UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :		
	:	
v.	**:**	**Crim. No.: 14-cr-141 (CRC)**
	:	
AHMED ABU KHATALLAH	**:**	

RENEWED MOTION FOR A MISTRIAL ON THE GROUNDS OF IMPROPER ARGUMENT BY GOVERNMENT COUNSEL

Mr. Ahmed Abu Khatallah, through undersigned counsel, respectfully renews his motion for mistrial that was made orally at the conclusion of the government's closing argument. The grounds for this motion, as set forth orally and explained further below, are that government counsel made repeated improper and highly prejudicial arguments throughout initial and especially rebuttal closing arguments, and referred to evidence in opening statements that was never introduced at trial. During rebuttal, government counsel improperly referred to statements not in evidence, made statements that shifted the burden of proof to the defense, and attacked the character of both the defendant and defense counsel. These improper arguments were of a nature and frequency that the harm to Mr. Abu Khatallah's fundamental right to due process and a fair trial was not alleviated, much less eliminated, by the curative instructions from the Court. The frequency and intensity of the arguments, combined with the fact that some were directly contrary to explicit instructions by the Court during the course of the trial, suggest intentionality, not mere mistake.

An important goal in this case was to be able to provide a fair and impartial trial, giving the same procedural protections to a foreign defendant in a high profile case that an American

defendant would receive. Yet the government's conduct undermined this goal. It made this case smack of "victor's justice," not American justice—urging conviction because of who Mr. Abu Khatallah is, where he is from, and what he thinks, rather than based on objective evidence. The vitriol, jingoism and appeal to nationalist sentiments were as odious as they were prejudicial to the rights guaranteed to this defendant by the United States Constitution. The Constitution is not just "ours," it is a guarantee to *all* defendants who come before the courts of the United States.

Under these circumstances, the Court must grant a mistrial, but should refrain from doing so until after the jury returns its verdict because a verdict of not guilty, despite the government's actions, would be the only other meaningful remedy for this conduct.

Factual Background

"I want them to hate him." This is how a journalist quoted an unidentified prosecutor at the end of the first day of trial. *See* Def. Exh. 108. The government's case proceeded as if this was its fundamental goal. To that end the government did the following, among other acts:

1. Twenty-eight times *before* closing the government used some variation of the phrases "Our Mission", "Our U.S. Consulate" or "Our Ambassador."[1] Counsel repeatedly placed

1

Date	Tr. page	Line	Context	Attorney
2017.10.02 Openings	552	7-8	the embassy. But **our** actual embassy in Libya was in the capital of Tripoli.	Crabb
2017.10.02 Openings	555	17-19	official representative, as **our** ambassador, and he tried to help the Libyans rebuild their	Crabb
2017.10.04 AM Session	1080	5-6	as one of **our** vehicles? A. Yes. Q. And can you tell us whether	Himelstein
2017.10.04 AM Session	1080	14-15	which were on **our** compound? A. We kept the keys with the vehicle so	Himelstein
2017.10.17 PM Session	2400	10-11	protecting **our** consulate, **our** mission, the U.S. consulate or mission? A No. Q	Himelstein
2017.10.17 PM Session	2401	13-14	far away was **our** U.S. consulate from the 17 February Camp? A It's	Himelstein
2017.10.18 AM Session	2511	15-16	was to protect **our** -- the United States' -- consulate? A. Yes. They are	Himelstein

particular emphasis on the word "our", a fact notable to the jury and anyone else present, but difficult to appreciate from a cold reading of the transcript. Remarkably, that practice continued after the Court explicitly instructed counsel to use the phrase "U.S. Mission" instead of "Our Mission". *See* Nov. 01, 2017 (AM Session) Trial Tr. 4456:9-20;

2. The government elicited detailed testimony from the FBI agent responsible for gathering evidence at the Special Mission and Annex of the considerable effort and time (when

2017.10.18 AM Session	2517	20-21	the distance between **our** United States consulate and the 17 February Camp where you	Himelstein
2017.10.18 PM Session	2640	19-20	received information that **our** ambassador, the United States Ambassador was at the hospital, can	Himelstein
2017.10.18 PM Session	2641	2-5	that it was **our** Ambassador, the United States Ambassador? A Yes. Q And once	Himelstein
2017.10.18 PM Session	2643	4-6	men to protect **our** Ambassador's body at the hospital? A I will speak as	Himelstein
2017.10.19 AM Session	2681	18-19	you heard that **our** ambassador was at the hospital -- and just to catch	Himelstein
2017.10.19 AM Session	2683	1-4	obtain, to receive, **our** ambassador's body along with other men? A. Yes. Q. And	Himelstein
2017.10.19 AM Session	2683	5-6	the body of **our** ambassador from the hotel to the airport in Benghazi? THE	Himelstein
2017.10.19 AM Session	2683	22-23	the attack on **our** consulate, was there a meeting at the 17 February Camp?	Himelstein
2017.10.19 AM Session	2686	9-10	the attack on **our** consulate? A. I was invited to a meeting. -	Himelstein
2017.11.01 AM Session	4449	3-4	the attack on **our** Mission with Ahmed Abu Khatallah? A. Yes. -	Himelstein
2017.11.01 AM Session	4454	17-18	the attack on **our** consulate, of the United States consulate, how many men in	Himelstein
2017.11.01 AM Session	4455	6-7	the attack on **our** Mission; is that correct? A. Yes	Himelstein
2017.11.01 AM Session	4456	2-4	Security service to **our** Mission, to **our** consulate that was being attacked?	Himelstein
2017.11.13 AM Session	5453	6-9	went down to **our** consulate on Venezia Street? A. On that day? Q. Right.	Himelstein
2017.11.13 AM Session	5459	20-22	the representative from **our** government that the defendant could not have done it because	Himelstein
2017.11.13 AM Session	5480	3-4	the attack on **our** consulate, and the day that you went to speak with	Himelstein

time was limited) spent searching for and collecting the remnants of a burned American flag that was spotted on the Special Mission grounds, and then displayed those remnants to the jury;[2]

3. The government called a relative of each of the deceased victims, ostensibly for purposes of identification, and sought repeatedly to elicit testimony regarding the victims' outstanding character and family connections, even though there was no dispute as to identity. *See, e.g.*, Testimony of Peter Sullivan, Oct. 3, 2017 (PM Session) Trial Tr. 916 – 921; Testimony

[2] Q. Do you recall during the course of your search if there was an American flag that was being investigated?
A. I remember that very vividly.
Q. Do you recall at what particular time of the day that was done?
A. I know we noticed it early on. What time we finished collecting, I'm not sure.
Q. Could you please describe the general nature of your work with regard to that?
A. I, Special Agent Clarke, and whoever else was available, once we noticed that there was a burned American flag on the premises, we decided that that was definitely a priority, and we needed to make sure that we collected every bit of the flag.
Q. How many team members were actually involved in that particular search?
A. Anywhere from three to five at different times. Again, we're doing a lot of different things at the same time, but we did prioritize this throughout the Mission to make sure that we did collect everything. So it wasn't all of us at once, but there were times when there could be two to four of us at the same time. And in fact, at one point, we had people stop so we could go out there, and we conducted a line search where we all lined up next to each other and searched the premises and – to the point where we were even on our hands and knees because some of the pieces were so small, you know, and they would get blown around maybe within the grass and things like that. So that took a little bit of time. But we would switch people on and off so we could continue the other jobs as well.
Oct. 11, 2017 (PM Session) Trial Tr. 2023:14-24:17

Q. Looking at the particular item in your hands, can you please describe its condition in any further detail?
A. It's remnants of part of a flag, very badly burned, very fragile. There seem to be some smaller fragments in there as well. One fragment is completely destroyed and burned on one side, yet on the other still -- you can still observe the stars and stripes.
Q. When you say the stars and stripes, you can still observe the colors of it, the red and white and blue?
A. That's correct
Oct. 11, 2017 (PM Session) Trial Tr. 2027:13-22

of Dorothy Narvaez-Woods, Oct. 11, 2017 (PM Session) Trial Tr. 2034:12-41:19; Testimony of Kate Quigley, Oct. 16, 2017 (AM Session) Trial Tr. 2133:20-36:23;

4. The government also repeatedly sought to elicit victim character evidence from non-family-member witnesses. *See, e.g.,* Testimony of Charles Alexander, Oct. 10, 2017 (AM Session) Trial Tr. at 1596:10–20 (Mr. Woods) and *Id.* at 1613:21-23 (Amb. Stevens);

5. Despite a stipulation as to the cause of death, the government insisted on calling a forensic pathologist, Dr. Edward Mazuchowski, and presenting graphic autopsy photos. Testimony of Dr. Edward Mazuchowski, Oct. 19, 2017 (PM Session) Trial Tr. 2770-2844;

6. David Ubben was asked to raise the leg of his trousers and display for the jury his leg injury as even after pictures of his injuries were admitted in to evidence and displayed to the jury.[3] Oct. 4, 2017 (AM Session) Trial Tr. 1057:13-–58:25; and

7. The government argued in closing that Mr. Abu Khatallah discussed taking actions designed to impress al-Qaeda even though there was no evidence presented at trial that such a discussion had taken place. Nov. 16, 2017 (AM Session) Trial Tr. 6035:22-36:2.

The government's concerted efforts to get the jury to hate Mr. Abu Khatallah reached their crescendo during its rebuttal argument. Once Mr. Abu Khatallah had no further opportunity to respond, the government amplified its efforts in an improper emotional and dramatic argument from counsel. That argument had the following features:

1. In direct contradiction of the Court's prior instruction, government counsel began by referring to "Our" United States Mission in in Benghazi and expressing honor in doing so. Nov. 16, 2017 (PM Session) Trial Tr. 6134:25-35:11;

[3] Government counsel asked the witness to do this in open court, with the jury present, without first notifying the defense of the intent to do so, putting the defense in the impossible position of objecting to this procedure before the jury.

2. Counsel then proceeded to up the ante by referring to Ambassador Stevens as "our son"; Sean Smith as "an American son"; and Glen Doherty and Tyrone Woods as "our American sons," again with the emphasis placed on the word "our"." *Id.*;

3. Counsel stated that "[t]he defendant is guilty as sin" and that he "is a stone cold terrorist." *Id.* at 19-20.;

4. Ambassador Stevens was referred to as "the son of Benghazi who was so beloved that his family received thousands and thousands of letters from Libyans who absolutely adored him" as well as a "beautiful humanitarian . . . who is beloved." *Id.* at Tr. 6135:25–36:4; 6136:10;

5. The attacks were personalized as attacks on America with the question "why are you attacking *us*?" and the phrase "so full of rage against *us.*" *Id.* at 6136:6 –37:8;

6. The personalized, ad hominem approach was extended to a direct attack on Mr. Abu Khatallah's counsel ["how dare you say that"] when counsel had simply and accurately stated what the witness testified to from the stand. *Id.* at 6140:1-10;

7. The carefully negotiated, Court approved CIPA stipulations were repeatedly derided as "words on pieces of paper." *Id*. at 6150:15, 25 and 6154:3, in order to urge the jury to ignore stipulations that were used as substitutes for classified evidence;

8. Counsel flatly stated that Mr. Abu Khatallah "was using many other phones that night [referring to September 11, 2012]" although there was absolutely no testimony or other evidence to that effect throughout the trial. *Id.* at 6151:10;

9. A witness for the defendant was accused of being someone who endorsed "the terrorist who bombed *our* embassy in Africa", despite his denial of that charge and the absence of any evidence to the contrary. *Id.* at. 6152:5-6; and

10. Finally, the rebuttal concluded with an exhortation to the jury to "do your duty" like "Christopher Stevens, the beautiful, the humanitarian, did his duty. And Sean Smith, American, an innocent – Sean Smith did his duty. And Glen Doherty, Navy SEAL, American son, did his duty. And Ty, Tyrone Woods, Navy SEAL, American son, did his duty. And so did Dave Ubben and Mark Geist and Scott Wickland and Ray Burt and Zach Harrison and Alec Henderson – all of them did their duty." *Id.* at 6155:7-16.

As set forth below, any of these statements, taken alone, would be sufficient to warrant a mistrial. Taken together, such conduct renders inescapable the conclusion that a mistrial must be ordered.

Argument

Improper comments by the government during argument require the granting of a new trial when the interest of justice so requires. Fed. R. Crim. P. 33. In deciding a motion for a new trial based upon improper argument, the Court must determine 1) whether the prosecutor's remarks were improper, and 2) whether the remarks prejudicially affected the defendant's substantial rights by depriving the defendant of a fair trial. *United States* v. *White*, 241 F.3d 1015, 1023 (8th Cir. 2001). In evaluating prejudicial effect, the court considers 1) the severity of the misconduct; 2) the measures adopted to cure the misconduct; and 3) the certainty of the conviction absent the improper remarks. *United States* v. *Monaghan*, 741 F.2d 1434, 1443 (D.C. Cir. 1984). While prosecutors may strike "hard blows," they may not strike "foul ones." *United States v. Moore*, 651 F.3d 30, 53 (D.C. Cir. 2011) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (affirming verdict because no prejudice resulted from prosecutorial misconduct), *aff'd in part sub nom. Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013)).

Amongst the impermissible "foul blows" are: (i) referring or relying upon evidence that

was never admitted at trial, *id.* (quoting *United States v. Maddox*, 156 F.3d 1280, 1282 (D.C. Cir. 1998)); (ii) drawing inferences from the evidence that intentionally misrepresents that evidence, *id.* (citing *United States v. Deloach,* 530 F.2d 990, 1000 (D.C. Cir. 1975)); (iii) making comments designed to inflame the passions or prejudices of the jury, or asking jurors to find a defendant guilty to promote community values, maintain order, or discourage future crime, *United States v. Johnson*, 231 F.3d 43, 47 (D.C. Cir. 2000) (citing cases); (iv) personally attacking the character or ethics of opposing counsel, *United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005); and (v) launching generalized attacks on a defendant's character that are not tied to the charges. *United States v. Gartmon*, 146 F.3d 1015, 1025 (D.C. Cir. 1998). In evaluating the prosecutor's conduct, the Court should also consider whether the tone of the argument was inflammatory. *Id.* During their arguments in this case, government counsel struck foul blow after foul blow.

A. Counsel for the Government Impermissibly and Prejudicially Referred to Evidence During Opening and Closing That Was Never Admitted at Trial.

As the District of Columbia Circuit recognized this year in *United States v. Davis*, "It is well established 'that the prosecutor may not refer in the opening or closing statement to evidence not admitted at trial.'" 863 F.3d 894, 903 (D.C. Cir. 2017) (quoting *United States v. Valdez*, 723 F.3d 206, 209 (D.C. Cir. 2013) (quoting *United States v. Small*, 74 F.3d 1276, 1282 (D.C. Cir. 1996)); *see also Moore* 651 F.39 at 51–52; *United States v. Watson*, 171 F.3d 695, 699-702 (D.C. Cir. 1999); *United States v. Thomas*, 114 F.3d 228, 247-49 (D.C. Cir. 1997); *Small*, 74 F.3d at 1284 . Here, the government repeatedly violated that well-established rule.

1. <u>During the Opening Argument.</u>

The government ran afoul of this prohibition in at least four distinct ways during its opening. First, counsel stated the following:

> "[D]uring this period, while the Mission was being attacked [ ] a friend of the ambassador drove to the Mission. He had heard about the attack, and he wanted to come help. You're going to hear that as he drove close to the Mission he saw a group of extremists had a roadblock set up, and they were shooting at the police and blocking anyone from coming in. The important thing about that roadblock is you're going to hear that when Khatallah was interviewed by the FBI, he put himself in that exact spot where that roadblock was where the ambassador's friends saw the extremists shooting at the Libyan police. (Oct 02, 2017 (AM Session) Trial Tr. 568:24-569:10)

The government never called any witness to provide such testimony and there was no such evidence admitted at trial. Second, during opening, the government told the jury that "[h]e [Mr. Abu Khatallah] stood up and he said, 'I am Abu Khatallah.' He said to everyone gathered there. 'You know me. You don't like me. And yes, I attacked the American Embassy.' He said it proudly. 'Yes, I attacked the American Embassy,' he said, 'but we have to put that behind us. We have to work together now.'" *Id* at. 578:10-15. The actual evidence at trial was far different and not incriminating. At trial, the witness testified as follows:

> He introduced himself as Ahmed Abu Khatallah. He was born in Benghazi and lived in Benghazi. And he said that he does not represent any entity. He represents himself. And I know that all of you there, you hate to walk along and be with me because *I've been accused* of several cases. Among them was this U.S. Embassy case. *I'm wanted for the Americans, for the U.S. Embassy*. And there's no use of me saying anything, and then he took – he sat down. (Nov. 6, 2017 (PM Session) Trial Tr. 4992:23-93:7)

Third, during its opening the government promised that "[y]ou're going to hear that one of Khatallah's associates, an associate I've mentioned over and over this morning, Dijawi, used mortars. Oct 02, 2017 (AM Session) Trial Tr. 577:3-5. There was no such evidence presented at trial.

Finally in the opening, the government told the jury that "[y]ou're also going to hear at this very same apartment Khatallah had items that were taken from the Mission and, in particular

from the office. You're going to hear Khatallah had maps, computers, books and charts, and even weapons that had been taken from the office." (Oct. 02, 2017 (AM Session) Trial Tr. 579:3-7) Again, at trial, the testimony was far different. The witness actually testified as follows:

> Q: In that private area of Mr. Khatallah's house, did you see any item or objects?
> A: Yes
> Q: What kind of things did you see?
> A: Piles of papers and folders and old computers, units, boxes
> Q: Did you ask Mr. Khatallah about the papers and the computers?
> A: It was a kind of spontaneous question. I just asked him, "Oh, gosh, why do you have these piles of papers and folders and the computers? He said, "All of these field leaders who visited the U.S. Ambassador, and Not I know them by name personally.
> Q: I'm sorry. Did you say anything about where these materials came from?
> A: No. (Nov. 06, 2017 (PM Session) Trial Tr. 4999:1-17)

All of these statements during opening arguments go directly to the government's theory of the case and there was no evidence of any of them.

2. <u>During the Closing Arguments.</u>

The government's misconduct in referring to purported facts that were not in evidence continued during the closing arguments. Counsel for the government stated during the initial closing argument that the witness, Ali, had testified that Mr. Abu Khatallah was "speaking to another militia leader, they were talking about trying to impress al-Qaeda." Nov. 16, 2017 (AM Session) Trial Tr. 6035:22-36:2. The witness never mentioned "al-Qaeda" during his testimony regarding this encounter. *See* Nov. 06, 2017 (PM Session) Trial Tr. 4995:8-96:14. It is difficult to imagine a more prejudicial comment than falsely suggesting that there was testimony that the defendant wanted to impress one of the most reviled terrorist organizations in the world by taking some dramatic action.

This linking of Mr. Abu Khatallah to al-Qaeda also significantly prejudiced the defense

by undermining its use of the CIPA stipulations. These stipulations were carefully negotiated. Some of them referred to al-Qaeda. Defense counsel's decision to present those stipulations to the jury was substantially informed by the fact that there was no testimony at trial linking Mr. Abu Khatallah to al-Qaeda. With one misstatement, that calculus was abruptly shattered. The jury is now in a positon to believe – with no evidentiary basis – that defendant was seeking to impress an organization that there is evidence, agreed by the defense and government, was intimately involved in the attacks.

Once rebuttal argument began, and the defendant would have no opportunity to respond, the government's continued references to "facts" unsupported by any evidence admitted at trial. With no basis whatsoever, counsel stated that Mr. Abu Khatallah "was using many other phones that night [referring to September 11, 2012]." Nov. 16, 2017 (PM Session) Trial Tr. 6151:10. This assertion was used to rebut the fact that the records that the government claimed showed Mr. Abu Khatallah's phone calls placed him near his home, miles away from the Annex and not communicating, at the time of the Annex attack. With one totally unsupported statement that Mr. Abu Khatallah "was using many other phones that night," the government sought to eviscerate the impact of that important showing and to suggest to the jury that in fact Mr. Abu Khatallah might have been at the Annex on another phone, a suggestion utterly without evidentiary basis.

3. The Government's Misstatements Were Highly Prejudicial.

Courts considers three factors in assessing whether improper prosecutorial argument sufficiently prejudiced the defendant to require reversal of the judgment of conviction: "[1] the closeness of the case, [2] the centrality of the issue affected by the error, and [3] the steps taken to mitigate the effects of the error." *Davis*, 863 F.3d at 901 (alteration in original) (quoting *Small*,

74 F.3d at 1280)). Each of these factors argues in favor of granting Mr. Abu Khatallah's motion.

This is, at best, a close case for the government. There are multiple holes in the government case and theory to include these eight. One, there is no confession; Mr. Abu Khatallah has been steadfast in denying his responsibility for the attacks and the jury heard those denials when the government introduced his statements under interrogation. Two, there is no physical evidence linking Mr. Abu Khatallah to the crimes. Three, there is no testimony concerning an agreement underlying the conspiracy charges – the government asks the jury to infer an agreement from circumstantial evidence. Four, none of the American witnesses implicates Mr. Abu Khatallah in the crimes. Five, the jury was never told the provenance and source of the "telephone records" the government relies upon as a key element of its case. Six, the government's key witness, Ali, did not know Mr. Abu Khatallah at the time of the attacks, was only involved as an almost unbelievably well-paid government agent who was introduced to Mr. Abu Khatallah for the purpose of arranging his capture, made inconsistent statements during testimony, and had significant, demonstrated motives to lie, including millions of dollars, that were explored on cross-examination. Seven, the other Libyan witnesses who attempted to implicate Mr. Abu Khatallah were also impeached with inconsistent statements and their motivations to curry favor with the government and political animus towards Mr. Abu Khatallah. And eight, the jury was given considerable reason to question the weight it should give to the alleged incriminating statements by defendant, given the lack of recording and the issues with the interpreting process. Given this reality, it is impossible to conclude that there was no prejudice to Mr. Abu Khatallah from the government's misconduct.

The government's references to "facts" not supported by admissible evidence also went to matters critical to the issue of guilt and innocence. These were not simple side shows, but

were matters at the heart of the case. The government said Mr. Abu Khatallah admitted participation in the attacks in front of a large group of people. He did not and no evidence was submitted that he did. The government described a roadblock where attackers were firing on police in a location in which Mr. Abu Khatallah had placed himself – no evidence of such a roadblock was even offered. The government used non-existent evidence of Mr. Abu Khatallah using multiple phones on the night of the attack in an effort to counter its agreement that the records showed him to be far away from the Annex at the relevant time. The government claimed Mr. Abu Khatallah admitted possessing items, including weapons, taken from the Special Mission – it introduced no evidence of such an admission. These misstatements go to the heart of this case. If believed by the jury, they would go a long way to establishing the government's entirely circumstantial case. The government is not permitted to convict by asserting critical matters are true when there is no admitted evidence supporting the assertion.

Given the pervasiveness and importance of the government's misstatements of the evidence, an instruction to the jury will not cure the harm to defendant's right to a fair trial. As the D.C. Circuit recognized in *Davis*, "[s]tandard jury instructions, such as that 'statements and arguments of counsel are not evidence' . . . and that it is the jury's 'memory of the evidence . . . that should control during . . . deliberations,' . . . have long been recognized not to be 'a cure-all for such errors.'" 863 F.3d at 903 (quoting *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969)). This is particularly so in a case such as this one where defense counsel's contemporaneous objections during the argument were not sustained by the Court – perhaps creating the mistaken impression in the jury that the arguments were accurate and proper. *See Maddox*, 156 F.3d at 1283.

B. The Government's Improperly Gutted the Stipulations Designed to Substitute for Classified Information.

Pursuant to Section 6 of the Classified Information Procedures Act, the government proposed stipulating to relevant exculpatory information, rather than disclosing the sources of this information. CIPA authorizes the government to avoid disclosure of relevant and helpful classified information only when the substitution of such stipulations provides "the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *See* CIPA § 6(c)(1). Here, the government's rebuttal argument gutted the effectiveness of the stipulations and made them inadequate substitutes for the classified information.

The Court instructed the jury that "[d]uring the trial, you were told that the parties had stipulates – that is, agreed – to certain facts. *You should consider any stipulation of fact to be undisputed evidence.*" [Instruction No. 3: Evidence in the Case (emphasis added)] Counsel for the government addressed the jury and told them "and unlike what the defense attorney told you, you do not have to conclude those words are true [objection] You are the finders of fact. You are the ones who are assessing credibility of witness who you can see, who you can – who have been cross-examined, who have been challenged. *They are words on pieces of paper.*" Nov. 16, 2017 (PM Session) Trial Tr. 6150:18:25 (emphasis added). This argument directly contradicted the Court's prior instruction that the stipulations were undisputed evidence and undermined the adequacy of the stipulations as substitutes for the undisclosed classified information. The argument invited the jury to give the stipulations limited or no weight, as compared to the testimony of witnesses they had seen, when in fact the jury was instructed to consider the stipulations as undisputed. Moreover, the Court's refusal to reinstruct the jury with respect to the stipulations at the request of the defense compounded this improper argument.

Even more damning, the argument asked the jury to downplay the importance of the stipulation evidence because there had been no witnesses presented. Of course, as the Court is well aware, the defense wanted to call witnesses. It was precluded from doing so because of the classified nature of information in the case. The stipulations were supposed to be a tailored remedy to alleviate the harm to the denial of Mr. Abu Khatallah's right to present and confront witnesses. The government's argument turned them in to a sword to gut the jury's consideration of critical evidence that persons other that defendant were truly responsible for the attacks.

C. The Government Improperly Appealed to Sympathies and Prejudice.

Finally, faced with limited real evidence, the government resorted to appeals to patriotism – "the last refuge of the scoundrel" according to Samuel Johnson. We will not repeat here the multiple statements detailed above by which the government figuratively wrapped itself in the flag, invited the jury to see a personal connection to the facilities and victims because they were "Ours", and described Ambassador Stevens as well as Messrs. Smith, Doherty and Woods as Americans. Faced with a foreign defendant, a Libyan with a very different history, set of religious beliefs and appearance, it was a difficult enough task to ask the jury to be fair, to decide the case on the evidence. The government's argument turned the task from difficult to impossible. The government unlawfully suggested that if it finds Mr. Abu Khatallah not guilty, the jury would not be "doing its duty" *as Americans*. The government insinuated that such a finding would be disrespectful to the flag, whose burned and tattered remnants it took such care to protect. The government argues that a not guilty verdict would fail the "American sons", "our sons" whose gruesome injuries were displayed, families left in grief, and lives lost. The government's repeated reference to the character of the victims further compounded this misconduct. *See United States v. Rico Williams,* 836 F.3d 1, 18 (D.C. Cir. 2016)

Juxtaposed to the government counsel's appeals to patriotism and sympathy, were the improper characterizations of Mr. Abu Khatallah as a "stone cold terrorist," Nov. 16, 2017 (PM Session) Trial Tr. 6135:14, and "a terrorist," *id.* at 6143:12. *See United States v. Steinkoetter*, 633 F.2d 719, 720-21 (6th Cir. 1980) (prosecutor's comments comparing defendant to Pontius Pilate and Judas Iscariat reversible error); *Mathis v. United States*, 513 A.2d 1344 (D.C. App. 1986) (prosecutor's description of defendant as "the Godfather" required reversal); *cf. United States v. Crooks*, 766 F.2d 7, 12 (1st Cir. 1985) (district court properly exclude testimony that associated defendant with word "Mafia"). While one witness, Khalid Abdullah, who testified via deposition, testified that Mr. Abu Khatallah "leads terrorist organization," the defense objected to this testimony, and the Court limited its use to evidence of identification and instructed the jury not to use it as character evidence. *See* Oct. 12, 2917 (PM Session) Trial Tr. 2089:12-23. Government counsel ignored that instruction and characterized Mr. Abu Khatallah as a "stone cold terrorist." In *DeLoach*, the D.C. Circuit found that "'in the context of current events,' the term 'assassination' constitutes an unnecessary appeal 'to passion and prejudice.'" 504 F.2d at 193 (quoting *Brown v. United States*, 125 U.S.App.D.C. 220, 224, 370 F.2d 242, 246 (1966) ("in context of current events, raising the specter of martial law was an especially flagrant and reprehensible appeal to passion and prejudice"))); *see also United States v. Jones*, 482 F.2d 747, 753 (1973) (condoning prosecutor's use of "executions"). Similarly, in the context of current events at this time, the use of the term "terrorist" to describe Mr. Abu Khatallah was highly prejudicial. If this does not constitute "comments designed to inflame the passions or prejudices of the jury, or asking jurors to find a defendant guilty to promote community values," *Johnson*, 231 F.3d at 47, it is difficult to know what would.

It is particularly problematic that much of the misconduct occurred during the rebuttal

phase of the government's case, leaving the defense no ability to counter the egregious misstatements, mischaracterizations, and character attacks. *See, e.g., Holmes*, 413 F.3d at 770.[4]

Conclusion

The government's arguments were highly improper and devastatingly prejudicial. An admission of responsibility for the Special Mission attack by Mr. Abu Khatallah promised in opening was never presented. Mr. Abu Khatallah was said to have been seeking ways to impress al-Qaeda despite there having been no evidence of that occurrence. Repeated appeals were made to patriotic duty and the flag and the jury was implored to do its duty like those who fought, were injured, and killed at the Special Mission and Annex. These and the myriad of other government abuses render this trial fundamentally unfair and a violation of the Constitution. Accordingly, the Court should grant Mr. Abu Khatallah's Motion for a Mistrial.

Respectfully submitted,

/s/

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[4] In its rebuttal argument, the government compounded these errors by misstating the law of conspiracy, muddling the elements suggesting the jury could find the defendant guilty of everything if they found just one thing. Nov. 16, 2017 (PM Session) Trial Tr. 6148:20-49:25. This ignored the Court's instructions regarding conspiracy and liability for the acts committed during the course of a conspiracy. It constitutes a separate and independent basis for granting a mistrial.

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