likewise stated without qualification that those counts charged predicate crimes of violence. The

jury acquitted Khatallah on Counts 3–15 and 17. And the government has declined to argue on appeal that Counts 1 and 2, which charged Khatallah with conspiring to provide material aid to terrorists and providing material aid to terrorists in violation of Section 2339A, were crimes of violence. That leaves Count 16, charging Khatallah with an offense under Section 1363, as the only possible basis for sustaining his conviction on Count 18. As noted above, Section 1363 imposes criminal liability on anyone who "willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act" within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1363.

B

We begin with Khatallah's acquittal argument. Khatallah argues that Count 16 did not charge a crime of violence because it is possible to violate Section 1363 by conspiring to injure property. Mere conspiracy does not necessarily involve the use, attempted use, or threatened use of force. As a result, Khatallah concludes, no properly instructed jury could have based a Section 924(c) conviction on Count 16.

The government concedes that conspiring to injure property is not a crime of violence. But it contends that Section 1363 is divisible into an inchoate offense of conspiring to injure property and a substantive offense of injuring property, the latter of which is a crime of violence. And it argues that documents such as the indictment show to the requisite degree of certainty that Khatallah was convicted of the substantive

offense. We agree with both contentions, and we find more than sufficient evidence to support the conviction.[13]

1

Section 1363 is divisible. The law has long treated conspiracy to commit a crime and the substantive crime that is the object of the conspiracy as distinct offenses rather than alternative means. There is no reason to think Section 1363 departed from this settled principle.

In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the petitioners had been convicted of both monopolization and conspiracy to monopolize. *Id.* at 783. Both convictions rested on the same statutory provision, which subjected any person "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" to a fine of up to $5,000, imprisonment of up to a year, or both. *See id.* at 784 n.2 (cleaned up). The petitioners asserted that they had been twice convicted of the same offense, in violation of the Double Jeopardy Clause. *Id.* at 788. The Supreme Court disagreed because "[i]t long has been settled … that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." *Id.* at 789 (cleaned up).

The Court reaffirmed this principle in *Callanan v. United States*, 364 U.S. 587 (1961). The petitioner in that case had been convicted of both Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. *Id.* at 587–88. Both convictions

[13] Section 1363 also covers attempting to injure property. An attempted crime of violence is not always itself a crime of violence. *See United States v. Taylor*, 142 S. Ct. 2015, 2021–22 (2022). But neither party suggests that the inclusion of attempt affects the outcome here, so we do not consider that question.

arose from the same statute, which subjected any person who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so" to a fine of up to $10,000, a prison term of up to 20 years, or both. *See id.* at 588 n.1 (cleaned up). The district court sentenced the petitioner "to consecutive terms of twelve years on each count," for a total sentence of 24 years. *Id.* at 588. The petitioner argued that he was either subjected to a punishment exceeding the statutory maximum or to "two penalties" for the same offense. *Id.* at 589. The Supreme Court affirmed the sentence. It stressed that "[t]he distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law." *Id.* at 593. As a result, "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Id.* (cleaned up).

Khatallah offers three reasons why, despite this established principle, Section 1363's conspiracy and substantive offenses are not distinct. None persuades.

First, Khatallah notes that conspiring to injure property carries the same penalty as actually doing so. It is true that two statutory alternatives are distinct offenses if they carry different punishments. *Mathis*, 579 U.S. at 518. But statutory alternatives can be distinct offenses even if they do not. As noted above, the statutes in both *American Tobacco* and *Callanan* imposed the same penalty for both conspiracy and the substantive offense. *See* 364 U.S. at 588 n.1; 328 U.S. at 784 n.2.

Second, Khatallah asserts that because Section 1363 enumerates destroying, injuring, attempting, and conspiring in a single list of alternatives, there is no textual basis for treating some of them as elements and others as means. Because

destroying and injuring property are not distinct offenses, he reasons, conspiracy must also be just another factual means for committing the one statutory offense. *Callanan* forecloses this argument as well, for the statute at issue there had the same structure as Section 1363. It listed different means of committing the substantive offense ("obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion"), followed by attempt ("or attempts … to do so"), followed by conspiracy ("or conspires to do so"). *See* 364 U.S. at 588 n.1 (cleaned up). Yet the Court held that the statute created a distinct conspiracy offense.

Third, Khatallah relies on the jury instructions, which stated that he satisfied the first element of the offense charged in Count 16 if he "injured or destroyed or attempted to injure or destroy or aided and abetted another to do the same or participated in a conspiracy to injure or destroy" property. Trial Tr. 5896–97 (Nov. 15, 2017, PM). These instructions are irrelevant to the question whether Section 1363 is divisible. Where "authoritative sources of [federal] law" establish that a federal statute is divisible, we cannot rely on instructions from a single trial to reach a contrary conclusion. *See Mathis*, 579 U.S. at 517–19.

2

Because Section 1363 is divisible, we consider whether the documents referenced in *Mathis* show with legal certainty that a properly instructed jury would have convicted Khatallah of the substantive offense. *See* 579 U.S. at 505–06. Count 16 of the indictment charged that Khatallah "did willfully and maliciously destroy and injure" the Mission. App. 17. It did not charge him with conspiracy. Therefore, a properly instructed jury would have been told that, to convict Khatallah

as charged, it needed to find that he injured the Mission, either directly or through *Pinkerton* co-conspirator liability. While a properly instructed jury could have convicted Khatallah of a substantive Section 1363 offense through *Pinkerton* liability, it is legally certain that a jury so instructed could not have convicted Khatallah of mere conspiracy.[14]

3

Finally, we consider whether a properly instructed jury could have found either that Khatallah himself used a firearm while committing a substantive offense of injuring property within the special maritime and territorial jurisdiction of the United States, which would make him directly liable for violating Section 924(c), or that one of his co-conspirators did so foreseeably and within the scope of the material-support conspiracy, which would make Khatallah liable for the co-conspirator's violation of Section 924(c) under *Pinkerton*.

Ample evidence existed to support a conviction for a substantive Section 1363 offense under *Pinkerton*. As discussed above, plenty of evidence showed that Khatallah's co-conspirators damaged the Mission foreseeably and within the scope of the conspiracy. *See supra* Part III. Likewise, plenty of evidence showed that Khatallah's co-conspirators used firearms during their attack on the Mission. Video cameras captured two co-conspirators, Jamaica and Dijawi, carrying AK-47s while participating in the first wave of the attack. The government presented this video evidence at trial, and a witness identified both Jamaica and Dijawi and the

[14] Because the indictment unambiguously charged only the substantive offense, we need not decide whether, in the posture of a motion for acquittal, the necessary legal certainty would be absent if the indictment had charged both the substantive offense and conspiracy.

weapons they were carrying. Moreover, the use of firearms obviously would further a conspiracy to attack the Mission, and it was foreseeable that serious weapons like AK-47s would be needed to launch an open attack on a U.S. diplomatic facility. The jury thus had a reasonable basis for convicting Khatallah on a *Pinkerton* theory of liability for Count 18.

Khatallah objects that we do not know whether the jury predicated the Section 924(c) conviction on a substantive offense of injuring property, as opposed to the offense of conspiring to do so, because the instructions permitted the jury to convict on Count 16 for a conspiracy offense and then stated without qualification that the offense charged in Count 16 was a crime of violence. Trial Tr. 5897–98 (Nov. 15, 2017, PM). This argument is misplaced in the context of an acquittal motion, which, as explained earlier, tests sufficiency against "how a properly instructed jury would assess the evidence," not on "how the jury was instructed." *United States v. Hillie*, 14 F.4th 677, 682 (D.C. Cir. 2021) (cleaned up). Because a properly instructed jury could readily have convicted on Count 18, the district court properly denied Khatallah's acquittal motion.

C

We now turn to Khatallah's challenge to the jury instructions on Count 18. Because Khatallah did not object to the instructions below, we review this claim only for plain error. FED. R. CRIM. P. 52(b).[15]

[15] The government argues that Khatallah invited any error by jointly proposing the instructions, and that his challenge to the instructions is thus unreviewable. As with his challenge to his Section 1363 conviction, Khatallah cannot show plain error, so we need not resolve whether the invited-error doctrine applies here.

The parties dispute whether the instructions on Count 16 impermissibly allowed the jury to convict Khatallah of an uncharged conspiracy offense, which could not serve as a predicate crime of violence for the Section 924(c) conviction, or whether the mention of conspiracy in Count 16 simply referred to instructions allowing the jury to convict Khatallah of a substantive offense under *Pinkerton*. The parties also dispute whether any instructional error in this regard was sufficiently clear or obvious. We need not resolve either of these disputes because any error, even if clear or obvious, was not prejudicial.

To satisfy the third requirement of plain-error review, Khatallah must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer*, 141 S. Ct. at 2093 (cleaned up). For reasons explained above, Khatallah cannot make that showing. Overwhelming evidence established Khatallah's *Pinkerton* liability for his co-conspirators' acts injuring the Mission. And video evidence plainly showed the co-conspirators using firearms while doing so. A jury properly instructed that only a substantive Section 1363 offense qualifies as a crime of violence would still very likely have convicted on Count 18.

For these reasons, we decline to set aside Khatallah's conviction under Section 924(c).

V

Khatallah argues that the government's improper and prejudicial comments during closing arguments require a new trial. Specifically, Khatallah claims that the prosecutor made unlawful inflammatory statements by appealing to the jury's emotions and nationalism, while also denigrating the factual stipulations to which the government and defense had agreed.

We review the district court's denial of a mistrial motion complaining of prosecutorial misconduct for an abuse of discretion. *United States v. Moore*, 651 F.3d 30, 50 (D.C. Cir. 2011) (per curiam). When a prosecutor commits misconduct to which the defendant objected at trial, the government bears the burden on appeal to show that the unlawful remarks were not substantially prejudicial. *United States v. Gartmon*, 146 F.3d 1015, 1026 & n.5 (D.C. Cir. 1998) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

Reviewing the record, we agree with Khatallah that the prosecutor's remarks were plainly improper and unbefitting a federal prosecutor. But because the misconduct did not substantially prejudice Khatallah, the district court did not abuse its discretion in denying the motion for a new trial.

A

The government does not contest, nor could it on this record, that the prosecutor's statements in her closing rebuttal crossed the line. *See* Gov't Opening Br. 63.

It is settled law that "a prosecutor may not use the bully-pulpit of a closing argument to inflame the passions or prejudices of the jury or to argue facts not in evidence." *United States v. Childress*, 58 F.3d 693, 715 (D.C. Cir. 1995) (per curiam). So during closing arguments, prosecutors may not sensationalize the facts or seek to turn jurors' perceived prejudices or favoritism against a defendant. *See Moore*, 651 F.3d at 51–52. Nor may the government weaponize a jury's allegiance to their Nation or incite jurors to protect their community or act as its conscience. *See United States v. Vega*, 826 F.3d 514, 525 (D.C. Cir. 2016) (per curiam); *see also United States v. Johnson*, 231 F.3d 43, 47 (D.C. Cir. 2000). The law also "universally condemn[s]" arguments that ask jurors to identify themselves with victims "because [they]

encourage[] the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence." *Caudle v. District of Columbia*, 707 F.3d 354, 359 (D.C. Cir. 2013) (internal quotation marks and citation omitted); *see also United States v. Hall*, 979 F.3d 1107, 1119 (6th Cir. 2020); *Arrieta-Agressot v. United States*, 3 F.3d 525, 527 (1st Cir. 1993) (reversing drug-distribution convictions because of prosecutor's closing arguments, in which he told the jury that "[n]obody has the right to … poison our children[,]" and applauded the Coast Guard for "protecting us" from "the evil of drugs"). When a prosecutor presses such an us-versus-them narrative in closing remarks to the jury, she walks a perilous legal line. *See Viereck v. United States*, 318 U.S. 236, 247–48 & n.3 (1943); *United States v. DeLoach*, 504 F.2d 185, 193 (D.C. Cir. 1974); *United States v. Moore*, 375 F.3d 259, 260 (3d Cir. 2004) (reversing conviction because, among other things, the prosecutor in closing statements delivered on September 10, 2002, repeatedly referred to a defendant on trial for arson and unlawful gun possession as a "terrorist").

The Assistant U.S. Attorney who gave the government's closing rebuttal surely knew this longstanding and foundational rule of law. On top of that, the district court had previously ordered her not to refer to the United States Mission in Benghazi, Libya as "our" Mission. *See* Trial Tr. 4456 (Nov. 1, 2017, AM) ("[J]ust refer to it as the U.S. Mission, okay?" "Yes, sir."); *see also Khatallah IV*, 313 F. Supp. 3d at 194. The court had also specifically directed the prosecution "to avoid gratuitous or unnecessary uses of the term[] [terrorist]." Order at 1–2, *United States v. Khatallah*, 313 F. Supp. 3d 176 (No. 1:14-cr-00141), ECF No. 371. Yet in her closing rebuttal, the prosecutor brushed off the court's orders. She began:

> At this moment, I cannot tell you how proud I am to represent the United States of America and how

> honored I am to call the United States Mission in Benghazi ours. Yes, it is ours. And … Ambassador Christopher Stevens is our son. And brave American Sean Smith is an American son. And Glen Doherty and Tyrone Woods, Navy Seals, are our American sons.
>
> And I cannot tell you how proud I am. And yes, they are ours. And the consulate and the other United States facility, the CIA Annex, that's ours too. And I will take that to the bank, and I will take full responsibility for saying that that is ours.

Trial Tr. 6134–35 (Nov. 16, 2017, PM).

The prosecutor then turned to the defense's argument that Khatallah had an innocent explanation for being at the Mission on the night of September 11th. She continued:

> The defendant is guilty as sin. And he is a stone cold terrorist. Innocent presence? Innocent presence? … His hit squad was searing through the United States Mission, searing violently with rage—his rage against America, brandishing AK-47s, [rocket-propelled grenades] and all sorts of weapons to *destroy us*, those innocent men who are on the compound.

Trial Tr. 6135 (Nov. 16, 2017, PM) (emphasis added). Khatallah's counsel objected repeatedly. *Id*. at 6136.

The prosecutor again referred to "our American facilities" and "our Mission[,]" personalizing the charged crimes as attacks on the jurors and the prosecution. Trial Tr. 6149 (Nov. 16, 2017, PM); *see also id*. at 6146 (asserting that Khatallah is guilty of "attacking our facilities"). She accused Khatallah's

"hit squad" of "attacking *us*[,]" and asked rhetorically "[w]hy are you attacking *us*?" *Id*. at 6136 (emphases added).

Later, the prosecutor turned to denigrating the written stipulations Khatallah had entered into evidence, and which the government itself had agreed were accurate. Those stipulations were the product of "lengthy negotiation[s]" between Khatallah and the government, and the parties had agreed to "a preamble that explained to the jury that the stipulations were summaries of classified information concerning the [Benghazi] attacks[.]" *Khatallah IV*, 313 F. Supp. 3d at 184. Because the defense lacked access to the underlying classified information, they did not know the sources behind the information and could not call them to testify. *Id.*; *see also* Trial Tr. 5852–54 (Nov. 15, 2017, PM) (explanation of stipulations).

The prosecutor nevertheless disparaged the stipulations as "words on a piece of paper" and unfavorably contrasted them with "witnesses who you can see … who have been cross-examined, who have been challenged." Trial Tr. 6150 (Nov. 16, 2017, PM); *see also id.* at 6153–54 (again dismissing stipulations as "words on a piece of paper," and asserting that jurors "do not know the reliability of them whatsoever"). Defense counsel objected, and the court said it would deal with the objections "[a]fterwards." *Id*. at 6150. At a bench conference immediately after the government closed, Khatallah's counsel lodged several objections and moved for a mistrial, asking the court to reserve its decision until after the jury verdict. *Id*. at 6155–56.

We expect better from an attorney representing the United States. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (although a prosecutor "may strike hard blows, [she] is not at liberty to strike foul ones"); *United States v. McGill*, 815 F.3d 846, 920 (D.C. Cir. 2016) (per curiam) ("A just outcome

obtained through a fair, evenhanded, and reliable process should be the government's goal; it is *not* to win at any cost.") (emphasis in original).

The "sole purpose of closing argument is to assist the jury in analyzing the evidence[.]" *Moore*, 651 F.3d at 52 (internal quotation marks and citation omitted). Yet here, the prosecutor repeatedly encouraged the jury to "substitute emotion for evidence[,]" and she made an appeal to nationalism that was "wholly irrelevant to any facts or issues in the case, the purpose and effect of which [was] only … to arouse passion and prejudice." *Vega*, 826 F.3d at 525 (internal quotation marks and citation omitted). In many regards, the prosecutor's call to arms was similar to the closing speech the Supreme Court found to be "highly prejudicial" in *Vierick v. United States*. 318 U.S. at 248. In that case, the government tried a registered German foreign agent during World War II for failing to divulge certain propaganda activity. *Id.* at 239–40. In his closing remarks, the prosecutor told the jury that the "American people are relying upon you … for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula[.]" *Id*. at 247 n.3. He then "call[ed] upon every one of [the jurors] to do [their] duty." *Id*. at 247–48 n.3. While the battles fought by the United States have changed, the law's condemnation of such rhetoric has not.

The prosecutor here further erred by maligning the stipulations entered into evidence by the defendant. In the stipulations, which were based on classified sources, the government agreed that it possessed certain information or that a person known to the government would, if called to the stand, testify to certain facts. *See, e.g.*, Trial Tr. 5853–54 (Nov. 15, 2017, PM). Especially because of the defense's limited access to the classified information underlying the stipulations, and

the government's express agreement to them, the prosecutor acted improperly in portraying the stipulations as untrustworthy and advising the jury to disbelieve them. Said another way, the prosecutor impermissibly and "intentionally misrepresent[ed] the evidence." *Moore*, 651 F.3d at 53.

B

Still, not all prosecutorial misconduct justifies vacating a jury verdict. "A mistrial is a severe remedy—a step to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor." *United States v. McLendon*, 378 F.3d 1109, 1112 (D.C. Cir. 2004) (citation omitted). Here, if the prosecutor's rebuttal substantially prejudiced Khatallah, a mistrial would be required. *See Moore*, 651 F.3d at 50. To assess whether the prosecutor's rebuttal substantially prejudiced Khatallah, we consider "(1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the error's effects." *Id*. at 51 (quoting *United States v. Becton*, 601 F.3d 588, 598 (D.C. Cir. 2010)). While we find the prosecutor's rebuttal argument "deeply troubling," the government has met its burden of showing that the wrongful remarks did not cause Khatallah "substantial prejudice." *McGill*, 815 F.3d at 921.

First, on the charges for which he was convicted, the case against Khatallah was not close. *See Moore*, 651 F.3d at 51. The jury convicted Khatallah for conspiring to provide, and providing, material support to terrorists, maliciously injuring property in the special jurisdiction of the United States, and carrying a firearm during a crime of violence. The government presented powerful and mutually reinforcing evidence of Khatallah's guilt on all four counts. *See* Parts III–IV, *supra*. Multiple witnesses attested to Khatallah's participation in the attack on the Mission, and their testimony was bolstered by

corroborating phone records and contemporaneous video footage from inside the Mission compound.

More specifically, Bilal al-Ubydi, a man overseeing a group of Libyan government militias, testified that several days before the attack he saw Khatallah, together with compatriots Aymen Dijawi and Zakaria Barghathi, securing munitions from a local military force.[16] On September 11th, both Dijawi and Barghathi were seen on camera attacking the U.S. Mission.[17] Phone records show that Khatallah was in contact with both men throughout the evening of September 11th, including right around the time that they were filmed at the compound. *See Khatallah V*, 314 F. Supp. 3d at 192–93.

The government also connected Khatallah with a third attacker from that night, a comrade of his known as Jamaica. According to FBI Special Agent Michael Clarke, Khatallah said during his interrogation that he spoke on the phone with Jamaica between 8:30 p.m. and 9 p.m. on September 11th while Jamaica was standing outside of the Mission. Trial Tr. 3867–68 (Oct. 30, 2017, AM); *id*. at 3935–36. Two witnesses identified Jamaica on camera carrying a gasoline can and firearm during the subsequent attack.[18]

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[16] Trial Tr. 2399, 2460–61, 2463–72 (Oct. 17, 2017, PM) (al-Ubydi testimony).

[17] Trial Tr. 2548–49, 2551–52, 2556–57, 2562 (Oct. 18, 2017, AM) (al-Ubydi testimony); Trial Tr. 5062–63, 5066, 5077, 5059–61 (Nov. 7, 2017, AM) (Majrisi testimony); *see also* Trial Tr. 3869 (Oct. 30, 2017, AM) (Clarke testimony).

[18] Trial Tr. 5062, 5071–72, 5075–76 (Nov. 7, 2017, AM) (Majrisi testimony); Trial Tr. 2561 (Oct. 18, 2017, AM) (al-Ubydi testimony); *see also Khatallah V*, 314 F. Supp. 3d at 193.

Evidence at trial also firmly tied Khatallah to the scene of the attack. Al-Ubydi testified that Khatallah called him at approximately 10:15 p.m. on September 11th and told him in a threatening tone to withdraw two men who were stationed near the Mission. Trial Tr. 2531–34, 2543 (Oct. 18, 2017, AM). Khatallah told al-Ubydi that he was calling from near one of the militia's trucks guarding an orchard close to the Mission. *Id.* at 2537–39 (al-Ubydi testimony). Phone records confirm that Khatallah called al-Ubydi at 10:20 p.m. that night, albeit for a shorter period of time than al-Ubydi initially remembered.[19]

Special Agent Clarke also placed Khatallah near the Mission that evening. According to Clarke, Khatallah told the FBI in an interrogation that he had set up a roadblock near the Mission while the attack was underway. Trial Tr. 3901–04 (Oct. 30, 2017, AM). Khatallah said he used the roadblock to turn away militiamen "responding" to the attack. *Id*. at 3903 (Clarke testimony). According to another witness, Ali Majrisi, Khatallah later accused one of those militias of "interfer[ing]" with his plan to "kill everybody" associated with the Mission. Trial Tr. 4994–95 (Nov. 6, 2017, PM). Khatallah also told Clarke that, while he was near the Mission, he spoke by phone with a commander of a militia tasked with protecting the Mission. Trial Tr. 3946–48 (Oct. 30, 2017, PM); Trial Tr. 2400 (Oct. 17, 2017, PM). Khatallah asked the commander why the militia was shooting at "us[,]" and warned him that "[i]f you kill one of us, you will be in trouble." Trial Tr. 3947–48 (Oct. 30, 2017, PM) (Clarke testimony).

Finally, Khatallah was filmed entering a building on the U.S. compound armed with an automatic rifle just before

[19] *See* Trial Tr. 2608–09 (Oct. 18, 2018, PM); App. 868, at line 1608 (phone records); Trial Tr. 5583–85 (Nov. 13, 2017, PM).

midnight on September 11th.[20] According to two witnesses viewing the video footage, Khatallah was accompanied by Dijawi, one of the men who had attacked the Mission in a previous wave and with whom Khatallah had picked up weapons. *See* Trial Tr. 5085 (Nov. 7, 2017, AM) (Majrisi testimony); Trial Tr. 2632 (Oct. 18, 2017, PM) (al-Ubydi testimony). After Khatallah exited the building, he gestured for several men to follow him. *See* Gov't Ex. 301-44 (video evidence) (time stamp 00:02:25–00:02:32); *see also Khatallah V*, 314 F. Supp. 3d at 200.

In short, the record evidence overwhelmingly supports the jury's verdict, leaving little practical room for the prosecutor's appeals to nationalism and emotion to operate.

Second, the district court took substantial steps to ensure that Khatallah was tried by an impartial jury and to mitigate any prejudicial effects of the prosecutor's inflammatory and misleading remarks. *See Moore*, 651 F.3d at 51.

Before the trial began, Judge Cooper required prospective jurors to complete a 28-page questionnaire to screen out jurors with relevant biases. *See* Amended Prospective Juror Questionnaire, *United States v. Khatallah*, 313 F. Supp. 3d 176 (No. 1:14-cr-00141), ECF No. 328. The questionnaire asked prospective jurors whether "non-citizens accused of crimes in U.S. courts should be afforded the same constitutional rights as U.S. citizens[,]" whether "'proof beyond a reasonable doubt' is too heavy a burden for the prosecution to have to meet in a terrorism trial[,]" and how difficult the prospective jurors would find it "to presume that a person who is charged with

[20] *See* Gov't Ex. 301-44 (video evidence) (time stamp 23:54–23:55); Trial Tr. 2632–38 (Oct. 18, 2017, PM) (al-Ubydi testimony); Trial Tr. 5062, 5080–82, 5084–85 (Nov. 7, 2017 AM) (Majrisi testimony); *see also Khatallah V*, 314 F. Supp. 3d at 191.

conspiracy to kill United States citizens is innocent[.]" *Id.* at 24–26. Potential jurors were also asked for their views on the Islamic faith and United States policy toward predominantly Muslim countries, as well as the potential jurors' history with people of Libyan or Arabic descent. *Id*. at 9, 12; *see also Khatallah IV*, 313 F. Supp. 3d at 194 (district court explaining its efforts "to ensure that the defendant received a trial as free as possible of nationalistic and cultural biases").

The district court also gave an instruction on the spot to mitigate the effect of the government's inflammatory rebuttal. Shortly after the government spoke, Judge Cooper reminded the jury that "the arguments of counsel and statements of counsel and questions by counsel are not evidence in the case." Trial Tr. 6158 (Nov. 16, 2017, PM). The court added that "it is up to you to … disregard arguments of counsel as evidence." *Id*. at 6159. He asked the jury "[i]s that clear?" and the jury indicated that it understood. *Id*. Several days later, just before the jurors began their deliberations, Judge Cooper again emphasized that "the [closing] arguments of the lawyers that you heard … are not evidence in the case, nor are the lawyers' characterization of the evidence[.]" Trial Tr. 6197 (Nov. 20, 2017, AM).

The district court had made this point before. At the beginning of trial, Judge Cooper told the jury that lawyers' arguments are not evidence. Trial Tr. 543 (Oct. 2, 2017, AM). The judge also instructed jurors that they should not allow the presence of Arabic translators and Arabic-speaking witnesses to "influence or bias you in any way[.]" *Id.* at 547. Then, as the trial drew to a close, he repeated that "[t]he statements of the lawyers are not evidence." Trial Tr. 5867 (Nov. 15, 2017, PM). The court's concluding jury instructions, which it provided before the parties made their closing arguments, directed jurors to reach their decisions free of prejudice. Judge

Cooper told jurors that they were to "determine the facts without prejudice, fear, sympathy or favoritism[,]" and he specifically warned them against being "improperly influenced by anyone's race, ethnic origin or gender." *Id*. at 5866; *accord* Jury Instructions at 2, *United States v. Khatallah*, 313 F. Supp. 3d 176 (No. 1:14-cr-00141), ECF No. 464 ("Jury Instructions").

Though not a panacea, the trial judge's instructions mitigated the prosecutor's improper appeals to passion and prejudice. *See Moore*, 651 F.3d at 54 (instruction that lawyers' arguments are not evidence is "usually a strong ameliorative consideration for prosecutorial misconduct during … closing argument") (citation omitted); *see also McGill*, 815 F.3d at 922; *Childress*, 58 F.3d at 716.

The district court also specifically countered the prosecutor's misleading statements about the evidentiary stipulations. Shortly after the prosecutor concluded her rebuttal, Judge Cooper told the jury that the stipulations in evidence "were agreements that were negotiated between the defense and the government very carefully[,]" and that the jury, "in assessing the meaning of the stipulation[s]," should "read them carefully … [and] take them as they are written. No more, no less." Trial Tr. 6159 (Nov. 16, 2017, PM). Later, just before the jurors began their deliberations, the court stated explicitly that the evidence included "the stipulations between the parties[,]" and reminded them to read the written instructions about the stipulations. Trial Tr. 6197 (Nov. 20, 2017, AM). Those instructions reminded jurors that, "[d]uring the trial, you were told that the parties had stipulated—that is, agreed—to certain facts. You should consider any stipulation of fact to be undisputed evidence." Jury Instructions at 2, ECF No. 464; *accord* Trial Tr. 5866 (Nov. 15, 2017, PM).

Khatallah contends that the judge's post-rebuttal instruction did not address the real harm from the prosecutor's dismissal of the stipulation—her claim that stipulations are inherently less trustworthy than live witnesses. But the judge made clear that the jury should take the stipulations as "undisputed evidence[,]" and he pointed out that the government had agreed to them after careful negotiation. Trial Tr. 5866 (Nov. 15, 2017, PM); *accord* Jury Instructions at 2, ECF No. 464; *see also* Trial Tr. 6159 (Nov. 16, 2017, PM). That drained the prosecutor's ill-considered attack of much of its force. Given that, the district court had good reason to be "confident that the[] repeated explanations of the nature and legal effect of the stipulations … mitigated any potential confusion caused by the government's comment in its rebuttal argument." *Khatallah IV*, 313 F. Supp. 3d at 192.

Third, we "owe[] deference to the district court's assessment of … a statement's prejudicial impact on the jury." *Moore*, 651 F.3d at 51 (citation omitted); *see also McLendon*, 378 F.3d at 1113. Judge Cooper was present for the entire trial and could see how the jury reacted to the prosecutor's remarks and to the court's instructions. His careful findings that "the jury in this case did not rise to the [government's] bait[,]" and that the "improper attempts to elicit sympathy for the victims were futile or perhaps even counter-productive[,]" *Khatallah IV*, 313 F. Supp. 3d at 194, 196, are borne out by the record.

For example, the jurors' deliberations spanned five days, *see* App. 972–74 (docket entries), and the jury sent several substantive questions to the judge as they weighed the facts, *see, e.g.*, Note from Jury at 1, *United States v. Khatallah*, 313 F. Supp. 3d 176 (No. 1:14-cr-00141), ECF No. 486 ("What is the definition of 'brandishing' in [C]ount 18?"); Note from Jury at 1, *United States v. Khatallah*, 313 F. Supp. 3d 176 (No. 1:14-cr-00141), ECF No. 483 ("Were we provided with all

available surveillance video at the [M]ission?"). The jury then acquitted Khatallah on all but four of the eighteen charges against him, and it made an express finding that Khatallah's actions did not result in death. As the district court observed, the jury's mixed verdict suggests that its decisionmaking was not inflamed or driven by the prosecutor's regrettable appeals to passion and prejudice. *See Khatallah IV*, 313 F. Supp. 3d at 196. Notably, the jury acquitted on the charges most directly implicated by the prosecutor's incendiary rhetoric—those accusing Khatallah of killing Americans. *See United States v. Small*, 74 F.3d 1276, 1284 (D.C. Cir. 1996) (finding a jury's acquittal on the charge most connected to a prosecutor's wrongful remarks to be "a strong indication that any prejudice did not impermissibly infect [the defendant's] conviction").

Of course, a split verdict is not unassailable evidence that a jury was unmoved by the government's wrongful remarks, especially when, as here, the government's improper statements addressed issues that were central to the case. Still, the jury's conduct in this case indicates that it "took [the court's] instruction[s] to heart and weighed the evidence, unswayed by whatever passions and prejudices the prosecutor['s] statements might have attempted to stoke." *McGill*, 815 F.3d at 922; *see also Small*, 74 F.3d at 1284 (finding prosecutor's wrongful comments not substantially prejudicial because, among other reasons, "nothing in the record suggests that the jury did not follow the instructions that arguments of counsel were not evidence") (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

As a result, after according due weight to the district court's on-the-ground judgment, the jury's nuanced verdict and lengthy deliberations, the overwhelming evidence of Khatallah's guilt, and the district court's repeated and targeted curative instructions, we agree with the district court that

Khatallah was not substantially prejudiced by the government's rebuttal. *See Moore*, 651 F.3d at 53 (Even where allegedly unlawful prosecutorial comments "appeared at times to address central issues in the case," the comments were not substantially prejudicial because "there was overwhelming evidence of appellants' guilt of the crimes implicated by the prosecutor's purported misconduct, and the district court [repeatedly] gave general limiting instructions on the arguments of counsel to the jury[.]").

Khatallah responds that the prosecutor's own conduct shows that she expected that her rhetoric would affect the jury. Khatallah also argues that the remarks were substantially prejudicial because they were made in rebuttal, when he had no opportunity to respond beyond objecting. Neither argument succeeds.

First, the fact that a prosecutor made inflammatory and improper statements, in violation of the district court's orders, does not by itself show that the government had a weak case. If clearly wrongful comments were self-evidently prejudicial, our separate tests for substantial prejudice and prosecutorial misconduct would collapse into one. Instead, in assessing substantial prejudice, this court focuses on the closeness of the case, the centrality of the issues affected, and the steps the trial court took to mitigate the errors. *See United States v. Fahnbulleh*, 752 F.3d 470, 480 (D.C. Cir. 2014). Whatever the prosecutor's subjective motivations or beliefs, on balance those factors show that Khatallah was not prejudiced by her improper statements.

That the prosecution's misconduct occurred during rebuttal does not change the outcome either. Though defendants are particularly vulnerable during the government's rebuttal because they cannot respond to wrongful remarks, *see*

United States v. Holmes, 413 F.3d 770, 776 (8th Cir. 2005), any prejudicial effect was tempered here by Khatallah's attorney correctly predicting in her own closing statement that the government would try to rile up the jury. In fact, she specifically warned jurors not to be taken in by the prosecutor's "very impassioned … pleas[.]" Trial Tr. 6134 (Nov. 16, 2017, PM); *see also id.* ("I don't get an opportunity to respond [to the government's rebuttal]. So I would ask you to think critically about what you hear and to make sure that what you're listening to is evidence as opposed to appeals to your sympathies."); *id*. at 6051 (Khatallah's counsel accusing the government of "play[ing] with your emotions[,]" including by "repeatedly referring to … our [M]ission, our consulate, our [A]mbassador[.]"). Those arguments anticipatorily threw a wet blanket on the government's inflammatory statements. *Cf. Gaither v. United States*, 413 F.2d 1061, 1080 (D.C. Cir. 1969) (reasoning that prejudicial effect of prosecutor's misstatement was "largely countered" by the defense counsel's contemporaneous objection and his summation "vigorously contest[ing] the … misstatement"). For that reason, as the district court found, the prosecutor's remarks may well have hurt rather than helped the government's case. *See Khatallah IV*, 313 F. Supp. 3d at 196.

In sum, though the prosecutor's statements in rebuttal were unlawful, we hold that the district court did not abuse its discretion in denying the motion for a mistrial.

VI

The government separately appeals the length of the sentence that the district court imposed. The government argues that the 22-year sentence was a substantively unreasonable variance from the suggested Guidelines sentence of life imprisonment plus ten years. Because the mandatory

minimum sentence for Khatallah's Section 924(c) offense alone accounted for ten of those 22 years, the district court imposed a sentence of just twelve years for all of the non-Section 924(c) charges combined—charges that independently supported a Guidelines sentence of life in prison.

The district court attributed part of the variance to avoiding any reliance on charged conduct for which the jury had acquitted Khatallah. The government does not dispute that the district court was permitted to discount acquitted conduct, and so we take that as given in this case. But in sentencing Khatallah to just twelve years for the two support-of-terrorism counts and the property destruction count, the district court did not—and could not on this record—sufficiently justify its additional variance so far below the sentencing range that would have been appropriate even without any consideration of acquitted conduct. It must be remembered that Khatallah was convicted of two counts of supporting terrorism and one count of attacking a United States Mission. Given the gravity of such an assault on an American diplomatic facility and the district court's own recognition of the vital need to deter such crimes, the district court's weighing of the Section 3553(a) factors could not have supported such a stark additional variance beyond discounting acquitted conduct. For that reason, we reverse and remand for resentencing.

A

The starting point of any federal sentencing proceeding is "correctly calculating the applicable Guidelines range[,]" which serves as the "initial benchmark" in determining an appropriate sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). The Guidelines, though, are not mandatory. *See United States v. Booker*, 543 U.S. 220, 258–59 (2005). So the district court retains the discretion to vary upward or downward

from the Guidelines range after considering statutorily prescribed sentencing factors. *See* 18 U.S.C. § 3553(a); *see also Booker*, 543 U.S. at 264–65.[21]

Under Section 3553(a), sentencing courts must weigh a number of considerations, including (i) "the nature and circumstances of the offense and the history and characteristics of the defendant;" (ii) "the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[,] (B) to afford adequate deterrence to criminal conduct[,] (C) to protect the public from further crimes of the defendant[,] and (D) to provide the defendant with needed [rehabilitation]"; and (iii) "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct[.]" 18 U.S.C. § 3553(a).[22]

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[21] A "variance" refers to a sentence outside of the recommended Guidelines range "based on the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." *United States v. Murray*, 897 F.3d 298, 308 n.8 (D.C. Cir. 2018). That is different from a "departure[,]" which refers to a sentence outside of the recommended Guidelines range based on factors specified in the Sentencing Guidelines themselves. *Id.*

[22] Section 3553(a) states:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—

A sentencing court "may not presume that the Guidelines range is reasonable." *Gall*, 552 U.S. at 50. Rather, the court "must make an individualized assessment based on the facts presented." *Id.* And if the court "decides that an outside-Guidelines sentence is warranted," it "must give serious consideration" to "the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 46, 50. After all, while not binding, the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Id.* at 46.

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines … issued by the Sentencing Commission …;
(5) any pertinent policy statement … issued by the Sentencing Commission …[;]
(6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Sentencing decisions can be reviewed for both procedural errors and their "substantive reasonableness." *Gall*, 552 U.S. at 51. In this case, the government does not dispute the procedural propriety of the district court's approach. It challenges only the substantive reasonableness of Khatallah's sentence.

We review the substantive reasonableness of a sentence for abuse of discretion. *See Gall*, 552 U.S. at 51. In doing so, we must "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* A reviewing court "must give due deference to the district court's decision that the [Section] 3553(a) factors … justify the extent of the variance." *Id.* At the same time, the court must ensure that the district court has explained its conclusion "that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* at 46.

B

1

The district court properly started its sentencing judgment by calculating Khatallah's Sentencing Guidelines range. Because Khatallah's Section 924(c) firearms conviction carried a statutorily mandated minimum sentence of ten years (and a maximum of life), the Guidelines determination focused on the remaining counts of conviction—that is, the convictions for conspiring to provide material support to terrorists, 18 U.S.C. § 2339A, providing such support, *id.*, and maliciously destroying or injuring property within the special maritime and territorial jurisdiction of the United States, 18 U.S.C. § 1363.

In computing the Guidelines range for those three offenses, the district court recognized that its analysis was not limited to

facts that the jury found, but could include any "relevant conduct." U.S.S.G. § 1B1.3.[23] While the jury, applying the beyond-a-reasonable-doubt standard, made a specific finding that Khatallah's actions did not result in death, the district court found by a preponderance of the evidence that Khatallah's relevant conduct had led to death. *See Khatallah V*, 314 F. Supp. at 190. The court reasoned that it was "more likely than not that [Khatallah] agreed with several other participants to launch an armed attack on the Mission, and the attack foreseeably resulted in deaths that furthered the ends of the conspiracy." *Id.* For that reason, the district court determined that Khatallah's base offense level for the two terrorism support counts, together with the property count, was 38, applying the Guideline for second-degree murder, U.S.S.G. § 2A1.2(a). The district court also found that Khatallah's initial criminal history category was Category I.

The court next applied sentencing enhancements for terrorism and Khatallah's leadership role. The Sentencing Guidelines call for a twelve-level increase in offense level and an automatic bump to criminal history Category VI if "the offense is a felony that involved, or was intended to promote, a

[23] "Relevant conduct" is broadly defined in the Sentencing Guidelines to include "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and in the case of "jointly undertaken criminal activity[,]" also "all acts and omissions of others that were—(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity[.]" U.S.S.G. § 1B1.3(a)(1). Relevant conduct also sweeps in "all harm that resulted from" or "was the object of" those acts and omissions. *Id.* § 1B1.3(a)(3).

federal crime of terrorism[,]" U.S.S.G. § 3A1.4(a), (b), defined as an offense falling within an enumerated list that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct[,]" 18 U.S.C. § 2332b(g)(5). The Guidelines' leadership enhancement separately calls for a four-level increase in the offense level if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]" U.S.S.G. § 3B1.1(a).

In applying the terrorism enhancement, the district court found that Khatallah's conduct was "more likely than not 'intended to promote' a crime calculated to retaliate against the U.S. government or to shape its policy." *Khatallah V*, 314 F. Supp. 3d at 199 (quoting U.S.S.G. § 3A1.4). The court pointed to both "the very choice of target for the attack[,]" *id.* at 198, and testimony showing that Khatallah had "expressed frustration about the United States spying on Libyans and Muslims in Benghazi[,]" and had "described the United States of America as the cause of all the world's problems[,]" *id.* at 199 (internal quotation marks and citations omitted).

As for the leadership enhancement, the district court found that Khatallah organized or led the attack on the Mission. The court relied on evidence showing that Khatallah procured weapons before the attack and instructed others during the attack, as well as testimony suggesting that he "sat atop the structure of" the militant group UBJ. *Khatallah V*, 314 F. Supp. 3d at 200. The court also pointed to evidence introduced at the sentencing stage from a Libyan student who told the government that he had taken a picture of several men, including Khatallah, in a truck outside the Mission on the night of the attack, after which Khatallah instructed other men to detain him.

Based on those findings, the district court concluded that the Guidelines sentence for the two support-of-terrorism convictions, along with the property-destruction conviction, was life imprisonment. The Section 924(c) count carried a statutory minimum of ten years to run consecutively to any other sentence, so Khatallah's advisory Guidelines sentence for all counts of conviction was life in prison plus ten years. The government agrees with the district court's calculation of that Sentencing Guidelines range.

2

In its sentencing memorandum, the government asked for the maximum sentence permissible under the law, which was life plus fifty years—life in prison being the maximum authorized under Section 924(c) and fifty years being the combined statutory maximum sentences for the other three offenses. Khatallah urged the court to impose a sentence between 51 and 63 months for the property damage and support of terrorism counts, and only the ten-year mandatory minimum on the Section 924(c) count.

At the sentencing hearing, the court affirmed that it had considered all of the Section 3553(a) factors and proceeded "to highlight" what it considered to be "a few of the most relevant factors[.]" Sentencing Tr. 52 (June 27, 2018). The "most important" factor for the district court was the "jury's acquittals[,]" without which it would have been "an easy sentencing[.]" *Id.* at 56–57. The court recounted that the jury had returned "[f]our convictions[,] all related to the destruction of a building at the Mission[,] and 14 acquittals and a specific finding that [Khatallah's] conduct did not result in anyone's death." *Id.* at 58. The court noted that it had considered acquitted conduct in calculating the Guidelines range. *See id.* at 52–53. But the court stressed that the "[twelve] jurors and

the three alternates … who sacrificed seven weeks" to hear the evidence and arguments and thoroughly deliberate each charge would likely be "shocked to learn that" Khatallah could be sentenced on the basis of conduct that they determined the government had not proven beyond a reasonable doubt. *Id.* at 59. In the district court's view, increasing Khatallah's sentence based on evidence the jury rejected would undermine "the fundamental purpose of the Sixth Amendment jury trial right, which is to ensure that before the government deprives someone of liberty it [has] persuade[d] a jury that it has proven each element of the crime charged beyond a reasonable doubt." *Id.*

Parsing the jury's verdict, the court concluded that it "could rely solely on facts that the jury did not necessarily reject to apply both the leadership and the terrorism enhancement … [which] would result in a life sentence." Sentencing Tr. 60 (June 27, 2018). "But stepping back a minute," the court stated that it was "clear enough … that the jury explicitly found that [Khatallah's] conduct did not result in death, that it rejected many of the facts presented that tied [Khatallah] to direct participation in the first wave of the attacks and to the attack on the Annex, and that what it convicted him of was essentially a property crime." *Id.* "[I]n light of those findings," the district court came, "somewhat reluctantly, to the conclusion that a life sentence overestimate[d] [Khatallah's] criminal conduct and culpability as it was determined by the jury." *Id.* at 60–61.

The court then varied downward from the Guidelines range of life imprisonment to impose a sentence of just twelve years for each of the three counts of property damage and support of terrorism, to run concurrently, plus the mandatory minimum of ten years on the Section 924(c) count, to run consecutively as required by law. That left Khatallah with a total sentence of 22 years.

C

This court has long left open the question of whether district courts are permitted to vary downward in order to avoid sentencing defendants on the basis of acquitted conduct. *See United States v. Settles*, 530 F.3d 920, 923–24 (D.C. Cir. 2008); *see also United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[E]ven in the absence of a change of course by the Supreme Court, … federal district judges have power in individual cases to disclaim reliance on acquitted … conduct."). We need not decide that question today because the government has conceded the point.

The problem is that the district court's sentence went far lower than discounting acquitted conduct alone could support when it imposed a total sentence of just twelve years for the terrorism-support and property-destruction convictions. Given the gap between the acquitted-conduct reduction and the twelve-year sentence imposed, the district court needed to provide reasons justifying the further steep reduction in Khatallah's sentence. Because the district court did not do so—and could not have done so on this record—we reverse the sentence and remand for a new sentencing.

1

According to the government, after setting aside acquitted conduct, Khatallah's Guidelines range would have been 30 years to life. *See* S.A. 104; Sentencing Tr. 24 (June 27, 2018); Gov't Opening Br. 83 & n.7. It arrived at that range by decreasing the base offense level from 38 to 24 to account for the jury's acquittals on all charges involving death, while also retaining the terrorism and leadership enhancements that the district court acknowledged could be applied without reference to acquitted conduct.

Khatallah disagrees, arguing that the Guidelines range without acquitted conduct would also exclude the terrorism and leadership enhancements. He reasons that, "while the district court concluded that it '*could* rely solely on facts that the jury did not *necessarily* reject to apply both the leadership and the terrorism enhancement,' … [it] may have concluded that the jury *actually* rejected the facts necessary for those enhancements." Khatallah Reply Br. 54 (emphases in original) (citation omitted).

But Khatallah was not "acquitted" for conduct unless the jury necessarily determined that the facts underlying a charge or enhancement were not proved beyond a reasonable doubt. On this record, we agree with the district court that "the jury did not necessarily reject" the facts underlying the terrorism and leadership enhancements. Sentencing Tr. 60 (June 27, 2018). That is because three of the crimes of which the jury *did* convict Khatallah—conspiring to provide material support to terrorists, providing such support, and destruction of government property—are themselves qualifying offenses in the definition of "[f]ederal crime of terrorism." 18 U.S.C. § 2332b(g)(5)(B)(i). More specifically, the conduct underlying those offenses could support a finding that Khatallah intended "to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." *Id.* § 2332b(g)(5)(A). So too the jury's acquittal of Khatallah for the deaths that occurred in no way precluded the jury from simultaneously concluding that Khatallah was "an organizer or leader" of some aspect of the attack. U.S.S.G. § 3B1.1(a). After all, much of the evidence that supported the jury's convictions pointed to Khatallah's role as an organizer of at least part of the attack on the Mission.

In short, the jury did not *acquit* Khatallah of the conduct that would support application of the terrorism and leadership

enhancements. Instead, its verdicts are consistent with a finding that Khatallah undertook conduct that would support those enhancements. As such, the district court did not need to exclude those enhancements to calculate what the Guidelines range would be in the absence of acquitted conduct. Because Khatallah does not otherwise dispute the government's calculation, we take as given that the Guidelines range would have been 30 years to life even without relying on acquitted conduct.

Khatallah asserts that considering the Guidelines range that would have applied without acquitted conduct places "undue emphasis" on the Guidelines. Khatallah Reply Br. 55. That is incorrect. While the Guidelines are no longer mandatory, they "remain the starting point and the initial benchmark for sentencing, … [and] thus continue to guide district courts in exercising their discretion by serving as the framework for sentencing[.]" *Beckles v. United States*, 137 S. Ct. 886, 894 (2017) (internal quotation marks and citation omitted). As a result, the sentence that the Guidelines would deem appropriate after subtracting out the conduct for which Khatallah was acquitted remains a relevant consideration in assessing whether the district court's variance was justified.

2

At bottom, the district court's rationale for varying downward to just a twelve-year sentence placed more weight on the acquitted-conduct rationale than it could bear.

We note at the outset that neither this court nor the government takes issue with the procedural soundness of the district court's sentencing statement. The district court properly began with the Guidelines sentence, and then carefully and comprehensively considered the key sentencing factors set out in Section 3553(a), including the nature and

seriousness of Khatallah's conduct, Khatallah's particular characteristics and history, and the need for general and specific deterrence.

The problem, instead, is that after analyzing the Section 3553(a) factors, the district court stated that "this would be an easy sentencing but for the final factor, … the jury's acquittals[.]" Sentencing Tr. 56–57 (June 27, 2018). This statement strongly implies that the other Section 3553(a) factors were a wash, and but for the jury's acquittals, the district court would have sentenced Khatallah consistent with the Guidelines' recommendation of a life sentence. To that same point, immediately after analyzing the effect of the jury's acquittals, the district court explained that, "in light of those findings, I have come, somewhat reluctantly, to the conclusion that a life sentence overestimates the defendant's criminal conduct and culpability as it was determined by the jury." *Id.* at 60–61. That leaves unexplained the basis on which the court varied downward from a 30-year sentence—the bottom of the Guidelines range once acquitted conduct is set aside—to just twelve years for the three support-of-terrorism and property counts. An unexplained variance is a substantively unreasonable variance.

But even if the district court also placed weight on Section 3553(a) factors besides the acquittals in choosing a twelve-year sentence, those other factors are inadequate to support such a steep additional variance. Every factor discussed by the district court other than acquitted conduct either supported imposition of a sentence within the Guidelines range or was a mixed bag.

First, the district court's treatment of the nature and the seriousness of the defendant's conduct cannot support a sentence so much more lenient than the applicable Guidelines range even without considering acquitted conduct. The court

remarked that it "did not believe that [Khatallah was] an innocent bystander on the night of September 11, 2012[,]" or that he "learned for the first time that there was a U.S. facility in Benghazi that night." Sentencing Tr. 53 (June 27, 2018). The court, in fact, found "at the very least" that Khatallah (i) "drove some of [his] men to the Mission" the night of the attack, (ii) was "in telephone contact with several of them before, during, and after" the attack, (iii) "appeared on camera, armed, entering a Mission building while it was being ransacked," and (iv) "drove several of [his men] away to the camp of another extremist group after the attack." *Id.* at 54. On that basis, the district court concluded that Khatallah's conduct was "gravely serious" because, "even if [he] did [not] pour the gasoline or light the match, … the evidence showed that [he was] aware of the attack, and that once those gates were breached the likelihood of someone dying was extremely high." *Id.* at 54–55. So to characterize a terrorist attack on a diplomatic outpost as "essentially a property crime" warranting a significantly below-Guidelines sentence both was inconsistent with the district court's own findings as to the seriousness of Khatallah's actions and failed to account for the two support-of-terrorism convictions. *Id.* at 60. Given the gravity of Khatallah's terrorism-support and Mission-destruction convictions, the court's twelve-year sentence for those counts was "shockingly low and unsupportable as a matter of law" on this record. *United States v. Mumuni*, 946 F.3d 97, 108 (2d Cir. 2019).

Second, the district court's discussion of Khatallah's individual characteristics and history offered scant support for an additional 60% downward variance from the Guidelines range. On one hand, the judge stated that he "appreciate[d] the attention and the respect that [Khatallah had] given to these proceedings," and opined that, based on the video testimonials submitted to the court, Khatallah "seem[ed] to be a hard-

working and resourceful guy" with "a supportive family." Sentencing Tr. 55–56 (June 27, 2018). Yet, even assuming that paying attention and being respectful in court are relevant Section 3553(a) factors, the district court also told Khatallah that "you strike me as a creature of [a violent] culture; perhaps not [a] stone-cold premediated terrorist …, but someone who might readily resort to or order violence in furtherance of whatever ideological or political goals you might have." *Id.* at 55; *see id.* (district court finding that Khatallah "spent [his] entire adult life in a culture of violence, oppression by the Gaddafi regime, imprisonment in brutal conditions, armed conflict during the revolution and … civil war after the revolution"). Those crosscutting statements regarding Khatallah's characteristics and history could not justify a lower sentence, let alone the extensive additional variance taken here.

Third, the district court was similarly equivocal in its analysis of the need for general and specific deterrence. The court began by declaring that "anyone intent on doing … harm" to United States persons stationed abroad "must know that there will be consequences[,]" and "that they will be apprehended, prosecuted, and given *stiff* sentences, if they are convicted." Sentencing Tr. 56 (June 27, 2018) (emphasis added). At the same time, the court stated that it had "no reason to doubt" that offenders like Khatallah "are less and less likely to reoffend as they get older[.]" *Id.* And it "doubt[ed]" that Khatallah "would have the means or the opportunity to harm America again[.]" *Id.* But it added that "certainly there's no guarantee of that." *Id.*

Those findings cannot support the variance that occurred here—or any downward variance at all. Quite the opposite, the district court's own analysis of the deterrence interests at stake acknowledged that they support a stiffer, not a lower, sentence. As the court noted, those contemplating attacks on the United

States, its official properties, and (most importantly) its personnel must know they will face severe consequences if apprehended and convicted. Their leaders even more so. The district court's variance down to a twelve-year sentence did not match its own deterrence concerns. Nor could such a variance be warranted on this record given the gravity of Khatallah's convictions.

At bottom, on this record, the district court's discussion of the Section 3553(a) factors was insufficient to justify a sentence substantially below the bottom of the Guidelines range that would have applied even in the absence of acquitted conduct. As the reviewing court, it is our responsibility to ensure that "an unusually lenient" sentence is supported "with sufficient justifications." *Gall*, 552 U.S. at 46. And it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.* at 50. A decrease from a 30-years-to-life Guidelines range to just twelve years is unquestionably a "major departure." *Id.* Even assuming that the district court's consideration of the jury's acquittals justified a departure down to thirty years, a further variance to less than half of that is itself significant and requires independent justification. Yet the district court did not offer a discussion of sentencing factors besides the jury's acquittals that was "sufficiently compelling to support the degree of the variance." *Id.* Nor could it have, given the facts of this case and the gravity of Khatallah's terrorism offenses and leadership role in a violent attack on the Mission.

D

In sum, while the district court's discretion to vary downward to discount acquitted conduct is undisputed in this case, the district court abused its discretion by varying downward significantly further and imposing a sentence both

lower than the minimum that would be appropriate in light of the jury's acquittals and far lower than could be justified on this record by reference to the Section 3553(a) factors. For that reason, on the government's cross appeal, we reverse and remand for resentencing.

VII

The judgment of the district court is affirmed in part and reversed in part. The case is remanded for resentencing.

So ordered.

MILLETT, *Circuit Judge*, concurring: While I join the court's opinion in full, I write separately with respect to the district court's sentencing decision to reconfirm what then-Judge Kavanaugh and others have said: District courts are permitted, in the exercise of their sentencing discretion, to do what the district court did here—to vary downward to ensure that a sentence is not predicated on acquitted conduct. *See United States v. Bell*, 808 F.3d 926, 927–928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). I have written separately before to explain why sentencing a defendant to a longer period of incarceration based on conduct of which he was *acquitted* by a jury is a "grave constitutional wrong." *United States v. Brown*, 892 F.3d 385, 409 (D.C. Cir. 2018) (Millett, J., concurring); *see also Bell*, 808 F.3d at 928–932 (Millett, J., concurring in the denial of rehearing en banc); *United States v. Bagcho*, 923 F.3d 1131, 1141 (D.C. Cir. 2019) (Millett, J., concurring). I continue to adhere to that view.

But the question before us today is much more modest: May district courts choose not to consider acquitted conduct if they determine that doing so would be inconsistent with their responsibility to impose a just and reasonable sentence under 18 U.S.C. § 3553(a)? I agree wholeheartedly with Judge Kavanaugh that district courts have that authority.

To be sure, for now, Supreme Court and circuit precedent "do[] not *prevent* the sentencing court from considering conduct underlying [an] acquitted charge[.]" *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) (emphasis added); *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) (Kavanaugh, J.). But nothing in binding precedent has ever *required* district courts to factor in such conduct when determining an appropriate sentence. *See Settles*, 530 F.3d at 923–924; *cf. United States v. White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc) ("To say that district court judges may enhance a defendant's sentence based on acquitted conduct * * * is not to say that they *must* do so.").

To the contrary, we have long left open the possibility that district courts may "discount acquitted conduct in particular cases—that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate." *Settles*, 530 F.3d at 924; *see Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[F]ederal district judges have power in individual cases to disclaim reliance on acquitted * * * conduct."). And the government, for its part, agrees that "the district court was permitted to vary downward to avoid sentencing Khatallah based on acquitted conduct[.]" Gov't Reply Br. 4; *see also* Gov't Reply Br. 20; Oral Arg. Tr. 57:8–10 ("[Y]ou don't dispute the District Court's authority to vary down to avoid taking account of acquitted conduct." "That's correct.").

So there is no barrier to a district court varying downward in a manner that discounts acquitted conduct if it determines that doing so appropriately "reflect[s] the seriousness" or "nature and circumstances of the offense[,]" "provide[s] just punishment for the offense[,]" "promote[s] respect for the law," or otherwise gives effect to the Section 3553(a) factors. 18 U.S.C. § 3553(a)(1), (a)(2)(A).

Here, the district court took heed of Judge Kavanaugh's suggestion in *Bell* and varied downward "to avoid reliance on acquitted conduct" in sentencing Khatallah. Sentencing Tr. 59:18–60:3 (June 27, 2018). And the court did so in a thoughtful and carefully explained manner. *See id.* at 60:4–61:1. Recall that the base offense level used in the Sentencing Guidelines calculations was that for second-degree murder because, in calculating the Guidelines range, the district court found by a preponderance of the evidence that "death resulted, or the offense was intended to cause death or serious bodily injury[.]" U.S.S.G. § 2K1.4(c)(1). The jury, however,

acquitted Khatallah of all charges involving death and specifically found Khatallah not guilty of causing death through his material support of terrorism. To "respect * * * the jury's overall verdict and underlying findings[,]" Sentencing Tr. 62:6–7 (June 27, 2018), the district court varied downward to avoid sentencing Khatallah as if the jury had found that his conduct resulted in death. The district court explained that, in its view, "significantly increas[ing] [Khatallah's] sentence based on evidence that [the jury] rejected" would undermine "the importance and the sanctity of jury service, and * * * the fundamental purpose of the Sixth Amendment jury trial right[.]" *Id.* at 59:8–14. After carefully analyzing the jury's split verdict and giving due weight to its explicit finding that Khatallah was not guilty of conduct resulting in death, the district court came "to the conclusion that a life sentence [would] overestimate[] [Khatallah's] criminal conduct and culpability as it was determined by the jury." *Id.* at 60:23–61:1.

Of course, I am of the view that district courts not only *can* vary downward to sidestep reliance on acquitted conduct, but that they *should* do so based on bedrock legal principles. "[A]llowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee[,]" and when a deprivation of liberty is made longer based on facts the jury determined were not proved beyond a reasonable doubt, then that great "liberty-protecting bulwark becomes little more than a speed bump at sentencing." *Bell*, 808 F.3d at 929 (Millett, J., concurring in the denial of rehearing en banc).

I am not alone in that view. "Many judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system." *Settles*, 530 F.3d at 924.

Judge Kavanaugh likewise explained that "[a]llowing judges to rely on acquitted * * * conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc); *see id.* at 927 (remarking that the practice by which a defendant can be acquitted of a crime by a jury of his peers, only to then be sentenced as if he had committed that very crime, is a stubborn "oddit[y] of sentencing law"); *see also Watts*, 519 U.S. at 164 (Stevens, J., dissenting) (describing sentencing based on acquitted conduct as a "perverse result"); *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring specially) ("[T]he use of acquitted conduct * * * in computing an offender's sentence leaves such a jagged scar on our constitutional complexion that periodically its presence must be highlighted and reevaluated in the hopes that someone will eventually pay attention[.]"); *United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017) ("[C]alculating a person's sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings."); *United States v. Alejandro-Montañez*, 778 F.3d 352, 362–363 (1st Cir. 2015) (Torruella, J., concurring) ("[I]t is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was * * * acquitted of."); *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Permitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing of the jury—it entirely trivializes its principal fact-finding function."); *White*, 551 F.3d at 392 (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006)

(Barkett, J., specially concurring) (decrying the "pernicious effect of sentencing on the basis of acquitted conduct"); *cf. Jones v. United States*, 574 U.S. 948, 949 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari) ("[A]ny fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("We admit [our premise] * * * assumes that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation.").

While it falls upon the Supreme Court to hold that sentencing defendants based on conduct for which they have been acquitted contravenes the Constitution and to firmly put an end to the practice, it is well within our bailiwick to reaffirm that district courts may vary downward to avoid reliance on acquitted conduct in individual cases. Granted, trial judges may still be obligated to factor in acquitted conduct when calculating the Guidelines range to the extent it constitutes "relevant conduct[,]" U.S.S.G. § 1B1.3. *See Bell*, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc). But since those Guidelines are only advisory, there should be no question that "district judges may then vary the sentence downward to avoid basing any part of the ultimate sentence on acquitted * * * conduct[,]" *id.*, and so to ensure a sentence is fair and appropriate as required by 18 U.S.C. § 3553(a).

In sum, the portion of the district court's downward variance designed to avoid reliance on acquitted conduct was a sound and commendable exercise of discretion. And it set an example that I hope other district court judges will follow to retain and "promote respect for the law," 18 U.S.C. § 3553(a)(2)(A), and to maintain the role of the jury trial as one of the greatest "guard[s] against a spirit of oppression and tyranny on the part of rulers" ever devised, *United States v. Gaudin*, 515 U.S. 506, 510–511 (1995) (citation omitted).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3041 **September Term, 2022**

1:14-cr-00141-CRC-1

Filed On: December 20, 2022

United States of America,

Appellee

v.

Ahmed Salimfaraj Abukhatallah, also known as Ahmed Mukatallah, also known as Ahmed Abu Khatallah, also known as Ahmed Bukatallah, also known as Sheik,

Appellant

Consolidated with 18-3054

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, and Pan*, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judge Pan did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. **AHMED SALIM FARAJ ABU KHATALLAH,** also known as "Ahmed Abu Khatallah," also known as "Ahmed Mukatallah" also known as "Ahmed Bukatallah" also known as "Sheik," Defendant.	Case No. 14-cr-00141 (CRC)

MEMORANDUM OPINION

On September 11 and 12, 2012, a U.S. diplomatic compound in Benghazi, Libya was attacked, resulting in the deaths of four Americans, including United States Ambassador to Libya J. Christopher Stevens. In an eighteen-count superseding indictment, a grand jury charged Defendant Ahmed Salim Faraj Abu Khatallah with orchestrating and participating in the attack. Abu Khatallah has moved to dismiss all but one of the counts. He alleges that most of the statutes he is charged with violating cannot be applied to conduct undertaken outside of the United States, that one of them is unconstitutionally vague and overbroad, and that the two facilities destroyed in the attack do not meet the applicable statutory definitions of "federal facilities" or "U.S. property." For the reasons discussed below, the Court will deny the motions as to all but two of the counts challenged. The Court will, by separate order, request supplemental briefing with respect to those counts.

I. Factual and Procedural Background

During the civil war that erupted in Libya in early 2011, the rebel group seeking to overthrow Muammar Gaddafi, the Transitional National Council ("TNC"), established its base of

operations in the city of Benghazi. On February 25, 2011, the U.S. Department of State evacuated American personnel from Libya and suspended its operations at the U.S. Embassy in Tripoli. Less than two months later, the State Department reestablished its presence in the country through the arrival in Benghazi of U.S. Special Envoy J. Christopher Stevens. According to the State Department's official report on the Benghazi attack, on June 21, 2011, Stevens moved into what would become a U.S. Special Mission compound. See Accountability Review Bd., U.S. Dep't of State, Benghazi Attack Report 14 (Unclassified) (2012), http://www.state.gov/documents/organization/202446.pdf ("State Department Report"). The compound was eventually comprised of "a diplomatic outpost, known as the U.S. Special Mission," where a contingent of U.S. State Department personnel were based, and a second "facility . . . , known as the Annex," where a contingent of other U.S. personnel were based. Indictment ¶¶ 5–6.

The United States officially recognized the TNC as Libya's governing authority the following month, on July 15, 2011, and Gaddafi was ousted from power only a few weeks later. The U.S. Embassy in Tripoli reopened with a temporary-duty staff in September 2011. Stevens continued as Special Envoy to the TNC in Benghazi until he left the country on November 17, 2011. The Special Envoy position was not filled after Stevens's departure, but he returned to Libya as Ambassador in May 2012, operating out of the U.S. Embassy in Tripoli. According to the State Department Report, "2012 saw an overall deterioration of the security environment in Benghazi, as highlighted by a series of security incidents involving the Special Mission, international organizations, non-governmental organizations . . . , and third-country nationals and diplomats." Id. at 15; see also id. at 15–16.

Ambassador Stevens traveled to Benghazi to visit the Mission compound on September 10, 2012. Stationed at the compound and present during the Ambassador's visit were Information Management Officer Sean Patrick Smith; Assistant Regional Security Officer Scott Wickland; Assistant Regional Officer David Ubben; Security Officers Tyrone Snowden Woods and Glen Anthony Doherty; and a Security Officer the Indictment refers to only as "Mark G." See Indictment ¶ 16; State Dep't Report 18.

The Mission and Annex were attacked on September 11 and 12, 2012. In two phases beginning on the evening of September 11 and lasting into the morning of September 12, armed intruders deployed small-arms and machine-gun fire, rocket-propelled grenades, and mortars at both facilities. See State Dep't Report 4. Buildings on the compound burned, and the fire spread to the Mission building housing Ambassador Stevens during his stay. Ambassador Stevens, Smith, Woods, and Doherty were killed in the attacks.

On July 15, 2013, a criminal complaint and arrest warrant issued for Abu Khatallah, whom the Department of Justice suspected of conspiring to commit and participating in the attack. Just under one year later, on June 16, 2014, a team of U.S. special military forces captured Abu Khatallah south of Benghazi. He was then transported to the United States aboard a Navy ship, the USS New York. According to news sources, Libya condemned the capture, calling for Abu Khatallah's return to Libya for trial. See Ulf Laessing & Ahmed Elumami, Libya Condemns U.S. Arrest of Benghazi Suspect, Demands His Return, Reuters (June 18, 2014, 10:11 AM), http://www.reuters.com/article/2014/06/18/us-libya-security-idUSKBN0ET1KQ20140618#TGChTGE0utFtJmxL.97.

A grand jury sitting in Washington, D.C. issued an initial indictment against Abu Khatallah within two weeks, and a superseding indictment approximately four months later, on

October 14, 2014. The Superseding Indictment ("Indictment") identifies the Defendant as Ahmed Salim Faraj Abu Khatallah, also known as Ahmed Abu Khatallah, Ahmed Mukatallah, Ahmed Bukatallah, and "Sheik," and describes him as having been "the commander of Ubaydah Bin Jarrah . . . , an Islamist extremist militia in Benghazi, which had the goal of establishing Sharia law in Libya," until that group merged in 2011 with Ansar al-Sharia, "another Islamist extremist group in Libya with the same goal," and Abu Khatallah became the new group's "Benghazi-based leader." Indictment ¶ 9. The Indictment notes that Abu Khatallah's first entry into the United States was in the District of Columbia. Id.

The eighteen-count Indictment charges Abu Khatallah with providing and conspiring to provide material support to terrorists, resulting in death, under 18 U.S.C. § 2339A (Counts One and Two); murder of an internationally protected person under 18 U.S.C. §§ 1116 and 1111 (Count Three); three counts of murder of an officer and employee of the United States under 18 U.S.C. §§ 1114 and 1111 (Counts Four through Six); three counts of attempted murder of an officer and employee of the United States under 18 U.S.C. §§ 1114 and 1113 (Counts Seven through Nine); four counts of killing a person in the course of an attack on a federal facility involving use of a firearm and a dangerous weapon under 18 U.S.C. §§ 930(c) and 1111 (Counts Ten through Thirteen); two counts of maliciously damaging and destroying U.S. property by means of fire and an explosive, causing death, under 18 U.S.C. § 844(f)(1) and (3) (Counts Fourteen and Fifteen); two counts of maliciously destroying and injuring dwellings and property and placing lives in jeopardy within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. §§ 1363 and 7 (Counts Sixteen and Seventeen); and using, carrying, brandishing, and discharging a firearm during a crime of violence under 18 U.S.C. § 924(c) (Count Eighteen).

Abu Khatallah has filed a series of motions to dismiss all but Count Three of the Indictment. He challenges Counts One and Two on the ground that 18 U.S.C. § 2339A is unconstitutionally vague and overbroad; Counts Four through Eighteen in whole, and One and Two in part, on the ground that the statutes under which he is charged in those counts do not apply extraterritorially; and Counts Ten through Fifteen on the ground that the Mission and Annex were not "federal facilities" under 18 U.S.C. § 930(g)(1) or "U.S. property" under 18 U.S.C. § 844(f). The Court held a hearing on these motions on October 16, 2015, with Abu Khatallah present.

The Court will deny Abu Khatallah's motions as to Counts One and Two, Four through Fifteen, and Eighteen. The Court will reserve ruling on his motion as to Counts Sixteen and Seventeen, and will request supplemental briefing from the parties on certain questions pertinent to those counts by separate order.

II. Legal Standard

A criminal defendant "may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Pretrial motions may challenge "a defect in the indictment or information," as long as "the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B). "'Because a court's use[] [of] its supervisory power to dismiss an indictment . . . directly encroaches upon the fundamental role of the grand jury,' dismissal is granted only in unusual circumstances." United States v. Ballestas, 795 F.3d 138, 148 (D.C. Cir. 2015) (quoting Whitehouse v. U.S. Dist. Court, 53 F.3d 1349, 1360 (1st Cir. 1995)). An indictment "only need contain 'a plain, concise, and definite written statement of the essential facts constituting the offense charged,'" id. at 149, in order "to inform the defendant of

the nature of the accusation against him," id. at 148–49 (quoting United States v. Hitt, 249 F.3d 1010, 1016 (D.C. Cir. 2001)) (internal quotation marks omitted). "When considering a motion to dismiss an indictment, a court assumes the truth of those factual allegations." Id. at 149.

III. Analysis

A. Motion To Dismiss Counts One, Two, and Four Through Eighteen for Lack of Extraterritoriality

Abu Khatallah has moved to dismiss all but Count Three of the eighteen-count Indictment on the ground that most of the statutes he is charged with violating do not apply to his actions in Libya as a matter of statutory construction. Recent Supreme Court decisions have indeed sharply limited the extraterritorial application of federal statutes. Unless Congress clearly intended as much, the Court has said, federal statutes do not apply abroad. But these restrictive expressions have all appeared in civil cases. An almost century-old case, United States v. Bowman, 260 U.S. 94 (1922)—which the Supreme Court has never repudiated—appears to leave significantly more room for the extraterritorial application of criminal statutes, even though recent decisions explicitly say that the same presumption against extraterritoriality applies to *all* cases. Abu Khatallah's arguments about the charged offenses' geographic reach require this Court to reconcile and synthesize these increasingly divergent strands of case law. The D.C. Circuit has attempted just such a harmonization, and this Court must follow its mode of analysis.

1. Generally Applicable Principles of Extraterritoriality

The Supreme Court has repeatedly—and quite recently—insisted that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (quoting Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2878 (2010)). Phrased slightly differently, "there must be present the affirmative intention of the Congress clearly expressed." Id. (quoting Benz v. Compania Naviera

Hidalgo, 353 U.S. 138, 147 (1957)). "[C]ongressional silence" on extraterritoriality therefore "means no extraterritorial application," Morrison, 130 S. Ct. at 2881, as does a merely "plausible" showing of intended extraterritorial application, EEOC v. Arabian American Oil Co., 499 U.S. 244, 250 (1991) ("Aramco"). Phrases like "clear indication" and "convincing indication," Small v. United States, 544 U.S. 385, 391 (2005), suggest that the required quantum of proof is significantly more than a preponderance. And the burden of making the necessary affirmative showing is on the party seeking to apply a statute extraterritorially. Aramco, 499 U.S. at 250. Importantly, the Supreme Court has instructed courts to "apply the presumption *in all cases*" in which an extraterritorial offense is alleged. Morrison, 130 S. Ct. at 2881 (emphasis added).

The presumption against extraterritoriality is a "canon of construction . . . rather than a limit upon Congress's power to legislate." Morrison, 130 S. Ct. at 2877. The canon rests on a defeasible assumption about congressional intent—that "Congress ordinarily legislates with respect to domestic, not foreign matters." Id. This assumption may or may not be factually correct in individual cases. But the presumption is meant to relieve judges from having to "guess anew in each case" by "divining what Congress would have wanted if it had thought of the situation before the court." Id. at 2881. Congress is on notice that courts apply the presumption across the board, which ensures a "stable background against which Congress can legislate with predictable effects." Id. Regardless of what Congress actually intends, the predictable effect of not clearly authorizing extraterritorial application will be no extraterritorial application. Of course, Congress remains free to modify statutes that courts have construed not to apply abroad (as it has done before). Id. at 2883 n.8.

Aside from administrability and predictability concerns, the presumption against extraterritoriality is also rooted in ideas of institutional competence and the separation of powers. Its robust application "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." Kiobel, 133 S. Ct. at 1664 (quoting Aramco, 499 U.S. at 248). Displacement of the presumption means that aliens can be sued (or prosecuted) and tried in American courts for acts committed in their home countries, even if their acts were perfectly lawful there. The political branches alone are equipped to make "such an important policy decision where the possibilities of international discord are so evident." Id. (quoting Benz, 353 U.S. at 147). The presumption against extraterritoriality therefore precludes judges from inferentially triggering such "significant foreign policy implications" in the absence of deliberate congressional choice. Id. at 1665. But whether this concern permeates any individual case is irrelevant: The "presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law." Morrison, 130 S. Ct. at 2877–78.

So strong is the presumption, the Supreme Court has said, that geographically unbounded terms like "every" and "any" fail to rebut it. Kiobel, 133 S. Ct. at 1665; Small, 544 U.S. at 388; Foley Bros. v. Filardo, 336 U.S. 281, 287 (1949). Even statutory definitions of commerce that specifically refer to "foreign commerce" do not "definitely disclose an intention to give . . . extraterritorial effect." Aramco, 499 U.S. at 251. Perhaps most strikingly, Kiobel very recently held that the Alien Tort Statute ("ATS") "does not imply extraterritorial reach" even though it permits actions by "alien[s]" for "violation[s] of the law of nations." Kiobel, 133 S. Ct. at 1663, 1665. That was true even though one such violation (piracy) "typically occurs . . . beyond the territorial jurisdiction of the United States." Id. at 1667. The two other paradigmatic law-of-nations violations contemplated by the ATS—"violation of safe conducts" and "infringement of

the rights of ambassadors," id. at 1666—could easily occur abroad and are creatures of international relations. Yet they, too, fail to displace the presumption against extraterritoriality. Id.

The Supreme Court has slightly diluted the presumption's potency by conceding that it is "not . . . a 'clear statement rule.'" Morrison, 130 S. Ct. at 2883. A statute need not say "this law applies abroad"; "[a]ssuredly context can be consulted as well." Id.; see also Small, 544 U.S. at 391 (recognizing "statutory language, context, history, or purpose" as proper tools for rebutting the presumption); Foley, 336 U.S. at 286 (concluding that a statute's legislative history revealed a "concern with domestic labor conditions"). Any indication of congressional intent is very likely material, regardless of its source. Yet context, purpose, legislative history, and statutory structure are unavailing unless they amount to a "clear indication" of intended extraterritoriality. Kiobel, 133 S. Ct. at 1664. According to the Supreme Court, this sometimes-multifaceted inquiry is neither "complex" nor "unpredictable in application." Morrison, 130 S. Ct. at 2878. And the D.C. Circuit very recently explained that contextual evidence tending to displace the presumption must be traceable to the statutory text. See Validus Reinsurance, Ltd. v. United States, 786 F.3d 1039, 1047 (D.C. Cir. 2015) ("[C]ourts must find clear and independent textual support—rather than relying on mere inference—to justify the nature and extent of each statutory application abroad.") (quoting Keller Found./Case Found. v. Tracy, 696 F.3d 835, 845 (9th Cir. 2012)).

2. Harmonizing the Apparent Civil/Criminal Divide

As detailed above, the modern Supreme Court has instructed lower courts to apply the presumption "in all cases." Morrison, 130 S. Ct. at 2881. Such insistence on across-the-board uniformity seems to foreclose doctrinal tests that would allow the presumption to be more easily

rebutted in certain kinds of cases. Nonetheless, a nearly century-old chestnut of extraterritoriality doctrine—United States v. Bowman, 260 U.S. 94 (1922)—sits uneasily with Aramco, Morrison, and Kiobel. In practice, Bowman requires a lesser evidentiary showing of congressional intent to permit the extraterritorial application of certain kinds of federal criminal statutes. Its application may well require judges to "guess anew in each case," Morrison, 130 S. Ct. at 2881, often under a shroud of empirical uncertainty. Yet the Supreme Court has not yet attempted to reconcile the stability-serving values undergirding recent civil decisions like Morrison and Kiobel with the reality that Bowman is "not easy to administer." Id. at 2879. Because Bowman remains binding on the lower courts, this Court must assume that satisfying Bowman is one way of "clear[ly] indicati[ng]" a federal statute's extraterritorial reach, id. at 2878—even if Bowman itself requires no "affirmative" evidence of a deliberate congressional decision to permit overseas applications. Kiobel, 133 S. Ct. at 1664.

a. The Facts and Holding of *United States v. Bowman*

The defendants in Bowman had allegedly conspired to defraud the Emergency Fleet Corporation—all of whose stock was owned by the United States—on board a ship approaching Brazil. Bowman, 260 U.S. at 95. The crux of the indictment was that the defendants had made (and conspired to make) a "false or fraudulent claim" against a "corporation in which the United States of America is a stockholder." Id. at 96, 100 n.1. Neither party disputed that all relevant actions had occurred outside American soil. If Bowman had never been decided, faithful application of recent Supreme Court precedents might well dictate a finding of no extraterritoriality on these facts alone. For the mere statutory reference to "*any* corporation in which the United States of America is a stockholder," id. at 100 n.6, would not rebut the presumption any more than statutory language encompassing "every contract," "any court," "any

person," or "any civil action." Foley Bros., 336 U.S. at 287; Small, 544 U.S. at 387; Morrison, 130 S. Ct. at 2881; Kiobel, 133 S. Ct. at 1665.

The Bowman Court took a starkly different approach, however. It began its analysis by observing that "the necessary *locus* [of proscribed activity], when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime." Id. at 97. Bowman postulated two broad types of crimes for these purposes. First were "[c]rimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds." Id. at 98. These offenses principally "affect the peace and good order of the community," and so must seemingly be committed within the political community that they disturb. Id. If Congress intends to punish such crimes extraterritorially, "it is natural for [it] to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." Id.

But a different rule of construction applies to "criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." Id. For these offenses, "to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." Id. Congress "has not thought it necessary" to explicitly enable their overseas application, instead "allow[ing] it to be inferred from the nature of the offense." Id.

The Bowman Court held that the charged crime fell comfortably within this second category. The statute had been amended in 1918 to encompass false claims harmful to corporations in which the United States owned stock. Id. at 101. The Court found that this

provision "was evidently intended to protect the Emergency Fleet Corporation," which was "expected to engage in, and did engage in, a most extensive ocean transportation business" that serviced "every great port of the world open during [World War I]." Id. at 101–02. Two key factors informed the Court's decision: that Congress had sought to stifle "frauds upon the Government," and—because of background assumptions about the Emergency Fleet Corporation's worldwide business—that those frauds were likely to occur "on the high seas and in foreign ports and beyond the land jurisdiction of the United States." Id.

Bowman also supplemented its holding (if only in dictum) with a list of six other federal crimes whose nature commanded an inference of extraterritorial application. Because Bowman has been entirely absent from the Supreme Court's modern extraterritoriality decisions, these six crimes are important data points for understanding Bowman's underlying rationale. The Court noted that all six appeared in a chapter of the U.S. Code entitled "Offenses against the operations of the Government," id. at 98–99; each crime had evidently been designed to forestall some tangible or intangible harm to the U.S. Government. In asserting that each of the following offenses would apply extraterritoriality, the Court also commented on the statutes' anticipated geographic reach:

(1) *A consul's knowingly certifying a false invoice*. "Clearly the *locus* of this crime as intended by Congress is in a foreign country . . . ." Id. at 99.

(2) *Forging or altering a ship's papers*. "The natural inference from the character of the offense is that the sea would be a probable place for its commission." Id.

(3) *Enticing desertions from the naval service*. Congress must have "intend[ed] by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done." Id.

(4) *Bribing an officer of the U.S. civil, military, or naval service to violate his duty or to aid in committing a fraud on the United States*. The Court concluded that it would "hardly [be] reasonable to construe this not to include offenses" directed at consuls, ambassadors, and military officers "in a foreign country or on the high seas." Id.

(5) *Defrauding the United States in the disposition of property captured as prize*. "This would naturally often occur at sea, and Congress could not have meant to confine it to the land of the United States." Id.

(6) *Stealing or embezzling property of the United States furnished or intended to be used for military or naval service*. "It would hardly be reasonable to hold that" Congress did not intend to punish offenses against U.S. military property located "in foreign countries, in foreign ports or on the high seas." Id. at 100.

In sum, for statutes whose geographic reach is ambiguous, satisfying Bowman first requires proof that a criminal offense directly harms the U.S. Government. Bowman also suggested that the presumption against extraterritoriality cannot be rebutted inferentially unless the enacting Congress very likely envisioned, and can be assumed to have authorized, a considerable number of extraterritorial applications. Yet whether Bowman's preconditions are satisfied is hardly a mechanical inquiry. Bowman left open the key question of how many foreseeable extraterritorial applications are necessary to warrant the inference that Congress "clearly" intended to allow prosecutions for acts occurring overseas. Its treatment of two statutory examples suggested that the number of expected extraterritorial offenses must outweigh domestic ones—that the former must be "probable" or "most likely." Id. at 99. But Bowman's fifth example pointed toward a looser "locus" test for extraterritoriality—that the crime "would naturally often occur" abroad. Id. The D.C. Circuit's resolution of this issue in favor of the latter formulation must guide this Court's analysis of Abu Khatallah's extraterritoriality challenges.

b. The D.C. Circuit's Application of *Bowman*: *United States v. Delgado-Garcia*

Along with other lower courts, the D.C. Circuit has sought to reconcile modern extraterritoriality doctrine's across-the-board, rule-like rigor with the more flexible and individualized inquiry required in criminal cases by Bowman. Its reading of Bowman precludes

two possible approaches to this case: (1) to proceed as if the Supreme Court has overruled Bowman *sub silentio* and apply only the restrictive test outlined in Aramco, Morrison, and Kiobel; or (2) to assume that federal crimes designed to prevent harm to the U.S. Government necessarily satisfy Bowman (and so apply extraterritorially) absent a clear indication to the contrary.

The defendants in United States v. Delgado-Garcia, 374 F.3d 1337, 1339 (D.C. Cir. 2004), were charged with (in the court's words) "conspiring to induce aliens illegally to enter the United States" and "attempting to bring illegal aliens into the United States," in violation of 8 U.S.C. § 1324(a). All relevant conduct occurred outside the United States. Id. The defendants moved to dismiss the indictment, claiming that § 1324(a) does not apply extraterritorially because the statute is silent on its geographic reach. The Delgado-Garcia court disagreed, citing "specific textual evidence" and "contextual factors" as affirmative evidence that Congress intended for § 1324(a) offenses to be prosecutable regardless of where they might occur. Id. at 1344–45. The court situated its analysis firmly within the framework established by Bowman, deeming it a "persuasive precedent" for the Government's position. See id. at 1346. Abu Khatallah therefore misses the mark in asking this Court to eschew Bowman on the theory that it "did not discuss the presumption against extraterritoriality which has since become the cornerstone of all jurisdictional analyses." Def.'s Reply Supp. Mot. Dismiss ("Reply"), ECF No. 111, 2 n.1.

But Delgado-Garcia also forecloses the expansive reading of Bowman espoused by the Government at the oral hearing on Abu Khatallah's motions—that any federal criminal statute designed to prevent harm to the U.S. Government necessarily applies abroad absent an affirmative indication of congressional intent to cabin its reach. Hearing Prelim. Tr. 30.

According to Delgado-Garcia, the generally worded statute at issue in Bowman applied abroad "*because* the Emergency Fleet Corporation . . . 'was expected to engage in, and did engage in, a most extensive ocean transportation business.'" Delgado-Garcia, 374 F.3d at 1346 (emphasis added); see also id. ("Because of this expectation, the Court reasoned, many persons who commit the crime of defrauding a U.S. corporation would do so overseas, and *therefore* the statute had extraterritorial application." (emphasis added)).

The Government's reading of Bowman echoes Judge Rogers's dissenting opinion in Delgado-Garcia. She understood Bowman to mean that when Congress "protect[s] the United States government from harm," it generally must be assumed to have done so "irrespective of [the harm's] origin." Id. at 1355 (Rogers, J., dissenting). For such crimes, in other words, "it is obvious that in declaring them to be crimes Congress intends to prohibit them everywhere." Id. at 1354. The majority rejected this line of reasoning, concluding that it "is for Congress, not this Court," to decide whether particular acts would "harm the United States government even if [they were] completed abroad." Id. at 1346 (majority opinion) (alteration in original) (quoting id. at 1355 (Rogers, J., dissenting)).[1] The Delgado-Garcia majority offered a different explanation of what it means for federal criminal offenses to be "not logically dependent on their locality"—that they "have many obvious extraterritorial applications." Id. at 1346–47.

Delgado-Garcia held that both § 1324(a) crimes charged in the indictment met this standard (and thus applied extraterritorially). After explaining that the statute satisfied

[1] The Court thus rejects the Government's gloss on Bowman—that a federal criminal law applies abroad whenever "the statute's purpose would be undermined were its scope confined to the United States' territorial boundaries." Govt.'s Opp'n Def.'s Mot. Dismiss, ECF No. 101 ("Opp'n") 5.

Bowman's "harm" prong because it sought to protect the integrity of U.S. borders, id. at 1345,[2] the court shifted to a lengthy discussion of Bowman's "locus" element. Reasoning purely from the text and structure of § 1324(a), the court found that the crimes of attempting to bring an unauthorized alien into the United States and conspiring to encourage or induce illegal immigration both "applie[d] to much extraterritorial conduct." Id. at 1347. First, because "[b]ringing' someone suggests . . . physical proximity" to the person sought to be brought, "many [failed] attempts to bring someone into the United States will occur outside the United States." Id. And second, the court reasoned that it would be "much easier" to conspire to encourage or induce illegal immigration "outside the United States, in proximity to those who carry out the plot." Id. at 1348. The conspiracy provision therefore "contemplates application to much extraterritorial conduct." Id.

In this Circuit, then, Bowman is satisfied when (1) a federal criminal offense directly harms the U.S. Government, and (2) enough foreseeable overseas applications existed at the time of a statute's enactment (or most recent amendment) to warrant the inference that Congress both contemplated and authorized prosecutions for extraterritorial acts. Delgado-Garcia's "locus" inquiry specifically asks whether a statute "ha[s] many obvious extraterritorial applications," id. at 1347, or whether offenders "will often be outside the United States," id.[3] As long as such a

[2] The Court found that the very nature of the harm tended to undermine the presumption against extraterritoriality: Because border-protection statutes are "fundamentally international, not simply domestic, in focus and effect," it "makes no sense to presume that such a statute applies only domestically." Id.

[3] Delgado-Garcia offered several virtually identical formulations of this standard. See, e.g., id. at 1346 ("[M]uch of the conduct that § 1324(a) criminalizes occurs beyond the borders of the United States."); id. at 1347 (concluding that § 1324(a) "applies to much extraterritorial conduct"); id. (observing that "many" proscribed attempts would occur overseas); id. at 1347–48 (finding that the charged conspiracy offense "has many natural extraterritorial applications"); id. at 1348 (noting that § 1324(a) "has a great many international applications").

likelihood existed when the statute was passed—whether because of the nature of the offense (as in Delgado-Garcia), contingent facts about the United States's presence abroad, or some combination thereof—courts may properly infer a congressional intent to permit extraterritorial uses. This process yields the necessary "clear indication of an extraterritorial application." Morrison, 130 S. Ct. at 2878. It is not enough, as the Government suggests, that a statute seek to protect U.S. interests that "lie, or may very well lie, outside the United States." Govt.'s Opp'n Def.'s Mot. Dismiss, ECF No. 101 ("Opp'n") 7. Nor may judges attempt to divine "what Congress would have wanted if it had thought of the situation before the court." Morrison, 130 S. Ct. at 2881. With these principles in mind, the Court now turns to Abu Khatallah's individual statutory challenges.

3. Abu Khatallah's Statutory Challenges

Abu Khatallah concedes that Congress intended the offense charged in Count Three (18 U.S.C. § 1116, murder of an internationally protected person) to apply extraterritorially. But he has moved to dismiss Counts Four through Eighteen in their entirety, and Counts One and Two insofar as they charge him with providing material support for any crime other than killing an internationally protected person. In all, Abu Khatallah challenges the extraterritorial application of six distinct crimes or sets of associated crimes. In a separate order, the Court will request supplemental briefing on one of them (18 U.S.C. § 1363, criminalizing certain actions within the special maritime and territorial jurisdiction of the United States). It will consider Abu Khatallah's five other extraterritoriality challenges in turn.

a. 18 U.S.C. § 1114: Murder and Attempted Murder of Officers and Employees of the United States

Counts Four through Six charge Abu Khatallah with murder in violation of 18 U.S.C. § 1114; counts Seven through Nine charge him with attempted murder in violation of § 1114.

That statute reads, in full:

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—
>
> (1) in the case of murder, as provided under section 1111;
>
> (2) in the case of manslaughter, as provided under section 1112; or
>
> (3) in the case of attempted murder or manslaughter, as provided in section 1113.

Section 1114 does not explicitly reference extraterritorial application, so such prosecutions must be justified by Bowman, if at all. The Court does not doubt—nor does Abu Khatallah contest—that § 1114 targets a form of harm suffered directly by the U.S. Government. Under Delgado-Garcia, then, just one question remains: Did § 1114 "have many obvious extraterritorial applications" when it was enacted (or most recently amended)?

Cautious of its institutional limitations in resolving an issue of this nature, the Court answers affirmatively. The parties have not informed the Court as to when § 1114 was either originally enacted or last amended. That law appears to have remained in its current form since being amended as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 727(a), 110 Stat. 1214. Nor have the parties provided concrete information on the number of U.S. officers and employees working and residing abroad, either in 1996 or today. The Government asserts (though without substantiation) that "[t]he United States government has over one hundred thousand officers and employees stationed abroad." Opp'n 8. Abu Khatallah has not questioned this estimate. Because a purely territorial statute cannot become extraterritorial as a result of changing conditions—only a deliberate congressional choice can rebut the presumption—present-day figures matter only insofar as they indirectly reflect what

conditions either obtained when a statute was passed or were understood to be likely to exist in the future.

Here, the Court is satisfied that § 1114 "ha[d] many obvious extraterritorial applications" when the law was last amended in 1996—enough to have put Congress on notice of the issue of extraterritoriality and to permit an inference under Bowman that the law was intended to reach conduct undertaken outside the United States. It is widely known that then, as now, large numbers of U.S. diplomats and Foreign Service Officers, military servicemembers, members of the intelligence community, and other government personnel served the United States's interests abroad. Executive and legislative officials (and their staff) also frequently traveled—and obviously still do—outside the United States in the course of performing their official duties. See also United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("[A] significant number of [U.S.] employees perform their duties outside U.S. territory."). Such U.S. employees and officials could obviously be killed while engaging in or on account of performing their official duties. Under Delgado-Garcia, this is enough to conclude that Congress authorized extraterritorial prosecutions under § 1114. Abu Khatallah may well be correct that "the focus of the legislation was domestic," Reply 4, whereas the Delgado-Garcia court found the relevant statute to be "fundamentally international . . . in focus and effect," 374 F.3d at 1345. Yet Bowman still allows an inference that Congress intended to authorize overseas prosecutions for crimes enacted in the wake of purely domestic incidents. Under Delgado-Garcia, a criminal offense whose most natural or obvious applications are domestic can still be prosecuted abroad if the law had "many obvious extraterritorial applications" at the time of enactment. Id. at 1346–47.

Abu Khatallah nonetheless argues that a comparison between § 1114 and § 1116, which

criminalizes the murder of internationally protected persons, reveals that Congress did not intend for § 1114 to apply extraterritorially. Both statutes were amended in 1996; whereas § 1116 broadened the "internationally protected person" category to reach "any other representative, officer, employee, or agent of the United States Government," § 1114 remained generally worded and geographically ambiguous. Def.'s Mot. Dismiss, ECF No. 91 ("Mot. Dismiss") 5. As a result, Abu Khatallah claims, § 1116's amendment "would have been unnecessary if Congress had intended § 1114 to apply to the extraterritorial killing of all [U.S.] officers and employees." Id. at 5–6. The Court is not persuaded. To qualify as an internationally protected person, one must be, "at the time and place concerned[,] . . . entitled pursuant to international law to special protection against attack." 18 U.S.C. § 1116(b)(4)(B). Such an element is missing from § 1114. Section 1116 "appl[ies] to a relatively small subset of the broad class of United States employees and officers covered by Section 1114." United States v. Bin Laden, 92 F. Supp. 2d 189, 203 (S.D.N.Y. 2000). Such modest overlap between the two statutes is not enough to upend the method of analysis called for by Delgado-Garcia.

Other statutes not cited by Abu Khatallah lend some credence to his position that "when Congress intend[s] a homicide statute to apply extraterritorially, it specifically state[s] so." Mot. Dismiss 6. One of them, 18 U.S.C. § 1751, criminalizes (among other things) assassinating the President, Vice President, or President-elect. This statute would seem to satisfy Bowman rather easily. Yet it specifically clarifies that "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section." Id. § 1751(k). A similar law prohibiting the killing of members of Congress, cabinet heads, Supreme Court Justices, and directors of specified intelligence agencies also explicitly permits prosecutions for extraterritorial conduct. 18 U.S.C. § 351(i). On the other hand, a number of federal criminal statutes designed to prevent harm to the Government that

would frequently occur abroad are expressly limited to domestic offenses. Congress apparently understood that Bowman would otherwise apply in these instances, but for some reason chose to limit its operation. Such criminal offenses include discriminating against persons wearing the uniform of the armed forces, 18 U.S.C. § 244; commencing or facilitating an expedition against a friendly nation, 18 U.S.C. § 960; and enlisting "to serve in armed hostility against the United States," 18 U.S.C. § 2390. The Court therefore declines to demand clear statements of extraterritorial application in this case—essentially, to render Bowman toothless—merely because some criminal statutes have not relied on Bowman to signal their geographic reach.

The D.C. Circuit's recent refusal to permit a Bivens cause of action to remedy harm inflicted extraterritorially does not change the Court's analysis. In Meshal v. Higginbotham, 804 F.3d 417 (D.C. Cir. 2015), decided after the Court heard argument on Abu Khatallah's motion, the D.C. Circuit offered the following hypothetical in declining to recognize the asserted implied private right of action: "If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory Bivens, so to speak), that cause of action would not apply to torts committed by federal officers abroad absent sufficient indication that Congress meant the statute to apply extraterritorially." Id. at 425 (citing Morrison, 130 S. Ct. at 2877). That statement fully coheres with this Court's analysis. Bowman and Delgado-Garcia continue to govern whether the presumption has been rebutted for *criminal* statutes. Under current law, satisfying Bowman furnishes a "sufficient indication that Congress meant the statute to apply extraterritorially." Id. Nor is this Court the first to hold that § 1114 reaches abroad under Bowman. See Al Kassar, 660 F.3d at 118; Bin Laden, 92 F. Supp. 2d at 202; United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984).

For the foregoing reasons, the Court will deny Abu Khatallah's motion as to Counts Four through Nine, which charge him with violating 18 U.S.C. § 1114.

b. 18 U.S.C. § 930(c): Killing a Person in the Course of an Attack on a Federal Facility Involving the Use of a Firearm or Other Dangerous Weapon

Counts Ten through Thirteen charge Abu Khatallah with violating 18 U.S.C. § 930(c). Section 930 provides, in relevant part:

> (c) A person who kills any person . . . in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon, or attempts or conspires to do such an act, shall be punished as provided [elsewhere].
>
> * * *
>
> (g) As used in this section:
>
> (1) The term "Federal facility" means a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.

Because § 930 is silent on its geographic reach, Bowman must again guide the Court's extraterritoriality analysis. Bowman's "harm" test is clearly satisfied here—the act of killing someone in the course of an attack on a federal facility directly harms the U.S. Government. The remaining question is whether § 930(c) offenses are "not logically dependent on their locality," meaning that the provision had "many obvious extraterritorial applications" when it was enacted (or most recently amended). Delgado-Garcia, 374 F.3d at 1346–47.

Abu Khatallah points out that § 930(c) was added to 18 U.S.C. § 930 as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60014, 108 Stat. 1796. He argues that because some other provisions of this omnibus legislation expressly permitted prosecutions for conduct abroad, Congress cannot be said to have clearly authorized the extraterritorial use of § 930(c). Mot. Dismiss 8. Abu Khatallah further claims that the

"obvious focus" of this statute is "Federal facilities within U.S. territory," id. 9, for "§ 930(c) was passed as part of a series of laws targeting murder committed by escaped prisoners, murder of state or local officials assisting federal law enforcement officials, the protection of court officers and jurors, and the retaliatory killings of witnesses, victims, and informants." Reply 6–7.

Yet a criminal statute whose legislative history and neighboring provisions are bereft of foreign references may still apply extraterritorially if Bowman's "harm" and "locus" elements (as understood by Delgado-Garcia) are both satisfied. Again, the Government has not provided a concrete figure for or independently substantiated how many federal facilities exist outside the United States. But it has assured the Court that they number in the "hundreds." Opp'n 12. Abu Khatallah does not contest this approximation. Cf. Bin Laden, 92 F. Supp. 2d at 201–02 (observing that "a significant number of Federal facilities are located outside the United States"). The Court notes that embassies, consulates, and other diplomatic missions would seem to be fairly encompassed within § 930(g)(1)'s definition of "Federal facility," as would the component structures of military bases. Such structures were no doubt similarly prevalent when § 930(c) was enacted in 1994. The Government also asserts that "many [Federal facilities abroad] are in more dangerous areas than Federal facilities within the United States," which presumably alerted Congress to the likelihood of attacks on overseas facilities for reasons apart from those facilities' sheer numerosity. Opp'n 12. The Court hesitates to impute an ignorance of these conditions to the enacting Congress. Accordingly, the Court joins the Southern District of New York in concluding that § 930(c) applies extraterritorially under Bowman, because that law had many foreseeable extraterritorial applications at the time of enactment. See Bin Laden, 92 F. Supp. 2d at 201–02. The Court will therefore not dismiss Counts Ten through Thirteen for lack of

extraterritoriality.

c. 18 U.S.C. § 844(f)(1) & (3): Maliciously Damaging and Destroying U.S. Property by Means of Fire and an Explosive Causing Death

Counts Fourteen and Fifteen charge Abu Khatallah with violating 18 U.S.C. §§ 844(f)(1) & (3). Sections 844(f)(1) and (3) provide:

> (f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.
>
> * * *
>
> (3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing [his] duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

As with § 1114 and § 930(c), § 844(f) contains no provision explicitly authorizing extraterritorial use. The Court will therefore analyze § 844(f)'s geographic reach under the Bowman framework. Damaging or destroying U.S. property unquestionably harms the U.S. Government. So again, the remaining issue is whether § 844(f) had "many obvious extraterritorial applications" at the time of its enactment or most recent amendment. Delgado-Garcia, 374 F.3d at 1347.

The Court answers in the affirmative. Statutory "Federal facilities"—buildings owned or leased by the U.S. Government, where federal employees are regularly present for the purpose of performing their official duties—are but a subset of "personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof." 18

U.S.C. § 844(f)(1). The enacting Congress[4] cannot have envisioned considerably fewer overseas applications of a more expansive category of crimes. Because the Court has already concluded that Bowman permits extraterritorial prosecutions under § 930(c), the Government may necessarily proceed under § 844(f), as well. Again, the Southern District of New York has held likewise. See Bin Laden, 92 F. Supp. 2d at 198.

Abu Khatallah insists that § 844(f) "does not have an international focus." Mot. Dismiss 10. For all the Court can tell, he is correct. Abu Khatallah argues that the congressional activity preceding § 844(f)'s original enactment "clearly evidences the intent to address property within the United States that had become vulnerable to a rash of bombings on account of protests against the Vietnam War" and to expand federal investigative and prosecutorial authority over such incidents. Reply 7. The Government offers no reason to doubt this account of the historical forces driving § 844's passage. But Abu Khatallah misunderstands the import of Delgado-Garcia's application of Bowman. To be sure, Delgado-Garcia characterized § 1324(a)'s border-control provisions as "fundamentally international . . . in focus and effect." Delgado-Garcia, 374 F.3d at 1345. Delgado-Garcia could have interpreted Bowman to mean that an offense is not logically dependent on its locality when it will likely be committed overseas more often than not, just as the court believed that § 1324(a) crimes would be. Yet the D.C. Circuit articulated a more permissive standard for satisfying Bowman's "locus" element: whether a criminal statute "ha[s] many obvious extraterritorial applications." Id. at 1347. A prohibition can have many obvious extraterritorial applications even if it is most readily and naturally deployed domestically.

Nor is it material that § 844(f) prohibits the damaging or destruction of "any institution or

[4] Section 844(f) was originally passed as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 956, and was last substantively modified in the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1125, 116 Stat. 2135.

organization receiving Federal financial assistance," the great majority of which are presumably located domestically. Section 844 clearly targets a vast range of destructive behavior undertaken within the territorial United States. But its independently operative provisions that protect U.S. property could foreseeably be applied abroad in a great number of situations; this must have been known when the statute was modified in 2002, as well. As a result, the Court will deny Abu Khatallah's motion as to Counts Fourteen and Fifteen.

d. 18 U.S.C. § 924(c): Using, Carrying, Brandishing, and Discharging a Firearm During a Crime of Violence

Count Eighteen charges Abu Khatallah with violating § 924(c)(1)(A). Section 924(c) provides, in relevant part:

> (c)(1)(A) . . . [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * *
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Count Eighteen specifically charges Abu Khatallah with "us[ing], carry[ing], brandish[ing], and discharg[ing] firearms . . . during and in relation to" every other offense with which he has been charged. Indictment, Count Eighteen ¶ 2. Abu Khatallah has not disputed that each of these other offenses qualifies as a "crime of violence" under § 924(c). He instead contends that § 924(c) offenses cannot be prosecuted extraterritorially because § 924(c) is a quintessentially domestic provision enacted to help cleanse America's streets and neighborhoods of violent crime.

Section 924(c) nowhere explicitly authorizes extraterritorial prosecutions. If the Court proceeded to apply Bowman, it would grant Abu Khatallah's Motion as to Count 18. The crime of "us[ing] or carr[ying]" a gun "during and in relation to any crime of violence" does not harm the U.S. Government's interests any more directly than the commission of any other federal crime; § 924(c) was not enacted to equip the Government to "defend itself against obstruction[] or fraud." Bowman, 260 U.S. at 98. Rather, the statutory term "crime of violence" hinges upon the actuality or prospect of "physical force against the person or property of another." 18 U.S.C. § 924(c)(3). One lesson of Bowman is that "[c]rimes against private individuals or their property" cannot be charged extraterritorially without a clear statement to that effect. Bowman, 260 U.S. at 98. The Government, moreover, has not sought to discredit Abu Khatallah's account of the reasons for § 924(c)'s enactment. That provision first appeared as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233. Abu Khatallah claims that § 924(c) is "set within a comprehensive statutory scheme regulating the domestic licensing, trade and use of guns and other firearms" in order to counteract "the gun violence problem within the United States." Mot. Dismiss 11. For present purposes, the Court

will assume that all of this is correct, and that later statutory amendments evinced no extraterritorial intentions.

Section 924(c) crimes are not ordinary substantive offenses, however. They depend on the commission of a concurrent—and predicate—"crime of violence." The role of § 924(c) is simply to "add[] a weapon to the Government's arsenal whenever a criminal uses a gun" in committing such an act. United States v. Mardirossian, 818 F. Supp. 2d 775, 777 (S.D.N.Y. 2011). The D.C. Circuit has concluded that "the extraterritorial reach of an ancillary offense . . . is coterminous with that of the underlying criminal statute." United States v. Ali, 718 F.3d 929, 939 (D.C. Cir. 2013). The D.C. Circuit has not comprehensively explained what makes a crime ancillary or substantive for purposes of extraterritoriality doctrine. See id. (merely citing "aiding and abetting or conspiracy" as exemplary "ancillary offense[s]"). But § 924(c)—which appears in a statutory section entitled "Penalties"—functions to regulate gun-related behavior in connection with an underlying criminal offense. The Court therefore joins six other courts in holding that § 924(c) applies abroad insofar as its predicate "crime of violence" may be prosecuted extraterritorially. See United States v. Siddiqui, 699 F.3d 690, 701 (2d Cir. 2012); United States v. Belfast, 611 F.3d 783, 814 (11th Cir. 2010); Mardirossian, 818 F. Supp. 2d at 777; United States v. Hasan, 747 F. Supp. 2d 642, 684–85 (E.D. Va. 2010); United States v. Reumayr, 530 F. Supp. 2d 1210, 1219 (D.N.M. 2008); United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *13 (S.D. Fla. July 5, 2007). To the Court's knowledge, no decision has ever held to the contrary.

Section 924(c) prohibits using or carrying a firearm "during and in relation to *any* crime of violence" for which someone may be prosecuted in federal court. Abu Khatallah rightly observes that "the use of the word 'any' in a statute does not [alone] convert it into one with

extraterritorial application." Reply 9; see Validus, 786 F.3d at 1047. Yet for ancillary statutes, words like "any" and "all" *do* maximize a derivative offense's geographic reach by linking it to that of the predicate crime. For example, nothing in the general federal conspiracy statute reveals the slightest concern with overseas criminality. But when Congress prohibited "conspir[ing] . . . to commit *any* offense against the United States," 18 U.S.C. § 371 (emphasis added), it affirmatively authorized extraterritorial conspiracy prosecutions insofar as the underlying federal crime were found to reach abroad. This principle also applies to such classic ancillary offenses as aiding and abetting and serving as an accessory after the fact. See 18 U.S.C. §§ 2–3. So the fact that § 924(c) is embedded in a series of domestically inspired anti-crime provisions does not defeat § 924(c)'s derivative extraterritoriality in this case. Bowman simply does not apply to ancillary criminal offenses; it does, of course, continue to govern the geographic reach of predicate crimes.

The Supreme Court's decision in Small v. United States, 544 U.S. 385 (2005), on which Abu Khatallah relies, is not to the contrary. In that case, the Court considered the proper interpretation of 18 U.S.C. § 922(g)(1), which made it "unlawful for any person . . . who has been *convicted in any court* of[] a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm" (emphasis added). Small considered the values underlying the presumption against extraterritoriality in holding that the phrase "convicted in any court" applied only to convictions in American courts. Small, 544 U.S. at 391. The Court also remarked that the "presumption would apply . . . were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically." Id. at 389. True, § 924(c) contains its own possession offense. But the Small Court was almost certainly referring to the prohibition of gun possession appearing in the very provision at issue in that case. Section

922(g)'s possession offense—unlike § 924(c)'s—is not ancillary, because it requires no linkage (other than temporal) to ongoing criminal activity or efforts to shield it from detection. Small's dictum therefore does not prevent this Court from treating as ancillary § 924(c)'s crimes of using or carrying a firearm "during and *in relation to*" a federal crime of violence, and possessing a firearm "*in furtherance of*" such a crime. 18 U.S.C. § 924(c) (emphases added).

In short, the offenses underlying Count Eighteen—§ 924(c)'s crimes of using, carrying, brandishing, and discharging a firearm during a crime of violence—apply overseas to the extent that any predicate offenses do. The Government characterizes all other offenses with which Abu Khatallah has been charged as crimes of violence; Abu Khatallah has not argued otherwise. With the exception of 18 U.S.C. § 1363, on which the Court will request supplemental briefing, the Court will soon have held that every predicate crime with which Abu Khatallah has been charged may be prosecuted extraterritorially. As a result, the Court will deny Abu Khatallah's motion as to Count Eighteen.

e. 18 U.S.C. § 2339A: Providing Material Support and Resources to Terrorists Resulting in Death (and Conspiring to Do the Same)

Count One charges Abu Khatallah with conspiring to violate 18 U.S.C. § 2339A ("the material-support statute"), and Count Two charges him with a substantive violation of that statute. As with each of the offenses discussed above, § 2339A does not explicitly authorize extraterritorial prosecutions. Section 2339A provides, in relevant part (with only potentially applicable predicate offenses listed below):

> (a) Offense. Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . 844(f) . . . , 930(c), . . . 1114, 1116, . . . [or] 1363, . . . or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an

> act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

Section 924(c) (corresponding to Count Eighteen) is the only crime with which Abu Khatallah has been charged that cannot serve as a predicate for material-support liability, because it is absent from § 2339A's lengthy list of underlying offenses. Section 1116 (corresponding to Count Three) explicitly authorizes extraterritorial prosecutions; the other four offenses (corresponding to Counts Four through Seventeen) do not. Abu Khatallah therefore moves to dismiss Counts One and Two insofar as they charge him with providing (or conspiring to provide) material support for violations of §§ 844(f), 930(c), 1114, and 1363.

Unlike with respect to § 924(c)'s firearm offense, Abu Khatallah and the Government agree that § 2339A is an ancillary crime that applies extraterritorially to the extent that an associated substantive offense does. Mot. Dismiss 19; Opp'n 24. So as with § 924(c), Bowman is not in play. Deciding whether to dismiss an ancillary offense for lack of extraterritoriality requires no new analysis when the geographic reach of any predicate crimes has already been determined. The Court therefore incorporates by reference its earlier holdings and denies Abu Khatallah's motion as to Counts One and Two. The Government may continue to proceed under § 2339A insofar as it charges Abu Khatallah with providing (or conspiring to provide) material support for a violation of §§ 844(f), 930(c), 1114, or 1116. The Court will reserve judgment on whether § 1363 may serve as a predicate offense for § 2339A liability on a set of extraterritorial facts, pending the resolution of issues on which the Court will request supplemental briefing.

B. Motion To Dismiss Counts One and Two as Unconstitutionally Vague and Overbroad

Abu Khatallah has also moved the Court to dismiss Counts One and Two of the Indictment as unconstitutionally vague and overbroad. As previously noted, those Counts charge

Abu Khatallah with violating (and conspiring to violate) 18 U.S.C. § 2339A, which prohibits "provid[ing] material support or resources or conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation" of certain enumerated federal criminal offenses. 18 U.S.C. § 2339A. The listed offenses include, *inter alia*, murder of an internationally protected person, murder of an officer or employee of the United States, attempted murder of an officer or employee of the United States, killing a person in the course of an attack on a federal facility involving the use of a firearm and a dangerous weapon, maliciously damaging and destroying U.S. property by means of fire and an explosive causing death, and maliciously destroying and injuring dwellings and property with the special maritime and territorial jurisdiction of the United States and attempting to do the same—all crimes with which Abu Khatallah has been substantively charged. Abu Khatallah claims that this statute, which falls under the heading "Providing material support to terrorists," punishes only *terrorist* activity. In his view, the statute provides no clear notice of when one's conduct constitutes "terrorism," Def.'s Mot. Dismiss, ECF No. 92 ("Mot. Dismiss") 5, and allows for "arbitrary and capricious enforcement," id. at 8, rendering it unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Abu Khatallah also claims that the material-support statute punishes a substantial and excessive amount of protected speech and is therefore unconstitutionally overbroad under the Free Speech Clause of the First Amendment, both as a facial matter and as applied to him.

1. Whether the Material-Support Statute Applies Only to Actions that Constitute "Terrorism"

According to Abu Khatallah, the material-support statute punishes only conduct that

constitutes terrorism. See Mot. Dismiss 5. He contends, however, that the statute is not sufficiently definite with regard to what constitutes "terrorism" to provide fair notice of what conduct is prohibited. Because the Government charged him with "provid[ing] material support and resources to *terrorists*," Indictment, Count Two ¶ 2 (emphasis added), he suggests, "[t]he absence of a specific 'terrorism' element in § 2339A renders the statute unconstitutionally vague," Mot. Dismiss 6. The Government counters that it is irrelevant whether it alleged that Abu Khatallah's actions supported terrorism or whether the material-support statute defines the term "terrorism." In its view, the reason is simple: "[T]here is no statutory requirement that [one's] actions 'qualify as terrorism'" to be guilty under § 2339A. Govt.'s Opp'n Def.'s Mot. Dismiss, ECF No. 100 ("Opp'n") 1. Rather, the statute criminalizes providing "material support" with the knowledge or intent that such support will be used in preparation for, or in carrying out, a set of enumerated criminal offenses that may or may not involve terrorist activity. According to the Government, nothing in the "plain text . . . mandate[s] a showing of terrorist conduct and the federal cases do not require such proof." Id. at 5. Because "the government is not required to show that [a defendant's] material-support actions 'qualify as terrorism,'" id. at 7, it contends, the statute cannot be void for vagueness on the grounds that the term "terrorism" is imprecise or undefined.

In response to the Government's argument that his void-for-vagueness challenge falters at the gate because the term that he considers vague—"terrorism"—has no necessary connection to criminal liability under § 2339A, Abu Khatallah contends that "the plain language of the statute (including the heading) . . . [and] the government's enforcement of § 2339A demonstrate[] that the statute is designed to punish material support *for terrorism*." Def.'s Reply Supp. Mot. Dismiss, ECF No. 113 ("Reply") 4. Although Abu Khatallah is correct that the

material-support statute may have been designed to punish activity connected to terrorism, an association with terrorism is not an element of the crime defined by § 2339A. As the Government submits, criminal liability under § 2339A attaches regardless of any linkage to terrorism. As a result, the statute need not provide any notice of what constitutes "terrorism" to survive a void-for-vagueness challenge under the Due Process Clause.

a. Statutory Text

Abu Khatallah argues that "the plain language of the statute . . . demonstrates that" criminal liability under "the statute requires some connection to terrorism." Reply 3. Yet the only "plain language" that Abu Khatallah points to is in the non-operative heading, which labels § 2339A as the crime of "[p]roviding material support to terrorists." 18 U.S.C. § 2339A; see also Bhd. of R.R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528–29 (1947) ("[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text."). True, "statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute," Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008), but here the statutorily defined elements could not be clearer. To be criminally liable under § 2339A, the operative text specifies that a person must provide or conspire to provide "material support," as defined in the statute, in preparation for, or to carry out, the commission of certain enumerated offenses. The text itself contains no requirement that one's actions be connected to terrorism.

b. Statutory History

Abu Khatallah further contends that the statute's passage as an anti-terrorism measure demonstrates that some connection to terrorism is required for criminal liability to attach under § 2339A. Reply 3 (citing United States v. Shah, 474 F. Supp. 2d 492, 495 (S.D.N.Y. 2007)

("Section 2339A . . . is an anti-terrorism law enacted by Congress as part of the Violent Crime Control and Law Enforcement Act . . . .")). The Government readily concedes that § "2339A's enumerated offenses are 'offenses of a type that terrorists commit,'" although it points out that "they are 'not all necessarily terrorist offenses.'" Opp'n 6. All that suggests, however, is that Congress passed § 2339A primarily to combat terrorism—and that it did so by imposing additional punishment on persons who provide material support to those who commit violent federal offenses of a kind that terrorists commit. The mere fact that Congress may have enacted § 2339A with terrorism in mind does not require prosecutors to prove that a person charged under that statute actually engaged in (or conspired to engage in) "terrorism."

c. Statutory Enforcement

Finally, Abu Khatallah maintains that "the government's enforcement of § 2339A also demonstrates that the statute is designed to punish [only] material support *for terrorism*." Reply 4. He asserts that "the government *only* uses § 2339A to prosecute material support for offenses allegedly connected to terrorism" (observing that "[a] search of the U.S. courts electronic case tracking system . . . in every federal district court reveals that in every case in which the government has charged a violation of 18 U.S.C. § 2339A, the government has alleged that the defendant provide[d] 'support to terrorists.'"). Id. But whatever § 2339A may have been "designed to" accomplish, the Government's track record of pursuing alleged terrorists under the statute does not bear on the statutorily defined elements of the crime. Nor does the fact that "[t]he United States Attorneys' Manual lists § 2339A as one of many 'International Terrorism Statutes.'" Id. (citing U.S. Attorneys' Manual § 9-2.136).

Although the Government may have consistently used § 2339A to prosecute those that it alleges have provided "support to terrorists," apparently no court has ever required the

Government to prove a specific connection to terrorism as an element of that crime. Abu Khatallah's own counsel "have found no reported decision in which a court addressed the issue presented here—that is, the failure of § 2339A to define terrorism." Reply 2. Yet they cite scores of cases in which the Government has charged a violation of § 2339A. Id. at 4 n.1. If the Government was required to prove that a defendant's actions constituted "terrorism" in order to secure a conviction under § 2339A, it is quite odd that in so many cases no court has ever addressed "the failure of § 2339A to define terrorism." Id. 2–3. The explanation, however, is straightforward: Conviction under § 2339A does not require proof of terrorist conduct—only proof of material support in preparation for, or in carrying out, at least one of an enumerated set of violent offenses.

Because § 2339A does not include terrorist conduct as an element of criminal liability, the Court will deny Abu Khatallah's void-for-vagueness challenge that the statute provides inadequate notice of what constitutes terrorism.

2. Whether Section 2339A Invites Arbitrary and Overreaching Enforcement

In addition to claiming that the material-support statute is insufficiently definite with respect to what constitutes terrorism, Abu Khatallah contends that it "also violates due process because it grants too much enforcement discretion to the government." Mot. Dismiss 7. He argues that "[a]bsent the inclusion of a clear 'terrorism' element, § 2339A could be applied to a host of garden variety criminal offenses not suited to the purpose of the federal law." Id.

Yet the bulk of crimes for which providing material support would subject a person to criminal liability under § 2339A are anything but "garden variety." See 18 U.S.C. § 2339A (criminalizing the provision of "material support" for, among other serious offenses, destroying aircraft, transacting in nuclear materials, murdering internationally protected persons, developing

biological weapons, assassinating the President of the United States, and committing genocide). And although Abu Khatallah correctly observes that someone who provides "material support" for the federal crime of arson, for example, could also be charged under § 2339A, that is the scheme that Congress has chosen to establish. That possibility, on its own, does not imply that the material-support statute is inevitably susceptible to arbitrary enforcement.

More importantly, the material-support statute does not provide the Government with the kind of "unfettered discretion" in enforcement that has been held to violate due process. See Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972). Abu Khatallah is undoubtedly correct that a statute must provide "'minimal guidelines' to law enforcement authorities" in order to pass constitutional muster under the Due Process Clause. Mannix v. Phillips, 619 F.3d 187, 197 (2d Cir. 2010 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)). This requirement renders unconstitutional laws that provide no standard for evaluating whether a suspect has violated the statute in question, leaving "full discretion" in the hands of law enforcement to determine whether or not a violation has occurred. See Kolender, 461 U.S. at 358–59. Section 2339A is not such a statute. It provides an exhaustive list of federal crimes for which a person can be charged for providing "material support"—a term which courts have consistently found to be clear and definite. See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 20–25 (2010). Thus, an objective standard exists for evaluating whether a person's conduct falls within the prohibition of the material-support statute. That determination is not left to the unfettered discretion of any law-enforcement officer. Section 2339A therefore does not invite the kind of arbitrary and overreaching enforcement that would contravene constitutional due process.

3. Whether the Indictment Violates the Double Jeopardy Clause

Abu Khatallah shifts his focus to the Double Jeopardy Clause, U.S. Const. amend. V,

in response to the Government's assertion that proving a violation of § 2339A does not require proving any link to terrorism. He contends that "[i]f, as the government claims, § 2339A requires no link to terrorism, the statute punishes only aiding and abetting or committing one of the predicate offenses and is *no different than punishing a violation of the predicate offense*." Reply 9 (emphasis added). That, he says, renders his indictment "multiplicitous"—a violation of the Double Jeopardy Clause—because it charges the same offense in multiple counts, thereby unfairly increasing his exposure to criminal sanctions. Id. (citing United States v. Mahdi, 598 F.3d 883 (D.C. Cir 2010)).

Whether two counts are multiplicitous and thus violate the constitutional prohibition of double jeopardy is assessed under the Blockburger test:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not," i.e., whether either is a lesser included offense of the other.

Mahdi, 598 F.3d at 888 (quoting United States v. Weathers, 186 F.3d 948, 951 (D.C. Cir. 1999)); see also Blockburger v. United States, 284 U.S. 299, 304 (1932).

Applying this standard, Abu Khatallah contends that, "[a]s defined by the government, providing material support in violation of § 2339A is the same offense as aiding and abetting or committing the predicate offenses listed in § 2339A—neither requires proof of a fact that the other does not." Reply 10. He interprets the Government's position to mean that "anyone who provides material support knowing and intending that the support will be used to carry[] out one of the predicate offenses[] also aids and abets or commits the underlying offense." Id. If this analysis is correct, then the Blockburger test implies that Counts One and Two (the material-support counts) are multiplicitous with Counts Three through Seventeen, each of which alleges a violation of one of the object offenses for which criminal liability might attach under § 2339A.

The proper remedy for this multiplicity problem, Abu Khatallah suggests, is to force the Government to choose "between proceeding on the material support charges in Counts One and Two and proceeding on the substantive offenses charged in Counts Three through Seventeen." Id.

The Government need not make this choice, however, because Abu Khatallah misapplies the Blockburger test. Both the material-support statute and the object offenses require proof of a fact or element that the other does not. For instance, to prove that a person has violated § 2339A, the Government must prove that he has provided "material support," defined as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C.A. § 2339A. On the other hand, proving that a person has aided or abetted an offense enumerated in § 2339A does *not* require proving that he has provided material support. See United States v. Hassoun, 476 F.3d 1181, 1188 (11th Cir. 2007) (holding that proving the commission of an offense enumerated in § 2339A "does not require proof that the defendant provided material support or resources"). Specifically, to punish someone as an aider-and-abettor, "[a]ll that is necessary is to show some affirmative participation which at least *encourages* the principal offender to commit the offense." United States v. Raper, 676 F.2d 841, 850 (D.C. Cir. 1982) (emphasis added); see also 18 U.S.C. § 2(a) (imposing criminal liability as a principal for "counsel[ing]" someone to commit a crime). As the statutory definition makes clear, proving that a person provided "material support" requires more than merely encouraging or counseling someone to commit a crime. Thus, proving a violation of § 2339A requires establishing a fact that proving a violation of any of the enumerated offenses does not.

The reverse is also true. To state the obvious, to establish that someone has committed one of the object crimes enumerated in § 2339A, the Government must prove that object crime has actually been completed—that is, the Government must prove all the elements of the object offense. On the other hand, "the Government need not prove all the elements of . . . the object offense[] in order to satisfy the elements of the substantive § 2339A charge." Raper, 676 F.2d at 1188. Indeed, "the object offense need not even have been completed yet, let alone proven as an element of the material support offense." Id. Thus, proving a violation of any of the enumerated offenses requires establishing a fact—the completion of the enumerated offense—that proving a violation of § 2339A does not. Because the material-support statute and each of the object offenses enumerated in the material-support statute require proof of an element not required by any other, no two counts in the Indictment are multiplicitous. As a result, under the Government's interpretation of the elements that are required for criminal liability under § 2339A, with which the Court agrees, the Indictment does not violate the Double Jeopardy Clause. The Court will therefore deny Abu Khatallah's request that the Government elect between proceeding with Counts One and Two or with Counts Three through Seventeen.

4. Whether Section 2339A Is Overbroad in Violation of the First Amendment

Abu Khatallah also mounts a facial First Amendment challenge to § 2339A, contending that it is overly broad because it "leaves open the possibility that a person may be punished for engaging in protected speech, leading persons to avoid the protected conduct for fear of uncertain proscriptions." Mot. Dismiss 8. He also claims that the statute is overbroad "as applied to" him, because some of the evidence that the Government lists in support of its indictment "include[s] the beliefs he held and the messages he communicated." Id. at 9. This argument is without merit, and the federal courts to have considered it so far have resoundingly

rejected it. See, e.g., United States v. Sattar, 314 F. Supp. 2d 279, 305 (S.D.N.Y. 2004) ("On its face, § 2339A is a legitimate exercise of Congress' power to enact criminal laws that reflect 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'") (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

1. Abu Khatallah's Facial Challenge

Both Abu Khatallah and the Government proceed from the same premise: that "[a] law is unconstitutionally overbroad if it 'punishes a substantial amount of protected speech, judged in relation to [its] plainly legitimate sweep.'" Opp'n 8 (quoting Virginia v. Hicks, 539 U.S. 113, 118–19 (2003)); see also Mot. Dismiss 8 (articulating a similar standard). Notably, as the Government points out, Abu Khatallah "makes no effort to show the requisite 'substantial' infringement of protected speech" that the material-support statute allegedly imposes. Opp'n 9. He merely states in conclusory fashion that "the statute is overbroad." Mot. Dismiss 9. But "recitation of the applicable legal standards and [a] conclusory declaration that [a law] is overbroad do not come close to carrying [the] burden" for prevailing in an overbreadth challenge under the First Amendment. United States v. Farhane, 634 F.3d 127, 137 (2d Cir. 2011). Because Abu Khatallah has "failed to describe any situation in which even an insubstantial amount of speech may be restrained because of § 2339A[] and cites no case law in which this statute . . . has been found overbroad," United States v. Awan, 459 F. Supp. 2d 167, 180 (E.D.N.Y. 2006), aff'd, 384 F. App'x 9 (2d Cir. 2010), the Court rejects his facial challenge.

2. Abu Khatallah's As-Applied Challenge

As to the statute's overbreadth "as applied" to him, Abu Khatallah complains that "the government seeks convictions based on [his] beliefs and communications." Mot. Dismiss 9. This complaint is unfounded. First, the Indictment refers to Abu Khatallah's beliefs and views

about the American presence in Benghazi for evidentiary reasons: "to demonstrate, among other things, his motive and intent," Opp'n 11; see also Mot. Dismiss 9 (acknowledging that the Government "provided as evidence . . . the beliefs [Abu Khatallah] held and the messages he communicated"). Evidence that Abu Khatallah "viewed U.S. intelligence actions in Benghazi as illegal," Indictment, Count One ¶ 20(a), for instance, could support the Government's theory about the object of the conspiracy with which Abu Khatallah is charged, see id. ¶ 19. Because the "First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent," Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993), the Government is on firm ground in mentioning Abu Khatallah's beliefs and his expression of those beliefs. Second, even a cursory review of the Indictment makes clear that the Government seeks to convict Abu Khatallah under § 2339A based not on protected speech, but on unquestionably unprotected criminal conduct. See, e.g., Indictment, Count One ¶ 20(e) (alleging that Abu Khatallah "actively participat[ed] in the attack on the Mission by coordinating the efforts of his conspirators and turning away first responders").

Thus, to the extent "that the government seeks convictions based on Mr. Abu Khatallah's [alleged] beliefs and communications," Mot. Dismiss 9, those beliefs and communications either provide evidence "of his motive for soliciting and procuring illegal attacks against the United States," United States v. Rahman, 189 F.3d 88, 118 (2d Cir. 1999), or constitute "speech integral to criminal conduct," United States v. Stevens, 559 U.S. 460, 468 (2010). In either case, the First Amendment places no bar on the prosecution of Abu Khatallah under § 2339A. The Court therefore rejects Abu Khatallah's as-applied First Amendment challenge to the material-support statute.

C. Motion To Dismiss Counts Ten Through Fifteen on the Ground that the Mission and Annex Were Neither "Federal Facilities" nor "U.S. Property"

Finally, Abu Khatallah moves to dismiss counts Ten through Fifteen of the Indictment, which, as noted above, charge him with offenses related to attacking a "federal facility" in violation of 18 U.S.C. § 930(c) (Counts Ten through Thirteen) and damaging "U.S. Property" in violation of 18 U.S.C. § 844(f) (Counts Fourteen and Fifteen). He argues that the Mission and Annex were neither "federal facilities" nor "U.S. Property" for purposes of those statutes because they were not lawfully owned or leased under certain treaties requiring consent of the host State to establish diplomatic posts. The Government counters that it is entitled to present evidence at trial as to each element of the offenses charged—and therefore that Abu Khatallah's argument is premature and unsuited to a motion to dismiss an indictment—and that it would be inappropriate to "import the terms of an international treaty to amend clearly worded statutory definitions in U.S. criminal statutes." Govt.'s Opp'n Def.'s Mot. Dismiss, ECF No. 99 ("Opp'n") 6. Because the treaties Abu Khatallah cites do not apply to the Mission or Annex, the Court will deny his motion to dismiss these counts.

1. Statutory Background

Section 930(c) prohibits "kill[ing] any person . . . in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon [and] attempt[ing] or conspir[ing] to do such an act." 18 U.S.C. § 930(c). Section 930(g)(1) defines "Federal facility" as "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." 18 U.S.C. § 930(g)(1).

Section 844(f) prohibits "maliciously damag[ing] or destroy[ing], or attempt[ing] [to do so], by means of fire or an explosive, any building, vehicle, or other personal or real property in

whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof." 18 U.S.C. § 844(f)(1). Subsection (f)(3) provides for the death penalty or a sentence of twenty years to life for any person who "directly or proximately causes the death of any person" while engaging in conduct prohibited by subsection (f).

2. The Parties' Arguments

Abu Khatallah begins his argument with the observation that the "common-sense meaning" of the statutes at issue "presumes that the government acts within the larger legal framework established by Congress, abiding by treaties it has enacted." Def.'s Mot. Dismiss, ECF No. 90 ("Mot. Dismiss") 6. The governing treaties here, he contends, are the Vienna Convention on Consular Relations and Optional Protocol on Disputes and the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes (the "Vienna Conventions"), which "require mutual consent between States to establish diplomatic relations and missions," id. at 4 (citing Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 2, Apr. 24, 1963, 21 U.S.T. 77; Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 2, Apr. 18, 1961, 23 U.S.T. 3227).[5] Abu Khatallah maintains that because the United States never sought such consent from the TNC to establish the Mission or Annex, the Mission and Annex were not lawfully possessed, leased, or owned by the United States, and therefore did not constitute federal facilities or U.S. property under § 930(g) and § 844(f).

The Government counters that these statutes should not be read to incorporate treaty

[5] Abu Khatallah finds support for his reading of the Vienna Conventions in the State Department's Foreign Affairs Manual. See Mot. Dismiss 4–5 ("When a decision to open a post has been reached, the acceptance of the foreign government is necessary and must precede any public disclosure of the proposed action." (quoting 2 Foreign Affairs Manual § 422.1-1, http://www.state.gov/documents/organization/210051.pdf)).

requirements found nowhere in the statutory text because "federal crimes . . . are solely the creatures of statute," and Congress is entrusted with designating elements of federal criminal offenses. Opp'n 7 (quoting Staples v. United States, 511 U.S. 600, 604 (1994)). The Government also makes two alternative arguments: first, that even if treaties can inform interpretation of the statutes, the Vienna Conventions are not in play here because they pertain only to facilities the Government seeks to have recognized as permanent diplomatic or consular facilities, and second, that Abu Khatallah's argument is an inappropriate basis for a motion to dismiss because the indictment is legally sufficient and the Government is entitled to an opportunity to prove all elements of the offenses charged at trial.

3. Applicability of the Vienna Conventions

As multilateral treaties, the Vienna Conventions "are contracts between sovereigns, [which] should be construed to give effect to the intent of the signatories." Gonzalez Paredes v. Vila, 479 F. Supp. 2d 187, 191 (D.D.C. 2007) (quoting Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir. 1996)) (internal quotation mark omitted). Courts discern signatories' intent "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of [the treaty's] object and purpose." Id. (quoting Logan v. Dupuis, 990 F. Supp. 26, 29 (D.D.C. 1997)) (citing Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331).

Even if the Government is incorrect that criminal laws are "creatures of statute" that should not be read in light of international law, see Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 62 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."), the Court sees no tension between the two in this case. Application of the statutes at issue to the Mission and Annex does not violate the

Vienna Conventions because those conventions do not bear on what constitutes a federal facility under § 930(g)(1) or U.S. property under § 844(f)(1).

The treaties require mutual consent for the "establishment of consular *relations*," Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 2, Apr. 24, 1963, 21 U.S.T. 77 (emphasis added), and the "establishment of diplomatic *relations* . . . and of *permanent diplomatic missions*," Vienna Convention on Diplomatic Relations and Optional Protocol Disputes art. 2, Apr. 18, 1961, 23 U.S.T. 3227 (emphases added). The establishment of consular or diplomatic relations with a foreign state is distinct from the U.S. Government's owning or leasing "a building or part thereof . . . where Federal employees are regularly present for the purpose of performing their official duties," 18 U.S.C. § 930(g)(1), or owning, possessing, or leasing, "in whole or in part," "any building, vehicle, or other personal or real property," 18 U.S.C. § 844(f)(1).[6] The U.S. Government could establish a federal facility or own, possess, or lease U.S. property recognized as such by these statutes irrespective of whether it used the facility or property in furtherance of diplomatic or consular relations.

Furthermore, the establishment of permanent diplomatic or consular relations is distinct from the use of nonpermanent locations for temporary diplomatic purposes. See Tachiona ex rel. Tachiona v. Mugabe, 186 F. Supp. 2d 383, 387 (S.D.N.Y. 2002) ("The genesis and negotiating history of the Vienna Convention [on Diplomatic Relations] make clear that the purpose the

[6] Articles 12 and 23 of the Vienna Convention on Diplomatic Relations, which Abu Khatallah also cites, see Mot. Dismiss 4, are not to the contrary. Article 12 provides that "[t]he sending State may not, without the prior express consent of the receiving State, establish offices forming part of the [diplomatic] mission in localities other than those in which the mission itself is established." Vienna Convention on Diplomatic Relations and Optional Protocol Disputes art. 12, Apr. 18, 1961, 23 U.S.T. 3227. To the extent this article applies to the Mission and Annex, the most it could do would be to call into question their status as parts of the United States's diplomatic mission in Libya. It would not affect their status as federal facilities or U.S. property under U.S. law. Article 23 is even less applicable to the question before the Court as it concerns diplomatic missions' exemption from local taxes. See id. art. 23.

treaty intended to address was the codification of rules governing diplomatic relations between sovereign states and the organization and functioning of permanent diplomatic missions in states with established relations."). And the indictment and Abu Khatallah's motion to dismiss make clear that neither the Mission nor the Annex was intended to be a "permanent diplomatic mission." The U.S. Embassy in Libya was located in Tripoli until the State Department suspended operations and evacuated personnel in February 2011. Mot. Dismiss 1. When the United States sought to reestablish an American presence in Libya a few months later in April 2011, it sent Special Envoy Stevens to Benghazi, and then set up a "U.S. Special Mission" and an annex building there in late 2011. Indictment ¶¶ 5–6. Within six months, Stevens had returned to Tripoli as the U.S. Ambassador to Libya, though he was present, and was killed, in Benghazi during the attack. Id.

Abu Khatallah himself appears to concede that the Special Mission in Benghazi was established as a temporary concern: "In December 2011, the State Department approved a one-year continuation of operations in Benghazi." Mot. Dismiss 2 (citing State Dep't Report). And the State Department report he cites for support describes the Mission's staffing as "short-term" and "transitory," State Dep't Report 4, noting that the Mission "was never a consulate and never formally notified to the Libyan government," id. at 14–15.

The bipartisan Senate intelligence report on the attacks, issued in January 2014, likewise characterizes the Mission as nonpermanent, using the term "U.S. Temporary Mission Facility." U.S. Senate Select Comm. Intelligence, Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012, at 4 (2014), http://www.intelligence.senate.gov /sites/default/files/press/benghazi.pdf. And commentators have hypothesized that part of the reason the attack was so devastating was the mission's "confusing legal status": "It wasn't an

embassy or even an official consulate; it was so off-book that the Libyan government was never officially notified of its existence. This put the mission outside the normal State Department procedures used to allocate security funding and personnel." Zack Beauchamp, 9 Questions About Benghazi You Were Too Embarrassed to Ask, Vox (Oct. 12, 2015, 9:00 AM), http://www.vox.com/2015/10/12/9489389/benghazi-explained. While this account may bolster Abu Khatallah's argument that the United State never obtained consent from the TNC to establish the Mission or Annex, it demonstrates that such consent was not required under the Vienna Conventions given the transitory nature of the posts.

Moreover, as the Government points out, it would make little sense for a foreign state to have veto power over the protections these statutes afford federal employees working in federal facilities. See Opp'n 8. While requiring the host state's consent to establish diplomatic or consular relations or permanent diplomatic facilities is consistent with the purposes of diplomacy and international cooperation, limiting the scope of a U.S. criminal statute designed to protect federal workers, whether within U.S. boundaries or abroad, subverts Americans' safety to the decision of a foreign state.

4. Applicability of the Vienna Conventions

The Government also urges the Court to reject Abu Khatallah's Vienna Convention argument because it presents a challenge to the sufficiency of the evidence, which the Government is entitled to establish at trial. The Government does not explicitly concede that it did not seek or obtain consent from the TNC to set up or operate the posts, but it also does not directly refute Abu Khatallah's claim that it never made the recognized Libyan Government aware of the locations. It focuses instead on the inapplicability of the treaties.

As discussed above, however, resolution of the questions before the Court does not turn

on the Mission's or Annex's status under the Vienna Conventions. Rather, the Court is able to determine as a matter of law that, whether or not the United States obtained consent from the TNC to set up the Mission and Annex, the Vienna Conventions do not bear on those entities' status as federal facilities or U.S. property. The Court may therefore address Abu Khatallah's argument at this stage. See United States v. Yakou, 428 F.3d 241, 247 (D.C. Cir. 2005) (noting that the D.C. Circuit "has upheld a pretrial dismissal of counts of an indictment based on a question of law") (citing United States v. Espy, 145 F.3d 1369, 1370 (D.C. Cir. 1998)).

IV. Conclusion

For the foregoing reasons, the Court will deny Abu Khatallah's motions to dismiss Counts One, Two, Four through Fifteen, and Eighteen. It will reserve ruling and order supplemental briefing on Abu Khatallah's motion to dismiss Counts Sixteen and Seventeen. A separate Order accompanies this Memorandum Opinion.

CHRISTOPHER R. COOPER
United States District Judge

Date: December 23, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - x
THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AHMED SALIM FARAJ ABU KHATALLAH,

Defendant.
- - - - - - - - - - - - - - - - - - x

Criminal Action No.
1:14-cr-00141-CRC-1
Wednesday, June 27, 2018
9:37 a.m.

TRANSCRIPT OF SENTENCING HEARING
HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER
UNITED STATES DISTRICT JUDGE

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(Continued on Next Page)

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Your Honor, we're on the record for Criminal Case 14-141, *United States of America vs. Ahmed Salim Faraj Abu Khatallah*. Counsel, if you could please approach the lectern and identify yourselves for the record.

And, Your Honor, we want to also let the record reflect that the interpreters have been sworn.

MR. DiLORENZO: Good morning, Your Honor. On behalf of the government: Michael DiLorenzo, Julieanne Himelstein, John Crabb, Opher Shweiki, and then we also have Special Agent Michael Clarke, paralegal Rayneisha Booth, and FBI analyst Jamie Jackson.

THE COURT: Okay. Welcome, everyone.

MR. ROBINSON: Good morning, Your Honor; Jeffrey Robinson for the defense. Along with me is Michelle Peterson, Mary Petras, Waleed Nassar, and Cole Lautermilch, our paralegal.

THE COURT: Good morning.

All right. So we are here for the defendant's sentencing hearing. I would expect to be memorializing the guidelines' sentencing calculations, then allow for witness testimony, both sides can address the 3553 factors, and I would anticipate then taking a recess of some length before I return and discuss and impose the sentence in this case.

I've reviewed both sides' sentencing memoranda. Any other written materials for the Court's consideration?

MR. DiLORENZO: The government has no further material.

THE COURT: Okay. I have reviewed, in addition to the defense's memorandum, two video submissions, and I have considered those for purposes of sentencing today.

The Court issued a ruling on the defense's objections to the factual findings and the guidelines calculation in the presentence investigation report last week. Are there any other objections to the PSR that were not resolved in the Court's ruling?

MR. ROBINSON: No, Your Honor.

THE COURT: Okay. The Court then accepts the factual findings in the PSR and adopts them for purposes of this sentencing.

The opinion last week went through the guidelines calculations and the associated factual findings, but just for the record, there were four counts of conviction in this case: Count I, providing material support to terrorists in violation of 18 USC Section 2339A, which carries a 15-year maximum sentence; Count 2, conspiring to provide material support in violation of 18 USC Section 2339A, which carries a 15-year maximum sentence -- with respect to those two material support counts, the jury found that the defendant's

conduct or his material support did not result in death -- count 16, intentionally destroying or injuring a federal building where that building was a dwelling or where lives were placed in danger in violation of 18 USC Section 1363, which carries a 20-year maximum sentence; and Count 18, carrying a semiautomatic firearm during or in relation to a crime of violence in violation of 18 USC Section 924(c), which carries a 10-year mandatory minimum sentence to run consecutively to any other sentence imposed by the Court.

Based on those counts of conviction, the Court agreed with the presentence investigation report writer that the base offense level is 38. The Court imposed a 12-level enhancement and an increase in criminal history to Criminal History Category 6 for conduct intended to promote a federal crime of terrorism under Guideline Section 3A1.4 and an additional four-level enhancement for playing a leadership role in the offense under Section 3A1.4(b) of the guidelines. Those calculations led to an advisory guidelines sentence of life. Okay?

Mr. DiLorenzo, do you want to proceed with your witnesses?

MR. DiLORENZO: Your Honor --

THE COURT: Before you get there, there was a motion filed by the defense to bar the testimony of some family members or members of families of the victims of the

Annex attack. The Court will deny that motion and will hear testimony from those folks as the government sees fit. Whether or not they meet the definition of "crime victim" under the statute, I think their testimony is well within the evidence that the Court may consider at sentencing.

MS. HIMELSTEIN: Good morning, Your Honor. Julieanne Himelstein on behalf of the United States.

THE COURT: Ms. Himelstein, how are you?

MS. HIMELSTEIN: Thank you.

Your Honor, we would like to present victim statements to the Court. The first --

THE COURT: So you have filed some under seal; is that correct?

MS. HIMELSTEIN: We have, Your Honor.

THE COURT: And I've reviewed all of those statements. Are there additional ones?

MS. HIMELSTEIN: There are three family members who would like to address the Court, with the Court's permission.

THE COURT: Very well.

MS. HIMELSTEIN: The first one is Ms. Dorothy Woods. She is the wife of Ty Woods. May I have the Court's indulgence?

THE COURT: You may.

(Pause)

MS. DOROTHY WOODS: Your Honor, thank you for your time, your effort, and your leadership.

To Michael DiLorenzo and your team, the DOJ, the FBI, and the special law enforcement team involved with the case, please accept my heartfelt thanks. Know that I will forever be grateful. Each and every one of you and your families will always be in my thoughts and prayers.

Ty did his job. Thank you for doing yours. Thank you for holding up your end of this very costly bargain. You should all be very proud of yourselves and each other as I am proud of you.

Your Honor, I fully understand that our nation's judicial system works best when cases are both linear and technical. Doctrine and the execution of doctrine often is not. Hate can be linear, but it can also be collateral, unspoken, and masked.

The men and women fighting on the front lines of the war on terror can tell you that it is neither linear nor technical, and, predictably, the terrorist standard of justice is not our American standard of justice. So how can you effectively prosecute or effect change when the bars are set to different moral compasses? Sometimes doing the right thing means blurring the lines and making a decision to save lives.

If Ty was waiting to cross the street at a busy

city intersection and witnessed, on the opposite side, an elderly woman unknowingly step onto the street into incoming traffic, I can guarantee he would have smartly and tactically rushed to save her. He would not have assessed the situation and said, "Well, technically, by federal state and local laws of traffic, the pedestrian sign says 'Do Not Cross', therefore, I will not cross to avoid breaking the law." No, he would have done what he could have to save another's life no matter the cost.

This is not just a hypothetical situation. Please remember that on the night of September 11, 2012, in Benghazi, Libya, Ty did just that. He saved American lives and lost his own.

Americans like my husband make decisions exactly like that every day, and the impacts range from the micro level of personal civility and acts of kindness to the macro end of the scale where lives are saved, Americans are protected, and our nation is secure.

President John F. Kennedy once said, "Too often we enjoy the comfort of opinion without the discomfort of thought." The jurors in the *United States vs. Abu Ahmed Khatallah* [sic] had the comfort of knowing they can return to their secure home every day. They had the comfort of sitting in a soft chair looking at pictures and listening to testimony. They had the comfort of an air-conditioned jury

room with cold bottled water and catering. In the end, the jury had the comfort of linear and technical opinion when deciding guilty or not guilty. Life is easy when you can check those very defined boxes with minimal to no interpretation or analysis required.

Again, the jury had the comfort of linear and technical opinion without the discomfort of thought: the thought of the notification of the death of your husband by a mortar on a rooftop fighting terrorists in Benghazi; the discomfort of the thoughts that race through your mind when watching his flag-draped casket held on the shoulders of the perfect United States Marines being walked down the ramp of a C17; the discomfort of the thoughts of what is next for my son and I, and will Ty have died for nothing.

As Americans, we all make choices in life, and that is the beauty of our nation. We can freely choose to be lions, to lead and to protect, or we can choose to be sheep and sit in a box or cross the street without looking. But like they say, it's better to be a lion for a day than a sheep your whole life.

Your Honor, your sentencing sends a message to the men and women on the front lines of the war on terror, to the men and women who work to support them here at home, and to the families who so willingly make that sacrifice. I ask that your message be clear and strong. I ask that your

message is, "I've got your six." I ask that you sentence Abu Ahmed Khatallah to the maximum.

Thank you, and may God bless the United States of America.

THE COURT: Thank you.

MS. HIMELSTEIN: Thank you, Your Honor. Next a Mr. Charles Woods, Ty Woods's father.

MR. CHARLES WOODS: Your Honor, good morning.

THE COURT: Good morning, sir.

MR. CHARLES WOODS: My name is Charles Woods. I'm the father of Ty Woods.

THE COURT: It's a pleasure to meet you.

MR. CHARLES WOODS: Ty was an awesome young man. Immediately out of high school he went into the Navy to be a Navy SEAL, not to scrape barnacles off the bottom of a ship, and that's exactly what he did for 20 years.

Once you're a SEAL, you're always a SEAL. And after he retired, it was still in his blood.

Every so often he'd get a call to do a particular assignment. He loved his country, and he loved working with the teams. That's why he went to Benghazi.

The last conversation I had with Ty, he'd just become a father days removed from this, and I told him, "Ty, for the 20 years that you were in the Navy SEALs, I prayed for your safety, but I never feared that anything would

happen." I told him, "For some reason or another, Ty, I feel differently this time. If there's any way that you can get out of this, do."

And he says, "Don't worry, dad. I can't tell you who I'm working for, but they never like to lose anyone."

He had the opportunity to come home. He was scheduled to come home before this. However, one of the men that he worked with received a call from his dad. He wanted to go elk hunting in Washington state during archery season. And I took Ty hunting the first time when he lived on a 9,000-acre ranch in Long Creek when he was five years old, so we'd done it together as father and son, and he knew how important this was, so he allowed this other individual to take his place, and he was scheduled to come home in six more days.

He had already told the people that he worked for that this was the last assignment that he would ever take since he was a new father and his primary responsibility was now to his family. Unfortunately, there was no reinforcement sent, and he was killed in Benghazi, Libya.

The purpose of terrorism is to cause fear, retaliation, and retribution. Our legal system has the opportunity to turn the tables and to cause terrorists to fear and to respect our legal system. That can be done by sending a message to potential terrorists that if you harm

American citizens anywhere in the world, we will come, and we will get you, and you will face justice.

According to testimony that was given on November 6th, Khatallah boasted that he was upset that more Americans were not killed in the attack. As an unrepentant terrorist, his desire is to make sure that more Americans are killed. As an unrepentant terrorist, he needs to be prevented from being given the opportunity to ever kill Americans again.

How can this be done? By making sure that he has a life sentence so that he is never given the opportunity to do that again.

There were four counts that he was found guilty on: Count No. 1, as you had already stated, providing material support to terrorists, 15 years maximum; Count No. 2, 15 years maximum; Count No. 3, 20 years maximum; Count No. 4, the weapons charge, ten-year minimum, maximum life in prison. These maximum terms should be run consecutively, one after another, and there should be no opportunity for early release from prison.

Personally speaking as a father, I have forgiven everyone that's involved in the death of my son so I'm not here to seek vengeance or retribution. I'm here to make sure that this never happens again.

What happened in Benghazi has profoundly affected my family and several other families who are here today and

who have suffered a loss. Ty had a son that was literally days old when he left for Benghazi. My grandson will never see his father this side of heaven.

It's been five years since this happened, and even though I've forgiven everyone, there's still times I cry. We need to make sure that this never happens to other American families. How can this be done? By giving a maximum sentence of life in prison without any possibility of early release. There is the possibility of repentance while in prison, but it would be wrong to give him anything less than the maximum of life in prison.

Thank you, Your Honor.

THE COURT: Thank you, sir.

MS. HIMELSTEIN: The Court's indulgence, Your Honor.

(Pause)

MS. HIMELSTEIN: Your Honor, that concludes the family members addressing the Court.

THE COURT: Okay.

MR. DiLORENZO: Good morning, Your Honor. And I'll address, as the Court had requested, the factors under 3553.

On September 11th, a group of armed men violently assaulted a U.S. diplomatic mission, the U.S. Special Mission in Benghazi. This act of aggression, this act of

terrorism, which was led at least in part by this man, resulted in the death of American lives, including a sitting U.S. ambassador. This is truly a singular event. I mean, the defense and the government have researched multiple cases. A U.S. ambassador has not been killed in the line of duty in 40 years, and this is the first time we have a man in custody who is responsible. This warrants the maximum sentence under the law, and that is a sentence of life plus 50 years.

Each of the factors under 3553 weigh heavily in favor of imposing the maximum sentence here. The first are the nature and circumstances of the offense. I mean, how do we know what happened? The Court had the benefit and the jury had the benefit of sitting through a seven-week trial. The defendant was convicted of four counts, and that verdict sets up the parameters for the Court within which to sentence the defendant.

The Court, however, had not just the benefit of a seven-week trial, but the Court has had the benefit of lengthy pretrial sentencing hearings as well as pretrial and presentencing hearings; so, as is typically the case, the Court has many more facts than the jury ever had, and the Court, unlike many cases, made specific findings in this case.

And what are those findings? Well, we know that

the Mission -- the Mission was established in Benghazi to rebuild -- the purpose of it was to rebuild war-torn Libya, to reestablish a relationship between the American and the Libyan people, and to help stabilize the region.

The Department of State employees, the ambassador, Sean Smith, and the other personnel served bravely in Libya and bravely in Benghazi to advance these goals. These goals never came to fruition in part because of this man. That man -- and I will discuss him in a moment -- was upset, as the Court found. He was upset about the U.S. presence in Benghazi. He viewed it as a threat to his extremist ideology. That man, in the days and weeks before, as the Court found, acquired truckloads of weapons in the planning for this attack, and he also acted not just as an attacker, but as a leader to the attack.

This was clearly not a spontaneous attack. It involved planning, the weapons, the defendant's communication with key attackers -- and the Court credited that in the Court's lengthy opinion -- communication with key attackers, members of his militia, Ubaydah Bin Jarrah, before the attack, during the attack, and after the attack, and, most of all, the defendant's role during the attack where he set up a virtual and a physical barrier around the Mission. It was while he was doing this, while he was ordering militia commanders to stand down, while he was

turning away emergency responders, that Ambassador Stevens and Sean Smith were taking their last breaths.

The verdict reflects as well that this was -- it was planned. It involved -- he was convicted of conspiracy, and as the Court knows, a conspiracy is a plan.

This man's actions and the actions of his co-conspirators, particularly the members of his armed militia, resulted in the death of -- as the Court found, resulted in the deaths of Ambassador Stevens and Sean Smith, and although not as relevant conduct, they were the proximate cause of the death of Tyrone Woods and Glen Doherty. They responded to the Mission because of the attack that he led.

Why did the defendant attack the Mission? And this is particularly important, his motivation. The Court found that his motivation was "calculated to influence or effect the conduct of the government by intimidation or coercion or to retaliate against the government." What does that mean in English? He viewed the Mission as a spy base, was frustrated by its presence, and took action by leading an attack on the Mission.

The verdict shows that as well. He was convicted of the conspiracy. The first object of the conspiracy was to remove the presence of the U.S. in Benghazi through the use of force and the threat of force. He was found guilty of that offense.

This is an act of terrorism. This behavior cannot stand. He must be punished, and, as Ms. Woods and Mr. Woods said, this cannot be allowed to happen again.

One of the other factors which is particularly important in this case is who is the defendant? And this is equally important to sentencing. The jury didn't have the benefit that the Court has of seeing really who the defendant is. They've got a picture of who he is. The defense, in their videos and in their sentencing memo, as is their job, pushed this false narrative of who he is as if he is a pious religious man, as if he is a victim.

That's not the truth. The Court has a clear picture of who the defendant is. Unlike many defendants who appear in this courthouse every day who are poor, who have no opportunity, the defendant had opportunity. He grew up in a middle-class family, educated. He had opportunity.

And there's no doubt he was incarcerated while in Libya in the Gaddafi regime, and the defense makes much of the regime being brutal. What we know is the defendant spent most of his adult life in prison. This may explain why we have what we hear today.

But his prior incarceration is no excuse. What did he do when he was in jail? Well, let's look at what he did. He formed the core of his armed militia, Ubaydah Bin Jarrah. This is a militia that he led into battle in the

revolution.

The defense tries to create this false narrative that he is a freedom fighter, that he fought in the revolution along the sides of the Americans. That's not true. He is not a freedom fighter. He is no George Washington. He had his own agenda.

Yes, he fought in the revolution, but during the revolution, as the Court has heard, the defendant kept separate. After the revolution, when militia members or militia commanders were invited -- we've got this new found freedom, and they were invited to come back to the U.S. -- I mean, back to Libya and assimilate, the defendant refused to assimilate. He had the opportunity. He turned it down because he had his own agenda.

After the revolution, he struck the United States. We helped the Libyans free themselves from that regime, and he struck America.

He's no freedom fighter. The defendant is not interested in freedom. He is interested in furthering his own extreme agenda, and this explains why, after the revolution, he kept that armed militia. It explains why he refused to assimilate with the fledgling Libyan government and explains why he maintained hit squads, operational squads that carried out crimes of violence, including assassinations on his behalf up to the date of his capture

in June of 2014. And it was members of this hit squad who played a key role -- key roles in the attack on the Mission and who he maintained communication with during the attack on the Mission.

As I noted, he continued to the date of his capture. That's June of 2014. The date is telling. From the point of the revolution -- and we don't know as much about the defendant before the revolution, but from the end of the revolution to the date of the capture the defendant continued to engage in this conduct, violently pushing his ideology.

This attack was not a whim. This is who he is. This attack was a result of the defendant's long-held and deep-rooted ideology. He is no candidate for rehabilitation. He is dangerous.

Another important factor -- some of the victim family members touched on this -- is lack of remorse. The defendant has showed a complete lack of remorse. In the guidelines -- and we've all become unbelievably acquainted with the guidelines with all this presentencing litigation -- the guidelines view an individual, a defendant, who stands up and takes responsibility for his actions. That's important. And they are given credit in the context of a sentencing or a plea.

Not only has the defendant shown a complete lack

of remorse, he has shown a complete lack of empathy. And we see that in several of the comments.

In the days after the attack, when discussing the ambassador's death, he said that he was just another dog who died like the other dogs. Complete lack of empathy.

In the days after his capture, to the FBI -- and the Court credited his conversation -- the defendant referred to the lives of the Americans that died as meaning nothing, as simply like watching it on TV. I mean, that was his chance. I mean, he could even have said and not admitted, "I didn't do it, but that was terrible." He said, "It means nothing to me."

We're getting a picture of what this -- what motivates this man. And one of the scariest comments the defendant made, and a comment that the defendant made that the Court credited, is the defendant expressed frustration after the attack that he was not able to kill more Americans.

So looking at the combination of the motivation for the attack, the defendant's ability, even while in prison, to organize, his ability to acquire and maintain weapons, his propensity to violence as evidenced by maintaining a hit squad, leading this attack, and statements like the fact that he is frustrated because he couldn't kill more Americans, his deep-rooted and long-standing extremist

ideology, his complete lack of remorse, these demonstrate not only is he -- is a maximum sentence warranted in this case, but it demonstrates that he poses a continuing danger.

And that's an important factor, too, when imposing sentence; the need to protect the public. That's the United States, that's the West, and the Libyan people.

Now, I've spoken about the impact this crime has had on the United States. Ms. Himelstein is going to talk about another -- when I'm done, another important factor, and that is the impact on the victims. The Court has received some letters and heard some of the testimonials, but she'll discuss that when I conclude. But that's a very important factor and something to take into consideration in the sentencing.

The guidelines -- the Court laid out the guidelines, and that's another -- they are advisory, but they do provide a guidepost for the Court. The guidelines in this case for Counts 1, 2, and 16 are a level 38. The Court, concurring with the office of probation, found that the two enhancements apply both for the leadership and organizer and the terrorist enhancement, which jacks up the guidelines to a 54, which is well above the maximum of the guidelines. The guidelines has a max of 43, but it's well above, and that results in an overall guideline range of life. Count 18 requires the mandatory minimum of ten years

consecutive, but it, too -- that carries a maximum of life.

Now, one of the issues is what should the Court do? You've got these offenses. The defense is going to stand up here and argue that they should be run concurrent. The government is going to say -- argue that they should be run consecutive. The Court has the discretion, but the Court is to look at the factors, the 3553 factors, and looking at the Counts 1, 2, and 16, which are grouped together, those three offenses call for life, but the maximum penalty is 50 years. They fall short of capturing the total punishment under the guidelines.

What the government is asking the Court to do in order to impose a reasonable and fair sentence in this case is look to Count 18, which carries a maximum of life. It's necessary to impose that life sentence on the firearms charge in order to achieve the total punishment contemplated by the sentencing guidelines. It's necessary to impose that life sentence on the firearms charge for all the factors under 3553. It's also necessary to capture -- to sentence under life because of the extent of the defendant's criminal behavior.

On that charge, if you recall, the defendant was convicted of the weapons charge and faces a ten-year mandatory minimum. That's for using, carrying, during a crime of violence. And as the defense argued, that portion

on the video at about 11:45 when he's seen with a gun, that's the criminal offense. That alone would convict the defendant.

But the defendant's conduct with respect to firearms is so much more. And what do I mean by that? As the Court found, the defendant didn't just possess that firearm during the attack, but he contributed to the other attackers possessing firearms.

And the weapons were essential to the success of this attack, so the mere fact -- it's an aggravating fact, that he helped acquire weapons, right? The Court found -- the language that the Court used was "procured," right? He procured weapons, truckloads of weapons, for attackers before the attack. This ensured the success of the attack. But for those guns, those weapons, or the weapons that the attackers had, this would not have been a successful attack. We would not have dead Americans.

So the life sentence on Count 18 should take into consideration -- would take into consideration the full extent of the defendant's conduct on the firearms. Not only just possession, but the fact that he aided and abetted the others, he procured, facilitated, their possession as well, and the result that ensued.

The downward departure -- I'm going to address a couple of issues in the defense's sentencing memo. The

defense invokes the *Bell* case. The Court had mentioned it at a prior hearing. In *Bell* -- and first, in *Bell* there was a concurrence where there were some comments by some of the judges where they pointed out a concern. Before addressing that, it's important to note that the Court denied the rehearing for sentencing based on long-standing precedent.

But the fact is this is not a case of *Bell*. In *Bell*, there was a dramatic increase based on acquitted conduct. The guidelines in that case were 51 to 63 months. With the acquitted conduct, the guidelines were substantially increased, and the defendant received 192 months. There was a 300 percent increase.

This is not the *Bell* case. The Court in that lengthy opinion found that the defendant's guidelines were life and did consider acquitted conduct resulting in death with the analogy to the second degree murder. Had the Court not considered acquitted conduct, and we used the guideline that the defense had suggested with the terrorism enhancement and leadership, the defendant's guidelines would be 360 to life. So when you take this case with acquitted conduct and you take it without acquitted conduct, the higher guideline, the acquitted conduct guideline, is not above. It's merely at the top of the guideline.

It is not the *Bell* case. There is no dramatic increase by considering acquitted conduct. It is not

substantially unreasonable, and there's no basis for a variance based on *Bell*.

With respect to the terrorism enhancement, the Court had commented about the terrorism enhancement, and the government had cited in its memo the *Meskini* case, and the Court talked about how Congress is free to ascribe any sentence that in its view reflects the seriousness of the underlying offense and the characteristics of the offense, and it goes on that some of the rationale for it is terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty for retaliation, and the need for incapacitation.

In that case, which is a nonviolent case, the material support with fraud counts, they upheld -- said that the terrorism enhancement was constitutional and imposed a 288-month sentence. This case factually is substantially more horrific.

So let's just take a step back, okay? Let's just look at what the terrorism enhancement does in this case.

The Court found that the defendant had a base offense level of 38, and if we just take the terrorism enhancement off the table and we add the four for role, the defendant's guidelines, even under Category 1, are still 360 to life.

Terrorism enhancement, which is so appropriate in

this case, even if that's taken off the table, the defense guidelines are 360 to life, and we would still be standing here requesting that life sentence.

Now, the defense cherry-picks a couple of cases which are factually inapposite where courts -- and the Court would have discretion in some cases to vary, but let's look at the cases that they cited. And there are a number of them, and I won't go through all of them, but I'll talk about a few of them.

One is the *Warsame* case. In that case the Court imposed a sentence below the guidelines, and this had something -- and held that nothing demonstrated the defendant was part of a specific plot, so that was a reason for departure.

Not this case. The defendant wasn't only part of the plot. The Court found that he led the plot, carried out the plot, and people died as a result of the plot. So this is factually inapposite of that.

Two other cases.

One was the *Aref* case, which was a sting case. The Court applied the 12-level increase but not the criminal history category enhancement. That case -- that sting case was factually inapposite. The Court made specific findings in that case in granting it.

And these are cases that they're relying on.

That's far from what we have here.

In that case, the crime -- it was a sting case which presented the defendant. In our case, the defendant led the attack. In that case, the *Aref* case, the motive was greed. The Court held that it was not ideological. Here, what drove the defendant? Deep-rooted, long-standing ideology which represents this continued threat. Very different. And also in *Aref*, no harm. Here we have deaths, destruction, injuries.

The *Nayyar* case that the defense cited. Very similar. Again, a sting case. In that case the government conceded that the defendant was not a terrorist. We're not making that concession here. I mean, looking at what he did, his history, he is the poster child of a terrorist.

Also in *Nayyar*, no plot, no harm, and there was a suggestion that he was amenable to treatment. We have none of those here.

So really, when reading the defendant's cases, what we see is where there is a departure from the terrorism enhancement, those are extreme cases. Yes, the Court has the authority to do it, but those are extreme cases. The other side of the spectrum.

This case, this is what Congress -- this is what the Sentencing Commission had in mind when they were talking about the terrorism enhancement. And what this allows the

Court to do is to take into consideration that some of these defendants were in the U.S., so if they had contact with the criminal justice system, they would have a record.

Of course the defendant doesn't have a record. He's never been to the United States. But is there a criminal history? Absolutely. Absolutely. He had a hit squad.

So what the terrorism enhancement allows the Court to do is to capture a lot of that behavior that is unique among terrorists.

The other grounds the defense argued for the variance are absolutely baseless. I'm not going to go through all of them, but I'll touch on some.

The defense talks about his age and his incarceration because he was incarcerated in Libya. His age, he used that to sway people to join his militia. He used it to his advantage. Same with the incarceration. He used it to his advantage to recruit members of his militia.

Treatment by the U.S. The defendant talks about the special administrative measures that are imposed and that he should get some credit. Those are imposed because they're necessary, and they're necessary because he has and continues to be a danger. That's why they're in place. He should receive no benefit for that.

His capture -- they make a lot of his capture.

The Court heard a lengthy week-and-a-half hearing about the facts around his capture. Yes, he was forcibly captured, but he had a gun on him. He was treated with minimal force, utmost respect. He received, during the course of his stay on the U.S. ship, more than 20 medical check-ups, food. He wasn't denied anything. This is not a basis for a variance.

And, again, the treatment by the Gaddafi regime and what he did, this demonstrates why he is a danger. It's after getting freedom, after the U.S. helped him and helped the Libyan people become free, he struck the hand that helped him. He struck the United States. That, without any doubt, demonstrates what a danger he is and argues in favor of keeping him locked up.

Just a few other comments.

One, the Court had -- in the government's sentencing memorandum, we asked the Court, when imposing its sentence, to kind of invoke the sentencing package doctrine, and I will say nothing more about that.

One of the other factors that's very important in 3553 is the need for the sentence, and really there's three things. One -- the first two I've really addressed. The sentence should reflect the seriousness of the offense and should provide a just punishment. The facts -- the defendant -- the facts in this case, the horrific facts in this case and the defendant's conduct and who the defendant

is clearly weigh in favor of imposing the maximum sentence.

The second is protecting the public. His attack was driven by long-standing and deep-rooted ideology, and as I mentioned, the defendant represents this continued threat. There is a need to impose the maximum sentence to protect the public.

Deterrence. Now, I haven't talked much about deterrence. The victim's family had. That's equally as important. This is truly a singular event. The most analogous case -- and we cited it in our brief -- was the *Ghailani* case, and that case was prosecuted in 2013. The defendant was convicted of one count of conspiracy to destroy a U.S. property, and those were the embassies in Kenya and Tanzania. He was acquitted.

That individual was acquitted of 281 counts, including many, many murders. Judge Kaplan imposed a life sentence, and in --

THE COURT: But the object of the conspiracy was death, correct?

MR. DiLORENZO: Correct.

THE COURT: So --

MR. DiLORENZO: Object --

THE COURT: So that distinguishes *Ghailani* from this case, doesn't it?

MR. DiLORENZO: Well, the object -- that was also

an object of our conspiracy, although we don't have a specific finding of that.

But in that case, and really it's the principle of deterrence in that case, and Judge Kaplan had stated, and it was in the opinion, that a sentence must be imposed that in addition to other things makes crystal clear that others who engage or contemplate engaging in deadly acts of terrorism risk enormously serious consequences.

This case, while not as many lives were lost, does have aggravating factors. The defendant was convicted of multiple counts. The defendant in this case -- the Court found he was a leader. The sentence in this case needs to send the same message.

Your Honor, as we sit here today, the world is watching. This case makes crystal clear that any would-be terrorist that -- makes clear to any would-be terrorist that if you commit an act of terrorism against the United States, particularly one as horrific as this, the U.S. government will go to the ends of the earth to gather evidence to obtain an indictment.

This case made clear to any would-be terrorist that you cannot hide. We will go anywhere in the world. We will track you down regardless of it being a hostile environment. And the U.S. government will come together, all agencies will come together, in order so that we can

obtain a conviction.

The government respectfully asks that the Court send a similar message of deterrence to any would-be terrorist engaging in deadly acts of terrorism, that the Court couple this message of deterrence with the guidelines that call for a life sentence and the 3553 factors that I have discussed and impose a necessary and just sentence, and that is a sentence of life on Count 18, 50 years consecutive on the other counts, so the defendant receives a total sentence of life plus 50 years.

Your Honor, I have nothing further. Ms. Himelstein would like to address the Court briefly.

THE COURT: Thank you.

MS. HIMELSTEIN: Thank you, Your Honor.

Ambassador Christopher Stevens, age 52, career diplomat, serving as a foreign service officer since 1991. He was in Libya as an ambassador since May of 2012, approximately four months before he was killed. His mission there was to build bridges.

The diplomacy that Ambassador Stevens showed, as we heard at the trial and in some of the statements that the Court received, was not with pomp and circumstance. It was not with bodyguards and big limousines. Ambassador Stevens's diplomacy was loading food off of ships with his bare hands. Ambassador Stevens's diplomacy was speaking

fluent Arabic with the people of Libya. His diplomacy was walking on the streets of Tripoli and Benghazi talking to the people, welcoming the citizens of Benghazi and setting up international relationships and breaking bread.

"Everyone we met," as the Court heard, "they didn't know Ambassador Stevens by "Ambassador Stevens." They knew him by simply "Chris."

A member of his security detail told the Court what it was like going out on the streets with Ambassador Chris Stevens. He said, "Everywhere we went people wanted to take selfies with him, and, really, he was like a rock star."

The Court heard from Peter Sullivan, a family member, who said that before he went to Benghazi, before he went to Libya to take that posting, he was so excited and optimistic. He said nothing was going to stop him. He wanted to make it a better place.

The family member who the Court met asked, "What about the risks? What about the dangers?"

Ambassador Stevens replied, "I don't care. I want to be with the people."

We are reminded that Ambassador Stevens was loved by many more Libyans than those who hated him for being an American. We are reminded that after the attack on the U.S. Mission, over 30,000 citizens in Libya protested the attack

and the deaths of the Americans. We are reminded that literally thousands of letters were received by the victim's family, from Libyans and others throughout the world who were touched by the ambassador.

Diplomatic Security Officer Sean Smith, age 34, a ten-year veteran of the State Department, husband, and father of two small children, Air Force veteran, devoted husband and father. At the time Sean Smith was killed, his children were age 6 and 7.

Scott Wickland, diplomatic security officer. The Court heard from Scott Wickland in person. He told us that when the Mission was attacked, while he was trying to locate the ambassador and Sean Smith, he told the jury and the Court, "I thought I was going to die." As the villa where the ambassador resided was ablaze in flames, Scott Wickland was on the roof barefoot and alone. He said the smoke inside was so thick that he couldn't see, he couldn't breathe.

"The smoke is coming out of the building. It was thick and black. I am just choking. I am so weak. I can barely stand. I'm throwing up and talking on the radio and trying not to be shot. I am trying to figure out what to do because nobody is on the radio so everybody must be dead. I don't know how many times I thought I was going to die."

Diplomatic Security Officer Dave Ubben. The Court

also heard from him. He is a man none of us can forget. The attacks that night left him with a leg nearly amputated, a gaping wound over his left elbow, a penetrating wound to his temple, countless lacerations, blast injuries, and shrapnel wounds over the rest of his body. Dave Ubben was evacuated out of Libya and ultimately to Walter Reed Hospital where he spent 15 months in hospital, went through dozens of surgeries, eight months confined to a wheelchair. He would say, and he did say to the Court, "I was just doing my duty."

Mark Geist, CIA security officer. The Court heard from Mark Geist, who, after the attack on the Mission, was posted atop Building 3 of the Annex with Dave Ubben, Glen Doherty, and Ty Woods. He told the Court and the jury, "I had gotten hit in the neck by shrapnel about a millimeter from my carotid artery. I was hit on both sides of my chest, one in the center. I still have three pieces of metal in my chest. I got hit in the stomach, up and down both arms, and then another piece of shrapnel about a millimeter from a femoral artery high up on the inside of my leg, and had a bunch of holes up and down my legs." He would say, and he did say, "I was just doing my duty."

Tyrone Woods, Ty Woods, former Navy SEAL, 42 years old, CIA security officer who responded to the United States Mission during the attack and then, arriving back to the

Annex, was posted atop Building 3, was killed instantly by mortar attack. The Court just heard from his wife, Dorothy Woods. His son was just an infant, three months old. He never got to meet his beloved father.

We heard from his wife Dorothy who was gracious and spoke with grace. We heard from his father, Mr. Charles Woods, who reminded us that his son was lost and how it profoundly affected his family. He would say that he was just doing his duty.

Glen Doherty, former Navy SEAL, 42 years old, a CIA security officer who was in Tripoli and who responded to Benghazi upon hearing about the attack. He went directly to the Annex, and when he arrived, he immediately posted atop Building 3. He was immediately killed by mortar attack. One of the witnesses told us that he said to him, "You just got here. Why are you up here already?"

He said, "No, I want to be with you guys," and just minutes later he was killed.

Nothing the Court can do can bring the sons back for these families and take away the injuries that the survivors endured. The United States Mission in Benghazi was created to build bridges and mutual respect for others, the Libyans and the Americans, just like Ambassador Stevens wanted. It is now gone. The Americans who were there were simply doing their duty. Four are dead, and their families

will be living with their deep loss and sorrow for the rest of lives. Two others were severely injured and will be living daily with their injuries for the rest of their lives.

Your Honor, for the reasons that Mr. DiLorenzo already set forth and the devastating and lasting effect this heinous crime had on the victims and their loved ones, we ask the Court to impose a life sentence plus 50 years.

THE COURT: Thank you.

Okay. Anything else from the government?

MR. DiLORENZO: No, Your Honor.

THE COURT: Mr. Robinson.

MR. ROBINSON: Thank you, Your Honor. To begin with, Your Honor has already received briefing and has reached his decision with respect to the guidelines, and we're not going to argue about those. I would note, however, that the government's request for a life sentence on the final count is above the guidelines, and they are essentially seeking a departure there based upon acquitted conduct.

THE COURT: Explain that to me.

MR. ROBINSON: The guidelines, as established, were not -- were ten years for that offense, and essentially the government is saying based upon the deaths, which the jury did not find, based upon other circumstances, which the

jury did not find, that the Court should depart and impose a life sentence on the basis of that count.

THE COURT: So the guideline range on the 924(c) case --

MR. ROBINSON: Was ten.

THE COURT: -- is the statutory -- mandatory minimum?

MR. ROBINSON: Right, which makes --

THE COURT: Which is usually the case.

MR. ROBINSON: Right, and which in this case is -- we would argue one can't depart below, but we want you to take into consideration the fact that the possession of an assault rifle, which is why it was ten instead of five years, in Benghazi in 2012 has a very different meaning than the possession of an assault weapon in the District of Columbia or in the circumstances under which that mandatory minimum was established, as we've set forth in the brief.

The Court identified the key issue in this, and frankly the Court directed the parties to the issue before we had even identified it. That's the issue that comes up in Kavanaugh. That is the fact --

THE COURT: In *Bell*.

MR. ROBINSON: In *Bell*, excuse me, by Judge Kavanaugh. Excuse me.

Imposition of a sentence under the guidelines

would completely disregard and, we would say, denigrate the work and service of the jury and what it found in this case. It is clear, it is beyond doubt, that the jury in this case found that Mr. Abu Khatallah did not commit murder. They found that repeatedly. The jury in this case found that Mr. Abu Khatallah's conduct, the offense conduct, did not lead to death. That's what they found.

They found that after sitting through seven weeks. They found that after sitting through seven weeks, I think even though we told them it was going to be five. And they sat, and they listened, and they watched the videos about what happened, and they listened to the repeated testimony about what happened, and they came back after Thanksgiving to continue their deliberations, and they deliberated carefully.

Now, I'm not happy with the verdict that they reached because I believe that the verdict should have been not guilty on all counts, but they did the job that we asked them to do. They sat, they listened, they deliberated, and they rendered a verdict.

The government, on the basis of acquitted conduct, is now asking the Court to pass -- to impose a sentence as though the jury hadn't done its job and had convicted on all counts and had decided that Mr. Abu Khatallah was a murderer. That is the fundamental issue before the Court.

THE COURT: What acquitted conduct did the Court rely on in applying the terrorism exception? The terrorism enhancement, I'm sorry.

MR. ROBINSON: The terrorism enhancement? Our -- we view that the jury -- that the only way to make sense of the jury's verdict is to conclude that it found Mr. Abu Khatallah's participation in the events centered on post-attack, being at the Mission when the TOC and that facility and the other -- the dining hall facility were being destroyed. That was his presence there, and that the support that he applied was simply being there.

That conduct --

THE COURT: And where, if any place, did the jury determine that his presence there at the latter parts of the attack was not based on a motivation to affect or retaliate against the U.S. presence there?

MR. ROBINSON: At that point in time there was no U.S. presence at that facility. And we think that the way to the -- the appropriate -- there is not a finding because the jury doesn't make a finding of that, but that the appropriate way to understand what they did as they carefully went through what had been argued to them about what they should find, that that's the only way one can understand it because the case that was presented to them, if they had credited it, would suggest that he had a much

larger involvement and that his conduct was -- so that that is the way -- you know, we're dealing with a jury verdict so we can't parse the particular language and finding, but we would submit to the Court that what makes sense -- what they did was conclude that Mr. Abu Khatallah had culpable conduct, but that it was limited. It wasn't about the deaths. It wasn't about this larger attack on the United States that was -- that was evidenced on the video, which led to the tragic deaths and the injuries that have been presented to the Court. There's no denying that.

The jury also clearly found that Mr. Abu Khatallah's involvement didn't have anything to do with what happened at the Annex. If he was -- if they had believed that he was somehow involved in trying to push the United States out and to eliminate a spy base, it would have naturally followed from the evidence that the government offered that somehow there was a natural flow from one to the other. It could have led them to believe that he was involved in that.

The jury said no. It proscribed his conduct to conduct which we submit to the Court doesn't support the terrorism enhancement. And more importantly, imposing -- using that enhancement in the guidelines context to ratchet up the sentence essentially disregards that work. Even if the conduct -- you know, the judge can make -- Your Honor

can make findings under the current D.C. Circuit law that are beyond and different than the jury's given the different standard of proof, but that doing so essentially says -- it's a pat on the head. It is, "You did your job. Thank you very much. And now we're going to go forward and sentence as though you didn't do that job, as though you didn't put in the seven weeks, didn't do the deliberation." And that's sort of a fundamental misstep about what this proceeding has always been about.

This proceeding has been about American justice. All criminal cases are about who did what when and why they did it. And obviously there's -- that's an important part of what this proceeding is about in the details of a criminal prosecution.

We talked a little bit about who Mr. Abu Khatallah really is, but the jury found that what he did was limited, and going beyond that, even if one can construct under existing rules the ability to go beyond that under the guidelines system, we submit, Your Honor, would be fair. It would take away -- it would be unfair. It would diminish the real purpose of this prosecution.

This prosecution was about trying to show that American justice, the American criminal justice system, can step up and handle matters that relate to a very notorious, a very serious, a very troubling loss that America suffered.

It began with an elaborate, well-litigated and documented capture operation. The planning and the operation was approved by the President of the United States who said that the purpose was to demonstrate American justice.

American justice is not American vengeance. American justice brought Mr. Abu Khatallah before an Article III Court to have his rights respected and to allow a jury to make -- to reach a decision. American justice is unlike American vengeance, which might have sent Mr. Abu Khatallah to Guantanamo for indefinite detention or for a proceeding before a tribunal.

He was brought here, and essential to our criminal justice system is the work and the value that we place in 12 ordinary citizens to render a verdict. They rendered their verdict, and we would suggest that the Court should respect that verdict by imposing a sentence that is consistent with what they saw and what you can tell from what they did.

We will talk a little bit about who Mr. Abu Khatallah is and the picture that has attempted to be painted of him.

Your Honor has had an opportunity to see the videos, and I'm -- they speak for themselves. And we didn't present the videos to you as sort of a play for sympathy or somehow extracharacteristic, but we presented them because there needs to be a fuller picture of who Mr. Abu Khatallah

is as you take on the responsibility of issuing a sentence for him.

He's not the monster that the government portrays, and to be fair, the government portrays that based upon very limited evidence and based upon the statements made by witnesses who it is impossible to proceed without understanding that the jury did not credit. The jury didn't credit the Libyan witnesses because, if they had credited them, we would have a different verdict here.

And so there is a fuller picture. There is a picture of Mr. Abu Khatallah who was from a conservative religious family, who was raised and who, because of his religious beliefs and his unwillingness to conform his religious beliefs, his desire to actually have a beard and to be seen as a devout Muslim, led the Gaddafi regime to imprison him.

I heard a little bit, but I think the government walked away from it, the notion of he does have some kind of criminal record so you have to take -- his criminal record is being put in jail for his religious beliefs in Libya during the Gaddafi regime. That's not a sort of sign that maybe he's a criminal. It's a sign of the sincerity of his religious beliefs.

Now, during many of the proceedings here -- the government didn't say it today, but throughout these

proceedings the government has taken the position that Mr. Abu Khatallah's extremist views are essentially evidenced by his desire to believe in Sharia law and to see Sharia law.

As we presented to the Court, Dr. Brown, a professor at Georgetown University, has shown belief in Sharia law is common, almost the majority view, throughout the Middle East, throughout countries which are staunch allies of the United States. It doesn't tell you anything about anti-Americanism at all. It doesn't tell you -- the statement that "I believe in and want to see Sharia law applied" doesn't tell you anything about the particulars of the results that someone wants to see. It's being -- it has been offered as a shorthand because we here in America don't necessarily understand what it means, and we see some of the people who adhere to it doing things that are horrendous, and it's a shorthand for saying, "Oh, you believe in Sharia law; therefore, you must be a terrorist." That's not right, and it's the only evidence of anti-Americanism or of terrorism that has been presented.

There was a statement about -- made, whether it's anti-Americanism or lack of remorse that the government repeated today somehow, about Mr. Abu Khatallah saying that the ambassador died like a dog. There's no credible evidence that he ever said that. It's a statement that's

become sort of folklore, and it gets repeated. But there's -- there is no evidence about that. That's not the kind of statement -- there is no report of anyone that was presented to the Court that he actually said those words.

Again, it sort of leads me a little bit to talking about the sort of remorse and -- Mr. Abu Khatallah spent ten years of his life in Gaddafi's prisons. He witnessed and experienced deprivations, beating, torture, and death. He grew up in a Libya in which that extreme -- the extremes of what he saw in prison were all too often reflected in the streets and in the way in which the government treated its own citizens, public hangings, and other activities.

The statements attributed to him about -- and the lack of remorse that he supposedly said are completely consistent with someone who's seen, grown up in, and lived in that trauma and is now being asked to talk about and react to deaths of people he doesn't know, and somehow we're going to punish him because he doesn't have the same -- doesn't emote about those things in the same way that we might want an American to do so.

Again, in the video presentation that was presented, you saw the statements from Dr. Hawthorne Smith who's worked with torture victims and other people who have been subjected to that kind of trauma and which show that the sort of flat affect and the not emoting and the sort of

stoicism reflected are not a sign of hard -- necessarily a sign of hardness or of not caring, but are a natural reaction to the kind of experiences that Mr. Abu Khatallah grew up with and received.

There's just simply -- other than the disputed statements about Americans, there's -- that came in in the litigation, there's simply no evidence that Mr. Abu Khatallah is anything other than a Libyan nationalist, a person who was oppressed in his country because of his religious beliefs and who fought back against that oppressor in Libya about Libya. His whole world -- there's nothing anti-American or American-directed about any of his conduct unless one argues about what the jury did find, the small conduct that occurred at the Mission.

Similarly, in talking about the weapons, the government asked the Court to take into consideration the fact that Mr. Abu Khatallah procured weapons that were used in the attack. Even crediting the discredited testimony, there's nothing that says those -- that the weapons that were allegedly procured were used in the attack; and if they had been, if the jury had found that the weapons were procured and that those were the weapons that were used in the attack making the attack successful, as the government argues, then they would have convicted him and held him responsible for the deaths that occurred in the attack.

Similarly, if the jury had found that Mr. Abu Khatallah was setting up a roadblock and that somehow he was preventing rescuers from arriving as the ambassador and Sean Smith died, they would have convicted him and held him responsible for that. They didn't. The evidence -- the jury that we impanelled and then charged with making the factual findings here rejected that theory.

Again, to repeat -- and I'm probably sounding like a broken record to Your Honor at this point, but to repeat that, that's what's important. Honoring and respecting the full part of the American justice system. It's bringing someone here for prosecution. It's giving them rights. It's assigning them lawyers to represent them and to advocate before Your Honor. It's making the kinds of rulings that had to be made about what evidence comes in and what evidence does come out. All of that is the process of justice. It's the process of justice, not the process of vengeance.

To complete that process, to complete the process of justice, we have to honor what the jury did. We have to sentence him for the conduct that they found, the criminal conduct they found, but the much more limited criminal conduct which they found.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

All right. It is 11:35. Why don't we take a recess until noon, and we will come back and impose the sentence, okay?

(Recess taken)

THE COURTROOM DEPUTY: Your Honor, we're again on the record for Criminal Case 14-141, *United States of America vs. Ahmed Salim Faraj Abu Khatallah*.

THE COURT: All right. Good afternoon, everyone.

Let me start by taking a point of personal privilege to make a few observations about this entire case. First of all, I want to publicly acknowledge the families of the four incredibly brave and patriotic Americans who perished in the attack as well as the surviving victims. Many people overlook the fact that before Benghazi was a political fire storm, it was a crime scene, and it was a crime scene that produced real victims; not political pawns, not caricatures, but victims and loved ones who endured unfathomable suffering and grief, and victims and loved ones who experienced the full range of emotions in response to tragedies like this.

Some of them have testified today. Others have written letters, and I have been moved by the incredible dignity and grace and even compassion reflected in the testimonies and the letters. And I know that it was frustrating for many of the family members not to be able to

testify at trial and to tell their stories, and I hope you all understand the reason why that was so or why that was necessary. But hearing your testimony and reading your letters today and in the lead-up to sentencing has been incredibly helpful for me, and I appreciate them.

Second, I want to reiterate what Mr. DiLorenzo stressed this morning about the historic significance of this case, which I think also has been overshadowed to a large degree by the politics of Benghazi, and I think that's unfortunate.

As he said, it was the first time in 40 years that a United States ambassador had been killed in the line of duty. The first time ever that a defendant accused of killing an ambassador has stood trial, and, maybe I'm wrong, but I cannot imagine another federal criminal prosecution that has required the level of coordination and cooperation between law enforcement, the intelligence community, the diplomatic community, and the U.S. military as this case has.

All of the public servants who participated in the investigation and the capture operation deserve just a ton of credit. And while, like the defense, I wish that the interviews on the ship had been recorded, the whole operation was truly the government working at its best across numerous agencies.

And I'm also sure that there have been few cases that have raised the array of novel and difficult legal issues that this case has raised literally from the start to the finish.

Third, I want to personally thank the U.S. Attorney's Office and the FBI for their handling of the prosecution of this case, not just the trial team, but the filter team, the victim witness coordinators, and the paralegals and the entire staff; the Federal Public Defender's office and the Lewis Baach firm and their respective staffs for mounting a vigorous and very effective defense in this case; and all of the dedicated professionals who have assisted in the trial: my law clerks and staff, the staff of the chief judge, our court security officers, the Marshals Service, the probation office, the court interpreters, and Ms. Peterson and our classified information security officers. There was an enormous amount of classified evidence in this trial, and it took a huge effort to both process it and figure out how it can and should be used in the trial. Anyone who might say that the federal court system cannot handle a high-profile terrorism trial obviously did not come and watch this one, and the only reason I can say that is because of the true professionals in and around this building.

Now, for the uninitiated, you've heard a lot of

talk about 3553 factors this morning, and those are simply the factors that the Court, by law, has to take into account in fashioning an appropriate sentence, and under the law an appropriate sentence is one that is long enough to achieve all of the purposes of sentencing but no longer than that, and I have considered, believe me, all of the factors available to me and that I am required to consider under the law, and I want to highlight a few of the most relevant factors in this case.

The first and the starting point in all sentences are the sentencing guidelines, and as I outlined at the beginning of the hearing today, I have calculated the guidelines range to be life imprisonment in this case, and those findings are set forth in a 37-page opinion that I issued last week. And that calculation is based, as you've heard today, on facts that I found by a preponderance of the evidence. Some of those findings are based on evidence that the jury in this case did not hear, and some of them are based on evidence that the jury heard but concluded that the government did not prove beyond a reasonable doubt.

Considering acquitted conduct in calculating the sentencing guidelines range strikes a lot of people as odd, which I will discuss more in a minute. And it's controversial among lawyers and among judges, but it has held to be constitutional. And, in fact, it would be error

for me not to -- it would be error for me to completely disregard acquitted conduct in calculating the advisory sentencing guidelines range, and that is what I've done.

The next factor, as counsel discussed this morning, is the nature and the seriousness of the defendant's conduct. Again, in the ruling that I issued last week I explained why I concluded that you, sir, were a participant and a leader in the attack on the U.S. Special Mission. There's no need for me to repeat all of my factual findings here, and it's not my style to lecture defendants, but it suffices to say that I simply did not believe that you were an innocent bystander on the night of September 11, 2012.

I don't think you learned for the first time that there was a U.S. facility in Benghazi that night. You grew up and you lived your entire life there, except for the time that you were imprisoned. You were well-known and well-connected in the community. You owned a garage. You owned a construction business. You were a local leader. You commanded a Benghazi-based militia during the revolution, and you continued to lead some of the men in your militia afterwards, some of the same men clearly seen storming the U.S. Mission that night. And so to me, at least, it defies common sense that you had no idea that there was a large, gated U.S. facility with an American flag flying over it

smack in the middle of Benghazi, and really that was the crux of your defense.

To the contrary, the evidence shows at the very least that you drove some of your men to the Mission, that you were in telephone contact with several of them before, during, and after they attacked the Mission, that you appeared on camera, armed, entering a Mission building while it was being ransacked, and that you drove several of your guys away to the camp of another extremist group after the attack.

Now, that said, there were obviously many questions that were left unanswered during the trial. I don't know if you were the main planner of the attack or what exactly you said to the attackers or what they said to you when you were on the phone with them, or whether you knew they were going to set fires to the buildings, or whether you knew Ambassador Stevens would be there and targeted him specifically, or whether you even intended to kill anyone that night or what your role in the Annex attack was. Unfortunately none of those questions was definitively answered during trial, but that doesn't mean that your conduct was not serious. It was gravely serious because, even if you didn't pour the gasoline or light the match, I believe the evidence showed that you were aware of the attack, and that once those gates were breached the

likelihood of someone dying was extremely high. This was not guilt by association, as your lawyers have argued.

The third factor is your particular characteristics and history. Who you are. And in many ways that's the most difficult factor to assess because I don't know you. I've never spoken to you. You exercised your right not to testify at trial or at this proceeding.

But I do know a few things. I know that you spent your entire adult life in a culture of violence, oppression by the Gaddafi regime, imprisonment in brutal conditions, armed conflict during the revolution and continued, in effect, civil war after the revolution. None of those facts are seriously contested, and, sir, you strike me as a creature of that culture; perhaps not the stone-cold premeditated terrorist that the government makes you out to be, but someone who might readily resort to or order violence in furtherance of whatever ideological or political goals you might have. And on that point I agree with Mr. Robinson that whether you advocate for Sharia law or not does not make you a terrorist, and I have not given much consideration to that fact.

Apart from that, I appreciate the attention and the respect that you have given to these proceedings, and judging by the video testimonials that I received, you seem to be a hard-working and resourceful guy, and you seem to

have a supportive family.

The next factor is deterrence, both generally and specifically as to you. And this is an important factor, general deterrence, for both of them.

The United States has diplomatic outposts and government facilities all over the world which are staffed every day not just by ambassadors, but by government employees, local employees, and private contractors, and anyone intent on doing those people harm or doing harm to the facilities themselves must know that there will be consequences; that they will be apprehended, prosecuted, and given stiff sentences, if they are convicted.

As for making sure that you don't commit crimes in the future, as the government notes, you had men and arms at your disposal in Libya, and if you were to return there, I don't know, I doubt you would have the means or the opportunity to harm America again, but certainly there's no guarantee of that.

I've also taken account of your lawyers' arguments that offenders are less and less likely to reoffend as they get older, and I have no reason to doubt that that would be true for you as it would be for any other defendant before me.

The last factor I want to talk about, and in this case the most important because frankly I think this would

be an easy sentencing but for the final factor, is the jury's acquittals in this case.

Let me return to a point that I made before. As Mr. Robinson said, I believe this case stands as an example for the principle that a defendant accused of international terrorism can get a fair trial in the U.S. criminal justice system. You saw, and I really hope that you appreciated, what a fair trial means. Not the justice you would have received in Libya, but American justice. Swift. Thorough. Professional.

And one of the cornerstones of the American justice system is the jury, and we were fortunate enough in this case -- I don't know how many of you came and observed the trial, but we had an incredibly accomplished and conscientious jury. And you all will remember back in October, when we picked them, I told them all that this was one of the most important civic duties that they could perform as U.S. citizens. I told them that it was one of the only opportunities in American society where everyday citizens from all backgrounds and all walks of life join together to solve common problems and how much and how important that was in this day and age.

And they all took an oath to set aside whatever passions and prejudices they had and to assess your guilt based solely on the evidence and the law, and they did

exactly that over seven difficult weeks. Everyone sacrificed, nobody dropped off, and we never had to use an alternate juror.

And what an incredible group of people it was: an epidemiologist, a college professor, a preschool teacher, a graphic artist, two lawyers, a CNN executive producer -- excuse me, a C-SPAN executive producer. And after the trial, they spent five days deliberating, and they delivered a verdict. And after the verdict, I went back and I shook hands and I thanked every single one of them, and I told them that they had done a service not only to the Court but to the country.

And we obviously know what that verdict was. We've talked about it today. Four convictions all related to the destruction of a building at the Mission and 14 acquittals and a specific finding that your conduct did not result in anyone's death.

And while I reached a different conclusion based on a different standard of evidence and based on some evidence that the jury did not see, the result the jury reached, in my view, was not illogical or unreasonable based on the evidence that they saw.

Now, the average American would be very surprised to learn that a defendant, as long as he is convicted of something, can be sentenced based on conduct that a jury

found he did not commit or at least that the jury -- that the government did not prove he committed beyond a reasonable doubt, and I certainly bet the 12 jurors and the three alternates in this case who sacrificed seven weeks in that box would be shocked to learn that, and I think for good reason.

We've talked a lot this morning about sending messages. What would it say to those 12 people if I significantly increased your sentence based on evidence that they rejected? For me, it would say that I really didn't mean what I told them about the importance and the sanctity of jury service, and it would also say that I really didn't, despite what I said, value the fundamental purpose of the Sixth Amendment jury trial right, which is to ensure that before the government deprives someone of liberty it needs to persuade a jury that it has proven each element of the crime charged beyond a reasonable doubt.

And I'm not the only one that feels that way. There are several members of our Court of Appeals who have expressed similar reservations about using acquitted conduct to significantly decrease -- excuse me, increase, a defendant's sentence beyond what the jury actually found, and the way that at least one of them, Judge Kavanaugh, has suggested dealing with this concern in appropriate cases -- not every case, but in appropriate cases -- is varying

downward from the sentencing guidelines range to avoid reliance on acquitted conduct, and that makes sense to me in this case.

It's often difficult in analyzing a split verdict, and believe me, as I'm sure all of you have, we've spent a lot of time thinking about what this jury actually found and what they concluded, and I agree with the government that I could rely solely on facts that the jury did not necessarily reject to apply both the leadership and the terrorism enhancement in this case, and that that would result in a life sentence.

But stepping back a minute, it's clear enough to me in this case that the jury explicitly found that the defendant's conduct did not result in death, that it rejected many of the facts presented that tied him to direct participation in the first wave of the attacks and to the attack on the Annex, and that what it convicted him of was essentially a property crime. Still a dangerous and violent one, let me stress that. Breaching and destroying a U.S. consulate, a fortified government building, while armed and directing others to steal property is a very serious offense.

But in light of those findings, I have come, somewhat reluctantly, to the conclusion that a life sentence overestimates the defendant's criminal conduct and

culpability as it was determined by the jury.

A related issue is the stacking of sentences, and the parties referred to it today. The general rule is that federal sentences run concurrent to one another, but the sentencing guidelines recommend an exception to that rule when the guidelines sentence, here life imprisonment, is higher than the statutory maximum for any individual crime of conviction. In that case, the guidelines recommend stacking the sentence to get to the guidelines sentence, and I find that that is not appropriate in this case for two reasons.

First, as I said, the guidelines sentence overestimates the criminal conduct on the defendant's part as found by the jury; and second, it strikes the Court as particularly unfair in this case to stack all of the sentences on the three property damage counts given that they all stem and are based on the same conduct.

So taking into account all of the relevant and statutory factors, the presentations of the parties today, the sentencing memos that have been presented, the Court will vary down from the advisory guidelines range and impose a sentence of 144 months on each of Counts 1, 2, and 16 to run concurrently with one another, plus the mandatory minimum of 120 months on Count 18, which is required by statute to run consecutively to the sentence on the first

three counts. And I want to make clear for the appellate record that I view these sentences as part of a package that results in an appropriate overall sentence, one that balances the grave harm that I have found the defendant caused by a preponderance of the evidence on the one hand with the respect that I believe is due the jury's overall verdict and underlying findings. As a result, should the Court of Appeals reverse my denial of the defendant's motions for an acquittal on the 924(c) charge, the proper course, in my view, would be an opportunity for resentencing.

Okay. With that, will the defendant stand.

It is the judgment of the Court that you, Ahmed Salim Faraj Abu Khatallah, are hereby committed to the custody of the Bureau of Prisons for a term of 144 months as to Counts 1, 2, and 16 to run concurrently with each other and a term of imprisonment of 120 months on Count 18, which shall be served consecutively to Counts 1, 2, and 16. You are further sentenced to serve a period of supervised release of five years as to each of Counts 1, 2, 16, and 18 to run concurrently, and you shall pay a $400 special assessment. The term of the sentence is to begin as of the date of your capture.

The Court finds that you do not have the ability to pay a fine and, therefore, waives imposition of a fine in

this case. The special assessments are immediately payable to the Clerk of the Court for the United States District Court, District of Columbia. Within 30 days of any change of address, you shall notify the Clerk of the Court of the change until such time as the final obligation is paid in full.

Should you be released from custody, within 72 hours of release you shall report in person to the probation office in the district to which you are released. While on supervision, you shall submit to the collection of your DNA, you cannot possess a firearm or other dangerous weapon, you shall not use or possess an illegal controlled substance, and you shall not commit another federal, state, or local crime.

You shall also abide by the general conditions of supervision adopted by the United States Probation Service as well as the following special condition:

You must immediately surrender to the U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed. If you are ordered deported from the United States after your sentence, you must remain outside of the United States unless legally authorized to reenter. If you reenter the United States, you must report to the nearest probation office within 72

hours after your return. The probation office shall release the presentence report and/or judgment and commitment order to the Bureau of Immigration and Customs Enforcement to facilitate any deportation proceedings. The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court.

Pursuant to 18 USC Section 3742, you have the right to appeal the verdict and sentence. If you appeal, you must file any appeal within 14 days after the Court enters judgment. If you are unable to afford the cost of an appeal, you may request permission from the Court to file an appeal without cost to you.

As defined in 28 USC 2255, you also have the right to challenge the conviction entered or the sentence imposed if new and currently unavailable information becomes available to you or on a claim that you received ineffective assistance of counsel in entering a plea of guilty to the offenses of conviction or in connection with this sentencing. If you are unable to afford the cost of an appeal, you may request permission from the Court to file an appeal without costs to you.

Any other objections to the sentence imposed that are not currently on the record?

MR. ROBINSON: None, Your Honor.

THE COURT: Okay. Sir, good luck to you, and we are adjourned.

(Whereupon the hearing was concluded at 12:38 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, LISA A. MOREIRA, RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 29th day of June, 2018.

/s/Lisa A. Moreira, RDR, CRR
Official Court Reporter
United States Courthouse
Room 6718
333 Constitution Avenue, NW
Washington, DC 20001