National Security Case Studies

Special Case-Management Challenges

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INTRODUCTION

National security cases often pose unusual and challenging case-management issues for the courts. Evidence or arguments may be classified; witnesses or the jury may require special security measures; attorneys' contacts with their clients may be diminished; other challenges may present themselves.

The purpose of this Federal Judicial Center resource is to assemble methods federal judges have employed to meet these challenges so that judges facing the challenges can learn from their colleagues' experiences.

These case studies include background factual information about a selection of national security cases as well as descriptions of the judges' challenges and solutions. The information presented is based on a review of case files and news media accounts and on interviews with the judges.

Classified Information Security Officers. Crucial in courts' handling of classified information are classified information security officers, who are detailed to the courts by the Department of Justice's Litigation Security Group. Until January 15, 2011, they were known as "court security officers," which was confusing because that term is used for persons who provide courthouses with physical security.

Hyperlinks. An Acrobat copy of this document posted within the judiciary at FJC Online includes hyperlinks among the footnotes. Embedded in citations to published opinions are hyperlinks to their Westlaw postings. Citations to unpublished orders and opinions often include hyperlinks to copies of the documents available at FJC Online. Embedded in citations to other court documents are hyperlinks to the relevant court's PACER site.

Other Publications. Lessons learned from these case studies are summarized in *National Security Case Management: An Annotated Guide* (2011), also available from the Federal Judicial Center.

This publication supersedes the following:

- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (September 20, 2007)
- *Terrorism-Related Cases: Special Case-Management Challenges: Case Studies* (March 26, 2008)
- *National Security Case Studies: Special Case-Management Challenges* (February 22, 2010)
- *National Security Case Studies: Special Case-Management Challenges* (November 14, 2011)

The following chapters are new: "Mujahedeen Khalq," "Ashland and Moscow," and "Triangle Takedown" (terrorism prosecutions); "Interrogation Death in Afghanistan" and "Castro Foe" (other criminal cases); and "Surveillance Software" and "Muslim Surveillance" (civil cases).

TERRORISM PROSECUTIONS

Terrorism prosecutions include prosecutions for acts of terrorism, conspiracy on sometimes thwarted acts of terrorism, and material support. Proscribed material support can include financial support ("Ashland and Moscow,"[1] "Prosecution of a Charity") or attending terrorism training camps ("Lackawanna," "Lodi"). Some cases include additional charges for false statements.

These prosecutions typically present courts with enhanced security concerns. In addition to physical security concerns about the courthouse, the jury, and sometimes witnesses, there are often information security concerns involving the court's handling of classified information. Classified information security officers provided by the Justice Department are the experts on how courts keep classified information secure.[2]

The terrorism prosecutions selected for this collection of case studies range in time from the 1993 bombing of the World Trade Center to 2012 pro se trials in the Eastern District of North Carolina.

Prosecutions related to the "First World Trade Center Bombing" included both prosecutions for the 1993 bombing and for thwarted plots to bomb Manhattan tunnels and landmarks and American airplane flights in Asia.

The prosecutions for the 1998 bombings of American embassies in "Kenya and Tanzania" were interrupted by the stabbing of a detention guard, which resulted in another prosecution. One fugitive defendant was not prosecuted until 2009 and 2010; other indicted defendants remain fugitives.

Handling classified information is perhaps the most unusual case-management challenge for courts presiding over national security cases. Occasionally, judges have immersed themselves in classified information ("Detroit"). For one of these cases, that did not become necessary until it was time to sentence the defendants ("Mujahedeen Khalq"). A terrorism prosecution, however, may involve no classified information at all ("Sears Tower").

Sometimes, to protect national security, a jury is presented with an unclassified substitute for classified information, such as a summary or an admission. A jury instruction may help the jury understand how and why classified information is avoided in the trial ("Chicago"). Courts might also employ the silent witness rule, in which a limited amount of classified information is presented to the jury, such as the identity of a person or a country referred to. The classified information is kept from the public, but it must not be kept from the defendant himself ("A Plot to Kill President Bush").

Witnesses are sometimes afforded extra protection to conceal their identities from the public ("American Taliban," "Chicago"). It is also not uncommon for

1. Titles in this introductory text refer to chapters in this publication.

2. Revised Security Procedures Established Pursuant to Pub. L. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C. app. 3 § 9 note ¶ 2, *available at* http://uscodebeta.house.gov/browse.xhtml.

terrorism prosecutions to require foreign evidence ("Millennium Bomber," "A Plot to Kill President Bush," "Ashland and Moscow," "Chicago").

As with other types of litigation, terrorism prosecutions are sometimes complex because of intertwined cases ("First World Trade Center Bombing," "Paintball," "Ashland and Moscow," "Prosecution of a Charity," "Toledo"). Management of the cases' complexity and high profile could benefit from careful developments of protocol, such as the decorum order developed for a prosecution for conspiracy to attack "Fort Dix."

Some terrorism defendants elect to proceed pro se. Perhaps the most famous example is Zacarias Moussaoui ("Twentieth Hijacker"), whose pro se privilege ultimately was taken away because of his disruptive filing behavior. Defendants in other cases were less disruptive ("Atlanta," "Triangle Takedown").

The mental health of defendants subject to strict security measures during pretrial detention can be an issue of concern ("Dirty Bomber," "Minneapolis").

Terrorism prosecutions frequently result in convictions, but sometimes defendants are acquitted. Some acquittals have been followed by deportation ("Ashland and Moscow," "Sears Tower") or a prosecution for something else ("Paintball").

First World Trade Center Bombing

United States v. Salameh (Kevin Thomas Duffy) and United States v. Abdel Rahman (Michael B. Mukasey) (S.D.N.Y.)

On Friday, February 26, 1993, a bomb exploded in the parking garage of the World Trade Center in Manhattan, killing six people and injuring more than one thousand.[3]

The Bombing of the World Trade Center

On April 24, 1992, Ahmad Mohammad Ajaj moved from Houston, Texas, to Pakistan, where he attended a terrorist training camp on the border between Afghanistan and Pakistan called Camp Khaldan.[4] He learned how to make bombs, and he met Ramzi Ahmed Yousef.[5] On September 1, 1992, Ajaj and Yousef entered the United States using false identities.[6] Ajaj's passport was discovered to be a forgery.[7] He was indicted in the Eastern District of New York, where John F. Kennedy International Airport is located, and imprisoned for six months on a guilty plea.[8] Yousef was stopped for traveling on an Iraqi passport without a visa but released on his own recognizance because the detention center was full.[9]

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3. The 9/11 Commission Report 280 (2004); *id.* at 71 ("The ensuing explosion opened a hole seven stories up."); United States v. Yousef, 327 F.3d 56, 79 (2d Cir. 2003); United States v. Salameh, 152 F.3d 88, 107–08 (2d Cir. 1998); United States v. Salameh, 54 F. Supp. 2d 236, 245 (S.D.N.Y. 1999); United States v. El-Gabrowny, 876 F. Supp. 495, 496 (S.D.N.Y. 1994); United States v. Salameh, 856 F. Supp. 781, 782 (S.D.N.Y. 1994); United States v. El-Gabrowny, 825 F. Supp. 38, 39–40 (S.D.N.Y. 1993); *see* Ralph Blumenthal, *Accounts Reconstruct Planning of Trade Center Explosion*, N.Y. Times, May 26, 1993, at B1; Robert D. McFadden, *Blast Hits Trade Center, Bomb Suspected*, N.Y. Times, Feb. 27, 1993, at 11; Christopher S. Wren, *U.S. Jury Convicts 3 in a Conspiracy to Bomb Airliners*, N.Y. Times, Sept. 6, 1996, at 1.

4. *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 290.

5. The 9/11 Commission Report 73 (2004); *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107.

Yousef was born Abdul Basit Mahmud Abdul Karim. Terry McDermott & Josh Meyer, The Hunt for KSM 45 (2012); Peter Lance, Triple Cross 101 (2006).

6. The 9/11 Commission Report 72 (2004); *Yousef*, 327 F.3d at 78, 135; *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 291; *see* Blumenthal, *supra* note 3; Lance, *supra* note 5, at 102; Mary B.W. Tabor, *Man Held in Bombing but Is Not Charged, Lawyer Says*, N.Y. Times, May 6, 1993, at B3; Wren, *supra* note 3.

7. *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 294; *see* Blumenthal, *supra* note 3; McDermott & Meyer, *supra* note 5, at 45.

8. *Salameh*, 152 F.3d at 107, 109, 118–20 (noting an October 6, 1992, guilty plea); *Salameh*, 54 F. Supp. 2d at 246, 294; Docket Sheet, United States v. Ajaj, No. 1:92-cr-993 (E.D.N.Y. Sept. 14, 1992) (noting judgment on January 13, 1993); *see* Blumenthal, *supra* note 3; Tabor, *supra* note 6.

9. *Yousef*, 327 F.3d at 78 n.2; *Salameh*, 152 F.3d at 107; *see* Richard Bernstein, *Inspector Testifies She Urged No Asylum for Blast Suspect*, N.Y. Times, Nov. 16, 1993, at B3; Blumenthal, *supra* note 3; Lance, *supra* note 5, at 102; Terry McDermott, Perfect Soldiers 131–32 (2005); McDermott & Meyer, *supra* note 5, at 45.

In the United States, Yousef assembled a conspiracy of terrorists.[10] With the assistance of Mahmoud Abouhalima, Yousef and Mohammad A. Salameh rented in Jersey City, New Jersey, an apartment and a storage unit, where they made and stored explosive materials.[11] Nidal Ayyad, a chemical engineer, acquired the explosives.[12]

On February 23, 1993, Salameh rented a Ryder van, which the conspirators loaded with explosive materials.[13] Three days later, Yousef and Eyad Ismoil drove the van to the World Trade Center, where they exploded the bomb by timer at 12:18 p.m.[14]

Ayyad anonymously contacted the New York Daily News by telephone and the New York Times by mail to take responsibility for the bomb as retaliation for the United States' support of Israel.[15] His DNA was found on the New York Times envelope, and a draft of the letter to the Times was found on his computer.[16]

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10. *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246; Lance, *supra* note 5, at 147 (describing Yousef as having "a massive IQ and an ego to match"); McDermott, *supra* note 9, at 132 ("Yousef, as a prospective terrorist, had two great abilities: his technical knowledge of explosives and his charm.").

11. *Yousef*, 327 F.3d at 78; *Salameh*, 152 F.3d at 107–08; *Salameh*, 54 F. Supp. 2d at 246–47; *see* Richard Bernstein, *4 Are Convicted in Bombing at the World Trade Center That Killed 6, Stunned U.S.*, N.Y. Times, Mar. 5, 1994, at 11; Blumenthal, *supra* note 3; Robert D. McFadden, *Agents Step Up Search for Bombing Suspect's Links*, N.Y. Times, Mar. 6, 1993, at 11; Alison Mitchell, *Chemical Engineer Is Held in the Trade Center Blast*, N.Y. Times, Mar. 11, 1993, at A1 [hereinafter *Engineer Held*]; Alison Mitchell, *U.S. Widens Charges in Trade Center Bombing*, N.Y. Times, May 27, 1993, at B4 [hereinafter *U.S. Widens Charges*].

12. The 9/11 Commission Report 72 (2004); *Salameh*, 152 F.3d at 107–08; *Salameh*, 54 F. Supp. 2d at 247; *see* Bernstein, *supra* note 11; Lance, *supra* note 5, at 110; Mitchell, *Engineer Held*, *supra* note 11.

13. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 246–47; United States v. El-Gabrowny, 876 F. Supp. 495, 497 (S.D.N.Y. 1994); United States v. El-Gabrowny, 825 F. Supp. 38, 40 (S.D.N.Y. 1993); *see* Blumenthal, *supra* note 3; Ralph Blumenthal, *Insistence on Refund for a Truck Results in an Arrest in Explosion*, N.Y. Times, Mar. 5, 1993, at A1 [hereinafter *Insistence on Refund*]; Robert D. McFadden, *Jersey City Man Is Charged in Bombing of Trade Center After Rented Van Is Traced*, N.Y. Times, Mar. 5, 1993, at A1.

14. *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; *see* Bernstein, *supra* note 11; Blumenthal, *supra* note 3; Lance, *supra* note 5, at 113–14; McDermott & Meyer, *supra* note 5, at 48; Wren, *supra* note 3; *see also* Benjamin Weiser, *Man Accused of Delivering a Bomb Said He Believed It Was Soap*, N.Y. Times, Oct. 16, 1997, at B3 (reporting testimony that Ismoil thought the van carried soap).

"Originally, the slightly built Palestinian[, Salameh,] was scheduled to be the wheel man for the rented yellow Ryder truck that would deliver the device. But by the fall of 1992 Salameh was involved in no less than three separate traffic accidents. In one, Yousef was injured and hospitalized." Lance, *supra* note 5, at 111.

15. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; *see* Bernstein, *supra* note 11; Richard Bernstein, *Telephone Threat After Blast Is Played at World Trade Center Bombing Trial*, N.Y. Times, Dec. 10, 1993, at B3; Blumenthal, *supra* note 3; Alison Mitchell, *Letter Explained Motive in Bombing, Officials Now Say*, N.Y. Times, Mar. 28, 1993, at 11.

16. *Salameh*, 152 F.3d at 129; *Salameh*, 54 F. Supp. 2d at 247; *see* Blumenthal, *supra* note 3; Mary B.W. Tabor, *Questions Linger in Explosion Case*, N.Y. Times, Sept. 14, 1993, at B1.

Investigators discovered the van's vehicle identification number in the bomb's debris.[17] Salameh was arrested when he returned to the Ryder rental office on March 4 to recover a $400 rental deposit on the destroyed van, which he had reported stolen.[18] "Because [Yousef] was the financier and had fled the country, leaving his accomplices on their own, Salameh was broke and desperately needed the cash from the deposit."[19]

Abouhalima fled to Egypt after the explosion, and he was arrested by Egyptian authorities on March 13.[20] He was returned to the United States on March 25.[21]

Yousef and Abdul Rahman Yasin, another conspirator, also fled the country.[22] Yousef was captured in a guesthouse in Pakistan on February 7, 1995.[23] For a $2 million reward, and to avoid prison, one of Yousef's recruits turned him in to the FBI.[24] Yousef's uncle, Khalid Sheikh Mohammed (KSM), was staying in the same guesthouse and was an on-the-scene witness to news media about the arrest.[25]

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17. *Yousef*, 327 F.3d at 79, 135; *El-Gabrowny*, 876 F. Supp. at 497; *El-Gabrowny*, 825 F. Supp. at 40; *see* Blumenthal, *supra* note 3; Blumenthal, *Insistence on Refund*, *supra* note 13; McDermott, *supra* note 9, at 136; McDermott & Meyer, *supra* note 5, at 52; McFadden, *supra* note 13.

18. The 9/11 Commission Report 72 (2004); *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; *see* Bernstein, *supra* note 11; Blumenthal, *supra* note 3; Blumenthal, *Insistence on Refund*, *supra* note 13; McDermott, *supra* note 9, at 136; McFadden, *supra* note 11; McFadden, *supra* note 13.

It was reported that Salameh had also returned to the rental office the day after the rental to replace a missing rearview mirror, creating a "mystery of why someone who intended to use a rented van for a bombing would let himself be seen repeatedly by witnesses." McFadden, *supra* note 11.

19. McDermott & Meyer, *supra* note 5, at 52 (referring to Yousef as Basit).

20. *Salameh*, 54 F. Supp. 2d at 247, 269–70; *see* Alison Mitchell, *Bombing Suspect Flown to U.S. After 10 Days in Egypt's Custody*, N.Y. Times, Mar. 25, 1993, at A1.

21. *See* Mitchell, *supra* note 20.

22. The 9/11 Commission Report 72 (2004); *Salameh*, 152 F.3d at 108, 135; *see* Tabor, *supra* note 16 (reporting the government's offering $2 million rewards each for Yousef and Yasin); Wren, *supra* note 3.

23. *Salameh*, 152 F.3d at 108 n.2, 135; United States v. Yousef, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); *see* David Johnston, *Fugitive in Trade Center Blast Is Caught and Returned to U.S.*, N.Y. Times, Feb. 9, 1995, at 1; Lance, *supra* note 5, at 200–02; McDermott & Meyer, *supra* note 5, at 77–78; James C. McKinley, Jr., *Suspected Bombing Leader Indicted on Broader Charges*, N.Y. Times, Apr. 14, 1995, at 3; Wren, *supra* note 3 ("Until his arrest in Pakistan in 1995, the United States considered him the most wanted fugitive alive, with a $2 million reward for his capture.").

24. *See* Lance, *supra* note 5, at 200; McDermott & Meyer, *supra* note 5, at 75–80.

> Kicking in the door, [American and Pakistani officers] confronted the bomb maker lying on his bed. The Feds found a copy of a July 1994 *Newsweek* nearby, open to the page that described Yousef as the world's "most wanted" felon. Scattered around the room were a host of toy cars and baby dolls, which Yousef intended to stuff with nitro-cellulose and turn into bombs.

Lance, *supra* note 5, at 200–01.

25. *See id.* at 201–02.

Ismoil was apprehended in Jordan on July 30.[26] Yasin, who was questioned but released by the FBI after the bombing, remains a fugitive.[27]

Ajaj was released from his six-month sentence on March 1.[28] On March 9, he was rearrested on an immigration detainer.[29]

Salameh and Ayyad were indicted in the Southern District of New York on March 17.[30] The district court assigned the case to Judge Kevin Thomas Duffy.[31] On March 31, a superseding indictment added Abouhalima and Yousef as defendants.[32] The next day, the court ordered the parties and their attorneys not to discuss publicly anything related to the case.[33] The court of appeals vacated this gag order as overbroad on April 30.[34]

Bilal Alkaisi turned himself in on March 24,[35] and a second superseding indictment added him as a defendant on April 7.[36] Because evidence against him

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26. United States v. Yousef, 327 F.3d 56, 79, 135 (2d Cir. 2003); United States v. Yousef, No. 1:93-cr-180, 1999 WL 714103, at *1 (S.D.N.Y. Sept. 13, 1999); *see* Docket Sheet, United States v. Salameh, No. 1:93-cr-180 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Salameh* Docket Sheet] (noting the filing on August 3, 1995, of a seventh superseding indictment against Yousef, Yasin, and Ismoil); *see also* James C. McKinley, Jr., *Suspect Is Said to Be Longtime Friend of Bombing Mastermind*, N.Y. Times, Aug. 4, 1995, at 1.

27. http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing (listing Yasin as one of the FBI's most wanted terrorism suspects); *Salameh*, 152 F.3d at 108 n.2; United States v. Salameh, 54 F. Supp. 2d 236, 254 (S.D.N.Y. 1999); *see* Alison Mitchell, *U.S. Informer Is New Suspect in Bomb Plot*, N.Y. Times, Aug. 5, 1993, at B1; Robert F. Worth, *Second Attack on Iraq Prison in 48 Hours Wounds 5 Iraqis*, N.Y. Times, Apr. 5, 2005, at A9.

Although a fugitive with a $25 million reward offered for his capture, he was interviewed by Lesley Stahl for CBS News' *60 Minutes* on May 23, 2002. *See* Tina Kelley, *Suspect in 1993 Bombing Says Trade Center Wasn't First Target*, N.Y. Times, June 1, 2002, at A10 (reporting that Yasin originally wanted to blow up Jewish neighborhoods in Brooklyn, but Yousef thought destroying the World Trade Center would be more effective).

28. *Salameh*, 152 F.3d at 108; *see* Tabor, *supra* note 6.

29. *Salameh*, 152 F.3d at 108; *see* Tabor, *supra* note 6.

30. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Ralph Blumenthal, *Suspect in Blast Believed to Be in Pakistan*, N.Y. Times, Mar. 18, 1993, at B4; *see also* Mitchell, *Engineer Held*, *supra* note 11 (reporting on Ayyad's Mar. 10, 1993, arrest).

31. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Mary B.W. Tabor, *As Trial Is Set in Explosion, Hunt Widens*, N.Y. Times, Apr. 2, 1993, at B1.

For this report, Tim Reagan interviewed Meghan Silhan, Judge Duffy's law clerk, by telephone on July 23, 2007.

The Southern District of New York's 2006 Milton Pollack Fellow, Philip J. Gross, also prepared a report on challenges to the district's judges in terrorism cases. Philip J. Gross, Guide to High Security & Terrorism Cases (2006).

32. United States v. Yousef, 327 F.3d 56, 135 (2d Cir. 2003); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Ralph Blumenthal, *Missing Suspect Charged in Trade Center Bombing*, N.Y. Times, Apr. 1, 1993, at B3.

33. United States v. Salameh, 992 F. 2d 445, 446 (2d Cir. 1993); *see* Tabor, *supra* note 31.

34. *Salameh*, 992 F. 2d 445; *see* United States v. Salameh, No. 1:93-cr-180, 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993); *see* David Margolick, *Ban on Press Statements in Trade Center Bombing Case Is Overturned*, N.Y. Times, May 1, 1993, at 127.

35. *See* Blumenthal, *supra* note 3; Mitchell, *supra* note 20.

36. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26.

was weaker than evidence against the others, his prosecution was severed.[37] On May 9, 1994, he pleaded guilty to an immigration violation and agreed to deportation.[38] Judge Duffy sentenced him on July 13 to one year and eight months in prison, which was four months more than the time already served.[39]

A third superseding indictment added Ajaj as a defendant on May 26, 1993.[40] A fourth superseding indictment added the fugitive Yasin as a defendant on August 4.[41] Salameh, Ayyad, Abouhalima, Ajaj, Yousef, and Yasin were named as defendants in a fifth superseding indictment filed on September 1.[42]

Jury selection in the trial against Salameh, Ayyad, Abouhalima, and Ajaj began on September 14.[43] The court issued 5,000 extra jury summonses to assemble a jury pool for the case.[44] Opening arguments began on October 5.[45] The jury began its deliberations on February 23, 1994, and convicted the defendants on March 4.[46]

Between conviction and sentencing, the defendants dismissed their attorneys.[47] Salameh, Abouhalima, and Ajaj sought to hire as sentencing attorneys the law firm representing other defendants in a related trial, which is described be-

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37. *See* Bernstein, *supra* note 11; Mitchell, *supra* note 27; Tabor, *supra* note 16; Mary B.W. Tabor, *Trade Center Defendant Agrees to a Plea Bargain*, N.Y. Times, May 10, 1994, at B3 [hereinafter *Plea Bargain*].

A sixth superseding information against Alkaisi was filed on May 9, 1994. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26.

38. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Tabor, *Plea Bargain*, *supra* note 37.

39. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Ronald Sullivan, *Bombing Figure Gets 20 Months for an Immigration Violation*, N.Y. Times, July 14, 1994.

Alkaisi was released from prison on November 7, 1994. http://www.bop.gov (reg. no. 28065-054).

40. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Mitchell, *U.S. Widens Charges*, supra note 11.

41. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Mitchell, *supra* note 27.

42. United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26.

43. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Ralph Blumenthal, *Jury Selection Starts in World Trade Center Case*, N.Y. Times, Sept. 15, 1993, at B1; Tabor, *supra* note 16.

Judge Duffy does not use jury questionnaires. United States v. Salameh, No. 1:93-cr-180, 1993 WL 364486, at *2 (S.D.N.Y. Sept. 15, 1993) ("There has been . . . absolutely no showing that jury questionnaires are of any particular help in the selection of a jury in highly publicized cases where a searching voir dire is conducted."); *see* Gross, *supra* note 31, at 23–24.

44. *See* Blumenthal, *supra* note 43; Mary B.W. Tabor, *Jury Pool to Be Expanded by 5,000 for Trade Center Trial*, N.Y. Times, Sept. 3, 1993, at B1.

45. *See* Richard Bernstein, *Hints of Confrontation in Opening Statements*, N.Y. Times, Oct. 5, 1993, at B4.

46. *Salameh*, 152 F.3d at 108, 135; United States v. Salameh, 856 F. Supp. 781, 782 (S.D.N.Y. 1994); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Bernstein, *supra* note 11; Richard Bernstein, *Jurors Begin Deliberations in Blast Case*, N.Y. Times, Feb. 24, 1994, at B1; Wren, *supra* note 3.

47. *Salameh*, 152 F.3d at 161; *Salameh*, 856 F. Supp. at 782; *see* Richard Bernstein, *4 Defendants Ask Lawyers Be Changed*, N.Y. Times, Apr. 27, 1994, at B2.

low.[48] Judge Duffy ruled that this would present an unacceptable conflict,[49] so the four defendants appeared at sentencing pro se.[50]

On May 24, 1994, the court sentenced each of the four defendants to 240 years in prison.[51] Judge Duffy arrived at 240 years by computing the remaining life expectancies of the six killed victims, which summed to 180 years, and adding 60 years, which is the mandatory sentence for two counts of assault on a federal officer.[52]

On August 4, 1998, the court of appeals affirmed the convictions, but remanded for resentencing, holding that the defendants did not effectively waive their rights to counsel at sentencing.[53] Judge Duffy resentenced the defendants in October 1999 to prison terms ranging from 108 years and four months to 117 years and one month.[54] The terms varied according to the defendants' ages, because for some of the counts, Judge Duffy used a sentencing method recently approved by the court of appeals of imposing a sentence of one month less than a defendant's life expectancy if the sentencing guidelines suggested a life term, but at the time of the crime the guidelines specified that life terms would be decided by the jury, which had made no such determination in this case.[55] On August 6, 2001, the court of appeals affirmed.[56]

On September 22, 2011, New York's court of appeals determined that the Port Authority of New York and New Jersey had governmental immunity from civil liability for the bombing.[57]

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48. *Salameh*, 856 F. Supp. at 782 (noting a desire to hire William Kunstler and Ronald Kuby, who were counsel for Siddig Ibrahim Siddig Ali and Ibrahim el-Gabrowny in a related prosecution before Judge Mukasey); *see* United States v. Rahman, 861 F. Supp. 266, 272 (S.D.N.Y. 1994); *see also* Bernstein, *supra* note 47; Gross, *supra* note 31, at 10.

49. *Salameh*, 856 F. Supp. 781; *see* Gross, *supra* note 31, at 10. The court of appeals denied the defendants' petition for a writ of mandamus. Docket Sheet, *In re* Abouhalima, No. 94-3038 (2d Cir. Apr. 21, 1994) (noting denial of the writ on May 3, 1994); *see Rahman*, 861 F. Supp. at 272.

50. *Salameh*, 152 F.3d at 161.

51. *Id.* at 108; *Salameh*, 856 F. Supp. at 782; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. Times, May 25, 1994, at A1; Gross, *supra* note 31, at 10–11; Wren, *supra* note 3.

52. *See* Bernstein, *supra* note 51; Gross, *supra* note 31, at 11.

53. *Salameh*, 152 F.3d at 161; *see Convictions Are Upheld in Trade Center Case*, N.Y. Times, Aug. 5, 1998, at B6; Gross, *supra* note 31, at 11.

54. United States v. Salameh, 261 F.3d 271, 275 (2d Cir. 2001).

55. *Id.* (noting sentences of 1,403 months for Salameh, 1,300 months for Abouhalima, 1,405 months for Ayyad, and 1,378 months for Ajaj); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (same); *see* http://www.bop.gov (noting release dates of January 22, 2095, for Salameh, reg. no. 34338-054; September 20, 2087, for Mahmud Abouhalima, reg. no. 28064-054; April 3, 2095, for Ayyad, reg. no. 16917-050; and June 25, 2093, for Ajaj, reg. no. 40637-053); *see also* United States v. Tocco, 135 F.3d 116, 131–32 (2d Cir. 1998) (approving a sentencing scheme by Judge Jack B. Weinstein of the Eastern District of New York).

56. *Salameh*, 261 F.3d 271; *see* Benjamin Weiser, *Trade Center Bombing Terms*, N.Y. Times, Aug. 7, 2001, at B4.

57. *In re* World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 957 N.E.2d 733 (2011); *see id.* at 446, 957 N.E.2d at 744 ("We . . . hold that the Port Authority acted within its governmental capac-

Plots to Bomb New York Landmarks

When Salameh rented the van used to bomb the World Trade Center, he used as identification a New York driver's license with an address belonging to Ibrahim el-Gabrowny.[58] On March 4, 1993, federal agents searched el-Gabrowny's home, where they found stun guns and taped messages from el-Gabrowny's cousin, El Sayyid Nosair, urging aggressive reactions to Jewish immigration to Israel.[59] Agents found el-Gabrowny near his home, and he was belligerent when frisked.[60] He was discovered to have fraudulent Nicaraguan passports for Nosair and Nosair's family.[61]

El-Gabrowny was indicted for assault in the Southern District of New York on March 17.[62] The court assigned the case to Judge Michael B. Mukasey,[63] who tried to conduct this case as much like other criminal trials as possible.[64]

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ity because its security operations at the WTC constituted police protection."); *see also* Benjamin Weiser, *Port Authority Not Liable in '93 Bombing, Court Says*, N.Y. Times, Sept. 23, 2011, at A25.

58. United States v. Rahman, 189 F.3d 88, 108 (2d Cir. 1999); United States v. El-Gabrowny, 876 F. Supp. 495, 497 (S.D.N.Y. 1994); United States v. El-Gabrowny, 825 F. Supp. 38, 40 (S.D.N.Y. 1993); *see* Blumenthal, *supra* note 3.

It was reported that Salameh failed four attempts to get a New Jersey driver's license using his own address. Blumenthal, *supra* note 3.

59. *Rahman*, 189 F.3d at 105, 106, 108; United States v. El-Gabrowny, 35 F.3d 63, 64 (2d Cir. 1994); *El-Gabrowny*, 876 F. Supp. at 496–97; United States v. Rahman, 861 F. Supp. 266, 270 (S.D.N.Y. 1994); *El-Gabrowny*, 825 F. Supp. at 39–40.

60. *Rahman*, 189 F.3d at 108; *El-Gabrowny*, 35 F.3d at 64; *El-Gabrowny*, 876 F. Supp. at 496–98; *Rahman*, 861 F. Supp. at 270; *El-Gabrowny*, 825 F. Supp. at 39–41; *see* McFadden, *supra* note 13; Alison Mitchell, *Suspect in Bombing Is Linked to Sect with a Violent Voice*, N.Y. Times, Mar. 5, 1993, at A1.

61. *Rahman*, 189 F.3d at 108; *El-Gabrowny*, 35 F.3d at 64; *El-Gabrowny*, 876 F. Supp. at 496–97; *Rahman*, 861 F. Supp. at 270; United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); *El-Gabrowny*, 825 F. Supp. at 39, 41; *see* Blumenthal, *supra* note 3; McFadden, *supra* note 11.

62. *El-Gabrowny*, 35 F.3d at 64; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; *El-Gabrowny*, 825 F. Supp. at 39; Docket Sheet, United States v. Abdel Rahman, No. 1:93-cr-181 (S.D.N.Y. Mar. 17, 1993) [hereinafter S.D.N.Y. *Abdel Rahman* Docket Sheet] (also noting the filing of a superseding indictment against El-Gabrowny on May 19, 1993); *see* Blumenthal, *supra* note 30.

63. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; Michael B. Mukasey, *Eleventh Annual Barbara K. Olson Memorial Lecture*, Engage, Mar. 2012, at 132, 134.

Judge Mukasey retired from the bench in 2006 and returned to the practice of law until President George W. Bush named him as his third Attorney General. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; *see* Michael Abramowitz & Dan Eggen, *Ex-Judge Is Said to Be Pick at Justice*, Wash. Post, Sept. 17, 2007, at A1; Dan Eggen, *Senate Confirms Mukasey by 53–40*, N.Y. Times, Nov. 9, 2007, at A1; Joseph Goldstein, *As Judge Leaves for Law Firm, His Legacy Is Remembered*, N.Y. Sun, July 26, 2006, at 1; Carl Hulse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. Times, Nov. 9, 2007, at A1; Sheryl Gay Stolberg & Philip Shenon, *Bush to Appoint Ex-Judge as Head of Justice Dept.*, N.Y. Times, Sept. 17, 2007, at A1.

Tim Reagan interviewed Judge Mukasey for this report at his law offices in Manhattan on June 25, 2007.

Nosair was in prison on a sentence of 7⅓ to 22 years for a state conviction on assault and weapons charges stemming from the killing of a "militant Zionist" and former member of the Israeli parliament, Rabbi Meir Kahane, at a November 5, 1990, speech that Kahane made in New York City.[65] There was evidence that projectiles found in the room where Kahane and others were shot came from Nosair's gun, but Nosair was acquitted of the murder.[66]

In 1991, during Nosair's state trial, an FBI informant, Emad Eldin Aly Abdou Salem, began to befriend followers of Sheik Omar Abdel Rahman, a blind Islamic cleric.[67] Salem met el-Gabrowny at the trial of el-Gabrowny's cousin Nosair.[68]

Abdel Rahman was tried but acquitted in Egypt as an accomplice in the October 6, 1981, murder of President Anwar el-Sadat.[69] He illegally entered the United

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64. Interview with Michael B. Mukasey, June 25, 2007.

65. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; *see* United States v. Nosair, 854 F. Supp. 251, 251 (S.D.N.Y. 1994); *see also* Blumenthal, *supra* note 3; McFadden, *supra* note 11; Lance, *supra* note 5, at 62–64, 81–83; John T. McQuiston, *Kahane Is Killed After Giving Talk in New York Hotel*, N.Y. Times, Nov. 6, 1990, at A1; Mitchell, *supra* note 60; Ronald Sullivan, *Judge Gives Maximum Term in Kahane Case*, N.Y. Times, Jan. 30, 1992, at A1.

66. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; *see* Blumenthal, *supra* note 3; M.A. Farber, *Gun That Was Found on Defendant Is Linked to Kahane Shooting*, N.Y. Times, Dec. 5, 1991, at B3; McFadden, *supra* note 11; McFadden, *supra* note 13; Mitchell, *supra* note 60; Selwyn Raab, *Jury Acquits Defendant in Kahane Trial*, N.Y. Times, Dec. 22, 1991, at 136; Tabor, *supra* note 16.

Nosair shot and was shot at the scene by Carlos Acosta, a postal police officer. *Rahman*, 189 F.3d at 105; *see* Lance, *supra* note 5, at 57, 81–83. Although Nosair was convicted of assault with a deadly weapon on Acosta, Nosair sued Acosta and the postal service for his own injury. Nosair v. Acosta, No. 1:92-cv-8274, 1993 WL 336996 (S.D.N.Y. Sept. 1, 1993). His suit was dismissed as precluded by his conviction, *id.*, and his appeal was dismissed as frivolous, Docket Sheet, Nosair v. Acosta, No. 93-2661 (2d Cir. Oct. 7, 1993).

67. *Rahman*, 189 F.3d at 104, 106; *see* Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. Times, Jan. 31, 1995, at 1 (reporting that Salem was paid more than $1 million by the United States government for his assistance); Lance, *supra* note 5, at 209 (reporting that Salem was "going to get $1.5 million and a new life in the Witness Protection Program"); Alison Mitchell, *Bomb Informer Active in 1991, Authorities Say*, N.Y. Times, July 15, 1993, at A1 [hereinafter *Bomb Informer*]; Alison Mitchell, *Egyptian Was Informer, Officials Say*, N.Y. Times, June 26, 1993, at 123 [hereinafter *Egyptian Informer*]; Alison Mitchell, *Official Recalls Delay in Using Informer*, N.Y. Times, July 16, 1993, at B2 (reporting that Salem had entered the federal witness protection program); Mitchell, *supra* note 60 (describing Abdel Rahman as "blind, with one eye without a pupil, the other an empty socket"); *see also* Lance, *supra* note 5, at 8 ("Blinded shortly after birth, Omar Abdel Rahman had memorized the Koran by the age of eleven."); Mary B.W. Tabor, *Informer's Ex-Wife Said He Warned of Terrorism*, N.Y. Times, Sept. 28, 1993, at B2 (reporting that Salem "said that the day after the explosion [he] was upset and told [his ex-wife] the bombing could have been averted if the F.B.I. had heeded his warnings").

68. *Rahman*, 189 F.3d at 106; *see* Lance, *supra* note 5, at 80; James C. McKinley, Jr., *Many Faces of Witness in Terror Trial*, N.Y. Times, Mar. 6, 1995, at 3.

69. *See* William E. Farrell, *5 in Sadat Trial Sentenced to Die*, N.Y. Times, Mar. 7, 1982, at 11; William E. Farrell, *Egypt Reports Plot to Kill Aides at Sadat's Funeral*, N.Y. Times, Oct. 31, 1981, at 13; McFadden, *supra* note 11; McFadden, *supra* note 13; Mitchell, *supra* note 60; Tabor, *supra* note 16; *see also* The 9/11 Commission Report 56 (2004) (Abdel Rahman's "preaching had

States in 1990 and faced a deportation order at the time of the World Trade Center bombing.[70] His followers plotted to assassinate Egypt's president, Hosni Mubarak, during a March 1993 visit to the United Nations in New York City.[71] Siddig Ibrahim Siddig Ali obtained Mubarak's itinerary from a source in the Sudanese government.[72] But the plot was foiled when a confidant of Abdel Rahman's, Abdo Mohammed Haggag, informed the Egyptian government of the assassination plan, and Mubarak's New York trip was canceled.[73]

Siddig Ali and Clement Rodney Hampton-El led paramilitary training on weekends between October 1992 and February 1993.[74] Participants included Amir and Fadil Abdelgani and Tarig Elhassan, as well as the Egyptian informant Haggag.[75] The training was for jihad, perhaps in Bosnia.[76] Hampton-El was observed by the FBI in July 1989 shooting weapons at a public rifle range on Long Island with World Trade Center bombers Abouhalima, Salameh, and Ayyad.[77]

In May 2003, the informant Salem persuaded Siddig Ali to establish a bomb-making safehouse where the FBI had installed surveillance equipment.[78]

The conspirators considered bombing various New York City locations, including the United Nations, the federal building, the FBI headquarters, the diamond district, the Lincoln Tunnel, and the Holland Tunnel.[79]

On June 13, 1993, Fares Khallafalla and the informant Salem purchased timers for bombs.[80] On June 19 and 21, Amir Abdelgani, Victor Alvarez, and Salem

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inspired the assassination of Sadat"); Ali H. Soufan, The Black Banners 47 (2011) ("he was acquitted but expelled from Egypt").

Abdel Rahman was subsequently tried for and acquitted of participating in a plot to overthrow the Egyptian government after el-Sadat's death. *See Egyptian Court Sentences 107 Moslem Militants in a 1981 Revolt*, N.Y. Times, Oct. 1, 1984, at A6. He was later included in an arrest of 1,500 Muslim extremists, but he was freed several months later. *See* Alan Cowell, *Cairo Frees Fundamentalist Cleric Pending Hearing on Role in Strife*, N.Y. Times, Aug. 11, 1989, at A3; Alan Cowell, *Egypt Seizes 1,500 in Crackdown on Fundamentalists*, N.Y. Times, Apr. 27, 1989, at A3.

70. *See* James C. McKinley, Jr., *Islamic Leader on U.S. Terrorist List Is in Brooklyn*, N.Y. Times, Dec. 16, 1990, at 144; McFadden, *supra* note 13; Mitchell, *supra* note 60; *see also* Soufan, *supra* note 69, at 47 ("The visa was given to him in Sudan by a CIA official.").

According to the 9/11 Commission, "After it was discovered that Abdel Rahman, the Blind Sheikh, had come and gone almost at will, State initiated significant reforms to its watchlist and visa-processing policies." The 9/11 Commission Report 95 (2004).

71. *Rahman*, 189 F.3d at 108; *see also* United States v. Rahman, 854 F. Supp. 254, 258 (S.D.N.Y. 1994).

72. *Rahman*, 189 F.3d at 108.

73. *Id.*

74. *Id.* at 107.

75. *Id.*

76. *Id.*

77. *Id.* at 105; *see* Lance, *supra* note 5, at 47–49, 74.

78. *Rahman*, 189 F.3d at 109; *see* Lance, *supra* note 5, at 118; Mitchell, *Egyptian Informer*, *supra* note 67.

79. *Rahman*, 189 F.3d at 108–09; *see* Ralph Blumenthal, *U.S. Says Bomb-Plot Suspects Talked of Blowing Up Manhattan Jewelry District*, N.Y. Times, June 30, 1993, at B3; Lance, *supra* note 5, at 118; Robert D. McFadden, *8 Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. Times, June 25, 1993, at A1.

unsuccessfully tried to steal cars to use as both bomb-delivery and getaway vehicles.[81] On June 22 and 23, Mohammed Saleh, who owned two gas stations in Yonkers, provided nearly $300 worth of diesel fuel to Siddig Ali and the Abdelganis to use for making bombs.[82]

A couple of hours after midnight on June 24, 1993, the FBI raided the safehouse and arrested Siddig Ali, Amir and Fadil Abdelgani, Elhassan, and Alvarez while they were mixing explosive chemicals.[83] Hampton-El, Saleh, and Khallafalla were arrested at their homes in Flatbush, Yonkers, and Jersey City, respectively.[84]

It was reported that the government allowed Abdel Rahman to remain free pending his deportation appeal because he was not considered a flight risk and the conspiracy evidence against him was weak.[85] But after his van evaded federal agents following him on June 30, the government decided to arrest him on an immigration detainer.[86] A negotiated surrender was agreed on for July 3.[87]

On July 14, the indictment against el-Gabrowny was expanded to include bomb conspiracy charges and defendants Siddig Ali, Hampton-El, Amir Abdelgani, Khallafalla, Elhassan, Fadil Abdelgani, Saleh, Alvarez, and two others: Earl Gant and a defendant identified only as "Wahid."[88] Abdel Rahman, Nosair, Haggag, and Mohammed Abouhalima, the brother of World Trade Center bomber Mahmoud Abouhalima, were added as defendants by superseding indictment on August 25.[89]

Gant, who was considered a minor player in the case, was arrested on July 1, 1993, and released on bail on October 19; he pleaded guilty on April 1, 1994.[90]

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80. *Rahman*, 189 F.3d at 110.

81. *Id.*; *see* McFadden, *supra* note 79.

82. *Rahman*, 189 F.3d at 110.

83. *Id.* at 111; *see* McFadden, *supra* note 79.

84. *Rahman*, 189 F.3d at 111; *see* McFadden, *supra* note 79.

85. Alison Mitchell, *U.S. Detains Cleric Linked to Militants*, N.Y. Times, July 3, 1993, at 11.

86. *See id.*

87. *See id.*

Abdel Rahman was tried in absentia, convicted, and sentenced to seven years in prison in Egypt in 1993 and 1994 in a prosecution for illegal demonstrations and attempts to kill police officers during protests. *See Bombing Defendant to Be Tried in Egypt*, N.Y. Times, Oct. 22, 1993, at B3; *Egyptian Court Sentences Absent Sheik to Prison*, N.Y. Times, Apr. 29, 1994, at B3.

88. United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Ralph Blumenthal, *Court Says Tapes in Bomb Plot Fail to Support Some Charges*, N.Y. Times, July 8, 1993, at B3 (reporting that Wahid was still missing); Mitchell, *Bomb Informer*, *supra* note 67.

89. *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Mary B.W. Tabor, *U.S. Indicts Egyptian Cleric as Head of Group Plotting "War of Urban Terrorism,"* N.Y. Times, Aug. 26, 1993, at A1.

90. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Ralph Blumenthal, *Defendant in a Bombing Plot Released on Bail*, N.Y. Times, Oct. 19, 1993, at B2 (reporting that there was evidence that Gant agreed to obtain explosives but had no real awareness of what they would be used for); Mary B.W. Tabor, *9th Held in Bomb Plot as Tie Is Made to a 1991 Murder*, N.Y. Times, July 1, 1993, at B3.

He was sentenced on July 20, 1994, to time served, with three years of supervised release.[91]

"Wahid" turned out to be Matarawy Mohammed Said Saleh, who was arrested on July 22, 1993, and who is not related to codefendant Mohammed Saleh.[92] Because prosecutors determined that Wahid joined the conspiracy only hours before the government began arresting codefendants, he pleaded guilty and was sentenced on December 19, 1995, to time served, with three years of supervised release.[93]

Haggag agreed to testify for the government; terrorism charges against him were dropped, and he pleaded guilty to an unrelated insurance fraud scheme in which he tried to collect on a fire he set in a cafe he co-owned.[94]

The other defendants were tried for seditious conspiracy "to conduct a campaign of urban terrorism," including participation in the bombing of the World Trade Center, the murder of Rabbi Kahane, the plot to assassinate President Mubarak, and plans to bomb New York landmarks.[95]

Famed defender of the unpopular William M. Kunstler and his partner, Ronald L. Kuby, represented el-Gabrowny.[96] When the indictment was superseded to include Siddig Ali and others as defendants, Kunstler and Kuby appeared for

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91. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Ronald Sullivan, *Minor Figure in Bomb Plot Sentenced to Time Served*, N.Y. Times, July 21, 1994, at B4 (reporting that Gant said he thought the explosives he was providing would be used to combat the rape and massacre of Muslims in Bosnia).

92. *See* Ralph Blumenthal, *Bombing Suspect Seized at Resort*, N.Y. Times, July 24, 1993, at 11; Joseph P. Fried, *Bombing Plotter in Plea Deal Is Given Probation and Time Served*, N.Y. Times, Dec. 20, 1995, at 5; John J. Goldman, *11th Suspect in N.Y. Bombing Plot Arrested*, L.A. Times, July 24, 1993, at 2.

93. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Fried, *supra* note 92.

94. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (noting sentencing in February 1996); *see* Joseph P. Fried, *In Plea Deal, Jerseyan to Testify in Terror Trial*, N.Y. Times, May 2, 1995, at 5.

95. United States v. Rahman, 189 F.3d 88, 103 (2d Cir. 1999); United States v. Rahman, 861 F. Supp. 266, 270 (S.D.N.Y. 1994); United States v. Rahman, 854 F. Supp. 254, 258 (S.D.N.Y. 1994); United States v. El-Gabrowny, 844 F. Supp. 955, 957 (S.D.N.Y. 1994); *see* Tabor, *supra* note 89.

Judge Mukasey denied Nosair's motion to dismiss some counts against him as double jeopardy because of his prior prosecution in state court for crimes related to the murder of Rabbi Kahane. United States v. Nosair, 854 F. Supp. 251 (S.D.N.Y. 1994). Judge Mukasey also ruled that although participation in the Kahane murder was a triable offense, it could not be prosecuted as part of seditious conspiracy, because Kahane was a private foreign citizen. *Rahman*, 854 F. Supp. at 258–61.

96. United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* David Margolick, *Still Radical After All These Years*, N.Y. Times, July 6, 1993, at B1; Albert Ruben, The People's Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantánamo 91 (2011).

Kunstler co-founded the Center for Constitutional Rights, which, beginning in 2002, coordinated representation of Guantánamo Bay habeas petitioners. *See* Steven T. Wax, Kafka Comes to America: Fighting for Justice in the War on Terror 25 (2008); *see also* "Guantánamo Bay," *infra*.

both el-Gabrowny and Siddig Ali.[97] Judge Mukasey sought to ensure that a conflict-of-interest waiver by the defendants was knowing.[98]

> I said I would conduct a hearing at a later date to determine that both defendants understood their right to conflict-free representation, and that in aid of such a determination I would appoint whichever attorneys from the panel of Criminal Justice Act ("CJA") attorneys were scheduled to receive cases that week, for the purpose of advising each defendant of that right independent of any advice received from the Kunstler firm. Kunstler objected, stating immediately in open court, without consulting either defendant, that "[t]hey are perfectly willing to be represented here by me and they are here and they are willing to waive any alleged conflict of interest." (7/15/93 Tr. 17) He added that he did not want any CJA attorney "talking to either one of them." When I noted that neither defendant would be obligated to talk to independent counsel, but only to listen to an explanation of the risks of dual representation, Kunstler responded, "There are no risks here, Judge, except those created by the government." (*Id.* at 18)
>
> Notwithstanding defense counsel's position, I appointed the two lawyers on duty to accept CJA appointment that day and a succeeding day to act as independent counsel to El-Gabrowny and Siddig Ali, to explain to them the hazards of joint representation . . . .
>
> . . .
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> . . . [B]oth defendants said they had understood the explanations of possible conflicts, and both expressed the desire to be represented by the Kunstler firm.[99]

When the indictment was superseded to include as defendants Nosair, Abdel Rahman, and two others, attorney Michael Warren appeared for Nosair, and another attorney appeared for Abdel Rahman.[100]

Warren and Kunstler represented Nosair at his state murder trial,[101] and Warren appeared for el-Gabrowny at el-Gabrowny's first appearance following the filing of a criminal complaint and preceding the filing of the indictment.[102] Judge Mukasey denied Nosair's application to name Warren as his appointed attorney in this federal trial as an exception to regular Criminal Justice Act procedures.[103] Judge Mukasey assigned Nosair a CJA panel attorney.[104]

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97. *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Ruben, *supra* note 96, at 91 ("The case . . . became for Kunstler an opportunity, having nothing in the least to do with the guilt or innocence of the accused, but of challenging the government.").

98. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 65–66.

99. *Rahman*, 837 F. Supp. at 65–66 (quotation alterations in original); *see id.* at 66 (noting that Siddig Ali appeared to base his decision in part on his proclamation of innocence: "I believe that my co-defendant and myself are innocent people. My conflict is not with my co-defendant or with anybody else, but it is with the government, with the FBI, and with those people who are accusing me of doing things or saying things that I have not conspired or done.").

100. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62.

101. *See* Lance, *supra* note 5, at 62–65, 81; Ruben, *supra* note 96, at 90; Selwyn Raab, *Jury Selection Seen as Crucial to Verdict*, N.Y. Times, Dec. 23, 1991, at B8.

102. *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62 (noting the filing of a criminal complaint against El-Gabrowny on March 5, 1993, and the filing of an indictment against El-Gabrowny on March 17, 1993).

103. United States v. Rahman, No. 1:93-cr-181, 1993 WL 340992 (S.D.N.Y. Sept. 3, 1993); *see* Gross, *supra* note 31, at 8.

Abdel Rahman's attorney announced that he and Abdel Rahman could not agree on a fee; Kunstler and Kuby informed the court that they had accepted Abdel Rahman's request that they represent him instead.[105] The government moved to disqualify the Kunstler firm from representing more than one defendant.[106] On November 9, 1993, Judge Mukasey ruled that the firm could either represent el-Gabrowny and Siddig Ali, as they had, or Abdel Rahman, but not all three.[107] Abdel Rahman opted to represent himself, and the court appointed a panel attorney to assist him.[108] By the time the trial commenced, he was represented by Lynne Stewart,[109] who had represented Ajaj at Ajaj's arraignment in the bombing case.[110]

On February 8, 1994, Mohammed Abouhalima was released in a sealed proceeding.[111] But he was indicted on September 18, 1996, for aiding his brother's escape.[112] He was convicted on May 28, 1997, and sentenced on November 24, 1998, to eight years in prison.[113]

In June 1994, Siddig Ali obtained substitute counsel to help him try to cooperate with the government, but the government decided in August not to strike a deal.[114] The substitute counsel asked to be relieved as Siddig Ali's attorney, because his knowledge of Siddig Ali's proffers to the government would constrain

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In denying Nosair's request on reconsideration, Judge Mukasey also denied an application by Lynne Stewart to represent Mouhammed Abouhalima. United States v. Rahman, *id.*, 1993 WL 410449 (Oct 13, 1993); *see* Gross, *supra* note 31, at 8.

104. *Rahman*, 861 F. Supp. at 270; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62.

105. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; United States v. Rahman, No. 1:93-cr-181, 1993 WL 385762 (S.D.N.Y. Sept. 27, 1993); *see Kunstler to Defend Sheik in Bombing Case*, N.Y. Times, Sept. 22, 1993, at B4; *see also* Gross, *supra* note 31, at 7–10 (describing as a "celebrity lawyer" issue the attorneys' wanting to represent not only lesser known defendants but also the most high-profile defendant).

106. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 65.

107. *Rahman*, 837 F. Supp. at 65, 72; *see id.* at 71 (noting that the court would appoint standby counsel "to conduct cross-examination of any former client of the Kunstler firm who takes the stand at trial, so as to minimize the risk that that client's privileged communications to the Kunstler firm will influence the cross-examination"); *Rahman*, 861 F. Supp. at 271 (noting ruling); *see also* Ralph Blumenthal, *Judge Rules That Sheik and Two Other Defendants Cannot Share Lawyers*, N.Y. Times, Nov. 11, 1993, at B3.

108. *Rahman*, 861 F. Supp. at 268; *see* Ralph Blumenthal, *Sheik Is Prepared to Act as Lawyer, Judge Is Told*, N.Y. Times, Nov. 16, 1993, at B3.

109. *See* Bernstein, *supra* note 67.

110. *See* Tabor, *supra* note 6.

111. *See* Mary B.W. Tabor, *Defendant in Bomb Plot Released on Bail*, N.Y. Times, Feb. 9, 1994, at B2.

112. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Joseph P. Fried, *U.S. Says Man Helped Brother Flee in Trade Center Bombing*, N.Y. Times, Sept. 19, 1996, at 8.

113. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see Two Are Sentenced in Trade Center Bombing*, N.Y. Times, Nov. 25, 1998. The court of appeals affirmed. United States v. Abouhalima, No. 98-1677, 1999 WL 1295846 (2d Cir. Dec. 23, 1999).

Mohammed Abouhalima was released from prison on August 25, 2005. http://www.bop.gov (reg. no. 28173-054).

114. United States v. Rahman, 861 F. Supp. 266, 268 (S.D.N.Y. 1994); *see* Raymond Hernandez, *Bomb Plot Suspect Will Not Be Witness for U.S.*, N.Y. Times, Aug. 13, 1994, at 123.

what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.[115] The government objected.[116] Judge Mukasey ruled that Kunstler and Kuby could no longer represent Siddig Ali.[117] Judge Mukasey also ruled that the Kunstler firm's prior representations of Siddig Ali and Nosair had now created conflicts of interest with its representation of el-Gabrowny so serious as to disqualify it from representing el-Gabrowny as well.[118] Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.[119]

Voir dire began on January 9, 1995.[120] To facilitate jury selection, Judge Mukasey used a jury questionnaire, which he had seldom done before, and he found it very helpful.[121] Judge Mukasey used an anonymous jury and conducted post-questionnaire voir dire in a conference room with the press represented by two reporters—one from print and one from electronic media.[122]

Opening statements commenced on January 30.[123] Judge Mukasey found it helpful—necessary even—to charge the jury with applicable law at the beginning of the case, between opening statements and presentation of evidence.[124] For example, it was important for the jury to understand up front that seditious conspira-

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115. *Rahman*, 861 F. Supp. at 268.

116. *Id.* at 267–68.

117. *Id.* at 268, 276, 279.

118. *Id.* at 276–78, 279; *see* Richard Bernstein, *Judge Disqualifies Kunstler Firm from Role in Bombing-Plot Trial*, N.Y. Times, Aug. 26, 1994, at A1; Ronald Sullivan, *U.S. Moves to Exclude 2 Lawyers*, N.Y. Times, July 7, 1994, at B4.

119. *See* Joseph P. Fried, *Sheik Called an Architect of Terrorism*, N.Y. Times, Sept. 6, 1995, at 3; Ruben, *supra* note 96, at 11, 98; David Stout, *William Kunstler, 76, Dies*, N.Y. Times, Sept. 5, 1995, at 6 (reporting that Kunstler died of a heart attack).

120. United States v. Abouhalima, 961 F. Supp. 78, 80 (S.D.N.Y. 1997); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Richard Bernstein, *Trial for 12 Opens in Plot for Bombing New York Buildings*, N.Y. Times, Jan. 10, 1995, at 1.

Public attention to this trial was diminished somewhat by the coincident criminal trial of O.J. Simpson for the murder of his wife and her friend. Interview with Michael B. Mukasey, June 25, 2007; *see Simpson Case Timeline*, L.A. Times, Oct. 3, 1995, at 3 (noting that jury selection in the Simpson trial began on Sept. 26, 1994; opening statements began on Jan. 24, 1995; and the not guilty verdict was announced on Oct. 3, 1995).

121. Michael B. Mukasey, United States v. Abdel Rahman: Jury Questionnaire (Jan. 9, 1995); Interview with Michael B. Mukasey, June 25, 2007.

> Judge Mukasey has pointed out that a good jury questionnaire should serve to weed out two types of jurors: those who cannot reasonably meet the time commitment for such a trial and those who cannot be impartial knowing all the publicity about the trial or having bias against certain people.

Gross, *supra* note 31, at 22–23.

122. Interview with Michael B. Mukasey, June 25, 2007.

123. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Bernstein, *supra* note 67.

124. Michael B. Mukasey, United States v. Abdel Rahman: Preliminary Charge (Feb. 1, 1995); Interview with Michael B. Mukasey, June 25, 2007.

cy did not necessarily include an intent to overthrow the government.[125] As was his general practice, Judge Mukasey permitted jurors to take notes.[126]

On February 6, Siddig Ali pleaded guilty, agreed to be a witness for the government, and asked God to forgive him for his acts, which he admitted were wrong.[127] He was sentenced to 11 years in prison on October 15, 1999, on a finding that he provided the government with extensive assistance in the case.[128]

Judge Mukasey conducted the nine-month trial four days per week.[129] A brief experience with five days per week fatigued all participants without moving things along noticeably faster.[130] Both Arabic and Spanish interpreters were required.[131]

While the trial was in progress, on April 19, 1995, the federal building in Oklahoma City, including the courthouse, was partially destroyed by a bomb.[132] Judge Mukasey permitted the jurors to consult news of the event, but admonished them not to let it influence them in the trial.[133]

On October 1, 1995, the jury convicted el-Gabrowny, Hampton-El, both Abdelganis, Khallafalla, Elhassan, Saleh, Alvarez, Abdel Rahman, and Nosair of seditious conspiracy and other charges, including a guilty verdict for Nosair in Rabbi Kahane's murder.[134] On January 17, 1996, Judge Mukasey sentenced Abdel Rahman and Nosair to life in prison and sentenced the other eight defendants as follows: el-Gabrowny to 57 years; Alvarez, Elhassan, Hampton-El, and Saleh to 35 years; Amir Abdelgani and Khallafalla to 30 years; and Fadil Abdelgani to 25 years.[135]

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125. Interview with Michael B. Mukasey, June 25, 2007.

126. *Id.*

127. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Richard Bernstein, *Bomb Plot Defendant Shifts Plea to Guilty and Implicates Others*, N.Y. Times, Feb. 7, 1995, at 1.

128. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Benjamin Weiser, *Remorseful Terror Conspirator Gets an 11-Year Sentence*, N.Y. Times, Oct. 16, 1999, at B6.

129. Interview with Michael B. Mukasey, June 25, 2007; *see* Adam Liptak, *Big Terror Trial Shaped Views of Justice Pick*, N.Y. Times, Sept. 20, 2007, at A1 (describing the trial as "the longest and most complex international terrorism case ever presented in a United States court").

130. Interview with Michael B. Mukasey, June 25, 2007.

131. *Id.*

132. *See* John Kifner, *At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building*, N.Y. Times, Apr. 20, 1995, at 1.

133. Interview with Michael B. Mukasey, June 25, 2007; *see* Joseph P. Fried, *Judge Refuses to Sequester Jury in Terrorism Case in New York*, N.Y. Times, Apr. 20, 1995, at 8.

134. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Joseph P. Fried, *Sheik and 9 Followers Guilty of a Conspiracy of Terrorism*, N.Y. Times, Oct. 2, 1995, at 1.

Hampton-El, Fadil Abdelgani, Elhassan, and Alvarez testified at trial; the others did not. Michael B. Mukasey, United States v. Abdel Rahman: Jury Instructions (Sept. 23, 1995).

135. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62; *see* Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. Times, Jan. 18, 1996, at 1; Wren, *supra* note 3; *see also* http://www.bop.gov (noting life sentences for Abdel Rahman, reg. no. 34892-054, and Nosair, reg. no. 35074-054, and noting release dates of April 22, 2025, for Alvarez, reg. no. 34848-054; December 21, 2023, for Elhassan, reg. no. 34852-054; December 21, 2023, for Hampton-El, reg. no. 34854-054; March 24, 2024, for Saleh, reg. no. 34853-054; October 11, 2019, for

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a reconsideration of el-Gabrowny's sentence.[136] On remand, Judge Mukasey sentenced el-Gabrowny to 33 years,[137] which the court of appeals affirmed.[138]

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.[139] There, he launched a conspiracy to bomb U.S. airliners serving routes in southeast Asia.[140] To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.[141] In December, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.[142] Yousef exited the plane during a stopover in Cebu, Philippines, and the bomb exploded during the second leg, killing one passenger and injuring several others.[143]

Amir Abdelgani, reg. no. 34850-054; October 10, 2019, for Khallafalla, reg. no. 34856-054; and April 5, 2015, for Fadil Abdelgani, reg. no. 34849-054).

Habeas petitions by Nosair have been unsuccessful. Nosair v. United States, 839 F. Supp. 2d 646 (S.D.N.Y. 2012); Nosair v. Wiley, 308 F. App'x 285 (10th Cir. 2009); *see* Benjamin Weiser, *Man Convicted in Terrorism Conspiracy Is Denied New Trial*, N.Y. Times, Jan. 14, 2012, at A18.

136. United States v. Rahman, 189 F.3d 88, 157–60 (2d Cir. 1999); *see* Benjamin Weiser, *Appellate Court Backs Convictions in '93 Terror Plot*, N.Y. Times, Aug. 17, 1999, at A1.

137. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 62.

138. United States v. Elgabrowny, 10 F. App'x 23 (2d Cir. 2001).

139. United States v. Yousef, 327 F.3d 56, 79–80 (2d Cir. 2003).

140. The 9/11 Commission Report 147 (2004) (noting that the plan became known as the "Bojinka" plot); *Yousef*, 327 F.3d at 79–80; *see* Lance, *supra* note 5, at 150–56; *id.* at 181 ("They planned to execute the Bojinka plot right after assassinating the Holy Father, during the week of January 12."); Dina Temple-Raston, The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror 24 (2007) (reporting that the plan was to use liquid explosives that would pass through airport metal detectors); *see also* McDermott & Meyer, *supra* note 5, at 66 (noting that *bojinka* is Serbo-Croatian for big noise).

> Using nothing more exotic or complicated than airline timetables, they devised a scheme whereby five men could in a single day board twelve flights—two each for three of the men, three each for the other two—assemble and deposit their bombs, exit the planes with the timers set to ignite the bombs up to several days ahead, allowing the men to be far away and far from reasonable suspicion by the time they exploded.

McDermott, *supra* note 9, at 148.

141. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; *see* Lance, *supra* note 5, at 152 (describing the injuries as minor); McDermott, *supra* note 9, at 147; McDermott & Meyer, *supra* note 5, at 67; Wren, *supra* note 3.

142. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; United States v. Yousef, 927 F. Supp. 673, 675 (S.D.N.Y. 1996); *see* Lance, *supra* note 5, at 152–54; McDermott, *supra* note 9, at 148–49; McDermott & Meyer, *supra* note 5, at 67; McKinley, *supra* note 23; Wren, *supra* note 3.

143. *Yousef*, 327 F.3d at 79, 81; *Yousef*, 927 F. Supp. at 675; *see* Lance, *supra* note 5, at 154–55; McDermott, *supra* note 9, at 148–49; McDermott & Meyer, *supra* note 5, at 67 ("the pilots heroically managed to land [the plane] with a gaping hole in its fuselage"); McKinley, *supra* note 23; Wren, *supra* note 3.

Yousef and his high school friend, Abdul Hakim Murad, were burning off excess chemicals in their Manila apartment on January 6, 1995, and they accidentally started a fire that resulted in a visit from Philippine police officers and discovery of the plot to bomb planes.[144]

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.[145] While en route, he confessed that the goal of the bombing plot was to punish the United States and its people for their support of Israel.[146]

Philippine authorities arrested Shah on January 11, but he escaped.[147] He was recaptured by Malaysian authorities in December and flown to New York on December 12.[148]

Yousef fled the Philippines but was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.[149] He was transported to the Southern District of New York on February 8.[150] En route, he confessed to an intention to topple one of the World Trade Center towers into the other.[151]

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.[152] Yousef asked to address the jury

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144. *Yousef*, 327 F.3d at 79, 81; *see* Lance, *supra* note 5, at 178–80; McDermott & Meyer, *supra* note 5, at 68 (describing Yousef as ever careless); McKinley, *supra* note 23; Philip Shenon, *Broad Terror Campaign Is Foiled by Fire in Kitchen, Officials Say*, N.Y. Times, Feb. 12, 1995, at 1; Temple-Raston, *supra* note 140, at 24; Wren, *supra* note 3; *see also* McDermott, *supra* note 9, at 146, 152–54 (reporting that the apartment was selected because it was on the route of a planned papal procession).

145. *Yousef*, 327 F.3d at 79, 81; United States v. Yousef, 925 F. Supp. 1069 (S.D.N.Y. 1996); *see* McKinley, *supra* note 23.

146. *Yousef*, 327 F.3d at 83.

147. *Id.* at 79, 82; *see* Lance, *supra* note 5, at 227; James C. McKinley, Jr., *F.B.I. Arrests Man in Far East, Charged in Plot to Bomb Planes*, N.Y. Times, Dec. 13, 1995, at 5.

148. *Yousef*, 327 F.3d at 79, 82; *see* Lance, *supra* note 5, at 227; McKinley, *supra* note 147.

149. The 9/11 Commission Report 148 (2004); *Yousef*, 327 F.3d at 79, 81–82; United States v. Yousef, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996); *see* Johnston, *supra* note 23; McDermott, *supra* note 9, at 153–54; McKinley, *supra* note 23; Temple-Raston, *supra* note 140, at 24; Wren, *supra* note 3.

150. *Yousef*, 327 F.3d at 82; *Yousef*, 925 F. Supp. at 1065; *see* S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (noting Yousef's not guilty plea on Feb. 9, 1995); *see also* Johnston, *supra* note 23; Wren, *supra* note 3.

151. *See* McDermott & Meyer, *supra* note 5, at 78–79; Benjamin Weiser, *Suspect's Confession Cited as Bombing Trial Opens*, N.Y. Times, Aug. 6, 1997, at B6.

152. *Yousef*, 327 F.3d at 85 (giving the start date as May 29, which was the day of opening arguments); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26 (also noting the filing on Apr. 13, 1995, of an eighth superseding indictment against Yousef, Yasin, and Murad; the filing on June 14, 1995, of a ninth superseding indictment against Yousef, Yasin, and Murad; the filing on Sept. 11, 1995, of a tenth superseding indictment against Yousef, Yasin, Murad, and Ismoil; the filing on Dec. 13, 1995, of eleventh superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah; and the filing on Feb. 21, 1996, of twelfth superseding indictments against Yousef, Yasin, Murad, Ismoil, and Shah); *see Judge Dismisses 75 on Bomb Jury Panel*, N.Y. Times, May 14, 1996, at 2 [hereinafter *Judge Dismisses 75*]; Lance, *supra* note 5, at 227; McDermott & Meyer, *supra* note 5, at 108–10 (reporting that Yousef's trial for the airplane plot occurred before his trial

during opening arguments, and Judge Duffy said that if he did he would have to act as his own lawyer throughout the trial.[153] Yousef and Judge Duffy agreed that he would do this.[154] All three defendants were convicted on September 5, the fourth day of deliberation.[155]

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.[156] This time, Yousef let a lawyer represent him.[157] Both were convicted on November 12.[158]

Judge Duffy sentenced Yousef on January 8, 1998, to 240 years in prison for his participation in the World Trade Center bombing and a consecutive life sentence for his participation in the plot to bomb airliners.[159] At his sentencing, Yousef proclaimed, "I am a terrorist and I am proud of it."[160] Judge Duffy sentenced Ismoil on April 3, 1998, to 240 years in prison; and the judge sentenced Murad on May 15, 1998, to life plus 60 years.[161] The court of appeals affirmed the convictions and sentences on April 4, 2003.[162] On October 8, 2004, Judge Duffy sentenced Shah to 30 years.[163]

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for the World Trade Center bombing so that a delay in the airplane trial would not make it more difficult to get testimony from witnesses in the Philippines).

153. *See* Gross, *supra* note 31, at 5; Christopher S. Wren, *Plot of Terror in the Skies Is Outlined by a Prosecutor*, N.Y. Times, May 30, 1996, at 3.

154. *See* Gross, *supra* note 31, at 5; Christopher S. Wren, *Terror Suspect Defends Himself and Offers Jury an Alibi*, N.Y. Times, May 31, 1996, at 1; Wren, *supra* note 3; Christopher S. Wren, *With Judge's Gentle Help, Terror Suspect Starts Case*, N.Y. Times, Aug. 22, 1996, at 1.

155. *Yousef*, 327 F.3d at 85; *see* Wren, *supra* note 3.

156. *Yousef*, 327 F.3d at 77–78, 80; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see Jury Selection Begins in Trade Center Trial*, N.Y. Times, July 16, 1997, at B2.

157. *See Bomb Suspect to Use Lawyer at 2d Trial*, N.Y. Times, Dec. 6, 1996, at 3 [hereinafter *Suspect to Use Lawyer*].

158. *Yousef*, 327 F.3d at 80, 137; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Benjamin Weiser, *"Mastermind" and Driver Found Guilty in 1993 Plot to Blow Up Trade Center*, N.Y. Times, Nov. 13, 1997, at A1.

159. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. Times, Jan. 9, 1998, at A1; *see also* http://www.bop.gov (noting a life sentence for Yousef, reg. no. 03911-000).

The court of appeals denied Yousef's appeal of the district court's decision not to appoint habeas corpus counsel under the Criminal Justice Act. United States v. Yousef, 395 F.3d 76 (2d Cir. 2005).

160. *See* Lance, *supra* note 5, at 284; McDermott & Meyer, *supra* note 5, at 113; Weiser, *supra* note 159.

161. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see Pilot Is Given Life Term for Bombing Plot*, N.Y. Times, May 16, 1998, at B5; Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. Times, Apr. 5, 1998, at B2; *see also* http://www.bop.gov (noting a release date of August 29, 2204, for Ismoil, reg. no. 37802-054, and a life sentence for Murad, reg. no. 37437-054).

162. *Yousef*, 327 F.3d 56; *see* Benjamin Weiser, *Judges Uphold Convictions in '93 Bombing*, N.Y. Times, Apr. 5, 2003, at D5.

The appeal was heard by Second Circuit Judges Ralph K. Winter, Jr., John Walker, Jr., and José A. Cabranes. Because, by chance, all three judges sat in New Haven, Connecticut, oral argument was held there. Interview with Hon. José A. Cabranes, Nov. 4, 2009. Second Circuit oral

2001 Destruction of the World Trade Center

On June 5, 2008, during the presidency of George W. Bush, five men were arraigned in military tribunals at Guantánamo Bay for the September 11, 2001, attacks: KSM, Mustafa Ahmed al-Hawsawi, Ramzi Bin al-Shibh, Walid Bin Attash, and Ali Abdul Aziz Ali.[164] Eric H. Holder, President Obama's attorney general, announced on November 13, 2009, that the men would be tried in the Southern District of New York instead.[165] Their sealed December 14 indictment was added to the indictment for the 1993 World Trade Center bombing.[166] Magistrate Judge James C. Francis IV granted the government's request to both seal the indictment and keep it off the case's docket.[167] According to the government,

> knowledge of the specific date the Superseding Indictment was returned may lead the defendants to coordinate with each other in ways that undermine both their security and the security of others. In addition, notice that new charges have been filed against the defendants may lead them to destroy evidence they now possess.[168]

The defense appropriation act for 2011, however, forbade the use of defense funds to transfer KSM or any other Guantánamo Bay detainee for prosecution in a civilian court,[169] so the government obtained a dismissal of the superseding indictment in favor of renewed military tribunal prosecutions.[170]

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arguments are almost always held in New York. Interview with 2d Cir. Clerk's Office Staff, Nov. 6, 2009.

163. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 26; *see* http://www.bop.gov (noting a release date of March 2, 2022, reg. no. 42799-054).

164. *See* William Glaberson, *Arraigned, 9/11 Defendants Talk of Martyrdom*, N.Y. Times, June 6, 2008, at A1; Josh White, *9/11 Architect Tells Court He Hopes for Martyrdom*, Wash. Post, June 6, 2008, at A1.

165. *See* Peter Finn & Carrie Johnson, *Alleged Sept. 11 Planner Will Be Tried in New York*, Wash. Post, Nov. 14, 2009, at A1; Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. Times, Nov. 14, 2009, at A1.

166. Superseding Indictment, United States v. Salameh, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011); *see* Benjamin Weiser, *In Federal Court, a Docket Number for Global Terror*, N.Y. Times, Apr. 11, 2011, at A18.

The unsealing of an indictment against KSM was earlier announced at the 1998 sentencing of his nephew Yousef. *See* Lance, *supra* note 5, at 283–85; McDermott & Meyer, *supra* note 5, at 136; Weiser, *supra* note 159. A sealed indictment against KSM was returned in January 1996. *See* McDermott, *supra* note 9, at 165.

167. Order, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011).

168. Affirmation at 2, *id.* (Dec. 14, 2009, filed Apr. 4, 2011).

169. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011); *see* Peter Finn & Anne E. Kornblut, *President Decries Rules on Detainees*, Wash. Post, Jan. 8, 2011, at A2; Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. Times, Jan. 8, 2011, at A11.

170. Nolle Prosequi, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Apr. 4, 2011); http://www.defense.gov/news/commissions.html (military commission records); *see* Peter Finn, *Charges Against 9/11 Suspects Are Re-Filed*, Wash. Post, June 1, 2011, at A6; Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, Wash. Post, Apr. 5, 2011, at A1; Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. Times, Apr. 5, 2011, at A1.

Challenge: Interpreters

These prosecutions required both Arabic and Spanish interpreters.[171]

Challenge: Court Security

Security was tight in these trials. One downside of tight security in a criminal prosecution is the message it sends to the jury that the defendants might be dangerous. In the trial for conspiracy to bomb airplanes, Judge Duffy had to dismiss the first 75 prospective jurors because they indicated they would be influenced by heavy court security.[172]

Challenge: Pro Se Defendants

Perhaps arising from ideological hostility to U.S. institutions, terrorism defendants sometimes elect to appear pro se. Sometimes defendants appear pro se because of irreconcilable conflicts with assigned counsel.

After their convictions, Salameh, Ayyad, Mahmoud Abouhalima, and Ajaj dismissed their attorneys, and they appeared pro se for sentencing.[173]

In response to Judge Mukasey's determination that Kunstler's law firm could represent either el-Gabrowny and Siddig Ali or Abdel Rahman, but not all three, Abdel Rahman elected to represent himself for a time.[174]

> Abdel Rahman had been successful defending himself pro se in Egypt on conspiracy charges in connection with the 1981 assassination of Egyptian President Anwar Sadat and thus thought he could duplicate those results; Abdel Rahman also wanted to use the trial as a platform from which to convey his views. Ultimately, Abdel Rahman's close circle of people around him convinced him that he would have little chance of prevailing if he continued through trial pro se and convinced him to accept counsel.[175]

At Yousef's first trial, for the plot to bomb airplanes, he appeared pro se so that he could address the jury during opening arguments.[176] He was convicted, and he opted for counsel representation at his second trial, for participation in the first bombing of the World Trade Center.[177]

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors' protection.[178]

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171. Interview with Michael B. Mukasey, June 25, 2007.

172. *See Judge Dismisses 75*, *supra* note 152.

173. United States v. Salameh, 152 F.3d 88, 161 (2d Cir. 1998).

174. United States v. Rahman, 861 F. Supp. 266, 268 (S.D.N.Y. 1994).

Judge Mukasey told Abdel Rahman that if he behaved improperly, appointed counsel would take over. Interview with Michael B. Mukasey, June 25, 2007.

175. Gross, *supra* note 31, at 4 (reporting on an interview with Judge Mukasey, footnote omitted).

176. *See id.* at 5.

177. *See Suspect to Use Lawyer*, *supra* note 157.

178. Michael B. Mukasey, United States v. Abdel Rahman: Preliminary Voir Dire (Jan. 9, 1995) [hereinafter Mukasey Preliminary Voir Dire]; *Behind Closed Doors: Secret Justice in Amer-*

> This process becomes necessary in high profile cases to protect the security of jurors. The confidential information in that case, mercifully, is something that even the court, and in a sense, the judge, is unaware of. The clerk knows the names of the jurors; the judge and the parties do not. The court tries at all costs to keep that information secret.[179]

To protect the jurors' safety and anonymity, they did not report directly to the courthouse but to secret locations from which deputy marshals transported them to court.[180]

In Judge Mukasey's case, "the identities of at least two of the jurors became known to some reporters after the case was over. As a result, those reporters camped outside the jurors' doors to discuss the jury's deliberations."[181] When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.[182]

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.[183] Judge Mukasey did not sequester the jurors during his trial until it was time to deliberate, at which time he moved to a seven-days-per-week schedule.[184]

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.[185]

Challenge: Classified Evidence

In the seditious conspiracy trial, the government presented six classified exhibits ex parte to Judge Mukasey, pursuant to the Classified Information Procedures Act (CIPA).[186] Judge Mukasey kept the exhibits in a safe while he considered whether

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ica, 9 J. L. & Pol'y 1, 10 (2000) [hereinafter *Behind Closed Doors*] (remarks by Judge Mukasey); *see* Bernstein, *supra* note 11; Blumenthal, *supra* note 43; Gross, *supra* note 31, at 21 ("In every major terrorism trial that has taken place in the Southern District [of New York], an anonymous jury has been used due to the heightened risk of harm to potential jurors because of the nature of the crime at issue."); McDermott & Meyer, *supra* note 5, at 110; Tabor, *supra* note 44; Wren, *supra* note 3 ("After the [first Yousef] trial ended, the jurors were whisked away in three vans before reporters could approach them.").

179. *Behind Closed Doors*, *supra* note 178, at 10 (remarks by Judge Mukasey).

180. Mukasey Preliminary Voir Dire, *supra* note 178; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007.

181. *Behind Closed Doors*, *supra* note 178, at 10 (remarks by Judge Mukasey).

182. *See* Benjamin Weiser, *Trial Delayed for 2 Charged with Bombing Trade Center*, N.Y. Times, Aug. 5, 1997, at B3.

183. Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007; *see* Bernstein, *supra* note 11; Tabor, *supra* note 44.

184. Interview with Michael B. Mukasey, June 25, 2007.

185. Mukasey Preliminary Voir Dire, *supra* note 178; *see* Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

186. United States v. Rahman, 870 F. Supp. 47, 49 (S.D.N.Y. 1994); Interview with Michael B. Mukasey, June 25, 2007; *see* Gross, *supra* note 31, at 37; *see also* 18 U.S.C. app. 3 (2011) (text of CIPA); Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (Federal Judicial Center, 2d ed. 2013).

they had to be produced.[187] He ruled which exhibit had to be disclosed to the defendants, ordered that it not be disclosed to anyone else by the defendants, and ordered that all of the exhibits be kept under seal with the classified information security officer.[188]

Challenge: Terrorist Communications

According to the *New York Times*,

> After news reports in 2006 that three men imprisoned in the 1993 World Trade Center bombing had sent letters to a Spanish terrorist cell, the Bureau of Prisons created two special wards, called Communication Management Units, or C.M.U.'s. The units, which opened at federal prisons in Terre Haute, Ind., in 2006 and Marion, Ill, in 2008, have set off litigation and controversy, chiefly because critics say they impose especially restrictive rules on Muslim inmates, who are in the majority.[189]

187. Interview with Michael B. Mukasey, June 25, 2007.

188. *Rahman*, 870 F. Supp. 47; *see* Gross, *supra* note 31, at 37 (reporting that only one of the six documents had to be disclosed); Liptak, *supra* note 129 ("Judge Mukasey was concerned throughout about balancing the defendants' rights against national security. He ordered an array of potential evidence to be disclosed to the defense, for instance, but drew the line at information he said would needlessly compromise intelligence operations.").

189. Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1; *see* Royer v. Fed. Bureau of Prisons, 808 F. Supp. 2d 274 (D.D.C. 2011); Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011).

Kenya and Tanzania

United States v. El-Hage (Leonard B. Sand, Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)[190]

Bombs exploded outside the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, killing 224 people, including 12 Americans.[191] Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya.[192]

Nairobi

Pakistani authorities arrested Mohammed Saddiq Odeh on the day of the bombings for traveling with a fraudulent passport,[193] and he quickly became a suspect

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190. An appeal was heard by Second Circuit Judges Wilfred Feinberg, Jon O. Newman, and José A. Cabranes.

For this report, on November 4, 2009, Tim Reagan interviewed Judge Newman in Judge Newman's Hartford chambers, and Judge Cabranes and his law clerk Matt McKenzie in Judge Cabranes's New Haven chambers.

191. The 9/11 Commission Report 70 (2004); *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 104 (2d Cir. 2008); United States v. Ghailani, 751 F. Supp. 2d 515, 521 (S.D.N.Y. 2010); United States v. Bin Laden, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); United States v. Bin Laden, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001); United States v. El-Hage, 213 F.3d 74, 77 (2d Cir. 2000); United States v. Bin Laden, 91 F. Supp. 2d 600, 604, 606 (S.D.N.Y. 2000); United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); *see* Rick Lyman, *Texans Cell Terror Suspect Apolitical*, N.Y. Times, Sept. 20, 1998, at 126; James C. McKinley, Jr., *Bombs Rip Apart 2 U.S. Embassies in Africa*, N.Y. Times, Aug. 8, 1998, at A1; *see also* Russ Feingold, While America Sleeps 11–12, 104 (2012) (reporting that "Al Qaeda . . . apparently narrowly missed a third one in Uganda on the same day"); Terry McDermott, Perfect Soldiers 63 (2005) ("That most of the dead were African Muslims seemed not to matter to true believers."); Ali H. Soufan, The Black Banners 14 (2011) (reporting that the bombings occurred two months after an ABC interview with Osama Bin Laden in which Bin Laden threatened, "We anticipate a black future for America. Instead of remaining United States, it shall end up separated states and shall have to carry the bodies of its sons back to America.").

> The leadership decided that the attacks would occur on Friday, August 7, 1998, at 10:30 a.m., the time of day when Muslims are meant to be in the mosque at prayer. Therefore, al-Qaeda's theologians argued, anyone killed in the bombing could not be a real Muslim, as he wasn't at prayer, and so his death would be an acceptable consequence.

Soufan, *supra*, at 78.

An account of the bombings and the prosecution of the bombers was prepared by an American anthropologist who survived the blast in Tanzania, but whose Kenyan husband died waiting for her outside the embassy. Susan F. Hirsch, In the Moment of Greatest Calamity: Terrorism, Grief, and a Victim's Quest for Justice (2006).

192. *See* Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6; Soufan, *supra* note 191, at 80.

"Hundreds more would have been killed and hurt but for the extraordinary luck of there having been a filled water truck parked at just that moment in front of the Dar es Salaam embassy." McDermott, *supra* note 191, at 177.

193. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 177, 185 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 104; United States v. Bin Laden, 132 F. Supp. 2d

in the Nairobi bombing.[194] Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12 as another suspect in the bombing.[195] Al-'Owhali admitted driving the bomb to the embassy in Kenya.[196] Later that month, the suspects were moved to New York,[197] and they were indicted on October 7.[198] The United States decided to seek the death penalty against al-'Owhali but not Odeh.[199]

The government identified Haroun Fazil as another suspect in the Nairobi bombing.[200] It is believed that he drove a pickup truck to lead the vehicle carrying the bomb to the embassy.[201] The government offered a $2 million reward for in-

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198 (S.D.N.Y. 2001); *see* Raymond Bonner, *Pakistan Arrests Two New Suspects in Embassy Blasts*, N.Y. Times, Aug. 19, 1998, at A1; Bonner, *supra* note 192; Soufan, *supra* note 191, at 88 ("Pakistani authorities had noticed that the picture on his passport was fraudulent").

194. *In re Terrorist Bombings*, 552 F.3d at 185 (noting that one week after detention in Pakistan, Odeh was transferred to Kenyan authorities); *see* David Johnston, *U.S. Says Suspect Does Not Admit Role in Bombings or Ties to Saudi*, N.Y. Times, Aug. 18, 1998, at A7.

195. *In re Terrorist Bombings*, 552 F.3d at 181; *In re Terrorist Bombings*, 552 F.3d at 105; United States v. Bin Laden, 132 F. Supp. 2d 168, 173–74 (S.D.N.Y. 2001); *see* David Johnston, *Blast Suspect Held in U.S. and Is Said to Admit Role*, N.Y. Times, Aug. 28, 1998, at A1; Soufan, *supra* note 191, at 85–87, 92.

196. *See* Johnston, *supra* note 195; *see also In re Terrorist Bombings*, 552 F.3d at 182 (noting that al-'Owhali's cooperation was contingent on his being tried in the United States, which he regarded as his enemy, instead of in Kenya, which he did not).

The court denied a motion to suppress this confession. *Bin Laden*, 132 F. Supp. 2d at 192–98; *see* Benjamin Weiser, *Judge Extends Legal Rights Beyond U.S.*, N.Y. Times, Feb. 17, 2001, at B1; Benjamin Weiser, *Kenya Statements in Terrorism Case Allowed by Judge*, N.Y. Times, Jan. 30, 2001, at A1.

197. *In re Terrorist Bombings*, 552 F.3d at 105; *Bin Laden*, 132 F. Supp. 2d at 205; *Bin Laden*, 132 F. Supp. 2d at 178; *see* Dan Barry, *With Suspect in Town, Giuliani Steps Up Security*, N.Y. Times, Aug. 28, 1998, at A6; David Johnston, *Charges Against 2d Suspect Detail Trial of Terrorists*, N.Y. Times, Aug. 29, 1998, at A4; Soufan, *supra* note 191, at 90, 94.

198. *In re Terrorist Bombings*, 552 F.3d at 102; United States v. Bin Laden, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); *see* United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000) (noting first court appearances on October 8, 1998); *see also* H.L. Pohlman, Terrorism and the Constitution 38–39 (2008) (discussing types of extraterritorial jurisdiction over crimes committed abroad).

199. *In re Terrorist Bombings*, 552 F.3d at 105, 109; United States v. Bin Laden, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting the filing of a death penalty notice on June 28, 2000); United States v. Bin Laden, 126 F. Supp. 2d 256 (S.D.N.Y. 2000); *see* Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa*, N.Y. Times, May 30, 2001, at A1 [hereinafter *4 Guilty*] (reporting that prosecutors did not explain why they did not seek the death penalty against Odeh); Benjamin Weiser, *Defendant in Bombings Faking Illness, Judge Is Told*, N.Y. Times, Dec. 12, 2000, at B3 [hereinafter *Faking Illness*]; Benjamin Weiser, *U.S. to Seek Death Penalty for 2d Defendant in Blasts*, N.Y. Times, June 14, 2000, at B3 [hereinafter *2d Death Penalty*]; Benjamin Weiser, *U.S. to Seek Death Penalty in Bombings*, N.Y. Times, May 10, 2000, at B1.

200. *See* Benjamin Weiser, *2 New Suspects Linked by U.S. to Terror Case*, N.Y. Times, Sept. 18, 1998, at A1 [hereinafter *2 New Suspects*]; Benjamin Weiser, *A Bin Laden Agent Left Angry Record of Gripes and Fears*, N.Y. Times, Dec. 2, 1998, at A1 [hereinafter *Angry Record*]. *See generally* Chris Heffelfinger, Radical Islam in America 58–60 (2011) (providing additional information about Fazil, identifying him as Abdullah Muhammad Fazul Husseine Mullah Ati, alias Harun Fazul).

201. *See* Weiser, *2 New Suspects*, *supra* note 200; Weiser, *Angry Record*, *supra* note 200.

formation leading to his arrest, but he has not been apprehended.[202] In 2009, Saleh Ali Saleh Nabhan, who is believed to be also responsible for the 2002 bombing of an Israeli hotel on the Kenyan coast, was killed in Somalia in a helicopter raid on Al-Shabab.[203]

On September 16, Wadih el-Hage, a naturalized U.S. citizen and resident of Arlington, Texas, who once shared a house with Fazil in Nairobi and who once was Osama Bin Laden's personal secretary, was arrested immediately after testifying before a grand jury.[204] El-Hage, who also testified before a grand jury about Bin Laden's activities a year earlier, was charged with making false statements to investigators and the grand jury.[205] On October 7, charges against him were broadened to include conspiracy to kill American citizens.[206]

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.[207]

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202. *See* Weiser, *2 New Suspects*, *supra* note 200; Weiser, *Angry Record*, *supra* note 200; Benjamin Weiser, *U.S. Charges Ex-Soldier, Calling Him Plotter with Bin Laden*, N.Y. Times, May 20, 1999, at A12 [hereinafter *U.S. Charges Ex-Soldier*].

203. *See* Jeffrey Gettleman & Eric Schmitt, *American Raid in Somalia Kills Qaeda Militant*, N.Y. Times, Sept. 15, 2009, at A1; Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. Times, Apr. 8, 2013, at A1.

204. *In re Terrorist Bombings*, 552 F.3d at 104; United States v. El-Hage, 213 F.3d 74, 77 (2d Cir. 2000); United States v. Bin Laden, 91 F. Supp. 2d 600, 606 (S.D.N.Y. 2000); United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); Docket Sheet, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998) [hereinafter S.D.N.Y. *El Hage* Docket Sheet]; *see* Lyman, *supra* note 191; Weiser, *2 New Suspects*, *supra* note 200; *see also* The 9/11 Commission Report 56 (2004) ("Hage was a U.S. citizen who had worked with Bin Ladin in Afghanistan in the 1980s, and in 1992 he went to Sudan to become one of al Qaeda's major financial operatives."); Heffelfinger, *supra* note 200, at 60 ("Born into a Catholic family in Lebanon in 1960, Wadih converted to Islam as a teenager while living in Kuwait where his father worked for an oil company, and was largely shunned by his family thereafter.").

205. *El-Hage*, 213 F.3d at 77; *Bin Laden*, 91 F. Supp. 2d at 605–07 (noting that el-Hage appeared before the grand jury on September 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204 (noting a criminal complaint filed on September 17, 1998); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 12 (2008) [hereinafter *Trying Cases*] (remarks by Judge Leonard B. Sand); *see* Lyman, *supra* note 191; Weiser, *2 New Suspects*, *supra* note 200.

Judge Sand ultimately decided that el-Hage could not be prosecuted in the Southern District of New York for false statements made to FBI agents in Texas. United States v. Bin Laden, 146 F. Supp. 2d 373 (S.D.N.Y. 2001).

206. *In re Terrorist Bombings*, 552 F.3d at 105; *Bin Laden*, 91 F. Supp. 2d at 605; *see* Benjamin Weiser, *U.S. Closer to Tying Bin Laden to Embassy Bombings*, N.Y. Times, Oct. 8, 1998, at A3.

207. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; United States v. Salim, 549 F.3d 67, 70 (2d Cir. 2008); *see* Benjamin Weiser, *U.S. May Ask Death Penalty in Embassy Bombings*, N.Y. Times, Oct. 9, 1998, at A10.

Tim Reagan interviewed Judge Sand for this report in the judge's chambers on June 25, 2007.

The case originally was assigned to Judge John E. Sprizzo, S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204, but Judge Sprizzo recused himself because he previously provided representation to Libya, *see* Benjamin Weiser, *U.S. Asks British to Deliver Suspected Bin Laden Aide*, N.Y. Times, Sept. 29, 1998, at A10 [hereinafter *Deliver Aide*].

On October 24, 2000, el-Hage tried to plead guilty, but the court did not accept his plea, because Judge Sand determined that el-Hage was pleading guilty to avoid the strip searches required every time he came to court rather than because he believed he was guilty.[208]

Dar es Salaam

On September 21, 1998, the government of Tanzania charged Mustafa Mahmoud Said Ahmed and Rashid Saleh Hemed with the bombing of the American embassy in Dar es Salaam.[209] Tanzania dropped charges against Ahmed in March 2000.[210] After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.[211]

Khalfan Khamis Mohamed was arrested in Cape Town, South Africa, on October 5, 1999, flown to New York, and arraigned on October 8 for participation in the Dar es Salaam bombing.[212] His attorney admitted at trial that K.K. Mohamed helped assemble the bomb.[213] The United States decided to seek the death penalty against him.[214] South Africa's Constitutional Court, its highest court, subsequently ruled that it was improper to turn Mohamed over to the United States for a capital trial.[215] Judge Sand ruled that the decision by the South African court did

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208. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Benjamin Weiser, *Judge Rejects Guilty Plea in Bomb Plot*, N.Y. Times, Oct. 25, 2000, at B1.

209. *See* Bonner, *supra* note 192; *see also* James Risen & Benjamin Weiser, *Before Bombings, Omens and Fears*, N.Y. Times, Jan. 9, 1999, at A1 (reporting that in 1997 Ahmed warned the American embassy in Kenya of a bomb plot).

210. *See Charges Dropped in an Embassy Bombing*, N.Y. Times, Mar. 20, 2000, at A5.

211. *See* Marc Lacey, *Tanzania Releases Man Held in '98 Bombing*, N.Y. Times, Dec. 23, 2004, at A11.

212. United States v. Bin Laden, 91 F. Supp. 2d 600, 604 n.3 (S.D.N.Y. 2000); United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); *see* Benjamin Weiser, *Man Charged in Bombing of U.S. Embassy in Africa*, N.Y. Times, Oct. 9, 1999, at A4.

After the bombings, Mohamed fled Tanzania; he arrived in South Africa on August 16, 1998. United States v. Bin Laden, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001). He used fraudulent documents and a false name to request political asylum, and he was arrested when the fraud was discovered. *Id.*

213. *See* Hirsch, *supra* note 191, at 69, 81 (reporting also that Mohamed was known as "K.K."); Benjamin Weiser, *Suspect Admits Helping Make Embassy Bomb*, N.Y. Times Feb. 6, 2001, at A1 (reporting that Mohamed's attorney made the concession during opening arguments); *see also Bin Laden*, 156 F. Supp. 2d at 362–63 ("During interrogation by American officials on October 5 and 6, 1999, Khalfan Mohamed admitted to playing a role in the August 7, 1998, bombing of the American Embassy in Dar es Salaam.").

Judge Sand denied Mohamed's motion to suppress his admission to arresting authorities. *Bin Laden*, 156 F. Supp. 2d at 363.

214. United States v. Bin Laden, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting the filing of a death penalty notice on June 27, 2000); United States v. Bin Laden, 126 F. Supp. 2d 256 (S.D.N.Y. 2000) (denying a claim that the death penalty certification was race-based); *see* Weiser, *Faking Illness*, *supra* note 199; Weiser, *2d Death Penalty*, *supra* note 199.

215. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; *see* Hirsch, *supra* note 191, at 228; Benjamin Weiser, *South Africa Regrets Its Role in a Defendant's Extradition*, N.Y. Times, May 31, 2001, at B4 (reporting that the May 28, 2001, ruling "came too late to do Mr. Mohamed any good").

not invalidate Mohamed's capital prosecution, but Mohamed could offer the decision as mitigating evidence.[216]

A Larger Plot

Osama Bin Laden was included in a November 4, 1998, superseding indictment,[217] but he remained a fugitive until his killing by U.S. forces in 2011.[218] Fazul Abdullah Mohammed came to be regarded as the bombings' mastermind, and he was killed in a firefight in 2011 when he mistakenly came upon a security checkpoint in Mogadishu, Somalia, and tried to flee.[219]

Mamdouh Mahmud Salim, Osama Bin Laden's finance manager, was suspected of organizing the embassy bombings and was arrested in Munich, Germany, on September 16, 1998.[220] German authorities handed him over to the U.S. government on December 20 on condition that he not face the death penalty.[221] He first appeared before the district court on December 21.[222] The government charged him with four broad conspiracy counts.[223]

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216. *Bin Laden*, 156 F. Supp. 2d 359; *see* Hirsch, *supra* note 191, at 228–29.

217. The 9/11 Commission Report 128 (2004); *see* Soufan, *supra* note 191, at 72; Benjamin Weiser, *Saudi Is Indicted in Bomb Attacks on U.S. Embassies*, N.Y. Times, Nov. 5, 1998, at A1.

Bin Laden was indicted two months before the embassy bombings, on June 10, 1998, for a 1993 killing of 18 American soldiers in Mogadishu, Somalia. Docket Sheet, United States v. Bin Laden, No. 1:98-cr-539 (S.D.N.Y. June 10, 1998); The 9/11 Commission Report 110 (2004); *see* Soufan, *supra* note 191, at 72; Benjamin Weiser, *Prosecutors Are Expected to Seek Dismissal of All Charges*, N.Y. Times, May 4, 2011, at A11.

218. Nolle Prosequi, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. June 17, 2011) (voluntarily dismissing indictments against Bin Laden); *see* Peter Baker & Helene Cooper, *Bin Laden Killed by U.S. Forces in Pakistan, Obama Says, Declaring Justice Has Been Done*, N.Y. Times, May 2, 2011, at A1; Dana Priest & William M. Arkin, Top Secret America 256–61 (2011); Nicholas Schmidle, *Getting Bin Laden*, New Yorker, Aug. 8, 2011, at 34; Soufan, *supra* note 191, at 532–36; Benjamin Weiser, *Federal Court Drops Charges Against Bin Laden*, N.Y. Times, June 18, 2011, at A9; Scott Wilson & Craig Whitlock, *U.S. Forces Kill Osama Bin Laden*, Wash. Post, May 2, 2011, at A1.

219. *See* Jeffrey Gettleman, *Somalis Kill Man Behind Bombings of U.S. Embassies*, N.Y. Times, June 12, 2011, at A1 (reporting that Mohammed "was one of the most wanted men in Africa and had a $5 million bounty on his head from the United States government"); Susan Raghavan, *Alleged Plotter of 1998 Embassy Attacks Is Killed*, Wash. Post, June 12, 2011, at A1 (reporting that "Mohammed had topped the FBI's most-wanted list for nearly 13 years").

220. United States v. Bin Laden, 160 F. Supp. 2d 670, 674 (S.D.N.Y. 2001); United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204 (noting a complaint and an arrest warrant against Salim filed on September 14, 1998); *see* Benjamin Weiser, *Judge Orders Embassy Bomb Suspect Held Without Bail*, N.Y. Times, Dec. 22, 1998, at B6 [hereinafter *Held Without Bail*]; Benjamin Weiser, *U.S. Says Bin Laden Aide Tried to Get Nuclear Material*, N.Y. Times, Sept. 26, 1998, at A3 [hereinafter *Nuclear Material*].

Judge Sand denied Salim's motion to suppress statements made while detained in Germany. *Bin Laden*, 160 F. Supp. 2d 670; *see Court Won't Suppress Statement in Bombing*, N.Y. Times, Aug. 25, 2001, at B3.

221. *Bin Laden*, 156 F. Supp. 2d at 370; *see* Weiser, *Held Without Bail*, *supra* note 220.

222. *Bin Laden*, 92 F. Supp. 2d at 231.

223. *See* Weiser, *Held Without Bail*, *supra* note 220; Weiser, *Nuclear Material*, *supra* note 220 (reporting the unsealing of charges on September 25, 1998).

Khalid al-Fawwaz, who was reportedly a close friend of Osama Bin Laden's and who ran Al-Qaeda's media operations, was arrested by British authorities in September 1998.[224] On June 19, 1999, the U.S. government indicted him for having a hand in the 1998 bombings.[225] At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdul Bary on July 11, 1999.[226] Britain's House of Lords ruled on December 17, 2001, that these three suspects could be extradited to the United States,.[227] Eidarous died of leukemia on July 16, 2008, while under house arrest in London.[228] On April 10, 2012, the European Court of Human Rights approved the extradition of al-Fawwaz and Bary.[229] The men were flown to New York on October 5.[230]

Ali A. Mohamed—a former sergeant in the U.S. Army who previously was a major in Egypt's army and then a CIA asset—was secretly charged with Al-Qaeda conspiracies in September 1998.[231] He was formally indicted on May 19, 1999, after he refused to cooperate in the tracking down of Osama Bin Laden, and

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224. *See* Andrew Jacobs, *U.S. Indicts 2 More Men in Bombing of Embassies*, N.Y. Times, June 17, 1999, at A17; Weiser, *Angry Record*, *supra* note 200; Weiser, *Deliver Aide*, *supra* note 207; Craig Whitlock, *Extradition of Terror Suspects Founders*, Wash. Post, Dec. 21, 2008, at A1.

225. *See* Jacobs, *supra* note 224.

226. *See* David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6; Whitlock, *supra* note 224; *see also* Soufan, *supra* note 191, at 98 ("Although we had urged the British to arrest Fawwaz, Bary, and Eidarous in 1996, they had refused.").

227. *See* Warren Hoge, *Court Approves Extraditions in Bombings of U.S. Embassies*, N.Y. Times, Dec. 18, 2001; Whitlock, *supra* note 224.

228. Nolle Prosequi, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Dec. 3, 2008); *see* Whitlock, *supra* note 224.

229. Judgment, Ahmad v. United Kingdom, Nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (Eur. Ct. H.R. Apr. 10, 2012), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/Lists+of+judgments/ (also approving extraditions of Mustafa Kamal Mustafa, Seyla Talha Ahsan, and Babar Ahmad; review by Grand Chamber denied on September 24, 2012); *see* Notice, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 25, 2012); *see also* John F. Burns & Alan Cowell, *European Court Says Britain Can Send Terror Suspects to U.S.*, N.Y. Times, Apr. 11, 2012, at A4.

230. *See* Transcript at 14, *El Hage*, No. 1:98-cr-1023 (S.D.N.Y. Oct. 9, 2012, filed Nov. 14, 2012) (provisionally setting trial for October 7, 2013); *see also* James Ball, *Five Al-Qaeda Suspects Reach U.S.*, Wash. Post, Oct. 7, 2012, at A3; Sarah Lyall & Alan Cowell, *British Judges Approve Extradition of Muslim Cleric to U.S. on Terrorism Charges*, N.Y. Times, Oct. 6, 2012, at A6; Larry Neumeister & John Christoffersen, *Five Terror Suspects Appear in U.S. Courts*, Miami Herald, Oct. 7, 2012, at 3A.

231. *See* Peter Lance, Triple Cross 10–17, 33–45, 318 (2006); Soufan, *supra* note 191, at 94; Benjamin Weiser, *U.S. Ex-Sergeant Linked to Bin Laden Conspiracy*, N.Y. Times, Oct. 30, 1998, at A1; *see also* The 9/11 Commission Report 68 (2004) (describing Ali Mohamed as "a former Egyptian army officer who had moved to the United States in the mid-1980s, enlisted in the U.S. Army, and became an instructor at Fort Bragg"); Lance, *supra*, at 301 (reporting that "to shield itself from the embarrassment of arresting an al Qaeda spy who had been one of their own informants, he was charged on a 'John Doe' warrant"); Benjamin Weiser & James Risen, *A Soldier's Shadowy Trail in U.S. and in the Mideast*, N.Y. Times, Dec. 1, 1998, at A1 (reporting that Mohamed applied to be a CIA agent in 1984).

he first appeared in court on May 27.[232] On October 20, 2000, he agreed to plead guilty.[233] He is held in a secret location, and he has never been sentenced.[234]

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.[235] He was held in secret for more than four months before charges against him were made public.[236] In early 2003, he pleaded guilty[237] and was sentenced to ten years and one month in prison.[238] He was released on August 21, 2009.[239]

Among the 25 defendants indicted in the U.S. prosecution, many of whom remain fugitives, is Ahmed Khalfan Ghailani.[240] He was captured in a raid on his home in Pakistan in the summer of 2004 and held in secret CIA prisons until September 2006, when he was transferred to Guantánamo Bay.[241] The U.S. government announced on March 31, 2008, that it would try Ghailani by military commission,[242] but the following year the government decided to try him in the

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232. United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); *see* Lance, *supra* note 231, at 320–22; Benjamin Weiser, *Indicted Ex-Sergeant Says He Knows Who Bombed U.S. Embassies*, N.Y. Times, June 5, 1999, at A3 (reporting that Mohamed was also known as Abu Omar); Weiser, *U.S. Charges Ex-Soldier*, *supra* note 202.

233. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Lance, *supra* note 231, at 3–7, 358–60; Benjamin Weiser, *Bin Laden Linked to Embassy Blast by an Ex-Soldier*, N.Y. Times, Oct. 21, 2000, at A1.

Mohamed was not called as a witness at the trial of the other defendants. *See* Lance, *supra* note 231, at 6, 364; Benjamin Weiser, *Lawyers Seeking to Expose Plea Deal in Bombings Case*, N.Y. Times, May 6, 2001, at 151.

234. *See* Lance, *supra* note 231, at 7, 23–24, 361–62 (reporting also that he receives occasional visits from his American wife); Soufan, *supra* note 191, at 94.

235. *See* Benjamin Weiser, *Qaeda Member Pleads Guilty to 1990s Conspiracy Charge*, N.Y. Times, Feb. 1, 2003, at A13 [hereinafter *Qaeda Member*]; Benjamin Weiser, *Terror Suspect Held Secretly for 4 Months*, N.Y. Times, Mar. 22, 2001, at B1 [hereinafter *Held Secretly*].

236. *See* Weiser, *Qaeda Member*, *supra* note 235; Weiser, *Held Secretly*, *supra* note 235.

237. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204 (noting a guilty plea on January 31, 2003); *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 138 (2d Cir. 2008) (noting February 2003 conviction); *see* Weiser, *Qaeda Member*, *supra* note 235.

238. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of ten years).

239. http://www.bop.gov (reg. no. 45047-054).

240. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; United States v. Ghailani, 751 F. Supp. 2d 515, 518 (S.D.N.Y. 2010); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. Times, Apr. 1, 2008, at A14.

241. *Ghailani*, 751 F. Supp. 2d at 518, 523–24; United States v. Ghailani, 751 F. Supp. 2d 508, 509–10 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); United States v. Ghailani, 686 F. Supp. 2d 279, 283–84 (S.D.N.Y. 2009); *see* Glaberson, *supra* note 240; Josh White & Joby Warrick, *Detainee Is Charged with Capital Murder in Embassy Bombing*, Wash. Post, Apr. 1, 2008, at A2.

242. *Ghailani*, 751 F. Supp. 2d at 525; *see* Glaberson, *supra* note 240; White & Warrick, *supra* note 241.

Southern District of New York instead.[243] On January 25, 2011, he was sentenced to life in prison for conspiracy to destroy buildings.[244]

A Prison Guard Is Stabbed

On November 1, 2000, Salim stabbed a prison guard with a sharpened comb when the guard escorted Salim back to retrieve some documents from the cell that Salim shared with K.K. Mohamed.[245]

> When the defendants met with their attorneys, they were escorted from their cells to the place where they met with the attorneys and were escorted back. Defendant Salim was escorted back by a corrections officer who was well known to be kind. Protocol would have called for the inmate, the defendant, to be put into the cell, the cell to be locked, with the corrections officer outside the cell, the defendant still handcuffed. Then the defendant was to put his hands through an opening left for that purpose and the cuffs to be removed.
>
> Well, Officer Louis Pepe didn't follow that protocol and took the handcuffs off Salim while he was still in the cell. Salim had taken a plastic comb and honed it into a knife and stabbed the corrections officer and inflicted a permanent brain injury to him.[246]

Because Salim's attorneys were both witnesses to the stabbing and potential targets, the court discontinued their representation of Salim and severed his prosecution from the other defendants' trial, which was scheduled to begin only two

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243. *Ghailani*, 751 F. Supp. 2d at 518, 526; *Ghailani*, 751 F. Supp. 2d at 503; *Ghailani*, 686 F. Supp. 2d at 284; *see* William Glaberson, *Detainee to Be Transferred to U.S. for Trial*, N.Y. Times, May 22, 2009, at A16; Benjamin Weiser, *A Row Over Who Will Represent Guantánamo Detainee*, N.Y. Times, June 2, 2009, at A17.

244. Judgment, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Jan. 25, 2011) [hereinafter *Ghailani* Judgment]; *see* Peter Finn, *Embassy Bomber Receives Life Sentence*, Wash. Post, Jan. 26, 2011, at A2; Benjamin Weiser, *Life Sentence Without Parole for Former Detainee*, N.Y. Times, Jan. 26, 2011, at A18.

245. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 150 (2d Cir. 2008); United States v. Salim, 549 F.3d 67, 70 (2d Cir. 2008); United States v. Salim, 287 F. Supp. 2d 250, 259 (S.D.N.Y. 2003); United States v. Bin Laden, 160 F. Supp. 2d 670, 673 (S.D.N.Y. 2001); *see* Benjamin Weiser, *2 in Terror Case Suspected in Stabbing of Guard at Federal Jail*, N.Y. Times, Nov. 2, 2000, at B7; Benjamin Weiser, *Quandary in Terror Case*, N.Y. Times, Nov. 12, 2000, at 139 [hereinafter *Quandary*].

The government argued that the stabbing was part of a plot to escape by taking hostages, but the court found that the motive was to enable an attack on defense counsel so that they would be dismissed. *Salim*, 287 F. Supp. 2d 250; *see* Benjamin Weiser, *Government Says Attack on Guard Was Part of Escape Plan*, N.Y. Times, Dec. 21, 2000, at B3 [hereinafter *Escape Plan*] (reporting on an alleged "elaborate plot to take defense lawyers hostage to get themselves and possibly other prisoners freed"); *see also* Benjamin Weiser, *Man Called a Qaeda Founder Denies a Terror Link to Assault*, N.Y. Times, Sept. 5, 2002, at A20 (reporting Salim's one-time claim that "he wanted to break out and go to the United Nations to proclaim his innocence").

At K.K. Mohamed's sentencing hearing, "[a] neurosurgeon testified [that the guard] suffered severe brain damage and lost much of his ability to see and communicate. He also suffered a stroke after surgery, the doctor said, and has partial paralysis in an arm and leg." Benjamin Weiser, *Doctor Details Injuries Left in Jail Attack*, N.Y. Times, June 26, 2001, at B4 [hereinafter *Doctor Details Injuries*].

246. *Trying Cases*, *supra* note 205, at 13–14 (remarks by Judge Sand).

months later.[247] Both Salim and K.K. Mohamed were transferred to other jails,[248] but only Salim was charged with the stabbing.[249] The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.[250]

Salim pleaded guilty on April 3, 2002, to attempted murder.[251] Judge Batts sentenced him to 32 years in prison,[252] but the court of appeals concluded that a terrorism enhancement did not require transnational conduct,[253] so Judge Batts resentenced Salim to life.[254] The court of appeals affirmed the life sentence.[255]

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.[256] With the help of a jury questionnaire, Judge Sand screened a jury pool of 1,302 people.[257] Opening arguments began a month later, on February 5.[258]

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247. *Bin Laden*, 160 F. Supp. 2d at 673; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see* Hirsch, *supra* note 191, at 213; Weiser, *Quandary*, *supra* note 245.

248. *See* Benjamin Weiser, *Judge Orders Confiscation of Papers in Terrorism Case*, N.Y. Times, Nov. 29, 2000, at B4.

249. *Bin Laden*, 160 F. Supp. 2d at 673; *see* Weiser, *Escape Plan*, *supra* note 245.

Although the government did not charge Mohamed with participation in the stabbing, in an effort to persuade his sentencing jury to have him executed, the government argued that he participated in the stabbing. *See* Weiser, *Doctor Details Injuries*, *supra* note 245.

250. *Salim*, 549 F.3d at 70; *Bin Laden*, 160 F. Supp. 2d at 673 n.5; Docket Sheet, United States v. Salim, No. 1:01-cr-2 (S.D.N.Y. Jan. 3, 2001) [hereinafter S.D.N.Y. *Salim* Docket Sheet]; *see* Benjamin Weiser, *Terror Suspect Fails in Effort to Move Other Trial*, N.Y. Times, Mar. 31, 2001, at B6.

251. *Salim*, 549 F.3d at 70; United States v. Salim, 287 F. Supp. 2d 250, 259 (S.D.N.Y. 2003); S.D.N.Y. *Salim* Docket Sheet, *supra* note 250; *see* Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

252. *Salim*, 549 F.3d at 70; S.D.N.Y. *Salim* Docket Sheet, *supra* note 250 (also noting a $4,722,820 restitution order); *see Salim*, 287 F. Supp. 2d 250 (finding facts for the sentence calculation); *see also* Susan Saulny, *As Attacker Is Sentenced, Victim Vents Disgust and Is Ejected*, N.Y. Times, May 4, 2004, at B3 (reporting that Judge Batts had to eject the victim from the court for disruptive behavior).

253. *Salim*, 549 F.3d 67, *cert. denied*, 558 U.S. 941 (2009); *see* Benjamin Weiser, *Panel Rules Jail Stabbing Constituted Terrorism*, N.Y. Times, Dec. 3, 2008, at A28.

254. S.D.N.Y. *Salim* Docket Sheet, *supra* note 250; *see* Benjamin Weiser, *Reputed Bin Laden Adviser Gets Life Term in Stabbing*, N.Y. Times, Sept. 1, 2010, at A18.

255. United States v. Salim, 690 F.3d 115 (2d Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 901 (2013).

256. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 102, 106 (2d Cir. 2008); United States v. Bin Laden, 156 F. Supp. 2d 359, 363 (S.D.N.Y. 2001); United States v. Bin Laden, 132 F. Supp. 2d 168, 172 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see* Benjamin Weiser, *First Day of Jury Selection in U.S. Embassy Bombings*, N.Y. Times, Jan. 3, 2001, at B3; *see also* Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 1 (2007) (describing the case as "the United States of America's first comprehensive attempt to prosecute the growing menace of Islamic extremism in a court of law").

257. Leonard B. Sand, United States v. El Hage: Jury Questionnaire (Jan. 3, 2001); *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); Interview with Hon. Leonard B. Sand, June

Many survivors of the bombings attended the trial, wearing lapel pins provided by a victims' advocate showing a map of Africa with Kenya and Tanzania highlighted.[259] The pins helped the deputy marshals identify victims for appropriate seating, but Judge Sand ordered that the pins not be worn after defense counsel argued that they would improperly influence the jurors.[260]

Closing arguments began on May 1,[261] and the jury began its deliberations on May 10.[262] All four defendants were convicted of all charges on May 29.[263]

Judge Sand granted al-'Owhali and K.K. Mohamed separate death penalty hearings.[264] First came al-'Owhali's hearing—the first death penalty hearing in the Southern District of New York since the 1950s—and the jury began to deliberate on his sentence on June 5, 2001.[265] On June 12, the jury announced that it

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25, 2007; *see* Alan Feuer, *Jury Questionnaire Fills In a Few Blanks*, N.Y. Times, Feb. 8, 2001, at B8.

According to Judge Sand, the questionnaire and voir dire caused many jurors to assume that the court would tell them what penalty would go with each crime, and did not make clear that ultimate decisions on the death penalty would be for the jury to make. Interview with Hon. Leonard B. Sand, June 25, 2007.

258. *In re Terrorist Bombings*, 552 F.3d at 102, 106; *Bin Laden*, 156 F. Supp. 2d at 363.

259. *See* Hirsch, *supra* note 191, at 72.

260. *See id.* at 72–73.

261. *See* Benjamin Weiser, *Conspiracy by Bin Laden Is Described*, N.Y. Times, May 2, 2001, at B1.

262. *See Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; *see also* Hirsch, *supra* note 191, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

263. *In re Terrorist Bombings*, 552 F.3d at 101–02, 107; United States v. Bin Laden, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005); United States v. Bin Laden, 160 F. Supp. 2d 670, 673 n.5 (S.D.N.Y. 2001); *Bin Laden*, 156 F. Supp. 2d at 363; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see* Hirsch, *supra* note 191, at 179–80; Weiser, *4 Guilty*, *supra* note 199 (reporting also that none of the defendants testified).

It was reported that initially five jurors voted to acquit el-Hage. Benjamin Weiser, *A Jury Torn and Fearful in 2001 Terrorism Trial*, N.Y. Times, Jan. 5, 2003, at 11 [hereinafter *Jury Torn*].

264. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see* Benjamin Weiser, *McVeigh Execution Casts Shadow on Embassy Terror Trial*, N.Y. Times, Apr. 24, 2001, at B2 (reporting on Judge Sand's April 23, 2001, ruling).

265. *See* Hirsch, *supra* note 191, at 186; Benjamin Weiser, *Jury Weighs Death Penalty for Bomber*, N.Y. Times, June 6, 2001, at B4.

The last execution in New York was the 1954 execution of Gerhard Puff, who was executed a year after Julius and Ethel Rosenberg. *See* Benjamin Weiser, *Reno Allows First U.S. Death Penalty Trial in Manhattan in Decades*, N.Y. Times, Nov. 20, 1997, at B1 [hereinafter *Reno Allows*]. Attorney General Janet Reno authorized capital prosecutions of John Cuff, Deric Frank, and Clarence Heatley in 1997, but they pleaded guilty and avoided capital sentencing trials. *See 25-Year Sentence for Ex-Girlfriend's Death*, N.Y. Times, Jan. 30, 2000, at 133; Benjamin Weiser, *Former Officer Gets a Life Term for 10 Murders in a Drug Gang*, N.Y. Times, Mar. 23, 1999, at B1; Benjamin Weiser, *Gang Leader, in Plea Deal, Admits to Role in 13 Killings*, N.Y. Times, Feb. 6, 1999, at B2; Weiser, *Reno Allows*, *supra*; Benjamin Weiser, *Reno Authorizes a Second Death Penalty Case for Prosecutors in Manhattan*, N.Y. Times, Nov. 21, 1997, at B4. The first federal defendant sentenced to death in New York since Puff was Ronell Wilson, whom a jury voted to execute on January 30, 2007, in the Eastern District of New York. Judgment, United States v. Wilson, No. 1:04-cr-1016 (E.D.N.Y. Mar. 29, 2007); *see* Michael Brick, *Jury Agrees on Death Sentence for the Killer of Two Detectives*, N.Y. Times, Jan. 31, 2007, at A1. The court of appeals,

was deadlocked, which meant that al-'Owhali would be imprisoned for life without the possibility of release.[266] The jury began to deliberate on K.K. Mohamed's sentence on July 5[267] and announced a deadlock on July 10.[268]

On October 18, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.[269] Because of the intervening and nearby attacks on September 11, court security on the day of sentencing was substantially enhanced.[270]

The defendants, including Salim, ultimately were sent to serve their sentences at the Administrative Maximum Facility, or "Super Max," in Florence, Colorado.[271]

New Trial Denied

On January 23, 2002, Judge Kevin Thomas Duffy took over for Judge Sand with respect to further proceedings in prosecutions for the embassy bombings.[272] That same month, prosecutors learned that the United States Marshals Service had many hours of videotape recordings of interviews with the government's first witness, an informant named Jamal Ahmed al-Fadl, that should have been turned

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however, vacated the sentence on June 30, 2010. United States v. Whitten, 610 F.3d 168 (2d Cir. 2010); *see* Manny Fernandez & A.G. Sulzberger, *U.S. Court Strikes Down Death Penalty for Officers' Killer*, N.Y. Times, July 1, 2010, at A20. A jury was selected for a new penalty trial to begin on June 24, 2013. Minutes, *Wilson*, No. 1:04-cr-1016 (E.D.N.Y. June 18, 2013).

266. *In re Terrorist Bombings*, 552 F.3d at 101, 107; *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *see* Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. Times, June 13, 2001, at A1 (reporting that ten jurors concluded that execution would make the defendant a martyr and that five jurors decided that life in prison would be the greater punishment); Hirsch, *supra* note 191, at 201–03 (same, reporting also that before announcing their verdict, the jurors requested a copy of the oath they had taken).

It was reported that the vote was nine to three in favor of execution. Benjamin Weiser, *4 Are Sentenced to Life in Prison in 1998 U.S. Embassy Bombings*, N.Y. Times, Oct. 19, 2001, at A1 [hereinafter *4 Are Sentenced*]; Weiser, *Jury Torn*, *supra* note 263.

267. *See* Benjamin Weiser, *Terror Jury Deliberates*, N.Y. Times, July 6, 2001, at B5.

268. *Bin Laden*, 156 F. Supp. 2d at 362–63; *see* Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. Times, July 11, 2001, at B1 (reporting that seven jurors concluded that execution would make the defendant a martyr).

269. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *In re Terrorist Bombings*, 552 F.3d at 102, 102; United States v. Bin Laden, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *see* Soufan, *supra* note 191, at 94; Weiser, *4 Are Sentenced*, *supra* note 266.

270. *See* Hirsch, *supra* note 191, at 244; Weiser, *4 Are Sentenced*, *supra* note 266 ("The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.").

271. http://www.bop.gov (al-'Owhali reg. no. 42371-054; Odeh reg. no. 42375-054; el-Hage reg. no. 42393-054; Salim reg. no. 42426-054; Mohamed reg. no. 44623-054); *see* Benjamin Weiser, *Prison Switch for Terrorists in Bombings*, N.Y. Times, Dec. 25, 2001, at B6.

272. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157, 165 (2d Cir. 2008); *In re Terrorist Bombings*, 552 F.3d at 101 n.2, 141 n.41; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 191, at 258.

over to el-Hage's attorneys for preparation of cross-examination.[273] In response to el-Hage's motion for a new trial, Judge Duffy wrote, "Through a mixture of inaction, incompetence and stonewalling to cover up their mistakes, the United States Marshals Service and the Department of Justice's Office of Enforcement Operations have seriously jeopardized the convictions of Al-Qaeda terrorist Wadih El-Hage."[274]

Al-Fadl was in the Witness Security Program, living in a secret location.[275] Prosecutors had arranged for a videoconference connection to al-Fadl, and the Marshals Service had recorded videoconferences with al-Fadl without the prosecutors' knowledge.[276] Prosecutors received copies of the videotapes from the Marshals Service and provided defense counsel with transcripts, redacting "various portions to protect the identities of certain individuals and to protect operation information that they believed was not subject to discovery."[277] On October 24, 2003, el-Hage moved for a new trial.[278]

Judge Duffy concluded that "although this material would have fueled a significant attack on al-Fadl's credibility, it would not have directly contradicted the government's case, and appears to fall within the general rule that undisclosed impeachment material generally does not warrant a new trial."[279] The court of appeals affirmed.[280]

All four defendants appealed their convictions,[281] but K.K. Mohamed withdrew his appeal.[282]

After the trial, the *New York Times* published an article based on interviews with nine of the 12 jurors.[283] The story reported that two jurors sought outside religious guidance on their sentence verdicts, one juror did legal research on the In-

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273. *In re Terrorist Bombings*, 552 F.3d at 140–43; *Bin Laden*, 397 F. Supp. 2d at 474–81, 518; *Trying Cases*, *supra* note 205, at 12 (remarks by Judge Sand); *see* Benjamin Weiser, *U.S. Videos of Qaeda Informer Offer Glimpse Into a Secret Life*, N.Y. Times, May 1, 2004, at A1 [hereinafter *Qaeda Informer*].

274. *Bin Laden*, 397 F. Supp. 2d at 473.

275. *In re Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 474; *see* Weiser, *Qaeda Informer*, *supra* note 273.

276. *In re Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 475–76.

277. *Bin Laden*, 397 F. Supp. 2d at 478.

278. *In re Terrorist Bombings*, 552 F.3d at 108, 141; *Bin Laden*, 397 F. Supp. 2d at 474, 478.

279. *Bin Laden*, 397 F. Supp. 2d at 515.

280. *In re Terrorist Bombings*, 552 F.3d at 140–46, 156, *cert. denied*, 558 U.S. 1137 (2010).

281. Docket Sheet, United States v. Mohamed, No. 01-1571 (2d Cir. Nov. 1, 2001) [hereinafter 2d Cir. *Mohamed* Docket Sheet] (appeal by Mohamed); Docket Sheet, United States v. Odeh, No. 01-1553 (2d Cir. Oct. 24, 2001) (appeal by Odeh); Docket Sheet, United States v. El Hage, No. 01-1550 (2d Cir. Oct. 25, 2001) (appeal by el-Hage); Docket Sheet, United States v. Al-'Owhali, No. 01-1535 (2d Cir. Oct. 19, 2001) [hereinafter 2d Cir. *Al-'Owhali* Docket Sheet] (lead case, appeal by al-'Owhali); *see* Weiser, *Jury Torn*, *supra* note 263.

282. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; 2d Cir. *Mohamed* Docket Sheet, *supra* note 281 (noting a January 21, 2004, order that the appeal was withdrawn with prejudice); *see* Benjamin Weiser, *3 Seek Retrial in Bombing of Embassies*, N.Y. Times, Jan. 23, 2004, at B4.

283. Weiser, *Jury Torn*, *supra* note 263 (reporting that one juror could not be found and two jurors declined interviews).

ternet, and some jurors were aware that the defendants were shackled under the defense table.[284] Judge Duffy determined that the article entitled el-Hage to neither a new trial nor an evidentiary hearing.[285]

On November 24, 2008, the court of appeals affirmed the convictions of Odeh, al-'Owhali, and el-Hage.[286]

A Guantánamo Bay Defendant

Nearly 11 years after the embassy bombings, Ghailani, the ninth defendant in the third superseding indictment filed on December 16, 1998, was transferred from the detention camp at Guantánamo Bay, Cuba, to the Southern District of New York.[287] Ghailani's alleged role was to obtain explosives and transport them to Dar es Salaam.[288]

Ghailani grew up in Zanzibar, and after the embassy bombings he reportedly became a cook for Osama Bin Laden.[289] "He was arrested [in August 2004] after a 14-hour gun battle with the Pakistan authorities, in which he received a shrapnel wound."[290] He was held in CIA custody until his transfer to Guantánamo Bay in 2006.[291]

On June 15, 2009, the case was transferred to Judge Lewis A. Kaplan.[292] Judge Kaplan determined that the interval between Ghailani's indictment and his

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284. *Id.*; *see* United States v. Bin Laden, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); Weiser, *supra* note 282; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1.

285. *Bin Laden*, No. 1:98-cr-1023, 2005 WL 287404.

286. *In re Terrorist Bombings*, 552 F.3d at 102, 108, 156; *see* Benjamin Weiser, *Warrantless Searches of Americans Are Legal Overseas, Court Panel Rules*, N.Y. Times, Nov. 25, 2008, at A19.

Al-'Owhali obtained a remand to the district court for proceedings on the effect of new evidence on the validity of his confession. 2d Cir. *Al-'Owhali* Docket Sheet, *supra* note 281 (noting a remand on April 30, 2009). On February 16, 2010, Judge Duffy denied al-'Owhali relief. Opinion, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Feb. 16, 2010), *aff'd*, *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 407 F. App'x. 548 (2d Cir. 2011).

Al-'Owhali and Odeh's petitions for writs of certiorari were denied. Odeh v. United States, 556 U.S. 1283 (2009).

287. United States v. Ghailani, 751 F. Supp. 2d 515, 518, 521, 529 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 508, 509–10 (S.D.N.Y. 2010); United States v. Ghailani, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); *see* Peter Finn, *Guantanamo Bay Detainee Brought to U.S. for Trial*, Wash. Post, June 10, 2009, at A1; Carol Rosenberg, *First Guantánamo Detainee Moved to U.S., Pleads Not Guilty*, Miami Herald, June 10, 2009, at 3A; Benjamin Weiser, *In U.S. Court, Guantánamo Detainee Pleads Not Guilty to Embassy Bombing Charges*, N.Y. Times, June 10, 2009, at A24.

288. United States v. Ghailani, 743 F. Supp. 2d 261, 265 (S.D.N.Y. 2010); United States v. Ghailani, 743 F. Supp. 2d 242, 247 (S.D.N.Y. 2010).

289. *See* Benjamin Weiser, *Conspirator's Path from Poverty as a Boy in Zanzibar to Bin Laden's Side*, N.Y. Times, Jan. 24, 2011, at A19.

290. *Id.*; *see* Jess Bravin, The Terror Courts 363 (2013).

291. *See* Bravin, *supra* note 290, at 363.

292. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

presentation to the court for prosecution did not violate a Sixth Amendment right to a speedy trial.[293] Although the time since his transfer from CIA to military custody implicated his speedy trial right,[294] he was not substantially prejudiced by the delay.[295]

Judge Kaplan also rejected Ghailani's argument that the indictment should be dismissed because of his alleged torture by the CIA while in its custody, because if Ghailani's allegation is true then "the proper remedy is money damages or criminal prosecution of the offending officers."[296]

Jury selection began on September 22.[297] Judge Kaplan used a jury questionnaire,[298] but he did not want the questionnaire to deprive the court of the benefits of oral voir dire:

> While the Court recognizes that eliciting pedigree information about prospective jurors by written questionnaire would be more efficient [than] doing so by oral *voir dire*, there is much to be said also for doing it orally. Affording an opportunity for prospective jurors to speak orally in the presence of the parties about familiar matters such as their backgrounds, education, employment and families may help make them sufficiently comfortable to be more responsive with respect to more sensitive matters. In any case, it gives the parties more of an impression of the individuals than would questionnaire answers alone.[299]

Voir dire began on September 29.[300] Judge Kaplan appointed counsel to represent one of the jurors, whose employer apparently illegally refused to excuse the juror's absence from work.[301]

The trial began on October 12.[302] Judge Kaplan reserved some seats in the courtroom for the news media.[303] On November 17, the jury found Ghailani guilty

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Tim Reagan interviewed Judge Kaplan for this report in the judge's chambers on November 5, 2009.

293. United States v. Ghailani, 751 F. Supp. 2d 515 (S.D.N.Y. 2010); *see* Peter Finn, *Delay in Prosecution Didn't Violate Detainee's Rights, Judge Rules*, N.Y. Times, July 14, 2010, at A6; Benjamin Weiser, *Judge Refuses to Dismiss Terror Suspect's Case*, N.Y. Times, July 14, 2010, at A19.

294. *Ghailani*, 751 F. Supp. 2d at 533–40.

295. *Id.* at 520, 531–34.

296. United States v. Ghailani, 751 F. Supp. 2d 502, 506 (S.D.N.Y. 2010); *see* Benjamin Weiser, *No Dismissal in Terror Case on Claim of Torture in Jail*, N.Y. Times, May 11, 2010, at A18.

297. *See* Lewis A Kaplan, United States v. Ghailani: Preliminary Remarks to Venire (Sept. 23, 2010) [hereinafter *Ghailani* Preliminary Remarks] (derived from the morning session of the second day of potential jurors reporting for service).

298. Lewis A. Kaplan, United States v. Ghailani: Jury Questionnaire (Sept. 22, 2010); *Ghailani* Preliminary Remarks, *supra* note 297; *see* United States v. Ghailani, 743 F. Supp. 2d 242, 247 n.1 (S.D.N.Y. 2010); *see also* Benjamin Weiser & Colin Moynihan, *Glimpse at Jurors in Ex-Detainee's Trial*, N.Y. Times, Oct. 14, 2010, at A33 ("The 11-page questionnaire, filled out by more than 1,000 potential jurors, included more than 30 questions.").

299. Order, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Aug. 20, 2010).

300. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

301. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 14, 2010).

on one count of conspiracy to destroy buildings but not guilty of the remaining 281 counts, including separate counts of murder for each of the persons killed at the two embassies.[304] Judge Kaplan sentenced Ghailani to life in prison.[305] An appeal was heard on May 8, 2013.[306]

A Challenge to Prison Security Measures

On December 17, 2007, K.K. Mohamed submitted to the U.S. District Court for the District of Colorado a pro se complaint alleging improper conditions of confinement.[307] Magistrate Judge Boyd N. Boland reviewed the complaint and, on December 27, ordered it filed.[308] On September 29, 2011, District Judge Marcia S. Krieger dismissed most claims, but she ruled that the complaint, as amended, alleged a potentially valid violation of the First Amendment.[309] Pursuant to the prison's Special Administrative Measures as applied to Mohamed, (1) the prisoner was permitted communication and visitation only with immediate family members and not with nieces, nephews, and in-laws; and (2) his mail could be held for surveillance for up to two weeks if written in English and up to two months if written in other languages.[310]

Judge Krieger agreed to appoint pro bono counsel, if a willing attorney could be found.[311] According to Mohamed, an attorney attempted to send him mail in October 2011, but the mail did not reach Mohamed because of security measures.[312] In time, an attorney agreed to represent Mohamed, and the court initially set a discovery deadline of January 11, 2013.[313] A protective order forbids

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302. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Benjamin Weiser, *Trial of Man Held at Guantánamo Opens, but Guantánamo Isn't Mentioned*, N.Y. Times, Oct. 13, 2010, at A19.

303. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 22, 2010).

304. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Peter Finn, *Terror Detainee Largely Acquitted*, Wash. Post, Nov. 18, 2010, at A1; Carol Rosenberg, *Guantánamo Detainee's Verdict a Test for War Court vs. Civilian Trial*, Miami Herald, Nov. 18, 2010, at 1A; Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. Times, Nov. 18, 2010, at A1.

305. *Ghailani* Judgment, *supra* note 244; *see* Finn, *supra* note 244; Weiser, *supra* note 244.

Ghailani is serving his sentence with the other embassy bombing defendants at the Super Max prison in Florence, Colorado. http://www.bop.gov (reg. no. 02476-748); *see* Benjamin Weiser, *Heightened Security for a Former Detainee*, N.Y. Times, June 10, 2011, at A23.

306. Docket Sheet, United States v. Ghailani, No. 11-320 (2d Cir. Jan. 28, 2011) (noting that the case was heard by Circuit Judges Pierre N. Leval, Jose A. Cabranes, and Barrington D. Parker, Jr.).

307. Complaint, Mohammed v. Gonzales, No. 1:07-cv-2697 (D. Colo. Dec. 27, 2007); *see* John Schwartz & Benjamin Weiser, *Judge Allows Trial on Terrorist's Challenge to Prison Rules*, N.Y. Times, Oct. 4, 2011, at A23.

308. Order, Mohammed v. Mukasey, No. 1:07-cv-2697 (D. Colo. Dec. 27, 2007).

309. Opinion at 15–22, 32, Mohammed v. Holder, *id.* (Sept. 29, 2011) [hereinafter *Mohammed* Opinion], *available at* 2011 WL 4501959; *see* Schwartz & Weiser, *supra* note 307.

310. *Mohammed* Opinion, *supra* note 309, at 15, 17; Schwartz & Weiser, *supra* note 307.

311. *Mohammed* Opinion, *supra* note 309, at 32.

312. Motion to Compel at 2, *Mohammed*, No. 1:07-cv-2697 (D. Colo. Nov. 15, 2011).

313. Order, *id.* (July 27, 2012).

the attorney to use any discovery for any purpose other than litigating the current case.[314]

Extradited Defendants

Judge Kaplan will preside over the trial of Fawwaz and Bary, the defendants extradited from Britain in 2012.[315] On June 20, 2013, Judge Kaplan denied Fawwaz's motion to be tried separately.[316]

Osama Bin Laden's Son-in-Law

An indictment against Sulaiman Abu Ghayth, one of Osama Bin Laden's sons-in-law, was filed in the case against embassy bombers on March 1, 2013, for conspiracy to kill Americans based on the defendant's support of Bin Laden in 2001.[317] Judge Kaplan set Abu Ghayth's trial for January 7, 2014.[318]

In 2002, Abu Ghayth was smuggled from Afghanistan into Iran following the 2001 U.S. invasion of Afghanistan.[319] He was kept under house arrest in Iran until his expulsion in 2012.[320] Turkey deported him to Kuwait in February 2013, but U.S. authorities arrested him during a layover in Jordan on February 28.[321]

Challenge: Attorney–Client Contacts

In detention, the original defendants were cut off from virtually all communications.[322] They were permitted to meet with their attorneys, but the attorneys were prohibited from sharing anything said in the meetings with investigators or experts, which seriously hampered the preparation of a defense.[323] In response to

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314. Protective Order, *id.* (Aug. 30, 2012).

315. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

316. Opinion, United States v. Fawwaz, No. 1:98-cr-1023-15 (S.D.N.Y. June 20, 2013), *available at* 2013 WL 3111043.

317. Abu Ghayth Indictment, United States v. Abu Ghayth, No. 1:98-cr-1023-26 (S.D.N.Y. Mar. 7, 2013); *see* Mark Mazzetti & William K. Rashbaum, *Qaeda Figure Is Held to Face New York Trial*, N.Y. Times, Mar. 8, 2013, at A1; Greg Miller & Peter Finn, *Terror Suspect Brought to U.S.*, Wash. Post, Mar. 8, 2013, at A1.

318. Order, *Abu Ghayth*, No. 1:98-cr-1023-26 (S.D.N.Y. Apr. 9, 2013).

319. *See* Abu Ghayth Indictment, *supra* note 317, at 2; Greg Miller & Julie Tate, *Bin Laden Son-in-Law Pleads Not Guilty to Conspiracy Charge*, Wash. Post, Mar. 9, 2013, at A3.

320. *See* Mazzetti & Rashbaum, *supra* note 317; Miller & Tate, *supra* note 319; Joby Warrick, *New Tensions Test Fragile Ties Between Iran, Al-Qaeda*, Wash. Post, Mar. 13, 2013, at A1.

321. *See* Mazzetti & Rashbaum, *supra* note 317 ("Jordan's spy service, the General Intelligence Directorate, is one of the Central Intelligence Agency's closest partners in the Middle East."); Miller & Tate, *supra* note 319; Shane, *supra* note 203; Warrick, *supra* note 320.

322. United States v. Bin Laden, 92 F. Supp. 2d 225, 231–32 (S.D.N.Y. 2000) (describing "special conditions of confinement"); *see* Benjamin Weiser, *Bombing Suspects Are Isolated in New York Jail*, N.Y. Times, Oct. 27, 1998, at A8 [hereinafter *Suspects Isolated*]; Benjamin Weiser, *Judge to Hear Complaints on Jail Rules*, N.Y. Times, Nov. 11, 1998, at B3 [hereinafter *Judge to Hear Complaints*]; Benjamin Weiser, *Lawyers for Bombing Suspects Say Jail Rules Violate Rights*, N.Y. Times, Nov. 10, 1998, at B4 [hereinafter *Rules Violate Rights*].

323. *See* Weiser, *Suspects Isolated*, *supra* note 322; Weiser, *Judge to Hear Complaints*, *supra* note 322; Weiser, *Rules Violate Rights*, *supra* note 322.

complaints by defense attorneys, Judge Sand visited the jail and approved the detention conditions, except that he ordered that the defendants be permitted to call their families three times a month instead of once.[324]

Attorney–client communications were also impaired by the fact that defense counsel could not discuss classified evidence with their clients because the defendants did not have security clearances.[325] The court of appeals affirmed Judge Sand's ruling that failure to share classified information with the defendants, as opposed to their cleared counsel, did not violate the Constitution.[326]

Relations between defendants and assigned counsel are often difficult; they were particularly so in this case: "Lawyers don't often represent somebody who hates them, who, all things being considered, would just as soon kill them. How you maintain an attorney–client relationship under those circumstances is very difficult."[327]

Although circumstances suggested that Salim meant to do his attorneys harm, Ghailani's confidence in his military commission attorneys was so great that he asked Judge Kaplan to order the Secretary of Defense to continue their representation of him in New York.[328] Although the Secretary was not a party to the case, Judge Kaplan agreed to consider the motion.[329] Judge Kaplan ruled that although an indigent defendant has a constitutional right to effective assistance of counsel, the indigent defendant does not have a constitutional right to select counsel.[330]

Ghailani's dissatisfaction with one of his appointed New York attorneys resulted in the court's dismissing the attorney from the case.[331]

Upon his indictment, the court assigned the federal defender to represent Abu Ghayth, but Abu Ghayth retained, with funds provided by his brother in Kuwait, a lawyer who himself was under federal indictment for tax improprieties.[332] After a

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324. United States v. El-Hage, 213 F.3d 74, 77 (2d Cir. 2000) (affirming Judge Sand's approving the conditions of confinement); *see* Benjamin Weiser, *Judge Won't Ease Jail Restrictions on Men Held in Bombings of U.S. Embassies*, N.Y. Times, Nov. 19, 1998, at B9.

325. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 116–23 (2d Cir. 2008); United States v. Bin Laden, No. 1:98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001); Leonard B. Sand, United States v. El Hage: Protective Order ¶ 15 (July 29, 1999) [hereinafter First *El Hage* Protective Order]; *see* Philip J. Gross, Guide to High Security & Terrorism Cases 12 (2006) (Southern District of New York report on challenges to the district's judges in terrorism cases).

326. *In re Terrorist Bombings*, 552 F.3d at 115–30, 156; *Bin Laden*, No. 1:98-cr-1023, 2001 WL 66393; *see* Weiser, *supra* note 286.

327. *Trying Cases*, *supra* note 205, at 13 (remarks by Judge Sand).

328. Motion, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Oct. 7, 2009).

329. United States v. Ghailani, 686 F. Supp. 2d 279, 285–97 (S.D.N.Y. 2009); *id.* at 297 ("Ghailani asks this Court to decide only the constitutional effect of the Secretary's intended action, not the propriety or wisdom of his decision to act in that manner.").

330. *Ghailani*, 686 F. Supp. 2d at 298–300; *see* Benjamin Weiser, *Terrorism Suspect Can't Keep His Military Lawyers, Judge Rules*, N.Y. Times, Nov. 19, 2009, at A25.

331. United States v. Ghailani, 751 F. Supp. 2d 515, 537 n.126 (S.D.N.Y. 2010).

332. *See* Benjamin Weiser, *Bin Laden's Son-in-Law Seeks a New Lawyer, but There's a Snag*, N.Y. Times, May 21, 2013, at A18 (also describing the attorney as "an outspoken former Legal Aid Society lawyer with a gray ponytail, who has also handled many terrorism cases over the

colloquy ensuring that Abu Ghayth knowingly accepted the risks of having an attorney who might seek favor for himself with the prosecution, Judge Kaplan approved the substitution.[333]

Challenge: Interpreters

For the trial before Judge Sand, both Arabic and Kiswahili interpreters were required.[334]

Challenge: Mental Health During Detention

After several months of restrictive confinement, el-Hage angrily criticized Judge Sand during a hearing for not reading a letter el-Hage had prepared that proclaimed his innocence and contended that the United States could have prevented the embassy bombings.[335] Deputy marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge toward the judge.[336] Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.[337] The government agreed to give el-Hage a cell mate, but the court ruled that his conditions of confinement were largely proper, and el-Hage complained that the cell mate made his cell too crowded.[338]

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage's possessions and privileges.[339] According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.[340] However, two court-appointed psychiatrists and a court-appointed psychologist determined that el-Hage was faking mental illness.[341] Judge Sand decided that the

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years"); *see also* United States v. Cohen, No. 5:12-cr-316 (N.D.N.Y. June 14, 2012); Letter, United States v. Abu Ghayth, No. 1:98-cr-1023-26 (S.D.N.Y. May 24, 2013).

The attorney also represented Mousa Abu Marzook. *See* Weiser, *supra* note 332; *see also infra*, "Prosecution of a Charity"; *infra*, "Chicago."

333. *See* Benjamin Weiser, *Defendant in Terror Case Gets Lawyer of His Choice*, N.Y. Times, May 29, 2013, at A20.

334. Interview with Hon. Leonard B. Sand, June 25, 2007.

335. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 149 (2d Cir. 2008); *see* Benjamin Weiser, *Suspect in Embassy Bombings Avows Innocence in Letters to Relatives*, N.Y. Times, June 25, 1999, at B5 [hereinafter *Suspect Avows Innocence*]; Benjamin Weiser, *Terrorism Suspect Charges Toward Judge, but Is Tackled*, N.Y. Times, June 23, 1999, at B6 [hereinafter *Suspect Charges*].

336. *In re Terrorist Bombings*, 552 F.3d at 149–50; *Trying Cases*, *supra* note 205, at 13; *see* Weiser, *Suspect Avows Innocence*, *supra* note 335; Weiser, *Suspect Charges*, *supra* note 335.

337. *See* Benjamin Weiser, *Report Says Isolation Takes Toll on Terrorism Suspect*, N.Y. Times, Dec. 15, 1999, at B20.

338. *See* Benjamin Weiser, *Judge Upholds Strict Jail Conditions for Suspect in Bin Laden Case*, N.Y. Times, Jan. 11, 2000, at B7; Weiser, *supra* note 337.

339. *See* Lowell Bergman & Benjamin Weiser, *Suspect in Terror Case Is Mistreated, Wife Says*, N.Y. Times, Nov. 22, 2000, at B4.

340. *See id.*

341. *See* Weiser, *Faking Illness*, *supra* note 199.

expert opinions were well founded and that el-Hage was competent to stand trial.[342]

During Ghailani's pretrial phase, he unsuccessfully moved for proscriptions on the strip and visual body cavity searches performed every time he left the detention center for a court appearance.[343] Judge Kaplan found that such searches apply without exception to all inmates at the Metropolitan Correctional Center in Manhattan.[344] Ghailani claimed that he could tolerate these invasions of his dignity until the ninth occasion of the search in which he was required to not only display his bare buttocks but "'open himself' to allow a visual rectal cavity inspection."[345] Between the time of search to which he objected and the time of Judge Kaplan's ruling, Ghailani agreed to come to court to attend a proceeding only once.[346] A psychologist testified that the stress of the searches was exacerbated by post-traumatic stress disorder resulting from enhanced interrogation techniques during his CIA custody, the details of which are classified.[347]

Judge Kaplan ruled that the government had made a credible showing that there were no ready alternatives to the search that would provide the same level of security.[348] If stress of the searches triggered a response that made him unable to assist in his defense, then his prosecution would be suspended until he recovered.[349]

A week later, by letter apparently prepared by his attorney, Ghailani waived the right to attend a pretrial conference held that day.[350] A week after that, Judge Kaplan issued an order finding that Ghailani has never suffered from post-traumatic stress disorder and his refusal to attend proceedings was motivated in part by an effort to frustrate the prosecution.[351] Ghailani was back in court on the eve of trial for a three-day hearing on his successful motion to suppress a key witness,[352] and he was in court for his trial.[353]

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342. *See* Benjamin Weiser, *Judge Rules Defendant's Amnesia Is Feigned in Terror Case*, N.Y. Times, Dec. 16, 2000, at B2.

343. United States v. Ghailani, 751 F. Supp. 2d 508 (S.D.N.Y. 2010).

344. *Id.* at 510.

345. *Id.* at 510–11.

346. *Id.* at 511.

347. *Id.* & n.11.

348. *Id.* at 514.

349. *Id.* at 514–15.

350. Letter, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. June 24, 2010).

351. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 1, 2010).

352. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

353. *See* Benjamin Weiser, *Inside Qaeda Terror Defense: Evolving Strategy and Emotional Pendulum*, N.Y. Times, Jan. 18, 2011, at A18 ("The lawyers pleaded with him to come to court, and ultimately, Mr. Ghailani agreed to attend the trial after [the defense psychologist] helped reduce his anxiety.").

Challenge: Jury Security

Judge Sand decided to close jury selection and use an anonymous jury, but not sequester the jury.[354]

> On Monday, Feb. 5, 2001, the first day of the trial, the 12 jurors and six alternates met at a secret location in Midtown Manhattan and were driven to court by armed federal marshals. Safety concerns were paramount for the jurors, who were not sequestered. The jury room was guarded by marshals and was checked each morning by bomb-sniffing dogs. But there was always the unexpected. One day, jurors said, they were startled when someone climbed through the window. It turned out to be a workman looking to use the bathroom.[355]

For the trial against Ghailani, Judge Kaplan granted the government's motion for an anonymous jury.[356] Deputy marshals shuttled the jurors to and from the courthouse and provided them with breakfast, lunch, and refreshments.[357]

Challenge: Court Security

In the first trial, persons entering the courtroom had to pass through a metal detector and sign a log book stating their purpose in attending the trial.[358]

At a law school presentation, Judge Sand recalled a critical security event:

> I held a conference before the jury was selected in my regular courtroom, which is a fairly standard size courtroom. The four defendants were seated in the jury box with a marshal on each side. The issue was that one of the defendants, El-Hage, had written a letter that he wanted to send to the media. The government objected, because they thought, "How do we know whether there are codes in that or other things that would not be apparent to us?" And so we were discussing the sending of a paraphrase—not the exact language, but the substance.
>
> While this discussion is going on, El-Hage, seated between two marshals in the jury box, jumps out of the jury box and races toward the bench. Now, I don't know why he was racing to the bench. I have a suspicion that he was not coming to shake my hand and thank me for the careful attention I was giving to his case. The courtroom was scattered with security officers. You know, you sort of look around and you see them, and they sometimes don't look so alert to you. Instantly, there was a security officer standing in front of me, shielding me with his body, which I appreciated. There had been a sketch artist who was just in the line of fire between El-Hage and myself. She immediately threw her easel over and ducked. Of course, one of the security officers tackled El-Hage just as he was coming up to the bench.[359]

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354. *See* Feuer, *supra* note 257; Gross, *supra* note 325, at 21–22; Weiser, *supra* note 256; Weiser, *Jury Torn*, *supra* note 263; Benjamin Weiser, *Life-and-Death Questions in Embassy Bombings Case*, N.Y. Times, June 3, 2001, at 137 (reporting that "even Judge Leonard B. Sand does not know their names").

355. Weiser, *Jury Torn*, *supra* note 263.

356. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. June 16, 2010); *see Ghailani* Preliminary Remarks, *supra* note 297, at 2; *see also* Weiser & Moynihan, *supra* note 298 ("the defense lawyers, prosecutors and even the judge have not been told their names").

357. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 27, 2010); *Ghailani* Preliminary Remarks, *supra* note 297, at 2.

358. *See* Hirsch, *supra* note 191, at 71.

359. *Trying Cases*, *supra* note 205, at 13 (remarks by Judge Sand).

Because of el-Hage's actions, the defendants were shackled to the floor under the table.[360] To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out.[361] And, for this trial, there was no "all rise" when the judge entered.[362] Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.[363]

Challenge: Witness Security

The informant al-Fadl was formerly Osama Bin Laden's payroll manager, whom the government had identified prior to his testimony, even to defense counsel, only as CS-1, which stood for "confidential source one."[364] He had been under U.S. protection in an undisclosed location since 1998 after pleading guilty to a conspiracy charge in a sealed proceeding in the Southern District of New York.[365] In 1996, al-Fadl presented himself at the American embassy in Eritrea as an asset in the fight against Al-Qaeda after he was caught embezzling nearly $110,000 from Bin Laden's organization.[366]

Al-Fadl's identity was not revealed to defense counsel until four days before his scheduled testimony, and a protective order forbade counsel from revealing his identity to their clients until the day before al-Fadl appeared in court.[367] Judge Sand forbade courtroom artists from sketching al-Fadl's face.[368]

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360. *Trying Cases*, *supra* note 205, at 14 (remarks by Judge Sand); Interview with Hon. Leonard B. Sand, June 25, 2007; *see* Gross, *supra* note 325, at 15 & n.54; Hirsch, *supra* note 191, at 78.

361. *Trying Cases*, *supra* note 205, at 14 (remarks by Judge Sand); Interview with Hon. Leonard B. Sand, June 25, 2007; *see* Hirsch, *supra* note 191, at 78.

362. United States v. Bin Laden, No. 1:98-cr-1023, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005); *Trying Cases*, *supra* note 205, at 14 (remarks by Judge Sand); *see* Hirsch, *supra* note 191, at 78.

363. Interview with Hon. Leonard B. Sand, June 25, 2007.

364. *See* Hirsch, *supra* note 191, at 103; Benjamin Weiser, *Ex-Aide to Bin Laden Describes Terror Campaign Aimed at U.S.*, N.Y. Times, Feb. 7, 2001, at A1 [hereinafter *Ex-Aide*]; Benjamin Weiser, *Secret Witness Set to Testify in Terror Trial*, N.Y. Times, Feb. 5, 2001, at B1; Weiser, *Qaeda Informer*, *supra* note 273.

Al-Fadl is related by marriage to al-Nalfi. *See* Weiser, *Qaeda Member*, *supra* note 235; Weiser, *Held Secretly*, *supra* note 235; Weiser, *Qaeda Informer*, *supra* note 273.

365. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 142 (2d Cir. 2008); United States v. Bin Laden, 397 F. Supp. 2d 465, 474 (S.D.N.Y. 2005); *see* Docket Sheet, United States v. Al-Fadl, No. 1:97-cr-673 (S.D.N.Y. July 10, 1997) (unsealed Apr. 2, 2001); *see also* Weiser, *Ex-Aide*, *supra* note 364; Weiser, *Qaeda Informer*, *supra* note 273.

366. The 9/11 Commission Report 109 (2004); *Bin Laden*, 397 F. Supp. 2d at 474; *see* Mark Bowden, The Finish 90 (2012); Bravin, *supra* note 290, at 202 (describing al-Fadl as "an al Qaeda turncoat who had become the US government's star informer"); Lance, *supra* note 231, at 260–65 (describing al-Fadl as a Zelig of terror and reporting that the embezzlement resulted in part from jealousy over el-Hage's higher compensation from Al-Qaeda); Soufan, *supra* note 191, at 66–69, 71; Weiser, *Qaeda Informer*, *supra* note 273.

367. *See* Hirsch, *supra* note 191, at 109.

368. *See id.*

Judge Kaplan also forbade courtroom artists from sketching a witness's face.[369] Ghailani moved to suppress evidence from a witness whom Tanzanian authorities arrested in 2006, the FBI questioned, and who was released after the witness agreed to testify against Ghailani.[370] Ghailani argued that finding the witness resulted from coercion during extremely harsh interrogation while Ghailani was in the CIA's Rendition, Detention, and Interrogation Program.[371] Judge Kaplan ordered an evidentiary hearing on the matter,[372] at which the witness testified.[373] The witness's identity was initially redacted from Judge Kaplan's opinion ordering the hearing,[374] but his identity was revealed at the hearing[375] and the opinion was reposted three weeks later without the witness's name redacted.[376] Judge Kaplan suppressed the witness,[377] and the government elected not to delay the trial by appealing the suppression order.[378]

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client's religious beliefs.[379] As Judge Sand reported,

> An attorney who was very diligently representing his client was talking to his client. His client explained that if he died as a martyr he would go immediately to paradise and have thirteen virgin brides. The lawyer said, "Can you imagine having thirteen fathers-in-law?" The next morning there is on my desk a motion to replace the attorney. The defendant said, "How can I be represented by a lawyer who mocks my religion?" I granted the application.[380]

Judge Sand carefully timed breaks in the trial to permit prayer at the appropriate times by the Muslim defendants, whose entry to and exit from the courtroom was made cumbersome by their hidden shackles.[381]

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369. *See* Benjamin Weiser, *Witness in 1998 Bombings Is Identified at a Hearing*, N.Y. Times, Sept. 20, 2010, at A26.

370. United States v. Ghailani, 743 F. Supp. 2d 242, 247–48, 259–60 (S.D.N.Y. 2010); *see* Benjamin Weiser, *Dispute Over Witness in Embassy Bombing Case*, N.Y. Times, Sept. 3, 2010, at A16 ("brief references in declassified papers say he is a Tanzanian named Hussein who sold Mr. Ghailani hundreds of pounds of TNT that was later used to blow up the United States Embassy in Tanzania").

371. *Ghailani*, 743 F. Supp. 2d at 248.

372. *Id.* at 261; *see* Weiser, *supra* note 370.

373. United States v. Ghailani, 743 F. Supp. 2d 261, 274 (S.D.N.Y. 2010); *see* Weiser, *supra* note 369.

374. *Ghailani*, 743 F. Supp. 2d 242.

375. *See* Weiser, *supra* note 369.

376. Opinion, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 7, 2010).

377. *Ghailani*, 743 F. Supp. 2d 261; *see* Peter Finn, *Ruling in '98 East Africa Embassy Bombings Is Setback for U.S.*, Wash. Post, Oct. 7, 2010, at A4; Benjamin Weiser, *Judge Prohibits Key U.S. Witness in Terror Trial*, N.Y. Times, Oct. 7, 2010, at A1.

378. *See* Benjamin Weiser, *Prosecutors Will Not Appeal Ruling Barring Key Witness in Trial of Former Detainee*, N.Y. Times, Oct. 11, 2010, at A19.

379. Interview with Hon. Leonard B. Sand, June 25, 2007.

380. *Trying Cases*, *supra* note 205, at 13 (remarks by Judge Sand).

381. *See* Hirsch, *supra* note 191, at 78.

Challenge: Classified Evidence

In order to have access to classified evidence, defense counsel had to have security clearances.[382] Protective orders specified defense attorneys' responsibilities for protecting government secrets.[383]

Initially the attorneys in the original trial objected to their adversaries' invading their privacy with background checks, but the government assured the attorneys and the court that background information would not be shared with prosecutors in the case.[384] The court ruled that a security clearance requirement did not violate the defendants' Sixth Amendment right to counsel, and the court of appeals affirmed.[385]

For the prosecution of Abu Ghayth, the defendant's retained counsel was under federal indictment for tax improprieties, but co-counsel was eligible for a security clearance.[386]

Judge Sand resolved issues concerning discovery of classified information by conducting ex parte discussions with defense counsel concerning defense strategy and ex parte discussions with prosecutors concerning potentially relevant classified information.[387] Sometimes Judge Sand was able to mediate a substitution for classified information:

> The District Court held five *in camera* CIPA hearings in February 2001. Portions of the February 6, 2001 hearing were conducted *ex parte*; the others were attended by counsel for both sides. El-Hage's defense attorneys, in the presence of the government, described in detail the classified material that they anticipated disclosing. The District Court then excused El-Hage's counsel in order to inquire into the government's reasons for refusing to declassify these items. After the government completed its presentation and was excused, the District Court recalled El-Hage's attorneys, inquiring, in the absence of government counsel, into the use that El-Hage's counsel planned to make of the classified information at issue. Having established that El-Hage's attorneys wished to use the classified material for cross-examination of a government witness, the District Court suggested that the parties could work together to produce a paraphrased version of the relevant portions. The District Court then recalled the government in order to discuss the merits of this proposal with counsel on both sides.[388]

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382. First *El Hage* Protective Order, *supra* note 325, ¶ 5; Interview with Hon. Lewis Kaplan, Nov. 5, 2009; *see* Gross, *supra* note 325, at 13; Benjamin Weiser, *Bomb Suspects' Lawyers to Need Security Checks*, N.Y. Times, July 1, 1999, at B5.

383. Abu Ghayth Protective Order, United States v. El-Hage, No. 1:98-cr-1023 (S.D.N.Y. Apr. 11, 2013); Fawwaz and Bary Protective Order, *id.* (Jan. 11, 2013); Ghailani Classified Protective Order, *id.* (July 21, 2009); Ghailani Unclassified Protective Order, *id.* (July 14, 2009); First *El Hage* Protective Order, *supra* note 325.

384. *See* Weiser, *supra* note 382.

385. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 119–28 (2d Cir. 2008); United States v. Bin Laden, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); *see* Gross, *supra* note 325, at 13.

386. Endorsed Letter, United States v. Abu Ghayth, No. 1:98-cr-1023-26 (S.D.N.Y. May 28, 2013).

387. Interview with Hon. Leonard B. Sand, June 25, 2007.

388. *In re Terrorist Bombings*, 552 F.3d at 118–19.

Sometimes Judge Sand was able to determine that classified information was not as relevant as defense counsel thought it might be:

> After giving El-Hage's counsel the opportunity to set forth their theory on the relevance of this information, the District Court explained that—based upon its review of an *ex parte* submission made by the government—it could represent with confidence that the classified information did not have the significance claimed by counsel.[389]

Judge Sand held, and the court of appeals agreed, that the Fourth Amendment's warrant requirement does not apply to extraterritorial searches by the U.S. government, but the Fourth Amendment's reasonableness requirement does apply to extraterritorial searches of U.S. citizens.[390] In 1996 and 1997, as part of an investigation of Al-Qaeda, telephone lines used by el-Hage in Kenya were bugged, and his Nairobi home was searched.[391] To resolve el-Hage's suppression motion, Judge Sand determined the reasonableness of the searches by ex parte examination of classified evidence instead of hearing evidence in an adversary proceeding.[392] The court of appeals determined that Judge Sand's method was appropriate.[393]

Judge Kaplan reviewed classified information on Ghailani to determine what had to be produced in discovery to cleared defense counsel.[394] Defense counsel challenged the adequacy of a chart summarizing the nature of 897 classified "CIA reports that the government claims are not themselves discoverable but that contain statements made by the defendant in response to custodial interrogation."[395] After reviewing 895 of the documents, Judge Kaplan determined that cleared defense counsel were entitled to an augmented chart "indicating, whenever the underlying documents so indicate, the duration of the interview in which a statement was made and whether that interview took place in the defendant's cell or elsewhere."[396] Judge Kaplan determined that the defense was entitled to additional information about two of the documents—"a summary of each statement referencing the Embassy Bombings sufficient to indicate the substance of the statement, the time when it was made, and to whom"—and Judge Kaplan reserved judgment on two documents the government had not yet shown him.[397]

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389. *Id.* at 119.

390. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157, 159, 161–64, 167–72, 176–77 (2d Cir. 2008); United States v. Bin Laden, 264 F. Supp. 2d 264, 270–77 (S.D.N.Y. 2000); *see* Weiser, *supra* note 286.

391. *In re Terrorist Bombings*, 552 F.3d at 159–60; *Bin Laden*, 264 F. Supp. 2d at 269.

In addition, el-Hage's home in Arlington, Texas, was bugged in August and September of 1998 pursuant to the Foreign Intelligence Surveillance Act, but the government did not use any information gathered from this search in el-Hage's prosecution. *In re Terrorist Bombings*, 552 F.3d at 160.

392. *In re Terrorist Bombings*, 552 F.3d at 159, 165–67; *Bin Laden*, 264 F. Supp. 2d at 286–88.

393. *In re Terrorist Bombings*, 552 F.3d at 159, 167, 177.

394. Order, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. Dec. 7, 2009) [hereinafter *Ghailani* Discovery Order].

395. *Id.* at 1.

396. *Id.* at 2.

397. *Id.*

Judge Sand's and Judge Kaplan's law clerks had security clearances.[398] It is Circuit Judge Cabranes's practice to ask his law clerks to seek security clearances,[399] but Circuit Judge Newman has never had a cleared clerk, unless the clerk came with a security clearance as a result of previous employment.[400] It is especially difficult for appellate judges to wait until they have a relevant case to ask their clerks to seek security clearances, because appellate judges are typically assigned to cases only a few weeks in advance of oral argument.[401]

Challenge: Classified Arguments

By the time of Ghailani's prosecution, electronic filing had become widespread in federal courts. Judge Kaplan issued a two-page order explaining how filings containing classified information would be electronically docketed: an unredacted copy of the filing would be filed with the classified information security officer and only a caption page would be filed electronically until a redacted copy could be filed electronically after a security review.[402]

Challenge: Classified Orders and Opinions

A discovery order by Judge Kaplan early in the Ghailani prosecution contained details about two classified documents, about which Judge Kaplan determined cleared counsel were entitled to more information.[403] The order was filed with the classified information security officer on November 24, 2009.[404] The security officer arranged for redaction by intelligence agencies: two bulleted paragraphs were redacted from the order, and then the redacted order was filed publicly on December 7.[405]

A second discovery order was filed with the classified information security officer on December 8, and a redacted version was filed publicly on February 4, 2010.[406] Judge Kaplan's opinion denying relief from strip and visual body cavity searches was filed with the classified information security officer on June 14, determined to contain no classified information, and then filed publicly three days later.[407]

On July 12, Judge Kaplan filed with the classified information security officer an opinion rejecting Ghailani's speedy trial motion, and the opinion was publicly

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398. Interview with Hon. Lewis Kaplan, Nov. 5, 2009; Interview with Hon. Leonard B. Sand, June 25, 2007.

399. Interview with Hon. José A. Cabranes, Nov. 4, 2009.

400. Interview with Hon. Jon O. Newman, Nov. 4, 2009.

401. Interview with 2d Cir. Clerk's Office Staff, Nov. 6, 2009.

402. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 27, 2009).

403. *Ghailani* Discovery Order, *supra* note 394.

404. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

405. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Jan. 7, 2010.

406. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

407. *Id.*; United States v. Ghailani, 751 F. Supp. 2d 508 (S.D.N.Y. 2010).

filed the next day with three slight redactions.[408] Also on July 12, Judge Kaplan filed with the security officer a classified supplement to his opinion discussing Ghailani's treatment while in CIA custody.[409] The supplement was docketed the next day, and a heavily redacted public version of it was filed two days after that.[410]

On August 17, Judge Kaplan ordered an evidentiary hearing on whether testimony from a government witness should be suppressed because the government learned of the witness through extraordinary interrogation methods.[411] Judge Kaplan's memorandum opinion ordering the hearing was filed with the classified information security officer on August 18.[412] On September 1, a heavily redacted version of the opinion was filed publicly.[413] Redactions include the name of the witness and appear to include details of Ghailani's capture, detention, and interrogation.[414] The witness's identity was revealed at the hearing on the admissibility of his testimony, and a substitute redacted opinion not redacting his name was filed three weeks after the hearing.[415]

On October 6, Judge Kaplan agreed to suppress the witness.[416] A redacted opinion on the matter was filed publicly approximately one week later.[417]

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided that testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of al-'Owhali's trial.[418] It was reported, "The lawyers . . . said they want[ed] to question Dr. Albright about 'her knowledge of the number of Iraqi children dying as a direct consequence of the United States enforcement of United Nations sanctions following the gulf

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408. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* United States v. Ghailani, 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

409. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Opinion, United States v. Ghailani, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010).

410. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 15, 2010).

411. United States v. Ghailani, 743 F. Supp. 2d 242, 261 (S.D.N.Y. 2010); *see* Weiser, *supra* note 370.

412. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204.

413. *Id.*

414. *Ghailani*, 743 F. Supp. 2d 242; *see* United States v. Ghailani, 743 F. Supp. 2d 261, 281 (S.D.N.Y. 2010) (noting that the witness's name was classified until approximately the time of the hearing).

415. Opinion, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Oct. 7, 2010).

416. *Ghailani*, 743 F. Supp. 2d 261.

417. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 204; *see* Benjamin Weiser, *Judge Says Witness Barred from Ex-Detainee's Trial Had Lied*, N.Y. Times, Oct. 15, 2010, at A21.

418. *See* Hirsch, *supra* note 191, at 195–96 (reporting that al-'Owhali wanted to prove that "U.S. government actions and al Qaeda actions could be viewed as similarly criminal"); *Subpoena for Albright in Bombings Trial*, N.Y. Times, Apr. 18, 2001, at B7 [hereinafter *Subpoena for Albright*].

war.'"[419] Judge Sand agreed to sign the subpoena,[420] but on the government's motion he quashed it.[421] Al-'Owhali presented at trial as a substitute for her live testimony a *60 Minutes* interview with Secretary Albright.[422] Al-'Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.[423]

419. Benjamin Weiser, *U.S. Checks Evidence Sharing in the Embassy Bombings Trial*, N.Y. Times, May 16, 2001, at B6.

420. *See Subpoena for Albright*, *supra* note 418.

421. *See* Weiser, *supra* note 419.

422. *See* Hirsch, *supra* note 191, at 196.

423. *See id.*; Benjamin Weiser, *Defense in Terror Trial Cites U.S. Sanctions Against Iraq*, N.Y. Times, June 5, 2001, at B4.

Millennium Bomber

United States v. Ressam (John C. Coughenour, W.D. Wash.) and United States v. Haouari (John F. Keenan, S.D.N.Y.)

On December 14, 1999, Ahmed Ressam was detained by customs officials suspicious of his nervousness as he tried to enter the United States by ferry from Canada into Washington with over 100 pounds of explosives in his car.[424]

Ressam was born in Algeria in 1967, and in February 1994 he moved to Canada, where he unsuccessfully applied for political asylum.[425] In Canada, he lived on welfare and petty theft.[426] In 1998 and 1999, he attended terrorist training camps in Afghanistan.[427]

Traveling under the name Benni Noris with fraudulent documentation, Ressam rented a car in Vancouver and drove it onto a ferry from Victoria to Port Angeles, Washington.[428] Ressam's car was the last off the ferry.[429] Noting that Res-

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424. United States v. Ressam, 679 F.3d 1069, 1073 (9th Cir. 2012); United States v. Ressam, 474 F.3d 597, 600 (9th Cir. 2007); United States v. Ressam, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); United States v. Meskini, 319 F.3d 88, 91 (2d Cir. 2003); Haouari v. United States, 429 F. Supp. 2d 671, 673 (S.D.N.Y. 2006); The 9/11 Commission Report 82 (2004); *see* Complaint, United States v. Ressam, No. 2:99-mj-547 (W.D. Wash. Dec. 17, 1999) [hereinafter *Ressam* Complaint]; Paula Bock, *An Otherwise Ordinary Day in Quiet Port Angeles, Local Folks Tackle a Terrorist—And Nothing Has Been Quite the Same Since*, Seattle Times, Nov. 25, 2001, at 16; *Frontline: Trail of a Terrorist* (PBS television broadcast Oct. 25, 2001) [hereinafter *Trail of a Terrorist*]; Susan Gilmore & Mike Carter, *Man Stopped at Border with Suspected Bomb Materials*, Seattle Times, Dec. 16, 1999, at A1; Josh Meyer, *Border Arrest Stirs Fear of Terrorist Cells in U.S.*, L.A. Times, Mar. 11, 2001, at 1; Steve Miletich, Susan Gilmore, Mike Carter, Joshua Robin, Ian Ith & Anne Koch, *FBI Probes Possible Terrorist Plot Here*, Seattle Times, Dec. 17, 1999, at A1; Scott Sunde & Elaine Porterfield, *Wider Bomb Plot Possible*, Seattle Post-Intelligencer, Dec. 18, 1999, at A1; Sam Howe Verhovek & Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, N.Y. Times, Dec. 18, 1999, at A1.

425. *Ressam*, 679 F.3d at 1072; *Ressam*, 474 F.3d at 599; *see Ressam* Complaint, *supra* note 424; Bock, *supra* note 424; William Booth, *Focus Is Narrow as Ressam Trial Begins*, Wash. Post, Mar. 14, 2001, at A8; John F. Burns, *Arrest at U.S. Border Reverberates in France*, N.Y. Times, Dec. 22, 1999, at A1; Maggie Farley, *Canada's Lapses Kept Algerian Suspect Free*, L.A. Times, Dec. 23, 1999, at 1; *Trail of a Terrorist*, *supra* note 424; Meyer, *supra* note 424; Steven Pearlstein, *Canadians Examine Lapses in Security*, Wash. Post, Dec. 22, 1999, at A8; Ali H. Soufan, The Black Banners 141 (2011) ("A wily Algerian, he falsely claimed political asylum in Canada in 1994, using a fake passport and a story about persecution.").

426. *See Trail of a Terrorist*, *supra* note 424; Soufan, *supra* note 425, at 141–42.

427. *Ressam*, 679 F.3d at 1072–73; *Ressam*, 474 F.3d at 598–600.

428. *Ressam*, 679 F.3d at 1073; *Ressam*, 474 F.3d at 599–600; *Ressam*, 221 F. Supp. 2d at 1254; *see Ressam* Complaint, *supra* note 424; Bock, *supra* note 424; *Trail of a Terrorist*, *supra* note 424; Soufan, *supra* note 425, at 142; Sunde & Porterfield, *supra* note 424; Verhovek & Weiner, *supra* note 424.

429. *See Ressam*, 474 F.3d at 600; *Ressam* Complaint, *supra* note 424; Bock, *supra* note 424; *Trail of a Terrorist*, *supra* note 424; Meyer, *supra* note 424; Soufan, *supra* note 425, at 142 ("Apparently he thought that the last car off would receive less attention."); Sunde & Porterfield, *supra* note 424.

sam's hands were shaking and, despite the cold weather, he was sweating, the customs inspector asked him to step out of the car, and Ressam initially refused.[430] Then he got out of the car and, as agents began searching the trunk, he fled.[431] He was caught a few blocks away.[432]

It was later determined that Ressam's sweating may have been caused by malaria, which he did not know at the time he had.[433]

A search of the car showed that its spare tire had been replaced by ten garbage bags containing 118 pounds of urea and 14 pounds of aluminum sulfate, two olive jars packed in sawdust containing a honey-like explosive, pill bottles containing other explosives, nine-volt batteries, and four circuit boards connected to Casio watches.[434]

> A Tylenol bottle contained a powerful military-grade explosive, cyclotrimethylenetrinitramine, or RDX. Another small bottle held hexamethylentriperoxodiamin, or HMTD, an unstable explosive so dangerous it's not manufactured commercially. Two tall olive jars were filled with 50 ounces of ethylene glycol dinitrate, or EGDN, a chemical cousin to nitroglycerin. Used in dynamite, EGDN is sensitive to shock, heat and friction. Screwing the jar lids could have been enough to set it off.[435]

Also in the car were maps of Washington, Oregon, and California.[436] Further investigation led to suspicion that he was an agent of Osama Bin Laden.[437]

Ressam was indicted on December 22, 1999, in the Western District of Washington, for false statements and improper transportation of explosives.[438] The court assigned the case to Judge John C. Coughenour.[439]

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430. *See Ressam* Complaint, *supra* note 424; Gilmore & Carter, *supra* note 424; Meyer, *supra* note 424; Sunde & Porterfield, *supra* note 424; Verhovek & Weiner, *supra* note 424.

431. *Ressam*, 679 F.3d at 1073; Haouari v. United States, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); *see Ressam* Complaint, *supra* note 424; Bock, *supra* note 424; Gilmore & Carter, *supra* note 424; *Trail of a Terrorist*, *supra* note 424; Meyer, *supra* note 424; Sunde & Porterfield, *supra* note 424; Verhovek & Weiner, *supra* note 424.

432. *Ressam*, 679 F.3d at 1073; *see Ressam* Complaint, *supra* note 424; Gilmore & Carter, *supra* note 424; Meyer, *supra* note 424; Miletich *et al.*, *supra* note 424; Verhovek & Weiner, *supra* note 424.

433. *See* Steve Miletich & Mike Carter, *Malaria May Have Unmasked Ressam*, Seattle Times, June 1, 2001, at A1 (reporting also that Ressam may have contracted malaria during a 1998 trip to Pakistan).

434. *Ressam*, 679 F.3d at 1073 n.2; *Ressam*, 474 F.3d at 600; United States v. Ressam, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *see Ressam* Complaint, *supra* note 424; John J. Goldman, *Algerian Admits Bomb Plot, Pledges Cooperation*, L.A. Times, Mar. 9, 2001, at 12; John Kifner & William K. Rashbaum, *Brooklyn Man Is Charged with Aiding in Bomb Plot*, N.Y. Times, Dec. 31, 1999, at A1; Steve Miletich, Mike Carter, James V. Grimaldi & Anne Koch, *Terrorist Link Explored*, Seattle Times, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 424; Verhovek & Weiner, *supra* note 424

435. Bock, *supra* note 424.

436. *See* Meyer, *supra* note 424; Miletich *et al.*, *supra* note 424; Sunde & Porterfield, *supra* note 424; Verhovek & Weiner, *supra* note 424.

437. *See* Michael Janofsky, *Terrorism Trial May Keep to Narrower Focus*, N.Y. Times, Mar. 14, 2001, at A12; Meyer, *supra* note 424; Steven Mufson, *Arrest Stirs Terrorism Concerns*, Wash. Post, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 424.

Ressam shared a motel room with another man for three weeks just before his ferry trip.[440] Canadian authorities determined that the other man was Abdelmajed Dahoumane.[441] On January 20, 2000, Ressam's indictment was superseded to add a terrorism charge and to add Dahoumane as a defendant.[442] On April 6, the U.S. embassy in Montreal offered a reward of $5 million for information leading to Dahoumane's arrest and conviction.[443] Dahoumane was arrested in Algeria late in 2000.[444] On April 1, 2001, the Algerian government announced that it would try Dahoumane there.[445] Dahoumane pleaded guilty in Algeria.[446]

Investigation showed that Ressam had a reservation for one night's stay at a Seattle motel near the Space Needle and a flight to London the following day.[447]

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438. Indictment, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); *see* William Booth, *Algerian Indicted on Explosives Counts*, Wash. Post, Dec. 23, 1999, at A1; Steve Miletich, *Algerian Indicted by Grand Jury*, Seattle Times, Dec. 22, 1999, at A1; Kim Murphy, *Algerian Suspect Pleads Not Guilty to 5 Bomb Charges*, L.A. Times, Dec. 23, 1999, at 17; Elaine Porterfield, *Bomb Suspect Is Indicted*, Seattle Post-Intelligencer, Dec. 23, 1999, at A1; Sam Howe Verhovek, *Grand Jury Charges Man Found with Bomb Materials*, N.Y. Times, Dec. 23, 1999, at A20.

439. Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 23, 1999) ("For reasons of security, the Honorable John C. Coughenour, Chief Judge for the Western District of Washington, directs the above-captioned case be filed in Seattle and assigned to the undersigned."); *see* Porterfield, *supra* note 438.

Tim Reagan interviewed Judge Coughenour for this report in the judge's chambers on October 3, 2008.

440. *See Trail of a Terrorist*, *supra* note 424; Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. Times, Dec. 19, 1999, at 142.

441. *See* David Johnston, *Canada Seeks Friend of Man Held in Ferrying of Explosives*, N.Y. Times, Dec. 25, 1999, at A21.

442. Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Jan. 20, 2000); *see* Mike Carter, *Algerian Bomb-Plot Web Grows with New Charges*, Seattle Times, Jan. 21, 2000, at A1; Elaine Porterfield, *Indictment Details Bomb Conspiracy*, Seattle Post-Intelligencer, Jan. 21, 2000, at A1; David A. Vise & Dan Eggen, *Bomb Plot Suspect Sought by United States, Canada Is Detained in Algeria*, Wash. Post, Dec. 8, 2000, at A44; *see also* Second Superseding Indictment, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Feb. 14, 2001); Sam Skolnik, *Terrorism Charge Expanded in Bomb-Smuggling Case*, Seattle Post-Intelligencer, Feb. 15, 2001, at B3 (reporting on second superseding indictment).

443. *See* Meyer, *supra* note 424 (reporting that this was the same bounty offered for Osama Bin Laden); Steve Miletich & Mike Carter, *Prints Found on Bomb Parts*, Seattle Times, Apr. 12, 2000, at B1; *Reward Offered on Suspected Terrorist*, L.A. Times, Apr. 7, 2000, at 6; Sam Skolnik, *U.S. Puts $5 Million Bounty for Algerian*, Seattle Post-Intelligencer, Apr. 7, 2000, at A1; Vise & Eggen, *supra* note 442.

444. *See* Lorraine Adams, *The Other Man*, Wash. Post Mag., May 20, 2001, at 10; Judith Miller, *Suspect in New Year's Terror Plot Is Arrested in Algeria*, N.Y. Times, Dec. 7, 2000, at A3; Vise & Eggen, *supra* note 442.

445. *See* Adams, *supra* note 444; *Algiers to Try Terror Suspect Sought by U.S.*, N.Y. Times, Apr. 2, 2001, at A5.

446. *See* Steve Miletich, *Ressam Co-Conspirator Pleads Guilty*, Seattle Times, Sept. 26, 2001, at A4; Sam Skolnik, *Man Sought in Ressam Case Is Convicted in Algeria*, Seattle Post-Intelligencer, Sept. 26, 2001, at B2.

447. *See Ressam* Complaint, *supra* note 424; Miletich *et al.*, *supra* note 434; Verhovek & Weiner, *supra* note 424.

Seattle canceled its millennium New Year's Eve party scheduled for the base of the Space Needle.[448] Because of the extensive news coverage in Seattle about "the possibility of a planned bombing of the Space Needle, the signature building of the Seattle skyline," on March 3, 2000, Judge Coughenour granted Ressam's motion to move the trial to Los Angeles.[449]

It was reported that a substantial factor in Judge Coughenour's ruling was the superior security of Los Angeles's newer courthouse compared to Seattle's old courthouse, designed in the 1920s, where judges rode the same elevators as defendants, jurors, and witnesses.[450] In addition, transportation of Ressam between the detention center in Seattle and the courthouse required road closures, but this was not necessary in Los Angeles because of the detention center's proximity to the courthouse.[451]

A minor international incident erupted in March 2000 as Ressam's attorneys prepared for trial.[452] The Western District of Washington's Federal Public Defender's office agreed to accept service on Ressam's behalf of three seizure notices from the Royal Canadian Mounted Police.[453] Two attorneys and an investigator traveled to Montreal to investigate the seizures, and they obtained from the court there copies of documents in the related files.[454] Apparently, the documents were disclosed to Ressam's attorneys in error, and they were taken back from the attor-

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448. *See* Timothy Egan, *Citing Security, Seattle Cancels a New Year's Eve Party*, N.Y. Times, Dec. 29, 1999, at A16; *Trail of a Terrorist*, *supra* note 424; Steve Miletich, J. Martin McOmber & Anne Koch, *How City Party Was Canceled*, Seattle Times, Dec. 28, 1999, at A1; Kery Murakami, *Seattle Center New Year's Gala Canceled*, Seattle Post-Intelligencer, Dec. 28, 1999, at A1; Jube Shiver, Jr., *Millennium Disconnects*, L.A. Times, Dec. 29, 1999, at 9.

A large crowd gathered the following year "to watch the Space Needle turn into the world's biggest sparkler." *The Center of the Celebration*, Seattle Post-Intelligencer, Jan. 1, 2001, at B1.

449. Order, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Mar. 3, 2000); United States v. Ressam, 679 F.3d 1069, 1074 (9th Cir. 2012); United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); *see* Meyer, *supra* note 424; Steve Miletich, *Ressam Will Get L.A. Trial*, Seattle Times, Mar. 3, 2000, at A1; Kim Murphy, *Trial of Suspected Algerian Terrorist Will Be Shifted from Seattle to L.A.*, L.A. Times, Mar. 4, 2000, at 14; Elaine Porterfield, *Bombing Suspect Will Be Tried in L.A.*, Seattle Post-Intelligencer, Mar. 4, 2000, at A1.

450. Mike Carter, *Jury Selection to Begin Today in Ressam Trial*, Seattle Times, Mar. 12, 2001, at B1; Steve Miletich, *Security Cited as Judge Moves Ressam Trial to L.A.*, Seattle Times, Mar. 4, 2000, at A1; Murphy, *supra* note 449; Porterfield, *supra* note 449.

The court in Seattle moved into a new courthouse in September 2004. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

451. John C. Coughenour, *Security for Judges—In and Out of the Courtroom*, 41 Int'l Soc'y of Barristers Q. 440, 444 (2006).

452. *See* Steve Miletich, *"Secret" File in Ressam Bomb Case Causes Stir*, Seattle Times, Mar. 23, 2000, at A1; Scott Sunde, *Attorneys for Ressam Draw Fire Over Files*, Seattle Post-Intelligencer, Mar. 24, 2000, at B1.

453. *See* Oliver Affidavit, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000).

454. *See* Document Return Motion Response, *id.* (Mar. 23, 2000); Steve Miletich, *Man in Alleged Bomb Plot to Enter Lesser Plea*, Seattle Times, Mar. 16, 2000, at B2; Sunde, *supra* note 452.

neys at the airport.[455] The U.S. government moved for return of all copies of the documents and for an order prohibiting Ressam's attorneys from discussing them with their client.[456] Both parties submitted affidavits, and Ressam's attorneys submitted a sealed ex parte affidavit "concerning purpose of review of Montreal court files."[457]

The Federal Public Defender pointed out that an order barring discussion with his client would present his attorneys with a conflict of interest potentially requiring withdrawal from the case: either they could serve their client and risk sanctions or they could obey the order and disserve their client.[458] After a hearing, Judge Coughenour ruled that the matter was moot because Ressam's attorneys no longer had copies of the documents.[459] The judge told the attorneys that they could use the information from the Canadian files, but only as a last resort and without disclosing to Ressam its origin.[460]

A couple of weeks before trial, on February 28, 2001, a 6.8-magnitude earthquake hit the Seattle area,[461] so a status conference held the next day was held at the SeaTac detention facility where Ressam was housed.[462]

Jury selection began in Los Angeles on March 12, 2001.[463] After a little more than seven hours of voir dire, a jury was selected from 44 prospective jurors.[464] Opening arguments and the first witnesses were presented the next day.[465]

On the first day of trial, a government witness presented a map seized from Ressam's Montreal apartment with Los Angeles International Airport and two other local airports circled.[466] Discovery of this map had been reported by news media nearly two months previously.[467]

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455. *See* Document Return Motion, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000); Miletich, *supra* note 452; Sunde, *supra* note 452.

456. Document Return Motion, *supra* note 455; *see* Miletich, *supra* note 452.

457. Document Return Motion Response, *supra* note 454; Document Return Motion, *supra* note 455.

458. Document Return Motion Response, *supra* note 454; *see* Mike Carter, *Ressam Lawyers May Use Secret Files*, Seattle Times, Mar. 24, 2000, at B3.

459. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); *see* Carter, *supra* note 458.

460. *See* Carter, *supra* note 458; Sunde, *supra* note 452.

461. *See* Eric Sorensen, *Shaken, but OK*, Seattle Times, Mar. 1, 2001, at A1.

462. Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 1, 2001, filed Mar. 8, 2001) [hereinafter *Ressam* Mar. 1, 2001, Transcript].

463. *Ressam* Complaint, *supra* note 424; *see* Carter, *supra* note 450; *Jury Selection Begins in Terrorism Trial*, N.Y. Times, Mar. 13, 2001, at A17.

464. *See* Mike Carter, *Ressam Trial Jury Picked Quickly*, Seattle Times, Mar. 13, 2001, at A1.

465. *Ressam* Complaint, *supra* note 424; *see* Booth, *supra* note 425; Janofsky, *supra* note 437.

466. *See* Mike Carter, *Defense Calls Ressam Dupe of Terrorists*, Seattle Times, Mar. 14, 2001, at A1; Sam Skolnik & Scott Sunde, *Ressam No Terrorist, Attorney Tells Court*, Seattle Post-Intelligencer, Mar. 14, 2001, at A1.

467. Josh Meyer, *Group May Have Planned to Bomb LAX Last Year, Prosecutors Say*, L.A. Times, Jan. 20, 2001, at 1; Sam Skolnik, *Did Ressam Have L.A. Targets?*, Seattle Post-Intelligencer, Jan. 19, 2001, at B1.

On April 6, 2001, the jury convicted Ressam on all counts.[468] On the same day, he and 23 others were sentenced by a French judge, before whom Ressam was tried in absentia, to five years in prison for conspiracy to support Islamic militants.[469]

Abdelghani Meskini's Brooklyn telephone number was found when Ressam was arrested.[470] Meskini, who reportedly lived as a con man and thief, was once an Algerian Army officer, and he came to the United States as a stowaway in 1994.[471]

Apparently Meskini flew to Seattle on December 11, 1999, to meet Ressam.[472] Because Ressam was a no-show, Meskini flew back to New York on December 16.[473] On the basis of his number's being in Ressam's car, the Foreign Intelligence Surveillance Court authorized surveillance of Meskini's telephone.[474] Meskini was arrested early in the morning on December 30 at his home as a suspected accomplice of Ressam.[475]

On January 6, 2000, a sealed indictment was filed in the Southern District of New York against Mokhtar Haouari, a former schoolmate of Meskini's in Algeria.[476] He was arrested four days later in Montreal; another three days later, the

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468. United States v. Ressam, 679 F.3d 1069, 1071 & n.1, 1074 (9th Cir. 2012); United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); Haouari v. United States, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); Docket Sheet, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Dec. 22, 1999); *see* Adams, *supra* note 444; William Booth, *Algerian Convicted on Terror Charges*, Wash. Post, Apr. 7, 2001, at A1; Mike Carter, *Ressam Guilty on All Counts*, Seattle Times, Apr. 7, 2001, at A1; Thomas J. Lueck, *Algerian Is Found Guilty in Plot to Bomb Sites in the U.S.*, N.Y. Times, Apr. 7, 2001, at A9; Josh Meyer, *Man Convicted of Taking Part in Bomb Plot*, L.A. Times, Apr. 7, 2001, at 1; Sam Skolnik & Scott Sunde, *Ressam Guilty of Terrorism*, Seattle Post-Intelligencer, Apr. 7, 2001, at A1; *see also* Transcript, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Apr. 4, 2001, filed Oct. 11, 2005) (jury instructions).

469. *See* Booth, *supra* note 468; Carter, *supra* note 468; Meyer, *supra* note 468; Skolnik & Sunde, *supra* note 468.

470. *See* Booth, *supra* note 468; Mike Carter, *Feds Link Ressam to Terror Camps*, Seattle Times, Mar. 9, 2001, at A1; *Trail of a Terrorist*, *supra* note 424; Meyer, *supra* note 424; Steve Miletich & Mike Carter, *Ressam Linked to Terrorist Group*, Seattle Times, Dec. 31, 1999, at A1; Benjamin Weiser, *New Trouble for Terrorist Who Helped Prosecutors*, N.Y. Times, July 31, 2010, at A12.

471. *See* Weiser, *supra* note 470.

472. *Haouari*, 429 F. Supp. 2d at 676; *see* Adams, *supra* note 444; Meyer, *supra* note 424; Miletich & Carter, *supra* note 470; David A. Vise, *Algerian Arrested Dec. 24*, Wash. Post, Jan. 4, 2000, at A2.

473. *Haouari*, 429 F. Supp. 2d at 676; *see* Adams, *supra* note 444; Meyer, *supra* note 424; Miletich & Carter, *supra* note 470; Vise, *supra* note 472.

474. *See* Walter Pincus, *Judge Discusses Details of Work on Secret Court*, Wash. Post, June 26, 2007, at A4; *see also Ressam* Mar. 1, 2001, Transcript, *supra* note 462.

475. *Haouari*, 429 F. Supp. 2d at 677; United States v. Haouari, No. 1:00-cr-15, 2000 WL 1593345, at *1 (S.D.N.Y. Oct. 25, 2000); *see* Adams, *supra* note 444; *Trail of a Terrorist*, *supra* note 424; Kifner & Rashbaum, *supra* note 434; Meyer, *supra* note 424; Miletich & Carter, *supra* note 470; Vise, *supra* note 472.

476. Docket Sheet, United States v. Haouari, No. 1:00-cr-15 (S.D.N.Y. Jan. 10, 2000) [hereinafter *Haouari* Docket Sheet]; *see* Adams, *supra* note 444; Craig Pyes, *Canada Adds Details on Algerians' Suspected Bomb Plot*, N.Y. Times, Jan. 21, 2000, at A3.

indictment was superseded to add Meskini as a defendant.[477] The court assigned the case to Judge John F. Keenan.[478]

Based in part on surveillance of Meskini's telephone conversations, Haouari was charged with coordinating Ressam's bomb plot.[479] Haouari waived extradition proceedings and agreed to be tried in the United States, where he was arraigned on August 14.[480]

On March 7, 2001, Meskini pleaded guilty and agreed to cooperate with the prosecution.[481] On January 23, 2004, he was sentenced to six years, with credit for time served.[482] He was released in 2005; his application for the witness protection program was rejected.[483] With the government's approval, he got a job in Atlanta as a building manager for an apartment complex known to be "a hotbed of criminal activity, where narcotics sales and prostitution occurred openly and persistently."[484] In October 2010, he was sentenced to two years and seven months for an attempt to acquire an AK-47 assault rifle.[485]

As Ressam's sentencing date approached, Meskini agreed to cooperate with the prosecution of Haouari, and Ressam's sentencing was postponed.[486] At Haouari's trial, on July 3, 2001, Ressam testified that he and accomplices had

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477. Superseding Indictment, *Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 13, 2000); *see* Adams, *supra* note 444; Benjamin Weiser & Craig Pyes, *U.S., in Pursuit of Bomb Plot, Indicts Man Held in Canada*, N.Y. Times, Jan. 19, 2000, at A1.

478. *Haouari* Docket Sheet, *supra* note 476.

Tim Reagan interviewed Judge Keenan for this report in the judge's chambers on November 6, 2009.

479. *See* Meyer, *supra* note 424; Pyes, *supra* note 476.

480. *See* John Sullivan, *Algerian Arraigned in Explosives Smuggling Case*, N.Y. Times, Aug. 15, 2000, at B3.

481. United States v. Ressam, 679 F.3d 1069, 1074–75 (9th Cir. 2012); United States v. Meskini, 319 F.3d 88, 91 (2d Cir. 2003); Haouari v. United States, 429 F. Supp. 2d 671, 677 (S.D.N.Y. 2006); United States v. Haouari, No. 1:00-cr-15, 2001 WL 1154714, at *1 (S.D.N.Y. Sept. 28, 2001); *see* Adams, *supra* note 444; Carter, *supra* note 470; Alan Feuer, *Man Pleads Guilty to Role in Millennial Terrorism Plot*, N.Y. Times, Mar. 10, 2001, at B2; Dan Eggen, *Algerian Guilty in Plot to Bomb Landmarks in U.S.*, Wash. Post, Mar. 9, 2001, at A3; Goldman, *supra* note 434; Meyer, *supra* note 424; Sam Skolnik, *A Guilty Plea to Aiding Ressam*, Seattle Post-Intelligencer, Mar. 9, 2001, at B1; Weiser, *supra* note 470.

482. *Haouari* Docket Sheet, *supra* note 476; *see* Weiser, *supra* note 470.

483. *See* Weiser, *supra* note 470.

484. Opinion, United States v. Haouari, No. 1:00-cr-15 (S.D.N.Y. Oct. 27, 2010).

485. *Haouari* Docket Sheet, *supra* note 476; *see* Benjamin Weiser, *"Millennium Plot" Terrorist Reimprisoned in Gun Case*, N.Y. Times, Oct. 30, 2010, at A16.

486. *See Trail of a Terrorist*, *supra* note 424; Laura Mansnerus & Judith Miller, *Bomb Plot Insider Details Training*, N.Y. Times, July 4, 2001, at A1; Sam Skolnik & Paul Shukovsky, *Ressam: Seattle No Target*, Seattle Post-Intelligencer, May, 21, 2001, at A1; *see also* Transcript, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. July 27, 2005, filed Aug. 4, 2005) [hereinafter *Ressam* July 27, 2005, Transcript] (discussing Ressam's cooperation); Transcript, *id.* (Apr. 27, 2005, filed Sept. 9, 2005) [hereinafter *Ressam* Apr. 27, 2005, Transcript] (same).

planned to bomb Los Angeles International Airport on New Year's Eve.[487] He said he planned to explode a suitcase filled with fertilizer and nitric acid.[488]

In order to keep the witness Ressam separate from the defendant Haouari, each was brought to Judge Keenan's courtroom by a different elevator.[489] There is one other courtroom on the same floor as Judge Keenan's, and separate prisoner elevators serve the two courtrooms.[490] Ressam was brought up in the other courtroom's elevator.[491]

Haouari found Ressam's testimony so upsetting that he repeatedly banged his head against the counsel table.[492] In time, he knocked himself out.[493] Judge Keenan had to excuse the jury and seek medical attention for the defendant.[494]

One juror, who worked as a waitress, had to be replaced when she recognized at work a journalist covering the trial and struck up a conversation with him about it.[495]

On July 13, the jury acquitted Haouari of aiding and abetting what became known as the millennium bombing plot, but convicted him of conspiracy and fraud.[496] On January 16, 2002, Judge Keenan sentenced Haouari to 24 years in prison.[497] A year later, the court of appeals affirmed the conviction and the sentence.[498]

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487. United States v. Ressam, 679 F.3d 1069, 1074 (9th Cir. 2012); United States v. Ressam, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *see Trail of a Terrorist*, *supra* note 424; Josh Meyer, *Terrorist Says Plans Didn't End with LAX*, L.A. Times, July 4, 2001, at 1; Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target*, Wash. Post, July 4, 2001, at A2; *see also* Mike Carter & Steve Miletich, *Ressam: L.A. Airport Was Target*, Seattle Times, May 30, 2001, at A1 (reporting that Ressam had told Haouari's prosecutors that the Los Angeles airport was his target); Josh Meyer, *Millennium Terrorist Now Detailing Plot, Sources Say*, L.A. Times, May 30, 2001, at 1 (same).

488. *See Trail of a Terrorist*, *supra* note 424; Powell & Haughney, *supra* note 487.

489. Interview with Hon. John F. Keenan, Nov. 6, 2009.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. Haouari v. United States, 510 F.3d 350, 351 (2d Cir. 2007); United States v. Meskini, 319 F.3d 88, 91 (2d Cir. 2003); Haouari v. United States, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); United States v. Haouari, No. 1:00-cr-15, 2001 WL 1154714, at *1 (S.D.N.Y. Sept. 28, 2001); *see* Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. Times, Jan. 17, 2002, at A26; Christine Haughney, *Third Algerian Convicted in Bombing Plot*, Wash. Post, July 14, 2001, at A22; Laura Mansnerus, *Man Is Guilty in Bomb Plot at Millennium*, N.Y. Times, July 14, 2001, at B1; Josh Meyer, *LAX Bombing Plot Figure Is Convicted*, L.A. Times, July 14, 2001, at 8.

497. *Haouari*, 429 F. Supp. 2d at 673; United States v. Ressam, 679 F.3d 1069, 1075 (9th Cir. 2012); *see* Fritsch, *supra* note 496; John J. Goldman, *Algerian Gets Prison in LAX Bomb Plot*, L.A. Times, Jan. 17, 2002, at 13.

498. United States v. Meskini, 319 F.3d 88 (2d Cir. 2003); *Haouari*, 429 F. Supp. 2d at 673; *see* Benjamin Weiser, *Conviction Upheld in Bomb Plot*, N.Y. Times, Jan. 28, 2003, at B7.

On July 27, 2005, at the conclusion of Ressam's cooperation with investigations and prosecutions,[499] Judge Coughenour sentenced Ressam to 22 years in prison.[500]

A year and a half later, the court of appeals reversed Ressam's conviction on one count, for carrying explosives while committing a felony, reasoning that carrying explosives did not relate to the felony of signing a false name on a customs declaration.[501] The court remanded the case for resentencing.[502]

On December 7, 2007, the Supreme Court agreed to review the court of appeals' decision.[503] On March 25, 2008, Attorney General Michael B. Mukasey, who, as a judge, had presided over the prosecution of blind Sheik Omar Abdel Rahman, argued the government's case to reinstate the conviction.[504] The Su-

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499. Judge Coughenour observed that the gentler approach of Seattle-based investigators was more effective in obtaining Ressam's cooperation than the more aggressive approach of New York-based investigators, who took over during the prosecution of Haouari. Interview with Hon. John C. Coughenour, Oct. 3, 2008; *see also* Mike Carter, *Mystery FBI Agent Revealed*, Seattle Times, Nov. 15, 2012, at A1 ("Special Agent Fred Humphries was outspoken in opposing the FBI's decision at the time to turn Ressam over to agents from New York after the attacks, and warned their tough tactics were undoing the cooperation Humphries had coaxed out of the al-Qaida-trained terrorist.").

500. *Ressam*, 679 F.3d at 1076–78; United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); *Ressam* July 27, 2005, Transcript, *supra* note 486; *see* Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, Seattle Times, July 28, 2005, at A1; Jonathan Hafetz, Habeas Corpus After 9/11 209 (2011); Sarah Kershaw, *Terrorist in '99 U.S. Case Is Sentenced to 22 Years*, N.Y. Times, July 28, 2005, at A20; Paul Shukovsky, *22 Years*, Seattle Post-Intelligencer, July 28, 2005, at A1; Tomas Alex Tizon & Lynn Marshall, *Would-Be Millennium Bomber Ressam Gets 22-Year Sentence*, L.A. Times, July 28, 2005, at 10.

501. *Ressam*, 474 F.3d at 598–604; *see Ressam*, 679 F.3d at 1078; Hal Bernton & Mike Carter, *Appeals Court Throws Out 1 Ressam Felony Conviction*, Seattle Times, Jan. 17, 2007, at B3; Paul Shukovsky, *Court Reverses 1 Count Against Ressam*, Seattle Post-Intelligencer, Jan. 17, 2007, at B1; Jennifer Steinhauer, *Appeals Court Vacates Term of Algerian in Bomb Plot*, N.Y. Times, Jan. 17, 2007, at A13; Henry Weinstein, *Court Voids Sentence in LAX Plot*, L.A. Times, Jan. 17, 2007, at 8.

502. *Ressam*, 474 F.3d at 604; *see Ressam*, 679 F.3d at 1078; Shukovsky, *supra* note 501.

Judge Marsha S. Berzon joined Judge Pamela Ann Rymer's opinion for the court, but Judge Arthur L. Alarcón dissented from the reversal of the conviction and determined that Ressam's sentence was too lenient. *Ressam*, 474 F.3d at 604–08 (Judge Alarcón, dissenting). Six judges dissented from the court's refusal to rehear the case en banc. United States v. Ressam, 491 F.3d 997 (9th Cir. 2007).

503. United States v. Ressam, 552 U.S. 1074 (2007); *See* Robert Barnes, *Cases of 2 U.S. Citizens in Iraq to Be Heard*, Wash. Post, Dec. 8, 2007, at A2; Linda Greenhouse, *Americans Held in Iraq Draw Justices' Attention*, N.Y. Times, Dec. 8, 2007, at A15.

504. *See* Carrie Johnson & Robert Barnes, *After a Lifetime in Law, a First Day in Court*, Wash. Post, Mar. 26, 2008, at A4; David G. Savage, *Justices Hear Terrorism Cases*, L.A. Times, Mar. 26, 2008, at 17; Philip Shenon, *Mukasey Goes to Court to Argue a Terrorism Case*, N.Y. Times, Mar. 26, 2008; *see also supra*, "First World Trade Center Bombing."

Judge Coughenour has otherwise been critical of Judge Mukasey's policy suggestions on the handling of terrorism cases. John C. Coughenour, Op-Ed, *How to Try a Terrorist*, N.Y. Times, Nov. 1, 2007; John C. Coughenour, Op-Ed, *The Right Place to Try Terrorism Cases*, Wash. Post, July 27, 2008, at B7.

preme Court agreed with the argument and reinstated the conviction on May 19.[505]

On December 3, Judge Coughenour resentenced Ressam to 22 years.[506] On February 2, 2010, a three-judge panel of the court of appeals determined that the sentence was too lenient and remanded the case for resentencing by a different judge.[507] Over the dissent of four judges, on March 12, 2012, an 11-judge en banc panel agreed that the sentence was unreasonably lenient, but the en banc panel remanded the case to Judge Coughenour for resentencing.[508] Judge Coughenour resentenced Ressam on October 24 to 37 years.[509]

Challenge: Classified Evidence

Invoking the Classified Information Procedures Act (CIPA), the government asked Judge Coughenour to review classified documents to determine whether or not they were discoverable.[510] Judge Coughenour reviewed the documents

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505. United States v. Ressam, 553 U.S. 272 (2008); *see Ressam*, 679 F.3d at 1078; William Branigin, *High Court Affirms Terrorism Conviction*, Wash. Post, May 20, 2008, at A6; Linda Greenhouse, *Court Upholds Child Pornography Law, Despite Free Speech Concerns*, N.Y. Times, May 20, 2008, at A17; *Justices Rule Against Ressam in Terror Case*, Seattle Post-Intelligencer, May 20, 2008, at B2; David G. Savage, *Full Prison Term Restored for "Millennium Bomber,"* L.A. Times, May 20, 2008, at 11.

506. Amended Judgment, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Dec. 3, 2008); *Ressam*, 679 F.3d at 1071, 1078–84; *see* Mike Carter, *Ressam Recants Everything Said as an Informant*, Seattle Times, Dec. 4, 2008, at A1; Paul Shukovsky, *Ressam Sentence Reinstated*, Seattle Post-Intelligencer, Dec. 4, 2008, at B1.

507. United States v. Ressam, 629 F.3d 793 (9th Cir.) (opinion by Circuit Judge Arthur L. Alarcón, joined by Circuit Judge Richard R. Clifton; Circuit Judge Ferdinand F. Fernandez dissented from both the reversal of the sentence and the reassignment to a different judge), *amending* 593 F.3d 1095 (2010); *Ressam*, 679 F.3d at 1085; *see* Hafetz, *supra* note 500, at 209; John Schwartz, *Appeals Court Throws Out Sentence in Bombing Plot, Calling It Too Light*, N.Y. Times, Feb. 3, 2010, at A15; Jennifer Sullivan, *Court: Ressam Sentence "Failed to Protect Public,"* Seattle Times, Feb. 3, 2010, at A1; Carol J. Williams, *22-Year Term in LAX Bomb Plot Overturned*, L.A. Times, Feb. 3, 2010, at 9.

508. *Ressam*, 679 F.3d at 1071–72, 1088–97 & n.11; *see* Ian Lovett, *Appeals Court Overturns Millennium Bomb-Plot Sentence as Too Lenient*, N.Y. Times, Mar. 13, 2012, at A13; Jennifer Sullivan, *Terrorist Ressam's Sentence Too Short, Appeals Court Says*, Seattle Times, Mar. 13, 2012, at B1; Carol J. Williams, *Sentence Overturned in LAX Plot*, L.A. Times, Mar. 13, 2012.

509. Sentencing Order, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Oct. 24, 2012); Transcript, *id.* (Oct. 24, 2012, filed Oct. 30, 2012); *see* Mike Carter, *Ressam Gets 37 Years at Resentencing in Millennial Bomb Plot*, Seattle Times, Oct. 25, 2012, at B1; Kirk Johnson, *New Sentence Is Imposed in Bomb Plot from 1999*, N.Y. Times, Oct. 25, 2012, at A18; Kim Murphy, *LAX Bomb Plotter Gets 37 Years*, L.A. Times, Oct. 25, 2012, at 7; *see also* Mike Carter, *U.S. Won't Appeal Ressam's Sentence*, Seattle Times, Nov. 29, 2012, at B3 (reporting that the government decided not to appeal the sentence).

510. *See* Mike Carter & Steve Miletich, *Judge to Review Ressam Papers*, Seattle Times, Nov. 3, 2000, at B1; Sam Skolnik, *Ressam Prosecutors Reveal Existence of Classified Data*, Seattle Post-Intelligencer, Nov. 3, 2000, at B2; *see also* 18 U.S.C. app. 3 (2011) (text of CIPA); Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (Federal Judicial Center, 2d ed. 2013).

without the assistance of a law clerk, because there was not time to obtain top secret clearance.[511] The documents were delivered to the judge by a classified information security officer and reviewed by the judge under the security officer's watch.[512] They were stored in a safe to which the officer, and not the judge, had access.[513] Judge Coughenour decided that the documents were not discoverable.[514]

Challenge: Examination of Foreign Witnesses

The government sought testimony of witnesses in Canada, beyond the court's subpoena power, who were unwilling to travel to the United States to offer testimony.[515] So, by stipulation of the parties, Judge Coughenour traveled to Canada to preside over video depositions in both Montreal and Vancouver to obtain the testimony.[516] A Canadian court official attended to rule on potential issues of Canadian law.[517] Ressam participated by video conference from his jail cell with the assistance of an Arabic interpreter.[518]

On one occasion, after Judge Coughenour had traveled to Canada for the deposition, a Canadian judge ruled, at a proceeding from which Judge Coughenour was excluded, that the witness did not have to testify.[519]

Some of the witnesses subsequently indicated that they might be willing to testify live at Ressam's trial, but the parties agreed that either side could substitute deposition video tapes.[520]

Challenge: Court Security

At Ressam's first appearance in court in Seattle, on December 17, 1999, "Security was so tight at the courthouse that anyone entering—even employees—had to produce a photo identification. A phalanx of U.S. marshals also blocked the door to [U.S. Magistrate Judge David] Wilson's courtroom and armed officers patrolled the streets as Ressam was brought to the courthouse."[521]

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511. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

512. *Id.*

513. *Id.*

Judge Coughenour preferred not to have to deal with the lock and combination himself. Interview with Dep't of Justice Litig. Sec. Group Staff, Jan. 7, 2010.

514. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

515. *See* Sam Skolnik, *Bomb Plot Case Inquiry Moves to Vancouver, B.C.*, Seattle Post-Intelligencer, July 20, 2000, at B3.

516. *See Ressam* Mar. 1, 2001, Transcript, *supra* note 462; Skolnik, *supra* note 515.

517. *See Ressam* Mar. 1, 2001, Transcript, *supra* note 462.

518. Interview with Hon. John C. Coughenour, Oct. 3, 2008; *see Seattle Judge to Hear from Terrorism-Case Witnesses*, Seattle Times, Oct. 27, 2000, at B2.

519. *Ressam* Apr. 27, 2005, Transcript, *supra* note 486; Interview with Hon. John C. Coughenour, Oct. 3, 2008.

520. Interview with Hon. John C. Coughenour, Oct. 3, 2008; *see Ressam* Mar. 1, 2001, Transcript, *supra* note 462.

521. Sunde & Porterfield, *supra* note 424.

For Ressam's trial also, security at the Roybal courthouse in Los Angeles was enhanced, including added patrols, bomb-sniffing dogs, and inspections of cars entering the underground garage.[522]

Challenge: Jury Security

Judge Coughenour was not asked to use an anonymous jury; he has never used one.[523] But jurors did not report directly to the courthouse; instead they met at a secret location from which they were transported to the courthouse by deputy marshals.[524]

Challenge: Witness Security

On March 29, 2001, Meskini testified at Ressam's trial.[525] It was reported that his testifying would require his entering the witness protection program.[526] He was brought to the courtroom through a side door.[527]

Judge Coughenour overruled the government's attempts to protect the identity of another witness, such as taking testimony remotely or behind a screen and withholding background information, and the government decided not to use the witness.[528]

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522. *See* Carter, *supra* note 464.

523. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

524. *Id.*

525. *See* Adams, *supra* note 444; Booth, *supra* note 468; Steve Miletich, *Key Witness Testifies Against Ressam*, Seattle Times, Mar. 30, 2001, at B1; Sam Skolnik, *U.S. Puts Reputed Fraud on the Stand*, Seattle Post-Intelligencer, Mar. 30, 2001, at B1.

526. *See* Mike Carter, *Witness Tells of Ticket to Pakistan*, Seattle Times, Mar. 15, 2001, at B1.

527. *See* Miletich, *supra* note 525.

528. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

Mujahedeen Khalq

United States v. Afshari

(Robert M. Takasugi and David O. Carter, C.D. Cal.)

After a three-year investigation, on three criminal complaints filed in the Central District of California on February 26, 2001, the FBI arrested on February 27 five Iranians and two Iranian Americans at various Los Angeles locations.[529] They were charged with providing material support to Mujahedeen Khalq, also known as MEK, which the State Department classified as a terrorist organization on October 8, 1997.[530] MEK arose in the 1960s and 1970s in opposition to the shah of Iran.[531] It came to be a regular solicitor of donations at airports, including the Los Angeles International Airport, ostensibly for charitable purposes.[532] The defendants were charged with participating in those solicitation efforts.[533]

U.S. citizens Mohammad Omidvar and Navid Taj, also known as Najaf Eshkoftegi, were granted $25,000 bail.[534] Iranian Hossein Afshari's bail was set at $100,000.[535] The other Iranians—Roya Rahmani, also known as Tahmineh Tahamtan, the only woman, Hassan Rezaie, Moustafa Ahmady, and Alireza Mohammad Moradi—were denied pretrial release.[536] The grand jury returned an indictment on March 13.[537] Two days later, Rahmani's bail was set at $500,000.[538] In April, bail was set for Rexaie, Ahmady, and Moradi at $60,000 each.[539]

On June 21, 2002, Judge Robert M. Takasugi dismissed the indictment.[540] Judge Takasugi determined that the statute authorizing the designation of MEK as a terrorist organization was unconstitutional:

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529. Docket Sheet, United States v. Afshari, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001) [hereinafter *Afshari* Docket Sheet]; Docket Sheet, United States v. Rahmani, No. 2:01-mj-393 (C.D. Cal. Feb. 26, 2001); *see* Soraya Sarhaddi Nelson, *7 Accused of Raising Funds for Terrorists*, L.A. Times, Mar. 1, 2001, at 3.

530. United States v. Afshari, 426 F.3d 1150, 1152–53 (9th Cir. 2005); Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004) (declining to overturn the redesignation); People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003) (declining to overturn the redesignation); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001) (remanding redesignation for due process cure); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999) (declining to overturn the designation); United States v. Afshari, 635 F. Supp. 2d 1110, 1113 (C.D. Cal. 2009); *see* Nelson, *supra* note 529.

531. *Afshari*, 426 F.3d at 1152; *see* Nelson, *supra* note 529.

532. *See* Nelson, *supra* note 529.

533. *Afshari*, 635 F. Supp. 2d at 1112–13.

534. *Afshari* Docket Sheet, *supra* note 529.

535. *Id.*

536. *Id.*

537. Indictment, United States v. Afshari, No. 2:01-cr-209 (C.D. Cal. Mar. 13, 2001).

538. *Afshari* Docket Sheet, *supra* note 529.

539. *Id.*

540. United States v. Rahmani, 209 F. Supp. 2d 1045 (C.D. Cal. 2002), *rev'd*, 426 F.3d 1150 (9th Cir. 2005); United States v. Afshari, 635 F. Supp. 2d 1110, 1113–14 (C.D. Cal. 2009); *see*

> [The statute admits] of no other interpretation but that the organization to be designated is precluded from challenging the facts contained in the administrative record or presenting evidence to rebut the proposition that it is a terrorist organization. Such provisions are unconstitutional as violative of due process and render [the statute] facially invalid.[541]

The court of appeals reversed in a series of opinions from December 2004 through October 2005.[542]

On June 14, 2005, and November 29, 2007, the government filed superseding indictments, the latter adding Mohammad Bigdeli and Elham Kiamanesh as fugitive defendants.[543]

The court transferred the case from Judge Takasugi in Los Angeles to Judge David O. Carter in Santa Ana on February 23, 2009.[544] Judge Takasugi died on August 4.[545]

On March 10 from 5:00 to 9:00 p.m. and on March 11 from 6:00 p.m. until past midnight, Judge Carter held a status conference with all counsel and defendants in preparation for an April trial.[546] Among the matters covered were the judge's learning how to pronounce the participants' names, a review of witnesses to be called, and preparation of a jury questionnaire.[547] On March 17 and 18, Judge Carter heard motions.[548] On April 9, the government filed a third superseding indictment.[549]

Jury selection began on Friday, April 17.[550] Jury questionnaire review continued on Monday and Tuesday, with jury selection to resume on April 29.[551] On the morning of April 29, the parties announced that they were close to a settlement of the case.[552] By 11:31 a.m., the parties were able to put plea agreements on the

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Jessica Garrison & David Rosenzweig, *Terror Funding Charges Rejected*, L.A. Times, June 22, 2002, at 1.

541. *Rahmani*, 209 F. Supp. 2d at 1058.

542. *Afshari*, 426 F.3d 1150 (on rehearing); United States v. Afshari, 412 F.3d 1071 (9th Cir. 2005) (amended opinion); United States v. Afshari, 392 F.3d 1031 (9th Cir. 2004) (opinion withdrawn); *Afshari*, 635 F. Supp. 2d at 1114.

543. Second Superseding Indictment, United States v. Afshari, No. 2:01-cr-209 (C.D. Cal. Nov. 29, 2007); First Superseding Indictment, *id.* (June 14, 2005).

544. Notice, *id.* (Feb. 23, 2009); *Afshari*, 635 F. Supp. 2d at 1114.

For this report, Tim Reagan interviewed Judge Carter and his law clerks Daniel Galindo and Robert Hudgson at the Santa Ana courthouse on October 16, 2012.

545. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

546. Transcripts, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 10 and 11, 2009, filed Mar. 11 and 13 and May 6, 2009).

547. *Id.*

548. Transcripts, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Mar. 17 and 18, 2009, filed Mar. 18, 19, and 20, July 21, and Sept. 30, 2009).

549. Third Superseding Indictment, *id.* (Apr. 9, 2009).

550. Minutes, *id.* (Apr. 17, 2009); Transcripts, *id.* (Apr. 17, 2009, filed Apr. 20, June 15, and July 8, 2009).

551. Minutes, *id.* (Apr. 20 and 21, 2009).

552. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009) (status conference).

record.[553] As a precaution, Judge Carter kept the jury at the courthouse during the plea colloquies.[554]

Judge Carter delayed sentencing, because of political efforts to have MEK removed from the list of terrorist organizations.[555] In September 2012, the Secretary of State removed MEK from the terrorist organization list.[556]

On February 19, 2013, Judge Carter sentenced each defendant to three years of supervised release.[557]

Challenge: Classified Evidence

In preparation for trial, the defendants filed a notice that they might introduce classified evidence,[558] and Judge Carter reviewed classified evidence for discoverability.[559]

The court's contacts with classified information became much more sensitive when Judge Carter determined that for sentencing purposes he needed to know how likely it was that MEK would be removed from the terrorist list.[560] Judge Carter, therefore, determined that he and his law clerks needed access to very sensitive and timely diplomatic and counterterrorism records.[561]

Judge Carter's law clerks and a court reporter received security clearances allowing them to view top secret sensitive compartmented information (SCI).[562] SCI must be stored in a sensitive compartmented facility (SCIF).[563] The Santa Ana courthouse does not have one, but the courthouse in Los Angeles has one.[564] Classified information designated secret and not SCI could be stored in an approved safe in the Santa Ana courthouse.[565]

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553. Transcript, *id.* (Apr. 29, 2009, filed May 6, 2009) (change of plea); Minutes, *id.* (Apr. 29, 2009); *see* Julie Cart, *7 Admit Raising Funds for Terrorists*, L.A. Times, Apr. 30, 2009, at 5; Kimberly Edds, *7 Plead Guilty to Raising Money for Terrorists*, Orange Cnty. Reg., May 1, 2009, at B.

554. Interview with Hon. David O. Carter, Oct. 16, 2012.

555. *Id.*; *see* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 613 F.3d 220 (D.C. Cir. 2010) (remanding redesignation for a due process remedy); Dena Bunis, *Iranian Exiles Get Local Support*, Orange Cnty. Reg., Sept. 9, 2008, at B.

556. *See* Shashank Bengali, *U.S. to Adjust Terror List*, L.A. Times, Sept. 22, 2012, at 3; Scott Shane, *Star Lobbyists Help Iran Group Escape Shadow*, N.Y. Times, Sept. 22, 2012, at A1; Joby Warrick, *U.S. to Remove Iranian Exiles from Terrorist List*, Wash. Post, Sept. 22, 2012, at A14

557. Judgments, *Afshari*, No. 2:01-cr-209 (C.D. Cal. Feb. 19, 2013).

558. Notice, *id.* (Mar. 20, 2009).

559. Transcript at 6–9, *id.* (Apr. 14, 2009, filed Apr. 15, 2009).

560. Interview with Hon. David O. Carter, Oct. 16, 2012.

561. *Id.*

562. *Id.*

563. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

564. Interview with Dep't of Justice Litig. Sec. Group Staff, Dec. 19, 2012.

565. *Id.*

Detroit

United States v. Koubriti (Gerald E. Rosen, E.D. Mich.)

Six days after the September 11, 2001, attacks on the United States, federal agents visited a suspected Detroit apartment residence of Nabil al-Marabh, a suspect in the attacks.[566] Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.[567] Agents found fraudulent identification documents in the name of Youssef Hmimssa, a former roommate, who had asked them to hold the documents for him.[568] Koubriti and Hannan admitted that they knew that the documents were fraudulent.[569] They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.[570] Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.[571] Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.[572] Abdel Ilah Elmardoudi, the alleged ringleader in

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566. Koubriti v. Convertino, 593 F.3d 459, 462 (6th Cir. 2010) (finding prosecutorial immunity in one defendant's civil action); United States v. Koubriti, 305 F. Supp. 2d 723, 724–25, 727 (E.D. Mich. 2003) (sanctioning Attorney General John Ashcroft for false and public statements about the case in violation of the court's gag order); United States v. Koubriti, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003) (agreeing to partially close the jury voir dire); United States v. Koubriti, 199 F. Supp. 2d 656, 658–59 (E.D. Mich. 2002) (denying motions to suppress evidence acquired during the search of the apartment); United States v. Koubriti, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001) (denying bond release pending trial); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 21 (2008) [hereinafter *Trying Cases*] (remarks by Judge Gerald E. Rosen); *see* David Johnston, *3 Held in Detroit After Aircraft Diagrams Are Found*, N.Y. Times, Sept. 20, 2001, at B2; Philip Shenon & Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. Times, Nov. 1, 2001, at A1; Don Van Natta, Jr., *Hundreds of Arrests, but Promising Leads Unravel*, N.Y. Times, Oct. 21, 2001, at B1.

567. *Koubriti*, 305 F. Supp. 2d at 727; *Koubriti*, 199 F. Supp. 2d at 660–61; *Koubriti*, 2001 WL 1525270, at *1; *see This American Life: The Prosecutor* (PRI radio broadcast May 31, 2008).

Two days later, al-Marabh was arrested in Burbank, Illinois. *See* Shenon & Van Natta, *supra* note 566; Jodi Wilgoren, *Trail of Man Sought in 2 Plots Leads to Chicago and Arrest*, N.Y. Times, Sept. 21, 2001, at B8. The government ultimately decided to merely deport him. *See* Danny Hakim, *Trial Set to Begin for Four Men Accused of Being in Terror Cell*, N.Y. Times, Mar. 17, 2003, at A15.

568. *Koubriti*, 305 F. Supp. 2d at 727; *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658; *Koubriti*, 2001 WL 1525270, at *2; *see* Johnston, *supra* note 566; Shenon & Van Natta, *supra* note 566; *The Prosecutor*, *supra* note 567; Van Natta, *supra* note 566.

569. *Koubriti*, 2001 WL 1525270, at *2, 6.

570. *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658–59; *Koubriti*, 2001 WL 1525270, at *1.

571. *Koubriti*, 199 F. Supp. 2d at 658; *Koubriti*, 2001 WL 1525270, at *1 n.2; *see* Danny Hakim, *Informer Is Cited as the Key to Unlocking a Terrorist Cell*, N.Y. Times, Aug. 30, 2002, at A10; Shenon & Van Natta, *supra* note 566; Van Natta, *supra* note 566.

572. *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658 n.1.

Chicago, also was indicted on March 27.[573] On August 28, 2002, the government added charges against the defendants for material support of terrorism.[574] The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Gerald E. Rosen.[575]

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.[576] On September 9, 2005, he was sentenced to six years and six months in prison for document fraud.[577] He was deported to Morocco in 2007.[578]

This case was a high-profile case that had received some national press coverage and a lot of local press coverage.[579] The court selected 280 prospective jurors for the case, and Judge Rosen greeted them on March 18, 2003, with a speech disclosing the case on which they might serve and welcoming them to their opportunity to provide civic service.[580]

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.[581] Based on answers to this questionnaire, the court and the attor-

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573. *Koubriti*, 199 F. Supp. 2d at 658 n.1; *see* United States v. Elmardoudi, 501 F.3d 935, 937–38 (8th Cir. 2007); *see also* Hakim, *supra* note 567; *The Prosecutor*, *supra* note 567.

Elmardoudi was arrested in North Carolina near Greensboro on November 4, 2002. *Elmardoudi*, 501 F.3d at 937; *see* Danny Hakim, *Man Accused of Being Leader of Detroit Terror Cell Is Arrested*, N.Y. Times, Nov. 15, 2002, at A20; Dan Eggen & Allan Lengel, *Alleged Leader of "Sleeper Cell" Arrested in N.C.*, Wash. Post, Nov. 15, 2002, at A28.

574. United States v. Koubriti, 305 F. Supp. 2d 723, 731 (E.D. Mich. 2003); *see* Douglas Farah & Tom Jackman, *6 Accused of Conspiracy to Aid in Terror Attacks*, Wash. Post, Aug. 29, 2002, at A1.

575. Docket Sheet, United States v. Koubriti, No. 2:01-cr-80778 (E.D. Mich. Sept. 27, 2001) [hereinafter E.D. Mich. *Koubriti* Docket Sheet]; Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 Cardozo Pub. L. Pol'y & Ethics J. 101, 102 (2006) ("I presided over the nation's first post-September 11 terrorism trial"); *see* Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. Times, Sept. 3, 2004, at A12.

Tim Reagan interviewed Judge Rosen for this report in the judge's chambers on December 7, 2006, and by telephone on January 3 and April 18, 2007.

576. *Koubriti*, 305 F. Supp. 2d at 734; *see* Koubriti v. Convertino, 593 F.3d 459, 462 n.3 (6th Cir. 2010); *Koubriti*, 199 F. Supp. 2d at 658 n.1.

"In the deal, Mr. Hmimssa received 46 months in prison for 10 unrelated felonies committed in three states; he could have faced up to 81 years." Danny Hakim, *2 Arabs Convicted and 2 Cleared of Terrorist Plot Against the U.S.*, N.Y. Times, June 4, 2003, at A1.

577. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 9, 2005); *see* Cecil Angel, *Ex-Terrorism Trial Witness Gets Maximum Sentence*, Detroit Free Press, Sept. 2, 2005, at 6.

Hmimssa was released from prison on May 25, 2007. http://www.bop.gov (reg. no. 20451-424).

578. *See* David Ashenfelter, *Terrorism Case's Witness Deported*, Detroit Free Press, Nov. 2, 2007, at 2.

579. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

580. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 575 (noting voir dire from March 18 to March 26, 2003); Gerald E. Rosen, United States v. Koubriti: Preliminary Voir Dire (Mar. 18, 2003) (text of speech); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

581. Gerald E. Rosen, United States v. Koubriti: Jury Questionnaire (Mar. 18, 2003); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

neys were able to sort the potential jurors into three groups: (1) apparently suitable, (2) possibly suitable, and (3) not suitable.[582] Jurors were questioned individually, beginning with those "apparently suitable," in random order, and a jury was selected from the approximately 65–80 potential jurors in that group.[583]

On June 3, the jury convicted Koubriti and Elmardoudi of both terrorism and document-fraud charges, convicted Hannan of document-fraud charges only, and acquitted Ali-Haimoud.[584]

In December 2003, it came to the court's attention that the lead prosecutor in the case had withheld from defense counsel a potentially exculpatory or impeaching document.[585] The defendant moved for a mistrial, but the government maintained that the document was not material.[586] Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.[587]

> As thoroughly detailed in the Government's filing, at critical junctures and on critical issues essential to a fair determination by the jury of the issues tried in this case, the prosecution failed in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further, as the Government's filing also makes abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case.[588]

Judge Rosen concluded that "the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view."[589]

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582. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

583. *Id.*

584. United States v. Koubriti, 509 F.3d 746, 748 (6th Cir. 2007); United States v. Koubriti, 305 F. Supp. 2d 723, 736 (E.D. Mich. 2003); *see* Koubriti v. Convertino, 593 F.3d 459, 463 & n.7 (6th Cir. 2010); United States v. Elmardoudi, 501 F.3d 935, 938 (8th Cir. 2007); *see also* Hakim, *supra* note 576; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10; *The Prosecutor*, *supra* note 567.

Ali-Haimoud sued the publisher of *The Terrorist Recognition Handbook* for falsely identifying him, with a photograph, as a known Al-Qaeda member. Notice of Removal, Ali-Haimoud v. Nance, No. 2:04-cv-74737 (E.D. Mich. Dec. 3, 2004). The case was remanded to state court on stipulation that the plaintiff would neither seek nor accept more than $75,000 in damages. Stipulation, *id.* (Apr. 22, 2005).

585. United States v. Koubriti, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004); United Koubriti, 297 F. Supp. 2d 955, 958–61 (E.D. Mich. 2004); *Trying Cases*, *supra* note 566, at 22 (remarks by Judge Rosen); *see Koubriti*, 593 F.3d at 463; *The Prosecutor*, *supra* note 567.

586. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

587. *Trying Cases*, *supra* note 566, at 23 (remarks by Judge Rosen); *see Koubriti*, 593 F.3d at 463; *The Prosecutor*, *supra* note 567.

588. *Koubriti*, 336 F. Supp. 2d at 680–81; *see also id.* at 681–82 n.5 ("Having itself reviewed [additional] classified materials, the Court observes that they provide additional and substantial support for the conclusions reached in the Government's filing.").

589. *Id.* at 681; *see* Hakim, *supra* note 575 (quoting text).

In a criminal trial over which Judge Arthur J. Tarnow presided, the prosecutor and a government witness were acquitted of wrongdoing.[590]

As a result, at the request of both the government and the defense, on September 2, 2004, the court dismissed the terrorism charges against Koubriti and Elmardoudi and ordered a new trial on the fraudulent-document charges against Koubriti, Elmardoudi, and Hannan.[591] The government elected not to pursue further the charges tried.[592]

The government nevertheless filed a fourth superseding indictment against Koubriti and Hannan on December 15, charging them with faking an automobile accident in July 2001 to defraud an insurance company.[593] Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of time served and deportation to Morocco.[594] The court released Koubriti on bond on October 12, 2004.[595] Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.[596] On February 9, 2010, Judge Rosen granted the government's motion to dismiss Koubriti's indictment for successful completion of pretrial diversion.[597]

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590. Docket Sheet, United States v. Convertino, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006) (noting an October 31, 2007, jury verdict of not guilty); *Koubriti*, 593 F.3d at 464; *Trying Cases*, *supra* note 566, at 23 (remarks by Judge Rosen); *see* Spencer S. Hsu, *Ex-Prosecutor, Security Officer Cleared in Terrorism Case*, Wash. Post, Nov. 1, 2007, at A3; Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, N.Y. Times, Nov. 1, 2007, at A17; *The Prosecutor*, *supra* note 567.

Tim Reagan interviewed Judge Tarnow for this report by telephone on October 3, 2012.

591. United States v. Koubriti, 509 F.3d 746, 748 (6th Cir. 2007); *Koubriti*, 336 F. Supp. 2d at 682; *Trying Cases*, *supra* note 566, at 23 (remarks by Judge Rosen); *see Koubriti*, 593 F.3d at 463–64; United States v. Elmardoudi, 501 F.3d 935, 938 & n.4 (8th Cir. 2007); *see also* Hakim, *supra* note 575; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15; *The Prosecutor*, *supra* note 567.

592. United States v. Koubriti, 435 F. Supp. 2d 666, 670 & n.5 (E.D. Mich. 2006); Order to Dismiss Third Superseding Indictment, United States v. Koubriti, No. 2:01-cr-80778 (E.D. Mich. Jan. 18, 2005); *The Prosecutor*, *supra* note 567.

593. *Koubriti*, 509 F.3d at 748; Fourth Superseding Indictment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Dec. 15, 2004); *see Koubriti*, 593 F.3d at 464; *Koubriti*, 435 F. Supp. 2d at 668, 670; *see also Terror Case Is Switched to Fraud Charges*, Wash. Post, Dec. 16, 2004, at A10.

When federal agents first searched Koubriti and Hannan's apartment, they noticed airport-employee badges, which the agents regarded as alarming evidence. United States v. Koubriti, 199 F. Supp. 2d 656, 660 (E.D. Mich. 2002); United States v. Koubriti, No. 2:01-cr-80778, 2001 WL 1525270, at *1 (E.D. Mich. Oct. 16, 2001); *see* Johnston, *supra* note 566; *The Prosecutor*, *supra* note 567. The residents told them at the time that they used to work for Sky Chefs as dishwashers but stopped after an automobile accident prevented them from working there. *Koubriti*, 199 F. Supp. 2d at 661; *Koubriti*, 2001 WL 1525270, at *3; *see* Shenon & Van Natta, *supra* note 566.

594. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Mar. 22, 2005); Plea Agreement, *id.* (Mar. 22, 2005); *see also Koubriti*, 435 F. Supp. 2d at 668 n.1 (noting that Hannan has been deported).

595. *Koubriti*, 593 F.3d at 464.

596. *Koubriti*, 509 F.3d 746 (holding that a retrial after a mistrial is not double jeopardy), *cert. denied*, 552 U.S. 1328 (2008); *Koubriti*, 435 F. Supp. 2d 666.

597. Order, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Feb. 9, 2010); *see* David Ashenfelter, *Deal May Lead to Probation for Koubriti*, Detroit Free Press, Apr. 15, 2009, at 4A (reporting on

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.[598] The district court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,[599] and the case settled.[600] Koubriti then sued his prosecutors for malicious prosecution,[601] but the Sixth Circuit's court of appeals determined that the prosecutors had prosecutorial immunity.[602] The district court granted summary judgment to an FBI agent defendant, bringing the case to a close.[603]

Elmardoudi was sentenced by the U.S. District Court for the District of Minnesota to four years and three months in prison in a separate prosecution for trafficking in fraudulent telephone calling cards,[604] and he was sentenced by the U.S. District Court for the Northern District of Iowa to five years in prison for fraudulent use of Social Security numbers.[605]

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an agreement that would save Koubriti from a criminal record and provide him with a path to citizenship); Paul Egan, *Ex-Terror Suspect in Talks to Clear Record*, Detroit News, Apr. 15, 2009, at 4A (same).

598. Complaint, Koubriti v. Rojo, No. 2:05-cv-74343 (E.D. Mich. Nov. 14, 2005).

In their first motion for summary judgment, the defendants noted that "[w]hile incarcerated in the Wayne County Jail Plaintiff was deemed a level 4 security risk by the U.S. Marshals, and as such, was placed in a 'super max' security cell block." Defendants' Summary Judgment Motion at 1, *id.* (July 25, 2006).

> Between September 17, 2001 until August of 2003, Plaintiff Koubriti was incarcerated in the Wayne County Jail, and per level 4 "super max" security protocol, Plaintiff Koubriti was ensconced in his cell for 23 hours per day, and allowed 1 hour per day of exercise. . . . In August of 2003, Plaintiff was released, but was recharged again in November 2003. From November 2003 until July of 2004, Plaintiff Koubriti was once again incarcerated in the Wayne County Jail and given a level 4 max security risk classification.

Id. at 2.

599. Opinion, *id.* (July 27, 2007), *available at* 2007 WL 2178331 (granting summary judgment on the exercise claim); Opinion, *id.* (Jan. 3, 2007), *available at* 2007 WL 45923 (granting summary judgment on the pork claim).

600. Stipulated Dismissals, *id.* (Aug. 9 and 24, 2007).

601. Complaint, Koubriti v. Convertino, No. 2:07-cv-13678 (E.D. Mich. Aug. 30, 2007); Docket Sheet, *id.*; *see* Paul Egan, *Ex-Terror Suspect Sues Convertino*, Detroit News, Aug. 31, 2007, at 5B; *The Prosecutor*, *supra* note 567.

602. Koubriti v. Convertino, 593 F.3d 459 (6th Cir.), *cert. denied*, ___ U.S. ___, 131 S. Ct. 82 (2010); *see* Ben Schmitt & Robin Erb, *Man Can't Sue U.S. Prosecutor in Terror Case*, Detroit Free Press, Feb. 4, 2010, at A8.

603. Order, *Koubriti*, No. 2:07-cv-13678 (E.D. Mich. May 23, 2011), *available at* 2011 WL 1982239; *see* David Ashenfelter, Mike Brookbank, Tammy Stables Battaglia, Elisha Anderson & Megha Satyanarayana, *Dismissal Ends Terror Trial Lawsuit*, Detroit Free Press, May 24, 2011, at A4.

604. United States v. Elmardoudi, 501 F.3d 935, 937, 940 (8th Cir. 2007) (describing the crime as "'shoulder surfing,' that is, surreptitiously memorizing other people's calling card and credit card numbers at the Minneapolis–St. Paul airport and then passing the numbers on to other people who used them to pay for telephone calls."), *cert. denied*, 552 U.S. 1120 (2008); Amended Sentencing Judgment, United States v. Elmardoudi, No. 0:06-cr-262 (D. Minn. Oct. 17, 2006).

605. Judgment, United States v. Elmardoudi, No. 1:06-cr-112 (N.D. Iowa Mar. 14, 2008); Indictment, *id.* (Aug. 16, 2006); *see Elmardoudi*, 501 F.3d at 937. The court of appeals affirmed. United States v. Elmardoudi, 313 F. App'x 923 (8th Cir.), *cert. denied*, 558 U.S. 958 (2009).

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."[606] Jurors did not come directly to the courthouse in the morning.[607] Instead, they assembled at a secret location and were driven to the courthouse in a van.[608] Someone found out about the secret location and called the jury room with a death threat.[609] On the following day, someone called the Detroit News with a death threat concerning the judge.[610] The Marshal changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.[611]

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.[612] Jury selection was conducted behind closed doors.[613] Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.[614] Judge Rosen noted that it was very important to make sure that the jury clerk knew that the names and addresses of the jurors were confidential.[615]

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued "a public and formal judicial admonishment of the Attorney General."[616] As Judge Rosen recalled,

> the Attorney General of the United States violated a gag order that was stipulated by the parties—indeed, drafted by the government—not once, but twice, which occasioned contempt motions by the defense throughout the trial, which I put off until after the trial. I think I was the first federal judge to be required to issue a public admonishment of the Attorney General of the United States.[617]

On October 23, 2001, Judge Rosen issued a stipulated gag order forbidding public comments about the case that would have a reasonable likelihood of inter-

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606. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

607. *Id.*

608. *Id.*

609. *Trying Cases*, *supra* note 566, at 21 (remarks by Judge Rosen); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

610. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

611. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Jan. 3, 2007.

612. United States v. Koubriti, 305 F. Supp. 2d 723, 728 (E.D. Mich. 2003); United States v. Koubriti, 252 F. Supp. 2d 424, 426 (E.D. Mich. 2003); United States v. Koubriti, 252 F. Supp. 2d 418 (E.D. Mich. 2002) (denying a motion opposing the empaneling of an anonymous jury); *Trying Cases*, *supra* note 566, at 21 (remarks by Judge Rosen); *see* David Eggen & Allan Lengel, *In Detroit, First Post-9/11 Terrorism Trial*, Wash. Post, Mar. 19, 2003, at A3; David Runk, *Judge Says Elmardoudi Terror Trial to Proceed*, St. Paul Pioneer Press, Mar. 25, 2003, at B9.

613. *Trying Cases*, *supra* note 566, at 21 (remarks by Judge Rosen); Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; *see* Eggen & Lengel, *supra* note 612.

614. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

615. *Id.*

616. *Koubriti*, 305 F. Supp. 2d at 726; *see id.* at 763–65; *see also* Robert E. Pierre, *Judge Rebukes Ashcroft for Gag Violation*, Wash. Post, Dec. 17, 2003, at A27; Richard B. Schmitt, *Ashcroft Is Rebuked by U.S. Judge*, L.A. Times, Dec. 17, 2003, at 20.

617. *Trying Cases*, *supra* note 566, at 21 (remarks by Judge Rosen).

fering with a fair trial.[618] Eight days later, Attorney General John Ashcroft incorrectly stated at a press conference that the defendants in the case were "suspected of having knowledge of the September 11th attacks."[619] In addition, during the trial, the Attorney General commented favorably at a press conference on the credibility of the cooperating codefendant's testimony.[620]

On the day before the grand jury handed down the second superseding indictment adding terrorism charges for the first time, Fox News announced the forthcoming indictment in detail sufficient to suggest the indictment had been improperly leaked.[621] On the following day, MSNBC News presented improperly leaked evidence against the defendants.[622] The Attorney General's responsibility for these leaks remained unclear.[623]

The defendants moved for sanctions against the Attorney General on August 28, 2003.[624] On the following day, Judge Rosen ordered the Attorney General "to show cause in writing why he should not be compelled to appear for a hearing to address Defendants' motion."[625] In response, the Attorney General stated that he regretted making the statements and acknowledged that they were mistakes, but said that the errors were entirely inadvertent.[626]

Because the sanction motion occurred after the trial was over, a civil contempt sanction could not remedy the wrongdoing; the only type of pertinent contempt would be criminal contempt as a punitive sanction.[627] Criminal contempt proceedings against a sitting Cabinet officer would require extraordinary procedures and implicate serious constitutional issues.[628] Because the record did not suggest willful violation of the court's order, Judge Rosen decided that confronting these difficulties would not be necessary.[629] Because the Attorney General did violate the

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618. *Koubriti*, 305 F. Supp. 2d at 728–29; *see id.* at 733 ("I didn't initiate the gag order, but I intend to keep it in place until further order of the Court, and I intend to enforce it."); *see also The Prosecutor*, *supra* note 567.

619. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; *see* Shenon & Van Natta, *supra* note 566 (reporting on the Attorney General's news conference); *The Prosecutor*, *supra* note 567.

Two days after the news conference, the Justice Department acknowledged that "it did not know whether three Arab men now in custody in Michigan had advance knowledge of the terror attacks of Sept. 11." Don Van Natta, Jr., *Justice Dept. Alters Stand on 3 Detained*, N.Y. Times, Nov. 3, 2001, at B5; *see The Prosecutor*, *supra* note 567. More than five years after that, however, government counsel told an appellate panel at oral argument that Elmardoudi was accused of supporting terrorists connected with the September 11, 2001, attacks. United States v. Elmardoudi, 504 F.3d 935, 938 n.3 (8th Cir. 2007).

620. *Koubriti*, 305 F. Supp. 2d at 725, 735–36.

621. *Id.* at 731; *Trying Cases*, *supra* note 566, at 22 (remarks by Judge Rosen); *see The Prosecutor*, *supra* note 567 (noting that Judge Rosen learned from the broadcast that he would preside over the case).

622. *Koubriti*, 305 F. Supp. 2d at 732.

623. *Id.* at 725 n.1.

624. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 575.

625. *Koubriti*, 305 F. Supp. 2d at 725; *see also id.* at 737.

626. *Id.* at 737–38; *see* Schmitt, *supra* note 616.

627. *Koubriti*, 305 F. Supp. 2d at 741.

628. *Id.* at 726, 742, 752–57.

629. *Id.* at 726, 748–57.

court's order on two occasions, however, Judge Rosen decided to formally admonish him.[630]

Challenge: Classified Evidence

In order to investigate claims of prosecutorial misconduct, the court had to review the prosecution's entire case file, which included classified documents, as well as highly sensitive records maintained at CIA headquarters.[631] Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and use of the CIA's evidence.[632] Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.[633]

Review of classified evidence in Detroit required the court to (1) establish a sensitive compartmented information facility (SCIF)[634] and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.[635]

A SCIF is a secure room in which documents are stored in independently locked file drawers.[636] The room was created by classified information security officers provided by the Justice Department's Litigation Security Group,[637] and then the court programmed the codes for access.[638] Only chambers staff with security clearances may enter this SCIF.[639]

If there is any chance that a case will involve classified information, Judge Rosen advised the following:

> The first thing that the judge should do is to have a conference with the lawyers and attempt to determine whether classified information is going to be a part of the case. That's not as easy as it sounds, because sometimes it is unclear whether classified information will be a part of the case. The government may have classified information, but they may not be certain if they are going to use it. So, at the very least, if it looks remotely as if classified information may be implicated in the case, the court should discuss this with counsel and have a very open discussion.[640]

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630. *Id.* at 725–26, 757–65; *see* Schmitt, *supra* note 616; *The Prosecutor*, *supra* note 567.

631. *Trying Cases*, *supra* note 566, at 22 (remarks by Judge Rosen); Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

632. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

633. *Trying Cases*, *supra* note 566, at 5–6 (remarks by Professor Daniel J. Capra); Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

634. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

635. United States v. Koubriti, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004).

Judge Rosen employs career law clerks, and all of his originally cleared staff remained on staff. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

636. Rosen, *supra* note 575, at 105; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; *see also Trying Cases*, *supra* note 566, at 4–5 (remarks by Professor Daniel J. Capra).

637. *See* Reagan, *supra* note 634, at 17–18.

638. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

639. *Id.*

640. *Trying Cases*, *supra* note 566, at 3 (remarks by Professor Daniel J. Capra).

For the prosecution of the prosecutor and a government witness, Judge Tarnow's law clerk and a court reporter obtained security clearances.[641] Classified information was stored in a chambers safe, but the classified information was not a significant factor in the case.[642]

641. Interview with Hon. Arthur J. Tarnow, Oct. 3, 2012.
642. *Id.*

Twentieth Hijacker

United States v. Moussaoui
(Leonie M. Brinkema, E.D. Va.)[643]

On September 11, 2001, four hijacked commercial jumbo jets were crashed in New York, Virginia, and Pennsylvania, killing nearly 3,000 people, including 19 suspected hijackers.[644] Two planes crashed into the two towers of the World Trade Center in New York City, and one plane crashed into the Pentagon; each of these planes apparently had five hijackers aboard.[645] The fourth plane crashed near Shanksville, Pennsylvania, after passengers thwarted the hijackers' plan to strike a strategic target—probably the Capitol.[646] This plane apparently had only four hijackers aboard.[647] Just a few days later, it was reported that Zacarias Moussaoui may have been intended to be the twentieth hijacker.[648]

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643. Pre-conviction appeals were heard by Fourth Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory; a post-conviction appeal was first heard by Judges Williams and Gregory and Fourth Circuit Judge William B. Traxler, Jr., and then reheard by Judges Traxler and Gregory and Fourth Circuit Judge Dennis W. Shedd.

644. The 9/11 Commission Report 1–14, 311 (2004); United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); United States v. Moussaoui, 382 F.3d 453, 457 (4th Cir. 2004); United States v. Moussaoui, 333 F.3d 509, 512 (4th Cir. 2003); *see* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon*, Wash. Post, Sept. 12, 2001, at A1; Serge Schmemann, *U.S. Attacked*, N.Y. Times, Sept. 12, 2001, at A1; *see also* http://legacy.com/Sept11/Home.aspx (providing victim profiles).

645. *See* Grunwald, *supra* note 644; David Johnston & Philip Shenon, *Man Held Since August Is Charged with a Role in Sept. 11 Terror Plot*, N.Y. Times, Dec. 12, 2001, at A1; *New Theory on a 20th Hijacker Is Offered*, N.Y. Times, Nov. 16, 2001, at B10 [hereinafter *New Theory*]; Schmemann, *supra* note 644.

646. The 9/11 Commission Report 244 (2004); *Moussaoui*, 591 F.3d at 266; *see* Jess Bravin, The Terror Courts 329 (2013); Grunwald, *supra* note 644; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; Terry McDermott, Perfect Soldiers 229, 241 (2005); *New Theory*, *supra* note 645; Schmemann, *supra* note 644; *see also* Terry McDermott, *The Mastermind*, New Yorker, Sept. 13, 2010, at 38, 49 ("[Khalid Sheikh Mohammed] allowed Atta to overrule Bin Laden's choice of the White House as one of the targets—Atta thought it was too difficult—and substituted the Capitol."); Terry McDermott & Josh Meyer, The Hunt for KSM 142 (2012) (reporting same); Ali H. Soufan, The Black Banners 282 (2011) (reporting that Osama Bin Laden identified the Capitol as the fourth target).

647. *See* David Johnston & Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, N.Y. Times, Oct. 6, 2001, at A1; Johnston & Shenon, *supra* note 645; Longman, *supra* note 646; *New Theory*, *supra* note 645.

648. Suzanne Daley, *Mysterious Life of a Suspect from France*, N.Y. Times, Sept. 21, 2001, at B1; David Peterson, *Mother Says Extremists Brainwashed Her Son*, Minneapolis–St. Paul Star Trib., Sept. 20, 2001, at 9A (reporting that the French newsmagazine *L'Express* speculated online on September 19, 2001, that Moussaoui might be the twentieth hijacker).

> Khalid Sheikh Mohammed wanted even more men, as many as seven or eight per plane. At least half a dozen men selected for the mission never made it into the United States—several had visas denied, others agreed to participate, then withdrew before ever leaving for the United States. At least one man was turned away by an immigration officer at arrival.

McDermott, Perfect Soldiers, *supra* note 646, at 204 (footnotes omitted).

Moussaoui could not hijack a plane on September 11, because he was in custody following an arrest in Minnesota on August 16 for an immigration violation.[649] Three days earlier, he had begun instruction at the Pan Am International Flight Academy.[650] It was initially reported that he aroused suspicion when he expressed an interest in steering a jumbo jet but not in taking off or landing.[651] The *Washington Post* reported in November, however, that the director of the FBI told federal prosecutors at a closed-door meeting that initial reports of Moussaoui's not wanting to learn how to take off or land were inaccurate, and Moussaoui no longer was thought to be intended as the twentieth hijacker; he was thought to have been intended for a later attack.[652]

Moussaoui was born on May 30, 1968, in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.[653] He moved to London in 1990, and then moved back to France in 1997.[654] By the time he entered the United States on a student visa, French authorities already suspected him of terrorist ties.[655] In February 2001, he moved to Norman, Oklahoma, for training at the Airman Flight School, where his performance was judged poor.[656]

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649. The 9/11 Commission Report 247 (2004) (reporting that the planners of the attacks might have canceled them if they had known about Moussaoui's arrest); *Moussaoui*, 591 F.3d at 266; *Moussaoui*, 382 F.3d at 457; *Moussaoui*, 333 F.3d at 512; United States v. Moussaoui, 282 F. Supp. 2d 480, 483 (E.D. Va. 2003); *see* Katherine C. Donahue, Slave of Allah 3, 15–16 (2007); Johnston & Shenon, *supra* note 645; McDermott, Perfect Soldiers, *supra* note 646, at 226; Peterson, *supra* note 648; H.L. Pohlman, Terrorism and the Constitution 192 (2008); Soufan, *supra* note 646, at 277.

650. The 9/11 Commission Report 246–47, 273 (2004); *Moussaoui*, 591 F.3d at 266, 274; *see* Johnston & Shenon, *supra* note 647.

One of the three instructors who alerted authorities to suspicion concerning Moussaoui received a $5 million reward in 2008. *See Reward in Moussaoui Case*, N.Y. Times, Jan. 25, 2008, at A18; *Two Others Seek Reward in Moussaoui Case*, N.Y. Times, Jan. 26, 2008, at A10.

651. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, Wash. Post, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 647; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, Wash. Post, Sept. 22, 2001, at A20.

652. Dan Eggen, *Yemeni Fugitive Linked to Hijackers*, Wash. Post, Nov. 15, 2001, at A20; *see* Bin al-Shibh Deposition Opinion at 3, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Mar. 10, 2003), *available at* 2003 WL 21263699 ("he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda"); Philip Shenon, *F.B.I. Chief Says Failed Sept. 11 Hijackers May Remain at Large*, N.Y. Times, Nov. 17, 2001, at B5; *see also* McDermott, Perfect Soldiers, *supra* note 646, at 204 (reporting that attack planners decided that they would use Moussaoui only as a last resort).

In 2004, the 9/11 Commission reported that 9/11 conspirator "Khallad believes [Khalid Sheikh Mohammed] wanted between four and six operators per plane. KSM states that al Qaeda had originally planned to use 25 or 26 hijackers but ended up with only the 19." The 9/11 Commission Report 235 (2004).

653. *See* Daley, *supra* note 648; Donahue, *supra* note 649, at 42, 104; Schmidt & Romano, *supra* note 651.

654. *See* Daley, *supra* note 648.

655. *See* Donahue, *supra* note 649, at 16–17, 116–17; Grimaldi, *supra* note 651 (reporting that French officials warned the FBI of their suspicions at least ten days before the September 11 attacks); Diana Jean Schemo & Robert Pear, *Suspects in Hijackings Exploited Loopholes in Immigration Policy*, N.Y. Times, Sept. 27, 2001, at A1.

During this time, he apparently had contact with Ramzi Muhammad Abdullah Bin al-Shibh, a roommate of Mohamed Atta[657] in Hamburg, Germany.[658] Atta is believed to have been the leader of the September 11 attacks and the pilot of the first plane to hit the World Trade Center.[659] Bin al-Shibh apparently wired Moussaoui $14,000,[660] $8,600 of which Moussaoui used for flight school.[661] Ramzi Bin al-Shibh was also known as Ramzi Omar,[662] and he too came to be suspected as the intended twentieth hijacker,[663] but he was repeatedly denied a visa to enter the

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In April 1998, Moussaoui was at the same terrorist training camp in Afghanistan as Ahmed Ressam, who is sometimes referred to as the Millennium Bomber. United States v. Ressam, 679 F.3d 1069, 1075 (9th Cir. 2012); *see* Donahue, *supra* note 649, at 121, 165; *see also supra*, "Millennium Bomber" (concerning the prosecution of Ressam).

656. The 9/11 Commission Report 224–25 (2004) (reporting that Mohamed Atta, the hijacking pilot of American Airlines flight 11, visited the flight school several months earlier); United States v. Moussaoui, 591 F.3d 263, 274 (4th Cir. 2010); *see* Daley, *supra* note 648; Donahue, *supra* note 649, at 13–15, 125; Timothy Dwyer & Jerry Markon, *Flight Instructor Recalls Unease with Moussaoui*, Wash. Post, Mar. 10, 2006, at A2; Johnston & Shenon, *supra* note 647; Schmidt & Romano, *supra* note 651; Soufan, *supra* note 646, at 276–77.

657. "Atta was a finicky, dour man whose chief attributes were obedience and a capacity for detail." McDermott, *The Mastermind*, *supra* note 646, at 49. "Where Atta was the dutiful striver, bin al-Shibh was an affable layabout who rarely held a job for more than a few weeks and found university study not worth his effort. A friend in Hamburg said Atta was impossible to like, but bin al-Shibh had charm to spare." McDermott & Meyer, *supra* note 646, at 140.

658. The 9/11 Commission Report 162 (2004) (Atta and Bin al-Shibh moved in with hijacker Marwan al-Shehhi in April 1998); *Moussaoui*, 591 F.3d at 274; *see* James Risen, *U.S. Says Suspect Tied to 9/11 and Qaeda Is Captured in Raid*, N.Y. Times, Sept. 14, 2002, at A1; Soufan, *supra* note 646, at 271–73; John Tagliabue & Raymond Bonner, *German Data Led U.S. to Search for More Suicide Hijacker Teams*, N.Y. Times, Sept. 29, 2001, at A1; *see also* The 9/11 Commission Report 161 (2004) (profiling Bin al-Shibh).

659. The 9/11 Commission Report 5 (2004) (Atta was "the only terrorist on board trained to fly a jet"); *see* Johnston & Shenon, *supra* note 647; Risen, *supra* note 658; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

660. The 9/11 Commission Report 246, 273 (2004); *see* Donahue, *supra* note 649, at 1, 28–29, 76; Johnston & Shenon, *supra* note 645.

661. *See* Philip Shenon, *The Terrible Missed Chance*, Newsweek, Sept. 12, 2011, at 15.

662. *See* McDermott, *The Mastermind*, *supra* note 646, at 49; Soufan, *supra* note 646, at 272.

"His real name, he said, had no religious meaning, so he adopted the name of the prophet Mohammed's successor, the second caliph of Islam. Many acquaintances in Hamburg didn't even know Omar had another name." McDermott, Perfect Soldiers, *supra* note 646, at 37.

663. *See New Theory*, *supra* note 645; Risen, *supra* note 658; Shenon, *supra* note 652; Tagliabue, *supra* note 659; *see also* Bravin, *supra* note 646, at 346 (reporting on an apparent military commission confession "that, as the government alleged, he, too, had aspired to be a Twentieth Hijacker").

Another person designated a twentieth hijacker—Mohammed al-Qahtani—is detained at Guantánamo Bay. *See* Peter L. Bergen, Man Hunt 95 (2012) ("the man al-Qaeda was grooming to be the twentieth hijacker in the months before the 9/11 attacks"); Bravin, *supra* note 646, at 252–55 (reporting that al-Qahtani was denied entry on August 4, 2011, at the Orlando airport); Jonathan Hafetz, Habeas Corpus After 9/11 38 (2011); Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1; Soufan, *supra* note 646, at 458–59; Steven T. Wax, Kafka Comes to America: Fighting for Justice in the War on Terror 154 (2008). He has been declared "incompetent and unable to assist effec-

United States.[664] He was captured in Karachi, Pakistan, on the eve of the first anniversary of September 11, held in Morocco in secret by the CIA, and eventually transferred to Guantánamo Bay.[665] He is on trial there by military commission.[666]

Unlike the hijackers, who trained on aircraft simulators for a year or more, Moussaoui enrolled in flight school only months before the September 11 attacks.[667]

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.[668] Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court immediately appointed three attorneys to represent him.[669] The court assigned the case to Judge Leonie M. Brinkema.[670]

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tively in [his] case." Docket Sheet, Al-Qahtani v. Bush, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) (April 20, 2012, minute order).

664. The 9/11 Commission Report 161, 168, 225 (2004) (reporting that Bin al-Shibh could not persuade immigration officials that he would return home); *see* McDermott, *The Mastermind*, *supra* note 646, at 49 ("the American immigration system viewed him as a likely economic migrant"); Michael Moss, *A Traveler with Strong Views on the Right Kind of Islam and No Fear of Sharing Them*, N.Y. Times, Dec. 12, 2001, at B6; Soufan, *supra* note 646, at 272 ("The United States at the time was suspicious of Yemeni visa seekers, believing they'd attempt to become illegal immigrants."); *id.* at 275.

665. *See* Donahue, *supra* note 649, at 29; Peter Finn, *9/11 Detainee's Interrogation in Morocco Was Recorded*, Wash. Post, Aug. 18, 2010, at A4; Kamran Khan & Peter Finn, *Pakistanis Detail Capture of Key 9/11 Suspect*, Wash. Post, Sept. 15, 2002, at A1; Mark Mazzetti, *9/11 Suspect Was Detained and Taped in Morocco*, N.Y. Times, Aug. 18, 2010, at A4; Walter Pincus, *Binalshibh Said to Provide "Useful Information,"* Wash. Post., Oct. 4, 2002, at A17; Risen, *supra* note 658; Soufan, *supra* note 646, at 428, 484–88.

666. *See* Peter Finn, *Sept. 11 Suspects Will Be Tried by a Military Panel*, Wash. Post, Apr. 5, 2011, at A1; *see also* http://www.mc.mil/CASES/MilitaryCommissions.aspx (military commission case records).

667. *See* Johnston & Shenon, *supra* note 647.

668. Indictment, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001); United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010); United States v. Moussaoui, 483 F.3d 220, 223 n.1 (4th Cir. 2007); *see* Donahue, *supra* note 649, at 1–2, 19; Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, Wash. Post, Dec. 12, 2001, at A1; Johnston & Shenon, *supra* note 645; Pohlman, *supra* note 649, at 192.

Moussaoui was originally flown to New York, on September 14, 2001, for possible prosecution there. *See* Donahue, *supra* note 649, at 18–19 ("But the Department of Justice was going to ask for the death penalty, and the New York court had deadlocked on the death penalty for two of the East African embassy bombing suspects. A court near the Pentagon would more likely decide for the death penalty."). Moussaoui was transported to Alexandria, Virginia, on December 13. *See id.* at 19.

669. Complex Case Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001), *available at* 2001 WL 1887910 (recognizing four capital counts); *see* Donahue, *supra* note 649, at 1, 19; Johnston & Shenon, *supra* note 645; David Johnston & Benjamin Weiser, *Government's Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

670. Docket Sheet, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) [hereinafter E.D. Va. Docket Sheet]; *see* Philip Shenon & Neil A. Lewis, *Unpredictable Judge for Terrorism Suspect*, N.Y. Times, Dec. 26, 2001, at B6.

Tim Reagan interviewed Judge Brinkema for this report in the judge's chambers on January 5, 2007, and by telephone on March 26, 2008.

At his January 2, 2002, arraignment, Moussaoui refused to enter a plea: "In the name of Allah, I do not have anything to plead. I enter no plea. Thank you very much."[671] Judge Brinkema, with the consent of Moussaoui's lawyer, entered a plea of not guilty.[672] Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.[673]

Moussaoui refused to honor the judge by standing when she entered or left the courtroom, so Judge Brinkema arranged proceedings so that she and he would enter and leave the courtroom at the same time.[674]

At a hearing on April 22 concerning Moussaoui's conditions of confinement, the defendant raised his hand and, when recognized by Judge Brinkema, began a 50-minute diatribe on Islam and the U.S. government's conspiracy to kill him.[675] He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.[676] Judge Brinkema said that he could represent himself if he were adjudged competent to do so, but that she recommended against it and would continue the appointment of his attorneys as backups.[677]

The government filed a superseding indictment on June 19,[678] and at the arraignment six days later Moussaoui tried to plead no contest.[679] Judge Brinkema admonished him that such a plea did not mean what he seemed to think it meant and again entered a plea of not guilty on his behalf.[680]

On June 24, in *Ring v. Arizona*, the Supreme Court determined that aggravating factors meriting a death sentence must be proved to a jury beyond a reasona-

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671. *See* David Johnston, *Not-Guilty Plea Is Set for Man in Terror Case*, N.Y. Times, Jan. 3, 2002, at A1; *see also* Libby Copeland, *A Glimpse at a Symbol of a Changed World*, Wash. Post, Jan. 3, 2002, at C1; Donahue, *supra* note 649, at 8, 20.

672. E.D. Va. Docket Sheet, *supra* note 670; *Moussaoui*, 591 F.3d at 267; *see* Copeland, *supra* note 671; Donahue, *supra* note 649, at 20; Johnston, *supra* note 671.

673. Complex Case Order, *supra* note 669, at 3 (setting a deadline of March 29, 2002); Death Penalty Notice, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 28, 2002); *Moussaoui*, 483 F.3d at 223–24 n.1; *see* Donahue, *supra* note 649, at 23; Philip Shennon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. Times, Mar. 29, 2002, at A20.

674. *See* Donahue, *supra* note 649, at 9, 64.

675. *See* Pohlman, *supra* note 649, 193–94 (presenting excerpts from the speech); Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

676. *Moussaoui*, 591 F.3d at 269–70; United States v. Moussaoui, 333 F.3d 509, 512–13 (4th Cir. 2003); *see* Motion to Proceed Pro Se, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 25, 2002) (handwritten motion dated April 22, 2002); Donahue, *supra* note 649, at 23–24, 36, 39–40, 166; Pohlman, *supra* note 649, at 192; Shenon, *supra* note 675.

677. Mental Health Evaluation Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2002), *available at* 2002 WL 1311722; *see Moussaoui*, 591 F.3d at 270; Donahue, *supra* note 649, at 24, 36, 54; Shenon, *supra* note 675.

678. Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 19, 2002).

679. Order Denying No-Contest Plea, *id.* (July 9, 2002), *available at* 2002 WL 1587025; *see* Neil A. Lewis, *Defendant in Sept. 11 Plot Accuses Judge of Trickery*, N.Y. Times, June 26, 2002, at A18.

680. Order Denying No-Contest Plea, *supra* note 679; E.D. Va. Docket Sheet, *supra* note 670; *see* Lewis, *supra* note 679.

ble doubt.[681] So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.[682] At the July 18 arraignment on the new indictment, Moussaoui announced, "I, Moussaoui Zacarias, in the interests to preserve my life, enter with full conscience a plea of guilty, because I have knowledge and participated in Al Qaeda."[683] Judge Brinkema decided to give him a week to reconsider his guilty plea.[684] On July 25, Moussaoui insisted that his support for Al-Qaeda did not include involvement in the September 11 hijackings, and, on instructions from Judge Brinkema that this was inconsistent with a guilty plea, he changed his plea to not guilty.[685]

On January 31, 2003, Judge Brinkema secretly ordered the government to allow Moussaoui's standby attorneys to interview Bin al-Shibh, who was undergoing intensive interrogations overseas.[686] Judge Brinkema postponed the trial indefinitely to permit the government to appeal.[687] The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.[688] Judge Brinkema ruled that a government summary of what Bin al-Shibh would say if interviewed would be insufficient "because of

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681. Ring v. Arizona, 536 U.S. 584 (2002).

682. Second Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. July 16, 2002); United States v. Moussaoui, 382 F.3d 453, 457 (4th Cir. 2004); *see* Donahue, *supra* note 649, at 26; Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

683. United States v. Moussaoui, 591 F.3d 263, 270 (4th Cir. 2010); *see* Philip Shenon, *9/11 Defendant in Guilty Plea*, N.Y. Times, July 19, 2002, at A1; *see also* Donahue, *supra* note 649, at 26; Pohlman, *supra* note 649, at 194.

684. *Moussaoui*, 591 F.3d at 270; *see* Donahue, *supra* note 649, at 26; Shenon, *supra* note 683.

685. E.D. Va. Docket Sheet, *supra* note 670; *Moussaoui*, 591 F.3d at 270–71; *see* Donahue, *supra* note 649, at 27; Pohlman, *supra* note 649, at 194; Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

686. Bin al-Shibh Deposition Opinion, *supra* note 652, at 16–17 ("The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant's behalf—both as to guilt and potential punishment."); Bin al-Shibh Deposition Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 31, 2003); *Moussaoui*, 382 F.3d at 458; United States v. Moussaoui, 333 F.3d 509, 513 (4th Cir. 2003); E.D. Va. Docket Sheet, *supra* note 670; *see* Donahue, *supra* note 649, at 28–29; Pohlman, *supra* note 649, at 194, 196; Susan Schmidt & Dana Priest, *Judge Orders Access to Detainee for Moussaoui's Lawyers*, Wash. Post, Feb. 1, 2003, at A9; Philip Shenon, *Moussaoui Case May Have to Shift from U.S. Court to Tribunal, Administration Says*, N.Y. Times, Feb. 7, 2003 (reporting that the government feared "that if Mr. Bin al-Shibh is questioned by Mr. Moussaoui's lawyers, he might divulge information about Al Qaeda that the government wants to keep secret.").

687. Order Vacating Trial Date, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 12, 2003), *available at* 2003 WL 402249; *see* Donahue, *supra* note 649, at 29; Jerry Markon, *Moussaoui Trial Postponed for Third Time*, Wash. Post, Feb. 13, 2002, at A8; Philip Shenon, *Judge Grants the Government a Delay of Moussaoui's Trial*, N.Y. Times, Feb. 13, 2003, at A21.

688. United States v. Moussaoui, No. 03-4162, 2003 WL 1889018 (4th Cir. Apr. 14, 2003); *Moussaoui*, 382 F.3d at 458; *see* Donahue, *supra* note 649, at 29; Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Pohlman, *supra* note 649, at 194; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

its unreliability, incompleteness and inaccuracy."[689] After oral argument on June 3 before Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,[690] the court of appeals determined on June 26 that it did not have appellate jurisdiction over Judge Brinkema's order, and the merits of the government's objection were not so clear as to warrant mandamus.[691]

On August 29, Judge Brinkema ordered the government to provide Moussaoui deposition access to Khalid Sheikh Mohammed (KSM)—regarded as the mastermind of the September 11 attacks—and Mustafa Ahmed al-Hawsawi—regarded as the paymaster for the September 11 attacks—as well.[692] KSM and al-Hawsawi had been captured in Pakistan on February 27.[693] The government refused to comply with the deposition orders, so Judge Brinkema ruled that the government could not argue that Moussaoui had anything to do with the September 11 attacks, and Judge Brinkema ruled that the government could not seek a sentence of death.[694]

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689. Bin al-Shibh Substitution Opinion at 6, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 15, 2003), *available at* 2003 WL 21277161; *Moussaoui*, 382 F.3d at 458–59; *see* Donahue, *supra* note 649, at 29; Jerry Markon, *Judge Rejects Bid to Block Access to Sept. 11 Planner*, Wash. Post, May 16, 2003, at A3; Philip Shenon, *Ruling Leaves Legal Standoff in 9/11 Case*, N.Y. Times, May 16, 2003, at A17.

690. *Moussaoui*, 333 F.3d at 513; *Moussaoui*, 382 F.3d at 459; *see* Philip Shenon, *Justice Dept. Warns of Risk to Prosecution and Security*, N.Y. Times, June 4, 2003, at A21.

691. *Moussaoui*, 333 F.3d at 512, 514, 517; *Moussaoui*, 382 F.3d at 459; *see* Donahue, *supra* note 649, at 29; Neil A. Lewis, *Bush Officials Lose Round in Prosecuting Terror Suspect*, N.Y. Times, June 27, 2003, at A13; Jerry Markon, *Appeals Court Rebuffs U.S. in Moussaoui Case*, Wash. Post, June 27, 2003, at A1; Pohlman, *supra* note 649, at 198.

Over the dissent of five judges, the court decided not to rehear the appeal en banc. United States v. Moussaoui, 336 F.3d 279 (4th Cir. 2003); *see* Jerry Markon, *Moussaoui Prosecutors Defy Judge*, Wash. Post, July 15, 2003, at A1; Philip Shenon, *U.S. Will Defy Court's Order in Terror Case*, N.Y. Times, July 15, 2003, at A1.

692. Mohammed and al-Hawsawi Deposition Opinion, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2003), *available at* 2003 WL 22258213; *Moussaoui*, 382 F.3d at 459; *see* Donahue, *supra* note 649, at 29; Eric Lichtblau, *New Ruling Favors Suspect in Terror Case*, N.Y. Times, Aug. 31, 2003, at 123; Jerry Markon, *Moussaoui Granted Access to Witnesses*, Wash. Post, Aug. 30, 2003, at A12; Susan Schmidt, *2nd Key Al Qaeda Suspect Identified*, Wash. Post, Mar. 5, 2003, at A1.

Ramzi Yousef, a principal in the first World Trade Center bombing, is KSM's nephew. The 9/11 Commission Report 73, 145 (2004). "According to KSM, he started to think about attacking the United States after Yousef returned to Pakistan following the 1993 World Trade Center bombing." *Id.* at 153; *see* Soufan, *supra* note 646, at 54 ("KSM had been yearning to get more actively involved in jihad ever since his nephew had earned notoriety for the World Trade Center bombing"); *see also* McDermott, Perfect Soldiers, *supra* note 646, at 128 (reporting that the uncle is three years older than the nephew).

693. *See* Donahue, *supra* note 649, at 29; Schmidt, *supra* note 692.

694. United States v. Moussaoui, 282 F. Supp. 2d 480, 481–82, 487 (E.D. Va. 2003); *Moussaoui*, 382 F.3d at 459–60; *see* Donahue, *supra* note 649, at 29–30; Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Pohlman, *supra* note 649, at 191, 198; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.[695] Although the court of appeals agreed that the government's proposed substitutions for detainee depositions were inadequate, in an opinion by Judge Wilkins, the court ordered Judge Brinkema to attempt to craft adequate substitutions.[696] Judge Gregory dissented in part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.[697]

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.[698] The government prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.[699] The court of appeals did not share Judge Brinkema's skepticism about the reliability of the detainee reports: the interrogators "have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives."[700] Noting that Judge Brinkema judged the summaries accurate reflections of the reports, the court of appeals ruled that the summaries "provide an adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony."[701]

Meanwhile, on November 14, 2003, Judge Brinkema decided that because of his frequent inappropriate filings Moussaoui could no longer proceed pro se.[702] Seventeen months later, on April 22, 2005, one month after the Supreme Court denied his petition for a writ of certiorari, Moussaoui pleaded guilty to a conspiracy to kill Americans, but denied involvement in the September 11 attacks.[703]

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695. *Moussaoui*, 382 F.3d at 462–63.

696. *Id.* at 456–57, 479–82; *see* Donahue, *supra* note 649, at 122; Hafetz, *supra* note 663, at 227; Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5; Pohlman, *supra* note 649, at 191, 224–32.

On March 21, 2005, the Supreme Court denied Moussaoui's petition for a writ of certiorari. Moussaoui v. United States, 544 U.S. 931 (2005); *see* Donahue, *supra* note 649, at 31; Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005; Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3; Pohlman, *supra* note 649, at 191.

697. *Moussaoui*, 382 F.3d at 483–89 (Judge Gregory, concurring in part and dissenting in part); *see* Markon, *supra* note 696; Pohlman, *supra* note 649, at 226–27.

698. *Moussaoui*, 382 F.3d at 458 n.5.

699. *Id.*

700. *Id.* at 478.

701. *Id.* at 479.

702. Order Vacating Pro Se Status at 3, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Nov. 14, 2003); United States v. Moussaoui, 591 F.3d 263, 271 (4th Cir. 2010); *Moussaoui*, 382 F.3d at 460 n.6; *see* Donahue, *supra* note 649, at 30–31, 36, 40; Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Pohlman, *supra* note 649, at 194; Philip Shenon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

703. Plea Statement, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 22, 2005); *Moussaoui*, 591 F.3d at 272; United States v. Moussaoui, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); *see* Donahue, *supra* note 649, at 31; Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y.

Judge Brinkema bifurcated Moussaoui's penalty trial into a first phase on whether he was eligible for the death penalty and a possible second phase on whether he merited the death penalty.[704] Jury selection began on February 6, 2006.[705] The court sent summonses to more than 1,000 residents within the district's Alexandria division.[706] Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than 500 potential jurors filled out.[707]

Opening statements began on March 6.[708] The government's core argument for Moussaoui's execution was that the tragedies of September 11, 2001, would not have occurred had Moussaoui not lied to authorities following his arrest in August 2001.[709] Proceedings were not publicly televised, but they were broadcast to viewing sites in Manhattan, Central Islip, Boston, Philadelphia, Newark, and Alexandria for family members of September 11 victims.[710]

As the sentencing trial entered its second week, Judge Brinkema learned that a lawyer for the Transportation Security Administration was improperly coaching witnesses who were aviation officials.[711] Judge Brinkema ruled that the coached witnesses could not testify.[712]

Times, Apr. 23, 2005, at A1; Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, Wash. Post, Apr. 23, 2005, at A1; Pohlman, *supra* note 649, at 192, 246.

"Mr. Moussaoui's lawyers urged him not to plead guilty, but they could not tell him why." Adam Liptak, *The Right to Counsel, in the Right Situations*, N.Y. Times, Feb. 26, 2008, at A11.

704. *Moussaoui*, 591 F.3d at 275; Leonie M. Brinkema, United States v. Moussaoui: Preliminary Venire Instructions (Feb. 6, 2006); Leonie M. Brinkema, United States v. Moussaoui: Jury Instructions for Penalty Phase Part Two (Feb. 6, 2006); *see* Donahue, *supra* note 649, at 33–34, 65.

705. E.D. Va. Docket Sheet, *supra* note 670; *see* Donahue, *supra* note 649, at 34, 59; Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

706. Interview with Hon. Leonie M. Brinkema, Mar. 26, 2008.

707. Trial Conduct Order 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Feb. 2, 2006); Leonie M. Brinkema, United States v. Moussaoui: Jury Questionnaire (Feb. 6, 2006); Interview with Hon. Leonie M. Brinkema, Mar. 26, 2008; *see* Donahue, *supra* note 649, at 59 ("Beginning on Wednesday, February 15, the potential jurors were to arrive in smaller groups for individual questioning, or *voir dire*, in order to create a pool of 85 potential jurors."); *id.* at 61–62; Jerry Markon, *Terrorism Jury Faces Slew of Questions*, Wash. Post, Nov. 29, 2006, at B1.

708. E.D. Va. Docket Sheet, *supra* note 670; *see* Donahue, *supra* note 649, at 59, 65; Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14.

709. *See* Lewis, *supra* note 708; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

710. *See* Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006); Donahue, *supra* note 649, at 65–66; Timothy Dwyer, *9/11 Families to Watch Moussaoui Face Fate*, Wash. Post, Feb. 6, 2006, at A1; Neil A. Lewis, *At Satellite Courthouses, 9/11 Relatives Will Watch Moussaoui's Sentencing*, N.Y. Times, Mar. 5, 2006, at 118; *see also* Trial Conduct Order 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 3, 2006).

"During the trial, Judge Brinkema remarked that fewer people were watching from the off-site courtrooms than anticipated." Donahue, *supra* note 649, at 174.

711. *See* Donahue, *supra* note 649, at 69–70; Stephen Labaton & Matthew L. Wald, *Lawyer Thrust Into Spotlight After Misstep in Terror Case*, N.Y. Times, Mar. 15, 2006, at A1; Neil A.

The trial continued and jurors began to deliberate on Wednesday, March 29.[713] After a weekend break,[714] on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.[715] On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,[716] returning a verdict of life in prison on Wednesday, May 3.[717] After interviews with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.[718]

Surprised that the jury spared his life, and more confident as a result in the possibility for a fair trial in an American court, Moussaoui moved on May 8 to withdraw his guilty plea.[719] Judge Brinkema denied his motion.[720] The court of

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Lewis, *Judge Calls Halt to Penalty Phase of Terror Trial*, N.Y. Times, Mar. 14, 2006, at A1; Jerry Markon & Timothy Dwyer, *Judge Halts Terror Trial*, Wash. Post, Mar. 14, 2006, at A1.

712. Second Aviation Witness Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006); First Aviation Witness Order, *id.* (Mar. 14, 2006); *see* Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct That Nearly Derailed the Moussaoui Trial*, 20 Geo. J. Legal Ethics 463 (2007); Donahue, *supra* note 649, at 70; Neil A. Lewis, *Judge Gives Prosecutors New Chance in Terror Case*, N.Y. Times, Mar. 18, 2006, at A10; Neil A. Lewis, *Judge Penalizes Moussaoui Prosecutors by Barring Major Witnesses*, N.Y. Times, Mar. 15, 2006, at A24; Jerry Markon, *Moussaoui Prosecutors Get a Break*, Wash. Post, Mar. 18, 2006, at A1; Jerry Markon & Timothy Dwyer, *Federal Witnesses Banned in 9/11 Trial*, Wash. Post, Mar. 15, 2006, at A1.

713. E.D. Va. Docket Sheet, *supra* note 670; *see* Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

714. *See* Jerry Markon, *Moussaoui Jurors Leave for Weekend*, Wash. Post, Apr. 1, 2006, at A7.

715. United States v. Moussaoui, 591 F.3d 263, 277 (4th Cir. 2010); Phase 1 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Apr. 3, 2006); *see* Donahue, *supra* note 649, at 85; Neil A. Lewis, *Jurors Permit Death Penalty for Moussaoui*, N.Y. Times, Apr. 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Moussaoui Found Eligible for Death*, Wash. Post, Apr. 4, 2006, at A1.

716. E.D. Va. Docket Sheet, *supra* note 670; *see* Donahue, *supra* note 649, at 99; Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

717. Phase 2 Jury Verdict, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 3, 2006); *Moussaoui*, 591 F.3d at 277, 302; United States v. Moussaoui, 483 F.3d 220, 223–24 n.1 (4th Cir. 2007); *see* Donahue, *supra* note 649, at 2, 100; Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. Times, May 4, 2006, at A1; Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, Wash. Post, May 4, 2006, at A1.

> On May 12, 2006, [Moussaoui] was flown by the US Marshals Service on a small jet operated by the Justice Prisoner and Alien Transportation System, more commonly known as "Con Air," to the Administrative Maximum security facility, or "Supermax" prison in Florence, Colorado. He now spends 23 hours a day alone in a cell, with another hour alone in exercise space.

Donahue, *supra* note 649, at 3.

718. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1; *see* Donahue, *supra* note 649, at 2–3, 102–03.

719. Motion to Withdraw Plea, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); *Moussaoui*, 591 F.3d at 278; *see* Donahue, *supra* note 649, at 102, 167; Neil A. Lewis, *Moussaoui's Move to Recant Guilty Plea Is Denied*, N.Y. Times, May 9, 2006, at A18; Jerry Markon, *Moussaoui Fails in Bid to Withdraw 9/11 Guilty Plea*, Wash. Post, May 9, 2006, at A16.

appeals affirmed on January 4, 2010: "the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands."[721]

Challenge: Attorney Appointment

Judge Brinkema initially appointed the Federal Public Defender and a private attorney to represent Moussaoui.[722] "The relationship between Moussaoui and his appointed attorneys was strained at best, and Moussaoui almost immediately began demanding to proceed *pro se*, but with the assistance of Muslim counsel."[723] Moussaoui identified a Muslim attorney in Texas with whom he wanted to consult, but this attorney never made an appearance, never sought admission to the court's bar, and never consented to the screening required for the security clearance that would be needed to represent Moussaoui in court.[724]

Moussaoui's relations with his appointed private attorney were more problematic than his relations with the Federal Defender's office, so Judge Brinkema appointed another private attorney.[725] "Although Moussaoui initially refused to

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According to Moussaoui's affidavit,

> 16. I was extremely surprised when the jury did not return a verdict of death because I knew that it was the intention of the American justice system to put me to death.
>
> 17. I had thought that I would be sentenced to death based on the emotions and anger toward me for the deaths on September 11 but after reviewing the jury verdict and reading how the jurors set aside their emotions and disgust for me and focused on the law and the evidence that was presented during the trial, I came to understand that the jury process was more complex than I assumed.
>
> 18. Because I now see that it is possible that I can receive a fair trial even with Americans as jurors and that I can have the opportunity to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001, I wish to withdraw my guilty plea and ask the Court for a new trial to prove my innocence of the September 11 plot.

Moussaoui Affidavit at 3, Motion to Withdraw Plea, *supra*; *see* Donahue, *supra* note 649, at 167.

720. Order Denying Plea Withdrawal, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. May 8, 2006); *Moussaoui*, 591 F.3d at 278; *see* Donahue, *supra* note 649, at 102, 167; Lewis, *supra* note 719; Markon, *supra* note 719; Pohlman, *supra* note 649, at 247.

721. *Moussaoui*, 591 F.3d at 307; *see* Docket Sheet, United States v. Moussaoui, No. 06-4494 (4th Cir. May 15, 2006) [hereinafter 4th Cir. May 15, 2006, Docket Sheet].

The appeal was first heard on January 26, 2009. 4th Cir. May 15, 2006, Docket Sheet, *supra*; *see* Jerry Markon, *Moussaoui's Attorneys Call Guilty Plea Invalid*, Wash. Post, Jan. 27, 2009, at A8. Judge Williams was on the panel that heard the appeal, but she retired for health reasons before the panel issued an opinion, so the appeal was reheard on September 25, 2009. 4th Cir. May 15, 2006, Docket Sheet, *supra*; *see New Arguments in 9/11 Case*, N.Y. Times, July 15, 2009, at A11; Josh White & Jerry Markon, *Diagnosis of Early Alzheimer's Forces Chief Judge to Retire*, Wash. Post, July 10, 2009, at B3.

Tim Reagan attended the September 25, 2009, rehearing, interviewed Judge Gregory for this report in the judge's chambers that same day, and interviewed Judge Shedd by telephone on September 3, 2009.

722. *Moussaoui*, 591 F.3d at 267.

723. *Id.*

724. *Id.* at 269.

725. *Id.*

communicate with any of his appointed counsel, he later testified that he began communicating with [the second private attorney] because [that attorney] was polite to him."[726]

Challenge: Pro Se Defendant

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.[727] On June 13, 2002, Judge Brinkema granted Moussaoui's motion to represent himself, keeping appointed attorneys as standbys.[728]

Because of his pro se status, Moussaoui was eventually given three cells to accommodate his access to documents in this case.[729]

As a result of his disruptive filing behavior, however, Judge Brinkema withdrew the privilege of self-representation in November 2003.[730]

Challenge: Court Security

Security was enhanced at Moussaoui's arraignment.[731] He arrived before 6:00 a.m., while it was still dark.[732] Deputy marshals surrounded the courthouse, and extra metal detectors were stationed at the courtroom.[733] Although the outside air was frigid, members of the news media and the public—there were several dozen of the former and almost none of the latter—were not allowed into the building until shortly before the hearing.[734]

At subsequent appearances also, extra deputy marshals guarded the courthouse.[735] It was reported that the courthouse had never seen such a level of security.[736]

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726. *Id.* at 271 n.6.

727. *See* Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11; *see also* Donahue, *supra* note 649, at 54.

728. Pro Se Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 14, 2002), *available at* 2002 WL 1311738; *Moussaoui*, 591 F.3d at 274–75, 292–93; United States v. Moussaoui, 333 F.3d 509, 513 (4th Cir. 2003); *see* Donahue, *supra* note 649, at 24, 36, 54; Pohlman, *supra* note 649, at 192; Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

729. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

730. Order Vacating Pro Se Status, *supra* note 702; *Moussaoui*, 591 F.3d at 271; United States v. Moussaoui, 382 F.3d 453, 460 n.6 (4th Cir. 2004).

731. *See* Copeland, *supra* note 671; Johnston, *supra* note 671.

732. *See* Copeland, *supra* note 671; *see also* Brooke A. Masters, *Alexandria's Logistical Juggling Act*, Wash. Post, Mar. 14, 2002 ("High-risk prisoners are being transported between the jail and the courthouse at night or in the early morning, and the streets are shut down to minimize the risks.").

733. *See* Johnston, *supra* note 671.

734. *See* Copeland, *supra* note 671.

735. *See* Masters, *supra* note 732.

736. *See* Libby Copeland & Richard Leiby, *The Moussaoui Circus Extends Its Run*, Wash. Post, July 26, 2002 ("'This is the most security we've ever had to use here at the courthouse since it opened in 1996,' said John Clark, acting U.S. Marshal for the Eastern District of Virginia.").

> On Friday, April 22, 2005, [at the hearing concerning Moussaoui's conditions of confinement where Moussaoui asked to proceed pro se,] security at the Alexandria Federal District Court was extremely tight. Two dogs and their handlers patrolled the street outside the courthouse, sniffing people's briefcases and purses for explosive devices. People entering the courthouse passed through a nuclear materials detector positioned just outside the doors. Up on the seventh floor, Courtroom 700 was closed off until 1:30 p.m. . . . At precisely 1:30 p.m. the guards let people take the elevators up from the second floor. The lawyers, press, family members of 9/11 victims, and the curious began to file in, again passing through another security checkpoint. IDs were checked, briefcases were x-rayed, people walked through metal detectors, men pulled their pant legs up to show that they had nothing hidden in their socks. At exactly 3:30 p.m. Judge Brinkema and Zacarias Moussaoui both entered the courtroom. Proceedings began.[737]

Challenge: Jury Security

Judge Brinkema used an anonymous jury.[738] Jurors assembled in a secret location and were driven to the courthouse.[739] The court set up a special room for the jurors to eat lunch away from the public.[740] They were never permitted to be in the building unsupervised.[741]

Judge Brinkema observed that it is important to work cooperatively with the Marshal while maintaining ultimate responsibility.[742]

Challenge: Classified Evidence

Classified materials require extraordinary procedures, but Judge Brinkema tries to keep procedures as normal as possible.[743] She requires all of her law clerks and other staff members to qualify for top-secret security clearances.[744]

Because Moussaoui's standby attorneys would need access to classified evidence to prepare his defense, Judge Brinkema issued a protective order, which provided that defense access to classified information would require appropriate security clearances and the signing of a memorandum of understanding requiring that classified secrets be kept secret forever.[745]

Moussaoui himself was not supposed to have access to classified information.[746] But, in June and July of 2002, the government inadvertently included

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737. Donahue, *supra* note 649, at 32.

738. Trial Conduct Order 1, *supra* note 707; *see* Markon, *supra* note 707.

739. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.*

745. United States v. Moussaoui, 591 F.3d 263, 267 (4th Cir. 2010); Protective Order and Memorandum of Understanding, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002); *see* Donahue, *supra* note 649, at 23; Pohlman, *supra* note 649, at 194.

746. Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 23, 2002), *available at* 2002 WL 1987964.

> As the Government strenuously argues, the defendant's repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and

classified materials among documents produced to Moussaoui.[747] On August 22, the government wrote to Judge Brinkema stating that two documents produced to Moussaoui had mistakenly not been classified and asking that a "walled-off FBI team" search Moussaoui's cell to retrieve the documents.[748]

Judge Brinkema denied the FBI search.

> [G]iven the massive amounts of material produced in this case, there is a significant danger than any agents sent to Mr. Moussaoui's cell would have to rummage through all of his materials. That would risk serious intrusions into his *pro se* work product, which a "walled off" FBI team would not solve.[749]

But Judge Brinkema did permit the Marshal Service, in consultation with the classified information security officer, to search Moussaoui's cells for the two documents plus an additional five that the government identified in the interim as improperly produced.[750] Of the seven searched for, five were found.[751] By the following week, the government presented to Judge Brinkema a list of 43 improperly produced documents.[752] Many of the documents were prepared by FBI agents who were brought into September 11 investigations without sufficient training in handling and labeling classified information.[753] Eventually, the documents were retrieved and properly classified.[754]

> pledged allegiance to Osama Bin Laden are strong evidence that the national security could be threatened if the defendant had access to classified information.

Id. at 2; *see* Liptak, *supra* note 703; Philip Shenon, *U.S. Gave Secrets to Terror Suspect*, N.Y. Times, Sept. 27, 2002, at A1.

Standby counsel, but not Moussaoui, also were granted access to "sensitive security information," which is secret—but not classified—information related to transportation security. *See* 49 C.F.R. § 1520.5(a) (2011); Tom Jackman, *Moussaoui's Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

747. Letter (Aug. 22, 2002) [hereinafter Aug. 22, 2002, Letter], *attached to* Classified Document Retrieval Unsealing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 26, 2002), *available at* 2002 WL 32001771; Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see* Shenon, *supra* note 746.

> These documents [redacted] were inadvertently produced as unclassified documents, in electronic form, to defense counsel and Mr. Moussaoui on June 12, 2002 [redacted] and June 7, 2002 [redacted]. On July 29, 2002, in accordance with the Court's order on hard-copy discovery, a paper copy of these documents was delivered to Mr. Moussaoui.

Aug. 22, 2002, Letter, *supra*, at 1.

748. Aug. 22, 2002, Letter, *supra* note 747; *see* Shenon, *supra* note 746.

749. Aug. 22, 2002, Letter, *supra* note 747.

750. Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010; *see* Letter (Aug. 29, 2002) [hereinafter Aug. 29, 2002, Letter], *attached to* Classified Document Retrieval Unsealing Order, *supra* note 747.

751. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; *see* Aug. 29, 2002, Letter, *supra* note 750; Shenon, *supra* note 746.

752. *See* Letter (Sept. 5, 2002), *attached to* Classified Document Retrieval Unsealing Order, *supra* note 747; Shenon, *supra* note 746.

753. *See* Dan Eggen, *FBI Failed to Classify Reports Before Moussaoui Had Them*, Wash. Post, Sept. 28, 2002, at A8.

754. Classified Document Retrieval Unsealing Order, *supra* note 747, at 1.

In part to accommodate the disruption to Moussaoui's trial preparation caused by the searches for improperly produced documents, Judge Brinkema pushed back the trial date six months.[755]

Challenge: Classified Arguments

Eastern District of Virginia

Moussaoui's appointed standby attorneys had security clearances; to ensure that they did not inadvertently put classified information into the public record, Judge Brinkema established a procedure in which they submitted filings to the classified information security officer, who was given 48 hours to identify any classified information that had to be redacted from the public record.[756] These filings could not be shared with Moussaoui, who did not have a security clearance, until they had been reviewed by the security officer.[757] Unredacted filings containing classified information were filed with the security officer rather than the clerk.[758] The government was responsible for classification reviews of its filings.[759]

Fourth Circuit

The court of appeals' clerk's office anticipated that it was likely to eventually receive an appeal in Moussaoui's case, and classified information would be part of the court record.[760] So the clerk's office worked with the classified information security officers to (1) create a sensitive compartmented information facility (SCIF)—an especially secure storage facility suitable for storing sensitive compartmented information and other classified information—and (2) begin the process of obtaining security clearances for several staff members.[761]

The court's judges meet in regular session in Richmond six times a year. There were safes in the court's SCIF for the Moussaoui case, with separate drawers allocated to each judge.[762] Cleared court staff members could bring classified documents from the SCIF to judges' Richmond chambers for review while the

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755. Order Rescheduling Trial, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. Sept. 30, 2002), *available at* 2002 WL 32001785; *see* Philip Shenon, *Judge Agrees to New Delay in Trial in Conspiracy Case*, N.Y. Times, Oct. 1, 2002, at A20.

756. Classified Filing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Oct. 3, 2002); *see Moussaoui Motions to Be Cleared*, Wash. Post, Oct. 4, 2002, at A15 [hereinafter *Moussaoui Motions*].

757. Classified Filing Order, *supra* note 756, at 2; *see Moussaoui Motions*, *supra* note 756.

758. Classified Filing Order, *supra* note 756, at 2–3.

759. *Id.* at 2; *see Moussaoui Motions*, *supra* note 756.

One 71-page government brief had 50 blank (redacted) pages, 15 partially redacted pages, three full pages of text, and three head and end pages. Government Response Brief, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 13, 2003); *see* Pohlman, *supra* note 649, at 194.

760. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

761. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

762. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

judges were in Richmond.[763] Judge Gregory's home chambers are in Richmond, so cleared court staff members can bring him classified documents from the Richmond SCIF even when the court is not in session. Judge Gregory frequently visited the SCIF himself to retrieve documents.[764] He observed that although it is convenient to have the documents stored near his chambers, he still must keep them within view at all times while they are out of the SCIF.[765]

Judge Wilkins had chambers in Greenville, South Carolina, and the courthouse there has a SCIF.[766] Judge Williams had chambers in Orangeburg, South Carolina, which is approximately 50 miles south of Columbia. Either classified information security officers brought classified documents to her chambers in Orangeburg for her review while they were there, or she traveled to Columbia, where the FBI has a SCIF.[767] Judge Shedd's chambers are in Columbia, so he can review files at the FBI SCIF there or at the court in Richmond during a session.[768]

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, the briefs were filed with the classified information security officer under seal.[769] Some information about their contents, however, was reported in the *Washington Post*.[770] In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs were filed with the classified information security officer under seal and redacted briefs were filed in the public record.[771]

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.[772] Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.[773] Moussaoui would give a document for the court of appeals to the jail where he was detained, and the jail would pass it on to a classified information security officer who notified the court.[774] The court docketed it as filed with the classified information security officer, who had it reviewed for classified information and then sent a redacted copy to the court

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763. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

764. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

765. *Id.*

766. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008. Judge Wilkins retired on October 5, 2008. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj.

767. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

768. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

769. Docket Sheet, United States v. Moussaoui, No. 03-4162 (4th Cir. Feb. 12, 2003) [hereinafter 4th Cir. Feb. 12, 2003, Docket Sheet]; *see* Jerry Markon, *U.S. Filed Terror Briefs in Secrecy*, Wash. Post, Mar. 15, 2003, at A6 ("legal specialists said they could recall virtually no other examples of the government's filing an entire set of legal briefs under seal").

770. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, Wash. Post, Apr. 2, 2003, at A7.

771. Docket Sheet, United States v. Moussaoui, No. 03-4792 (4th Cir. Oct. 7, 2003) [hereinafter 4th Cir. Oct. 7, 2003, Docket Sheet].

772. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

773. *Id.*

774. *Id.*

for public filing.[775] Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.[776]

For a petition to rehear en banc the ruling on Judge Brinkema's discovery sanction, full briefs were filed in the court's Richmond SCIF, and redacted copies were sent to each judge.[777] Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.[778] The court denied the petition.[779]

The appeal of Moussaoui's guilty plea also included classified briefing.[780] Judge Gregory observed that the most difficult issue presented to an appellate judge by the presence of classified information in a case is the difficulty of obtaining law clerk assistance.[781] Judge Gregory does not have a career law clerk, and security clearances take such a large fraction of a temporary law clerk's tenure to acquire that he relies on a court of appeals staff attorney, who has a security clearance, to help him with matters involving classified information.[782]

In August 2009, the court worked with the classified information security officer to establish a larger SCIF in Richmond, suitable for working and meeting in addition to storage.[783]

Challenge: Closed Proceedings

Closed proceedings in district courts are not common, but they do occur, especially in cases involving classified information. Closed proceedings in appellate courts are more rare.

All four oral arguments before the court of appeals included a public session and a closed session at which classified information could be discussed.[784] At the public session, a classified information security officer and a CIA officer attended to monitor the proceeding in case it needed to be interrupted to prevent disclosure

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775. *Id.*

776. *Id.*

777. *Id.*

778. *Id.*

779. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 771 (noting the denial of rehearing on October 13, 2004).

780. 4th Cir. May 15, 2006, Docket Sheet, *supra* note 721; Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

781. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

782. *Id.*

783. *Id.*; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008, and Sept. 1, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

784. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 771; Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 28, 2009; *see* Pohlman, *supra* note 649, at 196, 217; *id.* at 197–98 (presenting a redacted transcript from the June 3, 2002, closed session).

of classified information.[785] At these public sessions, no interruption was necessary.[786]

In the appeal of Judge Brinkema's order that Moussaoui be permitted to depose Bin al-Shibh, a motion panel of the court of appeals initially granted the government's motion to seal the oral argument.[787] But on a motion by news media to hold the oral argument in open court, the panel that would ultimately hear the appeal decided to bifurcate the argument: A public oral argument was held followed by a closed oral argument concerning classified information.[788] The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.[789] The court ordered that a redacted transcript of the closed argument be made available to the public within five business days of the court reporter's submission of the transcript to the government, which was required within 24 hours of the argument.[790] A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.[791]

Challenge: Classified Opinion

Many opinions issued by the district court and the court of appeals in this case were redacted. Judge Gregory observed that in the appeal of Judge Brinkema's discovery sanction the majority's opinion and Judge Gregory's separate opinion came back from the redaction process looking like Swiss cheese.[792] In the opinion issued by the court, redactions appear as white space equal in size to the amount of text redacted; in West's published version, the expression "[Redacted]" replaces redacted text, regardless of quantity.

Challenge: Terrorist Communications

Once Moussaoui declared in court that he wished to proceed pro se, he began to file with the court handwritten documents that the court regarded as motions.[793] The court initially filed these documents under seal.[794] On a Friday, the day after the court granted Moussaoui's request to proceed pro se, Judge Brinkema ordered

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785. Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 28, 2009.

786. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

787. 4th Cir. Feb. 12, 2003, Docket Sheet, *supra* note 769 (noting the grant, on March 24, 2003, of a motion to seal the argument); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Jerry Markon, *Moussaoui Hearing Closed to Public*, Wash. Post, Mar. 25, 2003, at A2.

788. United States v. Moussaoui, 65 F. App'x 881 (4th Cir. 2002) (order by Circuit Judges William W. Wilkins, H. Emory Widener, Jr., and Paul V. Niemeyer); Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Philip Shenon, *In Shift, Appeals Court Opens Hearing on a 9/11 Suspect*, N.Y. Times, May 14, 2003, at A15.

789. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

790. *Moussaoui*, 65 F. App'x 881.

791. *See* Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, Wash. Post, June 13, 2003, at A9.

792. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; *see* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

793. E.D. Va. Docket Sheet, *supra* note 670.

794. Pro Se Order, *supra* note 728, at 1.

Moussaoui's filings served on the government, which was required to advise the court by Monday morning whether it objected to the unsealing of the filings.[795] The government announced that it did not object to the unsealing, so Judge Brinkema ordered the filings unsealed and ordered future pro se filings sealed only until 4:00 p.m. on the workday following the filing to provide the government with an opportunity to object.[796]

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.[797] Judge Brinkema determined that Moussaoui's filings included improper material.

> The defendant's pleadings have been replete with irrelevant, inflammatory and insulting rhetoric, which would not be tolerated from an attorney practicing in this court. Because he has been warned numerous times that such writing would have to stop, the defendant may no longer hide behind his *pro se* status to avoid being held to appropriate pleading practice. Further, we find that the record supports the United States' concern that the defendant, who is charged with conspiracy to commit acts of terrorism transcending national boundaries among other offenses, is attempting to use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement.[798]

Judge Brinkema ordered that "any future pleadings filed by the defendant, *pro se*, containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language will be filed and maintained under seal."[799] She sealed several, but not all, recent filings.[800] She declined Moussaoui's suggestion that the court engage in the burdensome task of redacting inappropriate language from the filings instead of sealing them: "If he desires his pleadings to be publicly filed, the defendant must limit his writings to appropriate requests for relevant judicial relief."[801]

On motion from news media, and after observing that "the defendant has filed fewer pleadings and has significantly toned down his inappropriate rhetoric," Judge Brinkema modified her order so that all pro se filings would be sealed for ten days to give the government an opportunity "to advise the Court in writing whether the pleading should remain under seal or be unsealed with or without redactions."[802]

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795. *Id.* at 2.

796. Pro Se Filings Unsealing Order, United States v. Moussaoui, No. 1:01-cr-455 (E.D. Va. June 17, 2002), *available at* 2002 WL 1311764.

797. Letter, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 22, 2002) (portions redacted); *see* Philip Kennicott, *A Window on the Mind of Moussaoui*, Wash. Post, July 25, 2002, at C1 (reporting on the contents of Moussaoui's filings).

798. Pro Se Filings Sealing Order at 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), *available at* 2002 WL 1990900.

799. *Id.* at 4.

800. *Id.* at 3–4.

801. *Id.* at 4 n.3.

802. Pro Se Filings Sealing Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Sept. 27, 2002) [hereinafter Sept. 27, 2002, Pro Se Filings Sealing Order], *available at* 2002 WL 32001783; *see News Media Win Ruling in Terror Trial*, N.Y. Times, Sept. 28, 2002, at A11.

> The Court will also conduct its own review of the defendant's *pro se* pleadings, and will redact any insulting, threatening or inflammatory language which would not be tolerated from an attorney practicing in this court. Should the defendant's pleadings again become replete with inappropriate rhetoric, we will return to categorical sealing.[803]

Moussaoui was granted access to a videotape of an Al-Jazeera interview with the captured Bin al-Shibh, but the tape produced apparently was blank.[804] Judge Brinkema ordered the "inexcusable error" corrected immediately, but also ordered Moussaoui's motion to correct the error to remain under total seal, because it was "replete with irrelevant and inflammatory rhetoric, including messages to third parties and a prayer for the destruction of the United States."[805]

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803. Sept. 27, 2002, Pro Se Filings Sealing Order, *supra* note 802, at 4 n.1.

804. Videotape Production Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Nov. 5, 2002), *available at* 2002 WL 32001775; *see* Philip Shenon, *Court Papers Show Moussaoui Seeks Access to Captured Al Qaeda Members*, N.Y. Times, Nov. 1, 2002, at A20.

805. Videotape Production Order, *supra* note 804.

American Taliban

United States v. Lindh (T.S. Ellis III, E.D. Va.)

On November 25, 2001, at the Qala-i-Janghi prison near Mazar-e Sharif, Afghanistan, CIA officer Johnny "Mike" Spann interviewed a captured Taliban fighter who was an American citizen: John Phillip Walker Lindh.[806] Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.[807] Lindh[808] was shot in the upper thigh during the uprising, and he denied involvement in Spann's death.[809] Lindh and several dozen other surviving Taliban troops were recaptured on December 1 when the Northern Alliance flooded them out of a basement.[810]

Lindh was charged in a criminal complaint filed on January 15, 2002, with conspiracy to kill American citizens and with providing support to terrorists, including Al-Qaeda.[811] He arrived in the Eastern District of Virginia for trial eight days later.[812] An indictment filed on February 5 added related charges as well as a

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806. United States v. Lindh, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002); United States v. Lindh, 212 F. Supp. 2d 541, 546 (E.D. Va. 2002); *see* Dan Eggen & Brooke A. Masters, *U.S. Won't Seek Death for Walker*, Wash. Post, Jan. 16, 2002, at A1; Chris Heffelfinger, Radical Islam in America xix (2011); David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y. Times, Jan. 16, 2002, at A1; Fredrick Kunkle, *Lindh Never Betrayed Homeland, Parents Say*, Wash. Post, July 16, 2002, at A10; Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail*, Wash. Post, Jan. 24, 2002, at A13.

807. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; *see* Eggen & Masters, *supra* note 806; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 806; Kunkle, *supra* note 806; Vernon Loeb, *U.S. Soldiers Recount Smart Bomb's Blunder*, Wash. Post, Feb. 2, 2002, at A15; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 91–92 (2007); Rene Sanchez, *John Walker's Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

808. Early references to Lindh stated that he preferred to be identified by his mother's last name, Walker, but Lindh's attorney stated in January 2002 that Lindh prefers to be identified by his father's last name. *See Walker No More*, N.Y. Times, Jan. 25, 2002, at A11.

809. *Lindh*, 227 F. Supp. 2d at 569; *see* Eggen & Masters, *supra* note 806; Johnston, *supra* note 806; *see also* Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Romero & Temple-Raston, *supra* note 807, at 92–93.

810. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; *see* Johnston, *supra* note 806; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 807; Romero & Temple-Raston, *supra* note 807, at 94.

Also captured was Yasser Esam Hamdi. *See* John Mintz & Brooke A. Masters, *U.S.-Born Detainee May End Up in Va.*, Wash. Post, Apr. 5, 2002, at A3; Romero & Temple-Raston, *supra* note 807, at 95, 142, 191; *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that U.S. citizens cannot be held indefinitely as enemy combatants without a meaningful opportunity to contest their detention); Romero & Temple-Raston, *supra* note 807, at 144, 191 (reporting on *Hamdi*).

811. Docket Sheet, United States v. Lindh, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002) [hereinafter E.D. Va. Docket Sheet]; *see* Eggen & Masters, *supra* note 806; Johnston, *supra* note 806; Masters & Davis, *supra* note 806; Romero & Temple-Raston, *supra* note 807, at 140 & fig. 7.

812. *See* Masters & Davis, *supra* note 806; *see also* Jess Bravin, The Terror Courts 118–19 (2013) (reporting that Lindh's prosecution was steered to the Eastern District of Virginia by repatriating him there).

firearms charge.[813] The court assigned the case to Judge T.S. Ellis III.[814] Lindh pleaded not guilty on February 13.[815] Judge Ellis denied Lindh's motion to transfer the case to a district that did not include so many persons directly affected by the September 11, 2001, terrorist attacks.[816]

Lindh was born in February 1981 in the District of Columbia as the second of three children born to Marilyn Walker and Frank Lindh, who subsequently moved the family to California and ultimately separated.[817] John Walker Lindh was raised a Catholic, but he decided to convert to Islam at 16, taking the name Suleyman.[818] At 18, he moved to Yemen to study Arabic, and then he moved to Bannu, Pakistan, to attend a madrasah.[819]

Adopting the name Abdul Hamid, he reportedly volunteered to fight with the Taliban; because he did not know Pashto or Urdu, the local languages, he was assigned to fight with troops financed by Osama Bin Laden.[820] He arrived on the Taliban's front line on September 6, 2001.[821]

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813. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 811; *see* Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 807, at 139.

814. E.D. Va. Docket Sheet, *supra* note 811; *see* Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 807, at 142.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

815. E.D. Va. Docket Sheet, *supra* note 811; *see* Masters, *supra* note 814.

816. United States v. Lindh, 212 F. Supp. 2d 541, 547–52 (E.D. Va. 2002); *see* Tom Jackman, *Judge Turns Down Lindh's Challenges*, Wash. Post, June 18, 2002, at B5; Katharine Q. Seelye, *Judge in Lindh Case Refuses Defense Request to Move Trial*, N.Y. Times, June 18, 2002, at A18.

817. *See* Heffelfinger, *supra* note 806, at xiii–xiv; Kunkle, *supra* note 806; Loeb, *supra* note 810; Evelyn Nieves, *A U.S. Convert's Path from Suburbia to a Gory Jail for Taliban*, N.Y. Times, Dec. 4, 2001, at B1; Romero & Temple-Raston, *supra* note 807, at 13, 15; Sanchez, *supra* note 807.

818. *See* Eggen & Masters, *supra* note 806 (reporting that Lindh took the name Suleyman al-Faris); Heffelfinger, *supra* note 806, at xiv–xv ("He asked that the name on his [high-school] diploma be changed to Suleyman al-Lindh, though he never picked it up."); Kunkle, *supra* note 806; Loeb, *supra* note 810; Nieves, *supra* note 817 (reporting that Lindh took the name Suleyman al-Lindh); Romero & Temple-Raston, *supra* note 807, at 16 (reporting that "Suleyman" is equivalent to "Solomon"); Sanchez, *supra* note 807.

819. *See* Eggen & Masters, *supra* note 806; Heffelfinger, *supra* note 806, at xvi–xviii; Loeb, *supra* note 810; Romero & Temple-Raston, *supra* note 807, at 17–19 (reporting that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 807.

820. *See* Eggen & Masters, *supra* note 806; Loeb, *supra* note 810; Nieves, *supra* note 817; Romero & Temple-Raston, *supra* note 807, at 22–23, 138 (reporting that Lindh undertook military training to fight the Northern Alliance, not Al-Qaeda training, which was to fight civilians); Sanchez, *supra* note 807.

821. *See* Heffelfinger, *supra* note 806, at xiii; Romero & Temple-Raston, *supra* note 807, at 24.

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.[822] Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.[823] Other photos apparently were destroyed.[824]

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.[825] To protect Brosnahan's law firm's employees from harm, Brosnahan kept the firm's name off of the case.[826]

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.[827] But the government acknowledged at a hearing two months later that there was no evidence that Lindh killed or shot at any American citizen, including Spann.[828]

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.[829] All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.[830] On October 4, Judge Ellis imposed the statutory maximum of consecutive ten-year terms on each charge, a sentence to which the parties had agreed.[831] Lindh tearfully admitted making a mistake by joining the Taliban.[832] Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.[833]

Challenge: Protected National Security Information

Early in the prosecution, the government determined that it had to disclose to the defendant "reports of interviews of detainees captured in Afghanistan and elsewhere who may have knowledge of al Qaeda or who may have been members of

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822. *See* Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9; Romero & Temple-Raston, *supra* note 807, at 111 & fig. 5.

823. *See* Masters, *supra* note 822; Romero & Temple-Raston, *supra* note 807, at 114 (reporting that the obscenity was "shithead").

824. *See* Masters, *supra* note 822; Romero & Temple-Raston, *supra* note 807, at 114.

825. *See* Eggen & Masters, *supra* note 806; Romero & Temple-Raston, *supra* note 807, at 94, 111–14, 136–37.

826. *See Nation in Brief*, Wash. Post, Feb. 2, 2002, at A26.

827. *See* Masters, *supra* note 814; Romero & Temple-Raston, *supra* note 807, at 140–41 (reporting that the government brought Spann's family to the courthouse).

828. *See* Brooke A. Masters, *Prosecutors Concede Limits of Their Case Against Lindh*, Wash. Post, Apr. 2, 2002, at A11.

829. United States v. Lindh, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); E.D. Va. Docket Sheet, *supra* note 811; *see* Jackman, *supra* note 807; Kunkle, *supra* note 806; Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. Times, July 16, 2002; Romero & Temple-Raston, *supra* note 807, at 188.

830. *Lindh*, 227 F. Supp. 2d at 566; *see* Jackman, *supra* note 807; Lewis, *supra* note 829; Romero & Temple-Raston, *supra* note 807, at 188–89.

831. *Lindh*, 227 F. Supp. 2d at 571–72; E.D. Va. Docket Sheet, *supra* note 811; *see Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 807; Romero & Temple-Raston, *supra* note 807, at 12, 189–90.

832. *See Apologetic Lindh*, *supra* note 831; Romero & Temple-Raston, *supra* note 807, at 189.

833. *Lindh*, 227 F. Supp. 2d at 572; *see* http://www.bop.gov (noting a release date of May 23, 2019, reg. no. 45426-083).

that organization and who are housed primarily at Guantanamo Bay, Cuba."[834] The reports were regarded as "unclassified information vital to national security."[835] The government submitted to the court ex parte and in camera both an unredacted set of reports and a set with proposed redactions, omitting agent and case identifiers and information concerning other detainees not relevant to the defense.[836]

Judge Ellis granted the government's motion for a protective order.[837]

> [G]iven the nature of al Qaeda and its activities, and the ongoing federal law enforcement investigation into al Qaeda, the identities of the detainees, as well as the questions asked and the techniques employed by law enforcement agents in the interviews are highly sensitive and confidential. Additionally, the intelligence information gathered in the course of the detainee interviews may be of critical importance to national security, as detainees may reveal information leading to the identification and apprehension of other terrorist suspects and the prevention of additional terrorist acts. Thus, a protective order prohibiting the public dissemination of the detainee interview reports will, in this case, serve to prevent members of international terrorist organizations, including al Qaeda, from learning, from publicly available sources, the status of, the methods used in, and the information obtained from the ongoing investigation of the detainees.[838]

Judge Ellis rejected the government's proposal that defense investigators and expert witnesses be pre-screened before information contained in the redacted reports could be disclosed to them.[839] Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.[840]

> By signing such a memorandum of understanding, a defense investigator or expert would declare under penalty of perjury under the laws of the United States that she or he had (i) read and understood the protective order pertaining to these unclassified documents and materials and (ii) agreed to be bound by the terms of the protective order, which would remain binding during, and after the conclusion of these proceedings.[841]

On motion, and without objection from the defendant, Judge Ellis subsequently modified the protective order to require of persons seeing the reports a "brief, basic background investigation, performed by law enforcement personnel independent of the prosecution team and reporting directly to the Court through the Court Security Officer."[842]

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834. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002).

835. *Id.* at 742.

836. *Id.* at n.2.

Later in the case, Judge Ellis agreed with the government that a set of additional detainee reports did not need to be disclosed to the defense. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1974284 (E.D. Va. June 17, 2002).

837. *Lindh*, 198 F. Supp. 2d at 744.

838. *Id.* at 742.

839. *Id.*

840. *Id.* at 742–43; *see id.* at 743 (noting that the "defendant will be at liberty to disclose information from the redacted interview reports to investigators and expert witnesses who are not pre-screened by, or known to, the government").

841. *Id.* at 742–43.

842. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1974184 (E.D. Va. May 6, 2002).

This type of court security officer is now known as a classified information security officer. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets

Judge Ellis determined that showing the reports to a detainee witness, however, would additionally require notice to the government and court approval "to assure that the Court is fully apprised of the risks attendant to disclosure of unclassified protected information to a specific detainee."[843]

Challenge: Classified Evidence

In order to determine what evidence the government had to produce to the defendant, Judge Ellis had to review a substantial amount of classified material.[844] It was stored in the court's sensitive compartmented information facility (SCIF).[845]

Judge Ellis's career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.[846] The chambers has a rule requiring classified documents to be within eyesight at all times.[847] Even a law clerk's brief trip outside chambers requires taking the classified documents securely along.[848] But classified materials are *never* taken home.[849]

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.[850] Judge Ellis denied counsel face-to-face access to the detainees, but established a procedure allowing counsel to submit questions to "firewall" attorneys, who passed them on to the detainees.[851]

Firewall attorneys included attorneys from the Department of Justice and the Department of Defense "who are separate and independent from the attorneys who represent the government" in the case, including two assistant U.S. attorneys from another district.[852]

Defense counsel submitted questions for each detainee to the firewall attorneys.[853] The firewall attorneys could object to any questions, and the court would

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Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22 (Federal Judicial Center, 2d ed. 2013).

843. *Lindh*, 198 F. Supp. 2d at 743.

844. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

845. *Id.*; *see* Reagan, *supra* note 842, at 22–23 (describing SCIFs).

846. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

847. *Id.*

848. *Id.*

849. *Id.*

850. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1298601, at *1 (E.D. Va. May 30, 2002); *see* Masters, *supra* note 809; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

"Justice Department prosecutors . . . felt the Pentagon nearly had sabatoged the cases of Lindh and Zacarias Moussaoui . . . by blocking access to Guantanamo detainees who were potential witnesses. The Defense Department would not acknowledge any summons from a federal court directed to Guantanamo." Bravin, *supra* note 812, at 121.

851. *Lindh*, 2002 WL 1298601, at *1–2; Interview with Hon. T.S. Ellis III, Sept. 5, 2007; *see* Masters, *supra* note 809.

852. *Lindh*, 2002 WL 1298601, at *1 & n.1.

853. *Id.* at *1.

resolve any objections on sealed noticed filings.[854] Approved questions were submitted to interrogators who interwove the questions into the interrogations.[855] Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.[856] Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.[857]

Judge Ellis monitored the procedure to ensure that it protected Lindh's rights to a defense.[858]

Challenge: Witness Security

Lindh pleaded guilty on a day the court was prepared to take testimony from a covert agent in a hearing on Lindh's motion to suppress his confession.[859] To protect the witness by shielding the witness's identity, Judge Ellis worked with the classified information security officers and the Marshal Service to make adjustments to the courtroom.[860] The courtroom was outfitted with special draperies and screens.[861] The witness box was shielded from the public, as was the path to the door through which prisoners often are brought—a door that would be used in this case for the witness.[862]

The plan was for the defendant and his counsel to sit in the jury box so that they could see the witness, but the draperies shielded the witness from the public's view.[863] The courtroom was equipped with an electronic device that would distort the witness's voice, but the words would be audible to the parties and the public.[864]

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854. *Id.*

855. *Id.*

856. *Id.*

857. *Id.*

858. *Id.*; *see* Masters, *supra* note 809.

859. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; *see* Jackman, *supra* note 807; Lewis, *supra* note 829; Romero & Temple-Raston, *supra* note 807, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing).

860. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

861. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007; *see* Jackman, *supra* note 807; Lewis, *supra* note 829.

862. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

863. United States v. Rosen, 520 F. Supp. 2d 786, 795 n.15 (E.D. Va. 2007) ("the court indicated that it would allow a clandestine government intelligence agent to appear at an evidentiary hearing under an assumed name, and the courtroom would be arranged in such a way that the government, the defendant and defense counsel would see and confront the agent, while others in the courtroom would be able to [hear], but not [see] the agent"); Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

864. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

Challenge: Religious Accommodation

On January 11, 2013, Judge Jane Magnus-Stinson in the Southern District of Indiana granted summary judgment to Lindh in a civil action challenging his warden's refusal to permit group prayer.[865]

> His scant, nonviolent disciplinary history during his incarceration has merited him a classification of low security. He is allowed to engage in contact sports, play cards, and watch movies and television, including Muslim videos in the Arabic language. In this matter, he seeks permission to engage in one more activity: congregate prayer in accordance with his sincerely held religious beliefs.[866]

Judge Magnus-Stinson found that the warden's policy violated the Religious Freedom Restoration Act of 1993.[867] She approved a stipulated award of $160,607.52 in attorney fees and costs.[868]

Lindh was not an original plaintiff in the case.[869] Of the two original plaintiffs in the June 18, 2009, complaint,[870] one was released[871] and the other was transferred from the prison in Terre Haute, Indiana, to another prison.[872] Lindh was added by amendment on June 29, 2010.[873]

On April 10, 2013, Lindh filed a contempt motion challenging the warden's implementation of Judge Magnus-Stinson's decision.[874] The matter will be heard on June 26.[875]

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865. Opinion, Lindh v. Warden, No. 2:09-cv-215 (S.D. Ind. Jan. 11, 2013) [hereinafter Jan. 11, 2013, S.D. Ind. Opinion], *available at* 2013 WL 139699; *see* Opinion at 10, *id.* (Feb. 3, 2013) [hereinafter Feb. 3, 2013, S.D. Ind. Opinion], *available at* 2012 WL 379737 (finding "as a matter of law that daily group prayer is a religious exercise motivated by Mr. Lindh's sincerely held religious beliefs").

866. Jan. 11, 2013, S.D. Ind. Opinion, *supra* note 865, at 1.

867. *Id.* at 30; *see* 42 U.S.C. § 2000bb to 2000bb-4 (2011).

868. Order, *Lindh*, No. 2:09-cv-215 (S.D. Ind. Apr. 9, 2013); *see* Stipulation, *id.* (Apr. 8, 2013).

869. Feb. 3, 2013, S.D. Ind. Opinion, *supra* note 865, at 6.

870. Complaint, Arnaout v. Warden, No. 2:09-cv-215 (S.D. Ind. June 18, 2009) (complaint by Enaam Arnaout and Randall T. Royer).

871. http://www.bop.gov (noting Arnaout's release on February 8, 2011, reg. no. 14504-424).

872. Order, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. May 26, 2010) (dismissing Royer as a plaintiff because of his transfer to another prison); http://www.bop.gov (noting Royer's incarceration in Marion, Illinois, and a release date of February 6, 2021, reg. no. 46812-083).

873. Amended Complaint, *Arnaout*, No. 2:09-cv-215 (S.D. Ind. June 29, 2010); Order, *id.* June 28, 2010) (permitting amendment).

874. Motion, Lindh v. Warden, No. 2:09-cv-215 (S.D. Ind. Apr. 10, 2013).

875. Scheduling Order, *id.* (June 21, 2013).

Dirty Bomber

Padilla v. Rumsfeld (Michael B. Mukasey, S.D.N.Y.), Padilla v. Hanft and Padilla v. Rumsfeld (Henry F. Floyd, D.S.C.), and United States v. Hassoun (Marcia G. Cooke, S.D. Fla.)

Jose Padilla was born in Brooklyn to Puerto Rican parents.[876] On May 8, 2002, upon his landing at O'Hare International Airport in Chicago on a trip from Pakistan, federal authorities arrested him on a material witness warrant arising from a grand jury investigation of the September 11, 2001, attacks.[877] Padilla was flown to Manhattan for detention and possible grand jury testimony.[878]

On June 10, at a press conference in Russia, Attorney General John Ashcroft announced that the government was holding in custody an enemy combatant who had been apprehended at O'Hare on suspicion of planning to build and detonate a "dirty bomb," which is a bomb made up of radioactive material and conventional

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876. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002); *see* United States v. Jayyousi, 657 F.3d 1085, 1096 (11th Cir. 2011) ("they referred to Padilla as 'the Puerto Rican' because of his Puerto Rican descent"); Dan Eggen & Susan Schmidt, *"Dirty Bomb" Plot Uncovered, U.S. Says*, Wash. Post, June 11, 2002, at A1; James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at A1; Jo Thomas & Dana Canedy, *A Hispanic's Odyssey Into the Arms of Islam*, N.Y. Times, June 15, 2002, at A14; Jodi Wilgoren & Jo Thomas, *From Chicago Gang to Possible Al Qaeda Ties*, N.Y. Times, June 11, 2002, at A19.

877. Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004); Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540, 545 (4th Cir. 2012); Padilla v. Hanft, 423 F.3d 386, 388–90 (4th Cir. 2005); Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003); *Padilla*, 233 F. Supp. 2d at 568–69, 571, 573; Michael B. Mukasey, *Commencement Address—May 10, 2009*, 88 N.C. L. Rev. 1, 4 (2009) ("Padilla was arrested when he landed on a warrant I had issued in New York, based on information contained in an affidavit. That information came in part from the harsh interrogation of Abu Zabaydah . . . ."); *see Jayyousi*, 657 F.3d at 1094, 1101; *see also* Eggen & Schmidt, *supra* note 876; John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 Rev. Litig. 297, 304 (2008); Jonathan Hafetz, Habeas Corpus After 9/11 47, 73 (2011); Robert C. Herguth, *Former Chicagoan "Trained with the Enemy," U.S. Says*, Chi. Sun Times, June 10, 2002, at 3; Donna Newman, *The Jose Padilla Habeas Case: A Modern Day Struggle to Preserve the Great Writ*, 10 N.Y. City L. Rev. 333, 333 (2007) [hereinafter *Modern Day Struggle*]; Donna R. Newman, *What the F— Is an "Enemy Combatant"?*, *in* The Guantánamo Lawyers 361, 361 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) [hereinafter *What the F—*]; H.L. Pohlman, Terrorism and the Constitution 76 (2008); Risen & Shenon, *supra* note 876; Larry Siems, The Torture Report 1–6 (2011) ("Five minutes before his flight from Zurich landed, then-U.S. District Court Judge Michael Mukasey signed a material witness warrant authorizing Padilla's arrest."); Ali H. Soufan, The Black Banners 407–08, 428 (2011); Wilgoren & Thomas, *supra* note 876.

878. *Padilla*, 542 U.S. at 431; *Padilla*, 678 F.3d at 751; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700 ("On May 15, 2002, he appeared before Chief Judge Mukasey, who appointed Donna R. Newman, Esq., to represent Padilla."); *see* Eggen & Schmidt, *supra* note 876; Gibbons, *supra* note 877, at 304.

explosives.[879] The detainee was Padilla, and the government had transferred him the previous day to the high-security Consolidated Naval Brig in Charleston, South Carolina.[880] As a result of this transfer, Padilla was denied access to counsel.[881]

Padilla had been scheduled to appear on June 11 before the Southern District of New York's chief judge Michael B. Mukasey for a hearing on his motion to vacate the material witness warrant.[882] "[A material witness warrant] may not be used simply as a substitute for indefinite detention. When it was clear Padilla would not testify against his cohorts, he was transferred on order of the President to military custody as an unlawful combatant . . . ."[883]

As a result of Padilla's change in status from material witness to enemy combatant, the government vacated the warrant.[884] Padilla's attorney filed a habeas corpus petition on his behalf.[885] Judge Mukasey ruled that she had standing to do

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879. *Padilla*, 233 F. Supp. 2d at 572–73; *see Padilla*, 678 F.3d at 751; Eggen & Schmidt, *supra* note 876; Hafetz, *supra* note 877, at 47; Herguth, *supra* note 877; Newman, *What the F—*, *supra* note 877, at 362; Risen & Shenon, *supra* note 876; *US Announces Arrest of Alleged Al-Qaeda Terrorist*, Morning Edition (NPR radio broadcast June 10, 2002); *see also* Soufan, *supra* note 877, at 408 (reporting that the Attorney General was misinformed: "While Padilla was a committed terrorist set on trying to harm America, he was a brain transplant away from making a bomb, and there was no unfolding plot."); Clive Stafford Smith, Eight O'Clock Ferry to the Windward Side 49–80 (2007) (arguing that the alleged dirty bomb plot was "almost certainly a fantasy"). *But see* Terry McDermott & Josh Meyer, The Hunt for KSM 144 (2012) (reporting that Khalid Sheikh Mohammed "sent José Padilla, the hapless American son of Puerto Rican immigrants, back to the United States to research the possibility of building a dirty bomb and blowing up apartment buildings after filling them with gas."); *id.* at 187.

880. *Padilla*, 542 U.S. at 431–32; *Padilla*, 678 F.3d at 751; *Lebron*, 670 F.3d at 545; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 569; *see* Eggen & Schmidt, *supra* note 876; Gibbons, *supra* note 877, at 304–05; Pohlman, *supra* note 877, at 76–77; Risen & Shenon, *supra* note 876.

881. *Padilla*, 678 F.3d at 751; *Padilla*, 233 F. Supp. 2d at 574; *see* Newman, *Modern Day Struggle*, *supra* note 877, at 336.

882. *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; *see* Eggen & Schmidt, *supra* note 876; Gibbons, *supra* note 877, at 304–05; Risen & Shenon, *supra* note 876; *see also* Soufan, *supra* note 877, at 408 (noting that Judge Mukasey had signed the warrant).

Judge Mukasey had appointed counsel to represent Padilla in his material witness case:

> In May 2002, when it seemed that the smell of the debris and smoke from the demise of the Twin Towers had just cleared, I received a call from the courtroom deputy to the Honorable Michael B. Mukasey, then chief judge of the U.S. District Court for the Southern District of New York. He asked me to appear in court the following week for an assignment representing a grand-jury material witness who was being held in connection with the grand jury sitting to investigate 9/11.

Newman, *What the F—*, *supra* note 877, at 361.

883. Mukasey, *supra* note 877, at 4 (footnote and paragraph break omitted).

884. *Padilla*, 542 U.S. at 432 n.3; *Padilla*, 233 F. Supp. 2d at 571; *see* Newman, *What the F—*, *supra* note 877, at 362.

885. *Padilla*, 542 U.S. at 432; *Lebron*, 670 F.3d at 545; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; Docket Sheet, Padilla v. Rumsfeld, No. 1:02-cv-4445 (S.D.N.Y. June 12, 2002); *see* Newman, *Modern Day Struggle*, *supra* note 877, at 333; Newman, *What the F—*, *supra* note 877, at 364–65; *see also* Gibbons, *supra* note 877, at 305; Hafetz, *supra* note 877, at 47;

that as Padilla's next friend[886] and denied the government's motion to transfer the habeas case to the District of South Carolina.[887]

Judge Mukasey ruled that the President had the power to detain Padilla as an enemy combatant,[888] but he also ruled that Padilla had a right to consult counsel and pursue a habeas corpus petition challenging the grounds for the detention.[889] The government would have to show only "some evidence" to support its determination that Padilla was an enemy combatant.[890] On reconsideration, Judge Mukasey upheld his original ruling on access to counsel.[891] At the government's request, a month later, Judge Mukasey certified the issue for interlocutory appeal.[892]

Over the dissent of Judge Richard C. Wesley, Judges Rosemary S. Pooler and Barrington D. Parker, Jr., determined Padilla's detention to be unlawful: "Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat."[893] The court ordered Padilla released from military custody, and the court acknowledged that he could be held as a material witness or for criminal prosecution.[894]

Pohlman, *supra* note 877, at 77; Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect*, Wash. Post, June 13, 2002, at A11.

886. *Padilla*, 233 F. Supp. 2d at 569, 575–78, 610; *see* Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, N.Y. Times, Dec. 5, 2002, at A24. The court of appeals affirmed. *Padilla*, 352 F.3d at 702–04, 724.

887. *Padilla*, 233 F. Supp. 2d at 569, 578–87, 610. The court of appeals affirmed. *Padilla*, 352 F.3d at 704–10, 724.

888. *Padilla*, 233 F. Supp. 2d at 569, 587–99, 610; *see* Pohlman, *supra* note 877, at 84–85; Weiser, *supra* note 886.

889. *Padilla*, 233 F. Supp. 2d at 569, 588, 599–605, 610; *see* Andrew G. Patel, *Accessing Padilla*, *in* The Guantánamo Lawyers, *supra* note 877, at 364, 364–65; Pohlman, *supra* note 877, at 84–85; Weiser, *supra* note 886.

890. *Padilla*, 233 F. Supp. 2d at 570, 605–10; *see* Pohlman, *supra* note 877, at 85; Weiser, *supra* note 886.

Later, in another case, the Supreme Court determined that the "some evidence" standard is too lenient. Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (four-justice plurality opinion); *id.* at 540–41 (Justice Souter, joined by Justice Ginsburg, concurring in part, dissenting in part, and concurring in the judgment, rejecting the government's proposed "some evidence" standard).

891. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *see* Pohlman, *supra* note 877, at 85–86.

892. Padilla *ex rel.* Newman v. Rumsfeld, 256 F. Supp. 2d 218 (S.D.N.Y. 2003); *see* Benjamin Weiser, *New Turn in "Dirty Bomb" Case*, N.Y. Times, Apr. 10, 2003, at B15; *see also* Docket Sheet, Padilla v. Rumsfeld, No. 03-2235 (2d Cir. Apr. 21, 2003) (government's appeal); Docket Sheet, Padilla v. Rumsfeld, No. 03-2438 (2d Cir. June 10, 2003) (Padilla's cross-appeal).

893. Padilla v. Rumsfeld, 352 F.3d 695, 698 (2d Cir. 2003); *see* Neil A. Lewis & William Glaberson, *U.S. Courts Reject Detention Policy in 2 Terror Cases*, N.Y. Times, Dec. 19, 2003, at A1 (reporting also that the U.S. Court of Appeals for the Ninth Circuit found judicial rights for Guantánamo Bay detainees); Patel, *supra* note 889, at 365; Pohlman, *supra* note 877, at 87–88.

894. *Padilla*, 352 F.3d at 699, 724.

On June 28, 2004, the Supreme Court reversed, holding that Padilla should have brought his habeas corpus petition in the District of South Carolina, where he was held.[895] On the same day, however, the court held that foreign nationals apprehended abroad and held at the Guantánamo Bay Naval Base in Cuba could challenge their detention through habeas corpus.[896]

The court resolved a third case that day: a habeas corpus petition by Yaser Hamdi, who, like Padilla, was an American citizen held as an enemy combatant in a naval brig.[897] But Hamdi was apprehended in Afghanistan.[898] No opinion was endorsed by a majority of the court,[899] but only Justice Thomas thought that Hamdi could be detained indefinitely without a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.[900]

Approximately four weeks before the Supreme Court issued its opinion in Padilla's case, the government released newly declassified information on Padilla.[901] It was reported that Padilla admitted to attending a terrorist training camp, but his interest in a dirty bomb plot was only a ruse to avoid combat in Afghanistan.[902]

On July 2, 2004, Padilla's New York attorney filed a habeas corpus petition on his behalf in the District of South Carolina.[903] The court assigned the case to Judge Henry F. Floyd.[904] On February 28, 2005, Judge Floyd declared Padilla's

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895. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004) (Chief Justice Rehnquist delivered the opinion of the court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined; Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.); *see* Gibbons, *supra* note 877, at 305; Linda Greenhouse, *Access to Courts*, N.Y. Times, June 29, 2004, at A1; Pohlman, *supra* note 877, at 120.

896. Rasul v. Bush, 542 U.S. 466 (2004) (Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined; Justice Kennedy filed an opinion concurring in the judgment; Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined.); *see* Greenhouse, *supra* note 895.

897. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see* Gibbons, *supra* note 877, at 303; Greenhouse, *supra* note 895; Pohlman, *supra* note 877, at 76, 120.

898. *Hamdi*, 542 U.S. at 510; *see* Gibbons, *supra* note 877, at 303; Greenhouse, *supra* note 895; Pohlman, *supra* note 877, at 86.

899. *Hamdi*, 542 U.S. 507 (Justice O'Connor announced the judgment of the court and delivered an opinion in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined; Justice Souter filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which Justice Ginsburg joined; Justice Scalia filed a dissenting opinion, in which Justice Stevens joined; Justice Thomas filed a dissenting opinion.); *see* Pohlman, *supra* note 877, at 120–21, 130.

900. *Hamdi*, 542 U.S. at 579–99 (Justice Thomas, dissenting); *see* Gibbons, *supra* note 877, at 303; Greenhouse, *supra* note 895; Pohlman, *supra* note 877, at 121.

Hamdi was released to his home in Saudi Arabia in October 2004 without charge. *See* Joseph Margulies, Guantánamo and the Abuse of Presidential Power 156 (2006).

901. *See* Eric Lichtblau, *U.S. Spells Out Dangers Posed by Plot Suspect*, N.Y. Times, June 2, 2004, at A1; Pohlman, *supra* note 877, at 119–20.

902. *See* Lichtblau, *supra* note 901.

903. Petition, Padilla v. Hanft, No. 2:04-cv-2221 (D.S.C. July 2, 2004); *see* Lebron v. Rumsfeld, 670 F.3d 540, 545 (4th Cir. 2012); Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005); Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005); *see* Gibbons, *supra* note 877, at 305; Hafetz, *supra* note 877, at 144; Pohlman, *supra* note 877, at 131.

904. Docket Sheet, *Padilla*, No. 2:04-cv-2221 (D.S.C. July 2, 2004).

military detention improper.[905] On September 9, a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit reversed, determining that the 2001 Authorization for Use of Military Force Joint Resolution gave the President the authority to indefinitely detain even U.S. citizens as enemy combatants.[906]

While Padilla's petition to the Supreme Court for a writ of certiorari was pending, on November 17, 2005, the government indicted him in the Southern District of Florida, adding him to a terrorism conspiracy case pending for nearly two years against four other defendants.[907] The case had been assigned to Judge Marcia G. Cooke.[908]

For this report, Tim Reagan interviewed Judge Floyd, his law clerks Jeff Brown and Chase Samples, and the judge's judicial assistant Cindy Chapman on November 19, 2009, in Spartanburg, South Carolina, where Judge Floyd has his chambers.

Because of Judge Floyd's assignment to *Padilla v. Rumsfeld*, the court also assigned to him a later habeas petition filed by Ali Saleh Kahlah al-Marri. Docket Sheet, Al-Marri v. Hanft, No. 2:04-cv-2257 (D.S.C. July 8, 2004); *see* Al-Marri v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006) (dismissing the petition), *rev'd sub. nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc, holding that the president can detain a legal resident subject to judicial review of his status as an enemy combatant), *vacated sub. nom.* Al-Marri v. Spagone, 555 U.S. 1220 (2009) (ordering the appeal dismissed as moot in light of a February 26, 2009, indictment against the petitioner in the Central District of Illinois); *see also* Docket Sheet, United States v. Al-Marri, No. 1:09-cr-10030 (N.D. Ill. Feb. 26, 2009) (noting a plea agreement on April 30, 2009, and a sentence of eight years and four months); http://www.bop.gov (noting a release date of January 18, 2015, reg. no. 12194-026); Al-Marri v. Davis, 714 F.3d 1183 (10th Cir. 2013) (affirming the denial of al-Marri's habeas petition for confinement credits).

Judge Floyd was elevated to the court of appeals on October 5, 2011. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

905. *Padilla*, 389 F. Supp. 2d 678; *see* Hafetz, *supra* note 877, at 144; Neil A. Lewis, *Judge Says U.S. Terror Suspect Can't Be Held as an Enemy Combatant*, N.Y. Times, Mar. 1, 2005, at A14; Pohlman, *supra* note 877, at 131.

906. *Padilla*, 423 F.3d 386; *see* Pub. L. No. 107-40, 115 Stat. 224 (2001); *see* Gibbons, *supra* note 877, at 306; Hafetz, *supra* note 877, at 144–45; Neil A. Lewis, *Court Gives Bush Right to Detain U.S. Combatant*, N.Y. Times, Sept. 10, 2005, at A1; Pohlman, *supra* note 877, at 132.

907. Superseding Indictment, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Nov. 17, 2005) [hereinafter Nov. 17, 2005, Indictment]; Docket Sheet, *id.* (Jan. 8, 2004) [hereinafter S.D. Fla. *Hassoun* Docket Sheet]; Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 8 (2008) [hereinafter *Trying Cases*] (remarks by Judge Marcia G. Cooke); *see* Gibbons, *supra* note 877, at 306; Hafetz, *supra* note 877, at 145; Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. Times, Nov. 23, 2005, at A1; Pohlman, *supra* note 877, at 131; Jay Weaver, *Padilla to Face Terror Charges Here*, Miami Herald, Nov. 23, 2005, at 1A; *see also* Mukasey, *supra* note 877, at 6 ("the dirty bomb plot . . . couldn't be proved in a conventional trial where a defendant has access under conventional discovery rules not only to what evidence the government has but also how it is gathered").

The *Miami Herald* reported over a year earlier that Padilla might be indicted in Florida. Jay Weaver, *Padilla Could Be Charged in Miami*, Miami Herald, June 30, 2004, at 1A.

908. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 907; *Trying Cases*, *supra* note 907, at 8 (remarks by Judge Cooke); *see* Hafetz, *supra* note 877, at 146.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on October 8, 2009.

The court of appeals denied the government's motion to transfer Padilla to civilian authority in Florida.[909]

> [A] short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary in the interest of national security, the government determined that it was no longer necessary that Padilla be held militarily. Instead, it announced, Padilla would be transferred to the custody of federal civilian law enforcement authorities and criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla.[910]

The Supreme Court, however, granted the government's request to transfer Padilla.[911] In light of Padilla's removal from military detention, the court later denied his petition for a writ of certiorari.[912]

First indicted on January 8, 2004, Adham Amin Hassoun was a Lebanese-born Palestinian charged with raising money and recruiting persons for jihad training.[913] He and Padilla became friends when they both attended a Fort Lauderdale mosque in the 1990s.[914] Added by superseding indictment on September 16, 2004, Mohamed Hesham Youssef was charged as one of Hassoun's recruits; he was in custody in Egypt on other charges.[915] Kifah Wael Jayyousi and Kassem Daher were named in a sealed material support complaint filed on December 1, 2004.[916] The complaint was unsealed on March 30, 2005, when Jayyousi was apprehended in Detroit on his return from Qatar.[917] Jayyousi was born in Jordan;[918] Daher was a Canadian citizen in overseas custody.[919] Jayyousi

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909. Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005); *see* Hafetz, *supra* note 877, at 145–46; Neil A. Lewis, *Court Refuses U.S. Bid to Shift Terror Suspect*, N.Y. Times, Dec. 22, 2005, at A1; Pohlman, *supra* note 877, at 132.

910. *Padilla*, 432 F.3d at 584.

911. Hanft v. Padilla, 546 U.S. 1084 (2006); *see* Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. Times, Jan. 5, 2006; Hafetz, *supra* note 877, at 146; Pohlman, *supra* note 877, at 133; Jay Weaver, *Dirty-Bomb Suspect Charged as Civilian*, Miami Herald, Jan. 6, 2006, at 5B ("Padilla was flown in a military jet to Homestead Air Base, then by helicopter to Watson Island, before a convoy of U.S. marshals escorted him to the Miami Federal Detention Center for his initial court hearing.").

912. Padilla v. Hanft, 547 U.S. 1062 (2006); *see* Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. Times, Apr. 4, 2006, at A1; Hafetz, *supra* note 877, at 146; Pohlman, *supra* note 877, at 133.

913. Indictment, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Jan. 8, 2004); *Trying Cases*, *supra* note 907, at 8 (remarks by Judge Cooke); *see* Abby Goodnough, *After 5 Years, Padilla Goes on Trial in Terror Case*, N.Y. Times, May 15, 2007, at A14; Jay Weaver, *2 Men Facing Terror Charges*, Miami Herald, Sept. 17, 2004, at 1B.

914. *See* Weaver, *supra* note 907.

915. Second Superseding Indictment, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 16, 2004); *see* Weaver, *supra* note 913.

916. Sealed Criminal Complaint, United States v. Jayyousi, No. 1:04-mj-3565 (S.D. Fla. Dec. 1, 2004); Docket Sheet, *id.* (Apr. 4, 2005); *see Trying Cases*, *supra* note 907, at 8 (remarks by Judge Cooke).

917. *See* Hannah Sampson, *2 Men Held on Terror Charges*, Miami Herald, Mar. 30, 2005, at 9B.

918. *See* Goodnough, *supra* note 913.

919. *See* Sampson, *supra* note 917; Weaver, *supra* note 911.

and Daher were added to the pending indictment on April 7, 2005.[920] Youssef and Daher remain fugitives.[921]

Even after Padilla was added to the indictment, there was no charge pertaining to a dirty bomb.[922] The dirty bomb issue never arose at all in the case.[923] But there was the following allegation: "On or about July 24, 2000, Padilla filled out a 'Mujahideen Data Form' in preparation for violent jihad training in Afghanistan."[924] The government claimed that it was found in Afghanistan among dozens of other applications late in 2001.[925]

Hassoun and Jayyousi, the only two defendants in local custody, were held in solitary confinement because they were terrorism suspects; they complained of improper detention practices: not being permitted family visits on weekends when family members did not have to work; not being permitted family visits in the evenings, which meant that out-of-town family members had to pay for overnight lodging; not being permitted long-distance telephone calls to family members at times when the family members would be awake; severe mail delays; and various inconveniences in meetings with attorneys.[926] Judge Cooke denied the defendants' motion to be relieved of solitary confinement, but she said she would "hold the government's feet to the fire."[927]

A few months later, deciding that he was not a flight risk, Judge Cooke granted Jayyousi's request for bail, setting the bond at $1.3 million and imposing electronic monitoring.[928]

On August 18, 2006, Judge Cooke dismissed the first count of the 11-count indictment—a charge that the defendants conspired to murder, kidnap, and maim

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920. Nov. 17, 2005, Indictment, *supra* note 907; *see* Jack Dolan, *Third Suspect Faces Terror Charges*, Miami Herald, Apr. 9, 2005, at 4B.

921. United States v. Jayyousi, 657 F.3d 1085, 1091 n.1 (11th Cir. 2011); Order, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Feb. 24, 2006) (transferring Youssef and Daher to the court's fugitive case list).

922. *See* Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012); *see also* Pohlman, *supra* note 877, at 133; Weaver, *supra* note 907.

923. *Trying Cases*, *supra* note 907, at 7 (remarks by Judge Cooke); Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

924. Nov. 17, 2005, Indictment, *supra* note 907; *see Jayyousi*, 657 F.3d at 1093; Weaver, *supra* note 911.

925. *See* Jay Weaver, *We Found al Qaeda Inquiry, U.S. Says*, Miami Herald, Jan. 13, 2006, at 2B; *see also Jayyousi*, 657 F.3d at 1093.

926. Joint Motion, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. June 15, 2005) [hereinafter Joint Motion]; *see* Jay Weaver, *Two Men Claim Prison Abuse*, Miami Herald, June 18, 2005, at 1B.

927. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 21, 2005) [hereinafter Sept. 21, 2005, S.D. Fla. Order]; *see* Jay Weaver, *Judge Backs Confinement of Two Terror Suspects*, Miami Herald, Sept. 17, 2005, at 3B.

928. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006); *see* Weaver, *supra* note 911.

persons in a foreign country—as impermissibly multiplicitous of other counts.[929] The court of appeals reversed.[930]

On January 4, 2007, the *New York Times* printed a front-page story based in part on discovery that Padilla's attorneys improperly provided to the newspaper:

> Tens of thousands of conversations were recorded. Some 230 phone calls form the core of the government's case, including 21 that make reference to Mr. Padilla, prosecutors said. But Mr. Padilla's voice is heard on only seven calls. And on those seven, which The Times obtained from a participant in the case, Mr. Padilla does not discuss violent plots.[931]

Padilla's attorneys said that the error resulted from a person in the federal defender's office's not understanding the operable protective order, and Judge Cooke reprimanded the attorneys.[932]

Jury selection began on April 16, 2007.[933] Judge Cooke had decided that the court should send out 3,000 jury duty letters for the trial.[934] Jurors were selected from a pool of approximately 300.[935] Voir dire lasted four weeks.[936] Judge Cooke decided to use a jury questionnaire.[937] On May 8, 2007, the jury was selected from a culled pool of 88 potential jurors.[938]

After about three weeks of testimony, it was discovered that one of the jurors was not a U.S. citizen.[939] The jury summons was meant for his son, who had the same name.[940] Another juror was excused because of injuries suffered when he tried to prevent a break-in of his daughter's car.[941] Another juror's sister died, but she asked only for an early dismissal on Friday so that she could attend a memorial service in North Carolina on Saturday.[942]

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929. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Aug. 18, 2006), *available at* 2006 WL 2415946; *see* Jay Weaver, *Padilla Terror Count Tossed*, Miami Herald, Aug. 22, 2006, at 1B.

930. United States v. Hassoun, 476 F.3d 1181 (11th Cir. 2007); *see Jayyousi*, 657 F.3d at 1091; Jay Weaver, *Key Charge Against Padilla Restored*, Miami Herald, Jan. 31, 2007, at 1B.

931. Deborah Sontag, *In Padilla Wiretaps, Murky View of "Jihad" Case*, N.Y. Times, Jan. 4, 2007, at A1; *see* Jay Weaver, *Padilla Lawyers Blasted for Wiretap Leak*, Miami Herald, Jan. 23, 2007, at 5B.

932. *See* Jay Weaver, *Judge Scolds Padilla's Lawyers for Leak*, Miami Herald, Jan. 25, 2007, at 6B.

933. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 907; *Jayyousi*, 657 F.3d at 1091; *see* Jay Weaver, *Padilla Jury Picking Could Last 3 Weeks*, Miami Herald, Apr. 17, 2007, at 7B.

934. *Trying Cases*, *supra* note 907, at 10 (remarks by Judge Cooke); *see 3,000 in Jury Pool for Terror Trial*, Miami Herald, Oct. 27, 2006.

935. *Trying Cases*, *supra* note 907, at 10 (remarks by Judge Cooke); *see* Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. Times, May 9, 2007, at A18; Weaver, *supra* note 933.

936. *See* Goodnough, *supra* note 935.

937. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009; *see* Jay Weaver, *Padilla Terror Trial Is Ready to Unfold*, Miami Herald, Apr. 15, 2007, at 1A.

938. *See* Jay Weaver, *Angry Lawyers Finally Pick Jury*, Miami Herald, May 9, 2007, at 1B.

939. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

940. *Id.*

941. *Id.*

942. *Id.*

The jury convicted all three defendants on August 16, 2007, one day after beginning deliberations.[943] Three months later, Hassoun attempted suicide.[944] On January 22, 2008, Judge Cooke sentenced Padilla to 17 years and four months, Hassoun to 15 years and eight months, and Jayyousi to 12 years and eight months.[945] The court of appeals, over a dissent, affirmed the convictions but remanded Padilla's case for a harsher sentence.[946]

During his criminal prosecution in Florida, Padilla filed civil suits challenging his conditions of confinement while designated an enemy combatant. On February 17, 2011, Judge Richard Mark Gergel dismissed a 2007 action for nominal damages that Padilla and his mother filed in the District of South Carolina against the government.[947] The court originally assigned the action to Judge Floyd, but the action was transferred to Judge Gergel when he joined the bench.[948] The court of appeals affirmed on January 23, 2012: "The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages."[949]

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943. United States v. Jayyousi, 657 F.3d 1085, 1091–92 (11th Cir. 2011); *see* Padilla v. Yoo, 678 F.3d 748, 751 (9th Cir. 2012); *see also* Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. Times, Aug. 17, 2007, at A1; Hafetz, *supra* note 877, at 146; Pohlman, *supra* note 877, at 133; Jay Weaver & Larry Lebowitz, *Miami Jury Convicts Padilla*, Miami Herald, Aug. 17, 2007, at 1A; Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, Wash. Post, Aug. 17, 2007, at A1.

944. *See* Jay Weaver, *Padilla Codefendant Tries to Kill Himself*, Miami Herald, Dec. 4, 2007, at 5B.

945. *Jayyousi*, 657 F.3d at 1092; S.D. Fla. *Hassoun* Docket Sheet, *supra* note 907; *see* Hafetz, *supra* note 877, at 146; Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. Times, Jan. 23, 2008, at A14; Jay Weaver, *Padilla Gets 17 Years in "Jihad" Conspiracy*, Miami Herald, Jan. 23, 2008, at 1A; Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years*, Wash. Post, Jan. 23, 2008, at A3.

946. *Jayyousi*, 657 F.3d at 1119 (opinion by Judge Joel F. Dubina, joined by Judge William H. Pryor, Jr.), *cert. denied*, ___ U.S. ___, 133 S. Ct. 29 (petition by Padilla), ___ U.S. ___, 133 S. Ct. 29 (petition by Hassoun), *and* ___ U.S. ___, 133 S. Ct. 29 (2012) (petition by Jayyousi); *see Jayyousi*, 657 F.3d at 1119–35 (dissenting opinion by Judge Rosemary Barkett, who would have suppressed Padilla's statements before he was read his *Miranda* rights, who would have suppressed lay opinion testimony, and who determined that Padilla's sentence was reasonable); *see also Padilla*, 678 F.3d at 751; Lizette Alvarez, *Sentence for Terrorist Is Too Short, Court Rules*, N.Y. Times, Sept. 20, 2011, at A12; *see also* http://www.bop.gov (noting release dates of September 15, 2017, for Jayyousi, reg. no. 39551-039, and October 10, 2017, for Hassoun, reg. no. 72433-004).

947. Lebron v. Rumsfeld, 764 F. Supp. 2d 787 (D.S.C. 2011); *see Padilla*, 678 F.3d at 755–56; *see also Judge Tosses Out Padilla Torture Suit*, Wash. Post, Feb. 18, 2011, at A2; Siems, *supra* note 877, at 1–6 (also describing Judge Gergel's hearing).

948. Docket Sheet, Padilla v. Rumsfeld, No. 2:07-cv-410 (D.S.C. Feb. 9, 2007) (noting a transfer on Aug. 18, 2010); Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting the judge's commission on August 9, 2010).

949. Lebron v. Rumsfeld, 670 F.3d 540, 547 (4th Cir.), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2751 (2012); *see Padilla*, 678 F.3d at 756–57.

On January 4, 2008, Padilla and his mother filed an action against Boalt Hall law professor John Yoo, claiming that mistreatment of Padilla while in custody resulted from improperly crafted legal opinions that Yoo wrote when he worked for the Justice Department's Office of Legal Counsel.[950] The court assigned the case to Judge Jeffrey S. White,[951] who denied Yoo's motion to dismiss.[952] The court of appeals, however, determined that Professor Yoo was entitled to qualified immunity, because the rights of suspected terrorists held in military detention as enemy combatants were not beyond debate, and it was not clearly established at the time that Padilla's treatment qualified as torture.[953]

Challenge: Attorney–Client Contacts

Padilla was transferred from New York to South Carolina without notice to his attorney.[954] Once Padilla was designated an enemy combatant, the government denied him access to counsel, arguing that access to counsel would interfere with Padilla's interrogation and that Padilla might use contacts with counsel to communicate with other terrorists.[955] Judge Mukasey ruled this restriction improper.[956]

> [A]ccess to counsel need be granted only for purposes of presenting facts to the court in connection with this petition if Padilla wishes to do so; no general right to counsel in connection with questioning has been hypothesized here, and thus the interference with interrogation would be minimal or nonexistent.[957]

Judge Mukasey characterized concerns about using the attorney as a communication conduit to terrorists "gossamer speculation."[958] "[T]here is no reason that military personnel cannot monitor Padilla's contacts with counsel, so long as those who participate in the monitoring are insulated from any activity in connection with this petition, or in connection with a future criminal prosecution of Padilla, if there should ever be one." Further, there is nothing to suggest that a member of the court's Criminal Justice Act panel, such as Padilla's attorney, "would ever be inclined to act as conduits for their client, even if he wanted them to do so."[959]

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950. Complaint, Padilla v. Yoo, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008); *see* Amended Complaint, *id.* (June 2, 2008); *see also Padilla*, 678 F.3d at 751–54.

951. Docket Sheet, *Padilla*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008).

952. Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); *Padilla*, 678 F.3d at 754–55; *see* Adam Liptak, *Padilla Sues U.S. Lawyer Over Detention*, N.Y. Times, Jan. 5, 2008, at A9.

953. *Padilla*, 678 F.3d at 750; *see California: Court Throws Out Suit Against Bush Lawyer*, N.Y. Times, May 3, 2012, at A20; Howard Mintz, *Court Rules for UC Professor in Torture Lawsuit*, San Jose Mercury News, May 3, 2012, at 6B.

954. *See* Chris Hedges, *Speaking for Terror Suspect, and for the Constitution*, N.Y. Times Feb. 11, 2003, at B2.

955. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

956. *Id.* at 569, 599–605, 610; *see* Weiser, *supra* note 886.

957. *Padilla*, 233 F. Supp. 2d at 603.

958. *Id.* at 604.

959. *Id.*

Unwilling to allow Padilla access to counsel, the government filed a motion to reconsider, violating local rules by filing the motion late and submitting a supporting affidavit without leave of court.[960] The government argued that access to counsel would interfere with the psychological pressure on Padilla employed as part of the interrogation process and access to counsel was furthermore unnecessary because the court could rely on the government's evidence alone to decide Padilla's habeas corpus petition.[961] Judge Mukasey was not persuaded.[962]

Because the court of appeals ordered Padilla released, it did not reach the issue of his right to counsel, and the government continued to deny him counsel access until his case was pending before the Supreme Court, at which time the government argued that that legal issue was moot.[963]

In Florida, Hassoun and Jayyousi complained of insufficient access to counsel; Judge Cooke ordered that they be permitted two 15-minute telephone calls with their attorneys each week.[964] "During these legal telephone calls the [Federal Detention Center] officials shall stay a reasonable distance away from the Defendant to allow for sufficient privacy."[965] As trial approached, Judge Cooke ordered the detention center to provide a bigger conference table for meetings between the defendants and their attorneys.[966]

Challenge: Mental Health During Detention

One month before the scheduled commencement of trial, Padilla's attorneys filed a motion to determine whether their client was competent to stand trial: "he appears to be incapacitated by post traumatic stress disorder, stemming from the circumstances surrounding his time at the Naval Brig and, as a result of this incapacitation, is unable to assist his attorneys by providing relevant information to his defense."[967]

Special administrative measures for Padilla's detention (SAMs) made his psychiatric evaluation difficult,[968] so Judge Cooke had the evaluation conducted in her courtroom.[969] Judge Cooke was not present for the evaluation.[970]

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960. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 43–49 (S.D.N.Y. 2003).

961. *Id.* at 43.

962. *Id.* at 43, 53–57; *see* Benjamin Weiser, *Judge Is Angered by U.S. Stance in Case of "Dirty Bomb" Suspect*, N.Y. Times, Jan. 16, 2003, at A16.

963. *See* Patel, *supra* note 889, at 365–65.

964. Joint Motion, *supra* note 926.

965. Sept. 21, 2005, S.D. Fla. Order, *supra* note 927.

966. *See* Jay Weaver, *Padilla Judge: I Don't Want to Run a Prison*, Miami Herald, Feb. 4, 2006, at 1B.

967. Motion for Mental Competency Hearing, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006); *see* Deborah Sontag, *Federal Judge Is Asked to Decide if Padilla Is Competent for Trial*, N.Y. Times, Dec. 14, 2006, at A24; Jay Weaver, *Terror Suspect to Undergo Mental Testing*, Miami Herald, Dec. 19, 2006, at 4B.

968. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

969. *Id.*; *see* Jay Weaver, *Padilla Mental Evaluation to Be Done in Court*, Miami Herald, Dec. 22, 2006, at 5B.

970. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

Judge Cooke found Padilla competent to stand trial.[971]

For Padilla's scheduled December 3, 2012, resentencing, Padilla was transferred from the Supermax facility in Florence, Colorado, to Florida.[972] Padilla's attorney requested a delay in sentencing for the benefit of Padilla's mental health.[973] "While in Florence, Jose's family, who are of limited means, only have been able to visit him on one occasion. . . . The undersigned is clearly concerned about Jose's mental health and believes that multiple family visits, prior to the resentencing, will be beneficial to his mental health . . . ."[974] Judge Cooke delayed sentencing until April 8, 2013,[975] on which day two sealed docket entries were entered in the case.[976]

Challenge: Classified Arguments

In response to Padilla's habeas corpus petition in New York, the government submitted both a public redacted declaration describing evidence supporting the designation of Padilla as an enemy combatant and an ex parte, in camera classified unredacted declaration.[977] Judge Mukasey reviewed the classified declaration to assess the validity of the government's denial of Padilla's access to counsel.[978] The only information in the unredacted declaration not in the public declaration was the identity of sources and some circumstantial evidence corroborating facts in the redacted declaration.[979] The classified declaration did not refer to conduct by Padilla not described in the redacted declaration.[980]

Judge Mukasey ruled that it was proper to deny Padilla access to the classified declaration unless Padilla rebutted the facts in the redacted declaration justifying his designation as an enemy combatant and fairness demanded his access to the unredacted declaration, at which time the government could elect to withdraw the unredacted declaration instead of granting Padilla access to it, if the government so wished.[981]

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971. Competency Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Mar. 1, 2007), *available at* 2007 WL 610175; *see* Deborah Sontag, *U.S. Judge Finds Padilla Competent to Face Trial*, N.Y. Times, Mar. 1, 2007, at A11; Jay Weaver, *Judge Rules Padilla Fit for Trial*, Miami Herald, Mar. 1, 2007, at 1B; Peter Whoriskey, *Judge Rules Padilla Is Competent to Stand Trial*, Wash. Post, Mar. 1, 2007, at A3.

972. *See* Resentencing Motion at 2, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 6, 2012).

973. *Id.* at 1–4; Transcript, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Nov. 28, 2012, filed Dec. 20, 2012).

974. Resentencing Motion, *supra* note 972, at 2–3.

975. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 28, 2013).

976. Docket Sheet, *id.* (Jan. 8, 2004).

977. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 569–70, 572–73, 604–10 (S.D.N.Y. 2002); *see* Benjamin Weiser, *Lawyers for Detainee Ask Judge Not to Review Classified Papers*, N.Y. Times, Oct. 24, 2002, at A15.

978. *Padilla*, 233 F. Supp. 2d at 604.

979. *Id.* at 609.

980. *Id.*

981. *Id.* at 608–10 .

The government also presented in camera an ex parte unredacted declaration to support its motion to reconsider Judge Mukasey's granting Padilla access to counsel.[982] The court of appeals reviewed both unredacted declarations, but it did not rely on them.[983]

In the Eleventh Circuit appeal by Padilla, Hassoun, and Jayyousi, the court instructed the parties to give notice whether classified matters would be presented at oral argument.[984] None was.[985] Much of the information that was classified during the district court case, such as statements made while Padilla was designated an enemy combatant, had been declassified by the time of the appeal.[986] Hassoun's appellate brief included some still-classified information.[987]

Challenge: Witness Security

To show chain of custody for Padilla's alleged Mujahideen Data Form, the government offered testimony from the CIA agent who found it.[988] The government asked that the witness's identity be protected by use of (1) a pseudonym; (2) light disguise (which "may involve the witness wearing a wig, eyeglasses or minor facial hair"); (3) a separate entrance; (4) a prohibition on sketch artists "recording the witness' likeness"; and (5) a prohibition on "questioning the witness in a manner that would expose either his classified identity, the classified identities of other covert CIA personnel, or the specific location of the covert CIA site in Quandahar, Afghanistan where the witness worked."[989]

At trial, the witness wore black-rimmed glasses and a closely cropped beard.[990] He came to the courtroom from the basement by way of the prisoner elevator.[991]

Challenge: Court Security

For Padilla's Miami trial, federal deputy marshals were brought in from around the country.[992] An extra metal detector was set up outside Judge Cooke's courtroom.[993]

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982. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

983. Padilla v. Rumsfeld, 352 F.3d 695, 701 n.4 (2d Cir. 2003).

984. Docket Sheet, United States v. Jayyousi, No. 08-10494 (11th Cir. Feb. 4, 2008).

985. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 19, 2010.

986. *Id.*

987. *Id.*

988. Motion in Limine, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Mar. 22, 2007).

989. *Id.*; *see* Jay Weaver, *Padilla Trial CIA Witness May Testify in Disguise*, Miami Herald, Mar. 22, 2007.

990. *See* Jay Weaver, *"Secret Agent" Testifies about Padilla Document*, Miami Herald, May 16, 2007, at 3A.

991. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

992. *See* Goodnough, *supra* note 913.

993. *See* Weaver, *supra* note 933.

Challenge: Jury Security

To shield potential jurors from the public during jury selection, the court erected a screen in the courthouse lobby.[994] The jury was semi-sequestered.[995] Their identities were known to the court and the parties, but identifying information was not presented in open court or otherwise made public.[996] Jurors did not report directly to the courthouse; each reported to a specific secret location—one on the north side of town and one on the south side—from which they were shuttled to the courthouse.[997] Instead of going their own way for lunch, they always ate together.[998] Once a week or so, the deputy marshals took them out for lunch.[999]

Restrooms on the courtroom's floor were reserved for use by jurors and court staff only.[1000] Cubicle walls were used to screen off a rest area outside the jury room, a table and chairs were set up outside on a porch, and extra games and magazines were brought in.[1001]

Challenge: Classified Evidence

District of South Carolina

Padilla's attorneys wanted his habeas petition decided on legal grounds rather than factual grounds, so evidence was never an important issue in the case.[1002] However, this could not be known with certainty at the outset, so Judge Floyd's two law clerks and his judicial assistant obtained security clearances.[1003] Judge Floyd sits in Spartanburg, but he anticipated a possible evidentiary hearing at the larger courthouse in Charleston, about 200 miles away.[1004] For this reason, a courtroom deputy and a court reporter there obtained security clearances.[1005] As it happened, oral arguments were held in Spartanburg, and they did not refer to classified information.[1006]

Judge Floyd examined some classified evidence at a sensitive compartmented information facility (SCIF) at the courthouse in Charleston, but there was no need for his staff to do so.[1007]

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994. *See id*.
995. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.
996. *Id.*
997. *Id.*
998. *Id.*
999. *Id.*
1000. *Id.*
1001. *Id.*
1002. Interview with Hon. Henry F. Floyd, Nov. 19, 2009.
1003. *Id.*
1004. *Id.*
1005. *Id.*
1006. *Id.*
1007. *Id.*; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

Southern District of Florida

All defense attorneys in the criminal case received security clearances.[1008] There was already a SCIF in the basement of the courthouse, and defense attorneys could review classified information in this room.[1009]

More than two years after Padilla's indictment, Judge Cooke granted him access to classified evidence created during his military confinement.[1010] Although it is common to grant defense attorneys access to classified evidence relevant to a prosecution, it is very unusual for courts to grant such access to terrorism defendants. Both Judge Cooke and defense attorneys viewed classified videos of Padilla's interrogation in the basement SCIF.[1011]

All of Judge Cooke's staff received security clearances for this case.[1012] The last of her cleared law clerks left in 2009, but her permanent staff—her assistant, courtroom deputy, and court reporter—all retained top secret clearances.[1013] During this case, Judge Cooke did not use interns, because they would not have security clearances.[1014]

Challenge: FISA Evidence

FISA warrants resulted in evidence against each of the defendants.[1015] On February 14, 2006, Hassoun moved the court

> to undertake a careful review of all applications for electronic surveillance of defendant Hassoun conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as well as applications for such surveillance of any third-party target which intercepted defendant, and based upon that review, disclose the applications [and] orders to the defense, hold a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), and, as [a] result, suppress all intercepts of defendant Hassoun derived from illegally authorized FISA surveillance.[1016]

Judge Cooke referred the matter to Magistrate Judge Stephen T. Brown,[1017] who "examined *in camera* every application from which the Government has indicated that it derived evidence that will be used in its case against the Defendants."[1018] Judge Brown found

> that each individual application contain[ed] probable cause that the subject of the surveillance was "an agent of a foreign power." The Court additionally [found] that with respect

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1008. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1009. *Id.*

1010. Order, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. July 5, 2006); *see Judge Allows Padilla to See Secrets*, Wash. Post, July 14, 2006, at A12.

1011. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1012. *Id.*

1013. *Id.*

1014. *Id.*

1015. *Trying Cases*, *supra* note 907, at 8 (remarks by Judge Cooke); Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1016. Hassoun FISA Motion, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Feb. 14, 2006).

1017. FISA Order, *id.* (Apr. 4, 2007), *available at* 2007 WL 1068127.

1018. Report and Recommendation at 3, *id.* (Dec. 15, 2006), *available at* 2007 WL 1068127.

> to any target who is a "United States person," the probable cause finding(s) were not based solely on activities which are protected under the First Amendment.

On April 4, 2007, Judge Cooke affirmed Judge Brown's findings: "Although the Magistrate Judge carefully reviewed the FISA applications and other materials that are the subject of the instant motions, I also reviewed the applications. On review, I agree with Magistrate Judge Brown."[1019] When she was not looking at them, Judge Cooke stored the warrant applications in an approved safe in her chambers.[1020]

Judge Cooke was also called upon to review an evidentiary substitute for classified evidence, as provided by the Classified Information Procedures Act (CIPA).[1021] An agent of the intelligence agency with authority over the evidence brought the original evidence to the classified information security officer, who delivered it to Judge Cooke in chambers for her private review in her office while the agent and the security officer waited outside her door.[1022]

1019. FISA Order, *supra* note 1017.

1020. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1021. *Id.*; *see* 18 U.S.C. app. 3 (2011) (text of CIPA); Reagan, *supra* note 1007 (discussing CIPA).

1022. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

Lackawanna

United States v. Goba (William M. Skretny and H. Kenneth Schroeder, Jr., W.D.N.Y.)

In May 2001, the Buffalo office of the FBI received an anonymous tip that six young men of Yemeni dissent in Lackawanna, New York, had been to an Al-Qaeda training camp in Afghanistan that spring.[1023] The men—all American citizens—were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.[1024] The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.[1025] Although they trained at the camp and lied about it afterwards, it does not appear that they ever performed or intended to perform an act of terrorism.[1026]

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.[1027] Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.[1028] In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yasein Taher, Mukhtar al-Bakri, Shafal Mosed, and Faysal Galab.[1029]

Juma al-Dosari—a friend of Derwish's—was a traveling imam who gave a sermon in Lackawanna in the spring of 2001 urging the Muslim men there to fight side-by-side with their brothers in Kosovo, Chechnya, and Kashmir.[1030] The sermon, and Derwish's encouragement, persuaded the "Lackawanna Six" to travel to

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1023. *See Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) [hereinafter *Sleeper Cell*]; Michael Powell, *No Choice but Guilty*, Wash. Post, July 29, 2003, at A1; Matthew Purdy & Lowell Bergman, *Where the Trail Led*, N.Y. Times, Oct. 12, 2003, at 11; Dina Temple-Raston, The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror 153 (2007).

1024. *See* United States v. Goba, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, N.Y. Times, May 20, 2003, at A17; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 4.

1025. *See Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023.

1026. *See* Powell, *supra* note 1023; Purdy, *supra* note 1024; Purdy & Bergman, *supra* note 1023; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. Times, Oct. 22, 2002, at A19.

1027. *See Sleeper Cell*, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Ali H. Soufan, The Black Banners 507 (2011); Temple-Raston, *supra* note 1023, at 31–32, 44–46.

1028. *See* Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 37.

1029. *See* Temple-Raston, *supra* note 1023, at 44–45.

1030. *See* Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 81–87. "Dossari had a certain touch with the youth, able to make radical ideology approachable. He could give an incendiary sermon calling for jihad to avenge the repression of Muslims, then have lunch at Fuddruckers and go sightseeing at Niagara Falls." Jess Bravin, The Terror Courts 260 (2013).

Afghanistan to train for jihad.[1031] They told their families and friends, however, that they were going to Pakistan for religious study.[1032]

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28.[1033] Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.[1034] Derwish, who had moved his family to Yemen, arranged for the six to cross into Afghanistan to attend the al-Farooq training camp near Kandahar.[1035]

Shortly after arriving, the men began to look for opportunities to leave.[1036] "The six made excuses about needing to go home to make arrangements for their wives."[1037] Alwan had an exit interview with Osama Bin Laden, who asked about the willingness of other Muslims with U.S. passports to do martyrdom missions.[1038] Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June; Goba returned in August.[1039]

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.[1040] Bahraini authorities arrested him from his wedding bed on September 9.[1041] The other five men were arrested back home on September 13 and 14, on a criminal complaint for material support of terrorism.[1042]

1031. *See Sleeper Cell*, *supra* note 1023; Chris Heffelfinger, Radical Islam in America 115 (2011); Temple-Raston, *supra* note 1023, at 88–89.

1032. *See Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 89.

1033. United States v. Goba, 240 F. Supp. 2d 242, 251 (W.D.N.Y. Jan. 16, 2003); United States v. Goba, 220 F. Supp. 2d 182, 189 (W.D.N.Y. 2002); *see id.* at 197, 207–08, 210–11, 213; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 94.

1034. *Goba*, 240 F. Supp. 2d at 252; *Goba*, 220 F. Supp. 2d at 189; *see id.* at 197–98, 202, 216; *Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 94.

1035. *See* Powell, *supra* note 1023; Temple-Raston, *supra* note 1023, at 88–89, 99–109; *see also* Gordon Cucullu, Inside Gitmo 214 (2009) (reporting that at the camp the men became friends with Australian David Hicks, who would become a Guantánamo Bay detainee).

1036. *See Sleeper Cell*, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 110–25.

1037. Bravin, *supra* note 1030, at 260.

1038. *See id.*

1039. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; *see id.* at 211; *Sleeper Cell*, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 129.

1040. *See* Temple-Raston, *supra* note 1023, at 7.

1041. *See Sleeper Cell*, *supra* note 1023; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Lou Michel, "*I Did My Share of Suffering*," Buffalo News, Nov. 25, 2012, at A1; Purdy & Bergman, *supra* note 1023; Santora, *supra* note 1026; Temple-Raston, *supra* note 1023, at 1, 3, 154, 205.

1042. *Goba*, 240 F. Supp. 2d at 244–45 & n.2; *Goba*, 220 F. Supp. 2d at 184; Docket Sheet, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Oct. 21, 2002) [hereinafter *Goba* Docket Sheet]; *see Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Santora, *supra* note 1026; Temple-Raston, *supra* note 1023, at 160–61.

The defendants appeared before the U.S. District Court for the Western District of New York's Magistrate Judge H. Kenneth Schroeder, Jr., on September 14 and 16.[1043] All six defendants received appointed counsel; Judge Schroeder made a deliberate effort to appoint well-known and well-respected attorneys, appointing the Federal Defender to represent Goba and attorneys from the court's Criminal Justice Act panel to represent the other defendants.[1044]

All pretrial matters in criminal cases are referred to magistrate judges in this district.[1045] On September 18 through 20, Judge Schroeder held a detention hearing in the court's large ceremonial courtroom.[1046] The prosecution of alleged Al-Qaeda trainees near the first anniversary of the September 11, 2001, attacks drew international notice. The federal courthouse in Buffalo is located on Niagara Square, which is a plaza in front of Buffalo's city hall approximately 100 yards across. On the days of the detention hearing, the Square was filled with large media vans for news media from all over the world.[1047] Public picketers also occupied space in the plaza and around the courthouse; a popular picket read, "Jail, No Bail."[1048] Judge Schroeder strove to provide the government and the defendants with a fair and peaceful hearing, mindful that the world was watching how we treated criminal defendants.[1049] Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.[1050]

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.[1051] Told that supporters were willing to post $600,000 bond per defendant, Judge Schroeder set Alwan's bail at $600,000.[1052] But Alwan was unable to post such an amount after all, so he remained detained.[1053]

1043. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 1042.

Tim Reagan interviewed Judge Schroeder for this report in the judge's chambers on October 31, 2007.

1044. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 1042; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1045. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1046. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 1042; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1047. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1048. *Id.*

1049. *Id.*

1050. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 1042; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1051. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 1042; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

1052. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 1042; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1053. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

The six men were indicted on October 21.[1054] The court assigned the case to District Judge William M. Skretny for trial.[1055]

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002,[1056] and an indictment against him on December 15, 2003.[1057] He traveled to Yemen instead of returning from Afghanistan and became one of the FBI's most-wanted terrorism suspects.[1058] He was arrested in Yemen by Yemeni authorities in 2004, but he escaped two years later.[1059] He surrendered to Yemeni authorities in May 2007, who agreed not to extradite him to the U.S.[1060] He was observed in public in Yemen in February 2008.[1061] Yemeni authorities arrested him again following American press reports of his boasting that his freedom was protected by Yemen's president.[1062] On January 15, 2010, Judge Skretny appointed an attorney to represent him in U.S. court, should he ever appear.[1063]

A significant obstacle to the other men's defense was the government's refusal, for national-security reasons, to allow them to seek interviews with Derwish and al-Dosari.[1064] This matter, however, was not presented to the court.[1065]

1054. *Goba*, 240 F. Supp. 2d at 244; *see* Heffelfinger, *supra* note 1031, at 129; Purdy & Bergman, *supra* note 1023; Santora, *supra* note 1026; Temple-Raston, *supra* note 1023, at 193.

1055. *Goba* Docket Sheet, *supra* note 1042.

Tim Reagan interviewed Judge Skretny for this report in Judge Schroeder's chambers on October 31, 2007, following a private interview with Judge Schroeder.

1056. Docket Sheet, United States v. Elbaneh, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002).

1057. Docket Sheet, United States v. Elbaneh, No. 1:03-cr-255 (W.D.N.Y. Dec. 15, 2003).

1058. http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing; *see Sleeper Cell*, *supra* note 1023; Temple-Raston, *supra* note 1023, at 200, 206-10; *U.S. Fugitive Born in Yemen Surrenders in Terror Case*, N.Y. Times, May 25, 2007, at A11 [hereinafter *U.S. Fugitive*]; Craig Whitlock, *Al-Qaeda Operative Loses Freedom in Yemen*, Wash. Post, May 19, 2008, at A10; Jerry Zremski, *Officials Confident Money Will Yield Granville's Killers*, Buffalo News, Feb. 28, 2013, at 1 ("Elbaneh . . . remains at large despite a $5 million bounty on his head."); *see also* Soufan, *supra* note 1027, at 512 (noting that only indicted terrorists appear on the FBI's most wanted terrorists site).

1059. *See* Dan Herbeck, *Yemen Holds Lackawanna 6 Figure*, Buffalo News, Jan. 21, 2010, at A1 ("he and 22 other men, including many with alleged ties to terrorism, escaped [in February 2006] after digging a tunnel below a high-security prison in Sana, Yemen's capital"); Whitlock, *supra* note 1058; Craig Whitlock, *Bounties a Bust in Hunt for Al-Qaeda*, Wash. Post, May 17, 2008, at A1 [hereinafter *Bounties*].

1060. *See* Herbeck, *supra* note 1059 (reporting that "Yemen has no extradition agreement with the United States" and that "Yemen's government has refused requests from the U.S. government to extradite him"); Temple-Raston, *supra* note 1023, at 254; *U.S. Fugitive*, *supra* note 1058; Whitlock, *supra* note 1058; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

1061. *See* Whitlock, *Bounties*, *supra* note 1059; Worth, *supra* note 1060.

1062. *See* Whitlock, *supra* note 1058; Whitlock, *Bounties*, *supra* note 1059; *see also* Herbeck, *supra* note 1059 (reporting that Elbaneh was sentenced to ten years in Yemen's prison system for crimes in Yemen).

1063. Order, United States v. Elbaneh, No. 1:03-cr-255 (W.D.N.Y. Jan. 15, 2010); *see* Herbeck, *supra* note 1059.

1064. *See* Temple-Raston, *supra* note 1023, at 189, 193.

1065. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

Each of the men agreed to plead guilty in early 2003 and was sentenced in December 2003 to from seven to ten years in prison followed by three years of supervised release.[1066] It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.[1067]

Galab, the first to plead, was sentenced to the shortest term—seven years.[1068] Mosed and Taher each were sentenced to eight years; Alwan was sentenced to nine and one-half years.[1069] Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.[1070] As a reward for subsequent assistance in other prosecutions, Goba and Alwan's sentences were reduced to nine years.[1071] It was reported that Goba, Alwan, and Taher were offered entry into the witness protection program.[1072]

1066. *Goba* Docket Sheet, *supra* note 1042; *see* Temple-Raston, *supra* note 1023, at 198–205.

1067. Powell, *supra* note 1023 ("U.S. Attorney Michael Battle, whose region encompasses Lackawanna, said his office never explicitly threatened to invoke enemy combatant status but that all sides knew the government held that hammer."); Temple-Raston, *supra* note 1023, at 200 ("The threat was unspoken . . . .").

1068. *Goba* Docket Sheet, *supra* note 1042; *see* David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 1023, at 198–99.

Galab was released from prison on October 17, 2008. http://www.bop.gov (reg. no. 11871-055); *see* Lou Michel, *U.S. Gives Half of the Lackawanna Six a Fresh Start*, Buffalo News, June 13, 2009, at A1.

1069. *Goba* Docket Sheet, *supra* note 1042; *see* David Staba, *Last in Group Gets Sentence for Aiding Al Qaeda*, N.Y. Times, Dec. 18, 2003, at A41 (reporting a sentence of nine and one-half years for Alwan); David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. Times, Dec. 10, 2003, at A28 (reporting a sentence of eight years for Mosed); David Staba, *Qaeda Trainee Is Sentenced to 8-Year Term*, N.Y. Times, Dec. 5, 2003, at A32 [hereinafter *Qaeda Trainee*] (reporting a sentence of eight years for Taher); Temple-Raston, *supra* note 1023, at 199.

Mosed was released from prison on September 1, 2009. http://www.bop.gov (reg. no. 11875-055).

1070. Sentence Reduction Order at 1, United States v. Goba, No. 1:02-cr-214 (W.D.N.Y. Dec. 14, 2007); *Goba* Docket Sheet, *supra* note 1042; *see* United States v. Goba, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); Purdy & Bergman, *supra* note 1023 (reporting that Goba and al-Bakri were the only two who finished training); David Staba, *Judge Questions Sentence in al Qaeda Case*, N.Y. Times, Dec. 11, 2003, at A37 (reporting a sentence of ten years for Goba); Staba, *Qaeda Trainee*, *supra* note 1069 (reporting a sentence of ten years for al-Bakri); Temple-Raston, *supra* note 1023, at 199.

"The Lackawanna Six . . . proved faint-hearted jihadists. They quickly made plea bargains, promising cooperation in exchange for prison terms capped at ten years." Bravin, *supra* note 1030, at 259.

Al-Bakri was the last to plead. *See* Purdy, *Sixth Man Pleads*, *supra* note 1024. He was released from prison on July 1, 2011. http://www.bop.gov (reg. no. 11879-055); *see* Michel, *supra* note 1041 (reporting on al-Bikri's difficulties in obtaining a visa for his wife and his inability to visit her because of the terms of his supervised release).

1071. Amended Judgment, *Goba*, No. 1:02-cr-214 (W.D.N.Y. June 29, 2010) (Alwan); Amended Judgment, *id.* (Jan. 3, 2008) (Goba); Sentence Reduction Order, *supra* note 1070; *see* Sentence Reduction Motion, *Goba*, No. 1:02-cr-214 (W.D.N.Y. May 20, 2010); Order, *id.* (Jan. 7, 2008) (denying Goba's motion for a further reduction of his sentence).

As one example of Goba's cooperation, on May 18, 2007, Goba testified at the trial of Jose Padilla about the terrorist training camp Padilla allegedly applied to join. United States v. Jayyousi, 657 F.3d 1085, 1094 (11th Cir. 2011); *see* Abby Goodnough, *Witness Describes*

Derwish was killed in November 2002 in a U.S. military action in Yemen.[1073] Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.[1074] He attempted suicide several times while there.[1075] The government released him to Saudi Arabia on July 16, 2007.[1076]

Challenge: Classified Evidence

As a precaution in case Judge Schroeder was called upon to review classified evidence, classified information security officers discreetly facilitated a background check on him.[1077] Article III judges are automatically cleared to see classified evidence, but magistrate judges are not.[1078]

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.[1079] Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.[1080]

Challenge: Court Security

For this high-profile terrorism prosecution, the Marshal established extra security at the courthouse doors.[1081] The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.[1082] During the days of pleas and

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Training Padilla Reportedly Received, N.Y. Times, May 19, 2007, at A9; Jay Weaver, *Jihadist Testifies in Padilla Trial*, Miami Herald, May 19, 2007, at 3A; Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A6; *see also supra*, "Dirty Bomber."

1072. Michel, *supra* note 1068.

In May 2012, there were 700 active participants in the witness protection program. *See* Greg Miller, *Terrorist Witnesses Flew on U.S. Airliners*, Wash. Post, May 17, 2013, at A8; *see also* Charlie Savage, *Justice Dept. Lost Track of Terrorists, Report Says*, N.Y. Times, May 17, 2013, at A12 ("just two former known or suspected terrorists have been admitted into the program in the past six years").

1073. *See* Bravin, *supra* note 1030, at 261; *Sleeper Cell*, *supra* note 1023; Herbeck, *supra* note 1059; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Soufan, *supra* note 1027, at 506–07; Temple-Raston, *supra* note 1023, at 195–98, 249–50, 252.

1074. *See* Bravin, *supra* note 1030, at 68; *Sleeper Cell*, *supra* note 1023; Powell, *supra* note 1023; Purdy & Bergman, *supra* note 1023; Temple-Raston, *supra* note 1023, at 139–40, 148.

1075. *See* Mahvish Rukhsana Khan, My Guantánamo Diary 210, 298 (2008); Temple-Raston, *supra* note 1023, at 247–49.

1076. *See id.* at 252.

1077. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1078. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2 (Federal Judicial Center, 2d ed. 2013).

1079. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1080. *Id.*

1081. Interview with Hon. William M. Skretny, Oct. 31, 2007.

1082. *Id.*; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.[1083]

Challenge: Religious Accommodation

The court timed hearings to accommodate both daily prayers and religious holidays for the Muslim defendants.

All testimony at the detention hearing before Judge Schroeder was taken from government witnesses under oath.[1084] But the defendants' pleas before Judge Skretny were taken by affirmation.[1085]

1083. Interview with Hon. William M. Skretny, Oct. 31, 2007.
1084. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.
1085. Interview with Hon. William M. Skretny, Oct. 31, 2007.

A Plot to Kill President Bush

United States v. Abu Ali (Gerald Bruce Lee, E.D. Va.)[1086]

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding Al-Qaeda.[1087] Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.[1088]

Abu Ali, whose parents are Jordanian, was born in Houston, Texas, and raised in Falls Church, Virginia.[1089] He was a 1999 valedictorian at the Islamic Saudi Academy, a school funded by Saudi Arabia in Alexandria, Virginia, and then he studied engineering at the University of Maryland.[1090] In 2002, he went to Saudi Arabia to attend the University of Medina.[1091] He apparently had significant contacts with Al-Qaeda.[1092] He was arrested in Saudi Arabia, by officers of Saudi Arabia's counterterrorism Mabahith, on June 8, 2003, as part of an investigation of bombings on May 12, 2003, in Riyadh.[1093]

On July 28, 2004, Abu Ali's parents sought release of their son, filing a habeas corpus petition in the U.S. District Court for the District of the District of Co-

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1086. An appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

1087. Sentencing Order at 1 & n.1, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006); *see* Caryle Murphy, *Man Given 30 Years in Plot Against Bush*, Wash. Post, Mar. 30, 2006, at A3; David Stout, *American Is Sentenced to 30 Years in Terror Case*, N.Y. Times, Mar. 30, 2006, at A18. *See generally* Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after* Abu Ali, 88 Tex. L. Rev. 1501 (2010).

1088. Docket Sheet, *Abu Ali*, No. 1:05-cr-53 (E.D. Va. Feb. 3, 2005) [hereinafter E.D. Va. Docket Sheet]; *see* Murphy, *supra* note 1087; Stout, *supra* note 1087; *see also* Gerald Bruce Lee, United States v. Abu Ali: Jury Questionnaire (Oct. 25, 2005); Gerald Bruce Lee, United States v. Abu Ali: Preliminary Venire Instructions (Oct. 25, 2005).

Tim Reagan and Joy Richardson interviewed Judge Lee for this report in the judge's chambers on October 2, 2006.

1089. United States v. Abu Ali, 528 F.3d 210, 221; Sentencing Order, *supra* note 1087; *see* Paul Bradley, *Prosecutors Say Terror Suspect Lied*, Richmond Times–Dispatch, Feb. 24, 2005, at A5; Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32; Murphy, *supra* note 1087; Stout, *supra* note 1087.

Abu Ali's father was a computer analyst for Saudi Arabia's embassy. *Abu Ali*, 528 F.3d at 221; *see* Isikoff, *supra*.

1090. *Abu Ali*, 528 F.3d at 221; Sentencing Order, *supra* note 1087, at 7; Josh Meyer, *Student Allegedly Talked of Assassination Plots*, L.A. Times, Mar. 2, 2005, at A19; Joel Mowbray, *Why Strike Canada? Jihadists Want an Islamic State*, Wash. Times, June 12, 2006, at A19.

1091. *Abu Ali*, 528 F.3d at 221; United States v. Abu Ali, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005); Sentencing Order, *supra* note 1087, at 12; *see* Meyer, *supra* note 1090; Stout, *supra* note 1087.

1092. *Abu Ali*, 528 F.3d at 221–24; *see* Isikoff, *supra* note 1089; Mowbray, *supra* note 1090.

1093. *Abu Ali*, 528 F.3d at 223–24, 238; *Abu Ali*, 395 F. Supp. 2d at 341, 344, 367, 384; *see* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 30 (D.D.C. 2004); Bradley, *supra* note 1089; Isikoff, *supra* note 1089; Murphy, *supra* note 1087; Stout, *supra* note 1087.

lumbia.[1094] On December 16, Judge John D. Bates denied the government's motion to dismiss the petition for lack of jurisdiction,[1095] but on September 19, 2005, Judge Bates dismissed the petition as moot, because Abu Ali had been indicted and transferred to Virginia.[1096]

Abu Ali was held in Saudi Arabia until February 21, 2005, following a February 3 indictment for conspiracy to establish terrorist operations.[1097] The indictment later was expanded to include conspiracy to kill the President.[1098] He argued unsuccessfully that his confession was inadmissible because he was tortured while held in Saudi Arabia.[1099]

Although sentencing guidelines would dictate a life sentence, Judge Lee sentenced him on March 29, 2006, to 30 years in prison followed by 30 years of supervised release.[1100] The court of appeals vacated the sentence;[1101] although Judge Diana Gribbon Motz determined that the sentence was within Judge Lee's discretion,[1102] Judges J. Harvie Wilkinson III and William B. Traxler, Jr., determined that the sentence insufficiently reflected the gravity of the crime.[1103] On July 27, 2009, Judge Lee resentenced Abu Ali to life in prison.[1104] The court of appeals affirmed the life sentence.[1105]

1094. Docket Sheet, Abu Ali v. Ashcroft, No. 1:04-cv-1258 (D.D.C. July 28, 2004); *see* Jonathan Hafetz, Habeas Corpus After 9/11 196 (2011).

1095. *Abu Ali*, 350 F. Supp. 2d 28; *see* Hafetz, *supra* note 1094, at 196–97.

1096. Abu Ali v. Gonzales, 387 F. Supp. 2d 16 (D.D.C. 2005); *see* Hafetz, *supra* note 1094, at 197.

1097. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 395 F. Supp. 2d at 341 & n.1, 357, 367, 385; United States v. Abu Ali, 396 F. Supp. 2d 703, 704 (E.D. Va. 2005); *see* Bradley, *supra* note 1089; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 1087.

1098. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 396 F. Supp. 2d at 704.

1099. *Abu Ali*, 528 F.3d at 231–34; *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; *see* Bradley, *supra* note 1089; Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647, 649 (2008); Hafetz, *supra* note 1094, at 197; Isikoff, *supra* note 1089; Jerry Markon, *Conviction Upheld in Terror Plot*, Wash. Post, June 7, 2008, at B3; Markon & Priest, *supra* note 1097; Meyer, *supra* note 1090; Murphy, *supra* note 1087.

Portions of the confession are included in an NBC News report: http://www.msnbc.msn.com/id/10266654/.

1100. Sentencing Order, *supra* note 1087; *see* Stout, *supra* note 1087.

Abu Ali was sent to the "Super Max" prison in Florence, Colorado. http://www.bop.gov (reg. no. 70250-083); *see* Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to "Super-jail,"* London Times, June 20, 2006, at 8.

1101. *Abu Ali*, 528 F.3d at 269, *cert. denied*, 555 U.S. 1170 (2009); *see* Markon, *supra* note 1099.

1102. *Abu Ali*, 528 F.3d at 269–82 (Judge Motz, dissenting).

1103. *Id.* at 258–69 (opinion for the court).

Tim Reagan interviewed Judge Traxler for this report at the Federal Judicial Center on November 12, 2008.

1104. E.D. Va. Docket Sheet, *supra* note 1088; *see* Hafetz, *supra* note 1094, at 197; Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, Wash. Post, July 28, 2009, at A3.

1105. United States v. Abu Ali, 410 F. App'x 673 (4th Cir. 2011).

Challenge: Examination of Foreign Witnesses and Witness Security

To decide whether Abu Ali's confession should be suppressed, Judge Lee arranged for seven days of video depositions of Mabahith officers in Saudi Arabia.[1106] Because the identities of Mabahith officers are secret,[1107] the Saudi government would not permit them to come to the United States to testify.[1108] There also was the risk that dangerous groups in Saudi Arabia would object to the officers' cooperation with an American prosecution.[1109]

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.[1110] A live video feed was established between Saudi Arabia and the United States; the judge, additional counsel for both sides, and the court reporter were in Alexandria.[1111] The video image was constructed as a split screen with the defendant on one side and the witness on the other, so that the defendant could see the witness and the witness could see the defendant.[1112]

Portions of the deposition were put into evidence at a suppression hearing, in addition to live testimony from FBI agents (who had interviewed the Mabahith officers when Abu Ali was transported from Saudi Arabia to the United States), expert witnesses, and other percipient witnesses.[1113] The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.[1114] So the split-screen video deposition evidence was played to the jury as well.[1115]

1106. United States v. Abu Ali, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005); Order at 2, United States v. Abu Ali, No. 1:05-cr-53 (E.D. Va. Sept. 16, 2005) [hereinafter E.D. Va. Sept. 16, 2005, Order]; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* David H. Laufman, Op-Ed, *Terror Trials Work*, Legal Times, Nov. 5, 2007, at 58 (observation by the prosecuting attorney in the case that "for the first time, the Saudi government permitted Saudi security officers (including a general) to testify in an American criminal proceeding and to face rigorous cross-examination by defense attorneys—even though the officers would have to answer questions about Saudi interrogation methods said to violate international human rights standards"); Vladeck, *supra* note 1087, at 1510 ("Over Abu Ali's objection, such depositions were taken in July 2005 using procedures that, whatever their merits, were certainly novel.").

1107. E.D. Va. Sept. 16, 2005, Order, *supra* note 1106; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

The Mabahith is the Saudi domestic security service. E.D. Va. Sept. 16, 2005, Order, *supra* note 1106.

1108. *Abu Ali*, 528 F.3d at 239; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 1106, at 2.

1109. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see* E.D. Va. Sept. 16, 2005, Order, *supra* note 1106, at 5.

1110. *Abu Ali*, 528 F.3d at 239; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1111. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1112. *Abu Ali*, 528 F.3d at 239–40; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1113. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1114. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1115. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see Abu Ali*, 528 F.3d at 238–39.

The Mabahith officers testified pseudonymously.[1116] In court, the judge, the attorneys, the defendant, and the jury could see the images, but the public had access only to the audio portions of the depositions.[1117]

Taking the video depositions of foreign witnesses was challenging for several reasons.[1118] First, there was a substantial difference in time zones.[1119] Second, a secure communication line was necessary, and the availability of a secure line was not reliable.[1120] Third, the heat in Saudi Arabia sometimes caused technical difficulties.[1121]

Judge Lee acknowledges something he would do differently if he had it to do over: He would send at least one more interpreter.[1122] One interpreter was not enough, because, at the very least, interpreters need breaks.[1123]

Challenge: Attorney–Client Contacts

During the video depositions of the Mabahith officers, "Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings. In addition, the court was willing to stop the depositions if Abu Ali's counsel in Saudi Arabia wanted to consult with their client."[1124]

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali's trial was classified.[1125] Classified evidence was stored in the court's sensitive compartmented information facility (SCIF).[1126] One of Abu Ali's attorneys was denied a security clearance and the other did not apply for one, so the court appointed an attorney who already had one.[1127] Only the cleared attorney, and not Abu Ali or either uncleared attorney, was allowed to see classified evidence.[1128]

The court of appeals held that it was improper, but harmless error in this case, for the district court to permit the jury to see classified evidence that the defendant

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1116. *Abu Ali*, 395 F. Supp. 2d at 344; E.D. Va. Sept. 16, 2005, Order, *supra* note 1106, at 4–5; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1117. E.D. Va. Sept. 16, 2005, Order, *supra* note 1106, at 4, 7, 9–10; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1118. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1119. *Id.*

1120. *Id.*

1121. *Id.*

1122. *Id.*

1123. *Id.*

1124. United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008).

1125. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1126. *Id.*; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

1127. *Abu Ali*, 528 F.3d at 248–49; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

1128. *Abu Ali*, 528 F.3d at 248–55; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

could not see.[1129] At issue were two messages that the government claimed were coded communications between the defendant and fellow jihadists.[1130]

The government produced unredacted copies of the messages to cleared counsel.[1131] Uncleared counsel and the defendant received declassified copies complete in content and designating the dates of the messages, but "redacted to omit certain identifying and forensic information."[1132] Uncleared counsel were concerned that the redacted information might be relevant to when the government acquired the messages, which would be material to the defendant's ultimately unsuccessful argument that the government's cooperation with Saudi Arabia triggered a requirement of *Miranda* warnings upon Abu Ali's arrest.[1133] The district court denied uncleared counsel access to the classified evidence at a hearing pursuant to the Classified Information Procedures Act (CIPA), from which Abu Ali and his uncleared counsel were excluded, and at which Abu Ali was represented by cleared counsel.[1134]

Although the defendant was only permitted to see redacted messages, the jury was shown unredacted versions, which the court of appeals held "was clearly contrary to the rights guaranteed to Abu Ali by the Confrontation Clause."[1135]

> If classified information is to be relied upon as evidence of guilt, the district court may consider steps to protect some or all of the information from unnecessary public disclosure in the interest of national security and in accordance with CIPA, which specifically contemplates such methods as redactions and substitutions so long as these alternatives do not deprive the defendant of a fair trial. However, the government must at a minimum provide the same version of the evidence to the defendant that is submitted to the jury. We do not balance a criminal defendant's right to see the evidence which will be used to convict him against the government's interest in protecting that evidence from public disclosure. If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.[1136]

The court held, however, that the error was harmless beyond a reasonable doubt.[1137]

1129. *Abu Ali*, 528 F.3d at 248–57.

1130. *Id.* at 236–37, 248.

1131. *Id.* at 249.

1132. *Id.*

1133. *Id.* at 250; *see id.* at 227–31 (holding that *Miranda* warnings were not required).

1134. *Id.* at 250; *see* 18 U.S.C. app. 3 (2011) (text of CIPA); Reagan, *supra* note 1126 (describing CIPA procedures).

1135. *Abu Ali*, 528 F.3d at 253; *see id.* at 255 ("CIPA does not . . . authorize courts to provide classified documents to the jury when only . . . substitutions are provided to the defendant.").

1136. *Id.* at 255.

1137. *Id.* at 255–57; *id.* at 256 ("In this case, we are satisfied that the jury's decision to convict Abu Ali was not substantially swayed by the jury's access to the limited information redacted from the documents given to Abu Ali.").

Challenge: Classified Arguments

In the appeal, part of the record and part of the briefing concerning classified evidence were classified.[1138] Classified materials were filed through the classified information security officer.[1139] Part of oral argument was conducted in closed session.[1140]

All of Judge Traxler's law clerks are career clerks, and two of them had top secret security clearances.[1141] One of the two clerks with security clearances was assigned to help with the case.[1142] Judge Traxler reviewed most of the classified materials for the case in his Greenville, South Carolina, chambers;[1143] there is a SCIF in the Greenville courthouse.[1144] Occasionally, classified material would be submitted at a time when Judge Traxler was in Richmond, Virginia, to hear other matters, and he reviewed the materials in his Richmond chambers.[1145] Some material presented to the judges in this appeal was for judges' eyes only, and even law clerks with security clearances could not see it.[1146]

Judge Traxler observed two important challenges presented by classified materials: (1) constraints on communication and (2) burdens on protecting documents. The second challenge requires, for example, a law clerk at lunch to leave classified materials she is working with in the judge's office under his watch.[1147] Or a judge or law clerk taking a break to get coffee must take classified documents along.[1148] The communication challenge has many forms: (1) conversations in chambers about classified portions of the case must be held behind closed doors, excluding staff members not cleared; (2) judges'-eyes-only material cannot be discussed even with cleared clerks; and (3) communications among members

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1138. *Id.* at 244 n.13; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see, e.g.*, Order, United States v. Abu Ali, Nos. 06-4334 and 06-4521 (4th Cir. Nov. 27, 2006) [hereinafter 4th Cir. Classified Briefing Order] (accepting for filing classified portions of the appellant's brief and joint appendix); Docket Sheet, *Abu Ali*, No. 06-4521 (4th Cir. May 22, 2006) [hereinafter 4th Cir. Government Appeal Docket Sheet] (appeal by the government, noting Abu Ali's filing of a classified supplemental brief on March 5, 2007, and a classified supplemental appendix on March 6, 2007, and noting the government's filing of a classified supplemental brief and a classified supplemental appendix on April 27, 2007); Docket Sheet, *Abu Ali*, No. 06-4334 (4th Cir. Apr. 10, 2006) (appeal by the defendant, same).

1139. 4th Cir. Classified Briefing Order, *supra* note 1138.

An "under seal, in camera, ex parte notice" was filed in the district court on April 27, 2007. 4th Cir. Government Appeal Docket Sheet, *supra* note 1138 (noting that an original document was filed with the classified information security officer).

1140. *Abu Ali*, 528 F.3d at 244 n.13; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see* Larry O'Dell, *Torture Alleged in Bush-Plot Case*, Richmond Times–Dispatch, June 24, 2007, at B3.

1141. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1142. *Id.*

1143. *Id.*

1144. *Id.*; Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

1145. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

1146. *Id.*

1147. *Id.*

1148. *Id.*

of the panel about classified matters can generally happen only in person or by secure fax—the latter was accomplished by Judge Traxler's cleared clerk taking documents to the FBI's office in town for faxing.[1149]

Anticipating that the appellate court's opinion would require a classification review, the court ordered that the government determine "whether internal court documents proposed for public release by the Court contain any classified information . . . within 72 hours after submission of the documents to the Court Security Officer."[1150] The court also ordered that the security officer and all who participate in the classification review be "walled off from government counsel" and "otherwise protect the confidentiality of . . . internal court documents during the pendency of this appeal and thereafter."[1151]

While the appeal was pending, the government filed in the district court an in camera ex parte notice, and the court of appeals denied Abu Ali's motion to compel disclosure of it.[1152]

1149. *Id.*

1150. Order at 2, United States v. Abu Ali, Nos. 06-4334 and 06-4521 (4th Cir. Aug. 29, 2007) [hereinafter 4th Cir. Classification Review Order].

Classified information security officers, who help courts handle classified information, were formerly known by the ambiguous term "court security officers." *See supra*, "INTRODUCTION."

1151. 4th Cir. Classification Review Order, *supra* note 1150, at 1–2.

1152. E.D. Va. Docket Sheet, *supra* note 1088.

Paintball

United States v. Royer and United States v. Al-Timimi (Leonie M. Brinkema, E.D. Va.), United States v. Chandia (Claude M. Hilton, E.D. Va.), and United States v. Benkahla (James C. Cacheris, E.D. Va.)

On June 27, 2003, the United States began arresting and charging 11 men who had been playing paintball to train for jihad since 2000 in Spotsylvania County, Virginia, about 60 miles south of Washington, D.C.[1153] The indictment listed 32 terrorism counts.[1154] Six defendants pleaded guilty; the court acquitted two defendants and convicted three defendants at bench trials before Judge Leonie M. Brinkema in the Eastern District of Virginia.[1155] One related case was prosecuted before Judge Brinkema,[1156] and another related case was prosecuted before Judge Claude M. Hilton.[1157]

Nine defendants are American citizens, and three served in the U.S. military.[1158] At core, they were charged with conspiracy, in violation of the Neutrality Act,[1159] to support Lashkar-e-Taiba (LET), a terrorist group that opposes Indian

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1153. United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008); United States v. Chandia, 675 F.3d 329, 332 (4th Cir. 2012); United States v. Chandia, 514 F.3d 365, 370 (4th Cir. 2008); Docket Sheet, United States v. Royer, No. 1:03-cr-296 (E.D. Va. June 25, 2003) [hereinafter *Royer* Docket Sheet]; *see* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 32 (D.D.C. 2004); Khan Habeas Relief Opinion at 2, *Royer*, No. 1:03-cr-296 (E.D. Va. May 12, 2011); Chris Heffelfinger, Radical Islam in America 84, 91–92, 101, 129–31 (2011); Eric Lichtblau, *Group of Muslims Charged With Plotting Against India*, N.Y. Times, June 28, 2003, at A7; Jerry Markon, *"Virginia Jihad" Defendant Sentenced*, San Jose Mercury News, Aug. 26, 2006, at A7; Milton Viorst, *The Education of Ali al-Timimi*, Atlantic Monthly, June 2006, at 69, 77.

1154. United States v. Khan, 461 F.3d 477, 485 n.3 (4th Cir. 2006); United States v. Khan, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); Khan Habeas Relief Opinion, *supra* note 1153, at 3.

1155. *Benkahla*, 530 F.3d at 303–04; *Khan*, 461 F.3d at 485–86; *Khan*, 309 F. Supp. 2d 789; *Chandia*, 675 F.3d at 332; *Chandia*, 514 F.3d at 370; Khan Habeas Relief Opinion, *supra* note 1153, at 3; *see* Paul Bradley, *Lengthy Sentences for Two in "VA Jihad,"* Richmond Times–Dispatch, June 16, 2004, at B1; Jerry Markon, *"Va. Jihad" Case Hailed as Key in War on Terror*, Wash. Post, June 8, 2006, at A3 [hereinafter *Case Hailed*]; Markon, *supra* note 1153; Larry O'Dell, *Court Hears Appeal of Jihad Cases*, Richmond Times–Dispatch, May 26, 2006, at B10.

Tim Reagan interviewed Judge Brinkema for this report in the judge's chambers on January 5, 2007.

1156. Docket Sheet, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter *Al-Timimi* Docket Sheet].

1157. Docket Sheet, United States v. Chandia, No. 1:05-cr-401 (E.D. Va. Sept. 14, 2005) [hereinafter *Chandia* Docket Sheet].

Ahmed Omar Abu Ali apparently was at one time a suspect in the paintball case. United States v. Abu Ali, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005); *see* Michael Isikoff, *A Tangled Web*, Newsweek, Mar. 7, 2005, at 32. Subsequently he was tried for other crimes. *See supra*, "A Plot to Kill President Bush."

1158. *See* Lichtblau, *supra* note 1153.

1159. 18 U.S.C. § 960 (2011).

rule over Kashmir.[1160] The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.[1161]

Judge Brinkema tried four defendants in one bench trial,[1162] acquitting one on February 20, 2004,[1163] and convicting three on March 4.[1164] The convicted defendants were sentenced on June 15,[1165] and they were resentenced on July 29, 2005,[1166] in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.[1167]

Judge Brinkema convicted Masoud Ahmad Khan, a native-born American citizen of Pakistani descent residing in Gaithersburg, Maryland, of eight counts and sentenced him to life in prison without the possibility of parole.[1168] Khan spent time at an LET training camp in Pakistan.[1169] LET is the military wing of Markaz Dawa Wa'al Irshad, which was founded to organize Pakistani Muslims to conduct violent jihad against Russians in Afghanistan.[1170] Beginning in 1999, LET's primary focus was combating India's control in Kashmir.[1171] But the court found that the defendants' participation in the LET training camps was to prepare to fight against the United States in Afghanistan on behalf of the Taliban.[1172] At the train-

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1160. *Chandia*, 675 F.3d at 332; *Khan*, 461 F.3d at 484; Khan Habeas Relief Opinion, *supra* note 1153, at 2–3; *see* Heffelfinger, *supra* note 1153, at 91–93; Lichtblau, *supra* note 1153; Markon, *supra* note 1153; Scott Shane, *Beyond Guantánamo, a Web of Prisons*, N.Y. Times, Dec. 11, 2011, at A1; Mary Beth Sheridan, *Hardball Tactics in an Era of Threats*, Wash. Post, Sept. 3, 2006, at A1.

The name of the group means "army of the pure." *See* Brendan Smith, *Chandia Challenges Law on Terror Group*, Legal Times, Oct. 29, 2007, at 10. It was designated a terrorist organization in 2001 after a deadly attack on India's parliament building in New Delhi. *See id.*

1161. United States v. Khan, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); *see* Lichtblau, *supra* note 1153.

"[T]he vast majority of the group's firearms training in the United States was conducted legally and no specific plans were uncovered to carry out an attack inside the United States or to specifically target Americans." Heffelfinger, *supra* note 1153, at 93.

1162. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 1153, at 3.

1163. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; *see Judge Acquits Muslim Accused of Taliban Ties*, L.A. Times, Feb. 21, 2004, at 24 [hereinafter *Judge Acquits*].

1164. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827; Khan Habeas Relief Opinion, *supra* note 1153, at 3–4.

1165. *Royer* Docket Sheet, *supra* note 1153; Khan Habeas Relief Opinion, *supra* note 1153, at 4; *see* Bradley, *supra* note 1155.

1166. *Khan*, 461 F.3d at 486; *Royer* Docket Sheet, *supra* note 1153; Khan Habeas Relief Opinion, *supra* note 1153, at 4.

1167. 543 U.S. 220 (2005) (decided on January 12, 2005).

1168. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 1153, at 4; *see* Bradley, *supra* note 1155; Sheridan, *supra* note 1160.

1169. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807; Khan Habeas Relief Opinion, *supra* note 1153, at 25 ("During the several weeks he stayed in [LET] camps, [Khan] engaged in paramilitary training and after returning to the United States he stayed in touch with an LET operative and purchased military equipment for him.").

1170. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

1171. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; *see* Sheridan, *supra* note 1160.

1172. *Khan*, 309 F. Supp. 2d at 810; *see* Heffelfinger, *supra* note 1153, at 93.

ing camp, Khan fired an AK-47 rifle, an antiaircraft gun, and a rocket-propelled grenade.[1173] By December 2001, the United States had substantially defeated the Taliban[1174] and declared LET a terrorist organization.[1175] Khan returned to the United States that month.[1176] After returning to the United States, Khan made a ghost purchase of a robotic surveillance airplane on behalf of a prominent member of LET, who used the plane in Kashmir.[1177] Judge Brinkema found Khan guilty of conspiracy, conspiracy to levy war against the United States, conspiracy to contribute services to the Taliban, conspiracy to provide material support to LET, conspiracy to possess and use firearms in connection with a crime of violence, and three counts of using and discharging a weapon in relation to a crime of violence.[1178] In 2011, on habeas corpus review, Judge Brinkema and the government agreed that one of the conspiracy convictions and sentences should be vacated, but Khan remained sentenced to life in prison.[1179]

Judge Brinkema convicted Seifullah Chapman, a former Marine and police officer residing in Alexandria, Virginia, of five counts and sentenced him to 65 years in prison.[1180] Chapman also spent time at the LET training camp in Pakistan.[1181] In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LET member.[1182] Judge Brinkema found Chapman guilty of conspiracy, conspiracy to provide material support to LET, conspiracy to possess and use firearms in connection with a crime of violence, possession of firearms in furtherance of a crime of violence, and using and discharging a weapon in relation to a crime of violence.[1183]

1173. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811; Khan Habeas Relief Opinion, *supra* note 1153, at 27.

1174. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1175. *Khan*, 309 F. Supp. 2d at 812; Khan Habeas Relief Opinion, *supra* note 1153, at 2.

1176. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

1177. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14; Khan Habeas Relief Opinion, *supra* note 1153, at 17; *see* United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008).

1178. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820–21, 823, 826–27; Khan Habeas Relief Opinion, *supra* note 1153, at 4; *Royer* Docket Sheet, *supra* note 1153 (noting a court verdict against Masoud Ahmad Khan on March 4, 2004).

1179. Khan Habeas Relief Opinion, *supra* note 1153, at 2, 31 & n.2, *certificate of appealability denied*, Opinion, Khan v. United States, No. 11-6842 (4th Cir. Oct. 20, 2011), *available at* 2011 WL 5008572; *see* http://www.bop.gov (reg. no. 46810-083).

1180. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 803, 816; *see* http://www.bop.gov (noting a release date of May 22, 2060, reg. no. 46868-083); *see also* Bradley, *supra* note 1155; Heffelfinger, *supra* note 1153, at 96–97; Markon, *supra* note 1155; Sheridan, *supra* note 1160. The original sentence of 85 years was reduced to 65 years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1153 (July 29, 2005, minute entry).

1181. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811.

1182. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13.

1183. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823–24, 826–27; *Royer* Docket Sheet, *supra* note 1153 (noting a court verdict against Seifullah Chapman on March 4, 2004).

Chapman's petition for habeas corpus relief was unsuccessful. Opinion, United States v. Chapman, No. 10-6338 (4th Cir. Oct. 4, 2010); *Royer* Docket Sheet, *supra* note 1153 (noting dismissal of the petition on December 23, 2009).

Judge Brinkema convicted Hammad Abdur-Raheem, residing in Falls Church, Virginia, and formerly a soldier in the U.S. Army, of three counts and sentenced him to four and one-third years in prison.[1184] Judge Brinkema found Abdur-Raheem guilty of conspiracy, conspiracy to provide material support to LET, and conspiracy to possess and use firearms in connection with a crime of violence.[1185] Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded for resentencing,[1186] Judge Brinkema reimposed the same 52-month sentence, determining that she had not clearly articulated her reasons for the downward departure the first time.[1187] The government appealed again,[1188] but withdrew the appeal[1189] in light of the Supreme Court's holding on December 10, 2007, in *Gall v. United States*, that even sentences outside Sentencing Guidelines are reviewed for abuse of discretion.[1190] Abdur-Raheem was released on November 30, 2007.[1191]

The court of appeals affirmed the convictions of Khan, Chapman, and Abdur-Raheem.[1192]

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem, of Arlington, Virginia.[1193]

Randall Todd Royer pleaded guilty and was sentenced on April 9, 2004, to 20 years in prison for using firearms and explosives in relation to a crime of violence.[1194] Royer was born in St. Louis, converted to Islam at age 19, and eventually became president of the Muslim Student Association at American University in

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1184. *Khan*, 309 F. Supp. 2d at 796, 803, 814; *see* Bradley, *supra* note 1155. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 1153 (July 29, 2005, minute entry); *see* Heffelfinger, *supra* note 1153, at 96.

1185. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 1153 (noting a court verdict against Hammad Abdur-Raheem on March 4, 2004).

1186. *Khan*, 461 F.3d at 483, 498–501; *see* Jerry Markon, *Resentencing Is Ordered for "Jihad" Defendant*, Wash. Post, Sept. 2, 2006, at B5.

1187. Transcript, United States v. Royer, No. 1:03-cr-296 (E.D. Va. Aug. 16, 2007, filed Aug. 14, 2006) [hereinafter *Royer* Aug. 16, 2007, Transcript]; *Royer* Docket Sheet, *supra* note 1153 (noting resentencing on August 16, 2007). Resentencing was delayed by a petition to the Supreme Court for certiorari, which the Court denied on May 21, 2007. Chapman v. United States, 550 U.S. 956 (2007).

1188. Docket Sheet, United States v. Abdur-Raheem, No. 07-4941 (4th Cir. Oct. 2, 2007).

1189. Government Motion to Dismiss, *id.* (Dec. 18, 2007).

1190. Gall v. United States, 552 U.S. 38 (2007).

1191. http://www.bop.gov (reg. no. 46814-083); *see Royer* Aug. 16, 2007, Transcript, *supra* note 1187 (noting an expected release date of December 1, 2007).

1192. United States v. Khan, 461 F.3d 477 (4th Cir. 2006); *see* Markon, *supra* note 1186; Sheridan, *supra* note 1160. The Supreme Court denied petitions for certiorari on May 21, 2007. *Chapman*, 550 U.S. 956; Khan v. United States, 550 U.S. 956 (2007).

1193. *Khan*, 461 F.3d at 486; United States v. Khan, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004); *see Judge Acquits*, *supra* note 1163.

1194. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 1153; *see* http://www.bop.gov (noting a release date of February 6, 2021, reg. no. 46812-083); *see also* Shane, *supra* note 1160; Sheridan, *supra* note 1160.

Washington, D.C.[1195] In April 2000, Royer attended an LET training camp in Pakistan, where he fought on the front lines against India and he fired AK-47 and PK weapons.[1196]

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to 15 years in prison.[1197] Al-Hamdi attended an LET training camp in Pakistan.[1198]

Yong Ki Kwon, who resided in Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-half years in prison.[1199] After Kwon cooperated with the government, his sentence was reduced to three years and two months.[1200] He is now out of prison.[1201] Kwon attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.[1202]

Khwaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-quarter years in prison.[1203] After Hasan cooperated with the government, his sentence was reduced to three years and one month.[1204] He is now out of prison.[1205] Hasan attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.[1206]

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to ten and one-half years in prison.[1207] After he cooperated with the government, his sentence was reduced to three years and two months.[1208] He was released from prison on March 31, 2006.[1209]

Donald Thomas Surratt II, a former Marine Corps instructor residing in Maryland, pleaded guilty and was sentenced on November 7, 2003, to three years and

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1195. *See* Heffelfinger, *supra* note 1153, at 97.

1196. *Khan*, 309 F. Supp. 2d at 796, 808.

1197. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer* Docket Sheet, *supra* note 1153; *see* http://www.bop.gov (noting a release date of September 6, 2017, reg. no. 46583-083); *see also* Sheridan, *supra* note 1160.

1198. *Khan*, 309 F. Supp. 2d at 807, 811.

1199. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

1200. *Royer* Aug. 16, 2007, Transcript, *supra* note 1187; *Royer* Docket Sheet, *supra* note 1153 (noting a reduction-of-sentence order on February 24, 2006); *see* Sheridan, *supra* note 1160.

1201. *See* Viorst, *supra* note 1153, at 77.

1202. *Khan*, 309 F. Supp. 2d at 811.

1203. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer* Docket Sheet, *supra* note 1153.

1204. *Royer* Aug. 16, 2007, Transcript, *supra* note 1187; *Royer* Docket Sheet, *supra* note 1153 (noting a reduction-of-sentence order on February 24, 2006).

1205. *See* http://www.bop.gov (noting a release date of March 24, 2006, reg. no. 46866-083); *see also* Sheridan, *supra* note 1160 (reporting that Hasan spent less than three years in jail); Viorst, *supra* note 1153, at 77.

1206. *Khan*, 309 F. Supp. 2d at 811.

1207. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer* Docket Sheet, *supra* note 1153.

1208. *Royer* Aug. 16, 2007, Transcript, *supra* note 1187; *Royer* Docket Sheet, *supra* note 1153 (August 26, 2005, reduction of sentence for Muhammed Aatique); *see* Sheridan, *supra* note 1160.

1209. http://www.bop.gov (reg. no. 57593-066).

ten months in prison.[1210] After he cooperated with the government, his sentence was reduced to one year and 11 months.[1211] He was released from prison on February 14, 2006.[1212]

Judge Brinkema also acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.[1213] Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.[1214] Judge Brinkema found that Benkahla attended an LET training camp, but the government did not prove that he did so at a time when LET was designated a terrorist organization or at a place in Afghanistan under Taliban control, as alleged in the indictment.[1215] After his acquittal, Benkahla was interviewed by the FBI twice—on April 22 and on July 7—and called to testify before a grand jury twice—on August 26 and on November 16—all in 2004.[1216] His Fifth Amendment right not to testify was removed by a grant of use immunity, which would prevent the government from prosecuting him for truthful revelations.[1217] He denied attending any training camp, and he denied using any firearms.[1218] On February 9, 2006, he was indicted for perjury during his grand jury testimony and for obstruction of justice.[1219] On July 13, the indictment was expanded to charge him for false statements to the FBI.[1220] The court assigned Benkahla's perjury case to Judge

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1210. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer* Docket Sheet, *supra* note 1153; *see* Heffelfinger, *supra* note 1153, at 97; Sheridan, *supra* note 1160.

1211. *Royer* Aug. 16, 2007, Transcript, *supra* note 1187.

1212. http://www.bop.gov (reg. no. 46809-083).

1213. United States v. Benkahla, 530 F.3d 300, 303–04 (4th Cir. 2008); *Khan*, 461 F.3d at 485; United States v. Benkahla, 437 F. Supp. 2d 541, 544–46 (E.D. Va. 2006); *Khan*, 309 F. Supp. 2d at 796 n.2; Khan Habeas Relief Opinion, *supra* note 1153, at 3 n.2; *Royer* Docket Sheet, *supra* note 1153; *see* Matthew Barakat, *Va. Man Convicted of Lying in Terror Probe*, Richmond Times–Dispatch, Feb. 6, 2007, at B2; Heffelfinger, *supra* note 1153, at 93.

1214. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544–45.

1215. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 545–46; *see* Matthew Barakat, *Jihadist Suspect on Trial*, Richmond Times–Dispatch, Jan. 30, 2007, at B2 [hereinafter *Jihadist Suspect*]; Barakat, *supra* note 1213.

1216. *Benkahla*, 530 F.3d at 303; United States v. Benkahla, 501 F. Supp. 2d 748, 750–51 (E.D. Va. 2007); Opinion at 1–3, United States v. Benkahla, No. 1:06-cr-9 (E.D. Va. Oct. 2, 2006) [hereinafter *Benkahla* Dismissal Denial], *available at* 2006 WL 2871234; *see* Barakat, *Jihadist Suspect*, *supra* note 1215.

1217. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544 n.1 & 555; *Benkahla*, 501 F. Supp. 2d at 750 n.1; *see* Barakat, *supra* note 1213.

1218. *Benkahla*, 530 F.3d at 304–05; Habeas Denial Opinion at 2–3, *Benkahla*, No. 1:06-cr-9 (E.D. Va. July 8, 2010) [hereinafter *Benkahla* Habeas Denial Opinion], *available at* 2010 WL 2721384, *appeal dismissed*, 420 F. App'x 275 (4th Cir. 2011); *Benkahla*, 437 F. Supp. 2d at 544–45; *see* Barakat, *supra* note 1213.

1219. *Benkahla*, 530 F.3d at 305; *Benkahla*, 437 F. Supp. 2d at 544; Docket Sheet, *Benkahla*, No. 1:06-cr-9 (E.D. Va. Feb. 9, 2006) [hereinafter *Benkahla* Docket Sheet]; *see* Jerry Markon, *Va. "Jihad" Probe Sees New Charge*, Wash. Post, Feb. 23, 2006, at B4.

1220. *Benkahla*, 530 F.3d at 305; *Benkahla* Habeas Denial Opinion, *supra* note 1218, at 3; *Benkahla* Dismissal Denial, *supra* note 1216, at 1, 3–4; *Benkahla* Docket Sheet, *supra* note 1219.

James C. Cacheris,[1221] who told the jury at various times during the trial that it was a perjury case, not a terrorism case, that they were deciding.[1222] The jury found Benkahla guilty on February 5, 2007; Judge Cacheris sentenced him on July 24 to ten years and one month in prison.[1223] The court of appeals affirmed.[1224]

> On the one hand, there is some potential for abuse in the government's procedure of acquittal, questioning on matters related to the acquittal, and second prosecution for some form of perjury. . . . [P]rosecutors frustrated at an acquittal should not lightly be able to take a second bite at the apple by bringing perjury charges afterwards. . . .
>
> On the other hand, a defendant does not win with acquittal a license to commit perjury.[1225]

Ali al-Timimi was regarded as the paintballers' spiritual leader.[1226] Reportedly a person of international fame,[1227] he was a cofounder of a Muslim center in Falls Church called the Dar Al-Arqam Center, where many of the paintballers met each other.[1228] He was sentenced in 2005 to life in prison on an April 26, 2005, conviction of soliciting others to wage war against the United States and providing services to the Taliban.[1229] His appeal to the U.S. Court of Appeals for the Fourth Circuit was interrupted by a remand to the district court on April 25, 2006, for a

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1221. Tim Reagan interviewed Judge Cacheris for this report in the judge's chambers on November 6, 2008.

1222. Interview with Hon. James C. Cacheris, Nov. 6, 2008; *see* James C. Cacheris, United States v. Benkahla: Voir Dire Questions (Jan. 25, 2007).

1223. *Benkahla*, 530 F.3d at 305–06; *Benkahla* Habeas Denial Opinion, *supra* note 1218, at 6; United States v. Benkahla, 501 F. Supp. 2d 748, 751, 762 (E.D. Va. 2007); *Benkahla* Docket Sheet, *supra* note 1219; *see* http://www.bop.gov (noting a release date of May 5, 2016, reg. no. 46867-083); *see also* Barakat, *supra* note 1213; Jerry Markon, *10-Year Sentence for Perjury*, Wash. Post, July 25, 2007, at B5.

1224. *Benkahla*, 530 F.3d 300, *cert. denied*, 555 U.S. 1120 (2009).

1225. *Benkahla*, 530 F.3d at 306; *see id.* at 308 ("the investigations in which Benkahla was interviewed and the questions he was asked show no sign of having been manufactured for the sake of a second prosecution").

1226. *See* Markon, *Case Hailed*, *supra* note 1155; Markon, *supra* note 1153; Viorst, *supra* note 1153, at 69, 79.

1227. Heffelfinger, *supra* note 1153, at 88, 91.

1228. United States v. Chandia, 514 F.3d 365, 369 (4th Cir. 2008); *Benkahla* Habeas Denial Opinion, *supra* note 1218, at 1; United States v. Khan, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004); *see* Heffelfinger, *supra* note 1153, at 92, 94.

1229. *Chandia*, 514 F.3d at 369 n.1; *see* http://www.bop.gov (reg. no. 48054-083); Markon, *Case Hailed*, *supra* note 1155; Markon, *supra* note 1153; Viorst, *supra* note 1153, at 78; *see also Khan*, 309 F. Supp. 2d at 821 ("As we have found, the government's evidence established beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon's house to heed the call of Mullah Omar for all Muslims to help defend the Taliban."); Katherine C. Donahue, Slave of Allah 168 (2007) ("Dr. Ali al-Timimi was sentenced to life in prison for urging young men at a dinner party to go on jihad."); Heffelfinger, *supra* note 1153, at 93.

To select jurors for his trial, Judge Brinkema used a jury questionnaire. Leonie M. Brinkema, United States v. Al-Timimi: Jury Questionnaire (Mar. 28, 2005).

determination of whether the prosecution of al-Timimi relied on undisclosed surveillance.[1230]

Al-Timimi was born in the United States to Iraqi immigrants.[1231] His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.[1232] When al-Timimi was a teenager, his family spent some time in Saudi Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Islam.[1233] A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.[1234]

On June 6, 2006, a jury convicted Ali Asad Chandia, a former personal assistant to al-Timimi, of aiding LET by supplying them with paintballs and other equipment.[1235] Chandia was indicted separately, because although he was associated with the paintballers he did not actually play the game.[1236] Judge Hilton sentenced him to 15 years in prison on August 25, 2006, applying a terrorism sentencing enhancement.[1237] The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in this case.[1238] On January 23, 2008, the court of appeals remanded the case for resentencing, because Judge Hilton had not supported the enhancement with a finding of specific intent.[1239] On May 2, 2008, Judge Hilton again sentenced Chandia to 15 years in prison, and the court of appeals again remanded for more factfinding.[1240] On April 6, 2012, the court of appeals affirmed a third sentencing to 15 years.[1241] Chandia is a Pakistani citizen who taught third grade at an Islamic school called the Al-Huda School in College Park, Maryland.[1242]

1230. Order, United States v. Al-Timimi, No. 05-4761 (4th Cir. Apr. 25, 2006) [hereinafter *Al-Timimi* Remand Order]; Transcript, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Jan. 16, 2007, filed May 17, 2007) [hereinafter *Al-Timimi* Jan. 16, 2007, Transcript]; *see Al-Timimi* Docket Sheet, *supra* note 1156 (noting reopening of the district court case on May 19, 2006); *see also* Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

1231. *See* Heffelfinger, *supra* note 1153, at 94; Viorst, *supra* note 1153, at 69.

1232. *See* Sheridan, *supra* note 1160; Viorst, *supra* note 1153, at 69.

1233. *See* Sheridan, *supra* note 1160; Viorst, *supra* note 1153, at 72.

1234. *See* Viorst, *supra* note 1153, at 73.

1235. United States v. Chandia, 675 F.3d 329, 333 (4th Cir. 2012); United States v. Chandia, 514 F.3d 365, 370 (4th Cir. 2008); *see* Matthew Barakat, *Teacher Convicted of Aiding Terror Group*, Cincinnati Post, June 7, 2006, at A9; Jerry Markon, *Final Defendant Guilty in "Va. Jihad,"* Wash. Post, June 7, 2006, at A12 [hereinafter *Final Defendant*]; Markon, *supra* note 1155; Markon, *supra* note 1153; Sheridan, *supra* note 1160; Smith, *supra* note 1160 ("Chandia provided material support to LET by paying $622 to ship 50,000 paintballs to Pakistan.").

1236. *Chandia*, 675 F.3d at 332; *Chandia*, 514 F.3d at 373; *see* Barakat, *supra* note 1235.

1237. *Chandia*, 675 F.3d at 331; *Chandia*, 514 F.3d at 370–71; *Chandia* Docket Sheet, *supra* note 1157; *see* Markon, *supra* note 1153.

1238. *Chandia* Docket Sheet, *supra* note 1157.

1239. *Chandia*, 514 F.3d at 369, 375–77; *Chandia*, 675 F.3d at 331.

1240. *Chandia*, 675 F.3d at 331; *Chandia* Docket Sheet, *supra* note 1157; United States v. Chandia, 395 F. App'x 53 (4th Cir. 2010).

1241. *Chandia*, 675 F.3d 329, *cert. denied*, ___ U.S. ___, 133 S. Ct. 609 (2012); *see* http://www.bop.gov (noting a release date of August 2, 2019, reg. no. 46811-083).

1242. *See* Barakat, *supra* note 1235; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 1235; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing*

Challenge: Classified Evidence

Approximately three months before the beginning of his trial, al-Timimi filed a sealed motion, and then he moved under the Classified Information Procedures Act (CIPA) to use classified information.[1243] Judge Brinkema conducted a sealed CIPA hearing on January 19, 2005, and issued a sealed protective order on March, 21, 2005, ten days before the commencement of voir dire.[1244]

According to the remand order in al-Timimi's appeal, "The motion to vacate and to remand raises appellant's concern, based on recent developments, that the government may have undisclosed intercepts of either the appellant or various individuals material to his trial."[1245]

A problem that developed for the court in determining whether all discoverable information had been disclosed to al-Timimi's attorneys was the fact that the attorneys representing the government in the case did not necessarily have access to all of the information.[1246]

Another difficulty arose from the government's refusal to allow Judge Brinkema's law clerk, who had a security clearance, to see classified information that the government showed the judge.

> I have still not gotten my law clerk who is assigned to this case cleared to have access to all of the documents to which the Court has had access. I will not and do not function that way. That means I cannot have the assistance of my clerk in drafting any opinions, in having my own in-house person to discuss any legal or other issues. I have been asking the government for several probably months at this point. She has a full clearance but is not cleared for the particular issues involved in this case. Until that is done, this Court is not going to rule definitively on any of those issues that require that information be addressed.[1247]

Challenge: Closed Proceedings

On July 21, 2006, Judge Brinkema conducted a closed hearing on administrative motions in al-Timimi's remand, but the transcript of the hearing was unsealed the following month after a classification review.[1248] Another sealed proceeding was

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Profiles of Accused Jihad Network Member, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 1160.

1243. *Al-Timimi* Docket Sheet, *supra* note 1156 (noting the filing of a sealed motion on December 23, 2004, and the filing of a CIPA notice on December 29, 2004.); *see* 18 U.S.C. app. 3 (2011) (text of CIPA); Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2–22 (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

1244. *Al-Timimi* Docket Sheet, *supra* note 1156.

1245. *Al-Timimi* Remand Order, *supra* note 1230, at 1; *see Al-Timimi* Docket Sheet, *supra* note 1156 (referring to warrants under the Foreign Intelligence Surveillance Act).

1246. Transcript, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. July 21, 2006, filed July 24, 2006) [hereinafter *Al-Timimi* July 21, 2006, Transcript].

1247. Transcript at 4–5, *Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Feb. 19, 2009, filed Sept. 19, 2012) [hereinafter *Al-Timimi* Feb. 19, 2009, Transcript].

1248. *Al-Timimi* Docket Sheet, *supra* note 1156 (noting the unsealing of the transcript on August 14, 2006); *see* Matthew Barakat, *Eavesdropping Did Not Taint Case*, Richmond Times–Dispatch, July 22, 2006, at B8.

held on January 16, 2007, and its transcript was unsealed seven months later.[1249] The transcript of a closed proceeding held on October 23, 2008, was unsealed only seven days after the event.[1250] A partial transcript of a closed February 19, 2009, proceeding[1251] was unsealed in 2012.[1252]

The presence of al-Timimi in court sometimes necessitated cryptic dialogue. On one occasion, for example, Judge Brinkema, observed, "I want to try to do this hearing as much as possible with Mr. Timimi present, because obviously, it's his case, and he has a right to be present as much as possible, so we may have to talk elliptically, all right?"[1253]

Challenge: Classified Arguments

On November 7, 2007, in al-Timimi's case, the government filed a "Classified Supplemental Memorandum in Support of Government's Response to Defendant's Post-Remand Motions Concerning Surveillance by the National Security Agency."[1254] A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.[1255] Judge Brinkema ordered the government to grant attorneys in the case and her law clerk clearance to examine at least some of the secret submissions.[1256]

On October 10, 2008, al-Timimi filed with the classified information security officer a sealed motion for a finding of materiality.[1257]

Challenge: Attorney–Client Contacts

The court of appeals noted in its *Al-Timimi* remand order that "appellant has also raised questions relating to alleged violations of attorney–client communications and access to evidence claimed as classified by the government."[1258]

Appearing at the hearing were four attorneys and a special agent for the government and one attorney for al-Timimi. *Al-Timimi* July 21, 2006, Transcript, *supra* note 1246. Al-Timimi's attorney's secret clearance was signed an hour before the hearing. *Id.* Waiting in the hall was a second al-Timimi attorney, who had not yet received his clearance. *Id.*

1249. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 1230; *Al-Timimi* Docket Sheet, *supra* note 1156 (noting the unsealing of the transcript on August 16, 2007).

By the time of this hearing, both defense attorneys had obtained secret clearances. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 1230.

1250. *Al-Timimi* Docket Sheet, *supra* note 1156.

1251. *Id.*

1252. *Al-Timimi* Feb. 19, 2009, Transcript, *supra* note 1247.

1253. Transcript, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Oct. 23, 2008, filed Oct. 30, 2008).

1254. *Al-Timimi* Docket Sheet, *supra* note 1156.

1255. *See* Eric Lichtblau, *Wiretap Issue Leads Judge to Warn of Retrial in Terror Case*, N.Y. Times, Nov. 21, 2007, at A18; Jerry Markon, *Government Secrecy May Lead to New Trial in Va. Terrorism Case*, Wash. Post, Nov. 21, 2007, at A8.

1256. *See* Lichtblau, *supra* note 1255; Markon, *supra* note 1255.

1257. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 1156.

1258. *Al-Timimi* Remand Order, *supra* note 1230, at 1.

According to al-Timimi's attorney, the Bureau of Prisons opened al-Timimi's clearly labeled attorney–client mail and transferred al-Timimi so frequently from prison to prison that it was difficult for his attorneys to know where he was and make arrangements to see him.[1259] Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.[1260]

Challenge: Religious Accommodation

Judge Brinkema is concerned about possible bias against witnesses depending upon whether they swear on a Bible or a Quran before they offer testimony to a jury.[1261] Therefore, Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.[1262]

It was reported that "authorities" obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 1153, at 78.

1259. *Al-Timimi* July 21, 2006, Transcript, *supra* note 1246.

1260. *Al-Timimi* Docket Sheet, *supra* note 1156; *Al-Timimi* July 21, 2006, Transcript, *supra* note 1246.

1261. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

1262. *Id.*

Minneapolis

United States v. Warsame (John R. Tunheim, D. Minn.)

On December 8, 2003, the FBI interviewed Mohamed Abdullah Warsame, a Canadian citizen born in Mogadishu, Somalia, and studying at Minneapolis Community and Technical College as a permanent U.S. resident.[1263] He lived in Minneapolis with his wife, a naturalized U.S. citizen, and their daughter.[1264] The interview was prompted by information obtained by secretly monitoring Warsame's telecommunications and searching his home.[1265] On the following day, Warsame was arrested as a material witness in a Southern District of New York grand jury investigation.[1266]

FBI agents approached Warsame's home on December 8 at a time they knew he would be alone.[1267] Warsame invited the agents in.[1268] The agents told Warsame that he was on a terrorist watch list and that an interview would enable them to take him off the list.[1269] During the interview, Warsame first denied having visited Pakistan and Afghanistan, but then admitted he had when he learned that the agents already knew it.[1270]

In early 2000, Warsame illegally entered Afghanistan from Pakistan to attend an Al-Qaeda training camp near Kabul.[1271] That summer, Warsame trained at another Al-Qaeda training camp, in Kandahar, which was led by Osama Bin Laden.[1272] In 2001, Warsame returned to the United States, maintaining communication and financial contacts with Al-Qaeda.[1273]

1263. United States v. Warsame, 488 F. Supp. 2d 846, 849–50 (D. Minn. 2007); *see* Pam Louwagie, *Warsame, Al-Qaida Link Detailed*, Minneapolis–St. Paul Star Trib., Feb. 10, 2004, at 1A; Howie Padilla, Pam Louwagie & Greg Gordon, *Al-Qaida Suspect Identified*, Minneapolis–St. Paul Star Trib., Dec. 12, 2003, at 1A (noting that the Twin Cities area has one of the largest Somali communities in the U.S.); Susan Schmidt, *Canadian Held for Alleged Al Qaeda Ties*, Wash. Post, Jan. 22, 2004, at A3.

1264. *Warsame*, 488 F. Supp. 2d at 849; *see* Todd Nelson, *Suspect Faces N.Y. Extradition*, St. Paul Pioneer Press, Dec. 13, 2003, at A1.

1265. *Warsame*, 488 F. Supp. 2d at 850; *see* Pam Louwagie, *Terror Suspect's Case Debated in U.S. District Court*, Minneapolis–St. Paul Star Trib., Nov. 16, 2005, at 1B.

1266. *Warsame*, 488 F. Supp. 2d at 854; *see* Greg Gordon & Howie Padilla, *Al-Qaida Associate Held in Hennepin County Jail*, Minneapolis–St. Paul Star Trib., Dec. 10, 2003, at 1A; Pam Louwagie & Howie Padilla, *Student Accused of Link to Al-Qaida*, Minneapolis–St. Paul Star Trib., Jan. 22, 2004, at 1A; Schmidt, *supra* note 1263.

1267. *Warsame*, 488 F. Supp. 2d at 850.

1268. *Id.*

1269. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1270. *Warsame*, 488 F. Supp. 2d at 851; *see* Bob von Sternberg, *Warsame's Statements Suppressed*, Minneapolis–St. Paul Star Trib., June 1, 2007, at 4B.

1271. United States v. Warsame, 651 F. Supp. 2d 978, 979 (D. Minn. 2009) (quoting the plea agreement).

1272. *Id.* at 980.

1273. *Id.*

After substantial questioning during the December 2003 interview, the FBI agents asked Warsame to pack a bag and accompany them to a more secure location.[1274] Warsame consented.[1275] The agents drove Warsame to Camp Ripley, an Army National Guard military base in Little Falls, Minnesota, but they did not disclose to Warsame where they were taking him.[1276] After a night's sleep on the base, Warsame said that he wanted to go home.[1277] For that reason, and because the several hours of questioning that day were immediately followed by an arrest, Judge John R. Tunheim, on May 31, 2007, suppressed fruits of that day's interview.[1278]

On the day of his arrest, Warsame appeared before Magistrate Judge Earl Cudd at a closed proceeding, and his name was not reported publicly until a couple of days later.[1279] It was subsequently reported that Warsame's public identification thwarted the government's intentions to use him as an informant.[1280] At another closed proceeding, on December 16, 2003, the government received permission to transfer Warsame to Manhattan for grand jury testimony.[1281]

A Minnesota grand jury indicted Warsame on January 20, 2004, for providing material support to Al-Qaeda by attending training camps in Afghanistan.[1282] Warsame returned to Minnesota on the following day.[1283] The court assigned the case to Judge Tunheim.[1284] A superseding indictment was filed about a year and a

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1274. *Warsame*, 488 F. Supp. 2d at 851.

1275. United States v. Warsame, 547 F. Supp. 2d 982, 984 (D. Minn. 2008); *Warsame*, 488 F. Supp. 2d at 851.

1276. *Warsame*, 488 F. Supp. 2d at 850–51; *see* Von Sternberg, *supra* note 1270.

1277. *Warsame*, 488 F. Supp. 2d at 853.

1278. *Id.* at 861; *see* Von Sternberg, *supra* note 1270.

1279. *See* Gordon & Padilla, *supra* note 1266; Padilla *et al.*, *supra* note 1263.

1280. Greg Gordon, *FBI Hoped Warsame Would Act as Spy*, Minneapolis–St. Paul Star Trib., Feb. 14, 2004, at 1B; Schmidt, *supra* note 1263.

1281. *See* Pam Louwagie, *Balancing Security and Freedom*, Minneapolis–St. Paul Star Trib., Jan. 5, 2004, at 1A; Pam Louwagie, Howie Padilla & Margaret Zack, *Jailed Student Headed to N.Y.*, Minneapolis–St. Paul Star Trib., Dec. 17, 2003, at 1B; Todd Nelson, *Extradition to New York Approved for Warsame*, St. Paul Pioneer Press, Dec. 17, 2003, at B3.

1282. United States v. Warsame, 651 F. Supp. 2d 978, 979 (D. Minn. 2009); Docket Sheet, United States v. Warsame, No. 0:04-cr-29 (D. Minn. Jan. 20, 2004) [hereinafter D. Minn. Docket Sheet]; *see* Bill Gardner, *Student Indicted in Terror Probe*, St. Paul Pioneer Press, Jan. 22, 2004, at A1; Eric Lichtblau, *Terror Indictment*, N.Y. Times, Jan. 22, 2004, at A16; Louwagie, *supra* note 1263; Louwagie & Padilla, *supra* note 1266; Schmidt, *supra* note 1263.

1283. *See* Schmidt, *supra* note 1263.

1284. D. Minn. Docket Sheet, *supra* note 1282.

Tim Reagan interviewed Judge Tunheim for this report at the Federal Judicial Center on August 18, 2009.

half later.[1285] Warsame's attorneys claimed that he went to Afghanistan in search of Muslim utopia, but he left after becoming disillusioned.[1286]

The government appealed Judge Tunheim's suppression order, and the court of appeals heard arguments on March 13, 2008.[1287] The case could not be brought to trial while the appeal was pending.[1288]

Midway through his sixth year of detention, Warsame and the government agreed to a plea bargain.[1289] On July 9, 2009, Judge Tunheim sentenced Warsame to seven years and eight months and signed a stipulated deportation order.[1290]

Warsame was released from prison on October 8, 2010, and deported to Canada.[1291]

Challenge: Mental Health During Detention

Detention of terrorism suspects frequently amounts to solitary confinement.[1292] Concerned about the defendant's mental health, Judge Tunheim encouraged Warsame's attendance at proceedings to afford him time outside his cell and in the presence of other people under secure conditions.[1293] Judge Tunheim observed that visits by the Canadian consulate were also helpful.[1294]

Challenge: Attorney–Client Contacts

For over a month, between Warsame's extradition to New York and a couple of weeks after his indictment, contact between Warsame and his attorneys was prevented by the government's insistence on conditions to which the attorneys could

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1285. *Warsame*, 651 F. Supp. 2d at 979; D. Minn. Docket Sheet, *supra* note 1282; United States v. Warsame, 537 F. Supp. 2d 1005, 1009 (D. Minn. 2008); *see* Pam Louwagie, *Charges Added for Terror Suspect*, Minneapolis–St. Paul Star Trib., June 23, 2005, at 1A; Beth Silver, *New Charges Filed in Al-Qaida Case*, St. Paul Pioneer Press, June 23, 2005, at B3.

1286. *See* Pam Louwagie, *Terror Suspect's Case Questioned*, Minneapolis–St. Paul Star Trib., Aug. 29, 2005, at 1B.

1287. Docket Sheet, United States v. Warsame, No. 07-2560 (8th Cir. June 29, 2007).

1288. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1289. *Warsame*, 651 F. Supp. 2d at 979; *see* Pam Louwagie, *Terror Suspect Pleads Guilty*, Minneapolis–St. Paul Star Trib., May 21, 2009, at 1B.

1290. *Warsame*, 651 F. Supp. 2d 978 (sentencing judgment); Order for Removal, United States v. Warsame, No. 0:04-cr-29 (D. Minn. July 9, 2009); Transcript, *id.* (July 9, 2009, filed Aug. 10, 2009).

In light of the plea bargain, the court of appeals dismissed the government's pending suppression appeal. Judgment, *Warsame*, No. 07-2560 (8th Cir. Aug. 12, 2009).

1291. http://www.bop.gov (reg. no. 11355-041); *see* Sandro Contenta, *Terrorist Supporter Might Make Toronto His Home*, Toronto Star, Oct. 10, 2010, at A6.

1292. Interview with Hon. John R. Tunheim, Aug. 18, 2009; *see* Contenta, *supra* note 1291 ("Warsame spent 5½ years in solitary confinement during pre-trial custody. He was let out of his cell only one hour a day.").

1293. Interview with Hon. John R. Tunheim, Aug. 18, 2009; *see* Atul Gawande, *Hellhole*, New Yorker, Mar. 30, 2009, at 36 (describing mental health deterioration resulting from solitary confinement).

1294. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

not agree.[1295] Warsame was represented by the Federal Public Defender's office, and the problematic restrictions would have curtailed who in the office could communicate with Warsame.[1296] In time, attorneys for both sides were able to strike an agreement.[1297]

Challenge: Classified Evidence

The case against Warsame relied on classified evidence, and in addition a substantial amount of classified information was discoverable.[1298] Warsame's attorneys and Judge Tunheim's staff all obtained security clearances.[1299] A protective order governed defense handling of classified materials.[1300] Judge Tunheim decided to preside over pretrial matters rather than refer them to a magistrate judge to spare another chambers' having to obtain security clearances.[1301]

Supporters of Warsame thought that retained counsel would provide better representation than the federal defender's office, so they hired a law professor in Chicago to represent him.[1302] But because the professor could not identify local counsel likely to obtain a security clearance, Judge Tunheim continued the appointment of the federal defender's office as second counsel.[1303]

Early in the case, the government produced to defense counsel discoverable classified evidence, and Warsame's attorneys had to review the classified material in a secure room at the courthouse, which included a safe suitable for storing classified materials.[1304] The attorneys had to prepare any documents based on or referring to classified material in the secure room.[1305] The court reporter, who had a security clearance, also had to work on transcripts containing classified information in this room and store computer equipment she used for such transcripts in the safe.[1306] Judge Tunheim could keep classified materials in a safe in his chambers office.[1307]

1295. *See* Lisa Donovan, *Civil Rights, Terror on Trial*, St. Paul Pioneer Press, Feb. 9, 2004, at B1 [hereinafter *Civil Rights*]; Lisa Donovan, *Warsame Has First Hearing in Open Courtroom*, St. Paul Pioneer Press, Feb. 3, 2004, at B2.

1296. *See* Pam Louwagie, *Feds Want Restrictions in Terror Case*, Minneapolis–St. Paul Star Trib., Feb. 3, 2004, at 1B.

1297. Interview with Hon. John R. Tunheim, Aug. 18, 2009; *see* Donovan, *Civil Rights*, *supra* note 1295; Lisa Donovan, *Warsame's Attorneys, Prosecutors Strike Deal*, St. Paul Pioneer Press, Feb. 5, 2004, at B4; Pam Louwagie, *Warsame, Lawyer Will Be Allowed to Confer on Case*, Minneapolis–St. Paul Star Trib., Feb. 5, 2004, at 3B.

1298. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1299. *Id.*

1300. Protective Order, United States v. Warsame, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005).

1301. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1302. *Id.*

1303. *Id.*

1304. *Id.*; *see* Louwagie, *supra* note 1286.

1305. Interview with Hon. John R. Tunheim, Aug. 18, 2009; *see* Louwagie, *supra* note 1286.

1306. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1307. *Id.*

Later in the case, the government's presentation of classified evidence was mostly to Judge Tunheim for his approval of what could be presented at trial.[1308] Some information the government was willing to declassify, and for other information the government proposed unclassified substitutions—modifications to the evidence intended to redact classified information while retaining evidentiary value.[1309] Judge Tunheim compared all proposed substitutions with their corresponding originals and frequently asked for modifications.[1310] On reflection, Judge Tunheim thinks it would have been better for him to keep the originals for possible later reference rather than let the government retrieve them.[1311] As a result of this process, Warsame's attorneys saw only declassified evidence or unclassified substitutions.[1312]

Challenge: FISA Evidence

Some evidence against Warsame was obtained as a result of warrants granted pursuant to the Foreign Intelligence Surveillance Act (FISA).[1313] The FISA court issued secret warrants for surveillance of persons with whom Warsame was communicating, and later approved a tap of Warsame's telephone and a physical search of his apartment.[1314] The government notified Warsame that it intended to use some of this evidence against him at trial.[1315]

In camera, Judge Tunheim conducted an ex parte "comprehensive and careful review of the FISA applications, orders, and other related materials," reviewing probable cause determinations de novo, and he determined that FISA procedures were followed properly.[1316]

1308. *Id.*

1309. *Id.*; Substitution Protective Order 3, United States v. Warsame, No. 0:04-cr-29 (D. Minn. July 9, 2009) (approving specific unclassified substitutions as providing the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information); Substitution Protective Order 2, *id.* (Oct. 3, 2008) (same); Substitution Protective Order 1, *id.* (Mar. 8, 2005) (same).

1310. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1311. *Id.*

1312. *Id.*

1313. United States v. Warsame, 547 F. Supp. 2d 982, 984–85 (D. Minn. 2008); *see* United States v. Warsame, 488 F. Supp. 2d 846, 850 n.1 (D. Minn. 2007); Pam Louwagie, *Eavesdropping Debate Touches Local Case*, Minneapolis–St. Paul Star Trib., Dec. 22, 2005, at 1B.

1314. *Warsame*, 547 F. Supp. 2d at 984; Interview with Hon. John R. Tunheim, Aug. 18, 2009.

1315. *Warsame*, 547 F. Supp. 2d at 985–86.

1316. *Id.*, 547 F. Supp. 2d 982.

Ashland and Moscow[1317]

United States v. Al-Haramain Islamic Foundation, Inc. (Michael R. Hogan and Thomas M. Coffin, D. Or.), Al-Haramain Islamic Foundation, Inc. v. United States (Garr M. King, D. Or.), United States v. Al-Hussayen and Al-Kidd v. Gonzales (Edward J. Lodge and Mikel H. Williams, D. Idaho)

On February 19, 2004, the government froze the assets of Al-Haramain Islamic Foundation, a charity headquartered in Ashland, Oregon.[1318] The charity and two of its founders—Pete Seda and Soliman al-Buthe—had been on an FBI terrorism watch list for a couple of years.[1319] The Department of Treasury designated Al-Haramain and al-Buthe, whose name was sometimes spelled al-Buthi, global terrorist organizations on September 9.[1320]

An Iranian who was born Perouz Sedaghaty, Seda immigrated to the United States in the early 1970s to study at the Southern Oregon University.[1321] He remained in the United States following the 1979 Iranian revolution and became a tree trimmer in Ashland, where he was known as a skilled arborist who saved heritage trees.[1322] He also became a U.S. citizen.[1323] In 1989, Seda established a foundation to distribute Islamic books to American prisoners.[1324] This caught the attention of Al-Haramain Islamic Foundation in Saudi Arabia.[1325] Al-Haramain Saudi Arabia was the charitable arm of the Muslim World League, which was founded in 1962.[1326]

1317. Christopher Krewson provided research assistance for this case study.

1318. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 970–71, 973 (9th Cir. 2012); Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1245 (D. Or. 2008); *see* Les Zaitz, *U.S. Freezes Assets of Charity in Ashland*, Oregonian, Feb. 20, 2004, at A1.

1319. *Al Haramain Islamic Found.*, 686 F.3d at 971; *see* Beth Quinn, *Ashland Friends Defend Muslim*, Oregonian, June 4, 2004, at A1; Les Zaitz, *Saudi Charity in Ashland on Terrorism "Watch List,"* Oregonian, Nov. 9, 2003 [hereinafter *"Watch List"*], at A1; Zaitz, *supra* note 1318.

Although he was living in Iran at the time, Seda's home was searched on February 18 pursuant to a February 13 warrant. Order at 1–2, United States v. Sedaghaty, No. 6:05-cr-60008 (D. Or. Apr. 13, 2010) [hereinafter *Sedaghaty* Suppression Denial Order], *available at* 2010 WL 1490306.

1320. *Al Haramain Islamic Found.*, 686 F.3d at 970, 973–74, 977 *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243, 1245–46; *see* Les Zaitz, *U.S. Closing Oregon Islamic Charity It Calls Terror Link*, Oregonian, Sept. 10, 2004, at A1.

1321. *See* Quinn, *supra* note 1319 (reporting that his birth name was Pervouz Sada Gaty); Les Zaitz, *Charity Boss Is Back to Face Charges*, Oregonian, Aug. 16, 2007, at A4 [hereinafter *Charity Boss*]; Zaitz, *"Watch List," supra* note 1319.

1322. *See* Quinn, *supra* note 1319; Zaitz, *"Watch List," supra* note 1319.

1323. *See* Bill Bishop, *Charity's Fugitive Leader Arraigned*, Eugene Reg.-Guard, Aug. 16, 2007, at A1.

1324. *See* Zaitz, *Charity Boss*, *supra* note 1321; Zaitz, *"Watch List," supra* note 1319.

1325. *See* Zaitz, *Charity Boss*, *supra* note 1321.

1326. *See* Chris Heffelfinger, Radical Islam in America 57–59 (2011).

Al-Haramain Saudi Arabia helped Seda found Al-Haramain Oregon on October 22, 1997.[1327] In addition to operating a prayer house in Ashland and distributing Islamic literature, Al-Haramain established a mosque in Springfield, Missouri, in 2000.[1328] In 2003, Seda traveled to Saudi Arabia, after which he settled first in Dubai and then in Iran.[1329]

At one time, Al-Haramain Saudi Arabia had affiliates in approximately 50 countries.[1330] From 2002 through 2004, the U.S. Treasury Department identified as specially designated global terrorists Al-Haramain organizations in Afghanistan, Albania, Bangladesh, Bosnia-Herzogovina, the Comoros Islands, Ethiopia, Indonesia, Kenya, the Netherlands, Pakistan, Somalia, and Tanzania.[1331] The Saudi government shut down Al-Haramain Saudi Arabia in 2004,[1332] but the U.S. Treasury Department did not identify it as a specially designated global terrorist until June 19, 2008.[1333]

Aqeel Abdul Aziz al-Aqeel, director of Al-Haramain Saudi Arabia, co-founded Al-Haramain Oregon.[1334] He was president of Al-Haramain Oregon until his resignation in March 2003.[1335] His procedural challenge to the U.S. Treasury's June 2004 identification of him as a specially designated global terrorist was unsuccessful.[1336]

Al-Buthe was also an Al-Haramain Saudi Arabia official and was the only one other than Seda who had access to Al-Haramain Oregon's bank account.[1337]

1327. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1243 (D. Or. 2008); *see* Zaitz, *Charity Boss*, *supra* note 1321; Zaitz, *"Watch List," supra* note 1319; Les Zaitz, *Tax Case Ends Against Charity*, Oregonian, Aug. 5, 2005, at D1 [hereinafter *Tax Case Ends*]; Zaitz, *supra* note 1320; Zaitz, *supra* note 1318.

1328. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 971 (9th Cir. 2012); *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243; *see* Zaitz, *"Watch List," supra* note 1319.

1329. *See* Bill Bishop, *Charity's Fugitive Leader Arraigned*, Eugene Reg.-Guard, Aug. 16, 2007, at A1; Quinn, *supra* note 1319; Zaitz, *"Watch List," supra* note 1319; Zaitz, *Tax Case Ends*, *supra* note 1327.

1330. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241.

1331. *Id.*

1332. *Al Haramain Islamic Found.*, 686 F.3d at 971, 973; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1241; *see* Zaitz, *supra* note 1320.

1333. *Al Haramain Islamic Found.*, 686 F.3d at 975; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1334. *Al Haramain Islamic Found.*, 686 F.3d at 971, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242; *see Sedaghaty* Suppression Denial Order, *supra* note 1319, at 3; *see also* Zaitz, *"Watch List," supra* note 1319; Zaitz, *supra* note 1320.

1335. *Al Haramain Islamic Found.*, 686 F.3d at 971, 973, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242, 1245; *see Sedaghaty* Suppression Denial Order, *supra* note 1319, at 3; *see also* Zaitz, *"Watch List," supra* note 1319; Zaitz, *supra* note 1320.

1336. Al-Aqeel v. Paulson, 568 F. Supp. 2d 64 (D.D.C. 2008); *see Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242.

1337. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1242–43.

Idaho Prosecution

An associate of al-Buthe's, Sarni Omar al-Hussayen, was acquitted on June 10, 2004, of terrorism material support charges in Idaho.[1338]

Al-Hussayen was indicted on February 13, 2003, for failure to disclose as part of his student visa applications Internet development assistance that he provided to the Islamic Assembly of North America.[1339] The U.S. District Court for the District of Idaho assigned the case to Judge Edward J. Lodge.[1340]

The indictment was filed in the district's central division, which holds court in Moscow, but the case was transferred to Boise for trial because of the great publicity the case received locally.[1341] In Boise, the court reduced its burdens arising from news media interest by designating one member of the media as a liaison.[1342] This helped ensure that all members of the media had prompt and complete information at the same time.[1343] This effort proved successful, and the liaison acted as media liaison in one of Judge Lodge's subsequent cases.[1344]

Additional precautions by Judge Lodge to avoid improper prejudice included a proscription on references to terrorism in general, September 11, the Islamic faith, and similar matters unless they were directly related to the case.[1345] Judge Lodge did not find it necessary to sequester the Boise jury; he might have had to sequester a Moscow jury.[1346]

Al-Hussayen was a Saudi citizen and the son of a retired education minister; the Saudi government paid for his defense.[1347] In 1999, al-Hussayen entered a Ph.D. program in computer science at the University of Idaho in Moscow, Idaho.[1348] On January 9, 2004, a superseding indictment added a charge of material support to terrorism and an allegation of association with Al-

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1338. *Id.* at 1243; Verdict, United States v. Al-Hussayen, No. 3:03-cr-48 (D. Idaho June 10, 2004) [hereinafter *Al-Hussayen* Verdict]; *see No Conviction for Student in Terror Case*, N.Y. Times, June 11, 2004, at A14 [hereinafter *No Conviction*].

1339. Indictment, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003) [hereinafter *Al-Hussayen* Indictment); *see* Susan Schmidt, *5 Tied to Islamic Charity Indicted in N.Y., Idaho*, Wash. Post, Feb. 27, 2003, at A2 (reporting on the unsealing of the indictment).

1340. Docket Sheet, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Feb. 13, 2003); *see* Timothy Egan, *Computer Student on Trial over Muslim Web Site Work*, N.Y. Times, Apr. 27, 2004, at A16.

For this report, Tim Reagan interviewed Judge Lodge and his law clerk Lauri Thompson in the judge's chambers on October 17, 2012.

1341. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1342. *Id.*

1343. *Id.*

1344. *Id.*

1345. *Id.*

1346. *Id.* (noting that jurors perform better if they can return home every day).

1347. *See* Egan, *supra* note 1340 (also reporting, "Not long after the terrorist attacks of Sept. 11, 2001, a group of Muslim students led by a Saudi Arabian doctoral candidate held a candlelight vigil in the small college town of Moscow, Idaho, and condemned the attacks as an affront to Islam.").

1348. *Al-Hussayen* Indictment, *supra* note 1339; *see* Egan, *supra* note 1340.

Haramain.[1349] A March 4 second superseding indictment expanded the material support allegations to three counts.[1350] On June 10, the jury found him not guilty of the material support charges and some of the visa fraud charges and was unable to reach a verdict on the other visa fraud charges.[1351] The government dismissed the counts on which the jury was hung upon al-Hussayen's agreeing to deportation.[1352] Judge Lodge transferred al-Hussayen to the custody of immigration authorities on July 2,[1353] and al-Hussayen was immediately deported.[1354]

Material Witness Detention

Abdulla al-Kidd was held as a material witness in al-Hussayen's prosecution, but he was never called to testify.[1355]

According to al-Kidd's arrest warrant application, from March 2000 to November 2001 he and his wife received over $20,000 from al-Hussayen and his associates.[1356] The application also claimed that he had a one-way first-class ticket to Saudi Arabia departing from Dulles International Airport in Virginia on March 16, 2003.[1357] He was arrested at the airport on that date.[1358]

Al-Kidd was held in the Alexandria Detention Center for eight days.[1359] On March 24, he was transferred to Oklahoma, and he was transferred to Boise, Ida-

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1349. Superseding Indictment, United States v. Al-Hussayen, No. 3:03-cr-48 (D. Idaho Jan. 9, 2004).

1350. Second Superseding Indictment, *id.* (Mar. 4, 2004); *see* Egan, *supra* note 1340.

1351. *Al-Hussayen* Verdict, *supra* note 1338; *see* Timothy Egan, *Sensing the Eyes of Big Brother, and Pushing Back*, N.Y. Times, Aug. 8, 2004, at 120 ("One juror, John Steger, said in an interview that the jury believed Mr. Hussayen's activities were matters of free speech, protected by the First Amendment."); *No Conviction*, *supra* note 1338 (also reporting that al-Hussayen "has been jailed since his February 2003 arrest, but continued to work toward his doctorate from his cell. His wife and their children returned to Saudi Arabia this year rather than fight deportation.").

1352. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 1, 2004); *see U.S. Drops Charges for Saudi Student*, N.Y. Times, July 1, 2004, at A12; *see also Judge Allows Deportation for Saudi Grad Student*, Wash. Post, Apr. 26, 2003, at A10 (reporting on al-Hussayen's 2003 deportation order).

1353. Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho July 2, 2004).

1354. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1355. Opinion at 3, Al-Kidd v. Gonzales, No. 1:05-cv-93 (D. Idaho Sept. 18, 2006), *available at* 2006 WL 2682346 [hereinafter *Al-Kidd* Opinion Denying Motion to Dismiss]; Order, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho June 16, 2004).

1356. Application Affidavit at 2, *Al-Hussayen*, No. 3:03-cr-48 (D. Idaho Mar. 17, 2003).

1357. *Id.* at 3; *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1355, at 2.

1358. Opinion at 1–2, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 19, 2006), *available at* 2006 WL 2038592 [hereinafter Dunning Transfer Opinion]; *see* Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at A1 ("Abdullah al Kidd was on his way to Saudi Arabia to work on his doctorate in Islamic studies in March 2003 when he was arrested as a material witness in a terrorism investigation."); Susan Schmidt, *Fourth Man Arrested in Probe of Idaho Group*, Wash. Post, Mar. 18, 2003, at A21.

1359. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1355, at 3; *see* Susan Schmidt, *Fourth Man Arrested in Probe of Idaho Group*, Wash. Post, Mar. 18, 2003, at A21 (reporting, "The FBI has been seeking to interview [al-Kidd] about payments of about $20,000 he allegedly received from al-Hussayen and his associates.")

ho, on March 25.[1360] Following a March 31 hearing in Boise, he was released to the custody of his wife in Nevada.[1361] Conditions of release were removed on June 16, 2004, following the conclusion of al-Hussayen's trial.[1362]

On March 15, 2005, al-Kidd filed a civil action against various government officials, alleging that he was unlawfully detained as a terrorism suspect rather than as a material witness.[1363] He also claimed that his arrest warrant was based on false information.[1364]

> [The warrant application falsely stated that the plane ticket] was a first class, one-way ticket to Saudi Arabia, costing $5,000 when in reality it was a round trip ticket with no scheduled return date, coach class, costing approximately $2,000. In addition, [there were] several omissions from the warrant application: 1) Plaintiff's prior cooperation with the FBI, 2) Plaintiff was a native-born United States citizen with a wife, son, and other family living in the United States, 3) Plaintiff was not informed that his testimony may be needed or that he should not travel, 4) Plaintiff was not told to inform the FBI prior to any overseas travel, and 5) Plaintiff [had a history of cooperating with the FBI, but he] had not been contacted by the FBI in over eight months.[1365]

Judge Lodge determined that the Idaho court did not have personal jurisdiction over the warden of the Alexandria Detention Center, so he transferred the claims against him to the Eastern District of Virginia,[1366] where Judge Claude M. Hilton granted the warden summary judgment.[1367] Judge Lodge also adopted[1368] Magistrate Judge Mikel H. Williams's grant of summary judgment[1369] to the Ada

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1360. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1355, at 3.

1361. *Id.*; *see* Liptak, *supra* note 1358 ("a federal judge ordered [al-Kidd] to move in with his in-laws in Las Vegas, where his wife was planning to stay until she joined him in Saudi Arabia"); Adam Liptak, *Justices Will Decide Whether Ashcroft May Be Sued in 2003 Detention Case*, N.Y. Times, Oct. 19, 2010, at A19 ("Abdullah al-Kidd, born in Kansas and once a star running back at the University of Idaho, spent 16 days in federal detention in three states in 2003, sometimes naked and sometimes shackled hand and foot.").

1362. *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1355, at 3; Order, United States v. Al-Hussayen, No. 3:03-cr-48 (D. Idaho Aug. 6, 2004); Order, *id.* (June 16, 2004).

1363. Complaint, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Mar. 15, 2005); *see* Ethan Bronner, *Citizen Held After 9/11 Wins Right to Be Tried*, N.Y. Times, Sept. 29, 2012, at A16.

1364. Amended Complaint at 15, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Nov. 18, 2005) (denying the government's motion to dismiss); *Al-Kidd* Opinion Denying Motion to Dismiss, *supra* note 1355, at 8.

1365. Opinion at 3–4, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Nov. 18, 2005), *available at* 2012 WL 4470776 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Opinion].

Agents ceased seeking al-Kidd's voluntary cooperation so as to preserve the confidentiality of their investigations. Report and Recommendation at 6, *id.* (June 18, 2012), *available at* 2012 WL 4470852 [hereinafter *Al-Kidd* Summary Judgment Against FBI Agents Report and Recommendation].

1366. Dunning Transfer Opinion, *supra* note 1358.

1367. Docket Sheet, Al-Kidd v. Dunning, No. 1:06-cv-871 (E.D. Va. July 27, 2006) (noting summary judgment on May 11, 2007).

1368. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho July 17, 2008), *available at* 2008 WL 2795137.

1369. Opinion, *id.* (Feb. 13, 2008), *available at* 2008 WL 553777.

County sheriff respecting al-Kidd's conditions of confinement in Idaho. These matters settled on appeal.[1370]

On September 27, 2006, Judge Lodge denied Attorney General John Ashcroft's motion to dismiss on the grounds of absolute immunity and qualified immunity.[1371] The court of appeals affirmed on September 4, 2009.[1372] On May 31, 2011, however, the Supreme Court determined that Attorney General Ashcroft was protected from al-Kidd's suit by qualified immunity.[1373]

Agreeing with Judge Williams's report and recommendation, Judge Lodge awarded al-Kidd summary judgment on September 27, 2012, against the agent who prepared justifications for the arrest warrant application.[1374] Judge Lodge, however, awarded the agent who presented the warrant application summary judgment against al-Kidd, because the warrant application was not facially deficient.[1375] Judge Lodge also adopted Judge Williams's grant of summary judgment against the government on al-Kidd's Federal Tort Claims Act claim of false imprisonment.[1376] An appeal is pending.[1377]

A $150,000 Donation

In February 2000, Mahmoud Talaat el-Fiki, an Egyptian physician, donated $150,000 to Al-Haramain Oregon to support Muslims fighting Russian rule in Chechnya.[1378] On March 7, 2000, al-Buthe traveled from Saudi Arabia to Ashland, where, on March 10, he and Seda converted a wire transfer into 130 $1,000

1370. Docket Sheet, Al-Kidd v. Gonzales, No. 08-35692 (9th Cir. Aug. 22, 2008); Order, Al-Kidd v. Dunning, No. 07-1564 (4th Cir. Aug. 20, 2008); *see* Robert Barnes, *Ashcroft Not Liable in Man's Detention*, Wash. Post, June 1, 2011, at A2.

1371. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2006), *available at* 2006 WL 5429570; *see* Dan Eggen, *Ashcroft Is Denied Immunity in Case*, Wash. Post, Sept. 29, 2006, at A12.

1372. Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009); *see* Carrie Johnson, *Court Allows Lawsuit Against Ashcroft*, Wash. Post, Sept. 5, 2009, at A3; John Schwartz, *Federal Court Rules Against Ashcroft in 9/11 Case*, N.Y. Times, Sept. 5, 2009, at A10.

1373. Ashcroft v. al-Kidd, ___ U.S. ___, 131 S. Ct. 2074 (2011); *see* Al-Kidd v. Ashcroft, 653 F.3d 982 (9th Cir. 2011) (remanding the case to the district court); Barnes, *supra* note 1367; Adam Liptak, *Justices Block Suit Over Use of Material Witness Law Against Detainee*, N.Y. Times, June 1, 2011, at A17; Stephen I. Vladeck, *The New National Security Canon*, 61 Am. U. L. Rev. 1295, 1326 (2012).

1374. *Al-Kidd* Summary Judgment Against FBI Agents Opinion, *supra* note 1365 at 3–14, 23.

1375. *Id.* at 15–24; *see Al-Kidd* Summary Judgment Against FBI Agents Report and Recommendation, *supra* note 1365, at 32–38 (deferring to Judge Lodge the question of whether the warrant application was facially deficient, because the issue called into question the competence of Judge Williams).

1376. Opinion, *Al-Kidd*, No. 1:05-cv-93 (D. Idaho Sept. 27, 2012), *available at* 2012 WL 4470782; *see* Report and Recommendation, *id.* (June 26, 2012), *available at* 2012 WL 4470860.

1377. Docket Sheet, Al-Kidd v. United States, No. 12-35957 (9th Cir. Nov. 19, 2012) (noting that the answering brief is due on October 15, 2013).

1378. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1243–44 (D. Or. 2008); *Sedaghaty* Suppression Denial Order, *supra* note 1319, at 3; *see* Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 973, 978, 985 (9th Cir. 2012); *see also* Zaitz, *Charity Boss*, *supra* note 1321; Zaitz, *supra* note 1318.

travelers checks, which was the bank's entire inventory, and the remaining amount to a cashier's check, which would be more difficult to convert overseas.[1379] Al-Buthe returned to Saudi Arabia with the money, without declaring it as required.[1380]

The charity was indicted on February 17, 2005, for falsely claiming on its 2000 tax return that the money was used to acquire the Missouri mosque.[1381] Seda was included in the indictment as Perouz Sedaghaty.[1382] Al-Buthe, who lives in Saudi Arabia and who has not been in the United States since 2001, was the third defendant.[1383] The indictment was filed in the Eugene Division of the U.S. District Court for the District of Oregon, and the court assigned the case to Judge Michael R. Hogan.[1384] The charity was dismissed as a defendant on September 8, because it was only a "functionless shell."[1385]

Al-Haramain's Civil Actions

On April 26, 2006, Al-Haramain filed a lawsuit against the government seeking return of 155 cartons of religious pamphlets seized as part of the 2004 asset

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1379. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1244; *Sedaghaty* Suppression Denial Order, *supra* note 1319, at 4; *see* Zaitz, *Charity Boss*, *supra* note 1321; Zaitz, *supra* note 1320; Zaitz, *supra* note 1318.

1380. *See* Zaitz, *supra* note 1318.

"Al Buthe cashed the 130 $1,000 traveler's checks on about March 25, 2000, at a bank in Riyadh and deposited the $21,000 cashier's check." *Sedaghaty* Suppression Denial Order, *supra* note 1319, at 4.

1381. Indictment, United States v. Al Haramain Islamic Found., No. 6:05-cr-60008 (D. Or. Feb. 17, 2005) [hereinafter *Al Haramain* Indictment]; *Sedaghaty* Suppression Denial Order at 1–2, 4 *supra* note 1319; *see* Bishop, *supra* note 1323; Zaitz, *Tax Case Ends*, *supra* note 1327; Zaitz, *supra* note 1318.

Seda had an accountant prepare records showing the donation used to acquire the Springfield, Missouri, mosque. *Sedaghaty* Suppression Denial Order, *supra* note 1319, at 4–5.

1382. *Al Haramain* Indictment, *supra* note 1381; *see* Bishop, *supra* note 1323; Zaitz, *Charity Boss*, *supra* note 1321; Zaitz, *Tax Case Ends*, *supra* note 1327.

1383. *Al Haramain* Indictment, *supra* note 1381; *see* Zaitz, *Tax Case Ends*, *supra* note 1327.

1384. Docket Sheet, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Feb. 17, 2005) [hereinafter *Sedaghaty* Docket Sheet].

For this report, Tim Reagan interviewed Judge Hogan and his law clerk David Baker in the judge's chambers on September 20, 2012. Judge Hogan retired on November 1, 2012. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

1385. Transcript, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 8, 2005, filed Sept. 16, 2005); *Sedaghaty* Docket Sheet, *supra* note 1384; Redacted Indictment, *Al Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Sept. 21, 2005); *see* Zaitz, *Tax Case Ends*, *supra* note 1327.

freeze.[1386] On July 21, the government agreed to return the pamphlets,[1387] so the action was dismissed.[1388]

On August 6, 2007, Al-Haramain sued in the District of Oregon's Portland Division to reverse its designation as a terrorist organization.[1389] Nine days later, Seda returned to the United States to defend himself against the 2005 indictment.[1390]

Two months after freezing Al-Haramain Oregon's assets, the government provided the charity with unclassified information supporting its findings, but withheld supporting classified information.[1391]

By mistake, among the supplemental documents produced to Al-Haramain's lawyers was a top secret document that apparently is evidence that the lawyers' communications with persons overseas were surveilled without warrants in March and April of 2004.[1392] The lawyers sued the government on February 28, 2006, after the *New York Times* reported on a warrantless surveillance program conducted by the National Security Agency.[1393] The government removed the mistakenly produced document from the administrative record.[1394] On August 7, 2012, the court of appeals reversed a judgment against the government in favor of the lawyers, determining that the government had sovereign immunity.[1395]

Although it was eventually transferred to the Northern District of California as part of a multidistrict consolidation, the 2006 action by the lawyers was originally

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1386. Complaint, Al-Haramain Islamic Found. v. United States, No. 6:06-cv-553 (D. Or. Apr. 26, 2006); *see* Ashbel S. Green, *Islamic Charity Sues Feds over Seized Pamphlets*, Oregonian, Apr. 28, 2006, at B5.

1387. *See* Ashbel S. Green, *Islamic Charity Will Get Literature Back*, Oregonian, July 22, 2006, at D2.

1388. Judgment, *Al-Haramain Islamic Found.*, No. 6:06-cv-553 (D. Or. July 27, 2006).

1389. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 970 (9th Cir. 2012); Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1239 (D. Or. 2008); Complaint, Al-Haramain Islamic Found. v. U.S. Dep't of Treasury, No. 3:07-cv-1155 (D. Or. Aug. 6, 2007); *see* Supplemental Complaint, *id.* (Feb. 13, 2008); *see also* Bishop, *supra* note 1323; Les Zaitz, *Ex-charity Sues over Terrorist Labeling*, Oregonian, Aug. 7, 2007, at B1.

1390. Transcript, *Al-Haramain Islamic Found.*, No. 6:05-cr-60008 (D. Or. Aug. 15, 2007, filed July 21, 2008) (arraignment); Order at 17 n.4, *id.* (Aug. 10, 2011) [hereinafter *Sedaghaty* New Trial Denial], *available at* 2011 WL 3563145; *see* Bishop, *supra* note 1323; Zaitz, *Charity Boss*, *supra* note 1321.

1391. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1245.

1392. Opinion at 4, *Al Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. June 5, 2008), available at 2008 WL 2381640; *see* Susan Goldsmith, *Islamic Charity, Lawyers File Wiretapping Lawsuit*, Oregonian, Mar. 1, 2006, at E5; Ashbel S. Green, *Sealed Document Reportedly Backs Up Eavesdropping Suit*, Oregonian, Mar. 4, 2006, at E7.

1393. *See* Goldsmith, *supra* note 1392; Green, *supra* note 1392; *see also infra*, "Warrantless Wiretaps."

1394. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1247 n.7.

1395. Al-Haramain Islamic Found. v. Obama, 705 F.3d 845 (9th Cir. 2012); *see infra*, "Warrantless Wiretaps."

assigned to Judge Garr M. King.[1396] The 2007 action by Al-Haramain Oregon was assigned to Judge King as a related case.[1397]

To support a February 6, 2008, redesignation, the government provided Al-Haramain with additional unclassified supporting information and provided the court, ex parte and in camera, with additional classified supporting information.[1398]

On November 6, 2008, Judge King determined that the government violated Al-Haramain's due process rights by not giving it adequate notice of the reasons for its designation as a terrorist organization.[1399] Judge King determined, after additional briefing however, that this due process violation was harmless.[1400] The court of appeals, on September 23, 2011, affirmed both rulings.[1401]

The court of appeals determined that the government's seizure of Al-Haramain's assets without a warrant also violated due process and remanded the case to the district court for a determination of whether Al-Haramain was entitled to a remedy.[1402] On remand, Al-Haramain conceded that no remedy for the due process violation would be effective.[1403]

In addition, the court of appeals held that the Multicultural Association of Southern Oregon's First Amendment right to advocate on behalf of Al-Haramain's interests were unconstitutionally constrained by an executive order prohibiting the contribution of services for the benefit of organizations designated as terrorist organizations.[1404]

Seda's Conviction

Four weeks after Seda's return to the United States, Magistrate Judge Thomas M. Coffin agreed to release Seda pending trial, finding unpersuasive government ar-

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1396. Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006).

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on September 19, 2012.

1397. Interview with Hon. Garr M. King, Sept. 19, 2012.

1398. *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1246.

1399. *Id.* at 1253–57, 1272–73; *see* Ashbel S. Green, *Judge Won't Lift Charity's Terrorist Designation*, Oregonian, Nov. 8, 2008, at B1.

1400. Opinion at 18–19, Al-Haramain Islamic Found. v. U.S. Dep't of Treasury, No. 3:07-cv-1155 (D. Or. Nov. 5, 2009), available at 2009 WL 3756363.

1401. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 970, 979–90, 1001 (9th Cir. 2012), *amending* 660 F.3d 1019 (2011); *see Officials Improperly Seized Assets of Islamic Charity, Court Finds*, N.Y. Times, Sept. 24, 2011, at A13 [hereinafter *Officials Improperly Seized Assets*].

1402. *Al Haramain Islamic Found.*, 686 F.3d at 970, 990–95, 1001; *see Officials Improperly Seized Assets*, *supra* note 1401.

1403. Opinion at 13, *Al-Haramain Islamic Found.*, No. 3:07-cv-1155 (D. Or. Dec. 12, 2012).

1404. *Al Haramain Islamic Found.*, 686 F.3d at 970, 995–1001; *see* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); *see also* Mark Freeman, *Court Rules for Pro-Seda Group in Civil Rights Case*, Medford Mail Trib., Sept. 27, 2011.

guments that Seda posed a risk of dangerousness or flight.[1405] On the following day, Judge Hogan heard an appeal of Judge Coffin's decision.[1406] On November 30, Judge Hogan agreed that Seda could be released.[1407]

As the only magistrate judge in Eugene, Judge Coffin handles all pretrial detention matters there, and this was one of only a few release orders issued in his 20 years on the bench that the government appealed.[1408]

Seda was convicted on September 9, 2010.[1409] Following the conviction, the government disclosed that it had withheld from the defendant evidence that one of the government's witnesses was a paid informant.[1410] The government had intended to use her husband as a witness—he had a more extensive relationship with the government as an informant—but he died before trial.[1411] Judge Hogan determined that although the government had committed a discovery violation, the witness's testimony was more related to sentence, a matter for the court, than the jury's determination of guilt.[1412] On September 27, 2011, Judge Hogan sentenced Seda to two years and nine months in prison.[1413] An appeal was heard on December 3, 2012.[1414]

Seda reported to a low-security prison near Denver, Colorado, on February 29, 2012.[1415]

1405. Transcript, United States v. Sedaghaty, No. 6:05-cr-60008 (D. Or. Sept. 10, 2007, filed Sept. 11, 2007) (3:32 p.m. proceeding); *Sedaghaty* Docket Sheet, *supra* note 1384; *see* Bill Bishop, *Fraud Suspect Released Before Trial*, Eugene Reg.-Guard, Sept. 11, 2007, at C1.

Tim Reagan interviewed Judge Coffin for this report in the judge's chambers on September 20, 2012.

1406. Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 11, 2007, filed Oct. 22, 2007); *Sedaghaty* Docket Sheet, *supra* note 1384; *see* Bill Bishop, *In Reversal, Suspect Tied to Terror Group Ordered Held*, Eugene Reg.-Guard, Sept. 12, 2007, at A1.

1407. Release Order, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 30, 2007); *see* Bill Bishop, *Court Sets Founder of Islamic Charity Free*, Eugene Reg.-Guard, Dec. 1, 2007, at D41.

1408. Interview with Hon. Thomas M. Coffin, Sept. 20, 2012.

1409. Verdict, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2010); Transcript, *id.* (Sept. 9, 2010, filed Sept. 16, 2010); *see* Bryan Denson, *Evidence Withheld, Lawyers Say*, Oregonian, Jan. 13, 2011.

1410. *Sedaghaty* New Trial Denial, *supra* note 1390, at 14–22; *see* Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. June 7, 2011, filed June 23, 2011) (evidentiary hearing on a motion for a new trial); Transcript, *id.* (Mar. 1, 2011, filed Mar. 2, 2011) (oral argument on a motion for a new trial).

1411. *Sedaghaty* New Trial Denial, *supra* note 1390, at 15, 17–19 & n.3.

1412. *Id.* at 17, 20–22.

1413. Judgment, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 22, 2011); Transcript at 11–12, *id.* (Sept. 27, 2011, filed Oct. 5, 2011); *see* Mark Freeman, *Pete Seda Sentenced to Nearly Three Years*, Medford Mail Trib., Sept. 28, 2011.

1414. http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010164 (audio recording of oral argument); Docket Sheet, United States v. Sedaghaty, No. 11-30342 (9th Cir. Dec. 1, 2011) [hereinafter 9th Cir. *Sedaghaty* Docket Sheet].

1415. *See* Mark Freeman, *Seda Starts 33-Month Sentence Today*, Medford Mail Trib., Feb. 29, 2012; *see also* http://www.bop.gov (noting a release date of November 21, 2013, reg. no. 69971-065).

September 11 Damages

Various Al-Haramain organizations were among the defendants in actions to recover damages for the September 11, 2001, attacks from alleged supporters of the hijackers.[1416] On June 17, 2011, September 11 plaintiffs sought relief from the U.S. District Court for the Southern District of New York from Seda's failure to produce documents in response to a December 10, 2010, discovery request.[1417] On November 22, 2011, Magistrate Judge Frank Maas overruled Seda's objections that the discovery request infringed a Fifth Amendment privilege against self-incrimination, because the criminal trial was over, and Judge Maas overruled Seda's objections that the discovery request violated a protective order in the criminal case, because the protective order only covered information provided to Seda's attorneys that was not available to Seda from other sources.[1418] On January 11, 2012, District Judge George B. Daniels approved Judge Maas's ruling.[1419] On March 28, the court of appeals denied Seda's petition for mandamus relief from the discovery order.[1420]

Challenge: Classified Evidence

Judge King

For this litigation and for other criminal cases, Judge King's law clerks and court reporter have security clearances.[1421]

In response to Al-Haramain's legal challenge to its identification as a specially designated global terrorist, the government compiled an administrative record

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1416. Docket Sheet, World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); Docket Sheet, Cantor Fitzgerald & Co. v. Akida Bank Private Ltd., No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); Docket Sheet, Continental Cas. Co. v. Al Qaeda Islamic Army, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); Docket Sheet, O'Neill v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); Docket Sheet, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003); Docket Sheet, Barrera v. Al Qaeda Islamic Army, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, Fed. Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Complaint, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); Docket Sheet, York v. Al Qaeda Islamic Army, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, Salvo v. Al Qaeda Islamic Army, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); Docket Sheet, Adone v. Al-Baraka Inv. & Dev. Corp., No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002); Docket Sheet, Iwachiw v. Al-Baraka Inv. & Dev. Corp., No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, Tremsky v. Bin Laden, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); Docket Sheet, Mayore Estates, L.L.C. v. Al Qaeda Islamic Army, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002); Docket Sheet, Schneider v. Al Qaeda Islamic Army, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002); *see* Zaitz, *"Watch List," supra* note 1319; *infra*, "September 11 Damages."

1417. Motion, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 17, 2011).

1418. Order, *id.* (Nov. 22, 2011).

1419. Order, *id.* (Jan. 11, 2012), *available at* 2011 WL 104512.

1420. Order, *In re* Sedaghaty, No. 11-5371 (2d Cir. Mar. 28, 2012).

1421. Interview with Hon. Garr M. King, Sept. 19, 2012 (noting that the judge's judicial assistant has not sought or needed a security clearance).

and redesignated Al-Haramain.[1422] The government shared unclassified portions of its administrative case file with Al-Haramain.[1423] The government shared some classified portions of the case file with the court ex parte and in camera.[1424] The intelligence community allowed some information to be declassified so that it could be shared with Al-Haramain.[1425] The intelligence community did not permit the government to share some classified information with the court, and the government assured the court that it did not rely on this information for redesignation or include it in the administrative record.[1426]

The government refused counsel's request to obtain security clearances for access to classified portions of the record.[1427] Judge King determined, "The government's interest in keeping materials secret takes precedence over [Al-Haramain Oregon's] due process right to review the record against it. . . . It is not required by the Constitution to give [Al-Haramain Oregon] access to the classified record or to try to give the attorneys security clearances."[1428]

The court of appeals opined that the government should have tried harder to provide Al-Haramain with the substance of the classified evidence against it:

> To the extent that an unclassified summary could provide helpful information, such as the subject matter of the agency's concerns, and to the extent that it is feasible to permit a lawyer with security clearance to view the classified information, the value of those methods seems undeniable. . . .
>
> . . . [A]n unclassified summary, by definition, does not implicate national security because it is unclassified. Similarly, a lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance.[1429]

Judge Hogan

All members of Judge Hogan's chambers staff obtained security clearances to work on this case, and the classified information security officer delivered to Judge Hogan a safe for storing classified material and a laptop computer to use when preparing documents based on classified information.[1430] Some material in the case was designated for the judge's eyes only.[1431] Some sensitive compartmented information (SCI) was stored in the FBI's sensitive compartmented in-

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1422. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1246 (D. Or. 2008).

1423. *Id.*

1424. *Id.*

1425. *Id.*

1426. *Id.*

1427. *Id.* at 1259.

1428. *Id.* at 1260.

1429. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 982–83 (9th Cir. 2012).

1430. Transcript at 5–6, United States v. Sedaghaty, No. 6:05-cr-60008 (D. Or. Mar. 18, 2008, filed July 21, 2008) [hereinafter *Sedaghaty* Mar. 18, 2008, Transcript]; Transcript at 13, *id.* (Jan. 23, 2008, filed July 21, 2008); Interview with Hon. Michael R. Hogan, Sept. 20, 2012 (noting that the cleared court reporter sometimes works as needed in other districts).

1431. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

formation facility (SCIF) in Portland.[1432] Some SCI was also stored under the classified information security officer's control in Washington, D.C.[1433]

So that only one chambers had to deal with the security precautions required for classified materials, Judge Hogan handled discovery issues pertaining to classified information instead of Magistrate Judge Coffin.[1434] Judge Hogan had the defense submit ex parte a memorandum of their theory of the case to guide the judge's review of classified material for decisions on what needed to be disclosed to the defense in discovery.[1435]

While the case was in trial, the lock on Judge Hogan's safe broke.[1436] While the safe's door was being repaired, the classified information security officer arranged for classified papers to be stored in a safe in the marshal's office.[1437]

Seda was represented by the federal defender, who already had a secret security clearance, and a private attorney, who did not have a security clearance.[1438] Seda's attorneys argued that they needed security clearances in order to discuss with the court matters related to the top secret document mistakenly produced to Al-Haramain.[1439] The government's initial position was that defense counsel should not receive security clearances because the government did not intend to use classified evidence against Seda.[1440] The classified information security officer informed Judge Hogan that the federal defender's clearance could be upgraded if necessary and the clearance process could begin for the other attorney.[1441]

As part of Seda's defense, his attorneys sought discovery of potentially exculpatory classified information, including discovery related to the mistakenly produced top secret document.[1442] On advice of the government as to national security interests concerning the document, Judge Hogan ordered the attorneys not to discuss further, orally or in writing, the contents of the document, even with each other.[1443] The court of appeals denied Seda's petition for a writ of mandamus.[1444]

1432. *Id.*

1433. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

1434. *Sedaghaty* Mar. 18, 2008, Transcript, *supra* note 1430, at 8–9.

1435. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1436. Transcript at 259–60, United States v. Sedaghaty, No. 6:05-cr-60008 (D. Or. Apr. 31, 2008, filed Sept. 11, 2010).

1437. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Dec. 19, 2012.

1438. Transcript at 9, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 29, 2008, filed July 2, 2008) [hereinafter *Sedaghaty* Apr. 29, 2008, Transcript].

1439. *Sedaghaty* Apr. 29, 2008, Transcript, *supra* note 1438, at 7–8.

1440. *Id.* at 10–11.

1441. *Id.* at 14.

1442. Discovery Motion, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 17, 2008); *see* Brief, *id.* (Oct. 10, 2008) (renewing a motion for access to the top secret document); *see also Sedaghaty* Suppression Denial Order, *supra* note 1319, at 6–7 ("There is no reason to believe the activity on the part of the government regarding possible warrantless surveillance, to the extent such activity exists and was illegal, resulted in any information being used in the affidavit in support of the search warrant [for Seda's residence] or prompted the decision to seek the warrant.").

1443. Transcript at 4–13, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. July 15, 2008, filed June 30, 2008); Minute Order, *id.* (May 16, 2008).

On September 5, 2008, the government filed three public notices that it was providing the court with in camera, ex parte submissions pursuant to the Classified Information Procedures Act (CIPA).[1445] Four days later, Seda's attorneys filed a motion to establish a suitable procedure for them to present potentially classified information with the court.[1446] Judge Hogan allowed the attorneys to submit the intended filing to the classified information security officer for a classification review.[1447] The filing had to be prepared on a computer provided by the security officer.[1448]

In March 2009, Judge Hogan examined the government's classified submissions in Washington, D.C., when he was there for a celebration of the Eugene courthouse's winning a building award.[1449] Judge Hogan ruled that the defendant was not entitled to discovery of classified information, and Judge Hogan approved, pursuant to CIPA, unclassified summaries of classified information in the government's possession as providing the defendant with substantially the same ability to make his defense as would disclosure of the original classified information.[1450]

As trial approached, it was determined that the government should provide defense counsel with some classified information: "a classified summary in lieu of disclosure of original classified materials."[1451] Judge Hogan issued a protective order specifying how defense counsel would handle classified information.[1452]

Had Judge Hogan to do it over again, he would have made a greater effort to look at classified information earlier.[1453] Litigation over classified materials tends to slow down the case.[1454]

1444. Order, Sedaghaty v. United States District Court (United States), No. 09-73924 (9th Cir. May 12, 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 390 (2010).

1445. Notices, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 5, 2008); *see* 18 U.S.C. app. 3 (2011) (text of CIPA); Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (Federal Judicial Center, 2d ed. 2013).

1446. Filing Motion, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008).

1447. *Sedaghaty* Docket Sheet, *supra* note 1384 (noting a submission order on September 10, 2008).

1448. Transcript at 4–10, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Sept. 9, 2008, filed June 30, 2009) [hereinafter *Sedaghaty* Sept. 9, 2008, Transcript].

1449. *See* Transcript, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Feb. 26, 2009, filed Sept. 22, 2011); Transcript, *id.* (Jan. 6, 2009, filed Jan. 28, 2009); *Sedaghaty* Sept. 9, 2008, Transcript, *supra* note 1448, at 3.

1450. Orders, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Mar. 20, 2009); *see also* Order, *id.* (July 1, 2009), *available at* 2009 WL 1916712 (denying renewed motions for access to classified information).

1451. Order, *id.* (Feb. 26, 2010).

1452. Protective Order, *id.* (Mar. 19, 2010).

1453. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1454. *Id.*

Judge Lodge

It was necessary to establish secure space in the Boise courthouse to store and review classified material.[1455] This included establishment of a SCIF for storage.[1456] The Justice Department pays for required construction, but the court had to find space for the project, and court staff had to devote some of their time to coordination of the effort.[1457] Judges can often review classified material in chambers; the court also had to find space for defense counsel to review protected material.[1458]

Challenge: Classified Arguments

In the terrorist designation challenge, the government submitted to Judge King, ex parte and in camera, classified versions of documents supporting its summary judgment motion, and the government filed public notices of lodging to that effect.[1459]

The court of appeals reviewed the classified record.[1460] The appeal was heard by Judges Dorothy W. Nelson, who has chambers in Pasadena, California; Sidney R. Thomas, who has chambers in Billings, Montana; and Susan P. Graber, who has chambers in Portland, Oregon.[1461] Classified information in this case included information designated SCI, which cannot be stored in an ordinary safe but must be stored in a SCIF.[1462]

There is no SCIF in Billings, so the classified information security officer flew SCI materials to Judge Thomas for his review and flew them out the same day.[1463] In Portland, the U.S. Attorney has a SCIF, in which classified information security officers have their own safes, under their exclusive control, for storing SCI while Judge Graber was not reviewing it.[1464] There is no SCIF in Pasadena, but the district court in downtown Los Angeles has one that can be used to store SCI for Pasadena judges.[1465]

Challenge: Closed Proceedings

Seda's prosecution included several closed proceedings from which Seda was excluded.[1466] Seda was not cleared for access to classified information and could not

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1455. Interview with Hon. Edward J. Lodge, Oct. 17, 2012; *see* Reagan, *supra* note 1445, at 22–23 (describing SCIFs).

1456. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1457. *Id.*

1458. *Id.*

1459. Notice, Al-Haramain Islamic Found. v. U.S. Dep't of Treasury, No. 3:07-cv-1155 (D. Or. June 12, 2008); Notice, *id.* (Feb. 7, 2008).

1460. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 979 (9th Cir. 2012).

1461. *Id.*, 686 F.3d 965; Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

1462. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

1463. *Id.*

1464. *Id.*

1465. *Id.*

1466. *Sedaghaty* New Trial Denial, *supra* note 1390, at 13.

be present during discussions of procedural matters at which classified information might be discussed.[1467]

One procedure Judge Hogan used for conducting a hearing partially in open court and partially in closed session was to retire to a jury room for the closed session at which classified information was discussed.[1468] During trial, Judge Hogan used a jury room on another floor.[1469] The classified information security officer ensured that the room was safe for these purposes.[1470]

Seda's appeal was heard on December 3, 2012.[1471] Following an open session, the court met in consecutive closed sessions to hear the parties' classified arguments: one session including both sides, an ex parte session with the prosecution, and an ex parte session with other government attorneys, and not the prosecution, on whether the prosecution had access to classified information that the defense had submitted to the court.[1472]

Challenge: Classified Orders and Opinions

On occasion, Judge Lodge asked the classified information security officer to review his orders and opinions to make sure he had not inadvertently included classified information.[1473]

Challenge: Examination of Foreign Witnesses

Seda sought testimony from the Egyptian donor el-Fiki.[1474] He asked the court to either (1) compel the government to obtain el-Fiki's trial or deposition testimony pursuant to a Mutual Legal Assistance Treaty, signed in 1998 and effective since 2001, or (2) obtain the testimony by letter rogatory to the Egyptian courts.[1475] Judge Hogan denied the request.[1476] He determined that it would be improper for the court to impose on the Executive Branch's treaty relationship.[1477] He declined

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1467. *Id.* ("Precluding defendant, who does not have a security clearance, from these conferences was necessary and did not violate his rights to be present and to a public trial.").

1468. Transcript at 27, 39–40, United States v. Sedaghaty, No. 6:05-cr-60008 (D. Or. Apr. 1, 2010, filed Apr. 1, 2010).

1469. Transcript at 95, *id.* (Sept. 3, 2010, filed Sept. 11, 2010); Transcript at 277, *id.* (Sept. 2, 2010, filed Sept. 11, 2010).

1470. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1471. 9th Cir. *Sedaghaty* Docket Sheet, *supra* note 1414.

1472. Order, United States v. Sedaghaty, No. 11-30342 (9th Cir. Nov. 28, 2012); *see* Appellee Brief at 135, *id.* (Aug. 3, 2012) (noting that the defendant's "concern that the prosecution accessed the sealed document the defense had placed in a sensitive compartmented information facility" was addressed at a classified ex parte second supplemental brief stating that "the prosecution did not access the sealed document").

1473. Interview with Hon. Edward J. Lodge, Oct. 17, 2012.

1474. Opinion at 3, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Jan. 26, 2010) [hereinafter MLAT and Letter Rogatory Opinion]; Transcript, *id.* (Jan. 19, 2010, filed Feb. 8, 2010).

1475. MLAT and Letter Rogatory Opinion, *supra* note 1474, at 1–4.

1476. *Id.* at 9–10, 12.

1477. *Id.* at 5–10.

to issue a letter rogatory because el-Fiki's testimony concerning his charitable intentions would not negate a false tax return.[1478]

Judge Hogan did, however, issue a letter rogatory to the courts of Saudi Arabia for testimony by Sami 'Abd al-'Aziz al-Sanad.[1479]

The government issued a subpoena to the Saudi Arabian bank at which al-Buthe cashed the travelers checks and cashier's check at issue in the claim for a false tax return.[1480] The bank moved to quash the subpoena in the U.S. District Court for the District of the District of Columbia, and that court granted the government a stay pending resolution of the subpoena issued by Judge Hogan.[1481] Judge Hogan overruled the bank's objection that the subpoena asked the bank to violate Saudi Arabian privacy laws, holding that the government was free to pursue U.S. sanctions against the bank for failure to comply.[1482] Compliance with the subpoena was worked out while the issue was on appeal.[1483]

Judge Hogan took long-distance video testimony for Seda's sentencing hearing from a colonel in Russia's Federal Security Service.[1484] The witness accommodated time-zone issues by testifying at 1:00 in the morning, his time.[1485]

Challenge: FISA Evidence

In al-Kidd's civil action challenging his detention as a material witness, the government notified the court and the plaintiff that it intended to offer evidence in the case derived from warrants issued by the Foreign Intelligence Surveillance Court.[1486]

The government disclosed to al-Kidd all information obtained pursuant to the Foreign Intelligence Surveillance Act (FISA) in an investigation of al-Hussayen that referred to, mentioned, related to, or involved al-Kidd.[1487] Magistrate Judge Williams reviewed other FISA information on al-Hussayen and determined that it was properly obtained.[1488] Moreover, Judge Williams determined that as to al-Kidd the information was privileged.[1489]

1478. *Id.* at 10–12.

1479. Letter Rogatory, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Apr. 16, 2010).

1480. Saudi Arabian Bank Subpoena Opinion at 1–3, *id.* (Feb. 26, 2010); Transcript, *id.* (Feb. 16, 2010, filed Feb. 17, 2010).

1481. Docket Sheet, *In re* Administrative Subpoena to Al-Rajhi Banking & Inv. Corp., No. 1:10-mc-55 (D.D.C. Jan. 19, 2010) (noting the granting of a stay on February 9, 2010).

1482. Saudi Arabian Bank Subpoena Opinion, *supra* note 1480, at 19.

1483. Order, United States v. Sedaghaty, No. 10-30061 (9th Cir. July 12, 2010) (dismissing the appeal as moot); *see* Order, *In re Administrative Subpoena*, No. 1:10-mc-55 (D.D.C. Mar. 2, 2010) (dismissing the motion to quash as moot).

1484. Transcript at 17–94, *Sedaghaty*, No. 6:05-cr-60008 (D. Or. Nov. 23, 2010, filed Nov. 29, 2010).

1485. Interview with Hon. Michael R. Hogan, Sept. 20, 2012.

1486. Notice, Al-Kidd v. Gonzales, No. 1:05-cv-93 (D. Idaho Sept. 13, 2007).

1487. Opinion at 4, *id.* (Dec. 4, 2008), *available at* 2008 WL 5123009.

1488. *Id.* at 10.

1489. *Id.* at 12; *see id.* at 4 (noting the government's assertion of the state-secrets privilege, the law enforcement privilege, and the official files privilege).

Judge Williams's review of the FISA materials was delayed by several months, because an appropriate review facility had to be constructed at the courthouse.[1490] The FISA documents were produced to a classified information security officer on January 14, 2008, but a review facility was not established until July 31.[1491]

1490. *Id.* at 2.
1491. *Id.*

Prosecution of a Charity

United States v. Holy Land Foundation
(A. Joe Fish and Jorge A. Solis, N.D. Tex.)

On July 27, 2004, the government indicted the Holy Land Foundation for Relief and Development, once the largest Islamic charity in the United States, and seven of its leaders, for providing funds to Hamas.[1492] The U.S. District Court for the Northern District of Texas assigned the case to Judge A. Joe Fish.[1493]

The Occupied Land Fund was established in the late 1980s by Shukri Abu Baker and Ghassan Elashi; in 1991, the fund reorganized as the Holy Land Foundation.[1494] The foundation was an offshoot of the Islamic Association for Palestine, an information group.[1495] Both groups were headquartered in Richardson, Texas, approximately 15 miles north of Dallas.[1496] The FBI had been investigating the foundation's ties to Hamas since shortly after its reorganization.[1497]

The foundation and its principals had already been parties in other cases. Parents of David Boim, a 17-year-old boy killed in a 1996 terrorist attack in Israel, filed a federal civil action in Chicago in 2000 against the Holy Land Foundation and other defendants, alleging that the defendants provided financial support to Hamas, whom the parents alleged killed their son.[1498]

1492. United States v. El-Mezain, 664 F.3d 467, 483, 485, 573 (5th Cir. 2011); Indictment, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. July 26, 2004); *see* James Brooke & Elaine Sciolino, *U.S. Muslims Say Their Aid Pays for Charity, Not Terror*, N.Y. Times, Aug. 16, 1995, at 1; Eric Lichtblau, *Arrests Tie Charity Group to Palestinian Terrorists*, N.Y. Times, July 28, 2004, at A10; Michelle Mittelstadt, Matt Stiles & Frank Trejo, *Muslim Charity, Leaders Indicted U.S. Says*, Dallas Morning News, July 28, 2004, at 1A.

1493. Docket Sheet, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004) [hereinafter N.D. Tex. *Holy Land Found.* Docket Sheet].

Tim Reagan interviewed Judge Fish for this report in the judge's chambers on October 6, 2009.

1494. *El-Mezain*, 664 F.3d at 486; Holy Land Found. v. Ashcroft, 333 F.3d 156, 160 (D.C. Cir. 2003); Holy Land Found. v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); Representation Order at 18, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 24, 2010); *see* Brooke & Sciolino, *supra* note 1492; Steve McGonigle, *Tie to Hamas Leader Minimized*, Dallas Morning News, Dec. 16, 2001, at 35A; Gayle Reaves & Steve McGonigle, *Paper Trail Leads to Hamas*, Dallas Morning News, Apr. 8, 1996, at 1A.

1495. *El-Mezain*, 664 F.3d at 486; *see* Brooke & Sciolino, *supra* note 1492; Reaves & McGonigle, *supra* note 1494.

1496. *El-Mezain*, 664 F.3d at 485; *see* Brooke & Sciolino, *supra* note 1492; Reaves & McGonigle, *supra* note 1494.

1497. *See* Todd J. Gillman, *FBI Looks Into Islamic Fund Raising*, Dallas Morning News, Nov. 18, 1994, at 29A; Steve McGonigle, *Charity Inquiry Dated to 1989*, Dallas Morning News, Dec. 20, 2002, at 33A; Jason Trahan, *Stakes High in Holy Land Trial*, Dallas Morning News, July 16, 2007, at 1A; Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, Wash. Post, Oct. 23, 2007, at A3.

1498. Complaint, Boim v. Quranic Literacy Inst., No. 1:00-cv-2905 (N.D. Ill. May 12, 2000); *see* Boim v. Holy Land Found., 549 F.3d 685, 687 (7th Cir. 2008); Boim v. Quranic Literacy Inst., 349 F. Supp. 2d 1097 (N.D. Ill. 2004) (resolving motions in limine); Boim v. Quranic Literacy

On November 29, 2004, the district court granted the plaintiffs summary judgment on liability against some of the defendants, including the foundation.[1499] The jury returned a damages verdict of $52 million,[1500] which the court statutorily trebled to $156 million.[1501] On December 3, 2008, however, the court of appeals, en banc, reversed the district court's summary judgment against the foundation, because the district court had improperly given preclusive effect to another district court's affirming a seizure of the foundation's assets.[1502] The district court again granted the plaintiffs summary judgment against the foundation on August 31, 2012, finding that the foundation "knew about the character of Hamas and that it provided material support to Hamas during the relevant time period."[1503] Judge Keys reinstated the $156 million damages award.[1504]

In December 2001, the Treasury Department's Office of Foreign Asset Control designated the foundation a terrorist organization and froze its assets.[1505] On March 11, 2002, the foundation challenged the designation and the freezing in the U.S. District Court for the District of the District of Columbia.[1506] On June 20, 2003, the court of appeals affirmed a judgment in the government's favor.[1507]

Inst., 340 F. Supp. 2d 885 (N.D. Ill. 2004) (resolving motions for summary judgment); Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying motions to dismiss), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *see also* Steve McGonigle, *Suit Accuses Islamic Groups of Aiding in Terrorist Attack*, Dallas Morning News, May 13, 2000, at 29A; Matt O'Connor, *Parents of Boy Slain in Israel File Suit*, Chi. Trib., May 15, 2000, Metro Chicago, at 1.

1499. *Boim*, 549 F.3d at 688; *Boim*, 340 F. Supp. 2d 885; *see* Laurie Cohen, *3 Islamic Fundraisers Held Liable in Terror Death*, Chi. Trib., Nov. 11, 2004, Metro Chicago, at 1; Steve McGonigle, *Former Richardson Charities Tied to Hamas, Judge Rules*, Dallas Morning News, Nov. 11, 2004, at 14A.

1500. *Boim*, 549 F.3d at 688; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004).

1501. *Boim*, 549 F.3d at 688; Amended Judgment, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Feb. 25, 2005); *see* 18 U.S.C. § 2333(a) (2011); *see also* Matt O'Connor, *$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

1502. *Boim*, 549 F.3d at 691, *cert. denied*, 558 U.S. 981 (2009).

1503. Opinion at 27, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Aug. 31, 2012).

1504. Minutes, *id.* (Oct. 12, 2012).

1505. United States v. El-Mezain, 664 F.3d 467, 488 (5th Cir. 2011); Holy Land Found. v. Ashcroft, 333 F.3d 156, 159–60 (D.C. Cir. 2003); Holy Land Found. v. Ashcroft, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002); Representation Order, *supra* note 1494, at 18; *see* United States v. Holy Land Found., 493 F.3d 469, 471 n.3 (5th Cir. 2007); Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. Times, Oct. 23, 2007, at A1; David Jackson, *Holy Land Charity Shut Down*, Dallas Morning News, Dec. 5, 2001, at 1A; Whoriskey, *supra* note 1497.

Hamas, a word that means "zeal" in Arabic, is an acronym for "Harakat al-Muqawama al-Islamiyya," which means "The Islamic Resistance Movement." *Holy Land Found.*, 493 F.3d at 471 n.1; *see El-Mezain*, 664 F.3d at 485; *see also* Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Reaves & McGonigle, *supra* note 1494. The government declared Hamas a terrorist organization on January 23, 1995. *El-Mezain*, 664 F.3d at 483, 487; *Holy Land Found.*, 333 F.3d at 159; *Holy Land Found.*, 219 F. Supp. 2d at 64 n.2.

1506. Docket Sheet, Holy Land Found. v. Ashcroft, No. 1:02-cv-442 (D.D.C. Mar. 8, 2002); *see Holy Land Found.*, 219 F. Supp. 2d at 64.

1507. *Holy Land Found.*, 333 F.3d 156; *see Holy Land Found.*, 219 F. Supp. 2d 57; *see also* Michelle Mittelstadt, *Ruling Keeps Charity's Assets Frozen*, Dallas Morning News, June 21, 2003, at 1A.

The foundations's codefendants in the Northern District of Texas prosecution were CEO Abu Baker; chairman Elashi; Mohammed El-Mezain, director of endowments; Mufid Abdulqader, a top fundraiser; Abdulrahman Odeh, the foundation's New Jersey representative; Haitham Maghawri; and Akram Mishal.[1508] Maghawi and Mishal were living abroad and considered fugitives.[1509]

On December 17, 2002, the government indicted Elashi in a separate case against his family's computer company, Infocom, alleging that the Elashis and their company (1) violated export regulations in their export of goods to Libya and Syria and (2) funneled money to Hamas through a cousin's husband, Mousa Abu Marzook, who was once the head of Hamas's political branch.[1510] Ghassan Elashi's indictment was included in a superseding indictment in a case against the computer company and Ghassan's brothers Bayan and Basman Elashi and Ihsan Elashyi, which was filed on February 20, 2002.[1511] Also included in the superseding indictment were a fifth brother, Hazim Elashi; the men's cousin, Nadia Elashi; and her husband Abu Marzook.[1512] The court assigned the case to Judge Sam A. Lindsay.[1513]

On July 7, 2004, a jury found the brothers and their company guilty of export improprieties.[1514] On April 13, 2005, a separate jury found Ghassan, Bayan, and Basman Elashi and their company guilty of funneling funds to terrorists.[1515] Judge Lindsay sentenced Ghassan Elashi to a term of six years and eight months on October 16, 2006.[1516] The other brothers' sentences ranged from five to seven years.[1517] Nadia Elashi and Abu Marzook were fugitives.[1518] Ghassan's brothers were released from prison in 2008 and 2009.[1519]

1508. *El-Mezain*, 664 F.3d at 485–86; Indictment, *supra* note 1492; *see* Mittelstadt *et al.*, *supra* note 1492; Trahan, *supra* note 1497.

1509. *See* Mittelstadt *et al.*, *supra* note 1492; Trahan, *supra* note 1497.

1510. United States v. Elashyi, 554 F.3d 480, 489–91 & n.2 (5th Cir. 2008); United States v. Elashi, 440 F. Supp. 2d 536, 541–43 (N.D. Tex. 2007); Docket Sheet, United States v. Elashi, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002) [hereinafter N.D. Tex. *Elashi* Docket Sheet]; *see El-Mezain*, 664 F.3d at 486; *see also* Eric Lichtblau & Judith Miller, *5 Brothers Charged with Aiding Hamas*, N.Y. Times, Dec. 19, 2002, at A19; Cam Simpson, *Tech Company Execs, Chief in Hamas Indicted by U.S.*, Chi. Trib., Dec. 19, 2002, News, at 14.

1511. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510.

1512. *Id.*; *see El-Mezain*, 664 F.3d at 488 & n.3.

1513. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510.

1514. *Id.*

1515. *Elashi*, 440 F. Supp. 2d at 544; N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510; *see* Roy Appleton & Matt Stiles, Dallas Morning News, *3 Guilty of Terror Dealings*, Apr. 14, 2005, at 1B.

1516. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510; *see* Michael Grabell, *Holy Land Founder Gets 6 Years*, Dallas Morning News, Oct. 13, 2006, at 5B.

1517. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510 (noting Bayan's sentence of seven years and Basman's sentence of six years and eight months on October 16, 2006, Hazim's sentence of five years on February 1, 2006, and Ihsan's sentence of six years on January 27, 2006); *see* Michael Grabel, *Richardson Man Gets 7 Years in '04 Export Case*, Dallas Morning News, Oct. 12, 2006, at 11B; Tim Wyatt, *2 Sentenced for InfoCom Exports*, Dallas Morning News, Jan. 26, 2006, at 9B.

Jury selection in the Holy Land Foundation trial began on July 16, 2007.[1520] Judge Fish used a jury questionnaire.[1521]

During the first few days of jury selection, Judge Fish conducted proceedings to establish waivers of conflict relating to defense attorneys' representing both the Holy Land Foundation and Abu Baker, its CEO.[1522] Elashi had signed a waiver of conflict on behalf of the foundation, but his attorney announced during these proceedings that he may not have had the authority to speak for the foundation.[1523] The foundation's attorney said that she did not think there existed anyone who could speak for the foundation, so Judge Fish granted her firm's request to withdraw from representation of the foundation, and trial proceeded without the foundation's having counsel.[1524]

On September 19, the jury began to deliberate.[1525] Jurors deliberated on 197 counts for 19 days.[1526] On Thursday, October 18, the jury announced a partial verdict, but Judge Fish was at a judges' conference out of town.[1527] So the verdict

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1518. N.D. Tex. *Elashi* Docket Sheet, *supra* note 1510; *see* Appleton & Stiles, *supra* note 1515.

1519. http://www.bop.gov (noting release dates of April 14, 2008, for Hazim, reg. no. 29685-177; October 8, 2008, for Basman, reg. no. 29686-177; January 22, 2009, for Bayan, reg. no. 29688-177; and January 30, 2009, for Ihsan, reg. no. 28265-177).

1520. Representation Order, *supra* note 1494, at 4; *see* Neil MacFarquhar, *As Muslim Group Goes on Trial, Other Charities Watch Warily*, N.Y. Times, July 17, 2007, at A14; Trahan, *supra* note 1497.

In advance of jury selection, Judge Fish granted the defendants' motion for information on how the grand and petit jury were constituted so that the defendants could assess whether there was a structural or statistical bias against Arabs or Muslims. Opinion, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), *available at* 2007 WL 1452489.

1521. A. Joe Fish, United States v. Holy Land Foundation: Jury Questionnaire (July 16, 2007).

1522. United States v. El-Mezain, 664 F.3d 467, 574 (5th Cir. 2011); Representation Order, *supra* note 1494, at 4–5; Transcript at 1013–16, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 20, 2007, filed Sept. 25, 2008); Transcript at 821–23 *id.* (July 18, 2007, filed Sept. 25, 2008) [hereinafter N.D. Tex. *Holy Land Found.* July 18, 2007, Transcript]; Transcript at 523–26, *id.* (July 17, 2007, filed Sept. 25, 2008) [hereinafter N.D. Tex. *Holy Land Found.* July 20, 2007, Transcript]; Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1523. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1494, at 4–5; N.D. Tex. *Holy Land Found.* July 18, 2007, Transcript, *supra* note 1522, at 822.

1524. *El-Mezain*, 664 F.3d at 574; Representation Order, *supra* note 1494, at 5, 13; N.D. Tex. *Holy Land Found.* July 20, 2007, Transcript, *supra* note 1522, at 1013–16; Interview with Hon. A. Joe Fish, Oct. 6, 2009; *see* Jason Trahan, *Lawyers Debate Holy Land Foundation's Right to Attorney for Appeal*, Dallas Morning News, Jan. 13, 2010, at B7.

1525. *See* Jason Trahan, *Jury in Complex Holy Land Case Begins Deliberations*, Dallas Morning News, Sept. 20, 2007, at 11B; *see also* A. Joe Fish, United States v. Holy Land Foundation: Jury Instructions (Sept. 19, 2007).

1526. *El-Mezain*, 664 F.3d at 559; *see* Leslie Eaton, *Reading of Verdict in Terror Case Is Delayed*, N.Y. Times, Oct. 19, 2007, at A18; Jason Trahan, *Holy Land Verdict Sealed*, Dallas Morning News, Oct. 19, 2007, at 1A.

1527. Interview with Hon. A. Joe Fish, Oct. 6, 2009 (reporting that Judge Fish was at an annual conference for judges handling multidistrict consolidations); *see* Eaton, *supra* note 1526; Trahan, *supra* note 1526.

was presented to Magistrate Judge Paul D. Stickney, who kept it sealed until Judge Fish's return.[1528]

On Monday, Judge Fish unsealed the verdict.[1529] According to the verdict, one defendant was acquitted, but the jury was deadlocked on some charges for each of the other defendants.[1530] When the judge polled the jury, three jurors said that the verdict did not represent their views, so Judge Fish ordered the jury to resume deliberations.[1531] After additional deliberation, the jury returned that day deadlocked on counts against all defendants, so Judge Fish declared a mistrial.[1532] Mohammed el-Mezain, the foundation's former chairman, was acquitted of all but one charge.[1533] The jury was deadlocked on counts against all of the other defendants.[1534]

On November 12, 2007, Judge Fish assumed senior status and took himself out of the draw for criminal cases, so Judge Jorge A. Solis assumed responsibilities for the retrial.[1535] Judge Solis also used a jury questionnaire.[1536]

Opening arguments in the retrial began on September 22, 2008.[1537] On November 24, after eight days of deliberation, the jury found all defendants guilty on all 108 counts included in the retrial.[1538] Judge Solis sentenced Elashi to 65 years in prison, a sentence to be served consecutive to the sentence in his computer-

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1528. Interview with Hon. A. Joe Fish, Oct. 6, 2009; *see* Eaton, *supra* note 1526; Trahan, *supra* note 1526.

Because they knew that Judge Fish would be out of town, several of the government's attorneys in the case were also away. *See* Trahan, *supra* note 1526.

1529. Interview with Hon. A. Joe Fish, Oct. 6, 2009; *see* Eaton, *supra* note 1505; Jason Trahan, *"There Was Not Enough Evidence,"* Dallas Morning News, Oct. 23, 2007, at 1A; Whoriskey, *supra* note 1497.

1530. *El-Mezain*, 664 F.3d at 559.

1531. *Id.* at 559–60; *see* Eaton, *supra* note 1505.

1532. *El-Mezain*, 664 F.3d at 485, 560; *see* Eaton, *supra* note 1505; Trahan, *supra* note 1529; Whoriskey, *supra* note 1497.

1533. *El-Mezain*, 664 F.3d at 560; Jury Verdicts, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. Oct. 22, 2007); *see* Eaton, *supra* note 1505; Trahan, *supra* note 1529.

1534. *El-Mezain*, 664 F.3d at 560; *see* Eaton, *supra* note 1505; Trahan, *supra* note 1529.

1535. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; Interview with Hon. A. Joe Fish, Oct. 6, 2009; *see* Jason Trahan, *For Holy Land Judge, a Change*, Dallas Morning News, Nov. 13, 2007, at 1B; Jason Trahan, *Senate Attorney Named U.S. Judge*, Dallas Morning News, Nov. 26, 2007, at 1B.

Tim Reagan interviewed Judge Solis for this report in the judge's chambers on October 6, 2009.

1536. Jorge A. Solis, United States v. Holy Land Foundation: Jury Questionnaire (Sept. 4, 2008).

1537. *See* Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, Wash. Post, Sept. 21, 2008, at A2.

1538. *El-Mezain*, 664 F.3d at 483, 485, 490, 574; *see* Tanya Eiserer & Jason Trahan, *5 Ex-Leaders Guilty in Holy Land Trial*, Dallas Morning News, Nov. 25, 2008, at 1A; Gretel C. Kovach, *U.S. Wins Convictions in Retrial of Terrorism-Financing Case*, N.Y. Times, Nov. 25, 2008, at A16; *see also* Jorge A. Solis, United States v. Holy Land Foundation: Supplemental Jury Instructions (Nov. 24, 2008); Jorge A. Solis, United States v. Holy Land Foundation: Jury Instructions (Nov. 10, 2008).

company prosecution.[1539] Abu Baker was also sentenced to 65 years; Abdulqader was sentence to 20 years; el-Mezain and Odeh were each sentenced to 15 years.[1540] The court of appeals affirmed.[1541]

On July 1, 2009, Judge Solis resolved a third-party matter of judicial confidentiality.[1542] In preparation for the first trial, the government filed a trial brief on May 29, 2007.[1543] As an attachment, to lay the foundation for possible admissible hearsay during trial, the government included a list of 246 individuals and organizations headed "Unindicted Co-conspirators and/or Joint Venturers."[1544] Three organizations on the list asked the court to remove from the public record all references to them.[1545] Judge Solis agreed to seal the trial brief attachment, but declined to excise other references to the organizations in the trial record.[1546] Judge Solis sealed his order and all documents pertaining to the organizations' requests for relief.[1547] Not only were the documents sealed, but their docket entries were also omitted from the public docket sheet. One organization appealed the sealing of the order, and, on October 20, 2010, the court of appeals ordered the order unsealed.[1548] Docket entries for the other sealed documents then became public, showing only the filing dates of sealed documents.[1549] No one challenged the sealing of the trial brief attachment, and it remains sealed.[1550] In May 2011, however, Judge Solis granted a motion by two of the listed organizations to unseal their filings so that they could provide them to a congressional investigation.[1551]

1539. Judgment, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. May 29, 2009); *El-Mezain*, 664 F.3d at 490; *see* http://www.bop.gov (noting a release date of October 28, 2069, reg. no. 29687-177); *see also* Jason Trahan, *5 Decry Jail Terms in Holy Land Case*, Dallas Morning News, May 28, 2009, at 1A.

1540. *El-Mezain*, 664 F.3d at 490; Judgment, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009) (Baker's sentence); Judgments, *id.* (May 28, 2009) (Abdulqader, El-Mezain, and Odeh's sentences); *see* http://www.bop.gov (noting release dates of June 29, 2065, for Abu Baker, reg. no. 32589-177; April 29, 2026, for Abdulqader, reg. no. 32590-177; December 27, 2021, for el-Mezain, reg. no. 92412-198; and December 4, 2021, for Odeh, reg. no. 26548-050); *see also* Trahan, *supra* note 1539.

1541. *El-Mezain*, 664 F.3d at 484, 579, *cert. denied*, ___ U.S. ___, 133 S. Ct. 525 (petition for el-Mezain), *and* ___ U.S. ___, 133 S. Ct. 525 (2012) (petition for Elashi, Abu Baker, Abdulqader, and Odeh); *see* Jason Trahan, *Holy Land Verdicts Upheld*, Dallas Morning News, Dec. 8, 2011, at B3.

1542. Sealing Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 1, 2009); *see* United States v. Holy Land Found., 624 F.3d 685, 689 (5th Cir. 2010).

1543. Trial Brief, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 29, 2007); *see Holy Land Found.*, 624 F.3d at 688.

1544. *Holy Land Found.*, 624 F.3d at 688.

1545. *Id.* at 688–89 & n.1; Trial Brief, *supra* note 1543, at 1–2.

1546. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1542.

1547. *Holy Land Found.*, 624 F.3d at 689; Sealing Opinion, *supra* note 1542, at 20.

1548. *Holy Land Found.*, 624 F.3d 685; *see* Jason Trahan, *Judge's Ruling: Release of List Violated Group's Rights*, Dallas Morning News, Nov. 7, 2010, at B1.

1549. N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1493.

1550. *Holy Land Found.*, 624 F.3d at 689 n.3; N.D. Tex. *Holy Land Found.* Docket Sheet, *supra* note 1493.

1551. Order, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. May 2, 2011).

On September 24, 2009, the court of appeals remanded the case back to Judge Solis for findings on the prosecution of the foundation without representation.[1552] Because the docket sheet showed the foundation to still be represented by its original attorneys, Judge Solis did not know that the foundation was not represented at trial until sentencing.[1553] On May 24, 2010, Judge Solis appointed a University of Texas law professor to represent the foundation pro bono and ruled that the foundation had been effectively represented de facto during the trials.[1554] The court of appeals determined that because no one could speak for the foundation, no one could authorize an appeal.[1555]

Challenge: Classified Evidence

Some of the government's evidence concerning the defendants was classified.[1556] This included information obtained under the Foreign Intelligence Surveillance Act (FISA) and information provided by the government of Israel.[1557]

Judge Fish's law clerks received security clearances.[1558] Judge Fish could store classified documents in chambers safes.[1559] All defense counsel also received security clearances,[1560] but they were not allowed to reveal classified in-

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1552. Order, United States v. El-Mezain, No. 09-10560 (5th Cir. Sept. 24, 2009); *see* United States v. El-Mezain, 664 F.3d 467, 575 (5th Cir. 2011).

1553. Representation Order, *supra* note 1494, at 12; Interview with Hon. Jorge A. Solis, Oct. 6, 2009; *see El-Mezain*, 664 F.3d at 575.

1554. Representation Order, *supra* note 1494, at 14–19; *see* Trahan, *supra* note 1524.

1555. *El-Mezain*, 664 F.3d at 576–78; *see id.* at 578 ("Our foregoing analysis regarding a district court's authority to authorize a notice of appeal is expressly confined to the facts of this case.").

The Holy Land Foundation appealed the decision that it had been represented de facto at trial. Docket Sheet, United States v. Holy Land Found., No. 10-10590 (5th Cir. June 15, 2009); *see also* Docket Sheet, United States v. Holy Land Found., No. 10-10661 (5th Cir. June 29, 2010) (third-party appeal). The government appealed Judge Solis's appointment of an attorney to represent the Holy Land Foundation. Docket Sheet, United States v. Holy Land Found., No. 10-10690 (5th Cir. July 13, 2010). The attorney whom Judge Fish had permitted to withdraw from representing the Holy Land Foundation appealed Judge Solis's characterization of her as being less than candid with the court about whether the Holy Land Foundation was represented at the second trial. Docket Sheet, United States v. Abu Baker, No. 10-10586 (5th Cir. June 15, 2009).

Pending resolution of a government appeal, *see* Docket Sheet, United States v. Holy Land Found., No. 11-10535 (5th Cir. June 6, 2011), is a petition to recover foundation assets in satisfaction of a judgment against Hamas for a September 4, 1997, suicide bombing in Jerusalem. Stay Order, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Aug. 19, 2011); Amended Memorandum Opinion and Order, *id.* (Aug. 19, 2011); *see* Memorandum Opinion, Rubin v. Hamas, No. 1:02-cv-975 (D.D.C. Sept. 27, 2004), *available at* 2004 WL 2216489.

1556. Opinion at 4, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Nov. 2, 2006) [hereinafter Nov. 2, 2006, Opinion]; *see also id.* at 13 ("the defendants have thousands of pages of classified documents that they need to translate and digest in order to prepare for trial").

1557. Nov. 2, 2006, Opinion, *supra* note 1556, at 3.

1558. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1559. *Id.*

1560. *El-Mezain*, 664 F.3d at 518; Opinion at 5–6, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Dec. 8, 2006) [hereinafter Dec. 8, 2006, Opinion]; Nov. 2, 2006, Opinion, *supra* note 1556,

formation to the defendants.[1561] Judge Fish had to find space in the courthouse that could be fitted as a room for defense attorneys to store and review classified documents.[1562] A separate safe was established for each defendant.[1563]

Judge Solis's staff also received security clearances, including a career law clerk, his courtroom deputy, and his court reporter.[1564] Judge Solis also kept classified documents in a chambers safe.[1565]

Challenge: FISA Evidence

Evidence against the defendants was based in part on surveillance authorized by the FISA court.[1566]

In April 2005, the government mistakenly disclosed to cleared defense counsel the contents of FISA warrant applications.[1567] This is not the usual procedure for affording a defendant an opportunity to challenge evidence based on FISA warrants.[1568] The usual procedure is for the government to present the FISA warrant records to the district judge ex parte.[1569] In fact, Judge Fish spent several days conducting an in camera review of FISA warrants leading to evidence the government sought to use in the case.[1570] The court of appeals also reviewed the FISA warrants in camera and ex parte.[1571]

Judge Fish was at a conference in another city when he received, in the lobby of his hotel, an emergency motion from the FBI stating that FISA applications had been inadvertently disclosed to defense attorneys.[1572] The FBI asked the judge for relief because the attorneys refused to return them.[1573] Judge Fish issued an order

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at 17; *see* Steve McGonigle, *Attorney: Terror Case Not Derailed*, Dallas Morning News, Feb. 17, 2006, at 1B.

Some classified information reviewed by the court was classified above defense counsels' security clearance level. *El-Mezain*, 664 F.3d at 568.

1561. Dec. 8, 2006, Opinion, *supra* note 1560, at 3; Nov. 2, 2006, Opinion, *supra* note 1556, at 17; *see El-Mezain*, 664 F.3d at 518–19.

1562. Interview with Hon. A. Joe Fish, Oct. 6, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

Because of the level of classification of the documents with which defense attorneys worked, the secure room did not have to satisfy all of the technical specifications of a sensitive compartmented information facility (SCIF). Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 23, 2009

1563. Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

1564. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

1565. *Id.*

1566. *El-Mezain*, 664 F.3d at 485, 487, 563–70; *see* McGonigle, *supra* note 1560.

1567. *See* McGonigle, *supra* note 1560.

1568. *See id.*

1569. *El-Mezain*, 664 F.3d at 565, 567; *see* McGonigle, *supra* note 1560.

1570. Opinion at 5, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. July 11, 2007), *available at* 2007 WL 2011319.

1571. *El-Mezain*, 664 F.3d at 567.

1572. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1573. *Id.*

preserving the status quo and then ultimately granted the FBI substantially the relief requested.[1574]

The government also produced to defense counsel evidence obtained as a result of the FISA warrants.[1575] Much of this evidence was in the form of declassified "tech-cuts," which are English-language summaries of recorded conversations.[1576] Defense counsel discovered some errors in the summaries, and Judge Fish declared the errors to be "disturbing," but the defendants did not present evidence of sufficient inaccuracies to require a remedy.[1577]

The government also declassified some of the defendants' recorded conversations, and that evidence could be shared with the defendants.[1578] The court approved an offer by the government to seek declassification of additional conversations, which were in Arabic, that defense counsel, who did not speak Arabic, could specifically identify.[1579] Defense counsel argued that the offer was unconstitutional because it required them to reveal too much about their own conversations with their clients and their trail strategy.[1580] Judge Fish overruled this objection.[1581]

It was understood that any FISA evidence the government presented at trial would have to be declassified and provided to the individual defendants in advance of trial.[1582]

Challenge: Witness Security

Two trial witnesses testified under cover.[1583] Judge Fish agreed to exclude the public from the courtroom during their testimony, permit the witnesses to enter and exit the courtroom through a non-public door, and permit the witnesses to testify under pseudonyms.[1584] The defendants and their immediate family members

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1574. *Id.*

1575. Nov. 2, 2006, Opinion, *supra* note 1556, at 3.

1576. Dec. 8, 2006, Opinion, *supra* note 1560, at 7; Nov. 2, 2006, Opinion, *supra* note 1556, at 3, 18 n.6; *see El-Mezain*, 664 F.3d at 518.

1577. Opinion at 5, United States v. Holy Land Found., No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), *available at* 2007 WL 628059.

1578. *El-Mezain*, 664 F.3d at 518; Nov. 2, 2006, Opinion, *supra* note 1556, at 17.

1579. *El-Mezain*, 664 F.3d at 519; Dec. 8, 2006, Opinion, *supra* note 1560, at 5–6; Nov. 2, 2006, Opinion, *supra* note 1556, at 17, 22.

1580. Nov. 2, 2006, Opinion, *supra* note 1556, at 17; *see* Opinion at 5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 5, 2007), *available at* 2007 WL 1974769 ("as of the end of February, [2007,] defense counsel had presented no classified communications to the government for declassification"); Nov. 2, 2006, Opinion, *supra* note 1556, at 4 ("To the court's knowledge, the defendants have yet to request that any specific FISA intercepts be declassified.").

1581. Nov. 2, 2006, Opinion, *supra* note 1556, at 19–20.

1582. Dec. 8, 2006, Opinion, *supra* note 1560, at 6.

1583. *El-Mezain*, 664 F.3d at 490–94.

1584. *Id.* at 490; Opinion, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), *available at* 2007 WL 2004458; Opinion, *id.* (May 5, 2007) [hereinafter May 5, 2007, Opinion]; *see* Jason Trahan, *Another Anonymous Witness Testifies in Holy Land Case*, Dallas Morning News, Aug. 16, 2007, at 17B [hereinafter *Another Anonymous Witness*]; Jason Trahan, *Holy Land*

were permitted to see the witnesses, but members of the press and public could only listen to an audio feed in another courtroom.[1585] The witnesses' identities were not disclosed to defense counsel.[1586]

Judge Fish also approved a government proposal, to which the defendants did not object, that the secret witnesses be permitted to consult counsel before answering questions under cross-examination that called on them to reveal classified information.[1587] Judge Fish observed that "information that is classified under Israeli law is also classified under American law."[1588]

One witness was a lawyer in the counterterrorism section of the Israel Security Agency (ISA), also known as Shin Bet, who was to testify as an expert on Hamas financing.[1589] Israeli law prohibits the disclosure of ISA agents' identities.[1590] He testified under the alias "Avi."[1591] The other witness worked for the Israeli Defense Forces, which looks to ISA rules for the protection of its personnel.[1592] He testified as a fact witness under the alias "Major Lior."[1593]

Both witnesses testified under cover in the retrial as well.[1594]

Challenge: Jury Security

So that jurors would not have to pass through a gauntlet of reporters, Judge Fish had them meet at a secret location from which they were shuttled to the courthouse, and they came to the courtroom floor in a secure elevator.[1595] Even Judge Fish did not know where the jurors met each morning.[1596] Jurors took lunch in the jury room.[1597]

Trial Turns to Israeli Agent, Dallas Morning News, Aug. 10, 2006, at 7B [hereinafter *Israeli Agent*]; Whoriskey, *supra* note 1497.

1585. May 5, 2007, Opinion, *supra* note 1584; *see* Trahan, *Israeli Agent*, *supra* note 1584.

Judge Fish observed that an advantage of providing a space for members of the public to watch a live audiovisual presentation of the trial is that members of the news media can use electronic devices without disturbing the proceedings. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1586. *El-Mezain*, 664 F.3d at 490, 493; *see* Trahan, *Israeli Agent*, *supra* note 1584.

1587. May 5, 2007, Opinion, *supra* note 1584.

1588. *Id.* at 6; *see El-Mezain*, 664 F.3d at 492.

1589. *El-Mezain*, 664 F.3d at 489–90; Opinion at 3–5, *Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. July 16, 2007), *available at* 2007 WL 2059722; May 5, 2007, Opinion, *supra* note 1584; *see* Trahan, *Another Anonymous Witness*, *supra* note 1584.

1590. May 5, 2007, Opinion, *supra* note 1584; *see El-Mezain*, 664 F.3d at 490.

1591. *El-Mezain*, 664 F.3d at 489–90; *see* Trahan, *Another Anonymous Witness*, *supra* note 1584.

1592. *El-Mezain*, 664 F.3d at 490; May 5, 2007, Opinion, *supra* note 1584; *see* Trahan, *Israeli Agent*, *supra* note 1584.

1593. *El-Mezain*, 664 F.3d at 490; *see* Trahan, *Israeli Agent*, *supra* note 1584.

1594. *El-Mezain*, 664 F.3d at 489–90; *see* Jason Trahan, *Jurors to Hear Key Israeli Witnesses*, Dallas Morning News, Oct. 20, 2008, at 1B.

1595. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

1596. *Id.*

1597. *Id.*

Judge Solis chose not to implement special procedures for jurors in the retrial so as not to communicate to the jurors that the case was unusual.[1598]

1598. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

Chicago

United States v. Abu Marzook (Amy St. Eve, N.D. Ill.)

On August 20, 2004, the United States indicted three men for helping to fund Hamas: Muhammad Abdul Hamid Khalil Salah, Abdelhaleem Hasan Abdelraziq Ashqar, and Mousa Mohammed Abu Marzook.[1599] The U.S. District Court for the Northern District of Illinois assigned the case to Judge Amy St. Eve, who already was presiding over a prosecution for obstruction of justice against Ashqar.[1600]

The Defendants' Backgrounds

Muhammad Salah

Salah was born in a Palestinian refugee camp on the West Bank, and he became a United States citizen after he moved to the Chicago area from Jordan in 1970.[1601] He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip checkpoint and charged with providing aid to Hamas.[1602] Police found $97,400 in his

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1599. United States v. Marzook, 435 F. Supp. 2d 778, 779–80 (N.D. Ill. 2006) (denying Ashqar's motion to suppress evidence derived from a warrantless search of his home); United States v. Marzook, 435 F. Supp. 2d 708, 711–12 (N.D. Ill. 2006) (denying Salah's motion to suppress his confession); United States v. Marzook, 426 F. Supp. 2d 820 (N.D. Ill. 2006) (denying Salah's motion to dismiss count I); United States v. Abu Marzook, 412 F. Supp. 2d 913, 915 (N.D. Ill. 2006) (granting a motion to close a hearing); United States v. Marzook, 383 F. Supp. 2d 1056, 1057 (N.D. Ill. 2005) (denying Salah's motion to dismiss count II); Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 894 (N.D. Ill. 2004) (related civil action); Second Superseding Indictment, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004); *see* Eric Lichtblau, *U.S. Indicts 3 on Charges of Helping Militant Group*, N.Y. Times, Aug. 21, 2004, at A6; Todd Lighty & Laurie Cohen, *Hamas Probe Nearly Fell Apart*, Chi. Trib., Aug. 22, 2004, Metro, at 1; Matt O'Connor & Laurie Cohen, *U.S. Says Bridgeview Man, 2 Others Financed, Recruited for Terror Group*, Chi. Trib., Aug. 21, 2004, News, at 1.

1600. Docket Sheet, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter N.D. Ill. *Abu Marzook* Docket Sheet]; *see* Matt O'Connor, *Judge Accepts Bail for Hunger-Striking Activist*, Chi. Trib., Nov. 4, 2003, Metro, at 1; *Palestinian Activist Faces New Charge*, Chi. Trib., June 26, 2004, Metro, at 16 [hereinafter *New Charge*].

The indictment against Salah, Ashqar, and Marzook was filed as the second superseding indictment in the preexisting case against Ashqar.

Tim Reagan interviewed Judge St. Eve for this report in the judge's chambers on July 2, 2007.

1601. *See* Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, Chi. Trib., June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 1599; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, N.Y. Times, Oct. 20, 2006, at A16.

1602. *Marzook*, 435 F. Supp. 2d at 712, 716; *Abu Marzook*, 412 F. Supp. 2d at 916; *Boim*, 340 F. Supp. 2d at 917; United States v. One 1997 E35 Ford Van, 50 F. Supp. 2d 789, 793–94 (N.D. Ill. 1999); *see* Drew Bailey, *Family Fears for Israeli-Held Chicagoan*, Chi. Trib., Jan. 29, 1993, Chicagoland, at 4; David Jackson, Laurie Cohen & Robert Manor, *Money Trail Leads to Saudi, U.S. Says*, Chi. Trib., Oct. 28, 2001, News, at 1; Libby Sander, *2 Men Cleared of Charges of Aiding Hamas Violence*, N.Y. Times, Feb. 2, 2007, at A16 [hereinafter *2 Men Cleared*]; Sander, *supra* note 1601.

Also arrested was another American citizen, Muhammad Jarad, a Chicago grocer. *See* Bailey, *supra*; Karen Brandon & Stephen Franklin, *Chicago Families Defend 2 Men, Denounce Arrests by*

Jerusalem YMCA hotel room.[1603] In January 1995, after a trial lasting a year, he pleaded guilty in an Israeli military court to channeling funds to Hamas's military operation and was sentenced to five years in prison.[1604] He was released in November 1997.[1605]

On February 10, 1995, the United States froze Salah's assets, and on July 27 the United States classified Salah as a "Specially Designated Terrorist."[1606] On June 9, 1998, the government filed a civil forfeiture action against Salah and the Quranic Literacy Institute, for whom Salah volunteered, alleging that they laundered money for Hamas.[1607]

Israeli Police, Chi. Trib., Feb. 1, 1993, News, at 5. Jarad was released in July 1993 after six months in prison and a plea bargain requiring him to leave Israel after his release. *See* Sharman Stein, *Grocer Tied to Terrorists Comes Home*, Chi. Trib., July 28, 1993, Chicagoland, at 6. *Contra* James Brooke & Elaine Sciolino, *Bread or Bullets: Money for Hamas*, N.Y. Times, Aug. 16, 1995, at 1 ("After six months in jail, Mr. Jarad was released without charges.").

1603. *In re Ford Van*, 50 F. Supp. 2d at 794; *see* Jackson *et al.*, *supra* note 1602 (reporting $96,400 found); Sander, *2 Men Cleared*, *supra* note 1602 (reporting $97,000 found); Sander, *supra* note 1601 (same).

1604. *Boim*, 340 F. Supp. 2d at 918; *see* Mark Caro, *Man, 41, Gets Term in Israel*, Chi. Trib., Jan. 4, 1995, Metro Southwest, at 1; Jackson *et al.*, *supra* note 1602; Sander, *supra* note 1601.

1605. *In re Ford Van*, 50 F. Supp. 2d at 795.

Previously a used-car dealer and a grocer in the suburban Chicago community of Bridgeview, more recently Salah drove dialysis patients to and from treatment. *See* Jackson *et al.*, *supra* note 1602; Sander, *supra* note 1601. In 2003, he was fired from his job as a part-time lecturer on computer systems at City Colleges of Chicago, because he failed to disclose his Israeli conviction on his application. *See* Cohen & Ahmed-Ullah, *supra* note 1601; Lighty & Cohen, *supra* note 1599. The Chicago Public Schools also removed him from their roster of substitute teachers. *See* Laurie Cohen & Lori Oiszewski, *Schools Call Use of Sub Mistake*, Chi. Trib., June 8, 2003, Metro, at 3; Lighty & Cohen, *supra* note 1599.

1606. *Boim*, 340 F. Supp. 2d at 917; *In re Ford Van*, 50 F. Supp. 2d at 793; *see* Laurie Cohen, Stephen Franklin & Sam Roe, *Struggle for the Soul of Islam*, Chi. Trib., Feb. 8, 2004, News, at 1; Matt O'Connor, *FBI Seizes $1 Million Linked to Terrorism*, Chi. Trib., June 10, 1998, News, at 1.

1607. Docket Sheet, United States v. One 1997 E35 Ford Van, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998); *see* Cohen, *et al.*, *supra* note 1606; William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Jackson *et al.*, *supra* note 1602; Lighty & Cohen, *supra* note 1599.

The Quranic Literacy Institute's stated purpose was to translate Islamic texts. *In re Ford Van*, 50 F. Supp. 2d at 794; *see* Andrew Martin, *Religious Group Denies Terrorist Link*, Chi. Trib., Oct. 20, 1998, Metro Chicago, at 4.

The U.S. District Court for the Northern District of Illinois assigned the forfeiture action to Judge Wayne R. Andersen. Docket Sheet, *supra*; *see* Matt O'Connor, *Bridgeview Family Challenges Seizure*, Chi. Trib., June 16, 1998, Metro Chicago, at 3. On November 20, 2009, Judge Andersen signed a stipulated resolution of the action approving the forfeiture and permitting Salah's wife to buy from the government his forfeited share of their house. Stipulation, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. Nov. 20, 2009) (approving forfeiture of $1 million and a van against the Quranic Literacy Institute and forfeiture of $1.2 million and a house against Salah); *see* Transcript, *id.* (Nov. 20, 2009, filed Jan. 26, 2010). The court of appeals denied a third-party appeal, Opinion, United States v. Kadi, No. 10-1758 (7th Cir. May 21, 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1518 (2011).

In 2000, Salah and the Quranic Literacy Institute were among the defendants in a civil action for the alleged 1996 Hamas killing of David Boim.[1608] The parents attached to their complaint the government's forfeiture action against Salah and the institute.[1609] On December 3, 2008, the court of appeals reversed a summary judgment against Salah, because he was in an Israeli prison between the time that providing material support to Hamas became a crime and Boim's killing.[1610]

Abdelhaleem Ashqar

On February 23, 1998, Ashqar was jailed in Manhattan for refusing to testify before a grand jury investigating Hamas funding.[1611] Although offered immunity, Ashqar refused to cooperate and was jailed for civil contempt.[1612] Ashqar protested his jailing with a hunger strike.[1613] Five months into the hunger strike, the U.S. Court of Appeals for the Second Circuit affirmed a refusal by the district court to release Ashqar.[1614] He was released after six months in prison on a finding that continued confinement would not induce testimony.[1615]

On June 25, 2003, Ashqar refused to testify before a Chicago grand jury investigating American links to Middle East terrorism, and he was jailed for civil contempt on September 5.[1616] Ashqar again protested his imprisonment for con-

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1608. *See supra*, "Prosecution of a Charity."

1609. Complaint, *One 1997 E35 Ford Van*, No. 1:98-cv-3548 (N.D. Ill. June 9, 1998), *attached as* Ex. A, Complaint, Boim v. Quranic Literacy Inst., No. 1:00-cv-2905 (N.D. Ill. May 12, 2000).

1610. Boim v. Holy Land Found., 549 F.3d 685, 691 (7th Cir. 2008), *cert. denied*, 558 U.S. 981 (2009); Transcript at 4, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Mar. 6, 2009, filed May 23, 2011) (noting dismissal of the complaint against Salah); *see also* Opinion, *id.* (Oct. 27, 2010) (denying Salah's petition for costs), *available at* 2010 WL 4504876.

1611. United States v. Ashqar, 582 F.3d 819, 821 (7th Cir. 2009); *In re* Grand Jury Subpoena John Doe, 150 F.3d 170, 171 (2d Cir. 1998); *see* Benjamin Weiser, *2 Men Jailed Over Refusal to Aid Inquiry*, N.Y. Times, Apr. 18, 1998, at B1.

Ashqar was once a Howard University professor. *See* Dan Eggen, *Two Men Acquitted of Conspiracy to Fund Hamas Activities in Israel*, Wash. Post, Feb. 2, 2007, at A1; Stephen Franklin & Laurie Cohen, *Activist Charged with Contempt*, Chi. Trib., Oct. 11, 2003, Metro, at 20; Sander, *2 Men Cleared*, *supra* note 1602; Sander, *supra* note 1601. He came to the United States on an academic fellowship. *See* Sander, *supra* note 1601.

1612. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1611.

1613. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 1611.

1614. *In re Grand Jury Subpoena*, 150 F.3d 170; *see* Docket Sheet, *In re* Grand Jury, No. 98-6137 (2d Cir. June 19, 1998); *see also* Benjamin Weiser, *Appeal Lost by Inmate Who Refuses to Testify*, N.Y. Times, July 22, 1998, at B7.

1615. *Ashqar*, 582 F.3d at 821; *In re* Grand Jury Proceedings, 347 F.3d 197, 200 (7th Cir. 2003); *see Court Upholds Jailing of Activist*, Chi. Trib., Oct. 5, 2003, Metro, at 3 [hereinafter *Jailing*] (reporting that Ashqar lost about 50 pounds in prison).

1616. *Ashqar*, 582 F.3d at 821–22; *In re Grand Jury Proceedings*, 347 F.3d at 201; *see* Indictment, United States v. Ashqar, No. 1:03-cr-978 (N.D. Ill. Oct. 9, 2003) [hereinafter *Ashqar* Indictment]; *see also Jailing*, *supra* note 1615.

tempt with a hunger strike.[1617] After the court of appeals affirmed the holding of civil contempt against Ashqar,[1618] the government indicted him for criminal contempt.[1619] The U.S. District Court for the Northern District of Illinois assigned the prosecution of Ashqar for criminal contempt to Judge Amy St. Eve,[1620] who released Ashqar to home detention in Virginia on bail after two months of confinement.[1621] On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.[1622] Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.[1623]

Mousa Abu Marzook

Abu Marzook, the third man named in the case, but not tried, was a Palestinian who once was the head of Hamas's political branch.[1624]

Abu Marzook was an American resident detained in New York as a suspected terrorist on July 25, 1995, while returning from a five-month trip abroad.[1625] During his trip he was expelled from Jordan at the United States' urging after setting up a Hamas support office in Amman.[1626] Five days after his detention, Israel de-

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1617. *See Jailing*, *supra* note 1615; Franklin & Cohen, *supra* note 1611.

1618. *In re Grand Jury Proceedings*, 347 F.3d 197; *see Jailing*, *supra* note 1615.

1619. *Ashqar* Indictment, *supra* note 1616; *see Ashqar*, 582 F.3d at 822; *see also* Franklin & Cohen, *supra* note 1611.

1620. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1600; *see* Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

1621. *See* O'Connor, *supra* note 1600.

1622. Superseding Indictment, United States v. Ashqar, No. 1:03-cr-978 (N.D. Ill. June 24, 2004); *see Ashqar*, 582 F.3d at 822; *see also New Charge*, *supra* note 1600.

1623. *See Bail Denial Stands for Man Held in Hamas Case*, Chi. Trib., Aug. 24, 2004, Metro, at 4; *Suspected Member of Palestinian Militant Group Pleads Not Guilty*, Chi. Trib., Aug. 27, 2004, Metro, at 9.

1624. *In re* Extradition of Marzook, 924 F. Supp. 565, 568 (S.D.N.Y. 1996); Marzook v. Christopher, No. 1:96-cv-4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996); *see* United States v. El-Mezain, 664 F.3d 467, 486 (5th Cir. 2011); *see also* Stephen Franklin, *Terror Bombs Rip Hopes in Mideast*, Chi. Trib., July 31, 1997, News, at 1 (identifying Abu Marzook as Hamas's former political leader); Youssef M. Ibrahim, *Hamas Political Chief Says Group Can't Curb Terrorists*, N.Y. Times, Mar. 9, 1996, at 5 ("in his first interview since his detention, Mr. Abu Marzook, 45, a businessman, said he was the head of the political bureau of Hamas"); *see also* Jason Trahan, *Agent: Charity Was Part of Plot*, Dallas Morning News, Aug. 8, 2007, at 1B (reporting that Abu Marzook is "currently Hamas' No. 2 political leader").

1625. *In re Marzook*, 924 F. Supp. at 574; *Marzook*, 1996 WL 583378, at *1; *see* United States v. Elashyi, 554 F.3d 480, 490 (5th Cir. 2008); Steven Greenhouse, *U.S. Detains Arab Tied to Militants*, N.Y. Times, July 28, 1995, at 1; Neil MacFarquhar, *Terror Suspect Freed by U.S.*, N.Y. Times, May 6, 1997, at A1 ("legal resident of the United States since 1982").

It was reported that the suspicion of Abu Marzook was based in part on information provided by Salah during Salah's detention and prosecution in Israel. James C. McKinley, Jr., *U.S. Charges a Palestinian in Terror Case*, N.Y. Times, Aug. 9, 1995, at 5.

1626. *See* Greenhouse, *supra* note 1625; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 1625.

cided to seek his extradition.[1627] On May 7, 1996, the district court in Manhattan approved extradition.[1628]

While his appeal was pending, Abu Marzook decided to stop challenging his extradition, which meant he would have to be extradited or freed within 60 days.[1629] A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.[1630] Fearing retaliatory terrorist attacks in Israel, Prime Minister Benjamin Netanyahu told the United States on April 2, 1997, that Israel no longer wanted Abu Marzook extradited to Israel.[1631] Abu Marzook remained detained pending immigration exclusion proceedings, and one month later, Jordan announced that it would accept Abu Marzook back.[1632] Abu Marzook was deported to Jordan on May 5.[1633]

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.[1634] Jordan deported him in 1999.[1635] Abu Marzook was reported to be in Syria in 2001.[1636] In 2002, the fugitive Abu Marzook was indicted in the Northern District of Texas for con-

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1627. *See* Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

1628. *In re Marzook*, 924 F. Supp. 565; *see Marzook*, 1996 WL 583378, at *2; *see also* Don Van Natta, Jr., *Judge Orders Hamas Leader Extradited to Israel*, N.Y. Times, May 9, 1996, at 9.

Abu Marzook became a specially designated terrorist on August 16, 1995. *Elashyi*, 554 F.3d at 490, 498.

Judge Kevin Thomas Duffy also denied Abu Marzook's petition for habeas corpus. *In re Marzook*, 924 F. Supp. at 569; Docket Sheet, Abu Marzook v. Christopher, No. 1:95-cv-9799 (S.D.N.Y. Nov. 20, 1995). Abu Marzook's appeal of this decision was dismissed on August 4, 1997, for failure to comply with the scheduling order. Docket Sheet, Abu Marzook v. Christopher, No. 96-2372 (2d Cir. May 10, 1996). On October 10, 1996, Judge Kimba M. Wood denied another petition for habeas corpus. *Marzook*, 1996 WL 583378; Docket Sheet, Abu Marzook v. Christopher, No. 1:95-cv-4107 (S.D.N.Y. May 31, 1996); *see Judge Backs Extradition of a Palestinian to Israel*, N.Y. Times, Oct. 10, 1996, at 17. On February 6, 1997, the court of appeals granted Abu Marzook's motion to withdraw his appeal of this decision. Docket Sheet, Abu Marzook v. Christopher, No. 96-2841 (2d Cir. Oct. 24, 1996).

1629. *See* Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

1630. *See* Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

1631. *See* Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

1632. *See* Neil MacFarquhar, *Jordan to Let Terror Suspect Held in U.S. Into Kingdom*, N.Y. Times, May 1, 1997, at A7; MacFarquhar, *supra* note 1625; Storer H. Rowley, *Jordan's Hussein Steps in, Agrees to Take Hamas Leader Jailed in U.S.*, Chi. Trib., May 1, 1997, News, at 3.

1633. *See* MacFarquhar, *supra* note 1625.

1634. *See* William A. Orme, Jr., *Plot Report in Israel and Arrests in Jordan Renew Fear of Hamas*, N.Y. Times, Sept. 23, 1999, at A7.

1635. *See* Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1006–07 (N.D. Ill. 2001).

1636. William Glaberson, *Defending Muslims in Court and Drawing Death Threats as Well as a High Profile*, N.Y. Times, Sept. 28, 2001, at B8; *see Hamas Official Denies Accusations*, N.Y. Times, Aug. 22, 2004, at 110 (reporting Abu Marzook to be in Syria in 2004); Scott Wilson, *Hamas to Choose Top Gaza Figure as Prime Minister*, Wash. Post, Feb. 17, 2006, at A14 (identifying Abu Marzook as speaking from Syria in 2006).

spiring with a computer business owned by his wife's cousins to fund terrorism.[1637] From 2006 through 2011, identified as the deputy political bureau chief of Hamas, he published op-eds in the *Washington Post*,[1638] the *Los Angeles Times*,[1639] and the *Guardian*.[1640]

The Main Trial

At the time of the 2004 indictment, Salah was a resident of Bridgeview, Illinois, a suburb of Chicago; Ashqar was a resident of Alexandria, Virginia, a suburb of Washington, D.C.; and Marzook was believed to reside in Syria.[1641] Judge St. Eve allowed friends and relatives of Salah and Ashqar to post nearly $4 million worth of property to secure detention by home confinement.[1642]

Salah's prosecution was based, in part, on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.[1643] But Salah argued that the confession was obtained by more than 50 days of torture by the Israeli secret police.[1644] Salah also argued that his financial activity was humanitarian, intended to aid the Palestinian people and not to support terrorism.[1645] Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.[1646]

Ashqar's prosecution was based, in part, on recorded telephone conversations he had with Hamas officials and records seized from his home without a warrant

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1637. United States v. Elashi, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying codefendants' post-trial motions for acquittal); Docket Sheet, United States v. Elashi, No. 3:02-cr-52 (N.D. Tex. Feb. 20, 2002); *see supra*, "Prosecution of a Charity"; Lichtblau & Miller, *supra* note 1510; Simpson, *supra* note 1510.

1638. Mousa Abu Marzook, Op-Ed, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections).

1639. Mousa Abu Marzook, Op-Ed, *Palestinian Statehood: What Is the U.N.'s Role?*, L.A. Times, June 12, 2011, at 30 (promoting a U.N. resolution recognizing a Palestinian state); Mousa Abu Marzook, Op-Ed, *Hamas Speaks*, L.A. Times, Jan. 6, 2009, at 15 (inviting the President to visit a Palestinian refugee camp); Mousa Abu Marzook, Op-Ed, *Hamas' Stand*, L.A. Times, July 10, 2007 (concerning the release of a BBC journalist).

1640. Mousa Abu Marzook, Op-Ed, *Hamas Is Ready to Talk*, London Guardian, Aug. 16, 2007, at 34 (extolling the virtues of Hamas's governing).

1641. *See* Lichtblau, *supra* note 1599; Lighty & Cohen, *supra* note 1599; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 1599.

1642. *See* O'Connor, *supra* note 1641.

1643. Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 918–19 (N.D. Ill. 2004); *see* Michael Higgins, *Israeli Files Sought in Terrorism Case*, Chi. Trib., Dec. 13, 2005, Metro, at 3; Sander, *2 Men Cleared*, *supra* note 1602; Sander, *supra* note 1601.

1644. *See* Sander, *2 Men Cleared*, *supra* note 1602; Sander, *supra* note 1601.

1645. *See* Eggen, *supra* note 1611; Jackson *et al.*, *supra* note 1602; Sander, *2 Men Cleared*, *supra* note 1602; Sander, *supra* note 1601.

1646. United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006); *see* Jeff Coen, *Hamas Suspect Loses on Key Issue*, Chi. Trib., June 9, 2006, Metro, at 1.

while he was a graduate student at the University of Mississippi in 1993.[1647] Judge St. Eve denied Ashqar's motion to suppress evidence seized, because the search was reasonable and in good faith, and exclusion would not deter such searches, as such searches later became legal.[1648]

The trial began on October 12, 2006.[1649] The jury began to deliberate on January 11, 2007,[1650] and on February 1, the jury acquitted Salah and Ashqar of aiding terrorists.[1651] The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.[1652] Judge St. Eve sentenced Salah to one year and nine months in prison,[1653] and she sentenced Ashqar to eleven years and three months.[1654] The court of appeals affirmed.[1655] Salah was released from prison on April 10, 2009.[1656]

Challenge: Foreign Government Evidence

Salah sought to discover Israeli police documents to support his claim that his Israeli confession was obtained by torture and coercion.[1657] Judge St. Eve suggested

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1647. *Marzook*, 435 F. Supp. 2d at 780–81; *see* Michael Higgins, *ACLU Filing Challenges Hamas-Case Evidence*, Chi. Trib., Jan. 11, 2006, Metro, at 6; Sander, *2 Men Cleared*, *supra* note 1602.

1648. *Marzook*, 435 F. Supp. 2d at 788–94.

1649. Minute Entry, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006).

1650. Minute Entry, *id.* (Jan. 11, 2007); *see* Jury Instructions, *id.* (Jan. 12, 2007); *see also* Azam Ahmed, *Deliberations Begin in Hamas Case*, Chi. Trib., Jan. 12, 2007, Metro, at 8.

1651. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Feb. 1, 2007); *see* United States v. Ashqar, 582 F.3d 819, 822 (7th Cir. 2009); *see also* Rudolph Bush & Jeff Coen, *Two Found Not Guilty of Supporting Hamas*, Chi. Trib., Feb. 2, 2007, News, at 1; Eggen, *supra* note 1611; Sander, *2 Men Cleared*, *supra* note 1602.

1652. *Ashqar*, 582 F.3d at 822; *see* Bush & Coen, *supra* note 1651; Eggen, *supra* note 1611; Sander, *2 Men Cleared*, *supra* note 1602.

Salah's conviction for obstruction of justice was for false answers to interrogatories in the Boims' civil case against him. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 25, 2007); *see* Bush & Coen, *supra* note 1651; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

1653. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2007); *see* Michael Higgins, *21-Month Sentence for Salah*, Chi. Trib., July 12, 2007, Metro, at 1; Sander, *American Gets Prison*, *supra* note 1652.

1654. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007); *see Ashqar*, 582 F.3d at 822; http://www.bop.gov (noting a release date of June 13, 2017, reg. no. 41500-054); *see also Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

1655. *Ashqar*, 582 F.3d at 821, 827, *cert. denied*, ___ U.S. ___, 130 S. Ct. 1722 (2010).

Judge St. Eve denied Ashqar's habeas petition alleging ineffective assistance of counsel. Opinion, Ashqar v. United States, No. 1:11-cv-569 (N.D. Ill. Sept. 29, 2011), *available at* 2011 WL 4540729.

1656. http://www.bop.gov (reg. no. 21677-424).

On September 9, 2011, Judge St. Eve terminated Salah's supervised release seven months early. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Sept. 20, 2011). Salah was diagnosed with stage four kidney cancer in June 2010. Motion, *id.* (Sept. 13, 2011).

1657. Salah's Discovery Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005); *see* Higgins, *supra*, note 1643.

that he follow letter-rogatory procedures, but Salah ultimately relied on testimony from Israeli police officers.[1658]

Challenge: Witness Security

To prove that Salah's Israeli confession was obtained by torture and coercion, Salah sought testimony from two agents of the Israel Security Agency (ISA).[1659] It was unprecedented for such officers to provide testimony outside of Israel.[1660]

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.[1661] The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.[1662] All other persons in court during the testimony had security clearances.[1663]

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.[1664] The agents and their Israeli attorneys were identified in court documents by code names.[1665] But Judge St. Eve denied a request that they testify in "light disguise," because Salah had already seen them, the public would not see them, and the government had presented no evidence of security concerns respecting the attorneys and court staff who would see them.[1666]

The hearing was open for the testimony of other witnesses, including Israeli police officers.[1667]

1658. Interview with Hon. Amy St. Eve, July 2, 2007; *see* 28 U.S.C. § 1781 (2011); Fed. R. Civ. P. 28(b).

1659. United States v. Abu Marzook, 412 F. Supp. 2d 913, 916 (N.D. Ill. 2006); *see* Michael Higgins, *Terror Funds Hearing May Need Special Rules*, Chi. Trib., Dec. 20, 2005, Metro, at 3.

"The ISA is an intelligence agency for the State of Israel that provides for Israel's internal security." *Abu Marzook*, 412 F. Supp. 2d at 916. It is also known as the General Security Service. United States v. Marzook, 435 F. Supp. 2d 708, 712 (N.D. Ill. 2006); *Abu Marzook*, 412 F. Supp. 2d at 916. "Israel maintains the secrecy of the true identities of the ISA agents, as well as identifying characteristics." *Abu Marzook*, 412 F. Supp. 2d at 918.

1660. *Abu Marzook*, 412 F. Supp. 2d at 918 ("Israel has never before permitted ISA agents to give live testimony in the United States."); Government's Time Extension Motion at 2, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 19, 2004) ("The appearance of the ISA operational personnel as witnesses in a proceeding outside the State of Israel is unprecedented."); *see* Michael Higgins, *supra* note 1659 (quoting the government's brief).

1661. *Marzook*, 435 F. Supp. 2d at 714; *Abu Marzook*, 412 F. Supp. 2d 913; *see* Michael Higgins, *Ruling Backs Closed Court*, Chi. Trib., Feb. 1, 2006, Metro, at 3.

1662. *Abu Marzook*, 412 F. Supp. 2d at 917; *see* Minute Entry at 4, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 29, 2006) [hereinafter Aug. 29, 2006, *Abu Marzook* Minute Entry] ("[T]hese ISA agents and their families face a serious, legitimate risk of grave danger if they are publicly identified. . . . Terrorist organizations have targeted ISA agents.").

1663. *Abu Marzook*, 412 F. Supp. 2d at 919.

1664. *Id.* at 928; *see* Higgins, *supra* note 1661.

1665. *See* Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

1666. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

1667. *Id.* at 928; *see* Higgins, *supra* note 1661.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 1600.

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.[1668] Again Judge St. Eve permitted the witnesses to use private entrances.[1669] She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.[1670] Because of the presence of the family members and the jury, Judge St. Eve agreed to let the agents testify in light disguise, so long as the disguise did not interfere with the jurors' ability to judge their credibility.[1671] But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.[1672] Judge St. Eve decided that the rest of the trial would be public.[1673]

Judge St. Eve undertook measures to keep the closed portion of the trial as open as possible. First, she established a live video and audio feed to another courtroom where spectators could listen to the closed session and see those in the courtroom, except for the witnesses.[1674] Second, to disguise from the jury that the courtroom was closed, Judge St. Eve told the jurors that the camera was a precaution in case of an overflow crowd and allowed the witnesses to use the private entrance before the jury was brought in.[1675]

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)[1676] to a substantial amount of classified evidence.[1677] Classified documents were stored in a safe in Judge St. Eve's chambers, to which only the judge and a cleared court reporter had the combination.[1678] For hearings concerning classified documents, the court reporter used a laptop provided by classified information security officers, which was also stored in the safe.[1679]

1668. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 2–3; *see* Rudolph Bush, *Hamas-Case Defense Says U.S. Conspiring with Israel*, Chi. Trib., Aug. 30, 2006, Metro, at 6 [hereinafter *Conspiring with Israel*]; Rudolph Bush, *Torture of Salah Denied*, Chi. Trib., Nov. 2, 2006, Metro, at 3 [hereinafter *Torture Denied*]; Eggen, *supra* note 1611.

1669. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 6.

1670. *Id.* at 4; *see* Bush, *Conspiring with Israel*, *supra* note 1668.

1671. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 5–6; *see* Bush, *Conspiring with Israel*, *supra* note 1668.

1672. Interview with Hon. Amy St. Eve, July 2, 2007.

1673. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 5; *see* Bush, *Conspiring with Israel*, *supra* note 1668.

1674. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 4–5; *see* Bush, *Conspiring with Israel*, *supra* note 1668; Bush, *Torture Denied*, *supra* note 1668.

1675. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 1662, at 5–6.

1676. 18 U.S.C. app. 3 (2011); *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (Federal Judicial Center, 2d ed. 2013).

1677. Interview with Hon. Amy St. Eve, July 2, 2007.

1678. United States v. Abu Marzook, 412 F. Supp. 2d 913, 924 (N.D. Ill. 2006) (describing documents as kept under seal); Interview with Hon. Amy St. Eve, July 2, 2007 (noting that there are two cleared court reporters in the Chicago courthouse).

1679. Interview with Hon. Amy St. Eve, July 2, 2007.

Over the course of this litigation, two of Judge St. Eve's law clerks sought security clearances.[1680] The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law clerk assistance.[1681]

Defense counsel elected not to seek security clearances, so Judge St. Eve resolved evidentiary issues by holding ex parte conferences with defense counsel to determine their defense needs and ex parte conferences with government counsel to determine what classified information the government held.[1682]

Deputy marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.[1683]

Judge St. Eve required the government to decide what documents admitted into evidence at Salah's suppression hearing could be released to the public within seven business days of the documents' admissions, and she required the government to decide within seven business days of the hearing transcript's preparation which portions of the transcript could be released to the public.[1684]

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.[1685] For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.[1686] Judge St. Eve approved these evidence substitutions.[1687] She found that the substitutions were consistent with the agents' previous testimony, and Salah would be able to question the agents at trial about his specific treatment.[1688] As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.[1689]

To explain to the jury why some topics were being skirted during examination of the witnesses, Judge St. Eve prepared a jury instruction to accompany presentation of the admissions:

> This case involves certain classified information. Classified information is information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure. In lieu of disclosing specific classified information, I anticipate that you will hear certain substitutions for the classified information during this trial. These substitutions are admissions of relevant facts by the United States for purposes of this trial. The witnesses in this case as well as attorneys are prohibited from disclosing classified information and, in the case of the attorneys, are prohibited from asking questions to any witness which if answered would disclose classified information. Defendants may not cross examine a

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1680. *Id.*

1681. *Id.*

1682. *Id.*

1683. *Id.*

1684. United States v. Abu Marzook, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); *see* Higgins, *supra* note 1661.

1685. United States v. Salah, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

1686. *Id.* at 917.

1687. *Id.* at 925.

1688. *Id.* at 919–24.

1689. *Id.* at 925.

> particular witness regarding the underlying classified matters set forth in these admissions. You must decide what weight, if any, to give to these admissions.[1690]

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.[1691] To support its motion, the government presented a classified affidavit from the FBI's Assistant Director for Counterintelligence, which was stored in Judge St. Eve's safe.[1692]

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession[1693] occupies 70 pages of the *Federal Supplement*.[1694] Nineteen portions of the opinion are redacted.[1695] The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.[1696]

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.[1697] Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.[1698] Observing that the defendants were not in custody, had strictly adhered to the terms of their release, and otherwise posed no danger, Judge St. Eve denied the government's motion.[1699]

1690. *Id.* at 924.

1691. *See* Higgins, *supra* note 1661.

1692. Interview with Hon. Amy St. Eve, July 2, 2007; *see* Higgins, *supra* note 1661.

1693. Opinion, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. June 8, 2006).

1694. United States v. Marzook, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

1695. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51,758, 767.

1696. Interview with Hon. Amy St. Eve, July 2, 2007.

1697. Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. June 27, 2006); *see* Jeff Coen, *Anonymous Jury Urged in Hamas Funds Case*, Chi. Trib., June 28, 2006, Metro, at 4.

1698. Ashqar's Response to Government's Anonymous Jury Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. July 19, 2006); Salah's Response to Government's Anonymous Jury Motion, *id.* (July 18, 2006); *see* Jeff Coen, *Hamas-Case Motion Challenged*, Chi. Trib., June 29, 2006, Metro, at 3.

1699. Minute Entry, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Aug. 8, 2006); Interview with Hon. Amy St. Eve, July 2, 2007; *see* Rudolph Bush, *Hamas-Case Jury to Be Named*, Chi. Trib., Aug. 10, 2006, Metro, at 3.

Lodi

United States v. Hayat
(Garland E. Burrell, Jr., E.D. Cal.)

On June 5, 2005, the government arrested Hamid Hayat and his father, Umer, of Lodi, California, an agricultural town 40 miles south of Sacramento.[1700] Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.[1701]

The saga began in 2001, when the government hired Naseem Khan, of Bend, Oregon, to spy on potential terrorist sympathizers in Lodi, where Khan once lived.[1702] A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.[1703] He is reported to have encouraged support of terrorism as part of his undercover work.[1704] The government is reported to have paid him approximately $225,000.[1705]

1700. United States v. Hayat, 710 F.3d 875, 883 (9th Cir. 2013); *see* Randal C. Archibold & Jeff Kearns, *In California Terror Case, a Mistrial for a Father, but a Son Is Guilty*, N.Y. Times, Apr. 26, 2006, at A17; Greg Krikorian & Rone Tempest, *2 Men Held in Links to Terror*, L.A. Times, June 8, 2005, at 1; Dean E. Murphy & David Johnston, *California Father and Son Face Charges in Terrorism Case*, N.Y. Times, June 9, 2005, at A18.

1701. *See Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *Enemy Within*]; Krikorian & Tempest, *supra* note 1700; Murphy & Johnston, *supra* note 1700; Rone Tempest, Greg Krikorian & Lee Romney, *Ties to Terror Camps Probed*, L.A. Times, June 9, 2005, at 1.

The younger Hayat's maternal grandfather was Pakistan's minister of religious affairs in the late 1980s. *See* Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

1702. *Hayat*, 710 F.3d at 880–81; *see* Eric Bailey, *Attorney Says Lodi Terror Suspect Told Tall Tales to FBI Mole*, L.A. Times, Mar. 3, 2006, at 6; Rone Tempest, *FBI Informer Begins His Testimony in Terror Trial*, L.A. Times, Feb. 23, 2006, at 1 [hereinafter *FBI Informer*]; Rone Tempest, *Lodi Terror Trial Enters Final Round*, L.A. Times, Apr. 11, 2006, at 3 [hereinafter *Final Round*]; Rone Tempest, *Onetime Clerk Is at Center of Lodi Trial*, L.A. Times, Mar. 21, 2006, at 1 [hereinafter *Onetime Clerk*]; Rone Tempest, *Tape Recording Surfaces in Lodi Terrorism Trial*, L.A. Times, Apr. 5, 2006, at 3 [hereinafter *Tape Recording Surfaces*]; Denny Walsh, *Hayat Released from Custody*, Sacramento Bee, Aug. 26, 2006, at B1.

1703. *Hayat*, 710 F.3d at 880–81; *see Bailey*, *supra* note 1702; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 1702 ("Naseem Khan, then 28, rented an apartment overlooking the Lodi Mosque, befriended the town's Muslim religious leaders and, over the next three years, secretly taped hundreds of hours of conversations with members of the largely Pakistani American community as a paid undercover agent for the FBI."); Rone Tempest, *Lodi Man Describes Terrorist Training*, L.A. Times. Mar. 8, 2006, at 3 [hereinafter *Terrorist Training*]; Rone Tempest, *Man Trained to Be Terrorist, Prosecutor Says*, L.A. Times, Feb. 17, 2006, at 3 [hereinafter *Man Trained*]; Tempest, *Onetime Clerk*, *supra* note 1702.

1704. *E.g.*, Redacted Government's Motion for Protective Order at 4, United States v. Hayat, No. 2:05-cr-240 (E.D. Cal. dated Jan. 26, 2006, filed Feb. 1, 2006) ("in a second conversation, the CW [cooperating witness, namely Khan] congratulated Hamid on what is believed to be Hamid's acceptance into a training camp."); *see* Bailey, *Mixed Picture*, *supra* note 1703 ("But in tape-recorded telephone conversations, Naseem Khan, a paid government informant, accused Hayat of being 'a loafer' after his arrival in Pakistan during the summer of 2003. Khan pressed him to 'be a

The Hayats went to Pakistan in April 2003.[1706] Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.[1707] Federal agents discovered his trip while he was en route, and the plane was diverted to Japan, where agents detained him, interviewed him, and then let him continue on his trip.[1708] Four days after Hamid's return to California, federal agents interviewed him again.[1709] They also interviewed his father.[1710] Both denied the son's involvement with terrorists.[1711] After failing a polygraph examination, however, Hamid confessed to attending an Al-Qaeda training camp in Pakistan for six months in 2003 and 2004.[1712] The father

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man' and fulfill his vow to attend a terrorist training camp."); *Enemy Within*, *supra* note 1701 ("Narrator: And then there were the tapes of the informant talking to Hamid in Pakistan in which Naseem Khan was browbeating him about attending a Madrassa and going to a jihadi camp."); Tempest, *FBI Informer*, *supra* note 1702 ("Some Lodi residents contend that Khan was more than just a passive mole in the mosque. They said he was often an instigator, asking young men about waging jihad and encouraging travelers to Pakistan to bring back firebrand speeches and extremist documents.").

1705. Randal C. Archibold, *Diverging Views of Californian at Terror Trial*, N.Y. Times, Feb. 17, 2006, at A14 [hereinafter *Diverging Views*] (reporting a payment of $250,000); Randal C. Archibold, *Prosecution Sees Setback at Terror Trial in California*, N.Y. Times, Apr. 10, 2006, at A20 (about $225,000); Bailey, *supra* note 1702 (more than $200,000); Bailey, *Mixed Picture*, *supra* note 1703 (about $250,000); *Enemy Within*, *supra* note 1701 (hundreds of thousands of dollars); Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. Times, Apr. 27, 2007, at A1 (about $225,000); Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. Times, Sept. 11, 2007, at A20 (more than $200,000); Rone Tempest, *Al Qaeda in Lodi "Unlikely,"* L.A. Times, Mar. 30, 2006, at 9 (nearly $230,000 in salary and expenses); Tempest, *FBI Informer*, *supra* note 1702 (nearly $250,000 "for his efforts in Lodi alone"); Tempest, *Terrorist Training*, *supra* note 1703 (more than $200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 1702 (about $3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 1703 ($250,000); Tempest, *Onetime Clerk*, *supra* note 1702 (more than $200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 1702 (nearly $230,000); *see Hayat*, 710 F.3d at 880 n.2 ("The FBI paid Khan between $3,000 and $4,500 per month plus expenses.").

1706. *Hayat*, 710 F.3d at 881; *see* Second Superseding Indictment at 2, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 26, 2006); First Superseding Indictment at 3, *id.* (Sept. 22, 2005); *see Enemy Within*, *supra* note 1701; Krikorian & Tempest, *supra* note 1700; Tempest, *FBI Informer*, *supra* note 1702.

1707. *Hayat*, 710 F.3d at 882; *see* Archibold, *Diverging Views*, *supra* note 1705; Krikorian & Tempest, *supra* note 1700; Murphy & Johnston, *supra* note 1700.

1708. *Hayat*, 710 F.3d at 882; *see* Second Superseding Indictment, *supra* note 1706, at 3; First Superseding Indictment, *supra* note 1706, at 3; *see* Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

1709. *Hayat*, 710 F.3d at 882; *see Enemy Within*, *supra* note 1701; Krikorian & Tempest, *supra* note 1700.

1710. Government's Trial Brief at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); *see Enemy Within*, *supra* note 1701; Krikorian & Tempest, *supra* note 1700.

1711. Government's Trial Brief, *supra* note 1710, at 4–5, 8–9; *see* Krikorian & Tempest, *supra* note 1700.

1712. Government's Trial Brief, *supra* note 1710, at 8; *see* Krikorian & Tempest, *supra* note 1700; Tempest, *supra* note 1708; Tempest *et al.*, *supra* note 1701.

and son were indicted on June 16, 2005, for making false statements to federal officials.[1713] More than three months later, on September 22, Hamid's indictment was amended to include a charge of materially supporting terrorism by attending the training camp in Pakistan.[1714] The government added an additional false statement charge against each defendant on January 26, 2006.[1715] The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.[1716]

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.[1717] Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.[1718] They agreed to return to Pakistan to avoid terrorism-related charges.[1719]

The court did not permit a retired FBI agent to offer his expert opinion that the interrogation of the younger Hayat was so leading, and the defendant so suggestible, as to seriously call into question the reliability of the confession, because such testimony would have been cumulative of the cross-examination of the interrogation agents. Order at 41–55, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 17, 2007) [hereinafter Order Denying New Trial], *available at* 2007 WL 1454280; *see* Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times, May 28, 2006, West Mag., at 16; Archibold, *Diverging Views*, *supra* note 1705; *Enemy Within*, *supra* note 1701; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 719 (2010); Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. Pa. J. Const. L. 1475, 1493 (2009).

1713. Indictment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005); *see* Eric Bailey, *Lodi Men Accused of Lying to FBI*, L.A. Times, June 17, 2005, at 1; Chris Heffelfinger, Radical Islam in America 130 (2011); Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, *supra* note 1708; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

1714. First Superseding Indictment, *supra* note 1706; *see* Tempest, *supra* note 1708; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

1715. Second Superseding Indictment, *supra* note 1706; United States v. Hayat, 710 F.3d 875, 883 (9th Cir. 2013).

1716. Docket Sheet, *Hayat*, No. 2:05-cr-240 (E.D. Cal. June 16, 2005) [hereinafter E.D. Cal. Docket Sheet]; *see* Tempest & Krikorian, *supra* note 1713.

Tim Reagan interviewed Judge Burrell for this report in the judge's chambers on February 13, 2007.

1717. *See* Tempest *et al.*, *supra* note 1701.

1718. *See* Murphy & Johnston, *supra* note 1700; Tempest, *supra* note 1708; Tempest *et al.*, *supra* note 1701.

1719. *See* Archibold, *Diverging Views*, *supra* note 1705 (reporting a voluntary return to Pakistan to avoid deportation); *Enemy Within*, *supra* note 1701 (reporting that the government did not have enough evidence to charge the imams with anything related to terrorism); Maria L. La Ganga & Rone Tempest, *2 Lodi Men to Be Deported*, L.A. Times, July 16, 2005, at 3 (reporting Khan and Adil's agreement to be deported); Lee Romney & Ann M. Simmons, *Pakistani Cleric Agrees to Leave U.S.*, L.A. Times, Aug. 16, 2005, at 1 (reporting Ahmed's agreement to be deported); Tempest, *Terrorist Training*, *supra* note 1703 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, *supra* note 1714 (reporting that Khan was deported in August 2005).

The two Hayats were tried together, but before separate juries.[1720] The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.[1721]

The son moved for a new trial, arguing, among other things, that one juror observed the foreperson gesture, before the end of the trial, that the defendant should be hanged.[1722] After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.[1723] A new trial was denied.[1724] The son was sentenced on September 10, 2007, to 24 years in prison.[1725] Over a dissent,[1726] the court of appeals affirmed on March 13, 2013.[1727]

The government initially decided to retry the father,[1728] but decided to drop the charges in exchange for his pleading guilty to a false customs declaration related to his taking too much money to his family on the 2003 trip to Pakistan.[1729]

1720. Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 19, 2006) (ordering the empanelment of dual juries); *see* Rone Tempest, *Jury in Lodi Case Asks to See Video*, L.A. Times. Apr. 14, 2006, at 3.

1721. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006) (finding Hamid Hayat guilty); E.D. Cal. Docket Sheet, *supra* note 1716 (noting the granting of a mistrial as to Umer Hayat because the jury was not able to reach a verdict); United States v. Hayat, 710 F.3d 875, 881 n.3, 884 (9th Cir. 2013); *see* Order Denying New Trial, *supra* note 1712, at 1; *see also* Archibold & Kearns, *supra* note 1700; *Enemy Within*, *supra* note 1701; Walsh, *supra* note 1702 ("The jury split 7-5 for conviction on one count and 6-6 on a second count . . . ."); Tempest, *supra* note 1708 ("But what the three federal prosecutors could—and did—show convincingly was that 23-year-old Hamid Hayat of Lodi, Calif., espoused strong anti-American sentiments, supported militant Muslim political parties in Pakistan and had a romantic attachment to the idea of jihad."); Rone Tempest & Eric Bailey, *Conviction for Son, Mistrial for Father in Lodi Terror Case*, L.A. Times, Apr. 26, 2006, at 1 ("Although Hamid Hayat's conviction was a clear victory for the prosecution, the facts in the nine-week trial of the Lodi father and son never matched the government's repeated claims that it had discovered an active Al Qaeda terrorist cell embedded in California's agricultural heartland, 35 miles south of Sacramento.").

1722. Order Denying New Trial, *supra* note 1712, at 6, 8–13; *see* Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

1723. Order Denying New Trial, *supra* note 1712, at 8–13; *see* Demian Bulwa, *Lodi Man Loses Bid for New Terror Trial*, S.F. Chron., May 18, 2007, at B2; Denny Walsh, *Hayat Juror Was Biased, His Accuser Testifies*, Sacramento Bee, Apr. 14, 2007, at B1.

1724. Order Denying New Trial, *supra* note 1712; *see* Bulwa, *supra* note 1723.

1725. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007); *Hayat*, 710 F.3d at 884; *see* Marshall, *supra* note 1705.

1726. *Hayat*, 710 F.3d at 915 (Judge Tashima, dissenting: "Because the district court plainly erred in preventing Hayat from introducing exculpatory evidence and in allowing inflammatory expert testimony that usurped the jury's role as finder of fact, I would reverse Hayat's conviction and remand to the district court for a new trial. I therefore respectfully dissent.").

1727. *Hayat*, 710 F.3d 875; *see* http://www.bop.gov (noting a release date of May 2, 2026, reg. no. 15804-097); *see also* Bob Egelko, *Appeals Court Backs Terrorist Conviction*, S.F. Chron., Mar. 14, 2013, at D5; Sam Stanton, Denny Walsh & Stephen Magagnini, *Divided Appellate Panel Upholds Terrorist Conviction of Lodi's Hamid Hayat*, Sacramento Bee, Mar. 14, 2013.

1728. *See* Carolyn Marshall, *Government Will Retry Terror Case*, N.Y. Times, May 6, 2006, at A11; Rone Tempest, *U.S. to Retry Father in Lodi Case*, L.A. Times, May 6, 2006, at 1.

1729. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006); Information, *id.* (May 31, 2006); *Hayat*, 710 F.3d at 881 n.3; *see Enemy Within*, *supra* note 1701; Rone Tempest &

After his mistrial, the father's confinement was changed from prison to house arrest, and on August 25, 2006, he was sentenced to time served and three years of supervised release.[1730]

Subsequent to his release, the father told reporters that his and his son's confessions resulted from exhaustion and leading questions—they told the agents what they wanted to hear so that they could go home after extensive questioning.[1731] Meanwhile, two family members—both U.S. citizens—who were trying to return to Lodi from Pakistan discovered that they were on the no-fly list, and initially they were not permitted to return without submitting to interrogation first.[1732] They declined to be interrogated[1733] and were permitted to return home five months later after intervention of counsel.[1734]

Challenge: Classified Evidence

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)[1735] may apply to this case.[1736] Another nine days later, the government filed the following announcement:

> Government counsel have been informed that there is at least one classified document that is in the possession, custody and control of the government which is potentially discoverable and it is reasonably likely that the government will submit this document to the Court *ex parte*, and *in camera*, pursuant to CIPA, for a determination of whether it is discoverable. The government's request for a review of pertinent agency evidence has just

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Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 1702.

1730. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006); *Hayat*, 710 F.3d at 881 n.3; *see* Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 1702.

1731. *Enemy Within*, *supra* note 1701; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 1702.

1732. *See* Randal C. Archibold, *U.S. Blocks Men's Return to California from Pakistan*, N.Y. Times, Aug. 29, 2006, at A17; Demian Bulwa, *2 Lodi Residents Refused Entry Back Into U.S.*, S.F. Chron., Aug. 26, 2006, at A1.

The relatives are Muhammad Ismail, Hamid Hayat's uncle and apparently Umer Hayat's brother-in-law, and Muhammad's son Jaber Ismail, Hamid's cousin. *See* Archibold, *supra*; Bulwa, *supra*. Hamid Hayat had said during the interrogation that led to his prosecution that he thought some of his cousins, including Jaber Ismail, had attended terrorist training camps. *See* Archibold, *supra*; Bulwa, *supra*. The Ismails were detained on April 21, 2006, while the juries were deliberating in the Hayats' case, but Muhammad Ismail's wife and two younger children were permitted to return home. *See* Archibold, *supra*; Bulwa, *supra*.

1733. *See* Archibold, *supra* note 1732; Bulwa, *supra* note 1732.

1734. *See* Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. Times, Oct. 2, 2006, at A10; Demian Bulwa, *Men OKd to Return to U.S. from Pakistan*, S.F. Chron., Sept. 13, 2006, at B5.

1735. 18 U.S.C. app. 3 (2011); *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers (Federal Judicial Center, 2d ed. 2013).

1736. CIPA Notice, United States v. Hayat, No. 2:05-cr-240 (E.D. Cal. June 27, 2005).

> commenced. Thus, it is reasonably foreseeable that additional classified and potentially discoverable information will be encountered.[1737]

Six times the government noticed submission of material to the court ex parte, in camera, and under seal,[1738] and twice the government noticed a hearing ex parte, in camera, and under seal.[1739]

When a trial date was set, the government announced that some evidence against the defendants was obtained using methods so secret that they could not be disclosed to anyone without a security clearance.[1740] The defendants argued that the government's call for a security clearance was a delay tactic:

> Based on the discovery provided to date, the defense believes that there is currently only one item of evidence that may potentially invoke the Classified Information Procedures Act. . . .
>
> . . . The government advised that if the defense wanted to object to the foundation of this item of evidence, classified information would be involved and security clearances would be needed.

1737. CIPA Motion at 3, *id.* (July 6, 2005).

1738. Six times the government noticed the submission of ex parte, in camera, under seal material:

1. CIPA Notice, *id.* (Oct. 6, 2005); *see* Redacted Government's CIPA Brief, *id.* (Dec. 16, 2005) (specifying a hearing date of October 7, 2005).
2. CIPA Notice, *id.* (Nov. 18, 2005).
3. CIPA Notice, *id.* (Dec. 9, 2005); *see* Redacted Government's CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of December 9, 2005).
4. CIPA Notice, *id.* (Jan. 28, 2006); *see* Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 2, 2006) (specifying a hearing date of January 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 27, 2006, filed Feb. 1, 2006) (specifying a hearing date of January 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006) (specifying a hearing date of January 27, 2005).
5. CIPA Notice, *id.* (Apr. 3, 2006); *see* Redacted Government's CIPA Motion, *id.* (Apr. 4, 2006) (specifying a hearing date of April 4, 2006); Redacted Order, *id.* (Apr. 3, 2006).
6. CIPA Notice, *id.* (Dec. 13, 2006); *see* Order, *id.* (Dec. 21, 2006) (granting in camera ex parte motion for a protective order).

1739. Twice the government noticed an ex parte, in camera, under seal hearing:

1. CIPA Hearing Notice, *id.* (Dec. 5, 2005) (specifying a hearing date of December 9, 2005); *see* Redacted Government's CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of December 9, 2005).
2. CIPA Hearing Notice, *id.* (Dec. 9, 2005) (specifying a hearing date of Dec. 16, 2005); *see* Redacted Government's CIPA Brief, *id.* (Dec. 16, 2005) (specifying a hearing date of December. 16, 2005).

There may have been a third sealed hearing. *See* Redacted Government's CIPA Motion, *id.* (dated Jan. 6, 2005 [sic], filed Jan. 6, 2006) (specifying a hearing date of January 6, 2005 [sic]).

1740. *See Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of February 14, 2006); *see also* Order at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 10, 2006) (announcing a trial date of February 14, 2006, and discussing a government motion that defense counsel obtain a security clearance).

The evidence apparently resulted in four exhibits—satellite images in the vicinity of Balakot, Pakistan—that the parties ultimately stipulated were admissible. Exhibit 4 Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006); Exhibit 3 Stipulated Order, *id.* (Feb. 3, 2006); Exhibit 2 Stipulated Order, *id.* (Feb. 3, 2006); Exhibit 1 Stipulated Order, *id.* (Feb. 3, 2006).

> . . . Based on [an] investigation, the defense will not object to the admissibility of the item of evidence. . . .
>
> . . . .
>
> . . . The government, however, is objecting to such a stipulation by suggesting that the defendants cannot make such a decision voluntarily. The defense believes that such an objection is insincere, unfounded and just another tactic by the government to force delays in this case.
>
> . . . Now that the Court has set a trial date, the government is attempting to force defense counsel to undergo lengthy security clearances just to litigate an evidentiary issue that the defense has stated in open court it has no objections to.[1741]

Judge Burrell considered whether he should order defense counsel to obtain security clearances or, alternatively, should appoint already cleared counsel to assist in the defense.[1742] The classified information security officer could not find a local defense attorney with a security clearance, but he was able to identify two in the Northern District of California who were cleared.[1743] Ultimately, Judge Burrell decided that cleared counsel for the defendants was not necessary.[1744]

Within a few weeks, the parties and their attorneys agreed to a stipulated protective order stating that the case might require in camera proceedings concerning classified information, which would be held ex parte because defense counsel did not have security clearances and they did not want to delay the trial to obtain them.[1745] Judge Burrell's court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.[1746]

Hamid Hayat's motion for a new trial[1747] included eight main arguments, the third of which—"Hayat was deprived of his constitutional right to confront [the government informant] Khan by the Court's CIPA order of March 1, 2006"—was filed under seal because it referenced a sealed court order containing a discussion of potentially classified information.[1748] Judge Burrell filed his ruling on this argument under seal.[1749]

The court of appeals reviewed classified information withheld from the defense in discovery and affirmed its withholding.[1750]

1741. Defendants' Joint CIPA Response at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 16, 2006).

1742. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1743. *Id.*

1744. *Id.*

1745. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006).

1746. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

1747. New Trial Brief, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006).

1748. Sealing Order, *id.* (Feb. 5, 2007); Defendant's Sealing Request, *id.* (Oct. 27, 2006); *see also* Order, *id.* (Mar. 21, 2007) (granting the plaintiff's motion to file an argument III reply under seal); Order, *id.* (Feb. 5, 2007) (granting the government's motion to file a response to argument III under seal).

1749. Order Denying New Trial, *supra* note 1712, at 35; E.D. Cal. Docket Sheet, *supra* note 1716 (noting that "counsel for the parties are authorized to obtain from the clerk's office a copy of the sealed order").

1750. United States v. Hayat, 710 F.3d 875, 900 (9th Cir. 2013).

Toledo

United States v. Amawi and Related Actions (James G. Carr, N.D. Ohio)

On Thursday, February 16, 2006, the government filed a sealed indictment against three Muslim men of Toledo for conspiracy to fight United States forces in Iraq.[1751] Mohammad Zaki Amawi was a citizen of both the United States and Jordan, Marwan Othman el-Hindi was a naturalized citizen of the United States, and Wassim I. Mazloum was a permanent resident of the United States.[1752] El-Hindi and Mazloum were arrested in Toledo on Sunday; Amawi was arrested in Jordan on Sunday and flown to the United States on Monday; the indictment was unsealed on Tuesday.[1753] The U.S. District Court for the Northern District of Ohio assigned the case to Judge James G. Carr.[1754]

Amawi was born in the United States of Jordanian parents; the family moved back to Jordan when Amawi was two years old.[1755] After the parents divorced, Amawi's mother moved with him to Toledo, about five years before the indictment.[1756] In 2005, he worked at AZ Travel and Services.[1757] Later that year, he returned to Jordan.[1758] El-Hindi was born in Jordan.[1759] In the United States, he dropped out of Onondaga Community College.[1760] He had been married twice before his current marriage.[1761] Mazloum was born in Lebanon and grew up in Ven-

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1751. Indictment, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Indictment]; *see* Dan Eggen, *Ohio Men Accused of Plot to Kill Troops in Iraq*, Wash. Post, Feb. 22, 2006, at A3; Amanda Garrett, Mike Tobin, Christopher Evans & Stephen Koff, *3 Ohioans Face Terror Charges*, Cleveland Plain Dealer, Feb. 22, 2006, at A1; Neil A. Lewis, *3 Charged with Conspiring to Kill U.S. Troops in Iraq*, N.Y. Times, Feb. 22, 2006, at A12; Mike Wilkinson & Christina Hall, *3 Charged in Terror Plot*, Toledo Blade, Feb. 22, 2006, at A1; Andrew Zajac, *Ohio Men Indicted on Terror Charges*, Chi. Trib., Feb. 22, 2006, News, at 3.

1752. *See Amawi* Indictment, *supra* note 1751; Eggen, *supra* note 1751; Lewis, *supra* note 1751; Zajac, *supra* note 1751.

1753. Docket Sheet, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Docket Sheet]; *see* Eggen, *supra* note 1751; Garrett *et al.*, *supra* note 1751; Wilkinson & Hall, *supra* note 1751; Zajac, *supra* note 1751.

1754. *Amawi* Docket Sheet, *supra* note 1753; *see* Mark Reiter, *Deadline Imposed in Local Terrorism Case*, Toledo Blade, Mar. 8, 2006, at B1.

Tim Reagan interviewed Judge Carr for this report at a district judges' workshop in San Antonio, Texas, on September 9, 2008.

1755. Interview with Hon. James G. Carr, Sept. 9, 2008.

1756. *Id.*; *see* Erika Ray, *Experts Say Terror Links Are Formed Overseas*, Toledo Blade, Feb. 23, 2006, at A6.

1757. *See* Ignazio Messina & Christina Hall, *Business Falls at Firms Tied to 3 Suspects*, Toledo Blade, Feb. 23, 2006, at A6.

1758. *See* Ray, *supra* note 1756.

1759. *See Amawi* Indictment, *supra* note 1751; *Few Clues Available on Accused Toledo Man*, Toledo Blade, Feb. 22, 2006, at A4 [hereinafter *Few Clues*].

1760. *See* Christopher Evans, Amanda Garrett, Mark Rollenhagen & Mike Tobin, *Nickel-and-Dime Hustler, or Something Worse?*, Cleveland Plain Dealer, May 21, 2006, at A1.

1761. *See* Evans, *et al.*, *supra* note 1760; *Few Clues*, *supra* note 1759.

ezuela; he moved to the United States in 2000.[1762] With his brother, he operated City Auto Sales, a used-car business, and he studied computer science and engineering at the University of Toledo.[1763]

Information about the conspiracy was provided to the government by a man called "the Trainer" in the indictment.[1764] According to the indictment, the Trainer was a United States citizen with a U.S. military background whom el-Hindi had solicited "to assist in providing security and bodyguard training."[1765] The Trainer began passing information about the defendants to the government in 2004.[1766]

> Part of his pitch to the defendants was that Muslims needed to protect themselves. This morphed into suggestions and then offers that he could provide training to the defendants in jihadist methods. This, in turn, he told them, would prepare them either to engage in combat against American forces in Iraq and/or provide training to do so for others.
>
> The defendants fell for his spurious blandishments.[1767]

On March 2, newspapers identified the Trainer as Darren Griffin, also known as Bilal, who had worked at a charity called KindHearts, which the government shut down the same week it indicted Amawi, el-Hindi, and Mazloum.[1768] Two days after Amawi's indictment, the government obtained a warrant to search AZ Travel, where he worked.[1769] The supporting affidavit refers to Griffin as a paid cooperating witness who had been reporting to the FBI for four years.[1770] On June 6, 2006, Judge Carr issued an order forbidding public dissemination of Griffin's image or identity.[1771]

A year after the original indictment was filed, a superseding indictment added as defendants two Chicago men, cousins Zubair and Khaleel Ahmed.[1772] A

1762. *See* Erica Blake, *Local Man in Terror Case Is Released on Bail*, Toledo Blade, Sept. 1, 2007, at B1.

1763. *See* Christina Hall, *Indictment of UT Student Shocks Family, Acquaintances*, Toledo Blade, Feb. 22, 2006, at A4; Messina & Hall, *supra* note 1757; David Yonke & Tom Troy, *Toledo-Area Muslims Ask for Justice, Fear Backlash*, Toledo Blade, Feb. 22, 2006, at A1.

1764. *Amawi* Indictment, *supra* note 1751; *see* Eggen, *supra* note 1751; Garrett *et al.*, *supra* note 1751; Lewis, *supra* note 1751; Wilkinson & Hall, *supra* note 1751; Zajac, *supra* note 1751.

1765. *Amawi* Indictment, *supra* note 1751

1766. *See* Joshua Boak, *Detainee Served as Imam at Prison*, Toledo Blade, Feb. 23, 2006, at A1.

1767. Order, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Oct. 6, 2011), *available at* 2011 WL 4696477 (denying a motion for a new trial based on new evidence).

1768. Mike Tobin, Mark Rollenhagen & Christopher Evans, *FBI'S Informant Worked at Muslim Charity 3 Years*, Cleveland Plain Dealer, Mar. 2, 2006, at A1; David Yonke, *Insider in Local Terror Arrests ID'd*, Toledo Blade, Mar. 2, 2006, at A1; Christopher D. Kirkpatrick & David Yonke, *Muslims Find Giving to Charity Now Harder*, Toledo Blade, Mar. 6, 2006, at A1.

1769. Search Warrant, United States v. AZ Travel Inc., No. 3:06-mj-7025 (N.D. Ohio Feb. 18, 2006).

1770. Affidavit, *AZ Travel Inc.*, No. 3:06-mj-7025 (N.D. Ohio filed unsealed Apr. 17, 2006); *see* Mark Reiter, *Feds Suspected Plot by Toledo Trio in '04*, Toledo Blade, Apr. 18, 2006, at A1.

1771. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 6, 2006).

1772. Superseding Indictment, *id.* (Feb. 7, 2007); *see* Jeff Coen & Tonya Maxwell, *2 Arrested in Terror Conspiracy*, Chi. Trib., Feb. 22, 2007, Metro, at 1; Mark Reiter, *2 Tied to Terror Sus-*

separate indictment charged el-Hindi and Ashraf Zaim, the owner of AZ Travel, with grant fraud.[1773] A third indictment charged Mazloum's brother Bilal with making a false statement to federal agents during the investigation of Mazloum.[1774] The court assigned the two new cases to Judge Carr.[1775] Judge Carr decided that the Ahmeds and Wassim Mazloum could be released on bond and electronic monitoring.[1776] In December 2007, so that the trial against the original three defendants could proceed without impairing the Ahmeds' ability to mount defenses, the Ahmeds were dismissed from the superseding indictment, and a separate indictment was filed against them.[1777]

Jury selection for the trial of the original three defendants began on March 4, 2008.[1778] Judge Carr allowed the attorneys to prepare and use a jury questionnaire.[1779] Judge Carr permits attorneys to question potential jurors during voir dire,[1780] but he threatened to remove the privilege when the attorneys took too much time trying to develop challenges for cause against too many potential jurors.[1781] Voir dire proceeded more efficiently after that.[1782]

Judge Carr gave both sides extra peremptory challenges, but he was not lenient with challenges for cause.[1783] After all potential jurors had been questioned, there remained many more than needed for the jury, alternates, and peremptory challenges.[1784] So Judge Carr invited the attorneys to file a joint motion to reconsider denials of cause challenges.[1785] The attorneys accepted the invitation, poten-

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pects Indicted, Toledo Blade, Feb. 22, 2007, at A1; Libby Sander, *2 Chicago Cousins Are Charged with Plotting Overseas Attacks*, N.Y. Times, Feb. 22, 2007, at A20.

1773. Indictment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007); *see* Reiter, *supra* note 1772; Sander, *supra* note 1772.

1774. Indictment, United States v. Mazloum, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007); *see* Reiter, *supra* note 1772; Sander, *supra* note 1772.

1775. Docket Sheet, *Mazloum*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007) [hereinafter *Mazloum* Docket Sheet]; Docket Sheet, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007) [hereinafter *El-Hindi* Docket Sheet].

1776. *See* Blake, *supra* note 1762.

1777. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Dec. 27, 2007); Indictment, United States v. Ahmed, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007).

1778. *Amawi* Docket Sheet, *supra* note 1753; *see* Erica Blake, *U.S. Jury Pool Draws 450 for Terror Conspiracy Trial*, Toledo Blade, Mar. 5, 2008, at B1; Damian G. Guevara, *Toledo Trio Accused in 2006 Terror Plot Head to Trial*, Cleveland Plain Dealer, Mar. 4, 2008, at B1.

1779. James G. Carr, United States v. Amawi: Jury Questionnaire (Mar. 4, 2008); Interview with Hon. James G. Carr, Sept. 9, 2008; *see* Transcript, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Jan. 15, 2008, filed Jan. 25, 2010) [hereinafter *Amawi* Jan. 15, 2008, Transcript]; Transcript at 48–64, *id.* (Jan. 10, 2008, filed Jan. 25, 2010) [hereinafter *Amawi* Jan. 10, 2008, Transcript].

Judge Carr wishes he had given the questions greater scrutiny, because some proved to be too confusing to the potential jurors. Interview with Hon. James G. Carr, Sept. 9, 2008.

1780. Interview with Hon. James G. Carr, Sept. 9, 2008; *Amawi* Jan. 10, 2008, Transcript, *supra* note 1779, at 62–63.

1781. Interview with Hon. James G. Carr, Sept. 9, 2008.

1782. *Id.*

1783. *Id.*

1784. *Id.*

1785. *Id.*

tially appealable issues were removed, and a jury satisfactory to both sides and the court heard the case.[1786]

On March 24, Judge Carr severed from the trial two counts that were only against Amawi for threats against the President,[1787] and the government later dismissed those counts.[1788] Opening statements began on April 1.[1789] Griffin testified the following day.[1790] He testified that for nearly $56,000 a year he professed approval of overseas jihad to see who in the Toledo-area Muslim community would respond, and the three defendants took the bait.[1791] Closing arguments concluded on Tuesday, June 10.[1792] The jury reached guilty verdicts on Friday.[1793]

Judge Carr deferred sentencing of the three original defendants until after the separate indictment against el-Hindi was resolved.[1794] After a bench trial of five court days in November 2008,[1795] Judge Carr convicted el-Hindi on the fraud indictment and sentenced him to one year and a half;[1796] the court of appeals affirmed.[1797] Zaim pleaded guilty,[1798] and Judge Carr sentenced him to one day of custody.[1799] In October 2009, Judge Carr sentenced the three original defendants:[1800] 20 years for Amawi;[1801] 12 years for el-Hindi,[1802] to be served in advance

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1786. *Id.*

1787. Order, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Mar. 24, 2008).

1788. Government Motion, *id.* (July 15, 2008).

1789. *Amawi* Docket Sheet, *supra* note 1753.

Following opening statements, Judge Carr provided the jurors with preliminary instructions. James G. Carr, United States v. Amawi: Preliminary Jury Instructions (Apr. 1, 2008).

1790. *See* Erica Blake, *"The Trainer" Begins Terror Trial Testimony*, Toledo Blade, Apr. 3, 2008, at A1.

1791. *See id.*

1792. *Amawi* Docket Sheet, *supra* note 1753; *see* Mark Reiter, *Terrorist Plot Case Is Handed to Jurors*, Toledo Blade, June 11, 2008, at B1.

For jury instructions, see James G. Carr, United States v. Amawi: Final Jury Instructions (June 10, 2008); James G. Carr, United States v. Amawi: Stipulated Definitions (June 4, 2008); James G. Carr, United States v. Amawi: Supplemental Jury Instruction (June 10, 2008) (concerning examination of original evidence).

1793. Jury Verdicts, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 13, 2008); *see* Mark Reiter, *3 Guilty in Plot to Kill Troops*, Toledo Blade, June 14, 2008, at A1.

1794. *See* Erica Blake, *Millions Spent on Terror Case*, June 22, 2008, at A1.

1795. *El-Hindi* Docket Sheet, *supra* note 1775; *see* Erica Blake, *Convicted Terrorist to Face Another Trial*, Toledo Blade, Nov. 5, 2008, at B1.

1796. Judgment and Commitment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009); El-Hindi Sentencing Transcript at 163, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 21, 2009, filed Jan. 22, 2010); *see* Erica Blake, *El-Hindi Guilty of Conspiracy, Theft Charges*, Toledo Blade, Nov. 13, 2008, at B1.

1797. United States v. El-Hindi, 408 F. App'x 957 (6th Cir. 2011).

1798. *El-Hindi* Docket Sheet, *supra* note 1775.

1799. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Dec. 8, 2008).

1800. *See* Erica Blake, *3 in Toledo Terror Plot Will Serve up to 20 Years*, Toledo Blade, Oct. 22, 2009, at A1.

1801. Amended Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009); Amawi Sentencing Transcript at 287, *id.* (Oct. 21, 2009, filed Jan. 22, 2010); *see* http://www.bop.gov (noting a release date of August 6, 2023, reg. no. 30547-160).

of the sentence on the fraud indictment;[1803] and eight years and four months for Mazloum.[1804] On August 23, 2012, the court of appeals affirmed "all opinions and judgments of the district court."[1805]

Bilal Mazloum was sentenced on August 26, 2008, to one year of probation on a guilty plea.[1806] On January 15, 2009, the Ahmeds both pleaded guilty to a single count of material support to terrorists.[1807] They surrendered to begin serving their sentences in advance of sentencing.[1808] On July 12, 2010, Judge Carr sentenced Zubair Ahmed to ten years and Khaleel Ahmed to eight years and four months.[1809]

Challenge: Attorney–Client Contacts

As they began preparing their clients' defenses, the defendants' attorneys became concerned that their communications with their clients were being improperly monitored.[1810] One month after the indictment was filed, the assistant federal defender representing Amawi filed a motion "to compel the United States to describe with particularity the extent to which attorney–client communications have been or may be monitored, or in the alternative, for pretrial release on bond."[1811] Mazloum's attorney joined the motion on the next court day.[1812] Government attorneys responded that they were not aware of any monitoring other than customary monitoring by the Bureau of Prisons.[1813]

Eight months into the case, Judge Carr reluctantly allowed Amawi to fire the federal defender's office, which was representing him; Amawi was concerned that

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1802. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 26, 2009); El-Hindi Sentencing Transcript, *supra* note 1796, at 163; *see* http://www.bop.gov (noting a release date of January 8, 2018, reg. no. 43530-060).

1803. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009); El-Hindi Sentencing Transcript, *supra* note 1796, at 163.

1804. Judgment and Commitment, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 27, 2009); Mazloum Sentencing Transcript at 65, *id.* (Oct. 21, 2009, filed Jan. 22, 2010); *see* http://www.bop.gov (noting a release date of April 23, 2014, reg. no. 43528-060).

1805. United States v. Amawi, 695 F.3d 457, 465 (6th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 1474 (2013).

1806. *Mazloum* Docket Sheet, *supra* note 1775.

1807. Docket Sheet, United States v. Ahmed, No. 1:07-cr-647 (N.D. Ohio Dec. 13, 2007) [hereinafter *Ahmed* Docket Sheet]; *see 2 Men Plead Guilty in Local Terror Case*, Toledo Blade, Jan. 16, 2009, at B1.

1808. Surrender Order, *Ahmed*, No. 1:07-cr-647 (N.D. Ohio Jan. 8, 2010); Quarterly Report, *id.* (May 1, 2009).

1809. Sentencing Transcript at 44, 66, *id.* (July 12, 2010, filed Dec. 8, 2010); *Ahmed* Docket Sheet, *supra* note 1807; *see* http://www.bop.gov (noting release dates of July 27, 2018, for Zubair Ahmed, reg. no. 19303-424, and May 8, 2016, for Khaleel Ahmed, reg. no. 19304-424).

1810. Transcript at 37–39, 41–43, United States v. Amawi, No. 3:06-cr-719 (N.D. Ohio Mar. 7, 2006, filed Jan. 22, 2010) [hereinafter *Amawi* Mar. 7, 2006, Transcript]; *see* Christina Hall, *Scrutiny of Terror Suspects Strict*, Toledo Blade, Feb. 25, 2006, at A1.

1811. Amawi Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 17, 2006); *see Attorney Seeks Data on Inmate Privacy*, Toledo Blade, Mar. 18, 2006, at B1.

1812. Mazloum Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 20, 2006).

1813. Government Responses, *id.* (Mar. 21, 2006).

a government employee would not represent him adequately.[1814] Amawi was no more satisfied with newly appointed counsel and eventually requested to be represented by the federal defender's office again, a request that Judge Carr granted.[1815] Balancing Amawi's attorney's desire for more time to prepare for trial and el-Hindi's desire for a speedy trial, Judge Carr granted Amawi a short continuance to afford his reappointed attorney time to prepare.[1816]

Challenge: FISA Evidence

At an early status conference—before the Ahmeds had been indicted—Judge Carr, who sat on the court that reviewed surveillance warrants under the Foreign Intelligence Surveillance Act (FISA), asked government counsel if the case would include FISA evidence.[1817] The attorney, who appeared by telephone, responded, "The answer to that question alone, it could be considered classified, and we wouldn't be authorized to discuss that over this telephone line."[1818]

On the day before the Ahmeds' April 24, 2007, detention hearing, the government filed notices that it intended to use at the hearing evidence obtained pursuant to FISA warrants.[1819] On September 14, the government filed a notice that it intended to use FISA evidence pertaining to each defendant at some point during the case.[1820] Judge Carr determined that it was not necessary to disclose to defense counsel FISA application materials for the FISA evidence for the court to determine the validity of the FISA evidence ex parte and in camera.[1821]

The court of appeals agreed with Judge Carr that no FISA-derived evidence was discoverable.[1822]

Challenge: Court Security

Judge Carr was distressed to learn about unnecessarily visible court security.[1823] For example, prospective jurors had to walk by an SUV conspicuously marked as a Department of Homeland Security vehicle.[1824] It did not help that one news sta-

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1814. Transcript, *id.* (Oct. 19, 2006, filed Jan. 22, 2010); *Amawi* Docket Sheet, *supra* note 1753; *see* Mark Reiter, *Local Terror Suspect Will Get New Lawyer*, Toledo Blade, Oct. 20, 2006, at B3.

1815. Transcript at 3–7, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Jan. 18, 2008, filed Jan. 22, 2010); *Amawi* Jan. 10, 2008, Transcript, *supra* note 1779, at 3; Interview with Hon. James G. Carr, Sept. 9, 2008.

1816. Interview with Hon. James G. Carr, Sept. 9, 2008.

1817. *Amawi* Mar. 7, 2006, Transcript, *supra* note 1810, at 5.

1818. *Id.*

1819. FISA Notices, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Apr. 23, 2007).

1820. FISA Notice, *id.* (Sept. 14, 2007).

1821. United States v. Amawi, 531 F. Supp. 2d 832 (N.D. Ohio 2008).

1822. United States v. Amawi, 695 F.3d 457, 474–75 (6th Cir. 2012).

1823. Interview with Hon. James G. Carr, Sept. 9, 2008.

1824. *Id.*

tion reported on the case with a graphic titled, "Terror in Toledo."[1825] Chief Judge Carr was able to persuade security forces to convey less of a siege image.[1826]

Challenge: Jury Security

Judge Carr used an anonymous jury[1827] and had jurors report off-site instead of to the courthouse during the trial.[1828] To minimize prejudice, Judge Carr told the jurors that it was customary to use an anonymous jury in a criminal trial and that off-site reporting was necessitated by insufficient courthouse parking availability, which actually was true to some extent.[1829]

1825. *Id.*
1826. *Id.*
1827. *Id.*
1828. Interview with Hon. James G. Carr, Sept. 9, 2008.
1829. *Id.*

Atlanta

United States v. Ahmed (Clarence Cooper, William S. Duffey, Jr., and Gerrilyn G. Brill, N.D. Ga.)

On March 23, 2006, the FBI arrested Georgia Tech student Syed Haris Ahmed on a sealed material support indictment filed in the Northern District of Georgia.[1830] The court initially assigned the case to District Judge Clarence Cooper and Magistrate Judge Joel M. Feldman.[1831] With the defendant's consent, the government obtained from Judge Feldman permission to proceed initially under seal with closed proceedings.[1832] But on the following day, April 20, the day Ahmed pleaded not guilty at a closed hearing,[1833] the *Atlanta Journal-Constitution* reported Ahmed's arrest,[1834] and as a result the government moved to unseal the case.[1835]

Also on April 20, Magistrate Judge Linda T. Walker took over for Judge Feldman,[1836] because of Judge Feldman's impending retirement.[1837] Two months later, because of Judge Walker's recusal, Magistrate Judge Gerrilyn G. Brill took over for Judge Walker.[1838]

Ahmed is an American citizen born in Pakistan.[1839] He moved to the United States with his parents and siblings in 1997.[1840] At Georgia Tech, he majored in mechanical engineering.[1841]

On July 19, 2006, the indictment against Ahmed was superseded to add Ehsanul Islam Sadequee as a defendant.[1842] Sadequee was arrested while shop-

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1830. Indictment, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006); *see* Brenda Goodman, *Student Is Held in Terror Case*, N.Y. Times, Apr. 21, 2006, at A18; Bill Torpy, *Terror Charge for Student*, Atlanta J. & Const., Apr. 21, 2006, at A1.

1831. Docket Sheet, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 23, 2006) [hereinafter N.D. Ga. Docket Sheet].

For this report, Tim Reagan interviewed Judge Cooper and his law clerk Nicole Jenkins in the judge's chambers on November 18, 2009.

1832. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

1833. Bill Torpy & Jeremy Redmon, *Path Traced in Suspects' Terror Case*, Atlanta J. & Const., Apr. 22, 2006, at A1.

1834. Bill Torpy & Mike Morris, *FBI Detains Tech Student, but Won't Say Why*, Atlanta J. & Const., Apr. 20, 2006, at A1.

1835. Motion to Seal, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006); *see* Goodman, *supra* note 1830.

1836. N.D. Ga. Docket Sheet, *supra* note 1831.

1837. Reassignment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006) ("In light of the potential length required to dispose of the above-styled case which may extend beyond the undersigned's scheduled October 22, 2006 retirement, IT IS HEREBY ORDERED that this case be reassigned from the undersigned to the next magistrate scheduled to receive a long case, to wit: the Honorable Linda T. Walker."); *see* Order, *id.* (Apr. 19, 2006) (declaring the case to be complex under 18 U.S.C. § 3161(h)(8)(A), (B)(ii) (2006), now § 3161(h)(7)(A), (B)(ii) (2011)).

1838. Reassignment Order, *id.* (June 21, 2006); Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

1839. *See* Goodman, *supra* note 1830; Torpy & Morris, *supra* note 1834.

1840. *See* Torpy & Morris, *supra* note 1834.

1841. *See id.*

ping in Dhaka, Bangladesh, on April 17 and turned over to U.S. authorities.[1843] The U.S. District Court for the Eastern District of New York had issued a warrant for Sadequee's arrest on March 28.[1844] American authorities transported him to the District of Alaska;[1845] the court there committed Sadequee to the Eastern District of New York.[1846] Sadequee was arraigned in Brooklyn on April 22.[1847] On August 1, the court in the Eastern District of New York committed Sadequee to the Northern District of Georgia.[1848] Sadequee pleaded not guilty in Atlanta to the superseding indictment on August 9.[1849]

Ahmed and Sadequee met at Al-Farooq Masjid, a mosque near Georgia Tech.[1850] They agreed to prepare for violent jihad, including by playing paintball in the north Georgia mountains.[1851]

Sadequee is a U.S. citizen born in Fairfax, Virginia; his parents are Bangladeshi.[1852] He moved to the Atlanta area in 1988.[1853] From 1999 to 2001, he studied at an Islamic seminary in Ajax, Ontario.[1854] In August 2005, he traveled to Bangladesh to marry a cousin.[1855] While there, he studied business administration at North South University in Dhaka.[1856]

On March 6, 2005, Ahmed and Sadequee traveled together to Toronto, which has a very large Muslim community.[1857] Two of the men they met were subsequently prosecuted by Canada after a 17-suspect terrorism sweep.[1858]

1842. Superseding Indictment *Ahmed*, No. 1:06-cr-147 (N.D. Ga. July 19, 2006); *see* Jeffry Scott, *Georgia Terror Suspects Accused of Dobbins Plot*, Atlanta J. & Const., July 20, 2006, at D1.

1843. *See* William K. Rashbaum & Brenda Goodman, *New Terror Accusations Keep a Georgia Man in Custody*, N.Y. Times, Apr. 29, 2006, at A12; Torpy, *supra* note 1830; Torpy & Redmon, *supra* note 1833.

1844. Arrest Warrant, United States v. Sadequee, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

1845. Docket Sheet, United States v. Sadequee, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006); *see* Jeremy Redmon & Bill Torpy, *Feds Trace Pair to D.C. in Terror Case*, Atlanta J. & Const., Apr. 29, 2006, at A1.

1846. Commitment to Another District, *Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006).

1847. Docket Sheet, *Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

1848. Docket Sheet, United States v. Sadequee, No. 1:06-mj-820 (E.D.N.Y. Aug. 1, 2006).

1849. N.D. Ga. Docket Sheet, *supra* note 1831; *see* Bill Torpy, *Terror Case Suspect Returned to Atlanta*, Atlanta J. & Const., Aug. 10, 2006, at D12.

1850. *See* Torpy & Redmon, *supra* note 1833.

1851. Specific Findings at 2–4, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. June 10, 2009).

1852. *See* Bill Torpy, *Suspected Terrorists*, Atlanta J. & Const., June 11, 2006, at A1; Redmon & Torpy, *supra* note 1845.

1853. *See* Torpy, *supra* note 1852.

1854. *See id.*

1855. *See* Rashbaum & Goodman, *supra* note 1843; Redmon & Torpy, *supra* note 1845.

1856. *See* Redmon & Torpy, *supra* note 1845.

1857. Specific Findings, *supra* note 1851, at 3; *see* Brenda Goodman, *U.S. Says 2 Georgia Men Planned a Terror Attack*, N.Y. Times, Apr. 22, 2006, at A12; Torpy, *supra* note 1852.

1858. *See* Ian Austen & David Johnston, *17 Held in Plot to Bomb Sites Across Ontario*, N.Y. Times, June 4, 2006, at 11; Bill Torpy, *Ga. Terror Case Tied to Arrests*, Atlanta J. & Const., June 4, 2006, at A1; Torpy, *supra* note 1852.

In April, Ahmed and Sadequee made casing videos of potential terrorism targets: the Capitol, the George Washington Masonic Memorial in Alexandria, the World Bank, and a fuel storage facility in Newington, Virginia.[1859] A suspected terrorist in Britain, Younis Tsouli, was discovered to have received the videos over the Internet.[1860]

On July 17, Ahmed traveled to Pakistan.[1861] His family claimed the trip was for religious education, but the government claimed the purpose was military training.[1862] On August 18, Sadequee traveled to Bangladesh.[1863]

Ahmed returned to the United States on August 19, and federal agents interviewed him upon his arrival.[1864] They interviewed him again the following March.[1865]

In October 2008, because of Judge Cooper's taking senior status four months later, District Judge William S. Duffey, Jr., became the presiding judge.[1866] The government decided to try Ahmed and Sadequee by separate indictments.[1867]

As trial approached, each of the defendants expressed a desire to represent himself.[1868] Ahmed wanted to address the court during closing arguments.[1869] Sadequee said that he wanted to question witnesses.[1870]

1859. Specific Findings, *supra* note 1851, at 5–6 ("That the videos were to advance and provide support for terrorism is demonstrated by Sadequee's narration during the dusk videotaping of the Pentagon, when, referring to the Pentagon, Sadequee stated: 'this is where our brothers attacked.'"); *see* Rashbaum & Goodman, *supra* note 1843; Redmon & Torpy, *supra* note 1845; Torpy, *supra* note 1852; Craig Whitlock & Spencer S. Hsu, *Terror Webmaster Sentenced in Britain*, Wash. Post, Jan. 24, 2008, at A10.

1860. Specific Findings, *supra* note 1851, at 13; *see* Torpy, *supra* note 1852.

On July 5, 2007, Tsouli was sentenced by a British court to ten years in prison. *See* Whitlock & Hsu, *supra* note 1859.

1861. Specific Findings, *supra* note 1851, at 10; *see* Torpy, *supra* note 1852.

1862. *See* Torpy, *supra* note 1852.

1863. Specific Findings, *supra* note 1851, at 10.

1864. *Id.* at 11.

1865. *Id.* at 15.

1866. N.D. Ga. Docket Sheet, *supra* note 1831 (noting transfer of the case on October 1, 2008); Interview with Hon. Clarence Cooper, Nov. 18, 2009; *see* Transcript at 3, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Jan. 26, 2009, filed Feb. 12, 2009) [hereinafter First Jan. 26, 2009, Transcript]; Transcript at 2–3, *id.* (Jan. 26, 2009, filed Jan. 30, 2009) [hereinafter Second Jan. 26, 2009, Transcript]; Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Cooper's taking senior status on February 9, 2009).

Tim Reagan interviewed Judge Duffey for this report in the judge's chambers on June 16, 2009, and by telephone on February 18, 2010.

1867. Third Superseding Indictment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 9, 2008) (superseding indictment against Sadequee); Second Superseding Indictment, *id.* (superseding indictment against Ahmed).

1868. Second Jan. 26, 2009, Transcript, *supra* note 1866, at 21 ("[Sadequee]: I also wanted to ask about I'm considering going *pro se*. And I understand that there is a number of categories, like standby counsel."); *id.* at 27 (Ahmed "would like to address [the court] again about an issue that he just raised for the first time at counsel table similar to what Mr. Sadequee—the discussion you had with Mr. Sadequee."); First Jan. 26, 2009, Transcript, *supra* note 1866, at 14 ("[Ahmed]: I

Judge Duffey agreed to let Ahmed proceed with counsel but make his own closing statement if the trial were to the bench rather than to a jury.[1871] Ahmed opted for a bench trial,[1872] which began on June 1, 2009.[1873] He said that he thought that Judge Duffey would be more objective than the average juror.[1874] On the fourth day of trial, as the court prepared to hear closing arguments, Judge Duffey clarified that Ahmed elected not to testify and that his closing remarks could not be considered as evidence.[1875] On June 9, Judge Duffey announced that Ahmed was guilty.[1876]

The case received extensive coverage, especially by local news media.[1877] One status conference held in Judge Brill's chambers was attended by reporters from several news media because there had been talk of closing the proceeding.[1878] Judge Brill observed that sealing documents and closing proceedings often intensifies news media interest.[1879]

One local journalist sat through the entire trial.[1880] Judge Duffey reserved a row of seats for the press, and he permitted sketch artists to sit in the jury box.[1881] News media had access to all of the evidence on the day that it was admitted; the U.S. Attorney's office was responsible for providing copies of the evidence to the media.[1882] No one in Judge Duffey's chambers was permitted to convey infor-

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wanted to file a motion to terminate counsel."); *see* Bill Rankin, *Terror Suspects May Want to Defend Selves*, Atlanta J. & Const., Jan. 28, 2009, at C3.

1869. Interview with Hon. William S. Duffey, Jr., June 16, 2009; *see* Bill Rankin, *No Jury for Terror Suspect*, Atlanta J. & Const., May 20, 2009, at B1.

1870. Transcript at 31, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Mar. 3, 2009, filed Mar. 13, 2009) ("I would definitely intend to interview witnesses. . . . I also perhaps would make some statements in the opening statement or closing statement."); First Jan. 30, 2009, Transcript, *supra* note 1866 ("maybe I would just interview one or two witnesses"); *see* Rankin, *supra* note 1868.

1871. Transcript at 6–7, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. May 19, 2009, filed Jan. 12, 2010) [hereinafter May 19, 2009, Transcript]; Transcript, *id.* (May 18, 2009, filed Jan. 12, 2010).

1872. May 19, 2009, Transcript, *supra* note 1871, at 3–6; Specific Findings, *supra* note 1851, at 2; Interview with Hon. William S. Duffey, Jr., June 16, 2009; *see* Rankin, *supra* note 1869.

1873. N.D. Ga. Docket Sheet, *supra* note 1831; Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 1, 2009, filed June 19, 2009); Specific Findings, *supra* note 1851, at 2; *see* Bill Rankin, *Defendant "Fell Prey" to Extremist, Lawyer Says*, Atlanta J. & Const., June 2, 2009, at A10.

1874. May 19, 2009, Transcript, *supra* note 1871, at 9.

1875. Transcript at 877–78, 910, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 4, 2009, filed June 19, 2009); *see* May 19, 2009, Transcript, *supra* note 1871, at 8 ("THE DEFENDANT: . . . Can I explain something? I mean, as long as I can say this statement, I don't care if it's considered for my trial or not. For me that's—to say the statement, deliver it in public is all I care about.").

1876. Verdict, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 10, 2009); Transcript at 4, *id.* (June 10, 2009, filed June 19, 2009) [hereinafter June 10, 2009, Transcript]; Specific Findings, *supra* note 1851, at 2; *see* Robbie Brown, *Georgia Man Is Convicted in Conspiracy*, N.Y. Times, June 11, 2009, at A21; Bill Rankin, *Terror Trial Verdict: Guilty*, Atlanta J. & Const., June 11, 2009, at A1.

1877. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1878. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

1879. *Id.*

1880. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1881. *Id.*

1882. *Id.*

mation to news media, except to read those few answers provided by Judge Duffey to their questions about scheduling.[1883]

Judge Duffey sealed his special findings supporting the guilty verdict until after Sadequee's jury trial.[1884] News media initially objected to the idea, but they came to accept the temporary sealing as proper.[1885] Judge Duffey provided copies of the sealed findings to the parties' attorneys of record, forbidding them from revealing them to anyone else; the defendant was permitted to examine his attorney's copy but not to retain a copy.[1886]

For Sadequee's trial, Judge Duffey used a jury questionnaire.[1887] Prospective jurors filled out the questionnaire a week in advance of voir dire.[1888] This gave the lawyers and the court ample time to review the questionnaires to focus follow-up voir dire on the most important issues.[1889]

Judge Duffey bifurcated the questionnaire so that prospective jurors filled out the first part, which focused on general background issues and matters that might affect a panel member's service, before they filled out the second part, which focused on issues related to the nature of the trial, beliefs about Islam, and other case-specific matters.[1890]

Jury selection in Sadequee's trial began on August 3, 2009.[1891] That morning, Sadequee announced that he would represent himself.[1892] Judge Duffey appointed his attorneys as standby counsel.[1893] Sadequee cross-examined the government's witnesses and called only his sister as his own witness.[1894] He did not testify himself,[1895] but he did present a closing argument.[1896] On, August 12, the jury found Sadequee guilty on all four counts presented.[1897]

1883. *Id.*

1884. June 10, 2009, Transcript, *supra* note 1876, at 5; Specific Findings, *supra* note 1851; N.D. Ga. Docket Sheet, *supra* note 1831; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1885. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1886. June 10, 2009, Transcript, *supra* note 1876, at 6.

1887. William S. Duffey, Jr., United States v. Sadequee: Jury Questionnaire (July 22, 2009) [hereinafter Jury Questionnaire]; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

1888. Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

1889. *Id.*

Judge Duffey tries to minimize the amount of jurors' idle time at the courthouse. *Id.*

1890. Jury Questionnaire, *supra* note 1887; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

1891. N.D. Ga. Docket Sheet, *supra* note 1831.

1892. *Id.*; Transcript at 3, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Aug. 3 and 4, 2009, filed Aug. 31, 2009) [hereinafter Aug. 3 and 4, 2009, Transcript]; Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

1893. Interview with Hon. William S. Duffey, Jr., Feb. 18, 2010.

1894. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 10, 2009, filed Sept. 2, 2009) [hereinafter Aug. 10, 2009, Transcript]; Transcripts, *id.* (Aug. 5–7, 2009, filed Aug. 31 to Sept. 2, 2009); Aug. 3 and 4, 2009, Transcript, *supra* note 1892.

1895. Aug. 10, 2009, Transcript, *supra* note 1894, at 1241–42.

1896. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 11, 2009, filed Sept. 2, 2009).

1897. Jury Verdict, *id.* (Aug. 12, 2009) (guilty of conspiracy to provide material support to terrorists, providing and attempting to provide material support to terrorists, conspiracy to provide

The defendants represented themselves at sentencing, although their lawyers were allowed to argue some sentencing guidelines issues.[1898] On December 14, Judge Duffey sentenced Ahmed to 13 years and sentenced Sadequee to 17 years.[1899] Both defendants voluntarily dismissed their appeals.[1900]

Challenge: Closed Proceeding

When Ahmed entered a plea, Sadequee had not yet been indicted, and the government received permission from the court, with Ahmed's consent, to have the proceeding closed.[1901] Deputy marshals taped newspapers to the windows on the courtroom door so that no one could see inside.[1902]

Judge Brill granted the news media's motion to intervene for the purpose of possibly challenging sealing and closure orders.[1903]

Challenge: Attorney Appointment

Initially, one of the attorneys appointed to represent Sadequee was an attorney in the Federal Public Defender's office.[1904] But Sadequee was assaulted in detention by another inmate who was also represented by that office, so the office could no longer represent Sadequee.[1905] Judge Brill appointed a Muslim attorney with offices in Miami as a replacement.[1906]

Challenge: Classified Evidence

Early in the case, Judge Feldman issued a protective order requiring the defense to keep confidential discovery that, although not classified, was sensitive.[1907] Judge

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material support to a designated foreign terrorist organization, and attempting to provide material support to a designated foreign terrorist organization); Transcript, *id.* (Aug. 12, 2009, filed Sept. 2, 2009).

1898. Transcript, *id.* (Dec. 14, 2009, filed Jan. 12, 2010) (Ahmed's sentencing); Transcript, *id.* (Dec. 14, 2009, filed Jan. 8, 2010) (Sadequee's sentencing); N.D. Ga. Docket Sheet, *supra* note 1831; *see* Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 7, 2009).

1899. Judgment and Commitment, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 15, 2009) (Ahmed's sentence); Judgment and Commitment, *id.* (Dec. 14, 2009) (Sadequee's sentence); *see* http://www.bop.gov (noting release dates of August 11, 2017, for Ahmed, reg. no. 57897-019, and February 9, 2021, for Sadequee, reg. no. 15240-006); *see also* Bill Rankin, *Two Terrorists Get Prison Sentences*, Atlanta J. & Const., Dec. 15, 2009, at A1.

1900. Docket Sheet, United States v. Ahmed, No. 09-16452 (11th Cir. Dec. 29, 2009) (noting a dismissal on May 20, 2011); Docket Sheet, United States v. Sadequee, No. 09-16325 (11th Cir. Dec. 21, 2009) (noting a dismissal on April 9, 2010).

1901. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

1902. *See* Torpy & Redmon, *supra* note 1833.

1903. N.D. Ga. Docket Sheet, *supra* note 1831 (noting a minute order on September 1, 2006).

1904. Appointment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006).

1905. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; *see* Transcript at 5, 7–8, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Jan. 5, 2009, filed Jan. 30, 2009).

1906. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; *see* Transcript at 11–12, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Sept. 18, 2008, filed Sept. 23, 2008) [hereinafter Sept. 18, 2008, Transcript].

1907. Protective Order *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

Brill denied as overly broad and excessively burdensome for the court a subsequent government request for a protective order requiring defendants to file under seal, until the court could redact unclassified but sensitive information, all papers based on discovery.[1908] News media were vigilant in arguing that the case be prosecuted openly.[1909] Judge Brill insisted that specific reasons be articulated for the sealing of any filings.[1910] The parties subsequently agreed to a protective order that Judge Brill could sign.[1911]

On June 16, 2006, before Sadequee was added to the indictment, the government filed a notice that it would use evidence obtained through the Foreign Intelligence Surveillance Act (FISA) and a motion for a protective order, pursuant to the Classified Information Procedures Act, laying out ground rules for defense access to classified evidence.[1912] On February 8, 2007, Judge Cooper signed a protective order laying out procedures for handling classified information.[1913]

Defense counsel had to obtain security clearances.[1914] So did court staff.[1915] District judges have security clearances by virtue of their office, but magistrate judges must obtain security clearances to see classified information.[1916]

Before classified evidence is presented at trial, and often before it can be shared with defendants themselves, in addition to their cleared counsel, the evidence is either declassified or substituted with court-approved summaries or admissions.[1917] At an early proceeding, the U.S. Attorney observed that "the intelligence community always wants the Government to wait as long as it possibly can before it declassifies or gets substitutions because every step in that discretion poses some risk of disclosure of sources, even if we do substitutions."[1918]

Much pretrial work in criminal cases in the Northern District of Georgia is done by magistrate judges.[1919] Judge Brill reviewed classified foundations for trial evidence at an in camera proceeding with counsel for both sides present. [1920]

1908. Order, *id.* (Oct. 26, 2006); *see* Bill Torpy, *Terror Case Files to Remain Open*, Atlanta J. & Const., Oct. 27, 2006, at D3.

1909. *See* Moni Basu, *Judge Seeks Balance on Terror Case Evidence*, Atlanta J. & Const., Dec. 16, 2006, at B3.

1910. *See id.*

1911. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 20, 2006).

1912. N.D. Ga. Docket Sheet, *supra* note 1831; *see* Bill Torpy, *Lawyer in Georgia Terror Case Must Show "Need to Know,"* Atlanta J. & Const., June 20, 2006, at B3.

1913. Protective Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 8, 2007).

1914. *See* Bill Torpy, *Security Clearance Slows Terror Case*, Atlanta J. & Const., Sept. 2, 2006, at D3.

1915. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1916. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2 (Federal Judicial Center, 2d ed. 2013); *see also* Torpy, *supra* note 1914.

1917. 18 U.S.C. app. 3 §§ 4, 6(c)(1) (2011); *see* Reagan, *supra* note 1916, at 14–16; Sept. 18, 2008, Transcript, *supra* note 1906, at 4–5.

1918. Sept. 18, 2008, Transcript, *supra* note 1906, at 16.

1919. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; *see* Sept. 18, 2008, Transcript, *supra* note 1906, at 2.

Some classified information in this case was designated sensitive compartmented information (SCI), which means that it is protected by special procedures compartmenting who has access to it.[1921] Judges and court staff could view this information at a sensitive compartmented information facility (SCIF) at the U.S. Attorney's office in the same building as the courthouse.[1922] Judges Duffey and Brill were permitted to keep some classified materials in chambers safes.[1923] A secure room was set aside for defense counsel to store and review classified information.[1924] Classified information security officers reviewed any documents prepared based on classified information for possible redaction.[1925]

From 2001 until his becoming a judge in 2004, Judge Duffey was the district's U.S. Attorney.[1926] He was, therefore, familiar with the security staff at the U.S. Attorney's office.[1927] To view classified materials for the case, Judge Duffey made an appointment with the U.S. Attorney's security staff, and the judge usually complied with their request that he give them at least a day's notice and not stay past 5:00 p.m.[1928]

Challenge: FISA Evidence

Two months after the government provided notice that it would use FISA evidence in the case, Ahmed filed a motion to suppress FISA evidence.[1929] Judge Brill issued a report and recommendation finding no errors in FISA procedures and finding that none of the FISA materials were discoverable.[1930] Judge Brill acknowledged that defense counsel are in a difficult position when arguing for suppression of FISA evidence, because they do not have access to the FISA records.[1931] On the other hand, a FISA suppression motion is easier for the judge than many other suppression motions, because collection of the FISA evidence has been subjected to prior judicial review.[1932]

1920. Report and Recommendation, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Oct. 2, 2007), *adopted*, Order, *id.* (Dec. 19, 2008); *see* Minute Sheet, *id.* (Sept. 24, 2007).

1921. *See* Reagan, *supra* note 1916, at 3 (describing sensitive compartmented information).

1922. *See* Torpy, *supra* note 1908; *see also* Reagan, *supra* note 1916, at 19 (describing SCIFs).

1923. Interview with Hon. William S. Duffey, Jr., June 16, 2009; Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

1924. Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

1925. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; Interview with Hon. William S. Duffey, Jr., June 16, 2009; *see* Torpy, *supra* note 1908.

1926. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; *see* Rankin, *supra* note 1869.

1927. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

1928. *Id.*

1929. FISA Motion, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).

1930. Report and Recommendation, *id.* (Aug. 22, 2007).

1931. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

1932. *Id.*

Ahmed also filed a motion that the government disclose whether he had been subject to warrantless surveillance by the National Security Agency outside FISA.[1933] Judge Cooper denied the motion.[1934]

1933. NSA Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).
1934. Order, *id.* (Feb. 7, 2007).

Sears Tower

United States v. Batiste (Joan A. Lenard, S.D. Fla.)

In an effort to thwart a suspected plot to topple the building formerly known as the Sears Tower in Chicago and attack other targets in Chicago, Washington, New York, Los Angeles, and Miami, the government indicted seven men with ties to the Liberty City neighborhood of Miami on June 22, 2006.[1935] Narseal Batiste, Burson Augustin, his brother Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor were American citizens.[1936] Phanor was already in jail for a probation violation; the others were arrested in Miami on the day of indictment.[1937] Patrick Abraham was a Haitian arrested in Miami on May 9 for overstaying his tourist visa.[1938] Lyglenson Lemorin was a legal Haitian immigrant who had moved to Atlanta approximately two months previously, and he was arrested there on June 22.[1939] The defendants became known as the Liberty City Seven.[1940]

Batiste, married with four children, was born in Chicago and grew up there and in Louisiana, where his father was a Baptist preacher.[1941] His mother died in 2000.[1942] At one time, he worked for FedEx in Chicago.[1943] Batiste and his wife operated a stucco and masonry business, and he held Bible readings at his ware-

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1935. Indictment, United States v. Batiste, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006); United States v. Augustin, 661 F.3d 1105, 1114–15 (11th Cir. 2011); *see* Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. Times, July 1, 2006, at A1; Chris Heffelfinger, Radical Islam in America 132 (2011); David Ovalle, Evan S. Benn, Larry Lebowitz & Luisa Yanez, *Terrorism Raid Targets a Warehouse in Miami*, Miami Herald, June 23, 2006, at 1A; Walter Pincus, *FBI Role in Terror Probe Questioned*, Wash. Post, Sept. 2, 2006, at A1; Scott Shane & Andrea Zarate, *F.B.I. Killed Plot in Talking State, a Top Aide Says*, N.Y. Times, June 24, 2006, at A1; Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts*, Wash. Post, June 24, 2006, at A3.

In 2009, the Sears Tower became known as the Willis Tower. *See* Mary Ellen Podmolik, *Tower Title Holds Power*, Chi. Trib., Mar. 13, 2009, News, at 5.

1936. *See* Shane & Zarate, *supra* note 1935; Whoriskey & Eggen, *supra* note 1935.

1937. *Augustin*, 661 F.3d at 1114; *see* Trenton Daniel, Nicole White & Andres Viglucci, *Bible Their Book, Work Their Life, Family Says*, Miami Herald, June 24, 2006, at 1A; Shane & Zarate, *supra* note 1935; Whoriskey & Eggen, *supra* note 1935.

1938. *Augustin*, 661 F.3d at 1114; *see* Shane & Zarate, *supra* note 1935; Whoriskey & Eggen, *supra* note 1935.

1939. *Augustin*, 661 F.3d at 1114; *see* Daniel *et al.*, *supra* note 1937; Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. Times, Dec. 14, 2007, at A22; Shane & Zarate, *supra* note 1935; Jay Weaver & Luisa Yanez, *Mistrial Called for 6 of "Liberty City 7,"* Miami Herald, Dec. 14, 2007, at 1A; Peter Whoriskey, *Man Acquitted in Terror Case Faces Deportation*, Wash. Post, Mar. 2, 2008, at A3; Whoriskey & Eggen, *supra* note 1935.

1940. *See* Abby Goodnough, *Trial Starts for Men in Plot to Destroy Sears Tower*, N.Y. Times, Oct. 3, 2007, at A14.

1941. *See* Daniel *et al.*, *supra* note 1937; Drew & Lichtblau, *supra* note 1935; Charles Rabin & Susannah A. Nesmith, *Family: Suspect Grew Up Deeply Religious*, Miami Herald, June 27, 2006, at 1A.

1942. *See* Rabin & Nesmith, *supra* note 1941.

1943. *See* Drew & Lichtblau, *supra* note 1935; Pincus, *supra* note 1935.

house.[1944] Batiste, also known as Prince Manna, followed the traditions of the Moorish Science Temple of America, founded in 1913 by the Prophet Noble Drew Ali, which blends Judaism, Christianity, and Islam, with an emphasis on self-discipline through martial arts.[1945] He called his religious group the Seas of David.[1946]

Abraham was Batiste's right-hand man.[1947] Phanor was born in Miami of Haitian parents.[1948] He attended Edison Senior High School and finished high school in Tallahassee.[1949] At the time of his arrest, he was living in Batiste's warehouse.[1950] Herrera's parents were from the Dominican Republic.[1951] Lemorin, born in Haiti and married with two children, came to the United States as a child in 1993 and had permanent resident status.[1952]

The case against the men was established by Elie Assad, a veteran government informant who posed as a representative of Al-Qaeda.[1953] Assad provided the suspects with military boots and a video camera for casing targets.[1954] The FBI paid him $17,000 plus $19,570 in expenses, and the government granted him political asylum.[1955] Abbas al-Saidi, another informant, was paid $10,500 plus $8,815 in expenses.[1956]

1944. *See* Drew & Lichtblau, *supra* note 1935.

1945. United States v. Augustin, 661 F.3d 1105, 1111 (11th Cir. 2011); *see* Drew & Lichtblau, *supra* note 1935; Charles Rabin & Alexandra Alter, *Group Denies Violent Doctrine*, Miami Herald, June 24, 2006, at 29A; Whoriskey, *supra* note 1939; Peter Whoriskey, *Trial Begins for 7 Accused of Plotting to Destroy Sears Tower*, Wash. Post, Oct. 3, 2007, at A9 [hereinafter *Trial Begins*].

1946. *See* Drew & Lichtblau, *supra* note 1935; Goodnough, *supra* note 1940; Shane & Zarate, *supra* note 1935.

1947. *See* Jay Weaver & David Ovalle, *How FBI Moles Snared Terror Suspects*, Miami Herald, July 16, 2006, at 1A.

1948. *See id.*

1949. *See id.*

1950. *See id.*

1951. *See id.*

1952. *See* Daniel *et al.*, *supra* note 1937; Whoriskey, *supra* note 1939.

1953. United States v. Augustin, 661 F.3d 1105, 1112 (11th Cir. 2011); *see* Goodnough, *supra* note 1940; Shane & Zarate, *supra* note 1935; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 725–26 (2010);Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. Pa. J. Const. L. 1475, 1489–93 (2009); Whoriskey, *Trial Begins*, *supra* note 1945; Whoriskey & Eggen, *supra* note 1935.

Assad was born in Lebanon of Syrian descent. *See* Jay Weaver, *Liberty City Seven Defense Faces Setbacks*, Miami Herald, Oct. 23, 2007, at 1B (reporting that Assad was paid $80,000 and al-Saidi was paid about $40,000).

1954. *Augustin*, 661 F.3d at 1112; *see* Goodnough, *supra* note 1940; Shane & Zarate, *supra* note 1935; Whoriskey & Eggen, *supra* note 1935.

1955. *See* Pincus, *supra* note 1935; Jay Weaver, *Trial for "Liberty City Seven" to Start March 3*, Miami Herald, July 27, 2006, at 3B.

1956. *See* Pincus, *supra* note 1935; Weaver, *supra* note 1955.

The court assigned the case to Judge Joan A. Lenard.[1957] Jury selection began on September 18, 2007.[1958] Judge Lenard did not use a jury questionnaire; in a dozen years on the bench, she had never used one.[1959] She prefers face-to-face voir dire in three phases: first are questions directed to the whole panel, second are individual general qualification questions, and third are more sensitive case-specific individual questions.[1960]

Opening statements began on October 2.[1961] Later that month, a Miami police counterterrorism pamphlet, which was distributed at a Metrorail station, was discovered in the jury room.[1962] Judge Lenard dismissed two jurors and an alternate who said they had read it.[1963]

Jury deliberations began on December 3.[1964] On December 13, the jury acquitted Lemorin.[1965] But the jury deadlocked on the other defendants, and Judge Lenard declared a mistrial.[1966] On the following day, the government transferred Lemorin to an immigration detention center and initiated deportation proceedings against him.[1967] He was deported to Haiti on January 20, 2011; his wife and three children continued to live in Miami Beach.[1968]

After 13 days of deliberation, a second jury deadlocked, on April 16, 2008, and Judge Lenard again declared a mistrial.[1969] Jury selection in the third trial be-

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1957. Docket Sheet, United States v. Batiste, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006) [hereinafter S.D. Fla. Docket Sheet]; *see* Weaver, *supra* note 1955.

Tim Reagan interviewed Judge Lenard for this report in the judge's chambers on October 8, 2009.

1958. *Augustin*, 661 F.3d at 1115; *see* Jay Weaver, *Proving Liberty City 7's Intentions Is Task for Feds*, Miami Herald, Sept. 18, 2007, at 1A.

1959. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

1960. Joan A. Lenard, United States v. Batiste: Voir Dire Questions (Sept. 18, 2007) [hereinafter Voir Dire Questions]; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; *see* United States v. Campa, 459 F.3d 1121 (11th Cir. 2006) (finding Judge Lenard's voir dire procedures in a previous case to be a meticulous model); *see also* Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. Feb. 3, 2009, filed Jan. 20, 2010) (phase one and phase two questions in third trial).

1961. *See* Goodnough, *supra* note 1940; Whoriskey, *supra* note 1945.

1962. *See* Weaver, *supra* note 1953.

1963. *See id.*

1964. *See* Kirk Semple, *Defense Ends Its Arguments in Terrorism Trial in Miami*, N.Y. Times, Dec. 1, 2007, at A12.

1965. United States v. Augustin, 661 F.3d 1105, 1111, 1115 (11th Cir. 2011); *see* Semple, *supra* note 1939; Weaver & Yanez, *supra* note 1939; Peter Whoriskey, *Terrorism Case Ends in Mistrial; 1 Acquitted*, Wash. Post, Dec. 14, 2007, at A3.

1966. *Augustin*, 661 F.3d at 1115; *see* Semple, *supra* note 1939; Weaver & Yanez, *supra* note 1939; Whoriskey, *supra* note 1965.

1967. *See* Lemorin v. Attorney Gen., 416 F. App'x 35 (11th Cir. 2011); *Ex-Terror Suspect Is Charged Anew*, N.Y. Times, Feb. 7, 2008, at A27; Whoriskey, *supra* note 1939.

1968. *See Ex-Terror Suspect May Be Deported*, Wash. Post., Dec. 6, 2008, at A2; Andres Viglucci, *Haitian Acquitted in Liberty City 7 Case Is Ordered Deported*, Miami Herald, Dec. 6, 2008, at 5B; Jay Weaver & Trenton Daniel, *Acquitted Haitian Defendant in Liberty City Seven Terror Case Is Deported*, Miami Herald, Jan. 21, 2011, at 1B.

1969. *Augustin*, 661 F.3d at 1115; *see* Damien Cave, *Mistrial for 6 in Sears Tower Terror Case*, N.Y. Times, Apr. 17, 2008, at A21; Julienne Gage, *2nd Mistrial in "Liberty City 7" Case*, Wash. Post, Apr. 17, 2008, at A2.

gan on January 27, 2009.[1970] Selection proceedings were interrupted by briefing on whether the government's using a peremptory challenge against a young Haitian-American man was improper.[1971]

Opening statements began on February 19.[1972] Jury deliberations began on April 27 and were interrupted when one juror took ill and Judge Lenard replaced him with an alternate, which meant that deliberations had to begin again.[1973] Then jurors reported that one of their members had refused to participate in deliberations.[1974] After questioning all of the jurors, including the juror in question, and with consent of the parties, Judge Lenard replaced this juror as well.[1975] Ultimately, on May 12, the jury acquitted Herrera and convicted each of the others on at least some of the pending counts.[1976] The court of appeals affirmed the convictions.[1977]

On November 18 through 20, 2009, Judge Lenard sentenced Batiste to 13½ years, Abraham to nine years and four and a half months, Phanor to eight years, Rothschild Augustine to seven years, and Burson Augustin to six years.[1978] Augustin was released on September 12, 2012.[1979]

During deliberations, the jury decided to replace the foreperson. Transcript, United States v. Batiste, No. 1:06-cr-20373 (S.D. Fla. Apr. 4, 2008, filed Mar. 24, 2010).

1970. *Augustin*, 661 F.3d at 1115; *see* Jay Weaver, *Jurors Vetted in Liberty City 6 Trial*, Miami Herald, Jan. 28, 2009, at 3B.

1971. *See* Jay Weaver, *Racial Concerns Halt Jury Selection in Third Liberty City Six Terrorism Trial*, Miami Herald, Feb. 12, 2009, at 3B.

1972. *See* Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. Times, Feb. 19, 2009, at A18.

1973. *Augustin*, 661 F.3d at 1115; Transcript, *Batiste*, No. 1:06-cr-20373 (S.D. Fla. May 4, 2009, filed Aug. 24, 2010); Interview with Hon. Joan A. Lenard, Oct. 8, 2009; *see* Jay Weaver, *Jury Deliberations in Terror-Conspiracy Retrial Delayed Again*, Miami Herald, May 2, 2009, at 3B.

1974. *Augustin*, 661 F.3d at 1115, 1129; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; *see* Jay Weaver, *Five Members of Liberty City Six Guilty in Terror Plot*, Miami Herald, May 13, 2009, at 11A; Weaver, *supra* note 1973; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

1975. *Augustin*, 661 F.3d at 1115, 1129–32; Interview with Hon. Joan A. Lenard, Oct. 8, 2009; *see* Weaver, *supra* note 1974; Weaver, *supra* note 1973; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at 1A.

1976. *Augustin*, 661 F.3d at 1110–11, 1115; *see* Damen Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. Times, May 13, 2009, at A19; Weaver, *supra* note 1974.

1977. *Augustin*, 661 F.3d at 1134, *cert denied*, Batiste v. United States, ___ U.S. ___, 132 S. Ct. 2447 (petition by Batiste and Phanor), Augustine v. United States, ___ U.S. ___, 132 S. Ct. 2444, *and* Abraham v. United States, ___ U.S. ___, 132 S. Ct. 2118 (2012); *see* Jay Weaver, *Convictions Upheld in "Liberty City 7,"* Miami Herald, Nov. 2, 2011, at 6B.

1978. S.D. Fla. Docket Sheet, *supra* note 1957; *see* http://www.bop.gov (noting release dates of March 25, 2018, for Batiste, reg. no. 76736-004; August 20, 2014, for Abraham, reg. no. 76737-004; June 4, 2016, for Phanor, reg. no. 64959-004; and August 7, 2013, for Augustine, reg. no. 76732-004).

1979. http://www.bop.gov (reg. no. 76734-004).

Challenge: Classified Evidence

No part of this case involved classified information.[1980]

Challenge: Jury Security

During the first trial, an attorney working for one of the defendants gave a list of the jurors' names to members of a defendant's family.[1981] Because of this and other inappropriate disclosures, Judge Lenard used an anonymous jury for the next two trials.[1982] For the second trial, she also used partial sequestration, which meant that jurors met at undisclosed locations and were shuttled to the courthouse.[1983] The court provided them with lunch.[1984]

For the third trial, Judge Lenard did not implement sequestration procedures, but monitored the situation to see if implementing them would be advisable after all.[1985] Even partial sequestration is a burden on the jurors—they have to gather extra early—and the drivers and the vans required to shuttle them are an added expense.[1986]

Challenge: Pro Se Defendant

The court of appeals denied Augustin's motion to fire his attorney and proceed pro se on appeal.[1987]

1980. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

1981. *Id.*

1982. Voir Dire Questions, *supra* note 1960; Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

1983. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

1984. *Id.*

1985. *Id.*

1986. *Id.*

1987. Docket Sheet, United States v. Augustin, No. 09-15985 (11th Cir. Nov. 27, 2009) (noting the denial on August 15, 2011).

Fort Dix

United States v. Shnewer (Robert B. Kugler, D.N.J.)

On May 7, 2007, the government filed criminal complaints in the U.S. District Court for the District of New Jersey against six men, alleging a plot to attack U.S. military installations, including Fort Dix.[1988] Authorities arrested them that evening.[1989] The grand jury returned an indictment on June 5.[1990] The court assigned the case to Judge Robert B. Kugler.[1991]

Mohamad Shnewer, a taxi driver and naturalized U.S. citizen born in Jordan, was the alleged coordinator.[1992] He was the only defendant fluent in Arabic.[1993] Also charged were his three brothers-in-law: Dritan, Shain, and Eljvir Duka, roofers who were Albanian and who had been in the United States illegally since they were children.[1994] The two other defendants were Serdar Tatar, a legal resident born in Turkey who worked as a 7-Eleven clerk, and Agron Abdullahu, a legal resident who was born in Yugoslavia, had Egyptian military training, and baked dough for a supermarket.[1995] Fort Dix apparently was selected as a target because Tatar's family frequently delivered pizza there.[1996]

The group came to the government's attention in January 2006, when a video store clerk reported that the men were having copied a video showing them shout-

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1988. Docket Sheet, United States v. Shnewer, No. 1:07-cr-459 (D.N.J. June 5, 2007) [hereinafter D.N.J. Docket Sheet]; *see* United States v. Duka, 671 F.3d 329, 333–34 (3d Cir. 2011); *see also* George Anastasia, *Fort Dix Targeted in "Jihad," U.S. Says*, Phila. Inquirer, May 9, 2007, at A1; Chris Heffelfinger, Radical Islam in America 129 (2011); David Kocieniewski, *6 Men Arrested in a Terror Plot Against Ft. Dix*, N.Y. Times, May 9, 2007, at A1; Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, Wash. Post, May 9, 2007, at A1; John Shiffman & Jan Hefler, *Ordinary Lives, Radical Words*, Phila. Inquirer, May 9, 2007, at A1; John Shiffman & Jennifer Moroz, *Step by Step, Fort Dix Suspects Snared*, Phila. Inquirer, May 11, 2007, at A1.

1989. *Duka*, 671 F.3d at 335; D.N.J. Docket Sheet, *supra* note 1988; *see* George Anastasia & Troy Graham, *Fort Dix Suspects Indicted*, Phila. Inquirer, June 6, 2007, at B1; Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988.

1990. D.N.J. Docket Sheet, *supra* note 1988; *see* Kareem Fahim, *Charges Filed Against 6 Men in Plot to Attack Base*, N.Y. Times, June 6, 2007, at B6.

1991. D.N.J. Docket Sheet, *supra* note 1988; *see* Kareem Fahim, *U.S. Judge Promises Speedy Trial, and Leg Shackles, in Fort Dix Terror Case*, N.Y. Times, June 15, 2007, at A21; Troy Graham, *An Oct. Trial for Ft. Dix Six*, Phila. Inquirer, June 15, 2007, at B1.

Tim Reagan interviewed Judge Kugler for this report in the judge's chambers on December 15, 2009.

1992. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 1988; *see* Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988; Shiffman & Hefler, *supra* note 1988.

1993. *See* Heffelfinger, *supra* note 1988, at 112.

1994. *Duka*, 671 F.3d at 334; D.N.J. Docket Sheet, *supra* note 1988; *see* Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988; Shiffman & Hefler, *supra* note 1988.

1995. *Duka*, 671 F.3d at 335; D.N.J. Docket Sheet, *supra* note 1988; *see* Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988; Shiffman & Hefler, *supra* note 1988.

1996. *See* Edward Colimore, *Dismay at Cookstown Pizzeria*, Phila. Inquirer, May 9, 2007, at A4; Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988; Shiffman & Hefler, *supra* note 1988.

ing about jihad while training with assault weapons in the Poconos.[1997] The government sent Mahmoud Omar, an informant, to investigate the group, and by March the informant had befriended Shnewer.[1998] Arrests immediately followed a sham sale of firearms by Omar to Dritan and Shain Duka.[1999] It was reported that the government paid Omar more than $230,000.[2000] Besnik Bakalli, a second informant reportedly paid $150,000, had encouraged the defendants to avenge Muslims.[2001]

On October 31, 2007, Abdullahu pleaded guilty to a charge of providing firearms to illegal aliens, and Judge Kugler sentenced him to one year and eight months on March 31, 2008.[2002]

On July 11, Tatar initiated a civil action challenging his and his codefendants' conditions of confinement.[2003] Because they were detained in the Philadelphia Detention Center,[2004] across the Delaware River from the Camden courthouse where they were to be tried, Tatar filed his handwritten complaint in the Eastern District of Pennsylvania.[2005] The district court there transferred the action to Judge Kugler

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1997. *Duka*, 671 F.3d at 334; *see* Anastasia, *supra* note 1988; Alan Feuer, *Practice in the Poconos*, N.Y. Times, May 9, 2007, at B6; Troy Graham, *Employee Who Played Key Role in Dix Case Moves On*, Phila. Inquirer, Dec. 24, 2008, at A6; Kocieniewski, *supra* note 1988; Russakoff & Eggen, *supra* note 1988.

1998. *Duka*, 671 F.3d at 334; *see* Anastasia, *supra* note 1988; Feuer, *supra* note 1997; *Informer Appears at Trial, but His Recordings Talk*, N.Y. Times, Nov. 2, 2008, NJ, at 1 [hereinafter *Informer Appears*]; Wadie E. Said, *The Terrorist Informant*, 85 Wash. L. Rev. 687, 722–24 (2010).

According to a 2010 newspaper article on Omar, "He has an eviction notice for overdue rent, an application for welfare, a foundering export business, and an uncertain immigration status." George Anastasia, *From Star FBI Witness to Ostracism, Loss*, Phila. Inquirer, June 27, 2010, at A1.

1999. *Duka*, 671 F.3d at 335; *see* George Anastasia, *Details Emerge in Terror Sting*, Phila. Inquirer, May 10, 2007, at A1; Fahim, *supra* note 1990; *Informer Appears*, *supra* note 1998; Shiffman & Hefler, *supra* note 1988.

2000. *See* George Anastasia, *Terror Trial Opens for Ft. Dix 5*, Phila. Inquirer, Oct. 21, 2008, at A1; *Informer Appears*, *supra* note 1998; Paul von Zielbauer & Jon Hurdle, *Five Are Convicted of Conspiring to Attack Fort Dix*, N.Y. Times, Dec. 23, 2008, at A18; *see also* Geoff Mulvihill, *Defense Lawyers Question Informant in Terror Case*, Wash. Post, Nov. 6, 2008, at A10 ("Omar, an Egyptian who entered the U.S. illegally in the 1990s, is getting $1,500 a week plus free rent for his aid to the government.").

2001. *Duka*, 671 F.3d at 334; *see* Von Zielbauer & Hurdle, *supra* note 2000.

2002. D.N.J. Docket Sheet, *supra* note 1988; *see* Kareem Fahim, *Gun Supplier Is Given 20-Month Sentence in Fort Dix Case*, N.Y. Times, Apr. 1, 2008, at B3; Kareem Fahim, *Tough Talk, and Hedging, in Taped Conversations of a Terrorism Defendant*, N.Y. Times, Mar. 31, 2008, at A21; Troy Graham, *First of Fort Dix Six Pleads Guilty*, Phila. Inquirer, Nov. 1, 2007, at B1; Troy Graham, *Man Who Supplied Guns in Alleged Fort Dix Terror Plot Sentenced to 20 Months*, Phila. Inquirer, Apr. 1, 2008, at B1.

Abdullahu was released from prison on March 24, 2009. http://www.bop.gov (reg. no. 61286-066).

2003. Docket Sheet, Tartar v. Levi, No. 2:08-cv-3270 (E.D. Pa. July 11, 2008).

2004. Opinion at 1, Tatar v. Levi, No. 1:08-cv-4422 (D.N.J. Sept. 20, 2010), *available at* 2010 WL 3740610.

2005. Motion, *Tartar*, No. 2:08-cv-3270 (E.D. Pa. July 25, 2008).

in the District of New Jersey as related to the criminal case.[2006] Tatar filed a handwritten amended complaint on April 1, 2009,[2007] and a typed amended complaint on January 4, 2011.[2008] Judge Kugler granted the defendants summary judgment on June 19, 2012.[2009]

Because of the news media's attention to this case, Judge Kugler and the court set up a public website where documents in the case file are posted.[2010] This allowed access to the documents without going through PACER.[2011] Evidence was posted the moment it was admitted.[2012] Each side loaded digitized exhibits on a secure server in advance of moving for their admissibility.[2013] Neither side had access to the other side's exhibits on the server until they were admitted.[2014]

The court also posted proceeding transcripts on the server in a way that permitted free access to the proceedings while protecting the reporters' proprietary rights.[2015] Transcript text rolled on the public website in continuous loops so that a viewer would see whatever few lines of text were displayed when the viewer looked at the transcript and whatever lines of text scrolled by while the viewer watched.[2016]

Jury selection for the trial against the five remaining defendants began on September 29, 2008.[2017] Judge Kugler used a jury questionnaire.[2018] For five days, approximately 150 prospective jurors reported to the courthouse each day to fill out the questionnaire in the jury room, where Judge Kugler greeted them.[2019] In the courtroom, Judge Kugler and the attorneys reviewed answered questionnaires.[2020] Approximately two-thirds of the prospective jurors were disqualified on the basis of the questionnaires alone.[2021]

2006. Order, *id.* (Sept. 2, 2008).

2007. First Amended Complaint, *Tatar*, No. 1:08-cv-4422 (D.N.J. Apr. 10, 2009).

2008. Second Amended Complaint, *id.* (Jan. 4, 2011); *see* Danielle Camilli, *Fort Dix Conspirator Sues Prison Officials*, Bucks County Courier Times, Jan. 6, 2011, at 9.

2009. Opinion, *Tatar*, No. 1:08-cv-4422 (D.N.J. June 19, 2012).

2010. Decorum Order, United States v. Shnewer, No. 1:07-cr-459 (D.N.J. July 13, 2007) [hereinafter Decorum Order]; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* Graham, *supra* note 1991.

"Judge Kugler managed this extraordinarily complex trial in an exemplary way." United States v. Duka, 671 F.3d 329, 333 (3d Cir. 2011).

2011. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2012. *Id.*; *see* Graham, *supra* note 1991.

2013. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2014. *Id.*

2015. *Id.*

2016. *Id.*

2017. D.N.J. Docket Sheet, *supra* note 1988; *see* George Anastasia, *Trial for Fort Dix Five Begins Tomorrow*, Phila. Inquirer, Sept. 28, 2008, at A1.

2018. Robert B. Kugler, United States v. Shnewer: Jury Questionnaire (Sept. 29, 2008); *see* Anastasia, *supra* note 2017.

2019. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2020. *Id.*

2021. *Id.*

During the following week, 15 prospective jurors reported in the morning and 15 reported in the afternoon for individual voir dire.[2022] Judge Kugler observed that once the questionnaires were filled out, there were few questions left to ask.[2023] Although it is unusual in federal courts for attorneys to ask questions directly during voir dire, Judge Kugler permitted it in this case.[2024] Judge Kugler also granted the parties double the number of usual peremptory challenges.[2025]

Because of the trial's high profile, the court designated two overflow courtrooms: one for the news media and one for the rest of the public.[2026] Because Judge Kugler permitted the media to use laptop computers in the main courtroom and gave them wireless Internet access, they did not use their overflow courtroom.[2027] Recording devices were not permitted in the courtroom, nor were published likenesses of the jurors, and the general public were not permitted to bring in electronic equipment.[2028] The overflow courtroom was needed for the rest of the public on the first day of the trial and on the day of the verdict.[2029]

Trial began on October 20, 2008, with opening arguments.[2030] On December 22, after six days of deliberation, a jury convicted Shnewer, the Dukas, and Tatar of conspiring to kill American soldiers.[2031] On April 28 and 29, 2009, Judge Kugler sentenced Tatar to 33 years, and he sentenced the other defendants to life.[2032]

In part because of the cold December weather, Judge Kugler did not want press conferences on the steps of the courthouse following the verdict, so the news media were asked to gather in the jury assembly room.[2033] The government addressed the media for the first half hour, and defense counsel and families addressed the media thereafter.[2034] The media could bring in cameras and recording

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2022. *Id.*

2023. *Id.*

2024. *Id.*

2025. *Id.*

2026. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2027. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* Graham, *supra* note 1991.

Because of the court's wireless connection to the Internet, journalists were able to blog in real time from the courtroom. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2028. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2029. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2030. *See* Anastasia, *supra* note 2000.

2031. D.N.J. Docket Sheet, *supra* note 1988; *see* William Branigin, *5 Men Convicted in Plot to Kill Soldiers at Fort Dix*, Wash. Post, Dec. 23, 2008, at A2; Troy Graham, *Fort Dix Five Guilty of Conspiracy*, Phila. Inquirer, Dec. 23, 2008, at A1; Von Zielbauer & Hurdle, *supra* note 2000.

2032. United States v. Duka, 671 F.3d 329, 335–36 (3d Cir. 2011); D.N.J. Docket Sheet, *supra* note 1988; *see* http://www.bop.gov (noting life sentences for Shnewer, reg. no. 61283-066, Dritan Duka, reg. no. 61285-066, Shain Duka, reg. no. 61284-066, and Eljvir Duka, reg. no. 61282-066, and noting a release date of February 27, 2036, for Tatar, reg. no. 61287-066); *see also* Troy Graham, *Final 2 Ft. Dix Defendants Sentenced*, Phila. Inquirer, Apr. 30, 2009, at A1; Troy Graham, *Three in Fort Dix Terrorist Plot Sentenced to Life*, Phila. Inquirer, Apr. 29, 2009, at A1; *3 Brothers Sentenced to Life for Holy War Plot at Ft. Dix*, N.Y. Times, Apr. 29, 2009, at A19.

2033. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2034. *Id.*

devices for this purpose.[2035] Because it worked well, a similar procedure was used after sentencing.[2036]

In June and August of 2010, friends and relatives of the defendants organized rallies in front of the courthouse protesting the convictions.[2037]

On December 28, 2011, the court of appeals affirmed the convictions and sentences, with the exception of a defective charge against Shnewer.[2038] One week before oral argument, the government informed the court that an attempted weapons possession charge was not technically a crime, but it did not affect Shnewer's life sentence.[2039]

Challenge: Classified Evidence

Attorneys representing defendants who went to trial needed security clearances, and they were not permitted to share classified information with their clients.[2040] A secure room was set up in the courthouse for the attorneys to examine and work on classified documents—a separate safe was designated for each defendant.[2041] Judge Kugler's staff—law clerks, court reporters, courtroom deputies, and his judicial assistant—all received security clearances; Judge Kugler observed that the clearance process went smoothly.[2042]

The Camden courthouse does not have a facility for storing sensitive compartmented information, but the defense attorneys did not have to examine such information and the little that Judge Kugler examined was brought to him by a classified information security officer and taken away the same day.[2043]

Challenge: FISA Evidence

Much of the case against the defendants was based on evidence obtained pursuant to Foreign Intelligence Surveillance Act (FISA) warrants.[2044] Much of the FISA

2035. *Id.*

2036. *Id.*

2037. *See* George Anastasia, *Dix Appeal Spotlights Two Sides of Security*, Phila. Inquirer, Sept. 5, 2010, at B1; Barbara Boyer, *Protesters at City Court Back "Fort Dix Five,"* Phila. Inquirer, June 2, 2010, at B1.

2038. United States v. Duka, 671 F.3d 329, 333, 356 (3d Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2756 (2012) (Shnewer), ___ U.S. ___, 132 S. Ct. 2754 (2012) (Dritan Duka), ___ U.S. ___, 132 S. Ct. 2754 (2012) (Eljvir Duka), ___ U.S. ___, 132 S. Ct. 2764 (2012) (Shain Duka), *and* ___ U.S. ___, 132 S. Ct. 2763 (2012) (Tatar); *see* Geoff Mulvihill, *Court Upholds Fort Dix Attack Plot Conviction*, Trenton Times, Dec. 29, 2011, at A1.

2039. *Duka*, 671 F.3d at 353, 356; *see* Mulvihill, *supra* note 2038.

2040. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2041. *Id.*

2042. *Id.*

2043. *Id.*

2044. FISA Evidence Order at 2, United States v. Shnewer, No. 1:07-cr-459 (D.N.J. July 13, 2007); Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* George Anastasia, *More Ft. Dix Suspects Want to Suppress Evidence*, Phila. Inquirer, June 21, 2008, at B4; Mulvihill, *supra* note 2038.

evidence was declassified, but the affidavits supporting the FISA warrants generally were not.[2045] Judge Kugler reviewed FISA files to determine what was discoverable and to determine that the FISA surveillance was properly supported.[2046] FISA discoverability decisions are somewhat hampered by the judge's not knowing, particularly early in the case, what the defenses might be.[2047]

The court of appeals found no constitutional infirmity to the government's use of the FISA evidence.[2048]

Challenge: Classified Opinion

Judge Kugler's August 14, 2008, opinion on the validity of FISA evidence is classified.[2049] A redacted opinion was filed publicly on December 29, 2009, after review by intelligence agencies.[2050] Redactions appear to conceal what agents of Al-Qaeda were the targets of FISA surveillance resulting in evidence against the defendants.[2051]

Challenge: Jury Security

Judge Kugler used an anonymous jury.[2052] Each juror met at one of two secret locations; deputy marshals shuttled the jurors to the courthouse.[2053] During deliberations, the jurors were sequestered at a nearby hotel.[2054]

After the trial, jurors were given contact information for members of the news media, and they could contact them if they wished, but the media were not permitted to contact the jurors directly.[2055]

Challenge: Court Security

Court security was enhanced for the trial.[2056] Additional precautions were taken during the two days of sentencing.[2057] No other judge scheduled proceedings for

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On appeal, the government made a showing that FISA evidence was de minimis; although the court was skeptical that the government had identified all FISA-derived evidence, the quantity of FISA-derived evidence did not affect the outcome of the appeal. *Duka*, 671 F.3d at 337 n.4.

2045. FISA Evidence Order, *supra* note 2044, at 2–9; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2046. FISA Evidence Order, *supra* note 2044, at 13–23; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2047. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2048. *Duka*, 671 F.3d at 336–47; *see* Mulvihill, *supra* note 2038.

2049. FISA Evidence Order, *supra* note 2044, at 1; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2050. D.N.J. Docket Sheet, *supra* note 1988; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2051. *See* FISA Evidence Order, *supra* note 2044.

2052. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2053. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2054. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2055. Decorum Order, *supra* note 2010; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2056. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

2057. *Id.*

those days, and court staff were encouraged to work at home.[2058] Because a jury was not present, there was a greater visible presence of security.[2059]

Challenge: Attorney Appointment

In February and March of 2010, nearly ten months after their appeals were filed, each of the Dukas penned a five- or six-page handwritten pro se motion for new appellate counsel, claiming insufficient contacts with counsel and counsels' failure to keep them informed of their appeals' progress.[2060] The court of appeals denied their requests, finding no extraordinary circumstances justifying departure from the usual practice of trial counsel continuing on appeal.[2061] The court nevertheless permitted the defendants to file pro se appellate briefs in addition to their attorneys' briefs.[2062]

Shnewer's attorney filed Shnewer's request for new counsel on Shnewer's behalf, stating that Shnewer wanted to argue on appeal ineffective assistance of trial counsel.[2063] The court denied this request as well.[2064]

2058. *Id.*

2059. *Id.*

2060. New Counsel Motion, United States v. Duka, No. 09-2301 (3d Cir. signed Mar. 4, 2010, filed Mar. 15, 2010) (Shain Duka's motion); New Counsel Motion, United States v. Duka, No. 09-2300 (3d Cir. signed Feb. 19, 2010, filed Mar. 1, 2010) (Dritan Duka's motion); New Counsel Motion, United States v. Duka, No. 09-2292 (3d Cir. signed Feb. 15, 2010, filed Feb. 22, 2010) (Eljvir Duka's motion); *see* United States v. Duka, 671 F.3d 329, 351 (3d Cir. 2011).

2061. Order, *Duka*, No. 09-2301 (3d Cir. Mar. 23, 2010) (Shain Duka's appeal); Order, *Duka*, No. 09-2300 (3d Cir. Mar. 23, 2010) (Dritan Duka's appeal); Order, *Duka*, No. 09-2292 (3d Cir. Mar. 23, 2010) (Eljvir Duka's appeal).

2062. *Duka*, 671 F.3d at 333, 350–51.

2063. New Counsel Motion, United States v. Shnewer, No. 09-2299 (3d Cir. Mar. 1, 2010).

2064. Order, *id.* (Mar. 23, 2010).

Triangle Takedown[2065]

United States v. Boyd (Louise W. Flanagan, Malcolm J. Howard, William Arthur Webb, and James E. Gates) and United States v. Sherifi (W. Earl Britt) (E.D.N.C.)

Sabrina Boyd answered her front door on Monday, July 27, 2009, to news that her husband and her three sons had been in a serious automobile accident.[2066] Another son had been killed in an automobile accident in 2007.[2067] The man at the door offered her, her daughter, and her daughter-in-law a ride to Duke Hospital in a highway patrol car.[2068] At the hospital, she was greeted by a man dressed as a doctor, who offered her his hand.[2069] She declined to shake his hand, because of her religious beliefs.[2070] He grabbed her wrists and cuffed her.[2071]

Sabrina was lured away from her home and detained so that her home could be searched.[2072] Meanwhile, her husband, Daniel Patrick Boyd; two of her sons, Zakariya and Dylan Boyd; and four other men, Hysen Sherifi, Anes Subasic, Mohammad Omar Aly Hassan, and Ziyad Yaghi, were arrested and indicted on material support and conspiracy terrorism charges.[2073] The three Boyds had also been lured away from the family home under false pretenses[2074] in an operation described as a Triangle Takedown.[2075] Authorities seized gas masks, 27,000 rounds of ammunition, and 26 guns from the Boyds' home and truck.[2076]

2065. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

2066. *See* Campbell Robertson, *Wife Disputes Jihad Charge Against Husband and Sons*, N.Y. Times, July 30, 2009, at A20; Yonat Shimron, *Wife Adamantly Denies Suicide Plot*, Raleigh News & Observer, July 29, 2009, at A1.

2067. *See* Mandy Locke, Yonat Shimron & Josh Shafer, *7 Arrested in Terror Plot*, Raleigh News & Observer, July 28, 2009, at A1; Robertson, *supra* note 2066; Shimron, *supra* note 2066.

2068. *See* Shimron, *supra* note 2066.

2069. *See* Robertson, *supra* note 2066; Shimron, *supra* note 2066.

2070. *See* Shimron, *supra* note 2066.

2071. *See* Robertson, *supra* note 2066; Shimron, *supra* note 2066.

2072. *See* Shimron, *supra* note 2066.

2073. Indictment, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. July 22, 2009) [hereinafter *Boyd* Indictment]; *see* Carrie Johnson & Spencer S. Hsu, *Seven Face Terrorism Charges in N.C.*, Wash. Post, July 28, 2009, at A3; Locke *et al.*, *supra* note 2067; Sarah Ovaska, *Eighth Terror Suspect Named*, Raleigh News & Observer, Aug. 4, 2009, at A1.

2074. Transcript at 77–78, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 4–5, 2009, filed Aug. 10, 2009) [hereinafter *Boyd* Aug. 4–5, 2009, Transcript].

2075. *See The FBI's Takedown*, Editorial, Raleigh News & Observer, July 29, 2009 (referring to North Carolina's research triangle comprising Duke University, University of North Carolina at Chapel Hill, North Carolina State University, and the cities of Raleigh, Durham, and Chapel Hill).

2076. Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 11, 2009) [hereinafter Detention Order]; *see* Mandy Locke, Josh Shaffer, Sarah Ovaska & Yonat Shimron, *The Bulk of Terror-Case Evidence Concerns Boyd*, Raleigh News & Observer, Aug. 6, 2009, at A1; Sarah Ovaska & Mandy Locke, *FBI Agent: Boyd Spoke of "Jihad Right Here,"* Raleigh News & Observer, Aug. 5, 2009, at A1.

Sherifi was a legal resident from Kosovo, and the other defendants were United States citizens.[2077] An eighth defendant, Jude Kenan Mohammad, was a fugitive[2078] until he was killed in a drone strike on November 16, 2011.[2079]

Bajram Asllani, another fugitive conspiracy suspect, was not included in the indictment.[2080] He was arrested in Kosovo, but the United States and Kosovo do not have an extradition treaty.[2081]

The defendants were indicted on Wednesday, July 22, 2009.[2082] The court randomly assigned the case to Chief Judge Louise W. Flanagan.[2083] Originally, the defendants were going to be arrested on Saturday, so Chief Judge Flanagan arranged for some court staff to discreetly come to work on Saturday for initial appearances.[2084] In the event, the defendants were arrested on a weekday.[2085]

On September 24, the indictment was superseded to include allegations of plans to attack the Quantico, Virginia, Marine base.[2086]

Daniel Boyd grew up near Washington, D.C.[2087] Raised an Episcopalian, he converted to Islam after his mother married a Muslim.[2088] He and Sabrina were high-school sweethearts in Alexandria, Virginia; she also converted to Islam.[2089] In 1989, the Boyds moved to Peshawar, Pakistan.[2090]

2077. *See* Johnson & Hsu, *supra* note 2073; Locke *et al.*, *supra* note 2067.

2078. Order at 2 n.2, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 17, 2011) [hereinafter Reassignment Order]; *see* Anne Blythe, *Sentence Today in NC "Homegrown Terrorism" Ring*, Raleigh News & Observer, Jan. 13, 2012, B.

2079. *See* Karen DeYoung & Peter Finn, *4 Americans Killed in Drone Strikes Since '09*, Wash. Post, May 23, 2013, at A1; Scott Shane & Eric Schmitt, *One Drone Victim's Trail from Raleigh to Pakistan*, N.Y. Times, May 23, 2013, at A10; *Wanted International Terrorist Hails from Triangle, Could Be Dead*, WRAL.com, Feb. 16, 2012, http://www.wral.com/news/local/wral_investigates/story/10733078.

2080. *See* Complaint, United States v. Asllani, No. 5:10-mj-1350 (E.D.N.C. Apr. 19, 2010).

2081. *See* Anne Blythe, *N.C. Trio Found Guilty in Terror Plot*, Raleigh News & Observer, Oct. 14, 2011, A.

2082. *Boyd* Indictment, *supra* note 2073.

2083. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012. Tim Reagan interviewed Judge Flanagan for this report in the judge's New Bern chambers on March 5, 2012, and in her Raleigh chambers on May 17, 2013.

2084. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2085. *Id.*

2086. Superseding Indictment, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Sept. 24, 2009) *see* Spencer S. Hsu, *2 N.C. Men Now Accused of Targeting U.S. Military*, Wash. Post, Sept. 25, 2009, at A3.

2087. *See* Carrie Johnson & Spencer S. Hsu, *From Suburban D.C. Childhood to Indictment on Terror Charges*, Wash. Post, July 29, 2009, at A1.

2088. *See* Steve Coll, *The Brothers & the Grisly Sentence*, Wash. Post, Oct. 2, 1991, at B1; Johnson & Spencer, *supra* note 2087; Mandy Locke, Josh Shaffer & Yonat Shimron, *Contrasts Veil Daniel Boyd*, Raleigh News & Observer, Aug. 2, 2009, at A1 [hereinafter *Contrasts*]; Locke *et al.*, *supra* note 2067; Ovaska, *supra* note 2073.

2089. *See* Coll, *supra* note 2088; Johnson & Spencer, *supra* note 2087; Locke *et al.*, *Contrasts*, *supra* note 2088; Shimron, *supra* note 2066.

2090. *See* Locke *et al.*, *Contrasts*, *supra* note 2088.

In 1991, a Pakistani appellate court overturned a criminal sentence against Daniel Boyd that would have resulted in amputation of his right hand and his left foot.[2091] His brother was also spared a similar sentence, which was for a bank robbery that occurred shortly after a disagreement between the brothers and the bank manager.[2092] Following the prosecution ordeal, Daniel Boyd moved his family first to Massachusetts and then to North Carolina.[2093] At the time of the 2009 arrest, they lived in Willow Spring, a suburb south of Raleigh.[2094]

The Boyd investigation had been underway since approximately 2005.[2095] An informant facilitated the investigation by befriending Daniel Boyd and recording conversations with him over the course of several years.[2096]

Magistrate Judge William Arthur Webb presided over the defendants' detention hearing, which was conducted on August 4 and 5 in the district's Raleigh courthouse.[2097] The hearing was attended by more than 100 friends, relatives, and neighbors present to support the defendants.[2098] Spectators who prayed aloud during proceedings were required to leave the courtroom.[2099]

On August 5, Judge Webb continued Subasic's detention hearing and denied bail for the other defendants, who were then transferred to Virginia for detention.[2100] On August 10, Judge Webb denied bail for Subasic, and he also was transferred to Virginia.[2101]

Judge Flanagan, whose chambers are in New Bern, held her first status conference in the case on August 27 at the Raleigh courthouse.[2102] Early in the case,

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2091. *See* Steve Coll, *Brothers Spared Ghastly Sentence*, Wash. Post, Oct. 15, 1991, at E1.

2092. *See* Coll, *supra* note 2088; Coll, *supra* note 2091.

2093. *See* Locke *et al.*, *Contrasts*, *supra* note 2088.

2094. *See* Johnson & Spencer, *supra* note 2087; Locke *et al.*, *Contrasts*, *supra* note 2088; Ovaska, *supra* note 2073.

2095. *Boyd* Aug. 4–5, 2009, Transcript, *supra* note 2074, at 11; *see* Johnson & Spencer, *supra* note 2087.

2096. Detention Order, *supra* note 2076, at 2–4 (noting that the identity of the witness was not revealed for detention proceedings); *see* Locke *et al.*, *supra* note 2076; Ovaska & Locke, *supra* note 2076.

Tim Reagan interviewed Judge Webb for this report in the judge's chambers on March 20, 2012.

2097. *Boyd* Aug. 4–5, 2009, Transcript, *supra* note 2074; *see* Ovaska & Locke, *supra* note 2076; Yonat Shimron, *Muslims Turn Out in Court*, Raleigh News & Observer, Aug. 5, 2009, at A8.

2098. *See* Ovaska & Locke, *supra* note 2076; Shimron, *supra* note 2097.

2099. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2100. Detention Order, *supra* note 2076; Docket Sheet, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. July 22, 2009) [hereinafter *Boyd* Docket Sheet]; Interview with Hon. Louise W. Flanagan, May 17, 2013; *see* Sarah Ovaska, *Six Terror Suspects Are Now in a Va. Jail*, Raleigh News & Observer, Aug. 7, 2009, at B2.

2101. Detention Order, *supra* note 2076; Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 10, 2009, filed Aug. 23, 2010); *Boyd* Docket Sheet, *supra* note 2100; Interview with Hon. Louise W. Flanagan, May 17, 2013; *see* Mandy Locke & Sarah Ovaska, *No Bail for Suspect in Terror Plot*, Raleigh News & Observer, Aug. 11, 2009, at B3.

2102. *Boyd* Docket Sheet, *supra* note 2100; *see* Mandy Locke, *Terror Case May Be Long Coming to Trial*, Raleigh News & Observer, Aug. 28, 2009, at B3.

Judge Flanagan held pretrial proceedings in Raleigh for the convenience of the attorneys and the U.S. Marshals Service, as transportation issues involved in bringing the defendants back from Virginia to that courthouse then were easier to address.[2103] As the trial date became closer, Judge Flanagan began to hold proceedings in New Bern.[2104]

On November 24, 2010, the government filed a second superseding indictment, which added two counts against Subasic for immigration fraud.[2105] Judge Flanagan determined, on January 28, 2011, that these charges were improperly joined, so she severed them.[2106] Several months later, to promote a speedy trial, the new charges were assigned to Judge Malcolm J. Howard.[2107]

On February 9, Daniel Boyd pleaded guilty.[2108] His son Zakariya pleaded guilty on June 7.[2109] Dylan pleaded guilty on September 14, five days before trial.[2110]

As trial approached, Judge Flanagan completely severed the prosecution against Subasic, because he was by that time proceeding pro se and his unconventional representation might have been disruptive or prejudicial to the other defendants.[2111]

On Monday, September 19, the trial of Sherifi, Hassan, and Yaghi began before Judge Flanagan in New Bern, and the trial of Subasic for immigration fraud began before Judge Howard in Greenville.[2112] The Boyds appeared as cooperating witnesses against their codefendants.[2113]

2103. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012, and May 17, 2013.

2104. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2105. Second Superseding Indictment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 24, 2010); United States v. Sherifi, 793 F. Supp. 2d 751, 752 (E.D.N.C. 2011).

2106. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 28, 2011).

2107. Reassignment Order, *supra* note 2078; *Boyd* Docket Sheet, *supra* note 2100 (August 15, 2011, minutes); Interview with Hon. Louise W. Flanagan, May 17, 2013.

Tim Reagan interviewed Judge Howard for this report in the judge's Greenville chambers on March 21, 2012.

2108. *Boyd* Docket Sheet, *supra* note 2100; *see* Anne Blythe & Yonat Shimron, *N.C. Man Admits Terror Plot*, Raleigh News & Observer, A; Campbell Robertson, *North Carolina Man Admits to Aiding a Jihadist Plot*, N.Y. Times, Feb. 10, 2011, at A14; Francine Sawyer, *Boyd Pleads Guilty to Terrorism Charges*, New Bern Sun J., Feb. 9, 2011.

2109. *See* Mandy Locke, *2nd Man Admits Aiding Terrorism*, Raleigh News & Observer, June 8, 2011, B; Campbell Robertson, *Second Guilty Plea in Terror Case*, N.Y. Times, June 8, 2011, at A17; *"Homegrown Terrorist" Pleaded Guilty Tuesday in Federal Court in New Bern*, New Bern Sun J., June 7, 2011.

2110. *Boyd* Docket Sheet, *supra* note 2100; *see* Anne Blythe, *3rd Man Guilty in Terror Plot*, Raleigh News & Observer, Sept. 15, 2011, A.

2111. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2011).

2112. *Boyd* Docket Sheet, *supra* note 2100; Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed June 10, 2012) (first day of jury selection).

2113. Transcript at 52–224, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 5, 2011, filed Mar. 23, 2012) (Zakariya Boyd); *id.* at 225–78 (Dylan Boyd); Transcript at 34–279, *id.* (Sept. 28, 2011, filed Feb. 28, 2012) (Daniel Boyd).

Subasic's jury found him guilty of immigration fraud on September 23.[2114] On October 13, the day after receiving its charge, the other jury convicted Sherifi, Hassan, and Yaghi.[2115] Sherifi testified in his defense; Hassan and Yaghi presented no evidence.[2116]

In December 2011 and January 2012,[2117] Judge Flanagan sentenced Sherifi to 45 years,[2118] Yaghi to 31 years and eight months,[2119] Hassan to 15 years,[2120] Zakariya Boyd to nine years,[2121] and Dylan Boyd to eight years.[2122]

Appeals by Sherifi, Hassan, and Yaghi are pending.[2123]

On January 20, 2012, the government filed criminal complaints alleging that Sherifi conspired with his brother Skhumbin Sherifi[2124] and another person[2125] to have three trial witnesses against him beheaded.[2126] The complaint also alleged a plot to kill a fellow inmate by whom Sherifi believed he was defrauded.[2127] Codefendant Nevine Elshiekh was a teacher, Hassan was one of her former students.[2128] After attending trial proceedings, she began to correspond with Sherifi, and in time their correspondence became romantic.[2129] Judge Flanagan recused herself from this case,[2130] and the court assigned it to Judge W. Earl Britt.[2131]

2114. Jury Verdict, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 23, 2011).

2115. Jury Verdicts, *id.* (Oct. 13, 2011); Transcripts, *id.* (Oct. 12–13, 2011, filed June 10, 2012); *see* Blythe, *supra* note 2081.

2116. Transcript at 47–183, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 10, 2011, filed June 11, 2012) (Sherifi's testimony); *id.* at 194 (Hassan's attorney: "We see no reason to put on any evidence. We rest."); *id.* at 195 ("Likewise for Mr. Yaghi, your Honor."); *see* Blythe, *supra* note 2081; Francine Sawyer, *Federal Terrorism Trial Goes to Jury*, New Bern Sun J., Oct. 12, 2011.

2117. Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2012, filed June 10, 2012) (sentencing of Hassan, Sherifi, and Yaghi).

2118. Opinion, *id.* (Jan. 18, 2012); Judgment, *id.* (Jan. 13, 2012).

2119. Opinion, *id.* (Jan. 18, 2012), *available at* 2012 WL 147955; Yaghi Judgment, *id.* (Jan. 13, 2012); *see* http://www.bop.gov (noting a release date of February 26, 2037, reg. no. 51771-056).

2120. Opinion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 18, 2012), *available at* 2012 WL 147952; Hassan Judgment, *id.* (Jan. 13, 2012); *see* http://www.bop.gov (noting a release date of August 21, 2022, reg. no. 51769-056).

2121. Zakariya Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 20, 2011).

2122. Dylan Boyd Judgment, *id.* (Dec. 20, 2011).

2123. Docket Sheet, United States v. Sherifi, No. 12-4067 (4th Cir. Jan. 31, 2012) (noting tentative calendaring for the argument session of September 17–20, 2013); Docket Sheet, United States v. Yaghi, No. 12-4063 (4th Cir. Jan. 30, 2012) (same); Docket Sheet, United States v. Hassan, No. 12-4061 (4th Cir. Jan. 30, 2012) (same).

2124. Complaint, United States v. Sherifi, No. 7:12-mj-1008 (E.D.N.C. Jan. 20, 2012).

2125. Complaint, United States v. Elshiekh, No. 7:12-mj-1009 (E.D.N.C. Jan. 20, 2012).

2126. *See* Indictment, United States v. Sherifi, No. 7:12-cr-20 (E.D.N.C. Feb. 21, 2012); *see also* Anne Blythe, *2 More Held in NC Terror Case*, Raleigh News & Observer, Jan. 25, 2012, A.

2127. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; *see* Blythe, *supra* note 2126.

2128. *See* Anne Blythe, *Inmate Convicted in Murder-for-Hire Case*, Raleigh News & Observer, Nov. 9, 2012.

2129. *See id.*

2130. Notice, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. Feb. 24, 2012).

2131. Docket Sheet, *id.* (Feb. 21, 2012) [hereinafter *Sherifi* Docket Sheet].

Subasic's pro se trial on the original indictment began on May 8.[2132] Judge Flanagan welcomed 70 potential jurors, and 16 were empaneled on the following day.[2133] Subasic's defense was that he was a Christian conducting freelance surveillance on Muslim jihadists for the benefit of a future report.[2134]

Jury deliberations began on June 13;[2135] on the following day, the jury found Subasic guilty.[2136] On August 24, Judge Flanagan sentenced Subasic to 30 years;[2137] on the following day, she revoked his citizenship.[2138] An appeal is pending.[2139]

Following Subasic's trial, Judge Flanagan sentenced Daniel Boyd to 18 years,[2140] and she resentenced his sons to seven years and nine months for Zakariya[2141] and seven years for Dylan.[2142]

Sherifi's codefendants pleaded guilty on November 1, and Sherifi's trial, at which he appeared pro se, began on Monday, November 5.[2143] On Thursday, the jury found Sherifi guilty.[2144] On May 10, 2013, Judge Britt sentenced Sherifi to life in prison; he sentenced the brother to three years, and he sentenced Elshiekh to three-and-a-half years.[2145]

For this report, Tim Reagan interviewed Judge Britt and his law clerk Amy Petty in the judge's home chambers on May 16, 2013.

2132. *Boyd* Docket Sheet, *supra* note 2100.

2133. *Id.*

2134. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2135. *Boyd* Docket Sheet, *supra* note 2100.

2136. Jury Verdict, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. June 14, 2012); *see Accused Terrorist Found Guilty in New Bern Court*, New Bern Sun J., June 14, 2012; *Jury Convicts 7th Man in NC Terror Plot*, Raleigh News & Observer, June 14, 2012.

2137. Subasic Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012); *see* http://www.bop.gov (noting a release date of September 14, 2035, reg. no. 51766-056).

2138. Order, *id.* (Oct. 25, 2012).

2139. Docket Sheet, United States v. Subasic, No. 12-4683 (4th Cir. Aug. 29, 2012) (noting that the opening brief is due on Aug. 22, 2013).

2140. Daniel Boyd Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 24, 2012); *see* http://www.bop.gov (noting a release date of April 1, 2025, reg. no. 51765-056).

2141. Zakariya Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012); *see* http://www.bop.gov (noting a release date of April 27, 2016, reg. no. 51767-056).

2142. Dylan Boyd Amended Judgment, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Oct. 16, 2012); *see* http://www.bop.gov (noting a release date of September 1, 2015, reg. no. 51770-056).

2143. *Sherifi* Docket Sheet, *supra* note 2131; *see* Transcript, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 7, 2012, filed Jan. 28, 2013) (testimony by Sherifi's codefendants); *see also* Anne Blythe, *2 Plead Guilty in Beheading Plot*, Raleigh News & Observer, Nov. 2, 2012.

2144. Jury Verdict, United States v. Sherifi, No. 7:12-cr-20 (E.D.N.C. Nov. 8, 2012); *see* Blythe, *supra* note 2128.

2145. *Sherifi* Docket Sheet, *supra* note 2131; Judgments, *Sherifi*, No. 7:12-cr-20 (E.D.N.C. May 10, 2013); *see* http://www.bop.gov (noting a life sentence for Hysen Sherifi, reg. no. 51768-056); *see also* Anne Blythe, *Primary Suspect in Murder-for-Hire Gets Life in Prison*, Raleigh News & Observer, May 10, 2013.

Challenge: Attorney Appointment

The court appointed the federal defender to represent David Boyd and experienced CJA panel attorneys to represent the other defendants.[2146]

Under the Criminal Justice Act, Judge Flanagan supervised defense expenses as well as presided over the criminal case. She required the panel attorneys to submit time and expense budgets, and she authorized monthly payments for this complex case rather than requiring the attorneys to wait until the case was over to get paid.[2147] This was only the second time in recent memory that monthly CJA payments had been authorized in the Eastern District of North Carolina.[2148] Judge Flanagan encouraged the defense attorneys to pool resources as much as possible.[2149]

Defense expenses in this case were high, in part, because of the amount of surveillance evidence that the attorneys had to review.[2150] Magistrate Judge James E. Gates presided over discovery matters.[2151] Judge Gates appointed liaisons among the defense attorneys for various discovery issues, such as paper discovery, electronic files, and transcripts.[2152] Judge Gates and Judge Flanagan kept in especially frequent contact throughout this case, sometimes directly and sometimes through law clerks.[2153]

Judge Gates held regular status conferences with all sides present, followed by ex parte meetings as desired.[2154] The defendants themselves were not routinely present for status conferences, but Judge Gates ensured that each defendant was present at least once and present for anything particularly substantive.[2155]

The biggest discovery problem was approximately 270 hours of surveillance transcripts.[2156] A careful review turned out to be important because the first transcripts had many errors.[2157] Many of the recordings from which they were made were poor in quality.[2158]

2146. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012 (noting that the federal defender's office arranges for CJA appointments).

2147. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2148. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012, and May 17, 2013.

Monthly vouchers had been approved earlier for a death penalty case. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2149. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2150. *Id.*

2151. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012. Tim Reagan interviewed Judge Gates for this report in the judge's chambers.

2152. Interview with Hon. James E. Gates, Mar. 6, 2012.

2153. *Id.*

2154. *Id.*

2155. *Id.*

2156. *Id.*; Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2157. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2158. Interview with Hon. James E. Gates, Mar. 6, 2012.

Sherifi's second prosecution was also based on voluminous surveillance recordings, many in languages other than English, and Judge Gates closely managed discovery issues pertaining to those as well.[2159]

When Sherifi decided to proceed pro se, the court continued assigned counsel as standby counsel.[2160] As trial approached, however, Judges Britt and Gates decided that the expense of standby counsel was not necessary.[2161]

Challenge: Pro Se Defendants

Subasic's first attorney was appointed two days after Subasic's arrest.[2162] A week later, the court appointed substitute counsel, because the first attorney determined that she was not available to take the case.[2163] One year after that, the new attorney notified the court that his client had instructed him to resign.[2164] Subasic filed a handwritten motion for substitute counsel a month later, on September 3, 2010.[2165] On November 1, Judge Gates granted the motion, permitting the dismissed attorney to remain on the case for an overlap period to assist new counsel.[2166] Substitute counsel entered his appearance on November 5,[2167] and the dismissed attorney withdrew from the case on January 3, 2011.[2168] The public record does not reflect the precise nature of Subasic's difficulties with his attorney,[2169] but the attorney's notice of his client's instruction that he resign indicates that Subasic was dissatisfied with the attorney's zeal.[2170]

Subasic expressed dissatisfaction with his new counsel and sought other relief in pro se filings.[2171] Four times, Judge Flanagan ordered Subasic to seek relief from the court through counsel.[2172] On April 28, Subasic moved pro se to dismiss his new attorney.[2173] The attorney filed a motion on Subasic's behalf on the fol-

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2159. Interview with Hon. W. Earl Britt, May 16, 2013.

2160. *Id.*

2161. *Id.*

2162. Order at 1, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Nov. 1, 2010) [hereinafter Subasic Substitute Counsel Order]; Notice of Appearance, *id.* (July 29, 2009).

2163. Subasic Substitute Counsel Order, *supra* note 2162, at 1; Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 5, 2009); Motion to Withdraw, *id.* (Aug. 4, 2009).

2164. Notice of Instruction to Resign, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Aug. 13, 2010); Subasic Substitute Counsel Order, *supra* note 2162, at 1.

2165. Pro Se Motion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 3, 2010); Subasic Substitute Counsel Order, *supra* note 2162, at 1.

2166. Subasic Substitute Counsel Order, *supra* note 2162.

2167. Notice of Appearance, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Nov. 5, 2010); *see* Transcript, *id.* (Nov. 16, 2010, filed Feb. 28, 2011) (first court appearance of substitute counsel).

2168. Notice of Withdrawal, *id.* (Jan. 3, 2011).

2169. *See* Transcript at 10–11, *id.* (Oct. 5, 2020, filed Oct. 27, 2010) (noting the judge's sealing of the courtroom for a discussion of Subasic's motion for new counsel).

2170. Notice of Instruction to Resign, *supra* note 2164.

2171. Motion, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Apr. 15, 2011); Motion, *id.* (Feb. 18, 2011); Motion, *id.* (Feb. 14, 2011); Motion, *id.* (Feb. 3, 2011).

2172. Order, *id.* (Feb. 28, 2011); Order, *id.* (Feb. 24, 2011); Order, *id.* (Feb. 15, 2011); Order, *id.* (Feb. 7, 2011).

2173. Motion, *id.* (Apr. 28, 2011).

lowing day for Subasic to represent himself from then on.[2174] Subasic expressed the opinion that it would be suicide for him to be represented by an attorney.[2175] On May 13, Judge Flanagan granted the motion.[2176] Judge Flanagan, however, kept the attorney in the case as standby counsel.[2177]

Judge Flanagan agreed that because Subasic was representing himself, and because of the nature of the evidence, he would need a computer where he was detained.[2178] It was particularly difficult to find a detention facility that would permit an inmate to keep a computer in his cell.[2179]

At the immigration fraud trial, Subasic's standby attorney was always near at hand.[2180] He helped Subasic subpoena witnesses.[2181] At Subasic's terrorism trial, the attorney helped Subasic catalog evidence and locate and subpoena witnesses.[2182] He also answered Subasic's legal questions.[2183]

For his murder conspiracy trial, Sherifi chose to proceed pro se; the other defendants had assigned counsel.[2184] Because Sherifi's ankles were shackled out of the jury's sight, he questioned witnesses from a seated position.[2185] So as to not draw the jury's notice to seated questioning by the defendant, government attorneys also questioned witnesses and addressed the court from a seated position while the jury was present.[2186]

Judge Britt admonished Sherifi that if his conduct ever became disruptive he would have to watch proceedings from the holding cell outside the courtroom.[2187] Judge Britt arranged for closed-circuit transmission of proceedings to the cell,

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2174. Motion, *id.* (Apr. 29, 2011).

2175. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2176. *Boyd* Docket Sheet, *supra* note 2100; Order at 11, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 16, 2011) [hereinafter *Boyd* May 16, 2011, Order]; *see* Waiver of Counsel, *id.* (May 13, 2011); *see also* Anne Blythe, *Five Triangle Terror Suspects Enter Not Guilty Pleas*, Raleigh News & Observer, Aug. 16, 2011, A (reporting on Subasic's self representation).

2177. *Boyd* May 16, 2011, Order, *supra* note 2176, at 10; *see* Transcript at 5, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Sept. 19, 2011, filed Mar. 4, 2013) [hereinafter Immigration Fraud Trial Day 1 Transcript] (noting standby counsel's participation in the immigration fraud case).

2178. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2179. *Id.*; Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012.

There are no federal detention facilities in the district; the marshal service has contracts with approximately ten state and county facilities. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2180. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; *see* Immigration Fraud Trial Day 1 Transcript, *supra* note 2177, at 23–24.

2181. Immigration Fraud Trial Day 1 Transcript, *supra* note 2177, at 7.

2182. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2183. *Id.*

2184. Interview with Hon. James E. Gates, Mar. 6, 2012.

2185. Interview with Hon. W. Earl Britt, May 16, 2013.

2186. *Id.*

2187. *Id.*

should they have become necessary.[2188] On one occasion, Sherifi came close to eliciting an expulsion order, but he did not quite cross Judge Britt's line.[2189]

Sherifi pushed Judge Britt's tolerance during Sherifi's closing, but Sherifi's straying from propriety did not require more than the occasional caution from Judge Britt, who did not want to exacerbate the event.[2190]

Challenge: Interpreters

Subasic's native language was Bosnian, but he had fairly good command of English, and he often expressed himself in court in English.[2191] He nevertheless wanted an interpreter with him at court proceedings.[2192] Frequently, however, he disagreed with the interpreter's translations,[2193] especially translations of what Subasic said.[2194] When Subasic realized that one of the interpreters recognized him from Serbia, Subasic threatened her with physical harm.[2195]

Challenge: Court Security

At the August 2009 detention hearing, security officers kept a watchful eye on the large crowd of spectators for sudden movements.[2196] There were 16 armed deputy marshals at hand in the jury room.[2197] Judge Webb permitted women wearing burkhas to attend the proceedings upon positive identification, and extra female security officers were recruited to help screen the heavily covered female visitors.[2198]

It was convenient for a case requiring special security to be tried in New Bern, because the federal courthouse had recently been given congressionally approved security renovations.[2199] The U.S. Marshals Service worked with the Methodist

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2188. *Id.*

2189. *Id.*

2190. *Id.*

2191. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; Interview with Hon. Malcolm J. Howard, Mar. 21, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012; *e.g.*, Transcript at 62–63, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Dec. 7, 2011, filed Mar. 12, 2012); Transcript at 9–16, *id.* (July 29, 2011, filed June 10, 2012).

Subasic pronounced the word "exhibit" with an accent on the first syllable, and other trial participants, including Judge Howard, came to adopt that pronunciation as well. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2192. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2193. *Id.*

2194. Interview with Hon. James E. Gates, Mar. 6, 2012.

2195. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2196. *See* Ovaska & Locke, *supra* note 2076.

2197. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2198. *Id.*

2199. Omnibus Appropriations Act, 2009, Pub. L. 111-8, div. D, tit. V, 123 Stat. 524, 661 (providing $10.6 million for the New Bern courthouse and $153 million for the Chicago courthouse); Interview with Hon. Louise W. Flanagan, Mar. 5, 2012; *see* Nikie Mayo, *Money for Courthouse Renovation Clears Hurdle in Congress*, New Bern Sun J., July 31, 2008.

church across the street, which operated a daycare center,[2200] to allay the church's security concerns.[2201] The church hosted community meetings on the topic.[2202]

For Subasic's pro se immigration fraud trial in Greenville, Judge Howard decided that Subasic would not be shackled, although Subasic had been shackled at preliminary proceedings.[2203] Four experienced deputy marshals were at hand in the courtroom. Usually, two stood in the corners of the courtroom behind the judge and two stood behind the defendant.[2204] Judge Howard conducted sidebar conferences at a table next to the bench, and deputy marshals moved to stand near Subasic, so that Subasic would be separated from court staff.[2205]

At Subasic's pro se terrorism trial, he was frequently shackled beneath counsel table, but he was not shackled during jury selection and for opening and closing arguments.[2206] When he was permitted to move around the courtroom, he was required to wear a stun belt, and two deputy marshals stood near him.[2207] Subasic's behavior never created a security concern.[2208]

Sherifi's murder conspiracy trial began with the security precautions recommended by the U.S. Marshal and based on the precautions developed for Subasic's trial, but after one day Judge Britt decided that they were not necessary.[2209]

Challenge: Jury Security

Judge Flanagan used an anonymous jury, and jurors reported to a secret location from which they were bused to court.[2210]

Judge Britt used an anonymous jury, for the first time in his nearly 32 years on the bench, but the jurors reported directly to the courthouse.[2211] Judge Britt characterized the jurors' anonymity as routine.[2212] Judge Britt reassured the jury that he would not be anonymous and he was not concerned about his safety as a result of the trial.[2213]

Judge Howard did not employ any special security measures with respect to the jury, who knew virtually nothing about Subasic's dangerousness.[2214]

2200. *See* Francine Sawyer, *Terror Trial Could Be Held in New Bern*, New Bern Sun J., Aug. 2, 2010.

2201. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2202. *Id.*

2203. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

2204. *Id.*

2205. *Id.*

2206. Interview with Hon. Louise W. Flanagan, May 17, 2013.

2207. *Id.*

2208. *Id.*

2209. Interview with Hon. W. Earl Britt, May 16, 2013.

2210. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2211. Interview with Hon. W. Earl Britt, May 16, 2013.

2212. *Id.*

2213. *Id.*

2214. Interview with Hon. Malcolm J. Howard, Mar. 21, 2012.

Challenge: FISA Evidence

On the day that the indictment was unsealed and the defendants were arrested, the government filed notices that it would rely on evidence against each defendant obtained pursuant to the Foreign Intelligence Surveillance Act (FISA).[2215] In motions filed from December 10, 2010, to February 24, 2011, "defendants contend that aside from providing this notice, the government has not confirmed any details about what evidence derived from FISA searches and surveillance will be used in the prosecution of the case."[2216]

Judge Flanagan reviewed all FISA warrant applications resulting in the government's evidence and found all of the warrants were issued properly.[2217]

Challenge: Classified Evidence

At the beginning of the case, Judge Flanagan had one law clerk, her judicial assistant, and a court reporter obtain security clearances.[2218] As the case got going, she had additional staff obtain security clearances, including a member of the court's information technology staff.[2219] Judge Flanagan uses term law clerks; new law clerks start the clearance paperwork before they come aboard.[2220]

Magistrate Judges Webb and Gates were cleared to see classified information in this case.[2221] District judges automatically have security clearances, but magistrate judges must obtain them, a process that is greatly facilitated by the background checks they receive when they become judges.[2222] Both of Judge Gates's career law clerks were cleared.[2223] Judge Webb also had a career law clerk cleared.[2224]

On August 3, 2009, one week after the defendants were arrested, the government filed a notice that classified information might be at issue in the case and requested a hearing to discuss the matter, pursuant to the Classified Information Procedures Act.[2225] At the detention hearing on the following day, the government stated that classified methods were used to obtain evidence against the defend-

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2215. Notices, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. July 27, 2009); United States v. Sherifi, 793 F. Supp. 2d 751, 753 (E.D.N.C. 2011).

2216. *Sherifi*, 793 F. Supp. 2d at 753.

2217. *Id.* at 760–61.

2218. Interview with Hon. Louise W. Flanagan, Mar. 5, 2012.

2219. *Id.*

2220. *Id.*

2221. *Id.*; Interview with Hon. William Arthur Webb, Mar. 20, 2012; Interview with Hon. James E. Gates, Mar. 6, 2012.

2222. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2 (Federal Judicial Center, 2d ed. 2013).

2223. Interview with Hon. James E. Gates, Mar. 6, 2012.

2224. Interview with Hon. William Arthur Webb, Mar. 20, 2012.

2225. Government Motion, United States v. Boyd, No. 5:09-cr-216 (E.D.N.C. Aug. 3, 2009).

ants.[2226] A classified information security officer attended the detention hearing in case her expertise on how courts handle classified information became needed.[2227]

On January 4, 2010, the government filed a notice that it was submitting to the court an ex parte classified motion.[2228] The classified motion was filed with the classified information security officer, upon which it became part of the court record.[2229] On January 13, Judge Flanagan filed an ex parte classified order requesting supplementation.[2230] The government filed notices of ex parte classified supplementations on January 13[2231] and 27.[2232] Judge Flanagan resolved the ex parte issues addressed in these classified filings in a classified order issued on February 18 and amended on February 19.[2233] On January 28, in another classified order, Judge Flanagan had granted a classified ex parte motion to strike and substitute,[2234] which was filed on January 27.[2235]

On February 18, Judge Flanagan signed a protective order that required defense attorneys who received access to classified materials to keep those materials confidential.[2236]

From February through May, the government filed an additional 11 notices of ex parte classified filings.[2237] The docket sheet notes seven classified ex parte orders filed by Judge Flanagan in response to these classified filings.[2238] On May 24, Judge Flanagan explained in a public notice that she had, in classified orders, "authorized the government to delete specified items of classified information from discovery and to substitute summaries for certain classified documents."[2239]

As discovery proceeded over the next few months, both the defendants[2240] and the government[2241] filed notices of classified filings.

When Subasic began to represent himself, he sought access to classified evidence and did not want to rely on appointed cleared counsel to assist him with such materials.[2242] Judge Flanagan sought additional briefing from the cleared attorney and reasoned that the defendant's direct access to classified information would arise as an issue only if it were material to his defense, the government de-

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2226. Boyd Aug. 4–5, 2009, Transcript, *supra* note 2074, at 11.

2227. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 27, 2012.

2228. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 4, 2010).

2229. *Id.*

2230. *Boyd* Docket Sheet, *supra* note 2100.

2231. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 13, 2010).

2232. Notice, *id.* (Jan. 27, 2010).

2233. *Boyd* Docket Sheet, *supra* note 2100.

2234. *Id.*

2235. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Jan. 27, 2010).

2236. Classified Information Protective Order, *id.* (Feb. 18, 2010).

2237. Notices, *id.* (Feb. 25 and 26, Mar. 1, 11, and 18, Apr. 12 and 29, and May 18 and 20, 2010).

2238. *Boyd* Docket Sheet, *supra* note 2100 (noting classified orders filed on February 26, March 12 and 19, April 6, and May 14, 2010, and two classified orders filed on May 17, 2010).

2239. Notice, *Boyd*, No. 5:09-cr-216 (E.D.N.C. May 24, 2010).

2240. Notices, *id.* (Mar. 29 and May 24 and 26, 2010).

2241. Notice, *id.* (June 7, 2010).

2242. Order, *id.* (May 19, 2011), *available at* 2011 WL 1930628.

clined to declassify it or share it with him, and suitable substitutions could not be provided.[2243]

Classified evidence was stored and reviewed by defense counsel in secure rooms at the Raleigh courthouse next to a secure room originally established for the prosecution of David Passaro.[2244] There was a separate safe for each defendant.[2245] Judge Flanagan also had a safe for storage of classified materials at the New Bern courthouse.[2246]

Challenge: Sensitive Unclassified Evidence

Early in the case, on December 10, 2009, Judge Flanagan signed a protective order permitting the government to designate some discovery materials as sensitive, which would prohibit the defendants from sharing the materials with persons outside the litigation and require them to return the materials at the end of the case.[2247] According to the protective order,

> such material may include information relevant to ongoing national security investigations and prosecutions; information provided to the United States by foreign law enforcement, some of which may have led to prosecutions in other countries that are sensitive to pre-trial publicity; and materials implicating the privacy interests of the defendants and third parties.[2248]

A year later, Judge Flanagan noticed that procedures for protecting sensitive information in court filings while preserving as public a record as possible needed some adjustment, so Judge Flanagan issued an order that, among other things, made clear that filings could be sealed only with the court's permission.[2249]

2243. *Id.*

2244. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 27, 2012; *see* Ovaska, *supra* note 2073; "Interrogation Death in Afghanistan," *supra*.

2245. Interview with Hon. James E. Gates, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 27, 2012.

2246. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 27, 2012.

2247. Sensitive Discovery Protective Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 10, 2009); Protective Order Amendment, *id.* (Dec. 23, 2009).

2248. Sensitive Discovery Protective Order, *supra* note 2247, at 1.

2249. Order, *Boyd*, No. 5:09-cr-216 (E.D.N.C. Dec. 30, 2010).

ESPIONAGE PROSECUTIONS

Espionage cases, as loosely defined here, include prosecutions for leaking or attempting to leak government secrets. Courts presiding over espionage prosecutions typically must handle classified information. A frequent difference between espionage cases and terrorism cases is that the defendant himself must frequently be given access to classified materials as he prepares his defense against espionage charges.

Brian Patrick Regan ("Would-Be Spy") was prosecuted at the beginning of the century for trying to sell secrets, and he was ultimately sentenced to life in prison. Shortly after Regan's case concluded, the government launched a prosecution for "Giving State Secrets to Lobbyists," which the government eventually decided not to bring to trial.

Would-Be Spy

United States v. Regan (Gerald Bruce Lee, E.D. Va.)

On August 23, 2001, federal agents arrested Brian Patrick Regan, a resident of Bowie, Maryland, and a retired master sergeant of the U.S. Air Force, at Dulles International Airport, aborting his trip to Zurich.[2250]

> Regan had been under surveillance for months, after a foreign source passed on a letter from an unidentified US intelligence official offering to sell information. The letter was riddled with misspellings like "enprisoned" and "esponage," which led the FBI to look for a bad speller within the intelligence community. Regan, who was dyslexic, became the prime suspect. He would later be known as the spy who couldn't spell.[2251]

The government filed a criminal complaint against him the next day in the U.S. District Court for the Eastern District of Virginia, accusing him of attempted espionage.[2252] The complaint accused him of attempting to sell to Iraq, Libya, and China top-secret information to which he had access as a contract employee of the National Reconnaissance Office (NRO).[2253] Regan was indicted on October 23, 2001,[2254] and superseding indictments were filed on February 14[2255] and July 24,

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2250. United States v. Regan, 221 F. Supp. 2d 672, 675 (E.D. Va. 2002); United States v. Regan, 221 F. Supp. 2d 666, 669 (E.D. Va. 2002); United States v. Regan, 221 F. Supp. 2d 661, 662–63 (E.D. Va. 2002); *see* Yudhijit Bhattacharjee, *Tale of a Would-Be Spy, Buried Treasure, and Uncrackable Code*, Wired, Feb. 2010, at 82 (reporting that Regan was arrested aboard a mobile lounge); Rona Kobel, *An Unlikely Setting for Global Intrigue Espionage*, Balt. Sun, Feb. 11, 2003, at 1B; *Retired Air Force Sergeant Accused of Spying Is Going to Trial*, N.Y. Times, Jan. 13, 2003, at A19 [hereinafter *Going to Trial*]; Susannah Rosenblatt, *Arduous Dig to Find Spy's Buried Stash*, L.A. Times, July 31, 2003, at 24.

2251. Bhattacharjee, *supra* note 2250.

2252. United States v. Regan, 228 F. Supp. 2d 742, 745 (E.D. Va. 2002); *Regan*, 221 F. Supp. 2d at 674; *Regan,* 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; Docket Sheet, United States v. Regan, No. 1:01-cr-405 (E.D. Va. Oct. 23, 2001).

2253. United States v. Regan, 281 F. Supp. 2d 795, 801 (E.D. Va. 2002); *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan,* 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; *see Going to Trial*, *supra* note 2250.

Regan served in the U.S. Air Force from 1980 to 2001, retiring as a master sergeant. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan,* 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; *see Going to Trial*, *supra* note 2250. Until his retirement, he worked at the Signals Intelligence Applications Integration Office of the NRO. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan,* 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662.

2254. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 674; *Regan,* 221 F. Supp. 2d at 668; *Regan*, 221 F. Supp. 2d at 662; Docket Sheet, *supra* note 2252.

2255. *Regan*, 228 F. Supp. 2d at 745; *Regan*, 221 F. Supp. 2d at 675; *Regan,* 221 F. Supp. 2d at 669; *Regan*, 221 F. Supp. 2d at 663; Docket Sheet, *supra* note 2252.

2002.[2256] The government filed a notice of intent to seek the death penalty on April 19, 2002.[2257] The court assigned the case to Judge Gerald Bruce Lee.[2258]

On February 20, 2003, a jury convicted Regan of trying to sell secrets to Iraq and China, but acquitted him of trying to sell secrets to Libya.[2259] The jury rejected the death penalty on February 24,[2260] and Regan was sentenced on March 20 to life in prison without the possibility of parole.[2261] Regan agreed to accept the life sentence in exchange for the government's not prosecuting his wife and allowing her to keep part of his military pension.[2262]

Regan also agreed to disclose what he had done with classified information.[2263] Regan directed agents to a green plastic toothbrush holder and a purple plastic salt shaker, each hidden near exit ramps off Interstate 95 between Washington, D.C., and Richmond, Virginia.[2264] These containers held coded descriptions of the locations of 19 buried bundles of classified documents—20,000 pages, five compact discs, and five videotapes—hidden in Pocahontas State Park in Virginia and Patapsco Valley State Park in Maryland.[2265]

Challenge: Classified Evidence

As is common for a spy case, Regan's prosecution involved classified information to which the defendant and defense counsel had to be given access.[2266] The defendant and his attorneys were given access to the classified information and a

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2256. *Regan*, 228 F. Supp. 2d at 746 (noting the filing of a superseding indictment in light of the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)); *Regan*, 221 F. Supp. 2d at 675 (same); *Regan*, 221 F. Supp. 2d at 669 (same); *Regan*, 221 F. Supp. 2d at 663 (same); Docket Sheet, *supra* note 2252.

2257. *Regan*, 228 F. Supp. 2d at 746; *Regan*, 221 F. Supp. 2d at 675; *Regan*, 221 F. Supp. 2d at 669; *Regan*, 221 F. Supp. 2d at 663; Docket Sheet, *supra* note 2252; *see Going to Trial*, *supra* note 2250.

2258. Docket Sheet, *supra* note 2252; *see U.S. Prosecutors Reconsider, Back Delay in Espionage Suspect's Trial*, L.A. Times, Apr. 25, 2002, at 25 [hereinafter *Prosecutors Reconsider*]; *Would-Be Spy Given Life in Prison*, L.A. Times, Mar. 21, 2003, at 29 [hereinafter *Life in Prison*].

Tim Reagan and Joy Richardson interviewed Judge Lee for this report in the judge's chambers on October 2, 2006.

2259. Docket Sheet, *supra* note 2252; *see* Josh Meyer, *Would-Be Spy Won't Face Death Penalty*, L.A. Times, Feb. 25, 2003, at 15; *The Week That Was*, Balt. Sun, Feb. 23, 2003, at 2C; *Life in Prison*, *supra* note 2258.

2260. Docket Sheet, *supra* note 2252; *see* Meyer, *supra* note 2259; Rosenblatt, *supra* note 2250; *The Week That Was*, Balt. Sun, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 2258.

2261. Docket Sheet, *supra* note 2252; *see* Rosenblatt, *supra* note 2250; *Life in Prison*, *supra* note 2258.

2262. *See* Bhattacharjee, *supra* note 2250; *Life in Prison*, *supra* note 2258; *see also* http://www.bop.gov (reg. no. 41051-083).

2263. *See* Bhattacharjee, *supra* note 2250; Rosenblatt, *supra* note 2250.

2264. *See* Rosenblatt, *supra* note 2250.

2265. *See* Bhattacharjee, *supra* note 2250; Rosenblatt, *supra* note 2250.

2266. United States v. Regan, 281 F. Supp. 2d 795, 801 (E.D. Va. 2002).

Because classified information is an issue in many cases brought in the district that is home to the Pentagon and the Central Intelligence Agency, Judge Lee requires all of his law clerks to have security clearances. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

computer in a sensitive compartmented information facility (SCIF) located in the courthouse.[2267]

> The SCIF is a secure facility located in the courthouse where the Defendant and his attorneys may lawfully view classified information. Defense counsel may not remove certain classified information from the SCIF, and the Defendant may not remove classified information from the SCIF. . . . The SCIF has been provided to the espionage defendant and his counsel so that they may have access to classified information to prepare for trial. The Defendant and his counsel must have access to classified information in a "prosecution free zone." Defense counsel and their client reasonably expect to be free to work in the SCIF to compose work papers, trial memoranda, and trial strategy, free from the roving eye of the prosecutor or the Court. Because the classified information involved in this case relates to national security, the information must be kept secure. The SCIF affords the Government a place to continue to protect classified information.[2268]

Discovered in Regan's jail cell were apparently typewritten letters to his wife and children and a page of code.[2269] These documents appeared to concern the locations of hidden classified information.[2270] The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.[2271] Judge Lee allowed a search, but established special procedures to preserve the attorney–client privilege and work-product protection.[2272]

> In order to avoid any claims that the Government has had access to defense counsel's pre-trial preparation, the Court is not going to allow the United States Attorney or the Federal Bureau of Investigation to conduct the search. Rather the Court is going to refer this matter to a United States Magistrate Judge to supervise the process of securing the defense's SCIF computer hard drives and disks for imaging and their return to counsel. The United States Magistrate Judge will work with a court selected neutral computer expert with proper security clearances to image the Defendant's computer hard drives and to search for the enumerated four items: (1) two letters to Anette Regan; (2) letters or memoranda to his children; and (3) a page of code composed of letters and numbers. All of the items listed above will be attached to the court's Order, UNDER SEAL. If these items are found on the hard drive, then the computer expert will provide this information in electronic and hard copy to the United States Magistrate Judge for review. The United States Magistrate Judge is directed to report the computer expert's findings to all counsel and the District Judge. [The CIPA classified information security officer] is directed to maintain the imaged hard drive in a secure location until the verdict is reached in this

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2267. *Regan*, 281 F. Supp. 2d at 800–01; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs); *see also* Dana Priest & William M. Arkin, Top Secret America 50 (2011) (noting that SCIF is pronounced "skiff").

Defense experts also had to obtain security clearances to examine classified documents. *See Prosecutors Reconsider*, *supra* note 2258.

2268. *Regan*, 281 F. Supp. 2d at 801; *see* Anita Huslin, *If These Walls Could Talk . . .*, Wash. Post, May 28, 2006, at D1 ("the SCIF is a sanctuary, the ultimate members-only club for the keepers of secrets").

2269. *Regan*, 281 F. Supp. 2d at 800, 807.

2270. *Id.* at 800, 804–05.

2271. *Id.* at 799–800.

2272. *Id.* at 800.

> case and further order of the court. The accompanying order will provide specific details regarding the logistics of the computer imaging and search process.
>
> VIII. Post-Verdict Search Procedures
>
> After the jury has reached its verdict in this case, the Government may seek leave of Court to conduct a further search on the hard drives and floppy disks. The Government shall notify defense counsel of its intentions by a written motion. The Government must notice its motion for a hearing with the Clerk's Office, and then the motion shall be heard by the Court. Once the Government has reviewed the material that was seized pursuant to the search, the Government may make use of the items as it deems proper.
>
> Additionally, the appointed computer expert shall not reveal the contents of the search to anyone except the Magistrate Judge appointed to work on this case.
>
> This Memorandum Opinion and its accompanying Order SHALL be placed UNDER SEAL, to avoid revealing any information that might adversely affect a potential juror in the trial of Defendant Brian Patrick Regan.[2273]

The unit of the Justice Department that provides the courts with classified information security officers—the Litigation Security Group within the Management Division[2274]—conducted the search.[2275]

In 2009, a journalist moved the court to unseal a government motion concerning the jail cell documents and Regan's response.[2276] In 2012, after inviting briefing from both sides, Judge Lee ordered the government to publicly file suitably redacted copies of the documents.[2277]

2273. *Id.* at 806–07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 2252.

2274. *See* Reagan, *supra* note 2267, at 17–18.

2275. Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

2276. Docket Sheet, *supra* note 2252 (noting May 26, 2009, filing by Yudhijit Bhattacharjee).

2277. *Id.* (noting Feb. 17, 2012, order).

Giving State Secrets to Lobbyists

United States v. Franklin (T.S. Ellis III, E.D. Va.)[2278]

On August 27, 2004, the *CBS Evening News* reported that the FBI was investigating the possible passing of classified policy papers on Iran by a Defense Department analyst to the government of Israel through two men who worked for the American Israel Public Affairs Committee (AIPAC).[2279] On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.[2280]

It was reported that for several years the FBI had been investigating not the analyst but two men who worked at AIPAC.[2281] The FBI interviewed the two men on the day that the story broke on the *CBS Evening News* as well as twice earlier that month.[2282] On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,[2283] and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.[2284]

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.[2285] It was reported that Franklin was seen

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2278. An appeal was heard by Fourth Circuit Judges Robert B. King, Roger L. Gregory, and Dennis W. Shedd.

2279. United States v. Rosen, 471 F. Supp. 2d 651, 653 (E.D. Va. 2007); United States v. Rosen, 447 F. Supp. 2d 538, 552–53 (E.D. Va. 2006); *CBS Evening News* (CBS television broadcast Aug. 27, 2004).

2280. Bradley Graham & Thomas E. Ricks, *FBI Probe Targets Pentagon Official*, Wash. Post, Aug. 28, 2004, at A1; *see* Thomas E. Ricks & Robin Wright, *Analyst Who Is Target of Probe Went to Israel*, Wash. Post, Aug. 29, 2004, at A1 (reporting that Franklin served in the Air Force Reserve, rising to colonel, including service in Israel).

2281. David Johnston & Eric Schmitt, *F.B.I. Is Said to Brief Pentagon Bosses on Spy Case*, N.Y. Times, Aug. 31, 2004, at A14; Walter Pincus, *A Look at the Dropping of Espionage Charges*, Wash. Post, May 5, 2009, at A19 "the [defense] lawyers said that Rosen and Weissman were under government surveillance, including telephone wiretaps, for five years, from 1999 to 2004"); Susan Schmidt & Robin Wright, *Leak Probe More Than 2 Years Old*, Wash. Post, Sept. 2, 2004, at A6; Warren P. Strobel, *Spy Probe Focuses on More Civilians*, Miami Herald, Aug. 29, 2004, at 1A.

2282. United States v. Rosen, 474 F. Supp. 2d 799, 800 (E.D. Va. 2007); *see* David Johnston, *F.B.I. Interviews 2 Suspected of Passing Secrets to Israel*, N.Y. Times, Sept. 1, 2004, at A15.

2283. Richard B. Schmitt & Tyler Marshall, *FBI Questions Israeli Lobbyists in Spying Probe*, L.A. Times, Aug. 31, 2004, at 12.

Rosen was AIPAC's director of foreign policy issues and Weissman was a senior Middle East analyst. *E.g.*, United States v. Rosen, 487 F. Supp. 2d 721, 725 (E.D. Va. 2007).

2284. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 2282.

2285. *See* David Johnston & Eric Schmitt, *Pentagon Analyst Was Cooperating When Israel Spy Case Became Public*, N.Y. Times, Aug. 30, 2004, at A12; Pincus, *supra* note 2281 ("Franklin, wearing a recording device, met with Weissman and 'induced him into believing that he had to communicate certain information right away in order to save innocent lives,' according to the [defense] lawyers.").

joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.[2286] An investigation of Franklin revealed that he had given classified information to Rosen and Weissman and he had improperly stored classified information in his West Virginia home.[2287] His security clearance was suspended in June 2004.[2288] In July, Franklin cooperated in a recorded sting meeting with Weissman in which Franklin gave the lobbyist classified information.[2289] Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.[2290]

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.[2291] The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.[2292] The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.[2293] Franklin pleaded guilty on October 5 to conspiracy to communicate secret information and wrongfully keeping classified documents at home, saying that his motive in passing classified information to lobbyists was to create a back channel of influence over President Bush's policies on confronting Iran.[2294] On January 20, 2006, Judge Ellis provisionally sentenced Franklin to 12 years and seven months in prison, leaving room for an adjustment after the completion of Franklin's assistance in a trial against Rosen and Weiss-

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2286. Michael Isikoff & Mark Hosenball, *And Now a Mole?*, Newsweek, Sept. 6, 2004, at 50; David Johnston & David E. Sanger, *Pro-Israel Lobby Said to Have Been Inquiry Target*, N.Y. Times, Sept. 3, 2004, at A16.

2287. *See* Jerry Markon, *Defense Analyst Charged With Sharing Secrets*, Wash. Post, May 5, 2005, at A1 [hereinafter *Defense Analyst Charged*]; *see also* Jerry Markon, *Defense Worker Charged Again in Secrecy Case*, Wash. Post, May 25, 2005, at A4 (reporting that it had been known since 1997 that Franklin improperly took classified documents home).

2288. *See* Markon, *Defense Analyst Charged*, *supra* note 2287.

2289. United States v. Rosen, 445 F. Supp. 2d 602, 609–10 (E.D. Va. 2006); *see* Joel Brinkley, *Lobbyist in Espionage Inquiry Says That He Broke No Laws*, N.Y. Times, May 22, 2005, at 130; Jerry Markon, *FBI Tapped Talks About Possible Secrets*, Wash. Post, June 3, 2005, at A7 (reporting that Franklin warned Rosen and Weissman "that Iranian agents were planning attacks against American soldiers and Israeli agents in Iraq").

2290. *Rosen*, 445 F. Supp. 2d at 609–10; *see* Markon, *supra* note 2289.

2291. Docket Sheet, United States v. Franklin, No. 1:05-cr-225 (E.D. Va. May 26, 2005) [hereinafter E.D. Va. Docket Sheet]; *see* David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. Times, May 5, 2005, at A1.

2292. E.D. Va. Docket Sheet, *supra* note 2291.

2293. *Id.*

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

2294. United States v. Rosen, 599 F. Supp. 2d 690, 693 & n.4 (E.D. Va. 2009); *Rosen*, 445 F. Supp. 2d at 608 n.3; E.D. Va. Docket Sheet, *supra* note 2291; *see* Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. Times, Oct. 6, 2005, at A21; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, Wash. Post, Oct. 6, 2005, at A2.

man.[2295] Franklin's sentence ultimately was reduced, and he was ordered released on May 31, 2010.[2296]

AIPAC fired Rosen and Weissman on March 21, 2005.[2297] The August 4 superseding indictment added Rosen and Weissman as defendants.[2298] The indictment alleged a conspiracy that began in 1999 when Rosen and Weissman had conversations with an unnamed foreign official (FO-1) about terrorist activities in Asia.[2299] In 2000, Rosen and Weissman allegedly met with an unnamed government official (USGO-1),

> who had access to classified information relating to U.S. strategy pertaining to a certain Middle East country. Following this meeting, Rosen allegedly had a conversation with a member of the media in which he communicated classified information relating to the U.S. government's deliberations on its strategy towards that particular Middle Eastern country.
>
> The next overt act in furtherance of the alleged conspiracy occurred over one year later, when, on January 18, 2002, Rosen met with another U.S. government official (USGO-2). After this meeting, Rosen prepared a memorandum referencing classified information provided by USGO-2 to a foreign national. Rosen met again with USGO-2 on March 12, 2002 and discussed classified information regarding Al-Qaeda. Rosen allegedly disclosed this classified information to a fellow AIPAC employee the next day, and to another foreign embassy official (FO-2) the day after that.[2300]

According to the indictment, Rosen met Franklin in 2002.[2301] Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."[2302] Rosen allegedly passed information about the document to foreign officials, journalists, and a think-tank fellow.[2303] Weissman allegedly participated in several of these conversations.[2304]

2295. E.D. Va. Docket Sheet, *supra* note 2291; *see* David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

2296. E.D. Va. Docket Sheet, *supra* note 2291 (noting sentencing order on May 26, 2010); *see* http://www.bop.gov (reg. no. 70425-083).

2297. United States v. Rosen, 487 F. Supp. 2d 721, 725–26 (E.D. Va. 2007); *see* David Johnston, *Israeli Lobby Reportedly Fires 2 Top Aides in Spying Inquiry*, N.Y. Times, Apr. 21, 2005, at A14.

Rosen and Weissman claimed that the government pressured AIPAC to fire them and stop paying their legal fees or AIPAC itself would face prosecution. *Rosen*, 487 F. Supp. 2d at 724–25. Judge Ellis ruled that this would be a violation of the Sixth Amendment, except that it clearly had no negative effect on the defendants' very able representation by defense counsel. *Id.* at 726–36.

2298. E.D. Va. Docket Sheet, *supra* note 2291; *see* David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

2299. *Rosen*, 599 F. Supp. 2d at 693; *Rosen*, 445 F. Supp. 2d at 608; *see* Gabriel Schoenfeld, Necessary Secrets: National Security, the Media, and the Rule of Law 234 (2010) (describing the prosecution as "the most radical antileak prosecution in American history").

2300. *Rosen*, 445 F. Supp. 2d at 608–09; *see* David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. Times, Aug. 18, 2005, at A22 (identifying USGO-2).

2301. *Rosen*, 445 F. Supp. 2d at 609.

2302. *Id.*

2303. *Id.*

2304. *Id.*

Judge Ellis ruled that at trial the government would have to prove that the information passed by the defendants qualified as national defense information (NDI).[2305] "To qualify as NDI, information must be closely held by the government and potentially damaging to national security if disclosed."[2306] "It is important to recognize that NDI and classified material may not be coextensive sets."[2307] "In short, the government designates what information is labeled and treated as classified, while a court or jury determines what information qualifies as NDI . . . ."[2308]

Rosen and Weissman's trial was originally scheduled to begin in April 2006,[2309] but it was postponed several times as the court dealt with constitutional issues and the handling of classified information.[2310] Judge Ellis ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.[2311]

In light of Judge Ellis's other pretrial rulings, the government dismissed the indictment against Rosen and Weissman on May 1, 2009, approximately ten years after launching the investigation.[2312]

2305. United States v. Rosen, 599 F. Supp. 2d 690, 694–95 (E.D. Va. 2009) (enforcing a subpoena for expert testimony from the government's former classification czar); United States v. Rosen, 471 F. Supp. 2d 651, 652 (E.D. Va. 2007); *see* 18 U.S.C. § 793 (2011).

2306. United States v. Rosen, 487 F. Supp. 2d 703, 705 n.1 (E.D. Va. 2007).

2307. *Id.*

2308. *Rosen*, 599 F. Supp. 2d 690; *see* Walter Pincus, *Opinion Could Dampen Zeal to Classify Government Information*, Wash. Post, Feb. 23, 2009, at A17; *see also Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011) (defense expert and former head of the National Archives' Information Security Oversight Office—sometimes known as the classification czar—opining that "what these individuals were accused of passing along, clearly in my mind, did not meet the qualifications or standards for classification").

2309. *See* Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

2310. *See* Jerry Markon, *Classified Documents Allowed in Espionage Trial*, Wash. Post., Feb. 25, 2009, at A4 [hereinafter *Classified Documents Allowed*] (reporting a tentative trial date of Apr. 21, 2009); Jerry Markon, *Judge Rejects Dismissal of Pro-Israel Lobbyists Case*, Wash. Post, Aug. 11, 2006, at A5 [hereinafter *Judge Rejects Dismissal*]; Pincus, *supra* note 2281 ("Seven separate trial dates were set and postponed during the past 3½ years before the date of June 2[, 2009,] was established."); Pincus, *supra* note 2308 (reporting a tentative trial date of Apr. 21, 2009); Richard B. Schmitt, *Lobbyists' Lawyers Say Rice Leaked Information*, L.A. Times, Apr. 22, 2006, at 24 (reporting that the trial was postponed from May 23, 2006, to Aug. 7, 2006); Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case*, L.A. Times, Aug. 11, 2006, at 13 [hereinafter *Lobbyists to Stand Trial*] (reporting that the trial was postponed indefinitely from Aug. 7, 2006).

2311. *See* Markon, *Judge Rejects Dismissal*, *supra* note 2310; Schmitt, *Lobbyists to Stand Trial*, *supra* note 2310.

2312. E.D. Va. Docket Sheet, *supra* note 2291; *see* Neil A. Lewis & David Johnston, *U.S. Moves to End Secrets Case Against Israel Lobbyists*, N.Y. Times, May 2, 2009, at A11; Pincus, *supra* note 2281; Schoenfeld, *supra* note 2299, at 246–47 ("as the case subsequently unfolded in a series of motions and countermotions, it became increasingly clear that the government would be unable to prove that the secrets at issue in the case were of the proscribed character"); *see also id.* at 247 ("The only benefit to the public came from T.S. Ellis III, who bequeathed to the nation the most comprehensive and probing explication of the Espionage Act to date.").

Challenge: Classified Evidence

A large amount of classified evidence was at issue in this case.[2313] Judge Ellis's career law clerk has a top-secret security clearance, and she can help the judge deal with issues concerning classified information.[2314] One of Judge Ellis's temporary law clerks, however, was a Canadian citizen, and so he was not eligible for a security clearance.[2315]

Defense attorneys and witnesses with appropriate security clearances were able to review classified evidence in a sensitive compartmented information facility (SCIF) designated for their use in the courthouse.[2316]

Pursuant to the Classified Information Procedures Act (CIPA),[2317] the court of appeals heard the government's interlocutory appeal concerning the admissibility of information in two documents, identified as an "FBI Report" and an "Israeli Briefing Document."[2318] In an opinion by Judge Robert B. King, joined by Judges Roger L. Gregory and Dennis W. Shedd, the appellate court affirmed Judge Ellis's rulings.[2319]

As required by section 5(a) of CIPA, the defendants gave notice of their intent to introduce classified evidence at trial.[2320] Pursuant to section 6 of CIPA, Judge Ellis "determined that a substantial volume of the classified information was indeed relevant and admissible."[2321] As permitted by section 6(c)(1), the government proposed substitutions for the classified evidence "by redacting and otherwise summarizing classified information in the original documents."[2322] Judge Ellis

> ruled that, although some of the government's proposed redactions were acceptable, other such redactions would not afford the defendants the same opportunity to defend them-

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2313. United States v. Rosen, 557 F.3d 192, 195 (4th Cir. 2009).

2314. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

2315. *Id.*; *see* 28 C.F.R. § 17.41(b) (2011) ("Eligibility for access to classified information is limited to United States citizens . . . .").

2316. E.D. Va. Docket Sheet, *supra* note 2291; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

2317. 18 U.S.C. app. 3 (2011); *see* Reagan, *supra* note 2316 (discussing CIPA).

2318. *Rosen*, 557 F.3d at 196; *see* Markon, *Classified Documents Allowed*, *supra* note 2310 ("Sources familiar with the documents said the FBI report was on the 1996 Khobar Towers bombing in Saudi Arabia that killed 19 Americans and that the other paper describes a briefing by the Israeli government.").

2319. *Rosen*, 557 F.3d at 194, 199–200; *see* Neil A. Lewis, *Ex-Lobbyists in U.S. Case of Espionage Win a Round*, N.Y. Times, Feb. 25, 2009, at A15; Markon, *Classified Documents Allowed*, *supra* note 2310.

For this report, Tim Reagan interviewed Judge King in the judge's Richmond chambers on March 19, 2008; Judge Shedd by telephone on September 3, 2009; and Judge Gregory in the judge's chambers on September 25, 2009.

2320. *Rosen*, 557 F.3d at 195 ("a large volume of classified evidence"); *see* 18 U.S.C. app. 3 § 5(a).

2321. *Rosen*, 557 F.3d at 195; *see* 18 U.S.C. app. 3 § 6.

2322. *Rosen*, 557 F.3d at 196; *see* 18 U.S.C. app. 3 § 6(c)(1).

> selves as would the admission of the unredacted documents containing classified information. In some instances, the court concluded that less extensive redactions, or the use of replacements for particular names, places, or terms, would adequately protect the defendants' rights while simultaneously offering adequate protection for classified information. The court thus directed the parties to fashion substitutions for the classified documents in accordance with the oral rulings it made during the hearing. Thereafter, the court entered an order adopting the parties' agreed-to substitutions, over the government's objection.[2323]

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the "silent witness rule."[2324] The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public.[2325] It is a partial closing of the trial.[2326] The identities of persons and countries, for example, are withheld by referring to them by codes known only to the judge, the jury, the parties, and the witness, such as "person 1" or "country A."[2327]

The silent witness rule would be appropriate

> only when the government established (i) an overriding reason for closing the trial, (ii) that the closure is no broader than necessary to protect that interest, (iii) that no reasonable alternatives exist to closure, and (iv) that the use of the [silent witness rule] provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence, presented without the use of codes.[2328]

Challenge: Subpoenaing a Cabinet Officer

The defendants requested that subpoenas be issued to 20 current and former high-ranking government officials, including Secretary of State Condoleezza Rice, because of her former position as National Security Advisor, and convicted former Defense Department employee Franklin.[2329] The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the others would be at best cumulative.[2330] Judge Ellis sustained the government's objection as to five witnesses, but overruled its objection as to Secretary Rice; current National Security Advisor Stephen Hadley, who was her deputy; Paul Wolfowitz and Richard Armitage, each formerly Deputy Secretary of State; and seven others.[2331]

2323. *Rosen*, 557 F.3d at 196.

2324. United States v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007); *see* Reggie B. Walton, *Prosecuting International Terrorism Cases in Article III Courts*, 39 Geo. L.J. Ann. Rev. Crim. Proc. iii, xiv (2010) (noting that Judge Ellis's opinion was "the first published opinion to explicitly approve of the use of the silent witness procedure in the CIPA context").

2325. *Rosen* 520 F. Supp. 2d at 793–94.

2326. *Id.* at 794.

2327. *Id.* at 793–94.

2328. *Id.* at 799.

2329. United States v. Rosen, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007); *see* Pincus, *supra* note 2308.

2330. *Rosen*, 520 F. Supp. 2d at 807 & n.8, 810.

2331. *Id.* at 814–15; *see* Neil A. Lewis, *Trial to Offer Look at World of Information Trading*, N.Y. Times, Mar. 3, 2008, at A14; Philip Shenon, *Defense May Seek U.S. Testimony in Secrets Case*, N.Y. Times, Nov. 3, 2007, at A14.

> [N]othing in the Sixth Amendment right to compulsory process requires, nor should it require, an accused to refrain from calling government officials as witnesses until he has exhausted possible non-governmental witnesses to prove a fact. Inconvenience to public officials in the performance of their official duties is not a basis for infringing a defendant's Sixth Amendment compulsory process rights. And this point is particularly clear where, as here, the forecasted testimony would likely be more credible and probative were it to come from a government official, as compared to an AIPAC employee.[2332]

Challenge: Classified Orders

In a classified order, subsequently made public, Judge Ellis ordered an investigation into how reporters knew that Rosen and Weissman were under investigation before they were charged.[2333]

Because so many issues in this case concerned classified information, Judge Ellis filed separate orders under seal stating (1) how the silent witness rule would be applied[2334] and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.[2335]

As the final trial date approached, and shortly before the government dropped the case, Judge Ellis issued a sealed order concerning the defendants' evidence.[2336]

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.[2337] But the court held several closed hearings, each of which required a court reporter with a security clearance.[2338]

The court of appeals granted the government's motion to hear parts of oral arguments under seal in the government's appeal of Judge Ellis's rulings on the

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2332. *Rosen*, 520 F. Supp. 2d at 811–12 (footnote omitted); *see id.* at 812 ("to warrant the issuance of these disputed subpoenas, defendants must simply make a 'plausible showing' that each current or former government official sought to be subpoenaed would provide testimony that would be (i) relevant to the charged crimes, (ii) material, in that the testimony might have an impact on the outcome of the trial, and (iii) favorable to the defense") (footnote omitted).

2333. *See* Jerry Markon, *Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

2334. United States v. Rosen, 520 F. Supp. 2d 786, 789, 802 (E.D. Va. 2007).

2335. *Rosen*, 520 F. Supp. 2d at 814; E.D. Va. Docket Sheet, *supra* note 2291.

2336. E.D. Va. Docket Sheet, *supra* note 2291 (noting a sealed order filed on April 14, 2009).

2337. United States v. Rosen, 487 F. Supp. 2d 703 (E.D. Va. 2007); *see* Walter Pincus, *Justice Dept. Given 2 Weeks to Weigh Use of Classified Data in Espionage Case*, Wash. Post, Apr. 20, 2007, at A16.

2338. E.D. Va. Docket Sheet, *supra* note 2291 (noting closed hearings on July 10, 2006; Jan. 9, June 7, July 18–19 and 23, Aug. 8–9, 15–17, and 30, Sept. 7, Nov. 7–8, and Dec. 6, 2007; Jan. 10 and 29, Feb. 7 and 8, May 22, June 24, July 16, Aug. 7, Sept. 25, and Nov. 20, 2008; and Jan. 14 and Apr. 1, 2009).

admissibility of the "FBI Report" and the "Israeli Briefing Document."[2339] Eight portions of the court's published opinion resolving the appeal are redacted.[2340]

Challenge: Classified Arguments

In the interlocutory appeal of Judge Ellis's rulings on admissibility of classified evidence, the parties filed classified briefs with the classified information security officer and redacted briefs in the public record.[2341]

Appellate judges' options for reviewing classified documents depend on where they have chambers. Judge Gregory's chambers are at the court of appeals in Richmond, where classified materials can be stored in a SCIF. Judge Gregory can retrieve classified materials from the SCIF and bring them back to his chambers for a private review.[2342]

Judge Shedd's chambers in Columbia are not in a courthouse.[2343] When he needs to review classified materials, he reviews them at the FBI's SCIF in town.[2344] Both Judge Shedd and Judge King, who has chambers in Charleston, West Virginia, can also review classified materials in Richmond when they are there to hear cases.[2345]

2339. Docket Sheet, United States v. Rosen, No. 08-4358 (4th Cir. Mar. 31, 2008) [hereinafter 4th Cir. Docket Sheet] (government's appeal); *see also* Docket Sheet, United States v. Rosen, No. 08-4410 (4th Cir. Apr. 11, 2008) (defendants' cross-appeal, dismissed).

2340. United States v. Rosen, 557 F.3d 192, 197, 199–200 (4th Cir. 2009).

2341. 4th Cir. Docket Sheet, *supra* note 2339.

2342. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

2343. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

2344. *Id.*

2345. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with Hon. Robert B. King, March 19, 2008.

OTHER CRIMINAL CASES

The Classified Information Procedures Act was enacted in response to what was sometimes called graymail efforts by defendants in criminal cases during the Cold War who claimed governmental authorization for their crimes and threatened to reveal state secrets as part of their defense.

Cases of those type are not as common now, but two case studies follow that bear some similarity to the Cold War prosecutions.

"Interrogation Death in Afghanistan" is a prosecution of a CIA contractor who was prosecuted for interrogating a suspect to death. Among the challenges the case presented to the court were handling classified information and protecting a witness's identity.

"Castro Foe" describes the perjury prosecution of a man who once worked for the CIA and became wanted in Cuba and Venezuela for violent crimes. This case also required the court to meet the challenges of classified information and witness security against the backdrop of some accusations that the United States was harboring a terrorist.

Interrogation Death in Afghanistan[2346]

United States v. Passaro (Terrence W. Boyle, E.D.N.C.)

On June 21, 2003, Abdul Wali was found dead in his cell at the American-controlled Asadabad Firebase in the Kunar province of Afghanistan.[2347] On August 17, 2006, an Eastern District of North Carolina jury found David Passaro guilty of assault in connection with Wali's death.[2348]

Passaro was born in South Carolina; while he was very young, the family moved to Connecticut.[2349] In 1991, he was convicted of misdemeanor assault in a bar fight; the Hartford, Connecticut, police department fired him for the assault shortly after his graduation from the police academy.[2350]

Later, Passaro worked as a medic for the U.S. Army's special forces at Fort Bragg in Fayetteville, North Carolina.[2351] From December 2002, he was on leave as a paramilitary contractor for the CIA.[2352] In May 2003, he arrived in Asadabad.[2353] On June 19, he was assigned the task of interrogating Wali.[2354] The interrogation was brutal, and it lasted for two days, the remainder of Wali's life.[2355]

Wali was being detained as a suspected orchestrator of rocket attacks on the base.[2356] He was a well-known commander in fighting against the Soviet army.[2357]

2346. Margaret S. Williams collaborated on the research for this case study.

2347. United States v. Passaro, 577 F.3d 207, 210–12 (4th Cir. 2009); Jurisdictional Order at 3, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. Aug. 12, 2005); *see* Said Hyder Akbar, Come Back to Afghanistan 194 (2005); John Hendren & Mark Mazzetti, *U.S. Charges Contractor Over Beating of Afghan Detainee*, L.A. Times, June 18, 2004, at 6; Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, Wash. Post, June 18, 2004, at A1; *This American Life: Come Back to Afghanistan* (PRI radio broadcast Jan. 31, 2003); *This American Life: Teenage Embed, Part Two* (PRI radio broadcast Dec. 12, 2003).

2348. *Passaro*, 577 F.3d at 212; *see* Julian E. Barnes, *CIA Contractor Guilty in Beating of Det*

ainee, L.A. Times, Aug. 18, 2006, at 18; Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. Times, Aug. 18, 2006, at 8; Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, Raleigh News & Observer, Aug. 18, 2006, at A1.

2349. *See* Jennifer Brevorka, *CIA Contractor Had Other Faults*, Raleigh News & Observer, June 20, 2004, at A1.

2350. *See id.*; James Dao, *A Man of Violence, or Just "110 Percent" Gung-Ho?*, N.Y. Times, June 19, 2004, at 6; Craig Jarvis & Kristin Collins, *N.C. Man Charged in Afghan Case*, Raleigh News & Observer, June 18, 2004, at A1; Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, N.Y. Times, June 18, 2004, at 1.

2351. *Passaro*, 577 F.3d at 211; *see* Akbar, *supra* note 2347, at 261 ("a former Army Ranger"); Jarvis & Collins, *supra* note 2350; Oppel & Hart, *supra* note 2350.

2352. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Nov. 12, 2004); Oppel & Hart, *supra* note 2350; Estes Thompson, *Former CIA Contractor to Be Jailed Until Trial in Afghan Prisoner Assault*, Wash. Post, June 26, 2004, at A17.

2353. *Passaro*, 577 F.3d at 211; Public Authority Defense Notice, *supra* note 2352.

2354. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2347, at 2–3.

2355. *Passaro*, 577 F.3d at 211–12; Jurisdictional Order, *supra* note 2347, at 2–3; *see* Hendren & Mazzetti, *supra* note 2347.

2356. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2347, at 2–3; *see* Akbar, *supra* note 2347, at 185.

On June 18, he voluntarily presented himself for questioning.[2358] Sayed Fazl Akbar, governor of the province, arranged the visit, and Said Hyder Akbar, the governor's son, who had grown up in northern California, accompanied Wali as an interpreter.[2359]

Passaro returned to North Carolina in July.[2360] Nearly a year later, on June 17, 2004, the government indicted him for assault.[2361] Attorney General John D. Ashcroft announced the indictment at a news conference in Washington.[2362]

Passaro was not charged with homicide because Wali's family refused to allow an autopsy, so the precise cause of Wali's death could not be proved.[2363] Passaro was arrested at Fort Bragg and detained upon his indictment.[2364]

This was the first exercise of the government's extraterritorial jurisdiction under the USA PATRIOT Act.[2365] The Asadabad Firebase was a mud compound

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2357. *See* Dao, *supra* note 2350.

2358. *Passaro*, 577 F.3d at 211; Jurisdictional Order, *supra* note 2347, at 2; *see* Akbar, *supra* note 2347, at 186–93, 328 (reporting that "Abdul Wali had come to clear his name, not to admit to any wrongdoing"); Hendren & Mazzetti, *supra* note 2347; Oppel & Hart, *supra* note 2350.

2359. *See* Akbar, *supra* note 2347, at 186–93; Dao, *supra* note 2350; Matthew Eisley, *Young Afghan Adds Chapter to Striking Story*, Raleigh News & Observer, Aug. 10, 2006, at A1 ("Hyder Akbar was born in Afghanistan, but his ruling-class family fled to California when he was too young to remember. He grew up the youngest of four children in Oakland, where his father, Said Fazel Akbar, owned a hip-hop clothing store."); Schmidt & Priest, *supra* note 2347 (reporting that the governor "had returned to his native Kunar province to become the governor there after the fall of the Taliban"); *This American Life: Come Back to Afghanistan*, *supra* note 2347; *Teenage Embed, Part Two*, *supra* note 2347.

> On June 18, 2003, Abdul Wali visited my father's office. He knew that the Americans wanted to question him about some recent rocket attacks. He told us he was innocent, and he said he was terrified of going to the U.S. base, because there were pervasive rumors that prisoners were tortured there. My father told him that he needed to go, and he sent me along to reassure him.

Hyder Akbar, *Interrogation Unbound*, N.Y. Times, July 11, 2004, at 17 (reflections by the governor's son).

2360. *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2347, at 3.

2361. Docket Sheet, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. June 17, 2004); *Passaro*, 577 F.3d at 212; Jurisdictional Order, *supra* note 2347, at 3; *see* Brevorka, *supra* note 2349; Hendren & Mazzetti, *supra* note 2347; Jarvis & Collins, *supra* note 2350; Oppel & Hart, *supra* note 2350; Schmidt & Priest, *supra* note 2347.

2362. *See* Hendren & Mazzetti, *supra* note 2347; Oppel & Hart, *supra* note 2350; Schmidt & Priest, *supra* note 2347.

2363. *Passaro*, 577 F.3d at 212 n.1; Interview with Hon. Terrence W. Boyle, Mar. 6, 2012 (noting the cultural norm of rapid internment); *see* Akbar, *supra* note 2347, at 197, 258, 261 (Wali's father "would not permit an autopsy. To do so would break Islamic law."); Schmidt & Priest, *supra* note 2347; Shane, *supra* note 2348.

2364. Docket Sheet, *supra* note 2361; *see* Akbar, *supra* note 2347, at 260; Brevorka, *supra* note 2349; Hendren & Mazzetti, *supra* note 2347; Jarvis & Collins, *supra* note 2350; Oppel & Hart, *supra* note 2350; Schmidt & Priest, *supra* note 2347.

2365. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; *see* 18 U.S.C. § 7(9) (2011) (extending U.S. criminal jurisdiction to acts by or against U.S. citizens in places controlled by the U.S. government), *enacted by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377; *see also* Gregory P. Bailey, Note, *United States v. Passaro: Exercising*

constructed by the Soviet Union,[2366] but it was U.S. soil for jurisdictional purposes.[2367]

The court assigned the case to Judge Terrence W. Boyle.[2368] On June 25, after a detention hearing, Magistrate Judge William Arthur Webb ordered that Passaro remain detained.[2369] In August, Judge Boyle released Passaro with electronic monitoring and a curfew.[2370] Detention resumed in June 2005 after Passaro was arrested for assaulting his girlfriend.[2371] Judge Boyle released him again in March 2006, so that he could more effectively assist his attorneys with his defense.[2372] After he was involved in a traffic accident later that month without permission to be away from home, he was detained again.[2373]

Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States, 58 Cath. U. L. Rev. 1143 (2009); Craig Jarvis, *Secrecy Act Might Affect Passaro Case*, Raleigh News & Observer, July 10, 2004, at A1; Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 Stan. J. C.R. & C.L. 365, 375 (2006); Andrea Weigl, *Patriot Act's Reach Questioned*, Raleigh News & Observer, July 21, 2005, at B1.

2366. Jurisdictional Order, *supra* note 2347, at 2 & n.1 ("Asadabad is a small agricultural town in the eastern mountains of Afghanistan which is probably most famous for being the birthplace of jihad against the Soviets in the late 1970's.")

2367. *Passaro*, 577 F.3d at 212–19; Jurisdictional Order, *supra* note 2347, at 5–8; *see* Andrea Weigl, *Passaro's Dismissal Try Rejected*, Raleigh News & Observer, Aug. 13, 2005, at B5.

2368. Docket Sheet, *supra* note 2361.

Tim Reagan interviewed Judge Boyle for this report in the judge's Raleigh chambers on March 6, 2012.

2369. Docket Sheet, *supra* note 2361; Detention Order, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. Mar. 14, 2006); *see C.I.A. Contractor to Be Held Til Trial*, N.Y. Times, June 26, 2004, at 11; Craig Jarvis, *Passaro Will Await Trial in Jail*, Raleigh News & Observer, June 26, 2004, at A1; Thompson, *supra* note 2352.

2370. Docket Sheet, *supra* note 2361; Detention Order, *supra* note 2369; *see* Barbara Barrett, *Passaro Released from Jail*, Raleigh News & Observer, Aug. 28, 2004, at B1; *Fatal Beating Case*, N.Y. Times, Aug. 28, 2004, at 9.

2371. Docket Sheet, *supra* note 2361; Detention Order, *supra* note 2369; *see* Government Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. June 2, 2005) (citing a sheriff's report alleging that Passaro grabbed his girlfriend "by the shoulder, pushed and grabbed her again, forcing her into a door and out the front door, leaving scratches and marks on her left knee," damaged her cell phone, and stole her ruby ring); *see also Case of Ex-C.I.A. Contractor*, N.Y. Times, June 9, 2005, at 20; Sarah Ovaska, *Abuse Suspect Back in Custody*, Raleigh News & Observer, June 3, 2005, at A1.

Before Passaro was detained again, he also was reported to have acted as a good Samaritan by rescuing the driver of a dump truck that overturned on the shoulder of highway 421. *See Suspect in Beating Helps Rescue Driver*, Raleigh News & Observer, Mar. 31, 2005.

2372. Detention Order, *supra* note 2369; *see* Andrea Weigl, *Passaro Gets Release to Prepare for Trial*, Raleigh News & Observer, Mar. 16, 2006, at B5.

2373. Docket Sheet, *supra* note 2361; *see* Detention Petition, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 5, 2006); *see also* Andrea Weigl, *Judge Sends Passaro Back to Jail*, Raleigh News & Observer, Apr. 12, 2006, at B1; Andrea Weigl, *Passaro Returns to Wake Jail*, Raleigh News & Observer, Apr. 6, 2006, at B5.

On November 12, 2004, Passaro filed a notice that he would rely on a "public authority defense."[2374] On January 31, 2006, Judge Boyle denied the government's motion to exclude the defense.[2375]

Jury selection began on Monday, August 7, 2006.[2376] Evidence concluded on Wednesday of the following week, and the jury reached its guilty verdict on Thursday.[2377] On February 13, 2007, Judge Boyle sentenced Passaro to eight years and four months in prison.[2378]

On August 10, 2009, the court of appeals affirmed the conviction, but remanded for resentencing because of an error in applying sentencing guidelines.[2379] Judge Boyle sentenced Passaro to six years and eight months on April 6, 2010.[2380] He was released on January 26, 2011.[2381]

Challenge: Classified Evidence

A large amount of classified information was at issue in this case.[2382] There were 95 classified docket entries,[2383] out of approximately 300 total.[2384] Before this case, the federal court in the Eastern District of North Carolina had little to no experience handling classified information.[2385] Judge Boyle's courtroom deputy and one of his law clerks obtained security clearances.[2386] The defense team also received security clearances.[2387] Two sensitive compartmented information facilities (SCIFs) were constructed in the Raleigh federal building—one for the court and one for the U.S. Attorney.[2388]

2374. Public Authority Defense Notice, *supra* note 2352; *see* United States v. Passaro, 577 F.3d 207, 220–21 (4th Cir. 2009); *see* Shane, *supra* note 2348.

2375. Order, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Feb. 1, 2006); *see* Andrea Weigl, *Passaro Can Claim He Was Doing His Job*, Raleigh, News & Observer, Feb. 3, 2006, at B5.

2376. Docket Sheet, *supra* note 2361.

2377. Jury Verdict, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 17, 2006).

2378. Judgment, *id.* (Feb. 13, 2007); *Passaro*, 577 F.3d at 212; *see C.I.A. Contractor Is Sentenced*, N.Y. Times, Feb. 14, 2007, at 20; Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, Raleigh News & Observer, Feb. 14, 2007, at B1.

2379. *Passaro*, 577 F.3d at 211, 223.

2380. Amended Judgment, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Apr. 6, 2010); *see* Mandy Locke, *Passaro's Sentence Is Cut*, Raleigh News & Observer, Apr. 7, 2010, at B; *Term Is Cut in Detainee Abuse Case*, L.A. Times, Apr. 7, 2010, at 17.

2381. http://www.bop.gov (reg. no. 24708-056).

2382. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2383. *Id.*

2384. Docket Sheet, *supra* note 2361.

2385. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011; *see* Jarvis, *supra* note 2365.

2386. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2387. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2388. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011; *see* Craig Jarvis, *Judge Shields Records*, Raleigh News & Observer, July 22, 2004, at B4; Andrea Weigl, *Room Designed to Keep Secrets*, Raleigh News & Observer, Mar. 29, 2005, at B1.

The defendant himself had access to most classified evidence, which he reviewed in the SCIF.[2389] After his arrest for assaulting his girlfriend, he was on 24-hour video monitoring, even when in the SCIF.[2390]

On one occasion, the government presented classified information ex parte to Judge Boyle for in camera review, and Judge Boyle determined that the information was not material to Passaro's defense.[2391] Judge Boyle granted the government a protective order on July 26, 2005.[2392] The order was not filed, but it was delivered to the classified information security officer for service on the defendant.[2393] Judge Boyle denied Passaro's request for additional information about the information he determined was not discoverable.[2394] He granted, however, Passaro's request that the order be included in the public record,[2395] but it still does not appear to be available on PACER.[2396]

Challenge: Classified Arguments

Passaro's public-authority-defense notice was initially filed under seal,[2397] but a redacted copy was later filed unsealed.[2398] On April 12, 2005, Judge Boyle ordered that this and several other documents be redacted of their classified contents and unsealed.[2399]

The appellate briefs included some classified matters, and the court of appeals for the Fourth Circuit was experienced in handling classified briefs.[2400]

Challenge: Subpoenaing Senior Government Officials

Passaro sought testimony from a large number of senior government officials: Attorney General Alberto Gonzales; former CIA director George J. Tenet; David Addington, counsel to the Vice President; and former attorneys from President Bush's Office of Legal Counsel, Judge Jay Bybee and Professor John Yoo.[2401]

2389. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2390. *Id.*

2391. Denial of Protective Order Reconsideration, United States v. Passaro, No. 5:04-cr-211 (E.D.N.C. Sept. 14, 2005); Government Response, *id.* (Sept. 2, 2005).

2392. Denial of Protective Order Reconsideration, *supra* note 2391.

2393. Motion, *Passaro*, No. 5:04-cr-211 (E.D.N.C. Aug. 18, 2005) (noting service on August 5, 2005).

2394. Denial of Protective Order Reconsideration, *supra* note 2391.

2395. *Id.*

2396. Docket Sheet, *supra* note 2361.

2397. *Id.*

2398. Authority Defense Notice, *supra* note 2352.

2399. Docket Sheet, *supra* note 2361; *see* Andrea Weigl, *Court Unseals Passaro Papers*, Raleigh News & Observer, Apr. 13, 2005, at B1.

2400. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2401. *See* Weigl, *supra* note 2399.

Judge Boyle quashed the subpoenas.[2402] Judge Boyle, however, permitted Passaro to depose six witnesses whose identities are classified.[2403]

Challenge: Witness Security

Hyder Akbar, the Kunar governor's son who interpreted Wali's interrogation, testified openly at trial.[2404] Another interpreter, however, testified from behind a curtain.[2405] His identity was kept secret because no one in Afghanistan knew that he worked for the United States.[2406] He was screened from the public, but not from the defendant or the jury.[2407] At first, the curtain was positioned so that nothing was in view of the public—not the witness, not the jury, not even the judge.[2408] Judge Boyle had the curtain adjusted so that only the witness was screened.[2409]

Ten C.I.A. trial witnesses were protected by light disguise.[2410] They all sported the same look—wig, glasses, and moustache—and testified under pseudonyms.[2411]

Challenge: Closed Proceeding

For oral arguments on Passaro's appeal, the court prepared for a bifurcated proceeding in which closed arguments concerning classified information would follow open arguments.[2412] It turned out that a closed session was not needed.[2413]

2402. *See* Andrea Weigl, *Afghan's Deadly Beating Detailed*, Raleigh News & Observer, Aug. 8, 2006, at A1.

2403. *See C.I.A. Contractor Goes to Trial in Abuse Case*, N.Y. Times, Aug. 8, 2006, at A14.

2404. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2405. *Id.*

2406. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012.

2407. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2408. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012.

2409. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2410. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011; *see* Shane, *supra* note 2348.

2411. Interview with Hon. Terrence W. Boyle, Mar. 6, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011, and May 8, 2012; *see* Andrea Weigl & Matthew Eisley, *Agents Give Trial Air of Mystery*, Raleigh News & Observer, Aug. 9, 2006, at B1.

2412. Interview with Dep't of Justice Litig. Sec. Group Staff, Mar. 29, 2011.

2413. *Id.*, May 8, 2012.

Castro Foe[2414]

United States v. Posada Carriles
(Kathleen Cardone, W.D. Tex.)

Luis Posada Carriles left Cuba for the United States in 1960,[2415] and he was reportedly trained by the CIA to participate in the 1961 Bay of Pigs invasion.[2416] He was convicted in Panama in a prosecution related to a 2000 attempt to assassinate Castro.[2417] In 2004, he was pardoned by Panama's outgoing President Mireya Moscoso.[2418] Her successor criticized the pardon: "For me, there are not two classes of terrorism, one that is condemned and another that is pardoned."[2419] In March 2005, he sneaked into the United States, seeking asylum.[2420] On May 17,

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2414. Margaret S. Williams collaborated on the research for this case study; Christopher Krewson provided research assistance.

2415. United States v. Posada Carriles, 541 F.3d 344, 347 (5th Cir. 2008); United States v. Posada Carriles, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007).

2416. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation at 3, Posada-Carriles v. Campos, No. 3:06-cv-130 (W.D. Tex. Sept. 11, 2006); *see Cuban Exile Linked to Contras*, N.Y. Times, Oct. 22, 1986, at A1 [hereinafter *Cuban Exile*]; *Jury Clears Cuban Exile of Charges That He Lied to U.S.*, N.Y. Times, Apr. 9, 2011, at A16 [hereinafter *Jury Clears Cuban Exile*]; James C. McKinley, Jr., *Terror Accusations, But Perjury Charges*, N.Y. Times, Jan. 10, 2011, at A9; Joseph B. Treaster, *Accused Terrorist Helping to Supply the Contras*, N.Y. Times, Dec. 10, 1986, at A21; Tim Weiner, *Case of Cuban Exile Could Test the U.S. Definition of Terrorist*, N.Y. Times, May 9, 2005, at A1; Tim Weiner & Maria Herrera, *Cuban Exile Is Charged with Illegal Entry*, N.Y. Times, May 20, 2005, at A14.

2417. United States v. Carriles, 486 F. Supp. 2d 599, 601, 602, 604, 614, 619 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344 (5th Cir. 2008); Report and Recommendation, *supra* note 2416, at 5; *see* Oscar Corral & Alfonso Chardy, *3 Lawmakers Sought Freedom for Posada and Then Fell Silent*, Miami Herald, July 3, 2005, at 6A (reporting that Posada Carriles was convicted on lesser charges on Apr. 20, 2004); Elaine de Valle, *Panama Sentences Dismay Miami Exiles*, Apr. 22, 2004, at 14A; Abby Goodnough, Tim Weiner & Terry Aguayo, *U.S. Arrests Cuban Exile Accused in Deadly '76 Airline Bombing*, N.Y. Times, May 18, 2005, at A1; *Jury Clears Cuban Exile*, *supra* note 2416; McKinley, *supra* note 2416; *Panama Detains 4 After Castro Charges Plot to Kill Him*, N.Y. Times, Nov. 19, 2000, at 113; Frances Robles & Glenn Carvin, *4 Held in Plot Against Castro*, Miami Herald, Nov. 19, 2000, at 1A (reporting that Posada Carriles and three others were detained at Castro's request); Glenn Garvin, *Exile Says Aim Was Castro Hit*, Miami Herald, Jan. 13, 2001, at 1A (reporting that Posada Carriles called off the assassination attempt); Weiner, *supra* note 2416.

2418. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2416, at 5; *see 4 Anti-Castro Cubans Pardoned*, N.Y. Times, Aug. 27, 2004, at A6; Goodnough *et al.*, *supra* note 2417; *Jury Clears Cuban Exile*, *supra* note 2416; Marc Lacey, *Castro Foe with C.I.A. Ties Puts U.S. in an Awkward Spot*, N.Y. Times, Oct. 8, 2006, at 114; McKinley, *supra* note 2416; Weiner, *supra* note 2416; Weiner & Herrera, *supra* note 2417; *see also* Corral & Chardy, *supra* note 2417 (reporting that three Cuban-American members of Congress lobbied the Panamanian government to pardon Posada Carriles).

2419. *See* Weiner, *supra* note 2416.

2420. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; *see* Corral & Chardy, *supra* note 2417; *Jury Clears Cuban Exile*, *supra* note 2416; Weiner, *supra* note 2416; Weiner & Herrera, *supra* note 2417.

he was scheduled to have a naturalization interview, but he withdrew his asylum application and held a press conference at a secret location in Miami instead.[2421] Later that afternoon, the Department of Homeland Security's Immigration and Customs Enforcement took him into custody.[2422] He was transported from Miami to El Paso.[2423] On May 19, he was charged with illegal entry.[2424] On January 11, 2007, the government filed an illegal immigration indictment in the Western District of Texas.[2425] The court assigned the case to Judge Kathleen Cardone.[2426]

Posada Carriles was born on February 15, 1928, in Cienfuegos, Cuba.[2427] When he was 17, his family moved to Havana, where he enrolled in the University of Havana.[2428] Fidel Castro, who took control of Cuba on January 1, 1959, was a law student at the University, three years ahead of Posada Carriles.[2429]

In the 1960s, Posada Carriles served in the U.S. Army, and he was honorably discharged in March 1964.[2430] Unclassified records showed that he had a working relationship with the CIA from 1965 until 1974, but he claimed that he worked with the CIA into the 1980s.[2431]

In 1967, the CIA helped Posada Carriles get a job with Venezuela's intelligence service, and he came to direct counter-insurgency operations.[2432] Upon the election in Venezuela of Carlos Andres Perez as president in 1974, Posada Carriles left the intelligence service to start his own private security agency.[2433]

An October 6, 1976, bombing of a Cubana Aerolineas airplane killed all 73 persons on board.[2434] The flight originated in Georgetown, Guyana; two men who boarded the plane in Port-of-Spain, Trinidad, got off in Barbados before the plane

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2421. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; *see* Goodnough *et al.*, *supra* note 2417.

2422. *Posada Carriles*, 541 F.3d at 348; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; Report and Recommendation, *supra* note 2416, at 1, 5; *see* Goodnough *et al.*, *supra* note 2417.

2423. *See* Weiner & Herrera, *supra* note 2417.

2424. *See id.*

2425. Indictment, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007); *Posada Carriles*, 541 F.3d at 350; *Carriles*, 486 F. Supp. 2d at 601; *Posada Carriles*, 481 F. Supp. 2d at 793; *see* Alfonso Chardy, Jay Weaver & Oscar Corral, *Cuban Exile Militant, 2 Allies Indicted*, Miami Herald, Jan. 12, 2007, at 1A.

2426. Docket Sheet, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007).

Tim Reagan interviewed Judge Cardone for this report in the judge's chambers on April 2, 2012.

2427. Report and Recommendation, *supra* note 2416, at 3; *see* Ann Louise Bardach & Larry Rohter, *Decades of Intrigue*, N.Y. Times, July 13, 1998, at A1.

2428. *See* Bardach & Rohter, *supra* note 2427.

2429. *See id.*

2430. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2416, at 3.

2431. *Posada Carriles*, 541 F.3d at 347.

2432. *Id.* at 347; *see* McKinley, *supra* note 2416; Weiner, *supra* note 2416.

2433. *See* McKinley, *supra* note 2416; Weiner, *supra* note 2416.

2434. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2416, at 3; *see* Merrill Collett, *Bosch Ruled Not Guilty in Bombing*, Miami Herald, July 22, 1986, at 1A; Lacey, *supra* note 2418; McKinley, *supra* note 2416; Simon Romero, *'76 Bomb Resonates with Diplomats, Not with the Bomber*, N.Y. Times, Feb. 3, 2007, at A4.

continued to Havana, leaving explosives on board in a tube of toothpaste and a camera bag.[2435] Posada Carriles was arrested in Venezuela for suspected involvement with the bombing.[2436] In Cuba, he was tried in absentia and sentenced to death.[2437] In August 1985, he escaped from detention in Venezuela by bribing a guard and walking out disguised as a priest.[2438] He is still wanted for trial there.[2439]

In El Salvador, Posada Carriles provided support to the Contras, who were opposing the government of Nicaragua.[2440] In 1989, he moved to Guatemala, where he was seriously injured in an apparent attempt to assassinate him in 1990.[2441] He lived in other Central American countries throughout the 1990s.[2442]

In the spring and summer of 1997, bombs damaged several tourist facilities in Havana, killing an Italian tourist and injuring three others.[2443] From a secret loca-

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2435. *See* Collett, *supra* note 2434; Lacey, *supra* note 2418; Romero, *supra* note 2434.

2436. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2416, at 3–4; *see* Collett, *supra* note 2434; Lacey, *supra* note 2418 ("By the time the Cubana Airlines plane exploded, Mr. Posada was no longer in the employ of the C.I.A. But records show that he may have notified his former bosses that a bomb was going to be set off on a plane shortly before it happened."); McKinley, *supra* note 2416.

2437. *See* Glenn Garvin, *Cuba Seeks Custody of Anti-Castro Plotter*, Miami Herald, Nov. 20, 2000, at 1A.

2438. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2416, at 4; *see* Lacey, *supra* note 2418; McKinley, *supra* note 2416; Ana Puga, *Bosch Bombing Case May Be Nearing End After 10-Year Delay*, Miami Herald, June 5, 1986, at 14A ("Squeezed between Cuba's pressure for a harsh sentence and Cuban exile pressure for a quick release, 'nobody wants to decide anything,' said a member of the Venezuelan Congress' foreign policy commission who declined to be named. 'This case is what you call a hot potato.'"); Treaster, *supra* note 2416.

Posada Carriles previously escaped on August 8, 1982, and sought asylum at the Chilean embassy in Caracas, but the embassy turned him over to the Venezuelan government. *See Chile Denies Asylum to Caracas Escapees*, Miami Herald, Aug. 12, 1982, at 28A.

2439. *Posada Carriles*, 541 F.3d at 347; Report and Recommendation, *supra* note 2416, at 4; *see* James C. McKinley, Jr., *At Trial of Cuban Exile, a Rebuffed Venezuela Sits Quietly on the Sidelines*, N.Y. Times, Jan. 30, 2011, at A21.

2440. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2416, at 4; *see Cuban Exile*, *supra* note 2416; Tim Golden, *Sandinistas Say Escapee Ran Supplies*, Miami Herald, Oct. 16, 1986, at 1A (reporting that Posada Carriles was the number two figure in the contra supply operation); McKinley, *supra* note 2416; Weiner, *supra* note 2416.

2441. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2416, at 4; *see* Christopher Marquis, *Shooting Deepens Mystery of Itinerant Spy*, Miami Herald, May 13, 1990, at 1A (reporting that Posada Carriles was shot in his jaw, his chest, and his hip in 40 rounds fired from two cars while he was driving to work on February 26, 1990); *see also* Lacey, *supra* note 2418; McKinley, *supra* note 2416; Weiner, *supra* note 2416.

At first, news media reported that Posada Carriles was killed. *E.g.*, *Anti-Castro Agent Reported Killed*, Miami Herald, Apr. 10, 1990, at 7A.

2442. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2416, at 4 (reporting that Posada Carriles's countries of residence included Honduras and the Dominican Republic).

2443. Report and Recommendation, *supra* note 2416, at 5; *see* Ann Louise Bardach & Larry Rohter, *A Cuban Exile Details the "Horrendous Matter" of a Bombing Campaign*, N.Y. Times, July 12, 1998, at 110; Juan O. Tamayo, *Cuba Bombs Stir a Wild Guessing Game*, Miami Herald,

tion in the Caribbean, Posada Carriles consented to a three-day interview with Ann Louise Bardach, who published a series of three related articles in the *New York Times* in July 1998.[2444] According to the articles, Posada Carriles admitted to organizing the bombings.[2445] Later, he claimed that he was misunderstood.[2446]

News of Posada Carriles's presence in the United States in 2005 resulted in pressure from Cuba and Venezuela to extradite him and accusations that the U.S. government was harboring a terrorist.[2447] The Venezuelan government threatened to sever diplomatic ties if Posada Carriles was not arrested.[2448] At his May 2005 news conference, he said that he was withdrawing his asylum application to relieve international pressure on the United States.[2449]

After his transfer to El Paso, Posada Carriles renewed his petition for asylum.[2450] He received an immigration interview on May 21[2451] and dropped the asylum request on August 31.[2452] On September 27, he was ordered deported to a country willing to accept him other than Cuba or Venezuela, where he might be tortured.[2453] No other country was willing to accept him.[2454] He filed an application for naturalization on October 12 on the basis of his U.S. military service.[2455]

Aug. 14, 1997, at 1A; Juan O. Tamayo, *Cuban Hotels Were Bombed by Miami-Paid Salvadorans*, Miami Herald, Nov. 16, 1997, at 1A.

2444. Bardach & Rohter, *supra* note 2443; Bardach & Rohter, *supra* note 2427; Ann Louise Bardach & Larry Rohter, *Taking Aim at Castro*, N.Y. Times, July 12, 1998, at 11 [hereinafter *Taking Aim*]; *see* Dan Frosch, *Castro Enemy Said to Have Recounted Role in Attacks*, N.Y. Times, Mar. 17, 2011, at A21; *Jury Clears Cuban Exile*, *supra* note 2416; Andres Viglucci & Christopher Marquis, *Exile Denies CANF Leaders Financed Attacks in Cuba*, Miami Herald, July 14, 1998, at 1A.

At trial, Bardach disclosed that the interview was conducted in Posada Carriles's house in Aruba. Transcript at 91–92, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. Mar. 16, 2011, filed Apr. 8, 2011).

2445. Bardach & Rohter, *Taking Aim*, *supra* note 2444; Report and Recommendation, *supra* note 2416, at 5; *see* Goodnough *et al.*, *supra* note 2417; Weiner, *supra* note 2416; Weiner & Herrera, *supra* note 2417.

2446. *See* Frosch, *supra* note 2444; Dan Frosch, *Motives of Journalist Questioned in Exile's Trial*, N.Y. Times, Mar. 19, 2011, at A16 [hereinafter *Motives*]; James C. McKinley, Jr., *Cuban Exile Lied to U.S., Prosecutor Tells Texas Jury*, N.Y. Times, Jan. 13, 2011, at A17; James C. McKinley, *Lawyer in Perjury Case Tries to Discredit Reporter*, N.Y. Times, Mar. 22, 2011, at A18 [hereinafter *Tries to Discredit Reporter*]; Juan O. Tamayo & Jay Weaver, *Hero to Some, Terrorist to Others, Posada Gets Day in Court*, Miami Herald, Jan. 9, 2011, at 1A.

2447. *See* Goodnough *et al.*, *supra* note 2417.

2448. *See* Steven R. Weisman & Juan Forero, *U.S. Rejects Venezuelan Move on Extradition of Bombing Suspect*, N.Y. Times, May 28, 2005, at A2.

2449. *See* Goodnough *et al.*, *supra* note 2417.

2450. *See* Alfonso Chardy & Oscar Corral, *Posada Asylum Trial to Open*, Miami Herald, Aug. 29, 2005, at 1B; Weiner & Herrera, *supra* note 2417.

2451. United States v. Posada Carriles, 541 F.3d 344, 348 (5th Cir. 2008).

2452. *See Foe of Castro Withdraws U.S. Asylum Request*, N.Y. Times, Sept. 1, 2005, at A24.

2453. *Posada Carriles*, 541 F.3d at 348; Report and Recommendation, *supra* note 2416, at 2 (noting a finding of a likelihood that Cuban agents would torture Posada Carriles if he were deported to either Cuba or Venezuela); *see* Oscar Corral, *Judge: Posada to Stay in U.S. for Now*, Miami Herald, Sept. 28, 2005, at 1A; McKinley, *supra* note 2416; *Texas Judge Bars Deportation of Exile*, N.Y. Times, Sept. 28, 2005, at A22; Sunjay Trehan, *The Politicization of the Convention*

On April 6, 2006, Posada Carriles sought habeas corpus relief from his immigration detention.[2456] Magistrate Judge Norbert J. Garney recommended that the petition be granted.[2457] The government objected.[2458] District Judge Phillip R. Martinez issued an order to show cause by February 1, 2007, why the petition should not be granted.[2459] Because Posada Carriles was indicted before that deadline, he was transferred from immigration detention to criminal pretrial detention.[2460]

On April 26 and 27, 2006, while his habeas petition was pending, Posada Carriles had a naturalization interview.[2461] His interviewer specialized in national security and fraud cases.[2462] Also present were government attorneys from the Department of Homeland Security and the Department of Justice's Office of Immigration Litigation.[2463] Posada Carriles had two attorneys present, who were instructed not to interrupt the interview, and an interpreter provided by the government.[2464] On August 24, the government denied Posada Carriles naturalization.[2465]

The seven-count indictment filed on January 11, 2007, charged Posada Carriles with false statements about the particulars of his 2005 travel to the United States for immigration.[2466] He claimed that he entered the United States by land

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Against Torture: The Immigration Hearing of Luis Posada-Carriles and Its Inconsistency with the "War on Terror," 37 U. Miami Inter-Am. L. Rev. 567 (2006).

2454. *Posada Carriles*, 541 F.3d at 348; *see* Alfonso Chardy, *6 Nations Refused to Take Posada*, Miami Herald, Aug. 15, 2006, at 3B (reporting that Mexico, Canada, Honduras, Costa Rica, Guatemala, and El Salvador refused to take Posada Carriles); McKinley, *supra* note 2416.

2455. *Posada Carriles*, 541 F.3d at 348–49; *see Cuban Militant Wants to Be U.S. Citizen*, N.Y. Times, Apr. 27, 2006, at A23.

2456. United States v. Posada Carriles, 481 F. Supp. 2d 792, 793 (W.D. Tex. 2007); Report and Recommendation, *supra* note 2416, at 2; Habeas Petition, Posada-Carriles v. Campos, No. 3:06-cv-130 (W.D. Tex. Apr. 6, 2006); *see* Alfonso Chardy, *Posada Seeks Release from Federal Detention*, Miami Herald, Apr. 7, 2006, at 3B.

2457. Report and Recommendation, *supra* note 2416, at 22; *see* Alfonso Chardy, *Posada Should Be Released, Magistrate Tells Judge*, Miami Herald, Sept. 12, 2006, at 1B.

2458. *Posada Carriles*, 481 F. Supp. 2d at 793; Objection, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Oct. 5, 2006).

2459. *Posada Carriles*, 481 F. Supp. 2d at 793; Order Denying Reconsideration, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Dec. 28, 2006); Order to Show Cause, *id.* (Nov. 2, 2006); *see* Alfonso Chardy, *Judge Posada Carriles' Time in Detention "Well Beyond" Limit*, Miami Herald, Nov. 4, 2006, at 5B.

2460. *Posada Carriles*, 481 F. Supp. 2d at 794; Arrest Warrant, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. Jan. 11, 2007, filed Aug. 16, 2007); Order to Dismiss, *Posada-Carriles*, No. 3:06-cv-130 (W.D. Tex. Feb. 21, 2007) (dismissing the habeas corpus petition because of a transfer to pretrial detention); *see* Denial of Reconsideration, *id.* (Mar. 15, 2007).

2461. United States v. Posada Carriles, 541 F.3d 344, 350 (5th Cir. 2008).

2462. *Id.*; *see* Juan O. Tamayo, *Immigration Papers Raised Red Flags, Official Says*, Miami Herald, Jan. 20, 2011, at 12A.

2463. *Posada Carriles*, 541 F.3d at 350.

2464. *Id.*

2465. *Id.*

2466. Indictment, *supra* note 2425; *see* Chardy *et al.*, *supra* note 2425.

Indicted separately were two men who refused to testify before the grand jury empaneled to indict Posada Carriles. *See* Chardy *et al.*, *supra* note 2425.

from Mexico to Texas, but there was evidence that he entered the United States by sea in Miami.[2467]

The parties agreed to defer a pretrial detention hearing, but later disagreed on precisely what they had agreed to.[2468] On February 28, Posada Carriles sought to reopen his pretrial detention hearing, but Judge Garney denied the motion as failing to meet a statutory standard for detention reconsideration.[2469] Judge Cardone conducted a hearing on the matter on Tuesday, April 3, and determined on Thursday that the "Defendant does not pose a flight risk at this time, nor does he present a danger to the community," so she ordered him released on bond.[2470]

On the following Tuesday, Judge Cardone denied the government's motion for reconsideration of her release order,[2471] and the government filed a notice of appeal two days later.[2472] The court of appeals immediately stayed the release order,[2473] but on April 17, over a dissent, it lifted the stay.[2474] Posada Carriles returned to Miami to live with his family pending trial.[2475] Venezuela's ambassador to the United States opposed Posada Carriles's release in a *New York Times* op-ed.[2476]

On May 8, Judge Cardone dismissed the indictment.[2477] First, Judge Cardone found that the indictment was based on statements Posada Carriles made during an immigration interview at which interpretation was incompetent.[2478] Second, Judge Cardone found that the purpose of the immigration interview was not to assess Posada Carriles's fitness for citizenship but rather to create a criminal case

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2467. *Posada Carriles*, 541 F.3d at 348–49; Report and Recommendation, *supra* note 2416, at 5; *see* Habeas Petition, *supra* note 2456, at 6 (claiming entrance from Mexico on March 26, 2005); *see also* Chardy *et al.*, *supra* note 2425; Goodnough *et al.*, *supra* note 2417.

2468. United States v. Posada Carriles, 481 F. Supp. 2d 792, 794 (W.D. Tex. 2007).

2469. *Id.*

2470. *Id.* at 796–97; *see* Jay Weaver, *Bond Ruling Could Be a Victory for Posada*, Miami Herald, Apr. 11, 2007, at 3B.

2471. Order, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. Apr. 10, 2007); *see* Jay Weaver, *Posada Is a Step Closer to Release*, Miami Herald, Apr. 12, 2007, at 1B.

2472. Notice of Appeal, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Apr. 12, 2007).

2473. Order, United States v. Posada Carriles, No. 07-50456 (5th Cir. Apr. 12, 2007).

2474. Order, *id.* (Apr. 17, 2007) (order by Circuit Judges W. Eugene Davis and Jacques L. Wiener, Jr., with Circuit Judge Rhesa H. Barksdale dissenting); *see* Jay Weaver, *Posada Closer to Moving to Miami*, Miami Herald, Apr. 18, 2007, at 3B.

2475. *See* Oscar Corral & Alfonso Chardy, *Posada Is with Family but Unable to Comment*, Miami Herald, Apr. 21, 2007, at 3B; Anthony DePalma & Terry Aguayo, *U.S. Releases Cuban Bombing Suspect, Angering Havana*, N.Y. Times, Apr. 20, 2007, at A8; McKinley, *supra* note 2416.

2476. Bernardo Alvarez Herrera, Op-Ed, *A Terrorist Goes Free*, N.Y. Times, Apr. 21, 2007, at A15.

2477. United States v. Carriles, 486 F. Supp. 2d 599, 601, 607, 621 (W.D. Tex. 2007), *rev'd*, 541 F.3d 344 (5th Cir. 2008); *see* Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile Brings Both Glee and Rage*, N.Y. Times, May 10, 2007, at A20; Jay Weaver & Alfonso Chardy, *Judge Frees Posada, Rips Feds' Tactics*, Miami Herald, May 9, 2007, at 1A.

2478. *Carriles*, 486 F. Supp. 2d at 607–14; *see* Weaver & Chardy, *supra* note 2477.

against him:[2479] "the Government's tactics in this case are so grossly shocking and so outrageous as to violate the universal sense of justice."[2480]

Posada Carriles returned to Miami to live in a secret location.[2481] In July 2008, Panama's supreme court overturned his pardon.[2482]

The court of appeals reversed Judge Cardone's dismissal, finding that "nothing in the record suggests that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations."[2483] As for incompetent interpretation, the court of appeals held that that was a question for the jury and that Posada Carriles's indictable answers were not tainted by incompetent interpretation.[2484] The court of appeals remanded the case back to Judge Cardone on August 14, 2008.[2485]

Meanwhile, the government and Cuba cooperated on an investigation of the 1997 bombings in Cuba.[2486] On April 8, 2009, the government filed an 11-count superseding indictment that added charges for perjury pertaining to Posada Carriles's involvement in the bombings.[2487]

Jury selection began on January 10, 2011.[2488] Judge Cardone called 130 potential jurors to empanel 16 for this case, many more than the usual 42 called.[2489] She decided not to use a jury questionnaire.[2490] Most people in El Paso did not know about the defendant or his case.[2491] The judge thought that a questionnaire would only increase potential jurors' curiosity about the case.[2492]

Since the development of the Internet, Judge Cardone has found it considerably more important to provide jurors with clear instructions not to do independent research during the trial; people tend to feel entitled to immediate information

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2479. *Carriles*, 486 F. Supp. 2d at 614–20; *see* Weaver & Chardy, *supra* note 2477.

2480. *Carriles*, 486 F. Supp. 2d at 620.

2481. *See* Tania Valdemoro, *Posada Comes Back to Dade, but He's Under Wraps*, Miami Herald, May 14, 2007, at 3B.

2482. *See* Frances Robles & Alfonso Chardy, *Posada's Pardon Illegal, Panama's Top Court Rules*, Miami Herald, July 2, 2008, at 16A.

2483. United States v. Posada Carriles, 541 F.3d 344, 358 (5th Cir. 2008); *see* Alfonso Chardy, *Cuba Critical of Posada Ruling*, Miami Herald, Aug. 16, 2008, at 3B ("The Cuban government on Friday called the reinstatement of a criminal indictment against Cuban exile militant Luis Posada Carriles a 'maneuver' to delay and prevent his extradition.").

2484. *Posada Carriles*, 541 F.3d at 361–66.

2485. *Id.* at 366; *see Militant Ordered to Stand Trial*, N.Y. Times, Aug. 15, 2008, at A12.

2486. *See* Alfonso Chardy, Oscar Corral & Jay Weaver, *FBI, Cuba Cooperating on Posada*, Miami Herald, May 3, 2007, at 1A.

2487. Superseding Indictment, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. April 8, 2009); *see* Alfonso Chardy, *U.S. Indicts Cuban Exile Militant Luis Posada Carriles, Links Him to Tourist Bombings*, Miami Herald, Apr. 9, 2009, at 1A; *New Charges for Cuban Militant*, N.Y. Times, Apr. 9, 2009, at A19.

2488. Docket Sheet, *supra* note 2426.

2489. *See* Juan O. Tamayo, *Luis Posada Carriles Trial: Defense Dealt a Blow*, Miami Herald, Jan. 11, 2011, at 4A.

2490. Transcript at 4, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Feb. 5, 2010, filed Mar. 12, 2010); Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2491. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2492. *Id.*

now.[2493] Judge Cardone has found her instructions to jurors to be effective because she provides them with reasons for the instructions.[2494] There was no indication of outside research in this case.[2495]

The Department of Justice's counterterrorism section prosecuted the case rather than the local U.S. Attorney's office.[2496] The trial lasted nearly three months because to prove that Posada Carriles lied about his involvement in the Havana bombings the government had to prove his involvement in the bombings.[2497]

On April 8, the jury found Posada Carriles not guilty.[2498]

Challenge: Classified Evidence

On May 3, 2007, not quite four months after Posada Carriles's indictment, the government sought from Judge Cardone a protective order shielding from discovery classified information pertaining to the defendant.[2499] Judge Cardone determined that the government's classified information was not discoverable, and she granted the protective order.[2500]

As the trial on the superseding indictment commenced, Judge Cardone reviewed government information that would have been discoverable but for its classified status.[2501] This review kept Judge Cardone's chambers busy for two weeks, sometimes until 1:00 a.m.[2502]

On January 27, 2011, Judge Cardone issued a protective order approving the production in discovery of substitutions for the classified information.[2503] Obtaining substitutions from the government that she could approve required a substantial amount of back and forth.[2504] Because classified information was held by different parts of the intelligence community, it was sometimes difficult to determine precisely what information the government had.[2505] Judge Cardone was especially careful to review representations by the government that information was already known to the defendant or was duplicative.[2506] The order was prepared on a special laptop computer provided by the classified information security officer.[2507]

2493. *Id.*

2494. *Id.*

2495. *Id.*

2496. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2497. Interview with Hon. Kathleen Cardone, Apr. 2, 2012; *see* Tamayo & Weaver, *supra* note 2446.

2498. Jury Verdict, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. Apr. 8, 2011); *see* Alfonso Chardy, *After Being Acquitted, Cuban Ex-CIA Agent Plans to Return to Miami*, Miami Herald, Apr. 8, 2011.

2499. Docket Sheet, *supra* note 2426.

2500. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. May 7, 2007).

2501. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2502. *Id.*

2503. Protective Order, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. Jan. 27, 2011); *see* Transcript at 3–6, *id.* (Mar. 4, 2011, filed Apr. 8, 2011).

2504. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2505. *Id.*

2506. *Id.*

2507. *Id.*

The classified information security officer supervised security precautions for the ex parte discovery proceedings involving classified information.[2508]

It turned out that it was not necessary to give defense counsel access to classified information in this case.[2509] Two of Posada Carriles's attorneys already had clearances,[2510] but the government never determined that they had a need to know classified information for this case.[2511] Judge Cardone thinks that it is a good idea for defense attorneys to have security clearances in cases such as this in case access to classified information is necessary.[2512]

To help Judge Cardone handle classified information, her career law clerk, her courtroom deputy, and a court reporter obtained security clearances.[2513] Filings pertaining to classified information were handled by the cleared courtroom deputy rather than the regular docket clerk.[2514]

Classified materials were stored at the local FBI's sensitive compartmented information facility (SCIF) and couriered to and from the courthouse by FBI staff.[2515] The materials, as well as special laptops for the court and the court reporter to use when writing about classified information, were stored in locked bags to which only the court had a key.[2516]

On one occasion, the defense thought that it had classified information to present to the court.[2517] The classified information security officer submitted the information to the intelligence community for a walled-off classification review.[2518] The review was walled-off from the attorneys representing the government.[2519] It turned out that the information was not classified.[2520]

Challenge: Classified Orders

Judge Cardone was called upon to issue discovery orders concerning classified information.[2521] Such orders are difficult to craft because other judges' orders in similar cases tend to be unavailable.[2522] The classified information security officer was sometimes able to be helpful in advising the judge to whom in the intelligence community she should direct discovery orders.[2523]

2508. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2509. Interview with Hon. Kathleen Cardone, Apr. 2, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2510. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2511. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2512. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2513. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 23, 2013.

2514. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2515. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2516. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 26, 2012.

2517. *Id.*

2518. *Id.*

2519. *Id.*

2520. *Id.*

2521. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2522. *Id.*

2523. *Id.*

Challenge: Sensitive Unclassified Evidence

For Posada Carriles's trial on the superseding indictment, the government sought a confidential-discovery protective order forbidding the defense from disclosing to others some discovery: "This discovery does not contain any classified information; however, the information potentially implicates the privacy, proprietary, law enforcement and other interests of third parties and foreign governments."[2524] Protected material included unpublished portions of Bardach's 1998 interview with Posada Carriles.[2525] News media opposed the motion.[2526]

Judge Cardone examined in camera the discovery that the government deemed sensitive,[2527] and she agreed to issue a protective order.[2528] The defendant himself had access to the sensitive information, and his obligation to keep the information confidential was governed by the protective order.[2529]

Challenge: Court Security

Located less than a mile from Juárez, Mexico, one of the most dangerous cities in the world, the El Paso courthouse is accustomed to proceedings requiring enhanced snipers-on-the-roof security, and enhanced security was used in this case.[2530]

Security was provided for Posada Carriles's transportation to and from the court while he was in detention.[2531] After he was released, his attorneys took more responsibility for his security.[2532] Because of his status on release, he was on a no-fly list, so he had to travel to the court from Miami by car.[2533]

Challenge: Jury Security

Judge Cardone used an anonymous jury, and jurors met at an off-site location, from which they were driven to the courthouse by deputy marshals.[2534]

Challenge: Witness Security

One witness required special security precautions.[2535] The courtroom was closed during the witness's testimony, and the jury was admonished not to disclose some

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2524. Government Motion at 3, United States v. Posada Carriles, No. 3:07-cr-87 (W.D. Tex. June 5, 2009).

2525. *Id.* at 3 n.1.

Bardach appeared as a witness at the trial. *See* Frosch, *supra* note 2444; Frosch, *Motives*, *supra* note 2446; McKinley, *Tries to Discredit Reporter*, *supra* note 2446.

2526. Miami Herald and Associated Press Motion, *Posada Carriles*, No. 3:07-cr-87 (W.D. Tex. June 30, 2009).

2527. Order at 3–4, *id.* (Aug. 25, 2009).

2528. Protective Order, *id.* (Aug. 25, 2009).

2529. *Id.*; Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2530. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

2531. *Id.*

2532. *Id.*

2533. *Id.*; *see* Valdemoro, *supra* note 2481.

2534. Interview with Hon. Kathleen Cardone, Apr. 2, 2012.

of the witness's evidence even after the trial was over.[2536] Because the courtroom was closed to the public, the witness did not testify in disguise or from behind a screen.[2537]

2535. *Id.*
2536. *Id.*
2537. *Id.*

HABEAS CORPUS

The very complex collection of a few hundred petitions for habeas corpus relief from detention at the U.S. Naval Base at "Guantánamo Bay," Cuba, is surely a unique case-management challenge for a single district court and its court of appeals, but just as surely these national security actions offer lessons that may be applicable to other cases, now and in the future.

Although the Classified Information Procedures Act technically applies only to criminal cases, its procedures were used as guidance for these habeas corpus cases. Security clearances for court staff and attorneys and the inclusion in the record of classified filings, under seal of course, were coordinated by the Litigation Security Group's classified information security officers.

A very significant challenge in these cases was the judges' presiding over proceedings in which one party was in court and the other party appeared by secure video link. The fact that interpreters were often required added to the challenge.

A common challenge in national security cases involving pretrial detention, which bears some similarity to Guantánamo Bay detention, is the health, especially the mental health, of detainees who are confined in highly secure conditions. Judges have only limited control over conditions of confinement, but judges are called upon to exert their authority when conditions of confinement affect the abilities of detainees to present their cases.

Guantánamo Bay

In re Guantanamo Bay Detainee Litigation (Thomas F. Hogan, D.D.C.) and Related Actions (Louis F. Oberdorfer, Joyce Hens Green, Royce C. Lamberth, Paul L. Friedman, Gladys Kessler, Emmet G. Sullivan, Ricardo M. Urbina, James Robertson, Colleen Kollar-Kotelly, Henry H. Kennedy, Jr., Richard W. Roberts, Ellen Segal Huvelle, Reggie B. Walton, John D. Bates, Richard J. Leon, Rosemary M. Collyer, and Alan Kay, D.D.C.)

Habeas Corpus Rights

Jurisdiction Over Guantánamo Bay Detainees

On September 25, 2001, Australian David Hicks called his parents in Salisbury, Australia, a suburb of Adelaide, and told them that he had joined the Taliban.[2538] Hicks, a high-school dropout described as a drifter, had converted to Islam and adopted the name Mohammed Dawood.[2539] Apparently he joined the Taliban in 1999.[2540] The Northern Alliance captured him near Kabul, Afghanistan, on December 9, 2001, and turned him over to the United States on December 17.[2541] He was transferred to the *USS Peleliu*, the same ship that held John Walker Lindh at the time,[2542] and then to the Naval Base at Guantánamo Bay in January 2002.[2543]

Shafiq Rasul and Asif Iqbal grew up together in Tipton, England, a town near Birmingham.[2544] They also were described as drifters who converted to Islam.[2545] They also were captured in Afghanistan and transferred to Guantánamo Bay.[2546]

2538. *See* Douglas Frantz, *Alliance Captures Australian Man Fighting for the Taliban*, N.Y. Times, Dec. 13, 2001, at B3; Richard Leiby, *Taliban from Down Under*, Wash. Post, Mar. 10, 2002, at F1.

2539. *See* Frantz, *supra* note 2538; Leiby, *supra* note 2538; *see also* Jess Bravin, The Terror Courts 193 (2013) (noting that Dawood is Arabic for David).

2540. *See* John Shaw, *Australians Debate Fate of Fighter Held by U.S.*, N.Y. Times, Dec. 30, 2001, at 8.

2541. Al Odah v. United States, 321 F.3d 1134, 1137 (D.C. Cir. 2003); Rasul v. Bush, 215 F. Supp. 2d 55, 60 (D.D.C. 2002); *see* Frantz, *supra* note 2538; Shaw, *supra* note 2540.

2542. *See* Steve Vogel, *5 Detainees Held on U.S. Ship*, Wash. Post, Dec. 18, 2001, at A15; Steve Vogel & Molly Moore, *U.S. Warns Against Helping Bin Laden*, Wash. Post, Dec. 19, 2001, at A1; *see also supra*, "American Taliban."

2543. *See* Mark Landler & Katharine Q. Seelye, *U.N. Pleads for Afghan Aid While U.S. Jets Raid Compound*, N.Y. Times, Jan. 15, 2002, at A12; Leiby, *supra* note 2538; *see also* Joseph Margulies, Guantánamo and the Abuse of Presidential Power 63 (2006) ("On January 6, [2002,] Brigadier General Michael Lehnert received an urgent order from his boss, Defense Secretary Donald Rumsfeld. He was told to build a prison. He had ninety-six hours. . . . Lehnert finished the job with nine hours to spare.").

2544. *See* Warren Hoge, *Hometown of British Prisoners Known for Tranquil Diversity*, N.Y. Times, Jan. 29, 2002, at A14.

> On January 11, 2002, a cargo plane holding 20 detainees from Afghanistan landed at the U.S. naval base in Guantánamo Bay, Cuba, the first of many detainee transfers that eventually swelled the camp population at its height to over 600. Hooded and wearing earmuffs, detainees felt a blast of hot, humid air as they were escorted off the plane by U.S. soldiers, hustled onto a bus, and transported across the water by a ferry to a large building, part of the detention center located on the southeast corner of the 45-square-mile base. Once inside, detainees encountered a beehive of activity similar to their processing at Kandahar and Bagram. Camp personnel removed their outer clothing and earmuffs, lowered their goggles, and cut off their clothes.[2547]

On February 19, 2002, parents of Hicks, Rasul, and Iqbal filed a habeas corpus petition on their behalf in the U.S. District Court for the District of the District of Columbia, and the court assigned the case to Judge Colleen Kollar-Kotelly.[2548] This was the first habeas action filed on behalf of named Guantánamo Bay detainees, and it was filed at a time when there were approximately 300.[2549] Six days later, Judge Kollar-Kotelly ordered the government to file a return.[2550]

On May 1, fathers and brothers of 11 Kuwaitis held at Guantánamo Bay filed a complaint against the government seeking the detainees' access to family, counsel, and the courts.[2551] An amended complaint on July 8 added a twelfth plain-

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2545. *See* Amy Waldman, *How in a Little English Town Jihad Found Young Converts*, N.Y. Times, Apr. 24, 2001, at A1.

2546. *Rasul*, 215 F. Supp. 2d at 60; *see* Waldman, *supra* note 2545.

2547. Laurel E. Fletcher & Eric Stover, The Guantánamo Effect 41 (2009); *see* Barry Kamins, *Opening Remarks*, 10 N.Y. City L. Rev. 313, 313 (2007) ("The detention facility at Guantánamo was built in just ninety hours in January of 2002 on the long-term naval base the United States maintains on the tip of Cuba.").

2548. Docket Sheet, Rasul v. Bush, No. 1:02-cv-299 (D.D.C. Feb. 19, 2002); Rasul v. Bush, 542 U.S. 466, 472 (2004); Al Odah v. United States, 321 F.3d 1134, 1136–37 (D.C. Cir. 2003); *Rasul*, 215 F. Supp. 2d at 57; *see* Boumediene v. Bush, 553 U.S. 723, 734 (2008); *see also* John Mintz, *Detention of 3 Men in Cuba Disputed*, Wash. Post, Feb. 20, 2002, at A10; Michael Ratner, *The First Habeas Cases:* Rasul v. Bush, *in* The Guantánamo Lawyers 32, 32 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009); Michael Ratner & Ellen Ray, Guantánamo: What the World Should Know 7–8, 80 (2004); Philip Shenon, *Suit to Be Filed on Behalf of Three Detainees in Cuba*, N.Y. Times, Feb. 19, 2002, at A11; Steven T. Wax, Kafka Comes to America: Fighting for Justice in the War on Terror 25 (2008); Clive Stafford Smith, Eight O'Clock Ferry to the Windward Side 23 (2007).

2549. *See* Shenon, *supra* note 2548; *see also* Michael Ratner, *Guantánamo: The Ninth Circle of Hell*, *in* The Guantánamo Lawyers, *supra* note 2548, at 15 (describing the decision by the Center for Constitutional Rights to participate in the case).

2550. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Feb. 25, 2002).

2551. *Rasul*, 542 U.S. at 472; *Al Odah*, 321 F.3d at 1136; *Rasul*, 215 F. Supp. 2d at 58 & n.3; Docket Sheet, Al-Odah v. United States, No. 1:02-cv-828 (D.D.C. May 1, 2002) [hereinafter *Al-Odah* Docket Sheet]; *see* Neil MacFarquhar, *Kuwaitis Press U.S. Over 12 Held at Guantánamo*, N.Y. Times, June 26, 2002, at A18; John Mintz, *Detainees Say They Were Charity Workers*, Wash. Post, May 26, 2002, at A12 (reporting that legal expenses would be paid by the Kuwaiti government and donated by the law firm to charity); Ratner & Ray, *supra* note 2548, at 8; Wax, *supra* note 2548, at 25–26 (reporting that the lawyers in this case were retained, unlike the vast majority of Guantánamo Bay habeas attorneys, who worked pro bono).

> After receiving a letter from his son via the International Committee of the Red Cross, [Fawzi] al Odah's father, an American-trained pilot who had fought with the Kuwaiti Air

tiff.[2552] The court assigned the case to Judge Kollar-Kotelly on the plaintiffs' representation that it was related to the habeas petition by Hicks, Rasul, and Iqbal.[2553] The plaintiffs claimed that they were in Afghanistan for charitable purposes and they were captured by bounty hunters.[2554] Judge Kollar-Kotelly regarded the complaint as a habeas petition.[2555]

Judge Kollar-Kotelly determined, on July 30, that United States courts did not have jurisdiction over the habeas petitions, because the petitioners were aliens held outside sovereign territory.[2556] The following week, Judge Kollar-Kotelly also dismissed a habeas petition filed on June 10 by the wife of Mamdouh Habib, another Australian held at Guantánamo Bay, which was assigned to her as related to the other two cases.[2557] The court of appeals agreed that the court lacked jurisdiction over these three cases.[2558]

On June 28, 2004, the Supreme Court held, in *Rasul v. Bush*, that federal courts did have jurisdiction over habeas petitions by Guantánamo Bay detainees, because a 1903 lease and a 1934 treaty gave the United States indefinite "com-

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> Force in the First Gulf War, tracked down the families of eleven other Kuwaiti prisoners and hired a white-shoe American law firm to represent them.

Jonathan Mahler, The Challenge 66 (2008).

The law firm styled the filing as a complaint instead of a habeas corpus petition "[i]n an attempt to appear to the court more modest and less like [they] were demanding release." Kristine A. Huskey, *The First Habeas Cases:* Al Odah v. United States, *in* The Guantánamo Lawyers, *supra* note 2548, at 29, 30. The firm named the United States as the lead defendant so as not to offend partners who did not want the firm to sue the President. *Id.*

2552. *Rasul*, 215 F. Supp. 2d at 58 n.3; *Al-Odah* Docket Sheet, *supra* note 2551.

2553. *Rasul*, 215 F. Supp. 2d at 58; *Al-Odah* Docket Sheet, *supra* note 2551; *see* Huskey, *supra* note 2551, at 30.

2554. *Rasul*, 215 F. Supp. 2d at 60–61; *see* Mintz, *supra* note 2551.

2555. *Rasul*, 215 F. Supp. 2d at 64; *see* Huskey, *supra* note 2551, at 30–31.

2556. *Rasul*, 215 F. Supp. 2d 55, *rev'd*, 542 U.S. 466; *see* Boumediene v. Bush, 553 U.S. 723, 734 (2008); *see* Bravin, *supra* note 2539, at 80; Mahler, *supra* note 2551, at 66–67; Ratner & Ray, *supra* note 2548, at 80–81; Neely Tucker, *Judge Denies Detainees in Cuba Access to U.S. Courts*, Wash. Post, Aug. 1, 2002, at A10.

2557. Opinion, Habib v. Bush, No. 1:02-cv-1130 (Aug. 8, 2002); *see* Al Odah v. United States, 321 F.3d 1134, 1137 (D.C. Cir. 2003); *see also* Dana Priest, *Detainee Sent Home to Australia*, Wash. Post, Jan. 29, 2005, at A21 (reporting that Habib was born in Egypt and moved to Australia when he was 18).

> Visiting New York, where his sisters lived, Habib reconnected with school chums from Egypt who had relocated to the city. He visited the Statue of Liberty but spent more time attending the trial of El Sayyid Nosair, accused of assassinating Rabbi Meir Kahane, a right-wing Israeli politician. After returning to Australia, Habib's Egyptian friends in New York asked him to raise funds for Omar Abdel Rahman, the terrorist leader known as the Blind Sheikh, who ultimately received life imprisonment for conspiring to blow up the United Nations headquarters, the Lincoln Tunnel, and other landmarks. Habib enthusiastically agreed, even organizing rallies for the cause.

Bravin, *supra* note 2539, at 226–27 (providing a summary biography for Habib).

2558. *Al Odah*, 321 F.3d at 1141 (opinion by Circuit Judge A. Raymond Randolph, joined by Circuit Judges Merrick B. Garland and Stephen F. Williams), *rev'd*, 542 U.S. 466; *Boumediene*, 553 U.S. at 734; *see* Huskey, *supra* note 2551, at 31; Mahler, *supra* note 2551, at 67; Ratner & Ray, *supra* note 2548, at 81.

plete jurisdiction and control" over its Naval Base in Cuba and the courts unquestionably had jurisdiction over the petitioners' custodians.[2559]

While the Supreme Court case was pending, Rasul and Iqbal were returned to freedom in the United Kingdom.[2560] A subsequent suit for damages against the United States was unsuccessful,[2561] but the British government agreed to settle a damages suit against it.[2562] On June 10, Hicks was formally charged in a military tribunal with joining the Taliban.[2563] The government of Australia had agreed the previous November to such a proceeding for its citizen.[2564] Hicks pleaded guilty; pursuant to a plea agreement, he was sentenced on March 30, 2007, to seven years of post-detention imprisonment, with all but nine months suspended, and returned to Australia in May to serve out the remaining months of his sentence.[2565] Hicks

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2559. *Rasul*, 542 U.S. at 471, 473, 480, 483–84, 485 (opinion by Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer; Justice Kennedy concurred in the judgment; Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented); *see Boumediene*, 553 U.S. at 734; *see also* Huskey, *supra* note 2551, at 32; Mahler, *supra* note 2551, at 122–23; Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1, 5–6; Kara Simard, *Innocent at Guantanamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 Suffolk Transnat'l L. Rev. 365, 371 (2007) ("The United States obtained the lease from an American citizen, Tomas Estrada Palma, who later became the first President of Cuba.").

2560. *Rasul*, 542 U.S. at 471 n.1; *see* Order, Rasul v. Bush, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007) (dismissing the habeas petition); *see also British Frees 5 Citizens Sent Home From U.S. Jail*, N.Y. Times, Mar. 11, 2004, at A3; Margulies, *supra* note 2543, at 145; John Mintz, *U.S. Faces Quandary in Freeing Detainees*, Wash. Post, Mar. 22, 2004, at A1; Albert Ruben, The People's Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantánamo 15 (2011).

2561. Rasul v. Myers, 563 F.3d 527, 530 (D.C. Cir. 2009) (finding, among other things, qualified immunity for the defendants because, "No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights."); *see* Docket Sheet, Rasul v. Rumsfeld, No. 1:04-cv-1864 (D.D.C. Oct. 27, 2004); *Ex-Guantánamo Inmates File Suit*, N.Y. Times, Oct. 28, 2004, at A10.

A former Guantánamo Bay prison guard found Rasul on Facebook, and the BBC filmed a reunion of the two in December 2009. *See Our World: Guantanamo Reunited* (BBC television broadcast Jan. 20, 2010); Brian Stelter, *Guantánamo Reunion, by Way of BBC*, N.Y. Times, Jan. 11, 2010, at B9.

2562. *See* Rebecca Omonira-Oyekanmi & Peter Finn, *Britain Settles with Detainees*, Wash. Post, Nov. 17, 2010, at A10 (listing 15 of 16 detainees to receive compensation).

2563. *See* Bradley Graham, *3 Charges Placed Against Detainee*, Wash. Post, June 11, 2004, at A3; Mahler, *supra* note 2551, at 66–67; Eric Schmitt & Kate Zernike, *U.S. Charges an Australian with Fighting for Taliban*, N.Y. Times, June 11, 2004, at A12; *see also* Joshua L. Dratel, *Navigating the New Military Commissions: The Case of David Hicks*, 10 N.Y. City L. Rev. 385, 385–86 (2007) ("David Hicks has been the only one thus far referred to a military commission").

2564. *See* Neil A. Lewis, *U.S. Adds to Detained Australians' Rights*, N.Y. Times, Nov. 26, 2003, at A22; *see also* Bravin, *supra* note 2539, at 171 (reporting that Australia objected to indefinite detention for its citizen).

As a result of the Australian government's negotiations, Hicks was able to meet with his father and stepmother at Guantánamo Bay. *See* Neil A. Lewis, *Australian Pleads Not Guilty to Terrorism Conspiracy*, N.Y. Times, Aug. 26, 2004, at A14.

2565. Transcript at 81, 157, 243–45, United States v. Hicks (U.S. Mil. Comm. Mar. 30, 2007), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see* Order, *Rasul*, No. 1:02-

was released from prison on December 29[2566] and released from supervision on December 21, 2008.[2567] Habib had been returned to freedom in Australia, without charges, in January 2005.[2568]

Coordination Before Judge Green

During the three weeks following the Supreme Court's *Rasul* decision, eight cases on behalf of 32 detainees were filed.[2569] The government moved to consolidate these petitions with the ones already pending before Judge Kollar-Kotelly, but the

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cv-299 (D.D.C. Aug. 23, 2007); Bravin, *supra* note 2539, at 312–14; Gordon Cucullu, Inside Gitmo 224 (2009); William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. Times, Mar. 31, 2007, at A10; Karen Greenberg, The Least Worst Place: Guantanamo's First 100 Days 220 (2009); Spencer S. Hsu, *Guantanamo Detainee Returns to Australia*, Wash. Post, May 21, 2007, at A10; Michael D. Mori, *Escape from Guantánamo*, *in* The Guantánamo Lawyers, *supra* note 2548, at 190, 192; Josh White, *Australian to Return Home to Serve Shortened Term*, Wash. Post, Mar. 31, 2007, at A12; *see also* Jonathan Hafetz, Habeas Corpus After 9/11 212 (2011) ("The deal not only was negotiated without the prosecutors' knowledge, but was the result of a request to Vice President Cheney from Australia's prime minister John Howard, who was facing increasing demands at home to oppose Hicks's prosecution by a military commission.").

2566. *See* Raymond Bonner, *Australian Terrorism Detainee Leaves Prison*, N.Y. Times, Dec. 29, 2007, at A7; Rohan Sullivan, *Ex-Guantanamo Inmate Released*, Wash. Post, Dec. 29, 2007, at A14.

2567. *See* Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. Times, Dec. 21, 2008, at A12.

2568. *See* Raymond Bonner, *Australian's Long Path in the U.S. Antiterrorism Maze*, N.Y. Times, Jan. 29, 2005, at A4; Priest, *supra* note 2557; *see also* Margulies, *supra* note 2543, at 2 (according to Habib's attorney, "I had flown with [Habib] from Guantánamo in a plane chartered by the Australian government, west from Cuba and across the Pacific Ocean, careful not to cross over into U.S. airspace. I am the only lawyer allowed by the U.S. government to accompany a prisoner home from the base, a courtesy I cannot explain.").

It was reported that no charges were filed against Habib so that his torture while detained in Egypt would not become a matter of court review. *See* Raymond Bonner, *Ex-Captive in Guantánamo Makes Run for Office in Australia*, N.Y. Times, Mar. 21, 2007, at A12; *see also* Mori, *supra* note 2565. The Australian government insisted that Habib either be tried or released. *See* Bravin, *supra* note 2539, at 225–38.

2569. Docket Sheet, Anam v. Bush, No. 1:04-cv-1194 (D.D.C. July 15, 2004) [hereinafter *Anam* Docket Sheet] (15 detainees); Docket Sheet, Boumediene v. Bush, No. 1:04-cv-1166 (D.D.C. July 12, 2004) [hereinafter *Boumediene* Docket Sheet] (six detainees); Docket Sheet, Gherebi v. Bush, No. 1:04-cv-1164 (D.D.C. July 12, 2004) [hereinafter D.D.C. *Gherebi* Docket Sheet] (one detainee); Docket Sheet, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, Benchellali v. Bush, No. 1:04-cv-1142 (D.D.C. July 6, 2004) (three detainees); Docket Sheet, Begg v. Bush, No. 1:04-cv-1137 (D.D.C. July 2, 2004) (two detainees); Docket Sheet, Khadr v. Bush, No. 1:04-cv-1136 (July 2, 2004) [hereinafter *Khadr* Docket Sheet] (one detainee); Docket Sheet, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. July 2, 2004) (one detainee); *see* Margulies, *supra* note 2543, at 158 ("While we were waiting for the Supreme Court in *Rasul*, . . . Clive Stafford Smith had quietly been gathering authorizations to proceed on behalf of several dozen other prisoners at the base, and the Center for Constitutional Rights had recruited a score of prominent law firms to handle these new cases free of charge.").

While argument in the Supreme Court case was pending, an attorney filed a habeas petition on behalf of three of these detainees, Docket Sheet, Sassi v. Bush, No. 1:04-cv-547 (D.D.C. Apr. 5, 2004) (habeas petition by next friends of Nizar Sassi, Ridouane Khalid, and Omar Khadr), which the court dismissed on the parties' motion, Order, *id.* (Apr. 15, 2004).

judge ruled that the diversity of factual situations among the cases did not make them suitable for consolidation.[2570]

By early September, another three cases had been filed on behalf of another 21 detainees.[2571] On September 14, the district court's Executive Session decided that Senior Judge Joyce Hens Green[2572] would preside over preliminary coordination and management of all Guantánamo Bay habeas cases both already and subsequently filed, but assigned judges would retain their cases for merits purposes.[2573]

Judge Green assembled an informal meeting with petitioners' attorneys and representatives of the government, which included military personnel.[2574] At the meeting, Judge Green said that she expected written justifications of detention for each petitioner, which the government asked to think about.[2575] At a second informal meeting three days later, the government agreed to submit returns on a rolling basis.[2576]

2570. Opinion, *Rasul*, No. 1:02-cv-299 (D.D.C. July 26, 2004).

2571. Docket Sheet, Hamdan v. Rumsfeld, No. 1:04-cv-1519 (D.D.C. Sept. 2, 2004) [hereinafter *Hamdan* Docket Sheet] (one detainee); Docket Sheet, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. July 27, 2004) (14 detainees); Docket Sheet, Almurbati v. Bush, No. 1:04-cv-1227 (D.D.C. July 22, 2004) (six detainees).

2572. For this report, Tim Reagan interviewed, at the Federal Judicial Center on September 21, 2011, Judge Green; Frank Kulbaski, her former law clerk who served as her attorney advisor; and Marcia Davidson, who served as her judicial assistant.

2573. *E.g.*, Coordination Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 20, 2004); *see* Gherebi v. Bush, 338 F. Supp. 2d 91, 94 (D.D.C. 2004); Order, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 5, 2004) (transfer by Judge Kennedy); Order, *Anam*, No. 1:04-cv-1194 (D.D.C. Oct. 5, 2004) (transfer by Judge Kennedy); Order, *Boumediene*, No. 1:04-cv-1166 (D.D.C. Sept. 30, 2004) (transfer by Judge Leon); Order *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 29, 2004) (transfer by Judge Roberts); Order, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004) (transfer by Judge Leon); Order, *Khadr*, No. 1:04-cv-1136 (D.D.C. Sept. 21, 2004) (transfer by Judge Bates); Order, *Begg*, No. 1:04-cv-1137 (D.D.C. Sept. 20, 2004) (transfer by Judge Collyer); Order, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Sept. 20, 2004) (transfer by Judge Huvelle); Order, *Almurbati*, No. 1:04-cv-1227 (D.D.C. Sept. 17, 2004) (transfer by Judge Walton); Order, *Gherebi*, No. 1:04-cv-1164 (D.D.C. Sept. 17, 2004) (transfer by Judge Walton); Order, Habib v. Bush, No. 1:02-cv-1130 (D.D.C. Sept. 17, 2004) (transfer by Judge Kollar-Kotelly); Order, Al-Odah v. United States, No. 1:02-cv-828 (D.D.C. Sept. 17, 2004) (transfer by Judge Kollar-Kotelly); Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Sept. 17, 2004) (transfer by Judge Kollar-Kotelly); *Hamdan* Docket Sheet, *supra* note 2571 (noting a transfer by Judge Robertson on September 14, 2004,); *see also* Al Odah v. United States, 346 F. Supp. 2d 1, 4–5 n.5 (D.D.C. 2004); Daniel Freeman, *One Case, Two Decisions:* Khalid v. Bush, In re Guantanamo Detainee Cases, *and the Neutral Decisionmaker*, 24 Yale L. & Pol'y Rev. 241, 243 (2006); Mahler, *supra* note 2551, at 146–47; Margulies, *supra* note 2543, at 205.

The court commonly refers complex matters of general application to senior judges, who have more control over their dockets and time. Interview with Hon. Royce C. Lamberth, May 13, 2011; *see* Wax, *supra* note 2548, at 168.

2574. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2575. *Id.*

2576. *Id.*

It proved important to make sure that attorneys understood before whom motions and the like should be filed so that they did not think they could choose strategically between Judge Green and the merits judge.[2577]

Ninth Circuit Cases

Two of the 11 new cases were not filed originally in the District of Columbia; they were transferred from the Ninth Circuit.[2578] Before these two cases were filed in Ninth Circuit districts, and before the parents of Hicks, Rasul, and Iqbal filed a petition in the District of Columbia, concerned citizens filed a habeas petition on behalf of Guantánamo Bay detainees, on January 20, 2002, under the name "Coalition of Clergy, Lawyers, and Professors," in the Central District of California.[2579] On February 21, Judge A. Howard Matz dismissed the petition, finding that the plaintiffs lacked standing and no federal court would have jurisdiction over the petition anyway.[2580] On November 18, the court of appeals affirmed on standing and vacated the district court's holding on jurisdiction, reasoning that if the plaintiffs lacked standing then the court lacked jurisdiction over the jurisdiction issue.[2581]

On February 1, 2003, the brother of detainee Salim Gherebi presented to the court of appeals for the Ninth Circuit a habeas petition,[2582] which the court transferred to the district court for the Central District of California, and the district court assigned the petition to Judge Matz.[2583] Finding that this petitioner had standing, Judge Matz again ruled, on May 13, that no federal court had jurisdic-

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2577. *Id.*

2578. *Hamdan* Docket Sheet, *supra* note 2571; D.D.C. *Gherebi* Docket Sheet, *supra* note 2569; *see* Docket Sheet, Swift v. Rumsfeld, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004) (petition on behalf of Salim Ahmed Hamdan); Docket Sheet, Gheredi v. Bush, No. 2:03-cv-1267 (C.D. Cal. Feb. 24, 2003) [hereinafter C.D. Cal. *Gheredi* Docket Sheet] (petition on behalf of Falen Gherebi, spelling his last name as "Gheredi").

2579. Docket Sheet, Coalition of Clergy, Lawyers & Professors v. Bush, No. 2:02-cv-570 (C.D. Cal. Jan 20, 2002); *see* Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002); *see also* Gherebi v. Bush, 338 F. Supp. 2d 91, 92 (D.D.C. 2004); Bravin, *supra* note 2539, at 80.

2580. *Coalition of Clergy*, 189 F. Supp. 2d 1036, *aff'd in part and rev'd in part*, 310 F.3d 1153 (9th Cir. 2002); *see Gherebi*, 338 F. Supp. 2d at 92.

2581. *Coalition of Clergy*, 310 F.3d 1153; *see Gherebi*, 338 F. Supp. 2d at 92.

On August 26, 2003, the coalition attempted to cure standing deficiencies, which Judge Matz observed would be relatively easy to do, Gherebi v. Bush, 262 F. Supp. 2d 1064, 1066 (C.D. Cal. 2003), and filed a new complaint, Docket Sheet, Coalition of Clergy, Lawyers & Professors v. Bush, No. 2:02-cv-9516 (C.D. Cal. Dec. 16, 2002). Judge Matz dismissed the complaint on August 5, 2003, before the court of appeals held that federal courts had jurisdiction over Guantánamo Bay habeas petitions. Order, *id.* (Aug. 5, 2003). An appeal was dismissed on April 7, 2004, for lack of prosecution. Docket Sheet, Coalition of Clergy, Lawyers & Professors v. Bush, No. 03-56484 (9th Cir. Aug. 26, 2003).

2582. Docket Sheet, Gheredi v. Bush, No. 03-80012 (9th Cir. Feb. 5, 2003); *Gherebi*, 338 F. Supp. 2d at 92.

2583. C.D. Cal. *Gheredi* Docket Sheet, *supra* note 2578.

tion over Guantánamo Bay habeas petitions.[2584] On December 18, the court of appeals reversed.[2585] On June 30, 2004, the Supreme Court vacated the court of appeals' decision and remanded the case for reconsideration in light of the holding in *Rumsfield v. Padilla*[2586] that Jose Padilla's habeas petition filed in the Southern District of New York, where he had been in detention as a material witness, could not be heard in that district because he had been transferred to a naval brig in the District of South Carolina.[2587] On July 8, the court of appeals transferred Gherebi's petition to the District of Columbia.[2588]

The second transferred action was filed by Salim Ahmed Hamdan's military lawyer, who was assigned to represent Hamdan before a military commission.[2589] Hamdan, who was a driver for Osama Bin Laden, was captured in Afghanistan in November 2001 and transferred to Guantánamo Bay in mid-2002.[2590] In 2003, he was one of the first six detainees that President Bush referred to a military commission for trial.[2591] On April 6, 2004, Lieutenant Commander Charles Swift filed a habeas corpus action on behalf of Hamdan in Swift's home district, the Ninth Circuit's Western District of Washington.[2592] On August 9, Judge Robert S.

2584. *Gherebi*, 262 F. Supp. 2d 1064, *rev'd*, 374 F.3d 727 (9th Cir. 2004); *see Gherebi*, 338 F. Supp. 2d at 92–93; Mahler, *supra* note 2551, at 98.

2585. Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003), *modified*, 374 F.3d 727; *see Gherebi*, 338 F. Supp. 2d at 93; Mahler, *supra* note 2551, at 98; John Mintz, *Hearing Ordered for Terrorism Detainee*, Wash. Post, Dec. 19, 2003, at A19.

2586. 542 U.S. 426, 451 (2004).

2587. Bush v. Gherebi, 542 U.S. 952 (2004); *see Gherebi*, 338 F. Supp. 2d at 93; *see also supra*, "Dirty Bomber."

2588. *Gherebi*, 374 F.3d at 739; *Gherebi*, 338 F. Supp. 2d at 93–94.

2589. Petition, Swift v. Rumsfeld, No. 2:04-cv-777 (W.D. Wash. Apr. 6, 2004) [hereinafter *Swift* Petition]; *see* Neil A. Lewis, *Suit Contests Military Trials of Detainees at Cuba Base*, N.Y. Times, Apr. 8, 2004, at A25.

2590. Hamdan v. United States, 696 F.3d 1238, 1240, 1242–43 (D.C. Cir. 2012); Hamdan v. Rumsfeld, 565 F. Supp. 2d 130, 131 (D.D.C. 2008); Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 10 (D.D.C. 2006); *see* Neil A. Lewis, *Judge Sets Back Guantánamo Detainees*, N.Y. Times, Dec. 14, 2006, at A32; Mahler, *supra* note 2551, at 10–11; Ali H. Soufan, The Black Banners 449 (2011); *see also* Bravin, *supra* note 2539, at 4–6 (reporting, "Bin Laden's family also came from Hadramout[, where Hamdan was born]—his father Mohammed was born there—which perhaps explains the austere ideologue's affinity toward his barely literate driver.").

In 2012, the government released a video showing an episode of Hamdan's interrogation, and MSNBC posted the video on the Internet. Jim Miklaszewski, *Pentagon Releases Video of US Troops Interrogating Bin Laden's Driver*, MSNBC.com Open Channel, May 5, 2012, openchannel.msnbc.msn.com/_news/2012/05/04/11543668-pentagon-releases-video-of-us-troops-interrogating-bin-ladens-driver?lite.

2591. *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; *see* Lewis, *supra* note 2589; Soufan, *supra* note 2590, at 454–58 (describing how Hamdan's referral for prosecution interrupted acquisition of intelligence from him).

2592. *Swift* Petition, *supra* note 2589; *see Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; Bravin, *supra* note 2539, at 213–14; Lewis, *supra* note 2589; Mahler, *supra* note 2551, at 99 ("American service members are considered legal residents of wherever they last lived before joining up. So even though Swift had lived in Puerto Rico, Florida, and now Virginia, his official place of residence hadn't changed since he attended law school in Seattle.").

Lasnik transferred the petition, which challenged the validity of the military commission, to the District of Columbia.[2593]

Establishing Military Commissions

The District of Columbia district court assigned Hamdan's action to Judge James Robertson.[2594] Although Hamdan's petition was included in the court's coordination of preliminary matters before Judge Green, Judge Robertson was able to resolve substantial issues in the case in an opinion issued on November 8, 2004.[2595] Judge Robertson granted Hamdan's petition in part, holding that the military commission that was to try Hamdan could not do so lawfully, because its procedures allowed for conviction on secret evidence.[2596] The ruling reached Cuba that day, which resulted in the indefinite recess of a pretrial proceeding.[2597] The court of appeals reversed Judge Robertson, holding that "Congress authorized the military commission that will try Hamdan."[2598] The Supreme Court decided *Hamdan v. Rumsfeld* on June 29, 2006, reversing the court of appeals because the procedures specified for the military commission violated the Uniform Code of Military Justice.[2599]

On remand, Judge Robertson decided that the Military Commissions Act, signed by the President on October 17, deprived Guantánamo Bay detainees of

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> Swift's instructions from superior officers were to negotiate a deal, not to advocate zealously for his client, as JAG lawyers were bound and trained to do. The Bush administration had deliberately chosen for prosecution detainees who, it believed, would plead guilty and thereby give some legitimacy to the military commission process and the Guantánamo detention system generally.

Hafetz, *supra* note 2565, at 138.

2593. Order, *Swift*, No. 2:04-cv-777 (W.D. Wash. Aug. 9, 2004); *see Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; Mahler, *supra* note 2551, at 141.

2594. *Hamdan* Docket Sheet, *supra* note 2571; *see* Mahler, *supra* note 2551, at 146.

Judge Robertson retired on June 1, 2010. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

2595. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004); *see Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005); *see also* Mahler, *supra* note 2551, at 148 (reporting that Judge Robertson decided to keep Hamdan's case on a letter request from Hamdan's attorneys).

2596. *Hamdan*, 344 F. Supp. 2d at 166–72, *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); *see* Hafetz, *supra* note 2565, at 139; Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. Times, Nov. 9, 2004, at A1.

2597. *See* Bravin, *supra* note 2539, at 219–20; Lewis, *supra* note 2596; Mahler, *supra* note 2551, at 164–65.

2598. *Hamdan*, 415 F.3d 33, *rev'd*, 548 U.S. 557; *see* Hafetz, *supra* note 2565, at 139; Neil A. Lewis, *Ruling Lets U.S. Restart Trials at Guantánamo*, N.Y. Times, July 16, 2005, at A1; Mahler, *supra* note 2551, at 191–92.

2599. *Hamdan*, 548 U.S. at 613; *see* Hamdan v. United States, 696 F.3d 1238, 1243 (D.C. Cir. 2012); *see also* Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. Times, June 30, 2006, at A1; Hafetz, *supra* note 2565, at 147–48; Mahler, *supra* note 2551, at 283–85.

Following the Supreme Court's *Hamdan* decision, Hamdan's military attorney Swift was forced out of the Navy. *See* Mahler, *supra* note 2551, at 296–98.

statutory habeas corpus[2600] and that Hamdan's "connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."[2601] On July 18, 2008, Judge Robertson determined that the Military Commissions Act of 2006 established procedures much improved over those created earlier by executive order, and the provision for appeal to the U.S. Court of Appeals for the District of Columbia Circuit created an opportunity for adequate judicial review.[2602] On August 6, a military tribunal convicted Hamdan of providing material support for terrorism but not of terrorism conspiracy.[2603] The jury recommended a sentence of five years and six months, and the judge gave Hamdan credit for time served of five years and one month.[2604] The government released Hamdan to Yemen on November 25, 2008, to serve the last month of his sentence.[2605] On January 8, 2009, Yemen released Hamdan to live with his family in Sana.[2606]

On June 24, 2011, the Court of Military Commission Review affirmed Hamdan's conviction and sentence.[2607] The court of appeals for the District of Columbia Circuit, however, held on October 16, 2012, that because material support for terrorism was not at the time of Hamdan's actions (nor had it since

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2600. *Hamdan*, 464 F. Supp. 2d at 11–12; *see* Robert Barnes, *Judge Rejects Detention Challenge of Bin Laden's Driver*, Wash. Post, Dec. 14, 2006, at A9; Lewis, *supra* note 2590; Mahler, *supra* note 2551, at 300–01.

2601. *Hamdan*, 464 F. Supp. 2d at 18; *see* Lewis, *supra* note 2590.

2602. Hamdan v. Gates, 565 F. Supp. 2d 130 (D.D.C. 2008); *see* Scott Shane & William Glaberson, *Rulings Clear Military Trial of a Detainee*, N.Y. Times, July 18, 2008, at A1.

2603. *Hamdan*, 696 F.3d at 1240, 1244; Notice of Transfer, Hamdan v. Gates, No. 1:04-cv-1519 (D.D.C. Jan. 30, 2009) [hereinafter *Hamdan* Notice of Transfer]; Transcript at 3939–42, United States v. Hamdan (U.S. Mil. Comm. Aug. 6, 2008), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see* Charges, *id.* (May 10, 2007); *see* Bravin, *supra* note 2539, at 327–34; William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008, at A1; Jerry Markon, *Hamdan Guilty of Terror Support*, Wash. Post, Aug. 7, 2008, at A1

2604. *Hamdan*, 696 F.3d at 1240–41, 1244; Transcript at 4173–74, United States v. Hamdan (U.S. Mil. Comm. Aug. 7, 2008), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see* Bravin, *supra* note 2539, at 334–43 (noting that Hamdan received credit for detention following the filing of charges, but not for his previous indefinite detention as an enemy combatant); William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. Times, Aug. 8, 2008, at A1 (reporting on a credit of 61 months since Hamdan had been charged out of more than six years in all); Greenberg, *supra* note 2565, at 220 ("there was such scant evidence that his sentence was only five and a half years"); Jerry Markon & Josh White, *Bin Laden Driver Gets 5½ Years; U.S. Sought 30*, Wash. Post, Aug. 8, 2008, at A1; Soufan, *supra* note 2590, at 457.

2605. *Hamdan* Notice of Transfer, *supra* note 2603; *Hamdan*, 696 F.3d at 1241, 1244; *see* Joe McMillan, *The United States on Trial*, *in* The Guantánamo Lawyers, *supra* note 2548, at 178, 183; Carol Rosenberg, *Bin Laden's Driver Will Finish Jail Time in Yemen*, Miami Herald, Nov. 26, 2008, at 5A.

2606. *Hamdan*, 696 F.3d at 1241, 1244; *see* McMillan, *supra* note 2605, at 183; Soufan, *supra* note 2590, at 457; *Yemen Releases Former Bin Laden Driver from Jail*, N.Y. Times, Jan. 12, 2009, at A9.

2607. Opinion, United States v. Hamdan, No. 09-2 (U.S. Ct. Mil. Comm. Rev. June 24, 2011), *available at* http://www.mc.mil/CASES/USCourtofMilitaryCommissionReview.aspx; *Hamdan*, 696 F.3d at 1244.

become) a war crime according to the international law of war, Hamdan's conviction must be reversed.[2608]

Decisions by Judges Leon and Green

On November 15, 2004, Judge Richard J. Leon took back assignment for all purposes the two cases originally assigned to him.[2609] The court made sure that attorneys were promptly notified of the reassignment.[2610] By this time, two of the nine detainees in these two cases were no longer at Guantánamo Bay.[2611] On January 19, 2005, Judge Leon dismissed the petitions, holding that there was nothing unlawful about "the detention of non-resident aliens captured abroad and detained outside the territorial sovereignty of the United States, pursuant to lawful military orders, during a Congressionally authorized conflict."[2612]

Eleven cases remained before Judge Green, who held on January 31 that the habeas petitions stated valid due process claims.[2613] Nine days after the Supreme Court's *Rasul* decision, the Defense Department created a Combatant Status Review Tribunal (CSRT) to establish whether each detainee is an enemy combatant.[2614] The government used the results of CSRT proceedings as habeas re-

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2608. *Hamdan*, 696 F.3d at 1241, 1248–53; *see id.* at 1241, 1246–48 (concluding, to avoid a possible conflict with the Constitution's Ex Post Facto Clause, that the Military Commissions Act of 2006 does not "authorize *retroactive* prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred"); *see also* Bravin, *supra* note 2539, at 377–80; Charlie Savage, *In Setback for Military Tribunals, Bin Laden Driver's Conviction Is Reversed*, N.Y. Times, Oct. 17, 2012, at A20; Del Quentin Wilber & Ernesto Londoño, *Court Overturns Conviction of Bin Laden's Driver*, Wash. Post, Oct. 17, 2012, at A2; Lindsay Wise & Carol Rosenberg, *Bin Laden Driver's Conviction Tossed*, Miami Herald, Oct. 17, 2012, at 1A.

Nor was conspiracy a crime according to the international law of war. *See* Bravin, *supra* note 2539, at 128 ("Because armed conflict involves organized and hierarchical forces, conspiracy could be used to make any soldier culpable for the war crimes of another.")

2609. Order, Boumediene v. Bush, No. 1:04-cv-1166 (D.D.C. Nov. 15, 2004); Order, Benchellali v. Bush, No. 1:04-cv-1142 (D.D.C. Nov. 15, 2004); *see* O.K. v. Bush, 377 F. Supp. 2d 102, 104 (D.D.C. 2005) ("Judge Richard Leon elected to retain the motions to dismiss in his two cases."); Freeman, *supra* note 2573, at 243; Joe Palazzolo, *Judges Vow to Move Fast on Gitmo Cases*, Legal Times, July 14, 2008, at 6; Wax, *supra* note 2548, at 169.

2610. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2611. Khalid v. Bush, 355 F. Supp. 2d 311, 316 n.3 (D.D.C. 2005); Consent Motion, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 21, 2004) (noting the transfers of Nizar Sassi and Mourad Benchellali); *see* Wax, *supra* note 2548, at 169.

2612. *Khalid*, 355 F. Supp. 2d at 314; *see* Boumediene v. Bush, 553 U.S. 723, 734–35 (2008); *see also* Freeman, *supra* note 2573, at 241; Hafetz, *supra* note 2565, at 135.

2613. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 481 (D.D.C. 2005); *see* Freeman, *supra* note 2573, at 241; Hafetz, *supra* note 2565, at 136–37; Wax, *supra* note 2548, at 169–70.

2614. *Boumediene*, 553 U.S. at 733; Al Odah v. United States, 559 F.3d 539, 541 (D.C. Cir. 2009); Bismullah v. Gates, 501 F.3d 178, 181 (D.C. Cir. 2007); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450; *see* Margulies, *supra* note 2543, at 159 ("Each tribunal would consist of three commissioned officers who would base their decision on information presented by the military and the prisoner."); Meltzer, *supra* note 2559, at 6; Simard, *supra* note 2559, at 378;

turns.[2615] Judge Green held that CSRT procedures did not meet constitutional standards for due process.[2616] In addition, some petitioners stated valid claims under the Geneva Conventions.[2617] While Judge Green's decision was pending, the court received an additional eight cases.[2618]

Ill-Fated Transfer Injunctions

On Tuesday, March 1, 2005, attorneys for several Yemeni detainees sought from Judge Henry H. Kennedy, Jr., to whom the case had been assigned, an order requiring the government to give the attorneys 30 days' notice before transferring their clients from Guantánamo Bay, in light of concerns that the government would deprive the court of jurisdiction over the detainees by transferring them to prisons in other countries.[2619] On Friday of the following week, the *New York Times* reported on "a plan to cut by more than half the population at [the] detention facility in Guantánamo Bay, Cuba, in part by transferring hundreds of sus-

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Thomas P. Sullivan, *"Due Process" at Guantánamo*, *in* The Guantánamo Lawyers, *supra* note 2548, at 148. *See generally* Taxi to the Dark Side (Discovery Channel 2007).

CSRT records are posted at http://www.defense.gov/news/Combatant_Tribunals.html.

2615. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

2616. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481; *see Boumediene*, 553 U.S. at 734–35; *see also* Marc D. Falkoff, *Litigation and Delay at Guantánamo Bay*, 10 N.Y. City L. Rev. 393, 402 (2007); Hafetz, *supra* note 2565, at 136–37.

2617. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481.

2618. Docket Sheet, Abdullah v. Bush, No. 1:05-cv-23 (D.D.C. Jan. 7, 2005) (two detainees); Docket Sheet, Ben Mustapha v. Bush, No. 1:05-cv-22 (D.D.C. Jan. 7, 2005) (one detainee); Docket Sheet, Deghayes v. Bush, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004) (three detainees); Docket Sheet, Zemiri v. Bush, No. 1:04-cv-2046 (D.D.C. Nov. 19, 2004) (one detainee); Docket Sheet, Al-Marri v. Bush, No. 1:04-cv-2035 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, Paracha v. Bush, No. 1:04-cv-2022 (D.D.C. Nov. 17, 2004) (one detainee); Docket Sheet, Al-Qosi v. Bush, No. 1:04-cv-1937 (D.D.C. Nov. 8, 2004) (one detainee); Docket Sheet, Belmar v. Bush, No. 1:04-cv-1897 (D.D.C. Nov. 1, 2004) [hereinafter *Belmar* Docket Sheet] (one detainee); *see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 452 & n.15; *see also* Charles H. Carpenter, *Playing Politics*, *in* The Guantánamo Lawyers, *supra* note 2548, at 301, 301 (reporting on the filing of the petition in No. 1:05-cv-23).

2619. Motion, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. Mar. 3, 2005); *see* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 665–66 (2006) ("Since the spring of 2005, the docket of the district court in the District of Columbia has been flooded with motions by GTMO detainees seeking preliminary relief associated with the possibility of a transfer."); Falkoff, *supra* note 2616, at 395–96 ("The prospect of an unnoticed, dead-of-night transfer for indefinite detention in another country, coupled with the very real prospect that our clients might just as easily be rendered to another country to be tortured, led us to file [the motion]." (Footnote omitted.)); *see also* Chesney, *supra*, at 658 (noting that the purpose of the notice motions was to preserve an opportunity to challenge transfers that would result in a risk of torture); Allison M. Lefrak, *You're Going Home*, *in* The Guantánamo Lawyers, *supra* note 2548, at 341, 342 ("When a detainee is released, if [a thirty-day notice] order has been entered in his case, the government must give thirty days' notice of the release, in order to allow attorneys to object if the detainee is being sent to a country where he is likely to be tortured or persecuted.").

The petition was filed on behalf of 14 detainees, but the government could not locate Aref Abd il-Rheem. Preliminary Injunction, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 29, 2005) [hereinafter *Abdah* Preliminary Injunction], *available at* 2005 WL 711814; Status Report, *id.* (Oct. 22, 2004).

pected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen."[2620] At 10:30 p.m. that night, the Yemenis' attorneys submitted to the court an emergency motion for a temporary restraining order preventing transfer until Judge Kennedy could rule on the injunction motion.[2621]

Judge Rosemary M. Collyer was on duty as the emergency motion judge that weekend.[2622] On Saturday, Judge Collyer granted the temporary restraining order.[2623] On Sunday, several attorneys sought temporary restraining orders on behalf of their clients, but Judge Collyer declined to issue such orders en masse.[2624] On Monday, attorneys began to file 30-day-notice motions in other cases.[2625]

Judge Kennedy granted the Yemenis' motion[2626] and issued similar orders in other cases.[2627] Judges Ricardo M. Urbina,[2628] Paul L. Friedman,[2629] Gladys

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2620. Douglas Jehl, Neil A. Lewis & Tim Golden, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. Times, Mar. 11, 2005, at A1; *see* Al-Anazi v. Bush, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion at 1–2, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 12, 2005) [hereinafter *Abdah* Temporary Restraining Order], *available at* 2005 WL 589812.

2621. *Abdah* Temporary Restraining Order, *supra* note 2620, at 1 n.1.

2622. *Id.*

Tim Reagan interviewed Judge Collyer for this report in the judge's chambers on September 20, 2011.

2623. *Abdah* Temporary Restraining Order, *supra* note 2620.

2624. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

2625. O.K. v. Bush, 377 F. Supp. 2d 102, 105 (D.D.C. 2005); Motion, Abdullah v. Bush, No. 1:05-cv-23 (D.D.C. Mar. 14, 2005).

2626. *Abdah* Preliminary Injunction, *supra* note 2619; *see* Marc D. Falkoff, *Without Law or Justice*, *in* The Guantánamo Lawyers, *supra* note 2548, at 155, 164 ("[W]e proved to the judge's satisfaction that we had legitimate and well-founded fears that the United States might render our clients to other countries to be tortured. Our notice order would provide [the detainee] protection and enough time for us to get to the court in case the government tried anything like that.").

2627. Order, Al-Shubati v. Bush, No. 1:07-cv-2338 (D.D.C. Jan. 11, 2008); Order, Al-Yazidi v. Bush, No. 1:07-cv-2337 (D.D.C. Jan. 11, 2008); Order, Hentif v. Bush, No. 1:06-cv-1766 (D.D.C. July 28, 2007); Order, Saleh v. Bush, No. 1:06-cv-1765 (D.D.C. July 28, 2007); Order, Al-Harbi v. Bush, No. 1:05-cv-2479 (D.D.C. Aug. 18, 2006); Order, Al-Asadi v. Bush, No. 1:05-cv-2197 (D.D.C. Nov. 29, 2005); Order, Zakirjan v. Bush, No. 1:05-cv-2053 (D.D.C. Nov. 21, 2005); Order, Anam v. Bush, No. 1:04-cv-1194 (D.D.C. May 9, 2005); Order, Al-Mohammed v. Bush, No. 1:05-cv-247 (D.D.C. Mar. 30, 2005).

2628. Order, Al-Zarnouqi v. Bush, No. 1:06-cv-1767 (D.D.C. Dec. 4, 2006); Order, Rabbani v. Bush, No. 1:05-cv-1607 (D.D.C. June 16, 2006); Order, Alkhemisi v. Bush, No. 1:05-cv-1983 (D.D.C. Nov. 21, 2005); Order, Al-Subaiy v. Bush, No. 1:05-cv-1453 (D.D.C. Sept. 19, 2005); Order, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. Sept. 13, 2005); Order, Sohail v. Bush, No. 1:05-cv-993 (D.D.C. Sept. 13, 2005); Order, Faizullah v. Bush, No. 1:05-cv-1489 (D.D.C. Aug. 22, 2005); Order, Hatim v. Bush, No. 1:05-cv-1429 (D.D.C. Aug. 22, 2005); Order, El-Marqodi v. Bush, No. 1:05-cv-1649 (D.D.C. Aug. 19, 2005); Order, Al-Karim v. Bush, No. 1:05-cv-998 (D.D.C. Aug. 8, 2005); Order, Zalita v. Bush, No. 1:05-cv-1220 (D.D.C. July 25, 2005); Order, Al-Hela v. Bush, No. 1:05-cv-1048 (D.D.C. June 3, 2005); Order, Tumani v. Bush, No. 1:05-cv-526 (D.D.C. Apr. 6, 2005); Order, Qayed v. Bush, No. 1:05-cv-454 (D.D.C. Apr. 6, 2005); Order, Al-Oshan v. Bush, No. 1:05-cv-520 (D.D.C. Mar. 31, 2005).

Tim Reagan interviewed Judge Urbina for this report in the judge's chambers on August 15, 2011. Judge Urbina retired on May 31, 2012. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

Kessler,[2630] Richard W. Roberts,[2631] Kollar-Kotelly,[2632] Emmet G. Sullivan,[2633] and Thomas F. Hogan[2634] also issued similar orders. Judge Ellen Segal Huvelle

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2629. Paracha v. Bush, 374 F. Supp. 2d 118 (D.D.C. 2005); Mokit v. Bush, 374 F. Supp. 2d 106 (D.D.C. 2005); Order, Almerfedi v. Bush, No. 1:05-cv-1645 (D.D.C. June 23, 2005); Minute Order, Al-Salami v. Bush, No. 1:05-cv-2452 (D.D.C. May 31, 2006); Order, Akhtiar v. Bush, No. 1:05-cv-1635 (D.D.C. Sept. 26, 2005) [hereinafter Sept. 26, 2005, *Akhtiar* Order]; Order, Al-Shihry v. Bush, No. 1:05-cv-490 (D.D.C. Apr. 1, 2005), *available at* 2005 WL 1384680; Order, Al-Wazan v. Bush, No. 1:05-cv-329 (D.D.C. Apr. 1, 2005).

For this report, Tim Reagan interviewed Judge Friedman and his law clerk Albinas Prizgintas in the judge's chambers on October 12, 2011.

2630. Order, Mohammad v. Bush, No. 1:05-cv-885 (D.D.C. July 31, 2006); Order, Rahman v. Bush, No. 1:05-cv-882 (D.D.C. July 31, 2006); Order, Al-Aweda v. Bush, No. 1:05-cv-1668 (D.D.C. Dec. 28, 2005); Order, Alhami v. Bush, No. 1:05-cv-359 (D.D.C. June 9, 2005); Order, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. Apr. 28, 2005); Opinion, Al-Joudi v. Bush, No. 1:05-cv-301 (D.D.C. Apr. 4, 2005), *available at* 2005 WL 774847; Opinion, Al-Marri v. Bush, No. 1:04-cv-2035 (D.D.C. Apr. 4, 2005), *available at* 2005 WL 774843.

Tim Reagan interviewed Judge Kessler for this report in the judge's chambers on May 31, 2011.

2631. Order, Al-Shareef v. Bush, No. 1:05-cv-2458 (D.D.C. Dec. 8, 2006), *available at* 2006 WL 3544736; Order, Feghoul v. Bush, No. 1:06-cv-618 (D.D.C. Oct. 31, 2006), *available at* 2006 WL 3096856; Order, Alsaaei v. Bush, No. 1:05-cv-2369 (D.D.C. Aug. 14, 2006), *available at* 2006 WL 2367270; Order, Said v. Bush, No. 1:05-cv-2384 (D.D.C. July 25, 2006); Order, Zadran v. Bush, No. 1:05-cv-2367 (D.D.C. July 19, 2006); Order, Hamoud v. Bush, No. 1:05-cv-1894 (D.D.C. July 5, 2006), *available at* 2006 WL 1876947; Opinion, Al-Rubaish v. Bush, No. 1:05-cv-1714 (D.D.C. Dec. 14, 2005); Order, Mohammadi v. Bush, No. 1:05-cv-1246 (D.D.C. Sept. 22, 2005); Order, Abdulzaher v. Bush, No. 1:05-cv-1236 (D.D.C. Sept. 22, 2005); Order, Ahmed v. Bush, No. 1:05-cv-665 (D.D.C. July 8, 2005), *available at* 2005 WL 1606912; Order, Chaman v. Bush, No. 1:05-cv-887 (D.D.C. June 16, 2005); Order, Slahi v. Bush, No. 1:05-cv-881 (D.D.C. June 16, 2005); Order, Adem v. Bush, No. 1:05-cv-723 (D.D.C. June 6, 2005); Order, Al-Daini v. Bush, No. 1:05-cv-634 (D.D.C. June 6, 2005); Order, Al-Shamri v. Bush, No. 1:05-cv-551 (D.D.C. May 11, 2005); Order, Al-Rashaidan v. Bush, No. 1:05-cv-586 (D.D.C. Apr. 8, 2005); Order, Abdullah v. Bush, No. 1:05-cv-23 (D.D.C. Apr. 8, 2005); Order, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Apr. 8, 2005); *see* Marjorie M. Smith, *The Other Man*, *in* The Guantánamo Lawyers, *supra* note 2548, at 147.

2632. Order, Abu Ghanem v. Bush, No. 1:05-cv-1638 (D.D.C. July 10, 2007); Order, Rahmattullah v. Bush, No. 1:05-cv-878 (D.D.C. Jan. 23, 2007); Order, Alsawam v. Bush, No. 1:05-cv-1244 (D.D.C. Oct. 4, 2006); Order, Al-Baidany v. Bush, No. 1:05-cv-2380 (D.D.C. Oct. 4, 2006); Order, Ghalib v. Bush, No. 1:05-cv-1238 (D.D.C. May 1, 2006); Order, Shaaban v. Bush, No. 1:05-cv-892 (D.D.C. May 1, 2006); Order, Gul v. Bush, No. 1:05-cv-888 (D.D.C. May 1, 2006); Order, Al-Mithali v. Bush, No. 1:05-cv-2186 (D.D.C. Dec. 20, 2005); Order, Al-Harbi v. Bush, No. 1:05-cv-1857 (D.D.C. Nov. 17, 2005); Order, Sameur v. Bush, No. 1:05-cv-1806 (D.D.C. Nov. 17, 2005); Order, Al-Badah v. Bush, No. 1:05-cv-1641 (D.D.C. Nov. 17, 2005).

2633. Order, Zuhair v. Bush, No. 1:08-cv-864 (D.D.C. July 31, 2008); Order, Al-Shibh v. Bush, No. 1:06-cv-1725 (D.D.C. July 31, 2008); Order, Al-Habashi v. Bush, No. 1:05-cv-2370 (D.D.C. July 31, 2008); Order, Al-Sharbi v. Bush, No. 1:05-cv-2348 (D.D.C. July 31, 2008); Order, Batarfi v. Bush, No. 1:05-cv-409 (D.D.C. July 31, 2008); Order, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Aug. 17, 2006); Order, Ahmed v. Bush, No. 1:05-cv-1234 (D.D.C. Aug. 17, 2006); Order, Wahab v. Bush, No. 1:05-cv-886 (D.D.C. Aug. 17, 2006).

2634. Order, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. July 10, 2008).

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the United States Courts

ordered 30-days' notice, unless the detainee was to be released to freedom.[2635] Judge Robertson granted the government's motions to stay proceedings pending resolution of jurisdictional questions in higher courts and interpreted the stay to prohibit transfer of the detainees without notice.[2636] Judges Reggie B. Walton,[2637] John D. Bates,[2638] Leon,[2639] and Collyer[2640] declined to order 30-days' notice of detainee transfer.

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from October 2011 through June 2013. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; *New Administrative Office Director Named*, Third Branch, June 11, 2013, *available at* http://news.uscourts.gov/new-administrative-office-director-named (announcing the appointment of Judge John D. Bates as Judge Hogan's successor); *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, *available at* http://news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary.

2635. Order, Basardh v. Bush, No. 1:05-cv-889 (D.D.C. Sept. 25, 2006); Order, Al-Khatemi v. Bush, No. 1:05-cv-2248 (D.D.C. Dec. 20, 2005); Order, Al-Bahooth v. Bush, No. 1:05-cv-1666 (D.D.C. Dec. 20, 2005); Order, Kahn v. Bush, No. 1:05-cv-1001 (D.D.C. Dec. 20, 2005); Order, Mamet v. Bush, No. 1:05-cv-1602 (D.D.C. Sept. 30, 2005); Order, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. Apr. 12, 2005), *available at* 2005 WL 839542 (also applying to Ameziane v. Bush, No. 1:05-cv-392).

Tim Reagan interviewed Judge Huvelle for this report in the judge's chambers on June 13, 2011.

2636. Order, Awad v. Bush, No. 1:05-cv-2379 (D.D.C. Jan. 11, 2006) ("the stay will apply to all proceedings applicable to the petitioners, including without limitation their release, repatriation, or rendition, and it will remain in effect until further order of the Court"); Order, Khan v. Bush, No. 1:05-cv-1491 (D.D.C. Dec. 6, 2005); Order, Khiali-Gul v. Bush, No. 1:05-cv-877 (D.D.C. Dec. 6, 2005); Order, Al-Mudafari v. Bush, No. 1:05-cv-2185 (D.D.C. Dec. 2, 2005); Order, Idris v. Bush, No. 1:05-cv-1555 (D.D.C. Dec. 2, 2005); Order, Khalifh v. Bush, No. 1:05-cv-1189 (D.D.C. Oct. 24, 2005); Order, Aziz v. Bush, No. 1:05-cv-492 (D.D.C. Apr. 20, 2005); Order, Salahi v. Bush, No. 1:05-cv-569 (D.D.C. Apr. 15, 2005); Order, El-Mashad v. Bush, No. 1:05-cv-270 (D.D.C. Apr. 7, 2005); Order, Qassim v. Bush, No. 1:05-cv-497 (D.D.C. Apr. 13, 2005); *see* Qassim v. Bush, 382 F. Supp. 2d 126, 127 (D.D.C. 2005); *see also* Order, Alladeen v. Bush, No. 1:05-cv-833 (D.D.C. Oct. 27, 2005) (temporary restraining order against removal from Guantánamo Bay).

In one of the cases before Judge Robertson, the petitioners filed a motion for an injunction against rendition on February 4, 2005, a month ahead of the motion presented to Judge Kennedy. Motion, *El-Mashad*, No. 1:05-cv-270 (D.D.C. Feb. 4, 2005).

2637. Almurbati v. Bush, 366 F. Supp. 2d 72 (D.D.C. 2005).

Tim Reagan interviewed Judge Walton for this report in the judge's chambers on May 23, 2011.

2638. O.K. v. Bush, 377 F. Supp. 2d 102 (D.D.C. 2005); Al-Anazi v. Bush, 370 F. Supp. 2d 188 (D.D.C. 2005); Opinion, Al-Shabany v. Bush, No. 1:05-cv-2029 (D.D.C. Nov. 17, 2005), *available at* 2005 WL 3211407; Opinion, Zaid v. Bush, No. 1:05-cv-1646 (D.D.C. Oct. 25, 2005).

Tim Reagan interviewed Judge Bates for this report in the judge's chambers on October 15, 2009. On July 1, 2013, Judge Bates became Director of the Administrative Office of the United States Courts. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; *New Administrative Office Director Named*, Third Branch, June 11, 2013, *available at* http://news.uscourts.gov/new-administrative-office-director-named.

2639. Mammar v. Bush, 407 F. Supp. 2d 77 (D.D.C. 2005); Minute Order, Al-Ginco v. Bush, No. 1:05-cv-1310 (D.D.C. May 30, 2006).

Pursuant to the notice orders in some cases, the government filed sealed stipulated notices that petitioners' attorneys consented to their clients' impending transfers without 30 days' notice, and the notices were unsealed after the detainees were transferred.[2641] In other cases, the public record included notices of sealed submissions in advance of detainee transfers,[2642] but the submissions re-

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2640. Order, Deghayes v. Bush, No. 1:04-cv-2215 (D.D.C. June 14, 2005) (ordering, however, 30-days' notice before transferring one detainee to Libya, where the detainee's father was allegedly assassinated by the Libyan government).

2641. Stipulation and Order, Al-Habashi v. Bush, No. 1:05-cv-765 (D.D.C. Jan. 28, 2009), *filed as* Ex. 1, Notice, *id.* (Mar. 5, 2009); Stipulation and Order, Al-Joudi v. Bush, No. 1:05-cv-301 (D.D.C. Feb. 20, 2007); Stipulation and Order, Al-Badah v. Bush, No. 1:05-cv-1641 (D.D.C. Dec. 4, 2006); Stipulation and Order, *Alladeen*, No. 1:05-cv-833 (D.D.C. Nov. 15, 2006); Stipulation and Order, Mohammad v. Bush, No. 1:05-cv-885 (D.D.C. Nov. 14, 2006); Stipulation and Order, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 14, 2006).

2642. Filing Notice, Ahmed v. Bush, No. 1:05-cv-1234 (D.D.C. Oct. 9, 2008) (notice 32 days in advance of transfer); Filing Notice, Al-Karim v. Bush, No. 1:05-cv-998 (D.D.C. Aug. 29, 2008) (141 days); Filing Notice, Wahab v. Bush, No. 1:05-cv-886 (D.D.C. Aug. 21, 2008) (18 days); Filing Notice, Al-Qadir v. Bush, No. 1:08-cv-1185 (D.D.C. July 23, 2008) (33 days); Filing Notice, Feghoul v. Bush, No. 1:06-cv-618 (D.D.C. July 23, 2008) (33 days); Filing Notice, Al-Harbi v. Bush, No. 1:05-cv-2479 (D.D.C. July 23, 2008) (100 days); Filing Notice, Al-Marri v. Bush, No. 1:04-cv-2035 (D.D.C. June 6, 2008) (50 days); Filing Notice, Kahn v. Bush, No. 1:05-cv-1001 (D.D.C. Apr. 3, 2008) (27 days); Filing Notice, Rahmattullah v. Bush, No. 1:05-cv-878 (D.D.C. Apr. 8, 2008) (27 days); Filing Notice, Al-Bahooth v. Bush, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007) (seven days); Filing Notice, Al-Oshan v. Bush, No. 1:05-cv-520 (D.D.C. Dec. 21, 2007) (ten days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Dec. 21, 2007) (seven days); Filing Notice, Sameur v. Bush, No. 1:05-cv-1806 (D.D.C. Dec. 12, 2007) (seven days); Filing Notice, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Dec. 12, 2007) (seven days); Filing Notice, Zadran v. Bush, No. 1:05-cv-2367 (D.D.C. Dec. 5, 2007) (seven days); Filing Notice, Chaman v. Bush, No. 1:05-cv-887 (D.D.C. Dec. 5, 2007) (seven days); Filing Notice, Adem v. Bush, No. 1:05-cv-723 (D.D.C. Nov. 23, 2007) (21 days); Filing Notice, Rahman v. Bush, No. 1:05-cv-882 (D.D.C. Oct. 26, 2007) (seven days); Filing Notice, Al-Shareef v. Bush, No. 1:05-cv-2458 (D.D.C. Oct. 19, 2007) (21 days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Aug. 28, 2007) (eight days); Filing Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 11, 2007) (four days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 11, 2007) (four days); Filing Notice, Hamoud v. Bush, No. 1:05-cv-1894 (D.D.C. June 5, 2007) (13 days); Filing Notice, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. June 5, 2007) (13 days); Filing Notice, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Mar. 27, 2007) (three days); Filing Notice, Gul v. Bush, No. 1:05-cv-888 (D.D.C. Feb. 16, 2007) (12 days); Filing Notice, Mokit v. Bush, No. 1:05-cv-621 (D.D.C. Jan. 29, 2007) (30 days); Filing Notice, Al-Subaiy v. Bush, No. 1:05-cv-1453 (D.D.C. Jan. 19, 2007) (32 days); Filing Notice, Anam v. Bush, No. 1:04-cv-1194 (D.D.C. Dec. 8, 2006) (seven days); Filing Notice, Ghalib v. Bush, No. 1:05-cv-1238 (D.D.C. Dec. 5, 2006) (85 days); Filing Notice, Said v. Bush, No. 1:05-cv-2384 (D.D.C. Nov. 27, 2006) (16 days); Filing Notice, Alsaaei v. Bush, No. 1:05-cv-2369 (D.D.C. Nov. 27, 2006) (14 days); Filing Notice, Al-Rubaish v. Bush, No. 1:05-cv-1714 (D.D.C. Nov. 27, 2006) (16 days); Filing Notice, Akhtiar v. Bush, No. 1:05-cv-1635 (D.D.C. Nov. 15, 2006) (30 days); Filing Notice, Zakirjan v. Bush, No. 1:05-cv-2053 (D.D.C. Nov. 7, 2006) (ten days); Filing Notice, Khan v. Bush, No. 1:05-cv-1491 (D.D.C. Oct. 2, 2006) (nine days); Filing Notice, Faizullah v. Bush, No. 1:05-cv-1489 (D.D.C. Sept. 14, 2006) (27 days); Filing Notice, Mohammadi v. Bush, No. 1:05-cv-1246 (D.D.C. Aug. 31, 2006) (41 days); Filing Notice, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. Aug. 17, 2006) (seven days); Filing Notice, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. June 15, 2006) (nine days); Filing Notice, Al-Aweda v. Bush, No. 1:05-cv-1668 (D.D.C. Apr. 26, 2006) (22 days); Filing Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C.

mained sealed despite government notices that they could be unsealed.[2643] In a few additional cases, transfer notices referred to sealed submissions that were not otherwise reflected on the public record.[2644]

In 2009, the court of appeals vacated the 30-day notice orders as beyond the courts' power.[2645]

Apr. 26, 2006) (59 days); Filing Notice, Al-Rashaidan v. Bush, No. 1:05-cv-586 (D.D.C. Apr. 26, 2006) (22 days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. Apr. 26, 2006) (59 days); Filing Notice, Al-Shihry v. Bush, No. 1:05-cv-490 (D.D.C. Apr. 26, 2006) (59 days); Filing Notice, Qayed v. Bush, No. 1:05-cv-454 (D.D.C. Apr. 26, 2006) (59 days); Filing Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Apr. 26, 2006) (59 days); Filing Notice, Al-Khatemi v. Bush, No. 1:05-cv-2248 (D.D.C. Apr. 24, 2006) (59 days); Filing Notice, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. June 17, 2005) (32 days).

2643. Transfer Notice, *Al-Karim*, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009); Transfer Notice, *Ahmed*, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008); Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008); Transfer Notice, *Wahab*, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008); Transfer Notice, *Al-Qadir*, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008); Transfer Notice, *Feghoul*, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008); Transfer Notice, *Al-Marri*, No. 1:04-cv-2035 (D.D.C. July 29, 2008); Transfer Notice, *Kahn*, No. 1:05-cv-1001 (D.D.C. May 5, 2008); Transfer Notice, *Rahmattullah*, No. 1:05-cv-878 (D.D.C. May 5, 2008); Transfer Notice, *Sameur*, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007); Transfer Notice, *Al-Bahooth*, No. 1:05-cv-1666 (D.D.C. Dec. 21, 2007); Transfer Notices, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. June 27, 2006, and Dec. 31, 2007); Transfer Notices, *Al-Oshan*, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007); Transfer Notices, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007); Transfer Notice, *Zadran*, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007); Transfer Notice, *Chaman*, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007); Transfer Notice, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007); Transfer Notice, *Al-Shareef*, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007); Transfer Notice, *Rahman*, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007); Transfer Notice, *Al-Harbi*, No. 1:05-cv-2479 (D.D.C. July 17, 2007); Transfer Notice, *Hamoudh*, No. 1:05-cv-1894 (D.D.C. June 22, 2007); Transfer Notice, *Abdah*, No. 1:04-cv-1254 (D.D.C. June 22, 2007); Transfer Notice, *Ghalib*, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007); Transfer Notice, *Gul*, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007); Transfer Notice, *Mokit*, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007); Transfer Notice, *Al-Subaiy*, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007); Transfer Notice, *Said*, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006); Transfer Notice, *Alsaaei*, No. 1:05-cv-2369 (D.D.C. Dec. 20, 2006); Transfer Notice, *Al-Rubaish*, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006); Transfer Notice, *Akhtiar*, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006); Transfer Notice, *Anam*, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006); Transfer Notice, *Zakirjan*, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006); Transfer Notice, *Khan*, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006); Transfer Notice, *Faizullah*, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006); Transfer Notice, *Mohammadi*, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006); Transfer Notice, *Kurnaz*, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006); Transfer Notice, *Al-Khatemi*, No. 1:05-cv-2248 (D.D.C. June 27, 2006); Transfer Notice, *Al-Badah*, No. 1:05-cv-1641 (D.D.C. June 27, 2006); Transfer Notice, *Kiyemba*, No. 1:05-cv-1509 (D.D.C. June 27, 2006); Transfer Notice, *Qayed*, No. 1:05-cv-454 (D.D.C. June 27, 2006); Transfer Notice, *Al-Shihry*, No. 1:05-cv-490 (D.D.C. June 27, 2006); Transfer Notice, *Al-Aweda*, No. 1:05-cv-1668 (D.D.C. May 23, 2006); Transfer Notice, *Al-Rashaidan*, No. 1:05-cv-586 (D.D.C. May 23, 2006).

2644. Transfer Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Nov. 13, 2007).

2645. Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1880 (2010); Order, Khadr v. Obama, No. 08-5233 (D.C. Cir. Sept. 3, 2010) (applying the holding in *Kiyemba* to other appeals), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2900 (2011) (noting that Justices Breyer and Sotomayor would have granted certiorari and that Justice Kagan did not participate in the consideration of the certiorari petition).

On October 2, 2007, Judge Kessler enjoined the transfer of Mohammed Abdul Rahman to Tunisia, where he had been tried in absentia and sentenced to 20 years in prison, on representations of fragile health and the possibility of torture in Tunisia.[2646] On December 17, 2010, the court of appeals vacated the injunction on the authority of an intervening case holding that the court may not enjoin a transfer if the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country.[2647]

On August 19, 2011, Judge Walton denied a motion for an order requiring 30 days' notice before a transfer affecting a habeas petition that would leave the detainee in United States custody.[2648]

Protective Order Coordination

On November 2, 2005, the district court's Calendar and Case Management Committee decided that all matters pertaining to interpretation of applicable protective orders or logistical issues, such as attorney communications and visits with detainees, would be referred to Magistrate Judge Alan Kay.[2649]

Although Judge Kay occasionally issued rulings resolving disputes, his primary role was to act as a mediator.[2650] Judge Kay, an experienced mediator, considers mediation to be the legal equivalent of holistic medicine.[2651] Assignment of blame and the adversarial process are not essential components of mediation.[2652] Judge Kay assisted with such matters as last-minute refusals to let attorneys land, the amount of physical restraints during attorney–client meetings, and finding an interpreter to replace one whose security clearance had been suddenly revoked.[2653]

The Justice Department provided the government with attorney representation in the habeas cases, but it was the Defense Department that controlled Guantánamo Bay.[2654] Careful negotiation and mediation were crucial in working out matters with one of the parties so complex and powerful.[2655]

2646. Order, Alhami v. Bush, No. 1:05-cv-359 (D.D.C. Oct. 2, 2007); *see* William Glaberson, *Judge Halts Plan to Transfer Guantánamo Detainee*, N.Y. Times, Oct. 10, 2007, at A16.

2647. Order, Alhami v. Obama, No. 07-5400 (D.C. Cir. Dec. 17, 2010) (citing Order, Bin Mohammed v. Obama, No. 10-5218 (D.C. Cir. July 8, 2010) (citing *Kiyemba*, 561 F.3d at 516)), *cert. dismissed*, ___ U.S. ___, 131 S. Ct. 2091 (2011).

2648. Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Aug. 19, 2011); *see* Motion, *id.* (May 13, 2011).

2649. Order, Rasul v. Bush, No. 1:02-cv-299 (D.D.C. Nov. 2, 2005); *see* Murray Fogler, *The Next Friend Catch-22*, *in* The Guantánamo Lawyers, *supra* note 2548, at 115, 116; Wax, *supra* note 2548, at 178.

Tim Reagan interviewed Judge Kay for this report in the judge's chambers on June 21, 2011.

2650. Interview with Hon. Alan Kay, June 21, 2011; *see* Fogler, *supra* note 2649, at 116; Wax, *supra* note 2548, at 178–79.

2651. Interview with Hon. Alan Kay, June 21, 2011 (noting that successful mediation usually requires teaching, psychology, and humor).

2652. *Id.*

2653. *Id.*

2654. *Id.*

2655. *Id.*

Unconstitutional Stripping of Habeas Jurisdiction

Reviewing in consolidated appeals both Judge Leon's decision that the detainees did not have habeas rights and Judge Green's decision that they did, the court of appeals, on February 20, 2007, determined that the October 17, 2006, Military Commissions Act stripped the federal courts of jurisdiction over Guantánamo Bay habeas petitions.[2656] In *Boumediene v. Bush*, however, the Supreme Court held, on June 12, 2008, that the Military Commissions Act was an unconstitutional suspension of habeas corpus.[2657]

Establishing Procedures for Resolving Several Hundred Petitions

226 Petitions

The last detainee to arrive at Guantánamo Bay was Mohammed Rahim al-Afghani on March 14, 2008.[2658]

Between Judge Green's January 31, 2005, decision that the CSRT was constitutionally infirm and the Supreme Court's *Boumediene* decision, 226 habeas petitions were filed in the District of Columbia's district court on behalf of 560 detainees,[2659] of which at least 78 were duplicates.[2660] Sixty of the petitions were

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2656. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008); *see* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36; *see also* Falkoff, *supra* note 2616, at 402; Hafetz, *supra* note 2565, at 156–57; Meltzer, *supra* note 2559, at 7.

2657. *Boumediene*, 553 U.S. at 733, 792; *see* Robert Barnes, *Justices Say Detainees Can Seek Release*, Wash. Post, June 13, 2008, at A1; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008, at A1; Hafetz, *supra* note 2565, at 158–65; Meltzer, *supra* note 2559, at 9.

2658. *See* Petition at 2, Rahim v. Obama, No. 1:09-cv-1385 (D.D.C. July 27, 2009); *see also* Ben Fox, *Detainee Shows a Taste for Pop Culture*, Miami Herald, Jan. 1, 2013, at 4A.

2659. The cases were assigned the following docket numbers: 1:05-cv-247, 1:05-cv-270, 1:05-cv-280, 1:05-cv-301, 1:05-cv-329, 1:05-cv-345, 1:05-cv-359, 1:05-cv-392, 1:05-cv-409, 1:05-cv-429 through 1:05-cv-431, 1:05-cv-454, 1:05-cv-490, 1:05-cv-492, 1:05-cv-497, 1:05-cv-520, 1:05-cv-526, 1:05-cv-533, 1:05-cv-551, 1:05-cv-569, 1:05-cv-573, 1:05-cv-583, 1:05-cv-584, 1:05-cv-586, 1:05-cv-621, 1:05-cv-634, 1:05-cv-640, 1:05-cv-660, 1:05-cv-665, 1:05-cv-714, 1:05-cv-723, 1:05-cv-748, 1:05-cv-763 through 1:05-cv-766, 1:05-cv-795, 1:05-cv-833, 1:05-cv-877 through 1:05-cv-892, 1:05-cv-993 through 1:05-cv-1002, 1:05-cv-1008 through 1:05-cv-1013, 1:05-cv-1048, 1:05-cv-1124, 1:05-cv-1189, 1:05-cv-1220, 1:05-cv-1233 through 1:05-cv-1244, 1:05-cv-1246, 1:05-cv-1310 through 1:05-cv-1312, 1:05-cv-1347, 1:05-cv-1353, 1:05-cv-1429, 1:05-cv-1453, 1:05-cv-1457, 1:05-cv-1458, 1:05-cv-1487, 1:05-cv-1489 through 1:05-cv-1493, 1:05-cv-1497, 1:05-cv-1504 through 1:05-cv-1506, 1:05-cv-1509, 1:05-cv-1555, 1:05-cv-1590, 1:05-cv-1592, 1:05-cv-1601, 1:05-cv-1602, 1:05-cv-1607, 1:05-cv-1623, 1:05-cv-1635, 1:05-cv-1638, 1:05-cv-1639, 1:05-cv-1641, 1:05-cv-1645, 1:05-cv-1646, 1:05-cv-1649, 1:05-cv-1666 through 1:05-cv-1669, 1:05-cv-1678, 1:05-cv-1679, 1:05-cv-1697, 1:05-cv-1704, 1:05-cv-1714, 1:05-cv-1724, 1:05-cv-1725, 1:05-cv-1779, 1:05-cv-1806, 1:05-cv-1857, 1:05-cv-1864, 1:05-cv-1886, 1:05-cv-1894, 1:05-cv-1971, 1:05-cv-1983, 1:05-cv-2010, 1:05-cv-2029, 1:05-cv-2053, 1:05-cv-2083, 1:05-cv-2087, 1:05-cv-2088, 1:05-cv-2104, 1:05-cv-2112, 1:05-cv-2185, 1:05-cv-2186, 1:05-cv-2197, 1:05-cv-2199, 1:05-cv-2200, 1:05-cv-2201, 1:05-cv-2216, 1:05-cv-2223, 1:05-cv-2248, 1:05-cv-2249, 1:05-cv-2265, 1:05-cv-2336, 1:05-cv-2348, 1:05-cv-2349, 1:05-cv-2367, 1:05-cv-2369 through 1:05-cv-2371, 1:05-cv-2376, 1:05-cv-2378 through 1:05-cv-2381, 1:05-cv-2384 through 1:05-cv-2387, 1:05-cv-2398, 1:05-cv-2399, 1:05-cv-2427, 1:05-cv-2444, 1:05-cv-

2452, 1:05-cv-2458, 1:05-cv-2466, 1:05-cv-2467, 1:05-cv-2477, 1:05-cv-2479, 1:06-cv-618, 1:06-cv-619, 1:06-cv-1668, 1:06-cv-1674, 1:06-cv-1675 through 1:06-cv-1679, 1:06-cv-1681 through 1:06-cv-1691, 1:06-cv-1725, 1:06-cv-1752 through 1:06-cv-1754, 1:06-cv-1757 through 1:06-cv-1761, 1:06-cv-1763, 1:06-cv-1765 through 1:06-cv-1769, 1:07-cv-1710, 1:07-cv-2337, 1:07-cv-2338, 1:08-cv-864, and 1:08-cv-987.

An additional petition on behalf of Does 1 through 570 filed by the Center for Constitutional Rights was dismissed for lack of standing. Opinion, Does v. Bush, No. 1:05-cv-313 (D.D.C. Oct. 31, 2006), *available at* 2006 WL 3096685.

2660. There were at least 62 detainees named in two cases each:

1. Omar Khadr in No. 1:04-cv-1136 was identified as Omar Ahmad in No. 1:05-cv-2386.
2. Riyad Atag Ali Abdoh al-Haj (Atag Ali Abdoh) in No. 1:04-cv-1194 was identified as Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399.
3. Mahmood Salim al-Mohammed in No. 1:05-cv-247 was identified as Mahmoud al-Soury in No. 1:05-cv-429.
4. Sherif el-Mashad and Adel Fattouh Aly Ahmed Algazzar in No. 1:05-cv-270 were identified as Ismail al-Mashad and Ahmed Abdul Rahman, respectively, in No. 1:05-cv-833.
5. Zahir Omar Khamis Bin Hamdoon in No. 1:05-cv-280 was identified as Zaher Omer Bin Hamdoon in No. 1:05-cv-2223.
6. Majid Abdulla al-Joudi and Yousif Mohammad Mubarak al-Shehri in No. 1:05-cv-301 were identified as Maged and Yusuf Asshihri, respectively, in No. 1:05-cv-2386.
7. Ahmed Abdullah al-Wazan in No. 1:05-cv-329 was identified as Younis Shakur in No. 1:05-cv-764.
8. Thani Faris al-Anazi in No. 1:05-cv-345 was identified as Abdulal al-Thani in No. 1:05-cv-2386.
9. Mohammed Abdul Rahman in No. 1:05-cv-359 was identified as Mohammed Abdur Rahman in No. 1:05-cv-2386.
10. Hassan al-Gassary, Muhammed Sidii, and Adel al-Hakeemy in No. 1:05-cv-429 were identified as Laheen Ikasrien in No. 1:05-cv-764, Mohammed al-Amin in No. 1:05-cv-2336, and Adel Ben Ahmad al-Hakeemy in No. 1:05-cv-2386, respectively.
11. Abu Bakker Qassim in No. 1:05-cv-497 was identified as Abu Baker in No. 1:05-cv-2386.
12. Muhammed Fahad al-Qahtany and Musa al-Madany in No. 1:05-cv-520 were identified as Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265 and Mishal al-Madany in No. 1:05-cv-2386, respectively.
13. Ahmed Errachidi in No. 1:05-cv-640 was identified as Ahmed Abu Imran in No. 1:05-cv-764.
14. Abdul Salam Zaeef in No. 1:05-cv-660 was identified as Abdul Salam Deiff in No. 1:05-cv-2386.
15. Elham Battayav in No. 1:05-cv-714 was identified as Elham Bataif in No. 1:05-cv-2386.
16. Salim Muhood Adem in No. 1:05-cv-723 was identified as Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724.
17. Najeeb al-Husseini in No. 1:05-cv-764 was identified as Najeeb in No. 1:05-cv-2386.
18. Chaman in No. 1:05-cv-887 was identified as Chaman Gul Khialigol in No. 1:05-cv-2367.
19. Akhteyar Mohammad in No. 1:05-cv-996 was identified as Mohammad Akhtiar in No. 1:05-cv-1635.
20. Adel Hassan Hamad in No. 1:05-cv-1009 was identified as Adel Hassan in No. 1:05-cv-2386.
21. Haji Nasrat, Ali Shah Mousovi, Izaatullah Nusrat, and Sabar Lal in No. 1:05-cv-1124 were identified as Haji Nasrat in No. 1:05-cv-880, Syed Muhammad Ali Shah in No.

1:05-cv-1012, Ezatullah in No. 1:06-cv-1752, and Sabar Lal in No. 1:06-cv-1763, respectively.

22. Omar Mohammed Khalifh in No. 1:05-cv-1189 was identified as Omar Mohamad Khalifah in No. 1:05-cv-2386.
23. Ali Adel Motaleb Aweid al-Khaiy in No. 1:05-cv-1239 was identified as Abdul Zahir in No. 1:05-cv-1240.
24. Jawad Jabber Sadkhan in No. 1:05-cv-1487 was identified as Jawad Jabbar Sadkhan in No. 1:05-cv-1679.
25. Faraj Abdl al-Hadi Omar Mahmoud in No. 1:05-cv-1490 was identified as Abdul Hadi Omer Hamoud Faraj in No. 1:05-cv-1590.
26. Mohammed Amon in No. 1:05-cv-1493 was identified as Tooran Mohammad Amannullah in No. 1:05-cv-2367.
27. Shafiq in No. 1:05-cv-1506 was identified as Sofiane Mohammed Berhoumi in No. 1:05-cv-2386.
28. Ibrahim Osman Ibrahim Idris in No. 1:05-cv-1555 was identified as Abrahim Othman Abrahim Edries in No. 1:05-cv-1725.
29. Hassan Bin Attash in 1:05-cv-1592 was identified as Omier Ba Atash in 1:05-cv-2386.
30. Hamid al-Razak in No. 1:06-cv-1601 was identified as Qari Hamdullah in No. 1:06-cv-1691.
31. Ahmmed Ghulam Rabbani in No. 1:05-cv-1607 was identified as Ahmmed Ghulam Rabbani in No. 1:05-cv-2386.
32. Hussain Salem Hohammed Almerfedi in No. 1:05-cv-1645 was identified as Hussein Salem Mohammad Abdallah el-Marqodi in No. 1:05-cv-1649.
33. Abdannour Sameur in No. 1:05-cv-1806 was identified as Abdurrachman in No. 1:05-cv-2386.
34. Ravil Mingaza Gamil in No. 1:05-cv-2010 was identified as Ravil Mingazov in No. 1:05-cv-2479.
35. Dr. Abu Muhammed, also known as Fethi Boucetta, in No. 1:05-cv-2087 was identified as Abu Mohammed in No. 1:05-cv-2386.
36. Jabbarow Oybek Jamolivich in No. 1:05-cv-2112 was identified as Jabbarov Oybek Jamolovich in No. 1:05-cv-2386.
37. Abdu al-Qader Hussain al-Mudafari in No. 1:05-cv-2185 was identified as Abdualqader Hossin Ali al-Mothafri in No. 1:05-cv-2200.
38. Ahmed Ben Bacha in No. 1:05-cv-2349 was identified as Ahmed Ben Bacha in No. 1:05-cv-2386.
39. Abdullah Ali Saleh Gerab Alsaaei in No. 1:05-cv-2369 was identified as Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452.
40. Abdur Razakah in No. 1:05-cv-2370 was identified as Abdurazzak in No. 1:05-cv-2386.
41. Abdul Hamid Abdul Salam al-Ghizzawi in 1:05-cv-2378 was identified as Abin Alhamed Abid Alsallam Alkesawi in 1:05-cv-2386.
42. Adel, Abdo Ali al-Haj, and Saif in No. 1:05-cv-2385 were identified as Adel, Shargowi, and Saif Ullah, respectively, in No. 1:05-cv-2386.
43. Sultan al-Shareef in No. 1:05-cv-2385 was identified as Fahd Umar Abdulmajid al-Shareef in No. 1:05-cv-2458.
44. Ali, Mohammed Rimi, Zein al-Abedeen, Abdul Rahman Abdo Abulghaith Sulaiman, and Ali in No. 1:05-cv-2386 were identified as Ali in 1:05-cv-2398, Mohammad Rimi in No. 1:05-cv-2427, Zainulabidin Merozhev in No. 1:05-cv-2479, Abdullrahman Abdo Abo al-Ghith in No. 1:06-cv-1757, and Elisher in No. 1:06-cv-1759, respectively.
45. Alkhadr Abdullah al-Yafie and Tofiq Nasser Awad al-Bihani in No. 1:05-cv-2399 were also petitioners in No. 1:05-cv-2386.
46. Qari Saad Iqbal in No. 1:06-cv-1674 was also the petitioner in No. 1:06-cv-1688.

filed pro se. Most of the other petitions were filed by next friends, of which 26% were brothers, 9% were fathers, 4% were wives, 4% were cousins, 6% were other specified family members (seven uncles, three nephews, two brothers-in-law, one son, and one mother), 7% were family members of unspecified relationship, 34% were other detainees, and 11% were other friends.

Next Friend Validity

On April 1, 2005, the Center for Constitutional Rights filed a habeas petition for Hazi Ahmed, listing fellow detainee Mohammed Mohammed Hassen as his next friend.[2661] The Center had included Hassen as one of 14 petitioners in a July 27, 2004, petition.[2662] On May 24, 2005, Judge Roberts ordered briefing on whether the court should recognize Hassen as Ahmed's next friend—specifically, whether Ahmed otherwise was without access to the court, noting that several detainees had filed pro se petitions, and whether Hassen was sufficiently dedicated to Ahmed's interests.[2663] The government took no position on the issue, but noted, "The Protective Order typically made applicable in the Guantanamo Bay habeas cases permits counsel two visits with a detainee before an authorization of

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47. Naseer in No. 1:06-cv-1676 was also the petitioner in No. 1:06-cv-1689.

At least eight detainees were named in three cases each:

1. Yousuf al-Karany in No. 1:05-cv-429 was identified as M.C. in No. 1:05-cv-430 and as Mohmad Ahmad al-Kara'any in No. 1:05-cv-2336.
2. Ibrahim Towkah in No. 1:05-cv-429 was identified as Ibrahim Mahdi Ahmed Zaidan in No. 1:05-cv-431 and as Ibraheem Zaidan in No. 1:05-cv-2386.
3. Abdul al-Hadi in No. 1:05-cv-429 was identified as Abdul Hadi Ibn el-Hathily al-Hamamy in No. 1:05-cv-766 and as Abdulhadi al-Hamami in No. 1:05-cv-2336.
4. Abdul Aziz al-Mossary in No. 1:05-cv-429 was identified as Abu Abdul Aziz in No. 1:05-cv-1864 and as Alla al-Mossary in No. 1:05-cv-2386.
5. Mohammedou Ould Salahi in No. 1:05-cv-569 was identified as Mohameduo Ould Slahi in No. 1:05-cv-881 and as Mohamedou Ould Slahi in No. 1:05-cv-995.
6. Ameur Mammar in No. 1:05-cv-573 and No. 1:05-cv-1233 was identified as Amer Mohammon in No. 1:05-cv-2386.
7. Abdulzaher in No. 1:05-cv-1236 was identified as Abdul Zahir in No. 1:05-cv-1623 and as Abdulkadr Abdulkhalik Dad in No. 1:05-cv-2083.
8. Ahsanullah Pirzai in No. 1:05-cv-1242 was identified as Ihsan Ullah Peerzai in No. 1:05-cv-1243 and as Ehsan Ullah in No. 1:05-cv-1311.

2661. Petition, Ahmed v. Bush, No. 1:05-cv-665 (D.D.C. Apr. 1, 2005).

The Center for Constitutional Rights "is the umbrella organization coordinating the Guantánamo pro bono project." Candace Gorman, *My Experiences Representing a Guantánamo Detainee*, Litig., Spring 2009, at 10, 10 (reflections by a pro bono attorney who represented two Guantánamo Bay detainees). Originally called the Civil Rights Legal Defense Fund and then the Law Center for Constitutional Rights, the Center was first incorporated in 1966. *See* Ruben, *supra* note 2560, at 26–27.

2662. Petition, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. July 27, 2004) (identifying Hassen as Mohamed Mohamed Hassan Odaini and his brother Bashir Mohamed Hassan Odaini as Hassen's next friend).

2663. Order, *Ahmed*, No. 1:05-cv-665 (D.D.C. May 24, 2005), *available at* 2005 WL 6066070; *see* Adem v. Bush, 425 F. Supp. 2d 7, 13 n.13 (D.D.C. 2006) (noting the order).

representation by the detainee must be provided to respondents."[2664] On the day after the government's response, Judge Roberts signed a protective order, unopposed approval of which had been pending since a week after the case was filed, and the protective order's incorporated procedures for counsel access to detainees provided, "Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee."[2665] On August 8, the government filed a return[2666] pursuant to an order issued by Judge Roberts on July 8.[2667]

On August 31, the government filed a consolidated motion challenging the validity of fellow-detainee next friends in eight cases on behalf of nine detainees.[2668] Judge Friedman denied the motion in the case before him.[2669] Judges Huvelle,[2670] Collyer,[2671] and Robertson[2672] referred the matter, by agreement, to Senior Judge Louis F. Oberdorfer.[2673] The motion in another case was mooted by an amended petition naming the detainee's mother as his next friend.[2674]

On September 23, the government filed a motion with Judge Bates challenging the validity of a fellow-detainee next friend in a case filed earlier that month.[2675] Approximately one week later, Judge Bates issued sua sponte an order in another fellow-detainee next friend case to show cause why that case should not be dismissed for lack of next-friend standing.[2676] One week after that, the peti-

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2664. Government Response, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 23, 2005); *see Adem*, 425 F. Supp. 2d at 13.

2665. Protective Order, Ex. A at ¶ III.C.2, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 24, 2005).

2666. Return, *id.* (Aug. 8, 2005).

2667. Order, *id.* (July 8, 2005).

2668. Motion, Nos. 1:05-cv-1458, 1:05-cv-1497, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1635, and 1:05-cv-1704 (D.D.C. Aug. 31, 2005).

2669. Sept. 26, 2005, *Akhtiar* Order, *supra* note 2629.

2670. Order, Doe v. Bush, No. 1:05-cv-1458 (D.D.C. Oct. 13, 2005).

2671. Order, Shafiq v. Bush, No. 1:05-cv-1506 (D.D.C. Oct. 25, 2005); Order, Al-Hawary v. Bush, No. 1:05-cv-1505 (D.D.C. Oct. 25, 2005); Order, Nabil v. Bush, No. 1:05-cv-1504 (D.D.C. Oct. 25, 2005).

2672. Order, Abu Kabir v. Bush, No. 1:05-cv-1704 (D.D.C. Nov. 1, 2005) (two detainees).

2673. Judge Oberdorfer died on February 21, 2013. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

2674. Notice, Al-Wirghi v. Bush, No. 1:05-cv-1497 (D.D.C. Jan. 11, 2006); Amended Petition, *id.* (Dec. 1, 2005).

2675. Government Motion, Qasim v. Bush, No. 1:05-cv-1779 (D.D.C. Sept. 23, 2005) (petition by detainee Isa Ali al-Murbati as next friend of detainee Muhammed Qasim); *see* Petition, Almurbati v. Bush, No. 1:04-cv-1227 (D.D.C. July 22, 2004) (petition on behalf of six detainees, including Isa Ali Abdulla Almurbati, represented by his brother Mohamad Ali Abdulla Almurbati as next friend).

2676. Order, Hamlily v. Bush, No. 1:05-cv-763 (D.D.C. Oct. 3, 2005); *see* Adem v. Bush, 425 F. Supp. 2d 7, 13 (D.D.C. 2006) (discussing the order); Petition, *Hamlily*, No. 1:05-cv-763 (D.D.C. Apr. 15, 2005) (petition by detainee Shaker Aamer as next friend of detainee Adel Hamlily); *see also* Petition, Deghayes v. Bush, No. 1:04-cv-2215 (D.D.C. Dec. 22, 2004) (petition on behalf of three detainees, including Shaker Abduraheem Aamer, by his father-in-law Saeed Ahmed Siddique as next friend).

tioner's attorneys submitted evidence of a meeting between counsel and the detainee petitioner, which was held after the petition was filed, so the action could become a direct petition without the need for a next friend.[2677] Judge Bates referred the September 23 motion to Judge Oberdorfer.[2678]

Judge Oberdorfer issued the requested order to show cause on November 4.[2679] Judge Kessler issued a similar order to show cause on October 11,[2680] and the court granted the government's motion to consolidate her order with Judge Oberdorfer's.[2681]

Judge Oberdorfer's order to show cause included an order

> that Petitioners and Respondents consult with Magistrate Judge Kay as soon as is practicable (but in any event before the [December 5, 2005,] hearing) to discuss how counsel for Petitioners may obtain access to the detainees who allegedly seek to be represented by next friends to determine if the detainees will authorize counsel to represent them directly.[2682]

Judge Kay ordered the government to comply with applicable protective orders and permit attorneys to meet with petitioners so that they could pursue petitions directly without next friends, and this process began to moot the fellow-detainee-as-next-friend issue for these cases.[2683]

On March 10, 2009, Judge Sullivan dismissed a petition upon determining that the detainee did not want to pursue his case because of his "lack of confidence in the United States judicial process."[2684] Ghassan Abdullah al-Sharbi has been at Guantánamo Bay since March 2002.[2685] The government announced military-commission conspiracy charges against him on November 8, 2005.[2686] On December 8, Abdullah al-Sharbi filed a habeas petition on behalf of his son.[2687] The detainee refused to meet with the attorney that his father found for him, but the attorney endeavored to discover whether the refusal resulted from government interference, coercion, or mental illness.[2688] On August 8, 2008, the detainee wrote a letter to the court explaining in clear English that he did not want to pur-

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2677. Response, *Hamlily*, No. 1:05-cv-763 (D.D.C. Oct. 11, 2005); *see Adem*, 425 F. Supp. 2d at 13.

2678. Order, *Qasim*, No. 1:05-cv-1779 (D.D.C. Oct. 31, 2005).

2679. Order, Nos. 1:05-cv-1458, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1704, and 1:05-cv-1779 (D.D.C. Nov. 4, 2005) [hereinafter Nov. 4, 2005, Oberdorfer Order].

2680. Order, Al-Razak v. Bush, No. 1:05-cv-1601 (D.D.C. Oct. 11, 2005).

2681. Order, *id.* (Nov. 22, 2005).

2682. Nov. 4, 2005, Oberdorfer Order, *supra* note 2679.

2683. *See* Report and Recommendation, Nos. 1:05-cv-1458, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1601, 1:05-cv-1704, and 1:05-cv-1779 (D.D.C. Oct. 6, 2006) [hereinafter Oct. 6, 2006, Report and Recommendation].

2684. Al Sharbi v. Bush, 601 F. Supp. 2d 317, 319 (D.D.C. 2009).

2685. *Id.* at 318.

2686. *See* Neil A. Lewis, *Pentagon Charges 5 More in Guantánamo Bay Camp*, N.Y. Times, Nov. 8, 2005, at A22.

2687. Petition, Al-Sharbi v. Bush, No. 1:05-cv-2348 (D.D.C. Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

2688. *Al Sharbi*, 601 F. Supp. 2d at 318.

sue a habeas action,[2689] and the court received the letter on January 7, 2009.[2690] The dismissal followed a closed 90-minute hearing that Judge Sullivan held on March 6, at which al-Sharbi participated by video conference from Guantánamo Bay.[2691] Al-Sharbi has admitted to being a combatant against the United States.[2692]

Judges Bates,[2693] Leon,[2694] and Walton[2695] dismissed petitions because they were not authorized by the detainees.

Coordination Before Judge Hogan

By the time of the 2008 *Boumediene* decision, at least 195 petitioners had been transferred to other countries, sometimes for release and sometimes for detention and possible prosecution there.[2696] Three petitioners were voluntarily dismissed without prejudice.[2697] Another two petitioners committed suicide.[2698]

2689. Letter, *Al-Sharbi*, No. 1:05-cv-2348 (D.D.C. Jan. 7, 2009).

2690. Docket Sheet, *id.* (Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

2691. *Al Sharbi*, 601 F. Supp. 2d at 318–19.

2692. *See* Tim Golden, *The Battle for Guantánamo*, N.Y. Times, Sept. 17, 2006, at 660.

2693. Kuman v. Obama, 725 F. Supp. 2d 72 (D.D.C. 2010) (dismissing Ahmed Yaslam Said Kuman's petition).

2694. Order, Sliti v. Obama, No. 1:05-cv-429 (D.D.C. Aug. 25, 2010), *available at* 2010 WL 3339182 (dismissing Adel al-Hakeemy's petition).

2695. Docket Sheet, Al-Jayfi v. Bush, No. 1:05-cv-2104 (D.D.C. Oct. 27, 2005) [hereinafter *Al-Jayfi* Docket Sheet] (noting the dismissal of Khalid Mohammed al-Thabbi's petition on February 29, 2012).

2696. "Some have been released outright; more have been turned over to the custody of their home governments." Cucullu, *supra* note 2565, at 53; *see* Inside Guantanamo (National Geographic DVD 2009); *see also* Fletcher & Stover, *supra* note 2547, at 93–115 (describing detainees' experiences following their transfers). *Compare* Murat Kurnaz, Five Years of My Life 218–19 (2008) (report by a detainee that he was told that his release was contingent upon his signing an admission that he belonged to a terrorist organization but that he was released to freedom despite his not signing the admission) *with* Fletcher & Stover, *supra* note 2547, at 89–90 (reporting that detainees were falsely told that their releases were contingent on signing a document, but the document was a promise not to join Al-Qaeda or the Taliban rather than an admission).

For 159 transfers, the government filed notices in the detainees' habeas cases:

1. Eight: Notices, No. 1:02-cv-828 (D.D.C. Jan. 18, 2005, to Sept. 15, 2006) (Nasir Najr Nasir Balud al-Mutayri, Abdullah al-Ajmi, Abdulaziz al-Shammari, Mohammed al-Dihani, Adil al-Zamil, Saad al-Azmi, Omar Rajab Amin, and Abdullah Kamal Abdullah Kamal al-Kandari to Kuwait).
2. One: Notice, No. 1:04-cv-1135 (D.D.C. Aug. 25, 2006) (Murat Kurnaz to Germany); *see* Murat Kurnaz, Five Years of My Life (2008); Baher Azmy, *Free at Last*, *in* The Guantánamo Lawyers, *supra* note 2548, at 346; Bernhard Docke, *Lost and Found*, *in* The Guantánamo Lawyers, *supra* note 2548, at 297; Craig Whitlock, *U.S. Frees Longtime Detainee*, Wash. Post, Aug. 25, 2006, at A9.
3. Six: Notices, No. 1:04-cv-1144 (D.D.C. Apr. 3 and Dec. 21, 2007) (Bisher al-Rawi and Jamil el-Banna to the United Kingdom); Notice, Nos. 1:04-cv-1137, 1:04-cv-1144, and 1:04-cv-1897 (D.D.C. Jan. 25, 2005) (Feroz Ali Abbasi, Moazzam Begg, Richard Belmar, and Martin Mubanga to the United Kingdom); *see* Moazzam Begg, Enemy Combatant 345–74 (2006); *Britain Detains 3 Men Freed by U.S.*, N.Y. Times, Dec. 20, 2007 (reporting on a transfer to Britain of el-Banna and Omar Deghayes, a petitioner in No. 1:04-cv-2215, and one additional detainee, Adbenour Samuer); Glenda Cooper,

Last British Prisoners Leave Guantanamo, Wash. Post, Jan. 26, 2005, at A14 (reporting on the transfer of Abbasi, Begg, Belmar, and Mubanga); Omonira-Oyekanmi & Finn, *supra* note 2562 (reporting on a British damages settlement paid to Abassi, el-Banna, Begg, Belmar, Mubanga, and al-Rawi); Craig Whitlock, *Iraqi Resident of Britain to Leave Guantanamo*, Wash. Post, Mar. 30, 2007, at A11 (reporting on the transfer of al-Rawi).

4. One: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 20, 2006) (Ali Husayn al-Tays to Yemen).
5. Three: Notices, No. 1:04-cv-1227 (D.D.C. Oct. 26, 2006, to Aug. 10, 2007) (Salah Abdul Rasool al-Bloushi and Isa Ali Abdulla Almurbati to Bahrain and Jum'ah Mohammed Abdullatif Aldossari to Saudi Arabia); *see* Joshua Colangelo-Bryan, *Habeas on the Gate, Aftermath*, *in* The Guantánamo Lawyers, *supra* note 2548, at 345 (concerning Jumah al-Dossari); Mahvish Rukhsana Khan, My Guantánamo Diary 298–97 (2008) (same); Josh White, *16 Detainees Transferred from Guantanamo*, Wash. Post, July 17, 2007, at A3 (same).
6. One: Notice, No. 1:04-cv-1254 (D.D.C. June 22, 2007) (Sadeq Mohammed Said to Yemen).
7. Two: Notices, No. 1:04-cv-2215 (D.D.C. Feb. 9, 2006, and Dec. 21, 2007) (Jamal Kiyemba to Uganda and Omar Deghayes to the United Kingdom); *see Britain Detains 3 Men Freed by U.S.*, N.Y. Times, Dec. 20, 2007; Omonira-Oyekanmi & Finn, *supra* note 2562 (reporting on a British damages settlement paid to Deghayes).
8. One: Notice, No. 1:05-cv-23 (D.D.C. Sept. 6, 2007) (Rami Bin Saad al-Oteibi to Saudi Arabia).
9. Four: Notices, No. 1:05-cv-301 (D.D.C. June 27, 2006, to Dec. 31, 2007) (Abdulla Mohammad al-Ghanmi; Majid Abdulla al-Joudi, Maged in No. 1:05-cv-2386; Yousif Mohammad Mubarak al-Shehri, Yusuf Asshihri in No. 1:05-cv-2386; and Abdul-Hakim Abdul-Rahman al-Moosa to Saudi Arabia).
10. Five: Notices, No. 1:05-cv-345 (D.D.C. May 23, 2006, to Dec. 31, 2007) (Adel Egla Hussan al-Nussairi; Ibrahim Suleiman al-Rubaish; Abdulla Thani Faris al-Anazi, Abdulal al-Thani in No. 1:05-cv-2386; Abdulaziz Sa'ad Oshan; and Naief Fahad Mutlaq al-Otaibi to Saudi Arabia).
11. Five: Notices, No. 1:05-cv-429 (D.D.C. Oct. 3, 2005, to Nov. 3, 2008) (Sami al-Laithi, also known as Abdul Aziz al-Mossary, Abu Abdul Aziz in No. 1:05-cv-1864 and Alla al-Mossary in No. 1:05-cv-2386, to Egypt; Abdullah, later identified as Abdullah Bin Omar al-Hajji, to Tunisia; Muhammed Sidii, Mohammed al-Amin in No. 1:05-cv-2336, to Mauritania; and Sami Muhyideen and Amir Yakub to Sudan); *see* Order at 2, Sliti v. Obama, No. 1:05-cv-429 (D.D.C. Nov. 18, 2009), *available at* 2009 WL 4251108 ("Al Hajji is in prison in Tunisia, serving a sentence for an earlier conviction in that country."); Agnieszka Fryszman, *Wrong Side of History*, *in* The Guantánamo Lawyers, *supra* note 2548, at 277, 279 (account by al-Amin's habeas attorney); William Glaberson, *Cameraman Is Released from Guantánamo*, N.Y. Times, May 2, 2008, at A14 (reporting on the transfer of Al-Jazeera cameraman Sami al-Hajj, identified in his petition as Sami Muhyideen, to Sudan); John Robert Holland & Anna Cayton Holland-Edwards, *Representing the Rightless*, *in* The Guantánamo Lawyers, *supra* note 2548, at 289, 293 (according to al-Amin's habeas attorneys, "Mohammed Al Amin is now living free."); Josh White, *6 Detainees Repatriated by Military*, Wash. Post, June 20, 2007, at A6 (concerning Abdullah Bin Omar).
12. Three: Notice, No. 1:05-cv-431 (D.D.C. Nov. 13, 2007) (Usama Hasan Abu Kabir; Ahmad Hassan Jamil Suleiman; and Ibrahim Mahdi Ahmed Zaidan, Ibrahim Towkah in No. 1:05-cv-429 and Ibraheem Zaidan in No. 1:05-cv-2386, to Jordan).
13. One: Notice, No. 1:05-cv-454 (D.D.C. June 27, 2006) (Rashid Abdul Mosleh Qayed to Saudi Arabia).

14. One: Notice, No. 1:05-cv-490 (D.D.C. June 27, 2006) (Abdul-Salam Gaithan Mureef al-Shihry to Saudi Arabia).
15. Five: Notices, No. 1:05-cv-520 (D.D.C. July 20, 2005, to Dec. 31, 2007) (Saleh Abdulla al-Oshan; Musa al-Madany, Mishal al-Madany in No. 1:05-cv-2386; Muhammed Fahad al-Qahtany, Fahad Nasser Mohammed al-Sultan Algahtani in No. 1:05-cv-2265; Zaben Dhaher al-Shammari; and Abdullah Aali al-Otaibi to Saudi Arabia).
16. One: Notice, No. 1:05-cv-533 (D.D.C. Dec. 20, 2006) (Sulaiman Saad Mohaammed al-Oshan to Saudi Arabia).
17. One: Notice, No. 1:05-cv-584 (D.D.C. Nov. 13, 2007) (Murtadha Ali Magram to Saudi Arabia).
18. One: Notice, No. 1:05-cv-586 (D.D.C. May 23, 2006) (Abdullah Ibrahim Abdullah al-Rashaidan to Saudi Arabia).
19. One: Notice, No. 1:05-cv-621 (D.D.C. Mar. 2, 2007) (Wahidof Abdul Mokit to Tajikistan).
20. One: Notice, No. 1:05-cv-640 (D.D.C. May 2, 2007) (Ahmed Errachidi, Ahmed Abu Imran in No. 1:05-cv-764, to Morocco); *see* Christopher Chang, *A Cook, Not a General*, *in* The Guantánamo Lawyers, *supra* note 2548, at 349.
21. One: Notice, Nos. 1:05-cv-714 and 1:05-cv-2386 (D.D.C. Dec. 20, 2006) (Elham Battayav to Kazakhstan).
22. One: Notice, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007) (Salim Muhood Adem, Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724, to Sudan).
23. Two: Notice, No. 1:05-cv-764 (D.D.C. May 5, 2008) (Said to Morocco); Notice, *id.* and No. 1:05-cv-2386 (D.D.C. Feb. 9, 2006) (Najeeb al-Husseini to Morocco).
24. One: Notice, No. 1:05-cv-795 (D.D.C. Oct. 5, 2007) (Sofian Ebrahim Hamad Hamoodah to Libya); *see* Order, *id.* (Nov. 23, 2009), *available at* 2009 WL 4251102 ("Hamoodah [is] apparently being detained by the Libyan government.").
25. One: Notice, No. 1:05-cv-833 (D.D.C. Nov. 20, 2006) (Ala Abdel Maqsud Muhammad Salim to Albania).
26. One: Notice, No. 1:05-cv-878 (D.D.C. May 5, 2008) (Rahmattullah to Afghanistan).
27. One: Notice, No. 1:05-cv-879 (D.D.C. Oct. 24, 2006) (Taj Mohammad to Afghanistan); *see* Mahvish Rukhsana Khan, My Guantánamo Diary 296–97 (2008).
28. One: Notice, No. 1:05-cv-880 (D.D.C. Aug. 29, 2006) (Haji Nasrat, also a petitioner in No. 1:05-cv-1124, to Afghanistan).
29. One: Notice, No. 1:05-cv-882 (D.D.C. Nov. 13, 2007) (Fazil Rahman to Afghanistan).
30. One: Notice, No. 1:05-cv-884 (D.D.C. Oct. 5, 2007) (Muhibullah to Afghanistan).
31. One: Notice, No. 1:05-cv-885 (D.D.C. Oct. 5, 2007) (Alif Mohammad to Afghanistan).
32. One: Notice, No. 1:05-cv-887 (D.D.C. Dec. 14, 2007) (Chaman, Chaman Gul Khialigol in No. 1:05-cv-2367, to Afghanistan).
33. One: Notice, No. 1:05-cv-888 (D.D.C. Mar. 2, 2007) (Nazul Gul to Afghanistan).
34. One: Notice, No. 1:05-cv-890 (D.D.C. Feb. 9, 2006) (Sharbat Khan to Afghanistan).
35. One: Notice, No. 1:05-cv-891 (D.D.C. Oct. 5, 2007) (Nasrullah to Afghanistan).
36. One: Notice, No. 1:05-cv-997 (D.D.C. Feb. 9, 2006) (Khudaidad to Afghanistan).
37. One: Notice, No. 1:05-cv-1000 (D.D.C. Oct. 24, 2006) (Abib Sarajuddin to Afghanistan).
38. One: Notice, No. 1:05-cv-1001 (D.D.C. May 5, 2008) (Abdulla Mohammed Kahn to Afghanistan).
39. One: Notice, No. 1:05-cv-1002 (D.D.C. Aug. 31, 2006) (Akhtar Mohammad to Afghanistan).
40. One: Notice, No. 1:05-cv-1008 (D.D.C. Oct. 24, 2006) (Habibullah Mangut to Afghanistan).

41. One: Notice, No. 1:05-cv-1009 (D.D.C. Dec. 14, 2007) (Adel Hassan Hamad, Adel Hassan in No. 1:05-cv-2386, to Sudan); *see* Wax, *supra* note 2548, at 327–28.
42. One: Notice, No. 1:05-cv-1010 (D.D.C. Oct. 24, 2006) (Mohabat Khan to Afghanistan); *see* Order, *id.* (Nov. 23, 2009), *available at* 2009 WL 4251091 ("Khan's current whereabouts is unknown, but his counsel suspects he may be in custody in Afghanistan.").
43. One: Notice, No. 1:05-cv-1013 (D.D.C. Feb. 9, 2006) (Abdul Salaam to Afghanistan).
44. Two: Notices, No. 1:05-cv-1124 (D.D.C. Oct. 24, 2006, and May 5, 2008) (Ali Shah Mousovi, Syed Syed Muhammad Ali Shah in No. 1:05-cv-1012, and Haji Rohullah Wakil to Afghanistan); *see* Mahvish Rukhsana Khan, My Guantánamo Diary 281–89 (2008) (concerning Mousovi).
45. One: Notice, No. 1:05-cv-1235 (D.D.C. Feb. 9, 2006) (Abdul Baqi to Afghanistan).
46. One: Notice, No. 1:05-cv-1237 (D.D.C. Aug. 10, 2007) (Aminullah to Afghanistan).
47. One: Notice, No. 1:05-cv-1238 (D.D.C. Mar. 2, 2007) (Haji Ghalib to Afghanistan).
48. One: Notice, No. 1:05-cv-1242 (D.D.C. Aug. 29, 2006) (Ahsanullah Pirzai, Ihsan Ullah Peerzai in No. 1:05-cv-1243 and Ehsan Ullah in No. 1:05-cv-1311, to Afghanistan).
49. One: Notice, No. 1:05-cv-1246 (D.D.C. Oct. 24, 2006) (Abdul Majid Mohammadi to Iran).
50. One: Notice, No. 1:05-cv-1453 (D.D.C. Feb. 22, 2007) (Nasser Mazyad Abdullah al-Subaiy to Saudi Arabia).
51. One: Notice, No. 1:05-cv-1489 (D.D.C. Oct. 24, 2006) (Faizullah to Afghanistan).
52. One: Notice, No. 1:05-cv-1491 (D.D.C. Oct. 24, 2006) (Sawat Khan to Afghanistan).
53. One: Notice, No. 1:05-cv-1492 (D.D.C. Oct. 5, 2007) (Abdul Ahmad to Afghanistan).
54. One: Notice, No. 1:05-cv-1493 (D.D.C. Oct. 24, 2006) (Mohammed Amon, Tooran Mohammad Amannullah in No. 1:05-cv-2367, to Afghanistan); Unopposed Motion to Dismiss, No. 1:05-cv-2367 (Jan. 3, 2006).
55. One: Notice, No. 1:05-cv-1509 (D.D.C. June 27, 2006) (Saddiq Ahmed Turkistani to Saudi Arabia).
56. One: Notice, No. 1:05-cv-1635 (D.D.C. Dec. 20, 2006) (Mohammad Akhtiar, Akhteyar Mohammad in No. 1:05-cv-996, to Afghanistan).
57. Three: Notices, No. 1:05-cv-1641 (D.D.C. June 27 to Dec. 20, 2006) (Abdulaziz Abdulrahman al-Badah, Ibrahim Mohammed al-Naser, and Abdulaziz Mohammed al-Naser to Saudi Ariabia).
58. One: Notice, No. 1:05-cv-1666 (D.D.C. Dec. 31, 2007) (Ziyad Bin Salih Bin Muhammad al-Bahooth to Saudi Arabia).
59. One: Notice, No. 1:05-cv-1667 (D.D.C. May 23, 2006) (Abdul-Hadi Muhammed al-Siba'i to Saudi Arabia).
60. One: Notice, No. 1:05-cv-1668 (D.D.C. May 23, 2006) (Rashid Awadh Rashid al-Uwaidah to Saudi Arabia).
61. One: Notice, No. 1:05-cv-1669 (D.D.C. May 23, 2006) (Fahd Bin Salih Bin Sulaiman al-Jutaili to Saudi Arabia).
62. One: Notice, No. 1:05-cv-1697 (D.D.C. Oct. 24, 2006) (Kadeer Khandan to Afghanistan).
63. One: Notice, No. 1:05-cv-1714 (D.D.C. Dec. 20, 2006) (Yousif Abdullah al-Rubaish to Saudi Arabia).
64. One: Notice, No. 1:05-cv-1779 (D.D.C. Nov. 13, 2007) (Muhammed Qasim to Afghanistan); *see* Sahr Muhammed Ally, *Speaking Through Holes in Glass*, *in* The Guantánamo Lawyers, *supra* note 2548, at 339, 340.
65. One: Notice, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007) (Abdannour Sameur, Abdurrachman in No. 1:05-cv-2386, to the United Kingdom).
66. Three: Notice, No. 1:05-cv-1886 (D.D.C. May 5, 2006) (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe to Albania).

67. One: Notice, No. 1:05-cv-1894 (D.D.C. June 22, 2007) (Fawaz Naman Hamoud to Yemen).
68. One: Notice, No. 1:05-cv-2029 (D.D.C. July 17, 2007) (Bender Ayed Hamoud Hezam al-Oteibi al-Shabany to Saudi Arabia).
69. One: Notice, No. 1:05-cv-2053 (D.D.C. Nov. 20, 2006) (Zakirjan to Albania).
70. One: Notice, No. 1:05-cv-2087 (D.D.C. Nov. 20, 2006) (Dr. Abu Muhammed, Dr. Abu Mohammed in No. 1:05-cv-2386, and also known as Fethi Boucetta, to Albania); *see* Anne Castle, Trip Mackintosh & Scott Barker, *Stateless*, *in* The Guantánamo Lawyers, *supra* note 2548, at 335.
71. One: Notice, No. 1:05-cv-2104 (D.D.C. Dec. 20, 2006) (Issam Hamid Ali Bin Ali al-Jayfi to Yemen).
72. One: Notice, No. 1:05-cv-2197 (D.D.C. Dec. 20, 2006) (Mohammed Ahmed Ali al-Asadi to Yemen).
73. Two: Notices, No. 1:05-cv-2201 (D.D.C. Sept. 7 to Nov. 13, 2007) (Muhammed Mubarak al-Kurbi and Naif Abdulla al-Nakheelan to Saudi Arabia).
74. Three: Notices, No. 1:05-cv-2216 (D.D.C. May 23 to July 17, 2007) (Alghamdi Abdulrahman Othman A, Mohammed Bin Jaied Bin Aladi al-Mohammed al-Subaie, and Bijad Defalla Oteibi to Saudi Arabia).
75. One: Notice, No. 1:05-cv-2248 (D.D.C. June 27, 2006) (Saleh Zaid al-Khatemi to Saudi Arabia).
76. Four: Notice, No. 1:05-cv-2367 (D.D.C. Dec. 14, 2007) (Ghulam Roohani, Abdullah Wazir Zadran, Dr. Hiyatullah, and Abdullah Mujahid Haq to Afghanistan); *see* Mahvish Rukhsana Khan, My Guantánamo Diary 245–49 (2008) (reporting that Mujahid was informed that his transfer was imminent ten months before it occurred); Sahr Muhammed Ally, *Speaking Through Holes in Glass*, *in* The Guantánamo Lawyers, *supra* note 2548, at 339, 340 (concerning Ghulam Roohani and Abdullah Wazir).
77. One: Notice, No. 1:05-cv-2369, (D.D.C. Dec. 20, 2006) (Abdullah Ali Saleh Gerab Al-saaei, Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452, to Saudi Arabia).
78. One: Notice, No. 1:05-cv-2376 (D.D.C. Oct. 24, 2006) (Abdul Haleem to Pakistan).
79. Three: Notices, No. 1:05-cv-2384 (D.D.C. Dec. 20, 2006, to Sept. 7, 2007) (Anwar Handan al-Shimmiri, Bandar al-Jaabir, and Salim Said to Saudi Arabia).
80. Sixteen: Notices, No. 1:05-cv-2386 (D.D.C. May 23, 2006, to May 5, 2008) (Saleh Mohammed Ali Azoba, Abdullah al-Quatany, Slaim Harbi, Seed Farha, Fahd al-Haraazi, Fahd al-Fawzan, Khald al-Barkati, Mohammed Harbi, Jabir al-Quatany, and Sad al-Materi to Saudi Arabia; Abdullah to Kazakhstan; Mohsen and Ali al-Kazmi to Yemen; Omar to Afghanistan; and Waleed to Sudan); Notice, *id.* and 1:05-cv-2427 (D.D.C. Dec. 20, 2006) (Mohammed Rimi to Libya); *see* Order, Rimi v. Obama., No. 1:05-cv-2427 (D.D.C. Nov. 23, 2009), *available at* 2009 WL 4251097 (Muhammad Abdallah Mansur al-Futuri Rimi is "apparently being detained by the Libyan government.").
81. Two: Notice, No. 1:05-cv-2458 (D.D.C. Nov. 13, 2007) (Fahd Umar Abdulmajid al-Shareef, Sultan al-Shareef in No. 1:05-cv-2385, and Hani Saeed Mohammed Banan al-Kalf al-Gamdi to Saudi Arabia).
82. One: Notice, No. 1:05-cv-2466 (D.D.C. Oct. 24, 2006) (Anwar Khan to Afghanistan).
83. One: Notice, No. 1:05-cv-2467 (D.D.C. Dec. 20, 2006) (Mubark Hussein to Bangladesh).
84. One: Notice, No. 1:05-cv-2479 (D.D.C. July 17, 2007) (Ghanim-Abdulrahman al-Harbi to Saudi Arabia); *see* Lefrak, *supra* note 2619.
85. One: Notice, No. 1:06-cv-1675 (D.D.C. Dec. 29, 2006) (Wasim to Saudi Arabia).
86. One: Notice, No. 1:06-cv-1679 (D.D.C. Dec. 14, 2007) (Abdul Matin to Afghanistan).

87. One: Notice, No. 1:06-cv-1681 (D.D.C. May 5, 2008) (Sangar Yar Mullah Rahmattullah to Afghanistan).
88. One: Notice, No. 1:06-cv-1682 (D.D.C. Dec. 26, 2006) (Quari Ismatullah to Afghanistan).
89. One: Notice, No. 1:06-cv-1683 (D.D.C. Aug. 10, 2007) (Mohammed Mosa Yaakoobi to Afghanistan).
90. One: Notice, No. 1:06-cv-1685 (D.D.C. Dec. 14, 2007) (Abdul Gafoor Akhouzada to Afghanistan).
91. One: Notice, No. 1:06-cv-1686 (D.D.C. May 2, 2007) (Azeemullah to Afghanistan).
92. One: Notice, No. 1:06-cv-1687 (D.D.C. Dec. 14, 2007) (Ameenullah Toukh to Afghanistan).
93. One: Notice, No. 1:06-cv-1689 (D.D.C. Nov. 13, 2007) (Naseer, also the petitioner in No. 1:06-cv-1676, to Afghanistan).
94. One: Notice, No. 1:06-cv-1752 (D.D.C. Nov. 13, 2007) (Ezatullah, Izaatullah Nusrat in No. 1:05-cv-1124, to Afghanistan); *see* Sahr Muhammed Ally, *Speaking Through Holes in Glass*, *in* The Guantánamo Lawyers, *supra* note 2548, at 339, 340.
95. One: Notice, No. 1:06-cv-1753 (D.D.C. Nov. 13, 2007) (Abdulah Hakmat to Afghanistan).
96. One: Notice, No. 1:06-cv-1763 (D.D.C. Oct. 5, 2007) (Sabar Lal, also a petitioner in No. 1:05-cv-1124, to Afghanistan).
97. One: Notice, No. 1:06-cv-1769 (D.D.C. Dec. 31, 2007) (Khaled Mallouh Shaye Al-gahtani to Saudi Arabia).

There were 11 other transfers noted in voluntary dismissals:

1. Two: Notice, No. 1:02-cv-299 (D.D.C. Aug. 30, 2007) (Shafiq Rasul and Asif Iqbal to the United Kingdom).
2. Three: Status Report, No. 1:04-cv-1142 (D.D.C. July 18, 2008) (Ridouane Khalid, also a petitioner in No. 1:04-cv-547); Consent Motion, *id.* (Sept. 21, 2004) (Mourad Benchellali and Nizar Sassi, also a petitioner in No. 1:04-cv-547); *see* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, N.Y. Times, Feb. 25, 2009, at A5 (discussing transfers to France of Khalid; Benchellali; Sassi; Khaled Ben Mustapha, a petitioner in No. 1:05-cv-22; and one additional detainee, Brahim Yadel); *see also* Wesley R. Powell, *Preserving Our Image*, *in* The Guantánamo Lawyers, *supra* note 2548, at 296, 296 ("all the French detainees were released by early 2005").
3. Three: Status Report, No. 1:05-cv-429 (D.D.C. July 18, 2008) (in addition to other detainees otherwise accounted for, Adel Turkestani to Albania; Ibrahim Fauzee to Maldives; and Hassan al-Gassary, Lahcen Ikasiren in No. 1:05-cv-764, to Spain); *see also* Carol Rosenberg, *Probe Into U.S. Torture Reopens*, Miami Herald, Jan. 14, 2012, at 7A (reporting on Spanish probe into treatment of al-Gassary and three other detainees).
4. One: Status Report, No. 1:05-cv-431 (D.D.C. July 18, 2008) (in addition to other detainees otherwise accounted for, Khalid Mahmood Alasmar to Jordan).
5. One: Notice, No. 1:06-cv-1754 (D.D.C. Jan. 4, 2007) (al-Hasan Legseirein to Saudi Arabia).
6. One: Motion, No. 1:06-cv-1760 (D.D.C. Aug. 9, 2007) (Mohammed Gul to Afghanistan).

A July 14, 2008, status report, Status Report, *In re* Petitioners Seeking Habeas Corpus Relief, No. 1:08-mc-444 (D.D.C. July 14, 2008) (tallying 127 transfers, but counting three detainees twice each and another detainee three times), noted 16 transfers not otherwise accounted for:

1. One: No. 1:02-cv-299 (David Hicks to Australia).
2. One: No. 1:02-cv-1130 (Mamdouh Habib to Australia); *see* Jeffrey M. Strauss, *Family Photo*, *in* The Guantánamo Lawyers, *supra* note 2548, at 358, 360,.

(Since then, at least 77 additional petitioners have been transferred from Guantánamo Bay,[2699] 18 have been dismissed without prejudice,[2700] and four have died.[2701])

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3. Three: No. 1:04-cv-1227 (Adel Kamel Abdulla Hajee, Abdullah Majed Sayyah Hasan Alnoaimi, and Salman Bin Ibrahim Bin Mohammed Bin Ali al-Khalifa to Bahrain).
4. One: No. 1:05-cv-22 (Khaled Ben Mustapha to France); *see* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, N.Y. Times, Feb. 25, 2009, at A5.
5. Two: No. 1:05-cv-497 (Abu Bakker Qassim, Abu Baker in No. 1:05-cv-2386, and A'del Abdu al-Hakim to Albania); *see also* Qassim v. Bush, 466 F.3d 1073 (D.C. Cir. 2006).
6. One: No. 1:05-cv-551 (Majid Radhi al-Toume al-Shamri to Saudi Arabia).
7. One: No. 1:05-cv-660 (Abdul Salam Zaeef, Abdul Salam Deiff in No. 1:05-cv-2386, to Afghanistan); *see* Mahvish Rukhsana Khan, My Guantánamo Diary 134–41 (2008) (describing Zaeef as a former Taliban ambassador).
8. One: No. 1:05-cv-665 (Hazi Ahmed to France).
9. One: No. 1:05-cv-1011 (Abdul Zuhoor to Afghanistan).
10. One: No. 1:05-cv-1241 (Abdul Hakim Abdul Karim Amin Bukhari to Saudi Arabia).
11. One: No. 1:06-cv-1677 (Mohammed Naseem to Afghanistan).
12. One: No. 1:06-cv-1678 (Gulbas Khan to Afghanistan).
13. One: No. 1:06-cv-1768 (Saed Farhan al-Maliki to Saudi Arabia).

An April 19, 2007, motion filed simultaneously in several cases, *e.g.*, Motion to Dismiss, Abu Imran v. Bush, No. 1:05-cv-764 (D.D.C. Apr. 19, 2007), noted an additional nine transfers not otherwise accounted for:

1. Four: No. 1:05-cv-764 (Mohammed Mazoz, Moussa, Ridouane Shakur, and Tareq).
2. Three: No. 1:05-cv-2385 (Abd al-Rahman Abdullah al-Halmandy, Inshanullah, and Shamsullah).
3. Two: No. 1:05-cv-2386 (Saalih and Hamad).

2697. Notice, No. 1:05-cv-2444 (D.D.C. Sept. 20, 2006) (Talal Ahmed Mohammed Ali Almjrd; voluntary dismissal on the government's representation that the person on whose behalf the petition was filed was not a detainee at Guantánamo Bay); Stipulation, No. 1:05-cv-1124 (D.D.C. Oct. 26, 2005) (Abd al-Rahman and Abdul Rahman Aziz Khan).

2698. Notice, No. 1:05-cv-1857 (D.D.C. June 12, 2006) (Mani Shaman Turki al-Habardi al-Utaybi); Notice, No. 1:05-cv-2452 (D.D.C. June 12, 2006) (Saleh Ali Abdullah al-Salami); *see* George Daly, *Don't Take It Personally*, *in* The Guantánamo Lawyers, *supra* note 2548, at 282 (reflections by his habeas attorney on al-Utaybe's suicide); Jeffrey Davis, *Pending Release*, *id.* at 283 (same); *see* Mahvish Rukhsana Khan, My Guantánamo Diary 153–65 (2008) (reflections by his legal interpreter on al-Salami's suicide).

2699. There were 59 transfers documented by notices of transfer in the detainees' habeas cases:

1. Two: Notices, No. 1:02-cv-828 (D.D.C. Oct. 9 and Dec. 14, 2009) (Khalid Bin Abdullah al-Mutairi and Fouad al-Rabia to Kuwait); *see* Carol Rosenberg, *Guantánamo Detainees Sent to Kuwait, Belgium*, Miami Herald, Oct. 9, 2009 (al-Mutairi).
2. One: Notice, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009) (Saber Lahmar to France).
3. One: Notice, No. 1:04-cv-1194 (D.D.C. Dec. 22, 2009) (noting Abd al-Hakim Ahmad Alhag's transfer to Yemen, but this appears to be an error and an intended notice concerning Riyad Atiq Ali Abdu al-Haj al-Radai, Riyadh Ateek Ali Abdu al-Haj in No. 1:05-cv-2399).
4. Three: Notice, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2009, and July 13, 2010) (Faruq Ali Ahmed, Jamal Muhammad 'Alawi Mar'I, and Mohamed Mohamed Hassan Odaini to Yemen).
5. One: Notice, No. 1:04-cv-2035 (D.D.C. July 29, 2008) (Jarallah al-Marri to Qatar).

6. One: Notice, No. 1:04-cv-2046 (D.D.C. Jan. 22, 2010) (Ahcene Zemiri to Algeria).
7. One: Notice, No. 1:05-cv-270 (D.D.C. Feb. 24, 2010) (Sherif el-Mashad, Ismail al-Mashad in No. 1:05-cv-833, to Albania).
8. One: Notice, No. 1:05-cv-409 (D.D.C. Dec. 22, 2009) (Ayman Saeed Batarfi to Yemen).
9. Three: Notice, No. 1:05-cv-429 (D.D.C. Oct. 9, 2008, to June 11, 2009) (Mustafa Ibrahim to Sudan; Ahmad Abu Abduttawaab to Somaliland; and Mohammed el-Gharani, M.C. in No. 1:05-cv-430 and Mohmad Ahmad al-Kara'any in No. 1:05-cv-2386, to Chad).
10. Two: Notices, No. 1:05-cv-526 (D.D.C. Aug. 30, 2009, to July 19, 2010) (Mohammed Khan Tumani to Portugal and Abd al-Nasir Khan Tumani to Cape Verde).
11. One: Notice, No. 1:05-cv-573 (D.D.C. Oct. 9, 2008) (Ameur Mammar, also the petitioner in No. 1:05-cv-1233 and Amer Mohammon in No. 1:05-cv-2386, to Algeria).
12. One: Notice, No. 1:05-cv-763 (D.D.C. Jan. 22, 2010) (Adel Hamlily to Algeria).
13. One: Notice, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009) (Benjamin Mohammed al-Habashi to United Kingdom); *see* Yvonne R. Bradley, *A Rigged Process*, *in* The Guantánamo Lawyers, *supra* note 2548, at 173, 176 ("Ironically, he was flown to freedom from Guantánamo to the United Kingdom on the same type of Gulfstream aircraft that the CIA commandeered from Jeppesen Dataplan to fly him across the Middle East for torture and rendition.").
14. One: Status Report, No. 1:05-cv-886 (D.D.C. Sept. 2, 2008) (Abdul Wahab to Afghanistan).
15. One: Notice, No. 1:05-cv-998 (D.D.C. Jan. 21, 2009) (Arkan Mohammad Ghafil al-Karim to Iraq).
16. One: Notice, No. 1:05-cv-1220 (D.D.C. Feb. 24, 2010) (Abu Abdul Rauf Zalita to Albania).
17. One: Notice, No. 1:05-cv-1234 (D.D.C. Nov. 10, 2008) (Labed Ahmed to Algeria).
18. One: Notice, No. 1:05-cv-1239 (D.D.C. Jan. 21, 2009) (Ali Adel Motaleb Aweid al-Khaiy, Ali Abdulmotalib Aweid Hassan Altaiy in No. 1:05-cv-1240, to Iraq).
19. One: Notice, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011) (Farhi Saeed Bin Mohammed to Algeria).
20. One: Notice, No. 1:05-cv-1487 (D.D.C. June 11, 2009) (Jawad Jabbar Sadkhan, also the petitioner in No. 1:05-cv-1679, to Iraq).
21. One: Notice, No. 1:05-cv-1505 (D.D.C. Nov. 10, 2008) (Abbar Sufian al-Hawary to Algeria).
22. Four: Notice, No. 1:05-cv-1509 (D.D.C. June 11, 2009) (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat to Bermuda).
23. Six: Notice, No. 1:05-cv-1602, 1:05-cv-2370, 1:05-cv-2398, and 1:08-cv-1310 (D.D.C. Nov. 2, 2009) (Ahmad Tourson; Abdul Ghappar Abdul Rahman, Abdurahman in No. 1:05-cv-2386; Edham Mamet; Anwar Hassan, also a petitioner in No. 1:05-cv-2386; Dawut Abdurehim; and Adel Noori, Adel in 1:05-cv-2385 and No. 1:05-cv-2386, to Palau).
24. One: Notice, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009) (Alla Ali Bin Ali Ahmed to Yemen).
25. One: Notice, No. 1:05-cv-2367 (D.D.C. Dec. 22, 2009) (Mohammad Rahim to Afghanistan).
26. Two: Notices, No. 1:05-cv-2385 (D.D.C. Sept. 2, 2008, to Dec. 2, 2009) (Muhammed Saad Iqbal Madni to Pakistan and Riad Nargeri to Italy); *see Court Reverses Conviction of Former Guantánamo Prisoner*, N.Y. Times, Feb. 7, 2012, at A12 (reporting that a conviction of Nargeri, also known as Mohamed Ben Riadh Nasri, in Italy was overturned).

27. Four: Notices, No. 1:05-cv-2386 (D.D.C. June 15, 2009, to July 19, 2010) (Abdul Aziz al-Noofayaee to Saudi Arabia; Adel Bin Mabrouk to Italy; Saif Ullah, Saif in No. 1:05-cv-2385, to Albania; and Abdul Aziz Naji to Algeria).
28. One: Notice, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008) (Zainulabidin Merozhev, Zein al-Abedeen in No. 1:05-cv-2386, to Tajikistan).
29. One: Notice, No. 1:06-cv-618 (D.D.C. Sept. 1, 2008) (Abdulli Feghoul to Algeria); *see* Christi Charpentier, *Bittersweet*, *in* The Guantánamo Lawyers, *supra* note 2548, at 348.
30. One: Notice, No. 1:06-cv-619 (D.D.C. Jan. 21, 2009) (Abbas Abid Rumi to Iraq).
31. One: Notice, No. 1:06-cv-1684 (D.D.C. Dec. 22, 2009) (Mohammad Ahmed Taher to Yemen).
32. One: Notice, No. 1:08-cv-987 (D.D.C. Aug. 30, 2009) (Moammar Badawi Dokhan to Portugal).
33. One: Notice, No. 1:08-cv-1104 (D.D.C. Jan. 21, 2009) (Bashir Ghalaab to Algeria).
34. One: Notice, No. 1:08-cv-1153 (D.D.C. Dec. 22, 2009) (Mohammed Sulaymon Barre to Somaliland).
35. One: Notice, No. 1:08-cv-1185 (D.D.C. Sept. 1, 2008) (Mohammed Abd-Al al-Qadir to Algeria).
36. One: Notice, No. 1:08-cv-1222 (D.D.C. Dec. 22, 2009) (Sharifullah to Afghanistan).
37. One: Notice, No. 1:08-cv-1223 (D.D.C. Sept. 2, 2008) (Mahbub Rahman to Afghanistan).
38. Two: Notice, Nos. 1:08-cv-1229 and 1:08-cv-1231 (D.D.C. Aug. 1, 2008) (Yakubi to Afghanistan and Abdulah Alhamiri to United Arab Emirates).
39. One: Notice, No. 1:08-cv-1230 (D.D.C. June 15, 2009) (Khalid Said Mohammed al-Saif to Saudi Arabia).
40. One: Notice, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009) (Ismail Mohamed to Somaliland).

One transfer was noted in an order by the court of appeals: Order, No. 09-5254 (D.C. Cir. Aug. 17, 2010) (Ayman Mohammed Ahmed al-Shurfa, petitioner in the district court, No. 1:05-cv-431).

Six additional transfers were noted in reports by news media:

1. One: Peter Finn & Julie Tate, *Freed Algerian Detainee Flown to France*, Wash. Post, May 16, 2009, at A1 (reporting on transfer of Lakhdar Boumediene, petitioner in No. 1:04-cv-1166, to France); *see also* Mark. C. Fleming, *A Stunning Reversal*, *in* The Guantánamo Lawyers, *supra* note 2548, at 219, 221 ("the first time a European country accepted a Guantánamo prisoner who was neither its citizen nor its former resident"); Hafetz, *supra* note 2565, at 248; Scott Sayare, *After Guantanamo, Starting Anew, in Quiet Anger*, N.Y. Times, May 26, 2012, at A5 (reporting that the French government provided public housing for Boumediene and his family in Nice, and that Boumediene had trouble finding employment there).
2. Three: William Glaberson, *U.S. Is Set to Release 3 Detainees From Base*, N.Y. Times, Dec. 16, 2008, at A28 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir, petitioners in No. 1:04-cv-1166, to Bosnia and Herzegovina).
3. One: Mónica Ceberio Belaza, *"Al Qaeda Will Kill Me if I Go Home,"* El País, June 29, 2010, at 3 (reporting on the transfer of the petitioner in No. 1:05-cv-889 to Spain).
4. One: *Guantánamo Detainee Released*, N.Y. Times, Aug. 25, 2009, at A8 (reporting on the release of Mohammed Jawad, petitioner in No. 1:05-cv-2385, to Afghanistan).

There are 11 additional transfers reported in the *New York Times*' online database of Guantánamo Bay detainee information, http://projects.nytimes.com/guantanamo:

1. One: Adel Fattough Ali Algazzar, petitioner in Nos. 1:05-cv-270 and 1:05-cv-833, to Slovakia on January 24, 2010.
2. One: Rafiq Bin Bashir Bin Jallul Alhami, petitioner in No. 1:05-cv-359, to Slovakia on January 24, 2010.

Approximately three weeks after the Supreme Court's *Boumediene* decision, by which time another four petitions on behalf of four detainees had been

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3. One: Hedi Hammamy, also known as Abdul Haddi Bin Hadiddi, petitioner in 1:05-cv-429, 1:05-cv-766, and 1:05-cv-2386.
4. One: Abdul Rahim Abdul Razak al-Janko, petitioner in Nos. 1:05-cv-1310 and 1:10-cv-1702 (damages case), to Belgium on October 9, 2009.
5. Two: Bahtiyar Mahnut, identified as Sadar, and Arkin Mahmud, identified as Arkeen, petitioners in No. 1:05-cv-1704, to Switzerland on March 23, 2010.
6. One: Oybek Jamoldinivich Jabbarov, petitioner in Nos. 1:05-cv-2112 and 1:05-cv-2386, to Ireland on September 27, 2009.
7. One: Abin Alhamed Abid Alsallam Alkesawi, petitioner in Nos. 1:05-cv-2378 and 1:05-cv-2386, to Georgia on March 23, 2010.
8. One: Abd al-Zaher, petitioner in No. 1:05-cv-2386, to Slovakia on January 24, 2010.
9. One: Mohammed al-Palestini, petitioner in No. 1:05-cv-2386, to Spain on February 24, 2010.
10. One: Qari Saad Iqbal, petitioner in No. 1:06-cv-1674 and No. 1:06-cv-1688, to Pakistan on August 31, 2008.

On April 25, 2011, the government reported that 604 detainees had been transferred from Guantánamo Bay since the detention facility had been opened. Geoff Morrell & Dan Fried, *A Statement by the United States Government*, N.Y. Times, Apr. 25, 2011, at A11.

2700. Stipulated Dismissal, Bin Attash v. Obama, No. 1:05-cv-1592 (June 14, 2013) [hereinafter *Bin Attash* Stipulated Dismissal]; Stipulated Dismissal, Mohammon v. Obama, No. 1:05-cv-2386 (May 20, 2013) [hereinafter Hidar Stipulated Dismissal]; Stipulated Dismissal, Zaid v. Obama, No. 1:05-cv-1646 (May 20, 2013) [hereinafter *Zaid* Stipulated Dismissal]; Stipulated Dismissal, Bin Lep v. Obama, No. 1:09-cv-31 (Apr. 5, 2013) [hereinafter *Bin Lep* Stipulated Dismissal]; Stipulated Dismissal, Nasser v. Obama, No. 1:07-cv-1710 (D.D.C. Mar. 13, 2013) [hereinafter *Nasser* Stipulated Dismissal]; Stipulated Dismissal, Al-Shubati v. Obama, No. 1:07-cv-2338 (D.D.C. Mar. 13, 2013) [hereinafter *Al-Shubati* Stipulated Dismissal]; Stipulated Dismissal, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Mar. 11, 2013) [hereinafter Al-Marwalah Stipulated Dismissal] (Bisheer al-Marwalah); Stipulated Dismissal, *id.* (Mar. 11, 2013) [hereinafter Al-Swidi Stipulated Dismissal] (Abdulaziz al-Swidi); Stipulated Dismissal, *id.* (Mar. 11, 2013) [hereinafter Mahdi Stipulated Dismissal] (Ali Yaha Mahdi); Stipulated Dismissal, Al-Shimrani v. Obama, No. 1:05-cv-2249 (D.D.C. Mar. 1, 2013) [hereinafter *Al-Shimrani* Stipulated Dismissal]; Stipulated Dismissal, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Feb. 22, 2013) [hereinafter Abdulayev Stipulated Dismissal] (Umar Hamazayevich Abdulayev); Notice, Alkhemisi v. Obama, No. 1:05-cv-1983 (D.D.C. Nov. 2, 2012) [hereinafter Al-Bakush Voluntary Dismissal] (Ismael Ali Farag al-Bakush); Docket Sheet, Al-Khalaqi v. Bush, No. 1:05-cv-999 (D.D.C. May 18, 2005) (noting a dismissal on July 2, 2012); Order, Mattan v. Obama, No. 1:09-cv-745 (D.D.C. Oct. 28, 2011) (Sharqawi Abdu Ali al-Hajj, Abdo Ali al-Haj in No. 1:05-cv-2385 and Shargowi in No. 1:05-cv-2386); Notice, Abdessalam v. Obama, No. 1:06-cv-1761 (D.D.C. Oct. 4, 2011); Order, Al-Adahi v. Obama, No. 1:05-cv-280 (D.D.C. Mar. 24, 2010); Order, *id.* (Dec. 22, 2009) [hereinafter Bawazir Dismissal], *available at* 2009 WL 5196155; Notice, Albkri v. Bush, No. 1:05-cv-1639 (D.D.C. July 18, 2008).

2701. Notice, Nassim v. Obama, No. 1:09-cv-1332 (D.D.C. May 23, 2011) [hereinafter *Nassim* Death Notice] (Hajji Nassim by apparent suicide); Notice, Gul v. Obama, No. 1:08-cv-1224 (D.D.C. Feb. 3, 2011) (Awal Gul of natural causes); Notice, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. June 3, 2009) [hereinafter Al-Hanashi Death Notice] (Mohammad Ahmed Abdullah Saleh al-Hanashi by apparent suicide); *see* Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. Times, Sept. 12, 2012, at A22 (Adnan Farhan Abdul Latif by apparent suicide on Sept. 9, 2012).

filed,[2702] the district court decided, in executive session, that Judge Hogan, who had recently assumed senior status, would handle "coordination and management" of all Guantánamo Bay habeas petitions,[2703] with the exception of Hamdan's petition and nine cases assigned to Judge Leon, who opted out of the coordination plan.[2704] The court assigned one miscellaneous case number to coordination of 121 cases pertaining to detainees, *In re Guantanamo Bay Detainee Litigation*,[2705] and another case number to coordination of 103 cases pertaining to previous detainees, *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*.[2706] Later, Judge Sullivan also opted out of the coordination plan.[2707]

On April 1, 2010, Judge Hogan determined that the court no longer had jurisdiction over previous detainees' cases.[2708] By this time, another 38 petitions on behalf of 40 detainees had been filed,[2709] of which at least four were

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2702. The cases were assigned the following docket numbers: 1:08-cv-1085, 1:08-cv-1101, 1:08-cv-1104, and 1:08-cv-1153; *see* Josh White & Del Quentin Wilber, *Guantanamo Detainee to File Habeas Petition*, Wash. Post, June 26, 2008, at A14.

2703. The court gave Judge Hogan an extra law clerk for one year to help him with these cases. Interview with Hon. Royce C. Lamberth, May 13, 2011; Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

2704. *In re* Petitioners Seeking Habeas Corpus Relief, 567 F. Supp. 2d 83 (D.D.C. 2008); Order, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. July 2, 2008); *see* Al-Adahi v. Obama, 613 F.3d 1102, 1104 (D.C. Cir. 2010); *see also* Palazzolo, *supra* note 2609.

Judge Lamberth, who had been chief judge for one month when the Supreme Court issued its *Boumediene* decision, presided over regular meetings of judges hearing the habeas cases, including Judge Leon, who otherwise opted out of the coordination plan. Interview with Hon. Royce C. Lamberth, May 13, 2011.

2705. Docket Sheet, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 2, 2008).

2706. Docket Sheet, *In re* Petitioners Seeking Habeas Corpus Relief, No. 1:08-mc-444 (D.D.C. July 3, 2008) [hereinafter Former Guantánamo Detainees Docket Sheet].

2707. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 309, 310 n.1 (D.D.C. 2008); *see* Palazzolo, *supra* note 2609.

2708. *In re* Petitioners Seeking Habeas Corpus Relief, 700 F. Supp. 2d 119 (D.D.C. 2010).

2709. The cases were assigned the following docket numbers: 1:08-cv-1173, 1:08-cv-1185, 1:08-cv-1207, 1:08-cv-1221 through 1:08-cv-1224, 1:08-cv-1227 through 1:08-cv-1238, 1:08-cv-1310, 1:08-cv-1360, 1:08-cv-1440, 1:08-cv-1628, 1:08-cv-1789, 1:08-cv-1805, 1:08-cv-1828, 1:08-cv-1923, 1:08-cv-2019, 1:08-cv-2083, 1:09-cv-31, 1:09-cv-873, 1:09-cv-904, 1:09-cv-1332, 1:09-cv-1385, 1:09-cv-1460 through 1:09-cv-1462, and 1:10-cv-407.

duplicates,[2710] and another three turned out to have already been transferred to Afghanistan.[2711]

The court of appeals, considering the petitions of two detainees who had been transferred without rescission of their designation as enemy combatants, agreed with Judge Hogan, on July 22, 2011, that their petitions were without Article III remedy.[2712] The court of appeals expressly and summarily affirmed Judge Hogan's April 1, 2010, ruling on August 10, 2012.[2713]

Merits Rulings

Judge Leon

Proceeding with his retained cases, Judge Leon held a status conference on July 24, 2008, for a petition by six Algerians apprehended in Bosnia, where they held either dual citizenship or legal residence.[2714] Judge Leon determined that to justify detention the government had to show by a preponderance of the evidence that the detainee was an enemy combatant:

> an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[2715]

From November 2008 through June 2009, Judge Leon granted seven habeas petitions, and the petitioners were transferred out of Guantánamo Bay, and he denied five petitions; one of the denied petitioners was transferred anyway, two denials were affirmed by the court of appeals, and two appeals remain in abeyance.

2710. There were at least three detainees named in two cases each:

1. Houmad Warzly in No. 1:05-cv-2385 was identified as Hamoud Abdullah Hamoud Hassan al-Wady in No. 1:08-cv-1237.
2. Abdurahman in No. 1:05-cv-2386 was identified as Abdul Ghaffar in No. 1:08-cv-1310.
3. Abdul Rahim Hussein Muhamed Ali Nashir in No. 1:08-cv-1085 was identified as Abd al-Rahim Hussain Mohammed al-Nashiri in No. 1:08-cv-1207.

At least one detainee was named in three cases: Adel in Nos. 1:05-cv-2385 and 1:05-cv-2386 was identified as Adel Noori in No. 1:08-cv-1310.

2711. Notice, Hafiz v. Obama, No. 1:09-cv-1461 (D.D.C. Dec. 22, 2009) (noting the transfer of Abdul Hafiz to Afghanistan); Notice, Hashim v. Obama, No. 1:09-cv-1460 (D.D.C. Dec. 22, 2009) (noting the transfer of Mohammed Hashim to Afghanistan); Notice, Hafizullah v. Bush, No. 1:08-cv-1227 (D.D.C. Nov. 10, 2008) (noting that the detainee had been transferred a year and a half before the petition was filed).

2712. Gul v. Obama, 652 F.3d 12 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1906 (2012).

2713. Opinion, Chaman v. Obama, No. 10-5130 (D.C. Cir. Aug. 10, 2012), *available at* 2012 WL 3797596.

2714. Boumediene v. Bush, 579 F. Supp. 2d 191, 193–95 (D.D.C. 2008); *see 6 Tied to Terror Are Given to U.S. by Bosnia, Despite Court Ruling*, N.Y. Times, Jan. 19, 2002, at A8.

2715. Boumediene v. Bush, 583 F. Supp. 2d 133, 135 (D.D.C. 2008); *see* Bensayah v. Obama, 610 F.3d 718, 721 (D.C. Cir. 2010).

On November 20, 2008, Judge Leon ruled that classified evidence presented to the court established that Belkacem Bensayah was an Al-Qaeda facilitator.[2716] Judge Leon ruled against the government with respect to the other five detainees and ordered them released.[2717] As Judge Leon urged in court, the government did not appeal the release orders,[2718] but Bensayah appealed the decision against him.[2719] On appeal, the government changed its contention from Bensayah's providing support to Al-Qaeda to Bensayah's being part of Al-Qaeda, and the court of appeals determined that the change necessitated a remand to the district court.[2720] The parties, however, have consented to an extension of time to request a rehearing of the appeal.[2721] Although Bensayah remains at Guantánamo Bay, the last of the successful Bosnian petitioners was released on November 30, 2009.[2722] The government announced in September 2012 that Bensayah is approved for transfer once a transfer country can be identified.[2723]

On December 30, 2008, Judge Leon denied two habeas petitions.[2724]

2716. *Bensayah*, 610 F.3d at 721–22; Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. 2008), *vacated*, 610 F.3d 718; *see* William Glaberson & Bernie Becker, *Judge Declares Five Detainees Held Illegally*, N.Y. Times, Nov. 21, 2008, at A1 ("It was the first hearing on the government's evidence for holding detainees at Guantánamo."); Del Quentin Wilber, *5 at Guantanamo Ordered Released*, Wash. Post, Nov. 21, 2008, at A2.

2717. *Bensayah*, 610 F.3d at 721; *Boumediene*, 579 F. Supp. 2d at 196–99; *see* Glaberson & Becker, *supra* note 2716; Hafetz, *supra* note 2565, at 244; Chisun Lee, *Their Own Private Guantánamo*, N.Y. Times, July 23, 2009, at A31; Wilber, *supra* note 2716; Paul M. Winke, *A Day in Court*, *in* The Guantánamo Lawyers, *supra* note 2548, at 350, 357.

2718. *Boumediene* Docket Sheet, *supra* note 2569; *see* Glaberson & Becker, *supra* note 2716; Hafetz, *supra* note 2565, at 244; Winke, *supra* note 2717, at 357.

2719. Docket Sheet, Bensayah v. Obama, No. 08-5537 (D.C. Cir. Dec. 31, 2008); *see* Winke, *supra* note 2717, at 357.

2720. *Bensayah*, 610 F.3d at 720, 725–27; *see* Charlie Savage, *Appeals Court Sides with Guantánamo Detainee*, N.Y. Times, July 4, 2010, at A15.

2721. Order, *Bensayah*, No. 08-5537 (D.C. Cir. May 6, 2013) (setting the deadline for a petition for rehearing at August 19, 2013).

2722. Notice, Boumediene v. Obama, No. 1:04-cv-1166 (D.D.C. Dec. 1, 2009) (noting the release of Saber Lahmar to France); *see* Steven Erlanger, *Ex-Detainee Describes His 7 Years at U.S. Site*, N.Y. Times, May 27, 2009, at A10 (reporting on Lakhdar Boumediene's release to France on May 15, 2009); Steven Erlanger, *France: Algerian Freed From Guantánamo Prison*, N.Y. Times, Dec. 2, 2009, at A10 (reporting on Lahmar's release); Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, Wash. Post, Dec. 16, 2008, at A2 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir to Bosnia and Herzegovina); Peter Finn & Julie Tate, *4 From Guantanamo Are Sent to Europe*, Wash. Post, Dec. 1, 2009, at A6 (reporting on Lahmar's release); Peter Finn & Julie Tate, *Freed Algerian Detainee Flown to France*, Wash. Post, May 16, 2009, at A1 (reporting on Lakhdar Boumediene's transfer to France); William Glaberson, *U.S. Is Set to Release 3 Detainees From Base*, N.Y. Times, Dec. 16, 2008, at A28 (reporting on the release of Mohammed Nechle, Hadj Boudella, and Mustafa Ait Idir to Bosnia and Herzegovina).

2723. *See* Transfer Approval List, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. Sept. 21, 2012) [hereinafter Sept. 21, 2012, Transfer Approval List].

2724. Al-Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. 2008); *see* William Glaberson, *Judge Agrees with Bush in Ruling on 2 Detainees' Status*, N.Y. Times, Dec. 31, 2008, at A15.

Hisham Sliti, a native of Tunisia, was detained by Pakistani authorities in October 2000 while attempting to fly from Afghanistan to Europe on a false passport.[2725] He escaped but was again apprehended by Pakistani authorities while attempting to flee from Afghanistan in late 2001.[2726] Pakistan transferred him to U.S. custody, and the United States transferred him to Guantánamo Bay.[2727] On March 2, 2005, attorneys filed a habeas petition on behalf of Sliti and 15 other detainees.[2728] Treatment of Sliti at Guantánamo Bay, and mistreatment of his Quran, were reportedly related to a widespread hunger strike later that year.[2729] By the time of Sliti's December 2008 habeas hearing, 11 of Sliti's co-petitioners had been transferred to Albania, Egypt, Jordan, Maldives, Mauritania, Somaliland, Spain, Sudan, and Tunisia.[2730] Judge Leon found that the evidence that Sliti's travels were financed by extremists with ties to Al-Qaeda implied that Sliti was an Al-Qaeda recruit.[2731] An appeal is pending,[2732] but the government has announced that Sliti is approved for transfer once a transfer country can be identified.[2733]

Judge Leon also found adequate proof that Moath Hamza Ahmed al-Alwi, a Yemeni apprehended in Pakistan in late 2001, stayed at a guesthouse and received military training at a camp, both of which were associated with the Taliban or Al-Qaeda.[2734] The court of appeals affirmed on July 22, 2011.[2735]

On January 14, 2009, Judge Leon granted Mohammed el-Gharani's habeas petition.[2736] El-Gharani was a native of Saudi Arabia and a citizen of Chad; he was apprehended in 2001 at the age of 14.[2737]

> Unlike most of the other cases reviewed to date by this Court, the Government's evidence against el Gharani consists principally of the statements made by two other detain-

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2725. *Sliti*, 592 F. Supp. 2d at 48.

2726. *Id.*

2727. *Id.*

2728. Docket Sheet, Sliti v. Bush, No. 1:05-cv-429 (D.D.C. Mar. 2, 2005); *Sliti*, 592 F. Supp. 2d at 48.

2729. *See* Neil A. Lewis, *Widespread Hunger Strike at Guantánamo*, N.Y. Times, Sept. 18, 2005, at 124.

2730. *Supra* notes 2696, 2699.

Yousuf al-Karany was transferred to Chad the following June. *Supra* note 2699.

2731. *Sliti*, 592 F. Supp. 2d at 50.

2732. Docket Sheet, Sliti v. Obama, No. 09-5104 (D.C. Cir. Mar. 31, 2009); *see* Status Report, *id.* (May 24, 2013) (unopposed request to continue abeyance).

2733. Sept. 21, 2012, Transfer Approval List, *supra* note 2723.

2734. Al-Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008).

2735. Al-Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2739 (2012).

2736. El Gharani v. Bush, 593 F. Supp. 2d 144 (D.D.C. 2009); *see* William Glaberson, *Rulings of Improper Detentions in Cuba as the Bush Era Closes*, N.Y. Times, Jan. 19, 2009, at A1; Del Quentin Wilber, *Citing Weak Evidence, Judge Orders Guantanamo Detainee Freed*, Wash. Post, Jan. 15, 2009, at A11.

2737. *El Gharani*, 593 F. Supp. 2d at 145, 147; *see* Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; Glaberson, *supra* note 2736; Stafford Smith, *supra* note 2548, at 146–50; *see also id.* at 147 ("People born in Saudi Arabia of foreign parents are not considered as Saudis.").

> ees while incarcerated at Guantanamo Bay. . . . [T]he credibility and reliability of the detainees being relied upon by the Government has either been directly called into question by Government personnel or has been characterized by Government personnel as undetermined.[2738]

The government released el-Gharani to Chad on June 11.[2739]

On January 28, Judge Leon denied the petition of Ghaleb Nassar al-Bihani on evidence that he served with the 55th Arab Brigade in support of the Taliban against the Northern Alliance.[2740] The court of appeals affirmed.[2741]

Judge Leon denied Hedi Hammamy's petition on April 2.[2742] Hammamy is a Tunisian arrested in Pakistan in April 2002, and Judge Leon found adequate proof that he fought in the battle of Tora Bora.[2743] Hammamy had been charged with terrorism activity in Italy, and his identification papers were found at Tora Bora.[2744] He was transferred to Georgia on March 23, 2010.[2745]

Judge Leon granted a petition on June 22.[2746] Abdul Rahim Abdul Razak al-Janko, a Syrian citizen, admitted to staying at a Taliban guesthouse and attending the al-Farouq training camp, but he claimed that he did this involuntarily.[2747] The government conceded that he was subsequently imprisoned by Al-Qaeda and tortured into a false confession that he was a U.S. spy,[2748] and Judge Leon concluded that after such treatment he could not have been part of Al-Qaeda or the Taliban when he was apprehended by the United States.[2749] Al-Janko was released from Guantánamo Bay,[2750] and, on October 5, 2010, he filed a civil action against the government alleging torture.[2751] On December 22, 2011, Judge Leon determined

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2738. *El Gharani*, 593 F. Supp. 2d at 147.

2739. Transfer Notice, Sliti v. Obama, No. 1:05-cv-429 (D.D.C. June 11, 2009) [hereinafter El-Gharani Transfer Notice]; *see* Finn & Somashekhar, *supra* note 2737.

2740. Al-Bihani v. Obama, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); *see* Lee, *supra*, note 2717.

2741. Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1814 (2011); *see Justices Reject Appeals of Detainees at Guantanamo*, Wash. Post, Apr. 5, 2011, at A6 [hereinafter *Justices Reject Appeals*].

2742. Hammamy v. Obama, 604 F. Supp. 2d 240 (D.D.C. 2009).

2743. *Id.*

2744. *Id.* at 243–44.

2745. *See* http://projects.nytimes.com/guantanamo.

2746. Al Ginco v. Obama, 634 F. Supp. 2d 109 (D.D.C. 2009); Al-Ginco v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009); *see* Del Quentin Wilber, *Judge Orders Guantanamo Detainee's Release*, Wash. Post, June 23, 2009, at A12.

2747. *Al-Ginco*, 626 F. Supp. 2d at 128.

2748. *Id.* at 127; *see* Hafetz, *supra* note 2565, at 246; *see* Al-Janko v. Gates, 831 F. Supp. 2d 272, 275 (D.D.C. 2011).

2749. *Al-Ginco*, 626 F. Supp. 2d at 129–30; *see* Hafetz, *supra* note 2565, at 246.

2750. "The United States did not appeal the ruling, and the plaintiff was finally released from Guantanamo on October 7, 2009." *Al-Janko*, 831 F. Supp. 2d at 276

2751. Docket Sheet, Al-Janko v. Gates, No. 1:10-cv-1702 (D.D.C. Oct. 5, 2010); *see Al-Janko*, 831 F. Supp. 2d at 274; *see also* Spencer S. Hsu, *Ex-Detainee Sues the U.S., Saying Captors Tortured Him*, Wash. Post, Oct. 7, 2010, at A4 ("Janko says that he was urinated on by his American captors, slapped, threatened with loss of fingernails, and exposed to sleep deprivation, extreme cold and stress positions.").

that because al-Janko was no longer a detainee, the court did not have jurisdiction over his complaint.[2752]

Uighurs

Twenty-two of the Guantánamo Bay detainees were ethnic Uighurs, and there are reports that the government of China used the international effort to combat terror as an opportunity to squelch Uighur separatism in China.[2753]

On March 10, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of two Uighurs: Abu Bakker Qassim and A'del Abdu al-Hakim.[2754] The court assigned the petition to Judge Robertson.[2755] On July 13 and 15, counsel met the petitioners for the first time and learned that at least two months previously the CSRT had determined that Qassim and al-Hakim were not enemy combatants.[2756] The government provided neither the attorneys nor Judge Robertson with notice of the CSRT ruling.[2757] On July 22, the attorneys filed a motion for their clients' immediate release.[2758] Recognizing that returning the Uighurs to China could subject them to persecution and releasing them within the United States could have national security implications, Judge Robertson concluded, on December 22, that although the continued detention of the petitioners was unlawful the court could not provide a remedy.[2759] On May 5, 2006, three days before oral argument on the petitioners' appeal, the government released Qassim, al-Hakim, and three other Uighurs to a United Nations refugee camp in Albania.[2760]

2752. *Al-Janko*, 831 F. Supp. 2d 272; *see Judge Dismisses Former Gitmo Detainee's Lawsuit*, Nat'l L.J., Jan. 2, 2012, at 8. An appeal is pending. Docket Sheet, Al-Janko v. Gates, No. 12-5017 (D.C. Cir. Jan. 15, 2012) (noting that the reply brief was filed on April 15, 2013).

2753. Qassim v. Bush, 382 F. Supp. 2d 126, 128 n.4 (D.D.C. 2005); *see* Cucullu, *supra* note 2565, at 139–40; Charlie Savage, *Two Guantánamo Detainees Freed, the First in 15 Months*, N.Y. Times, Apr. 20, 2012, at A8; Simard, *supra* note 2559, at 369, 379.

2754. Petition, Qassim v. Bush, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005); Qassim v. Bush, 407 F. Supp. 2d 198, 199 (D.D.C. 2005); *see* Simard, *supra* note 2559, at 382.

2755. Docket Sheet, *Qassim*, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005).

2756. *Qassim*, 407 F. Supp. 2d at 199; *Qassim*, 382 F. Supp. 2d at 127; Release Motion, *Qassim*, No. 1:05-cv-497 (D.D.C. July 22, 2005) [hereinafter *Qassim* Release Motion].

2757. *Qassim*, 407 F. Supp. 2d at 199; *Qassim*, 382 F. Supp. 2d at 127.

2758. *Qassim* Release Motion, *supra* note 2756.

2759. *Qassim*, 407 F. Supp. 2d 198; *see* Neil A. Lewis, *Freed from Guantánamo but Stranded Far from Home*, N.Y. Times, Aug. 15, 2006, at A15; Simard, *supra* note 2559, at 382–84.

2760. Qassim v. Bush, 466 F.3d 1073, 1074 (D.C. Cir. 2006); Notice, Mamet v. Bush, No. 1:05-cv-1886 (D.D.C. May 5, 2006) (Ayoub Haji Mamet, Aktar Doe, and Ahmad Doe); *see* Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. Times, June 10, 2007, at 11; Lewis, *supra* note 2759; Abu Bakker Qassim, *The View from Guantánamo*, N.Y. Times, Sept. 17, 2006, at 415; Savage, *supra* note 2753; Simard, *supra* note 2559, at 384–85; Stafford Smith, *supra* note 2548, at 264–65; P. Sabin Willett, *Exile*, *in* The Guantánamo Lawyers, *supra* note 2548, at 329.

> These Uighurs now live in a refugee camp, monitored by armed guards, and surrounded by razor wire. Integration has been hard for them because there is no Uighur community in Albania, and they do not speak the language. Albania is not a highly sought country for asylum because of its economic situation and poverty.

Simard, *supra* note 2559, at 386.

From July 29 through December 14, 2005, six habeas petitions were filed on behalf of an additional 17 Uighur detainees.[2761] The Center for Constitutional Rights filed a petition on behalf of 159 detainees in December 2005,[2762] and two of these detainees were Uighurs; they were given a new case number so that their case could be consolidated before Judge Urbina with other Uighur cases.[2763]

One of the detained Uighurs was Huzaifa Parhat, who, on December 4, 2006, filed one of the first appeals from the CSRT.[2764] On June 20, 2008, the court of appeals, in the only CSRT appeal to reach the merits, determined that the evidence presented to the CSRT was insufficient to support Parhat's designation as an enemy combatant.[2765] "The government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the petitioners should be detained as enemy combatants."[2766]

Habeas proceedings concerning the Uighurs received considerable public attention and were attended by Uighurs from the extensive local Uighur community and by Uighurs from elsewhere in the United States and from other countries.[2767] On October 9, Judge Urbina ruled that the government had to release the 17 remaining Uighurs within the United States, because it had taken too long to find somewhere else to send them.[2768]

It was reported that Albania refused to accept additional Uighurs because of pressure from China. Cucullu, *supra* note 2565, at 227.

2761. Petition, Thabid v. Bush, No. 1:05-cv-2398 (D.D.C. Dec. 14, 2005) (two Uighur detainees); Petition, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Dec. 12, 2005) (two Uighur detainees); Petition, Mamet v. Bush, No. 1:05-cv-1886 (D.D.C. Sept. 23, 2005) (two Uighur detainees); Petition, Abu Kabir v. Bush, No. 1:05-cv-1704 (D.D.C. Aug. 25, 2005) (two Uighur detainees); Petition, Mamet v. Bush, No. 1:05-cv-1602 (D.D.C. Aug. 11, 2005) (one Uighur detainee); Petition, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. July 29, 2005) (eight Uighur detainees and one Saudi detainee).

2762. Petition, Mohammon v. Bush, No. 1:05-cv-2386 (D.D.C. Dec. 21, 2005).

The petition appeared to be on behalf of 167 detainees, but some detainees were listed more than once. On July 29, 2008, Judge Hogan dismissed without prejudice all but 29 of the petitioners from this case. Order, *id.* (July 29, 2008).

2763. Docket Sheet, Ghaffar v. Bush, No. 1:08-cv-1310 (D.D.C. July 30, 2008); *see* Order, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 30, 2008) (ordering a new case number).

2764. Docket Sheet, Parhat v. Rumsfeld, No. 06-1397 (D.C. Cir. Dec. 4, 2006) [hereinafter D.C. Cir. *Parhat* Docket Sheet].

The Detainee Treatment Act of 2005 gave the U.S. Court of Appeals for the District of Columbia Circuit exclusive jurisdiction over CSRT appeals. Pub. L. 109-163, § 1405(e), 119 Stat. 3364, 3477 (2006), 10 U.S.C. § 801 note (2011).

2765. Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008); *see* William Glaberson, *U.S. Court, in a First, Voids Finding by Tribunal*, N.Y. Times, June 24, 2008, at A15; Hafetz, *supra* note 2565, at 249; Josh White & Del Quentin Wilber, *Appeals Court Invalidates Detainee's "Enemy" Status*, Wash. Post, June 24, 2008, at A14.

2766. Kiyemba v. Obama, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

2767. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

2768. *In re* Guantanamo Bay Detainee Litig., 581 F. Supp. 2d 33 (D.D.C. 2008); *see* Kent Spriggs, *The Tallahassee Uighur Settlement Project*, *in* The Guantánamo Lawyers, *supra* note 2548, at 314, 315 ("The Lutheran refugee agency for the greater Washington, D.C., area was to take fourteen of the Uighurs, and Tallahassee was to take three. The plans of both groups were proffered to Judge Urbina and became part of the record."); *see also* Cucullu, *supra* note 2565, at

On February 18, 2009, the court of appeals vacated Judge Urbina's order.[2769] Judges A. Raymond Randolph and Karen Lecraft Henderson held that the judicial branch did not have the authority to order admission of aliens.[2770] Judge Judith W. Rogers would have remanded for consideration of whether immigration detention would be proper.[2771] On June 11, the government released Parhat and three other Uighurs to Bermuda.[2772]

The Supreme Court granted a writ of certiorari on October 20.[2773] The government transferred six Uighurs to Palau in November.[2774] Palau offered to accept six of the remaining seven Uighurs, but they declined the offer.[2775] One of the Uighurs who declined, Bahtiyar Mahnut, did so because the offer was not extended to his brother, Arkin Mahmud, because he suffered from mental illness.[2776] Switzerland agreed to take the brothers.[2777] On May 1, 2010, the Supreme Court decided not to review the case after all, because all of the Uighurs had been offered places of resettlement outside China and the United States, and most of them had

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227; William Glaberson, *In Blow to President, Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. Times, Oct. 8, 2008, at A15; Hafetz, *supra* note 2565, at 249; Savage, *supra* note 2753; Del Quentin Wilber, *Chinese Muslims Ordered Released from Guantanamo*, Wash. Post, Oct. 8, 2008, at A1.

2769. *Kiyemba*, 555 F.3d 1022; *see* William Glaberson, *Appeals Court Stops Release of 17 Detainees in U.S.*, N.Y. Times, Feb. 19, 2009, at A18; Hafetz, *supra* note 2565, at 249–50; Del Quentin Wilber & Carrie Johnson, *Court Blocks Release of 17 Uighurs Into U.S.*, Wash. Post, Feb. 19, 2009, at A4.

2770. *Kiyemba*, 555 F.3d at 1023–32.

2771. *Id.* at 1032–39 (Judge Rogers, concurring in the judgment).

2772. Notice of Transfer, Kiyemba v. Obama, No. 1:05-cv-1509 (D.D.C. June 11, 2009) (Abdul Nasser, Jalal Jaladin, Abdul Semet, and Huzaifa Parhat); *see* Erik Eckholm, *Freed from Guantánamo, Uighur Muslims Bask in Bermuda*, N.Y. Times, June 15, 2009, at A4; Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, Wash. Post, June 12, 2009, at A1; William Glaberson, *6 Guantánamo Detainees Are Released to Other Countries as Questions Linger*, N.Y. Times, June 12, 2009, at A6; Hafetz, *supra* note 2565, at 250; Savage, *supra* note 2753.

2773. Kiyemba v. Obama, 558 U.S. 969 (2009); *see* Robert Barnes, *Supreme Court to Hear Uighurs' Case*, Wash. Post, Oct. 21, 2009, at A1; Hafetz, *supra* note 2565, at 250; Adam Liptak, *Justices to Hear Appeal from Uighurs Held at Guantánamo*, N.Y. Times, Oct. 21, 2009, at A14.

2774. Notice of Transfer, Ghaffar v. Obama, No. 1:08-cv-1310 (D.D.C. Nov. 2, 2009) (Abdul Ghappar Abdul Rahman and Adel Noori); Notice of Transfer, Thabid v. Obama, No. 1:05-cv-2398 (D.D.C. Nov. 2, 2009) (Anwar Hassan and Dawut Abdurehim); Notice of Transfer, Razakah v. Obama, No. 1:05-cv-2370 (D.D.C. Nov. 2, 2009) (Ahmad Tourson); Notice of Transfer, Mamet v. Obama, No. 1:05-cv-1602 (D.D.C. Nov. 2, 2009) (Edham Mamet); *see* Hafetz, *supra* note 2565, at 250; David Johnston, *6 Uighurs Leave Guantánamo for Palau*, N.Y. Times, Nov. 1, 2009, at 14; Savage, *supra* note 2753.

2775. *See* Del Quentin Wilber & Peter Finn, *Uighur Brothers to Resettle in Switzerland*, Wash. Post, Feb. 4, 2010, at A10.

2776. *See* Carol Rosenberg, *Swiss Resettle 2 Uighurs from Guantánamo, Georgia Takes Libyans*, Miami Herald, Mar. 24, 2010; Wilber & Finn, *supra* note 2775.

2777. *See* Rosenberg, *supra* note 2776; Savage, *supra* note 2753; Wilber & Finn, *supra* note 2775.

accepted the offers.[2778] The judges on the court of appeals reinstated their original opinions on August 9.[2779] On April 18, 2011, the Supreme Court denied certiorari. Justice Kagan recused herself, and four justices observed that offers of resettlement from two countries "and the Government's uncontested commitment to continue to work to resettle petitioners" made the case one that did not present "the important question whether a district court may order the release of an unlawfully held prisoner into the United States *where no other remedy is available*."[2780]

El Salvador offered to accept the five remaining Uighurs; in 2012, Ahmed Mohamed and Abdul Razak accepted the offer.[2781]

Returns

For the cases assigned to him for coordination, Judge Hogan ordered the government to begin filing or amending factual returns at the rate of 50 per month, beginning August 29, 2008.[2782] Just before midnight on August 29, after having filed ten returns, the government moved for a 30-day extension of all return deadlines, arguing that accommodating the classified information associated with the returns had been unexpectedly time-consuming.[2783] Judge Hogan reluctantly granted the motion.[2784] In November, Judge Hogan ordered that the public files include unclassified versions of the returns.[2785]

Conditions of Confinement

On September 22, in response to motions for access to medical records and other relief, Judge Hogan ruled that although the Supreme Court had declared unconstitutional the Military Commissions Act of 2006's stripping of jurisdiction over core habeas corpus claims, the precedent did not apply to the act's stripping of jurisdiction over claims concerning conditions of confinement, so Judge Hogan

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2778. Kiyemba v. Obama, 559 U.S. 131 (2010); *see* Robert Barnes, *Court Declines to Rule on Resettlement of Guantanamo Detainees*, Wash. Post, Mar. 2, 2010, at A5; Hafetz, *supra* note 2565, at 250; Adam Liptak, *Supreme Court Refuses Ruling on Chinese Uighurs Held at Guantánamo*, N.Y. Times, Mar. 2, 2010, at A16.

2779. Kiyemba v. Obama, 605 F.3d 1046, 1047 (D.C. Cir. 2010) ("we reinstate our original opinion, as modified here to take account of new developments"); *id.* at 1048 (Judge Rogers, concurring in the judgment) ("my separate concurrence . . . must . . . also be reinstated, acknowledging certain new developments").

2780. Kiyemba v. Obama, 563 U.S. ___, 131 S. Ct. 1631 (2011) (statement of Justice Breyer, joined by Justices Kennedy, Ginsburg, and Sotomayor); *see* Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. Times, Apr. 19, 2011, at A18.

It was reported that the five remaining Uighurs were offered transfer to Maldives or Palau. Savage, *supra* note 2753.

2781. *See* Carol Rosenberg, *U.S. Sends Captives to El Salvador*, Miami Herald, Apr. 20, 2012, at 3A; Savage, *supra* note 2753.

2782. *In re* Guantanamo Bay Detainee Litig., 564 F. Supp. 2d 14, 16 (D.D.C. 2008).

2783. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 309, 310 (D.D.C. 2008).

The Justice Department did not begin organizing evidence against the detainees until the Supreme Court's *Boumediene* decision. Interview with Hon. Royce C. Lamberth, May 13, 2011.

2784. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 310.

2785. Case Management Order, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. Nov. 6, 2008), *available at* 2008 WL 4858241.

denied the motions.[2786] Judge Roberts, the merits judge for one of the cases, decided on reconsideration that the motion concerned the detainee's ability to pursue his core habeas claims and granted relief on November 28.[2787]

Judges Urbina,[2788] Bates,[2789] and Kessler[2790] agreed with Judge Hogan that the court had no jurisdiction over conditions of confinement.

Zayn al-Abidin Muhammad Husayn,[2791] a Palestinian also known as Abu Zubaydah, was identified in early 2000 as a suspected key lieutenant of Osama Bin Laden's.[2792] In March 2002, he was captured in Faisalabad, Pakistan.[2793] He was waterboarded at least several dozen times the following August.[2794] Information derived from his interrogation helped to identify Jose Padilla as a terrorism suspect.[2795] Destruction of videotapes of Abu Zubaydah and other detainees' harsh interrogations led to a high-profile criminal investigation that ultimately resulted in no criminal charges.[2796] On September 6, 2006, President Bush an-

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2786. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 314 (D.D.C. 2008); *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 312 (D.D.C. 2008).

As Congress considered stripping Guantánamo Bay detainees of habeas corpus rights, habeas attorneys contemplated urging a compromise in which only jurisdiction over conditions of confinement would be stripped. *See* Gary A. Isaac, *The Great Writ Gets Political: Defending Habeas Corpus in Court, in Congress, and on the Campaign Trail*, *in* The Guantánamo Lawyers, *supra* note 2548, at 200, 205, 212–13.

2787. Husayn v. Gates, 588 F. Supp. 2d 7 (D.D.C. 2008).

2788. Tumani v. Obama, 598 F. Supp. 2d 67, 69 (D.D.C. 2008) (denying a motion for less restrictive detention); *In re* Guantanamo Bay Detainee Litig., 570 F. Supp. 2d 13, 19 (D.D.C. 2008) (same).

2789. Khadr v. Bush, 587 F. Supp. 2d 225, 234–37 (D.D.C. 2008) (overruling a challenge to confinement as an adult).

2790. Al-Adahi v. Obama, 596 F. Supp. 2d 111, 117–20 (D.D.C. 2009) (denying an injunction against the government's methods of force-feeding two hunger-striking detainees).

2791. Docket Sheet, Husayn v. Gates, No. 1:08-cv-1360 (D.D.C. Aug. 6, 2008) [hereinafter *Husayn* Docket Sheet].

2792. *See* Judith Miller, *Dissecting a Terror Plot From Boston to Amman*, N.Y. Times, Jan. 15, 2001, at A1; James Risen, *Foiled Terror Plot on Tourists Linked to Bin Laden Aide*, N.Y. Times, Feb. 29, 2000, at A1; Soufan, *supra* note 2590, at 380–81; *see also* Hafetz, *supra* note 2565, at 232 ("Interrogators later realized that Zubaydah was merely a low-level personnel clerk who helped facilitate travel to training camps in Afghanistan."); Soufan, *supra* note 2590, at 381 ("It was not until the Obama administration was in office that U.S. official stopped calling him a senior al-Qaeda member.").

2793. *See* Michael R. Gordon, *A Top Qaeda Commander Believed Seized in Pakistan*, N.Y. Times, Mar. 31, 2002, at 112; Soufan, *supra* note 2590, at 373–74.

2794. *See* Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. Times, Apr. 20, 2009, at A1.

2795. *See* Hafetz, *supra* note 2565, at 46, 232; Eric Lichtblau & Adam Liptak, *Questioning to Be Legal, Humane and Aggressive, the White House Says*, N.Y. Times, Mar. 4, 2003, at A13; Terry McDermott & Josh Meyer, The Hunt for KSM 218–19 (2012); Soufan, *supra* note 2590, at 354, 427; *see also supra*, "Dirty Bomber."

2796. *See* Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal*

nounced that Abu Zubaydah and 13 other terrorism suspects, including Khalid Sheikh Mohammed, who is understood to be the mastermind of the September 11, 2001, attacks, had been transferred from secret CIA prisons to Guantánamo Bay.[2797]

At Guantánamo Bay, Abu Zubaydah suffered from frequent and severe seizures.[2798] He claimed that side effects from treatment provided at Guantánamo Bay "rendered him incoherent, interfered with his ability to write and speak, and made him acutely psychotic."[2799] Judge Roberts granted Abu Zubaydah's attorneys access to his medical records and gave them permission to share them with an independent physician.[2800] Judge Urbina also granted a habeas petitioner's attorneys access to the client's medical records.[2801] Judge Sullivan appointed the court's "own medical/mental health expert to examine the Petitioner and provide the Court with a report and any recommendations" in response to representations that forcefeeding the detainee with a corn-based solution to which he might have been allergic was causing vomiting so extensive that it was interfering with attorney–client visits.[2802] A court-appointed doctor visited the detainee the following month.[2803]

Inquiry Into C.I.A. Tapes, N.Y. Times, Jan. 3, 2008, at A1; Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12; Larry Siems, The Torture Report 59–97 (2011); Soufan, *supra* note 2590, at 434 ("Declassified internal CIA e-mails show senior CIA officials stating the urgency and importance of destroying the tapes.").

2797. *See* Cucullu, *supra* note 2565, at 5; Hafetz, *supra* note 2565, at 48; Sheryl Gay Stolberg, David Johnston & Mark Mazzetti, *President Moves 14 Held in Secret to Guantánamo*, N.Y. Times, Sept. 7, 2006, at A1.

2798. Husayn v. Gates, 588 F. Supp. 2d 7, 9 (D.D.C. 2008); *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 314, 315 (D.D.C. 2008); *see also* Soufan, *supra* note 2590, at 381–84 (describing Abu Zubaydah's precarious health soon after his capture).

2799. *Husayn*, 588 F. Supp. 2d at 9.

2800. *Id.* at 12.

Judge Roberts overruled the government's redactions from the medical records of "certain, limited information based on a determination that Petitioner's counsel does not have the requisite need-to-know the information," reasoning that "[t]he petitioner's counsel has a security clearance and is presumed to have a need to know the information that he is requesting." Order, Husayn v. Gates, No. 1:08-cv-1360 (D.D.C. Mar. 4, 2009), *available at* 2009 WL 544492. The government complied with the order, reserving the right to rebut need to know in appropriate cases. Government Response, *id.* (Mar. 6, 2009).

2801. Tumani v. Obama, 598 F. Supp. 2d 67, 70–71 (D.D.C. 2008).

2802. Zuhair v. Bush, 592 F. Supp. 2d 16 (D.D.C. 2008); *see id.* at 17 ("in order to ensure that Petitioner has meaningful access to counsel, that his counsel are able to adequately communicate with him in order to represent his claims to this Court, and to preserve this Court's jurisdiction over Petitioner's habeas petition"); *see* Order, Zuhair v. Bush, No. 1:08-cv-864 (D.D.C. Jan. 16, 2009), *available at* 2009 WL 111690 ("The report shall not be filed on the public docket, however, the Court will provide copies to counsel for the parties.").

2803. Docket Sheet, *Zuhair*, No. 1:08-cv-864 (D.D.C. May 19, 2008) (noting a January 2009 visit); *see* Report, *id.* (Aug. 24, 2009).

In 2012, it was reported that attorneys for Abu Zubaydah requested his prosecution by military commission. *See* Ben Fox, *Trial Sought for Longtime Guantánamo Inmate*, Miami Herald, May 11, 2012, at 11A.

In response to a June 18, 2009, motion by attorneys for Muhammad Ahmad Abdallah al-Ansi for medical records to determine "whether Mr. al Ansi has a serious or life-threatening medical condition and whether he is receiving adequate medical treatment that will keep him alive and competent to participate in these proceedings,"[2804] Judge Kessler ruled that "counsel is entitled to the medical records in order to provide Petitioner effective access to his counsel"[2805] and that the order "does not pertain to the conditions of Petitioner's confinement."[2806]

Abstention

One of the cases assigned to Judge Hogan for coordination was a petition by Omar Khadr, a Canadian citizen whose family moved to Afghanistan in 1997, who was 15 when he was captured in Kabul in July 2002, and who was 16 when he arrived at Guantánamo Bay.[2807] He was 17 when his grandmother filed a habeas petition on his behalf.[2808] The government brought war charges against Khadr in a military commission, alleging, among other things, murder of a U.S. soldier by throwing a hand grenade at U.S. forces and attempted murder by converting land mines to improvised explosive devices.[2809] The merits judge for the habeas case was Judge Bates, who determined that the habeas action should be stayed pending military commission proceedings, because the commission result was subject to Article III review.[2810] Khadr pleaded guilty on October 25, 2010, pursuant to an agreement that he serve no more than eight years.[2811] He was returned to Canada on September 29, 2012, to serve the remainder of his sentence.[2812]

On January 6, 2009, Judge Kollar-Kotelly, concerning the habeas petitions of Kuwaitis Fouad Mahmoud al-Rabiah and Fayiz Mohammed Ahmen al-Kandari, agreed that habeas cases should be stayed during military commission proceed-

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2804. Emergency Motion at 3, Al-Ansi v. Obama, No. 1:08-cv-1923 (D.D.C. June 18, 2009).

2805. Order, *id.* (July 9, 2009), *available at* 2009 WL 2020774.

2806. *Id.* at 1 n.1.

2807. Khadr v. Bush, 724 F. Supp. 2d 61, 62 (D.D.C. 2010); Khadr v. Bush, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); O.K. v. Bush, 344 F. Supp. 2d 44, 49 (D.D.C. 2004).

"Born in Toronto, Khadr was a Canadian citizen. But his father, Ahmed Said Khadr, was a confidant of Osama bin Laden, and Omar spent much of his youth in Pakistan and Afghanistan, where he and his brothers attended al Qaeda camps and played with bin Laden's children." Bravin, *supra* note 2539, at 287.

2808. *Khadr*, 587 F. Supp. 2d at 228; *O.K.*, 344 F. Supp. 2d at 52; *Khadr* Docket Sheet, *supra* note 2569.

2809. Khadr v. United States, 529 F.3d 1112, 1114 (D.C. Cir. 2008).

The Defense Department posts on the Internet docket information about military commission cases. http://www.mc.mil/CASES/MilitaryCommissions.aspx.

2810. *Khadr*, 724 F. Supp. 2d 61; *O.K.*, 344 F. Supp. 2d 44.

2811. *See* Carol Rosenberg, *Teen Terrorist Gets 40 Years, But Will Serve Only 8*, Miami Herald, Oct. 31, 2010, at 5A; Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. Times, Nov. 2, 2010, at A13; Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. Times, Oct. 26, 2010, at A12.

2812. *See* Ian Austen, *Canadian Held at Guantánamo Bay Is Repatriated*, N.Y. Times, Sept. 30, 2012, at 27; Ernesto Londoño, *Youngest Detainee Leaves Guantanamo*, Wash. Post, Sept. 30, 2012, at A3; Carol Rosenberg, *Khadr Back in Canada from Guantánamo*, Miami Herald, Sept. 30, 2012, at 3A.

ings, but a stay was not warranted until a military commission was actually convened against the petitioner.[2813] Each petitioner had been charged with violating the laws of war, but the Convening Authority, who is appointed by the Secretary of Defense to review such charges, had not yet decided whether to dismiss the charges or refer them to a military commission.[2814]

Judge Kollar-Kotelly held a merits hearing for al-Rabiah in August 2009.[2815] Al-Rabiah, who had studied in Perth, Scotland, and Daytona Beach, Florida, was an aviation engineer for Kuwait Airways.[2816] He periodically took approved leave from his job to do charitable work in stressed locations such as Bosnia, Kosovo, and Bangladesh.[2817] Al-Rabiah took two weeks' leave for a trip to Afghanistan in October 2001, but he was unable to return because the border was closed as a result of the military actions by the United States there that month.[2818] Al-Rabiah was captured near the end of the year.[2819] Judge Kollar-Kotelly found the government's evidence that al-Rabiah was in Afghanistan for other than charitable purposes to be very inconsistent and ultimately not credible, so, on September 17, 2009, she ordered his release.[2820] Al-Rabiah was released to Kuwait on December 9.[2821]

On the other hand,

> Al-Kandari was in the mountains near Tora Bora, during the height of the [December 2001] Battle of Tora Bora, armed with a Kalishnikov rifle, and in the company of several members and high-level leaders of al Qaeda, the Taliban, or associated enemy forces, who were actively engaged in fighting the United States and its Coalition allies.[2822]

Judge Kollar-Kotelly denied al-Kandari's petition on September 15, 2010, following an October 2009 merits hearing,[2823] and the court of appeals affirmed.[2824] In 2012, the government decided not to prosecute al-Kandari.[2825]

2813. Al Odah v. Bush, 593 F. Supp. 2d 53, 61 (D.D.C. 2009); *see* Charge Sheet, United States v. Al-Rabia (U.S. Mil. Comm. Oct. 21, 2008), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; Charge Sheet, United States v. Al-Kandari, *id.*

2814. *Al Odah.*, 593 F. Supp. 2d at 54–55, 60–61.

2815. Al Rabiah v. United States, 658 F. Supp. 2d 11, 15 (D.D.C. 2009).

2816. *Id.* at 20.

2817. *Id.* at 20–21.

2818. *Id.* at 21; *see* United States v. Passaro, 577 F.3d 207, 211 (4th Cir. 2009) ("After the September 11, 2001, terrorist attacks, the United States conducted a military operation in Afghanistan in an effort to topple the Taliban regime.").

2819. *Al Rabiah*, 658 F. Supp. 2d at 21–22.

2820. *Id.* at 42; *see* Hafetz, *supra* note 2565, at 247; *Kuwaiti Ordered Released from Guantánamo Bay*, N.Y. Times, Sept. 26, 2009, at A15 ("Mr. Rabiah, 50, is the 30th Guantánamo detainee to be ordered released by a federal judge who has reviewed evidence justifying detention."); Carol Rosenberg, *Guantánamo Detainees Sent to Kuwait, Belgium*, Miami Herald, Oct. 9, 2009.

2821. Transfer Notice, Al-Odah v. Obama, No. 1:02-cv-828 (D.D.C. Dec. 14, 2009); *see* Carol Rosenberg, *Cleared Guantánamo Detainee Sent to Kuwait*, Miami Herald, Dec. 9, 2009.

2822. Al Kandari v. United States, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

2823. *Id.*

2824. Al-Kandari v. Obama, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2741 (2012).

2825. *See* Carol Rosenberg, *Kuwaiti's War-Crimes Charges Are Dropped*, Miami Herald, June 30, 2012, at 4A.

Authority passed from President Bush to President Obama on January 20, 2009.[2826] Four days in advance of that, the government moved to stay habeas proceedings for Ahmad Mohammad al-Darbi because he had been referred to a military commission the previous February.[2827] Because military commissions were suspended two days after President Obama's inauguration,[2828] Judge Royce C. Lamberth denied the government's motion.[2829] Judges Kollar-Kotelly[2830] and Huvelle[2831] ruled similarly in cases before them. Military commission proceedings against al-Darbi resumed in 2012.[2832]

Combatant Status Review Tribunal Appeals

In July 2004, the Defense Department created Combatant Status Review Tribunals (CSRTs) to determine whether each Guantánamo Bay detainee is an enemy combatant.[2833] The Department also created Administrative Review Boards (ARBs) to periodically review the status of detained enemy combatants to determine whether the detainee still poses a threat justifying detention.[2834]

The Detainee Treatment Act of 2005 was attached to the 2006 appropriation act for the Defense Department, enacted on December 30, 2005.[2835] The act specified that the Defense Department would submit to Congress reports on CSRT and ARB proceedings.[2836] It also conferred on the District of Columbia Circuit's court of appeals "exclusive jurisdiction to determine the validity of any final decision of

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2826. *See* Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. Times, Jan. 21, 2009, at A1.

2827. Government Motion, Al-Darbi v. Bush, No. 1:05-cv-2371 (D.D.C. Jan. 16, 2009).

2828. Exec. Order No. 13,492, § 7, 74 Fed. Reg. 4897 (Jan. 27, 2009).

2829. Order, *Al-Darbi*, No. 1:05-cv-2371 (D.D.C. Apr. 7, 2009), *available at* 2009 WL 949088.

Tim Reagan interviewed Judge Lamberth for this report in the judge's chambers on May 13, 2011.

2830. Order, Alsawam v. Obama, No. 1:05-cv-1244 (D.D.C. Apr. 15, 2009) (Tariq Mahmoud Alsawam).

2831. Order, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. Apr. 22, 2009), *available at* 2009 WL 1078660 (Mohammed Jawad and Mohammed Kameen).

Mohammed Jawad's petition was ultimately successful, Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 30, 2009) [hereinafter Jawad Writ], *available at* 2009 WL 2365846, and he was released to Afghanistan, *Guantánamo Detainee Released*, N.Y. Times, Aug. 25, 2009, at A8.

2832. http://www.mc.mil/CASES/MilitaryCommissions.aspx (military commission case records); *see* Carol Rosenberg, *Pentagon Charges Al-Qaida Suspect*, Miami Herald, Aug. 30, 2012, at 3A.

2833. Boumediene v. Bush, 553 U.S. 723, 733 (2008); Al Odah v. United States, 559 F.3d 539, 541 (D.C. Cir. 2009); Bismullah v. Gates, 501 F.3d 178, 181 (D.C. Cir. 2007); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450 (D.D.C. 2005); *see* Lewis, *supra* note 2598; Meltzer, *supra* note 2559, at 6.

Former detainee Moazzam Begg reported that he received a notice of CSRT proceedings about a week after the CSRTs were established. Moazzam Begg, Enemy Combatant 261–62 (2006).

2834. *See* Lewis, *supra* note 2598.

2835. Pub. L. No. 109-148, 119 Stat. 2680, 2739–44 (2005).

2836. *Id.*, § 1005.

a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."[2837]

The court of appeals' docket shows 177 CSRT appeals.[2838] The first was filed on behalf of Saifullah Paracha on January 24, 2006.[2839] The second was also filed on behalf of Paracha, on March 30,[2840] and the court of appeals determined that the second appeal was from the ARB, over which the court was not given review jurisdiction.[2841]

The third CSRT appeal was filed on June 9 on behalf of Haji Bismullah,[2842] and the fourth was filed on December 4 on behalf of seven Uighurs.[2843] In these two cases, the court made a significant preliminary ruling that the court's review is not limited to the CSRT record, but "the court must have access to all the information available to the Tribunal."[2844] The court granted relief to the Uighur Parhat,[2845] but nearly one year later the court determined that had Congress known that the Supreme Court would nullify Congress's stripping of the detainees' habeas corpus rights, Congress would not have given the court of appeals review jurisdiction over CSRT decisions.[2846]

2837. *Id.*, § 1005(e); 28 U.S.C. § 2241(e)(2)(A) (2011); *see* Meltzer, *supra* note 2559, at 6–7.

2838. The cases were assigned the following docket numbers: 06-1038, 06-1117, 06-1197, 06-1397, 07-1031, 07-1066, 07-1083, 07-1089, 07-1090, 07-1095, 07-1096, 07-1098 through 07-1101, 07-1104 through 07-1114, 07-1116 through 07-1119, 07-1122, 07-1125 through 07-1127, 07-1131, 07-1132, 07-1134 through 07-1137, 07-1149, 07-1150, 07-1154 through 07-1161, 07-1165 through 07-1167, 07-1169 through 07-1171, 07-1176, 07-1181 through 07-1186, 07-1188, 07-1189, 07-1191, 07-1192, 07-1195 through 07-1197, 07-1199, 07-1202 through 07-1204, 07-1213 through 07-1215, 07-1221, 07-1224, 07-1225, 07-1234, 07-1236, 07-1237, 07-1243 through 07-1246, 07-1249 through 07-1254, 07-1263, 07-1266, 07-1267, 07-1269, 07-1274, 07-1295, 07-1302, 07-1303, 07-1307, 07-1308, 07-1316, 07-1317, 07-1320, 07-1322, 07-1324, 07-1325, 07-1330, 07-1331, 07-1340 through 07-1342, 07-1349, 07-1350, 07-1357, 07-1358, 07-1365, 07-1368, 07-1373, 07-1374, 07-1384, 07-1393 through 07-1396, 07-1399, 07-1402, 07-1405, 07-1413, 07-1420, 07-1442, 07-1476, 07-1485, 07-1508 through 07-1512, 07-1519, 07-1520 through 07-1523, 07-1526, 07-1527, 08-1007, 08-1011, 08-1027 through 08-1029, 08-1033, 08-1042, 08-1043, 08-1049, 08-1053 through 08-1055, 08-1058, 08-1060, 08-1064, 08-1084, 08-1104, 08-1112, 08-1113, 08-1130, 08-1183, 08-1198, 08-1207, 08-1209, 08-1236, 09-1238, 09-1244, 09-1274, 09-1294, and 10-1067.

2839. Docket Sheet, Paracha v. Rumsfeld, No. 06-1038 (D.C. Cir. Jan. 24, 2006).

2840. Docket Sheet, Paracha v. Rumsfeld, No. 06-1117 (D.C. Cir. Mar. 30, 2006).

2841. Order, *id.* (Apr. 9, 2007).

2842. Docket Sheet, Bismullah v. Rumsfeld, No. 06-1197 (D.C. Cir. June 9, 2006).

Bismullah was transferred to Afghanistan on January 17, 2009. *See* http://projects.nytimes.com/guantanamo.

2843. D.C. Cir. *Parhat* Docket Sheet, *supra* note 2764.

Later, the court ordered separate actions on behalf of each detainee. Bismullah v. Gates, 501 F.3d 178, 192 (D.C. Cir. 2007) (resulting in the assignment of docket numbers 07-1508 through 07-1512 and 07-1523).

2844. *Bismullah*, 501 F.3d at 180; *see* William Glaberson, *Court Tells U.S. to Reveal Data on Guantánamo*, N.Y. Times, July 21, 2007, at A1; Meltzer, *supra* note 2559, at 53; Josh White, *Government Must Share All Evidence on Detainees*, Wash. Post, July 21, 2007, at A2.

2845. Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008).

2846. Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. 2009).

Contempt

On March 13, 2009, Judge Sullivan issued an "order to show cause why the government and the attorneys for the government in this case should not be held in contempt for failure to . . . produce exculpatory information."[2847] The government was obliged, including by orders dated September 22, 2008,[2848] and January 16, 2009,[2849] to provide habeas counsel with exculpatory information about their client, Aymen Saeed Batarfi.[2850] The government was also obliged to produce Batarfi's medical records.[2851] Among these records, the government inadvertently included medical information about another detainee, who was a witness against Batarfi.[2852] The identity of the witness is protected in the record, but it appears to be the case that the medical information about him is that he suffered from antisocial personality disorder, of which deceit is a common symptom.[2853] Judge Sullivan viewed this information as "highly exculpatory" and called the government to task for not producing it advertently.[2854] In the end, Judge Sullivan did not issue an order of contempt,[2855] and Batarfi was released to Yemen on December 19, 2009.[2856]

Detainability

On March 13, 2009, the government filed the new administration's understanding of whom it could detain at Guantánamo Bay:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[2857]

2847. Batarfi v. Bush, 602 F. Supp. 2d 118, 119 (D.D.C. 2009).

2848. *See* Government Contempt Response, Batarfi v. Bush, No. 1:05-cv-409 (D.D.C. Apr. 3, 2009).

2849. Order, *id.* (Feb. 10, 2009) [hereinafter *Batarfi* Discovery Order] (order issued orally on January 16, reduced to writing and signed on January 29, and filed on February 10).

2850. *Batarfi*, 602 F. Supp. 2d at 119.

2851. *Batarfi* Discovery Order, *supra* note 2849.

2852. Government Response at 8, *Batarfi*, No. 1:05-cv-409 (D.D.C. Feb. 20, 2009), *as redacted*, *id.* (Mar. 17, 2009) [hereinafter *Batarfi* Government Response]; *see* Marisa Taylor, *Judge Blasts Government's Conduct*, Miami Herald, Apr. 7, 2009, at 3A.

2853. *Batarfi* Government Response, *supra* note 2852, at 8–9; *see* Taylor, *supra* note 2852.

2854. Transcript at 2–9, *Batarfi*, No. 1:05-cv-409 (D.D.C. Apr. 1, 2009, filed Apr. 1, 2009).

2855. Docket Sheet, *id.* (Mar. 1, 2005).

2856. Transfer Notice, *id.* (Dec. 22, 2009); *see* http://projects.nytimes.com/guantanamo; William Glaberson, *U.S. Decides to Release Detainee at Guantánamo*, N.Y. Times, Mar. 31, 2009, at A17.

2857. Government Brief at 2, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. Mar. 13, 2009).

The modification of support with the adverb "substantially" was a change from the previous administration's position.[2858]

On April 22, Judge Walton announced the standard of detainability he would apply to his cases.[2859] He agreed to adopt the government's basic framework,[2860] "provided that the terms 'substantially supported' and 'part of' are interpreted to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture."[2861]

Judge Kessler decided to adopt Judge Walton's framework.[2862]

On May 19, Judge Bates announced his standard of detainability:

> Specifically, the Court rejects the concept of "substantial support" as an independent basis for detention. Likewise, the Court finds that "directly supporting hostilities" is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of "support" as a valid ground for detention. . . .
>
> With the exception of these two "support"-based elements, however, the Court will adopt the government's proposed framework.[2863]

Judges Lamberth,[2864] Kollar-Kotelly,[2865] Robertson,[2866] Hogan,[2867] and Urbina[2868] decided to adopt Judge Bates's framework. The court of appeals, however, held that detention could be justified by support, because the government's detention power was not constrained by the international laws of war.[2869]

Unreliable Cooperation

On March 31, 2009, Judge Huvelle ordered a detainee released[2870] on a finding that he could "no longer constitute a threat to the United States."[2871] The detainee, whose association with Al-Qaeda appears to have been more mercenary than ide-

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2858. Gherebi v. Obama, 609 F. Supp. 2d 43, 53 (D.D.C. 2009).

2859. *Id.* at 54–71.

2860. *Id.* at 54, 70.

2861. *Id.* at 71; *see* Hafetz, *supra* note 2565, at 243.

2862. Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 42 (D.D.C. 2009); Opinion at 6, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. Aug. 21, 2009) [hereinafter *Al-Adahi* Habeas Grant], *available at* 2009 WL 2584685.

2863. Hamlily v. Obama, 616 F. Supp. 2d 63, 69 (D.D.C. 2009); *see* Hafetz, *supra* note 2565, at 243.

2864. Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

2865. Al Rabiah v. United States, 658 F. Supp. 2d 11, 19 (D.D.C. 2009); Al Odah v. United States, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009); Al Mutairi v. United States, 644 F. Supp. 2d 78, 85 (D.D.C. 2009).

2866. Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. 2009).

2867. Anam v. Obama, 653 F. Supp. 2d 62, 64 (D.D.C. 2009).

2868. Hatim v. Obama, 677 F. Supp. 2d 1, 7 (D.D.C. 2009).

2869. Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1814 (2011); *see* Hafetz, *supra* note 2565, at 243.

2870. Final Judgment, Basardh v. Bush, No. 1:05-cv-889 (D.D.C. Mar. 31, 2009), *available at* 2009 WL 856345; *see Detainee to Be Released*, L.A. Times, Apr. 1, 2009, at 15.

2871. Basardh v. Bush, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

ological, apparently suffered serious reprisals for his heavy cooperation with the government.[2872]

The possible unreliability of his cooperation, however, was a factor in Judge Leon's granting Mohammed el-Gharani's petition,[2873] Judge Kessler's granting a petition by Alla Ali Bin Ali Ahmed,[2874] and Judge Urbina's granting a petition by Saeed Mohammed Saleh Hatim.[2875]

The cooperating detainee was transferred to Spain in May 2010.[2876]

Product of Torture

Judge Huvelle agreed, on July 17, 2009, to suppress "every statement made by [Mohammed Jawad] since his arrest as a product of torture."[2877] The government had declined to contest the motion to suppress[2878] and determined after the motion was granted that it "will no longer treat petitioner as detainable under the Author-

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2872. *Id.* at 32; *see* Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, Wash. Post, Feb. 3, 2009, at A1 [hereinafter *Quandary*]; *see also* Del Quentin Wilber, *'08 Habeas Ruling May Snag Obama Plans*, Wash. Post, Feb. 13, 2010, at A2 [hereinafter *Snag*] ("The Yemeni has serious psychological problems that include suicide attempts, hallucinations, a severe personality disorder and depression . . . .").

The detainee signed a pro se petition on March 3, 2005. Petition, *Basardh*, No. 1:05-cv-889 (D.D.C. May 3, 2005) ("Please look at my case, and also send a lawyer to look at my request for asylum because my life has been threatened by Saudis and Yemenis.").

2873. El Gharani v. Bush, 593 F. Supp. 2d 144, 147–49 (D.D.C. 2009); *see* Wilber, *Quandary*, *supra* note 2872.

The government released el-Gharani to Chad. El-Gharani Transfer Notice, *supra* note 2739.

2874. Ahmed v. Obama, 613 F. Supp. 2d 51, 56–57 (D.D.C. 2009); *see* Hafetz, *supra* note 2565, at 244–45; Dafna Linzer, *In Gitmo Case, a Reality Check*, Nat'l L.J., Oct. 11, 2010, at 1; Scott Shane & Benjamin Weiser, *Judging Detainees' Risk, Often with Flawed Evidence*, N.Y. Times, Apr. 25, 2011, at A1; Del Quentin Wilber, *Release of Yemeni Held at Guantanamo Ordered*, Wash. Post, May 13, 2009, at A5.

The government returned Ahmed to Yemen. Transfer Notice, Ahmed v. Obama, No. 1:05-cv-1678 (D.D.C. Sept. 28, 2009); *see* Scott Shane, *Detainee's Case Illustrates Bind of Prison's Fate*, N.Y. Times, Oct. 4, 2009, at A1; Shane & Weiser, *supra*.

2875. Hatim v. Obama, 677 F. Supp. 2d 1, 16–18 (D.D.C. 2009); *id.* at 17 (the witness's "symptoms were consistent with a 'depressive disorder, psychosis, post traumatic stress, and a severe personality disorder'"); *see* Chisun Lee, *Judges Reject Evidence in Gitmo Cases*, Nat'l L.J., Aug. 16, 2010, at 1; Carol Rosenberg, *Federal Judge Orders 32nd Detainee Freed from Guantánamo*, Miami Herald, Dec. 16, 2009; Wilber, *Snag*, *supra* note 2872.

Hatim's writ was vacated and the case remanded for reevaluation in light of subsequent case law. Hatim v. Obama, 632 F.3d 720 (D.C. Cir. 2011); *see Court Orders Detainee Held*, N.Y. Times, Feb. 16, 2011, at A18.

2876. *See* Mónica Ceberio Belaza, *"Al Qaeda Will Kill Me if I Go Home,"* El País, June 29, 2010, at 3; Shane & Weiser, *supra* note 2874.

2877. Order, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. July 17, 2009) [hereinafter Jawad Suppression Order], *available at* 2009 WL 2149949; *see* William Glaberson, *U.S. Judge Challenges Evidence on a Detainee*, N.Y. Times, July 23, 2009, at A22 (reporting that a military judge "wrote last year that Afghan officials had threatened to kill Mr. Jawad and his family if he did not confess to the grenade attack").

2878. Government Response, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 15, 2009); *see* Glaberson, *supra* note 2877.

ization for Use of Military Force."[2879] The government noted, however, that "the Attorney General has directed that the criminal investigation of petitioner in connection with the allegation that petitioner threw a grenade at U.S. military personnel continue."[2880]

Jawad may have been as young as 12 years old when he was captured in Kabul in December 2002.[2881] On October 9, 2007, military commission charges were filed against Jawad for the alleged throwing of a grenade.[2882] It was reported that a military prosecutor returned to civilian status after concluding that Jawad might not be guilty.[2883] On July 30, 2009, Judge Huvelle granted Jawad's writ petition.[2884] Jawad was flown home on August 24 to Kabul, where he met with President Hamid Karzai.[2885]

Weak Evidence

Judge Kollar-Kotelly granted Khalid Abdullah Mishal al-Mutairi's writ on July 29, 2009.[2886] Al-Mutairi, born in Kuwait City in 1975, traveled to Afghanistan a few days after the September 11, 2001, attacks with $15,000 in United States currency.[2887] He was one of the detainees named in the 2002 petition filed by fathers and brothers of Kuwaiti detainees.[2888] The government claimed that al-Mutairi was part of Al-Wafa, an Islamic foundation accused of supporting terrorism,[2889] but al-Mutairi claimed that he was in Afghanistan to fund the creation of a

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2879. Notice at 1, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 24, 2009) [hereinafter Jawad Nondetainability Notice].

2880. *Id.* at 2; *see* William Glaberson, *Government Might Allow Trial in U.S. for Detainee*, N.Y. Times, July 25, 2009, at A14 ("In a statement accompanying Friday's court filing, the Justice Department said that an administration task force reviewing the cases of Guantanamo detainees had previously made the decision to refer Mr. Jawad's case for possible prosecution.").

2881. *See Guantánamo Detainee Released*, N.Y. Times, Aug. 25, 2009, at A8 [hereinafter *Detainee Released*] ("Relatives say he was about 12 when he was arrested. The Pentagon said a bone scan showed that he was about 17 at the time.").

2882. Charge Sheet, United States v. Jawad (U.S. Mil. Comm. Oct. 9, 2007), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see* William Glaberson, *Guántanamo Detainee Is Charged in '02 Attack*, N.Y. Times, Oct. 12, 2007, at A19; Glaberson, *supra* note 2877; Hafetz, *supra* note 2565, at 246.

2883. Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, Wash. Post, Sept. 25, 2008, at A6; William Glaberson, *Guantánamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. Times, Sept. 25, 2008, at A18.

2884. Jawad Writ, *supra* note 2831; *see* William Glaberson, *Judge Orders a Detainee to Be Freed in August*, N.Y. Times, July 31, 2009, at A14; Hafetz, *supra* note 2565, at 247.

Military Commission proceedings against Jawad were dismissed on July 31, 2009. Direction, *Jawad* (U.S. Mil. Comm. July 31, 2009), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx.

2885. *See Detainee Released*, *supra* note 2881.

2886. Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. 2009).

2887. *Id.* at 86.

2888. *Al-Odah* Docket Sheet, *supra* note 2551.

2889. *See* Thom Shanker & James Dao, *U.S. Planes Bomb Taliban Compound in Kandahar*, N.Y. Times, Nov. 28, 2001, at A1.

mosque and to support Al-Wafa's charitable projects.[2890] Judge Kollar-Kotelly found al-Mutairi's story about charitable intents and his explanation of how he lost his passport of dubious credibility,[2891] but she also found the government's evidence justifying his detention weak.[2892] The government released al-Mutairi to Kuwait.[2893]

Three Writs Denied; One Writ Reversed

From August through September 2009, Judges Robertson,[2894] Kollar-Kotelly,[2895] and Collyer[2896] each denied a habeas petition. The court of appeals affirmed.[2897]

On July 13, 2010, the court of appeals reversed a writ of habeas corpus granted to Mohammed al-Adahi by Judge Kessler on August 17, 2009.[2898] Al-Adahi, a citizen of Yemen, arranged a marriage between his sister and Riyadh Abd al-Aziz Almujahid, a Yemini living in Kandahar, Afghanistan.[2899] In July 2001, al-Adahi took a six-month leave of absence from his security job in Yemen and delivered his sister to Almujahid, and Osama Bin Laden hosted a celebration of the marriage.[2900] In addition to meeting with Bin Laden while away from home, al-Adahi attended the al-Farouq training camp, but he was expelled from the camp—for smoking tobacco, he claimed.[2901] Judge Kessler saw the evidence as showing al-Adahi's brother-in-law as a close associate of Bin Laden's but not al-Adahi;[2902] the court of appeals saw the evidence as more inculpatory of al-Adahi.[2903]

2890. *Al Mutairi*, 644 F. Supp. 2d at 86–87.

2891. *Id.* at 87–89.

2892. *Id.* at 89–96.

2893. Transfer Notice, Al-Odah v. Obama, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009); *see* Rosenberg, *supra* note 2820.

2894. Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. 2009) (finding that Adham Mohammed al-Awad was an Al-Qaeda fighter, but acknowledging that "[t]he case against Awad is gossamer thin" and "[i]t seems ludicrous to believe that he[—marginally literate who has spent more than seven of his 26 years in American custody—]poses a security threat now").

2895. Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009) (finding that Fawzi Khalid Abdullah Fahad al-Odah became a part of the forces of the Taliban and Al-Qaeda).

2896. Order, Shafiq v. Obama, No. 1:05-cv-1506 (D.D.C. Sept. 3, 2009) [hereinafter Barhoumi Order] (denying the writ to Sufyian Barhoumi "[f]or the reasons stated on the record in a closed hearing"); Transcript, *id.* (Sept. 3, 2009, filed Jan. 4, 2010) [hereinafter Barhoumi Transcript].

2897. Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010); Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1812 (2011); Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1814 (2011); *see Justices Reject Appeals*, *supra* note 2741.

2898. Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1001 (2011); *see* Charlie Savage, *Reversal Upholds Detention of Yemeni at Guantánamo*, N.Y. Times, July 14, 2010, at A19 ("Courts have now upheld the detention of 15 Guantánamo prisoners, while ordering 36 freed.").

2899. *Al-Adahi*, 613 F.3d at 1106; *Al-Adahi* Habeas Grant, *supra* note 2862, at 14.

2900. *Al-Adahi*, 613 F.3d at 1102, 1106; *Al-Adahi* Habeas Grant, *supra* note 2862, at 14–15, 17 & n.9.

2901. *Al-Adahi*, 613 F.3d at 1102, 1106–09; *Al-Adahi* Habeas Grant, *supra* note 2862, at 17, 20–31.

2902. *Al-Adahi* Habeas Grant, *supra* note 2862, at 40–41.

2903. *Al-Adahi*, 613 F.3d 1102.

Reluctant Algerians

On November 19, 2009, Judge Kessler granted a writ to Farhi Saeed Bin Mohammed, an Algerian who lived in Europe under false names with false documents and traveled to Afghanistan along a "terrorist pipeline."[2904] "The Government has failed to provide reliable evidence that Petitioner received any training in weaponry or fighting, or that he engaged in actual fighting of any kind on behalf of al-Qaida and/or the Taliban."[2905]

On May 27, 2010, Bin Mohammed sought an injunction against his return to Algeria, because he feared he would be harmed there.[2906]

> Petitioner asks to enjoin that transfer because of his great fear that he will be caught in a "no win" situation: either the Government of Algeria will arrest him as a terrorist because of his detention at Guantanamo Bay, and then torture, try, and possibly execute him, or he will be targeted for recruitment and retribution by Islamic extremist groups who have been terrorizing the Algerian population for close to 20 years and who will kill him if he refuses to join their ranks. Petitioner stated that he no longer has family ties, friends, or prospects in Algeria. He has declared that he would rather stay at Guantanamo Bay for the rest of his life than be returned to Algeria.[2907]

On June 29, Judge Kessler enjoined Bin Mohammed's transfer to Algeria.[2908] On July 8, the court of appeals summarily reversed and dissolved the injunction.[2909] On July 16, the Supreme Court denied Bin Mohammed's application for a stay of the appellate decision, with Justices Ginsburg, Breyer, and Sotomayor dissenting.[2910] On January 6, 2011, the government transported Bin Mohammed to Algeria.[2911]

2904. Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 39, 45–46 (D.D.C. 2009), *reprinted at* 704 F. Supp. 2d 1; *see* Carol Rosenberg, *Fearful Detainee Sent Home to Algeria*, Miami Herald, Jan. 7, 2011, at 4A; Siems, *supra* note 2796, at 16–17.

2905. *Bin Mohammed*, 689 F. Supp. 2d at 67.

2906. Opinion at 4, Bin Mohammed v. Obama, No. 1:05-cv-1347 (D.D.C. June 29, 2010) [hereinafter *Bin Mohammed* Injunction], *filed as* Ex. 1, Public (Redacted) Motion, Bin Mohammed v. Obama, No. 10-5218 (D.C. Cir. Sept. 21, 2010); Order, *Bin Mohammed*, No. 1:05-cv-1347 (D.D.C. June 3, 2010); Notice of Filing, *id.* (May 26, 2010); *see* Rosenberg, *supra* note 2904.

2907. *Bin Mohammed* Injunction, *supra* note 2906, at 4.

2908. *Id.* at 12.

2909. Order, *Bin Mohammed*, No. 10-5218 (D.C. Cir. July 8, 2010) [hereinafter *Bin Mohammed* Injunction Reversal]; *see* Peter Finn, *Six Algerians Say They Prefer Guantanamo Over Repatriation*, Wash. Post, July 10, 2010, at A3.

Judge David S. Tatel dissented in part from the decision by Judges Thomas B. Griffith and Brett M. Kavanaugh. Judge Tatel would have remanded for a determination of whether the government had taken into account danger to Bin Mohammed from entities other than the Algerian government. *Bin Mohammed* Injunction Reversal, *supra* (Judge Tatel, dissenting).

2910. Bin Mohammed v. Obama, ___ U.S. ___, 131 S. Ct. 32 (2010); *see* Peter Finn, *Guantanamo Bay Detainee Is First to Be Sent Home Unwillingly*, Wash. Post, July 20, 2010, at A4; *Justices Decide U.S. May Send Two Detainees Back to Algeria*, N.Y. Times, July 18, 2010, at 15 [hereinafter *Back to Algeria*].

2911. Transfer Notice, *Mohammed*, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011); *see* Rosenberg, *supra* note 2904.

Five other Algerians preferred staying at Guantánamo Bay to a return to Algeria.[2912] Judge Walton denied Abdul Aziz Naji's application for an injunction against transfer on June 7, 2010.[2913] On July 16, the court of appeals determined that its decision in Bin Mohammed's case governed Naji's case.[2914] On the same day, the Supreme Court denied Naji's application for a stay pending a certiorari petition.[2915] On July 19, the government filed a notice that Naji had been sent to Algeria.[2916]

The other four Algerians remain at Guantánamo Bay. On February 22, 2007, the government notified Ahmed Belbacha that he was cleared for release.[2917] In July, Judge Collyer denied Belbacha an injunction against transfer to Algeria.[2918] The court of appeals remanded the case back to Judge Collyer to preserve jurisdiction over the matter pending the Supreme Court's resolution of *Boumediene*.[2919] A day after the Supreme Court's *Boumediene* decision, Judge Collyer enjoined Belbacha's transfer "pending briefing and resolution of the issues left unresolved in *Boumediene*."[2920] On November 4, 2009, in a possibly merely symbolic gesture, the town of Amherst, Massachusetts voted to accept Belbacha.[2921] In light of the court of appeals' decision in *Kiyemba v. Obama*[2922] that the courts did not have the power to enjoin detainee transfers, Judge Hogan dissolved Judge Collyer's injunction on February 4, 2010, by sealed order,[2923] and denied reconsideration on April 19.[2924]

2912. *See* Notice of Filing, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. July 31, 2009) (filing by Djamel Ameziane, No. 1:05-cv-392; Farhi Saeed Bin Mohammed, No. 1:05-cv-1347; Motai Saib, No. 1:05-cv-1353; Nabil Hadjarab, No. 1:05-cv-1504; Ahmed Belbacha, No. 1:05-cv-2349; and Abdul Aziz, No. 1:05-cv-2386); Finn, *supra* note 2910; *Back to Algeria*, *supra* note 2910.

2913. Sealed Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. June 7, 2010), *filed as* Ex. 8, Public (Redacted) Response, Naji v. Obama, No. 10-5191 (D.C. Cir. July 29, 2010) [hereinafter *Naji* Government Response].

2914. Order, *Naji*, No. 10-5191 (D.C. Cir. July 16, 2010).

2915. Naji v. Obama, ___ U.S. ___, 131 S. Ct. 32 (2010).

2916. Notice of Transfer, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 19, 2010); *see* Finn, *supra* note 2910; *Back to Algeria*, *supra* note 2910.

2917. *See* Craig Whitlock, *82 Inmates Cleared but Still Held at Guantanamo*, Wash. Post, Apr. 29, 2007, at A1.

2918. Order, Ben Bacha v. Bush, No. 1:05-cv-2349 (D.D.C. July 27, 2007), *available at* 2007 WL 2422031.

2919. Belbacha v. Bush, 520 F.3d 452 (D.C. Cir. 2008); *see* Joby Warrick, *U.S. Transfers Bin Laden Aide*, Wash. Post, Mar. 15, 2008, at A3.

2920. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. June 13, 2008); *see In re* Guantanamo Bay Detainee Litig., 706 F. Supp. 2d 120, 121–22 (D.D.C. 2010).

2921. *See* Carol Rosenberg, *U.S. Court Orders Russian Detainee Freed from Guantánamo*, Miami Herald, May 14, 2010, at 6A.

2922. 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1880 (2010); *see* Hafetz, *supra* note 2565, at 170.

2923. Docket Sheet, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Dec. 8, 2005) [hereinafter *Ben Bacha* Docket Sheet]; *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d at 122.

2924. *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120.

By sealed order, on June 17, 2010, Judge Collyer denied Motai Saib's sealed May 24 injunction motion.[2925] On July 13, Nabil Hadjarab sought an injunction against his transfer to Algeria.[2926] For Djamel Ameziane, the Supreme Court denied a sealed petition for certiorari.[2927]

On August 20, Belbacha and Hadjarab moved that their cases proceed to merits hearings.[2928] On January 14, 2011, Judge Collyer granted Belbacha's motion but denied Hadjarab's.[2929] Hadjarab's motion for reconsideration was granted on March 30.[2930] Belbacha and Hadjarab's proceedings are now stayed by agreement of the parties.[2931]

Ten Writs Denied and Another Writ Terminated; Two Writs Reversed and Two Writs Vacated; One Writ Granted and One Writ Still on Appeal

From December 2009 through October 2010, Judges Hogan,[2932] Kessler,[2933] Lamberth,[2934] Kennedy,[2935] Robertson,[2936] Bates,[2937] Walton,[2938] and Leon[2939] denied habeas petitions.

2925. Notice, Saib v. Obama, No. 1:05-cv-1353 (D.D.C. May 26, 2010) (noting the motion); Docket Sheet, *id.* (July 5, 2005) (noting the order).

2926. Notice of Filing, Nabil v. Obama, No. 1:05-cv-1504 (D.D.C. July 15, 2010).

2927. Ameziane v. Obama, ___ U.S. ___, 131 S. Ct. 1673 (2011).

2928. Notice, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Aug. 20, 2010); Notice, *Nabil*, No. 1:05-cv-1504 (D.D.C. Aug. 20, 2010).

2929. Order, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Jan. 14, 2011); Order, *Nabil*, No. 1:05-cv-1504 (D.D.C. Jan. 14, 2011).

2930. Docket Sheet, *Nabil*, No. 1:05-cv-1504 (D.D.C. July 28, 2005) [hereinafter *Nabil* Docket Sheet].

2931. *Ben Bacha* Docket Sheet, *supra* note 2923 (noting a stay order on May 6, 2013); *Nabil* Docket Sheet, *supra* note 2930 (same).

2932. Anam v. Obama, 696 F. Supp. 2d 1 (D.D.C. 2010) (finding that Musa'ab Omar al-Madhwani trained, traveled, and associated with Al-Qaeda members); Order, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010); *Anam* Docket Sheet, *supra* note 2569 (noting an oral ruling on December 14, 2009); *see* Rosenberg, *supra* note 2875; Del Quentin Wilber, *U.S. Can Continue to Detain Yemeni*, Wash. Post, Dec. 15, 2009, at A12.

The court of appeals affirmed. Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2739 (2012).

2933. Al-Adahi v. Obama, 698 F. Supp. 2d 48 (D.D.C. 2010) (finding that Fahmi Salem al-Assani received military training from Al-Qaeda); Al-Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. 2010) (finding that Suleiman Awadh Bin Agil al-Nahdi received military training from Al-Qaeda and performed guard duties for Al-Qaeda at Tora Bora); Order, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. Feb. 24, 2010); Docket Sheet, *id.* (Feb. 7, 2005) [hereinafter *Al-Adahi* Docket Sheet]; *see* Carol Rosenberg & Mark Seibel, *Judge OKs Detention of 2 Men Bush Panel Cleared*, Miami Herald, Feb. 24, 2010.

Appeals were dismissed voluntarily. Order, Al-Nahdi v. Obama, No. 10-5127 (D.C. Cir. June 21, 2011); Order, Al-Assani v. Obama, No. 10-5126 (D.C. Cir. June 21, 2011). The government has announced that al-Assani and al-Nahdi are approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2723.

Another petitioner, Muhammad Ali Abdullah Bawazir, elected not to proceed with his scheduled January 2010 merits hearing, so Judge Kessler dismissed his petition without prejudice on December 22, 2009. Bawazir Dismissal, *supra* note 2700; *see Al-Adahi*, 698 F. Supp. 2d at 50 n.1, 51; *Al-Adahi*, 692 F. Supp. 2d at 86 n.1, 88.

2934. Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. 2010) (finding that Mukhtar Yahia Naji al-Warafi assisted with medical care to Taliban fighters as part of the Taliban).

The court of appeals affirmed Judge Lamberth's finding that al-Warafi acted as part of the Taliban but remanded the case for a more specific determination whether he satisfied the Geneva Conventions' criteria for protected medical personnel. Warafi v. Obama, 409 F. App'x 360 (D.C. Cir. 2011). On August 31, 2011, Judge Lamberth concluded that al-Warafi could not prove permanent medical personnel status because he lacked required identification. Al Warafi v. Obama, 821 F. Supp. 2d 47, 55–56 (D.D.C. 2011). The court of appeals affirmed. Al-Warafi v. Obama, ___ F.3d ___, 2013 WL 2278201 (D.C. Cir. 2013).

2935. Abdah v. Obama, 709 F. Supp. 2d 25 (D.D.C. 2010) (finding that Yasein Khasem Mohammad Esmail fought on behalf of Al-Qaeda); *see* Opinion, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. June 23, 2010), *available at* 2010 WL 2521431 (denying a motion for reconsideration); *see also* Lee, *supra* note 2875.

The court of appeals affirmed. Esmail v. Obama, 639 F.3d 1075 (D.C. Cir. 2011); *see* Shane & Weiser, *supra* note 2874.

2936. Opinion, Khalifh v. Obama, No. 1:05-cv-1189 (D.D.C. June 14, 2010) [hereinafter *Khalifh* Opinion], *available at* 2010 WL 2382925 (finding that Omar Mohammed Khalifh was part of Al-Qaeda).

An appeal was voluntarily dismissed. Order, Khalifh v. Obama, No. 10-5241 (D.C. Cir. Jan. 28, 2011).

2937. Khan v. Obama, 741 F. Supp. 2d 1 (D.D.C. 2010) (finding that Shawali Khan was a member of Hezb-i-Islami Gulbuddin, a terrorist organization affiliated with the Taliban and Al-Qaeda); Order, Khan v. Obama, No. 1:08-cv-1101 (D.D.C. Sept. 3, 2010); *see* Khan v. Obama, 646 F. Supp. 2d 6 (D.D.C. 2009) (denying Khan's motion for judgment on the preliminary record).

The court of appeals affirmed on September 6, 2011. Khan v. Obama, 655 F.3d 20 (D.C. Cir. 2011). On September 23, the detainee filed a sealed motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60. Petitioner Notice, *Khan*, No. 1:08-cv-1101 (D.D.C. Sept. 26, 2011). In advance of its response to this motion, the government announced that it would no longer rely "on statements made by Petitioner Shawali Khan during custodial interrogations, or during his Administrative Review Board ('ARB') proceedings, to justify his detention. . . . The sole statements by Petitioner upon which Respondents continue to rely are those made during his merits hearing testimony on May 17, 2010." Government Notice, *id.* (Oct. 12, 2011). The government has announced that Khan is approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2723.

2938. Sulayman v. Obama, 729 F. Supp. 2d 26 (D.D.C. 2010) (finding that Abd al-Rahman Abdu Abu al-Ghayth Sulayman was part of the Taliban); Opinion, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Oct. 7, 2010) (finding that Toffiq Nasser Awad al-Bihani was part of Al-Qaeda); *see* Carol Rosenberg, *Yemeni Captive Loses Ruling*, Miami Herald, Oct. 16, 2010 (concerning al-Bihani); Carol Rosenberg, *Yemeni Psych Patient Ordered Freed*, Miami Herald, July 21, 2010 [hereinafter *Psych Patient*] (concerning Sulayman).

The court of appeals affirmed denial of the writ to Sulayman. Suleiman v. Obama, 670 F.3d 1311 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 133 S. Ct. 184 (2012). Agreeing that the denial of his petition was compelled by circuit law, al-Bihani moved for summary affirmance so that a petition for certiorari could be filed with the Supreme Court, and the Supreme Court denied certiorari. Order, Al-Bihani v. Obama, No. 10-5352 (D.C. Cir. Feb. 10), *available at* 2011 WL 611708, *cert. denied*, ___ U.S. ___, 132 S. Ct. 2739 (2011).

2939. Obaydullah v. Obama, 744 F. Supp. 2d 344 (D.D.C. 2010) (finding that Obaydullah was part of an Al-Qaeda bomb cell); *see* Charlie Savage, *New Questions Raised in Afghan Detainee Case*, N.Y. Times, Feb. 9, 2012, at A10 (reporting in 2012, "Of 220 Afghans sent to Guantánamo Bay, Cuba, he is among the 18 who remain.").

Judge Huvelle's August 3, 2010, denial of Sabry Mohammad Ebrahim al-Qurashi's motion to suppress his testimony[2940] had the practical effect of terminating his habeas petition.[2941] Judge Huvelle found evidence of voluntariness to be credible and claims of coercion to be exaggerated.[2942]

On March 29, 2011, the court of appeals reversed a writ granted to Uthman Abdul Rahim Mohammed Uthman.[2943] Using a command structure test to determine whether Uthman was part of Al-Qaeda, Judge Kennedy found that evidence Uthman was a bodyguard for Osama Bin Laden largely derived from torture-induced statements by other detainees.[2944] The court of appeals determined that the command structure test had been rejected by subsequent appellate decisions[2945] and Uthman's capture near Tora Bora in December 2001 "with a small group of men, two of whom were al Qaeda members and bodyguards for Osama Bin Laden and one of whom was a Taliban fighter,"[2946] among other facts, made it more likely than not that Uthman was part of Al-Qaeda.[2947]

The court of appeals, on June 10, 2011, also reversed[2948] a writ granted by Judge Friedman the previous July.[2949] In 2009, the government obtained a stay in the case because it had approved Hussain Salem Mohammad Almerfedi's transfer from Guantánamo Bay, but the government was unable to accomplish the transfer, so the case proceeded to the merits.[2950]

On November 5, 2010, the court of appeals vacated a writ[2951] granted to Mohammedou Ould Salahi by Judge Robertson on March 22.[2952] Salahi, a Mauritanian, swore bayat, an oath of loyalty, to Al-Qaeda in 1991, a time in

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The court of appeals affirmed. Obaydullah v. Obama, 688 F.3d 784 (D.C. Cir. 2012), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2013 WL 706176 (2013).

2940. Al-Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. 2010).

2941. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

2942. *Al-Qurashi*, 733 F. Supp. 2d at 81.

The government has announced that al-Qurashi is approved for transfer once a transfer country can be identified. Sept. 21, 2012, Transfer Approval List, *supra* note 2723.

2943. Uthman v. Obama, 637 F.3d 400, 402, 408 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2739 (2012).

2944. Abdah v. Obama, 708 F. Supp. 2d 9 (D.D.C. 2010); *see* Opinion, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. May 19, 2010) (denying a motion for reconsideration); *see also Judge Orders Release of Guantánamo Detainee*, Seattle Times, Feb. 26, 2010, at A5.

2945. *Uthman*, 637 F.3d at 402.

2946. *Id.* at 404.

2947. *Id.* at 402, 403–07.

2948. Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, ___ U.S. ___, 1232 S. Ct. 2739 (2012).

2949. Almerfedi v. Obama, 725 F. Supp. 2d 18 (D.D.C. 2010) (finding that the government's claim that Hussain Salem Mohammad Almerfedi was an Al-Qaeda facilitator was not supported by sufficient evidence); *see* Charlie Savage, *Rulings Raise Doubts on Policy on Transfer of Yemenis*, N.Y. Times, July 9, 2010, at A9.

2950. *Almerfedi*, 725 F. Supp. 2d at 21; *see Almerfedi*, 654 F.3d at 4 n.3 ("whether a detainee has been cleared for release is irrelevant to whether a petitioner may be detained lawfully").

2951. Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010); *see* Bravin, *supra* note 2539, at 377.

2952. Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. 2010); Docket Sheet, Salahi v. Bush, No. 1:05-cv-569 (D.D.C. Mar. 18, 2005); *see* Bravin, *supra* note 2539, at 377.

which the United States and Al-Qaeda both opposed Afghanistan's communist government.[2953] The courts determined that the question was whether Salahi was still part of Al-Qaeda when he was captured in 2001.[2954] The court of appeals remanded the case for reevaluation in light of guidance provided by intervening appellate decisions.[2955] Because of Judge Robertson's June 1 retirement,[2956] Salahi's petition was reassigned to Judge Lamberth.[2957] (The district court decided that new judges—those joining the bench in 2010 or later—would not receive Guantánamo Bay habeas petitions.[2958])

On October 14, 2011, the court of appeals vacated a writ[2959] granted on July 21, 2010, by Judge Kennedy to Adnan Farhan Abdul Latif.[2960] Latif was born in Udayn, Yemen, and he traveled to Pakistan and Afghanistan in 2001.[2961] He claimed that he was traveling for medical care, and Judge Kennedy determined that the government did not prove its contention that he was an Al-Qaeda recruit was more probable.[2962] The court of appeals determined that Judge Kennedy failed to give the government's report on evidence against Latif a sufficient presumption of regularity.[2963] Latif died of an apparent suicidal drug overdose on September 8, 2012.[2964]

Judge Kennedy granted habeas corpus relief to Mohamed Mohamed Hassan Odaini on May 26, 2010,[2965] and the government transferred him to Yemen the following July.[2966] Odaini was born in Taiz, Yemen, and his father worked for the

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2953. *Salahi*, 625 F.3d at 748, 751; *Salahi*, 710 F. Supp. 2d at 3–4, 9–10.

2954. *Salahi*, 625 F.3d at 751; *Salahi*, 710 F. Supp. 2d at 6.

2955. *Salahi*, 625 F.3d at 746–47.

2956. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

2957. Reassignment Notice, *Salahi*, No. 1:05-cv-569 (D.D.C. Oct. 11, 2011).

2958. Interview with Hon. Royce C. Lamberth, May 13, 2011.

2959. Latif v. Obama, 677 F.3d 1175 (D.C. Cir.) (reissuing, with fewer redactions, a 2011 opinion), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2741 (2012); *see* Adam Liptak, *The "Fill In the Blanks" Court Game of Indefinite Detention*, N.Y. Times, Dec. 13, 2011, at A21.

2960. Opinion, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. Aug. 16, 2010) [hereinafter D.D.C. Latif Opinion], *available at* 2010 WL 3270761; *see* Liptak, *supra* note 2959; Rosenberg, *Psych Patient*, *supra* note 2938.

2961. D.D.C. Latif Opinion, *supra* note 2960, at 5–6.

2962. *Id.* at 25–28; *see* Liptak, *supra* note 2959.

2963. *Latif*, 677 F.3d at 1176, 1178–89; *see* Liptak, *supra* note 2959.

2964. *See* Carol Rosenberg, *Yemeni's Death in Detention Still Under Investigation*, Miami Herald, Dec. 19, 2012, at 3A; Charlie Savage, *Guantánamo Detainee, a Former Hunger Striker, Dies*, N.Y. Times, Sept. 11, 2012, at A13; Savage, *supra* note 2701; Julie Tate, *Detainee Found Dead Had Gone on a Hunger Strike*, Wash. Post, Sept. 12, 2012, at A2; *see also* Falkoff, *supra* note 2616, at 394–95 (description by Latif's attorney at a March 23, 2007, symposium of Latif's psychological problems and suicidality).

2965. Abdah v. Obama, 717 F. Supp. 2d 21 (D.D.C. 2010); *see* Peter Finn, *U.S. Revisits Transfers to Yemen*, Wash. Post, June 19, 2010, at A3; Carol Rosenberg, *U.S. Sends Yemeni Detainee Home*, Miami Herald, July 14, 2010, at 4A; Savage, *supra* note 2949.

2966. Transfer Notice, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. July 13, 2010); *see* Peter Finn, *U.S. Will Repatriate Detainee to Yemen*, Wash. Post, June 26, 2010, at A8; Rosenberg, *supra* note 2965; Savage, *supra* note 2949.

Yemeni Security Service.[2967] On March 28, 2002, he was a student at Salafia University in Pakistan spending the night at a nearby guesthouse "after spending the evening talking to other Yemeni, Salafia University students who lived there about religion as well as 'their past and where they lived in Yemen.'"[2968] "At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants."[2969] Odaini was transferred to Guantánamo Bay in June.[2970] Judge Kennedy concluded, "There is no evidence that Odaini has any connection to Al Qaeda."[2971]

The court of appeals is reviewing a May 13, 2010, writ of habeas corpus granted by Judge Kennedy to a Russian, Ravil Mingazov, who left Russia in 2000 to raise his child in a Muslim country and was captured in Pakistan in 2002.[2972] Judge Kennedy found that his claims in captivity of support of the Taliban were motivated by his desire not to be returned to Russia.[2973] While an appeal was pending, the government sought to present additional evidence to Judge Kennedy,[2974] and the court of appeals agreed to hold the appeal in abeyance until the district court resolved the government's request.[2975] A motion considered by Berkeley, California's city council to accept Mingazov was defeated.[2976]

Guantánamo Review Task Force

Four cabinet departments, the Director of National Intelligence, and the joint chiefs of staff collaborated on a January 22, 2010, report on 240 Guantánamo Bay detainees "subject to review."[2977] A total of 779 men had been detainees at Guantánamo Bay.[2978] Of the 240 remaining detainees covered in the report, 44 had al-

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2967. *Abdah*, 717 F. Supp. 2d at 25; *see* Finn, *supra* note 2966.

2968. *Abdah*, 717 F. Supp. 2d at 26; *see* Finn, *supra* note 2965.

2969. *Abdah*, 717 F. Supp. 2d at 26.

2970. *Id.* at 23.

2971. *Id.* at 36; *see* Savage, *supra* note 2949 (reporting on "a scathing opinion denouncing the effort to keep imprisoning him despite 'overwhelming' evidence that he was innocent of Qaeda ties").

2972. Opinion, Al-Harbi v. Obama, No. 1:05-cv-2479 (D.D.C. June 1, 2010) [hereinafter Mingazov Opinion], *available at* 2010 WL 2398883; *see* Rosenberg, *supra* note 2921.

Mingazov is the last Russian detainee at Guantánamo Bay. *See* Begg, *supra* note 2833, at 332 n.*.

2973. Mingazov Opinion, *supra* note 2972.

2974. Opposition Brief, Mingazov v. Obama, No. 10-5217 (D.C. Cir. Dec. 27, 2010) [hereinafter D.C. Cir. *Mingazov* Opposition Brief].

2975. Order, *id.* (Apr. 19, 2011) [hereinafter *Mingazov* Abeyance Order]; Order, *id.* (Aug. 15, 2012) (remanding record).

2976. *See* Doug Oakley, *Berkeley Council Rejects Proposal to Invite Guantanamo Detainees to Live in City*, Oakland Trib., Feb. 16, 2011.

2977. Guantanamo Review Task Force Final Report (Jan. 22, 2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf; *see* Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, Wash. Post, Jan. 22, 2010, at A1; Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. Times, Jan. 22, 2010, at A14.

2978. Guantanamo Review Task Force Final Report, *supra* note 2977, at 1; *see* Omonira-Oyekanmi & Finn, *supra* note 2562; *see also* Fletcher & Stover, *supra* note 2547, at 42 ("The camp population peaked at 660 in July 2003 and began to decline in November of that year (Fig-

ready been transferred out.[2979] The Guantánamo Review Task Force determined that 126 detainees could be transferred, including the 44 already transferred, 44 should be prosecuted, 48 could not be prosecuted because of tainted evidence but were too dangerous to transfer, and 30 were Yemenis who could be transferred once a stable and suitable location was found for each.[2980]

In 2013, pursuant to a freedom-of-information action by *Miami Herald* reporter Carol Rosenberg, the government released the names of the 48 persons designated for indefinite detention.[2981]

Military Commission Guilty Plea

The first conviction before a Guantánamo Bay military commission in the Obama administration resulted from a guilty plea by Ibrahim Ahmed Mahmoud al-Qosi to conspiracy and material support charges.[2982]

Al-Qosi "was captured by Pakistani forces in the Tora Bora mountains in December 2001."[2983] He "acknowledged following the Qaeda leader, Osama Bin Laden, from Sudan to Afghanistan in 1996 and serving variously as a quartermaster, cook, bodyguard and driver at Qaeda compounds."[2984] On August 11, 2010, a military jury returned a sentence verdict of 14 years, but the plea agreement provided for a sentence cap of two years.[2985]

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ure 3)."); *see also id.*, Fig. 3 (charting the size of the detainee population from January 2002 through July 2008).

2979. Guantanamo Review Task Force Final Report, *supra* note 2977, at ii.

2980. *Id.* at ii, 9–13.

2981. *See* Carol Rosenberg, *Herald Suit Yields Names of "Indefinite Detainees,"* Miami Herald, June 18, 2013, at 3A.

The reporter filed a federal complaint in the District of Columbia on March 15, 2013, to pursue a Freedom of Information Act request submitted to the Department of Defense in December 2012. Complaint, Rosenberg v. U.S. Dep't of Defense, No. 1:13-cv-342 (D.D.C. Mar. 15, 2013). The government's answer stated, "The requested document has been located and is currently undergoing a declassification review by multiple government agencies. Defendant anticipates that the declassification review will be complete by May 15, 2013, and that it will be able to respond to plaintiff's FOIA request shortly thereafter." Answer at 1–2, *id.* (Apr. 18, 2013). Judge Kessler set an initial scheduling conference for May 15. Order, *id.* (Apr. 19, 2013). The government produced the document on June 17. *See* Rosenberg, *supra*.

2982. Trial Report, United States v. Al-Qosi (U.S. Mil. Comm. Aug. 11, 2010), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see Guantanamo Detainee Pleads Guilty*, Wash. Post, July 8, 2010, at A3 ("Qosi is only the fourth prisoner convicted in the controversial military tribunals since the Guantanamo Bay detention camp opened in January 2002."); Frances Robles, *Bin Laden Driver to War-Court Convict*, Miami Herald, July 8, 2010, at 1A; Carol Rosenberg, *Al Qaeda Cook Could Leave Guantánamo in 2012*, Miami Herald, Feb. 9, 2011; Charlie Savage, *Guantánamo Detainee Pleads Guilty in Terrorism Case*, N.Y. Times, July 8, 2010, at A15; *see also* http://www.mc.mil/CASES/MilitaryCommissions.aspx (military commission case records).

2983. Savage, *supra* note 2982.

2984. *Id.*

2985. Final Action, United States v. Al-Qosi (U.S. Mil. Comm. Feb. 3, 2011), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx; *see* Peter Finn, *U.S. Lacks Policy on Housing Military Commission Convicts*, Wash. Post, Aug. 12, 2010, at A2; Robles, *supra* note 2982; Carol Rosenberg, *Canadian Terror Trial Deal Would Test Obama Pledge*, Miami Herald,

Al-Qosi's habeas petition was dismissed by stipulation on August 23.[2986] He was returned to Sudan on July 10, 2012.[2987]

Recusal

On April 22, 2009, the court transferred eight detainees in the 159-detainee case filed by the Center for Constitutional Rights in December 2005 to a new case, which the court assigned to Judge Lamberth.[2988] On January 29, 2010, one of the detainee's attorneys filed a motion for Judge Lamberth's recusal.[2989] The attorney objected to a thought question attributed to Judge Lamberth in a reported interview by ProPublica: "How confident can I be that if I make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?"[2990] Although the thought question appears to pose a matter of general concern to all judges in all Guantánamo Bay habeas cases, the motion expressed concern that Judge Lamberth's observation created a question about a specific petitioner, Abdal Razak Ali: "will this Court be willing to enter the great writ in his case if the Government does not meet its burden or will this Court hold Petitioner indefinitely in fear that it might make a mistake?"[2991]

Rejecting "the notion that its publicly expressed views provide any basis for recusal," Judge Lamberth nevertheless recused himself "[b]ecause this is much ado about nothing, and petitioner's counsel has preferred to delay disposition of the merits of the petition to address this sideshow."[2992]

The court randomly assigned Ali's case to Judge Leon,[2993] who denied Ali's petition on February 25, 2011.[2994] An appeal is pending.[2995]

Oct. 24, 2010, at 3A; Carol J. Williams, *Guilty Plea at Guantanamo Tribunal*, Chi. Trib., Oct. 26, 2010, News, at 9.

> In the military commission of Ibrahim Ahmed Mahmoud al Qosi, the sentence of 14 years confinement is approved and will be executed, but the execution of that part of the sentence extending to confinement in excess of two (2) years from July 2, 2010, is suspended until such time as the United States Government determines that the accused has complied with the terms of the pretrial agreement of June 9, 2010, or for a period of five (5) years from the date sentence was announced (August 11, 2010), whichever is sooner.

Final Action, *supra*.

2986. Order, Al-Qosi v. Obama, No. 1:04-cv-1937 (D.D.C. Aug. 23, 2010).

2987. *See Guantanamo Inmate Home After 10 Years*, Wash. Post, July 12, 2012, at A8; Mohamed Osman & Ben Fox, *Guantánamo Prisoner Returns Home*, Miami Herald, July 12, 2012, at 11A; Carol Rosenberg, *Convicted Al-Qaida Operative Back in Sudan*, Miami Herald, July 11, 2012, at 1A; Charlie Savage, *Guantánamo Prisoner Is Repatriated to Sudan*, N.Y. Times, July 12, 2012, at A9.

2988. Docket Sheet, Mattan v. Obama, No. 1:09-cv-745 (D.D.C. Apr. 22, 2009) [hereinafter *Mattan* Docket Sheet].

2989. Recusal Motion, *id.* (Jan. 29, 2010).

2990. *Id.* at 3, 10.

2991. *Id.* at 3.

2992. Order, *id.* (June 16, 2010).

2993. *Mattan* Docket Sheet, *supra* note 2988.

2994. Ali v. Obama, 770 F. Supp. 2d 1 (D.D.C. 2011); *see* Order, Ali v. Obama, No. 1:10-cv-1020 (D.D.C. June 12, 2012) (denying a motion for rehearing); Order, *id.* (May 17, 2011) (same);

Five More Writs Denied

In 2011, Judge Urbina denied petitions for writs of habeas corpus by Mashour Abdullah Muqbel Alsabri[2996] and Khirulla Said Wali Khairkhwa.[2997] The court of appeals affirmed.[2998]

To resolve Guantánamo Bay habeas petitions, Judge Urbina required both parties to submit proposed findings of fact and conclusions of law.[2999] He found that this not only focused the judge's attention on key issues, but it helped illuminate the credibility of the parties' positions.[3000] Judge Urbina noticed that over the years the government's presentation of its cases improved substantially and the petitioners' presentations also improved.[3001]

Judges Kennedy[3002] and Walton[3003] also denied writ petitions in 2011.

Meanwhile, a sealed habeas petition on behalf of high-value detainee Mohd Farik Bin Amin, also known as Zubair, was filed on May 16, 2011.[3004]

Order, *id.* (Mar. 11, 2011) (same); *see also Judge Upholds Algerian's Detention at Guantánamo*, Miami Herald, Jan. 11, 2011.

2995. Docket Sheet, Ali v. Obama, No. 11-5102 (D.C. Cir. Apr. 29, 2011) (noting that public versions of the final briefs were filed on June 11, 2013).

On January 9, 2012, the Supreme Court denied a mandamus petition. *In re* Bankhouche, ___ U.S. ___, 132 S. Ct. 1036 (2012).

2996. Alsabri v. Obama, 764 F. Supp. 2d 60 (D.D.C. 2011) (finding that the petitioner served as part of Taliban or Al-Qaeda forces); *see* Carol Rosenberg, *Court OKs Yemeni's Detention*, Miami Herald, Feb. 5, 2011, at 5A.

2997. Khairkhwa v. Obama, 793 F. Supp. 2d 1 (D.D.C. 2011) (finding that the petitioner "was, without question, a senior member of the Taliban").

2998. Khairkhwa v. Obama, 703 F.3d 547 (D.C. Cir. 2012); Alsabri v. Obama, 684 F.3d 1298 (D.C. Cir. 2012); *see Court Upholds Detention of Guantánamo Prisoner*, Miami Herald, Dec. 15, 2012, at 3A (Khairkhwa).

2999. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

3000. *Id.*

3001. *Id.*

3002. Hentif v. Obama, 810 F. Supp. 2d 33 (D.D.C. 2011) (finding that Fadhel Hussein Saleh Hentif was more likely than not part of Al-Qaeda or the Taliban).

Following Judge Kennedy's retirement, Judge Lamberth denied Hentif's motion for reconsideration. Hentif v. Obama, 883 F. Supp. 2d 97 (D.D.C. 2012).

An appeal is pending. Docket Sheet, Hentif v. Obama, No. 12-5314 (D.C. Cir. Oct. 17, 2012) (noting that the reply brief was filed on June 11, 2013).

3003. Bostan v. Obama, 821 F. Supp. 2d 80 (D.D.C. 2011) (finding that Karim Bostan's admitted membership in Jamaat al-Tablighi and other evidence implied affiliation with Al-Qaeda); Hussein v. Obama, 821 F. Supp. 2d 67 (D.D.C. 2011) (finding that Abdul Qader Ahmed Hussein's travels and activities in Afghanistan and Pakistan were consistent with his being part of Al-Qaeda or the Taliban).

The court of appeals affirmed the denial of a writ to Hussein. Hussein v. Obama, ___ F.3d ___, 2013 WL 2990993 (D.C. Cir. 2013). *But see id.* at ___ (Judge Edwards, concurring in the judgment) (p.13 of filed opinion) ("The result in this case is unsurprising because, in my view, it fits the mold of a number of the decisions of this court that have recited the 'preponderance of the evidence' standard while in fact requiring nothing more than substantial evidence to deny habeas petitions."). The government has announced that Hussein is approved for transfer once a transfer country can be identified, Sept. 21, 2012, Transfer Approval List, *supra* note 2723.

3004. Docket Sheet, Bin Amin v. Obama, No. 1:11-cv-923 (D.D.C. May 16, 2011).

Transfers Halted

Since Farhi Saeed Bin Mohammed was transferred to Algeria over his objection in January 2011, no detainee was transferred out of Guantánamo Bay until two Uighurs accepted transfer to El Salvador in April 2012.[3005] The defense appropriation act for 2011 prohibited the transfer of Guantánamo Bay detainees except by court order or upon certification by the Secretary of Defense and the Secretary of State that the transferee country can ensure that the detainee "cannot engage or re-engage in terrorist activity."[3006] The 2012 appropriation extended the prohibition for another year,[3007] but it also provided for a waiver by the Secretary of Defense "with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence" upon a determination that the transfer furthers national security and the risk of future terrorist activity by the detainee is mitigated.[3008] The government relied on Judge Urbina's 2008 court order for the Uighurs' transfer.[3009]

The 2013 appropriation continued transfer restrictions.[3010] On signing the appropriation bill, President Obama issued a signing statement reserving his right to preserve the constitutional separation of powers:

> My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.[3011]

On September 21, 2012, the government released a list of 55 petitioners who had been approved for transfer once a suitable transfer location could be identified, and a 56th petitioner was also approved for transfer, but his name was sealed pursuant to orders by the court of appeals.[3012]

3005. *See* Peter Finn, *Detainees Cleared for Release Are Still Waiting*, Wash. Post, Nov. 9, 2011, at A16; Rosenberg, *supra* note 2677; Savage, *supra* note 2753; Jane Sutton, *Two Uighur Detainees Sent to El Salvador*, Wash. Post, Apr. 20, 2012, at A9.

3006. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351–52 (2011); *see* Finn, *supra* note 3005.

3007. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(b)(1)(E), 125 Stat. 1298, 1567 (2011).

3008. *Id.*, § 1028(d)(1).

3009. *See* Rosenberg, *supra* note 2677; Savage, *supra* note 2753.

3010. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §§ 1027–1028, 126 Stat. 1632, 1914–17 (2013).

3011. Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, Daily Comp. Pres. Docs., 2013 DCPD No. 00004; *see* White House Press Release, Jan. 3, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310; *see also* Peter Finn, *Activists Blast Obama for Signing Defense Bill*, Wash. Post, Jan. 4, 2013, at A2; Carol Rosenberg, *Obama: Guantánamo a Waste of Resources*, Miami Herald, Jan. 4, 2012, at 1A; Charlie Savage, *Obama Disputes Limits on Detainee Transfers Imposed in Defense Bill*, N.Y. Times, Jan. 4, 2013, at A1.

3012. Sept. 21, 2012, Transfer Approval List, *supra* note 2723; *see* Carol Rosenberg, *U.S. Names 55 Guantánamo Captives Cleared for Release*, Miami Herald, Sept. 22, 2012, at 3A; *U.S. Names 55 Set for Transfer from Guantánamo*, N.Y. Times, Sept. 22, 2012, at A6; *see also* Emma

Many of the detainees approved for transfer are from Yemen, and President Obama announced on May 23, 2013, that he was lifting a moratorium on transfers to Yemen that was put in place because of instability there.[3013]

Another Military Commission Guilty Plea

Majid Khan's 2012 guilty plea before a military commission[3014] resulted in the voluntary dismissal of his habeas petition.[3015]

Challenge: Attorney–Client Contacts

Right to Counsel

After the Supreme Court decided in *Rasul* that the courts have jurisdiction over Guantánamo Bay detainees' habeas petitions, the Solicitor General's office convened a meeting with attorneys from the Justice Department's civil division, representatives from the Department of Defense, and members of the Justice Department's Litigation Security Group.[3016] The Litigation Security Group is a unit of the Justice Department that works independently of the attorneys representing the government in court and that provides the courts with classified information security officers.[3017] Among the services that classified information security officers provide the courts is facilitation of security clearances for attorneys.

In October 2004, Judge Kollar-Kotelly determined that the detainees had rights to counsel.[3018] Soon thereafter the clerk's office issued to all detainees notices of their rights to counsel in habeas proceedings.[3019]

Attorneys had to obtain security clearances to meet with the detainees.[3020] All of the petitioners were provided with cleared counsel.[3021]

Kantrowitz, *No New Closing Date Given for Guantánamo*, Miami Herald, Mar. 14, 2013, at 4A (reporting that 86 detainees have been cleared for release).

The three remaining Uighurs are on this list. Transfer Approval List, *supra.*

3013. *See* Charlie Savage, *Obama Lifts Moratorium on Transfer of Detainees*, N.Y. Times, May 24, 2013, at A10; Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. Times, May 23, 2013, at A1.

3014. Plea Agreement, United States v. Khan (U.S. Mil. Comm. Feb. 29, 2012), *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx *see* Peter Finn, *High-Value Detainee Agrees to Cooperate in Exchange for 19-Year Sentence*, Wash. Post, Mar. 1, 2012, at A3; Peter Finn, *Plea Agreement for Terror Suspect Sparks a Debate*, Wash. Post, Mar. 2, 2012, at A3; Carol Rosenberg, *Terrorist's Deal: Testimony for a Hope of Release*, Miami Herald, Mar. 1, 2012, at 1A; Scott Shane, *Testimony on Al Qaeda Is Required in Plea Deal*, N.Y. Times, Mar. 1, 2012, at A17. *See generally* McDermott & Meyer, *supra* note 2795, at 187–88 (describing Khan's affiliation with Khalid Sheikh Mohammed).

3015. Docket Sheet, Khan v. Obama, No. 1:06-cv-1690 (D.D.C. Sept. 29, 2006) [hereinafter *Khan* Docket Sheet].

3016. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3017. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 21–22 (Federal Judicial Center, 2d ed. 2013); *supra*, "INTRODUCTION."

3018. Al Odah v. United States, 346 F. Supp. 2d 1, 5 (D.D.C. 2004); *see* Hafetz, *supra* note 2565, 134.

3019. Interview with Hon. Alan Kay, June 21, 2011.

Travel to Guantánamo Bay

Reflections by habeas attorneys illuminate some logistical issues pertaining to client visits:

> To get to Guantánamo, you fly to Fort Lauderdale and then continue on to the base on one of two small prop-plane carriers, Air Sunshine or Lynx Air. The planes have a dozen or so seats but no toilet on board. When you check in for the three-and-a-half-hour flight, you're weighed along with your luggage to determine if the plane will be too heavy to fly all the way to the base without a stop to refuel at Exuma in the Bahamas. The plane may not enter Cuban air space, so you fly to the easternmost end of the island, make a right turn, and descend to the airport on the leeward side of the base. There is no prison on that side of the bay, and unsupervised movements are permitted, but amenities such as restaurants or grocery stores are scarce. You stay at the former "CBQ"—Combined Bachelors' Quarters—at an attractive government room rate of approximately $20 per night. A kitchenette and four twin beds furnish each two-room "suite."[3022]
>
> . . . The morning routine for counsel is to take the 7:40 bus from the CBQ to a ferry, and then the 8:00 ferry to the windward side of the base where the prison camp is located and where we lawyers are met by a military escort. While the leeward side is ramshackle and barren, the windward side is surreal. There is a Starbucks, a McDonald's, a combined Subway-Pizza Hut, a Wal-Mart-like big-box store called the Nex, and a gift shop.[3023]
>
> . . . At every jail and prison at which I had previously visited a client, a lawyer was forbidden to bring the prisoner anything but legal papers. The rules at Guantánamo, though, permit lawyers to bring all manner of food and drink to client meetings. The only limitation seems to be that the prisoner may consume it only during the meeting. . . .
>
> I had been alerted that my client would feel free to eat only if we lawyers ate. Always ready to go the extra mile for a client, I had prepared by eating nothing before boarding the ferry.[3024]

Monitoring Communication

The government sought to perform a classification review of all documents, including attorney notes, taken out of a meeting with a detained client and to monitor all attorney conversations with selected detainees.[3025] Judge Kollar-Kotelly

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3020. *Al Odah*, 346 F. Supp. 2d at 14; *see* Ruben, *supra* note 2560, at 15; Thomas P. Sullivan, *Imagine*, *in* The Guantánamo Lawyers, *supra* note 2548, at 42, 43–44 ("Before being permitted to write or visit your clients, you must first obtain a 'secret' security clearance, a process which involves the FBI and usually consumes months.").

Initially, the government proposed that attorneys be permitted to meet with their clients one and only one time, but that could have been malpractice. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3021. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Royce C. Lamberth, May 13, 2011.

3022. Sullivan, *supra* note 3020, at 43; *see also* Khan, *supra* note 2698, at 31 ("With the exception of one corporate law firm that always makes a grand entrance in a chartered private jet, the attorneys doing habeas work at Gitmo fly one of two commercial airlines, Air Lynx or Air Sunshine.").

Military personnel have other options for getting to the base. Wax, *supra* note 2548, at 23.

3023. Gorman, *supra* note 2661, at 12. *See generally* Inside Guantanamo, *supra* note 2696.

The Nex is the Navy Exchange. *See* Greenberg, *supra* note 2565, at 9.

3024. David Marshall, *Escort Required*, *in* The Guantánamo Lawyers, *supra* note 2548, at 47, 48.

3025. Al Odah v. United States, 346 F. Supp. 2d 1, 3–4 (D.D.C. 2004).

rejected this infringement on the attorney–client privilege.[3026] She identified alternative procedures as more appropriate: Only one attorney would meet with a detainee; a classification review would only be required of any communications about the meeting to another person, including the attorney's legal colleagues and staff.[3027]

Judge Green later specified a slightly more relaxed standard of sharing for attorneys for other detainees: "counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients."[3028]

Meetings with Clients for Petition Authorizations

When the government began to challenge the validity of fellow detainees as habeas petitioners' next friends, the district court observed that applicable protective orders granted detainees a right to meet directly with counsel, which would moot the need for next friends.[3029]

One of Salim Muhood Adem's co-detainees was represented by counsel and suggested that Adem should obtain counsel as well.[3030] With the help of the co-detainee's attorney, volunteer counsel was found for Adem.[3031] But the government prevented attorneys from meeting with Adem until Adem provided written authorization for the representation (by attorneys he had been unable to meet yet).[3032]

On December 9, 2005, the attorneys filed a motion for contempt, arguing that the government was preventing them from meeting with Adem in order to thwart Adem's habeas petition.[3033] Judge Roberts referred the matter to Magistrate Judge Kay, who ordered the government to comply with the applicable protective order and permit counsel to visit Adem.[3034] Judge Roberts affirmed Judge Kay's order,[3035] and other judges affirmed similar orders by Judge Kay in their cases.[3036] Adem was transferred to Sudan in 2007.[3037]

3026. *Id.* at 8–15.

3027. *Id.* at 13–15.

3028. *In re* Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 180 (D.D.C. 2004).

3029. *E.g.*, Oct. 6, 2006, Report and Recommendation, *supra* note 2683.

3030. Interview with Hon. Alan Kay, June 21, 2011.

3031. *Id.*

3032. *Id.*

3033. Contempt Motion, Adem v. Bush, No. 1:05-cv-723 (D.D.C. Dec. 9, 2005).

3034. Adem v. Bush, 425 F. Supp. 2d 7, 26 (D.D.C. 2006); *see* Fogler, *supra* note 2649, at 116.

3035. Opinion, *Adem*, No. 1:05-cv-723 (D.D.C. Apr. 28, 2006), *available at* 2006 WL 1193853; *see* Fogler, *supra* note 2649, at 116.

3036. Order, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. Aug. 7, 2006) (Urbina), *available at* 2006 WL 2255736; Order, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. May 18, 2006) (Sullivan); Docket Sheet, Said v. Bush, No. 1:05-cv-2384 (D.D.C. Dec. 13, 2005) (noting a May 26, 2006, minute order by Judge Roberts).

3037. Notice of Transfer, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007).

On December 13, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of 63 detainees.[3038] According to the Center's deputy legal director, "Having conducted as complete a factual inquiry as the circumstances have permitted to date, it is my good faith belief that, although they have been unable to provide *written* authorization, the following Petitioners in fact desire that the legal remedies available to them be pursued."[3039] Among the 63 detainees listed was Houmad Warzly.[3040]

On December 13, 2006, a Sami al-Hajj of Guantánamo Bay signed a statement that he wished to act as next friend on behalf of apparently 22 detainees.[3041] One of the detainees listed was Hamoud Abdullah Hamoud Hassan al-Wady.[3042] The signed statement bears a fax date of January 15, 2007, and it was filed as a pro se habeas petition on July 17, 2008, with the other 21 names redacted.[3043]

On August 1, the government notified the court that Warzly and al-Wady are the same detainee.[3044] Judge Urbina, therefore, dismissed the action under the Warzly name.[3045] In December 2008, appointed counsel traveled to Guantánamo Bay to meet with the detainee, but authorities there said that he did not want to meet with them.[3046] Magistrate Judge Kay granted the attorneys' motion that the

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3038. Petition, Al-Halmandy v. Bush, No. 1:05-cv-2385 (D.D.C. Dec. 13, 2005) [hereinafter *Al-Halmandy* Petition].

On July 29, 2008, Judge Hogan dismissed without prejudice all but seven of the petitioners from this case. Order, *id.* (July 29, 2008).

3039. *Al-Halmandy* Petition, *supra* note 3038, Ex. A ¶ 15.

3040. *Id.*

3041. Petition, Al-Wady v. Bush, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

3042. *Id.*

3043. *Id.*; *see* Al Wady v. Obama, 623 F. Supp. 2d 20, 21 (D.D.C. 2009).

Filed the same day were five other pro se petitions that appear to be on behalf of detainees on the same list. Petition, Balzuhair v. Bush, No. 1:08-cv-1238 (D.D.C. July 17, 2008); Petition, Kuman v. Bush, No. 1:08-cv-1235 (D.D.C. July 17, 2008); Petition, Salih v. Bush, No. 1:08-cv-1235 (D.D.C. July 17, 2008); Petition, Bin Atef v. Bush, No. 1:08-cv-1232 (D.D.C. July 17, 2008); Petition, Hadi v. Bush, No. 1:08-cv-1228 (D.D.C. July 17, 2008).

Filed the same day were seven other pro se petitions that appear to be on behalf of detainees on three other lists also signed by al-Hajj on December 13, 2006, and faxed on January 15, 2007, apparently in the same fax. Petition, Al-Sattar v. Bush, No. 1:08-cv-1236 (D.D.C. July 17, 2008) [hereinafter *Al-Sattar* Petition] (p.7 of fax apparently listing two detainees); Petition, Al-Hamiri v. Bush, No. 1:08-cv-1231 (D.D.C. July 17, 2008) (same); Petition, Qattaa v. Bush, No. 1:08-cv-1233 (D.D.C. July 17, 2008) (p.16 of fax apparently listing 36 detainees); Petition, Mohammed v. Bush, No. 1:08-cv-1230 (D.D.C. July 17, 2008) (same); Petition, Yakubi v. Bush, No. 1:08-cv-1229 (D.D.C. July 17, 2008) (p.14 of fax apparently listing 34 detainees); Petition, Gul v. Bush, No. 1:08-cv-1224 (D.D.C. July 17, 2008) (same); Petition, Hafizullah v. Bush, No. 1:08-cv-1227 (D.D.C. July 17, 2008) (same).

A petition filed ten days earlier showed one of the faxed lists unredacted. Petition, Obaydullah v. Bush, No. 1:08-cv-1173 (D.D.C. July 7, 2008) (p.14 of fax listing 34 detainees).

3044. Status Report, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 1, 2008); *see Al Wady*, 623 F. Supp. 2d at 21 n.2.

3045. Order, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. Feb. 23, 2009); *see Al Wady*, 623 F. Supp. 2d at 21 n.2.

3046. *Al Wady*, 623 F. Supp. 2d at 22; Status Report at 2 n.1, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. Aug. 27, 2010) [hereinafter Aug. 27, 2010 *Al-Wady* Status Report].

government be required to arrange a meeting between the detainee and the attorneys with an interpreter.[3047] Judge Walton issued a similar order in a case before him.[3048]

"[I]t is to the trial court's benefit that a non-governmental attorney provide confirmation beyond the assurances of guard personnel that a detainee's decision to refuse legal assistance and abandon a *habeas* petition filed on his behalf is voluntary and fully informed."[3049]

On May 14, 2009, appointed counsel—from the federal defender's office in the Central District of California—met with the detainee.[3050] They came to understand that his correct name was Hamoud Abdullah Hamoud Hasan al-Waeli.[3051] According to the attorneys, "During that visit, Mr. Al Waeli told us unequivocally that he authorized our continued representation of him in this case and that he wanted us to continue pursuing his release through habeas corpus relief or through any other means."[3052] But the attorneys

> did not feel it was appropriate to ask Mr. Al Waeli to provide written authorization. Mr. Al Waeli has been incarcerated for more than seven years without meeting with anyone other than interrogators. Moreover, Mr. Al Waeli described a recent encounter during which interrogators falsely portrayed themselves as representatives of the Interagency Review Task Force. Given his experience, we were concerned about creating mistrust by demanding that he sign a form.[3053]

On September 9, 2010, Judge Urbina ordered the attorneys to submit a written authorization from the detainee for the action.[3054] Al-Waeli refused to meet with his attorneys in August 2010 and January 2011, so the attorneys suggested that new counsel be appointed.[3055] Efforts by the federal defender's office to provide al-Waeli with an attorney in whom al-Waeli has confidence are pending.[3056]

Al-Hajj also submitted a next-friend petition on behalf of Muieen Adeen Jamal Adeen Abd al-Fusal Abd al-Sattar.[3057] Judge Bates granted al-Sattar's attorney an order that she be permitted a face-to-face meeting with her client: the government "may transfer him to the designated meeting place without informing

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3047. *Al Wady*, 623 F. Supp. 2d at 22.

3048. Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. May 12, 2009), *available at* 2009 WL 1312537 (denying reconsideration of the order pertaining to Jamil Ahmad Saeed); Order, *id.* (May 1, 2009) (granting an ore tenus motion for an expeditious, unobstructed, face-to-face visit).

3049. *Al Wady*, 623 F. Supp. 2d at 22.

3050. Notice of Authorization, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. May 22, 2009) [hereinafter *Al-Wady* Notice of Authorization]; Aug. 27, 2010 *Al-Wady* Status Report, *supra* note 3046, at 2 n.1.

3051. *Al-Wady* Notice of Authorization, *supra* note 3050.

3052. *Id.*

3053. *Id.*

3054. Docket Sheet, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

3055. Response, *id.* (Jan. 11, 2011).

3056. Joint Status Report, *id.* (Mar. 31, 2013).

3057. *Al-Sattar* Petition, *supra* note 3043.

him of the purpose of the transfer."[3058] As the date of the planned meeting approached, Judge Bates refined his order: "respondents shall inform petitioner of the following: 'You have a meeting with Ms. Cleary and [name of translator].'"[3059] The effort to induce al-Sattar to attend the meeting by not telling him it would be a meeting with his attorney failed.[3060] After five refusals by al-Sattar to meet with his attorney, Judge Bates dismissed the petition.[3061]

Judge Lamberth dismissed Idris Ahmad Abdu Qadir Idris's petition, originally filed with al-Hajj as next friend, on October 6, 2009, for failure to file a signed authorization.[3062] "By refusing to meet with counsel on at least five occasions, petitioner has unequivocally refused to authorize counsel to go forward with his case."[3063] Idris was included among the 158 detainees in the Center for Constitutional Rights' December 2005 petition, and Idris was among the eight detainees transferred from that case by Judge Walton to Judge Lamberth on April 21, 2009.[3064] Judge Lamberth ruled further, "Without some evidence that petitioner suffers from a mental incapacity, the Court will not compel discovery into petitioner's competence, knowledge, and voluntariness."[3065]

Judge Lamberth has stayed the habeas petition of Nadir Omar Abdullah Bin Sa'adoun Alsa'ary on representations that habeas counsel was making progress in establishing rapport with the detainee.[3066]

On October 22, 2009, Judge Urbina gave attorneys one last chance to get authorization from their putative client.[3067] Judge Urbina observed that it was often difficult to determine whether a detainee did not want to pursue a petition, was too sick to meet with counsel to discuss it, or was just still undecided.[3068] Rhode Island attorneys, in cooperation with the Center for Constitutional Rights, filed a petition on behalf of Mullah Norullah Noori on October 24, 2008, with al-Hajj listed as next friend.[3069] Noori, a Taliban official, was captured in Afghanistan in 2001.[3070] On March 16, 2009, the attorneys attempted to meet with Noori in

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3058. Order, Al-Sattar v. Obama, No. 1:08-cv-1236 (D.D.C. Sept. 2, 2009), *available at* 2009 WL 2899907.

3059. Order, *id.* (Sept. 18, 2009) (quotation alteration in original), *available at* 2009 WL 3060319.

3060. Status Report, *id.* (Oct. 15, 2009).

3061. Order, *id.* (Oct. 21, 2009), *available at* 2009 WL 3416195.

3062. Idris v. Obama, 667 F. Supp. 2d 25 (2009).

3063. *Id.* at 28 (noting attempted visits by counsel in Guantánamo Bay in February, March, April, May, and June of 2009).

3064. *Id.* at 27 n.1; Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Apr. 21, 2009).

3065. *Idris*, 667 F. Supp. 2d at 28.

3066. Order, Mattan v. Obama, No. 1:09-cv-745 (D.D.C. Apr. 11, 2013); Order, *id.* (Jan. 17, 2013); Status Report, *id.* (Jan. 15, 2013).

3067. Noori v. Obama, 664 F. Supp. 2d 116 (D.D.C. 2009).

3068. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

3069. *Noori*, 664 F. Supp. 2d at 117; Petition, Noori v. Bush, No. 1:08-cv-1828 (D.D.C. Oct. 24, 2008); *see* Katie Mulvaney, *Their Reluctant Defendant Is a Detainee*, Providence J. Bull., June 3, 2009, at 1.

3070. *See* Mulvaney, *supra* note 3069.

Guantánamo Bay, but he refused to see them.[3071] By the time of Judge Urbina's order, the attorneys had not attempted a second visit, but they had attempted to send Noori letters and they had dispatched an investigator to Afghanistan to attempt to locate family members.[3072] Judge Urbina gave the attorneys 30 days to secure authorization for the petition.[3073] The attorneys met with Noori on November 23, 2009, and Noori declined to authorize the representation,[3074] so Judge Urbina dismissed the action on February 18, 2010.[3075]

In 2011, Judges Walton[3076] and Collyer[3077] granted motions to dismiss without prejudice petitions on behalf of detainees whose attorneys were never successful in meeting them.

Suicides' Notes

On June 10, 2006, three detainees were found dead in their cells, having apparently bound and hanged themselves with torn bed sheets and clothes.[3078] These were the first Guantánamo Bay detainee deaths.[3079] The Naval Criminal Investigative Service discovered in the cells of the deceased detainees, and others on the same block, notes related to the suicides that were marked as attorney–client privileged

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3071. *Noori*, 664 F. Supp. 2d at 117 n.3; Petitioner's Response, *Noori*, No. 1:08-cv-1828 (D.D.C. Mar. 31, 2009).

3072. *Noori*, 664 F. Supp. 2d at 118 n.4; *see* Mulvaney, *supra* note 3069.

3073. *Noori*, 664 F. Supp. 2d at 117, 120.

3074. Status Report, *Noori*, No. 1:08-cv-1828 (D.D.C. Nov. 24, 2009).

3075. Order, *id.* (Feb. 18, 2010).

3076. *Al-Jayfi* Docket Sheet, *supra* note 2695 (noting a dismissal on September 1, 2011); *see* Motion, *id.* (July 7, 2011).

3077. Docket Sheet, Suleiman v. Obama, No. 1:10-cv-1411 (D.D.C. Aug. 19, 2010) (noting a dismissal on September 16, 2011); *see* Joint Notice, *id.* (July 5, 2011) ("Petitioner's counsel was unable to learn anything regarding Petitioner's wishes with respect to this case during counsel's visit to Guantanamo Bay on June 22 and 23, 2011, because Petitioner declined to meet with counsel.").

3078. Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 105–07 (D.D.C. 2010); Hicks v. Bush, 452 F. Supp. 2d 88, 94–95 (D.D.C. 2006); Boumediene v. Bush, 450 F. Supp. 2d 25, 28 (D.D.C. 2006); *see* James Risen & Tim Golden, *Three Prisoners Commit Suicide at Guantánamo*, N.Y. Times, June 11, 2006, at 11; Charlie Savage, *As Acts of War or Despair, Suicides Rattle a Prison*, N.Y. Times, Apr. 25, 2011, at A13; Josh White, *Signs of Detainees' Planning Alleged*, Wash. Post, July 8, 2006, at A1. *But see* Scott Horton, *The Guantanamo "Suicides,"* Harper's, Mar. 2010, at 27 (reporting on "evidence that suggests the current administration failed to investigate seriously—and may even have continued—a cover-up of the possible homicides of three prisoners at Guantánamo in 2006"); Khan, *supra* note 2698, at 160–63, 230, 234, 297 (reporting that one deceased detainee's repatriated body was missing organs, including organs in the throat, that would have provided evidence of the cause of his death).

The court of appeals affirmed Judge Huvelle's dismissal of a tort action by two of the detainees' survivors as beyond the court's jurisdiction. Al-Zahrani v. Rodriguez, 669 F.3d 315 (D.C. Cir. 2012) (action by survivors of Yasser al-Zahrani and Salah Ali Abdullah Ahmed al-Salami), *affirming Al-Zahrani*, 684 F. Supp. 2d 103; *see Guantánamo Suicide Suit Disallowed*, N.Y. Times, Feb. 22, 2012, at A16.

3079. *See* Savage, *supra* note 3078.

material.[3080] Although the government maintained that the courts had no jurisdiction over detainees' habeas petitions, it asked the court to issue orders authorizing review of the potentially privileged material.[3081]

Judge Leon, whose decision that the court did not have jurisdiction over the habeas petitions was on appeal, decided that he did not have jurisdiction to offer the government the protection it sought.[3082] "[T]here is nothing about the circumstances of this situation that would or will prevent this, or another court at a later time, from ensuring that any information learned by the Government's reviewers is never used by the Government against any detainee in the future."[3083]

Judge Robertson, to whom the matter had been referred by nine other judges,[3084] decided, "my idea of prudence is to give the government the guidance it seeks. If jurisdiction has been improperly asserted, the Court of Appeals will correct the error. If I do have jurisdiction, both sides will be better off having received judicial guidance sooner rather than later."[3085] Judge Robertson approved a plan calling "for the use of a 'Filter Team,' walled off from government investigators and prosecutors, that would review the seized materials and set aside anything arguably protected by the attorney–client privilege."[3086]

Classified Detainee Statements and the Privilege Review Team

When Judge Hogan accepted coordination and management of the habeas petitions in 2008, he issued a protective order specifying that the detainees' attorneys must regard any information they received from their clients as classified until a privilege review team determined otherwise.[3087]

> "Privilege team" means a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee. If required, the privilege

3080. Boumediene v. Bush, 450 F. Supp. 2d 25, 29 (D.D.C. 2006); *see* Kamins, *supra* note 2547, at 320; White, *supra* note 3078.

3081. Hicks v. Bush, 452 F. Supp. 2d 88, 98 (D.D.C. 2006); *Boumediene*, 450 F. Supp. 2d at 27–28.

A habeas attorney reported that the military was "looking for evidence, in part, that lawyers had something to do with facilitating the suicides." Falkoff, *supra* note 2626, at 163. *Compare* Cucullu, *supra* note 2565, at 101 (speculating that "the attorneys apparently began to coach detainees in hunger strike techniques"), *and id.* at 180–86, 200, *with* Patricia M. Wald, *Forward* to Fletcher & Stover, *supra* note 2547, at xi, xii–xiv (2009) ("Hunger strikes and suicide attempts (labeled 'manipulative self-injurious behavior') became the only recourse of detainees until lawyers finally appeared on the scene and courts intervened.").

3082. *Boumediene*, 450 F. Supp. 2d at 28, 31–34 (resolving the motion in 13 cases).

3083. *Id.* at 33.

3084. *Hicks*, 452 F. Supp. 2d at 94 n.2 (noting referrals by Judges Bates, Collyer, Friedman, Kennedy, Kollar-Kotelly, Roberts, Sullivan, Urbina, and Walton).

3085. *Id.* at 99.

3086. *Id.* at 94 (resolving the motion in 100 cases).

3087. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 163 (D.D.C. 2008) (¶ II.I.29).

team may include interpreters/translators, provided that such personnel meet these same criteria.[3088]

Attorneys are prohibited from sharing classified information with their clients (1) unless the information was provided by the detainee or (2) they receive permission from the government.[3089] The privilege review team reviews attorney–client communications and work product to determine if they include classified information.[3090]

An attorney for Tariq Mahmoud Alsawam, who filed his petition on June 22, 2005,[3091] submitted statements made by the detainee included in the government's classified return to the privilege review team to determine what she could share with her client on her next visit.[3092] The privilege team determined which statements clearly originated from the detainee and gave the attorney permission to discuss those statements with her client.[3093] The government, however, asserted that according to the protective order, "while counsel may discuss with a petitioner-detainee information provided by that petitioner-detainee in communications with counsel, counsel may not disclose classified information that originated in classified Government documents to the petitioner-detainee, even if those classified documents contain petitioner-detainee's own statements."[3094]

Judge Hogan ruled against the government and granted the attorney permission to "review [the petitioner's statements] with Petitioner, provided that the Privilege Review Team determines that [the statements] contain[] only statements made by Petitioner to agents of the United States government, and contain[] no information other than Petitioner's statements, Petitioner's name, and the date the statements were made."[3095]

In one of the cases before her, Judge Kessler determined that "any classified statements that the Government relies on and alleges were made by the Petitioner may be shared with the Petitioner by counsel, provided that the Privilege Review Team determines that such statements were made by Petitioner to agents of the United States Government."[3096]

Shortly after the detainee had been released to the United Kingdom,[3097] the Privilege Review Team brought to the attention of the court allegedly unprofes-

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3088. *Id.* at 156 (¶ II.B.6); *see* Cucullu, *supra* note 2565, at 198.

3089. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 150 (¶ I.D.29).

3090. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Gorman, *supra* note 2661, at 11; David H. Remes, *Negotiating the Protective Order*, *in* The Guantánamo Lawyers, *supra* note 2548, at 109, 110 (noting that the privilege review team was bound to keep the communications confidential).

3091. Petition, Alsawam v. Bush, No. 1:05-cv-1244 (June 22, 2005).

3092. Motion at 2–3, *id.* (Jan. 6, 2009).

3093. *Id.* at 3.

3094. Government Opposition at 6, *id.* (Jan. 13, 2009).

3095. Order, *id.* (Jan. 15, 2009).

3096. Order, Ahmed v. Obama, No. 1:05-cv-1678 (D.D.C. Feb. 12, 2009).

3097. Transfer Notice, Al-Habashi v. Obama, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009); *see* Lee, *supra* note 2875 ("He's now free in Britain, where he has mounted a public campaign to have the British officers he claims were complicit in his torture held accountable.").

sional actions by habeas attorneys for Benjamin Mohammed al-Habashi after the Manchester *Guardian* reported that Defense Department officials were withholding from President Obama evidence that Binyam Mohamed—apparently a more common version of al-Habashi's name—had been tortured.[3098] The *Guardian* article was apparently based, in part, on a letter the attorneys wrote to the President concerning the alleged torture, attached to which was an apparent memo concerning the matter from one of the attorneys.[3099] The intended recipient of the memo and all of its contents were redacted.[3100] The letter states that it and the attached memo were also submitted to the review team with a request that the team either declassify the redacted material or forward the redacted material to the President under secure conditions.[3101] It is not clear whether the review team ever had access to the information redacted from the memo, but the team objected to the implication that it was withholding information from the President.[3102] The review team argued that its purview did not include screening letters to the President or declassifying information classified by other entities; it was created "for the limited purpose of reviewing privileged communications between detainees and their counsel."[3103] Judge Sullivan addressed the matter in sealed filings.[3104]

An attorney for Ismail Mohamed, detained at Guantánamo Bay since 2007, identified 21 statements by the detainee that the government was relying on in its factual return to justify his detention.[3105] The attorney sought declassification of the statements so that she could discuss them with her client during a planned June 12, 2009, meeting, but as the meeting date approached the government had provided her with only seven.[3106] Judge Roberts declined to order that all statements be provided to the detainee for the scheduled meeting, because the attorney "did not follow [procedures] establishing the method to request access for a petitioner to material before a visit from counsel"[3107] and because the seven statements already provided ensured that the planned meeting would not be fruitless.[3108] Judge Roberts noted, however, that

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3098. Privilege Review Team's Report, Ben Bacha v. Obama, No. 1:05-cv-2349 (Feb. 26, 2009) (filed initially in the wrong case, where Binyam Mohammed had been identified as a next friend), *also filed in Al-Habashi*, No. 1:05-cv-765 (D.D.C. Mar. 5, 2009); *see* Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 57–61 (D.D.C. 2009) (describing Mohamed's accounts of torture as a basis for excluding evidence obtained from him against another detainee); *see also* Omonira-Oyekanmi & Finn, *supra* note 2562 (reporting on a British damages settlement paid to Mohamed); *infra*, "Torture Flights" (discussing a civil action by Mohamed against a company that allegedly provided transportation services for extraordinary rendition).

3099. Privilege Review Team's Report, *supra* note 3098, Ex. A; *see also* Stafford Smith, *supra* note 2548, at 49–80 (account by Mohamed's attorney of Mohamed's detention experiences).

3100. Privilege Review Team's Report, *supra* note 3098, Ex. A.

3101. *Id.*

3102. Privilege Review Team's Report, *supra* note 3098.

3103. *Id.* at 3.

3104. Docket Sheet, Al-Habashi v. Bush, No. 1:05-cv-765 (Apr. 15, 2005).

3105. Mohamed v. Gates, 624 F. Supp. 2d 40, 42 (D.D.C. 2009).

3106. *Id.*

3107. *Id.* at 41.

3108. *Id.* at 43–44.

> the respondent may not justify Mohamed's detention with statements of Mohamed's that he has not had a meaningful opportunity to discuss with his counsel. If the respondent were to choose not to divulge these statements to Mohamed, the respondent presumably would have to seek leave to file a new amended factual return that does not rely upon the undisclosed statements.[3109]

Judge Roberts also determined that, despite the government's wishes to the contrary, the detainee would be entitled to have copies of the statements available to review after the meeting with the attorney.[3110] Mohamed was released to Somaliland by December 22, 2009.[3111]

Coordination with Military Defense Attorneys

Judge Kollar-Kotelly was presented with a request by habeas attorneys to share what they knew with military defense attorneys for two detainees who had been referred to military commissions.[3112] The government denied the defense attorneys access to classified information that it had shared with habeas attorneys.[3113] Judge Kollar-Kotelly determined that she did not have jurisdiction over the matters concerning the defense attorneys unless they made appearances in the habeas cases, and her response to representations that they were not sure that they were authorized to do so was that they should try first.[3114]

Attorney Contacts After Voluntary Habeas Dismissals

In 2012, the government adopted a policy respecting detainees' ability to voluntarily dismiss their habeas petitions while retaining access to counsel: The government decided that it would permit post-dismissal contacts as a matter of discretion, but it would oppose court-ordered contacts.[3115] On September 6, 2012, Judge Lamberth overruled the government's position that only detainees with pending or imminent habeas petitions had a right to counsel:

> The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantanamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel. Therefore, the Government's attempt to supersede the Court's authority is an illegitimate exercise of Executive power. The Court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive

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3109. *Id.* at 44.

3110. *Id.* ("the respondent's assertion that national security interests would not be imperiled if petitioner and counsel discuss petitioner's statements, yet would somehow be jeopardized if petitioner keeps paper copies of his own statements, is unpersuasive").

3111. Transfer Notice, Mohamed v. Gates, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009).

3112. Al Odah v. United States, 608 F. Supp. 2d 46, 48 (D.D.C. 2009).

3113. *Id.*

3114. *Id.* at 48–50.

3115. Government Opposition Brief at 8–9, Al-Mithali v. Obama, No. 1:05-cv-2186 (D.D.C. Apr. 30, 2012); Government Opposition Brief at 7–9, Al-Mudafari v. Obama, No. 1:05-cv-2185 (D.D.C. Apr. 30, 2012); Status Report at 2–3 & n.1, Abu Ghanem v. Obama, No. 1:05-cv-1638 (D.D.C. Apr. 30, 2012); *see* Mike Scarcella, *Justices' Gitmo Gamble*, Legal Times, Aug. 6, 2012, at 23.

> confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. This very notion offends separation-of-powers principles and our constitutional scheme.[3116]

Appeals were dismissed voluntarily on December 14.[3117]

The government withheld petitioners' legal mail pending resolution of the counsel access issue "without notifying the Court or petitioners' counsel or moving for a stay pending appeal after [Judge Lamberth's] decision."[3118] After the government withdrew its appeal, it apparently mistakenly withheld a piece of one detainee's legal mail a few weeks too long.[3119] Judge Lamberth declined to order a sanction hearing, but he did order a complete accounting of how all unsuccessful detainees' legal mail had been handled.[3120]

Following Judge Lamberth's assurances that petitioners' access to counsel could be preserved, 11 habeas petitions were voluntarily dismissed without prejudice in 2012 and 2013.[3121]

On May 22, 2013, attorneys for three detainees filed motions challenging anal and genital searches as prerequisites to in-person or telephone communication with counsel—searches implemented as tightened security for detainees leaving their cells following a widespread hunger strike.[3122] Judge Lamberth heard the matter on June 5.[3123]

Challenge: Classified Evidence

Because of the extensive amount of classified information in these cases, Chief Judge Lamberth worked with the Justice Department to double the number of classified information security officers in the Department's Litigation Security

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3116. *In re* Guantanamo Bay Detainee Continued Access to Counsel, 892 F. Supp. 2d 8, 28 (D.D.C. 2012); *see* Michael Doyle, *Judge Rejects New Limits on Attorneys*, Miami Herald, Sept. 7, 2012, at 3A; Charlie Savage, *Judge Rejects New Rules on Access to Prisoners*, N.Y. Times, Sept. 7, 2012, at A20; Mike Scarcella, *Slapped Down*, Nat'l L.J., Sept. 10, 2012, at 23; Del Quentin Wilber, *Judge Says U.S. Can't Block Lawyer Access to Detainees*, Wash. Post, Sept. 7, 2012, at A3.

3117. Voluntary Dismissals, Nos. 12-5350, 12-5351, 12-5353, 12-5354, and 12-5356 (D.C. Cir. Jan. 11, 2013); Al-Zarnouqi v. Obama, ___ F. Supp. 2d ___, ___, 2013 WL 1859259 (D.D.C. 2013) (p.2 of filed opinion).

3118. *Al-Zarnouqi*, ___ F. Supp. 2d at ___, 2013 WL 1859259 (p.4 of filed opinion) (emphasis omitted).

3119. *Id.* at ___ (p.3 of filed opinion).

3120. *Id.* at ___ (p.5 of filed opinion); *see* Mike Scarcella, *Government Credibility Threatened*, Nat'l L.J., May 13, 2013, at 20.

3121. *Bin Attash* Stipulated Dismissal, Hidar Stipulated Dismissal, *Zaid* Stipulated Dismissal, *Bin Lep* Stipulated Dismissal, *Nasser* Stipulated Dismissal, *Al-Shubati* Stipulated Dismissal, Al-Marwalah Stipulated Dismissal, Al-Swidi Stipulated Dismissal, Mahdi Stipulated Dismissal, *Al-Shimrani* Stipulated Dismissal, Abdulayev Stipulated Dismissal, and Al-Bakush Voluntary Dismissal, *supra* note 2700.

3122. Motions, *In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 1:12-mc-398 (D.D.C. May 22, 2013) (motions on behalf of Fadhel Hussein Saleh Hentif, Abdurrahman Abdallah Ali Mahmoud al-Shubati, and Saeed Mohammed Saleh Hatim).

3123. Docket Sheet, *id.* (July 27, 2012).

Group.[3124] The court decided to apply to these cases the security principles of the Classified Information Procedures Act (CIPA),[3125] which technically applies only to criminal cases.[3126]

The Secure Facility

The Litigation Security Group's classified information security officers set up a secure facility in Crystal City, which is in Arlington, Virginia, for habeas attorneys to view, discuss, and work on classified information concerning their clients' cases.[3127] The suite of rooms includes office space, cubicle space, and safes for storing classified information.[3128] With the exception of a few cases involving high-value detainees, all of the classified information to which the petitioners' attorneys were given access is classified as secret.[3129]

Attorneys are not permitted to bring back to their offices notes taken during their meetings with their clients, because the notes are presumptively classified until they have been reviewed.[3130] Attorneys find reviewed notes waiting for them at the secure facility.[3131] Documents containing no classified information and unclassified redacted versions of documents can be faxed to the attorneys' remote offices.[3132]

The secure facility is staffed by cleared contract personnel under the supervision of the Litigation Security Group.[3133] Originally, the facility operated according to business hours, but now it operates 24 hours a day.[3134] Cleared habeas attorneys who wish to work on classified materials in their cases can show up at will, and office space is available on a first-come, first-served basis.[3135] Computers are available for their use; separate hard drives for each case are stored in the safes.[3136]

3124. Interview with Hon. Royce C. Lamberth, May 13, 2011; *see* Reagan, *supra* note 3017, at 17–18 (describing the Litigation Security Group).

3125. 18 U.S.C. app. 3 (2011).

3126. Interview with Hon. Royce C. Lamberth, May 13, 2011; *see* Reagan, *supra* note 3017 (discussing CIPA).

3127. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Gorman, *supra* note 2661, at 11, 15; Remes, *supra* note 3090, at 110; Ruben, *supra* note 2560, at 15; Sullivan, *supra* note 3020, at 43; Wax, *supra* note 2548, at 118.

3128. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3129. *Id.*

3130. *Id.*; *see* Joshua Colangelo-Bryan, *Habeas on the Gate, Part I*, *in* The Guantánamo Lawyers, *supra* note 2548, at 59, 63; Remes, *supra* note 3090, at 110.

3131. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Colangelo-Bryan, *supra* note 3130, at 63; Matthew O'Hara, *I Love Cowboys*, *in* The Guantánamo Lawyers, *supra* note 2548, at 119, 123; Remes, *supra* note 3090, at 110.

3132. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Patricia A. Bronte, *Classified Art*, *in* The Guantánamo Lawyers, *supra* note 2548, at 111, 111.

3133. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3134. *Id.*

3135. *Id.*

3136. *Id.*

Some information pertaining to high-value detainees is designated sensitive compartmented information (SCI).[3137] Access to SCI requires a higher security clearance, and storage requirements for SCI are more stringent. SCI must be stored in a sensitive compartmented information facility (SCIF).[3138] The secure facility now includes a SCIF.[3139]

Factual Returns

Following the Supreme Court's decision in *Rasul* that the courts have jurisdiction over Guantánamo Bay detainees' habeas petitions, the government began to submit factual returns based on CSRT designations of the detainees as enemy combatants.[3140] The government designated some return information for the court's eyes only and some information as for attorney and court eyes only.[3141] Habeas attorneys were permitted to see some classified information, but they were not permitted to share it with their clients, and some classified information was shared only with the court.[3142]

On November 8, 2004, at which time 11 cases were pending before her, Judge Green issued a protective order specifying how habeas attorneys who had obtained security clearances would be given access to classified information.[3143] At the end of the following January, Judge Green ruled that attorneys with security

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3137. *Id.*; *see* Reagan, *supra* note 3017, at 3 (describing sensitive compartmented information).

3138. *See* Reagan, *supra* note 3017, at 19 (describing SCIFs).

3139. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3140. Returns, Almurbati v. Bush, No. 1:04-cv-1227 (D.D.C. Oct. 13 to Nov. 3, 2004) (six detainees); Returns, Begg v. Bush, No. 1:04-cv-1137 (D.D.C. Oct. 25 to Nov. 3, 2004) (two detainees); Returns, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Oct. 21 to Nov. 3, 2004) (three detainees); Returns, Al-Odah v. Bush, No. 1:02-cv-828 (D.D.C. Sept. 17 to Nov. 3, 2004) (12 detainees); Returns, Boumediene v. Bush, No. 1:04-cv-1166 (D.D.C. Oct. 12 to Nov. 1, 2004) (six detainees); Returns, Abdah v. Bush, No. 1:04-cv-1254 (D.D.C. Oct. 1 to 21, 2004) (13 detainees, an additional detainee could not be found at Guantánamo Bay by the government); Return, Khalid v. Bush, No. 1:04-cv-1142 (D.D.C. Oct. 18, 2004) (one detainee); Return, Kurnaz v. Bush, No. 1:04-cv-1135 (D.D.C. Oct. 18, 2004) (one detainee); Returns, Anam v. Bush, No. 1:04-cv-1194 (D.D.C. Sept. 17 to Oct. 14, 2004) (14 detainees, additional detainee omitted from amended petition); Return, Gherebi v. Bush, No. 1:04-cv-1164 (D.D.C. Oct. 6, 2004) (one detainee); Return, Khadr v. Bush, No. 1:04-cv-1136 (D.D.C. Sept. 15, 2004) (one detainee); Return, Habib v. Bush, No. 1:02-cv-1130 (D.D.C. Oct. 6, 2004) (one detainee); Return, Rasul v. Bush, No. 1:02-cv-299 (D.D.C. Oct. 6, 2004) (return for Hicks only, because Rasul and Iqbal had already been released); *see* Status Report, *id.* (Oct. 22, 2004) [hereinafter Oct. 22, 2004, Status Report]; Order, *Khalid*, No. 1:04-cv-1142 (D.D.C. Sept. 29, 2004) (dismissing two petitioners who had been sent to France for prosecution); *see also* Al Odah v. United States, 559 F.3d 539, 542 (D.C. Cir. 2009).

3141. *Al Odah*, 559 F.3d at 543; Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Oct. 29, 2004) (ordering the government to present complete returns to the court for examination by the judge and her cleared staff); Oct. 22, 2004, Status Report, *supra* note 3140.

3142. Notice, *Rasul*, No. 1:02-cv-299 (D.D.C. Nov. 5, 2004).

3143. *In re* Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004).

An additional case had been filed the previous week. *Belmar* Docket Sheet, *supra* note 2618.

clearance must be given access to all classified information in the returns, overruling the government's designation of some of it as for the court's eyes only.[3144]

The court of appeals, on March 6, 2009, determined that the government could be required to disclose to habeas counsel only classified information that was helpful to the petitioners' cases,[3145] and that the government must be permitted to suggest unclassified substitutions for the classified information.[3146] The district judges reviewed the original classified evidence and proposed substitutions—either unclassified or classified at a lower level—and decided individually whether the substitutions were adequate and what to do about the evidence if the substitutions were not.[3147]

Judge Green's January 31, 2005, order also approved of the government's designation of some of the unclassified information in the returns as protected, which meant that it was shared with habeas attorneys under seal.[3148] The habeas attorneys did not object to this designation.[3149]

In one of Judge Kollar-Kotelly's cases, counsel for the petitioners asked her to order the government to either declassify the classified portions of the returns or provide adequate summaries that the attorneys could share with their clients.[3150] Because the government failed to respond to the motion, Judge Kollar-Kotelly dismissed one of its attorneys.[3151] She deferred consideration of whether the government should be able to rely on any information in the returns that the attorneys could not share with their clients.[3152]

In 2009, the government sought to designate all of the unclassified information in a large number of factual returns as protected, in part because the versions of the returns designated unclassified had inadvertently included classified information in some cases.[3153] Judge Hogan determined that this would violate the public's First Amendment and common-law right of access to the court's files,

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3144. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Jan. 31, 2005) [hereinafter Jan. 31, 2005, Attorney Access Order].

3145. *Al Odah*, 559 F.3d at 544.

3146. *Id.* at 547.

3147. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3148. Jan. 31, 2005, Attorney Access Order, *supra* note 3144.

3149. *Id.* at 2.

3150. Al Odah v. United States, 608 F. Supp. 2d 42, 43 (D.D.C. 2009).

3151. *Id.*; Order at 7–8, Al-Odah v. United States, No. 1:02-cv-828 (D.D.C. Feb. 13, 2009), *available at* 2009 WL 382098 ("The Court has lost confidence in Respondents' current counsel, and the Court does not view his representations as credible.").

The government's motion to reconsider the attorney's dismissal was denied. Al Odah v. United States, 606 F. Supp. 2d 141 (D.D.C. 2009) ("Respondents' Motion is based on a shockingly revisionist version of the events that transpired . . . .").

3152. *Al Odah*, 608 F. Supp. 2d at 44–46.

3153. *In re* Guantanamo Bay Detainee Litig., 630 F. Supp. 2d 1, 3–4 (D.D.C. 2009); *In re* Guantanamo Bay Detainee Litig., 624 F. Supp. 2d 27, 29–30 (D.D.C. 2009).

and he gave the government four weeks to designate with precision what information in the returns had to be protected.[3154]

Judge Friedman observed that returns and traverses were only the beginning of documentary evidence relating to the merits; they were typically supplemented with substantial subsequent filings.[3155]

For the habeas petition by Wali Mohammed Morafa, the government submitted to Judge Collyer ex parte evidence relating to recently identified documents.[3156] The government provided Morafa's attorneys with what the government characterized as "robust substitutes for substantial portions of the *ex parte* information at issue" and argued that "those substitutes provide counsel with sufficient information to ensure Petitioner receives meaningful habeas review."[3157] The new evidence was classified as top secret, but Morafa's attorneys were cleared only to see secret information.[3158] Judge Collyer determined that the ex parte evidence was inculpatory.[3159] She ordered the government to establish the adequacy of its substitutions.[3160]

On January 9, 2013, Judge Collyer determined that the secret substitution withheld from the detainee's attorneys top secret source information imposed

> a minor detrimental impact on Mr. Morafa's ability to contest the basis for his detention. However, the Court concludes that the incremental value to the Court of considering that evidence, in tandem with the exceptionally grave damage to the national security that could result from the unauthorized disclosure of Top Secret information outweighs the marginal impact of withholding the information in question.[3161]

The government, therefore, could "rely on Top Secret source-identifying information for which there is no adequate substitute and that cannot be released to Petitioner's counsel, even if it might assist his petition."[3162]

CSRT Appeals

In 2006, detainees began to file appeals of their CSRT enemy combatant designations. Although they were not permitted access to counsel in the CSRT proceedings, and they were not granted access to classified evidence against them, their

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3154. *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d at 7–8; *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d at 34.

3155. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3156. Mousovi v. Obama, ___ F. Supp. 2d ___, ___, 2013 WL 97355 (D.D.C. 2013) (p.2 of filed opinion); Order at 1, Mousovi v. Obama, No. 1:05-cv-1124 (D.D.C. Sept. 28, 2011) [hereinafter Morafa Order]; Government Response at 1–3, *id.* (Jan. 21, 2011) [hereinafter Government Morafa Response]; Notice, *id.* (Oct. 22, 2010).

3157. Government Morafa Response, *supra* note 3156, at 2; *see* Morafa Order, *supra* note 3156, at 6.

3158. *Mousovi*, ___ F. Supp. 2d at ___, 2013 WL 97355 (pp.3–4 of filed opinion).

3159. Morafa Order, *supra* note 3156, at 6.

3160. *Id.* at 7–8.

3161. *Mousovi*, ___ F. Supp. 2d at ___, 2013 WL 97355 (p.11 of filed opinion) (citation, footnote, and quotation marks omitted).

3162. *Id.* at ___ (p.1 of filed opinion).

appellate attorneys were given access to complete CSRT records, including the classified evidence.[3163]

Internment Serial Numbers

The government assigned to each detainee an internment serial number (ISN).[3164] For example, David Hicks was 002, Huzaifa Parhat was 320, and Omar Khadr was 766.[3165] Originally, ISNs were classified as secret.[3166] After a time, they became regarded as protected, which meant that they were afforded confidentiality approximately equivalent to social security numbers, but they are no longer classified or protected.[3167]

In 2005, while the ISNs were still classified, a Navy lawyer sent the Center for Constitutional Rights a list of detainees' names and ISNs in a Valentine's Day card addressed to an attorney who had been seeking a list of names.[3168] Realizing that she should not have received this information that way, the attorney contacted the district court, and then classified information security officers retrieved the list.[3169] The leaker was convicted of removing classified material, communicating classified information, violating a lawful general order, and conduct unbecoming an officer and a gentleman.[3170] He was sentenced to six months in prison and dismissed from the Navy.[3171]

Petitioner Statements

Judge Hogan ruled that the government could not easily withhold from the detainee petitioners themselves records of their own statements even if the records were classified.[3172] Judge Hogan observed that it would be difficult for the government to "deny the materiality of statements that it has chosen to rely upon to justify a petitioner's detention."[3173] Also, "the security risk from providing petitioners access to their own statements is not comparable to the risk from disclosing other

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3163. Parhat v. Gates, 532 F.3d 834, 840 (D.C. Cir. 2008).

3164. Abdah v. Obama, 709 F. Supp. 2d 25, 27–28 n.2 (D.D.C. 2010).

3165. *E.g.*, Government Motion to Dismiss, Ex. A, Rasul v. Bush, No. 1:02-cv-299 (D.D.C. Apr. 19, 2007).

John Walker Lindh was ISN 001. *See* Bravin, *supra* note 2539, at 116; Cucullu, *supra* note 2565, at 67; David Leigh, *What Are These Files?*, London Guardian, Apr. 25, 2011, at 2.

3166. United States v. Diaz, 69 M.J. 127, 133 (C.A.A.F. 2010); Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3167. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Assoc. Press v. Dep't of Defense, 462 F. Supp. 2d 573, 574 (S.D.N.Y. 2006) (noting the release of ISNs); Assoc. Press v. Dep't of Defense, 410 F. Supp. 2d 147, 149 (S.D.N.Y. 2006) (noting, in an action under the Freedom of Information Act, that ISNs were redacted to protect detainees' privacy rather than to protect national security).

3168. *Diaz*, 69 M.J. at 130; *see* Tim Golden, *Naming Names at Gitmo*, N.Y. Times, Oct. 21, 2007, at 678; Wax, *supra* note 2548, at 169.

3169. *Diaz*, 69 M.J. at 131; *see* Golden, *supra* note 3168.

3170. *Diaz*, 69 M.J. at 129.

3171. *Id.*; *see* Golden, *supra* note 3168.

3172. *In re* Guantanamo Bay Detainee Litig., 634 F. Supp. 2d 17 (D.D.C. 2009).

3173. *Id.* at 25.

classified information."[3174] "At a minimum, the government cannot rely on a petitioner's statement if it does not timely provide the petitioner with a sufficient alternative to that statement."[3175]

WikiLeaks

On April 24, 2011, news media posted on their websites information derived from several hundred classified files on Guantánamo Bay detainees.[3176] Newspapers and National Public Radio's news programs ran stories on the documents, beginning the following morning.[3177] The documents were leaked to WikiLeaks in 2010, and another source shared them with some news media, who in turn shared them with other news media.[3178]

The documents were mostly risk-assessment reports on detainees written from February 2002 through January 2009, and the classified information was classified as secret.[3179] The *New York Times* and National Public Radio collaborated on an Internet database that includes leaked information about Guantánamo Bay detainees.[3180]

On December 3, 2010, and on April 25, 2011, classified information security officers notified the detainees' attorneys that because a leak of classified information does not render the information declassified the attorneys should continue to handle classified information on their clients in appropriate ways.[3181]

On April 27, 2011, Saifullah Paracha's attorney filed an emergency motion with Judge Friedman seeking assurance that he could view Internet information on his client without repercussion, such as loss of his security clearance.[3182] Judge

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3174. *Id.* at 23.

3175. *Id.* at 25.

3176. *See* Motion at 2, Alhag v. Obama, No. 1:05-cv-2199 (D.D.C. May 3, 2011) [hereinafter *Alhag* WikiLeaks Motion]; Motion at 1–2 & n.2, Paracha v. Obama, No. 1:04-cv-2022 (D.D.C. Apr. 27, 2011) [hereinafter *Paracha* WikiLeaks Motion].

3177. *E.g.*, Peter Finn, *New Revelations on al-Qaeda's 9/11 Movements*, Wash. Post, Apr. 25, 2011, at A1; *"High-Risk" Detainees Released from Guantanamo*, Morning Edition (NPR radio broadcast Apr. 25, 2011) [hereinafter *"High-Risk" Detainees*]; *Military Documents Detail Life at Guantanamo*, Morning Edition (NPR radio broadcast Apr. 25, 2011) [hereinafter *Military Documents*]; Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. Times, Apr. 25, 2011, at A1.

3178. *See, e.g.*, *Military Documents*, *supra* note 3177 ("The Guantanamo files were leaked last year to the website WikiLeaks. An anonymous source obtained the documents from WikiLeaks and then passed them to the New York Times, and the newspaper shared them with us.").

3179. *See "High-Risk" Detainees*, *supra* note 3177; Savage et al., *supra* note 3177.

3180. *See "High-Risk" Detainees*, *supra* note 3177; *A Note to Readers*, N.Y. Times, Apr. 25, 2011, at A1.

3181. *See* Motion at 1, Faraj v. Obama, No. 1:05-cv-1490 (D.D.C. Apr. 18, 2012) [hereinafter *Faraj* WikiLeaks Motion]; *id.*, Ex. A; *Alhag* WikiLeaks Motion, *supra* note 3176, at 2–3; *Paracha* WikiLeaks Motion, *supra* note 3176, at 3; Scott Shane, *Detainees' Lawyers Can't Click on Leaked Documents*, N.Y. Times, Apr. 27, 2011, at A1.

3182. *Paracha* WikiLeaks Motion, *supra* note 3176; *see* Scott Shane, *Guantánamo Detainee's Lawyer Seeks a Voice on WikiLeaks Documents*, N.Y. Times, Apr. 28, 2011, at A16.

Friedman denied the motion's emergency status.[3183] Four days later, Abd al-Hakim Ghalib Ahmad Alhag's attorney filed a motion similar to the Paracha motion with Judge Kennedy, noting that a merits hearing in the case was scheduled for less than three weeks later.[3184] Judge Kennedy canceled the merits hearing while he considered the motion.[3185]

On June 10, classified information security officers informed counsel that they could view on home and office computers classified information about their clients posted on WikiLeaks, but they could not "download, save, print, disseminate, or otherwise reproduce, maintain, or transport potentially classified information" derived from the Internet.[3186] They could, however, prepare unclassified discovery requests for purported government documents referred to by WikiLeaks so long as the requests identified the documents sought with particularity without revealing their contents.[3187] The government provided counsel with "purported detainee assessments posted on the WikiLeaks website" at the Crystal City facility.[3188]

The restrictions on access to WikiLeaks information did not apply to "secondary reporting such as news articles, blogs, transcripts of broadcasts, and the like. You may download, print, copy, or otherwise access, maintain, disseminate, and transport secondary reporting that discusses or refers to potentially classified information."[3189] "You may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified status of the information or disclosing that you had personal access to classified information confirming, contradicting, or otherwise relating to the information already in the public domain."[3190] "Although the U.S. Government has confirmed that purported detainee assessments were leaked to WikiLeaks, it has neither confirmed nor denied that individual reports are official government documents."[3191]

On April 18, 2012, Abdulhadi Omer Mahmoud Faraj's attorney filed a motion with Judge Friedman for release from some restrictions on the use of classified information about Faraj on WikiLeaks.[3192] Because some of the WikiLeaks information about Faraj cast Faraj in a bad light, the attorney wanted to be able to discuss the information with Faraj and possibly rebut the information in public for

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3183. Opinion, Paracha v. Obama, No. 1:04-cv-2022 (D.D.C. Apr. 29, 2011), *available at* 2011 WL 1639259.

3184. *Alhag* WikiLeaks Motion, *supra* note 3176.

3185. Docket Sheet, Alhag v. Obama, No. 1:05-cv-2199 (D.D.C. Nov. 10, 2005).

3186. Government Brief, Ex. A, *Paracha*, No. 1:04-cv-2022 (D.D.C. June 15, 2011) [hereinafter WikiLeaks Guidelines]; Government Motion at 1–2 & Ex. A, *id.* (June 10, 2011); *see* Charlie Savage, *Lawyers for Detainees Allowed to See Leaked Files*, N.Y. Times, June 11, 2011, at A8.

3187. WikiLeaks Guidelines, *supra* note 3186.

3188. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 26, 2011; *see* Savage, *supra* note 3186.

3189. WikiLeaks Guidelines, *supra* note 3186.

3190. *Id.*

3191. *Id.*

3192. *Faraj* WikiLeaks Motion, *supra* note 3181.

the sake of Faraj's family in Syria and Faraj's possible transfer from Guantánamo Bay.[3193]

Reviewing Classified Materials

All judges reviewing Guantánamo Bay habeas cases have special safes to store classified materials.[3194] Although cleared petitioners' attorneys were granted access only to secret information, the government presented to judges additional top secret information.[3195] In general, judges were permitted to keep secret information in their chambers' safes, but some top secret information was delivered to them for private review as needed.[3196]

Many judges are concerned about surrendering control of classified materials they review. Judge Hogan, for example, dates and initials all classified documents that he reviews.[3197]

Challenge: Sensitive Unclassified Information

Although the Executive Branch determines what information is classified, the courts determine what part of a judicial record is otherwise protected or sealed.[3198]

Judge Hogan's 2008 protective order provided for the government's designation of unclassified information in returns and other court documents as protected:

> Should government counsel in these consolidated cases wish to have the Court deem any document or information "protected," government counsel shall disclose the information to qualified counsel for petitioners—i.e., counsel who have satisfied the necessary prerequisites of this Protective Order for the viewing of protected information—and attempt to reach an agreement about the designation of the information prior to filing a motion with the Court. Petitioners' counsel shall treat such disclosed information as protected unless and until the Court rules that the information should not be designated as protected.[3199]

On June 30, 2009, Judge Huvelle overruled the government's designation of some information as protected.[3200] Judge Huvelle ruled by sealed order after a closed proceeding.[3201] In a heavily redacted published opinion, the court of appeals reversed,[3202] but it was very difficult to determine from the public record

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3193. *Id.* at 2, 4–7.

3194. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

3195. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3196. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3197. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

3198. Bismullah v. Gates, 501 F.3d 178, 188 (D.C. Cir. 2007); *see* Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide (2010).

3199. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 151 (D.D.C. 2008) (¶ 34).

3200. Ameziane v. Obama, 620 F.3d 1, 3 (D.C. Cir. 2010); Docket Sheet, Ameziane v. Bush, No. 1:05-cv-392 (D.D.C. Feb. 24, 2005) [hereinafter *Ameziane* Docket Sheet].

3201. *Ameziane* Docket Sheet, *supra* note 3200.

3202. *Ameziane*, 620 F.3d 1; *see Appeals Court Upholds Secrecy in Algerian's Case*, Miami Herald, Oct. 8, 2010; *Guantanamo Detainee Loses Bid to Have US Release Information to the Public*, Boston Globe, Oct. 9, 2010, at 2 (reporting that the detainee had been waterboarded).

why the government should or should not have been entitled to designate the information as protected. The Supreme Court denied a sealed petition for certiorari.[3203]

The matter became clear in 2012 when the government informed the court of appeals that its opinion could be released unredacted.[3204] Djamel Ameziane had moved to unseal his approval for transfer so that he could negotiate directly with countries of his choice for transfer.[3205] In order to prevent detainees from interfering with the government's negotiations, the government sought to keep transfer approvals secret.[3206] In 2012, "the [potential] diplomatic and national security harms [were] no longer as acute."[3207]

On September 4, 2009, Judge Huvelle again overruled the government's designation of some information as protected, and her ruling did not receive appellate review.[3208] Respecting the government's statement of material facts in Jawad's case, the government sought to designate as protected the dates of interrogations so that a reader could not induce the identities of interrogators. Judge Huvelle, noting that the government did not regard this information as classified, determined that dates for Jawad's interrogations were already public so those dates could not be regarded as protected and only dates of the month, but not month and year, needed to be protected for interrogations of others.[3209] "The public has a legitimate interest in gaining access to the month and year of the reports containing inculpatory statements to determine whether those statements are reliable (*i.e.*, whether the interrogation occurred a substantial time after the event in question)."[3210]

Between the government's sealed motion to designate the dates protected and Jawad's sealed opposition to that motion, Judge Huvelle issued an order suppressing Jawad's out-of-court statements as the products of torture.[3211] Before she issued her ruling on whether the dates could be protected, the government decided to no longer regard Jawad detainable,[3212] Judge Huvelle granted the writ,[3213] and Jawad was released.[3214] On December 30, 2010, Judge Huvelle approved redac-

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3203. Ameziane v. Obama, ___ U.S. ___, 131 S. Ct. 1673 (2011).

3204. Motion to Unseal, Ameziane v. Obama, No. 09-5236 (D.C. Cir. Sept. 21, 2012) [hereinafter *Ameziane* Motion to Unseal].

Judge Huvelle's two-page order is unsealed in the appellate record. Appendix at 86–87, *id.* (Aug. 6, 2009) ("The government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected, or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries.").

3205. Ameziane v. Obama, 699 F.3d 488, 490 (D.C. Cir. 2010).

3206. *Id.*

3207. *Ameziane* Motion to Unseal, *supra* note 3204, at 3–4.

3208. Bacha v. Obama, 653 F. Supp. 2d 32 (D.D.C. 2009).

3209. *Id.* at 34.

3210. *Id.* at 35.

3211. Jawad Suppression Order, *supra* note 2877; Docket Sheet, Al-Halmandy v. Obama, No. 1:05-cv-2385 (D.D.C. July 17, 2009).

3212. Jawad Nondetainability Notice, *supra* note 2879.

3213. Jawad Writ, *supra* note 2831.

3214. *See Detainee Released*, *supra* note 2881.

tions in the public filing of Jawad's return,[3215] which was filed on March 15, 2011.[3216]

On May 12, 2011, Judge Hogan further clarified under what circumstances the government could designate unclassified information as protected from public disclosure:

> Pursuant to [the] first step, the government must identify the categories of information it seeks to protect and provide a valid basis for withholding information in those categories. To satisfy this step, the government must proffer a specific, tailored rationale for protecting a general category of information. To be clear, the rationale must be tailored to the category for which protection is sought but need not necessarily be tailored to a particular case. It will not suffice for the government to identify broad categories for which the rationale for protection is brief, spare and generic. On the other hand, the government's rationale need not be so specific that it precludes any generalized categorization. Furthermore, the narrower the category for which the government seeks protection, the more likely the government's rationale will be sufficiently tailored.
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> With respect to [the] second step, the Court must determine whether the specific information the government has designated for protection properly falls within the category identified in the first step. . . . [D]etermining whether the information falls within the protected category requires evaluating whether the rationale for protection asserted in the first step is implicated by the specific information the government has designated for protection in the second step. . . . Thus, determining whether designated information falls within a protected category requires the Court to evaluate whether the rationale for the category applies to the designated information.
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> . . . [I]f the government satisfies [this] two-step test . . . , the district court is required to defer to the government's assessment of the harm to foreign relations and national security that would result from disclosure of the information the government seeks to protect.[3217]

Challenge: Classified Arguments

Judge Green's November 2004 protective order specified that documents that might contain classified information were to be filed with the classified information security officers, at which time they would be deemed filed with the court; the security officers would arrange for a classification review, and redacted versions of the documents, if redaction was necessary, would be filed on the public record.[3218] A protective order issued by Judge Hogan in 2008, two months after he accepted pretrial consolidation of the habeas petitions, provided for similar procedures.[3219]

Sometimes inferences about classified filings can be drawn from unclassified filings. To ask Judge Kennedy to accept new evidence following the judge's grant of habeas corpus relief to the Russian detainee Mingazov, the government filed a

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3215. Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. Dec. 30, 2010).

3216. Order, *id.* (Mar. 15, 2011).

3217. *In re* Guantanamo Bay Detainee Litig., 787 F. Supp. 2d 5, 13–14 (D.D.C. 2011) (citations and quotation marks omitted).

3218. *In re* Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 182 (D.D.C. 2004); *see* Gorman, *supra* note 2661, at 14.

3219. *In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143 (D.D.C. 2008).

classified motion.[3220] Mingazov's attorneys filed a classified opposition.[3221] The government filed a classified motion with the court of appeals seeking abeyance pending resolution of the motion before Judge Kennedy.[3222] Mingazov's attorneys filed an unclassified—and unsuccessful—opposition, which disclosed that the motion before Judge Kennedy was a request to present additional evidence, without disclosing what the evidence was.[3223] The government's reply brief on the abeyance motion was also unclassified.[3224]

In the spring of 2011, the government filed notices of top secret ex parte filings in ten habeas cases for high-value detainees,[3225] a category used for central figures in terrorism planning.[3226] Judges Kollar-Kotelly,[3227] Walton,[3228] Bates,[3229] Friedman,[3230] and Roberts[3231] referred the matter to Judge Sullivan, to whom two of the cases had been assigned.[3232] The briefing on this matter was classified, but the filings of papers were noted on the public record.[3233] On May 9, 2012, Judge

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3220. Notice of Filing, Al-Harbi v. Obama, No. 1:05-cv-2479 (D.D.C. Dec. 15, 2010).

3221. Notice of Filing, *id.* (Jan. 31, 2011).

3222. Docket Sheet, Mingazov v. Obama, No. 10-5217 (D.C. Cir. June 28, 2010).

3223. D.C. Cir. *Mingazov* Opposition Brief, *supra* note 2974; *see Mingazov* Abeyance Order, *supra* note 2975 (granting abeyance).

3224. Reply Brief, *Mingazov*, No. 10-5217 (D.C. Cir. Jan. 3, 2011).

3225. Notice of Filing, Bin Lep v. Obama, No. 1:09-cv-31 (D.D.C. Apr. 8, 2011); Notice of Filing, Hambali v. Obama, No. 1:10-cv-407 (D.D.C. Mar. 24, 2011); Notice of Filing, Al-Baluchi v. Obama, No. 1:08-cv-2083 (D.D.C. Mar. 24, 2011); Notice of Filing, Al-Nashiri v. Obama, No. 1:08-cv-1207 (D.D.C. Mar. 24, 2011); Notice of Filing, Bin al-Shibh v. Obama, No. 1:06-cv-1725 (D.D.C. Mar. 24, 2011); Notice of Filing, Abdulrazzaq v. Obama, No. 1:09-cv-1462 (D.D.C. Mar. 23, 2011); Notice of Filing, Rahim v. Obama, No. 1:09-cv-1385 (D.D.C. Mar. 23, 2011); Notice of Filing, Mohammad v. Obama, No. 1:09-cv-873 (D.D.C. Mar. 23, 2011); Notice of Filing, Husayn v. Obama, No. 1:08-cv-1360 (D.D.C. Mar. 23, 2011); Notice of Filing, Khan v. Obama, No. 1:06-cv-1690 (D.D.C. Mar. 23, 2011).

3226. *See* Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. Times, Jan. 20, 2011, at A1 (defining high-value detainee as "a senior terrorism suspect who was held for a time in secret C.I.A. prisons and subjected to what the Bush administration called 'enhanced interrogation techniques'"); *see also* Fox, *supra* note 2658 (reporting that high-value detainees are so designated "because of their previous CIA detention").

3227. Order, *Mohammad*, No. 1:09-cv-873 (D.D.C. Apr. 15, 2011).

3228. Order, *Khan*, No. 1:06-cv-1690 (D.D.C. Apr. 15, 2011).

3229. Order, *Hambali*, No. 1:10-cv-407 (D.D.C. Apr. 18, 2011); Order, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Apr. 18, 2011).

3230. Order, *Rahim*, No. 1:09-cv-1385 (D.D.C. Apr. 18, 2011); Order, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Apr. 18, 2011).

3231. Order, Husayn v. Obama, No. 1:08-cv-1360 (D.D.C. Apr. 18, 2011); Order, Al-Nashiri v. Obama, No. 1:08-cv-1207 (D.D.C. Apr. 18, 2011).

3232. Docket Sheet, Abdulrazzaq v. Obama, No. 1:09-cv-1462 (D.D.C. Aug. 3, 2009) [hereinafter *Abdulrazzaq* Docket Sheet]; Docket Sheet, Bin al-Shibh v. Obama, No. 1:06-cv-1725 (D.D.C. Aug. 30, 2005) [hereinafter *Bin al-Shibh* Docket Sheet]; *see* Opinion at 2, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Nov. 1, 2012), *available at* 2012 WL 5382730 [hereinafter *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion].

3233. The briefing concluded with government replies filed on June 15 and 16, 2011.

Sullivan entered a notice in each case that he had issued a classified opinion on the matter.[3234] A November 1, 2012, denial of one detainee's motion to reconsider discloses that the classified opinion was issued on May 7 and that the opinion granted a government motion with additional conditions.[3235]

Both habeas counsel[3236] and the government[3237] filed classified briefs in a motion to reconsider Judge Lamberth's order denying leave to depose Ali H. Soufan,

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1. Majid Khan: Government Reply, *Khan*, No. 1:06-cv-1690 (D.D.C. June 16, 2011); Petitioner's Response, *id.* (June 2, 2011); Strike Reply, *id.* (Apr. 29, 2011); Strike Opposition, *id.* (Apr. 20, 2011); Petitioner's Motion to Strike, *id.* (Apr. 8, 2011).
2. Ramzi Bin al-Shibh: Government Reply, *Bin al-Shibh*, No. 1:06-cv-1725 (D.D.C. June 15, 2011); Petitioner's Response, *id.* (June 7, 2011); Extension Opposition, *id.* (Apr. 8, 2011); Extension Motion, *id.* (Apr. 1, 2011).
3. Abd al-Rahim Hussain Mohammed al-Nashiri: Government Reply, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. June 15, 2011); Petitioner's Joinder, *id.* (May 31, 2011); Petitioner's Response, *id.* (May 31, 2011); Extension Motion, *id.* (Apr. 8, 2011).
4. Zayn al-Abidin Muhammad Husayn (Abu Zubaydah): Government Reply, *Husayn*, No. 1:08-cv-1360 (D.D.C. June 15, 2011); Strike Opposition, *id.* (Apr. 12, 2011); Petitioner's Motion to Strike, *id.* (Apr. 12, 2011). Note that the petitioner's response to the original filing does not appear to be docketed.
5. Ammar al-Balluchi: Government Reply, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. June 15, 2011).
6. Mohammed Nazir Bin Lep: Government Reply, *Bin Lep*, No. 1:09-cv-31 (D.D.C. June 16, 2011); Petitioner's Response, *id.* (June 2, 2011); Extension Opposition, *id.* (Apr. 8, 2011); Extension Motion, *id.* (Apr. 6, 2011).
7. Mustafa Frarj Mohammad: Government Reply, Mohammad v. Obama, No. 1:09-cv-873 (D.D.C. June 15, 2011); Petitioner's Response, *id.* (May 31, 2011); Extension Opposition, *id.* (Apr. 20, 2011); Extension Motion, *id.* (Apr. 8, 2011).
8. Muhammed Rahim: Government Reply, *Rahim*, No. 1:09-cv-1385 (D.D.C. June 15, 2011); Petitioner's Joinder, *id.* (May 31, 2011); Petitioner's Response, *id.* (May 31, 2011); Disclosure Opposition, *id.* (May 5, 2011); Motion to Disclose, *id.* (May 2, 2011); Extension Notice, *id.* (Apr. 20, 2011); Extension Motion, *id.* (Apr. 18, 2011); Opposition, *id.* (Apr. 8, 2011); Extension Notice, *id.* (Apr. 8, 2011); Extension Motion, *id.* (Mar. 30, 2011).
9. Nashwana al-Ramer Abdulrazzaq: Government Reply, *Abdulrazzaq*, No. 1:09-cv-1462 (D.D.C. June 15, 2011); Extension Reconsideration Motion, *id.* (Apr. 13, 2011); Extension Motion, *id.* (Apr. 5, 2011).
10. Riduan Bin Isomuddin Hambali: Government Filing, *Hambali*, No. 1:10-cv-407 (D.D.C. June 15, 2011); Government Notice of Opposition to Motion to Enlarge Time, *id.* (Apr. 12, 2011); Motion to Enlarge Time, *id.* (Apr. 11, 2011) (motion for an extension of time to consult with the detainee and counsel for other detainees).

3234. Docket Sheet, *Hambali*, No. 1:10-cv-407 (D.D.C. Mar. 11, 2010); *Abdulrazzaq* Docket Sheet, *supra* note 3232; Docket Sheet, *Rahim*, No. 1:09-cv-1385 (D.D.C. July 27, 2009); Docket Sheet, *Mohammad*, No. 1:09-cv-873 (D.D.C. May 11, 2009); Docket Sheet, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Jan. 8, 2009); Docket Sheet, *Al-Baluchi*, No. 1:08-cv-2083 (D.D.C. Dec. 2, 2008); *Husayn* Docket Sheet, *supra* note 2791; Docket Sheet, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. July 15, 2008); *Bin al-Shibh* Docket Sheet, *supra* note 3232; *Khan* Docket Sheet, *supra* note 3015.

3235. *Al-Nashiri* Denial of Motion to Reconsider Classified Opinion, *supra* note 3232.

3236. Notice of Filing, Abdah v. Obama, No. 1:04-cv-1254 (D.D.C. Mar. 30, 2012) (reply brief); Notice of Filing, *id.* (Mar. 7, 2012) (motion brief).

3237. Notice of Filing, *id.* (Mar. 26, 2012) (opposition brief).

who interrogated the petitioner when Soufan worked for the FBI and who published a book in 2012 that discussed the interrogation.[3238] The book was published in September 2011, and counsel moved on October 21 for leave to depose Soufan.[3239] Judge Lamberth, to whom the case had been assigned after Judge Kennedy's disability retirement,[3240] ordered the discovery motion untimely on January 23, 2012.[3241]

Classification reviews of habeas filings, so that cleared or redacted versions could appear on the public record, have required a considerable amount of effort. In 2013, Judge Lamberth informed the government in an order concerning one case that the amount of effort was not an excuse for excessive delays in providing the public with records of the court's proceedings.

> The Court is troubled by the government's apparent lack of urgency in issuing public versions of classified materials filed in Guantanamo proceedings. In this case in particular, the government has failed to produce public versions of the petitioner's traverse and hearsay briefs, which were filed on July 31, 2009. The government argues that because petitioner's habeas petition was dismissed and he has been released from the Guantanamo Bay Detention Facility, there is no urgent need to produce these documents. However, this ignores the inherent public interest in Guantanamo litigation generally, and in the facts related to the release of this detainee in particular. Moreover, the practice of publicly disclosing court documents is deeply rooted in our system of government. See *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978). The public interest served by releasing court filings includes allowing "citizens . . . to keep a watchful eye on the workings of public agencies." *Id.* (citations omitted). More importantly, it is the judiciary and not the executive that determines whether the public can access and inspect court records. *See Bismullah* [*v. Gates*], 501 F.3d [178,] 188 [(D.C. Cir. 2007)] (citations omitted). Here, petitioner's documents have remained essentially under seal for approximately 42 months, and the Court sees no reason to write the government a blank check and allow them to produce the documents at some unknown point in the future.[3242]

To help judges with classified materials, chambers staff persons must have security clearances. Some judges permit some staff members to forgo the clearance process and the special responsibility that comes with handling classified material. Also, not all of the court's court reporters have agreed to seek security clearances.

When classified materials are not in use, they must be stored in combination safes, and the combinations must be memorized.

3238. Order at 1, *id.* (Jan. 23, 2012) [hereinafter *Abdah* Deposition Order]; Soufan, *supra* note 2590, at 470–71, 536 (referring to the petitioner as detainee number 37 and al-Batar); Government Opposition to Deposition at 2, *Abdah*, No. 1:04-cv-1254 (D.D.C. Nov. 7, 2011).

3239. Deposition Motion, *Abdah*, No. 1:04-cv-1254 (D.D.C. Oct. 21, 2011); *Abdah* Deposition Order, *supra* note 3238, at 1.

3240. Reassignment, *Abdah*, No. 1:04-cv-1254 (D.D.C. Dec. 22, 2011); Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting that Judge Kennedy "[a]ssumed senior status due to certified disability on November 18, 2011").

3241. *Abdah* Deposition Order, *supra* note 3238.

3242. Barre v. Obama, ___ F. Supp. 2d ___, ___, 2013 WL 1180300 (D.D.C. Mar. 8, 2013) (pp. 11–12 of filed opinion).

Challenge: Closed Proceedings and Remote Participation

A very important part of managing a Guantánamo Bay habeas case is determining when to close proceedings for purposes of national security.[3243]

Judges will often try to conduct as much of the proceeding as possible in open session. An important challenge during an open session is keeping track of what information is classified and therefore not something to be discussed openly. Especially difficult to remember as classified are details, such as the date the detainee was arrested, that have a classified status not intuitively obvious.[3244] Complicating the burden for judges was the fact that sometimes their unredacted copies of documents, such as factual returns, did not clearly show what parts of the documents were classified.[3245]

Transitioning from an open session to a closed session always took several minutes, in part because the reporter had to set up special equipment to transcribe classified proceedings.[3246]

All persons present at classified proceedings must have security clearances. If a judge's courtroom clerk is not cleared, then a cleared law clerk can act as courtroom clerk.[3247] Classified materials used by habeas attorneys in court must be transported by cleared couriers from the secure facility in Crystal City to the courthouse.[3248]

In cooperation with Attorney General Mukasey, the court established a direct satellite connection with Guantánamo Bay.[3249] The court identified one courtroom to fit with a secure connection to the satellite for Guantánamo Bay hearings.[3250]

Obtaining detainees' participation from Guantánamo Bay presented the court with one of its most substantial logistical challenges.[3251] Timing of the proceeding had to be coordinated with, among other things, the timing of flights to Guantánamo Bay.[3252]

If the detainee did not testify, then classified information would not be transmitted between the courtroom and Guantánamo Bay, because the detainee was not permitted access to classified information.[3253] If, however, a detainee testified, either as the petitioner or as a witness, then the detainee's testimony was pre-

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3243. Interview with Hon. John D. Bates, Oct. 15, 2009.

3244. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3245. Transcript at 3–4, Al-Halmandy v. Bush, No. 1:05-cv-2385 (D.D.C. June 19, 2009, filed Aug. 27, 2009); Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3246. Interview with Hon. Gladys Kessler, May 31, 2011.

3247. Interview with Hon. Reggie B. Walton, May 23, 2011.

3248. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3249. Interview with Hon. Royce C. Lamberth, May 13, 2011.

Detainees were not brought to court for proceedings so that they would not be able to pursue asylum rights. *Id.* Proceedings were not held at Guantánamo Bay, because the judges did not believe that they could hear cases outside of the United States. *Id.*

3250. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011; Interview with Hon. Reggie B. Walton, May 23, 2011; Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3251. Interview with Hon. Gladys Kessler, May 31, 2011.

3252. *Id.*

3253. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

sumptively classified.[3254] The testimony was transmitted by secure audiovisual link, which required FBI security specialists at both locations.[3255]

The first few habeas hearings set the mold for how future hearings were conducted. By the time of the hearing, the government had identified a specific number of issues, and it needed to prevail on any one issue to justify detention, so the structure of the hearing usually tracked the enumerated case-specific issues.[3256]

On November 6, 2008, Judge Leon began the first evidentiary hearing on the government's evidence supporting a Guantánamo Bay detention.[3257] Attorneys for both sides made opening statements in open court.[3258] The detainees were to listen to proceedings by a live audio feed, but because of technical difficulties they were only able to listen to an audio recording of the proceeding the next day.[3259] They received a written Arabic translation soon afterward.[3260]

On the afternoon of the same day, Judge Leon continued the proceeding in closed session because classified evidence would be presented and discussed.[3261] During the next few days of the proceeding, two detainees testified by audiovisual feed from Guantánamo Bay.[3262] Their attorneys provided them with shirts and ties; one was able to testify in English.[3263] Closing arguments on November 14 were also held in closed session, from which the detainees were excluded, because much of the arguments was classified.[3264]

The 2008 and 2009 hearings for al-Alwi, Sliti, al-Bihani, and Hammamy, whose habeas petitions were denied, and for el-Gharani and al-Janko, whose petitions were granted, were conducted similarly.[3265] Judge Leon began with public

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3254. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011; Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Winke, *supra* note 2717, at 356.

3255. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

The video link between the courthouse and Guantánamo Bay was established pursuant to a letter request by Chief Judge Lamberth on September 18, 2008, to the FBI's Technical Response Unit. *Id.*, Sept. 26, 2011.

Judge Collyer observed that because the video presentation of the detainee's testimony did not include a close-up, she could not observe the detainee's facial demeanor nearly as well as she could that of a witness testifying in the courtroom. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3256. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3257. Boumediene v. Bush, 579 F. Supp. 2d 191, 193 (D.D.C. 2008); *see* William Glaberson, *Judge Opens First Habeas Corpus Hearing on Guantánamo Detainees*, N.Y. Times, Nov. 7, 2008, at A21; Glaberson & Becker, *supra* note 2716.

3258. *Boumediene*, 579 F. Supp. 2d at 193; *see* Glaberson, *supra* note 3257.

3259. *Boumediene*, 579 F. Supp. 2d at 193; *see* Glaberson, *supra* note 3257; Winke, *supra* note 2717, at 353–55 (describing the petitioners' reactions to the recording).

3260. *Boumediene*, 579 F. Supp. 2d at 193.

3261. *Id.*

3262. *Id.*; *see* Winke, *supra* note 2717, at 356–57.

3263. *See* Winke, *supra* note 2717, at 355.

3264. *Boumediene*, 579 F. Supp. 2d at 193.

3265. Al-Ginco v. Obama, 626 F. Supp. 2d 123, 125 (D.D.C. 2009) (hearing May 28–29, 2009); Hammamy v. Obama, 604 F. Supp. 2d 240, 241 (D.D.C. 2009) (hearing March 12, 2009); Al-Bihani v. Obama, 594 F. Supp. 2d 35, 36 (D.D.C. 2009) (hearing January 15–16, 2009); El Gharani v. Bush, 593 F. Supp. 2d 144, 145 (D.D.C. 2009) (hearing December 17–18, 2008); Al-

opening statements.[3266] The hearings continued in closed session because classified information would be discussed.[3267] Sliti elected not to participate,[3268] but al-Alwi, el-Gharani, al-Bihani, Hammamy, and al-Janko listened to live translations of the public opening statements by telephone from Guantánamo Bay.[3269]

Fawzi Khalid Abdullah Fahad al-Odah,[3270] al-Rabiah,[3271] and al-Kandari[3272] also listened to the public opening statements in their habeas merits proceedings.

At a March 31, 2009, habeas hearing, Judge Huvelle began with a closed session on classified and other evidence and then held a closed session that did not include classified information but was sealed at the request of the petitioner, who expressed fear of reprisals for his cooperation with the government.[3273] He listened to the unclassified session by telephone from Guantánamo Bay.[3274]

On June 18, 2009, Judge Kessler ruled that al-Adahi's testimony from Guantánamo Bay at his merits hearing would be in open court.[3275] "Petitioner will not be giving any classified testimony on direct or re-direct because he has access to none, and the Government will not be able to cross-examine him on any classified testimony."[3276] On the following day, however, Judge Kessler rescinded the order, but she did order the government to preserve a videotape of al-Adahi's testimony.[3277] A four-day hearing began on June 22, 2009.[3278] Al-Adahi testified on June 23 and 24.[3279] A redacted transcript was filed publicly on June 26.[3280] Redacted were the identities of the interpreter and an informant detainee.[3281] On July 23, the government filed a notice that it did not videotape al-Adahi's testimony as ordered,[3282] and Judge Kessler found the government in contempt on December

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Alwi v. Bush, 593 F. Supp. 2d 24, 25 (D.D.C. 2008) (December 16–17, 2008); Sliti v. Bush, 592 F. Supp. 2d 46, 47 (D.D.C. 2008) (hearing December 18, 2008).

3266. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47.

3267. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25; *Sliti*, 592 F. Supp. 2d at 47; *see* Glaberson, *supra* note 3257.

3268. *Sliti*, 592 F. Supp. 2d at 47.

3269. *Al-Ginco*, 626 F. Supp. 2d at 125; *Hammamy*, 604 F. Supp. 2d at 241; *Al-Bihani*, 594 F. Supp. 2d at 39; *El Gharani*, 593 F. Supp. 2d at 145; *Al-Alwi*, 593 F. Supp. 2d at 25.

3270. Al Odah v. United States, 648 F. Supp. 2d 1, 3 (D.D.C. 2009).

3271. Al Rabiah v. United States, 658 F. Supp. 2d 11, 15 n.1 (D.D.C. 2009).

3272. Al Kandari v. United States, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

3273. Basardh v. Bush, 612 F. Supp. 2d 30, 31 (D.D.C. 2009).

3274. *Id.*

3275. Order, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. June 18, 2009), *available at* 2009 WL 1743758.

3276. *Id.*

3277. Order, *id.* (June 19, 2009), *available at* 2009 WL 1764540.

3278. *Al-Adahi* Habeas Grant, *supra* note 2862, at 4; *Al-Adahi* Docket Sheet, *supra* note 2933.

3279. Transcript, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. June 23 and 24, 2009, filed June 26, 2009).

3280. *Id.*

3281. *Id.*

3282. Notice, *id.* (July 23, 2009).

10.[3283] On January 8, 2010, the government promised more reliable videotaping procedures.[3284]

Judge Kessler's hearing on September 3, 2009, on Bin Mohammed's successful writ petition began with unclassified opening arguments and continued in closed session.[3285] Bin Mohammed chose not to listen to the opening arguments or testify.[3286]

Judge Walton began Abd al-Rahman Abdu Abu al-Ghayth Sulayman's unsuccessful merits hearing on May 3, 2010.[3287] The detainee elected to testify and to listen to the unclassified portions of the hearing.[3288] One of Sulayman's attorneys and an interpreter were in Guantánamo Bay; another Sulayman attorney was in the courtroom.[3289] Overcoming a few difficulties with the transmission feed, the four-day hearing concluded successfully.[3290]

Proceedings on Bin Mohammed's ill-fated injunction against his transfer to Algeria were largely under seal.[3291] On the day it decided the case, the court of appeals issued an order to show cause why its reversal of Judge Kessler's injunction should not be released publicly.[3292] One week later, the order was unsealed.[3293] Eleven weeks later, the government filed redacted copies of its appellate briefs, including a redacted copy of Judge Kessler's injunction opinion,[3294] but the opinion remains sealed in the district court file.[3295] Redactions appear to be protected but not classified.

Proceedings on Naji's efforts to avoid transfer to Algeria also were sealed; sealed district court filings appear unsealed in the court of appeals' case file.[3296]

Classified information security officers typically attend open proceedings at which there is a possibility that someone will inadvertently say something that is classified. The security officers will interrupt if it looks like someone is about to say something improper for an open session. If something slips out, it is common to redact it from the transcript.

3283. Order, *id.* (Dec. 10, 2009).

3284. Government Brief, *id.* (Jan. 8, 2010).

3285. Bin Mohammed v. Obama, 689 F. Supp. 2d 38, 40 (D.D.C. 2009); Docket Sheet, Bin Mohammed v. Bush, No. 1:05-cv-1347 (D.D.C. July 6, 2005) [hereinafter D.D.C. *Bin Mohammed* Docket Sheet].

3286. *Bin Mohammed*, 689 F. Supp. 2d at 40.

3287. Sulayman v. Obama, 729 F. Supp. 2d 26, 29 (D.D.C. 2010).

3288. Notice, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Feb. 26, 2010).

3289. Interview with Hon. Reggie B. Walton, May 23, 2011.

3290. *Id.*

3291. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 3285.

3292. Order, Bin Mohammed v. Obama, No. 10-5218 (D.C. Cir. July 8, 2010).

3293. *Bin Mohammed* Injunction Reversal, *supra* note 2909.

3294. Docket Sheet, *Bin Mohammed*, No. 10-5218 (D.C. Cir. June 30, 2010).

3295. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 3285.

3296. *Naji* Government Response, *supra* note 2913.

Challenge: Classified Orders and Opinions

If an order or opinion might contain classified information, it ordinarily should be submitted to a classified information security officer, who will forward it to members of the intelligence community for a walled-off classification review.[3297] The court can either issue a potentially classified opinion and serve it on cleared attorneys for the parties, with a classification review to follow, or the court can submit the opinion to a classification review before it is issued.[3298] Persons reviewing an opinion before it has been issued must be walled off from persons working with those representing the government in court.[3299]

Habeas attorneys generally must travel to the secure facility in Crystal City to review unredacted classified opinions and other classified filings.[3300]

District Court

Each judge presiding over a Guantánamo Bay habeas petition was provided with a safe for storing classified materials and a secure laptop computer, which was stored in the safe.[3301] It was determined to be too expensive to provide each judge with a classified printer, so one was established on each floor of the district court.[3302] Most of the judges' law clerks did not have security clearances before these cases were filed, but law clerks for all of the judges hearing these cases obtained clearances.[3303]

Some law clerks were cleared to work with SCI, but access to SCI requires an Executive Branch decision that the person can be read into the specific SCI pro-

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3297. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

> The U.S. intelligence community, or IC, consists of sixteen agencies and organizations within the Executive Branch: Air Force Intelligence, Army Intelligence, the Central Intelligence Agency, Coast Guard Intelligence, the Defense Intelligence Agency, the Department of Energy's intelligence arm, the Department of Homeland Security's intelligence arm, the Department of State's Bureau of Intelligence and Research, the Department of the Treasury's intelligence arm, the Drug Enforcement Administration, the Federal Bureau of Investigation, Marine Corps Intelligence, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the National Security Agency, and Navy Intelligence. The Office of the Director of National Intelligence is the seventeenth member of the intelligence community; and some consider the Department of Defense another member; but by executive order, the IC consists of sixteen agencies.

Dana Priest & William M. Arkin, Top Secret America xx n.3 (2011); *see* Peter Lance, Triple Cross 69 & n.* (2006) (identifying as the big five the FBI, the CIA, the DIA, the NSA, and the U.S. State Department's Bureau of Intelligence and Research).

Judges are not classification authorities, so they are not empowered to determine what is classified and what is not. *See id.*

3298. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

3299. *Id.*

3300. *Id.*

3301. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3302. *Id.*

3303. *Id.*

gram.[3304] Judge Friedman, for example, had one law clerk read into SCI for Guantánamo Bay cases and another law clerk read into SCI for another case.[3305]

Judge Green's January 31, 2005, opinion resolving the government's motion to dismiss the coordinated cases included some classified information.[3306] An unredacted opinion was served on the attorneys for both sides and preserved for the court of appeals, and a redacted version was filed on the public record.[3307] In cooperation with classified information security officers, Judge Green and her staff blacked out redactions electronically, printed the opinion on a secure printer, and then filed a scanned image of the opinion in the court's electronic case file.[3308] This procedure prevented persons from unredacting the electronic redactions.[3309] Judge Green denied a government attorney's request for an advance copy so that government attorneys could tell her what to redact.[3310]

Judge Leon's denials of Sliti, al-Alwi, al-Bihani, and Hammamy's habeas petitions and his granting of el-Gharani and al-Janko's habeas petitions were memorialized in both published opinions and more complete classified opinions.[3311] In granting Ahmed's habeas corpus petition, Judge Kessler cited Judge Leon's classified *El-Gharani* opinion.[3312]

Six months after Judge Leon ruled that the government had presented sufficient evidence to detain Belkacem Bensayah at Guantánamo Bay, Bensayah filed a motion under Rule 60(b)(2) of the Federal Rules of Civil Procedure for relief from the judgment based on newly discovered evidence.[3313] The parties filed their briefing on this motion with the classified information security officer and filed public notices of the filings with the clerk.[3314] Within three months, Judge Leon denied the motion in a classified memorandum order filed with the classified information security officer.[3315] An appeal is pending.[3316]

Judge Kollar-Kotelly's opinion ordering al-Rabiah's release was issued on September 17, 2009, but it contained classified information so it was not released

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3304. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

3305. *Id.*

3306. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (noting in the public version, "Material redacted by court"); Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3307. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3308. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 26, 2011.

3309. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

3310. *Id.*

3311. Al-Ginco v. Obama, 626 F. Supp. 2d 123, 125 (D.D.C. 2009); Hammamy v. Obama, 604 F. Supp. 2d 240, 241 (D.D.C. 2009); Al-Bihani v. Obama, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); El Gharani v. Bush, 593 F. Supp. 2d 144, 145 (D.D.C. 2009); Al-Alwi v. Bush, 593 F. Supp. 2d 24, 25 (D.D.C. 2008); Sliti v. Bush, 592 F. Supp. 2d 46, 47 (D.D.C. 2008).

3312. Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. 2009).

3313. Notice, Boumediene v. Obama, No. 1:04-cv-1166 (D.D.C. May 26, 2009).

3314. *Boumediene* Docket Sheet, *supra* note 2569.

3315. *Id.*

3316. Docket Sheet, Bensayah v. Obama, No. 09-5376 (D.C. Cir. Oct. 29, 2009) (noting an extension of time to request a rehearing of the appeal).

publicly.[3317] A redacted version, containing 519 redactions in 65 pages, was released on September 25.[3318] The redacted version of her opinion denying al-Kandari's petition, containing 82 redactions in 64 pages, was released on September 29, 2010, two weeks after the full classified opinion was issued.[3319] Her other opinions resolving habeas petitions were also put on the public record in redacted form.[3320]

Judges Huvelle,[3321] Kessler,[3322] Robertson,[3323] Urbina,[3324] Kennedy,[3325] Bates,[3326] Leon,[3327] Friedman,[3328] Walton,[3329] and Lamberth[3330] also resolved habeas petitions with opinions containing classified information, so the opinions were filed with a classified information security officer and redacted versions were filed in the public record later.

3317. *Al-Odah* Docket Sheet, *supra* note 2551.

3318. Redacted Opinion, Al-Odah v. United States, No. 1:02-cv-828 (D.D.C. Sept. 25, 2009).

3319. Redacted Opinion, *id.* (Sept. 29, 2010).

3320. Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009) (redacted opinion filed seven days after the classified opinion); Al Mutairi v. United States, 644 F. Supp. 2d 78 (D.D.C. 2009) (six days).

3321. Basardh v. Bush, 612 F. Supp. 2d 30 (D.D.C. 2009) (redacted opinion filed two days after the classified opinion); *see also* Al-Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. 2010) (denying a motion to suppress a confession; redacted opinion filed 16 days after the classified opinion).

3322. Al-Adahi v. Obama, 698 F. Supp. 2d 48 (D.D.C. 2010) (redacted opinion filed 14 days after the classified opinion); Al-Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. 2010) (14 days); Bin Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. 2009) (27 days); *Al-Adahi* Habeas Grant, *supra* note 2862 (four days; redactions included the names of co-petitioners and the detainee's brother-in-law, whose identities were otherwise public); Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009) (one day).

3323. *Khalifh* Opinion, *supra* note 2936 (redacted opinion filed 17 days after the classified opinion); Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. 2010) (18 days); Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. 2009) (seven days).

3324. Khairkhwa v. Obama, 793 F. Supp. 2d 1 (D.D.C. 2011) (redacted opinion filed 23 days after the classified opinion); Alsabri v. Obama, 764 F. Supp. 2d 60 (D.D.C. 2011) (15 days); Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. 2009) (20 days).

3325. Hentif v. Obama, 810 F. Supp. 2d 33 (D.D.C. 2011) (redacted opinion filed 14 days after the classified opinion); Mingazov Opinion, *supra* note 2972 (80 days); D.D.C. Latif Opinion, *supra* note 2960 (26 days); Abdah v. Obama, 717 F. Supp. 2d 21 (D.D.C. 2010) (15 days); Abdah v. Obama, 709 F. Supp. 2d 25 (D.D.C. 2010) (26 days).

3326. Khan v. Obama, 741 F. Supp. 2d 1 (D.D.C. 2010) (redacted opinion filed 32 days after the classified opinion).

3327. Ali v. Obama, 770 F. Supp. 2d 1 (D.D.C. 1011) (redacted opinion filed 17 days after the classified opinion was issued).

3328. Almerfedi v. Obama, 725 F. Supp. 2d 18 (D.D.C. 2010) (redacted opinion filed 15 days after the classified opinion).

3329. Bostan v. Obama, 821 F. Supp. 2d 80 (D.D.C. 2011) (redacted opinion filed 19 days after the classified opinion); Hussein v. Obama, 821 F. Supp. 2d 67 (D.D.C. 2011) (15 days); Opinion, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Oct. 7, 2010) (15 days); Sulayman v. Obama, 729 F. Supp. 2d 26 (D.D.C. 2010) (15 days).

3330. Hentif v. Obama, 883 F. Supp. 2d 97 (D.D.C. 2012) (denying a motion for reconsideration, redacted opinion filed 14 days after the classified opinion); Al Warafi v. Obama, 821 F. Supp. 2d 47 (D.D.C. 2011) (53 days).

Judge Collyer denied Sufyian Barhoumi's petition from the bench without a written opinion.[3331] A redacted transcript of her ruling was filed four months later.[3332] Judge Collyer often issues rulings in the Guantánamo cases from the bench because of the many logistical hurdles required when an opinion is written later.[3333] All of the work must be done on a special laptop computer, which must be stored with all classified documents in a safe, and none of the work can be done at home.[3334]

Judge Hogan denied al-Madhwani's petition with an oral ruling on December 14, 2009.[3335] On January 6, 2010, Judge Hogan filed an unclassified opinion supporting his ruling, "part of which was classified."[3336] On April 28, Judge Hogan denied al-Madhwani's motion for reconsideration,[3337] filing a classified opinion with classified information security officers.[3338] Although the docket sheet promises a later filing of a redacted opinion, it does not appear to reflect such a filing.

On February 24, 2010, Judge Kennedy resolved a habeas petition with an opinion filed with a security officer, and an opinion without apparent redactions was filed nearly two months later.[3339] A redacted opinion had been filed on March 16, but it had to be withdrawn because it was insufficiently redacted:

> A day after his March 16 order was filed on the court's electronic docket, Kennedy's opinion vanished. Weeks later, a new ruling appeared in its place. While it reached the same conclusion, eight pages of material had been removed, including key passages in which Kennedy dismantled the government's case against Uthman.
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> . . .
>
> The creation of the additional opinion stemmed from a mishap inside the Justice Department: Kennedy's first opinion was accidentally cleared for public release before government agencies had blacked out all the classified information it cited.[3340]

Judge Lamberth resolved a habeas petition with an opinion that was marked secret and filed with a security officer, but it appears that no redactions were nec-

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3331. Barhoumi Order, *supra* note 2896; *see* Barhoumi v. Obama, 609 F.3d 416, 419 (D.C. Cir. 2010). Barhoumi Transcript, *supra* note 2896.

3332. Barhoumi Transcript, *supra* note 2896 (transcribing a September 3, 2009, proceeding); Docket Sheet, Shafiq v. Bush, No. 1:05-cv-1506 (D.D.C. July 28,2005) (noting the filing on January 4, 2010).

3333. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3334. *Id.*

3335. *Anam* Docket Sheet, *supra* note 2569.

3336. Anam v. Obama, 696 F. Supp. 2d 1, 3 (D.D.C. 2010).

3337. Order, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010).

3338. *Anam* Docket Sheet, *supra* note 2569.

3339. Abdah v. Obama, 708 F. Supp. 2d 9 (D.D.C. 2010) (public opinion filed 56 days after the original opinion), *rev'd sub nom.* Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011).

3340. Linzer, *supra* note 2874.

essary.[3341] Judges commonly strive to craft opinions that require as few redactions as possible.[3342]

Judge Leon denied Obaydullah's petition on October 19, 2010, filing a public opinion[3343] and promising a more complete classified opinion in the coming weeks.[3344] On November 24, Judge Leon filed a classified opinion with the court security officers; a redacted version was filed in the public record on March 23, 2011.[3345]

Court of Appeals

Many of the opinions resolving appeals in these cases contained classified information, so redacted opinions were filed in the public record, sometimes on the same day and sometimes a few days later.[3346] Sometimes, a classification review determined that the opinion could be publicly released in full.[3347]

One of these opinions was released in redacted form 26 days after the classified opinion was issued[3348] and then reissued in less redacted form nearly six months later,[3349] upon the government's motion[3350] with the detainee's support,[3351] because some of the originally redacted information had been declassi-

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3341. Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. 2010) (public opinion filed 15 days after the classified opinion).

Judge Lamberth tries to tell the public as much as he can about high-visibility cases and tries to avoid the speculation that results from redactions. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3342. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

3343. Obaydullah v. Obama, 744 F. Supp. 2d 344 (D.D.C. 2010).

3344. *Id.* at 346.

3345. Opinion, Obaydullah v. Obama, No. 1:08-cv-1173 (D.D.C. Mar. 23, 2011).

3346. Obaydullah v. Obama, 688 F.3d 784 (D.C. Cir. 2012) (redacted opinion filed seven days after the classified opinion); Suleiman v. Obama, 670 F.3d 1311 (D.C. Cir. 2012) (11 days); Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011) (26 days), *reissued*, 677 F.3d 1175 (D.C. Cir. 2012) (reissued in less redacted form after some material had been declassified while a petition for Supreme Court certiorari was pending); Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010) (same day); Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010) (seven days); Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010) (three days); Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010) (11 days); Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (same day); Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (same day).

3347. Alsabri v. Obama, 684 F.3d 1298 (D.C. Cir. 2012) (opinion issued under seal on April 27, 2012, and publicly on May 3, 2012); *see* Government Response, Alsabri v. Obama, No. 11-5081 (D.C. Cir. May 2, 2012) (confirming that the opinion contains no classified information).

In another case, an order was initially filed under seal with an order to show cause why it should not be unsealed, and the order was unsealed seven days later. *Bin Mohammed* Injunction Reversal, *supra* note 2909.

3348. *Latif*, 666 F.3d 746.

3349. *Latif*, 677 F.3d 1175 (unredacting references to an interrogation report).

3350. Government Motion, Latif v. Obama, No. 10-5319 (D.C. Cir. Apr. 24, 2012) [hereinafter D.C. Cir. *Latif* Government Motion].

3351. Petitioner Support, *id.* (Apr. 25, 2012) ("In supporting the government's motion, Latif does not concede that any of the retained redactions are proper.").

fied "in connection with ongoing proceedings" in the detainee's petition for a Supreme Court writ of certiorari.[3352]

On July 22, 2011, the court of appeals filed a sealed opinion reviewing an April 9, 2010, sealed order by Judge Hogan concerning former detainees.[3353] After sealed briefing, the Supreme Court denied certiorari.[3354]

Redactions from appellate opinions usually are blacked out in the public opinion and represented by "[redacted]" in West's publication of the opinions. This means that although the published opinion does not show how much material was redacted, the version of the opinion in the case file shows whether each redaction is the size of a word, a phrase, a paragraph, or a page. On September 6, 2011, an opinion by Judge Merrick B. Garland indicated redactions a different way.[3355] Redactions in this opinion are indicated similarly to how they are indicated in West's published opinions, except that the redactions are numbered from "[Redaction 1]" to "[Redaction 11]."[3356] A separate classified appendix, filed under seal, specifies what is redacted.[3357]

A 2010 opinion affirming denial of habeas corpus relief contained classified information.[3358] The court shaded the material it thought was classified and ordered the government to show cause why any other parts of the opinion should also be redacted.[3359] The government identified four additional parts of the opinion for redaction.[3360] The show-cause order also stated, "no person may disclose, receive, or use the opinion, or this order and attached judgment, for any purpose other than that of responding to this order."[3361]

The government asked the court to modify its order so that it could cite the court's new precedent in a draft brief in another case.[3362] The government also asked the court to adopt a protective order: "this Court should order the Government to provide a public, unclassified version of the opinion within a specific time

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3352. D.C. Cir. *Latif* Government Motion, *supra* note 3350; *see* Docket Sheet, Latif v. Obama, No. 11-1027 (U.S. Oct. 14, 2011).

3353. Docket Sheet, El-Falesteny v. Obama, No. 10-5180 (D.C. Cir. June 3, 2010); *see* Former Guantánamo Detainees Docket Sheet, *supra* note 2706; Docket Sheet, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. Dec. 13, 2005).

3354. El-Falesteny v. Obama, ___ U.S. ___, 132 S. Ct. 2773 (2012); Docket Sheet, El-Falesteny v. Obama, No. 11-9344 (U.S. Mar. 19, 2010).

3355. Khan v. Obama, 655 F.3d 20 (D.C. Cir. 2011) (affirming the denial of habeas corpus relief).

3356. *Id.* at 22–23, 25, 30, 32 & nn.2–3.

3357. *Id.* at 21 n.1.

3358. Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010).

3359. Order, Barhoumi v. Obama, No. 09-5383 (D.C. Cir. June 11, 2010) [hereinafter *Barhoumi* Show-Cause Order].

The court followed a similar procedure for a 2011 petition. Order, Latif v. Obama, No. 10-5319 (D.C. Cir. Nov. 9, 2011), *available at* 2011 WL 5508892.

3360. Government Response at 2, *id.* (June 17, 2010).

3361. *Barhoumi* Show-Cause Order, *supra* note 3359.

3362. Government Motion, *Barhoumi*, No. 09-5383 (D.C. Cir. June 22, 2010).

period, but the handling and distribution of the classified opinion will otherwise be controlled by the governing protective order."[3363]

The panel granted the government's request as to the case before the panel and referred the general request to the full court.[3364] The full court decided not to adopt a general policy:

> ORDERED that the practices suggested by the government remain in the discretion of the merits panel assigned to each case. The court denies the government's requests to adopt a court-wide policy against certain restrictions on the government's use of classified opinions and a court-wide policy regarding classification review and preparation of redacted opinions and judgments in all Guantanamo habeas appeals.[3365]

Challenge: Interpreters

To communicate with their clients, the detainees' attorneys typically needed to find interpreters who had or could obtain security clearances.

> . . . The vast majority of prisoners at Guantánamo do not speak English. They speak Pashto, Dari, Russian, Farsi, Arabic, and other languages. Therefore, in order to communicate with clients, lawyers must bring interpreters with them to Guantánamo.
>
> These interpreters are nothing short of courageous. . . . They submitted themselves to thorough background checks in order to obtain the necessary security clearances to travel to Guantánamo. They asked employers for permission to take off work, days at a time, for trips to Guantánamo. They explained to loved ones, including small children, why they would be away from home. In fact, because there is such a shortage of security-cleared interpreters, they devote even more time to Guantánamo trips than the attorneys do.[3366]

Interpreters were also needed for court proceedings in which the detainees participated. An effective proceeding required one of the detainee's attorneys to be in Cuba, with an interpreter, and another of the detainee's attorneys to be in court.[3367] Often, the detainee's attorneys and the government also had interpreters in court.[3368] Attempting a proceeding with only an interpreter in court worked very badly, because it was difficult for participants to stop talking while the interpreter told the detainee what was said.[3369]

Challenge: Mental and Physical Health During Detention

On Tuesday, February 26, 2002, a Guantánamo Bay guard ordered a prisoner at prayer to remove a makeshift turban from his head; turbans were forbidden because they could be used to conceal weapons, so guards provided tight-fitting

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3363. *Id.* at 4.

3364. Order, *id.* (June 22, 2010).

3365. Order, *id.* (Nov. 17, 2010).

3366. Carolyn M. Welshhans, *Heroes in Any Language*, *in* The Guantánamo Lawyers, *supra* note 2548, at 103, 103–04.

3367. Interview with Hon. Gladys Kessler, May 31, 2011.

3368. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

If the proceeding included more than one interpreter, occasionally an interpreter would object to another interpreter's translation. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011 (noting that, in her experience, the interpreters were always able to finally agree on a translation).

3369. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

prayer caps on request.[3370] On the following day, many prisoners began refusing to take meals, in protest.[3371] An announcement on Thursday that prisoners could wear turbans, reserving a right to inspect them, abated the hunger strike somewhat.[3372] A month later, camp doctors began force-feeding two strikers.[3373] Hunger strikes and suicide attempts were a problem at Guantánamo Bay from time to time thereafter.[3374] Some detainees engaged in hunger strikes for several years.[3375]

In 2004, Judge Bates denied a motion by the detainee Khadr for an independent medical evaluation.[3376] Khadr was captured as a juvenile in Kabul in 2002.[3377] Judge Bates determined that his mental competency was not legally an issue because he did not face criminal charges, and Judge Bates declined to interfere with conditions of detention at Guantánamo Bay.[3378] Later, Judge Bates denied Khadr a preliminary injunction against torture because Khadr's attorneys could not show that torture was imminent.[3379]

On July 21, 2005, the Pentagon reported that 50 Guantánamo Bay detainees were on a hunger strike.[3380] Promises to improve conditions abated the strike a week later.[3381] In August, however, detainees were striking again.[3382] On September 1, habeas attorneys in five cases filed with the classified information security officers motions for a preliminary injunction requiring the government to provide the striking detainees with appropriate medical treatment.[3383] The judges assigned

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3370. *See* James Dao, *Detainees Stage Protest at Base Over a Turban*, N.Y. Times, Mar. 1, 2002, at A12; Greenberg, *supra* note 2565, at 182–83.

3371. *See* Dao, *supra* note 3370; Greenberg, *supra* note 2565, at 185; Margulies, *supra* note 2543, at 138.

3372. *See* Greenberg, *supra* note 2565, at 190; Eric Schmitt, *A Concession on Turbans Calms Protest in Cuba Camp*, N.Y. Times, Mar. 2, 2002, at A9.

3373. *See* James Dao, *Navy Doctors Force-Feeding 2 Prisoners*, N.Y. Times, Apr. 2, 2002, at A12.

3374. *See* Carlotta Gall & Neil A. Lewis, *Tales of Despair from Guantánamo*, N.Y. Times, June 17, 2003, at A1.

3375. Al-Adahi v. Obama, 596 F. Supp. 2d 111, 117 (D.D.C. 2009); *see also id.* at 114 n.3 ("The Government designates detainees as hunger-strikers after they have missed nine consecutive meals.").

3376. O.K. v. Bush, 344 F. Supp. 2d 44 (D.D.C. 2004).

3377. Khadr v. Bush, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K.*, 344 F. Supp. 2d at 49.

3378. *O.K.*, 344 F. Supp. 2d at 48, 54; *see also* Opinion, Al-Ghizzawi v. Bush, No. 1:05-cv-2378 (Oct. 2, 2006), *available at* 2006 WL 2844781 (denying a similar medical care motion).

3379. O.K. v. Bush, 377 F. Supp. 2d 102, 103, 111–15, 118 (D.D.C. 2005).

3380. *See Guantánamo Hunger Strike Is Reported*, N.Y. Times, July 22, 2005, at A16.

3381. *See* Lewis, *supra* note 2729.

3382. *See* Al Odah v. United States, 406 F. Supp. 2d 37, 39 (D.D.C. 2005) (concerning the hunger strike of Fawzi al-Odah); Neil A. Lewis, *Hunger Strike by Detainees Goes to Court*, N.Y. Times, Sept. 22, 2005, at A29.

3383. Notice of Filing, Al-Habashi v. Bush, No. 1:05-cv-765 (D.D.C. Sept. 14, 2005); Notice of Filing, Abu Imran v. Bush, No. 1:05-cv-764 (D.D.C. Sept. 13, 2005); Notice of Filing, Abdulaziz v. Bush, No. 1:05-cv-492 (D.D.C. Sept. 13, 2005); Notice of Filing, Deghayes v. Bush, No. 1:04-cv-2215 (D.D.C. Sept. 13, 2005); Notice of Filing, El-Banna v. Bush, No. 1:04-cv-1144 (D.D.C. Sept. 13, 2005); *see* Lewis, *supra* note 3382.

to these cases transferred the motions to Judge Oberdorfer for resolution.[3384] While the motions were pending, hunger striking became more prevalent.[3385] Judge Oberdorfer followed Judge Bates's resolution of a medical care motion and, on September 28, denied the injunction without prejudice.[3386] Judges Kollar-Kotelly and Urbina denied similar motions in other cases a few days later.[3387] In 2009, Judge Leon relied on Judge Bates's opinion in denying a motion for an independent medical examination.[3388]

From September 19 to September 29, 2005, counsel representing six detainees in four cases before Judge Kessler moved for emergency injunctive relief ordering the government to provide the attorneys with access to their clients, who were being force-fed because of their participation in a hunger strike, and to their clients' medical records.[3389] The government argued that it would be infeasible to provide every detainee's attorney with medical updates.[3390] On October 26, Judge Kessler ordered the government to provide contemporaneous medical information on force-fed detainees to their attorneys.[3391]

Government attorneys assured the court that another sort of medical treatment would not be forced upon a detainee.[3392] Judge Friedman ruled against the detainee's request for transfer to the Bethesda Naval Hospital for the procedure.[3393] Saifullah Paracha was a Pakistani millionaire arrested in Bangkok in July

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3384. Order, *El-Banna*, No. 1:04-cv-1144 (D.D.C. Sept. 27, 2005) (order by Roberts); Order, *Deghayes*, No. 1:04-cv-2215 (D.D.C. Sept. 26, 2005) (order by Collyer); Order, *Al-Habashi*, No. 1:05-cv-765 (D.D.C. Sept. 23, 2005) (order by Sullivan); Order, *Aziz*, No. 1:05-cv-492 (D.D.C. Sept. 23, 2005) (order by Robertson); Order, *Abu Imran*, No. 1:05-cv-764 (D.D.C. Sept. 21, 2005) (order by Kollar-Kotelly).

3385. *See* Lewis, *supra* note 2729.

3386. El-Banna v. Bush, 394 F. Supp. 2d 76, 78–79 (D.D.C. 2005).

3387. Order, Al-Oshan v. Bush, No. 1:05-cv-520 (D.D.C. Oct. 5, 2005) (also applying to Nos. 1:05-cv-1048, 1:05-cv-1429, 1:05-cv-1453, and 1:05-cv-1724); Opinion, Al-Odah v. United States, No. 1:02-cv-828 (D.D.C. Sept. 30, 2005); *see Al Odah*, 406 F. Supp. 2d 37 (denying a subsequent motion because the detainee's medical situation was caused by his own hunger strike).

3388. Order, Sliti v. Obama, No. 1:05-cv-429 (D.D.C. Apr. 28, 2009).

3389. Motion, Al-Razak v. Bush, No. 1:05-cv-1601 (D.D.C. Sept. 29, 2005); Motion, Al-Adahi v. Bush, No. 1:05-cv-280 (D.D.C. Sept. 20, 2005); Motion, Al-Joudi v. Bush, No. 1:05-cv-301 (D.D.C. Sept. 19, 2005); Motion, Al-Marri v. Bush, No. 1:04-cv-2035 (D.D.C. Sept. 19, 2005).

3390. Al-Joudi v. Bush, 406 F. Supp. 2d 13, 15–16 (D.D.C. 2005).

3391. *Id.* at 23; *see* Neil A. Lewis, *Guantánamo Detainees Gain in Ruling*, N.Y. Times, Oct. 27, 2005, at A22.

Judge Kessler observed that it was very difficult to determine how disruptive the detainees' forced feeding was. Interview with Hon. Gladys Kessler, May 31, 2011.

3392. Order, Paracha v. Bush, No. 1:04-cv-2022 (D.D.C. Nov. 20, 2006) [hereinafter Cardiac Catheterization Order], *available at* 2006 WL 3355177; *see* Carol Rosenberg, *Captive Seeks Medical Venue*, Miami Herald, Nov. 16, 2006, at 3A (reporting on a government representation that "with the exception of involuntary forced feedings, medical procedures are only carried out with the consent of a detainee").

3393. Cardiac Catheterization Order, *supra* note 3392; *see* Carol J. Williams, *Detainee Refuses Surgery*, L.A. Times, Nov. 23, 2006, at 22.

2003.[3394] He was interrogated at the Bagram Airbase in Afghanistan; in September 2004, he was transferred to Guantánamo Bay.[3395] He allegedly acted as a financier and weapons-smuggler for Al-Qaeda.[3396] In July 2006, his son Uzair was sentenced in the Southern District of New York to 30 years for providing material support to Al-Qaeda.[3397] The elder Paracha, who had survived two heart attacks, reported chest pains the following fall, so prison physicians prescribed a cardiac catheterization, in which a catheter is snaked through a patient's artery into the heart for diagnostic purposes.[3398] The unsuccessful motion was based on a claim that the procedure could not be performed safely at Guantánamo Bay.[3399] Judge Friedman ruled that Paracha failed to establish irreparable injury.[3400] The court of appeals summarily affirmed.[3401]

Litigation over medical issues occurred against a backdrop of occasional suicides. In addition to the three June 2006 suicides, Abdul Rahman Ma'ath Thafir al-Amri was found dead by apparent suicide in 2007.[3402] Mohammad Ahmed Abdullah Saleh al-Hanashi, who had been on a hunger strike, apparently committed suicide in 2009.[3403] Hajji Nassim, a high-value detainee, apparently killed himself in 2011.[3404] Adnan Farhan Abdul Latif apparently killed himself by drug overdose in 2012.[3405]

3394. *See* Zarar Khan, *Wife Says Detainee Has Done No Wrong*, Phila. Inquirer, Mar. 6, 2006, at A7.

3395. *See* Rosenberg, *supra* note 3392.

3396. *See Detainee Wants to Be Relocated for Surgery*, Wash. Post, Nov. 19, 2006, at A10.

3397. Docket Sheet, United States v. Paracha, No. 1:03-cr-1197 (S.D.N.Y. Oct. 8, 2003); *see* Opinion, *id.* (Jan. 3, 2006), *available at* 2006 WL 12768 (discussing the son's unsuccessful motion to compel the father's testimony at trial). The court of appeals affirmed the conviction. United States v. Paracha, 313 Fed. Appx. 347 (2d Cir. 2008).

3398. *See Detainee Wants to Be Relocated for Surgery*, *supra* note 3396; Rosenberg, *supra* note 3392; Williams, *supra* note 3393.

3399. *See* Rosenberg, *supra* note 3392; *see also* Cucullu, *supra* note 2565, at 161–62 (reporting anger by a military officer that so many resources had been wasted on a detainee who ultimately refused the procedure); Williams, *supra* note 3393 (reporting on the government's claim that "nearly $400,000 was spent flying in a 24-member team of cardiac specialists and equipment to be on hand in case of complications").

3400. Cardiac Catheterization Order, *supra* note 3392.

3401. Order, Paracha v. Bush, No. 06-5379 (D.C. Cir. Dec. 1, 2006).

3402. *See* Cucullu, *supra* note 2565, at 132–33; William Glaberson, *Detainee Found Dead in Guantánamo Cell*, N.Y. Times, May 31, 2007, at A14; William Glaberson & Margot Williams, *Pentagon Files Offer Details on Detainee in Suicide*, N.Y. Times, June 1, 2007, at A22; Gorman, *supra* note 2661, at 16 (reporting that before his death al-Amri suffered from untreated hepatitis B and tuberculosis and was so ill that he could barely walk); Savage, *supra* note 3078.

3403. Al-Hanashi Death Notice, *supra* note 2701; *see* William Glaberson & Margot Williams, *Officials Report Suicide of Guantánamo Detainee*, N.Y. Times, June 3, 2009, at A17; Savage, *supra* note 3078.

3404. *Nassim* Death Notice, *supra* note 2701; *see Afghan Detainee Is Found Dead at Guantánamo*, N.Y. Times, May 19, 2011, at A19.

3405. *See* Rosenberg, *supra* note 2964; Savage, *supra* note 2964; Savage, *supra* note 2701; Tate, *supra* note 2964.

In 2005, Jumah al-Dossari tried to kill himself during a bathroom break while his attorney was visiting him so that the attorney would be a witness.[3406] He made another suicide attempt in 2006,[3407] and he was transferred to Saudi Arabia in 2007.[3408]

In 2009 and 2010, Judge Urbina ordered medical treatment and psychiatric evaluation for Abdul Rahman Shalabi to ensure that Shalabi could meaningfully assist counsel with his petition.[3409] Shalabi had been on a hunger strike since August 2005.[3410] To keep him alive, the government force-fed him twice a day through his nose.[3411]

In early 2013, hunger strikes again became prevalent; news reports suggested that the strikes were sparked by a change in search procedures coinciding with a new rotation of guards and fueled by years of confinement uncertainty for the detainees.[3412] Guards engaged in a forceful crackdown on the strikes and other forms of protest in April.[3413] The hunger strikes did not abate, and because the strikes were heavily influenced by what detainees considered disrespectful searches of their Qurans, guards agreed to allow the detainees to forego having Qurans.[3414] The number of strikers continued to increase until they included a majority of the detainees.[3415]

3406. Joshua Colangelo-Bryan, *Jumah al-Dossari: What Indefinite Detention Without Charge or Trial Looks Like*, 10 N.Y. City L. Rev. 379, 381–83 (2007).

3407. *See id.* at 383.

3408. Notice of Transfer, Almurbati v. Bush, No. 1:04-cv-1227 (D.D.C. July 16, 2007).

3409. Al-Oshan v. Obama, 753 F. Supp. 2d 1 (D.D.C. 2010); Order, Al-Oshan v. Obama, No. 1:05-cv-520 (D.D.C. Nov. 13, 2009); Order, *id.* (July 14, 2009); Order, *id.* (June 3, 2009).

3410. *Al-Oshan*, 753 F. Supp. 2d at 2.

3411. *Id.*

3412. *See* Peter Finn & Julie Tate, *Signs of Growing Frustrations at Guantanamo Bay*, Wash. Post, Mar. 17, 2013, at A3; Carol Rosenberg, *U.S. Acknowledges Hunger Strike*, Miami Herald, Mar. 16, 2013, at 3A; Carol Rosenberg, *Weapons-in-Quarans Claim at Crux of Strike*, Miami Herald, Apr. 6, 2013, at 1A; Charlie Savage, *Hunger Strike Cases at Guantánamo Rise to at Least 25*, N.Y. Times, Mar. 21, 2013, at A15.

3413. *See* Peter Finn, *Military, Detainees Clash at Guantanamo Bay*, Wash. Post, Apr. 14, 2013, at 1A; Carol Rosenberg, *Details Emerge of Guards' Clash with Captives*, Miami Herald, Apr. 17, 2013, at 3A; Carol Rosenberg, *U.S. Guards Raid Camp, Move Hunger Strikers to Single Cells*, Miami Herald, Apr. 14, 2013, at 4A; Carol Rosenberg, *White House Alerted Ahead of Prison Raid*, Miami Herald, Apr. 16, 2013, at 3A; Charlie Savage, *Mounting Tensions Escalate Into Violence During Raid at Guantánamo Prison*, N.Y. Times, Apr. 14, 2013, at A16; Charlie Savage, *Officials Describe Chaos at Guantánamo in Weeks That Preceded Raid on Prison*, N.Y. Times, Apr. 17, 2013, at A10.

3414. *See* Carol Rosenberg, *Almost a Third of Captives Now Hunger Strikers*, Miami Herald, Apr. 18, 2013, at 3A.

3415. *See* Carol Rosenberg, *Hunger Strike Tally Rises to 102 at Guantánamo*, Miami Herald, May 17, 2013, at 4A; Carol Rosenberg, *Hunger Strike Toll Keeps Getting Bigger*, Miami Herald, Apr. 21, 2013, at 3A; Carol Rosenberg, *More Terror Captives Begin Hunger Strikes*, Miami Herald, Apr. 19, 2013, at 3A; Charlie Savage, *Despair Drives Guantánamo Detainees to Revolt*, N.Y. Times, Apr. 25, 2013, at A1.

Some of the strikers were force-fed to keep them alive:[3416]

> Twice a day at the military detention center at Guantanamo Bay, Cuba, guards take a group of detainees from their cells, one at a time to a camp clinic or a private room on their block.
>
> The detainees are offered a hot meal or a liquid nutritional supplement, and, if they refuse, they are strapped into a chair. A nurse then passes a tube through their noses and down into their stomachs; for one to two hours, they are fed a drip of Ensure while a Navy corpsman watches.[3417]

The International Committee of the Red Cross[3418] and the World Medical Association,[3419] among others, have determined it to be an unethical deprivation of rights to force-feed a mentally competent hunger striker.[3420] On June 19, the chair of the U.S. Senate Select Committee on Intelligence expressed to the Secretary of Defense her opposition to the force-feeding of Guantánamo Bay hunger strikers.[3421]

Detainees' health can become an issue in a variety of ways. Some detainees had health issues before they arrived at Guantánamo Bay. Some detainees developed health issues at Guantánamo Bay. Some detainees recovered from health issues at Guantánamo Bay and argued that earlier statements by them were compromised by earlier ill health.[3422] As the detainees age, the military has been enhancing resources for medical care, because Congress has forbidden transfer of the detainees out of Guantánamo Bay, even for medical care.[3423]

In 2012, Mohammed al-Qahtani was declared "incompetent and unable to assist effectively in [his] case."[3424] His interrogation experience during detention

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3416. *See* Carol Rosenberg, *Third of Hunger Strikers Being Force Fed by U.S.*, Miami Herald, May 27, 2013, at 3A (reporting on the force-feeding of 35 detainees and reporting, "The prison won't identify those on hunger strike but the Justice Department has notified attorneys for at least 16 of the men that their clients are being force-fed.").

3417. Peter Finn & Julie Tate, *Protest Spotlights Indefinite Detention*, Wash. Post, May 3, 2013, at A1; *see* Carol Rosenberg, *Rights Groups: End "Cruel" Force-Feeding*, Miami Herald, May 15, 2013, at 3A.

3418. Hunger Strikes in Prisons: The ICRC's Position, http://www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm.

3419. World Medical Association Reiterates its Policies on Hunger Strikes, http://www.wma.net/en/40news/20archives/2012/2012_12/index.html.

3420. *See* Peter Finn, *Number of Protesting Guantanamo Bay Detainees Being Force-Fed Grows to 41*, Wash. Post, June 7, 2013, at A6; Finn & Tate, *supra* note 3417; Carol Rosenberg, *Medical Ethicists: Stop Prison Force-Feeding*, Miami Herald, June 13, 2013, at 6A; Rosenberg, *supra* note 3417.

3421. Feinstein Letter, *available at* http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=17585d4b-c235-4f32-b957-50648d4e6252; *see Feinstein: End Force-Feeding of Prisoners at Guantánamo*, Miami Herald, June 20, 2013, at 3A.

3422. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

3423. *See* Carol Rosenberg, *For Aging Captives, Cardiac Healthcare Will Come to Them*, Miami Herald, Sept. 29, 2012, at 1A.

3424. Docket Sheet, Al-Qahtani v. Bush, No. 1:05-cv-1971 (D.D.C. Oct. 5, 2005) (April 20, 2012, minute order).

had been one of the harshest.[3425] Attorneys for Tariq Ali Abdullah Ahmed Ba Odah asked the court to hold petition proceedings in abeyance during the detainee's hunger strike, because the strike interfered with the detainee's ability to communicate with counsel.[3426]

Challenge: Religious Accommodation

At the March 6, 2009, hearing that Judge Sullivan held to determine whether al-Sharbi was knowingly and competently withdrawing his habeas petition voluntarily, in which al-Sharbi participated by video conference from Guantánamo Bay, Judge Sullivan recessed the proceeding briefly at al-Sharbi's request so that al-Sharbi could pray.[3427]

Challenge: Ordering Testimony from an Ambassador

On June 10, 2010, Judge Kessler ordered Daniel Fried, Special Envoy for the Closure of the Guantánamo Bay Detention Facility, to appear at a hearing on Bin Mohammed's application for an injunction against his transfer to Algeria.[3428]

> In my capacity as Special Envoy, I engage in diplomatic dialogue with foreign governments concerning the repatriation and/or resettlement of individuals who are detained at the U.S. detention facility at Guantanamo Bay, Cuba. My position was established in order to intensify diplomatic efforts to arrange for the repatriation or resettlement of individuals approved for such disposition under the review procedures established by Executive Order 13,492, which was signed by President Obama on January 22, 2009.[3429]

Ambassador Fried had submitted declarations assuring the court of Bin Mohammed's safety in Algeria,[3430] and Judge Kessler determined that "this Court has

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3425. *See* Mark Bowden, The Finish 113 (2012); Philippe Sands, Torture Team (2008); Siems, *supra* note 2796, at 219–47; Soufan, *supra* note 2590, at 464–72, 483, 564. "As with other detainees, [al-Qahtani's interrogation] program focused on sexual and excretory humiliations, including forced enemas. . . . [Pentagon] lawyers jokingly referred to Qahtani as an 'enema combatant.'" Bravin, *supra* note 2539, at 257.

> Mohammed al-Qahtani [was] a baby-faced young Saudi who had pledged himself to al Qaeda and had planned to join the 9/11 hijackers as "muscle"—one of the enforcers trained to seize the plane and keep the passengers under control on the way to impact. He had arrived in Orlando about a month before the attacks—Mohammed Atta was waiting there to pick him up—but was turned away by an immigration officer, whose suspicions, even in that relatively unwary time, were aroused by the fact that Qahtani had a one-way ticket and could not speak English. When Qahtani grew indignant, he earned himself a return flight to Afghanistan.

Bowden, *supra* note 3425, at 113.

3426. Status Report, Odah v. Obama, No. 1:06-cv-1668 (Jan. 7, 2013).

3427. Al Sharbi v. Bush, 601 F. Supp. 2d 317, 320 n.3 (D.D.C. 2009).

3428. Order, Bin Mohammed v. Obama, No. 1:05-cv-1347 (D.D.C. June 10, 2010) [hereinafter *Bin Mohammed* Hearing Order].

3429. July 9, 2009, Fried Declaration, *attached as* Ex. 9, Government Opposition, Naji v. Obama, No. 10-5191 (D.C. Cir. July 15, 2010).

3430. Nov. 25, 2009, Fried Declaration, *attached as* Ex. 10, , Government Opposition, *Naji*, No. 10-5191 (D.C. Cir. July 15, 2010); July 15, 2009, Fried Declaration, *supra* note 3429.

an obligation to ensure that there is real substance behind the conclusory phrases contained in Special Envoy Fried's declarations."[3431]

The government sought reconsideration from Judge Kessler and relief from the court of appeals.[3432] On Friday, June 25, the court of appeals ordered Judge Kessler to put her case in an appealable posture by 4:00 p.m. on Tuesday.[3433] On June 29, Judge Kessler, without hearing testimony from Ambassador Fried, enjoined Bin Mohammed's transfer to Algeria.[3434] The court of appeals dissolved the injunction on July 8.[3435]

Ambassador Fried's Guantánamo Bay position was eliminated in 2013.[3436]

3431. *Bin Mohammed* Hearing Order, *supra* note 3428, at 2.

3432. *Bin Mohammed* Injunction, *supra* note 2906, at 2.

3433. Order, Bin Mohammed v. Obama, No. 10-5200 (D.C. Cir. June 25, 2010); *Bin Mohammed* Injunction, *supra* note 2906, at 2–3.

3434. *Bin Mohammed* Injunction, *supra* note 2906.

3435. *Bin Mohammed* Injunction Reversal, *supra* note 2909.

3436. *See* Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. Times, Jan. 29, 2013, at A14.

OTHER CIVIL CASES

In criminal cases, the government is pursuing the litigation, so it has an incentive to help the court and the parties move the case forward while accommodating national security interests. The incentive structure in civil cases is often different, because in civil cases the government is frequently a defendant.

The Classified Information Procedures Act technically only applies to criminal cases, but its principles are often applied to civil cases ("Burma").

Actions under the Freedom of Information Act (FOIA) concerning information that may be related to national security frequently require judges to review information held by the government to determine whether FOIA requires its production ("Detainee Documents"). In a case concerning "Muslim Surveillance," the judge concluded that the government had improperly misled him about what information the government had that was responsive to the FOIA request.

In an employment action initially dismissed on state-secrets grounds ("Burma"), the judge concluded that the dismissal was based on inaccurate representations of secrecy, and the case ultimately settled for $3 million. Tort actions concerning "Mistaken Rendition" and "Torture Flights" were also dismissed on state-secrets grounds.

The government is a complex entity, and it is possible for its attorneys in court to not be fully informed about the extent of classified information at issue in a civil case ("Surveillance Software").

The cases described here include two large collections of complex litigation.

Litigation concerning "Warrantless Wiretaps" was complex multidistrict civil litigation over a closely guarded yet widely reported national security program. The government presented to several district and circuit judges in several jurisdictions classified arguments in defense of government actions as too secret for litigation. In addition, special security measures were imposed for one secret but inadvertently disclosed document that apparently is direct evidence of the government's subjecting two attorneys to a legally questionable surveillance program that the courts generally concluded was no longer secret.

Also described is litigation concerning "September 11 Damages." Although classified information was not a large factor in this litigation, sensitive unclassified information required special procedures during discovery.

Burma

Horn v. Huddle (Royce C. Lamberth, D.D.C.)

On August 11, 1994, Richard A. Horn, who had been the country attaché in Burma for the Drug Enforcement Administration (DEA), filed a civil action alleging illegal surveillance of his telephone calls by the Department of State's chief of mission there and by a CIA officer, arising from disagreements over how much credit Burma should have received for addressing drug enforcement issues.[3437] The U.S. District Court for the District of the District of Columbia assigned the Case to Judge Harold H. Greene.[3438]

The complaint alleged that Horn "made substantial progress working in concert with the Burmese government to improve its performances in addressing major drug issues."[3439] Because of a "political and personal agenda to thwart and undermine DEA's mission in Burma,"[3440] however, information that the defendants provided to Congress and the President "was deliberately shaped to conform with [a] political policy [that] in effect prevented [Burma] from accruing any credit for its efforts or achievements."[3441]

A week after the complaint was filed, the government moved to seal the case in order to protect classified information from public disclosure.[3442] Judge Greene granted the motion on August 29.[3443]

On September 12, 1996, Horn filed a class action complaint alleging a pattern and practice of illegal surveillance of DEA agents,[3444] and that case, which remains sealed,[3445] was dismissed in 2000.[3446]

Horn's *Bivens* action[3447] claimed surveillance, in violation of the Fourth Amendment, conducted to facilitate a transfer of Horn out of Burma.[3448] On Feb-

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3437. Redacted Complaint, Horn v. Huddle, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994, refiled June 9, 2009) [hereinafter *Horn v. Huddle* Complaint]; *see In re* Sealed Case, 494 F.3d 139, 141 (D.C. Cir. 2007); Horn v. Huddle, 699 F. Supp. 2d 236, 237 (D.D.C. 2010); Horn v. Huddle, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); Docket Sheet, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 11, 1994); *see also* Mike Scarcella, *DOJ Won't Open Classified Minds*, Legal Times, Sept. 21, 2009, at 21; Tim Weiner, *Suit by Drug Agent Says U.S. Subverted His Burmese Efforts*, N.Y. Times, Oct. 27, 1994, at A9.

3438. *Horn v. Huddle* Complaint, *supra* note 3437.

3439. *Id.* at 6.

3440. *Id.* at 3.

3441. *Id.* at 6.

3442. Sealing Motion, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 19, 1994, refiled June 9, 2009) (motion by U.S. Attorney Eric H. Holder, Jr., and Assistant U.S. Attorney John D. Bates).

3443. Order, *id.* (Aug. 30, 1994, refiled June 9, 2009); *see* Horn v. Huddle, 636 F. Supp. 2d 20, 21 (D.D.C. 2009).

3444. Horn v. Huddle, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Aug. 15, 2000, refiled June 9, 2009).

3445. Docket Sheet, Horn v. Christopher, No. 1:96-cv-2120 (D.D.C. Sept. 12, 1996) (sealed).

The complaint is filed unsealed in the record of Horn's earlier action. Class Action Complaint, *Horn*, No. 1:94-cv-1756 (D.D.C. Sept. 12, 1996, refiled June 9, 2009).

3446. *In re* Sealed Case, 494 F.3d 139, 141 n.1 (D.C. Cir. 2007).

ruary 10, 1997, Judge Greene denied the government's motion to dismiss.[3449] In 1999, Judge Royce C. Lamberth assumed responsibility for the case because of Judge Greene's illness and death.[3450]

On July 28, 2004, Judge Lamberth granted the government's motion to dismiss the case on state-secrets grounds.[3451] On June 29, 2007, the court of appeals reversed, in part.[3452] The court ruled that the case could proceed against Franklin Huddle, Jr., the chief of mission, but not against the CIA officer, whose identity was classified.[3453]

A government attorney, who began working on the case after the remand, discovered and informed Judge Lamberth that since 2002 the CIA officer's identity had actually not been classified.[3454] In light of the remand and finding that "the conduct of an attorney within the CIA's office of general counsel in 2005 escalated this case from one of simple misrepresentation to fraud on the court,"[3455] Judge Lamberth decided, on January 15, 2009, to give Horn an opportunity to show how he could proceed using unprivileged material against both Huddle and the CIA agent, Arthur Brown.[3456]

Initially, Judge Lamberth was told that Brown's unclassified status did not come to the attention of CIA attorneys until 2005, at which time it should have

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3447. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

3448. *In re Sealed Case*, 494 F.3d at 141; *see* Scarcella, *supra* note 3437 ("Horn was moved to a DEA office in New Orleans in 1993").

3449. Opinion, *Horn*, No. 1:94-cv-1756 (Feb. 10, 1997, refiled June 9, 2009).

3450. *In re Sealed Case*, 494 F.3d at 142 n.2; Notice, *Horn*, No. 1:94-cv-1756 (June 27, 1999, refiled June 9, 2009); Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Greene's January 29, 2000, death); *see* Scarcella, *supra* note 3437.

Tim Reagan interviewed Judge Lamberth for this report in the judge's chambers on May 13, 2011.

3451. Opinion, *Horn*, No. 1:94-cv-1756 (D.D.C. July 28, 2004, refiled June 9, 2009); *see In re Sealed Case*, 494 F.3d at 142; Horn v. Huddle, 636 F. Supp. 2d 10, 13 (D.D.C. 2009); *see* Scarcella, *supra* note 3437; *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011) [hereinafter *Too Secret?*].

3452. *In re Sealed Case*, 494 F.3d 139; *see* Scarcella, *supra* note 3437.

3453. *In re Sealed Case*, 494 F.3d 139; *see Horn*, 636 F. Supp. 2d at 13–14 & n.2; *see Too Secret?*, *supra* note 3451.

3454. *Horn*, 636 F. Supp. 2d at 15; Opinion at 2 & n.2, *Horn*, No. 1:94-cv-1756 (D.D.C. Jan. 15, 2009, refiled June 9, 2009) [hereinafter Jan. 15, 2009, Opinion]; *see* Scarcella, *supra* note 3437.

"And if you had simply Googled his name, you would have seen that he appeared on 'The Charlie Rose Show' a couple of years before." *Too Secret?*, *supra* note 3451; *see A Conversation with Arthur Brown, Former CIA East Asia Division Chief About the Nuclear Program in North Korea*, Charlie Rose (PBS television broadcast June 17, 2005).

3455. Jan. 15, 2009, Opinion, *supra* note 3454, at 5; *see Horn*, 636 F. Supp. 2d at 15; *see also* Scarcella, *supra* note 3437.

3456. Jan. 15, 2009, Opinion, *supra* note 3454, at 12–13; *see Horn*, 636 F. Supp. 2d at 15.

been brought to the attention of the court of appeals,[3457] but after Judge Lamberth ruled that the case against Brown might go forward, Brown informed the court that he informed the CIA's office of general counsel about his change in status within a few months of its occurring.[3458]

Judge Lamberth ordered the government to provide the court and the plaintiff with an unclassified redacted version of every document filed so far in the still-sealed case.[3459] On June 9, 2009, the case was unsealed and public versions of all documents filed before then were added to the case file.[3460]

On October 26, the case settled for $3 million.[3461] In cooperation with the Attorney General, Judge Lamberth referred the evidence of possible misconduct by CIA lawyers to the House of Representatives Intelligence Committee.[3462]

Challenge: Classified Evidence

Judge Lamberth decided to apply to this civil case the principles of the Classified Information Procedures Act (CIPA),[3463] which technically only applies to criminal cases.[3464] Using CIPA procedures, the court determines what information must be protected as classified and what unclassified substitutions—redactions, summaries, or admissions—can be used so that the case can proceed.[3465]

The government appealed,[3466] and the case settled while the appeal was pending. As a condition of settlement, Judge Lamberth vacated his order calling for CIPA-like procedures, noting that "a District Court's opinions are non-precedential and only persuasive authority" anyway, his opinions on the matter had already been published in the Federal Supplement, and "[t]he reasoning is unaltered, to the extent it is deemed persuasive by anyone."[3467]

3457. *Horn*, 636 F. Supp. 2d at 13 n.2; Opinion at 3, *Horn*, No. 1:94-cv-1756 (D.D.C. Feb. 6, 2009, refiled June 9, 2009) [hereinafter Feb. 6, 2009, Opinion]; Jan. 15, 2009, Opinion, *supra* note 3454, at 5–6.

3458. *Horn*, 636 F. Supp. 2d at 13–14 n.2; Feb. 6, 2009, Opinion, *supra* note 3457.

Although Judge Lamberth had been told that Brown's name would forever be classified, Brown's affiliation with the CIA was declassified so that he could cite his CIA experience in obtaining post-retirement employment. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3459. Horn v. Huddle, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14.

3460. *Horn*, 636 F. Supp. 2d at 21.

3461. Horn v. Huddle, 699 F. Supp. 2d 236, 237–38 (D.D.C. 2010); Stipulation, *Horn*, No. 1:94-cv-1756 (D.D.C. Nov. 3, 2009); *see U.S. to Pay $3 Million to Settle CIA Lawsuit*, Wash. Post, Nov. 5, 2009, at A12.

3462. Interview with Hon. Royce C. Lamberth, May 13, 2011.

3463. 18 U.S.C. app. 3 (2011).

3464. Horn v. Huddle, 647 F. Supp. 2d 55, 59–60 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14, 18–19.

3465. *Horn*, 636 F. Supp. 2d at 18–19; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 9–22 (Federal Judicial Center, 2d ed. 2013) (describing CIPA procedures).

3466. Docket Sheet, Horn v. Huddle, No. 09-5311 (D.C. Cir. Sept. 3, 2009).

3467. Horn v. Huddle, 699 F. Supp. 2d 236, 238 (D.C. Cir. 2010).

> The state secrets privilege is a judicial doctrine, and when the Court evaluates the privilege, its evaluation is not merely an academic exercise. When the privilege is denied, the Court has the ability to order the information disclosed in litigation. Were the rule otherwise, the Executive Branch could immediately ensure that the "state secrets privilege" was successfully invoked simply by classifying information, and the Executive's actions would be beyond the purview of the judicial branch. This would of course usurp the judicial branch's obligation "to say what the law is."[3468]

Although the Department of Justice's Litigation Security Group determined that the plaintiff's and defendants' attorneys were eligible for security clearances, it determined that they did not have a "need to know" classified information.[3469] Judge Lamberth overruled that determination.[3470]

> [T]he Executive must grant counsel for plaintiff and defendants, who have been favorably adjudicated for access to classified information, security clearances commensurate with the level of information known by their clients. . . . It is important to remember that at this juncture, the plaintiff, defendants, and their counsel, only have a need-to-know the classified and/or privileged information already known to them or to their clients for purposes of allowing this lawsuit to proceed. If it is necessary to renew the security clearances of the plaintiff and defendants themselves in order to implement the lawful discussion of the information that will be contained in the filings in preparation of the CIPA-like proceedings, the Executive must do that as well.[3471]

Challenge: Classified Arguments

Judge Lamberth ordered all filings made after the case became unsealed that might include classified information to be filed with a classified information security officer; redacted versions were filed on the public docket after a classification review.[3472]

3468. *Horn*, 647 F. Supp. 2d at 62–63.

3469. *Id.* at 63 n.11, 65 n.18; *see* Scarcella, *supra* note 3437.

3470. *See* Scarcella, *supra* note 3437.

3471. *Horn*, 647 F. Supp. 2d at 66; *see* Scarcella, *supra* note 3437 ("The twist is that the classified information at issue resides in the memories of the plaintiff and the defendants themselves. (Lamberth's order does not compel the government to turn over documents.)").

3472. Horn v. Huddle, 636 F. Supp. 2d 20, 22–23 (D.D.C. 2009).

September 11 Damages

In re Terrorist Attacks on September 11, 2001
(Richard Conway Casey and George B. Daniels) and
In re September 11 Litigation and Related Actions
(Alvin K. Hellerstein) (S.D.N.Y.)

Actions for damages resulting from the terrorist attacks on September 11, 2001, include a couple of dozen actions against the terrorists and a few thousand actions against airlines, airport security companies, and property managers.

Actions Against Terrorists

On September 4, 2002, 318 survivors of the September 11, 2001, attacks on the United States filed in the U.S. District Court for the Southern District of New York a 91-page civil complaint for damages.[3473] The plaintiffs were 44 persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.[3474] The 141 defendants were (1) the "Al Qaeda Islamic Army" and 38 affiliated persons and entities, including Osama Bin Laden; (2) the 19 deceased hijackers and Zacarias Moussaoui; (3) the Taliban and Muhammad Omar; (4) the Republic of Iraq and 15 affiliated persons and entities, including Saddam Hussein; and 64 "entities or individuals who provided financial or other support to Al Qaeda and its terrorist activities."[3475]

Also on September 4, the law firm representing plaintiffs in the first suit filed a second action on behalf of seven estates and more than 1,000 firefighters, police officers, paramedics, and others against the Al Qaeda Islamic Army.[3476] On September 10, the plaintiffs amended their complaint to include 300 estates and 51 individuals as plaintiffs.[3477] On the same day, four other actions were filed against similar defendants.[3478]

3473. Complaint, Ashton v. Al Qaeda Islamic Army, No. 1:02-cv-6977 (S.D.N.Y. Sept. 4, 2002) [hereinafter *Ashton* Complaint]; *see* Discovery Opinion at 1, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Jan. 13, 2010); Marcia Coyle, *How Two Lawyers Brought a Suit They Just Might Win*, Nat'l L.J., Nov. 11, 2002, at A1; Tina Kelley, *Suit by Victims' Kin Says Iraq Knew of 9/11 Plans*, N.Y. Times, Sept. 5, 2002, at A15.

3474. *Ashton* Complaint, *supra* note 3473.

3475. *Id.*; *id.* at 29; *see* Coyle, *supra* note 3473.

3476. Docket Sheet, Beyer v. Al Qaeda Islamic Army No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); *see* Coyle, *supra* note 3473; Kelley, *supra* note 3473.

3477. First Amended Complaint, *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002).

3478. Docket Sheet, Bauer v. Al Qaeda Islamic Army, No. 1:02-cv-7236 (S.D.N.Y. Sept. 10, 2002) (action by one individual and two estates); Docket Sheet, Burlingame v. Bin Laden, No. 1:02-cv-7230 (S.D.N.Y. Sept. 10, 2002) (action by 114 individuals and estates); Docket Sheet, Mayore Estates, L.L.C. v. Al Qaeda Islamic Army, No. 1:02-cv-7214 (S.D.N.Y. Sept. 10, 2002) (action by the owners of a building across the street from the World Trade Center); Docket Sheet, Schneider v. Al Qaeda Islamic Army, No. 1:02-cv-7209 (S.D.N.Y. Sept. 10, 2002) (action by six estates).

All six actions were consolidated before Judge Allen G. Schwartz,[3479] and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.[3480] The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.[3481]

The plaintiffs filed amended consolidated master complaints on August 1 and 13 and September 5, 2003; March 10, 2004; and September 20 and 30, 2005—ultimately naming 2,582 plaintiffs and 160 defendants.[3482]

On December 9, 2003, the Judicial Panel on Multidistrict Litigation joined the consolidated action with three other actions in the Southern District of New York[3483] and two actions in the District of the District of Columbia,[3484] creating *In*

3479. Consolidation Order, Ashton v. Al Qaeda Islamic Army, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002).

3480. Consolidated Master Complaint, *id.* (Mar. 6, 2003) [hereinafter *Ashton* Consolidated Master Complaint].

3481. Reassignment Notice, *id.* (Apr. 16, 2003); Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Schwartz's March 22, 2003, death).

The action was reassigned to Judge George B. Daniels after Judge Casey's March 22, 2007, death. Reassignment Notice, *id.* (Apr. 17, 2007) [hereinafter Apr. 17, 2007, Reassignment Notice]; *see* Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting Judge Casey's March 22, 2007, death); Obit., *Richard Conway Casey, 74, Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

For this report, Tim Reagan interviewed Owen Smith, Judge Casey's law clerk from June 2006 through the transition of Judge Casey's cases, by telephone on May 17, 2007, and in Mr. Smith's office on June 26, 2007.

3482. Sixth Amended Consolidated Master Complaint, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Fifth Amended Consolidated Master Complaint, *id.* (Sept. 20, 2004); Fourth Amended Consolidated Master Complaint, *id.* (Mar. 10, 2004); Third Amended Consolidated Master Complaint, *Ashton*, No. 1:02-cv-6977 (S.D.N.Y. Sept. 5, 2003); Second Amended Consolidated Master Complaint, *id.* (Aug. 13, 2003); First Amended Consolidated Master Complaint, *id.* (Aug. 1, 2003).

3483. Docket Sheet, York v. Al Qaeda Islamic Army, No. 1:03-cv-5493 (S.D.N.Y. July 8, 2003); Docket Sheet, Salvo v. Al Qaeda Islamic Army, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003) [hereinafter *Salvo* Docket Sheet]; Docket Sheet, Tremsky v. Bin Laden, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002).

A pro se action was dismissed for failure to execute service, Docket Sheet, Iwachiw v. Al-Baraka Inv. & Dev. Corp., No. 1:02-cv-7303 (S.D.N.Y. Sept. 11, 2002); *see* Docket Sheet, Iwachiw v. Al-Baraka Inv. & Dev. Corp., No. 03-9028 (2d Cir. Oct. 3, 2002) (noting denial of a motion to appeal in forma pauperis), and another action was dismissed voluntarily, Docket Sheet, Adone v. Al-Baraka Inv. & Dev. Corp., No. 1:02-cv-8190 (S.D.N.Y. Oct. 16, 2002).

3484. Docket Sheet, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett* Docket Sheet], *refiled as* Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:03-cv-9849 (S.D.N.Y. Dec. 11, 2003); Docket Sheet, Havlish v. Bin-Laden, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002), *refiled as* Havlish v. Bin-Laden, No. 1:03-cv-9848 (S.D.N.Y. Dec. 11, 2003); *see Seven Families Sue Bin Laden and Others for Billions*, N.Y. Times, Feb. 20, 2002, at A11 (reporting on the original filing of *Havlish*).

re Terrorist Attacks on September 11, 2001[3485] in the Southern District of New York.[3486]

The first panel-added New York case was a class action filed on September 11, 2002, by three named plaintiffs against Osama Bin Laden, Saddam Hussein, the Taliban, and 98 other defendants.[3487] The second New York case was filed on July 8, 2003, by an estate against the same 399 defendants as were named in the consolidated master complaint in the first consolidated action.[3488] The third New York case also was filed on July 8—by four estates against 222 defendants similar to the list in the original complaint in the first-filed action of the original consolidation.[3489]

The first panel-added District of Columbia case was a class action filed on February 19, 2002, by seven estates against 167 defendants: Osama Bin Laden; the Taliban; the countries of Afghanistan, Iran, and Iraq; the 19 hijackers and Zacarias Moussaoui; and more than 100 persons and entities identified by the government as global terrorists.[3490] An amended complaint listed 85 plaintiff estates and 27 defendants, omitting the "global terrorists."[3491]

The second District of Columbia case was based on a complaint filed on August 15 against 100 alleged financial supporters of the terrorist attacks.[3492] Listed

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3485. Docket Sheet, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Dec. 10, 2003) [hereinafter S.D.N.Y. *In re Terrorist Attacks* Docket Sheet].

3486. *In re* Terrorist Attacks on Sept. 11, 2001, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 671–72 (2d Cir. 2013); *see* Consolidation and Transfer Motion, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1570 (J.P.M.L. Aug. 7, 2003, filed Aug. 21, 2003), *filed in Havlish*, No. 1:02-cv-305 (D.D.C. Aug. 11, 2003); *see also In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); *In re* Terrorist Attacks on Sept. 11, 2001, 718 F. Supp. 2d 456, 464 (S.D.N.Y. 2010); Discovery Opinion, *supra* note 3473, at 1 ("The plaintiffs in the civil actions comprising this multi-district litigation seek to recover damages arising out of the atrocities committed by terrorists on September 11, 2001."); John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 Rev. Litig. 315, 329 (2008).

3487. Complaint, *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); *see also* Amended Complaint, *id.* (Aug. 22, 2003) (same parties).

3488. Complaint, *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); *see Ashton* Consolidated Master Complaint, *supra* note 3480. The case was designated as related to the original consolidation and assigned to Judge Casey on August 13, 2003. *Salvo* Docket Sheet, *supra* note 3483.

3489. Complaint, York v. Al Qaeda Islamic Army, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003); *see Ashton* Complaint, *supra* note 3473. The case was designated as related to the original consolidation and assigned to Judge Casey on August 18, 2003. Assignment Notice, *York*, No. 1:03-cv-5493 (S.D.N.Y. Aug. 18, 2003); Docket Sheet, *id.* (July 8, 2003). The plaintiffs voluntarily dismissed this action as duplicative of the consolidation on March 22, 2004. Dismissal, *id.* (Mar. 22, 2004).

3490. Class Action Complaint, *Havlish*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002).

3491. Second Amended Complaint, Havlish v. Bin Laden, No. 1:03-cv-9848 (S.D.N.Y. Sept. 7, 2006), *also filed in In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Sept. 7, 2006); *see* Amended Complaint, *Havlish*, No. 1:02-cv-305 (D.D.C. May 3, 2002) (listing 55 plaintiff estates and 20 defendants); *see also* Third Amended Complaint, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. June 23, 2010).

3492. Complaint, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002) [hereinafter D.D.C. *Burnett* Complaint]; *see In re* Terrorist Attacks on Sept. 11, 2001, 538

as plaintiffs were 407 named estates, 37 named individuals, 73 "Doe" estates (specific estates given pseudonyms), nine "Doe" individuals (specific individuals given pseudonyms), and 159 additional "Doe" plaintiffs (identified as John and Jane Doe 42 through 200).[3493] The case came to include 4,779 listed plaintiffs and 205 defendants.[3494] By the time this case had been included in the multidistrict consolidation, its plaintiffs already had filed a similar complaint in the Southern District of New York,[3495] which was added to the multidistrict consolidation as a tag-along case on March 10, 2004,[3496] and then voluntarily dismissed as duplicative on February 12, 2008.[3497]

Also consolidated as tag-along cases were one case filed in the District of the District of Columbia and three cases filed in the Southern District of New York: (1) an action filed on August 20, 2003, by the estate and four survivors of the World Trade Center's chief of security against 73 defendants, including Iraq, Al-Qaeda, and the 19 September 11 hijackers;[3498] (2) an action filed on September 10

F.3d 71, 78 (2d Cir. 2008); Coyle, *supra* note 3473; Chris Heffelfinger, Radical Islam in America 74 (2011).

3493. D.D.C. *Burnett* Complaint, *supra* note 3492.

3494. Addition of Parties, *Burnett*, No. 1:02-cv-1616 (D.D.C. Dec. 30, 2003) (adding two defendants); Addition and Removal of Parties, *id.* (Dec. 19, 2003) (adding 224 plaintiffs and removing eight plaintiffs and one defendant); Burnett v. Al Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9 (D.D.C. 2003) (November 14, 2003, dismissal of two defendants); Addition and Removal of Defendants, *Burnett,* No. 1:02-cv-1616 (D.D.C. Oct. 27, 2003) (removing one defendant); Addition and Removal of Parties, *id.* (Sept. 10, 2003) (adding 207 plaintiffs and removing three plaintiffs); Addition and Removal of Parties, *id.* (Sept. 5, 2003) (adding 489 plaintiffs and removing 11 plaintiffs); Addition and Removal of Defendants, *id.* (Aug. 22, 2003) (removing six defendants); Addition and Removal of Parties, *id.* (Aug. 1, 2003) (adding 550 plaintiffs and removing one plaintiff); Addition and Removal of Parties, *id.* (May 23, 2003) (adding 375 plaintiffs and removing three plaintiffs); Addition and Removal of Defendants, *id.* (May 2, 2003) (adding 27 defendants and removing one defendant); Addition and Removal of Parties, *id.* (Feb. 21, 2003) (adding 245 plaintiffs and nine defendants and removing seven plaintiffs and 11 defendants); Third Amended Complaint, *id.* (Nov. 22, 2002) (listing as plaintiffs 1,785 named estates, 799 named individuals, 129 Doe estates, nine Doe individuals, and 5,000 additional Doe plaintiffs, and listing 189 defendants); Amended Complaint, *id.* (Sept. 4, 2002); *see* Jennifer Senior, *A Nation Unto Himself*, N.Y. Times, Mar. 14, 2004, at 636.

3495. Complaint, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:03-cv-5738 (S.D.N.Y. Aug. 1, 2003); *see id.* at 265 (stating that the action "is commenced in this Court solely as a prophylactic measure to protect 9/11 victims whose rights have been threatened by certain New York workers' compensation insurance carriers and in the event that subject matter jurisdiction is lacking in the District of Columbia action"); *see also* Amended Complaint, *id.* (Sept. 3, 2003).

3496. Docket Sheet, *id.* (Aug. 1, 2003).

3497. Notice of Voluntary Dismissal, *id.* (Feb. 12, 2008).

The New York action was filed as a jurisdictional precaution, but the complaint was never served. Status Conference, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. June 26, 2007) (representation by a plaintiff's attorney).

3498. Complaint, O'Neill v. Republic of Iraq, No. 1:03-cv-1766 (D.D.C. Aug. 20, 2003); *see* Docket Sheet, *id.* (noting multidistrict consolidation on January 27, 2004); *see also* First Consolidated Complaint, *id.* (naming 109 defendants), *filed in In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005); Third Amended Complaint, O'Neill v. Republic of Iraq, No. 1:04-cv-1076 (S.D.N.Y. June 7, 2005) (naming 108 defendants); Second Amended Complaint, *id.* (Dec.

by 29 insurance companies against Al-Qaeda and 524 alleged supporters;[3499] (3) an action filed on September 10 by 28 estates and 27 individuals against the defendants listed in the original consolidation's third amended master complaint;[3500] and (4) an action filed on October 30 by three insurance companies against Saudi Arabia and Syria.[3501]

The multidistrict consolidation also includes nine cases subsequently filed in the Southern District of New York. After their District of Columbia case was transferred to New York, the security chief's survivors filed class actions on March 10, 2004, against Saudi Arabia, Syria, and Sudan,[3502] and 38 alleged financial supporters of the September 11 terrorists.[3503] Another seven cases were filed in August and September of 2004: (1) on August 6, an insurance company filed an action against 495 defendants;[3504] (2) on September 1, six insurance companies filed an action against 426 defendants;[3505] (3) on September 2, Cantor Fitzgerald

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30, 2004) (naming 112 defendants); First Amended Complaint, *id.* (Sept. 28, 2004) (naming 80 defendants); Docket Sheet, *id.* (Feb. 10, 2004) (noting multidistrict consolidation on February 9, 2004).

It was reported that John O'Neill was an FBI expert on the terrorist plans of Osama Bin Laden and Al-Qaeda who was forced out of the FBI a few months before the September 11, 2001, attacks. *Frontline: The Man Who Knew* (PBS television broadcast Oct. 3, 2002).

3499. Complaint, Fed. Ins. Co. v. Al Qaida, No. 1:03-cv-6978 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on March 10, 2004). At the time of consolidation, the complaint was amended to include 41 plaintiffs. First Amended Complaint, *id.* (Mar. 10, 2004); *see also In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 780 n.2 (S.D.N.Y. 2005) ("forty-one insurance companies that have paid and reserved claims in excess of $4.5 billion as a result of the September 11 attacks").

3500. Complaint, Barrera v. Al Qaeda Islamic Army, No. 1:03-cv-7036 (S.D.N.Y. Sept. 10, 2003); Docket Sheet, *id.* (noting multidistrict consolidation on March 10, 2004).

3501. Docket Sheet, Vigilant Ins. Co. v. Kingdom of Saudi Arabia, No. 1:03-cv-8591 (S.D.N.Y. Oct. 30, 2003) (noting multidistrict consolidation on November 12, 2003, which appears to be an error).

3502. Class Action Complaint, O'Neill v. Kingdom of Saudi Arabia, No. 1:04-cv-1922 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on April 4, 2004); *see also* First Amended Complaint, *id.*, *filed in In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

3503. Class Action Complaint, O'Neill v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-1923 (S.D.N.Y. Mar. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on April 4, 2004); *see also* First Amended Complaint, *id.* (naming 95 defendants), *filed in In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Sept. 30, 2005).

3504. Complaint, New York Marine and Gen. Ins. Co. v. Al Qaida, No. 1:04-cv-6105 (S.D.N.Y. Aug. 6, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 21, 2004); *see also* Second Amended Complaint, *id.* (Sept. 30, 2005) (listing 419 defendants); First Amended Complaint, *id.* (Dec. 23, 2004) (listing 478 defendants).

3505. Complaint, Continental Cas. Co. v. Al Qaeda Islamic Army, No. 1:04-cv-5970 (S.D.N.Y. Sept. 1, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 29, 2004); *see also* Second Amended Complaint, *id.* (420 defendants); First Amended Complaint, *id.* (434 defendants); Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, N.Y. Times, Sept. 9, 2004, at B1.

filed an action against 88 defendants;[3506] (4) on September 10, ten insurance companies filed an action against Saudi Arabia and Syria;[3507] (5) on September 10, ten World Trade Center businesses filed an action against 201 defendants;[3508] (6) on September 10, the World Trade Center property managers filed an action against 201 defendants;[3509] and (7) on September 10, plaintiffs filed a complaint against Riggs Bank for failure to notice suspicious financial transactions that aided the September 11 terrorists, and they amended their complaint on March 24, 2005, to name 1,233 individuals and 1,117 estates as plaintiffs.[3510]

On January 18, 2005, Judge Casey ruled that claims against Saudi Arabia and members of its royal family should be dismissed, largely as a result of foreign sovereign immunity and lack of personal jurisdiction.[3511] On September 21, Judge Casey dismissed additional Saudi royals and other defendants.[3512] The dismissals became final on January 10, 2006,[3513] and the court of appeals affirmed on August 14, 2008.[3514]

3506. Complaint, Cantor Fitzgerald & Co. v. Akida Bank Private Ltd., No. 1:04-cv-7065 (S.D.N.Y. Sept. 2, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 21, 2004); *see also* Amended Complaint, *id.* (Sept. 10, 2004).

3507. Complaint, Pacific Employers Ins. Co. v. Kingdom of Saudi Arabia, No. 1:04-cv-7216 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 21, 2004).

3508. Complaint, Euro Brokers, Inc. v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7279 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 29, 2004).

3509. Complaint, World Trade Ctr. Props. LLC v. Al Baraka Inv. & Dev. Corp., No. 1:04-cv-7280 (S.D.N.Y. Sept. 10, 2004); *see* Docket Sheet, *id.* (noting multidistrict consolidation on September 29, 2004).

3510. Amended Complaint, Vadhan v. Riggs Nat'l Corp., No. 1:04-cv-7281 (S.D.N.Y. Mar. 24, 2005); *see* Docket Sheet, *id.* (Sept. 10, 2004) (noting multidistrict consolidation on October 15, 2004).

3511. *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *see* Order of Dismissal, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. May 5, 2005) (applying the January 18, 2005, ruling to dismiss all claims in all cases against the Kingdom of Saudi Arabia, members of its royal family, and the Al Rajhi Banking and Investment Corporation); *see also In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 78–79 (2d Cir. 2008); Discovery Opinion, *supra* note 3473, at 3; Murphy, *supra* note 3486, at 329.

3512. *In re* Terrorist Attacks on Sept. 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); *see In re Terrorist Attacks*, 538 F.3d at 79; Discovery Opinion, *supra* note 3473, at 4; Mark Hamblett, *Saudi Charity Dropped from Suit Over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

3513. Judgment, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006); *In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 672 (2d Cir. 2013); *see In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570, 2006 WL 708149 (S.D.N.Y. Mar. 20, 2006) (explaining that Judge Casey decided to certify appeals for defendants dismissed on Rule 12(b)(1) or 12(b)(2) grounds but not defendants dismissed on Rule 12(b)(6) grounds); *see also In re Terrorist Attacks*, 538 F.3d at 75.

3514. *In re Terrorist Attacks*, 538 F.3d 71, *cert. denied*, 557 U.S. 935 (2009); *In re Terrorist Attacks*, 714 F.3d at 672; *see* Discovery Opinion, *supra* note 3473, at 4–6; Heffelfinger, *supra* note 3492, at 74; Eric Lichtblau, *Supreme Court Refuses Case by Sept. 11 Victims' Families*, N.Y. Times, June 30, 2009, at A12.

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.[3515] Discovery and other matters were referred to Magistrate Judge Frank Maas.[3516]

On June 16, 2010, Judge Daniels dismissed actions against 49 foreign defendants for lack of personal jurisdiction,[3517] but decided that the plaintiffs had pleaded facts sufficient to confer the court's jurisdiction over Dubai Islamic Bank.[3518] Also for lack of personal jurisdiction, Judge Daniels dismissed an additional seven defendants on September 13,[3519] and he dismissed the Saudi Bin Laden Group on January 11, 2012.[3520] Reviewing on appeal 37 of these dismissals, the court of appeals affirmed 25 on April 16, 2013 (including the Saudi Bin Laden Group), and remanded 12 dismissals for further jurisdiction discovery.[3521]

On December 16, 2011, Judge Daniels approved a calculation by Judge Maas of insurance companies' default-judgment damages against Al-Qaeda in the amount of $9,351,247,965.99.[3522] Judge Daniels extended liability for this amount to Hezbollah on March 27, 2012.[3523]

The U.S. Court of Appeals for the Second Circuit, on November 7, contradicted its earlier ruling by a different panel in favor of sovereign immunity for Saudi

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3515. *In re* Terrorist Attacks on Sept. 11, 2001, 718 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); Apr. 17, 2007, Reassignment Notice, *supra* note 3481; *see* Obit., *supra* note 3481.

Tim Reagan attended Judge Daniels' first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

3516. *In re Terrorist Attacks*, 718 F. Supp. 2d at 487; S.D.N.Y. *In re Terrorist Attacks* Docket Sheet, *supra* note 3485.

Tim Reagan interviewed Judge Maas for this report in the judge's chambers on June 26, 2007, and on November 6, 2009.

3517. *In re Terrorist Attacks*, 718 F. Supp. 2d at 469–89, 495 (original opinion dated June 16 and filed on June 17); *In re Terrorist Attacks*, 714 F.3d at 672.

3518. *In re Terrorist Attacks*, 718 F. Supp. 2d at 488–95 ("It can be reasonably inferred, from the allegations pled, that DIB personally and intentionally provided material support to al Qaeda in aid of al Qaeda's plan to commit an aggressive terrorist strike against the United States, with knowledge that the United States and its residents would likely bear the brunt of the resulting injuries.").

3519. *In re* Terrorist Attacks on Sept. 11, 2001, 740 F. Supp. 2d 494, 506–11, 524 & n.12 (2d Cir. 2011); *In re Terrorist Attacks*, 714 F.3d at 672.

3520. *In re* Terrorist Attacks on Sept. 11, 2001, 840 F. Supp. 2d 776 (S.D.N.Y. 2012); *In re Terrorist Attacks*, 714 F.3d at 672–73.

3521. *In re Terrorist Attacks*, 714 F.3d 659.

On the same day, the court affirmed the dismissal of five defendants for failure to state a claim, *In re* Terrorist Attacks on Sept. 11, 2011, 714 F.3d 118 (2d Cir. 2013), and the dismissal of two Saudi charities as immune under the Foreign Sovereign Immunities Act, *In re* Terrorist Attacks on Sept. 11, 2011, 714 F.3d 109 (2d Cir. 2013).

3522. Opinion, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. Dec. 16, 2011), *available at* 2011 WL 6318975; Report and Recommendation, *id.* (Oct. 14, 2011), *available at* 2011 WL 4903584; *see* Eric Lichtblau, *Prospects Improve for Sept. 11 Suits Against Nations*, N.Y. Times, Nov. 19, 2011, at A13.

3523. Order, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Mar. 27, 2012), *available at* 2012 WL 1034414.

Arabia[3524] by provisionally denying sovereign immunity to Afghanistan.[3525] The ruling arose in litigation initiated earlier than the cases included in the multidistrict litigation.

On December 4, 2001, Lynn Faulkner filed suit in the District of the District of Columbia against Osama Bin Laden, Al-Qaeda, the Taliban, Afghanistan, and Iraq for the wrongful death of his wife Wendy, who perished in Two World Trade Center on September 11.[3526] Judge Richard W. Roberts granted Faulkner's request[3527] to proceed as John Doe "[i]n order to protect the health, safety, welfare, and privacy interests of Plaintiff and his family, including two teenagers, from both further terrorist attacks and from media harassment."[3528] On February 27, 2004, Afghanistan sought to vacate[3529] a default judgment that was issued against it on January 29, 2003,[3530] claiming sovereign immunity pursuant to the Foreign Sovereign Immunities Act (FSIA).[3531] Judge Roberts determined, on September 30, 2008, that jurisdiction depended upon whether the plaintiff could show an FSIA exception for noncommercial torts[3532] and whether the Taliban controlled the government of Afghanistan during the September 11, 2001, conspiracy or it merely had partial military control over Afghanistan's territory.[3533]

3524. Doe v. Bin Laden, 663 F.3d 64, 70–71 n.10 (2d Cir. 2011); *see In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 78 (2d Cir. 2008); *see also* Lichtblau, *supra* note 3522.

The second panel circulated its opinion to members of the first panel and to all active judges of the court before filing, and no judge objected to the new opinion. *Doe*, 663 F.3d at 70–71 n.10. The court considers this a mini en banc procedure. *Id.*; Shipping Corp. of India v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 67 n.90 (2d Cir. 2009); United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007).

3525. *Doe*, 663 F.3d 64; *see* Lichtblau, *supra* note 3522.

3526. Complaint, Doe v. Bin Laden, No. 1:01-cv-2516 (D.D.C. Jan. 4, 2002); Docket Sheet, *id.* (Dec. 4, 2001) (noting a motion on December 4, 2001, for leave to file the action under a pseudonym).

3527. Order, *id.* (Dec. 4, 2001); *Doe*, 663 F.3d at 65 n.1.

3528. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Dec. 4, 2001).

On October 7, 2002, Faulkner filed a John Doe complaint against banks and charities alleging financial support of the terrorists. Complaint, Doe v. Al-Baraka Inv. & Dev. Corp., No. 1:02-cv-1980 (D.D.C. Oct. 7, 2002). He moved to intervene instead in a pending action against the same defendants—the second District of Columbia action added to the multidistrict consolidation. Motion, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:02-cv-1616 (D.D.C. Feb. 5, 2003). Parties objected to his intervening as a John Doe, and Judge James Robertson denied the motion. Order, *id.* (Feb. 24, 2003). He renewed his motion under his own name, Motion, *id.* (Mar. 21, 2003), and Judge Robertson granted intervention, D.D.C. *Burnett* Docket Sheet, *supra* note 3484 (noting that the motion was granted on August 6, 2003). On the following day, Faulkner dismissed his separate action against the banks and charities. Notice, *Doe*, No. 1:02-cv-1980 (D.D.C. Aug. 7, 2003).

3529. Motion, *Doe*, No. 1:01-cv-2516 (D.D.C. Feb. 27, 2004).

3530. Order, *id.* (Jan. 29, 2003); *see also* Order, *id.* (Feb. 29, 2004) (default judgment against Iraq).

3531. Pub. L. No. 94-583, 90 Stat. 2891 (1976); *see* 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (2011).

3532. 28 U.S.C. § 1605(a)(5) (providing an exception of immunity for tort damages because of noncommercial activity that is not discretionary or defamatory).

3533. Doe v. Bin Laden, 580 F. Supp. 2d 93 (D.D.C. 2008); Doe v. Bin Laden, 663 F.3d 64, 66 (2d Cir. 2011).

On November 24, 2009, the court of appeals for the District of Columbia Circuit transferred the appeal to the Second Circuit in light of the multidistrict consolidation in the Southern District of New York.[3534] The Second Circuit's court of appeals agreed with Judge Roberts that the noncommercial tort exception might apply and remanded the case to the district court for the Southern District of New York for jurisdictional discovery.[3535]

On March 15, 2012, the district court entered a default judgment against Sudan in one of the originally consolidated actions from the District of the District of Columbia.[3536]

Actions Against Domestic Defendants

Meanwhile the U.S. District Court for the Southern District of New York has been handling many thousand lawsuits against airlines, airport security companies, and property managers for damages resulting from the September 11, 2001, terrorist attacks and their aftermath.[3537]

On September 22, 2001, the President signed the Air Transportation Safety and System Stabilization Act.[3538] Title IV of the Act created a "September 11th Victim Compensation Fund of 2001"[3539] to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."[3540] The Attorney General appointed Kenneth Feinberg as a special master to administer the fund.[3541] The deadline for filing a claim against the fund was established as two years after the Attorney General and the special master promulgated imple-

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3534. Order, Doe v. Bin-Laden, No. 08-7117 (D.C. Cir. Nov. 24, 2009); *Doe*, 663 F.3d at 66.

3535. *Doe*, 663 F.3d 64; *see* Lichtblau, *supra* note 3522.

3536. Default Judgment, Burnett v. Al Baraka Inv. & Dev. Corp., No. 1:03-cv-9849 (S.D.N.Y. Mar. 15, 2012).

3537. Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 Cornell L. Rev. 127 (2012).

3538. Pub. L. No. 107-42, 115 Stat. 230 (2001), 49 U.S.C. § 40101 note (2011); *see In re* Sept. 11 Litig., 236 F.R.D. 164, 166 (S.D.N.Y. 2006); Colaio v. Feinberg, 262 F. Supp. 2d 273, 279 (S.D.N.Y. 2003); Hellerstein et al., *supra* note 3537, at 128–29, 132; *see also* Jill Schachner Chanen & Margaret Graham Tebo, *Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

3539. Pub. L. No. 107-42, § 401, 115 Stat. at 237, 49 U.S.C. § 40101 note.

3540. *Id.*, § 403; *see* United States v. Moussaoui, 483 F.3d 220, 225 n.4 (4th Cir. 2007); Schneider v. Feinberg, 345 F.3d 135, 138–39 (2d Cir. 2003); *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *Colaio*, 262 F. Supp. 2d at 278–79; Hellerstein et al., *supra* note 3537, at 128–29, 132.

3541. *Schneider*, 345 F.3d at 138; *Colaio*, 262 F. Supp. 2d at 279, 281; *see* Anemona Hartocollis, *Little-Noticed 9/11 Lawsuits Will Get Their Day in Court*, N.Y. Times, Sept. 4, 2007, at A1; Chanen & Tebo, *supra* note 3538, at 59.

The fund awarded $7.049 billion to the families of 2,880 of the 2,973 victims killed on September 11, 2001, and to 2,680 persons injured that day. *In re Sept. 11 Litig.*, 236 F.R.D. at 166; Chanen & Tebo, *supra* note 3538, at 59. "Ultimately, 97% of all potential individual wrongful death claimants presented their claims to the Special Master, Kenneth Feinberg." *In re* Sept. 11th Litig., 590 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

menting regulations,[3542] and after promulgation of the regulations the deadline became December 22, 2003.[3543] The Act required plaintiffs to elect either recovery from the fund or recovery by civil action.[3544] The Act also established exclusive jurisdiction in the Southern District of New York for civil actions,[3545] except for actions against the terrorists and their supporters.[3546]

On December 20, 2001, the wife of a passenger aboard United Airlines Flight 175, which left Boston for Los Angeles and hit Two World Trade Center, filed a complaint in the Southern District of New York against United Airlines.[3547] The court assigned the case to Judge Alvin K. Hellerstein.[3548]

During the first six months of 2002, 12 additional actions were filed by estates of passengers,[3549] estates of workers in the World Trade Center,[3550] and operators

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3542. Pub. L. No. 107-42, § 405(a)(3), 115 Stat. at 238, 49 U.S.C. § 40101 note; *see Schneider*, 345 F.3d at 139.

3543. 28 C.F.R. § 104.62 (2012); *see Colaio*, 262 F. Supp. 2d at 278–79, 281; Hellerstein et al., *supra* note 3537, at 133; *see also* Pub. L. No. 107-42, § 407, 115 Stat. at 240, 49 U.S.C. § 40101 note (providing for promulgation of implementing regulations no later than 90 days after enactment of the Act); Hartocollis, *supra* note 3541.

3544. Pub. L. No. 107-42, § 405(c)(3)(B), 115 Stat. at 239–40, 49 U.S.C. § 40101 note; *see Schneider*, 345 F.3d at 139; *In re* Sept. 11 Litig., 567 F. Supp. 2d 611, 614 (S.D.N.Y. 2008); *Colaio*, 262 F. Supp. 2d at 279; *see also* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & Soc'y Rev. 645 (2008) (analyzing reasons survivors gave for their choices between the fund and litigation); Hartocollis, *supra* note 3541 (describing parents of an 11-year-old girl killed when American Flight 77 struck the Pentagon as having "to choose between what they perceived as a minimal award from a federal fund set up to compensate victims or calling one of the many lawyers who had sent what [the mother] calls 'advertising packages' and filing a lawsuit.").

3545. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. at 241, 49 U.S.C. § 40101 note; *see In re Sept. 11 Litig.*, 567 F. Supp. 2d at 619; *Moussaoui*, 483 F.3d at 225 n.4; *In re Sept. 11 Litig.*, 236 F.R.D. at 166; *In re* Sept. 11th Liab. Ins. Coverage Cases, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004); *Colaio*, 262 F. Supp. 2d at 279; Hellerstein et al., *supra* note 3537, at 134; Chanen & Tebo, *supra* note 3538, at 59.

3546. Pub. L. No. 107-42, § 408(c), 115 Stat. at 241, 49 U.S.C. § 40101 note; *see also* Pub. L. No. 107-71, 115 Stat. 646, 49 U.S.C. § 40101 note; (also exempting from exclusive jurisdiction "civil actions to recover collateral source obligations").

3547. Docket Sheet, Mariani v. United Air Lines, Inc., No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001).

3548. *Id.*; *see* Hartocollis, *supra* note 3541.

For this report, Tim Reagan interviewed Judge Hellerstein and his law clerk Brian Sutherland in the judge's chambers on June 25, 2007, and again interviewed Judge Hellerstein in the judge's chambers on November 5, 2009.

3549. Docket Sheet, Miller v. American Airlines, Inc., No. 1:02-cv-3676 (S.D.N.Y. May 14, 2002) (action by the estate of American Flight 11 passenger David Angell, a television screenwriter, against American Airlines and Globe Aviation Services, dismissed as settled on February 13, 2008); Docket Sheet, Koutny v. United Airlines, Inc., No. 1:02-cv-2802 (S.D.N.Y. Apr. 12, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA, dismissed as settled on December 29, 2006); Docket Sheet, Miller v. United Airlines, Inc., No. 1:02-cv-1728 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security, dismissed as settled on November 14, 2007); Docket Sheet, Sweeney v. United Airlines, Inc., No. 1:02-cv-1727 (S.D.N.Y. Mar. 5, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA,

of businesses in the World Trade Center[3551] against the airlines that operated the hijacked flights[3552] and the companies providing security for their departures.[3553]

On June 20, the government initiated a motion to intervene to ensure that transportation "sensitive security information" (SSI) would be protected in these lawsuits.[3554] The court granted the government's motion and ordered the cases consolidated.[3555]

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dismissed as settled on December 29, 2006); Docket Sheet, Lopez v. United Airlines, Inc., No. 1:02-cv-458 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 175 passenger against United Airlines and Huntleigh USA, dismissed as settled on March 3, 2008); Docket Sheet, O'Hare v. United Airlines, Inc., No. 1:02-cv-456 (S.D.N.Y. Jan. 17, 2002) (action by the estate of a United Flight 93 passenger against United Airlines and Argenbright Security, dismissed as settled on November 14, 2006); Docket Sheet, Doe v. American Airlines, Inc., No. 1:02-cv-454 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, voluntarily dismissed on March 28, 2002); Docket Sheet, Debeuneure v. American Airlines, Inc., No. 1:02-cv-452 (S.D.N.Y. Jan. 17, 2002) (action by the estate of an American Flight 77 passenger against American Airlines and Argenbright Security, dismissed as settled on May 16, 2006).

3550. Docket Sheet, Pitt v. American Airlines, Inc., No. 1:02-cv-4365 (S.D.N.Y. June 11, 2002) (action by the estate of an employee of Cantor Fitzgerald in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on December 31, 2003); Docket Sheet, Smithwick v. American Airlines, Inc., No. 1:02-cv-2669 (S.D.N.Y. Apr. 8, 2002) (action by the estate of a worker in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on December 20, 2002).

3551. Docket Sheet, Tower Computer Servs., Inc. v. American Airlines, Inc., No. 1:02-cv-3295 (S.D.N.Y. Apr. 30, 2002) (action by the operators of a business in One World Trade Center against American Airlines and Globe Aviation Services, voluntarily dismissed on November 5, 2004); Docket Sheet, World Trade Farmers v. United Air Lines, Inc., No. 1:02-cv-2987 (S.D.N.Y. Apr. 18, 2002) (action by the operators of a business at the World Trade Center against United Airlines, American Airlines, Globe Aviation Services, and Huntleigh USA).

3552. American Airlines operated Flight 11 from Boston to Los Angeles, which hit One World Trade Center, and Flight 77 from Washington to Los Angeles, which hit the Pentagon. United Airlines operated Flight 175 from Boston to Los Angeles, which hit Two World Trade Center, and Flight 93 from Newark to San Francisco, which crashed in Pennsylvania. The 9/11 Commission Report 1–14, 32–33 (2004).

3553. Argenbright Security provided security for United Airlines at Dulles International Airport, near Washington, D.C., which affected American Flight 77, and at Newark International Airport, which affected United Flight 93. The 9/11 Commission Report 3–4 (2004). Globe Aviation Services provided security for American Airlines at Logan International Airport in Boston, which affected American Flight 11, and Huntleigh USA provided security for United Airlines at Logan International Airport in Boston, which affected United Flight 175. The 9/11 Commission Report 2 (2004).

Damages for passengers in international travel are specified by the Warsaw Convention, which entitles their survivors to a minimum of 100,000 "special drawing rights" (equivalent to $153,078 on July 30, 2007) and an opportunity to prove additional damages if the airline cannot prove it took all reasonable measures to prevent the incident. *In re* Sept. 11 Litig., 500 F. Supp. 2d 356 (S.D.N.Y 2007).

3554. Docket Sheet, Mariani v. United Air Lines, Inc., No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (noting a notice on June 26, 2002).

3555. Order, *id* (July 25, 2002); *see* Benjamin Weiser, *Ruling Favors Limited Access to 9/11 Data*, N.Y. Times, July 13, 2002, at B1; Benjamin Weiser, *Security Cited in Proposals on Lawsuits from Sept. 11*, N.Y. Times, Sept. 20, 2002, at B5.

During the next four months, 120 additional cases were filed.[3556] On November 1, Judge Hellerstein ordered the consolidation of "all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the [Air Transportation Safety and System Stabilization Act] against any defendant (including defendants airlines and airline security companies), except for alleged hijackers or terrorists" and established a master docket case entitled *In re September 11 Litigation*.[3557]

Judge Hellerstein also established a suspense docket to allow plaintiffs to file a civil action before expiration of its statute of limitation without impairing their ability to seek compensation from the fund instead.[3558] After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.[3559]

The plaintiffs filed five master complaints on December 11—four pertaining to personal injuries arising from the crash of each plane and one pertaining to property damage and business interruption.[3560] Both the court and the plaintiffs'

3556. The cases were assigned the following docket numbers: 1:02-cv-5288, 1:02-cv-6186, 1:02-cv-6339, 1:02-cv-6358, 1:02-cv-6361 through 1:02-cv-6365, 1:02-cv-6378, 1:02-cv-6379, 1:02-cv-6658, 1:02-cv-6885, 1:02-cv-7031, 1:02-cv-7032, 1:02-cv-7048, 1:02-cv-7110 through 1:02-cv-7122, 1:02-cv-7134, 1:02-cv-7135, 1:02-cv-7143 through 1:02-cv-7156, 1:02-cv-7164, 1:02-cv-7165, 1:02-cv-7167, 1:02-cv-7170 through 1:02-cv-7172, 1:02-cv-7174, 1:02-cv-7176, 1:02-cv-7177, 1:02-cv-7179, 1:02-cv-7180, 1:02-cv-7182, 1:02-cv-7185, 1:02-cv-7188, 1:02-cv-7195, 1:02-cv-7196, 1:02-cv-7198, 1:02-cv-7201, 1:02-cv-7203 through 1:02-cv-7205, 1:02-cv-7208, 1:02-cv-7212, 1:02-cv-7219 through 1:02-cv-7227, 1:02-cv-7231 through 1:02-cv-7233, 1:02-cv-7243 through 1:02-cv-7246, 1:02-cv-7248 through 1:02-cv-7250, 1:02-cv-7252, 1:02-cv-7256, 1:02-cv-7258 through 1:02-cv-7262, 1:02-cv-7264, 1:02-cv-7267, 1:02-cv-7269 through 1:02-cv-7273, 1:02-cv-7275, 1:02-cv-7279, 1:02-cv-7289, 1:02-cv-7290, 1:02-cv-7296, 1:02-cv-7305, 1:02-cv-7314, 1:02-cv-7328, 1:02-cv-7331, 1:02-cv-7389, 1:02-cv-7608, 1:02-cv-7912, 1:02-cv-7920, 1:02-cv-8092, 1:02-cv-8100, 1:02-cv-8111, 1:02-cv-8434, 1:02-cv-8554, and 1:02-cv-8688.

3557. Order, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y Nov. 1, 2002); *see* Docket Sheet, *id.*; *see also In re* Sept. 11 Litig., 236 F.R.D. 164, 167, 168 n.3 (S.D.N.Y. 2006).

The code "21" appears in place of the year in the case number because in the court's records of miscellaneous cases "21" is the code for multidistrict litigation. Interview by e-mail with Southern District of New York Staff, Aug. 20, 2009.

3558. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Dec. 2, 2003); Order, *id.* (Nov. 21, 2003); Order, *id.* (July 23, 2003); Order, Mulligan v. Port Auth. of N.Y. & N.J., No. 1:02-cv-6885 (S.D.N.Y. Sept. 6, 2002); *In re Sept. 11 Litig.*, 236 F.R.D. at 166–67; *see* Benjamin Weiser, *Judge Says Sept. 11 Families Can Change Minds on Suing*, N.Y. Times, Sept. 4, 2002, at B3.

"Proceedings [before Judge Hellerstein] began after the Victim Compensation Fund closed, so that the litigation did not compete with the workings of the Fund." *In re* Sept. 11 Litig., 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

3559. Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Feb. 20, 2004).

Subsequently, the court resolved the suspense docket for cleanup and aftermath cases. Order, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-100 (S.D.N.Y. Mar. 15, 2004); Corrective Order, *id.* (Mar. 3, 2004).

3560. Docket Sheet, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. Nov. 1, 2002); *see* Fourth Amended Complaint, *id.* (Sept. 14, 2007) (concerning American Flight 11 from Boston to Los Angeles, which crashed into One World Trade Center); Fourth Amended Complaint *id.* (Aug. 1, 2007) (concerning American Flight 77 from Dulles to Los Angeles, which crashed into the Penta-

executive committee established publicly accessible Internet webpages to post information about the litigation and selected court filings.[3561]

By February 11, 2003, an additional 38 cases had been filed.[3562] On that date, Judge Hellerstein divided the cases into two groups: (1) cases claiming damages arising from conduct through the September 11, 2001, attacks, and (2) cases claiming damages arising mostly from respiratory injuries during the cleanup and aftermath period.[3563] Cases in the first group remained part of the original master docket case, and cases in the second group were assigned to a new master docket case entitled *In re World Trade Center Disaster Site Litigation*.[3564]

One of the cases filed in early 2003 was an action by an insurance company to determine its obligation to insure and provide defense costs for owners and operators of the World Trade Center.[3565] Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.[3566]

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gon); Third Amended Complaint, *id.* (Aug. 1, 2007) (concerning United Flight 93 from Newark to San Francisco, which crashed in Pennsylvania); Fourth Amended Complaint, *id.* (Sept. 14, 2007) (concerning United Flight 175 from Boston to Los Angeles, which crashed into Two World Trade Center); Fourth Amended Complaint, *id.* (Jan. 18, 2005) (concerning property injuries).

3561. *See* http://nysd.uscourts.gov/sept11 (the court's website); http://www.sept11tort litigation.com (the plaintiffs' website).

3562. The cases were assigned the following docket numbers: 1:02-cv-8916, 1:02-cv-8918, 1:02-cv-8919, 1:02-cv-8938, 1:02-cv-9126 through 1:02-cv-9128, 1:02-cv-9234, 1:02-cv-9935, 1:02-cv-10052, 1:02-cv-10054, 1:02-cv-10160, 1:02-cv-10270 through 1:02-cv-10275, 1:02-cv-10304, 1:03-cv-6 through 1:03-cv-8, 1:03-cv-29, 1:03-cv-33 through 1:03-cv-38, 1:03-cv-131, 1:03-cv-193 through 1:03-cv-195, 1:03-cv-332, 1:03-cv-439, 1:03-cv-644, 1:03-cv-645, and 1:03-cv-912.

3563. Case Management Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

3564. *See* Docket Sheet, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Feb. 13, 2003); *see also In re* Sept. 11 Litig., 236 F.R.D. 164, 168 n.3 (S.D.N.Y. 2006).

Judge Hellerstein denied the government defendants' motions to dismiss on immunity grounds, *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520 (S.D.N.Y. 2006), *aff'd*, 521 F.3d 169 (2d Cir. 2008); *see* Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. Times, Mar. 30, 2008, at 18.

3565. Docket Sheet, Zurich American Ins. Co. v. World Trade Ctr. Props., No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

3566. *In re* Sept. 11th Liab. Ins. Coverage Cases, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004). *See generally* Scott G. Johnson, *Ten Years After 9/11: Property Insurance Lessons Learned*, 46 Tort Trial & Ins. Prac. L.J. 685 (2011) (discussing September 11, 2001, insurance coverage litigation).

Judge Hellerstein ruled that World Trade Center liability insurance policies did not include defense costs, except for one policy that would come into effect once $265 million in damages had been paid. *In re* Sept. 11th Liab. Ins. Coverage Cases, 458 F. Supp. 2d 104 (S.D.N.Y. 2006). Judge Hellerstein resolved this part of the litigation by sanctioning insurance companies $1,250,000 for denying coverage and by dismissing the action. *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (sanctions); Judgment, *Zurich American Ins. Co.*, No. 1:03-cv-332 (S.D.N.Y. July 23, 2007); Order, *id.* (Jan. 18, 2007) (dismissal). Appeals were settled subsequent to oral arguments. Docket Sheet, Zurich American Ins. Co. v. World Trade Ctr. Props., No. 07-991 (2d Cir. Mar. 12, 2007) (settled January 9, 2009); Docket Sheet, Zurich American Ins. Co. v. World Trade Ctr. Props., No. 07-776 (2d Cir. Mar. 1, 2007) (settled October 24, 2008);

By the end of June, another 13 cases had been filed; eight of these were consolidated in the cleanup master docket,[3567] and the other five were consolidated in the attacks master docket.[3568]

Some cleanup cases were filed in state court against the City of New York, the Port Authority of New York and New Jersey, or both, and removed to federal court.[3569] The Southern District of New York's exclusive jurisdiction applies to suits for damages "resulting from or relating to" the terrorist attacks.[3570] Judge Hellerstein determined that with respect to actions in New York his court's exclusive jurisdiction applied to injuries at the World Trade Center site from the time of the crashes on September 11 until the search for survivors ceased on September 29.[3571] Judge Hellerstein remanded all actions that included only claims for injuries outside those geographical and temporal limits, but assumed supplemental jurisdiction over claims outside the limits in actions that included claims within the limits.[3572]

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.[3573] Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands to state court are not reviewable.[3574] The appellate court reviewed some plaintiffs' cross-appeals of Judge Hellerstein's denials of their remand motions and affirmed.[3575]

Docket Sheet, Zurich American Ins. Co. v. World Trade Ctr. Props., No. 07-706 (2d Cir. Feb. 26, 2007) (settled January 9, 2009); Docket Sheet, Zurich American Ins. Co. v. World Trade Ctr. Props., No. 07-530 (2d Cir. Feb. 14, 2007) (same).

3567. The cases were assigned the following docket numbers: 1:03-cv-2067, 1:03-cv-2104, 1:03-cv-2447, 1:03-cv-2621 through 1:03-cv-2623, 1:03-cv-3040, and 1:03-cv-4064.

3568. The cases were assigned the following docket numbers: 03-cv-1016, 03-cv-1040, 03-cv-2004, 03-cv-2104, 03-cv-2621, 03-cv-2622, 03-cv-2684, and 03-cv-3999.

3569. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003); Hellerstein et al., *supra* note 3537, at 134.

3570. Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001), 49 U.S.C. § 40101 note (2011).

3571. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85; Hellerstein et al., *supra* note 3537, at 134–35.

Judge Hellerstein previously remanded two cleanup cases that were never consolidated with the other September 11 damages cases described here. Spagnuolo v. Port Auth. of N.Y. & N.J., 245 F. Supp. 2d 519 (S.D.N.Y. 2003) (remanding Spagnuolo v. Port Auth. of N.Y. & N.J., No. 1:02-cv-6360 (S.D.N.Y. Aug. 9, 2002)); Graybill v. City of N.Y., 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding Graybill v. City of N.Y., No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); *see In re World Trade Ctr.*, 270 F. Supp. 2d at 365.

3572. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

3573. *Id.* at 380–81; Hellerstein et al., *supra* note 3537, at 135.

3574. *In re* WTC Disaster Site, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005); *see* 28 U.S.C. § 1447(d) (2011) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section [1442 or] 1443 of this title shall be reviewable by appeal or otherwise." (quotation alteration added by amendment, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545)); *see also id.*, § 1443 (providing for removal of certain civil rights cases).

3575. *In re WTC Disaster Site*, 414 F.3d at 357, 371–81.

The court noted that its reasoning implied that the remands were improper, because Judge Hellerstein's temporal and geographic distinctions had no basis in the Act.[3576] The court of appeals, therefore, invited the district court to reconsider its remand orders, which were stayed, in light of the court of appeals' "view that the respiratory injury claims before the district court are preempted by" the Act.[3577] So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.[3578]

By March of 2005, more than 1,000 civil cases against defendants other than the terrorists and their supporters claimed damages related to the September 11, 2001, attacks. On March 10, the court created a third master docket case for complaints alleging property damage as a result of the terrorist attacks, calling the new consolidation *In re September 11 Property Damage and Business Loss Litigation*.[3579] The court created a fourth master docket case called *In re World Trade Center Lower Manhattan Disaster Site Litigation* on August 9 for claimed injuries outside the immediate World Trade Center area.[3580]

In time, many thousand cases were filed in this litigation. After many cases alleging both injuries at the World Trade Center and outside the immediate World Trade Center area were filed, the court created, on March 28, 2007, a fifth master

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3576. *Id.* at 380–81 ("we have noted our agreement with cross-appellants' contention that there was no appropriate basis for the district court's conclusion that their claims should be retained while those of plaintiffs who asserted claims of respiratory injury suffered at sites other than the World Trade Center site or after Sept. 29, 2001, were to be remanded."); *see* Hellerstein et al., *supra* note 3537, at 135; *see also* Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

3577. *In re WTC Disaster Site*, 414 F.3d at 381; Hellerstein et al., *supra* note 3537, at 135–36.

3578. *See In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).

Judge Hellerstein subsequently relied on the court of appeals' dictum to deny motions to remand later-removed cases. *In re* World Trade Ctr. Disaster Site Litig., 467 F. Supp. 2d 372 (S.D.N.Y. 2006).

3579. Order, *In re* Sept. 11 Prop. Dam. and Bus. Loss Litig., No. 1:21-mc-101 (S.D.N.Y. Mar. 14, 2005); *see* Docket Sheet, *id.* (Mar. 21, 2005); *see also In re* Sept. 11 Litig., 236 F.R.D. 164, 167 n.1, 168 n.3 (S.D.N.Y. 2006).

On March 14, 2007, the U.S. Court of Appeals for the Fourth Circuit ruled that a different district court hearing the case of *United States v. Moussaoui*, *see supra*, "Twentieth Hijacker," did not have the power to grant the plaintiffs in these cases access to discovery produced to a criminal defendant in the other court. United States v. Moussaoui, 483 F.3d 220 (4th Cir. 2007).

On December 11, 2008, Judge Hellerstein ruled that insurance recovery for loss of the World Trade Center towers would be fair market value at the time of destruction rather than replacement value. *In re* Sept. 11th Litig., 590 F. Supp. 2d 535 (S.D.N.Y. 2008).

3580. Case Management Order, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-100 (S.D.N.Y. Aug. 8, 2005); *see* First Amended Master Complaint, *In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., No. 1:21-mc-102 (S.D.N.Y. Apr. 18, 2008); Master Complaint, *id.* (June 11, 2007); Docket Sheet, *id.* (Aug. 9, 2005); *see also In re Sept. 11 Litig.*, 236 F.R.D. at 168 n.3.

docket case for these "straddlers," called *In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation (Straddler Plaintiffs)*.[3581]

By July 2007, of the 95 actions included in the original master docket, 53 had settled and one was dismissed.[3582] Judge Hellerstein limited attorney fees, at least among those cases settling during early phases, to 15% of settlement.[3583] To facilitate settlements among the remaining cases, Judge Hellerstein selected six representative cases and ordered that they be tried for damages only, with liability to be determined later if the cases did not settle.[3584] Judge Hellerstein believed that this would help the plaintiffs and the defendants in all of the remaining cases assess the values of the claims.[3585] All six cases settled before damages trials were held.[3586]

By March 19, 2008, so many of the original actions had settled that Judge Hellerstein closed the original master docket consolidation, *In re September 11 Litigation*, and transferred remaining cases to the master docket consolidation for property damage cases, *In re September 11 Property Damage and Business Loss Litigation*.[3587]

A law firm representing four of the last remaining plaintiffs among the original wrongful death actions—for modest-wage earners at the Pentagon—negotiated settlements totaling $28.5 million, averaging much more than previous

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3581. Case Management Order, *In re* Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig., No. 1:21-mc-103 (S.D.N.Y. Mar. 28, 2007); *see* Docket Sheet, *id.* (Mar. 28, 2007).

3582. *In re* Sept. 11 Litig., 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); *see* Hartocollis, *supra* note 3541.

3583. *E.g.*, Order Concerning Settlement, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. Aug. 9, 2007), *available at* 2007 WL 2298352; Order Concerning Settlement, *id.* (June 29, 2007); *In re* Sept. 11 Litig., 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

3584. Opinion, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), *available at* 2007 WL 1965559; Order, *id.* (July 2, 2007); *In re* Sept. 11 Litig., 600 F. Supp. 2d 549, 554 (S.D.N.Y. 2009) ("I determined that the problems of discovery delay arose in connection with issues of liability, not damages."); *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 616.

3585. Opinion at 4, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. July 5, 2007), *available at* 2007 WL 1965559; Interview with Hon. Alvin K. Hellerstein, June 25, 2007; *see* Hartocollis, *supra* note 3541 (reporting, "The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.").

3586. *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554 ("The experiment was successful. After some discovery, and without the need of any trials, all six cases settled and more followed."); *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 617; Settlement Order, Wilson v. American Airlines, No. 1:03-cv-6968 (S.D.N.Y. Nov. 1, 2007); Settlement Order, Shontere v. AMR Corp., No. 1:03-cv-6966 (S.D.N.Y. Nov. 1, 2007); Settlement Order, Ambrose v. American Airlines, No. 1:02-cv-7150 (S.D.N.Y. Nov. 1, 2007); Settlement Order, Driscoll v. Argenbright Security, Inc., No. 1:02-cv-7912 (S.D.N.Y. Sept. 17, 2007); Settlement Order, Carstanjen v. UAL Corp., No. 1:02-cv-7153 (S.D.N.Y. Sept. 17, 2007); Settlement Order, O'Hare v. United Airlines, No. 1:02-cv-456 (S.D.N.Y. Sept. 17, 2007).

3587. Order, *In re* Sept. 11 Prop. Dam. and Bus. Loss Litig., No. 1:21-mc-101 (S.D.N.Y. Mar. 18, 2008); Order, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y Mar. 18, 2008).

settlements, and negotiated a fee with each plaintiff of 25%.[3588] As part of his policy to prevent early settlers from leveraging recoveries against later settlers and vice versa, Judge Hellerstein disapproved these settlements as excessive.[3589] The judge also disapproved the firm's fee as out of line with others' in the litigation.[3590] "The litigants then accepted the assistance of the mediator and agreed to settlements that were consistent with previous settlements. They also agreed to a 15% contingency fee."[3591]

By the end of 2008, only three of the original 95 wrongful death and personal injury cases remained unsettled,[3592] but there remained approximately 10,000 cases by rescue and cleanup workers for respiratory and other injuries.[3593] In addition to delays resulting from interlocutory appeals, "[t]he inability of counsel to style useful pleadings, or to proceed with discovery relevant to the immunity defenses without excessive and wasteful disputes, made it necessary to develop an alternative manner of proceeding."[3594]

To help the parties assess the values of the claims, Judge Hellerstein again initiated a process for test trials: 30 cases, mostly representing the most severe cases but also representing other cases, would proceed through discovery for trial in May 2010.[3595] In March, however, the parties announced a global settlement.[3596] Judge Hellerstein determined that the settlement was not a good enough deal for

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3588. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; *see In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3589. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 621; *see In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554; *New Ruling Sought in 9/11 Settlements*, Wash. Post, Aug. 7, 2008, at A5.

3590. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; *see In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3591. *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

3592. *In re* Sept. 11 Litig., 723 F. Supp. 2d 534, 539 (S.D.N.Y. 2010); *In re* Sept. 11 Litig., 621 F. Supp. 2d 131, 140 (S.D.N.Y. 2009); *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 553–54; *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 504 n.9 (S.D.N.Y. 2009); *In re* Sept. 11th Litig., 590 F. Supp. 2d 535, 540 (S.D.N.Y. 2008).

3593. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 499 n.1, 501, 503; *see* Hellerstein et al., *supra* note 3537, at 132–33.

3594. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

3595. *Id.* at 504; Hellerstein et al., *supra* note 3537, at 142–55; *see* Mireya Navarro, *Effort to Settle Sept. 11 Lawsuits*, N.Y. Times, Feb. 5, 2010, at A1 ("Several hundred lawyers are working on the cases, and the court documents run to tens of millions of pages.").

The case management order called for division of the cases into five groups, depending upon when the case was filed, and the selection of six cases from each group. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–04. From the 200 cases in each group with the most severe injuries, the two sides of the litigation would each select two cases. *Id.* at 504. Special masters would identify an additional 25 representative cases, and Judge Hellerstein would select two cases from among the 196 severe cases not selected by the parties and the 25 other representative cases. *Id.*

3596. *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011); Hellerstein et al., *supra* note 3537, at 155–57; *see* Mireya Navarro, *Deal Is Reached on Health Costs of 9/11 Workers*, N.Y. Times, Mar. 12, 2010, at A1.

the individual plaintiffs,[3597] but he approved a revised settlement that gave more money to workers and less to their lawyers.[3598]

On November 19, an allocation neutral reported to the court that eight plaintiffs more than a required 95% had accepted the settlement.[3599] Judge Hellerstein appointed a special counsel to help the several hundred other plaintiffs decide whether or not to join the settlement at a later time.[3600]

A month later, Congress passed the James Zadroga 9/11 Health and Compensation Act,[3601] which provided rescue and cleanup workers additional funds for health monitoring and treatment and which reopened the September 11th Victim Compensation Fund to provide compensation for employment and other economic losses.[3602] Plaintiffs were given until January 2, 2012, to decide whether to pursue damages from the fund or through litigation.[3603] The fund began to pay out awards on January 29, 2013.[3604]

After Judge Hellerstein dismissed some plaintiffs "because they had given up being parties, if, indeed, they had ever been real parties,"[3605] the fraction of settling plaintiffs rose to 99.4%.[3606] Judge Hellerstein overruled the insurer's motion

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3597. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188 ("my study of the settlement caused me to reject it, as not fair and adequate, and for providing too much money for the lawyers, for reserving too much money for unlikely claims in the future, and for providing too little money for the settling Plaintiffs, and because its terms were unfair and purported to be judicially unreviewable and unaccountable"); Hellerstein et al., *supra* note 3537, at 157–59; *see* Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. Times, May 3, 2010, at A16; Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. Times, Mar. 20, 2010, at A12.

3598. Order, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-100 (S.D.N.Y. June 10, 2010); *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 188; *see Judge Approves 9/11 Settlement*, Wash. Post, June 11, 2010, at A3.

Appeals were withdrawn. Stipulation, *In re* World Trade Ctr., No. 10-3172 (2d Cir. Oct. 26, 2010) (cross-appeal by some plaintiffs); Stipulation, Quinones v. City of N.Y., No. 10-2765 (2d Cir. Oct. 26, 2010) (defendants' appeal).

3599. Letter, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 19, 2010) (reporting agreements by 10,043 out of 10,563 plaintiffs); *see* Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. Times, Nov. 20, 2010, at A1.

3600. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. Nov. 24, 2010) (noting that plaintiffs not accepting the settlement included plaintiffs who could not be reached, plaintiffs who refused communication from their attorneys, plaintiffs who had withdrawn from the litigation but still remained on the docket, and plaintiffs still on the fence); *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 192–93; *see In re* World Trade Ctr. Disaster Site Litig., 762 F. Supp. 2d 631 (S.D.N.Y. 2010).

3601. Pub. L. No. 111-347, 124 Stat. 3623 (2011).

3602. *See* Hellerstein et al., *supra* note 3537, at 129–31; Raymond Hernandez, *Senate Passes 9/11 Health Bill as Republicans Back Down*, N.Y. Times, Dec. 23, 2010, at A1; *see also* Sheryl Gay Stolberg, *Obama Signs 9/11 Health Care Bill*, N.Y. Times, Jan. 3, 2011, at A17.

3603. *See* David B. Caruso, *For Those With 9/11 Health Lawsuits, A Compensation Dilemma*, Wash. Post, Dec. 26, 2011, at A7.

3604. *See* Anemona Hartocollis, *9/11 Health Compensation Fund Pays Out Its First 15 Awards*, N.Y. Times, Jan. 30, 2013, at A23.

3605. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 185.

3606. *Id.* at 190.

to include involuntarily dismissed plaintiffs in the denominator to reduce its obligation of an additional $1.25 million in settlement payments for every tenth of a percentage the fraction of settlers surpassed 95%.[3607]

On July 1, 2010, Judge Hellerstein approved settlements in property damage actions over the objection of non-settling plaintiffs affiliated with the long-term lessee of the World Trade Center, Larry Silverstein,[3608] and the court of appeals affirmed.[3609] In 2011, however, Judge Hellerstein dismissed an action by Consolidated Edison, whose power station was destroyed when Building 7 of the World Trade Center collapsed, apparently as a result of hot debris from the twin towers.[3610] Judge Hellerstein concluded that Building 7's developer and principal tenant, whose diesel-fueled backup generators contributed to the fires that destroyed Building 7, were not liable for the improbable chain of events that resulted in Building 7's destruction.[3611]

The one remaining wrongful death action was scheduled to go to trial in November 2011.[3612] On September 16, the plaintiffs filed 127 exhibits in opposition to a motion for summary judgment.[3613] Three days later, the plaintiffs filed a notice that the case had settled.[3614] It was reported that the September 16 filing made the public case that the plaintiffs were seeking to make.[3615]

On March 20, 2013, Judge Hellerstein had an opportunity to determine that the September 11, 2001, attack was an act of war.[3616] The owner of property near the World Trade Center sued the port authority, the airlines, and other defendants for damages pursuant to the Comprehensive Environmental Response, Compensa-

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3607. *Id.* at 199.

3608. *In re* Sept. 11 Litig., 723 F. Supp. 2d 534 (S.D.N.Y. 2010); *see In re* Sept. 11 Litig., 760 F. Supp. 2d 433, 437 (S.D.N.Y. 2011).

3609. *In re* Sept. 11 Prop. Damage Litig., 650 F.3d 145 (2d Cir. 2011).

3610. Aegis Ins. Servs., Inc. v. 7 World Trade Co., No. 865 F. Supp. 2d 370 (2011).

3611. *Id.*

3612. *In re* Sept. 11 Litig., 811 F. Supp. 2d 883, 885 (S.D.N.Y. Sept. 7, 2011) (action against United Airlines and Huntleigh USA Corporation by the mother of Mark Bavis, who died on United Flight 175, which departed Boston for Los Angeles and struck World Trade Center 2); Order, Bavis v. UAL Corp., No. 1:02-cv-7154 (S.D.N.Y. June 14, 2011); *see In re Sept. 11 Litig.*, 760 F. Supp. 2d at 436 ("Ninety-four of the ninety-five cases have settled."); *see also* Benjamin Weiser, *A 9/11 Judge Sets a Timer for a Month*, N.Y. Times, Apr. 28, 2011, at A1.

On August 11, 2010, two other cases settled. Stipulation, Low v. U.S. Airways, Inc., No. 1:03-cv-7040 (S.D.N.Y. Aug. 11, 2010); Stipulation, Keating v. American Airlines, Inc., No. 1:02-cv-7156 (S.D.N.Y. Aug. 11, 2010); *see In re Sept. 11 Litig.*, 723 F. Supp. 2d at 539 n.6 (noting pending motions for approval of settlements).

3613. Declaration, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 16, 2011); *see* Benjamin Weiser, *Filing Details Shortcomings of Airport Screeners on 9/11*, N.Y. Times, Sept. 17, 2011, at A15.

3614. Stipulation, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 19, 2011); *see* Transcript at 2, *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-100 (S.D.N.Y. Oct. 18, 2011, filed Jan. 26, 2012); *see also* Benjamin Weiser, *Last 9/11 Wrongful-Death Suit Is Settled, as Family and Airline Reach Terms*, N.Y. Times, Sept. 20, 2011, at A21.

3615. Weiser, *supra* note 3614 (focusing on inadequate airport security as the reason for the disaster, according to the plaintiffs).

3616. *In re* Sept. 11 Litig., ___ F. Supp. 2d ___, 2013 WL 1137320 (S.D.N.Y. 2013).

tion and Liability Act of 1980 (CERCLA).[3617] Judge Hellerstein determined that the action was barred by the statute's time limitation and the injury was not covered by the statute.[3618] The court of appeals remanded the case for a determination of whether CERCLA's act-of-war defense applied.[3619] Judge Hellerstein determined that it did.[3620] In response to the attack, Congress authorized military action against Al-Qaeda in retaliation for the attack and against the Taliban government of Afghanistan for harboring Al-Qaeda.[3621]

Challenge: Service of Process on International Terrorists

Plaintiffs in the actions against terrorists were faced with unusual service difficulties. One process server was murdered trying to serve the complaint in Saudi Arabia.[3622] Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.[3623]

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.[3624] The court agreed.[3625]

The plaintiffs proposed that the government serve process on defendants in their custody.[3626] The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.[3627] The court agreed that the government's service on defendants in its custody would be effective, but declined to order the government to facilitate service, and agreed that the government need not disclose whether it had in custody those defendants it had not publicly acknowledged hold-

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3617. Complaint, Cedar & Wash. Assocs. v. Port Auth. of N.Y. & N.J., No. 1:08-cv-9146 (S.D.N.Y. Oct. 24, 2008); *In re Sept. 11 Litig.*, ___ F. Supp. 2d at ___, 2013 WL 1137320 (pp.1–2 of filed opinion); *see* 42 U.S.C. §§ 9601–9675 (2011).

3618. Order, *Cedar & Wash. Assocs.*, No. 1:08-cv-9146 (S.D.N.Y. Sept. 22, 2010); *In re Sept. 11 Litig.*, ___ F. Supp. 2d at ___, 2013 WL 1137320 (p.2 of filed opinion).

3619. *In re* Sept. 11 Litig., 485 F. App'x 443 (2d Cir. 2012) (retaining jurisdiction); *In re Sept. 11 Litig.*, ___ F. Supp. 2d at ___, 2013 WL 1137320 (p.3 of filed opinion).

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
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> . . .
>
> (2) an act of war; . . .

42 U.S.C. § 9607(b).

3620. *In re Sept. 11 Litig.*, ___ F. Supp. 2d at ___, 2013 WL 1137320 (pp.3, 26–29 of filed opinion).

3621. Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C. § 1541 note (2011); *In re Sept. 11 Litig.*, ___ F. Supp. 2d at ___, 2013 WL 1137320 (pp.7–8, 23 of filed opinion).

3622. *In re* Terrorist Attacks on Sept. 11, 2001, 718 F. Supp. 2d 456, 490 (S.D.N.Y. 2010); Interview with Owen Smith, law clerk to Hon. Richard Conway Casey, May 17, 2007.

3623. Opinion, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. June 14, 2004), 2004 WL 1348996.

3624. *Id.* at 1–2.

3625. *Id.* at 2–3.

3626. *Id.* at 1–2.

3627. *Id.* at 4.

ing.[3628] The court ruled that service by publication would be effective for those individuals whom the government did not serve.[3629]

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.[3630] The court ruled that this would be effective service, and agreed to request that the foreign ministries accept service, but declined to order them to do so.[3631]

Challenge: Classified Evidence

In the actions against alleged supporters of the terrorists, plaintiffs supported a discovery motion with documents that the plaintiffs knew were sensitive and suspected might be classified.[3632] It was reported that the documents had been anonymously leaked to the plaintiffs' attorneys.[3633] The attorneys delivered the documents to the court, sent copies to the U.S. Attorney, and provided defendants only with a copy of the transmittal letter.[3634] The government determined that at least some of the documents were classified, so the court's copies were securely stored.[3635] The plaintiffs were required to surrender their copies.[3636] Judge Daniels denied the plaintiffs' request that he review the documents.[3637]

Challenge: Sensitive Unclassified Information

Classified information is information protected by the government for national security reasons; information protected by the government for other reasons is known as "controlled unclassified information."[3638]

Litigation that claimed inadequate security required discovery concerning security procedures. The government decided that the Transportation Security Administration (TSA) should screen discovery for "sensitive security information"

3628. *Id.* at 4. The government acknowledged custody of ten of the 23 defendants who the plaintiffs claimed were in the government's custody. *Id.*

3629. *Id.* at 6.

3630. *Id.* at 1–2, 5.

3631. *Id.* at 6 & n.2.

3632. Discovery Opinion, *supra* note 3473, at 18.

3633. Eric Lichtblau, *Documents Back Saudi Link to Extremists, But May Never Be Used in 9/11 Suit*, N.Y. Times, June 24, 2009, at A11; Discovery Opinion, *supra* note 3473, at 19.

3634. Discovery Opinion, *supra* note 3473, at 18.

3635. *Id.* at 18–19.

3636. *Id.* at 19.

3637. Order, *In re* Terrorist Attacks on Sept. 11, 2001, No. 1:03-md-1570 (S.D.N.Y. July 16, 2009); *see* Discovery Opinion, *supra* note 3473, at 19; Lichtblau, *supra* note 3633 ("The Justice Department had the lawyers' copies destroyed and now wants to prevent a judge from even looking at the material.").

3638. Exec. Order No. 13,556, 75 Fed. Reg. 68,675 (Nov. 9, 2010); Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information (Aug. 25, 2009), *available at* http://www.justice.gov/ag/cui_task_force_rpt.pdf; *see Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011).

(SSI), which is controlled unclassified information related to transportation security.[3639] This slowed substantially the progress of the litigation.[3640]

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.[3641] It took the TSA two years to screen the discovery.[3642] The plaintiffs noticed depositions of the defendants for April 2006.[3643] TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.[3644] The defendants argued that it was in their interest to answer the plaintiffs' questions, and they objected to being held responsible for protecting the government's SSI.[3645] Judge Hellerstein was sympathetic to the defendants' position.

> Given the uncertainty of what is properly classifiable as SSI, and TSA's own changes of attitudes regarding prior classifications, the task of objecting and instructing is beyond the jurisdictional competence of defense counsel, particularly in light of the client's interests in fully responding to proper questions. Thus, the only lawyers who have the obligation to act as enforcers of TSA's policies are TSA's own lawyers, and it is they, and no one else, who have the responsibility to object and to instruct whenever they, in good faith, believe that SSI may be implicated in a question or an answer. Their attendance at depositions is critical. That is the very reason that they moved to intervene in the case, and the reason that I granted TSA's motion to intervene.[3646]

Judge Hellerstein ruled that the depositions be conducted with only cleared counsel and witnesses present, that TSA be granted 30 days to redact the transcript, and that the original be filed under seal.[3647] Judge Hellerstein limited TSA's asserted "right to raise objections during the course of depositions, and instruct witnesses not to answer, where the questions posed to witnesses, and the

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3639. *In re* Sept. 11 Litig., 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009).

Regulations provide the following definition:

> SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the TSA has determined would—
>
> (1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);
>
> (2) Reveal trade secrets or privileged or confidential information obtained from any person; or
>
> (3) Be detrimental to the security of transportation.

49 C.F.R. § 1520.5(a) (2012); *see In re* Sept. 11 Litig., 567 F. Supp. 2d 611, 615 (S.D.N.Y. 2008); *In re* Sept. 11 Litig., 236 F.R.D. 164, 169 (S.D.N.Y. 2006).

3640. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 616; Interview with Hon. Alvin K. Hellerstein, June 25, 2007. "The TSA has reviewed over a million pages of documents and 121 deposition transcripts before allowing their release, in original or redacted form. As a result, discovery has become extended, and a number of judicial interventions were necessary to avoid impasse." *In re* Sept. 11 Litig., 621 F. Supp. 2d 131, 142 (S.D.N.Y. 2009) (citations omitted).

3641. *In re Sept. 11 Litig.*, 236 F.R.D. at 167.

3642. *Id.*

3643. *Id.* at 169.

3644. *Id.* at 165–66, 169.

3645. *Id.* at 166, 169.

3646. *Id.* at 173.

3647. *Id.* at 173–74.

answers elicited therefrom, might implicate information relevant to the case but potentially or actually SSI."[3648] Judge Hellerstein determined that "TSA's position will thwart the very purpose of conducting depositions, as witnesses, fearful that any answer provided might contain information subject to ultimate designation as SSI, would be unable to engage in the dynamic process of question and answer so essential to developing and defending a negligence action."[3649] So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.[3650]

Judge Hellerstein determined that the parties, especially the plaintiffs, wanted to identify too many attorneys to participate in the depositions. Two problems Judge Hellerstein identified as resulting from the participation of too many attorneys were (1) a potential delay resulting from the TSA having to clear all of them and (2) a potential compromising of national security resulting from so many attorneys participating.[3651] So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.[3652] The plaintiffs' attorneys were unwilling to be represented by other parties' attorneys, but the government relaxed its insistence that deposition participation be limited, so depositions finally commenced in September 2006.[3653]

In October 2007, plaintiffs moved to set aside discovery confidentiality designations so that all discovery other than SSI could be made public.[3654] Plaintiffs subsequently withdrew this motion, but they renewed it on January 14, 2009.[3655] On July 30, Judge Hellerstein denied the motion, ruling that the confidentiality protective order required that objections to confidentiality designations be made within 120 days of the designations.[3656]

For the single wrongful death action against the airlines not to settle, Judge Hellerstein issued a protective order governing the use of SSI at trial.[3657] "TSA has determined, pursuant to its discretionary authority under 49 C.F.R. § 1520.15(e), to grant Plaintiff, Defendants and the members of the jury limited and conditional access to certain SSI, subject to the terms and conditions set forth in this Order."[3658] Judge Hellerstein called for use of the silent witness rule to present SSI to the jury without presenting it to the public.[3659] With this rule, witness-

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3648. *In re* Sept. 11 Litig., 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

3649. *Id.* at 410.

3650. *Id.*

3651. Order at 1, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. June 5, 2006).

3652. *Id.* at 1–2.

3653. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

3654. Opinion at 1–3, *In re* Sept. 11 Prop. Dam. and Bus. Loss Litig., No. 1:21-mc-101 (S.D.N.Y. July 30, 2009).

3655. *Id.* at 1.

3656. *Id.* at 1, 4, 9.

3657. Protective Order, Bavis v. UAL Corp., No. 1:02-cv-7154 (S.D.N.Y. June 28, 2011).

3658. *Id.* at 2.

3659. *Id.* at 15.

es testify about secret matters in code so that the jury and the participants know the secrets in the testimony but the public does not.[3660]

In 2013, Judge Hellerstein issued a similar SSI protective order in Cantor Fitzgerald's action.[3661]

Challenge: Witness Security

Nine years after they filed their original complaint in the District of Columbia, some plaintiffs introduced as evidence supporting a default judgment against Iran[3662] videotaped testimony from three defectors from the Iranian government.[3663] To protect the safety of the witnesses and their families, the court allowed the plaintiffs to file both a public brief and a sealed supplemental brief, with the defectors' testimony as sealed exhibits.[3664] A few months later, the plaintiffs notified the court that one of the witnesses "has obtained satisfactory protections as to his identity and location such that he has given his permission to unseal his identity and the majority of his testimony."[3665] Judge Daniels reduced the scope of sealing accordingly on the next day.[3666]

Challenge: Foreign Government Evidence

Judge Maas agreed on April 9, 2013, to issue letters rogatory to the government of Iran to obtain discovery from Iranian defendants.[3667]

3660. United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987); United States v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007); *see supra*, "Giving State Secrets to Lobbyists."

3661. Protective Order, Cantor Fitzgerald & Co. v. American Airlines, Inc., No. 1:04-cv-7318 (S.D.N.Y. May 8, 2013).

3662. Judgment, Havlish v. Bin Laden, No. 1:03-cv-9848 (S.D.N.Y. Dec. 22, 2011); Findings of Fact and Conclusions of Law, *id.* (Dec. 22, 2011); *see also* Default Judgment, Ashton v. Al-Qaeda Islamic Army, No. 1:02-cv-6977 (S.D.N.Y. Dec. 22, 2011) (default judgment against Iran on behalf of plaintiffs in another action).

3663. Default Judgment Brief at 12, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. May 19, 2011); *see* Benjamin Weiser & Scott Shane, *Court Filings Assert Iran Had Link to 9/11 Attacks*, N.Y. Times, May 20, 2011, at A6.

3664. Order, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. July 5, 2011); *see* Weiser & Shane, *supra* note 3663.

3665. Motion, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. Dec. 14, 2011).

3666. Order, *id.* (Dec. 15, 2011).

3667. Order, *id.* (Apr. 11, 2013).

Mistaken Rendition

El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)[3668]

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claimed that the U.S. Central Intelligence Agency abducted him on December 31, 2003, while he was on vacation in Macedonia and imprisoned him for five months as part of its extraordinary rendition program and then abandoned him in Albania after realizing that it had apprehended the wrong person.[3669] El-Masri's captors thought he was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.[3670] It apparently took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.[3671]

On March 2, 2007, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal of el-Masri's civil suit for damages as precluded by the state-secrets privilege.[3672] The Supreme Court denied certiorari.[3673]

3668. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

3669. El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007); El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006); *see* Complaint at 1–2, 7–17, El-Masri v. Tenet, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005), *available at* http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; *see also* Jonathan Hafetz, Habeas Corpus After 9/11 58–59 (2011); David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. Times, Apr. 23, 2005, at A3; Bob Kemper, *A Privilege or a Free Pass?*, Wash. Lawyer, Nov. 2009, at 24, 24 (reporting that "German investigators and a fellow detainee in the Afghan prison have confirmed El-Masri's story and the identities of his captors); Neil A. Lewis, *Federal Judge Dismisses Lawsuit by Man Held in Terror Program*, N.Y. Times, May 19, 2006, at A22 [hereinafter *Man Held*]; Neil A. Lewis, *Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit*, N.Y. Times, Nov. 29, 2006, at A15 [hereinafter *Mistakenly Abducted*]; Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 Rev. Litig. 479, 480 (2008); Joseph Margulies, Guantánamo and the Abuse of Presidential Power 192 (2006) ("On New Year's Eve 2003, Khaled Masri traveled by bus from his home in Ulm, Germany, to Macedonia, after he and his wife got into an argument."); *The Passionate Eye: CIA's Secret War* (CBC television broadcast Oct. 15, 2006); Dana Priest, *The Wronged Man*, Wash. Post, Nov. 29, 2006, at C1; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 66–69 (2007); Don Van Natta, Jr., & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11; Steven M. Watt & Ben Wizner, *The Not-So-Secret Man*, *in* The Guantánamo Lawyers 387 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (reflections by el-Masri's attorneys).

3670. *See* Van Natta & Mekhennet, *supra* note 3669.

3671. *See* Johnston, *supra* note 3669; Lewis, *Man Held*, *supra* note 3669.

3672. *El-Masri*, 479 F.3d 296; *see id.* at 310 ("virtually any conceivable response to El-Masri's allegations would disclose privileged information"); *El-Masri*, 437 F. Supp. 2d at 539, 541 (district court's dismissal); *see also* Kemper, *supra* note 3669, at 24; Lewis, *Man Held*, *supra* note 3669; Lewis, *Mistakenly Abducted*, *supra* note 3669; Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. Times, Mar. 3, 2007, at A6; Priest, *supra* note 3669.

3673. El-Masri v. United States, 552 U.S. 947 (2007); *see* Robert Barnes, *Supreme Court Won't Review Alleged CIA Abduction*, Wash. Post, Oct. 10, 2007, at A4; Linda Greenhouse, *Jus-*

El-Masri's complaint, which he filed on December 6, 2005, alleged that he was beaten, stripped, sodomized with a foreign object, and then flown to Kabul, Afghanistan, where he was imprisoned in the "Salt Pit" for another four months.[3674] The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.[3675] According to Judge Ellis,

> Following his abduction, El-Masri alleges the Macedonia authorities imprisoned him in a Skopje hotel room for 23 days, refusing to let him contact a lawyer, a German consular officer, a translator or his wife, and interrogating him continuously about his alleged association with Al Qaeda, an association he consistently denied. . . .
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> . . .
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> . . . El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road. With the assistance of Albanian authorities, El-Masri eventually made his way back to his home in Germany only to find that his wife and four children, believing he had abandoned them, had left Germany to live in Lebanon.[3676]

It took four days for el-Masri to find his wife and children.[3677]

It was reported that el-Masri received very little psychiatric treatment for the trauma he experienced until he was committed to a psychiatric institution following his setting fire to a supermarket in Ulm, Germany, on May 17, 2007.[3678] On March 30, 2010, he was sentenced to two years in prison for attacking the mayor of his home town.[3679]

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tices Turn Aside Case of Man Accusing C.I.A. of Torture, N.Y. Times, Oct. 10, 2007, at A16; Kemper, *supra* note 3669, at 24.

3674. *El-Masri*, 437 F. Supp. 2d at 533; Complaint, *supra* note 3669, at 8–14; *see* Jane Mayer, *The Black Sites*, New Yorker, Aug. 13, 2007, at 46, 54–55 (describing the conditions of el-Masri's detention); *see also* James Risen, State of War 30 (2006) ("CIA sources say that Salt Pit is in Afghanistan and is used to house low-level prisoners."); Romero & Temple-Raston, *supra* note 3669, at 69 (describing the Salt Pit as "a secret U.S.-run prison just north of Kabul" and noting that the suit was filed on a day that Rice, who had become Secretary of State, arrived in Berlin for a visit with Chancellor Angela Merkel).

3675. Docket Sheet, El-Masri v. Tenet, No. 1:05-cv-1417 (E.D. Va. Dec. 6, 2005) [hereinafter E.D. Va. Docket Sheet]; *see* Kemper, *supra* note 3669, at 24.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

3676. *El-Masri*, 437 F. Supp. 2d at 532–34; *see* Complaint, *supra* note 3669, at 7, 14–16; *see also* Johnston, *supra* note 3669; Van Natta & Mekhennet, *supra* note 3669.

It was reported that German officials may have known of el-Masri's detention within a few days of his capture. Souad Mekhennet & Craig S. Smith, *German Spy Agency Admits Mishandling Abduction Case*, N.Y. Times, June 2, 2006, at A8; Don Van Natta, Jr., *Germany Weighs If It Played Role in Seizure by U.S.*, N.Y. Times, Feb. 21, 2006, at A1.

3677. *See* Van Natta & Mekhennet, *supra* note 3669.

3678. *See* Souad Mekhennet, *Ex-C.I.A. Detainee Held in Arson Attack*, N.Y. Times, May 18, 2007, at A8; Tony Paterson, *CIA Torture Victim Committed After Supermarket Arson Attack*, Indep. (London), May 19, 2007, at 3; *see also* Dana Priest & William M. Arkin, Top Secret America xxiii (2011) (concluding that "the CIA's bungled operation" cost el-Masri his sanity).

3679. *See Ex-CIA Torture Victim Convicted of Assault*, Toronto Star, Mar. 31, 2010, at 17.

In 2007, a German court issued arrest warrants for 13 CIA operatives who participated in el-Masri's abduction.[3680] The German government, however, did not seek the operatives' extradition,[3681] and a German court rejected a suit by el-Masri to compel prosecution.[3682] On allegations that the plane that transported el-Masri stopped in La Palma, Spain, prosecutors asked a Spanish court to also issue arrest warrants for the operatives.[3683]

On December 13, 2012, the European Court of Human Rights granted el-Masri a €60,000 judgment against Macedonia for its complicity in el-Masri's mistreatment.[3684]

Challenge: Classified Arguments

The government asserted the state-secrets privilege

> by submitting an *ex parte* classified declaration labeled "JUDGE'S EYES ONLY," and also an unclassified declaration for the public record. The latter document states in general terms that damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations. The former is a detailed explanation of the facts and reasons underlying the assertion of the privilege.[3685]

The classified declaration was delivered to the judge by a classified information security officer, who took responsibility for its storage when the judge was not privately reviewing it.[3686]

Without revealing the contents of classified submissions, Judge Ellis noted that

> the substance of El-Masri's publicly available complaint alleges a clandestine intelligence program, and the means and methods the foreign intelligence services of this and other countries used to carry out the program. And, as the public declaration makes pellucidly clear, any admission or denial of these allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security. This conclusion finds firm

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3680. *See* Jeffrey Fleishman & John Goetz, *Germany May Indict U.S. Agents in Abduction*, N.Y. Times, Jan. 31, 2007, at 1; Mark Landler, *German Court Challenges CIA Over Abduction*, N.Y. Times, Feb. 1, 2007, at A1 ("They include the four pilots of the Boeing 737 that picked up Mr. Masri, a mechanic and several CIA operatives, people familiar with the case said."); Lobel, *supra* note 3669, at 480; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, at A1.

3681. *See* Michael Slackman, *Officials Pressed Germans on Kidnapping by C.I.A.*, N.Y. Times, Dec. 9, 2010, at A13.

3682. *See Court Rejects Lawsuit Related to a C.I.A. Kidnapping*, N.Y. Times, Dec. 11, 2010, at A10.

3683. *See* Manuel Altozano, *High Court Seeks Arrest of CIA Agents for 2004 Kidnap*, El País, May 12, 2010, at 1.

3684. Judgment, El-Masri v. Former Yugoslav Republic of Macedonia, No. 39630/09 (Eur. Ct. H.R. Dec. 13, 2012), *available at* http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"sort":["kpdate Descending"],"respondent":["MKD"],"documentcollectionid2":["GRANDCHAMBER", "CHAMBER"],"itemid":["001-115621"]}; *see* Nicholas Kulish, *Court Finds Rights Violation in C.I.A. Rendition Case*, N.Y. Times, Dec. 14, 2012, at A13.

3685. El-Masri v. Tenet, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006); *see* E.D. Va. Docket Sheet, *supra* note 3675 (noting a March 23, 2006, notice of in camera submission).

3686. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

support in the details disclosed in the [Director of the CIA's] classified *ex parte* declaration.[3687]

The court of appeals also reviewed the classified declaration and announced that "the extensive information it contains is crucial to our decision in this matter."[3688] The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.[3689] Sometime before oral argument, Judge King, who was to author the opinion, drove from his home in Charleston, West Virginia, to Richmond, Virginia, to review the classified declaration.[3690] A deputy clerk with a security clearance brought the declaration to Judge King's chambers, where the judge reviewed the declaration in private, and a cleared deputy clerk returned the declaration to the court's sensitive compartmented information facility (SCIF) when the judge was finished.[3691] Judges Shedd and Duncan reviewed the declaration in their Richmond chambers when they were in town for a sitting.[3692]

Two Supreme Court justices reviewed the classified declaration to consider el-Masri's petition for certiorari,[3693] which the court denied.[3694]

3687. *El-Masri*, 437 F. Supp. 2d at 537.

3688. El-Masri v. United States, 479 F.3d 296, 312 (4th Cir. 2007).

3689. Docket Sheet, El-Masri v. Tenet, No. 06-1667 (4th Cir. June 14, 2006).

For this report, Tim Reagan interviewed Judge Duncan by telephone on November 8, 2007; Judge King in the judge's Richmond chambers on March 19, 2008; and Judge Shedd by telephone on September 3, 2009.

3690. Interview with Hon. Robert B. King, March 19, 2008. The drive is approximately 320 miles.

3691. *Id.*; *see* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

The court created the SCIF for the Zacarias Moussaoui case. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; *see supra*, "Twentieth Hijacker."

3692. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009; Interview with Hon. Allyson Kay Duncan, Nov. 8, 2007.

3693. Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

3694. El-Masri v. United States, 552 U.S. 947 (2007).

Detainee Documents

ACLU v. Department of Defense
(Alvin K. Hellerstein, S.D.N.Y.)

Several civil rights organizations—the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace—sought injunctive relief in aid of Freedom of Information Act (FOIA) requests to the government—specifically the Departments of Defense, Homeland Security, Justice, and State, and the CIA—by filing an action in the Southern District of New York on June 2, 2004.[3695] The court assigned the case to Judge Alvin K. Hellerstein.[3696]

The FOIA requests were presented to the various government agencies from October 2003 to May 2004.[3697] They sought records concerning three topics pertaining to terrorism suspects detained by the government at extraterritorial military facilities since September 11, 2001: (1) records of treatment, (2) records of deaths, and (3) records of rendition to countries known to use torture.[3698] The only document produced before the lawsuit was filed was a set of State Department talking points.[3699]

A little over three months after the case was filed, Judge Hellerstein ordered the government agencies to "produce or identify all responsive documents" within one month.[3700] Judge Hellerstein scheduled a status conference for ten days following that deadline.[3701]

> It is the duty of the court to uphold FOIA by striking a proper balance between plaintiffs' right to receive information on government activity in a timely manner and the government's contention that national security concerns prevent timely disclosure or identification. . . . .

3695. Complaint, ACLU v. Dep't of Defense, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004); *see* Amended Complaint, *id.* (July 6, 2004); *see also* Larry Siems, The Torture Report 15 (2011).

3696. Docket Sheet, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 2, 2004).

Tim Reagan interviewed Judge Hellerstein for this report in the judge's chambers on November 5, 2009.

3697. ACLU v. Dep't of Defense, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); Amended Complaint, *supra* note 3695, at 2–3; *see* Amrit Singh, *Freedom of Information*, *in* The Guantánamo Lawyers 246, 246 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

3698. ACLU v. Dep't of Defense, 723 F. Supp. 2d 621, 623 (S.D.N.Y. 2010); *ACLU*, 339 F. Supp. 2d at 502; Amended Complaint, *supra* note 3695, at 2.

Amnesty International, the Center for Constitutional Rights, and Washington Square Legal Services pursued a separate FOIA action before Judge Loretta A. Preska against the same defendants for documents pertaining to extraordinary rendition. Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479 (S.D.N.Y. 2010) (largely approving the CIA's response to the FOIA requests); Docket Sheet, Amnesty Int'l USA v. CIA, No. 1:07-cv-5435 (S.D.N.Y. June 7, 2007); *see CIA Sustained in Shielding Interrogation Documents*, Nat'l L.J., Aug. 16, 2010, at 8.

3699. *See* Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 31, 2009, at A4.

3700. *ACLU*, 339 F. Supp. 2d at 505.

3701. *Id.*

> . . . Documents that have been classified as matters of national defense or foreign policy may be exempt from FOIA. However, before it can be determined if documents requested by plaintiffs fall under such exemptions, the documents must first be identified, by some form of log, to enable a specific claim of exemption to be asserted and justified. As to documents the existence of which the government contends it may be unable to confirm or deny, procedures can be established to identify such documents in camera or to a special master with proper clearance. . . .
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> . . . .
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> I order that by October 15, 2004 defendants must produce or identify all responsive documents. . . . Documents that cannot be identified to plaintiffs because of their classified status shall be identified in camera on a log produced to the court, providing the document's classification status and justification thereof.[3702]

The CIA moved to stay Judge Hellerstein's order as to CIA files on the ground that the CIA Information Act exempts CIA operational files from FOIA.[3703] Judge Hellerstein denied the stay, ruling that the CIA failed to satisfy the statutory requirement that the Director of the CIA explicitly claim the exemption with respect to specifically categorized files.[3704] Moreover, the statute excepts from the exemption files relating to government investigations of illegal conduct.[3705] The documents sought by the plaintiffs related to an investigation by the CIA's Inspector General of the CIA's treatment of detainees.[3706]

The CIA cured the procedural defect, and Judge Hellerstein ruled that to comply with the FOIA request, the CIA needed only to search and review relevant documents already identified and produced to or collected by the Inspector General.[3707] Determinations by the CIA Director that the illegality exception does not apply are not subject to district court review.[3708]

By September 2005, "The government, after being inattentive for many months to the obligations imposed on it by FOIA, [had] made large, but not complete, production, reviewing and turning over thousands of documents from various of its agencies."[3709] Judge Hellerstein resolved some pending disputes concerning document production, including by reviewing some documents in camera.[3710]

Judge Hellerstein's June 2006 rulings on 29 "photographs taken by individuals serving in Iraq and Afghanistan"[3711] received Supreme Court action. On September 22, 2008, the court of appeals affirmed Judge Hellerstein's order that the government release 21 of these photographs, with redactions to protect the sub-

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3702. *Id.* at 504–05 (citation omitted).

3703. ACLU v. Dep't of Defense, 351 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

3704. *Id.* at 268, 272, 278.

3705. *Id.* at 271.

3706. *Id.* at 268, 271–73.

3707. Order, ACLU v. Dep't of Defense, No. 1:04-cv-4151 (S.D.N.Y. April 18, 2005).

3708. ACLU v. Dep't of Defense, 723 F. Supp. 2d 621 (S.D.N.Y. 2010).

3709. ACLU v. Dep't of Defense, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005) (citation omitted).

3710. *ACLU*, 389 F. Supp. 2d 547.

3711. Supplemental Order, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. June 21, 2006), *available at* 2006 WL 1722574; Order, *id.* (June 9, 2006), *available at* 2006 WL 1638025.

jects' privacy.[3712] On October 28, 2009, the President signed an appropriations bill for the Department of Homeland Security, which included the "Protected National Security Documents Act of 2009."[3713] This act allows the Secretary of Defense to protect from disclosure any detainee photograph taken from September 11, 2001, through January 22, 2009, if disclosure would endanger American citizens, military personnel, or employees abroad.[3714] The Supreme Court remanded the case back to the court of appeals for reconsideration in light of the act,[3715] and the court of appeals vacated Judge Hellerstein's June 2006 rulings.[3716]

On December 7, 2007, news media reported that in 2005 the CIA destroyed videotapes of detainee interrogations.[3717] Five days later, plaintiffs moved for contempt and sanctions.[3718] On January 2, 2008, Attorney General Michael Mukasey announced a criminal investigation into the destruction of the tapes.[3719] Judge Hellerstein stayed consideration of the contempt motion until February 2009 so as not to interfere with the criminal investigation.[3720] On July 30, 2009, Judge Hellerstein, finding that the investigation continued, ordered the government to prepare an index of documents relevant to the contempt motion.[3721] On November 9, 2010, the government announced that the tape destruction would result in no criminal charges.[3722] Judge Hellerstein, on October 5, 2011, denied the contempt motion, because a finding of contempt would not cure any present impropriety, but he did agree to award the plaintiffs attorney fees for the motion.[3723]

By the end of August 2009, the plaintiffs had obtained 2,814 documents from the Defense Department, 998 from the State Department, 872 from the FBI, 145 from other Justice Department units, and 49 from the CIA.[3724] Information based in part on this FOIA action is presented in the ACLU's online *Torture Report*.[3725]

3712. ACLU v. Dep't of Defense, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009).

3713. Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184–85 (2009).

3714. *Id.*; *see* Adam Liptak, *Supreme Court Overturns Decision on Detainee Photos*, N.Y. Times, Dec. 1, 2009, at A18.

3715. Dep't of Defense v. ACLU, 558 U.S. 1042 (2009); *see* Liptak, *supra* note 3714.

3716. Order, ACLU v. Dep't of Defense, No. 06-3140 (2d Cir. May 6, 2010).

3717. Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, at A1.

3718. Opinion at 1, ACLU v. Dep't of Defense, No. 1:04-cv-4151 (S.D.N.Y. July 30, 2009) [hereinafter July 30, 2009, Opinion]; *see* Siems, *supra* note 3695, at 15.

3719. *See* Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1; Mark Mazzetti & David Johnston, *U.S. Announces Criminal Inquiry Into C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, at A1.

3720. July 30, 2009, Opinion, *supra* note 3718, at.1.

3721. July 30, 2009, Opinion, *supra* note 3718.

3722. *See* Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. Times, Nov. 10, 2010, at A12.

3723. Opinion, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Oct. 5, 2011), *available at* 2011 WL 4636596; Transcript at 49–51, *id.* (Aug. 1, 2011, filed Oct. 28, 2011).

3724. *See* Shane, *supra* note 3699; *see also* Singh, *supra* note 3697, at 251 (more than 100,000 pages).

3725. http://www.thetorturereport.org; *see also* Siems, *supra* note 3695 (book version).

On May 21, 2012, the court of appeals reversed some of Judge Hellerstein's disclosure orders and affirmed denials of disclosure in a companion case concerning legal memoranda prepared by the Justice Department's Office of Legal Counsel.[3726]

Challenge: Classified Evidence

All of Judge Hellerstein's law clerks have security clearances.[3727] They begin the process of getting cleared at hiring, before they start work.[3728] However, the government did not extend the law clerks' need to know to all classified materials that Judge Hellerstein had to review.[3729] As a result, Judge Hellerstein developed a procedure where he could examine documents on the record by being the only one looking at them.[3730] A court reporter without a clearance could record the proceeding and law clerks, who had clearances but still were not cleared to see the documents, could attend.[3731] Judge Hellerstein did not retain the documents after he examined them and ruled on whether or not they had to be produced either redacted or unredacted.[3732]

Judge Hellerstein described one occasion in a published opinion:

> On September 30, 2009, I conducted an *in camera*, *ex parte* review of the documents at issue in the fourth and fifth motions for summary judgment. Government attorneys and a court reporter were present. I reviewed the documents and expressed preliminary rulings, and at times, posed questions to the Government attorneys about the documents. The transcript of this proceeding was classified but was released, in redacted form, several weeks later. After the *ex parte* session ended, I heard oral argument in open court on various of the legal issues at hand, and expressed initial rulings . . . .[3733]

The court reporter for this proceeding had a security clearance, as did Judge Hellerstein's law clerk, but the law clerk was asked to step out three times during the proceeding.[3734]

3726. ACLU v. Dep't of Justice, 681 F.3d 61 (2d Cir. 2012); *see* Complaint, ACLU v. Dep't of Justice, No. 1:05-cv-9620 (S.D.N.Y. Nov. 15, 2005).

3727. Interview with Hon. Alvin K. Hellerstein, Nov. 5, 2009.

3728. *Id.*

3729. *Id.*

3730. *Id.*

3731. *Id.*

3732. *Id.*

3733. ACLU v. Dep't of Defense, 723 F. Supp. 2d 621, 624 (S.D.N.Y. 2010); *see* Transcript, ACLU v. Dep't of Defense, No. 1:04-cv-4151 (S.D.N.Y. Sept. 30, 2009, filed Oct. 16, 2009) [hereinafter Sept. 30, 2009, Transcript], *also filed as* Ex. B, Government Motion, ACLU v. Dep't of Defense, No. 10-4290 (2d Cir. Feb. 2, 2012) [hereinafter Government Security Motion].

The ACLU has posted online redacted opinions by the Office of Legal Counsel that are at issue in this proceeding. http://www.aclu.org/accountability/olc.html; *see* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1 (reporting on the opinions at issue).

3734. Sept. 30, 2009, Transcript, *supra* note 3733, at 8, 19, 34.

Challenge: Classified Arguments

For the government's appeal of Judge Hellerstein's ordered disclosure of redacted information at issue in Judge Hellerstein's September 30, 2009, ex parte proceeding, the government asked the court of appeals to permit ex parte oral argument.[3735]

3735. Government Security Motion, *supra* note 3733.

Surveillance Software[3736]

Montgomery v. eTreppid Technologies, Inc., In re Search Warrant, eTreppid Technologies, LLC v. Montgomery, and United States ex rel. Montgomery v. Trepp (Philip M. Pro and Valerie P. Cooke, D. Nev.)

Civil litigation between business partners became a national security case, because the business included classified government contracts.

Warren Trepp and Dennis Montgomery founded eTreppid in 1998 in Reno, Nevada, to develop facial-recognition surveillance software for casinos.[3737] The U.S. government entered into multimillion dollar contracts with eTreppid to develop terrorist surveillance software.[3738]

Dennis Montgomery was eTreppid's chief software developer until he separated in January 2006.[3739] On January 19, eTreppid sued Montgomery in Nevada's state court for Washoe County, claiming that Montgomery had wrongfully removed source code upon his separation.[3740] Montgomery removed the action to federal court in Reno on January 25.[3741] Judge Howard D. McKibben remanded the action on January 31.[3742] On that day, Montgomery filed his own federal action against Trepp and eTreppid, also in the nature of unfair competition and including a claim of copyright infringement.[3743] An amended complaint on February 21 added the Department of Defense as a defendant.[3744] The court assigned this case to Judge Brian E. Sandoval.[3745] (On May 24, 2007, the court dismissed

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3736. Margaret S. Williams collaborated on the research for this case study.

3737. *See* Martha Bellisle, *Company's Pattern Recognition Technology Could Be Useful to Military, Casino Industry*, Reno Gazette-J., Apr. 29, 2007, at A1; David Kihara, *True Believers*, L.V. Rev.-J., June 7, 2009, at 1A; Ryan Randazzo, *Gibbons' Ties to Tech Firm Scrutinized*, Reno Gazette-J., Nov. 2, 2006, at 1A.

3738. *See* Sheigh Crabtree, *Small eTreppid Eyes Big Time with DCI Invite*, Hollywood Reporter, Apr. 20, 2004, at 8; Jeff German & J. Patrick Coolican, *Trepp May Have Had More Contracts*, L.V. Sun, Mar. 7, 2007, at A1; Kihara, *supra* note 3737; Randazzo, *supra* note 3737.

3739. *See* Kihara, *supra* note 3737.

3740. Complaint, eTreppid Techs., Inc. v. Montgomery, No. CV06-114 (Nev. 2d Dist. Ct. Washoe Cnty. Jan. 19, 2006), *attached to* Notice of Removal, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 25, 2006); Opinion at 2, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 31, 2009), *available at* 2009 WL 910739 [hereinafter Cooke Sanction Opinion].

3741. Notice of Removal, *supra* note 3740; Opinion at 2, *Montgomery*, No. 3:06-cv-56 (D. Nev. Apr. 5, 2010), *available at* 2010 WL 1416771 [hereinafter Pro Sanction Opinion].

3742. Judgment, *eTreppid Techs., Inc.*, No. 3:06-cv-41 (D. Nev. Jan. 31, 2006); Minutes, *id.* (Jan. 31, 2006).

3743. Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Jan. 31, 2006); Pro Sanction Opinion, *supra* note 3741, at 2–3; Cooke Sanction Opinion, *supra* note 3740, at 4.

3744. Amended Complaint, *Montgomery*, No. 3:06-cv-56 (D. Nev. Feb. 21, 2006).

3745. Docket Sheet, *id.* (Jan. 31, 2006) [hereinafter *Montgomery v. eTreppid Techs., Inc.* Docket Sheet].

copyright claims against the Department of Defense, because they could only be brought in the Court of Federal Claims.[3746])

Trepp reported to the FBI that Montgomery had stolen trade secrets and was unlawfully retaining national defense information,[3747] so from February 28 through March 3, 2006, the FBI sought and obtained from Magistrate Judge Valerie P. Cooke search warrants for Montgomery's home and five storage units.[3748] On March 10, Montgomery sued for the return of his property and for other relief.[3749] The government responded that before return of Montgomery's property could be contemplated it must first be reviewed to make sure classified information was not improperly returned.[3750]

On March 20, the government removed again the Washoe County District Court action by eTreppid against Montgomery, because the Department of Defense was named as a defendant in a counterclaim by Montgomery.[3751]

Judge Sandoval recused himself from the litigation on November 2; the court reassigned the case to Judge Larry R. Hicks.[3752]

After evidentiary hearings held on June 29, July 31, and August 17, Judge Cooke determined on November 28 that she had been misled about pertinent facts by the FBI in the government's application for search warrants against Montgomery.[3753] The search warrants were not, in fact, based on probable cause,

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3746. Order, *id.* (May 24, 2007), *available at* 2007 WL 1560338.

3747. Return of Property Order at 2, *In re* Search Warrant, No. 3:06-cv-263 (D. Nev. Nov. 28, 2006); Search Warrant Application, *id.* (Feb. 28, 2006).

3748. Docket Sheet, *id.* (May 10, 2006) [hereinafter *In re Search Warrant* Docket Sheet]; Pro Sanction Opinion, *supra* note 3741, at 3; Cooke Sanction Opinion, *supra* note 3740, at 4; *see* Kihara, *supra* note 3737.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on September 25, 2012.

3749. Motion, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 10, 2006); Pro Sanction Opinion, *supra* note 3741, at 3; Cooke Sanction Opinion, *supra* note 3740, at 5.

3750. Government Response, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Mar. 27, 2006); *see* Government Motion, *id.* (May 8, 2006) (expressing concern that the litigation may have released confidential classified information, which is the level of classification below secret).

3751. Notice of Removal, eTreppid Techs., LLC v. Montgomery, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006); Pro Sanction Opinion, *supra* note 3741, at 3; Cooke Sanction Opinion, *supra* note 3740, at 2–3; *see* Third Amended Complaint, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Dec. 17, 2007); Second Amended Complaint, *id.* (June 11, 2007).

3752. *In re Search Warrant* Docket Sheet, *supra* note 3748; Docket Sheet, *eTreppid Techs., LLC*, No. 3:06-cv-145 (D. Nev. Mar. 20, 2006); *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 3745; *see* J. Patrick Coolican, *Lawsuits Promise Headaches for Gibbons*, L.V. Sun, Nov. 18, 2006, at A1 ("The case was further complicated earlier this month when U.S. District Judge Brian Sandoval, formerly a prominent Nevada Republican and the state's attorney general, recused himself the day after Montgomery gave Sandoval a secret, detailed declaration about the case.").

Judge Sandoval resigned in September 2009, Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html, and was elected governor on November 2, 2010, *see* Benjamin Spillman, *Sandoval's Victory a First*, L.V. Rev.-J., Nov. 3, 2010, at 1B.

3753. Return of Property Order, *supra* note 3747, at 1, 13, 17–32.

and the searches obtained no classified information.[3754] So she ordered the property returned and the search warrant affidavits unsealed.[3755]

Montgomery filed a qui tam False Claims action against Trepp on December 14.[3756] The complaint alleged a plot by Trepp to take control of Montgomery's surveillance software that was part and parcel of efforts to defraud the government.[3757] As provided by the False Claims Act, the whistleblower complaint was sealed until the government decided whether or not to take the lead in pursuing the civil case.[3758]

On February 21, 2007, Judge Hicks recused himself from the litigation,[3759] and the cases were reassigned to Chief Judge Philip M. Pro in Las Vegas, who had substantial experience handling national security information in both criminal and civil cases.[3760]

Montgomery's principal attorney was Michael Flynn, a California attorney licensed to practice in Massachusetts and appearing in the Nevada litigation pro hac vice.[3761] As a result of a fee dispute, he sought permission to withdraw on July 9, 2007.[3762] On August 21, he sought a fee order from the Nevada federal court.[3763] His supporting brief alleged that fees owed were improperly caught up in divorce proceedings involving Montgomery's new business partner Edra Blixseth and suggested that the software at issue in the litigation was ineffective.[3764] Judge Pro granted Flynn's motion to withdraw on September 4.[3765] Flynn's demand for fees

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3754. *Id.* at 13, 17–32.

3755. *Id.* at 1, 32, *aff'd*, Opinion, *In re* Search Warrant, No. 3:06-cv-263 (D. Nev. Mar. 19, 2007) [hereinafter Return of Property Affirmance].

3756. Complaint, United States *ex rel.* Montgomery v. Trepp, No. 3:06-cv-691 (D. Nev. Dec. 14, 2006).

3757. *Id.* at 2.

3758. *See* 31 U.S.C. § 3730(b) (2011).

3759. Minutes, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007); Minutes, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Feb. 21, 2007); *see* Jeff German & J. Patrick Coolican, *Claims of "Judicial Tampering" Emerge After Judge's Recusal*, L.V. Sun, Feb. 22, 2007, at A1.

3760. Minutes, *In re Search Warrant*, No. 3:06-cv-263 (D. Nev. Feb. 21, 2007); *Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 3745; Interview with Hon. Philip M. Pro, Sept. 26, 2012. Tim Reagan interviewed Judge Pro for this report in the judge's chambers.

3761. Pro Sanction Opinion, *supra* note 3741, at 3; Cooke Sanction Opinion, *supra* note 3740, at 2–8; *see* Flynn Declaration, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007).

3762. Withdrawal Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. July 9, 2007); Pro Sanction Opinion, *supra* note 3741, at 6; Cooke Sanction Opinion, *supra* note 3740, at 9; *see* Martha Bellisle, *2 Lawyers for Former eTreppid Employee Want to Quit*, Reno Gazette-J., July 11, 2007, at A3; David Kihara & Molly Ball, *Attorneys Seek to Withdraw*, L.V. Rev.-J., July 10, 2007, at 1B.

3763. Attorney Fee Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 21, 2007); Pro Sanction Opinion, *supra* note 3741, at 9; Cooke Sanction Opinion, *supra* note 3740, at 13.

3764. Attorney Fee Motion, *supra* note 3763.

3765. Withdrawal Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 4, 2007); Pro Sanction Opinion, *supra* note 3741, at 10; Cooke Sanction Opinion, *supra* note 3740, at 14.

and Montgomery's new attorneys' demand for Flynn's files remained unresolved.[3766]

Discovery litigation continued until August 2008, at which time the parties filed a notice that they were amenable to settlement negotiations.[3767] On December 11, the parties filed confessed judgments of $20 million in favor of eTreppid and $5 million in favor of Trepp, secured by Blixseth.[3768]

The settlement was not perfected. As a result of a real estate bubble's bursting, Blixseth declared bankruptcy in March 2009.[3769] In July, Montgomery was arrested in California on a Nevada indictment for writing bad checks in connection with gambling debts.[3770] Montgomery also launched bankruptcy proceedings.[3771] In December, *Playboy* reported that Montgomery's false representations of his software's ability to detect secret codes in Al-Jazeera broadcasts resulted in the unnecessary cancelation of international flights and elevation of the nation's security level to orange in December 2003.[3772]

On March 31, 2009, Judge Cooke sanctioned Montgomery and his new attorneys $204,411 for their vexatious litigation strategy in their fee and file dispute with Flynn: half of the sanction was assessed against Montgomery and half was assessed against his new attorneys, but they were held jointly and severally liable.[3773] Judge Pro affirmed the sanction against Montgomery,[3774] but he determined that the sanctions against the lawyers were flawed.[3775] The individual at-

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3766. Withdrawal Order, *supra* note 3765; Cooke Sanction Opinion, *supra* note 3740, at 10; Docket Sheet, Montgomery v. Flynn, No. 2:07-cv-5078 (C.D. Cal. Aug. 6, 2007) (action for return of files removed from California's state court and then remanded back to the state court for lack of federal jurisdiction).

3767. Joint Proposal, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2008); Transcript at 7, *id.* (Nov. 19, 2008, filed Jan. 6, 2009); *see* Proposed Stipulation, *id.* (Sept. 26, 2008); *see also Montgomery v. eTreppid Techs., Inc.* Docket Sheet, *supra* note 3745 (listing docket entries 257 to 829 between Judge Pro's granting Flynn's withdrawal and the parties' notice of settlement amenability).

3768. Confessions of Judgment, *Montgomery*, No. 3:06-cv-56 (D. Nev. Dec. 11, 2008); Pro Sanction Opinion, *supra* note 3741, at 16.

3769. Docket Sheet, *In re* Blixseth, No. 2:09-bk-60452 (D. Mont. Bankr. Mar. 26, 2009); *In re* Blixseth, 684 F.3d 865 (9th Cir. 2012); *In re* Blixseth, 459 B.R. 444 (D. Mont. Bankr. 2011); *see* Amy Wallace, *Checkmate at the Yellowstone Club*, N.Y. Times, June 14, 2009, at 1.

3770. *See* David Kihara, *Gibbons Accuser Arrested in California*, L.V. Rev.-J., July 23, 2009, at 1B; Francis McCabe, *Man Who Triggered Gibbons Probe Faces Bad Check Charges*, L.V. Rev.-J., Nov. 13, 2010, at 2B.

3771. Docket Sheet, *In re* Montgomery, No. 2:10-bk-18510 (C.D. Cal. Bankr. June 26, 2009); Docket Sheet, *In re* Montgomery, No. 6:09-bk-24322 (C.D. Cal. Bankr. June 26, 2009).

3772. *See* Eric Lichtblau & James Risen, *Hiding Details of Dubious Deal, U.S. Invokes National Security*, N.Y. Times, Feb. 20, 2011, at A1; *The Man Who Conned the Pentagon*, All Things Considered (NPR radio broadcast Dec. 19, 2009); Steve Tetreault, *Report: Nevadan's Bogus Data Sparked Terror Alert*, L.V. Rev.-J., Dec. 24, 2009, at 1B.

3773. Cooke Sanction Opinion, *supra* note 3740, at 52.

3774. Pro Sanction Opinion, *supra* note 3741, at 24–32, 38.

3775. *Id.* at 21–24, 33–38.

torneys did not receive sufficient notice, and their law firm could not be sanctioned under section 1927, which applies only to individual lawyers.[3776]

Challenge: Classified Evidence

What began as a dispute between business partners became a matter of national security for the court because the business included government contracts with one or more intelligence agencies. The parties initiating the litigation did not take sufficient precautions to prevent disclosures of classified information, but once the Justice Department's Civil Division became aware of the security risks posed by the litigation, Civil Division attorneys brought in the Justice Management Division's Litigation Security Group, which provides the courts with classified information security officers.[3777]

Judge Cooke was granted a security clearance.[3778] District judges are automatically cleared to see classified information necessary for their work, but magistrate judges technically require the granting of a clearance.[3779] Because of the background checks performed when they become judges, their clearances are granted quickly.[3780] Members of Judge Cooke's staff, including a court reporter, also received security clearances.[3781]

Once classified information has been disclosed, it is difficult to undisclose it. On the one hand, it is difficult to claw back secrets once they have been released. On the other hand, efforts to do so might draw additional attention to the secrets.

When eTreppid's action against Montgomery was removed from state court to federal court in 2006, eTreppid sought in federal court a protective order to protect its trade secrets.[3782] The brief supporting this motion stated that the state court action was sealed to protect both trade secrets and national security.[3783] When Montgomery filed his own action in federal court, eTreppid again sought sealing

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3776. *Id.*; *see* 28 U.S.C. § 1927 (2011).

3777. Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 7, 2012; *see* Transcript at 3, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Sept. 10, 2007, filed Apr. 7, 2009) (hearing on a trade secrets discovery protective order); *see also* Martha Bellisle, *ETreppid Case Gets Special Treatment*, Reno Gazette-J., Apr. 19, 2007, at A1 (reporting that the Justice Department's decision not to ask that the case be dismissed for national security reasons benefitted Trepp).

3778. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012.

3779. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 2 (Federal Judicial Center, 2d ed. 2013); Robert Timothy Reagan, National Security Case Management: An Annotated Guide 7 (2011) [hereinafter Annotated Guide].

3780. *See* Reagan, Annotated Guide, *supra* note 3779, at 7–8.

3781. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 7, 2012.

3782. Protective Order Motion, eTreppid Techs., Inc. v. Montgomery, No. 3:06-cv-41 (D. Nev. Jan. 27, 2006).

3783. *Id.* at 2.

of court records to protect trade secrets.[3784] Montgomery opposed the motion as overbroad.[3785]

Approximately eight months after Montgomery filed his civil action against eTreppid in federal court, the government sought a protective order preserving a situation in which the government neither confirmed nor denied any relationship between the parties and an intelligence agency.[3786] Judge Pro issued such a protective order on August 29, 2007.[3787]

The case file created for the Montgomery search warrants remains sealed.[3788] Judge Cooke was concerned that because the case included participants inexperienced in dealing with classified information that the case file might include classified material, and she conveyed her concern to Judge Pro.[3789] Judge Pro's March 19, 2007, affirmance of Judge Cooke's ordering property returned to Montgomery ordered warrant records to be unsealed in the case file for the property-return action.[3790] Judge Pro gave the parties 21 days to show cause why any part of the case file should remain sealed.[3791] On March 23, Judge Pro granted a motion by the Defense Department to perform a classification review of the case file and present redaction requests to Judge Pro in camera.[3792] He also ordered the parties to cease reviewing the sealed records until this classification review was complete.[3793] On March 30, Judge Pro approved redactions and ordered that the unredacted documents be retained by the classified information security officer for subsequent review by the courts as needed.[3794] The deadline for the parties to request additional redactions was extended until April 20.[3795] In time, the deadline was extended until May 15.[3796]

3784. Protective Order Motion, Montgomery v. eTreppid Techs., Inc., No. 3:06-cv-56 (D. Nev. Mar. 17, 2006).

3785. Protective Order Opposition, *id.* (Apr. 5, 2006).

3786. Protective Order Motion, eTreppid Techs., LLC v. Montgomery, No. 3:06-cv-145 (D. Nev. Sept. 25, 2006); Protective Order Motion, *Montgomery*, No. 3:06-cv-56 (D. Nev. Sept. 25, 2006).

3787. Protective Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Aug. 29, 2007).

3788. Docket Sheet, Application and Affidavit for Search Warrant, No. 3:06-mj-23 (Feb. 28, 2006) (sealed).

3789. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012.

3790. Return of Property Affirmance, *supra* note 3755, at 16; *see* Martha Bellisle, *Judge Says FBI Raid in eTreppid Case Went Too Far*, Reno Gazette-J., Mar. 20, 2007, at A1; J. Patrick Coolican, *Why Did Feds Intervene in Civil Dispute?*, L.V. Sun, Mar. 21, 2007, at A1; David Kihara, *Judge Orders FBI to Return Property*, L.V. Rev.-J., Mar. 20, 2007, at 1B .

3791. Return of Property Affirmance, *supra* note 3755, at 16.

3792. Minutes, *Montgomery*, No. 3:06-cv-56 (D. Nev. Apr. 2, 2007) [hereinafter Apr. 2, 2007, *Montgomery* Minutes]; Reconsideration Order, *id.* (Apr. 2, 2007); Transcript at 6, *id.* (Nov. 9, 2007, filed Apr. 7, 2009) ("Judge Pro gave the Department of Justice an opportunity . . . to go to Las Vegas, review all of the papers in Judge Pro's chambers personally, and redact them.").

3793. Apr. 2, 2007, *Montgomery* Minutes, *supra* note 3792, at 2.

3794. Reconsideration Order, *supra* note 3792, at 3–4; *see* Martha Bellisle, *Judge: Some eTreppid Case Data to Remain Classified*, Reno Gazette-J., Apr. 3, 2007, at A4.

3795. Reconsideration Order, *supra* note 3792, at 4.

3796. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. May 11, 2007).

Judge Pro admonished the parties not to put the court in the position of having to put the genie back in the bottle.[3797]

> From the *in camera* review of the Search Warrant case file conducted by the Court on March 30, 2007, it has become apparent that the parties to the Search Warrant case, both Montgomery and the United States, have not guarded against the disclosure of classified information as carefully as they should. To the extent Montgomery or any other party to these proceedings possess classified information it is incumbent upon them strictly to avoid disclosure of such information in any filing with the Court be it an unsealed, sealed or *in camera* submission. This is not an onerous requirement. Any party to this litigation who thinks it is necessary to raise a classified matter with the Court can do so with a proper filing of a Motion to Permit the Disclosure of Classified Information to the Court. In doing so, however, the party making the motion must be careful not to disclose the classified content of the very information they seek to bring to the Court's attention unless and until the Court has given them specific permission to do so.
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> . . . .
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> The United States of America is a party to each of these cases. Unfortunately, because many executive branch entities which comprise the United States are involved, as well as an equally diverse aggregation of government counsel, it is imperative that the various components of the United States which make up the parties involved in these related cases exert greater effort to communicate and cooperate amongst themselves prior to making filings with the Court which are later determined to have been improvident. To date, the United States has failed to do so. The result has been the inadvertent release of classified information which could have been avoided had the various representatives of the United States in these cases taken the care and the time necessary to communicate more effectively. . . . [T]he Court, as well as every other party to these related cases and the public is entitled to have the United States as a party speak with "one voice" at least insofar as it relates to representations as to what is or is not subject to a claim of the military and state secrets privilege.[3798]

On March 23, Judge Pro also ordered the parties to show cause why any other document in the related cases should remain sealed.[3799]

> To the extent the basis for sealing a particular filing relates to the pendency of state secrets or trade secrets, counsel of the parties have only to identify the pertinent sealed filing at issue. Otherwise, the parties shall articulate the alternative basis which warrants continued sealing of the particular sealed filings they have made.[3800]

When Flynn withdrew as Montgomery's attorney, Judge Pro agreed to include in his withdrawal order a reminder that both new and old attorneys were bound by obligations to protect state secrets.[3801] Judge Pro declined to condition the withdrawal on a surrender to the government by Flynn of all documents containing state secrets.[3802]

3797. Reconsideration Order, *supra* note 3792, at 6.
3798. *Id.* at 5–6.
3799. Order, *Montgomery*, No. 3:06-cv-56 (D. Nev. Mar. 23, 2007).
3800. *Id.* at 2.
3801. Withdrawal Order, *supra* note 3765, at 4.
3802. *Id.*; Pro Sanction Opinion, *supra* note 3741, at 10.

The court did not store any classified documents for this case; classified information security officers brought classified documents to the court as necessary.[3803]

3803. Interview with Hon. Valerie P. Cooke, Sept. 25, 2012; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 7, 2012.

Warrantless Wiretaps

Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and Related Actions (Vaughn R. Walker, N.D. Cal.) and Al-Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.);[3804] *ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.);*[3805] *Terkel v. AT&T and Related Actions (Matthew F. Kennelly, N.D. Ill.); Center for Constitutional Rights v. Bush (Gerard E. Lynch, S.D.N.Y.); Electronic Privacy Information Center v. Department of Justice and Related Action (Henry H. Kennedy, Jr., D.D.C.); and Electronic Frontier Foundation v. Department of Justice (Thomas F. Hogan, D.D.C.)*

On December 16, 2005, the *New York Times* reported that in 2002 President Bush secretly authorized the National Security Agency (NSA) to conduct warrantless wiretaps of international communications with people in the United States.[3806]

3804. Appeals were heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown.

3805. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

3806. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1; *see* Al-Haramain Islamic Found. v. Obama, 705 F.3d 845, 848 (9th Cir. 2012); *In re* NSA Telecomm. Records Litig., 669 F.3d 933, 930–31 (9th Cir. 2012); *In re* NSA Telecomm. Records Litig., 671 F.3d 881, 890–91 (9th Cir. 2011); *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); Dismissal Order at 3, Jewel v. NSA, No. 3:08-cv-4373 (N.D. Cal. Jan. 21, 2010) [hereinafter *Jewel* Dismissal Order], *available at* 2010 WL 235075; Offices of Inspectors General, Unclassified Report on the President's Surveillance Program 1, 36 (July 10, 2009) [hereinafter PSP Report], *available at* http://www.justice.gov/oig/special/s0907.pdf; *see also* Matthew M. Aid, The Secret Sentry 287 (2009). *See generally* Gabriel Schoenfeld, Necessary Secrets: National Security, the Media, and the Rule of Law (2010) (providing a historical analysis of news media reports of government secrets).

> In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization . . . .

Clapper v. Amnesty Int'l USA, ___ U.S. ___, ___, 133 S. Ct. 1138, 1143–44 (2013) (quotation marks omitted).

"After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted." Risen & Lichtblau, *supra*. The newspaper posted the story to the Internet the night before the story appeared in the paper to avoid the possibility of the government's enjoining publication. Eric Lichtblau, Bush's Law 210–11 (2008).

The story appeared 18 months after the newspaper received a tip from a Justice Department lawyer. *See* Michael Isikoff, *The Fed Who Blew the Whistle*, Newsweek, Dec. 22, 2008, at 40, 42. In the summer of 2007, FBI agents executed a classified search warrant in a raid of the lawyer's

President Bush acknowledged the existence of the program on the following day.[3807] On May 11, 2006, *USA Today* reported that "[t]he National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by AT&T, Verizon and BellSouth, people with direct knowledge of the arrangement told *USA Today*."[3808] According to the *USA Today* report, the telephone companies were providing the government with records of who was calling whom, not information about the contents of the calls.[3809]

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home as part of an investigation into the leak. *See* Michael Isikoff, *Looking for a Leaker*, Newsweek, Aug. 13, 2007, at 8. Nearly four years later, the government dropped its case against the lawyer. *See* Dana Priest & William M. Arkin, Top Secret America xxi (2011). A retired NSA employee "was cleared of any wrongdoing, but the investigation derailed his career and changed his life." Ethan Bronner, Charlie Savage & Scott Shane, *Leak Inquiries Show How Wide a Net U.S. Cast*, N.Y. Times, May 26, 2013, at A1. He lost his security clearance and therefore had to close his security business. *See id.*

Part of the Department of Defense, the NSA was established in 1952 to conduct communication surveillance. *See* Priest & Arkin, *supra*, at 5 n.1. According to the 9/11 Commission, "The law requires the NSA to not deliberately collect data on U.S. citizens or on persons in the United States without a warrant based on foreign intelligence requirements." The 9/11 Commission Report 87 (2004).

3807. President's Radio Address, Dec. 17, 2005, Daily Comp. Pres. Docs., 41 WCPD 1880.

> In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.
>
> This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.

Id.; *see* ACLU v. NSA, 493 F.3d 644, 653 (6th Cir. 2007) (it is undisputed that "the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties"); PSP Report, *supra* note 3806, at 5–6 ("beginning in December 2005 the President and other Administration officials acknowledged that these activities included the interception without a court order of certain international communications").

For a discussion of the *New York Times*' and the government's disclosures, see Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1192–94,1198–200 (9th Cir. 2007); *ACLU*, 493 F.3d at 648 & n.1; Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1218, 1221–22 (D. Or. 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 986–87 (N.D. Cal. 2006).

3808. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, at 1A.

BellSouth and Verizon denied participation in this program, but MCI, which Verizon acquired, may have participated. *See* Susan Page, *Lawmakers: NSA Database Incomplete*, USA Today, June 30, 2006, at 2A; *see also Al-Haramain Islamic Found.*, 507 F.3d at 1193 n.1; *Hepting*, 439 F. Supp. 2d at 988–89.

3809. Cauley, *supra* note 3808; *see Hepting*, 439 F. Supp. 2d at 988; *see also* Scott Shane & David Johnston, *Mining of Data Prompted Fight Over U.S. Spying*, N.Y. Times, July 29, 2007, at

Dozens of lawsuits followed these revelations.[3810] The Judicial Panel on Multidistrict Litigation (JPML) consolidated most of these cases in the U.S. District Court for the Northern District of California before Judge Vaughn R. Walker.[3811]

The government argued for dismissal of these cases, claiming that they could not be litigated without revealing state secrets.[3812] This argument was successful with respect to alleged transfers of communication records by the telephone companies to the government,[3813] but less successful with respect to the warrantless

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A1 (reporting that the government acknowledged warrantless wiretaps but did not acknowledge data mining in calling records, although the latter was widely reported).

3810. *In re NSA*, 671 F.3d at 890; *In re NSA*, 633 F. Supp. 2d at 955; *Jewel* Dismissal Order, *supra* note 3806, at 3–4; *see* Pete Carey, *S.F. Judge Tapped for Telecom Lawsuits*, San Jose Mercury News, Aug. 11, 2006, at A12; Jason McLure, *DOJ Losing Ground in Wiretap Fight*, Legal Times, Sept. 4, 2006, at 1.

3811. Conditional Transfer Order 6, *In re* NSA Telecomm. Records Litig., No. 1791 (J.P.M.L. issued Mar. 23, 2007, final Apr. 10, 2007) (transferring one action against a telephone company); *In re* NSA Telecomm. Records Litig., 474 F. Supp. 2d 1355 (J.P.M.L. 2007) (transferring actions by the federal government against states); Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 15, 2006) [hereinafter Dec. 15, 2006, J.P.M.L. Transfer Order] (transferring three actions against the government and one action against telephone companies); Conditional Transfer Order 5, *id.* (issued Nov. 3, 2006, final Nov. 21, 2006) (transferring one action against a telephone company); Conditional Transfer Order 2, *id.* (issued Sept. 11, 2006, final Sept. 27, 2006) (transferring one action against a telephone company); Conditional Transfer Order 1, *id.* (issued Aug. 31, 2006, final Sept. 18, 2006) (transferring one action against the government and 15 actions against telephone companies); *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (initial August 9, 2006, transfer order transferring 17 actions against telephone companies, one transfer of which was later vacated because the case already was dismissed); *see* Order, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Aug. 31, 2006) (consolidating for pretrial purposes all cases already before Judge Walker); Docket Sheet, *id.* (Aug. 14, 2006); *see also In re NSA*, 671 F.3d at 891; *In re NSA*, 633 F. Supp. 2d at 956; *Jewel* Dismissal Order, *supra* note 3806, at 5; Carey, *supra* note 3810; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. Chron., Aug. 11, 2006, at B1; McLure, *supra* note 3810.

Tim Reagan interviewed Judge Walker for this report in the judge's chambers on February 15, 2007, September 29, 2008, and February 23, 2011. Judge Walker retired on February 28, 2011. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

3812. *Al-Haramain Islamic Found.*, 507 F.3d at 1193; *ACLU*, 493 F.3d at 650 & nn.2–3; Government Brief, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 20, 2007); Government Brief, Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006); Government Brief, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. June 21, 2006); Government Brief, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Government Brief, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Government Brief, Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. May 13, 2006); *see* Jewel v. NSA, 673 F.3d 902, 905, 913–14 (9th Cir. 2011); U.S. Statement of Interest, Harrington v. AT&T, Inc., No. 1:06-cv-374 (W.D. Tex., July 17, 2006) (announcing an intent to seek dismissal on state-secrets grounds).

3813. ACLU v. NSA, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing data-mining claims); Terkel v. AT&T, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing the complaint with leave to amend); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 995–98 (N.D. Cal. 2006) (provisionally denying discovery on transfers of communication records); *see ACLU*, 493 F.3d at 650 n.2 ("The alleged data mining, which has not been publicly acknowledged, might fall within [the state-secrets rule of non-justiciability]."); *id.* at 719 (Judge Gilman, dissenting) ("After

monitoring of the contents of communications, because the government acknowledged that it did that.[3814]

Judge Anna Diggs Taylor of the U.S. District Court for the Eastern District of Michigan declared the warrantless wiretap program unconstitutional and a violation of the Foreign Intelligence Surveillance Act (FISA).[3815] She issued a permanent injunction against the program,[3816] but a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed and ordered the challenge to the program

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a careful review of the record, I conclude that the district court's analysis of this issue and of the preclusive effect of the state-secrets privilege is persuasive."); *see also* Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps*, Wash. Post, Aug. 18, 2006, at A1; Adam Liptak, *Judge Rejects Customer Suit Over Records from AT&T*, N.Y. Times, July 26, 2006, at A13; McLure, *supra* note 3810; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6.

3814. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1197–201; *In re* NSA Telecomm. Records Litig., 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009); Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1220–24 (D. Or. 2006); *ACLU*, 438 F. Supp. 2d at 759, 764–66; *Hepting*, 439 F. Supp. 2d at 980, 991–94; *see* Egelko, *supra* note 3811; Eric Lichtblau, *Court Bars Secret Papers in Eavesdropping Case*, N.Y. Times, Nov. 17, 2007, at A11; Adam Liptak, *Judge Allows Islamic Group to Challenge Wiretapping*, N.Y. Times, Sept. 8, 2006, at A17; John Markoff, *Judge Declines to Dismiss Privacy Suit Against AT&T*, N.Y. Times, July 21, 2006, at A13; McLure, *supra* note 3810; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9; *see also Jewel*, 673 F.3d at 912 ("It is no secret that in the weeks after the attacks of September 11, 2001, President Bush authorized the NSA to engage in warrantless wiretapping.").

The New York University School of Law's Center on Law and Security described two types of "electronic surveillance," which is a more formal term for wiretaps, and which implicitly acknowledges that not all electronic communications pass through wires: "We define 'trawling surveillance' as NSA interception of entire streams of communications, which are then subjected to computer analysis for particular names, internet addresses, and trigger words. 'Targeted surveillance' refers to intercepts focused on one person or phone number." 1 *For the Record* 7 (Jan. 2007), *available at* http://www.lawandsecurity.org/Portals/0/Documents/NSA_jan_07.pdf; *see also* Aid, *supra* note 3806, at 287–88 ("It would appear that there are between ten and twelve programs being run by NSA dealing directly in some fashion with the agency's warrantless SIGINT efforts, including at least a half-dozen strictly compartmentalized SIGINT collection, processing, analytic, and reporting projects handling different operational aspects of the problem."); *id.* at 188 ("The only one of these NSA programs that the Bush administration has publicly acknowledged is the warrantless eavesdropping program, which the White House labeled in 2005 as the Terrorist Surveillance Program (TSP). All other aspects of NSA's SIGINT collection work that touch on the domestic front have remained unacknowledged.").

3815. *ACLU*, 438 F. Supp. 2d at 775–76, 778–80, 782; *ACLU*, 493 F.3d at 650; *see* Eggen & Linzer, *supra* note 3813; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcheson & Margaret Talev, *Wiretap Program Is Ruled Illegal*, San Jose Mercury News, Aug. 18, 2006, at A1; Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. Times, Aug. 18, 2006, at A1; McLure, *supra* note 3810; Anthony D. Romero & Dina Temple-Raston, In Defense of Our America 149, 195 (2007).

Tim Reagan interviewed Judge Taylor for this report in the judge's chambers on December 7, 2006.

3816. *ACLU*, 438 F. Supp. 2d at 782; Judgment and Permanent Injunction Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006).

dismissed the case.[3817] Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,[3818] but Judge Ronald Lee Gilman would have affirmed the injunction.[3819] The Supreme Court denied certiorari.[3820]

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveilled, but the U.S. Court of Appeals for the Ninth Circuit held that the proffered evidence was too secret to afford them standing.[3821] On remand, Judge Walker ruled that an amended complaint alleged sufficient public information to create inferences supporting the plaintiffs' claims,[3822] and the plaintiffs were entitled to summary judgment because the government did not rebut those inferences.[3823] The court of appeals subsequently determined that the government was entitled to sovereign immunity.[3824]

Judge Walker dismissed other consolidated suits against the government as generalized grievances insufficient to afford the plaintiffs standing,[3825] but the court of appeals determined that the plaintiffs did have standing.[3826]

3817. *ACLU*, 493 F.3d at 648, 687–88; *see* ACLU v. NSA, 467 F.3d 590 (6th Cir. 2006) (staying the injunction pending appeal); Dismissal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Nov. 28, 2007); *see also* Amy Goldstein, *Lawsuit Against Wiretaps Rejected*, Wash. Post, July 7, 2007, at A1; Adam Liptak, *Panel Dismissed Suit Challenging Secret Wiretaps*, N.Y. Times, July 7, 2007, at A1; Charlie Savage, *Court Gives Bush Win on Surveillance*, Boston Globe, July 7, 2007, at 1A.

3818. *ACLU*, 493 F.3d at 653 ("the plaintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA"); *id.* at 692 (Judge Gibbons, concurring in the judgment) ("Under any understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing standing because of the state secrets privilege.").

3819. *Id.* at 693, 720 (Judge Gilman, dissenting).

For this report, Tim Reagan interviewed Judge Batchelder in the judge's Cincinnati chambers on October 30, 2007; interviewed Judge Gilman in the judge's home chambers on October 29, 2007; and interviewed Judge Gibbons in the judge's home chambers on October 29, 2007, and by telephone on November 1, 2007.

3820. ACLU v. NSA, 552 U.S. 1179 (2008); Docket Sheet, ACLU v. NSA, No. 07-468 (U.S. Oct. 9, 2007) (noting denial of the petition on February 19, 2008, after consideration at conferences on January 18 and February 15, 2008); *see* Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

3821. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1193–95, 1205 (9th Cir. 2007); Al-Haramain Islamic Found. v. Obama, 705 F.3d 845, 849 (9th Cir. 2012); *In re* NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1110–15, (N.D. Cal. 2008); *see* Lichtblau, *supra* note 3814.

3822. *In re* NSA Telecomm. Records Litig., 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009).

3823. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182 (N.D. Cal. 2010); *see* Order, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Dec. 21, 2010) [hereinafter *Al-Haramain* Remedies Order] (awarding damages and attorney fees).

3824. *Al-Haramain Islamic Found.*, 705 F.3d 845.

3825. Order, *Ctr. for Constitutional Rights*, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011) [hereinafter Manhattan Action Dismissal Order]; *Jewel* Dismissal Order, *supra* note 3806.

3826. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011); *see Court Upholds Law That Protects Companies Aiding U.S. Surveillance*, N.Y. Times, Dec. 30, 2011, at B4 [hereinafter *Court Upholds Law*]; Carol J. Williams, *Court Revives Suit Against Wiretapping*, L.A. Times, Dec. 30, 2011, at 13.

On February 1, 2007, because of orders obtained from the Foreign Intelligence Surveillance Court (FISC), the government abandoned the warrantless feature of the surveillance program.[3827]

Six civil suits challenged the government directly, and dozens more challenged telephone companies' assistance to the government. In addition, the government sued five states to stop their investigations of the warrantless wiretaps.

FISA Amendments Act of 2008

On July 10, 2008, President Bush signed amendments to FISA expanding the government's statutory surveillance power and providing telephone companies with immunity for their assistance with pre-amendment surveillance.[3828]

3827. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1194 (9th Cir. 2007); ACLU v. NSA, 493 F.3d 644, 651 n.4 (6th Cir. 2007); *Al-Haramain* Remedies Order, *supra* note 3823, at 8; PSP Report, *supra* note 3806, at 30; Notice of Attorney General's Letter to Congress, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Jan. 17, 2007); *see* Dan Eggen, *Court Will Oversee Wiretap Program*, Wash. Post, Jan. 18, 2007, at A1 (reporting "a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people"); *Frontline: Spying on the Home Front* (PBS television broadcast May 15, 2007) [hereinafter *Home Front*]; Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. Times, Jan. 18, 2007, at A1; Adam Liptak, *Secrecy at Issue in Suits Opposing Domestic Spying*, N.Y. Times, Jan. 26, 2007, at A1; Romero & Temple-Raston, *supra* note 3815, at 195. *But see* Walter Pincus, *Intelligence Chief Decries Constraints*, Wash. Post, May 2, 2007, at A7 (reporting congressional testimony from the new director of national intelligence that the FISA court's January 2007 orders have prevented agencies from collecting intelligence that they should be collecting); James Risen, *Administration Pulls Back on Surveillance Agreement*, N.Y. Times, May 2, 2007, at A16 (reporting congressional testimony from the new director of national intelligence that the President retained authority under Article II of the Constitution to resume warrantless wiretaps).

According to the government, on January 10, 2007, the FISA court issued classified negotiated orders, and the government decided that it no longer had to conduct its surveillance without warrants. Notice of Filing, Ex. 2, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Feb. 22, 2007) (also stating that "the number, nature, and contents of the specific orders described herein are highly classified"); *see* NSA Director's Declaration, ACLU v. NSA, Nos. 06-2095 and 06-2140 (6th Cir. Jan. 25, 2007) ("The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court."), *also filed as* Ex. 1, Notice of Filing, *supra*. It was reported that another judge on the FISA court subsequently nullified some or all of the enabling orders. Charlie Savage, *Bush Urges Congress to Pass Wiretap Bill*, Boston Globe, Aug. 3, 2007, at 2A; *see* Clapper v. Amnesty Int'l USA, ___ U.S. ___, ___, 133 S. Ct. 1138, 1144 (2013) ("After a FISC Judge subsequently narrowed the FISC's authorization of . . . surveillance . . . , the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism.").

3828. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436; *see* Al-Haramain Islamic Found. v. Obama, 705 F.3d 845, 848 (9th Cir. 2012); *Jewel* Dismissal Order, *supra* note 3806, at 6; Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008, at A1; *see also* Ellen Nakashima, *Senate Votes to Renew Contentious Surveillance Law*, Wash. Post, Dec. 29, 2012, at A3 (reporting that the amendments were extended for another five years at the end of 2012); Robert Pear, *Federal Power to Intercept Messages Is Extended*, N.Y. Times, Dec. 29, 2012, at A12 (same).

On the day that President Bush signed the amendments, the ACLU filed an action in the Southern District of New York challenging the amendments' constitutionality,[3829] and it filed a motion before the FISC seeking participation in that court's review of the amendments.[3830]

In the trial court, Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments,[3831] but the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.[3832] In *Clapper v. Amnesty International USA*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.[3833]

The FISC denied the ACLU's motion.[3834]

Pending is an action under the Freedom of Information Act (FOIA) by the Electronic Frontier Foundation for release of a FISC opinion expressing constitutional concerns about the 2008 amendments.[3835]

In 2009, Judge Walker determined that the FISA amendments required dismissal of all actions against telephone companies[3836] and summary judgment for the federal government in all actions against states.[3837] On January 6, 2012, the Ninth Circuit's court of appeals ruled that the telephone companies' retroactive immunity was constitutional.[3838]

3829. Complaint, Amnesty Int'l USA v. McConnell, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008)

3830. Motion, *In re* Proceedings Required by § 702(i), No. Misc. 08-1 (FISA Ct. July 10, 2008).

3831. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

3832. Amnesty Int'l USA v. Clapper, 638 F.3d 118 (2d Cir.), *rehearing en banc denied*, 667 F.3d 163 (2d Cir. 2011) (rehearing denied on a vote of six to six), *rev'd*, ___ U.S. ___, 133 S. Ct. 1138 (2013); *see* Eric Lichtblau, *Court Revives Lawsuit Over Government Surveillance*, N.Y. Times, Mar. 22, 2011, at A17; Eric Lichtblau, *Split Decision and Barbed Comments Show a Court Deeply Divided on Wiretapping*, N.Y. Times, Sept. 22, 2011, at A15; Larry Neumeister, *Federal Appellate Court Reinstates Eavesdropping Suit*, Wash. Post, Mar. 22, 2011, at A2.

3833. ___ U.S. ___, 133 S. Ct. 1138 (2013); *see* Robert Barnes, *Challenge to Foreign-Surveillance Law Rejected, 5–4*, Wash. Post, Feb. 27, 2013, at A2; Adam Liptak, *Justices Reject Legal Challenge to Surveillance*, N.Y. Times, Feb. 27, 2013, at A1.

3834. Opinion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. Aug. 27, 2008), *available at* http://www.aclu.org/pdfs/safefree/fisc_decision.pdf.

3835. Complaint, Electronic Frontier Found. v. Dep't of Justice, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012); *see* Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

On June 12, 2013, the FISC determined that its rules did not prohibit disclosure of the opinion. Order, *In re* Motion for Consent to Disclosure of Court Records, No.Misc. 13-1 (FISA Ct. June 12, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf.

3836. *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009).

3837. *In re* NSA Telecomm. Records Litig., 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

3838. *In re* NSA Telecomm. Records Litig., 669 F.3d 933 (9th Cir. 2012); *see Court Upholds Law*, *supra* note 3826; Williams, *supra* note 3826.

At the end of May 2013, as this complex multijurisdictional litigation appeared to be drawing to a close, Edward Snowden, who worked for a government contractor in national security matters, disclosed to the London *Guardian* top-secret details about extensive FISA court-approved surveillance of telecommunication patterns.[3839] Snowden was fired on June 11[3840] as the government pursued charges against him.[3841] A sealed criminal complaint was filed on June 14 and unsealed on June 21.[3842] On June 10, the ACLU filed a motion with the FISA court for release of orders approving the newly disclosed surveillance program,[3843] and the ACLU filed a civil action in the Southern District of New York on the following day challenging the constitutionality of the program.[3844] Google filed a motion with the FISA court on June 18 for permission to "disclose limited, aggregate statistics regarding Google's receipt of orders issued by this Court, if any."[3845]

3839. *See* Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, Wash. Post, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, London Guardian, June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, London Guardian, June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. Times, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, Wash. Post, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story*, N.Y. Times, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1.

3840. *See* Thomas Heath & Marjorie Censer, *NSA Leak Puts Focus on Area Firm Owned by the Carlyle Group*, Wash. Post, June 12, 2013, at A6.

3841. *See* Michael S. Schmidt, Eric Schmitt & Keith Bradsher, *U.S. Preparing Charges Against Leaker of Data*, N.Y. Times, June 11, 2013, at A12.

3842. Complaint, United States v. Snowden, No. 1:13-cr-265 (E.D. Va. June 14, 2013); *see* Peter Finn & Sari Horwitz, *U.S. Files Charges Against Snowden*, Wash. Post, June 22, 2013, at A1; Scott Shane, *Leaker Charged with Violating Espionage Act*, N.Y. Times, June 22, 2013, at A1.

3843. Motion, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-2 (FISA Ct. June 10, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/aclu-misc-13-02.pdf and http://www.aclu.org/files/assets/fisc_unsealing_motion.pdf.

Judge Reggie B. Walton provisionally ordered briefing on the matter be completed by July 12, 2013. Order, *In re Section 215 Orders*, No. Misc. 13-2 (FISA Ct. June 14, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/aclu-briefing-order.pdf; *see* Peter Wallsten, Carol D. Leonnig & Alice Crites, *Rare Scrutiny for a Court Used to Secrecy*, Wash. Post, June 23, 2012, at A1.

3844. Complaint, ACLU v. Clapper, No. 1:13-cv-3994 (S.D.N.Y. June 11, 2013); *see* Ellen Nakashima & Scott Wilson, *ACLU Challenges NSA Program*, Wash. Post, June 12, 2013, at A5; Charlie Savage, *A.C.L.U. Files Lawsuit Seeking to Stop the Collection of Domestic Phone Logs*, N.Y. Times, June 12, 2013, at A18.

The court assigned this case to Judge William H. Pauley III as related to an unsuccessful FOIA action by the *New York Times* and the ACLU to obtain a classified report to Congress regarding foreign intelligence collection. Assignment Notice, *ACLU*, No. 1:13-cv-3994 (S.D.N.Y. June 14, 2013); *see* N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309 (S.D.N.Y. 2012).

3845. Motion, *In re* Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information About FISA Orders, No. ___ (FISA Ct. June 18, 2013), *available at* http://s3.documentcloud.org/documents/716102/google-foreign-intelligence-surveillance-court.pdf; *see* Craig Timberg & Cecilia Kang, *Google Challenges Gag Orders on Court's Data Requests*, Wash. Post, June 19, 2013, at A1.

In June 2013, The FISA court created a public docket website for selected matters brought by private parties.[3846]

Suits Against the Government

The ACLU, other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's program of warrantless wiretaps on January 17, 2006, in federal court in Detroit.[3847] The court assigned the case to Judge Taylor,[3848] who enjoined the program on August 17.[3849] The government immediately appealed,[3850] and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication records claims.[3851] On July 6, 2007, the court of appeals vacated the injunction and ordered the case dismissed,[3852] with one judge dissenting.[3853]

Also on January 17, 2006, the Center for Constitutional Rights, a public-interest law firm in New York, and members of its legal staff filed a similar suit in Manhattan, which the U.S. District Court for the Southern District of New York assigned to Judge Gerard E. Lynch.[3854] Judge Lynch heard arguments on the

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3846. http://www.uscourts.gov/uscourts/courts/fisc/index.html; *see* Wallsten *et al.*, *supra* note 3843.

3847. ACLU v. NSA, 493 F.3d 644, 648–50 (6th Cir. 2007); Complaint, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006); *see* David Ashenfelter & Niraj Wari, *Suits Filed to Stop Domestic Spying*, Detroit Free Press, Jan. 18, 2006, at 1; Eric Lichtblau, *Two Groups Planning to Sue Over Federal Eavesdropping*, N.Y. Times, Jan. 17, 2006, at A14; Romero & Temple-Raston, *supra* note 3815, at 71–72. *See generally* Jameel Jaffer, *Balancing Power in the U.S. Response to External Threats: NSA Surveillance and Guantánamo Detention*, 10 N.Y. City L. Rev. 361 (2007) (outlining the ACLU's legal analysis).

3848. Docket Sheet, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Jan. 17, 2006) [hereinafter E.D. Mich. *ACLU* Docket Sheet]; *see* Ashenfelter & Wari, *supra* note 3847.

3849. *ACLU*, 493 F.3d at 650; ACLU v. NSA, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006); Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); *see* Eggen & Linzer, *supra* note 3813; Gibson, *supra* note 3815; Hutcheson & Talev, *supra* note 3815; Liptak & Lichtblau, *supra* note 3815; McLure, *supra* note 3810; Romero & Temple-Raston, *supra* note 3815, at 149.

The court of appeals stayed the injunction pending appeal. ACLU v. NSA, 467 F.3d 590 (6th Cir. 2006); *see Court Allows Warrantless Wiretapping During Appeal*, Wash. Post, Oct. 5, 2006, at A18; *U.S. Eavesdropping Is Allowed to Continue During Appeal*, N.Y. Times, Oct. 5, 2006, at A23.

3850. Docket Sheet, ACLU v. NSA, No. 06-2095 (6th Cir. Aug. 17, 2006); Defendants' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006); *see* Gibson, *supra* note 3815; Hutcheson & Talev, *supra* note 3815; Liptak & Lichtblau, *supra* note 3815.

3851. *ACLU*, 493 F.3d at 648, 650; Docket Sheet, ACLU v. NSA, No. 06-2140 (6th Cir. Aug. 30, 2006); Plaintiffs' Notice of Appeal, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 24, 2006).

In the appeal, eleven amicus curiae briefs were filed. Docket Sheets, *ACLU*, Nos. 06-2095 and 06-2140 (6th Cir. Aug. 17 and 30, 2006) [hereinafter 6th Cir. *ACLU* Docket Sheets].

3852. *ACLU*, 493 F.3d at 648, 687–88; *see* Goldstein, *supra* note 3817; Liptak, *supra* note 3817; Savage, *supra* note 3817.

3853. *ACLU*, 493 F.3d at 693–720 (Judge Gilman, dissenting).

3854. Complaint, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006); Docket Sheet, *id.*; Manhattan Action Dismissal Order, *supra* note 3825, at 2; *see* Ashenfelter & Wari, *supra* note 3847; Lichtblau, *supra* note 3847.

Tim Reagan interviewed Judge Lynch for this report by e-mail on May 16, 2007.

plaintiffs' motion for partial summary judgment[3855] and the government's motion for dismissal on state-secrets grounds[3856] on September 5,[3857] but did not rule before the case was transferred to Judge Walker.[3858]

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.[3859]

The Al-Haramain Islamic Foundation—a charity that the government accused of aiding terrorists—and two of its attorneys filed a federal suit in Portland, Oregon, on February 28, 2006, claiming not that the plaintiffs' communications *might* be tapped, but that their communications actually were tapped, according to inadvertently disclosed top-secret evidence.[3860] The secret evidence was

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Judge Lynch was elevated to the U.S. Court of Appeals for the Second Circuit on September 18, 2009, Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html, and he authored the opinion—ultimately reversed—recognizing standing in a constitutional challenge to the 2008 FISA amendments, Amnesty Int'l USA v. Clapper, 638 F.3d 118 (2d Cir. 2011), *rev'd*, ___ U.S. ___, 133 S. Ct. 1138 (2013).

3855. Plaintiffs' Partial Summary Judgment Brief, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

3856. Government's Brief, *id.* (May 27, 2006).

3857. Transcript, *id.* (Sept. 5, 2006, filed Nov. 2, 2006) [hereinafter *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript]; Order, *id.* (Aug. 8, 2006); *see* Adam Liptak, *Judge Hears Arguments on Federal Spying Program*, N.Y. Times, Sept. 6, 2006, at A14.

3858. Manhattan Action Dismissal Order, *supra* note 3825, at 5; Interview with Hon. Gerard E. Lynch, May 16, 2007.

3859. Brief by Members of Congress, *Ctr. for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. May 31, 2006); Brief by Members of Congress, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. May 10, 2006).

3860. Al-Haramain Islamic Found. v. Obama, 705 F.3d 845, 848 (9th Cir. 2012); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1193–95 (9th Cir. 2007); *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182, 1185 (N.D. Cal. 2010); Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); Complaint, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter *Al-Haramain* Complaint] (describing the document as "United States Treasury Office of Foreign Assets Control logs of . . . conversations"); *see* ACLU v. NSA, 493 F.3d 644, 687 (6th Cir. 2007) ("In *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (D. Or. 2006), unlike the present case, the plaintiffs purported to have evidence proving that their own communications had actually been intercepted."); *Al-Haramain* Remedies Order, *supra* note 3823, at 2; *see also* Ashbel S. Green, *U.S. Attacks Lawsuit, Arguing Secret Rationale for Secret File*, Oregonian, Apr. 15, 2006, at B1 [hereinafter *U.S. Attacks Lawsuit*]; Patrick Radden Keefe, *State Secrets*, New Yorker, Apr. 28, 2008, at 28, 28, 31; Lichtblau, *supra* note 3814; Liptak, *supra* note 3814; Liptak, *supra* note 3817; McLure, *supra* note 3810; Justin Scheck, *NSA's Wiretaps Face Scrutiny in S.F. Courtroom*, S.F. Recorder, Apr. 10, 2006, at 1.

"Al Haramain was established, with help from the Saudi royal family, in 1991." Keefe, *supra*, at 29. "Al Haramain Oregon was incorporated in 1991." *Id.* at 30; *see also* The 9/11 Commission Report 170 (2004) (describing the charity as a suitable source for Al-Qaeda funds from sympathetic employees because of its "lax external oversight and ineffective internal controls").

"The document's value to plaintiffs is in its confirmation that plaintiffs were targets of the President's warrantless electronic surveillance program—which establishes their standing to prosecute this lawsuit." Plaintiffs' Reply Brief at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 22, 2006) (italics omitted). The document apparently reports clandestinely monitored telephone calls between the charity's director in Saudi Arabia and its lawyers in Washington, D.C.

improperly included in materials submitted to the foundation's attorneys in August 2004 in an action to freeze the foundation's assets because of its alleged support of terrorism.[3861] The U.S. District Court for the District of Oregon assigned the case against the government to Judge Garr M. King,[3862] who denied a motion by the government to dismiss the case on state-secrets grounds and certified an immediate appeal.[3863] The court of appeals affirmed in an opinion authored by Circuit Judge M. Margaret McKeown and joined by Judges Harry Pregerson and Michael Daly Hawkins, but the court ruled that the plaintiffs could not rely on the secret evidence.[3864]

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hereinafter *Al-Haramain* Complaint, *supra*, at 3–4, *id.* (Feb. 28, 2006); *see* Ashbel S. Green, *Lawsuits Challenge Feds' Stance on Secrets*, Oregonian, June 7, 2006, at A1 [hereinafter *Feds' Stance*]; Keefe, *supra*, at 28 (the four-page document "appears to have been a summary of intercepted telephone conversations between two of Al Haramain's American lawyers, in Washington, and one of the charity's officers, in Saudi Arabia"); *id.* at 30–31 ("The document was dated May 24, 2004; the conversations took place in March and April—just as the Treasury Department was investigating the charity."); Pamela A. MacLean, *Critical Juncture for Spying Cases*, Nat'l L.J., July 16, 2007, at 5 (describing the document as "a 2004 phone log from the spy program").

3861. *Al-Haramain Islamic Found.*, 705 F.3d at 848; *Al-Haramain Islamic Found.*, 507 F.3d at 1193–95; *In re NSA*, 700 F. Supp. 2d at 1185; *In re* NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008); *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1218–19; Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records at 2, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Apr. 14, 2006); Acting Office of Foreign Assets Control Director's Declaration, Attach. A, *id.*; *see* Keefe, *supra* note 3860, at 28; Lichtblau, *supra* note 3814; Liptak, *supra* note 3814; Liptak, *supra* note 3817; MacLean, *supra* note 3860 ("According to published accounts, the alleged wiretap log covered March and April 2004, when former Attorney General John Ashcroft advised the president that the program was illegal."); Matthew Preusch, *U.S. Freezes a Charity's Assets*, N.Y. Times, Feb. 21, 2004, at A9; Scheck, *supra* note 3860 ("The most important piece of evidence in the Portland suit is a secret document accidentally disclosed by the FBI in 2004 through discovery in another lawsuit. It's currently being held in a secure location in Seattle, despite efforts by the federal government to take it back.").

The Saudi Arabian government announced in 2004 that it would shut down the charity. *See* Douglas Jehl, *Saudis Are Shutting Down a Charity Tied to Terrorists*, N.Y. Times, June 3, 2004, at A12.

3862. Docket Sheet, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Feb. 28, 2006) [hereinafter D. Or. *Al-Haramain Islamic Found.* Docket Sheet]; *see* Ashbel S. Green, *Secrecy Increasingly Cloaks Terror Cases*, Oregonian, Apr. 25, 2006, at A1.

For this report, Tim Reagan interviewed Judge King and his law clerk Carra Sahler in the judge's chambers on February 14, 2007.

3863. *Al-Haramain Islamic Found.*, 507 F.3d at 1195–96; *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1220–28, 1233; *see* Liptak, *supra* note 3814. The court of appeals agreed to hear the appeal. Order, Al-Haramain Islamic Found. v. Bush, No. 06-80134 (9th Cir. Dec. 21, 2006) (granting permission to appeal); *see* Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 06-36083 (9th Cir. Dec. 22, 2006) [hereinafter 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet].

Proceedings in the district court, which were transferred to the Northern District of California, were stayed pending the interlocutory appeal. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* (noting a stay order on April 4, 2007).

3864. *Al-Haramain Islamic Found.*, 507 F.3d 1190; *see id.* at 1193 (describing the privilege as "an evidentiary privilege that protects national security and military information in appropriate

The court of appeals determined that the warrantless wiretap program revealed by the *New York Times* in December 2005 was not a secret, because the government had publicly disclosed and discussed so many of its details, so a suit challenging the program could not be dismissed on state-secrets grounds.[3865] The state-secrets privilege did apply, however, to the evidence that the charity and its attorneys proffered to establish standing.[3866] The court remanded the case for a determination of whether FISA afforded the plaintiffs a statutory mechanism for challenging the legality of the alleged surveillance that preempts the privilege.[3867] Judge Walker, to whom the case was transferred, determined that FISA did preempt the state-secrets privilege, but the plaintiffs would still have to establish standing without access to the secret evidence.[3868] On January 5, 2009, Judge Walker ruled that an amended complaint did that.[3869] On March 31, 2010, Judge Walker granted the plaintiffs summary judgment, because the plaintiffs submitted public evidence that they were surveilled and the government presented no evidence that it had a warrant for the surveillance.[3870]

Judge Walker awarded the two Al-Haramain attorneys $20,400 each in liquidated FISA damages, as requested by the plaintiffs, representing $100 per day for the 204 days between the freezing of Al-Haramain's assets and a designation of Al-Haramain as a Specially Designated Global Terrorist.[3871] Judge Walker also awarded $2,537,399.45 in attorney fees and costs.[3872] Judge Walker

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circumstances"); *Al-Haramain Islamic Found.*, 705 F.3d at 849; *see* Keefe, *supra* note 3860, at 33; Lichtblau, *supra* note 3814.

For this report, Tim Reagan interviewed Judge McKeown and her law clerk Kathy Tran in the judge's home chambers on January 9, 2008; interviewed Judge Hawkins in the judge's San Francisco chambers on September 30, 2008; and interviewed Judge Pregerson in the judge's home chambers on October 1, 2008.

3865. *Al-Haramain Islamic Found.*, 507 F.3d at 1192–95, 1197–201; *id.* at 1192 ("Though its operating parameters remain murky, and certain details may forever remain so, much of what is known about the Terrorist Surveillance Program ("TSP") was spoon-fed to the public by the President and his administration."); *see* Lichtblau, *supra* note 3814.

3866. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; *see* Lichtblau, *supra* note 3814.

3867. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; *see* Lichtblau, *supra* note 3814.

3868. *In re* NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109 (N.D. Cal. 2008); *see* Eric Lichtblau, *Judge Rejects Bush's View on Wiretaps*, N.Y. Times, July 3, 2008, at A15.

3869. *In re* NSA Telecomm. Records Litig., 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009); *see* Carrie Johnson, *Handling of "State Secrets" at Issue*, Wash. Post, Mar. 25, 2009, at A1.

3870. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182 (N.D. Cal. 2010); *see* Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Were Illegal*, N.Y. Times, Apr. 1, 2010, at A1.

3871. *Al-Haramain* Remedies Order, *supra* note 3823, at 2, 9, 11, 13–14, 46; *id.* at 12 ("Plaintiffs' estimate of the duration of unlawful surveillance appears conservative."); Al-Haramain Islamic Found. v. Obama, 705 F.3d 845, 848, 850 (9th Cir. 2012); *see* 50 U.S.C. § 1810(a) (2011) (providing for "actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of [FISA] violation, whichever is greater"); *see also* Eric Lichtblau, *U.S. Ordered to Pay Group of Muslims*, N.Y. Times, Dec. 22, 2010, at A23.

3872. *Al-Haramain* Remedies Order, *supra* note 3823, at 3, 28–46; *Al-Haramain Islamic Found.*, 705 F.3d at 848, 850.

ruled against burdening the taxpayers with punitive damages[3873] and ruled that as a Specially Designated Global Terrorist Al-Haramain was ineligible for damages.[3874] The court of appeals, however, determined that sovereign immunity precluded the damages awarded.[3875]

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn[3876] and Atlanta.[3877] The government moved on July 18, 2006, to dismiss the Atlanta case for lack of standing,[3878] and the government moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.[3879]

The JPML consolidated all of these cases with the cases before Judge Walker, except for the Detroit action by the ACLU, which already was on appeal.[3880] Nearly two years later, an action was filed against the government by plaintiffs who filed the first action against a telephone company,[3881] and Judge Walker accepted assignment of the case as related to the others before him.[3882]

On January 21, 2010, Judge Walker dismissed the last-filed action and the action originally filed in Brooklyn for lack of standing.[3883] Thereafter, plaintiffs voluntarily dismissed the Atlanta action,[3884] and Judge Walker dismissed the Manhattan action for lack of standing.[3885] The court of appeals reversed Judge Walker's standing ruling, remanding for a determination by the district court whether suit was barred by the state-secrets privilege.[3886] On June 10, 2013, however, the court of appeals affirmed dismissal of the Manhattan action, relying on

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3873. *Al-Haramain* Remedies Order, *supra* note 3823, at 2; *Al-Haramain Islamic Found.*, 705 F.3d at 849.

3874. *Al-Haramain* Remedies Order, *supra* note 3823, at 2–3, 14–16, 29, 46.

3875. *Al-Haramain Islamic Found.*, 705 F.3d 845.

3876. Complaint, Shubert v. Bush, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006); *see Jewel* Dismissal Order, *supra* note 3806, at 4.

3877. Complaint, Guzzi v. Bush, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006).

3878. Government Motion, *id.* (July 18, 2006).

3879. Government Motion, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. May 25, 2007).

3880. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 3811; Conditional Transfer Order 2, *supra* note 3811; Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Ctr. for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) (action transferred from the Southern District of New York); Docket Sheet, Shubert v. Bush, No. 3:07-cv-693 (N.D. Cal. Feb. 2, 2007) (action transferred from the Eastern District of New York); Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Jan. 9, 2007) (action transferred from the District of Oregon); Docket Sheet, Guzzi v. Bush, No. 3:06-cv-6225 (N.D. Cal. Oct. 3, 2006) (action transferred from the Northern District of Georgia).

3881. Complaint, Jewel v. NSA, No. 3:08-cv-4373 (N.D. Cal. Sept. 18, 2008).

3882. Order, *id.* (Oct. 28, 2008).

3883. *Jewel* Dismissal Order, *supra* note 3806, at 16–17.

3884. Order, *Guzzi*, No. 3:06-cv-6225 (N.D. Cal. Mar. 5, 2010).

3885. Manhattan Action Dismissal Order, *supra* note 3825.

3886. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011); *see Court Upholds Law*, *supra* note 3826; Williams, *supra* note 3826.

the Supreme Court's February 26 denial of standing in *Clapper*.[3887] The government requested abeyance in the Brooklyn action pending further consideration of the government's responses to the Edward Snowden leak.[3888]

Suits Against Telephone Companies

In 2006 and 2007, 45 suits were filed against telephone companies for their assistance with the warrantless wiretaps. Five were voluntarily dismissed, one was a pro se prisoner suit dismissed by the court, and one was dismissed on state-secrets grounds with leave to amend the complaint. The latter case and 38 other active cases were consolidated in the Northern District of California before Judge Walker.

One suit filed against a telephone company predated the May 2006 *USA Today* article.[3889] The Electronic Frontier Foundation filed a class action complaint on behalf of telephone customers against AT&T on January 31, 2006, in federal court in San Francisco.[3890] To support their case, the plaintiffs filed under seal evidence provided by a former AT&T employee.[3891] The court assigned the case to Judge Walker.[3892]

On May 30, another class action against AT&T was filed in federal court in San Francisco,[3893] and the court assigned this case to Judge Walker as related to the first case against AT&T.[3894]

On June 5 and June 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.[3895]

3887. Ctr. for Constitutional Rights v. Obama, ___ F. App'x ___, 2013 WL 2466880 (9th Cir. 2013); *see* Clapper v. Amnesty Int'l USA, ___ U.S. ___, 133 S. Ct. 1138 (2013); *see also* Schmidt *et al.*, *supra* note 3841.

3888. Request, Shubert v. Bush, No. 3:07-cv-693 (N.D. Cal. June 7, 2013).

3889. *See* Cauley, *supra* note 3808.

3890. Docket Sheet, Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. Jan. 31, 2006) [hereinafter N.D. Cal. *Hepting* Docket Sheet]; *see* Amended Complaint, *id.* (Feb. 22, 2006); *see also Jewel* Dismissal Order, *supra* note 3806, at 3–4; *Home Front*, *supra* note 3827; John Markoff, *AT&T Is Accused in Eavesdropping*, N.Y. Times, Feb. 1, 2006, at A20; Scott Shane, *Attention in N.S.A. Debate Turns to Telecom Industry*, N.Y. Times, Feb. 11, 2006, at A11.

The lead plaintiff was motivated to sue by the experiences of his father, whose international correspondence was monitored for years because of correspondence with communist China arising from his picking up a shortwave Chinese broadcast at age 13. *See Key Figure in Wiretapping Suit Goes Public*, Morning Edition (NPR radio broadcast Mar. 6, 2008).

3891. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); *see* McLure, *supra* note 3810; Scheck, *supra* note 3860.

Judge Walker denied motions by news media to unseal the declarations, Order, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Feb. 20, 2007), but they and portions of their exhibits were later unsealed by stipulation, Order, *id.* (Oct. 1, 2007); Stipulation, *id.* (Sept. 25, 2007).

3892. N.D. Cal. *Hepting* Docket Sheet, *supra* note 3890; *see* Scheck, *supra* note 3860.

3893. Complaint, Roe v. AT&T Corp., No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

3894. Related Case Order, *id.* (June 21, 2006).

3895. Notice of Removal, Campbell v. AT&T Commc'ns of Cal., No. 3:06-cv-3596 (N.D. Cal. June 6, 2006) [hereinafter *Campbell* Notice of Removal]; Docket Sheet, Riordan v. Verizon Commc'ns, Inc., No. 3:06-cv-3574 (N.D. Cal. June 5, 2006).

The later removed case was filed on May 26 by California affiliates of the ACLU and various individuals, including a former Republican member of Congress, a doctor, ministers, lawyers, and journalists, seeking relief under California state law, which the complaint alleged "provide[s] the most robust protection for the privacy of telephone customers."[3896] AT&T removed the case "because federal law completely preempts any challenge Plaintiffs nominally could bring under state law and Plaintiffs' right to relief depends on the resolution of substantial questions of federal law" and because AT&T is alleged to have acted at the direction of the federal government.[3897] This case was randomly assigned to Judge Walker,[3898] who reassigned it to himself as related to the first case against AT&T.[3899]

The earlier removed action was also filed in San Francisco Superior Court on May 26, 2006, by California affiliates of the ACLU and various individuals, and it also alleged violations of state law, but against Verizon Communications, Inc.[3900] The case was assigned to Judge Walker as related to the removed case against AT&T.[3901]

On July 7, 2006, yet another class action was filed in San Francisco federal court—this one against MCI.[3902] Judge Walker took assignment of this case as related to the first case filed against AT&T.[3903]

In the first San Francisco case against AT&T, the court denied the government's motion to dismiss on state-secrets grounds.[3904] The court certified an appeal of its order,[3905] and the court of appeals granted petitions for interlocutory

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The government moved to intervene as a defendant in these cases in order to defeat motions to remand, U.S. Motion to Intervene, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. Aug. 4, 2006); U.S. Motion to Intervene, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. Aug. 4, 2006), and Judge Walker denied the remand motions, *In re* NSA Telecomm. Records Litig., 483 F. Supp. 2d 934 (N.D. Cal. 2007) (finding three grounds for federal jurisdiction: (1) the state-secrets privilege as an embedded federal issue, (2) the telephone companies' allegedly acting on government instructions as satisfying the federal officer removal statute, and (3) the futility of remands given that the state would permit the government to intervene as a defendant).

3896. Complaint at 1, Campbell v. AT&T Commc'ns of Cal., No. 06-452626 (Cal. Sup. Ct. S.F. May 26, 2006), *attached as* Ex. A, *Campbell* Notice of Removal, *supra* note 3895.

3897. *Campbell* Notice of Removal, *supra* note 3895.

3898. Docket Sheet, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); *see* Administrative Motion at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

3899. Related Case Order, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 20, 2006).

3900. *See* Administrative Motion at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

3901. Related Case Order, *id.* (July 5, 2006).

3902. Class Action Complaint, Spielfogel-Landis v. MCI, LLC, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006).

3903. Related Case Order, *id.* (July 17, 2006).

3904. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); *see Jewel* Dismissal Order, *supra* note 3806, at 5; Markoff, *supra* note 3814; McLure, *supra* note 3810; Mohammed, *supra* note 3814.

3905. *Hepting*, 439 F. Supp. 2d at 1011; *see Jewel* Dismissal Order, *supra* note 3806, at 5; McLure, *supra* note 3810.

appeal by both the government and AT&T.[3906] The appeal was heard on August 15, 2007, in San Francisco,[3907] but the court remanded the case to the district court on August 21, 2008, in light of the July 10 amendments to FISA.[3908]

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in other districts.[3909] The JPML transferred those cases not voluntarily dismissed to Judge Walker.[3910]

A Chicago attorney filed a class action against telephone companies on May 15, 2006.[3911] The U.S. District Court for the Northern District of Illinois assigned the case to Judge Matthew F. Kennelly.[3912] The ACLU's Illinois branch filed a class action against AT&T on May 22, with Studs Terkel and the Illinois House of Representatives' majority leader among the named plaintiffs.[3913] Judge Kennel-

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3906. Order, United States v. AT&T Corp., Nos. 06-80109 and 06-80110 (9th Cir. Nov. 7, 2006), attached, *e.g.*, as Attach. B to Joint Case Management Statement, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Nov. 7, 2006); *see* Docket Sheet, Hepting v. AT&T Corp., No. 06-17137 (9th Cir. Nov. 8, 2006) (appeal by the government); Docket Sheet, Hepting v. AT&T Corp., No. 06-17132 (9th Cir. Nov. 8, 2006) (appeal by AT&T).

Twelve amicus curiae briefs were filed. Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006).

3907. Docket Sheets, *Hepting*, Nos. 06-17132 and 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 9th Cir. *Hepting* Docket Sheets].; *see* Adam Liptak, *U.S. Defends Surveillance Before 3 Skeptical Judges*, N.Y. Times, Aug. 16, 2007, at A13; Karl Vick, *Judges Skeptical of State-Secrets Claim*, Wash. Post, Aug. 16, 2007, at A4.

3908. Hepting v. AT&T Corp., 539 F.3d 1157 (9th Cir. 2008); *see Jewel* Dismissal Order, *supra* note 3806, at 7.

3909. *Jewel* Dismissal Order, *supra* note 3806, at 4.

3910. *Supra* note 3811; *see* Carey, *supra* note 3810; Egelko, *supra* note 3811.

Among the cases filed in the Northern District of California, only the first action against AT&T was part of the multidistrict consolidation order. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006). But the others were consolidated before Judge Walker. Order, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Aug. 31, 2006); *see also* August 14, 2006, docket sheet notations in Docket Sheet, Spielfogel-Landis v. MCI, LLC, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006); Docket Sheet, Campbell v. AT&T Commc'ns of Cal., No. 3:06-cv-3596 (N.D. Cal. June 6, 2006); Docket Sheet, Riordan v. Verizon Commc'ns, Inc., No. 3:06-cv-3574 (N.D. Cal. June 5, 2006); Docket Sheet, Roe v. AT&T Corp., No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

"Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with local rules for the assignment of related actions." J.P.M.L. Rule 7.5(a).

3911. Complaint, Schwarz v. AT&T Corp., No. 1:06-cv-2680 (N.D. Ill. May 15, 2006) (class action on behalf of the attorney and others against AT&T); *see* Amended Complaint, *id.* (May 22, 2006) (adding other telephone companies and the government as defendants); Second Amended Complaint, Joll v. AT&T Corp., *id.* (July 7, 2006) (removing the attorney as a plaintiff, which caused the case name to change, and removing the government as a defendant).

3912. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this report in the judge's chambers on May 24, 2007.

3913. Complaint, Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. May 22, 2006); *see* Amended Complaint, *id.* (June 5, 2006).

Studs Terkel died, while his action was pending, on October 31, 2008, at age 96. *See* Bart Barnes & Patricia Sullivan, *Celebrated Author Elevated Listening to an Art*, Wash. Post, Nov. 1,

ly took assignment of this case as related to the first case.[3914] Judge Kennelly dismissed the second case on state-secrets grounds, but granted the plaintiffs leave to amend,[3915] which they did.[3916] A third class action against AT&T in Chicago federal court was filed on May 24[3917] and assigned to Judge Kennelly as related to the first two.[3918] All of these cases were transferred to Judge Walker.[3919]

Also transferred to Judge Walker were 31 cases[3920] originally filed in the following districts:

- the Eastern District of California (one case);[3921]
- the Southern District of California (one case);[3922]
- the Southern District of Florida (two cases);[3923]
- the Northern District of Georgia (one case);[3924]

2008, at A1; William Grimes, *Studs Terkel, Listener to Americans, Is Dead at 96*, N.Y. Times, Nov. 1, 2008, at B9.

3914. Executive Committee Order, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. June 2, 2006).

3915. Terkel v. AT&T, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 3813; McLure, *supra* note 3810; Robinson, *supra* note 3813.

Judge Kennelly, however, denied AT&T's motion to dismiss on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903–04, 920.

3916. Second Amended Class Action Complaint, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006).

3917. Complaint, Waxman v. AT&T Corp., No. 1:06-cv-2900 (N.D. Ill. May 24, 2006).

3918. Executive Committee Order, *id.* (June 12, 2006).

3919. The first two cases were part of the original multidistrict consolidation. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, Joll v. AT&T Corp., No. 3:06-cv-5485 (N.D. Cal. Sept. 7, 2006); Docket Sheet, Terkel v. AT&T Corp., No. 3:06-cv-5340 (N.D. Cal. Aug. 30, 2006).

The third case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Waxman v. AT&T Corp., No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

3920. In addition to the cases listed here, Verizon stated that it intended to remove one case filed against it in Nebraska's state court. Defendant's Administrative Motion, Riordan v. Verizon Commc'ns, Inc., No. 3:06-cv-3574 (N.D. Cal. Aug. 14, 2006) (expressing an intention to remove Davis v. AT&T, No. 1063569 (Neb. Dis. Ct. Douglas County)).

3921. Notice of Removal, Conner v. AT&T, No. 1:06-cv-632 (E.D. Cal. May 23, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Conner v. AT&T, No. 3:06-cv-5576 (N.D. Cal. Sept. 12, 2006).

3922. Complaint, Souder v. AT&T Corp., No. 3:06-cv-1058 (S.D. Cal. May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Souder v. AT&T Corp., No. 3:06-cv-5067 (N.D. Cal. Aug. 22, 2006).

3923. Two cases were transferred from the Southern District of Florida:

1. Complaint, Fortnash v. AT&T Corp., No. 0:06-cv-60828 (S.D. Fla. June 12, 2006); *see* John Holland, *Hollywood Conservative Files Suit Over NSA Wiretaps*, S. Fla. Sun-Sentinel, June 28, 2006, at 1B. This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Fortnash v. AT&T Corp., No. 3:06-cv-6385 (N.D. Cal. Oct. 12, 2006).
2. Notice of Removal, Jacobs v. AT&T Corp., No. 0:07-cv-60365 (S.D. Fla. Mar. 14, 2007). This case was transferred as a tag-along case. Conditional Transfer Order 6, *supra* note 3811; *see* Docket Sheet, Jacobs v. AT&T Corp., No. 3:07-cv-2538 (N.D. Cal. May 14, 2007).

3924. Complaint, Lebow v. BellSouth Corp., No. 1:06-cv-1289 (N.D. Ga. May 25, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see*

- the District of Hawaii (one case);[3925]
- the Southern District of Indiana (two cases);[3926]
- the Western District of Kentucky (one case);[3927]
- the Eastern District of Louisiana (two cases);[3928]
- the District of Maryland (one case);[3929]
- the Western District of Michigan (one case);[3930]
- the District of Minnesota (one case);[3931]
- the Eastern District of Missouri (one case);[3932]

Docket Sheet, Lebow v. BellSouth Corp., No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007) [hereinafter N.D. Cal. *Lebow* Docket Sheet].

3925. Class Action Complaint, Crockett v. Verizon Wireless LLC, No. 1:06-cv-345 (D. Haw. June 26, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Crockett v. Verizon Wireless LLC, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006).

3926. Two cases were transferred from the Southern District of Indiana:

1. Complaint, Cross v. AT&T Commc'ns, Inc., No. 1:06-cv-847 (S.D. Ind. May 25, 2006).
2. Notice of Removal, Cross v. AT&T Commc'ns, Inc., No. 1:06-cv-932 (S.D. Ind. June 14, 2006).

These cases were transferred as tag-along cases. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Cross v. AT&T Commc'ns, Inc., No. 3:06-cv-6224 (N.D. Cal. Oct. 3, 2006) (transfer of S.D. Ind. No. 1:06-cv-932); Docket Sheet, Cross v. AT&T Commc'ns, Inc., No. 3:06-cv-6222 (N.D. Cal. Oct. 3, 2006) (transfer of S.D. Ind. No. 1:06-cv-847).

3927. Complaint, Suchanek v. Sprint Nextel Corp., No. 1:06-cv-71 (W.D. Ky. May 18, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Suchanek v. Sprint Nextel Corp., No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006).

3928. Two cases were transferred from the Eastern District of Louisiana:

1. Complaint, Herron v. Verizon Global Networks, Inc., No. 2:06-cv-2491 (E.D. La. May 12, 2006). This case was part of the original multidistrict consolidation. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); *see* Docket Sheet, Herron v. Verizon Global Networks, Inc., No. 3:06-cv-5343 (N.D. Cal. Aug. 30, 2006).
2. Complaint, Hardy v. AT&T Corp., No. 2:06-cv-2853 (E.D. La. May 30, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Hardy v. AT&T Corp., No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006).

3929. Notice of Removal, Bready v. Verizon Md. Inc., No. 1:06-cv-2185 (D. Md. Aug. 23, 2006); *see* Plaintiffs' Motion for Remand, *id.* (Sept. 6, 2006). This case was transferred as a tag-along case. Order, *id.* (Oct. 4, 2006) (administratively closing the action while the case is pending in the transferee court); Conditional Transfer Order 2, *supra* note 3811; *see* Docket Sheet, Bready v. Verizon Md. Inc., No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006).

3930. Amended Complaint, Dubois v. AT&T Corp., No. 5:06-cv-85 (W.D. Mich. June 12, 2006); Complaint, *id.* (May 30, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Dubois v. AT&T Corp., No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006).

3931. Notice of Removal, Roche v. AT&T Corp., No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 5, *supra* note 3811; *see* Docket Sheet, Roche v. AT&T Corp., No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007).

3932. Notice of Removal, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 4:06-cv-1113 (E.D. Mo. July 20, 2006). This case was transferred as a tag-along case. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 3811; Conditional Transfer Order 1, *supra* note 3811 (noting objection

- the District of Montana (two cases);[3933]
- the District of New Jersey (one case);[3934]
- the Eastern District of New York (one case);[3935]
- the Southern District of New York (four cases);[3936]
- the District of Oregon (one case);[3937]
- the Eastern District of Pennsylvania (one case);[3938]

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to the transfer by the plaintiff); *see* Docket Sheet, Mink v. AT&T Commc'ns of the Southwest, Inc., No. 3:06-cv-7934 (N.D. Cal. Dec. 29, 2006).

3933. Two cases were transferred from the District of Montana:

1. Complaint, Fuller v. Verizon Commc'ns, Inc., No. 9:06-cv-77 (D. Mont. May 12, 2006).
2. Complaint, Dolberg v. AT&T Corp., No. 9:06-cv-78 (D. Mont. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; see Docket Sheet, Dolberg v. AT&T Corp., No. 3:06-cv-5269 (N.D. Cal. Aug. 28, 2006); Docket Sheet, Fuller v. Verizon Commc'ns, Inc., No. 3:06-cv-5267 (N.D. Cal. Aug. 28, 2006).

3934. Amended Notice of Removal, Chulsky v. Cellco P'ship, No. 2:06-cv-2530 (D.N.J. June 16, 2006); Notice of Removal, *id.* (June 6, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Chulsky v. Cellco P'ship, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006).

3935. Complaint, Marck v. Verizon Commc'ns, Inc., No. 2:06-cv-2455 (E.D.N.Y. May 19, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Marck v. Verizon Commc'ns, Inc., No. 3:06-cv-5063 (N.D. Cal. Aug. 22, 2006).

3936. Four cases were transferred from the Southern District of New York:

1. Amended Complaint, Mayer v. Verizon Commc'ns Inc., No. 1:06-cv-3650 (S.D.N.Y. June 23, 2006); Complaint, *id.* (May 12, 2006).
2. Complaint, Electron Tubes Inc. v. Verizon Commc'ns, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006).
3. Complaint, Basinski v. Verizon Commc'ns Inc., No. 1:06-cv-4169 (S.D.N.Y. June 1, 2006).
4. Complaint, Payne v. Verizon Commc'ns, Inc., No. 1:06-cv-4193 (S.D.N.Y. June 2, 2006).

The first case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Anderson v. Verizon Commc'ns, Inc., No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007) [hereinafter N.D. Cal. *Anderson* Docket Sheet]. The other three cases were transferred as tag-along cases. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Payne v. Verizon Commc'ns, Inc., No. 3:06-cv-6435 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Basinski v. Verizon Commc'ns Inc., No. 3:06-cv-6434 (N.D. Cal. Oct. 16, 2006); Docket Sheet, Electron Tubes Inc. v. Verizon Commc'ns, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006).

One of these actions subsequently was dismissed. Notice of Voluntary Dismissal, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Feb. 16, 2007) (dismissing *Electron Tubes Inc.*, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006), *transferred as Electron Tubes Inc.*, No. 3:06-cv-6433 (N.D. Cal. Oct. 16, 2006)).

3937. Amended Complaint, Hines v. Verizon Northwest, Inc., No. 3:06-cv-694 (D. Or. June 2, 2006); Complaint, *id.* (May 12, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Hines v. Verizon Northwest, Inc., No. 3:06-cv-5341 (N.D. Cal. Aug. 30, 2006).

3938. Complaint, Solomon v. Verizon Commc'ns, Inc., No. 2:06-cv-2193 (E.D. Pa. May 24, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Solomon v. Verizon Commc'ns, Inc., No. 3:06-cv-6388 (N.D. Cal. Oct. 12, 2006).

- the District of Rhode Island (three cases);[3939]
- the Southern District of Texas (one case);[3940]
- the Western District of Texas (one case);[3941] and
- the Western District of Washington (one case).[3942]

Two of these actions subsequently were dismissed voluntarily.[3943]

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.[3944]

3939. Three cases were transferred from the District of Rhode Island:

1. Complaint, Bissitt v. Verizon Commc'ns, Inc., No. 1:06-cv-220 (D.R.I. May 15, 2006).
2. Complaint, Mahoney v. AT&T Commc'ns, Inc., No. 1:06-cv-223 (D.R.I. May 15, 2006).
3. Complaint, Mahoney v. Verizon Commc'ns, Inc., No. 1:06-cv-224 (D.R.I. May 15, 2006).

These cases were part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Bissitt v. Verizon Commc'ns, Inc., No. 3:06-cv-5066 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-220); Docket Sheet, Mahoney v. AT&T Commc'ns, Inc., No. 3:06-cv-5065 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-223); Docket Sheet, Mahoney v. Verizon Commc'ns, Inc., No. 3:06-cv-5064 (N.D. Cal. Aug. 22, 2006) (transfer of D.R.I. No. 1:06-cv-224).

3940. Amended Complaint, Trevino v. AT&T Corp., No. 2:06-cv-209 (S.D. Tex. May 19, 2006); Complaint, *id.* (May 17, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Trevino v. AT&T Corp., No. 3:06-cv-5268 (N.D. Cal. Aug. 28, 2006).

The plaintiffs voluntarily dismissed the action on November 26, 2008. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008).

3941. Third Amended Complaint, Harrington v. AT&T, Inc., No. 1:06-cv-374 (W.D. Tex. Aug. 14, 2006); Second Amended Complaint, *id.* (June 12, 2006); First Amended Complaint, *id.* (June 5, 2006); Complaint, *id.* (May 18, 2006). This case was part of the original multidistrict consolidation. *In re NSA*, 444 F. Supp. 2d 1332; *see* Docket Sheet, Harrington v. AT&T, Inc., No. 3:06-cv-5452 (N.D. Cal. Sept. 6, 2006).

3942. Complaint, Derosier v. Cingular Wireless LLC, No. 2:06-cv-917 (W.D. Wash. June 28, 2006). This case was transferred as a tag-along case. Conditional Transfer Order 1, *supra* note 3811; *see* Docket Sheet, Derosier v. Cingular Wireless LLC, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006).

3943. Order, *Trevino*, No. 3:06-cv-5268 (N.D. Cal. Nov. 26, 2008); Voluntary Dismissal Order, Electron Tubes Inc. v. Verizon Commc'ns, No. 3:06-cv-6433 (N.D. Cal. Feb. 22, 2007) (dismissing Electron Tubes Inc. v. Verizon Commc'ns, No. 1:06-cv-4048 (S.D.N.Y. May 26, 2006)).

3944. *See In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949, 956 (N.D. Cal. 2009). Plaintiffs filed consolidated master complaints against

1. defendants affiliated with Cingular, Master Consolidated Cingular Complaint, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Jan. 16, 2007);
2. defendants affiliated with Comcast, Master Comcast Consolidated Complaint, *id.* (Jan. 16, 2007);
3. defendants affiliated with Sprint, Master Consolidated Spring Complaint, *id.* (Jan. 16, 2007);
4. defendants affiliated with Verizon, Master Consolidated Verizon Complaint, *id.* (Jan. 16, 2007); and
5. defendants affiliated with BellSouth, Master Consolidated BellSouth Complaint, *id.* (Jan. 16, 2007).

A few actions against telephone companies were dismissed early. The district court for the District of Nebraska dismissed a pro se case filed against AT&T, Verizon, and BellSouth in state court and removed to federal court.[3945] Plaintiffs voluntarily dismissed actions filed in the District of the District of Columbia (three cases),[3946] the Eastern District of Missouri (one case),[3947] and the Middle District of Tennessee (one case).[3948]

In 2008, an additional action was filed in the Southern District of New York[3949] and transferred to Judge Walker.[3950]

On June 3, 2009, Judge Walker dismissed all actions against telephone companies in light of immunity granted by Congress for these cases.[3951] On December 29, 2011, in 33 consolidated appeals, the court of appeals affirmed.[3952] Finding that the complaints also included claims against the government, the court re-

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3945. Opinion, Tyler v. AT&T, No. 8:06-cv-523 (D. Neb. Aug. 30, 2006) (finding that the complaint stated no facts and claimed no relief), *sum. aff'd*, Judgment, Tyler v. AT&T, No. 06-4174 (8th Cir. Feb. 28, 2007); *see* Amended Complaint, *Tyler*, No. 8:06-cv-523 (D. Neb. Aug. 4, 2006); Notice of Removal, *id.* (July 31, 2006).

Upon learning of the dismissal, the JPML vacated its conditional transfer order. Order Vacating Conditional Transfer Order, *In re* NSA Telecomm. Records Litig., No. 1791 (J.P.M.L. Sept. 7, 2006).

3946. Notice of Voluntary Dismissal, Phillips v. BellSouth Corp., No. 1:06-cv-918 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, Ludman v. AT&T Inc., No. 1:06-cv-917 (D.D.C. May 25, 2006); Notice of Voluntary Dismissal, Driscoll v. Verizon Commc'ns, Inc., No. 1:06-cv-916 (D.D.C. May 25, 2006); *see* Complaint, *Phillips*, No. 1:06-cv-918 (D.D.C. May 15, 2006); Complaint, *Ludman*, No. 1:06-cv-917 (D.D.C. May 15, 2006); Complaint, *Driscoll*, No. 1:06-cv-916 (D.D.C. May 15, 2006).

These cases were included in Verizon's original multidistrict consolidation motion. Verizon Transfer Brief at 4–7, *In re NSA*, No. 1791 (J.P.M.L. May 30, 2006).

3947. Notice of Dismissal, Mink v. AT&T Corp., No. 4:06-cv-831 (E.D. Mo. June 22, 2006); Docket Sheet, *id.* (May 26, 2006) (noting dismissal on July 5, 2006); *see* Amended Notice of Removal, *id.* (June 12, 2006); Notice of Removal, *id.* (May 26, 2006). The plaintiff refiled in state court, the action was removed again, it was conditionally transferred as part of the multidistrict consolidation, and the plaintiff challenged the transfer. *See supra* note 3932.

3948. Order, Potter v. BellSouth Corp., No. 3:06-cv-469 (M.D. Tenn. July 17, 2006); Notice of Dismissal, *id.* (July 13, 2006); *see* Complaint, *id.* (May 15, 2006). This case was listed in the multidistrict consolidation order, *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006), but the transfer was vacated because the case was dismissed before transfer, Order Vacating Transfer, *In re NSA*, No. 1791 (J.P.M.L. Aug. 17, 2006).

3949. Complaint, McMurray v. Verizon Commc'ns Inc., No. 1:08-cv-6264 (S.D.N.Y. July 10, 2008).

3950. Transfer Order, *In re NSA*, No. 1791 (J.P.M.L. issued Dec. 19, 2008); *see* Docket Sheet, McMurray v. Verizon Commc'ns Inc., No. 3:09-cv-131 (N.D. Cal. Jan. 12, 2009).

3951. *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009); *see id.* at 956 ("On July 7, 2008, after months of election-year legislative exertion that received considerable press coverage, Congress enacted [the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436]."); *see also Jewel* Dismissal Order, *supra* note 3806, at 7.

3952. *In re* NSA Telecomm. Records Litig., 671 F.3d 881 (9th Cir. 2011), *cert. denied*, ___ U.S. ___, 133 S. Ct. 421 (2012); *see In re* NSA Telecomm. Records Litig., 669 F.3d 933 (9th Cir. 2012) (also rejecting an argument that the statutory amendment was an unconstitutional taking); *see also Court Upholds Law*, *supra* note 3826; Williams, *supra* note 3826.

manded a case originating in the Northern District of Georgia and a case originating in the Southern District of New York.[3953]

Suits by the Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.[3954] The government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,[3955] Missouri,[3956] Maine,[3957] Connecticut,[3958] and Vermont.[3959] Also filed in Missouri, and transferred to Judge Walker, was an action by the state against the telephone companies.[3960]

Judge John A. Woodcock, Jr., of the District of Maine, granted the government a preliminary injunction against the state of Maine's investigation.[3961]

3953. *In re NSA*, 671 F.3d at 904; N.D. Cal. *Anderson* Docket Sheet, *supra* note 3936 (action transferred from the Southern District of New York); N.D. Cal. *Lebow* Docket Sheet, *supra* note 3924 (action transferred from the Northern District of Georgia).

3954. *In re* NSA Telecomm. Records Litig., 630 F. Supp. 2d 1092, 1093 (N.D. Cal. 2009); Order at 1, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. July 24, 2007) (denying summary judgment in the state cases) [hereinafter State Cases Summary Judgment Denial Order], *available at* 2007 WL 2127345; *see* Elbert Aull, *U.S. Sues State, Verizon to Block NSA Revelations*, Portland Press Herald, Aug. 22, 2006, at A1 (reporting that Maine was the third state sued, following suits against Missouri and New Jersey); Judy Harrison, *Wiretaps Lawsuit Moved to California*, Bangor Daily News, Feb. 17, 2007, at 1 (reporting similar suits filed in Maine, Missouri, New Jersey, Connecticut, and Vermont).

3955. Complaint, United States v. Farber, No. 3:06-cv-2683 (D.N.J. June 14, 2006); *see id.* at 2 ("Compliance with the subpoenas issued by those officers would first place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security."); *see also* Rick Hepp, *ACLU Petitions for Probe of Phone-Record Access*, Newark Star–Ledger, June 16, 2006, at 43.

The name for the New Jersey case changed twice, because New Jersey's attorney general resigned, was initially replaced by an acting attorney general, and then was replaced by a permanent attorney general. Order Amending Caption, United States v. Rabner, No. 3:06-cv-2683 (D.N.J. Oct. 17, 2006) (substituting the new attorney general Stuart Rabner as the lead defendant); Letter, United States v. Milgram, No. 3:06-cv-2683 (D.N.J. Oct. 12, 2006) (identifying Anne Milgram as the acting attorney general); *see* Richard G. Jones, *In New Jersey, New Nominee to Top Law Job*, N.Y. Times, Aug. 25, 2006, at A20 (reporting on Governor Corzine's nomination of Stuart J. Rabner to replace Farber); Laura Mansnerus & David W. Chen, *New Jersey Attorney General Quits After Investigation Finds Ethics Breach*, N.Y. Times, Aug. 16, 2006, at A18.

3956. Complaint, United States v. Gaw, No. 4:06-cv-1132 (E.D. Mo. July 25, 2006); *see* Donna Walter, *Missouri Lawsuit Seeks to Stop Phone Inquiry*, Kansas City Daily Record, July 31, 2006.

3957. United States v. Adams, 473 F. Supp. 2d 108, 112 (D. Me. 2007); Complaint, United States v. Adams, No. 1:06-cv-97 (D. Me. Aug. 21, 2006); *see* Aull, *supra* note 3954; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

3958. Complaint, United States v. Palermino, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006).

3959. Complaint, United States v. Volz, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006).

3960. Notice of Removal, Gaw v. AT&T Commc'ns of the Southwest Inc., No. 2:06-cv-4177 (W.D. Mo. Aug. 10, 2006); *see In re* NSA Telecomm. Records Litig., 630 F. Supp. 2d 1092, 1093–94 (N.D. Cal. 2009); State Cases Summary Judgment Denial Order, *supra* note 3954, at 3.

3961. *Adams*, 473 F. Supp. 2d 108.

The JPML consolidated all of these actions before Judge Walker,[3962] who denied the government's motions for summary judgment on supremacy and foreign affairs grounds.[3963] On the government's state-secrets motion, Judge Walker ruled that "some of the information sought [by the states in their] investigations may implicate the state secrets privilege," but "some questions posed in these investigations fall outside the privilege's scope."[3964] Judge Walker decided to await further guidance from the court of appeals in pending appeals before deciding the matter more precisely.[3965]

On June 3, 2009, Judge Walker granted summary judgment to the federal government in all of these actions in light of immunity granted by Congress to the telephone companies.[3966] The states did not appeal.

Suits to Discover Secret Documents

On the day the *New York Times* first reported on the warrantless wiretap program, the Electronic Privacy Information Center submitted requests under the Freedom of Information Act to four government agencies to obtain documents concerning the program.[3967] The ACLU and the National Security Archive Fund submitted similar requests four days later.[3968] Disappointed by what was produced, the organizations sought relief in the U.S. District Court for the District of the District of Columbia, which assigned the cases to Judge Henry H. Kennedy, Jr.[3969] On

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3962. *In re* NSA Telecomm. Records Litig., 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *see* State Cases Summary Judgment Denial Order, *supra* note 3954, at 2; Docket Sheet, United States v. Volz, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007) (action transferred from Vermont); Docket Sheet, United States v. Palermino, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007) (action transferred from Connecticut); Docket Sheet, United States v. Rabner, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007) (action transferred from New Jersey); Docket Sheet, United States v. Adams, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007) (action transferred from Maine); Docket Sheet, United States v. Gaw, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007) (action transferred from the Eastern District of Missouri); Docket Sheet, Clayton v. AT&T Commc'ns of the Southwest Inc., No. 3:07-cv-1187 (N.D. Cal. Feb. 28, 2007) (action transferred from the Western District of Missouri); *see also* Harrison, *supra* note 3954.

The name for the government's action against Missouri changed upon the expiration of Steve Gaw's term on the Missouri Public Service Commission; Commissioner Robert M. Clayton III remained a defendant. Order, United States v. Clayton, No. 3:07-cv-1242 (N.D. Cal. Dec. 12, 2007).

3963. State Cases Summary Judgment Denial Order, *supra* note 3954, at 15–34.

3964. *Id.* at 35.

3965. *Id.*

3966. *In re* NSA Telecomm. Records Litig., 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

3967. Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56, 62–63 (D.D.C. 2007); Elec. Privacy Info. Ctr. v. Dep't of Justice, 416 F. Supp. 2d 30, 33–34 (D.D.C. 2006); Complaint at 3, Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006) [hereinafter *Elec. Privacy Info Ctr.* Complaint].

3968. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 63; Complaint at 6, ACLU v. Dep't of Justice, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006) [hereinafter D.D.C. *ACLU* Complaint]; *see* Romero & Temple-Raston, *supra* note 3815, at 71.

3969. *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; D.D.C. *ACLU* Complaint, *supra* note 3968; Docket Sheet, *ACLU*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006) [hereinafter D.D.C. *ACLU*

September 5, 2007, Judge Kennedy ruled that some of the withheld documents were properly withheld and some needed further justification to withhold.[3970] On October 31, 2008, Judge Kennedy ruled additional documents properly withheld, but he also ruled that he needed to review in camera ten documents containing opinions by the Justice Department's Office of Legal Counsel (OLC) to determine whether they, or parts of them, should be disclosed.[3971] Seventeen days later, the government lodged the documents for Judge Kennedy's review.[3972] Because of Judge Kennedy's disability retirement late in 2011,[3973] the cases were reassigned to Judge Royce C. Lamberth.[3974]

On July 10, 2009, inspectors general for the Departments of Defense and Justice, the CIA, the NSA, and the Director of National Intelligence released a report on the "President's Surveillance Program."[3975] In response to arguments by plaintiffs concerning public disclosures in the report,[3976] the government agreed to review again four of the withheld OLC opinions.[3977] The government determined that two should remain withheld and, on March 21, 2011, filed redacted versions of the other two.[3978] The filing included a substantially redacted version of a 108-page May 6, 2004, opinion by assistant attorney general Jack Goldsmith concluding that the warrantless wiretap program was legal.[3979] Among the redactions was the program's name.[3980] The filing also included a redacted November 2, 2001, opinion of at least 21 pages by Deputy Assistant Attorney General John Yoo from which the only portions not redacted were a handful of statements referring to the

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Docket Sheet]; *Elec. Privacy Info Ctr.* Complaint, *supra* note 3967; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006) [hereinafter *Elec. Privacy Info Ctr.* Docket Sheet]; *see* Dan Eggen, *A Judge Finds Administration's Secrecy "Baffling,"* Wash. Post, Sept. 7, 2007, at A19.

Tim Reagan interviewed Judge Kennedy for this report in the judge's chambers on November 12, 2008.

3970. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56.

3971. Elec. Privacy Info. Ctr. v. Dep't of Justice, 584 F. Supp. 2d. 65 (D.D.C. 2008); *see Judge Seeks Wiretapping Documents*, N.Y. Times, Nov. 2, 2008, at 18.

3972. Notice of Lodging, *ACLU*, No. 1:06-cv-214 (D.D.C. Nov. 17, 2008).

3973. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html (noting that Judge Kennedy "[a]ssumed senior status due to certified disability on November 18, 2011.").

3974. D.D.C. *ACLU* Docket Sheet, *supra* note 3969; *Elec. Privacy Info Ctr.* Docket Sheet, *supra* note 3969.

3975. PSP Report, *supra* note 3806; *see* Carrie Johnson & Ellen Nakashima, *"Inappropriate" Secrecy Hurt Surveillance Effort, Report Says*, Wash. Post, July 11, 2009, at A3; Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. Times, July 11, 2009, at A1.

3976. Plaintiffs' Supplemental Memorandum, Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 1:06-cv-96 (D.D.C. Sept. 15, 2009).

3977. Stipulation, *id.* (Jan. 18, 2011).

3978. Notice of Filing, *id.* (Mar. 21, 2011).

3979. *Id.*

3980. *Id.*

inapplicability of FISA to the program.[3981] The complete ten opinions remain before Judge Lamberth for review.[3982]

The Electronic Frontier Foundation, who filed the first action against telephone companies, sued the Justice Department under the Freedom of Information Act (FOIA) for release of the secret FISC orders that the government claimed obviated the need for surveillance without warrants.[3983] The U.S. District Court for the District of the District of Columbia assigned the case to Judge Thomas F. Hogan,[3984] who on August 14, 2007, granted the government's motion for summary judgment, finding that the orders meet FOIA's national defense, statutory, and law enforcement exemptions.[3985]

On August 9, 2007, the ACLU filed a motion directly with the FISC that its orders on warrantless wiretapping be made public.[3986] On August 16, the court's Presiding Judge Colleen Kollar-Kotelly issued an order that the government re-

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3981. *Id.*

3982. *See* Plaintiffs' Status Report, *id.* (Dec. 17, 2012); Government Response, *id.* (Apr. 15, 2011).

3983. Complaint, Elec. Frontier Found. v. Dep't of Justice, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

3984. Docket Sheet, *id.*

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010. Judge Hogan served as Director of the Administrative Office of the United States Courts from October 2011 through June 2013. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html; *New Administrative Office Director Named*, Third Branch, June 11, 2013, *available at* http://news.uscourts.gov/new-administrative-office-director-named (announcing the appointment of Judge John D. Bates as Judge Hogan's successor); *Interview: AO Director Discusses Challenges Facing Judiciary*, Third Branch, June 7, 2012, *available at* http://news.uscourts.gov/interview-ao-director-discusses-challenges-facing-judiciary.

3985. Opinion at 14–18, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Aug. 14, 2007) [hereinafter D.D.C. *Elec. Frontier Found.* Summary Judgment Opinion]; *see* Opinion, *id.* (Jan. 29, 2008) (denying a motion for reconsideration based on new revelations in the press).

> [FOIA] does not apply to matters that are—
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> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
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> . . . .
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
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> . . . .
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . .

5 U.S.C. § 552(b) (2011).

3986. *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007); *see* Dan Eggen, *Secret Court Asks for White House View on Inquiry*, Wash. Post, Aug. 18, 2007, at A3; Eric Lichtblau, *Court Weighs Making Public Rulings on U.S. Wiretapping*, N.Y. Times, Aug. 18, 2007, at A10.

spond to the motion.[3987] Judge John D. Bates issued a public opinion on December 11 denying the motion.[3988] This was the third public opinion ever issued by the court, and it resolved the court's first proceeding in its history to which the government was not the only party.[3989] Judge Bates rejected the ACLU's suggestion that the court determine what need not be withheld to protect properly classified information.

> [T]he proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review. The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable.[3990]

Challenge: Classified Evidence

The Portland case against the government concerned an evidentiary document so secret that it could be seen only by judges, and it had to be stored in a sensitive compartmented information facility (SCIF).[3991] Government attorneys would not even disclose whether they were cleared to see it.

Judge King, District of Oregon

The plaintiffs attempted to file under seal a classified document inadvertently disclosed to them in an asset-freezing proceeding.[3992] They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."[3993] More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.[3994]

3987. Scheduling Order, *In re* Motion for Release of Court Records, No. Misc. 07-1 (FISA Ct. Aug. 16, 2007); *see* Eggen, *supra* note 3986; Lichtblau, *supra* note 3986.

3988. *In re Court Records*, 526 F. Supp. 2d 484; *see* James Risen, *Surveillance Court Declines to Release Secret Opinions*, N.Y. Times, Dec. 12, 2007, at A27; Elizabeth Williamson, *Secret U.S. Intelligence Court Intends to Keep Wiretap Rulings Under Wraps*, Wash. Post, Dec. 12, 2007, at A27.

3989. *In re Court Records*, 526 F. Supp. 2d 484, 488; *see* Williamson, *supra* note 3988.

3990. *In re Court Records*, 526 F. Supp. 2d 484, 496.

3991. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers 22–23 (Federal Judicial Center, 2d ed. 2013) (describing SCIFs).

3992. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1218–19 (D. Or. 2006); In Camera Inspection Motion, Al-Haramain Islamic Found. v. Bush, 3:06-cv-274 (D. Or. Feb. 28, 2006); *see* Green, *supra* note 3862; Green, *U.S. Attacks Lawsuit*, *supra* note 3860; Liptak, *supra* note 3817.

3993. Interview with Hon. Garr M. King, Feb. 14, 2007; *see* In Camera Inspection Motion, *supra* note 3992; *see also* Keefe, *supra* note 3860, at 31.

3994. Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Transcript, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. Mar. 21,

A government security officer reviewed the document in chambers and determined that it contained "sensitive compartmented information" (SCI), which requires more stringent storage and handling procedures than ordinary top secret information,[3995] so it needed to be stored in a SCIF.[3996]

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.[3997] Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.[3998] The government argued that creating a SCIF for the court would be infeasible because of the time and expense required.[3999] So it was agreed that the document would be sent to the Western District of Washington's U.S. Attorney's SCIF in Seattle.[4000]

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.[4001] The document would be stored in a sealed envelope addressed to Judge King, inside a locked bag to which only Judge King and a security officer—not the FBI—would have a key, at the FBI's SCIF in Portland.[4002]

The government moved for an order (1) preventing the plaintiffs from having further access to the classified evidentiary document and (2) requiring the return of any copies of the document in the plaintiffs' possession.[4003] In opposition to the government's motion, the plaintiffs filed under seal a declaration by one of their attorneys "describing the [classified evidentiary] document as he recalls seeing it."[4004] The usual procedure for the court's accepting a sealed filing is for the clerk's office to unseal the filing to make a copy for the judge and then file the

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2006, filed Jan. 5, 2007) [hereinafter *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript], *also filed as* Attach. C, Government Brief, *id.* (Apr. 14, 2006); *see also* Liptak, *supra* note 3814; Liptak, *supra* note 3817.

3995. *See* Reagan, *supra* note 3991, at 3.

3996. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 3994; Interview with Hon. Garr M. King, Feb. 14, 2007; *see Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Government Lodging Reply at 4, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 12, 2006); *see also* Keefe, *supra* note 3860, at 31; Liptak, *supra* note 3817.

3997. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 3994; Interview with Hon. Garr M. King, Feb. 14, 2007.

3998. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 3994; Interview with Hon. Garr M. King, Feb. 14, 2007; *see* Tim Fought, *Mystery Document Headed to Seattle*, Seattle Times, Mar. 24, 2006, at B5.

3999. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 3994.

4000. *Id.*; *see* Fought, *supra* note 3998; Keefe, *supra* note 3860, at 31.

4001. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Hon. Garr M. King, Feb. 14, 2007.

4002. Transcript at 32–33, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. Apr. 25, 2006, filed Jan. 5, 2007) [hereinafter *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript], *also filed as* Attach. 1, Government Lodging Reply, *supra* note 3996; *see* Liptak, *supra* note 3817.

4003. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1229 (granting the government's motion); Government Motion, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. May 26, 2006).

4004. Plaintiffs' Response at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006).

document under seal.[4005] Despite the plaintiffs' including a cover letter with the sealed declaration asking that it be delivered to Judge King unopened, the clerk's office followed its usual procedure.[4006] Judge King advised the parties of the situation, and the government stated that because the declaration described a classified document, it also should be treated as classified and stored in the SCIF.[4007] After the judge read the document, security officers picked it up and deposited it in the judge's locked bag in the SCIF, using the judge's key to do so.[4008]

The government said that it might be necessary to purge the plaintiffs' attorneys' computers of data associated with their declaration of what they remember about the classified document.[4009]

Although he saw the classified evidentiary document,[4010] Judge King was careful not to rely on its contents in his ruling against dismissal.[4011] Judge King granted the government's motion to deny the plaintiffs access to it, but he said that the plaintiffs could file in camera affidavits "attesting to the contents of the document from their memories," and that the government should consider providing the plaintiffs with access to a redacted version of the document under a protective order.[4012]

It was difficult for the plaintiffs in this case to determine whom on the government side they could serve with papers describing the classified evidentiary document.[4013] The government said that the identities of persons with clearance to see such documents was a state secret.[4014] On one occasion, the judge asked a government attorney before him if he had such clearance.[4015] The attorney responded that he did not think he was permitted to answer that question.[4016] The

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4005. Interview with Hon. Garr M. King, Feb. 14, 2007.

4006. *Id.*

4007. *Id.*

4008. *Id.*

4009. *Id.*; *see* Liptak, *supra* note 3817.

4010. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 3994; *see* Green, *Feds' Stance*, *supra* note 3860.

4011. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1223 n.3 (D. Or. 2006). *But see id.* at 1231 ("it is no longer secret to plaintiffs whether their communications were intercepted as described in the Sealed Document").

4012. *Id.* at 1229; *see* Liptak, *supra* note 3814; Liptak, *supra* note 3817; MacLean, *supra* note 3860.

Although the plaintiffs' attorneys said that they had surrendered all copies of the document in their possession, they could not state whether their clients still had any copies without violating the attorney–client privilege. Pursuant to the government's request, Judge King ordered the plaintiffs to deliver to his chambers all copies of the sealed document in their possession or under their control. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1229. It was reported that "copies of the document appear to have been sent abroad, and the government concedes that it has made no efforts to contact people overseas who it suspects have them." Liptak, *supra* note 3817. In addition, it appears that a reporter for *The Washington Post* reviewed the document. *Id.*; MacLean, *supra* note 3860.

4013. Interview with Hon. Garr M. King, Feb. 14, 2007.

4014. *Id.*; *see* Liptak, *supra* note 3817.

4015. Interview with Hon. Garr M. King, Feb. 14, 2007.

4016. *Id.*

solution to this problem was to have the plaintiffs send classified information to the government on a secure fax line, leaving it up to the government to ensure that only authorized persons received the classified information.[4017]

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Members of the appellate panel also reviewed the classified document in camera, pursuant to procedures established by classified information security officers.[4018]

> Having reviewed it *in camera*, we conclude that the Sealed Document is protected by the state secrets privilege, along with the information as to whether the government surveilled Al-Haramain. We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be—and has been—provided for us to make a meaningful examination. The process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.[4019]

The court of appeals concluded that it was not appropriate to substitute as evidence the plaintiffs' memories of the privileged document for the document itself; accurate memories would be as privileged as the document, and inaccurate memories would be worse.[4020]

Judge Walker, Central District of California

On January 5, 2009, Judge Walker ordered the government to present to him the classified document and to grant, within eight weeks, security clearances to one or more of the plaintiffs' attorneys.[4021]

> The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.
>
> To be more specific, the court will review the Sealed Document ex parte and in camera. The court will then issue an order regarding whether plaintiffs may proceed—that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rul-

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4017. *Id.*

4018. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007).

4019. *Id.* at 1203.

4020. *Id.* at 1204.

4021. *In re* NSA Telecomm. Records Litig., 595 F. Supp. 2d 1077, 1089–90 (N.D. Cal. 2009); *see* Johnson, *supra* note 3869.

The court of appeals determined that this order was not appropriate for interlocutory appeal. Order, Al-Haramain Islamic Found., Inc. v. Obama, No. 09-15266 (9th Cir. Feb. 27, 2009).

> ings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders.[4022]

The government cleared two attorneys within the court's deadline,[4023] but the government informed the court that whether the attorneys could see the classified document was a matter for the Executive Branch to decide, and the Executive Branch decided that the attorneys still could not see the document.[4024]

On May 22, Judge Walker issued an order to show cause why he should not rule in the plaintiffs' favor as to liability.[4025] On June 5, Judge Walker continued his order to show cause and instead ordered briefing on summary judgment for plaintiffs against the government.[4026]

> Plaintiffs shall base their motion on non-classified evidence. If defendants rely upon the Sealed Document or other classified evidence in response, the court will enter a protective order and produce such classified evidence to those of plaintiffs' counsel who have obtained top secret/sensitive compartmented information clearances . . . for their review. Otherwise, the court will consider the motion on non-classified evidence.[4027]

Judge Walker granted the plaintiffs summary judgment on March 31, 2010, because they could present publicly available evidence of surveillance, and the government presented no evidence of surveillance warrants.[4028]

Judge Kennedy, District of the District of Columbia

To decide the validity of exemption claims for documents withheld by the government in response to FOIA requests for information on the warrantless wiretap programs, Judge Kennedy reviewed itemized exemption claims in camera.[4029]

4022. *In re NSA*, 595 F. Supp. 2d at 1089.

4023. Government's Response to Court Orders at 1, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Feb. 27, 2009); Plaintiffs' Supplemental Case Management Statement at 1, *id.* (Feb. 18, 2009) (noting that the attorneys were informed of their clearance on February 12, 2009); *see* Johnson, *supra* note 3869.

4024. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182, 1184, 1191 (N.D. Cal. 2010); Government's Response to Court Orders at 3–12, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Nov. 5, 2008); *see* Transcript, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Sept. 23, 2009, filed Feb. 22, 2010) ("Mr. Coppolino [for the government]: There is no more direct abrogation of the state secrets privilege than to provide the very information subject to the privilege to counsel for the party that is seeking it."); *see also Al-Haramain* Remedies Order, *supra* note 3823, at 39–40 ("defendants disobeyed direct court orders to negotiate an appropriate protective order and to give plaintiffs' counsel access to some of the information once they had obtained security clearances").

4025. Order to Show Cause re Liability, *Al-Haramain Islamic Found.*, No. 3:07-cv-109 (N.D. Cal. May 22, 2009), *available at* 2009 WL 1468792; *see* Carrie Johnson, *Showdown Looming on "State Secrets,"* Wash. Post, May 26, 2009, at A4.

4026. Briefing Order, *Al-Haramain Islamic Found.*, No. 3:07-cv-109 (N.D. Cal. June 5, 2009); *see* Carrie Johnson, *Judge Revisits Warrantless Eavesdropping*, Wash. Post, June 4, 2009, at A4.

4027. Briefing Order, *supra* note 4026, at 2.

4028. *In re NSA*, 700 F. Supp. 2d 1182; *Al-Haramain* Remedies Order, *supra* note 3823 (awarding damages and attorney fees); *see* Savage & Risen, *supra* note 3870.

The exemption claims were classified and submitted ex parte.[4030] Plaintiffs and their attorneys were not permitted to see them, and neither were Judge Kennedy's law clerks, although the clerks had secret security clearances.[4031]

Review of the exemption claims required many hours of Judge Kennedy's time over several days without the assistance of staff.[4032] Doors were closed, windows were covered, and the documents were under the judge's immediate control at all times.[4033] The documents were not stored in chambers; classified information security officers, whose offices and storage facilities, at the time, were a few blocks away from the federal courthouse in the District of Columbia, delivered and retrieved the documents on request.[4034]

In denying the government's initial motion for summary judgment, Judge Kennedy expressed frustration that he was denied assistance of law clerks to review classified declarations supporting the motion:

> Without expressing approval or disapproval of DOJ's use of these *ex parte* declarations—and without opining regarding whether the declaration redactions are legitimately classified (beyond a measure of skepticism as to some portions thereof)—the court does express substantial frustration with one aspect of the Executive's approach to this information: In part for purposes of this case, this judicial officer had his law clerk cleared through an extensive, high-level background investigation so that the clerk would have access to classified information, and specifically to the documents lodged in this case. Notwithstanding the clearance obtained, it has become apparent that the Executive will not grant the clerk access to the classified declarations filed here, at least not in the absence of vociferous resistance from this judicial officer. This stance is baffling and has been significantly disruptive to the court's review of this matter.[4035]

Judge Hogan, District of the District of Columbia

Although Judge Hogan would later join the FISC, he was not on that court when it issued orders that became the object of the Electronic Frontier Foundation's 2007 FOIA action.[4036] To resolve the FOIA action, Judge Hogan examined the classified orders as well as classified affidavits supporting the government's objections to the FOIA request.[4037] When reviewing classified documents that are not kept in the court's file, Judge Hogan initials and dates each document he examines to facilitate assurances that the copies he examined can later be included in the appellate record, if necessary.[4038]

4029. Interview with Hon. Henry H. Kennedy, Jr., Nov. 12, 2008.

4030. *Id.*

4031. *Id.*

4032. *Id.*

4033. *Id.*

4034. *Id.*

4035. Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56, 63 n.5 (D.D.C. 2007); *see* Eggen, *supra* note 3969 (quoting text).

4036. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

4037. *Id.*

4038. *Id.*

Challenge: Classified Arguments

The government regards the classified arguments in these cases as so secret that it will not permit even attorneys or law clerks with security clearances to see them.[4039] President Bush personally decided who was cleared to see documents related to the surveillance programs at issue in this litigation.[4040] It was also reported that information about these programs was closely held even at the NSA:

> Intense and unwavering secrecy has been the hallmark of these programs since their inception, and even the number of people at NSA headquarters who know the details of the operations has deliberately been kept to a minimum for security reasons. Each of these programs operates from inside its own special "red seal" work center at Fort Meade, meaning that those NSA employees cleared for these specific programs must pass one at a time through a booth containing a retinal or iris scanner and other biometric sensors before they can get inside their operations center.[4041]

Judge King, District of Oregon

The Oregonian intervened and filed a motion to unseal the classified evidentiary document in the Portland case against the government.[4042] In response, the government lodged a classified declaration for ex parte in camera review.[4043] The government subsequently lodged a second classified declaration for ex parte in camera review "for reasons that must be explained in the superseding classified declaration."[4044] Judge King stated at a telephonic hearing, "I believe the Court should avoid, if possible, receiving secret declarations from one side and basing decisions on facts or arguments not disclosed to the other side. Now, I hasten to

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4039. *See* Liptak, *supra* note 3817.

In addition to submitting classified arguments in the cases described here, the government offered to submit classified arguments to support its motion to enjoin Maine's investigation of Verizon's assistance in government surveillance if the court would not grant its motion on the basis of unclassified arguments. TRO Brief at 13 n.3, United States v. Adams, No. 1:06-cv-97 (D. Me. Feb. 6, 2007). Because the court did grant the government's motion on the basis of unclassified arguments, the government did not present classified arguments. *See* United States v. Adams, 473 F. Supp. 2d 108 (D. Me. 2007).

4040. PSP Report, *supra* note 3806, at 10 ("the President made the decision on all requests to 'read in' any non-operational persons, including [Department of Justice] officials"); *see* Lichtblau, *supra* note 1255.

4041. Aid, *supra* note 3806, at 288.

4042. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1219 (D. Or. 2006); D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 3862 (noting the filing of the motion on March 17, 2006); *see* Green, *U.S. Attacks Lawsuit*, *supra* note 3860.

4043. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 3862 (noting the filing of a lodging notice on April 14, 2006); *see* Green, *U.S. Attacks Lawsuit*, *supra* note 3860.

The government argued, "On the basis of the public record, therefore, the Oregonian's Motion to Unseal Records (Mar. 17, 2006) [Docket Nos. 7 & 8] should be denied. Should the Court require additional detail regarding the sealed classified document in this case, however, such detail can only be conveyed in a classified format, which must be reviewed ex parte and in camera, and the Court's review of Defendants' classified declaration is appropriate in these circumstances." Government Lodging Reply, *supra* note 3996, at 3.

4044. Government Lodging Reply, *supra* note 3996, at 2 n.1; *see* Notice of Lodging of Superseding Material, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. May 12, 2006).

say that I understand that in issues involving national security that may be necessary."[4045] Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian's motion,[4046] which Judge King denied.[4047]

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.[4048] Judge King ordered that the classified lodgings be brought to the Portland SCIF, but stated that he had not yet decided whether he was going to review them.[4049] Ultimately he decided to review the classified materials[4050] and permit the case to proceed.[4051]

The classified lodgings by the government were deposited in the same locked bag in the FBI's SCIF as housed the plaintiffs' classified evidentiary document.[4052] The procedure for Judge King's review of materials in the locked bag was to request that the bag be brought to his chambers, where Judge King would review the materials in private.[4053] When Judge King was finished reviewing the materials, he would lock them in the bag with any notes he took, and chambers staff would arrange for a security officer at the FBI to come back and retrieve the locked bag from Judge King.[4054]

Judge King observed that it is difficult to handle a case if there is material that a law clerk cannot see.[4055] He has to be careful what he tells her, and she cannot help him with the material she cannot see.[4056] The judge's law clerks were going to seek security clearances for this case, but they stopped looking into it when the case was transferred to Judge Walker.[4057]

4045. *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript, *supra* note 4002.

4046. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

4047. *Id.* at 1218, 1232–33.

4048. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006) (providing notice of the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006) (providing notice of the lodging of (1) a classified brief, (2) a classified declaration by the director of national intelligence, (3) a classified declaration by the director of the NSA, and (4) a classified opposition to the plaintiffs' pending motion to compel discovery).

4049. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 3862.

4050. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 3862.

4051. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 3814.

4052. Interview with Hon. Garr M. King, Feb. 14, 2007.

4053. *Id.*

4054. *Id.*; Letter from Carra Sahler, law clerk to Hon. Garr M. King, Apr. 23, 2007.

4055. Interview with Hon. Garr M. King, Feb. 14, 2007.

4056. *Id.*

4057. *Id.*

Because of subsequent cases before Judge King, his law clerks and court reporter later obtained security clearances. Interview with Hon. Garr M. King, Sept. 19, 2012; *see supra*, "Ashland and Moscow."

Judge Taylor, Eastern District of Michigan

In Detroit, on June 12, 2006, Judge Taylor heard arguments on the ACLU's motion for partial summary judgment against the government.[4058] The government filed a redacted brief in response to this motion, lodging a classified unredacted brief with classified supporting declarations in a secure location in Washington, D.C.[4059] The government filed a notice saying, "The Court may contact the undersigned counsel to assist in securing delivery of these submissions for review at the Court's convenience."[4060] Judge Taylor elected to wait until after the hearing to review the classified documents,[4061] but she considered them in issuing the injunction.[4062]

Judge Taylor reviewed classified documents three times.[4063] Each time, she reviewed the documents in her chambers without assistance of chambers staff and under observation of the security officer who brought the documents to her.[4064] The security officer told Judge Taylor that she could take notes, but the security officer would have to take them back with her.[4065] So the judge decided not to take notes.[4066]

Judges Batchelder, Gilman, and Gibbons, Sixth Circuit

In the appeal of Judge Taylor's injunction against warrantless wiretaps, the court of appeals granted the government permission "to submit separate public and sealed versions of briefs to protect classified information."[4067] On each of the days

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4058. E.D. Mich. *ACLU* Docket Sheet, *supra* note 3848; *see* Plaintiffs' Partial Summary Judgment Motion, ACLU v. NSA, No. 2:06-cv-10204 (E.D. Mich. Mar. 9, 2006); *see also* David Ashenfelter, *Battle Over Wiretaps to Begin Today*, Detroit Free Press, June 12, 2006, at 1; Adam Liptak, *Arguments on Spy Program Are Heard by Federal Judge*, N.Y. Times, June 13, 2006, at A17; Niraj Warikoo, *Wiretap Suit All About Power*, Detroit Free Press, June 13, 2006, at 1.

4059. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006); Motion to Dismiss at 4 n.3, *id.* (May 26, 2006); *see* Liptak, *supra* note 4058; Henry Weinstein, *Domestic Spying Program Comes Under Legal Scrutiny*, L.A. Times, June 12, 2006, at 5.

Strictly speaking, the defendants' brief supported a separate motion and was not a response to the plaintiffs' motion, but the defendants said, "Defendants respectfully submit that their Motion to Dismiss and Motion to Stay—both of which were based upon the United States' assertion of the state-secrets privilege—were the appropriate response to Plaintiffs' Motion." Defendants' Motion for Clarification at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. June 2, 2006); *see* Ashenfelter, *supra* note 4058.

4060. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006).

4061. Transcript, *id.* (June 12, 2006, filed July 7, 2006); *see* Liptak, *supra* note 4058 (reporting that Judge Taylor did not review the classified documents before the hearing).

4062. ACLU v. NSA, 438 F. Supp. 2d 754, 764 (E.D. Mich. 2006) ("the court acknowledges that it has reviewed all of the materials Defendants submitted *ex parte* and *in camera*").

4063. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006; *see* E.D. Mich. *ACLU* Docket Sheet, *supra* note 3848 (noting the lodging of classified documents on May 26, June 30, and September 1, 2006).

4064. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006.

4065. *Id.*

4066. *Id.*

4067. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting the order filed October 11, 2006).

that the government filed redacted versions of its opening and reply briefs, it filed a "Notice of Lodging of In Camera, Ex Parte Brief."[4068]

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.[4069] The judges worked out with the parties procedures for the judges' review of classified information.[4070] Judges Gilman and Gibbons have chambers in Memphis, Tennessee, and Judge Batchelder has chambers in Medina, Ohio. The three judges met with the parties in a district court conference room in Memphis on January 8, 2007, approximately three weeks before oral argument.[4071] The meeting was transcribed, and the transcript was sealed.[4072] One concern of the judges addressed at the meeting was the integrity of the classified portion of the record over which the court did not have control.[4073] One result of the meeting was the government's agreement to file a list of classified documents presented to the judges,[4074] a list which the government updated upon each additional lodging.[4075]

Approximately two weeks before oral argument, security officers delivered to the judges' chambers the government's unredacted opening and reply briefs.[4076]

On January 17, the government announced to Congress and the courts that the President would not reauthorize the warrantless wiretap program at issue in this case, but instead would abide by new secret orders issued by the FISC one week earlier.[4077] Five days before this announcement, and two days after the FISC orders were issued, the government again lodged classified materials for the court's review.[4078] Security officers brought these materials to the judges at the same time as the briefs.[4079]

4068. *Id.* (noting the government's filing of briefs on October 16 and December 5, 2006).

4069. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4070. ACLU v. NSA, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting an October 19, 2006, letter from the court to the government concerning the filing of classified information with the court and a November 1, 2006, motion by the government for approval of proposed procedures regarding classified information).

4071. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 3827.

4072. Interview with Hon. Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

4073. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 3827.

4074. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4075. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting the filing of classified-document lists on January 12 and 25, April 9, and June 11, 2007).

4076. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4077. *E.g.*, Notice of Attorney General's Letter to Congress, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Jan. 17, 2007); *see* Eggen, *supra* note 3827; Lichtblau & Johnston, *supra* note 3827.

4078. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851; *see* ACLU v. NSA, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

4079. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

The security officer who visited Judge Gilman's chambers presented the judge with the classified materials in the judge's office and waited elsewhere in the building for the judge's call saying he had completed his review.[4080] The officer asked Judge Gilman to close his window blinds and close the door to his office.[4081] Judge Gilman literally has an open-door policy, so although a doorway separates his office from the rest of the chambers, there is no physical door attached.[4082] Judge Gilman reviewed the materials privately in his office.[4083]

The security officer who visited Judge Gibbons's chambers also asked her to close her window blinds, but only on the windows facing other buildings, not the windows facing the Mississippi River.[4084] Judge Batchelder, who is the only tenant in her small-town building, was not asked to close her blinds.[4085]

No one on the judges' staffs saw the classified materials.[4086] Knowing that they would not be able to keep them, none of the judges took notes.[4087] The judges understood that if they needed extended access to the classified documents they could be stored in another agency's local SCIF, but the judges did not need that.[4088]

Approximately one week after the government's announcement concerning the FISA court, and one week before oral argument, the government filed a "supplemental submission" and lodged a classified submission.[4089] The judges reviewed the classified submission in Cincinnati on the day of oral argument.[4090]

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,[4091] and within days of these lodgings, classified information security officers delivered the classified submissions to the judges' chambers.[4092]

4080. Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007.

4081. *Id.*

4082. *Id.*

4083. *Id.*

4084. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4085. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007.

4086. *Id.*; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4087. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4088. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4089. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting the filing of a supplemental submission and the lodging of a classified submission on January 25, 2007); *see* Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, L.A. Times, Jan. 27, 2007, at 14.

4090. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4091. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting the lodging of classified submissions on April 9 and June 11, 2007).

4092. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007 (noting that technically the judges should not have reviewed this material, because it was outside the record); Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

There were no oral ex parte communications with government attorneys in this appeal.[4093]

Judge Batchelder's opinion states,

> At the behest of the government, I reviewed these privileged documents, but their contents—being privileged—are excluded from our consideration and I have not relied on any of that information in this opinion. The state secrets privilege granted by the district court has been maintained on appeal and this opinion is decided solely on the publicly available information that was admitted by the district court and made a part of its record.[4094]

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.[4095]

With one exception, this was the first time any of these judges had been called upon to review classified information.[4096] The exception was an appeal decided in 2004 by a panel including Judges Batchelder and Gibbons affirming the dismissal of a civil suit on state-secrets grounds.[4097] The secrets in that case were handled by ordinary sealing procedures.[4098]

Judge Lynch, Southern District of New York

In the Manhattan case against the government, as in the Detroit case, the government lodged, in a secure Washington, D.C., location for the court's ex parte in camera review, a classified brief and classified declarations supporting a motion to dismiss.[4099] Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,[4100] but Judge Lynch did not review the classified lodgings before the hearing on the motion.[4101] He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information during the hearing.[4102] The case was transferred to the

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4093. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4094. ACLU v. NSA, 493 F.3d 644, 650 n.3 (6th Cir. 2007); *see id.* at 692 ("All three members of the panel have reviewed the documents filed by the government under seal that arguably are protected by the privilege.").

4095. 6th Cir. *ACLU* Docket Sheets, *supra* note 3851 (noting the July 6, 2007, denial of the motion); *see* Weinstein, *supra* note 4089 (reporting the filing of the motion).

4096. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007. Judge Batchelder has been a circuit judge since 1991 and was a bankruptcy judge 1983–85 and a district judge 1985–91; Judge Gilman has been a circuit judge since 1997; and Judge Gibbons has been a circuit judge since 2002 and was a district judge 1983–2002. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

4097. Tenenbaum v. Simonini, 372 F.3d 776 (6th Cir. 2004); Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4098. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

4099. Government Brief at 4 n.3, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Notice of Lodging, *id.* (May 26, 2006).

4100. Interview with Hon. Gerard E. Lynch, May 16, 2007.

4101. *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 3857; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4102. *Ctr. for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 3857; Interview with Hon. Gerard E. Lynch, May 16, 2007.

Northern District of California as part of multidistrict consolidation before Judge Lynch ruled on the motion,[4103] and he never read the classified lodgings.[4104]

Judge Kennelly, Northern District of Illinois

In a Chicago action against AT&T, Judge Kennelly granted the government's motion to dismiss on state-secrets grounds.[4105] In advance of this ruling, a classified information security officer brought from Washington classified arguments supporting the motion.[4106] Judge Kennelly reviewed the documents in private while the security officer waited outside his office.[4107] When the judge was finished reviewing the documents, the security officer took them and the judge's notes for storage in the U.S. Attorney's SCIF in the same building.[4108] When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.[4109]

Judge Kennelly's opinion states that he did not rely on classified submissions in reaching this decision.[4110] His opinion, however, describes how he reviewed the submissions:

> Only one copy of the materials was provided, and following our review, the materials were removed to a secure location outside the Court's control (we reviewed the materials again on later occasions under similar conditions). The court was not permitted to discuss the materials with other members of our staff, and notes that we took were removed and kept in a secure location outside the court's control. We advised the parties that we needed to ask the government's counsel questions about the material; this was done in an *in camera*, *ex parte* session on July 13, 2006 that was tape recorded so that a transcript could later be made by personnel with appropriate security clearance (we have reviewed the transcript of the July 13 session and believe it to be accurate). The court asked the government to provide further information about certain matters in the classified materials; this information was thereafter produced for *in camera*, *ex parte* inspection as well.[4111]

In order to avoid inadvertently disclosing information in the classified documents at the public hearing, Judge Kennelly carefully prepared all of his questions for counsel in advance.[4112] On one occasion, the judge began to refer to how many additional pages the classified documents had compared with the public versions, and the government's attorney instructed the judge not to do so.[4113]

4103. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 3811; Interview with Hon. Gerard E. Lynch, May 16, 2007.

4104. Interview with Hon. Gerard E. Lynch, May 16, 2007.

4105. Terkel v. AT&T, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 3813; McLure, *supra* note 3810; Robinson, *supra* note 3813.

4106. Interview with Hon. Matthew F. Kennelly, May 24, 2007; *see* Notice of Lodging, Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. June 30, 2006).

4107. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4108. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

4109. *Id.*

4110. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

4111. *Id.* at 902 n.2.

4112. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4113. *Id.*

The night before the classified proceeding, the judge's chambers were swept for surveillance devices.[4114] When the judge arrived for work on the morning of the hearing, he was greeted by an armed guard who demanded identification before the judge could enter his chambers.[4115] During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.[4116]

Judge Walker, Northern District of California

Judge Walker found his experience reviewing classified ex parte arguments very unpleasant.[4117] Ex parte presentations deprive the judge of the perspective and focus that usually comes with an adversary proceeding.[4118] Classified information is often presented without sufficient context to understand why it is classified or what injury to national security is at stake, so it can be hard to know what to make of it.[4119]

In the first San Francisco action against AT&T, the government intervened and unsuccessfully argued that the state-secrets privilege required dismissal of the case.[4120] The government sought to support its argument with classified documents.[4121] An attorney for the government described the procedure for judicial review of classified documents as follows:

> The classified brief and the classified declarations on which it relies are available, they are in the possession of a group called the Litigation Security Section of the Department of Justice, which is a subgroup of something called the Security and Emergency Program Staff. The brief, those materials, are in their possession. And when your Honor would like to look at those materials, you just call them up and they fly them out to San Francisco, allow you to take a look at them. When you're done with them, they take the materials back. They're maintained in a secure facility, just like all other documents relating to these materials would be.[4122]

On June 6, 2006, Judge Walker agreed to review the government's secret papers, ordering the government "to provide in camera and no later than June 9, 2006, the classified memorandum and classified declarations of John D. Negro-

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4114. *Id.*

4115. *Id.*

4116. *Id.*

4117. Interview with Hon. Vaughn R. Walker, Feb. 23, 2011.

4118. *Id.*

4119. *Id.*

4120. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Motion to Dismiss, Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. May 13, 2006); First U.S. Statement of Interest, *id.* (Apr. 28, 2006); *see* Pete Carey, *U.S.: Lawsuit a Risk to Secrecy*, San Jose Mercury News, May 14, 2006, at A1; John Markoff, *U.S. Steps Into Wiretap Suit Against AT&T*, N.Y. Times, Apr. 29, 2006, at A9; Joseph Menn & Josh Meyer, *Justice Department Asks U.S. Judge to Dismiss AT&T Suit*, L.A. Times, May 14, 2006, at 4.

4121. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 13, 2006); *see Hepting*, 439 F. Supp. 2d at 979; *see also* Carey, *supra* note 4120.

4122. Transcript, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006, filed May 22, 2006), *also filed in part as* Attach., Notice of Motion for Transfer and Coordination, Souder v. AT&T Corp., No. 3:06-cv-1058 (S.D. Cal. May 31, 2006).

ponte and Keith B. Alexander for review by the [judge] and by any chambers personnel that he so authorizes."[4123]

Judge Walker reviewed the government's classified briefing in his chambers.[4124] A security officer brought the documents to his chambers in a sealed pouch.[4125] Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.[4126] Judge Walker took some notes, which the security officer took back with the classified documents.[4127]

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.[4128] In part because of time constraints, instead of bringing classified documents to Judge Walker, a classified information security officer arranged for an FBI agent to bring Judge Walker to an FBI SCIF in the same building as the courthouse, where Judge Walker received a secure fax containing the classified documents for his review and then he shredded the fax.[4129]

On the eve of, and concerning, the Attorney General's announcement that the government would seek warrants from the FISA court for surveillance of international communications with persons in the United States, the government again presented classified briefing materials to Judge Walker.[4130] Again a classified information security officer brought them to his chambers, where Judge Walker reviewed them in private.[4131]

On 13 additional occasions, the government lodged classified documents.[4132]

4123. Order, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 6, 2006), *available at* 2006 WL 1581965; *see Hepting*, 439 F. Supp. 2d at 980; *see also* Bob Egelko, *Judge to Hold Private Review of AT&T Case*, S.F. Chron., June 8, 2006, at A4.

"Article III federal judges . . . , by virtue of their Constitutional office, may receive access to classified information in order to address questions before them." U.S. Response to Order to Show Cause, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

4124. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

The government also presented a classified reply brief with classified supporting declarations. Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. June 16, 2006).

4125. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; *see Hepting*, 439 F. Supp. 2d at 1011 (noting that the classified arguments were hand carried to San Francisco and stored in a secure facility there for a few days while the court conducted its review).

4126. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

4127. *Id.*

4128. *Id.*; *see* Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

4129. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4130. Notice of Lodging, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Jan. 13, 2007); Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4131. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4132. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Oct. 30, 2009); Notices of Lodging, *id.* (Feb. 27, 2009); Notice of Lodging, *id.* (Nov. 5, 2008); Notice of Lodging, *id.* (Sept. 19, 2008); Notice of Lodging, *id.* (Mar. 14, 2008); Notice of Lodging, *id.* (Oct. 25, 2007); Notice of Lodging, *id.* (Aug. 3, 2007); Notices of Lodging, *id.* (June 8, 2007); Notices of Lodging, *id.* (May 25, 2007); Notices of Lodging, *id.* (Apr. 21, 2007); Notice of Lodging, *id.* (Apr. 9, 2007); Notice of Lodging, *id.* (Mar. 13, 2007); Notice of Lodging, *id.* (Feb. 22, 2007).

The government lodged for Judge Walker's review a classified declaration that had been presented to the U.S. Court of Appeals for the Sixth Circuit in the appeals concerning Judge Taylor's injunction against the warrantless wiretap program.[4133]

The next lodging supported a scheduling motion.[4134] The unclassified memorandum supporting the motion noted that the recent appointment of a new Director of National Intelligence complicated assertion of the state-secrets privilege, because the new director would have to make an independent decision on whether or how to assert it.[4135]

The public record does not show the reason for the next lodging, and the plaintiffs objected to the government's lodging classified materials without providing any public information about what they are lodging or why.[4136] The government responded that "nothing more may be said without compromising the Government's compelling interest in protecting the Nation's security."[4137]

Judge Walker noted in his published opinion denying the government's motion to dismiss that his traveling to Washington to review classified documents might be a suitable future alternative.[4138] The next set of lodgings was an unredacted brief and unredacted declarations of the Director of National Intelligence and the Director of the NSA in support of a motion to dismiss actions against Verizon companies, including MCI, on state-secrets grounds.[4139] Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.[4140]

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn[4141] and Manhattan.[4142] Another lodging was a classified reply brief supporting state-secrets motions to dismiss in several other cases.[4143]

4133. Notice of Lodging, *id.* (Feb. 22, 2007).

4134. Notice of Lodging, *id.* (Mar. 13, 2007).

4135. Scheduling Motion, *id.* (Mar. 12, 2007); *see* Mark Mazzetti, *In Shift, Director for Intelligence in State Dept. Post*, N.Y. Times, Jan. 4, 2007, at A1 (reporting the President's appointment of John D. Negroponte, then Director of National Intelligence, to be Deputy Secretary of State, and reporting J. Michael McConnell, a former Director of the National Security Agency, to be Negroponte's replacement).

4136. Letter, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 13, 2007).

4137. Government Response to Plaintiffs' Letter, *id.* (Apr. 27, 2007).

4138. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

4139. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 21, 2007) (a separate notice for each document); *see* Government Motion, *id.* (Apr. 20, 2007) (unredacted brief and declarations).

4140. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

4141. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007); *see* Government Motion, *id.* (May 25, 2007) (redacted brief and declarations).

4142. Notices of Lodging, *id.* (June 8, 2007); Manhattan Action Dismissal Order, *supra* note 3825, at 5–6; *see* Government's Supplemental Motion, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007) (redacted brief).

4143. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Aug. 3, 2007).

The government lodged a classified declaration in opposition to the plaintiffs' motion for an order requiring defendants to preserve evidence.[4144] The government argued that the motion should be denied because the state-secrets privilege prevented the defendants from confirming or denying that there was any evidence to preserve.[4145] The classified declaration specified "how potentially discoverable information, if any, is being preserved."[4146] Determining that the public briefing showed that the plaintiffs were entitled to a preservation order, Judge Walker issued the order without stating whether or not he reviewed the government's classified brief and declaration.[4147]

Another lodging supported the government's motion to dismiss the action against the government by the Islamic charity on the grounds of standing, sovereign immunity, and state secrets.[4148]

In September 2008, in open court, Judge Walker observed that classified lodgings had not yet been very helpful to him:

> Well, let me tell you what has been my reaction to the filings in these cases here before. And that has been that the classified materials that I have viewed in connection with the state secrets issues that have been litigated here, frankly, have not been very helpful in resolving the issues that I have had to resolve.
>
> And, consequently, I have come to the conclusion that what I should do, if at all possible, is to address the issues that are raised without resort to any classified information, if I can.[4149]

Classified lodgings continued nevertheless. On September 19, 2008, the government lodged a classified certification by the Attorney General supporting its motion to dismiss actions against the telephone companies in light of immunity granted by the July 10, 2008, amendments to FISA.[4150] On November 5, 2008, the government both lodged a classified reply[4151] and filed a public redacted reply[4152] in support of its motion. But Judge Walker did not review the classified lodgings in advance of oral arguments:

> I have not read the classified certification. I concluded that I would attempt to see if the public filings would be sufficient to provide guidance to the Court as to how the action should come out, or, at least, this motion should come out, and, if possible, to make a determination without relying upon the classified certification, then I'd proceed in that fashion.
>
> If I conclude that that is not possible, then I'll have to decide exactly what to do with that particular document. But, you should know, at the outset, that what has been filed in

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4144. Notice of Lodging, *id.* (Oct. 25, 2007).

4145. Opposition Brief, *id.* (Oct. 25, 2007).

4146. *Id.* at 2.

4147. Preservation Order, *id.* (Nov. 6, 2007).

4148. Notice of Lodging, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Mar. 14, 2008); Motion to Dismiss, *id.*

4149. Transcript, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Sept. 12, 2008, filed Nov. 6, 2008).

4150. *In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949, 957 (N.D. Cal. 2009); Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (Sept. 19, 2008).

4151. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (Nov. 5, 2008).

4152. Reply, *id.*

> the public record is all that I've seen in connection with the present motions, and nothing else.[4153]

Subsequently, the government lodged classified declarations in conjunction with case management statements.[4154] Later, the government lodged a classified brief and classified declarations supporting a motion for dismissal of the action against the government originally filed in Brooklyn.[4155]

No one on Judge Walker's staff saw any of the classified documents.[4156] Judge Walker's career law clerk obtained a security clearance, but the classified warrantless wiretap briefs were for judges' eyes only.[4157] The law clerk's clearance allowed her to transport classified briefings between the FBI's SCIF and Judge Walker's chambers.[4158]

Judge Walker observed that presentation of classified information embedded within unclassified material, with the classified information redacted in public versions, makes it difficult to remember what is classified and what is not.[4159] He would have preferred that classified information be referred to in code in the public briefs with a separate document laying out what information is classified.[4160]

Judges Pregerson, Hawkins, and McKeown, Ninth Circuit

Prior to this litigation, presentation of classified information to Ninth Circuit judges involved delivery of the material to persons in the clerk's office with security clearances who stored it in a safe in San Francisco when the judges were not looking at it.[4161] Judges reviewed the material in San Francisco when they were in town.[4162]

In the appeals of refusals to dismiss on state-secrets grounds by Judge Walker in the first action filed against AT&T and by Judge King in the action filed against the government based on classified evidence, the government lodged clas-

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4153. Transcript, *id.* (Dec. 2, 2008, filed Dec. 9, 2008).

4154. Notices of Lodging, *id.* (Feb. 27, 2009).

4155. Notices of Lodging, *id.* (Oct. 30, 2009).

4156. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4157. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007, and Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

Judge Walker was his district's chief judge, and he used his career law clerk as his administrative law clerk. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

4158. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4159. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

Circuit Judge Hawkins, on the other hand, observed that this method facilitates comprehension. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008; *see infra*.

4160. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

4161. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

Now there are safes suitable for storing top secret information in each of the court's four principal places of hearing cases: San Francisco, Pasadena, Seattle, and Portland. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4162. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

sified briefs, and the court of appeals agreed that only the judges on the reviewing panel would see them.[4163]

This had an impact on the judges' work with their law clerks. The law clerks' memoranda had to remain somewhat abstract,[4164] and the judges had to take care that conversations with law clerks would not include topics that could give the clerks hints about the contents of the restricted materials.[4165]

The classified information that the Ninth Circuit judges reviewed included classified briefing by the government to both the district judges and the circuit judges, the classified evidence submitted in Judge King's case, and classified briefing by the plaintiffs concerning the classified evidence submitted in Judge King's case.[4166]

Judge Hawkins observed that embedding classified information within the narrative structure of the briefs, redacting the classified information for public versions, facilitated comprehension.[4167] A public brief written in code with a separate code sheet would have been more difficult to read.[4168]

Judge Pregerson wished that he could have received some guidance from the plaintiffs on what to look for in the classified materials, but the plaintiffs could offer little guidance because they were denied access to the materials.[4169] Perhaps clearance could be granted to an attorney in the Federal Defender's Office to represent a party's interest in judges' review of classified material when the party is denied access to it.[4170]

The same classified information security officer delivered the classified materials to the judges' chambers both before and after oral argument.[4171] Unlike the officers who visited the Sixth Circuit judges, she provided no instructions on closing doors or windows.[4172] A separate set of materials was prepared for each judge so that they could make individual notes on the documents.[4173] The officer, whose office is in Washington, D.C., was able to bring the materials back to the judges whenever they wanted to see them on a couple of days' notice.[4174]

It is important that as classified information security officers coordinate their visits to judges' chambers, they not disclose to persons other than the judges, such

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4163. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 3863; 9th Cir. *Hepting* Docket Sheets, *supra* note 3907; *see* Vick, *supra* note 3907.

4164. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4165. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4166. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4167. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

District Judge Walker, on the other hand, observed that this method made it more difficult to remember what was classified and what was not. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; *see supra*.

4168. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4169. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

4170. *Id.*

4171. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4172. *Id.*

4173. *Id.*

4174. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

as attorneys representing the government, which judges they are visiting.[4175] This is a problem more serious for appellate proceedings than for trial court proceedings, because cases are assigned to judges well in advance of the assignments' becoming public information.[4176] And the assignment of opinion authorship is regarded as confidential until the opinion is issued.[4177]

The court agreed to permit C-SPAN to televise oral argument so long as the program was not aired until after the court had an opportunity to excise any inadvertently disclosed secrets, a contingency that did not occur.[4178] Classified information security officers offered to review the court's opinion for inadvertently disclosed secret information before the opinion's release, but the court declined the offer.[4179]

This was Judge Hawkins' first case as a judge involving classified information.[4180] Judge McKeown had to review classified information in approximately two previous cases.[4181] She had substantial experience as a practicing attorney in Seattle arguing trade secret cases in open court without revealing the secrets.[4182] In over 40 years as a federal judge, including nearly 30 years as a circuit judge, Judge Pregerson had occasionally reviewed classified information before.[4183]

Even after the appeal had been resolved by a remand, the government lodged a classified declaration of the Director of National Intelligence to correct an inaccuracy in an earlier government submission.[4184] The court ruled, however, that it no longer had jurisdiction to receive the lodging.[4185]

In 2011, the appellate court heard appeals of statutorily mandated dismissals of actions against the telephone companies and dismissals of actions against the government for lack of standing. Attorneys for the government admonished the court by letter to its clerk, "All classified information has been provided to the Court with the understanding that the secrecy of this information will be properly protected."[4186] The court determined that it did not need to consider classified materials to resolve the appeals.[4187]

4175. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

4176. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4177. *Id.*

4178. *Id.*

4179. *Id.*

4180. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

4181. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

4182. *Id.*

4183. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

4184. Notice of Lodging, Al-Haramain Islamic Found. v. Bush, No. 06-36083 (9th Cir. Nov. 9, 2009).

4185. Order, *id.* (Nov. 23, 2009).

4186. *E.g.*, Letter, Jewel v. NSA, No. 10-15616 (9th Cir. Aug. 3, 2011); Letter, Hepting v. AT&T, No. 09-16676 (9th Cir. Aug. 3, 2011).

4187. *In re* NSA Telecomm. Records Litig., 671 F.3d 881, 894 n.1 (9th Cir. 2011) ("Because this appeal raises only the constitutionality of [the statute] and not its specific application in this case, we need not consider the classified materials.").

Judge Hogan, District of the District of Columbia

In the Electronic Frontier Foundation's unsuccessful FOIA suit to discover the secret FISC orders on which the government said it would rely to obtain warrants for what previously were warrantless wiretaps, the government lodged, on June 25, 2007, for ex parte in camera review, a classified declaration opposing the plaintiff's motion that the court examine the secret orders.[4188] Judge Hogan relied on this declaration both to grant the government summary judgment and to deny the motion to review the FISC orders.[4189]

Challenge: Classified Opinion

Although Judge Kennelly did not rely on classified submissions in his decision to dismiss, with leave to amend, plaintiffs' suit against AT&T for facilitating warrantless surveillance, he did decide to respond to the submissions.

> We are issuing on this date a separate Memorandum discussing various points arising from the classified materials; because that Memorandum discusses certain of the contents of those materials, it, too, is classified and will be unavailable for inspection by the public or any of the parties or counsel in this case other than counsel for the government. The court directs counsel for the government to cause the classified Memorandum be placed in a secure location and to ensure its availability in the event of appellate review.[4190]

To write the classified opinion, Judge Kennelly was required to compose the opinion on a "clean" laptop computer provided by the classified information security officer.[4191] The computer, and all drafts, were stored in the U.S. Attorney's SCIF in the same building.[4192] As the judge was preparing the classified opinion, he had additional questions for the government.[4193] It was arranged that he would ask them on a "secured telephone unit" in the U.S. Attorney's SCIF.[4194]

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret opinion.[4195]

Challenge: Redacting Secrets

AT&T electronically filed a brief with several lines redacted, but the redacted text could be retrieved easily from the electronic document. It appears that when this was brought to the court's attention, two days after the filing, the electronic text file was replaced with an electronic image file.

At a May 17, 2006, hearing in the first case against telephone companies filed in San Francisco, Judge Walker issued the following order:

4188. Notice of Lodging, Elec. Frontier Found. v. Dep't of Justice, No. 1:07-cv-403 (D.D.C. June 25, 2007).

4189. D.D.C. *Elec. Frontier Found.* Summary Judgment Opinion, *supra* note 3985, at 11, 15, 18.

4190. Terkel v. AT&T, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

4191. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

4192. *Id.*

4193. *Id.*

4194. *Id.*

4195. Minute Entry, Terkel v. AT&T, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007).

> Plaintiffs are instructed to file by close of business on May 22, 2006, a memorandum that addresses: (1) whether this case can be litigated without deciding the state secrets issue, thereby obviating any need for the court to review the government's classified memorandum and declarations and (2) whether the state secrets privilege is implicated by plaintiffs' FRCP 30(b)(6) deposition request for information whether AT&T received any certification from the government. AT&T and the government may each file reply memoranda on these issues by close of business on May 24, 2006.[4196]

As instructed, AT&T filed a reply brief on May 24, 2006.[4197] It appears that AT&T filed an electronic version of the brief, with several lines on three pages blacked out, and filed an unredacted paper version under seal.[4198] Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.[4199] On the day of the CNET report, the court filed a substitute electronic version of the redacted file.[4200]

CNET's website provides a link to the originally filed Acrobat text file.[4201] Selecting the redacted sections and pasting them into a text file reveals the redacted text. The replacement version filed two days later is an Acrobat image file from which the redacted text cannot be selected.[4202]

Challenge: Court-Appointed National Security Expert

In the first San Francisco action against AT&T, Judge Walker asked the parties for advice on whether he should name a court-appointed national security expert "to assist the court in determining whether disclosing particular evidence would create a 'reasonable danger' of harming national security."[4203] The judge wrote, "The court contemplates that the individual would be one who had a security clearance for receipt of the most highly sensitive information and had extensive experience in intelligence matters."[4204] Judge Walker did not believe that other

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4196. Civil Minute Order, Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. May 17, 2006).

4197. N.D. Cal. *Hepting* Docket Sheet, *supra* note 3890.

4198. Notice of Manual Filing, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 24, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 3890.

The redacted text appeared in one of AT&T's three arguments—an argument spanning four pages of the 20-page brief: "II.B. The Court Cannot Adjudicate Plaintiffs' Prima Facie Claims Until It Reviews The Classified Submissions." Redacted Reply Brief, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 26, 2006).

4199. Declan McCullagh, *AT&T Leaks Sensitive Info in NSA Suit*, May 26, 2006, http://news.com.com/AT38T+leaks+sensitive+info+in+NSA+suit/2100-1028_3-6077353.html.

4200. Redacted Reply Brief, *supra* note 4198; N.D. Cal. *Hepting* Docket Sheet, *supra* note 3890.

4201. http://www.politechbot.com/docs/att.not.redacted.brief.052606.pdf.

4202. Redacted Reply Brief, *supra* note 4198.

4203. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1010 (N.D. Cal. 2006); *see id.* at 1011 (ordering the parties to show cause in writing by July 31, 2006, why the court should not appoint such an expert).

4204. *Id.* at 1010–11; *see id.* at 1011 (noting that the court had a specific candidate in mind). Judge Walker thought that former CIA Director James Woolsey would be a good candidate, but one of the parties expressed concerns about Mr. Woolsey's having opined on the secret surveillance program. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

judges previously used Federal Rule of Evidence 706(a) to appoint an expert of this type.[4205] Judge Walker decided, however, not to appoint such an expert "at this stage."[4206]

4205. *Hepting*, 439 F. Supp. 2d at 1010.
4206. Civil Minute Order, Hepting v. AT&T Corp., No. 3:06-cv-672 (N.D. Cal. Aug. 8, 2006).

Muslim Surveillance

Islamic Shura Council of Southern California v. FBI and Fazaga v. FBI (Cormac J. Carney, C.D. Cal.)

The U.S. District Court for the Central District of California heard a collection of civil actions against the FBI seeking relief from surveillance of Muslims in Orange County.

Freedom of Information Act

Concerned that many Muslims were avoiding mosques because of suspected government surveillance, on May 15, 2006, with the assistance of the ACLU, six Muslim organizations and five Muslim individuals submitted to the FBI requests pursuant to the Freedom of Information Act (FOIA) for records of their surveillance.[4207] On April 27, 2007, the FBI notified five of the organizations and four of the individuals that no records responsive to their requests were found.[4208] In May, the FBI informed the Council on American Islamic Relations—California (CAIR) and Hussam Ayloush that it had found one responsive document for each of them.[4209] The FBI presented them with redacted versions in June: one page for CAIR and three pages for Ayloush.[4210]

FOIA's subsection (b) *exempts* nine categories of information from government agencies' production obligations:[4211]

- classified national defense or foreign policy information
- internal personnel policies
- statutorily exempt information
- trade secrets
- confidential internal correspondence
- confidential personnel and medical files
- confidential law enforcement investigations
- financial regulation reports
- geophysical information concerning wells

4207. Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1162 (9th Cir. 2011); Islamic Shura Council of S. Cal. v. FBI, 278 F.R.D. 538, 539 (C.D. Cal. 2011); Islamic Shura Council of S. Cal. v. FBI, 779 F. Supp. 2d 1114, 1118 (C.D. Cal. 2011); *see* Ann Pepper, *ACLU Seeks FBI Records on Monitoring of Islamic Groups*, Orange Cnty. Reg., May 16, 2006; H.G. Reza, *Area Islamic Groups Sue the FBI*, L.A. Times, Sept. 19, 2007, California, at 4 [hereinafter *Islamic Groups Sue*]; H.G. Reza, *On Behalf of Muslims, ACLU Seeks FBI Surveillance Data*, L.A. Times, May 16, 2006, California Metro, at 4.

4208. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539 & n.1; *Islamic Shura Council*, 779 F. Supp. 2d at 118.

4209. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1118.

4210. *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539; *Islamic Shura Council*, 779 F. Supp. 2d at 118.

4211. 5 U.S.C. § 552(b) (2011).

Redactions from the FBI's production to CAIR and Ayloush were related to internal personnel policies, confidential personnel and medical files, and confidential law enforcement investigations.[4212]

On September 18, 2007, the 11 Muslim organizations and individuals filed an action in the U.S. District Court for the Central District of California for a more complete response to their FOIA requests.[4213] The court assigned the case to Judge Cormac J. Carney.[4214]

As a result of the lawsuit, the government performed an additional search for the nine plaintiffs whom it had told no documents existed in response to their requests and produced to the plaintiffs 120 pages, which included numerous redactions.[4215]

FOIA's subsection (c) *excludes* three categories of information from government agencies' production obligations; "the agency may treat the records as not subject to the requirements of [FOIA]."[4216]

- ongoing confidential law enforcement investigations
- informant records
- foreign intelligence

"Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information."[4217]

The government supported a motion for summary judgment with a declaration identifying the reasons for each of the redactions in the 124 pages produced to the plaintiffs.[4218] The phrase "outside the scope of plaintiffs' requests" was used for

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4212. *Islamic Shura Council*, 779 F. Supp. 2d at 118.

4213. Docket Sheet, Islamic Shura Council of S. Cal. v. FBI, No. 8:07-cv-1088 (C.D. Cal. Sept. 18, 2007) [hereinafter C.D. Cal. *Islamic Shura Council* Docket Sheet]; *Islamic Shura Council*, 635 F.3d at 1162; *Islamic Shura Council*, 278 F.R.D. at 539–40; *see* Reza, *Islamic Groups Sue*, *supra* note 4207.

4214. C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4213.

Tim Reagan interviewed Judge Carney for this report in the judge's chambers on October 16, 2012.

4215. *Islamic Shura Council*, 635 F.3d at 1162–63; *Islamic Shura Council*, 779 F. Supp. 2d at 118.

> From September 5 to September 27, 2007, [the Department of Justice's Office of Information and Privacy] affirmed the FBI's "no records" response to the Nine Plaintiffs. Nevertheless, on March 14, 2008, the FBI released an additional 120 pages of responsive documents to seven of the Nine Plaintiffs—a large amount of which was either redacted or withheld as "outside the scope" of Plaintiffs' FOIA request while some of the information was redacted pursuant to specific exemptions under FOIA.

Islamic Shura Council, 278 F.R.D. at 540 (citation omitted).

4216. 5 U.S.C. § 552(c).

4217. *Islamic Shura Council*, 779 F. Supp. 2d at 1123.

4218. Hardy Declaration Supporting Government's Summary Judgment Motion at 46–131, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Mar. 21, 2008) [hereinafter Hardy Declaration].

subsection (c) exclusions without informing the plaintiffs or the court that that was what the phrase meant.[4219] In its reply brief, the government stated that "outside the scope" meant that "the redacted portions did not contain information responsive to plaintiffs' request."[4220]

Judge Carney decided to review unredacted versions of the documents.[4221] He concluded, "Although the FOIA allows the Government to withhold certain categories of documents from requestors such as Plaintiffs pursuant to statutory exemptions, 5 U.S.C. § 552(b), or exclusions, 5 U.S.C. § 552(c), the FOIA does not permit the Government to withhold responsive information from the Court."[4222]

> The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance. The Court is charged with the humbling task of defending the Constitution and ensuring that the Government does not falsely accuse people, needlessly invade their privacy or wrongfully deprive them of their liberty. The Court simply cannot perform this important task if the Government lies to it. Deception perverts justice. Truth always promotes it.[4223]

Judge Carney determined, however, that the government had produced to the plaintiffs all of the documents, and portions of documents, that FOIA required.[4224]

Judge Carney resolved summary judgment motions by sealed order on June 23, 2009, which Judge Carney said he would unseal unless ordered otherwise by the court of appeals.[4225] On March 30, 2011, the court of appeals determined that "full disclosure of the Sealed Order would compromise the authorized secrecy from plaintiffs of some of the information it contains."[4226] The appellate court remanded "to the district court to revise the Sealed Order to eliminate statements

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4219. *See* *Islamic Shura Council*, 278 F.R.D. at 540, 545–46; *Islamic Shura Council*, 779 F. Supp. 2d at 1117–19, 1121–26 & n.4; Hardy Declaration, *supra* note 4218.

4220. Government Reply Brief at 2, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Jan. 23, 2009).

4221. *Islamic Shura Council*, 278 F.R.D. at 540; *Islamic Shura Council*, 779 F. Supp. 2d at 1119–20; Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1163 (9th Cir. 2011); *see* Defendants' Notice of *In Camera, Ex Parte* Submission Pursuant to Court's Order, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 19, 2009).

4222. *Islamic Shura Council*, 779 F. Supp. 2d at 1121; *accord* *Islamic Shura Council*, 635 F.3d at 1165.

4223. *Islamic Shura Council*, 779 F. Supp. 2d at 1125; *see* *Islamic Shura Council*, 278 F.R.D. at 539 ("false and misleading information"); *id.* ("deception of the court"); *id.* at 540 ("blatantly false and misleading information"); *id.* at 545 ("the Government lied to the Court").

4224. *Islamic Shura Council*, 779 F. Supp. 2d at 1126; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541; *see* Transcript at 5, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. Apr. 27, 2011, filed Feb. 24, 2012) ("What I can say, so you know, is based on the information I received in classified hearings, closed hearings, that the government has complied with its obligations under FOIA.").

4225. Minutes, *Islamic Shura Council*, No. 8:07-cv-1088 (C.D. Cal. June 25, 2009); C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4213; *Islamic Shura Council*, 635 F.3d at 1163; *Islamic Shura Council*, 278 F.R.D. at 541.

4226. *Islamic Shura Council*, 635 F.3d at 1169; *see* *Islamic Shura Council*, 278 F.R.D. at 541–42.

the government has designated as national security and sensitive law enforcement information."[4227]

Although the court of appeals agreed with the government that all of Judge Carney's sealed order could not be unsealed, the court of appeals agreed with Judge Carney that the government may not represent to the court that it has produced all responsive information when in fact it has not.[4228]

Judge Carney issued a revised and public order on April 27.[4229]

On November 17, Judge Carney granted the plaintiffs' motion for sanctions.[4230] Judge Carney awarded the plaintiffs $36,248 in attorney fees for bringing the motion.[4231] An appeal will be heard in Seattle on June 26, 2013.[4232]

Tort

In "Operation Flex," the FBI paid Craig Monteilh in 2006 and 2007 to look for dangerous Muslims in Southern California mosques.[4233] The informant's efforts to foster and identify antisocial violence resulted in a restraining order against him issued in June 2007 by a state court in response to complaints by mosque members.[4234] In the state court proceedings, Monteilh revealed details about the FBI's operation.[4235] Monteilh's work as an informant was also revealed in the prosecution of Ahmadullah Sais Niazi.[4236] Niazi was indicted in 2009 for association with a designated terrorist and for false statements.[4237] Judge Carney drew this case.[4238]

4227. *Islamic Shura Council*, 635 F.3d at 1169.

4228. *Id.* at 1166; *Islamic Shura Council*, 278 F.R.D. at 541.

4229. *Islamic Shura Council*, 779 F. Supp. 2d 1114; *see Islamic Shura Council*, 278 F.R.D. at 542; *see* Transcript, *supra* note 4224, at 3 ("my original order did not disclose the nature, content, or number of the documents that were withheld").

4230. *Islamic Shura Council*, 278 F.R.D. 538.

4231. *Id.* at 548; Order, Islamic Shura Council of S. Cal. v. FBI, No. 8:07-cv-1088 (C.D. Cal. Dec. 14, 2011) (declining to award an additional $880 in paralegal fees because of insufficient documentation).

4232. Docket Sheet, Islamic Shura Council of S. Cal. v. FBI, No. 12-55305 (9th Cir. Feb. 14, 2012).

4233. Fazaga v. FBI, 885 F. Supp. 2d 978, 980 (C.D. Cal. 2012); Fazaga v. FBI, 884 F. Supp. 2d 1022, 1028–30 (C.D. Cal. 2012).

4234. *See* Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, Wash. Post, Dec. 5, 2010, at A1; H.G. Reza, *Restraining Order Bars Man from Irvine Mosque*, L.A. Times, June 30, 2007, at 5.

4235. *See* Teresa Watanabe, *Man Says He Was FBI Informant*, L.A. Times, Feb. 26, 2009.

4236. *Fazaga*, 884 F. Supp. 2d at 1032; *see* Markon, *supra* note 4234; Watanabe, *supra* note 4235.

4237. Indictment, United States v. Niazi, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009); *see* Salvador Hernandez, *Man Lied to Hide Terrorist Links, U.S. Says*, Orange Cnty. Reg., Feb. 21, 2009, at A; Markon, *supra* note 4234 ("Prosecutors said he is the brother-in-law of Osama bin Laden's security coordinator."); Carol J. Williams & Christine Hanley, *Al Qaeda Figure's In-Law Arrested*, L.A. Times, Feb. 21, 2009, at 1.

4238. Docket Sheet, *Niazi*, No. 8:09-cr-28 (C.D. Cal. Feb. 11, 2009).

In 2010, the indictment was voluntarily dismissed because of "[e]videntiary issues, including the unavailability of an overseas witness."[4239]

Monteilh filed a civil action against the FBI on January 22, 2010, complaining that his federal undercover work had resulted in a state court criminal conviction and his reputation as an informant had resulted in a prison stabbing.[4240] The court assigned this case to Judge James V. Selna.[4241] On February 16, 2011, Judge Selna determined that Monteilh's contract claims against the government needed to be brought in the Court of Federal Claims and his tort claims were barred (1) for failure to pursue them administratively first and (2) by discretionary function immunity.[4242]

On February 22, three Orange County Muslims filed a class action challenge to the FBI's operation.[4243] With their complaint, the plaintiffs filed a notice that their action might be related to the earlier FOIA action.[4244] Judge Carney accepted transfer to him of the tort case as related to the FOIA case.[4245] One month later, the government notified the court that the Muslim tort case was related to Monteilh's tort case.[4246] The three Muslims argued that their case was not sufficiently related to Judge Selna's.[4247] Judge Selna declined transfer, because the Muslim tort case was about surveillance injuries to Muslims and Monteilh's case was about post-surveillance injuries to Monteilh.[4248]

On August 14, 2012, Judge Carney dismissed a claim against the government in the Muslim tort case based on the Foreign Intelligence Surveillance Act, rely-

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4239. Fitzgerald Declaration, *id.* (Sept. 29, 2010); *see* Order, *id.* (Sept. 30, 2010) (granting dismissal); *see also* Scott Glover, *U.S. Won't Pursue Case Against Niazi*, L.A. Times, Oct. 1, 2010, at 1; Salvador Hernandez, *Muslims Question Tactics of FBI in Tustin Man's Case*, Orange Cnty. Reg., Oct. 9, 2010, at B; Markon, *supra* note 4234.

4240. Complaint, Monteilh v. FBI, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010); *see id.* at 14 ("Mr. Monteilh is informed that his life was in danger as the Muslim extremists had ordered a 'fatwa,' the Romanian Mafia had ordered a 'hit,' the Mexican Mafia had ordered a 'hit,' and the White Supremacists were given a 'green light' on Craig F. Monteilh."); *see also Fazaga*, 884 F. Supp. 2d at 1033; Scott Glover, *Suit by Alleged Informant Says FBI Endangered Life*, L.A. Times, Jan. 23, 2010, at 11; Salvador Hernandez, *Man Who Says He Was Informant Sues FBI*, Orange Cnty. Reg., Jan. 23, 2010, at A; Markon, *supra* note 4234.

4241. Docket Sheet, *Monteilh*, No. 8:10-cv-102 (C.D. Cal. Jan. 22, 2010).

4242. Minutes, *id.* (Feb. 16, 2011); *see* Salvador Hernandez, *Judge Tosses Most of Man's Claims*, Orange Cnty. Reg., Feb. 24, 2011, at B.

4243. Complaint, Fazaga v. FBI, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011); Fazaga v. FBI, 885 F. Supp. 2d 978, 980–81 (C.D. Cal. 2012); *Fazaga*, 884 F. Supp. 2d at 1028–30, 1033; *see* Amended Complaint, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Sept. 13, 2011); *see also* Salvador Hernandez, *Suit Alleges FBI Wrongly Spied on Muslims*, Orange Cnty. Reg., Feb. 24, 2011, at B; Shan Li, *FBI Violated the Rights of Muslims, Lawsuit Alleges*, L.A. Times, Feb. 24, 2011, at 3; Jerry Markon, *Lawsuit Alleges FBI Violated Muslims' Freedom of Religion*, Wash. Post, Feb. 23, 2011, at A13; Jennifer Medina, *Suit Accuses F.B.I. of Spying at Mosques in California*, N.Y. Times, Feb. 25, 2011, at A17.

4244. Notice, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Feb. 22, 2011).

4245. Order, *id.* (Feb. 24, 2011).

4246. Notice, *id.* (Mar. 31, 2011).

4247. Notice, *id.* (Apr. 5, 2011).

4248. Order, *id.* (Apr. 6, 2011).

ing on a decision by the court of appeals issued on August 7 in another case that the government retained sovereign immunity from such claims.[4249] Judge Carney denied the agents' defense of qualified immunity, however, allowing a claim against them of illegal surveillance to go forward.[4250]

Also on August 14, after a skeptical review of the government's state-secrets privilege, Judge Carney dismissed the Muslims' other claims.[4251]

> [F]urther litigation of the action would risk or require the disclosure of state secrets related to Operation Flex. More specifically, the Government contends that because Plaintiffs' claims are premised on their core allegation that Defendants conducted an indiscriminate religion-based investigation, any rebuttal against this allegation would risk or require disclosure of privileged information—whom and what the FBI was investigating under Operation Flex and why—in order to establish that the investigation was properly predicated and focused. The Court agrees.[4252]

An appeal by the plaintiffs is pending.[4253]

Challenge: Classified Evidence

To assist Judge Carney with these cases, his law clerks received security clearances.[4254] Classified documents were stored in a chambers safe.[4255] Judge Carney made a deliberate decision to look at the classified materials rarely.[4256]

Challenge: Closed Proceedings

To evaluate whether the government had properly responded to FOIA demands, Judge Carney decided to review unredacted versions of the documents produced to the plaintiffs.[4257] Troubled that the unredacted documents showed that the government had not only misled the plaintiffs but had also misled the court about what information the government was withholding from the plaintiffs, Judge Carney presided over a classified ex parte hearing at which the government presented its position on application of FOIA exclusions.[4258]

4249. Fazaga v. FBI, 885 F. Supp. 2d 978, 982–84 (C.D. Cal. 2012); *see* Al-Haramain Islamic Found. v. Obama, 705 F.3d 845 (9th Cir. 2012); *supra*, "Warrantless Wiretaps."

4250. *Fazaga*, 885 F. Supp. 2d at 984–87; *see* Salvador Hernandez, *Spying at Mosques*, Orange Cnty. Reg., Aug. 15, 2012, at A.

4251. Fazaga v. FBI, 884 F. Supp. 2d 1022 (C.D. Cal. 2012); *see* Hernandez, *supra* note 4250; Victoria Kim, *Spying Suit Against FBI Is Rejected*, L.A. Times, Aug. 15, 2012, at 1.

4252. *Fazaga*, 884 F. Supp. 2d at 1039 (citation omitted).

4253. Docket Sheet, Fazaga v. FBI, No. 13-55017 (9th Cir. Jan. 3, 2013).

4254. Interview with Hon. Cormac J. Carney, Oct. 16, 2012.

4255. *Id.*

4256. *Id.*

4257. Islamic Shura Council of S. Cal. v. FBI, 278 F.R.D. 538, 540 (C.D. Cal. 2011); Islamic Shura Council of S. Cal. v. FBI, 779 F. Supp. 2d 1114, 1119–20 (C.D. Cal. 2011); Islamic Shura Council of S. Cal. v. FBI, 635 F.3d 1160, 1163 (9th Cir. 2011).

4258. Interview with Hon. Cormac J. Carney, Oct. 16, 2012.

Before Judge Carney issued his sealed order in the FOIA case, the classified information security officer reviewed it for inadvertent inclusion of classified information.[4259]

Challenge: Classified Arguments

In response to the plaintiffs' motion for sanctions in the FOIA action, the government filed a redacted brief and submitted to Judge Carney ex parte an unredacted brief.[4260] The court of appeals granted the government's motion for classified ex parte briefing in the sanction appeal.[4261]

With its motion to dismiss the Muslim tort action, the government filed notices that it was lodging with Judge Carney a classified brief and a classified declaration.[4262] Three days later, the plaintiffs filed a motion that Judge Carney not examine the classified materials until after a review of the plaintiffs' response to the government motion and a determination that the ex parte classified lodgings merit examination.[4263] "Plaintiffs argued that such a ruling would prevent the Court from unnecessarily reviewing information that could be highly prejudicial to Plaintiffs and not properly subject to consideration by the Court."[4264] Judge Carney denied the plaintiffs' request that he refrain from reviewing the classified submissions.[4265] He "was confident that [his] independent evaluation would not be compromised by the contents of those submissions."[4266] The government lodged a supplemental classified declaration after the plaintiffs amended their complaint.[4267]

4259. *Id.*

4260. Sanction Response, Islamic Shura Council of S. Cal. v. FBI, No. 8:07-cv-1088 (C.D. Cal. Oct. 24, 2011); C.D. Cal. *Islamic Shura Council* Docket Sheet, *supra* note 4213.

4261. Order, Islamic Shura Council of S. Cal. v. FBI, No. 12-55305 (9th Cir. Mar. 25, 2013).

4262. Notices of Lodging, Fazaga v. FBI, No. 8:11-cv-301 (C.D. Cal. Aug. 1, 2011); *see* Fazaga v. FBI, 884 F. Supp. 2d 1022, 1033 (C.D. Cal. 2012).

4263. Motion, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 4, 2011); *Fazaga*, 884 F. Supp. 2d at 1033.

4264. *Fazaga*, 884 F. Supp. 2d at 1033.

4265. Minutes, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Aug. 11, 2011).

4266. *Fazaga*, 884 F. Supp. 2d at 1033.

4267. Notice of Lodging, *Fazaga*, No. 8:11-cv-301 (C.D. Cal. Nov. 4, 2011); *see Fazaga*, 884 F. Supp. 2d at 1034.

Torture Flights

Mohamed v. Jeppesen DataPlan, Inc.
(James Ware, N.D. Cal.)

On May 30, 2007, the ACLU filed a civil action in the U.S. District Court for the Northern District of California on behalf of five men who had experienced extraordinary rendition.[4268] According to the complaint, extraordinary rendition "involves the clandestine apprehension and transfer of persons suspected of involvement in terrorist activities to secret detention and interrogation facilities in countries outside the United States, utilizing methods impermissible under United States and international law."[4269] The court assigned the case to Judge James Ware, who dismissed the action on state-secrets grounds.[4270]

Because the action was dismissed without the filing of an answer, the facts are substantially limited to the plaintiffs' allegations.[4271] Ahmed Agiza, an Egyptian seeking asylum in Sweden, was captured by Swedish authorities, transferred to American custody, and flown to Egypt, where he was subjected to extremely harsh conditions of confinement and then sentenced to 15 years in Egyptian prison on a military court conviction.[4272] Abou Elkassim Britel, a Moroccan-Italian, was detained in Pakistan, transferred to American custody, and flown to Morocco, where he was subjected to extremely harsh conditions of confinement and then sentenced to 15 years in Moroccan prison.[4273] Binyam Mohamed, an Ethiopian and legal resident of the United Kingdom, was arrested in Pakistan, and then transferred, in turn, to Morocco, Afghanistan, and Guantánamo Bay, where he was subjected to extremely harsh conditions of confinement.[4274] Bisher al-Rawi, an Iraqi and legal resident of the United Kingdom, was arrested in Gambia and transferred, in turn, to Afghanistan and Guantánamo Bay, where he was subjected to extremely harsh conditions of confinement.[4275] Mohamed Farag Ahmad Bashmilah, a Yemeni, was arrested in Jordan, and transferred, in turn, to Afghanistan

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4268. Complaint, Mohamed v. Jeppesen Dataplan, Inc., No. 5:07-cv-2798 (N.D. Cal. May 30, 2007); *see* John Schwartz, *Claims of Torture Abroad Face Test Monday in Court*, N.Y. Times, Feb. 6, 2009, at A17.

4269. First Amended Complaint at 4, *Mohamed*, No. 5:07-cv-2798 (N.D. Cal. Aug. 1, 2007); Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008). *See generally* M. Cherif Bassiouni, International Extradition 289–94 (5th ed. 2007); Jonathan Hafetz, Habeas Corpus After 9/11 51–59 (2011).

4270. *Mohamed*, 539 F. Supp. 2d 1128; *see* Schwartz, *supra* note 4268.

Tim Reagan interviewed Judge Ware for this report in the judge's chambers on September 24, 2010. Judge Ware retired on August 31, 2012. Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

4271. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010); *Mohamed*, 539 F. Supp. 2d at 1131.

4272. *Mohamed*, 614 F.3d at 1074.

4273. *Id.*; *Mohamed*, 539 F. Supp. 2d at 1130–31.

4274. *Mohamed*, 614 F.3d at 1074; *Mohamed*, 539 F. Supp. 2d at 1130.

4275. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32; *see* Hafetz, *supra* note 4269, at 46–47.

and an unknown CIA black site prison, where he was subjected to extremely harsh conditions of confinement.[4276] Mohamed, al-Rawi, and Bashmilah were subsequently released.[4277]

The defendant was Jeppesen DataPlan, Inc., a subsidiary of Boeing, with headquarters in San Jose.[4278] It allegedly "provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture."[4279] There was evidence that "Jeppesen knew what was going on when it arranged flights described by one of its own officials as 'torture flights.'"[4280]

The government intervened to block the suit on state-secrets grounds.[4281] Judge Ware determined, on February 13, 2008, that "the very subject matter of this case is a state secret" and dismissed the action.[4282]

On April 28, 2009, a three-judge panel of the court of appeals reversed.[4283] On rehearing, however, an en banc panel determined, by a vote of six to five, on September 8, 2010, that "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets."[4284] The Supreme Court denied certiorari.[4285]

Challenge: Classified Arguments

To support its motion for dismissal on state-secrets grounds, the government submitted ex parte to Judge Ware a classified declaration by the head of the

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4276. *Mohamed*, 614 F.3d at 1075; *Mohamed*, 539 F. Supp. 2d at 1131.

4277. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32.

4278. *Mohamed*, 539 F. Supp. 2d at 1129; *see* Schwartz, *supra* note 4268.

4279. *Mohamed*, 614 F.3d at 1075.

4280. *Id.* at 1095 (Judge Hawkins, dissenting).

4281. *Mohamed*, 539 F. Supp. 2d at 1130, 1132–33.

The government did not intervene in a contract dispute in New York's state court between Sportsflight, a Long Island aircraft brokerage business, and Richmor Aviation, which provided a plane for Sportsflight's government contract, apparently a contract for rendition transportation. *See* Richmor Aviation, Inc. v. Sportsflight Air, Inc., 82 A.D.3d 1423, 918 N.Y.S.2d 806 (2011); Peter Finn & Julie Tate, *Billing Dispute Reveals Details of CIA's Rendition Flights*, Wash. Post, Sept. 1, 2011, at A1.

4282. *Mohamed*, 539 F. Supp. 2d at 1130, 1134–35.

4283. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009) (opinion by Circuit Judge Michael Daly Hawkins, joined by Circuit Judges Mary M. Schroeder and William C. Canby, Jr.); *see* Carrie Johnson, *Appeals Court Rejects "State Secrets" Claim, Revives Detainee Suit*, Wash. Post, Apr. 29, 2009, at A3; Charlie Savage, *Court Lets Ex-Detainees Proceed with Torture Lawsuit*, N.Y. Times, Apr. 29, 2009, at A15.

4284. *Mohamed*, 614 F.3d at 1083 (opinion by Judge Raymond C. Fisher, joined by Chief Judge Alex Kozinski and Judges Richard C. Tallman, Johnnie B. Rawlinson, and Consuelo Maria Callahan); *see id.* at 1093 (concurring opinion by Judge Carlos Bea, finding that the case should be dismissed because its subject matter is a state secret); *cf. id.* at 1093–131 (dissenting opinion by Judge Hawkins, joined by Judges Schroeder, Canby, Sidney R. Thomas, and Richard A. Paez); *see* Charlie Savage, *Court Dismisses a Case Asserting Torture by C.I.A.*, N.Y. Times, Sept. 9, 2010, at A1.

4285. Mohamed v. Jeppesen Dataplan, Inc., ___ U.S. ___, 131 S. Ct. 2442 (2011).

CIA.[4286] A classified information security officer brought the declaration to Judge Ware's chambers.[4287] Judge Ware reviewed the declaration privately in his office, with the blinds drawn, while the security officer waited outside.[4288] The officer said that she would take back the declaration and any notes the judge took, but the judge could get them back at any time.[4289] Not wanting unknown persons to have access to his notes, the judge did not take notes.[4290]

On appeal, the government submitted to the appellate judges ex parte classified briefs and declarations.[4291] For each judge, a classified information security officer brought the materials to the judge's chambers at the judge's convenience, waited for the judge to finish reviewing them, and took them back, along with any notes the judge took.[4292] On the day of oral argument, the security officer again provided each judge with that judge's set of materials.[4293]

Classified information security officers received advance notice that the appeal would be reheard en banc, but they do not share confidential information of this type with the attorneys representing the government.[4294]

4286. *Mohamed*, 614 F.3d at 1076; *Mohamed*, 539 F. Supp. 2d at 1130, 1132; Interview with Hon. James Ware, Sept. 24, 2010.

4287. Interview with Hon. James Ware, Sept. 24, 2010.

4288. *Id.*

4289. *Id.*

4290. *Id.*

4291. *Mohamed*, 614 F.3d at 1084 n.6; Docket Sheet, Mohamed v. Jeppesen Dataplan, Inc., No. 08-15693 (9th Cir. Mar. 31, 2008) (noting the lodging of classified materials with the three-judge panel on August 27, 2008, and with the en banc panel on November 13, 2009).

4292. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

4293. *Id.*

4294. *Id.*

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