

National Security Case Studies
Special Case-Management Challenges

Robert Timothy Reagan
Federal Judicial Center

November 14, 2011

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct research and education programs for the judicial branch. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

Table of Contents

Table of Challenges.....	ix
Table of Judges	xi
Introduction	1
First World Trade Center Bombing	
<i>United States v. Salameh (Kevin Thomas Duffy, S.D.N.Y.) and United States v. Abdel Rahman (Michael B. Mukasey, S.D.N.Y.)</i>	2
<i>Challenge: Court Security</i>	19
<i>Challenge: Jury Security</i>	19
<i>Challenge: Classified Evidence</i>	20
Burma	
<i>Horn v. Huddle (Royce C. Lamberth, D.D.C.)</i>	21
<i>Challenge: Classified Evidence</i>	23
<i>Challenge: Classified Arguments</i>	24
Kenya and Tanzania	
<i>United States v. El-Hage (Leonard B. Sand, Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)</i>	25
<i>Challenge: Attorney–Client Contacts</i>	39
<i>Challenge: Mental Health During Detention</i>	40
<i>Challenge: Jury Security</i>	42
<i>Challenge: Court Security</i>	42
<i>Challenge: Witness Security</i>	43
<i>Challenge: Religious Accommodation</i>	44
<i>Challenge: Classified Evidence</i>	44
<i>Challenge: Classified Arguments</i>	47
<i>Challenge: Classified Orders and Opinions</i>	47
<i>Challenge: Subpoenaing a Cabinet Officer</i>	48
Millennium Bomber	
<i>United States v. Ressam (John C. Coughenour, W.D. Wash.) and United States v. Haouari (John F. Keenan, S.D.N.Y.)</i>	49
<i>Challenge: Classified Evidence</i>	58
<i>Challenge: Examination of Foreign Witnesses</i>	58
<i>Challenge: Court Security</i>	59
<i>Challenge: Jury Security</i>	59
<i>Challenge: Witness Security</i>	59
Would-Be Spy	
<i>United States v. Regan (Gerald Bruce Lee, E.D. Va.)</i>	61
<i>Challenge: Classified Evidence</i>	62
Detroit	
<i>United States v. Koubriti (Gerald E. Rosen, E.D. Mich.)</i>	65
<i>Challenge: Jury Security</i>	70

<i>Challenge: Sanctioning a Cabinet Officer</i>	70
<i>Challenge: Classified Evidence</i>	72
Twentieth Hijacker	
<i>United States v. Moussaoui (Leonie M. Brinkema, E.D. Va.)</i>	73
<i>Challenge: Attorney Appointment</i>	83
<i>Challenge: Court Security</i>	83
<i>Challenge: Jury Security</i>	84
<i>Challenge: Classified Evidence</i>	84
<i>Challenge: Classified Arguments</i>	86
<i>Challenge: Closed Proceedings</i>	89
<i>Challenge: Classified Opinion</i>	89
<i>Challenge: Terrorist Communications</i>	90
American Taliban	
<i>United States v. Lindh (T.S. Ellis III, E.D. Va.)</i>	92
<i>Challenge: Protected National Security Information</i>	94
<i>Challenge: Classified Evidence</i>	96
<i>Challenge: Interviewing Guantánamo Bay Detainees</i>	96
<i>Challenge: Witness Security</i>	97
September 11 Damages	
<i>In re Terrorist Attacks on September 11, 2001 (Richard Conway Casey and George B. Daniels, S.D.N.Y.) and In re September 11 Litigation and Related Actions (Alvin K. Hellerstein, S.D.N.Y.)</i>	98
<i>Challenge: Service of Process on International Terrorists</i>	114
<i>Challenge: Classified Evidence</i>	114
<i>Challenge: Controlled Unclassified Information</i>	115
<i>Challenge: Witness Security</i>	117
Guantánamo Bay	
<i>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.)</i>	118
<i>Challenge: Attorney–Client Contacts</i>	177
<i>Challenge: Classified Evidence</i>	187
<i>Challenge: Protected Information</i>	194
<i>Challenge: Classified Arguments</i>	196
<i>Challenge: Closed Proceedings and Remote Participation</i>	198
<i>Challenge: Classified Orders and Opinions</i>	202
<i>Challenge: Mental and Physical Health During Detention</i>	207
<i>Challenge: Religious Accommodation</i>	211
<i>Challenge: Ordering Testimony from an Ambassador</i>	211

Dirty Bomber	
<i>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.)</i>	213
<i>Challenge: Attorney–Client Contacts</i>	221
<i>Challenge: Mental Health During Detention</i>	222
<i>Challenge: Classified Arguments</i>	223
<i>Challenge: Witness Security</i>	223
<i>Challenge: Court Security</i>	224
<i>Challenge: Jury Security</i>	224
<i>Challenge: Classified Evidence</i>	225
<i>Challenge: FISA Evidence</i>	226
Lackawanna	
<i>United States v. Goba (William M. Skretny and H. Kenneth Schroeder, Jr., W.D.N.Y.)</i>	227
<i>Challenge: Classified Evidence</i>	232
<i>Challenge: Court Security</i>	232
<i>Challenge: Religious Accommodation</i>	232
A Plot to Kill President Bush	
<i>United States v. Abu Ali (Gerald Bruce Lee, E.D. Va.)</i>	233
<i>Challenge: Examination of Foreign Witnesses and Witness Security</i>	235
<i>Challenge: Attorney–Client Contacts</i>	236
<i>Challenge: Classified Evidence</i>	236
<i>Challenge: Classified Arguments</i>	238
Paintball	
<i>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.)</i>	240
<i>Challenge: Classified Evidence</i>	247
<i>Challenge: Closed Proceedings</i>	248
<i>Challenge: Classified Arguments</i>	249
<i>Challenge: Attorney–Client Contacts</i>	249
<i>Challenge: Religious Accommodation</i>	249
Minneapolis	
<i>United States v. Warsame (John R. Tunheim, D. Minn.)</i>	250
<i>Challenge: Mental Health During Detention</i>	252
<i>Challenge: Attorney–Client Contacts</i>	252
<i>Challenge: Classified Evidence</i>	253
<i>Challenge: FISA Evidence</i>	254
Mistaken Rendition	
<i>El-Masri v. Tenet (T.S. Ellis III, E.D. Va.)</i>	255
<i>Challenge: Classified Arguments</i>	257

Detainee Documents	
<i>ACLU v. Department of Defense (Alvin K. Hellerstein, S.D.N.Y.)</i>	259
<i>Challenge: Classified Evidence</i>	262
Prosecution of a Charity	
<i>United States v. Holy Land Foundation (A. Joe Fish and Jorge A. Solis, N.D. Tex.)</i>	263
<i>Challenge: Classified Evidence</i>	269
<i>Challenge: FISA Evidence</i>	270
<i>Challenge: Witness Security</i>	271
<i>Challenge: Jury Security</i>	272
Chicago	
<i>United States v. Abu Marzook (Amy St. Eve, N.D. Ill.)</i>	273
<i>Challenge: Foreign Government Evidence</i>	279
<i>Challenge: Witness Security</i>	280
<i>Challenge: Classified Evidence</i>	281
<i>Challenge: Classified Arguments</i>	283
<i>Challenge: Classified Opinion</i>	283
<i>Challenge: Jury Security</i>	283
Giving State Secrets to Lobbyists	
<i>United States v. Franklin (T.S. Ellis III, E.D. Va.)</i>	284
<i>Challenge: Classified Evidence</i>	287
<i>Challenge: Subpoenaing a Cabinet Officer</i>	289
<i>Challenge: Classified Orders</i>	290
<i>Challenge: Closed Proceedings</i>	290
<i>Challenge: Classified Arguments</i>	291
Lodi	
<i>United States v. Hayat (Garland E. Burrell, Jr., E.D. Cal.)</i>	292
<i>Challenge: Classified Evidence</i>	296
Warrantless Wiretaps	
<i>Hepting v. AT&T, In re NSA Telecommunication Records Litigation, and Related Actions (Vaughn R. Walker, N.D. Cal.); Al Haramain Islamic Foundation v. Bush (Garr M. King, D. Or.); ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.); 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.)</i>	299
<i>Challenge: Classified Evidence</i>	322
<i>Challenge: Classified Arguments</i>	327
<i>Challenge: Classified Opinion</i>	341
<i>Challenge: Redacting Secrets</i>	342
<i>Challenge: Court-Appointed National Security Expert</i>	343

Toledo	
<i>United States v. Amawi and Related Actions (James G. Carr, N.D. Ohio)</i>	344
<i>Challenge: Attorney–Client Contacts</i>	348
<i>Challenge: FISA Evidence</i>	349
<i>Challenge: Court Security</i>	349
<i>Challenge: Jury Security</i>	350
Atlanta	
<i>United States v. Ahmed (Clarence Cooper, William S. Duffey, Jr., and Gerrilyn G. Brill, N.D. Ga.)</i>	351
<i>Challenge: Closed Proceeding</i>	356
<i>Challenge: Attorney Appointment</i>	356
<i>Challenge: Classified Evidence</i>	357
<i>Challenge: FISA Evidence</i>	358
Sears Tower	
<i>United States v. Batiste (Joan A. Lenard, S.D. Fla.)</i>	360
<i>Challenge: Classified Evidence</i>	363
<i>Challenge: Jury Security</i>	364
Fort Dix	
<i>United States v. Shnewer (Robert B. Kugler, D.N.J.)</i>	365
<i>Challenge: Classified Evidence</i>	369
<i>Challenge: FISA Evidence</i>	369
<i>Challenge: Classified Opinion</i>	370
<i>Challenge: Jury Security</i>	370
<i>Challenge: Court Security</i>	370
<i>Challenge: Attorney Appointment</i>	370
Torture Flights	
<i>Mohamed v. Jeppesen DataPlan, Inc. (James Ware, N.D. Cal.)</i>	372
<i>Challenge: Classified Arguments</i>	373

Table of Case-Management Challenges

Attorney Issues	
Attorney Appointment	83, 356, 370
Attorney–Client Contacts	39, 177, 221, 236, 249, 252, 348
Senior Government Officers	
Ordering Testimony from an Ambassador	211
Sanctioning a Cabinet Officer	70
Subpoenaing a Cabinet Officer	48, 289
Information Protection	
Classified Arguments	24, 47, 86, 196, 223, 238, 249, 257, 283, 291, 327, 373
Classified Evidence	20, 23, 44, 58, 62, 72, 84, 96, 114, 187, 225, 232, 236, 247, 253, 262, 269, 281, 287, 296, 322, 357, 363, 369
Classified Orders and Opinions	47, 89, 202, 283, 290, 341, 370
Closed Proceedings	89, 198, 248, 290, 356
Controlled Unclassified Information	115
Court-Appointed National Security Expert	343
FISA Evidence	226, 254, 270, 349, 358, 369
Interviewing Detainees	96
Protected Information	194
Protected National Security Information	94
Redacting Secrets	342
Remote Participation	198
Foreign Evidence	
Examination of Foreign Witnesses	58, 235
Foreign Government Evidence	279
Mental and Physical Health During Detention	40, 207, 222, 252
Physical Security	
Court Security	19, 42, 59, 83, 224, 232, 349, 370
Jury Security	19, 42, 59, 70, 84, 224, 272, 283, 350, 364, 370
Witness Security	43, 59, 97, 117, 223, 235, 271, 280
Religious Accommodation	44, 211, 232, 249
Terrorist Contacts	
Service of Process on International Terrorists	114
Terrorist Communications	90

Table of Judges

Batchelder, Alice M. (6th Cir.)	299
Bates, John D. (D.D.C.)	118
Brill, Gerrilyn G. (N.D. Ga.)	351
Brinkema, Leonie M. (E.D. Va.)	73, 240
Burrell, Garland E., Jr. (E.D. Cal.)	292
Cabranes, José A. (2d Cir.)	25
Cacheris, James C. (E.D. Va.)	240
Carr, James G. (N.D. Ohio)	344
Casey, Richard Conway (S.D.N.Y.)	98
Collyer, Rosemary M. (D.D.C.)	118
Cooke, Marcia G. (S.D. Fla.)	213
Cooper, Clarence (N.D. Ga.)	351
Coughenour, John C. (W.D. Wash.)	49
Daniels, George B. (S.D.N.Y.)	98
Duffey, William S., Jr. (N.D. Ga.)	351
Duffy, Kevin Thomas (S.D.N.Y.)	2, 25
Duncan, Allyson K. (4th Cir.)	255
Ellis, T.S., III (E.D. Va.)	92, 255, 284
Feinberg, Wilfred (2d Cir.)	25
Fish, A. Joe (N.D. Tex)	263
Floyd, Henry F. (D.S.C.)	213
Friedman, Paul L. (D.D.C.)	118
Gibbons, Julia Smith (6th Cir.)	299
Gilman, Ronald Lee (6th Cir.)	299
Green, Joyce Hens (D.D.C.)	118
Gregory, Roger L. (4th Cir.)	73, 284
Hawkins, Michael Daly (9th Cir.)	299
Hellerstein, Alvin (S.D.N.Y.)	98, 259
Hilton, Claude M. (E.D. Va.)	240
Hogan, Thomas F. (D.D.C.)	118, 299
Huvelle, Ellen Segal (D.D.C.)	118
Kaplan, Lewis A. (S.D.N.Y.)	25
Kay, Alan (D.D.C.)	118
Keenan, John F. (S.D.N.Y.)	49
Kennedy, Henry H., Jr. (D.D.C.)	118, 299

Kennelly, Matthew F. (N.D. Ill.)	299
Kessler, Gladys (D.D.C.)	118
King, Garr M. (D. Or.)	299
King, Robert B. (4th Cir.)	255, 284
Kollar-Kotelly, Colleen (D.D.C.)	118
Kugler, Robert B. (D.N.J.)	365
Lamberth, Royce C. (D.D.C.)	21, 118
Lee, Gerald Bruce (E.D. Va.)	61, 233
Lenard, Joan A. (S.D. Fla.)	360
Leon, Richard J. (D.D.C.)	118
Lynch, Gerard E. (S.D.N.Y.)	299
McKeown, M. Margaret (9th Cir.)	299
Motz, Diana Gribbon (4th Cir.)	233
Mukasey, Michael B. (S.D.N.Y.)	2, 213
Newman, Jon O. (2d Cir.)	25
Oberdorfer, Louis F. (D.D.C.)	118
Pregerson, Harry (9th Cir.)	299
Roberts, Richard W. (D.D.C.)	118
Robertson, James (D.D.C.)	118
Rosen, Gerald E. (E.D. Mich.)	65
St. Eve, Amy (N.D. Ill.)	273
Sand, Leonard B. (S.D.N.Y.)	25
Schroeder, H. Kenneth, Jr. (W.D.N.Y.)	227
Shedd, Dennis W. (4th Cir.)	73, 255, 284
Skretny, William M. (W.D.N.Y.)	227
Solis, Jorge A. (N.D. Tex)	263
Sullivan, Emmet G. (D.D.C.)	118
Taylor, Anna Diggs (E.D. Mich.)	299
Traxler, William B., Jr. (4th Cir.)	73, 233
Tunheim, John R. , (D. Minn.)	250
Urbina, Ricardo M. (D.D.C.)	118
Walker, Vaughn R. (N.D. Cal.)	299
Walton, Reggie B. (D.D.C.)	118
Ware, James. (N.D. Cal.)	372
Wilkins, William W. (4th Cir.)	73
Wilkinson, J. Harvie, III (4th Cir.)	233
Williams, Karen J. (4th Cir.)	73

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. The lessons learned from these case studies are summarized in *National Security Case Management: An Annotated Guide*, 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)

First World Trade Center Bombing

United States v. Salameh (Kevin Thomas Duffy, S.D.N.Y.) 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.¹

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 called “Camp Khaldan” on the border between Afghanistan and Pakistan.² He learned how to make bombs, and he met Ramzi Ahmed Yousef.³ On September 1, 1992, Ajaj and Yousef entered the United States using false identities.⁴ Ajaj’s passport was discovered to be a forgery.⁵ 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.⁶ Yousef was stopped for traveling on an Iraqi passport without a visa but released on his own recognizance because the detention center was full.⁷

In the United States, Yousef assembled a conspiracy of terrorists.⁸ 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

1. 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-Gabrowni*, 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-Gabrowni*, 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 Airlines*, N.Y. Times, Sept. 6, 1996, at 1.

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

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

4. 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 1; 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 1.

5. *Salameh*, 152 F.3d at 107; *Salameh*, 54 F. Supp. 2d at 246, 294; *see* Blumenthal, *supra* note 1.

6. *Salameh*, 152 F.3d at 107, 109, 118–20 (noting an Oct. 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 Jan. 13, 1993); *see* Blumenthal, *supra* note 1; Tabor, *supra* note 4.

7. *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 1.

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

stored explosive materials.⁹ Nidal Ayyad, a chemical engineer, acquired the explosives.¹⁰

On February 23, 1993, Salameh rented a Ryder van, which the conspirators loaded with explosive materials.¹¹ 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.¹²

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.¹³ His DNA was found on the New York Times envelope, and a draft of the letter to the Times was found on his computer.¹⁴

Investigators discovered the van's vehicle identification number in the bomb's debris.¹⁵ 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.¹⁶

9. *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 1; 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*].

10. 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 9; Mitchell, *Engineer Held*, *supra* note 9.

11. *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 1; 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.

12. *Yousef*, 327 F.3d at 79, 135; *Salameh*, 152 F.3d at 108; see Bernstein, *supra* note 9; Blumenthal, *supra* note 1; Wren, *supra* note 1; 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).

13. *Salameh*, 152 F.3d at 108; *Salameh*, 54 F. Supp. 2d at 247; see Bernstein, *supra* note 9; 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 1; Alison Mitchell, *Letter Explained Motive in Bombing, Officials Now Say*, N.Y. Times, Mar. 28, 1993, at 11.

14. *Salameh*, 152 F.3d at 129; *Salameh*, 54 F. Supp. 2d at 247; see Blumenthal, *supra* note 1; Mary B.W. Tabor, *Questions Linger in Explosion Case*, N.Y. Times, Sept. 14, 1993, at B1.

15. *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 1; Blumenthal, *Insistence on Refund*, *supra* note 11; McFadden, *supra* note 11.

16. 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 9; Blumenthal, *supra* note 1; Blumenthal, *Insistence on Refund*, *supra* note 11; McFadden, *supra* note 9; McFadden, *supra* note 11.

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

Abouhalima fled to Egypt after the explosion, and he was arrested by Egyptian authorities on March 13.¹⁷ He was returned to the United States on March 25.¹⁸

Yousef and Abdul Rahman Yasin, another conspirator, also fled the country.¹⁹ It was not until February 7, 1995, that Yousef was captured in Pakistan.²⁰ Ismoil was apprehended in Jordan on July 30, 1995.²¹ Yasin, who was questioned but released by the FBI after the bombing, remains a fugitive.²²

Ajaj was released from his six-month sentence on March 1, 1993.²³ On March 9, he was rearrested on an immigration detainer.²⁴

Salameh and Ayyad were indicted in the Southern District of New York on March 17, 1993.²⁵ The district court assigned the case to Judge Kevin Thomas Duffy.²⁶ On March 31, a superseding indictment added Abouhalima and Yousef

rented van for a bombing would let himself be seen repeatedly by witnesses.” McFadden, *supra* note 9.

17. *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.

18. See Mitchell, *supra* note 17.

19. The 9/11 Commission Report 72 (2004); *Salameh*, 152 F.3d at 108, 135; see Tabor, *supra* note 14 (reporting the government’s offering \$2 million rewards each for Yousef and Yasin); Wren, *supra* note 1.

20. *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; James C. McKinley, Jr., *Suspected Bombing Leader Indicted on Broader Charges*, N.Y. Times, Apr. 14, 1995, at 3; Wren, *supra* note 1 (reporting that, “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.”).

21. *Yousef*, 327 F.3d at 79, 135; *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 Aug. 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.

22. *Salameh*, 152 F.3d at 108 n.2; *Salameh*, 54 F. Supp. 2d at 254; 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).

23. *Salameh*, 152 F.3d at 108; see Tabor, *supra* note 4.

24. *Salameh*, 152 F.3d at 108; see Tabor, *supra* note 4.

25. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; 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 9 (reporting on Ayyad’s Mar. 10, 1993, arrest).

26. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Mary B.W. Tabor, *As Trial Is Set in Explosion, Hunt Widens*, N.Y. Times, Apr. 2, 1993, at B1.

Tim Reagan interviewed Meghan Silhan, Judge Duffy’s law clerk, by telephone on July 23, 2007.

as defendants.²⁷ The next day, the court ordered the parties and their attorneys not to discuss publicly anything related to the case.²⁸ The court of appeals vacated this gag order as overbroad on April 30.²⁹

Bilal Alkaysi turned himself in on March 24, 1993,³⁰ and a second superseding indictment added him as a defendant on April 7.³¹ Because evidence against him was weaker than evidence against the others, his prosecution was severed.³² On May 9, 1994, he pleaded guilty to an immigration violation and agreed to be deported.³³ 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.³⁴

A third superseding indictment added Ajaj as a defendant on May 26, 1993.³⁵ A fourth superseding indictment added the fugitive Yasin as a defendant on August 4.³⁶ Salameh, Ayyad, Abouhalima, Ajaj, Yousef, and Yasin were named as defendants in a fifth superseding indictment filed on September 1.³⁷

Jury selection in the trial against Salameh, Ayyad, Abouhalima, and Ajaj began on September 14.³⁸ The court issued 5,000 extra jury summonses to assemble

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).

27. *United States v. Yousef*, 327 F.3d 56, 135 (2d Cir. 2003); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Ralph Blumenthal, *Missing Suspect Charged in Trade Center Bombing*, N.Y. Times, Apr. 1, 1993, at B3.

28. *United States v. Salameh*, 992 F. 2d 445, 446 (2d Cir. 1993); *see* Tabor, *supra* note 26.

29. *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.

30. *See* Blumenthal, *supra* note 1; Mitchell, *supra* note 17.

31. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21.

32. *See* Bernstein, *supra* note 9; Mitchell, *supra* note 22; Tabor, *supra* note 14; 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 Alkaysi was filed on May 9, 1994. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21.

33. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Tabor, *Plea Bargain*, *supra* note 32.

34. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Ronald Sullivan, *Bombing Figure Gets 20 Months for an Immigration Violation*, N.Y. Times, July 14, 1994.

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

35. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Mitchell, *U.S. Widens Charges*, *supra* note 9.

36. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Mitchell, *supra* note 22.

37. *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998); S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21.

38. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; *see* Ralph Blumenthal, *Jury Selection Starts in World Trade Center Case*, N.Y. Times, Sept. 15, 1993, at B1; Tabor, *supra* note 14.

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 26, at 23–24.

a jury pool for the case.³⁹ Opening arguments began on October 5.⁴⁰ The jury began its deliberations on February 23, 1994, and convicted the defendants on March 4.⁴¹

Between conviction and sentencing, the defendants dismissed their attorneys.⁴² Salameh, Abouhalima, and Ajaj sought to hire as sentencing attorneys the law firm representing other defendants in a related trial, which is described below.⁴³ Judge Duffy ruled that this would present an unacceptable conflict,⁴⁴ so the four defendants appeared at sentencing pro se.⁴⁵

On May 24, 1994, the court sentenced each of the four defendants to 240 years in prison.⁴⁶ 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.⁴⁷

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.⁴⁸ Judge Duffy resentenced the defendants in October 1999 to prison terms ranging from 108 years and four months to 117 years and one month.⁴⁹ 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

39. See Blumenthal, *supra* note 38; Mary B.W. Tabor, *Jury Pool to Be Expanded by 5,000 for Trade Center Trial*, N.Y. Times, Sept. 3, 1993, at B1.

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

41. *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 21; see Bernstein, *supra* note 9; Richard Bernstein, *Jurors Begin Deliberations in Blast Case*, N.Y. Times, Feb. 24, 1994, at B1; Wren, *supra* note 1.

42. *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.

43. *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-Gabrowni 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 42; Gross, *supra* note 26, at 10.

44. *Salameh*, 856 F. Supp. 781; see Gross, *supra* note 26, 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.

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

46. *Id.* at 108; *Salameh*, 856 F. Supp. at 782; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. Times, May 25, 1994, at A1; Gross, *supra* note 26, at 10–11; Wren, *supra* note 1.

47. See Bernstein, *supra* note 46; Gross, *supra* note 26, at 11.

48. *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 26, at 11.

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

by the jury, which had made no such determination in this case.⁵⁰ On August 6, 2001, the court of appeals affirmed.⁵¹

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.⁵²

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.⁵³ 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.⁵⁴ Agents found el-Gabrowny near his home, and he was belligerent when frisked.⁵⁵ He was discovered to have fraudulent Nicaraguan passports for Nosair and Nosair's family.⁵⁶

El-Gabrowny was indicted for assault in the Southern District of New York on March 17.⁵⁷ The court assigned the case to Judge Michael B. Mukasey,⁵⁸ who tried to conduct this case as much like other criminal trials as possible.⁵⁹

50. *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 21 (same); *see* 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).

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

52. *In re* World Trade Ctr. Bombing Litig., ___ N.Y. ___, ___ N.E.2d ___, 2011 WL 4387517 (2011); *see id.* at ___, ___ N.E.2d at ___ (p.23 of filed opinion) (“We . . . hold that the Port Authority acted within its governmental capacity 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.

53. 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 1.

It was reported that Salameh failed four attempts to get a New Jersey driver's license using his own address. Blumenthal, *supra* note 1.

54. *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.

55. *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 11; Alison Mitchell, *Suspect in Bombing Is Linked to Sect with a Violent Voice*, N.Y. Times, Mar. 5, 1993, at A1.

56. *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 1; McFadden, *supra* note 9.

57. *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

Nosair was in prison on a sentence of 7½ 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 Kahane made in New York City.⁶⁰ There was evidence that projectiles found in the room where Kahane and others were shot came from Nosair’s gun, but he was acquitted of the murder.⁶¹

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.⁶² Salem met el-Gabrownny at the trial of Nosair, who was el-Gabrownny’s cousin.⁶³

filing of a superseding indictment against El-Gabrownny on May 19, 1993); *see* Blumenthal, *supra* note 25.

58. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57.

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/public/home.nsf/hisj>; *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.

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

60. *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 1; McFadden, *supra* note 9; John T. McQuiston, *Kahane Is Killed After Giving Talk in New York Hotel*, N.Y. Times, Nov. 6, 1990, at A1; Mitchell, *supra* note 55; Ronald Sullivan, *Judge Gives Maximum Term in Kahane Case*, N.Y. Times, Jan. 30, 1992, at A1.

61. *Rahman*, 189 F.3d at 105 & n.3; *Rahman*, 861 F. Supp. at 270; *see* Blumenthal, *supra* note 1; 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 9; McFadden, *supra* note 11; Mitchell, *supra* note 55; Selwyn Raab, *Jury Acquits Defendant in Kahane Trial*, N.Y. Times, Dec. 22, 1991, at 136; Tabor, *supra* note 14.

Nosair shot and was shot by a postal police officer at the scene, Carlos Acosta. *Rahman*, 189 F.3d at 105. 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).

62. *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); 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 55 (describing Abdel Rahman as “blind, with one eye without a pupil, the other an empty socket”); *see also* Mary B.W. Tabor, *Informer’s Ex-Wife Said He Warned of Ter-*

Abdel Rahman was tried, but acquitted, in Egypt as an accomplice in the October 6, 1981, murder of President Anwar el-Sadat.⁶⁴ He illegally entered the United States in 1990 and faced a deportation order at the time of the World Trade Center bombing.⁶⁵ His followers plotted to assassinate Egypt's president, Hosni Mubarak, during a March 1993 visit to the United Nations in New York City.⁶⁶ Siddig Ibrahim Siddig Ali obtained Mubarak's itinerary from a source in the Sudanese government.⁶⁷ 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.⁶⁸

Siddig Ali and Clement Rodney Hampton-El led paramilitary training on weekends between October 1992 and February 1993.⁶⁹ Participants included Amir and Fadil Abdelgani and Tarig Elhassan, as well as the Egyptian spy Haggag.⁷⁰ The training was for jihad, perhaps in Bosnia.⁷¹ 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.⁷²

In May 2003, the informant Salem persuaded Siddig Ali to establish a bomb-making safehouse where the FBI had installed surveillance equipment.⁷³

rorism, 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").

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

64. 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 9; McFadden, *supra* note 11; Mitchell, *supra* note 55; Tabor, *supra* note 14; see also The 9/11 Commission Report 56 (2004) (Abdel Rahman's "preaching had 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.

65. 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 11; Mitchell, *supra* note 55; see also Soufan, *supra* note 64, 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).

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

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

68. *Id.*

69. *Id.* at 107.

70. *Id.*

71. *Id.*

72. *Id.* at 105.

73. *Id.* at 109; see Mitchell, *Egyptian Informer*, *supra* note 62.

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.⁷⁴

On June 13, 1993, Fares Khallafalla and the informant Salem purchased timers for bombs.⁷⁵ On June 19 and 21, Amir Abdelgani, Victor Alvarez, and Salem unsuccessfully tried to steal cars to use as both bomb-delivery and getaway vehicles.⁷⁶ 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 Abdelgani to use for making bombs.⁷⁷

A couple of hours after midnight on June 24, 1993, the FBI raided the safe-house and arrested Siddig Ali, Amir and Fadil Abdelgani, Elhassan, and Alvarez while they were mixing explosive chemicals.⁷⁸ Hampton-El, Saleh, and Khallafalla were arrested at their homes in Flatbush, Yonkers, and Jersey City, respectively.⁷⁹

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.⁸⁰ But after his van evaded federal agents following him on June 30, the government decided to arrest him on an immigration detainer.⁸¹ A negotiated surrender was agreed on for July 3.⁸²

On July 14, the indictment against el-Gabrownny 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."⁸³ Abdel Rahman, Nosair, Haggag, and Mohammed Abouhalima, the brother of World Trade Center bomber

74. *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; 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.

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

76. *Id.*; see McFadden, *supra* note 74.

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

78. *Id.* at 111; see McFadden, *supra* note 74.

79. *Rahman*, 189 F.3d at 111; see McFadden, *supra* note 74.

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

81. *See id.*

82. *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. *Bombing Defendant to Be Tried in Egypt*, N.Y. Times, Oct. 22, 1993, at B3; *Egyptian Court Sentences Absent Sheikh to Prison*, N.Y. Times, Apr. 29, 1994, at B3.

83. *United States v. Rahman*, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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 62.

Mahmoud Abouhalima, were added as defendants by superseding indictment on August 25.⁸⁴

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, 1994.⁸⁵ He was sentenced on July 20, 1994, to time served, with three years of supervised release.⁸⁶

“Wahid” turned out to be Matarawy Mohammed Said Saleh, who was arrested on July 22, 1993, and who is not related to co-defendant Mohammed Saleh.⁸⁷ Because prosecutors determined that Wahid joined the conspiracy only hours before the government began arresting co-defendants, he pleaded guilty and was sentenced on December 19, 1995, to time served, with three years of supervised release.⁸⁸

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.⁸⁹

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.⁹⁰

84. *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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.

85. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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.

86. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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).

87. 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.

88. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Fried, *supra* note 87.

89. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57 (noting sentencing in Feb. 1996); see Joseph P. Fried, *In Plea Deal, Jerseyan to Testify in Terror Trial*, N.Y. Times, May 2, 1995, at 5.

90. *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-Gabrownny*, 844 F. Supp. 955, 957 (S.D.N.Y. 1994); see Tabor, *supra* note 84.

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.

Famed defender of the unpopular William M. Kunstler and his partner, Ronald L. Kuby, represented el-Gabrownny.⁹¹ When the indictment was superseded to include Siddig Ali and others as defendants, Kunstler and Kuby appeared for both el-Gabrownny and Siddig Ali.⁹² Judge Mukasey sought to ensure that a conflict-of-interest waiver by the defendants was knowing.⁹³

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-Gabrownny and Siddig Ali, to explain to them the hazards of joint representation

...

. . . [B]oth defendants said they had understood the explanations of possible conflicts, and both expressed the desire to be represented by the Kunstler firm.⁹⁴

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.⁹⁵

Warren and Kunstler represented Nosair at his state murder trial,⁹⁶ and Warren appeared for el-Gabrownny at el-Gabrownny’s first appearance following the filing of a criminal complaint and preceding the filing of the indictment.⁹⁷ Judge Muka-

91. *United States v. Rahman*, 837 F. Supp. 64, 65 (S.D.N.Y. 1993); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see David Margolick, *Still Radical After All These Years*, N.Y. Times, July 6, 1993, at B1.

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*.

92. *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57.

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

94. *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.”).

95. *Rahman*, 861 F. Supp. at 271; *Rahman*, 837 F. Supp. at 67; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57.

96. See Selwyn Raab, *Jury Selection Seen as Crucial to Verdict*, N.Y. Times, Dec. 23, 1991, at B8.

97. *Rahman*, 861 F. Supp. at 270; *Rahman*, 837 F. Supp. at 65; S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57 (noting the filing of a criminal complaint against El-Gabrownny on Mar. 5, 1993, and the filing of an indictment against El-Gabrownny on Mar. 17, 1993).

sey denied Nosair's application to name Warren as his appointed attorney in this federal trial as an exception to regular Criminal Justice Act procedures.⁹⁸ Judge Mukasey assigned Nosair a CJA panel attorney.⁹⁹

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.¹⁰⁰ The government moved to disqualify the Kunstler firm from representing more than one defendant.¹⁰¹ On November 9, 1993, Judge Mukasey ruled that the firm could either represent el-Gabrownny and Siddig Ali, as they had, or Abdel Rahman, but not all three.¹⁰² Abdel Rahman opted to represent himself, and the court appointed a panel attorney to assist him.¹⁰³ By the time the trial commenced, he was represented by Lynne Stewart,¹⁰⁴ who had represented Ajaj at Ajaj's arraignment in the bombing case.¹⁰⁵

On February 8, 1994, Mohammed Abouhalima, the brother of World Trade Center bombing defendant Mahmud Abouhalima, was released in a sealed proceeding.¹⁰⁶ But he was indicted on September 18, 1996, for aiding his brother's

98. United States v. Rahman, No. 1:93-cr-181, 1993 WL 340992 (S.D.N.Y. Sept. 3, 1993); see Gross, *supra* note 26, at 8.

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 26, at 8.

99. Rahman, 861 F. Supp. at 270; S.D.N.Y. Abdel Rahman Docket Sheet, *supra* note 57.

100. 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 26, 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).

101. Rahman, 861 F. Supp. at 271; Rahman, 837 F. Supp. at 65.

102. 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.

103. 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.

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.

Gross, *supra* note 26, at 4 (reporting on an interview with Judge Mukasey).

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

104. See Bernstein, *supra* note 62; Gross, *supra* note 26, at 4 ("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.").

105. See Tabor, *supra* note 4.

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

escape.¹⁰⁷ He was convicted on May 28, 1997, and sentenced on November 24, 1998, to eight years in prison.¹⁰⁸

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.¹⁰⁹ 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 what evidence the attorney could offer at trial, and Siddig Ali asked to be represented by the Kunstler firm again.¹¹⁰ The government objected.¹¹¹ Judge Mukasey ruled that Kunstler and Kuby could no longer represent Siddig Ali.¹¹² 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-Gabrownny so serious as to disqualify it from representing el-Gabrownny as well.¹¹³ Kunstler died on Labor Day, September 4, 1995, the day before closing arguments began in the trial.¹¹⁴

Voir dire began on January 9, 1995.¹¹⁵ To facilitate jury selection, Judge Mukasey used a jury questionnaire, which he had seldom done before, and he found it very helpful.¹¹⁶ Judge Mukasey used an anonymous jury and conducted post-

107. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Joseph P. Fried, *U.S. Says Man Helped Brother Flee in Trade Center Bombing*, N.Y. Times, Sept. 19, 1996, at 8.

108. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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).

109. *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.

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

111. *Id.* at 267-68.

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

113. *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.

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

115. *United States v. Abouhalima*, 961 F. Supp. 78, 80 (S.D.N.Y. 1997); S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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).

116. 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.

questionnaire voir dire in a conference room with the press represented by two reporters—one from print and one from electronic media.¹¹⁷

Opening statements commenced on January 30.¹¹⁸ 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.¹¹⁹ For example, it was important for the jury to understand up front that seditious conspiracy did not necessarily include an intent to overthrow the government.¹²⁰ As was his general practice, Judge Mukasey permitted jurors to take notes.¹²¹

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.¹²² 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.¹²³

Judge Mukasey conducted the nine-month trial four days per week.¹²⁴ A brief experience with five days per week fatigued all participants without moving things along noticeably faster.¹²⁵ Both Arabic and Spanish interpreters were required.¹²⁶

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.¹²⁷ Judge Mukasey permitted the jurors to consult news of the event, but admonished them not to let it influence them in the trial.¹²⁸

On October 1, 1995, the jury convicted el-Gabrownny, 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.¹²⁹ On January 17, 1996, Judge Mukasey sentenced Abdel

Gross, *supra* note 26, at 22–23.

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

118. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Bernstein, *supra* note 62.

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

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

121. *Id.*

122. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Richard Bernstein, *Bomb Plot Defendant Shifts Plea to Guilty and Implicates Others*, N.Y. Times, Feb. 7, 1995, at 1.

123. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Benjamin Weiser, *Remorseful Terror Conspirator Gets an 11-Year Sentence*, N.Y. Times, Oct. 16, 1999, at B6.

124. 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”).

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

126. *Id.*

127. 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.

128. 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.

129. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; 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).

Rahman and Nosair to life in prison and sentenced the other eight defendants as follows: el-Gabrownny to 57 years; Alvarez, Elhassan, Hampton-El, and Saleh to 35 years; Amir Abdelgani and Khallafalla to 30 years; and Fadil Abdelghani to 25 years.¹³⁰

On August 16, 1999, the court of appeals affirmed the convictions and largely affirmed the sentences, remanding for a reconsideration of el-Gabrownny's sentence.¹³¹ On remand, Judge Mukasey sentenced el-Gabrownny to 33 years,¹³² which the court of appeals affirmed.¹³³

A Plot to Bomb Airplanes

In the summer of 1994, Yousef moved to Manila, Philippines.¹³⁴ There, he launched a conspiracy to bomb U.S. airliners serving routes in southeast Asia.¹³⁵ To test their methods, Yousef and Wali Khan Amin Shah bombed a Manila movie theater on December 1, 1994, injuring several moviegoers.¹³⁶ On December 11, Yousef planted a nitroglycerine bomb under a passenger seat during the first leg of a Philippine Airlines flight from Manila to Tokyo.¹³⁷ 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.¹³⁸

Yousef and his high school friend, Abdul Hakim Murad, were burning 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.¹³⁹

130. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57; see Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. Times, Jan. 18, 1996, at 1; Wren, *supra* note 1.

On July 23, 2010, Magistrate Judge Kevin Nathaniel Fox agreed to appoint habeas counsel for Nosair. Order, *Nosair v. United States*, No. 1:00-cv-8383 (S.D.N.Y. July 23, 2010); see Benjamin Weiser, *Convicted Qaeda Agent Seeks Retrial in '95 Case*, N.Y. Times, June 13, 2011, at A21.

131. *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.

132. S.D.N.Y. *Abdel Rahman* Docket Sheet, *supra* note 57.

133. *United States v. Elgabrownny*, 10 F. App'x 23 (2d Cir. 2001).

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

135. The 9/11 Commission Report 147 (2004) (noting that the plan became known as the “Bojinka” plot); *Yousef*, 327 F.3d at 79–80; 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).

136. The 9/11 Commission Report 147 (2004); *Yousef*, 327 F.3d at 79, 81; see Wren, *supra* note 1.

137. 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 McKinley, *supra* note 20; Wren, *supra* note 1.

138. *Yousef*, 327 F.3d at 79, 81; *Yousef*, 927 F. Supp. at 675; see McKinley, *supra* note 20; Wren, *supra* note 1.

139. *Yousef*, 327 F.3d at 79, 81; see McKinley, *supra* note 20; 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 135, at 24; Wren, *supra* note 1.

Philippine authorities arrested Murad on January 7, and he was transported to the Southern District of New York on April 12.¹⁴⁰ 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.¹⁴¹

Philippine authorities arrested Shah on January 11, but he escaped.¹⁴² He was recaptured by Malaysian authorities in December 1995 and flown to New York on December 12.¹⁴³

Yousef fled the Philippines but was turned in by an accomplice to authorities in Islamabad, Pakistan, on February 7, 1995.¹⁴⁴ He was transported to the Southern District of New York on February 8.¹⁴⁵ En route, he confessed to an intention to topple one of the World Trade Center towers into the other.¹⁴⁶

A jury trial against Yousef, Murad, and Shah for conspiracy to bomb airliners began with jury selection on May 13, 1996.¹⁴⁷ Yousef asked to address the jury during opening arguments, and Judge Duffy said that if he did he would have to act as his own lawyer throughout the trial.¹⁴⁸ Yousef and Judge Duffy agreed that he would do this.¹⁴⁹ All three defendants were convicted on September 5, the fourth day of deliberation.¹⁵⁰

140. *Yousef*, 327 F.3d at 79, 81; *United States v. Yousef*, 925 F. Supp. 1069 (S.D.N.Y. 1996); see McKinley, *supra* note 20.

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

142. *Id.* at 79, 82; see 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.

143. *Yousef*, 327 F.3d at 79, 82; see McKinley, *supra* note 142.

144. 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 20; McKinley, *supra* note 20; Temple-Raston, *supra* note 135, at 24; Wren, *supra* note 1.

145. *Yousef*, 327 F.3d at 82; *Yousef*, 925 F. Supp. at 1065; see S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21 (noting Yousef's not guilty plea on Feb. 9, 1995); see also Johnston, *supra* note 20; Wren, *supra* note 1.

146. See Benjamin Weiser, *Suspect's Confession Cited as Bombing Trial Opens*, N.Y. Times, Aug. 6, 1997, at B6.

147. *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 21 (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*].

148. See Gross, *supra* note 26, at 5; Christopher S. Wren, *Plot of Terror in the Skies Is Outlined by a Prosecutor*, N.Y. Times, May 30, 1996, at 3.

149. See Gross, *supra* note 26, 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 1; Christopher S. Wren, *With Judge's Gentle Help, Terror Suspect Starts Case*, N.Y. Times, Aug. 22, 1996, at 1.

150. *Yousef*, 327 F.3d at 85; see Wren, *supra* note 1.

A jury trial against Yousef and Ismoil for involvement in the bombing of the World Trade Center began with jury selection on July 15, 1997.¹⁵¹ This time, Yousef let a lawyer represent him.¹⁵² Both were convicted on November 12.¹⁵³

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.¹⁵⁴ At his sentencing, Yousef proclaimed, “I am a terrorist and I am proud of it.”¹⁵⁵ 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.¹⁵⁶ The court of appeals affirmed the convictions and sentences on April 4, 2003.¹⁵⁷ On October 8, 2004, Judge Duffy sentenced Shah to 30 years.¹⁵⁸

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: Khalid Sheikh Mohammed (KSM), Mustafa Ahmed al-Hawsawi, Ramzi Bin al-Shibh, Walid Bin Attash, and Ali Abdul Aziz Ali.¹⁵⁹ Eric H. Holder, President Obama’s attorney general, announced on November 13, 2009, that the men

151. *Yousef*, 327 F.3d at 77–78, 80; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see *Jury Selection Begins in Trade Center Trial*, N.Y. Times, July 16, 1997, at B2.

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

153. *Yousef*, 327 F.3d at 80, 137; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Benjamin Weiser, “*Mastermind*” and *Driver Found Guilty in 1993 Plot to Blow Up Trade Center*, N.Y. Times, Nov. 13, 1997, at A1.

154. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; see Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. Times, Jan. 9, 1998, at A1.

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).

155. See Weiser, *supra* note 154.

156. *Yousef*, 327 F.3d at 80, 85, 135; S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21; 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.

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

158. S.D.N.Y. *Salameh* Docket Sheet, *supra* note 21.

159. 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.

would be tried in the Southern District of New York instead.¹⁶⁰ Their sealed December 14 indictment was added to the indictment for the 1993 World Trade Center bombing.¹⁶¹ Magistrate Judge James C. Francis IV granted the government's request to both seal the indictment and keep it off the case's docket.¹⁶² 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.¹⁶³

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,¹⁶⁴ so the government obtained a dismissal of the superseding indictment in favor of renewed military tribunal prosecutions.¹⁶⁵

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.¹⁶⁶

Challenge: Jury Security

Both Judge Duffy and Judge Mukasey used anonymous juries for the jurors' protection.¹⁶⁷ To protect the jurors' safety and anonymity, they did not report directly

160. 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.

161. 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.

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

163. Affirmation at 2, *Salameh*, No. 1:93-cr-180 (S.D.N.Y. Dec. 14, 2009, filed Apr. 4, 2011).

164. Pub. L. No. 111-383, 124 Stat. 4351, § 1032 (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.

165. *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.

166. See *Judge Dismisses 75*, *supra* note 147.

167. Michael B. Mukasey, *United States v. Abdel Rahman: Preliminary Voir Dire* (Jan. 9, 1995) [hereinafter Mukasey Preliminary Voir Dire]; see Bernstein, *supra* note 9; Blumenthal, *supra* note 38; Gross, *supra* note 26, 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."); Tabor, *supra* note 39; Wren,

to the courthouse but to secret locations from which deputy marshals transported them to court.¹⁶⁸ When an alternate juror's anonymity became at risk in the last trial, Judge Duffy dismissed the juror.¹⁶⁹

Because of the anticipated lengths of the trials, Judge Duffy decided not to sequester the juries.¹⁷⁰ 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.¹⁷¹

Both Judge Duffy and Judge Mukasey sought to provide the jurors with extra comforts, such as meals and beverages.¹⁷²

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).¹⁷³ Judge Mukasey kept the exhibits in a safe while he considered whether they had to be produced.¹⁷⁴ 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.¹⁷⁵

supra note 1 (“After the [first Yousef] trial ended, the jurors were whisked away in three vans before reporters could approach them.”).

168. Mukasey Preliminary Voir Dire, *supra* note 167; Interview with Michael B. Mukasey, June 25, 2007; Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007.

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

170. Interview with Meghan Silhan, law clerk to Hon. Kevin Thomas Duffy, July 23, 2007; see Bernstein, *supra* note 9; Tabor, *supra* note 39.

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

172. Mukasey Preliminary Voir Dire, *supra* note 167; see Benjamin Weiser, *Bomb Trial Judge Tries to Put the Jury at Ease*, N.Y. Times, Aug. 10, 1997, at 131.

173. *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 26, at 37; see also 18 U.S.C. app. 3; Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers* (2007).

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

175. *Rahman*, 870 F. Supp. 47; see Gross, *supra* note 26, at 37 (reporting that only one of the six documents had to be disclosed); Liptak, *supra* note 124 (“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.”).

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.¹⁷⁶ The U.S. District Court for the District of Columbia assigned the Case to Judge Harold H. Greene.¹⁷⁷

The complaint alleged that Horn "made substantial progress working in concert with the Burmese government to improve its performances in addressing major drug issues."¹⁷⁸ Because of a "political and personal agenda to thwart and undermine DEA's mission in Burma,"¹⁷⁹ 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."¹⁸⁰

A week after the complaint was filed, the government moved to seal the case in order to protect classified information from public disclosure.¹⁸¹ Judge Greene granted the motion on August 29.¹⁸²

On September 12, 1996, Horn filed a class action complaint alleging a pattern and practice of illegal surveillance of DEA agents,¹⁸³ and that case, which remains sealed,¹⁸⁴ was dismissed in 2000.¹⁸⁵

176. 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.

177. *Horn v. Huddle* Complaint, *supra* note 176.

178. *Id.* at 6.

179. *Id.* at 3.

180. *Id.* at 6.

181. 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).

182. Order, *id.* (Aug. 30, 1994, refiled June 9, 2009); see *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009).

183. *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).

184. 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).

185. *In re Sealed Case*, 494 F.3d 139, 141 n.1 (D.C. Cir. 2007).

Horn's *Bivens* action¹⁸⁶ claimed surveillance, in violation of the Fourth Amendment, conducted to facilitate a transfer of Horn out of Burma.¹⁸⁷ On February 10, 1997, Judge Greene denied the government's motion to dismiss.¹⁸⁸ In 1999, Judge Royce C. Lamberth assumed responsibility for the case because of Judge Greene's illness and death.¹⁸⁹

On July 28, 2004, Judge Lamberth granted the government's motion to dismiss the case on state-secrets grounds.¹⁹⁰ On June 29, 2007, the court of appeals reversed, in part.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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,"¹⁹⁴ 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.¹⁹⁵

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

186. *See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

187. *In re Sealed Case*, 494 F.3d at 141; *see Scarcella, supra* note 176 ("Horn was moved to a DEA office in New Orleans in 1993").

188. Opinion, *Horn*, No. 1:94-cv-1756 (Feb. 10, 1997, refiled June 9, 2009).

189. *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/public/home.nsf/hisj> (noting Jan. 29, 2000, as the date of death); *see Scarcella, supra* note 176.

Tim Reagan interviewed Judge Lamberth for this report in the judge's chambers on May 13, 2011.

190. 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 176; *Too Secret? Rethinking Government Classification*, The Kojo Nnamdi Show (WAMU radio broadcast Aug. 15, 2011) [hereinafter *Too Secret?*].

191. *In re Sealed Case*, 494 F.3d 139; *see Scarcella, supra* note 176.

192. *In re Sealed Case*, 494 F.3d 139; *see Horn*, 636 F. Supp. 2d at 13–14 & n.2; *see Too Secret?*, *supra* note 190.

193. *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 176.

"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 190; *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).

194. Jan. 15, 2009, Opinion, *supra* note 193, at 5; *see Horn*, 636 F. Supp. 2d at 15; *see also Scarcella, supra* note 176.

195. Jan. 15, 2009, Opinion, *supra* note 193, at 12–13; *see Horn*, 636 F. Supp. 2d at 15.

been brought to the attention of the court of appeals,¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ On June 9, 2009, the case was unsealed and public versions of all documents filed before then were added to the case file.¹⁹⁹

On October 26, the case settled for \$3 million.²⁰⁰ In cooperation with the Attorney General, Judge Lamberth referred the evidence of possible misconduct by CIA lawyers to the House of Representatives Intelligence Committee.²⁰¹

Challenge: Classified Evidence

Judge Lamberth decided to apply to this civil case the principles of the Classified Information Procedures Act (CIPA),²⁰² which technically only applies to criminal cases.²⁰³ 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.²⁰⁴

The government appealed,²⁰⁵ 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.”²⁰⁶

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 other-

196. *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 193, at 5–6.

197. *Horn*, 636 F. Supp. 2d at 13–14 n.2; Feb. 6, 2009, Opinion, *supra* note 196.

Although Judge Lamberth had been told that Brown's name would forever be classified, his 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.

198. *Horn v. Huddle*, 636 F. Supp. 2d 20, 21 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14.

199. *Horn*, 636 F. Supp. 2d at 21.

200. *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.

201. Interview with Hon. Royce C. Lamberth, May 13, 2011.

202. 18 U.S.C. app. 3.

203. *Horn v. Huddle*, 647 F. Supp. 2d 55, 59–60 (D.D.C. 2009); *Horn*, 636 F. Supp. 2d at 14, 18–19.

204. *Horn*, 636 F. Supp. 2d at 18–19; see Reagan, *supra* note 173, at 8–18 (describing CIPA procedures).

205. Docket Sheet, *Horn v. Huddle*, No. 09-5311 (D.C. Cir. Sept. 3, 2009).

206. *Horn v. Huddle*, 699 F. Supp. 2d 236, 238 (D.C. Cir. 2010).

wise, 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.”²⁰⁷

Although the government 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.²⁰⁸ Judge Lamberth overruled that determination.²⁰⁹

[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.²¹⁰

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.²¹¹

207. *Horn*, 647 F. Supp. 2d at 62–63.

208. *Id.* at 63 n.11, 65 n.18; see Scarcella, *supra* note 176.

209. See Scarcella, *supra* note 176.

210. *Horn*, 647 F. Supp. 2d at 66; see Scarcella, *supra* note 176 (“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.)”).

211. *Horn v. Huddle*, 636 F. Supp. 2d 20, 22–23 (D.D.C. 2009).

Kenya and Tanzania

*United States v. El-Hage (Leonard B. Sand,
Kevin Thomas Duffy, and Lewis A. Kaplan, S.D.N.Y.)*²¹²

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.²¹³ Eleven non-American deaths occurred in Tanzania; the other deaths occurred in Kenya.²¹⁴

Nairobi

Pakistani authorities arrested Mohammed Saddiq Odeh on the day of the bombings for traveling with a fraudulent passport,²¹⁵ and he quickly became a suspect

212. 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.

213. The 9/11 Commission Report 70 (2004); *In re Terrorist Bombings of U.S. Embassies in East 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 Soufan, *supra* note 64, at 14 (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* note 64, 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).

214. See Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy*, N.Y. Times, Sept. 22, 1998, at A6; Soufan, *supra* note 64, at 80.

215. *In re Terrorist Bombings of U.S. Embassies in East 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 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 214; Soufan, *supra* note 64, at 88 ("Pakistani authorities had noticed that the picture on his passport was fraudulent").

in the Nairobi bombing.²¹⁶ Kenyan authorities arrested Mohamed Rashed Daoud al-'Owhali on August 12, 1998, as another suspect in the bombing.²¹⁷ Al-'Owhali admitted driving the bomb to the embassy in Kenya.²¹⁸ Later that month, the suspects were moved to New York,²¹⁹ and they were indicted on October 7.²²⁰ The United States decided to seek the death penalty against al-'Owhali but not Odeh.²²¹

The government identified Haroun Fazil as another suspect in the Nairobi bombing.²²² It is believed that he drove a pickup truck to lead the vehicle carrying the bomb to the embassy.²²³ The government offered a \$2 million reward for information leading to his arrest, but he has not been apprehended.²²⁴

216. *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.

217. *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 64, at 85–87, 92.

218. See Johnston, *supra* note 217; 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.

219. *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 64, at 90, 94.

220. *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 Oct. 8, 1998); see also H.L. Pohlman, *Terrorism and the Constitution 38–39* (2008) (discussing types of extraterritorial jurisdiction over crimes committed abroad).

221. *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 June 28, 2000, filing of death penalty notice); *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.

222. 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 Grips and Fears*, N.Y. Times, Dec. 2, 1998, at A1 [hereinafter *Angry Record*].

223. See Weiser, *2 New Suspects*, *supra* note 222; Weiser, *Angry Record*, *supra* note 222.

224. See Weiser, *2 New Suspects*, *supra* note 222; Weiser, *Angry Record*, *supra* note 222; 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*].

On September 16, 1998, 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.²²⁵ 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.²²⁶ On October 7, charges against him were broadened to include conspiracy to kill American citizens.²²⁷

The U.S. District Court for the Southern District of New York assigned the case to Judge Leonard B. Sand.²²⁸

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.²²⁹

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 ambas-

225. *In re Terrorist Bombings*, 552 F.3d at 104; *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000); *Bin Laden*, 91 F. Supp. 2d at 606; *Bin Laden*, 92 F. Supp. 2d at 231; 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 213; Weiser, *2 New Suspects*, *supra* note 222; see also The 9/11 Commission Report 56 (2004) ("Hage was a U.S. citizen who had worked with Bin Laden in Afghanistan in the 1980s, and in 1992 he went to Sudan to become one of al Qaeda's major financial operatives.").

226. *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 Sept. 24, 1997); *Bin Laden*, 92 F. Supp. 2d at 231; S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225 (noting criminal complaint filed on Sept. 17, 1998); *Trying Cases Related to Allegations of Terrorism: Judges' Roundtable*, 77 Fordham L. Rev. 1, 12 (2008) [hereinafter *Trying Cases*]; see Lyman, *supra* note 213; Weiser, *2 New Suspects*, *supra* note 222.

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).

227. *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.

228. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *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 225, 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*].

229. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; see Benjamin Weiser, *Judge Rejects Guilty Plea in Bomb Plot*, N.Y. Times, Oct. 25, 2000, at B1.

sy in Dar es Salaam.²³⁰ Tanzania dropped charges against Ahmed in March 2000.²³¹ After a four-year trial, Tanzania's High Court ruled in 2004 that the evidence did not support a conviction against Hemed.²³²

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.²³³ His attorney admitted at trial that K.K. Mohamed helped assemble the bomb.²³⁴ The United States decided to seek the death penalty against him.²³⁵ 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.²³⁶ Judge Sand ruled that the decision by the South African court did not invalidate Mohamed's capital prosecution, but Mohamed could offer the decision as mitigating evidence.²³⁷

A Larger Plot

Osama Bin Laden was included in a November 4, 1998, superseding indictment,²³⁸ but he remained a fugitive until his killing by U.S. forces in 2011.²³⁹ Fa-

230. See Bonner, *supra* note 214; 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).

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

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

233. *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.*

234. See Hirsch, *supra* note 213, 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.

235. *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001) (noting June 27, 2000, filing of a death penalty notice); *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 221; Weiser, *2d Death Penalty*, *supra* note 221.

236. *Bin Laden*, 156 F. Supp. 2d at 361 & n.1; see Hirsch, *supra* note 213, 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").

237. *Bin Laden*, 156 F. Supp. 2d 359; see Hirsch, *supra* note 213, at 228–29.

238. The 9/11 Commission Report 128 (2004); see Soufan, *supra* note 64, 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*

zul Abdullah Mohammed came to be regarded as the bombings' mastermind, and he was killed a firefight in 2011 when he mistakenly came upon a security checkpoint in Mogadishu, Somalia, and tried to flee.²⁴⁰

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, 1998.²⁴¹ German authorities handed him over to the U.S. government on December 20 on condition that he not face the death penalty.²⁴² He first appeared before the district court on December 21.²⁴³ The government charged him with four broad conspiracy counts.²⁴⁴

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 1998.²⁴⁵ On June 19, 1999, the U.S. government indicted him for having a hand in the 1998 bombings.²⁴⁶ At the United States' request, British authorities also arrested Ibrahim Hussein Eidarous and Adel Mohammed Abdul Bary on

Laden, No. 1:98-cr-539 (S.D.N.Y. June 10, 1998); The 9/11 Commission Report 110 (2004); see Soufan, *supra* note 64, at 72; Benjamin Weiser, *Prosecutors Are Expected to Seek Dismissal of All Charges*, N.Y. Times, May 4, 2011, at A11.

239. 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; Nicholas Schmidle, *Getting Bin Laden*, New Yorker, Aug. 8, 2011, at 34; Soufan, *supra* note 64, at 532–36; Dana Priest Priest & William M. Arkin, *Top Secret America* 256–61 (2011); 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.

240. 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”).

241. 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 225 (noting Sept. 14, 1998, complaint and arrest warrant against Salim); 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.

242. *Bin Laden*, 156 F. Supp. 2d at 370; see Weiser, *Held Without Bail*, *supra* note 241.

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

244. See Weiser, *Held Without Bail*, *supra* note 241; Weiser, *Nuclear Material*, *supra* note 241 (reporting the unsealing of charges on Sept. 25, 1998).

245. 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 222; Weiser, *Deliver Aide*, *supra* note 228; Craig Whitlock, *Extradition of Terror Suspects Founders*, Wash. Post, Dec. 21, 2008, at A1.

246. See Jacobs, *supra* note 245.

July 11, 1999.²⁴⁷ Britain's House of Lords ruled on December 17, 2001, that these three suspects could be extradited to the United States,²⁴⁸ but the extradition has not yet happened.²⁴⁹ Eidarous died of leukemia on July 16, 2008, while under house arrest in London.²⁵⁰

Ali A. Mohamed, a former sergeant in the U.S. Army, who previously was a major in Egypt's army, was secretly charged with Al-Qaeda conspiracies in September 1998.²⁵¹ He was formally indicted on May 19, 1999, after he refused to cooperate in the tracking down of Osama Bin Laden, and he first appeared in court on May 27.²⁵² On October 20, 2000, he agreed to plead guilty.²⁵³ According to a former FBI agent, "To date he is awaiting sentencing and is being held in a secure location."²⁵⁴

Mohamed Suleiman al-Nalfi was lured from his home in Sudan and apprehended in Kenya in late 2000 by the United States.²⁵⁵ He was held in secret for more than four months before charges against him were made public.²⁵⁶ In early

247. See David Rohde, *U.S. Says It Has Fingerprints of Embassy Bombing Suspects*, N.Y. Times, July 13, 1999, at A6; Whitlock, *supra* note 245; see also Soufan, *supra* note 64, at 98 ("Although we had urged the British to arrest Fawwaz, Bary, and Eidarous in 1996, they had refused.").

248. See Warren Hoge, *Court Approves Extraditions in Bombings of U.S. Embassies*, N.Y. Times, Dec. 18, 2001; Whitlock, *supra* note 245.

249. See Craig Whitlock, *Britain Pays to Keep Suspects from U.S. Hands*, Wash. Post, May 2, 2009, at A9; Whitlock, *supra* note 245.

250. Nolle Prosequi, United States v. El Hage, No. 1:98-cr-1023 (S.D.N.Y. Dec. 3, 2008); see Whitlock, *supra* note 245.

251. See Soufan, *supra* note 64, 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"); 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).

252. United States v. Bin Laden, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000); see 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 224.

253. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; see 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 Benjamin Weiser, *Lawyers Seeking to Expose Plea Deal in Bombings Case*, N.Y. Times, May 6, 2001, at 151.

254. Soufan, *supra* note 64, at 94.

255. 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*].

256. See Weiser, *Qaeda Member*, *supra* note 255; Weiser, *Held Secretly*, *supra* note 255.

2003, he pleaded guilty²⁵⁷ and was sentenced to 10 years and one month in prison.²⁵⁸

Among the 25 defendants indicted in the U.S. prosecution, many of whom remain fugitives, is Ahmed Khalfan Ghailani.²⁵⁹ He was not captured until a raid on his home in Pakistan in the summer of 2004.²⁶⁰ He was held in secret CIA prisons until September 2006, when he was transferred to Guantánamo Bay.²⁶¹ The U.S. government announced on March 31, 2008, that it would try Ghailani by military commission,²⁶² but the following year the government decided to try him in the Southern District of New York instead.²⁶³ On January 25, 2011, he was sentenced to life in prison for conspiracy to destroy buildings.²⁶⁴

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.²⁶⁵

257. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225 (noting Jan. 31, 2003, guilty plea); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 138 (2d Cir. 2008) (noting February 2003 conviction); *see* Weiser, *Qaeda Member*, *supra* note 255.

258. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *see* Benjamin Weiser, *10 Years for al Qaeda Operative*, N.Y. Times, Feb. 25, 2003, at B4 (reporting a sentence of 10 years).

259. *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 225; *see* William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. Times, Apr. 1, 2008, at A14.

260. *Ghailani*, 751 F. Supp. 2d at 518; *United States v. Ghailani*, 751 F. Supp. 2d 508, 509 (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 259; Josh White & Joby Warrick, *Detainee Is Charged with Capital Murder in Embassy Bombing*, Wash. Post, Apr. 1, 2008, at A2.

261. *Ghailani*, 751 F. Supp. 2d at 518, 523–24; *Ghailani*, 751 F. Supp. 2d at 509–10; *United States v. Ghailani*, 751 F. Supp. 2d 502, 503 (S.D.N.Y. 2010); *Ghailani*, 686 F. Supp. 2d at 283–84; *see* Glaberson, *supra* note 259; White & Warrick, *supra* note 260.

262. *Ghailani*, 751 F. Supp. 2d at 525; *see* Glaberson, *supra* note 259; White & Warrick, *supra* note 260.

263. *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.

264. Judgment, *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.

265. *In re Terrorist Bombings of U.S. Embassies in East 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*

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.²⁶⁶

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 months later.²⁶⁷ Both Salim and K.K. Mohamed were transferred to other jails,²⁶⁸ but only Salim was charged with the stabbing.²⁶⁹ The court assigned the prosecution of Salim for the stabbing to Judge Deborah A. Batts.²⁷⁰

Salim pleaded guilty on April 3, 2002, to attempted murder.²⁷¹ Judge Batts sentenced him to 32 years in prison,²⁷² but the court of appeals concluded that a

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*].

266. *Trying Cases*, *supra* note 226, at 13–14.

267. *Bin Laden*, 160 F. Supp. 2d at 673; *Trying Cases*, *supra* note 226, at 12; see Hirsch, *supra* note 213, at 213; Weiser, *Quandary*, *supra* note 265.

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

269. *Bin Laden*, 160 F. Supp. 2d at 673; see Weiser, *Escape Plan*, *supra* note 265.

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 265.

270. *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.

271. *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 270; see Robert F. Worth, *Man Admits Murder Attempt*, N.Y. Times, Apr. 4, 2002, at B5.

272. *Salim*, 549 F.3d at 70; S.D.N.Y. *Salim* Docket Sheet, *supra* note 270 (also noting ordered restitution of \$4,722,820); see *Salim*, 287 F. Supp. 2d 250 (finding facts for 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).

terrorism enhancement did not require transnational conduct,²⁷³ so Judge Batts resentenced Salim to life.²⁷⁴

The Main Trial

The trial against Odeh, al-'Owhali, el-Hage, and K.K. Mohamed began with jury selection on January 3, 2001.²⁷⁵ With the help of a jury questionnaire, Judge Sand screened a jury pool of 1,302 people.²⁷⁶ Opening arguments began a month later, on February 5.²⁷⁷ Both Arabic and Kiswahili interpreters were required.²⁷⁸

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.²⁷⁹ 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.²⁸⁰

Closing arguments began on May 1,²⁸¹ and the jury began its deliberations on May 10.²⁸² All four defendants were convicted of all charges on May 29.²⁸³

273. *Salim*, 549 F.3d 67 (resolving *United States v. Salim*, No. 04-2643 (2d Cir. Apr. 7, 2004)), *cert. denied*, ___ U.S. ___, 130 S. Ct. 325 (2009); see Benjamin Weiser, *Panel Rules Jail Stabbing Constituted Terrorism*, N.Y. Times, Dec. 3, 2008, at A28.

274. S.D.N.Y. *Salim* Docket Sheet, *supra* note 270; see Benjamin Weiser, *Reputed Bin Laden Adviser Gets Life Term in Stabbing*, N.Y. Times, Sept. 1, 2010, at A18.

275. *In re Terrorist Bombings of U.S. Embassies in East 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 225; *Trying Cases*, *supra* note 226, at 12; 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”).

276. Leonard B. Sand, *United States v. El Hage: Jury Questionnaire* (Jan. 3, 2001); *Trying Cases*, *supra* note 226, at 12; Interview with Hon. Leonard B. Sand, June 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.

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

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

279. See Hirsch, *supra* note 213, at 72.

280. See *id.* at 72–73.

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

282. See *Jury Gets Terror Case*, N.Y. Times, May 11, 2001, at B6; Hirsch, *supra* note 213, at 177 (reporting that jury deliberations were interrupted by dental work and a house closing).

283. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 101–02, 107 (2d Cir. 2008); *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); *United States v. Bin Laden*, 156 F. Supp. 2d 359, 361, 363 (S.D.N.Y. 2001); S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *Trying Cases*, *supra* note 226, at 12; see Hirsch, *supra* note 213, at 179–80; Weiser, *4 Guilty*, *supra* note 221 (reporting also that none of the defendants testified).

Judge Sand granted al-'Owhali and K.K. Mohamed separate death penalty hearings.²⁸⁴ 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, 2001.²⁸⁵ On June 12, the jury announced that it was deadlocked, which meant that al-'Owhali would be imprisoned for life without the possibility of release.²⁸⁶ The jury began to deliberate on K.K. Mohamed's sentence on July 5²⁸⁷ and announced a deadlock on July 10.²⁸⁸

On October 18, 2001, Judge Sand sentenced each of the four defendants to life in prison without the possibility of release.²⁸⁹ Because of the intervening and

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*].

284. *Bin Laden*, 156 F. Supp. 2d at 361 n.2; *Trying Cases*, *supra* note 226, at 12; see Benjamin Weiser, *McVeigh Execution Casts Shadow on Embassy Terror Trial*, N.Y. Times, Apr. 24, 2001, at B2 (reporting on Judge Sand's Apr. 23, 2001, ruling).

285. See Hirsch, *supra* note 213, 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-01016 (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, 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.

286. *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 10 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 213, 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 283.

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

288. *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).

289. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *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 64, at 94; Weiser, *4 Are Sentenced*, *supra* note 286.

nearby attacks on September 11, 2001, court security on the day of sentencing was substantially enhanced.²⁹⁰

The defendants, including Salim, ultimately were sent to serve their sentences at the Administrative Maximum Facility, or “Super Max,” in Florence, Colorado.²⁹¹

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.²⁹² 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 over to el-Hage’s attorneys for preparation of cross-examination.²⁹³ 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 Wadiah El-Hage.”²⁹⁴

Al-Fadl was in the Witness Security Program, living in a secret location.²⁹⁵ Prosecutors had arranged for a videoconference connection to al-Fadl, and the Marshals Service had recorded videoconferences with al-Fadl without the prosecutors’ knowledge.²⁹⁶ 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.”²⁹⁷ On October 24, 2003, el-Hage moved for a new trial.²⁹⁸

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

290. See Hirsch, *supra* note 213, at 244; Weiser, *4 Are Sentenced*, *supra* note 286 (“The building resembled a military base, with federal marshals carrying shotguns, public entrances closed and the screening of visitors increased.”).

291. <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.

292. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *In re Terrorist Bombings of U.S. Embassies in East 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 226, at 12; see *Embassy Bombings Case Goes to New Judge*, N.Y. Times, Jan. 26, 2002, at A9; Hirsch, *supra* note 213, at 258.

293. *In re Terrorist Bombings*, 552 F.3d at 140–43; *Bin Laden*, 397 F. Supp. 2d at 474–81, 518; *Trying Cases*, *supra* note 226, at 12; 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*].

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

295. *In re Terrorist Bombings*, 552 F.3d at 142; *Bin Laden*, 397 F. Supp. 2d at 474; see Weiser, *Qaeda Informer*, *supra* note 293.

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

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

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

government's case, and appears to fall within the general rule that undisclosed impeachment material generally does not warrant a new trial."²⁹⁹ The court of appeals affirmed.³⁰⁰

All four defendants appealed their convictions,³⁰¹ but K.K. Mohamed withdrew his appeal.³⁰²

After the trial, the *New York Times* published an article based on interviews with nine of the 12 jurors.³⁰³ The story reported that two jurors sought outside religious guidance on their sentence verdicts, one juror did legal research on the Internet, and some jurors were aware that the defendants were shackled under the defense table.³⁰⁴ Judge Duffy determined that the article entitled el-Hage to neither a new trial nor an evidentiary hearing.³⁰⁵

On November 24, 2008, the court of appeals affirmed the convictions of Odeh, al-'Owhali, and el-Hage.³⁰⁶

Another 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

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

300. *In re Terrorist Bombings*, 552 F.3d at 140–46, 156, *cert. denied*, ___ U.S. ___, 130 S. Ct. 1050 (2010).

301. 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) (lead case, appeal by al-'Owhali); *see Weiser, Jury Torn, supra* note 283.

302. *In re Terrorist Bombings*, 552 F.3d at 101 n.1; 2d Cir. *Mohamed* Docket Sheet, *supra* note 301 (noting a Jan. 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.

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

304. *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 302; Benjamin Weiser, *Jury Behavior Raises Issues in Terror Case*, N.Y. Times, Jan. 16, 2003, at B1.

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

306. *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 301 (noting a remand on Apr. 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 East Africa*, 407 F. App'x. 548 (2d Cir. 2011).

Al-'Owhali and Odeh's petitions for writs of certiorari were denied. *Al-'Owhali v. United States*, ___ U.S. ___, 129 S. Ct. 2778 (2009); *Odeh v. United States*, ___ U.S. ___, 129 S. Ct. 2765 (2009).

York.³⁰⁷ Ghailani's alleged role was to obtain explosives and transport them to Dar es Salaam.³⁰⁸

Ghailani grew up in Zanzibar, and after the embassy bombings he reportedly became a cook for Osama Bin Laden.³⁰⁹ "He was arrested [in August 2004] after a 14-hour gun battle with the Pakistan authorities, in which he received a shrapnel wound."³¹⁰

On June 15, 2009, the case was transferred to Judge Lewis A. Kaplan.³¹¹ Judge Kaplan determined that the interval between Ghailani's indictment and his presentation to the court for prosecution did not violate a Sixth Amendment right to a speedy trial.³¹² Although the time since his transfer from CIA to military custody implicated his speedy trial right,³¹³ he was not substantially prejudiced by the delay.³¹⁴

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."³¹⁵

Jury selection began on September 22.³¹⁶ Judge Kaplan used a jury questionnaire,³¹⁷ but he did not want the questionnaire to deprive the court of the benefits of oral voir dire:

307. 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 Guantanamo 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.

308. 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).

309. 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.

310. *Id.*

311. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

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

312. *Ghailani*, 751 F. Supp. 2d 515; 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.

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

314. *Id.* at 520, 531–34.

315. 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.

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

317. Lewis A. Kaplan, United States v. Ghailani: Jury Questionnaire (Sept. 22, 2010); *Ghailani* Preliminary Remarks, *supra* note 316; 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-*

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.³¹⁸

Voir dire began on September 29.³¹⁹ Judge Kaplan appointed counsel to represent one of the jurors, whose employer apparently illegally refused to excuse the juror's absence from work.³²⁰

The trial began on October 12.³²¹ Judge Kaplan reserved some seats in the courtroom for the news media.³²² On November 17, the jury found Ghailani guilty 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.³²³ Judge Kaplan sentenced Ghailani to life in prison.³²⁴ An appeal is pending.³²⁵

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.³²⁶ Magistrate Judge Boyd N. Boland reviewed the complaint and, on December 27, ordered it filed.³²⁷ On September 29, 2011, District Judge Marcia S. Krieger dismissed most claims, but she ruled that the complaint, as amended,

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.").

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

319. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

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

321. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; see Benjamin Weiser, *Trial of Man Held at Guantánamo Opens, but Guantánamo Isn't Mentioned*, N.Y. Times, Oct. 13, 2010, at A19.

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

323. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; 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.

324. *Ghailani* Judgment, *supra* note 264; see Finn, *supra* note 264; Weiser, *supra* note 264.

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.

325. Docket Sheet, *United States v. Ghailani*, No. 11-320 (2d Cir. Jan. 28, 2011) (noting that the appellate brief is due Jan. 17, 2012).

326. 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.

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

alleged a potentially valid violation of the First Amendment.³²⁸ 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.³²⁹

Challenge: Attorney–Client Contacts

In detention, the original defendants were cut off from virtually all communications.³³⁰ 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.³³¹ In response to 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.³³²

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.³³³ 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.³³⁴

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.”³³⁵

328. 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 326.

329. *Mohammed* Opinion, *supra* note 328, at 15, 17; Schwartz & Weiser, *supra* note 326.

330. *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*].

331. See Weiser, *Suspects Isolated*, *supra* note 330; Weiser, *Judge to Hear Complaints*, *supra* note 330; Weiser, *Rules Violate Rights*, *supra* note 330.

332. *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.

333. *In re Terrorist Bombings of U.S. Embassies in East 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 *El Hage Protective Order*]; see Gross, *supra* note 26, at 12.

334. *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 306.

335. *Trying Cases*, *supra* note 226, at 13.

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.³³⁶ Although the Secretary was not a party to the case, Judge Kaplan agreed to consider the motion.³³⁷ 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.³³⁸

Ghailani's dissatisfaction with one of his appointed New York attorneys resulted in the court's dismissing the attorney from the case.³³⁹

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.³⁴⁰ Deputy marshals restrained el-Hage when he leapt from his chair in the courtroom and appeared to charge toward the judge.³⁴¹ Approximately six months later, a psychiatrist reported that el-Hage's solitary confinement was seriously impairing his mental health.³⁴² 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.³⁴³

After the prison guard was stabbed, an incident not involving el-Hage, the prison removed el-Hage's possessions and privileges.³⁴⁴ According to his wife, his mental state deteriorated sharply and he stopped recognizing his attorney.³⁴⁵ However, two court-appointed psychiatrists and a court-appointed psychologist

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

337. *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.”).

338. *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.

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

340. *In re Terrorist Bombings of U.S. Embassies in East 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*].

341. *In re Terrorist Bombings*, 552 F.3d at 149–50; *Trying Cases*, *supra* note 226, at 13; *see* Weiser, *Suspect Avows Innocence*, *supra* note 340; Weiser, *Suspect Charges*, *supra* note 340.

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

343. *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 342.

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

345. *See id.*

determined that el-Hage was faking mental illness.³⁴⁶ Judge Sand decided that the expert opinions were well founded and that el-Hage was competent to stand trial.³⁴⁷

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.³⁴⁸ Judge Kaplan found that such searches apply without exception to all inmates at the Metropolitan Correctional Center in Manhattan.³⁴⁹ 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.³⁵⁰ 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.³⁵¹ 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.³⁵²

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.³⁵³ 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.³⁵⁴

A week later, by letter apparently prepared by his attorney, Ghailani waived the right to attend a pretrial conference held that day.³⁵⁵ 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.³⁵⁶ Ghailani was back in court on the eve of trial for a three-day hearing on his successful motion to suppress a key witness,³⁵⁷ and he was in court for his trial.³⁵⁸

346. See Weiser, *Faking Illness*, *supra* note 221.

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

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

349. *Id.* at 510.

350. *Id.* at 510–11.

351. *Id.* at 511.

352. *Id.* & n.11.

353. *Id.* at 514.

354. *Id.* at 514–15.

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

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

357. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

358. 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.³⁵⁹

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.³⁶⁰

For the trial against Ghailani, Judge Kaplan granted the government's motion for an anonymous jury.³⁶¹ Deputy marshals shuttled the jurors to and from the courthouse and provided them with breakfast, lunch, and refreshments.³⁶²

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.³⁶³

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.³⁶⁴

359. See Feuer, *supra* note 276; Gross, *supra* note 26, at 21–22; Weiser, *supra* note 275; Weiser, *Jury Torn*, *supra* note 283; 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").

360. Weiser, *Jury Torn*, *supra* note 283.

361. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. June 16, 2010); see *Ghailani* Preliminary Remarks, *supra* note 316, at 2; see also Weiser & Moynihan, *supra* note 317 ("the defense lawyers, prosecutors and even the judge have not been told their names").

362. Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. Sept. 27, 2010); *Ghailani* Preliminary Remarks, *supra* note 316, at 2.

363. See Hirsch, *supra* note 213, at 71.

364. *Trying Cases*, *supra* note 226, at 13.

Because of el-Hage's actions, the defendants were shackled to the floor under the table.³⁶⁵ To prevent the jurors from realizing this, the jury was not present when defendants were brought in and out.³⁶⁶ And, for this trial, there was no "all rise" when the judge entered.³⁶⁷ Judge Sand believed it was important to conceal as much as possible any extraordinary security measures.³⁶⁸

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."³⁶⁹ 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.³⁷⁰ "In 1996, Mr. Fadl fled [Al-Qaeda] after he embezzled about \$110,000 from one of Mr. Bin Laden's companies, eventually walking into an American embassy in Africa and offering his services in the fight against Al-Qaeda."³⁷¹

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.³⁷² Judge Sand forbade courtroom artists from sketching al-Fadl's face.³⁷³

Judge Kaplan also forbade courtroom artists from sketching a witness's face.³⁷⁴ Ghailani moved to suppress evidence from a witness whom Tanzanian authorities arrested in 2006, the FBI questioned, and who was released after the

365. *Trying Cases*, *supra* note 226, at 14; Interview with Hon. Leonard B. Sand, June 25, 2007; *see Gross*, *supra* note 26, at 15 & n.54; Hirsch, *supra* note 213, at 78.

366. *Trying Cases*, *supra* note 226, at 14; Interview with Hon. Leonard B. Sand, June 25, 2007; *see Hirsch*, *supra* note 213, at 78.

367. *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 226, at 14; *see Hirsch*, *supra* note 213, at 78.

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

369. *See Hirsch*, *supra* note 213, 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 293.

Al-Fadl is related by marriage to al-Nalfi. *See Weiser*, *Qaeda Member*, *supra* note 255; Weiser, *Held Secretly*, *supra* note 255; Weiser, *Qaeda Informer*, *supra* note 293.

370. *In re Terrorist Bombings of U.S. Embassies in East 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 369; Weiser, *Qaeda Informer*, *supra* note 293.

371. Weiser, *Qaeda Informer*, *supra* note 293; *see* The 9/11 Commission Report 109 (2004) ("Jamal Ahmed al Fadl walked into a U.S. embassy in Africa, established his bona fides as a former senior employee of Bin Ladin, and provided a major breakthrough of intelligence on the creation, character, direction, and intentions of al Qaeda."); *Bin Laden*, 397 F. Supp. 2d at 474; *see also Soufan*, *supra* note 64, at 66–69, 71.

372. *See Hirsch*, *supra* note 213, at 109.

373. *See id.*

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

witness agreed to testify against Ghailani.³⁷⁵ 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.³⁷⁶ Judge Kaplan ordered an evidentiary hearing on the matter,³⁷⁷ at which the witness testified.³⁷⁸ The witness's identity was initially redacted from Judge Kaplan's opinion ordering the hearing,³⁷⁹ but his identity was revealed at the hearing³⁸⁰ and the opinion was reposted three weeks later without the witness's name redacted.³⁸¹ Judge Kaplan suppressed the witness,³⁸² and the government elected not to delay the trial by appealing the suppression order.³⁸³

Challenge: Religious Accommodation

An appointed attorney had to be dismissed for mocking his client's religious beliefs.³⁸⁴ 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.³⁸⁵

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.³⁸⁶

Challenge: Classified Evidence

In order to have access to classified evidence, defense counsel had to have security clearances.³⁸⁷ Initially the attorneys in the original trial objected to their adver-

375. 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").

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

377. *Id.* at 261; see Weiser, *supra* note 375.

378. United States v. Ghailani, 743 F. Supp. 2d 261, 274 (S.D.N.Y. 2010); see Weiser, *supra* note 374.

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

380. See Weiser, *supra* note 374.

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

382. *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.

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

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

385. *Trying Cases*, *supra* note 226, at 13.

386. See Hirsch, *supra* note 213, at 78.

saries' 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.³⁸⁸ The court ruled that a security clearance requirement did not violate the defendants' Sixth Amendment right to counsel, and the court of appeals affirmed.³⁸⁹

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.³⁹⁰ 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.³⁹¹

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.³⁹²

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.³⁹³ In 1996 and 1997, as part of an investigation of Al-Qaeda, telephone lines used by el-Hage in Kenya were bugged,

387. *El Hage Protective Order*, supra note 333, ¶ 5; Interview with Hon. Lewis Kaplan, Nov. 5, 2009; see Gross, supra note 26, at 13; Benjamin Weiser, *Bomb Suspects' Lawyers to Need Security Checks*, N.Y. Times, July 1, 1999, at B5.

388. See Weiser, supra note 387.

389. *In re Terrorist Bombings of U.S. Embassies in East 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 26, at 13.

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

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

392. *Id.* at 119.

393. *In re Terrorist Bombings of U.S. Embassies in East 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 306.

and his Nairobi home was searched.³⁹⁴ 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.³⁹⁵ The court of appeals determined that Judge Sand's method was appropriate.³⁹⁶

Judge Kaplan reviewed classified information on Ghailani to determine what had to be produced in discovery to cleared defense counsel.³⁹⁷ 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."³⁹⁸ 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."³⁹⁹ 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.⁴⁰⁰

Judge Sand's and Judge Kaplan's law clerks had security clearances.⁴⁰¹ It is Circuit Judge Cabranes's practice to ask his law clerks to seek security clearances,⁴⁰² but Circuit Judge Newman has never had a cleared clerk, unless the clerk came with a security clearance as a result of previous employment.⁴⁰³ 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.⁴⁰⁴

394. *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.

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

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

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

398. *Id.* at 1.

399. *Id.* at 2.

400. *Id.*

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

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

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

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

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.⁴⁰⁵

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.⁴⁰⁶ The order was filed with the classified information security officer on November 24, 2009.⁴⁰⁷ 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 7.⁴⁰⁸

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, 2010.⁴⁰⁹ 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.⁴¹⁰

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 filed the next day with three slight redactions.⁴¹¹ 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.⁴¹² The supplement was docketed the next day, and a heavily redacted public version of it was filed two days after that.⁴¹³

On August 17, Judge Kaplan ordered an evidentiary hearing on whether testimony from a government witness should be suppressed because the government

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

406. *Ghailani* Discovery Order, *supra* note 397.

407. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

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

409. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

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

411. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *see United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

412. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; *see* Opinion, *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 12, 2010).

413. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; Order, *Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 15, 2010).

learned of the witness through extraordinary interrogation methods.⁴¹⁴ Judge Kaplan's memorandum opinion ordering the hearing was filed with the classified information security officer on August 18.⁴¹⁵ On September 1, a heavily redacted version of the opinion was filed publicly.⁴¹⁶ Redactions include the name of the witness and appear to include details of Ghailani's capture, detention, and interrogation.⁴¹⁷ 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.⁴¹⁸

On October 6, Judge Kaplan agreed to suppress the witness.⁴¹⁹ A redacted opinion on the matter was filed publicly approximately one week later.⁴²⁰

Challenge: Subpoenaing a Cabinet Officer

Al-'Owhali's attorneys decided testimony from Secretary of State Madeleine Albright might be helpful during the penalty phase of al-'Owhali's trial.⁴²¹ It was reported that, "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 war.'"⁴²² Judge Sand agreed to sign the subpoena,⁴²³ but on the government's motion he quashed it.⁴²⁴ Al-'Owhali presented at trial as a substitute for her live testimony a *60 Minutes* interview with Secretary Albright.⁴²⁵ Al-'Owhali also presented similar evidence through a willing witness, former Attorney General Ramsey Clark.⁴²⁶

414. United States v. Ghailani, 743 F. Supp. 2d 242, 261 (S.D.N.Y. 2010); see Weiser, *supra* note 375.

415. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225.

416. *Id.*

417. *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).

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

419. United States v. Ghailani, 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

420. S.D.N.Y. *El Hage* Docket Sheet, *supra* note 225; see Benjamin Weiser, *Judge Says Witness Barred from Ex-Detainee's Trial Had Lied*, N.Y. Times, Oct. 15, 2010, at A21.

421. See Hirsch, *supra* note 213, 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*].

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

423. See *Subpoena for Albright*, *supra* note 421.

424. See Weiser, *supra* note 422.

425. See Hirsch, *supra* note 213, at 196.

426. 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.⁴²⁷

Ressam was born in Algeria in 1967, and in February 1994 he moved to Canada, where he unsuccessfully applied for political asylum.⁴²⁸ In Canada, he lived on welfare and petty theft.⁴²⁹

Traveling under the name Benni Noris with fraudulent documentation, Ressam rented a car in Vancouver and traveled with his car by ferry from Victoria to Port Angeles, Washington.⁴³⁰ Ressam's car was the last off the ferry.⁴³¹ Noting that Ressam's hands were shaking and, despite the cold weather, he was sweating,

427. *United States v. Ressam*, 629 F.3d 793, 808 & n.1 (9th Cir. 2010), *amending* 593 F.3d 1095; *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.

428. *Ressam*, 629 F.3d at 806; *Ressam*, 474 F.3d at 599; *see* *Ressam* Complaint, *supra* note 427; Bock, *supra* note 427; 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 427; Meyer, *supra* note 427; Steven Pearlstein, *Canadians Examine Lapses in Security*, Wash. Post, Dec. 22, 1999, at A8; Soufan, *supra* note 64, at 141 ("A wily Algerian, he falsely claimed political asylum in Canada in 1994, using a fake passport and a story about persecution.").

429. *See* *Trail of a Terrorist*, *supra* note 427; Soufan, *supra* note 64, at 141–42.

430. *Ressam*, 629 F.3d at 807–08; *Ressam*, 474 F.3d at 599–600; *Ressam*, 221 F. Supp. 2d at 1254; *see* *Ressam* Complaint, *supra* note 427; Bock, *supra* note 427; *Trail of a Terrorist*, *supra* note 427; Soufan, *supra* note 64, at 142; Sunde & Porterfield, *supra* note 427; Verhovek & Weiner, *supra* note 427.

431. *See* *Ressam*, 474 F.3d at 600; *Ressam* Complaint, *supra* note 427; Bock, *supra* note 427; *Trail of a Terrorist*, *supra* note 427; Meyer, *supra* note 427; Soufan, *supra* note 64, at 142 ("Apparently he thought that the last car off would receive less attention."); Sunde & Porterfield, *supra* note 427.

the customs inspector asked him to step out of the car, and Ressay initially refused.⁴³² Then he got out of the car and, as agents began searching the trunk, he fled.⁴³³ He was caught a few blocks away.⁴³⁴

It was later determined that Ressay's sweating may have been caused by malaria, which he did not know at the time he had.⁴³⁵

A search of the car showed that its spare tire had been replaced by 10 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.⁴³⁶

A Tylenol bottle contained a powerful military-grade explosive, cyclotrimethylene-trinitramine, or RDX. Another small bottle held hexamethylenetriperoxodiamin, 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.⁴³⁷

Also in the car were maps of Washington, Oregon, and California.⁴³⁸ Further investigation led to suspicion that he was an agent of Osama Bin Laden.⁴³⁹

Ressay was indicted on December 22, 1999, in the Western District of Washington, for false statements and improper transportation of explosives.⁴⁴⁰ The court assigned the case to Judge John C. Coughenour.⁴⁴¹

432. *Ressay*, 629 F.3d at 808; *see Ressay Complaint*, *supra* note 427; Gilmore & Carter, *supra* note 427; Meyer, *supra* note 427; Sunde & Porterfield, *supra* note 427; Verhovek & Weiner, *supra* note 427.

433. *Ressay*, 629 F.3d at 808; *Haouari v. United States*, 429 F. Supp. 2d 671, 676 (S.D.N.Y. 2006); *see Ressay Complaint*, *supra* note 427; Bock, *supra* note 427; Gilmore & Carter, *supra* note 427; *Trail of a Terrorist*, *supra* note 427; Meyer, *supra* note 427; Sunde & Porterfield, *supra* note 427; Verhovek & Weiner, *supra* note 427.

434. *Ressay*, 629 F.3d at 808; *see Ressay Complaint*, *supra* note 427; Gilmore & Carter, *supra* note 427; Meyer, *supra* note 427; Miletich *et al.*, *supra* note 427; Verhovek & Weiner, *supra* note 427.

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

436. *Ressay*, 629 F.3d at 808 n.1; *Ressay*, 474 F.3d at 600; *United States v. Ressay*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); *see Ressay Complaint*, *supra* note 427; 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 427; Verhovek & Weiner, *supra* note 427.

437. Bock, *supra* note 427.

438. *See Meyer*, *supra* note 427; Miletich *et al.*, *supra* note 427; Sunde & Porterfield, *supra* note 427; Verhovek & Weiner, *supra* note 427.

439. *See Michael Janofsky, Terrorism Trial May Keep to Narrower Focus*, N.Y. Times, Mar. 14, 2001, at A12; Meyer, *supra* note 427; Steven Mufson, *Arrest Stirs Terrorism Concerns*, Wash. Post, Dec. 18, 1999, at A1; Sunde & Porterfield, *supra* note 427.

440. Indictment, *United States v. Ressay*, 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

Ressam shared a motel room with another man for three weeks just before his ferry trip.⁴⁴² Canadian authorities determined that the other man was Abdelmajed Dahoumane.⁴⁴³ On January 20, 2000, Ressam's indictment was superseded to add a terrorism charge and to add Dahoumane as a defendant.⁴⁴⁴ On April 6, the U.S. embassy in Montreal offered a reward of \$5 million for information leading to Dahoumane's arrest and conviction.⁴⁴⁵ Dahoumane was arrested in Algeria late in 2000.⁴⁴⁶ On April 1, 2001, the Algerian government announced that it would try Dahoumane there.⁴⁴⁷ Dahoumane pleaded guilty in Algeria.⁴⁴⁸

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.⁴⁴⁹ Seattle canceled its millennium New Year's Eve party scheduled for the base of

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.

441. 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 440.

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

442. See *Trail of a Terrorist*, *supra* note 427; Sam Howe Verhovek, *2nd Man Sought for Questioning in Bomb Plot*, N.Y. Times, Dec. 19, 1999, at 142.

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

444. 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. Wise & 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).

445. See Meyer, *supra* note 427 (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; Wise & Eggen, *supra* note 444.

446. 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; Wise & Eggen, *supra* note 444.

447. See Adams, *supra* note 446; *Algiers to Try Terror Suspect Sought by U.S.*, N.Y. Times, Apr. 2, 2001, at A5.

448. 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.

449. See *Ressam* Complaint, *supra* note 427; Miletich *et al.*, *supra* note 436; Verhovek & Weiner, *supra* note 427.

the Space Needle.⁴⁵⁰ 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.⁴⁵¹

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.⁴⁵² 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.⁴⁵³

A minor international incident erupted in March 2000 as Ressam’s attorneys prepared for trial.⁴⁵⁴ 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.⁴⁵⁵ 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.⁴⁵⁶ Apparently, the documents were disclosed to Ressam’s attorneys in error, and they were taken back from the attorneys at the airport.⁴⁵⁷ The U.S. government moved for return of all copies of the documents and for an order prohibiting Ressam’s attorneys from discussing them

450. 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 427; 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.

451. Order, United States v. Ressam, No. 2:99-cr-666 (W.D. Wash. Mar. 3, 2000); United States v. Ressam, 474 F.3d 597, 601 (9th Cir. 2007); see Meyer, *supra* note 427; 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.

452. 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 451; Porterfield, *supra* note 451.

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

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

454. 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.

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

456. 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 454.

457. See Document Return Motion, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 20, 2000); Miletich, *supra* note 454; Sunde, *supra* note 454.

with their client.⁴⁵⁸ Both parties submitted affidavits, and Ressam's attorneys submitted a sealed ex parte affidavit "concerning purpose of review of Montreal court files."⁴⁵⁹

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.⁴⁶⁰ After a hearing, Judge Coughenour ruled that the matter was moot because Ressam's attorneys no longer had copies of the documents.⁴⁶¹ 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.⁴⁶²

A couple of weeks before trial, on February 28, 2001, a 6.8-magnitude earthquake hit the Seattle area,⁴⁶³ so a status conference held the next day was held at the SeaTac detention facility where Ressam was housed.⁴⁶⁴

Jury selection began in Los Angeles on March 12, 2001.⁴⁶⁵ After a little more than seven hours of voir dire, a jury was selected from 44 prospective jurors.⁴⁶⁶ Opening arguments and the first witnesses were presented the next day.⁴⁶⁷

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.⁴⁶⁸ Discovery of this map had been reported by news media nearly two months previously.⁴⁶⁹

On April 6, 2001, the jury convicted Ressam on all counts.⁴⁷⁰ On the same day, he and 23 others were sentenced by a French judge, before whom Ressam

458. Document Return Motion, *supra* note 457; see Miletich, *supra* note 454.

459. Document Return Motion Response, *supra* note 456; Document Return Motion, *supra* note 457.

460. Document Return Motion Response, *supra* note 456; see Mike Carter, *Ressam Lawyers May Use Secret Files*, Seattle Times, Mar. 24, 2000, at B3.

461. Minutes, *Ressam*, No. 2:99-cr-666 (W.D. Wash. Mar. 23, 2000); see Carter, *supra* note 460.

462. See Carter, *supra* note 460; Sunde, *supra* note 454.

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

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

465. *Ressam* Complaint, *supra* note 427; see Carter, *supra* note 452; *Jury Selection Begins in Terrorism Trial*, N.Y. Times, Mar. 13, 2001, at A17.

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

467. *Ressam* Complaint, *supra* note 427; see Booth, *supra* note 428; Janofsky, *supra* note 439.

468. 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.

469. 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.

470. *United States v. Ressam*, 629 F.3d 793, 809 (9th Cir. 2010); *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 446; William Booth, *Algerian Convicted on Terror Charges*, Wash. Post, Apr.

was tried in absentia, to five years in prison for conspiracy to support Islamic militants.⁴⁷¹

Abdelghani Meskini's Brooklyn telephone number was found when Ressay was arrested.⁴⁷² 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 1994.⁴⁷³

Apparently Meskini flew to Seattle on December 11, 1999, to meet Ressay.⁴⁷⁴ Because Ressay was a no-show, Meskini flew back to New York on December 16.⁴⁷⁵ On the basis of his number's being in Ressay's car, the Foreign Intelligence Surveillance Court authorized surveillance of Meskini's telephone.⁴⁷⁶ Meskini was arrested early in the morning on December 30 at his home as a suspected accomplice of Ressay.⁴⁷⁷

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.⁴⁷⁸ He was arrested four days later in Montreal; another three days later, the indictment was superseded to add Meskini as a defendant.⁴⁷⁹ The court assigned the case to Judge John F. Keenan.⁴⁸⁰

7, 2001, at A1; Mike Carter, *Ressay 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, *Ressay Guilty of Terrorism*, Seattle Post-Intelligencer, Apr. 7, 2001, at A1; see also Transcript, *Ressay*, No. 2:99-cr-666 (W.D. Wash. Apr. 4, 2001, filed Oct. 11, 2005) (jury instructions).

471. See Booth, *supra* note 470; Carter, *supra* note 470; Meyer, *supra* note 470; Skolnik & Sunde, *supra* note 470.

472. See Booth, *supra* note 470; Mike Carter, *Feds Link Ressay to Terror Camps*, Seattle Times, Mar. 9, 2001, at A1; *Trail of a Terrorist*, *supra* note 427; Meyer, *supra* note 427; Steve Miletich & Mike Carter, *Ressay 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.

473. See Weiser, *supra* note 472.

474. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 446; Meyer, *supra* note 427; Miletich & Carter, *supra* note 472; David A. Vise, *Algerian Arrested Dec. 24*, Wash. Post, Jan. 4, 2000, at A2.

475. *Haouari*, 429 F. Supp. 2d at 676; see Adams, *supra* note 446; Meyer, *supra* note 427; Miletich & Carter, *supra* note 472; Vise, *supra* note 474.

476. See Walter Pincus, *Judge Discusses Details of Work on Secret Court*, Wash. Post, June 26, 2007, at A4; see also *Ressay* Mar. 1, 2001, Transcript, *supra* note 464.

477. *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 446; *Trail of a Terrorist*, *supra* note 427; Kifner & Rashbaum, *supra* note 436; Meyer, *supra* note 427; Miletich & Carter, *supra* note 472; Vise, *supra* note 474.

478. 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 446; Craig Pyes, *Canada Adds Details on Algerians' Suspected Bomb Plot*, N.Y. Times, Jan. 21, 2000, at A3.

479. Superseding Indictment, *Haouari*, No. 1:00-cr-15 (S.D.N.Y. Jan. 13, 2000); see Adams, *supra* note 446; Benjamin Weiser & Craig Pyes, *U.S., in Pursuit of Bomb Plot, Indicts Man Held in Canada*, N.Y. Times, Jan. 19, 2000, at A1.

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

Based in part on surveillance of Meskini's telephone conversations, Haouari was charged with coordinating Ressam's bomb plot.⁴⁸¹ Haouari waived extradition proceedings and agreed to be tried in the United States, where he was arraigned on August 14.⁴⁸²

On March 7, 2001, Meskini pleaded guilty and agreed to cooperate with the prosecution.⁴⁸³ On January 23, 2004, he was sentenced to six years, with credit for time served.⁴⁸⁴ He was released in 2005; his application for the witness protection program was rejected.⁴⁸⁵ 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."⁴⁸⁶ In October 2010, he was sentenced to two years and seven months for an attempt to acquire an AK-47 assault rifle.⁴⁸⁷

As Ressam's sentencing date approached, Meskini agreed to cooperate with the prosecution of Haouari, and Ressam's sentencing was postponed.⁴⁸⁸ At Haouari's trial, on July 3, 2001, Ressam testified that he and accomplices had planned to bomb Los Angeles International Airport on New Year's Eve.⁴⁸⁹ He said he planned to explode a suitcase filled with fertilizer and nitric acid.⁴⁹⁰

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

481. See Meyer, *supra* note 427; Pyes, *supra* note 478.

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

483. *United States v. Ressam*, 629 F.3d 793, 810 (9th Cir. 2010); *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 446; Carter, *supra* note 472; 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 436; Meyer, *supra* note 427; Sam Skolnik, *A Guilty Plea to Aiding Ressam*, Seattle Post-Intelligencer, Mar. 9, 2001, at B1; Weiser, *supra* note 472.

484. *Haouari* Docket Sheet, *supra* note 478; see Weiser, *supra* note 472.

485. See Weiser, *supra* note 472.

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

487. *Haouari* Docket Sheet, *supra* note 478; see Benjamin Weiser, "Millennium Plot" Terrorist Reimprisoned in Gun Case, N.Y. Times, Oct. 30, 2010, at A16.

488. See *Trail of a Terrorist*, *supra* note 427; 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).

489. *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002); see *Trail of a Terrorist*, *supra* note 427; 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).

490. See *Trail of a Terrorist*, *supra* note 427; Powell & Haughney, *supra* note 489.

In order to keep the witness Ressam separate from the defendant Haouari, each was brought to Judge Keenan's courtroom by a different elevator.⁴⁹¹ There is one other courtroom on the same floor as Judge Keenan's, and separate prisoner elevators serve the two courtrooms.⁴⁹² Ressam was brought up in the other courtroom's elevator.⁴⁹³

Haouari found Ressam's testimony so upsetting that he repeatedly banged his head against the counsel table.⁴⁹⁴ In time, he knocked himself out.⁴⁹⁵ Judge Keenan had to excuse the jury and seek medical attention for the defendant.⁴⁹⁶

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.⁴⁹⁷

On July 13, a jury acquitted Haouari of aiding and abetting what became known as the millennium bombing plot, but convicted him of conspiracy and fraud.⁴⁹⁸ On January 16, 2002, Judge Keenan sentenced Haouari to 24 years in prison.⁴⁹⁹ A year later, the court of appeals affirmed the conviction and sentence.⁵⁰⁰

On July 27, 2005, at the conclusion of Ressam's cooperation with investigations and prosecutions,⁵⁰¹ Judge Coughenour sentenced Ressam to 22 years in prison.⁵⁰²

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

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. *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.

499. *Haouari*, 429 F. Supp. 2d at 673; *United States v. Ressam*, 629 F.3d 793, 810 (9th Cir. 2010); see Fritsch, *supra* note 498; John J. Goldman, *Algerian Gets Prison in LAX Bomb Plot*, L.A. Times, Jan. 17, 2002, at 13.

500. *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.

501. 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.

502. *Ressam*, 629 F.3d at 805, 814; *United States v. Ressam*, 474 F.3d 597, 601 (9th Cir. 2007); *Ressam* July 27, 2005, Transcript, *supra* note 488; 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,

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.⁵⁰³ The court remanded the case for resentencing.⁵⁰⁴

On December 7, 2007, the Supreme Court agreed to review the court of appeals' decision.⁵⁰⁵ 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.⁵⁰⁶ The Supreme Court agreed with the argument and reinstated the conviction on May 19.⁵⁰⁷ On December 3, Judge Coughenour resentenced Ressam to 22 years.⁵⁰⁸ 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

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.

503. *Ressam*, 474 F.3d at 598–604; *see Ressam*, 629 F.3d at 814; 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.

504. *Ressam*, 474 F.3d at 604; *see Ressam*, 629 F.3d at 814; Shukovsky, *supra* note 503.

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 (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).

505. *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.

506. *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.

507. *United States v. Ressam*, 553 U.S. 272 (2008); *see Ressam*, 629 F.3d at 814; 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.

508. Amended Judgment, *United States v. Ressam*, No. 2:99-cr-666 (W.D. Wash. Dec. 3, 2008); *Ressam*, 629 F.3d at 805; *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.

judge.⁵⁰⁹ This decision was reviewed by an 11-judge en banc panel on September 21, 2011.⁵¹⁰

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.⁵¹¹ Judge Coughenour reviewed the documents without the assistance of a law clerk, because there was not time to obtain top secret clearance.⁵¹² The documents were delivered to the judge by a classified information security officer and reviewed by the judge under the security officer's watch.⁵¹³ They were stored in a safe to which the officer, and not the judge, had access.⁵¹⁴ Judge Coughenour decided that the documents were not discoverable.⁵¹⁵

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.⁵¹⁶ 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.⁵¹⁷ A Canadian court official attended to rule on potential issues of Canadian law.⁵¹⁸ Ressay participated by video conference from his jail cell with the assistance of an Arabic interpreter.⁵¹⁹

509. *Ressay*, 629 F.3d 793 (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; see Hafetz, *supra* note 502, 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: Ressay 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.

510. http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006165 (video recording of oral argument); Docket Sheet, United States v. Ressay, No. 09-30000 (9th Cir. Jan. 5, 2009).

511. See Mike Carter & Steve Miletich, *Judge to Review Ressay Papers*, Seattle Times, Nov. 3, 2000, at B1; Sam Skolnik, *Ressay Prosecutors Reveal Existence of Classified Data*, Seattle Post-Intelligencer, Nov. 3, 2000, at B2.

512. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

513. *Id.*

514. *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.

515. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

516. See Sam Skolnik, *Bomb Plot Case Inquiry Moves to Vancouver, B.C.*, Seattle Post-Intelligencer, July 20, 2000, at B3.

517. See *Ressay* Mar. 1, 2001, Transcript, *supra* note 464; Skolnik, *supra* note 516.

518. See *Ressay* Mar. 1, 2001, Transcript, *supra* note 464.

519. 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.

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.⁵²⁰

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.⁵²¹

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."⁵²²

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.⁵²³

Challenge: Jury Security

Judge Coughenour was not asked to use an anonymous jury; he has never used one.⁵²⁴ 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.⁵²⁵

Challenge: Witness Security

On March 29, 2001, Meskini testified at Ressam's trial.⁵²⁶ It was reported that his testifying would require his entering the witness protection program.⁵²⁷ He was brought to the courtroom through a side door.⁵²⁸

Judge Coughenour overruled the government's attempts to protect the identity of another witness, such as taking testimony remotely or behind a screen and

520. *Ressam* Apr. 27, 2005, Transcript, *supra* note 488; Interview with Hon. John C. Coughenour, Oct. 3, 2008.

521. Interview with Hon. John C. Coughenour, Oct. 3, 2008; *see Ressam* Mar. 1, 2001, Transcript, *supra* note 464.

522. Sunde & Porterfield, *supra* note 427.

523. *See Carter*, *supra* note 466.

524. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

525. *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.

526. *See Adams*, *supra* note 446; Booth, *supra* note 470; 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.

527. *See Mike Carter*, *Witness Tells of Ticket to Pakistan*, Seattle Times, Mar. 15, 2001, at B1.

528. *See Miletich*, *supra* note 526.

withholding background information, and the government decided not to use the witness.⁵²⁹

529. Interview with Hon. John C. Coughenour, Oct. 3, 2008.

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.⁵³⁰

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.⁵³¹

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.⁵³² 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).⁵³³ Regan was indicted on October 23, 2001,⁵³⁴ and superseding indictments were filed on February 14⁵³⁵ and July 24, 2002.⁵³⁶ The government filed a notice of intent to seek the death penalty on April 19, 2002.⁵³⁷ The court assigned the case to Judge Gerald Bruce Lee.⁵³⁸

530. *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.

531. Bhattacharjee, *supra* note 530.

532. *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).

533. *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 530.

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 530. 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.

534. *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 532.

535. *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 532.

536. *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

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.⁵³⁹ The jury rejected the death penalty on February 24,⁵⁴⁰ and Regan was sentenced on March 20 to life in prison without the possibility of parole.⁵⁴¹ 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.⁵⁴²

Regan also agreed to disclose what he had done with classified information.⁵⁴³ 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.⁵⁴⁴ 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.⁵⁴⁵

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.⁵⁴⁶ The defendant and his attorneys were given access to the classified information and a computer in a sensitive compartmented information facility (SCIF) located in the courthouse.⁵⁴⁷

675 (same); *Regan*, 221 F. Supp. 2d at 669 (same); *Regan*, 221 F. Supp. 2d at 663 (same); Docket Sheet, *supra* note 532.

537. *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 532; *see Going to Trial*, *supra* note 530.

538. Docket Sheet, *supra* note 532; *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.

539. Docket Sheet, *supra* note 532; *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 538.

540. Docket Sheet, *supra* note 532; *see Meyer, supra* note 539; Rosenblatt, *supra* note 530; *The Week That Was*, Balt. Sun, Mar. 2, 2003, at 2C; *Life in Prison*, *supra* note 538.

541. Docket Sheet, *supra* note 532; *see Rosenblatt, supra* note 530; *Life in Prison*, *supra* note 538.

542. *See Bhattacharjee, supra* note 530; *Life in Prison*, *supra* note 538.

543. *See Bhattacharjee, supra* note 530; Rosenblatt, *supra* note 530.

544. *See Rosenblatt, supra* note 530.

545. *See Bhattacharjee, supra* note 530; Rosenblatt, *supra* note 530.

546. *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.

547. *Regan*, 281 F. Supp. 2d at 800–01; *see Reagan, supra* note 173, at 19 (describing SCIFs); *see also Priest & Arkin, supra* note 239, at 50 (noting that SCIF is pronounced “skiff”).

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.⁵⁴⁸

Discovered in Regan’s jail cell were apparently typewritten letters to his wife and children and a page of code.⁵⁴⁹ These documents appeared to concern the locations of hidden classified information.⁵⁵⁰ The government sought permission from the court to search the SCIF to see if these documents were improperly created on the computer there.⁵⁵¹ Judge Lee allowed a search, but established special procedures to preserve the attorney–client privilege and work-product protection.⁵⁵²

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 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

Defense experts also had to obtain security clearances to examine classified documents. *See Prosecutors Reconsider*, *supra* note 538.

548. *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”).

549. *Regan*, 281 F. Supp. 2d at 800, 807.

550. *Id.* at 800, 804–05.

551. *Id.* at 799–800.

552. *Id.* at 800.

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.⁵⁵³

The unit of the Justice Department that provides the courts with classified information security officers—the Litigation Security Group within the Management Division⁵⁵⁴—conducted the search.⁵⁵⁵

553. *Id.* at 806–07. The memorandum opinion was unsealed on March 10, 2003. Docket Sheet, *supra* note 532.

554. *See* Reagan, *supra* note 173, at 17–18.

555. Interview with Dep’t of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

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.⁵⁵⁶ Apparently al-Marabh had moved, and the current residents—Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud—consented to a search.⁵⁵⁷ Agents found fraudulent identification documents in the name of Youssef Hmimssa, a former roommate, who had asked them to hold the documents for him.⁵⁵⁸ Koubriti and Hannan admitted that they knew that the documents were fraudulent.⁵⁵⁹ They were arrested that day and charged on the following day; they were indicted on September 27 for possession of false documents.⁵⁶⁰ Hmimssa, who was arrested in Cedar Rapids, Iowa, also was indicted on September 27.⁵⁶¹ Ali-Haimoud was arrested with Koubriti and Hannan, but he was not indicted until March 27, 2002.⁵⁶² Abdel Ilah Elmardoudi, the alleged ringleader in Chicago,

556. *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*, *supra* note 226, at 21; *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.

557. *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) [hereinafter *Prosecutor*].

Two days later, al-Marabh was arrested in Burbank, Illinois. *See* Shenon & Van Natta, *supra* note 556; 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.

558. *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 556; Shenon & Van Natta, *supra* note 556; *Prosecutor*, *supra* note 557; Van Natta, *supra* note 556.

559. *Koubriti*, 2001 WL 1525270, at *2, 6.

560. *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658–59; *Koubriti*, 2001 WL 1525270, at *1.

561. *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 556; Van Natta, *supra* note 556.

562. *Koubriti*, 252 F. Supp. 2d at 426; *Koubriti*, 199 F. Supp. 2d at 658 n.1.

also was indicted on March 27.⁵⁶³ On August 28, 2002, the government added charges against the defendants for material support of terrorism.⁵⁶⁴ The U.S. District Court for the Eastern District of Michigan assigned the case to Judge Gerald E. Rosen.⁵⁶⁵

Hmimssa's prosecution was severed from the other defendants' because he agreed to cooperate with the government and testify against them.⁵⁶⁶ On September 9, 2005, he was sentenced to more than six years in prison for document fraud.⁵⁶⁷ He was deported to Morocco in 2007.⁵⁶⁸

This case was a high-profile case that had received some national press coverage and a lot of local press coverage.⁵⁶⁹ The court selected 280 prospective jurors for the case, and the judge 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.⁵⁷⁰

To select jurors, Judge Rosen worked with the attorneys to prepare a jury questionnaire.⁵⁷¹ Based on answers to this questionnaire, the court and the attor-

563. *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 557; *Prosecutor*, *supra* note 557.

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.

564. *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.

565. 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.

566. *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.

567. Criminal Judgment, *Koubriti*, No. 2:01-cr-80778 (E.D. Mich. Sept. 9, 2005) (sentencing Hmimssa to 78 months in prison); 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).

568. See David Ashenfelter, *Terrorism Case's Witness Deported*, Detroit Free Press, Nov. 2, 2007, at 2.

569. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

570. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 565 (noting voir dire from Mar. 18 to Mar. 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.

571. 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.⁵⁷² 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.⁵⁷³

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.⁵⁷⁴

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.⁵⁷⁵ The defendant moved for a mistrial, but the government maintained that the document was not material.⁵⁷⁶ Judge Rosen ordered an investigation, which showed that the withholding of this document was the tip of a misconduct iceberg.⁵⁷⁷

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.⁵⁷⁸

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.”⁵⁷⁹

572. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

573. *Id.*

574. *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 566; Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial*, Wash. Post, June 4, 2003, at A10; *Prosecutor*, *supra* note 557.

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).

575. *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 226, at 22; *see Koubriti*, 593 F.3d at 463; *Prosecutor*, *supra* note 557.

576. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

577. *Trying Cases*, *supra* note 226, at 23; *see Koubriti*, 593 F.3d at 463; *Prosecutor*, *supra* note 557.

578. *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.”).

579. *Id.* at 681; *see* Hakim, *supra* note 565 (quoting text).

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 El-mardoudi and ordered a new trial on the fraudulent-document charges against Koubriti, El-mardoudi, and Hannan.⁵⁸⁰ The government elected not to pursue further the charges tried.⁵⁸¹

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.⁵⁸² Hannan pleaded guilty on March 22, 2005, agreeing to a prison term of time served and deportation to Morocco.⁵⁸³ The court released Koubriti on bond on October 12, 2004.⁵⁸⁴ Koubriti unsuccessfully moved to dismiss the fourth superseding indictment as double jeopardy and otherwise a violation of due process.⁵⁸⁵ On February 9, 2010, Judge Rosen granted the government's motion to dismiss Koubriti's indictment for successful completion of pretrial diversion.⁵⁸⁶

The prosecutor and a government witness were acquitted of wrongdoing in a criminal trial. Docket Sheet, *United States v. Convertino*, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006) (noting an Oct. 31, 2007, jury verdict of not guilty); *Koubriti*, 593 F.3d at 464; *Trying Cases*, *supra* note 226, at 23; 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; *Prosecutor*, *supra* note 557.

580. *United States v. Koubriti*, 509 F.3d 746, 748 (6th Cir. 2007); *Koubriti*, 336 F. Supp. 2d at 682; *Trying Cases*, *supra* note 226, at 23; see *Koubriti*, 593 F.3d at 463–64; *United States v. El-mardoudi*, 501 F.3d 935, 938 & n.4 (8th Cir. 2007); see also Hakim, *supra* note 565; Richard B. Schmitt, *Judge, Citing Misconduct, Tosses Terror Convictions*, L.A. Times, Sept. 3, 2004, at 15; *Prosecutor*, *supra* note 557.

581. *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); *Prosecutor*, *supra* note 557.

582. *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 556; *Prosecutor*, *supra* note 557. 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 556.

583. 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).

584. *Koubriti*, 593 F.3d at 464.

585. *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.

586. 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 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).

Koubriti filed a lawsuit against the Wayne County Jail for improper conditions of confinement, such as excessive security and serving him pork.⁵⁸⁷ The district court granted the county summary judgment on claims of insufficient exercise and serving pork, but denied summary judgment on excessive strip searches,⁵⁸⁸ and the case settled.⁵⁸⁹ Koubriti then sued his prosecutors for malicious prosecution,⁵⁹⁰ but the Sixth Circuit's court of appeals determined that the prosecutors had prosecutorial immunity.⁵⁹¹ The district court granted summary judgment to an FBI agent defendant, bringing the case to a close.⁵⁹²

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,⁵⁹³ 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.⁵⁹⁴

587. 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.

588. Opinion, *id.* (July 27, 2007), available at 2007 WL 2178331 (granting summary judgment on exercise claim); Opinion, *id.* (Jan. 3, 2007), available at 2007 WL 45923 (granting summary judgment on the pork claim).

589. Stipulated Dismissals, *id.* (Aug. 9 and 24, 2007).

590. 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; *Prosecutor, supra* note 557.

591. *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.

592. 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.

593. *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).

594. 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. Opinion, *United States v. Elmardoudi*, 313 F. App’x 923 (8th Cir.), *cert. denied*, ___ U.S. ___, 130 S. Ct. 421 (2009).

Challenge: Jury Security

To protect jurors' security, Judge Rosen implemented "soft sequestration."⁵⁹⁵ Jurors did not come directly to the courthouse in the morning.⁵⁹⁶ Instead, they assembled at a secret location and were driven to the courthouse in a van.⁵⁹⁷ Someone found out about the secret location and called the jury room with a death threat.⁵⁹⁸ On the following day, someone called the Detroit News with a death threat concerning the judge.⁵⁹⁹ The Marshal changed the jurors' meeting location, used a different-color van to transport them, and beefed up security for Judge Rosen's courtroom.⁶⁰⁰

Another measure Judge Rosen implemented to protect jurors' security was to empanel an anonymous jury.⁶⁰¹ Jury selection was conducted behind closed doors.⁶⁰² Judge Rosen released a redacted transcript of the selection process, but only after the trial was over.⁶⁰³ 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.⁶⁰⁴

Challenge: Sanctioning a Cabinet Officer

On December 16, 2003, Judge Rosen issued "a public and formal judicial admonishment of the Attorney General."⁶⁰⁵ 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.⁶⁰⁶

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-

595. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

596. *Id.*

597. *Id.*

598. *Trying Cases*, *supra* note 226, at 21; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

599. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

600. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Jan. 3, 2007.

601. *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 empanelling of an anonymous jury); *Trying Cases*, *supra* note 226, at 21; 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.

602. *Trying Cases*, *supra* note 226, at 21; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Eggen & Lengel, *supra* note 601.

603. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

604. *Id.*

605. *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.

606. *Trying Cases*, *supra* note 226, at 21.

fering with a fair trial.⁶⁰⁷ 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.”⁶⁰⁸ In addition, during the trial, the Attorney General commented favorably at a press conference on the credibility of the cooperating codefendant’s testimony.⁶⁰⁹

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.⁶¹⁰ On the following day, MSNBC News presented improperly leaked evidence against the defendants.⁶¹¹ The Attorney General’s responsibility for these leaks remained unclear.⁶¹²

The defendants moved for sanctions against the Attorney General on August 28, 2003.⁶¹³ 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.”⁶¹⁴ In response, the Attorney General stated that he regretted making the statements and acknowledged that they were mistakes, but said that they were entirely inadvertent.⁶¹⁵

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.⁶¹⁶ Criminal contempt proceedings against a sitting Cabinet officer would require extraordinary procedures and implicate serious constitutional issues.⁶¹⁷ Because the record did not suggest willful violation of the court’s order, Judge Rosen decided that confronting these difficulties would not be necessary.⁶¹⁸ But because the Attorney General did violate

607. *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 Prosecutor*, *supra* note 557.

608. *Koubriti*, 305 F. Supp. 2d at 725, 729–30; *see* Shenon & Van Natta, *supra* note 556 (reporting on the Attorney General’s news conference); *Prosecutor*, *supra* note 557.

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 Prosecutor*, *supra* note 557. But, more than five years after that, government counsel told an appellate panel at oral argument that Elwardoudi was accused of supporting terrorists connected with the September 11, 2001, attacks. *United States v. Elwardoudi*, 504 F.3d 935, 938 n.3 (8th Cir. 2007).

609. *Koubriti*, 305 F. Supp. 2d at 725, 735–36.

610. *Id.* at 731; *Trying Cases*, *supra* note 226, at 22; *see Prosecutor*, *supra* note 557 (noting that Judge Rosen learned from the broadcast that he would preside over the case).

611. *Koubriti*, 305 F. Supp. 2d at 732.

612. *Id.* at 725 n.1.

613. E.D. Mich. *Koubriti* Docket Sheet, *supra* note 565.

614. *Koubriti*, 305 F. Supp. 2d at 725; *see also id.* at 737.

615. *Id.* at 737–38; *see* Schmitt, *supra* note 605.

616. *Koubriti*, 305 F. Supp. 2d at 741.

617. *Id.* at 726, 742, 752–57.

618. *Id.* at 726, 748–57.

the court's order on two occasions, Judge Rosen decided to formally admonish him.⁶¹⁹

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.⁶²⁰ Judge Rosen negotiated with the CIA's general counsel to establish a protocol for the review and use of the CIA's evidence.⁶²¹ Because records of cable traffic could not be brought to Detroit, Judge Rosen traveled to McLean, Virginia, to review them.⁶²²

Review of classified evidence in Detroit required the court to (1) establish a sensitive compartmented information facility (SCIF)⁶²³ and (2) engage in the time-consuming process of obtaining security clearances for both court staff and defense counsel.⁶²⁴

A SCIF is a secure room in which documents are stored in independently locked file drawers.⁶²⁵ The room was created by classified information security officers provided by the Justice Department's Litigation Security Group,⁶²⁶ and then the court programmed the codes for access.⁶²⁷ Only chambers staff with security clearances may enter this SCIF.⁶²⁸

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.⁶²⁹

619. *Id.* at 725–26, 757–65; see Schmitt, *supra* note 605; *Prosecutor*, *supra* note 557.

620. *Trying Cases*, *supra* note 226, at 22; Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

621. Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

622. *Trying Cases*, *supra* note 226, at 5–6; Interviews with Hon. Gerald E. Rosen, Dec. 7, 2006, and Apr. 18, 2007.

623. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see Reagan, *supra* note 173, at 19 (describing SCIFs).

624. *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 remain on staff. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

625. Rosen, *supra* note 565, at 105; Interview with Hon. Gerald E. Rosen, Dec. 7, 2006; see also *Trying Cases*, *supra* note 226, at 4–5.

626. See Reagan, *supra* note 173, at 17–18.

627. Interview with Hon. Gerald E. Rosen, Dec. 7, 2006.

628. *Id.*

629. *Trying Cases*, *supra* note 226, at 3.

Twentieth Hijacker

United States v. Moussaoui
(*Leonie M. Brinkema, E.D. Va.*)⁶³⁰

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.⁶³¹ 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.⁶³² The fourth plane crashed near Shanksville, Pennsylvania, apparently after passengers thwarted the hijackers' plan to strike a strategic target—perhaps the Capitol.⁶³³ This plane apparently had only four hijackers aboard.⁶³⁴ Just a few days later, it was reported that Zacarias Moussaoui may have been intended to be the twentieth hijacker.⁶³⁵

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.⁶³⁶ Three days earlier, he had begun instruction at the Pan Am International

630. 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.

631. 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 Schmemmann, *U.S. Attacked*, N.Y. Times, Sept. 12, 2001, at A1; see also <http://legacy.com/Sept11/Home.aspx> (providing victim profiles).

632. See Grunwald, *supra* note 631; 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*]; Schmemmann, *supra* note 631.

633. The 9/11 Commission Report 244 (2004); *Moussaoui*, 591 F.3d at 266; see Grunwald, *supra* note 631; Jere Longman, *Families Say Tapes Verify Talk of Valor*, N.Y. Times, Apr. 19, 2002, at A14; *New Theory*, *supra* note 632; Schmemmann, *supra* note 631; 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.”); Soufan, *supra* note 64, at 282 (reporting that Osama Bin Laden identified the Capitol as the fourth target).

634. 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 632; Longman, *supra* note 633; *New Theory*, *supra* note 632.

635. 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 Sept. 19, 2001, that Moussaoui might be the twentieth hijacker).

636. 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);

Flight Academy.⁶³⁷ 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.⁶³⁸ But the *Washington Post* reported in November 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.⁶³⁹

Moussaoui was born on May 30, 1968, in the Atlantic coast town of St.-Jean-de-Luz, France, the youngest of four children.⁶⁴⁰ He moved to London in 1990, and then moved back to France in 1997.⁶⁴¹ By the time he entered the United States on a student visa, French authorities already suspected him of terrorist ties.⁶⁴² In February 2001, he moved to Norman, Oklahoma, for training at the Airman Flight School, where his performance was judged poor.⁶⁴³

Johnston & Shenon, *supra* note 632; Peterson, *supra* note 635; Pohlman, *supra* note 220, at 192; Soufan, *supra* note 64, at 277.

637. The 9/11 Commission Report 246–47, 273 (2004); *Moussaoui*, 591 F.3d at 266, 274; *see* Johnston & Shenon, *supra* note 634.

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.

638. James V. Grimaldi, *FBI Had Warning on Man Now Held in Attacks*, Wash. Post, Sept. 23, 2001, at A18; Johnston & Shenon, *supra* note 634; Susan Schmidt & Lois Romano, *Did Student's Case Hold Clues to Terrorist Plot?*, Wash. Post, Sept. 22, 2001, at A20.

639. 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.

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).

640. *See* Daley, *supra* note 635; Donahue, *supra* note 636, at 42, 104; Schmidt & Romano, *supra* note 638.

641. *See* Daley, *supra* note 635.

642. *See* Donahue, *supra* note 636, at 16–17, 116–17; Grimaldi, *supra* note 638 (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.

In April 1998, Moussaoui was at the same terrorist training camp in Afghanistan as Ahmed Ressay, who is sometimes referred to as the Millennium Bomber. *See* Donahue, *supra* note 636, at 121, 165; *see also supra*, “Millennium Bomber” (concerning the prosecution of Ressay).

643. 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 635; Donahue, *supra* note 636, 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 634; Schmidt & Romano, *supra* note 638; Soufan, *supra* note 64, at 276–77.

During this time, he apparently had contact with Ramzi Muhammad Abdullah Bin al-Shibh,⁶⁴⁴ a roommate of Mohamed Atta⁶⁴⁵ in Hamburg, Germany.⁶⁴⁶ 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.⁶⁴⁷ Bin al-Shibh apparently wired Moussaoui \$14,000,⁶⁴⁸ \$8,600 of which Moussaoui used for flight school.⁶⁴⁹ Ramzi Bin al-Shibh was also known as Ramzi Omar,⁶⁵⁰ and he too came to be suspected as the intended twentieth hijacker,⁶⁵¹ but he was repeatedly denied a visa to enter the United States.⁶⁵² 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.⁶⁵³ He is to be tried there by military commission.⁶⁵⁴

644. “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.” McDermott, *supra* note 633, at 49.

645. “Atta was a finicky, dour man whose chief attributes were obedience and a capacity for detail.” *Id.*

646. 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 64, 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).

647. The 9/11 Commission Report 5 (2004) (Atta was “the only terrorist on board trained to fly a jet”); see Johnston & Shenon, *supra* note 634; Risen, *supra* note 646; John Tagliabue, *Retracing a Trail to Sept. 11 Plot*, N.Y. Times, Nov. 18, 2001, at 1.

648. The 9/11 Commission Report 246, 273 (2004); see Donahue, *supra* note 636, at 1, 28–29, 76; Johnston & Shenon, *supra* note 632.

649. See Philip Shenon, *The Terrible Missed Chance*, Newsweek, Sept. 12, 2011, at 15.

650. See McDermott, *supra* note 633, at 49; Soufan, *supra* note 64, at 272.

651. See *New Theory*, *supra* note 632; Risen, *supra* note 646; Shenon, *supra* note 639; Tagliabue, *supra* note 647.

Another person designated the twentieth hijacker—Mohammed al-Qahtani—is detained at Guantánamo Bay. See Hafetz, *supra* note 502, at 38; 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 64, at 458–59; Wax, *supra* note 91, at 154.

652. 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, *supra* note 633, 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 64, 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.

653. See Donahue, *supra* note 636, 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, *Bin al-Shibh Said to Provide “Useful Information,”* Wash. Post., Oct. 4, 2002, at A17; Risen, *supra* note 646; Soufan, *supra* note 64, at 428, 484–88.

654. See Finn, *supra* note 165; see also <http://www.mc.mil> (military commission records).

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.⁶⁵⁵

The government filed an indictment against Moussaoui on December 11, 2001, in the U.S. District Court for the Eastern District of Virginia.⁶⁵⁶ Four of the six conspiracy counts exposed Moussaoui to the death penalty, and the court immediately appointed three attorneys to represent him.⁶⁵⁷ The court assigned the case to Judge Leonie M. Brinkema.⁶⁵⁸

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.”⁶⁵⁹ Judge Brinkema, with the consent of Moussaoui’s lawyer, entered a plea of not guilty.⁶⁶⁰ Meeting a deadline set by the court, the government announced on March 28 that it would seek the death penalty.⁶⁶¹

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.⁶⁶²

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

655. See Johnston & Shenon, *supra* note 634.

656. 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 636, 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 632; Pohlman, *supra* note 220, at 192.

Moussaoui was originally flown to New York, on September 14, 2001, for possible prosecution there. See Donahue, *supra* note 636, 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.

657. Complex Case Order at 1, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001) (recognizing four capital counts), available at 2001 WL 1887910; see Donahue, *supra* note 636, at 1, 19; Johnston & Shenon, *supra* note 632; David Johnston & Benjamin Weiser, *Government’s Focus in the First Sept. 11 Trial: Al Qaeda*, N.Y. Times, Dec. 13, 2001, at B5.

658. 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.

659. 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 636, at 8, 20.

660. E.D. Va. Docket Sheet, *supra* note 658; *Moussaoui*, 591 F.3d at 267; see Copeland, *supra* note 659; Donahue, *supra* note 636, at 20; Johnston, *supra* note 659.

661. Complex Case Order, *supra* note 657, at 3 (setting a deadline of Mar. 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 636, at 23; Philip Shenon & Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, N.Y. Times, Mar. 29, 2002, at A20.

662. See Donahue, *supra* note 636, at 9, 64.

50-minute diatribe on Islam and the U.S. government's conspiracy to kill him.⁶⁶³ He said that his lawyers did not understand Muslims, so he would like to represent himself, possibly with the assistance of a Muslim lawyer.⁶⁶⁴ 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.⁶⁶⁵

A court-appointed psychiatrist determined that Moussaoui was a fanatic, but not mentally incompetent to stand trial or waive his right to counsel.⁶⁶⁶ On June 13, Judge Brinkema granted Moussaoui's motion to represent himself, keeping appointed counsel as standbys.⁶⁶⁷

The government filed a superseding indictment on June 19,⁶⁶⁸ and at the arraignment six days later Moussaoui tried to plead no contest.⁶⁶⁹ 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.⁶⁷⁰

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 reasonable doubt.⁶⁷¹ So the government filed a second superseding indictment on July 16 to accommodate the requirements of *Ring*.⁶⁷² 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 know-

663. See Pohlman, *supra* note 220, at 193–94 (presenting excerpts from speech); Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, N.Y. Times, Apr. 23, 2002, at A1.

664. *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 Apr. 22, 2002); Pohlman, *supra* note 220, at 192; Donahue, *supra* note 636, at 23–24, 36, 39–40, 166; Shenon, *supra* note 663.

665. 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 636, at 24, 36, 54; Shenon, *supra* note 663.

666. See Philip Shenon, *Court Psychiatrist Concludes Defendant Is Not Mentally Ill*, N.Y. Times, June 8, 2002, at A11; see also Donahue, *supra* note 636, at 54.

667. 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; *Moussaoui*, 333 F.3d at 513; see Donahue, *supra* note 636, at 24, 36, 54; Pohlman, *supra* note 220, at 192; Philip Shenon, *Judge Lets Man Accused in Sept. 11 Plot Defend Himself*, N.Y. Times, June 14, 2002, at A27.

668. Superseding Indictment, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. June 19, 2002).

669. 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.

670. Order Denying No-Contest Plea, *supra* note 669; E.D. Va. Docket Sheet, *supra* note 658; see Lewis, *supra* note 669.

671. *Ring v. Arizona*, 536 U.S. 584 (2002).

672. 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 636, at 26; Philip Shenon, *Judge Clears Defendant to Meet French Diplomats*, N.Y. Times, July 17, 2002, at A16.

ledge and participated in Al Qaeda.”⁶⁷³ Judge Brinkema decided to give him a week to reconsider his guilty plea.⁶⁷⁴ 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.⁶⁷⁵

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.⁶⁷⁶ Judge Brinkema postponed the trial indefinitely to permit the government to appeal.⁶⁷⁷ The court of appeals stayed the appeal briefly and remanded the case so that the government could suggest alternatives to the evidence sought.⁶⁷⁸ Judge Brinkema ruled that a government summary of what Bin al-Shibh would say if interviewed would be insufficient “because of its unreliability, incompleteness and inaccuracy.”⁶⁷⁹ After oral argument on June 3 before U.S. Circuit Judges William W. Wilkins, Karen J. Williams, and Roger L. Gregory,⁶⁸⁰ the court of appeals determined on June 26 that it did not

673. *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 636, at 26; Pohlman, *supra* note 220, at 194.

674. *Moussaoui*, 591 F.3d at 270; see Donahue, *supra* note 636, at 26; Shenon, *supra* note 673.

675. E.D. Va. Docket Sheet, *supra* note 658; *Moussaoui*, 591 F.3d at 270–71; see Donahue, *supra* note 636, at 27; Pohlman, *supra* note 220, at 194; Philip Shenon, *Terror Suspect Changes Mind on Guilty Plea*, N.Y. Times, July 26, 2001, at A1.

676. Bin al-Shibh Deposition Opinion, *supra* note 639, 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 658; see Donahue, *supra* note 636, at 28–29; Pohlman, *supra* note 220, 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.”).

677. 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 636, 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.

678. *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 636, at 29; Jerry Markon, *Court Seeks Deal on Terror Witness Access*, Wash. Post, Apr. 16, 2003, at A12; Pohlman, *supra* note 220, at 194; Philip Shenon, *Prosecution Says Qaeda Member Was to Pilot 5th Sept. 11 Jet*, N.Y. Times, Apr. 16, 2003, at B10.

679. 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 636, 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.

680. *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.

have appellate jurisdiction over Judge Brinkema's order, and the merits of the government's objection were not so clear as to warrant mandamus.⁶⁸¹

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.⁶⁸² KSM and al-Hawsawi had been captured in Pakistan on February 27.⁶⁸³ 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.⁶⁸⁴

The same panel that dismissed the appeal of Judge Brinkema's deposition order determined that this sanction order was appealable.⁶⁸⁵ 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.⁶⁸⁶ Judge Gregory dissented in

681. *Moussaoui*, 333 F.3d at 512, 514, 517; *Moussaoui*, 382 F.3d at 459; see Donahue, *supra* note 636, 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 220, 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.

682. 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 636, 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 64, 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").

683. See Donahue, *supra* note 636, at 29; Schmidt, *supra* note 682.

684. *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 636, at 29–30; Jerry Markon, *Ruling Shakes Up Moussaoui Terror Case*, Wash. Post, Oct. 3, 2003, at A1; Pohlman, *supra* note 220, at 191, 198; Philip Shenon, *Judge Rules Out a Death Penalty for 9/11 Suspect*, N.Y. Times, Oct. 3, 2003, at A1.

685. *Moussaoui*, 382 F.3d at 462–63.

686. *Id.* at 456–57, 479–82; see Donahue, *supra* note 636, at 122; Hafetz, *supra* note 502, at 227; Jerry Markon, *Court Clears Way for Moussaoui Trial*, Wash. Post, Sept. 14, 2004, at A5; Pohlman, *supra* note 220, 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 636, at 31; Linda Greenhouse, *After 5 Months' Absence, Rehnquist Is Back in Court*, N.Y. Times, Mar. 22, 2005;

part on the ground that substitutions for witness depositions would not be sufficient to justify a death sentence.⁶⁸⁷

As part of the government's interrogation of the three detainees, it had prepared classified detainee reports for military and intelligence use.⁶⁸⁸ The government prepared classified summaries of these detainee reports for the use of cleared counsel in Moussaoui's prosecution.⁶⁸⁹ 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."⁶⁹⁰ 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."⁶⁹¹

Meanwhile, on November 14, 2003, Judge Brinkema decided that because of his frequent inappropriate filings Moussaoui could no longer proceed pro se.⁶⁹² 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.⁶⁹³

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.⁶⁹⁴ Jury selection began on February 6,

Jerry Markon, *High Court Declines to Hear Terror Case*, Wash. Post, Mar. 22, 2005, at A3; Pohlman, *supra* note 220, at 191.

687. *Moussaoui*, 382 F.3d at 483–89 (Gregory, concurring in part and dissenting in part); *see* Markon, *supra* note 686; Pohlman, *supra* note 220, at 226–27.

688. *Moussaoui*, 382 F.3d at 458 n.5.

689. *Id.*

690. *Id.* at 478.

691. *Id.* at 479.

692. 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 636, at 30–31, 36, 40; Jerry Markon, *Lawyers Restored for Moussaoui*, Wash. Post, Nov. 15, 2003, at A2; Pohlman, *supra* note 220, at 194; Philip Sheanon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. Times, Nov. 15, 2003, at A8.

693. 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 636, at 31; Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. Times, Apr. 23, 2005, at A1; Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, Wash. Post, Apr. 23, 2005, at A1; Pohlman, *supra* note 220, 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.

694. *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 636, at 33–34, 65.

2006.⁶⁹⁵ The court sent summonses to more than 1,000 residents within the district's Alexandria division.⁶⁹⁶ Judge Brinkema used an anonymous jury, and to facilitate juror selection she used a jury questionnaire, which more than 500 potential jurors filled out.⁶⁹⁷

Opening statements began on March 6.⁶⁹⁸ 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 2001.⁶⁹⁹ 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.⁷⁰⁰

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.⁷⁰¹ Judge Brinkema ruled that the coached witnesses could not testify.⁷⁰²

695. E.D. Va. Docket Sheet, *supra* note 658; *see* Donahue, *supra* note 636, at 34, 59; Jerry Markon & Timothy Dwyer, *Moussaoui Repeatedly Ejected at Trial*, Wash. Post, Feb. 7, 2006, at B1.

696. Interview with Hon. Leonie M. Brinkema, Mar. 26, 2008.

697. 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 636, 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.

698. E.D. Va. Docket Sheet, *supra* note 658; *see* Donahue, *supra* note 636, at 59, 65; Neil A. Lewis, *Prosecutor Urges Death for Concealing Sept. 11 Plot*, N.Y. Times, Mar. 7, 2006, at A14.

699. *See* Lewis, *supra* note 698; Jerry Markon & Timothy Dwyer, *Moussaoui's Lies Led to 9/11, Jury Told*, Wash. Post, Mar. 7, 2006, at A1.

700. *See* Trial Conduct Order 2, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 1, 2006); Donahue, *supra* note 636, 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 636, at 174.

701. *See* Donahue, *supra* note 636, 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. 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.

702. Second Aviation Witness Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 17, 2006); First Aviation Witness Order, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Mar. 14, 2006); *see* Donahue, *supra* note 636, 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.

The trial continued and jurors began to deliberate on Wednesday, March 29.⁷⁰³ After a weekend break,⁷⁰⁴ on Monday, April 3, the jurors unanimously agreed that Moussaoui lied to federal agents knowing that people would die as a result.⁷⁰⁵ On Monday, April 24, the jury began to deliberate on Moussaoui's penalty,⁷⁰⁶ returning a verdict of life in prison on Wednesday, May 3.⁷⁰⁷ After interviews with two anonymous jurors, *The Washington Post* reported that Moussaoui's life was spared by a single juror's vote.⁷⁰⁸

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.⁷⁰⁹ Judge Brinkema denied his motion.⁷¹⁰ The court of

703. E.D. Va. Docket Sheet, *supra* note 658; see Neil A. Lewis, *Moussaoui Sentencing Case Goes to the Jury*, N.Y. Times, Mar. 30, 2006, at A18.

704. See Jerry Markon, *Moussaoui Jurors Leave for Weekend*, Wash. Post, Apr. 1, 2006, at A7.

705. 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 636, 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.

706. E.D. Va. Docket Sheet, *supra* note 658; see Donahue, *supra* note 636, at 99; Neil A. Lewis, *Jury in Sentencing Trial Begins Deliberating Moussaoui's Fate*, N.Y. Times, Apr. 25, 2006, at A18.

707. 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 636, 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 636, at 3.

708. Timothy Twyer, *One Juror Between Terrorist and Death*, Wash. Post, May 12, 2006, at A1; see Donahue, *supra* note 636, at 2–3, 102–03.

709. 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 636, 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.

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.

appeals affirmed: “the finality of the guilty plea, entered knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences, stands.”⁷¹¹

Challenge: Attorney Appointment

Judge Brinkema initially appointed the Federal Public Defender and a private attorney to represent him.⁷¹² “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.”⁷¹³ Moussaoui identified a Muslim attorney in Texas whom he wanted to consult with, 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.⁷¹⁴

Moussaoui’s relations with private appointed counsel were more problematic than his relations with the Federal Defender’s office, so Judge Brinkema appointed another private attorney.⁷¹⁵ “Although Moussaoui initially refused to communicate with any of his appointed counsel, he later testified that he began communicating with [the second private attorney] because [he] was polite to [Moussaoui].”⁷¹⁶

Challenge: Court Security

Security was enhanced at Moussaoui’s arraignment.⁷¹⁷ Moussaoui arrived before 6:00 a.m., while it was still dark.⁷¹⁸ Deputy marshals surrounded the courthouse,

Moussaoui Affidavit at 3, Motion to Withdraw Plea, *supra*; see Donahue, *supra* note 636, at 167.

710. 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 636, at 102, 167; Lewis, *supra* note 709; Markon, *supra* note 709; Pohlman, *supra* note 220, at 247.

711. *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.

712. *Moussaoui*, 591 F.3d at 267.

713. *Id.*

714. *Id.* at 269.

715. *Id.*

716. *Id.* at 271 n.6.

717. See Copeland, *supra* note 659; Johnston, *supra* note 659.

718. See Copeland, *supra* note 659; 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 extra metal detectors were stationed at the courtroom.⁷¹⁹ 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.⁷²⁰

At subsequent appearances also, extra deputy marshals guarded the courthouse.⁷²¹ It was reported that the courthouse had never seen such a level of security.⁷²²

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.⁷²³

Challenge: Jury Security

Judge Brinkema used an anonymous jury.⁷²⁴ Jurors assembled in a secret location and were driven to the courthouse.⁷²⁵ The court set up a special room for the jurors to eat lunch away from the public.⁷²⁶ They were never permitted to be in the building unsupervised.⁷²⁷

Judge Brinkema observed that it is important to work cooperatively with the Marshal while maintaining ultimate responsibility.⁷²⁸

Challenge: Classified Evidence

Classified materials require extraordinary procedures, but Judge Brinkema tries to keep procedures as normal as possible.⁷²⁹ She requires all of her law clerks and other staff members to qualify for top-secret security clearances.⁷³⁰

and the courthouse at night or in the early morning, and the streets are shut down to minimize the risks.”).

719. See Johnston, *supra* note 659.

720. See Copeland, *supra* note 659.

721. See Masters, *supra* note 718.

722. 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.”).

723. Donahue, *supra* note 636, at 32.

724. Trial Conduct Order 1, *supra* note 697; see Markon, *supra* note 697.

725. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

726. *Id.*

727. *Id.*

728. *Id.*

729. *Id.*

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.⁷³¹

Moussaoui himself was not supposed to have access to classified information.⁷³² But, in June and July of 2002, the government inadvertently included classified materials among documents produced to Moussaoui.⁷³³ 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.⁷³⁴ (To accommodate the pro se defendant's access to documents in this case, Moussaoui was eventually given three cells.⁷³⁵)

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.⁷³⁶

But Judge Brinkema did permit the Marshal Service, in consultation with the classified information security officer, to search Moussaoui's cells for the two docu-

730. *Id.*

731. *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 636, at 23; Pohlman, *supra* note 220, at 194.

732. 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 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 693; 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); Tom Jackman, *Moussaoui's Access to Documents Limited*, Wash. Post, June 13, 2002, at A17.

733. 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 732.

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.

734. Aug. 22, 2002, Letter, *supra* note 733; see Shenon, *supra* note 732.

735. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

736. Aug. 22, 2002, Letter, *supra* note 733.

ments plus an additional five that the government identified in the interim as improperly produced.⁷³⁷ Of the seven searched for, five were found.⁷³⁸ By the following week, the government presented to Judge Brinkema a list of 43 improperly produced documents.⁷³⁹ 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.⁷⁴⁰ Eventually, the documents were retrieved and properly classified.⁷⁴¹

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.⁷⁴²

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.⁷⁴³ These filings could not be shared with Moussaoui, who did not have a security clearance, until they had been reviewed by the security officer.⁷⁴⁴ Unredacted filings containing classified information were filed with the security officer rather than the clerk.⁷⁴⁵ The government was responsible for classification reviews of its filings.⁷⁴⁶

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

737. 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 733.

738. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007; see Aug. 29, 2002, Letter, *supra* note 737; Shenon, *supra* note 732.

739. See Letter (Sept. 5, 2002), attached to Classified Document Retrieval Unsealing Order, *supra* note 733; Shenon, *supra* note 732.

740. See Dan Eggen, *FBI Failed to Classify Reports Before Moussaoui Had Them*, Wash. Post, Sept. 28, 2002, at A8.

741. Classified Document Retrieval Unsealing Order, *supra* note 733, at 1.

742. 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.

743. 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*].

744. Classified Filing Order, *supra* note 743, at 2; see *Moussaoui Motions*, *supra* note 743.

745. Classified Filing Order, *supra* note 743, at 2–3.

746. *Id.* at 2; see *Moussaoui Motions*, *supra* note 743.

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 220, at 194.

the court record.⁷⁴⁷ 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.⁷⁴⁸

The court's judges meet in regular session in Richmond six times a year. There are safes in the court's SCIF for the Moussaoui case, with separate drawers allocated to each judge.⁷⁴⁹ Cleared court staff members can bring classified documents from the SCIF to judges' Richmond chambers for review while the judges are in Richmond.⁷⁵⁰ 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 visits the SCIF himself to retrieve documents.⁷⁵¹ 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.⁷⁵²

Judge Wilkins had chambers in Greenville, South Carolina, and the courthouse there has a SCIF.⁷⁵³ 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.⁷⁵⁴ 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.⁷⁵⁵

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.⁷⁵⁶ Some information about their contents, however, was reported in the *Washington Post*.⁷⁵⁷ In the appeal of Judge Brinkema's sanction for the government's refusal to produce detainees for depositions, complete briefs

747. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

748. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010; *see* Reagan, *supra* note 173, at 19 (describing SCIFs).

749. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Feb. 3, 2010.

750. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

751. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

752. *Id.*

753. 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>.

754. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

755. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

756. 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").

757. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, *Wash. Post*, Apr. 2, 2003, at A7.

were filed with the classified information security officer under seal and redacted briefs were filed in the public record.⁷⁵⁸

While Moussaoui was proceeding pro se, he filed several documents with the court of appeals.⁷⁵⁹ Typically, the documents were construed as attempted appeals, which were reviewed and dismissed.⁷⁶⁰ 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.⁷⁶¹ 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 for public filing.⁷⁶² Sometimes the government's response would be accompanied by instructions to cleared court staff members to do some of the redacting themselves.⁷⁶³

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.⁷⁶⁴ Some judges opted to review the full briefs in Richmond, and some judges opted to rely on the redacted briefs.⁷⁶⁵ The court denied the petition.⁷⁶⁶

The appeal of Moussaoui's guilty plea also included classified briefing.⁷⁶⁷ 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.⁷⁶⁸ 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.⁷⁶⁹

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.⁷⁷⁰

758. Docket Sheet, *United States v. Moussaoui*, No. 03-4792 (4th Cir. Oct. 7, 2003) [hereinafter 4th Cir. Oct. 7, 2003, Docket Sheet].

759. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

760. *Id.*

761. *Id.*

762. *Id.*

763. *Id.*

764. *Id.*

765. *Id.*

766. 4th Cir. Oct. 7, 2003, Docket Sheet, *supra* note 758 (noting denial of rehearing on Oct. 13, 2004).

767. 4th Cir. May 15, 2006, Docket Sheet, *supra* note 711; Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

768. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

769. *Id.*

770. *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.

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.⁷⁷¹ 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 of classified information.⁷⁷² At these public sessions, no interruption was necessary.⁷⁷³

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.⁷⁷⁴ 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.⁷⁷⁵ The closed proceeding was transcribed by Judge Brinkema's court reporter, who had a security clearance.⁷⁷⁶ 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.⁷⁷⁷ A redacted transcript of the closed arguments on Tuesday, June 3, 2003, was released to the public on Thursday, June 12.⁷⁷⁸

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

771. 4th Cir. *Moussaoui* Oct. 7, 2003, Docket Sheet, *supra* note 758; 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 220, at 196, 217; *id.* at 197–98 (presenting redacted transcript from June 3, 2002, closed session).

772. Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 28, 2009.

773. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

774. 4th Cir. Feb. 12, 2003, Docket Sheet, *supra* note 756 (noting Mar. 24, 2003, grant 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.

775. *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.

776. Interview with 4th Cir. Clerk's Office Staff, Feb. 26, 2008.

777. Argument Closure Order, *supra* note 775, at 17.

778. *See* Jerry Markon, *Moussaoui Prosecutor Fights Ruling*, Wash. Post, June 13, 2003, at A9.

came back from the redaction process looking like Swiss cheese.⁷⁷⁹ 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.⁷⁸⁰ The court initially filed these documents under seal.⁷⁸¹ On a Friday, the day after the court granted Moussaoui's request to proceed *pro se*, Judge Brinkema ordered 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.⁷⁸² 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.⁷⁸³

Two months later, the government expressed concern that Moussaoui's filings might include coded messages to confederates.⁷⁸⁴ 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.⁷⁸⁵

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."⁷⁸⁶ She sealed several, but not all, recent filings.⁷⁸⁷ She declined Moussaoui's suggestion that the court engage in the burdensome task of redacting inappropriate language from the filings

779. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; *see* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

780. E.D. Va. Docket Sheet, *supra* note 658.

781. Pro Se Order, *supra* note 667, at 1.

782. *Id.* at 2.

783. 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.

784. 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).

785. Pro Se Filings Sealing Order at 3, *Moussaoui*, No. 1:01-cr-455 (E.D. Va. Aug. 29, 2002), *available at* 2002 WL 1990900.

786. *Id.* at 4.

787. *Id.* at 3-4.

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.”⁷⁸⁸

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 10 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.”⁷⁸⁹

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.⁷⁹⁰

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.⁷⁹¹ 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.”⁷⁹²

788. *Id.* at 4 n.3.

789. 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.

790. Sept. 27, 2002, *Pro Se Filings Sealing Order*, *supra* note 789, at 4 n.1.

791. 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.

792. Videotape Production Order, *supra* note 791.

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.⁷⁹³ Spann became the first American casualty of the war in Afghanistan when he was killed in a prisoner uprising later that day.⁷⁹⁴ Lindh⁷⁹⁵ was shot in the upper thigh during the uprising, and he denied involvement in Spann’s death.⁷⁹⁶ Lindh and several dozen other surviving Taliban troops were recaptured on December 1, 2001, when the Northern Alliance flooded them out of a basement.⁷⁹⁷

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.⁷⁹⁸ He arrived in the Eastern District of Virginia for trial eight days later.⁷⁹⁹ An indictment filed on February 5 added related charges as well as a

793. *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; 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.

794. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 546; see Eggen & Masters, *supra* note 793; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, Wash. Post, July 16, 2002, at A1; Johnston, *supra* note 793; Kunkle, *supra* note 793; Vernon Loeb, *U.S. Soldiers Recount Smart Bomb’s Blunder*, Wash. Post, Feb. 2, 2002, at A15; Romero & Temple-Raston, *supra* note 275, at 91–92; Rene Sanchez, *John Walker’s Restless Quest Is Strange Odyssey*, Wash. Post, Jan. 14, 2002, at A1.

795. 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.

796. *Lindh*, 227 F. Supp. 2d at 569; see Eggen & Masters, *supra* note 793; Johnston, *supra* note 793; see also Brooke A. Masters, *Lindh Defense Is Denied Access to Detainees*, Wash. Post, May 29, 2002, at A7; Romero & Temple-Raston, *supra* note 275, at 92–93.

797. *Lindh*, 227 F. Supp. 2d at 569; *Lindh*, 212 F. Supp. 2d at 547; see Johnston, *supra* note 793; Vernon Loeb, *Pro-Taliban Fighter Grew Up in Maryland*, Wash. Post, Dec. 3, 2001, at A13; Loeb, *supra* note 794; Romero & Temple-Raston, *supra* note 275, 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 275, 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 275, at 144, 191 (reporting on Hamdi).

798. Docket Sheet, *United States v. Lindh*, No. 1:02-cr-37 (E.D. Va. Feb. 5, 2002); see Eggen & Masters, *supra* note 793; Johnston, *supra* note 793; Masters & Davis, *supra* note 793; Romero & Temple-Raston, *supra* note 275, at 140 & fig. 7.

799. See Masters & Davis, *supra* note 793.

firearms charge.⁸⁰⁰ The court assigned the case to Judge T.S. Ellis III.⁸⁰¹ Lindh pleaded not guilty on February 13.⁸⁰² 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.⁸⁰³

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.⁸⁰⁴ John Walker Lindh was raised a Catholic, but he decided to convert to Islam at 16, taking the name Suleyman.⁸⁰⁵ At 18, he moved to Yemen to study Arabic and then moved to Bannu, Pakistan, to attend a madrassah.⁸⁰⁶

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.⁸⁰⁷ He arrived on the Taliban's front line on September 6, 2001.⁸⁰⁸

A photo taken during Lindh's captivity showed him naked and blindfolded, strapped to a stretcher.⁸⁰⁹ Another photo showed American soldiers posing with a handcuffed and blindfolded Lindh, an obscenity written across the blindfold.⁸¹⁰ Other photos apparently were destroyed.⁸¹¹

800. United States v. Lindh, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002); Docket Sheet, *supra* note 798; see Brooke A. Masters & Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, Wash. Post, Feb. 6, 2002, at A1; Romero & Temple-Raston, *supra* note 275, at 139.

801. Docket Sheet, *supra* note 798; see Brooke A. Masters, *Lindh Pleads Not Guilty to Terror Aid*, Wash. Post, Feb. 14, 2002, at B1; Romero & Temple-Raston, *supra* note 275, at 142.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

802. Docket Sheet, *supra* note 798; see Masters, *supra* note 801.

803. 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.

804. See Kunkle, *supra* note 793; Loeb, *supra* note 797; 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 275, at 13, 15; Sanchez, *supra* note 794.

805. See Eggen & Masters, *supra* note 793 (reporting that Lindh took the name Suleyman al-Faris); Kunkle, *supra* note 793; Loeb, *supra* note 797; Nieves, *supra* note 804 (reporting that Lindh took the name Suleyman al-Lindh); Romero & Temple-Raston, *supra* note 275, at 16 (reporting that "Suleyman" is equivalent to "Solomon"); Sanchez, *supra* note 794.

806. See Eggen & Masters, *supra* note 793; Loeb, *supra* note 797; Romero & Temple-Raston, *supra* note 275, at 17–19 (reporting that the Lindhs determined that Yemen was the best place in the world to learn classical Arabic); Sanchez, *supra* note 794.

807. See Eggen & Masters, *supra* note 793; Loeb, *supra* note 797; Nieves, *supra* note 804; Romero & Temple-Raston, *supra* note 275, 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 794.

808. See Romero & Temple-Raston, *supra* note 275, at 24.

809. See Brooke A. Masters, *U.S. Soldiers Posed with Bound Lindh*, Wash. Post, Apr. 13, 2002, at A9; Romero & Temple-Raston, *supra* note 275, at 111 & fig. 5.

810. See Masters, *supra* note 809; Romero & Temple-Raston, *supra* note 275, at 114 (reporting that the obscenity was "shithead").

811. See Masters, *supra* note 809; Romero & Temple-Raston, *supra* note 275, at 114.

Lindh's parents hired prominent San Francisco attorney James Brosnahan to defend him.⁸¹² To protect Brosnahan's law firm's employees from harm, Brosnahan kept the firm's name off of the case.⁸¹³

Spann's family attended Lindh's plea hearing, telling reporters that they blamed Lindh for Spann's death.⁸¹⁴ 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.⁸¹⁵

On July 15, 2002, Lindh pleaded guilty to the felony of fighting for the Taliban.⁸¹⁶ All other charges were dropped, and Lindh pleaded guilty to a new charge of carrying grenades while committing a felony.⁸¹⁷ 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.⁸¹⁸ Lindh tearfully admitted making a mistake by joining the Taliban.⁸¹⁹ Judge Ellis gave Lindh credit for time served, beginning December 1, 2001.⁸²⁰

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 that organization and who are housed primarily at Guantanamo Bay, Cuba."⁸²¹ The reports were regarded as "unclassified information vital to national security."⁸²² 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.⁸²³

812. See Eggen & Masters, *supra* note 793; Romero & Temple-Raston, *supra* note 275, at 94, 111–14, 136–37.

813. See *Nation in Brief*, Wash. Post, Feb. 2, 2002, at A26.

814. See Masters, *supra* note 801; Romero & Temple-Raston, *supra* note 275, at 140–41 (reporting that the government brought Spann's family to the courthouse).

815. See Brooke A. Masters, *Prosecutors Concede Limits of Their Case Against Lindh*, Wash. Post, Apr. 2, 2002, at A11.

816. *United States v. Lindh*, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002); Docket Sheet, *supra* note 798; see Jackman, *supra* note 794; Kunkle, *supra* note 793; 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 275, at 188.

817. *Lindh*, 227 F. Supp. 2d at 566; see Jackman, *supra* note 794; Lewis, *supra* note 816; Romero & Temple-Raston, *supra* note 275, at 188–89.

818. *Lindh*, 227 F. Supp. 2d at 571–72; Docket Sheet, *supra* note 798; see *Apologetic Lindh Gets 20 Years*, Wash. Post, Oct. 5, 2002, at A1 [hereinafter *Apologetic Lindh*]; Jackman, *supra* note 794; Romero & Temple-Raston, *supra* note 275, at 12, 189–90.

819. See *Apologetic Lindh*, *supra* note 818; Romero & Temple-Raston, *supra* note 275, at 189.

820. *Lindh*, 227 F. Supp. 2d at 572.

821. *United States v. Lindh*, 198 F. Supp. 2d 739, 741 (E.D. Va. 2002).

822. *Id.* at 742.

823. *Id.* at n.2.

Judge Ellis granted the government's motion for a protective order.⁸²⁴

[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.⁸²⁵

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.⁸²⁶ Judge Ellis determined that having investigators and witnesses sign a memorandum of understanding would suffice.⁸²⁷

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.⁸²⁸

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."⁸²⁹

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."⁸³⁰

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).

824. *Lindh*, 198 F. Supp. 2d at 744.

825. *Id.* at 742.

826. *Id.*

827. *Id.* at 742–43; *see id.* at 743 (noting that "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").

828. *Id.* at 742–43.

829. *United States v. Lindh*, No. 1:02-cr-37, 2002 WL 1974184 (E.D. Va. May 6, 2002).

830. *Lindh*, 198 F. Supp. 2d at 743.

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.⁸³¹ It was stored in the court's sensitive compartmented information facility (SCIF).⁸³²

Judge Ellis's career law clerk has a top-secret security clearance, so she can assist the judge with reviews of classified information.⁸³³ The chambers has a rule requiring classified documents to be within eyesight at all times.⁸³⁴ Even a law clerk's brief trip outside chambers requires taking the classified documents securely along.⁸³⁵ But classified materials are *never* taken home.⁸³⁶

Challenge: Interviewing Guantánamo Bay Detainees

Defense counsel sought to interview Guantánamo Bay detainees.⁸³⁷ 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.⁸³⁸

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.⁸³⁹

Defense counsel submitted questions for each detainee to the firewall attorneys.⁸⁴⁰ The firewall attorneys could object to any questions, and the court would resolve any objections on sealed noticed filings.⁸⁴¹ Approved questions were submitted to interrogators who interwove the questions into the interrogations.⁸⁴² Firewall attorneys prepared written summaries, and defense counsel could submit follow-up questions.⁸⁴³ Soon thereafter, the firewall attorneys submitted to defense counsel video recordings of the interviews.⁸⁴⁴

Judge Ellis monitored the procedure to ensure that it protected Lindh's rights to a defense.⁸⁴⁵

831. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

832. *Id.*; see Reagan, *supra* note 173, at 19 (describing SCIFs).

833. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

834. *Id.*

835. *Id.*

836. *Id.*

837. United States v. Lindh, No. 1:02-cr-37, 2002 WL 1298601 at *1 (E.D. Va. May 30, 2002); see Masters, *supra* note 796; *U.S. Still Fights Lindh Defense on Interviews with Detainees*, Wash. Post, May 15, 2002, at A13.

838. *Lindh*, 2002 WL 1298601 at *1–2; Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Masters, *supra* note 796.

839. *Lindh*, 2002 WL 1298601 at *1 & n.1.

840. *Id.* at *1.

841. *Id.*

842. *Id.*

843. *Id.*

844. *Id.*

845. *Id.*; see Masters, *supra* note 796.

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.⁸⁴⁶ 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.⁸⁴⁷ The courtroom was outfitted with special draperies and screens.⁸⁴⁸ 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.⁸⁴⁹

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.⁸⁵⁰ 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.⁸⁵¹

846. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; see Jackman, *supra* note 794; Lewis, *supra* note 816; Romero & Temple-Raston, *supra* note 275, at 188, 192 (reporting that a condition of the plea agreement was that Lindh accept the agreement before the suppression hearing).

847. Interview with Hon. T.S. Ellis III, Sept. 5, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

848. 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 794; Lewis, *supra* note 816.

849. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

850. *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.

851. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

September 11 Damages

In re Terrorist Attacks on September 11, 2001
(Richard Conway Casey and George B. Daniels,
S.D.N.Y.) 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.⁸⁵² The plaintiffs were 44 persons injured in the attacks and 274 representatives of estates of persons killed in the attacks.⁸⁵³ 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.”⁸⁵⁴

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.⁸⁵⁵ On September 10, the plaintiffs amended their complaint to include 300 estates and 51 individuals as plaintiffs.⁸⁵⁶ On the same day, four other actions were filed against similar defendants.⁸⁵⁷

852. 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.

853. *Ashton Complaint*, *supra* note 852.

854. *Id.*; *id.* at 29; see Coyle, *supra* note 852.

855. Docket Sheet, *Beyer v. Al Qaeda Islamic Army* No. 1:02-cv-6978 (S.D.N.Y. Sept. 4, 2002); see Coyle, *supra* note 852; Kelley, *supra* note 852.

856. First Amended Complaint, *Beyer*, No. 1:02-cv-6978 (S.D.N.Y. Sept. 10, 2002).

857. 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 6 estates).

All six actions were consolidated before Judge Allen G. Schwartz,⁸⁵⁸ and a consolidated master complaint was filed on March 6, 2003, with approximately 1,500 plaintiffs and 400 defendants.⁸⁵⁹ The consolidated action was reassigned to Judge Richard Conway Casey after Judge Schwartz's death.⁸⁶⁰

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.⁸⁶¹

On December 9, 2003, the Judicial Panel on Multidistrict Litigation joined the consolidated action with three other actions in the Southern District of New York⁸⁶² and two actions in the District of the District of Columbia,⁸⁶³ creating *In re Terrorist Attacks on September 11, 2001*⁸⁶⁴ in the Southern District of New York.⁸⁶⁵

858. Consolidation Order, *Ashton v. Al Qaeda Islamic Army*, No. 1:02-cv-6977 (S.D.N.Y. Nov. 19, 2002).

859. Consolidated Master Complaint, *id.* (Mar. 6, 2003) [hereinafter *Ashton* Consolidated Master Complaint].

860. Reassignment Notice, *id.* (Apr. 16, 2003).

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 *Obit., Richard Conway Casey, 74, Blind Federal Judge*, N.Y. Times, Mar. 24, 2007, at C10.

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.

861. 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).

862. 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).

863. Docket Sheet, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 1:02-cv-1616 (D.D.C. Aug. 15, 2002), *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*).

864. 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].

865. *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); see Consolidation and Transfer Motion, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1570 (J.P.M.L. Aug. 7, 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,*

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.⁸⁶⁶ 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.⁸⁶⁷ 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.⁸⁶⁸

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.⁸⁶⁹ An amended complaint listed 85 plaintiff estates and 27 defendants, omitting the “global terrorists.”⁸⁷⁰

The second District of Columbia case was based on a complaint filed on August 15 against 100 alleged financial supporters of the terrorist attacks.⁸⁷¹ Listed 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).⁸⁷² Ultimately the case had 4,779 listed plaintiffs and

2001, 718 F. Supp. 2d 456, 464 (S.D.N.Y. 2010); Discovery Opinion, *supra* note 852, 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).

866. Complaint, *Tremsky*, No. 1:02-cv-7300 (S.D.N.Y. Sept. 11, 2002); *see also* Amended Complaint, *id.* (Aug. 22, 2003) (same parties).

867. Complaint, *Salvo*, No. 1:03-cv-5071 (S.D.N.Y. July 8, 2003); *see Ashton* Consolidated Master Complaint, *supra* note 859. The case was designated as related to the original consolidation and assigned to Judge Casey on Aug. 13, 2003. *Salvo* Docket Sheet, *supra* note 862.

868. Complaint, *York v. Al Qaeda Islamic Army*, No. 1:03-cv-5493 (S.D.N.Y. July 24, 2003); *see Ashton* Complaint, *supra* note 852. 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).

869. Class Action Complaint, *Havlish*, No. 1:02-cv-305 (D.D.C. Feb. 19, 2002).

870. 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).

871. 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 F.3d 71, 78 (2d Cir. 2008); Coyle, *supra* note 852.

872. D.D.C. *Burnett* Complaint, *supra* note 871.

205 defendants.⁸⁷³ 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,⁸⁷⁴ which was added to the multidistrict consolidation as a tag-along case on March 10, 2004,⁸⁷⁵ and then voluntarily dismissed as duplicative on February 12, 2008.⁸⁷⁶

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;⁸⁷⁷ (2) an action filed on September 10 by 29 insurance companies against Al-Qaeda and 524 alleged supporters;⁸⁷⁸ (3) an

873. 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) (Nov. 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.

874. 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).

875. Docket Sheet, *id.* (Aug. 1, 2003).

876. 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).

877. 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 Jan. 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. 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 Feb. 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).

878. 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 Mar. 10, 2004). At the time of consolida-

action filed on September 10 by 28 estates and 27 individuals against the defendants listed in the original consolidation's third amended master complaint;⁸⁷⁹ and (4) an action filed on October 30 by three insurance companies against Saudi Arabia and Syria.⁸⁸⁰

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,⁸⁸¹ and 38 alleged financial supporters of the September 11 terrorists.⁸⁸² Another seven cases were filed in August and September of 2004: (1) on August 6, an insurance company filed an action against 495 defendants;⁸⁸³ (2) on September 1, six insurance companies filed an action against 426 defendants;⁸⁸⁴ (3) on September 2, Cantor Fitzgerald filed an action against 88 defendants;⁸⁸⁵ (4) on September 10, 10 insurance companies filed an action against Saudi Arabia and Syria;⁸⁸⁶ (5) on September 10, 10 World Trade Center businesses filed an action against 201 defendants;⁸⁸⁷ (6) on

tion, 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").

879. 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 Mar. 10, 2004).

880. 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 Nov. 12, 2003, which appears to be an error).

881. 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 Apr. 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).

882. 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 Apr. 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).

883. 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 Sept. 21, 2004); *see also* Second Amended Complaint, *id.* (Sept. 30, 2005) (listing 419 defendants); First Amended Complaint, *id.* (Dec. 23, 2004) (listing 478 defendants).

884. 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 Sept. 29, 2004); *see also* Second Amended Complaint, *id.* (420 defendants); First Amended Complaint, *id.* (434 defendants); *see also* Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror*, N.Y. Times, Sept. 9, 2004, at B1.

885. 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 Sept. 21, 2004); *see also* Amended Complaint, *id.* (Sept. 10, 2004).

886. 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 Sept. 21, 2004).

887. 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 Sept. 29, 2004).

September 10, the World Trade Center property managers filed an action against 201 defendants;⁸⁸⁸ 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.⁸⁸⁹

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.⁸⁹⁰ On September 21, Judge Casey dismissed additional Saudi royals and other defendants.⁸⁹¹ The dismissals became final on January 10, 2006,⁸⁹² and the court of appeals affirmed on August 14, 2008.⁸⁹³

Judge Casey died on March 22, 2007, and these cases were reassigned to Judge George B. Daniels.⁸⁹⁴ Discovery and other matters were referred to Magistrate Judge Frank Maas.⁸⁹⁵

On June 16, 2010, Judge Daniels dismissed actions against 49 foreign defendants for lack of personal jurisdiction,⁸⁹⁶ but decided that plaintiffs had pleaded facts sufficient to confer the court's jurisdiction over Dubai Islamic Bank.⁸⁹⁷

888. 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 Sept. 29, 2004).

889. 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 Oct. 15, 2004).

890. *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 Jan. 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 Corp.); see also *In re Terrorist Attacks* on Sept. 11, 2001, 538 F.3d 71, 78–79 (2d Cir. 2008); Discovery Opinion, *supra* note 852, at 3; Murphy, *supra* note 865, at 329.

891. *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 852, at 4; Mark Hamblett, *Saudi Charity Dropped from Suit Over 9/11*, N.Y. L.J., Sept. 27, 2005, at 1.

892. Judgment, *In re Terrorist Attacks*, No. 1:03-md-1570 (S.D.N.Y. Jan. 10, 2006); 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.

893. *In re Terrorist Attacks*, 538 F.3d 71, *cert. denied*, ___ U.S. ___, 129 S. Ct. 2859 (2009); see Discovery Opinion, *supra* note 852, at 4–6; Eric Lichtblau, *Supreme Court Refuses Case by Sept. 11 Victims' Families*, N.Y. Times, June 30, 2009, at A12.

894. *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 860; see Obit., *supra* note 860.

Tim Reagan attended Judge Daniels' first status conference in this litigation on June 26, 2007, and met with Judge Daniels following the conference.

895. *In re Terrorist Attacks*, 718 F. Supp. 2d at 487; S.D.N.Y. *In re Terrorist Attacks* Docket Sheet, *supra* note 864.

Tim Reagan interviewed Judge Maas for this report in the judge's chambers on June 26, 2007, and on November 6, 2009.

896. *In re Terrorist Attacks*, 718 F. Supp. 2d at 469–89, 495.

On October 14, 2011, Judge Maas recommended to Judge Daniels a default judgment against Al-Qaeda in the amount of \$9,351,247.965.99.⁸⁹⁸

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.

On September 22, 2001, the President signed the Air Transportation Safety and System Stabilization Act.⁸⁹⁹ Title IV of the Act created a “September 11th Victim Compensation Fund of 2001”⁹⁰⁰ 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.”⁹⁰¹ The Attorney General appointed Kenneth Feinberg as a special master to administer the fund.⁹⁰² The deadline for filing a claim against the fund was established as two years after the Attorney General and the special master promulgated implementing regulations,⁹⁰³ and after promulgation of the regulations the deadline became December 22, 2003.⁹⁰⁴ The Act required plaintiffs to elect either recovery from

897. *Id.* 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.”).

898. Report and Recommendation, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570 (S.D.N.Y. Oct. 14, 2011), available at 2011 WL 4903584.

899. 49 U.S.C. § 40101 note, Pub. L. No. 107-42, 115 Stat. 230 (2001); 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); see Jill Schachner Chanen & Margaret Graham Tebo, *Accounting for Lives*, ABA J., Sept. 2007, at 58, 59.

900. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 401, 115 Stat. 230, 237 (2001).

901. *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.

902. *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 899, 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 899, 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).

903. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(a)(3), 115 Stat. 230, 238 (2001); see *Schneider*, 345 F.3d at 139.

904. 28 C.F.R. § 104.62; see *Colaio*, 262 F. Supp. 2d at 278–79, 281; see also 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 407, 115 Stat. 230, 240 (2001) (providing for promulgation of implementing regulations no later than 90 days after enactment of the Act); Hartocollis, *supra* note 902.

the fund or recovery by civil action.⁹⁰⁵ The Act also established exclusive jurisdiction in the Southern District of New York for civil actions,⁹⁰⁶ except for actions against the terrorists and their supporters.⁹⁰⁷

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.⁹⁰⁸ The court assigned the case to Judge Alvin K. Hellerstein.⁹⁰⁹

During the first six months of 2002, 12 additional actions were filed by estates of passengers,⁹¹⁰ estates of workers in the World Trade Center,⁹¹¹ and operators of

905. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 405(c)(3)(B), 115 Stat. 230, 239–40 (2001); 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 902 (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.”).

906. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230, 241 (2001); 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; Chanen & Tebo, *supra* note 899, at 59.

907. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(c), 115 Stat. 230, 241 (2001); see also *id.*, Pub. L. No. 107-71, 115 Stat. 646 (also exempting from exclusive jurisdiction “civil actions to recover collateral source obligations”).

908. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001).

909. *Id.*; see Hartocollis, *supra* note 902.

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.

910. 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 Feb. 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 Dec. 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 Nov. 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, dismissed as settled Dec. 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 Mar. 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 Nov. 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 Mar. 28, 2002); Docket Sheet, *Debeuneure v. American Airlines, Inc.*, No. 1:02-cv-

businesses in the World Trade Center⁹¹² against the airlines that operated the hijacked flights⁹¹³ and the companies providing security for their departures.⁹¹⁴

On June 20, the government initiated a motion to intervene to ensure that transportation “sensitive security information” (SSI) would be protected in these lawsuits.⁹¹⁵ The court granted the government’s motion and ordered the cases consolidated.⁹¹⁶

During the next four months, 120 additional cases were filed.⁹¹⁷ On November 1, Judge Hellerstein ordered the consolidation of “all actions for wrongful death,

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).

911. 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 Dec. 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 Dec. 20, 2002).

912. 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 Nov. 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).

913. 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).

914. 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).

915. Docket Sheet, *Mariani v. United Air Lines, Inc.*, No. 1:01-cv-11628 (S.D.N.Y. Dec. 20, 2001) (noting June 26, 2002, notice).

916. Order, *Mariani*, No. 1:01-cv-11628 (S.D.N.Y. 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.

917. 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-

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*.⁹¹⁸

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.⁹¹⁹ After the deadline passed for seeking compensation from the fund, Judge Hellerstein dismissed all actions on the suspense docket.⁹²⁰

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.⁹²¹ Both the court and the plaintiffs’ executive committee established publicly accessible Internet webpages to post information about the litigation and selected court filings.⁹²²

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.

918. 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.

919. 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).

920. 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).

921. 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 Pentagon); 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).

922. See <http://nysd.uscourts.gov/sept11> (the court’s website); <http://www.sept11tortlitigation.com> (the plaintiffs’ website).

By February 11, 2003, an additional 38 cases had been filed.⁹²³ 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.⁹²⁴ 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*.⁹²⁵

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.⁹²⁶ Judge Hellerstein named this and related actions *In re September 11th Liability Insurance Coverage Cases*.⁹²⁷

By the end of June, another 13 cases had been filed; eight of these were consolidated in the cleanup master docket,⁹²⁸ and the other five were consolidated in the attacks master docket.⁹²⁹

923. 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.

924. 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.

925. 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.

926. Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 1:03-cv-332 (S.D.N.Y. Jan. 15, 2003).

927. *In re Sept. 11th Liab. Ins. Coverage Cases*, 333 F. Supp. 2d 111, 115 (S.D.N.Y. 2004).

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 Jan. 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-776 (2d Cir. Mar. 1, 2007) (settled Oct. 24, 2008); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-706 (2d Cir. Feb. 26, 2007) (settled Jan. 9, 2009); Docket Sheet, *Zurich American Ins. Co. v. World Trade Ctr. Props.*, No. 07-530 (2d Cir. Feb. 14, 2007) (settled Jan. 9, 2009).

928. 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.

929. 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.

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.⁹³⁰ The Southern District of New York's exclusive jurisdiction applies to suits for damages "resulting from or relating to" the terrorist attacks.⁹³¹ 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 29.⁹³² 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.⁹³³

Judge Hellerstein certified his decision for interlocutory appeal and stayed the remands pending appeal.⁹³⁴ Approximately two years later, the court of appeals dismissed the defendants' appeals of the remands, because remands to state court are not reviewable.⁹³⁵ The appellate court reviewed some plaintiffs' cross-appeals of Judge Hellerstein's denials of their remand motions and affirmed.⁹³⁶ 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.⁹³⁷ 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.⁹³⁸ So the court of appeals was able to effectively reverse orders it did not have jurisdiction to review.⁹³⁹

930. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003).

931. 49 U.S.C. § 40101 note, Pub. L. No. 107-42 § 408(b)(3), 115 Stat. 230, 241 (2001).

932. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

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 New York*, 247 F. Supp. 2d 345 (S.D.N.Y. 2002) (remanding *Graybill v. City of New York*, No. 1:02-cv-684 (S.D.N.Y. Jan. 28, 2002)); see *In re World Trade Ctr.*, 270 F. Supp. 2d at 365.

933. *In re World Trade Ctr.*, 270 F. Supp. 2d at 361, 380–85.

934. *Id.* at 380–81.

935. *In re WTC Disaster Site*, 414 F.3d 352, 357, 371, 381 (2d Cir. 2005); see 28 U.S.C. § 1447(d) ("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 1443 of this title shall be reviewable by appeal or otherwise."); see also *id.* § 1443 (providing for removal of certain civil rights cases).

936. *In re WTC Disaster Site*, 414 F.3d at 357, 371–81.

937. *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 Robert D. McFadden, *Medical Claims from 9/11 Are Assigned to a Single Court*, N.Y. Times, July 18, 2005, at B7.

938. *In re WTC Disaster Site*, 414 F.3d at 381.

939. See *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).

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*.⁹⁴⁰ 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.⁹⁴¹

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 docket case for these “straddlers,” called *In re Combined World Trade Center and Lower Manhattan Disaster Site Litigation (Straddler Plaintiffs)*.⁹⁴²

By July 2007, of the 95 actions included in the original master docket, 53 had settled and one was dismissed.⁹⁴³ Judge Hellerstein limited attorney fees, at least among those cases settling during early phases, to 15% of settlement.⁹⁴⁴ 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.⁹⁴⁵ Judge Hellerstein believed that this

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).

940. 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).

941. 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.

942. 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).

943. *In re Sept. 11 Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007); see Hartocollis, *supra* note 902.

944. *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, *In re Sept. 11 Litig.*, No. 1:21-mc-97 (S.D.N.Y. 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.

945. 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.

would help the plaintiffs and the defendants in all of the remaining cases assess the values of the claims.⁹⁴⁶ All six cases settled before damages trials were held.⁹⁴⁷

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*.⁹⁴⁸

A law firm representing four of the last remaining plaintiffs among the original wrongful death actions—modest-wage earners at the Pentagon—negotiated settlements totaling \$28.5 million, averaging much more than previous settlements, and negotiated a fee with each plaintiff of 25%.⁹⁴⁹ 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.⁹⁵⁰ The judge also disapproved the firm’s fee as out of line with others’ in the litigation.⁹⁵¹ “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.”⁹⁵²

By the end of 2008, only three of the original 95 wrongful death and personal injury cases remained unsettled,⁹⁵³ but there remained approximately 10,000 cases

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.

946. 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 902 (reporting, “The plaintiffs acknowledge that the biggest difference between the two sides is over the value of pain and suffering.”).

947. *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).

948. 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).

949. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; see *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

950. *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.

951. *In re Sept. 11 Litig.*, 567 F. Supp. 2d at 618; see *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

952. *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 554.

953. *In re Sept. 11 Litig.*, 723 F. Supp. 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).

by rescue and cleanup workers for respiratory and other injuries.⁹⁵⁴ 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.”⁹⁵⁵

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 2010.⁹⁵⁶ On March 12, however, it was reported that a global settlement had been reached.⁹⁵⁷ Judge Hellerstein determined that the settlement was not a good enough deal for the individual plaintiffs,⁹⁵⁸ but he approved a revised settlement that gave more money to workers and less to their lawyers.⁹⁵⁹

On November 19, an allocation neutral reported to the court that eight plaintiffs more than a required 95% had accepted the settlement.⁹⁶⁰ 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.⁹⁶¹

A month later, Congress passed the James Zadroga 9/11 Health and Compensation Act,⁹⁶² which provided rescue and cleanup workers additional funds for

954. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 499 n.1, 501, 503.

955. *Id.* at 501.

956. *Id.* at 504; 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.*

957. Mireya Navarro, *Deal Is Reached on Health Costs of 9/11 Workers*, N.Y. Times, Mar. 12, 2010, at A1.

958. 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.

959. Order, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-100 (S.D.N.Y. June 10, 2010); 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 New York*, No. 10-2765 (2d Cir. Oct. 26, 2010) (defendants’ appeal).

960. 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.

961. 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); see *In re World Trade Ctr. Disaster Site Litig.*, 762 F. Supp. 2d 631 (S.D.N.Y. 2010).

962. Pub. L. No. 111-347, 124 Stat. 3623 (2011).

health monitoring and treatment and which reopened the September 11th Victim Compensation Fund to provide compensation for employment and other economic losses.⁹⁶³

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,⁹⁶⁴ and the court of appeals affirmed.⁹⁶⁵ 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.⁹⁶⁶ 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.⁹⁶⁷

The one remaining wrongful death action was scheduled to go to trial in November 2011.⁹⁶⁸ On September 16, the plaintiffs filed 127 exhibits in opposition to a motion for summary judgment.⁹⁶⁹ Three days later, the plaintiffs filed a notice that the case had settled.⁹⁷⁰ It was reported that the September 16 filing made the public case that the plaintiffs were seeking to make.⁹⁷¹

963. See 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.

964. *In re Sept. 11 Litig.*, 723 F. Supp. 534 (S.D.N.Y. 2010); see *In re Sept. 11 Litig.*, 760 F. Supp. 2d 433, 437 (S.D.N.Y. 2011).

965. *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145 (2d Cir. 2011).

966. Opinion, *Aegis Ins. Servs., Inc. v. 7 World Trade Co.*, No. 1:04-cv-7272 (S.D.N.Y. Sept. 23, 2011), available at 2011 WL 4549391.

967. *Id.*

968. *In re Sept. 11 Litig.*, ___ F. Supp. 2d ___, ___, 2011 WL 4089596 (S.D.N.Y. Sept. 7, 2011) (p.1 of filed opinion) (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. at 539 n.6 (noting pending motions for approval of settlements).

969. 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.

970. Stipulation, *Bavis*, No. 1:02-cv-7154 (S.D.N.Y. Sept. 19, 2011); see Benjamin Weiser, *Last 9/11 Wrongful-Death Suit Is Settled, as Family and Airline Reach Terms*, N.Y. Times, Sept. 20, 2011, at A21.

971. Weiser, *supra* note 970 (focusing on inadequate airport security as the reason for the disaster, according to the plaintiffs).

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.⁹⁷² Judge Casey resolved insurance companies' motion to effectuate service of process on alleged terrorists as follows.⁹⁷³

The plaintiffs proposed that service on incarcerated leaders of terrorist organizations would be effective service on the organizations.⁹⁷⁴ The court agreed.⁹⁷⁵

The plaintiffs proposed that the government serve process on defendants in their custody.⁹⁷⁶ The government agreed to facilitate service on defendants it had publicly acknowledged holding, but objected to serving defendants it had not publicly acknowledged holding.⁹⁷⁷ 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 holding.⁹⁷⁸ The court ruled that service by publication would be effective for those individuals whom the government did not serve.⁹⁷⁹

The plaintiffs proposed that the court order foreign justice ministries to accept service on behalf of defendants in their custody.⁹⁸⁰ 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.⁹⁸¹

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.⁹⁸² It was reported that the documents had been anonymously leaked to the plaintiffs' attorneys.⁹⁸³ 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.⁹⁸⁴ The government determined that at least some of the documents were classified, so the court's copies were securely

972. *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.

973. *In re Terrorist Attacks* on Sept. 11, 2001, No. 1:03-md-1570, 2004 WL 1348996 (S.D.N.Y. June 14, 2004).

974. *Id.* at *2.

975. *Id.*

976. *Id.*

977. *Id.*

978. *Id.* at *1–*3. The government acknowledged custody of 10 of the 23 defendants who the plaintiffs claimed were in the government's custody. *Id.* at *2.

979. *Id.* at *2–*3.

980. *Id.* at *3.

981. *Id.* at *3 & n.2.

982. Discovery Opinion, *supra* note 852, at 18.

983. 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 852, at 19.

984. Discovery Opinion, *supra* note 852, at 18.

stored.⁹⁸⁵ The plaintiffs were required to surrender their copies.⁹⁸⁶ Judge Daniels denied the plaintiffs' request that he review the documents.⁹⁸⁷

Challenge: Controlled 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."⁹⁸⁸

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" (SSI), which is controlled unclassified information related to transportation security.⁹⁸⁹ This slowed substantially the progress of the litigation.⁹⁹⁰

In late 2003, plaintiffs propounded interrogatories and document requests concerning security measures in effect when the terrorists boarded the planes.⁹⁹¹ It took the TSA two years to screen the discovery.⁹⁹² The plaintiffs noticed depositions of the defendants for April 2006.⁹⁹³ TSA refused to attend the depositions, but instructed the defendants to object to any questions that called for SSI and refuse to answer them.⁹⁹⁴ The defendants argued that it was in their interest to answer the plaintiffs' questions, and they objected to being held responsible for pro-

985. *Id.* at 18–19.

986. *Id.* at 19.

987. 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 852, at 19; Lichtblau, *supra* note 983 ("The Justice Department had the lawyers' copies destroyed and now wants to prevent a judge from even looking at the material.").

988. 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?*, *supra* note 190.

989. *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); 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).

990. *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).

991. *In re Sept. 11 Litig.*, 236 F.R.D. at 167.

992. *Id.*

993. *Id.* at 169.

994. *Id.* at 165–66, 169.

protecting the government's SSI.⁹⁹⁵ 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.⁹⁹⁶

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.⁹⁹⁷ 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 answers elicited therefrom, might implicate information relevant to the case but potentially or actually SSI."⁹⁹⁸ 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."⁹⁹⁹ So Judge Hellerstein ordered that witnesses answer all questions but those that clearly call for SSI; TSA counsel could make objections on the record.¹⁰⁰⁰

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.¹⁰⁰¹ So Judge Hellerstein instructed the parties to identify a small number of attorneys who could represent the interests of the various party categories.¹⁰⁰² 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 2006.¹⁰⁰³

In October 2007, plaintiffs moved to set aside discovery confidentiality designations so that all discovery other than SSI could be made public.¹⁰⁰⁴ Plaintiffs

995. *Id.* at 166, 169.

996. *Id.* at 173.

997. *Id.* at 173–74.

998. *In re* Sept. 11 Litig., 431 F. Supp. 2d 405, 409 (S.D.N.Y. 2006).

999. *Id.* at 410.

1000. *Id.*

1001. Order at 1, *In re* Sept. 11 Litig., No. 1:21-mc-97 (S.D.N.Y. June 5, 2006).

1002. *Id.* at 1–2.

1003. Interview with Hon. Alvin K. Hellerstein, June 25, 2007.

1004. 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).

subsequently withdrew this motion, but they renewed it on January 14, 2009.¹⁰⁰⁵ 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.¹⁰⁰⁶

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.¹⁰⁰⁷ “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.”¹⁰⁰⁸ Judge Hellerstein called for use of the silent witness rule to present SSI to the jury without presenting it to the public.¹⁰⁰⁹ With this rule, witnesses testify about secret matters in code so that the jury and the participants know the secrets in the testimony but the public does not.¹⁰¹⁰

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 videotaped testimony from three defectors from the Iranian government.¹⁰¹¹ 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.¹⁰¹²

1005. *Id.* at 1.

1006. *Id.* at 1, 4, 9.

1007. Protective Order, *Bavis v. UAL Corp.*, No. 1:02-cv-7154 (S.D.N.Y. June 28, 2011).

1008. *Id.* at 2.

1009. *Id.* at 15.

1010. *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 infra*, “Giving State Secrets to Lobbyists.”

1011. Default Judgment Brief at 12, *Havlish v. Bin Laden*, 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.

1012. Order, *Havlish*, No. 1:03-cv-9848 (S.D.N.Y. July 5, 2011); *see Weiser & Shane, supra* note 1011.

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.¹⁰¹³ Hicks, a high-school dropout described as a drifter, had converted to Islam and adopted the name Mohammed Dawood.¹⁰¹⁴ Apparently he joined the Taliban in 1999.¹⁰¹⁵ The Northern Alliance captured him near Kabul, Afghanistan, on December 9, 2001, and turned him over to the United States on December 17.¹⁰¹⁶ He was transferred to the *USS Peleliu*, the same ship that held John Walker Lindh at the time,¹⁰¹⁷ and then to the Naval Base at Guantánamo Bay in January 2002.¹⁰¹⁸

Shafiq Rasul and Asif Iqbal grew up together in Tipton, England, a town near Birmingham.¹⁰¹⁹ They also were described as drifters who converted to Islam.¹⁰²⁰ They also were captured in Afghanistan and transferred to Guantánamo Bay.¹⁰²¹

1013. 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.

1014. See Frantz, *supra* note 1013; Leiby, *supra* note 1013.

1015. See John Shaw, *Australians Debate Fate of Fighter Held by U.S.*, N.Y. Times, Dec. 30, 2001, at 8.

1016. *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 1013; Shaw, *supra* note 1015.

1017. 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.”

1018. 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 1013; 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.”).

1019. See Warren Hoge, *Hometown of British Prisoners Known for Tranquil Diversity*, N.Y. Times, Jan. 29, 2002, at A14.

1020. See Amy Waldman, *How in a Little English Town Jihad Found Young Converts*, N.Y. Times, Apr. 24, 2001, at A1.

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.¹⁰²²

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 Columbia, and the court assigned the case to Judge Colleen Kollar-Kotelly.¹⁰²³ 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 300.¹⁰²⁴ Six days later, Judge Kollar-Kotelly ordered the government to file a return.¹⁰²⁵

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.¹⁰²⁶ An amended complaint on July 8 added a twelfth plain-

1021. *Rasul*, 215 F. Supp. 2d at 60; see Waldman, *supra* note 1020.

1022. Laurel E. Fletcher & Eric Stover, *The Guantánamo Effect* 41 (2009).

1023. 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; Wax, *supra* note 91, at 25; Clive Stafford Smith, *Eight O’Clock Ferry to the Windward Side* 23 (2007).

1024. See Shenon, *supra* note 1023; see also Michael Ratner, *Guantánamo: The Ninth Circle of Hell*, in *The Guantánamo Lawyers*, *supra* note 1023, at 15 (describing the decision by the Center for Constitutional Rights to participate in the case).

1025. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Feb. 25, 2002).

1026. *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 1023, at 8; Wax, *supra* note 91, 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 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*, *su-*

tiff.¹⁰²⁷ 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.¹⁰²⁸ The plaintiffs claimed that they were in Afghanistan for charitable purposes and they were captured by bounty hunters.¹⁰²⁹ Judge Kollar-Kotelly regarded the complaint as a habeas petition.¹⁰³⁰

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.¹⁰³¹ 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.¹⁰³² The court of appeals agreed that the court lacked jurisdiction over these three cases.¹⁰³³

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 "complete jurisdiction and control" over its Naval Base in Cuba and the courts unquestionably had jurisdiction over the petitioners' custodians.¹⁰³⁴

pra note 1023, 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.*

1027. *Rasul*, 215 F. Supp. 2d at 58 n.3; *Al-Odah* Docket Sheet, *supra* note 1026.

1028. *Rasul*, 215 F. Supp. 2d at 58; *Al-Odah* Docket Sheet, *supra* note 1026; *see* Huskey, *supra* note 1026, at 30.

1029. *Rasul*, 215 F. Supp. 2d at 60–61; *see* Mintz, *supra* note 1026.

1030. *Rasul*, 215 F. Supp. 2d at 64; *see* Huskey, *supra* note 1026, at 30–31.

1031. *Rasul*, 215 F. Supp. 2d 55, *rev'd*, 542 U.S. 466; *see* Boumediene v. Bush, 553 U.S. 723, 734 (2008); *see* Mahler, *supra* note 1026, at 66–67; Ratner & Ray, *supra* note 1023, at 80–81; Neely Tucker, *Judge Denies Detainees in Cuba Access to U.S. Courts*, Wash. Post, Aug. 1, 2002, at A10.

1032. 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).

1033. *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 1026, at 31; Mahler, *supra* note 1026, at 67; Ratner & Ray, *supra* note 1023, at 81.

1034. *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 1026, at 32; Mahler, *supra* note 1026, 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 Guantánamo 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.").

While the Supreme Court case was pending, Rasul and Iqbal were returned to freedom in the United Kingdom.¹⁰³⁵ A subsequent suit for damages against the United States was unsuccessful,¹⁰³⁶ but the British government agreed to settle a damages suit against it.¹⁰³⁷ On June 10, Hicks was formally charged in a military tribunal with joining the Taliban.¹⁰³⁸ The government of Australia had agreed the previous November to such a proceeding for its citizen.¹⁰³⁹ 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.¹⁰⁴⁰ Hicks was released from prison on December 29¹⁰⁴¹ and released from supervision on

1035. *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 habeas petition); see also Margulies, *supra* note 1018, at 145; John Mintz, *U.S. Faces Quandary in Freeing Detainees*, Wash. Post, Mar. 22, 2004, at A1; *British Frees 5 Citizens Sent Home From U.S. Jail*, N.Y. Times, Mar. 11, 2004, at A3.

1036. *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 May 8, 2010), available at <http://www.youtube.com/watch?v=cRhOzWFBES8>; Brian Stelter, *Guantánamo Reunion, by Way of BBC*, N.Y. Times, Jan. 11, 2010, at B9.

1037. 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).

1038. See Bradley Graham, *3 Charges Placed Against Detainee*, Wash. Post, June 11, 2004, at A3; Mahler, *supra* note 1026, at 66–67; Eric Schmitt & Kate Zernike, *U.S. Charges an Australian with Fighting for Taliban*, N.Y. Times, June 11, 2004, at A12.

1039. See Neil A. Lewis, *U.S. Adds to Detained Australians’ Rights*, N.Y. Times, Nov. 26, 2003, at A22.

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.

1040. Transcript at 81, 157, 243–45, *United States v. Hicks* (U.S. Mil. Comm. Mar. 30, 2007), available at <http://www.mc.mil>; see Order, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Aug. 23, 2007); 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 1023, at 190, 192; Josh White, *Australian to Return Home to Serve Shortened Term*, Wash. Post, Mar. 31, 2007, at A12; see also Hafetz, *supra* note 502, at 212 (“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.”).

1041. 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.

December 21, 2008.¹⁰⁴² Habib had been returned to freedom in Australia, without charges, in January 2005.¹⁰⁴³

Coordination Before Judge Green

During the three weeks following the Supreme Court's *Rasul* decision, eight cases on behalf of 32 detainees were filed.¹⁰⁴⁴ The government moved to consolidate these petitions with the ones already pending before Judge Kollar-Kotelly, but the judge ruled that the diversity of factual situations among the cases did not make them suitable for consolidation.¹⁰⁴⁵

By early September, another three cases had been filed on behalf of another 21 detainees.¹⁰⁴⁶ On September 14, the district court's Executive Session decided that Senior Judge Joyce Hens Green¹⁰⁴⁷ would preside over preliminary coordination and management of all Guantánamo Bay habeas cases both already and sub-

1042. See Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. Times, Dec. 21, 2008, at A12.

1043. See Raymond Bonner, *Australian's Long Path in the U.S. Antiterrorism Maze*, N.Y. Times, Jan. 29, 2005, at A4; Priest, *supra* note 1032; see also Margulies, *supra* note 1018, 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 1040.

1044. 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 1018, 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).

1045. Opinion, *Rasul*, No. 1:02-cv-299 (D.D.C. July 26, 2004).

1046. 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).

1047. For this report, Tim Reagan interviewed Judge Green; Frank Kulbaski, her former law clerk who served as her attorney advisor; and Marcia Davidson, who served as her judicial assistant, at the Federal Judicial Center on September 21, 2011.

sequently filed, but assigned judges would retain their cases for merits purposes.¹⁰⁴⁸

Judge Green assembled an informal meeting with petitioners' attorneys and representatives of the government, which included military personnel.¹⁰⁴⁹ At the meeting, Judge Green said that she expected written justifications of detention for each petitioner, which the government asked to think about.¹⁰⁵⁰ At a second informal meeting three days later, the government agreed to submit returns on a rolling basis.¹⁰⁵¹

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.¹⁰⁵²

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.¹⁰⁵³ 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 Califor-

1048. *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 Huvette); 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 1046 (noting Sept. 14, 2004, transfer by Judge Robertson); *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 Decisionsmaker*, 24 *Yale L. & Pol'y Rev.* 241, 243 (2006); Mahler, *supra* note 1026, at 146–47; Margulies, *supra* note 1018, 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 91, at 168.

1049. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

1050. *Id.*

1051. *Id.*

1052. *Id.*

1053. *Hamdan* Docket Sheet, *supra* note 1046; D.D.C. *Gherebi* Docket Sheet, *supra* note 1044; *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").

nia.¹⁰⁵⁴ 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.¹⁰⁵⁵ 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 the court lacked jurisdiction over the jurisdiction issue.¹⁰⁵⁶

On February 1, 2003, the brother of detainee Salim Gharebi presented to the court of appeals for the Ninth Circuit a habeas petition,¹⁰⁵⁷ which the court transferred to the district court for the Central District of California, and the district court assigned the petition to Judge Matz.¹⁰⁵⁸ Finding that this petitioner had standing, Judge Matz again ruled, on May 13, that no federal court had jurisdiction over Guantánamo Bay habeas petitions.¹⁰⁵⁹ On December 18, the court of appeals reversed.¹⁰⁶⁰ 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 *Rumsfeld v. Padilla*¹⁰⁶¹ 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.¹⁰⁶² On July 8, the court of appeals transferred Gharebi's petition to the District of Columbia.¹⁰⁶³

1054. 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 *Gharebi v. Bush*, 338 F. Supp. 2d 91, 92 (D.D.C. 2004).

1055. *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 *Gharebi*, 338 F. Supp. 2d at 92.

1056. *Coalition of Clergy*, 310 F.3d 1153; see *Gharebi*, 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, *Gharebi 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).

1057. Docket Sheet, *Gheredi v. Bush*, No. 03-80012 (9th Cir. Feb. 5, 2003); *Gharebi*, 338 F. Supp. 2d at 92.

1058. C.D. Cal. *Gheredi* Docket Sheet, *supra* note 1053.

1059. *Gharebi*, 262 F. Supp. 2d 1064, *rev'd*, 374 F.3d 727 (9th Cir. 2004); see *Gharebi*, 338 F. Supp. 2d at 92–93; Mahler, *supra* note 1026, at 98.

1060. *Gharebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *modified*, 374 F.3d 727; see *Gharebi*, 338 F. Supp. 2d at 93; Mahler, *supra* note 1026, at 98; John Mintz, *Hearing Ordered for Terrorism Detainee*, Wash. Post, Dec. 19, 2003, at A19.

1061. 542 U.S. 426, 451 (2004).

1062. *Bush v. Gharebi*, 542 U.S. 952 (2004); see *Gharebi*, 338 F. Supp. 2d at 93; see also *infra*, "Dirty Bomber."

1063. *Gharebi*, 374 F.3d at 739; *Gharebi*, 338 F. Supp. 2d at 93–94.

The second transferred action was filed by Salim Ahmed Hamdan's military lawyer, who was assigned to represent Hamdan before a military commission.¹⁰⁶⁴ Hamdan, who was a driver for Osama Bin Laden, was captured in Afghanistan in November 2001 and transferred to Guantánamo Bay in mid-2002.¹⁰⁶⁵ In 2003, he was one of the first six detainees that President Bush referred to a military commission for trial.¹⁰⁶⁶ On April 6, 2004, Lieutenant Commander Charles Swift filed a habeas corpus action on behalf of Hamdan in Swift's home district, the Western District of Washington.¹⁰⁶⁷ On August 9, Judge Robert S. Lasnik transferred the petition, which challenged the validity of the military commission, to the District of Columbia.¹⁰⁶⁸

Establishing Military Commissions

The District of Columbia district court assigned Hamdan's action to Judge James Robertson.¹⁰⁶⁹ 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 November 8, 2004.¹⁰⁷⁰ 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 proce-

1064. 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.

1065. *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 1026, at 10–11; Soufan, *supra* note 64, at 449.

1066. *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; see Lewis, *supra* note 1064; Soufan, *supra* note 64, at 454–58 (describing how Hamdan's referral for prosecution inter-rupted acquisition of intelligence from him).

1067. *Swift* Petition, *supra* note 1064; see *Hamdan*, 565 F. Supp. 2d at 131; *Hamdan*, 464 F. Supp. 2d at 10; Lewis, *supra* note 1064; Mahler, *supra* note 1026, 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.”).

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 502, at 138.

1068. 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 1026, at 141.

1069. *Hamdan* Docket Sheet, *supra* note 1046; see Mahler, *supra* note 1026, at 146.

1070. *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 1026, at 148 (reporting that Judge Robertson decided to keep Hamdan's case on letter request from Hamdan's attorneys).

dures allowed for conviction on secret evidence.¹⁰⁷¹ The ruling reached Cuba that day, which resulted in a pretrial proceeding's indefinite recess.¹⁰⁷² The court of appeals reversed, holding that "Congress authorized the military commission that will try Hamdan."¹⁰⁷³ 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.¹⁰⁷⁴

On remand, Judge Robertson decided that the Military Commissions Act, signed by the President on October 17, deprived Guantánamo Bay detainees of statutory habeas corpus¹⁰⁷⁵ and that Hamdan's "connection to the United States lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."¹⁰⁷⁶ 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 court of appeals for the District of Columbia Circuit created an opportunity for adequate judicial review.¹⁰⁷⁷ On August 6, a military tribunal convicted Hamdan of providing material support for terrorism but not of terrorism conspiracy.¹⁰⁷⁸ 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.¹⁰⁷⁹ The govern-

1071. *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 502, at 139; Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. Times, Nov. 9, 2004, at A1.

1072. See Lewis, *supra* note 1071; Mahler, *supra* note 1026, at 164–65.

1073. *Hamdan*, 415 F.3d 33, *rev'd*, 548 U.S. 557; see Hafetz, *supra* note 502, at 139; Neil A. Lewis, *Ruling Lets U.S. Restart Trials at Guantánamo*, N.Y. Times, July 16, 2005, at A1; Mahler, *supra* note 1026, at 191–92.

1074. *Hamdan*, 548 U.S. at 613; see Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. Times, June 30, 2006, at A1; Hafetz, *supra* note 502, at 147–48; Mahler, *supra* note 1026, 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 1026, at 296–98.

1075. *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 1065; Mahler, *supra* note 1026, at 300–01.

1076. *Hamdan*, 464 F. Supp. 2d at 18; see Lewis, *supra* note 1065.

1077. *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.

1078. 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>; see Charges, *id.* (May 10, 2007); see also 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.

1079. Transcript at 4173–74, *United States v. Hamdan* (U.S. Mil. Comm. Aug. 7, 2008), available at <http://www.mc.mil>; see 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 1040, 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 64, at 457.

ment released Hamdan to Yemen on November 25, 2008, to serve the last month of his sentence.¹⁰⁸⁰ On January 8, 2009, Yemen released Hamdan to live with his family in Sana.¹⁰⁸¹ On June 24, 2011, the Court of Military Commission Review affirmed his conviction and sentence.¹⁰⁸²

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.¹⁰⁸³ The court made sure that attorneys were promptly notified of the reassignment.¹⁰⁸⁴ By this time, two of the nine detainees in these two cases were no longer at Guantánamo Bay.¹⁰⁸⁵ 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.”¹⁰⁸⁶

Eleven cases remained before Judge Green, who held on January 31 that the habeas petitions stated valid due process claims.¹⁰⁸⁷ 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.¹⁰⁸⁸ The government used the results of CSRT proceedings as habeas returns.¹⁰⁸⁹ Judge Green held that CSRT procedures did not meet constitutional

1080. *Hamdan* Notice of Transfer, *supra* note 1078; see Joe McMillan, *The United States on Trial, in The Guantánamo Lawyers*, *supra* note 1023, at 178, 183; Carol Rosenberg, *Bin Laden’s Driver Will Finish Jail Time in Yemen*, *Miami Herald*, Nov. 26, 2008, at 5A.

1081. See McMillan, *supra* note 1080, at 183; Soufan, *supra* note 64, at 457; *Yemen Releases Former Bin Laden Driver from Jail*, *N.Y. Times*, Jan. 12, 2009, at A9.

1082. 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>.

1083. 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 1048, at 243; Joe Palazzolo, *Judges Vow to Move Fast on Gitmo Cases*, *Legal Times*, July 14, 2008, at 6; Wax, *supra* note 91, at 169.

1084. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

1085. *Khalid v. Bush*, 355 F. Supp. 2d 311, 316 n.3 (D.D.C. 2005); Motion, *Benchellali*, No. 1:04-cv-1142 (D.D.C. Sept. 21, 2004); see Wax, *supra* note 91, at 169.

1086. *Khalid*, 355 F. Supp. 2d at 314; see *Boumediene v. Bush*, 553 U.S. 723, 734–35 (2008); see also Freeman, *supra* note 1048, at 241; Hafetz, *supra* note 502, at 135.

1087. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005); see Freeman, *supra* note 1048, at 241; Hafetz, *supra* note 502, at 136–37; Wax, *supra* note 91, at 169–70.

1088. *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 1018, 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 1034, at 6; Simard, *supra* note 1034, at 378; Thomas P. Sullivan, “*Due Process*” at *Guantánamo*, in *The Guantánamo Lawyers*, *supra* note 1023, 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.

1089. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

standards for due process.¹⁰⁹⁰ In addition, some petitioners stated valid claims under the Geneva Conventions.¹⁰⁹¹ While Judge Green's decision was pending, the court received an additional eight cases.¹⁰⁹²

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.¹⁰⁹³ 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 suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen."¹⁰⁹⁴ 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.¹⁰⁹⁵

1090. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481; see *Boumediene*, 553 U.S. at 734–35; see Hafetz, *supra* note 502, at 136–37.

1091. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 481.

1092. 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) [hereinafter *Paracha* Docket Sheet] (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 1023, at 301, 301 (reporting on the filing of the petition in No. 1:05-cv-23).

1093. 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*, 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."); see also *id.* 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 1023, 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. Order, *Abdah*, No. 1:04-cv-1254 (D.D.C. Mar. 29, 2005) [hereinafter *Abdah* Order], available at 2005 WL 711814; Status Report, *id.* (Oct. 22, 2004).

1094. 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.

1095. *Abdah* Temporary Restraining Order, *supra* note 1094, at 1 n.1.

Judge Rosemary M. Collyer was on duty as the emergency motion judge that weekend.¹⁰⁹⁶ On Saturday, Judge Collyer granted the temporary restraining order.¹⁰⁹⁷ On Sunday, several attorneys sought temporary restraining orders on behalf of their clients, but Judge Collyer declined to issue such orders en masse.¹⁰⁹⁸ On Monday, attorneys began to file 30-day-notice motions in other cases.¹⁰⁹⁹

Judge Kennedy granted the Yemenis' motion¹¹⁰⁰ and issued similar orders in other cases.¹¹⁰¹ Judges Ricardo M. Urbina,¹¹⁰² Paul L. Friedman,¹¹⁰³ Gladys Kessler,¹¹⁰⁴ Richard W. Roberts,¹¹⁰⁵ Kollar-Kotelly,¹¹⁰⁶ Emmet G. Sullivan,¹¹⁰⁷ and

1096. *Id.*

Tim Reagan interviewed Judge Collyer for this report in the judge's chambers on September 20, 2011.

1097. *Abdah* Temporary Restraining Order, *supra* note 1094.

1098. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1099. *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).

1100. *Abdah* Order, *supra* note 1093; see Marc D. Falkoff, *Without Law or Justice*, in *The Guantánamo Lawyers*, *supra* note 1023, 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.”).

1101. 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).

1102. 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.

1103. *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, *Almerferdi 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.

1104. 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

Thomas F. Hogan¹¹⁰⁸ also issued similar orders. Judge Ellen Segal Huvelle ordered 30-days' notice, unless the detainee was to be released to freedom.¹¹⁰⁹ Judge Robertson granted the government's motions to stay proceedings pending resolution of jurisdictional questions in higher courts and interpreted the stay to

(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.

1105. 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), 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 1023, at 147.

1106. Order, Abu Ghanem v. Bush, No. 1:05-cv-1638 (D.D.C. July 10, 2007); Order, Rahmatullah 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).

1107. 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).

1108. 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.

1109. 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.

prohibit transfer of the detainees without notice.¹¹¹⁰ Judges Reggie B. Walton,¹¹¹¹ John D. Bates,¹¹¹² Leon,¹¹¹³ and Collyer¹¹¹⁴ declined to order 30-days' notice of detainee transfer.

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.¹¹¹⁵ In other cases, the public record includes notices of sealed submissions in advance of detainee transfers,¹¹¹⁶ but the submissions re-

1110. 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, 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).

1111. *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.

1112. *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.

1113. *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).

1114. 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).

1115. 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).

1116. 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

main sealed despite government notices that they can be unsealed.¹¹¹⁷ In a few additional cases, transfer notices refer to sealed submissions that are not otherwise reflected on the public record.¹¹¹⁸

(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) (10 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) (10 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. 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).

1117. 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, *Feghouf*, 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

In 2009, the court of appeals vacated the 30-day notice orders as beyond the courts' power.¹¹¹⁹

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.¹¹²⁰ 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.¹¹²¹

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.¹¹²²

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

(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).

1118. Transfer Notice, *Al-Joudi*, No. 1:05-cv-301 (D.D.C. Nov. 13, 2007).

1119. *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).

1120. 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.

1121. 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).

1122. Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Aug. 19, 2011); *see* Motion, *id.* (May 13, 2011).

orders or logistical issues, such as attorney communications and visits with detainees, would be referred to Magistrate Judge Alan Kay.¹¹²³

Although Judge Kay occasionally issued rulings resolving disputes, his primary role was to act as a mediator.¹¹²⁴ Judge Kay, an experienced mediator, considers mediation to be the legal equivalent of holistic medicine.¹¹²⁵ Assignment of blame and the adversarial process are not essential components of mediation.¹¹²⁶ 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.¹¹²⁷

The Justice Department provided the government with attorney representation in the habeas cases, but it was the Defense Department that controlled Guantánamo Bay.¹¹²⁸ Careful negotiation and mediation were crucial in working out matters with one of the parties so complex and powerful.¹¹²⁹

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.¹¹³⁰ 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.¹¹³¹

Establishing Procedures for Resolving Several Hundred Petitions

226 Petitions

Between Judge Green’s January 31, 2005, decision that the CSRT was constitutionally infirm and the Supreme Court’s *Boumediene* decision, 226 habeas peti-

1123. 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 1023, at 115, 116; Wax, *supra* note 91, at 178.

Tim Reagan interviewed Judge Kay for this report in the judge’s chambers on June 21, 2011.

1124. Interview with Hon. Alan Kay, June 21, 2011; see Fogler, *supra* note 1123, at 116; Wax, *supra* note 91, at 178–79.

1125. Interview with Hon. Alan Kay, June 21, 2011 (noting that successful mediation usually requires teaching, psychology, and humor).

1126. *Id.*

1127. *Id.*

1128. *Id.*

1129. *Id.*

1130. *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 Hafetz, *supra* note 502, at 156–57; Meltzer, *supra* note 1034, at 7.

1131. *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 502, at 158–65; Meltzer, *supra* note 1034, at 9.

tions were filed in the District of Columbia's district court on behalf of 560 detainees,¹¹³² of which at least 78 were duplicates.¹¹³³ Sixty of the petitions were filed

1132. 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.

1133. There were at least 55 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. Riyadh 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. Sulaiman Saad Mohaammed al-Oshan in No. 1:05-cv-533 was identified as Sulaiman Saad Mohaammed al-Oshan in No. 1:05-cv-583.
 14. Ahmed Errachidi in No. 1:05-cv-640 was identified as Ahmed Abu Imran in No. 1:05-cv-764.
 15. Abdul Salam Zaeef in No. 1:05-cv-660 was identified as Abdul Salam Deiff in No. 1:05-cv-2386.
 16. Elham Battayav in No. 1:05-cv-714 was identified as Elham Bataif in No. 1:05-cv-2386.
 17. Salim Muhood Adem in No. 1:05-cv-723 was identified as Salim Mohammed Adam Bin Amir in No. 1:05-cv-1724.
 18. Najeeb al-Husseini in No. 1:05-cv-764 was identified as Najeeb in No. 1:05-cv-2386.
 19. Chaman in No. 1:05-cv-887 was identified as Chaman Gul Khialigol in No. 1:05-cv-2367.
 20. Akhteyar Mohammad in No. 1:05-cv-996 was identified as Mohammad Akhtiar in No. 1:05-cv-1635.
 21. Adel Hassan Hamad in No. 1:05-cv-1009 was identified as Adel Hassan in No. 1:05-cv-2386.
 22. 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.
 23. Omar Mohammed Khalifh in No. 1:05-cv-1189 was identified as Omar Mohamad Khalifah in No. 1:05-cv-2386.
 24. Ali Adel Motaleb Aweid al-Khaiy in No. 1:05-cv-1239 was identified as Abdul Zahir in No. 1:05-cv-1240.
 25. Jawad Jabber Sadkhan in No. 1:05-cv-1487 was identified as Jawad Jabbar Sadkhan in No. 1:05-cv-1679.
 26. Faraj Abd al-Hadi Omar Mahmoud in No. 1:05-cv-1490 was identified as Abdul Hadi Omer Hamoud Faraj in No. 1:05-cv-1590.
 27. Mohammed Amon in No. 1:05-cv-1493 was identified as Tooran Mohammad Amanullah in No. 1:05-cv-2367.
 28. Shafiq in No. 1:05-cv-1506 was identified as Sofiane Mohammed Berhoumi in No. 1:05-cv-2386.
 29. Ibrahim Osman Ibrahim Idris in No. 1:05-cv-1555 was identified as Abraham Othman Abraham Edries in No. 1:05-cv-1725.
 30. Hassan Bin Attash in 1:05-cv-1592 was identified as Omier Ba Atash in 1:05-cv-2386.
 31. Hamid al-Razak in No. 1:06-cv-1601 was identified as Qari Hamdullah in No. 1:06-cv-1691.
 32. Ahmmed Ghulam Rabbani in No. 1:05-cv-1607 was identified as Ahmmed Ghulam Rabbani in No. 1:05-cv-2386.
 33. 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.
 34. Abdannour Sameur in No. 1:05-cv-1806 was identified as Abdurrachman in No. 1:05-cv-2386.

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.

-
35. Ravil Mingaza Gamil in No. 1:05-cv-2010 was identified as Ravil Mingazov in No. 1:05-cv-2479.
 36. 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.
 37. Jabbarow Oybek Jamolovich in No. 1:05-cv-2112 was identified as Jabbarov Oybek Jamolovich in No. 1:05-cv-2386.
 38. 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.
 39. Ahmed Ben Bacha in No. 1:05-cv-2349 was identified as Ahmed Ben Bacha in No. 1:05-cv-2386.
 40. Abdullah Ali Saleh Gerab Alsaee in No. 1:05-cv-2369 was identified as Abdullah al-Sali al-Asoriya in No. 1:05-cv-2452.
 41. Abdur Razakah in No. 1:05-cv-2370 was identified as Abdurazzak in No. 1:05-cv-2386.
 42. Abdul Hamid Abdul Salam al-Ghizzawi in 1:05-cv-2378 was identified as Abin Al-hamed Abid Alsallam Alkesawi in 1:05-cv-2386.
 43. 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.
 44. Sultan al-Shareef in No. 1:05-cv-2385 was identified as Fahd Umar Abdulmajid al-Shareef in No. 1:05-cv-2458.
 45. Ali, Mohammed Rimi, Zein al-Abedeem, 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.
 46. 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.
 47. Qari Saad Iqbal in No. 1:06-cv-1674 was also the petitioner in No. 1:06-cv-1688.

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. Ameer Mammam in No. 1:05-cv-573 and No. 1:05-cv-1233 was identified as Amer Mohammed in No. 1:05-cv-2386.
7. Abdulzahir 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.

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 next friend.¹¹³⁴ The Center had included Hassen as one of 14 petitioners in a July 27, 2004, petition.¹¹³⁵ 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.¹¹³⁶ 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 representation by the detainee must be provided to respondents."¹¹³⁷ 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."¹¹³⁸ On August 8, the government filed a return¹¹³⁹ pursuant to an order issued by Judge Roberts on July 8.¹¹⁴⁰

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.¹¹⁴¹ Judge Friedman denied the motion in the case before him.¹¹⁴² Judges Huvelle,¹¹⁴³ Collyer,¹¹⁴⁴ and Robertson¹¹⁴⁵ referred the matter, by agreement, to Senior Judge

1134. 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 Guantanamo pro bono project." Candace Gorman, *My Experiences Representing a Guantanamo Detainee*, Litig., Spring 2009, at 10, 10 (reflections by pro bono attorney who represented two Guantanamo Bay detainees).

1135. 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).

1136. 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 order).

1137. Government Response, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 23, 2005); see *Adem*, 425 F. Supp. 2d at 13.

1138. Protective Order, Ex. A at ¶ III.C.2, *Ahmed*, No. 1:05-cv-665 (D.D.C. June 24, 2005).

1139. Return, *id.* (Aug. 8, 2005).

1140. Order, *id.* (July 8, 2005).

1141. 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, 1:05-cv-1704 (D.D.C. Aug. 31, 2005).

1142. Sept. 26, 2005, *Akhtiar* Order, *supra* note 1103.

1143. Order, *Doe v. Bush*, No. 1:05-cv-1458 (D.D.C. Oct. 13, 2005).

1144. 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).

1145. Order, *Abu Kabir v. Bush*, No. 1:05-cv-1704 (D.D.C. Nov. 1, 2005) (two detainees).

Louis F. Oberdorfer. The motion in another case was mooted by an amended petition naming the detainee's mother as his next friend.¹¹⁴⁶

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.¹¹⁴⁷ 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.¹¹⁴⁸ One week after that, the petitioner'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.¹¹⁴⁹ Judge Bates referred the September 23 motion to Judge Oberdorfer.¹¹⁵⁰

Judge Oberdorfer issued the requested order to show cause on November 4.¹¹⁵¹ Judge Kessler issued a similar order to show cause on October 11,¹¹⁵² and the court granted the government's motion to consolidate her order with Judge Oberdorfer's.¹¹⁵³

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.¹¹⁵⁴

Judge Kay ordered the government to comply with applicable protective orders and permit attorneys to meet with petitioners so that they could pursue petitions

1146. Notice, *Al-Wirghi v. Bush*, No. 1:05-cv-1497 (D.D.C. Jan. 11, 2006); Amended Petition, *id.* (Dec. 1, 2005).

1147. 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).

1148. 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 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).

1149. Response, *Hamlily*, No. 1:05-cv-763 (D.D.C. Oct. 11, 2005); *see* *Adem*, 425 F. Supp. 2d at 13.

1150. Order, *Qasim*, No. 1:05-cv-1779 (D.D.C. Oct. 31, 2005).

1151. Order, Nos. 1:05-cv-1458, 1:05-cv-1504, 1:05-cv-1505, 1:05-cv-1506, 1:05-cv-1704, 1:05-cv-1779 (D.D.C. Nov. 4, 2005) [hereinafter Nov. 4, 2005, Oberdorfer Order].

1152. Order, *Al-Razak v. Bush*, No. 1:05-cv-1601 (D.D.C. Oct. 11, 2005).

1153. Order, *id.* (Nov. 22, 2005).

1154. Nov. 4, 2005, Oberdorfer Order, *supra* note 1151.

directly without next friends, and this process began to moot the fellow-detainee-as-next-friend issue for these cases.¹¹⁵⁵

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.”¹¹⁵⁶ Ghassan Abdullah al-Sharbi has been at Guantánamo Bay since March 2002.¹¹⁵⁷ The government announced military-commission conspiracy charges against him on November 8, 2005.¹¹⁵⁸ On December 8, Abdullah al-Sharbi filed a habeas petition on behalf of his son.¹¹⁵⁹ The detainee refused to meet with the attorney his father found for him, but the attorney endeavored to discover whether the refusal resulted from government interference or coercion or from mental illness.¹¹⁶⁰ On August 8, 2008, the detainee wrote a letter to the court explaining in clear English that he did not want to pursue a habeas action,¹¹⁶¹ and the court received the letter on January 7, 2009.¹¹⁶² 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.¹¹⁶³ Al-Sharbi has admitted to being a combatant against the United States.¹¹⁶⁴

In 2010, Judges Bates¹¹⁶⁵ and Leon¹¹⁶⁶ dismissed petitions because they were not authorized by the detainees.

Coordination Before Judge Hogan

By the time of the 2008 *Boumediene* decision, at least 200 petitioners had been transferred to other countries, sometimes for release and sometimes for detention and possible prosecution there.¹¹⁶⁷ Four petitioners were voluntarily dismissed without prejudice.¹¹⁶⁸ Another two petitioners committed suicide.¹¹⁶⁹

1155. 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, 1:05-cv-1779 (D.D.C. Oct. 6, 2006) [hereinafter Oct. 6, 2006, Report and Recommendation].

1156. *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 319 (D.D.C. 2009).

1157. *Id.* at 318.

1158. See Neil A. Lewis, *Pentagon Charges 5 More in Guantánamo Bay Camp*, N.Y. Times, Nov. 8, 2005, at A22.

1159. Petition, *Al-Sharbi v. Bush*, No. 1:05-cv-2348 (D.D.C. Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

1160. *Al Sharbi*, 601 F. Supp. 2d at 318.

1161. Letter, *Al-Sharbi*, No. 1:05-cv-2348 (D.D.C. Jan. 7, 2009).

1162. Docket Sheet, *id.* (Dec. 8, 2005); *Al Sharbi*, 601 F. Supp. 2d at 318.

1163. *Al Sharbi*, 601 F. Supp. 2d at 318–19.

1164. See Tim Golden, *The Battle for Guantánamo*, N.Y. Times, Sept. 17, 2006, at 660.

1165. *Kuman v. Obama*, 725 F. Supp. 2d 72 (D.D.C. 2010) (dismissing Ahmed Yaslam Said Kuman’s petition).

1166. 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).

1167. “Some have been released outright; more have been turned over to the custody of their home governments.” Cucullu, *supra* note 1040, at 53; see Inside Guantanamo (National Geographic DVD 2009); see also Fletcher & Stover, *supra* note 1022, 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 1022, at 89–90 (reporting that detainees were falsely told that their release was 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* Kurnaz, *supra*; Baher Azmy, *Free at Last, in* The Guantánamo Lawyers, *supra* note 1023, at 346; Bernhard Docke, *Lost and Found, in* The Guantánamo Lawyers, *supra* note 1023, 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 [hereinafter *Britain Detains*] (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 1037 (reporting on a British damages settlement paid to Abbasi, 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 Almurbat 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 1023, at 345 (concerning Jum'ah 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, supra*; Omonira-Oyekanmi & Finn, *supra* note 1037 (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, Abdal al-Thani in No. 1:05-cv-2336; 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-Laiti, 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-2336, 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 1023, 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 1023, 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, also the petitioner in No. 1:05-cv-583, 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 1023, at 349.
 21. One: Notice, Nos. 1:05-cv-714 and 1:05-cv-2386 (D.D.C. Dec. 20, 2006) (Elham Batayav 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 91, 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 to Afghanistan).
 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 Arabia).
 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 1023, at 339, 340.
 65. One: Notice, No. 1:05-cv-1806 (D.D.C. Dec. 21, 2007) (Abdannour Sameur, Abdurachman 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-1886, and also known as Fethi Boucetta, to Albania); *see* Anne Castle, Trip Mackintosh & Scott Barker, *Stateless*, in *The Guantánamo Lawyers*, *supra* note 1023, 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 Abdurahman 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 10 months before it occurred); Sahr Muhammed Ally, *Speaking Through Holes in Glass*, in *The Guantánamo Lawyers*, *supra* note 1023, 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 1093.
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 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 1023, 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 to Afghanistan).
97. One: Notice, No. 1:06-cv-1769 (D.D.C. Dec. 31, 2007) (Khaled Mallouh Shaye Algahani 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 1023, 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 to Spain).
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 Alasmal 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 1023, at 358, 360.
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).
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).
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. 1:05-cv-1677 (Mohammed Naseem to Afghanistan).
12. One: No. 1:05-cv-1678 (Gulbas Khan to Afghanistan).
13. One: No. 1:05-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).

The transfers of an additional three petitioners were noted in other sources:

1. One: *See* Steven Erlanger, *France Clears 5 Ex-Inmates Whom U.S. Held in Cuba*, N.Y. Times, Feb. 25, 2009, at A5 (Khaled Ben Mustapha, petitioner in No. 1:05-cv-22, to France).
2. Two: *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006) (noting release in Albania of two ethnic Uighurs found not to be enemy combatants, petitioners in No. 1:05-cv-497: Abu Bakker Qassim, Abu Baker in No. 1:05-cv-2386, and A'del Abdu al-Hakim.).

Two additional transfers are reported in the *New York Times*' online database of Guantánamo Bay detainee information, <http://projects.nytimes.com/guantanamo>:

1. One: Hammad Ali Amno Gadallah, petitioner in No. 1:05-cv-2386, to Sudan on July 19, 2005.
2. One: Salih Uyar, petitioner in No. 1:05-cv-2386, to Turkey on April 18, 2005.

1168. Notice, No. 1:06-cv-1676 (D.D.C. Nov. 6, 2006) (Naseer); Notice, No. 1:05-cv-2444 (D.D.C. Sept. 20, 2006) (Talal Ahmed Mohammed Ali Almjrđ); Stipulation, No. 1:05-cv-1124 (D.D.C. Oct. 26, 2005) (Abd al-Rahman and Abdul Rahman Aziz Khan).

1169. 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 1023, at 282 (reflections on al-Utaybe's suicide by his habeas attorney); Jeffrey Davis, *Pending Release*, *id.* at 283

(Since then, at least 76 additional petitioners have been transferred from Guantánamo Bay,¹¹⁷⁰ three have been dismissed without prejudice,¹¹⁷¹ and three have died.¹¹⁷²)

(same); *see* Mahvish Rukhsana Khan, *My Guantánamo Diary* 153–65 (2008) (reflections on al-Salami’s suicide by his legal interpreter).

1170. 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-Rabiah 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).
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 Zemirito to Algeria).
7. One: Notice, No. 1:05-cv-270 (D.D.C. Feb. 24, 2010) (Sherif el-Mashad 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 Mammam, 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 1023, 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) (Labeled 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; Edham Mamet; Anwar Hassan, also a petitioner in No. 1:05-cv-2386; Dawut Abdurehim; and Adel Noori 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).
 27. Four: Notices, No. 1:05-cv-2386 (D.D.C. June 15, 2009, to July 19, 2010) (Abdul Aziz al-Noofayae to Saudi Arabia, Adel Bin Mabrouk to Italy, Saif Ullah to Albania, and Abdul Aziz Naji to Algeria).
 28. One: Notice, No. 1:05-cv-2479 (D.D.C. Oct. 31, 2008) (Zainulabidin Merozhev 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 1023, 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 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 1023, 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 502, at 248.
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).

Approximately three weeks after the Supreme Court's *Boumediene* decision, by which time another four petitions on behalf of four detainees had been filed,¹¹⁷³ 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,¹¹⁷⁴ with the exception of Hamdan's petition and nine cases assigned to Judge Leon, who opted out of the coordination

-
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 10 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.
3. 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.
4. 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.
5. One: Oybek Jamoldinovich Jabbarov, petitioner in Nos. 1:05-cv-2112 and 1:05-cv-2386, to Ireland on September 27, 2009.
6. One: Abin Alhamed Abid Alsallam Alkesawi, petitioner in Nos. 1:05-cv-2378 and 1:05-cv-2386, to Georgia on March 23, 2010.
7. One: Abd al-Zaher, petitioner in No. 1:05-cv-2386, to Slovakia on January 24, 2010.
8. One: Mohammed al-Palestini, petitioner in No. 1:05-cv-2386, to Spain on February 24, 2010.
9. One: Qari Saad Iqbal, petitioner in No. 1:06-cv-1674, 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.

1171. Order, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Oct. 28, 2011) (dismissing the petition of 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) (withdrawing the petition of Achraf Salim Abdessalam); Notice, *Albkri v. Bush*, No. 1:05-cv-1639 (D.D.C. July 18, 2008) (withdrawing the petition of Ameen Mohammad Albkri).

1172. Notice, *Nassim v. Obama*, No. 1:09-cv-1332 (D.D.C. May 23, 2011) (Hajji Nassim by apparent suicide) [hereinafter *Nassim Death Notice*]; 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) (Mohammad Ahmed Abdullah Saleh al-Hanashi by apparent suicide) [hereinafter *Al-Hanashi Death Notice*].

1173. 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.

1174. 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.

plan.¹¹⁷⁵ The court assigned one miscellaneous case number to coordination of 121 cases pertaining to detainees, *In re Guantanamo Bay Detainee Litigation*,¹¹⁷⁶ 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*.¹¹⁷⁷ Later, Judge Sullivan also opted out of the coordination plan.¹¹⁷⁸

On April 1, 2010, Judge Hogan determined that the court no longer had jurisdiction over previous detainees' cases.¹¹⁷⁹ By this time, another 38 petitions on behalf of 40 detainees had been filed,¹¹⁸⁰ of which at least four were duplicates,¹¹⁸¹ and another three turned out to have already been transferred to Afghanistan.¹¹⁸²

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.¹¹⁸³

1175. *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 1083.

Judge Lamberth, who had been chief judge 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.

1176. Docket Sheet, *In re Guantanamo Bay Detainee Litig.*, No. 1:08-mc-442 (D.D.C. July 2, 2008).

1177. 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*].

1178. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 n.1 (D.D.C. 2008); see Palazzolo, *supra* note 1083.

1179. *In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119 (D.D.C. 2010).

1180. 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.

1181. 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.

1182. Notice, *Hafiz v. Obama*, No. 1:09-cv-1461 (D.D.C. Dec. 22, 2009) (noting transfer of Abdul Hafiz to Afghanistan); Notice, *Hashim v. Obama*, No. 1:09-cv-1460 (D.D.C. Dec. 22, 2009) (noting 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).

1183. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011).

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.¹¹⁸⁴ 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.¹¹⁸⁵

On November 20, 2008, Judge Leon ruled that classified evidence presented to the court established that Belkacem Bensayah was an al-Qaeda facilitator.¹¹⁸⁶ Judge Leon ruled against the government with respect to the other five detainees and ordered them released.¹¹⁸⁷ As Judge Leon urged in court, the government did not appeal the release orders,¹¹⁸⁸ but Bensayah appealed the decision against him.¹¹⁸⁹ 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.¹¹⁹⁰ The parties, however, have consented to an extension of time to request a rehearing of the appeal.¹¹⁹¹ Although Bensayah remains at Guantánamo Bay, the last of the successful Bosnian petitioners was released on November 30, 2009.¹¹⁹²

1184. *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.

1185. *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).

1186. *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 Guantanamo.”); Del Quentin Wilber, *5 at Guantanamo Ordered Released*, Wash. Post, Nov. 21, 2008, at A2.

1187. *Bensayah*, 610 F.3d at 721; *Boumediene*, 579 F. Supp. at 196–99; see Glaberson & Becker, *supra* note 1186; Hafetz, *supra* note 502, at 244; Chisun Lee, *Their Own Private Guantánamo*, N.Y. Times, July 23, 2009, at A31; Wilber, *supra* note 1186; Paul M. Winke, *A Day in Court, in The Guantánamo Lawyers*, *supra* note 1023, at 350, 357.

1188. *Boumediene* Docket Sheet, *supra* note 1044; see Glaberson & Becker, *supra* note 1186; Hafetz, *supra* note 502, at 244; Winke, *supra* note 1187, at 357.

1189. Docket Sheet, *Bensayah v. Obama*, No. 08-5537 (D.C. Cir. Dec. 31, 2008) [hereinafter First D.C. Cir. *Bensayah* Docket Sheet]; see Winke, *supra* note 1187, at 357.

1190. *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.

1191. Order, *Bensayah*, No. 08-5537 (D.C. Cir. Nov. 10, 2010); see First D.C. Cir. *Bensayah* Docket Sheet, *supra* note 1189 (noting a deadline of Nov. 22, 2011, for a petition for rehearing).

1192. 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,

On December 30, 2008, Judge Leon denied two habeas petitions.¹¹⁹³

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.¹¹⁹⁴ He escaped but was again apprehended by Pakistani authorities while attempting to flee from Afghanistan in late 2001.¹¹⁹⁵ Pakistan transferred him to U.S. custody, and the United States transferred him to Guantánamo Bay.¹¹⁹⁶ On March 2, 2005, attorneys filed a habeas petition on behalf of Sliti and 15 other detainees.¹¹⁹⁷ Treatment of Sliti at Guantánamo Bay, and mistreatment of his Quran, were reportedly related to a widespread hunger strike later that year.¹¹⁹⁸ 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.¹¹⁹⁹ 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.¹²⁰⁰ An appeal is pending.¹²⁰¹

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.¹²⁰² The court of appeals affirmed on July 22, 2011.¹²⁰³

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).

1193. 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.

1194. *Sliti*, 592 F. Supp. 2d at 48.

1195. *Id.*

1196. *Id.*

1197. Docket Sheet, Sliti v. Bush, No. 1:05-cv-429 (D.D.C. Mar. 2, 2005); *Sliti*, 592 F. Supp. 2d at 48.

1198. See Neil A. Lewis, *Widespread Hunger Strike at Guantánamo*, N.Y. Times, Sept. 18, 2005, at 124.

1199. *Supra* notes 1167, 1170.

Yousuf al-Karany was transferred to Chad the following June. *Supra* note 1170.

1200. *Sliti*, 592 F. Supp. 2d at 50.

1201. Docket Sheet, Sliti v. Obama, No. 09-5104 (D.C. Cir. Mar. 31, 2009); see Status Report, *id.* (July 1, 2011) (requesting extension of a stay).

1202. Al-Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008).

1203. Al-Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011); see Docket Sheet, Al-Alwi v. Obama, No. 11A368 (U.S. Aug. 22, 2011) (noting an extension until Dec. 5, 2011, to file a petition for a writ of certiorari).

On January 14, 2009, Judge Leon granted Mohammed el-Gharani's habeas petition.¹²⁰⁴ El-Gharani was a native of Saudi Arabia and a citizen of Chad; he was apprehended in 2001 at the age of 14.¹²⁰⁵

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 detainees 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.¹²⁰⁶

The government released el-Gharani to Chad on June 11.¹²⁰⁷

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.¹²⁰⁸ The court of appeals affirmed.¹²⁰⁹

Judge Leon denied Hedi Hammamy's petition on April 2.¹²¹⁰ 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.¹²¹¹ Hammamy had been charged with terrorism activity in Italy, and his identification papers were found at Tora Bora.¹²¹²

Judge Leon granted a petition on June 22.¹²¹³ 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.¹²¹⁴ The government conceded that he was subsequently imprisoned by al-Qaeda and tortured into a false confession that he was a U.S. spy,¹²¹⁵ and Judge Leon concluded that after such treatment he could not have been part of al-Qaeda or the Taliban

1204. *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.

1205. *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 1204; Stafford Smith, *supra* note 1023, at 146–50; see also *id.* at 147 (“People born in Saudi Arabia of foreign parents are not considered as Saudis.”).

1206. *El Gharani*, 593 F. Supp. 2d at 147.

1207. 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 1205.

1208. *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 39 (D.D.C. 2009); see Lee, *supra*, note 1187.

1209. *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*].

1210. *Hammamy v. Obama*, 604 F. Supp. 2d 240 (D.D.C. 2009).

1211. *Id.*

1212. *Id.* at 243–44.

1213. *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.

1214. *Al-Ginco*, 626 F. Supp. 2d at 128.

1215. *Id.* at 127; see Hafetz, *supra* note 502, at 246.

when he was apprehended by the United States.¹²¹⁶ Al-Janko was released from Guantánamo Bay, and, on October 5, 2010, he filed a civil action against the government alleging torture.¹²¹⁷

Uighurs

Eighteen 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.¹²¹⁸

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.¹²¹⁹ The court assigned the petition to Judge Robertson.¹²²⁰ 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.¹²²¹ The government provided neither the attorneys nor Judge Robertson with notice of the CSRT ruling.¹²²² On July 22, the attorneys filed a motion for their clients' immediate release.¹²²³ 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.¹²²⁴ On May 5, 2006, three days before oral argument on the petitioners' appeal, the government released Qassim and al-Hakim to a United Nations refugee camp in Albania.¹²²⁵

1216. *Al-Ginco*, 626 F. Supp. 2d at 129–30; see Hafetz, *supra* note 502, at 246.

1217. Docket Sheet, *Al-Janko v. Gates*, No. 1:10-cv-1702 (D.D.C. Oct. 5, 2010); see 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.”).

1218. *Qassim v. Bush*, 382 F. Supp. 2d 126, 128 n.4 (D.D.C. 2005); see Cucullu, *supra* note 1040, at 139–40; Simard, *supra* note 1034, at 369, 379.

1219. 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 1034, at 382.

1220. Docket Sheet, *Qassim*, No. 1:05-cv-497 (D.D.C. Mar. 10, 2005).

1221. *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].

1222. *Qassim*, 407 F. Supp. 2d at 199; *Qassim*, 382 F. Supp. 2d at 127.

1223. *Qassim* Release Motion, *supra* note 1221.

1224. *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 1034, at 382–84.

1225. *Qassim v. Bush*, 466 F.3d 1073, 1074 (D.C. Cir. 2006); see Tim Golden, *Chinese Leave Guantánamo for Albanian Limbo*, N.Y. Times, June 10, 2007, at 11; Lewis, *supra* note 1224; Abu Bakker Qassim, *The View from Guantánamo*, N.Y. Times, Sept. 17, 2006, at 415; Simard, *supra* note 1034, at 384–85; Stafford Smith, *supra* note 1023, at 264–65; P. Sabin Willett, *Exile, in The Guantánamo Lawyers*, *supra* note 1023, 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 1034, at 386.

From July 29 through December 14, 2005, five habeas petitions were filed on behalf of an additional 16 Uighur detainees.¹²²⁶ The Center for Constitutional Rights filed a petition on behalf of 159 detainees in December 2005,¹²²⁷ 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 the other Uighur cases.¹²²⁸ In June 2006, Sadiq Ahmed Turkistani was released to Saudi Arabia.¹²²⁹

One of the detained Uighurs was Huzaifa Parhat, who, on December 4, 2006, filed one of the first appeals from the CSRT.¹²³⁰ 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.¹²³¹ "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."¹²³²

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.¹²³³ 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.¹²³⁴

It was reported that Albania refused to accept additional Uighurs because of pressure from China. Cucullu, *supra* note 1040, at 227.

1226. Petition, Thabid v. Bush, No. 1:05-cv-2398 (D.D.C. Dec. 14, 2005) (two detainees); Petition, Razakah v. Bush, No. 1:05-cv-2370 (D.D.C. Dec. 12, 2005) (two detainees); Petition, Abu Kabir v. Bush, No. 1:05-cv-1704 (D.D.C. Aug. 25, 2005) (two detainees); Petition, Mamet v. Bush, No. 1:05-cv-1602 (D.D.C. Aug. 11, 2005) (one detainee); Petition, Kiyemba v. Bush, No. 1:05-cv-1509 (D.D.C. July 29, 2005) (nine detainees).

1227. 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).

1228. 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).

1229. Notice of Transfer, *Kiyemba*, No. 1:05-cv-1509 (D.D.C. June 27, 2006).

1230. 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. 10 U.S.C. § 801 note.

1231. 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 502, at 249; Josh White & Del Quentin Wilber, *Appeals Court Invalidates Detainee's "Enemy" Status*, Wash. Post, June 24, 2008, at A14.

1232. *Kiyemba v. Obama*, 555 F.3d 1022, 1024 (D.C. Cir. 2009).

1233. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

1234. *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 1023, 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 1040, at

On February 18, 2009, the court of appeals vacated Judge Urbina's order.¹²³⁵ Judges A. Raymond Randolph and Karen Lecraft Henderson held that the judicial branch did not have the authority to order admission of aliens.¹²³⁶ Judge Judith W. Rogers would have remanded for consideration of whether immigration detention would be proper.¹²³⁷ On June 11, the government released Parhat and three other Uighurs to Bermuda.¹²³⁸

The Supreme Court granted a writ of certiorari on October 20.¹²³⁹ The government transferred six Uighurs to Palau in November.¹²⁴⁰ Palau offered to accept six of the remaining seven Uighurs, but they declined the offer.¹²⁴¹ 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.¹²⁴² Switzerland agreed to take the brothers.¹²⁴³ 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 accepted the offers.¹²⁴⁴ The judges on the court of appeals reinstated

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 502, at 249; Del Quentin Wilber, *Chinese Muslims Ordered Released from Guantanamo*, Wash. Post, Oct. 8, 2008, at A1.

1235. *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 502, at 249–50; Del Quentin Wilber & Carrie Johnson, *Court Blocks Release of 17 Uighurs Into U.S.*, Wash. Post, Feb. 19, 2009, at A4.

1236. *Kiyemba*, 555 F.3d at 1023–32.

1237. *Id.* at 1032–39 (Rogers, concurring in the judgment).

1238. 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 502, at 250.

1239. *Kiyemba v. Obama*, ___ U.S. ___, 130 S. Ct. 458 (2009); see Robert Barnes, *Supreme Court to Hear Uighurs' Case*, Wash. Post, Oct. 21, 2009, at A1; Hafetz, *supra* note 502, at 250; Adam Liptak, *Justices to Hear Appeal from Uighurs Held at Guantánamo*, N.Y. Times, Oct. 21, 2009, at A14.

1240. 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 502, at 250; David Johnston, *6 Uighurs Leave Guantánamo for Palau*, N.Y. Times, Nov. 1, 2009, at 14.

1241. See Del Quentin Wilber & Peter Finn, *Uighur Brothers to Resettle in Switzerland*, Wash. Post, Feb. 4, 2010, at A10.

1242. See Carol Rosenbergt, *Swiss Resettle 2 Uighurs from Guantanamo, Georgia Takes Libyans*, Miami Herald, Mar. 24, 2010; Wilber & Finn, *supra* note 1241.

1243. See Rosenberg, *supra* note 1241; Wilber & Finn, *supra* note 1241.

1244. *Kiyemba v. Obama*, ___ U.S. ___, 130 S. Ct. 1235 (2010); see Robert Barnes, *Court Declines to Rule on Resettlement of Guantanamo Detainees*, Wash. Post, Mar. 2, 2010, at A5; Hafetz, *supra* note 502, at 250; Adam Liptak, *Supreme Court Refuses Ruling on Chinese Uighurs Held at Guantánamo*, N.Y. Times, Mar. 2, 2010, at A16.

their original opinions on August 9.¹²⁴⁵ 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.*”¹²⁴⁶

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, 2008.¹²⁴⁷ 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.¹²⁴⁸ Judge Hogan reluctantly granted the motion.¹²⁴⁹ In November, Judge Hogan ordered that the public files include unclassified versions of the returns.¹²⁵⁰

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 denied the motions.¹²⁵¹ Judge Roberts, the merits judge for one of the cases, de-

1245. *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 (Rogers, concurring in the judgment) (“my separate concurrence . . . must . . . also be reinstated, acknowledging certain new developments”).

1246. *Kiyemba v. Obama*, 563 U.S. ___, 131 S. Ct. 1631 (2011) (statement of Breyer, joined by Kennedy, Ginsburg, and Sotomayor); see Adam Liptak, *Justices Decline to Hear Appeal from Chinese Detainees*, N.Y. Times, Apr. 19, 2011, at A18.

1247. *In re Guantanamo Bay Detainee Litig.*, 564 F. Supp. 2d 14, 16 (D.D.C. 2008).

1248. *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.

1249. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 310.

1250. 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.

1251. *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 1023, at 200, 205, 212–13.

cided on reconsideration that the motion concerned the detainee's ability to pursue his core habeas claims and granted relief on November 28.¹²⁵²

Judges Urbina,¹²⁵³ Bates,¹²⁵⁴ and Kessler¹²⁵⁵ agreed with Judge Hogan that the court had no jurisdiction over conditions of confinement.

Zayn al-Abidin Muhammad Husayn,¹²⁵⁶ a Palestinian also known by his nom de guerre, Abu Zubaydah, was identified in early 2000 as a suspected key lieutenant of Osama Bin Laden's.¹²⁵⁷ In March 2002, he was captured in Faisalabad, Pakistan.¹²⁵⁸ He was waterboarded at least several dozen times the following August.¹²⁵⁹ Information derived from his interrogation helped to identify Jose Padilla as a terrorism suspect.¹²⁶⁰ 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.¹²⁶¹ On September 6, 2006, the President announced that Abu Zubaydah and 13 other terrorism suspects, including Khalid Sheikh Mohammed, who is understood to be the mastermind of the September 11,

1252. *Husayn v. Gates*, 588 F. Supp. 2d 7 (D.D.C. 2008).

1253. *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).

1254. *Khadr v. Bush*, 587 F. Supp. 2d 225, 234–37 (D.D.C. 2008) (overruling a challenge to confinement as an adult).

1255. *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).

1256. Docket Sheet, *Husayn v. Gates*, No. 1:08-cv-1360 (D.D.C. Aug. 6, 2008) [hereinafter *Husayn* Docket Sheet].

1257. 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 64, at 380–81; see also Hafetz, *supra* note 502, 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 64, at 381 (“It was not until the Obama administration was in office that U.S. official stopped calling him a senior al-Qaeda member.”).

1258. See Michael R. Gordon, *A Top Qaeda Commander Believed Seized in Pakistan*, N.Y. Times, Mar. 31, 2002, at 112; Soufan, *supra* note 64, at 373–74.

1259. See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. Times, Apr. 20, 2009, at A1.

1260. See Hafetz, *supra* note 502, 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; Soufan, *supra* note 64, at 354, 427; see also *infra*, “Dirty Bomber.”

1261. See Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1 [hereinafter *CIA Destroyed Videos*]; Dan Eggen & Joby Warrick, *Criminal Probe on CIA Tapes Opened*, Wash. Post, Jan. 3, 2008, at A1 [hereinafter *Criminal Probe Opened*]; 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 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; Soufan, *supra* note 64, at 434 (“Declassified internal CIA e-mails show senior CIA officials stating the urgency and importance of destroying the tapes.”).

2001, attacks, had been transferred from secret CIA prisons to Guantánamo Bay.¹²⁶²

At Guantánamo Bay, Abu Zubaydah suffered from frequent and severe seizures.¹²⁶³ 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.”¹²⁶⁴ Judge Roberts granted Abu Zubaydah’s attorneys access to his medical records and gave them permission to share them with an independent physician.¹²⁶⁵ Judge Urbina also granted a habeas petitioner’s attorneys access to the client’s medical records.¹²⁶⁶ 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.¹²⁶⁷ A court-appointed doctor visited the detainee the following month.¹²⁶⁸

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,”¹²⁶⁹ Judge Kessler ruled that “counsel is entitled to the medical

1262. See Cucullu, *supra* note 1040, at 5; Hafetz, *supra* note 502, 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.

1263. *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 64, at 381–84 (describing Abu Zubaydah’s precarious health soon after his capture).

1264. *Husayn*, 588 F. Supp. 2d at 9.

1265. *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).

1266. *Tumani v. Obama*, 598 F. Supp. 2d 67, 70–71 (D.D.C. 2008).

1267. *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.”).

1268. 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).

1269. Emergency Motion 3, *Al-Ansi v. Obama*, No. 1:08-cv-1923 (D.D.C. June 18, 2009).

records in order to provide Petitioner effective access to his counsel”¹²⁷⁰ and that the order “does not pertain to the conditions of Petitioner’s confinement.”¹²⁷¹

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, was 15 when he was captured in Kabul in July 2002, and who was 16 when he arrived at Guantánamo Bay.¹²⁷² He was 17 when his grandmother filed a habeas petition on his behalf.¹²⁷³ 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.¹²⁷⁴ The merits judge for the habeas case was Judge Bates, who determined that the habeas action should be stayed pending the outcome of the military commission, because the commission result was subject to Article III review.¹²⁷⁵ Kadr pleaded guilty on October 25, 2010, pursuant to an agreement that he serve no more than eight years.¹²⁷⁶

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 proceedings, but a stay was not warranted until a military commission was actually convened against the petitioner.¹²⁷⁷ 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.¹²⁷⁸

Judge Kollar-Kotelly held a merits hearing for al-Rabiah in August 2009.¹²⁷⁹ Al-Rabiah, who had studied in Perth, Scotland, and Daytona Beach, Florida, was an aviation engineer for Kuwait Airways.¹²⁸⁰ He periodically took approved leave

1270. Order, *id.* (July 9, 2009), available at 2009 WL 2020774.

1271. *Id.* n.1.

1272. *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).

1273. *Khadr*, 587 F. Supp. 2d at 228; *O.K.*, 344 F. Supp. 2d at 52; *Khadr* Docket Sheet, *supra* note 1044.

1274. *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>.

1275. *Khadr*, 724 F. Supp. 2d 61; *O.K.*, 344 F. Supp. 2d 44.

1276. 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.

1277. *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>; Charge Sheet, *United States v. Al-Kandari*, *id.*

1278. *Al Odah.*, 593 F. Supp. 2d at 54–55, 60–61.

1279. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 (D.D.C. 2009).

1280. *Id.* at 20.

from his job to do charitable work in stressed locations such as Bosnia, Kosovo, and Bangladesh.¹²⁸¹ 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.¹²⁸² Al-Rabiah was captured near the end of the year.¹²⁸³ 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.¹²⁸⁴ Al-Rabiah was released to Kuwait on December 9.¹²⁸⁵

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.¹²⁸⁶

Judge Kollar-Kotelly denied al-Kandari's petition on September 15, 2010, following an October 2009 merits hearing.¹²⁸⁷ An appeal is pending.¹²⁸⁸

Authority passed from President Bush to President Obama on January 20, 2009.¹²⁸⁹ Four days in advance of that, the government moved to stay habeas proceedings by Ahmad Mohammad al-Darbi because he had been referred to a military commission the previous February.¹²⁹⁰ Because military commissions were suspended two days after President Obama's inauguration,¹²⁹¹ Judge Royce C. Lamberth denied the government's motion.¹²⁹² Judges Kollar-Kotelly¹²⁹³ and Huelle¹²⁹⁴ ruled similarly in cases before them.

1281. *Id.* at 20–21.

1282. *Id.* at 21.

1283. *Id.* at 21–22.

1284. *Id.* at 42; see Hafetz, *supra* note 502, 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.

1285. 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.

1286. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

1287. *Id.*

1288. Docket Sheet, *Al-Kandari v. Obama*, No. 10-5373 (D.C. Cir. Nov. 19, 2010) (noting, on Nov. 8, 2011, that the appeal will be decided without oral argument).

1289. See Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. Times, Jan. 21, 2009, at A1.

1290. Government Motion, *Al-Darbi v. Bush*, No. 1:05-cv-2371 (D.D.C. Jan. 16, 2009).

1291. Exec. Order No. 13,492 § 7, 74 Fed. Reg. 4897 (Jan. 27, 2009).

1292. 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.

1293. Order, *Alsawam v. Obama*, No. 1:05-cv-1244 (D.D.C. Apr. 15, 2009).

1294. Order, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. Apr. 22, 2009), available at 2009 WL 1078660.

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.¹²⁹⁵ 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.¹²⁹⁶

The Detainee Treatment Act of 2005 was attached to the 2006 appropriation act for the Defense Department, enacted on December 30, 2005.¹²⁹⁷ The act specified that the Defense Department would submit to Congress reports on CSRT and ARB proceedings.¹²⁹⁸ It also conferred on the District of Columbia Circuit's court of appeals "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."¹²⁹⁹

The court of appeals' docket shows 177 CSRT appeals.¹³⁰⁰ The first was filed on behalf of Saifullah Paracha on January 24, 2006.¹³⁰¹ The second was also filed on behalf of Paracha, on March 30,¹³⁰² and the court of appeals determined that the second appeal was from the ARB, over which the court was not given review jurisdiction.¹³⁰³

1295. *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 1073; Meltzer, *supra* note 1034, 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).

1296. See Lewis, *supra* note 1073.

1297. Pub. L. No. 109-148, 119 Stat. 2739–44 (2005).

1298. *Id.* § 1005.

1299. *Id.* § 1005(e); 28 U.S.C. § 2241(e)(2)(A); see Meltzer, *supra* note 1034, at 6–7.

1300. 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.

1301. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1038 (D.C. Cir. Jan. 24, 2006).

1302. Docket Sheet, *Paracha v. Rumsfeld*, No. 06-1117 (D.C. Cir. Mar. 30, 2006).

1303. Order, *id.* (Apr. 9, 2007).

The third CSRT appeal was filed on June 9 on behalf of Haji Bismullah,¹³⁰⁴ and the fourth was filed on December 4 on behalf of seven Uighurs.¹³⁰⁵ 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."¹³⁰⁶ The court granted relief to the Uighur Parhat,¹³⁰⁷ 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.¹³⁰⁸

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."¹³⁰⁹ The government was obliged, including by orders dated September 22, 2008,¹³¹⁰ and January 16, 2009,¹³¹¹ to provide habeas counsel with exculpatory information about their client, Aymen Saeed Batarfi.¹³¹² The government was also obliged to produce Batarfi's medical records.¹³¹³ Among these records, the government inadvertently included medical information about another detainee, who was a witness against Batarfi.¹³¹⁴ 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 suffers from antisocial personality disorder, of which deceit is a common symptom.¹³¹⁵ Judge Sullivan viewed this information as "highly exculpatory" and called the government to task for not producing it advertently.¹³¹⁶ In the end, Judge Sullivan did not issue

1304. Docket Sheet, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir. June 9, 2006).

1305. D.C. Cir. *Parhat* Docket Sheet, *supra* note 1230.

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).

1306. *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 1034, at 53; Josh White, *Government Must Share All Evidence on Detainees*, Wash. Post, July 21, 2007, at A2.

1307. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

1308. *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).

1309. *Batarfi v. Bush*, 602 F. Supp. 2d 118, 119 (D.D.C. 2009).

1310. See Government Contempt Response, *Batarfi v. Bush*, No. 1:05-cv-409 (D.D.C. Apr. 3, 2009).

1311. Order, *Batarfi*, No. 1:05-cv-409 (D.D.C. Feb. 10, 2009) [hereinafter *Batarfi* Discovery Order] (order issued orally on Jan. 16, reduced to writing and signed on Jan. 29, and filed on Feb. 10).

1312. *Batarfi*, 602 F. Supp. 2d at 119.

1313. *Batarfi* Discovery Order, *supra* note 1311.

1314. 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.

1315. *Batarfi* Government Response, *supra* note 1314, at 8–9; see Taylor, *supra* note 1314.

1316. Transcript at 2–9, *Batarfi*, No. 1:05-cv-409 (D.D.C. Apr. 1, 2009, filed Apr. 1, 2009).

an order of contempt,¹³¹⁷ and Batarfi was released to Yemen by December 22, 2009.¹³¹⁸

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.¹³¹⁹

The modification of support with the adverb "substantially" was a change from the previous administration's position.¹³²⁰

On April 22, Judge Walton announced the standard of detainability he would apply to his cases.¹³²¹ He agreed to adopt the government's basic framework,¹³²² "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."¹³²³

Judge Kessler decided to adopt Judge Walton's framework.¹³²⁴

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.¹³²⁵

Judges Lamberth,¹³²⁶ Kollar-Kotelly,¹³²⁷ Robertson,¹³²⁸ Hogan,¹³²⁹ and Urbina¹³³⁰ decided to adopt Judge Bates's framework. The court of appeals, however,

1317. Docket Sheet, *id.* (Mar. 1, 2005).

1318. Transfer Notice, *id.* (Dec. 22, 2009); *see* William Glaberson, *U.S. Decides to Release Detainee at Guantánamo*, N.Y. Times, Mar. 31, 2009, at A17 (reporting a decision earlier in the year to transfer Batarfi).

1319. Government Brief at 2, *In re* Guantanamo Bay Detainee Litig., No. 1:08-mc-442 (D.D.C. Mar. 13, 2009).

1320. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009).

1321. *Id.* at 54–71.

1322. *Id.* at 54, 70.

1323. *Id.* at 71; *see* Hafetz, *supra* note 502, at 243.

1324. *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.

1325. *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009); *see* Hafetz, *supra* note 502, at 243.

1326. *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

held that detention could be justified by support, because the government's detention power was not constrained by the international laws of war.¹³³¹

Unreliable Cooperation

On March 31, 2009, Judge Huvelle ordered a detainee released¹³³² on a finding that he could "no longer constitute a threat to the United States."¹³³³ The detainee, whose association with al-Qaeda appears to have been more mercenary than ideological, apparently suffered serious reprisals for his heavy cooperation with the government.¹³³⁴

The possible unreliability of his cooperation, however, was a factor in Judge Leon's granting Mohammed el-Gharani's petition,¹³³⁵ Judge Kessler's granting a petition by Alla Ali Bin Ali Ahmed,¹³³⁶ and Judge Urbina's granting a petition by Saeed Mohammed Saleh Hatim.¹³³⁷

1327. *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).

1328. *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009).

1329. *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009).

1330. *Hatim v. Obama*, 677 F. Supp. 2d 1, 7 (D.D.C. 2009).

1331. *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 502, at 243.

1332. 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.

1333. *Basardh v. Bush*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

1334. *Id.* at 32; *see Del Quentin Wilber, Detainee-Infomer 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.").

1335. *El Gharani v. Bush*, 593 F. Supp. 2d 144, 147–49 (D.D.C. 2009); *see Wilber, Quandary, supra* note 1334.

The government released el-Gharani to Chad. *El-Gharani Transfer Notice, supra* note 1207.

1336. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56–57 (D.D.C. 2009); *see Hafetz, supra* note 502, 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*.

1337. *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 Guantanamo*, *Miami Herald*, Dec. 16, 2009; Wilber, *Snag, supra* note 1334.

The cooperating detainee was transferred to Spain in May 2010.¹³³⁸

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.”¹³³⁹ The government had declined to contest the motion to suppress¹³⁴⁰ and determined after the motion was granted that it “will no longer treat petitioner as detainable under the Authorization for Use of Military Force.”¹³⁴¹ 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.”¹³⁴²

Jawad may have been as young as 12 years old when he was captured in Kabul in December 2002.¹³⁴³ On October 9, 2007, military commission charges were filed against Jawad for the alleged throwing of a grenade.¹³⁴⁴ It was reported that a military prosecutor returned to civilian status after concluding that Jawad might not be guilty.¹³⁴⁵ On July 30, 2009, Judge Huvelle granted Jawad’s writ petition.¹³⁴⁶ Jawad was flown home on August 24 to Kabul, where he met with President Hamid Karzai.¹³⁴⁷

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.

1338. See Mónica Ceberio Belaza, “*Al Qaeda Will Kill Me if I Go Home*,” *El País*, June 29, 2010, at 3; Shane & Weiser, *supra* note 1336.

1339. 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”).

1340. Government Response, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 15, 2009); see Glaberson, *supra* note 1339.

1341. Notice at 1, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 24, 2009) [hereinafter *Jawad Nondetainability Notice*].

1342. *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.”).

1343. 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.”).

1344. Charge Sheet, *United States v. Jawad* (U.S. Mil. Comm. Oct. 9, 2007), available at <http://www.mc.mil>; see William Glaberson, *Guantánamo Detainee Is Charged in '02 Attack*, N.Y. Times, Oct. 12, 2007, at A19; Glaberson, *supra* note 1339; see Hafetz, *supra* note 502, at 246.

1345. 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.

1346. Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. July 30, 2009) [hereinafter *Jawad Writ*], available at 2009 WL 2365846; see William Glaberson, *Judge Orders a Detainee to Be Freed in August*, N.Y. Times, July 31, 2009, at A14; Hafetz, *supra* note 502, at 247.

Weak Evidence

Judge Kollar-Kotelly granted Khalid Abdullah Mishal al-Mutairi's writ on July 29, 2009.¹³⁴⁸ 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.¹³⁴⁹ He was one of the detainees named in the 2002 petition filed by fathers and brothers of Kuwaiti detainees.¹³⁵⁰ The government claimed that al-Mutairi was part of Al-Wafa, an Islamic foundation accused of supporting terrorism,¹³⁵¹ but al-Mutairi claimed that he was in Afghanistan to fund the creation of a mosque and to support Al-Wafa's charitable projects.¹³⁵² Judge Kollar-Kotelly found al-Mutairi's story about charitable intents and his explanation of how he lost his passport of dubious credibility,¹³⁵³ but she also found the government's evidence justifying his detention weak.¹³⁵⁴ The government released al-Mutairi to Kuwait.¹³⁵⁵

Three Writs Denied; One Writ Reversed

From August through September 2009, Judges Robertson,¹³⁵⁶ Kollar-Kotelly,¹³⁵⁷ and Collyer¹³⁵⁸ each denied a habeas petition. The court of appeals affirmed.¹³⁵⁹

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, 2009.¹³⁶⁰ Al-

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>.

1347. See *Detainee Released*, *supra* note 1343.

1348. *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009).

1349. *Id.* at 86.

1350. *Al-Odah* Docket Sheet, *supra* note 1026.

1351. See Thom Shanker & James Dao, *U.S. Planes Bomb Taliban Compound in Kandahar*, N.Y. Times, Nov. 28, 2001, at A1.

1352. *Al Mutairi*, 644 F. Supp. 2d at 86–87.

1353. *Id.* at 87–89.

1354. *Id.* at 89–96.

1355. Transfer Notice, *Al-Odah v. Obama*, No. 1:02-cv-828 (D.D.C. Oct. 9, 2009); Rosenberg, *supra* note 1284.

1356. *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”).

1357. *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).

1358. 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].

1359. *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 1209.

1360. *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.”).

Adahi, a citizen of Yemen, arranged a marriage between his sister and Riyadh Abd al-Aziz Almujaheed, a Yemeni living in Kandahar, Afghanistan.¹³⁶¹ In July 2001, al-Adahi took a six-month leave of absence from his security job in Yemen and delivered his sister to Almujaheed, and Osama Bin Laden hosted a celebration of the marriage.¹³⁶² 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.¹³⁶³ 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;¹³⁶⁴ the court of appeals saw the evidence as more inculpatory of al-Adahi.¹³⁶⁵

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."¹³⁶⁶ "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."¹³⁶⁷

On May 27, 2010, Bin Mohammed sought an injunction against his return to Algeria, because he feared he would be harmed there.¹³⁶⁸

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.¹³⁶⁹

On June 29, Judge Kessler enjoined Bin Mohammed's transfer to Algeria.¹³⁷⁰ On July 8, the court of appeals summarily reversed and dissolved the injunction.¹³⁷¹

1361. *Al-Adahi*, 613 F.3d at 1106; *Al-Adahi Habeas Grant*, *supra* note 1324, at 14.

1362. *Al-Adahi*, 613 F.3d at 1102, 1106; *Al-Adahi Habeas Grant*, *supra* note 1324, at 14–15, 17 & n.9.

1363. *Al-Adahi*, 613 F.3d at 1102, 1106–09; *Al-Adahi Habeas Grant*, *supra* note 1324, at 17, 20–31.

1364. *Al-Adahi Habeas Grant*, *supra* note 1324, at 40–41.

1365. *Al-Adahi*, 613 F.3d 1102.

1366. *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.

1367. *Bin Mohammed*, 689 F. Supp. 2d at 67.

1368. 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 1366.

1369. *Bin Mohammed Injunction*, *supra* note 1368, at 4.

1370. *Id.* at 12.

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.¹³⁷² On January 4, 2011, the government transported Bin Mohammed to Algeria.¹³⁷³

Five other Algerians preferred staying at Guantánamo Bay to a return to Algeria.¹³⁷⁴ Judge Walton denied Abdul Aziz Naji's application for an injunction against transfer on June 7, 2010.¹³⁷⁵ On July 16, the court of appeals determined that its decision in Bin Mohammed's case governed Naji's case.¹³⁷⁶ On the same day, the Supreme Court denied Naji's application for a stay pending a certiorari petition.¹³⁷⁷ On July 19, the government filed a notice that Naji had been sent to Algeria.¹³⁷⁸

The other four Algerians remain at Guantánamo Bay. On February 22, 2007, the government notified Ahmed Belbacha that he was cleared for release.¹³⁷⁹ In July, Judge Collyer denied Ahmed Belbacha an injunction against transfer to Algeria.¹³⁸⁰ 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*.¹³⁸¹ A day after the Supreme Court's *Boumediene* decision, Judge Collyer enjoined Belbacha's transfer "pending briefing and resolution of the is-

1371. 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* (Tatel, dissenting).

1372. Order, *Bin Mohammed v. Obama*, No. 10A52 (U.S. July 16, 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*].

1373. Transfer Notice, *Mohammed*, No. 1:05-cv-1347 (D.D.C. Jan. 7, 2011); see Rosenberg, *supra* note 1366.

1374. 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 1372; *Back to Algeria*, *supra* note 1372.

1375. 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].

1376. Order, *Naji*, No. 10-5191 (D.C. Cir. July 16, 2010).

1377. Order, *Naji v. Obama*, No. 10A70 (U.S. July 16, 2010).

1378. Notice of Transfer, *Mohammon*, No. 1:05-cv-2386 (D.D.C. July 19, 2010); see Finn, *supra* note 1372; *Back to Algeria*, *supra* note 1372.

1379. See Craig Whitlock, *82 Inmates Cleared but Still Held at Guantanamo*, Wash. Post, Apr. 29, 2007, at A1.

1380. Order, *Ben Bacha v. Bush*, No. 1:05-cv-2349 (D.D.C. July 27, 2007), available at 2007 WL 2422031.

1381. *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.

sues left unresolved in *Boumediene*.¹³⁸² On November 4, 2009, in a possibly merely symbolic gesture, the town of Amherst, Massachusetts voted to accept Belbacha.¹³⁸³ In light of the court of appeals' decision in *Kiyemba v. Obama*¹³⁸⁴ 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,¹³⁸⁵ and denied reconsideration on April 19.¹³⁸⁶

By sealed order, on June 17, 2010, Judge Collyer denied Motai Saib's sealed May 24 injunction motion.¹³⁸⁷ On July 13, Nabil Hadjarab sought an injunction against his transfer to Algeria.¹³⁸⁸ For Djamel Ameziane, the Supreme Court denied a sealed petition for certiorari.¹³⁸⁹

On August 20, Hadjarab and Belbacha moved that their cases proceed to merits hearings.¹³⁹⁰ On January 14, 2011, Judge Collyer granted Belbacha's motion but denied Hadjarab's.¹³⁹¹ Hadjarab's motion for reconsideration was granted on March 30.¹³⁹²

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,¹³⁹³ Kessler,¹³⁹⁴ Lamberth,¹³⁹⁵ Kennedy,¹³⁹⁶ Robertson,¹³⁹⁷ Bates,¹³⁹⁸ Walton,¹³⁹⁹ and Leon¹⁴⁰⁰ denied habeas petitions.

1382. 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).

1383. See Carol Rosenberg, *U.S. Court Orders Russian Detainee Freed from Guantánamo*, Miami Herald, May 14, 2010, at 6A.

1384. 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1880 (2010); see Hafetz, *supra* note 502, at 170.

1385. Docket Sheet, *Ben Bacha*, No. 1:05-cv-2349 (D.D.C. Dec. 8, 2005); *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d at 122.

1386. *In re Guantanamo Bay Detainee Litig.*, 706 F. Supp. 2d 120.

1387. Notice, Saib v. Obama, No. 1:05-cv-1353 (D.D.C. May 26, 2010) (noting motion); Docket Sheet, *id.* (July 5, 2005) (noting order).

1388. Notice of Filing, Nabil v. Obama, No. 1:05-cv-1504 (D.D.C. July 15, 2010).

1389. Ameziane v. Obama, ___ U.S. ___, 131 S. Ct. 1673 (2011).

1390. 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).

1391. 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).

1392. Docket Sheet, *Nabil*, No. 1:05-cv-1504 (D.D.C. July 28, 2005).

1393. *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 1044 (noting oral ruling on Dec. 14, 2009); see Rosenberg, *supra* note 1337; 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. pending*, Docket Sheet, No. 11-7020 (U.S. Oct. 25, 2011).

1394. *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).

Another petitioner elected not to proceed with his scheduled January 2010 merits hearing, so Judge Kessler dismissed his petition without prejudice on December 22, 2009. Order, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. Dec. 22, 2009), *available at* 2009 WL 5196155; *see Al-Adahi*, 698 F. Supp. 2d at 50 n.1, 51; *Al-Adahi*, 692 F. Supp. 2d at 86 n.1, 88.

1395. *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. Judgment, *Al-Warafi v. Obama*, No. 10-5170 (D.C. Cir. Feb. 22, 2011). On August 31, 2011, Judge Lamberth concluded that al-Warafi could not prove permanent medical personnel status because he lacked required identification. Opinion at 15–18, *Al-Wrafie v. Obama*, No. 1:09-cv-2368 (D.D.C. Aug. 31, 2011) [hereinafter *Al-Wrafie* Opinion]. Another appeal is pending. Docket Sheet, *Al-Warafi v. Obama*, No. 11-5276 (D.C. Cir. Oct. 17, 2011).

1396. *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 motion for reconsideration); *see also* Lee, *supra* note 1337.

The court of appeals affirmed. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *see* Shane & Weiser, *supra* note 1336.

1397. Order, *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).

1398. *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, 2011, 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).

1399. *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).

Sulayman's appeal is pending. Docket Sheet, *Sulayman v. Obama*, No. 10-5292 (D.C. Cir. Sept. 8, 2010) (noting that oral argument was held on Sept. 16, 2011). Agreeing that the denial of his petition was compelled by circuit law, al-Bihani moved for summary affirmance so that a peti-

Judge Huvelle's August 3, 2010, denial of Sabry Mohammad Ebrahim al-Qurashi's motion to suppress his testimony¹⁴⁰¹ had the practical effect of terminating his habeas petition.¹⁴⁰² Judge Huvelle found evidence of voluntariness to be credible and claims of coercion to be exaggerated.¹⁴⁰³

On March 29, 2011, the court of appeals reversed a writ granted to Uthman Abdul Rahim Mohammed Uthman.¹⁴⁰⁴ 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.¹⁴⁰⁵ The court of appeals determined that the command structure test had been rejected by subsequent appellate decisions¹⁴⁰⁶ 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,"¹⁴⁰⁷ among other facts, made it more likely than not that Uthman was part of al-Qaeda.¹⁴⁰⁸

The court of appeals, on June 10, 2011, also reversed¹⁴⁰⁹ a writ granted by Judge Friedman the previous July.¹⁴¹⁰ In 2009, the government obtained a stay in the case because it had approved Hussain Salem Mohammad Almerfedi's transfer

tion for certiorari could be filed with the Supreme Court. Order, *Al-Bihani v. Obama*, No. 10-5352 (D.C. Cir. Feb. 10, 2011), *cert. pending*, Docket Sheet, No. 10-1383 (U.S. May 11, 2011) (noting that a response is due Nov. 23, 2011).

1400. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010) (finding that Obaydullah was part of an al-Qaeda bomb cell).

An appeal is pending. Docket Sheet, *Obaydullah v. Obama*, No. 11-5123 (D.C. Cir. May 24, 2011) (noting that briefing should be completed by Mar. 26, 2012).

The detainee has been designated as subject to trial by a military commission. *Obaydullah*, 744 F. Supp. 2d at 347; *see* Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. Times, Jan. 20, 2011, at A1.

1401. *Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010).

1402. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

1403. *Al-Qurashi*, 733 F. Supp. 2d at 81.

1404. *Uthman v. Obama*, 637 F.3d 400, 402, 408 (D.C. Cir. 2011), *cert. pending*, Docket Sheet, No. 11-413 (U.S. Aug. 29, 2011) (noting that a response is due Dec. 2, 2011).

1405. *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 motion for reconsideration); *see also Judge Orders Release of Guantánamo Detainee*, Seattle Times, Feb. 26, 2010, at A5.

1406. *Uthman*, 637 F.3d at 402.

1407. *Id.* at 404.

1408. *Id.* at 402, 403–07.

1409. *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *see* Docket Sheet, *Almerfedi v. Obama*, No. 11A220 (U.S. Aug. 22, 2011) (noting an extension until Nov. 7, 2011, to file a petition for a writ of certiorari).

1410. *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.

from Guantánamo Bay, but the government was unable to accomplish the transfer, so the case proceeded to the merits.¹⁴¹¹

On November 5, 2010, the court of appeals vacated a writ¹⁴¹² granted to Mohammed Ould Salahi by Judge Robertson on March 22.¹⁴¹³ Salahi, a Mauritanian, swore bayat, an oath of loyalty, to al-Qaeda in 1991, a time in which the United States and al-Qaeda both opposed Afghanistan's communist government.¹⁴¹⁴ The courts determined that the question was whether Salahi was still part of al-Qaeda when he was captured in 2001.¹⁴¹⁵ The court of appeals remanded the case for reevaluation in light of guidance provided by intervening appellate decisions.¹⁴¹⁶ Because of Judge Robertson's June 1 retirement,¹⁴¹⁷ Salahi's petition was reassigned to Judge Lamberth.¹⁴¹⁸ (The district court decided that new judges—those joining the bench in 2010 or later—would not receive Guantánamo Bay habeas petitions.¹⁴¹⁹)

On October 14, 2011, the court of appeals vacated a writ¹⁴²⁰ granted on July 21, 2010, by Judge Kennedy to Adnan Farhan Abdul Latif.¹⁴²¹ Latif was born in Udayn, Yemen, and he traveled to Pakistan and Afghanistan in 2001.¹⁴²² 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.¹⁴²³ The court of appeals determined that Judge Kennedy failed to give the government's report on evidence against Latif a sufficient presumption of regularity.¹⁴²⁴

Judge Kennedy granted habeas corpus relief to Mohamed Mohamed Hassan Odaini on May 26, 2010,¹⁴²⁵ and the government transferred him to Yemen the

1411. *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”).

1412. *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010).

1413. *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).

1414. *Salahi*, 625 F.3d at 748, 751; *Salahi*, 710 F. Supp. 2d at 3–4, 9–10.

1415. *Salahi*, 625 F.3d at 751; *Salahi*, 710 F. Supp. 2d at 6.

1416. *Salahi*, 625 F.3d at 746–47.

1417. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>.

1418. Reassignment Notice, *Salahi*, No. 1:05-cv-569 (D.D.C. Oct. 11, 2011).

1419. Interview with Hon. Royce C. Lamberth, May 13, 2011.

1420. *Latif v. Obama*, ___ F.3d ___, 2011 WL ___ (D.C. Cir. 2011); Opinion, *Latif v. Obama*, No. 10-5319 (D.C. Cir. Nov. 9, 2011) [hereinafter D.C. Cir. *Latif* Opinion].

1421. 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 Rosenberg, *Psych Patient*, *supra* note 1399.

1422. D.D.C. *Latif* Opinion, *supra* note 1421, at 5–6.

1423. *Id.* at 25–28.

1424. D.C. Cir. *Latif* Opinion, *supra* note 1420, at 2, 5–31.

1425. *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 1410.

following July.¹⁴²⁶ Odaini was born in Taiz, Yemen, and his father worked for the Yemeni Security Service.¹⁴²⁷ 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.’”¹⁴²⁸ “At around 2:00 a.m., Pakistani police raided the house and seized all of its occupants.”¹⁴²⁹ Odaini was transferred to Guantánamo Bay in June.¹⁴³⁰ Judge Kennedy concluded, “There is no evidence that Odaini has any connection to Al Qaeda.”¹⁴³¹

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 2002.¹⁴³² Judge Kennedy found that his claims in captivity of support of the Taliban were motivated by his desire not to be returned to Russia.¹⁴³³ While an appeal was pending, the government sought to present additional evidence to Judge Kennedy,¹⁴³⁴ and the court of appeals agreed to hold the appeal in abeyance until Judge Kennedy resolved the government’s request.¹⁴³⁵ A motion considered by Berkeley, California’s city council to accept Mingazov was defeated.¹⁴³⁶

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.”¹⁴³⁷ A total of 779 men had been detainees at Guan-

1426. 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 1425; Savage, *supra* note 1410.

1427. *Abdah*, 717 F. Supp. 2d at 25; see Finn, *supra* note 1426.

1428. *Abdah*, 717 F. Supp. 2d at 26; see Finn, *supra* note 1425.

1429. *Abdah*, 717 F. Supp. 2d at 26.

1430. *Id.* at 23.

1431. *Id.* at 36; see Savage, *supra* note 1410 (reporting on “a scathing opinion denouncing the effort to keep imprisoning him despite ‘overwhelming’ evidence that he was innocent of Qaeda ties”).

1432. 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 1383.

Mingazov is the last Russian detainee at Guantánamo Bay. Begg, *supra* note 1295, at 332 n.*.

1433. *Mingazov* Opinion, *supra* note 1432.

1434. Opposition Brief, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. Dec. 27, 2010) [hereinafter D.C. Cir. *Mingazov* Opposition Brief].

1435. Order, *id.* (Apr. 19, 2011) [hereinafter *Mingazov* Abeyance Order].

1436. See Doug Oakley, *Berkeley Council Rejects Proposal to Invite Guantanamo Detainees to Live in City*, Oakland Trib., Feb. 16, 2011.

1437. 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.

tánamo Bay.¹⁴³⁸ Of the 240 remaining detainees covered in the report, 44 had already been transferred out.¹⁴³⁹ 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.¹⁴⁴⁰

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.¹⁴⁴¹ Al-Qosi “was captured by Pakistani forces in the Tora Bora mountains in December 2001.”¹⁴⁴² 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.”¹⁴⁴³ 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.¹⁴⁴⁴ Al-Qosi’s habeas petition was dismissed by stipulation on August 23.¹⁴⁴⁵

1438. Guantanamo Review Task Force Final Report, *supra* note 1437, at 1; *see* Omonira-Oyekanmi & Finn, *supra* note 1037; *see also* Fletcher & Stover, *supra* note 1022, at 42 (“The camp population peaked at 660 in July 2003 and began to decline in November of that year (Figure 3).”); *see also id.* Fig. 3 (charting size of detainee population from January 2002 through July 2008).

1439. Guantanamo Review Task Force Final Report, *supra* note 1437, at ii.

1440. *Id.* at ii, 9–13.

1441. Trial Report, United States v. Al-Qosi (U.S. Mil. Comm. Aug. 11, 2010), *available at* <http://www.mc.mil>; *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).

1442. Savage, *supra* note 1441.

1443. *Id.*

1444. Final Action, United States v. Al-Qosi (U.S. Mil. Comm. Feb. 3, 2011), *available at* <http://www.mc.mil>; *see* Peter Finn, *U.S. Lacks Policy on Housing Military Commission Convicts*, Wash. Post, Aug. 12, 2010, at A2; Robles, *supra* note 1441; Carol Rosenberg, *Canadian Terror Trial Deal Would Test Obama Pledge*, Miami Herald, 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*.

1445. Order, Al-Qosi v. Obama, No. 1:04-cv-1937 (D.D.C. Aug. 23, 2010).

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.¹⁴⁴⁶ On January 29, 2010, one of the detainee's attorneys filed a motion for Judge Lamberth's recusal.¹⁴⁴⁷ 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?"¹⁴⁴⁸ 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?"¹⁴⁴⁹

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."¹⁴⁵⁰

The court randomly assigned Ali's case to Judge Leon,¹⁴⁵¹ who denied Ali's petition on February 25, 2011.¹⁴⁵² An appeal is pending.¹⁴⁵³

Five More Writs Denied

In 2011, Judge Urbina denied petitions for writs of habeas corpus by Mashour Abdullah Muqbel Alsabri¹⁴⁵⁴ and Khirulla Said Wali Khairkhwa.¹⁴⁵⁵ Appeals are pending.¹⁴⁵⁶

To resolve Guantánamo Bay habeas petitions, Judge Urbina requires both parties to submit proposed findings of fact and conclusions of law.¹⁴⁵⁷ Judge Urbina

1446. Docket Sheet, *Mattan v. Obama*, No. 1:09-cv-745 (D.D.C. Apr. 22, 2009) [hereinafter *Mattan* Docket Sheet].

1447. Recusal Motion, *id.* (Jan. 29, 2010).

1448. *Id.* at 3, 10.

1449. *Id.* at 3.

1450. Order, *id.* (June 16, 2010).

1451. *Mattan* Docket Sheet, *supra* note 1446.

1452. *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. May 17, 2011) (denying a motion for rehearing); Order, *id.* (Mar. 11, 2011) (same); *see also Judge Upholds Algerian's Detention at Guantánamo*, *Miami Herald*, Jan. 11, 2011.

1453. Docket Sheet, *Ali v. Obama*, No. 11-5102 (D.C. Cir. Apr. 29, 2011).

1454. *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.

1455. *Khairkhwa v. Obama*, ___ F. Supp. 2d ___, 2011 WL 2490960 (D.D.C. 2011) (finding that the petitioner "was, without question, a senior member of the Taliban").

1456. Docket Sheet, *Khairkhwa v. Obama*, No. 11-5180 (D.C. Cir. July 29, 2011) (noting that the public reply brief is due on Apr. 2, 2012); Docket Sheet, *Alsabri v. Obama*, No. 11-5081 (D.C. Cir. Apr. 1, 2011) (noting oral argument was heard on Oct. 24, 2011).

1457. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

found that this not only focuses the judge's attention on key issues, but it helps illuminate the credibility of the parties' positions.¹⁴⁵⁸ Judge Urbina noticed that over the years the government's presentation of its cases improved substantially and the petitioners' presentations also improved.¹⁴⁵⁹

Judges Kennedy¹⁴⁶⁰ and Walton¹⁴⁶¹ 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, 2011.¹⁴⁶²

Transfers Halted

Since Farhi Saeed Bin Mohammed was transferred to Algeria over his objection in January 2011, no detainee has been transferred out of Guantánamo Bay.¹⁴⁶³ The defense appropriation act for 2011 forbids 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."¹⁴⁶⁴

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.¹⁴⁶⁵ 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.¹⁴⁶⁶ Among the services classified information security officers provide the courts is facilitation of security clearances for attorneys.

1458. *Id.*

1459. *Id.*

1460. Hentif v. Obama, ___ F. Supp. 2d ___, 2011 WL 4102538 (D.D.C. 2011) (finding that Fadhel Hussein Saleh Hentif was more likely than not part of Al-Qaeda or the Taliban).

1461. Bostan v. Obama, ___ F. Supp. 2d ___ 2011 WL 5127620 (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, ___ F. Supp. 2d ___ 2011 WL 5114842 (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).

1462. Docket Sheet, Bin Amin v. Obama, No. 1:11-cv-923 (D.D.C. May 16, 2011).

1463. See Peter Finn, *Detainees Cleared for Release Are Still Waiting*, Wash. Post, Nov. 9, 2011, at A16.

1464. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4351, § 1033 (2011); see Finn, *supra* note 1463.

1465. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1466. Reagan, *supra* note 173, at 17–18; *supra*, "Introduction."

In October, Judge Kollar-Kotelly determined that the detainees had rights to counsel.¹⁴⁶⁷ Soon thereafter the clerk's office issued to all detainees notices of their rights to counsel in habeas proceedings.¹⁴⁶⁸

Attorneys had to obtain security clearances to meet with the detainees.¹⁴⁶⁹ All of the petitioners were provided with cleared counsel.¹⁴⁷⁰

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."¹⁴⁷¹

. . . 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.¹⁴⁷²

. . . 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. . . .

1467. *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004); see Hafetz, *supra* note 502, at 134.

1468. Interview with Hon. Alan Kay, June 21, 2011.

1469. *Al Odah*, 346 F. Supp. 2d at 14; see Thomas P. Sullivan, *Imagine, in The Guantánamo Lawyers*, *supra* note 1023, 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.

1470. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Royce C. Lamberth, May 13, 2011.

1471. Sullivan, *supra* note 1469, at 43; see also Khan, *supra* note 1169, 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 91, at 23.

1472. Gorman, *supra* note 1134, at 12. See generally *Inside Guantanamo* (National Geographic DVD 2009).

The Nex is the Navy Exchange. See Greenberg, *supra* note 1040, at 9.

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.¹⁴⁷³

. . . 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.¹⁴⁷⁴

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.¹⁴⁷⁵ Judge Kollar-Kotelly rejected this infringement on the attorney–client privilege.¹⁴⁷⁶ 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.¹⁴⁷⁷

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.”¹⁴⁷⁸

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.¹⁴⁷⁹

One of Salim Muhood Adem’s co-detainees was represented by counsel and suggested that Adem should obtain counsel as well.¹⁴⁸⁰ With the help of the co-detainee’s attorney, volunteer counsel was found for Adem.¹⁴⁸¹ But the govern-

1473. David Marshall, *Escort Required*, in *The Guantánamo Lawyers*, *supra* note 1023, at 47, 48.

1474. Carolyn M. Welshhans, *Heroes in Any Language*, in *The Guantánamo Lawyers*, *supra* note 1023, at 103, 103–04.

1475. *Al Odah v. United States*, 346 F. Supp. 2d 1, 3–4 (D.D.C. 2004).

1476. *Id.* at 8–15.

1477. *Id.* at 13–15.

1478. *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004).

1479. *E.g.*, Oct. 6, 2006, Report and Recommendation, *supra* note 1155.

1480. Interview with Hon. Alan Kay, June 21, 2011.

1481. *Id.*

ment prevented attorneys from meeting with Adem until Adem provided written authorization for the representation (by attorneys he had been unable to meet yet).¹⁴⁸²

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.¹⁴⁸³ 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.¹⁴⁸⁴ Judge Roberts affirmed Judge Kay's order,¹⁴⁸⁵ and other judges affirmed similar orders by Judge Kay in their cases.¹⁴⁸⁶ Adem was transferred to Sudan in 2007.¹⁴⁸⁷

On December 13, 2005, the Center for Constitutional Rights filed a habeas petition on behalf of 63 detainees.¹⁴⁸⁸ 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."¹⁴⁸⁹ Among the 63 detainees listed was Houmad Warzly.¹⁴⁹⁰

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.¹⁴⁹¹ One of the detainees listed was Hamoud Abdullah Hamoud Hassan al-Wady.¹⁴⁹² 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.¹⁴⁹³

1482. *Id.*

1483. Contempt Motion, *Adem v. Bush*, No. 1:05-cv-723 (D.D.C. Dec. 9, 2005).

1484. *Adem v. Bush*, 425 F. Supp. 2d 7, 26 (D.D.C. 2006); *see Fogler, supra* note 1123, at 116.

1485. Opinion, *Adem*, No. 1:05-cv-723 (D.D.C. Apr. 28, 2006), *available at* 2006 WL 1193853; *see Fogler, supra* note 1123, at 116.

1486. Order, *Kiyemba v. Bush*, No. 1:05-cv-1509 (D.D.C. Aug. 7, 2006), *available at* 2006 WL 2255736 (Urbina); 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).

1487. Notice of Transfer, *Adem*, No. 1:05-cv-723 (D.D.C. Dec. 14, 2007).

1488. 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).

1489. *Al-Halmandy* Petition, *supra* note 1488, Ex. A ¶ 15.

1490. *Id.*

1491. Petition, *Al-Wady v. Bush*, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

1492. *Id.*

1493. *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).

On August 1, the government notified the court that Warzly and al-Wady are the same detainee.¹⁴⁹⁴ Judge Urbina, therefore, dismissed the action under the Warzly name.¹⁴⁹⁵ 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.¹⁴⁹⁶ Magistrate Judge Kay granted the attorneys' motion that the government be required to arrange a meeting between the detainee and the attorneys with an interpreter.¹⁴⁹⁷ Judge Walton issued a similar order in a case before him.¹⁴⁹⁸

“[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.”¹⁴⁹⁹

On May 14, 2009, appointed counsel met with the detainee.¹⁵⁰⁰ They came to understand that his correct name was Hamoud Abdullah Hamoud Hasan al-Waeli.¹⁵⁰¹ 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.”¹⁵⁰² 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

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 10 days earlier shows 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).

1494. 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.

1495. 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.

1496. *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].

1497. *Al Wady*, 623 F. Supp. 2d at 22.

1498. Order, Mohammon v. Obama, No. 1:05-cv-2386 (D.D.C. May 12, 2009) (denying reconsideration of order pertaining to Jamil Ahmad Saeed), available at 2009 WL 1312537; Order, *id.* (May 1, 2009) (granting *ore tenus* motion for an expeditious, unobstructed, face-to-face visit).

1499. *Al Wady*, 623 F. Supp. 2d at 22.

1500. 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 1496, at 2 n.1.

1501. *Al-Wady* Notice of Authorization, *supra* note 1500.

1502. *Id.*

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.¹⁵⁰³

On September 9, 2010, Judge Urbina ordered the attorneys to submit a written authorization from the detainee for the action.¹⁵⁰⁴ Al-Waeli refused to meet with his attorneys in August 2010 and January 2011, so the attorneys suggested that new counsel be appointed.¹⁵⁰⁵ Efforts by new counsel are pending.¹⁵⁰⁶

Al-Hajj also submitted a next-friend petition on behalf of Muieen Adeen Jamal Adeen Abd al-Fusal Abd al-Sattar.¹⁵⁰⁷ 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 him of the purpose of the transfer."¹⁵⁰⁸ 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].'"¹⁵⁰⁹ The effort to induce al-Sattar to attend the meeting by not telling him it would be a meeting with his attorney failed.¹⁵¹⁰ After five refusals by al-Sattar to meet with his attorney, Judge Bates dismissed the petition.¹⁵¹¹

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.¹⁵¹² "By refusing to meet with counsel on at least five occasions, petitioner has unequivocally refused to authorize counsel to go forward with his case."¹⁵¹³ 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, 2009.¹⁵¹⁴ 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."¹⁵¹⁵

1503. *Id.*

1504. Docket Sheet, *Al-Wady*, No. 1:08-cv-1237 (D.D.C. July 17, 2008).

1505. Response, *id.* (Jan. 11, 2011).

1506. Order, *id.* (Apr. 19, 2011) (holding in abeyance, pending efforts by new counsel to secure representation authorization, a motion to reconsider dismissal without prejudice); Status Report, *id.* (Aug. 5, 2011); *see* Opinion, *id.* (Feb. 3, 2011), *available at* 2011 WL 381050 (provisionally dismissing the action without prejudice).

1507. *Al-Sattar* Petition, *supra* note 1493.

1508. Order, *Al-Sattar v. Obama*, No. 1:08-cv-1236 (D.D.C. Sept. 2, 2009), *available at* 2009 WL 2899907.

1509. Order, *id.* (Sept. 18, 2009), *available at* 2009 WL 3060319 (quotation alteration in original).

1510. Status Report, *id.* (Oct. 15, 2009).

1511. Order, *id.* (Oct. 21, 2009), *available at* 2009 WL 3416195.

1512. *Idris v. Obama*, 667 F. Supp. 2d 25 (2009).

1513. *Id.* at 28 (noting attempted visits by counsel in Guantánamo Bay in February, March, April, May, and June of 2009).

1514. *Id.* at 27 n.1; Order, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Apr. 21, 2009).

1515. *Idris*, 667 F. Supp. 2d at 28.

On October 22, 2009, Judge Urbina gave attorneys one last chance to get authorization from their putative client.¹⁵¹⁶ 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.¹⁵¹⁷ 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.¹⁵¹⁸ Noori, a Taliban official, was captured in Afghanistan in 2001.¹⁵¹⁹ On March 16, 2009, the attorneys attempted to meet with Noori in Guantánamo Bay, but he refused to see them.¹⁵²⁰ 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.¹⁵²¹ Judge Urbina gave the attorneys 30 days to secure authorization for the petition.¹⁵²² The attorneys met with Noori on November 23, 2009, and Noori declined to authorize the representation,¹⁵²³ so Judge Urbina dismissed the action on February 18, 2010.¹⁵²⁴

In 2011, Judges Walton¹⁵²⁵ and Collyer¹⁵²⁶ 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.¹⁵²⁷ These were

1516. Noori v. Obama, 664 F. Supp. 2d 116 (D.D.C. 2009).

1517. Interview with Hon. Ricardo M. Urbina, Aug. 15, 2011.

1518. 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.

1519. See Mulvaney, *supra* note 1518.

1520. Noori, 664 F. Supp. 2d at 117 n.3; Petitioner's Response, Noori, No. 1:08-cv-1828 (D.D.C. Mar. 31, 2009).

1521. Noori, 664 F. Supp. 2d at 118 n.4; see Mulvaney, *supra* note 1518.

1522. Noori, 664 F. Supp. 2d at 117, 120.

1523. Status Report, Noori, No. 1:08-cv-1828 (D.D.C. Nov. 24, 2009).

1524. Order, *id.* (Feb. 18, 2010).

1525. Docket Sheet, Al-Jayfi v. Bush, No. 1:05-cv-2104 (D.D.C. Oct. 27, 2005) (noting Sept. 1, 2011, dismissal); see Motion, *id.* (July 7, 2011).

1526. Docket Sheet, Suleiman v. Obama, No. 1:10-cv-1411 (D.D.C. Aug. 19, 2010) (noting Sept. 16, 2011, dismissal); 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.").

1527. 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

the first Guantánamo Bay detainee deaths.¹⁵²⁸ 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 material.¹⁵²⁹ 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.¹⁵³⁰

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.¹⁵³¹ “[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.”¹⁵³²

Judge Robertson, to whom the matter had been referred by nine other judges,¹⁵³³ 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.”¹⁵³⁴ 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.”¹⁵³⁵

at Guantánamo in 2006”); Khan, *supra* note 1169, 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).

Judge Huvelle dismissed a tort action by two of the detainees’ survivors as beyond the court’s jurisdiction. *Al-Zahrani*, 684 F. Supp. 2d 103 (dismissing an action by survivors of Yasser al-Zahrani and Salah Ali Abdullah Ahmed al-Salami); *see* Docket Sheet, *Al-Zahrani v. Gates*, No. 10-5393 (D.C. Cir. Nov. 30, 2010) (pending appeal, noting that oral argument was held on Oct. 6, 2011).

1528. *See* Savage, *supra* note 1527.

1529. *Boumediene v. Bush*, 450 F. Supp. 2d 25, 29 (D.D.C. 2006); *see* White, *supra* note 1527.

1530. *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 1100, at 163. *Compare* Cucullu, *supra* note 1040, 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 1022, 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.”).

1531. *Boumediene*, 450 F. Supp. 2d at 28, 31–34 (resolving the motion in 13 cases).

1532. *Id.* at 33.

1533. *Hicks*, 452 F. Supp. 2d at 94 n.2 (noting referral by Judges Bates, Collyer, Friedman, Kennedy, Kollar-Kotelly, Roberts, Sullivan, Urbina, and Walton).

1534. *Id.* at 99.

1535. *Id.* at 94 (resolving the motion in 100 cases).

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.¹⁵³⁶

“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 team may include interpreters/translators, provided that such personnel meet these same criteria.¹⁵³⁷

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.¹⁵³⁸ The privilege review team reviews attorney–client communications and work product to determine if they include classified information.¹⁵³⁹

An attorney for Tariq Mahmoud Alsawam, who filed his petition on June 22, 2005,¹⁵⁴⁰ 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.¹⁵⁴¹ The privilege team determined which statements clearly originated from the detainee and gave the attorney permission to discuss those statements with her client.¹⁵⁴² 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.”¹⁵⁴³

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.”¹⁵⁴⁴

1536. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 163 (D.D.C. 2008) (¶ II.I.29).

1537. *Id.* at 156 (¶ II.B.6); see Cucullu, *supra* note 1040, at 198.

1538. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 150 (¶ I.D.29).

1539. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; see Gorman, *supra* note 1134, at 11; David H. Remes, *Negotiating the Protective Order*, in *The Guantánamo Lawyers*, *supra* note 1023, at 109, 110 (noting that the privilege review team was bound to keep the communications confidential).

1540. Petition, *Alsawam v. Bush*, No. 1:05-cv-1244 (June 22, 2005).

1541. Motion at 2–3, *id.* (Jan. 6, 2009).

1542. *Id.* at 3.

1543. Government Opposition at 6, *id.* (Jan. 13, 2009).

1544. Order, *id.* (Jan. 15, 2009).

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.”¹⁵⁴⁵

Shortly after the detainee had been released to the United Kingdom,¹⁵⁴⁶ the Privilege Review Team brought to the attention of the court allegedly unprofessional 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.¹⁵⁴⁷ 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.¹⁵⁴⁸ The intended recipient of the memo and all of its contents were redacted.¹⁵⁴⁹ 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.¹⁵⁵⁰ 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.¹⁵⁵¹ 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.”¹⁵⁵² Judge Sullivan addressed the matter in sealed filings.¹⁵⁵³

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.¹⁵⁵⁴ The attorney sought declassification of

1545. Order, *Ahmed v. Obama*, No. 1:05-cv-1678 (D.D.C. Feb. 12, 2009).

1546. Transfer Notice, *Al-Habashi v. Obama*, No. 1:05-cv-765 (D.D.C. Feb. 23, 2009); see Lee, *supra* note 1337 (“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.”).

1547. 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 1037 (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).

1548. Privilege Review Team’s Report, *supra* note 1547, Ex. A; see also *Stafford Smith*, *supra* note 1023, at 49–80 (account by Mohamed’s attorney of Mohamed’s detention experiences).

1549. Privilege Review Team’s Report, *supra* note 1547, Ex. A.

1550. *Id.*

1551. Privilege Review Team’s Report, *supra* note 1547.

1552. *Id.* at 3.

1553. Docket Sheet, *Al-Habashi v. Bush*, No. 1:05-cv-765 (Apr. 15, 2005).

1554. *Mohamed v. Gates*, 624 F. Supp. 2d 40, 42 (D.D.C. 2009).

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.¹⁵⁵⁵ 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”¹⁵⁵⁶ and because the seven statements already provided ensured that the planned meeting would not be fruitless.¹⁵⁵⁷ Judge Roberts noted, however, that

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.¹⁵⁵⁸

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.¹⁵⁵⁹ Mohamed was released to Somaliland by December 22, 2009.¹⁵⁶⁰

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.¹⁵⁶¹ The government denied the defense attorneys access to classified information that it had shared with habeas attorneys.¹⁵⁶² 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.¹⁵⁶³

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 Group.¹⁵⁶⁴ The court decided to apply to these cases the security principles of the

1555. *Id.*

1556. *Id.* at 41.

1557. *Id.* at 43–44.

1558. *Id.* at 44.

1559. *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”).

1560. Transfer Notice, Mohamed v. Gates, No. 1:08-cv-1789 (D.D.C. Dec. 22, 2009).

1561. Al Odah v. United States, 608 F. Supp. 2d 46, 48 (D.D.C. 2009).

1562. *Id.*

1563. *Id.* at 48–50.

1564. Interview with Hon. Royce C. Lamberth, May 13, 2011; see Reagan, *supra* note 173, at 17–18 (describing the Litigation Security Group).

Classified Information Procedures Act (CIPA),¹⁵⁶⁵ which technically applies only to criminal cases.¹⁵⁶⁶

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.¹⁵⁶⁷ The suite of rooms includes office space, cubicle space, and safes for storing classified information.¹⁵⁶⁸ 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.¹⁵⁶⁹

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.¹⁵⁷⁰ Attorneys find reviewed notes waiting for them at the secure facility.¹⁵⁷¹ Documents containing no classified information and unclassified redacted versions of documents can be faxed to the attorneys' remote offices.¹⁵⁷²

The secure facility is staffed by cleared contract personnel under the supervision of the Litigation Security Group.¹⁵⁷³ Originally, the facility operated according to business hours, but now it operates 24 hours a day.¹⁵⁷⁴ 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.¹⁵⁷⁵ Computers are available for their use; separate hard drives for each case are stored in the safes.¹⁵⁷⁶

Some information pertaining to high-value detainees is designated sensitive compartmented information (SCI).¹⁵⁷⁷ Access to SCI requires a higher security clearance, and storage requirements for SCI are more stringent. SCI must be

1565. 18 U.S.C. app. 3.

1566. Interview with Hon. Royce C. Lamberth, May 13, 2011; *see* Reagan, *supra* note 173 (discussing CIPA).

1567. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Gorman, *supra* note 1134, at 11, 15; Remes, *supra* note 1539, at 110; Sullivan, *supra* note 1469, at 43; Wax, *supra* note 91, at 118.

1568. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1569. *Id.*

1570. *Id.*; *see* Joshua Colangelo-Bryan, *Habeas on the Gate, Part I*, in *The Guantánamo Lawyers*, *supra* note 1023, at 59, 63; Remes, *supra* note 1539, at 110.

1571. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see* Colangelo-Bryan, *supra* note 1570, at 63; Matthew O'Hara, *I Love Cowboys*, in *The Guantánamo Lawyers*, *supra* note 1023, at 119, 123; Remes, *supra* note 1539, at 110.

1572. 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 1023, at 111, 111.

1573. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1574. *Id.*

1575. *Id.*

1576. *Id.*

1577. *Id.*; *see* Reagan, *supra* note 173, at 3 (describing sensitive compartmented information).

stored in a sensitive compartmented information facility (SCIF).¹⁵⁷⁸ The secure facility now includes a SCIF.¹⁵⁷⁹

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.¹⁵⁸⁰ The government designated some return information for the court's eyes only and some information as for attorney and court eyes only.¹⁵⁸¹ 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.¹⁵⁸²

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.¹⁵⁸³ At the end of the following January, Judge Green ruled that attorneys with security 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.¹⁵⁸⁴

The court of appeals, on March 6, 2009, determined that the government could be required to disclose to habeas counsel only classified information that

1578. See Reagan, *supra* note 173, at 19 (describing SCIFs).

1579. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1580. 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).

1581. *Al Odah*, 559 F.3d at 543; Order, *Rasul v. Bush*, 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 1580.

1582. Notice, *Rasul*, No. 1:02-cv-299 (D.D.C. Nov. 5, 2004).

1583. *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 1092.

1584. Order, *Rasul*, No. 1:02-cv-299 (D.D.C. Jan. 31, 2005) [hereinafter Jan. 31, 2005, Attorney Access Order].

was helpful to the petitioners' cases,¹⁵⁸⁵ and that the government must be permitted to suggest unclassified substitutions for the classified information.¹⁵⁸⁶ 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.¹⁵⁸⁷

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.¹⁵⁸⁸ The habeas attorneys did not object to this designation.¹⁵⁸⁹

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.¹⁵⁹⁰ Because the government failed to respond to the motion, Judge Kollar-Kotelly dismissed one of its attorneys.¹⁵⁹¹ 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.¹⁵⁹²

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.¹⁵⁹³ Judge Hogan determined that this would violate the public's First Amendment and common-law right of access to the court's files, and he gave the government four weeks to designate with precision what information in the returns had to be protected.¹⁵⁹⁴

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.¹⁵⁹⁵

1585. *Al Odah*, 559 F.3d at 544.

1586. *Id.* at 547.

1587. Interview with Hon. Joyce Hens Green, Sept. 21, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1588. Jan. 31, 2005, Attorney Access Order, *supra* note 1584.

1589. *Id.* at 2.

1590. *Al Odah v. United States*, 608 F. Supp. 2d 42, 43 (D.D.C. 2009).

1591. *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 . . .”).

1592. *Al Odah*, 608 F. Supp. 2d at 44–46.

1593. *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).

1594. *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.

1595. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

For the habeas petition by Wali Mohammed Morafa, the government submitted to Judge Collyer *ex parte* evidence relating to recently identified documents.¹⁵⁹⁶ 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."¹⁵⁹⁷ Judge Collyer determined that the *ex parte* evidence was inculpatory.¹⁵⁹⁸ She ordered the government to establish the adequacy of its substitutions.¹⁵⁹⁹

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 appellate attorneys were given access to complete CSRT records, including the classified evidence.¹⁶⁰⁰

Internment Serial Numbers

The government assigned to each detainee an internment serial number (ISN).¹⁶⁰¹ For example, David Hicks was 002, Huzaifa Parhat was 320, and Omar Khadr is 766.¹⁶⁰² Originally, ISNs were classified as secret.¹⁶⁰³ 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.¹⁶⁰⁴

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.¹⁶⁰⁵ Realizing

1596. 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).

1597. Government Morafa Response, *supra* note 1596, at 2; *see Morafa Order, supra* note 1596, at 6.

1598. *Morafa Order, supra* note 1596, at 6.

1599. *Id.* at 7–8.

1600. *Parhat v. Gates*, 532 F.3d 834, 840 (D.C. Cir. 2008).

1601. *Abdah v. Obama*, 709 F. Supp. 2d 25, 27–28 n.2 (D.D.C. 2010).

1602. *E.g.*, Ex. A, Government Motion to Dismiss, *Rasul v. Bush*, No. 1:02-cv-299 (D.D.C. Apr. 19, 2007).

John Walker Lindh was ISN 001. *See Cucullu, supra* note 1040, at 67; David Leigh, *What Are These Files?*, London Guardian, Apr. 25, 2011, at 2.

1603. *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.

1604. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011; *see Associated Press v. Dep't of Defense*, 462 F. Supp. 2d 573, 574 (S.D.N.Y. 2006) (noting the release of ISNs); *Associated 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).

1605. *Diaz*, 69 M.J. at 130; *see Tim Golden, Naming Names at Gitmo*, N.Y. Times, Oct. 21, 2007, at 678; Wax, *supra* note 91, at 169.

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.¹⁶⁰⁶ The leaker was convicted of removing classified material, communicating classified information, violating a lawful general order, and conduct unbecoming an officer and a gentleman.¹⁶⁰⁷ He was sentenced to six months in prison and dismissed from the Navy.¹⁶⁰⁸

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.¹⁶⁰⁹ 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.”¹⁶¹⁰ Also, “the security risk from providing petitioners access to their own statements is not comparable to the risk from disclosing other classified information.”¹⁶¹¹ “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.”¹⁶¹²

WikiLeaks

On April 24, 2011, news media posted on their websites information derived from several hundred classified files on Guantánamo Bay detainees.¹⁶¹³ Newspapers and National Public Radio’s news programs ran stories on the documents, beginning the following morning.¹⁶¹⁴ 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.¹⁶¹⁵

The documents were mostly risk-assessment reports on detainees written from February 2002 through January 2009, and the classified information was classified as secret.¹⁶¹⁶ The *New York Times* and National Public Radio collaborated on an Internet database that includes leaked information about Guantánamo Bay de-

1606. *Diaz*, 69 M.J. at 131; *see Golden, supra* note 1605.

1607. *Diaz*, 69 M.J. at 129.

1608. *Id.*; *see Golden, supra* note 1605.

1609. *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d 17 (D.D.C. 2009).

1610. *Id.* at 25.

1611. *Id.* at 23.

1612. *Id.* at 25.

1613. *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*].

1614. *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*]; Savage et al., *supra* note 651.

1615. *See, e.g., Military Documents, supra* note 1614 (“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.”).

1616. *See “High-Risk Detainees, supra* note 1614; Savage et al., *supra* note 651.

tainees.¹⁶¹⁷ Classified information security officers promptly 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.¹⁶¹⁸

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.¹⁶¹⁹ Judge Friedman denied the motion's emergency status.¹⁶²⁰ 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.¹⁶²¹ Judge Kennedy canceled the merits hearing while he considered the motion.¹⁶²²

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.¹⁶²³ 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.¹⁶²⁴ The government provided counsel with "purported detainee assessments posted on the WikiLeaks website" at the Crystal City facility.¹⁶²⁵

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."¹⁶²⁶ "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

1617. See "High-Risk" Detainees, *supra* note 1614; *A Note to Readers*, N.Y. Times, Apr. 25, 2011, at A1.

1618. See *Alhag WikiLeaks Motion*, *supra* note 1613, at 2–3; *Paracha WikiLeaks Motion*, *supra* note 1613, at 3; Scott Shane, *Detainees' Lawyers Can't Click on Leaked Documents*, N.Y. Times, Apr. 27, 2011, at A1.

1619. *Paracha WikiLeaks Motion*, *supra* note 1613; see Scott Shane, *Guantánamo Detainee's Lawyer Seeks a Voice on WikiLeaks Documents*, N.Y. Times, Apr. 28, 2011, at A16.

1620. Opinion, *Paracha v. Obama*, No. 1:04-cv-2022 (D.D.C. Apr. 29, 2011), available at 2011 WL 1639259.

1621. *Alhag WikiLeaks Motion*, *supra* note 1613.

1622. Docket Sheet, *Alhag v. Obama*, No. 1:05-cv-2199 (D.D.C. Nov. 10, 2005).

1623. 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.

1624. *WikiLeaks Guidelines*, *supra* note 1623.

1625. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 26, 2011; see Savage, *supra* note 1623.

1626. *WikiLeaks Guidelines*, *supra* note 1623.

confirming, contradicting, or otherwise relating to the information already in the public domain.”¹⁶²⁷ “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.”¹⁶²⁸

Reviewing Classified Materials

All judges reviewing Guantánamo Bay habeas cases have special safes to store classified materials.¹⁶²⁹ Although cleared petitioners’ attorneys were granted access only to secret information, the government presented to judges additional top secret information.¹⁶³⁰ 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.¹⁶³¹

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.¹⁶³²

Challenge: Protected Information

Although the Executive Branch determines what information is classified, the courts determine what part of a judicial record is otherwise protected or sealed.¹⁶³³

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.¹⁶³⁴

On June 30, 2009, Judge Huvelle overruled the government’s designation of some information as protected.¹⁶³⁵ Judge Huvelle ruled by sealed order after a closed proceeding.¹⁶³⁶ In a heavily redacted published opinion, the court of ap-

1627. *Id.*

1628. *Id.*

1629. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

1630. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1631. Interview with Hon. Paul L. Friedman, Oct. 12, 2011; Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1632. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

1633. *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).

1634. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 151 (D.D.C. 2008) (¶ 34).

1635. *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].

1636. *Ameziane* Docket Sheet, *supra* note 1635.

peals reversed,¹⁶³⁷ but it is very difficult to determine from the public record 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.¹⁶³⁸

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.¹⁶³⁹ 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.¹⁶⁴⁰ "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)."¹⁶⁴¹

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.¹⁶⁴² Before she issued her ruling on whether the dates could be protected, the government decided to no longer regard Jawad detainable,¹⁶⁴³ Judge Huvelle granted the writ,¹⁶⁴⁴ and Jawad was released.¹⁶⁴⁵ On December 30, 2010, Judge Huvelle approved redactions in the public filing of Jawad's return,¹⁶⁴⁶ which was filed on March 15, 2011.¹⁶⁴⁷

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 ra-

1637. *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).

1638. *Ameziane v. Obama*, ___ U.S. ___, 131 S. Ct. 1673 (2011).

1639. *Bacha v. Obama*, 653 F. Supp. 2d 32 (D.D.C. 2009).

1640. *Id.* at 34.

1641. *Id.* at 35.

1642. *Jawad Suppression Order*, *supra* note 1339; Docket Sheet, *Al-Halmandy v. Obama*, No. 1:05-cv-2385 (D.D.C. July 17, 2009).

1643. *Jawad Nondetainability Notice*, *supra* note 1341.

1644. *Jawad Writ*, *supra* note 1346.

1645. *Detainee Released*, *supra* note 1343.

1646. Order, *Al-Halmandy*, No. 1:05-cv-2385 (D.D.C. Dec. 30, 2010).

1647. Order, *id.* (Mar. 15, 2011).

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.

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.

. . . [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.¹⁶⁴⁸

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.¹⁶⁴⁹ A protective order issued by Judge Hogan in 2008, two months after he accepted pretrial consolidation of the habeas petitions, provided for similar procedures.¹⁶⁵⁰

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 classified motion.¹⁶⁵¹ Mingazov's attorneys filed a classified opposition.¹⁶⁵² The government filed a classified motion with the court of appeals seeking abeyance pending resolution of the motion before Judge Kennedy.¹⁶⁵³ 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.¹⁶⁵⁴ The government's reply brief on the abeyance motion was also unclassified.¹⁶⁵⁵

1648. *In re Guantanamo Bay Detainee Litig.*, 787 F. Supp. 2d 5, 13–14 (D.D.C. 2011) (citations and quotation marks omitted).

1649. *In re Guantanamo Bay Detainee Cases*, 344 F. Supp. 2d 174, 182 (D.D.C. 2004); see Gorman, *supra* note 1134, at 14.

1650. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143 (D.D.C. 2008).

1651. Notice of Filing, *Al-Harbi v. Obama*, No. 1:05-cv-2479 (D.D.C. Dec. 15, 2010).

1652. Notice of Filing, *id.* (Jan. 31, 2011).

1653. Docket Sheet, *Mingazov v. Obama*, No. 10-5217 (D.C. Cir. June 28, 2010).

1654. D.C. Cir. *Mingazov* Opposition Brief, *supra* note 1434; see *Mingazov* Abeyance Order, *supra* note 1435 (granting abeyance).

1655. Reply Brief, *Mingazov*, No. 10-5217 (D.C. Cir. Jan. 3, 2011).

Petitioner Hajji Nassim, who was considered a high-value detainee, a category used for central figures in terrorism planning, apparently killed himself on May 18, 2011.¹⁶⁵⁶ On May 23, the government filed in his case a notice of his death¹⁶⁵⁷ and filed in nine other high-value detainee cases notices of top secret ex parte filings.¹⁶⁵⁸ Judges Kollar-Kotelly,¹⁶⁵⁹ Walton,¹⁶⁶⁰ Bates,¹⁶⁶¹ Friedman,¹⁶⁶² and Roberts¹⁶⁶³ referred the matter to Judge Sullivan, to whom two of the cases had been assigned.¹⁶⁶⁴ The briefing on this matter was classified, but the filings of papers were noted on the public record.¹⁶⁶⁵ The matter apparently remains pending.

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.

1656. See *Afghan Detainee Is Found Dead at Guantánamo*, N.Y. Times, May 19, 2011, at A19 [hereinafter *Found Dead*]; see also Savage, *supra* note 1400 (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’”).

1657. *Nassim* Death Notice, *supra* note 1172; see Order, *Nassim v. Obama*, No. 1:09-cv-1332 (D.D.C. July 12, 2011) (dismissing *Nassim*'s habeas petition as moot).

1658. Notice of Filing, *Bin Lep v. Obama*, No. 1:09-cv-31 (D.D.C. Apr. 8, 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).

1659. Order, *Mohammad*, No. 1:09-cv-873 (D.D.C. Apr. 15, 2011).

1660. Order, *Khan*, No. 1:06-cv-1690 (D.D.C. Apr. 15, 2011).

1661. Order, *Bin Lep*, No. 1:09-cv-31 (D.D.C. Apr. 18, 2011).

1662. 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).

1663. Order, *Husayn*, No. 1:08-cv-1360 (D.D.C. Apr. 18, 2011); Order, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. Apr. 18, 2011).

1664. 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].

1665. *Abdulrazzaq* Docket Sheet, *supra* note 1664; Docket Sheet, *Rahim*, No. 1:09-cv-1385 (D.D.C. July 27, 2009); Docket Sheet, *Mohammad v. Obama*, 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 1256; Docket Sheet, *Al-Nashiri*, No. 1:08-cv-1207 (D.D.C. July 15, 2008); *Bin al-Shibh* Docket Sheet, *supra* note 1664; Docket Sheet, *Khan*, No. 1:06-cv-1690 (D.D.C. Sept. 29, 2006).

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.¹⁶⁶⁶

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.¹⁶⁶⁷ Complicating the burden for judges was the fact that sometimes their unredacted copies of documents, such as factual returns, did not show what parts of the documents were classified.¹⁶⁶⁸

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.¹⁶⁶⁹

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.¹⁶⁷⁰ Classified materials used by habeas attorneys in court must be transported by cleared couriers from the secure facility in Crystal City to the courthouse.¹⁶⁷¹

In cooperation with Attorney General Mukasey, the court established a direct satellite connection with Guantánamo Bay.¹⁶⁷² The court identified one courtroom to fit with a secure connection to the satellite for Guantánamo Bay hearings.¹⁶⁷³

Obtaining detainees' participation from Guantánamo Bay presented the court with one of its most substantial logistical challenges.¹⁶⁷⁴ Timing of the proceeding had to be coordinated with, among other things, the timing of flights to Guantánamo Bay.¹⁶⁷⁵

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.¹⁶⁷⁶ Often, the detainee's attorneys and the government also had interpreters in

1666. Interview with Hon. John D. Bates, Oct. 15, 2009.

1667. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

1668. 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.

1669. Interview with Hon. Gladys Kessler, May 31, 2011.

1670. Interview with Hon. Reggie B. Walton, May 23, 2011.

1671. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1672. 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.*

1673. 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.

1674. Interview with Hon. Gladys Kessler, May 31, 2011.

1675. *Id.*

1676. *Id.*

court.¹⁶⁷⁷ 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.¹⁶⁷⁸

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.¹⁶⁷⁹ If, however, a detainee testified, either as the petitioner or as a witness, then the detainee's testimony was presumptively classified.¹⁶⁸⁰ The testimony was transmitted by secure audiovisual link, which required FBI security specialists at both locations.¹⁶⁸¹

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.¹⁶⁸²

On November 6, 2008, Judge Leon began the first evidentiary hearing on the government's evidence supporting a Guantánamo Bay detention.¹⁶⁸³ Attorneys for both sides made opening statements in open court.¹⁶⁸⁴ 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.¹⁶⁸⁵ They received a written Arabic translation soon afterward.¹⁶⁸⁶

On the afternoon of the same day, Judge Leon continued the proceeding in closed session because classified evidence would be presented and discussed.¹⁶⁸⁷ During the next few days of the proceeding, two detainees testified by audiovisual

1677. 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).

1678. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1679. *Id.*

1680. 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 1187, at 356.

1681. 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.

1682. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

1683. *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 1186.

1684. *Boumediene*, 579 F. Supp. 2d at 193; *see* Glaberson, *supra* note 1683.

1685. *Boumediene*, 579 F. Supp. 2d at 193; *see* Glaberson, *supra* note 1683; Winke, *supra* note 1187, at 353–55 (describing the petitioners' reactions to the recording).

1686. *Boumediene*, 579 F. Supp. 2d at 193.

1687. *Id.*

feed from Guantánamo Bay.¹⁶⁸⁸ Their attorneys provided them with shirts and ties; one was able to testify in English.¹⁶⁸⁹ Closing arguments on November 14 were also held in closed session, from which the detainees were excluded, because much of the arguments was classified.¹⁶⁹⁰

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.¹⁶⁹¹ Judge Leon began with public opening statements.¹⁶⁹² The hearings continued in closed session because classified information would be discussed.¹⁶⁹³ Sliti elected not to participate,¹⁶⁹⁴ 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.¹⁶⁹⁵

Fawzi Khalid Abdullah Fahad al-Odah,¹⁶⁹⁶ al-Rabiah,¹⁶⁹⁷ and al-Kandari¹⁶⁹⁸ 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.¹⁶⁹⁹ He listened to the unclassified session by telephone from Guantánamo Bay.¹⁷⁰⁰

On June 18, 2009, Judge Kessler ruled that al-Adahi's testimony from Guantánamo Bay at his merits hearing would be in open court.¹⁷⁰¹ "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

1688. *Id.*; see Winke, *supra* note 1187, at 356–57.

1689. See Winke, *supra* note 1187, at 355.

1690. *Boumediene*, 579 F. Supp. 2d at 193.

1691. *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 Mar. 12, 2009); *Al-Bihani v. Obama*, 594 F. Supp. 2d 35, 36 (D.D.C. 2009) (hearing Jan. 15–16, 2009); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 145 (D.D.C. 2009) (hearing Dec. 17–18, 2008); *Al-Alwi v. Bush*, 593 F. Supp. 2d 24, 25 (D.D.C. 2008) (Dec. 16–17, 2008); *Sliti v. Bush*, 592 F. Supp. 2d 46, 47 (D.D.C. 2008) (hearing Dec. 18, 2008).

1692. *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.

1693. *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 1683.

1694. *Sliti*, 592 F. Supp. 2d at 47.

1695. *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.

1696. *Al Odah v. United States*, 648 F. Supp. 2d 1, 3 (D.D.C. 2009).

1697. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 n.1 (D.D.C. 2009).

1698. *Al Kandari v. United States*, 744 F. Supp. 2d 11, 14 (D.D.C. 2010).

1699. *Basardh v. Bush*, 612 F. Supp. 2d 30, 31 (D.D.C. 2009).

1700. *Id.*

1701. Order, *Al-Adahi v. Bush*, No. 1:05-cv-280 (D.D.C. June 18, 2009), available at 2009 WL 1743758.

testimony.”¹⁷⁰² 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.¹⁷⁰³ A four-day hearing began on June 22, 2009.¹⁷⁰⁴ Al-Adahi testified on June 23 and 24.¹⁷⁰⁵ A redacted transcript was filed publicly on June 26.¹⁷⁰⁶ Redacted were the identities of the interpreter and an informant detainee.¹⁷⁰⁷ On July 23, the government filed a notice that it did not videotape al-Adahi’s testimony as ordered,¹⁷⁰⁸ and Judge Kessler found the government in contempt on December 10.¹⁷⁰⁹ On January 8, 2010, the government promised more reliable videotaping procedures.¹⁷¹⁰

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.¹⁷¹¹ Bin Mohammed chose not to listen to the opening arguments or testify.¹⁷¹²

Judge Walton began Abd al-Rahman Abdu Abu al-Ghayth Sulayman’s unsuccessful merits hearing on May 3, 2010.¹⁷¹³ The detainee elected to testify and to listen to the unclassified portions of the hearing.¹⁷¹⁴ One of Sulayman’s attorneys and an interpreter were in Guantánamo Bay; another Sulayman attorney was in the courtroom.¹⁷¹⁵ Overcoming a few difficulties with the transmission feed, the four-day hearing concluded successfully.¹⁷¹⁶

Proceedings on Bin Mohammed’s ill-fated injunction against his transfer to Algeria were largely under seal.¹⁷¹⁷ 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.¹⁷¹⁸ One week later, the order was unsealed.¹⁷¹⁹ Eleven weeks later, the government filed redacted copies of its appellate briefs, including a redacted copy of Judge Kessler’s injunction opinion,¹⁷²⁰

1702. *Id.*

1703. Order, *id.* (June 19, 2009), available at 2009 WL 1764540.

1704. *Al-Adahi Habeas Grant*, *supra* note 1324, at 4; *Al-Adahi Docket Sheet*, *supra* note 1394.

1705. Transcript, *Al-Adahi*, No. 1:05-cv-280 (D.D.C. June 23 and 24, 2009, filed June 26, 2009).

1706. *Id.*

1707. *Id.*

1708. Notice, *id.* (July 23, 2009).

1709. Order, *id.* (Dec. 10, 2009).

1710. Government Brief, *id.* (Jan. 8, 2010).

1711. *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*].

1712. *Bin Mohammed*, 689 F. Supp. 2d at 40.

1713. *Sulayman v. Obama*, 729 F. Supp. 2d 26, 29 (D.D.C. 2010).

1714. Notice, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Feb. 26, 2010).

1715. Interview with Hon. Reggie B. Walton, May 23, 2011.

1716. *Id.*

1717. D.D.C. *Bin Mohammed Docket Sheet*, *supra* note 1711.

1718. Order, *Bin Mohammed v. Obama*, No. 10-5218 (D.C. Cir. July 8, 2010).

1719. *Bin Mohammed Injunction Reversal*, *supra* note 1371.

1720. Docket Sheet, *Bin Mohammed*, No. 10-5218 (D.C. Cir. June 30, 2010).

but the opinion remains sealed in the district court file.¹⁷²¹ 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.¹⁷²²

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.

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 classification review.¹⁷²³ 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.¹⁷²⁴ Persons reviewing an opinion before it has been issued must be walled off from persons working with those representing the government in court.¹⁷²⁵

Habeas attorneys generally must travel to the secure facility in Crystal City to review unredacted classified opinions and other classified filings.¹⁷²⁶

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.¹⁷²⁷ 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

1721. D.D.C. *Bin Mohammed* Docket Sheet, *supra* note 1711.

1722. *Naji* Government Response, *supra* note 1375.

1723. 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).

Judges are not classification authorities, so they are not empowered to determine what is classified and what is not. *See id.*

1724. Interview with Dep't of Justice Litig. Sec. Group Staff, July 28, 2011.

1725. *Id.*

1726. *Id.*

1727. Interview with Hon. Royce C. Lamberth, May 13, 2011.

court.¹⁷²⁸ 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.¹⁷²⁹

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 program.¹⁷³⁰ Judge Friedman, for example, has one law clerk read into SCI for Guantánamo Bay cases and another law clerk read into SCI for another case.¹⁷³¹

Judge Green's January 31, 2005, opinion resolving the government's motion to dismiss the coordinated cases included some classified information.¹⁷³² 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.¹⁷³³ 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.¹⁷³⁴ This procedure prevented persons from unredacting the electronic redactions.¹⁷³⁵ Judge Green denied a government attorney's request for an advance copy so that government attorneys could tell her what to redact.¹⁷³⁶

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.¹⁷³⁷ In granting Ahmed's habeas corpus petition, Judge Kessler cited Judge Leon's classified *El-Gharani* opinion.¹⁷³⁸

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.¹⁷³⁹ The parties filed their briefing on this motion with the classified information security officer and filed public notices of the filings with the clerk.¹⁷⁴⁰ Within three months, Judge Leon

1728. *Id.*

1729. *Id.*

1730. Interview with Hon. Paul L. Friedman, Oct. 12, 2011.

1731. *Id.*

1732. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 447 n.7 (D.D.C. 2005) (noting in public version "Material redacted by court"); Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

1733. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

1734. *Id.*; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 26, 2011.

1735. Interview with Hon. Joyce Hens Green, Sept. 21, 2011.

1736. *Id.*

1737. *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).

1738. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56 (D.D.C. 2009).

1739. Notice, *Boumediene v. Obama*, No. 1:04-cv-1166 (D.D.C. May 26, 2009).

1740. *Boumediene* Docket Sheet, *supra* note 1044.

denied the motion in a classified memorandum order filed with the classified information security officer.¹⁷⁴¹ An appeal is pending.¹⁷⁴²

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 publicly.¹⁷⁴³ A redacted version, containing 519 redactions in 65 pages, was released on September 25.¹⁷⁴⁴ 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.¹⁷⁴⁵ Her other opinions resolving habeas petitions were also put on the public record in redacted form.¹⁷⁴⁶

Judges Huvelle,¹⁷⁴⁷ Kessler,¹⁷⁴⁸ Robertson,¹⁷⁴⁹ Urbina,¹⁷⁵⁰ Kennedy,¹⁷⁵¹ Bates,¹⁷⁵² Leon,¹⁷⁵³ Friedman,¹⁷⁵⁴ Walton,¹⁷⁵⁵ and Lamberth¹⁷⁵⁶ also resolved ha-

1741. *Id.*

1742. Docket Sheet, *Bensayah v. Obama*, No. 09-5376 (D.C. Cir. Oct. 29, 2009).

1743. *Al-Odah* Docket Sheet, *supra* note 1026.

1744. Redacted Opinion, *Al-Odah v. United States*, No. 1:02-cv-828 (D.D.C. Sept. 25, 2009).

1745. Redacted Opinion, *id.* (Sept. 29, 2010).

1746. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009) (redacted opinion filed seven days after classified opinion); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009) (six days).

1747. *Basardh v. Bush*, 612 F. Supp. 2d 30 (D.D.C. 2009) (redacted opinion filed two days after classified opinion); *see also Al-Qurashi v. Obama*, 733 F. Supp. 2d 69 (D.D.C. 2010) (denying motion to suppress confession; redacted opinion filed 16 days after classified opinion).

1748. *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010) (redacted opinion filed 14 days after 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 1324 (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).

1749. *Khalifh* Opinion, *supra* note 1397 (redacted opinion filed 17 days after 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).

1750. *Khairkhwa v. Obama*, ___ F. Supp. 2d ___, 2011 WL 2490960 (D.D.C. 2011) (redacted opinion filed 23 days after 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).

1751. *Hentif v. Obama*, ___ F. Supp. 2d ___, 2011 WL 4102538 (D.D.C. 2011) (redacted opinion filed 14 days after classified opinion); *Mingazov* Opinion, *supra* note 1432 (80 days); *D.D.C. Latif* Opinion, *supra* note 1421 (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).

1752. *Khan v. Obama*, 741 F. Supp. 2d 1 (D.D.C. 2010) (redacted opinion filed 32 days after classified opinion).

1753. *Ali v. Obama*, 770 F. Supp. 2d 1 (D.D.C. 1011) (redacted opinion filed 17 days after classified opinion was issued).

1754. *Almerfedi v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (redacted opinion filed 15 days after classified opinion).

1755. *Bostan v. Obama*, ___ F. Supp. 2d ___, 2011 WL 5127620 (D.D.C. 2011) (redacted opinion filed 19 days after classified opinion); *Hussein v. Obama*, ___ F. Supp. 2d ___, 2011 WL 5114842 (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).

beas 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.

Judge Collyer denied Sufyian Barhoumi's petition from the bench without a written opinion.¹⁷⁵⁷ A redacted transcript of her ruling was filed four months later.¹⁷⁵⁸ 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.¹⁷⁵⁹ 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.¹⁷⁶⁰

Judge Hogan denied al-Madhwani's petition with an oral ruling on December 14, 2009.¹⁷⁶¹ On January 6, 2010, Judge Hogan filed an unclassified opinion supporting his ruling, "part of which was classified."¹⁷⁶² On April 28, Judge Hogan denied al-Madhwani's motion for reconsideration,¹⁷⁶³ filing a classified opinion with classified information security officers.¹⁷⁶⁴ 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.¹⁷⁶⁵ 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.

...

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.¹⁷⁶⁶

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 ne-

1756. *Al-Wrafié* Opinion, *supra* note 1395 (redacted opinion filed 53 days after classified opinion).

1757. Barhoumi Order, *supra* note 1358; *see* Barhoumi v. Obama, 609 F.3d 416, 419 (D.C. Cir. 2010). Barhoumi Transcript, *supra* note 1358.

1758. Barhoumi Transcript, *supra* note 1358 (transcribing a Sept. 3, 2009, proceeding); Docket Sheet, Shafiq v. Bush, No. 1:05-cv-1506 (D.D.C. July 28, 2005) (noting filing on Jan. 4, 2010).

1759. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1760. *Id.*

1761. Anam Docket Sheet, *supra* note 1044.

1762. Anam v. Obama, 696 F. Supp. 2d 1, 3 (D.D.C. 2010).

1763. Order, Anam v. Obama, No. 1:04-cv-1194 (D.D.C. Jan. 6, 2010).

1764. Anam Docket Sheet, *supra* note 1044.

1765. Abdah v. Obama, 708 F. Supp. 2d 9 (D.D.C. 2010) (public opinion filed 56 days after original opinion), *rev'd sub nom.* Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011).

1766. Linzer, *supra* note 1336.

cessary.¹⁷⁶⁷ Judges commonly strive to craft opinions that require as few redactions as possible.¹⁷⁶⁸

Judge Leon denied Obaydullah's petition on October 19, 2010, filing a public opinion¹⁷⁶⁹ and promising a more complete classified opinion in the coming weeks.¹⁷⁷⁰ 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, 2011.¹⁷⁷¹

Classified orders and opinions can be provided to cleared counsel before redacted versions are available for the public, but detainees' attorneys had to review the classified versions either at the courthouse or at the Crystal City facility.¹⁷⁷²

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.¹⁷⁷³

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.¹⁷⁷⁴

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.¹⁷⁷⁵

1767. *Al Warafi v. Obama*, 704 F. Supp. 2d 32 (D.D.C. 2010) (public opinion filed 15 days after 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.

1768. Interview with Hon. Ellen Segal Huvelle, June 13, 2011.

1769. *Obaydullah v. Obama*, 744 F. Supp. 2d 344 (D.D.C. 2010).

1770. *Id.* at 346.

1771. Opinion, *Obaydullah v. Obama*, No. 1:08-cv-1173 (D.D.C. Mar. 23, 2011).

1772. Interview with Hon. Reggie B. Walton, May 23, 2011.

1773. D.C. Cir. *Latif* Opinion, *supra* note 1420 (redacted opinion filed 26 days after classified opinion); *Ameziane v. Obama*, 620 F.3d 1 (D.C. Cir. 2010) (apparently also redacting merely protected information, 271 days); *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).

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 1371.

1774. Docket Sheet, *El-Falesteny v. Obama*, No. 5180 (D.C. Cir. June 3, 2010); *see* Former Guantánamo Detainees Docket Sheet, *supra* note 1177; Docket Sheet, *Mohammon v. Obama*, No. 1:05-cv-2386 (D.D.C. Dec. 13, 2005).

1775. *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011) (affirming the denial of habeas corpus relief).

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]."¹⁷⁷⁶ A separate classified appendix, filed under seal, specifies what is redacted.¹⁷⁷⁷

A 2010 opinion affirming denial of habeas corpus relief contained classified information.¹⁷⁷⁸ 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.¹⁷⁷⁹ The government identified four additional parts of the opinion for redaction.¹⁷⁸⁰ 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."¹⁷⁸¹

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.¹⁷⁸² 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 period, but the handling and distribution of the classified opinion will otherwise be controlled by the governing protective order."¹⁷⁸³

The panel granted the government's request as to the case before the panel and referred the general request to the full court.¹⁷⁸⁴ 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.¹⁷⁸⁵

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 prayer caps on request.¹⁷⁸⁶ On the following day, many prisoners began refusing

1776. *Id.* at ___ (pp. 5, 10, 21, 23, 24 & nn.2–3 of filed opinion).

1777. *Id.* at ___ (p. 2 n.1 of filed opinion).

1778. *Barhoumi*, 609 F.3d 416.

1779. 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. Oct. 14, 2011).

1780. Government Response at 2, *id.* (June 17, 2010).

1781. *Barhoumi Show-Cause Order*, *supra* note 1779.

1782. Government Motion, *Barhoumi*, No. 09-5383 (D.C. Cir. June 22, 2010).

1783. *Id.* at 4.

1784. Order, *id.* (June 22, 2010).

1785. Order, *id.* (Nov. 17, 2010).

1786. See James Dao, *Detainees Stage Protest at Base Over a Turban*, N.Y. Times, Mar. 1, 2002, at A12; Greenberg, *supra* note 1040, at 182–83.

to take meals, in protest.¹⁷⁸⁷ An announcement on Thursday that prisoners could wear turbans, reserving a right to inspect them, abated the hunger strike somewhat.¹⁷⁸⁸ A month later, camp doctors began force-feeding two strikers.¹⁷⁸⁹ Hunger strikes and suicide attempts were a problem at Guantánamo Bay from time to time thereafter.¹⁷⁹⁰ Some detainees engaged in hunger strikes for several years.¹⁷⁹¹

In 2004, Judge Bates denied a motion by the detainee Khadr for an independent medical evaluation.¹⁷⁹² Khadr was captured as a juvenile in Kabul in 2002.¹⁷⁹³ 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.¹⁷⁹⁴ Later, Judge Bates denied Khadr a preliminary injunction against torture because Khadr's attorneys could not show that torture was imminent.¹⁷⁹⁵

On July 21, 2005, the Pentagon reported that 50 Guantánamo Bay detainees were on a hunger strike.¹⁷⁹⁶ Promises to improve conditions abated the strike a week later.¹⁷⁹⁷ In August, however, detainees were striking again.¹⁷⁹⁸ 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.¹⁷⁹⁹ The judges assigned to these cases transferred the motions to Judge Oberdorfer for resolution.¹⁸⁰⁰

1787. See Dao, *supra* note 1786; Greenberg, *supra* note 1040, at 185; Margulies, *supra* note 1018, at 138.

1788. See Greenberg, *supra* note 1040, at 190; Eric Schmitt, *A Concession on Turbans Calms Protest in Cuba Camp*, N.Y. Times, Mar. 2, 2002, at A9.

1789. See James Dao, *Navy Doctors Force-Feeding 2 Prisoners*, N.Y. Times, Apr. 2, 2002, at A12.

1790. See Carlotta Gall & Neil A. Lewis, *Tales of Despair from Guantánamo*, N.Y. Times, June 17, 2003, at A1.

1791. *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.”).

1792. *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

1793. *Khadr v. Bush*, 587 F. Supp. 2d 225, 228 (D.D.C. 2008); *O.K.*, 344 F. Supp. 2d at 49.

1794. *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).

1795. *O.K. v. Bush*, 377 F. Supp. 2d 102, 103, 111–15, 118 (D.D.C. 2005).

1796. See *Guantánamo Hunger Strike Is Reported*, N.Y. Times, July 22, 2005, at A16.

1797. See Lewis, *supra* note 1198.

1798. 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.

1799. 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 1798.

1800. 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.

While the motions were pending, hunger striking became more prevalent.¹⁸⁰¹ Judge Oberdorfer followed Judge Bates's resolution of a medical care motion and, on September 28, denied the injunction without prejudice.¹⁸⁰² Judges Kollar-Kotelly and Urbina denied similar motions in other cases a few days later.¹⁸⁰³ In 2009, Judge Leon relied on Judge Bates's opinion in denying a motion for an independent medical examination.¹⁸⁰⁴

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.¹⁸⁰⁵ The government argued that it would be infeasible to provide every detainee's attorney with medical updates.¹⁸⁰⁶ On October 26, Judge Kessler ordered the government to provide contemporaneous medical information on force-fed detainees to their attorneys.¹⁸⁰⁷

Government attorneys assured the court that another sort of medical treatment would not be forced upon a detainee.¹⁸⁰⁸ Judge Friedman ruled against the detainee's request for transfer to the Bethesda Naval Hospital for the procedure.¹⁸⁰⁹ Saifullah Paracha was a Pakistani millionaire arrested in Bangkok in July 2003.¹⁸¹⁰ He was interrogated at the Bagram Airbase in Afghanistan; in September 2004, he was transferred to Guantánamo Bay.¹⁸¹¹ He allegedly acted as a financier and

Sept. 23, 2005) (order by Robertson); Order, *Abu Imran*, No. 1:05-cv-764 (D.D.C. Sept. 21, 2005) (order by Kollar-Kotelly).

1801. See Lewis, *supra* note 1198.

1802. *El-Banna v. Bush*, 394 F. Supp. 2d 76, 78–79 (D.D.C. 2005).

1803. 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).

1804. Order, *Sliti v. Obama*, No. 1:05-cv-429 (D.D.C. Apr. 28, 2009).

1805. 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).

1806. *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 15–16 (D.D.C. 2005).

1807. *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.

1808. 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").

1809. *Cardiac Catheterization Order*, *supra* note 1808; see Carol J. Williams, *Detainee Refuses Surgery*, L.A. Times, Nov. 23, 2006, at 22.

1810. See Zarar Khan, *Wife Says Detainee Has Done No Wrong*, Philadelphia Inquirer, Mar. 6, 2006, at A7.

1811. See Rosenberg, *supra* note 1808.

weapons-smuggler for al-Qaeda.¹⁸¹² 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.¹⁸¹³ 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.¹⁸¹⁴ The unsuccessful motion was based on a claim that the procedure could not be performed safely at Guantánamo Bay.¹⁸¹⁵ Judge Friedman ruled that Paracha failed to establish irreparable injury.¹⁸¹⁶ The court of appeals summarily affirmed.¹⁸¹⁷

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 2007.¹⁸¹⁸ Mohammad Ahmed Abdullah Saleh al-Hanashi, who had been on a hunger strike, apparently committed suicide in 2009.¹⁸¹⁹ Hajji Nassim, a high-value detainee, apparently killed himself in 2011.¹⁸²⁰

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.¹⁸²¹ Shalabi had been on a hunger strike since August 2005.¹⁸²² To keep him alive, the government force-fed him twice a day through his nose.¹⁸²³

1812. *See Detainee Wants to Be Relocated for Surgery*, Wash. Post, Nov. 19, 2006, at A10.

1813. 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).

1814. *See Detainee Wants to Be Relocated for Surgery*, *supra* note 1812; Rosenberg, *supra* note 1808; Williams, *supra* note 1809.

1815. *See* Rosenberg, *supra* note 1808; *see also* Cucullu, *supra* note 1040, 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 1809 (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").

1816. Cardiac Catheterization Order, *supra* note 1808.

1817. Order, *Paracha v. Bush*, No. 06-5379 (D.C. Cir. Dec. 1, 2006).

1818. *See* Cucullu, *supra* note 1040, 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 1134, 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 1527.

1819. Al-Hanashi Death Notice, *supra* note 1172; *see* William Glaberson & Margot Williams, *Officials Report Suicide of Guantánamo Detainee*, N.Y. Times, June 3, 2009, at A17; Savage, *supra* note 1527.

1820. *Nassim* Death Notice, *supra* note 1172; *see Found Dead*, *supra* note 1656.

1821. *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).

1822. *Al-Oshan*, 753 F. Supp. 2d at 2.

1823. *Id.*

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.¹⁸²⁴

Challenge: Religious Accommodation

At the March 6, 2009, hearing 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.¹⁸²⁵

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.¹⁸²⁶

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, 2009.¹⁸²⁷

Ambassador Fried had submitted declarations assuring the court of Bin Mohammed's safety in Algeria,¹⁸²⁸ and Judge Kessler determined that "this Court has an obligation to ensure that there is real substance behind the conclusory phrases contained in Special Envoy Fried's declarations."¹⁸²⁹

The government sought reconsideration from Judge Kessler and relief from the court of appeals.¹⁸³⁰ 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.¹⁸³¹ On June 29, Judge Kessler, without hearing testimony from Ambassador Fried, en-

1824. Interview with Hon. Rosemary M. Collyer, Sept. 20, 2011.

1825. *Al Sharbi v. Bush*, 601 F. Supp. 2d 317, 320 n.3 (D.D.C. 2009).

1826. Order, *Bin Mohammed v. Obama*, No. 1:05-cv-1347 (D.D.C. June 10, 2010) [hereinafter *Bin Mohammed Hearing Order*].

1827. July 9, 2009, Fried Declaration, *attached as Ex. 9, Government Opposition, Naji v. Obama*, No. 10-5191 (D.C. Cir. July 15, 2010).

1828. Nov. 25, 2009, Fried Declaration, *attached as Ex. 10, id.*; July 15, 2009, Fried Declaration, *supra* note 1827.

1829. *Bin Mohammed Hearing Order, supra* note 1826, at 2.

1830. *Bin Mohammed Injunction, supra* note 1368, at 2.

1831. Order, *Bin Mohammed v. Obama*, No. 10-5200 (D.C. Cir. June 25, 2010); *Bin Mohammed Injunction, supra* note 1368, at 2-3.

joined Bin Mohammed's transfer to Algeria.¹⁸³² The court of appeals dissolved the injunction on July 8.¹⁸³³

1832. *Bin Mohammed Injunction*, *supra* note 1368.

1833. *Bin Mohammed Injunction Reversal*, *supra* note 1371.

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.¹⁸³⁴ 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.¹⁸³⁵ Padilla was flown to Manhattan for detention and possible grand jury testimony.¹⁸³⁶

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 explosives.¹⁸³⁷ The detainee was Padilla, and the government had transferred him the previous day to the high-security Consolidated Naval Brig in Charleston,

1834. *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.

1835. *Rumsfeld v. Padilla*, 542 U.S. 426, 430–31 (2004); *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; see *Jayyousi*, 657 at 1094, 1101; see also Eggen & Schmidt, *supra* note 1834; John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 Rev. Litig. 297, 304 (2008); Hafetz, *supra* note 502, at 47, 73; Robert C. Herguth, *Former Chicagoan "Trained with the Enemy," U.S. Says*, Chi. Sun Times, June 10, 2002, at 3; Donna R. Newman, *What the F— Is an "Enemy Combatant"?*, in *The Guantánamo Lawyers*, *supra* note 1023, at 361, 361; Pohlman, *supra* note 220, at 76; Risen & Shenon, *supra* note 1834; Soufan, *supra* note 64, at 407–08, 428; Wilgoren & Thomas, *supra* note 1834.

1836. *Padilla*, 542 U.S. at 431; *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 1834; Gibbons, *supra* note 1835, at 304.

1837. *Padilla*, 233 F. Supp. 2d at 572–73; see Eggen & Schmidt, *supra* note 1834; Hafetz, *supra* note 502, at 47; Herguth, *supra* note 1835; Newman, *supra* note 1835, at 362; Risen & Shenon, *supra* note 1834; *US Announces Arrest of Alleged Al-Qaeda Terrorist*, Morning Edition (NPR radio broadcast June 10, 2002); see also Soufan, *supra* note 64, 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."); Stafford Smith, *supra* note 1023, at 49–80 (arguing that the alleged dirty bomb plot was "almost certainly a fantasy").

South Carolina.¹⁸³⁸ As a result of this transfer, Padilla was denied access to counsel.¹⁸³⁹

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.¹⁸⁴⁰ As a result of Padilla's change in status from material witness to enemy combatant, the government vacated the warrant.¹⁸⁴¹ Padilla's attorney filed a habeas corpus petition on his behalf.¹⁸⁴² Judge Mukasey ruled that she had standing to do that as Padilla's next friend¹⁸⁴³ and denied the government's motion to transfer the habeas case to the District of South Carolina.¹⁸⁴⁴

Judge Mukasey ruled that the President had the power to detain Padilla as an enemy combatant,¹⁸⁴⁵ but he also ruled that Padilla had a right to consult counsel and pursue a habeas corpus petition challenging the grounds for the detention.¹⁸⁴⁶ The government would have to show only "some evidence" to support its determination that Padilla was an enemy combatant.¹⁸⁴⁷ On reconsideration, Judge Mu-

1838. *Padilla*, 542 U.S. at 431–32; *Padilla*, 423 F.3d at 390; *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 569; see Eggen & Schmidt, *supra* note 1834; Gibbons, *supra* note 1835, at 304–05; Pohlman, *supra* note 220, at 76–77; Risen & Shenon, *supra* note 1834.

1839. *Padilla*, 233 F. Supp. 2d at 574.

1840. *Padilla*, 352 F.3d at 700; *Padilla*, 233 F. Supp. 2d at 571; see Eggen & Schmidt, *supra* note 1834; Gibbons, *supra* note 1835, at 304–05; Risen & Shenon, *supra* note 1834; see also Soufan, *supra* note 64, 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, *supra* note 1835, at 361.

1841. *Padilla*, 542 U.S. at 432 n.3; *Padilla*, 233 F. Supp. 2d at 571; see Newman, *supra* note 1835, at 362.

1842. *Padilla*, 542 U.S. at 432; *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, *supra* note 1835, at 364–65; see also Gibbons, *supra* note 1835, at 305; Hafetz, *supra* note 502, at 47; Pohlman, *supra* note 220, at 77; Susan Schmidt & Kamran Khan, *Lawmakers Question CIA on Dirty-Bomb Suspect*, Wash. Post, June 13, 2002, at A11.

1843. *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.

1844. *Padilla*, 233 F. Supp. 2d at 569, 578–87, 610. The court of appeals affirmed. *Padilla*, 352 F.3d at 704–10, 724.

1845. *Padilla*, 233 F. Supp. 2d at 569, 587–99, 610; see Pohlman, *supra* note 220, at 84–85; Weiser, *supra* note 1843.

1846. *Padilla*, 233 F. Supp. 2d at 569, 588, 599–605, 610; see Andrew G. Patel, *Accessing Padilla*, in *The Guantánamo Lawyers*, *supra* note 1023, at 364, 364–65; Pohlman, *supra* note 220, at 84–85; Weiser, *supra* note 1843.

1847. *Padilla*, 233 F. Supp. 2d at 570, 605–10; see Pohlman, *supra* note 220, at 85; Weiser, *supra* note 1843.

kasey upheld his original ruling on access to counsel.¹⁸⁴⁸ At the government's request, a month later, Judge Mukasey certified the issue for interlocutory appeal.¹⁸⁴⁹

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."¹⁸⁵⁰ 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.¹⁸⁵¹

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.¹⁸⁵² 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.¹⁸⁵³

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.¹⁸⁵⁴ But Hamdi was apprehended in Afghanistan.¹⁸⁵⁵ No opinion was

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 540–541 (Souter, joined by Ginsburg, concurring in part, dissenting in part, and concurring in the judgment, rejecting the government's proposed "some evidence" standard).

1848. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *see* Pohlman, *supra* note 220, at 85–86.

1849. *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).

1850. *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; Patel, *supra* note 1846, at 365; Pohlman, *supra* note 220, at 87–88.

1851. *Padilla*, 352 F.3d at 699, 724.

1852. *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 Bryer joined.); *see* Gibbons, *supra* note 1835, at 305; Linda Greenhouse, *Access to Courts*, N.Y. Times, June 29, 2004, at A1; Pohlman, *supra* note 220, at 120.

1853. *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 1852.

1854. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see* Gibbons, *supra* note 1835, at 303; Greenhouse, *supra* note 1852; Pohlman, *supra* note 220, at 76, 120.

1855. *Hamdi*, 542 U.S. at 510; *see* Gibbons, *supra* note 1835, at 303; Greenhouse, *supra* note 1852; Pohlman, *supra* note 220, at 86.

endorsed by a majority of the court,¹⁸⁵⁶ 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.¹⁸⁵⁷

Approximately four weeks before the Supreme Court issued its opinion in Padilla's case, the government released newly declassified information on Padilla.¹⁸⁵⁸ 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.¹⁸⁵⁹

On July 2, 2004, Padilla's New York attorney filed a habeas corpus petition on his behalf in the District of South Carolina.¹⁸⁶⁰ The court assigned the case to Judge Henry F. Floyd.¹⁸⁶¹ On February 28, 2005, Judge Floyd declared Padilla's military detention improper.¹⁸⁶² 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.¹⁸⁶³

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

1856. *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 220, at 120–21, 130.

1857. *Hamdi*, 542 U.S. at 579–99 (Justice Thomas dissenting); see Gibbons, *supra* note 1835, at 303; Greenhouse, *supra* note 1852; Pohlman, *supra* note 220, at 121.

Hamdi was released to his home in Saudi Arabia in October 2004 without charge. See Margulies, *supra* note 1018, at 156.

1858. See Eric Lichtblau, *U.S. Spells Out Dangers Posed by Plot Suspect*, N.Y. Times, June 2, 2004, at A1; Pohlman, *supra* note 220, at 119–20.

1859. See Lichtblau, *supra* note 1858.

1860. Petition, Padilla v. Hanft, No. 2:04-cv-2221 (D.S.C. July 2, 2004); see 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 1835, at 305; Hafetz, *supra* note 502, at 144; Pohlman, *supra* note 220, at 131.

1861. Docket Sheet, Padilla, No. 2:04-cv-2221 (D.S.C. July 2, 2004).

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).

1862. *Padilla*, 389 F. Supp. 2d 678; see Hafetz, *supra* note 502, 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 220, at 131.

1863. *Padilla*, 423 F.3d 386; see Pub. L. No. 107-40, 115 Stat. 224 (2001); see Gibbons, *supra* note 1835, at 306; Hafetz, *supra* note 502, 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 220, at 132.

two years against four other defendants.¹⁸⁶⁴ The case had been assigned to Judge Marcia G. Cooke.¹⁸⁶⁵

The court of appeals denied the government's motion to transfer Padilla to civilian authority in Florida.¹⁸⁶⁶

[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.¹⁸⁶⁷

The Supreme Court, however, granted the government's request to transfer Padilla.¹⁸⁶⁸ In light of Padilla's removal from military detention, the court later denied his petition for a writ of certiorari.¹⁸⁶⁹

First indicted on January 8, 2004, Adham Amin Hassoun was a Lebanese-born Palestinian charged with raising money and recruiting persons for jihad training.¹⁸⁷⁰ He and Padilla became friends when they both attended a Fort Lauderdale mosque in the 1990s.¹⁸⁷¹ Added by superseding indictment on September 16, 2004, Mohamed Hesham Youssef was charged as one of Hassoun's recruits;

1864. 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]; *Trying Cases*, *supra* note 226, at 8; *see* Gibbons, *supra* note 1835, at 306; Hafetz, *supra* note 502, 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 220, at 131; Jay Weaver, *Padilla to Face Terror Charges Here*, Miami Herald, Nov. 23, 2005, at 1A.

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.

1865. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1864; *Trying Cases*, *supra* note 226, at 8; *see* Hafetz, *supra* note 502, at 146.

Tim Reagan interviewed Judge Cooke for this report in the judge's chambers on October 8, 2009.

1866. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005); *see* Hafetz, *supra* note 502, 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 220, at 132.

1867. *Padilla*, 432 F.3d at 584.

1868. *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 502, at 146; Pohlman, *supra* note 220, 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.”).

1869. *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 502, at 146; Pohlman, *supra* note 220, at 133.

1870. Indictment, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 8, 2004); *Trying Cases*, *supra* note 226, at 8; *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.

1871. *See* Weaver, *supra* note 1864.

he was in custody in Egypt on other charges.¹⁸⁷² Kifah Wael Jayyousi and Kassem Daher were named in a sealed material support complaint filed on December 1, 2004.¹⁸⁷³ The complaint was unsealed on March 30, 2005, when Jayyousi was apprehended in Detroit on his return from Qatar.¹⁸⁷⁴ Jayyousi was born in Jordan,¹⁸⁷⁵ Daher was a Canadian citizen in overseas custody.¹⁸⁷⁶ Jayyousi and Daher were added to the pending indictment on April 7, 2005.¹⁸⁷⁷ Youssef and Daher remain fugitives.¹⁸⁷⁸

Even after Padilla was added to the indictment, there was no charge pertaining to a dirty bomb.¹⁸⁷⁹ The dirty bomb issue never arose at all in the case.¹⁸⁸⁰ But there was an allegation that “On or about July 24, 2000, Padilla filled out a ‘Mujahideen Data Form’ in preparation for violent jihad training in Afghanistan.”¹⁸⁸¹ The government claimed that it was found in Afghanistan among dozens of other applications late in 2001.¹⁸⁸²

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.¹⁸⁸³ 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.”¹⁸⁸⁴

1872. Second Superseding Indictment, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Sept. 16, 2004); see Weaver, *supra* note 1870.

1873. 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 226, at 8.

1874. See Hannah Sampson, *2 Men Held on Terror Charges*, *Miami Herald*, Mar. 30, 2005, at 9B.

1875. See Goodnough, *supra* note 1870.

1876. See Sampson, *supra* note 1874; Weaver, *supra* note 1868.

1877. Nov. 17, 2005, Indictment, *supra* note 1864; see Jack Dolan, *Third Suspect Faces Terror Charges*, *Miami Herald*, Apr. 9, 2005, at 4B.

1878. *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).

1879. See Pohlman, *supra* note 220, at 133; Weaver, *supra* note 1864.

1880. *Trying Cases*, *supra* note 226, at 7; Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1881. Nov. 17, 2005, Indictment, *supra* note 1864; see *Jayyousi*, 657 F.3d at 1093; Weaver, *supra* note 1868.

1882. 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.

1883. Joint Motion, *United States v. 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.

1884. 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.

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.¹⁸⁸⁵

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 persons in a foreign country, as impermissibly multiplicitous of other counts.¹⁸⁸⁶ The court of appeals reversed.¹⁸⁸⁷

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.¹⁸⁸⁸

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.¹⁸⁸⁹

Jury selection began on April 16, 2007.¹⁸⁹⁰ Judge Cooke had decided that the court should send out 3,000 jury duty letters for the trial.¹⁸⁹¹ Jurors were selected from a pool of approximately 300.¹⁸⁹² Voir dire lasted four weeks.¹⁸⁹³ Judge Cooke decided to use a jury questionnaire.¹⁸⁹⁴ On May 8, 2007, the jury was selected from a culled pool of 88 potential jurors.¹⁸⁹⁵

After about three weeks of testimony, it was discovered that one of the jurors was not a U.S. citizen.¹⁸⁹⁶ The jury summons was meant for his son, who had the same name.¹⁸⁹⁷ Another juror was excused because of injuries suffered when he

1885. Order, *Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Jan. 25, 2006); see Weaver, *supra* note 1868.

1886. 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.

1887. *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.

1888. 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.

1889. See Jay Weaver, *Judge Scolds Padilla's Lawyers for Leak*, Miami Herald, Jan. 25, 2007, at 6B.

1890. S.D. Fla. *Hassoun* Docket Sheet, *supra* note 1864; Jayyousi, 657 F.3d at 1091; see Jay Weaver, *Padilla Jury Picking Could Last 3 Weeks*, Miami Herald, Apr. 17, 2007, at 7B.

1891. *Trying Cases*, *supra* note 226, at 10; see *3,000 in Jury Pool for Terror Trial*, Miami Herald, Oct. 27, 2006.

1892. *Trying Cases*, *supra* note 226, at 10; see Abby Goodnough, *Jurors Seated in Terror Trial of Padilla and 2 Others*, N.Y. Times, May 9, 2007, at A18; Weaver, *supra* note 1890.

1893. See Goodnough, *supra* note 1892.

1894. 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.

1895. See Jay Weaver, *Angry Lawyers Finally Pick Jury*, Miami Herald, May 9, 2007, at 1B.

1896. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1897. *Id.*

tried to prevent a break-in of his daughter's car.¹⁸⁹⁸ 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.¹⁸⁹⁹

The jury convicted all three defendants on August 16, 2007, one day after beginning deliberations.¹⁹⁰⁰ Three months later, Hassoun attempted suicide.¹⁹⁰¹ 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.¹⁹⁰² The court of appeals, over a dissent, affirmed the convictions but remanded Padilla's case for a harsher sentence.¹⁹⁰³

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 that Padilla and his mother filed in the District of South Carolina against the government.¹⁹⁰⁴ The court originally assigned the action to Judge Floyd, but the action was transferred to Judge Gergel when he joined the bench.¹⁹⁰⁵ An appeal was heard on October 26.¹⁹⁰⁶

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 Yoo wrote when he worked for

1898. *Id.*

1899. *Id.*

1900. United States v. Jayyousi, 657 F.3d 1085, 1091–92 (11th Cir. 2011); see Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. Times, Aug. 17, 2007, at A1; Hafetz, *supra* note 502, at 146; Pohlman, *supra* note 220, 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.

1901. See Jay Weaver, *Padilla Codefendant Tries to Kill Himself*, Miami Herald, Dec. 4, 2007, at 5B.

1902. *Jayyousi*, 657 F.3d at 1092; S.D. Fla. *Hassoun Docket Sheet*, *supra* note 1864; see Hafetz, *supra* note 502, 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.

1903. *Jayyousi*, 657 F.3d at 1119 (opinion by Circuit Judge Joel F. Dubina, joined by Circuit Judge William H. Pryor, Jr.); see *id.* at 1119–35 (dissenting opinion by Circuit 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 Lizette Alvarez, *Sentence for Terrorist Is Too Short, Court Rules*, N.Y. Times, Sept. 20, 2011, at A12.

1904. Lebron v. Rumsfeld, 764 F. Supp. 2d 787 (D.S.C. 2011); see *Judge Tosses Out Padilla Torture Suit*, Wash. Post, Feb. 18, 2011, at A2.

1905. Docket Sheet, *Padilla v. Rumsfeld*, No. 2:07-cv-410 (D.S.C. Feb. 9, 2007) (noting transfer on Aug. 18, 2010); Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (noting commission on Aug. 9, 2010).

1906. Docket Sheet, *Lebron v. Rumsfeld*, No. 11-6480 (4th Cir. Apr. 13, 2011); see *Reinstate Torture Suit, Padilla Lawyers Urge*, Miami Herald, Oct. 27, 2011, at 3A.

the Justice Department's Office of Legal Counsel.¹⁹⁰⁷ The court assigned the case to Judge Jeffrey S. White,¹⁹⁰⁸ who denied Yoo's motion to dismiss.¹⁹⁰⁹ An appeal was argued on June 14, 2010,¹⁹¹⁰ but the case was stayed¹⁹¹¹ pending resolution of *Ashcroft v. Al-Kidd*¹⁹¹² by the Supreme Court.

Challenge: Attorney–Client Contacts

Padilla was transferred from New York to South Carolina without notice to his attorney.¹⁹¹³ 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.¹⁹¹⁴ Judge Mukasey ruled this restriction improper.¹⁹¹⁵

[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.¹⁹¹⁶

Judge Mukasey characterized concerns about using the attorney as a communication conduit to terrorists “gossamer speculation.”¹⁹¹⁷ “[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.”¹⁹¹⁸

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.¹⁹¹⁹ The government argued that access to counsel would interfere with the psychological pressure on Padilla employed as

1907. Complaint, *Padilla v. Yoo*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008); see Amended Complaint, *id.* (June 2, 2008).

1908. Docket Sheet, *Padilla*, No. 3:08-cv-35 (N.D. Cal. Jan. 4, 2008).

1909. *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009); see Adam Liptak, *Padilla Sues U.S. Lawyer Over Detention*, N.Y. Times, Jan. 5, 2008, at A9.

1910. Docket Sheet, *Padilla v. Yoo*, No. 09-16478 (9th Cir. July 14, 2009).

1911. Order, *id.* (Oct. 18, 2010).

1912. ___ U.S. ___, 131 S. Ct. 2074 (2011) (recognizing the former Attorney General's qualified immunity).

1913. See Chris Hedges, *Speaking for Terror Suspect, and for the Constitution*, N.Y. Times Feb. 11, 2003, at B2.

1914. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

1915. *Id.* at 569, 599–605, 610; see Weiser, *supra* note 1843.

1916. *Padilla*, 233 F. Supp. 2d at 603.

1917. *Id.* at 604.

1918. *Id.*

1919. *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 43–49 (S.D.N.Y. 2003).

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.¹⁹²⁰ Judge Mukasey was not persuaded.¹⁹²¹

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.¹⁹²²

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.¹⁹²³ "During these legal telephone calls the [Federal Detention Center] officials shall stay a reasonable distance away from the Defendant to allow for sufficient privacy."¹⁹²⁴ As trial approached, Judge Cooke ordered the detention center to provide a bigger conference table for meetings between the defendants and their attorneys.¹⁹²⁵

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."¹⁹²⁶

Special administrative measures for Padilla's detention (SAMs) made his psychiatric evaluation difficult,¹⁹²⁷ so Judge Cooke had the evaluation conducted in her courtroom.¹⁹²⁸ Judge Cooke was not present for the evaluation.¹⁹²⁹

Judge Cooke found Padilla competent to stand trial.¹⁹³⁰

1920. *Id.* at 43.

1921. *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.

1922. Patel, *supra* note 1846, at 365–65.

1923. Joint Motion, *supra* note 1883.

1924. Sept. 21, 2005, S.D. Fla. Order, *supra* note 1884.

1925. See Jay Weaver, *Padilla Judge: I Don't Want to Run a Prison*, Miami Herald, Feb. 4, 2006, at 1B.

1926. 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.

1927. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1928. *Id.*; see Jay Weaver, *Padilla Mental Evaluation to Be Done in Court*, Miami Herald, Dec. 22, 2006, at 5B.

1929. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1930. 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.

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.¹⁹³¹ Judge Mukasey reviewed the classified declaration to assess the validity of the government's denial of Padilla's access to counsel.¹⁹³² 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.¹⁹³³ The classified declaration did not refer to conduct by Padilla not described in the redacted declaration.¹⁹³⁴

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.¹⁹³⁵

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.¹⁹³⁶ The court of appeals reviewed both unredacted declarations, but did not rely on them.¹⁹³⁷

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.¹⁹³⁸ None was.¹⁹³⁹ 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.¹⁹⁴⁰ Hassoun's appellate brief included some still-classified information.¹⁹⁴¹

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.¹⁹⁴² The government asked that the witness's identity be protected by use of (1) a pseudonym; (2) light

1931. 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.

1932. Padilla, 233 F. Supp. 2d at 604.

1933. *Id.* at 609.

1934. *Id.*

1935. *Id.* at 608–10.

1936. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, 46 (S.D.N.Y. 2003).

1937. Padilla v. Rumsfeld, 352 F.3d 695, 701 n.4 (2d Cir. 2003).

1938. Docket Sheet, United States v. Jayyousi, No. 08-10494 (11th Cir. Feb. 4, 2008).

1939. Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 19, 2010.

1940. *Id.*

1941. *Id.*

1942. Motion in Limine, United States v. Hassoun, No. 0:04-cr-60001 (S.D. Fla. Mar. 22, 2007).

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.”¹⁹⁴³

At trial, the witness wore black-rimmed glasses and a closely cropped beard.¹⁹⁴⁴ He came to the courtroom from the basement by way of the prisoner elevator.¹⁹⁴⁵

Challenge: Court Security

For Padilla’s Miami trial, federal deputy marshals were brought in from around the country.¹⁹⁴⁶ An extra metal detector was set up outside Judge Cooke’s courtroom.¹⁹⁴⁷

Challenge: Jury Security

To shield potential jurors from the public during jury selection, the court erected a screen in the courthouse lobby.¹⁹⁴⁸ The jury was semi-sequestered.¹⁹⁴⁹ Their identities were known to the court and the parties, but identifying information was not presented in open court or otherwise made public.¹⁹⁵⁰ 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.¹⁹⁵¹ Instead of going their own way for lunch, they always ate together.¹⁹⁵² Once a week or so, the deputy marshals took them out for lunch.¹⁹⁵³

Restrooms on the courtroom’s floor were reserved for use by jurors and court staff only.¹⁹⁵⁴ 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.¹⁹⁵⁵

1943. *Id.*; see Jay Weaver, *Padilla Trial CIA Witness May Testify in Disguise*, Miami Herald, Mar. 22, 2007.

1944. See Jay Weaver, “*Secret Agent*” Testifies about Padilla Document, Miami Herald, May 16, 2007, at 3A.

1945. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1946. See Goodnough, *supra* note 1870.

1947. See Weaver, *supra* note 1890.

1948. See *id.*

1949. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1950. *Id.*

1951. *Id.*

1952. *Id.*

1953. *Id.*

1954. *Id.*

1955. *Id.*

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.¹⁹⁵⁶ 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.¹⁹⁵⁷ Judge Floyd sits in Spartanburg, but he anticipated a possible evidentiary hearing at the larger courthouse in Charleston, about 200 miles away.¹⁹⁵⁸ For this reason, a courtroom deputy and a court reporter there obtained security clearances.¹⁹⁵⁹ As it happened, oral arguments were held in Spartanburg, and they did not refer to classified information.¹⁹⁶⁰

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.¹⁹⁶¹

Southern District of Florida

All defense attorneys in the criminal case received security clearances.¹⁹⁶² There was already a SCIF in the basement of the courthouse, and defense attorneys could review classified information in this room.¹⁹⁶³

More than two years after Padilla's indictment, Judge Cooke granted him access to classified evidence created during his military confinement.¹⁹⁶⁴ 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.¹⁹⁶⁵

All of Judge Cooke's staff received security clearances for this case.¹⁹⁶⁶ The last of her cleared law clerks left in 2009, but her permanent staff—her assistant, courtroom deputy, and court reporter—all retain top secret clearances.¹⁹⁶⁷ During this case, Judge Cooke did not use interns, because they would not have security clearances.¹⁹⁶⁸

1956. Interview with Hon. Henry F. Floyd, Nov. 19, 2009.

1957. *Id.*

1958. *Id.*

1959. *Id.*

1960. *Id.*

1961. *Id.*; see Reagan, *supra* note 173, at 19 (describing SCIFs).

1962. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1963. *Id.*

1964. 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.

1965. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1966. *Id.*

1967. *Id.*

1968. *Id.*

Challenge: FISA Evidence

FISA warrants resulted in evidence against each of the defendants.¹⁹⁶⁹ 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.¹⁹⁷⁰

Judge Cooke referred the matter to Magistrate Judge Stephen T. Brown,¹⁹⁷¹ 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.”¹⁹⁷² 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 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.”¹⁹⁷³ When she was not looking at them, Judge Cooke stored the warrant applications in a safe in her chambers.¹⁹⁷⁴

Judge Cooke was also called upon to review an evidentiary substitute for classified evidence, as provided by the Classified Information Procedures Act (CIPA).¹⁹⁷⁵ 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.¹⁹⁷⁶

1969. *Trying Cases*, *supra* note 226, at 8; Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1970. Hassoun FISA Motion, *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Feb. 14, 2006).

1971. FISA Order, *id.* (Apr. 4, 2007), *available at* 2007 WL 1068127.

1972. Report and Recommendation at 3, *id.* (Dec. 15, 2006), *available at* 2007 WL 1068127.

1973. FISA Order, *supra* note 1971.

1974. Interview with Hon. Marcia G. Cooke, Oct. 8, 2009.

1975. *Id.*; *see* 18 U.S.C. app. 3; Reagan, *supra* note 173 (discussing CIPA).

1976. 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 descent in Lackawanna, New York, had been to an Al-Qaeda training camp in Afghanistan that spring.¹⁹⁷⁷ The men, who were all American citizens, were inspired to visit the camp by a local friend and a traveling imam, who preached the importance of jihad.¹⁹⁷⁸ The men lied to family, friends, and ultimately the FBI and said they were going to Pakistan for religious training.¹⁹⁷⁹ 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.¹⁹⁸⁰

Alleged recruiter Kamal Derwish had an apartment in Lackawanna, where he hosted gatherings of young Yemeni-American men.¹⁹⁸¹ Derwish shared the apartment with Yahya Goba, whom he had met at a pro-Palestinian rally in New York City.¹⁹⁸² In addition to Goba, those who attended Derwish's gatherings included Sahim Alwan, Yasein Taher, Mukhtar al-Bakri, Shafal Mosed, and Faysal Galab.¹⁹⁸³

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.¹⁹⁸⁴ The sermon, and Derwish's encouragement, persuaded the "Lackawanna Six" to travel to Afghanistan to train for jihad.¹⁹⁸⁵ They told their families and friends, however, that they were going to Pakistan for religious study.¹⁹⁸⁶

1977. 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; Temple-Raston, *supra* note 135, at 153.

1978. See *United States v. Goba*, 220 F. Supp. 2d 182, 206, 208, 212, 214 (W.D.N.Y. 2002); *Sleeper Cell*, *supra* note 1977; Powell, *supra* note 1977; Matthew Purdy, *Sixth Man Pleads Guilty to al Qaeda Training*, N.Y. Times, May 20, 2003, at A17; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 4.

1979. See *Sleeper Cell*, *supra* note 1977; Powell, *supra* note 1977; Purdy & Bergman, *supra* note 1977.

1980. See Powell, *supra* note 1977; Purdy, *supra* note 1978; Purdy & Bergman, *supra* note 1977; Marc Santora, *6 Indicted on Charges of Providing Material Aid to Terrorist Group*, N.Y. Times, Oct. 22, 2002, at A19.

1981. See *Sleeper Cell*, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Soufan, *supra* note 64, at 507; Temple-Raston, *supra* note 135, at 31–32, 44–46.

1982. See Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 37.

1983. See Temple-Raston, *supra* note 135, at 44–45.

1984. See Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 81–87.

1985. See *Sleeper Cell*, *supra* note 1977; Temple-Raston, *supra* note 135, at 88–89.

1986. See *Sleeper Cell*, *supra* note 1977; Powell, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 89.

Taher, Mosed, and Galab flew from New York to Lahore, Pakistan, on April 28.¹⁹⁸⁷ Goba, Alwan, and al-Bakri flew from Toronto to Karachi, Pakistan, on May 14.¹⁹⁸⁸ 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.¹⁹⁸⁹ Shortly after arriving, however, the men began to look for opportunities to leave.¹⁹⁹⁰

Alwan, Taher, al-Bakri, Mosed, and Galab returned to the United States in June; Goba returned in August.¹⁹⁹¹

In May 2002, al-Bakri traveled to the Middle East for a September wedding to a woman in Bahrain selected by his father.¹⁹⁹² Bahraini authorities arrested him from his wedding bed on September 9.¹⁹⁹³ The other five men were arrested back home on September 13 and 14, on a criminal complaint for material support of terrorism.¹⁹⁹⁴

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 16.¹⁹⁹⁵ 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.¹⁹⁹⁶

1987. *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 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 94.

1988. *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 1977; Powell, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 94.

1989. *See* Powell, *supra* note 1977; Temple-Raston, *supra* note 135, at 88–89, 99–109; *see also* Cucullu, *supra* note 1040, at 214 (reporting that at the camp the men became friends with Australian David Hicks, who would become a Guantánamo Bay detainee).

1990. *See Sleeper Cell*, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 110–25.

1991. *Goba*, 240 F. Supp. 2d at 251; *Goba*, 220 F. Supp. 2d at 189–90; *see id.* at 211; *Sleeper Cell*, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 129.

1992. *See* Temple-Raston, *supra* note 135, at 7.

1993. *See Sleeper Cell*, *supra* note 1977; John Kifner, *Bahrain Presence at Crucial Time Led to Arrest*, N.Y. Times, Sept. 28, 2002, at A11; Purdy & Bergman, *supra* note 1977; Santora, *supra* note 1980; Temple-Raston, *supra* note 135, at 1, 3, 154, 205.

1994. *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 1977; Powell, *supra* note 1977; Santora, *supra* note 1980; Temple-Raston, *supra* note 135, at 160–61.

1995. *Goba*, 240 F. Supp. 2d at 245 n.3; *Goba*, 220 F. Supp. 2d at 184; *Goba* Docket Sheet, *supra* note 1994.

Tim Reagan interviewed Judge Schroeder for this report in the judge's chambers on October 31, 2007.

1996. *Goba*, 240 F. Supp. 2d at 245; *Goba* Docket Sheet, *supra* note 1994; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

All pretrial matters in criminal cases are referred to magistrate judges in this district.¹⁹⁹⁷ On September 18 through 20, Judge Schroeder held a detention hearing in the court's large ceremonial courtroom.¹⁹⁹⁸ 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.¹⁹⁹⁹ Public picketers also occupied space in the plaza and around the courthouse; a popular picket read, "Jail, No Bail."²⁰⁰⁰ 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.²⁰⁰¹ Following the three days of hearing, the court accepted additional proffers from both sides and concluded the hearing on October 3.²⁰⁰²

Judge Schroeder ruled on October 8 that all defendants except for Alwan should be detained.²⁰⁰³ Told that supporters were willing to post \$600,000 bond per defendant, Judge Schroeder set Alwan's bail at \$600,000.²⁰⁰⁴ But Alwan was unable to post such an amount after all, so he remained detained.²⁰⁰⁵

The six men were indicted on October 21.²⁰⁰⁶ The court assigned the case to District Judge William M. Skretny for trial.²⁰⁰⁷

The government filed a complaint against a seventh man—Jaber Elbaneh—on September 17, 2002,²⁰⁰⁸ and an indictment against him on December 15, 2003.²⁰⁰⁹ He traveled to Yemen instead of returning from Afghanistan and became one of

1997. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1998. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185; *Goba* Docket Sheet, *supra* note 1994; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

1999. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2000. *Id.*

2001. *Id.*

2002. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 185, 196–223; *Goba* Docket Sheet, *supra* note 1994; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2003. *Goba*, 240 F. Supp. 2d at 245; *Goba*, 220 F. Supp. 2d at 194–96; *Goba* Docket Sheet, *supra* note 1994; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

2004. *Goba*, 220 F. Supp. 2d at 194; *Goba* Docket Sheet, *supra* note 1994; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2005. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007; *see Goba*, 240 F. Supp. 2d at 244.

2006. *Goba*, 240 F. Supp. 2d at 244; *see Purdy & Bergman*, *supra* note 1977; Santora, *supra* note 1980; Temple-Raston, *supra* note 135, at 193.

2007. *Goba* Docket Sheet, *supra* note 1994.

Tim Reagan interviewed Judge Skretny for this report in Judge Schroeder's chambers on October 31, 2007, following a private interview with Judge Schroeder.

2008. Docket Sheet, *United States v. Elbaneh*, No. 1:02-mj-111 (W.D.N.Y. Sept. 17, 2002).

2009. Docket Sheet, *United States v. Elbaneh*, No. 1:03-cr-255 (W.D.N.Y. Dec. 15, 2003).

the FBI's most-wanted terrorism suspects.²⁰¹⁰ He was arrested in Yemen by Yemeni authorities in 2004, but he escaped two years later.²⁰¹¹ He surrendered to Yemeni authorities in May 2007, who agreed not to extradite him to the U.S.²⁰¹² He was observed in public in Yemen in February 2008.²⁰¹³ Yemeni authorities arrested him again following American press reports of his boasting that his freedom was protected by Yemen's president.²⁰¹⁴ On January 15, 2010, Judge Skretny appointed an attorney to represent him in U.S. court, should he ever appear.²⁰¹⁵

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.²⁰¹⁶ This matter, however, was not presented to the court.²⁰¹⁷

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.²⁰¹⁸ It was reported that the defendants might have been regarded as enemy combatants had they not pleaded guilty.²⁰¹⁹

Galab, the first to plead, was sentenced to the shortest term—seven years.²⁰²⁰ Mosed and Taher each were sentenced to eight years; Alwan was sentenced to

2010. http://www.fbi.gov/wanted/wanted_terrorists/@@wanted-group-listing; see *Sleeper Cell*, *supra* note 1977; Temple-Raston, *supra* note 135, 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; see also Soufan, *supra* note 64, at 512 (noting that only indicted terrorists appear on the FBI's most wanted terrorists site).

2011. 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 2010; Craig Whitlock, *Bounties a Bust in Hunt for Al-Qaeda*, Wash. Post, May 17, 2008, at A1 [hereinafter *Bounties*].

2012. See Herbeck, *supra* note 2011 (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 135, at 254; *U.S. Fugitive*, *supra* note 2010; Whitlock, *supra* note 2010; Robert F. Worth, *Wanted by F.B.I., but Walking Out of a Yemen Hearing*, N.Y. Times, Mar. 1, 2008, at A3.

2013. See Whitlock, *Bounties*, *supra* note 2011; Worth, *supra* note 2012.

2014. See Whitlock, *supra* note 2010; Whitlock, *supra* note 2011; see also Herbeck, *supra* note 2011 (reporting that Elbaneh was sentenced to 10 years in Yemen's prison system for crimes in Yemen).

2015. Order, *United States v. Elbaneh*, No. 1:03-cr-255 (W.D.N.Y. Jan. 15, 2010); see Herbeck, *supra* note 2011.

2016. See Temple-Raston, *supra* note 135, at 189, 193.

2017. Interview with Hon. William M. Skretny, Oct. 31, 2007; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2018. *Goba* Docket Sheet, *supra* note 1994; see Temple-Raston, *supra* note 135, at 198-205.

2019. Powell, *supra* note 1977 ("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 135, at 200 ("The threat was unspoken . . .").

2020. *Goba* Docket Sheet, *supra* note 1994; see David Staba, *Qaeda Camp Attendee Gets 7 Years*, N.Y. Times, Dec. 17, 2003, at A37; Temple-Raston, *supra* note 135, at 198-99.

nine and one-half years.²⁰²¹ Both Goba, who organized the trip, and al-Bakri, who stayed at the training camp the longest, were sentenced to ten years.²⁰²² As a reward for subsequent assistance in other prosecutions, Goba and Alwan's sentences were reduced to nine years.²⁰²³ It was reported that Goba, Alwan, and Taher were offered entry into the witness protection program.²⁰²⁴

Derwish apparently was killed in November 2002 in a U.S. military action in Yemen.²⁰²⁵ Al-Dosari was arrested by Pakistani authorities and, in January 2002, transferred to Guantánamo Bay.²⁰²⁶ He attempted suicide several times while there.²⁰²⁷ The government released him to Saudi Arabia on July 16, 2007.²⁰²⁸

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.

2021. Goba Docket Sheet, *supra* note 1994; 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 135, at 199.

Mosed was released from prison on September 1, 2009. <http://www.bop.gov> (reg. no. 11875-055).

2022. 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 1994; see *United States v. Goba*, 220 F. Supp. 2d 182, 199, 217, 222 (W.D.N.Y. 2002); Purdy & Bergman, *supra* note 1977 (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 2021 (reporting a sentence of ten years for al-Bakri); Temple-Raston, *supra* note 135, at 199.

Al-Bakri was the last to plead. See Purdy, *Sixth Man Pleads*, *supra* note 1978. He was released from prison on July 1, 2011. <http://www.bop.gov> (reg. no. 11879-055).

2023. 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 2022; see Sentence Reduction Motion, *id.* (May 20, 2010); Order, *id.* (Jan. 7, 2008) (denying Goba's motion for a further reduction of 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 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."

2024. Michel, *supra* note 2020.

2025. See *Sleeper Cell*, *supra* note 1977; Herbeck, *supra* note 2011; Powell, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Soufan, *supra* note 64, at 506–07; Temple-Raston, *supra* note 135, at 195–98, 249–50, 252.

2026. See *Sleeper Cell*, *supra* note 1977; Powell, *supra* note 1977; Purdy & Bergman, *supra* note 1977; Temple-Raston, *supra* note 135, at 139–40, 148.

2027. See Khan, *supra* note 1169, at 210, 298; Temple-Raston, *supra* note 135, at 247–49.

2028. See *id.* at 252.

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.²⁰²⁹ Article III judges are automatically cleared to see classified evidence, but magistrate judges are not.²⁰³⁰

The government filed potentially sensitive affidavits with Judge Schroeder to support search warrants and detention.²⁰³¹ Defense counsel were able to see these affidavits so that they could rebut them, and defense counsel were not required to obtain security clearances.²⁰³²

Challenge: Court Security

For this high-profile terrorism prosecution, the Marshal established extra security at the courthouse doors.²⁰³³ The courthouse received security sweeps three times a day, and security included a bomb-sniffing dog.²⁰³⁴ During the days of pleas and sentences, armed surveillance officers were posted at the windows in Judge Skretny's chambers.²⁰³⁵

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.²⁰³⁶ But the defendants' pleas before Judge Skretny were taken by affirmation.²⁰³⁷

2029. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2030. Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information ¶ 4, 18 U.S.C. app. 3 § 9 note; 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* Reagan, *supra* note 173, at 3.

2031. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2032. *Id.*

2033. Interview with Hon. William M. Skretny, Oct. 31, 2007.

2034. *Id.*; Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2035. Interview with Hon. William M. Skretny, Oct. 31, 2007.

2036. Interview with Hon. H. Kenneth Schroeder, Jr., Oct. 31, 2007.

2037. 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.*)²⁰³⁸

On November 22, 2005, Ahmed Omar Abu Ali was convicted of plotting to kill President George W. Bush and aiding Al-Qaeda.²⁰³⁹ Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia presided over the case.²⁰⁴⁰

Abu Ali, whose parents are Jordanian, was born in Houston, Texas, and raised in Falls Church, Virginia.²⁰⁴¹ 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.²⁰⁴² In 2002, he went to Saudi Arabia to attend the University of Medina.²⁰⁴³ He apparently had significant contacts with Al-Qaeda.²⁰⁴⁴ He was arrested in Saudi Arabia, by officers of Saudi Arabia's counterterrorism Mabahith, on June 8, 2003, as part of an investigation of the May 12, 2003, Riyadh bombings.²⁰⁴⁵

2038. An appeal was heard by Fourth Circuit Judges J. Harvie Wilkinson III, Diana Gribbon Motz, and William B. Traxler, Jr.

2039. 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).

2040. 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 2039; Stout, *supra* note 2039; 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.

2041. *United States v. Abu Ali*, 528 F.3d 210, 221; Sentencing Order, *supra* note 2039; 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 2039; Stout, *supra* note 2039.

Abu Ali's father was a computer analyst for Saudi Arabia's embassy. *Abu Ali*, 528 F.3d at 221; see Isikoff, *supra*.

2042. *Abu Ali*, 528 F.3d at 221; Sentencing Order, *supra* note 2039, 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.

2043. *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 2039, at 12; see Meyer, *supra* note 2042; Stout, *supra* note 2039.

2044. *Abu Ali*, 528 F.3d at 221-24; see Isikoff, *supra* note 2041; Mowbray, *supra* note 2042.

2045. *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 2041; Isikoff, *supra* note 2041; Murphy, *supra* note 2039; Stout, *supra* note 2039.

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 Columbia.²⁰⁴⁶ On December 16, Judge John D. Bates denied the government's motion to dismiss the petition for lack of jurisdiction,²⁰⁴⁷ but on September 19, 2005, Judge Bates dismissed the petition as moot, because Abu Ali had been indicted and transferred to Virginia.²⁰⁴⁸

Abu Ali was held in Saudi Arabia until February 21, 2005, following a February 3 indictment for conspiracy to establish terrorist operations.²⁰⁴⁹ The indictment later was expanded to include conspiracy to kill the President.²⁰⁵⁰ He argued unsuccessfully that his confession was inadmissible because he was tortured while held in Saudi Arabia.²⁰⁵¹

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.²⁰⁵² The court of appeals vacated the sentence;²⁰⁵³ although Judge Diana Gribbon Motz determined that the sentence was within Judge Lee's discretion,²⁰⁵⁴ Judges J. Harvie Wilkinson III and William B. Traxler, Jr., determined that the sentence insufficiently reflected the gravity of the crime.²⁰⁵⁵ On July 27,

2046. Docket Sheet, *Abu Ali v. Ashcroft*, No. 1:04-cv-1258 (D.D.C. July 28, 2004); see Hafetz, *supra* note 502, at 196.

2047. *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004); see Hafetz, *supra* note 502, at 196–97.

2048. *Abu Ali v. Gonzales*, 387 F. Supp. 2d 16 (D.D.C. 2005); see Hafetz, *supra* note 502, at 197.

2049. *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 2041; Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, Wash. Post, Feb. 23, 2005, at A1; Murphy, *supra* note 2039.

2050. *Abu Ali*, 528 F.3d at 225; *Abu Ali*, 396 F. Supp. 2d at 704.

2051. *Abu Ali*, 528 F.3d at 231–34; *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; see Bradley, *supra* note 2041; Hafetz, *supra* note 502, at 197; Isikoff, *supra* note 2041; Jerry Markon, *Conviction Upheld in Terror Plot*, Wash. Post, June 7, 2008, at B3; Markon & Priest, *supra* note 2049; Meyer, *supra* note 2042; Murphy, *supra* note 2039.

Portions of the confession are included in an NBC News report: <http://www.msnbc.msn.com/id/10266654/>.

2052. Sentencing Order, *supra* note 2039; see Stout, *supra* note 2039.

It was reported that Abu Ali was sent to the “Super Max” prison in Florence, Colorado. Daniel McGrory, *Al-Qaeda Man Who Plotted to Kill Bush Is Sent to “Superjail,”* London Times, June 20, 2006, at 8.

2053. *Abu Ali*, 528 F.3d at 269, *cert. denied*, ___ U.S. ___, 129 S. Ct. 1312 (2009); see Markon, *supra* note 2051.

2054. *Abu Ali*, 528 F.3d at 269–82 (Motz, dissenting).

2055. *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.

2009, Judge Lee resentenced Abu Ali to life in prison.²⁰⁵⁶ The court of appeals affirmed the life sentence.²⁰⁵⁷

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 Mabath officers in Saudi Arabia.²⁰⁵⁸ Because the identities of Mabath officers are secret,²⁰⁵⁹ the Saudi government would not permit them to come to the United States to testify.²⁰⁶⁰ There also was the risk that dangerous groups in Saudi Arabia would object to the officers' cooperation with an American prosecution.²⁰⁶¹

Judge Lee sent to Saudi Arabia two prosecutors, two defense attorneys, a camera operator, and an interpreter.²⁰⁶² A live video feed was established between Saudi Arabia and the United States, and the judge, additional counsel for both sides, and the court reporter were in Alexandria.²⁰⁶³ 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.²⁰⁶⁴

Portions of the deposition were put into evidence at a suppression hearing, in addition to live testimony from FBI agents (who had interviewed the Mabath officers when Abu Ali was transported from Saudi Arabia to the United States),

2056. E.D. Va. Docket Sheet, *supra* note 2040; see Hafetz, *supra* note 502, at 197; Jerry Markon, *Falls Church Man's Sentence in Terror Plot Is Increased to Life*, Wash. Post, July 28, 2009, at A3.

2057. United States v. Abu Ali, 410 F. App'x 673 (4th Cir. 2011).

2058. 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 (prosecuting attorney in the case observing 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 2039, at 1510 ("Over Abu Ali's objection, such depositions were taken in July 2005 using procedures that, whatever their merits, were certainly novel.").

2059. E.D. Va. Sept. 16, 2005, Order, *supra* note 2058; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

The Mabath is the Saudi domestic security service. E.D. Va. Sept. 16, 2005, Order, *supra* note 2058.

2060. *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 2058, at 2.

2061. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; see E.D. Va. Sept. 16, 2005, Order, *supra* note 2058, at 5.

2062. *Abu Ali*, 528 F.3d at 239; *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2063. *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.

2064. *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.

expert witnesses, and other percipient witnesses.²⁰⁶⁵ The judge ruled against suppression, but he ruled that the defense could argue coercion to the jury.²⁰⁶⁶ So the split-screen video deposition evidence was played to the jury as well.²⁰⁶⁷

The Mabahith officers testified pseudonymously.²⁰⁶⁸ 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.²⁰⁶⁹

Taking the video depositions of foreign witnesses was challenging for several reasons.²⁰⁷⁰ First, there was a substantial difference in time zones.²⁰⁷¹ Second, a secure communication line was necessary, and the availability of a secure line was not reliable.²⁰⁷² Third, the heat in Saudi Arabia sometimes caused technical difficulties.²⁰⁷³

Judge Lee acknowledges something he would do differently if he had it to do over: He would send at least one more interpreter.²⁰⁷⁴ One interpreter was not enough, because, at the very least, interpreters need breaks.²⁰⁷⁵

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.”²⁰⁷⁶

Challenge: Classified Evidence

Some of the evidence presented in Abu Ali’s trial was classified.²⁰⁷⁷ Classified evidence was stored in the court’s sensitive compartmented information facility (SCIF).²⁰⁷⁸ 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

2065. *Abu Ali*, 395 F. Supp. 2d at 344; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2066. *Abu Ali*, 395 F. Supp. 2d at 341, 373, 386–87; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2067. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006; *see Abu Ali*, 528 F.3d at 238–39.

2068. *Abu Ali*, 395 F. Supp. 2d at 344; E.D. Va. Sept. 16, 2005, Order, *supra* note 2058, at 4–5; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2069. E.D. Va. Sept. 16, 2005, Order, *supra* note 2058, at 4, 7, 9–10; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2070. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2071. *Id.*

2072. *Id.*

2073. *Id.*

2074. *Id.*

2075. *Id.*

2076. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008).

2077. Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2078. *Id.*; *see Reagan*, *supra* note 173, at 19 (describing SCIFs).

one.²⁰⁷⁹ Only the cleared attorney, and not Abu Ali or either uncleared attorney, was allowed to see classified evidence.²⁰⁸⁰

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 could not see.²⁰⁸¹ At issue were two messages that the government claimed were coded communications between the defendant and fellow jihadists.²⁰⁸²

The government produced unredacted copies of the messages to cleared counsel.²⁰⁸³ 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.”²⁰⁸⁴ 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.²⁰⁸⁵ 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.²⁰⁸⁶

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.”²⁰⁸⁷

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.²⁰⁸⁸

2079. *Abu Ali*, 528 F.3d at 248–49; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2080. *Abu Ali*, 528 F.3d at 248–55; Interview with Hon. Gerald Bruce Lee, Oct. 2, 2006.

2081. *Abu Ali*, 528 F.3d at 248–57.

2082. *Id.* at 236–37, 248.

2083. *Id.* at 249.

2084. *Id.*

2085. *Id.* at 250; *see id.* at 227–31 (holding that *Miranda* warnings were not required).

2086. *Id.* at 250; *see* 18 U.S.C. app. 3 (text of CIPA); Reagan, *supra* note 173 (describing CIPA procedures).

2087. *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.”).

2088. *Id.* at 255.

The court held, however, that the error was harmless beyond a reasonable doubt.²⁰⁸⁹

Challenge: Classified Arguments

In the appeal, part of the record and part of the briefing concerning classified evidence were classified.²⁰⁹⁰ Classified materials were filed through the classified information security officer.²⁰⁹¹ Part of oral argument was conducted in closed session.²⁰⁹²

All of Judge Traxler's law clerks are career clerks, and two of them had top secret security clearances.²⁰⁹³ One of the two clerks with security clearances was assigned to help with the case.²⁰⁹⁴ Judge Traxler reviewed most of the classified materials for the case in his Greenville, South Carolina, chambers;²⁰⁹⁵ there is a SCIF in the Greenville courthouse.²⁰⁹⁶ 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.²⁰⁹⁷ 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.²⁰⁹⁸

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.²⁰⁹⁹ Or a judge or law clerk taking a break to get coffee must take classified docu-

2089. *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.”).

2090. *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. Governmentt Appeal Docket Sheet] (appeal by the government, noting Abu Ali’s filing of a classified supplemental brief on Mar. 5, 2007, and a classified supplemental appendix on Mar. 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).

2091. 4th Cir. Classified Briefing Order, *supra* note 2090.

An “under seal, in camera, ex parte notice” was filed in the district court on April 27, 2007. 4th Cir. Governmentt Appeal Docket Sheet, *supra* note 2090 (noting that an original document was filed with the classified information security officer).

2092. *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.

2093. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

2094. *Id.*

2095. *Id.*

2096. *Id.*; Interview with 4th Cir. Clerk’s Office Staff, Feb. 26, 2008.

2097. Interview with Hon. William B. Traxler, Jr., Nov. 12, 2008.

2098. *Id.*

2099. *Id.*

ments along.²¹⁰⁰ 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 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.²¹⁰¹

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.”²¹⁰² 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.”²¹⁰³

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.²¹⁰⁴

2100. *Id.*

2101. *Id.*

2102. 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.”

2103. 4th Cir. Classification Review Order, *supra* note 2102, at 1–2.

2104. E.D. Va. Docket Sheet, *supra* note 2040.

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.²¹⁰⁵ The indictment listed 32 terrorism counts.²¹⁰⁶ 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.²¹⁰⁷ One related case was prosecuted before Judge Brinkema,²¹⁰⁸ and another related case was prosecuted before Judge Claude M. Hilton.²¹⁰⁹

Nine defendants are American citizens, and three served in the U.S. military.²¹¹⁰ At core, they were charged with conspiracy, in violation of the Neutrality Act,²¹¹¹ to support Lashkar-e-Taiba (LET), a terrorist group that opposes Indian

2105. *United States v. Benkahla*, 530 F.3d 300, 303 (4th Cir. 2008); *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); 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.

2106. *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 2105, at 3.

2107. *Benkahla*, 530 F.3d at 303–04; *Khan*, 461 F.3d at 485–86; *Khan*, 309 F. Supp. 2d 789; *Chandia*, 514 F.3d at 370; Khan Habeas Relief Opinion, *supra* note 2105, 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 2105; 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.

2108. Docket Sheet, *United States v. Al-Timimi*, No. 1:04-cr-385 (E.D. Va. Sept. 23, 2004) [hereinafter *Al-Timimi* Docket Sheet].

2109. 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 Isikoff, *supra* note 2041. Subsequently he was tried for other crimes. See *supra*, “A Plot to Kill President Bush.”

2110. See Lichtblau, *supra* note 2105.

2111. 18 U.S.C. § 960.

rule over Kashmir.²¹¹² The trial showed that the men played paintball to prepare for possible assistance to rebel forces in Chechnya.²¹¹³

Judge Brinkema tried four defendants in one bench trial,²¹¹⁴ acquitting one on February 20, 2004,²¹¹⁵ and convicting three on March 4.²¹¹⁶ The convicted defendants were sentenced on June 15,²¹¹⁷ and they were resentenced on July 29, 2005,²¹¹⁸ in light of the intervening Supreme Court determination in *United States v. Booker* that federal sentencing guidelines are advisory.²¹¹⁹

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.²¹²⁰ Khan spent time at an LET training camp in Pakistan.²¹²¹ 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.²¹²² Beginning in 1999, LET's primary focus was combating India's control in Kashmir.²¹²³ 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.²¹²⁴ At the training camp, Khan fired an AK-47 rifle, an antiaircraft gun, and a rocket-propelled grenade.²¹²⁵ By December 2001, the United States had substantially defeated the

2112. *Khan*, 461 F.3d at 484; Khan Habeas Relief Opinion, *supra* note 2105, at 2–3; see Lichtblau, *supra* note 2105; Markon, *supra* note 2105; 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.” 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. *Id.*

2113. *United States v. Khan*, 309 F. Supp. 2d 789, 803–07 (E.D. Va. 2004); see also Lichtblau, *supra* note 2105.

2114. *Khan*, 461 F.3d at 485–86 & n.4; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 2105, at 3.

2115. *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*].

2116. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 827; Khan Habeas Relief Opinion, *supra* note 2105, at 3–4.

2117. *Royer Docket Sheet*, *supra* note 2105; Khan Habeas Relief Opinion, *supra* note 2105, at 4; see Bradley, *supra* note 2107.

2118. *Khan*, 461 F.3d at 486; *Royer Docket Sheet*, *supra* note 2105; Khan Habeas Relief Opinion, *supra* note 2105, at 4.

2119. 543 U.S. 220 (2005) (decided Jan. 12, 2005).

2120. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796; Khan Habeas Relief Opinion, *supra* note 2105, at 4; see Bradley, *supra* note 2107; Sheridan, *supra* note 2112.

2121. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 803, 807; Khan Habeas Relief Opinion, *supra* note 2105, 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.”).

2122. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 806–07.

2123. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 807; see Sheridan, *supra* note 2112.

2124. *Khan*, 309 F. Supp. 2d at 810.

2125. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811; Khan Habeas Relief Opinion, *supra* note 2105, at 27.

Taliban²¹²⁶ and declared LET a terrorist organization.²¹²⁷ Khan returned to the United States that month.²¹²⁸ 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.²¹²⁹ 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.²¹³⁰ 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.²¹³¹

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.²¹³² Chapman also spent time at the LET training camp in Pakistan.²¹³³ In addition, Chapman purchased the video camera and transmitter for the robot plane on behalf of the prominent LET member.²¹³⁴ 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.²¹³⁵

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

2126. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

2127. *Khan*, 309 F. Supp. 2d at 812; Khan Habeas Relief Opinion, *supra* note 2105, at 2.

2128. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 811.

2129. *Khan*, 461 F.3d at 484; *Khan*, 309 F. Supp. 2d at 813–14; Khan Habeas Relief Opinion, *supra* note 2105, at 17; *see* United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008).

2130. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 820, 821, 823, 826–27, 827; Khan Habeas Relief Opinion, *supra* note 2105, at 4; *Royer* Docket Sheet, *supra* note 2105 (noting a court verdict against Masoud Ahmad Khan on Mar. 4, 2004).

2131. Khan Habeas Relief Opinion, *supra* note 2105, at 2, 31 & n.2, *certificate of appealability denied*, Opinion, Khan v. United States, No. 1:08-cv-533 (E.D. Va. Oct. 20, 2011), *available at* 2011 WL 5008572.

2132. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 803, 816; *see* Bradley, *supra* note 2107; Markon, *supra* note 2107; Sheridan, *supra* note 2112. The original sentence of 85 years was reduced to 65 years on July 29, 2005. *Royer* Docket Sheet, *supra* note 2105 (July 29, 2005, minute entry).

2133. *Khan*, 461 F.3d at 484, 490; *Khan*, 309 F. Supp. 2d at 807, 811.

2134. *Khan*, 461 F.3d at 484, 489; *Khan*, 309 F. Supp. 2d at 812–13.

2135. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 824, 826, 827; *Royer* Docket Sheet, *supra* note 2105 (noting a court verdict against Seifullah Chapman on Mar. 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 2105 (noting Dec. 23, 2009, dismissal of petition).

him to four and one-third years in prison.²¹³⁶ 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.²¹³⁷ Although the court of appeals reversed her downward departure from the sentencing guidelines and remanded for resentencing,²¹³⁸ Judge Brinkema reimposed the same 52-month sentence, determining that she had not clearly articulated her reasons for the downward departure the first time.²¹³⁹ The government appealed again,²¹⁴⁰ but withdrew the appeal²¹⁴¹ 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.²¹⁴² Abdur-Raheem was released on November 30, 2007.²¹⁴³

The court of appeals affirmed the convictions of Khan, Chapman, and Abdur-Raheem.²¹⁴⁴

Judge Brinkema acquitted Caliph Basha Ibn Abdur-Raheem, of Arlington, Virginia.²¹⁴⁵

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.²¹⁴⁶ 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.²¹⁴⁷

2136. *Khan*, 309 F. Supp. 2d at 796, 803, 814; see Bradley, *supra* note 2107. The original sentence of eight years was reduced to four and one-third years on July 29, 2005. *Royer* Docket Sheet, *supra* note 2105 (July 29, 2005, minute entry).

2137. *Khan*, 461 F.3d at 486; *Khan*, 309 F. Supp. 2d at 796, 818, 821, 823, 827; *Royer* Docket Sheet, *supra* note 2105 (noting a court verdict against Hammad Abdur-Raheem on Mar. 4, 2004).

2138. *Khan*, 461 F.3d at 483, 498–501; see Jerry Markon, *Resentencing Is Ordered for "Jihad" Defendant*, Wash. Post, Sept. 2, 2006, at B5.

2139. 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 2105 (noting resentencing on Aug. 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).

2140. Docket Sheet, *United States v. Abdur-Raheem*, No. 07-4941 (4th Cir. Oct. 2, 2007).

2141. Government Motion to Dismiss, *id.* (Dec. 18, 2007).

2142. *Gall v. United States*, 552 U.S. 38 (2007).

2143. <http://www.bop.gov> (reg. no. 46814-083); see *Royer* Aug. 16, 2007, Transcript, *supra* note 2139 (noting expected release date of Dec. 1, 2007).

2144. *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006); see Markon, *supra* note 2138; Sheridan, *supra* note 2112. The Supreme Court denied petitions for certiorari on May 21, 2007. *Chapman v. United States*, 550 U.S. 956 (2007); *Khan v. United States*, 550 U.S. 956 (2007).

2145. *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 2115.

2146. *Khan*, 461 F.3d at 485; *Royer* Docket Sheet, *supra* note 2105; see Sheridan, *supra* note 2112.

2147. *Khan*, 309 F. Supp. 2d at 796, 808.

Ibrahim Ahmed al-Hamdi, the son of a Yemeni diplomat, pleaded guilty and was sentenced on April 9, 2004, to 15 years in prison.²¹⁴⁸ Al-Hamdi attended an LET training camp in Pakistan.²¹⁴⁹

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.²¹⁵⁰ After Kwon cooperated with the government, his sentence was reduced to three years and two months.²¹⁵¹ He is now out of prison.²¹⁵² Kwon attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.²¹⁵³

Khwaja Mahmood Hasan, of Fairfax, Virginia, pleaded guilty and was sentenced on November 7, 2003, to 11 and one-quarter years in prison.²¹⁵⁴ After Hasan cooperated with the government, his sentence was reduced to three years and one month.²¹⁵⁵ He is now out of prison.²¹⁵⁶ Hasan attended an LET training camp in Pakistan, where he fired an AK-47 and a rocket-propelled grenade.²¹⁵⁷

Muhammed Aatique, of Norristown, Pennsylvania, pleaded guilty and was sentenced on September 22, 2003, to 10 and one-half years in prison.²¹⁵⁸ After he cooperated with the government, his sentence was reduced to three years and two months.²¹⁵⁹ He was released from prison on March 31, 2006.²¹⁶⁰

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 ten months in prison.²¹⁶¹ After he cooperated with the government, his sentence was reduced to one year and 11 months.²¹⁶² He was released from prison on February 14, 2006.²¹⁶³

2148. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 808; *Royer Docket Sheet*, *supra* note 2105; *see Sheridan*, *supra* note 2112.

2149. *Khan*, 309 F. Supp. 2d at 807, 811.

2150. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796.

2151. *Royer* Aug. 16, 2007, Transcript, *supra* note 2139; *Royer Docket Sheet*, *supra* note 2105 (noting a reduction-of-sentence order on Feb. 24, 2006); *see Sheridan*, *supra* note 2112.

2152. *See Viorst*, *supra* note 2105, at 77.

2153. *Khan*, 309 F. Supp. 2d at 811.

2154. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 2105.

2155. *Royer* Aug. 16, 2007, Transcript, *supra* note 2139; *Royer Docket Sheet*, *supra* note 2105 (noting a reduction-of-sentence order on Feb. 24, 2006).

2156. *See Viorst*, *supra* note 2105, at 77; *see also Sheridan*, *supra* note 2112 (reporting that Hasan spent less than three years in jail).

2157. *Khan*, 309 F. Supp. 2d at 811.

2158. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796; *Royer Docket Sheet*, *supra* note 2105.

2159. *Royer* Aug. 16, 2007, Transcript, *supra* note 2139; *Royer Docket Sheet*, *supra* note 2105 (Aug. 26, 2005, reduction of sentence for Muhammed Aatique); *see Sheridan*, *supra* note 2112.

2160. <http://www.bop.gov> (reg. no. 57593-066).

2161. *Khan*, 461 F.3d at 485; *Khan*, 309 F. Supp. 2d at 796, 803; *Royer Docket Sheet*, *supra* note 2105; *see Sheridan*, *supra* note 2112.

2162. *Royer* Aug. 16, 2007, Transcript, *supra* note 2139.

2163. <http://www.bop.gov> (reg. no. 46809-083).

Judge Brinkema also acquitted Sabri Benkahla on March 9, 2004, in a separate bench trial.²¹⁶⁴ Benkahla was arrested in Saudi Arabia in 2003 and charged with supplying services to the Taliban during a 1999 trip to south Asia.²¹⁶⁵ 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.²¹⁶⁶ 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 2004.²¹⁶⁷ 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.²¹⁶⁸ He denied attending any training camp, and he denied using any firearms.²¹⁶⁹ On February 9, 2006, he was indicted for perjury during his grand jury testimony and for obstruction of justice.²¹⁷⁰ On July 13, the indictment was expanded to charge him for false statements to the FBI.²¹⁷¹ The court assigned Benkahla's perjury case to Judge James C. Cacheris,²¹⁷² who told the jury at various times during the trial that it was a perjury case, not a terrorism case, that they were deciding.²¹⁷³ The jury

2164. *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 2105, at 3 n.2; *Royer Docket Sheet*, *supra* note 2105; see Matthew Barakat, *Va. Man Convicted of Lying in Terror Probe*, *Richmond Times–Dispatch*, Feb. 6, 2007, at B2.

2165. *Benkahla*, 530 F.3d at 304; *Benkahla*, 437 F. Supp. 2d at 544–45.

2166. *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 2164.

2167. *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 2166.

2168. *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 2164.

2169. *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 2164.

2170. *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*, Fe. 23, 2006, at B4.

2171. *Benkahla*, 530 F.3d at 305; *Benkahla Habeas Denial Opinion*, *supra* note 2169, at 3; *Benkahla Dismissal Denial*, *supra* note 2167, at 1, 3–4; *Benkahla Docket Sheet*, *supra* note 2170.

2172. Tim Reagan interviewed Judge Cacheris for this report in the judge's chambers on November 6, 2008.

2173. Interview with Hon. James C. Cacheris, Nov. 6, 2008; see James C. Cacheris, *United States v. Benkhala: Voir Dire Questions* (Jan. 25, 2007).

found Benkahla guilty on February 5, 2007; Judge Cacheris sentenced him on July 24 to ten years and one month in prison.²¹⁷⁴ The court of appeals affirmed.²¹⁷⁵

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.²¹⁷⁶

Ali al-Timimi was regarded as the paintballers' spiritual leader.²¹⁷⁷ 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.²¹⁷⁸ 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.²¹⁷⁹ 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 determination of whether the prosecution of al-Timimi relied on undisclosed surveillance.²¹⁸⁰

Al-Timimi was born in the United States to Iraqi immigrants.²¹⁸¹ His father was a lawyer who worked in Iraq's embassy and his mother was a clinical psychologist.²¹⁸² When al-Timimi was a teenager, his family spent some time in Saudi Arabia, where al-Timimi adopted a fundamentalist Salafiya approach to Is-

2174. *Benkahla*, 530 F.3d at 305–06; *Benkahla Habeas Denial Opinion*, *supra* note 2169, at 6; *United States v. Benkahla*, 501 F. Supp. 2d 748, 751, 762 (E.D. Va. 2007); *Benkahla Docket Sheet*, *supra* note 2170; *see* Barakat, *supra* note 2164; Jerry Markon, *10-Year Sentence for Perjury*, Wash. Post, July 25, 2007, at B5.

2175. *Benkahla*, 530 F.3d 300, *cert. denied*, ___ U.S. ___, 129 S. Ct. 950 (2009).

2176. *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”).

2177. *See* Markon, *Case Hailed*, *supra* note 2107; Markon, *supra* note 2105; Viorst, *supra* note 2105, at 69, 79.

2178. *United States v. Chandia*, 514 F.3d 365, 369 (4th Cir. 2008); *Benkahla Habeas Denial Opinion*, *supra* note 2169, at 1; *United States v. Khan*, 309 F. Supp. 2d 789, 802 (E.D. Va. 2004).

2179. *Chandia*, 514 F.3d at 369 n.1; *see* Markon, *Case Hailed*, *supra* note 2107; Markon, *supra* note 2105; Viorst, *supra* note 2105, 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.”); Donahue, *supra* note 636, at 168 (“Dr. Ali al-Timimi was sentenced to life in prison for urging young men at a dinner party to go on jihad.”).

To select jurors for his trial, Judge Brinkema used a jury questionnaire. *See* Leonie M. Brinkema, *United States v. Al-Timimi: Jury Questionnaire* (Mar. 28, 2005).

2180. 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 2108 (noting May 19, 2006, reopening of the district court case); *see also* Jerry Markon, *Va. Terror Case Sent Back to Lower Court*, Wash. Post, Apr. 26, 2006, at A10.

2181. *See* Viorst, *supra* note 2105, at 69.

2182. *See* Sheridan, *supra* note 2112; Viorst, *supra* note 2105, at 69.

lam.²¹⁸³ A graduate of the University of Maryland, he matriculated at George Mason University for a doctorate in computational biology.²¹⁸⁴

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.²¹⁸⁵ Judge Hilton sentenced him to 15 years in prison on August 25, 2006, applying a terrorism sentencing enhancement.²¹⁸⁶ The government filed a sealed motion, and Judge Brinkema filed a sealed order that same day in this case.²¹⁸⁷ 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.²¹⁸⁸ On May 2, 2008, Judge Hilton again sentenced Chandia to 15 years in prison,²¹⁸⁹ and the court of appeals again remanded for more factfinding.²¹⁹⁰ A third sentencing to 15 years²¹⁹¹ is on appeal.²¹⁹² Chandia is a Pakistani citizen who taught third grade at an Islamic school called the Al-Huda School in College Park, Maryland.²¹⁹³ Although linked to the paintballers, he did not actually play the game.²¹⁹⁴

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.²¹⁹⁵ Judge Brinkema conducted a sealed

2183. See Sheridan, *supra* note 2112; Viorst, *supra* note 2105, at 72.

2184. See Viorst, *supra* note 2105, at 73.

2185. 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 2107; Markon, *supra* note 2105; Sheridan, *supra* note 2112; Smith, *supra* note 2112 ("Chandia provided material support to LET by paying \$622 to ship 50,000 paintballs to Pakistan.").

2186. *Chandia*, 514 F.3d at 370–71; *Chandia* Docket Sheet, *supra* note 2109; see Markon, *supra* note 2105.

2187. *Chandia* Docket Sheet, *supra* note 2109.

2188. *Chandia*, 514 F.3d at 369, 375–77.

2189. *Chandia* Docket Sheet, *supra* note 2109.

2190. United States v. Chandia, 395 F. App'x 53 (4th Cir. 2010).

2191. *Chandia* Docket Sheet, *supra* note 2109 (noting sentencing on Mar. 14, 2011).

2192. Docket Sheet, United States v. Chandia, No. 11-4323 (4th Cir. Mar. 24, 2011) (noting that oral argument is tentatively scheduled for the week of Jan. 24–27, 2012).

2193. See Barakat, *supra* note 2185; *Corrections*, Wash. Post, May 26, 2006, at A2; Markon, *Final Defendant*, *supra* note 2185; Jerry Markon & Mary Beth Sheridan, *Jurors Hear Clashing Profiles of Accused Jihad Network Member*, Wash. Post, May 23, 2006, at B6; Sheridan, *supra* note 2112.

2194. United States v. Chandia, 514 F.3d 365, 373 (4th Cir. 2008); see Barakat, *supra* note 2185.

2195. *Al-Timimi* Docket Sheet, *supra* note 2108 (noting the filing of a sealed motion on Dec. 23, 2004, and the filing of a CIPA notice on Dec. 29, 2004.); see Reagan, *supra* note 173, at 8–18 (describing CIPA procedures).

CIPA hearing on January 19, 2005, and issued a sealed protective order on March, 21, 2005, ten days before the commencement of voir dire.²¹⁹⁶

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."²¹⁹⁷

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.²¹⁹⁸

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.²¹⁹⁹ Another sealed proceeding was held on January 16, 2007, and its transcript was unsealed seven months later.²²⁰⁰ The transcript of a closed proceeding held on October 23, 2008, was unsealed only seven days after the event.²²⁰¹ The transcript of a closed February 19, 2009, proceeding²²⁰² was never unsealed, because no one ordered it.²²⁰³

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?"²²⁰⁴

2196. *Id.*

2197. *Al-Timimi* Remand Order, *supra* note 2180, at 1; *see Al-Timimi* Docket Sheet, *supra* note 2108 (referring to warrants under the Foreign Intelligence Surveillance Act).

2198. 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].

2199. *Al-Timimi* Docket Sheet, *supra* note 2108 (noting the unsealing of the transcript on Aug. 14, 2006); *see* Matthew Barakat, *Eavesdropping Did Not Taint Case*, Richmond Times-Dispatch, July 22, 2006, at B8.

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 2198. 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.*

2200. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 2180; *Al-Timimi* Docket Sheet, *supra* note 2108 (noting the unsealing of the transcript on Aug. 16, 2007).

By the time of this hearing, both defense attorneys had obtained secret clearances. *Al-Timimi* Jan. 16, 2007, Transcript, *supra* note 2180.

2201. *Al-Timimi* Docket Sheet, *supra* note 2108.

2202. *Id.*

2203. E-mail interview with court reporter, July 16, 2010.

2204. Transcript, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. Oct. 23, 2008, filed Oct. 30, 2008).

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."²²⁰⁵ A subsequent open hearing revealed that the government made classified submissions and appearances to which neither prosecuting nor defense attorneys had access.²²⁰⁶ 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.²²⁰⁷

On October 10, 2008, al-Timimi filed with the classified information security officer a sealed motion for a finding of materiality.²²⁰⁸

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."²²⁰⁹

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.²²¹⁰ Judge Brinkema ordered al-Timimi returned to the Eastern District of Virginia.²²¹¹

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.²²¹² Therefore, Judge Brinkema now takes testimony in all cases from all witnesses by affirmation rather than by oath.²²¹³

2205. *Al-Timimi* Docket Sheet, *supra* note 2108.

2206. 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.

2207. See Lichtblau, *supra* note 2206; Markon, *supra* note 2206.

2208. E.D. Va. *Al-Timimi* Docket Sheet, *supra* note 2108.

2209. *Al-Timimi* Remand Order, *supra* note 2180, at 1.

It was reported that "authorities" obstructed visits between al-Timimi and his appellate attorney. Viorst, *supra* note 2105, at 78.

2210. *Al-Timimi* July 21, 2006, Transcript, *supra* note 2198.

2211. *Al-Timimi* Docket Sheet, *supra* note 2108; *Al-Timimi* July 21, 2006, Transcript, *supra* note 2198.

2212. Interview with Hon. Leonie M. Brinkema, Jan. 5, 2007.

2213. *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.²²¹⁴ He lived in Minneapolis with his wife, a naturalized U.S. citizen, and their daughter.²²¹⁵ The interview was prompted by information obtained by secretly monitoring Warsame's telecommunications and searching his home.²²¹⁶ On the following day, Warsame was arrested as a material witness in a Southern District of New York grand jury investigation.²²¹⁷

FBI agents approached Warsame's home on December 8 at a time they knew he would be alone.²²¹⁸ Warsame invited the agents in.²²¹⁹ 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.²²²⁰ 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.²²²¹

In early 2000, Warsame illegally entered Afghanistan from Pakistan to attend an Al-Qaeda training camp near Kabul.²²²² That summer, Warsame trained at another Al-Qaeda training camp, in Kandahar, which was led by Osama Bin Laden.²²²³ In 2001, Warsame returned to the United States, maintaining communication and financial contacts with Al-Qaeda.²²²⁴

2214. *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.

2215. *Warsame*, 488 F. Supp. at 849; see Todd Nelson, *Suspect Faces N.Y. Extradition*, St. Paul Pioneer Press, Dec. 13, 2003, at A1.

2216. *Warsame*, 488 F. Supp. 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.

2217. *Warsame*, 488 F. Supp. 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 2214.

2218. *Warsame*, 488 F. Supp. at 850.

2219. *Id.*

2220. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2221. *Warsame*, 488 F. Supp. at 851; see Bob von Sternberg, *Warsame's Statements Suppressed*, Minneapolis–St. Paul Star Trib., June 1, 2007, at 4B.

2222. *United States v. Warsame*, 651 F. Supp. 2d 978, 979 (D. Minn. 2009) (quoting plea agreement).

2223. *Id.* at 980.

2224. *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.²²²⁵ Warsame consented.²²²⁶ 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.²²²⁷ After a night's sleep on the base, Warsame said that he wanted to go home.²²²⁸ 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.²²²⁹

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.²²³⁰ It was subsequently reported that Warsame's public identification thwarted the government's intentions to use him as an informant.²²³¹ At another closed proceeding, on December 16, 2003, the government received permission to transfer Warsame to Manhattan for grand jury testimony.²²³²

A Minnesota grand jury indicted Warsame on January 20, 2004, for providing material support to Al-Qaeda by attending training camps in Afghanistan.²²³³ Warsame returned to Minnesota on the following day.²²³⁴ The court assigned the case to Judge Tunheim.²²³⁵ A superseding indictment was filed about a year and a

2225. *Warsame*, 488 F. Supp. at 851.

2226. *United States v. Warsame*, 547 F. Supp. 2d 982, 984 (D. Minn. 2008); *Warsame*, 488 F. Supp. at 851.

2227. *Warsame*, 488 F. Supp. at 850–51; *see* Von Sternberg, *supra* note 2221.

2228. *Warsame*, 488 F. Supp. at 853.

2229. *Id.* at 861; *see* Von Sternberg, *supra* note 2221.

2230. *See* Gordon & Padilla, *supra* note 2217; Padilla *et al.*, *supra* note 2214.

2231. Greg Gordon, *FBI Hoped Warsame Would Act as Spy*, Minneapolis–St. Paul Star Trib., Feb. 14, 2004, at 1B; Schmidt, *supra* note 2214.

2232. *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.

2233. *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 2214; Louwagie & Padilla, *supra* note 2217; Schmidt, *supra* note 2214.

2234. *See* Schmidt, *supra* note 2214.

2235. D. Minn. Docket Sheet, *supra* note 2233.

Tim Reagan interviewed Judge Tunheim for this report at the Federal Judicial Center on August 18, 2009.

half later.²²³⁶ Warsame's attorneys claimed that he went to Afghanistan in search of Muslim utopia, but he left after becoming disillusioned.²²³⁷

The government appealed Judge Tunheim's suppression order, and the court of appeals heard arguments on March 13, 2008.²²³⁸ The case could not be brought to trial while the appeal was pending.²²³⁹

Midway through his sixth year of detention, Warsame and the government agreed to a plea bargain.²²⁴⁰ On July 9, 2009, Judge Tunheim sentenced Warsame to seven years and eight months and signed a stipulated deportation order.²²⁴¹

Warsame was released from prison on October 8, 2010, and released into Canada.²²⁴²

Challenge: Mental Health During Detention

Detention of terrorism suspects frequently amounts to solitary confinement.²²⁴³ 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.²²⁴⁴ Judge Tunheim observed that visits by the Canadian consulate were also helpful.²²⁴⁵

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

2236. *Warsame*, 651 F. Supp. 2d at 979; D. Minn. Docket Sheet, *supra* note 2233; 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.

2237. See Pam Louwagie, *Terror Suspect's Case Questioned*, Minneapolis–St. Paul Star Trib., Aug. 29, 2005, at 1B.

2238. Docket Sheet, United States v. Warsame, No. 07-2560 (8th Cir. June 29, 2007).

2239. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2240. *Warsame*, 651 F. Supp. 2d at 979; see Pam Louwagie, *Terror Suspect Pleads Guilty*, Minneapolis–St. Paul Star Trib., May 21, 2009, at 1B.

2241. *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).

2242. <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.

2243. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Contenta, *supra* note 2242 (“Warsame spent 5½ years in solitary confinement during pre-trial custody. He was let out of his cell only one hour a day.”).

2244. 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).

2245. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

not agree.²²⁴⁶ 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.²²⁴⁷ In time, attorneys for both sides were able to strike an agreement.²²⁴⁸

Challenge: Classified Evidence

The case against Warsame relied on classified evidence, and in addition a substantial amount of classified information was discoverable.²²⁴⁹ Warsame's attorneys and Judge Tunheim's staff all obtained security clearances.²²⁵⁰ A protective order governed defense handling of classified materials.²²⁵¹ 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.²²⁵²

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.²²⁵³ 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.²²⁵⁴

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.²²⁵⁵ The attorneys had to prepare any documents based on or referring to classified material in the secure room.²²⁵⁶ 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.²²⁵⁷ Judge Tunheim could keep classified materials in a safe in his chambers office.²²⁵⁸

2246. 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.

2247. See Pam Louwagie, *Feds Want Restrictions in Terror Case*, Minneapolis–St. Paul Star Trib., Feb. 3, 2004, at 1B.

2248. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Donovan, *Civil Rights*, *supra* note 2246; 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.

2249. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2250. *Id.*

2251. Protective Order, *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005).

2252. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2253. *Id.*

2254. *Id.*

2255. *Id.*; see Louwagie, *supra* note 2237.

2256. Interview with Hon. John R. Tunheim, Aug. 18, 2009; see Louwagie, *supra* note 2237.

2257. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2258. *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.²²⁵⁹ 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.²²⁶⁰ Judge Tunheim compared all proposed substitutions with their corresponding originals and frequently asked for modifications.²²⁶¹ 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.²²⁶² As a result of this process, Warsame’s attorneys saw only declassified evidence or unclassified substitutions.²²⁶³

Challenge: FISA Evidence

Some evidence against Warsame was obtained as a result of warrants granted pursuant to the Foreign Intelligence Surveillance Act (FISA).²²⁶⁴ 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.²²⁶⁵ The government notified Warsame that it intended to use some of this evidence against him at trial.²²⁶⁶

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.²²⁶⁷

2259. *Id.*

2260. *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).

2261. Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2262. *Id.*

2263. *Id.*

2264. 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.

2265. *Warsame*, 547 F. Supp. 2d at 984; Interview with Hon. John R. Tunheim, Aug. 18, 2009.

2266. *Warsame*, 547 F. Supp. 2d at 985–86.

2267. *Id.*, 547 F. Supp. 2d 982.

Mistaken Rendition

El-Masri v. Tenet
(*T.S. Ellis III, E.D. Va.*)²²⁶⁸

Khaled el-Masri, a German citizen and resident of Lebanese heritage who was born in Kuwait, claims 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.²²⁶⁹ El-Masri's captors thought he was Khalid al-Masri, who was believed to have been involved in the September 11, 2001, attacks.²²⁷⁰ It apparently took two orders by the National Security Advisor, Condoleezza Rice, over several weeks to release el-Masri.²²⁷¹

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.²²⁷² The Supreme Court denied certiorari.²²⁷³

2268. The appeal was heard by Fourth Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.

2269. *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 Hafetz, *supra* note 502, at 58–59; 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); Margulies, *supra* note 1018, at 192 (“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; Romero & Temple-Raston, *supra* note 275, at 66–69; 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*, *supra* note 1023, at 387 (reflections by el-Masri’s attorneys).

2270. See Van Natta & Mekhennet, *supra* note 2269.

2271. See Johnston, *supra* note 2269; Lewis, *Man Held*, *supra* note 2269.

2272. *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 2269, at 24; 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; Lewis, *Man Held*, *supra* note 2269; Lewis, *Mistakenly Abducted*, *supra* note 2269; Priest, *supra* note 2269.

2273. *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, alleges 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.²²⁷⁴ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.²²⁷⁵ 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. . . .

. . . 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.²²⁷⁶

It took four days for el-Masri to find his wife and children.²²⁷⁷

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, 2007.²²⁷⁸ On March 30, 2010, he was sentenced to two years in prison for attacking the mayor of his home town.²²⁷⁹

tices Turn Aside Case of Man Accusing C.I.A. of Torture, N.Y. Times, Oct. 10, 2007, at A16; Kemper, *supra* note 2269, at 24.

2274. *El-Masri*, 437 F. Supp. 2d at 533; Complaint, *supra* note 2269, 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 275, 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).

2275. 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 2269, at 24.

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

2276. *El-Masri*, 437 F. Supp. 2d at 532–34; see Complaint, *supra* note 2269, at 7, 14–16; see also Johnston, *supra* note 2269; Van Natta & Mekhennet, *supra* note 2269.

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.

2277. See Van Natta & Mekhennet, *supra* note 2269.

2278. 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 Priest & Arkin, *supra* note 239, at xxiii (concluding that "the CIA's bungled operation" cost el-Masri his sanity).

2279. 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.²²⁸⁰ The German government, however, did not seek the operatives' extradition,²²⁸¹ and a German court rejected a suit by el-Masri to compel prosecution.²²⁸² 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.²²⁸³

On April 9, 2008, the ACLU filed a petition on el-Masri's behalf with the Organization of American States' Inter-American Commission on Human Rights.²²⁸⁴

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.²²⁸⁵

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.²²⁸⁶

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 support in the details disclosed in the [Director of the CIA's] classified *ex parte* declaration.²²⁸⁷

2280. 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 2269, at 480; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Feb. 1, 2007, at A1.

2281. See Michael Slackman, *Officials Pressed Germans on Kidnapping by C.I.A.*, N.Y. Times, Dec. 9, 2010, at A13.

2282. See *Court Rejects Lawsuit Related to a C.I.A. Kidnapping*, N.Y. Times, Dec. 11, 2010, at A10.

2283. See Manuel Altozano, *High Court Seeks Arrest of CIA Agents for 2004 Kidnap*, El País, May 12, 2010, at 1.

2284. http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf.

2285. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006); see E.D. Va. Docket Sheet, *supra* note 2275 (noting a Mar. 23, 2006, notice of in camera submission).

2286. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

2287. *El-Masri*, 437 F. Supp. 2d at 537.

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.”²²⁸⁸ The appeal was heard on November 28, 2006, by Circuit Judges Robert B. King, Dennis W. Shedd, and Allyson K. Duncan.²²⁸⁹ 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.²²⁹⁰ 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.²²⁹¹ Judges Shedd and Duncan reviewed the declaration in their Richmond chambers when they were in town for a sitting.²²⁹²

Two Supreme Court justices reviewed the classified declaration to consider el-Masri’s petition for certiorari,²²⁹³ which the court denied.²²⁹⁴

2288. *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

2289. 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.

2290. Interview with Hon. Robert B. King, March 19, 2008. The drive is approximately 320 miles.

2291. *Id.*; see Reagan, *supra* note 173, at 19 (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.”

2292. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009; Interview with Hon. Allyson Kay Duncan, Nov. 8, 2007.

2293. Interview with Dep’t of Justice Litig. Sec. Group Staff, Nov. 6, 2007.

2294. *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, 2004.²²⁹⁵ The court assigned the case to Judge Alvin K. Hellerstein.²²⁹⁶

The FOIA requests were presented to the various government agencies from October 2003 to May 2004.²²⁹⁷ 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.²²⁹⁸ The only document produced before the lawsuit was filed was a set of State Department talking points.²²⁹⁹

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.²³⁰⁰ Judge Hellerstein scheduled a status conference for 10 days following that deadline.²³⁰¹

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. . . .

2295. 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).

2296. Docket Sheet, *id.* (June 2, 2004).

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

2297. *ACLU v. Dep’t of Defense*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004); Amended Complaint, *supra* note 2295, at 2–3; *see* Amrit Singh, *Freedom of Information, in* The Guantánamo Lawyers, *supra* note 1023, at 246, 246.

2298. *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 2295, at 2.

Amnesty International, the Center for Constitutional Rights, and Washington Square Legal Services are pursuing 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 CIA’s response to 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.

2299. *See* Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. Times, Aug. 31, 2009, at A4.

2300. *ACLU*, 339 F. Supp. 2d at 505.

2301. *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. . . .

. . . .
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.²³⁰²

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.²³⁰³ 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.²³⁰⁴ Moreover, the statute excepts from the exemption files relating to government investigations of illegal conduct.²³⁰⁵ The documents sought by the plaintiffs related to an investigation by the CIA's Inspector General of the CIA's treatment of detainees.²³⁰⁶

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.²³⁰⁷ Determinations by the CIA Director that the illegality exception does not apply are not subject to district court review.²³⁰⁸

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."²³⁰⁹ Judge Hellerstein resolved some pending disputes concerning document production, including by reviewing some documents in camera.²³¹⁰

Judge Hellerstein's June 2006 rulings on 29 "photographs taken by individuals serving in Iraq and Afghanistan"²³¹¹ 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-

2302. *Id.* at 504–05 (citation omitted).

2303. *ACLU v. Dep't of Defense*, 351 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).

2304. *Id.* at 268, 272, 278.

2305. *Id.* at 271.

2306. *Id.* at 268, 271–73.

2307. Order, *ACLU v. Dep't of Defense*, No. 1:04-cv-4151 (S.D.N.Y. April 18, 2005).

2308. *ACLU v. Dep't of Defense*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010).

2309. *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 550 (S.D.N.Y. 2005) (citation omitted).

2310. *ACLU*, 389 F. Supp. 2d 547.

2311. 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.²³¹² 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."²³¹³ 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.²³¹⁴ The Supreme Court remanded the case back to the court of appeals for reconsideration in light of the act,²³¹⁵ and the court of appeals vacated Judge Hellerstein's June 2006 rulings.²³¹⁶

On December 7, 2007, news media reported that in 2005 the CIA destroyed videotapes of detainee interrogations.²³¹⁷ Five days later, plaintiffs moved for contempt and sanctions.²³¹⁸ On January 2, 2008, Attorney General Michael Mukasey announced a criminal investigation into the destruction of the tapes.²³¹⁹ Judge Hellerstein stayed consideration of the contempt motion until February 2009 so as not to interfere with the criminal investigation.²³²⁰ 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.²³²¹ On November 9, 2010, the government announced that the tape destruction would result in no criminal charges.²³²² 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.²³²³

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.²³²⁴ Information based in part on this FOIA action is presented in the ACLU's online *Torture Report*.²³²⁵

2312. *ACLU v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008), *vacated*, ___ U.S. ___, 130 S. Ct. 777 (2009).

2313. Pub. L. No. 111-83§ 565, 123 Stat. 2142, 2184–85 (2009).

2314. *Id.*; see Adam Liptak, *Supreme Court Overturns Decision on Detainee Photos*, N.Y. Times, Dec. 1, 2009, at A18.

2315. *Dep't of Defense v. ACLU*, ___ U.S. ___, 130 S. Ct. 777 (2009); see Liptak, *supra* note 2314.

2316. Order, *ACLU v. Dep't of Defense*, No. 06-3140 (2d Cir. May 6, 2010).

2317. Eggen & Warrick, *CIA Destroyed Videos*, *supra* note 1261; Mazzetti, *supra* note 1261.

2318. 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].

2319. See Eggen & Warrick, *Criminal Probe Opened*, *supra* note 1261; Mazzetti & Johnston, *supra* note 1261.

2320. July 30, 2009, Opinion, *supra* note 2318, at.1.

2321. July 30, 2009, Opinion, *supra* note 2318.

2322. See Mazzetti & Savage, *supra* note 1261.

2323. Opinion, *ACLU*, No. 1:04-cv-4151 (S.D.N.Y. Oct. 5, 2011), *available at* 2011 WL 4636596.

2324. See Shane, *supra* note 2299; see also Singh, *supra* note 2297, at 251 (more than 100,000 pages).

2325. <http://www.thetorturereport.org>.

Pending are appeals of some of Judge Hellerstein's rulings in this case²³²⁶ and a companion case²³²⁷ concerning legal memoranda prepared by the Justice Department's Office of Legal Counsel.²³²⁸

Challenge: Classified Evidence

All of Judge Hellerstein's law clerks have security clearances.²³²⁹ They begin the process of getting cleared at hiring, before they start work.²³³⁰ However, the government did not extend the law clerks' need to know to all classified materials that Judge Hellerstein had to review.²³³¹ As a result, Judge Hellerstein developed a procedure where he could examine documents on the record by being the only one looking at them.²³³² 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.²³³³ 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.²³³⁴

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 rulings²³³⁵

2326. Docket Sheet, *ACLU v. Dep't of Defense*, No. 10-4668 (2d Cir. Nov. 17, 2010) (plaintiffs' appeal, noting argument planned for early in 2012); Docket Sheet, *ACLU v. Dep't of Defense*, No. 10-4290 (2d Cir. Oct. 26, 2010) (government's appeal).

2327. Docket Sheet, *ACLU v. Dep't of Justice*, No. 10-4647 (2d Cir. Nov. 15, 2010) (plaintiffs' appeal, noting argument planned for early in 2012); Docket Sheet, *ACLU v. Dep't of Justice*, No. 10-4289 (2d Cir. Oct. 25, 2010) (government's appeal).

2328. Complaint, *ACLU v. Dep't of Justice*, No. 1:05-cv-9620 (S.D.N.Y. Nov. 15, 2005).

2329. Interview with Hon. Alvin K. Hellerstein, Nov. 5, 2009.

2330. *Id.*

2331. *Id.*

2332. *Id.*

2333. *Id.*

2334. *Id.*

2335. *ACLU v. Dep't of Defense*, 723 F. Supp. 2d 621, 624 (S.D.N.Y. 2010).

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.²³³⁶ The U.S. District Court for the Northern District of Texas assigned the case to Judge A. Joe Fish.²³³⁷

The Occupied Land Fund was established in 1989 by Shukri Abu Baker and Ghassan Elashi; in 1991, the fund reorganized as the Holy Land Foundation.²³³⁸ The foundation was an offshoot of the Islamic Association for Palestine, an information group.²³³⁹ Both groups were headquartered in Richardson, Texas, approximately 15 miles north of Dallas.²³⁴⁰ The FBI had been investigating the foundation's ties to Hamas since shortly after its reorganization.²³⁴¹

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.²³⁴²

2336. Indictment, *United States v. Holy Land Foundation*, 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.

2337. Docket Sheet, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 26, 2004) [hereinafter N.D. Tex. *Holy Land Foundation* Docket Sheet].

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

2338. *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003); *Holy Land Foundation v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002); Representation Order at 18, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 24, 2010); see Brooke & Sciolino, *supra* note 2336; 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.

2339. See Brooke & Sciolino, *supra* note 2336; Reaves & McGonigle, *supra* note 2338.

2340. See Brooke & Sciolino, *supra* note 2336; Reaves & McGonigle, *supra* note 2338.

2341. 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.

2342. 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 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*

On November 29, 2004, the district court granted the plaintiffs summary judgment on liability against some of the defendants, including the foundation.²³⁴³ The jury returned a damages verdict of \$52 million,²³⁴⁴ which the court statutorily trebled to \$156 million.²³⁴⁵ 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.²³⁴⁶

On December 4, 2001, the Treasury Department's Office of Foreign Asset Control designated the foundation a terrorist organization and froze its assets.²³⁴⁷ On March 11, 2002, the foundation challenged the designation and the freezing in the U.S. District Court for the District of Columbia.²³⁴⁸ On June 20, 2003, the court of appeals affirmed a judgment in the government's favor.²³⁴⁹

The foundations's co-defendants 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.²³⁵⁰ Maghawri and Mishal were living abroad and considered fugitives.²³⁵¹

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.

2343. *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.

2344. *Boim*, 549 F.3d at 688; Verdict Form, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Dec. 8, 2004).

2345. *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); see also Matt O'Connor, *\$156 Million Award in Terrorist Killing*, Chi. Trib., Dec. 9, 2004, Metro, at 1.

2346. *Boim*, 549 F.3d at 691, *cert. denied*, ___ U.S. ___, 130 S. Ct. 458 (2009).

2347. *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 159–60 (D.C. Cir. 2003); *Holy Land Foundation v. Ashcroft*, 219 F. Supp. 2d 57, 62, 64 (D.D.C. 2002); Representation Order, *supra* note 2338, at 18; see *United States v. Holy Land Foundation*, 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 2341.

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 Foundation*, 493 F.3d at 471 n.1; see Hundley, *How Israel Helped Militants Gain Power*, Chi. Trib., Feb. 2, 1993, News, at 1; Reaves & McGonigle, *supra* note 2338. The government declared Hamas a terrorist organization on January 23, 1995. *Holy Land Foundation*, 333 F.3d at 159; *Holy Land Foundation*, 219 F. Supp. 2d at 64 n.2.

2348. Docket Sheet, *Holy Land Foundation v. Ashcroft*, No. 1:02-cv-442 (D.D.C. Mar. 8, 2002); see *Holy Land Foundation*, 219 F. Supp. 2d at 64.

2349. *Holy Land Foundation*, 333 F.3d 156; see *Holy Land Foundation*, 219 F. Supp. 2d 57; see Michelle Mittelstadt, *Ruling Keeps Charity's Assets Frozen*, Dallas Morning News, June 21, 2003, at 1A.

2350. Indictment, *supra* note 2336; see Mittelstadt *et al.*, *supra* note 2336; Trahan, *supra* note 2341.

2351. See Mittelstadt *et al.*, *supra* note 2336; Trahan, *supra* note 2341.

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.²³⁵² 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, 2002.²³⁵³ Also included in the superseding indictment were a fifth brother, Hazim Elashi; the men's cousin, Nadia Elashi; and her husband Abu Marzook.²³⁵⁴ The court assigned the case to Judge Sam A. Lindsay.²³⁵⁵

On July 7, 2004, a jury found the brothers and their company guilty of export improprieties.²³⁵⁶ On April 13, 2005, a separate jury found Ghassan, Bayan, and Basman Elashi and their company guilty of funneling funds to terrorists.²³⁵⁷ Judge Lindsay sentenced Ghassan Elashi to a term of six years and eight months on October 16, 2006.²³⁵⁸ The other brothers' sentences ranged from five to seven years.²³⁵⁹ Nadia Elashi and Abu Marzook were fugitives.²³⁶⁰

Jury selection in the Holy Land Foundation trial began on July 16, 2007.²³⁶¹ Judge Fish used a jury questionnaire.²³⁶²

2352. 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 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.

2353. N.D. Tex. *Elashi* Docket Sheet, *supra* note 2352.

2354. *Id.*

2355. *Id.*

2356. *Id.*

2357. *Elashi*, 440 F. Supp. 2d at 544; N.D. Tex. *Elashi* Docket Sheet, *supra* note 2352; see Roy Appleton & Matt Stiles, Dallas Morning News, *3 Guilty of Terror Dealings*, Apr. 14, 2005, at 1B.

2358. N.D. Tex. *Elashi* Docket Sheet, *supra* note 2352; see Michael Grabell, *Holy Land Founder Gets 6 Years*, Dallas Morning News, Oct. 13, 2006, at 5B.

2359. N.D. Tex. *Elashi* Docket Sheet, *supra* note 2352 (noting Bayan Elashi's sentence of seven years and Basman Elashi's sentence of six years and eight months on Oct. 16, 2006, Hazim Elashi's sentence of five years on Feb. 1, 2006, and Ihsan Elashyi's sentence of six years on Jan. 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.

2360. N.D. Tex. *Elashi* Docket Sheet, *supra* note 2352; see Appleton & Stiles, *supra* note 2357.

2361. Representation Order, *supra* note 2338, 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 2341.

In advance of jury selection, Judge Fish granted defendants' motion for information on how the grand and petit jury were constituted so that the defendants could assess whether or not there

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.²³⁶³ 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.²³⁶⁴ 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.²³⁶⁵

On September 19, the jury began to deliberate.²³⁶⁶ Jurors deliberated on 197 counts for 19 days.²³⁶⁷ On Thursday, October 18, the jury announced a partial verdict, but Judge Fish was at a judges' conference out of town.²³⁶⁸ So the verdict was presented to Magistrate Judge Paul D. Stickney, who kept it sealed until Judge Fish's return.²³⁶⁹

On Monday, Judge Fish unsealed the verdict.²³⁷⁰ According to the verdict, one defendant was acquitted, but the jury was deadlocked on some charges for each of the other defendants.²³⁷¹ 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 de-

was a structural or statistical bias against Arabs or Muslims. Opinion, *Holy Land Foundation v. Ashcroft*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), available at 2007 WL 1452489.

2362. A. Joe Fish, *United States v. Holy Land Foundation: Jury Questionnaire* (July 16, 2007).

2363. Representation Order, *supra* note 2338, at 4–5; Transcript at 1013–16, *Holy Land Foundation*, 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 Foundation* July 18, 2007, Transcript]; Transcript at 523–26, *id.* (July 17, 2007, filed Sept. 25, 2008) [hereinafter N.D. Tex. *Holy Land Foundation* July 20, 2007, Transcript]; Interview with Hon. A. Joe Fish, Oct. 6, 2009.

2364. Representation Order, *supra* note 2338, at 4–5; N.D. Tex. *Holy Land Foundation* July 18, 2007, Transcript, *supra* note 2363, at 822.

2365. Representation Order, *supra* note 2338, at 5, 13; N.D. Tex. *Holy Land Foundation* July 20, 2007, Transcript, *supra* note 2363, 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.

2366. 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).

2367. 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.

2368. 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 2367; Trahan, *supra* note 2367.

2369. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 2367; Trahan, *supra* note 2367.

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 2367.

2370. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 2347; Jason Trahan, "There Was Not Enough Evidence," Dallas Morning News, Oct. 23, 2007, at 1A; Whoriskey, *supra* note 2341.

2371. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

liberations.²³⁷² After additional deliberation, the jury returned that day deadlocked on counts against all defendants, so Judge Fish declared a mistrial.²³⁷³ Mohammed el-Mezain, the foundation's former chairman, was acquitted of all but one charge.²³⁷⁴ The jury was deadlocked on counts against all of the other defendants.²³⁷⁵

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.²³⁷⁶ Judge Solis also used a jury questionnaire.²³⁷⁷

Opening arguments in the retrial began on September 22, 2008.²³⁷⁸ On November 24, after eight days of deliberation, the jury found all defendants guilty on all 108 counts included in the retrial.²³⁷⁹ Judge Solis sentenced Elashi to 65 years in prison, a sentence to be served consecutive to the sentence in his computer-company prosecution.²³⁸⁰ Abu Baker was also sentenced to 65 years; Abdulqader was sentenced to 20 years; el-Mezain and Odeh were each sentenced to 15 years.²³⁸¹ Appeals are pending.²³⁸²

2372. See Eaton, *supra* note 2347.

2373. Interview with Hon. A. Joe Fish, Oct. 6, 2009; see Eaton, *supra* note 2347; Trahan, *supra* note 2370; Whoriskey, *supra* note 2341.

2374. Jury Verdicts, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Oct. 22, 2007); see Eaton, *supra* note 2347; Trahan, *supra* note 2370.

2375. See Eaton, *supra* note 2347; Trahan, *supra* note 2370.

2376. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>; 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.

2377. Jorge A. Solis, *United States v. Holy Land Foundation: Jury Questionnaire* (Sept. 4, 2008).

2378. See Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, Wash. Post, Sept. 21, 2008, at A2.

2379. 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).

2380. Judgment, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 29, 2009); see Jason Trahan, *5 Decry Jail Terms in Holy Land Case*, Dallas Morning News, May 28, 2009, at 1A.

2381. Judgment, *Holy Land Foundation*, 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 Trahan, *supra* note 2380.

2382. Docket Sheet, *United States v. El-Mezain*, No. 09-10560 (5th Cir. May 29, 2009) (lead case, appeal by el-Mezain and the Holy Land Foundation, noting that oral arguments were held on Sept. 1, 2011); Docket Sheet, *United States v. Odeh*, No. 09-10569 (5th Cir. June 1, 2009); Docket Sheet, *United States v. Abdulqader*, No. 09-10565 (5th Cir. May 29, 2009); Docket Sheet, *United States v. Baker*, No. 09-10564 (5th Cir. May 29, 2009); Docket Sheet, *United States v. Elashi*, No. 09-10563 (5th Cir. May 29, 2009).

On July 1, 2009, Judge Solis resolved a third-party matter of judicial confidentiality.²³⁸³ In preparation for the first trial, the government filed a trial brief on May 29, 2007.²³⁸⁴ 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.”²³⁸⁵ Three organizations on the list asked the court to remove from the public record all references to them.²³⁸⁶ Judge Solis agreed to seal the trial brief attachment, but declined to excise other references to the organizations in the trial record.²³⁸⁷ Judge Solis sealed his order and all documents pertaining to the organizations’ requests for relief.²³⁸⁸ 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.²³⁸⁹ Docket entries for the other sealed documents then became public, showing only the filing dates of sealed documents.²³⁹⁰ No one challenged the sealing of the trial brief attachment, and it remains sealed.²³⁹¹ 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.²³⁹²

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.²³⁹³ 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.²³⁹⁴ 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.²³⁹⁵ Appeals were heard on September 1, 2011.²³⁹⁶

2383. Sealing Opinion, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 1, 2009); see *United States v. Holy Land Foundation*, 624 F.3d 685, 689 (5th Cir. 2010).

2384. Trial Brief, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 29, 2007); see *Holy Land Foundation*, 624 F.3d at 688.

2385. *Holy Land Foundation*, 624 F.3d at 688.

2386. *Id.* at 688–89 & n.1; Trial Brief, *supra* note 2384, at 1–2.

2387. *Holy Land Foundation*, 624 F.3d at 689; Sealing Opinion, *supra* note 2383.

2388. *Holy Land Foundation*, 624 F.3d at 689; Sealing Opinion, *supra* note 2383, at 20.

2389. *Holy Land Foundation*, 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.

2390. N.D. Tex. *Holy Land Foundation* Docket Sheet, *supra* note 2337.

2391. *Holy Land Foundation*, 624 F.3d at 689 n.3; N.D. Tex. *Holy Land Foundation* Docket Sheet, *supra* note 2337.

2392. Order, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. May 2, 2011).

2393. Order, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Sept. 24, 2009).

2394. Representation Order, *supra* note 2338, at 12; Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

2395. Representation Order, *supra* note 2338, at 14–19; see Trahan, *supra* note 2365.

2396. http://www.ca5.uscourts.gov/OralArgRecordings/09/09-10560_9-1-2011.wma (audio recording of oral argument).

Challenge: Classified Evidence

Some of the government's evidence concerning the defendants was classified.²³⁹⁷ This included information obtained under the Foreign Intelligence Surveillance Act (FISA) and information provided by the government of Israel.²³⁹⁸

Judge Fish's law clerks received security clearances.²³⁹⁹ Judge Fish could store classified documents in chambers safes.²⁴⁰⁰ All defense counsel also received security clearances,²⁴⁰¹ but they were not allowed to reveal classified information to the defendants.²⁴⁰² 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.²⁴⁰³ A separate safe was established for each defendant.²⁴⁰⁴

Judge Solis's staff also received security clearances, including a career law clerk, his courtroom deputy, and his court reporter.²⁴⁰⁵ Judge Solis also kept classified documents in a chambers safe.²⁴⁰⁶

The Holy Land Foundation appealed the decision that it had been represented de facto at trial. Docket Sheet, *United States v. Holy Land Foundation*, No. 10-10590 (5th Cir. June 15, 2009); *see also* Docket Sheet, *United States v. Holy Land Foundation*, 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 Foundation*, 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 the foundation's appeal 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 Foundation*, 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.

2397. Opinion at 4, *Holy Land Foundation*, 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").

2398. Nov. 2, 2006, Opinion, *supra* note 2397, at 3.

2399. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

2400. *Id.*

2401. Opinion at 5–6, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Dec. 8, 2006) [hereinafter Dec. 8, 2006, Opinion]; Nov. 2, 2006, Opinion, *supra* note 2397, at 17; *see* Steve McGonigle, *Attorney: Terror Case Not Derailed*, Dallas Morning News, Feb. 17, 2006, at 1B.

2402. Dec. 8, 2006, Opinion, *supra* note 2401, at 3; Nov. 2, 2006, Opinion, *supra* note 2397, at 17.

2403. 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

2404. Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

2405. Interview with Hon. Jorge A. Solis, Oct. 6, 2009.

2406. *Id.*

Challenge: FISA Evidence

Evidence against the defendants was based in part on wiretaps authorized by the FISA court.²⁴⁰⁷

In April 2005, the government mistakenly disclosed to cleared defense counsel the contents of FISA warrant applications.²⁴⁰⁸ This is not the usual procedure for affording a defendant an opportunity to challenge evidence based on FISA warrants.²⁴⁰⁹ The usual procedure is for the government to present the FISA warrant records to the district judge *ex parte*.²⁴¹⁰ 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.²⁴¹¹

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.²⁴¹² The FBI asked the judge for relief because the attorneys refused to return them.²⁴¹³ Judge Fish issued an order preserving the status quo and then ultimately granted the FBI substantially the relief requested.²⁴¹⁴

The government also produced to defense counsel evidence obtained as a result of the FISA warrants.²⁴¹⁵ Much of this evidence was in the form of declassified “tech-cuts,” which are English-language summaries of recorded conversations.²⁴¹⁶ 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.²⁴¹⁷

The government also declassified some of the defendants’ recorded conversations, and that evidence could be shared with the defendants.²⁴¹⁸ 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.²⁴¹⁹ Defense counsel argued that the offer was unconstitutional because it required them to reveal too much about their own conversa-

2407. See McGonigle, *supra* note 2401.

2408. *See id.*

2409. *See id.*

2410. *See id.*

2411. Opinion at 5, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 11, 2007), *available at* 2007 WL 2011319.

2412. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

2413. *Id.*

2414. *Id.*

2415. Nov. 2, 2006, Opinion, *supra* note 2397, at 3.

2416. Dec. 8, 2006, Opinion, *supra* note 2401, at 7; Nov. 2, 2006, Opinion, *supra* note 2397, at 3, 18 n.6.

2417. Opinion at 5, *United States v. Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. Feb. 27, 2007), *available at* 2007 WL 628059.

2418. Nov. 2, 2006, Opinion, *supra* note 2397, at 17.

2419. Dec. 8, 2006, Opinion, *supra* note 2401, at 5–6; Nov. 2, 2006, Opinion, *supra* note 2397, at 17, 22.

tions with their clients and their trial strategy.²⁴²⁰ Judge Fish overruled this objection.²⁴²¹

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.²⁴²²

Challenge: Witness Security

Two trial witnesses testified under cover.²⁴²³ 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.²⁴²⁴ The defendants and their immediate family members were permitted to see the witnesses, but members of the press and public could only listen to an audio feed in another courtroom.²⁴²⁵ The witnesses' identities were not disclosed to defense counsel.²⁴²⁶

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.²⁴²⁷ Judge Fish observed that "information that is classified under Israeli law is also classified under American law."²⁴²⁸

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.²⁴²⁹ Israeli law prohibits the disclosure of ISA agents' identities.²⁴³⁰ He

2420. Nov. 2, 2006, Opinion, *supra* note 2397, at 17; *see* Opinion at 5, *Holy Land Foundation*, 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 2397, at 4 ("To the court's knowledge, the defendants have yet to request that any specific FISA intercepts be declassified.").

2421. Nov. 2, 2006, Opinion, *supra* note 2397, at 19–20.

2422. Dec. 8, 2006, Opinion, *supra* note 2401, at 6.

2423. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

2424. Opinion, *Holy Land Foundation*, 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 Trial Turns to Israeli Agent*, Dallas Morning News, Aug. 10, 2006, at 7B [hereinafter *Israeli Agent*]; Whoriskey, *supra* note 2341.

2425. May 5, 2007, Opinion, *supra* note 2424; *see* Trahan, *Israeli Agent*, *supra* note 2424.

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.

2426. *See* Trahan, *Israeli Agent*, *supra* note 2424.

2427. May 5, 2007, Opinion, *supra* note 2424.

2428. *Id.* at 6.

2429. Opinion at 3–5, *Holy Land Foundation*, No. 3:04-cr-240 (N.D. Tex. July 16, 2007), *available at* 2007 WL 2059722; May 5, 2007, Opinion, *supra* note 2424; *see* Trahan, *Another Anonymous Witness*, *supra* note 2424.

2430. May 5, 2007, Opinion, *supra* note 2424.

testified under the alias “Avi.”²⁴³¹ The other witness worked for the Israeli Defense Forces, which looks to ISA rules for the protection of its personnel.²⁴³² He testified as “Major Lior.”²⁴³³

Both witnesses testified under cover in the retrial as well.²⁴³⁴

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.²⁴³⁵ Even Judge Fish did not know where the jurors met each morning.²⁴³⁶ Jurors took lunch in the jury room.²⁴³⁷

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.²⁴³⁸

2431. See Trahan, *Another Anonymous Witness*, *supra* note 2424.

2432. May 5, 2007, Opinion, *supra* note 2424; see Trahan, *Israeli Agent*, *supra* note 2424.

2433. See Trahan, *Israeli Agent*, *supra* note 2424.

2434. Interview with Hon. Jorge A. Solis, Oct. 6, 2009; see Jason Trahan, *Jurors to Hear Key Israeli Witnesses*, Dallas Morning News, Oct. 20, 2008, at 1B.

2435. Interview with Hon. A. Joe Fish, Oct. 6, 2009.

2436. *Id.*

2437. *Id.*

2438. 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.²⁴³⁹ 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.²⁴⁴⁰

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 1970.²⁴⁴¹ He was arrested on January 25, 1993, by Israeli officials at a Gaza Strip checkpoint and charged with providing aid to Hamas.²⁴⁴² Police found \$97,400 in his

2439. *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.

2440. 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.

2441. See Laurie Cohen & Noreen Ahmed-Ullah, *Firing Tied to Israel Sentence*, Chi. Trib., June 6, 2003, Metro, at 1; Lighty & Cohen, *supra* note 2439; Libby Sander, *Trial Begins for 2 Charged with Aiding Terror Group*, N.Y. Times, Oct. 20, 2006, at A16.

2442. *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 2441.

Jerusalem YMCA hotel room.²⁴⁴³ 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.²⁴⁴⁴ He was released in November 1997.²⁴⁴⁵

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."²⁴⁴⁶ 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.²⁴⁴⁷

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 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.").

2443. *In re Ford Van*, 50 F. Supp. 2d at 794; see Jackson *et al.*, *supra* note 2442 (reporting \$96,400 found); Sander, *2 Men Cleared*, *supra* note 2442 (reporting \$97,000 found); Sander, *supra* note 2441 (same).

2444. *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 2442; Sander, *supra* note 2441.

2445. *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 2442; Sander, *supra* note 2441. 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 2441; Lighty & Cohen, *supra* note 2439. 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 2439.

2446. *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.

2447. 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 2446; William Gaines & Andrew Martin, *Terror-Funding Probe Touches Suburban Group*, Chi. Trib., Sept. 8, 1998, News, at 1; Jackson *et al.*, *supra* note 2442; Lighty & Cohen, *supra* note 2439.

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.²⁴⁴⁸ The parents attached to their complaint the government's forfeiture action against Salah and the institute.²⁴⁴⁹ 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.²⁴⁵⁰

Abdelhaleem Ashqar

On February 23, 1998, Ashqar was jailed in Manhattan for refusing to testify before a grand jury investigating Hamas funding.²⁴⁵¹ Although offered immunity, Ashqar refused to cooperate and was jailed for civil contempt.²⁴⁵² Ashqar protested his jailing with a hunger strike.²⁴⁵³ 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.²⁴⁵⁴ He was released after six months in prison on a finding that continued confinement would not induce testimony.²⁴⁵⁵

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 5.²⁴⁵⁶ Ashqar again protested his imprisonment for con-

2448. *See supra*, "Prosecution of a Charity."

2449. 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).

2450. *Boim v. Holy Land Found.*, 549 F.3d 685, 691 (7th Cir. 2008), *cert. denied*, ___ U.S. ___, 130 S. Ct. 458 (2009); Transcript at 4, *Boim*, No. 1:00-cv-2905 (N.D. Ill. Mar. 6, 2009, filed May 23, 2011) (noting dismissal of complaint against Salah); *see also* Opinion, *id.* (Oct. 27, 2010) (denying Salah's petition for costs), available at 2010 WL 4504876.

2451. *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 2442; Sander, *supra* note 2441. He came to the United States on an academic fellowship. *See* Sander, *supra* note 2441.

2452. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 2451.

2453. *Ashqar*, 582 F.3d at 821; *In re Grand Jury Subpoena*, 150 F.3d at 171; *see* Weiser, *supra* note 2451.

2454. *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.

2455. *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).

2456. *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 2455.

tempt with a hunger strike.²⁴⁵⁷ After the court of appeals affirmed the holding of civil contempt against Ashqar,²⁴⁵⁸ the government indicted him for criminal contempt.²⁴⁵⁹ The U.S. District Court for the Northern District of Illinois assigned the prosecution of Ashqar for criminal contempt to Judge Amy St. Eve,²⁴⁶⁰ who released Ashqar to home detention in Virginia on bail after two months of confinement.²⁴⁶¹ On June 24, 2004, the indictment was expanded to include a charge for obstruction of justice.²⁴⁶² Ashqar was again temporarily detained following the 2004 superseding indictment for funding Hamas.²⁴⁶³

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.²⁴⁶⁴

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.²⁴⁶⁵ During his trip he was expelled from Jordan at the United States' urging after setting up a Hamas support office in Amman.²⁴⁶⁶ Five days after his detention, Israel de-

2457. See *Jailing*, *supra* note 2455; Franklin & Cohen, *supra* note 2451.

2458. *In re Grand Jury Proceedings*, 347 F.3d 197; see *Jailing*, *supra* note 2455.

2459. *Ashqar* Indictment, *supra* note 2456; see *Ashqar*, 582 F.3d at 822; see also Franklin & Cohen, *supra* note 2451.

2460. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 2440; see Matt O'Connor, *Palestinian Activist Seeks Release on Bail*, Chi. Trib., Oct. 16, 2003, Metro, at 2.

2461. See O'Connor, *supra* note 2440.

2462. 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 2440.

2463. 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.

2464. *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 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").

2465. *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.

2466. See Greenhouse, *supra* note 2465; John Kifner, *Alms and Arms: Tactics in a Holy War*, N.Y. Times, Mar. 15, 1996, at 1; MacFarquhar, *supra* note 2465.

cided to seek his extradition.²⁴⁶⁷ On May 7, 1996, the district court in Manhattan approved extradition.²⁴⁶⁸

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.²⁴⁶⁹ A spokesperson for Hamas announced that America would be punished if Abu Marzook were to be extradited.²⁴⁷⁰ 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.²⁴⁷¹ Abu Marzook remained detained pending immigration exclusion proceedings, and one month later, Jordan announced that it would accept Abu Marzook back.²⁴⁷² Abu Marzook was deported to Jordan on May 5.²⁴⁷³

More than two years later, Abu Marzook and two other Hamas leaders were arrested in Jordan following terrorist bombings in Jerusalem.²⁴⁷⁴ Jordan deported him in 1999.²⁴⁷⁵ Abu Marzook was reported to be in Syria in 2001.²⁴⁷⁶ In 2002, the fugitive Abu Marzook was indicted in the Northern District of Texas for con-

2467. See Joel Greenberg, *Israel to Ask U.S. to Yield Palestinian*, N.Y. Times, July 31, 1995, at 3.

2468. *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).

2469. See Steven Erlanger, *Palestinian Held in U.S. May Halt Fight on Extradition*, N.Y. Times, Jan. 29, 1997, at A9.

2470. See Douglas Jehl, *Arabs May "Punish America" for Extradition, Hamas Says*, N.Y. Times, Jan. 30, 1997, at A3.

2471. See Stephen Franklin, *Israelis Drop Claim to Hamas Leader*, Chi. Trib., Apr. 4, 1997, News, at 1.

2472. 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 2465; 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.

2473. See MacFarquhar, *supra* note 2465.

2474. 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.

2475. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1006-07 (N.D. Ill. 2001).

2476. 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).

spiriting with a computer business owned by his wife's cousins to fund terrorism.²⁴⁷⁷ From 2006 through 2011, identified as the deputy political bureau chief of Hamas, he published op-eds in the *Washington Post*,²⁴⁷⁸ the *Los Angeles Times*,²⁴⁷⁹ and the *Guardian*.²⁴⁸⁰

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.²⁴⁸¹ 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.²⁴⁸²

Salah's prosecution was based, in part, on a confession to Israeli authorities, following his 1993 arrest, that he provided aid to Hamas.²⁴⁸³ But Salah argued that the confession was obtained by more than 50 days of torture by the Israeli secret police.²⁴⁸⁴ Salah also argued that his financial activity was humanitarian, intended to aid the Palestinian people and not to support terrorism.²⁴⁸⁵ Judge St. Eve ruled on June 8, 2006, that most of Salah's confession statements were admissible.²⁴⁸⁶

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

2477. *United States v. Elashi*, 440 F. Supp. 2d 536 (N.D. Tex. 2007) (denying co-defendants' 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 2352; Simpson, *supra* note 2352.

2478. Mousa Abu Marzook, Op-Ed, *What Hamas Is Seeking*, Wash. Post, Jan. 31, 2006, at A17 (concerning Hamas's victory in Palestinian elections).

2479. 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).

2480. Mousa Abu Marzook, Op-Ed, *Hamas Is Ready to Talk*, London Guardian, Aug. 16, 2007, at 34 (extolling the virtues of Hamas's governing).

2481. See Lichtblau, *supra* note 2439; Lighty & Cohen, *supra* note 2439; Matt O'Connor, *Hamas-Case Men Sent Home*, Chi. Trib., Sept. 16, 2004, Metro, at 3; O'Connor & Cohen, *supra* note 2439.

2482. See O'Connor, *supra* note 2481.

2483. *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 2442; Sander, *supra* note 2441.

2484. See Sander, *2 Men Cleared*, *supra* note 2442; Sander, *supra* note 2441.

2485. See Eggen, *supra* note 2451; Jackson *et al.*, *supra* note 2442; Sander, *2 Men Cleared*, *supra* note 2442; Sander, *supra* note 2441.

2486. *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 1993.²⁴⁸⁷ 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.²⁴⁸⁸

The trial began on October 12, 2006.²⁴⁸⁹ The jury began to deliberate on January 11, 2007,²⁴⁹⁰ and on February 1, the jury acquitted Salah and Ashqar of aiding terrorists.²⁴⁹¹ The defendants were convicted, however, of obstructing justice, and Ashqar was also convicted of criminal contempt.²⁴⁹² Judge St. Eve sentenced Salah to one year and nine months in prison,²⁴⁹³ and she sentenced Ashqar to eleven years and three months.²⁴⁹⁴ The court of appeals affirmed.²⁴⁹⁵ Salah was released from prison on April 10, 2009.²⁴⁹⁶

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.²⁴⁹⁷ Judge St. Eve sug-

2487. *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 2442.

2488. *Marzook*, 435 F. Supp. 2d at 788–94.

2489. Minute Entry, *United States v. Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Oct. 12, 2006).

2490. 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.

2491. 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 2451; Sander, *2 Men Cleared*, *supra* note 2442.

2492. *Ashqar*, 582 F.3d at 822; see Bush & Coen, *supra* note 2491; Eggen, *supra* note 2451; Sander, *2 Men Cleared*, *supra* note 2442.

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 2491; Libby Sander, *American Gets Prison for Lying About Hamas*, N.Y. Times, July 12, 2007, at A17 [hereinafter *American Gets Prison*].

2493. 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 2492.

2494. Judgment, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Nov. 21, 2007); see *Ashqar*, 582 F.3d at 822; see also *Ex-Professor Is Sentenced in a Hamas Case*, N.Y. Times, Nov. 22, 2007, at A23.

2495. *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.

2496. <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).

2497. Salah's Discovery Motion, *Abu Marzook*, No. 1:03-cr-978 (N.D. Ill. Dec. 12, 2005); see Higgins, *supra*, note 2483.

gested that he follow rogatory-letter procedures, but Salah ultimately relied on testimony from Israeli police officers.²⁴⁹⁸

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).²⁴⁹⁹ It was unprecedented for such officers to provide testimony outside of Israel.²⁵⁰⁰

Judge St. Eve agreed to close the hearing on Salah's motion to suppress his confession while the ISA agents testified.²⁵⁰¹ The government of Israel waived its secret classification of the agents' testimony as to defense attorneys and Salah.²⁵⁰² All other persons in court during the testimony had security clearances.²⁵⁰³

To protect the agents' identities, they were permitted to use private entrances to the courthouse and the courtroom.²⁵⁰⁴ The agents and their Israeli attorneys were identified in court documents by code names.²⁵⁰⁵ 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.²⁵⁰⁶

The hearing was open for the testimony of other witnesses, including Israeli police officers.²⁵⁰⁷

2498. Interview with Hon. Amy St. Eve, July 2, 2007; see 28 U.S.C. § 1781; Fed. R. Civ. P. 28(b).

2499. *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.

2500. *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 2499 (quoting the government's brief).

2501. *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.

2502. *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.").

2503. *Abu Marzook*, 412 F. Supp. 2d at 919.

2504. *Id.* at 928; see Higgins, *supra* note 2501.

2505. See Michael Higgins, *In Chicago Court, Israelis Deny '93 Torture of Bridgeview Man*, Chi. Trib., May 1, 2006, News, at 12.

2506. *Abu Marzook*, 412 F. Supp. 2d at 927–28.

2507. *Id.* at 928; see Higgins, *supra* note 2501.

The hearing was conducted intermittently from March 3 to April 27, 2006. N.D. Ill. *Abu Marzook* Docket Sheet, *supra* note 2440.

For the trial, Judge St. Eve again permitted the ISA agents to testify using pseudonyms in a closed courtroom.²⁵⁰⁸ Again Judge St. Eve permitted the witnesses to use private entrances.²⁵⁰⁹ She permitted the defendants' immediate family members to remain in the courtroom during the agents' testimony.²⁵¹⁰ 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.²⁵¹¹ But the agents ultimately decided to testify without disguise, because of the limitations on who would be in the courtroom to see them.²⁵¹² Judge St. Eve decided that the rest of the trial would be public.²⁵¹³

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.²⁵¹⁴ 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.²⁵¹⁵

Challenge: Classified Evidence

A significant challenge in this case was application of the Classified Information Procedures Act (CIPA)²⁵¹⁶ to a substantial amount of classified evidence.²⁵¹⁷ 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.²⁵¹⁸ For hearings concerning classified documents, the court reporter used a laptop provided by classified information security officers, which was also stored in the safe.²⁵¹⁹

2508. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, 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 2451.

2509. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, at 6.

2510. *Id.* at 4; *see* Bush, *Conspiring with Israel*, *supra* note 2508.

2511. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, at 5–6; *see* Bush, *Conspiring with Israel*, *supra* note 2508.

2512. Interview with Hon. Amy St. Eve, July 2, 2007.

2513. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, at 5; *see* Bush, *Conspiring with Israel*, *supra* note 2508.

2514. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, at 4–5; *see* Bush, *Conspiring with Israel*, *supra* note 2508; Bush, *Torture Denied*, *supra* note 2508.

2515. Aug. 29, 2006, *Abu Marzook* Minute Entry, *supra* note 2502, at 5–6.

2516. 18 U.S.C. app. 3; *see* Reagan, *supra* note 173.

2517. Interview with Hon. Amy St. Eve, July 2, 2007.

2518. *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).

2519. 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.²⁵²⁰ The clearance process took a substantial fraction of their tenures as law clerks, so Judge St. Eve handled classified issues without law clerk assistance.²⁵²¹

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.²⁵²²

Deputy marshals electronically monitored for surveillance conferences and hearings in which classified information was discussed.²⁵²³

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.²⁵²⁴

For the trial, the government proposed the substitution of five admissions in lieu of classified evidence concerning Salah's interrogation by ISA agents.²⁵²⁵ For example, the government offered to admit that the ISA authorized its agents to use hoods, handcuffs, and shackles during interrogations.²⁵²⁶ Judge St. Eve approved these evidence substitutions.²⁵²⁷ 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.²⁵²⁸ As the trial unfolded, Salah cross-examined the agents extensively, and the vast majority of the topics covered did not involve classified information.²⁵²⁹

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

2520. *Id.*

2521. *Id.*

2522. *Id.*

2523. *Id.*

2524. United States v. Abu Marzook, 412 F. Supp. 2d 913, 928 (N.D. Ill. 2006); *see* Higgins, *supra* note 2501.

2525. United States v. Salah, 462 F. Supp. 2d 915, 916–18 (N.D. Ill. 2006).

2526. *Id.* at 917.

2527. *Id.* at 925.

2528. *Id.* at 919–24.

2529. *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.²⁵³⁰

Challenge: Classified Arguments

The government moved for secrecy in the taking of testimony from agents of the ISA.²⁵³¹ 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.²⁵³²

Challenge: Classified Opinion

Judge St. Eve's 138-page public opinion denying Salah's motion to suppress his Israeli confession²⁵³³ occupies 70 pages of the *Federal Supplement*.²⁵³⁴ Nineteen portions of the opinion are redacted.²⁵³⁵ The parties received unredacted copies, and the unredacted original is stored in Judge St. Eve's safe.²⁵³⁶

Challenge: Jury Security

To protect jurors' safety, the government moved for an anonymous jury.²⁵³⁷ Defense counsel argued that an anonymous jury is an improper message to jurors that the defendants are dangerous.²⁵³⁸ 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.²⁵³⁹

2530. *Id.* at 924.

2531. *See* Higgins, *supra* note 2501.

2532. Interview with Hon. Amy St. Eve, July 2, 2007; *see* Higgins, *supra* note 2501.

2533. Opinion, United States v. Abu Marzook, No. 1:03-cr-978 (N.D. Ill. June 8, 2006).

2534. United States v. Marzook, 435 F. Supp. 2d 708, 708–77 (N.D. Ill. 2006).

2535. *Id.* at 715–16, 718, 721, 726, 746–47, 750–51, 758, 767.

2536. Interview with Hon. Amy St. Eve, July 2, 2007.

2537. 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.

2538. 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.

2539. 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.

Giving State Secrets to Lobbyists

United States v. Franklin
(*T.S. Ellis III, E.D. Va.*)²⁵⁴⁰

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).²⁵⁴¹ On the following day, *The Washington Post* identified the analyst as Larry Franklin, an Iran specialist, who formerly worked for the Defense Intelligence Agency.²⁵⁴²

It was reported that for several years the FBI had been investigating not the analyst but two men who worked at AIPAC.²⁵⁴³ 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.²⁵⁴⁴ On August 31, the *Los Angeles Times* reported on the August 27 interviews, identifying the men as Steve Rosen and Keith Weissman,²⁵⁴⁵ and on the following day the *New York Times* reported that the men were suspected of passing classified information to Israel.²⁵⁴⁶

When the story broke, Franklin was cooperating with the government in its investigation of Rosen and Weissman.²⁵⁴⁷ It was reported that Franklin was seen

2540. An appeal was heard by Fourth Circuit Judges Robert B. King, Roger L. Gregory, and Dennis W. Shedd.

2541. *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).

2542. 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).

2543. 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.

2544. *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.

2545. 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).

2546. *Rosen*, 471 F. Supp. 2d at 653; *Rosen*, 447 F. Supp. 2d at 553; Johnston, *supra* note 2544.

2547. 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 2543 (“Franklin, wearing a recording device, met with Weissman and ‘induced him into believing that he had to

joining a monitored lunch meeting Rosen and Weissman had with an Israeli embassy official in 2003.²⁵⁴⁸ 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.²⁵⁴⁹ His security clearance was suspended in June 2004.²⁵⁵⁰ In July, Franklin cooperated in a recorded sting meeting with Weissman in which Franklin gave the lobbyist classified information.²⁵⁵¹ Weissman passed on the information to Rosen, and then they passed it on to the Israeli embassy and a reporter for the *Washington Post*.²⁵⁵²

On May 3, 2005, the government filed a sealed criminal complaint against Franklin, who surrendered to authorities the next day.²⁵⁵³ The government filed a sealed indictment against Franklin on May 26 and a superseding indictment on August 4.²⁵⁵⁴ The U.S. District Court for the Eastern District of Virginia assigned the case to Judge T.S. Ellis III.²⁵⁵⁵ 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.²⁵⁵⁶ 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-

communicate certain information right away in order to save innocent lives,' according to the [defense] lawyers.”)

2548. 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.

2549. 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).

2550. See Markon, *Defense Analyst Charged*, *supra* note 2549.

2551. 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”).

2552. *Rosen*, 445 F. Supp. 2d at 609–10; see Markon, *supra* note 2551.

2553. 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.

2554. E.D. Va. Docket Sheet, *supra* note 2553.

2555. *Id.*

Tim Reagan interviewed Judge Ellis for this report in the judge's chambers on September 5, 2007.

2556. 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 2553; 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.²⁵⁵⁷ Franklin's sentence ultimately was reduced, and he was ordered released on May 31, 2010.²⁵⁵⁸

AIPAC fired Rosen and Weissman on March 21, 2005.²⁵⁵⁹ The August 4 superseding indictment added Rosen and Weissman as defendants.²⁵⁶⁰ 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.²⁵⁶¹ 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.²⁵⁶²

According to the indictment, Rosen met Franklin in 2002.²⁵⁶³ Franklin allegedly disclosed to Rosen and Weissman, on February 12, 2003, information about a draft policy document concerning "a certain Middle Eastern country."²⁵⁶⁴ Rosen allegedly passed information about the document to foreign officials, journalists, and a think-tank fellow.²⁵⁶⁵ Weissman allegedly participated in several of these conversations.²⁵⁶⁶

Judge Ellis ruled that at trial the government would have to prove that the information passed by the defendants qualified as national defense information

2557. E.D. Va. Docket Sheet, *supra* note 2553; see David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. Times, Jan. 21, 2006, at A14.

2558. E.D. Va. Docket Sheet, *supra* note 2553 (noting sentencing order on May 26, 2010); see <http://www.bop.gov> (reg. no. 70425-083).

2559. *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.

2560. E.D. Va. Docket Sheet, *supra* note 2553; see David Johnston, *Israel Lobbyists Facing Charges in Secrets Case*, N.Y. Times, Aug. 5, 2005, at A1.

2561. *Rosen*, 487 F. Supp. 2d at 693; *Rosen*, 445 F. Supp. 2d at 608.

2562. *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).

2563. *Rosen*, 445 F. Supp. 2d at 609.

2564. *Id.*

2565. *Id.*

2566. *Id.*

(NDI).²⁵⁶⁷ “To qualify as NDI, information must be closely held by the government and potentially damaging to national security if disclosed.”²⁵⁶⁸ “It is important to recognize that NDI and classified material may not be coextensive sets.”²⁵⁶⁹ “In short, the government designates what information is labeled and treated as classified, while a court or jury determines what information qualifies as NDI”²⁵⁷⁰

Rosen and Weissman’s trial was originally scheduled to begin in April 2006,²⁵⁷¹ but it was postponed several times as the court dealt with constitutional issues and the handling of classified information.²⁵⁷² Judge Ellis ruled on August 10, 2006, that prosecution of Rosen and Weissman under the 1917 Espionage Act was constitutional.²⁵⁷³

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.²⁵⁷⁴

Challenge: Classified Evidence

A large amount of classified evidence was at issue in this case.²⁵⁷⁵ Judge Ellis’s career law clerk has a top-secret security clearance, and she can help the judge

2567. *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.

2568. *United States v. Rosen*, 487 F. Supp. 2d 703, 705 n.1 (E.D. Va. 2007).

2569. *Id.*

2570. *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?*, *supra* note 190 (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”).

2571. See Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, Wash. Post, Jan. 21, 2006, at A1.

2572. 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 2543 (“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 2570 (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).

2573. See Markon, *Judge Rejects Dismissal*, *supra* note 2572; Schmitt, *Lobbyists to Stand Trial*, *supra* note 2572.

2574. E.D. Va. Docket Sheet, *supra* note 2553; 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 2543.

2575. *United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009).

deal with issues concerning classified information.²⁵⁷⁶ One of Judge Ellis's temporary law clerks, however, was a Canadian citizen, and so he was not eligible for a security clearance.²⁵⁷⁷

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.²⁵⁷⁸

Pursuant to the Classified Information Procedures Act (CIPA),²⁵⁷⁹ 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."²⁵⁸⁰ 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.²⁵⁸¹

As required by section 5(a) of CIPA, the defendants gave notice of their intent to introduce classified evidence at trial.²⁵⁸² Pursuant to section 6 of CIPA, Judge Ellis "determined that a substantial volume of the classified information was indeed relevant and admissible."²⁵⁸³ 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."²⁵⁸⁴ 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 themselves 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

2576. Interview with Hon. T.S. Ellis III, Sept. 5, 2007.

2577. *Id.*; see 28 C.F.R. § 17.41(b) ("Eligibility for access to classified information is limited to United States citizens . . .").

2578. E.D. Va. Docket Sheet, *supra* note 2553; see Reagan, *supra* note 173, at 19 (describing SCIFs).

2579. 18 U.S.C. app. 3; see Reagan, *supra* note 173 (discussing CIPA).

2580. *Rosen*, 557 F.3d at 196; see Markon, *Classified Documents Allowed*, *supra* note 2572 ("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.").

2581. *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 2572.

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.

2582. *Rosen*, 557 F.3d at 195 ("a large volume of classified evidence"); see 18 U.S.C. app. 3 § 5(a).

2583. *Rosen*, 557 F.3d at 195; see 18 U.S.C. app. 3 § 6.

2584. *Rosen*, 557 F.3d at 196; see 18 U.S.C. app. 3 § 6(c)(1).

entered an order adopting the parties' agreed-to substitutions, over the government's objection.²⁵⁸⁵

Judge Ellis determined that it might be appropriate to introduce classified evidence at trial using the "silent witness rule."²⁵⁸⁶ The silent witness rule permits some evidence to be presented to the judge, the jury, and the parties, but not to the public.²⁵⁸⁷ It is a partial closing of the trial.²⁵⁸⁸ 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."²⁵⁸⁹

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.²⁵⁹⁰

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.²⁵⁹¹ The government objected to subpoenas for all but Franklin and three others, arguing that testimony from the others would be at best cumulative.²⁵⁹² 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.²⁵⁹³

[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

2585. *Rosen*, 557 F.3d at 196.

2586. *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").

2587. *Rosen* 520 F. Supp. 2d at 793–94.

2588. *Id.* at 794.

2589. *Id.* at 793–94.

2590. *Id.* at 799.

2591. *United States v. Rosen*, 520 F. Supp. 2d 802, 804, 806–07 (E.D. Va. 2007); see Pincus, *supra* note 2570.

2592. *Rosen*, 520 F. Supp. 2d at 807 & n.8, 810.

2593. *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.

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.²⁵⁹⁴

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.²⁵⁹⁵

Because so many issues in this case concern classified information, Judge Ellis filed separate orders under seal stating (1) how the silent witness rule would be applied²⁵⁹⁶ and (2) specific reasons for his ruling on each requested subpoena of a high-ranking government official.²⁵⁹⁷

As the final trial date approached, and shortly before the government dropped the case, Judge Ellis issued a sealed order concerning the defendants' evidence.²⁵⁹⁸

Challenge: Closed Proceedings

Judge Ellis rejected the government's motion to try the defendants in closed proceedings.²⁵⁹⁹ But the court held several closed hearings, each of which required a court reporter with a security clearance.²⁶⁰⁰

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 admissibility of the "FBI Report" and the Israeli Briefing Document."²⁶⁰¹ Eight portions of the court's published opinion resolving the appeal are redacted.²⁶⁰²

2594. *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).

2595. *See* Jerry Markon, *Leak Investigation Ordered*, Wash. Post, Aug. 23, 2006, at A4.

2596. *United States v. Rosen*, 520 F. Supp. 2d 786, 789, 802 (E.D. Va. 2007).

2597. *Rosen*, 520 F. Supp. 2d at 814; E.D. Va. Docket Sheet, *supra* note 2553.

2598. E.D. Va. Docket Sheet, *supra* note 2553 (noting a sealed order filed Apr. 14, 2009).

2599. *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.

2600. E.D. Va. Docket Sheet, *supra* note 2553 (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).

2601. 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).

2602. *United States v. Rosen*, 557 F.3d 192, 197, 199–200 (4th Cir. 2009).

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.²⁶⁰³

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.²⁶⁰⁴

Judge Shedd's chambers in Columbia are not in a courthouse.²⁶⁰⁵ When he needs to review classified materials, he reviews them at the FBI's SCIF in town.²⁶⁰⁶ Both Judge Shedd and Judge King, who has chambers in Charleston, West Virginia, can also review classified materials in Richmond when they are there.²⁶⁰⁷

2603. 4th Cir. Docket Sheet, *supra* note 2601.

2604. Interview with Hon. Roger L. Gregory, Sept. 25, 2009.

2605. Interview with Hon. Dennis W. Shedd, Sept. 3, 2009.

2606. *Id.*

2607. Interview with Hon. Roger L. Gregory, Sept. 25, 2009; Interview with Hon. Robert B. King, March 19, 2008.

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.²⁶⁰⁸ Umer drove an ice cream truck; Hamid worked in a fruit-packing plant.²⁶⁰⁹

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.²⁶¹⁰ A native of Pakistan who became a U.S. citizen during his undercover work, Khan moved back to Lodi in August 2002.²⁶¹¹ He is reported to have encouraged support of terrorism as part of his undercover work.²⁶¹² The government is reported to have paid him approximately \$225,000.²⁶¹³

2608. 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.

2609. See *Frontline: The Enemy Within* (PBS television broadcast Oct. 10, 2006) [hereinafter *Enemy Within*]; Krikorian & Tempest, *supra* note 2608; Murphy & Johnston, *supra* note 2608; 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. Mubashir Zaidi, Rone Tempest & Greg Krikorian, *Relative Casts Doubt on Charge*, L.A. Times, June 11, 2005, at 16.

2610. 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.

2611. See Bailey, *supra* note 2610; Eric Bailey, *Mixed Picture of Suspect*, L.A. Times, Mar. 1, 2006, at 3 [hereinafter *Mixed Picture*]; Tempest, *FBI Informer*, *supra* note 2610 ("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 2610.

2612. 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 2611 ("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 man' and fulfill his vow to attend a terrorist training camp."); *Enemy Within*, *supra* note 2609

The Hayats went to Pakistan in April 2003.²⁶¹⁴ Although Hamid was on the no-fly list of suspected extremists, he returned from Pakistan to California by plane via Korea on May 30, 2005.²⁶¹⁵ 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.²⁶¹⁶ Four days after Hamid's return to California, federal agents interviewed him again.²⁶¹⁷ They also interviewed his father.²⁶¹⁸ Both denied the son's involvement with terrorists.²⁶¹⁹ After failing a polygraph examination, however, Hamid confessed to attending an Al-Qaeda training camp in Pakistan for six months in 2003 and 2004.²⁶²⁰ The father

("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 2610 ("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.").

2613. 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 2610 (more than \$200,000); Bailey, *Mixed Picture*, *supra* note 2611 (about \$250,000); *Enemy Within*, *supra* note 2609 (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 2610 (nearly \$250,000 "for his efforts in Lodi alone"); Tempest, *Terrorist Training*, *supra* note 2611 (more than \$200,000 in salary and bonuses); Tempest, *Final Round*, *supra* note 2610 (about \$3,500 per month plus expenses); Tempest, *Man Trained*, *supra* note 2611 (\$250,000); Tempest, *Onetime Clerk*, *supra* note 2610 (more than \$200,000 in salary and expenses); Tempest, *Tape Recording Surfaces*, *supra* note 2610 (nearly \$230,000).

2614. Government's Trial Brief at 3, 6, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 14, 2006); Second Superseding Indictment at 2, *id.* (Jan. 26, 2006); First Superseding Indictment at 3, *id.* (Sept. 22, 2005); *see Enemy Within*, *supra* note 2609; Krikorian & Tempest, *supra* note 2608; Tempest, *FBI Informer*, *supra* note 2610.

2615. Government's Trial Brief, *supra* note 2614, at 3-4; *see Archibold, Diverging Views, supra* note 2613; Krikorian & Tempest, *supra* note 2608; Murphy & Johnston, *supra* note 2608.

2616. Government's Trial Brief, *supra* note 2614, at 4; Second Superseding Indictment, *supra* note 2614, at 3; First Superseding Indictment, *supra* note 2614, at 3; *see Rone Tempest, In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at 1.

2617. Government's Trial Brief, *supra* note 2614, at 4, 7; *see Enemy Within, supra* note 2609; Krikorian & Tempest, *supra* note 2608.

2618. Government's Trial Brief, *supra* note 2614, at 5, 9; *see Enemy Within, supra* note 2609; Krikorian & Tempest, *supra* note 2608.

2619. Government's Trial Brief, *supra* note 2614, at 4-5, 8-9; *see Krikorian & Tempest, supra* note 2608.

2620. Government's Trial Brief, *supra* note 2614, at 8; *see Krikorian & Tempest, supra* note 2608; Tempest, *supra* note 2616; Tempest *et al.*, *supra* note 2609.

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, *United States v. Hayat*, No. 2:05-

and son were indicted on June 16, 2005, for making false statements to federal officials.²⁶²¹ 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.²⁶²² The government added an additional false statement charge against each defendant on January 26, 2006.²⁶²³ The U.S. District Court for the Eastern District of California assigned the case to Judge Garland E. Burrell, Jr.²⁶²⁴

After arresting the Hayats, the government arrested other Pakistani-American and Pakistani men in Lodi.²⁶²⁵ Muslim clerics Shabir Ahmed and Mohamed Adil Khan and Khan's son Mohammed Hassan Adil were detained on immigration violations.²⁶²⁶ They agreed to return to Pakistan to avoid terrorism-related charges.²⁶²⁷

The two Hayats were tried together, but before separate juries.²⁶²⁸ The younger Hayat's jury convicted him of all charges on April 25, 2006, and the father's jury deadlocked.²⁶²⁹

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 2613; *Enemy Within*, supra note 2609; 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).

2621. 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; Dean E. Murphy, *Two Indicted in Terrorism Case*, N.Y. Times, June 17, 2005, at A24; Tempest, supra note 2616; Rone Tempest & Greg Krikorian, *Affidavit Changed in Terrorism Accusation*, L.A. Times, June 10, 2005, at 1.

2622. First Superseding Indictment, supra note 2614; see Tempest, supra note 2616; Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. Times, Sept. 23, 2005, at 3 [hereinafter *Lodi Man Indicted*].

2623. Second Superseding Indictment, supra note 2614.

2624. 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 2621.

Tim Reagan interviewed Judge Burrell for this report in the judge's chambers on February 13, 2007.

2625. See Tempest et al., supra note 2609.

2626. See Murphy & Johnston, supra note 2608; Tempest, supra note 2616; Tempest et al., supra note 2609.

2627. See Archibold, *Diverging Views*, supra note 2613 (reporting a voluntary return to Pakistan to avoid deportation); *Enemy Within*, supra note 2609 (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 2611 (reporting that both imams were allowed to leave the country voluntarily); Tempest, *Lodi Man Indicted*, supra note 2622 (reporting that Khan was deported in Aug. 2005).

2628. 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.

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.²⁶³⁰ After taking testimony from both jurors, Judge Burrell credited the foreperson's claim that he did not make the gesture.²⁶³¹ A new trial was denied.²⁶³² The son was sentenced on September 10, 2007, to 24 years in prison.²⁶³³ His appeal was heard on June 10, 2009.²⁶³⁴

The government initially decided to retry the father,²⁶³⁵ 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.²⁶³⁶ 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.²⁶³⁷

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 question-

2629. Verdict, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Apr. 25, 2006) (finding Hamid Hayat guilty); E.D. Cal. Docket Sheet, *supra* note 2624 (noting the granting of a mistrial as to Umer Hayat because the jury was not able to reach a verdict); *see* Order Denying New Trial, *supra* note 2620, at 1; *see also* Archibold & Kearns, *supra* note 2608; *Enemy Within*, *supra* note 2609; Walsh, *supra* note 2610 (“The jury split 7-5 for conviction on one count and 6-6 on a second count . . .”); Tempest, *supra* note 2616 (“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.”).

2630. Order Denying New Trial, *supra* note 2620, at 6, 8–13; *see* Denny Walsh, *New Trial Sought for Hayat*, Sacramento Bee, Oct. 29, 2006, at B1.

2631. Order Denying New Trial, *supra* note 2620, 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.

2632. Order Denying New Trial, *supra* note 2620; *see* Bulwa, *supra* note 2631.

2633. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 25, 2007); *see* Marshall, *supra* note 2613.

2634. http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003604 (audio recording of oral argument); Docket Sheet, *United States v. Hayat*, No. 07-10457 (9th Cir. Sept. 21, 2007) (noting oral argument heard by circuit judges Mary M. Schroeder, A. Wallace Tashima, and Marsha S. Berzon).

2635. *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.

2636. Plea Agreement, *Hayat*, No. 2:05-cr-240 (E.D. Cal. May 31, 2006); Information, *id.* (May 31, 2006); *see* *Enemy Within*, *supra* note 2609; Rone Tempest & Eric Bailey, *Lodi Man Is Released in Plea Bargain*, L.A. Times, June 1, 2006, at 7; Walsh, *supra* note 2610.

2637. Judgment, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Sept. 5, 2006); *see* Carolyn Marshall, *Man in Terror Investigation Is Released*, N.Y. Times, Aug. 26, 2006, at A12; Walsh, *supra* note 2610.

ing.²⁶³⁸ 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.²⁶³⁹ They declined to be interrogated²⁶⁴⁰ and were permitted to return home five months later after intervention of counsel.²⁶⁴¹

Challenge: Classified Evidence

Nine days after the defendants were first indicted, the government filed a notice that the Classified Information Procedures Act (CIPA)²⁶⁴² may apply to this case.²⁶⁴³ 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 commenced. Thus, it is reasonably foreseeable that additional classified and potentially discoverable information will be encountered.²⁶⁴⁴

Six times the government noticed submission of material to the court *ex parte*, *in camera*, and under seal,²⁶⁴⁵ and twice the government noticed a hearing *ex parte*, *in camera*, and under seal.²⁶⁴⁶

2638. *Enemy Within*, *supra* note 2609; Stephen Magagnini, *Waiting to Go Free*, Sacramento Bee, Aug. 25, 2006, at A1; Walsh, *supra* note 2610.

2639. *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*.

2640. *See* Archibold, *supra* note 2639; Bulwa, *supra* note 2639.

2641. *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 OK'd to Return to U.S. from Pakistan*, S.F. Chron., Sept. 13, 2006, at B5.

2642. 18 U.S.C. app. 3; *see* Reagan, *supra* note 173.

2643. CIPA Notice, *United States v. Hayat*, No. 2:05-cr-240 (E.D. Cal. June 27, 2005).

2644. CIPA Motion at 3, *id.* (July 6, 2005).

2645. 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 Oct. 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 Dec. 9, 2005).

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.²⁶⁴⁷ 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.

. . . 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.²⁶⁴⁸

Judge Burrell considered whether he should order defense counsel to obtain security clearances or, alternatively, should appoint already cleared counsel to as-

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 Jan. 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 27, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005); Redacted Government's CIPA Motion, *id.* (dated Jan. 26, 2006, filed Feb. 1, 2006) (specifying a hearing date of Jan. 27, 2005).

5. CIPA Notice, *id.* (Apr. 3, 2006); *see* Redacted Government's CIPA Motion, *id.* (Apr. 4, 2006) (specifying a hearing date of Apr. 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).

2646. 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 Dec. 9, 2005); *see* Redacted Government's CIPA Motion, *id.* (dated Dec. 9, 2005, filed Dec. 16, 2005) (specifying a hearing date of Dec. 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 Dec. 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 Jan. 6, 2005 [sic]).

2647. *See Trial Date Is Set for Lodi Men*, L.A. Times, Jan. 7, 2006, at 6 (reporting a trial date of Feb. 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 Feb. 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).

2648. Defendants' Joint CIPA Response at 2–3, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Jan. 16, 2006).

sist in the defense.²⁶⁴⁹ 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.²⁶⁵⁰ Ultimately, Judge Burrell decided that cleared counsel for the defendants was not necessary.²⁶⁵¹

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.²⁶⁵² Judge Burrell's court reporter obtained a security clearance, as did one other reporter at the court as a potential backup.²⁶⁵³

Hamid Hayat's motion for a new trial²⁶⁵⁴ 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.²⁶⁵⁵ Judge Burrell filed his ruling on this argument under seal.²⁶⁵⁶

2649. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

2650. *Id.*

2651. *Id.*

2652. Stipulated Order, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Feb. 3, 2006).

2653. Interview with Hon. Garland E. Burrell, Jr., Feb. 13, 2007.

2654. New Trial Brief, *Hayat*, No. 2:05-cr-240 (E.D. Cal. Oct. 27, 2006).

2655. 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).

2656. Order Denying New Trial, *supra* note 2620, at 35; E.D. Cal. Docket Sheet, *supra* note 2624 (noting that "counsel for the parties are authorized to obtain from the clerk's office a copy of the sealed order").

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.);*²⁶⁵⁷ *ACLU v. NSA (Anna Diggs Taylor, E.D. Mich.);*²⁶⁵⁸ *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.²⁶⁵⁹ President Bush acknowledged the existence of the program the following day.²⁶⁶⁰

2657. Appeals were heard by Ninth Circuit Judges Harry Pregerson, Michael Daly Hawkins, and M. Margaret McKeown.

2658. The appeal was heard by Sixth Circuit Judges Alice M. Batchelder, Ronald Lee Gilman, and Julia Smith Gibbons.

2659. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1; see *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).

"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 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 Priest & Arkin, *supra* note 239, at xxi.

Part of the Department of Defense, the NSA was established in 1952 to conduct communication surveillance. See Priest & Arkin, *supra* note 239, 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).

2660. President's Radio Address, Dec. 17, 2005, available at <http://usgovinfo.about.com/od/the-president-and-cabinet/a/radio121705.htm>.

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*.”²⁶⁶¹ 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.²⁶⁶² Dozens of lawsuits followed these revelations.²⁶⁶³ 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.²⁶⁶⁴

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 2659, 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).

2661. 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.

2662. Cauley, *supra* note 2661; 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 A1 (reporting that the government acknowledged warrantless wiretaps but did not acknowledge data mining in calling records, although the latter was widely reported).

2663. *In re NSA*, 633 F. Supp. 2d at 955; *Jewel Dismissal Order*, *supra* note 2659, 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.

2664. 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, *In re NSA*, No. 1791 (J.P.M.L. issued Nov. 3, 2006, final Nov. 21, 2006) (transferring one ac-

The government argued for dismissal of these cases, claiming that they could not be litigated without revealing state secrets.²⁶⁶⁵ This argument was successful with respect to alleged transfers of communication records by the telephone companies to the government,²⁶⁶⁶ but less successful with respect to the warrantless monitoring of the contents of communications, because the government acknowledged that it did that.²⁶⁶⁷

tion against a telephone company); Conditional Transfer Order 2, *In re NSA*, No. 1791 (J.P.M.L. issued Sept. 11, 2006, final Sept. 27, 2006) (transferring one action against a telephone company); Conditional Transfer Order 1, *In re NSA*, No. 1791 (J.P.M.L. 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 Aug. 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*, 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) [hereinafter N.D. Cal. *In re NSA* Docket Sheet]; see also *In re NSA*, 633 F. Supp. 2d at 956; Jewel Dismissal Order, *supra* note 2659, at 5; Carey, *supra* note 2663; Bob Egelko, *Surveillance Lawsuits Transferred to Judge Skeptical of Bush Plan*, S.F. Chron., Aug. 11, 2006, at B1; McLure, *supra* note 2663.

Tim Reagan interviewed Judge Walker for this report in the judge's chambers on February 15, 2007, September 29, 2008, and February 23, 2011.

2665. *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, *Center 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 also U.S. Statement of Interest, *Harrington v. AT&T, Inc.*, No. 1:06-cv-374 (W.D. Tex., July 17, 2006) (announcing intent to seek dismissal on state-secrets grounds).

2666. *ACLU v. NSA*, 438 F. Supp. 2d 754, 759, 764–66 (E.D. Mich. 2006) (dismissing datamining claims); Terkel v. AT&T, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006) (dismissing 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 (Gilman, dissenting) (“After 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 2663; Mike Robinson, *Judge Dismisses Lawsuit on AT&T Data Handover*, Wash. Post, July 26, 2006, at A6.

2667. *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 2664; 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 2663; Arshad Mohammed, *Judge Declines to Dismiss Lawsuit Against AT&T*, Wash. Post, July 21, 2006, at A9.

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).²⁶⁶⁸ She issued a permanent injunction against the program,²⁶⁶⁹ but a divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed and ordered the challenge to the program dismissed.²⁶⁷⁰ Judges Alice M. Batchelder and Julia Smith Gibbons determined that the plaintiffs' claims were too speculative to afford them standing,²⁶⁷¹ but

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 2659, 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.").

2668. *ACLU*, 438 F. Supp. 2d at 775–76, 778–80, 782; *ACLU*, 493 F.3d at 650; see Eggen & Linzer, *supra* note 2666; Gail Gibson, *NSA Wiretaps Ruled Illegal*, Chi. Trib., Aug. 18, 2006, News, at 1; Ron Hutcherson & 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 2663; Romero & Temple-Raston, *supra* note 275, at 149, 195.

Tim Reagan interviewed Judge Taylor for this report in the judge's chambers on December 7, 2006.

2669. *ACLU*, 438 F. Supp. 2d at 782; Judgment and Permanent Injunction Order, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. Aug. 17, 2006).

2670. *ACLU*, 493 F.3d at 648, 687–88; see *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (staying 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.

2671. *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 (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.").

Judge Ronald Lee Gilman would have affirmed the injunction.²⁶⁷² The Supreme Court denied certiorari.²⁶⁷³

Lawyers for an Islamic charity claimed that they possessed inadvertently disclosed direct evidence that they had been improperly surveiled, but the U.S. Court of Appeals for the Ninth Circuit held that the proffered evidence was too secret to afford them standing.²⁶⁷⁴ On remand, the district court ruled that an amended complaint alleged sufficient public information to create inferences supporting the plaintiffs' claims,²⁶⁷⁵ and the plaintiffs were entitled to summary judgment because the government did not rebut those inferences.²⁶⁷⁶

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.²⁶⁷⁷

2672. *Id.* at 693, 720 (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.

2673. *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 Feb. 19, 2008, after consideration at conferences on Jan. 18 and Feb. 15, 2008); see Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. Times, Feb. 20, 2008, at A15.

2674. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1193–95, 1205 (9th Cir. 2007); *In re NSA Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1110–15, (N.D. Cal. 2008); see Lichtblau, *supra* note 2667.

2675. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1082–86 (N.D. Cal. 2009).

2676. *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).

2677. *Al-Haramain Islamic Found.*, 507 F.3d at 1194; *ACLU*, 493 F.3d at 651 n.4; *Al-Haramain Remedies Order*, *supra* note 2676, at 8; PSP Report, *supra* note 2659, 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 275, 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. Ex. 2, Notice of Filing, *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 also 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

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.

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.²⁶⁷⁸ A constitutional challenge is pending.²⁶⁷⁹

Judge Walker determined that the FISA amendments required dismissal of all actions against telephone companies²⁶⁸⁰ and summary judgment for the federal government in all actions against states.²⁶⁸¹ Judge Walker also dismissed suits against the government that were generalized grievances insufficient to afford the plaintiffs standing.²⁶⁸²

Suits Against the Government

The American Civil Liberties Union (ACLU), other civil rights organizations, journalists, scholars, and attorneys sought injunctive relief against the NSA's pro-

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.

2678. FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436; *see Jewel Dismissal Order*, *supra* note 2659, at 6; Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. Times, July 10, 2008, at A1.

2679. Docket Sheet, *Amnesty Int'l USA v. McConnell*, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008).

On the day of President Bush's signature, the ACLU filed an action in the Southern District of New York challenging the amendments' constitutionality, Complaint, *id.*, and a motion before the FISC seeking participation in that court's review of the amendments, Motion, *In re Proceedings Required by § 702(i)*, No. Misc. 08-1 (FISA Ct. July 10, 2008).

In the Southern District of New York, 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, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009), but the court of appeals determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir.), *rehearing en banc denied*, ___ F.3d ___, 2011 WL 4381737 (2d Cir. 2011) (rehearing denied on a vote of six to six); *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.

The FISC denied the ACLU's motion, 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.

2680. *In re NSA Telecomm. Records Litig.*, 633 F. Supp. 2d 949 (N.D. Cal. 2009).

2681. *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

2682. Order, *Center for Constitutional Rights*, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011) [hereinafter *Manhattan Action Dismissal Order*]; *Jewel Dismissal Order*, *supra* note 2659.

gram of warrantless wiretaps on January 17, 2006, in federal court in Detroit.²⁶⁸³ The court assigned the case to Judge Taylor,²⁶⁸⁴ who enjoined the program on August 17.²⁶⁸⁵ The government immediately appealed,²⁶⁸⁶ and the plaintiffs cross-appealed the court's dismissal on state-secrets grounds of their communication records claims.²⁶⁸⁷ On July 6, 2007, the court of appeals vacated the injunction and ordered the case dismissed,²⁶⁸⁸ with one judge dissenting.²⁶⁸⁹

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.²⁶⁹⁰ Judge Lynch heard arguments on the plaintiffs' motion for partial summary judgment²⁶⁹¹ and the government's motion for dismissal on state-secrets grounds²⁶⁹² on September 5,²⁶⁹³ but did not rule before the case was transferred to Judge Walker.²⁶⁹⁴

2683. *United States v. Holy Land Foundation*, 493 F.3d 469, 648–50 (5th 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 275, at 71–72.

2684. 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 2683.

2685. *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 2666; Gibson, *supra* note 2668; Hutcheson & Talev, *supra* note 2668; Liptak & Lichtblau, *supra* note 2668; McLure, *supra* note 2663; Romero & Temple-Raston, *supra* note 275, 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.

2686. 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 2668; Hutcheson & Talev, *supra* note 2668; Liptak & Lichtblau, *supra* note 2668.

2687. *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].

2688. *ACLU*, 493 F.3d at 648, 687–88; see Goldstein, *supra* note 2670; Liptak, *supra* note 2670; Savage, *supra* note 2670.

2689. *ACLU*, 493 F.3d at 693–720 (Gilman, dissenting).

2690. Complaint, *Center 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 2682, at 2; see Ashenfelter & Wari, *supra* note 2683; Lichtblau, *supra* note 2683.

Tim Reagan interviewed Judge Lynch for this report by e-mail on May 16, 2007.

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/public/home.nsf/hisj>, and he authored the opinion giving standing to the constitutional challenge to the 2008 FISA amendments, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

2691. Plaintiffs' Partial Summary Judgment Brief, *Center for Constitutional Rights*, No. 1:06-cv-313 (S.D.N.Y. Mar. 9, 2006).

2692. Government's Brief, *id.* (May 27, 2006).

Seventy-two members of Congress filed amicus curiae briefs supporting the plaintiffs in these two cases.²⁶⁹⁵

The Al-Haramain Islamic Foundation—a charity 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.²⁶⁹⁶ The secret evidence was 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 terror-

2693. Transcript, *id.* (Sept. 5, 2006) [hereinafter *Center 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.

2694. Manhattan Action Dismissal Order, *supra* note 2682, at 5; Interview with Hon. Gerard E. Lynch, May 16, 2007.

2695. Brief by Members of Congress, *Center 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).

2696. *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) (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 2676, 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 2667; Liptak, *supra* note 2667; Liptak, *supra* note 2670; McLure, *supra* note 2663; 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. Complaint 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”).

ism.²⁶⁹⁷ The U.S. District Court for the District of Oregon assigned the case against the government to Judge Garr M. King,²⁶⁹⁸ who denied a motion by the government to dismiss the case on state-secrets grounds and certified an immediate appeal.²⁶⁹⁹ The U.S. Court of Appeals for the Ninth Circuit 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.²⁷⁰⁰

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.²⁷⁰¹ The

2697. *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 2696, at 28; Lichtblau, *supra* note 2667; Liptak, *supra* note 2667; Liptak, *supra* note 2670; MacLean, *supra* note 2696 (“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 2696 (“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.

2698. 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.

2699. *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 2667. 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* note 2699 (noting a stay order on Apr. 4, 2007).

2700. *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 circumstances”); see Keefe, *supra* note 2696, at 33; Lichtblau, *supra* note 2667.

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.

2701. *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

state-secrets privilege did apply, however, to the evidence that the charity and its attorneys proffered to establish standing.²⁷⁰² 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.²⁷⁰³ 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.²⁷⁰⁴ On January 5, 2009, Judge Walker ruled that an amended complaint did that.²⁷⁰⁵ 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.²⁷⁰⁶

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.²⁷⁰⁷ Judge Walker also awarded \$2,537,399.45 in attorney fees and costs.²⁷⁰⁸ Judge Walker ruled against burdening the taxpayers with punitive damages²⁷⁰⁹ and ruled that as a Specially Designated Global Terrorist Al-Haramain was ineligible for damages.²⁷¹⁰ Appeals are pending.²⁷¹¹

Suits against the government challenging warrantless wiretaps were also filed in Brooklyn²⁷¹² and Atlanta.²⁷¹³ The government moved on July 18, 2006, to dis-

known about the Terrorist Surveillance Program ("TSP") was spoon-fed to the public by the President and his administration."); see Lichtblau, *supra* note 2667.

2702. *Al-Haramain Islamic Found.*, 507 F.3d at 1201–05; see Lichtblau, *supra* note 2667.

2703. *Al-Haramain Islamic Found.*, 507 F.3d at 1193, 1205–06; see Lichtblau, *supra* note 2667.

2704. *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.

2705. *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.

2706. *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.

2707. *Al-Haramain Remedies Order*, *supra* note 2676, at 2, 9, 11, 13–14, 46; see *id.* at 12 ("Plaintiffs' estimate of the duration of unlawful surveillance appears conservative."); see also 50 U.S.C. § 1810(a) (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"); Eric Lichtblau, *U.S. Ordered to Pay Group of Muslims*, N.Y. Times, Dec. 22, 2010, at A23.

2708. *Al-Haramain Remedies Order*, *supra* note 2676, at 3, 28–46.

2709. *Id.* at 2.

2710. *Id.* at 2–3, 14–16, 29, 46.

2711. Docket Sheet, *Al-Haramain Islamic Found. v. Obama*, No. 11-15535 (9th Cir. Mar. 7, 2011) (Al-Haramain's appeal, noting that the last brief is due Dec. 14, 2011); Docket Sheet, *Al-Haramain Islamic Found. v. Obama*, No. 11-15468 (9th Cir. Feb. 25, 2011) (government's appeal).

2712. Complaint, *Shubert v. Bush*, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006); see *Jewel Dismissal Order*, *supra* note 2659, at 4.

2713. Complaint, *Guzzi v. Bush*, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006).

miss the Atlanta case for lack of standing,²⁷¹⁴ and the government moved on May 25, 2007, to dismiss the Brooklyn case on state-secrets grounds.²⁷¹⁵

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.²⁷¹⁶ Nearly two years later, an action was filed against the government by plaintiffs who filed the first action against a telephone company,²⁷¹⁷ and Judge Walker accepted assignment of the case as related to the others before him.²⁷¹⁸

On January 21, 2010, Judge Walker dismissed the last-filed action and the action originally filed in Brooklyn for lack of standing: “The two cases at bar are, in essence, citizen suits seeking to employ judicial remedies to punish and bring to heel high-level government officials for the allegedly illegal and unconstitutional warrantless electronic surveillance program or programs now widely, if incompletely, aired in the public forum.”²⁷¹⁹ Thereafter, plaintiffs voluntarily dismissed the Atlanta action,²⁷²⁰ and Judge Walker dismissed the Manhattan action for lack of standing.²⁷²¹

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

2714. Government Motion, *id.* (July 18, 2006).

2715. Government Motion, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. May 25, 2007).

2716. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 2664; Conditional Transfer Order 2, *supra* note 2664; Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, Center for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007) [hereinafter Manhattan Action Docket Sheet] (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).

2717. Complaint, *Jewel v. NSA*, No. 3:08-cv-4373 (N.D. Cal. Sept. 18, 2008).

2718. Order, *id.* (Oct. 28, 2008).

2719. *Jewel* Dismissal Order, *supra* note 2659, at 16–17.

Appeals were heard on August 31, 2011. http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000008011 (audio recording of oral argument in *Jewel v. NSA*, No. 10-15616); http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006163 (video recording of oral argument in *Hepting v. AT&T Corp.*, No. 09-16676); Docket Sheet, *Jewel v. NSA*, No. 10-15616 (9th Cir. Mar. 23, 2010); Docket Sheet, *Hepting v. AT&T Corp.*, No. 10-16676 (9th Cir. Aug. 7, 2009).

2720. Order, *Guzzi*, No. 3:06-cv-6225 (N.D. Cal. Mar. 5, 2010).

2721. Manhattan Action Dismissal Order, *supra* note 2682.

A notice of appeal was filed, Manhattan Action Docket Sheet, *supra* note 2716, but no appeal was docketed.

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.²⁷²² 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.²⁷²³ To support their case, the plaintiffs filed under seal evidence provided by a former AT&T employee.²⁷²⁴ The court assigned the case to Judge Walker.²⁷²⁵

On May 30, another class action against AT&T was filed in federal court in San Francisco,²⁷²⁶ and the court assigned this case to Judge Walker as related to the first case against AT&T.²⁷²⁷

On June 5 and June 6, telephone companies removed similar cases against them from San Francisco Superior Court to federal court.²⁷²⁸

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

2722. See Cauley, *supra* note 2661.

2723. 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 2659, at 3–4; *Home Front*, *supra* note 2677; 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).

2724. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979, 989 (N.D. Cal. 2006); see McLure, *supra* note 2663; Scheck, *supra* note 2696.

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).

2725. N.D. Cal. *Hepting* Docket Sheet, *supra* note 2723; see Scheck, *supra* note 2696.

2726. Complaint, *Roe v. AT&T Corp.*, No. 3:06-cv-3467 (N.D. Cal. May 30, 2006).

2727. Related Case Order, *id.* (June 21, 2006).

2728. 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 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).

the privacy of telephone customers.”²⁷²⁹ 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.²⁷³⁰ This case was randomly assigned to Judge Walker,²⁷³¹ who reassigned it to himself as related to the first case against AT&T.²⁷³²

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.²⁷³³ The case was assigned to Judge Walker as related to the removed case against AT&T.²⁷³⁴

On July 7, 2006, yet another class action was filed in San Francisco federal court—this one against MCI.²⁷³⁵ Judge Walker took assignment of this case as related to the first case filed against AT&T.²⁷³⁶

In the first San Francisco case against AT&T, the court denied the government’s motion to dismiss on state-secrets grounds.²⁷³⁷ The court certified an appeal of its order,²⁷³⁸ and the court of appeals granted petitions for interlocutory appeal by both the government and AT&T.²⁷³⁹ The appeal was heard on August

2729. 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 to Campbell Notice of Removal*, *supra* note 2728.

2730. *Campbell Notice of Removal*, *supra* note 2728.

2731. 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).

2732. Related Case Order, *Campbell*, No. 3:06-cv-3596 (N.D. Cal. June 20, 2006).

2733. *See* Administrative Motion at 1, *Riordan*, No. 3:06-cv-3574 (N.D. Cal. June 12, 2006).

2734. Related Case Order, *id.* (July 5, 2006).

2735. Class Action Complaint, *Spielvogel-Landis v. MCI, LLC*, No. 3:06-cv-4221 (N.D. Cal. July 7, 2006).

2736. Related Case Order, *id.* (July 17, 2006).

2737. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *see Jewel Dismissal Order*, *supra* note 2659, at 5; *Markoff*, *supra* note 2667; *McLure*, *supra* note 2663; *Mohammed*, *supra* note 2667.

2738. *Hepting*, 439 F. Supp. 2d at 1011; *see Jewel Dismissal Order*, *supra* note 2659, at 5; *McLure*, *supra* note 2663.

2739. 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).

The appeals were consolidated. Docket Sheets, *Hepting*, Nos. 06-17132 and 06-17137 (9th Cir. Nov. 8, 2006) [hereinafter 9th Cir. *Hepting* Docket Sheets]. Twelve amicus curiae briefs were filed. Docket Sheet, *Hepting*, No. 06-17132 (9th Cir. Nov. 8, 2006).

15, 2007, in San Francisco,²⁷⁴⁰ but the court remanded the case to the district court on August 21, 2008, in light of the July 10 amendments to FISA.²⁷⁴¹

Dozens of cases against telephone companies alleging improper provision of private information to the government were filed in federal courts in other districts.²⁷⁴² The JPML transferred those cases not voluntarily dismissed to Judge Walker.²⁷⁴³

A Chicago attorney filed a class action against telephone companies on May 15, 2006.²⁷⁴⁴ The U.S. District Court for the Northern District of Illinois assigned the case to Judge Matthew F. Kennelly.²⁷⁴⁵ 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.²⁷⁴⁶ Judge Kennelly took assignment of this case as related to the first case.²⁷⁴⁷ Judge Kennelly dismissed the second case on state-secrets grounds, but granted the plaintiffs leave to amend,²⁷⁴⁸ which they did.²⁷⁴⁹ A third class action against AT&T in Chicago fed-

2740. 9th Cir. *Hepting* Docket Sheets, *supra* note 2739; *see* Adam Liptak, *U.S. Defends Surveillance Before 3 Sceptical Judges*, N.Y. Times, Aug. 16, 2007, at A13; Karl Vick, *Judges Skeptical of State-Secrets Claim*, Wash. Post, Aug. 16, 2007, at A4.

2741. *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008); *see Jewel* Dismissal Order, *supra* note 2659, at 7.

2742. *Jewel* Dismissal Order, *supra* note 2659, at 4.

2743. *Supra* note 2664; *see* Carey, *supra* note 2663; Egelko, *supra* note 2664.

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* Aug. 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).

2744. 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).

2745. Docket Sheet, *id.* (May 15, 2006).

Tim Reagan interviewed Judge Kennelly for this report in the judge's chambers on May 24, 2007.

2746. 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, 2008, at A1; William Grimes, *Studs Terkel, Listener to Americans, Is Dead at 96*, N.Y. Times, Nov. 1, 2008, at B9.

2747. Executive Committee Order, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. June 2, 2006).

2748. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 2666; McLure, *supra* note 2663; Robinson, *supra* note 2666.

eral court was filed on May 24²⁷⁵⁰ and assigned to Judge Kennelly as related to the first two.²⁷⁵¹ All of these cases were transferred to Judge Walker.²⁷⁵²

Also transferred to Judge Walker were 31 cases²⁷⁵³ originally filed in the following districts:

- the Eastern District of California (one case);²⁷⁵⁴
- the Southern District of California (one case);²⁷⁵⁵
- the Southern District of Florida (two cases);²⁷⁵⁶
- the Northern District of Georgia (one case);²⁷⁵⁷
- the District of Hawaii (one case);²⁷⁵⁸

Judge Kennelly, however, denied AT&T's motion to dismiss on standing grounds. *Terkel*, 441 F. Supp. 2d at 901, 903–04, 920.

2749. Second Amended Class Action Complaint, *Terkel*, No. 1:06-cv-2837 (N.D. Ill. July 31, 2006).

2750. Complaint, *Waxman v. AT&T Corp.*, No. 1:06-cv-2900 (N.D. Ill. May 24, 2006).

2751. Executive Committee Order, *id.* (June 12, 2006).

2752. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, *Waxman v. AT&T Corp.*, No. 3:06-cv-6294 (N.D. Cal. Oct. 6, 2006).

2753. 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)).

2754. 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).

2755. 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).

2756. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 6, *supra* note 2664; *see* Docket Sheet, *Jacobs v. AT&T Corp.*, No. 3:07-cv-2538 (N.D. Cal. May 14, 2007).

2757. Complaint, *Lebow v. BellSouth Corp.*, No. 1:06-cv-1289 (N.D. Ga. May 25, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, *Lebow v. BellSouth Corp.*, No. 3:07-cv-464 (N.D. Cal. Jan. 24, 2007).

2758. Class Action Complaint, *Crockett v. Verizon Wireless LLC*, No. 1:06-cv-345 (D. Haw. June 26, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict

- the Southern District of Indiana (two cases);²⁷⁵⁹
- the Western District of Kentucky (one case);²⁷⁶⁰
- the Eastern District of Louisiana (two cases);²⁷⁶¹
- the District of Maryland (one case);²⁷⁶²
- the Western District of Michigan (one case);²⁷⁶³
- the District of Minnesota (one case);²⁷⁶⁴
- the Eastern District of Missouri (one case);²⁷⁶⁵

consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, Crockett v. Verizon Wireless LLC, No. 3:06-cv-6254 (N.D. Cal. Oct. 4, 2006).

2759. 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 to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *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).

2760. Complaint, Suchanek v. Sprint Nextel Corp., No. 1:06-cv-71 (W.D. Ky. May 18, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, Suchanek v. Sprint Nextel Corp., No. 3:06-cv-6295 (N.D. Cal. Oct. 6, 2006).

2761. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, Hardy v. AT&T Corp., No. 3:06-cv-6924 (N.D. Cal. Nov. 7, 2006).

2762. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Order, *id.* (Oct. 4, 2006) (administratively closing the action while the case is pending in the transferee court); Conditional Transfer Order 2, *supra* note 2664; *see* Docket Sheet, Bready v. Verizon Md. Inc., No. 3:06-cv-6313 (N.D. Cal. Oct. 10, 2006).

2763. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; *see* Docket Sheet, Dubois v. AT&T Corp., No. 3:06-cv-6387 (N.D. Cal. Oct. 12, 2006).

2764. Notice of Removal, Roche v. AT&T Corp., No. 0:06-cv-4252 (D. Minn. Oct. 20, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 5, *supra* note 2664; *see* Docket Sheet, Roche v. AT&T Corp., No. 3:07-cv-1243 (N.D. Cal. Mar. 2, 2007).

2765. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 2664; Conditional Transfer Order 1, *supra* note 2664 (noting objection to the transfer by the plaintiff); *see* Docket

- the District of Montana (two cases);²⁷⁶⁶
- the District of New Jersey (one case);²⁷⁶⁷
- the Eastern District of New York (one case);²⁷⁶⁸
- the Southern District of New York (four cases);²⁷⁶⁹
- the District of Oregon (one case);²⁷⁷⁰
- the Eastern District of Pennsylvania (one case);²⁷⁷¹

Sheet, *Mink v. AT&T Commc'ns of the Southwest, Inc.*, No. 3:06-cv-7934 (N.D. Cal. Dec. 29, 2006).

2766. 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).

2767. 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 to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; see Docket Sheet, *Chulsky v. Cellco P'ship*, No. 3:06-cv-6570 (N.D. Cal. Oct. 20, 2006).

2768. 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).

2769. 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, *Mayer v. Verizon Commc'ns, Inc.*, No. 3:07-cv-2029 (N.D. Cal. Apr. 10, 2007). The other three cases were transferred to Judge Walker as tag-along cases in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; 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)).

2770. 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).

2771. Complaint, *Solomon v. Verizon Commc'ns, Inc.*, No. 2:06-cv-2193 (E.D. Pa. May 24, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; 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);²⁷⁷²
- the Southern District of Texas (one case);²⁷⁷³
- the Western District of Texas (one case);²⁷⁷⁴ and
- the Western District of Washington (one case).²⁷⁷⁵

Two of these actions subsequently were dismissed voluntarily.²⁷⁷⁶

On January 16, 2007, plaintiffs filed consolidated master complaints against various sets of defendants.²⁷⁷⁷

2772. 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).

2773. 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).

2774. 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).

2775. Complaint, Derosier v. Cingular Wireless LLC, No. 2:06-cv-917 (W.D. Wash. June 28, 2006). This case was transferred to Judge Walker as a tag-along case in the multidistrict consolidation. Conditional Transfer Order 1, *supra* note 2664; see Docket Sheet, Derosier v. Cingular Wireless LLC, No. 3:06-cv-6253 (N.D. Cal. Oct. 4, 2006).

2776. 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)).

2777. 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.²⁷⁷⁸ Plaintiffs voluntarily dismissed actions filed in the District of the District of Columbia (three cases),²⁷⁷⁹ the Eastern District of Missouri (one case),²⁷⁸⁰ and the Middle District of Tennessee (one case).²⁷⁸¹

In 2008, an additional action was filed in the Southern District of New York²⁷⁸² and transferred to Judge Walker.²⁷⁸³

On June 3, 2009, Judge Walker dismissed all actions against telephone companies in light of immunity granted by Congress for these cases.²⁷⁸⁴ Appeals were heard on August 31, 2011.²⁷⁸⁵

2778. 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).

2779. 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).

2780. 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 July 5, 2006, dismissal); *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 2765.

2781. 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).

2782. Complaint, *McMurray v. Verizon Commc'ns Inc.*, No. 1:08-cv-6264 (S.D.N.Y. July 10, 2008).

2783. 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).

2784. *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. 110-261, 122 Stat. 2436].”); *see also Jewel Dismissal Order, supra* note 2659, at 7.

2785. *E.g.*, Docket Sheet, *Hepting v. AT&T Corp.*, No. 09-16676 (9th Cir. Aug. 7, 2009) (listing 33 consolidated appeals).

Suits by the Government Against States

While moving to dismiss other lawsuits, the government filed five of its own.²⁷⁸⁶ The government sued to block state investigations of telephone companies' assistance with the government's surveillance in New Jersey,²⁷⁸⁷ Missouri,²⁷⁸⁸ Maine,²⁷⁸⁹ Connecticut,²⁷⁹⁰ and Vermont.²⁷⁹¹ Also filed in Missouri, and transferred to Judge Walker, was an action by the state against the telephone companies.²⁷⁹²

Judge John A. Woodcock, Jr., of the District of Maine, granted the government a preliminary injunction against the state of Maine's investigation.²⁷⁹³

The JPML consolidated all of these actions before Judge Walker,²⁷⁹⁴ who denied the government's motions for summary judgment on supremacy and foreign

2786. *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 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).

2787. 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.

2788. 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.

2789. *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 2786; Gregory D. Kesich, *U.S. Shows New Toughness with State*, Portland Press Herald, Aug. 23, 2006, at A1.

2790. Complaint, *United States v. Palermino*, No. 3:06-cv-1405 (D. Conn., Sept. 6, 2006).

2791. Complaint, *United States v. Volz*, No. 2:06-cv-188 (D. Vt. Oct. 2, 2006).

2792. 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 2786, at 3.

2793. *Adams*, 473 F. Supp. 2d 108.

2794. *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 2786, at 2; Docket Sheet, *United States v. Volz*, No. 3:07-cv-1396 (N.D. Cal. Mar. 9, 2007) (action transferred from D. Vt.); Docket Sheet, *United States v. Palermino*, No. 3:07-cv-1326 (N.D. Cal. Mar. 7, 2007) (action transferred from D.

affairs grounds.²⁷⁹⁵ 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."²⁷⁹⁶ Judge Walker decided to await further guidance from the court of appeals in pending appeals before deciding the matter more precisely.²⁷⁹⁷

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.²⁷⁹⁸ 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.²⁷⁹⁹ The ACLU and the National Security Archive Fund submitted similar requests four days later.²⁸⁰⁰ Disappointed by what was produced, the organizations sought relief in the U.S. District Court for the District of Columbia, which assigned the cases to Judge Henry H. Kennedy, Jr.²⁸⁰¹ On September 5, 2007, Judge Kennedy ruled that some of the withheld documents were properly

Conn.); Docket Sheet, *United States v. Rabner*, No. 3:07-cv-1324 (N.D. Cal. Mar. 7, 2007) (action transferred from D.N.J.); Docket Sheet, *United States v. Adams*, No. 3:07-cv-1323 (N.D. Cal. Mar. 7, 2007) (action transferred from D. Me.); Docket Sheet, *United States v. Gaw*, No. 3:07-cv-1242 (N.D. Cal. Mar. 2, 2007) (action transferred from E.D. Mo.); 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 W.D. Mo.); *see also* Harrison, *supra* note 2786.

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).

^{2795.} State Cases Summary Judgment Denial Order, *supra* note 2786, at 15–34.

^{2796.} *Id.* at 35.

^{2797.} *Id.*

^{2798.} *In re NSA Telecomm. Records Litig.*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009).

^{2799.} *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*].

^{2800.} *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 275, at 71.

^{2801.} *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 35; *D.D.C. ACLU Complaint*, *supra* note 2800; Docket Sheet, *ACLU*, No. 1:06-cv-214 (D.D.C. Feb. 7, 2006); *Elec. Privacy Info Ctr. Complaint*, *supra* note 2799; Docket Sheet, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (D.D.C. Jan. 19, 2006); *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.

withheld and some needed further justification to withhold.²⁸⁰² On October 31, 2008, Judge Kennedy ruled additional documents properly withheld, but he also ruled that he needed to review in camera 10 documents containing opinions by the Justice Department's Office of Legal Counsel (OLC) to determine whether they, or parts of them, should be disclosed.²⁸⁰³ Seventeen days later, the government lodged the documents for Judge Kennedy's review.²⁸⁰⁴

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."²⁸⁰⁵ In response to arguments by plaintiffs concerning public disclosures in the report,²⁸⁰⁶ the government agreed to review again four of the withheld OLC opinions.²⁸⁰⁷ The government determined that two should remain withheld and, on March 21, 2011, filed redacted versions of the other two.²⁸⁰⁸ 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.²⁸⁰⁹ Among the redactions was the program's name.²⁸¹⁰ 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 inapplicability of FISA to the program.²⁸¹¹ The complete ten opinions remain before Judge Kennedy for review.²⁸¹²

The Electronic Frontier Foundation, who filed the first action against telephone companies, sued the Justice Department under FOIA for release of the secret FISC orders that the government claimed obviated the need for surveillance without warrants.²⁸¹³ The U.S. District Court for the District of Columbia assigned the case to Judge Thomas F. Hogan,²⁸¹⁴ who on August 14, 2007,

2802. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d 56.

2803. *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.

2804. Notice of Lodging, *ACLU*, No. 1:06-cv-214 (D.D.C. Nov. 17, 2008).

2805. PSP Report, *supra* note 2659; *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.

2806. Plaintiffs' Supplemental Memorandum, *Elec. Privacy Info. Ctr.*, No. 1:06-cv-96 (D.D.C. Sept. 15, 2009).

2807. Stipulation, *id.* (Jan. 18, 2011).

2808. Notice of Filing, *id.* (Mar. 21, 2011).

2809. *Id.*

2810. *Id.*

2811. *Id.*

2812. *See* Government Response, *id.* (Apr. 15, 2011).

2813. Complaint, *Elec. Frontier Found. v. Dep't of Justice*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007).

2814. Docket Sheet, *id.*

Tim Reagan interviewed Judge Hogan for this report in the judge's chambers on January 12, 2010.

granted the government's motion for summary judgment, finding that the orders meet FOIA's national defense, statutory, and law enforcement exemptions.²⁸¹⁵

On August 9, 2007, the ACLU filed a motion directly with the FISC that its orders on warrantless wiretapping be made public.²⁸¹⁶ On August 16, the court's Presiding Judge Colleen Kollar-Kotelly issued an order that the government respond to the motion.²⁸¹⁷ Judge John D. Bates issued a public opinion on December 11 denying the motion.²⁸¹⁸ 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.²⁸¹⁹ 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.²⁸²⁰

2815. Opinion at 14–18, *id.* (Aug. 14, 2007) [hereinafter D.D.C. *Elec. Frontier Found. Summary Judgment Opinion*]; *see* Opinion, *id.* (Jan. 29, 2008) (denying motion for reconsideration based on new revelations in the press).

[FOIA] does not apply to matters that are—

(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;

....

(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;

....

(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).

2816. *In re* Motion for Release of Ct. Rs., 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.

2817. Scheduling Order, *In re* Motion for Release of Court Records, No. Misc. 07-01 (FISA Ct. Aug. 16, 2007); *see* Eggen, *supra* note 2816; Lichtblau, *supra* note 2816.

2818. *In re* Ct. Rs., 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.

2819. *In re* Ct. Rs., 526 F. Supp. 2d 484, 488; *see* Williamson, *supra* note 2818.

2820. *In re* Ct. Rs., 526 F. Supp. 2d 484, 496.

Challenge: Classified Evidence

The Portland case against the government concerned an evidentiary document so secret that it could be seen only by judges and had to be stored in a sensitive compartmented information facility (SCIF).²⁸²¹ 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.²⁸²² They delivered to Judge King's chambers a copy of the document in a sealed envelope "for the Court's consideration in camera."²⁸²³ More than two weeks later, the government insisted that the document required more security than a sealed document filed with the court.²⁸²⁴ 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,²⁸²⁵ so it needed to be stored in a SCIF.²⁸²⁶

The FBI had a SCIF in Portland, and the U.S. Attorney in Seattle had a SCIF.²⁸²⁷ Because the FBI was a defendant in the action, the plaintiffs did not want the document stored at the FBI's SCIF.²⁸²⁸ The government argued that creating a SCIF for the court would be infeasible because of the time and expense required.²⁸²⁹ So it was agreed that the document would be sent to the Western District of Washington's U.S. Attorney's SCIF in Seattle.²⁸³⁰

2821. See Reagan, *supra* note 173, at 19 (describing SCIFs).

2822. *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 2698; Green, *U.S. Attacks Lawsuit*, *supra* note 2696; Liptak, *supra* note 2670.

2823. Interview with Hon. Garr M. King, Feb. 14, 2007; see In Camera Inspection Motion, *supra* note 2822; see also Keefe, *supra* note 2696, at 31.

2824. 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, 2006) [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 2667; Liptak, *supra* note 2670.

2825. See Reagan, *supra* note 173, at 3.

2826. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 2824; 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 2696, at 31; Liptak, *supra* note 2670.

2827. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 2824; Interview with Hon. Garr M. King, Feb. 14, 2007.

2828. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 2824; Interview with Hon. Garr M. King, Feb. 14, 2007; see Tim Fought, *Mystery Document Headed to Seattle*, Seattle Times, Mar. 24, 2006, at B5.

2829. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 2824.

2830. *Id.*; see Fought, *supra* note 2828; Keefe, *supra* note 2696, at 31.

Shortly thereafter, the government established a plan for storing the document in Portland, to which the plaintiffs agreed.²⁸³¹ 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.²⁸³²

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.²⁸³³ 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.”²⁸³⁴ 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 document under seal.²⁸³⁵ 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.²⁸³⁶ 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.²⁸³⁷ 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.²⁸³⁸

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.²⁸³⁹

Although he saw the classified evidentiary document,²⁸⁴⁰ Judge King was careful not to rely on its contents in his ruling against dismissal.²⁸⁴¹ 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 provid-

2831. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; Interview with Hon. Garr M. King, Feb. 14, 2007.

2832. Transcript at 32–33, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. Apr. 25, 2006) [hereinafter *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript], also filed as Attach. 1, Government Lodging Reply, *supra* note 2826; see Liptak, *supra* note 2670.

2833. *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).

2834. Plaintiffs’ Response at 15, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. June 16, 2006).

2835. Interview with Hon. Garr M. King, Feb. 14, 2007.

2836. *Id.*

2837. *Id.*

2838. *Id.*

2839. *Id.*; see Liptak, *supra* note 2670.

2840. *Al-Haramain Islamic Found.* Mar. 21, 2006, Transcript, *supra* note 2824; see Green, *Feds’ Stance*, *supra* note 2696.

2841. *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”).

ing the plaintiffs with access to a redacted version of the document under a protective order.²⁸⁴²

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.²⁸⁴³ The government said that the identities of persons with clearance to see such documents was a state secret.²⁸⁴⁴ On one occasion, the judge asked a government attorney before him if he had such clearance.²⁸⁴⁵ The attorney responded that he did not think he was permitted to answer that question.²⁸⁴⁶ The 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.²⁸⁴⁷

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.²⁸⁴⁸

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.²⁸⁴⁹

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;

2842. *Id.* at 1229; *see* Liptak, *supra* note 2667; Liptak, *supra* note 2670; MacLean, *supra* note 2696.

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 2670. In addition, it appears that a reporter for *The Washington Post* reviewed the document. *Id.*; MacLean, *supra* note 2696.

2843. Interview with Hon. Garr M. King, Feb. 14, 2007.

2844. *Id.*; *see* Liptak, *supra* note 2670.

2845. Interview with Hon. Garr M. King, Feb. 14, 2007.

2846. *Id.*

2847. *Id.*

2848. *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1194 n.2, 1203 (9th Cir. 2007).

2849. *Id.* at 1203.

accurate memories would be as privileged as the document, and inaccurate memories would be worse.²⁸⁵⁰

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.²⁸⁵¹

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 rulings 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.²⁸⁵²

The government cleared two attorneys within the court's deadline,²⁸⁵³ 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.²⁸⁵⁴

2850. *Id.* at 1204.

2851. *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077, 1089–90 (N.D. Cal. 2009); *see Johnson, supra* note 2705.

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).

2852. *In re NSA*, 595 F. Supp. 2d at 1089.

2853. 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 Feb. 12, 2009); *see Johnson, supra* note 2705.

2854. *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 2676, 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”).

On May 22, Judge Walker issued an order to show cause why he should not rule in the plaintiffs' favor as to liability.²⁸⁵⁵ On June 5, Judge Walker continued his order to show cause and instead ordered briefing on summary judgment for plaintiffs against the government.²⁸⁵⁶

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.²⁸⁵⁷

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.²⁸⁵⁸

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.²⁸⁵⁹

The exemption claims were classified and submitted *ex parte*.²⁸⁶⁰ 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.²⁸⁶¹

Review of the exemption claims required many hours of Judge Kennedy's time over several days without the assistance of staff.²⁸⁶² Doors were closed, windows were covered, and the documents were under the judge's immediate control at all times.²⁸⁶³ 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.²⁸⁶⁴

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 ex-

2855. 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.

2856. 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.

2857. Briefing Order, *supra* note 2856, at 2.

2858. *In re NSA*, 700 F. Supp. 2d 1182; *Al-Haramain Remedies Order*, *supra* note 2676 (awarding damages and attorney fees); see Savage & Risen, *supra* note 2706.

2859. Interview with Hon. Henry H. Kennedy, Jr., Nov. 12, 2008.

2860. *Id.*

2861. *Id.*

2862. *Id.*

2863. *Id.*

2864. *Id.*

press 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.²⁸⁶⁵

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.²⁸⁶⁶ 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.²⁸⁶⁷ 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.²⁸⁶⁸

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.²⁸⁶⁹ President Bush personally decided who was cleared to see documents related to the surveillance programs at issue in this litigation.²⁸⁷⁰ 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

2865. 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 2801 (quoting text).

2866. Interview with Hon. Thomas F. Hogan, Jan. 12, 2010.

2867. *Id.*

2868. *Id.*

2869. See Liptak, *supra* note 2670.

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).

2870. PSP Report, *supra* note 2659, 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 2206.

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.²⁸⁷¹

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.²⁸⁷² In response, the government lodged a classified declaration for ex parte in camera review.²⁸⁷³ 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.”²⁸⁷⁴ 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 say that I understand that in issues involving national security that may be necessary.”²⁸⁷⁵ Judge King ultimately decided it was not necessary to review these documents to rule on the Oregonian’s motion,²⁸⁷⁶ which Judge King denied.²⁸⁷⁷

The government moved to dismiss the action on state-secrets grounds and lodged several classified documents in support of the motion.²⁸⁷⁸ 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.²⁸⁷⁹ Ultimately he decided to review the classified materials²⁸⁸⁰ and permit the case to proceed.²⁸⁸¹

2871. *Aid, supra* note 2659, at 288.

2872. *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 2698 (noting the filing of the motion on Mar. 17, 2006); *see Green, U.S. Attacks Lawsuit, supra* note 2696.

2873. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n.8; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 2698 (noting the filing of a lodging notice on Apr. 14, 2006); *see Green, U.S. Attacks Lawsuit, supra* note 2696.

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 2826, at 3.

2874. Government Lodging Reply, *supra* note 2826, at 2 n.1; *see* Notice of Lodging of Super-seeding Material, *Al-Haramain Islamic Found. v. Bush*, No. 3:06-cv-274 (D. Or. May 12, 2006).

2875. *Al-Haramain Islamic Found.* Apr. 25, 2006, Transcript, *supra* note 2832.

2876. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1232 n. 8.

2877. *Id.* at 1218, 1232–33.

2878. *Id.* at 1219; Notice of Lodging, *Al-Haramain Islamic Found.*, No. 3:06-cv-274 (D. Or. July 25, 2006) (noticing the lodging of an unredacted classified reply brief); Notice of Lodging, *id.* (June 21, 2006) (noticing 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).

2879. D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 2698.

2880. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1219; D. Or. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 2698.

2881. *Al-Haramain Islamic Found.*, 451 F. Supp. 2d at 1217, 1228, 1233; *see* Liptak, *supra* note 2667.

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.²⁸⁸² 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.²⁸⁸³ 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.²⁸⁸⁴

Judge King observed that it is difficult to handle a case if there is material that a law clerk cannot see.²⁸⁸⁵ He has to be careful what he tells her, and she cannot help him with the material she cannot see.²⁸⁸⁶ 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.²⁸⁸⁷

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.²⁸⁸⁸ 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.²⁸⁸⁹ 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."²⁸⁹⁰ Judge Taylor elected to wait until after the hearing to

2882. Interview with Hon. Garr M. King, Feb. 14, 2007.

2883. *Id.*

2884. *Id.*; Letter from Carr Sahler, law clerk to Hon. Garr M. King, Apr. 23, 2007.

2885. Interview with Hon. Garr M. King, Feb. 14, 2007.

2886. *Id.*

2887. *Id.*

2888. E.D. Mich. *ACLU* Docket Sheet, *supra* note 2684; *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.

2889. 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 2888; 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 2888.

2890. Notice of Lodging at 2, *ACLU*, No. 2:06-cv-10204 (E.D. Mich. May 26, 2006).

review the classified documents,²⁸⁹¹ but she considered them in issuing the injunction.²⁸⁹²

Judge Taylor reviewed classified documents three times.²⁸⁹³ 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.²⁸⁹⁴ The security officer told Judge Taylor that she could take notes, but the security officer would have to take them back with her.²⁸⁹⁵ So the judge decided not to take notes.²⁸⁹⁶

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."²⁸⁹⁷ On each of the days that the government filed redacted versions of its opening and reply briefs, it filed a "Notice of Lodging of In Camera, Ex Parte Brief."²⁸⁹⁸

To help segregate the influence of classified information, the judges reviewed public portions of the briefs and record before reviewing classified portions.²⁸⁹⁹ The judges worked out with the parties procedures for the judges' review of classified information.²⁹⁰⁰ 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.²⁹⁰¹ The meeting was transcribed, and the transcript was sealed.²⁹⁰² 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.²⁹⁰³ One result of the meeting was the government's

2891. Transcript, *id.* (June 12, 2006); *see* Liptak, *supra* note 2888 (reporting that Judge Taylor did not review the classified documents before the hearing).

2892. *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*").

2893. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006; *see* E.D. Mich. *ACLU* Docket Sheet, *supra* note 2684 (noting the lodging of classified documents on May 26, June 30, and Sept. 1, 2006).

2894. Interview with Hon. Anna Diggs Taylor, Dec. 7, 2006.

2895. *Id.*

2896. *Id.*

2897. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting order filed Oct. 11, 2006).

2898. *Id.* (noting the government's filing of briefs on Oct. 16 and Dec. 5, 2006).

2899. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2900. *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007); 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting an Oct. 19, 2006, letter from the court to the government concerning the filing of classified information with the court and a Nov. 1, 2006, motion by the government for approval of proposed procedures regarding classified information).

2901. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 2677.

2902. Interview with Hon. Julia Smith Gibbons, Oct. 29 and Nov. 1, 2007.

2903. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007; *see* Liptak, *supra* note 2677.

agreement to file a list of classified documents presented to the judges,²⁹⁰⁴ a list which the government updated upon each additional lodging.²⁹⁰⁵

Approximately two weeks before oral argument, security officers delivered to the judges' chambers the government's unredacted opening and reply briefs.²⁹⁰⁶

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.²⁹⁰⁷ 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.²⁹⁰⁸ Security officers brought these materials to the judges at the same time as the briefs.²⁹⁰⁹

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.²⁹¹⁰ The officer asked Judge Gilman to close his window blinds and close the door to his office.²⁹¹¹ 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.²⁹¹² Judge Gilman reviewed the materials privately in his office.²⁹¹³

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.²⁹¹⁴ Judge Batchelder, who is the only tenant in her small-town building, was not asked to close her blinds.²⁹¹⁵

No one on the judges' staffs saw the classified materials.²⁹¹⁶ Knowing that they would not be able to keep them, none of the judges took notes.²⁹¹⁷ The judges understood that if they needed extended access to the classified documents

2904. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2905. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting the filing of classified-document lists on Jan. 12 and 25, Apr. 9, and June 11, 2007).

2906. 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.

2907. *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 2677; Lichtblau & Johnston, *supra* note 2677.

2908. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687; *see* *ACLU v. NSA*, 493 F.3d 644, 650 n.3 (6th Cir. 2007).

2909. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2910. Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007.

2911. *Id.*

2912. *Id.*

2913. *Id.*

2914. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2915. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007.

2916. *Id.*; Interview with Hon. Ronald Lee Gilman, Oct. 29, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2917. 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.

they could be stored in another agency's local SCIF, but the judges did not need that.²⁹¹⁸

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.²⁹¹⁹ The judges reviewed the classified submission in Cincinnati on the day of oral argument.²⁹²⁰

While a ruling from the court was pending, the government lodged classified submissions on two additional occasions,²⁹²¹ and within days of these lodgings, classified information security officers delivered the classified submissions to the judges' chambers.²⁹²²

There were no oral *ex parte* communications with government attorneys in this appeal.²⁹²³

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.²⁹²⁴

The court denied the plaintiffs' motion to have all or part of the secret submissions unsealed.²⁹²⁵

With one exception, this was the first time any of these judges had been called upon to review classified information.²⁹²⁶ The exception was an appeal decided in 2004 by a panel including Judges Batchelder and Gibbons affirming the dismissal

2918. Interview with Hon. Alice M. Batchelder, Oct. 30, 2007; Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2919. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting the filing of a supplemental submission and the lodging of a classified submission on Jan. 25, 2007); *see* Henry Weinstein, *ACLU Wants Access to Sealed Wiretap Filings*, *L.A. Times*, Jan. 27, 2007, at 14.

2920. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2921. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting the lodging of classified submissions on Apr. 9 and June 11, 2007).

2922. 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.

2923. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2924. *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.").

2925. 6th Cir. *ACLU* Docket Sheets, *supra* note 2687 (noting denial of the motion on July 6, 2007); *see* Weinstein, *supra* note 2919 (reporting the filing of the motion).

2926. 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/public/home.nsf/hisj>.

of a civil suit on state-secrets grounds.²⁹²⁷ The secrets in that case were handled by ordinary sealing procedures.²⁹²⁸

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.²⁹²⁹ Judge Lynch believed that the documents were brought to New York and stored in the U.S. Attorney's SCIF there,²⁹³⁰ but Judge Lynch did not review the classified lodgings before the hearing on the motion.²⁹³¹ He did not want to risk inadvertent disclosure—or the appearance of inadvertent disclosure—of classified information during the hearing.²⁹³² The case was transferred to the Northern District of California as part of multidistrict consolidation before Judge Lynch ruled on the motion,²⁹³³ and he never read the classified lodgings.²⁹³⁴

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.²⁹³⁵ In advance of this ruling, a classified information security officer brought from Washington classified arguments supporting the motion.²⁹³⁶ Judge Kennelly reviewed the documents in private while the security officer waited outside his office.²⁹³⁷ 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.²⁹³⁸ When Judge Kennelly needed to review the documents again, a security officer for the U.S. Attorney's office delivered and retrieved them.²⁹³⁹

2927. *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.

2928. Interview with Hon. Julia Smith Gibbons, Oct. 29, 2007.

2929. Government Brief at 4 n.3, *Center for Constitutional Rights v. Bush*, No. 1:06-cv-313 (S.D.N.Y. May 26, 2006); Notice of Lodging, *id.* (May 26, 2006).

2930. Interview with Hon. Gerard E. Lynch, May 16, 2007.

2931. *Center for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 2693; Interview with Hon. Gerard E. Lynch, May 16, 2007.

2932. *Center for Constitutional Rights* Sept. 5, 2006, Transcript, *supra* note 2693; Interview with Hon. Gerard E. Lynch, May 16, 2007.

2933. Dec. 15, 2006, J.P.M.L. Transfer Order, *supra* note 2664; Interview with Hon. Gerard E. Lynch, May 16, 2007.

2934. Interview with Hon. Gerard E. Lynch, May 16, 2007.

2935. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 901, 920 (N.D. Ill. 2006); *see* Liptak, *supra* note 2666; McLure, *supra* note 2663; Robinson, *supra* note 2666.

2936. 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).

2937. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

2938. *Id.* Judge Kennelly noted that it would be more appropriate for the court to have its own SCIF. *Id.*

2939. *Id.*

Judge Kennelly's opinion states that he did not rely on classified submissions in reaching this decision.²⁹⁴⁰ 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.²⁹⁴¹

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.²⁹⁴² 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.²⁹⁴³

The night before the classified proceeding, the judge's chambers were swept for surveillance devices.²⁹⁴⁴ 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.²⁹⁴⁵ During the classified proceeding, the judge's window blinds were closed, and a government agent electronically monitored the room for surveillance.²⁹⁴⁶

Judge Walker, Northern District of California

Judge Walker found his experience reviewing classified *ex parte* arguments very unpleasant.²⁹⁴⁷ *Ex parte* presentations deprive the judge of the perspective and focus that usually comes with an adversary proceeding.²⁹⁴⁸ 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.²⁹⁴⁹

In the first San Francisco action against AT&T, the government intervened and unsuccessfully argued that the state-secrets privilege required dismissal of the

2940. *Terkel*, 441 F. Supp. 2d at 902, 910–11.

2941. *Id.* at 902 n.2.

2942. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

2943. *Id.*

2944. *Id.*

2945. *Id.*

2946. *Id.*

2947. Interview with Hon. Vaughn R. Walker, Feb. 23, 2011.

2948. *Id.*

2949. *Id.*

case.²⁹⁵⁰ The government sought to support its argument with classified documents.²⁹⁵¹ 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.²⁹⁵²

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. Negroponte and Keith B. Alexander for review by the [judge] and by any chambers personnel that he so authorizes."²⁹⁵³

Judge Walker reviewed the government's classified briefing in his chambers.²⁹⁵⁴ A security officer brought the documents to his chambers in a sealed pouch.²⁹⁵⁵ Judge Walker reviewed the documents in private while the security officer waited in the chambers reception area.²⁹⁵⁶ Judge Walker took some notes, which the security officer took back with the classified documents.²⁹⁵⁷

2950. *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.

2951. 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 2950.

2952. Transcript, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006), 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).

2953. 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).

2954. 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).

2955. 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).

2956. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007. According to Judge Walker, the officer may have stepped out for coffee. *Id.*

2957. *Id.*

On a subsequent occasion, the government presented classified briefing materials to Judge Walker by a different means.²⁹⁵⁸ 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 shredded the fax.²⁹⁵⁹

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.²⁹⁶⁰ Again a classified information security officer brought them to his chambers, where Judge Walker reviewed them in private.²⁹⁶¹

On 13 additional occasions, the government lodged classified documents.²⁹⁶²

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.²⁹⁶³

The next lodging supported a scheduling motion.²⁹⁶⁴ 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.²⁹⁶⁵

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.²⁹⁶⁶ The gov-

2958. *Id.*; see Notice of Lodging, *Hepting*, No. 3:06-cv-672 (N.D. Cal. July 31, 2006).

2959. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007; Interview with Dep't of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

2960. 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.

2961. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

2962. Notices of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Oct. 30, 2009); Notices of Lodging, *id.* (N.D. Cal. 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).

2963. Notice of Lodging, *id.* (Feb. 22, 2007).

2964. Notice of Lodging, *id.* (Mar. 13, 2007).

2965. 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).

2966. Letter, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Apr. 13, 2007).

ernment responded that “nothing more may be said without compromising the Government’s compelling interest in protecting the Nation’s security.”²⁹⁶⁷

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.²⁹⁶⁸ 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.²⁹⁶⁹ Judge Walker arranged to review these in Washington the following week, when he was there for a meeting of chief district judges.²⁹⁷⁰

Two lodgings supported motions to dismiss on state-secrets grounds the actions against the government filed in Brooklyn²⁹⁷¹ and Manhattan.²⁹⁷² Another lodging was a classified reply brief supporting state-secrets motions to dismiss in several other cases.²⁹⁷³

The government lodged a classified declaration in opposition to the plaintiffs’ motion for an order requiring defendants to preserve evidence.²⁹⁷⁴ 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.²⁹⁷⁵ The classified declaration specified “how potentially discoverable information, if any, is being preserved.”²⁹⁷⁶ 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.²⁹⁷⁷

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.²⁹⁷⁸

In September 2008, in open court, Judge Walker observed that classified lodgings had not yet been very helpful to him:

2967. Government Response to Plaintiffs’ Letter, *id.* (Apr. 27, 2007).

2968. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006).

2969. 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).

2970. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep’t of Justice Litig. Sec. Group Staff, Apr. 24, 2007.

2971. 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).

2972. Notices of Lodging, *id.* (June 8, 2007); Manhattan Action Dismissal Order, *supra* note 2682, at 5–6; *see* Government’s Supplemental Motion, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. May 25, 2007) (redacted brief).

2973. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Aug. 3, 2007).

2974. Notice of Lodging, *id.* (Oct. 25, 2007).

2975. Opposition Brief, *id.* (Oct. 25, 2007).

2976. *Id.* at 2.

2977. Preservation Order, *id.* (Nov. 6, 2007).

2978. Notice of Lodging, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Mar. 14, 2008); Motion to Dismiss, *id.*

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.²⁹⁷⁹

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.²⁹⁸⁰ On November 5, 2008, the government both lodged a classified reply²⁹⁸¹ and filed a public redacted reply²⁹⁸² 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 the public record is all that I've seen in connection with the present motions, and nothing else.²⁹⁸³

Subsequently, the government lodged classified declarations in conjunction with case management statements.²⁹⁸⁴ 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.²⁹⁸⁵

No one on Judge Walker's staff saw any of the classified documents.²⁹⁸⁶ Judge Walker's career law clerk obtained a security clearance, but the classified warrantless wiretap briefs were for judges' eyes only.²⁹⁸⁷ The law clerk's clearance allowed her to transport classified briefings between the FBI's SCIF and Judge Walker's chambers.²⁹⁸⁸

2979. Transcript, *In re NSA*, No. 3:06-md-1791 (N.D. Cal. Sept. 12, 2008).

2980. *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).

2981. Notice of Lodging, *In re NSA*, No. 3:06-md-1791 (Nov. 5, 2008).

2982. Reply, *id.*

2983. Transcript, *id.* (Dec. 2, 2008).

2984. Notices of Lodging, *id.* (Feb. 27, 2009).

2985. Notices of Lodging, *id.* (Oct. 30, 2009).

2986. Interview with Hon. Vaughn R. Walker, Feb. 15, 2007.

2987. 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.

2988. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

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.²⁹⁸⁹ 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.²⁹⁹⁰

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.²⁹⁹¹ Judges reviewed the material in San Francisco when they were in town.²⁹⁹²

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 classified briefs, and the court of appeals agreed that only the judges on the reviewing panel would see them.²⁹⁹³

This had an impact on the judges' work with their law clerks. The law clerks' memoranda had to remain somewhat abstract,²⁹⁹⁴ 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.²⁹⁹⁵

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.²⁹⁹⁶

Judge Hawkins observed that embedding classified information within the narrative structure of the briefs, redacting the classified information for public versions, facilitated comprehension.²⁹⁹⁷ A public brief written in code with a separate code sheet would have been more difficult to read.²⁹⁹⁸

2989. 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*.

2990. Interview with Hon. Vaughn R. Walker, Sept. 29, 2008.

2991. 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.

2992. Interview with 9th Cir. Clerk's Office Staff, Sept. 29, 2008.

2993. 9th Cir. *Al-Haramain Islamic Found.* Docket Sheet, *supra* note 2699; 9th Cir. *Hepting* Docket Sheets, *supra* note 2739; *see* Vick, *supra* note 2740.

2994. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

2995. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

2996. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

2997. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

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.²⁹⁹⁹ 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.³⁰⁰⁰

The same classified information security officer delivered the classified materials to the judges' chambers both before and after oral argument.³⁰⁰¹ Unlike the officers who visited the Sixth Circuit judges, she provided no instructions on closing doors or windows.³⁰⁰² A separate set of materials was prepared for each judge so that they could make individual notes on the documents.³⁰⁰³ 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.³⁰⁰⁴

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 as attorneys representing the government, which judges they are visiting.³⁰⁰⁵ 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.³⁰⁰⁶ And the assignment of opinion authorship is regarded as confidential until the opinion is issued.³⁰⁰⁷

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.³⁰⁰⁸ 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.³⁰⁰⁹

This was Judge Hawkins' first case as a judge involving classified information.³⁰¹⁰ Judge McKeown had to review classified information in approximately two previous cases.³⁰¹¹ She had substantial experience as a practicing attorney in

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*.

2998. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

2999. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

3000. *Id.*

3001. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

3002. *Id.*

3003. *Id.*

3004. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

3005. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008; Interview with Dep't of Justice Litig. Sec. Group Staff, Sept. 24, 2008.

3006. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

3007. *Id.*

3008. *Id.*

3009. *Id.*

3010. Interview with Hon. Michael Daly Hawkins, Sept. 30, 2008.

3011. Interview with Hon. M. Margaret McKeown, Jan. 9, 2008.

Seattle arguing trade secret cases in open court without revealing the secrets.³⁰¹² In over 40 years as a federal judge, including nearly 30 years as a circuit judge, Judge Pregerson had occasionally reviewed classified information before.³⁰¹³

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.³⁰¹⁴ The court ruled, however, that it no longer had jurisdiction to receive the lodging.³⁰¹⁵

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.”³⁰¹⁶

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.³⁰¹⁷ Judge Hogan relied on this declaration both to grant the government summary judgment and to deny the motion to review the FISC orders.³⁰¹⁸

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.³⁰¹⁹

3012. *Id.*

3013. Interview with Hon. Harry Pregerson, Oct. 1, 2008.

3014. Notice of Lodging, *Al-Haramain Islamic Found. v. Bush*, No. 06-36083 (9th Cir. Nov. 9, 2009).

3015. Order, *id.* (Nov. 23, 2009).

3016. *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).

3017. Notice of Lodging, *Elec. Frontier Found. v. Dep’t of Justice*, No. 1:07-cv-403 (D.D.C. June 25, 2007).

3018. D.D.C. *Elec. Frontier Found.* Summary Judgment Opinion, *supra* note 2815, at 11, 15, 18.

3019. *Terkel v. AT&T*, 441 F. Supp. 2d 899, 902 (N.D. Ill. 2006).

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.³⁰²⁰ The computer, and all drafts, were stored in the U.S. Attorney’s SCIF in the same building.³⁰²¹ As the judge was preparing the classified opinion, he had additional questions for the government.³⁰²² It was arranged that he would ask them on a “secured telephone unit” in the U.S. Attorney’s SCIF.³⁰²³

Judge Kennelly denied without prejudice a motion by the plaintiffs to publicly release the secret opinion.³⁰²⁴

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:

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, 2006.³⁰²⁵

As instructed, AT&T filed a reply brief on May 24, 2006.³⁰²⁶ 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.³⁰²⁷ Two days later, CNET reported online that the redacted text could easily be retrieved from the electronic file.³⁰²⁸ On the day of the CNET report, the court filed a substitute electronic version of the redacted file.³⁰²⁹

3020. Interview with Hon. Matthew F. Kennelly, May 24, 2007.

3021. *Id.*

3022. *Id.*

3023. *Id.*

3024. Minute Entry, *Terkel v. AT&T*, No. 1:06-cv-2837 (N.D. Ill. Feb. 21, 2007).

3025. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. May 17, 2006).

3026. N.D. Cal. *Hepting* Docket Sheet, *supra* note 2723.

3027. Notice of Manual Filing, *Hepting*, No. 3:06-cv-672 (N.D. Cal. May 24, 2006); N.D. Cal. *Hepting* Docket Sheet, *supra* note 2723.

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).

3028. 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.

3029. Redacted Reply Brief, *supra* note 3027; N.D. Cal. *Hepting* Docket Sheet, *supra* note 2723.

CNET's website provides a link to the originally filed Acrobat text file.³⁰³⁰ 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.³⁰³¹

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.”³⁰³² 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.”³⁰³³ Judge Walker did not believe that other judges previously used Federal Rule of Evidence 706(a) to appoint an expert of this type.³⁰³⁴ Judge Walker decided, however, not to appoint such an expert “at this stage.”³⁰³⁵

3030. <http://www.politechbot.com/docs/att.not.redacted.brief.052606.pdf>.

3031. Redacted Reply Brief, *supra* note 3027.

3032. *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).

3033. *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.

3034. *Hepting*, 439 F. Supp. 2d at 1010.

3035. Civil Minute Order, *Hepting v. AT&T Corp.*, No. 3:06-cv-672 (N.D. Cal. Aug. 8, 2006).

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.³⁰³⁶ 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.³⁰³⁷ 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.³⁰³⁸ The U.S. District Court for the Northern District of Ohio assigned the case to Judge James G. Carr.³⁰³⁹

Amawi was born in the United States of Jordanian parents; the family moved back to Jordan when Amawi was two years old.³⁰⁴⁰ After the parents divorced, Amawi's mother moved with him to Toledo, about five years before the indictment.³⁰⁴¹ In 2005, he worked at AZ Travel and Services.³⁰⁴² Later that year, he returned to Jordan.³⁰⁴³ El-Hindi was born in Jordan.³⁰⁴⁴ In the United States, he dropped out of Onondaga Community College.³⁰⁴⁵ He had been married twice before his current marriage.³⁰⁴⁶ Mazloum was born in Lebanon and grew up in Ve-

3036. 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.

3037. See *Amawi* Indictment, *supra* note 3036; Eggen, *supra* note 3036; Lewis, *supra* note 3036; Zajac, *supra* note 3036.

3038. Docket Sheet, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Feb. 16, 2006) [hereinafter *Amawi* Docket Sheet]; see Eggen, *supra* note 3036; Garrett *et al.*, *supra* note 3036; Wilkinson & Hall, *supra* note 3036; Zajac, *supra* note 3036.

3039. *Amawi* Docket Sheet, *supra* note 3038; 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.

3040. Interview with Hon. James G. Carr, Sept. 9, 2008.

3041. *Id.*; see Erika Ray, *Experts Say Terror Links Are Formed Overseas*, Toledo Blade, Feb. 23, 2006, at A6.

3042. See Ignazio Messina & Christina Hall, *Business Falls at Firms Tied to 3 Suspects*, Toledo Blade, Feb. 23, 2006, at A6.

3043. See Ray, *supra* note 3041.

3044. See *Amawi* Indictment, *supra* note 3036; *Few Clues Available on Accused Toledo Man*, Toledo Blade, Feb. 22, 2006, at A4 [hereinafter *Few Clues*].

3045. See Christopher Evans, Amanda Garrett, Mark Rollenhagen & Mike, *Nickel-and-Dime Hustler, or Something Worse?*, Cleveland Plain Dealer, May 21, 2006, at A1.

3046. See Evans, *et al.*, *supra* note 3045; *Few Clues*, *supra* note 3044.

nezuela. He moved to the United States in 2000.³⁰⁴⁷ With his brother, he operated City Auto Sales, a used-car business, and he studied computer science and engineering at the University of Toledo.³⁰⁴⁸

Information about the conspiracy was provided to the government by a man called “the Trainer” in the indictment.³⁰⁴⁹ 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.”³⁰⁵⁰ The Trainer began passing information about the defendants to the government in 2004.³⁰⁵¹

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.³⁰⁵²

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 Mazloun.³⁰⁵³ Two days after Amawi’s indictment, the government obtained a warrant to search AZ Travel, where he worked.³⁰⁵⁴ The supporting affidavit refers to Griffin as a paid cooperating witness who had been reporting to the FBI for four years.³⁰⁵⁵ On June 6, 2006, Judge Carr issued an order forbidding public dissemination of Griffin’s image or identity.³⁰⁵⁶

A year after the original indictment was filed, a superseding indictment added as defendants two Chicago men, cousins Zubair and Khaleel Ahmed.³⁰⁵⁷ A sepa-

3047. See Erica Blake, *Local Man in Terror Case Is Released on Bail*, Toledo Blade, Sept. 1, 2007, at B1.

3048. See Christina Hall, *Indictment of UT Student Shocks Family, Acquaintances*, Toledo Blade, Feb. 22, 2006, at A4; Messina & Hall, *supra* note 3042; David Yonke & Tom Troy, *Toledo-Area Muslims Ask for Justice, Fear Backlash*, Toledo Blade, Feb. 22, 2006, at A1.

3049. *Amawi* Indictment, *supra* note 3036; see Eggen, *supra* note 3036; Garrett *et al.*, *supra* note 3036; Lewis, *supra* note 3036; Wilkinson & Hall, *supra* note 3036; Zajac, *supra* note 3036.

3050. *Amawi* Indictment, *supra* note 3036

3051. See Joshua Boak, *Detainee Served as Imam at Prison*, Toledo Blade, Feb. 23, 2006, at A1.

3052. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Oct. 6, 2011) (denying a motion for a new trial based on new evidence), available at 2011 WL 4696477.

3053. 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.

3054. Search Warrant, *United States v. AZ Travel Inc.*, No. 3:06-mj-7025 (N.D. Ohio Feb. 18, 2006).

3055. 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.

3056. Order, *Amawi*, No. 3:06-cr-719 (N.D. Ohio June 6, 2006).

3057. 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-*

rate indictment charged el-Hindi and Ashraf Zaim, the owner of AZ Travel, with grant fraud.³⁰⁵⁸ A third indictment charged Mazloun's brother Bilal with making a false statement to federal agents during the investigation of Mazloun.³⁰⁵⁹ The court assigned the two new cases to Judge Carr.³⁰⁶⁰ Judge Carr decided that the Ahmeds and Wassim Mazloun could be released on bond and electronic monitoring.³⁰⁶¹ 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.³⁰⁶²

Jury selection for the trial of the original three defendants began on March 4, 2008.³⁰⁶³ Judge Carr allowed the attorneys to prepare and use a jury questionnaire.³⁰⁶⁴ Judge Carr permits attorneys to question potential jurors during voir dire,³⁰⁶⁵ 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.³⁰⁶⁶ Voir dire proceeded more efficiently after that.³⁰⁶⁷

Judge Carr gave both sides extra peremptory challenges, but he was not lenient with challenges for cause.³⁰⁶⁸ After all potential jurors had been questioned, there remained many more than needed for the jury, alternates, and peremptory challenges.³⁰⁶⁹ So Judge Carr invited the attorneys to file a joint motion to reconsider denials of cause challenges.³⁰⁷⁰ The attorneys accepted the invitation, poten-

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.

3058. Indictment, United States v. El-Hindi, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007); see Reiter, *supra* note 3057; Sander, *supra* note 3057.

3059. Indictment, United States v. Mazloun, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007); see Reiter, *supra* note 3057; Sander, *supra* note 3057.

3060. Docket Sheet, *Mazloun*, No. 3:07-cr-75 (N.D. Ohio Feb. 8, 2007) [hereinafter *Mazloun* Docket Sheet]; Docket Sheet, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Feb. 8, 2007) [hereinafter *El-Hindi* Docket Sheet].

3061. See Blake, *supra* note 3047.

3062. 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).

3063. *Amawi* Docket Sheet, *supra* note 3038; 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.

3064. 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.

3065. Interview with Hon. James G. Carr, Sept. 9, 2008; *Amawi* Jan. 10, 2008, Transcript, *supra* note 3064, at 62–63.

3066. Interview with Hon. James G. Carr, Sept. 9, 2008.

3067. *Id.*

3068. *Id.*

3069. *Id.*

3070. *Id.*

tially appealable issues were removed, and a jury satisfactory to both sides and the court heard the case.³⁰⁷¹

On March 24, Judge Carr severed from the trial two counts that were against Amawi only for threats against the President,³⁰⁷² and the government later dismissed those counts.³⁰⁷³ Opening statements began on April 1.³⁰⁷⁴ Griffin testified the following day.³⁰⁷⁵ 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.³⁰⁷⁶ Closing arguments concluded on Tuesday, June 10.³⁰⁷⁷ The jury reached guilty verdicts on Friday.³⁰⁷⁸

Judge Carr deferred sentencing of the three original defendants until after the separate indictment against el-Hindi was resolved.³⁰⁷⁹ After a bench trial of five court days in November 2008,³⁰⁸⁰ Judge Carr convicted el-Hindi on the fraud indictment and sentenced him to one year and a half;³⁰⁸¹ the court of appeals affirmed.³⁰⁸² Zaim pleaded guilty,³⁰⁸³ and Judge Carr sentenced him to one day of custody.³⁰⁸⁴ In October 2009, Judge Carr sentenced the three original defendants:³⁰⁸⁵ 20 years for Amawi;³⁰⁸⁶ 12 years for el-Hindi,³⁰⁸⁷ to be served in ad-

3071. *Id.*

3072. Order, *United States v. Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 24, 2008).

3073. Government Motion, *id.* (July 15, 2008).

3074. *Amawi* Docket Sheet, *supra* note 3038.

Following opening statements, Judge Carr provided the jurors with preliminary instructions. James G. Carr, *United States v. Amawi: Preliminary Jury Instructions* (Apr. 1, 2008).

3075. See Erica Blake, “*The Trainer*” Begins Terror Trial Testimony, *Toledo Blade*, Apr. 3, 2008, at A1.

3076. See *id.*

3077. *Amawi* Docket Sheet, *supra* note 3038; 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).

3078. 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.

3079. See Erica Blake, *Millions Spent on Terror Case*, June 22, 2008, at A1.

3080. *El-Hindi* Docket Sheet, *supra* note 3060; see Erica Blake, *Convicted Terrorist to Face Another Trial*, *Toledo Blade*, Nov. 5, 2008, at B1.

3081. 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.

3082. *United States v. El-Hindi*, 408 F. App’x 957 (6th Cir. 2011).

3083. *El-Hindi* Docket Sheet, *supra* note 3060.

3084. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Dec. 8, 2008).

3085. See Erica Blake, *3 in Toledo Terror Plot Will Serve up to 20 Years*, *Toledo Blade*, Oct. 22, 2009, at A1.

3086. 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).

3087. Judgment and Commitment, *id.* (Oct. 26, 2009); *El-Hindi Sentencing Transcript*, *supra* note 3081, at 163.

vance of the sentence on the fraud indictment;³⁰⁸⁸ and eight years and four months for Mazloum.³⁰⁸⁹ Appeals by both the defendants and the government are pending.³⁰⁹⁰

Bilal Mazloum was sentenced on August 26, 2008, to one year of probation on a guilty plea.³⁰⁹¹ On January 15, 2009, the Ahmeds both pleaded guilty to a single count of material support to terrorists.³⁰⁹² They surrendered to begin serving their sentences in advance of sentencing.³⁰⁹³ On July 12, 2010, Judge Carr sentenced Zubair Ahmed to 10 years and Khaleel Ahmed to eight years and four months.³⁰⁹⁴

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.³⁰⁹⁵ 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.”³⁰⁹⁶ Mazloum’s attorney joined the motion on the next court day.³⁰⁹⁷ Government at-

3088. Judgment and Commitment, *El-Hindi*, No. 3:07-cr-74 (N.D. Ohio Oct. 26, 2009); El-Hindi Sentencing Transcript, *supra* note 3081, at 163.

3089. 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).

3090. Docket Sheet, *United States v. Mazloum*, No. 09-4345 (6th Cir. Nov. 4, 2009) (government’s appeal of Mazloum’s sentence, noting that the final brief was filed on Sept. 1, 2011); Docket Sheet, *United States v. El-Hindi*, No. 09-4342 (6th Cir. Nov. 4, 2009) (government’s appeal of El-Hindi’s sentence); Docket Sheet, *United States v. Amawi*, No. 09-4340 (6th Cir. Nov. 4, 2009) (government’s appeal of Amawi’s sentence); Docket Sheet, *United States v. Mazloum*, No. 09-4344 (6th Cir. Nov. 4, 2009) (Mazloum’s appeal); Docket Sheet, *United States v. El-Hindi*, No. 09-4341 (6th Cir. Nov. 4, 2009) (El-Hindi’s appeal); Docket Sheet, *United States v. Amawi*, No. 09-4339 (6th Cir. Nov. 4, 2009) (Amawi’s appeal); *see* Docket Sheet, *United States v. Amawi*, No. 11-4079 (6th Cir. Oct. 13, 2011) (noting a due date of Feb. 15, 2012, in Amawi’s appeal from the denial of a new trial); *see also* *Terror Trio File Notices of Appeal with Federal Court*, Toledo Blade, Oct. 29, 2009, at B3; *U.S. Appeals Sentences in Local Terrorism Case*, Toledo Blade, Oct. 31, 2009, at B2.

3091. *Mazloum* Docket Sheet, *supra* note 3060.

3092. 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.

3093. Surrender Order, *Ahmed*, No. 1:07-cr-647 (N.D. Ohio Jan. 8, 2010); Quarterly Report, *id.* (May 1, 2009).

3094. Sentencing Transcript at 44, 66, *id.* (July 12, 2010, filed Dec. 8, 2010); *Ahmed* Docket Sheet, *supra* note 3092.

3095. 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.

3096. 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.

3097. Mazloum Motion, *Amawi*, No. 3:06-cr-719 (N.D. Ohio Mar. 20, 2006).

torneys responded that they were not aware of any monitoring other than customary monitoring by the Bureau of Prisons.³⁰⁹⁸

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 a government employee would not represent him adequately.³⁰⁹⁹ 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.³¹⁰⁰ 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.³¹⁰¹

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.³¹⁰² 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.”³¹⁰³

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.³¹⁰⁴ 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.³¹⁰⁵ 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*.³¹⁰⁶

Challenge: Court Security

Judge Carr was distressed to learn about unnecessarily visible court security.³¹⁰⁷ For example, prospective jurors had to walk by an SUV conspicuously marked as a Department of Homeland Security vehicle.³¹⁰⁸ It did not help that one news sta-

3098. Government Responses, *id.* (Mar. 21, 2006).

3099. Transcript, *id.* (Oct. 19, 2006, filed Jan. 22, 2010); *Amawi* Docket Sheet, *supra* note 3038; see Mark Reiter, *Local Terror Suspect Will Get New Lawyer*, Toledo Blade, Oct. 20, 2006, at B3.

3100. 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 3064, at 3; Interview with Hon. James G. Carr, Sept. 9, 2008.

3101. Interview with Hon. James G. Carr, Sept. 9, 2008.

3102. *Amawi* Mar. 7, 2006, Transcript, *supra* note 3095, at 5.

3103. *Id.*

3104. FISA Notices, *Ahmed*, No. 3:06-cr-719 (N.D. Ohio Apr. 23, 2007).

3105. FISA Notice, *id.* (Sept. 14, 2007).

3106. *United States v. Amawi*, 531 F. Supp. 2d 832 (N.D. Ohio 2008).

3107. Interview with Hon. James G. Carr, Sept. 9, 2008.

3108. *Id.*

tion reported on the case with a graphic titled, “Terror in Toledo.”³¹⁰⁹ Chief Judge Carr was able to persuade security forces to convey less of a siege image.³¹¹⁰

Challenge: Jury Security

Judge Carr used an anonymous jury³¹¹¹ and had jurors report off-site instead of to the courthouse during the trial.³¹¹² 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.³¹¹³

3109. *Id.*

3110. *Id.*

3111. Interview with Hon. James G. Carr, Sept. 9, 2008; *Amawi* Jan. 15, 2008, Transcript, *supra* note 3064, at 64 (recording vehement opposition by defense counsel).

3112. Interview with Hon. James G. Carr, Sept. 9, 2008.

3113. *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.³¹¹⁴ The court initially assigned the case to District Judge Clarence Cooper and Magistrate Judge Joel M. Feldman.³¹¹⁵ With the defendant's consent, the government obtained from Judge Feldman permission to proceed initially under seal with closed proceedings.³¹¹⁶ But on the following day, April 20, the day Ahmed pleaded not guilty at a closed hearing,³¹¹⁷ the *Atlanta Journal-Constitution* reported Ahmed's arrest,³¹¹⁸ and as a result the government moved to unseal the case.³¹¹⁹

Also on April 20, Magistrate Judge Linda T. Walker took over for Judge Feldman,³¹²⁰ because of Judge Feldman's impending retirement.³¹²¹ Two months later, because of Judge Walker's recusal, Magistrate Judge Gerrilyn G. Brill took over for Judge Walker.³¹²²

Ahmed is an American citizen born in Pakistan.³¹²³ He moved to the United States with his parents and siblings in 1997.³¹²⁴ At Georgia Tech, he majored in mechanical engineering.³¹²⁵

3114. 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.

3115. 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.

3116. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

3117. Bill Torpy & Jeremy Redmon, *Path Traced in Suspects' Terror Case*, Atlanta J. & Const., Apr. 22, 2006, at A1.

3118. Bill Torpy & Mike Morris, *FBI Detains Tech Student, but Won't Say Why*, Atlanta J. & Const., Apr. 20, 2006, at A1.

3119. Motion to Seal, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 20, 2006); see Goodman, *supra* note 3114.

3120. N.D. Ga. Docket Sheet, *supra* note 3115.

3121. 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)).

3122. Reassignment Order, *id.* (June 21, 2006); Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

3123. See Goodman, *supra* note 3114; Torpy & Morris, *supra* note 3118.

3124. See Torpy & Morris, *supra* note 3118.

3125. See *id.*

On July 19, 2006, the indictment against Ahmed was superseded to add Ehsanul Islam Sadequee as a defendant.³¹²⁶ Sadequee was arrested while shopping in Dhaka, Bangladesh, on April 17 and turned over to U.S. authorities.³¹²⁷ The district court for the Eastern District of New York had issued a warrant for Sadequee's arrest on March 28.³¹²⁸ American authorities transported him to the District of Alaska,³¹²⁹ which committed Sadequee to the Eastern District of New York.³¹³⁰ Sadequee was arraigned in Brooklyn on April 22.³¹³¹ On August 1, the Eastern District of New York committed Sadequee to the Northern District of Georgia.³¹³² Sadequee pleaded not guilty in Atlanta to the superseding indictment on August 9.³¹³³

Ahmed and Sadequee met at Al-Farooq Masjid, a mosque near Georgia Tech.³¹³⁴ They agreed to prepare for violent jihad, including by playing paintball in the north Georgia mountains.³¹³⁵

Sadequee is a U.S. citizen born in Fairfax, Virginia; his parents are Bangladeshi.³¹³⁶ He moved to the Atlanta area in 1988.³¹³⁷ From 1999 to 2001, he studied at an Islamic seminary in Ajax, Ontario.³¹³⁸ In August 2005, he traveled to Bangladesh to marry a cousin.³¹³⁹ While there, he studied business administration at North South University in Dhaka.³¹⁴⁰

On March 6, 2005, Ahmed and Sadequee traveled together to Toronto, which has a very large Muslim community.³¹⁴¹ Two of the men they met were subsequently prosecuted by Canada after a 17-suspect terrorism sweep.³¹⁴²

3126. Superseding Indictment *Ahmed*, No. 1:06-cr-147 (N.D. Ga. July 19, 2006); see Jeffrey Scott, *Georgia Terror Suspects Accused of Dobbins Plot*, Atlanta J. & Const., July 20, 2006, at D1.

3127. 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 3114; Torpy & Redmon, *supra* note 3117.

3128. Arrest Warrant, United States v. Sadequee, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

3129. 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.

3130. Commitment to Another District, *Sadequee*, No. 3:06-mc-11 (D. Alaska Apr. 21, 2006).

3131. Docket Sheet, *Sadequee*, No. 1:06-mj-335 (E.D.N.Y. Mar. 28, 2006).

3132. Docket Sheet, United States v. Sadequee, No. 1:06-mj-820 (E.D.N.Y. Aug. 1, 2006).

3133. N.D. Ga. Docket Sheet, *supra* note 3115; see Bill Torpy, *Terror Case Suspect Returned to Atlanta*, Atlanta J. & Const., Aug. 10, 2006, at D12.

3134. See Torpy & Redmon, *supra* note 3117.

3135. Specific Findings at 2–4, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. June 10, 2009).

3136. See Bill Torpy, *Suspected Terrorists*, Atlanta J. & Const., June 11, 2006, at A1; Redmon & Torpy, *supra* note 3129.

3137. See Torpy, *supra* note 3136.

3138. See *id.*

3139. See Rashbaum & Goodman, *supra* note 3127; Redmon & Torpy, *supra* note 3129.

3140. See Redmon & Torpy, *supra* note 3129.

3141. Specific Findings, *supra* note 3135, 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 3136.

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.³¹⁴³ A suspected terrorist in Britain, Younis Tsouli, was discovered to have received the videos over the Internet.³¹⁴⁴

On July 17, Ahmed traveled to Pakistan.³¹⁴⁵ His family claimed the trip was for religious education, but the government claimed the purpose was military training.³¹⁴⁶ On August 18, Sadequee traveled to Bangladesh.³¹⁴⁷

Ahmed returned to the United States on August 19, and federal agents interviewed him upon his arrival.³¹⁴⁸ They interviewed him again the following March.³¹⁴⁹

In October 2008, because of Judge Cooper's taking senior status four months later, District Judge William S. Duffey, Jr., became the presiding judge.³¹⁵⁰ The government decided to try Ahmed and Sadequee by separate indictments.³¹⁵¹

As trial approached, each of the defendants expressed a desire to represent himself.³¹⁵² Ahmed wanted to address the court during closing arguments.³¹⁵³ Sadequee said that he wanted to question witnesses.³¹⁵⁴

3142. 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 3136.

3143. Specific Findings, *supra* note 3135, 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 3127; Redmon & Torpy, *supra* note 3129; Torpy, *supra* note 3136; Craig Whitlock & Spencer S. Hsu, *Terror Webmaster Sentenced in Britain*, Wash. Post, Jan. 24, 2008, at A10.

3144. Specific Findings, *supra* note 3135, at 13; see Torpy, *supra* note 3136.

On July 5, 2007, Tsouli was sentenced by a British court to 10 years in prison. See Whitlock & Hsu, *supra* note 3143.

3145. Specific Findings, *supra* note 3135, at 10; see Torpy, *supra* note 3136.

3146. See Torpy, *supra* note 3136.

3147. Specific Findings, *supra* note 3135, at 10.

3148. *Id.* at 11.

3149. *Id.* at 15.

3150. N.D. Ga. Docket Sheet, *supra* note 3115 (noting transfer on Oct. 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/public/home.nsf/hisj> (noting Judge Cooper’s taking senior status on Feb. 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.

3151. 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).

3152. Second Jan. 26, 2009, Transcript, *supra* note 3150, 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

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.³¹⁵⁵ Ahmed opted for a bench trial,³¹⁵⁶ which began on June 1, 2009.³¹⁵⁷ He said that he thought that Judge Duffey would be more objective than the average juror.³¹⁵⁸ 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.³¹⁵⁹ On June 9, Judge Duffey announced that Ahmed was guilty.³¹⁶⁰

The case received extensive coverage, especially by local news media.³¹⁶¹ 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.³¹⁶² Judge Brill observed that sealing documents and closing proceedings often intensifies news media interest.³¹⁶³

One local journalist sat through the entire trial.³¹⁶⁴ Judge Duffey reserved a row of seats for the press, and he permitted sketch artists to sit in the jury box.³¹⁶⁵ 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

had with Mr. Sadequee."); First Jan. 26, 2009, Transcript, *supra* note 3150, at 14 ("[Ahmed]: I 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.

3153. 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.

3154. 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 3150 ("maybe I would just interview one or two witnesses"); see Rankin, *supra* note 3152.

3155. 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).

3156. May 19, 2009, Transcript, *supra* note 3155, at 3–6; Specific Findings, *supra* note 3135, at 2; Interview with Hon. William S. Duffey, Jr., June 16, 2009; see Rankin, *supra* note 3153.

3157. N.D. Ga. Docket Sheet, *supra* note 3115; Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. June 1, 2009, filed June 19, 2009); Specific Findings, *supra* note 3135, at 2; see Bill Rankin, *Defendant "Fell Prey" to Extremist, Lawyer Says*, Atlanta J. & Const., June 2, 2009, at A10.

3158. May 19, 2009, Transcript, *supra* note 3155, at 9.

3159. 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 3155, 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.").

3160. 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 3135, 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.

3161. 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.

3162. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

3163. *Id.*

3164. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

3165. *Id.*

media.³¹⁶⁶ No one in Judge Duffey's chambers was permitted to convey information to news media, except to read those few answers provided by Judge Duffey to their questions about scheduling.³¹⁶⁷

Judge Duffey sealed his special findings supporting the guilty verdict until after Sadequee's jury trial.³¹⁶⁸ News media initially objected to the idea, but they came to accept the temporary sealing as proper.³¹⁶⁹ 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.³¹⁷⁰

For Sadequee's trial, Judge Duffey used a jury questionnaire.³¹⁷¹ Prospective jurors filled out the questionnaire a week in advance of voir dire.³¹⁷² This gave the lawyers and the court ample time to review the questionnaires to focus follow-up voir dire on the most important issues.³¹⁷³

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.³¹⁷⁴

Jury selection in Sadequee's trial began on August 3, 2009.³¹⁷⁵ That morning, Sadequee announced that he would represent himself.³¹⁷⁶ Judge Duffey appointed his attorneys as standby counsel.³¹⁷⁷ Sadequee cross-examined the government's witnesses and called only his sister as his own witness.³¹⁷⁸ He did not testify him-

3166. *Id.*

3167. *Id.*

3168. June 10, 2009, Transcript, *supra* note 3160, at 5; Specific Findings, *supra* note 3135; N.D. Ga. Docket Sheet, *supra* note 3115; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

3169. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

3170. June 10, 2009, Transcript, *supra* note 3160, at 6.

3171. William S. Duffey, Jr., *United States v. Sadequee: Jury Questionnaire* (July 22, 2009) [hereinafter *Jury Questionnaire*]; Interview with Hon. William S. Duffey, Jr., February 18, 2010.

3172. Interview with Hon. William S. Duffey, Jr., February 18, 2010.

3173. *Id.*

Judge Duffey tries to minimize the amount of jurors' idle time at the courthouse. *Id.*

3174. *Jury Questionnaire*, *supra* note 3171; Interview with Hon. William S. Duffey, Jr., February 18, 2010.

3175. N.D. Ga. Docket Sheet, *supra* note 3115.

3176. *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., February 18, 2010.

3177. Interview with Hon. William S. Duffey, Jr., February 18, 2010.

3178. 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 3176.

self,³¹⁷⁹ but he did present a closing argument.³¹⁸⁰ On, August 12, the jury found Sadequee guilty on all four counts presented.³¹⁸¹

The defendants represented themselves at sentencing, although their lawyers were allowed to argue some sentencing guidelines issues.³¹⁸² On December 14, Judge Duffey sentenced Ahmed to 13 years and sentenced Sadequee to 17 years.³¹⁸³ Both defendants voluntarily dismissed their appeals.³¹⁸⁴

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.³¹⁸⁵ Deputy marshals taped newspapers to the windows on the courtroom door so that no one could see inside.³¹⁸⁶

Judge Brill granted the news media's motion to intervene for the purpose of possibly challenging sealing and closure orders.³¹⁸⁷

Challenge: Attorney Appointment

Initially, one of the attorneys appointed to represent Sadequee was an attorney in the Federal Public Defender's office.³¹⁸⁸ But Sadequee was assaulted in detention by another inmate who was also represented by that office, so the office could no longer represent Sadequee.³¹⁸⁹ Judge Brill appointed a Muslim attorney with offices in Miami as a replacement.³¹⁹⁰

3179. Aug. 10, 2009, Transcript, *supra* note 3178, at 1241–42.

3180. Transcript, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 11, 2009, filed Sept. 2, 2009).

3181. 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 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).

3182. 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 3115; *see* Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Oct. 7, 2009).

3183. 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* Bill Rankin, *Two Terrorists Get Prison Sentences*, Atlanta J. & Const., Dec. 15, 2009, at A1.

3184. Docket Sheet, *United States v. Ahmed*, No. 09-16452 (11th Cir. Dec. 29, 2009) (noting May 20, 2011, dismissal); Docket Sheet, *United States v. Sadequee*, No. 09-16325 (11th Cir. Dec. 21, 2009) (noting Apr. 9, 2010, dismissal).

3185. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

3186. *See* Torpy & Redmon, *supra* note 3117.

3187. N.D. Ga. Docket Sheet, *supra* note 3115 (noting Sept. 1, 2006, minute order).

3188. Appointment Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 9, 2006).

3189. 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).

3190. 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].

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.³¹⁹¹ Judge 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.³¹⁹² News media were vigilant in arguing that the case be prosecuted openly.³¹⁹³ Judge Brill insisted that specific reasons be articulated for the sealing of any filings.³¹⁹⁴ The parties subsequently agreed to a protective order that Judge Brill could sign.³¹⁹⁵

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.³¹⁹⁶ On February 8, 2007, Judge Cooper signed a protective order laying out procedures for handling classified information.³¹⁹⁷

Defense counsel had to obtain security clearances.³¹⁹⁸ So did court staff.³¹⁹⁹ District judges have security clearances by virtue of their office, but magistrate judges must obtain security clearances to see classified information.³²⁰⁰

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.³²⁰¹ 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.”³²⁰²

3191. Protective Order *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Apr. 19, 2006).

3192. Order, *id.* (Oct. 26, 2006); see Bill Torpy, *Terror Case Files to Remain Open*, Atlanta J. & Const., Oct. 27, 2006, at D3.

3193. See Moni Basu, *Judge Seeks Balance on Terror Case Evidence*, Atlanta J. & Const., Dec. 16, 2006, at B3.

3194. See *id.*

3195. Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Dec. 20, 2006).

3196. N.D. Ga. Docket Sheet, *supra* note 3115; see Bill Torpy, *Lawyer in Georgia Terror Case Must Show “Need to Know,”* Atlanta J. & Const., June 20, 2006, at B3.

3197. Protective Order, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 8, 2007).

3198. See Bill Torpy, *Security Clearance Slows Terror Case*, Atlanta J. & Const., Sept. 2, 2006, at D3.

3199. 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.

3200. Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information ¶ 4, 18 U.S.C. app. 3 § 9 note; see Torpy, *supra* note 3198.

3201. 18 U.S.C. §§ 4, 6(c)(1) (2000); see Reagan, *supra* note 173, at 12–14; Sept. 18, 2008, Transcript, *supra* note 3190, at 4–5.

3202. Sept. 18, 2008, Transcript, *supra* note 3190, at 16.

Much pretrial work in criminal cases in the Northern District of Georgia is done by magistrate judges.³²⁰³ Judge Brill reviewed classified foundations for trial evidence at an in camera proceeding with counsel for both sides present.³²⁰⁴

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.³²⁰⁵ 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.³²⁰⁶ Judges Duffey and Brill were permitted to keep some classified materials in chambers safes.³²⁰⁷ A secure room was set aside for defense counsel to store and review classified information.³²⁰⁸ Classified information security officers reviewed any documents prepared based on classified information for possible redaction.³²⁰⁹

From 2001 until his becoming a judge in 2004, Judge Duffey was the district's U.S. Attorney.³²¹⁰ He was, therefore, familiar with the security staff at the U.S. Attorney's office.³²¹¹ 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.³²¹²

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.³²¹³ Judge Brill issued a report and recommendation finding no errors in FISA procedures and finding that none of the FISA materials were discoverable.³²¹⁴ 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.³²¹⁵ On the other hand, a FISA suppression motion is easier for the judge

3203. Interview with Hon. Clarence Cooper, Nov. 18, 2009; Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009; *see* Sept. 18, 2008, Transcript, *supra* note 3190, at 2.

3204. 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).

3205. *See* Reagan, *supra* note 173, at 3 (describing sensitive compartmented information).

3206. *See* Torpy, *supra* note 3192; *see also* Reagan, *supra* note 173, at 19 (describing SCIFs).

3207. *Id.*; Interview with Hon. William S. Duffey, Jr., June 16, 2009.

3208. Interview with Dep't of Justice Litig. Sec. Group Staff, Oct. 18, 2011.

3209. 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 3192.

3210. Federal Judicial Center Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>; *see* Rankin, *supra* note 3153.

3211. Interview with Hon. William S. Duffey, Jr., June 16, 2009.

3212. *Id.*

3213. FISA Motion, United States v. Ahmed, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).

3214. Report and Recommendation, *id.* (Aug. 22, 2007).

3215. Interview with Hon. Gerrilyn G. Brill, Nov. 18, 2009.

than many other suppression motions, because collection of the FISA evidence has been subjected to prior judicial review.³²¹⁶

Ahmed also filed a motion that the government disclose whether he had been subject to warrantless surveillance by the National Security Agency outside FISA.³²¹⁷ Judge Cooper denied the motion.³²¹⁸

3216. *Id.*

3217. NSA Motion, *Ahmed*, No. 1:06-cr-147 (N.D. Ga. Aug. 16, 2006).

3218. 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, 2006.³²¹⁹ Narseal Batiste, Burson Augustin, his brother Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor were American citizens.³²²⁰ Phanor was already in jail for a probation violation; the others were arrested in Miami on the day of indictment.³²²¹ Patrick Abraham was a Hatian arrested in Miami on May 9 for overstaying his tourist visa.³²²² Lyglenson Lemorin was a legal Hatian immigrant who had moved to Atlanta approximately two months previously, and he was arrested there on June 22.³²²³ The defendants became known as the Liberty City Seven.³²²⁴

Batiste, married with four children, was born in Chicago and grew up there and in Louisiana, where his father was a Baptist preacher.³²²⁵ His mother died in

3219. Indictment, *United States v. Batiste*, No. 1:06-cr-20373 (S.D. Fla. June 22, 2006); *United States v. Augustin*, ___ F.3d ___, ___, 2011 WL 5141523 (11th Cir. 2011) (pp.13–14 of filed opinion); see Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. Times, July 1, 2006, at A1; 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.

3220. See Shane & Zarate, *supra* note 3219; Whoriskey & Eggen, *supra* note 3219.

3221. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.13 of filed opinion); see Trenton Daniel, Nicole White & Andres Vignucci, *Bible Their Book, Work Their Life, Family Says*, Miami Herald, June 24, 2006, at 1A; Shane & Zarate, *supra* note 3219; Whoriskey & Eggen, *supra* note 3219.

3222. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.13 of filed opinion); see Shane & Zarate, *supra* note 3219; Whoriskey & Eggen, *supra* note 3219.

3223. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.13 of filed opinion); see Daniel *et al.*, *supra* note 3221; Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. Times, Dec. 14, 2007, at A22; Shane & Zarate, *supra* note 3219; 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 3219.

3224. See Abby Goodnough, *Trial Starts for Men in Plot to Destroy Sears Tower*, N.Y. Times, Oct. 3, 2007, at A14.

3225. See Daniel *et al.*, *supra* note 3221; Drew & Lichtblau, *supra* note 3219; Charles Rabin & Susannah A. Nesmith, *Family: Suspect Grew Up Deeply Religious*, Miami Herald, June 27, 2006, at 1A.

2000.³²²⁶ At one time, he worked for FedEx in Chicago.³²²⁷ Batiste and his wife operated a stucco and masonry business, and he held Bible readings at his warehouse.³²²⁸ 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.³²²⁹ He called his religious group the Seas of David.³²³⁰

Abraham was Batiste's right-hand man.³²³¹ Phanor was born in Miami of Haitian parents.³²³² He attended Edison Senior High School and finished high school in Tallahassee.³²³³ At the time of his arrest, he was living in Batiste's warehouse.³²³⁴ Herrera's parents were from the Dominican Republic.³²³⁵ Lemorin, born in Haiti and married with two children, came to the United States as a child in 1993 and had permanent resident status.³²³⁶

The case against the men was established by Elie Assad, a veteran government informant who posed as a representative of Al-Qaeda.³²³⁷ Assad provided the suspects with military boots and a video camera for casing targets.³²³⁸ The FBI paid him \$17,000 plus \$19,570 in expenses, and the government granted him political asylum.³²³⁹ Abbas al-Saidi, another informant, was paid \$10,500 plus \$8,815 in expenses.³²⁴⁰

3226. See Rabin & Nesmith, *supra* note 3225.

3227. See Drew & Lichtblau, *supra* note 3219; Pincus, *supra* note 3219.

3228. See Drew & Lichtblau, *supra* note 3219.

3229. United States v. Augustin, ___ F.3d ___, ___, 2011 WL 5141523 (11th Cir. 2011) (p.4 of filed opinion); see Drew & Lichtblau, *supra* note 3219; Charles Rabin & Alexandra Alter, *Group Denies Violent Doctrine*, Miami Herald, June 24, 2006, at 29A; Whoriskey, *supra* note 3223; Peter Whoriskey, *Trial Begins for 7 Accused of Plotting to Destroy Sears Tower*, Wash. Post, Oct. 3, 2007, at A9 [hereinafter *Trial Begins*].

3230. See Drew & Lichtblau, *supra* note 3219; Goodnough, *supra* note 3224; Shane & Zarate, *supra* note 3219.

3231. See Jay Weaver & David Ovalle, *How FBI Moles Snared Terror Suspects*, Miami Herald, July 16, 2006, at 1A.

3232. See *id.*

3233. See *id.*

3234. See *id.*

3235. See *id.*

3236. See Daniel *et al.*, *supra* note 3221; Whoriskey, *supra* note 3223.

3237. United States v. Augustin, ___ F.3d ___, ___, 2011 WL 5141523 (11th Cir. 2011) (p.6 of filed opinion); see Goodnough, *supra* note 3224; Shane & Zarate, *supra* note 3219; Said, *supra* note 2620, at 725–26; Sherman, *supra* note 2620, at 1489–93; Whoriskey, *Trial Begins*, *supra* note 3229; Whoriskey & Eggen, *supra* note 3219.

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).

3238. Augustin, ___ F.3d at ___, 2011 WL 5141523 (p.7 of filed opinion); see Goodnough, *supra* note 3224; Shane & Zarate, *supra* note 3219; Whoriskey & Eggen, *supra* note 3219.

3239. See Pincus, *supra* note 3219; Jay Weaver, *Trial for "Liberty City Seven" to Start March 3*, Miami Herald, July 27, 2006, at 3B.

3240. See Pincus, *supra* note 3219; Weaver, *supra* note 3239.

The court assigned the case to Judge Joan A. Lenard.³²⁴¹ Jury selection began on September 18, 2007.³²⁴² Judge Lenard did not use a jury questionnaire; in a dozen years on the bench, she had never used one.³²⁴³ 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.³²⁴⁴

Opening statements began on October 2.³²⁴⁵ Later that month, a Miami police counterterrorism pamphlet, which was distributed at a Metrorail station, was discovered in the jury room.³²⁴⁶ Judge Lenard dismissed two jurors and an alternate who said they had read it.³²⁴⁷

Jury deliberations began on December 3.³²⁴⁸ On December 13, the jury acquitted Lemorin.³²⁴⁹ But the jury deadlocked on the other defendants, and Judge Lenard declared a mistrial.³²⁵⁰ On the following day, the government transferred Lemorin to an immigration detention center and initiated deportation proceedings against him.³²⁵¹ He was deported to Haiti on January 20, 2011; his wife and three children continued to live in Miami Beach.³²⁵²

After 13 days of deliberation, a second jury deadlocked, on April 16, 2008, and Judge Lenard again declared a mistrial.³²⁵³ Jury selection in the third trial be-

3241. 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 3239.

Tim Reagan interviewed Judge Lenard for this report in the judge's chambers on October 8, 2009.

3242. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.14 of filed opinion); see Jay Weaver, *Proving Liberty City 7's Intentions Is Task for Feds*, Miami Herald, Sept. 18, 2007, at 1A.

3243. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

3244. 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).

3245. See Goodnough, *supra* note 3224; Whoriskey, *supra* note 3229.

3246. See Weaver, *supra* note 3237.

3247. See *id.*

3248. See Kirk Semple, *Defense Ends Its Arguments in Terrorism Trial in Miami*, N.Y. Times, Dec. 1, 2007, at A12.

3249. *United States v. Augustin*, ___ F.3d ___, ___, 2011 WL 5141523 (11th Cir. 2011) (pp.4, 14 of filed opinion); see Semple, *supra* note 3223; Weaver & Yanez, *supra* note 3223; Peter Whoriskey, *Terrorism Case Ends in Mistrial; 1 Acquitted*, Wash. Post, Dec. 14, 2007, at A3.

3250. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.14 of filed opinion); see Semple, *supra* note 3223; Weaver & Yanez, *supra* note 3223; Whoriskey, *supra* note 3249.

3251. 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 3223.

3252. 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.

3253. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.14 of filed opinion); see Damien Cave, *Mistrial for 6 in Sears Tower Terror Case*, N.Y. Times, Apr. 17, 2008, at A21; Julianne Gage, *2nd Mistrial in "Liberty City 7" Case*, Wash. Post, Apr. 17, 2008, at A2.

gan on January 27, 2009.³²⁵⁴ Selection proceedings were interrupted by briefing on whether the government's using a peremptory challenge against a young Haitian-American man was improper.³²⁵⁵

Opening statements began on February 19.³²⁵⁶ 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.³²⁵⁷ Then jurors reported that one of their members had refused to participate in deliberations.³²⁵⁸ After questioning all of the jurors, including the juror in question, and with consent of the parties, Judge Lenard replaced this juror as well.³²⁵⁹ Ultimately, on May 12, the jury acquitted Herrera and convicted each of the others on at least some of the pending counts.³²⁶⁰ The court of appeals affirmed the convictions.³²⁶¹

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.³²⁶²

Challenge: Classified Evidence

No part of this case involved classified information.³²⁶³

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).

3254. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.14 of filed opinion); see Jay Weaver, *Jurors Vetted in Liberty City 6 Trial*, Miami Herald, Jan. 28, 2009, at 3B.

3255. See Jay Weaver, *Racial Concerns Halt Jury Selection in Third Liberty City Six Terrorism Trial*, Miami Herald, Feb. 12, 2009, at 3B.

3256. See Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. Times, Feb. 19, 2009, at A18.

3257. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.15 of filed opinion); 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.

3258. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (pp.15, 48 of filed opinion); 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 3257; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at A1.

3259. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (pp.15, 48-54 of filed opinion); Interview with Hon. Joan A. Lenard, Oct. 8, 2009; see Weaver, *supra* note 3258; Weaver, *supra* note 3257; Jay Weaver, *Terror Trial's Outcome May Be Tainted*, Miami Herald, May 17, 2009, at 1A.

3260. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (pp.2, 4, 15 of filed opinion); 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 3258.

3261. *Augustin*, ___ F.3d at ___, 2011 WL 5141523 (p.59 of filed opinion); see Jay Weaver, *Convictions Upheld in "Liberty City 7,"* Miami Herald, Nov. 2, 2011, at 6B.

The court of appeals denied Augustin's motion to fire his attorney and proceed pro se on appeal. Docket Sheet, United States v. Augustin, No. 09-15985 (11th Cir. Nov. 27, 2009) (noting Aug. 15, 2011, denial).

3262. S.D. Fla. Docket Sheet, *supra* note 3241.

3263. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

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.³²⁶⁴ Because of this and other inappropriate disclosures, Judge Lenard used an anonymous jury for the next two trials.³²⁶⁵ For the second trial, she also used partial sequestration, which meant that jurors met at undisclosed locations and were shuttled to the courthouse.³²⁶⁶ The court provided them with lunch.³²⁶⁷

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.³²⁶⁸ 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.³²⁶⁹

3264. *Id.*

3265. Voir Dire Questions, *supra* note 3244; Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

3266. Interview with Hon. Joan A. Lenard, Oct. 8, 2009.

3267. *Id.*

3268. *Id.*

3269. *Id.*

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 Fort Dix.³²⁷⁰ Authorities arrested them that evening.³²⁷¹ The grand jury returned an indictment on June 5.³²⁷² The court assigned the case to Judge Robert B. Kugler.³²⁷³

Mohamad Shnewer, a taxi driver and U.S. citizen born in Jordan, was the alleged coordinator.³²⁷⁴ Also charged were his three brothers-in-law: Dritan, Shain, and Eljvir Duka, roofers who were ethnically Albanian, born in Yugoslavia, and who had been in the United States illegally since they were children.³²⁷⁵ 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.³²⁷⁶ Fort Dix apparently was selected as a target because Tatar's family frequently delivered pizza there.³²⁷⁷

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-

3270. Docket Sheet, *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. June 5, 2007) [hereinafter D.N.J. Docket Sheet]; see George Anastasia, *Fort Dix Targeted in "Jihad," U.S. Says*, Phila. Inquirer, May 9, 2007, at A1; 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.

3271. D.N.J. Docket Sheet, *supra* note 3270; see George Anastasia & Troy Graham, *Fort Dix Suspects Indicted*, Phila. Inquirer, June 6, 2007, at B1; Kocieniewski, *supra* note 3270; Russakoff & Eggen, *supra* note 3270.

3272. D.N.J. Docket Sheet, *supra* note 3270; see Kareem Fahim, *Charges Filed Against 6 Men in Plot to Attack Base*, N.Y. Times, June 6, 2007, at B6.

3273. D.N.J. Docket Sheet, *supra* note 3270; 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.

3274. D.N.J. Docket Sheet, *supra* note 3270; see Kocieniewski, *supra* note 3270; Russakoff & Eggen, *supra* note 3270; Shiffman & Hefler, *supra* note 3270.

3275. D.N.J. Docket Sheet, *supra* note 3270; see Kocieniewski, *supra* note 3270; Russakoff & Eggen, *supra* note 3270; Shiffman & Hefler, *supra* note 3270.

3276. D.N.J. Docket Sheet, *supra* note 3270; see Kocieniewski, *supra* note 3270; Russakoff & Eggen, *supra* note 3270; Shiffman & Hefler, *supra* note 3270.

3277. See Edward Colimore, *Dismay at Cookstown Pizzeria*, Phila. Inquirer, May 9, 2007, at A4; Kocieniewski, *supra* note 3270; Russakoff & Eggen, *supra* note 3270; Shiffman & Hefler, *supra* note 3270.

ing about jihad while training with assault weapons in the Poconos.³²⁷⁸ The government sent Mahmoud Omar, an informant, to investigate the group, and by March the informant had befriended Shnewer.³²⁷⁹ Arrests immediately followed a sham sale of firearms by Omar to Dritan and Shain Duka.³²⁸⁰ It was reported that the government paid Omar more than \$230,000.³²⁸¹ A second informant was reportedly paid \$150,000.³²⁸²

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, 2008.³²⁸³

On July 11, Tatar initiated a civil action challenging his and his co-defendants' conditions of confinement.³²⁸⁴ Because they were detained in the Philadelphia Detention Center,³²⁸⁵ 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.³²⁸⁶ The district court there transferred the action to Judge Kugler in the District of New Jersey as related to the criminal

3278. See Anastasia, *supra* note 3270; 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 3270; Russakoff & Eggen, *supra* note 3270.

3279. See Anastasia, *supra* note 3270; Feuer, *supra* note 3278; *Informer Appears at Trial, but His Recordings Talk*, N.Y. Times, Nov. 2, 2008, NJ, at 1 [hereinafter *Informer Appears*]; Said, *supra* note 2620, at 722–24.

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.

3280. See George Anastasia, *Details Emerge in Terror Sting*, Phila. Inquirer, May 10, 2007, at A1; Fahim, *supra* note 3272; *Informer Appears*, *supra* note 3279; Shiffman & Hefler, *supra* note 3270.

3281. See George Anastasia, *Terror Trial Opens for Ft. Dix 5*, Phila. Inquirer, Oct. 21, 2008, at A1; *Informer Appears*, *supra* note 3279; 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.”).

3282. See Von Zielbauer & Hurdle, *supra* note 3281.

3283. D.N.J. Docket Sheet, *supra* note 3270; 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).

3284. Docket Sheet, *Tartar v. Levi*, No. 2:08-cv-3270 (E.D. Pa. July 11, 2008).

3285. Opinion at 1, *Tatar v. Levi*, No. 1:08-cv-4422 (D.N.J. Sept. 20, 2010), available at 2010 WL 3740610.

3286. Motion, *Tartar*, No. 2:08-cv-3270 (E.D. Pa. July 25, 2008).

case.³²⁸⁷ Tatar filed a hand-written amended complaint on April 1, 2009,³²⁸⁸ and a typed amended complaint on January 4, 2011.³²⁸⁹ Answers followed on January 18.³²⁹⁰

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.³²⁹¹ This allowed access to the documents without going through PACER.³²⁹² Evidence was posted the moment it was admitted.³²⁹³ Each side loaded digitized exhibits on a secure server in advance of moving for their admissibility.³²⁹⁴ Neither side had access to the other side's exhibits on the server until they were admitted.³²⁹⁵

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.³²⁹⁶ 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.³²⁹⁷

Jury selection for the trial against the five remaining defendants began on September 29, 2008.³²⁹⁸ Judge Kugler used a jury questionnaire.³²⁹⁹ 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.³³⁰⁰ In the courtroom, Judge Kugler and the attorneys reviewed answered questionnaires.³³⁰¹ Approximately two-thirds of the prospective jurors were disqualified on the basis of the questionnaires alone.³³⁰²

During the following week, 15 prospective jurors reported in the morning and 15 reported in the afternoon for individual voir dire.³³⁰³ Judge Kugler observed that once the questionnaires were filled out, there were few questions left to

3287. Order, *id.* (Sept. 2, 2008).

3288. First Amended Complaint, *Tatar*, No. 1:08-cv-4422 (D.N.J. Apr. 10, 2009).

3289. 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.

3290. Docket Sheet, *Tatar*, No. 1:08-cv-4422 (D.N.J. Sept. 5, 2008).

3291. <http://www.njd.uscourts.gov/FortDixTrial/index.html>; 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 3273.

3292. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3293. *Id.*; *see* Graham, *supra* note 3273.

3294. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3295. *Id.*

3296. *Id.*

3297. *Id.*

3298. D.N.J. Docket Sheet, *supra* note 3270; *see* George Anastasia, *Trial for Fort Dix Five Begins Tomorrow*, Phila. Inquirer, Sept. 28, 2008, at A1.

3299. Robert B. Kugler, *United States v. Shnewer: Jury Questionnaire* (Sept. 29, 2008); *see* Anastasia, *supra* note 3298.

3300. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3301. *Id.*

3302. *Id.*

3303. *Id.*

ask.³³⁰⁴ Although it is unusual for attorneys to ask questions directly during voir dire, Judge Kugler permitted it in this case.³³⁰⁵ Judge Kugler also granted the parties double the number of usual peremptory challenges.³³⁰⁶

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.³³⁰⁷ 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.³³⁰⁸ 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.³³⁰⁹ 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.³³¹⁰

Trial began on October 20, 2008, with opening arguments.³³¹¹ On December 22, after six days of deliberation, a jury convicted Shnewer, the Dukas, and Tatar of conspiring to kill American soldiers.³³¹² On April 28 and 29, 2009, Judge Kugler sentenced Tatar to 33 years, and he sentenced the other defendants to life.³³¹³

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.³³¹⁴ The government addressed the media for the first half hour, and defense counsel and families addressed the media thereafter.³³¹⁵ The media could bring in cameras and recording devices for this purpose.³³¹⁶ Because it worked well, a similar procedure was used after sentencing.³³¹⁷

3304. *Id.*

3305. *Id.*

3306. *Id.*

3307. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3308. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009; *see* Graham, *supra* note 3273.

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.

3309. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3310. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3311. *See* Anastasia, *supra* note 3281.

3312. D.N.J. Docket Sheet, *supra* note 3270; *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 3281.

3313. D.N.J. Docket Sheet, *supra* note 3270; *see* 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.

3314. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3315. *Id.*

3316. *Id.*

3317. *Id.*

In June and August of 2010, friends and relatives of the defendants organized rallies in front of the courthouse protesting the convictions.³³¹⁸

Appeals were heard on May 23, 2011.³³¹⁹

Challenge: Classified Evidence

Attorneys representing defendants who went to trial needed security clearances, but they were not permitted to share classified information with their clients.³³²⁰ 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.³³²¹ Judge Kugler’s staff—law clerks, court reporters, courtroom deputies, and judicial assistant—all received security clearances, and Judge Kugler observed that the clearance process went smoothly.³³²²

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.³³²³

Challenge: FISA Evidence

Much of the case against the defendants was based on evidence obtained pursuant to FISA warrants.³³²⁴ Much of the FISA evidence was declassified, but the affidavits supporting the FISA warrants generally were not.³³²⁵ Judge Kugler reviewed FISA files to determine what was discoverable and to determine that the FISA surveillance was properly supported.³³²⁶ FISA discoverability decisions are

3318. 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.

3319. <http://www.ca3.uscourts.gov/oralargument/audio/09-2292etalUSAvDukaetalpart1.wma> (video recording of oral argument, part one); <http://www.ca3.uscourts.gov/oralargument/audio/09-2292etalUSAvDukaetalpart2.wma> (part two); Docket Sheet, *United States v. Tatar*, No. 09-2302 (3d Cir. May 5, 2009) (Tatar’s appeal); Docket Sheet, *United States v. Duka*, No. 09-2301 (3d Cir. May 5, 2009) (Shain Duka’s appeal); Docket Sheet, *United States v. Duka*, No. 09-2300 (3d Cir. May 5, 2009) (Dritan Duka’s appeal); Docket Sheet, *United States v. Shnewer*, No. 09-2299 (3d Cir. May 5, 2009) (Shnewer’s appeal); Docket Sheet, *United States v. Duka*, No. 09-2292 (3d Cir. May 5, 2009) (Eljvir Duka’s appeal); see Nathan Gorenstein, “*Fort Dix Five*” *Argue for Second Trials*, Phila. Inquirer, May 24, 2011, at B1.

3320. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3321. *Id.*

3322. *Id.*

3323. *Id.*

3324. 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.

3325. FISA Evidence Order, *supra* note 3324, at 2–9; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3326. FISA Evidence Order, *supra* note 3324, at 13–23; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

somewhat hampered by the judge's not knowing, particularly early in the case, what the defenses might be.³³²⁷

Challenge: Classified Opinion

Judge Kugler's August 14, 2008, opinion on the validity of FISA evidence is classified.³³²⁸ A redacted opinion was filed publicly on December 29, 2009, after review by intelligence agencies.³³²⁹ Redactions appear to conceal what agents of Al-Qaeda were the targets of FISA surveillance resulting in evidence against the defendants.³³³⁰

Challenge: Jury Security

Judge Kugler used an anonymous jury.³³³¹ Each juror met at one of two secret locations; deputy marshals shuttled the jurors to the courthouse.³³³² During deliberations, the jurors were sequestered at a nearby hotel.³³³³

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.³³³⁴

Challenge: Court Security

Court security was enhanced for the trial.³³³⁵ Additional precautions were taken during the two days of sentencing.³³³⁶ No other judge scheduled proceedings for those days, and court staff were encouraged to work at home.³³³⁷ Because a jury was not present, there was a greater visible presence of security.³³³⁸

Challenge: Attorney Appointment

In February and March of 2010, nearly 10 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.³³³⁹ The court denied their

3327. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3328. FISA Evidence Order, *supra* note 3324, at 1; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3329. D.N.J. Docket Sheet, *supra* note 3270; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3330. *See* FISA Evidence Order, *supra* note 3324.

3331. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3332. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3333. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3334. Decorum Order, *supra* note 3291; Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3335. Interview with Hon. Robert B. Kugler, Dec. 15, 2009.

3336. *Id.*

3337. *Id.*

3338. *Id.*

3339. 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-

requests, finding no extraordinary circumstances justifying departure from the usual practice of trial counsel continuing on appeal.³³⁴⁰

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.³³⁴¹ The court denied this request as well.³³⁴²

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).

3340. 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).

3341. New Counsel Motion, *United States v. Shnewer*, No. 09-2299 (3d Cir. Mar. 1, 2010).

3342. Order, *id.* (Mar. 23, 2010).

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.³³⁴³ 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.”³³⁴⁴ The court assigned the case to Judge James Ware, who dismissed the action on state-secrets grounds.³³⁴⁵

Because the action was dismissed without the filing of an answer, the facts are substantially limited to the plaintiffs’ allegations.³³⁴⁶ 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.³³⁴⁷ 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.³³⁴⁸ 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.³³⁴⁹ 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.³³⁵⁰ Mohamed Farag Ahmad Bashmilah, a Yemeni, was arrested in Jordan, and transferred, in turn, to Afghanistan

3343. 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.

3344. 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); Hafetz, *supra* note 502, at 51–59.

3345. *Mohamed*, 539 F. Supp. 2d 1128; see Schwartz, *supra* note 3343.

Tim Reagan interviewed Judge Ware for this report in the judge’s chambers on September 24, 2010.

3346. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010); *Mohamed*, 539 F. Supp. 2d at 1131.

3347. *Mohamed*, 614 F.3d at 1074.

3348. *Id.*; *Mohamed*, 539 F. Supp. 2d at 1130–31.

3349. *Mohamed*, 614 F.3d at 1074; *Mohamed*, 539 F. Supp. 2d at 1130.

3350. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32; see Hafetz, *supra* note 502, at 46–47.

and an unknown CIA black site prison, where he was subjected to extremely harsh conditions of confinement.³³⁵¹ Mohamed, al-Rawi, and Bashmilah were subsequently released.³³⁵²

The defendant was Jeppesen DataPlan, Inc., a subsidiary of Boeing, with headquarters in San Jose.³³⁵³ 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.”³³⁵⁴ There was evidence that “Jeppesen knew what was going on when it arranged flights described by one of its own officials as ‘torture flights.’”³³⁵⁵

The government intervened to block the suit on state-secrets grounds.³³⁵⁶ Judge Ware determined, on February 13, 2008, that “the very subject matter of this case is a state secret” and dismissed the action.³³⁵⁷

On April 28, 2009, a three-judge panel of the court of appeals reversed.³³⁵⁸ 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.”³³⁵⁹ The Supreme Court denied certiorari.³³⁶⁰

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

3351. *Mohamed*, 614 F.3d at 1075; *Mohamed*, 539 F. Supp. 2d at 1131.

3352. *Mohamed*, 614 F.3d at 1074–75; *Mohamed*, 539 F. Supp. 2d at 1131–32.

3353. *Mohamed*, 539 F. Supp. 2d at 1129; see Schwartz, *supra* note 3343.

3354. *Mohamed*, 614 F.3d at 1075.

3355. *Id.* at 1095 (Hawkins, dissenting).

3356. *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.

3357. *Mohamed*, 539 F. Supp. 2d at 1130, 1134–35.

3358. *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.

3359. *Mohamed*, 614 F.3d at 1083 (opinion by Circuit Judge Raymond C. Fisher, joined by Chief Circuit Judge Alex Kozinski and Circuit Judges Richard C. Tallman, Johnnie B. Rawlinson, and Consuelo Maria Callahan); see *id.* at 1093 (concurring opinion by Circuit 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 Circuit Judge Hawkins, joined by Circuit 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.

3360. *Mohamed v. Jeppesen Dataplan, Inc.*, ___ U.S. ___, 131 S. Ct. 2442 (2010).

CIA.³³⁶¹ A classified information security officer brought the declaration to Judge Ware's chambers.³³⁶² Judge Ware reviewed the declaration privately in his office, with the blinds drawn, while the security officer waited outside.³³⁶³ 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.³³⁶⁴ Not wanting unknown persons to have access to his notes, the judge did not take notes.³³⁶⁵

On appeal, the government submitted to the appellate judges ex parte classified briefs and declarations.³³⁶⁶ 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.³³⁶⁷ On the day of oral argument, the security officer again provided each judge with that judge's set of materials.³³⁶⁸

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.³³⁶⁹

3361. *Mohamed*, 614 F.3d at 1076; *Mohamed*, 539 F. Supp. 2d at 1130, 1132; Interview with Hon. James Ware, Sept. 24, 2010.

3362. Interview with Hon. James Ware, Sept. 24, 2010.

3363. *Id.*

3364. *Id.*

3365. *Id.*

3366. *Mohamed*, 614 F.3d at 1084 n.6; Docket Sheet, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. Mar. 31, 2008) (noting lodging of classified materials with the three-judge panel on Aug. 27, 2008, and with the en banc panel on Nov. 13, 2009).

3367. Interview with Dep't of Justice Litig. Sec. Group Staff, July 20, 2011.

3368. *Id.*

3369. *Id.*

The Federal Judicial Center

Board

The Chief Justice of the United States, *Chair*

Judge Susan H. Black, U.S. Court of Appeals for the Eleventh Circuit

Magistrate Judge John Michael Facciola, U.S. District Court for the District of Columbia

Judge James B. Haines, U.S. Bankruptcy Court for the District Maine

Judge James F. Holderman, Jr., U.S. District Court for the Northern District of Illinois

Judge Edward C. Prado, U.S. Court of Appeals for the Fifth Circuit

Judge Loretta A. Preska, U.S. District Court for the Southern District of New York

Judge Kathryn H. Vratil, U.S. District Court for the District of Kansas

Judge Thomas F. Hogan, Director of the Administrative Office of the U.S. Courts

Director

Judge Jeremy D. Fogel

Deputy Director

John S. Cooke

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovation & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.