

GUIDE TO HIGH SECURITY & TERRORISM CASES
2006 MILTON POLLACK FELLOWSHIP

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^{*} Milton Pollack Fellow, Summer 2006; J.D. Candidate, May 2008, Fordham University School of Law. I wish to thank The Honorable Michael B. Mukasey and The Honorable Loretta A. Preska for providing me with the most rewarding experience of my short legal career. I am grateful for their constant input, encouragement, and guidance in helping me see this Guide through to its completion. Advice I received from The Honorable Kenneth M. Karas was also critical in helping me determine what issues to research and how to organize the topics contained in this Guide, so I wish to thank him as well. Part of the uniqueness of this Guide comes from the conversations I was able to have with The Honorable Leonard B. Sand and The Honorable Kevin T. Duffy, who gave generously of their valuable time to speak with me. Finally, a special thank you to District Executive Clifford P. Kirsch and the entire staff in the District Executive's office for their help and assistance throughout my time spent at the Southern District of New York's Daniel Patrick Moynihan United States Courthouse.

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INTRODUCTION

We are on strange ground . . . But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead.¹

The last two decades have brought about significant changes in the world in which we live. Usama Bin Laden, Abu Musab Al-Zarqawi and al Qaeda have become household names as the United States wages its war against terrorism. War inevitably leads to prisoners who must face their day in a court of law, and this is where the job of the honorable judges of this court, the Southern District of New York (S.D.N.Y.), begins.

While a terrorism case² should in theory be approached as a judge would any other case,³ there are specific issues that tend to arise in such cases, including issues involving representation, prisoner confinement conditions, jury, venue, the Foreign Intelligence Surveillance Act ("FISA"), discovery and access to classified information under the Classified Information Procedures Act ("CIPA"). As this summer's Milton Pollack Fellow, I have been tasked with composing a guide for

¹ In re Yamashita, 327 U.S. 1, 43 (1946) (Rutledge, J., dissenting).

² For purposes of this Guide, the terms "high security" and "terrorism" will be used interchangeably, although it is certainly possible to have high security cases that are not related to terrorism and indeed some of the opinions that will be cited in this Guide come from high security cases unrelated to terrorism.

³ Conversation with The Honorable Michael B. Mukasey, Chief Judge, S.D.N.Y., in New York, N.Y. (July 27, 2006) [hereinafter Judge Mukasey Conversation A]; Judge Duffy expressed similar sentiments that judges must treat a terrorism case like any other criminal case and are tasked simply with giving both sides a fair trial. Phone Interview with The Honorable Kevin Thomas Duffy, U.S. District Court Judge, S.D.N.Y., in New York, N.Y. (August 14, 2006) [hereinafter Judge Duffy Conversation].

S.D.N.Y. judges detailing how such issues have been dealt with by judges in previous high security trials and what can be learned for similar trials in the future. This Guide is based on information obtained through both extensive legal research and conversations with those honorable S.D.N.Y. judges and others who have had particular expertise in dealing with high security cases in an attempt to glean “both the law and the lore”⁴ of high security cases.

I. REPRESENTATION ISSUES

A. Pro Se Defendants

One of the first issues that may arise in high security cases is when a defendant must choose⁵ whether to have counsel represent him or to proceed pro se.⁶ The Honorable Kenneth M. Karas has highlighted the need to realize why some defendants in

⁴ Id.

⁵ See *Faretta v. California*, 422 U.S. 806, 834 (1975) (holding that “[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him . . . The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.”).

⁶ Although in general, courts will allow defendants to proceed pro se when they so choose, Judge Mukasey has pointed out that such a request can be denied if it risks trial disruption or if defendant is found to be making a mockery of the proceedings and committing more than simple inadvertent rule violations here or there (for example, by using opening or closing statements to preach or convey evidence) in which case the judge should then appoint competent counsel to argue instead of pro se defendant. Conversation with The Honorable Michael B. Mukasey, Chief Judge, S.D.N.Y., in New York, N.Y. (June 16, 2006) [hereinafter Judge Mukasey Conversation B]. See also *United States v. Abdel Rahman*, 189 F.3d 88, 144 (2d Cir. 1999) (citation omitted) (affirming the district court’s ruling denying defendant the right to proceed pro se in mid-trial and stating that “Judge Mukasey’s decision was well within the broad discretion of a district judge considering an application for self-representation made after a trial has begun . . . and the risk of trial disruption was clear”).

terrorism cases often choose to proceed pro se.⁷ This is in part based on their personal distrust of the U.S. government and, by extension, any perceived agent of the U.S. such as counsel appointed by the court.⁸

High security case defendants have proceeded pro se in a number of high profile terrorism cases. In Abdel Rahman, The Honorable Michael B. Mukasey allowed defendant Sheik Abdel Rahman to proceed pro se for a fourteen month period pre-trial, a decision challenged by the defendant on appeal for permitting him to appear pro se in such a difficult case.⁹ Judge Mukasey has explained what he felt led Abdel Rahman to proceed pro se: 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.¹⁰ 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.¹¹

⁷ Conversation with The Honorable Kenneth M. Karas, U.S. District Court Judge, S.D.N.Y., in New York, N.Y. (June 9, 2006) [hereinafter Judge Karas Interview].

⁸ Id.

⁹ See Abdel Rahman, 189 F.3d at 144 (holding that the court's decision was "meticulously made and was well within its proper exercise of discretion").

¹⁰ Judge Mukasey Conversation B, supra note 6.

¹¹ Id.

Similarly, in United States v. Yousef, defendant Yousef told the court that he wished to make his own opening statement and proceed pro se.¹² After being advised by the court several times of the dangers inherent in representing himself, the court concluded that Yousef "knowingly and voluntarily ... waived his right to counsel," allowed Yousef to continue pro se and appointed Roy Kulcsar, Yousef's attorney up to that point, to remain as standby counsel as an advisor.¹³ As Yousef's attorney-advisor, Kulcsar was actively involved in the case, making numerous objections and motions on Yousef's behalf.¹⁴ Despite this assistance, Judge Duffy has pointed out that Yousef's decision to proceed pro se (and generally, any defendant's similar decision in a high security case proceeding pro se) essentially was tantamount to his pleading guilty.¹⁵ Such similar events also occurred in United States v. Moussaoui, where the defendant requested and was granted permission to proceed pro se with a standby counsel appointed to assist him.¹⁶

¹² See 327 F.3d 56, 121 n. 53 (2d Cir. 2003).

¹³ Id.

¹⁴ Id.

¹⁵ Judge Duffy Conversation, supra note 3. Judge Duffy also elaborated that Yousef's pro se defense had been going well for the first six weeks or so into trial until the government decided that they wanted to play an audio portion of film on what was alleged to be Yousef's computer. Yousef did not object and said it was not his computer so they could do whatever they wanted and the jury proceeded to listen to a voice on the computer which was the same exact voice as Yousef which ended up sinking Yousef's case because the computer contained information about the Bojinka bomb plot and information about how to build bombs.Id.

¹⁶ See No. crim.01-455-A, 2002 WL 1311738 (E.D.Va. June 14, 2002) (granting defendant the right to proceed pro se and release of defendant's former counsel from representation responsibilities once substitute standby counsel was identified); United States v. Moussaoui, No. crim.01-455-A, 2002 WL

Finally, in the Embassy Bombings case before the Honorable Leonard B. Sand, this issue of terrorism defendants' mistrust of appointed counsel and the wish to proceed pro se also arose, albeit with different results from some of the other cases.¹⁷ Judge Sand has pointed out that this issue of the relationships between defendants and their counsel was perhaps the most time consuming one and is certainly something for judges to take note of.¹⁸ Not only did a lack of rapport exist between counsel and defendants, but the court had to take measures to protect counsel from their clients since the cultural differences between these types of defendants and their CJA appointed counsel are so extreme and these types of defendants often have trouble understanding that their lawyers are looking out solely for the client's best interests and not for the government.¹⁹ In some instances, the defendants had made requests for new counsel or to proceed pro se but after hearing these applications, either the lawyers were able to work things out with their

1311741 (E.D.Va. June 17, 2002) (appointing new standby counsel for defendant and relieving former court appointed counsel from all responsibilities); United States v. Moussaoui, No. crim.01-455-A, 2002 WL 1587017 (E.D.Va. July 11, 2002) (denying defendant's motion for reconsideration of district court's ruling appointing standby counsel).

¹⁷ See generally Sam A. Schmidt & Joshua L. Dratel, Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions, 48 N.Y.L. Sch. L. Rev. 69, 74-75 n.13 (2003) (detailing how disagreements between counsel and defendants were handled in the Embassy Bombings case and how certain conflicts between the two led to in camera ex parte hearings which resulted in the defendants being able to vent their frustration and have their attorney's serve as a lightning rod for "client tension and dissatisfaction" without ultimately dropping counsel).

¹⁸ Interview with The Honorable Leonard B. Sand, U.S. District Court Judge, S.D.N.Y., in New York, N.Y. (Aug. 16, 2006) [hereinafter Judge Sand Interview].

¹⁹ Id.

clients or the requests to proceed pro se were not properly made and thus denied.²⁰ All of the co-defendants proceeded throughout the trial with appointed counsel, and Judge Sand felt that all of the defendants ended up being diligently represented.²¹

B. Criminal Justice Act("CJA") & Celebrity Lawyers

The next representation issue that often appears in high security cases is that of "celebrity lawyers" who are interested in serving as defense counsel in these high profile trials. These lawyers try to get appointed as counsel both through attempted manipulation of the CJA system or simply by offering their services despite a clear conflict of interest. Judge Mukasey has observed that at times, attorneys who are looking for attention but who have not been appointed to the CJA panel²² may begin these high security trials not "fully retained", and then request a special exception to continue as CJA appointed attorney because they already have particular familiarity with the case.²³ Thus, judges in these trials must be diligent and confirm that counsel has been "fully retained" for the duration of the case, regardless of the method of resolution and if needed in the interests of justice, a judge can appoint the CJA

²⁰ For example, the requests were not clear enough or there was a limit placed on the amount of times defendants could change counsel which had been exceeded. Id.

²¹ Id.

²² Either they are not on the CJA panel at all or it simply is not their day to be appointed from the CJA panel.

²³ Judge Mukasey Conversation B, supra note 6.

attorney on duty that day and require the client to be liable for fees he later has money to pay.²⁴

In the Abdel Rahman trial, Judge Mukasey had to deal with this type of attempted abuse of the CJA system in a few instances. Judge Mukasey denied defendant Nosair CJA funds to retain his previous lawyer, Michael W. Warren,²⁵ since an effective advocate could be found for Nosair from the CJA panel itself.²⁶ Additionally, Judge Mukasey denied CJA funds for Lynne Stewart and rejected claims from attorneys in the case, including William M. Kuntsler and Ronald L. Kubby, that there should be a special rule regarding counsel appointment in these high profile cases and held that “[t]he special rule they advocate would create two classes of defendants, and apparently of lawyers, and is therefore both unworkable and unfair . . .

. ”²⁷

²⁴ Id. See also United States v. Parker, 439 F.3d 81, 99-109 (discussing the ramifications of the “fully retained” inquiry as it relates to the CJA).

²⁵ Warren had represented Nosair in his previous murder trial for the killing of Rabbi Meir Kahane and thus Nosair argued that having him as an attorney in this case should qualify as a “special circumstance” necessary for a judge to request approval from the Chief Judge of the district for CJA funds for a non-CJA panel attorney. See United States v. Rahman, No. S3 93 Cr. 181, 1993 WL 410449, at *1-*4 (S.D.N.Y. Oct. 13, 1993).

²⁶ Id. at *2 (holding “while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”).

²⁷ United States v. Rahman, No. S3 93 Cr. 181, 1993 WL 410449, at *5 (S.D.N.Y. Oct. 13, 1993)

Similarly, the Honorable Loretta A. Preska recounted²⁸ how this same CJA abuse issue appeared early on in a recent terrorism case, United States v. Shah.²⁹ Judge Preska received one letter from attorney Joshua L. Dratel saying that he would be replacing defendant Shah's then current counsel and then another ex parte letter from Dratel asking to be appointed as CJA attorney.³⁰ The next time they appeared in court, Judge Preska confirmed with Shah that he wished to be provided with a CJA attorney, and appointed the CJA panel attorney who was on duty for that day, not Dratel because despite his being on the CJA panel, pursuant to the Southern District's Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act (18 U.S.C. § 3006A), it was not his "duty day".³¹ Two weeks later, Dratel sent a letter to Judge Preska confirming that he was now fully retained.³² Only when Dratel confirmed that he had been "fully retained" did Judge Preska allow him to serve as attorney with the knowledge that he would be Shah's attorney until the charges against Shah were fully resolved.³³

²⁸ Conversation with The Honorable Loretta A. Preska, U.S. District Court Judge, S.D.N.Y., in New York, N.Y. (June 28, 2006) [hereinafter Judge Preska Conversation].

²⁹ No. 05 Cr. 673 (LAP) (S.D.N.Y. case still pending).

³⁰ Judge Preska Conversation, supra note 28.

³¹ Id. See also U.S. Dist. Ct. for the S. Dist. of N.Y., Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act (18 U.S.C. § 3006A) ¶ III(E) (2005) (detailing obligations of CJA Panel members to be available for designated "'intake duty'" days).

³² Judge Preska had no idea how he suddenly became fully retained when two weeks prior, the client was asking for a CJA panel attorney due to lack of funds. Judge Preska Conversation, supra note 28.

³³ Id.

Turning for a moment to the "celebrity lawyer" issue, this issue has arisen often in high security cases and specifically in some of these cases with regards to the law firm then known as Kuntsler & Kuby. In the Abdel Rahman trial, Judge Mukasey issued numerous opinions sorting out whom Kuntsler & Kuby could represent; they had begun the case representing some of the lesser known defendants but wished to defend the most high profile defendant, Sheik Abdel Rahman (following Abdel Rahman's decision to proceed with counsel and not continue to trial pro se).³⁴ All of Judge Mukasey's opinions in Abdel Rahman were affirmed by the Second Circuit.³⁵

An event similar to that in the Abdel Rahman trial happened at the close of the First World Trade Center Bombing trial during sentencing. The law firm of Kuntsler & Kuby wanted to be substituted as defense counsel for sentencing, a motion which was rejected by Judge Duffy based upon conflict of interest related to the clients they were defending in the Abdel Rahman trial.³⁶ Despite facing life sentences, the defendants announced

³⁴ See generally United States v. Rahman, 837 F. Supp. 64 (S.D.N.Y. 1993) (denying defendants' motions to waive conflicts of interest within the Kuntsler firm and requiring Kuntsler firm to choose one client only); United States v. Rahman, 861 F. Supp. 266 (S.D.N.Y. 1994) (discussing various conflicts of interests for Kuntsler firm and why they were disqualified from representing some co-defendants due to attorneys' status as unsworn witnesses); United States v. Rahman, No. S3 93 Cr. 181, 1993 WL 385762 (S.D.N.Y. Sept. 27, 1993) (ordering Abdel Rahman's former lawyer to give counsel to Abdel Rahman about switching to be represented by the law firm of Kuntsler & Kuby and the conflicts this could pose).

³⁵ See United States v. Rahman, 189 F.3d 88, 143-45 (2d Cir. 1999) (rejecting defendants challenge on appeal that the district court had erred in allowing lawyers that posed a conflict of interest and who provided ineffective assistance of counsel).

³⁶ United States v. Salameh, 856 F. Supp. 781 (S.D.N.Y. 1994).

next that they would be proceeding pro se at sentencing since Judge Duffy had refused to permit their chosen counsel to represent them; the defendants then indeed did so and were each sentenced to 240-year prison terms.³⁷ The Second Circuit ultimately affirmed these convictions but ordered Judge Duffy to re-sentence each defendant to confirm that each had knowingly and voluntarily waived his right to counsel at sentencing.³⁸

C. CIPA & Security Clearances for Counsel

While the issue of CIPA and how actually to deal with classified information will be dealt with in a later section of this Guide,³⁹ this issue also arises within the representation context. If a defendant does choose to proceed pro se and is entitled to view classified information, then generally,⁴⁰ the government must provide standby counsel to do what is in the best interests of the client.⁴¹ This occurred in Moussaoui when Judge Brinkema ordered standby counsel appointed to conduct classified depositions; Moussaoui could not conduct these depositions because he could not obtain necessary security

³⁷ United States v. Salameh, 152 F.3d 88, 161 (2d Cir. 1998).

³⁸ Id.

³⁹ See infra Section V.

⁴⁰ There is one recent opinion which will be discussed later in this section that seems to be an exception to this, in that the judge did grant access to the defendant himself to view classified information but this seems to be the exception rather than the rule. See infra notes 50-52 and accompanying text.

⁴¹ Standby counsel generally can obtain necessary security clearances to view the classified information and use such information in the best interests of their client. See Schmidt, supra note 17, at 80-82 (discussing difficulties for defense lawyers in having to analyze the classified evidence without being able to discuss it with their clients).

clearances to circumvent the Protective Orders issued by the judge regarding classified information.⁴²

Even if the defendant does not choose to proceed pro se, high security cases that involve classified information still lead to situations where classified discovery is produced. Attorneys with proper security clearances can view this information but will not be able to share it with their clients, especially terrorism-related defendants who pose a high national security risk. Judge Sand dealt with this issue in the Embassy Bombings case when, after issuing a Protective Order under CIPA,⁴³ the practical result of which was that defense counsel were cleared to review a category of classified documents that could not be shared with their clients, defendants argued that this violated their Fifth and Sixth Amendment rights.⁴⁴ Judge Sand ruled that while “[i]t is clear that, usually, a defendant is permitted to review items which have been produced in discovery,” still based on Supreme Court and further Second Circuit precedent, “given the Government’s compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions, the

⁴² See *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 1987964, at *1 (E.D.Va. Aug. 23, 2002) (citations omitted) (holding that “Moussaoui’s Fifth and Sixth Amendment rights are adequately protected by standby counsel’s review of the classified discovery and their participation in any proceedings held pursuant to the Classified Information Procedures Act . . . even though the defendant will be excluded from these proceedings.”).

⁴³ This Protective Order is a useful supplement to understand what security procedures are to be put in place by judges and is being attached as **Appendix I** to this Guide.

⁴⁴ *United States v. Bin Laden*, No. S(7) 98 CR. 1023, 2001 WL 66393, at *1-*2 (S.D.N.Y. Jan. 25, 2001).

Court rejects the Defendant's claim of an unconstitutional deprivation of counsel."⁴⁵ Judge Sand also held that defendants' being excluded from certain CIPA proceedings was not unconstitutional and that CIPA rulings did not violate defendants' Fifth Amendment rights.⁴⁶

Judge Sand further ruled in a separate opinion in the Embassy Bombings case that any lawyer seeking to view classified information must go through a background check and receive proper clearance as the text and structure of CIPA create a presumption that "the Court possesses the authority to require counsel to seek security clearance" before the Court gives them access to classified materials.⁴⁷ Such a requirement also does not violate defendant's Sixth Amendment rights.⁴⁸ Finally, this background check is best carried out by the DOJ and supervised by a Court-appointed Security Officer.⁴⁹

Finally, one recent⁵⁰ opinion seems on its face to go against the general principle of not granting terrorist defendants access to classified information. Judge Marcia Cooke of the Southern District of Florida judge issued an order allowing alleged al Qaeda terror suspect Jose Padilla access to

⁴⁵ Id. at *4.

⁴⁶ Id. at *6-*8.

⁴⁷ United States v. Bin Laden, 58 F. Supp. 2d 113, 118-23 (S.D.N.Y. 1999).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ See United States v. Padilla, Case No. 04-60001-CR-COOKE (S.D. Fl. July 5, 2006).

view and discuss with his lawyer certain classified documents including "32 Defense Department documents that summarize statements Padilla made during his years in military custody. He also can examine 57 videotapes of interrogations he underwent during that same period."⁵¹ This seems to be the rare case where a defendant who did not have security clearance was given access to classified information.⁵²

II. DEFENDANT CONDITIONS OF CONFINEMENT IN COURT AND PRISON

One of the very real day to day issues that judges must face while trying terrorism defendants is security in the courtroom. Judge Mukasey has pointed out in this context that while defendants must wear street clothes when the jury is present to preserve each defendant's presumption of innocence and make sure the jury does not have a daily reminder that defendants are in custody, this approach must still be balanced with the fact that many of these defendants do pose real security risks which must be taken into account when such defendants appear in court and in dealing with such defendants in custody.⁵³

⁵¹ Curt Anderson, Suspect Padilla Gets Access to Secrets, A.P., July 14, 2006, <http://abcnews.go.com/US/Terrorism/wireStory?id=2191209>.

⁵² Id.

⁵³ Judge Mukasey Conversation B, *supra* note 6.

A. Shackling Dangerous Defendants in Court

In many terrorism cases, the defendants have appeared in court with their legs shackled, although this is usually done under a table with defendants already seated before the jury is brought in so that the jury does not witness a defendant in leg shackles.⁵⁴ Throughout United States v. Bin Laden, all of the defendants were kept in leg shackles but after the trial, a N.Y. Times article appeared which stated that some of the jurors may have known that some of the defendants were in leg shackles during the trial.⁵⁵ Judge Duffy⁵⁶ ruled as to a post-trial motion to set aside the verdict that

Judge Sand took all reasonable precautions to ensure that the defendants were not 'parad[ed] . . . before the jury in shackles'. . . . Although the Second Circuit has not yet ruled on whether jurors' inadvertent sightings of shackled defendants are presumptively prejudicial, cases in other circuits have held that defendants must show specific prejudice from such sightings before being entitled to relief. I find these cases persuasive.⁵⁷

⁵⁴ While leg shackling occurred in Judge Sand's Embassy Bombings trial, Judge Duffy has pointed out that he never felt the need to shackle his defendants in any of his high security cases, including during the First World Trade Center Bombing case, the Airline Bombing case or the Brinks case (for background information on the Brinks case, see generally United States v. Ferguson, 758 F.2d 843 (2d Cir.1985)). Judge Duffy Conversation, supra note 3. Judge Duffy has commented that as long as one maintains proper control over defendants in high security cases (for example, if one of the high security defendants tries to stand up when not told to as happened in the Brinks trial, a judge should immediately ask them to leave the courtroom and make their lawyers stay to represent them in court), he has felt no need to shackle but had he felt the need, he would have no problem shackling defendants. Id. Judge Mukasey also did not use leg shackles during the Abdel Rahman trial.

⁵⁵ United States v. Bin Laden, No. S7R 98CR1023KTD, 2005 WL 287404, at *2 (S.D.N.Y. Feb. 7, 2005) (citations omitted).

⁵⁶ Although the trial had originally been before Judge Sand, Judge Duffy handled the post-trial motions. See id. at *1.

⁵⁷ Id. at *3-*4 (citation omitted).

This ruling was reached based in part on the Second Circuit's holding that "if the trial court has in fact evaluated the safety and security concerns, has taken steps to minimize the restraints and their prejudicial effects, and has given a cautionary instruction to the jury, there is likely no denial of due process."⁵⁸

B. Special Administrative Measures

Most defendants on trial in terrorism cases will be placed under Special Administrative Measures (known as "SAMs") which are authorized by the Bureau of Prisons' regulations for the confinement of particularly dangerous detainees.⁵⁹ These measures ordinarily include "housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism."⁶⁰ SAMs can be imposed at any time from the complaint stage up to and

⁵⁸ Davidson v. Riley, 44 F.3d 1118, 1124 (2d Cir. 1995).

⁵⁹ See 28 C.F.R. § 501.2 (2006) (stating that "[u]pon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information."); 28 C.F.R. § 501.3 (2006) (stating that "[u]pon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury."). For purposes of the rest of this section, this Guide will focus only on § 501.3 since this is the more common regulation from which issues arise in high security cases, although § 501.2 could also apply in these situations.

⁶⁰ 28 C.F.R. § 501.3(a).

including imprisonment following conviction,⁶¹ although SAMs must be reviewed at least annually.⁶² SAMs historically were first used against a convicted Latin Kings gang leader who had ordered murders from prison.⁶³

Judges in high security cases are often faced with various mid-trial and post-trial motions from defendants regarding their prison confinement conditions under the SAMs. It is noteworthy that courts have stressed the need for a defendant to exhaust all administrative remedies available to challenge SAMs before the issue will be ripe to be heard by a District Court.⁶⁴

Once the SAMs issue is ripe, the trend has been for courts to reject SAMs challenges, with minor exceptions. All of the defendants in the Embassy Bombings case before Judge Sand had been placed under SAMs by the Bureau of Prisons.⁶⁵ Defendants

⁶¹ See *United States v. Ali*, 396 F. Supp. 2d 703, 719 (E.D.Va. 2005) (explaining that since the term "inmate" is used in the regulation authorizing the Attorney General to direct the implementation of SAMs, "inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.").

⁶² 28 C.F.R. § 501.3(c).

⁶³ See *Schmidt*, *supra* note 17 at 71 (detailing the history of SAMs and referencing the Latin Kings' case, *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998)).

⁶⁴ See *Ali*, 396 F. Supp. 2d at 705-07 (holding that "[s]ince Defendant has not exhausted his ability to challenge his conditions of confinement through the Administrative Remedy Program, the issue is not ripe for this Court's consideration"); *Yousef v. Reno*, 254 F.3d 1214, 1223 (10th Cir. 2001) (affirming the district court's dismissal of the plaintiff's claim challenging SAMs and remanding the case to the district court "without prejudice to allow for exhaustion of his administrative remedies."); *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 17 n.5 (D.D.C. 2003) (noting that "a judicial challenge to the SAM that currently covers plaintiff could not be mounted at this time as plaintiff concedes that he has failed to exhaust his administrative remedies in regards to the existing SAM.").

⁶⁵ See *United States v. Bin Laden*, 109 F. Supp. 2d 211, 213-14 (S.D.N.Y. 2000) (detailing SAMs implemented including defendants "being housed in special housing units, either alone or with a single roommate; limited access to recreational facilities; and restrictions on telephone calls, correspondence, and visits.").

challenged the length of time they were placed under SAMs and the actual confinement conditions, and Judge Sand, while recognizing the significance of the defendants' objections, rejected these challenges and accepted the SAMs as non-punitive and justified by the government's legitimate security concerns.⁶⁶ Judge Sand did allow certain SAMs modifications pre-trial at first, including allowing El-Hage to have dental treatment, double bunking with a co-defendant instead of solitary confinement, group prayer sessions with co-defendants, and permission to use a plastic chair which he could sit on and read discovery and other litigation documents and write notes.⁶⁷ However, these changes were reversed by Judge Sand after one of El-Hage's co-defendant's brutally attacked a prison guard in November 2000.⁶⁸

SAMs have also been challenged in two other noteworthy high security trials. In United States v. Sattar, attorney Lynne Stewart (along with several other co-defendants) was charged and

⁶⁶ See United States v. Bin Laden, No. 98 Cr. 1023 (S.D.N.Y. Jan. 10, 2000) (oral order), aff'd sub nom. United States v. El-Hage, 213 F.3d 74, 76, 78, 81 (2d Cir. 2000) (per curiam) (holding that the use of SAMs does not violate a prisoner's right to due process based on the Supreme Court's decision in Turner v. Safley, 482 U.S. 78, 87 (1987), which sets out a four-factor test for evaluating whether a prison regulation that allegedly violates a constitutional right is reasonably related to a valid correctional objective, and holding that it was clear that pre-trial SAMs imposed on El-Hage certainly served a legitimate Government interest in protecting national security).

⁶⁷ See El-Hage, 213 F.3d at 78 (referencing some of these changes in SAMs made by the Bureau of Prisons); Schmidt, supra note 17 at 73-74 nn.9-12 (detailing El-Hage's arguments before Judge Sand that the SAMs were impairing his emotional capacity so severely that El-Hage could not properly participate in his defense, an argument which the court was sensitive to at first).

⁶⁸ See Bin Laden, 2005 WL 287404 at *7 (detailing the prison guard attack); see generally Schmidt, supra note 17 at 73-74 n.11 (detailing reversal of relaxation of certain of the SAMs relative to El-Hage after some of these incidents).

ultimately found guilty of, among other things, helping Sheik Abdel Rahman (while Stewart as former counsel was visiting him in prison) violate SAMs imposed upon him by facilitating and concealing communications from the Sheik to terrorist leaders around the world.⁶⁹ Stewart had signed an affirmation pursuant to 28 U.S.C. § 1746 in which she acknowledged having read the "Notification of Special Administrative Measures" imposed upon the Sheik and agreed to "abide by its terms".⁷⁰ Stewart attempted to challenge the SAMs and the attorney affirmation requirement as illegal or unconstitutional, but this challenge was rejected by the Honorable John G. Koeltl, who ruled that "[t]he Department of Justice had the colorable authority to implement the SAMs relating to Sheikh Abdel Rahman and it also had the colorable authority to seek affirmations from those visiting Sheikh Abdel Rahman as a means to assure that the SAMs were complied with and were not circumvented."⁷¹ Finally, in United States v. Ali, defendant Ahmed Omar Abu Ali (who had been charged with such crimes as conspiracy to assassinate the President of the United States, conspiracy to commit aircraft piracy, and conspiracy to destroy aircraft) had filed a motion for relief from conditions of confinement arguing that the SAMs imposed by the Attorney General violated his right to due

⁶⁹ 272 F. Supp. 2d 348, 369 (S.D.N.Y. 2003).

⁷⁰ Id.

⁷¹ Id. at 371-72.

process.⁷² The Honorable Gerald Bruce Lee of the Eastern District of Virginia ruled that the SAMs imposing special conditions of confinement comported with the Supreme Court's Turner factors for conditions of confinement,⁷³ stating that

there is a valid, rational connection between the prison regulations and the government's legitimate national security interest put forward to justify them, there are no alternative means of allowing Defendant greater communication and association with other inmates or others outside the detention center, allowing greater communication or visits would have a significant impact on prison resources, and there are no alternatives. Furthermore, the SAMs do not violate Defendant's due process rights because they have not, and will not, restrict his ability to help prepare his own defense.⁷⁴

III. VENUE & JURY ISSUES

A. Change of Venue Motions

Defendants in high security cases often will move for a change of venue due to perceived local jury bias. Generally, though, such motions are denied since, as Judge Duffy has put it, "if not here, then where"; no matter where you go, all of these high security trials generate incredible media publicity, and the solution to picking a non-biased jury is a thorough jury voir dire.⁷⁵

Venue change motions were denied in both United States v. Salameh and United States v. Yousef, both trials before Judge

⁷² 396 F. Supp. 2d 703, 704-05 (E.D.Va. 2005).

⁷³ See supra note 66.

⁷⁴ Ali, 396 F. Supp. 2d at 711.

⁷⁵ Judge Duffy Conversation, supra note 3.

Duffy.⁷⁶ The Second Circuit on appeal affirmed Judge Duffy's decision denying a venue change in Yousef.⁷⁷ Similarly, venue change motions were denied by the Honorable John F. Keenan in a Northern District of Illinois case that Judge Keenan had presided over by designation.⁷⁸ Judge Keenan similarly felt that defendant's concerns were "adequately addressed during the voir dire process" and thus there was no need for any venue change.⁷⁹

B. Anonymous Juries & Jury Voir Dire Questionnaires

Once proper venue has been established and a terrorism trial is ready to begin, a fair jury must be selected, something which can be particularly challenging in high security cases. In every major terrorism trial that has taken place in the Southern District, 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. Thus, Judges Mukasey, Duffy and

⁷⁶ See United States v. Salameh, No. S5 93 Cr. 0180, 1993 WL 364486, at *1-*2 (S.D.N.Y. Sept. 15, 1993) (rejecting defendants claim that jurors in the District of Columbia would provide for a more fair trial and stating that the test for an impartial jury is not whether jurors are completely ignorant of the circumstances underlying the charges rather as long as the judge can find an impartial jury who can render a decision based solely on the evidence as determined through a thorough voir dire, this suffices); United States v. Yousef, No. S12 93 CR. 180, 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997) (stating that "a thorough voir dire of potential jurors will be sufficient in detecting and eliminating any prospective jurors prejudiced by pretrial publicity. Accordingly, Yousef's motion for change of venue is denied.").

⁷⁷ See United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003) (holding that "the key to determining the appropriateness of a change of venue is a searching voir dire of the members of the jury pool" and being that the judge conducted an extensive voir dire nor did Yousef renew the motion for a change of venue after the voir dire, this indicated that counsel was satisfied that the voir dire resulted in a jury that had not been tainted by publicity).

⁷⁸ See United States v. Nettles, 400 F. Supp. 2d 1084, 1086 (N.D. Ill. 2005) (detailing how Judge Keenan was designated to try a case in Illinois for a defendant who ultimately was found guilty by a jury of attempting to blow up the federal courthouse building in Chicago).

⁷⁹ Id. at 1092.

Sand all granted motions for anonymous juries in Rahman, the First World Trade Center Bombing Trial, the Airline Bombing Plot Case, and the Embassy Bombing Case, respectively. The Second Circuit has consistently held that “‘when genuinely called for and when properly used, anonymous juries do not infringe upon a defendant’s constitutional rights.’”⁸⁰ An anonymous jury is “genuinely called for” in cases where “the jury needs protection, as when the government has demonstrated a defendant’s ‘willingness to tamper . . . with the judicial process’”.⁸¹ Still, the Second Circuit has stressed that even when an anonymous jury is warranted, the defendant’s fundamental rights must still be protected by the court’s conducting a thorough voir dire to uncover juror bias and giving jurors plausible and non-prejudicial reasons both for their anonymity and for other security precautions that need be taken.⁸²

What emerges from the Second Circuit’s position on anonymous juries is that judges must conduct an extremely thorough jury voir dire when an anonymous jury is warranted, but the style of this voir dire can and does vary from judge to judge. Most judges in these areas have used jury questionnaires to aid in the voir dire process.⁸³ Judge Mukasey has pointed out

⁸⁰ United States v. Thai, 29 F.3d 785,800-01 (2d Cir. 1994) (citations omitted).

⁸¹ Id.

⁸² Id.

⁸³ See United States v. Abdel Rahman, 189 F.3d 88, 121-22 (2d Cir. 1999) (affirming Judge Mukasey’s through jury voir dire and use of jury questionnaire, stating that “[i]t is clear that Judge Mukasey’s

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.⁸⁴ Judge Sand also has pointed out that questionnaires can be useful in saving time and providing the court with valuable information about the potential jurors that may be too tedious to bring out through oral voir dire.⁸⁵

In contrast to the style of other S.D.N.Y. judges in terrorism trials, Judge Duffy has chosen not to use jury questionnaires. In United States v. Salameh, Judge Duffy rejected defendant's motion challenging Judge Duffy's refusal to use jury questionnaires for voir dire, stating that "[t]here has been, however, 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."⁸⁶

thorough selection procedures went far beyond the minimum constitutional requirements . . . the Court gave each venireperson a nineteen-page questionnaire to fill out. This questionnaire did far more than 'cover the topic[s]' of pretrial publicity and ethnic bias. . . . Judge Mukasey's voir dire skillfully balanced the difficult task of questioning such a large jury pool with the defendants' right to inquire into the sensitive issues that might arise in the case."); see also United States v. Bin Laden, 132 F. Supp. 2d 198, 213 (S.D.N.Y. 2001) (describing Judge Sand's jury questionnaire process in detail, stating that "1,302 citizens of this federal district were asked to complete a probing and exhaustive questionnaire containing 96 distinct questions. Only 424 individuals in this original pool of 1,302 were found to be without clear hardship . . . they were thereafter summoned for individual voir dire . . . after 9 full days of jury selection-the Court had engaged in the voir dire of 154 potential jurors and had selected 65 to be included in the final pool."). See Appendix II for the attached complete versions of Judges Mukasey & Sands' jury questionnaires used in their respective terrorism trials.

⁸⁴ Judge Mukasey Conversation B, supra note 6.

⁸⁵ Judge Sand Interview, supra note 18.

⁸⁶ No. S5 93 Cr. 0180, 1993 WL 364486, at *2 (S.D.N.Y. Sept. 15, 1993).

Judge Duffy rejected similar challenges in United States v. Yousef, stating that "a thorough voir dire of potential jurors will be sufficient in detecting and eliminating any prospective jurors prejudiced by pretrial publicity."⁸⁷ Judge Duffy has noted that the reason he personally disfavors jury questionnaires is because if you give a juror time to think about an answer to a question, he then has more time to create a convincing lie and with a properly instructed group of jurors who know they are being picked for an anonymous jury, they will give more truthful answers on the spot.⁸⁸ Regardless, Judge Duffy thinks that the time it took him to help select his juries was certainly equal to if not less than the number of days that both Judge Mukasey and Judge Sand's jury selections took with the use of a questionnaire,⁸⁹ and the Second Circuit affirmed Judge Duffy's method of conducting jury voir dire without questionnaires as being "extensive",⁹⁰ "proper and thorough."⁹¹ Thus the issue of use of jury questionnaires in a terrorism trial really is up to the preference of each individual judge.

IV. FISA ISSUES

Many terrorism trials implicate the Foreign Intelligence Surveillance Act ("FISA") as the government conducts

⁸⁷ No. S12 93 CR. 180, 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997).

⁸⁸ Judge Duffy Conversation, supra, note 3.

⁸⁹ Id.

⁹⁰ United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003).

⁹¹ United States v. Salameh, 152 F.3d 88, 120-21 (2d Cir. 1998).

surveillance in order to prevent attacks against the United States and such surveillance often involves FISA. It is therefore important for S.D.N.Y. judges to understand how FISA works and in what ways FISA issues have arisen in terrorism trials.

A. Statutory Background

FISA, codified at 50 U.S.C. §§ 1801-1811, permits government authorities, generally the Department of Justice, to obtain orders authorizing electronic surveillance for the purpose of obtaining foreign intelligence information in aid of protecting the United States against attack by foreign governments or international terrorist organizations.⁹² All applications for a FISA warrant to conduct surveillance must be approved by a special FISA court judge who is appointed by the Chief Justice.⁹³ The FISA court judge conducts an ex parte review of the sufficiency of the FISA application pursuant to 50 U.S.C. § 1804 and grants, denies or modifies the request if he finds that:

⁹² United States v. Abdel Rahman, 861 F. Supp. 247, 249 (S.D.N.Y. 1994); 50 U.S.C. § 1801(e) (2006).

⁹³ See 50 U.S.C. § 1803 (detailing appointment of eleven such judges by the Chief Justice and procedures for appealing a FISA court ruling to a special FISA court of review “which shall have jurisdiction to review the denial of any application made under this chapter.”). For surveillance activities involving communications “exclusively between or among foreign powers” with “no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party,” the government may conduct the surveillance without a court order. See 50 U.S.C. §1802 (a)(1).

- (1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
- (2) the application has been made by a Federal officer and approved by the Attorney General;
- (3) on the basis of the facts submitted by the applicant there is probable cause to believe that-
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and
 - (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;
- (4) the proposed minimization procedures meet the definition of minimization procedures. . . ;
- (5) the application which has been filed contains all statements and certifications required. . . .⁹⁴

Whenever the government wishes to admit FISA evidence for any purpose, it "must notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information."⁹⁵ This aggrieved person then may move to suppress the FISA evidence, in which event the District Court reviews ex parte and in camera all materials relevant to making a determination whether the FISA related evidence was lawfully obtained.⁹⁶

⁹⁴ 50 U.S.C. § 1805(a). In determining whether there is presumed probable cause as required in § 1805(a)(3), "a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target." 50 U.S.C. § 1805(b).

⁹⁵ 50 U.S.C. § 1806(c).

⁹⁶ 50 U.S.C. § 1806(e)-(f).

The USA PATRIOT Act of 2001 amended certain FISA provisions.⁹⁷ While Title II of the USA PATRIOT Act generally deals with various changes in surveillance procedures, several of the more significant changes related to FISA include allowing for "roving" surveillance under FISA⁹⁸ and allowing for an application for a FISA surveillance or search order when gathering foreign intelligence is a "significant purpose" of the application rather than "the purpose", thus expanding situations when FISA warrants may be granted.⁹⁹

B. Defendant Challenges Under FISA

Defendants in terrorism trials often will move to suppress evidence obtained through FISA arguing either that FISA was being misused or that proper minimization procedures necessary under FISA were not followed. It is interesting to note from the outset that

[i]n the twenty-five year history of FISA, the statute has invariably survived constitutional attack, and not a single piece of FISA-generated evidence . . . has ever been suppressed, nor has the government ever had a FISA warrant application denied. . . . Consequently, unless the interceptions or seized materials are exculpatory, there is very little defense counsel can do to make FISA work for the defendant.¹⁰⁰

⁹⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 15, 18, 22, 31, 42, 49 and 50 U.S.C.) (2006)).

⁹⁸ Id. at § 206.

⁹⁹ Id. at § 218. See also United States v. Sattar, No. 02 CR. 395, 2003 WL 22137012, at *3 n.3 (S.D.N.Y. Sept. 15, 2003) (referencing this change in FISA under the USA PATRIOT Act).

¹⁰⁰ Schmidt, supra note 17 at 83 n.40.

Defendants in a number of Southern District terrorism cases have challenged FISA evidence. In United States v. Abdel Rahman, defendants argued both that FISA was misused and that proper minimization procedures were not followed and therefore, the FISA evidence should be suppressed.¹⁰¹ Citing a Second Circuit holding, Judge Mukasey ruled that as long as the government's FISA application contained all the necessary certifications which were not clearly erroneous, it was not the function of either the FISA court judge or a reviewing district court judge to "second guess" the certifications.¹⁰² Following an ex parte, in camera review of the FISA applications, Judge Mukasey found that there was nothing in the materials submitted to the FISA court to suggest any misuse of FISA and that although the evidence was being used was for a criminal prosecution and not intelligence, FISA certainly was intended to allow for criminal prosecutions based on evidence obtained through such surveillance; accordingly, the motion to suppress was denied.¹⁰³

Similar challenges were raised in Sattar, where defendants moved to suppress evidence obtained through FISA.¹⁰⁴ Judge Koeltl's opinion goes through a lengthy and thorough description

¹⁰¹ 861 F. Supp. 247, 249-51 (S.D.N.Y. 1994).

¹⁰² Id. at 251 (citations omitted).

¹⁰³ Id. The court also accepted the government's reasons for recording all phone calls automatically and then choosing which parts to keep, thus holding that such actions did not violate minimization procedures required under FISA. Id. at 252-53.

¹⁰⁴ 2003 WL 22137012.

of the FISA process and then summarizes what a FISA court judge must determine prior to approval of an electronic surveillance order:

FISA 'requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the electronic surveillance is to be directed is used or is about to be used by a foreign power or an agent of a foreign power....' Once it appears that an authorized member of the executive branch has certified that the FISA surveillance was conducted for an appropriate purpose, that the certification is supported by probable cause, and it appears that the application is not clearly erroneous as it applies to a United States person, a reviewing court, whether a FISA judge or this Court, is not to "second guess" the certification.¹⁰⁵

The court then proceeded to analyze the claimed lack of probable cause and minimization procedures followed in the case and after an ex parte, in camera review of the evidence, determined that

there was ample probable cause to believe that the targets of the relevant surveillance . . . were acting as agents of a foreign power which is defined to include 'a group engaged in international terrorism or activities in preparation therefore,' and that each of the facilities at which the surveillance was directed was being used, or was about to be used, by that target In sum, all of the statutory requirements were satisfied. . . . [T]he Court [also] concludes that appropriate minimization procedures were both established and followed in accordance with FISA. The Government followed the minimization procedures on file with the FISA Court and each FISA application specified the minimization procedures that would be used and each FISA Court order required minimization

¹⁰⁵ Id. at *7 (citations omitted).

procedures. . . . The Government's efforts at minimization were reasonable and in good faith and were in compliance with its reasonable procedures. . . . There is no basis to suppress the fruits of the FISA surveillance on this ground.¹⁰⁶

Finally, the court rejected defendant Lynne Stewart's arguments that the evidence against her was collected as part of a criminal investigation rather than for intelligence gathering purposes.¹⁰⁷ Similar FISA challenges with similar results are recounted in Seventh Circuit's opinion in United States v. Dumeisi.¹⁰⁸

Judge Sand also issued two FISA-related opinions with regard to the Embassy Bombings case. In a case of first impression in the Southern District,¹⁰⁹ Judge Sand adopted a "foreign intelligence exception" to the FISA warrant requirement with respect to overseas surveillance authorized by the President or his delegate as long as such surveillance is conducted for foreign intelligence purposes and targets foreign

¹⁰⁶ Id. at *7; *11 (citations omitted).

¹⁰⁷ See id. at *11-*13 (holding that the FISA process used in this case met even the more stringent pre-USA PATRIOT Act requirements under FISA that the evidence gathered must come from surveillance conducted for the primary purpose of intelligence gathering; even though Stewart was not a target of such intelligence, any information obtained from lawful FISA proceedings can be used against anyone involved in any criminal activities).

¹⁰⁸ See 424 F.3d 566, 579 (7th Cir. 2005) (stating that "[w]e have reviewed the classified materials relied upon by the FISC and conclude that the government provided probable cause that Dumeisi was an agent of a foreign power entirely independent of any of his journalistic activities. The requirements of § 1805(a)(3) and 1824(a)(3) were properly fulfilled, and the district court's ruling must be affirmed.").

¹⁰⁹ See United States v. Bin Laden, 126 F. Supp. 2d 264, 272 n.8 (S.D.N.Y. 2000) (noting that this case was a case of first impression since all of the previous Second Circuit cases recognizing a foreign intelligence exception to a warrant requirement arose before the enactment of FISA).

powers or their agents.¹¹⁰ Judge Sand further held that certain of the surveillance which was obtained unlawfully by the government nonetheless would not be excluded because the surveillance was undertaken in good faith and excluding such evidence would not lead to deterrence.¹¹¹ Judge Sand's second FISA-related opinion in Bin Laden dealt with the defendant's claim for sanctions for the government's destruction of certain FISA materials; Judge Sand ruled that a defendant seeking sanctions had to show that the government acted in bad faith and, since no bad faith was shown, no sanctions were granted.¹¹²

V. CIPA & ACCESS TO CLASSIFIED INFORMATION & DETAINEES

Classified information issues and procedures for dealing with such information also arise frequently in high security cases, and these issues necessarily implicate the Classified Information Procedures Act (CIPA). CIPA "was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest.'" ¹¹³ The goal of CIPA was to try to "minimize the problem of so-called graymail--a threat by the defendant to

¹¹⁰ Id. at 277.

¹¹¹ Id. at 282.

¹¹² United States v. Bin Laden, No. S(7) 98 CR. 1023, 2001 WL 30061, at *5-*8 (S.D.N.Y. Jan. 2, 2001). The court also additionally concluded that that such conduct by the government did not amount to a violation of defendant's due process rights. Id.

¹¹³ United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996) (citations omitted).

disclose classified information in the course of trial--by requiring a ruling on the admissibility of the classified information before trial.'"¹¹⁴ While CIPA issues involving this graymail concern could certainly arise in terrorism cases in situations where terrorism defendants had prior knowledge of classified information, this has not been the case historically.¹¹⁵ Defendants in terrorism trials generally "are not in possession of the classified information and there is no chance that they will obtain the necessary clearance to view classified materials."¹¹⁶ Instead, the CIPA issues that most often arise in high security trials tend to be the following:

- 1) Implementing the protective orders issued by the court detailing the security and procedures for dealing with the classified information.
- 2) Determining what to do when the government refuses to disclose certain classified documents or grant access to certain witnesses (such as classified terrorism detainees).
- 3) Relating to the previous issue, the government's proposing under CIPA to substitute a redacted or summarized version of classified documents or testimony, with the substitution determined by the court to be sufficient to satisfy criminal

¹¹⁴ Id.

¹¹⁵ Schmidt, supra note 17, at 81.

¹¹⁶ Id. But see infra notes 50-52 and accompanying text.

discovery requirements. All of these issues will be discussed following a brief overview of the CIPA structure and framework.

A. Statutory Background

CIPA is codified at 18 U.S.C. App. III §§ 1-16 (2006). Sections 1-2 deal with defining classified information for which CIPA applies and pre-trial conferences which are held to discuss CIPA issues. Section 3 deals with the "Protective Orders" which a court must issue upon a defendant being given discoverable information deemed classified by the government. Sections 4 and 6 deal with discovery of classified information which the government does not want disclosed because of its sensitive nature; upon determination by the court that disclosure is authorized and necessary, the government is given a choice of either providing a summarized version of the information (if the court finds "that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information") or, if the government refuses (or if a summarized version will not suffice), potential sanctions against the government up to and including dismissal of the case. Section 5 deals with the graymail issue, that is, procedures applicable when a defendant has potential classified information that he wishes to disclose during the trial. Sections 7-8 deal with interlocutory appeals and the process of introduction of

classified materials as evidence, respectively. Finally, Section 9 of CIPA states that the "the Chief Justice of the United States, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court."¹¹⁷

B. Protective Orders & Security Procedures

As mentioned in an earlier section, judges in cases in which the government is willing to turn over certain kinds of protected or classified information must institute special "Protective Orders".¹¹⁸ Judges and lawyers alike must deal with issues such as a Secure Compartmentalized Information Facility ("SCIF"), varied levels of clearance, and the fact that such classified information generally can only be viewed under the observation of a Department of Justice-appointed Court Security Officer ("CSO") who ensures the safety of such information.¹¹⁹ To understand better what issues arise when such procedures are

¹¹⁷ Pursuant to this, Chief Justice Warren Burger (who was the Chief Justice of the United States at the time of CIPA's enactment) established the SECURITY PROCEDURES ESTABLISHED PURSUANT TO PUB.L. 96-456, 94 STAT. 2025, BY THE CHIEF JUSTICE OF THE UNITED STATES FOR THE PROTECTION OF CLASSIFIED INFORMATION. See such Procedures which appear immediately following 18 U.S.C. App. III § 9.

¹¹⁸ See supra Section I.C. See also **Appendix I** for Judge Sand's Protective Orders issued in the Embassy Bombings case.

¹¹⁹ See Schmidt, supra note 17, at 79 nn.29-30 (detailing security and clearance procedures defense lawyers had to go through in *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118-23 (S.D.N.Y. 1999)). See also supra notes 47-49 and accompanying text.

implemented, it seems extremely useful to quote from the words of Michael P. Macisso, a Security Specialist with the Department of Justice Litigation Security Section for his insights as to what issues tend to arise in such cases:

Typically, the defense counsel are very hesitant to deal with a Security Specialist from the Dept of Justice as their CIPA Court Security Officer (CSO) but once we provide them with names of other defense attorneys that we have assisted over the years, they are more receptive to our help.

Secondly, the defense counsel are also a little skittish about the security clearance process. Some defense counsel don't mind filling out the forms and having their backgrounds investigated whereas other defense counsel are very skeptical of their personal information being exposed to U.S. government officials. Once again, we advise them that their background investigation information is handled by a Security Specialist from the CIPA team and it is not shared with the prosecutors or any member of the prosecution team.

If the discovery material is classified then the CIPA CSO has to find the cleared defense counsel with a space to work within the U.S. Courthouse. In addition, the CIPA CSO must obtain safes, secure computers, printers, copy machines, shredders, etc. so the defense counsel can process potentially classified submissions to be presented to the Court. Generally, the defense counsel hate leaving their comfortable law firms to come to the Courthouse to review the discovery material, to prepare the drafts, finalize the drafts and to make the classified filings. Under CIPA, any potentially classified submission must be made through the CSO or his designee (typically, a cleared law clerk) in that District. The filings are submitted to the Court and served upon the opposing party. All filings are treated as presumptively classified and are to be stored in the safe while the CSO arranges for the

appropriate government agency to conduct a classification review of the submission.

Under CIPA, the defense counsel, in advance of the trial, has to provide the Court with a notice of what they intend to disclose or what they may cause others to disclose which might be classified. These notices and the government replies are generally classified.

Once the Court has received the submissions, the Court will hold closed CIPA Section 6 hearings to determine the use, admissibility, and relevance of the classified information which the defense seeks to use at trial.

Sometimes, the defense is precluded from using any of the classified information. Other times, the Court rules that the defense is allowed to use portions of the classified information. The government begrudgingly agrees with the ruling and offers unclassified substitutions (which the Court must approve) or the government seeks an interlocutory appeal.

The goal of CIPA is to address all of the classified issues prior to an open public trial. It is not meant to be an exercise to keep everything secret and hidden.¹²⁰

C. Access to Classified Discovery Materials & Detainees

Two particular cases serve as extremes of how CIPA can proceed at trial. In United States v. Abdel Rahman, the government moved ex parte pursuant to Section 4 of CIPA for the court to review in camera documents said to contain classified information for an order barring disclosure of such

¹²⁰ E-mail from Michael P. Macisso, Security Specialist, Dept. of Justice Litigation Security Section, to Philip J. Gross, Summer 2006 Milton Pollack Fellow, Law Student, Fordham University School of Law (July 21, 2006, 2:38 PM EST) (on file with author).

information.¹²¹ Notable in this opinion is Judge Mukasey's laying out a reasonable way to proceed in a five-step process to analyze: 1) The various groups of documents presented and to determine of those, which if any were properly deemed classified. 2) Whether any of the classified information is discoverable under any rule. 3) Whether such information would be deemed material to the defendant. 4) Whether such information should be disclosed. 5) Finally, if such information is to be disclosed, whether it should be disclosed in some form other than the form currently submitted to the court.¹²² Judge Mukasey proceeded through this five-step analysis and determined that of the six documents submitted for review, only one of the documents related to the credibility of a government witness and thus would be potentially discoverable under Giglio v. United States.¹²³ Therefore, upon balancing the defendant's need for the information and the value to the defendant against the potential damage to the government's security interest upon disclosure, Judge Mukasey determined that it would suffice to disclose the substance of the information contained in just that one of the six documents, with the other documents being either inculpatory of the defendant or having questionable relevance, at best, and therefore a substantial

¹²¹ 870 F. Supp. 47, 49 (S.D.N.Y. 1994).

¹²² Id. at 50.

¹²³ 405 U.S. 150 (1972).

prejudice to the government; thus, no disclosure was required for the other documents.¹²⁴

On the opposite extreme stands a case related to Iran-Contra, United States v. Fernandez.¹²⁵ In this case, Joseph Fernandez, a CIA station chief, was indicted for allegedly making false statements to the CIA Inspector General and the Tower Commission with regard to the Iran-Contra Affair.¹²⁶ Defendant had requested pursuant to CIPA that the government disclose at trial nearly 5,000 documents containing classified information.¹²⁷ The district court had determined that certain of the information was necessary for the defendant's case and rejected proposed substitutions by the government and dismissed the indictment.¹²⁸ The Court of Appeals determined that in reviewing such a decision, the Court is faced with a very narrow, fact-specific inquiry into whether the defendant could receive a fair trial without the aid of the requested evidence.¹²⁹ While in certain cases, CIPA will allow for substitutions or summaries of some of the documents, here, despite the government's "lament [of] what it perceives as the failure of the court to perform an 'express balancing' of the various interests involved'", the Court found that since particular

¹²⁴ Id. at 52-53.

¹²⁵ 913 F.2d 148 (4th Cir. 1990).

¹²⁶ Id. at 150-51.

¹²⁷ Id.

¹²⁸ Id. at 156-59.

¹²⁹ Id.

classified information was necessary to the defendant, this was enough to defeat the contrary interest in protecting national security; since substitutions did not suffice as they failed to provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information, dismissal of the indictment was necessary under 18 U.S.C. App. III § 6(c)(1).¹³⁰

Unlike the issue of access to classified documents or discovery which is expressly dealt with by CIPA, it is important to keep in mind before looking at the case law that while the issue of defense access to terrorist detainees is not explicitly a CIPA issue, CIPA still does indeed provide a useful framework for dealing with detainee issues as well.¹³¹

In Moussaoui, the government had refused to provide defendant access to three detainees whom the court determined would provide material and favorable testimony for defendant Moussaoui.¹³² Judge Brinkema rejected the government's proposed substitutions and, using the CIPA framework, ordered certain

¹³⁰ Id.

¹³¹ See United States v. Moussaoui, 382 F.3d 453, 471-72 n.20 (4th Cir. 2004) (holding that "CIPA does not apply because the January 30 and August 29 orders of the district court are not covered by either of the potentially relevant provisions of CIPA, § 4 (concerning deletion of classified information from documents to be turned over to the defendant during discovery) or § 6 . . . Like the district court, however, we believe that CIPA provides a useful framework for considering the questions raised by Moussaoui's request for access to the enemy combatant witnesses."). See also United States v. Moussaoui, 282 F. Supp. 2d 480, 482 n.1 (E.D.Va. 2003) ("resolv[ing] the initial defense motions concerning access [to detainees] using CIPA for guidance, finding that the statute provided a useful framework within which to resolve the tension between the United States' national security considerations and the defendant's right to mount an effective defense").

¹³² 282 F. Supp. 2d at 481.

sanctions against the government including preventing the government from offering certain evidence at trial and precluding use of the death penalty as a potential sentence.¹³³ The Fourth Circuit then vacated the sanctions after an analysis of many of the issues, including: 1) Determining that the writ of habeas corpus ad testificandum could properly be served on the Secretary of Defense Donald Rumsfeld since unlike in Rumsfeld v. Padilla,¹³⁴ here the immediate custodian of the detainees was not known and thus the Secretary of Defense was well within the process power of the Court.¹³⁵ 2) Holding that the various detainee witnesses all potentially had testimony "material" to the defense.¹³⁶ The Court of Appeals therefore reversed the lower court and found substitutions to be appropriate for these witnesses based on redacted summaries of interrogations taken from the detainees by the government and ordered that these substitutions be made with the help of the district court; such substitutions would then be submitted as

¹³³ Id. at 487.

¹³⁴ 542 U.S. 426 (2004).

¹³⁵ Moussaoui, 382 F.3d at 464-66. This issue connects with the issue of scope of discovery obligations in general (a full treatment of which is beyond the scope of this Guide) mentioned by Judge Karas in private conversation. Judge Karas Interview, supra note 7. If other government agencies besides the prosecutor's office has evidence, how far must the government go in disclosing that information to defendant? See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (holding "that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

¹³⁶ Moussaoui, 382 F.3d at 471-76.

evidence with special jury instructions as to how to evaluate this evidence.¹³⁷

The Honorable Sidney H. Stein proceeded with an analysis very similar to Moussaoui in a recent case, United States v. Paracha.¹³⁸ Defendant Paracha had been charged with (and ultimately found guilty by a jury of), among other things, conspiracy and providing material support and resources to al Qaeda.¹³⁹ Paracha sought access to three detainees, and the judge realized that an order compelling depositions or trial testimony from these three would pose significant risks to national security; thus, Paracha was required to demonstrate that the testimony of each witness would be material and favorable to his defense before his Sixth Amendment right to compulsory process to present witnesses in his defense would be implicated.¹⁴⁰ The court did indeed determine that two of these three witnesses would provide exculpatory evidence for Paracha and that in a normal case, under CIPA, dismissal ordinarily would be ordered

¹³⁷ Id. at 479-82. The Court of Appeals further pointed out that the government could not then appeal these substitutions under CIPA since “[i]t must be remembered that the substitution process we here order is a replacement for the testimony of the enemy combatant witnesses. Because the Government will not allow Moussaoui to have contact with the witnesses, we must provide a remedy adequate to protect Moussaoui's constitutional rights. Here, that remedy is substitutions. Once Moussaoui has selected the portions of the [Redacted] summaries he wishes to submit to the jury and the Government has been given an opportunity to be heard, the district court will compile the substitutions, using such additional language as may be necessary to aid the understanding of the jury. Once this process is complete, the matter is at an end—there are to be no additional or supplementary proceedings under CIPA regarding the substitutions.” Id.

¹³⁸ No. 03 CR. 1197, 2006 WL 12765 (S.D.N.Y. Jan. 3, 2006)

¹³⁹ Id. at *1.

¹⁴⁰ Id. at *10.

(since the government had been refusing to provide access to such detainees) but that as in Moussaoui, in light of the unique circumstances of this case, it would be possible for the court to fashion a remedy permitting Paracha to present these witnesses' testimony without requiring their appearance at trial.¹⁴¹ The court then looked to both CIPA and Moussaoui for guidance regarding jury instructions and sets forth the required jury instructions in the written opinion.¹⁴² Unlike in Moussaoui and Paracha, in other high security cases, access to terrorist detainees has been denied for defendant's failure to make a plausible showing of how the detainee's testimony would have been both material and favorable to his defense.¹⁴³

¹⁴¹ Id. at *13.

¹⁴² Id. at *14-*15. See **Appendix III** for the excerpt of the jury instructions that Judge Stein used in this case, something which should prove useful for S.D.N.Y. judges who need to come up with jury instructions for similar situations in the future.

¹⁴³ See United States v. Sattar, 314 F. Supp. 2d 279, 319-20 (S.D.N.Y. 2004) (holding that "Sattar has not established that he has a Sixth Amendment right to compulsory process for Mohammed Abdel Rahman . . . [T]he Sixth Amendment does not confer on the defendant an absolute right to compel the presence of any witnesses the defendant may choose . . . Rather, the defendant in a criminal trial is entitled to call witnesses 'in his favor,' and thus to establish a violation of the Sixth Amendment right to compulsory process, the defendant 'must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.'"); United States v. Bin Laden, No. S7R 98CR1023KTD, 2005 WL 287404, at *11-*13 (S.D.N.Y. Feb. 7, 2005) (stating that "to compel the presence of a witness under the Sixth Amendment, a defendant must show that the witness will have information that is material and favorable to his defense, and not merely cumulative of the testimony of available witnesses . . . El-Hage has not come close to meeting this burden . . . To hold otherwise would arguably provide any defendant convicted of a crime relating to al Qaeda with the constitutional right to question any al Qaeda detainee, as such a detainee "might" have exculpatory information. There is no basis in law for such a right, which would undoubtedly prolong litigation, threaten national security, and thwart society's interest in the finality of criminal convictions.").

APPENDIX I: PROTECTIVE ORDER

U.S. v. BIN LADEN (S.D.N.Y. 1999)

DOC #78

U.S. DISTRICT COURT
FILED
JUL 29 1999
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - : PROTECTIVE ORDER

USAMA BIN LADEN, et al. : 98 Cr. 1023 (LBS)

Defendants. :

- - - - - x

WHEREAS this matter comes before the Court upon the motion of the United States for a Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and documents belonging to the United States Government which may be reviewed by, made available to, or may otherwise come to be in the possession of the defendants and defense counsel in this case, and

WHEREAS the Government personnel in this case, including Assistant United States Attorneys Patrick J. Fitzgerald, Kenneth M. Karas, Michael J. Garcia and Paul W. Butler, who have had, and will have, access to national security information and documents relating to this case have "Top Secret" security clearances, and

WHEREAS the Government maintains and has access to storage facilities necessary for the storage, maintenance and handling of "Top Secret" and "Secret" national security information and documents, and

WHEREAS the national security information in this case may be classified at the "Secret" and "Top Secret" levels, and

WHEREAS having considered the motion of the Government, the defendants' opposition, all other related submissions and proceedings, and having heard oral argument,

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to Fed. R.

Crim. P. 16(d), Sections 3 and 9 of the Classified Information and Procedure Act, Title 18, United States Code, App. III, ("CIPA"), and the Court's inherent authority, the following Protective Order is entered.

1. The Court finds that this case will involve classified national security information, the storage, handling and control of which requires special security precautions, and access to which requires a security clearance and a "need to know."

2. The purpose of this Order is to establish the procedures that must be followed by all defense counsel of record, their respective defendants, all other counsel involved in this case, translators for the defense, any Court personnel, and all other individuals who receive access to classified national security information or documents in connection with this case.

3. The procedures set forth in this Protective Order and the Classified Information Procedures Act will apply to all pre-trial, trial, post-trial, and appellate aspects concerning this case, and may be modified from time to time by further order of the Court acting under Fed. R. Crim. P. 16(d), Sections 3 and 9 of CIPA, and its inherent supervisory authority to ensure a fair and expeditious trial.

4. In accordance with the provisions of CIPA and the Security procedures promulgated by the Chief Justice of the United States pursuant to that Act, this Court appoints James Londergan as the Court Security Officer (hereinafter "Administrative CSO") who will provide security arrangements necessary to protect from unauthorized disclosure any classified information or document made available to the defense or the Court in connection with this case. The Court also appoints Charles L. Alliman, Christine E. Gunning, Earl D. Hicks, Michael P. Macisso, and Barbara J. Russell as alternate Administrative CSO's. Defense counsel and Court personnel shall seek guidance from the Administrative CSO's with regard to appropriate storage, handling, transmittal, and use of classified information. Furthermore, the Court appoints James P. Walker as the "Security Clearance CSO" whose sole responsibility will be to process the security clearances for defense counsel, their staff, and any designated Court personnel who will have access to classified information in this case. The Court may appoint alternate or additional Administrative and/or Security Clearance CSO's for either purpose at a later date.

5. No defendant, counsel for a defendant, employee of counsel for a defendant, defense witness, or Courtroom personnel required by the Court for its assistance, shall have access to any classified information involved in this case unless that person shall first have:

(a) received the necessary security clearance as determined by the Department of Justice Security Officer working in conjunction with the Security Clearance CSO, or approval from the Court (as set forth below in paragraph 8), or the Government for

access to the particular classified information in question; approval by the Court shall not occur but upon a showing to the Court's satisfaction of a "need to know" the particular classified information; and

(b) signed the Memorandum of Understanding in the form attached hereto agreeing to comply with the terms of this Order.

6. Standard Form 86, "Questionnaire for National Security Positions," attached releases, and full fingerprints shall be completed and submitted to the Security Clearance CSO forthwith by all defense counsel, persons whose assistance the defense reasonably requires and by such courtroom personnel as the Court requires for its assistance. The Security Clearance CSO shall undertake all reasonable steps to process all security clearance applications in accordance with applicable regulations.

7. Prior security clearance and a "need to know" as determined by any government entity or the Court as applying to one person does not give that person the authority to disclose any classified national security documents or information to any other individual. By way of example, but not limitation, defense counsel with appropriate clearances and a "need to know," as determined by the Court or the government, are not authorized to discuss such classified information with an uncleared defendant absent written permission of either the Court or the government.

8. The Court will be the final arbiter of all classified information questions. In the event that the Department Security officer working in conjunction with the Security Clearance CSO determines, after exhausting all administrative processes of review (including meeting with counsel applying for the clearance), that any counsel is not to be granted a security clearance, the Security Clearance CSO shall advise the Court promptly of the fact that such a clearance is not forthcoming but not the underlying reasons. In that event, the Court will conduct an ex Parte hearing to determine that person's eligibility to see classified materials. In the first instance, the Court will schedule a conference with such counsel (in the absence of the Government or other counsel) at which time defense counsel will advise whether counsel wishes the Court to undertake a review of the security clearance determination in order to make an access decision. If the Court reviews such a determination, only the Court, counsel seeking the clearance and the Security Clearance CSO shall participate in that process, absent further order of the Court. If counsel seeks a revision of this Protective Order in any manner, the Government shall be notified of the proposed amendments and provided an opportunity to be heard on the proposed amendments.

9. The substitution, departure, or removal for any reason from this case of any defense counsel, defendant, or anyone associated with the defense as a witness or otherwise shall not release that individual from the provisions of this Order or any form or document executed in connection with this Order. Because classified information remains the property of the United States Government, the persons covered in this order are bound by any

subsequent conditions imposed on the classified information or documents, even if more restrictive.

10. As used herein, the term "classified national security information or document" refers to:

A. any classified information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government, its agencies, employees and contractors including research and development;

B. any document, including notes and regardless of form or characteristic, or information contained therein, which contains classified information;

C. verbal classified information known to the defendant or defense counsel;

D. classified documents (or information contained therein) or information disclosed to the defendant, defense counsel or others governed by this order as part of the proceedings in this case;

E. classified documents and information which have otherwise been made known to defendant, defense counsel or others governed by this Order and which documents have been marked or designated: "CONFIDENTIAL", "SECRET", "TOP SECRET", or "SENSITIVE COMPARTMENTED INFORMATION", or concerning which the defendant or defense counsel or others governed by this Order have been orally advised of the classified nature of the document or information;

F. information and documents covered by Presidential Executive Order 12356; and

G. any information or document, regardless of place of origin and including foreign classified documents, that could reasonably be believed to contain classified information, or that refers or relates to national security or intelligence matters. Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of "classified national security information or document" unless and until the Administrative CSO or counsel for the government advises otherwise in writing.

H. This provision shall not apply to documents or information which the defense obtains from other than classified materials, or to public court documents or to documents which are provided by the Government with a marking to indicate that the document has been "declassified." While information in the public domain is ordinarily not classified, however, such information may be considered as classified, and therefore

subject to the provisions of CIPA and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial corroborates or tends to refute the information in question. Any attempt by the defense to have such information confirmed or denied at trial or in any public proceeding in this case shall be governed by CIPA and all provisions of this Order.

11. All classified documents and information contained therein shall remain classified unless and until anyone covered by this Order has been notified in writing by the appropriate attorney for the government or the Court Security Officer that the document or information has been declassified and marked declassified by the appropriate classifying authority; or the documents bear a clear indication that they have been declassified by the agency or department of government that originated the document or the information contained therein.

12. "Documents" or "associated materials" or "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals, all identical copies, and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including without limitation pleadings, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort concerning conversations, meetings or other communication, teletypes, telefaxes, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendments of any kind of the foregoing; graphic or aural records or representations of any kind, including without limitation, photographs, charts, graphs, microfiches, microfilm, video tapes, sound recording of any kind, motion pictures, any electronic mechanical or electric records or representations of any kind, including without limitation, tapes, cassettes, computers, discs, CD-ROMs, recordings, films, typewriter ribbons, correcting ribbons, and word processor discs, tapes and ribbons; and information acquired orally.

13. The Administrative CSO shall arrange for the creation, construction, maintenance and operation of a "secure room" hereinafter referred to as an "SR", for the storage, handling, and control of classified documents and information to which the defense counsel, defendants, and other persons assisting in the preparation of the defense case are cleared for access. The Administrative CSO shall establish procedures to assure that the SR is accessible to defendants (if such access should be determined by the Court to be necessary), counsel for defendants, employees of counsel for defendants and authorized witnesses accompanied by counsel for defendants. The Court Security officer, in consultation with counsel for defendants, shall establish procedures to assure that the SR is maintained and operated in the most efficient manner consistent with the protection of classified information. The government may also construct a separate SR for the storage, handling, and control of classified documents and information in accordance with the security procedures required by the Administrative CSO. For the

convenience of the Court, the defense counsel, and the Government, the Government may provide classified materials to the defense pursuant to Fed. R. Crim. P. 16, CIPA, Brady v. Maryland, Giglio v. United States, and the Jencks Act by providing it to the Administrative CSO and making it available at the SR without requiring the Court to pass upon the identified recipient's "need to know." If it is necessary for a defendant to review or discuss classified matters, or otherwise meet with defense counsel, in the SR, this will only occur under appropriate supervision to ensure that the defendant does not escape, attempt to escape, cause physical injury to himself or others, or remove, copy, alter, or destroy classified information, or obtain access to classified information the defendant is not entitled to review, and to ensure that the defendant does not use the opportunity to review the classified materials to circumvent any applicable security restrictions, including the Special Administrative Measures imposed by the Bureau of Prisons, other prison regulations, and the other orders of this Court governing discovery in this case.

14. Classified national security documents and information or information believed to be classified shall only be kept, discussed, or reviewed, in a SR.

15. Defendants, defense attorneys, and those persons whose assistance the defense reasonably requires shall not disclose or discuss classified national security documents or information, or information believed to be classified, with other defendants or with counsel for other defendants without prior consent of the Government with notification to the Administrative CSO, or the prior approval of the Court. That authorization will not be unreasonably withheld but, when granted, will be subject to all the provisions of this Order. Moreover, the Government shall attach a cover page to each installment of classified materials indicating the names of other counsel who have received the same materials. Counsel may discuss the contents of any such installment he or she receives if counsel (i) verifies that other counsel are also on the list of addressees for that particular installment of classified information and (ii) conducts the conversation in an appropriate place and manner (e.g. in the SR but not on an unclassified telephone). If counsel are not certain as to which counsel have received particular materials, they should ask either an attorney for the Government or the Administrative CSO for clarification of whether particular classified information has been shared with any other counsel.

16. No one shall discuss any classified national security information or document over any standard commercial telephone instrument or office intercommunication system. Nor shall any person covered by this Order discuss or disclose such information in the presence of any person who does not have a clearance certified by the Administrative CSO as applicable to this case, and either a "need to know" as determined by the Court or written approval from counsel for the government.

17. Written materials presumed to contain classified national security information which are prepared for this case by

a defendant or defense counsel shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have received access to classified information pursuant to this order, and in accordance with conditions prescribed by the Administrative CSO.

18. Machines of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Administrative CSO and in accordance with instructions he shall issue, including instructions as to where such machines must be operated and stored.

19. To facilitate the defendants' filings of notices as required under Section 5 of CIPA, the Administrative CSO shall make arrangements with the respective agencies for a determination of the classification level, if any, of materials or information either within the possession of the defense or about which the defense has knowledge and which the defense intends to use in any way at trial. Nothing thus submitted by the defense to the Administrative CSO pursuant to this paragraph shall be made available to the prosecutors unless so ordered by the Court, or so designated by the defense. Any and all of these items which are classified shall be listed in the defendant's Section 5 notice.

20. All written pleadings, filings, attachments, or documents involving classified information, or those which reasonably might cause the disclosure of classified information, or which concern or relate to national security or intelligence matters (as defined in paragraph 10 above) shall not be publicly filed, but shall be filed under seal to the Administrative CSO and shall be marked: "Filed in Camera and Under Seal with the Court Security Officer," with separate service of copies upon counsel for the Government and co-defendants (except in the event of an ex parte application), provided that the materials be transported by, and delivered to, persons known to have the appropriate security clearance. Service upon other defense counsel with security clearances shall be effected by depositing such counsel's copy (in an envelope marked on the outside to indicate the addressee and the fact that the document enclosed contains classified information) in the drawer of the safe in the SR which will be designated as a drawer to be shared in common by cleared counsel (the "common drawer"). Notice shall be sent to all cleared counsel by hand or by facsimile which shall simply state that a document which may contain classified information has been filed with the Administrative CSO and served upon the Government and is available in the safe in the SR. Service shall be effected upon the Government by personal delivery by cleared counsel to one of the following persons: Assistant United States Attorneys Patrick J. Fitzgerald, Kenneth M. Karas, Michael J. Garcia, or Paul W. Butler, or Paralegal Specialists Gerard Francisco or Lillie Grant, or Intelligence Officer Harry Brady, all of whom have Top secret clearance and who will thereafter be responsible for the documents secure storage within the United States Attorney's Office. If for any reason, none of the seven named Government personnel are available at the time of attempted

service, then defense counsel shall maintain the Government's copy in the common drawer in the SR (in an envelope marked on the outside to indicate the copy is for delivery to the Government and the fact that the document enclosed contains classified information) and send a notice to the Government by hand or by facsimile indicating that the delivery of a filing which may contain classified needs to be arranged. Thereafter, the Government may obtain the document from any cleared defense counsel (or the Administrative CSO) with access to the common drawer, and the Government personnel obtaining such documents shall sign a receipt indicating the date and time of receipt and the cleared person from whom it was received. The Government shall not have direct access to the common drawer of the SR but shall only be provided such documents by cleared defense counsel or the Administrative CSO." The date and time of physical submission to the Administrative CSO, which shall be noted on the document, shall be considered the date and time of filing. Upon receiving a pleading from a defense counsel, the Administrative CSO shall notify by the end of the next business day the Court of the fact that a pleading has been filed. Thereafter, any defense counsel with the appropriate security clearance and who has been granted access to the particular classified information in question by the government or the Court pursuant to paragraph 5(a) of this order will be permitted to review such pleadings in the SR under the same conditions as they would review other classified information. The Administrative CSO shall promptly review such pleading and shall determine, with the assistance of and in consultation with personnel from the appropriate agencies, whether any of the submitted material is classified, and the level of any classified information. If the Administrative CSO, working in conjunction with appropriate Intelligence Community member agencies, determines that the pleading or document contains classified information, the Administrative CSO shall insure that the portion of the document, and only that portion, is marked with the appropriate classification marking and remains sealed. All reasonable efforts to declassify such materials will be undertaken by the agencies conducting the review. Portions of the pleading or documents that do not contain classified information shall be unsealed by the Administrative CSO and placed in the public record.

21. The Administrative CSO shall maintain a separate sealed record for those materials which are classified. The Administrative CSO shall be responsible for the maintaining of the secured record for purposes of later proceedings or appeals.

22. Pleadings containing classified information which are filed by any one defendant on behalf of a single defendant or other defendants, can only be disclosed to other defense counsel whom counsel knows is authorized pursuant to paragraph 15 to discuss all the classified information contained in the document therein.

23. Persons subject to this Order are advised that all information to which they obtain access by this Order is now and will forever remain the property of the United States Government. They shall return all materials that may have come into their

possession or for which they are responsible because of such access upon demand by the counsel for the government or the Court Security Officer.

24. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of the United States criminal laws, including without limitation, the provisions of 18 U.S.C. Sections 371, 641, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. Sections 421 (the Intelligence Identities Protection Act) and 783; and that a violation of this Order or any portion hereof may be chargeable as a contempt of Court.

25. Nothing contained in this Order shall be construed as a waiver of any right of any defendant.

26. A copy of this Order shall be issued forthwith to counsel for all defendants who shall be responsible for advising defendants, employees of counsel for defendants, and defense witnesses of the contents of this Order. Each defendant, counsel for defendant, employee of counsel for defendant, defense witness, or any other person associated with the defense to be provided access to classified information shall execute the Memorandum of Understanding described in paragraph 4 of this Order, and counsel for defendants shall file executed originals with the Court and the Administrative CSO and serve an executed original of such document upon the government. The execution and filing of the Memorandum of Understanding is a condition precedent to receiving access to classified information.

Dated: New York, New York
July 29, 1999

SO ORDERED

[Signature]

HON. LEONARD B. SAND
United States District Judge
Southern District of New York

APPENDIX II(A): JURY QUESTIONNAIRE

U.S. v. ABDEL RAHMAN (S.D.N.Y. 1995)

JUROR QUESTIONNAIRE

The furnishing of information on this questionnaire is designed to expedite the jury selection process in this case. If you have any inquiries concerning any particular question, please contact the court and it will be explained to you.

The jurors are advised that the Court is aware that some of the questions contained in the questionnaire are of a personal nature. Nonetheless, the Court must ensure that the jury that hears this case can be completely fair to both sides and that both sides have sufficient information about each juror's background and experiences that they can feel comfortable that a fair and impartial jury will hear this case.

Please be completely frank and candid in responding to this questionnaire. Please do not discuss the questionnaire or your answers with anyone. It is very important that the answers be yours and yours alone. Remember that there are no "right" or "wrong" answers; only truthful answers. You are sworn to give true and complete answers to all questions.

Your answers will not become public and, indeed, the Court and the parties will not even know your name. Selecting an anonymous jury is not an unusual practice and has been followed in many cases in Federal Court. Anonymity will ward off curiosity that might infringe on a juror's privacy. Please write only your juror number, and not your name, on this page.

1. The Court and the parties estimate that after a jury is selected this case will last approximately 6 to 9 months. It is anticipated that the jury in this case will be sitting four (4) days per week, not including holidays. If, however, it becomes necessary, we may have to sit five (5) days per week. Jury service is one of the highest duties and privileges of a citizen. Mere inconvenience or the usual financial hardships of jury service will be insufficient to excuse a prospective juror. Do you wish to apply to the Court to be excused on the ground that jury service would be a serious hardship?

Yes _____ No _____

If yes, briefly explain the hardship:

[Note: If the hardship claimed is financial, please do not name your employer but merely describe in general terms the nature of the situation.]

2. a. Do you have any problem with your hearing or vision that would make it difficult for you to serve as a juror?

Yes _____ No _____

- b. Do you have any medical condition that would make it difficult for you to serve as a juror on this case?

Yes _____ No _____

- c. Are you taking any medication that may interfere with your ability to concentrate?

Yes _____ No _____

- d. Do you have any difficulty in reading or understanding English?

Yes _____ No _____

If you answered yes to any of these questions, please explain the circumstances:

3. The Government is represented in this case by the United States Attorney, Mary Jo White, though the conduct of the case is in the immediate charge of the Government attorneys appearing in the courtroom. Do you or does any relative or friend know or have any connection with Mary Jo White?

Yes _____ No _____

4. Do you or does any relative or friend know or have any connection with any of the following persons who will be seated at the counsel table for the government?

Assistant United States Attorney Andrew C. McCarthy
Assistant United States Attorney Robert S. Khuzami
Assistant United States Attorney Patrick J. Fitzgerald
Special Agent Chris Voss (FBI)
Special Agent John Liguori (FBI)
Detective Thomas Corrigan (NYPD)
Jane Chu (Legal Assistant, U.S. Attorney's Office)

Yes _____ No _____

- (a) Have you seen, heard or read anything about any of these individuals? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

- (b) What have you seen, heard or read? _____

5. (a) Do you or does any relative or friend know or have any connection with any of the defendants?

Omar Ahmad Ali Abdel Rahman	Yes _____	No _____
El Sayyid Nosair	Yes _____	No _____
Ibrahim El-Gabrownny	Yes _____	No _____
Siddig Ibrahim Siddig Ali	Yes _____	No _____
Clement Hampton-el	Yes _____	No _____
Amir Abdelgani	Yes _____	No _____
Fares Khallafalla	Yes _____	No _____
Tarig Elhassan	Yes _____	No _____
Fadil Abdelgani	Yes _____	No _____
Mohammed Saleh	Yes _____	No _____
Victor Alvarez	Yes _____	No _____
Matarawy Saleh	Yes _____	No _____

- (b) Have you seen, heard or read anything about this case or any of the defendants? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

- (c) What have you seen, heard or read? _____

6. (a) Do you or does any relative or friend know or have any connection with any of the following defense lawyers:

Emanuel Moore (Legal Advisor to Omar Abdel Rahman)
Roger Stavis
Andrew Patel
Anthony Ricco
Gary Villanueva
Daniel Felber
Gerald Tritz
Kenneth Wasserman
Steven Bernstein
Valerie Amsterdam
Joyce London
Charles Lavine
John Jacobs
Wesley Serra
Thomas Nooter

Yes _____ No _____

- (b) Have you seen, heard or read anything about any of these attorneys? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

- (c) What have you seen, heard or read? _____

7. (a) Have you seen, heard or read anything about any of the following attorneys whose names may be mentioned during the trial? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Harry Batchelder
Michael Warren
William Kunstler
Ronald Kuby
Howard Leader
Lawrence Schoenbach
Frank Handelman
Alan Nelson
David L. Lewis

Yes _____ No _____

- (b) What have you seen, heard or read? _____

8. Have you read, seen or heard anything about this case?

Yes _____ No _____

What was the source of the information (radio, TV, newspaper, etc.)?

9. If you have seen, heard or read something about this case, the defendants, or attorneys, is there anything about what you have heard, seen, or read that would prevent you from rendering a fair and impartial verdict based solely on the evidence presented in court?

Yes _____ No _____

10. Are you aware that the World Trade Center was bombed?

Yes _____ No _____

11. (a) Were you, or any close friend or relative, at or near the World Trade Center when it was bombed?

Yes _____ No _____

- (b) Have you, or anyone close to you, avoided entering the World Trade Center since that time?

Yes _____ No _____

- (c) Do you, or any close friend or relative, regularly use the Holland tunnel, Lincoln tunnel, or George Washington Bridge?

Yes _____ No _____

- (d) Have you, or anyone close to you, avoided using the Holland tunnel, Lincoln tunnel or the George Washington Bridge as a result of this case?

Yes _____ No _____

- (e) Is there anything about a case involving charges concerning the bombing of the World Trade Center, or plans to bomb the United Nations, the Holland tunnel, the Lincoln tunnel, and the George Washington Bridge, that would make it difficult for you to serve as a juror in this case?

Yes _____ No _____

- (f) If you answered any of the questions (a) through (e) "yes", please explain:

12. Have you read, seen or heard anything about the "World Trade Center" case?

Yes _____ No _____

13. Have you ever heard of Rabbi Meir Kahane?

Yes _____ No _____

If yes, what have you heard?

14. You will learn that there was a prior state trial concerning Rabbi Kahane and defendant El Sayyid Nosair. Have you ever heard about it?

Yes _____ No _____

If yes, what have you heard?

15. Some of the witnesses to be called at this trial testified at the earlier trial. You are not to speculate as to the reasons why a separate federal trial is being brought. The Court instructs you that this trial is proper and specifically does not violate double jeopardy. Does this cause you any concern?

Yes _____ No _____

If yes, please explain:

Would you have any difficulty accepting my instruction that the outcome of the first trial and the reasons for the second trial are irrelevant to this proceeding?

Yes _____ No _____

16. This case may receive media attention. The Court wants to make sure that this case is decided solely on the evidence in the courtroom and not based on things that are said outside the courtroom. Accordingly, the Court will be advising you periodically that you must avoid reading about the case in the newspapers or listening to any radio or television reports about the case. The Court will also advise you periodically that you must avoid discussing this case with friends or family during the course of the trial. Would these requirements pose any difficulty for you?

Yes _____ No _____

PERSONAL BACKGROUND

17. (a) What is your age? _____

(b) Are you:

Male _____ Female _____

18. What is your place of birth? (Please list only the city and state, and, if outside the United States, the country.)

19. Are you (check one)

Married _____

Single _____

Divorced/Separated _____

Widow/Widower _____

20. (a) What is your ethnic background?

- (b) If married, what is the ethnic background of your spouse?

21. (a) What is your county of residence?

(b) In what states or counties have you lived in the past 10 years?

22. Do you read a newspaper regularly (at least two or three times a week)?

Yes _____ No _____

If yes, list the names of the newspapers you read and indicate how often you read each newspaper.

Name of Newspaper	Once a week	2-3 times a week	more than 4x a week	Daily	Sunday only
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

23. What magazines or periodicals do you read?

24. Do you watch any television newscasts on a regular basis?

Yes _____ No _____

If yes, which ones?

25. Do you watch TV shows like "Hard Copy", "Current Affair", or "Inside Edition"?

Yes _____ No _____

26. Do you watch police or crime shows such as "America's Most Wanted", "Cops", or "Unsolved Mysteries"?

Yes _____ No _____

27. Do you listen to any radio stations on a regular basis?

Yes _____ No _____

If yes, which ones?

28. (a) Do you speak Arabic (or any dialect of Arabic) or did you grow up in households where the Arabic language or any of its dialects were spoken?

Yes _____ No _____

(b) Do you read any Arabic language newspapers or publications?

Yes _____ No _____

If so, please list the Arabic language newspapers or publications:

(c) If you speak, read or understand the Arabic language (or any of its dialects), would you have any difficulty relying upon the official interpreter's translation of testimony, and witnesses' translations of Arabic language evidence?

Yes _____ No _____

(d) What other languages, if any, do you speak or understand?

Employment Note: Please do not indicate the names of employers in answering any of the following questions. Please refer to employment matters generically, e.g., "bank teller."

29. Are you: ☐ Employed full-time ☐ retired
 ☐ Employed part-time ☐ student
 ☐ Homemaker ☐ disabled
 ☐ Unemployed/laid off

- a. If employed full or part-time, what type of work do you do for a living?

- b. If retired or unemployed, what type of work had you been doing?

- c. If homemaker or student, have you a job skill which you have worked at?

Yes _____ No _____

IF YES: What?

30. What is (was) your job title? _____

- a. What are (were) your duties on that job?

- b. Do (did) you supervise others in that job?

Yes _____ No _____

IF YES: How many? _____

31. Do you have a second job?

Yes _____ No _____

IF YES: What do you do?

32. How many children do you have, if any? _____

33. List the sex, age and occupation of each employed child:

SEX	AGE	OCCUPATION
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

34. If you have ever been married, list your spouse's most recent type of work?

35. Do you: () Own your own home () Rent
() Live with relatives or friends

36. What is the highest grade of schooling you have completed?

() 8th grade or less	() Community college
() some high school	() some four-year college
() high school graduate	() college graduate
	() post graduate

If you have training/education beyond high school, please list the field(s) of study:

Please list all degrees you have received but not the name of the colleges you received them from:

37. Please describe generally what type of civic, educational, professional, sports, business, religious or political activities you participate in? [Note: Please do not name the organization but indicate your role in the activity or organization, i.e. "active," "inactive," or "leader."]

38. What charities or organizations have you contributed to in the last five (5) years? (The answer to this question is optional.)

39. Do you have any hobbies? Yes _____ No _____

If yes, what are they? _____

40. Have you ever served in the military?

Yes _____ No _____

Has your spouse served in the military?

Yes _____ No _____

IF YES to either, complete the following and indicate whether this concerns you or your spouse:

Branch _____ from 19__ to 19__

(Note: Describe only the branch: "Army," "Navy," etc.)

Rank _____

Were you or your spouse in combat? () Yes () No

41. Have you or a spouse had any experience in military intelligence?

Yes _____ No _____

If yes, please explain _____

42. Were you ever a member of the military police or shore patrol?

Yes _____ No _____

If yes, please explain _____

43. Were you or anyone close to you ever involved in a court martial?

Yes _____ No _____

If yes, please explain _____

44. Have you or any members of your family or friends ever attended any para-military training, a survival school, class, training seminar and/or participated in war games?

Yes _____ No _____

If yes, please explain _____

45. Do you or anyone in your house own any firearms?

Yes _____ No _____

If yes, what type and for what purpose? _____

46. Do you belong to any organization that takes positions on gun control (either for or against) such as the National Rifle Association?

Yes _____ No _____

If so, please list the organizations and/or associations you belong to:

Experience with Courts

47. (a) Have you ever sat:

(i) as a juror in a civil case?

Yes _____ No _____

(ii) as a grand juror?

Yes _____ No _____

(iii) as a juror in a criminal case?

Yes _____ No _____

(b) Have you ever been a juror in a case where the jury was unable to reach a verdict?

Yes _____ No _____

(c) If you have served on a jury, please list below (1) the approximate date(s); (2) whether you served in state court or federal court; (3) whether it was a grand jury or a trial jury; (4) whether it was a criminal case or a civil case; (5) what the general nature of the case was (for example, robbery, murder, contract, negligence, medical malpractice, etc.); and (6) whether or not a verdict was reached. If so, do not state what the verdict was.

(1) Date	(2) State or Federal	(3) Grand Jury or Trial Jury	(4) Criminal or Civil	(5) Nature of case	(6) Was there a Verdict?
-------------	----------------------------	---------------------------------------	-----------------------------	--------------------------	--------------------------------

_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

48. Do you have any concerns about serving on an anonymous jury?

Yes _____ No _____

If yes, please explain _____

_____	_____
_____	_____

49. Have you ever sued anyone or been sued by anyone?

Yes _____ No _____

50. Have you, or anyone you know well, ever been employed or received training in any local, state, or federal law enforcement agency, including but not limited to the following: (Circle as many as apply for each category.)

	<u>Self</u>	<u>Close Relative</u>	<u>Close Friend</u>
F.B.I	x	x	x
C.I.A.	x	x	x
U.S. Attorney	x	x	x
Internal Revenue Service	x	x	x
Immigration/Naturalization Service	x	x	x
Drug Enforcement Agency	x	x	x
Alcohol, Tobacco and Firearms	x	x	x
Military Police	x	x	x
Prison Guards	x	x	x
State Troopers	x	x	x
Police Department	x	x	x
District Attorney	x	x	x
U.S. Marshal	x	x	x
U.S. Treasury Department	x	x	x
Joint Terrorist Task Force	x	x	x
Port Authority of New York & New Jersey	x	x	x

51. Have you or a relative or friend ever applied to a federal, state or local agency for employment?

Yes _____ No _____

52. Have you ever attended law school?

Yes _____ No _____

53. Do you have any close friends or relatives who are lawyers or who have attended law school?

Yes _____ No _____

54. Do you or does any relative or friend work for a criminal lawyer or private investigator?

Yes _____ No _____

55. Are you or do you have any close relatives or friends who are judges, law clerks, court attendants, court clerks, other types of court personnel, probation officers, or persons connected with any penal institution, jail or penitentiary?

Yes _____ No _____

Note: In the following questions, the Court is not looking to pry into the past history of jurors or their families but wants to be informed as to what experiences each juror (or their loved ones) has gone through in order to determine whether these prior experiences might color the juror's perceptions of how the criminal justice system works. Thus, the following questions must be answered fully and candidly to assure that the Court, and the parties, can make a proper determination of whether jurors would be particularly suited for this case. Please do not feel embarrassed about any questions as the answers will be treated in strict confidence.

56. Have you or anyone close to you ever been charged with a crime or been the subject of a criminal investigation?

Yes _____ No _____

57. Have you ever appeared or testified as a witness in any investigation or legal proceeding?

Yes _____ No _____

58. Are you, or anyone close to you, now under subpoena or, to your knowledge, about to be subpoenaed in any criminal case?

Yes _____ No _____

59. Have you ever visited a jail or prison?

Yes _____ No _____

60. Have you ever been questioned in any matter by the state or local police, any state or local law enforcement agency or by the Department of Justice or any United States investigative agency such as the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Internal Revenue Service (IRS), Immigration and Naturalization Service (INS) or Customs Service?

Yes _____ No _____

61. Have you ever been involved, or do you expect to become involved, in any legal action or dispute with the United States or any agency, officer, or employee of the United States, or have you ever had any financial interest in such a dispute?

Yes _____ No _____

62. Have you or has a family member or close friend ever been the victim of a crime?

Yes _____ No _____

63. Have you or has a family member or close friend ever been falsely accused of anything?

Yes _____ No _____

64. Have you ever been treated for a substance abuse problem (for example, alcohol, illegal or prescription drugs)?

Yes _____ No _____

65. Do you tend to believe that a member of law enforcement, such as a police officer or federal agent who testifies in court, is (circle one)

- a. more likely to tell the truth than other witnesses
- b. about as likely to tell the truth as other witnesses
- c. less likely to tell the truth than other witnesses

66. You may hear testimony in this case concerning the use of informants by federal authorities in their investigations. One or more of those individuals may be called to testify in this case and you may learn that some of the individuals have participated in serious crimes. Others may be expecting to receive a very substantial reward as will be brought out in the evidence at trial. The Court wishes to advise you that there is nothing illegal or improper about the Government using informants to investigate a case. Does any potential juror have strongly held feelings about informants?

Yes _____ No _____

If you have such views, please describe them:

67. The Government expects to call Emad Salem as one of the Government witnesses in this case. You will learn that Emad Salem, a former Egyptian military person, was a Government informant in this case. Have you seen, heard or read anything about Emad Salem?

Yes _____ No _____

If so, what have you heard or read?

68. There may be evidence in this case about the activities of American and/or foreign intelligence agencies. Do you have any strong feelings about American intelligence services, foreign intelligence services in general, or the Egyptian government and its intelligence services in particular?

Yes _____ No _____

If you have such views, please describe them:

69. There will be evidence in this case consisting of tape recordings made by an informant of one or more of the defendants, at a time when the defendants did not know they were being recorded. In addition, there will be evidence in this case in the form of tape recordings of conversations taking place in given locations or over the telephone, through the use of electronic devices commonly known as "bugs" or "wiretaps." Does any juror have strongly held views about secretly tape recording conversations or "wiretaps" or "bugs"?

Yes _____ No _____

If you have such views, please describe them:

70. There may also be evidence obtained from photographic and physical surveillance as well as evidence seized pursuant to searches of various places, including the homes of some of the defendants. Do you have any feelings about the use of lawfully conducted surveillance or searches?

Yes _____ No _____

If you have such views, please describe them:

71. To your knowledge, have you, or any close friend or relative, ever been the subject of a surveillance (visual, photographic or electronic) by law enforcement or had their car or home searched by law enforcement officers?

Yes _____ No _____

72. Defendant Omar Abdel Rahman has chosen to proceed at this trial as his own attorney. Emanuel Moore is an attorney who will serve as Omar Abdel Rahman's legal advisor. Mr. Moore is not acting as Omar Abdel Rahman's attorney and Abdel Rahman shall direct his own defense. Each juror should judge whatever arguments, if any, Omar Abdel Rahman chooses to make on the merits of the argument, just as that juror will judge the merits of the arguments made by any other defense counsel. In other words, no juror is to accord any less weight to Omar Abdel Rahman's arguments because he does not have formal legal training. On the other hand, no juror is to treat Omar Abdel Rahman's arguments by any easier standards because he does not have formal legal training. Would you have any difficulty following this rule?

Yes _____ No _____

73. The statements and arguments of counsel are not evidence. Similarly, the questions of counsel are not evidence. Only sworn testimony subject to cross-examination is considered testimony at trial. Since Omar Abdel Rahman is representing himself, you will be instructed that you must not consider Omar Abdel Rahman's arguments and questions to you as testimony. Would you have any difficulty following this rule?

Yes _____ No _____

74. Is there anything about the fact that Omar Abdel Rahman has chosen to represent himself that causes you any difficulty? If so, please explain.

75. Does the fact that defendant Omar Abdel Rahman is blind make it difficult for you to follow the proposition of law that sympathy will not enter into the deliberations of the jury?

Yes _____ No _____

Questions 76 through 80 Concerning Religion Are Optional

76. What, if any, is your current religious affiliation?

77. What, if any, religion were you raised in?

78. Would you consider yourself to be:

- _____ very religious
_____ somewhat religious
_____ not too religious
_____ not religious at all

79. (a) Have you ever experienced what you believe to be discrimination against you because of your religious beliefs?

Yes _____ No _____

(b) Have you ever experienced violence against you because of your religious beliefs?

Yes _____ No _____

If yes to either question, please explain

80. Do you, or any close friend or family member, practice Islam?

Yes _____ No _____

81. The defendants are members of the Islamic faith.

Do you know anything about, or have any opinion about, the teachings or doctrines of Islam?

Yes _____ No _____

If yes, please explain: _____

82. Have you ever heard the word "Jihad"?

Yes _____ No _____

If yes, what does it mean to you?

83. (a) Have you ever been to the Abu Bakr Mosque ("Masjid Abu Bakr"), Al Taqwa Mosque ("Masjid al Taqwa") or Al Farooq Mosque ("Masjid Al Farooq") in Brooklyn?

Yes _____ No _____

(b) Have you ever been to the Al Salaam Mosque ("Masjid Al Salaam") in Jersey City, New Jersey?

Yes _____ No _____

(c) Have you ever been to the Atlantic Avenue section of Brooklyn between Fourth Avenue and Court Street?

Yes _____ No _____

(d) Have you ever attended a speech, sermon or lecture by defendant Omar Abdel Rahman?

Yes _____ No _____

(e) Have you ever seen or heard a recorded speech, sermon or lecture by defendant Omar Abdel Rahman?

Yes _____ No _____

84. (a) Is there anything about a case where all the defendants are Muslims (which means they practice Islam) that would make it hard for you to serve as a juror?

Yes _____ No _____

(b) One defendant is an African-American Muslim. Would that fact cause you to judge his case any differently?

Yes _____ No _____

85. If a person commits a crime believing his or her acts are lawful in light of his or her religious beliefs, do you believe that person is:

_____ Guilty of a crime
_____ Not guilty of a crime

Please explain:

86. Do you believe it is proper for an American citizen to become involved in political causes affecting foreign countries?

Yes _____ No _____

Please explain:

87. Have you read about, visited, or formed impressions or opinions about the following countries?

Libya	Sudan
Egypt	Saudi Arabia
Iran	Iraq
Israel	Palestine
Kuwait	Syria
Afghanistan	Arab Emirates
Serbia	Bosnia and Herzegovina

Yes _____ No _____

If yes, please explain. Use the following side of the page if necessary.

88. Have you ever travelled outside the United States?

Yes _____ No _____

If yes, please explain where and when:

89. Have you ever disagreed with the policies or actions of the United States government?

Yes _____ No _____

Please explain: _____

90. Some of the defendants in this case are of Arab descent.

a. Are you, or any relatives or close friends, of Arab descent?

Yes _____ No _____

b. Do/have you worked with any people of Arab descent?

Yes _____ No _____

c. Do you socialize with any people of Arab descent?

Yes _____ No _____

d. Have you ever had a negative experience with a person of Arab descent?

Yes _____ No _____

If yes, please explain:

- e. Do you have any negative feelings or opinions about people of Arab descent?

Yes _____ No _____

If yes, please explain:

91. Do you believe that there is a law enforcement bias for or against people of Arabic descent or people of the Islamic faith?

Yes _____ No _____

If yes, please explain:

92. At the conclusion of the case it is the Court's task and duty to charge you on the law and explain to you the elements of the crimes charged in the indictment. Do you have personal, religious, philosophical or other beliefs as to what the law is or should be that would make it difficult for you to follow the instructions of the Court?

Yes _____ No _____

93. (a) Is there any reason that you could not be completely fair and impartial to the defendants in this case?

Yes _____ No _____

- (b) Is there any reason that you could not be completely fair and impartial to the Government in this case?

Yes _____ No _____

If you answered either part of the question "yes," please explain:

94. Is there any matter not covered by this questionnaire that you feel you should tell us about?

Yes _____ No _____

If yes, please explain:

95. If the choice were solely up to you, would you want to serve on the jury in this case? Why or why not?

APPENDIX II(B): JURY QUESTIONNAIRE

U.S. v. BIN LADEN (S.D.N.Y. 2001)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Cy E B
1/01/01
Walden

-----x
UNITED STATES OF AMERICA :

JUROR # _____

-against- :

JURY QUESTIONNAIRE

USAMA BIN LADEN, etc., et al., :

S(7) 98 Cr. 1023 (LBS)

Defendants. :

-----x
General Instructions:

This questionnaire is designed to help simplify and expedite the jury selection process. Although some of the questions may appear to be of a personal nature, please understand that the Court and the parties must learn enough information about each juror's background and experiences to select a fair and impartial jury.

Please answer **all** the questions, to the best of your ability. If you have any questions write them on the form. If you don't know the answer to a question then write, "I don't know." There are no "right" or "wrong" answers; only truthful answers. Do not discuss the case or your answers with anyone. It is important that the answers be yours alone. Remember, you are sworn to give true and complete answers to all questions. After reading your questionnaire, Judge Sand will personally interview you, and give you the opportunity to discuss your answers.

During your jury service the Judge and the parties will not know your name. They will know you only by your juror number. Selecting an anonymous jury is not an unusual practice, and has been followed in many cases in Federal Court. Anonymity will deter curiosity that might infringe on your privacy. Accordingly, do not reveal any information in the questionnaire that could be used to identify you, such as your employer's name or your address.

Use black pen only. Blue ink will not copy. You may borrow a black pen if necessary.

Write your juror number at the top of this page.

Do not write on the back of any page, only the front pages will be copied. If you need additional space to complete an answer, go to the blank pages at the back of the questionnaire, indicate the number of the question, and continue your answer.

(1) Hardship question:

The Court and the parties estimate that the trial in this case will last approximately 9 to 12 months. It is anticipated that the jury will sit 4 days per week during the bulk of the trial when evidence is being taken,

although the jury will have to be present 5 days a week during jury selection, opening and closing statements and deliberations. Thus, for most of the trial jurors will not be required to report on Fridays or holidays. If possible, the Court plans to adjourn for a one week recess in August. In addition, every effort will be made to accommodate special needs of individual jurors. Jurors will be paid an attendance fee of \$40 per day for the first 30 days of trial, and \$50 per day thereafter. Lunch will be provided daily, and your transportation costs will be reimbursed.

Jury service is one of the highest duties and privileges of a citizen. The participation of people like yourself is essential to the proper administration of justice. The Court recognizes that not everyone can serve on a case of this length. However, mere inconvenience or the usual financial hardships of jury service will not be enough to excuse you. You must show that service in this case would cause an unacceptable amount of personal hardship.

Would you have a serious hardship if chosen for this case?

_____ YES, I would have a serious hardship if chosen for this case. Please answer the questions below, and fully explain your hardship. You must still complete the entire questionnaire.

_____ NO, I would have not have a serious hardship if chosen for this case. Please move on to the next section of the questionnaire.

If YES, please explain the hardship, and list your current occupation. Describe the type of job and business without giving details of your employer's name or address. For example, simply list "receptionist", "business executive", "school teacher" or "self-employed/freelance". If you are retired or unemployed, please indicate that fact and list your previous occupation. Please write legibly.

Occupation: _____ Your Age: _____

Are you self-employed? _____ Are you retired? _____

Will you be paid your salary while you serve jury duty? _____

What is your hardship? _____

(Hardship continued) :

Description of the Case

In this case there are four defendants, two of whom face the death penalty. All four defendants are charged in an indictment with having been part of a conspiracy to commit various acts of terrorism, and with committing certain federal crimes, including murder, attempted murder, the bombing of federal buildings, perjury and making false statements to federal law enforcement officers. Specifically, the defendants are charged variously with crimes relating to an alleged agreement to kill American citizens, which resulted in the bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7, 1998. In the bombing in Tanzania, 11 people were killed and approximately 70 were injured. In the bombing in Kenya, 223 people were killed and thousands of people were injured.

The organization with which the defendants were allegedly associated is called "al Qaeda," or the "Base," which the Government charges was engaged in international terrorism. While other people were allegedly involved, only four defendants are on trial in this case. Each of the accused is entitled to separate consideration and the case against each person must be decided individually.

The Nature of an Indictment

An indictment is merely an accusation. It is proof of nothing. You may draw no inference against any defendant from the fact that he has been indicted. Each defendant has pleaded "not guilty" to each of the charges against him and is presumed to be innocent. A defendant does not have to prove anything. The Government bears the burden of proving the guilt of a defendant beyond a reasonable doubt.

PERSOIAL BACKGROUND

1. What is your age? _____
2. Are you: Male _____ Female _____
3. Do you have any problem with your hearing or vision that would make it difficult for you to serve as a juror?
Yes _____ No _____
4. Do you have any medical condition that would make it difficult for you to serve as a juror on this case?
Yes _____ No _____
5. Are you taking any prescription medication that may interfere with your ability to concentrate or serve as a juror in any way?
Yes _____ No _____
6. Have you recently been treated for a substance abuse problem (for example, alcohol, illegal or prescription drugs)?
Yes _____ No _____
7. What is your place of birth? (Please list only the city and state, and, if outside the United States, the country.)

8. Are you (check one)
Married _____
Single _____
Living with another person as a couple _____
Divorced/Separated _____
Widow/Widower _____
9. What is your ethnic background?

(a) If married, what is the ethnic background of your spouse?

10. What county do you live in? _____

- (a) If you live in New York City, what neighborhood do you live in
(For example: Upper West Side, Morrisania, Throgs Neck)?
Do not give your address.

- (b) If you live in a suburban county, what part of the county do you
live in, north or south?

11. Do you read a newspaper regularly (at least two or three times a
week)?

Yes _____ No _____

If yes, list the names of the newspapers you read and indicate how
often you read each newspaper.

Name of Newspaper	Once a week	2-3 times a week	More than 4x a week	Daily	Sunday only

_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

12. What magazines or periodicals do you read?

13. Do you watch any television newscasts on a regular basis?

Yes _____ No _____

If yes, which ones?

14. Do you listen to any radio stations on a regular basis?

Yes _____ No _____

If yes, which ones?

15. Is English your first language?

Yes _____ No _____

16. What other languages do you speak, read or understand?

17. Where were your parents born:

Mother _____

Father _____

18. Are you, your spouse or a former spouse a naturalized U.S. Citizen?

Yes _____ No _____

If yes, please tell us who and when they became a citizen?

19. Are your parents, in-laws or grandparents naturalized U.S. Citizens?

Yes _____ No _____

If yes, please tell us your relationship to that person (for example, "mother-in-law,") and when (if you know) they became a citizen?

20. Do you speak Arabic (or any dialect of Arabic) or did you grow up in households where the Arabic language or any of its dialects were spoken?

Yes _____ No _____

(a) Do you read any Arabic language newspapers or publications?

Yes _____ No _____

If so, please list the Arabic language newspapers or publications:

(c) If you speak, read or understand the Arabic language (or any of its dialects), would you have any difficulty relying solely upon the official interpreter's translation of testimony, and witnesses' translations of Arabic language evidence?

Yes _____ No _____

21. Do you speak Swahili or did you grow up in households where the Swahili language or any of its dialects were spoken?

Yes _____ No _____

(a) Do you read any Swahili language newspapers or publications?

Yes _____ No _____

If so, please list the Swahili language newspapers or publications:

(b) If you speak, read or understand the Swahili language (or any or its dialects), would you have any difficulty relying solely upon the official interpreter's translation of testimony, and witnesses' translations of Swahili language evidence?

Yes _____ No _____

22. Are you: () Employed full-time () Retired
 () Employed part-time () Student
 () Homemaker () Disabled & unable to
 () Unemployed/laid off work

(a) Without telling us the name of your employer what kind of work do you do? (For example: Electric Utility, maintenance; Teacher, High School) **Please do not write anything that would reveal your identity.**

(b) If retired or unemployed, what type of work had you been doing?

(c) If homemaker or student, please tell us what jobs outside the home (if any) you have had in the past:

23. What is (was) your job title? _____

(a) What are (were) your duties on that job?

(b) Do (did) you supervise others in that job?

Yes _____ No _____

If yes: How many? _____

24. Do you have a second job?

Yes _____ No _____

If yes: What do you do?

25. How many children do you have, if any? _____

26. If your children are in school, what type of school do they attend?

Public _____

Private _____

Religious _____

Home _____

27. List the gender, age and occupation of each employed child:

GENDER

AGE

OCCUPATION

28. If you have ever been married, list your spouse's most recent type of work?

29. Do you have any close friends or relatives who are employed by the United States Department of State or who have worked in an embassy?

Yes _____ No _____

If yes, please explain:

30. Do you: () Own your own home () Rent
() Live with relatives or friends

31. What is the highest grade of schooling you have completed?

() 8th grade or less

() Community college

() Some high school

() Some four-year college

() High school graduate

() College graduate

() Post graduate

32. Please list all degrees you have received but not the name of the colleges you received them from:

33. Please describe generally what type of civic, educational, professional, sports, business, religious or political activities you participate in:

34. List any organizations to which you belong. Please do not write anything that would reveal your identity. (For example, "PTA President," not "PTA President, P.S. 123.")

Please tell us your role in the organization:

35. What charities or organizations have you contributed to in the last five (5) years?

36. Do you have any hobbies?

Yes _____ No _____

If yes, what are they?

37. Do you have any family, relatives or friends in the military who are currently or were formerly stationed in the Middle East?

Yes _____ No _____

If yes, where is, or was that person stationed?

38. If you, a family member or friend served in the military, were they ever in a combat situation?

Yes _____ No _____ Don't Know _____

If yes, please tell us where and when:

39. How closely did you follow the media coverage of the Gulf War?

Very closely _____
Somewhat closely _____
Not too closely _____
Not at all _____

40. (a) How closely did you follow the media coverage of the events in Somalia in 1993?

Very closely _____
Somewhat closely _____
Not too closely _____
Not at all _____

- (b) How closely did you follow the media coverage of Somalia after the United Nations and American troops left Somalia?

Very closely _____
Somewhat closely _____
Not too closely _____
Not at all _____

41. (a) How closely have you followed the media coverage of the bombing of the U.S.S. Cole in Yemen?

Very closely _____
Somewhat closely _____
Not too closely _____
Not at all _____

(b) If you have followed the media coverage of this event, based on what you have heard or read, are you of the opinion that the bombing was carried out by any particular group?

Yes _____ No _____

If yes, which group?

42. The Government is represented in this case by the United States Attorney, Mary Jo White, though the conduct of the case is in the immediate charge of the Government attorneys appearing in the courtroom. Do you or does any relative or friend know or have any connection with Mary Jo White?

Yes _____ No _____

43. Do you or does any relative or friend know or have any connection with any of the following persons who will be seated at the counsel table for the government?

Assistant United States Attorney Patrick J. Fitzgerald
Assistant United States Attorney Kenneth M. Kara's
Assistant United States Attorney Michael J. Garcia
Assistant United States Attorney Paul W. Butler
Assistant United States Attorney Andrew C. McCarthy
Gerard Francisco (Paralegal Specialist, U.S. Attorney's Office)
Lillie Grant (Paralegal Specialist, U.S. Attorney's Office)
Nozomi Maeyama (Records Examiner, U.S. Attorney's Office)

Yes _____ No _____

- (a) Have you seen, heard or read anything about any of these individuals? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

- (b) What have you seen, heard or read?

44. Do you or does any relative or friend know or have any connection with any of the defendants?

Wadih El-Hage	Yes	_____	No	_____
Mohamed Sadeek Odeh	Yes	_____	No	_____
Mohamed Al-'Owhali	Yes	_____	No	_____
Khalfan Khamis Mohamed	Yes	_____	No	_____

(a) Have you seen, heard or read anything about any of the defendants? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

(b) What have you seen, heard or read?

45. Several individuals have been charged in the indictment in this case but will not be defendants in this trial. Do you or does any relative or friend know or have any connection with any of these defendants?

Usama Bin Laden	Yes	_____	No	_____
Muhammed Atef	Yes	_____	No	_____
Ayman al Zawahiri	Yes	_____	No	_____
Khalid al Fawwaz	Yes	_____	No	_____
Ibrahim Eidaous	Yes	_____	No	_____
Adel Abdel Bary	Yes	_____	No	_____
Fazul Abdullah Mohammed	Yes	_____	No	_____
Mustafa Mohamed Fadhil	Yes	_____	No	_____
Ahmed Khalfan Ghailani	Yes	_____	No	_____
Fahid Mohammed Ally Msalam	Yes	_____	No	_____
Mamdouh Mahmud Salim	Yes	_____	No	_____
Sheikh Ahmed Salim Swedan	Yes	_____	No	_____

(a) Have you seen, heard or read anything about any of these defendants? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

(b) What have you seen, heard or read?

46. (a) Do you or does any relative or friend know or have any connection with any of the following defense lawyers or their staff:

Attorneys

Sandra A. Babcock	Yes	_____	No	_____
David P. Baugh	Yes	_____	No	_____
Frederick Cohn	Yes	_____	No	_____
Joshua L. Dratel	Yes	_____	No	_____
Laura K. Gasiorowski	Yes	_____	No	_____
Carl J. Herman	Yes	_____	No	_____
Kristian K. Larsen	Yes	_____	No	_____
Marshall Mintz	Yes	_____	No	_____
Anthony L. Ricco	Yes	_____	No	_____
David Ruhnke	Yes	_____	No	_____
Sam A. Schmidt	Yes	_____	No	_____
Jeremy Schneider	Yes	_____	No	_____
David Stern	Yes	_____	No	_____
Edward D. Wilford	Yes	_____	No	_____

Staff

Georgia Alikakos	Yes	_____	No	_____
Diana Barrett	Yes	_____	No	_____
Elizabeth Besobrasow	Yes	_____	No	_____
Robert Hirschhorn	Yes	_____	No	_____
Kevin Johnson	Yes	_____	No	_____
Nadia Kahf	Yes	_____	No	_____
Katie Tempone	Yes	_____	No	_____

- (b) Have you seen, heard or read anything about any of these attorneys or their staff? This includes not only the media, but anything you may have heard from friends, relatives, or co-workers.

Yes _____ No _____

- (c) What have you seen, heard or read?

47. The judge who will preside over this case is Judge Leonard B. Sand of the United States District Court for the Southern District of New York. Do you or does any relative or friend know or have any connection with Judge Sand or any of his staff:

Yes _____ No _____

48. Is there any particular news program, magazine, or newspaper article, or broadcast about this case, the defendants, or the embassy bombings that has made a lasting impression on you?

Yes _____ No _____

If yes, what was the program, article or broadcast:

Is there anything you have seen, heard, or read about that would interfere with your ability to render a fair verdict in this case based solely on the evidence presented in court?

Yes _____ No _____

49. Before you came to court today were you aware that the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were bombed on August 7, 1998?

Yes _____ No _____

50. This case is likely to receive ongoing media attention. The Court wants to make sure that this case is decided solely on the evidence in the courtroom and not based on things that are said outside the courtroom. Accordingly, the Court will be advising you periodically that you must avoid reading about the case in the newspapers or listening to any radio or television reports about the case. The Court will also advise you periodically that you must avoid discussing this case with friends or family during the course of the trial. Would these requirements pose any difficulty for you?

Yes _____ No _____

EXPERIENCE WITH COURTS

51. Have you ever:

(A1) Sat as a juror in a civil case?

Yes _____ No _____

(A2) Sat as a grand juror?

Yes _____ No _____

(A3) Sat as a juror in a criminal case?

Yes _____ No _____

(A4) Have you ever been a juror in a case where the jury was unable to reach a verdict?

Yes _____ No _____

(B) If you have served on a jury, please list below (1) the approximate date(s); (2) whether you served in state court or federal court; (3) whether it was a grand jury or a trial jury; (4) whether it was a criminal case or a civil case; (5) what the general nature of the case was (for example, robbery, murder, contract, negligence, medical malpractice, etc.); and (6) whether or not a verdict was reached. If so, do not state what the verdict was.

(1) Date	(2) State or Federal	(3) Grand Jury or Trial Jury	(4) Criminal or Civil	(5) Nature of case	(6) Was there a Verdict?
-------------	----------------------------	---------------------------------------	-----------------------------	--------------------------	--------------------------------

If you need additional space to complete this or any other answer, please write "continued," go to the blank pages at the back of the questionnaire, indicate the number of the question, and continue your answer.

52. Have you ever been questioned in any matter by the United States Department of Justice, the New York City Police Department, or any investigative agency of the United States, including the Federal Bureau of Investigation, the DEA, the IRS, or any other state or federal investigative agency?

Yes _____ No _____

If yes, please explain the circumstances:

53. Have you or has a family member or close friend ever been falsely accused of a crime?

Yes _____ No _____

If yes, please explain the circumstances:

54. Have you, any family member or friend ever worked for any federal, state or local law enforcement agency? (For example, NYPD, State Police, Sheriff, F.B.I., C.I.A., D.E.A., Probation and Parole, Corrections, U.S. Customs, Secret Service, etc.)

Yes _____ No _____

If yes please tell us who, what agency, how long and the highest rank achieved?

55. Have you or a relative or friend ever worked or applied for employment with a federal, state or local agency?

Yes _____ No _____

If yes what agency?

56. Do you personally, or in connection with your business, have any pending interest in any legal action or dispute with the United States, or any officer, agents or employees of the United States?

Yes _____ No _____

If yes, please explain the nature of your interest in such proceedings:

57. Are you a vendor or a contractor for the United States Government or do you work for one?

Yes _____ No _____

58. Do you have any difficulty accepting the principle that non-citizens who are charged with a crime in a United States court are entitled to the same rights as United States citizens?

Yes _____ No _____

59. Have you ever attended law school?

Yes _____ No _____

60. Do you have any close friends or relatives who are lawyers or who have attended law school?

Yes _____ No _____

61. Do you or does any relative or friend work for a criminal lawyer or private investigator?

Yes _____ No _____

62. Do you know anyone who has been connected with the criminal justice system such as: judges, law clerks, court attendants, court clerks, other types of court personnel, probation officers, or persons connected with any penal institution, jail or penitentiary?

Yes _____ No _____

63. Have you or anyone close to you ever been charged with a crime or been the subject of a criminal investigation?

Yes _____ No _____

64. Have you ever appeared or testified as a witness in any investigation or legal proceeding?

Yes _____ No _____

65. Do you believe that you, a member of your family, or a close friend, has ever been directly or indirectly affected in any way by a terrorist act or threat?

Yes _____ No _____

66. The Court will instruct you that the testimony of a law enforcement officer is entitled to no greater weight or lesser weight than that of any other witness. Do you have any difficulty accepting that statement?

Yes _____ No _____

67. You may hear testimony in this case concerning the use of accomplices or informants by federal authorities in their investigations. One or more of those individuals may be called to testify in this case and you may learn that some of the individuals have participated in serious crimes. The Court wishes to advise you that there is nothing illegal or improper about the Government using accomplices or informants to investigate a case. Do you have strongly held feelings against the use of informants?

Yes _____ No _____

68. Are you, or anyone close to you, now under subpoena or, to your knowledge, about to be subpoenaed in any criminal case?

Yes _____ No _____

69. Have you or has a family member or close friend ever been the victim of a serious crime other than burglary or car theft?

Yes _____ No _____

70. There will be evidence in this case consisting of tape recordings of conversations taking place in given locations or over the telephone, through the use of electronic devices commonly known as "bugs" or "wiretaps." Before received in evidence, the Court will have ruled that this evidence is lawfully before you. Do you have strongly held views against the use of secretly tape-recorded conversations or "wiretaps" or "bugs"?

Yes _____ No _____

71. There may also be evidence obtained from photographic and physical surveillance as well as evidence seized pursuant to searches of various places, including the homes of some of the defendants. Do you have any feelings against the use of lawfully conducted surveillance or searches?

Yes _____ No _____

72. To your knowledge, have you, or any close friend or relative, ever been the subject of a surveillance (visual, photographic or electronic) by law enforcement or had their car or home searched by law enforcement officers?

Yes _____ No _____

73. The evidence in this case will include pictures of the bodies of the people who were killed and injured in the embassy bombings in Kenya and Tanzania in 1998 and testimony of people who suffered those injuries. Is there anything about having to view and hear such evidence that would interfere with your ability to arrive at a verdict of guilty or not guilty as to any of the individual defendants?

Yes _____ No _____

If yes, please explain:

RELIGION

74. What, if any, is your current religious affiliation?

75. What, if any, religion were you raised in?

76. Have you ever experienced what you believe to be discrimination against you because of your religious beliefs?

Yes _____ No _____

If yes please explain:

77. Do you know anyone who practices the faith of Islam?

Yes _____ No _____

78. How knowledgeable are you about the history and practices of Islam?

very knowledgeable _____
somewhat knowledgeable _____
not too knowledgeable _____
not knowledgeable at all _____

79. Is there anything about a case where all the defendants are Muslim that would make it hard for you to serve as a juror? *

Yes _____ No _____

80. Do you have any strong views against the religion of Islam or its adherents?

Yes _____ No _____

81. Have you ever traveled outside the United States?

Yes _____ No _____

If yes, please explain where and when:

82. Some of the defendants in this case are of Arab, Middle Eastern and African descent.

(a) Are you, or any relatives or close friends, of Arab, Middle Eastern or African descent? --

Yes _____ No _____

(b) Do/have you worked with any people of Arab, Middle Eastern or African descent?

Yes _____ No _____

(c) Do you socialize with any people of Arab, Middle Eastern and African descent?

Yes _____ No _____

(d) Do you have any negative feelings or opinions about people of Arab, Middle Eastern or African descent?

Yes _____ No _____

If yes, please explain:

83. Do you believe that there is a law enforcement bias against people of Arabic descent or people of the Islamic faith?

Yes _____ No _____

If yes, please explain:

POTENTIAL PUNISHMENT

In this case, two of the men on trial - Mohamed al-`Owhali, and Khalfan Khamis Mohamed - face a potential sentence of death. In a case where individual jurors may have to consider death as a possible punishment, it is important that we know your thoughts and opinions regarding the death penalty.

If either Mohamed al-'Owhali or Khalfan Khamis Mohamed are found guilty of capital crimes, there will be a second phase of the trial: the penalty phase. The first phase of the trial deals only with evidence on the question of whether or not the government has proven beyond a reasonable doubt the guilt of each of the four defendants. During this stage of the trial, the possibility of punishment must not enter into your deliberations at all.

If the jury determines that either defendant Mohamed al-'Owhali or Khalfan Khamis Mohamed is guilty of murder, the jury's service will not be over. The same jury must also decide whether or not the defendant they are considering is to be sentenced to death or to life imprisonment, without possibility of release. That phase of the trial is expected to last 3 to 4 weeks.

During that second stage, the Government would have the opportunity to introduce evidence as to certain things referred to in the law as aggravating factors, or the circumstances that make the crime particularly serious and therefore that tend to favor the imposition of the death penalty. Mr. Al-'Owhali and Mr. Mohamed would have the opportunity at such a hearing to demonstrate to you the existence of what are referred to as mitigating factors, or the circumstances about the crime or about the individual defendant that would suggest that the death penalty is not appropriate in this case.

Before the jury could vote to impose the death penalty, it would have to be persuaded unanimously and beyond a reasonable doubt that the defendant had the requisite state of mind when he engaged in the crime and that at least one of the specific aggravating factors identified by the Government exists. Moreover, before a jury could vote to impose the death penalty, it would also have to be persuaded unanimously that the aggravating factors it found to exist outweigh any mitigating factors that one or more jurors found existed. Even if the jury did not find any mitigating factors, it would still have to be persuaded unanimously that the aggravating factor or factors were themselves sufficient to justify a death sentence. Absent such unanimous agreement, a jury could not vote to impose the death penalty.

In sum, a jury is never required to impose a sentence of death upon a defendant. You should know, however, that if the jury does decide to impose the death penalty, this Court would be required to impose that sentence. Similarly, if you decide to impose life imprisonment without parole - an option that would also be available to you - the Court would be required to impose that sentence. In other words, the Court could not change your decision.

Obviously, what I have just stated is only an overview of the law applicable to a jury's consideration of the death penalty. If this case were ever to require a sentencing hearing -- and remember that each of the defendants is presumed innocent of each of the charges that have been brought against him -- the Court will instruct the jury in more detail about its duties.

84. Please CIRCLE the number that best reflects your opinion regarding the death penalty:

Strongly
Oppose

Strongly
Favor

1 2 3 4 5 6 7 8 9 10

85. How do you feel about the death penalty? _____

86. In your opinion, is the death penalty in our society:
Circle all that apply

A. useful

B. necessary

C. counterproductive

D. inhumane

E. other: please explain: _____

87. Please circle the answer or answers that best correspond to your views on the death penalty (you may select more than one):

A. The death penalty should be imposed in every case where someone deliberately takes the life of another person.

B. While I favor the death penalty, I do believe that there are rare cases where the death penalty should not be imposed even if someone has deliberately murdered another person.

C. While I am somewhat in favor of the death penalty, I do not believe it should be used as a punishment for most cases, even where a person has been deliberately murdered.

D. I have no views one way or the other on the death penalty.

E. While I am somewhat opposed to the death penalty, I do believe that there are many cases where a death sentence should be imposed.

F. While I am strongly opposed to the death penalty, I do believe there are some cases where a death sentence should be imposed.

G. The death penalty should never be imposed.

88. If the law and the evidence leads to a conclusion that is contrary to your present personal beliefs concerning the death penalty, could you set aside your own views and act in accord with the Court's instruction?

Yes _____ No _____ Not sure _____

Please explain: _____

89. If the evidence in this case convinces you that the death penalty is appropriate, could you vote to impose the death penalty?

Yes _____ No _____ Not sure _____

Please explain: _____

90. Do you believe that the death penalty is sought and imposed unfairly?

Sometimes _____ Always _____ Never _____

Please explain: _____

91. (a) Have you read or heard anything concerning an attack by defendant Khalfan Khamis Mohamed on corrections officers which caused one officer serious injury?

Yes _____ No _____

(b) If you were to learn that such an attack took place and found that Khalfan Khamis Mohamed participated in the attempted murder of a corrections officer, would it alter any of your answers to questions 84 to 90 as to defendant Khalfan Khamis Mohamed?

Yes _____ No _____ Uncertain _____

CONCLUSION - MISCELLANEOUS INFORMATION

92. At the conclusion of the case it is the Court's task and duty to charge you on the law and explain to you the elements of the crimes charged in the indictment. Do you have personal, religious, philosophical or other beliefs as to what the law is or should be that would make it difficult for you to follow the instructions of the Court?

Yes _____ No _____

93. Is there anything about the nature of the charges in this case that would affect your ability to fairly evaluate the evidence regarding whether or not the government has proven the guilt of the defendants beyond a reasonable doubt?

Yes _____ No _____

If yes please explain:

94. Is there any reason that you could not be completely fair and impartial to the defendants in this case?

Yes _____ No _____

95. Is there any reason that you could not be completely fair and impartial to the Government in this case?

Yes _____ No _____

If you answered either part of the question "yes," please explain:

96. Is there any matter not covered by this questionnaire that you feel you should tell us about?

Yes _____ No _____

If yes, please explain:

JUROR NUMBER _____

DATE _____

Continuation to any questions (indicate question number):

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Continuation to any questions (indicate question number):

APPENDIX III: JURY INSTRUCTIONS

U.S. v. PARACHA (S.D.N.Y. 2006)

Not Reported in F.Supp.2d, 2006 WL 12768 (S.D.N.Y.), 69 Fed. R. Evid. Serv. 130

United States District Court,
S.D. New York.
UNITED STATES OF AMERICA
v.
Uzair PARACHA Defendant.
No. 03 CR. 1197(SHS).
Jan. 3, 2006.

OPINION

STEIN, J.

***1** Defendant Uzair Paracha is charged in a five count indictment with conspiracy and substantive charges of providing material support and resources to al Qaeda; making or receiving a contribution of funds, goods or services on behalf of al Qaeda; and committing identification document fraud with the intent of providing material support to al Qaeda in order to facilitate a terrorist act. According to the indictment, Paracha conspired to provide support to al Qaeda by coming to the United States, posing as a person Paracha knew to be an al Qaeda associate, obtaining immigration documents that would permit the al Qaeda associate to enter the United States, conducting financial transactions involving the al Qaeda associate's bank account, and accepting up to \$200,000 of al Qaeda funds to be invested in a business where Paracha was employed until the funds were needed by al Qaeda. During the course of the trial, which concluded with the jury returning a verdict of guilty on all five counts on November 23, 2005, the parties raised a variety of legal issues, all of which were ruled on prior to or during the trial. Three of those issues--whether Paracha was entitled to access to prospective defense witnesses whom the government will neither confirm nor deny were in its custody; whether a proposed government expert would be allowed to testify to terrorist tradecraft; and **how properly to instruct the jury on the *mens rea* requirement of the statute that makes it a crime to provide material support to foreign terrorist organizations** [Ed. Note: Emphasis Added]--are likely to recur in the future. Accordingly, having subjected its analysis to the crucible of writing, the Court now sets forth with greater specificity the reasoning behind its trial determinations.

[Editor's Note: Skipping to ***14** for the jury instructions]

.....

e. Proper jury instructions for the introduction of the unclassified summaries

***14** The Court must determine what instructions should accompany the unclassified summaries when they are presented to the jury. The only case of which the Court is aware that has engaged in similar analysis is the Fourth Circuit's opinion in [Moussaoui](#). See 382 F.3d at 478-82. The standard articulated in CIPA, which requires that unclassified summaries of classified materials must "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information," also provides guidance. 18 U.S.C.App. 3, § 6(c)(1); see [United States v. Rezaq](#), 134 F.3d 1121, 1142-43 (D.C.Cir.1998).

Paracha has proposed several specific instructions that he asserts are necessary to give him a substantially similar alternative to live testimony. Paracha has proposed that the Court instruct the jury, *inter alia*, that the witnesses are providing assistance to the U.S. government and that the government has found the witnesses to be credible. [\[FN2\]](#)

[FN2](#). Specifically, Paracha requests the jury be instructed that:

(1) the witnesses are in U.S. custody; (2) the witnesses are providing material assistance to the U.S. in pursuit of the war on terrorism; (3) the witnesses have provided reliable information to the government in the past; (4) the government continues to rely on information provided by the witnesses; (5) the government has found the witnesses to be credible; (6) The witnesses were questioned by United States government officials while in custody in relation to their relationship with the defendant; (7) the witnesses [sic] have a profound interest in obtaining accurate information and reporting that information accurately to 'those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives;' and (8) the failure to provide truthful information would be detrimental to the witnesses' relationship to the U.S. government.

(See Decl. of Edward D. Wilford, dated Sept. 13, 2005, at 10-11) (emphasis omitted). In his seventh requested instruction, Paracha appears to misinterpret a redacted reference in the *Moussaoui* decision. The surrounding context of the decision, and logic, suggest that the Fourth Circuit envisioned an instruction that those who are questioning the witnesses, not the witnesses themselves, have a profound interest in obtaining accurate information. See [Moussaoui, 382 F.3d at 487](#).

Paracha's proposed instructions are problematic for two reasons: (1) they assume facts that the Court does not know to be true--i.e., whether or not the witnesses are in fact providing assistance to the government rather than misleading it; and (2) they take the function of judging witness credibility away from the jury. On the other hand, the jury must be told more than simply that the statements were made by Khan and al Baluchi because the jury would then have no basis upon which to assess the declarant's credibility.

The Fourth Circuit approved of the adequacy of the statements in *Moussaoui* only because it was convinced that "those who are [questioning] the witnesses 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." *Id.* at 478. That court reasoned that those considerations "provide sufficient indicia of reliability to alleviate the concerns of the district court [that the statements were unreliable]." *Id.* Accordingly, the Fourth Circuit directed the trial court to give instructions that explain both what the statements are and that they were made in a context giving them some indicia of reliability. Specifically, the court explained that:

the jury must be informed, at a minimum, that the substitutions are what the witnesses would say if called to testify; that the substitutions are derived from statements obtained under conditions that provide circumstantial guarantees of reliability; [and] that the substitutions contain statements obtained over the course of weeks or months....

Id. at 480-81. In directing the crafting of an adequate substitution, the Fourth Circuit was "mindful of the fact that no written substitution will enable the jury to consider the witnesses' demeanor in determining their credibility," but believed that its instructions "plus any other instructions the district court may deem necessary in the exercise of its discretion, adequately address this problem." *Id.* at 481, n. 38.

***15** Here, too, in the event Paracha chooses to admit statements made by Khan or al Baluchi, the jury will be unable to consider the witnesses' demeanor and must accordingly be given some information regarding the context in which the statements were made that bear on their reliability. Although the Court will not instruct the jury that the statements are in fact accurate, the jury will be instructed as follows:

You will hear testimony from the written statements of two witnesses--Majid Khan and Ammar al Baluchi--who will not appear at this trial. Those statements were made while the witnesses were in custody. For the purposes of this trial only, you may assume that the United States government has custody of these two witnesses and control over the conditions of their confinement.

The witnesses were questioned on multiple occasions over some period of time. The witnesses were questioned in relation to their relationship with the defendant.

None of the attorneys in this action has had access to the two witnesses. The witnesses are segregated from each other and are not able to coordinate their statements. The witnesses have had no contact with the defendant since his arrest.

The witnesses' statements were obtained under circumstances that were designed to elicit truthful and accurate information from the witnesses because the statements are relied upon by United States officials responsible for making national security decisions. The failure to provide truthful information would be detrimental to any relationship to the United States government by the witnesses.

Those who questioned the witnesses 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.

It is your decision, after reviewing all the evidence, whether to accept the testimony of these two witnesses just as it is with every other witness and to give that testimony whatever weight that you find it deserves.

These instructions are designed to give the jury a basis for evaluating the statements, but to leave to the jury the function of determining their credibility and what weight, if any, they are to be given. Because Paracha has had no opportunity to confront Khan or al Baluchi, none of their statements may be used affirmatively by the government in its case against Paracha. See [*Moussaoui*, 382 F.3d at 482](#). Similarly, the government may not argue to the jury that if the witnesses had been present for cross examination at trial they might have provided inculpatory evidence in addition to the exculpatory statements offered by the defendant. The government may, however, ask the jurors to utilize their good judgment, common sense and life experiences in judging the credibility of the witnesses' statements just as they would with any other witness.

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