

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

United States of America,	)	Case No. 3:06-CR-00719
	)	
Plaintiff,	)	Hon. James G. Carr
	)	
v.	)	<b><u>POST HEARING BRIEF IN SUPPORT OF</u></b>
	)	<b><u>MOTION TO EXCLUDE TESTIMONY OF</u></b>
Marwan Othman El Hindi,	)	<b><u>EVAN KOHLMANN</u></b>
	)	
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Now comes Defendant Marwan Othman El Hindi, by and through counsel, and respectfully requests that the Court exclude any report or testimony by government' witness Evan Kohlmann because: 1) his testimony is not relevant, 2) his opinions exceed even his own

claimed area of expertise, 3) the probative value of his testimony would be far outweighed by the danger unfair prejudice, 4) Kohlmann is not qualified to testify as an expert, and 5) Kohlmann deliberately overstated the extent to which his work is subject to peer review.

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**I. KOHLMANN'S OPINIONS AND TESTIMONY ARE NOT RELEVANT**

Evidence is relevant to a trial if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evid. R. 401. Evidence that is not relevant is not admissible. Evid. R. 402. In this case, the evidence the government seeks to introduce through the testimony of witness Evan Kohlmann is not relevant, and should therefore be excluded.

Put another way, relevance is established by a showing that it is more likely than it would be without the evidence that a defendant committed the crime with which he is charged. Kohlmann's various reports and opinions do nothing to substantiate that the Defendants committed the crimes with which they are charged.

At the start of his first report, Kohlmann states that he "specializes in tracking Al-Qaida and other contemporary terrorist movements." See Kohlmann Report 1, at 1. At the outset, therefore, his relevance as a witness should be questioned because there is no allegation anywhere in the case that the Defendants intended to join Al-Qaida, or any other "contemporary terrorist movement," nor is there any indication that the "material support" the Defendants are accused of providing was targeted to or intended for any specific terrorist or terrorist group.

**A. KOHLMANN REPORT I**

Kohlmann's Expert Report I is a detailed analysis of 1) Al Qaeda's network in Saudi Arabia, 2) Al Qaeda's network in Iraq, and 3) the formation and development of the Palestinian Hamas movement. Sprinkled throughout his opinion of the development, purpose and methods of various terrorist groups are Kohlmann's explanations of the genesis,

purpose and target audience of various pieces of media that were supposedly found on one of the Defendant's hard drives.

Kohlmann's explanations, despite being void of any documentary evidence upon which they are based, include explanations about the crimes and activities of various people he identifies as terrorists. For example, on page two of his Report I, Kohlmann works into his opinion that Al-Qaida launched a "dramatic series of coordinated suicide bombing attacks on various targets inside the Saudi Arabian capital of Riyadh. *Id.* at 2. What connection do those bombings have to this case? Absolutely none. He simply references those bombings because they "heralded the emergence of a new, functioning Al-Qaida operational branch within the Saudi Kingdom." *Id.*

How does this "new, functioning Al-Qaida operational branch" have any relevance to this case? It doesn't. Rather, Kohlmann points to the beginning of that new operational branch because it proved later to be "highly innovative and media savvy, and it was the first of Bin Laden's regional branches or affiliates to adopt the internet as a primary means to distribute communications and propaganda messages." *Id.* Kohlmann then opines that "[m]any electronic documents, magazines, audio and video recordings produced by Al-Qaida in Saudi Arabia and distributed over the Internet have become classic works in the annals of the mujahideen and Al-Qaida." *Id.*

Despite that it has nothing to do with this case or these Defendants, Kohlmann managed to craft an opening paragraph to Section I that used the term "Al-Qaida" four times and mentions "suicide bombing," "Osama Bin Laden," "terrorists," "propaganda" and "Mujahideen." It is a scare tactic and nothing more, and it is specifically designed to inflame

and frighten the jury into drawing a connection between these Defendants and the very sinister culture of terrorism that exists in some parts of the world.

Perhaps Kohlmann would argue that this paragraph is simply included for background information and in order to provide later context to his opinions about certain electronic evidence. If that is the case, then its probative value is next to nothing and the danger of unfair prejudice from the terms themselves, let alone the tenuous connection Kohlmann makes later, is far outweighed by the very real danger of unfair prejudice. This is fear-mongering at its worst, and the Court should not allow it.

The second paragraph of Section I is no better than the first. “The author or inspiration for much of this material [the material described but not identified in the preceding paragraph] was the original founder of Al-Qaida’s operational network in Saudi Arabia, and the mastermind behind the May 2003 suicide bombings in Riyadh, Shaykh Yousef al-Ayyiri (a.k.a. “The Swift Sword”). Kohlmann’s states that “senior figures in Al-Qaida” respected al-Ayyiri as a seasoned military man, and he cites another digital magazine “later distributed by Al-Qaida in Saudi Arabia,” that when al-Ayyiri learned of the September 11, 2001 suicide hijackings in New York and Washington D.C. he “was so joyous he floated in air.” [internal quotations omitted]. Once again there is nothing in this paragraph that connects to this case or these Defendants. However, Kohlmann did manage to mention Al-Qaida several more times, use the term “suicide bombing” twice, mention “The Swift Sword” [with no authoritative citation] and even tied in the September 11 tragedy. How that material could possibly be important to his report, which pertains to source of certain videos, is a mystery.

The effect those words and concepts will have on the jury, however, is very clear, and indeed calculated.

The only factual connection Kohlmann's Report I has to this case is that he identifies what he perceives to be the original production and distribution source(s) for some of the videos found on one of the computers in the case. If the Court recalls his testimony at the hearing, however, Kohlmann could not confirm that the videos found in this case were downloaded or viewed from the websites he identifies as the original source. All he was able to say is that the files about which he was directly questioned appeared to be the same size and type of files that were published on the websites he identified as the sources of the various videos.

Kohlmann admitted on cross examination during the hearing on the instant motion that videos posted to various internet websites are often copied and posted other places or circulated directly between users via e-mail, chat rooms and forums. There is not evidence in Kohlmann's Report I to indicate that the videos in question came from the source site or that they came from some secondary or even tertiary source.

Because Kohlmann cannot trace the videos that are evidence to the source(s) from which he claims originated, his testimony about the source(s), and the groups behind them, cannot possibly help the jury determine the elements of the various charges. His testimony, therefore, is not relevant and should be excluded.

Throughout the remainder of Kohlmann Report I, there are factual allegations about source material and various terrorists and terrorist groups that have no connection to the

allegations against these Defendants and therefore do nothing to assist the trier of fact in deciding whether a crime was committed. For example:

- On page 2, Kohlmann describes that al-Ayyiri established the website Al-Neda “to distribute communiqués and booklets about Al-Qaida’s activities in the Arabian Peninsula and elsewhere.” However, there is no evidence that any of the Defendants visited the Al-Neda website or viewed or downloaded any material from it.
- On page 3, Kohlmann states that al-Ayyiri’s book The Path to the Land of Battle, “encourages Muslims around the world to join in Al-Qaida’s cause, whether directly or indirectly.” He then states that this book was found on a computer seized from one of the Defendants. However, he cannot state that the copy on a Defendant’s computer came from al-Ayyiri’s website or that the copy was ever read by any of the Defendants.
- Kohlmann conceded during cross examination that many of the videos identified in his report were available at one time or another on Al Jazeera or other mainstream media websites. Again, however, the presence of these materials cannot be traced to their original source and do not make any fact of consequence more or less likely.
- Kohlmann’s report tries to vilify videos by commenting on their content even when he admits that the video was either reprocessed or originally available on mainstream media sites. See Report I, p. 9.
- On Page 6 of Report I, Kohlmann states that the 18<sup>th</sup> issue of Sawt la-Jihad, which was allegedly found on one of the seized computers, featured an interview with Fawwaz al Nashmi, who, according to Kohlmann, served as commander of Al-Qaida’s Al-Quds



Brigade. Without ever stating that it has anything to do with the interview in Sawt al-Jihad issue 18, Kohlmann also states that al-Nashmi took responsibility for killing 22 people in Khobar Saudi Arabia on May 29, 2004. He explains, without citing any particular relevance to the charges in this case, that “the victims [of the May 29, 2004 attack] included a British employee of the Saudi company Apicorp, whose body was reportedly tied to a car by jubilant Al-Qaida members and dragged behind as a trophy.” He uses details like these throughout his report even though they have nothing to do with the charges here.

The conclusions in Kohlmann’s Report I are perhaps the most troublesome because they contain the most broad and sweeping statements about terrorists and their aims, but have no more connection to the actions of these Defendants than most of the rest of Report I. Kuhlman states: “...the evidence [provided to him by the government] communicates the general aims and ideology of Al Qaeda and other likeminded terrorist organizations to a wide global audience.” *Id.* at 14. However, there is no evidence that the Defendants got this evidence from a site operated by Al-Qaida or any other “likeminded terrorist organization,” and there is no factual connection between Kohlmann’s opinion about the purpose of the material and its presence on the Defendant’s computer.

## **B. TESTIMONY IN OTHER TERRORISM CASES**

In an effort to bolster is own credibility, Kohlmann mentioned several times that he has consulted with and testified on behalf of the government in a number of other terrorism cases. While that is true, those other cases all have a common characteristic which makes them markedly different from the instant case. All the other cases in which Kohlmann has consulted

or testified involve a specific organization, individual or act which connected the defendant(s) with a specific group or movement.

COURT	CASE NAME	TERRORIST LINK
D.O., 2003	U.S. v. Battle “The Portland Seven”	Al-Qaida and the Taliban
E.D.VA, 2004	U.S. v. Khan “Paintball Terrorists”	Al-Qaeda, Taliban and Lashkar-e-Taiba (LET)
E.D.VA, 2004	U.S. v. Royer, “Virginia Jihad”	Al-Qaeda, the Taliban and Lashkar-e-Taiba (LET)
E.D.VA, 2004	U.S. v. Benkhala	Part of Khan case (above)
E.D.VA, 2005	U.S. v. Al-Timimi	Taliban
S.D.NY	U.S. v. Paracha	Al Qaeda
E.D.VA, 2005	U.S. v. Abu Ali	Al-Qaeda
E.D.CA, 2006	U.S. v. Hyat	training camp in Pakistan
E.D.VA, 2006	U.S. v. Chandia	Lashkar-e-Taiba
N.D.N.Y.	U.S. v. Aref,	Al-Qaida, and laundering money from a supposed arms transaction
E.D.VA, 2004	U.S. v. Benkhala	Supplying service to Taliban
S.D.N.Y., 2006	U.S. v. Sabir, “Bronx Cell”	Al-Qaeda
S.D FL., 2007	U.S. v. Padilla,	Al Qaeda
D.Mass, 2007	U.S. V. Muntasser,	Al Kifah, and other organizations tied to Al Qaeda
D.Conn, 2007	U.S. v. Abu-Jihaad	Leaking classified information to Azzam Publications

The fact that Kohlmann may have been qualified as an expert, or even allowed to testify as a fact witness, in other cases does not have any bearing on his ability to testify in the instant case, particularly because the factual allegations of this case do not involve a specific terrorist organization or financial transaction as did all the other cases in which he has consulted or testified.

## **II. KOHLMANN'S CONTENTIONS CRIMINALIZE CONDUCT PROTECTED BY THE FIRST AMENDMENT**

The Conclusion of Report I culminates in his opinion that, “this material is very likely to be useful to a person or persons conspiring to join a terrorist organization, to provide material support to a terrorist organization, and/or to carry out an act of terrorism.” *Id.* That is the most disturbing statement he makes. What he is saying is that because you have the material on your computer, you must want to be a terrorist.

Is that what our criminal justice system has become? Is it proper for the government to take a protected First Amendment right and turn it on its head all in the name of the so-called “war on terror?” That is the kind of argument used at Salem and in the McCarthy hearings.

“If the First Amendment means anything, it means the state has no business telling a man, sitting in his own house, what books he may read or what films he may watch.” *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

## **III. KOHLMANN'S REPORTS AND OPINIONS FAR EXCEED THE AREA IN WHICH HE CLAIMS EXPERTISE**

The lack of relevance of Kohlmann's proposed testimony notwithstanding, his reports and testimony go far beyond the area in which he claims to have expertise. He should not be permitted to testify in such areas, or to use such areas as a basis for his opinions. Some examples of his testimony either exceed or are not at all related to his claimed area of expertise include:

1. Kohlmann does not speak or read conversational Arabic, yet he admitted at the hearing that the majority of the materials on which he bases his opinions are published

in Arabic. He claims he uses a computer program and hires two part time employees in order to review the materials, and yet there is no basis at all for the Court to measure the reliability of the translations. The statements of the translation are unreliable hearsay, at best. If Kohlmann were a fact witness who claimed to have heard a defendant make a statement in another language, the Court would not, and should not, let him testify as to the meaning of the words in a language in which he was not fluent. It is no different here, and the Court should not allow him to base any testimony on translations without first verifying their accuracy.

2. Kohlmann testified about the difficulty in obtaining and downloading certain materials from various websites. He is not a forensic computer specialist, however, and should therefore not be allowed to make such statements. He also testified to different kinds of passwords and levels of security that some websites have. There is no basis to believe he has the training and expertise to testify to such matters. The FBI computer specialist, whose reports on the Defendants' computers have been turned over to the defense, would certainly have the expertise to testify about password protection and security levels, but Kohlmann does not, and he should not be allowed to testify about such matters or to base his opinion about the operators of certain websites on such information.
3. Kohlmann testified during the hearing that certain videos were only available at certain periods of time because Al-Qaida, prior to 2004, did not have sufficient bandwidth available to it to distribute such material. There are so many suppositions in that statement as to render it completely untrustworthy. Kohlmann is not an expert in

telecommunications equipment and capacity, so he shouldn't be allowed to testify about what was and was not possible at given periods of time. He also provided no basis for his contention that Al-Qaida did not have access to certain bandwidth. He claims to know what equipment was available in Iraq at certain times, but he does not have any idea, nor can he, where the materials were uploaded in the first place. Given his own characterization of how Al-Qaida and other organizations operate, it is entirely possible that someone could have been hosting and uploading to any of the websites he mentions in his report from any location on earth. Not only is he unqualified to draw conclusions, he does not provide a reasonable basis for his opinion, and therefore he should not be allowed to testify about when and how certain materials were available on the internet.

4. Kohlmann tried to insinuate that the Defendants must have been tied into certain terrorist websites because some of the materials he found on their computers were only posted on what he calls "jihadist websites" for a very short period of time and because file sharing was not possible until 2004. He is not an expert in the operation and development of the internet. He does not have any basis to say that the same files or videos were not available from other sources at other times. As for the availability of file sharing, the Court may recall that the file sharing service Napster was shut down in 2001 because it was an extremely easy, fast and unregulated method to share copyrighted information. In fact, Napster had 25,000,000 unique users in or around February of 2001, so the practice of file-sharing was hardly new in 2004.

**IV. THE PROBATIVE VALUE OF KOHLMANN'S TESTIMONY IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE**

Even if relevant, evidence may be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. Evid. R. 403. Such is the evidence in the proposed testimony of Evan Kohlmann. Even if it were relevant, its probative value is minimal and is so outweighed by the danger of unfair prejudice that it should not be put in front of the jury.

El Hindi does not need to explain to the Court the incredible prejudice that is inherent in a case of this type. There may be no way to eliminate the prejudice, for after all he is charged with a crime and there is going to be a trial. The Court should make every effort to limit the prejudice, however, and to submit Kohlmann's opinions to the jury does just the opposite. Although they are not part of the charges in the case and therefore do not have any bearing on guilt or innocence, Kohlmann mentions the following people, terms and events in his various reports:

- a. Usama (Osama) Bin Laden.
- b. Al-Qaida.
- c. September 11, 2001 attacks on New York and Washington
- d. Al-Gama' at al-Islamiyya (the Egyptian Islamic Group).
- e. Egyptian Islamic Jihad Movement.
- f. Jemaah Islamiya in Indonesia.
- g. Al-Qaida Shura Council.
- h. Mamdouh Mahmud Salim (a.k.a. Abu Hajer al-Iraqi).
- i. Attacks on U.S. embassies in East Africa in 1998.
- j. Kamikaze bombing attacks targeting Westerners from Indonesia to Morocco in 2002 and 2003.
- k. Shaykh Yousef al-Ayyiri.
- l. Suicide bombing attacks in Riyadh, Saudi Arabia in 2003.
- m. Al-Qaida recruitment efforts in Europe.
- n. Mujahideen training camps
- o. Abu Hamza al-Masri (a.k.a. Mustafa Kamel).

- p. Al-Muhajiroun organization.
- q. Shaykh Omar Bakir Mohammed.
- r. Taliban.
- s. Louis Atiyatullah.
- t. Khalid Sheikh Mohammed.
- u. Adam Gadahn (a.f.a. Azzam al-Amriki).
- v. Destruction of U.S.S. Cole.
- w. Dr. Ayman al-Zawahiri.
- x. Al-Farouq and Tarnak terrorist training camps.
- y. Abu Musab al-Zarawi.
- z. Shaykh Anwar al-Awlaki.
- aa. Abdelaziz al-Muqrin (a.k.a. Abu Hajer al-Najdi).
- bb. Salih al-Hassan.
- cc. Fawaz al-Nashmi (a.k.a. Turki al-Mutairi).
- dd. Ashraf bin Ibrahim al-Sayyed (a.k.a. Abu Tamim al-Madani).
- ee. Nasser bin Abdallah al-Sayyari al-Khalidi.
- ff. Ali bin Hamid al-Madabi Al-Harbi.
- gg. Al-Qaida Network in Iraq.
- hh. Rabei Osman El Sayed Ahmed.
- ii. Abul-Harith Abdelrahman al-Dosari.
- jj. Abu Saad al-Makki.
- kk. Abu al-Zubair al-Najdi.
- ll. Abu Amshah al-Suri.
- mm. Abu Abdullah al-Liby.
- nn. Abu Abdelkarim al-Suri.
- oo. Ahmed Said al-Ghambi (a.k.a. Abu al-Migdad al-Ghamdi).
- pp. Martyrs Brigade of Mesopotamia.
- qq. Tawheed wal-Jihad Movement.
- rr. Palestinian cleric Abu Qatada al-Falastini.
- ss. Ansar al-Sunnah Army (JAAS).
- tt. Islamic Army of Iraq (IAI).
- uu. Mujahideen Army of Iraq.
- vv. Izzadeen al-Qassam Brigades.
- ww. Hamas.
- xx. Hizballah.
- yy. Shaykh Anwar Shaaban.
- zz. Video depicting downing of Russian Mi-24 by Abu al-Walid al-Ghamdi.
- aaa. Ibn ul-Khattab.
- bbb. Algerian Salafist Group for Prayer and Combat.
- ccc. Muntada al-Ansar forum.

Those people, organizations, places and events are not part of the charges in this case, and they do not make any of the elements more or less likely to be true. Their probative value, therefore, is minimal. The unfair prejudice will be insurmountable, however, if Kohlmann is allowed to testify as he did in the hearing and does in his reports such that he tries to tie these Defendants, or the material on their computers, to Osama Bin Laden and those like him. Hypothetically, it would not help the jury decide if Defendants are guilty for Kohlmann to say that someone who was the inspiration for a pamphlet on one of the computers was a good friend of Osama Bin Laden and was pleased by the 9/11 attacks. It would certainly incite the passions of some jurors, however, and therefore should be excluded.

#### **V. KOHLMANN IS NOT QUALIFIED AS AN EXPERT**

The conclusions Kohlmann reaches, while interesting, are really nothing more than convenient and inflammatory opinions espoused by a self-appointed expert, and they have no plain or obvious basis in fact or reliable methodology.

The Supreme Court has identified various factors for the trial court to consider when evaluating the reliability of the proposed expert opinion: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. Under Fed. R. Evid. 702 the Court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact. *Daubert*, at 592-93. In other words, the expert “must fit” the issues in the case by having a valid connection to the pertinent inquiry. *Id.* at 591-92.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an



expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702:

Evan Kohlmann should not be qualified as an expert because he does not satisfy the requirements for the admissibility of an expert opinion under the Federal Rules of Evidence.

#### **A. Education**

Evan Kohlmann is a self-professed expert who does not have the educational background or experience to reliably give expert opinions regarding matters of terrorism. As demonstrated at the *Daubert* hearings, Mr. Kohlmann's CV (Def. Ex. 1) sets forth his credentials in an inflated and deceptive manner. While Kohlmann is indeed a recent (2004) law school graduate, the law degree, while meaningful, does not enhance his credentials as an expert on terrorism.

Mr. Kohlmann's undergraduate degree from Georgetown University deceptively presented that he held a "**minor**" in Islamic studies. Mr. Kohlmann admitted under cross-examination that he merely obtained a "**certificate**" from the Center for Muslim Christian Understanding.

#### **B. Experience**

##### **1. The Investigative Project**

Mr. Kohlmann's experience is really little more than being a collector and librarian with a fascination in terrorism-related matters. His CV demonstrates his penchant for exaggeration. Kohlmann lists himself as a "**Senior Terrorism Consultant**" for the Investigative Project, Washington, D.C. from February 1998 through January 2004 on page one of his CV (Def. Ex. 1).

The “Investigative Project” was founded and run by Stephen Emerson, the same Stephen Emerson who, according to Kohlmann’s testimony, publicly stated that the “Oklahoma City bombing” must have been related to Middle East terrorism. Under examination, Kohlmann acknowledged that, for much of this period of time, he simply worked there part time as an intern while going to school full time. He acknowledged that he was not promoted to “Senior Terrorism Consultant” until the latter stages of his affiliation with the “Investigative Project.”

2. Globalterroralert.com

After graduating from law school and leaving the “Investigative Project,” Mr. Kohlmann established his own website: globalterroralert.com. (Def. Ex. 2d) Working solo out of one’s apartment in New York City, without the supervision of any academics, Mr. Kohlmann spends his time surfing the web looking for materials to add to his “extensive library of terrorist-related materials.” It is the matching up of these materials to similar ones provided by the government on which Kohlmann offers his opinions. The timing and source of Kohlmann obtaining his materials does not prove a legally significant fact. The timing and source from which Mr. Kohlmann obtained his documents is immaterial and irrelevant.

3. The Nine Eleven Finding Answers Foundation (NEFA)

Mr. Kohlmann also identifies himself as being a Senior Investigator for the **Nine Eleven Finding Answers Foundation (NEFA)** from August 2005 through the present. The description under NEFA is merely a description of the foundation and not of Mr. Kohlmann’s role within the foundation. Nor is there any suggestion in Kohlmann’s testimony that he received any additional academic training or experience through the Nine Eleven Finding

Answers Foundation which would lead to reliable principles and methodology regarding matters of terrorism.

Kohlmann's lack of oversight and training is particularly significant when it is recognized that four of the documents which Kohlmann lists as "major papers" on the third page of his resume are actually postings on a website or, as Kohlmann describes it, "occasional report published by the Nine Eleven Finding Answers Foundation (NEFA)." This lack of peer review, supervision, or training critically undermines Kohlmann's qualifications as an expert in the field of terrorism.

#### 4. On-Air News Analyst

Mr. Kohlmann's CV (Def. Ex. 1) also proudly proclaims that he is an "On-Air Terrorism Analyst, NBC News/MSNBC October 2004 – Present". Once again this is a credential demonstrating only that Mr. Kohlmann has a fascination with terrorism and likes to talk about it. It does not demonstrate an educational or experiential foundation which would permit him to render expert opinions in a court of law regarding matters of terrorism. Working hand-in-hand with journalists in order to add color to the news broadcast is no substitute for academic training and rigor which are necessary in order to have developed a reliable methodology and procedure in order to present to the jury meaningful opinions on matters of terrorism.

### C. WRITINGS AND PUBLICATIONS

The government's proposed expert witness presents on the third page of his CV a reference to his one and only book "Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network" followed by a half page of comments about his book. First and foremost under this category, Kohlmann presents a note that this book was "[c]ited as a source by the final report of the

Congressional 9/11 Commission.” While this claim is indeed true, Kohlmann’s book is (in this government publication of over 500 pages) at the end of a string citation in each of two footnotes, 37 and 80, for simple historical propositions which have nothing to do with the computer or video materials on which he is here being asked to give testimony.

Mr. Kohlmann’s article in the journal Foreign Affairs, September/October 2006: *The Real Online Terrorist Threat* (Def. ex. 12), is a glimpse into the opinion that the government seeks to extract from Mr. Kohlmann. As Kohlmann states on page 122 of the “Foreign Affairs” article, “In some cases, the line between terrorist activities online and terrorist activities on the battlefield is so blurred that it is virtually impossible to distinguish them.” While this may be Mr. Kohlmann’s opinion, and one which he would try to bleed into the case evidence regardless of how we restrict his testimony, there is no reliable methodology behind reaching such a conclusion.

Significantly, the same Foreign Affairs article points to one of Mr. Kohlmann’s chief shortcomings as an expert on terrorist matters. Mr. Kohlmann admitted in cross-examination that he does not read Arabic and must rely on translators who have not been tested by the court to tell him what is being said in Arabic. Yet this same “Foreign Affairs” article (Def. Ex. 12) criticized FBI Director Robert Mueller as being arrogant when he stated that, “Knowledge of Islam, Arabic, and the Middle East is helpful but not essential” (Foreign Affairs, p. 123) and concludes his article by stating, essentially, that the ability to read Arabic and understand jihadist cultures are essential in fighting terrorism. (Foreign Affairs, p. 124).

Kohlmann’s opinions spring from his review of materials within his “vast library” which have been translated for him by untested, unknown translators whose skill level, dialect

familiarity, and reliability have not been tested. The information which an expert relies upon must be the product of reliable principles and methods in order to be admissible. Kohlmann's reliance on this untested translation process, in order to give nuanced opinions regarding these internet and print materials, does not yield competent evidence in a form which can be relied upon by the trier of fact.

**VI. KOHLMAN DELIBERATELY OVERSTATES THE EXTENT TO WHICH HIS WORK IS SUBJECT TO PEER REVIEW**

Kohlmann's writings lack a meaningful peer review process. The release of his writings on the internet cannot be likened to legitimate peer review. The hypotheses expressed in his opinions from his reports are not able to be tested, quantified, or verified.

During the hearing, Kohlmann stated that his work was indeed subjected to peer review and that he works with people who are native speakers of Arabic to make up for the fact that he himself does not speak Arabic. One such person Kohlmann mentioned by name is Dr. Mohammed Hafez at the University of Kansas City. Kohlmann called him a "close colleague" and mentioned him in the context that everything Kohlmann does is "closely reviewed by native Arabic speakers, including academics and policy makers, law enforcement..." Kohlmann did not tell the truth. As evidenced by the Affidavit of Mohammed Hafez, attached as Exhibit I, Hafex is not a close colleague of Kohlmann and has never peer reviewed any of his material. Because of the proximity in time between the hearing and this brief, a certified transcript is not yet available. Attached to the Hafex Affidavit are two pages from a draft transcript outlining Kohlmann's misleading testimony regarding Hafez. The certified transcript will be provided to the Court upon completion.

**VII. CONCLUSION**

Because his reports and opinions have no relevance to the charges, because any probative value they may offer is substantially outweighed by the danger of unfair prejudice, and because he does not qualify as an expert under the law, Defendant Marwan El Hindi respectfully requests that the Court exclude the testimony and opinions of Evan Kohlmann from trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy was filed electronically this 29<sup>th</sup> day of February, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt.

Respectfully submitted,

KERGER & ASSOCIATES

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