United States v. Abdel Rahman: Preliminary Charge

Hon. Michael B. Mukasey
Southern District of New York

The following text was prepared by the Southern District of New York's United States District Judge Michael B. Mukasey to instruct jurors between opening statements and presentation of evidence in a trial for seditious conspiracy to conduct a campaign of urban terrorism, including participation in the 1993 bombing of the World Trade Center and plans to bomb New York landmarks, *United States v. Abdel Rahman*, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993).

Introduction

The indictment in this case contains 28 counts or charges. After all the evidence has been presented, I will instruct you in detail on the rules that define each of the charges in the indictment. Before we begin, however, I am going to explain Count One of the indictment, which charges all of the defendants with a crime that is often referred to as "seditious conspiracy," although those words do not appear in the body of the law that defines the crime. The reason I have singled out this charge for explanation at the beginning of the trial is that, unlike the other charges, which involve concepts and rules you have probably heard of before, this count involves some concepts and rules that may not be familiar, and I thought you should be aware of them while you listen to the evidence instead of having to wait until the end of the trial to hear about them. Also, the charge in this count was the subject of some incorrect news reports you may have heard or seen before you came here, and any misconceptions you may have picked up from such reports, or from the comments of the lawyers during their openings, should be corrected.

I am also going to touch on a few other matters that I think you should know before we start, relating to some of the arguments you heard about how religion is involved in this case, entrapment, and El Sayyid Nosair's state court trial. We will then begin with the government's presentation of evidence. Again, the purpose of these introductory instructions is to help you put in context the evidence you may see and hear.

Seditious Conspiracy

Summary of Count One

Count One charges that all of the defendants and other persons participated in a conspiracy, which is simply an unlawful agreement with each other and with other persons to do at least one of three things: (1) to levy a war of urban terrorism against the United States, (2) to oppose by force the authority of the United States, and (3) to prevent, hinder, or delay by force the execution of laws of the United States.

Summary of the Applicable Statute

The statute that you are going to be asked to apply is a federal law, section 2384 of title 18, United States Code, which reads in relevant part as follows:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to . . . levy war against [the United States], or to oppose by force the authority [of the United States], or by force to prevent, hinder, or delay the execution of any law of the United States,

they shall be guilty of a crime.

Conspiracy Elements—Summary

In order to find a defendant guilty of the crime charged in Count One of the indictment, you must find beyond a reasonable doubt:

First, that two or more persons conspired or agreed with one another;

Second, that such conspiracy had the goal of making war against the United States, of opposing by force the authority of the United States, or of preventing, hindering, or delaying by force the execution of any law of the United States;

Third, that the conspiracy took place or was intended to have an effect in the United States, in its territories, or in any place subject to the jurisdiction of the United States;

Fourth, that the defendant you are considering joined in that agreement with awareness of one or more of its unlawful goals.

Seditious Conspiracy—Element One—Existence of Agreement

As I have just told you, the first thing that the government must prove at this trial, beyond a reasonable doubt, is that a conspiracy actually existed. The essence of the crime of conspiracy is an agreement between two or more persons to do something that violates the law. Whether the agreement is ever carried out, or whether it succeeds or fails, does not matter. Indeed, the agreement need not be consistently followed. The unlawful purpose in this case is to wage war against the United States, to oppose the authority of the United States, or to prevent, hinder, or delay the execution of any law of the United States.

The government must prove, beyond a reasonable doubt, that the particular conspiracy the defendants are charged with participating in existed, and existed at or about the time alleged in the indictment. If you find that the conspiracy charged in the indictment did not exist, you cannot find any defendant guilty on Count One of the indictment.

A conspiracy has sometimes been called a partnership for criminal purposes in which each partner becomes the agent of every other partner and has the authority to act and speak on behalf of every other partner. However, to establish the existence of a conspiracy, the government is not required to show that two or more people sat around a table and entered into a formal contract, orally or in writing, stating that they have formed a conspiracy to violate the law and setting forth the means by which it was to be carried out or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific agreement. It is enough if two or more persons, in any manner,

whether they say so directly or not, come to a common understanding to violate the law. Express language or specific words are not required to indicate agreement to or membership in a conspiracy.

It is important, in order to understand what a conspiracy is, to keep in mind the difference between the object or goal of the conspiratorial agreement—that is, the crime that two or more people agree to commit—and the agreement itself. A conspiracy—the agreement to commit a crime—is a violation of law entirely separate and distinct from the crime that the members of the conspiracy agree to commit. Let me give an example that has nothing to do with this case. If two or more people were to agree to rob a bank, that agreement itself would be a crime. It would make no difference, as far as conspiracy law is concerned, whether or not the conspirators actually carried out their plan to rob the bank. If the government could prove beyond a reasonable doubt that there was an agreement to rob the bank, those defendants who had agreed to rob the bank would be guilty of conspiracy. On the other hand, even if the bank actually was robbed by someone, there would be a robbery but no conspiracy if the government could not prove that the person who actually robbed the bank agreed to the robbery beforehand with another person.

Just as is true of the bank robbery example I used, it does not matter whether the conspiracy charged in Count One was successful or not. The question is whether two or more defendants formed an agreement to wage war against the United States, to oppose its authority by force, or to prevent, hinder, or delay by force the execution of its laws. If two or more persons did so agree, the crime of conspiracy is complete. It does not matter whether the persons who formed the agreement actually carried out their plans, or whether the agreement ultimately was successful.

Of course, proof concerning the accomplishment of the object of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. In other words, success of the venture in carrying out an act, if you believe it was carried out, is often the best proof of the venture or the agreement. But as I just said, it is not necessary that a conspiracy actually succeed in its purpose for you to conclude that it existed. Also, in determining whether there has been an unlawful agreement, you may consider the acts and conduct of the alleged members of the conspiracy that are done to carry out an apparent criminal purpose. The adage "actions speak louder than words" is applicable here. Often, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators. However, when taken together and in connection with the reasonable inferences that flow from them, those acts may show a criminal agreement just as conclusively as more direct proof. Whether any acts that are proved during this trial show a conspiracy, or not, is for you to decide.

If, upon consideration of all the evidence, direct and circumstantial, you find beyond a reasonable doubt that the minds of at least two persons met—that is, that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment—then proof of the existence of the conspiracy is established.

Second Element—Objects or Goals of the Conspiracy

In Count One, the defendants are charged with agreeing to three goals: (1) to make war against the United States, (2) to oppose by force the authority of the United States, and (3) to prevent, hinder, or delay by force the execution of laws of the United States. Although three separate objects or goals are charged, you may find the conspiracy proved if it is established that any single one of those objects was agreed to by two or more persons. The government is not required to prove all three goals. However, the government must prove at least one of those objects or goals beyond a reasonable doubt. If the government has not proved that at least one of those goals was a goal of the conspiracy charged in Count One, your verdict must be not guilty.

As you can probably see from the objects or goals I have just described, an agreement to use force is a necessary ingredient of each. To prove someone guilty of the conspiracy charged in Count One, the government must show that the conspirators agreed that physical force would be used. In this case, the indictment charges that the conspirators agreed to use force by planning and carrying out certain acts of violence, including bombings. Again, it is not necessary for the government to show that force was actually used by the conspirators, but the government must prove at least that the conspirators intended to use force.

Second Element—Intent to Levy War, Forcibly to Oppose the United States, or Hinder Execution of United States Law

The three goals of the conspiracy charged in the indictment—(1) to wage war against the United States, (2) to oppose by force the authority of the United States, and (3) to prevent, hinder, or delay by force the execution of some law of the United States—all have as a common ingredient not only the use of force but also opposition to the United States, functioning through its government.

In other words, it is not enough for the prosecution to prove that two or more persons agreed to commit random acts of violence, or to prevent some person or people who work for the government from doing their job, or simply to violate a law of the United States. Rather, the prosecution must prove that those who participated in the conspiracy intended to use force for the purpose of attacking the United States, functioning through its government. In order to prove intent to attack the United States functioning through its government, the evidence must prove that those who participated in the unlawful agreement wanted to use force that would inflict widespread punishment or suffering as retribution for some policy or act of the United States government, or that would have the effect of attempting to force the United States government to perform some act or to change some policy.

However, when the law uses the words "levy war against the United States," that does not mean that the conspirators must have been planning to overthrow the government, or to replace it with another government, or to seize United States territory. Nor does it mean that the target of force must necessarily be a government employee or government property. Rather, I instruct you that an attack even on people who do not work for the government, and even on property that does not belong to the government, may be considered an act of "war"

against the United States if it caused or threatened damage that was widespread enough to show an intent to threaten the peace and safety of a large segment of the population, that such widespread damage was intended by members of the conspiracy, and that the purpose of causing such widespread damage was either to punish or retaliate against the United States government for an act or policy that it followed, or to force the United States government to perform some act or change some policy.

You should consider the acts, if any, that were planned and how severe the consequences of each planned act were or might have been as well as the statements and other conduct by defendants that you consider to be relevant. Taking all these factors into consideration, you must then decide, based on your common sense, whether the acts that the conspirators planned to commit could constitute a "war" against the United States as I have explained that concept to you. Again, let me remind you that the only acts you may consider here are those that the prosecution has proved, beyond a reasonable doubt, that the conspirators either committed or planned to commit.

To determine whether any of the acts that defendants conspired to commit constituted "opposing by force the authority of the United States," you should consider whether the proved acts, whether they were actually committed or simply planned, included elements of force and whether they were intended to oppose or undermine the authority of the United States government to conduct one or more of its official functions. Force is defined in the conventional sense. An act involves force if it threatens or results in violence, or if it threatens or results in harming or destroying property, or harming or killing people. An act opposes the authority of the United States if successfully carried out it would adversely affect the ability of the United States government to govern the country or to perform one of its proper functions. Here I want to caution you that affecting the ability of the United States government to govern or to perform one of its proper functions must be the purpose of the person who commits the act and not merely an incidental effect of an act that is planned or carried out for another purpose. In other words, in order to be guilty of conspiring to oppose by force the authority of the United States, a person must intend to oppose the authority of the United States, and not simply to do something for another purpose even though it may have the incidental effect of interfering with the authority of the United States.

To determine whether a conspiratorial act "by force prevents, hinders, or delays the execution of laws of the United States," you must consider whether the act would, if successfully carried out, forcibly prevent or interfere with the carrying out of a law of the United States. Again, force is defined in the conventional sense. An act involves force if it threatens or results in violence, or if it threatens or results in harming or destroying property, or harming or killing people. The "execution of laws" includes enforcing laws of the United States that are found in statute books, as well as the orders of courts. Once again, I want to caution you, as I did a moment ago in connection with the second alleged goal of the conspiracy, that preventing, hindering, or delaying the carrying out of a law of the United States must be a purpose of the person who plans or commits the act, and not merely an incidental effect of an act that is planned or carried out for another purpose.

So the question for you to consider is what was in the minds of those who planned the use of force, if you find any such plan existed. To establish the existence of the conspiracy charged in Count One, the government must prove that two or more people agreed to use force for the purpose of attacking the United States, functioning through its government, as I have explained that concept to you. However, if you find that there was simply an agreement to attack people or places without an intention to attack the United States, functioning through its government, then the conspiracy charged in Count One would not be proved and your obligation would be to return a verdict of not guilty as to that count.

Third Element—Within the United States

The third element that the government must prove beyond a reasonable doubt in order to establish that a conspiracy as charged in Count One existed is that the conspiracy, as I have explained it to you, was formed or pursued in the United States or its territories or in a place subject to its jurisdiction. In order to find the existence of a conspiracy of the sort charged in Count One, you must find that the conspiracy was joined by a defendant or pursued in the United States, in its territories, or in any place subject to its jurisdiction.

There may not be any dispute that the specific acts charged, if proved, occurred in the United States. Nonetheless, in order to find the conspiracy charged in Count One, you must find that a conspiracy with one of the three goals I mentioned was formed or pursued in the United States or its territories or in a place subject to its jurisdiction.

Fourth Element—Participation in the Conspiracy

If you find that the government has proved beyond a reasonable doubt that the conspiracy charged in the indictment existed, then you must determine whether each individual defendant was a member of that conspiracy. I remind you that guilt is individual and that you must consider each defendant's participation or lack of participation separately. In determining whether the defendant you are considering became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did the defendant join with an awareness of at least one of the unlawful aims and purposes of the conspiracy?

In defining the requirement of participation in the conspiracy, I said that you must determine whether or not the defendant you are considering knowingly joined in the agreement with intent to further at least one of the conspiracy's three unlawful goals—(1) waging a war of urban terrorism against the United States, (2) opposing by force the government of the United States, or (3) using force to prevent, hinder, or delay the execution of any law of the United States.

When you consider whether a particular defendant was a member of the conspiracy charged in Count One, you must determine whether he knowingly and intentionally agreed to further one of the three unlawful purposes of the conspiracy. I have already explained those goals to you when I explained the nature of the conspiracy charged in Count One, and I am not going to repeat that explana-

tion here. It is contained on pages 4 through 6 of these instructions and it applies when you are deciding whether a defendant agreed to further one of those goals.

To have guilty knowledge, a defendant need not know the full extent of the conspiracy. Similarly, the defendant need not know all of the activities of the conspiracy. Further, the defendant need not know who all the co-conspirators are. Indeed, a single act may be enough to bring the defendant within the membership of the conspiracy provided that the defendant was aware of the conspiracy and knowingly associated himself with its unlawful aims.

Of course, mere association with a conspirator does not make someone a member of a conspiracy. Nor is knowledge without participation sufficient. What is necessary is that the defendant you are considering participated by agreeing to further one of the unlawful purposes of the conspiracy. In other words, in order to participate in a seditious conspiracy, a defendant must have had knowledge of at least one of the three unlawful purposes of the conspiracy—(1) to make war on the United States, (2) to oppose by force the authority of the United States, or (3) to prevent, hinder or delay by force the execution of a law of the United States—and must have agreed to aid in the accomplishment of one of those ends. It is not necessary, however, that the defendant received or even anticipated any financial benefit from his participation in the conspiracy so long as the defendant participated in it in the way that I have explained.

If you find that a conspiracy of the kind charged in Count One existed and that the defendant you are considering participated knowingly and intentionally in it, the extent or length of his participation has no bearing on whether or not he is guilty. A defendant may join a conspiracy at any point after it begins, and leave before the conspiracy ends, and still be held responsible as a conspirator. Once a conspiracy has been proved, the act of any conspirator becomes, in the eyes of the law, the act of all of the members of the conspiracy. Thus, if you find that a seditious conspiracy existed and that a particular defendant participated in the conspiracy, then that defendant is responsible for all the acts of the conspiracy. Even if the defendant you are considering participated in the conspiracy to a degree more limited than that of another co-conspirator, that defendant is equally guilty so long as he was at any time during the relevant period a conspirator.

If you find that a defendant joined the conspiracy charged in Count One, then that defendant is presumed to remain a member of the conspiracy—and is responsible for all actions taken in furtherance of the conspiracy after he joins—until the conspiracy has been completed or abandoned or otherwise ended, for example by the arrest of some or all conspirators, or until the defendant has withdrawn from the conspiracy.

The question then is: Did the defendant you are considering join the conspiracy charged in Count One and participate in it with the awareness of at least one of its basic purposes and aims?

Participation: "Unlawful," "Intentional," and "Knowing"

In defining the requirement of participation in the conspiracy, I have used the words "unlawful," "intentional," and "knowing." As I explained before, the terms "unlawful, intentional, and knowing" mean that you must find beyond a reason-

able doubt that the defendant knew what he was doing and he did it deliberately and voluntarily as opposed to mistakenly or accidentally.

The word "unlawful" simply means contrary to law, that is, to do something which the law forbids. Agreeing to engage in sedition, defined as the three goals of making war against the United States; opposing by force the authority of the United States; or preventing, hindering, or delaying by force the execution of any law of the United States, is unlawful.

A person acts knowingly if he acts purposely and deliberately and not because of mistake or accident or other innocent reason.

A person acts intentionally if he acts voluntarily, willfully, and with a bad purpose, that is, a purpose to do something the law forbids. Of course, it is not necessary that the defendant knew that he was violating any particular law. But you must be convinced beyond a reasonable doubt that he was aware that what he was doing was, in general, unlawful.

Your decision whether a defendant acted knowingly, intentionally, or willfully, and whether he joined the conspiracy with intent to accomplish one of its unlawful goals, involves a decision about that defendant's state of mind. Since it is not possible to look into a person's mind to see what he was thinking, you must consider all the facts and circumstances shown by the evidence and exhibits in order to determine what his state of mind was.

In our everyday affairs, we are continually called upon to decide from the actions of others what their state of mind is. Experience has taught us that, frequently, actions speak louder than words. Therefore, you may well rely on circumstantial evidence in determining a defendant's state of mind. It is up to you, based on all the evidence, to determine whether each defendant knowingly and intentionally entered the alleged conspiracy, and whether he did so with one of its unlawful goals in mind.

Of course, you may consider a defendant's statements as well if you find them relevant to the issue of his state of mind.

Agreement with Government Agent Not Sufficient

When I say that the government must prove the existence of an agreement between two or more persons, it is important to recall that an agreement between a defendant and someone you find to have been a government agent, such as Emad Salem, is not enough to establish a conspiracy. The government must prove that at least two people who were not government agents agreed to at least one of the goals I described before. If you find that at least two people who were not government agents agreed to one or more of those goals, that is enough to prove the existence of the conspiracy, even if they also thought that Emad Salem was part of the conspiracy and not a government agent. Also, it is possible for two people to agree to one or more of these goals through someone who is a government agent, but there must be two or more people who are not government agents agreeing to one or more of these goals, and each must be aware that someone other than the government agent also is participating in the conspiracy.

Religion

I want to say a few words also about how religion may be involved as an issue in this case, and also about how it is not an issue in this case.

The government has argued to you that among the motives or reasons the defendants had for committing the acts charged in the indictment were certain of their religious beliefs. Some defendants have argued that the government was motivated by opposition to their religion in bringing these charges, and some have argued that their religious beliefs were not a motive for violence.

You will recall that when I described a few moments ago the elements of the conspiracy charged in Count One, motive was not among them. The government does not have to prove that someone had a motive or reason for committing a crime, but only that he acted with the intent to further one of the unlawful goals I described a few moments ago. A defendant does not have to prove anything, and certainly not that the government had a motive or reason for bringing charges. However, the government may try to prove and argue a motive and a defendant may try to prove and argue a motive by the government as well.

Let me illustrate this with an example that has nothing to do with this case. If the government charges a defendant with bank robbery, it does not have to prove the defendant's motive for committing the robbery. However, the government may if it wishes present evidence that the defendant needed the money badly as evidence that he had a motive to rob the bank. Of course, the defendant may try to show that he was in fact a millionaire, and did not need the money, and argue that the government was picking on him only because he was wealthy.

However, it is important for you to understand that although the government may introduce proof of religious belief and argue motive from that, you may not find that a defendant committed any offense charged in this indictment merely because you may disagree with or dislike his religious beliefs, nor may you find that he did not commit an offense simply because you agree with or admire his religious beliefs. Every person in this country, including each of these defendants, has the right to believe what he or she wishes. To put the matter simply, if you find beyond a reasonable doubt that a defendant committed one or more of the crimes charged in this indictment with the required state of mind, it is not a defense that he committed the crime in the name of religion, and your verdict as to that defendant should be guilty. On the other hand, if you find there is not enough evidence to prove beyond a reasonable doubt that a defendant committed a crime, his religion cannot provide the basis for a criminal conviction, and your verdict as to that defendant should be not guilty.

Defense: Entrapment

Some defendants may assert as a defense to some or all of the counts in this indictment that they were the victims of entrapment by an agent of the government. The law permits government agents to trap an unwary criminally-minded person, but the law does not permit agents of the government to entrap an unwary innocent person. Thus, a defendant may not be convicted of a crime if it was a government agent who gave the defendant the idea to commit the crime, if it was the government agent who also persuaded him to commit the crime, and if he was

not ready and willing to commit the crime before the government agent spoke with him.

On the other hand, if the defendant was ready and willing to violate the law, and the government agent merely presented him with an opportunity to do so, that would not constitute entrapment.

Your inquiry on this issue should first be to determine if there is any evidence that a government agent took the first step that led to a crime charged in the indictment; in other words, that he induced that criminal act. And here inducement means soliciting, proposing, or suggesting that a defendant commit the crime charged. If you find there was no such evidence of inducement by someone who was at the time a government agent, there can be no entrapment and your inquiry on this defense should end there.

If, on the other hand, you find some evidence that a government agent initiated a criminal act charged in the indictment, then you must decide if the government has satisfied its burden to prove beyond a reasonable doubt that the defendant you are considering was predisposed—that he was ready and willing before the inducement to commit the crime. The defendant does not have to prove his lack of predisposition; the government must prove such predisposition beyond a reasonable doubt. The government may prove predisposition in one of three ways: (1) by proving that the defendant, before any inducement from a government agent, was already involved in a course of criminal conduct similar to the one charged here; (2) by proving that the defendant, before any inducement from a government agent, had already formed the intention to commit a crime charged here; or (3) by proving that the defendant readily responded to the inducement, and by doing that showed that he was ready and willing to commit the crime charged. If you find beyond a reasonable doubt that the defendant was predisposed—that is, ready and willing—to commit the offenses charged in the indictment, and was simply waiting for a favorable opportunity to commit the offenses charged, then you should find that the defendant was not the victim of entrapment. On the other hand, if you have a reasonable doubt that the defendant would have committed the offenses charged without the government agent's inducements, you must acquit the defendant of those charges.

You should know that, with respect to the defense of entrapment as well as other decisions in this case, you must consider each defendant separately. Whether or not you find there was entrapment as to one defendant should not control your decision as to whether or not any other defendant was entrapped.

Prior State Trial

You were told during jury selection that one defendant, El Sayyid Nosair, was tried in a New York state court on various charges in connection with the November 5, 1990, murder of Rabbi Meir Kahane. That trial began in November 1991 and ended in December 1991 with an acquittal on some charges and a conviction on others. He was sentenced in January 1992 in connection with the charges on which he was convicted to a prison term of between seven and one third and twenty-two years. You may hear about that trial and the resulting sentence during this trial.

There are a few things you should understand about that state case and how it may be relevant to this case, and also how it is not relevant to this case.

First, you should be aware, and I instruct you, that there is nothing unconstitutional or otherwise unlawful about a person being tried in a federal court on a federal charge in connection with an act that was also the subject of an earlier state trial on a state charge. Some of you may have heard of the double jeopardy clause, but that clause does not apply to a charge brought by a separate government. The federal and state governments are separate. One consequence of that is that if a jury reached a particular result in the state case, that result is in no way binding on you as a federal jury applying federal law. Your decision here is separate from the decision made by a state court jury under state law. Simply because the state court jury acquitted him on some charges is not evidence supporting an acquittal here, and simply because the state court jury convicted him on other charges is not evidence supporting a conviction here.

Second, the way that the earlier state case may be relevant here is that you may consider how, if at all, the result in that case may have influenced later events, and may have influenced the conduct of people whose conduct will be the subject of testimony here. Also, some witnesses who testified in the state trial may testify here, and you may very well hear the lawyers mention that trial in connection with the testimony of those witnesses.

Conclusion

Now I have finished with this preliminary charge, and I thank you for your attention. I want to remind you that I have given you these preliminary instructions only to introduce you to some concepts that may not be familiar or that you may have had some mistaken impression about either because of news reports or because what one or another of the lawyers may have said during their opening statements. I do not mean to suggest by these instructions that these are the only legal rules that apply to this case. They are not. I gave you some preliminary instructions before the openings and I may be giving you instructions throughout the trial as to legal rules if it becomes necessary. I will instruct you on all the elements of each of the crimes charged at the end of the trial. Finally, I do not want any of these instructions to be taken as a comment by me on what the evidence will show. I have no idea what it will show, and you are the only judges of what the evidence proves or does not prove.